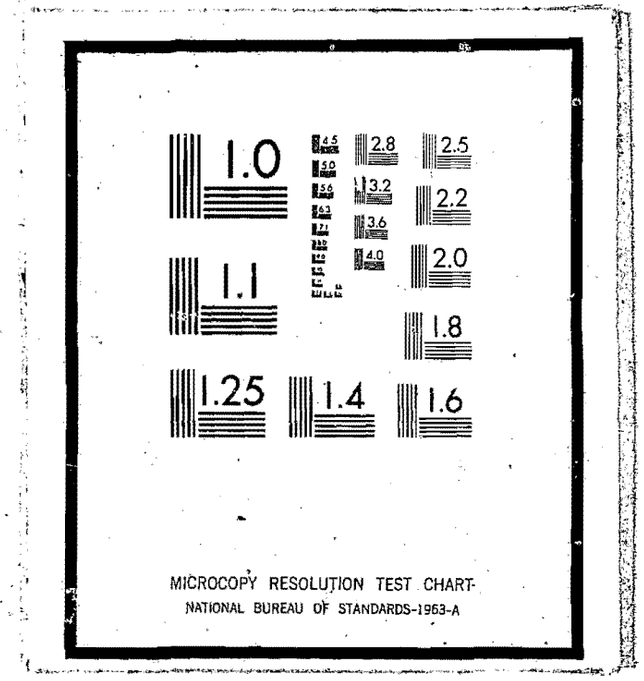

NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE

Proceedings of May 27 – 29, 1964

and

Interim Report,
May 1964 – April 1965

Washington, D. C.
April 1965

Proceedings and Interim Report

of the

National Conference on Bail and Criminal Justice

Co-sponsored by

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THE VERA FOUNDATION, INC.
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Office of the Attorney General
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April 21, 1965

The National Conference on Bail and Criminal Justice was convened in May 1964 for a simply stated but vital purpose: to focus nationwide attention on the defects in the bail system, the success of experiments in improving it, and the problems remaining in its reform. The Proceedings of the Conference, reprinted in this volume, testify to the success with which that purpose was carried out. More than four hundred people from all over the country, representing every aspect of the criminal process, explored the thesis that financial bail, with its concomitant hardships and discrimination, is often unnecessary to assure an accused person's appearance in court. This publication, it is hoped, will serve the same educating function for those who did not attend the Conference.

With the help of the press, the enthusiasm which characterized the Conference has been spread far and wide. The many forms which it has taken -- bail projects, resolutions, other conferences -- are described in the accompanying Interim Report. Since last fall the Executive Board, headed by Judge Bernard Botein, has been assisting interested groups and communities throughout the country. The work which has been accomplished is essential and encouraging. Former Attorney General Robert F. Kennedy, Vera Foundation President Louis Schweitzer, and I are proud to have been part of it.

Much remains to be done. I invite your suggestions and urge your cooperation in the continuing efforts to improve the administration of criminal justice.

Nicholas deB. Katzenbach

Attorney General

Table of Contents

INTERIM REPORT

of the

NATIONAL CONFERENCE ON

BAIL AND CRIMINAL JUSTICE

INTERIM REPORT

Contents

INTERIM REPORT
May 1964—April 1965

For many years, the bail system in the United States has presented a disturbing picture to those concerned with the evenhanded administration of criminal justice. Originally conceived as a device to free accused persons prior to conviction by a court of law, bail had degenerated into a two-way door, opening outward to pretrial liberty for defendants with funds, but inward to prolonged confinement for defendants without money to post bond. Those on bail remained free to earn a living, support dependents and aid in their own defense; those without money could not. For them poverty itself became a crime, punishable by imprisonment.

The National Conference on Bail and Criminal Justice was launched in 1963 to promote awareness that prevailing bail practices were unfair and that new methods had been developed for handling the problem of pretrial release in criminal cases. This interim report is intended as an introduction to the Proceedings of that Conference and a summary of the remarkable response which it has evoked throughout the United States. The meeting in Washington was only a beginning; the Conference project is still in progress. Cosponsored by the Department of Justice and the Vera Foundation, and guided by an Executive Board of distinguished judges, lawyers and citizens, it is continuing to assist courts, communities and organizations in developing systems to eliminate unnecessary detention of accused persons and provide fairer and less costly ways of enforcing their appearance in court to answer charges under criminal laws.

Though the bail system in the United States has been enlightened in the past year by developments such as those summarized here, there is a long way yet to go. The benefits to be secured extend to the effectiveness of police efforts to control crime as well as to the efforts of courts to safeguard individual rights. This report is an invitation to all who have not yet responded to the challenge of the Conference.

1. *The Conference*

On May 27-29, 1964, the National Conference on Bail and Criminal Justice convened in Washington and for the first time exposed the scope and depth of the bail problem to a national audience of over 400 judges, prosecutors, defense lawyers, police, bondsmen, and prison officials. The Conference presented for analysis and discussion specific and workable alternatives to monetary bail based on the experience of the Manhattan Bail Project and some others which followed in its wake. The Conference opened on May 27 with major addresses by Chief Justice Earl Warren and Presiding Justice Bernard Botein of the Appellate Division of the New York State Supreme Court, and welcoming speeches by Attorney General Robert F. Kennedy and Louis Schweitzer, President of the Vera Foundation.

During the next two days, four plenary sessions were held. The first dealt with the establishment of fact-finding projects, the release of accused persons without bail on their own recognizance, and the use of the summons in lieu of arrest. The second session aired the complex problems involved in using high bail as a means to keep in jail until trial accused persons who are thought to be potentially dangerous. The third dealt with the constitutionality of monetary bail, with the range of nonmonetary conditions that might be attached to pretrial release in cases where release on recognizance seems insufficient to guarantee reappearance, and with the role of the bail bondsman. The fourth session considered the specialized problems of pretrial release or detention for juveniles within the context of juvenile court philosophy and procedures.

Following two of the plenary sessions, the conferees were divided into regional discussion groups to permit intensive exploration of the bail system and its alternatives. As shown in the Proceedings, these discussions provoked searching inquiries into the operation of bail fact-finding projects, their staffing and financing; the creation of programs to substitute summonses for arrests in selected offenses; the problems of excluding certain crimes from project coverage, of gathering reliable information promptly, of ensuring confidentiality or allowing disclosure of unfavorable information and of devising notification procedures to secure the appearance of released persons in court; the relationship between pretrial release and the right to assigned counsel; the incidence of crime committed by persons out on bail, and proposals for identifying and minimizing such risks. The Conference concluded on May 29 with summary reports of the discussions in these regional groups and an address by Attorney General Kennedy.

2. *The Conference Aftermath*

The impact of the Conference can best be portrayed by a brief review of some of the events which have occurred since May. Newspapers in every section of the country have endorsed the selective release and fact-finding procedures reported on at the sessions. Radio and television networks and national periodicals have devoted extensive space to dramatizing the inequities in the bail system and describing the Manhattan and other project alternatives. Public response indicates a rapidly growing consensus in favor of the proposition that pretrial release without bail can be accorded to large numbers of accused persons with significant benefits to the cause of justice and without handicapping law enforcement or impairing public safety.

The sources of this consensus, in terms of individuals, organizations, cities and states, are illustrated below.

a. *Executive Board*

On September 3, 1964 Attorney General Kennedy and Louis Schweitzer appointed an Executive Board to supervise the continuing work of the Conference.* At their first meeting in October, the Board members avowed their intent to encourage pretrial release on recognizance of accused persons, regardless of means, who pose no substantial risk of flight. The Board undertook to actively promote and assist regional conferences, encourage the development of new bail and summons projects, and initiate follow-up studies on the effects of bail and detention practices in connection with dangerous of-

* The membership of the Board is set out at page xxxii.

leaders, civil rights, and juveniles. The Board will strive to provide impetus wherever bail reform lags, and seek institutional acceptance by courts and law enforcement personnel of organized fact-finding as a prerequisite to bail determinations.

Executive Board members have individually stimulated bail reform in a wide range of geographical and professional activities. On December 2, 1964 under the leadership of Judge Claude M. Owens, the National Association of Municipal Judges held a day-long session in Los Angeles devoted to expanded use of pretrial release by courts of primary jurisdiction. Executive Board Chairman Bernard Botein delivered the keynote address to judges from forty states. Two days later, at the University of Texas Law School in Austin, Judge Botein delivered another major address on bail reform at a statewide Criminal Law Institute for judges, professors, and law enforcement officers. In February 1965, Judge Botein spoke to the Conference of State Bar Presidents in New Orleans on the organized bar's participation in fact-finding release programs; and, a week later, to the Advisory Council of the Defender Project of the National Legal Aid and Defender Association. In April 1965, Judge Botein addressed a bail conference sponsored by the Massachusetts Council on Crime and Delinquency.

Through the initiative of Board members William E. Scent, Thomas M. Kavanagh and Dan McCullough, the first regional Conference on "Bail and the Right to Counsel" was held in Louisville, Kentucky on January 22-23, 1965. The five-state Conference was officially sponsored by Governor Edward T. Breathitt of Kentucky in cooperation with Governors Frank G. Clement of Tennessee, George W. Romney of Michigan, and Roger D. Branigan of Indiana. It briefed nearly 500 police, lawyers, prosecutors, and judges on the bail situation in their states and the movements toward reform. A conference covering the state of Connecticut was held at the Yale Law School on March 22, 1965 under the direction of Judge Jay Rubinow, in cooperation with the Connecticut Bar Association. Deputy Commissioner Leonard Reisman was a featured speaker at both Conferences, reporting on the continued progress and expansion of the New York City Police Department's program of utilizing the summons in lieu of arrest. Shortly after the Connecticut Conference, Judge Rubinow initiated a pretrial release project in Hartford, Connecticut.

In Atlanta, Judge Luther Alverson has organized a pretrial release project for the Fulton County Superior Court. In Charleston and Huntington, West Virginia, James B. McIntyre has been instrumental in founding two pretrial release projects in which staff members are supplied by the State Welfare Department. In Ohio, Dan McCullough, in addition to organizing a Toledo pretrial release project, has traveled widely throughout the state enlisting support for bail reform in both large cities and outlying areas. Executive Board Vice-Chairman James V. Bennett has helped develop an experimental program for bail setting by United States Commissioners in the federal courts of Louisiana. Mr. Bennett also spoke on bail reform at the Criminal Law Institute held in February 1965 in San Antonio, Texas. Attorney General Arthur J. Sills of New Jersey has prepared an extensive paper on bail and summons for the National Association of Attorneys General and drafted legislation recently enacted in New Jersey, making bail jumping a crime.

b. *States and Cities*

The geographic sweep of current bail developments is perhaps best illustrated by pinpointing the localities where tangible action is known to have taken place. Needless to say, many more places may well have launched studies or projects of their own during the same period.

A Governor's task force in Kentucky, Judicial Councils in California, Colorado, Michigan, New Jersey and Rhode Island, and a Legislative Council in Virginia are conducting bail studies; while the Attorneys General of Delaware, Iowa, Michigan, New Jersey, West Virginia and Wisconsin and State Bar Associations in California, Missouri, Ohio and Texas are developing statewide programs to reduce unnecessary detention of persons accused of crime.

Pretrial release projects* are reported to be operating in the following cities and counties:

Anaheim, California
Berkeley, California
Contra Costa County, California
Los Angeles, California
Oakland, California
San Francisco, California
Sunnyvale, California
West Covina, California
Denver, Colorado
District of Columbia
Hartford, Connecticut
Atlanta, Georgia
Chicago, Illinois
Gary, Indiana
Des Moines, Iowa
Lexington, Kentucky
Louisville, Kentucky
Montgomery County, Maryland
Prince Georges County, Maryland
Boston, Massachusetts
Lansing, Michigan
Kansas City, Missouri
St. Louis, Missouri
Burlington County, New Jersey
Camden County, New Jersey
Gloucester County, New Jersey
Hackensack, New Jersey
Albuquerque, New Mexico
Nassau County, New York
New York City, New York
Plattsburgh, New York
Rochester, New York
Syracuse, New York
Cleveland, Ohio
Toledo, Ohio
Tulsa, Oklahoma
Bucks County, Pennsylvania
Westmoreland County, Pennsylvania
Providence, Rhode Island
Bountiful, Utah
Charleston, West Virginia
Huntington, West Virginia
Madison, Wisconsin
Milwaukee, Wisconsin

Similar projects are reported to be on the drawing boards in these additional communities:

Tucson, Arizona
Santa Clara County, California
New Haven, Connecticut
Wilmington, Delaware
Miami, Florida
Jacksonville, Florida
Orlando, Florida
Manhattan, Kansas
New Orleans, Louisiana
Baltimore, Maryland
Montgomery County, Maryland
Boston, Massachusetts

* See appendix 2 for the list of persons who can provide information on these projects.

Detroit, Michigan
Detroit, Michigan
Duluth, Minnesota
Minneapolis, Minnesota
Minneapolis, Minnesota
Perrytown, New Jersey
Bordentown, New Jersey
Buffalo, New York
Buffalo, New York
Durham, North Carolina
Durham, North Carolina
High Point, North Carolina
High Point, North Carolina
Akron, Ohio
Akron, Ohio
Canton, Ohio
Canton, Ohio
Cincinnati, Ohio
Cincinnati, Ohio
Columbus, Ohio
Columbus, Ohio
Dayton, Ohio
Dayton, Ohio
Miami, Ohio
Miami, Ohio
Oklahoma City, Oklahoma
Oklahoma City, Oklahoma
Portland, Oregon
Portland, Oregon
Salem, Oregon
Salem, Oregon
Berks County, Pennsylvania
Berks County, Pennsylvania
Philadelphia, Pennsylvania
Philadelphia, Pennsylvania
Austin, Texas
Austin, Texas
Dallas, Texas
Dallas, Texas
Houston, Texas
Houston, Texas
San Antonio, Texas
San Antonio, Texas
Salt Lake City, Utah
Salt Lake City, Utah

Also since May 1964, professional organizations have placed bail on their agendas, or special bail conferences have been organized on a national, regional or state basis, as follows:

May 1964:
Rhode Island Judicial Conference.

July 1964:
Joint meeting of the National Association of Defense Lawyers in Criminal Cases and the Criminal Law Section of the Texas Bar Association.

August 1964:
American Bar Association: Sections on Bar Activities, Criminal Law, etc.

Joint meeting of the Michigan Judicial Conference and the Michigan Judges Association.

September 1964:
Conference of the Philadelphia Bench and Bar.

Convention of the New Jersey Judges Seminar.

October 1964:
Eastern Regional Conference of Attorneys General.

Colorado Judicial Conference.

Convention of the National Association of Crime Commissioners.

Convention of New Jersey Magistrates.

December 1964:	Convention of the National Association of Municipal Judges.
	Institute on Criminal Law of the University of Texas Law School.
January 1965:	Maryland Judicial Conference.
	Governor's Regional Conference on Bail and the Right to Counsel (Kentucky, Tennessee, Indiana, Michigan and Ohio).
February 1965:	National Conference of State Bar Presidents.
	Advisory Council, National Defender Project, National Legal Aid and Defender Association.
	San Antonio Criminal Law Institute.
	Midwinter Meeting of the Virginia State Bar Association.
March 1965:	New Jersey Probation Association's Annual Institute.
	Connecticut Conference on Bail and Criminal Justice.
April 1965:	Conference of the Massachusetts Council on Crime and Delinquency.

In addition, special bail conferences are known to be under consideration in Iowa, Nebraska, Minnesota, Illinois, North Carolina and Wisconsin.

c. *Federal Programs*

Following up the commitment made by Attorney General Kennedy at the Conference in May, the Department of Justice has undertaken a district by district study of pretrial release practices, with a view to minimizing pretrial detention of federal defendants wherever possible. The Department's activities in this area have been pursued by its newly created Office of Criminal Justice together with the Criminal Division and United States Attorneys and in close cooperation

with federal judges and the Congress. Among several projects in the bail area under consideration by the Department are: developing fact-finding services to provide commissioners and judges with background information for bail hearings promptly after arrest; devising methods of providing information on defendants detained for want of bail; and preparing comprehensive legislative proposals to deal with pretrial and post-conviction release and detention. As a result of the successful expansion of the use of summonses in lieu of arrests in the District of Connecticut and the Northern District of California, a uniform summons policy for United States Attorneys is also being prepared.

On the judicial front, amendments liberalizing Rule 46 of the Federal Rules of Criminal Procedure have been proposed by the Advisory Committee on Criminal Rules to the Judicial Conference of the United States and are now being circulated for comment. In the 88th Congress, extensive hearings were held by two subcommittees of the Senate Judiciary Committee on proposed legislation to (1) release indigents on personal recognizance, except for good cause shown, (2) allow a 10% cash deposit in lieu of bail bond, and (3) credit pretrial detention against prison sentences. These bills, applicable to all federal courts and to the District of Columbia, were co-sponsored by a group of Senators led by Senator Sam Ervin of North Carolina and were based on recommendations made in the February 1963 Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice. The Senate Subcommittee hearings were published in January 1965 together with a favorable report endorsing the principles in these bills and enlarging their coverage to apply to all federal defendants regardless of whether they could afford to post bail. On March 4, 1965, a more comprehensive bill, S. 1357, was introduced in the 89th Congress by Senator Ervin and a number of his colleagues to combine various conditions of pretrial release and specify procedures for implementing them.

d. *Vera Foundation Programs*

Because the pioneering work of the Vera Foundation played such a pivotal role in producing the Conference and in provid-

ing models for the nationwide activity which has followed in its wake, no report would be complete without bringing up to date the status of the Manhattan Bail and Summons Projects.

(1) *The Manhattan Bail Project*

The operating phase of the Manhattan Bail Project, which is described fully in the accompanying Proceedings, ended on August 31, 1964. During the three-year pilot project, 3505 accused persons were released on recognizance on the recommendations of its staff. Of these, 98.4% returned to court when required. Only 56 persons—1.6%—wilfully failed to appear. In contrast, the forfeiture rate on bail bonds during the same period was 3%.

To date, 3202 of the persons released through the project have had their cases finally disposed of in the courts. Of these, 48% have won acquittals or had their cases dismissed; 52% were convicted. Of those found guilty, 70% received suspended sentences while 10% were given prison terms. The remaining 20% were given alternative fine or jail sentences.

During its three years of operation, the initial guidelines of the Manhattan Bail Project were altered in two significant respects. At the outset, defendants charged with homicide, felonious assault on a police officer, forcible rape, impairing the morals of a minor, carnal abuse, and narcotic offenses were automatically excluded from consideration, along with all non-indigent defendants. By the end, however, the class of offenses originally excluded from Project consideration was substantially narrowed, so that only defendants charged with homicide and certain narcotic offenses were ineligible for interview. In addition, both indigent and non-indigent defendants were being interviewed, on the theory that a good risk for release on recognizance should not be forced to post bail merely because he could afford it.

The work of the Manhattan Bail Project has now been taken over by the Office of Probation of the City of New York. It has extended the r.o.r. operation to the Bronx, Queens, Brooklyn, and Richmond. Though the City project has been in operation less than a year, over 3,000 persons have already been r.o.r.'d on factually-based recommendations, with just about the same rates of judicial acceptance and of "no-shows" as in the Manhattan Bail Project.

(2) *The Manhattan Summons Project*

In early 1964, the Vera Foundation launched the Manhattan Summons Project, in cooperation with the New York City Police Department and the courts of New York. The project proceeded on the theory that if persons charged with felonies and serious misdemeanors could be safely r.o.r.'d by a court possessing bail project information, a summons in lieu of arrest could be issued by the police at an earlier stage of the proceedings in less serious cases, if similar information were made available. At the Conference in May, as reported in the Proceedings, New York City Police Commissioner Michael J. Murphy described the early results of the Manhattan Summons Project.

Since that time, over 400 persons have been issued summonses by the New York City police in cases involving petit larceny, simple assault and malicious mischief, and only six defendants have failed to appear at arraignment. Of those whose cases continued beyond their initial appearance, 98% have been released on recognizance by the courts. On December 2, 1964, in an address before the National Association of Municipal Judges, Commissioner Murphy forecast increased use of the summons method for minor offenders as a means of further improving "relations between police and the community." He observed:

> Consideration shown the accused with respect to his rights, his comfort, his welfare and his dignity, is a practical manifestation of the assumption that a man is innocent until proven guilty. Indigent persons, unable to afford bail, are spared the ignominy of what may be an unnecessary incarceration. When permitted their freedom while awaiting trial, they can maintain their limited resources, continue their employment, and avail themselves of the opportunity to retain counsel. . . .

In terms of the benefit to law enforcement objectives, he noted:

> The probability of eliminating the officer's appearance in court in some instances, coupled with the prospect of permitting the officer to swear to the complaint at the precinct instead of in court, will keep policemen on patrol where they belong.

By the end of the Manhattan Summons Project's first year, the Commissioner predicted, "the saving in police time will be over 4,000 hours."

Other jurisdictions have since announced their interest in issuing summonses for significant numbers of criminal violations. In Pennsylvania, new rules for the State Supreme Court, broadening the use of the summons in lesser offenses, went into effect on January 1, 1965. Rule 107 provides for the mandatory use of a summons instead of a warrant in summary cases, unless the issuing authority has reasonable grounds to believe that the defendant will not obey a summons. Rule 108 provides for the discretionary use of a summons instead of a warrant in cases punishable by imprisonment of two years or less.

In Minnesota, new municipal court rules were adopted on June 19, 1964. They provide that when a person is arrested without a warrant for any criminal offense, the arresting officer may issue a summons in lieu of taking him into custody. In all cases where warrants may be issued, the judge or clerk may, and upon the request of the prosecuting attorney shall issue a summons in lieu of a warrant.

Other jurisdictions which are seeking legislative authority to issue summonses, or are considering expanded use of their existing authority to use the summons, include California, Connecticut, and the District of Columbia, as well as Denver, Des Moines, Illinois, Milwaukee, Salt Lake City and Toledo. The summons is used to initiate nearly 50% of all cases in the federal court for the Northern District of California and, as indicated earlier, its expanded use in the federal system is now being considered.

The widespread interest in the summons led the Conference staff in mid-1964 to undertake a survey of existing statutes and current practices throughout the United States. A comprehensive report on summonses, citations and notices to appear, is scheduled for publication within the next several weeks.

3. *The Challenge of the Conference*

While much has been accomplished in many places in the brief period since the Bail Conference ended, a great deal more remains. Along with the notable increase in public understanding of the bail system and its need for change have come problems to which solutions have not yet been found, and setbacks which need to be overcome. Set forth briefly below are an interim appraisal of the developments which have been noted to date, an outline of the problems which require further study and experimentation, and a description of the assistance which the Conference Board and staff offer to all who are interested.

a. *Accomplishments and Setbacks*

Projects, conferences, studies and plans have been reported from dozens of cities in more than 4/5 of the states. In sheer volume, probably never before in our legal history has so substantial a movement for reform in the law taken place in so short a time. Of particular significance is the fact that these changes have flowed not out of a crisis created by judicial decisions outlawing prevailing practices, but rather from education, through empirical research and demonstration, which has spotlighted the defects in a system and the ways available to improve it. Action projects have sprung up as a result of concern exhibited by inter-professional groups representing a cross-section of community interests in the criminal law and the administration of justice. In an era of heightened concern over the incidence of crime and the need to control it, the emerging changes in the bail system have been found conducive both to the better protection of individual rights and the greater effectiveness of law enforcement. Carefully controlled and adequately supervised, these bail projects may well lay the basis for interdisciplinary attacks on other troublesome problems in the criminal process.

But hundreds, perhaps thousands, of communities have not yet responded to the challenge, and of those which have, project quality varies widely. Under the heading of bail reform, some courts appear to direct their r.o.r program efforts to releasing "substantial" or "respected" citizens who might well afford a bail bond premium, while detaining those who are poor. Some projects are interrogating the defendant as to his involvement in the alleged crime instead of confining their questions to the nature of the defendant's roots in the community. These projects even go so far as to disqualify from consideration a defendant who refuses to discuss the circumstances of his arrest. Plainly, little ground exists for complacency; the nationwide, long-term success of pretrial release projects is far from assured.

b. *Unresolved Problems*

Although many problems inherent in bail projects are illuminated by the Conference Proceedings, few of them have yet been fully resolved by experience. Perhaps the broadest consensus to date has been achieved on the question of indigency: the vast majority of projects appear not to be confining their recommendations for r.o.r. to persons who are financially unable to afford bail bonds. They are proceeding on the philosophy that every defendant, rich or poor, who has sufficient community roots should be entitled to release without bail. Endorsement of this point was given in October 1964 by the Executive Board and in January 1965 by the report of the Senate Judiciary Subcommittees.

Some of the open questions are summarized below.

(1) *Fact-finding agencies*

Several important issues arise out of the type of agency selected to conduct bail fact-finding investigations. (See Proceedings, pp. 85-99.) At present, a wide variety of institutions operate release programs—probation offices, police departments, public defender agencies, prosecutors, law schools, bar associations, social work agencies, private foundations. We do not yet know which may prove most effective; perhaps a totally new kind of fact-finding entity will be required. Each of the agencies presently involved has advantages and limitations. For example, when the interviewing is done under prosecution auspices, incriminating evidence from accused persons may inadvertently be elicited. On the other hand, public defender offices may not be regarded by the courts as sufficiently objective fact-finders. Probation officers seem particularly well equipped in training and experience to interview and verify information about defendants, but in some cases a practical problem of training probation personnel for this pre-conviction role has arisen. Probation officers traditionally come into contact with a defendant only after he has been convicted; in a bail inquiry, on the other hand, they are dealing with accused persons who may not yet be represented by counsel and whose right to remain silent concerning the alleged offense should not be disturbed. As an arm of the court, the probation officer may feel obliged to disclose to the judge any incidental information he elicits, including facts not material to the likelihood of appearance in court but possibly bearing on guilt. As a result, defense lawyers become apprehensive that bail interviews with their clients may divulge information detrimental to the outcome of their case, and may caution silence even at the expense of pretrial liberty. (See Proceedings, pp. 107-9.) Accumulated experience may permit comparative evaluation of the merits of fact-finding by these different agencies, and a legal study is now in progress to determine the privileged status, if any, of communications by a defendant to a bail investigator for the purpose of determining his eligibility for release.

(2) *Negative recommendations*

Closely related to the choice of fact-finder is the problem arising from negative inferences about a defendant which a judge may draw from a project's failure to recommend r.o.r. (See Proceedings, pp. 109-116.) Some judges tend to regard even a notation of "unable to verify" as equivalent to a finding that the accused gave false information or as a euphemism for a negative recommendation. Some projects in fact submit negative recommendations. Because many projects base their affirmative recommendations on objective criteria concerning an accused's roots in the community, an otherwise thoroughly

reliable defendant who is arrested while away from his home community will usually not qualify. Also, while we have reached the stage of recognizing that defendants who pass the screening procedures and are released on recognizance will return to court, we still do not know that defendants who fail to meet these point standards will necessarily be more likely to flee. Whether supposedly "poor risk" defendants will also show up in court remains to be determined by some controlled experiment involving the release of such defendants in cases involving minor crimes. For these reasons, the propriety or desirability of negative recommendations or of drawing negative inferences remains a matter of dispute.

(3) *Objective criteria*

A third problem is whether the decision to recommend or not recommend should be based on purely objective criteria or whether it may incorporate the interviewer's subjective reaction to the defendant. Preliminary experience shows that projects which utilize objective point weighting systems report a high rate of recommendations among those interviewed, and good records of reappearance by those released; on the other hand, projects whose evaluation is principally subjective have generally shown a lower rate of recommendations. The original point rating system devised by the Manhattan Bail Project is, of course, not immutable. Many projects have varied the scales to suit the character of their courts and communities. This kind of continuous experimentation in refining the point system should be pursued.

(4) *Excluded offenses*

The offenses to which bail fact-finding interviews extend have differed considerably among projects. (See Proceedings, pp. 75-85.) In some communities, such as Tulsa and Chicago, the project covers only misdemeanors. In others, like the District of Columbia and San Francisco, defendants charged with any crime, from petit larceny through rape and murder, have been equally entitled to be interviewed for the purpose of determining whether or not they should be recommended for release. In still others, such as Manhattan and Des Moines,

the initial list of excluded offenses has been steadily narrowed as the project gains court and community acceptance. The public relations value of excluding serious offenses from project coverage cannot be overlooked. At the same time, disqualifying a defendant from securing pretrial release not on the basis of the likelihood that he will fail to reappear, but rather solely on account of the seriousness of the charge against him, is thought by many to be inconsistent with the philosophy that bail determinations ought to be tailored to the alleged offender rather than his alleged offense. In addition, the experience to date of several projects indicates not only that selective release of defendants in serious cases can be accomplished successfully, but also that such releasees as a class may be better risks than the class of persons charged with some types of lesser crimes.

(5) *Preventive detention*

Perhaps the most perplexing of all problems raised at and since the Conference is the issue of so-called preventive detention, i.e., the intentional setting of bail beyond the means of a defendant believed to be dangerous, for the purpose of assuring that he will not be released prior to trial. (See Proceedings, pp. 149-215.)

Because high bail setting at the trial level is hardly ever accompanied by a judicial opinion or a statement of reasons, and is rarely the subject of appellate review, the practice, at present, is largely unseen. The defendant simply fails to raise the bond premium and remains in jail. No standards are currently prescribed by rule or statute for authorized pretrial detention, except in capital cases. A substantial body of opinion supports the view that setting high bail to detain dangerous offenders is unconstitutional.

In order to increase the visibility of detention which is predicated on dangerousness, and to focus attention on both the need for criteria to govern it and the question of its legality, efforts are now under way to draft legislation on the subject. Several studies are also in process to assemble empirical data, and to test the predictability of the commission of offenses by persons released prior to trial.

The advantages of such a statute are apparent. Heightened public concern over crime emphasizes the importance of balancing an arrested person's need for pretrial freedom with the interest of the community in being protected from threats to the physical safety of its citizens. Moreover, spelling out standards for preventive detention will increase its reviewability in particular cases. A statute might therefore tend to diminish unnecessary detention and yet make it possible to deny release altogether where monetary bail now frees dangerous persons who should be detained.

The disadvantages, on the other hand, are many. It is difficult to secure agreement on standards for denying release: if drawn narrowly, they may eliminate the discretion which is desirable in hard cases; if drawn broadly, they may undermine the Anglo-Saxon tradition which favors pretrial release. Some judges, moreover, may be reluctant to find a likelihood of future criminal conduct on the part of a defendant who has not even been convicted on the charge which brought him into custody. Other judges may tend to detain accused persons whenever there is doubt about their dangerousness, especially in times of heightened community concern. A detention statute also raises problems of delayed release pending hearings on detention (in order to secure witnesses and appoint counsel); of prejudicing a defendant's right to a fair trial by adducing and giving attendant publicity to background evidence in detention hearings; and, through requiring damaging findings as prerequisites to detention, interfering with the presumption of innocence at trial and tainting the defendant's record even if he is later acquitted on the charge which caused his arrest.

The consideration now being given to the problem of preventive detention is relevant to the rights of detained defendants. The range of suggestions here includes prompt appellate review, trial priority, limitations on the period of pretrial detention, provision of separate facilities and other privileges to minimize interference with the accused's preparation for trial, and credit for detention against any sentence ultimately imposed.

The foregoing are only illustrative of the thorny issues which remain to be solved. Others relate to the criteria and facilities for the detention of juveniles; the use of bail in cases

involving civil rights demonstrators; the exploration of new methods, apart from money and r.o.r., upon which the release of defendants can be conditioned to give greater assurance of appearance at trial; the detention of material witnesses; and the requirement of bail for nonresident motorists. A number of these are subjects of current study, experimentation or legislative proposals.

4. *Community Assistance Programs*

In February 1965, the Office of Juvenile Delinquency and Youth Development of the Department of Health, Education and Welfare awarded a third stage grant, under P. L. 87-274, to carry forward the work begun in 1963 by the National Conference on Bail and Criminal Justice. The continuing work of the Conference will be directed to encouraging and assisting the establishment of bail and summons projects, and other improvements in the bail system, wherever needed and requested. Through its Executive Board, staff, and sponsoring agencies, the Conference will serve as a consultant on bail problems, conferences and projects, as a clearing house for bail research and information, and as a referral agency for individuals and groups wishing to coordinate bail efforts with others in the same locality or region.

The resources of the Conference fall into three categories: personnel, publications and finances. Members of the Executive Board as well as representatives of the Vera Foundation, the Department of Justice and established bail and summons projects will be available to help organize programs, recommend speakers for meetings, and advise on the mechanics of studying a bail system and organizing a project. Financial assistance may be available on a matching funds basis, within the limits of the enabling grant, where local resources are inadequate. Conference funds may also enable bail project directors to travel to distant communities where new personnel need to be trained and new procedures established. The staff can also help plan surveys and studies of existing bail systems in communities which are considering the need for improvements, as well as help evaluate the performance of bail projects which have already been launched.

With respect to publications, the Conference can provide a range of materials appropriate for different kinds of community needs. In addition to these *Proceedings* and a number of specialized documents, they include (1) *Bail in the United States: 1964,* a 116-page book prepared in connection with the National Conference, which addresses itself to the history of bail, the defects in the system, the alternative methods of reform, and many of the problems discussed in this *Interim Report,* and contains an extensive bail bibliography; (2) *The Bail System of the District of Columbia,* a 50-page study prepared in 1963 by the Junior Bar Section of the D. C. Bar Association under the auspices of the Judicial Conference of the District of Columbia Circuit, comprehensively examining the operation and defects of a traditional bail system; and (3) a short form questionnaire recently developed by the Manhattan Bail Project for use in conducting bail interviews. Soon to be available are a publication on the use of summonses, citations and notices to appear, as alternatives to arrest.

In addition, the Conference has available, without charge, a limited number of 16-mm film prints of a 30-minute television program entitled *Must It Be Bail or Jail?,* produced by *All America Wants to Know* and portraying the operation of a bail project. Also available is a set of guidelines to aid in establishing new projects.

All of this work was made possible by the success of the National Conference on Bail and Criminal Justice in May 1964 and by the creative contributions of its participants. The Proceedings are reprinted here not simply as a matter of record, but as a unique source of information and ideas from a nationwide cross-section of the judicial, legal and law enforcement professions. They are intended for the benefit of all who seek to improve the administration of criminal justice.

BERNARD BOTEIN
Chairman, Executive Board

DANIEL J. FREED
HERBERT J. STURZ
Conference Co-Directors

NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE

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(Appointed October 1963)

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NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE

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Proceedings of the Conference

May 27-29, 1964

NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE

Program, May 27-29, 1964

Wednesday, May 27

Registration: 2:30 p.m.

Opening Session. 4:00 p.m. Auditorium

ATTORNEY GENERAL ROBERT F. KENNEDY
CHIEF JUSTICE EARL WARREN
JUSTICE BERNARD BOTEIN, NEW YORK SUPREME COURT
LOUIS SCHWEITZER, THE VERA FOUNDATION, INC.

Presiding: Herbert J. Miller, Jr.
Assistant Attorney General, Criminal Division
Department of Justice

●

Reception by the Attorney General for the Supreme Court and Members of the Conference

5:30-7:30 p.m.—Benjamin Franklin, Thomas Jefferson and John Quincy Adams Rooms

Thursday, May 28

MORNING SESSION

Panel A: Fact-Finding, Release on Recognizance, and Summons in Lieu of Arrest — 9:00-10:30 a.m. International Conference Room

MODERATOR:

Circuit Judge John A. Danaher, United States Court of Appeals for the District of Columbia Circuit (D.C. Bail Project)

PANELISTS:

Manhattan Bail Project: Herbert J. Sturz, Executive Director, Vera Foundation

Eastern District of Michigan R.O.R. Program: Judge Wade H. McCree, Jr., United States District Court

Des Moines Pre-Trial Release Project: Dan L. Johnston, Director

Manhattan Summons Project: Police Commissioner Michael J. Murphy

Thursday, May 28 (cont.)

Group Discussion Period: 10:45-12:15 p.m.
Room 1207

REGIONAL GROUP WEST

Moderator: Harold W. Solomon, University of Southern California Law School

Reporter: Judge William S. Fort, Eugene, Oregon

REGIONAL GROUP MIDWEST — Room 1107

Moderator: Frank J. Remington, University of Wisconsin Law School

Reporter: Lee Silverstein, American Bar Foundation

REGIONAL GROUP SOUTH — Room 1205

Moderator: Dale E. Bennett, Louisiana State University Law School

Reporter: Edwin E. Dunaway, Little Rock, Arkansas

REGIONAL GROUP EAST — International Conference Room

Moderator: Samuel Dash, Philadelphia Council for Community Advancement

Reporter: Charles E. Ares, New York University Law School

AFTERNOON SESSION

Panel B: Setting High Bail to Prevent Pre-Trial Release — 2:00-3:30 p.m.
International Conference Room

MODERATOR:

Herman Goldstein, Executive Assistant to Superintendent O. W. Wilson, Chicago Police Department

PANELISTS:

Prosecutor: Garrett H. Byrne, District Attorney for Suffolk County; President, National District Attorneys Association

Defense Lawyer: Edward Bennett Williams, Washington, D. C.

Judge: Luther Alverson, Superior Court of the Atlanta Judicial Circuit

Group Discussion Period: 3:45-5:00 p.m.

Same groups as morning session

Friday, May 29

MORNING SESSION

Panel C: Pre-Trial Release Based on Money or Other Conditions — 9:00-10:45 a.m.
International Conference Room

MODERATOR:

Caleb Foote, University of Pennsylvania Law School: Challenging the Constitutionality of Conditioning Pre-Trial Freedom on Money

PANELISTS:

Prosecutor: Richard H. Kuh, Assistant District Attorney, New York County

Bondsman: Frank Wright, President, United Bonding Company of Indianapolis

Alternatives to the Bondsman: Charles H. Bowman, University of Illinois Law School

Panel D: Pre-Trial Release for Juveniles — 11:00-12:30 p.m.

MODERATOR:

Judge George Edwards, United States Court of Appeals for the Sixth Circuit; Former Police Commissioner of Detroit

PANELISTS:

Police: Assistant Chief Raymond A. Dahl, Milwaukee

Probation: Warren Thornton, Chief Probation Officer, Sacramento

Judge: Orman W. Ketcham, District of Columbia

Attorney General Robert F. Kennedy — 12:30 p.m.

AFTERNOON SESSION

Closing Session: 2:30-4:00 p.m.

Presiding: Herbert J. Miller, Jr., Assistant Attorney General

Report of Regional Groups

Conference Discussion and Summary

CHAPTER I

Opening Session

Presiding:

Herbert J. Miller, Jr., Assistant Attorney General,
Criminal Division, Department of Justice

Speakers:

Attorney General Robert F. Kennedy
Chief Justice Earl Warren
Judge Bernard Botein
Louis Schweitzer

The National Conference on Bail and Criminal Justice convened in the Auditorium of the State Department Building, Washington, D. C., at 4:10 p.m., Herbert J. Miller, Jr., Assistant Attorney General, Criminal Division, Department of Justice, presiding.

MR. MILLER: I would like at this time to call to order the National Conference on Bail and Criminal Justice.

It is my distinct honor to present the Attorney General of the United States of America who will make a few preliminary remarks and introduce the Chief Justice of the United States. Attorney General Kennedy.

Welcome by

ATTORNEY GENERAL ROBERT F. KENNEDY

ATTORNEY GENERAL KENNEDY: Mr. Chief Justice, Judge Botein, Mr. Schweitzer, and Members of the Conference:

It is an honor to welcome you today to the First National Conference on Bail and Criminal Justice. It is also a source of deep satisfaction and confidence in our legal system.

For so many distinguished judges, public officials, lawyers and citizens to take the time to come here from every State, and from several foreign countries as well, testifies warmly to our concern that justice be equal for all Americans.

Here in Washington 30 years ago, Attorney General Homer Cummings convened the first Attorney General's Conference on Crime.

It was a highly successful meeting, with a distinguished roster of participants. Some of you here today were here then and you know the importance of that conference to the development of the fight against modern crime.

Many of you—police, sheriffs, prosecuting attorneys—are deeply involved in that fight every day. You are meeting your responsibilities with intelligence, vigilance, and dedication.

Yet the problem of enforcing the law extends beyond investigation, arrest and prosecution. It involves our whole system of criminal justice.

Many of you here today have other responsibilities in this broad field. As judges, probation officers, prison officials, and organization representatives, you administer our courts, analyze the causes of crime, help protect the rights of individuals, and seek to fight against poverty and delinquency.

The President's Committee on Juvenile Delinquency and Youth Crime, which was formed by President Kennedy, which made the grant for planning this conference, is vitally concerned with these problems.

This conference was called to deal particularly with a problem central to all of these responsibilities.

The relationship of bail to criminal justice is a subject which involves fair treatment for our fellow citizens in court, whether arrested for speeding or burglary, whether guilty or innocent.

This relationship determines what happens to them after they have been accused but before they have been tried. It may well affect their future attitude toward law, toward the community, toward society, and their chances for rehabilitation.

Yet, one of the most surprising—and really troubling—disclosures of recent history is that whether or not a man makes bail has a vital effect on whether, if innocent, he will be acquitted; and whether, if guilty, he will receive equal opportunity for probation.

By the time we conclude on Friday, I hope all of us will have a better understanding of our bail system and what we can do to improve it.

I received a letter when word appeared in the newspapers that we were going to have this conference. It was from a gentleman in our Federal Penitentiary in Atlanta.

He wrote, "Dear Sir: I notice by the newspapers that you and the Honorable Chief Justice, Earl Warren, will conduct a forum type conference 'to talk out the problem' and to correct the acknowledged abuses in the bail bond system as being applicable to 'poor defendants'. The wealthy ones seem to have no problems on that score.

"Somehow, I feel an urgent desire to speak at that meeting, because it appears that, in fact, the 'poor man' has not been listed as one of those to be present or even heard at that time."

So, it seems to me there is some justification for that remark. There is a special responsibility on all of us here, a special responsibility to represent those who can not be here, those who are poor, those who are the unfortunate—the 1,500,000 persons in the United States who are accused of crime, who haven't yet been found guilty, who are yet unable to make bail and serve a time in prison prior to the time that their guilt has even been established. For these people, for those who cannot protect themselves, for those who are unfortunate, we here, over the period of the next three days, have a special responsibility, and I am sure we will meet that responsibility.

The programs and experiments you will hear about have generated new techniques for releasing accused persons prior to trial, without hampering law enforcement, without increasing crime, and without prompting defendants to flee.

These techniques have fiscal value. They can help to increase the efficiency of police forces and they can save communities from the substantial costs of unnecessary detention.

But even more significant, in a land which has put the quality of justice ahead of the cost of justice, these techniques have social value.

They can enable courts to tailor bail decisions to the individual. They can enable lawyers to do a better job of representing their clients.

And, most important of all, they can save countless citizens from needlessly or unjustly spending days or weeks or even months in jail.

One of the persons deeply concerned with this problem was, I discover, an equally concerned participant in the Attorney General's Conference of 30 years ago.

Then he was a young district attorney from Alameda County, California, where he had already established a fine reputation for law enforcement in the West.

Yet, he modestly told the Conference that, except for a little experiment in his own county, "I can conceive of no

reason why the Attorney General should have selected me for this discussion."

I doubt that anyone here today will question why we have invited the same gentleman to honor us by opening this conference. He is one of the most widely respected men in the world today.

In our own land he is the embodiment of equal justice under law.

I am honored to present the Chief Justice of the United States: Earl Warren.

Address of

HONORABLE EARL WARREN

Chief Justice of the United States

CHIEF JUSTICE WARREN: Thank you, Mr. Attorney General.

Ladies and Gentlemen of the Conference: I remember very well indeed that great conference that Attorney General Cummings had almost 35 years ago, 31 years ago it was to be exact, and I remember some of the things that flowed from that conference. It was a great conference, and it did as much as any conference I know to stimulate the police officers, probation officers and judges in their own home states to work out programs for the better administration of criminal justice.

We have made great strides since that time. There is better law enforcement today than there ever has been in my experience, which extends over a long period of years, in spite of what we read in the papers sometimes; and I think there is really more justice administered by far than there was in those days. That is because the law enforcement agencies of this country are elevating themselves to the standards of a profession, and I am just sure that as time goes on, with the efforts that the law enforcement officers of this country are engaged in at the present time to raise their own standards, that it will be one of the most admired professions in the land.

Now, when the Attorney General invited me to speak at the National Conference on Bail and Criminal Justice, he described its aim as being "to focus national attention on the serious shortcomings of our present bail system and the promising alternatives which might be adopted." You who are seeking a solution to these shortcomings are admirably equipped for the task; for I am informed that you are drawn from "the entire spectrum of those who participate in or influence the criminal process between apprehension and release to freedom." I am happy to welcome you to what I understand is the first national conference ever held in this country to evaluate bail problems. I think it is as important a problem as we can raise in this area, and I am satisfied that this too will be a great conference.

The provisions for granting bail before trial and the problems which concern bail are essentially similar in both federal and state courts. These provisions in the federal system were established early in our history. In the Judiciary Act of 1789, which antedated the Eighth Amendment to the Constitution, bail was established as a right in all criminal cases except where the punishment might be death. In capital cases bail was discretionary with the courts, who were to be guided by "the nature and circumstances of the offense, and of the evidence, and the usage of law." The Eighth Amendment, which is part of the Bill of Rights, became effective some two years later and declared that "excessive bail shall not be required." This clause has generally been construed as guaranteeing the right to bail by logical implication.

Today under Rule 46 of the Federal Rules of Criminal Procedure the provisions for bail before conviction remain about the same as in the first Judiciary Act. Bail pending judicial review of a conviction is also provided for unless it appears that the appeal is frivolous or taken for delay. The amount of bail under the Rule is to be such as will insure the presence of the defendant, account being taken of the nature and circumstances of the offense charged, the weight of the evidence against him, his financial ability to give bail, and the character of the defendant. Though the amount of bail is thus left to judicial discretion, such discre-

tion must not be abused, and the factors set forth in the Rule must be carefully heeded.

Utilizing the present Rule 46, federal commissioners and judges generally require a bail bond for release of the accused. This emphasis upon the financial aspect of bail is common to both the federal and state systems and is a weakness of both. Such emphasis is based on the assumption that an accused will not forfeit the collateral which he is usually required to post with a bail bondsman to avoid standing trial. But the almost complete reliance on the financial aspect of bail creates serious problems for many defendants who are unable to raise bail, either because of their inability to obtain a bondsman, or because of their indigence, or both. And defendants unable to post bond languish in jail until trial, in some cases for considerable periods of time (I think in this very District the time is about 51 days), despite which in many cases they do not even receive credit for such time on their sentences; moreover, innocent defendants incarcerated while awaiting trial are without recourse of any kind.

Although Rule 46 contains provisions for bonds and sureties, it states that "in proper cases no security need be required . . ." Justice Douglas, in his capacity as Circuit Justice, discussed this phase of the Rule in two recent cases. After mentioning the financial basis of the bail system—"that the threat of forfeiture of one's goods will be an effective deterrent to the temptation to break the condition of one's release"—he stressed that this theory proceeds on the assumption that a defendant has property. The Supreme Court, he pointed out, has held that a poor defendant is denied equal protection of the laws if, solely because of his indigence, he is denied an appeal on equal terms with other defendants. Justice Douglas therefore queried whether an indigent can be denied freedom, where a wealthy man would not, because he does not happen to have enough property to pledge for his liberty. Other than financial considerations were suggested by him as discouraging an accused from jumping bail; long residence in a locality, the ties of family and friends, and the efficiency of the modern police. All of these he believed might constitute deterrents equally effective to the threat of forfeiture.

The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, taking cognizance of these and other considerations, has submitted amendments to Rule 46 proposed by the Advisory Committee on Criminal Rules which are designed to facilitate the release on bail of a greater percentage of indigent defendants. The Advisory Committee feels that to the extent other factors make it reasonably likely the defendant will appear, it is both good practice and good economics to release him on bail, though he cannot arrange for cash or bonds even in small amounts. Proposed changes in the Rule would provide for a deposit of cash or government securities in an amount less than the face value of a bond; the release of the accused without financial security when other deterrents appear reasonably effective; the imposition of nonfinancial conditions as the price of dispensing with security for a bond; and notification that bail-jumping is a federal offense.

I am advised of several experimental projects directed to the use of nonfinancial considerations in the release of accused persons prior to trial. The eight district judges of the United States District Court for the Eastern District of Michigan adopted a policy of releasing on personal bond those defendants with substantial ties to the community, after investigation by the United States Attorney's office. The statistical results involving over 400 cases during a six-month period commencing September 1, 1961, are quite impressive. During that time a surety bond was required in only about a third of the cases, but was dispensed with for the remaining two-thirds of the defendants, who were released on personal bond. No serious problem of default occurred.

Another, and immensely significant, experiment in this same field is the Manhattan Bail Project, about which I am sure you will hear much during the course of this conference. The evidence so far strongly indicates that, with careful investigation and adequate notification and follow-up procedure, a system which has been termed pre-trial parole can be utilized with safety in a substantial number of cases.

Additional experimental programs have been undertaken in other jurisdictions, including release on recognizance programs in St. Louis and the District of Columbia and a youth

court experiment in Baltimore. I am also happy to learn in my own State of California there are several programs of that kind, and seeing here one of the judges from my own city, I am happy to say that one of those programs is in that City of Oakland. The Attorney General's office, with the view of broadening the use of release on recognizance, has urged all United States Attorneys and their assistants 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 for trial.

Many suggestions for attacking the problems of bail have emerged from these studies and experiments. These include the increased use of release on personal recognizance for misdemeanors and lesser felonies; refundable cash deposits in lieu of bail bonds; the assignment of counsel to the financially disadvantaged accused prior to the time when bail determinations are made; supervision of persons released on personal bonds, by reporting regularly, or by "sleeping in"; and the establishment of permanent agencies to make investigations and recommendations for release pending trial. These and many more approaches will doubtless be explored at your work-sessions and hopefully will be subjected to further testing in other projects.

Certainly as far as bail for indigents accused for the first time of committing misdemeanors is concerned, we can and should take prompt steps to alleviate the often harsh bail requirements. We can then move on to the improvement of the situation with respect to those charged with at least some of the more serious offenses. We can proceed circumspectly, ever maintaining the proper balance which is inherent in our system of criminal justice between the rights of the individual accused of crime and the rights of society to be protected against unlawful conduct.

Now, I have spoken thus far about problems of bail, since these are your immediate concern. We must not forget, however, that there are many other important facets of criminal justice, and to some of these I should like to invite your further attention.

It has been observed that "the quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law." I believe that is a wise observation. When those methods result in arbitrary inequality because of race, indigence, or otherwise, the nation as a whole suffers as well as those who are the victims of inequality.

The concepts that all men are created equal and that no state shall deny any person the equal protection of the laws are deeply imbedded in the philosophy of our Government, and their antecedents extend back to the Magna Charta and beyond. Yet we cannot give meaningful import to those principles in the field of criminal law as long as the poor cannot effectively assert their rights in our courts. Or, in the language of Justice Black, "There can be no equal justice where the kind of trial a man gets depends upon the amount of money he has." In this connection, you may be interested to know that the Justices of the United States Supreme Court take an oath to "administer justice without respect to persons, and [to] do equal right to the poor and the rich . . ." In addition to bail, indigence presents special problems with respect to the right to counsel, the right to a criminal appeal, the right to be provided with transcripts on appeal, and the right to be free from arbitrary arrest. All these in one way or another concern the relationship of poverty to the administration of justice.

There recently appeared in serial form a series of three magazine articles, to appear in book form, which I commend to your attention, written by Anthony Lewis, who reports regularly on the work of the Supreme Court. These articles constitute a profile of a case dealing with an indigent's right to counsel, which our Court decided a little over a year ago. The prevailing rule previously did not provide a guarantee of counsel in a state criminal proceeding not involving a capital offense. In this Florida case, the defendant, not being able to afford counsel, had to defend himself against a felony charge. He was convicted. When the case reached our Court, we unanimously upheld the right to counsel in a state felony case and in doing so expressly overruled the holding on that issue of over 20 years before. Mr. Justice Black, speaking for the Court, said:

> [I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.

Legislation is pending in Congress now to be known as the Criminal Justice Act which is designed to provide an accused person financially unable to obtain an adequate defense with counsel at every step of a federal criminal proceeding from preliminary examination to appeal. This proposed legislation is a bipartisan undertaking, which it is to be hoped will successfully climax the efforts during the last quarter century by a great many dedicated people, particularly by your present Attorney General. The main thrust of the measure is a system whereby compensated counsel can be provided either through representation by private attorneys; by a federal public defender and assistants; by attorneys furnished by a bar association, legal aid society, or other local defender organization; or by a combination of the foregoing. In addition, the legislation proposes providing counsel with the auxiliary investigative and expert services so often essential to ascertaining the facts and making the judgments upon which to prepare and present the defendant's case, thus rendering representation by counsel more effective and meaningful. The proposed bills recognize that poverty is a relative concept and that the poverty of the accused must be measured in each case by reference to the particular need or

service under consideration. This was stressed in the Allen Report on Poverty and the Administration of Federal Criminal Justice, which was submitted to the Attorney General last year.

Mr. Attorney General, I want to say to you that if this bill is finally enacted and signed, as we hope it will be, you will have made a great advance in the administration of justice in this country, because I know how close it is to your heart, and I know how hard you have had to work to bring it to fruition.

Differing versions of this legislation have passed both houses of Congress and are being considered by a conference committee. We are thus closer than ever before to a legislative solution at the federal level to a very troublesome problem.

Appellate review of criminal convictions is a more recent development in the law than may ordinarily be supposed. The value of such review, now firmly established as an indispensable ingredient of criminal justice, can be measured by the percentage of reversals resulting from appeals considered by higher courts—about 20% in the federal system, with an even higher percentage in some states. Present federal law makes an appeal from a District Court's judgment of conviction in a criminal case, in effect, a matter of right. Where state appellate review is granted, the standards of due process and equal protection demanded by the federal Constitution must be applied. In a case where appeal of a state conviction depended upon the furnishing of a transcript, but the defendants lacked financial resources to obtain one, the Supreme Court held that the State must afford a procedure whereby they could obtain a review as adequate as that accorded to those who could afford to pay for the transcript.

Now, we have heard some criticism of that from various states to the effect that it imposes a tremendous burden upon the state to supply such transcripts, and that it will encourage appeals. I want to say to you that when I was a young man, 50 years ago, in California, California provided tran-

scripts in that way, and it provided them not only for the poor but for anyone. I assure you we had no more appeals in criminal cases in California than they had in other states that do not supply transcripts in this manner, and I think that there is a greater measure of justice administered by reason of that rule, and the State of California has not gone broke yet.

There are other aspects of the relationship of poverty and criminal law and criminal procedure which have proved troublesome, and which await further attention by our legislative bodies and the courts, such as vagrancy laws and closely allied arrests for "investigation." As Justice Douglas has pointed out with respect to vagrancy, a "man who is idle and has no visible means of support is placed in a criminal category, because he is deemed likely to commit a crime in order to gain a livelihood." That premise, as he indicates, has been challenged and there seems to be little evidence to support it. "Moreover," as he comments critically, "when the law proceeds on that basis, suspicion is the foundation of the conviction; the presumption of innocence is thrown out the window. . . ."

In this brief discussion, I have been able to do no more than mention certain facets of poverty and its connection with criminal justice. The Allen Report probes these problems in considerable detail, and as far as bail is concerned will doubtless be considered by you in depth along with other available materials.

Although bail and the other matters I have alluded to are mainly problems of poverty in the administration of justice, there are many other components of our system of criminal justice which do not necessarily involve poverty. These include the right to be free from extorted confessions and illegal searches and seizures, the right to petition for a writ of habeas corpus, the right to trial by jury, the elimination of discrimination in the selection of jurors, more uniform standards for sentencing, better detention facilities, especially for pretrial detention, more effort directed toward rehabilitation of criminals, the vital problem of juvenile delinquency, and many others. All of these add up to the underlying concept of fair play to the accused as well as to the public in our administration of criminal justice. We who are public officials, in whatever capacity, have a special responsibility to see that these rules of fair play are strictly observed. For in a very special sense we are the trustees of democracy, a system of government which can be meaningful only as long as respect is maintained for the rights of the individual.

Before I finish, I should like to tell you how impressed I am with the techniques which have been employed in the Manhattan Bail Project, which point the way to an exciting new approach to the solution of the problems which I have mentioned as well as others in the administration of justice. The possibilities for the application of these methods are many and the prospects of solution outside the traditional confines of the law are great. Moreover, the combination of lawyers, judges, police, sociologists, and volunteer workers—including notably law students—can be used successfully in a great many areas.

I understand, for example, that the New York Police Department and the Vera Foundation are now cooperating in a pilot project looking toward the substitution of summons for arrest where this can safely be done. Here again, as with the Bail Project, a coalition of talents is being brought to coverage upon a problem. This time the effort is directed at determining if a system cannot be devised, where it is appropriate to do so, which has advantages over the traditional arrest techniques which have been so expensive in money and time and, often, human values. The immense potential of this type of approach may well revolutionize our thinking in the administration of justice. You will be hearing more about this from New York Police Commissioner Murphy in a panel discussion tomorrow. But I just want to add this thought. The participation of the New York Police Department in this forward-looking approach is itself one of the most encouraging developments. When agencies like that—and the Department of Justice, which is co-sponsoring this Conference—are in the vanguard in efforts to seek new solutions to old problems, I am inspired and heartened.

And what challenging goals lie ahead! I have mentioned many aspects of the administration of justice where refinements and improvements are being sought. To all these the new methods of empirical research can be applied with profit. Other areas which cry out for bold and imaginative pioneering involve the alternatives for fine or jail as they confront the indigent criminal and the problem of the homeless man, usually an alcoholic. Cannot some more meaningful approach, like using rehabilitation centers instead of jails, be used to deal with this type of individual, with whom the police are often needlessly preoccupied?

I had occasion to observe in a speech in Chicago some time ago that we are living in a new and rapidly changing age to which every person and institution and every function of the Government must conform. In some areas of human activity we have developed skills and accomplishments amazing to all, as is true of space and biology. But in the fields of some of the more pressing problems of modern life, such as the administration of justice, we are still moving at a snail's pace.

> By way of contrast [as I said at that time], there has been no comparable development in the administration of justice by our courts. In spite of the efforts of many forward looking judges it sometimes seems in the courts as though time stands still.
>
> It takes no gift of prophecy to predict that this condition cannot last. Either the administration of justice by the courts must grow and develop as the rest of the world grows and develops or the courts as we know them will wither on the vine and the function of administering justice in the broad sense will be performed in a different way. . . .

I would like to think that through the efforts of those associated with experimental projects such as have been and are being used to attack the problem of bail and the problem of arrest, and through other imaginative undertakings which are enlisting the talents of those in many different fields, a turning point will have been reached and the solutions to human problems will catch up with solutions to scientific problems.

In conclusion, I should like to say that the Attorney General has expressed to me a hope which I should like to relay to you. May there emerge from your deliberations, as he put it, "a new awareness of the opportunities available to State and Federal officials to facilitate the pre-trial release of many more accused persons with reasonable assurance that they will appear at trial, yet without the price tag that now places freedom on bail beyond the reach of so many." I share his hope and his belief that this can be done, not as a sentimentality for those who have committed crime, or to make it more difficult for law enforcement officers to perform their jobs, but to give deeper meaning to our great objective, "Equal Justice under Law."

As you embark upon your promising venture, I wish you Godspeed.

MR. MILLER: Thank you very much, Mr. Chief Justice.

It is fair to say that no member of the bench or bar has devoted more study to the problem which this conference has been called to consider than Justice Bernard Botein, the Presiding Justice of the Appellate Division, Supreme Court, New York, First Department.

Justice Botein served as an assistant district attorney for New York County for several years. He has been a justice of the New York Supreme Court since 1941. He is the author of several books and law review articles, and has been intimately connected with the Manhattan Bail Project since its inception.

He served on the Advisory Committee which met last October to lay the groundwork for this conference opening here today, and thereafter, for several weeks, studied the pre-trial release practices in certain European countries including Sweden, Italy, and England.

It is most fitting that Justice Botein should address the opening session of this conference, and it is my privilege to now introduce him.

Address of

HONORABLE BERNARD BOTEIN

Presiding Justice, New York Supreme Court
Appellate Division, First Department

JUSTICE BOTEIN: Mr. Chief Justice, Mr. Attorney General, Mr. Schweitzer, Mr. Miller, Ladies and Gentlemen:

There could not be found a group of persons more distinguished and expert in all facets of the administration of criminal justice than the one assembled here this afternoon. During the working sessions of the next two days your collective experience and skills will expose the faults and the virtues of the bail system in the United States. The devoted personnel of the Department of Justice and Vera Foundation have worked hard and intelligently in organizing this Conference; and if through our participation and contributions we are persuaded that change is required, I am sure they hope that we will spread the gospel when we return home.

I imagine I have been accorded the honor of addressing you because the first substantial experimentation affecting the bail processes in this century originated in New York County a few years ago. In something like an opening statement I shall try to unroll the broad canvas of bail procedures in the United States, hopeful that in the next two days of the Conference it will help you relate in greater depth and detail the separate parts to the whole picture.

Now let me make it clear at the outset that I regard myself as a fairly tough-minded and hard-nosed judicial administrator. As the administrative head of the First Judicial Department of New York State, which includes the exciting and important County of New York in which the experimentation was conducted, I and my associates would not dare to tinker lightly with existing machinery. Were we in New York City to embrace all ideas for the improvement of the judicial process that are so earnestly pressed upon us, our courts would soon be in a sad state.

Therefore, when Louis Schweitzer, the dedicated philanthropist who established Vera Foundation, first came to me and other officials of New York City a few years ago with his ideas about reforming bail procedures, we did not plunge

in blindly. He convinced us that a fresh look at the bail system was long overdue; but before we moved we explored every aspect of the proposal with Mr. Schweitzer, Herbert Sturz, the highly competent Director of Vera Foundation, representatives of the Institute of Judicial Administration and many others. And when we did decide to conduct an experimental project, to be called the Manhattan Bail Project, we proceeded very cautiously. Before this Conference ends you'll hear a great deal about the Manhattan Bail Project and other programs already in action or which soon will be under way to revise bail procedures in a dozen communities.

Why this sudden, swelling chorus of concern with a bail system that has persisted fundamentally unchanged in this country for a century and a half? I think the answer is the old story of unthinking acceptance of the status quo by those wedded to it, until along came a newcomer like Louis Schweitzer, with a sensitive concern for implementing the rights vouchsafed an accused by the Sixth and Eighth Amendments. He saw the reality missed by those of us so close to the situation that we could only see the Emperor fully clothed.

When appraising the current ferment in the light of previous inaction, we must appreciate that bail reform has always dragged and been achieved infrequently.

At the turn of the 17th century Lord Coke wrote a treatise on bail for the guidance of those entrusted with bail setting powers. Coke translated the meaning of bail literally from the French word "bailer", to deliver; and defined the bail function as delivering the prisoner, "as it were into the prison of the sureties." This simile, representing the surety as the substituted jailer for the accused, conveys some idea of the responsibility for the latter's appearance resting upon the surety; and the penalties for nonappearance visited upon him were correspondingly harsh. Centuries before Coke the surety had in effect been a hostage, who could be jailed in place of the fugitive from justice. Later this sanction was relaxed but the surety still suffered the penalty of forfeiture of all his property. And still later the liability became one of paying only a specified sum of money in case of failure to appear. The personal exposure of the surety was usually

deemed a better guarantee of the continued presence of the accused in the jurisdiction than the loosely guarded prisons or the corrupt sheriffs of that period. It is interesting to note that even in those days Lord Coke made it evident that he did not regard bail as a punitive device.

Three and a half centuries later every civilized country in the world shares or at least purports to share this enlightened solicitude that no person should be unnecessarily held in prison while awaiting trial. But only a few nations even begin to approach this ideal in practice; and definitely, quite definitely, the United States has not achieved it. A brief glimpse at the pre-trial release procedures of some other countries might help us in appraising our own systems. Let us start with England.

Despite their common origin, bail as it is furnished in England is today quite different from bail in this country. Generally, release in England is conditioned upon the accused, or the accused and one or two sureties, furnishing a personal recognizance; that is a contract, under which they agree to forfeit a stated sum—the specified amount in which bail is fixed—if the accused fails to appear subsequently in court. There is no posting of cash, real estate deeds or security of any kind with the court—a radical departure from present American practice. A defendant may not deposit collateral with or agree to pay a fee to or indemnify his surety in England. It follows therefore that bail may not be posted by insurance companies; and so there are no professional bondsmen in England. In fact, the only two countries in which professional bail bondsmen can operate are the United States and the Philippines.

Rarely are forfeitures required in England because of nonappearance of the defendant—so rarely that they are not even reported for statistical purposes. And this although bail is usually set at only a fraction of the amount ordinarily fixed for similar charges in the United States—and without collateral. It should be noted, however, that judges, usually magistrates, release on bail only about 60% of defendants charged with indictable offenses, although there is growing sentiment that this ratio should be larger. One factor in this statistic may be that the police, who in England perform

many of the functions of our district attorneys, including actual prosecution of trials, usually make the bail recommendations; and I am informed their recommendations are followed in 95% of the cases.

In Italy there is statutory provision for bail, which is, however, never utilized in actual practice. The Italians regard the bail concept as undemocratic, as favoring the rich over the poor. Now this will be a constant refrain. You heard the Attorney General read the letter from the inmate in the penitentiary, and he voiced the same "rich-man poor-man" coupling and consequent injustice. The same concept prevails in Italy, in a country, mind you, with an inquisitorial prosecuting procedure, in which the prosecutor is given unreviewable power to detain an accused for a long period of time—power which would be regarded as unconscionable in this country. And yet, as I read the criminal statistics of Italy, 90% of defendants charged with what we would regard as minor or moderately serious crimes are released unconditionally pending trial, without furnishing bail or any other form of pledge. This is a much higher ratio of release than obtains among defendants charged with comparable crimes in the United States.

In Sweden and Denmark, because of the egalitarian philosophy pervading governmental thinking, one is not surprised to learn that they also reject bail as placing the poor in an unfavorable position in comparison with the rich. And again, although these countries employ an inquisitorial criminal procedure, they too appear to hold comparatively less defendants in pre-trial detention than do we in the United States. The minimal incidence of flight to avoid trial in all these countries may in part be due to the frequent use of fines where some imprisonment might usually be imposed in this country; 40% of all persons convicted of indictable offenses in England are sentenced to pay fines only. Also, much milder sentences are imposed in these countries, as compared with ours, for comparable crimes—so that a defendant does not apprehend such severe punishment as he does for a similar offense in the United States.

For comparison, here are a few figures about the heavy incidence of pre-trial detention in the United States.

A 1958 study of bail in New York City disclosed that 28% of the defendants were unable to raise bail in so low an amount as $500, and 45% could not raise bail when it was set at $2,000. In St. Louis 79% of the defendants could not raise bail, and so with approximately 75% in Baltimore and Philadelphia, and with 65% held in the District of Columbia District Court. In a survey made of four Federal judicial districts, the percentages of defendants who could not raise as little as $500 bail ranged from 11% in one district to as much as 78% in another.

Here are some New York City figures. In 1962, 58,458 persons, of whom 12,995 were adolescents, were confined to prison while awaiting disposition of criminal charges pending in city and state courts. The adults spent an average of 28 days apiece in jail, the adolescents an average of 32 days. The total, staggering number of days spent in jail by these 58,000 presumably innocent individuals during the year was 1,775,788. Persons accused of Federal offenses in 1963 spent an estimated 600,000 days in local prisons. I need not dilate on the many millions it costs the taxpayers to maintain these persons in New York City jails each year, to support their dependents who are forced onto relief rolls, and the tens of millions it costs to build bigger jails to lodge the constantly increasing detention population. Much more important, often tragic and irretrievable, is the damage done the community through ruination of members of the family and the family unit itself, the debasement of human dignity and moral values and the disillusionment with the processes of American justice.

Although our bail system was originally imported from England, it is not surprising that procedures suitable to that "tight little isle" developed differently in a huge sprawling country that levelled its frontiers as rapidly as has the United States in the past two centuries. The practical difficulties, often the unfairness, of holding a personal surety to his bargain by demanding that he produce a defendant who had all too easily slipped through the loose boundaries of his community soon became apparent. As a result, the professional bondsman, who made it his impersonal, balance sheet business to produce the defendant in court, gradually began to replace

the friend or relative surety—to an extent where he has virtually taken over the bail posting process in the United States and turned it into an enormous business for profit. A person not owning real estate will seldom qualify as a surety, and not many defendants can enlist property owners who will risk their equities by assuming a bail obligation when there is a simpler alternative. Acting as agent for a surety company, the commercial bondsman, for a cash premium, will issue a bond guaranteeing the defendant's future court appearance—but under conditions that are often oppressive.

Now we must ask the question, why has this complex of American bail procedures, originally designed to improve existing methods and afford the accused a simple, uncomplicated method of procuring bail on payment of a modest fee, turned into an instrument of oppression? True, we are liberal and eloquent and certainly sincere in enunciating the right to bail through constitutions, statutes and decisional law. But underscore this, because it goes straight to the heart of the objective of this Conference. The *right* to bail is quite different from the *ability* to furnish bail.

At common law, in England and this country, the right to bail in all cases is vested in the discretion of the courts. We are granted protection, by the Eighth Amendment and through State Constitutions and legislation, against excessive bail. The Federal Judiciary Act of 1789 provided for the right to bail in Federal Courts in all but capital cases. Over forty states make similar provision, by constitution or statute, except possibly in capital or treason cases.

And the decisional law echoes in ringing tones the mandates of constitution and statute. The Court of Appeals of New York State has set forth the guidelines usually observed in this country in setting bail. It has said: "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.'" But while holding that a "judge is not free to make the sky the limit" in fixing bail,

because of the constitutional prohibition against excessive bail, the courts have held that the inability of a defendant to raise bail does not in and of itself stamp such bail as illegally excessive. You heard the Chief Justice echo Justice Douglas' challenge, and it will bear repetition: "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?"

The answer unhappily is yes! The harsh facts give our legislative and judicial pronouncements about the right to bail a hollow ring. Pronouncements do not furnish defendants with the cash premiums and substantial, often full collateral demanded by bondsmen; and which in actual practice constitute the ability to furnish bail. Hundreds of thousands of persons each year in this country who are charged with minor and moderately serious crimes are held in jail awaiting disposition of their cases because they are unable to raise bail in moderate, low or even nominal amounts. And their neighbors, charged with crimes of the same gravity, sometimes co-defendants charged with the same crime, but possessed of sufficient means to secure bail, remain at liberty.

These are facts—indisputable facts, unfair, undemocratic and unhealthy facts. Surely, this alone should command a conference such as we are now attending.

In contrast, England, Italy, Sweden and Denmark, which were selected for comparative study on behalf of this Conference, reflect no such economic dichotomy. As in the United States, their attitudes emphasize release during the critical pre-trial period of the large number of persons charged with minor offenses and with moderately serious crimes who have no serious criminal records and enjoyed previous good character.

It was reported to this Conference, and I quote:

> "These two categories constitute an overwhelming majority of the persons charged with criminal offenses in all countries; and in Sweden, Denmark, Italy and England we found that these persons were in fact usually given their liberty prior to trial, whereas in the United States we too often fail to realize this objective, and many persons in these categories remain behind bars."

I do not doubt that our bail procedures derive from a genuine concern to make a reality of the entire bundle of rights afforded an accused during the period between arrest and trial. But in moulding the procedures to accomplish this objective I believe the architects in large measure defeated their own purpose.

It is my belief that a major reason why the European pre-trial detention experience is in many respects more favorable to the accused than ours is that European officials have to make the hard choice between pre-trial jail or freedom. There is no easy judicial compromise, as in this country, by fixing low or moderate bail—which, as we have seen, defendants are so often unable to raise. Freedom or jail is a more uncompromising challenge to the judicial conscience than bail or jail.

Now, I have been a long way getting to the point of what is being done and what is being proposed to remedy these conditions; because I have endeavored to brief you on the background and dimensions of the problems with which we will grapple in the next two days.

First of all, and speaking only for myself, I do not advocate the outright scrapping of financially secured bail. I am not prepared now to say that financially secured bail is not appropriate in many cases; and that properly administered might not even help maintain the integrity of our overall bail system. But I do believe that hundreds of thousands of persons are jailed each year in this country because of inability to raise bail who should be released on parole or on their own recognizance.

The Manhattan Bail Project, mentioned so favorably by the Chief Justice earlier, commenced functioning about two and one-half years ago in New York County. The project's staff, after swift but adequate investigation, furnishes the arraigning judge with enough verified information on the defendant's personal, financial and community background to enable a knowledgeable decision on the question of bail. I do not propose to take the edge off tomorrow's working session by describing the operation in detail. Suffice it to say that to date, 2,600 persons have been released on Vera recommendations; and only twenty-four have wilfully failed

to appear, or, in other words, jumped parole. This represents less than one per cent—much lower than the ratio of bail jumping in New York County. Controlled experimentation revealed that judges armed with project reports released *four* times as many defendants on parole than when they made the bail or jail decisions in the blind. In other words, three-fourths of defendants thus held in bail on the old uninformed basis should have been released on parole.

One more finding. Controlled analysis of the final dispositions revealed that *two and one-half* times as many parolees were found not guilty than defendants who were in detention from time of arraignment to adjudication. This experience suggests some interesting speculation on the greater effectiveness a defendant at liberty possesses in cooperating toward the preparation of his defense than a defendant confined in prison.

The city fathers of the City of New York were so impressed that they recently made a substantial appropriation to the Office of Probation to maintain, on a permanent and expanded scale in all five counties of the city, the services previously rendered by the Manhattan Project. Also, ten widely separated communities have started projects designed to explore the efficiency of their bail procedures. A highly effective one is in progress right here in the District of Columbia, headed by Judge Danaher.

Much of the report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice was devoted to the bail bond situation. One of its recommendations was for the increased use in Federal Courts of the practice of releasing defendants on their own recognizance. A highly significant recommendation of the Committee reads that to "insure sound bail decisions, more effective fact-finding devices are required than those currently employed in the federal courts." Fact-finding, it would seem, rather than bail in the blind, is the key to sensible decisions on release pending trial. This conclusion is so intrinsic to the program of the Conference that it will bear repetition.

We all know from our own experiences that tax-conscious governing officials in many communities regard even conventional probation services, not to mention their extension to

bail procedures, as an unnecessary frill. This too will pass; but in the meantime much can be done without elaborate and expensive fact-finding facilities to implement the bail decision. Police, prosecutors and defense counsel can collaborate to furnish the judge swiftly with at least some of the essentials of the defendant's background. Judges should articulate for the record the bases upon which they set bail. Periodically, there should be a review of the bail decision when a defendant is unable to raise bail. And when bail cannot be furnished, every effort should be made to afford the defendant a speedy trial.

A study is currently being conducted by the Police Department of the City of New York in conjunction with Vera Foundation into the use of the summons in lieu of arrest in certain categories of minor offenses and crimes. In Denmark the authorities estimate that about two-thirds of all prosecutions originate with a summons. A first offender is arrested only when charged with a very serious crime. The New York experiment commenced a few months ago, and was limited at first to the issuance of summonses instead of making arrests in disorderly conduct cases. It has recently been extended to charges of simple assault and petit larceny. The results thus far have been highly gratifying, but it is too early to attempt any long-range predictions. Tomorrow morning you shall hear a full report on the Manhattan Summons Project from the able Police Commissioner of New York City, Michael J. Murphy.

Unlike many European countries we reject, at least on the record, such reasons for detaining an accused as the likelihood that he will commit another crime while at liberty, or the fear that he will tamper with the prosecution's witnesses or because of the desire of the police to detain the accused in the hope of developing a case against him where one does not as yet exist. In Italy we were told that the prosecutors held persons in detention to induce "cooperation". It is also not uncommon in England for the police to detain the accused pending further investigation.

One of the working sessions tomorrow will treat with this type of pre-trial detention for dangerous offenders. This practice is called euphemistically preventive detention—to

prevent the release of a person who may be expected to commit anticipated crimes. Ordinarily this is effected by either denying bail outright or setting it at so high an amount that a defendant cannot raise it. Variants of this practice include detention of suspects, under the label of material witnesses, again by fixing bail too high to be furnished. Alternatives to bail include the proposed hospitalization of sexual psychopaths and narcotics addicts with criminal tendencies and in another aspect, commitment of defendants incompetent to stand trial. As explained in one of the papers prepared for this conference, the justification advanced for preventive detention of a person with compulsive criminal tendencies "flows from a decision that the value of protecting innocent individuals from anticipated crime outweighs the value of preserving pre-trial liberty for those likely to commit the crime." Perhaps tomorrow's highly qualified panel will succeed in reconciling these measures with Federal and State constitutional provisions prohibiting excessive bail or cruel and inhuman punishments.

This subject is not unrelated to that of the third panel, which on Friday will discuss pre-trial release based on money, and also supervised release and release on nonfinancial conditions. I imagine this group's agenda will include methods of court-controlled release after arraignment and before trial, such as release supervised by probation officers, release in the custody of third parties (private persons, officials or organizations), and a sort of hybrid release to work during the day and return to detention at night. There has been little experience or interest in this country in applying these techniques to adults at the pre-trial stage, and it will be interesting to observe whether this Conference will stimulate some whole-hearted efforts to try out these procedures. The experience we have gained from our enlightened use of various forms of supervised liberty prior to disposition for youth in trouble and with probation and parole after sentence for adults should furnish valuable guidelines. In this area the Tulsa (Oklahoma) County Bar Association inaugurated an apparently successful program a little less than a year ago. About 200 defendants charged with misdemeanors are released to their attorneys each month without the requirement of cash bond—a procedure permitted under Oklahoma law. You will no doubt also hear about the experience under the new Illinois statute, which permits release upon cash, refundable deposits with the court of 10% of the amount in which bail is fixed.

Such measures are evidently aimed at diminishing the power of the professional bondsman. Circuit Judge Wright of this District stated a year ago: "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." I shall not burden you with a sordid recital of the charges and findings in recurring investigations of overreaching by bondsmen. In certain communities many first offenders cannot secure bail unless they deposit with the bondsman full or substantial collateral. Yet racketeers and members of the crime syndicates seem to encounter no such difficulties—despite the fact that their incidence of bail jumping is very high. Commissioner Giordano of the United States Bureau of Narcotics has recently stated:

> "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."

Finally, Friday's working session on pre-trial release for juvenile offenders may present one of the most provocative and challenging programs of the entire Conference. We, like all civilized countries, exhibit a special solicitude for youngsters in trouble, whether they are of an age bringing them within the jurisdiction of the juvenile courts or whether they are old enough to be charged with crime in criminal courts. The common law minimum age for criminal responsibility is seven years; most states have raised this minimum to sixteen or eighteen years.

The governing philosophy of juvenile courts is to offer treatment, not punishment, in the best interests of the child.

Generally juveniles may be apprehended or detained by courts, often police, in two categories of charges. One is loosely known as juvenile delinquency—acts which usually would be crimes if committed by adults or which could injure or endanger the morals or health of the youth himself or others. The second embraces those who are designated in most juvenile court jurisdictions as neglected or dependent children—whose surroundings and exposure are such that their own health, morals or safety are endangered, and who may therefore require protective custodial care. We should scrutinize the norms for detaining these children innocent of any wrongdoing, the facilities in which they will be detained, and the company to which they will be exposed in those facilities.

What is particularly distressing is that there is such wide but poorly defined latitude afforded police officers in deciding whether to apprehend a youngster in the first instance and to social workers and judges in making the detention decisions at intake and subsequent court procedures. And the decisional standards for detention seem so vague and invite such subjective value judgments that one wonders how much uniformity and what controls restrain this vast grant of power to disrupt the life of a child, perhaps permanently scar him. And remember, children alleged to be neglected as well as delinquent may be detained by police or often by probation officers and social workers without previous judicial order.

Since the sanctions of a juvenile court are not criminal in nature, professedly not punitive, and in theory at least are nonadversary, youngsters coming within the court's jurisdiction are generally not clothed with many of the constitutional safeguards and basic rights afforded an adult offender. This is rationalized on a variant of the benevolent *parens patriae* philosophy of the juvenile courts; the state is the legal guardian of all children and will if needs be assume the role of father to protect the child. Now the bland assumption that the father State knows best would be fine if in this area the State really did know best or if it had the facilities to implement its alleged omniscience. Instead, too often juveniles are detained, before and after adjudication, in obscene quarters which are even more dangerous and degrading than

the unsuitable surroundings from which they were so protectively retrieved. Over 100,000 children each year are detained in ordinary jails or similar structures in which adults are confined, although none will dispute that juveniles should be lodged in separate facilities, maintained by public or private agencies, and with medical, psychological and other auxiliary services. Can we possibly shrug off these conditions when there can be no doubt that many adult criminal careers with which the other panels will be concerned were shaped by such irresponsible and damaging detention in childhood?

No large country has yet resolved satisfactorily the problem of treating with youth in trouble. If any nation can break through, it should be the United States, the wealthiest and the one enjoying the greatest resources and the highest standards of living; because lack of education, bad housing, inadequate recreational facilities and other deficiencies peripheral to law enforcement all play a part in drawing youth into trouble. We men of law and law enforcement should take the lead, and enlist the cooperation of all other implicated callings and disciplines in meeting this challenge.

I am confident that the present unsophisticated public attitude of indifference will be reversed; that officials will in time be accountable to public opinion for unnecessarily detaining an accused; and that there will be an understanding forbearance, absent official corruption, for the occasional abuse by a defendant of his pre-trial liberty. To achieve this community awareness and tolerance, however, the cooperation of the communications media and other opinion moulding agencies is required. Once convinced of the humane, democratic and economic imperatives for radical revision of our bail procedures, they could perform an important service by enlightening the public. But when a crusade of this nature, and I think it is taking on the dimensions of a crusade, is spurred on by the creative dynamics of men like our Chief Justice and Attorney General, I have high hope for the future.

In concluding, I would like to take you back to the year 1801. That year 104,250 persons were arrested for debt in England—60,000 of them for indebtedness under 30 pounds. Dickens, in "Little Dorrit", and Charles Reade wrote about

the inhumanity and degradation of debtor prisons; and they are often credited with so arousing the sympathies and indignation of the public that the law permitting imprisonment for debt was finally repealed in 1869.

Let us not, a century later, wait for a latter-day Dickens to wrench the banner from our faltering hands and lead the charge in our stead. He would have plenty of shocking case material in the wrecking of lives and the crushing of human dignity through the unnecessary pre-trial jailing of persons accused of crime.

It is high time that we who are entrusted with the administration of the bail procedures cleaned our own stables. And speaking of some detention prisons, that is no figure of speech.

MR. MILLER: Thank you very much, Justice Botein.

As the members of this Conference know, it is sponsored jointly by the Attorney General and the Vera Foundation. The president of the Vera Foundation is the distinguished chemical engineer, and a distinguished citizen, who has interested himself deeply in the problems posed by the bail system in the United States. This Conference is deeply indebted to Mr. Schweitzer, for his personal interest in these problems.

I am most happy to introduce to you the president of the Vera Foundation, Mr. Louis Schweitzer.

Remarks of

LOUIS SCHWEITZER

President, Vera Foundation, Inc.

MR. SCHWEITZER: Mr. Attorney General, Chief Justice Warren, Justice Botein, Mr. Miller, Ladies and Gentlemen. What can I add to all of the fine things that have been said today except to say how delighted I am to see so many intelligent, influential people here to attend this Conference. The next two days will bring an opportunity to talk, to exchange ideas, and I am looking forward to listening to these talks.

Thank you.

CHAPTER II

Fact-Finding, Release on Recognizance, and Summons in Lieu of Arrest

A. Plenary Session Panel (Panel A)

Moderator:

Circuit Judge John A. Danaher
United States Court of Appeals for the District of Columbia Circuit

Panelists:

Herbert J. Sturz
Executive Director, Vera Foundation

Judge Wade H. McCree, Jr.
United States District Court for the Eastern District of Michigan

Dan L. Johnston
Director, Des Moines Pre-Trial Release Project

Michael J. Murphy
Police Commissioner, New York City

Thursday, May 28, 1964
9:00 a.m.

MR. WILLIAM A. GEOGHEGAN (Assistant Deputy Attorney General): Will the Conference please come to order.

I am very happy to welcome you here this morning for our first session of the Conference. This morning's session is on fact-finding, release on recognizance, and summons in lieu of arrest.

We have a very fine panel. Our Moderator, who I am now going to introduce, is Judge John A. Danaher, United States Court of Appeals for the District of Columbia. He is a former Senator from the State of Connecticut. Judge Danaher is Chairman of the Committee on Bail Problems of the Judicial Conference of the District of Columbia Circuit. Through this committee has been established the District of Columbia Bail Project which you will hear about today.

Address of

JUDGE JOHN A. DANAHER
United States Court of Appeals
For the District of Columbia Circuit
Washington, D. C.
Panel Moderator

JUDGE DANAHER: Thank you very much.

Colleagues, Members of the Conference. I suppose that the first and foremost important aspect of an approach to any problem is to realize that there is one. "Awareness" is the word I use and take as a key.

Two years ago there was presented to the Judicial Conference for the District of Columbia Circuit a question as to whether or not there should be inquiry into the administration of bail in the District of Columbia Circuit. Judge Wilbur K. Miller, then Chief Judge, appointed a conference committee, named me chairman, appointed with me District Judge Tamm, District Court of Appeals Judge Myers, Harry Alexander, Esq., and John H. Pratt, Esq. We hoped thus to draw upon the experience of judges in each of the courts active here in this dual jurisdiction known as the District of Co-

lumbia. The lawyer members of our committee were widely experienced: Mr. Alexander having been an Assistant United States Attorney, and Mr. Pratt having been at the bar many years, indeed he is now closing his year as President of the District of Columbia Bar Association.

As we looked into the problem, we turned first to the Court of General Sessions which, broadly speaking, deals with offenses under the District of Columbia Code. There we found some 15 judges at what we might describe as the magistrate level, all of whom individually had their respective ideas as to how to deal with their problems in the day-in and day-out operations of the courts. But there was not in the Court of General Sessions that element of delay which has worked so harshly in so many instances, for the reason that in the Court of General Sessions an accused usually can be tried on the very day he is brought into court, at least if he waives a jury trial.

We thought, as we looked further, that there was room for inquiry when we learned, through the Corporation Counsel's office, that he had posted a list in all of the precincts making it possible for a desk sergeant to prescribe collateral, that is to say the equivalent of bail, in more than 250 offenses. No discretion. No inquiry. Simply, "What is this man charged with?" "What does this schedule call for"? But federal offenses were not involved in that arrangement.

Then, of course, on the other side of the ledger, we had Rule 46, Federal Rules of Criminal Procedure, which outlined the basis upon which bail was to be provided for. "United States offenses," as I choose to classify them. Dealing with that category we had first, the United States Commissioner. Next, were those judges of the Court of General Sessions who might sit as committing magistrates. Finally, we had all of the United States District Judges.

We asked the Chief of Police for such statistics as he might be able to provide concerning the number of recidivists, those who might have been picked up for a subsequent offense after having been once released on bail. There were no such statistics. His cooperation, however, was unlimited. He assigned an officer who pulled every 10th file, which is the best that could be done under the circumstances. We caused a sampling

to be made on that 10 per cent basis which ranged out to 2,192 prisoners who had been released during the year 1962 upon the posting of bail by bondsmen. Of that number only 16 could be shown to have been arrested subsequently to release on bail for offenses committed while on bail. That particular statistic, or the conclusion to be drawn from it, rough though the sampling was, was enough to suggest to us that there was a very complete answer to the fear, and it was a fear, that people who might be released on bail having been charged with an offense would once again resort to criminal activity. Perhaps because of such fear, there had been much opposition originally in the Judicial Conference even to our undertaking this study.

We went farther, even so. We were dealing, you see, in that sampling only with offenders on whose liberty bail bondsmen had passed. So, if a judge had fixed bail in the amount of $1,000 or $5,000, or whatever the range might have been, some bail bondsman decided whether "X" would go free or whether he would not, depending upon whether or not that man, or his family, could provide the bondsman's fee. We weren't satisfied that that was necessarily the criterion. Additional figures showed that more than 40 per cent of those charged with crime were unable to produce bail at all, which is to say that the indigent stayed in jail, and those with funds went free.

Well, over that trial period as we explored it, we sought to develop our own "awareness." We were fortunate enough to be able to call upon the Junior Bar Section of the District of Columbia Bar Association. Some 15 young men, under the chairmanship of James A. Belson, divided the work. They culled court records. They checked statistics. They interviewed prisoners where they could. They worked up monographs on the law. They prepared so complete a report that by 1963, when the Judicial Conference met again in May, we utilized the Junior Bar Section Report as an appendix to our own.

We then recommended to the Judicial Conference of the United States for this Circuit, called as you know by statute, that were the Conference so to approve, the Standing Committee would be willing to continue its service for another

year, provided that we could obtain outside help to gather statistics and to ascertain the facts. Facts are what we wanted. Facts are what a judge wants.

We interviewed many foundation people. Most importantly interested, as it seemed to us, was Dean King of the University of Colorado School of Law, who came here as an advance man for the Ford Foundation. His visit was followed up by a series of conferences with Mr. William Pincus, a program analyst for Ford. In due course, in the fall of 1963, the Ford Foundation was so far convinced that we were on the right track that the Ford Foundation allocated $195,000 to be expended at the rate of $65,000 for each of three years, that we might pursue our inquiry into the facts.

It named the Georgetown Law Center as grantee. It seems there are such things as tax laws, and other requirements of statute which must be met by these foundations, and by their grantees. It was deemed desirable by counsel for the Ford Foundation that there be such a grantee. We readily accepted their decision. We did it, however, on the premise that we, as a Committee of the Judicial Conference, would maintain oversight for the first year. At the end of that year we would be able to report to the Judicial Conference our recommendations as to what next should be done. Then, for each of two succeeding years the grantee, but in collaboration with us, would name the Committee on Oversight to continue the operation.

We had our Judicial Conference session of 1964 on Tuesday of this week. I submitted to the Conference the Report of the Bail Study Committee, and this time we were able to supply as an appendix the Report of the D.C. Bail Project, as it came to be known. The D.C. Bail Project, you may understand, was that which was authorized under the Ford Foundation grant. It is under the directorship of David J. McCarthy, Jr., who had had experience in the United States Court of Appeals, not only as a law clerk, but as a motions clerk to the Court. He had earned his Master's degree. He was in the Appellate Section of the Civil Division of the Department of Justice. We were able to get him to abandon, at least for the time being, and to our very great advantage, a most promising career at that important level to undertake the direction of

the D.C. Bail Project. I mention Mr. McCarthy specifically in this respect for you are to hear from him in detail later in this Conference. But as a dedicated young man, with a staff selected by him, with "dedication," again, as the keynote of their work, the D.C. Bail Project has gone forward.

It commenced its operations in November of 1963. It drew largely on the magnificent work of the Vera Foundation in New York as a matter of approach. Mr. McCarthy and other members of his staff went to New York, where it was no problem to secure the cooperation of Mr. Herbert J. Sturz, Executive Director of the Vera Foundation, of Professor Ares of the New York University School of Law, and others.

When that staff was assembled and went to work, it wasn't even two days before word went all through that jail and every prisoner in it was delighted to talk with the interviewers. It was on a completely voluntary basis, to be sure, and I want you to understand that. We wanted it made clear, and our Committee, as a policy-making committee, has insisted that this be so, that the D.C. Bail Project not be recognized, or treated, as an arm of the court. Rather, it is a fact-finding entity, designed to secure the best possible information as to a prisoner's roots in the community, to establish a basis upon which it could reasonably be hoped that a particular prisoner could be enlarged on his own recognizance and no more.

There were aspects of the D.C. Bail Project dealing with federal cases that differed markedly from the problems which confronted those in charge of the New York County operation. So, the Vera Foundation approach was adapted to our own needs.

Our reports, submitted as I suggested, containing all of the relevant studies and statistical data compiled by the D.C. Bail Project staff, not only met with approval at the Judicial Conference on Tuesday of this week; it was unanimously accepted. So that from two years ago, with marked opposition throughout the Conference, to a complete unanimity in 1964, I respectfully suggest is a very considerable step.

Over the period of the operation of the D.C. Bail Project hundreds of interviews have been conducted. Scores of prisoners have been released on their own recognizance. To get

the program off to a good start. District Judge Tamm himself agreed to take all arraignments for a sufficient period to give the project interviewers, with their recommendations passed along to the judge through a court-appointed attorney, an opportunity for evaluation of their work. Also Judge Tamm hoped thus to bring home to all other District judges an awareness of the possibilities in this program.

The Judicial Conference not only has approved what has been and is being done, but it has directed us to complete a year's study in October of 1964. At that time it is our purpose, drawing on that year's experience, to ask the Congress to create a pretrial entity, or functionary of the Court, a fact-finding entity of the Court, to deal with the bail problem. I have proceeded, and I think all judges here will recognize that we are right in this, on the premise that no judge will ignore the facts. All judges want the facts.

Now, let me make one other thing clear. We are not in opposition to the professional bail bondsman here in the District of Columbia. He serves a very useful purpose. There is no question that there are a great many people who properly can be and are being enlarged on the posting of bond where they indeed are able to do so. We have no quarrel with that. We don't object to that. What we are trying to do is to establish a basis upon which those who cannot secure bail through a bail bondsman, or otherwise, will be afforded equal opportunity.

More than 40 years ago I was appointed an Assistant United States Attorney in Connecticut. I had some years on the prosecutor's side before I went into the civil work of the United States Attorney's Office. It was our experience there in Connecticut that the largest number of people could be summoned on merely a letter from the United States Attorney directing appearance at court in a stated city and at a stated time and date. It was amazing. It was an eye-opener then to me, and in our thinking here we have drawn upon that experience.

We also know that there are many who will abscond no matter what you do. Mere dollars will not detain a man who, as the police would say, "is running." Dollars are no deterrent. So, that brought us to another phase of our problem

FACT-FINDING, RELEASE, AND SUMMONS IN LIEU OF ARREST 41

in this District of Columbia, and that was what to do in cases on this District of Columbia and that was what to do in cases of application for bail or release. If you will look, as you judges and lawyers in the federal practice in particular have looked, you will find no criteria set up in the rules as to what showing of facts must be made to an appellate court as to the background of the individual. Oh yes, Rule 46 says, we must take into account the nature and the circumstances of the offense charged. The weight of the evidence against him. The financial ability of the defendant to give bail. The character of the defendant. How does an Appellate Court ascertain that sort of factual background?

Well, when I became Presiding Judge of a division on the Motions Calendar, where such motions for enlargement on bail on appeal were to be heard, we adapted to our own advantage the formula, the format, and the pretrial techniques of the D.C. Bail Project. We called to the attention of the attorney for the accused, and where there was no attorney, to the attention of the accused *pro se*, the availability of the interviewing services of the D.C. Bail Project. Under those circumstances and through such means, a showing could be made in support of the application on appeal. Thus, for the first time in my experience in nearly 14 years on the bench, the Court of Appeals receives some information on which to evaluate the problem, not simply to determine whether or not there is a non-frivolous question, but whether or not, taking into account the character of the accused, the nature of the offense, and the other elements set out in the rule, this applicant properly is to be regarded as a fair risk.

Our orders have been entered on that basis, and we have in a meeting of the nine judges, adopted in general a program which is now being applied with reference to cases of bail bonds on appeal.

In the latter situation, I might add, we have seen to it that the individual prisoner is brought to the clerk of our court. He there is handed a copy of the statute which makes him guilty of a misdemeanor automatically, should he jump bail, having been charged with a misdemeanor, or of a felony, automatically, if he defaults after having been charged with a felony. Should he violate that statute, he is informed that

he is amenable, forthwith. That has a very salutary effect. We have him put that paper right in his pocket.

We have asked the Probation Officer of the District Court for his cooperation. Then we have turned this individual over to the Probation Officer for oversight while the appeal is pending. It works.

The accused then is asked to sign a recognizance, for Rule 46(d) says, "A person required or permitted to give bail shall execute a bond for his appearance." But that bond is conditioned, specifically, that it is received in consideration of the order, either reducing bail, or releasing on recognizance. Moreover, the applicant is subject to the provisions of Title 18, Section 3146. Otherwise, the bond is further conditioned in accordance with the terms of what is nothing more, nor less, than a common law bond, stated in some amount, $200, perhaps $500, or otherwise, depending.

I was asked to sum up the nature of the problem as we saw it to begin with; the ramifications which we explored; the results which we have been obtaining; and the ultimate objective we seek to obtain. I thought that it might be of some value to you, to those of you who have come from the widely scattered reaches of this great country of ours to know that in a jurisdiction which is both Federal and State in character, such things can be done. Such things are being done.

It is my hope that in due course elaboration will be possible from each of the panelists, and in detail in the regional meetings, that questions which may be in your minds can be posed and answered, and that out of it all some very really valuable result can be achieved.

I mentioned a while ago the Vera Foundation. Its Executive Director, Herbert J. Sturz, will be our first panelist this morning. Mr. Sturz obtained his Bachelor of Arts degree from the University of Wisconsin some 16 years ago, his Master's degree from Columbia in 1952. As Executive Director of the Vera Foundation he has also been serving as Director of the Manhattan Bail Project. In 1963 Judge Botein and Mr. Sturz were awarded Ford Foundation grants to study pretrial release procedures in various foreign countries.

Mr. Sturz.

Address of

HERBERT J. STURZ
Executive Director, Vera Foundation, Inc.
Director, Manhattan Bail Project

MR. STURZ: As of yesterday 2630 accused persons have been released on their own recognizance in New York City's Criminal Court upon the recommendation of the Manhattan Bail Project. Of these 2630 persons, 99% have returned to court when required. Only 24 persons—or 1%—failed to return. Before the experiment began two and a half years ago, we could not really be sure that even one accused person would return to court; nor could we know whether committing magistrates would listen to our recommendations. Some even said we would be doing the community a disservice by turning loose the kind of people who would add to the rising crime rate by committing crimes while awaiting trial.

Months of study preceded our first day in court. Our early thought was to provide a revolving bail fund which would be available to indigent defendants. But helping the poor to buy their freedom is no solution; it merely perpetuates reliance upon money as the criterion for release. We wanted to break the pattern and stimulate a more basic change in bail thinking. The release of greater numbers on their own recognizance appeared the broadest and most potentially valuable approach. We decided to test the hypothesis that a greater number of defendants could be successfully released in this way if verified information about their stability and community roots could be presented to the court. This was the goal of Vera Foundation's first undertaking: the Manhattan Bail Project.

The Bail Project, financed in part by a generous grant from the Ford Foundation and launched in cooperation with the Institute of Judicial Administration, with New York University Law School providing a student working force, inaugurated a three year pre-trial release operation in October 1961. It began in what was then called the felony part of Magistrates Court; now it operates in the felony, misdemeanor and adolescent parts of Manhattan's Criminal Court.

Offices in the Criminal Courts Building were made available by Judge John Murtagh and Judge Larry Vetrano for the Bail Project staff; and Corrections Commissioner Kross set aside space in the detention pens for interviews with prisoners.

The Manhattan Bail Project works like this. When a prisoner is brought to the detention pen prior to his first court appearance, a law student checks his previous record and current charge with the arresting officer to see if he is bailable in the Criminal Court. The law student also determines whether he has been charged with one of certain offenses—homicide, most narcotics offenses, and certain sex crimes—excluded from the experiment because of the special problems they present. If the prisoner is eligible, he is interviewed to determine whether he has roots in the community. He is asked whether he is working, how long he has held his job, whether he supports his family, whether he has contact with relatives in the city, whether he receives unemployment insurance or welfare relief, etc.

After the interview the defendant is scored according to a point-weighting system. If the interview indicates that the accused would be a good r.o.r. risk, the interviewer obtains written permission from the prisoner to get in touch with a friend, relative, or employer for the purpose of verifying the information. Verification is done either by telephone or in the visitors' section of the courtroom. An interview generally takes about ten minutes and verification less than an hour.

If the case is still considered a good risk after verification, a summary of the information is sent to the arraignment court. Copies of the recommendation and supporting information are given to the judge, the district attorney, and counsel for the accused.

Now let me translate the system into a typical case history.

Walter Layne is charged in 1964 with felonious assault and § 1897 of the N.Y. Penal Code (possession of a concealed weapon). His prior criminal record consists of a felonious assault charge which was reduced to simple assault, for which he received 30 days suspended sentence in 1952. In 1957 he was convicted of driving while intoxicated and his sentence was $100 fine or 30 days. He couldn't post the fine, and went

to jail. In 1961 he was convicted on a disorderly conduct charge, and got a suspended sentence.

He is 35 years old, has been living at his present residence for 6 months with his wife and child, and has a verified previous one year residence in Manhattan. He has been working as a counterman in a restaurant for the past 3 months, and his previous job has been verified as lasting 3 years. His current employer says he is a good worker. If he is paroled, the employer will volunteer to help him get to court. But the employer adds, "If he isn't back to work by tomorrow I'll have to hire someone else."

Should Mr. Layne be recommended for parole? Well, this is how we calculate his score.

—1 point for three misdemeanor convictions
+2 points for a stable residence
+2 points for family ties
+2 points for good ratings on present and prior jobs

Mr. Layne totals 5 points.

Although this is a *minimum* score, he would be recommended for parole.

During the first year of the Project, half of the recommendable cases were set aside as a control group and were not recommended to the court. The control group demonstrated how accused persons who met Vera's good risk criteria fared without the Vera recommendation. The court granted release on recognizance in 60% of the cases in which a recommendation was actually made; but in only 14% of the parallel cases in the control group—those cases in which Vera was prepared to make a recommendation but refrained. In other words, judges paroled four times as many accused persons with the aid of verified information.

A glance at the history of the Manhattan Bail Project shows a steady increase in the number of defendants released. During the first year of the Project an average of five defendants were released each week; now we average about 70. There are several reasons for this increase, the principal one being a rise in the number of defendants considered "recommendable" by Vera staff—from 29% of those interviewed to the current rate of 65%. This is largely due to the introduction

of a point-weighting system to replace a more subjective type of decision by the interviewer used in the beginning of the Project. The increase in numbers released also reflects greater staff proficiency; an increased case load for each interviewer; and a rise from 55% rate of acceptance by judges at the Project's outset to 70% at the present time.

The rate of appearance in court is fundamental. Included in the 99% who returned are some few defendants who did miss a court appearance, had their parole revoked and a bench warrant issued; but in most of these cases a telephone call from Vera revealed some mishap or misunderstanding; and the official process was reversed. The high rate of returns in the Manhattan Bail Project suggests that verified information about a defendant is a more reliable criterion upon which to base release than ability to buy a bail bond. Vera's success in insuring the return of released defendants may be accounted for, to some degree, by a careful system of notification. Vera sends a letter to each parolee telling him when and where he is to appear. If the parolee is illiterate, he is telephoned as well as notified by letter. If he is literate in a language other than English, he receives a letter in his native tongue. A person like Mr. Layne's employer whom the parolee has given as a reference often agrees to help get the defendant to court. In this case, the reference is notified as well.

To date we have dispositions on 1214 cases released on our recommendation. Fifty-two percent have won acquittals or had their cases dismissed; 48% were convicted. Of those found guilty, 72% received suspended sentences while 9% were given prison terms. The remaining 19% of those found guilty were given the alternative of fine or jail. Of the 1214 dispositions of persons released on their own recognizance, only 53 ultimately ended up behind bars. The advantages of pre-trial liberty are infectious; leniency before trial appears to produce leniency at verdict and at sentencing.

And so far we know only 12 out of the 2630 parolees have been re-arrested on new charges while awaiting trial.

As Judge Botein mentioned yesterday, the City of New York has incorporated the fact-finding procedures of the Manhattan Bail Project in the five boroughs of the City. Since March the Manhattan Bail Project staff has been working

closely with Office of Probation law students and investigators in an attempt to pass along the knowledge and techniques gained over the past thirty months.

One of the most encouraging by-products of the Manhattan Bail Project has been the spread of its philosophy and methodology to other cities.

Many of you sitting here today represent state and federal jurisdictions which have launched or are making plans to launch pre-trial release programs. Experimental projects are under way in Chicago, Des Moines, Nassau County, New York, Los Angeles, San Francisco, Tulsa, St. Louis, and Washington, D.C. Projects are being planned in Philadelphia, Syracuse, Oakland, Boston, New Haven, Newark, and Cleveland. New Jersey, under the leadership of Attorney General Arthur Sills, is preparing a state-wide approach to bail reform.

Like all pilot experiments the Manhattan Bail Project has raised just as many questions as it has answered. In the fall, when the Office of Probation assumes day to day responsibility for the pre-trial release operation, we are going to look for some of the answers in a careful evaluation of the records and data accumulated in our three years in the Criminal Court.

For example, when a parole recommendation is rejected does the fact that it was made in the first place cause the judge to set bail lower than he otherwise would? On the other hand does the lack of a recommendation have a "punitive" effect if the judge construes its absence to mean there is something "bad" about the case, or "unworthy" about the defendant, thereby leading him to set high bail?

We will also be studying the effect of the Bail Project on the size of the detention population. We will determine the proportion of defendants released on recognizance, released on bail, and held in detention prior to the Manhattan Bail Project and for a period near the end of the Project. A comparison of these two samples will enable us to see what kind of over-all impact the Project has had on detention in New York City in its three years.

The financial and social costs of unnecessary detention or what Judge Botein has called ". . . the irretrievable damage

to the community through the ruination of family units . . . and disillusionment with the processes of American justice," have so far been the subject of much concern but little specific calculation. We plan to investigate the precise impact of detention on the defendant, his family, his employer, and other persons he comes in contact with. With the help of mean income figures and the like we can estimate fairly accurately the wages, spending power and taxes lost to the community by detention. When the breadwinner is in jail, the family often goes on relief. Specific data on this further cost to the community will be gathered.

In another vein we have already begun an investigation into the causes of failure to post bail. Lack of money alone does not explain every case. Some defendants could raise the bail premium and post collateral as well, but remain in detention either because they make no effort to get out, or because their efforts are thwarted. We interviewed over one hundred inmates at the Manhattan Men's House of Detention and found that a variety of factors often combine to cause failure to post bond. Some prisoners exist in what we call "structural" isolation. They have resources but can't get to them; either they are from out of town, and know no one in New York City; or they are local men who either have little or no access to a telephone while in detention, or there is no phone at their place of residence to call for help. Frustrated and usually confined to one phone call, they give up. Then there is the defendant who lives in "social" isolation. He has no one to call upon for help, or else he knows people to call upon but they can't or won't help him. When the data are analyzed, undoubtedly other such patterns will be manifested, and we will have gained further insight into why people remain in detention and what further types of action may be taken to accomplish their release.

As I mentioned before, only 1% of those persons released on our recommendation can be classified as r.o.r.—or parole—jumpers. Another 1½% of those paroled did miss one or more court appearances, but then either returned voluntarily or were rounded up by Vera staff within a few days. The persons in this 1½% category failed to appear for various reasons: death in the family; illness; failure to receive notification; fear of the court; alcoholism; belief that their cases had been disposed of (for example, a statutory rape charge in which a defendant married the complainant and therefore supposed everything was all right). We plan to run an analysis of our two categories of "no-shows"—the hard core 1% who never returned at all and the 1½% who eventually did return. The Bail Bond Bureau of the New York County District Attorney's Office has opened its files to us, permitting us to analyze the reasons given by defendants for missing their court appearances in over 800 cases of bail forfeitures in 1963 in which motions for remittance were made before the N.Y. Supreme Court. A comparison of these bail jumpers with our r.o.r. jumpers will be made to see if the two groups differ in any significant respects. The end result of such research, we hope, will be the perfection of techniques of notification contact with and supervision of pre-trial parolees.

From our evaluation we should get many new insights into how to improve the present release program in New York City and into what are the most fruitful guidelines for future experimentation. But as we are well aware, the answers for New York City are not necessarily the answers for Kalamazoo, Austin, or Omaha. Over the next few years the Vera Foundation hopes to serve as a coordinating center for budding bail projects all over the country, to assist them in analyzing their local problems and adapting bail reforms to meet their unique local and regional problems—problems like budgeting, interview procedures, notification, questionnaires. We will answer their calls for information and assistance, and a field coordinator will be available to visit new or incipient projects. In this way we hope to accumulate a repository of knowledge about bail problems, and techniques to solve them, from which any interested group, anywhere in the country, can draw. We do not think we have the final answer. We look forward to the impact of simultaneous and creative thinking about bail on a nation-wide basis. Solutions more effective than ours may emerge and we will communicate them as fast as they emerge.

One critical question yet to be answered is who is best suited to administer pre-trial release programs. The Manhattan Bail Project is run by a private organization with the

cooperation of a law school. Projects in St. Louis, Oakland, and Boston are being organized by Offices of Probation. In Seattle, the plan is to locate responsibility in the office of the prosecutor; in Chicago and Philadelphia, in the public defender's office. As you can see the orientation of each of these groups toward an accused may be very different and may reflect itself in the operation and results of the project. Any agency which undertakes pre-arraignment interviewing is treading on sensitive ground involving access to an accused, often before he has seen his lawyer. It is important therefore for all these agencies to conduct experimental projects, and only a comparative evaluation of several projects in each category may yield the most desirable *modus operandi*.

Another provocative facet of pre-trial release programs is the kind of crimes and defendants they cover. The Manhattan Bail Project has excluded from eligibility most narcotics offenses, homicide and certain sex crimes. This meant automatic exclusion of about 20% of the defendants contacted in the detention pens.

Some of the enterprising projects like Washington, D.C. exclude no categories of crimes. In a year or two, we will be able to see how successful they fare and if indeed there are any crimes where it is not safe to let a defendant free before trial.

The Manhattan Bail Project began as an operation for the release of indigents only, but it has since expanded to cover all defendants. It is somehow not entirely logical that a responsible citizen of limited means should spend his hard-earned money for a bail bond while an equally responsible indigent goes free on his own recognizance. Nascent projects like Oakland and seasoned ones like the Eastern District of Michigan will make their services available to all defendants. Their experience on a broad spectrum basis will be important in future reforms.

We at Vera have seen the fruition of an idea in the Manhattan Bail Project, and we have seen it work. Now we are anxious to refine and expand that idea to affect more people in a more comprehensive way. We're also anxious to try out new approaches, like the Manhattan Summons Project. Although we are heartened by the progress of recent years we believe the future will be more productive and no less exciting.

Thank you.

JUDGE DANAHER: Thank you, Mr. Sturz.

A year and a half or so ago, as our studies were going forward, one of those in the Department of Justice who was a member of the Junior Bar Section here in the District of Columbia, who was of great help, was Mr. Daniel J. Freed. Mr. Freed's genius for organization is evidenced by our presence here today. At that time Mr. Freed called to my notice the fact that there was a federal jurisdiction where steps had already been undertaken to deal with the problem as we saw it shaping up. He put me in touch with Judge McCree of Michigan.

I was in correspondence with Judge Wade H. McCree thereafter and was delighted to have had from him excellent cooperation and a high degree of valuable information which our committee assessed. He is, of course, operating in the Federal field.

Judge McCree obtained his B.A. Degree at Fisk University and his law degree from Harvard in 1944. He was admitted to the Michigan bar in 1948 and practiced law there for several years. He was made Commissioner of the Michigan Workman's Compensation Commission in 1953. Later he was Circuit Judge of Wayne County. In 1961 he was appointed United States District Judge for the Eastern District of Michigan.

I am proud to be able to present my colleague, Judge McCree.

Address of

JUDGE WADE H. McCREE, JR.

United States District Court

For the Eastern District of Michigan

JUDGE MCCREE: Judge Danaher, Distinguished Panelists, Fellow Conferees, Ladies and Gentlemen.

No one will deny the validity of the proposition that bail is basic to our system of criminal jurisprudence, and, of course,

the Eighth Amendment to the Constitution of the United States provides, "excessive bail shall not be required." It is equally unassailable, as the United States Supreme Court has stated, that bail should never be denied for purposes of punishment and that its sole purpose before trial is to insure the presence of the accused without the hardship of incarceration before guilt has been proved, and while the presumption of innocence is to be given effect.

Equally well established is the proposition that the prevention of the commission of crime between indictment and trial is not a proper ground for refusing bail. Unnecessary of any emphasis is the proposition that enrichment of the public coffers is not a legitimate object of bail.

Nevertheless, the perversion of some of these principles, or the catering to public outrage over a particularly heinous offense, or the notorious character of the defendant, often results in the situation of an offender, presumptively innocent, and representing a good risk as far as appearing for trial is concerned, being held in custody for weeks, and even months, before a busy court can conduct his trial.

Several years ago, the judges of the Eastern District of Michigan evolved a procedure to eliminate some of the abuses to which the previous speakers have alluded in their presentations. I recognize that there are many differences between the limited criminal jurisdiction of a United States District Court and that of a metropolitan court of general criminal jurisdiction, but I believe and hope that our experience may be helpful to other courts which may be willing to experiment in this area.

I suggest that the differences cut both ways. Although the advantage of nationwide federal criminal process over the somewhat involved interstate extradition process cannot be denied, nevertheless, the fact remains that the greater number of persons charged with local offenses are local residents with local community ties, and without substantial interstate mobility which might facilitate flight. This is often the case in federal offenses.

I might observe further that in the Eastern District of Michigan we sit in a court house which is five minutes from the tunnel which leads to Canada, and 15 minutes from a bridge which connects with the same country. We have found this not to be a complicating factor.

To avoid unnecessary and protracted pre-trial detention, we employ the following techniques in our eight-judge court.

First, we do not utilize commissioners for the purpose of arraignments, because we believe that the judge, who has the ultimate responsibility, will be less likely, out of fear of criticism, to err in the directon of excessiveness in setting bail. One of the judges conducts the very first arraignment, which in the federal practice is on the complaint and warrant, and thus is able to see that counsel is afforded, frequently within hours after arrest, with the incidental benefit derived therefrom of having an officer of the court in the picture to advise the judge of factors relevant to the setting of bail. The judges rotate weekly the responsibility of presiding over the miscellaneous criminal docket, and each judge hears this docket twice daily, at 11 a.m. and 3 p.m. during a recess of the other matters in progress before him.

Next, we utilize the Office of the United States Attorney to perform the fact-finding function. The United States Attorney knows that he will be asked to make a recommendation on bail, and he, therefore, becomes acquainted with the relevant information, such as the length of the defendant's residence, his employment and other community ties, his family situation, and his prior record. The United States Attorney knows our philosophy about bail and most conscientiously and fairly reports his findings to the court. I have never experienced a situation where a member of his staff has falsified or shaded a report in this respect. Our entire bench is outspoken in its appreciation of this undertaking and its discharge by the District Attorney, who has never once complained to us that this added duty is an onerous or unwelcome chore.

Whenever a cash or surety bond is required as bail, the defendant and his counsel are advised that they may informally, by making an appointment with the United States Attorney and the Court, move at any time to reduce or reconsider bail if good cause may be shown for so doing.

Frequently, when the defendant possesses insufficient personal ties to the community, we will accept as his surety

relatives or friends who can qualify and agree to be bound in the penal sum stipulated. We have discovered that such a surety is at least as responsible as a professional bondsman and certainly possesses greater motivation to produce the defendant at the proper time.

We employ the procedure of notifying by mail defendants released on bail and, except for the occasional miscarriage of mail, or the moving of a defendant, we have experienced a response as good as that as when a bondsman is in the picture and notification is through him.

As a precaution against the overlooking of a defendant who is in custody because of inability to post bail, we require the United States Marshal to furnish each judge with a weekly jail inventory which is annotated by the Clerk of the Court to indicate the judge to whom the case is assigned, the charge against the offender, and the date custody commenced. These cases are given first priority for trial.

A recent innovation employed by some of the judges is a device of a periodic check-in by the defendant on personal recognizance. In the doubtful case, we have found that the obligation of weekly call in person, or by telephone, to the United States Attorney's Office, or the Marshal's office, is an effective reminder to the defendant of his obligation to the Court.

The practical results of this system have been most gratifying, as the statistics we have furnished this Conference will demonstrate. We find them, incidentally, on page 69 of the bail publication furnished yesterday. I read this relevant sentence, "Serious crimes, mandatory sentence offenses, and even guilty pleas are included among those eligible for release. In 1963 773 defendants were released on personal bonds; 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 subsequently apprehended. None of the failures to appear were found to be deliberate. Bond forfeitures in 1963 totaled 15. Six were cash or surety bonds and nine were personal recognizance. The default rate thus was 7½% on the bail bonds, compared to only 1.1% on personal bonds."

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I might add too that our average cash bail, with the exception of bank robbery cases, is $2500. Yet, we find that only 40 per cent of the defendants from whom we required a cash or surety bond subsequently posted such bond, a consequence which we believe reflects the unwillingness of bondsmen to assume the risk, as much as it reflects the financial inability of the defendant.

In short, we believe that we judges can, with adequate information, make as good an assessment of the defendant's likelihood of appearing when required as can a bondsman, and that the defendant might better employ his funds for counsel than for a bond premium if he is faced with such a choice.

In conclusion, I want to observe that we have released on personal recognizance in appropriate instances defendants charged with offenses as serious as bank robbery and narcotics traffic, and that our experience with those on personal recognizance is substantially the same, if not better, than that with persons who have posted a cash or surety bond.

This system of ours has worked for some 20 years now. It is by no means perfect, and continues to evolve as our experience indicates. We are, however, convinced that the approach is sound.

Thank you.

JUDGE DANAHER: Thank you very much, Judge McCree.

I think we should hear from a young man who will give us the experience of a project inaugurated in Des Moines. To be graduated from the Drake Law School this month is Mr. Dan L. Johnston. He has been the director of the Des Moines Pre-Trial Release Project since its inception in January of this year.

Mr. Johnston.

Address of

DAN L. JOHNSTON
Drake Law School
Director, Des Moines Pre-Trial Release Project

MR. JOHNSTON: Judge Danaher, Ladies and Gentlemen.

About a year and a half ago, Gilbert Cranberg, who is an editorial writer for the Des Moines Register, and who is here today, wrote two articles about bail practices in the criminal courts of Des Moines. The first article was critical generally of the provisions of the Iowa Code pertaining to bail bonds and also somewhat critical of the conduct of individual bondsmen. The second article spent a good deal of time describing the Manhattan Bail Project.

Upon reading these articles the trustees of a local Des Moines foundation—The Hawley Welfare Foundation—contacted Mr. Cranberg and together they sought the advice and counsel of Mr. Sturz, and others involved in the Manhattan Bail Project. Mr. Sturz came out from New York and he met with judges, prosecutors, and leaders of the Bar Association of Des Moines, the police, and the Dean of the Law School at Drake University.

The result of these meetings was that Mr. Sturz found almost everyone that he talked to was interested in some sort of reform in the area of bonds in criminal courts in Des Moines. They were very interested and very receptive to the particular kind of program that he had been operating in New York City.

Eventually the Hawley Foundation made a grant of $16,500, which is an amount to last for one year. This is to see if a project similar to the one in New York would be able to function in Des Moines. The hope of the Foundation is that eventually, if we are able to do enough, or do a good enough job, and if the project proves itself, it will be taken over and made a part of the judiciary budget of the Municipal Court of Des Moines, and the District Court of the State of Iowa for our county.

As the project is to serve also as an internship program in Criminal Law, my staff is made up of eight junior and

senior law students working part time at an hourly wage. I think that we would all agree that as law students the experience gained in the jails and criminal courts of Des Moines in the past four months has been valuable. No classroom, as I am sure you all know, could be as dynamic.

I am at the present time the only full time person employed by the project. We have an advisory board which is made up of the State and Municipal Court judges who happen to be on criminal assignment at any particular time, the United States Attorney for the Southern District of Iowa, the Polk County Attorney, the Sheriff, Assistant Police Chief, representatives of the Bar Association, faculty members of the law school, an assistant City Attorney, and officials of the Foundation and representatives of civic organizations. The function of this board is to provide advice on basic policy, and to function as a clearing house for complaints that otherwise might grow and fester and become real problems before we found out about that.

In the beginning the heads of nearly all the involved public agencies willingly and quickly pledged their full cooperation. Nearly everyone we talked to, and everyone we had to deal with, seemed concerned about the dangers, real and potential, which were inherent in the conventional bail bond system. The police administrators of Des Moines recognized that since the bonding business is very profitable, and in Des Moines it is very competitive, it is fraught with opportunity for corruption and police scandel. Our Iowa procedure, under the Code of Iowa, in the State courts, worked a hardship on the defendants because a new bond is set each time the defendant must appear in court. This means that in one case, if it is an indictable offense, the bond may be set as many as four times, from the beginning until the final disposition. Each time the bondsman may demand a new fee. Many abuses resulted from the prerogative of the bondsman to revoke the bond at any time he may desire, and to deliver the defendant back into custody without returning any part of the fee.

In Des Moines, all of those who are arrested are brought to a single central police station and soon thereafter a formal charge is filed. We have been given by the Police Depart-

ment constant access to the jail book which shows the name, address, charge, and cell number of each prisoner. For interviews our law students go directly to the cell and talk to the defendant through the door. He is told we are not policemen, this is done to make very clear that his cooperation with us and his answers are voluntary, but if he wants to answer our questions, and he qualifies, we will try to get him out of jail on his own bond by making a recommendation to the judge.

If, after the interview, he seems qualified for release, we verify the facts he has given us, by telephoning references which he has given us. If he still qualifies, a written recommendation is given to the judge. Points are assigned in a fashion very similar to the way they are assigned in New York, based on family ties in Polk County, the length of time of residence in the county, prior conviction record and employment. We have access to the police files in order to verify the defendant's past conviction record.

The project began on the 1st of February of this year. The initial task was to fit into existing police and court procedures without creating too much chaos and too much hostility. One thing, of course, was for the judge and the Chief of Police to pledge their support to an idea, but it was quite another thing for the jailers and bailiffs to alter their habits to accept law students working next to them and disrupting the way things had been done for years, and asking questions which law students ask, and which the jailers and bailiffs think unworthy of answers. Had these men refused to make adjustments in their conduct and activities and procedures to make it possible for us to accomplish our work, the path ahead would have been difficult indeed. I don't think we would have been able to last very long.

Problems did arise in those first few days. The temptation was to go immediately to so-called "gold-braid" of the Police Department for a written order solving every problem, or to a judge, for a written order solving every problem. I think we could have gotten it. It became very apparent, however, that this might very well have been a very serious breach of the unwritten laws that abound in police departments and in jails. The voluntary cooperation which we now get from

these men might never have come. It was certainly worth waiting for.

I am told by some of the police that one reason there was not more resistance to our project at the very beginning was that most people thought we would fail within a week or two, we would fold up our tents and go home, that a reform which depended upon the reliability of those charged with crime was doomed to failure by its very premise.

Before our project, bail was based solely upon the seriousness of the alleged offense. The bond for robbery with aggravation was $7500, almost invariably, $1500 to $5000 for forgery, depending upon the amount of the instrument, $5000 for breaking and entering—$500 for liquor violations, and $300 for driving while intoxicated. Bond for simple misdemeanors with penalties less than 30 days was either $100 or $200 surety, or $10 or $20 cash bond.

The reason, I suppose, that the bond amount was based solely upon the alleged offense is that it was usually the only reliable information the judge had, and it has, of course, been believed that those charged with crime are of a generally irresponsible and untrustworthy class. One police captain told me he doubted if we would find five a week to interview, and two a month to release.

Frankly, this was my fear also. Although I didn't think it would be that bad, I did fear that in Des Moines, in a county the size of Polk County, we would not be able to find enough eligible for release to warrant the expense and effort.

The New York experience I think was evidence to us that those released under these criteria would return. But it is one thing to be able to find enough qualified for release in a city of 8,000,000, and quite another thing to find enough qualified to release in a county of 260,000. The prediction of a police captain, and my own fears, have been disproved.

Since February 3rd we have released over 160 people on their own bonds. About seven out of 10—and this is the interesting figure to me—of all Polk County residents charged with crime in our municipal courts, or our State trial court, we find are eligible for release on their own bond. Before the project began about 20 a month were released without bond, and also none of these were charged with serious offenses.

About one-fourth of those we released, and we operate in the Traffic Court, and also in the criminal courts, are charged with felonies. Although three defendants have failed to appear on time, two of those came in one day later, and the third, which, I think, was the only wilful failure to appear, was arrested four days later for another forgery. The Iowa law, under its present makeup, provides no penalty for failure to appear, or for skipping bond.

The judges in both the Municipal Court and the District Court have accepted all our recommendations except two. We have made a few over 200 recommendations. The reason we have more recommendations than we have defendants is, of course, that some defendants need more than one recommendation in a particular case before they are finished, at the various levels of courts.

Now, our next major aim is to try to develop contact with the Justices of the Peace Courts of the county. We are also experimenting with standards for release that will allow more defendants to qualify.

Judges in the eastern Iowa City of Waterloo are now planning a meeting to consider establishing a pre-trial release project similar to ours in their courts. When the consultant for the Iowa Citizens Council on Crime and Delinquency was called to Dubuque, Iowa to investigate complaints regarding long pre-trial delays and general jail conditions, he recommended that Dubuque adopt a project similar to ours.

The bondsman who wrote about three out of four of the bonds in Des Moines says he is losing about $3,000 a month because of our project. I have no crusade against the bondsmen. I have neither pride nor joy in their loss. But those who now have that money need it much worse than the bondsmen do. We may never be able, I don't suppose, in Des Moines to completely make the criminal law apply equally to all people, regardless of their economic status. I think we can prevent, and we are making some effort now, to prevent its being used as a tool to make the rich richer and the poor poorer. We can prevent its being used to force American citizens to pay a ransom for their own freedom.

One bondsman told me he thought our project should be limited to those who cannot raise bond—those who would

have to stay in jail because of inability to raise bond. There is a clear difference between being able to raise a bondsman's fee and being able to afford it. I don't think we have released more than half a dozen who could afford bond. Our jails, of course, are old, and they are crowded. They are not pleasant places. Those still presumed innocent are put with those serving sentences. Few men, given the choice between hiring a bondsman to obtain immediate freedom, or hiring an attorney to provide adequate counsel later, or providing the essentials of life to his family, would hesitate in turning to the bondsman. It is as natural as drawing another breath.

Late in March Gary Trogdon was to go to trial in Des Moines for robbery with aggravation in our State trial court. He was identified by an eye-witness as the person who had held up a filling station. He spent five weeks in the County Jail, unable to raise a $10,000 bond. The day before the trial the crime was admitted by another. Gary Trogdon was set free with an apology.

Because Mr. Trogdon was arrested by the sheriff's department he was arraigned before a Justice of the Peace out in the county. Bond was set and he was in the County Jail before we saw him. When we saw him to interview him we found that he qualified for release. He had enough points, but the recommendation was never made because his attorney felt the Justice of the Peace would not accept it. We did not get his cooperation on it.

Gary Trogdon's experience of course is not an isolated one. I think the one thing we try to guard against in our project is the chance that we will develop the view that the kind of thing that happened to Gary Trogdon is an isolated situation.

I have tried to impress upon the people who are doing the interviewing that there is a presumption, as far as I am concerned, that a man is qualified for release on his own bond. We should do everything we can, within the bounds of this questionnaire, and within the bounds of the point system, to make sure he qualifies.

It is no insult to the Des Moines public officials who are present at this Conference, Police Chief Douglas, and Sheriff Hildreth, both of whom have been very cooperative, to tell you that our jails, at least in Polk County, aren't fit really

for housing human beings. Like jails most everywhere they were constructed by people with ideas of penology and justice long since discarded by all of us.

Because of jail conditions, pre-trial detention for those presumed innocent is much more of an ordeal than serving a term after conviction in a more modern State prison. For the innocent accused, like Gary Trogdon, a month or more spent needlessly in jail is a tragic and embittering experience.

I believe that in Des Moines, because of the joint effort of a conscientious judiciary, an enlightened and progressive police and sheriff's department, run by Sheriff Hildreth and Chief Douglas, and citizens who care about the fundamental fairness in the administration of our criminal law, such as Mr. Cranberg of the Des Moines Register, and Mr. Doolittle, who is at this Conference, who is the Chairman of The Hawley Foundation, that we are proving that, at least in our county, at least in Des Moines, pre-trial detention is seldom necessary for our residents.

Thank you.

JUDGE DANAHER: Thank you very much, Mr. Johnston.

The final speaker on this particular panel is the distinguished Police Commissioner of the City of New York, the Honorable Michael J. Murphy. He is graduate of the Brooklyn Law School. Commissioner Murphy received his Master's degree in Public Administration from the City College of New York. He served on the New York State Police Force. He entered the New York City Police Department in 1940. He has come up through the ranks, and is now Commissioner of that magnificent force in that great city.

It is a privilege indeed for me to be able to present Commissioner Michael J. Murphy.

Address of

MICHAEL J. MURPHY

Police Commissioner of the City of New York:
The Manhattan Summons Project

COMMISSIONER MURPHY: This opportunity to present a picture of some new pathways of police thinking and procedure which we are exploring in the Police Department of the City of New York is most gratifying to me. It is a moment of great personal pride that, as a career police officer who has lived, planned and worked for the furtherance of the professionalization of law enforcement for some twenty-eight years, I appear before you in this national forum to tell you of our local efforts.

Policing any city is a tremendous job. It is further complicated in large metropolitan areas by the nature and size of its population and by the thousands of problems, both criminal and non-criminal, which come to police attention. In New York City, these problems are multiplied ten times over. I doubt that there is ever a moment in any day where there is not some contact between a policeman and a member of the public, sometimes healthy and constructive; too often unhealthy and destructive.

The frame of reference for the detailed discussion of our pilot summons project is a metropolis of some eight million residents and additional millions of visitors and transients annually. To police our 319 square miles, our 6,000 miles of streets and our 578 miles of waterfront, which make up in broad outline the area of the City of New York, we employ 26,135 policemen, 1,189 civilians and 1,250 part-time school crossing guards. We are now at our peak historical strength. In addition to our short-wave radio communications, which represent the lifeline of the city, we have a motor fleet of almost 1,500 vehicles, a navy of twelve police launches, an air force of five helicopters and a cavalry of 250 horses and mounted men.

In New York City last year, we arrested 206,248 persons, a number greater than the population of many large cities in this country. All of these defendants were brought to one of

our eighty patrol precincts, questioned, in appropriate cases fingerprinted and photographed, booked, and brought before the bar of justice. Their offenses ranged from murder—583 arrests—to disorderly conduct—68,314 arrests.

As you well know, the purpose of arrest is to insure that the individual complained of or observed committing a crime or offense will be brought promptly before constituted judicial authority to answer the charge and, at the same time, will be afforded an opportunity to defend himself.

In the City of New York, after the formal arrest procedures have been completed, a prisoner is dispatched to the proper court when in session. If court is not in session, the prisoner must be held over until the following morning unless, of course, he can in a proper case produce bail.

Thus, we have found it necessary to set up detention cells for men and for women in selected station houses, and to utilize a fleet of special vehicles to bring prisoners to headquarters for photographing prior to their appearance in court. At every stage of this extensive and tragic pipeline, each prisoner must be accompanied by the arresting officer. Once arraigned, the prisoner becomes the charge of the Department of Correction and his detention is no longer our responsibility.

This procedure, while a bit cumbersome, carries out the requirements of law and needs of security. Of course, in terms of manpower removed from the primary function of patrol and detection of crime, it is extremely costly and we have recognized that drawback. For some years we have been reviewing this problem and, in cooperation with the court system, have succeeded in reducing some of the paper work and in streamlining to some extent the detention and movement of prisoners when in our custody. We can say that the old "paddy wagon" is now powered by an internal combustion engine instead of original horsepower and the pipeline clears somewhat more speedily. Basically, however, there has been little change in these formal procedures in the past hundred years and we're still plodding along.

There is no reason why we must continue forever in the established groove worn by a century of use when new methods can be devised to remove obstacles and clear the

road toward more effective enforcement. In the scientific and technical aspects of police methodology, our department has sought to keep abreast of the times: electronic processing of fingerprints, the electro-mechanical "Imagemaker" for quicker identification of suspects from eye-witness descriptions, and the like. We have also improved our police pedagogy for training raw recruits and retraining seasoned officers, particularly in the rapidly changing areas of human relations and civil rights.

Now in the area of arrest procedures and detention we are equally anxious to move forward, taking advantage of the offer extended by the Vera Foundation and its most capable and imaginative staff. This presents us with an outstanding opportunity to reexamine our procedures and experiment to the end that we may improve our efforts for the greater good of the community as well as furthering the individual rights and liberties of the accused.

We think that a better method may be devised in certain cases to accomplish the primary purpose of our arrest procedures, namely, to bring the offending individual before a judicial officer but do it in a way which will reduce expense to the taxpayer, free police manpower for our primary duties, safeguard the defendant's rights and ultimately add to the dignity of the law enforcement process. We think that it is sound to attempt to utilize more broadly the summons process in lieu of formal arrest and detention.

As you know, a summons is an order served on an individual directing and requiring him to be present in court on a specified date and time, to answer a specified charge brought against him. Last year, the Police Department issued just over two and a half million summonses (2,518,071). Almost all of them were issued for traffic offenses, but there were a considerable number—90,264—issued for other offenses such as disorderly conduct and violation of city ordinances.

The number of minor offenses for which summons may be issued by the man on post has expanded rapidly. More and more of the city's ordinances and the rules and regulations of the various city departments have been included. This process began in 1932 when then Governor Franklin Delano Roosevelt signed a bill declaring that, "The Board of City

Magistrates with the concurrence of the Police Commissioner shall adopt regulations providing for the service of a summons in lieu of arrest but not in the case of a felony." In 1961, through an agreement with the Magistrates Courts (now the Criminal Court of the City of New York) certain subdivisions of the disorderly conduct statute were included. Today, we issue summonses rather than make arrests for such violations as those pertaining to animals, any misdemeanor punishable by fine not exceeding $100 or imprisonment not exceeding 60 days, or both, any violation of the labor law, vehicle and traffic law, workmen's compensation law, New York City Charter and administrative code, any violation of the rules of the Fire Department, and many violations of the multiple dwelling law, the alcoholic beverage control law and the navigation law. There are other miscellaneous local laws in the same category, which I need not mention.

It is apparent that most of these summonsable regulations are not in the category of crimes per se, with the exception perhaps of disorderly conduct. In this category we have limited our summonsing power to those sections having to do with offensive conduct. This includes such acts as the use of offensive, disorderly, threatening, abusive or insulting language or behavior with all of its ramifications on the public streets or where a considerable number of persons are annoyed. In these cases a summons may be issued upon proper identification and when the desk officer at the precinct is satisfied the person will respond and the offense will not recur. Departmental restrictions specifically prohibit issuance of summons when the person charged is known as a prostitute, gambler, pickpocket, professional thief or other known criminal, or is in an intoxicated condition.

In spite of this broad authority, we have issued only a relatively small number of summonses over the years in these disorderly conduct cases. In an attempt to pinpoint the reasons for this failure to utilize the summons process, a survey of arrests for this offense was conducted for a sample week encompassing some 748 arrests for disorderly conduct. The survey procedure required the desk officer in the precinct of arrest to note the reason for non-issuance of summons.

The results were as follows: The most frequent reason given, in 33.8% of the cases, was that the defendants had no home; 25.3% of the defendants could not properly identify themselves; in 21.4% of the cases the desk officer was not convinced that the condition that led to the arrest would not recur; 20.7% of the persons arrested were intoxicated; 10.6% were recorded as not being of good reputation; and 7.5% fell into the category of prostitute, gambler, pickpocket, professional thief, or known criminal; in 1.9% of the cases the desk officer was of the opinion that the defendant would not reappear. Some of the defendants failed to meet more than one of the specified criteria.

Thus it is clear that the wide use of summons in lieu of arrest procedure in these categories of disorderly conduct may not be logical or practical. I think the most accurate summary of this survey is the conclusion drawn by the Vera Foundation: "It is the nature of the typical disorderly conduct defendant which precludes a summons, not any reluctance to issue it on the part of the police."

Until the inauguration of the current study to determine the advisability of broadening the use of summons in lieu of arrest, we had reached the limits of current summons practice. The next step, embodied in this experiment, was an exceedingly important—and, I might add, bold—one. It took the use of the summons into an area which had never been penetrated, at least, in New York City. It moved it primarily from the area of regulatory law and into the area of crime per se. With the permission of the Appellate Divisions of the Supreme Court of New York State, First and Second Judicial Departments, and the Criminal Court of the City of New York, we have extended the use of the summons to the offenses of simple assault and petit larceny.

In cooperation with the Vera Foundation, a pilot project was initiated in late March of this year in the 14th Precinct —a midtown command in the center of a large shopping and industrial area. This area was selected because of its heavy volume of arrests in these two misdemeanor categories. This precinct is not a residential area. What slums it did have, in the past twenty years, have been torn down for tunnels, highways, bus and airline terminals and office and factory

buildings. The precinct, in addition to a large waterfront and warehouse area, included most of the garment area, Pennsylvania terminal, and the city's largest and busiest shopping area, including such stores as Macy's, Gimbels, Lord and Taylor, Ohrbach's and others. In addition, there are numerous office buildings and hotels including the Empire State Building, the world's tallest.

Detailed procedures were set up for interviews to be conducted by Vera personnel to establish the eligibility of a prisoner to receive a summons in lieu of arrest. The procedures were based upon the existing regulations of the Police Department, the Criminal Court Act and the verification process used successfully in the Manhattan Bail Project for over two years. These techniques are as follows:

A representative of the Vera Foundation is present at the station house for the purpose of interviewing arrested persons. The person arrested must consent to the interview.

The Vera representative immediately verifies by telephone the information obtained. Using a point-weighting system similar to that currently applied in the Manhattan Bail Project, a decision is made by the Vera representative as to whether a summons should be recommended to the desk officer.

The desk officer considers the recommendation of the Vera representative in making his determination, which is final, as to whether the prisoner is to be summonsed or detained. If a summons is served, it is made returnable from five to ten days after issuance. The Vera Foundation assumes responsibility for reminding a defendant of his scheduled court appearance, and also endeavors to notify a relative, employer or friend as further assurance of the reappearance of the defendant.

When the offense is petit larceny, the prisoner is also interviewed by a precinct squad detective for identification. In addition, his statement of residence is checked through the appropriate precinct and the desk officer consults the precinct squad detective before arriving at a determination as to the issuance of the summons.

For purposes of brevity I have omitted in this description the numerous details relating to blotter entries and other police records. These may be found in the copies of the departmental order establishing this project which are available to those who are interested in the procedural aspects.

The Manhattan Summons Project has now been actually running for some seven weeks and certainly our statistical base is still too small for deep and accurate evaluation. However, some figures are available and some useful, but tentative, conclusions can be drawn.

In the period between April 2nd and May 18th inclusive, there were 116 persons arrested in the 14th precinct for the categories of crime under consideration. When sixteen of these cases occurred, the Vera representative was not present. However, in four of the sixteen cases—all simple assault—the desk officer made a determination to substitute summons. The four defendants appeared in court on the return date designated in the summons.

Sixteen cases were excluded from consideration, ten because of narcotics addiction, one because of residence outside the fifty-mile circle considered the metropolitan area, and four because of a background of sex and other serious offenses. One refused to be interviewed.

84 of the 116 cases were interviewed by Vera representatives. Twenty-six failed to pass this screening: fifteen did not qualify in the interview, six whose identity could not be satisfactorily established, and five whose addresses could not be verified.

Thus, Vera recommended 58 prisoners to the police lieutenant in charge of booking prisoners for summons process. The lieutenant accepted 53, eliminating five, who in his judgment did not qualify. Of the 50 persons served summonses who were scheduled to appear in court at the time of this compilation, every single one has appeared.

Let me cite a fairly typical case encountered in this experiment:

Mrs. S, 21, lives with her husband and works as a machine operator in a garment firm. Her three children are with

relatives in a foreign country. She was arrested in Gimbels for shoplifting a $10 dress. Mrs. S had no previous criminal record.

She was brought into the precinct about 5:45 P.M. on a weekday night. The interview by the Vera representative began shortly afterwards and required ten minutes. Since Mrs. S had no phone, a neighbor, suggested by Mrs. S, was called. The neighbor verified that Mrs. S had lived next door with her husband for approximately one year and that she worked as a machine operator in the city. This telephone verification required five minutes. With her residence and family ties verified—and without any prior arrests—she scored eight points on the interview and six points on the checkout.

The summons recommendation was presented to the desk lieutenant at 6:30 and accepted immediately. Mrs. S was served with a summons and left the precinct at 7 P.M., having spent a total of one and a half hours in the precinct.

Five days later, Mrs. S appeared in court for arraignment, was represented by a Legal Aid Society attorney, pleaded guilty and was paroled. Two weeks later, she received a thirty-day suspended sentence.

We cannot as yet, accurately project these initial results for the entire eighty precincts of the city. The experimental area is not an average precinct and it is at this time unknown as to the nature and quality of the volume that may be expected in other areas. Of course, if the pilot program continues with this initial salutary quality, we will strongly consider the extension of the program to other precincts where we may be able to examine more concretely the problems that may be faced in simple assault and other cases. When we realize that last year the Police Department made a total of 13,267 arrests for petit larceny and simple assault, it is clear that we are on an important threshold.

What practical benefits for the police and the community can be anticipated from this new approach, if it is ultimately successful?

On the economic side, a considerable saving in detention and welfare costs may be anticipated. Many thousands of

predisposition detention days may be eliminated annually. The present high cost of custodial care and the current overcrowding of jails indicate the urgent need for measures of this nature.

There will be a saving in police man-hours. The probability of eliminating the officer's appearance in court in some instances, coupled with the prospect of permitting the officer to swear to the complaint at the precinct instead of in court, will keep policemen on patrol where they belong. Indeed, there has been some evidence of man-power economy already.

We hope, too, for further improvement in the relations between police and the community. Consideration shown the accused with respect to his rights, his comfort, his welfare and his dignity, is a practical manifestation of the assumption that a man is innocent until proven guilty. Indigent persons, unable to afford bail, are spared the ignominy of what may be an unnecessary incarceration. When permitted their freedom while awaiting trial, they can maintain their limited resources, continue their employment, and avail themselves of the opportunity to retain counsel.

The procedure of extended use of summons in lieu of arrest thus may help remove one of the most marked inequities of our judicial system—the deprivation of freedom because of inability to raise bail. Where background and reputation are satisfactory, the defendant may be accorded the privilege of the summons without regard to economic status.

Let me emphasize that the procedures I have described, while still experimental, are constructive steps in the modernization of the processes of law enforcement and the administration of justice. We intend to keep a close eye on the project as it expands and develops. To us in New York, it appears a logical move, productive of benefit to the public, to the police and the courts. I offer it to you in the hope that it provides guidelines for similar experiments elsewhere and in the firm belief that it is our task continually to seek methods to provide more effective and progressive law enforcement.

B. Regional Group Discussion (Panel A)

Following Panel A on Thursday morning, May 28, the first set of regional group discussions was held. Conference members were assigned to East, South, Midwest and West groups, according to their residence, and a moderator, reporter, and resource personnel were assigned to each group. The Thursday morning discussions were designed to elaborate on the panel speeches and air problems raised in them. Because of the length and inevitably repetitive nature of these simultaneous discussions, we do not reprint them in full. Instead, we have selected and grouped excerpts, identified by region and speaker, which deal with the most troublesome problems. This chapter is addressed to the speeches in Panel A. Beginning at page 179, we have condensed the group discussions which followed Panel B. The original transcripts of the discussions are available for those who may wish to read them in their entirety.

The principal participants in each of the four discussion groups were as follows:

EAST GROUP

Moderator: Samuel Dash, Philadelphia Council for Community Advancement

Reporter: Professor Charles E. Ares, New York University Law School

Resource Personnel:

Police Commissioner Michael J. Murphy, Manhattan Summons Project

Arthur H. Sills, Attorney General of New Jersey

Boyd McDivitt, New York City Probation Pretrial Release Program

Bernard Segal, Philadelphia Bail Project

Jeanne Wahl, D. C. Bail Project

David Flatow, General Agent, Public Service Mutual Insurance Company, New York

Herbert Sturz, Co-Director, National Conference on Bail and Criminal Justice

Judge Orman W. Ketcham, Jr., Juvenile Court, District of Columbia

SOUTH GROUP

Moderator: Professor Dale E. Bennett, Louisiana State University Law School

Reporter: Edwin E. Dunaway, Little Rock, Arkansas

Resource Personnel:

Gilbert Cranberg, Des Moines Pretrial Release Project

Deputy Commissioner Robert Gallati, Manhattan Summons Project

Oliver Gresham, Tulsa Pretrial Release Project

David J. McCarthy, Jr., Director, D. C. Bail Project

Fred Suffet, Manhattan Bail Project

George Will, American Society of Professional Bail Bondsmen, Miami

Louis F. Claiborne, Department of Justice

Daniel J. Freed, Co-Director, National Conference on Bail and Criminal Justice

MIDWEST GROUP

Moderator: Professor Frank J. Remington, University of Wisconsin Law School

Reporter: Lee Silverstein, American Bar Foundation

Resource Personnel:

Judge Wade H. McCree, Jr., United States District Court, Eastern District of Michigan

Chief Justice Augustine J. Bowe, Chicago Municipal Court

Justice Theodore Souris, Supreme Court of Michigan

Dan Johnston, Director, Des Moines Pretrial Release Project

Charles Mann, St. Louis Pretrial Release Project

Deputy Commissioner Leonard Reisman, Manhattan Summons Project

FRANK WRIGHT, President, United Bonding Insurance Company of Indianapolis

PROFESSOR CHARLES H. BOWMAN, University of Illinois Law School

HARRY SUBIN, Staff, National Conference on Bail and Criminal Justice

WEST GROUP

Moderator: PROFESSOR HAROLD W. SOLOMON, University of Southern California Law School

Reporter: JUDGE WILLIAM S. FORT, Eugene, Oregon

Resource Personnel:

JUDGE JOHN A. DANAHER, United States Court of Appeals, D. C. Bail Project

JUDGE JOSEPH A. WAPNER, Los Angeles Recognizance Project

NORMAN JESSE, Des Moines Pretrial Release Project

ALBERT WAHL, San Francisco Federal Probation Service Project

ROGER BARON, Manhattan Bail and Summons Projects

JOHN F. MERRILL, Bail Bondsman, Los Angeles

HAROLD D. KOFFSKY, Department of Justice

PATRICIA M. WALD, Staff, National Conference on Bail and Criminal Justice

The discussions on Fact-Finding, Release on Recognizance and Summons in Lieu of Arrest have been edited, grouped by region, and subdivided as follows:

1. Exclusions and Proper Scope of Recognizance Projects

EAST GROUP

ARCHIBALD ALEXANDER (Newark, New Jersey): Are there any statistics available which will help you determine the types of offenses which are more desirable to allow release? The Manhattan Bail Project referred to narcotics offenses, homicide, and sex crimes. I am not sure why those offenses were not included within the project.

Perhaps it was on the basis of a determination that it was likely that defendants would commit the offenses again, or that the offense was a particularly dangerous one, or that the defendants would not show up for trial.

MR. STURZ: Well, we excluded narcotics charges because we thought there was a medical problem involved in narcotics. We did not want to muddy the experiment before we began. We certainly have no hard knowledge to the effect that narcotics defendants skip at an inordinate rate. Possibly you might direct the question to Mr. Flatow, representing the bail bondsmen, as to the incidence of persons accused of narcotics offenses jumping bail or r.o.r.

MR. FLATOW: I don't believe we have any figures on bail forfeitures on particular offenses. I know that many of the company's agents are quite hesitant to admit defendants in narcotics offenses to bail unless they are well secured cases. There are many reasons for this. As to forfeitures in cases of narcotics charges, we do not have that. We have general overall figures, but they are not broken down.

MODERATOR DASH: Chief Murphy, did you want to comment on this?

COMMISSIONER MURPHY: I think that the types of crimes that have been excluded from the Manhattan Bail Project, from my experience, are wisely chosen.

MODERATOR DASH: I think there may be another aspect to this. Many of these projects, and especially the Manhattan Bail Project, which was the first, are now in the community, and I think, perhaps, as a matter of public relations some of the types of crimes which are abhorrent to the public, or which receive quite a bit of news publicity, may have been excluded so as not to condemn the project at the outset. This is my own view as to why some of these crimes may have been omitted.

MR. RICHARD KUH, Assistant District Attorney, New York: I would like to add to this narcotics matter, that in New York we have a law that permits addicts to be committed and released under after-care. Our after-care figures show that about 40 per cent of the carefully selected addicts who have been hospitalized and who report not to a correctional facility, or to court, but to a hospital, fail to reappear. I think our general feeling that the addict tends to be unreliable is borne out. This isn't in a bail framework, but something that is analogous.

GENERAL SILLS: I think that you may find different results in different areas of the country even where narcotics is concerned. In New York, perhaps where the narcotics traffic is heavy, you may have one kind of incidence. I have had in New Jersey, however, the experience of meeting with mothers and fathers of young boys who have become addicted, and who are sitting in jail. From what I have observed personally, the family ties are such that these boys would not skip. As a matter of fact, what the parents of the boys were looking for was some method of treatment so their children could get off the habit, if that is possible.

SOUTH GROUP

GEORGE WILL: I am with the American Society of Professional Bail Bondsmen. I have one point. Aren't we practicing discrimination against these people who can't go out on their own recognizance, and who do not have the financial ability to make bail?

MR. BENNETT: I think we will ask Fred Suffet of the Manhattan Bail Project to reply to that.

MR. SUFFET: There are perhaps two answers to this one. One answer is that it might have been seriously considered when the Bail Project was first set up to simply release everybody without any screening, release them on their own recognizance, and see what the results would be.

As a matter of fact, every so often we toy around with the idea of trying this experiment. Request the judge to release, say, 50 defendants outright to see if they will appear. It is possible they would come back without the screening we give them.

The project, however, was set up on a different basis. We employ perhaps similar considerations as a bail bondsman. We consider a man's background, his job, and so on.

MR. DAVID MCCARTHY: I am with the D. C. Bail Project. Mr. Will, maybe I can answer your question this way. Those of us working in the D. C. Bail Project are faced with the fact that a large percentage of defendants are not obtaining pretrial release on bond set for them by the court, and we are trying to find an answer, not necessarily the only answer, to the problem of pretrial detention.

One of the answers is the use of recognizance for those people who would be good risks from the point of view of remaining in the community until the time of trial.

MR. WILL: They are going beyond that point. They are releasing people no matter what financial condition they are in. Your contention is to release people of good risk.

In Des Moines the interviewer sees the defendant before the bondsman sees him. They are interviewed as soon as they hit the desk.

MR. BROWARD SEGREST (Alabama): The question I want to ask is, Mr. Will, would you have them discriminate against a person simply because he has money? I think if the program is going to be valid at all, they can't consider as a separate criterion whether the man is indigent or not. If they do, they are discriminating against the person who has a little money.

Are you suggesting that this program apply only to indigent people? If so, how would you determine who is indigent?

MR. WILL: That was the original intent, correct me if I am wrong, the Manhattan Bail Project was to apply to people not able to afford bond.

MR. GILBERT CRANBERG: I am with the Des Moines Pretrial Release Project.

I think the fundamental basis of our project is to provide information to the court, information the court did not have previously at initial arraignment and arraignment after indictment. It seemed to us the court should not be denied factual information simply because a man has funds.

The essential purpose of a court is to receive factual information and to make judgments on the basis of this information. It seemed to us illogical to deny the court this kind of information simply because of the man's financial status.

MR. JAMES RUSS: I am Prosecuting Attorney, Orlando, Florida. As a Prosecuting Attorney I am, of course, concerned with the man in jail as well as the public, and I would like to know why under the Vera Project they excluded certain categories such as homicide and narcotics offenses. In the District of Columbia I understand there is no delineation.

MR. SUFFET: There is this rock-bottom truth about the project when it was first set up; there was some resistance. It seems to have a degree of acceptance now that it is not shocking to let people go without bail.

The risk seems more probable in some cases than in others, such as where people are accused of molesting children, or homicide, or narcotics charges. This is particularly true in the case of a narcotic addict, because a narcotic addict frequently has to rob to support his habit. Such people seem to create a sense of outrage because of the particular deed involved.

At the outset these cases were excluded. It may seem these were political reasons and perhaps they were. We had to cooperate just to get the program initiated. After two years of experience of Vera, it seemed the logical next step forward, as undertaken on the D. C. Project, was to experiment with other charges.

FROM THE FLOOR: Do you find in practical application that judges believe that people accused of sex offenses are any different than a man accused of robbery?

MR. MCCARTHY: I think a sex offense can be subdivided, such as rape, statutory rape, and friendship between the parties. I think, for example, that a judge would look more favorably on statutory rape than on the violent sex offense.

With respect to homicide we have had little trouble in recommending and effecting release of those charged with homicide. Here you have to distinguish between a felony murder, a fellow that is perhaps trigger-happy, the robber who shoots his victim, and the man who commits probably the one crime of his life with no prior record, but because of circumstances is alleged to have committed a murder.

That man is actually an outstanding risk. If you want to assume for the sake of argument the safety of the community, I still say he is a good risk from that point of view. He is a good risk because of his community ties, because he has lived here all his life. Homicide in that respect has not been a great problem.

I don't want to mislead you. Like Vera we, too, walk in baby steps in the beginning. We handle the whole range of felonies but do exclude a man who has been convicted previously of the same offense or of other felonies.

MIDWEST GROUP

MR. GERALD S. GOLD: I am with the Cleveland Defender's Office.

There are some limitations that have been raised by the various projects regarding the type of offense. Some don't have felonies, some have certain felonies and not others. I would like to hear a little bit about the experience. You have some very serious felonies with very high penalties where people wind up getting probation, at least in Cleveland, Ohio. I don't think we are much different from other fairly large cities. If you want a jury trial after indictment, it takes between five and seven months, and this is the time where the person loses his family and job and so forth.

Some of the judges have, on their own, after being given advice by counsel, recognized the personal bond, even in some rather serious felony cases, such as burglaries of inhabited dwellings.

Now where do you draw the line? I think perhaps the type of offense may be something that we ought to discuss, because we have to go back home and try and sell a program. I can understand some of the public aspects of letting a sex offender go loose, but what is a sex offender? Sometimes it will be a very young fellow charged with statutory rape. Is there any experience that you can help us with on that?

MR. MANN: Our program in St. Louis is dealing only in the felony area. We have released on recognizance persons accused of robbery, murder in the second degree, arson, carrying concealed weapons, assault to do great bodily harm, everything but murder first, and I would not hesitate to recommend the proper accused person for release on recognizance for that.

I think it flies completely in the face of the philosophical basis of recognizance to exclude these people if they meet our criteria.

MR. JACK GOODSITT (Wisconsin): My question goes to the mechanics of the various systems. Assuming that the categories of offenses are well defined with respect to whether or not a person would be eligible for release on his own recognizance, or arrested and given a summons, and so forth, what I am interested in is with respect to the interview; how much significance is given to past record?

Assuming that the man's record may well include several arrests, and possibly convictions, but of crimes no more serious than the one then under consideration, would this disqualify him for release on his own recognizance?

MR. JOHNSTON: Well, at the present time, under the Manhattan system, under the point system we are using, a man can lose one point, for two or more felony convictions or three or more misdemeanor convictions. One of the things I want to do when I get back is talk to the Judges and see if we can't stop taking away points for misdemeanor convictions.

But another thing, if you get a man who has a lot of felony convictions, and if he has been in the State prison a lot of times, he probably won't make points in the other areas. Incidentally, we don't consider the prison at Fort Madison or Anamosa a residence for the purpose of assigning points.

But under the present system, he can gain points for having no record or a small record, but he can lose for convictions for felonies or misdemeanors.

MR. GOODSITT: How many points?

MR. JOHNSTON: He needs five. At the present time, with standards which we thought were cautious because we wanted to make sure we didn't fall on our face when we started out, the actual percentage is over 68 per cent of Polk County residents accused of crimes in our courts who qualify for release under our system, and this includes all people, no matter how long their record is.

WEST GROUP

MR. WALLY PERRY, Bondsman, California: Mr. Chairman, I want to ask the project people one question. I heard the Police Commissioner of New York say they arrest in New York City—and I understand that Manhattan is one of five boroughs—206,000 people per year. So, over a 40-month period, New York City would have arrested 515,000 people.

Now the Vera Foundation in their explorations managed to release 2,600 people. They have been quoting percentages a great deal. 2,600, that is one-half of one per cent. Again, I realize that Manhattan is only a part of New York City, but it appears to me that there were approximately 750 people in New York City being arrested a day, and two and one-half people being released on the project.

Was this caused by expert screening, trying to be perfectionists about it, or just not having the personnel to get around to everybody?

MR. ROGER BARON: There are a number of different arraignment courts in Manhattan. We do not even go into several of these courts. The Women's Court for Prostitution, the Gambling Court, and there is a whole court for drug cases.

These courts make up a good proportion of the cases. Also, there are a lot of minor offenses which make up the great majority of the people arrested, such as the disorderly conduct figure which Commissioner Murphy gave. It is a tremendous figure. And in this particular type of charge the case almost always is disposed of the same day. There is no

need for a bail determination to be made for this person, since he has been arrested the night before and that same day, most likely, he will plead guilty and receive a sentence. The case will be disposed of the same day.

Thus the great bulk of the cases need no investigation. There are also a great many cases in the Felony Court which are not bailable.

There is also a great bulk of cases dismissed the same day and there are cases sent to Bellevue for observation, or held for another jurisdiction. In short, to quote a figure of how many people are arrested in all five boroughs is misleading; it doesn't tell you very much.

JUDGE WAPNER: Prior to the Vera Foundation, did some of the Judges release defendants on their own, without bail?

MR. BARON: Yes, but it was used infrequently. This was the purpose of the original study in the control group, where it was found that four times as many people were released with verified information available.

JUDGE PEIRSON M. HALL (California): How many people were interviewed by the Vera Foundation in New York?

MR. BARON: 12,460, so far.

PROF. SOLOMON: In response to Mr. Perry's question, on page 62 of the excellent book, "Bail in the United States—1964," the total number of defendants who were in the court in which the Vera Foundation Experiment Project was conducted was 13,000.

I would like to emphasize that the project was experimental. It was undertaken in one court. To set it up against the total number of arrests in New York over which the Vera Foundation had, in a sense, no participant interest would be to mislead.

I think also that the project, being confined to an important court in New York County with a large percentage of important cases, was reasonably representative.

MR. BARON: I have some figures which, perhaps, will help you with that question. So far this year in the Felony Court there have been 6,250 cases that have been arraigned; and in about 50 per cent of these cases the bail question did not arise. And of the remainder, the number of people that were

r.o.r.'d during this period were 568, which was approximately 18 per cent of those in which the question of bail came up.

MR. PERRY: Were they released on their own recognizance?

MR. BARON: These are the number that we had actually released, 18 per cent of those that came through.

DEAN KING (Colorado): May I ask a question? Mr. Baron, you also exclude entirely, do you not, certain offenses? I mean, you do not interview people accused of rape, murder, narcotics?

MR. BARON: We previously have had exclusions for forcible rape cases and for impairing the morals of minors, but within the last three or four months we are looking more into the circumstances of these charges. Actually, there is no reason for excluding any charge. I mean, the information is there. There is no reason to think that a person arrested for forcible rape or impairing the morals of a minor is any worse risk than somebody charged with assault and robbery.

DEAN JOSEPH LOHMAN (California): The across-the-board exclusion of certain courts has the effect of a type of selection with reference to the areas in which you do operate; it shifts emphasis away from the essential purpose of the whole project, namely, not to exclude a person on the basis of offense or on the basis of falling into broad categories. This points up the question of the advisability of research or study in terms of establishing broad risk categories independent of particular jurisdictions.

MR. BARON: When I say that we exclude courts, there is a reason for it. For instance, the Gambler's Court is pretty well routine in that the bondsmen are available there. People who are arrested on policy charges are bailed out the same or the next day. There is no problem of detention there.

The other court I mentioned was the Narcotics Court. This was the one area where we originally wanted to stay out. In the next couple of months, however, we will experiment in it.

JUDGE HALL: What manpower was required to conduct these 12,460 interviews?

MR. BARON: The equivalent of 7 full-time staff members.

JUDGE HALL: What do you do about people arrested at 7 o'clock or 9 o'clock at night?

MR. BARON: The people on the felony charges arrested at night are brought in the next morning. The people on the misdemeanor charges go to night court.

JUDGE HALL: You do not work in the night court?

MR. BARON: Right. What happens is that for these cases that are arraigned at night or on weekends we usually get the bail evaluation the next time they appear in court.

MR. IRVING REICHERT (California): I am also concerned with the Manhattan Bail Project's exclusion of sexual offenses, assaults against police officers, and narcotics. My question is: were these offenses eliminated from consideration because it was felt the defendants constituted bad risks, or because you did not want to arouse public feeling against the project at its inception?

MR. BARON: It was the public feeling at the outset that we were concerned with. There was no reason to believe, except perhaps in the narcotics cases, that these people would be poorer risks than anyone else, especially in the sex cases.

But, as I say, we no longer have blanket exclusions. We have now gone into some of the narcotics starting with marijuana. We still have not gone into heroin.

There is no real reason, from the point of view of these people returning, to exclude anything. It is a matter of public policy. Obviously, when you are starting a project, felonious assault on a police officer would be a little tricky to handle.

But we now have permission from Commissioner Murphy to handle any felonious assault on the police officer where the police officer does not object to our interviewing the defendant. So far we have had only about one per cent rejection by officers.

JUDGE HALL: I got some figures for the Southern District of California just before I left. We have 145 fugitives and about a third of them are narcotics offenses; their bonds range from $1,000 to $35,000.

MRS. WALD: I wanted to ask Mr. Baron one question. When the New York Probation Department takes over the Manhattan Bail Project's work, are they going to take it over on your terms, or are they going to exclude only the offenses you have excluded?

I know they are going into every borough. But are they going into all the courts? How will the scope change, or do you know that?

MR. BARON: Our Manhattan Bail Project will last until September, at which time they will start work in Manhattan. But they have already started work in Brooklyn, Queens, and probably within the next week in the Bronx.

They have started, basically, with our interview form, but they do have a different policy. As of now, the way we operate is that we only present a recommendation to the judge in cases where we are prepared to recommend that an accused be released on his own recognizance. The Probation Department, as of now, is submitting reports on every single case that they interview. In the cases that meet the standards that we have set up, they present a recommendation for release. In cases where they interview the defendant, but are not able to recommend release, they present the judge with the information that they have verified without recommending anything: they simply submit the information. There is a difference in philosophy in that the Department of Probation considers itself to be an arm of the court. Its responsibility is to the judge, to present him with whatever information will be helpful to him in determining the question of bail. We feel that we should only present favorable recommendations.

I think the Department of Probation is thinking of dropping various exclusions. But they have just begun in the last two months, so there could be great changes.

2. Who Should Conduct Bail Investigations?

EAST GROUP

MISS SAMUELS: I am Gertrude Samuels, New York Times.

I have been listening to your praise of Vera and the work of the NYU law students. We in New York know how valid that is, but do you think that law schools generally throughout your areas, perhaps throughout the country, are doing their job to encourage their students to provide such legal help inside the criminal courts as part of their academic training

say, in the same way that the medical schools require their students to do their internship at hospitals? In New York, for example, only the NYU students are involved in the Vera Foundation. I don't know of any Ivy league school that is doing the same thing.

MODERATOR DASH: Challenging question.

JUDGE JAY RUBINOW: I am the Chief Judge of the Connecticut Circuit Court.

The Yale Public Defenders, a voluntary, non-paid group associated with the Yale Law School, has offered its services to our Public Defenders and also to those of our judges who wish to make use of their services for research purposes.

In connection with the work that they are offering to the Public Defenders in our court, their services extend not only to research in questions of law, but also to making investigations, interviewing witnesses, and, if requested by a Public Defender, to interviewing the defendant, if he happens to be incarcerated.

PROFESSOR LIVINGSTON HALL (Massachusetts): I would like to speak about what is being done in Boston. Boston College Law School has offered the services of its Law School students to implement the same type of studies that the New York University Law School students are making for a bail project that is going to start next fall, we hope.

Boston University and Harvard Law School both have considerable programs in which their law students work with the Massachusetts Defenders' Committee, and to a large extent they work under the supervision of other attorneys under a rule of court.

At Harvard we have around 32 men who are working on that. It is not possible to use the full resources of all of the students in any one field or, perhaps, in even all fields together, because you don't have places such as hospitals where large quantities of legal cases are gathered together and can be worked on.

I think within the limits of the material involved, a great deal is being done in Boston to help. I don't think there is a shortage of law students to help on specific projects.

DEAN KENNETH PYE: Georgetown University. At the present time the D. C. Bail Project is housed at our University.

The grant was made by the Ford Foundation to the University, which next year will undertake the supervision from the Judicial Conference Committee. It is staffed, in addition to Mr. McCarthy and Miss Wahl, with students from the local schools, not only students from our school, but from two of the other law schools as well.

MR. MCDIVITT: I just want to say that the recognizance program that we are undertaking in the Office of Probation has 30 positions; 15 are law school aides. The law schools in New York are cooperating fully.

SOUTH GROUP

MR. L. B. STEPHENS (Alabama): In connection with the foundation studies, what recommendations, if any, do you have regarding investigation by probation departments, and and if you do have this on a nation-wide basis, what are some of the problems that might develop by placing this with probation officers?

MR. CRANBERG: We have debated this among ourselves; ours [in Des Moines] is a Foundation-sponsored project. The Foundation originally underwrote it for one year and has indicated a willingness to do so for two years. We started thinking about what happens after the Foundation money expires, how we are going to incorporate this into the court structure.

This is quite a problem and Mr. Sturz alluded to this in his talk. We have the director of our project here, and he is interested in this. He wants to see it work, and he is willing to take some risks.

He recommends people, some borderline people sometimes. He is willing to stick his neck out.

The problem arises, if you place the responsibility in the hands of a probation officer, a probation office, or the City Clerk's office. There may well be a tendency to play it safe and to avoid risk. This is a problem and I don't know what the answer is to it.

MR. FREED: Mr. Stephens, I think you will find this question is being looked into. The probation offices are used to run the projects in St. Louis and the Northern District of

California. They are looking into the question of the impact on a pre-sentence report and on the relationship between the probation officer and the accused when the officer starts the interview process, not after conviction, but after arrest.

MR. WALTER TALLEY (Florida): It appears to me that one part of this problem that has been overlooked is that in small towns and in small areas we don't have this bail problem. This problem is confined to the large metropolitan areas. Our judges know most of the people.

Somebody calls up and says, "We have Old Mose here." The judge says, "Turn him loose and tell him to come back next week." That is what we do.

PROF. BENNETT: Do you have a procedure to release a man on his own recognizance?

MR. TALLEY: Yes, the judge says let him go, and we do.

I represent an 8-county area in Florida, and we don't have a great bail bond problem.

If the judge doesn't like what the bondsman is doing, he says, "Don't let him write any more bonds."

MR. CRANBERG: I think what you say is probably true in the smaller communities, but it would depend on what you call small and it would depend on the practice of a particular judge. I did a survey for the Conference in Marshalltown, Iowa, a town with a population of 25,000.

I found there that the Municipal Court Judge was setting bond in practically every case in the community of 25,000. There was a professional bail bondsman. About half the people in that County Jail were people awaiting the disposition of their case because they could not raise bond.

PROF. BENNETT: Mr. Gresham, would you like to say a few words?

MR. GRESHAM: Our project in Tulsa does not deal with an attorney who is not registered with the court. At Tulsa, as overseers of the court, each attorney must sign a form in which he states he will not ask for the release on personal recognizance of any individual that has been charged with a felony.

Ours is strictly a misdemeanor program. It also states that the attorney will not release any individual, any person convicted of a crime involving moral turpitude for a 6 month period. If a person is put in jail for drunken driving and is given a $500 bond, the attorney can sign the bond and the defendant is released on his own recognizance.

FROM THE FLOOR: Are you acting as defense attorney? Suppose he doesn't have a lawyer?

MR. GRESHAM: He would have to get one, hire one, or get a public defender.

FROM THE FLOOR: What does a public defender do and at what stage?

MR. GRESHAM: At the public arraignment, which is usually the next day. They are only appointed when the defendant demands one. Most people in Tulsa are able to hire an attorney or get one sitting in the room.

Unless the attorney makes sure this defendant appears on time, he is taken off an approved list. If he is on the disapproved list, he can't have any more clients released.

When we ran our survey we found the situation was controlled by four attorneys who were working with the bondsmen. We now have 60 some attorneys doing 85 per cent of the business after an 11 month period of time. In fact, one of the Tulsa bondsmen said we had knocked them out of $35,000 worth of business.

We like our program; in fact, we are real strong about it.

MR. ROY W. SMITH (Oklahoma bondsman): This program was originated by the Bar Association, a committee of some 8 or 10 men. It was not voted on by the Bar Association as a whole, but it was put into effect and is operating. They go down only on those who have the money. They call a lawyer and he goes down and gets them out of jail, and represents them.

I am not accusing anybody of anything, but they have knocked us out of $35,000 and I assume the lawyers have increased, and they sign one slip and they are liable to the court. Gentlemen, what does liable mean? They will take their name off the list, that is all they say. There are no rules or regulations; it is only by word of mouth as to when they go back on or who takes them off. I know one instance. I asked to look at the list in the morning at 9 o'clock, and the number one man on the list was taken off.

90 NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE

At 9 or 10 that night I was at the desk of the Sergeant on duty when a call came in. The Sergeant hung up and said to me, "Guess who that was. That was the Judge ordering me to let this man 'OR' anybody he wanted to."

That means to me "own recognizance." That means Tom, Dick or Harry, doctor, lawyer, or pancake maker. I don't think you can "OR" one man to another man.

FROM THE FLOOR: That is the way the bail system started.

MR. JAMES V. BENNETT: One of the things that can be done in this business, it seems to me, is to bring these cases to the attention of jailers. For the most part they are conscientious fellows who want to help the man in the institution, and if you can use him more, you will find he will be able to appraise these people pretty well, and tell whether or not they are going to report.

I am sure the Federal judges in Kentucky seldom jail any of those whiskey cases down there. They just say, "Wait until the creek runs dry and they will come to court." (Laughter.)

These people, the jailers, know it, and they can be of help to the local people.

One of the problems we meet, particularly in some of the southern states, as Mr. Stephens from Alabama knows, is that many of the jails operate on a fee system. The jailer gets a turnkey fee for letting the fellow in. He can keep part of the profits, and frequently keeps a lot of them. That complicates the problem considerably from the point of view of getting information from a defendant and getting his case to the attention of arresting officers, commissioners, magistrates, and so on.

MR. JOHN GOLDSMITH: I am from Radford, Virginia, General Counsel for the National Sheriff's Association.

I appreciate Jim Bennett talking about my clients, and saying they are by and large fine representative citizens. But there are 3,026 counties in the United States, most of them are comparatively small in size and population. Some of those counties are geographically bigger than the State of Rhode Island.

Now in the states where the sheriff may succeed himself, which unfortunately is not true in Kentucky or West Virginia,

FACT-FINDING, RELEASE, AND SUMMONS IN LIEU OF ARREST 91

you are going to find that you have in this discussion been leaving out the key figure, because I never go into a county to defend a man that I don't first go to the sheriff's office and ask him what kind of guy my client is.

Sometimes they tell me, sometimes they don't, but for the purpose of bond, except in your large metropolitan areas, the sheriff or his deputies are going to be able to tell you in a few minutes all about this man, whether he will return or not.

If you are defending people in the Federal courts you will find that when the Alcoholic Tax Unit arrests these bootleggers as they do down in my country, they take this man by the sheriff's office and say, "Sheriff, will he show up?"

The sheriff says, "You better take him on down to Roanoke," or, "Take him on up to Abbington, or somewhere, and put him in jail and keep him." Or the sheriff will say, "Sure, he will be there when you want him." I will say 99 out of 100 times the information he gives you about this individual will be correct. He can tell you where he lives, how many children he has got, and the name of his dog if you want to know it.

I suggest that you not leave out this key law enforcement officer; in most states, he is a constitutional officer, with deputies covering the whole county. He knows 10 times more about the defendants than any of us or any law student or bail bondsman, or anybody else.

MIDWEST GROUP

JUDGE BENJAMIN S. SCHWARTZ (Ohio): I have heard touched on very lightly the utilization of the Probation Department in this field. I have heard emphasis on law students and I have heard emphasis on work hours, but our chief probation officer down home is armed with voluminous records of what has taken place in our community, and he also has his contacts as to previous records, agencies, and all that, which would come into it.

For instance, he points out, this will take not more than six to eight hours:

1. Interview the defendant and determine his origin, period of residence in the locality, and family ties.

2. Ascertain if he has a job, or has reasonable prospects of gainful employment here.

3. Check any possible previous record of arrests in various police departments here, particularly in the city of Cincinnati.

4. Take cognizance of the extent of the defendant's responsibilities in regard to possible dependents who might undergo undue hardship if he is incarcerated in jail for a protracted period, while the case is pending.

5. Check the file of the adult probation department, which now comes close to 14,000 cases, for contacts with other family members or antecedents.

6. Contact certain other agencies which have played a key role in the affairs of the defendant or members of his family.

Now, it appears to me that with all due regard to law students—and I was a law student once—and in due regard to this point system which is pretty hard (it may be practical in New York, where there are 8 million people), I do question its use in a smaller community. But I do believe a probation department is experienced in sizing up individuals, and furthermore, you are saving the county thousands of dollars by this plan.

But the point I want to make has only been lightly touched on by the panel: Has the probation department been utilized? And why can't there be additional members of probation department when it is saving the taxpayers so much money to handle this particular phase?

PROF. REMINGTON: Well, I think Mr. Mann can speak to this question of his own experience.

MR. MANN: Yes, in St. Louis the probation department is conducting the investigation for release on recognizance. As a matter of fact, it was at the department's recommendation that the program was put into operation. I also agree with you from my orientation as a social worker that a subjective evaluation of a defendant is probably as valuable as a point system.

I don't want to depreciate the point system, but I think it leaves something to be desired when you are determining the

quality of an individual. It is very difficult to weigh him by points, and from my training, I feel a subjective evaluation is more appropriate and probably more helpful to the court. With the impression the probation officer gets of the person and the objective criteria and data, we can better determine whether the person will return to court as he is so ordered.

PROF. REMINGTON: Mr. Reisman has a comment, and also Mr. Sanger Powers.

MR. REISMAN: Well, the Probation Department in New York City is taking over the Manhattan Bail Project which moved slowly until the validity and the importance of the project was clearly defined. They were reluctant to expend the thousands of dollars required to set up a probation facility, but now the Probation Department is working intensively in this area, bringing to it all of their skills.

I might say, in a large city, where your volume is heavy, you must ultimately rely on an objective system called the point system. Before I went to the other side of the fence as a police official and as a District Attorney, I was with the Criminal Division of the Legal Aid Society, and it is quite true that in interviewing indigent clients you get a feel that a man is or is not a good risk.

The problem, though, is translating that as an objective factor on the record to a Judge who has other thoughts on the matter, and I would think that if your point system works out, and it probably will, it will be the sort of mechanical, objective procedure that is the only way to handle the incredible volume we have in a large metropolis.

Perhaps in other areas of the country you can spend more time in an intensive analysis of the man, but when you think in terms of the fast-moving session, you don't have that opportunity; we are working on an assembly-line basis, and under the incredible pressures that result from our problems.

PROF. REMINGTON: Mr. Sanger Powers has a comment, and then we will hit this side of the table.

MR. SANGER B. POWERS: Mr. Chairman, I am Director of the Division of Corrections for Wisconsin.

Speaking of the point made by the Judge here, I would say that in Wisconsin, we have a total of 7500 offenders under

jurisdiction on probation and parole, about evenly divided. We provide a probation service, statewide, exclusive of Milwaukee County, to all courts of criminal jurisdiction. I would agree with you that the Probation Department would be the logical agency to make the type of investigation to determine whether or not release on recognizance is proper. Also I suspect in the smaller areas the judgments would be pretty largely subjective, but taking into consideration many of the objective factors that the Commissioner referred to here.

MR. BEN MEEKER (Chicago): I wanted to ask Judge McCree to comment on the experience in detail on the use of the United States Attorney's Office, as I believe was mentioned in your talk this morning. I am all in favor of this screening, but I have some reservations about whether the Probation Office should do it. I wonder if there is any legal problem here of whether the Probation Office, a branch of the judiciary should get involved at this early point in the procedure with reference to a defendant. The other question I have relates to implementation. Whether or not a probation officer has the skills that we are trying to develop, should he be assigned this kind of responsibility, when his services are so gravely needed, at least in our experience, in the area to which he is assigned?

I am wondering whether someone of less skill and training could handle this screening problem.

JUDGE MCCREE: In response to Mr. Meeker's question, first let me say that I don't think there is any magic about using the United States Attorney's office or the Probation Office, or a volunteer contingent of law students, or any other agency for fact finding. I think that the significant factor here is the disposition of the court to undertake a program of release on recognizance. Each court then will use the agency at hand best suited to assist it by furnishing it this information. We use the United States Attorney's office principally for two reasons: In the first place, they are possessed of most of this information. If you will look at the work sheet which the Manhattan Project uses, we find that these are the categories for which points are assigned: prior record, family ties, employment, residence, time in the city.

When the defendant is booked, the United States Attorney's office obtains this information pretty much routinely, as an incident of booking him, and therefore, a further investigation isn't required. This is one of the reasons we utilize it.

Secondly, the U. S. Attorney's office is committed to the principle of the validity of release on recognizance in appropriate cases, and for this reason, we have not seen fit to call on our Probation Office to do this. We recognize that they have the competence, but we also recognize the fact that they are presently overloaded with supervision, and that they would just be duplicating the efforts of the United States Attorney's office.

WEST GROUP

REP. LANHAM (Hawaii): I would like to ask a basic question. Chief Justice Warren said that this matter of setting bail is a matter of judicial discretion; and if there is an abuse of discretion, there would be legal error, I would assume.

This being so, anything based upon discretion must be based upon fact-finding, I would assume. I would like to know why the judges are not doing this already, before the Vera Foundation gets it. If the judges were doing what they were supposed to, you would not need the Vera Foundation.

MR. BARON: The only information that the judge has available to him, really, is what the defendant tells him, or what the police officer tells him, or what the complainant tells him. In other words, he has no way of verifying this information himself. He cannot, practically speaking, make phone calls to check the information the defendant gives him.

FROM THE FLOOR: He has a probation officer assigned to his court in most states. He can have them check it out.

PROF. SOLOMON: I would like to call on Judge Wapner from California for their practice.

JUDGE WAPNER: The first thing I would like to clear up is that in California since 1959 judges have been allowed to release anyone in the judge's discretion that he felt would be a good risk on his own recognizance.

And we have done that since that time. The problem is, as someone brought out, that the judge does not have, sometimes, sufficient information on which to base a release. He has what the defendant may tell him when the defendant is in front of him on the arraignment, or what the defendant's counsel may tell him.

Oftentimes, on arraignment, a man does not have counsel of his own choosing. At that time, of course, the court will appoint the public defender. But the public defender, if he is appointed that moment, the day of arraignment, has not had the time to check out any information.

So the purpose of our program was to see to it that we had an investigator who would look into the facts of the case and see to it that a man was offered an opportunity to be released on his own recognizance.

First of all, I will say that this program is an arm of the court. This is the court's program; the court controls it. Notice is given to the District Attorney. The District Attorney has a copy of the release application that the defendant makes out.

The District Attorney has an opportunity to recheck so that there is this adversary type of proceeding. The problem with us, of course, is that we do not have enough money to handle it. We have only one investigator now. In the two months that we have used the program, approximately 35 people have been released.

Only one person has failed to show other than for any legitimate reason. We have at least 100 people who have felony complaints issued per day. That is a minimum. They first come to the Municipal Court. Judge Leader, who is sitting here, handles the arraignment in the Municipal Court.

At that time, really, Judge Zirpoli hit on the key of this thing on what we have to try and work out, and that is how do we get to this person before he is arraigned to get him out on the street on his own recognizance, if he deserves it. That is the real problem.

Sometimes we cannot and that is why Judge Leader would release people on personal recognizance on just the statement of the defendant or his attorney. Judge Leader has done this many, many times. He has done this hundreds of times.

By the time defendants come to the Superior Court to be arraigned before me, they may or may not have made this application. Probably not, because of the time factor. But then the application may be initiated again in the Superior Court by the investigator whom we have hired. He investigates. We get the report back within 24 to 48 hours, and at that time we pass on the application.

We have excluded certain types of crimes that New York started to exclude—hard narcotics, murder cases, obviously, but also crimes of violence and also sex molestation cases. We did this for two reasons, primarily, although I do not agree with the reasons.

One, we have on our Committee the Chief of Police, the head of the Sheriff's Department, and the District Attorney. In order to get their cooperation in a pilot program, we felt it was best to go along with excluding these crimes.

At the end of a 6-month period, we hope that they will see that it has worked in other areas. If a man can make bail on a crime that calls for a $5,000 bail, he makes bail. If a man cannot afford it, he may be just as good a risk to be released on personal recognizance after we have checked the facts.

So, we have done it for that reason, and as a matter of public policy. We want the public to accept the program. As far as money is concerned, we do not have a Vera Foundation, we do not have a Mr. Schweitzer, who is philanthropic. Maybe we can find one, but right now the monies come out of the court budget for the investigator.

I have talked to Professor Harold Solomon about the possibility of even enlisting senior law students to do this free in their spare time for the experience. We have many good law schools in Southern California, and we hope that we can do this.

MR. PERRY: I do not know how many police people are in this room, but I believe we are being a little bit naive here. I will agree that the foundation makes phone calls and they contact people. This is wonderful. In Des Moines you are doing this too. But you cannot tell me that the police officer who has investigated a burglary, who has apprehended a subject, does not know, by far, a great deal more about that

individual and his likelihood to commit further crimes. If he is released on bail, and this has happened time and time again, they have tailed people, they have watched their activities, they have kept them under scrutiny. I do not think our police departments have been given enough credit for what they have done here. And I think that the information they supply the courts in most cases is more than adequate for the decisions that judges have made regarding bail and everything else.

JUDGE CHARLES W. REDDING (Oregon): There is a subject that has been troubling me. I realize, for instance, that in the city of New York assistance other than from counsel is essential to gather facts for the bail determination but frankly I am disturbed about cities like Des Moines, where it would appear to me off-hand that the lawyers are abrogating their responsibility in not getting the facts.

Any lawyer, in ten minutes, can find out whether his client is employed and whether he lives in the community and whether he has got a family. He can appear before the judge, the first appearance, and can move for reduction of bail. Now the question that troubles me is, is this not a responsibility of the bar and is the bar not abrogating its responsibility in looking to other bureaus or agencies for this duty?

I readily recognize that the Vera Foundation has made a real contribution in the studies. It enlightens us judges to the fact that we have not been realistic in "recogging" people. I released two people charged with first degree murder on bail. I received some criticism, but I was satisfied that they would appear, so I released them. But the point I want to make is: Is this not a responsibility of the lawyer to bring to the attention of the court?

MR. PAUL AUGUSTINE (Los Angeles): I would like to answer that. Quite often counsel will not be retained on a case until weeks after a person is arrested. Quite often the initial phone call of an arrestee is to a bondsman, and then, lo and behold, the arrestee ends up with an attorney selected by the bondsman.

FROM THE FLOOR: I cannot imagine that.

MR. AUGUSTINE: I will say this. In many cases in my office we have received calls from a defendant who is going to trial

the next day. We invariably decline taking the case, of course. But this does occur. And in Los Angeles we have an overwhelming number of defendants represented by the Public Defender's Office. You cannot put the responsibility on the bar because quite often they do not come into the picture until late in the game. So I think you have to have another agency. If counsel is retained, of course, he is going to present facts advantageous to his client for bail setting. But your question, sir, presupposes that there is a lawyer in the picture.

JUDGE REDDING: In Oregon, if you cannot hire one, why one is appointed. He is appointed at the preliminary hearing stage. Anybody in Oregon charged with a misdemeanor or a felony is entitled to a lawyer, whether he asks for one or not. And maybe our solution is to get more public defenders.

MR. JESSE: I would like to respond since you directed your remarks at least in part to Des Moines. We have what I believe, at least from the discussion, is a unique situation. We do not have a public defender. A person is not entitled to counsel until the third time that he appears before the court. He appears for his arraignment on the charge, without counsel. He appears for his preliminary hearing, without counsel. He is bound over to the grand jury for action. And the first time he is entitled to counsel is when he is arraigned on the indictment. So in this situation, while it might be the responsibility of the bar, the bar is not there at that point.

JUDGE HALL: I think what gave birth to the Manhattan Project and the Vera Foundation was the fact that the bar was not performing its responsibilities.

MR. LANHAM: I do not see any reason why the bar association cannot tell one lawyer "It is your day to go down to District Court and stand up for these men and see that they get proper bail, whether they are employed or not."

MR. AUGUSTINE: I agree.

3. Operating Procedures of Bail Projects

a. Timing of Recommendations

SOUTH GROUP

MR. CHARLES WALKER: I am a prosecutor from West Virginia.

I think you are overlooking one of the main purposes of granting a defendant bail, that is, to enable him to get out to help prepare his defense.

It is as a policeman told me once. He said, "I don't see any sense in that drunken driver getting out of jail. He will just get a bunch of people to swear he was sober."

I think the bail bondsman performs a service, you might say, to a person who knows the ins and outs. The one who is in jail and knows a bondsman, he can get out in 10 minutes, whereas the amateur has to wait for this questioner to come around and fill out a questionnaire and take it to a judge; and maybe he will be a week getting out. What does the panel think about that?

MR. SUFFET: First of all, our experience on the Manhattan Bail Project has been that nobody waits a week. This is a matter of procedural fact; these people are interviewed as soon as they are brought in for arraignment; and a person is not detained any longer than he ordinarily would be.

The recommendation for release, if one is forthcoming, is made at the arraignment itself, so there is no excessive time spent in this procedure. That is how it works on the Manhattan Bail Project.

MIDWEST GROUP

JUDGE SOURIS: What I am about to raise suggests, perhaps, a little broader field of inquiry in connection with the use of bail by our courts, and I am really asking to determine if any jurisdictions other than Michigan have encountered this problem.

It was brought to our attention that in some of the courts bail was used as an alternative to determination of petitions for writs of habeas corpus. The practice, apparently, in some courts was, upon filing of a writ challenging the propriety of detention, that the hearing on the petition was either adjourned without determination for varying periods from 48 to 72 hours, or the prisoner was given the alternative of bail prior to judicial determination of the legality of his detention.

That, I trust, has been stopped in our court by the adoption of a specific rule which sets forth the procedures for handling writs of habeas corpus in our hearing, which expressly forbids determination of bail questions upon filing of a petition for habeas corpus until a decision has been made to deny the writ, and only after that petition has been denied may the court now properly in conformance with our current rule consider the question of bail.

I merely inquire: Have you gentlemen encountered in your jurisdictions the misuse of bail in this fashion, or is it unique to my jurisdiction?

MR. EDWIN F. WOODLE (Ohio): I can perhaps offer some experience in the City of Cleveland, Cuyahoga County, where the police departments have repeatedly had it pointed out to them by the two local bar associations that it is necessary to bring an accused before a magistrate in not more than 48 hours, and preferably within 24 hours. Notwithstanding this, it has been the practice of our police department in many instances to hold prisoners incommunicado for as long as 72 or 96 hours, supposedly for the purpose of investigation solely.

It has been the practice to require in many instances the filing of an application for a writ of habeas corpus, following which, within not more than four or five hours, the prisoner is either released or charged.

The question of bail, of course, at this stage has not appeared in the problem. When a prisoner is charged, bail is immediately fixed, and usually, in cases where bail is fixed and a prisoner has been kept for 48 or 72 hours, it is considered by the court that the problem is serious enough so that bail should be substantial.

The question as to the background of the prisoner or his previous record is seldom gone into, in cases of this kind, and this is an important thing. Our bar associations have repeatedly sought the cooperation of the police department;

they have been repeatedly promised it, but don't get it. I don't know whether other cities have the same problem.

PROF. REMINGTON: Anyone else have a comment?

I take it one way to put this question is what is the relationship between bail and the police desire to continue the in-custody interrogation. I take it that under writ of habeas corpus in Michigan, bail would be set without a determination that the detention was proper, and that issue would be deferred, and the person put on bail prior to that time. Judge Souris' specific question was, is there in the Midwest, represented by this group, any other experience of that sort? I take it in Cleveland, the question of bail is not considered. The question of continuation of custody is considered, but the question of bail is not considered until there is a decision by the prosecutor to charge.

MR. WOODLE: Bail can't be fixed until there is a charge.

JUDGE SOURIS: I might add that in our new rule, we have specifically provided that the determination of legality of arrest and commitment upon petition for a writ of habeas corpus is to be made as of the time of arrest, thereby removing the objective for delay from the standpoint of the arresting authorities. So whatever is developed, subsequent to the time of arrest, in accordance with our rule, is not available for use in justification for the initial arrest and detention.

PROF. REMINGTON: Mr. Bowman has a comment on this.

PROF. BOWMAN: I think my comment may be an accommodation of the Judge's question in regard to experience, and the gentleman from Cleveland. When we made a study about four years ago in regard to practices in Chicago on bail, we found that many times the only way one could get the accused before a magistrate, to set bail, because of holding for investigation and refusing to book him or charge him, was to get a writ. Then the magistrate would have to charge him, and he would fix bail.

This was a method that the lawyers used to get the accused before the magistrate to fix bail, and this was about the only way they could do it when the police were moving him from one precinct station to another. Otherwise, he might be held for 72, 96, or 120 hours or more without being charged and, of course, without coming before a magistrate.

I don't know if the police are still doing this now, but this was true about four years ago when we studied the situation.

MR. MEAD BAILEY (South Dakota): Where that is true, you are assuming the man has a lawyer. What if he is an indigent? There is a great group of lost citizens.

JUDGE AUGUSTINE BOWE (Chicago): This is true, and I suspect if he doesn't have a lawyer, he doesn't get before the magistrate until the police get ready to bring him before the magistrate.

MR. BAILEY: Isn't that the crux of the problem here?

PROF. BOWMAN: I think so, Mr. Bailey. I think this is one of the things that we are attacking, one of the things that we have to cure.

MR. SILVERSTEIN: May I say something? As part of the American Bar Foundation survey, we have inquired of judges and prosecutors when they think, under an ideal system, that counsel ought first to be provided. One of the interesting and, I think, most significant findings in the report is a very large proportion of judges and prosecutors in some states, more prosecutors than judges, feel that under an ideal system counsel should be provided at an early stage, at or near the first appearance for the preliminary hearing. Partly as a result of our study, there have already been changes in Virginia and one or two other states.

MR. BAILEY: Well, in South Dakota our Supreme Court has said you are not entitled to a lawyer at a preliminary hearing. I think they are absolutely wrong because that is when a fellow needs a friend, and our judges throughout the State disagree, because by agreement and informal action, they appoint a lawyer. They make sure the man has a lawyer, even though he doesn't get paid.

WEST GROUP

MR. NORMAN GREEN (Tucson): Throughout the West, not using a grand jury but using an information instead, all felony cases are started by a complaint sworn to by the justice of the peace. Under recent constitutional rulings, once it is filed it is a very short time until the defendant is brought before the justice of the peace.

Therefore, we would really have no time for any interview; bail has to be set at that particular time. Now the problem is, as one of the speakers this morning mentioned, that it is a bad situation when those who cannot make bail are not interviewed until after the initial bail hearing to see whether they should be given pre-trial release.

Under our setup it would be necessary to do that because by the time we could get around to making any type of an interview, if the person could make his bail, he would be out already, so we have a situation in which we could interview only those people who could not make bail.

PROF. SOLOMON: May I respond to that. The New York procedure is not different from your own. That is to say, the man is arraigned in the Felony Court. That is the initial arraignment. It is on a written complaint, though it is later processed through the grand jury or on information, if it is a misdemeanor.

He is arraigned on a written complaint. It is at that point that he comes to the attention of the court: and at that point this efficient, quick interview is undertaken in order to fix bail. Essentially, it is at the arraignment on the complaint that presents the occasion for the interview and determination as to bail.

JUDGE ZIRPOLI: One moment, if I may. Is the interview before, or at that point, or immediately thereafter? I do not quite follow you on "at that point."

PROF. SOLOMON: Well, Mr. Baron can explain precisely the timing.

MR. BARON: Most of the defendants that we have interviewed have been arrested the night before. The following morning, usually between the hours of 9 and 10:30 A.M. they are brought from the police precincts, where they have been kept overnight, to the detention pens, which lie near the courts.

Usually when the defendant is brought in, he is given over to the Department of Correction officer. He is put into the pen. The arresting officer then goes to the complaint room where he has the complaint drawn up, with his complainant there with him. Then he comes back to the court, gives the written complaint to the court clerk, goes down and gets his prisoner, and brings him up for arraignment.

This process of having the complaint drawn, getting back to court, and waiting for the case to be called, usually takes approximately two to three hours. It is during this period that we interview the defendant and verify the information that he has given, so that we can get to court prepared to present the recommendation when the case is called.

JUDGE ZIRPOLI: And the recommendation is made, actually, before the arraignment?

MR. BARON: At the time of the arraignment.

JUDGE ZIRPOLI: I am talking about the timing of the arraignment. You arraign the man. Even if it is a matter of seconds, is the recommendation made before or after?

MR. BARON: At the time the case is called.

JUDGE ZIRPOLI: I should think, in my own analysis, that the first thing a man ought to have decided before he is even arraigned is the question of his bail.

PROF. SOLOMON: May I respond in this sense that the New York procedure, as Mr. Baron has outlined it, affords a matter of hours in which, in effect, the defendant is sitting around.

JUDGE HALL: He is arrested.

JUDGE ZIRPOLI: I understand.

PROF. SOLOMON: He has been arrested, but the complaint has not been handed to the judge; it is being prepared and typed but not yet before the court. It is during that time that the interview takes place.

When the complaint is read and he is then, at that moment, I suppose, technically arraigned, a moment thereafter the recommendation, if any, is made. It is using that time which is otherwise dead time for this constructive purpose.

DEAN KING (Colorado): I have seen the Manhattan Project in operation, and I am not sure that everyone gets the picture. What you have just said, I think, described it very, very well. The morning I was there I happened to observe a girl who was an NYU student. They are paid $80 a week or something like that. They cannot work at night, because that is when they go to school. They have the record, if the person has been arrested before. They may look at that sheet

and drop the case on the face of it because they feel that they cannot make a recommendation. For example, if the person has no address, has 21 previous arrests, no job, they put that one aside.

At least, when I was there, it was a very fast operation. They interview the person through the bars. They get the dope. They then send it upstairs where a student is standing in front of a desk with street address telephone directories of all the Boroughs and a set of telephones, and they start checking the data on home, employer, family, length of residence, and everything like that. And within 30 minutes, or so, they will be ready to report.

MRS. WALD: I want to ask Mr. Wahl who is running the probation project for the Federal court in the Northern District of California how they are going about gathering the necessary information in the short time available.

MR. WAHL: That, of course, is the problem. Speed is of the essence. We make an investigation at the request of any defendant who wants it. No offense is excluded. But the commissioner also may request an investigation, even if the defendant does not.

It takes about one hour and 12 minutes, that is the mean time to do an investigation on the basis of our experience at this time. If that can be done prior to the appearance before the commissioner, it is heard at that time. If not, the commissioner usually continues the case until the investigation is done. He does not leave the place of detention. So this has worked out.

MR. SMITH: I would like to return to the question of timing. It seems to me that this is particularly important in misdemeanor cases, the great bulk of cases.

I would like to ask, first, whether the probation office in New York proposes to make these interviews on weekends and at night. Or do they propose to follow a 9 to 5 procedure also?

MR. BARON: They have started this way.

MR. SMITH: I see. Are there not a vast bulk of cases in misdemeanor arrests where the person arrested is deserving of release but who is going to remain in jail over the night or over the weekend? Under California procedures, we have

a bail schedule procedure whereby the jailer or the clerk can receive bail or the bond. The arrested person is automatically released, if he has the money, by putting up the bond with the jailer at night and on the weekend.

b. Confidentiality of Investigation

SOUTH GROUP

CHARLES WALKER (Charleston, W. Va.): I am interested in whether or not you ever had an attorney challenge the interview form that has been used in these projects because the information was obtained from the defendant at a time when he did not have counsel present, or an opportunity to consult counsel.

On the form I notice it asks the man or woman if they are on drugs, it asks how many times arrested, it asks what convictions they have had, and what for. I am a prosecutor, but if I were a defense attorney, I would not want my client answering those questions.

MR. MCCARTHY: Each of these forms involves willingness and understanding on the part of the defendant as to what is being done. Nobody, to my knowledge, in our project, or the New York project, discusses in any way whatsoever any aspect of the crime. All we are dealing with is name, address, friends, relatives, and employment. I think the defense attorney would never have to make such a claim because each of the interviewers is instructed, should any discussion of the alleged offense begin, to stop it, and if he cannot, he is to walk away.

This has been strictly maintained. The attorneys are aware of it, and we have never had any difficulty.

MR. WALKER: I realize that ordinarily that would be true in many types of cases. But at the same time the fact that you might caution a man being interviewed not to say anything about the crime or to make any statement that might furnish evidence to be used against him, still you are putting him in the position of being without counsel, when responding to questions there on the interview form.

This would be, I think, of some concern to any prosecutor who wanted to try to put this into effect, particularly where no counsel is present.

You feel the form does not raise a problem like that?

MR. MCCARTHY: I don't think so because it is so general, dealing only with matters such as address, length of time in this particular location, employment, and so forth.

FROM THE FLOOR: We have had one attorney advise his client not to participate in the project. This was simply because the attorney felt it would not aid his client by having someone call his employer.

MR. MCCARTHY: The United States Attorney's office has agreed with us informally that they would make no efforts to obtain information about the offense from the interviewer by subpoena or anything else. It is kind of a half-way agreement, because it depends on the defense counsel as well.

MIDWEST GROUP

JUDGE WILLIAM MERLIN (Minnesota): I wonder if any of the projects has set down in writing any guidelines for pretrial release on recognizance, any guidelines in regard to avoiding the problem of self-incrimination.

MR. REMINGTON: I think we need a volunteer for this.

MR. JOHNSTON: This is a difficult policy question which, frankly, we have not yet met. It is one of the top things on our agenda. It is something we are going to have to get together with the judges, the County Attorney and the bar association to try to work out.

JUDGE SOURIS: What do you tell the defendant when you request his permission to interview him? Do you advise him of the use and the limitations upon the use of the information that you may extract?

MR. JOHNSTON: We make it clear what the area of questions are going to be, what the criteria are, and then we tell him we will make a written recommendation to the judge.

MR. REARDON: My question: In New York, is the defendant's statement protected from pre-trial discovery?

Second, may it be used by the state's attorney for the purpose of impeachment in the event the defendant testifies?

MR. DELANEY: Frank Hogan, the District Attorney of New York City, has informally made a commitment that he will never subpoena any of our information, either the questionnaire or a person to whom the information was given.

You will notice that there is nothing on the form about the facts of the crime. It goes only to identity and to family roots, to employment, and so on.

Now that might be important on impeachment, conceivably, but the informal privilege that the District Attorney of New York County has extended to the project has been followed.

c. Disclosure of Unfavorable Information to the Judge

WEST GROUP

MR. FRANCIS WHELAN (United States Attorney, Los Angeles): I would like to ask Mr. Baron whether Vera brings forward only the things that might help the defendant to be released, and does not bring anything forward that would be detrimental. I have understood that the purpose of the program was to bring forward the facts for the benefit of the court.

MR. BARON: We will not present information to a judge where we are not prepared to recommend his release. When we are prepared to recommend his pretrial release, then we will present whatever verified information we have. We will not cover up anything. In other words, if we find that the fellow has no home and we are not prepared to recommend his release, we will not submit a report of this to the judge.

JUDGE HALL: No report?

MR. BARON: That is right. We just do not make any recommendation.

JUDGE HALL: When you do submit a report, you give the bad with the good?

MR. BARON: Right, whatever the verified information is.

MR. SULLIVAN (Oregon): Where does the prosecutor's office fit in? Do you screen the defendants through the prosecutor's office? Are you independent of the prosecutor's office, or do you seek a recommendation from them?

DEAN KING: I might be able to answer that. Is this not true, Mr. Baron, that at the time the NYU student makes his recommendation to the court, virtually always the prosecuting attorney is there?

MR. BARON: Right.

DEAN KING: And someone from Legal Aid representing the defendant, so that there are three persons before the judge, a representative of the District Attorney's office, the student making the recommendation, and someone from Legal Aid.

MR. SULLIVAN: Well, that raises the question: Do you often meet the adversary situation where the prosecutor's office opposes your recommendation?

MR. BARON: Definitely. We noted, though, in the beginning of the project that the district attorneys objected to about 50 per cent of the cases in which we recommended release.

Now there is only about a 20 per cent opposition. Of course, whether the court will go along with the district attorney depends on the particular judge. Some judges are guided solely by the district attorney. If he objects, they will not grant pretrial release; some use their own discretion, as they should, and make their own decisions, based on both objection and recommendation.

PROF. SOLOMON: Could I add one other point to what Mr. Baron said. If I understand the project, where a recommendation is made, all of the data on which the recommendation has been made is given to the District Attorney so that he and the court and counsel have the benefit of the information which the inquiring staff has gathered and on which they have based the recommendation, and they present it to the court for its approval.

So that it is not simply a recommendation without the factual foundation disclosed. It is the inquiry disclosed, the data gathered, and the basis on which the recommendation is made. The District Attorney and the court are apprised of the criteria, the point system by which the data gathered is appraised, and on which the recommendation is made.

I think it is quite important that a full disclosure is made where a recommendation is made so that the judge can act in his discretion on that data.

PROFESSOR JEROME SKOLNICK (University of California, Berkeley): I have two questions along this line. One is: my understanding is that adverse information relating to the defendant is not presented to the judge, if the defendant is not recommended for bail. Is that correct?

One of the things that troubles me a little bit is this: Suppose this system were to work for everybody irrespective of whether they could afford bail, or not, that is, not only for the indigent defendant but for all defendants.

Many cases, of course, are tried without juries and may be tried before the same judge who is doing the arraigning. Are you not, in effect, suggesting to the judge, before the trial of the defendant, that there is something wrong with this man's character, when he is not being recommended for bail?

MR. BARON: This is a problem that we are really trying to study now. It is possible that the implication is there. But judges are aware of the fact that, for instance, the defendant might be a perfectly good risk, and we might have been prepared to recommend him, except for the fact that we could not have verified the information on which to base our recommendation.

In other words, the defendant might say he lives with his wife and three children or that he works at a certain place, and there might be every reason to believe that this is true, but because he has not given us any references or enough people to contact, we are unable to verify this information.

Therefore, no recommendation is made. The judge can presume the reason why no recommendation is being made. It might be that we do not handle this type of case. The implication could go either way. The judges do not really know the reason why we have not made a recommendation.

PROF. SOLOMON: It is an ambiguous inference.

MR. BARON: This is what we are going to study in the next three years to see what happened in these cases where we did not recommend release, to see how the judges set bail in those particular instances.

MR. JAMES COONEY: I am an attorney in Los Angeles. In relation to the question of whether the District Attorney is advised about the defendant we are trying to release, the District Attorney has a make sheet. It comes from Los Angeles, it comes from our California Intelligence Agency, which is the Record Bureau there, and it has everything that he wants in cases ranging from a parking ticket to a capital crime.

And in California you can arrest a fellow, you can hold him for 8 hours, two court days, before he must be taken before a magistrate or the case must be dismissed. And by that time they have one, two, three or four pages of information.

If the recommendation comes from the attorney for the defense, public defender, whatever it is, the judge then exercises his judicial independence to make the determination.

So I do not think it is incumbent upon the Vera Foundation, or whoever is making the recommendation, to put the bad things in as well as the good. He is, in effect, trying to do something for the defendant, because the District Attorney has presented everything bad against this fellow the very moment he is arraigned.

JUDGE HOFFMAN (Oakland): I am the arraigning judge for felonies. We have this experience which might be helpful. The complaint is filed and the man is brought before the judge the following morning. The public defender is in the court every morning. The accused are asked if they have an attorney. Ninety per cent of them choose the public defender as their attorney. He then asks at that time for a motion to reduce bail or for release on personal recognizance. He then makes a statement based on information which he has obtained from the defendant that morning, and sometimes he has to put it over until the following morning, or even later in the day, to get the information on the defendant's background and family situation.

I am then given the "rap" sheet which gives the prior violations. I then decide that day the motion to reduce bail. Before the day is out, I go to the District Attorney's office

with a list of the motions made for reduction in bail, and discuss it from their standpoint.

They very rarely oppose except in certain cases such as narcotics. Before the day is up, the motion to reduce bail is decided. Now I realize that a program of this sort will facilitate the gathering of sufficient information. But it seems to me, from the standpoint of the judge, if it is going to be effective, he has to have all the facts, rather than just the favorable facts as is done in the Vera Program. Otherwise, it seems to me from the standpoint of the judge it is pointless, if he is only given the recommendation in a case they determine is eligible for r.o.r.

PROF. SOLOMON: May I say that as I visualize these numerous experiments, one might get a distortion of the picture because what has been described has not been the total picture. What these pre-release programs have done is to inject the results of an inquiry made by a source that has not heretofore been available to the court. Information is made available which has been given by the defendant and which has been verified by this inquiring staff. It is that information which is the new information which is being presented to the court.

From my own experience as a prosecutor, we had information from a rap sheet, from the cop, from the defendant, but we did not know how much of it was true from what the paper record showed. It is that additional information, I take it, which is being presented to the court, and it is that which these projects have as their constructive feature, I gather.

JUDGE HOFFMAN: If that is so, are not the law students who are working on this program themselves making the choice from the information they have gathered which they have verified, as to who is entitled to reduction of bail or release on personal recognizance? That, it seems to me, is the ultimate responsibility of the judge.

PROF. SOLOMON: I understand that the law student is not taking the jurisdiction or discretion away from the judge. He is simply reporting to the judge, in effect, that he had made phone calls to the wife, the relatives, the employer, and so forth, who have said that the man is such and such,

and that what he told you is true. That is what he is reporting. I do not think that the suggestion is that by a recommendation they are disposing of the case.

JUDGE HOFFMAN: I realize that the information such a staff will be able to produce would be much more helpful to the judge than the way it is now, which is to some extent guesswork.

MR. IRVING REICHERT (San Francisco): I have a question which I sense not only bothers me but bothers a few other people here: Let us suppose that Vera or the fact-finding agency in some other jurisdiction interviews the man. On the basis of what they learned, or merely because the man did not tell them the truth, they make no recommendation. The man appears in court. The fact-finding representative is there in the court at the time the man is called before the judge. The man asks to be released on his own recognizance. Or perhaps his counsel does: and since counsel frequently has been called in at the last minute, he will make the representation to the court that the man has made to him.

Now, in this case, the court is aware of the fact that Vera has made no favorable recommendation. The court will turn to the representative and say, "Why was no recommendation made in this case?" Or, again, what if the representative hears erroneous information being given, does he remain mute? If the court asks him a question, does he answer? What does he do?

PROF. SOLOMON: I should think, as Mr. Baron earlier indicated, this is one of the unresolved problems as to what inference you draw and what attitude ought the Vera Foundation person or his equivalent show in the court when he cannot make a recommendation?

MR. REICHERT: Why should this be unresolved? As I understand it, all of this is fact-finding information made for the purpose of enlightening the court. Why should not a full disclosure be made to whoever is gathering the facts, so that the court will have more confidence in the person who is doing this work?

PROF. SOLOMON: I was not suggesting that it ought not to be disclosed. I was simply indicating that it is a problem area.

FROM THE FLOOR: I would like to follow this up. I would like to pose the question just a little bit differently. When the fact-finder or probation officer does not make a recommendation, and follows the policy of withholding information from the court, isn't the law student or the fact-finder then taking over a judicial function? And isn't this an important innovation in our system?

PROF. SOLOMON: I would like to call on Mr. Jesse from the Des Moines Project.

MR. JESSE: First of all, I do not see how the law student can be taking over the judicial function when he fails to make a recommendation when, if he were not present, it would go according to the prior process. So the fact that he does not make a recommendation, or makes a recommendation, has nothing to do with judicial discretion, because the court had a system prior to this.

We have run into the problem. We started putting on our sheets that we handed to the judge, where we made no recommendation, a statement explaining why. For example, in our particular project, we operate only in Polk County, and so those persons who do not have a Polk County address are excluded. Certainly if this fact is placed on the sheet, there can be no derogatory inference drawn from the fact that he does not live in Polk County. It is just that our project cannot handle it.

Now the judge sitting on the criminal bench is requiring us to show him the entire summary sheet, so that he will have the information before him. But there is some question in our mind whether or not we should do this because the defendant believes that he is cooperating with us. If we turn in a recommendation or turn in a sheet with information on it that might hurt him, then I think we might be breaching a faith that he has.

JUDGE DANAHER: Perhaps I can answer readily two or three different questions that I have heard put here by various of our colleagues. Right in front of me are our figures for the past three months. Recommendations were made in 94 cases. To demonstrate that the recommending entity did not take over the function of the trial judge, 30 recommendations were denied, 54 were released on personal bond and 10 resulted in reduced bond.

Now coming to those situations in which no recommendations were made, there were factors that I have not heard mentioned here at all, factors which, indeed, I think the recommending entity should not go into. Number one, we have had some 16 cases where the arrests included people who were wanted in other jurisdictions, and as to whom a detainer had either been lodged in this jurisdiction, or the teletype had told us they were wanted elsewhere, so there was no recommendation made by the project.

Number two, we always operate through an attorney. Our entity does not appear as attorney for the accused. He represents only the project in terms of its possible assistance to the court. Therefore, the legal aid counsel or the man's own attorney has in front of him the information. The United States Attorney is given the same information, namely, that the following factors have been checked, we have verified this information this very day, and we are prepared to make a recommendation in this case. And it is through the attorney that the court is advised officially that these are the facts.

Now one other observation. On this matter of making no recommendation or keeping quiet as to why no recommendation is made. It can easily be, and often is, considering the element with which you are dealing, that the fellow is indeed a floater who has been in the jurisdiction of the District of Columbia 24 hours.

There are yet other situations. Here's a case that was in the paper only yesterday where a man was sentenced for robbery in Virginia in 1949, three to five. He was released on parole. He was convicted in the District of Columbia in 1952 and he got 9 years. He just got out of Lorton Reformatory on April 27, and he was involved, again, on Tuesday of this week for robbery, and he had $5,000 in his pocket. He had just come from the savings and loan place where the holdup had occurred. Now that, obviously, is a case where our people have no interest whatever in going forward.

What we are interested in doing is acquainting the court with feasible, proper candidates for release on their own recognizance, and that stems basically from community ties.

4. Relationship Between Pretrial Release and Assignment of Counsel

EAST GROUP

MR. LAWRENCE SPEISER: I am from the American Civil Liberties Union in Washington.

Has there been any study about the relationship of granting counsel to indigents, based on their getting out on bail? Mr. Sturz mentioned the situation of individuals in jail who probably had the funds to get out on bail. There is a "Hobson's Choice" here, which often exists for indigent defendants, that if they do get out on bail, they cut themselves out from being provided counsel under a public defender's system, or whatever else is available.

MODERATOR DASH: Mr. Segal, of the Defender Project of Philadelphia, might respond to your question on the availability of counsel to those who get out on their own recognizance, that is, whether they have to make the choice, either bail or counsel.

MR. SEGAL: The experience in New York, as I understand it, has been that defendants who do not have to pay the bondsman's premium and are released on their own recognizance are still entitled to the services of Legal Aid in New York, if they otherwise cannot afford counsel. Nevertheless, there is a tendency on the part of defendants to obtain private counsel. That is, it appears there is a transference of the funds that would have been used for bail to the fees that are applicable to private counsel.

It seems to me that this is a strong argument that should not be under-evaluated by any of us who are interested in this kind of a program. The continuing support of the legal profession is probably more desirable than the continuing support of the bondsman's profession.

I think this is an encouraging sign. I think that it indicates that defendants who are released upon their own recognizance do not look upon this as another opportunity for freeloading on the community. I feel it is a valuable result that we have learned from the New York situation that as many persons who possibly can, switch to private counsel after they receive

their release on their own recognizance. It is not a great number, but sufficient to show that the additional available funds are meaningful.

MODERATOR DASH: I am going to ask Mr. Flatow if he will pick up the question and respond to what was an interesting challenge between two professions. Mr. Flatow, being a lawyer, is in an enviable position.

MR. FLATOW: Well, first of all, the greatest business in the City of New York is in the Criminal Court. This court deals with misdemeanors. The tremendous majority of our bonds written there are written between $500 and $1,000. The normal premium for a $500 bond would be $25. I know very few lawyers who would go into the Criminal Court of New York City for $25, unless they were only practicing 6 months to a year and wanted the court experience. Most attorneys, even where a plea is involved, would have to make three appearances: They would have to make an appearance for arraignment, on the plea, and possibly for sentencing.

An attorney's fee would run considerably higher than a premium. Much is said about the high cost of bail, yet the average bond written is very small and the premiums are regulated by the New York State Insurance Department.

Getting back to the $500 bond, with a $25 premium, this man would perhaps put up a bank book with, for argument sake, $135 or $140. This would be deposited with the surety company, and the company would in turn issue a collateral receipt. Well, $135 sounds more like a legal fee than $25.

Upon termination of a case, what normally happens in situations which I have handled on behalf of the company, the defendant would assign the receipt to his attorney, and his attorney would come to the office of the surety company and present the receipt. On most occasions he would do so with the defendant, and present a certificate of disposition.

By this means the collateral could be returned to the attorney, and he would be compensated for his case. Insofar as the indigent defendant who cannot raise the premium, or the attorney's fees, I say it would be easier in many instances to raise the premium than counsel's fees.

In a larger majority of these $500 misdemeanor cases, we do take assignments of collateral and the attorney is compensated for this. So, you just can't make a generalization that people who are out on bail cannot afford attorneys because of notions they squander their money.

They have spent their money on freedom. Actually, $25 worth of freedom is considerably less than they would have to pay for an attorney.

MR. ANTHONY MARRA (Legal Aid Society, New York): It is not true, in our experience, that he ends up with a private attorney. Now, as in all walks of life, there are honorable bondsmen and there are others who are kind of shady. In some instances where a defendant is bailed out it is a package deal with the bond and the fee lumped together.

It has been our experience where the defendant is released on personal recognizance, in about 65 or 70 per cent of the cases they stay with Legal Aid because they have no resources to pay for a private attorney.

The same thing goes for the man who may get out on the nominal bail of $500 or $1,000. Mr. Flatow has stated that over the years the premiums have remained static. The premium for $1,000 is five per cent, $50.00. I am quite sure that an individual who cannot raise $50.00 cannot afford an attorney in about 9 cases out of 10.

For these reasons I would disagree with Mr. Segal's point.

MODERATOR DASH: A short response from Mr. Segal.

MR. SEGAL: I don't disagree at all with what Chick Marra said. All I was saying is that the figures which Herb Sturz has gathered, which I have talked about and done some work on my own, indicate a tendency—even your figure of 65 per cent indicates that about 35 per cent of the men released upon their own recognizance get their own counsel. I didn't know it was that high.

This is a desirable tendency. I might also point out that in Philadelphia we have a limited use of release on recognizance. That is, where a man has been in prison for some time and his case has not been tried for reasons of either court congestion, the inability of the Commonwealth to produce a witness, and the like. The courts will take recognition of the fact that in view of the Commonwealth's inability to proceed to trial, the man should be released on his own bond. In those situations, if he has been represented by the Defend-

er's Office, the court will frequently direct, as the condition of the release on his own recognizance, that the Defender Office stay in the case.

Our own experience is that the defendants, once they get out, make every attempt to get their own counsel and they do in a substantial number of cases. There is a desire on the part of most defendants to try and establish a personal relationship with a single attorney; they feel sometimes this is lacking in the services of Legal Aid or Defender Associations, or generally they have heard of one attorney they desire to have working in their own behalf.

So, I think the experience really is that once a man gets out, especially if he hasn't used up his assets for bail, he tends to seek out the services of private counsel.

MODERATOR DASH: Jim Crumlish is District Attorney for Philadelphia.

MR. CRUMLISH: First of all, I disagree with you, Mr. Segal. Those defendants who are in prison awaiting trial for the most part do not obtain private counsel. Most of them are represented by your Association.

Secondly, if you are so confident that defendants once out on bail would get private counsel, why does your Association endeavor to obtain additional funds to represent bail defendants?

MR. SEGAL: Only about a third get private counsel. That still means about two-thirds are not represented.

Last year, we did a study and found that about 25 per cent of all of the persons who were out on bail finally appeared in court without counsel. So, I think, there is no question about the need for those funds to represent the others.

I am not saying that the counsel problem is solved by simply releasing a man on his own recognizance, but it does cut down on the load of cases given to the Defenders, or the Legal Aid agencies. And it does increase the amount of work available for private counsel. This is an important point. All of us should be concerned with the continuing role of the private bar in the representation of criminal cases.

MR. CRUMLISH: You will wind up in the same situation if you represent bail defendants as you are now in representing jail defendants. The great favor which you intend to do for

the criminal bar, I think, will not be as beneficial as you would like us to believe.

MR. MILONE: I would like to comment. I am Lou Milone, Director of Probation for Nassau County.

We have a system going in Nassau County. In our County we have legal aid assigned by the judges for misdemeanor matters. We have a Public Defender system of three competent lawyers for felony cases. Out of 103 cases recommended to the judiciary on multi-misdemeanors and felonies from July of 1963 to about May 12 of this year, 23 of that 103 were interviewed for pre-trial release investigation, which ascertained inability to provide bail and inability to provide counsel. In all of the 23 cases, the defendants were not only unable to raise bail, but they were unable to furnish fees for counsel.

There is one other point I want to make. Those 23 people were eventually acquitted or dismissed. The time they would have spent in jail comes to 659 days.

JUDGE RYAN: I am Judge of the Domestic Relations Court of the General Sessions Court of Washington, D. C.

I want to make a point. I don't think anybody has really answered Larry Speiser's question. What is the connection, really, between a man being on personal recognizance as opposed to being on bail and his right to have legal aid represent him?

MODERATOR DASH: The question, which is relevant in many jurisdictions is that legal aid or defender agencies do not, either by decisions of their own board, or by general agreement, take defendants who may be indigent, but who have made bail, as opposed to those who did not make bail and stay in prison.

JUDGE CONFORD (Appellate Division, Superior Court of New Jersey): We have an assigned counsel system. I must, unfortunately, report that there is a correlation between making bail and the judicial determination of whether a man should have the assignment of counsel as an indigent. If a man has been able to make bail there is a bias against the determination of indigency for purposes of assignment of counsel.

I think that is unfortunate; it is wrong. The fact that the man has been able to produce bail may simply be a result

of pressures on family, friends, and relatives, in no way derogating from the fact that the man is indigent and that he should have assigned counsel.

I think there is a very important relationship between these matters. I think that that relationship is underscored by the title of this conference today. It is a conference on bail and criminal justice. Both factors are closely interrelated.

They cannot be separated. An integrated approach to the problem of providing adequate representation for the indigent, as well as his liberty prior to his adjudication, is important, and, in my judgment, should be pursued.

MODERATOR DASH: We are moving into the issue of the right to counsel, but it does bear on the bail question. Professor Hall?

PROF. HALL: The Massachusetts Defenders' Committee, a public body, has had until recently a hard and fast rule that they would not represent anyone who is able to make bail, whatever it might be for his offense.

I am happy to report that at their last meeting they decided that that rule was inadequate. Now the question of whether to represent the man will be made independently of the question of whether he was able to make bail.

MODERATOR DASH: I think we will be overlooking something if we did not recognize that much of the pressure in many communities for not providing legal aid or counsel to the prisoner who is able to make bail comes from the members of the bar associations who represent defendants in criminal cases. They believe that expansion of legal aid, or public defender, into this area may well eke into their own livelihood. This question has been raised in many meetings which I have attended.

MR. ARNOLD TREBACH (National Defender Project): I just wanted to comment that in going around the country I have found this general situation to prevail: In the majority of the communities the general rule seems to be that if a man makes bail, he cannot get assigned counsel, or take advantage of the public defender system in that community. We have found, as is the case in Massachusetts, that this matter is being reconsidered. I would suggest, therefore, that perhaps one of the things that might come out of this Conference, as

a side benefit, is a recommendation that making bail does not render a defendant ineligible for the assignment of counsel, or for the services of the public defender.

MR. EDWARD CARR (Legal Aid Society, New York): I just want to say on this general subject that our own policy is that bail in nominal amounts doesn't bar our representation of a defendant. Bail in substantial amounts, say $1,500, $2,000, $2,500, with the premium and the collateral, is a factor to be taken into consideration as far as we are concerned.

JUDGE THOMAS MADDEN (Chief Judge, U. S. District Court, New Jersey): I just want to keep the record straight as far as New Jersey is concerned. All judges of our court are in agreement that if a defendant has spent his last $500, even for bail, he is then indigent. Under the law, as we find it, he must receive the assistance of assigned counsel.

MR. FORRESTER: My name is Gordon Forrester, from the District of Columbia. I would like to make one comment on this situation from my own experience as a law clerk to a District Court judge here in Washington. All that is required to get an appointed counsel in the District of Columbia is for the defendant to sign a pauper's oath. Once this is signed, counsel is automatically appointed. Sometimes it seems a little bit ridiculous, when you look in the record and see that the defendant is out on a $5,000 bond, and at the same time he is considered indigent.

Still, no question is raised. He is given appointed counsel, and that ends it. I think maybe, at least, some judges might be a little happier to find out he is out on his personal recognizance, if he is asking to be appointed counsel.

MR. ROCHELLE: James Rochelle, Bondsman, representing the Cosmopolitan Mutual Insurance Company of New York.

I would like to make several observations rather than ask a question. One, that a man on bail, appearing for an arraignment in court, requesting Legal Aid, is generally advised by the judge that since he is out on bail and could raise the premium for the bondsman puts him in the category where he should be forced, one way or the other, to retain private counsel. Generally his case will be adjourned several times until the defendant has appeared four or five times, at a possible loss of income and his job, until it finally becomes

apparent to the judge that a $25 or $50 premium does not necessarily mean he is financially capable of retaining his own attorney. Then, possibly, a court-assigned attorney is appointed.

Also, it has been my observation through our agents, that in many instances a person putting up collateral, or pledging property, comes into court and claims that he cannot afford to hire an attorney. He is then assigned legal aid or a court-assigned attorney. He is represented free.

Where do you differentiate, where do you sit down and discuss whether this man is indigent because he paid $50 or $25, or because he sat in jail?

The other observation I would like to make is that many people appearing in court, being advised of the fact that being out on bail they would have to retain their own attorney, refuse to go out on bail because they know they cannot afford an attorney's fee, which will run in the hundreds of dollars as opposed to a $25 or a $50 bail bond premium.

These are my observations on why so many people remain in jail rather than be out on bail.

5. Bail Jumping Statutes as Deterrents

EAST GROUP

MODERATOR DASH: Attorney General Sills, it might be of interest to this group, since you have in New Jersey a state-wide experiment with legislation in this area, if you would briefly tell us what you are doing on bail in New Jersey.

MR. SILLS: I became interested in this when I read about Attorney General Kennedy's Committee on Poverty and the Administration of Federal Criminal Justice. About the same time I received a report from Passaic County that pointed out that many people were spending an inordinate amount of time in jail.

When I went to the National Association of Attorneys General in Seattle in July of last year, I presented a resolution, which was adopted by the Attorneys General, to the effect that we look into this matter and try to do something about it.

I then called upon the 21 county prosecutors—each county in New Jersey has a prosecutor as the chief law enforcement officer of that county—to give me statistics concerning people who were in jail awaiting trial.

We took the statistics for September, October, and November. We gave them to the Vera Foundation, and perhaps not to coin a new word, but to use one, they were "Verafied" and analyzed, and are contained in the report which you have now.

Based upon the report, and I don't think the report shows anything different from what others have been talking about in their parts of the country, I made some recommendations to our State Supreme Court. Since the Supreme Court of our state is the rule-making body, I don't believe we need any legislation for the rules. The rules do provide today, by way of implication, that accused persons can get out on recognizance. I have asked that we specifically set forth that one can be bailed on his personal recognizance. I have also asked that the court do it by order so that the failure of the defendant to report could be a contempt of court. I have also asked that the probation departments join in and do the review which the Vera Foundation is doing in New York. I have had some informal reports from probation officers to the effect that while they are burdened, they don't believe this will be a double burden, since a lot of the information they would obtain they would need in any event later on in the proceedings.

The one piece of legislation which I have advocated, and which has passed the Senate but not the Assembly, although I am hopeful that it will pass the Assembly either on June 22, or failing that, November 19, when they reconvene, would make bail jumping a crime.

We don't have that in New Jersey today. The legislation would say that you would be guilty of a crime similar to the crime from which you jumped. We don't have felonies and misdemeanors in New Jersey; we have high misdemeanors, and misdemeanors, and disorderly persons offenses. If one were to jump from one of those three categories, he would be considered guilty of a crime whatever the case may be.

MODERATOR DASH: Mr. Moore of Philadelphia.

MR. CECIL MOORE: I would like to address my question to the gentleman from New Jersey. I think you said that you wanted to make bail jumping a crime. What would happen to the fellow who is found not guilty of the original offense? Would he be automatically held not guilty of the bail jumping?

MR. SILLS: No.

MR. MOORE: Then he would be penalized doubly.

MR. SILLS: He didn't have to jump bail.

MR. MOORE: He might not have had to have been arrested.

MR. SILLS: That is true, too, but if you are going to work on the problem of letting people out so that they can prepare their defenses and prevent their families from going on welfare, then you have got to have some kind of deterrent. You can't just let them go free on the assumption that perhaps they might not have been guilty, the presumption to the contrary notwithstanding. I think there has got to be some kind of deterrent.

VOICE: If a person is held in contempt, and the time for his trial is past, or at least the case is continued, would he be readmitted to bail?

MR. SILLS: I imagine that would be at the discretion of the court. The idea of having the contempt procedure is so that you would not have to charge the defendant with a crime in every case.

MR. AARON KOHN (New Orleans): Would it not be more practical and equitable for the price tag to be totally removed for release after arrest pending disposition of a charge?

Would it not, perhaps, be more equitable to impose by statute the cash penalty only on those who fail to appear, supplemented, perhaps, by the felony or misdemeanor charge for bail jumping?

Is there anything in the experience of these projects that would indicate, as raised by the previous question, that the elimination of the cash bond could be achieved without any injury to the integrity of our courts and the appearance of defendants for trial.

MODERATOR DASH: Is your question also related to the persons financially able to pay a premium and who may also be a bad risk?

MR. KOHN: I am talking about any bailable person who might be bailed at present with cash penalties for failing to appear being released without cash bail.

MODERATOR DASH: Judge Murtagh?

JUDGE MURTAGH: I think the question implies that we extend the recognizance idea to all charges. I think most of us who have worked in the field realize that that is an excellent goal, but one that will never be attained.

I think the question, however, is good in that it emphasizes, to my mind, the fact that what our concern is, is primarily detention rather than bail.

Bail, or release on one's own recognizance, are means of reducing unnecessary detention. As is evidenced by the remarks made here today, we are making great strides in improving bail procedures, but in order to obtain something close to our ultimate goal of greatly reducing detention, we will eventually have to turn our attention to improving criminal procedures.

In New York City, for example, I think the bulk of detention arises not so much from archaic bail procedures as from archaic criminal procedures.

Incidentally, I might throw out one innovation that has taken place in New York City in recent years, aside from the Manhattan Bail Project. In New York City, for the past several years, there has been automatic reevaluation of bail within 48 hours after arrest, so that if bail was excessive, the judge is afforded an opportunity to take a good, hard look again after a short interval has taken place.

At that time he may either release the defendant, or, at least, make a more realistic evaluation of the bail, and enable the defendant to secure his release.

MR. EDWARD DOBROWSKI (Sheriff of Bristol County, Massachusetts): Preparing for this conference, I made a study of the bail situation in my county, and I drew some figures from that study. I think there is a way of reducing the number of days spent in jail because of the failure to provide bail. I

intend to notify the judges, either weekly or monthly, of those who are still on bail.

Referring back to that case of the 18-year-old boy who was in jail for 42 days, I am sure if the judge got a report showing that the bail was $100, that it was set on May 7, and the boy was still there on the 15th, he would then have him released on personal recognizance.

So, in this way, perhaps there will be a reduction in the number of days spent by these people, because the judge, once he imposes bail, has no way of following through and seeing whether or not bail was provided, except when it is provided right there in his courtroom.

SOUTH GROUP

MR. JAMES BENNETT: I just wanted to say some of the economics may not have been considered. One is, of course, the increasing cost of jails. Some of the jails that have been built in Northern states have been running $15,000 a man for the physical facility.

Secondly, the per diem cost of maintaining people in jail is running up on a country-wide average of at least $4 a day, and down in Miami, Florida it is a little over $6 a day.

I wonder how many of you realize how small the risk involved is that a really serious felon can escape in this country nowadays. Because of the application of the Fugitive Felon Act and the widespread activities of the Federal Bureau of Investigation, the fact a man must have identification to get any kind of a job almost anywhere, it is extremely difficult for a person to escape and remain out of custody, if they really want to catch him, for any length of time.

Since I have been Director of the Federal Prison Bureau, there have been 750,000 men and women in and out of those institutions; and we have had escapes, but today at large there are less than 12 men we know of who have escaped and haven't again been apprehended.

I think you will find that true all over the country. If they really want him and if he is a really serious offender, he is pretty apt to show up a little later on.

6. Role of the Professional Bondsman

EAST GROUP

MR. TIM MURPHY (Assistant United States Attorney, District of Columbia): The speeches we have heard since the beginning of this Conference have all been directed toward the proposition that the bail requirement is generally undesirable, and that we should consider reduction or abolition of the system. Parenthetically, we have also implied that bail bondsmen are people who live off the unfortunates of our society, and that this is not necessarily a good thing.

I have heard nothing in support of the system. I am curious as to whether bondsmen believe that their system should pass from our society. What do the bondsmen consider the strongest reason to justify their existence?

MODERATOR DASH: We have a few minutes left of this session to give the bondsmen a chance to do justice.

Who would like to make a response?

MR. MICHAEL SHAPIRO (Stuyvesant Insurance Company): The bondsmen in the City of New York do a great justice to the public. The reason that the bondsmen should be in existence is to be found in the following facts: In the County of Kings, since the first of the year, there have been 138 bail bond forfeitures in comparison to 1,274 warrants issued in the Criminal Court alone.

If you take these 138 bail bond forfeitures and subtract them from the 1,274, you find that there are 1,100 warrants that have been issued where there are parole cases, or small cases.

Small cash bail. In the County of New York there have been over 2,500 warrants issued in the Criminal Court, and there have been 416 bail bond forfeitures, which include the Criminal Court, and the Supreme Court.

These 2,500 warrants are only from the criminal court. When you take 460 bail bond forfeitures from the 2,500 warrants, you will find there are 2,100 cases of parole and small cash bails that have not been returned.

I should not say "have not been returned." We find that over 90 per cent of the bail bond forfeitures are returned

through the efforts of the surety company, whereas in the City of New York, we find that over 70 per cent of the "parole" cases—of the warrants of the "parole" cases—are never apprehended.

In the County of Queens, the statistics show that over 75 per cent of warrants issued were "parole" cases, or small cash. Whereas, 25 per cent were bail bonds.

In the County of Richmond, there were over 253 warrants issued in the Criminal Court, and no bail bond forfeitures.

So, I would say that the bail bond business seems to be something that the surety company provides for the court, and for the public; it is a good thing, because we provide diligent efforts in producing these defendants.

I am not questioning the Vera figures. I believe they are honest and accurate. I am not against the Vera Project. We do say, however, that the bail bond business is something that will go on forever. It cannot be abolished.

That is all I have to say.

MODERATOR DASH: A ringing cry.

JUDGE MURTAGH: In the main, the remarks that were made are correct. The main error, however, or the main issue, arises from the fact that no real allusion is made to the Vera Project. Specifically, the comparison there is between bail and "parole" without Vera.

I think it would be more accurate to contrast bail with "parole" with Vera, because Vera provides the necessary implementation for release on recognizance that is inherent in a bail system.

I think it is much more desirable to attain the goal of a regular appearance at court through means such as Vera, rather than penalizing the accused person in order to secure appearance.

MR. FLATOW: I would like to get back to the question of the complete abolition of the surety system in the criminal courts. When the Vera organization first began, I felt, as an attorney, that it would be a marvelous thing for people who would otherwise be detained in jail.

Having, of course, connections with a surety company, there was a problem of what effect it would have on the volume of business written by our company.

I still persist in feeling that the Vera organization is serving a marvelous function, for people who would otherwise languish in jail are now getting back to their jobs and their families.

I would like to state the position of my company: we support this. I would also like to state the fact that I believe there can be coexistence between Vera and the surety industry, at least in New York, because of the many instances where we can and do produce defendants in order to hold down our loss, even though it is a financial loss which we are trying to hold down.

A forfeiture in a court holds the court in disrepute. This is written in the decisions of many states. We attempt to return the principals to custody as soon as possible. Many situations occur where a man may be confined to another institution. He might be in a hospital. There may be some other justifiable reason which we could offer in mitigation of his default.

I feel very strongly, however, having seen agents sometimes spend the face amount of the bail bond in order to repatriate fugitives, and to return them to the court, that the system has worked in the past, is working, and can continue to work.

For that reason, I would support Vera. I would support this organization. I feel very strongly that its work is marvelous. It should continue.

I also think that in order to continue the efficiency of the administration of justice, a system of surety companies should be permitted to continue.

There were many situations in the past, possibly before Vera was even conceived, in which an outstanding citizen appeared before the court and was released in his own custody. I know of many situations in the past year or so in the Federal courts, in the Supreme Court, and in the criminal courts of our city where defendants were sent back to their homes pending trial.

There is not even a suggestion by the United States Attorney's Office, or the District Attorney's Office, that the man be released in bail. This, in effect, is the system which is now being used and extended to the man who is not an outstanding business man in the community, but is a clerk in a department store.

It is bringing that system down to the common man, yes, the indigent man. The surety companies have certainly not complained about this in the past. I would very much support the increase of this system in the future.

SOUTH GROUP

MR. ROBERT KOEPPEL (Public Defender, Miami): My question is what are the advantages of the bail bond system over this system inaugurated by the Vera Foundation.

MR. WILL: The advantage?

MR. KOEPPEL: What extra service can be provided by the bail bond system if the Vera Foundation did not exist?

MR. WILL: I don't know if you read my article, but bail bondsmen have been a part of justice since people came over on the Mayflower. It is a part of the arm of a court to enforce the appearance of the defendant in court. The advantage is that there is a third party who has a monetary interest in seeing that the defendant appears.

Under your personal recognizance, if the defendant does not appear, who cares?

MR. KOEPPEL: I think it has been shown that a person who is out on his own recognizance is as good as the man out on bail.

MR. WILL: You are quoting from figures supplied from these projects. They have only interviewed a certain percentage; they have not taken the whole release system. I don't know if you are familiar with a bottle of milk—the first few inches are all cream. That is what they are doing. They are taking the cream of the indigent and those who need help are still in jail.

MR. KOEPPEL: Your analysis is very good, and I suspect the reason this makes a bondsman unhappy is he is left with a poor risk.

MR. WILL: That is right.

PROF. BENNETT: Mr. Freed, do you want to say something about the Manhattan Project?

MR. FREED: This morning you heard of projects in different stages of development. The one developed farthest of all is in Michigan; it has been going on for 20 years with no foundation support or law students. The judge looks at everyone who comes in. The percentage of release on own recognizance is 70 per cent. Yet, the rate of those not appearing when on recognizance is 1% while the rate of those jumping on bail bond is 7%. Why should those 773 people who were released on recognizance last year in the Eastern District of Michigan pay a bondsman to go free?

MR. WILL: How about the other 25 per cent, aren't they entitled to release? My recommendation would be that anybody or everybody should produce collateral to get out on bond.

MR. MCCARTHY: I speak mainly for the District of Columbia, not the others, although I know something about them. The people getting out without bond may be the cream of the crop, but they are in jail when we interview them. We do not have information available to us that is not available to the bondsman in the District. In the District the bondsmen get more information.

In addition, we are not the judge and the jury as evidenced by the fact of the percentage, approaching 25 per cent or higher, of the recommendations we made in court were denied by the judges. Secondly, another small percentage of those have been denied partially to the extent the courts have not permitted them to be released on their own recognizance, but also refused bond on the information presented.

What we are doing is providing facts. Our recommendation may or may not be given weight. I think the fact is that a man who has not made bond in jail can be released and will return for trial. That is the type of information we present.

MR. WILL: You are basing your recommendation on the frame of reference of Washington, D. C. Naturally what they are trying to do now is use this on a national level and release everybody regardless of whether they can get out under a bondsman or not.

FROM THE FLOOR: I think we should take judicial notice of the fact that these examinations for release without bond hurts the bond business. There is no question about it.

MR. DAVID WALTERS (Miami): I spent about half of my life on law enforcement work, and the other half in defense work. As I examine the procedures, I see that both the Foundation people and the bondsmen approach the problem from the same point of view. Their idea is to investigate these people and determine whether or not they should be released. They use more or less the same factors. The only difference is the bondsman might suffer a loss on his recommendation if he released somebody, whereas the Foundation would chalk it up as a bad risk, and also chalk it up as a statistic.

The question I would like to ask, Mr. Will, as a bondsman, and one that has troubled me over the years, is just how often do you require full collateral and guarantee? How often do you release a man on his looks and your evaluation, and take the risk yourself?

MR. WILL: I can only answer that on my own experience. I have been a practicing bondsman in Miami for the past 20 years. If I had 20 per cent on full collateral, I would be surprised. I take what amounts to personal recognizance on approximately 80 per cent; 20 per cent is full collateral. You can't get 100 per cent collateral.

FROM THE FLOOR: I am from a town in Kentucky. We have one professional bondsman and he is busy all the time. By the time he gets through putting the bite on these folks in jail, they haven't got the money to hire a lawyer.

He takes their home, their automobile, and if he could take their children, he would do that. These guys get in jail and they want out five minutes after they get in. He has a tieup with the jailer each year; how much he pays him, I do not know, but I have my suspicions.

I think this is a very far-reaching program, and I think something ought to be done about these people. I think they ought to be protected against professional bondsmen.

MR. WILL: I would like to answer. He made some dis-

PROF. BENNETT: Very well, but will you make it quick?

paraging remarks against the professional bondsman.

MR. WILL: He is making charges against one bondsman. He feels because there is one crook, all bondsmen are crooks. There are crooks, no question. But because there is one crook, that does not mean the whole barrel is crooked.

I would like to say that in Florida we have the highest per cent of attorneys being arrested for felonies than any other state.

MR. EDWARD SCHROERING: I am Commonwealth Attorney of Louisville.

I think many law enforcement officers are interested in their communities and what will happen when these people are released.

We have a bail bond problem in Louisville, Kentucky that I can pretty well set out in 6 categories. We find there is no relation to the propriety of whether a defendant should be released by a bondsman, based on the danger to the public, just on the basis of whether he has enough money to get out.

A bondsman, indeed by necessity, must have a background as far as criminals are concerned to be successful. A bondsman with no background in crime will go out of business in no time.

He will go out of business for the simple reason he does not know how to judge his risk. With every criminal, you usually get them back 60 per cent of the time, the same ones. He knows these people and whether they are good risks in the community.

We find our bondsmen hustle bonds, fix deals, and so on. The grand juries had several instances, but in one instance they investigated a professional bondsman across from the courthouse who had assaulted another; and we found fee splitting. I won't say that goes on all the time.

Incidentally, bonds are very difficult to collect. We get a forfeiture for a bondsman locally, and we find we have great difficulty in collecting them. These are the problems we have.

MR. ARCHIE WILLIS (Memphis, Tennessee): I was wondering if the Foundation has or is planning to come out with something positive in the program that would take over this whole problem nationwide. It seems to me it is immaterial whether a bondsman stays in business; it is a waste of time to talk about it.

The iceman is out of business because we have refrigerators.

The bondsman is in the business because of the problem in the system of justice. The state is not willing to gamble, so the businessman says, "Well, I can make a dollar out of this so I will take a chance." So he goes out and protects himself, gets mortgages and everything else. I don't blame him. He has to protect himself.

The question is whether the state is going to take this gamble now. The judge is free because the man is under $25 bond and he jumps bond. His conscience is free the minute the bondsman pays him off. The criminal is loose and nobody worries about it any more.

There is something basically wrong with the whole approach, and I think we all recognize that.

MIDWEST GROUP

MR. BEY: Gentlemen, I am Jerry Bey. I am a bail bondsman in Chicago, and before the lights go out here, literally and figuratively for me, I would like to say something.

I have sat back here and listened to these figures from the Vera Foundation, and these gentlemen from Des Moines, Iowa. I don't need a survey. I have got the files on every single bond forfeiture we have ever had in my office. I look at them, and I know what the figures are. In 1962, we had 115 forfeitures that we brought back or caused to be apprehended.

I didn't count the ones that were brought in by the police department, by themselves, or got their own attorneys, or got dragged into court.

I just wanted to make this point before you all run home and start throwing the jail doors open.

I want to bring up one more point. The figure of 2,000—I believe—is what the Vera Foundation has let out?

MR. SUBIN: 2600.

MR. BEY: The Police Commissioner said there were about 200,000 arrests in New York City per year, and I think that this has been in effect about two and a half years, am I correct? So that is about 500,000 prisoners; and you know, they are only discussing 2,000 out of 500,000.

I could probably do better than them on predicting incidences, if I could go to the county jail, and had the time to interview them.

I am telling you it isn't true that they are all good risks and that it is all gravy, and nothing to it. It is not that way at all. Believe me, because my job in the office is chasing bond forfeitures; I am well aware of the situation.

7. Summons in Lieu of Arrest

MIDWEST GROUP

MR. LEONARD REISMAN: I am a Deputy Police Commissioner of the City of New York. You heard the Police Commissioner give a report on the Manhattan Summons Project. You have a full text of his remarks in front of you. The early statistical data is to be found starting on page 11.

This is a very exciting area, and one which might have some incredible ramifications in terms of the custodial pressures in the various jail situations that are found throughout the country. Our primary concern, of course, was to make sure that the persons to whom we issued summonses did not find themselves involved in violations of the penal law a few moments after release, to put it drastically.

We have found that in the type of case where we have substituted a summons for arrest in the simple assault, and petty larceny cases, the return response has been complete; 50 out of 50 have returned so far, and its projection would indicate that their dispositions will not be jail terms, and they will be free, we trust, to mend their ways in the future.

We have copies of our detailed instructional orders in typical police department style available. They are available for those who have a particular technical interest in the procedural aspects. Of course, as a general proposition, our Department stands ready to give you any details that we may have on the workings of the project, by letter, by conference, or what have you. It can be done through my office in the police headquarters of New York City, and I would assume from time to time we will be publishing more details of the projects as they unfold.

MR. JAMES E. STARRS: I direct this to Mr. Reisman.

In Illinois, we have legislative provisions which permit a policeman in any case to issue what is called a "Notice to Appear" which is the same as a summons, as you have been using that term in New York. The legislative provision is not carried out in Illinois by the police's exercise of discretion.

I wonder in New York whether any legislative effort was necessary to permit the police to issue summons, in connection with the project that is now underway.

MR. REISMAN: In 1932 a state law was passed which permitted the Police Department to issue summonses in lieu of arrest in all but felony cases; and over the years, this was gradually implemented in terms of city ordinance violations, disorderly conduct violations, and the like. That is done, or was done, through the rules of the then Magistrate's Court of the City of New York.

Now we can obtain an extension of our authority, up to but not including felony cases, by the amendment of the rules of the Criminal Court of the City of New York through the direction of the Appellate Divisions which are now the supervisory agencies. To implement this program of extension into petty larceny and simple assault cases, we obtained an amendment of the rules of the Criminal Court by direction of the Appellate Divisions.

I might add, of course, that this extension must be done within the legislative framework. In New York we had a fair amount of latitude. We do not have it, as yet, in felony cases, but we are a long way from projection into that sensitive area.

MR. HAROLD NORRIS (Michigan): Mr. Chairman, I would like to ask this question of the same gentleman.

One impact of arrest is the record that ensues. Is there a record impact to this formal or informal summons procedure? I notice the use of the words "formal" and "informal" with reference to a summons. Is there a record affixed to the defendant so that in a future case, coming before the court, there is not merely the question of whether he has been arrested, but has he been the recipient of a summons of this character?

MR. REISMAN: That is a good question. We have not worked out those details finally as yet. Clearly, if he is convicted, there is no problem. If he is convicted, he will be convicted of the misdemeanor, will be fingerprinted, and that conviction will become a part of his criminal record.

In cases of summons, the person is initially arrested by being taken to a station house under duress, if you will, and in custody. Then there is a substitution of the summons, and it is so noted.

I think for the purposes of this study, it would be considered that the summons has been substituted for the formal arrest, and if a man who has been later acquitted is asked "Have you ever been arrested?", probably he can truthfully say "I have never been arrested," in that form. Of course, in recognition of this interpretation, many business firms and governmental agencies have broadened the question to "Have you ever been arrested, summonsed, tapped on the shoulder, or what have you?" so that the problem of formal arrest as against summonses is rapidly dying out.

The answer is a wee bit vague only because we have not thought this area through finally. We have been more concerned with getting it off the ground.

MR. IRVING NEMEROV (Minneapolis): How about the fingerprints? That is the key. Are his fingerprints taken when he is arrested before he is given the summons?

MR. REISMAN: In the cases of petty larceny and simple assault, even where a man has been arrested under the old-time procedures, he was not fingerprinted. In those particular cases, he is only fingerprinted after conviction, so that we lost little of control in that nature. Of course, if we ever get into the what we call in New York "552 misdemeanors", which are serious ones—gun violations, burglary tools, criminal receiving, narcotics, and gambling—then it would be a question whether or not fingerprinting would be affected.

I would think for control purposes we would probably fingerprint anyway, but we have not come to that as yet.

MR. C. PAUL JONES (Minneapolis): Does the New York law have any sanctions that are imposed for failure to comply with the summons, or is this strictly a voluntary proposition which would be followed by a formal, written warrant, if they do not comply?

MR. REISMAN: It would be followed by a formal bench warrant for failure to appear.

MR. JONES: Is there a sanction or a penalty for failure to appear?

MR. REISMAN: There is no additional penalty for that.

MR. JERRY BEY: Mr. Reisman, if I might ask you, did you say that after conviction would be the only time that you would fingerprint them on summons?

MR. REISMAN: In the area of simple assault and petty larceny, we do not fingerprint at the present time on initial arrest or issuance of summons.

MR. BEY: How do you determine a previous record?

MR. REISMAN: You mean on initial screening?

MR. BEY: Yes.

MR. REISMAN: Well, some of it has to be the response from the defendant. There is a check made at the local detective squad, and you may get a flavor, but you may be wrong.

In the petty larceny cases, most of them are shoplifting cases. You get an initial screening through the so-called Stores Protective Association, which includes the major department stores in New York; they keep elaborate files on recidivists in shoplifting. It is quite true, you may get a shoplifter who has a narcotics background, but some of this becomes apparent in the screening process.

It is to some extent vague, but when it is checked against the man's residential factors, and his family ties, and his employment record, these other points usually crop up. You get the indication of a previous record.

MR. NORRIS: I was disturbed, Mr. Moderator, about a statement made by Judge Alverson to the effect that the presumption of innocence accrues at the time of trial and not at pre-trial. I raise the question of whether this is sound law in terms of wisdom and justice, or policy that ought to be, especially in light of the premises of this Conference.

It seems to me that once accepting the premise that the presumption accrues at time of trial and not at pre-trial, there is little reason for this Conference, because then it seems to me that you can impose all kinds of conditions prior to trial, including preventive detention. It does pose the question, does it not, of the association of the matter of bail to the matter of investigative arrests?

I would like to say that this project ought to be commended, not only for dealing with the matter of bail, but it poses a re-examination of a considerable number of practices of police authority, one of which, in my judgment, has become so encrusted and so accepted by not only police authority but the judiciary that you even have a Uniform Arrest Act, which legalizes that which in fact is prevailing.

The main avenue of approach I would like to emphasize with regard to the matter of bail is this: for indigents and non-indigents, we should reduce the volume of arrests on the basis of suspicion, to deal with the matter of opposing investigative arrests. The Anglo-Saxon conception of conducting an investigation before arrest is certainly turned around for a variety of reasons in most urban police departments, a matter which I think is in part dealt with by the most significant thing I have seen so far, a summons, formal or informal. I think that is a very encouraging development, although I see from the New York experience some of the procedural problems that we ought to address ourselves to and sharpen our knowledge about.

I hope for a monograph of some kind which would carry forward the talk of Commissioner Murphy, and some of the other experience elsewhere in the country, so that we could have an application of the summons in lieu of investigative arrests for other communities. I think that is a very important development for us to consider, but I feel you can't talk about that if you are going to accept the premise that the presumption of innocence accrues at the trial and not pre-trial stage.

JUDGE SOURIS: May I make a comment?

PROF. REMINGTON: Judge Souris.

JUDGE SOURIS: In connection with Commissioner Murphy's comments on the use of summons in lieu of arrest, I think maybe someone ought to express some doubt as to the definition of his term of "arrest". As I listened to the description, both of Commissioner Murphy and his deputy, it seemed to me that a more accurate description of that process was a sum-

mons in lieu of detention. In our jurisdiction, the moment of arrest occurs upon the moment of immediate detention, and it certainly doesn't occur in the police station.

I think perhaps there was some misunderstanding—at least there was on my part.

PROF. REMINGTON: We have Mr. Delaney here, if he would like to resolve that.

My reaction would be the same: to say to a person three hours after he is taken into custody that he is being given a summons in lieu of his arrest, is using arrest in a special sense.

MR. JOHN DELANEY: I think I agree. In fact, an analysis of the case law in New York convinces me that the arrest occurs at the moment when the officer arrives on the scene and reduces the defendant to custody.

The question of arrest, though, is a question of fact in New York law. It is not absolutely clear; there aren't judicial decisions on the point I just made, but I think they would hold that way. The reason why we say this is a summons in lieu of arrest is that the enabling act and related statutes that authorize the use of summons describe the summons that way. The Appellate Division order that implements the enabling act, which is part of the legal basis of the summons project, also refers to the summons in lieu of arrest. So that I have concluded that what the statute and the legislature intended here was to substitute the summons for the arrest.

Otherwise, that statutory language, "summons in lieu of arrest", is meaningless.

JUDGE MERLIN (Minneapolis): Why can't there be actually a summons in lieu of arrest, that is, without detention? Why can't a summons be delivered to the defendant without any detention?

MR. JOHN DELANEY: Some Appellate Departments in New York say the defendant is arrested when he is reduced to custody, when the cop puts his hand on him, and says, "Come with me".

PROF. REMINGTON: I suppose the question is in the case of a shoplifter in the department store; why not, instead of taking him down to the Precinct Station, hand him a piece of paper which says, "Be in court Tuesday morning at 9:00 o'clock". I take it one of the reasons is that the New York University law students are down at the precinct station; and that is where the interview takes place.

JUDGE MCCREE: Mr. Chairman, on analysis, isn't this really a summons in lieu of a warrant? I mean, the arrest takes place, and the complaint is sworn out in the police station. Normally, as I understand the exposition, a warrant would be sought based upon that complaint, and in lieu of the issuance of a warrant which would demand the detention pursuant to its terms and some arrangement, a summons is then issued.

MR. NEMEROV: Mr. Delaney, the fingerprinting is what concerns me most. I was relieved when they said they didn't fingerprint.

MR. DELANEY: You can only fingerprint in New York in cases which are authorized by statute. Any fingerprinting in a case which is not authorized by statute is an assault, civilly and criminally. Petit larceny and simple assault are not crimes in which fingerprinting is authorized by the statutes.

You have no fingerprinting problem until the conviction. Now, at conviction, you have a different situation. At that time, they are fingerprinted.

MR. DAN JOHNSTON: I think at least for our community, and I suspect for many small communities, this summons project as it works now in New York is not strictly applicable. In Des Moines a man can be arrested, taken to the police station and bailed either with surety or on our recommendations, at night, without going before a judge, if no judge is there, just as quickly as the procedure now occurs in New York City. This is true for all misdemeanors, for anything less than a felony, so I don't really see how that particular aspect of Vera Foundation's operations has much relevance for small communities where you don't have the long distance to one central court from a number of precincts. It wouldn't save any time in Des Moines at all.

PROF. REMINGTON: There are also practices in a city like Detroit, where the prosecutor is entitled to release people who are arrested. I take it that that would serve the same

function as the New York program on so-called summons in lieu of arrest, or summons in lieu of detention.

It is probably true that there are, the country over, ways of accomplishing this immediate release of a person who I would say has been arrested prior to the time that he is brought before a judicial officer.

JUDGE SOURIS: Mr. Chairman. I think one of the things that has escaped the attention of the Conference so far is a consideration of the time before a prisoner is brought to a magistrate for arraignment, because this certainly is the first moment bail can be considered. I can imagine, therefore, that there will be a vast difference in the magnitude of the problem between jurisdiction such as ours where, by statute and by judicial decisions, we require arraignment without unnecessary delay, and other jurisdictions which permit delay ranging from several hours to several days or even weeks. I think that that might be the subject of some consideration.

MR. T. E. LAUER (Missouri): With regard to this summons in lieu of an arrest, we actually have such a procedure in Missouri under our court rules and statutes which is simply this: When the man comes in and says, "Sam Taylor punched me in the nose", or, "He stole my horse or my cow", a summons can be issued instead of a warrant by the magistrate. This is served on the defendant at his home, if it would appear that he will not flee the jurisdiction before he otherwise would be arraigned. So there is never an arrest in such a case.

The defendant is never actually brought to the police station or the sheriff's office, or wherever it happens to be.

PROF. REMINGTON: Is it used very much?

MR. LAUER: Not as much as it should be.

MR. NORRIS: Isn't it possible to use some kind of notice to appear which would not be an arrest, and which would afford a person an opportunity to come in, if he wishes, and to permit the investigation to come about without an investigative arrest?

PROF. REMINGTON: I know that in Missouri and Wisconsin and there are obviously other states including the Federal jurisdiction that have a provision allowing the magistrate to issue a summons in lieu of the warrant, but the experience has been that it has not been used. Therefore, you don't hear it very much discussed.

One of the explanations is that most people in criminal law administration can't see any value to the summons, over a letter or a phone call or a note, because when they ask what advantage is there over a letter, if you go get a summons, the answer is none, in the sense that the penalty for failure to respond to the summons is the issuance of a warrant. The penalty for the failure to answer a letter is the issuance of a warrant, or the penalty for the failure to answer a phone call is the issuance of a warrant. It seems to me that the great disappointment that many people have had over the fact that summons statutes have not been implemented administratively is not necessarily a reflection that police are arresting these people. It may be, and in many instances, I am sure, is, that they are continuing to rely on highly informal methods, such as leaving a note in the door, if they are not home, or saying, "Be down to court", and giving them a note, even though a warrant has been issued, a warrant is never executed by making an arrest.

Now if there is advantage, and I have never understood, myself, what the advantage of a summons is over a letter, but if there is an advantage in a summons, I suppose you want law enforcement officers and prosecuting attorneys to use them. Somebody is going to have to convince them that there is some good reason to use them.

JUDGE MERLIN: Well, in our small court, we do have a little summons form. While it doesn't look like a traffic ticket, it is on the same form, with a place for a sworn complaint after it is served. Our fire department uses it for very minor offenses of improper burning, for violations of building codes, and this kind of thing. They are delighted with it; it works very well, with the least inconvenience to the defendant.

PROF. REMINGTON: What happens if they ignore it?

JUDGE MERLIN: In every case, the complaint is sworn to, and it will be followed with a warning letter from the Court; and if they don't respond to that, a warrant will issue.

PROF. REMINGTON: But I think the question that still remains is, is there any advantage to the summons which there would

not be to an ordinary letter or any other communication in a rural area—a phone call, or a verbal message?

MR. DANIEL P. REARDON, JR. (Missouri): If I may interject something here, in the way of defense to a notice to appear, I think prosecutors frequently are faced with the problem of having a complaint made to them which they have serious doubt about; rather than have the complainer sign and swear to a complaint, they will use the notice to appear form.

In the event the person does not appear, of course, a verified complaint will have to be signed, so that a warrant can issue; I think they use it for a practical reason, and find it helpful.

PROF. REMINGTON: I take it a notice to appear has no effect, does it, beyond the effect of saying, "the failure to appear . . . "

MR. REARDON: I can only speak for Illinois. In Illinois, a notice to appear is merely an invitation. It is a request. It is nothing more than that. It is not sworn to.

MR. LAUER: Mr. Chairman, in Missouri, of course, a summons is simply an invitation to appear, but if a summons is issued by the Court, and the defendant does not appear, a warrant is issued. He is brought before the judge, and the first thing the magistrate asks is "Why didn't you come in in response to the summons?" And if the man pleads guilty, the magistrate will probably load $25 on the fine or so, or maybe some jail time, just to show that this man can't disregard the invitation of the Court to come to court.

MR. DELANEY: If the officer is executing a warrant of arrest, perhaps it does not matter whether he executes it by a summons or by a letter, but in New York City, 97 or 98 percent of our arrests are on-the-spot arrests, and arrest by warrant is a very rare animal. You obviously can't write a letter, so that the summons here in New York City is highly significant. It is an alternative to on-the-spot arrest, or it is a release shortly after the arrest.

MR. WRIGHT: I think we are losing sight of the fact that the gentleman mentioned. How is the police department going to operate if they are not permitted to make the arrest and have a reasonable time to investigate? The point, I think, that we are losing track of is that after they have reasonable

time, that is when we want the man released. The police should have a certain amount of time to do their work.

MR. JONES: It seems to me that it is perfectly clear from what we have been talking about here for some time that increased use of the summons or informal letter would alleviate a great deal of this problem, if the states adopted this type of thing.

In addition to that, it seems perfectly clear that not only in traffic ticket cases, but in other minor cases of that kind, if a traffic ticket approach in lieu of arrest, or in lieu of detention were utilized, again it would alleviate a great deal of our problem, regardless of whether a man does or does not have money.

Thirdly, there is the court aspect of it. You have to have an investigation, such as is done by the Vera Foundation and in Des Moines; and you can utilize your probation offices, so that you can make sure that everybody entitled to go out in the proper cases is out.

WEST GROUP

JUDGE ZIRPOLI: I would like to make an observation. I have a report prepared over a 12-month period ending February 29th of this year of bailing all the criminal cases.

PROF. SOLOMON: In your District?

JUDGE ZIRPOLI: In our District. The basic question I would like to ask is: Why should we not first determine those offenses for which there need be no arrest at all and for which we should utilize completely the summons process? This is being done in the Northern District of California. I can tell you, as this report will indicate, that over a 12-month period summonses have been issued in 30 per cent of all criminal cases.

This program has been accelerated by Mr. Poole in the course of his administration. Much of the credit, therefore, goes to him. In addition, my statistics indicate that approximately 42 per cent of all defendants are either brought in by summons or released upon their own recognizance.

It appears to me, if we want to attack this program in the proper manner, we should, first of all, explore the avenues in which it is completely unnecessary to talk about these pre-

release investigations. The statistics we have amply support the justification of such a program. I think we ought to consider it.

PROF. SOLOMON: I think this is a very important point. I want to emphasize the correlation that occurs to me as I study the problem of summons in lieu of arrest and ROR in lieu of bail. Many of the same factors influence the decision in both. And that's what Judge Zirpoli is suggesting, that you move the problem to the threshold question of whether we need arrest and bail in the first place. I wonder whether it might not be appropriate to consider perhaps two principles on which to organize all of this data.

The first would be a presumption that summons ought to be used in preference to arrest, if feasible, and that release on own recognizance ought to be the norm in preference to bail, unless there is reason to believe that non-appearance is probable.

The second principle I throw out for your consideration, as I have not reached a conclusion on these, is that the less severe and the less socially costly deterrent to non-appearance is desirable in the first instance and ought to be used; that we ought to use non-financial equivalents to bail before we use financial bail; that we ought to use low bail or cash bail before we use premium bond type bail; and that if, in effect, we visualize a ladder of greater costs, of greater severity, that we climb that ladder first before we start to climb downward.

JUDGE CLAUDE OWENS (California): Your point, Mr. Chairman, was that everything should be considered in the light of two principles: one, use of summons instead of an arrest, and the other, personal recognizance in lieu of bail. Both are aimed at reducing the number of people confined unnecessarily.

A third area, it seems would be use of personal recognizance to permit a person to have time to pay his fine. Oftentimes the sentence is $15 or five days, and when he cannot pay it, he goes to jail. If a little thought were given, using the same facts that might be available under this program, those facts might justify the court in releasing the person on his promise that he would return at a set time with his fine.

CHAPTER III

Setting High Bail to Prevent Pre-trial Release

A. Plenary Session Panel (Panel B)

Moderator:

Herman Goldstein
Executive Assistant to Superintendent
O. W. Wilson, Chicago Police Department

Panelists:

Prosecutor: Garrett H. Byrne
District Attorney for Suffolk County;
President, National District Attorneys Association

Defense Lawyer: Edward Bennett Williams
Washington, D. C.

Judge: Luther Alverson
Superior Court of the Atlanta Judicial Circuit

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2 OF 5

MR. GEOGHEGAN: The Moderator for this afternoon's session is Mr. Herman Goldstein, Executive Assistant to O. W. Wilson of the Chicago Police Department. He will introduce the other panelists. Mr. Goldstein is a graduate of the University of Connecticut. He did graduate work and obtained a Master's degree in Government Administration from the University of Pennsylvania. He has been in his present position for the past five years.

Address of

HERMAN GOLDSTEIN

Executive Assistant to the Superintendent of Police
Chicago, Illinois
Panel Moderator

MR. GOLDSTEIN: Thank you, Mr. Geoghegan.

One subject for this afternoon's discussion is the use of bail for preventive detention.

The prevailing view in this country today is that the only legitimate purpose of bail is to assure the reappearance of a defendant for trial. Current efforts to release a greater number of defendants on personal recognizance, however, indicate that there certainly is more than a strong suspicion that bail is being used to serve other purposes as well. While we lack a statistical statement of the problem, it is apparent: (1) that many factors other than those which indicate the likelihood of flight are considered in the setting of bail; and (2) that bail is used, in current practice, to detain individuals in custody—not for assuring their appearance at trial—but rather because of the belief that the defendant, if allowed to go free, is likely to commit additional crimes or is apt to intimidate witnesses or victims.

The use of the bail system to serve a purpose quite different from that which it was designed to serve has frustrated the efforts of those concerned with introducing some logic into our bail policies. Obviously, their problems would be greatly simplified if the use of bail were restricted to assuring the reappearance of the defendant for trial. But employing a procedure designed for one purpose to serve quite a different

purpose is not unusual in our criminal justice system. Rather, there is a pattern of adaptations, modifications and accommodations in the administration of the system which, in a somewhat awkward manner, often fulfill socially acceptable goals which are not provided for by the legal system. The purposes which bail has come to serve may be without foundation in law, but they cannot be rejected for this reason without at least examining the needs which they fulfill.

Chief among these expressed needs is the desire to protect the community from the defendant who it is felt will commit additional crimes if allowed to go free. The problem centers most specifically around the professional burglar, the narcotic offender, and the armed robber—individuals who are often characterized as hardened criminals committed to a life of crime and who give the impression that they have "nothing to lose" in the pursuit of their criminal activities. When the activities of such criminals become a subject of public discussion or when a specific crime committed by one of them enrages the community, the community tends to label the alleged offender as dangerous and the judge often reflects this view in his use of bail to maintain the alleged offender in custody. But in our large cities, where the problem of crime is most aggravated, the professional criminal may enjoy a degree of anonymity not unlike that of the majority of city dwellers. Public pressure does not develop in many aggravated cases in which the police feel that the public interest would be better served were the alleged offender detained. A case which illustrates this expressed need—as well as the need for more expeditious handling of our court cases—is that involving a Chicago subject—Anthony Massari.

> Massari was released from the Illinois State Penitentiary upon completion of a three-year term for burglary and armed robbery in 1961. On July 8, 1963, Massari was apprehended in the act of committing a burglary. He was indicted and released on bail totaling $7,500. On August 24, 1963, while free on bail, the subject was apprehended in the commission of a second burglary and was found to have in his possession the proceeds of still another burglary committed earlier in the day. He was indicted on two counts of burglary and released on $4,500 bail. The subject was again arrested on November 18, 1963, when he was found to be in possession of a loaded firearm and burglary tools. On January 16, 1964, he was arrested in the act of committing a burglary and found to have the proceeds of two other burglaries in his possession. He was indicted the following day and released on $15,000 bail, only to be again arrested on the same afternoon while committing still another burglary for which he was indicted and bail set at $5,000. Subsequently, he was arrested on February 8, 1964, with release on bail set at $10,000; again on February 21, 1964, with release on bail of $5,000; and again on March 5, 1964, when bail was set at $5,000.
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> On April 24, 1964, when Massari went to trial, he had been arrested nine times in the period from July 8, 1963, to March 5, 1964, indicted on ten counts and was free on $48,500 in bail. He entered a guilty plea to the 10 indictments and was sentenced to from five to 15 years in the penitentiary on each count—the sentences to run concurrently.

The pattern in the Massari case is often repeated. The offender launches himself on a cycle. He commits more crimes in order to acquire more money in order to meet larger amounts of bail and the accumulation of attorney's fees. He often becomes more daring in the types of crimes he commits and is more likely to use force as his concern for the eventual consequences of his actions decreases.

The possibility that an offender will do harm to a witness or a victim is the second most common source of concern for the police. Another case, drawn from Chicago, illustrates this need as expressed by the police.

> Frank Wallace was, at the age of 19, convicted of rape and sentenced to the Illinois State Penitentiary for three years. Approximately one year after his release, Wallace was suspected as being the individual responsible for a wave of robberies of pensioners. Bits of information came to the attention of the police that a number of old men had been attacked and threatened with bodily harm if they complained to the police. Detectives identified one of the victims and from him ob-

tained sufficient information to identify Wallace as the perpetrator of these crimes. A warrant was signed and Wallace was arrested and charged with robbery. Shortly after being arraigned and released on bail, Wallace broke into the apartment of a 71 year old man, beat the victim about his head, kicked him numerous times and left him in an unconscious state. He then ransacked the apartment, taking approximately $3,000 in currency and a 38 caliber revolver. The victim required seven stitches in his head and suffered a possible concussion. Wallace was identified by the victim and quickly apprehended. He was arrogant toward the arresting officers; threatened to shoot them on sight after his release; and boasted that he would be on the street immediately after his appearance in court. Most of the currency and the revolver were found on his person. While in custody, he was identified by another pensioner as having robbed him and threatened him with bodily harm if he complained to the police. He was indicted on two counts of robbery and released on bail of $1,500.

Upon his release, Wallace returned to the home of the victim and again assaulted the old man in an overt effort to dissuade him from testifying. He was again apprehended and charged with aggravated battery. Bail was, at the initial arraignment, set at $50,000 and the case scheduled for the grand jury within twelve days. On the scheduled date, a request for continuance was granted and the amount of bail was reduced to $5,000—enabling Wallace to be released.

If the defendant is released on bail, it is not uncommon in such situations to arrange for the detention of the victim. This occurs most frequently when a man stands accused of incest with his daughter. With the release of the father on bail, the daughter may be placed in custody for her own safety and to insure that she will testify free of threats. The release of the suspect is accomplished, in other words, at the expense of incarcerating the victim.

Concern for preventing additional crimes and safeguarding the victim are but two examples of the kinds of situations frequently cited by the police in which it is their feeling that some form of preventive detention is required. Often, the need, as they have expressed it, goes unmet, as was true in

the cases of Anthony Massari and Frank Wallace. Or the expressed need may be met through some alternative—and perhaps somewhat awkward device—such as the detention of the victim, as is often done in incest cases to protect the daughter. When the needs as expressed by the police are recognized as well by the judge, the situation may be dealt with by the denial of bail or the setting of bail in an especially high amount. High bail may be tantamount to denial if the action of the judge is interpreted by the bail bondsmen as intended to assure that the defendant remains in custody. Bail bondsmen, who require the cooperation of the court in their work, may refuse to write a bond which would have the effect of offending a judge.

When bail is used to maintain a person in custody, many problems are created for the individual offender. Because the criteria for setting bail are not clearly established and the determination in a given case is not articulated, the offender has no way of knowing how much of his bail is attributable to each of the several considerations which may have come to the attention of a judge. The basis for setting bail cannot easily be challenged by the offender on logical grounds.

In most jurisdictions, individuals awaiting trial are housed together with convicted inmates. Where separate facilities are provided, there is reason to believe that security is even greater than that for the inmates. In our county institutions, the convicted inmate is likely to be a misdemeanant and knows, when he is placed in the custody of the jailer, the specific period of time he is to serve in jail. In trying to make the best of the situation, a trusted relationship usually develops with jail personnel which carries along with it a greater degree of freedom. In contrast, the setting of high bail or the denial of bail by a judge is likely to be viewed by the jailer as a signal that the alleged offender being placed in his custody may attempt to escape the jurisdiction. Extra precautions, often approaching maximum security measures, are taken in the detention of persons denied bail or for whom high bail is set. In other words, the individual awaiting trial is often held in greater security than the person who has been convicted.

Still another gross inequity, from the standpoint of the individual, is that the setting of high bail to assure detention, like the setting of high bail to assure reappearance, results in detaining only the indigent defendant. The individual engaged in organized criminal activity, many of those who commit white collar crimes, and the professional thief who steals to meet his bail will not remain in custody unless bail is denied.

It is also argued that preparation for trial, while in custody, is more difficult than when the accused is free in the community. Some current research efforts support the view that there is also a greater likelihood of conviction of those who remain in jail pending trial.

Committed as we are to the concept that an individual is presumed to be innocent until proved guilty, the use of bail for preventive detention is considered by some to be totally repugnant, in conflict with our basic system of justice and an outright perversion of the legally established provisions. It is argued that sacrificing community security to individual rights is basic under our system of government, that it is preferable to allow a crime to be committed than to chip away in any measure at the presumption of innocence concept; that it is foreign to our system to speculate as to guilt prior to trial; and that it is equally foreign to take official action against an individual to protect society from those crimes which are unconsummated.

On the other hand, it is argued that the presumption of innocence is a rule of evidence to secure a fair trial and implies that the guilt of an accused must be proved at his trial beyond all reasonable doubt. It is contended that this concept does not mean that those who discharge administrative functions prior to trial should be bound to act as though the suspect had behaved as a law-abiding citizen or that he would behave as such pending trial.

These considerations place this problem within the same context as so many of the other critical issues in the criminal justice system; the need for striking a delicate balance between the concern for the protection of society and the desire to guarantee maximum freedom for the individual; the desire to prevent future crimes versus the desire to

allow the suspect to be free prior to trial. When the issue is viewed in this form, it is helpful to relate it to the same kind of issue as it is faced at other important decision-making points in the administration of our criminal justice system.

We recognize the need for an orderly process of proceeding against alleged criminal offenders. We have established steps in our system which require increasingly heavy proof and safeguards prior to their imposition as their infringement on individual freedom increases. A police officer, for example, needs some basis for stopping and questioning people. He needs substantially more of a basis for arresting a person and taking him into custody. A prosecutor typically employs a more rigid test in measuring the quantum of evidence when deciding upon a charge than was employed by the police in their initial decision to arrest. And the adjudication of guilt by the trial court requires proof beyond a reasonable doubt.

At each point in this process, the issue of physical custody arises. When these points are compared, one wonders why our concern for custody pending trial becomes so intense at the bail-setting stage in contrast to our tendency to almost ignore the same issue at points earlier in the system—points where it would appear that the severity of custody might be even more disproportionate to either the nature of the crime or the supporting evidence. We hear voices of righteous indignation in reaction to the keeping in custody of persons indicted and awaiting trial. Yet, we are only now beginning to develop a real interest in the summons as a means of eliminating the need for custody at the arrest stage—a point in the system where we usually have less supporting evidence and where we are dealing with a greater number of people who will eventually be released or acquitted.

This unbalanced concern for the issue of custody has given rise to a number of interesting situations. In Wisconsin, for example, an effort to refine the criteria for effecting an arrest in misdemeanor cases appears to provide a broader basis for detention after arrest than exists after indictment. The provision states that an arrest may be made for a misde-

meanor when the officer has reasonable grounds to believe the offense was committed, and if there are also reasonable grounds to believe that the offender is likely to do further harm, or is likely to escape the jurisdiction. By including as a condition for arrest the likelihood of doing further harm the system in Wisconsin affords the police an opportunity to take an individual into custody for preventive detention, but later requires that he be released at the bail-setting stage without consideration of the factor which resulted in his initial detention. One might rationalize what appears to be an illogical sequence by assuming that arrest serves to meet an immediate need or danger which no longer exists at the time bail is set.

Still another interesting observation can be made at that point in the system between arrest and appearance in court. In contrast to the bail-setting stage, where the emphasis is upon getting everybody released, the total emphasis in the period following arrest and prior to appearance has been upon assuring that individuals are kept in custody. An exception, of course, is the so-called "station house" bail system. Otherwise, the police in many states are without the power to release following arrest and pending appearance—and in others, the authority is, at best, ambiguous. Indeed, in some jurisdictions lacking specific authority for release, liability to suit for false arrest has given rise to so ironclad a policy against release that even innocence becomes an inappropriate consideration. From the standpoint of the police, this practice places them in the position of detaining those whom they feel need not be detained, while functioning under a system which releases those whom they feel should be detained.

In the light of these observations, we might do well, in addressing ourselves to the problem of bail for preventive detention, to view this problem as it relates to the manner in which the need for custody is met at all points in the system.

Like so many issues in criminal justice administration, the issue of preventive detention is complicated by the fact that we do not really know, in quantitative terms, what the

social costs are of the several alternatives. We have only fragments of information on how many crimes are committed by individuals while on bail. And where such figures are available, we have no indication of the extent to which these figures are influenced by the prevalent practice of detaining those who would be the most serious risks. We do not know whether those crimes which are committed are similar to those with which the individual has already been charged. We do not know how many of these crimes could have been prevented. And we have little quantitative knowledge of the inconvenience or damage which prevalent practice in the use of bail causes the individual.

The legal issues which are involved have not been squarely raised and resolved. With little dissent, the courts have held that, under existing legislative provisions, the only legitimate purpose of bail is to secure the presence of the accused at trial. The constitutional prohibition against excessive bail has meaning only insofar as it can be related to a criterion for establishing excessiveness. This, in turn, must be measured on the basis of the purposes being served. Since the only purpose of bail which is set forth in existing federal or state law is that of assuring the reappearance of the defendant for trial, it would appear that the question of whether bail is excessive must be determined on the basis of the criteria which predict the likelihood of reappearance.

It is not at all clear how the constitutional issue might be resolved if a law were enacted specifically authorizing the use of bail for preventive detention. To date, the constitutional question has been raised in the abstract about a policy judgment which has never been made. There has not been an effort on the part of a legislature in this country to consider the question and make a careful judgment as to the merits of the issue. Appellate courts have ruled on the actions of individual judges in specific cases, functioning under existing laws. We have not had the reaction of an appellate court to a preventive detention provision specifically authorized by a legislative body.

It is apparent that we are at a stage in the evolution of our criminal justice system at which it is essential that we

explore the specific need for a form of action to deal with the individual in custody who it is feared will likely commit additional crimes if released; that we attempt to define the delicate issues involved; and that we weigh the potential effect of alternate proposals upon our total criminal justice system.

This panel is designed to give impetus to these kinds of considerations. The questions to which we might profitably direct our attention are four in number: (1) Is preventive detention justifiable under any conditions? (2) If not, what measures should be taken to prevent current administrative distortion of our bail system? (3) If preventive detention is a justifiable social policy, should a more formal legal procedure be substituted for the current administrative manipulation of bail to serve this purpose? (4) And finally, are there alternatives to bail which will serve as effective means by which the need for preventive detention might better be fulfilled?

We have three gentlemen on the platform to discuss these questions, and to view them from the standpoint of a prosecutor, a defense counsel, and a judge.

It is my pleasure, first, to call upon Mr. Garrett H. Byrne, District Attorney for Suffolk County, which includes the City of Boston, and president of the National District Attorneys Association. Mr. Byrne.

Address of

GARRETT H. BYRNE

District Attorney for Suffolk County
President, National District Attorneys Association

MR. BYRNE: Mr. Moderator, Judge Alverson, Mr. Bennett Williams, at first I was of the impression when I listened to the Moderator, about the cases in Chicago, that he had perhaps read a part of one of my papers, but as he went on I could feel sure that he displayed impartiality from beginning to end.

Now, do not be disturbed about these papers that I am fumbling around here with, because I can assure you that within the last hour I have destroyed sentences, and torn paragraphs, and sometimes I have destroyed pages in order that I might remain within the bounds of reason on this particular subject.

I think it is safe to say that those in attendance here know that prosecuting attorneys are not men whose only aim and desire is to jail everyone, on every charge, on every occasion. It is of great concern to every prosecutor that possibly an innocent defendant, or even a guilty defendant of limited means, who will not default because of his family roots, financial considerations, and character, may be incarcerated when he could, and should, be set free.

A problem confronting every prosecutor in the county arises from the nature of his particular position. He is sworn to uphold the laws, and protect the public. On the one hand there are defendants deserving and undeserving. On the other, there are the rights of people as a whole to be safe in their homes and in their persons.

Let us examine the historical background of bail before proceeding. As you know, bail is of ancient English origin, due perhaps to the porous quality of the jails of antiquity, and also to the thrifty disinclination of the English sheriffs to feed and lodge defendants. According to a learned legal historian, the right to be bailed in certain cases is as old as the law of England itself. Bail is a heritage of our country's legal system from the English common law. It is considered in the Constitution of the United States in the Eighth Amendment which forbids excessive bail.

A similar amendment is found in the Constitution of Massachusetts, Declaration of Rights, Article 26. The purpose of bail is to assure the presence of a defendant to answer a charge, and if found guilty, to suffer the penalty.

What is to be done about the bail problem? Having in mind care for the defendant and, equally, the rights of the public, A possible solution is indicated by the Vera Foundation's Manhattan Bail Project. Just as the voluntary defender concept has become an accepted adjunct of the court.

It is possible that a non-partisan body could voluntarily, or as a commission of the state, inquire into the background, record, and character of a defendant, and give the court an unbiased, and objective report as to the desirability of releasing him on his own recognizance. It is assumed, of course, that in the cases where recommendations of release are accepted, the recommending body would undertake the task of producing the defendant in court when his presence is required.

A report such as above described and the production of the defendant in court would assist the judge or magistrate and remove one of the stumbling blocks in the release on recognizance. It is the fear of the courts that they may be deceived, and appear easily duped.

It has been said that the granting of bail is a judicial act. In Massachusetts a judge in the exercise of his discretion has the power to release a defendant upon the defendant's recognizance. It is not a disused power, but could be used more extensively if the courts were satisfied that proper safeguards were available to insure the presence of the defendant at a trial and, if convicted, for sentence.

A system similar to the Vera Foundation Manhattan Bail Project might well be the answer to the plight of the trustworthy but poverty stricken defendant. It is elementary that the opinion of the bench must be obtained as to the feasibility of any such purpose, release on recognizance, or whatever form it may take. This must be done before an attempt is made to initiate the program. The bench is charged with the responsibility, therefore its opinion should control.

One of the matters on the agenda of the National Conference on Bail and Criminal Justice concerns extended release on recognizance to an accused. It is clear that strict rules must be laid down so that an advantage for the indigent, perhaps innocent unfortunate, may not be subject to abuse and exploitation by hardened criminals. There is no doubt that unreasonable hardships can be wrought by unduly long pre-trial confinements. In some counties and districts in this country grand juries sit only two, three, or four times a year. The possibility exists that an innocent accused could be confined for months, even before the question of indictment is settled, let alone trial.

That brings us to the role of the judge, or the magistrate. The judiciary is composed of men of learning, ability, and goodwill. They receive no satisfaction from confining their fellow humans in lieu of bail. But as anyone familiar with the court knows, under the present crushing work load in most courts it is next to impossible for the judge or magistrate to distinguish between the deserving and the undeserving defendant. In this connection I revert again to the Vera Foundation's Manhattan Bail Project, or some similar system.

It is certainly worth exploration to ascertain if some method can be found either within the present system, or by increasing the staff of probation departments, or as before stated, by a new, independent body, answerable to the court.

It must be borne in mind that the financial status of a defendant is not the only criterion in deciding whether bail should be imposed. It is not necessary to labor the point that the benefits of any system of release on recognizance could not be extended to habitual offenders and perpetrators of crimes which outrage the public, such as armed robbers, professional killers, rapists, murderers, muggers, and others of that ilk. It is unrealistic, and unthinkable, that it should even be considered.

The right of a defendant to be admitted to bail is well discussed in Stack v. Boyle, 342 U. S. 1. From the passage of the Judiciary Act of 1789 to the present Federal Rules of Criminal Procedure, Rule 46(a)(1), federal law has unequivocally provided that any person arrested for a non-capital offense shall be admitted to bail.

> "The 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 right to release before trial is conditional upon the accused giving adequate assurance that he will stand trial

and submit to sentence if found guilty. No one can quarrel with that theory.

Massachusetts has a similar statute: c. 276, Sections 42 to 57. Massachusetts has gone so far as to grant bail in first degree murder cases: Commonwealth v. Baker, 343 Mass. 162.

In reference to the case of Commonwealth v. Baker, what I am about to say may seem strange, coming from a prosecuting attorney. But there are certain homicide cases in which justice will be done by admitting a defendant to bail, whatever his financial status may be: For example, a killing in the heat of passion, by one who has no prior record of criminality, and whose character, reputation, roots in a community are well established, and who has displayed remorse. It is evident that he will not attempt to evade trial and punishment. This makes such a defendant, in my opinion, a good risk for release on reasonable bail.

But I want no misunderstanding as to my position on this subject. In no case should judicial discretion extend the privilege of bail in homicide cases to hardened criminals with bad records, to professional killers, killers in the course of armed robbery, or killings in the course of muggings, robbery with violence.

In any discussion of the bail question there is an important consideration which is too often ignored or neglected. This is the right of the general public to be safe in their homes, and on the public highways. I firmly believe that public policy demands that no maudlin sympathy be shown because of the incarceration of these hardened criminals. There is some doubt under the present system of bail in our country, at least in my opinion, whether imposition of high bail for purposes of preventive detention, either to eliminate further crimes, or to protect material witnesses, is constitutional. In my opinion, I say that any such doubt should be resolved in favor of the long suffering general public.

That which we refer to commonly as the "right to bail" is not an absolute right under all conditions. The right to bail is not a constitutional right, but a statutory one in both the Federal system and in Massachusetts. The protection afforded by the Constitution of the United States, Amendment 8, and by Massachusetts Declaration of Rights, Article

26, is against excessive bail. There is not a shadow of doubt that Congress, or state legislatures, where the right to bail is statutory, have the right to make offenses non-bailable.

A late decision of the United States Court of Appeals, in Mastrian v. Headman, has upheld the right of states to make their own rules as to bail.

The following language is worth citing: "Neither the Eighth Amendment, nor the Fourteenth Amendment, requires that everyone charged with a state offense must be given his liberty pending trial. While it is inherent in our American concept of liberty that a right to bail shall generally exist, this has never been held to mean that a state must make every criminal offense subject to such a right, or that the right provided as to offenses made subject to bail must be so administered so that every accused shall always be able to secure his liberty pending trial. Traditionally, and acceptedly, there are offenses of a nature as to which a state properly may refuse to make provision for a right to bail.

In Massachusetts bail is a matter of legislation. It is stated in Commonwealth v. Baker, referring to the right of the court to allow bail for murder, that the most likely method of abrogating this usage would be by statute, as the Legislature has done in cases of treason, or constitutional provisions, but neither our statutes nor our Constitution does so.

The possibility of preventive detention should be a matter of discretion in cases where the welfare and safety of the public is in peril. No one will seriously contend that the mere fact that a serious crime is charged is sufficient for high bail, or preventive detention. It would, of course, be a violation of the Eighth Amendment and, perhaps, of the Due Process Clause of the Fourteenth Amendment, to set bail on such a basis. More must be shown to justify substantial bail, such as a record of frequent defaults, of failure to appear for trial, flight to avoid prosecution while on bail, and the repetition of former offenses while on bail.

No contention is made that preventive detention would be legal based only on the anticipation that a defendant might continue to commit crimes while on bail.

Offenders, such as those last described, can be legally denied bail by legislative amendment of the Congress or State

Legislature. In states where bail is not a constitutional right the method would consist of amending the Federal Rules of Criminal Procedure, Rule 46, and the Massachusetts General Statutes, c. 276, Section 42, by adding after the statement that "bail shall be granted", an additional statement to the effect that "except for good cause shown to the justice or the court".

The people, as represented by the prosecution, are entitled to a fair trial. As is the defendant. The public welfare and safety would be well served by detention without bail of those who have a history of habitual or compulsive law breaking while on bail or parole. Certainly people in these categories who contemptuously continue to offend while charges are pending against them are a menace against which the general public should be protected.

There may be talk of a double standard, and deprivation of a defendant's presumption of innocence if a rule is enforced denying bail to criminals who flee from trial and possible conviction, or while on bail intimidate or harm witnesses, or interfere with the investigation of the case against them. Insofar as double standards are concerned, I know of no constitutional provision, or prohibition, preventing the establishment of standards to protect the public by denying bail to this type of criminal. In my opinion there is no validity to the theory that incarceration deprives the defendant of the presumption of innocence. No attorney, whether for the defendant or the prosecution, wants to do away with this presumption of innocence, but let us recognize it for what it is, a right the defendant has upon his trial, a rebuttable presumption which can be overturned by evidence of guilt.

We in law enforcement in this country can learn much from the English courts which realistically refuse bail to recidivists who commit further offenses while on bail.

The courts of the State of New York have also displayed common sense and courage in meeting this situation. Admittedly the laws of England and New York differ from our Federal laws in relation to bail. In England the judge has wide discretion in granting bail, and unlimited discretion in denying further bail to one who has committed further crimes while on bail. In New York the granting of bail is discretionary in felony cases. The decisions of these courts provide a guide to us in the exploration of future courses of action.

I would like to cite the language of the great Judge Learned Hand in the case of *In re Fried*, 161 F. 2d page 453. Although not a case involving bail, the following is appropriate to the bail question:

> The protection of the individual from oppression and abuse by the police and other enforcing officers is indeed of major interest in a free society, but so is the effective prosecution of crime an interest which at times seems to be completely forgotten.

A subject which follows logically here is that of upholding the principle of judicial discretion. When bail is set for serious crimes, based on the defendant's bad background and poor record, the judge's discretion should be upheld in the interest of the public at large. The public has the right to demand that the defendant be available for trial.

Concerning juveniles, increasingly the safeguards provided to keep juveniles in custody away from the association of other defendants, is evidenced, but society wishes to treat children as children. Massachusetts has a Youth Service Board to which, with very few exceptions, children between the ages of 7 and 17 who are charged with crime or delinquency may be committed if unable to furnish bail.

Now, material witnesses, that is a thorny subject. In practice it often approaches preventive detention, in order that the witness' very life may be saved. In one of many vicious murder cases that it has been my experience to run into within the last year, one in particular I can't forget. That is where the defendant, paroled from State Prison, out on the road for a matter of six weeks, picked up for six or seven armed holdups, incarcerated in a jail next to my particular county, and having a sweetheart who happens to be a married woman, continuously brooding as to how he could get out to be with her and kill her husband, breaks jail. He meets up with three men on parole, one on bail, and all with guns. They go to the home of this so-called "sweetheart". The police have been tipped off, but unfortunately they get inside the house before the police see them. Their guns

start to blaze. The mother and the 18 month old infant are killed, both shot through the head. They escape.

Now, it was absolutely necessary, they are on the prowl, they're killers, a background of armed robbery, it was absolutely necessary for the safety, the interest, and the protection of the laws, for two men to be incarcerated until at least the others were captured. It was also absolutely necessary to put the sister of the woman who got shot and died, in jail and, eventually, into the custody of the police in a hotel for a matter of two or three months in order to protect their lives.

Does anyone say that they have any rights, either under our State Constitution, or the United States Constitution, to come out, roaming around, while that condition exists? Why, ladies and gentlemen, you might just as well throw mad dogs upon society.

The tragedy of brutal criminal activities lies in the suffering of the innocent. In many instances the rights of these innocent victims are never considered. Unfortunately, however, in so many instances the hardened criminal becomes free to resume his campaign of viciousness and terror.

We as District Attorneys, however, recognize that we are definitely servants of the law. As such, we must prosecute with earnestness and vigor. We must strike hard blows, but never foul blows, so that in the end neither the accused nor his innocent victim shall be the subject or the object of an unjust result.

Thank you.

MR. GOLDSTEIN: Our next speaker will view this problem from the standpoint of the defense. It gives me pleasure to call upon Mr. Edward Bennett Williams. Mr. Williams.

Address of

EDWARD BENNETT WILLIAMS

Washington, D. C.

MR. WILLIAMS: Mr. Moderator, Fellow panelists, ladies and gentlemen of the conference: This is the second time in my life when I have spoken on the subject of preventive

detention. I can open only by hoping that it is more successful than the first.

Several years ago, I was invited to address the inmates in the Maximum Security Division of St. Elizabeth's Hospital in Washington, which is the Federal hospital for the insane. I was to address them on the subject of preventive detention as part of their educational program, perhaps as part of their group therapy.

I like to think that the Superintendent who wrote me a very warm and gracious letter of invitation was being a little whimsical when he said that he thought it would provide me with an excellent forum for the expression of some of my views. (Laughter.) And that he could guarantee me an excellent turnout. (Laughter.)

In any event, he was true to his word, because when I got there I was ushered into a large auditorium with, I would say, several hundred men. The presiding officer of the evening was an inmate immediately familiar to me. I had represented him years before on a check charge. Coincidentally, while he was on bail he repeated the offense by giving his bondsman a bad check. (Laughter.) I suppose there are some who would say he thereby fathered the spirit that binds us together in this Conference. He was a very eloquent and articulate fellow. He waxed on quite effusively as to how I was held in great esteem and affection by the men over there. He seemed to be caught in a flight of his own rhetoric when suddenly he stopped and said, "Oh well, I have talked too long. Suffice it to say, Mr. Williams, that we fellows here at John Howard Pavilion regard you as one of us."

I was nonplused by the introduction, and I unwittingly committed a terrible faux pas, because I opened my remarks of the evening by saying, "It's wonderful to have so many of you here tonight." (Laughter.)

The final touch came as I got into my prepared talk. There was a fellow in the back of the room who, after I had talked about five minutes, cupped his hands to his mouth and said, "Why don't you pipe down?"

I had been told to pay no heed to any interruptions of that kind. I tried not to and went on, a little bit unnerved. He then repeated this, saying, "Why don't you shut up?"

Two more interruptions came like that. I scrapped a large section of my prepared talk and sat down. The doctor then came over and said that he was embarrassed by these interruptions, but that I should take solace in the fact that this was the first coherent and lucid expression this man had made in some six months. (Laughter.)

The past three years have seen great strides made in the elimination of poverty from the equation in the administration of criminal justice. The Gideon case gave new cogency, new force, to the guarantee of the Sixth Amendment regarding the right to counsel.

Now, we are focusing our attention here in this Conference on the problem of eliminating indigence as a cause of pretrial detention. I think that this afternoon's panel discussion constitutes somewhat of a detour off the road, but I hope it is not a meaningless one, because if, in the course of the next hour or so, we can lay to rest the concept of preventive detention, with proper funereal ritual, I think it will be time well spent.

The jailing of persons by courts because of anticipated, but uncommitted crimes, is a concept wholly at war with the basic traditions of American justice. Imprisonment to protect society from unconsummated, but predicted crimes, is so unprecedented, and so fraught with the potential for abuse, and injustice, and excess, as to make freedom loving minds quail in alarm.

Three hundred twenty-three years ago the right to bail was given recognition in this country in Massachusetts Bay Colony, when the Body of Liberties was enacted as the code of governing laws for that community. Those people were Puritans. Their laws reflected both their severity and their faith. Blasphemy was a capital offense, but they recognized in 1641 the right to bail before trial, unqualifiedly and unequivocably.

Two years before the Bill of Rights was annexed to the Constitution the Congress enacted the Judiciary Act of 1789, and they recognized the right to bail in all but capital offenses.

In 1791 when the Founding Fathers of this Republic forged the American Bill of Rights, we had the anomalous situation

of a constitutional provision implementing a statutory right when they wrote into the Eighth Amendment "excessive bail shall not be required".

Ever since the earliest beginnings of our history, we have recognized the right to bail in all but capital cases. This historic understanding has been continued in the Federal Criminal Rules of Procedure.

I think that perhaps the rationale, the philosophy behind this right, has never been more eloquently expressed than by Chief Justice Vinson in the case that Mr. Byrne referred to a few moments ago, Stack v. Boyle in 1951 when he said:

> "The 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."

Now, without deviation, our courts have held that the sole purpose of bail is to insure the presence of a defendant at trial. To use the bail mechanism for another purpose, for example, for preventive detention, is to misuse it. It is to pervert it. It is to use a means illicitly to attain an end that may be thought laudatory by some court. But from the beginnings of our judicial history we have recoiled at the philosophical premise that a good end justifies an illegal means in the administration of criminal justice.

I don't think preventive detention has any more place in our jurisprudence than preventive war has in our diplomacy.

Now, concededly, there are difficult cases. There are sorely troublesome cases involving the habitual offender—the defendant with a long record of anti-social behavior—the defendant with a long record of crimes similar to the very one with which he is charged. These are cases which excite in any judge the desire to protect the community from further transgressions at the hands of this defendant.

I think, however, that society can be protected adequately without revolutionizing our theory of bail, without any philo-

sophical upheaval in respect to the traditional purposes of bail. I think that society can be protected in these cases within the existing framework.

Now, these cases, I believe, can be broken down into two categories. There is the apparently compulsive recidivist who may be acting through mental illness—the repeating sex offender—the repeating arsonist—the addict.

Secondly, there is the habitual offender with a long criminal record attributable apparently to no mental illness.

Now, we have, both federally and in the states, procedural mechanisms with which to deal with the first category, because there can be pre-trial commitment for mental examination under existing sex psychopathy laws, under civil commitment laws for the insane, and under laws which permit mental observation, mental examination, to determine competency to stand trial.

What about the other class? The Master of Arts in Crime who can't wait to get out to go to work on his Ph.D. What do we do with him?

Well, first of all, I think the question which should course through our minds is how big is the problem? Of what magnitude is this problem in the United States today? Because its magnitude will determine to some extent its gravity. As Mr. Goldstein said earlier, there aren't many hard statistics to help us on this, and we better get some pretty quickly, but there are some which do shed some light on the problem.

In 1962 the Metropolitan Police Department in the City of Washington sampled 2,192 cases of people who were released here on bail. They found that of the 2,192 defendants only 16 committed offenses while at liberty awaiting trial.

Now, it is my understanding that the Vera Foundation made a similar but much less extensive sampling and came up with an almost identical percentage. I believe their figures were two out of 250.

Now, as of May 6 of this year, three weeks ago, there were 856 felony cases processed for bail settings in the District of Columbia, and of those 856 alleged felonies only 27 of them were *allegedly* committed by persons awaiting trial on another charge. So, these figures would indicate that we are talking about perhaps 3 per cent of the case load, the criminal case load in this city. I think there would be comparable figures elsewhere if they were developed.

So, I say that those statistics don't warrant a constitutional upheaval in the concept of bail. However, they suggest that we can solve the problems that have been posed here this afternoon by Mr. Goldstein and Mr. Byrne—some horrible cases, everyone must admit. I believe that they can be solved within the existing framework, constitutionally, and lawfully.

Instead of infringing on civil liberties, instead of encroaching on the civil rights of defendants, I believe we can solve them by implementing their rights. First, by a statutory provision which would double the maximum penalty for a person who commits a crime while he is on bail awaiting trial on an old charge.

Secondly, by a simple manipulation of the trial calendar. I think doubling the potential maximum would be a deterrent to the recidivist who might otherwise be tempted to break the law again while at liberty awaiting trial. Giving priority on the trial calendar to those cases would narrow the potential for harm to the community to a point, I suggest, of insignificance. I don't think that any advocate of preventive detention can point to a single federal case in the last few years where a defendant has committed a crime within 30 days of his release on bail. The crimes that are committed are crimes that are committed by defendants who are on a congested calendar, and who are waiting four, five, six and seven months for their trial.

I say, implement the constitutional right to a speedy trial. Give these defendants a trial within 30 days, assuring only that they have adequate time in which to prepare their defenses.

As I compute them, there are 15 basic safeguards that are contained in the Bill of Rights for defendants in criminal cases: He is protected against unlawful arrest and unlawful search.

He is guaranteed the right to a grand jury indictment in a felony case.

He is protected against double jeopardy.

He is given the right to silence.

He is given the right to a speedy trial, a public trial, and a jury trial, in the place where he committed the offense.

He is given the right to have notification of the charges, the right to confront, to cross-examine his accuser, to subpoena witnesses in his own defense, to have the assistance of counsel, to be free from any requirement of excessive bail, to be freed of any cruel and unusual penalty potential.

Of all those rights the least asserted in American criminal jurisprudence is the right to a speedy trial. Why? Because, I suppose, that defense lawyers operate on the old principle that was supposedly first expressed by the Chinese philosopher Confucius, "He who chases justice may catch it."

Defendants don't press for early trials. So, if you take 3 per cent, or 2 per cent of the case load, and you give priority to those cases on the trial calendar, there won't be any hue and cry from anyone whose place has been taken in the line.

So, I suggest, by these two means, by doubling the potential penalty, statutorily, for crimes committed while the defendant is awaiting trial on an old charge, by giving him a speedy trial, within 30 days, safeguarding only his right to prepare his defense, that we can all but eliminate the problems that the advocates of preventive detention point to. In this way we can preserve intact the traditional presumption of innocence in our law. We can preserve intact the true purpose of bail. We can preserve the right of the defendant to prepare his case without the disadvantages of detention.

Finally, I believe that we can adequately safeguard society from the possibility of new crimes by a predictable recidivist.

Thank you.

MR. GOLDSTEIN: Our next speaker is Judge Luther Alverson, Superior Court of the Atlanta Judicial Circuit, who will view this same problem from the standpoint of the court. Judge Alverson.

Address of

JUDGE LUTHER ALVERSON

Superior Court of the Atlanta Judicial Circuit

JUDGE ALVERSON: Mr. Chairman, Members of the panel, and distinguished ladies and gentlemen.

I think it is fitting for us to say something about Mr. Schweitzer. I think it is ironic that we would have a chemical engineer, and a prominent philanthropist, to come to our workshop and tell us some of the things that we should have been doing many years ago. It is certainly fitting for us to pay this respect, and to thank Mr. Schweitzer for what he has done. In fact, I do not think this Conference would be here today if it were not for his foresight, his philanthropy, and his paving the way in this particular area.

Because the court stands as a leveling influence between the government's prosecution powers and the people themselves, it is crucial that the delicate balance of individual liberties and public safety be preserved by our courts. Any new concepts to fit changing needs must meet Constitutional standards. In preventive detention, we must therefore question to what extent pre-trial preventive detention is inconsistent with the presumption of innocence and the due process rights of the defendant. This question must be answered before we can suggest proper uses for preventive detention and methods of effectuating these uses.

Any preventive detention solutions must fit within the framework of the limitations imposed by those principles of due process and the presumption of innocence, else we are merely substituting one form of abuse for another. So we must go further and ask ourselves exactly what it is that we hope to prevent by pre-trial detention and which of these proposed uses, if any, are inconsistent with the defendant's presumed innocence or due process rights.

What has been the traditional or common law use and purpose of pre-trial detention and bail? To insure the defendant's appearance before the court at the time the case is to be tried. Bail simply substitutes a more palatable form of durance for jail and supposedly replaces it when the same result would be accomplished.

Now the right of bail has been abused by many to such an extent that we are now asking ourselves if the traditional use of pre-trial detention can't be expanded to include other uses—uses which some say in fact are already lurking underneath the administration of bail procedures by many judges under the guise of this traditional use.

We should face honestly what is really worrying us about the releasing of defendants on bail immediately, and, in turn, consider on which side of the law enforcement-individual liberty scales the concern is weighted.

The most frightening, I believe, is that the defendant will strike again while on bail and fell more victims by his conduct. Next, I think we are worried about the defendant's harming or intimidating the witnesses on whom the government is relying to establish the necessary evidence. Correlated to this is the concern that the defendant may interfere with the investigation in process. Also, we want any ill defendant to be able to stand trial, so detention to give medical treatment is proposed.

Some would propose preventive detention for punishment purposes.

All of these proposed uses, plus the traditional use of bail to prevent escape, are frankly concerned with the protection and order of society as a whole, and being so, the courts must be conscientiously concerned as to whether these uses can be openly reconciled with the defendant's due process rights and his presumption of innocence.

Obviously, detention to punish the defendant is inconsistent, both with the presumption of innocence and his due process rights and is never authorized.

Detention to prevent further criminal conduct pending trial is not inconsistent with the presumption of innocence. It is, however, inconsistent with the Constitutional provision that no one be deprived of liberty without due process. Prior restraint for an anticipatory crime necessarily violates due process.

Detention to prevent intimidation of witnesses, hampering of continued investigation, or escape are not necessarily opposed to either the presumption of innocence or due process. These are merely extensions of the common law concept of pre-trial detention to insure that a trial will be held.

These conclusions are based on an analysis of the nature of the presumption of innocence and requirements of due process.

In fact, the presumption of innocence of an accused accrues in the courtroom at the time of trial. This is not to say that the presumption is only a presumption of going forward with the evidence. Conceding that it is a substantive presumption which disappears only in the jury room where the State has produced evidence of guilt beyond a reasonable doubt, nevertheless the presumption exists for the purposes of the trial only. As long as the presumption remains inviolate at the trial, its full purpose is served. There is no presumption of innocence during the pre-trial process of bringing a defendant to trial. A defendant can only be arrested and indicted if there is probable cause to believe him guilty. The very fact that we have always permitted pre-trial detention to prevent escape of a defendant pending trial indicates that the presumption of innocence accrues at the time of trial and is not *necessarily* violated by pre-trial detention.

On the question of due process in connection with criminal cases, the Constitution requires that no one be deprived of liberty without due process. This means that no one may be deprived of liberty without being afforded "procedural" as well as "substantive" due process. "Procedural" due process requires generally that the accused receive a fair trial. Substantive due process requires that he be found guilty of committing a "crime." Detention to prevent a defendant from committing a crime necessarily violates substantive due process even if procedural due process has been satisfied by holding a hearing as a prerequisite to such detention. If we should accept the principle that a person may be jailed to prevent him from committing a crime, the next question would arise: Why confine it to persons under indictment? Through scientific processing, lie detector tests and the like, it might be possible to screen the entire population periodically and determine which persons have a "criminal mind" and are likely to commit crimes. The most dangerous of these could be jailed

even if, as yet, they had committed no overt act. Unquestionably, this would be a violation of substantive due process. Statistics show that a substantial number of persons now in prison will resume a life of crime upon their release. If we accept the principle of detention to prevent anticipated crimes, why not determine which of these are likely to continue their criminal activities and simply detain these in jail for life? This also would clearly violate the Fourteenth Amendment. Likewise, pre-trial detention to prevent continued criminal activity also violates the due process clause of the Fourteenth Amendment.

On the other hand, pre-trial detention for the purpose of preventing frustration of the State's duty to bring an accused to trial, including detention to prevent escape, to prevent hindrance of continued investigation, to prevent intimidation of witnesses pending trial, and to insure a fair trial is not necessarily inconsistent with the requirements of substantive due process or the presumption of innocence. Accordingly, it might be possible to frame appropriate legislation which will permit pre-trial detention in such cases provided constitutional and statutory requirements with respect to bail are amended to permit such legislation and provided further that the requirements of procedural due process be met in such cases, that is, the pre-trial detention must not be arbitrary, but only after a "hearing" or "trial" which meets procedural due process requirements, in which right to counsel is, of course, included.

The intricacies of such legislation are confounding. We would, in effect, be eliminating not just judicial discretion, but also the court-made law or the judicially engrafted guidelines which must be the basis of the judicial discretion. Conceding the desirability of such preventive detention legislation, however, I think it would properly not be extended beyond the coverage of violent acts. Nonviolent acts would be excluded. The violation of city ordinances would likewise be excluded.

Since the infringement of Constitutional rights in the bail and pre-trial detention processes so frequently occurs on the city level, there is a real need for quicker appellate review. In our State, while there is a method known as the

"fast bill" route, it should be faster. For example, a defendant aggrieved by excessive bail (which is legally equivalent to denial of bail) can file a habeas corpus which by law must be heard within eight days. An unfavorable ruling can be appealed via a "fast" bill of exceptions and the review of the case receives priority over other cases. This is good, but should be better, by providing quicker hearing dates by statute on both trial and appellate court levels, by eliminating the burden of preparing briefs of evidence, written appellate briefs, and so on. In other words, for such exigent cases, the actual trial court transcript, with a simple bill of exceptions stating the error complained of, and oral argument could all be substituted and allowed in lieu of the more cumbersome and time-consuming legal mechanisms.

In the latest bail case to reach our State's Supreme Court, the Ashley Jones case, there elapsed over three and a half months before the Appellate Court ruled on the defendant's habeas corpus writ based on excessive bail. The writ was denied by the trial court on October 8, 1963. It was January 15, 1964, before the Supreme Court heard argument. On January 22, 1964, the Supreme Court rendered their decision which in effect held the bail to be excessive.

I do hope that the gentlemen herein assembled will reach some intelligent solutions toward these important considerations that are so pertinent today.

B. Regional Group Discussion (Panel B)

Following Panel B on Thursday afternoon, May 28, on Setting High Bail to Prevent Pretrial Release, discussions were held in regional groups composed of the same members as the morning sessions.

The discussions have been edited, grouped by region, and subdivided as follows:

1. Incidence of Crimes Committed While on Bail

EAST GROUP

MR. CECIL MOORE: I don't want to pose as an authority, but I usually have from 40 to 50 cases listed a week in Philadelphia. With reference to the alarm concerning repeaters, it is my experience that less than one-tenth of one per cent of those persons commit other offenses while they are on bail. They usually involve lottery or selling whiskey.

In addition, the suggestion was made on a speedy trial. I hardly see where it is possible to prepare a major felony in 30 days. Of course, we think that Mr. Crumlish in Philadelphia has done an excellent job in scheduling cases on the basis of priority.

If you schedule on the basis of priority for repeaters, you are still going to have some other people who are possibly going to be in jail. They probably have only committed minor offenses: they might be found not guilty; and thus they may be in for a longer period of time than they would have been, sometimes longer than if they had been convicted and served the sentence which the law applies.

I would say with reference to the repeaters that it is probably a very sore issue. I will use a very good example. In Chester, Pennsylvania, which is the last element of MacLure's Plantation, the only northern cesspool of bigotry we can find, it was in that particular case with civil rights demonstrators where $25,000 bail for Father Hewitt was fixed because he violated a law that did not exist. We do not have a criminal trespass statute in Pennsylvania.

These persons could be considered repeaters.

JUDGE MORRISSEY (Boston): The offenders that my distinguished colleague talks about, if we had them in our Commonwealth, they would all go out on personal recognizance. They would not hold them at all on bail.

SOUTH GROUP

MR. MCCARTHY: I wonder if first of all we shouldn't try to do what Mr. Williams suggested, to try to come to some

kind of consensus on whether this is a definite problem. There is no question that it is a theoretical problem, that people will go out and commit subsequent offenses. But the figures Mr. Williams gave indicate this is not, indeed, the problem we assume it to be.

Our own experience in the District of Columbia has been minimal at this stage, but we are very young. It hasn't been a tremendous problem for us. Of the 66 releases we have obtained, there have been five subsequent offenses charged.

One was intoxication and one was a traffic charge, so only three were serious out of the 66. And we are dealing with people who are charged with felonies, who have previous records, sometimes long records, though not necessarily felony records.

FROM THE FLOOR: Well, did you determine in your study how many were in jail in the District during that period of time as a result of preventive bail?

MR. MCCARTHY: Preventive bail is something you can't put your finger on. It is possible that the judge may have set it in any number of cases or no cases at all.

MR. CRANBERG: Granted that numerically it may not be a large problem, I think you have to concede it is a problem. Of course these types do exist. We had a case of a professional Chicago burglar come through our town. This man was going from state to state burglarizing, and getting out on bail, burglarizing again. He had bail set at $40,000 in Des Moines. He had no difficulty raising that bail at all. He simply went another 200 miles and burglarized some place else, and then went on from there and burglarized a bank in Indiana.

This tends to bring the whole matter of pretrial release into disrepute. It does seem to me to be a problem, and one of Mr. Williams' suggestions was that these people be afforded speedy trial.

Now, that makes a good deal of sense except these people, the professionals with connections in Chicago, at any rate, appeal. This fellow brought in a couple of very able Chicago criminal lawyers; and he appealed the case to the Circuit Court of Appeals. He asked for rehearing, which was turned

down, so I presume he is going to appeal to the Supreme Court.

He has been free on $40,000 bail now for well over a year, and I presume he is still active. His attorney reported privately that this man has a tax-free income of $100,000 a year through his efforts.

JUDGE GLANTON (Des Moines): Mr. Chairman, let me hasten to say that this pretrial release project is much better than the old system that we used. I happened to be Assistant County Attorney for 6 years, and I had lots of experience in this bonding situation.

Out of the 668 cases handled since we initiated this pretrial detention project, we only had one person that failed to appear; and we caught him four days later. Under the old situation it was quite frequent that a person would jump bail, and it happened quite frequently that those out on bail would commit other offenses. In fact, we had one case that was worse than the one the gentleman spoke about this afternoon. We had one convicted of crime 15 times while he was out on bail.

So, I am behind this project 100 per cent. I don't know why we had not thought of it in Des Moines long before this.

MIDWEST GROUP

JUDGE REARDON: I am Judge Reardon from Illinois. I am in hearty sympathy with the general idea of release on recognizance, but I have been frequently asked the question: "Have any statistics been developed upon crimes, if any, that may have been committed by people who are at large under their own recognizance?"

JUDGE MCCREE: I didn't provide any statistics to that effect, but they are available, at least in the case of every such person who is subsequently convicted. We order a pre-sentence investigation, in those cases and the report always contains data relative to criminal conduct, if any, between indictment and sentence.

My recollection would be that there is very little incidence of it, except in one particular type of activity which comes

under the Federal Court, and that is violation of the alcohol tax law. We do find some recidivism during the period of pre-trial recognizance release of people who are engaged in the illicit manufacture of distilled spirits, but except for that, I know of no instance over several years where that has happened. I could get the data for you if it is desired.

I might suggest, Mr. Moderator, that the District Attorney for the Eastern District of Michigan is here, Mr. Lawrence Gubow, and he might be able to answer this in part, too.

MR. LAWRENCE GUBOW (Michigan): I don't have any statistics either. I would agree with the Judge on the alcohol tax cases, but I would add the gambling cases also.

JUDGE MCCREE: I think you are right.

MR. GUBOW: Outside of those two areas, I can only think of one other case since I have been in office, and in that case the Judge took this person off of personal bond and turned him over to the Marshal.

PROF. REMINGTON: I think Mr. Mann has some experience in St. Louis that might be relevant to this.

MR. MANN: All I can give you is the number of defendants on their own recognizance who had an information issued against them. There were four out of 170-some. We have no comparison between the offenses upon which our informations were issued and people who were on professional bond during the same period.

MR. JOHNSTON: Mr. Chairman, of our 160, I know of two that have been arrested. One was arrested for attempted burglary, and another was arrested for another forgery charge. I think this is going to happen. It is to be expected. It happens when they are out on bond that a bondsman makes. In fact, I think there is some feeling that having to raise money for a bondsman, in some cases, may very well be an incentive for the professional. He has got to raise more money, if he is going to have to pay a bondsman.

We have had a greater incidence of arrests while out on professional bonds than we have had under this own-bond release project.

2. Factors to Be Considered in Setting Bail

EAST GROUP

JUDGE MORRISSEY: Speaking about the courts in Massachusetts, I don't think there are many judges who hold anyone in excessive bail. In my own particular case, I would say that in the last two years, I would say that I have let go 8 out of 10 on personal recognizance. If defendants can show that they have any permanent residence at all, or if they can show from their background that they will reappear in court, they are let go. The attitude of most judges is that they certainly would like to have the cases disposed of. At least 95 per cent of the judges in our state certainly do not impose excessive bail.

I think the tendency has been to go along in a great many cases with personal recognizance, certainly on the recommendation of the Probation Department or the defense attorney. If they can assure the judge that they will be back in court, there is no question that in our Commonwealth they will be granted that consideration.

I remember one case where I had the problem presented to me from a practical point of view. I had a person before me who was charged with deriving support from a prostitute. His record showed that out of 12 major offenses every one was dismissed for want of prosecution. The young lady that was before me had her shoulder broken, her teeth knocked out, and she was scarred up with acid. She said she would testify if this particular person were kept in jail.

There was no question at that particular time of the defendant not appearing in court. The question was whether to hold the young lady as a material witness. I normally impose, say, $2,500, then to $5,000, and so on. In this particular case, the issue was whether to let him out on the street and/or hold the young lady as a material witness. This is one of the kinds of problems that you have to face in a conference such as this.

If you let him out on personal recognizance, with the understanding that he would appear again at trial, and then the victim was badly injured again, or killed, you have the problem of the newspapers coming in in a very critical vein. You have to have some security for the particular judge, whether he was exercising good, balanced judgment in not holding that particular offender in excessive bail.

This is the problem from the practical point of view.

VOICE: I am not a judge. I am not a lawyer, but I am in the field of probation. It seems to me that what I would like to have clarified is what is considered as high bail? In what type of cases would you place high bail? That to me should be resolved in order to have it controlled so that it could be somewhat uniform.

All I can say is that this question of high bail would be comparable to many disparities in sentencing throughout the country.

MODERATOR DASH: Yes? Do you want to respond to that?

MR. EDWARD DABROWSKI: I am Sheriff of Bristol County in Massachusetts.

High bail, or excessive bail, is the amount of bail that you can't make. I have been in a situation that happened last year—it is not humorous; these are things you get into when you deal with people. I had an 18-year-old boy who did 42 days in jail because he could not post $100 bail. If you ask what high bail is to that boy, $100 bail is high bail for he could not meet it.

MODERATOR DASH: We have been discussing for the last 15 or 20 minutes a special question that was raised in the panel this afternoon: the use of bail, not for the purpose of assuring the appearance of the defendant at trial, but for that particular defendant who has shown a history of repeated crimes and, especially, a history of committing crimes while on bail.

VOICE: Although not all people who do not return to court for trial are people who commit crimes while they are out on liberty pending trial, the reverse may be true. That is, people who commit crimes of violence while awaiting trial may well be the same people who won't show up for their trials.

We can only speculate on that. I have the feeling that they may be the same people. The experience that we are getting with the studies now should provide us with a more factual answer to that same question.

The Vera approach, identifying background factors concerning individuals up for liberty or detention decision, can provide us information upon which to distinguish those people who show up for their trials against those who don't. If the information is acquired with sufficient accuracy, and if it is followed with sufficient care, it can provide us with a firm basis in experience for identifying where the high risks of further crimes or violence are.

We could couple that with something that we have in a number of courts in Massachusetts, the Psychiatric Court Clinic, where there is available to the judge medical and social expertise.

I think we have gone a long way toward making an informed assessment of who is likely to show up for trial and who is likely to commit further crimes. If any court makes its decision on the basis of that kind of available data, then I think we have made a good deal of progress.

SOUTH GROUP

MR. DUNAWAY: How can you have preventive bail without amending the Constitution?

PROF. BENNETT: You have preventive bail right now by fixing the bail so high they can't make it.

MR. DUNAWAY: Isn't that unconstitutional?

PROF. BENNETT: Well, Mr. Byrne suggested, as I understood him, that maybe one solution, if we assume preventive bail is sound, is give a judge discretion in major felony cases to deny bail.

FROM THE FLOOR: I think that primary to this entire discussion is a workable definition of excessive.

JUDGE ALVERSON: We have these guidelines in our decisions.

MR. SEGREST: I thought what Mr. Byrne said was that the right to bail is a statutory right and not a constitutional right; and by statute you could exclude the right.

Mr. Williams came up two minutes later and said, "Sure, that is right, the right to bail antedates the Constitution. It is a common law right that is more basic than even the Constitution."

According to Mr. Byrne any state could pass a statute which would do away with bail.

FROM THE FLOOR: If it is in the Constitution, how are they going to do it?

MR. SEGREST: According to Mr. Byrne, and tell me if you all understood this, too, Mr. Byrne was saying that the Constitution has a provision which does not guarantee bail. It is a provision that says you can't have excessive bail.

JUDGE ALVERSON: In all but capital crime.

FROM THE FLOOR: It can't get much more excessive than no bail.

MR. DUNAWAY: Did you hear what Chief Justice Warren said yesterday on that? Do you have any doubt what the United States Supreme Court would hold on that subject?

MR. SEGREST: I don't, but Mr. Byrne apparently does.

FROM THE FLOOR: And Mr. Williams.

MR. SEGREST: Did any of you get the impression that is what he said?

FROM THE FLOOR: There is no question that is what he said.

FROM THE FLOOR: I don't think there is any constitutional basis for preventive detention. If you can say you are going to presume a man is going to commit another crime when he is presently presumed innocent of the crime he is charged with, I think that is completely alien to the philosophy expressed by the Supreme Court.

FROM THE FLOOR: We still have the Constitution. If your bail is excessive or is denied, you are still violating the Constitution.

MR. DUNAWAY: May I ask you, specifically, are we not in the South presently in the civil rights cases both exercising preventive detention and using excessive bonds?

For example, is not a $500 bond for what would ordinarily be a $50 bondable disturbing of the peace charge for a Negro college student who is sitting-in more excessive than a $25,000 bond for a professional criminal?

FROM THE FLOOR: I would say, yes. But we don't have this problem in Kentucky.

MR. RONALD SOKOL (University of Virginia Law School): I would like to suggest an answer to the question that all bail is excessive. I think it has been established to my satisfaction that in terms of a man's financial ability to meet bail,

that all bail is excessive and that financial ability bears no relationship whatsoever to whether or not he will, in fact, appear at trial.

If it doesn't bear any relationship, it seems to me all bail is excessive. That brings me to the question of whether a state could enact, consistently with the Constitution, a statute for certain offenses such as narcotics offenses, or repeated sex offenses, where recidivism is very high, saying that bail would not be permitted in these cases. The suggestion has been made from the floor this could not be done consistently with the Constitution.

I think I would probably disagree with that statement. If the statute were framed carefully enough and standards were set out that were specific enough I think that such a statute would pass the test of the due process clause. I would like to hear if anyone disagreed.

PROF. BENNETT: I would like to ask you one more thing while you are talking. Suppose instead of prohibiting bail in certain cases, you have a statute that makes the granting of bail in major felony cases not a matter of right, but the discretion of the trial judge. Do you think a statute of that type would be valid?

MR. SOKOL: In my judgment, if that were the only standard of the statute, I think it would be unconstitutional. The standards would have to be very rigidly set forth. If they were, I think it would withstand the due process of law test.

PROF. BENNETT: Does anyone have anything to offer in answer or in addition?

MR. WALLACE HOAGLUND (Louisville, Kentucky): Since the standard of reasonable bail is to assure the defendant's presence in court, I think the judge could take into consideration the fact this prisoner is likely to commit additional crimes, because if he does, then his chances of showing up at the hearing are less than if he has only one offense to worry about.

Secondly, if the chances of the prisoner are that he will injure or harm some witness or some other victim of the previous crime that might interfere with the prosecution of the case, his chances of appearing at his original trial are therefore less.

So, I think using the standard of a poor risk to appear would justify the preventive detention by denying bail completely, not to prevent him from committing the crime, but because of his character and the likelihood of what he may do will make him a poor risk.

On that theory I say we are not in conflict with the original purpose of the Constitution or statutes, namely, the assurance of the person's presence at trial.

FROM THE FLOOR: I would like to observe again that I feel that as far as preventive detention is concerned, you can't have it without presuming a man is guilty of the crime with which he is charged, and also presuming he is going to commit another one if he is out on bail. That is the only basis on which you can have preventive detention.

You presume him to be guilty and that is absolutely contrary to our system of justice.

FROM THE FLOOR: This is exactly what we must do in Kentucky in capital cases in order to have no bail. We must have a hearing at which we can show this. The presumption is great and the evidence strong that he has committed this offense.

PROF. BENNETT: That is something I was going to ask about. We have the same type of provision in Louisiana. A study I made of it some time back indicated a great number of states have it. It is a constitutional limitation with us that bail is denied where the proof is evident or the presumption great. In other words, where the crime is really dangerous, and we are virtually saying to defendant, "We don't care how nondangerous you are, we are going to deny you bail."

MR. MILLS: In taking this one step farther, I know in our District of Kentucky that when we have a capital case and we ask for no bail from the court, then we must file affidavits that we have made an investigation and what we can show to meet this burden.

JUDGE KALISTE SALOOM (Louisiana): The question I have is that we have been talking about the major offenders, the felons, but what about the little man that we see so much of in the municipal and city courts for whom jail is a second home? They are jailed so often. If they are taken out, it is

usually before the judge or magistrate commits them to an additional sentence.

If they are held, as they are in many places on misdemeanors, or very small violations of state laws, municipal or county ordinances, they are sometimes held for two, three, or four weeks for a violation that the maximum penalty might not exceed 10 days or 30 days.

The Police Departments that I have always worked with say, "Judge, if you let him out, I am going to pick him up again tonight, and you will have him again tomorrow."

MR. JAMIE MOORE (Alabama): I am from Birmingham, Alabama, Chief of Police. I wish to answer the gentleman's question about the bond for those that go through the city jail. We arrest anywhere from 2,000 to 2,500 persons per month that go through our city jail. We have a set schedule of fines that is set up by the Director of Finance for certain offenses, such as driving while intoxicated, reckless driving, disorderly conduct, and drunk.

The general practice is that if a man is listed in the city directory and shows that he works, or is listed in the telephone directory, he will sign his own bond for any offense in the city jail.

Our people who are not known offenders don't have too much trouble getting out of the city jail. Like somebody said at the Conference yesterday, somebody will call me or somebody they know; I will call the warden over at the city jail and tell him to let that fellow out. It is informal.

MR. JACK YOUNG (Jackson, Mississippi): During the last two years I have represented some thousand or more indigent clients. What I am concerned about is what can be done about the indigent clients I have who are not eligible for bail bond because bail bond companies won't even take them.

In Mississippi we are subjected to this matter of preventive bonds by the high and excessive bonds assessed against the students and others who are arrested. I would like to know if any member of the panel can tell me what I might do to cover the situation I am in now and expect to get into later in the summer.

JUDGE HUNTLEY: I am Judge Moscoe Huntley, Richmond, Virginia.

We have had our share of the sit-in and trespass cases. If my recollection is correct, we have a minimum bond of $100 in many of these cases; they appeal to a Supreme Court somewhere in Washington. A lot of times most of them are college students involved; and in the summer they are spread all over the country.

We do not require them to return to the city during their vacation period. Their lawyer comes in and tells us they will appear at the time for their return to school. We take it at face value and let it go.

We understood there was a principle involved and we thought they had a right to sit. Therefore, we fixed what we thought would be a minimum bond in these cases, and let them go on out of the state.

JUDGE LUTHER ALVERSON (Atlanta): I would like to speak to the gentleman from Jackson. I think we have overlooked the question he really propounded to us. I am very pleased that the judge from Virginia has treated the cases in the way he has treated them there with $100 bonds.

The problem is real in many places in the South where preventive detention is used. I would like to ask the gentleman from Jackson how much the bonds happen to be in the cases where he represented the defendants.

MR. YOUNG: Defendants in Jackson are convicted under city ordinance or state ordinance. They can be arrested for disorderly conduct under city ordinance; for that your bond would be $225. If they elect to charge you on the state statutes, your bond would be $500.

JUDGE ALVERSON: Have those limits been tested as to excessiveness?

MR. YOUNG: No, they have not been tested as to excessiveness. Now, on trials in the county court you have to post a $1,500 appeal bond in order to appeal Federal. All these bonds are cash bonds, because the bonding companies in Mississippi will not touch them. There is not a single bonding company in the state that would touch one of these cases.

Obviously you can't get a property bond, so you have no other choice but cash.

JUDGE ALVERSON: Have you filed for *habeas corpus* in those particular cases?

MR. YOUNG: As to excessive bonds?

JUDGE ALVERSON: Yes.

MR. YOUNG: No, we have not filed for excessive bonds.

JUDGE ALVERSON: I would suggest that you test the excessiveness of these particular assessments.

MIDWEST GROUP

JUDGE ROY HARPER (Missouri): While it may be unpopular with a lot of people, there are still a few of us who believe that the first consideration is to the public rather than the individual with whom we are dealing. I know you can get a lot of argument on that. There are also some of us that believe that even in the interests of the juvenile and some others that one of the best deterrents is detention for about 24 to 48 hours to see the inside of a jail house.

I think that you are going to run into a lot more opposition if you are going to say that you arrest these people and they don't even get into the jail than you do if after they are there awhile, and they are unable to make bond, that you look to getting them out.

We have, in the Federal Court in St. Louis, for a long time, permitted some people to go without bail. But I would assure you that it is not the general rule.

PROF. REMINGTON: Judge Harper, I think you have inspired some reaction.

MR. SUBIN: If I may just address myself to the point Mr. Gold was suggesting, and also, Judge, the point you were just making, I believe that in the New York experience, and in terms of how a project starts, they were a lot more conservative in New York about recommending release on recognizance in felony cases at the outset than it turned out they needed to be as a result of their experience. I think one of the points of the Conference, perhaps one of the most important considerations in the whole problem of bail, is that defendants should be treated upon an individualized basis.

Of course, the young boy picked up for statutory rape is not the same as a sex maniac, although they both may be sex offenders. With more individualization of the process, I think the felony-misdemeanor distinction breaks down pretty much.

As Mr. Sturz said this morning: Certain sex offenses, certain narcotics offenses, and certain homicide cases, are now excluded, but they are finding that more and more, even with the narcotics offenses, which is usually listed as the great taboo, they can successfully recommend these people for release.

MR. MANN: I would just like to make a brief comment regarding the desirability of confining an accused person to "teach him a lesson". I bring a specific instance that occurred in July of 1963 in a Farmington, Missouri jail, in which a seventeen year old accused person, born and reared in the neighborhood, was stomped to death following a night of sexual horror of an abnormal type. The murderer, a known sex offender with, I think, two principal convictions, was found guilty of murder in the second degree just this week.

I can't see that it was beneficial to this 17 year old boy to be confined to teach him a lesson.

JUDGE HARPER: Might I say to you that while there are a lot of people that share your thought, there are a lot of people sitting on the bench that don't? We don't have a lot of juvenile offenders, but I will tell you frankly that I put every one of them right over in city jail, where they are kept for 24 to 48 hours. I have been on the bench 17 years, and that is how long I have been doing it. I have only had one in 17 years go bad on me after I put him over there, and that was when I put him on probation; so that is the other side of the coin.

MR. MANN: Well, is that circumstance a result of his being confined that period of time?

JUDGE HARPER: I don't say what it is a result of, I am just telling you what the practice is; when they go over there and come ba they tell me they don't want to go back.

MR. MANN: I don't know anyone in jail that wants to go back.

MR. BAILEY (South Dakota): I think you have to look at the bail problem from the standpoint of what is the public reaction in your community. Now the Judge here across the way from me puts these kids in jail for a couple of days, and when he said that, I sensed a feeling that people didn't like it.

On occasions, I have sat as temporary judge of our municipal court, and I have found where we have speeders and drag

racing going up and down our streets, we don't have the boys fined because momma just comes in with her fur coat and pays it, so we put them in jail.

We put them in jail, and they get a taste of it. That is a fine they can pay. They only go from 9:30 in the morning until 5, 6, 7, 8 or 9 at night. They eat one or two meals down there. It is a real thrill, and I will say to you, Judge, I am with you, because I have got a hunch that you are right; we are going to have to head back to the woodshed with the kids.

That got good public reaction in my community. Put those kids in jail, there is no fine to pay, but the public reaction is good.

We have got a county judge, when he gets a kid who is brought in for speeding, he cuts his hair; and how close does he cut it? About like mine, and that is how you tell the children in our community. They have their heads shaved.

MR. WILLIAM RANDALL (Minnesota): Several of our speakers have stated that the traditional and sole purpose of bail is to make sure that the man comes to trial; it seems from the statements made that they thought this was an unqualified statement of the law.

Just this last year, the question was raised in Minnesota. It went to the Minnesota Supreme Court, certiorari denied, then into the United States District Court, and then to the United States Circuit Court of Appeals, and again certiorari was denied. The sole issue as indicated in the opinion related to the request for $100,000 bail based on the likelihood that the petitioner's liberty would hinder the prosecution of the case against him.

This was the reason. It was not that he was not expected to be present when the trial came. The United States Circuit Court of Appeals stated, "It has always been accepted that beyond the purpose of assuring presence at trial, a state court may in a particular situation make denial or postponement of the general right to bail, where their rationale appears to be necessary to prevent the threat or likelihood of interference with the processes of investigation, or the orderliness of trial". So there certainly is some authority contrary to the statement that bail is only for the purposes of showing up again at the right date.

PROF. REMINGTON: I am not sure everybody knows about that case. Do you have a citation there, as long as we have a record?

MR. RANDALL: *Minnesota* v. *Mastrian,* 326 F. 2d 708 (8th Cir. 1963).

MR. RICHARDSON: What if the fellow has $100,000? Then Minnesota does not get served.

PROF. REMINGTON: The question, I take it, is what if he has $100,000?

MR. RANDALL: If I had thought he had $100,000 I would have asked $200,000. I was pretty sure he didn't.

WEST GROUP

PROF. SOLOMON: I think that what we were talking about this morning, and the topic for the afternoon session, are related in an important way. It seems to me that the issue of preventive detention is relevant to the problem which we were discussing this morning as to the kinds of offenders to exclude from a program designed to release on personal recognizance, or, even a step further back and earlier, a summons project.

In a sense, the kinds of offenders who pose problems which are dealt with by the high-bail-preventive-detention concept are the people who also frequently are being automatically excluded even from inquiry, if you view the kinds of projects which are going on throughout the country.

In effect, there is a judgment that is being made by those who run these projects that there is something intrinsic in the character of the offense that is one step towards the question which at the end of the road would be characterized as preventive detention or high bail to prevent the release of those whom we regard as dangerous.

In short, there is a thread, there is a continuum from minimal deprivation through the use of summons, ROR, to the opposite extreme, manipulation of bail, or the invention of some new device, the law of preventive detention, which is not unknown in Continental, African, or Oriental countries, as a means of dealing with crime.

As I read the bail materials, it occurred to me that if you would try to make a composite of all of the existing experi-

ments and the pattern of eligibility or ineligibility, you would find that certain kinds of crimes have been excluded for various reasons. Judge Wapner, for example, quite candidly mentioned the exclusion of homicide, hard narcotics, certain kinds of sex-molestation cases, and one or two others.

JUDGE ZIRPOLI: You go one step beyond that and you will find certain types of offenses that one district attorney will decline prosecution, and another one will accept. I mean, getting down to minor offenses, you have a variation which is even one step further advanced to the summons stage.

PROF. SOLOMON: What I am suggesting is that a composite of the eligibility rules adopted in the five or six districts in which these experiments have taken place range from no exclusions at all—Washington, D. C., and the Eastern District of Michigan, if I am not mistaken, have no restriction.

At the opposite extreme, Chicago, in which they limit it simply to misdemeanors. There is something operating here which, I think, we can consider in terms of preventive detention. The logic which leads to the characterization that a man who allegedly commits a homicide or a kind of a sex offense is not a fit subject even to be considered for ROR leads, at the opposite extreme, to saying that a man who allegedly commits a sex offense of this sort, or a homicide, is a fit subject for high, excessive, prohibitive bail, for purposes of keeping him in.

MR. PERRY: Getting back to your original statement where you roughly said there are classes of people, some we could consider for release on personal recognizance, some we could not. Personally, I say there is no hard, fast, set rule for any offender who commits any offense. There are people who could be OR'd, who would commit any possible offense you could name. There are people who could not be OR'd, who are in the same type of category. There must be an individual determination of each man.

There is no general category. People are still individuals. You have got to look at them as individuals. And you have to let a judge use his good discretion in determining whether that individual should be released or not.

JUDGE ZIRPOLI: The only thing I want to discuss is, if you follow the suggestion just made, you are in a hopeless situation

in your large metropolitan areas. Either you fix some classifications, or you do not. You are going to have to fix classifications, and you know in advance that you are going to have a percentage of people who are going to violate the trust that is extended. But the question is, is it worth it? If it is worth it, do it.

FROM THE FLOOR: That is correct.

JUDGE WAPNER: I think there is truth in what Mr. Perry says, but not a great deal. Certainly the judge is going to use his discretion, but it must be based upon some rational criteria that we set up and we evaluate. But obviously, we must have these various criteria, his background in the community, whether he has a job, whether he has a family, whether he has any children, whether he has committed a prior offense, and so forth. We must look at each individual case separately. But if we did not have this criteria, the judge would not have anything to base his decision upon.

DEAN JOSEPH LOHMAN (Univ. of California School of Criminology): It seems to me that part of the problem arises from confusion as to the variables that are being introduced in the discussion here. At one point we speak about certain categories of crime. At another point we speak about the social characteristics of offenders, or their psychological characteristics. To a certain extent these do converge one upon another, but it seems to me they have to be dealt with as independent variables in the picture. If we do not, then we cannot come up with anything that has any meaning.

When we speak about these as being strictly individuals, I think we, again, miss the point. It seems to me, if we could establish a high correlation between certain social attributes and some predictable offense in the future, we could then establish a risk category.

MR. REICHERT: Before we talk about preventive detention, it seems to me what should be clarified is whether this group accepts or rejects the principle that the sole purpose of bail is to guarantee the appearance of the defendant at all criminal proceedings. The minute you go beyond that, you are talking about legislative and perhaps constitutional changes for a principle that bail has more than that function.

JUDGE WAPNER: I think we have to define what we mean by preventive bail. In Los Angeles in the Superior Court we have a bail schedule. Let us just take one example, assault with a deadly weapon. Slight injuries, $500; slight injuries with prior felony, $1,000; serious injuries, $2,000; serious injuries with prior felony, $3,000.

These are the criteria set up and adopted by the judges. Let us assume you have serious injuries, prior felonies, but bail set at $3,000. Is it preventive, then, to say the judge will now raise it to $10,000, because he thinks the man will get out and kill the intended victim, or is it preventive to leave him at $3,000, because he cannot make $3,000, and we are not going to release him OR?

I would like to have somebody comment on that.

PROF. SOLOMON: Judge Hall.

JUDGE HALL (Los Angeles): First of all, I think we are all committed to the proposition that bail is to be used only to require the appearance of the defendant. However, if a case came before me and it indicated that the man was quite happy —if a bank robber—to go out and rob another bank, I feel as though I would be justified in fixing a very high bail. Because if it appeared, in my judgment that he might go out and commit another crime, it would also follow that I would come to the conclusion that he would not appear. Therefore, it is not preventive detention. It comes down to the proposition of bail fixed to guarantee his appearance.

PROF. SOLOMON: May I just put a question, because I think it might be relevant here. How do you tell whether the man is apt to rob another bank or do something else?

JUDGE HALL: You may have a make sheet on him. You may have information which the Vera Foundation now provides in a hurry concerning his lack of roots in the community—or you may have a threat. I have denied bail on a narcotic offender where he has threatened to kill two narcotics agents.

PROF. SOLOMON: I would have no difficulty with that case.

JUDGE HALL: I just fixed a very high bail, that is all.

JUDGE ZIRPOLI: You cannot fix absolutes. You have to leave something to the discretion and to the good reasoning and common sense of the judge. And this is it. A fellow robbed three banks and spent time and came out and robbed another.

You are beginning to have some facts from which to at least make a reasonable conclusion.

JUDGE HALL: It depends upon the facts of the case. But you still never bend that proposition that bail has a constitutional purpose of requiring appearance.

MR. AUGUSTINE (Los Angeles): I would say that one approach to the problem could be handled like this. Upon an arrest for either a misdemeanor or a felony, the record from Washington would indicate whether the arrestee was on parole, whether the arrestee was on probation, or if neither of these, whether the arrestee had failed to appear in other or the same jurisdictions; in other words, whether the arrestee has jumped bail before.

I think those types of persons would clearly be eligible for preventive detention. As far as the rest of the misdemeanors, I think little harm would come from releasing on their own recognizance, because most misdemeanors are not very harmful offenses.

JUDGE RUPERT CRITTENDEN (Berkeley): I think that, by far, the greater number of offenses are the misdemeanor offenses, and they are committed at the local level. One of the problems that you have in the question of preventive detention, although it really is not detention, is the control of the local bum, the local hoodlum. This man comes in and if he is released by me immediately upon coming into court, he laughs all the way out of the courtroom, because this is a joke. Part of setting bail, even a low bail and one that he can get out on, is to impress the accused and the community with the seriousness of the offense.

While we can approach this purely on the legal theory that the only basis upon which we fix bail is whether or not this man will appear, this really begs the question to some extent because you have more involved in this than just the pure question of whether he will appear or not.

PROF. SOLOMON: This poses the question which was the second question that Mr. Herman Goldstein put; that having answered his first question in the affirmative, some of you would regard preventive detention as justifiable. The question then becomes what measures, if you also believe that bail is

primarily for the purposes of assuring appearance, what device would prevent the distortion of that function of bail?

Should you have a different kind of bail, bail for purposes of preventive detention as distinguished from bail for purposes of appearance?

JUDGE HALL: You cannot under the Constitution.

JUDGE ZIRPOLI: Things are complicated enough as it is. I would not want to make it more complicated.

PROF. BOWMAN: I have been listening to all of this. It seems to me that it comes down to whether we are going to abide by the Constitutional provision that bail is for one purpose only, to guarantee appearance based upon the individual judgment of the judge from all the circumstances presented to him by each individual.

PROF. SOLOMON: The problem, though, as I see it from the remarks that have been made, is that there are several things that are bothering the judge, not only whether he will appear, but while he might appear he might also do something else. How are we going to sort out these things and relate them to bail?

MR. PERRY: I do not know who invented the words "preventive detention." But in California judges have continuously taken into consideration the problem that is posed by the defendant's possible release, and high bail where bad situations exist, does not constitute excessive bail, because it can also be construed that they also mean he might possibly not appear.

The offense would actually have no bearing, because what does it take to produce this man? It might take $1 million to make sure he never got out. That is possible. I am not saying it is, but the point I am trying to make is that where threats have been posed by husband against wife in beating cases and so on, where they have increased bail not only because they are afraid for the wife, but they are also afraid that this man might not return to this court.

JUDGE HALL: I think he has answered the question or has given the same answer I would. "Preventive detention" are words that should not enter into it. The fact that a man might commit a crime is merely one of the things that the judge takes into consideration in fixing bail, and the likelihood of his responding to bail.

In other words, if he is a hardened criminal, the likelihood of his showing up is less than if he is not a criminal.

PROF. SOLOMON: I wonder whether, in view of what I read in this bail handbook, whether that is necessarily so. Second, I would draw, with the weaknesses of this sort of impression, upon my own experiences as a prosecutor, in which I had no doubt at all that the judge fixed bail in an amount which he regarded as utterly inaccessible to the particular defendant. Whether you denominate it preventive detention, or excessive or prohibitive bail the net effect, which was intended, was to use bail to make sure that he would simply not get out of jail.

JUDGE HALL: May I put it another way, that you fix bail to make sure that he would appear, not that he should not get out of jail.

PROF. SOLOMON: Again, I would submit that there is a possibility that there is a mixture of motives, which is often not quite clearly sorted out. That is to say, that the concept of his being a dangerous character, a bad actor, affects, as you have indicated before, the judgment as to his appearance or non-appearance and vice versa. There must be, if Judge Crittenden's assumption is correct about the primary purpose of bail, at least a separation analytically between these two things, and what bail might be expected to accomplish.

MR. JESSE: I would like to attach another term to it. I think that preventive detention by the route of bail is a prostitution of bail. I think preventive detention and bail are mutually exclusive. In Iowa we have a peace bond which the judge can impose upon a person, if he thinks that there is a likelihood that he may violate or commit some aggressive act. If the guy fails to post the peace bond, he remains in jail. But I think the type of bail at least that our project deals with is an appearance bond. And I believe that any use of the appearance bond for preventive detention is a prostitution of the bail.

PROF. BOWMAN: So do I. So does every judge I know.

MR. JESSE: But you all use it. You all admit that you use it for that purpose. Now you are doing something indirectly which you cannot do directly.

JUDGE HALL: We use it for the purpose of determining whether or not there is a likelihood the defendant will appear.

MR. JESSE: Now I submit that the relationship is tenuous. Unfortunately we have had some experience with people that we have released. We haven't had any, so far as I know, that have been caught performing other breakings and enterings, or what have you, but we have some that the law-enforcement officials have had suspicions that they were performing other jobs while we had released them. In the cases of those individuals, they have appeared every time that they were supposed to appear. Yet the law officials claimed that while they were out, they were performing more jobs. In fact, one of the police officials suggested that, at least in the case of one individual, that we release him, when he is arrested, on his own recognizance, because if bail was set on him he would get out on bond and then he would perform another job to pay the bondsman.

PROF. SOLOMON: It is possible, isn't it, Mr. Jesse, that police chiefs with that view in mind might encourage the use of ROR's on the expectation that dangerous offenders could be tailed, though, and lead to the solution of crime?

MR. JESSE: Well, that is possible and he seemed to have that in mind.

PROF. SKOLNICK: I think that it is perfectly possible to have a "concept" of preventive detention. It certainly is clear that there are lots of professional criminals who would be perfectly willing to appear and who, while out, would continue to commit crimes. I think that it is quite true, too, that many judges feel that they would set high bail in order to prevent these people from committing crimes, rather than to assure their appearance.

Now the issue, it seems to me, is another and even broader issue. It is one that has been troubling me for some time. And this is the issue of how the criminal status of the individual ought to affect the further disposition within the criminal process. I do not think that we can come up with a solution this afternoon. I think that any simplified kind of solution is not going to operate. But I think what we can do, perhaps, is point to a way of thinking about the situation so that we do not fool ourselves by developing a set of concepts

that are unrealistic. The one thing we should not do is say that judges set high bail only for appearance.

The fact is that judges set bail, and I think quite properly, because they see a man's record. On the basis of that record, they feel that he is a danger to the community. I do not think that should be taken lightly. I do not think that is a completely irrational thing for a judge to do. But I wonder whether we cannot somehow establish a set of circumstances under which a judge can make this sort of determination.

MR. LANHAM: Most of the time when you go to court to set bail, the judge will say, "Bail so much." So, if you appeal that bail, usually the Supreme Court decision will come out "We cannot say, as a matter of law, that that bail is too high."

But if the judge were required to enter into the minutes of the hearing the thought processes and the reasoning which caused him to make this amount of bail, then on appeal you would have something solid to hang your hat on.

JUDGE HALL: There is a 9th Circuit case right on the point. *United States* v. *Fiano.* Fiano threatened to kill two narcotic agents; he threatened to kill a third person; he was convicted; I refused bail on appeal on the ground that he had threatened to murder these people and therefore he was a dangerous character. He went up, the 9th Circuit says, "No, that is not a proper ground. The only ground upon which you can fix bail is the reasonable probability as to whether or not he will appear." When it came back, they directed a rehearing. I asked another judge to hear it. He heard it and he found, from the evidence in the case, that he had made these three threats, that he lived close to Mexico, that he went back and forth to New York, all of which was known to me, and therefore it was not reasonable that he would appear on bail and he denied bail.

DEAN KING: It seems to me that there are some matters we need to clear up here. One has to do with a difference of opinion between Mr. Jesse and Judge Hall.

JUDGE HALL: I do not have any difference of opinion with him. He just had a different appraisal of me than I have of myself.

DEAN KING: But I think that we should look at the situation realistically and that we cannot assume that our judges should

fix bail at a high amount in order to keep the person in jail. If that is his motive, that is, under existing law, I think we should start now considering what changes in our statutes, what changes in our laws, are necessary to accomplish the detention of an arrested person when the good of society seems to demand it. And I think we must decide the thing. I think Mr. Jesse is right, that we should not recommend, or we should not approve doing anything by indirection which is not permitted by law.

MR. WHELAN: May I speak? Perhaps it might be well just to consider one small example that happened in our office recently. Bail was set by one judge at $25,000 on an armed bank robbery. He determined that was the amount of bail necessary to insure the appearance of the defendant. A few days later the matter came up before another judge and he made the determination that the bail should be reduced to $10,000. He evidently thought that that would be sufficient to insure the appearance of the defendant. It turned out that $10,000 was not sufficient to insure the appearance of the defendant, because he did not appear and his bail was forfeited. And, incidentally, he committed 2 or 3 armed bank robberies thereafter. He has not been apprehended.

MR. SMITH: I do not see how anyone here could disagree with Dean King that the law is plain that there is no basis in law for placing bail on other than the principle of securing the defendant's presence in court.

JUDGE HALL: Nobody disagrees with that.

MR. SMITH: That is right. And what we are talking about here are practices and discretion of the judge, and perhaps we ought to direct our discussion and research and thoughts to other methods, other preventive methods, other methods of detention prior to trial. As mentioned, there are many existing, including the peace bond in California, but certainly in principle none of us could disagree with Dean King.

PROF. SOLOMON: Let me restate that, if I may, slightly. And that is, if the feeling of those who regard the function of bail as being purely for purposes of assuring appearance. But if on the other hand there are people who quite genuinely have anxiety and concern for the repetition of some category of offenses which they would denominate "serious" and offenders

whom they would denominate "dangerous" by whatever criteria you would identify these, and then some other means, preserving the purety of bail for purposes of appearance, ought to be considered, peace bonds and others, so that the analysis and the criteria for each might be developed and applied rationally. Is that a fair statement of your concern?

MR. SMITH: Yes.

MR. LANHAM: I think what we should stand for—and maybe I am just speaking for myself—is that when the judge is reaching his decision as to how much bail would require the presence of the defendant at a certain hearing, he also should consider the financial status of the defendant, because $100 would cause me to go running back to court, but to a millionaire it might not.

MR. BARON: I think this whole problem of high bail revolves around the fact that the only thing being considered is the question of the defendant's prior record and the seriousness of the charge. That is all the judges are really concerned with. Which leads me to believe that they are just looking at these factors and not whether or not this defendant is really going to return. Because no mention has really been made of his background, his employment, his family ties, his residence. These are very pertinent. And the problem of the habitual offender, this high bail being set in the case of a defendant with an extremely long record, isn't as crucial to me as the problem of high bail being set on a defendant who is charged with a serious charge, say, without any prior record at all, because the only concern is for the charge and not for his background. Publicity is important too. Many judges fear that if they let somebody out on a serious charge on their own recognizance and this person does something or does not appear, the papers are really going to give it to them. And judges should be independent in this sense. They should not be subject to criticism for doing this, but the problem, still overlooked, is that we are worrying about the wrong things. If you are just thinking of the charge and the prior record, you are not really worrying about whether he is going to come back, because there are many factors that enter into this.

JUDGE OWENS: Well, are you saying then that Judge Hall should be permitted to consider the likelihood of this fellow

committing another bank robbery? Is that the proper thing to do?

JUDGE HALL: Or an improper thing to do.

JUDGE OWENS: Yes, or the improper thing to do.

MR. BARON: No, I am saying he should consider all factors which have relevance to whether or not he is going to return to court and not just his criminal record as an indication of his doing something else.

JUDGE HALL: I have been setting bail for 23 years now, and I think I take every circumstance into consideration, a man's financial condition, his family and the like.

MR. BARON: I think part of this is shown in the fact that there are these bail schedules where a fixed amount of bail is prescribed for each offense, for example $3,000 is for a burglary or breaking and entering.

3. Speedy Trials and Additional Penal Deterrents for Dangerous Offenders

SOUTH GROUP

MR. JAMES RUSS (Orlando, Florida): As I said this morning, I was a student of Edward Bennett Williams when he taught criminal law at Georgetown, so I have somewhat mixed emotions about this problem. What he said this afternoon makes a lot of sense to me.

I find preventive detention is a reality in our administration of criminal justice today. I handle about 800 felony cases a year. In the multiple burglary ring situation, there is no question about it when the judge sets bail on a dozen burglaries, he is setting it with the idea that he is going to keep that fellow in jail until that trial is concluded.

The way I feel about it, I would be more than happy to let that man out on bail or his recognizance if I knew I could try him in 30 days after the case was referred to my office. But the truth of the matter is that the professional criminal hiring good legal talent is going to put off the day of trial so the average prosecutor spends his time trying punks and never gets to the hardened criminal.

I would gladly let him go on his own recognizance if I knew I could try him in 30 days, and if I missed him the first time, I could take the second case 30 days later and try him again. It is just a matter of cutting away at the tree. Sooner or later he is going to be behind bars.

MR. FRED HASTY: I am from Charlotte, North Carolina.

I don't concur with Mr. Williams in his conclusion. I don't believe the hardened criminal is going to fear additional punishment at the hands of the court. He is going his way and take his chances. That is my observation in dealing with them. Most of the statutes they violate carry punishment, say, from two or three years to 15 years, so the judge has discretion if he commits additional offenses by enlarging the punishment. I don't think it is good thinking to say we are going to take a man and let him out, and if he does the same thing, we are going to put twice as much on him as the original offense would carry.

FROM THE FLOOR: I am from Kentucky. I agree with this gentleman that when you are dealing with the habitual criminal, the professional burglar, that type, I don't think the additional sentence would be any deterrent to keep him from committing a crime if he is going to commit one while he is out on bail.

FROM THE FLOOR: I wanted to make one comment on the use of bail to prevent people from harming witnesses. In Kentucky we have just recently rewritten our criminal rules, and that posed quite a problem to us. We met the problem by providing for the right to take and use depositions, both for the Commonwealth and the defendant. Now, by making the state pay for the expenses of the attorney and the defendant, wherever the deposition is taken, we feel this will take care of compensation, and certainly once the deposition of the material witness is taken, there is little use in the defendant, who is there and hears the deposition taken, of going out the next day and killing him if he finds him on the street.

EAST GROUP

JUDGE MORRISSEY: Now, I ask my worthy brother here this particular question: I ask other judges and district attorneys

as well. I don't know how many defense attorneys move for a speedy trial. I think our experience has been that a great many of them ask to have the trial postponed or continued. Very few ask for an immediate trial.

MR. SEGAL: If you are looking for something that you think our legislature should do, I for one would suggest that you suggest to the legislature that they give us enough judges and give the judges enough power to make the proper criminal procedural rules so that they can act promptly. I urge that everybody consider the kind of thing that Edward Bennett Williams talked about, a speedy trial, to protect the community.

In Philadelphia, our District Attorney has adopted this program of creating special categories of cases. He takes it upon himself and designates "this case" as a priority case. The designation comes about because the man may have a record of prior offenses. It may be a particular crime. All that the community is concerned about is this case. The District Attorney does what it is his responsibility to do, namely, act. If you bring these persons up to trial promptly, you don't pervert the constitutional right of bail. You don't leave open the possibility of abuse.

As Mr. Williams suggested, and I agree wholeheartedly, we are talking about a very small number of cases. Yet we are going to give judicial authority which I am certain will apply in many more cases than are actually necessary under the cover of saying, "We can't tell for sure whether we ought to keep this man locked up, so let us lock him up."

I say give him his reasonable bail, but if you are worried, bring him to trial promptly. Let him have his day in court. Let the community have its day in court. That is the answer, I think. That is the legislative program we ought to recommend.

PROFESSOR HALL: I just want to ask, if you did have this speedy trial and conviction, would you then allow the man out on bail pending appeal? After the conviction, and assuming there is no retrial, or danger to the witnesses, but there remains the danger of recidivism, what would be the answer on appeal?

MODERATOR DASH: Does anyone want to respond to Professor Hall on that one? Perhaps a speedy appeal.

VOICE: Theoretically, of course, there is the right to be at large on appeal after conviction, because there is the possibility of error. There is no sense in surrounding the appealing criminal defendant with the rights that the United States Supreme Court has given him last year, that is, the right to counsel on appeal, the right to transcript, decided several years ago, all of which are based upon the possibility that he may have been unjustly convicted, and denying him bail when it may turn out that he was unjustly convicted, and should be released.

MR. WILLIAM WELLS (Boston): I have a comment on both Professor Hall's and Mr. Williams's suggestions. As for Professor Hall's statement, it strikes me that there is a definite difference between the appeal and pretrial situations in that, whether or not the first trial was unjust, you now have a presumption of guilt, whereas previously you had a presumption of innocence.

As for my comment on Mr. Williams, I agree with the speaker over here; I found the double penalty suggestion rather difficult to take. One of the major crimes listed, for example, was first degree murder. In our state the penalty for first degree murder is death in the electric chair or life imprisonment. I find it difficult to conceive how to double those penalties.

VOICE: I have a comment to make on Mr. Williams's solutions. They sounded fine, but there are practical problems. A speedy trial is certainly a right, but every defendant doesn't want a speedy trial. He has a right not to have a speedy trial if it would interfere with his defense. There are other practical problems of getting a jury. You have problems of logistics when you have a lot of litigation.

His other solution of doubling the penalty seems to fly in the face of the Constitution. That is an arbitrary concept. You may be getting into excessive bail. Suppose the bail that was originally set was just about what this man could make. You say now just because you are accused of doing the same

type of an act that the bail will be automatically doubled. That seems to me to be arbitrary.

MODERATOR DASH: I think his recommendation was that if a crime is committed while out on bail, the penalty would be doubled as a deterrent.

VOICE: Yes, of course, but you don't know whether the crime has been committed until he is tried on that. I think you are begging the question. I think it is arbitrary just to double it.

I like the suggestion that was made earlier about having statutory authority to make failing to show up if a man is out on his personal bond, or if he is out on bail, a crime of the same dignity as the crime of which he is accused.

We certainly have precedent for this in the federal philosophy. You have the Fugitive Felon Act where the Federal Government acts in rendition proceedings to assist the states. Taking just one year, 1960, there were about 900 people picked up on the Fugitive Felon Act, but there were only 9 prosecutions because they were serving the function of apprehending the fugitive.

I think that the idea of the statute in the various jurisdictions saying that anybody who absconds, whether they are on personal bond by the court or on bail, will be guilty of a violation of a crime of the dignity of the crime of which they stand accused.

We are talking here basically about just two types of offenses. These are the categories where individuals ought to be released on personal bond.

Now, probably there are very many who ought to be released on personal bond who are not because the court is not informed, so the court errs on the side of caution. This is what they have to do, and have done historically.

The Manhattan Bail Project, the D. C. Project, these other projects, are serving to inform the court at the time it needs the information. So there will be many more released on personal bond.

Then, you have the type of case that every sensible man would agree that a man ought to be put on bail. You have extremes of that category where somebody is put on excessive

bail. For instance, alluding to the State of Massachusetts again, I would feel much better if I were a young lady in Massachusetts hearing that "Jack the Ripper" had been apprehended, if he were not put out on bail; but my fears, of course, would come from my own personal feelings at that time.

The judge, and the prosecutor, and the man who would ask for bail for that type of individual have to take all this into consideration; and whether or not an excessive amount is asked for at that time would depend upon the peculiar facts of that case.

4. Psychopathic Commitments, Peace Bonds and Other Conditions Attached to Bail

EAST GROUP

JUDGE CONFORD (New Jersey): In answer to this problem, it may be useful to consider the existing treatment in some states, including New Jersey, of sexual offenders. They may be examined prior to conviction, and if found either unable to stand trial, or unsafe to be released, they can be held until they can stand trial. Even after they are convicted they can be given indeterminate terms.

Why, in principle, can't this idea be extended to those people who are guilty of repetitive crimes of violence? Why do they not represent a type of psychopath which logically justifies, not necessary an indeterminate sentence, but a sentence which at its conclusion has strings attached in the form of a parole, or a conditional release, so that if, after being released, finally, they commit another crime, you don't have the uncomfortable problem of violating the spirit of bail. You then take them back into custody, because of the conditions of their sentence.

In other words, why do we adopt a practice which is on its face violative of the principle of bail when there are alternative procedures and methodologies available to handle this problem by handling all of these people as a class.

MODERATOR DASH: Are you predicating that on the basis of a mental disability which causes habitual offense?

JUDGE CONFORD: Yes, something of that nature. I don't think there is any basis for saying that only the sexual psychopath represents a proper candidate for treatment of that kind. I think that psychiatric opinion is that the repeated committers of crimes of violence do represent a type of psychopathic behavior and like the sex offender, he should be under general social supervision to prevent his visiting his psychological manifestations upon society.

MODERATOR DASH: This is an interesting suggestion. It should raise some responses.

PROFESSOR SANFORD FOX (Boston): Let me first say this: I agree that we are living in a period of history which sees the transfer of pieces, little by little, from the area of criminal jurisdiction, into the area of civil commitment—sex offenders, youthful offenders, drug addicts, and so forth. Perhaps the pretrial period that we are examining now constitutes another area to deal with on a somewhat different basis from a criminal one.

The difficulty with it is that whatever basis we use, there has to be some kind of a hearing. Sex offender laws, all of these non-criminal proceedings, require some kind of a hearing. We still face the problem of what to do with the individual pending a hearing. So we don't eliminate the problem even though we shifted from a criminal to a non-criminal proceeding.

JUDGE CONFORD: My response to that would be that in the first overt crime of violence, the individual would have to be accorded a hearing and all the rest of it. But if the hearing in connection with his conviction resulted in a determination that he was a psychologically repetitive criminal of the violent type, then he could be put under a sentence with conditions that would enable the state to take him back.

This abnormal portion of the population, which is responsible for this kind of crime could be gradually reduced, and society would have strings upon them whereby it could take them back under procedures which have the sanction of due process, rather than upon the perversion of bail, which is now being exercised in the form of what we all must admit goes on in many jurisdictions throughout the country, including

New Jersey—the deliberate setting of bail at a figure which is calculated to prevent the person from being released.

In other words, I think it is a proper objective to see to it that people should not be at large because of their psychological makeup. That objective should be pursued, but it should not be done by the perversion of the concept of bail.

MR. SEGAL: If I can comment on the Judge's suggestion, I think the difficulty with it is that it is predicated on an assumption that the status of the social sciences is such that we can adequately predict people's behavior in this situation. I think the Judge is sophisticated enough to realize that our brothers in psychiatry are a long way from the state that we in the law would like to see them at. We in the law would like to have more accurate ways for measuring the people who are going to give us this trouble. I doubt very much if we can realistically expect to shortly turn to some psychiatrist and say, "Tell me, brother, should we let this man go, or not?"

I want to make another comment on this suggestion that men with previous records for a similar type crime ought to be treated in a special category. As a defense lawyer, I have a great deal of difficulty with that suggestion, because I know that the method of police operation is naturally to try and find people who have done similar crimes before, and work on the assumption that they may have done it again.

Sometimes they are correct, sometimes the animal does not change his stripes, even though he left his stripes back in the jail. On the other hand, they just as frequently make an error in assuming that a man, because he once committed a robbery, or a rape, is a good and likely suspect again.

We are hearing suggestions now that that man, because he is accused of a similar offense, ought to be treated very specially. In my opinion, his problem of defense is even greater than the man who is charged for the first time with a particular type of crime, and is not considered to be a repeater-robber, or repeater type of sex offender. I am not talking about those crimes that are motivated by psychological imbalance, particularly robbery. His problem requires special handling. His counsel needs his assistance on the outside of prison much more to aid and prepare the defense.

I certainly hope we steer away from any strong suggestion that, aside from psychological imbalanced cases, we consider setting up a special category for the repeat-offender. I think we are again treading on unsafe grounds, and making difficult the job in the course of deciding the real guilt or innocence of the defendant in a trial, rather than deciding it ahead of time, before trial, to keep him from getting adequate access to counsel to make the proper presentation at the time necessary and available to him.

MR. RICHARD KUH: On the one hand the judge talks about the perversion of bail, and, on the other hand, and I say this with due respect to him, he suggests the perversion of psychiatry, or calling upon the psychologist to do something that he can't do. Then, on the third hand, the gentleman on the platform suggests that really, it is so complicated and against the tradition of the Bill of Rights, that the community is left powerless to protect itself.

Now, I think the whole concept, as I understand the Constitution and the interpretation of the Bill of Rights by the majority of the Supreme Court, is that the rights as spelled out are not absolute: that the whole concept is what the community reasonably needs to protect itself.

I just think that for this Conference to throw up its hands and say that we are powerless to work out a procedure for protecting the community or the individual is a defeatist attitude. I think it is just as defeatist to say that we have to use existing methods and pervert them. I think that the glory of legislation is that you can do something new.

VOICE: I want to respond to the several suggestions that have been made here that my previous suggestion about treating habitual perpetrators of crimes of violence as psychopaths is intruding into an area in which psychiatry is incompetent.

I say there is in principle no difference between the class judgment of repetitive sex criminals as psychopaths, who could be treated differently on the one hand and perpetrators of the type of offense that District Attorney Byrne of Suffolk County mentioned this morning.

How can anyone have the slightest doubt that an individual who goes out repeatedly during a period of several months

and commits crimes of violence is a psychopath who can, with just as much psychiatric judgment, be classified separately from other criminals as a repetitive sex offender?

I suggest that our acceptance of the separate category of repetitive sex offenders is because we have a peculiar repugnance of sexual misconduct and a special concern for the typical victims of sex offenders.

So why should we be less squeamish about people whose blood is shed by gunfire than people who are injured by sex offenders?

This man who has committed a number of repetitive crimes of violence over a period of years is no different because he happens to have committed another one now for which he is under indictment. He is a clearly definable psychological risk, and on psychological, as well as social grounds, we have every justification for treating him differently from the isolated criminal, and in deciding when he is sentenced after a proper hearing, that he cannot be released unconditionally.

When we finally put these strings upon him, then we are protecting society by treating the whole disease, and not seizing upon an isolated situation in the life history of that person. Again, I repeat, bail is perverted in that one instance by putting excessively high bail on him.

MIDWEST GROUP

MR. ROBERT BLAKEY (Indiana): I was somewhat surprised to hear assumed by so many people that the concept of preventive detention was contrary to our history and past practices. But I remembered from having read Blackstone that there was common law, a peace bond, as opposed to a bail bond, that where an individual was in fear that he would be physically harmed or his property would be physically harmed, he could swear out a peace bond against the individual, and where the individual could not furnish adequate surety, the individual could be detained for up to twelve months.

Now I am wondering as a practical matter, are peace bonds used anywhere? And if so, what has been the experience with them?

The main reason I am asking this is it seems to be that we are assuming that a bail bond can't be used for preventive detention. Historically, we have had something called a peace bond, which has served the function of preventive detention. Now if historically, our bail bond has become a peace bond, and the purpose of this Conference is in part to diminish the practice of preventive detention, I wonder if we dare do this until we bring back some legal device which will serve the function of the traditional peace bond?

The practical question is, do they exist today, and are they used, and what has been the experience with them?

MRS. HELEN BRYANT (Michigan): Mr. Chairman, in the Prosecutor's Office in Detroit, we have a peace bond system which is used for complaints that concern mostly misdemeanors. The complaint is made to the prosecutor, over assault in situations between neighbors or between persons, and the Prosecutor's Office sends a letter to the person complained about, asking him to come to the Prosecutor's Office. Everything is settled there.

If they don't come, there is not a thing we can do about it. If they do come, we try to straighten it out, and then the person complained against, if the circumstances seem to be the way the complaint was received, is put under a peace bond, and the records are kept in the office, and it is a personal matter, and we do get violations of them.

If they violated two or three peace bonds, then we recommend a warrant, and take it to court.

PROF. REMINGTON: I take it it is accurate of the Detroit practice to say that no peace bond has ever been collected?

MRS. BRYANT: That is right.

PROF. REMINGTON: The point, I take it, is that the Detroit experience serves a function quite different, as I see it—and I stand corrected if I am wrong—namely, as a way of disposing of relatively minor husband and wife assault cases, neighborhood cases, rather than the function which I take it you have in mind, and that is to effect the continued incarceration of a potentially dangerous person?

MR. WRIGHT: You are correct. The peace bond is for a different purpose altogether than the bail bond. Usually, it

is a deterrent to keep somebody from bothering somebody else, as in Detroit.

JUDGE MCCREE: I recall an instance in our Detroit experience related to the discussions this afternoon. It involved a Mann Act prosecution, where the complaining witness happened to have been an employee of the defendant; and there was a great deal of concern on the part of the United States Attorney as to whether the defendant would be able to persuade this witness, either by logic or threat of force or force—all of which he had used in the past—not to testify against him on this occasion.

It appeared that the defendant had every reason to be released on recognizance, as far as his ties to the community were concerned, plus the fact that he had a responsible attorney, who was well known to the court.

I admitted him to release on recognizance, but imposed as a condition of this release that he makes no effort to contact this person whatsoever, and to leave it up to his attorney. Of course, the defendant had the right to interview her, but as a condition of release on recognizance, he was to stay away from her personally.

The United States Attorney was aware of this restriction, and went along with it.

The consequence was that the defendant respected this condition; we went into trial, and the trial lasted about a half hour. She was the first witness, and the defendant's lawyer spent the greater portion of that time trying to get her to recant her story. Failing to do that, the matter was disposed of by a withdrawn plea of not guilty, and a plea of guilty. This is one way, I think, we can prevent intimidations or abuse of witnesses by making that a condition of release.

MR. ORVILLE RICHARDSON (St. Louis): I don't want to get off this subject, but one question I think that we ought to consider is what conditions can be or should be attached to a recognizance if the fellow declines to appear? This has already been raised in one aspect by one of our participants. The fellow was told to keep away from the prosecuting witness. I have some reservations and doubts about that sort

of thing, but what should be done with the man? What conditions? Should he report? Should he be put in jail at night? This was suggested by Judge Botein. That seems to me a little bit of a half-justice for the indigent accused, or justice, let's say, by the daytime.

JUDGE SCHWARTZ (Cincinnati): I just want to say this. I am getting more confused as we go along here. I thought the basic principle of this whole business about bail bonds is that if a man unfortunately can't put up a bond, we are trying to help him the same as a man who can.

In other words, if two men are brought in for auto stealing, one puts up a bond, he goes out without any restrictions. He can see his girl, he can do anything he wants, because he had a few dollars. As for the man that does not have any money, now we are talking about imposing all kinds of restrictions on him. It is not because of anything except that he doesn't have the money.

In considering this whole matter, I can just see those two fellows brought in for auto stealing, one who had the few dollars to get out on bond, he can do anything he wants, but his friend without money has to be home by six o'clock, or whatever restrictions you are going to put on him.

What is our philosophy? What are we trying to achieve here? The first thing I heard when I arrived was whether this is going to be rich man's justice or poor man's justice. Now because this poor fellow hasn't got the price of a bond, we are talking about what we are going to do to him. If he had the bond, you couldn't do anything to him, so I would like to have us get our thinking straightened out here. As far as I heard this afternoon from an eminent criminal attorney, we should double the penalty, so if a man happens to be brought in for burglary, that calls for 5 to 20 years, he is going to get another five to twenty years: if it is for embezzlement, which calls for 1, he is only going to get 1 year more.

Why are we putting all the obstacles on the poor fellow when the other fellow who has a few dollars, does not have any?

JUDGE FORT: I am troubled because we seem to be dealing with two absolutes here. We are dealing with the absolute of bail, or call it freedom, on the one hand, and incarceration on the other.

All of our discussion, as I understand it, is to these two points. I wonder if there is any room to consider as a possible area for exploration the power of the court to maintain the status quo by the use of various procedures. As an example, let me use a type of case which we are all concerned about. In the criminal court we could employ the same power which we use commonly in a domestic relations case, where the complainant comes in and the lawyer rushes in and wants a restraining order against the father because the mother claims that the father is having relations or is molesting the girl in some manner. There is no crime yet. In that type of case, an *ex parte* order is usually issued, an order to show cause which will permit the court on very short and immediate notice to examine this question and enter a temporary order which is not final, it is not determinative of the issue, but which does impose a restriction on the individual which prevents him from seeing the girl or having such other contact as the court may say is improper. This order is punishable by contempt if it is violated in any particular during the process.

I wonder if we may use the same procedure to exercise control over a defendant. If the order is violated, the immediate return of this individual to court is made for the determination of whether or not his actions constitute a contempt of the court, punishable under our normal contempt statutes with incarceration, if necessary, for 15 or 30 days, or until such time as this matter can be disposed of on its merits.

PROF. SOLOMON: I wonder whether I could put the question in a somewhat different way. If the ROR procedure is thought to be desirable, even in cases which might otherwise be regarded as offenses of a dangerous character, or even with respect to offenders who might be thought to repeat, why not impose conditions of probation?

JUDGE ZIRPOLI: We do it now.

CHAPTER IV

Pre-trial Release Based on Money or Other Conditions

Plenary Session Panel (Panel C)

Moderator:

Professor Caleb Foote
University of Pennsylvania Law School

Panelists:

Prosecutor: Richard H. Kuh
Assistant District Attorney, New York County

Bondsman: Frank Wright
President, United Bonding Insurance Company of Indianapolis

Alternatives to the Bondsman:
Professor Charles H. Bowman
University of Illinois Law School

MR. GEOGHEGAN: Will the Conference please come to order?

At this time, I would like to introduce Professor Caleb Foote of the University of Pennsylvania, who is the Moderator for the first session this morning, "Pre-Trial Release Based on Money or Other Conditions."

Professor Foote.

Address of

PROFESSOR CALEB FOOTE

University of Pennsylvania Law School:
Challenging the Constitutionality of Conditioning
Pre-Trial Freedom on Money
Panel Moderator

PROFESSOR FOOTE: Thank you very much.

Seven years ago this month, the University of Pennsylvania was preparing to send a team of eight students to New York City to investigate that city's administration of its bail system. There was little interest in the project. Indeed, it was almost cancelled for lack of funds, until at the last moment a grant was obtained from the Fund for the Republic. The general reaction of scholars, judges, and lawyers whom we contacted was: Why do you want to bother to study that subject? Nor was there anything to give us any encouragement from the experience of the only two serious previous studies of the defendant's side of the bail problem, one in Philadelphia in 1954,[1] and the pioneering work of Dr. Arthur Beeley in Chicago in 1927.[2] These studies had been researched, written up, published, and filed on library shelves to gather dust.

If anyone seven years ago had predicted that in 1964 bail would be regarded as so important a problem in the administration of criminal justice as to warrant a Conference such as this, he would have been regarded as a madman. Of course, it would be unreasonable to expect that one could predict the emergence of the laymen's team of Schweitzer and Sturz, or to gauge how rapidly the attack on impact of

[1] Foote, Markle & Woolley, Compelling Appearance in Court: Administration of Bail in Philadelphia, 102 U. Pa. L. Rev. 1031 (1954).

[2] Beeley, The Bail System in Chicago (1927).

poverty in undermining fairness in criminal procedure would gather momentum.

Surely the most striking thing about the incredible developments in the bail field in the last half dozen years is that, unlike all other areas of ferment in criminal law administration, bail is the only major reform in which the courts have so far played a wholly passive role. With search and seizure and indigents' right to counsel, the Supreme Court has warned, cajoled, and finally forced major change upon the states. In at least one instance, removal of discriminatory economic barriers in the state appellate process, the Court almost without warning upset traditional and accepted practices in many states. In such areas, the Supreme Court has taken the initiative, precipitating storms of controversy and creating constitutional crises for administration of criminal law. In bail, however, the courts have been conspicuously silent in the face of mounting documentation of discrimination.

It seems highly probable that this judicial inaction will not persist, and that in the next decade the major developments in the bail field will come from the courts. Certainly courts are not going to be immune from the sense of basic unfairness which alike has motivated scholarly research, foundation support for bail action projects, the Attorney General's Committee on Poverty, and your attendance at this Conference. It is just such growing consciousness of the inadequacy of traditional approaches for changed conditions which has been the root for all of our developing law of due process over the last 30 years.

The immunity of the Eighth Amendment from the reexamination which has been given to the Fourth and Sixth Amendments is a product not so much of historical tradition as of ignorance, lack of public concern, and the formidable procedural and practical difficulties of getting an indigent bail case to appellate courts and to the United States Supreme Court. These defenses against change in legal interpretation are crumbling, and the likelihood that judicial mandate will soon require basic changes in our handling of pre-trial detention should import a sense of urgency into our deliberations here. The Vera-type projects examined yesterday and

the kinds of devices we are going to consider today are not just an outlet in the attack upon poverty as a significant criterion in criminal dispositions, but give us opportunity to gain invaluable experience in preparation for meeting probable developments in changed interpretation of constitutional law.

The constitutional problems posed by the bail system fall into three closely related patterns. The first is due process. The most probable factual hypothesis on present evidence is that pre-trial detention has a marked tendency to affect adversely the quality of treatment afforded the defendant in the criminal trial process. I state this discriminatory effect as a hypothesis rather than an established fact because the statistical evidence advanced in its support, while very suggestive, is certainly inadequately controlled to eliminate other variables—a research problem which is now beginning to receive some attention and which should receive much more study. But the statistical inferences are strongly supported by common sense observations and are likely to be further buttressed in an entirely different manner through sociological research now being carried out at the University of California.

If it comes to be generally accepted that in the outcome of his case the jailed defendant is prejudiced compared with the defendant who has pre-trial liberty, such a finding will certainly have a profound impact upon any judicial consideration of constitutional bail questions. It was such impermissible prejudicial effects, stemming from poverty, which formed the basis of the due process requirement of counsel in *Gideon* v. *Wainwright.*[3]

A second line of attack which in the next few years is certain to be pressed by lawyers in bail cases stems from Mr. Justice Jackson's maxim that indigency is "constitutionally an irrelevance,"[4] and, arguing by analogy from *Griffin* v. *Illinois,*[5] *Douglas* v. *California,*[6] and other indigency appeal

[3] 372 U. S. 335 (1963).
[4] Edwards v. California, 314 U. S. 160, 185 (1941) (concurring opinion).
[5] 351 U. S. 12 (1956).
[6] 372 U. S. 353 (1963).

cases, that a classification whose effect at least in part is to make pre-trial freedom turn on the weight of the defendant's pocketbook offends the equal protection clause of the 14th Amendment. To some extent, this is merely attaching a different label to the considerations just advanced on due process. But it goes further, and factually, the existence of such a classification would probably be easier to establish than to establish the discriminatory effects of detention upon the ultimate disposition of the case.

Finally, there is the Eighth Amendment, until recently the forgotten amendment, and which, due to neglect, is riddled with unresolved constitutional problems. I pass, for lack of time, such questions as the incorporation by silence of the bail clause of the Eighth Amendment in the Fourteenth Amendment,[7] and the probability, despite the clear language to the contrary of a five-four majority in *Carlson* v. *Landon*,[8] 12 years ago, that the court today would hold that the right against excessive bail encompasses by implication the right to bail in all noncapital cases.

The central problem today, of course, is how to apply the standard of excessiveness of bail of the Eighth Amendment to a criminal population which is at least 50 per cent indigent. Neither our decisional law nor our present or proposed Federal rules of criminal procedure have gotten to first base in dealing with this riddle. In 1835, a man named Lawrence fired two loaded pistols at President Jackson. He missed, and when he was brought up for preliminary examination, Chief Judge Cranch of the District of Columbia Circuit questioned the prisoner and supposed that, in view of his very limited economic circumstances, $1,000 bail would be enough, for "to require larger bail than the prisoner could give would be to require excessive bail."[9] When the Government objected to such low bail because of the danger to the President's life, Judge Cranch in effect threw up his hands, increased the amount to $1,500, and remarked that if the ability

[7] Cf. Pilkinton v. Circuit Court, 324 F. 2d 45 (8th Cir. 1963) (incorporation assumed).

[8] 342 U. S. 524 (1952).

[9] United States v. Lawrence, 26 Fed. Cas. 887, 888 (D. C. Cir. 1835).

of the prisoner alone were to be considered, $1,500 was too much, but if the atrocity of the offense alone were to be considered, it was too small.

That there is not a single intellectually respectable judicial decision on this problem in the ensuing 129 years is probably a testimonial to the fact that the riddle of the indigent is insoluble in the context of the bond system. But one thing seems likely. In its future dealings with the Eighth Amendment, the Supreme Court is going to be influenced not so much by the Amendment's intellectually barren judicial gloss or by a historical origin irrelevant to today's conditions, as it will be concerned to read the right against excessive bail in the light of related developments in due process and equal protection, and in keeping with the policy in *Stack* v. *Boyle*[10] to encourage and extend pre-trial liberty.

Law is thus likely to play a dominant role through a critical reexamination of Judge Cranch's 1835 dictum that "larger bail than the prisoner can give would be excessive bail."[11] Such a strictly legal initiative is also a necessary next step in the reform of the bail area. The Vera-type programs we have been examining could ultimately achieve the release of a considerable proportion of the indigent accused, at least of the preferred risks. How large this proportion would be I don't think anybody can determine. But certainly the program is necessarily incomplete, both because even at its most advanced it would reject some substantial percentage of indigents as poor risks, and even more because the spread of Vera-type programs through the 50 states will, if the history of counsel gives us any indication, be slow, spotty, and often incomplete. Besides, even with Vera-type projects, there remain a host of major problems which have never really been resolved, but which we can expect will be pressed by lawyers with renewed vigor in the next ten years: the amount of bail to be set for those who can afford at least some, improved procedures for setting bail, radically new procedures for speedy review of initial bail settings, the control of abuses

[10] 342 U. S. 1 (1951).

[11] United States v. Lawrence, supra.

in the bonding business, and the development of economic sanctions to compel appearances which bypass the bondsman.

It is to these what we might call beyond-Vera type of questions that we turn our attention this morning. Our plan for the remainder of this panel session is as follows: Each of the three panelists will talk for about ten minutes each, and then the four of us will engage in a free give-and-take discussion here for the remaining time allotted to us.

The first speaker is a representative of a group about whom we have been talking constantly, but who have previously not had the opportunity to reach this forum.

It is my pleasure to introduce Mr. Frank Wright, of the United Bonding Insurance Company of Indianapolis.

Address of

FRANK WRIGHT, President

United Bonding Insurance Company of Indianapolis

MR. WRIGHT: Mr. Moderator, fellow panelists: I have had to rework this several times, so that I don't even recognize my own talk.

Our adherence to the presumption of innocence as a basic foundation of our criminal procedure stands in stark contrast with the imprisonment of an accused before trial, a trial which may well end in his being found innocent.

We have heard a lot of the bail system in England, but the one thing we did not hear is that from 30 to 50 per cent of the people who are ultimately acquitted have been refused bail.

It seems to me our bail system is a much better system than England's. Our system, through the professional bail bondsman, is more equitable. The bondsman furnishes a service which can be obtained nowhere else.

He investigates the circumstances of the alleged crime, interviews the defendant, talks with the immediate family or close friends, determines the risk of going bail. By so doing, he obtains the freedom of the accused until he has been adjudged guilty or innocent. And this is at no expense to

society or the taxpayer. This freedom permits the accused to return to his family and employment, in many cases prevents his dependents from becoming public charges during his imprisonment.

The bondsman, because he has a money obligation in the case of a forfeiture, is a better custodian of the accused. He will keep in constant contact with the accused, report all changes of address and employment, and in addition to his surveillance, the surveillance and cooperation of the family or close friends are given, because they have indemnified. All this is furnished to society with no cost to the taxpayer.

In order to preserve the system, we must eliminate the abuses. These abuses in my opinion fall into two categories: Corrupt practices, and failure of the bail system to provide relief for the poor or indigent.

I do not believe it is necessary to expound on the abuses, but let us take a look at the causes, and if we can eliminate the causes, we can eliminate the abuses.

Most governing bodies, and I mean Federal, state, and local, have no rules or regulations governing the conduct and procedures of bondsmen. Those governing bodies that do have some rules and regulations do not enforce them. This is usually because of inadequate budget or because of lack of interest and awareness of the problem.

Let us hope this Conference will stimulate that interest.

Companies are not blameless, but are in the weakest position of making improvements.

Competition being what it is, if the company bears down too hard on an agent, or has too many regulations, the agent will just transfer to another company.

Another cause, and probably the one that receives the greatest notoriety, is due to the conduct of some of the agents. I say this because most agents are honest, upstanding men in their communities who perform a great service.

To those who are part of the cause, I say: "Contribute to the effort of improving the bail system, or get out of the business."

Now that we have briefly touched on the causes of the abuses in the bail industry, let us see what we can do, in my opinion, to eliminate them.

If the causes can be eliminated, the system will be improved. Through an improvement of the system, we can care for the poor and indigent and eliminate the corrupt practices.

The various state insurance departments should adopt or promulgate rules and regulations covering bail bonds. They should require a special bail bond license for agents in this field.

A step in this direction was the adoption of the Uniform Bail Bond Act by the National Association of Insurance Commissioners. Some states have adopted this, but the greater number have not.

The insurance departments should enforce the rules and regulations. Bail bond agents and their activities should be regulated, the same as any other insurance agents' activities, whether they write for a company or are self-employed by pledging property or collateral with the courts. It would avail us nothing to regulate only those agents who are licensed and writing for surety companies, and overlook the self-employed agent.

We must educate the courts and the law enforcing agents with the rules and regulations in order for them to report violations. These rules and regulations must be stringent enough and properly enforced to eliminate the undesirables. The system is no better than the people who are in it.

The ultimate success of any program must come about not only from the full cooperation of the courts, but from their leadership. It is the court which has the authority to set bail. It is the court which has the authority to approve or disapprove the sureties. It is the court which releases on bail.

The courts have the authority to release the poor and indigent on their own recognizance, or anyone else, for that matter, if supplied the facts. In my opinion, who is better equipped to supply the facts than the probation departments of the various courts? In the absence of the probation department, the judge, after a short interrogation of the defendant's employment record, financial status, standing in the community, and so forth, could release first offenders on misdemeanors.

We know all defendants are not good risks, but where the judge has a doubt, he may refer the defendant to a so-called assigned risk pool, as we do for motorists who can't obtain automobile insurance. The risk could be reduced by giving the assigned risk preference as to an early trial.

The assigned risk of an indigent could be paid for from the forfeiture funds. It is not the intent of the state to be enriched from bail forfeitures. Therefore let us put this money to use to help the poor and the worthy cases. If the defendant does not appear, then the agent must return the fee to the forfeiture fund. By such a process, the indigent will be released.

We might have the states contribute to this fund all or a part of the premium tax that the companies are assessed annually for bail bonds. Believe me, ladies and gentlemen, this is a large amount of money. In my opinion, the forfeiture money with the premium tax could be more than sufficient to take care of all needy cases.

This method could cause no additional burden on the taxpayer. Both the tax and forfeiture money are being contributed by the people in the industry, who in turn have received it from defendants who can afford bail.

Doesn't our present tax structure provide that part of our taxes be used for the poor and indigent? What better way is there to pay for an indigent bail than through the tax or forfeitures collected from the industry? There is much to be developed in this area, but to me the idea appears sound.

Companies can improve the system by using ordinary sound employment practices. If an agent violates the rules of the company, such as over-charging, he is dismissed, cancelled, fired, and no other company in the industry should hire him.

Two states have similar rules to this.

If a company desires to be in the business, then it should run the operation from its own office. It should maintain the necessary supervisors and personnel. It should screen the agents, as to whether they have been fired by another company.

Agents have today no trouble moving from company to company. Because of the wrongdoing of an agent, many times the company is prohibited from writing any further bonds.

This does not affect the agent, as he merely changes companies and continues on his way.

For this reason, agents try to represent several companies at one time. If agents could only represent one company at one time, they would know that any violation, any over-charge, would put them out of business. This would be a good deterrent, and in my opinion would improve their deportment.

The agent must realize that he acts in a fiduciary capacity, and he must realize he is an officer of the court, in a minor capacity.

I know agents on many occasions have brought to the attention of the court information which has allowed the court to release indigents, and I have known cases where the agent has brought information to the court, where in hardship cases they have reduced the bond so that the defendant may be released.

The point I make is: If the agent has the respect of the court, he can help himself by helping the court and the law enforcing agents.

If the agent would investigate the indigent cases for the court, make an honest recommendation to the judge, I am sure many who are now deprived of their freedom could be released on their own recognizance. The agent must make a sincere effort to solve the problems of the poor and the indigent.

We must not forget that in this country we have the free enterprise system. We do not expect everyone to own the same priced automobile or to have the same priced home, and we do not expect all workers, whether labor or professional, to receive the same pay.

Bail bonds are surety bonds. Surety bonds are insurance. Therefore, bail bonds are insurance.

Shall we say that if a man cannot afford a life insurance policy to protect his family, the Government should pay for it? Shall we say that if a man cannot afford fire insurance, the Government should pay for it? Shall we say that any of the benefits that the middle class or the wealthy have should be provided by the Government for the poor?

This is not the free enterprise system. This is socialism. And if the Government can move in on a small fraction of the insurance industry and socialize it, they can also socialize the whole insurance industry. And if they can do that, they can socialize all industry.

Thank you.

MODERATER FOOTE: Our next speaker is Mr. Richard Kuh, Assistant District Attorney of New York County.

Address of

RICHARD H. KUH

Assistant District Attorney, New York County

MR. KUH: Mr. Moderator, fellow panelists, ladies and gentlemen:

Frank, I hope you won't think it rude of me, in starting, to say that to contemplate expanding the use of bail bondsmen with the central fund, to have them in the area of helping those who can't afford bail, in this age—after we have appeared here today, and after decades of experience with bail bondsmen—indicates to me, and I am a partisan, I guess, an inability to profit from experience. It reminds me of Elizabeth Taylor's answer when asked what she would do if she had her life to live over again. She reportedly answered, "Exactly the same things—but with different people." (Laughter)

It does seem to me to expand the use of bail bondsmen with different people reflects that same inability.

I am here to discuss the experience of prosecutors in dealing with bail bondsmen and how we see the professional bail bondsmen in our courts.

Despite the few days of discussion here, I hope none of you will think I am kicking a dead horse. The bail bondsman is very much with us at this point, and I predict is likely to be with us for many, many, many years to come.

Yesterday, Herb Sturz gave us some of the figures. He pointed out that Vera, which has done a fantastic job in our county and in our courts, has secured 2,600 releases in a period of two and a half years.

Well, that is an awful lot of releases. But if you recognize that during that same two and a half years we had between

125 and 150 thousand cases, you will recognize that Vera effected the release of about two per cent of our people.

And at this point, when the Vera project, which is much further along, is achieving a release of about 70 people a week, we are arraigning about a thousand people a week. So Vera is dealing with about seven per cent of our arrested populace, and I think the bondsman will, for some time to come, have to deal with the remaining (or at least a substantial portion of the remaining) 93, or thereabouts, per cent.

And so I think it important that we recognize and study the role of the professional bondsman and what services he does perform, and what services he claims to perform.

The first claim of the bondsman is that when a person is released on collateral, and he posts security with his bondsman, he is likely to appear, and that this is a good thing. I think in theory that is sound.

I think I find myself, as prosecutors frequently do, in disagreement with Mr. Justice Douglas on that point, and also, I might add, with our Moderator, Caleb Foote.

I think when a person's life's savings are at stake, or possibly, to be dramatic, the savings—or the equity in the mortgaged home—owned by his widowed, gray-haired mother, I think that person is likely to appear.

I think one can reasonably, not arbitrarily, make a distinction between the "rich" and the poor in the area of the bail bond. I think if someone has some property involved, it is a factor, not the sole factor but a factor, that is validly considered on whether or not he will return.

I think, however, that factor is largely over-rated and my own experience in dealing with bondsmen indicates that in 95 per cent, or thereabouts, of the cases, in fact there is no collateral. The defendants do not post collateral.

That is a sort of strong statement to make. I say it on the basis of our experience in New York County in opposing remissions of bail bond forfeitures.

We have had a "get tough" policy. When a bondsman's contract is violated, when a defendant doesn't appear, we have opposed the giving back to him of the funds that have been forfeited.

We have had several hundred forfeitures this year. Just eight days ago, last Thursday, I appeared in our State Supreme Court and opposed remissions in 71 bail forfeitures. In not a single one of those 71 sets of papers, and they all contained affidavits from bondsmen, and many of them affidavits from the defendants—in not a single one was there any allegation that, "My life savings are at stake," or, "My widowed mother's equity is at stake," or, "This property belonging to me, the defendant, is at stake." In not one out of 71.

I suggest, too, that the bondsman would not be so worried about our policy on remissions and would not threaten so-called strikes of bail bondsmen, if it weren't that their money, rather than their clients' money, was involved.

So I suggest to you that the question of collateral makes nice talk, but rarely exists.

The second claim of the bondsman tends to be that to protect his own investment, he not having collateral, he makes a careful investigation of the character of the defendant and the likelihood as to whether the defendant will or will not reappear.

I suggest to you that in some cases—and I can't give you a proportion—that is undoubtedly true. In some cases, reputable bondsmen rely upon reputable lawyers in terms of the lawyer's representation, "This is a fellow who will be here."

But I suggest to you that in many, many cases—a significant portion of the cases—the bondsmen do not rely on any investigation of any kind. Indeed, they have no knowledge at all of the person or the bail, but depend upon the representations of persons in the syndicate. This is typically true in gambling, and it is typically true in narcotics, which is a major problem, certainly, in my county.

We have had several grand juries investigate this area. One of them in its report said, "Referring to more than 150 separate arrests . . . 75 witnesses testified that they were promptly released on bail by bondsmen, whose services they had not requested, and were represented by attorneys whom they had not retained. They paid neither the bondsmen nor the lawyers." Unknown bondsmen appeared.

I suggest to you, ladies and gentlemen, that the idea that the bondsmen have made investigations of clients whose names they get on a little list is a little bit absurd.

Yesterday some of you were here in this room when we had the Eastern discussion, and we were discussing then the role of bondsmen and lawyers, and the very able Anthony "Chick" Marra, in charge of the Criminal Branch of our Legal Aid Society, pointed out that there is a "package deal" frequently, in which for one fee there is provided both the services of bondsmen and lawyers.

So I suggest to you that there are unholy connections frequently between the bondsman and the lawyer.

And similarly, the grand jury commented in that area: "One lawyer periodically received from a bondsman his list of clients . . . In another instance, lawyers and a bondsman shared an office and took each other's phone calls."

I suggest that this is not furthering the administration of criminal justice.

The third claim bondsmen make is that they perform a valuable service in notifying defendants of the date when they are due to appear in court.

I suggest to you that is just as much hokum as the other two claims.

I suggest to you that in my examining of hundreds of papers on remission applications, I have yet to see one in which a bondsman says: "I tried to notify the defendant, but got a notice back that he had moved." I suggest to you they do not look for the defendants until after the bail forfeiture has been ordered, and then their money is at stake.

Let me give you just one sample from one of the many, many remission applications we see. This is a statement by a defendant. And I ask, does this reflect any reliance on the bondsman to notify her of the date she was due? And I quote: "The reason for my failure to appear was due to the fact I did not know I had to be in court." (This is a lady defendant.) "My husband, who had kept me informed as to when I was to appear, was himself convicted and sent to prison. Prior to his confinement, he had kept me informed as to when I was to appear in court."

This is the sort of reliance we read about in our court papers as to how defendants expect to be notified.

I suggest to you the bondsmen do have one claim that I think is completely valid, and we must recognize it, and that is when the client has failed to appear, when a bench warrant is issued, they do a valid service in then locating the defendant.

I think their service in that regard, at least in our county, is crystal clear. I can't give you exact statistics, but comparing the frequency of the use of bail bonds with the frequency of releasing a defendant on his own recognizance, and releasing the defendant on small cash bail, we find that the defendants who stay away more than 30 days—who are then charged with an added crime—are disproportionately small when we are talking about the bail bonded defendant. Most defendants out on bond are ultimately brought back. (I am not comparing this statistic to the Vera experience. Vera has done a unique job. I am talking of a defendant released on his own recognizance without a Vera investigation, and the defendant released on small cash bail without a Vera investigation.) The defendant who is released in the hands of the bondsman ultimately reappears.

Of course, the defect of this is the method used in securing his reappearance: I think bondsmen buy information. They use their syndicate and their underworld contacts. They use strong-arm tactics. They use every illegal method, that would turn Justice Douglas' hair even grayer, if the prosecutor dared to use it. They are not bound by rules on legality of obtaining evidence, and their methods sometimes are somewhat shocking.

I think, however, like the Northwest Canadian Mounted Police, they do get their man. But at that point, any resemblance ceases. (Laughter)

Overall, I think in evaluating the role of the bondsman, we must recognize, as I have said, that they do handle and will continue to handle large numbers of defendants, and they do obtain their reappearance, through legal or extra-legal means.

Now, what do we do if we have to live with the bondsman for the years ahead, and how do we improve his lot, how do we improve his role in the administration of criminal justice?

Frank Wright has given us some very excellent clues in that area. I, as a prosecutor, if you will, have some further suggestions.

One: I would have legislation in a state like New York, which would require bondsmen, just as public officials are required, when summoned to appear before the grand jury, to appear and waive immunity, or in the absence of immunity, waive or forfeit their license as bondsmen.

Like Caesar's wife, they should be above suspicion. They should be accountable in every action they engage in.

Two: I would have legislation that would bar bondsmen—and this may seem difficult, but would at least nominally bar bondsmen—from ever referring their clients to lawyers.

In New York, we do have a statute that makes it a misdemeanor for a bondsman to communicate the names of prospective clients to lawyers. But this does not seem to stop bondsmen from saying to John Doe, "Why don't you go to Richard Roe? He is a good lawyer, and he is just around the corner."

This I think should be enforced with penal sanctions.

Three: I would have a whole series of regulations which I won't stop to explain at this point, but that go somewhat beyond those that Frank Wright has suggested, such that the Licensing Agency (the State Insurance Department) can strictly interfere with any bondsman-syndicate connections.

Another thing that I think is important is to drive home to the bondsman his responsibility to have the defendant in court on time, not simply ultimately, but in court—as Vera does so effectively—on each date when his case is on the calendar.

And I think the only way that can be done is the way that is solely in the control of the judiciary, and I suggest that the judiciary can do it either by judicial decision, or the administrative judges in overall charge of the courts of the state can do it, I think, by judicial regulation.

I suggest that there should be a clear policy that every time a defendant who is out on a bail bond fails to appear, there shall be a significant, an appreciable, charge, possibly

25, 30, 35, or 40 per cent of the amount of the bond, that shall be leveled for that nonappearance, unless that nonappearance is fully and convincingly explained.

We have too many nonappearances where the affidavits say: "I forgot." "I was mistaken." "I wasn't feeling very well." "I had some other business to do." And judges grant full remission, complete remission, in those cases, which tells the bondsman that he is free to let a defendant miss an appearance or two, as long as the defendant ultimately appears.

I suggest that when this happens, the bondsmen again function as a thorn in the side of the effective administration of justice, because when defendants don't appear, witnesses get tired out, maybe tough judges are avoided, maybe witnesses have certain pressures brought to bear on them during the intervening lengthened period.

So I suggest that, judicially, there should be clear rules that require forfeitures of at least a certain appreciable per cent of the bonds when a defendant doesn't appear.

I think this would serve several purposes. One: by permitting the remission of a portion, it would encourage the bondsman to bring the defendant back. Two: by imposing some penalty, it would tell the bondsman the defendant has to appear on time.

I would permit complete remission of forfeitures only when the reasons for absence were clearly beyond the control of the defendant and were validly explained.

Another major change that I would suggest—and this is one that I cannot lay at the doorstep of the bondsman—this item needing correction is the fault of we prosecutors, the fault of you defense counsel, and, yes, if I may say so (with the immunity of this podium), it is clearly the fault of the judges amongst you. And that is our great willingness to put our problems in the hands of the bondsman.

The simplicity of a prosecutor recommending $500 bail, without any investigation, the judge nodding and saying, "$500 bail"—this is our fault.

I think our goal should be the achievement of no bail ever being set until there has been a Vera-type investigation.

And I point out to you in criticizing the judges, prosecutors, and defense lawyers, that a half century ago Gilbert Chesterton noted, and I quote:

> "The horrible thing about all legal officials, even the best, about all judges, magistrates, barristers, detectives, and policemen, is not that they are wicked (some of them are good), not that they are stupid (some of them are quite intelligent), it is simply that they have got used to it."

And I think our problem is that we, around the courts, "have got used to it."

We are all deeply indebted to the tremendous work of Louis Schweitzer and Herb Sturz, and the thing that they have given birth to. And I think that our goal should be that it is never suggested that any bondsman get into the picture—that no bail be set in any case—until there has been a full and complete Vera-type investigation. I thank you.

MODERATOR FOOTE: Next, Professor Charles Bowman of the University of Illinois.

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PROFESSOR CHARLES H. BOWMAN

University of Illinois Law School

PROF. BOWMAN: Thank you, Caleb.

Ladies and gentlemen, I have been asked to discuss the Illinois statutory provisions in regard to bail and pre-trial detention.

I have also been asked to discuss some of the other pilot projects that are going on in other jurisdictions, particularly that of Albert Wahl, in the Northern District of California, where the Probation Department has given some supervision to releasees, also Charley Mann's project down in St. Louis, about which we have heard, and that down in Tulsa, Oklahoma, which is particularly exciting to me, where the releasees are released into the custody of the attorneys. And the experience down there so far seems to offer tremendous potentialities.

Most of these have been mentioned during the past two days, and in the push of time, as has been mentioned, I am not going to dwell on them. They are described in Dan Freed's and Pat Wald's most excellent booklet that has been written for this Conference, "Bail in the United States in 1964." All of you have copies of it, I am sure, and the material that I mentioned, describing these other projects, begins on page 73.

In Illinois, we have recently revised and codified our entire substantive and procedural criminal law. Our Substantive Code of 1961 went into effect January 1, 1962, and the Procedural Code of 1963 became effective January 1, 1964.

Our constitution in Illinois provides that all offenses shall be bailable except in capital offenses where the proof is evident or the presumption great. Therefore, the problem to us is a many-faced one, affecting the rich, the poor, the professional recidivist, the traffic violator, the misdemeanant, and the felon.

As you all know by now, there is a complex problem involving the public, the accused, the defense counsel, the courts, and the bail bondsman.

We tried to attack the problem from several angles at different steps in the prosecution process. I will mention briefly some of these, without detailed explanation, and I am sure that from the very mention of them you will recognize their relevance to pre-trial detention.

First we provide that in lieu of arrest, a peace officer may issue a notice to appear for any offense.

Secondly, in lieu of an arrest warrant, we will provide that a magistrate may issue a summons to be served personally or by mail, as in civil cases.

After arrest, we provide that if the officer is satisfied that there are no grounds for criminal complaint against the arrested person, the officer may release him without going before a court.

And fourth, within a reasonable time after arrival at the first place of custody, the arrested person is entitled to make

a reasonable number of telephone calls, to communicate with his family and his attorney. And we provide further that he must be permitted to consult alone and in private with his attorney at all reasonable times.

Fifth, in every police station, jail, or other place of detention, a notice of rights must be posted, and this includes the right to counsel and the right to bail under the various provisions that we have. It must be posted in plain view and printed in the English language.

Sixth, if any officer violates any right secured to an accused, this officer is guilty of official misconduct, punishable by imprisonment, up to five years in the penitentiary.

Seventh, the accused shall be taken before a magistrate without unnecessary delay, and the magistrate shall inform the accused of his right to counsel and of his right to bail, and if indigent, he shall appoint counsel for him. This applies to all offenses, including misdemeanors.

Eighth, it is expressly stated that the public policy of the state is that where all the circumstances indicate that the accused will appear as required, he shall be released on his own recognizance, and it is additionally expressed that this provision shall be liberally construed to effectuate the policy of the state that criminal sanction shall be relied upon rather than financial loss.

The principle embodied in this provision of our statute has recently been embodied in a bill introduced into Congress, Senate Bill No. 2838, introduced May the 14th. The identical language is embodied in House Bill 11384, introduced just three days ago, May the 26th.

Ninth, bail jumping or violation of conditions of own recognizance is prohibited and made a separate offense, carrying a penalty of one year, or $1,000, if a misdemeanor is charged, or up to $5,000 or five years in the penitentiary if a felony has been charged. We also provide that a person out on bail must notify the court within 24 hours of any change of address.

Tenth, only one bail bond shall be required from arrest through appeal.

Formerly we had different bail bonds, different fees, at various stages of the prosecution process.

We additionally provide that if the case is reversed on appeal and a new trial is awarded, the original bond and original bail may be ordered to stand, pending the new trial or during the new trial.

Eleventh, credit for detention in lieu of bail is given at the rate of $5 per day against any fine which may subsequently be imposed after conviction.

This was one place where we tried to get time credit also in this provision, but we had to strike it in the legislature.

Time credit for detention before trial has recently been incorporated in two bills introduced into Congress—Senate Bill 2839 and House Bill 1183, the Senate introduced bill May 14th and the House bill May 26.

Twelfth, we repealed the age-old law providing for a peace bond as a deterrent to a threatened offense before its commission.

Thirteenth, an accused must be tried within 120 days of arrest or be discharged, unless the delay is caused by him. If he is out on bail, it is 120 days from the time he demands trial.

Fourteenth, we have provided for a continuous grand jury subject to call to eliminate delays pending the call of a special term.

Fifteenth, an accused may waive indictment in open court and be prosecuted by information.

Sixteenth, on an appeal by the state, the defendant may not be held in jail or on bail. He is released on his own recognizance. There are several decisions from which the state may appeal.

Seventeenth, in order to help the prosecutor in some of the situations that were mentioned yesterday, where you have dangerous criminals, and what to do with them, such as Herman Goldstein mentioned yesterday afternoon, we have

a sexually dangerous persons act, to permit the state to deal promptly with such persons. It is a civil proceeding, and bail is not permitted.

Eighteenth, we also have a sex crimes against children act, which provides in a slightly different context for prompt treatment of similar people.

And lastly, we have a new mental health code of 1963, which permits the immediate commitment of those deemed to be dangerous because of mental incompetence.

These are all indirect attacks on the problem of bail. But finally, we made one direct attack.

We provided that any person held in custody for other than a capital offense—shall secure his release by depositing with the clerk of the court 10 per cent of the amount of bail in cash.

If he complies with all the conditions of the bail bond and appears as required, then 90 per cent of his deposit is returned to him. Ten per cent of the deposit, or one per cent of the original amount of bail, is retained by the state for costs.

To illustrate, if the bail is fixed at $100, he may obtain his release by depositing in cash $10 with the clerk of the court. If he complies with all conditions and appears when required, he gets a return of $9, and the state keeps $1.

The identical provisions of this section of our statutes have recently been incorporated in bills and introduced in Congress on the same dates that I mentioned before. These bills are Senate Bill 2840 and House Bill 11382. They use almost identically the same language as we have in the Illinois statute.

We provide an alternative to depositing the 10 per cent in cash, in that he may put up the full amount of bail in cash, or he may deposit with the clerk as collateral, stocks and bonds in the full amount of the bail, or he may pledge as collateral real estate in double the amount of the original bail. If he appears and complies as required, then the entire amount of cash that he has deposited is returned to him, or the full amount of his stocks and bonds or real estate that is used as security is released.

One thing that we put in there—and this of course was directed at the bondsman—was that when he pledges stocks

and bonds or pledges real estate, he must sign a schedule, and an affidavit, that such stocks and bonds and real estate have not previously been used during the 12 months immediately preceding as bail, and we have another section that prohibits the use of stocks and bonds or real estate as collateral for bail more than once in any one 12 month period.

As originally submitted to the legislature, we intended the 10 per cent deposit provisions to put the bail bondsman out of business, and restore the control of pre-trial detention to the courts, where it belongs.

The opposition was so great that we had to compromise and accept a two-year limitation on the bill. It was adopted with this limitation.

The other provisions that we have which permit bail bondsmen to operate—we had to take those out of the repealer section and leave those provisions in the statute.

So at the present time, until August 31st, 1965, we have the alternative provisions where they may use the 10 per cent deposit provision, or they may use a bail bondsman.

Ordinarily we would have had a clear-cut trial as to which is the best, the 10 per cent deposit, of which he gets 90 per cent back, or the 10 per cent fee, which is the maximum fee charged in Illinois by the bail bondsman. Probably there would not have been much choice, and I think we would have run the bondsmen out of business, but strangely enough, the Supreme Court of Illinois, at the suggestion of the Conference of Chief Circuit Judges, adopted a Supreme Court rule which suspended the 10 per cent deposit provision in all traffic cases, in all quasi-criminal cases, which are violations of municipal ordinances, and in certain misdemeanors. They also set up a schedule of bail for these various offenses.

So, in most of the counties of the state, they have still been using the bail bondsman for these offenses included in the Supreme Court rule.

However, in the felony offenses, to which the 10 per cent provision does apply, we have practically run the bail bondsman out of business. They get very little of the felony business unless they cut their fee, which they have been doing, or take promissory notes, which they have been doing also since January 1.

Professor James Starrs of DePaul University is conducting a very careful and exhaustive survey in Cook County, which is Chicago, and also downstate counties, in which we hope to have considerable information on how the 10 per cent provision in competition with the bail bondsman is operating, and from the preliminary figures that we have, I think the statements that I have made are true.

Oddly enough, many of the counties permit the 10 per cent deposit in traffic cases and those misdemeanors listed in the Supreme Court rule, so we are getting some experience on those cases, in spite of the rule.

One side effect of the rule is that the police officers are using more and more the notice to appear, rather than taking them into the station and requiring the bail which is provided for in the Supreme Court rule.

Another side effect is that the magistrates are using the summons more and more, rather than the arrest warrant to bring them in and require bail.

So I think the Supreme Court rule may ultimately benefit the project, and I think that by the end of this year, from Professor Starrs's studies, we will have sufficient information to continue the 10 per cent provision at least for another two years, if not indefinitely, and if we can do that, and eliminate the bail bondsman, then I think we will return the control of bail and pre-trial detention to the courts, where it belongs.

Thank you very much for your kind attention.

PANEL DISCUSSION

MODERATOR FOOTE: Now we want to use the remaining time that we have to try to explore, in group discussion, here, some of the issues that have been raised.

Let me ask one question, Professor Bowman, from what you have just been saying: Has this had any effect at all—I presume it has had no effect—on indigent cases in Illinois?

PROF. BOWMAN: One thing it has done is to cause the police to issue more notices to appear. I think this certainly benefits indigents as well as anyone else.

Also, any time the judge will issue a summons, this helps the indigent.

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Also, any time the judge will issue a summons, this helps the indigent.

These provisions in various ways help them, I think.

The 10 per cent doesn't particularly, except that he is going to get 90 per cent of it back. If he doesn't have 10 per cent of the bail amount, he couldn't get out with bondsmen, anyway, because the fee for the bondsman is 10 per cent.

So what we tried to do was to take a preliminary step, and if this works, then maybe we can go on from there.

But if he can raise it for the bondsman, he can raise it for the clerk of the court, and if he knows he is going to get 90 per cent of it back, he is more likely to be able to raise it from somebody than if he is not going to get any of it back.

MR. KUH: Could I add a point?

We have had some experience in New York. We have been using cash bail. Judges have set cash bail in lieu of bail bond for many, many years.

Unfortunately, we have never scientifically studied our statistics, but I recently got statistics for our crimes of bail and parole jumping for the year 1964. This meant people who were out more than 30 days. And the results are "lousy." There is no nice way of putting it.

I think when you have an investigation ahead of time, and find out somebody is reliable, that is one thing. But if you simply tell somebody to leave $25 with another somebody, our experience would seem to indicate the person figures, "Then I forfeit $25 but don't get convicted of petty larceny." Many of you—even this very distinguished group—have been traveling and have gotten a traffic ticket some place and have posted a $25 bond which, in effect, is sort of an advance way of paying the fine, and then you have never returned to Keokuk, or wherever the place was.

And I think that cash bail encourages that attitude, that this is an advance way of paying the fine, and you have nobody responsible to bring the defendant back, and you know nothing about the defendant.

It may be in the felony cases in which you mention, Professor Bowman, in which cash bail is being used now, people will realize the seriousness of the crime, but I venture to say, and our experience indicates, that when you extend it to misdemeanors and offenses, cash bail is meaningless. It becomes an advance fine. And these are the largest areas—cash bail

and uninvestigated parole—in which we get jumps, and we never get the people back, unless the time comes when they are arrested for something else and the open warrant turns them up.

I can't stress too much, from our experience, that judges and prosecutors can go too far in the area with which this Conference is concerned. You can go hog wild in saying, "Let's turn everybody loose," but if you do it *without a careful investigation,* without verifying who they are, I say you are going to have an awful lot of people out in the community who will never come back.

I don't mean to make this too long, but today's Times, page 1, has a story, and the first paragraph tells of an incident on April 17th in New York County. I didn't know this would be in today's Times, but I have some facts on that incident.

Here is what one of the complaints said about the defendant involved in that incident. (I bring this out, because here is one who was paroled, and the judges have gone too far with, "Let's parole everybody with minor things, let's set $10 cash bail or $20 cash bail," and it isn't a good policy):

> Patrolman Patrick Vahey was struck on the back of the neck by a length of iron pipe wielded by defendant Hamm who also kicked Patrolman Vahey in the back; that said officer, after a struggle, took from the possession of defendant Hamm an open-bladed knife, which said defendant then held in his right hand, that said officer, as a result of said assault, sustained a neck injury for which he was treated at Harlem Hospital where he was placed in a neck brace.

A judge paroled that defendant *without any investigation,* and sure enough, that was April 17th.

On May 30th, this was the headline: "8 Youths Kill Woman in Store."

And one of them was the paroled defendant (previously mentioned) who was picked up two days later.

This sort of willy-nilly paroling, simply because it seems not very serious, I think can be the most dangerous thing to the good administration of criminal justice.

PROF. BOWMAN: Let me make one additional statement.

I think one of the biggest benefits that we have received in Illinois from this 10 per cent provision, and the big fight we had in the legislature with bail bondsmen, is the alerting of the people of the State of Illinois to the fact of bail—the public generally. Also the police, the courts, the lawyers. They are all now alert to the fact that this bail is a problem.

Many of the judges are disregarding the Supreme Court rule entirely. Policemen are beginning to disregard it, this requirement of bail, where they know the person, and he is not going to run. So what we are getting, both in Chicago and more so downstate, is a tremendously increased number of ROR's.

And this I think is healthy, in those cases where they know the person, and have absolutely no reason at all to think he is going to give up his community ties and leave.

MODERATOR FOOTE: What about the issue of investigation in the felony cases, where your cash 10 per cent deposit applies?

PROF. BOWMAN: You mean investigation before the 10 per cent?

MODERATOR FOOTE: I assume the only effect of the investigation, there, would be to increase the size of the 10 per cent deposit, by increasing the size of the bail demand.

PROF. BOWMAN: Well, one thing that they are doing: In Chicago we have one judge particularly who is violently opposed to the 10 per cent provision, and he has recommended that all judges merely increase the bail 10 times. And one judge did this in one case.

Ordinarily they set it at $30,000, and they set it at $300,000. And on a writ of habeas corpus, Justice Schaefer, who practically never writes an opinion on the use of bail, did so in this case, and he said that the judges have the obligation to obey the law just the same as everyone else, and he reduced the bail to $30,000.

We have another judge in Chicago, the presiding judge of the Municipal Court, Augustine Bowe, who is very much in favor of the 10 per cent, and he tells his judges to use it, and he also has increased the use of ROR.

We have no fact finding agency, such as the Vera project. Professor Kamin, who is sitting over here, is conducting a study there, but I don't think we have gotten into any fact finding basis as yet.

MODERATOR FOOTE: I guess on that issue, the issue is joined between the Cities of Chicago and New York.

Could I point out that you have led into another problem that we haven't gotten to before at all this morning, and that relates to the remedies on appeal.

You catalog, Mr. Bowman, 18 or 19 reforms in Illinois, and I don't recall any of them dealing effectively with the process of getting speedy review, and particularly indigents being able to get speedy review.

PROF. BOWMAN: Well, we have very careful provisions in regard to review, for indigents, of course, and traffic. In capital cases, we provide under the new Code for an automatic review. We provide for a cut down record. We provide for a "quickie" record.

MODERATOR FOOTE: Pardon me. I think you misunderstand me.

Suppose a man is put in and $5,000 bail is asked, and I presume other Chicago defendants are like New York and Philadelphia defendants, and many of them can't make $500. Maybe a few could, if they knew they were going to get it back, but they probably can't make this sum of money, or anything close to it. So here he is. He is an indigent. He has had his hearing.

What next for him, sitting in the jail? He reads a notice that he has a right to bail. I suppose he already has that right to bail.

PROF. BOWMAN: You mean before he is convicted?

MODERATOR FOOTE: Before he is convicted. Right after bail is set.

I am talking about the great deficiency in our present system, in the inadequacies of the methods of review for indigents or near-indigents, in trying to get any adjustment of the amount required for bail for people of moderate means.

What does he do?

PROF. BOWMAN: At the present time, unless they will release him on his ROR, we have nothing for him. If his bail is $500, of course, he could get out at $50. He can do the same thing by paying a bail bondsman $50. But if he can't raise the $50—we have from 300 to 500 persons in the Cook County jail any day of the week, those that can't make bail.

MR. WRIGHT: Professor Bowman, I won't contradict you, but you are saying that the bondsmen are losing business?

PROF. BOWMAN: Yes.

MR. WRIGHT: The only thing I can show you is our balance sheet, that our business in the Chicago area has doubled.

Now, as was brought out here, these people do not have the 10 per cent. They do not have the money. We are here today to see what we can do for the poor and the indigent.

The bondsmen will take them out for nothing. He may pay them $5 a week or $10 a week, but he gets out. And that is what we are trying to do.

Just by saying that you put up 10 per cent—the great number of these people don't have the 10 per cent.

PROF. BOWMAN: This is true. And I think one favorable result is that now bondsmen are taking payments on installments, taking promissory notes, cutting their fee to five per cent or 10 per cent. The 10 per cent provision has had this effect. At least to this extent, this is good.

MR. WRIGHT: Are you saying, then, that we are accomplishing our end by your 10 per cent?

PROF. BOWMAN: Well, I say if you are taking less than 10 per cent, which you were taking before, and taking installment payments, and letting these people out, this is all we would want.

We don't care how you arrange your business to do it. All we want to do is to get the people out if they are eligible for it.

MR. WRIGHT: Your statement, Professor, that you would eliminate the professional bondsman and use the 10 per cent—I think this is a great hardship, because a large number of these people do not have this 10 per cent, and unless they are extended credit by the professional bondsman, you will have to enlarge the jail in Cook County.

PROF. BOWMAN: I think if the bondsmen cut their fees to five per cent, we might cut the deposit to five per cent.

MR. KUH: Professor Foote asked Professor Bowman a question about what is done if the defendant is still in jail. Recently Judge Murtagh pointed out in New York City we have what we call "bail reevaluation". If the defendant has been in jail and is unbailed for 48 hours, automatically his case is brought on before a judge to reevaluate the bail and see if something can't be done to release him.

I think, too, in that regard, in regard to the whole problem of—someone used the term the other day "languishing in jail"—I believe that for everybody who spends an extra day in jail, this isn't good, but I think one can overpaint the picture.

In New York State, a man has the right to counsel in misdemeanors as well as felonies, so within a short time after arraignment, almost everybody has obtained counsel, unless he doesn't want one. And if one is a good risk, counsel is soon there to make this known to the court.

So I suggest the picture of people languishing for weeks in jail who are good risks but don't get out is an extremely false picture.

Thank you. Thank you. I have some friends.

If people are good risks and have counsel, their counsel will make known to the court—and I must again say, to praise Legal Aid, Legal Aid does a fine job. I grant you if this man spends an extra 48 hours in jail, that isn't good, but he doesn't spend weeks and weeks, when he is a substantially good risk.

MODERATOR FOOTE: Dick, I think there is serious question about this. Legal Aid doesn't get to these cases except perfunctorily, in many instances, after the preliminary application.

Certainly in cities we have studied at the University of Pennsylvania, and cities where Vera has studied, if a person is denied release at the initial hearing, and he is a person of very moderate means or no means, his chances of effectively getting judicial review by habeas corpus are just about nil.

MR. KUH: I have seen the figures, and nothing I have said here is anti-Vera. I think they have done a fantastic job, and enough praise can't be given. But I think in many ways the figures are incomplete.

For instance, with the control group that they used to use, four times—they will tell you—as many people were paroled on Vera recommendations as were paroled from the control group. Hence, the inference we are left with is that the others in the control group languished in jail.

There is no follow-up to tell you whether the other persons made a $25 premium or $25 cash bail, or whether 48 hours later their bail was reduced. We have no figures ultimately as to how many people were released before trial in each case.

So I think, No. 1, your figures are defective in that regard.

MODERATOR FOOTE: We can make a pretty good inference from the overall detention figures in the indigents and the overall detention figures at various levels of bail, and we can get a pretty good inference that a substantial number of them do languish in jail, I think.

MR. KUH: One can get any inference one looks for.

Justice Frankfurter once said "It makes a great deal of difference whether you start with an answer or with a problem". If you want to start with the solution, I guess you can find justification for it, because there are people in jail. But if we are proving things fairly I would like to see the statistics, and we have only seen partial statistics.

Secondly, I would like to point out that Vera suggests that the person in jail is less able to defend himself. I find that not proven by the statistics.

They will take two groups of 150. The first 150 they recommend be paroled. They go into court so recommending; the judge and the DA oppose 50 of them. They get about two-thirds released, so they have about a hundred who have been subjected to extra culling who are released. Then they will tell you what the percentage of acquittals and dismissals and suspended sentences and so on are on those that have been culled. The bad risks—those 50 who were not released—you don't hear about.

Then in the control group they have 150, but they just chronologically, eliminate the last 50, with no selectivity, and they take the first hundred.

And so you are comparing apples and bananas. You are not comparing comparable groups. And I suggest when they therefore tell us that inevitably the control groups demonstrate that persons are prejudiced when they have to defend themselves from a jail cell, I don't find it proven.

MODERATOR FOOTE: I think you would concede that for an indigent or a person of moderate means who has had bail set in many areas of the country in a figure he can't meet, his chances now of obtaining judicial review of that bail setting are very small.

MR. KUH: In some jurisdictions I am sure they are very small. In New York that bail setting is reviewed within 48 hours.

MODERATOR FOOTE: What are the statistics on the proportion of people released?

MR. KUH: I must admit defeat, here, Caleb. You have scored a victory. One of our big problems in New York is that except for Vera, we don't have statistics that are worth a damn.

I have seen the court figures. I can't figure too much head or tail of those.

I think one of the problems is that Vera, with its manpower, with its foundation support, has been able to do things that we, who are dependent upon government pittances and overworked employees, aren't.

PROF. BOWMAN: May I make one statement, here?

I have listened with great interest to your statements in regard to the indigents that are still in jail, with no way to get them out.

We don't pretend, in Illinois, in all of those different provisions that I mentioned, that this solves the problem of bail or pre-trial detention. This is something that has been entrenched for hundreds of years. And I don't think we can solve it all at one time.

Vera is doing what? About seven per cent, I think, Dick. We are getting some. But sooner or later we have to make a start.

The purpose of this Conference here is at least to make a start on these things, and take it a step at a time. We are not going to accomplish it over night. And we are not going to get all the indigents out of jail at one fell swoop. I haven't seen any project yet that will do it.

But at least I think it is time to make a start on it. And if we get some out this year, and have an additional number out next year, and we learn to control the professionals and know what to do with them, and solve the other facets of the problem—then I think we are making progress. But the thing is that we have to make a start somewhere.

MODERATOR FOOTE: Charles, you mentioned, at the beginning, that you were going to raise questions of third party parole and daytime release. Do you characterize those as alternative methods?

PROF. BOWMAN: Yes. Out in the Northern District of California, Albert Wahl, who is chief probation officer, at the suggestion of the letter that came from the Attorney General's office, urging them to use ROR's more, they set up a project where as soon as the marshal arrests a person, he contacts Mr. Wahl's office, the probation office, and they make a thorough investigation, and they have a set of factors, something like the Vera study, in which they determine the ties to the community and any previous records, and so forth, and then they make recommendations as to whether or not he should be released on his own recognizance.

And so far—I think it just went into effect four months ago, officially—I think it has proven out very well.

Charley Mann is doing the same thing in St. Louis, where the probation is getting these people released under the supervision of probation officers.

In my estimation, the probation officers are probably as professionally equipped to investigate and supervise these as any division or group personnel that we have. They are set up to do it. All they need is additional personnel.

Down in Tulsa, a project which excites me more than a little: Ollie Gresham began it down there a year ago, attorneys sign up on an approved list, when a person is arrested, an attorney on the list submits an affidavit that he will have this person appear at the time required, and they release the person in the attorney's custody.

So far, out of well over 200 cases, they have only had a couple of attorneys whose name was removed from the approved list because the person did not appear, and with some of those, there were reasons why they didn't appear, such as illness and so forth.

But this is working very well, and whereas most of the business was concentrated in four attorneys, prior to the initiation of this project, now they have a list of something like 316, I think, that do this.

Then in some areas arrestees are released to the custody of other people. The labor unions in New York are looking into this. They have consulted with Mr. Meany, and are looking into release in the custody of the union, who will be responsible and who will supervise and see that he appears when he is supposed to.

In North Carolina, they have a project going down there in regard to release under the supervision of probation officers.

More and more in downstate Illinois we are using probation officers as supervisors of released persons.

All of these, I think, are tentative pokes at the problem, and I think as they prove successful, then to that extent, we can expand them further.

MODERATOR FOOTE: I think we have explored two types of avenues in this discussion, at least. One is the really amazing simplicity of devices which are only now being tried as if they were something new, devices which you would suppose that any management efficiency expert would have immediately incorporated into the system.

The most shocking thing I guess about Mr. Bowman's presentation was the fact that we now put notices in jail house cells in Chicago telling defendants a certain amount, in the English language, I think he said, as to how they could obtain certain of their basic rights and certain of their telephone calls, and that they can even make more than one phone call in case their wife isn't home when they make the first one.

This is I suppose a relatively revolutionary statute.

PROF. BOWMAN: It is in Illinois.

MODERATOR FOOTE: And similarly, the other types of steps, the possibility that if a defendant is only going to have $10 of his own money for a $100 bond involved, anyway, he might as well file it directly with the state—one would suppose, too, this was an extraordinarily simple type of procedural device.

One of the big beyond-Vera or outside Vera clean-up operations, which is obviously indicated by this discussion, is these relatively simple humanitarian measures, which presumably could have some considerable impact on the results of the total process.

I thank you all very much.

CHAPTER V

Pre-trial Release for Juveniles

Plenary Session Panel (Panel D)

Moderator:

Judge George Edwards
United States Court of Appeals
for the Sixth Circuit; Former Police Commissioner, Detroit

Panelists:

Police: Raymond A. Dahl, Assistant Chief of Police, Milwaukee

Probation: Warren Thornton
Chief Probation Officer, Sacramento

Judge: Orman W. Ketcham
Juvenile Court of the District of Columbia

MR. GEOGHEGAN: The last panel session of the Conference is entitled "Pre-Trial Release for Juveniles."

Our Moderator is Judge George Edwards, of the United States Court of Appeals for the Sixth Circuit, who was recently appointed to this position. Prior to his appointment as judge for the Federal Court of Appeals, he was Police Commissioner for the City of Detroit, and prior to that he was a judge on the Michigan Supreme Court.

Address of

JUDGE GEORGE EDWARDS

United States Court of Appeals for the Sixth Circuit

Panel Moderator

JUDGE EDWARDS: Thank you so much, Bill.

Difficult as are the problems with which this Conference has been grappling in relation to adult bail, the problem of pre-hearing release for juveniles proves to be even more complex.

We deal, in this panel, with a wholly different philosophy, and we deal in 1964 with something approaching a crisis situation in the juvenile detention homes of the country.

The juvenile court started as a great popular movement some 60 years ago.

The statutes which created juvenile courts said, in essence: We, as a people, as to our children, are going to abandon the theory of fitting the punishment to the crime. We are going to take our children out of jails. We are going to take them out of penitentiaries. We are going to consider them all capable of being rehabilitated, capable of being put back on to the road toward sound citizenship.

The paragraph which I am going to quote is the preamble to the Michigan Juvenile Code. It is found, in substance, in most juvenile codes in the country. And it says as follows:

> "Each child coming within the jurisdiction of the court shall receive such care, guidance, and control, preferably in his own home, as will be conducive to the child's welfare and the best interests of the state. When such child

262 NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE

is removed from the control of his parents, the court shall secure for him care as nearly as possible equivalent to the care which should have been given him by them."

This says that where a child is in trouble and doesn't have an adequate home, the job of the court is to give him the best substitute home, with substitute parents, which he should have had as a natural right in his own home with his own parents.

It is a philosophy based on the idea of treatment rather than punishment.

It is a philosophy founded upon the proposition that we should not give up on any child below the age stipulated by the statute, that we should not resign ourselves to the notion that juvenile delinquency inevitably makes for adult crime, and that treatment should make use of the best thinking, the best techniques and disciplines, in social work, psychiatry, and medicine.

It is a philosophy which holds that through this process of treatment we will manage to save an increasingly higher percentage of children, who otherwise might find their way to society's scrap heap.

This is a theory which the people in this country have accepted, and expounded, for over half a century. But you know as well as I do, that our practices are far removed from the theory.

We have, for example, eliminated the holding of children in jail in this state. But have we also done so in fact? Essentially what we have done is to place the word "home" on the children's jail, a verbal maneuver which didn't change the structure at all.

We meet today to reexamine our practices in the pre-hearing detention of children. My task is to introduce the topic, to set the stage, to challenge you to think about and hopefully to find answers to our problems.

In the few moments allotted to me, let me seek to identify quickly and succinctly the worst of these problems.

I charge that thousands upon thousands of children now in detention in this country are held behind bars without court hearing or order, and under circumstances which many lawyers deem in violation of the Constitution of the United States.

PRE-TRIAL RELEASE FOR JUVENILES 263

I charge that hundreds upon hundreds of children are held illegally in adult jails each year in this country. The dedicated consultant for the National Council on Crime and Delinquency, Sherwood Norman, has recently estimated that figure at over 100,000 per year.

I charge that most children now in detention are held in institutions which at best represent cold storage, and at worst are similar to adult penitentiary practices, and that in 1964 treatment for and human concern and contact with children in detention is the exception in the detention homes of this country, rather than the rule.

I charge that many juvenile detention homes in 1964 still freely intermingle the neglected children, the delinquent children, and the mentally ill children, whom society finds too big a burden for its streets.

I charge that delays in hearings by over-burdened courts and delays in acceptances by totally inadequate state training schools and state mental hospitals have produced an overcrowding in the juvenile detention homes which is terribly damaging to the children held there, and potentially dangerous and explosive.

I charge that the over-crowded conditions of detention homes resulting from the causes referred to above are today often bringing the refusal of detention for hundreds of juvenile offenders whose prior conduct and predictable future conduct on the streets of our big cities makes them an active danger to themselves and to our people.

I charge, in short, that American society has given the juvenile courts a wonderful theory, and then deprived them of the tools necessary to do the job properly, and that no place is the gap between theory and practice more visible today than in the juvenile detention homes of this country.

I ran a juvenile detention home for four years, while I was a juvenile court judge in Wayne County. The first inventory in that home told me that there were 27 children there who had been held behind bars for over 100 days, without a judicial order or ever having seen a judge or a referee.

Two of those children, who had never seen a judge or a referee or been the subject of a judicial order, had been in that detention home behind iron bars for over six months.

We had youngsters whose sole problem was that their home had been burned and they had been housed for shelter only, lodged with sophisticated delinquents capable of teaching them much about the road to crime.

We had schizophrenics and children in psychotic panic, ready to trigger juvenile riot at any moment, and in immediate contact with all the other youngsters in the institution.

We had penal practices of a number of varieties, children marching to meals, two by two, marching with their arms folded, under orders, the rule of silence enforced in the mess hall—this for youngsters between the ages of 12 and 16—and the rules backed up ultimately by baseball bats.

These memories are over a dozen years old, and much has happened to change the picture of detention in Wayne County for the better in the intervening years. And I know that similar efforts, led in many instances by the NCCD, have produced similar good results in many other cities in this country.

But I also know that the results are not sufficient to deprive this Conference and the Vera Foundation and the Attorney General's office with reasons for great concern about the continuing practices which I am outlining.

I know that what we foresaw and warned about a dozen years ago, also, the wave of post-World War II babies, has now, unprovided for by complacent legislatures, overwhelmed the juvenile courts.

If you add 14 to 16 years to the years 1947, 1948, and 1949, and you go back and pick up the increase in births which occurred in those earlier years, you will find reason to understand the increasing juvenile delinquency in the big cities of this country in the immediate past years, because there has been at least a 24 per cent increase in juvenile population in the crucial years of juvenile delinquency in the course of the years 1961 to the present.

Detention homes, good or bad, by previous standards, have been inundated by youngsters whom state training schools and hospitals have not been provided with beds sufficient to take care of.

Now, if these mild comments have not laid a sufficient burden on your conscience, I turn to our panel. The experts we have assembled here are charged with exploring pre-hearing release procedures. In short, alternatives to detention.

Can intake control, can release to parents, can release under supervision, can placement in foster homes pending hearing, can police interviewing without arrest, can bail, help in selecting for pre-hearing release those children who are not an active danger to the public? Can these measures help to relieve the crisis in detention which I have described?

Where these possibilities exist, the juvenile code and the whole philosophy of the juvenile court mandate such pre-hearing release even more specifically and even more forcefully than our statutes mandate the right to bail.

The challenge to make our practice accord with our principles in this crucial area is a very great one.

Thank you.

And now it is my pleasure to turn to our truly distinguished panel, who will discuss the particularities of this problem, and the first is the Deputy Chief of Police of Milwaukee, Wisconsin. In his 27 years in police work, he has for many of those years had supervision of the Juvenile Bureau and its activities of one of the best known police departments in the United States of America, and one with the highest reputation for professionalism.

It is a very real honor to present Chief Raymond A. Dahl, of Milwaukee.

Address of

RAYMOND A. DAHL

Assistant Chief of Police, Milwaukee, Wisconsin

Judge Edwards, fellow panelists, ladies and gentlemen: I am a cop. My job and that of my contemporaries is to meet this problem right where it is, on the concrete streets of the cities. And I think I speak for some 200-odd thousand other police officers when I tell you today that we are greatly concerned about the juvenile problem.

The uniform crime reports show that in 1963 some 734,784 juveniles were arrested for felonies in these United States. And I regret to report that in my City of Milwaukee, the increase is still continuing, and for the first five months of this year, we have an additional increase of 12 per cent.

This points out a need for us to reevaluate our enforcement procedures, our detention methods, and that great word, "rehabilitation" that Judge Edwards spoke about in the philosophy of the juvenile code.

Arrest statistics across the nation reveal that offenders under 18—"America's resource of the future, the kids that are going to take over this country"—are committing 79 per cent of all the auto thefts in the country, that they are committing 59 per cent of the burglaries, and more than 50 per cent of the larcenies.

In the larger cities, every day now we see juveniles committing strong-arming attacks; we see armed robbery, holdup men, if you please, the very vicious type of crimes.

The juvenile driver is getting a great deal of attention, and we in the police look at this with apprehension, and we are appalled at the way they are involved in increasingly serious traffic accidents. We are concerned in their lack of consideration for others and not facing up to their responsibilities as motorists.

The tremendous increase in the involvement of juveniles with law enforcement requires serious thought in our arrest volumes, our interrogation, our detention, and our rehabilitation methods.

Now, our job in the Police Department—and we appreciate an opportunity like this to talk with you gentlemen who represent the other facets of this whole judicial procedure—our job is to prevent crime. That is what you pay us for. And that is what we are out here to do; to control and suppress criminal tendencies and irresponsible behavior, and, of course, to protect persons and property. The vandalism and the destruction of property by our young people is appalling.

Now, as we do this job, we must face facts. Everything that a policeman does, every case that he prepares, everything that he actually accomplishes is based on this premise: "Get the facts and meet the situation from that standpoint."

Now, the fact is that there are juvenile criminals. There are some real vicious juvenile criminals. We are not only dealing with mischievous pranksters; we must bring to bear all the controls, the deterrent factors available to us to hold the line against juvenile crime.

In this Conference, we are talking about detention: Is detention a deterrent factor to future behavior? Is bail a deterrent factor to future behavior?

Well, let's consider that a little later on.

Our present methods and approaches are not doing the job, in my prejudiced opinion. We are not so much interested, in law enforcement, with what the court does with a particular case as we present it to them, but we are interested in what the court's action does on the thinking of the violator and the thinking of his friends and his family and society in general. What reaction do they get when this kid comes out of juvenile court, by the manner in which now he is going to be rehabilitated?

The philosophy of the juvenile code is wonderful, and we, the police, buy it. We believe in it.

But, gentlemen, I think it needs to be looked at. Is it doing the job?

There is, we believe, an over-emphasis in this country today on the rights of individuals, to the disregard of the equally important rights of society.

How do I, as a policeman, go back to the merchant who has been clubbed over the head by a 16-year-old gang of hoodlums, when those hoodlums are back on the streets before, probably, my man gets back on the beat?

And this happens, gentlemen. I have no quarrel with it. I am trying to just bring you the facts.

Law enforcement officers, professional ones—and I believe most of us come under that category—are fully aware of all the constitutional rights of citizens, and the juvenile violator. We want to assure everyone that we respect such rights and procedures.

We are, however, concerned about our ability to do our job. And unless society, and particularly the lawmakers and the law interpreters, begin to take a more practical and realistic look at the entire problem, the objectives, the net result

268 NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE

of our entire legal process involving juveniles may well collapse.

Now, let's look at this juvenile detention procedure. In most of the states, and in my State of Wisconsin, the Children's Code was patterned after the National Council on Crime and Delinquency standards for detention and youth that was put out in 1961, and the Police Committee on Federal Security put out in 1945. This provides for detention only to protect the welfare of the juvenile, to protect the community, or guarantee appearance.

According to Chapter 48 of our Wisconsin Code, we, the police, cannot detain a child, nor can the police authorize the detention of a child. Police can only request the children's court judge to detain and must cite the reasons for the request in a well documented report.

We have no quarrel with this at all. It is a good procedure, providing that the end result is what we want it to be.

Now, release or detention: After a child has been taken into custody, we, the police, after reasonable questioning, the officer in charge of the investigation, unless it is impractical or he has been ordered otherwise by the court (and I am not talking about some cases that involve parolees and so forth), we release the child to the parent, the guardian, or the legal custodian, on the promise that such person is to bring the child to court and if necessary we actually make this parent sign an agreement that he will be responsible for the conduct of this child until he can come before the court.

Now, as to when juveniles should be placed in detention and when they should be released, I would say in very few cases do we need to put them in detention.

A child should not be placed in detention when his parents can and will control him and present him at court when ordered.

Children should not be detained merely to facilitate a police investigation, or merely because of the seriousness of the offense or the suspicion of the commission of crimes of the other[illegible].

When, however, because of the seriousness of the offense, the child may threaten to run away, or injure himself, or

PRE-TRIAL RELEASE FOR JUVENILES 269

others, or commit additional crimes, by the past pattern of his conduct, he may be detained and should be.

Since an adoption of a new procedure in the Milwaukee Police Department (and we have in the city of three quarters of a million people a relatively large [illegible]) less than 15 per cent of all juvenile cases are actually requested to be detained by the police.

And I also point out that of that 15 per cent, 35 per cent of those are parolees who have violated their parole and are probably being held at the request of the parole officer. So there isn't a great number of cases that are detained before the trial.

Detention to the police is not too important. We are not interested in detention as punishment. We are, however, interested in what our police procedures, the court procedures, and the probation procedures, including everybody, will accomplish on the thinking of our offending youth.

Will our efforts deter further involvement in additional law violations? Does our present, drawn out sociological approach to the handling of juveniles do the job? I believe we have to look for the answer to that critical question in the police [illegible].

More juvenile crime, more serious crime involves the nation, [illegible] pattern of recidivism that is breeding a class of hardened criminals for [illegible] future.

Now what is important to us in this is that once we arrest or take into custody [illegible] lapse. And that is just about what happens in most of these

juvenile cases, when we have a trial a week, two weeks, three months, six months, after the offense, it has little or no effect.

We are dealing with immature minds. We are dealing with children who need to have immediate correction, if it is going to be effective.

Following apprehension, then, a juvenile has a right to an early hearing. In order to accomplish this, the intake procedure should closely follow the completion of the police investigation.

At this stage of events, right away, the child is not looking for rights. He is not looking for counsel to represent him or a formal trial. If he is a first offender, this is a pretty shocking time for him, and he is looking for guidance. He wants to get it over with. And if the proper procedures are established, there is a great chance that he won't be repeating.

I am talking now about the initial contact with the first offender.

You know, these youngsters sometimes get into trouble by design, not by accident. Each act is intended to top the last one, and in a great many cases, he invites being caught in various ways.

Our society today has developed a concept of juvenile criminality. And, yet, most juvenile offenders don't repeat.

Our failures stem from the small percentage of children who exhibit a pattern which is readily discernible, but which community services choose to ignore.

In Milwaukee, again, because we are very apprehensive about our ability to meet this problem, our Chief of Police, Harold Breier, and our Juvenile Bureau, told us to do a study on the 1963 experience with juveniles taken into custody.

We set up criteria for finding out how many families there were in which the children had contacts with the police more than four times in 1963.

I sort of thought when this started we would wind up with about 1,500 families or so, and, incidentally, we have 215,000 families in our City of Milwaukee. To our amazement, we came up with 487 families in which the children had been in contact with the police at least four times. And in this 487, we had one family where they had been in contact with us 17 times.

This was an interesting observation, so we went a little further with it, and we checked out and we found that of the 487 families, 667 children were involved.

We checked the parents of these families, and to our amazement, we find that most of the parents had problems as juvenile delinquents, and were in contact with the Children's Center when they were children, back two generations.

My point is this: What we have been doing in these 50 years that Judge Edwards talked about has not been doing the job. We are perpetuating a system of families, if you please, or juveniles, in this atmosphere of inadequate handling.

Now, I would like to just say a little bit about probation, which is wonderful, and we have no quarrel with probation. But as a practical policeman, I just think it can't work in the set-up that I see in so many cities. You can't have probation with a hundred cases to take care of by one probation officer.

About three months ago, a father came into my office, and he was indignant because his son, who was 15, had been arrested as a juvenile burglar. And this was nine months ago, and the kid now was getting into trouble again, because he was apparently going out with the same companions that he went with before.

And the father said: "You know, I was arrested as a juvenile burglar 19 years ago, and I was put on probation, and the probation officer put me straight. He saw me at least once a week. He knew what I was doing." And he says, "Now, my son, who is 15, hasn't seen his probation officer in nine months."

And this is a truism, I am sure, in many cases, because of the tremendous overload of cases for the probation officer.

We, the police, make this statement, and it might not be accepted. But, after 5:00 o'clock of a day, and on Saturdays, Sundays and holidays, the only probation officers, the only social workers operating in most of our communities, are the Police Department.

And the problems don't occur in the daytime. They occur after the 5:00 o'clock period of time.

Now, much has been said in juvenile statutes about rehabilitation, but little is furnished in the way of rehabilitative services.

To rehabilitate, in my mind, is to change people. And that takes a lot of doing.

Children on probation expect to live within new curbs and limitations. When probation makes no demands or does not attempt to make changes in the family circumstances, the child on probation has no respect for authority.

In conclusion, I have one last item I want to bring into focus here and that is the matter of restitution as a means of control over juvenile problems.

We had a situation in Milwaukee where juveniles began to attack our parking meters. About 800 of them were damaged, as these kids smashed them, and the bill was astronomical, something like $20,000 worth of services and repairs.

We arrested, or we took into custody, 30 youngsters whom we caught in the act of doing this.

It seems to me that if we could make the parents and these youngsters pay for the damage they did to these meters, this would be important as a deterrent effect. But, we, the Police Department, are not a collection agency. The juvenile court says they are not a collection agency. So, it becomes a civil matter between the owner of the property, or, in this case, the City of Milwaukee, who owned the parking meters, and the juvenile. This is wrong. When you look at this kind of thing, you can't fix responsibility for actions.

Now, the last thing that I am asked to talk about is the necessity of us interrogating a juvenile once he is in detention, before the trial. And I will say this very briefly.

Our case is generally complete by the time we turn them over to the intake center. However, in many cases, these juveniles are involved in numerous crimes, and our detectives, our auto squad, for example, have the necessity of talking to this kid further about other cases he might be involved in, or other accomplices that might be involved.

We do this very cooperatively with our Children's Center, and that is no problem. But, gentlemen, I hope that when you evaluate this Conference, and that when there are suggestions made as to an improvement or new procedures, we keep track of the things that are of interest to us, the police.

The deterrent factor: What can we do to put in the mind of this youngster that he should not repeat, what factors or conscience can we instill into him that will make him accept his responsibility in our society?

Thank you very much.

JUDGE EDWARDS: Thank you, Chief Dahl, for this very informative statement of the police view of this problem we are dealing with.

And now we turn to one of those folks who goes home at 5:00 o'clock.

The Chief Probation Officer for Sacramento, California, comes to us with a long record of education and service that commends his words to our attention. He served in the San Francisco Juvenile Court and the California Youth Authority, in the private practice of law. He has been an assistant district attorney and he is now a statutory officer, which I don't think many states are familiar with—the Chief Probation Officer of Sacramento, California, Mr. Warren Thornton.

Address of
WARREN THORNTON
Chief Probation Officer, Sacramento, California

MR. THORNTON: Judge Edwards, members of the panel, ladies and gentlemen: I assure you that I work later than 5:00 o'clock.

As a matter of fact, I concur with what the chief has just said. And one of my pet peeves with social workers is that they do keep regular office hours from 8:00 to 5:00.

I want you to know, Chief, that in our department we have a shift of social workers, some 25, who supervise cases, who work from 1:00 to 10:00. And they go out and see the people

in their homes when they are there, and not in the daytime, when they are not there.

For the past two days, we have been wrestling with the knotty problem: What is the purpose of bail? And why more people charged with crime and awaiting trial cannot be released until the hearing?

We have discussed also the touchy subject of protective detention and its relationship to the original concept of bail.

While all of this is fit and proper, one of the main problems regarding detention is that of the juvenile law violator, which is sometimes considered secondary to the adult, in spite of the fact that 50 per cent of our burglaries and auto thefts are committed by youngsters who are under the age of 18.

In fact, the manner in which a minor is handled may be the beginning or the ending of a potential adult criminal career.

If there were ever one area where crime prevention can start, it is with fair and skilled dealing with the child who falls into the bureaucratic clutches of our juvenile justice machinery.

The one basic, fundamental concept, however, that we must accept by our statutory law is that minors and adults are not treated alike, and the proceedings in the juvenile court and the steps leading to the court are not criminal in nature of any kind.

Regardless of what words are used, the minor who is confined in jail or in a juvenile detention home or in a state training school is in fact locked up just as effectively, and sometimes more effectively, than he would be had he been over 18 and charged as an adult.

I trust you will pardon my referral to California, but it is appropriate to mention our present statutory procedure only because of its recent origin.

A little over two years ago, after a very extensive study of four years, brought on because the public felt that we were much too punitive with children in California—and statistics bear this out, we have a reputation of locking up more children for longer lengths of time than anywhere in the world—that after some series of four years of meetings

and compromises, which included many people, our California Bar Association, our Juvenile Judges Association, our District Attorneys Association, and representatives from law enforcement, we came up with a new code.

It allegedly now contains the current theories and philosophies shared by the majority of our law enforcement officers, our judiciary, our Bar Association, our district attorneys, our social workers, our probation officers, and all the various students in crime and delinquency. And that is the general public, because if there is one field that everyone is an expert in, believe me, it is this one.

The main reason that this 60 year old law was rewritten was that so many studies indicated that great injustices were being done to our youngsters who were held in jails and juvenile halls throughout the state. Too many were placed in detention too long.

There was a great demand to give statutory sanction and guidance to the judiciary, to the probation department, and to law enforcement officers, as to what their powers and duties should be.

Let me give you a little frame of reference. In California, we do everything in a big way. During 1962, we had 210,000 minors under the age of 18 arrested for law violation and delinquent tendencies.

May I pause for a moment to explain to you what delinquent tendencies are? Delinquent tendencies mean if you are under 18 and you stay out after 10:30, or if you drink, or if you are sexually promiscuous, that is a delinquent tendency. If you are adult, it is a pleasure.

This 210,000, I hurriedly point out, does not include traffic violations and does not include dependent, neglected children, whom we by law must segregate from delinquents.

We have given law enforcement officers in California a complete, wide discretion in the handling of minor juvenile offenders. For the first time, in the State of California, we have told law enforcement officers: "We trust your judgment. We think you are high caliber people"—which they are—"that you are trained, professional, skilled men, and we must have your judgment. We recognize that you are our first line of defense against delinquency, that you are the man on the

street that makes the decision on the spot, the man that really knows what is going on, and when a few days pass, lots of things change, and facts get very blurred."

So we have given our law enforcement officers in California three choices to make when they arrest a minor who is under the age of 18. He has these three alternatives:

One, he may dismiss the matter. And that is after a consultation with the parents, and after taking the child home, or having the child brought to the police precinct station.

Two, he may cite the child and the parents, on a ticket almost like a traffic citation, to appear within a designated date and time, and it is usually within two or three days, to appear before the probation officer to have him dispose of the case.

Or, three, he may take the minor into temporary custody and deliver his temporary custody to the probation officer at the juvenile hall.

Now, of these 210,000 cases arrested by law enforcement officers in California, 60 per cent of them were disposed of by that law enforcement officer without any referral to the juvenile probation department or to the court.

And this is plausible, because many of those children were handled much better by law enforcement officers than social workers and judges.

I am sorry to say in our state 18,000 of them ended up in some manner or other in a city or county jail.

Probation officers in most states are charged with the responsibility of determining the necessity for the filing of juvenile court petitions, which is a pleading, to start action in the juvenile court.

Experience in California indicates that at least half of the cases referred to a probation officer are handled on an unofficial, informal basis, without the filing of a court petition.

So now we find a rather strange situation. Law enforcement officers handle 60 per cent of the cases. Probation officers handle about 20 per cent of the cases. And once in awhile we let a judge see a case. The judges, in fact, are handling less than 25 per cent of all the cases arrested.

These 25 per cent, however, I hasten to point out, are obviously the more serious cases.

But it is interesting to note that the general public thinks that judges have a greater dealing with delinquents than do law enforcement agencies, which they do not. The majority of the cases are handled by competent, efficient law enforcement officers, and the largest percentage of delinquents do not appear in juvenile courts.

Now, what about the detention of minors pending this dispositional hearing? What is the criterion used by the judge as to who should be held and who should not be held, pending disposition of his case?

Some states apparently have no statutory criteria, nor do they require a hearing. The California statute and the model Juvenile Court Act require that a petition, which is similar to a criminal complaint, must be filed in 48 hours, and a detention hearing held by the court must be held within 24 hours thereafter.

Now, the criterion is spelled out. It is very simply spelled out. The minor must be released to his parents pending the dispositional hearing unless one of the three following factors are found, and the judge must designate which one he has found, and the reasons why.

No. 1, he is likely to flee the court jurisdiction.

Now, this is the same theory that we have been talking about on our OR's, the same theory with adults pending their court hearing.

No. 2, that the minor has violated previously an order of the court.

This is the same as the adult parole violator or probation violator.

But the third one really is a statutory statement and authority to hold a minor, almost like protective detention, that we have been discussing. It simply states this: The minor must be released to his parents, guardian, or responsible relative, unless it appears that further detention of such minor is a matter of immediate and urgent necessity for the protection of such minor or the person and property of another.

This of course is subject to as many different interpretations as there are people to interpret them.

How do you reach these conclusions? We have to rely on good judicial judgment.

If the determination is made by the court that the minor be detained, pending his final disposition hearing, that hearing must be held within 15 days.

This custodial period, in the juvenile hall or the detention home, should be a meaningful experience. The kind of experience it will be will of course largely depend upon the physical facilities available. Juvenile detention facilities are not jails for punishment, but they are to be as much like a home as possible. Confinement in a jail in fact can do more harm than good.

Short term detention may have a therapeutic effect upon a minor.

The California Youth Authority has been experimenting for two years now in Sacramento with minors who have been committed to the Youth Authority to be placed in state schools. Now, they are releasing these youngsters on parole supervision within 30 days after their arrival, instead of the normal seven to 12 months, which they have done in the past.

These minors are placed under the supervision of a highly trained agent, who has a maximum case load of eight. Each one of these children is seen daily, and may be placed back in custody at the reception center at any time in the agent's discretion for short-term custodial therapy, not to exceed one week, and without court action.

They in fact are doing what we have been criticized as probation officers and law enforcement officers for wanting to do, and they are having a great deal of success. This program may soon be expanded in lieu of custodial care, which is extremely expensive.

In any event, when a minor is in detention at the juvenile hall, the responsibility for his care and custody rests with the probation officer or the superintendent of the facility, if the institution does not come under the probation officer, which it does in California.

As a general rule, minors may not be taken out of the hall for questioning, identification, and so forth, without express approval of the probation officer, and in some jurisdictions it requires the signature of a juvenile court judge.

The juvenile halls in most jurisdictions are not places where minors are committed or sentenced for their offenses. It is not a juvenile jail. In nearly all jurisdictions, it is declared merely as a preliminary place of detention, pending disposition of the minor's case by the probation officer or the juvenile court.

We in California by statute must charge the parents for the actual cost of the child's care while he is in detention. This amount is set by the county auditor, and it is based on the actual operational cost, and it ranges from $10 to $18 a day. The average cost is about $12 a day, in our medium sized counties with populations of 300 to 500 thousand.

There may be some deterring effect in making parents pay for the cost of their children's care while they are detained, but, of course, as you would expect, you find a large portion of the parents are indigent, or nearly so, or are on welfare, and they can't pay anybody.

No matter what the intake or the release policy pending court disposition may be, as stated by the court, by the probation officer, or by the statute, it is carried out by human beings, and these people who make these decisions have their own ideas as to justice, convictions, and punishment.

I would like to close by just making two brief remarks.

We, as professionals, have a duty and a responsibility to see to it that juveniles are treated as just that, juveniles, and not as adult criminals. This is not to say that some minors, because of their sophistication in the ways of the world and crime, should not be treated as adults. This, however, should be a judicial decision, and not one to be made by law enforcement officers or probation officers.

Now, it is not that I don't think judges are infallible, but this is the use of our judicial judgment, and is a part of our three branch system of democracy.

I would like to close with just one final statement.

In spite of all the figures that we have about the rise of juvenile delinquency, after 21 years of experience, I have come to this broad conclusion: that the children today are much finer than grew up in my generation, they are intelligent, they work harder, and they are a fine, fine group of kids.

JUDGE EDWARDS: Thank you very much, Mr. Thornton.

And now it is my pleasure to introduce to you a real live juvenile court judge, if there is such a personage extant yet in the land.

I was one once, so I have a great deal of sympathy with their problems.

After the family has thoroughly abdicated its responsibility in relation to a child, and thoroughly messed up his life, after the neighborhood has failed to handle him at all, after the church groups have perhaps had to exclude him, after the Boy Scouts have had to throw him out, after the schools have listed him as completely beyond their means to cope with, after the probation officer has thrown up his hands, after the police officers have repeatedly tried and failed, finally, they bring the kid to the juvenile court judge and say: "And now fix him, Judge, and do it in a hurry."

And here is one of the judges who is striving to deal with this problem, and he can tell you some of his experiences in relation to the problems of the juvenile court and detention here in Washington, D. C.

The judge of the Washington, D. C., Juvenile Court, my good friend, Orman Ketcham.

Address of

JUDGE ORMAN KETCHAM
Juvenile Court, Washington, D. C.

JUDGE KETCHAM: Thank you, George.

When I tell you that Judge Edwards was a juvenile court judge earlier than I was, perhaps you know why his hair is whiter than mine. I was at a farewell party the other night, and the theme of it was: The biggest and best ones, like fish, always get away. Unfortunately for the juvenile courts, George Edwards is out of the business now.

Judge Edwards, Mr. Thornton, Chief Dahl, ladies and gentlemen: I have found it a very stimulating experience to attend these deliberations and to hear the reports of so many

promising experiments in release without bail bond—criminal justice on the move!

Now, as the anchor man on this panel, I should like to report similar efforts to reduce or improve the juvenile detention problem. But I regret to say that, until the President's Committee on Juvenile Delinquency and Youth Crime got underway some three years ago, under the leadership of Attorney General Robert Kennedy, there was little going on in this area except for the development of standards or model criteria for juvenile detention and release. Ten years ago, the Children's Bureau published "Standards for Specialized Courts Dealing with Children." In 1958, the first edition of "Standards and Guides for the Detention of Children and Youth" was published, and in 1961 the second edition of this was published by the National Council on Crime and Delinquency.

Today, fortunately, the National Council on Crime and Delinquency, the Ford Foundation, the Vera Foundation, the National Council of Juvenile Court Judges, and the Children's Bureau are all considering this growing problem. Perhaps belatedly, as Judge Edwards indicates, but they are at work gathering facts and trying to achieve improvements, for which we judges will be most grateful.

Along the line that Judge Edwards has mentioned, I suggest that the juvenile court, as an extension of the *parens patriae* concept, is really part of the American dream, like Paul Bunyan and his blue ox. In reality, the average juvenile court judge is not Paul Bunyan, but a conscientious lawyer, whom the governor or the electorate thought had "a nice manner with young children" or could "talk sense to some of those sassy young ones." And for the herculean task which the community so confidently entrusts to these dedicated men and women who sit on our juvenile court benches, instead of a fabulous blue ox named "Babe" to do the job, the average juvenile court judge feels very fortunate, in most cases, if any of his probation officers have specialized training in social work. Probation officers who have Mr. Thornton's experience are rare and judges who have them on their staff are most fortunate.

How Are Juveniles Detained?

Consideration of pretrial detention of juveniles must include some understanding of the apprehension or arrest procedure that leads to detention. Chief Dahl has mentioned the semantic difference. This is a constant quibble, but I don't think it is really a problem. But there is often a great deal of difference in so far as the frequency of detention is concerned between those youths arrested by the police and those apprehended by school attendance officers, public welfare workers, or the court's own probation officers. Perhaps the group most likely to be detained are those brought in by their own parents. Such variations in detention practices, depending upon who takes the child into custody, reflect I think quite accurately the various purposes for which detention is used by each of the disciplines involved.

Police frequently use detention to facilitate interrogation, as a leverage to locate missing property, to permit reenactment of the crime, to permit line-ups, or to facilitate investigation of other offenses. Social workers use it to facilitate their interviews before 5:00 o'clock, to bring the parents in, to obtain medical and psychological evaluations, and to afford study of the youth under what they call "controlled conditions." And all groups—I put the judges in this, too—judges, police, social workers, and parents, occasionally use detention to vent their annoyance at the children concerned, to "shake them up", to "teach them a lesson", or, as the chief says, to "prevent other crimes". And finally, detention is used in some or all of these manners to protect the community.

Such differing reasons for detention of juveniles are feasible because the statutory standards are subjective in the extreme. In recent code revisions such as those in California, in New York, and in Oregon, more restrictive and more specific criteria have been adopted.

To further complicate the problem, there are often several parties involved, to some degree, in the decision whether to detain or release a juvenile. To the degree that the police,

the welfare agencies, or social workers, are permitted by the court to detain juveniles, their respective purposes and points of view will ultimately affect the standards. In my judgment, the most obvious need in this area is for clear written language defining specifically, narrowly, and objectively the criteria for admission to detention. Preferably, these should be by a statutory definition, implemented by rules promulgated by the judge of the juvenile court. Where such statutory language is lacking, I feel that the judge of the juvenile court should carefully define the policy and the criteria for detention, so that whoever exercises this authority to release or retain will have clear guidelines for the decision. I can't emphasize too much my belief that the root of the matter is clear and explicit standards for detention or release.

Such new juvenile courts as those in New York and California tend to divide juvenile jurisdiction into three categories, which I will paraphrase in my own way as, first, children who are dependent or neglected, secondly, children who have not violated the criminal law but who are in need of much closer supervision lest they do so, and, finally, children who have violated a criminal law or ordinance. I suggest that each of these three categories has need of special criteria for admission to pre-trial detention. In the first category, dependent and neglected children, I personally believe that the child should only be detained if he or she is literally homeless and likely to run away, or in danger of physical abuse pending adjudication. In the second category, which is often known in New York as "PINS," i.e., Persons in Need of Supervisors, the child should be detained, in my judgment, only if there is a serious doubt whether the parents can assure his reappearance (for example, if he is likely to run away) or if he is likely to cause irreparable injury to himself or others prior to the hearing—a considerably narrower standard than most courts use today. In the third category of juvenile law violators, release to parents should be available to those denying offenses whenever the court is satisfied that the parents can assure reappearance. Where offenses

have been admitted, the youth should be detained only if he is almost certain to run away or to commit another criminal offense or cause irreparable injury while awaiting disposition.

Is There a Right to Bail for Juveniles?

This is an often raised question, and since this is the National Conference on Bail and Criminal Justice, it might be quite inviting to urge, as a solution to our problems, that juveniles be assured of a constitutional right to bail—although after hearing these two days of deliberations, I am not sure it is today such a valuable right! There are very few reported opinions on the question of whether a juvenile is entitled to bail pending an adjudication by the juvenile court. Many state statutes provide that a juvenile may, in the discretion of the court, be released on bail, and this has usually been construed as a discretionary power of the court, although, in a Louisiana case, a refusal to set bail in such matter was considered an abuse of discretion and unconstitutional. In a recent New York case it was held to be "improvident," whatever that means. In the District of Columbia, a Federal judge held, in *Trimble* v. *Stone,* that the right to bail for juveniles is assured by the Federal Constitution. However, decisions in Ohio and Maryland have rejected such claims in so far as they have affected those states. There are also a number, perhaps a dozen or more, opinions, which consider the right of a juvenile to bail pending appeal, but these raise somewhat different questions than we are dealing with here.

Although it may be heretical, I personally believe that, where a youth is charged with a violation of the criminal law which he denies, the juvenile court, if it is not willing to release him to his parents on their personal assurances, should permit his parents to post bail bond for him pending trial. Whether this is founded upon the Eighth Amendment to the Constitution, a relevant statute establishing bail procedures, or concepts of due process and equal protection, it seems to me only time and the evolving decisions of appellate courts will tell us.

Is Bail the Answer?

Such a right to bail, however, would have significant application to only a minority of the third category of juveniles I have described above, those juveniles now held in detention awaiting juvenile court action for violations of criminal law. It would not apply to the vastly more numerous youths who admit their law violations at initial hearings and are detained thereafter for study and disposition. It would be of little value in cases of children who have allegedly been incorrigible or have gotten beyond the control of their parents, because concern for their parents' money is not something that is high in their esteem and would hardly be expected to assure their reappearance if their family posted the bond. And where is the juvenile court judge who will permit an irate and abusive parent to post bond and depart with a cowering girl who alleges sexual mistreatment by her father or beatings by her mother as the reason why she ran away from home in the first place? As I was telling someone earlier today, while we were awaiting the panel discussion, I have even had instances of 16 or 17 year old girls picked up for streetwalking, and the person whom we had reason to believe ran the "house" promptly came forward and asked for the right to post bail bond for their release. This is hardly the solution to our juvenile delinquency problem! Since bondsmen look to legally responsible adults to pay their fees, the exercise of any right to bail by a juvenile depends upon a harmonious relationship between him and his parents or guardian. And yet, it is well recognized that the absence of such an effective child-parent relationship is at the root of most of the causes of juvenile delinquency.

Hence, I reluctantly come to the conclusion that efforts to secure the right to bail for juveniles in the belief that such action would *per se* insure fair treatment and protect the liberties of juveniles awaiting juvenile court action are doomed to disappointment. Regretfully, I do not believe that due process of law for juveniles would be readily provided merely by assuring them of the right to release on bail.

Who Has the Authority to Detain Juveniles?

In most communities, the majority of juvenile arrests are made by the police. In addition, the police in many jurisdictions, imbued with the milk of social welfare, have assumed wide powers in regard to children which have nothing to do with what I conceive to be their primary function as protectors of public safety. I don't think that prevention is essentially the role of the police. I think their role is that of protecting public safety through the apprehension of those who break our laws.

Moreover, in this city, the detention home is not under the control or supervision of the juvenile court. The result here in Washington is a kind of a "witch's brew" wherein the police arrest and detain at a faster rate than the judicial officers can hear, adjudicate, and discharge. In fact, in recent months something over 60 per cent of all juveniles arrested are placed in the detention home by the police.

The proper procedure, in my judgment, is to require judicial determination and a written order before detention is authorized. This places the burden upon the arresting person seeking detention to justify its need according to established, published standards. Such a policy can operate only if it is unequivocally established that only the judge or his personal delegate, such as a detention referee, can authorize detention. This means that in areas where the police operate around the clock, the court must be prepared to do likewise. Efficient handling of the entire arrest-through-adjudication procedure within a court depends largely upon an alert intake staff, performing its functions with speed, decisiveness, and courage. In unusual cases, where detention is authorized *ex parte* by the judge or the detention referee, it should be reviewed at a hearing with the youth and his parents present as soon as possible, certainly no later than the next session reviewed. Only thus will detention remain the exception if of the court. Such exceptions should be rare and frequently should be, rather than the rule.

Where Should Juveniles Be Detained?

Far too often—and Mr. Thornton was showing me a picture of the beautiful new Juvenile Center in Sacramento—communities feel virtuous because they have built a multi-purpose masonry structure called a juvenile detention home. Having built it, the citizens mean to use it as much as possible for all manner of delinquent and destitute youths.

In larger communities I admit, there is usually a need for a small security unit to provide custody for those juveniles who are charged with serious law violations, who cannot be released pending adjudication. But for the majority of youths detained, such costly secure quarters are not necessary. Something less will suffice. A separate shelter home for dependent and neglected children need be little more than a large boarding house run by a friendly couple with plenty of rooms, good wholesome food, and good laundry equipment. (In fact, such shelter homes are usually not even classified as detention facilities.) More supervision and control for transients and runaways could be established through around-the-clock supervisory shifts at a desk-controlled modern youth hostel. Washington Action for Youth, which is a project being considered here, has proposed the operation of such a "wayward minors" home (or "half-way-in" house, as it is sometimes called) for persons destitute of suitable family controls, who are likely to harm themselves or others unless they are strictly supervised, but who do not have criminal tendencies. In many instances, reasonable surveillance of a youth's own home instead of detention would be sufficient.

The need, then, is for a greater variety of facilities to meet the special demands of various kinds of juveniles who require detention or court supervision pending adjudication. Such shelters, hostels and detention homes should, in my opinion, be exclusively under the control of the intake unit of the juvenile court. To assure proper supervision and the operation of various places of detention, the juvenile court's intake staff, as I indicated, needs to operate around-the-clock, be provided with adequate equipment, chauffeurs, autos,

quick investigation services and good liaison with the schools; welfare; and police departments.

Detention for Juvenile Racial Demonstrators

Before going on, I should like to take occasion to deal with the difficult questions posed by the detention of juveniles who participate in racial demonstrations. Glaring examples of children detained without bail for reasons quite at variance with the principles of a juvenile court philosophy have occurred in various cities in the recent past. Should there be a right to release on bail in such instances? Perhaps there should. But I suggest that specific, objective standards for admission to detention, plus a statutory provision for prompt *habeas corpus* to insure compliance, would be a better protection against juvenile court abuse of discretion in such instances.

Conclusions

In conclusion, I do not think it is surprising that the juvenile court philosophy of individualized justice for children does not lend itself to one simple solution of its pre-trial detention and release problems. Such problems are far more numerous than those faced in adult criminal courts. Bail in adult courts is for the sole, professed purpose of assuring the defendant's reappearance. Detention of juveniles, even under narrow and restrictive standards, has several varied purposes, in addition to assuring reappearance. Consequently, the solutions of juvenile courts must also be varied. We sincerely invite the interest of you lawyers and gentlemen concerned with the administration of criminal justice to help us find fair procedures for appropriate but not excessive pre-trial detention of juveniles.

Panel Discussion

JUDGE EDWARDS: I think we have sufficient material for quite an explosive discussion, which could last for quite a while. I don't think we have the time for that, but we will take a few minutes.

Might I lead off with a comment or two that has been simmering in my mind while the discussion has been going forward?

I tried, in starting out, simply to lay out the problem. I would like to now say something about treatment of the problem.

I have one specific comment to make, which I invite debate on, if need be, and that is that the deprivation of liberty should, under our system of law, always be a judicial decision, and I reject as undesirable, and at least possibly unconstitutional, and certainly not in keeping with the philosophy of our Government, any detention which is behind iron bars which is under the authority of agencies other than a court.

Would anyone like to pick that one up and talk about it?

Chief Dahl comes from a state where this debate has been settled by law, and he is in agreement.

Unfortunately, we do not have, from Washington, D. C., the opposite side of this argument, because, although Washington, D. C. does not have detention under judicial authority, we do not have a protagonist of the opposite point of view present, I guess.

MR. THORNTON: Judge, I would like to comment.

JUDGE EDWARDS: Oh, that includes probation officers. I don't think they have any business in this, either.

MR. THORNTON: I disagree with the Wisconsin statute that says that an arresting officer cannot take a boy or girl to the juvenile hall. I disagree thoroughly with that. I think that is an absolute right as to the discretion given the law enforcement officer.

What happens once he is delivered there, as I see it, is no business of the police from there on, but they certainly should have the right to bring them to the hall.

CHIEF DAHL: I would like to correct that impression.

We do take them there, but we have to have a good reason to sul mntiate his being held there, and that decision is not ours, but the court's.

JUDGE EDWARDS: There certainly should be a good reason for any detention behind iron bars.

Has anyone anything on their minds they would like to offer?

I have another comment I would like to make before we conclude, here, but I would like to yield to those who are bursting.

Well, I will try again.

I want to suggest a very simple thing. I think we have got the best generation of young people growing up in this land that has ever been produced at any time in the history of this country or the history of the world. And personally, I don't want ever to participate in a discussion of juvenile delinquency that takes it so completely out of context that we forget that this is indeed the fact. We have more kids going further in school, getting more education, more youngsters who are more concerned about human brotherhood and international affairs, more youngsters in church affiliation, than ever before in any of these categories, in the entire history of this land, in the entire history of this world.

Now, this isn't to downrate the subject of our discussion, because we are talking about a serious problem, but this problem statistically is limited to about one to three per cent of the juvenile population of our land, and we can't brush off anything that is as serious as something that affects the future of one to three per cent of the juvenile population of our country, because out of that may come a very high percentage of the adult criminals 20 years from now.

Let's not think that we are headed toward Doomsday as a result of the statistics which are continually showered upon us.

I don't dispute the statistics. I don't dispute their validity. But I certainly dispute the conclusions that have been arrived at on the basis of those statistics.

There are some simple things which are omitted in thinking about the statistics about juvenile delinquency. One, in modern times we have become the greatest nation in keeping statistics that ever appeared in the history of the universe, and we weren't anywhere near that good 20 years ago.

No one really knows how much juvenile delinquency existed 20 years ago. I only know that the generation I have seen growing up in our towns and in our schools is a whale of a lot better than the one I grew up in, and I think most of you can probably check this against your own experience.

I also know that in addition to keeping statistics better, we shift population around quite a lot in this country, and sometimes that population ends up where crimes are counted, when it came from areas of the country where crimes weren't counted at all, and this is a very important aspect of the present situation.

And then we tend to ignore the fact that we are talking in gross terms about juvenile delinquency, and not in terms of units of population, and it is most important, when you are making comparisons, to compare in terms of population units.

And finally, there is another thing. Our standards change. A whole host of things which we consider and categorize as juvenile delinquency today were not so considered and not so categorized in a preceding year.

If you want to take a real quick backward look at that, consider Tom Jones. I was counting the acts which would be deemed modern felonies committed by this man whom everybody has been delighted to view and cheer on in recent days.

Chief?

CHIEF DAHL: I would just like to conclude on this thought.

We are very much concerned about young people, their thinking, their attitudes, and their behavior. But we adults have been thinking about the examples that we have been setting all the way along, and while we are now talking about the juvenile problem, it is a direct reflection of an adult problem.

I would agree with the statistics that maybe only three to four per cent of those are serious crimes, but I am speaking for law enforcement again, and I am worried about the disrespect for authority that is evident in a lot of people who are not juvenile delinquents, exactly. They are just ordinary people.

I am concerned about the disrespect for civil authority in our schools, the attack on our teachers, and the irresponsible way in which the kids drive their cars around, and that sort of thing, which I think is something that all of us, not just the judicial process, but every citizen, needs to think about from the adult point of view.

JUDGE EDWARDS: I would just like to say that this is directly in line with what I think and hope will come out of this Conference, in so far as the problem of juveniles and juvenile detention is concerned.

There is a great problem with the lack of respect for our concepts. One of the basic concepts that we have, and that we wish our young people to have, is a respect for equal justice under law.

I invite the lawyers of this country to get involved in the juvenile court movement, because here is where many of our people will have to learn respect for the judicial process and respect for the laws of the country. There, in the detention homes, in the juvenile halls of California, they will get their first taste of what our system of justice, at least, actually is.

And if you who are interested in helping young people will get yourselves into your courts, your juvenile courts, and see what can be done, and see whether the picture of justice as seen by the young people is the one you want them to have, you will be doing a great service toward improving this respect for law.

The great objective of America sometimes has been summarized in the idea phrased in the words "equality of opportunity." Those who have sat in the juvenile courts know how much of a dream this is still in our land.

I think at this conference, by spending an hour and a half on this topic, you will have made a real contribution to helping those intimately concerned with it to try to do an even better job.

Thank you very much.

CHAPTER VI

Closing Session

A. Address of Attorney General Robert F. Kennedy

MR. GEOGHEGAN: In April, 1961, Robert Kennedy held his first press conference as Attorney General. The conference received widespread publicity, because the Attorney General announced plans for an all-out drive against organized crime and racketeering.

At this press conference, he outlined eight legislative proposals he was submitting to Congress, which would provide the necessary tools to conduct war on syndicated crime. He made another announcement, which almost went unnoticed in the press. I refer to his announcement of the appointment of Professor Allen, of the University of Chicago Law School, to be chairman of a committee to study the effects of poverty on the administration of criminal justice. This set in motion a sequence of events which has brought us here today.

In the rotunda outside the Attorney General's office is an inscription which reads "The United States wins its point whenever justice is done its citizens in its courts."

If you were looking for a philosophy to characterize the operation of the Department of Justice during its past three and one-half years, under the leadership of our next speaker, you would have to go no further than that inscription.

It is my great pleasure to introduce to you at this time the Attorney General of the United States, the Honorable Robert F. Kennedy.

Address of

ATTORNEY GENERAL ROBERT F. KENNEDY

ATTORNEY GENERAL KENNEDY: Ladies and gentlemen, I am very pleased to be back here with you.

I am sorry that the change in schedule did not permit me to address you at the end of the session, this afternoon, because of the problems that have arisen today. I am going to have to leave town right after the speech, so I had to come at this time.

I am impressed with a report that I received about all of you. I realize that you really have a thirst. There were 600

of you at the reception Wednesday night, and you consumed enough liquor for a thousand. (Laughter)

So I am very impressed with that.

I think the fact that none of you were arrested is also impressive. I'm not sure you could have gotten out on bail.

I would like to begin by reading to you briefly from a report on bail.

"In too many instances," it says, "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."

And the report goes on to recommend a greater use of the summons to avoid unnecessary arrests and the inauguration of fact finding investigations, so that bail can be tailored to the individual.

This report sounds very much like a product of this National Conference on Bail and Criminal Justice. It is not. It was written 37 years ago. Nevertheless, there is little about the present problems of bail which it does not tell us.

The author of the report, Arthur Lawton Beeley, Dean Emeritus of the University of Utah, is here today, and it is proper for us to acknowledge his enduring contribution to the concern that brings us here now.

I wonder, if he is somewhere in the audience, if he will stand up.

As Dean Beeley's report of 1925 makes clear, that concern is not new. For 175 years, the right to bail has not been a right to release, it has been a right merely to put up money for release, and 1964 can hardly be described as the year in which the defects in the bail system were discovered.

What is new, however, is the spirit of the period, the spirit in which we approach these problems.

We live in a time of growing awareness and responsiveness to the problems of criminal justice. There is an increasing concern among people all over the country who want to insure that the scales of our legal system weigh justice, not wealth.

A number of factors contribute to the development of this concern. The Gideon decision of the Supreme Court, requiring the appointment of counsel for poor defendants in state as well as Federal cases, is an important factor. The recommendations of our Committee on Poverty and Criminal Justice, chaired by Professor Allen, have been an important factor. The Administration's criminal justice bill, now in a joint Senate-House conference after passage through both houses, is also an important factor.

This conference is an expression, really, of the same kind of spirit.

What has been made clear today, in the last two days, is that our present attitudes toward bail are not only cruel, but really completely illogical. What has been demonstrated here is that usually only one factor determines whether a defendant stays in jail before he comes to trial. That factor is not guilt or innocence. It is not the nature of the crime. It is not the character of the defendant. That factor is, simply, money. How much money does the defendant have?

And what this Conference has demonstrated, perhaps above all, is that there is a great deal that we can do in order to remedy this most unfortunate situation.

We have undertaken to do so at the Federal level. It is, after all, not the Department of Prosecution but the Department of Justice over which the Attorney General presides.

As Mr. Justice Sutherland once said, the interest of the Government in a criminal prosecution is "not that it shall win a case, but that justice shall be done."

The Department's co-sponsorship of this Conference coincides with our own efforts to make a wholesale reevaluation of the bail system.

We began, as you know, in March, 1963, by instructing all our United States Attorneys across the United States to recommend the release of defendants on their own recognizance in every practicable case.

We now have the results of a survey to find out how well this new policy has worked. The results really are quite illuminating. The rate of release on bail on recognizance—

without bail—has tripled, from six per cent of defendants to 18 per cent. Four districts release more than 65 per cent of their defendants without bail.

Despite these increases, the percentage of those who have failed to appear has remained about two and one-half per cent, just about the same rate as those who are required to post bail.

But even these advances are just a bare beginning. Our survey also shows that 32 districts released less than 10 per cent of their defendants on recognizance last year, and 13 of these districts released less than four per cent.

There is no question that circumstances vary in every district, just as they vary in our own community. There are perfectly sound explanations for variations in the number of persons released without bail. But for the rate to vary from under four per cent in some districts to over 65 per cent in others indicates a far greater range than should be tolerated within a single judicial system.

One immediate step the Federal Government can and will take is to probe more deeply into the reasons for this wide range. We need to determine how more defendants can safely be released pending trial.

At the Federal level, we also can start and begin some experimental study of other approaches. Perhaps the most important is the use of the summons in lieu of arrest, the procedure described yesterday by Commissioner Murphy of the Police Department of New York.

I hope that within the next year we can expand in United States Attorneys' offices the experimental use of this summons procedure, as recommended by the Allen Committee and authorized by the Federal Rules of Criminal Procedure.

It is our belief that such experimentation can help us to improve the administration of justice within the Federal system. It can also provide more information and better examples of benefit to you, at the state and at the local level, who must contend with so many greater problems and so much greater share of the problems than we do at the Federal level.

Indeed, providing such assistance and guidance is one of the purposes of this conference. It is to this end that Mr. Schweitzer and I, as co-sponsors of the conference, have established a three-point program of assistance.

The first one is that we will shortly announce an executive board which will sponsor regional conferences on bail and criminal justice later this year in various parts of the United States.

Second, a detailed report of the work of this Conference will be prepared and distributed to all of you and to other law enforcement officers around the country.

Third, we will seek to provide staff assistance to any communities which want to follow the examples of the projects that we have been discussing here.

These steps, like our Federal efforts, can be of assistance to you, but they cannot, by themselves, spare citizens from the physical, fiscal, and social cost of unnecessary or unjust imprisonment. That job is one for the law enforcement officials of the communities of the nation.

Our consideration of the problem and of the potential solutions here during this Conference has been diligent, but however diligent we are, I believe it would be a delusion for us to consider that the simple fact of our meeting, the simple fact that we have been discussing this problem, is some kind of a major accomplishment.

The real work of the National Bail Conference cannot be done at meetings in Washington. It must be accomplished by action in the communities that you represent.

What this Conference does establish is that such action as that is necessary and can be done—and that even one individual can accomplish a great deal.

Mr. Louis Schweitzer is really a very, very good example. He is a chemical engineer, an outsider to the field of law and law enforcement. When he learned that people in the City of New York were held in jail when their innocence or guilt hadn't been even established, and that they were in jail for a period as long as a year prior to trial, he was not simply troubled. He sought to do something about it.

Think how much that resolve, of one man, has accomplished, the Vera Foundation's Manhattan Bail Project, the new Manhattan Summons Project, and even, in substantial manner, this Conference, are the results of that concern. And all this has happened in the last three years.

Another example is that set by the two young men who set this conference up, established its program, and were its co-directors; whose energy and intelligence have propelled it since its inception.

One is Daniel J. Freed, an attorney in the Antitrust Division, who has been involved in this study, really, since I have been Attorney General and I have been most impressed with his dedication and his interest in demonstrating what one individual can do.

I would like to have him stand, if he would.

Another is Herbert Sturz, who is Executive Director of the Vera Foundation, whose work has had great continuing effect not only in New York but in the other cities which have sought his assistance.

And I would like to have him stand, if he would.

Yesterday you heard a description of the work being done in Des Moines. And that effort likewise stems from the interest and concern of one man, Gil Cranberg, an editorial writer of the Des Moines Register. His articles on abuses of the bail system led directly to the development of the Des Moines project.

I was wondering if he was here today. I would like to have him stand, if he would.

I would like to think when I talk about these four gentlemen that really what can be done by one individual is something that President Kennedy was so interested in and felt so strongly about: that one individual becoming interested in rectifying certain injustices or doing something for his community or state or country could really make a major difference.

I think when we have such a large country, particularly in the urban areas, we feel that we just get lost among tens

of thousands and hundreds of thousands of other people, and so therefore the effort is not made.

We might remember what happened up in New York, where that woman was being attacked and was finally killed, and 39 people knew about it, and no one called for help. Or when that man was threatening to jump off the ledge in Albany and people down in the street yelled, "Jump, jump," or "Jump on this side, because otherwise I might miss it." We read about it in the paper and then we begin to perhaps even lose confidence in what the system is and where we are going here in this country.

But I think what we have heard and what we have seen here through Mr. Schweitzer and Mr. Freed and Mr. Cranberg and Mr. Sturz, all of them, who have made an effort to remedy injustices, to help their neighbor, to help their community, shows that something can really restore and reestablish our confidence in our own system and in the country.

So I think if we can do that, if that same spirit can exist in all of our communities, at the Federal level, in this field and in all of the other fields, then this country has a bright future.

There has been similar effort and interest in the other cities around the country. The grant to finance this Conference was made on June 1, 1963. At that time only four or five communities had bail projects under way. And now, the number has increased four-fold.

Such programs can be developed really in every community. And I would like to suggest four steps toward doing so.

Number one, myths and misconceptions about the bail process flourish among too many lawyers and even law enforcement officials. Collecting the facts about the bail system in your own community is an important starting point toward its correction.

Two, the same is true of the public, which has little occasion to think about the purpose of the bail system, let alone its abuses. The program of public education, like that con-

ducted in Des Moines, can provide broad public support for efforts at reform.

Three, a variety of experimental programs have been discussed and evaluated at this Conference. These programs, which require little if any legislative authority, may very well be adapted to the particular conditions in your community.

And the fourth point really is a fundamental one.

I began by speaking of the current spirit of concern, about criminal justice, in America, and I would like to close now by returning to that subject.

By our concern for the abuses of the bail system, we can see to it that America does not unjustly punish a man who was already serving a life term of poverty.

But this Conference presents us—prosecutors, judges, police, sheriffs, lawyers—all of us—a challenge which goes beyond the mechanical abuses of our bail system. That challenge extends to the entire relationship of the poor man and the courts.

Let us today accept the larger challenge. Let us see to it that for the poor man, the word "law" does not mean an enemy, a technicality, an obstruction. Let us see to it that law, for all men, means justice.

Thank you very much.

MR. GEOGHEGAN: Thank you, Attorney General Kennedy.

B. Summary of Regional Discussions

MR. GEOGHEGAN: The Conference, as you recall, was opened by Mr. Herbert J. Miller, the Assistant Attorney General of the Department of Justice in charge of the Criminal Division. Mr. Miller will preside as Moderator at this, our concluding session of the Conference.

MR. MILLER: The plan for this rather brief closing session will be to hear from the four Reporters who covered the Regional Discussion Groups. Following this, we shall attempt

to answer some of the questions that have been propounded, and then at that time we will close the Conference.

First I would like to call on the Reporter for the Southern Group, Edwin E. Dunaway, former Supreme Court Justice of the State of Arkansas, and currently engaged in the private practice of law.

REPORTER DUNAWAY: Mr. Miller and friends: I hope to be able to demonstrate that it is possible for a southerner to talk in Washington without talking on indefinitely.

I am supposed to very briefly hit the high spots of matters that were discussed at the Regional Meetings, and then the others will add the things that I have overlooked.

Before the discussions we had a feeling that maybe we ought to cook up some questions, because the people in the discussion groups would be very quiet, and not have anything to say. I think we were all pleased that it was quite the contrary. It was a matter of not having enough time, which I think demonstrates the great interest and enthusiasm at this Conference.

Since no official findings are to be made, what we will try to do is to state here what we consider to be the general feeling on certain matters, noting where there was disagreement.

First, I think it was generally agreed that greater use should be made of the release on recognizance program. The question of what categories should be excluded caused considerable comment.

I think most people felt that to the extent that it was possible, all categories of crime should be included in the program. Some wanted to automatically say all misdemeanors are included. Then at least one judge commented that that wouldn't do, because on certain misdemeanors, like vagrancy or public drunkenness or disorderly conduct, he would receive much more criticism for turning that man out on recognizance than he would if he turned out a murderer, who presumably would not go out and kill anybody else if the circumstances were ripe.

The question of whether this program should be confined to indigent people met with no unanimity. I think we sensed that the majority, possibly, of those here thought that it should not be confined to the indigent. However, a strong

contingent of bondsmen and some law enforcement officers felt that it should be so limited.

The question, then, of course, if you are going to limit it to the indigent, is: What is an indigent person, for this purpose?

I think the general feeling is that you should not be excluded from the program if, as a matter of fact, your financial resources are so limited that you would have to take bread out of your children's mouths.

And I, as a lawyer, would also think, and I think other lawyers felt, that there should be included in this program people who would otherwise not have enough money to pay a lawyer.

On the matter of preventive detention, we felt that in all the sections, the general feeling was that bail should be required for the purpose for which it has been traditionally considered proper, that is, to secure the presence of the accused at the time and place you want him.

Here, again, a number of law enforcement officers had rather strong views that certainly in the case of known professional criminals, there was a good case to be made for preventive detention by way of denial of bail or fixing the bail high. As one chief of police said, "Frankly, we want to keep him out of circulation as long as we can."

This, then, raises the question of whether it is possible to constitutionally fix bail on a preventive basis.

Another question which came up in several places was the matter of: what is excessive bail?

I think an example might illustrate the problem.

A lawyer from Jackson, Mississippi, pointed out that in the civil rights cases in Mississippi, bonds of $500 are required, whereas on an ordinary trespass, a minimum bond of $50 is required.

Secondly, bondsmen in Mississippi will not make bonds for these people, so it entails putting up cash.

So it has been demonstrated, I think, that a $25,000 bond might not be excessive in the case of a member of a gang, who has a regular bonding company, whereas $500 is excessive for a poor college student who is out trying to demonstrate his views.

If I may be permitted one small personal comment, here, I was rather disappointed that in our southern panel there was not the extensive discussion on this phase of the civil rights problem, that is, excessive bail in civil rights cases in the South. There was not the extensive discussion that there has been on Capitol Hill on other phases of this.

A practical suggestion was made by a number of people, and that is the use of the term "parole" in connection with pre-trial release. To a great many of the people here, this was confusing because the term "parole" in most jurisdictions is a term applied to release after conviction and sentencing. We were informed that this term had been used because it is a peculiar New York term, where they do have regularly in use the term "pre-trial parole."

The suggestion from several of the sections was that in the future maybe some better word should be picked out.

Then of interest to those who are contemplating setting up a program of this kind in their own places is the care that should be used in preparing the questionnaires.

The question was raised as to whether or not any defense lawyer in any place where these projects had been tried has yet raised the question that information given on these questionnaires constituted in some measure self-incrimination, and therefore they would be in a position to object, at some stage of the proceedings, to the whole criminal trial.

The thing seems to be that where used now, the interviewers are instructed not to discuss the crime, but there are questions, if you notice, like, "Are you a user of narcotics," and "Where and when have you been arrested and convicted," and in one of the groups one of the prosecutors said if he were a defense attorney, he surely wouldn't want his client answering any questions of this type. This might raise a constitutional question.

Then finally, the matter of what is the public reception to these projects came up, and I think the groups were told that where it has been tried successfully, as in Manhattan and in the District of Columbia, the public reception has been good.

To indicate that there was a problem there, though, a judge from Texas said if he went home and proposed this release

on recognizance program as it was being used in these demonstration places, he would have to look for a new job.

MR. MILLER: Next I would like to call on the Reporter for the Western Group, Judge Eugene S. Fort, Judge of the Circuit Court of the State of Oregon.

JUDGE FORT: Mr. Miller, fellow conferees: One or two additional thoughts which came from our section, that we felt would be of interest to you, may be summarized as follows.

First, there is no one perfect solution for the various problems which we discussed here.

The discussion in our panel made it clear that there are differences in size of communities, jurisdiction of courts, statutory provisions, court rules, and established procedures of agencies related to law and its enforcement. These make the solution of the problem of bail one which, as to its manner of accomplishment, is not presently susceptible to any single, uniform method, law, or rule.

Acknowledgment of the uniform existence of the problem, in other words, does not mean that a single, uniform method will everywhere effect its solution. Each jurisdiction must carefully evaluate its own choice of solutions, and failure to do so may unnecessarily incur serious community repercussions.

In the area of research, which was discussed in our panel, the comment is simply this: That the establishment of categories of risk to undergird any system of summons or release on recognizance, of course, is an important matter.

Such research must consider establishment of categories based not only on the act allegedly committed by a defendant, but also upon characteristics of the defendant which may be combined to furnish a guide based upon demonstrated experience, which in turn will provide to courts a basis of substantial probability upon which to decide.

And it was the feeling in our panel that there was a real need for continuing research to assist in furnishing more reliable guides for judges and for law officers faced with the problem of utilization of summons.

Prevention without detention was discussed briefly in our area in the following general manner:

The power of a court to maintain the status quo pendente lite by appropriate limitations imposed on litigants should not be overlooked as a potentially useful tool for operation within the great void which now exists between jail, on the one hand, and freedom on the other.

Violations of such lawful orders of course are normally disposed of by summary procedures, including that of contempt, and have long proved their value in preventing particular activity inimical to the ultimate fair disposition of a case upon its merits, regardless of whether such activity is otherwise entirely lawful.

Careful study of possible utilization, and even of possible extension, of such authority within the area that we are now concerned with in our view warranted careful study and even experimentation.

And finally, it was suggested that the police and the court both should approach the question of deprivation of liberty on the assumption it should be presumed either the defendant should be brought before the court by summons or that the defendant should be ROR'd, and thus arrested or subjected to bail only if there were substantial factors making such action appropriate.

Thank you.

MR. MILLER: The next reporter is for the Midwest Group, Mr. Lee Silverstein, Project Director, American Bar Foundation, in charge of the study of the defense of indigents.

REPORTER SILVERSTEIN: Mr. Miller, fellow panelists, fellow conferees: On behalf of the Midwestern group, I should like to say that the theme of discussion in our group was one of great interest in the release on recognizance program and the use of a summons in lieu of arrest or detention.

I would say that there were more questions raised about the mechanics of doing this than about anything else. And there was great interest in carrying these ideas back to the states in the Midwest and trying to work out something locally.

On the problem of release on recognizance, a number of matters came up as to how to do it, and administrative problems, and two of these I will mention here.

One was the question of who should handle the investigation. Should you use law students? Should you use a proba-

tion department, a United States Attorney's office, or the state prosecutor's office, the defense attorney, or, as in Philadelphia, the defender office, the private defender office? Who should do it?

And is there a problem, if the defense attorney does it, is there a possible conflict of interest between his duty to the court to investigate the facts that might effect release on recognizance and his duty to his client? Is there any possible conflict of interest there?

Secondly, there was a question raised about the advantages and disadvantages of the objective method of evaluation for eligibility, for release on recognizance, namely, the point system, as used under the Vera plan in New York, or a subjective evaluation by a probation officer or some other person qualified to make an investigation without the use of a point system.

And someone from New York made the point that because of the large volume of cases, the objective system was the only one feasible there.

The other thing I want to mention briefly is the discussion we had about the use of summons in lieu of arrest.

First of all, I should like to point out another problem of definition, and that is: What is an arrest?

As we understood it in our group, after discussing it for some minutes, under the New York system, when the shoplifter was picked up at the store, that constituted an arrest, and when she was brought to the precinct headquarters and a summons issued to her, the summons was not in lieu of the original arrest, but rather in lieu of detention following arrest, or, to use the language that was used by someone from New York, in lieu of formal arrest. Someone else suggested that it was in lieu of a warrant for arrest, rather than in lieu of arrest.

I point this out, because as lawyers we have to be careful about the use of these terms, and it should be clear that at least the way it is used in New York, there is an arrest, and the summons is being used in lieu of the detention following arrest.

Thank you.

MR. MILLER: I will now call upon Mr. Charles E. Ares, Professor of Law, New York University, who was the Reporter for the Eastern Regional Group.

REPORTER ARES: Mr. Miller, ladies and gentlemen: One of the points which Mr. Dunaway touched upon, which I would like to elaborate a little bit, because I think it reflects some concern that was evidenced in the Eastern Discussion Group, was this problem of public response.

Someone mentioned, the first day of the Conference, that the fact that all these people were gathered here is evidence of the power of an idea whose time has arrived, and I think that view is appropriate when discussing the public response you are likely to feel at the suggestion that something on the order of an ROR program be adopted in your local community.

One of the most important features of cultivating this public response we found in New York City was the cooperation and assistance of the press.

And if I may, I would like to correct what I think has been something of an oversight, here, in recognizing the contribution of the press in New York City, and in particular a writer on the New York Times.

One of the staff writers of the New York Times, early in the stages of the Manhattan Bail project, did one of the most excellent pieces of writing that I have seen in the daily press. She spent time in the project doing her own investigation, writing her own article, and we have used reprints of this article literally by the hundreds, because it is such a fine description of the project which was started in New York City.

I am referring, of course, to Gertrude Samuels, who wrote a very fine article in the New York Times Sunday Magazine. And I think it would be appropriate at this time if we asked Miss Samuels to stand and accept the recognition of this body.

Miss Samuels.

The power of the idea which I referred to, I think, is this question of indigency. There is a great concern, now, obviously, with the problem of poverty, and I think that if suggestions for the improvement of the bail system, or the pretrial release system, are keyed, initially, at least, to the idea of making the law operate more efficiently and more humanely

for the poor, the problem of public response will prove no difficulty.

One other problem which has been mentioned in the discussion groups, and which I think deserves perhaps some mention here now, is related to the problem of the inquiry that the investigator will make into certain sensitive areas having to do with the prior record of the defendant and the possibility of narcotics addiction, and so forth.

The solution of that, in New York, which was worked out, was an informal one, by which the district attorney's office has agreed informally to treat this information as privileged information, confidential information between the bail project personnel and the defendant.

This is not a final solution, and it raises a problem with which you will have to deal in more concrete terms, perhaps, and more lasting terms, than we have been able to do so far.

One other feature of this has to be mentioned, as well. What happens when your investigator discovers unfavorable information about the defendant? What is his obligation to report this unfavorable information to the court?

This will involve, of course, the relationship between the investigator and the defendant. What is that relationship? Is that a confidential relationship? And what about the relationship between the investigator and the court?

And much will be determined, of course, by the personnel you select or the agency you select to do the investigation.

Preventive detention was much discussed in the Eastern Discussion Group, and one aspect of it caused considerable trouble, and we could not pursue it far enough to arrive at any very firm conclusions.

There seemed to be a ready assumption on the part of many in the general discussions at this Conference that there is some way in which you can fairly accurately predict who is going to commit crimes while released pending trial.

Some mention of this factor was made in our discussion group, and the assertion was made—and it is an open question and quite subject to argument—that our predictive techniques, which are employed in the post-conviction probation and parole area, do not give us much basis for feeling very

comfortable about our ability to predict who is going to commit a violent crime if released pending his trial.

In this respect, I was a little puzzled by the example proffered by my friend and colleague this morning concerning the defendant who was paroled and then involved in a very violent crime later on, a murder. I am not sure exactly how we would have, or anybody would have, predicted in advance that that boy was going to be involved in that terrible crime.

This is a major problem, it seemed to us, with this issue of preventive detention.

We should not assume very readily that we can predict who the subsequent offenders will be. The fact that they have a prior record may be one factor, but many people have voiced the concern that we give too much weight to that factor, and that it is not the conclusive factor that we sometimes assume it is.

Mention was also made in our discussion group of the bail review procedures, the automatic review of cases in which bail has been set but not made. And of course this is a very worthwhile and necessary feature of any system.

One observation here has been made, and I think should be repeated: If this Conference demonstrates anything, it demonstrates that what is important is how a system works in fact, not how it looks on paper. And this is as true of an automatic bail review procedure as any other part of the procedure.

If that review is a pro forma one, a perfunctory one, where no cases, or very few cases, which are brought up result in a reduction of bail, then it serves no purpose, and wastes everybody's time.

And this is one of the lessons, I think, that we have learned by our experience with the bail system. You have to take a hard look at how the system operates in fact, and not theory.

Finally, and this may be somewhat special pleading, but in this case it is perhaps a special indictment: At the conclusion, or almost the conclusion of the Eastern Group's discussion yesterday, the role of the law school was called in question, again, characteristically, in this area, by a layman. And it was questioned whether the law schools have performed their function or fulfilled their obligations in this area. And

many representatives of law schools asserted very vigorously that they had.

If I may be permitted a personal observation—and this is my area—it seemed to me that what the law schools said they were doing really amounted to what the law students had been doing on a voluntary basis in their spare time. And of course we do our best to see that they have as little of that as can be managed.

My own judgment is, and I think this will be borne out by the observations of others in the teaching profession, that the law schools have failed to recognize the serious problems in the administration of criminal justice. This is changing, and the law schools are doing better, but they can do a great deal more.

We must do more than make students available on a voluntary basis. The law schools must reshape their curricula to recognize these serious problems that require research and require training of young lawyers and require the stimulation of interest on the part of the young graduates in criminal law as a career.

One of the great unanswered questions at this Conference, it seems to me, is how far ROR, release on recognizance, can be extended.

We do not know. The judges' and the lawyers' and the police officers' and the probation officers' primary function is to make the system operate. There is one organization, one institution, whose job ought to be research in teaching, and that institution is made up of the law schools of the country. And that is our obligation, to perform that function.

Thank you.

MR. MILLER: I would next like to call upon the man who had so much to do with presenting this Conference, who will answer, because of my inability to do so, many of the very fine questions which have been presented—the Co-Director of the Conference, Mr. Dan Freed.

MR. FREED: One question was whether we could give information on the cost of programs like the Manhattan Bail Project in comparison with the actual costs of the commercial bondsman who claims to perform a service at low cost.

At the present time, the bondsman doesn't spend anything on behalf of the man who stays in jail. Nobody pays to investigate his situation. Therefore, that cost can only be borne by a fact-finding project. In terms of specific operating costs, the Manhattan bail project runs about $1,000 a week. Approximately half of this is devoted to research and analysis and includes the employment of a sociologist. When the City of New York takes over the Manhattan bail project in all five counties, the estimated cost will be $181,000 a year for 37 employees.

If you will recall, Police Commissioner Murphy spoke of this yesterday and noted that New York City produces 200,000 arrests a year. The cost of fact-finding to the city may be offset in large part by the savings to it in the costs of detention—the cost of the facilities and food and clothing and care of inmates. Exactly how this will work out, future studies will have to tell.

But I think it is also important to recognize that many of the projects mentioned in the course of this Conference appear to cost nothing. The Tulsa program, paroling defendants in the custody of their attorneys, does not result in a cost to the community. Public defender projects in some areas are going to take on the fact-finding function, with apparently little additional cost.

The probation study now going on in the Northern District of California, under the leadership of Albert Wahl, the Chief United States Probation Officer, is inquiring specifically into the additional costs of having probation officers perform the fact-finding function, over and above the costs of the fact-finding they do for the court in relation to sentencing.

It is important to recognize that the program described by Judge McCree yesterday, for the Eastern District of Michigan, has the fact finding function performed by the court and the United States Attorney. There is no indication that this results in any additional cost to the Government.

An interesting question was posed by the delegate to this Conference from the State of Hawaii, who said that someone suggested that if bondsmen were put out of business and

the complete power of performing their present role would be put in the courts, this would benefit everyone. I am afraid, however, that the same argument would apply if you had the office of public defender handle all criminal cases, thereby putting all lawyers out of business.

The materials available to you on the practice in Scandinavian countries indicate that the cost of defense in criminal cases is sometimes borne by the state. And Justice Goldberg, in a recent address, suggested that we might consider paying for the defense of people in criminal cases, or at least reimbursing those who are eventually acquitted.

But a basic difference between counsel and bail is that the traditional function of the lawyer is to perform an affirmative service, namely, the representation of the accused at trial. The traditional purpose of bail, on the other hand, is to assure that a man comes back to court. If there is no need to pay for that function, if the man will come back to court without a bondsman, then to insist on a bondsman is akin to insisting on featherbedding.

One area which hasn't been touched upon by this Conference concerns motorists who are picked up in a jurisdiction in which they are not residents, and have difficulty posting bond. A study is being conducted by the traffic court program of the American Bar Association on this question. There are other people here who are interested in trying to develop interstate compacts to deal with this problem. If we have material on this, we will include it in the proceedings or a later report.

A number of people here have mentioned projects that are not covered in the handbook on *Bail in the United States: 1964*. Several others have mentioned surveys which are now under way. It would be helpful if each of you who has a report on a project in operation would let us know about it. In this way, as projects are developed, we can let people throughout the country know, through our publications and correspondence. This will enable developments in one area to become known to other communities close by.

Following the conference, the Attorney General and Mr. Schweitzer intend to appoint an Executive Board, composed

of members of different professions and geographic localities throughout the country. The Board will also have consultants in each state. We would like your suggestions for people who might be appointed to this Board, and also for persons who might be asked to participate in setting up regional and local conferences.

These conferences will be your responsibility. If a town, state or region comes to us and requests help in setting up a conference modeled along the lines of this one, or tailored more particularly to the needs of the locality, we will make every effort to help. We will also have some funds available after the costs of this conference have been paid out of our grant from the President's Committee on Juvenile Delinquency and Youth Crime. We will use these funds to help you with some of the costs of regional and local conferences, particularly for speakers and their transportation. We can give you further information if you will write us at the Department of Justice or the Vera Foundation, stating specifically what your program plans are, what region you would serve, and what your dates and financial needs are. We will allocate the funds available to us as equitably as possible to help you put on these meetings.

One of the most forward looking aspects of this conference has been the willingness to experiment. The Federal system perhaps uniquely provides an opportunity to test new procedures, both in the area of bail and criminal justice generally.

Albert Wahl's project in San Francisco is an excellent example. As Chief United States Probation Officer for the Northern District of California, Mr. Wahl was able to launch an experimental program, following up a recommendation by the Allen Committee, to see whether probation officers can and should perform bail fact-finding functions in the Federal system.

If any of you have ideas about new procedures that you can't handle in your own community, but that you think might be appropriate for the Federal system or elsewhere, let us know. The purpose of this conference is to learn, to educate

and to seek better ways of meeting the problems of bail and criminal justice.

Thank you.

MR. MILLER: At this stage, I would like to pay a personal tribute, and I assume it is also a tribute from all of you, to people who have really worked to put this conference on. I would just like to run through the names, so that they would be a matter of public record.

It is a small thing that I should do this, but I would like to pay respect to the fact that they worked long hours in addition to their normal duties to try to make this conference a success:

First, John Bodner, who is a member of the Allen Committee, and is a practicing lawyer here in town.

Peter White, from the President's Committee on Juvenile Delinquency.

Pat Wald, who not only co-authored the book on bail, but has five children and served as the general catalyst for the whole Conference.

Harry Subin and Harold Koffsky, who I am proud to say, work for me in the Criminal Division.

Louis Claiborne, who is better suited to acting on the side of justice, since he works for the Solicitor General and not the Criminal Division.

And last but not least, those fine men who have taken care of all the administrative details of the Conference, Maurice Keville and Gene Krizek.

I saved out one question, which was dropped in the box up here, because I noticed, being a prosecutor myself, that sometimes there is a tendency, at a conference of this nature, for there to be a small but persistent amount of friction between the prosecutors and those who would protect the, of course, innocent.

I would like to read this because it brings the whole thing to mind: What is the relationship of the subject of this conference to the basic problem of the prevention of crime?

And I have considered this at length, and I am not sure that I know exactly how to answer the question.

I assume that the idea behind this question is that there is some basic crime prevention purpose in this conference.

There may in fact be, from the fact that individuals will, instead of being held in incarceration, be released so that they can go out and, hopefully, get a job and maintain themselves until they are found innocent by the courts.

But it does point up a problem which the prosecutors have, and I think this problem is that we deal with the basic and indeed gory realities of life, to an extent that the ordinary lawyer—I know I never did before I took this job—or perhaps the ordinary businessman, just never sees.

You can cite gory examples. I have pictures of a woman back in my office, an informant. She was laid open by a knife from the tip of her chin to her navel, and then for good measure from ear to ear. She had rights, too. She had the right to live.

And when we talk of balancing the right of the individual against the right of society, we are talking not only about society as a group, but really we are talking about other individuals, such as you and myself.

It is much more difficult when you talk about an indigent, his right to counsel, his right to be released on recognizance, on the one hand, and the right of society, on the other, this vast amorphous mass. But when you see the results of mistakes which we prosecutors make, which result in perhaps someone being permanently crippled, blinded, tortured to death, I hope that you who have not been or are not in the business can understand what our concern is, because I feel we bear a real responsibility not only to protect people from being hurt, but also to attempt to go as far as we see fit in protecting the individual rights of those who are brought before the court.

I think that this conference is a success because it has been called in an area in which there can be no disagreement whatsoever, and that is that where adequate information is available, indigents should be released on recognizance.

It is only when you move forward into the areas of preventive detention or of what to do with juveniles, when you move off that basic center, that you hit the controversy.

But here you have readily laid out before you a small area which, with a little effort by anyone or everyone in this room,

can accomplish a substantial amount of good, and not even prosecutors such as myself can or will complain.

Now, this country has an investment, and everybody that has attended this conference, as well. It has had an investment in the last three days. You people have been at this conference. You have spent three days out of your life.

Now, the issue is going to be: What are you each, individually, going to do with the information that you have learned here at this conference? Are you going to go home and forget it? Or are you each going to go home and try to start at least analyzing what the problem is in your jurisdiction, and seeing what steps can be formulated to bring into practice, if need be, a release of the type covered here?

I hope each of you will consider that, and will move forward in your own respective communities, so that the time that all of us have spent here will not be dead time.

I think it is particularly fitting that this conference will come to a close on the birthdate of President Kennedy.

The conference is closed.

(Whereupon, at 2:50 p. m., the conference was closed.)

APPENDIX I

Report on PRE-TRIAL RELEASE PRACTICES IN SWEDEN, DENMARK, ENGLAND AND ITALY to the NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE

By Bernard Botein and Herbert Sturz

INTRODUCTION

These studies were undertaken in the hope that an analysis of the advantages and disadvantages of pre-trial release and detention practices in other countries would help in evaluating our own bail system. We believe that this expectation has been justified by our experience. Let us say, however, that we entertained no illusion of finding a system that could be imported full-blown into the United States to replace the bail system as it now exists in this country, even had we found the best of all possible systems. There are too many and too great variations in the court structures, in the laws affecting the administration of criminal justice, and in the national character and traditions to warrant such an expectation.

Sweden was selected for study because it has no provisions for bail whatsoever in its law or its practice. The accused, after inquiry by prosecutor or court, or both, is either released pending trial or held in detention. Italy and Denmark were chosen because their statutes, while stressing the stark, pre-trial alternatives of liberty or custody, also make provision for bail as an alternative measure; and we believed that it would be productive to examine such a bifocal approach to

the pre-trial detention problem. We have ascertained, however, that although there are such statutory provisions for release on bail in the last-mentioned countries, the power is exercised so rarely that we can state unreservedly that in practice Italy and Denmark likewise do not employ a bail system. Another reason for selecting these three countries was because with varying degrees of tenacity and depth, they all maintain inquisitional procedures unlike the Anglo-American accusatorial system. In each of these countries, functioning within the complex of investigation to determine whether the accused is to be prosecuted, the prosecutor or judge determines also whether he is to be released or detained pending charge and trial.

England was visited because like the United States it follows accusatorial procedures in its administration of criminal justice. England does maintain what is technically a bail system. In practice the personal recognizance of the defendant in which he pledges to pay the Crown a sum of money if he does not appear when required, or in some instances the personal recognizances of the defendant and co-surety, satisfy the bail requirements. In other words, in England security in the form of cash, bonds, real estate equities or surety company bond are not required to be posted in the furnishing of bail. The concept and nature of bail in England, therefore, are radically different from bail as it is generally furnished in the United States. The United States and the Philippines are the only countries in which bail requirements must usually be satisfied by full security or surety company bond.

In each country visited the attitudes reflected in pre-trial detention procedures are fundamentally the same and quite similar to those prevailing in the United States. These apparently universal objectives are to give freedom during the critical period from the initial preferment of charges to final disposition of the case to certain categories of accused. They are (1) persons charged with minor offenses and (2) the large number of persons charged with moderately serious

crimes who have no criminal records, or no serious criminal records, and who are of previous good character.

These two categories constitute an overwhelming majority of the persons charged with criminal offenses in all countries; and in Sweden, Denmark, Italy, and England we found that these persons were in fact usually given their liberty prior to trial, whereas in the United States we too often fail to realize this objective, and many persons in these categories remain behind bars.

Essentially, the reason for this statement is that the previously mentioned solicitude for these types of accused persons in the countries under study finds its solution in their outright release by police, prosecutor and judge pending trial. In the United States, however, this solicitude too often results in the committing magistrates, animated by the best of motives, fixing what they regard as low or nominal bail. Unfortunately large numbers of defendants are unable to furnish bail in such amount or in any amount; and the result is that they are incarcerated for varying periods, some lengthy, while facing charges for which they would be released pending trial in the European countries we visited. When the pre-trial detention decision must be either liberty or custody, there can be no easy accommodation of the judicial conscience by the fixation of so-called low or nominal bail. So, strange as it may seem, many defendants are held in pre-trial custody in the United States who would be released in countries that do not otherwise enjoy our more liberal and enlightened concerns for safeguarding the accused.

Putting it another way, although the judge in the United States fulfills the statutory responsibility of determining whether a defendant should be released on bail and in what amount, too often in practice it is the bail bondsman—a private businessman—who makes the ultimate decision as to whether the accused will in fact be released. It is widely thought that sometimes bondsmen with guarantees from organized crime will not require collateral from hardened criminals charged with the most serious and shocking crimes, but will lay down stringent collateral requirements for persons

charged with first and much less serious offenses. In this respect we find that in the countries we studied, and we suspect in most countries, the courts strive consciously or unconsciously to detain pending trial persons charged with the most serious types of crime or those which the community regards as particularly outrageous or horrendous. In the United States the norm for detaining or releasing any accused in most categories of crime is professedly governed by the likelihood whether he will appear for trial. In the countries we visited the authorities were influenced by additional and often what they regard as more weighty factors, such as the previous criminal record of the defendant and the possibility that while at liberty he would commit additional crimes; or the possibility that he would obstruct the prosecution by tampering with its witnesses. There is no doubt that these considerations enter into the bail determinations of many judges in the United States. But even this unsanctioned attitude is often frustrated by the bail process, for dangerous, professional criminals who would without hesitation be retained in custody in the four countries we visited are at times released in very high bail in the United States through the favor of bondsmen.

Again, all civilized countries strive to detain children and juveniles in trouble only to the extent necessary for treatment and rehabilitation. Such concern manifests itself in a cautious exercise of detention powers in this area. Perhaps because of this universal solicitude, and the fact that juvenile or children's courts do not hold youths falling within their jurisdiction in bail, there is greater similarity among the countries we studied and the United States in the pre-disposition detention experiences for this age group than in any other grouping of accused persons. There are, as will be indicated, differences in statutory age limits, definitions and disposition provisions for youthful offenders. And of course, there are differences in the effectiveness and efficiencies of youth procedures due more to variations in social service and related resources than to distinctions in the conceptual approaches to youth problems. But to repeat, because of a

common absence of the bail requirement for youth in trouble, the pre-disposition detention practices for young persons resemble ours most closely.

The social and political concepts of bail that are held by the Continental countries we visited, however, differ radically from the Anglo-American attitudes. In Sweden, there is total and blunt rejection of the bail process as favoring the rich over the poor. This is not surprising in view of the strong egalitarian tradition in Sweden. In Denmark, however, and somewhat unexpectedly in Italy, we encountered a similar and pervasive abhorrence of bail as an instrument oppressive to the poor but convenient for the rich and well-connected.

This report, however, will not be a panegyric on the fairness and effectiveness of pre-trial detention in the countries we visited. To the contrary, we entertain substantial reservations, particularly as to how fairly these countries deal with persons charged with crimes regarded as serious by the community. We are persuaded that detention under the inquisitorial system at least holds the potential for harsher and more unbridled treatment of accused persons and suspects than is possible under the Anglo-American system.

Nevertheless we return from our studies abroad strengthened in our conviction that bail procedures in the United States are not as effective or as fair as a democratic nation could wish. However faithful to the democratic ideal may have been the original weaving of the bail process into the fabric of the American system of justice, it cannot be gainsaid that defendants of limited means are often detained simply because bail bondsmen do not consider them good financial risks.

In the following pages we present the body of our report. First, however, we would like to acknowledge the support of the Ford Foundation and the Institute of International Education for giving us the benefit of their expert guidance and in making available funds for travel and study. We also wish to express our appreciation to the Department of Jus-

tice and the Department of State for the invaluable assistance given us in the countries we visited.

SWEDEN AND DENMARK

We looked into pre-trial practices in the strongly democratic countries of Sweden and Denmark, being particularly interested in those of Sweden, which has no bail system either by law or in practice. While the applicable statutes and court structures of these two countries differ, their pre-trial practices are in fact remarkably similar. Although Denmark does have a bail system by statute, she does not have one in practice. The animating philosophy underlying the administration of criminal justice in the two nations is marked by a deep concern for the fair treatment of citizens accused of crimes, with marked emphasis on not favoring the rich over the poor. Modes of pre-trial release and detention, as we expected, reflect the social consciousness which exists at every level in Sweden and Denmark. We observed first hand and in some depth the procedures in Sweden relevant to our study; and explored further in Denmark those areas in which pre-trial practices of the two countries differed.

Court Structure

Sweden's three-tiered court structure is comprised of (1) the general lower courts—district courts for rural areas and smaller municipal areas, and town courts for larger urban areas, (2) the intermediate courts of appeals, and (3) the Supreme Court. The district and town courts serve as courts of first instance for both civil and criminal cases; their original jurisdiction in criminal cases extends from the most trivial offense to the most serious crime. Trials for trivial offenses are held before a single professional or career judge. In the more serious criminal cases, the career judge is joined by a panel of lay judges—not less than seven, not more than nine. Lesser, but more than trivial, offenses may be tried by a professional judge sitting with a panel of three lay judges.

The lay judges and the career judge deliberate together. Because the lay judges must vote as a body, the professional judge generally has the controlling voice in determining the outcome. The opinion of the laymen prevails over the contrary vote of the professional judge only when all panel members, in the case of a three lay judge panel, or at least seven members when a full panel of seven to nine is used, agree upon both the decision and the reasons advanced in its support. In practice, it is rare that the career judge is outvoted. We were informed that lay judges play a more important role in the fixing of sentence than in the adjudication of guilt or innocence.

From the general lower courts there is a virtually unlimited right of appeal to an intermediate appellate court. Appeal to the highest level requires Supreme Court permission. All appellate tribunals have college-trained benches. On appeal from a court of first instance, a party is generally entitled to review of all aspects of the case. The courts of appeals may hear witnesses and examine tangible evidence; they may redetermine fact questions as well as questions of law. Although examination and re-evaluation of facts may also occur in the Supreme Court, high court review is usually addressed primarily to matters of law.

Representing the Swedish Parliament is the Parliamentary Commissioner for Civil Affairs (Ombudsman), who acts as a sort of watchdog over the entire court system. The Ombudsman can act as a Special Prosecutor and initiate suit against police, prosecution, or court authorities—not necessarily for corruption in office, but often for neglect of duty. He is also authorized to communicate "reminder" opinions directly to an investigated official. These "reminders," in lieu of criminal prosecutions, sometimes set forth conditions to which the investigated official must adhere in order to avoid prosecution. Compensating an aggrieved private complainant is one example of the conditions the Ombudsman may impose. Within our field of interest the Ombudsman's responsibility includes the monitoring of seizure, arrest and detention procedures; and high police and court officials informed us that his vigilance exerts a wholesome influence in those areas.

Denmark has two Courts of First Instance, with jurisdiction, as in Sweden, over both civil and criminal cases. Most criminal cases originate in the Lower (District or Municipal) Court. Less serious crimes are heard summarily in these Courts by a career judge; or if they go to trial, are heard by a career judge and two elected lay judges. An accused person can plead to serious crimes in the Lower Court. The other Court of First Instance is the Upper or Jury Court, which tries serious crimes and is composed of three career judges and twelve lay judges. A majority among the career judges and a majority of eight among the lay judges is necessary to convict. This is referred to as the "double guarantee."

An Appellate Court acts on appeals from the Lower Court. Both the Appellate Court and the Supreme Court act on appeals from the Upper or Jury Court.

Although the Danes use the term "Jury Court," the Anglo-American system of trial by jury does not exist either in Denmark or in Sweden. But on a humorous note, we were told that more and more Swedes are coming to believe that they do indeed have the right to a jury trial. This notion has sprung up from weekly television exposure to that internationally known American lawyer, Perry Mason. And in Denmark, where as in Sweden an indigent accused has the right to request a court-appointed attorney by name, one accused person actually asked to be represented by Mr. Mason.

Chronological Progress of Eventual Detention or Release Pending Trial of Persons Suspected of a Crime

Sweden

In Sweden persons may be brought to the police station for questioning by the police for a period up to six hours. If at the end of six hours the police consider the questioned person a "suspect" he may be held for a maximum of six additional hours. Swedish Code of Procedure (*Rattegangsbalk* (RB)) 24:23; 23:9. (Note: The Code covers both civil and criminal procedure.) In minor cases for which the penalty

is a fine or temporary suspension from office, but not imprisonment, a suspect whose identity and residence in Sweden are known must be released pending trial after the twelve hour preliminary inquiry period. RB 24:1(4). Health considerations or those of age may also lead the police to release persons at this time after charging them with a crime. RB 24:3. After detaining a suspect twelve hours under its general seizure power, the police must release him or obtain arrest authorization. Normally, jurisdiction passes from the police to the prosecuting authorities at the end of the twelve hour period. However, the relevant statute provides that a decision to arrest at the close of preliminary inquiry may be made by the police officer in charge of the investigation or by the prosecutor. Arrest is permitted in two situations: (1) when the preliminary inquiry discloses grounds for pre-trial detention; and (2) when full grounds for pre-trial detention have not been uncovered, but custody pending further inquiry is found to be of particular importance. RB 24:5.

After arrest of a suspect, if prolonged detention is sought, the prosecutor must present a pre-trial detention petition to the court of first instance. In no case may this petition be filed later than five days after the prosecutor's or police investigator's arrest decision. RB 24:12. Once the petition is filed, the court must hold a detention hearing within four days, unless trial on the criminal charge is to take place within a week after the filing of the petition. RB 25:13.

Although a suspect can therefore be seized and detained for nine to ten days before receiving his day in court, such delay is a rarity. At the detention trial (presided over by one career judge) the court determines whether legal grounds exist for continued detention. If legal grounds do exist the court hears the prosecutor's request for continued detention pending trial as well as the arguments of defense counsel and the suspect himself.

Circumstances under which a person may or must be committed pending trial are specified by statute. When there is "probable cause" to suspect a person of a crime punishable by penal servitude (imprisonment with obligatory labor),

pre-trial incarceration may be ordered "if there is reason to fear that the suspect may flee, dispose of evidence, prevent investigation or pursue his criminality." RB 24:1(1). A non-resident suspected of a lesser crime than the foregoing but one which may lead to a prison sentence, may be detained, if there is reason to believe that he may flee. RB 24:1(2). If a crime carries a minimum penalty of two years' imprisonment, the person shall be detained, "unless it is clear that no reason exists [for this precaution]." RB 24:1-3. Swedish authorities estimate that less than 1% of persons released pending trial fail to return to court when required.

At his pre-trial detention hearing the suspect has the right (though rarely exercised) of calling character witnesses to speak for his pre-trial release. If the court orders detention, as it will in over 95 per cent of cases in which the police so recommend, the judge must state the offense of which the person is accused and indicate the grounds for pre-trial detention. RB 14-16. The judge must also set a date for the detained person's formal trial. Usually this is within two weeks. If the trial is not held within this two week period, normally another pre-trial detention hearing must be held unless waived by the suspect. RB 24:18. If the prosecution has not been initiated within the time limit fixed by the court, and the prosecutor has not requested an extension before expiration of that period, then the court must release the detained person. RB 24:19. The suspect may enter a guilty plea at the detention hearing. Admission of guilt, however, does not close the case; it must be tried by the court on the theory that admissions need corroboration.

An August, 1963 Report prepared by a Special Commission on the Police reveals that in Sweden from 1959 through 1962 approximately 14,000 persons were arrested, i.e., detained upon charge by the investigating police officer or prosecutor. Detention petitions were filed by the prosecutor in about 45% (6,000) of these cases. Over 80% (5,000) of the filed petitions were approved by the court. The Report points out that many filed petitions were rendered moot to court consideration, especially those involving youthful suspects, when

responsibility for the case was assumed by social welfare authorities.

Of all persons detained in Stockholm's arrest division for criminal investigation in 1962, 57% were released within 24 hours. The remaining 43% spent an average of 4 to 5 days in jail awaiting formal detention hearings. The average length of pre-trial incarceration in Stockholm, following court commitment, in 1962 was 14 days—or a total detention time of 19 days. This detention period is much shorter than those that prevail in many English and American communities.

Like the judge, the prosecutor may impose various forms of provisional liberty, such as requiring the suspect to report to the police at stipulated intervals, limiting him to Stockholm or Sweden, etc. Generally, however, accused persons are released pending trial solely on their promise to return to court.

The prosecutor's quasi-judicial power to control release of accused persons is troublesome to those trained in Anglo-American law. In our accusatory system the prosecutor, theoretically representing the people, and theoretically responsible for developing evidence both favorable and unfavorable to the accused, is in fact dominated largely by pressures to win convictions. Thus, prosecution and defense of criminal cases usually take on the flavor of adversary proceedings. Untrammeled power for United States police and prosecutor to control the liberty or detention question for nine to ten days would be intolerable. However, the Swedish people do not appear to find the exercise of this power in the hands of the police and prosecutor intolerable. Perhaps this is because the Swedish system combines the inquisitional and accusatorial philosophy with ingrained and traditional acceptance of safeguards for an acused. Defense counsel are assured that the police and prosecutor will develop evidence both favorable and unfavorable to the suspect and that the police will provide background data in order to facilitate his release pending trial. At the request of defense counsel, or by court order, police will seek new evidence, possibly favorable

to the defense, locates witnesses, etc. Experts available to the police will also be made available to the defense.

Furthermore there is no "surprise" in the Swedish trial system. The prosecutor may not present an indictment in court until the person concerned and his counsel have had an opportunity to acquaint themselves with the course of the preliminary investigation. To present an indictment, the prosecutor submits to the court a signed request that the accused be sent a Notice of Proceedings. The request must identify the accused; the injured party, if any; the offense in question, including the time and place of commission and other identifying circumstances, as well as the relevant legal provisions; the evidence the prosecutor intends to present and the purpose of such evidence and the competence of the court unless this is evident from other information given. RB 45:4. If the court agrees to issue a Note of Proceedings, this request, and the documentation attached thereto by the prosecutor, must be transmitted to the accused. In proceedings before the lower courts, the judge may empower the prosecutor to draw up the Notice of Proceedings. In that case, the indictment is considered as having been brought on the day the Notice was delivered to the accused. RB 45:1.

Withal, under the Swedish system it would appear that conceivably the prosecutor can abuse his power by using the decision to release or to detain coercively to obtain evidence or confessions. This potential for abuse is enhanced by the fact that defense counsel may be present when the suspect is interrogated only "if this does not endanger the investigation." RB 23:10.

On the other hand, if a detained suspect cannot retain a lawyer privately, he may request the court to assign him one, which the court will do, generally within a period of two days after seizure. This does not automatically mean that the suspect will confer at once with his court-appointed attorney; it is more likely that the first time a detained person sees assigned counsel will be at the detention hearing or about five days after his arrest. While the law does not

guarantee right to counsel at all pre-trial stages, counsel is generally present if requested by the suspect. The court may assign counsel to a rich defendant. In fact, most private lawyers engaged in criminal trials, although selected by the accused, are designated by the court to act in the capacity of public defender. The state is responsible for the attorney's fee in the event of an acquittal whether the defendant is rich or poor. If the defendant is found guilty the state bears his attorney's cost only if he is poor, i.e., the beneficiary of "free legal proceedings."

There is no large segment of the bar which specializes largely or exclusively in the practice of criminal law. While under Swedish law a party to a lawsuit may represent himself or be represented by a layman, in practice litigation of any importance is usually handled by college trained lawyers.

Denmark

As we have said earlier, the Swedish and Danish pre-trial systems are quite similar. Perhaps one of the major differences lies in the extensive use of summonses with which the Danish police originate criminal cases. Danish authorities estimate that about two-thirds of all prosecutions originate with a summons. In these cases, it is not uncommon for a person to be charged, to be indicted, to stand trial, and, if found guilty, to await sentencing, all while at liberty. It may happen that a person will run the gamut of these procedures and then be sentenced to prison. Charges such as simple theft, burglary, embezzlement, simple assault, and forgery may originate with the summons. The summons may be by telephone or letter. Generally first offenders will not be seized or spend any time in custody prior to trial unless charged with a very serious crime. Danish authorities feel that seizure is "very upsetting" to persons accused of a crime for the first time. The Danes are concerned with keeping the accused person's record free from the stigma of arrest, as well as giving him an opportunity to keep his job and life intact.

Criteria governing pre-trial release or detention follow almost precisely those of Sweden. Persons charged with homicide, forcible rape, intentional manslaughter, serious cases of forgery and counterfeiting are rarely released pending trial. As in Sweden, in Denmark drunken driving is regarded as a most serious crime and persons so accused are rarely released. Those charged with moderately serious crimes, whose prior records are good, are invariably released pending trial. Those charged with moderately serious crimes who have lengthy or serious past criminal records, may or may not be released depending upon the discretion of the court. We learned that frequently judges invoke a three-day detention as a cooling-off period, especially in cases of minor assault involving husband and wife.

The law provides for bail but it is never used. The Danes feel that a financial tie to liberty "improperly favors the rich." Persons are either released outright pending trial or held in detention. The law provides for various kinds of provisional liberty but these devices are not used.

On all charges, the police have discretion to release suspects or accused persons prior to a detention hearing. In 1961, 6,600 persons were seized by the police; of these 5,000 were released—generally covering those charged with misdemeanors—within 24 hours. If the police detain a person, it is rare for the court, composed of one career judge, to release him at the detention hearing. As a result of 1,500 detention hearings held in Copenhagen in 1961, only 50 persons were released. In all Denmark in 1961 there were 3,200 detention hearings and only 200 persons were released. We were told that judges who at the detention hearings have before them the suspect's dossier consisting of personal history and background, prepared by the police, rarely release persons over the objection of police or prosecutor because the police, the prosecutor and the court employ the same criteria in determining release or detention. The estimate of the average pre-trial detention period that we received is three to four weeks. Difficult cases, ones that require prolonged preparation, can of course take months.

There is no right to defense counsel at the moment of seizure. Counsel will represent an accused suspect at the detention hearing, which is not later than three days after arrest. A public defense counsel is in court every day and regularly assigned to cases. A defendant can plead guilty at his detention trial.

The Handling of Young Persons

The minimum age for criminal responsibility in both Sweden and Denmark is 15. There are no special courts in either country to adjudicate youthful offenders. However, judges have broad areas of discretion in imposing or withholding criminal sanctions on those between the ages of 15 through 18. In Sweden it was our understanding that whenever possible those in the 15 to 18 year old age group would be released pending trial and placed under the supervision of the Children's Welfare Board. The prosecutor may also defer prosecution and assign the youth to the Children's Welfare Board for appropriate supervision. There are special youth preferences for persons 15 to 18 and 18 to 21 and these age groups are segregated at all stages from older accused or suspected persons. The Children's Welfare Board is composed of laymen elected by the community. It is the general rule that if a young person is seized by the police during the day, the youth will be immediately turned over to a Children's Welfare Board social worker whose offices are at the central police headquarters. Jointly the prosecutor and the Welfare Board will make the decision as to detention and prosecution. If a young person is seized at night, he may be placed in detention until the next morning, at which time the Welfare Board will enter the case. The Welfare Board has institutions throughout Sweden where young persons may be detained up to four weeks awaiting court action.

In Denmark, the lower court judge has discretion as to whether to impose criminal sentence in the 15 to 18 year age group. If a person in this age group has a serious prior

record, he will be imprisoned in the Danish equivalent of the British Borstal system.

The Swedish Day-Fine System

Although not directly related to the question of pre-trial release or detention we took the time to inquire in some detail into the system of imposing day-fines, since it does reflect the Swedish philosophy of criminal law sanctions. The purpose of the day-fine system is to insure equal treatment—in this case relating to punishment—of rich and poor. Day-fines also serve the purpose of markedly reducing the prison population.

The day-fine system works like this. The court makes two determinations in passing sentence: it decides the *number* of day-fines required, ranging from 1 to 120 days and the *amount* of day-fines, ranging from 1-300 crowns per day (20¢-$60). As of January 1, 1965 the range will be 2-500 crowns per day (40¢-$100). In deciding on the number of day-fines, the court considers the nature of the offense and the offender. The amount of the fine is independent of the seriousness of the offense and must be correlated exclusively with the income of the convicted, his assets, the number of his dependents, and his general financial status. It is the judge's responsibility to determine what amount per day the fined person can raise, short of becoming financially distressed and punishing his family. The judge ascertains a person's financial status by checking with the tax authorities and by police report. It has been estimated that as a result of the introduction of this measure there has been a 50% drop in the number of alternative prison terms served in Sweden.

The day-fines can be paid in installments at monthly intervals. The fined person may have up to four months to begin paying the State. Usually the obligation of the fine must be paid within one year but up to two years may be permitted. If the fined person falls behind the State can garnish his income or employ attachments. If the fine is not paid the person can be sent to prison. We were told that this outcome rarely eventuates.

ENGLAND

Three nation-wide courts of criminal jurisdiction function in England: Magistrates' Court, Quarter Sessions Court, and Court of Assizes. There are special courts where serious charges are tried in certain large centres of population, such as the Central Criminal Court (Old Bailey) in London and the Crown Courts of Manchester and Liverpool.

As in the United States, bail decisions affecting most persons charged with crime are made initially in the so-called lower courts—by Magistrates. (We shall not clutter this report by distinguishing between Stipendiary Magistrates who are lawyers and Lay Magistrates, i.e., Justices of the Peace, who in bail procedures, at least, exercise essentially similar jurisdiction.) But a Magistrates' Court in England—whether composed of one legally trained judge in some urban areas or two or more Justices of the Peace—possesses plenary jurisdiction over much more serious crimes than its American counterpart. Therefore, some discussion of the summary powers of English Magistrates is indicated to help define their role in bail and custody procedures.

The Magistrates' Courts in both countries are quite similar in that they exercise summary jurisdiction over minor offenses. And similarly, when a defendant must be or elects to be tried before a jury in a higher court, they conduct preliminary hearings to determine whether the prosecution has shown sufficient cause to warrant holding the defendant for trial. In England, summary offenses which call for a penalty not exceeding three months imprisonment must be tried summarily in the Magistrates' Court. Such cases include drunk and disorderly conduct, minor traffic violations, violations of the administrative code, simple assaults, etc. In the great proportion of these cases accused persons are released by the police prior to their first court appearance or are held overnight to appear the next morning before the Magistrate, at which time the case is usually disposed of. Generally, the arresting officer will serve as prosecutor for minor charges. The police are impressively restrained and knowledgeable in the conduct of trials.

Certain summary offenses which may carry a penalty exceeding three months in prison—but not more than six months—can either be tried summarily in the Magistrates' Court or the defendant can demand trial on indictment by a jury in Quarter Sessions Court. Offenses falling within this category include such infractions as animal theft, forgery of licenses and certificates, dangerous driving, driving while intoxicated, etc. If the case is tried summarily, either the arresting officer or a Solicitor or Barrister will act as prosecutor. Even though the accused is without funds, counsel will probably not be furnished him in Magistrates' Court, unless he requests such representation. If a defendant asks for legal aid and does not possess the means to hire counsel, the Court will generally assign a Solicitor to defend him—particularly if he is charged with an offense involving imprisonment. If the case is tried by a jury in Quarter Sessions Court, a Solicitor attached to the police organization will present the Crown's evidence at a preliminary hearing in the Magistrates' Court and a Barrister in private practice will be retained by the Police Solicitor to prosecute the trial itself in the name of the Crown. Often, in these cases, an accused will not exercise his right to a jury trial.

A third and more serious category of crimes are certain so-called indictable offenses which may be tried by jury in Quarter Sessions Court or summarily in Magistrates' Court with the consent of the accused. These cases include fraud, embezzlement, petty larceny, receiving stolen goods, minor forgery, some assaults, etc. It should be noted that many of these charges constitute felonies in the United States and are usually tried by a jury and not summarily by Magistrates. "A person summarily convicted of an indictable offense . . . shall be liable for a term not exceeding six months or a fine not exceeding one hundred pounds or both." (Magistrates Court Act, 1952, s. 19.) If more than one such charge is prosecuted the Magistrate can impose an aggregate of twelve months imprisonment. If a Magistrate believes punishment in excess of his power is required, or if the offender is between 15 and 21 years of age and the Magistrate considers Borstal training appropriate, he may after conviction commit the

defendant to Quarter Sessions for sentence. Generally, the Police Solicitor will conduct the prosecution if a case in this category is tried summarily, while a Barrister must prosecute if the case is tried with a jury. Again, the defendant will often waive his right to a jury trial. If, however, the case does go to jury trial, delay ensues because of the committal process; and the question of pre-trial liberty or detention becomes important—assuming of course that the police have not granted the accused person his release prior to his first court appearance. Of course, such action by the police is not necessarily binding on the court.

The fourth and most serious category of crimes are indictments for crimes such as murder, treason, manslaughter, armed robbery, perjury, conspiracy, criminal libel, forgery of official documents, burglary, grave sexual offenses, etc. As we have said these cases—as do all cases—originate in Magistrates' Court where the Police Solicitor or, even a Barrister in some cases will conduct the preliminary hearing and at times be heard on the question of bail or jail. If the defendant is indigent and is charged with a capital offense he must be assigned counsel at the time of trial. In the prosecution of all other crimes appointment of counsel is at the discretion of the court, but counsel is usually provided defendants charged with the serious crimes in this fourth category.

In cases of a serious nature the police are not in practice authorized to release an accused prior to court appearance. Also, a person charged with treason shall not be admitted to bail except by order of a judge of the High Court or the Secretary of State. In all other cases the question whether to admit to bail or to remand in custody lies in the discretion of the committing Magistrate, who in over 95% of the cases follows the recommendation of the police and also consults them about the solvency of the sureties. High bail is usually set in fraud cases involving large sums of money, presumably because the greater the sum involved the greater the inducement to decamp; and the sureties in this type of case, whose role in the bail process is described further on, are scrutinized especially closely for financial responsibility. We

were told by a judge that in severe cases of violence the defendants simply do not get bail.

It is customary for the police to make representations to the court as to the advisability and amount of bail. Here again, as in the above-described prosecution of summary trials, they fulfill a function usually performed by the district attorney in the United States. The English have no local level prosecuting offices, manned full-time by public officials; and therefore many duties we associate with district attorneys devolve upon the police. About 60% of all persons charged with indictable offenses who are remanded for trial are released on bail pending trial; 40% are detained. Pre-trial detention in cases held for Quarter Sessions and Assizes averages four weeks in large urban centres, where the courts function continuously, and six to seven weeks in less populated areas where Assizes may be held only three or four times a year. These pre-trial detention periods approximate roughly the detention intervals in New York City and many other jurisdictions in the United States. As in most countries, England usually affords an earlier trial to persons held in custody than to those released on bail.

Since the publication of the above-mentioned 1961 Report the effects of the 1962 Criminal Justice Administration Act are becoming evident. The period of pre-trial detention is often further reduced because of the provisions of Sections 14 and 15 of that Act. Under Section 14, when certain consents, including that of the accused, have been obtained the defendant may be committed for trial to Assizes and Quarter Sessions then being held, instead of being held for the next sitting of the Court.

A word about juveniles charged with commissions of offenses. Children of the age of ten years or over may be accused and convicted of crime, and are not shielded by the device of an adjudication of juvenile delinquency. Special sittings of Magistrates to deal with offenders under 17 years of age are held in "Juvenile Courts." These courts are governed by the same solicitude for youth in trouble that animates United States Juvenile Courts. They sit in a different place or on a different day from the place or day designated

for the hearings of charges against adults and the general public is excluded.

Unlike the procedure in the United States, we shall see that the bail process is often started in the police station. Juveniles charged with offenses are generally released by the police or Magistrate, unless the crime is homicide, or very serious in nature; or unless the police believe it is not in the juvenile's best interest to be released on bail. Juveniles may be bailed by the police even when arrested on warrants not endorsed for bail.

At this point some statistics may help in appreciating the role of bail in the administration of criminal justice. About 200,000 indictable offenses are prosecuted each year in England, of which more than 80% are disposed of summarily by Magistrates, and the remainder by Quarter Sessions, Assizes and the special metropolitan courts. About 1,000,000 non-indictable offenses are brought to Magistrates' Court each year, of which approximately 700,000 are motoring offenses. Three-quarters of the persons committed for trial plead guilty —a lower average than obtains in most jurisdictions in the United States. Some idea of the shrewdness with which bail determinations are made may be gleaned from a recent debate in the House of Commons. It was revealed that in 1962 35,244 untried persons were received in prisons because bail was refused or not provided by the accused. Subsequently, 1,265 were found not guilty—only about 3% of the number held in custody.

Bail as it is furnished in England is quite different from bail in this country. Generally release is conditioned upon the accused, or the accused and one or two sureties, furnishing a recognizance under which they agree to forfeit a stated sum—the amount in which bail is fixed—if the accused fails to appear subsequently in court. As explained by a Police Solicitor, the agreement upon the stated sum of money which may become forfeit "legitimatizes" what is in effect a contract between the accused and the Crown. There is no requirement, in fact it is forbidden, to post cash or security of any kind with the court—another departure from Ameri-

can practice. If the police should report and the court agrees that a certain surety is unacceptable, either because of his character or financial status, the accused is afforded the opportunity or producing another surety. A defendant may not, by decisional law, agree to pay or indemnify his surety, and bail may not be posted by insurance companies. Therefore, the furnishing of bonds for profit or as a business is illegal and there are no professional bondsmen in England. One important purpose is to ensure the personal involvement of the surety in accepting responsibility for the defendant's appearance in court.

In accepting a recognizance the surety is required to appear before a court, where he is interrogated as to his means before the recognizance is entered. The court impresses upon the surety that he will be liable for the amount of the recognizance if his principal does not appear, and is most careful to make certain that the surety appreciates the extent of the responsibility he is undertaking. In the rare instances where recognizances are forfeited, the surety is often not required to pay the full amount pledged.

In cases where bail has been denied, an appeal may be taken to a Judge of the High Court. This appeal is most informal, particularly by our American experience, and availed of with some frequency. A form is filled out by the accused, containing relevant material such as the police report and evidence and brought to the Judge in chambers by the accused's Solicitor or the Official Solicitor if the accused cannot afford a lawyer. A High Court Judge informed us he frequently processed about six a day; but only about 2% of such applications are granted. Bail is seldom permitted while a defendant is awaiting sentence or his conviction is being appealed.

In England, the principal criterion governing release on bail is whether the accused will appear in court when required. In making this determination the following factors are weighed: nature of the offense; past criminal record; weight of evidence; whether the accused has a home or fixed address; range of possible sentence; trustworthiness of

sureties. There is also some decisional law encouraging the practice of detaining a person not because he may fail to appear but rather to prevent his committing another crime while at liberty, even though he is presumed innocent of the first crime; or because of apprehension that, if released, the accused will tamper with the prosecution's witnesses (*R.* v. *Phillips,* 111 J.P. 333, C.C.A. (1947)). Many Barristers and Solicitors express dissatisfaction with these criteria. Nor is it uncommon for the police to request that the accused be detained if further inquiries are to be made, further charges against the accused are to be levied or further related arrests are contemplated. We were informed, too, that on occasion bail at the arrest stage may be withheld coercively by the police; that is, to induce "cooperation"—sometimes in the form of a confession.

In many countries these latter factors are legally and openly considered in deciding whether to detain or release an accused before trial. In the United States, where they are unacknowledged and unauthorized considerations, judges, prosecutors and police are nevertheless often influenced by them.

Since, as stated, English judges follow the recommendation of the police in over 95% of bail determinations, it is important to discuss police procedures in some detail as they relate to the bail decision.

A Magistrate who issues a warrant for arrest may endorse it with a stipulation that bail be granted forthwith by the police upon such terms as he specifies. If the warrant is not endorsed, the accused must be brought before a magistrate as soon as possible, although in some instances where the warrants are not endorsed, bail may be fixed by the police. As in the United States, however, the great majority of criminal prosecutions originate by arrest without a warrant.

Magistrates' Courts Act, 1952, s. 38 reads:

> On a person's being taken into custody for an offence without a warrant, a police officer not below the rank of inspector, or the police officer in charge of the police station to which the person is brought, may, and, if it

> will not be practicable to bring him before a magistrates' court within twenty-four hours after his being taken into custody, shall, inquire into the case and, unless the offence appears to the officer to be a serious one, release him on his entering into a recognizance, with or without sureties, for a reasonable amount, conditioned for his appearance before a magistrates' court at the time and place named in the recognizance.

When the officer in charge decides the offense is not serious and release is indicated he will say to an accused person: "We are going to release you in your own recognizance of (blank) pounds to attend court—and if you fail to appear in court you will be liable to forfeit some or all of that (blank) pounds." In cases punishable by fine the amount of bail does not exceed the maximum possible penalty. Before releasing an accused the police will at the least verify his residence. If the bail amount is less than fifty pounds the police generally take the word of the accused as to his having sufficient funds to meet the forfeiture demand. Only rarely do the police set bail higher than the sum of fifty pounds. When bail is set by the court it is generally a fraction of the amount fixed on similar charges in the United States. A Home Office study of the higher courts, above the Magistrates' Court level, discloses, interestingly enough, that 37% of defendants released on bail had one to five convictions, and 13% had six or more. A 1960 Home Office Research Unit Report entitled "Time Spent Awaiting Trial" reveals that in only 1% of cases in which a bail amount had been set were persons detained pending trial because of inability to find sureties acceptable to the police or to the court.

In practice, however, there appears to be little danger of forfeiture despite the fact that the recognizances are unsecured and relatively low in amount. In fact, so few defendants fail to appear in court when required that "no show" or forfeiture statistics are not even kept by the courts and the incidence of forfeitures is so minimal that the Home Office keeps no record of them, despite its tradition of detailed, com-

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We believe another reason there are so few forfeitures of unsecured recognizances as compared to bail forfeitures in the United States is that sentences and punishments are milder in England. The offender does not apprehend the stiffer sentences meted out in the United States. We witnessed a case in Magistrates' Court in which a young man just released from prison pleaded guilty to attempting to take and drive away a motorcar. This is a special statutory offense, separate and distinct from larceny. He was sentenced to three months imprisonment; in the United States his sentence would probably have ranged from one to five years imprisonment for a similar offense. We observed cases in which defendants found guilty of breaking and entering, with records of several convictions of like crimes, were sentenced to six months imprisonment. In the United States they would generally have drawn much more severe sentences.

Also, fines are imposed in many instances when prison sentences would be imposed, or at the least suspended, in the United States. In 1961, according to the Home Office Report on Criminal Statistics in England and Wales, 54.4% of all persons aged 17 and under 21 found guilty of indictable offenses by Magistrates were punished only by imposition of fines, only 3.9% were sentenced to imprisonment, and 2.8% committed to Quarter Sessions for sentence. In the 21 or over age group Magistrates fined 58.8%, imprisoned 15.3% and committed 3.1% to Quarter Sessions for sentence.

In the higher courts, where the most serious crimes are prosecuted, 9.9% of the 17 to 21 age group were fined in 1961,

11.4% imprisoned, 27.9% remanded for Borstal training, and 36.2% placed on probation. In the over age 21 group, the higher courts imprisoned 55.4%, fined 16.8% and placed 14.8% on probation.

In the cases of persons found guilty of nonindictable offenses, 95.2% were fined and only 1% imprisoned. Judges generally afford convicted persons a month or longer to pay their fines—a practice quite different from that generally followed in the United States, where a person who cannot pay a fine is usually put behind bars at once.

Conditional Liberty

Bail or recognizance—the terms are used interchangeably—is sometimes granted subject to certain conditions. These include surrender of a passport, daily or weekly reports to a police station, residence in a particular town or house, the promise to remain at home by day or night, or both (virtually house arrest). In one extreme case the accused was permitted bail on condition that he stay at home, communicate with no one, and consent to have his telephone wires cut. Conditional liberty in England is intended to lessen the accused's opportunity to commit further crimes as well as to deter flight. Many experienced Magistrates, however, refuse to impose such conditions, being of the opinion that Magistrates do not possess such powers (Magistrates' Court Act, 1952, Sections 6, 7, 14 and 105).

Use of Summons

In metropolitan areas the summons is seldom used in police prosecutions in cases other than minor traffic offenses. Occasionally an exception is made when an offense such as minor assault or petty larceny comes to light—considerably after the crime is alleged to have been committed. When however the prosecutions are instituted by Government departments, such as the Inland Revenue for tax evasion or the Board of Trade for breaches of the requirements of corporation law, the proceedings are almost inevitably commenced by summons even where they involve substantial amounts of money

or where the penalties may be severe. Apart from traffic offenses and a few violations of the administrative code metropolitan police are directed to arrest whenever they have the power to do so. It is our understanding that the summons is used more extensively in rural areas for two reasons: courts do not sit continuously and the accused is generally quite familiar to the police.

Conclusion

There is no doubt that release on recognizances furnished by defendants and sureties functions much better in England than does the bail system in the United States. The weighting of pre-trial release in favor of rich as compared with poor is minimized by the English procedure. In England, judge and police look to the factors that experience has proven indicate a defendant can be released with reasonable assurance that he will appear for trial. He and his family do not then first have to face the problem, often insurmountable and often impoverishing, of raising collateral and the surety bond premium. And the halls of justice are rendered no less pure by the absence of professional bondsmen.

Although there is little doubt that English bail procedures as they operate in England are healthier, fairer and more democratic than ours, this does not mean that they can be imported in toto to the United States. There are differences of geography, tradition, national temperament and the climate of criminal justice which give one pause. It is clear, however, that we can learn and probably adapt within our administration of the criminal law a good deal of the English system of bail. But each aspect will have to be studied in the light of our own experience and that of other countries, and perhaps tested separately and cautiously on an experimental basis in the United States.

ITALY

Persons charged with crimes are tried in three courts: (1) the Pretura or lower court, which deals with relatively minor offenses; (2) the Tribunal, which deals with moderately

serious crimes; (3) the Court of Assizes, a special section of the Tribunal, which has jurisdiction over the most serious crimes. From each of these courts an appeal as of right lies to a higher court on both questions of fact and questions of law. Subsequently, by constitutional mandate, as of right a review of issues of law may be carried to the Supreme Court. Any provisional order or decree affecting personal liberty may be brought to the Supreme Court for review. In 1960, some 50,000 petitions for review were brought before the Supreme Court in criminal matters.

In all three courts of original criminal jurisdiction the power to arrest or detain a person pending trial hinges primarily on the term of punishment than can be meted out for the crime charged. Also, we shall note that this paper will be preoccupied largely with pre-trial detention statutes and practices as they affect persons suspected of or charged with the moderately serious crimes falling within the jurisdiction of the Tribunal; it is usually in those cases that prosecutors and judges will be called upon to exercise discretion as to pre-trial release or detention.

The Pretura

This Court has jurisdiction over crimes with penalties ranging from fines up to three years imprisonment. (If a crime calling for three years imprisonment is aggravated (infra), the punishment may be increased and still fall within the jurisdiction of the Pretura.) In the large proportion of cases, accused persons charged with crimes under the jurisdiction of the Pretura are "invited" by the police to respond to a charge. Formal arrest does not usually take place, although what might be termed a form of "seizure" of the person may; in the overwhelming proportion of the above-described cases these is no pre-trial detention at all.

Should an accused be detained in connection with a case pending in the Pretura in excess of thirty days and a decree ordering him to trial not be issued, the accused must be freed. In practice, however, the trial is usually held within this thirty day period. (Article 272 of the Code of Penal Procedure.) Generally, since detention is discretionary (art. 277), only an accused with a "tendency to crime" or labeled a "professional" will be detained.

It is interesting to note that in certain cases, even if apprehended in the commission of a crime *in flagrante delicto*, the offender may not be arrested by a policeman or by a private person when the crime being perpetrated would fall within the jurisdiction of the Pretura. What would seem at this juncture to be a paralysis of police power is remedied by the fact that while the offense itself may not justify arrest, the refusal to accept the "invitation" to proceed to the police station is itself an offense for which the suspect may be seized or arrested. Police arrest is to be distinguished from detention pursuant to a formal warrant of seizure issued by a court. Persons subject to police arrest must be released within 48 hours or alternatively placed at the disposition of the District Attorney. The police may request authorization from the District Attorney to continue to hold a person in police arrest up to a maximum of 7 days in cases requiring extensive preliminary investigation. However, in most cases falling within the jurisdiction of the Pretura, police arrest usually does not occur and, if it does, it lasts for only a few hours.

Cases in the Pretura, which it will be recalled are in the least serious categories of crime, are tried by one judge. This judge also functions in the dual official capacity of prosecutor in developing preliminarily the facts of the case—a dual role somewhat difficult for votaries of an accusatorial system such as prevails in the United States to comprehend. It is the prosecutor-judge who alone makes the determination whether the accused is released or detained pending trial. Since the prosecutor becomes the judge who hears the charges which he himself has instituted and will decide them upon trial, a private attorney picked at random from among those lawyers who happen at the moment to be in the Pretura, is chosen to represent the people's interest in the case. In Rome the prosecutor-judge of the Pretura is responsible to the District Attorney located in the city.

Since the prosecutor combines the office of judge in the Pretura he may dismiss charges prior to trial. In the higher courts the prosecutor is independent of the judge and his function more closely resembles that of the prosecuting attorney in the United States. This combination of the prosecution and judicial function—never permitted in our courts—can only be understood in the climate of the career service, upon which both prosecutors and judges embark at the outset of their professional careers. In the United States and England, judges often ascend the bench, after winning their spurs as practicing lawyers or by accident of political or other process; this is not the case in Italy. There a young graduate of law school chooses such a career and his advancement thereafter is based upon the capacity and merit he exhibits. Early in his career he will very likely become a prosecutor, and then move on to the judiciary. However, it is not unusual for a judge to forsake the bench, temporarily or permanently, to take a high-ranking position in the prosecution or in other areas of the administration of justice.

Court of Assizes

Passing over the middle-level Tribunal for the moment, we turn to a brief discussion of pre-trial detention in the Assizes Court—which entertains the most serious criminal charges. This court consists of 2 career judges and 6 lay judges (private citizens having at least 8 years formal education and appointed for the duration of the court's current session).

Because of the gravity of the crimes falling within the jurisdiction of the Court of Assizes, as reflected in the statutory provisions for lengthy imprisonment, little discretion is vested in police, prosecutor, or even judge in the arrest or formal seizure for pre-trial detention of an accused. We have remarked that, in cases within the jurisdiction of the Pretura, police arrest and pre-trial detention are not the rule. We shall note further on that in alleged crimes which would be prosecuted in the Tribunal the Italian officials concerned may exercise a certain degree of discretion. However, police arrest and subsequent pre-trial detention almost invariably occur in cases which are so serious as to come within the jurisdiction of the Court of Assizes.

Pre-trial detention in cases for the Court of Assizes is based on an *ordine* (an order of seizure issued by the District Attorney) or a *mandato* (a warrant of seizure issued by the Investigating Judge). These warrants serve the same purpose. Under Article 253 of the Code of Penal Procedure a warrant for the seizure of the person must be issued against the accused for charges coming within the scope of that article, the more serious of which would be triable in the Court of Assizes; and the defendants must be kept in pre-trial detention until the case is decided by the Court (for limitations, *infra* under "General Practices"), unless the charges have been previously dismissed.

According to Article 253 of the Code of Penal Procedure "the warrant of seizure *must* (emphasis supplied) be issued against a person accused of:

1. a crime against the personalty of the State, for which the law provides imprisonment of not less than five years in its minimum, or ten years in its maximum or life imprisonment;

2. a crime for which the law provides for imprisonment for a minimum of not less than five years, or a maximum of not more than fifteen years, or life imprisonment;

3. sale or purchase of slaves;

4. clandestine or fraudulent trading of narcotics;

5. forging of currency, wilfully spending, using and introducing forged currency in the State."

The jurisdiction of the Court of Assizes encompasses crimes punishable by imprisonment in excess of 10 years and certain specified crimes, including crimes against the personalty of the State (treason, espionage, etc.), willful homicide, crimes relating to enslavement of persons, aggravated robbery, aggravated extortion, kidnapping, commerce in adulterated foodstuffs, and others.

The Tribunal

The Tribunal consists of 3 career judges. It is in this court which deals with the moderately serious crimes, that discretion as to pre-trial detention is most often invoked, and in which difficult decisions as to such detention arise. The Tribunal has jurisdiction over crimes not specifically within the jurisdiction of the Court of Assizes or of the Pretura. The rules and standards governing the exercise of discretion by prosecutor and judge are somewhat difficult to comprehend by persons conditioned in the Anglo-American system of criminal law. According to Article 254 of the Code of Penal Procedure:

> The warrant of seizure *may* (emphasis supplied) be issued against a person accused of:
>
> 1. a non-negligent crime (*delitto non colposo*) for which the law provides imprisonment for not less than three years in its maximum;
>
> 2. a non-negligent crime (*delitto non colposo*) for which the law provides imprisonment for a maximum of not less than two years, when the accused has been condemned more than twice for a non-negligent crime (*delitto non colposo*) or was condemned once before for a crime of the same type, or when he is not a resident of the State, or he has taken or is preparing to take flight;
>
> 3. a non-negligent crime (*delitto non colposo*) for which the law provides imprisonment for a minimum of not less than two years or for a maximum of not less than five years.

In order to appreciate adequately the functioning of the Tribunal as it relates to pre-trial detention, it is necessary to trace procedures from the moment of police arrest of the suspect or accused—in those situations in which the police exercise their discretion so to restrain a person. Within forty-eight hours (usually sooner) the police either release the suspect or place him at the disposition of the District Attorney. In the latter event, the District Attorney will then

make the decision whether to release the accused person, or have him detained for further questioning and investigation by the police, or issue a warrant for his formal seizure and pre-trial detention. In the American system the principal criterion for release is whether the accused will return to court for trial. Italian prosecutors and judges, for various reasons, are not particularly worried about an accused's failure to appear; they are, however, concerned about the accused's behavior should he be granted his liberty pending trial. As in Sweden and Denmark, specific and enunciated criteria are the severity of the crime charged, the likelihood that the accused would tamper with witnesses or evidence, past criminal record and concomitant consideration that the accused may commit further crimes while at liberty. (In fairness to the Italian, Danish, and Swedish procedures it should be stated that the same considerations, consciously or unconsciously, govern bail decisions of many judges in the United States and England.)

Italian officials and defense counsel whom we interviewed made it clear that an added factor is influential in determining pre-trial release or detention. This was the matter of the accused's cooperation with or "usefulness" to the prosecution in the preparation of the prosecution's case. It is of course abhorrent to one conditioned in the concepts of Anglo-American law that a person's liberty pending trial should be affected by such considerations. Prosecutors, judges and other public officials with whom we discussed this aspect of the administration of criminal justice were frankly in favor of this practice. One cannot blink the fact that in Italy full confession is probably considered full cooperation by the prosecutor. On the other hand, the harshness of this standard may be mitigated by the caliber of the officials who administer the law, and their career status. There appears to be an enveloping protective philosophy toward the accused which reflects the attitude of the state and its officials towards its citizens. And there is a variant of this concept of "cooperation" that is practiced by some prosecutors in the United States. An accused may be rewarded with pre-trial liberty

and recommendation for leniency in sentence in exchange for testimony implicating a more important defendant.

Recently in Italy, the Code of Penal Procedure has been subjected to the widespread criticism that it does not implement the libertarian spirit of the post-war democratic constitution. The Italian Parliament has delegated power to the government to enact a new Code of Penal Procedure within the next four years. The basis of the new law will very likely be a model code already drafted under government auspices. The model code reflects a quite different attitude toward the rights of the accused from that prevalent in the present code. For example, it provides that the accused has a right to counsel before he is interrogated by the prosecutor. If he does not have counsel of his own choosing, the prosecutor must appoint counsel for him.

Coming back to the chronological development of seizure and detention procedures: after a case within the jurisdiction of the Tribunal has been turned over to the public prosecutor by the police, the prosecutor must examine the accused as soon as possible and in any event within 3 days after such referral. Should the prosecutor decide to proceed with the case, he has 40 days within which to complete the pre-trial investigation and to request that the case be put on the court's docket. During this 40 day period the prosecutor may hold a person under investigation in pre-trial detention, although we were informed that it is unusual to do so for the maximum period. Failing to ready the case for trial within 40 days, the prosecutor must then refer it for a form of preliminary hearing to the *Giudice Istruttore* (whom we shall call the Investigating Judge).

The Investigating Judge proceeds in much the same manner as the prosecutor in preparing a case. He interrogates the accused, the victim of the alleged offense, and any witnesses, and calls in experts when necessary. Counsel for the accused is not present when the prosecutor, or the Investigating Judge, interrogates the accused and the witnesses. In fact, during these periods of preparation and interrogation defense counsel may consult with the accused only with the approval of prosecutor or judge. We were informed, however, that in practice this approval is rarely withheld. Defense counsel may discuss informally with the prosecutor or judge the possible pre-trial release of his client during the preliminary inquiry period.

When he has concluded his hearings the Investigating Judge returns the case file to the prosecutor. The latter official studies the file which contains statements from witnesses, expert testimony, etc. If the prosecutor decides to recommend to the same judge that the accused be indicted, he then recommends either continued detention, or his release pending trial. After receiving the prosecutor's recommendation, the Investigating Judge then makes the file available to defense counsel and generally hears the attorney formally for the first time concerning the accusation(s) against his client. It is at this point that the Investigating Judge finally determines whether the accused is to be indicted or exonerated. This judge cannot serve as one of the three judges at the trial of a defendant whom he has indicted. In determining the issue of further pre-trial detention the judge is governed by the same considerations which animate the prosecutor. For that reason the judge will rarely release a defendant who has been held in detention by the prosecutor during the investigative stages, or override a prosecutor's recommendation for continued detention. At any time after the accused has been formally seized, his counsel may petition for his release either during the time the case is being investigated by the prosecutor or by the Investigating Judge. Even on the first day of the trial counsel may move for his client's release from detention; and sometimes such release is granted.

General Practices

In cases in which the warrant of seizure is optional, pre-trial detention may not exceed six months if the maximum penal sanction for the crime charged is longer than four years; three months if the law provides a shorter period of imprisonment. In cases in which the warrant of seizure is compulsory, pre-trial detention may not exceed two years if

the law provides a penalty of detention not less than twenty years or life imprisonment in its maximum; one year if the law provides for a shorter penalty. (art. 272 of the Code of Penal Procedure). Time spent in jail awaiting trial is credited against a subsequent prison sentence. (art. 137 of the Penal Code) We were assured, however, that rarely does a detention period approximate the permissible maximum.

There are extrinsic circumstances which constitute "aggravations" of a crime. We have noted the correlation between initial police arrest of the person, pre-trial detention, and range of sentence. One aggravating circumstance may increase punishment by up to one-third; more aggravating factors may increase punishment by up to three times the statutory maximum. Limitations on this general rule are set forth in Article 66 of the Penal Code. Thus a case in which pre-trial detention would have been discretionary may, if aggravation is present, be propelled into that category of crime whose sentence range makes detention mandatory. This is perhaps of minimal importance in the Tribunal as aggravating circumstances, even without the provision for additional punishment, would ordinarily influence a judge to exercise his discretion in favor of detention anyway. Similarly, aggravation may result in removing a case from the jurisdiction of the Pretura to that of the Tribunal and into a category where pre-trial detention becomes optional. Aggravating circumstances include such factors as the use of cruelty in commission of a crime, abuse of one's authority (police vis-à-vis a person in custody; head of family vis-à-vis wife and children et cetera), abuse of hospitality, and inflicting grave financial damage. For example, the crime of negligently causing a fire is punishable by not less than one or more than five years imprisonment. An aggravating circumstance would be that the accused acted although he foresaw the possibility of the disaster. This element of foreseeability would increase the maximum penalty by one-third or to six years eight months and, being more than five years, would permit the issuance of a warrant of seizure.

To round out and summarize a complex picture, an accused who is held before trial must be released if he is not indicted within the statutorily specified period of time. He may be released, except where a warrant of seizure is mandatory, when the judge in his discretion finds that the accused's further detention is not necessary for the development of the case; or that the accused either because of his good past record or because of family or health considerations warrants being released pending trial. The accused's cooperation is an important factor in the judge's exercise of discretion. Even in cases where the issuance of a warrant of seizure is mandatory, the accused must be released if insufficient indicia of guilt appear in the pre-trial record. In addition, the prisoner must be released if the warrant of seizure is vacated where it is shown to have been either improperly issued or no longer valid because of supervening factors.

When the prisoner is freed under any of the provisions for mandatory release, he is at full liberty. When, however, the release is based on the judge's discretionary powers, the prisoner may either be released outright pending trial or be placed on provisional liberty. The court may require an accused to surrender his passport, to live in a particular town, or to report at specified times to a police station. Provisional liberty may be revoked upon violation of these conditions or upon the accused's preparing to take flight or his actual flight, or upon his committing some other crime.

The use of bail in Italy is severely restricted since a financial tie to liberty is considered undemocratic. It should be mentioned that a person accused of crime in Italy does not quite enjoy a presumption of innocence, but rather a presumption that he is not guilty. (art. 27 of the Constitution) The Chief Prosecutor of Rome stated that a bail contract between the sovereignty of the state and a private individual is antithetical to Italian legal philosophy. Though provisions for the furnishing of bail exist in the statutes, these provisions are rarely invoked. One judge of the Tribunal declared that he set a bail amount in about one case in every five hundred; and only then when the offense charged arose from a disaster,

e.g., a bridge has collapsed, and where the posted bail money represents security for plaintiffs who may intervene in a criminal action to obtain civil relief.

We have stated above that the officials administering criminal justice in Italy are not overly concerned about the possibility of an accused's failure to appear for trial; and in fact, such defaults appear to be negligible. One influential reason may be that in Italy, as we have observed in England, punishment upon conviction for crime is substantially less severe than in the United States. According to Italy's Statistical Guide Book, over 50,000 persons were sentenced to prison in 1960. Of this number only 384 received sentences ranging from five to ten years, 266 over ten years, and 34 persons received life imprisonment. Coupled with the fact that the average offender need not fear a severe sentence is the additional consideration that defendants charged with the gravest categories of crime are just not released pending disposition of their cases.

Before wringing one's hands at the potential for oppressiveness in Italian pre-trial detention procedure, it would be well to study another item from the Statistical Guide Book. About ten percent (23,939) of the persons (234,584) against whom the police lodged formal criminal charges (non-traffic) were arrested in the first instance. The other 90 percent did not suffer even a few hours detention in jail prior to arraignment. Few jurisdictions in the United States, under their bail procedures, can match this record. Perhaps the newly awakened interest of a few communities in the use of the summons in lieu of arrest for charges of offenses and minor crimes may mark a step in the direction of reducing the number of unnecessary arrests.

It may be that some of the criminal charges upon which arrests are not made in Italy are so minor that they would not result in arrests in the United States. Nevertheless, even giving superficial validity to the last-mentioned statistic, it is likely that a smaller percentage of Italian defendants are held in detention awaiting trial than obtains in most communities in the United States, where an unreserved presumption of innocence prevails. Italy's inquisitorial system of administering criminal justice has some harsh overtones, as we have observed. But if despite these features its pre-trial detention practices may in the generality deal more generously with defendants, this could be a weighty argument for a fresh look at our own bail procedures.

Tribunal for Minors

As stated in the introduction, Italy shares the universal concern for the sensitive treatment of youthful offenders. The age of criminal responsibility commences at fourteen. No child under that age may be charged with a crime. There are provisions, not dissimilar to those in many other countries, for imposition of safety measures and rehabilitative treatment of offenders under that age limit.

There are also special provisions for the 14-18 age group, even though in the eyes of the law they are responsible for criminal conduct. The Tribunal for Minors is composed of a panel consisting of two career judges and two lay judges experienced in social work. We were impressed by the endeavor to procure both career and lay judges imbued with a high degree of social consciousness.

Articles 253 and 254 of the Code of Penal Procedure relating to mandatory and optional detention also relate to juveniles, but are applied more leniently. If detention is indicated, however, there are special observation institutions to which youngsters in the 14-18 year group are sent pending adjudication. They are not intermingled with older persons accused of crimes while in detention. Those charged with less serious crimes almost always remain free, unless home conditions require institutionalization for the protection of the youthful offender.

If a youth within this age group is found guilty and sentenced to prison he is confined in a special reformatory for youth. Convictions of youth found capable of reclamation to useful lives can be "rehabilitated"; that is, the past criminal record will not be shown on police certificates issued for presentation to prospective employers or to public officials au-

thorized to grant passports, driver's licenses, et cetera. There is a roster of defense lawyers who have manifested their desire to represent juvenile defendants. Only 150 youths in this age group are serving specific terms of imprisonment. In 1960, over 3,500 were receiving various forms of correctional and rehabilitative treatment adapted to their ages, capability and personalities. Two-thirds of these were in reeducation centers, most of them in centers operated by private groups, rather than directly by the State.

There appears to be extensive granting of suspended sentences to persons convicted of minor crimes and crimes of moderate severity—particularly with respect to first offenders. We were informed that a factor in the decision to release a defendant pending trial is the awareness that if convicted he will in all likelihood receive a suspended sentence. It would seem that judges are generous in handing out suspended sentences, at all age levels. Prosecutors and defense attorneys are adept at forecasting the likelihood of a suspended sentence, and in such a case, the defendant may be advised by his counsel that it is unnecessary for him to be present at his trial—a circumstance quite unusual in an American or English criminal court. There is no requirement at law that the defendant appear for trial or any stage of the prosecution following the pre-trial investigation by the prosecutor or the Investigating Judge; and it is not unusual for a trial to be concluded and suspended sentence imposed with only the attorney present.

APPENDIX II

PRE-TRIAL RELEASE PROJECTS— PERSONS TO CONTACT

Anaheim, California
Honorable Claude M. Owens
President, National Association of Municipal Judges
Municipal Court of Anaheim
Anaheim, California

Berkeley, California
Captain John A. Lindquist
Berkeley Police Department
Hall of Justice
Berkeley, California

Contra Costa County, California
Mr. John A. Nejedly
District Attorney
Contra Costa County
Hall of Records
Martinez, California

Los Angeles, California
Honorable Joseph A. Wapner
Superior Court Judge
County of Los Angeles
111 North Hill
Los Angeles, California

Oakland, California
Mr. Norvel Smith
Coordinator
Interagency Project
1419 Broadway
Room 409
Oakland, California

San Francisco, California
Mr. Irving F. Reichert, Jr.
Assistant Administrator
Continuing Education of the Bar
University Extension
University of California
Berkeley, California

Sunnyvale, California
Mr. Jacob A. Jessup
Department of Public Safety
515 South Mathilda Avenue
Sunnyvale, California

Denver, Colorado
Undersheriff Jose Trujillo
Sheriff's Office
Denver County Jail
Denver, Colorado

District of Columbia
Mr. David McCarthy, Jr.
Executive Director
D. C. Bail Project
Georgetown University Bail Center
506 E Street, N.W.
Washington, D. C.

Hartford, Connecticut
Honorable Jay E. Rubinow
Chief Judge
Connecticut Circuit Court
One Grand Street
Hartford, Connecticut

Atlanta, Georgia
Mr. Ernest Huey
Solicitor General's Office
Third floor—Courthouse
Atlanta, Georgia 30303

Chicago, Illinois
Honorable Augustine J. Bowe
Chief Justice
Municipal Court of Chicago
917 City Hall
Chicago, Illinois

Gary, Indiana
Honorable Richard S. Kaplan
City Court Judge
Gary City Court
Gary, Indiana

Des Moines, Iowa
Mr. Martin Dunn
Director
Des Moines Pre-trial Release Project
Municipal Court Building
East First and Court Streets
Des Moines, Iowa

Lexington, Kentucky
Dean W. L. Matthews
University of Kentucky Law School
South Lime
Lexington, Kentucky

Louisville, Kentucky
Dean Martin Volz
University of Louisville Law School
2301 South Third Street
Louisville, Kentucky

Montgomery County, Maryland
Mr. Frank E. Hagan
Peoples Court Clerk
Montgomery County Peoples Court
Rockville, Maryland

Prince Georges County, Maryland
Mr. Arthur A. Marshall
State's Attorney
County Office Building
Prince Georges County
Upper Marlboro, Maryland

Boston, Massachusetts
Mr. Joseph Dee
Action for Boston Community Development, Inc.
18 Tremont Avenue—Suite 700
Boston 8, Massachusetts

Lansing, Michigan
Honorable Thomas M. Kavanagh
Chief Justice
Supreme Court of Michigan
Lansing, Michigan

Kansas City, Missouri
Honorable Henry A. Reiderer
Judge of the Circuit Court
Division One
415 East 12th Street
Kansas City, Missouri

St. Louis, Missouri
Mr. Charles Mann
Chief Probation and Parole Officer
Circuit Court for Criminal Causes
Probation and Parole Office
Room 330
Municipal Court Building
St. Louis, Missouri

Burlington, Camden, Gloucester Counties, New Jersey
Honorable Ernest N. Sever
Judge of Municipal Court
Burlington County Municipal Court
Wilingboro, New Jersey

Hackensack, New Jersey
Mr. Richard Albera
Principal Probation Officer
Bergen County Probation Department
Administrative Building
Hackensack, New Jersey 07601

Albuquerque, New Mexico
Honorable James A. Maloney
Presiding Justice
Municipal Court
P. O. Box 133
222 Third Street, N.W.
Albuquerque, New Mexico

Nassau County, New York
Mr. Louis J. Milone
Director of Probation
Nassau County Probation Department
New County Court House
Mineola, New York

New York, New York
Mr. Boyd McDivitt
Deputy Director
Office of Probation
2 Lafayette Street
New York, New York

Plattsburgh, New York
Honorable Sherlock E. Haley
Judge of Clinton County
County Court Chambers
Plattsburgh, New York

Rochester, New York
Mr. Thomas C. Hartzell
Executive Director
Monroe County Bar Association
Indigents' Defense Program
401 Times Square Building
Rochester, New York 14614

Syracuse, New York
Mr. Edward McLaughlin
Assistant District Attorney
Office of the District Attorney
Onondaga County Court House
Syracuse, New York

Cleveland, Ohio
Honorable Hugh A. Corrigan
Judge, Court of Common Pleas
County of Cuyahoga
Cleveland 13, Ohio

Toledo, Ohio
Mr. Dan H. McCullough
Counsellor at Law
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Toledo, Ohio 43604

Tulsa, Oklahoma
Mr. Ollie W. Gresham
Van Cleave, Thomas, Liebler & Gresham
Suite 905—Mayo Building
5th Street at Main
Tulsa, Oklahoma

Bucks County, Pennsylvania
Mr. Thomas Colgan
William Penn Center
Newportville Road
Fallsington, Pennsylvania

Westmoreland County, Pennsylvania
Honorable L. Alexander Sculco
Judge, 10th District of Pennsylvania
Westmoreland County Court
North Main Street
Greensburg, Pennsylvania

Providence, Rhode Island
Honorable Joseph R. Weisberger
Associate Justice
Superior Court of Rhode Island
Providence, Rhode Island

Bountiful, Utah
Honorable Wendell B. Hammond
City Court Judge
745 South Main
Bountiful, Utah

Charleston, West Virginia
Mr. Paul M. Brinkley
Social Worker
Kanawha Bail Project
Kanawha County Court Building
Charleston, West Virginia

Huntington, West Virginia
Mr. David W. Forinash
Social Worker II
Cabell County Department of Welfare
1922 College Avenue
Huntington, West Virginia

Madison, Wisconsin
Professor Frank Remington
University of Wisconsin Law School
Madison 6, Wisconsin

Milwaukee, Wisconsin
Mr. Melvin Sherman
Executive Director
Wisconsin Service Association
526 West Wisconsin Avenue
Second Floor
Milwaukee 3, Wisconsin

APPENDIX III

LIST OF CONFEREES

ALABAMA

Melvin Bailey, Sheriff, Jefferson County, Birmingham

Jamie Moore, Chief of Police, Birmingham

Broward Segrest, Tuskegee

Arthur Shores, Birmingham

L. B. Stephens, Executive Director, State Board of Pardons and Paroles, Montgomery

ARIZONA

Judge Raul H. Castro, Pima County Superior Court #5, Tucson

John Flynn, Phoenix

Norman E. Green, County Attorney, Pima County, Tucson

Marvin Johnson, Phoenix

ARKANSAS

Edwin E. Dunaway, Little Rock

CALIFORNIA

Paul Augustine, Jr., Los Angeles

Judge Robert Beresford, Municipal Court, San Jose

Michael N. Canlis, Sheriff, San Joaquin County, Stockton

James G. Cooney, Los Angeles

Judge Rupert Crittenden, Berkeley Albany Municipal Court, Berkeley

Richard A. Frank, Deputy Director, Administrative Office of California Courts, San Francisco

Judge Peirson M. Hall, United States District Court, Los Angeles

Judge William Hoffman, Superior Court, Oakland

Judge Maurice T. Leader, Presiding Judge, Los Angeles Municipal Court, Division 40, Los Angeles

Dean Joseph Lohman, School of Criminology, University of California, Berkeley

Professor David Louisell, University of California Law School, Berkeley

Thomas C. Lynch, District Attorney, San Francisco

Edwin Meese, III, District Attorney, Oakland

John F. Merrill, Los Angeles

Attorney General Stanley Mosk, Sacramento

George Nye, Oakland

Judge Claude M. Owens, Municipal Court, Anaheim; President, National Association of Municipal Judges

Wally Perry, Palo Alto

Cecil F. Poole, United States Attorney, San Francisco

Irving F. Reichert, Jr., Assistant Administrator, Continuing Education of the Bar, University Extension, University of California, Berkeley

Professor Jerome Skolnick, Department of Sociology, University of California, Berkeley

Arlo Smith, Chief Assistant, Criminal Division, Office of the Attorney General, Sacramento

Professor Harold W. Solomon, University of Southern California, School of Law, Los Angeles

Alvin N. Taylor, Juvenile Control Coordinator, Office of the City Manager, Oakland

Warren Thornton, Chief, Probation Department, Sacramento County, Sacramento

Albert Wahl, Chief United States Probation Officer, United States Court House, San Francisco

Judge Joseph A. Wapner, Presiding Judge, Superior Court, Los Angeles

Francis C. Whelan, United States Attorney, Los Angeles

Judge Lionel Wilson, Superior Court, Oakland

Judge Alfonso J. Zirpoli, United States District Court, San Francisco

COLORADO

Judge Don Bowman, Denver District Court, Denver

Dean Edward King, University of Colorado Law School, Boulder

Albert B. Logan, Executive Director, National Association of Municipal Court Judges, Denver

CONNECTICUT

Alton H. Cowan, Director, Commission on Adult Probation, Hartford

Professor Joseph Goldstein, Yale Law School, New Haven

Arthur M. Lewis, Hartford

Francis McManus, Chief of Police, New Haven

Leo Nevas, Westport

Chief Judge Jay E. Rubinow, Circuit Court, Hartford

Robert C. Zampano, United States Attorney, New Haven

DELAWARE

Max S. Bell, Jr., Wilmington

Herbert L. Cobin, Wilmington

Judge Thomas Herlihey, Jr., Municipal Court, Wilmington

Charles Richards, Office of the Attorney General, Dover

DISTRICT OF COLUMBIA

David C. Acheson, United States Attorney

Harry T. Alexander, Department of Justice

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