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DEPARTMENT OF POLITICAL SCIENCE

RELEASE ON RECOGNIZANCE:

AN EMPIRICAL AND LEGAL ANALYSIS

by

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CHAPTER I - INTRODUCTION

STATEMENT OF PURPOSE

This project examines release on recognizance (ROR) as an alternative to money bail. ROR is the pretrial release of an accused on his promise to appear in court. Money bail is the release of an accused upon the deposit of a sum of money with the court. Bail reformers claim that money bail discriminates against the poor because the financial resources of a defendant determine whether he remains in jail or is released prior to his trial. ROR is an alternative to money bail offered by these bail reformers because it does not base pretrial release upon wealth.

The study of bail policy in this paper focuses on the proper role for ROR in American criminal justice. First, the empirical and legal guidelines for bail policy are reviewed to develop a normative release range for ROR. Then, the bail decisions in the Memphis-Shelby County Criminal Justice System are studied to examine the status of ROR. The use of ROR in Memphis-Shelby County is evaluated in the context of the role for ROR established in the empirical and legal framework. An explanation of the differences between Memphis-Shelby County bail policy and the framework is made to indicate areas for future reform. The suggestions for reform are based on the role for ROR proposed by the framework.

BAIL IN THE CRIMINAL JUSTICE SYSTEM

The bail policies of a jurisdiction are part of the criminal justice

system. Judges set bail so that persons accused of a crime can be released prior to their trial. The purpose behind bail can be understood by examining the value systems that operate in the criminal justice system. These value systems are articulated in the Crime Control and Due Process Models of American criminal justice proposed by Herbert Packer.[1]

According to Packer, the Due Process Model "insists on the prevention and elimination of mistakes to the extent possible."[2] The model is not based on the idea that it is socially undesirable to repress crime, but on the premise that the aim of the criminal process is to protect the factually innocent at least as much as the factually guilty. In addition, Packer says the Due Process model views

> the combination of stigma and loss of liberty that is embodied in the end result of the criminal process as being the heaviest deprivation that government can inflict upon an individual.3

Therefore, the Due Process Model not only places a premium on protecting the innocent, but also proposes that putting a person in jail is an extreme act by the state to be avoided if possible.

The concept that persons accused of crimes are "innocent until proven guilty" is central to the administration of justice in the United States. The Due Process Model emphasizes this concept. Since bail decisions can determine whether a presumably innocent person will be denied liberty before his trial, the Due Process Model suggests that bail decisions be made so that the number of pretrial releases is maximized. To protect as many defendants as possible from punishment prior to their trial, the Due Process Model indicates that a decision to release a defendant should be made strictly on a concern for appearance of the defendant at his trial.

The Crime Control Model, on the other hand, "is based on the presup-

position that the repression of criminal conduct is by far the most important function" of a criminal justice system.[4] In order to guarantee public order, the Crime Control Model requires that primary attention be paid to the system's capacity to bring criminal conduct under tight control. The efficiency screening process operated by police and prosecutors are reliable indicators of probable guilt."[5] Packer says that the Crime Control Model assumes that

> once a man has been arrested and investigated without being found to be probably innocent, or to put it differently, once a determination has been made that there is enough evidence of guilt to permit holding him over for further action, then all subsequent activity toward him is based on the view that he is probably guilty.[6]

Therefore, the Crime Control Model not only emphasizes protecting society from anti-social behavior, but also assumes the defendant is factually guilty.

The concept of "innocent until proven guilty" is not rejected by the Crime Control Model. The presumption of innocence is still "a direction to officials about how they are to proceed" in the trial.[7] However, the procedural presumption of innocence is not as strong for activities other than the trial under the Crime Control Model. The assumption of factual guilt in the Crime Control Model implies that the state has more leeway in its treatment of the defendant than under the Due Process Model. For a bail decision, the Crime Control Model indicates the state may have purposes other than appearance when a judge sets bail. The protection of society, or the pretrial detention of possibly dangerous defendants, is usually seen as one other purpose.

The Crime Control and Due Process Models are not without common ground. Proponents of both models would agree no individual should be taken into custody and arbitrarily held without any limitations. Proponents of the

models would also agree that there should be official standards guiding bail decisions. The disparity between the two models results from the claims about what should be included in these standards for judicial decisionmakers. The governmental purposes of these standards for guiding bail decisions have direct implications on the pretrial release of defendants.

The tension between the Due Process and Crime Control Models is an on-going controversy. For example, in February of 1981 Chief Justice Warren Burger criticized the current bail laws in an address to the American Bar Association. Burger attacked the bail laws because in most jurisdictions they forbid judges from considering a defendant's potential danger to society. Burger said in his address that

> the crucial element of future dangerousness, based on a combination of the particular crime, the past record and the evidence before the court, should be restored to deter the startling amount of crime committed by persons on release awaiting trial.8

Burger might not be totally embracing the Crime Control Model, but he apparently thinks the country's bail laws should move toward the values behind that model.

Burger's remarks can be interpreted two ways. He might be advocating a change in the laws that allows judges to deny pretrial release to an accused the judge thought was dangerous. A provision of this type is included in the Code for the District of Columbia. Or, Burger might be suggesting that perceived dangerousness should affect the amount of money bail. The more dangerous the defendant the higher the judge sets the money bail.

There are problems with the proposals Burger makes. Some civil rights advocates strongly oppose the Washington, D.C. law that allows judges to detain defendants to protect society. A spokesman for the American Civil Liberties Union (ACLU) believes "preventive detention is an extremely

dangerous procedure."[9] He said the ACLU "does not think the court system has the ability to predict who is going to commit a crime in the future."[10] If the ACLU is correct, detaining defendants to protect society is a practice difficult to justify.

Another problem arises if Burger means judges should adjust the amount of bail according to the judge's perception of a defendant's dangerousness. Some "dangerous" defendants might still obtain their release even if they have higher bail set. Increasing the amount of bail means that the rich "dangerous" defendant is released prior to his trial, while the poor "dangerous" defendant remains in jail. Discrimination according to wealth in this manner does not seem equitable.

Nevertheless, some judges do set bail in this manner. Judge Horace Pierotti of the Memphis City Court is an example. In a newspaper interview about bail in 1979, Judge Pierotti said

> my philosophy is that it should be as high as possible, especially with the increase in crime. . . . Society has to be protected.[11]

Judge Pierotti explained in the interview that the increase in crime today means money bail must be used to protect the community. He sees potential defendant dangerousness as an additional factor to be considered when setting the amount of bail.

The use of money bail in Memphis does in fact make some defendants wait for their trial in jail because they cannot post their money bail. A 1978 article in the Memphis Press-Scimitar showed that the crowded conditions in the Memphis City Jail were due to the large number of defendants who were unable to post bond. A representative of the police department suggested that the answer to the problem was for the judges to set lower bonds.[12]

The newspaper article in 1978 also showed that some of the defendants

were unable to post relatively small bonds. Two examples were given in the article of men who spent months in the City jail because they could not make a low bond. One of these men had his charges dismissed when he finally went to court.[13] This defendant is an example of the case which the Due Process Model would avoid.

The fact that some defendants with low bail are not released prior to their trial raises the question of "why set money bail at all?" Legally, appearance is the only purpose behind bail. In theory, the court holds the defendant's money to assure he appears in court. However, in practice, defendants obtain release by paying a bail bondsman a nonrefundable fee. The bondsman then signs a surety bond for his new client's release.

The reliance of American criminal justice on money bail has been criticized by many different sources. As early as 1832 Alexis De Toqueville recognized "that a legislation of this kind is hostile to the poor man, and favorable only to the rich."[14] A federal judge in 1963 claimed that the ultimate affect of such a system

> is that the professional bondsmen hold the key to the jail in their pockets. They determine for whom they will act as surety -- who in their judgement is a good risk. The bad risks, in the bondsman's judgement, and the ones who are unable to pay the bondsman's fee, remain in jail. The court and the commissioner are relegated to the relatively unimportant chore of fixing the amount of bail." (emphasis in original)15

The role of the bail bondsman would appear to negate the theory behind money bail. Some bail reformers suggest that posting money is not related to the appearance of a defendant. Since appearance of the defendant is the legal purpose of bail, their premise suggests that some defendants are needlessly sitting in jail. The alternative offered to replace money bail

is usually ROR, the release of a defendant on his promise to appear in court.

The acceptance of ROR as a type of bail depends on the purpose behind a bail decision. The Due Process Model suggests appearance of the defendant is the only legitimate purpose of a bail decision. If this point of view is accepted, money bail might be necessary only for those defendants who would not appear in court if released on their own recognizance. The type of bail set would be determined by the judge's perception of the likelihood of the appearance of the defendant.

The Crime Control Model suggests that potential defendant dangerousness, as well as likelihood of appearance, is a legitimate purpose of a bail decision. A concern for dangerousness might mean a determination of likelihood of appearance for some defendants is unnecessary since they will be detained to protect society. A preventive detention hearing is a method presently used in some jurisdictions to detain dangerous defendants.

On the other hand, the Crime Control Model might suggest the amount of bail set for a defendant would be determined by the perception of dangerousness and appearance. The amount of money bail would increase with the dangerousness of the defendant and the likelihood of flight. Setting bail in this manner protects society by making the more dangerous defendants less likely to be released. It also keeps court resources from being wasted on preventive detention hearings. The release of a defendant a judge perceives as dangerous would depend on how dangerous the judge thinks the defendant is, how likely the judge thinks the defendant is to flee, the financial resources of the defendant, and the willingness of a bondsman to accept the defendant as a client.

Placing the bail decision in the context of Packer's two models of criminal process has identified two purposes for bail decisions: assuring

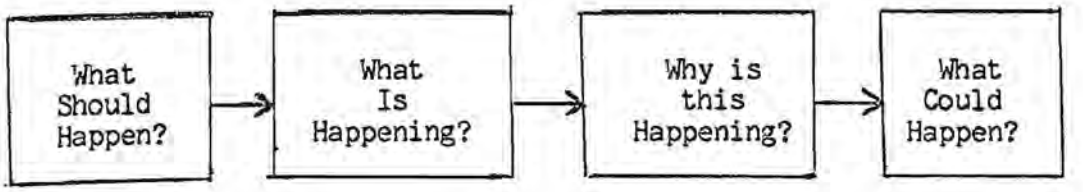
the appearance of the defendant and protecting society. The role ROR plays in a criminal justice system depends on which of these two purposes is operating in a bail decision. The adoption of the values behind one of these models, or even an emphasis on one model over the other, could change the number of defendants released on their own recognizance.

THE FORMAT AND METHODOLOGY

The inquiry of this paper into the role of ROR in American criminal justice begins by reviewing the past literature on bail decisionmaking. After giving the historical background of the bail reform movement, Chapter II anchors the discussion within the context of empirical research already conducted in the area of bail decisionmaking. The review of past empirical studies is presented to bring the reader up-to-date with what has been learned in previous research. The literature review also develops a theoretical framework around the issues in bail decisionmaking. This theoretical framework is used to suggest guidelines for the use of ROR.

Various legal sources are analyzed in Chapter III to provide an official definition of the purpose of bail. In addition, the legal analysis examines the instructions to judges in the legal sources to identify the kinds of criteria that "ought" to guide bail decisions. The legal purpose behind bail and the legal bail decisionmaking criteria are used to develop a legal framework that suggests guidelines for the role of ROR.

The findings of the literature review and the legal analysis are then used to evaluate the status of ROR in the Memphis-Shelby County Criminal Justice System. The following model for policy analysis was constructed to organize the discussion of ROR in Memphis-Shelby County:



The model of policy analysis provides a format for proposing an ideal policy, describing the present policy, identifying the potential points for reform, and making suggestions for those reform efforts. The model is designed to give a policymaker the basis on which to justify moving the existing ROR policy toward what the earlier chapters suggests is its proper role.

"What Should Happen" is developed in Chapter IV. First, the Tennessee state law is described. Then, the state law is interpreted using the guidelines from the literature review and legal analysis. This chapter makes several proposals for the proper role of ROR in Tennessee based on this interpretation of the state law.

The present bail policy in Memphis-Shelby County, or "What is Happening," is described in Chapter V. The bail outcomes of defendants are described by data gathered for this purpose. During 1980 four different judges presided over felony City Court. Therefore, a month in which each one of these judges presided was used for the sample.

The sample includes 1851 defendants. Information was gathered on the defendant's charge, the judge who set bail, the action that Pretrial Services took, and the type of bail the defendant had to post to be released from jail. This information was drawn from the daily records kept by Pretrial Services of bail decisions. In addition, information was gathered on whether a defendant was released from City Jail and the time until release for one-fourth of the original sample. This subsample was drawn

randomly from the original four month sample.

Information compiled by Pretrial Services is also presented to describe the effect Pretrial Services has on the status of ROR and to describe the effects of parts of the criminal justice system not covered by the earlier sample. The Pretrial Services information is used to make a fuller explanation of how the bail decisionmaking process affects the number of defendants released on their own recognizance.

Chapter VI, or "Why Is This Happening," examines the systemic factors that shape bail decisions. This chapter tries to explain the status of ROR in Memphis-Shelby County. The explanation is based on interviews using open-ended questions. This format of interviewing is intended to stress the interviewee's definition of the situation. The interviewee introduces his own notions and assumptions of what he regards as relevant, instead of relying upon the interviewer's notions.[16]

However, interviews are not always a reliable method of examining a policy. The empirical information in Chapter V is used to validate the interviews. Combining the results of the interviews and some empirical analysis should produce a reasonably accurate explanation of why judges set ROR.

Chapter VII, the final part of the model, focuses on what could happen with change. The chapter offers some suggestions to move the Memphis-Shelby County Criminal Justice System toward the role the empirical and legal framework proposed for ROR. A prediction is made of what could happen if the bail policy is changed. The explanation of why ROR is set by judges is used to suggest ways of changing the bail policy. This last chapter is intended to make some concrete proposals to reform the ROR policies if actors in the criminal justice system think the bail policies need to be changed.

ENDNOTES

1. Herbert L. Packer, The Limits of the Criminal Sanction (Stanford, California: Stanford University Press, 1968).

2. Ibid., p. 163.

3. Ibid., p. 165.

4. Ibid., p. 158.

5. Ibid.

6. Ibid., p. 160.

7. Ibid., p. 171.

8. Fred Barbask, "Burger Says Legal System Is Too Easy On Criminals," The Washington Post, February 9, 1981, p. A1.

9. Benjamin Weiser, "Prosecution Wants More Suspects Detained in Jail," The Washington Post, February 12, 1981, p. A1, A27.

10. Ibid.

11. Leonard A. Novarro, "Bail: Protection for the Accused or for Society," Memphis Press-Scimitar, December 13, 1979, p. 1.

12. Ken Garland, "Bail Problems Add to Jail Crowding," The Memphis Press-Scimitar, December 13, 1978, p. 1.

13. Ibid.

14. As quoted in the preface of Pretrial Release: An Evaluation of Defendant Outcomes and Program Impact (Washington, D.C.: The Lazar Institute, 1981).

15. Parnell v. United States, 115 U.S. App. DC 379, 320 F.2d 698, 699 (1963) (Wright, J. concurring).

16. For further discussion of this type of interviewing see Lewis A. Dexter, Elite and Specialized Interviewing (Evanston, Ill.: Northwestern University Press, 1970), or Interviewers Manual, revised edition (Ann Arbor, Mich.: Survey Research Center, Institute for Social Research, 1976).

17. For an overview of Policy Analysis Models and their formulation see Duncan MacRae, Jr. and James A. Wilde, Policy Analysis for Public Decisions (Belmont, Calif.: Wadsworth, Inc., 1979).

CHAPTER II - LITERATURE REVIEW

A review of bail literature gives an understanding of the present state of knowledge about release on recognizance, as well as helping to develop a theoretical framework by which the Memphis system can later be evaluated. As one of the methods of pretrial release, ROR must be compared to the other, dominant form of pretrial release, money bail. Although there are variations on these two types of bail, all of the variations may be divided into financial, or nonfinancial bail. This discussion is simplified by limiting it to money bail and ROR, making the comparisons between the two clearer. The past research is presented to describe what other studies have discovered about bail policy. Individual studies are described to show the different areas concerning bail decision-making that have been researched and to provide an understanding of the methodology that has been used.

HISTORY

The roots of our bail system are in medieval England. During that time, travelling magistrates visited the various towns and administered justice. Between these visits the local sheriff was responsible for the custody of accused persons. Due to the high cost of imprisonment and the vulnerability of the jails to escapes, it became a common practice for the sheriff to release a defendant in the custody of a friend of the accused. The third person would promise himself to stand in place of the

defendant at the trial should the defendant flee the jurisdiction. The medieval practice of releasing an accused to the custody of a third party is similar to the modern practice of releasing a defendant on his own recognizance. Today, the supervision is usually by a government agency instead of a private citizen.

Problems evolved with a third party standing trial for a defendant who did not appear in court. By the thirteenth century, a sum of money had become the more common means to assure the appearance of the defendant before the magistrate. If the accused failed to appear, the sheriff would force the third party to pay an agreed upon sum of money instead of standing trial. The third party still had the responsibility for making sure the defendant appeared in court as required, but he risked forfeiting a sum of money rather than his own freedom.[1]

A critical difference developed between the American bail system of the nineteenth century and the traditional English system which had been brought to the colonies. The commercial bail bondsman assumed a dominant role. Under the English system, the personal relationship between the defendant and the person who posted money bail was as important as the sum of money at stake. However, the mobility of nineteenth century Americans reduced the ability of defendants to find a friend to act as a third party to obtain their release. The commercial bondsman gradually became increasingly important, developing into the money bail system that "remains the predominant form of pretrial release in this country throughout the twentieth century."[2]

EARLY DESCRIPTIVE STUDIES

One of the first critical examinations of the American money bail

system was by Roscoe Pound and Felix Frankfurter in a book published in 1922.[3] The study was a systematic, in depth examination of problems involved in the administration of criminal justice in Cleveland, Ohio. It asserted that the "real evil in the situation is not the matter of easy bail, but the professional bondsmen who make a business of exploiting the misfortunes of the poor."[4] The book called for the "removal of bail wherever possible, and a relaxation where such a removal cannot be accomplished."[5] Since the book examined the entire Cleveland criminal justice system, it gave little empirical data on which to base reform efforts. Yet, it recognized that the American bail system was not functioning properly and led to later studies.

The first major empirical study of pretrial release was published by Arthur Beeley in 1927 about the bail system in Chicago.[6] Beeley collected background information about defendants detained in the Cook County jail because of inability to make bail, and made an estimate of the proportion of detained defendants that he thought could be expected to appear at future court proceedings, if released on nonfinancial conditions. Although he never tested his predictions, Beeley believed that nearly three-tenths of those detained could have been safely released. He later discovered that approximately one-third of these detained defendants were not convicted. Beeley concluded that the bail system in Chicago was "completely broken down" and that the best solution was to make "the use of pretrial detention unnecessary altogether."[7]

Beeley's estimates were based on a number of assumptions: 1) bail and detention should be predicted exclusively on a concern for appearance of defendants at trial, 2) defendants charged with minor offenses and having no previous record were more likely to appear, 3) social history data

(family stability, employment, and residence) were helpful in establishing likelihood of appearance, and 4) an intuitive assessment of character (based on intelligence, personality and habits) was also a reliable predictor of appearance. These same assumptions later became the core of efforts to reform American bail systems.[8]

In 1932 the Oregon Law Review published the results of a comprehensive study by Morse and Beattie examining the disposition of 1,711 felony cases in Multnomah County (Portland), Oregon.[9] The study examined the pretrial custody-release status of defendants arrested on felony charges during 1927 and 1928. In that jurisdiction, roughly 20 percent of all felony defendants were released on bail. Only 8 percent were released on their own recognizance. The rest were detained.

The amount of bail set for a defendant depended on the severity of the charge. Low bail cases tended to be disposed of at the preliminary hearing and were more unlikely to be indicted by the Grand Jury. In addition, the defendant's custody status, or whether he was in jail before and during his trial, was found to be strongly correlated with the disposition of the case. Although Morse and Beattie did not claim a cause and effect relationship, their data did raise questions about the connection between a defendant's custody status and his final case disposition.[10]

Interest in reforming the American method of pretrial release was dead until more than twenty years later when Professor Caleb Foote of the University of Pennsylvania Law School supervised two descriptive studies. His teams of law students examined the administration of bail in Philadelphia and New York.

The Philadelphia bail study, undertaken in 1953, asserted that the bail decisionmaking process did not consider likelihood of appearance.[11]

The size of bail was found to be based upon the charge. Seventy percent of the defendants had bail set without being asked any questions by the judge. Twenty-five percent of the state defendants and 50 percent of the federal defendants awaited trial in jail. Eighteen percent of these detained defendants were acquitted or had the charges dropped. In comparison, 48 percent of the bailed were acquitted or had their charges dropped. Finally, the study found defendants charged with the least serious offenses and lower money bail jumped bail more often than those charged with serious crimes.[12]

Although the applicable statutes were different, findings in the New York study[13] were similar to those encountered in Philadelphia. Bail was closely related to the offense charged. The Courts seldom made inquiries into the defendant's community roots, job status, or financial position. Release of a defendant on his own recognizance, known in New York as "pretrial parole," was used in only three percent of the cases. Moreover, marked differences were seen between the outcomes of the cases of those detained in jail and those free on bail. The defendants detained in jail were less likely to have the charges dismissed or be acquitted, and more likely to plead guilty, or upon conviction be given a prison sentence. The sentencing pattern was particularly disparite. Forty-five percent of the defendants free on bail who were found guilty were given prison sentences. Eighty-four percent of the detained defendants found guilty were given prison sentences. However, as the author noted, it was possible that factors besides being detained, such as prior criminal record or the strength of the prosecutor's case, might have contributed to the disparities.[14]

THE MANHATTAN BAIL PROJECT

The Manhattan Bail Project -- undertaken in the early 1960's in

New York City under auspices of the Vera Foundation -- responded to the issues that had been raised in the earlier descriptive studies. A preparatory descriptive study replicated the findings of earlier studies.[15] The controlling factor in bail decisionmaking appeared to be the crime with which a person was accused. The study found a relationship between the bail amounts and the number of defendants who posted bond, with more than a third of the defendants being detained because they could not raise bail. Release on recognizance occurred in only about one percent of all cases. Almost two-thirds of the defendants who eventually had their cases dismissed spent some time detained in jail. Released defendants fared much better than jailed defendants in terms of both conviction rates and sentencing.[16]

A striking implication of the first part of the Manhattan Bail Project was that for over three decades and across four varying jurisdictions (Chicago, Portland, Philadelphia, and New York) "the general substance of the descriptive findings had not changed."[17] The problems with the American system of money bail had been recognized as early as 1922. The descriptive studies had shown bail was being set according to the charge, keeping poor defendants in jail prior to their trial. Not only were people accused of committing an offense sitting in jail, but detention of defendants unable to post bond seemed to have adverse affects on the disposition of their cases. Although the inequities in the system had been recognized in the 1920's, no reform efforts had been made. Now, the Vera Foundation decided to demonstrate that the bail system could be changed.

The action part of the Manhattan Bail Project that followed the descriptive study was staffed primarily by students from New York University Law School. In the morning, the student staff members interviewed detainees, gathering information on a number of factors assumed to be rele-

vant to pretrial release decisions. This information included place of residence, employment history, family ties in New York City, prior criminal record, and possible character references. Defendants who already had private counsel and those charged with several types of crimes (mainly homicide, narcotic cases, sex offenses involving minors, and assault on a police officer) were not eligible for an interview. If the information gathered in the interview indicated that the defendant would be a "good risk" for release on his own recognizance, the interviewer would try to verify the information by telephone. The staff would then decide whether to recommend the defendant for pretrial parole. Initially, this decision was made subjectively, on a case-by-case basis. Later, a point scale was devised to quantitatively weigh the interview questions and provide an objective decision.

If the staff decided to recommend a defendant, a short written summary of background information was sent to the staff member in the arraignment courtroom. This staff member had a chart which randomly divided the defendants' written summaries into "experimental" and "control" groups. If the defendant fell into the experimental group, the Vera recommendation and summary were read into the record and became part of the release decision. If he was part of the control group, the staff member did not read the recommendation or read the summary.

Randomly placing the defendants into either the control group or the experimental group allowed the Vera Foundation to empirically show two things. First, judges would release more defendants on their own recognizance if they had information other than the charge which could be considered in the bail decision. Second, similar groups would have different judicial outcomes if one group was not released before trial.

Making the groups similar by randomly placing them in the experimental or the control group strengthened the Vera Foundations findings about the effects of background information and pretrial detention.

Judges paroled four times asy many defendants with verified background information as defendants without such information. During the first eleven months of the operation, 60 percent of the experimental group was given ROR. Only 14 percent of the control group was given ROR. The released defendants also made most of their court appearances. Only 1.2 percent of the recommended persons jumped parole. In comparison, a study one year earlier showed that 3.8 percent of all defendants at liberty before trial jumped bail. Furthermore, additional evidence was found that indicated released defendants had more favorable case outcomes than detained defendants. Only 41 percent of the parolees were convicted, while 77 percent of the detained persons in the control group were convicted.[18]

The Manhattan Bail Project empirically demonstrated that judges in New York would release more defendants on their own recognizance if they had information upon which to make this decision. That study showed that those defendants released on pretrial parole were more likely to return for trial than other defendants at liberty. The study also provided further support for the argument that pretrial detention affects the final outcome of a case.

The findings of the Manhattan Bail Project triggered the creation of bail projects in many other communities. By 1965, programs were operating in over 70 different jurisdictions.[19] The success and acceptance of ROR programs was due to the ease of integrating the background information used by the Vera program into existing court procedures. In addition, many of the new programs established by the bail reform efforts used the Vera point scale

to recommend eligible defendants for release. The success the programs imitating the Manhattan Bail Project had with defendants coming back to court further helped secure a place for ROR programs in these other jurisdictions.[20]

The Manhattan Bail Project and the earlier descriptive studies created the background for understanding the issues involved in bail decisionmaking. These studies questioned the administration of bail in America and focused attention on the inequities of dependence on money bail. Several important problems were recognized:

1. Bail was set on the basis of the offense with which the defendant was charged; the more serious the charge, the higher the bail.
2. Other factors, such as community ties or the financial position of the accused, were not considered in most bail decisions.
3. Consequently, many defendants, although presumed innocent, sat in jail because they could not make their money bond.
4. In addition, whether or not the defendant was in jail at the time of his trial seemed to be tied to his later judicial outcomes.

The Manhattan Bail Project attempted to solve some of these problems. By increasing the role for ROR, the Vera Foundation reformed the bail decisionmaking in New York.

RECENT LITERATURE

The Manhattan Bail Project left many questions unanswered. No one explored how many and which defendants could be trusted and released on their own recognizance. Research was still needed to identify defendant characteristics that predict if a defendant would be a "good risk" for release. Additional descriptive studies were needed to find how effectively reform efforts were working. Literature addressing these

problems followed the Manhattan Bail Project, giving an indication of the developing role for ROR in American criminal justice systems.

In 1975, Mahoney published An Evaluation of Policy Related Research on the Effectiveness of Pretrial Release Programs.[22] In his attempt to answer the basic questions about pretrial release programs, Mahoney's report reviews and assesses almost all of the applicable literature up to that time. In the report Mahoney groups the empirical studies into three general categories: 1) evaluations of individual release projects; 2) studies of overall pretrial release systems in single jurisdictions; and 3) national scope or multi-jurisdictional studies comparing the operation of pretrial release systems in different jurisdictions.[23]

Mahoney found the first and largest group lacked methodological rigor, thereby making the project evaluation studies not as useful for generalizations about the state of knowledge of pretrial release. Almost every pretrial release project has produced a paper or report that contains quantitative data and discusses the project's success. These papers are used to justify a release program's existence or to argue for the expansion of the program. Although some project evaluation studies raised questions about or discussed administrative difficulties concerning own recognizance, their lack of methodological rigor, as suggested by Mahoney, made them not as useful for developing policy.[24] Therefore, few evaluation studies were reviewed by Mahoney.

Mahoney did find some of the single jurisdiction studies and the cross-jurisdictional national studies to be useful in shaping the present state of knowledge about pretrial release. The single jurisdiction studies examine the overall pretrial release system of a particular city or county. The national studies compare the bail and pretrial practices on a cross-

jurisdictional basis. By reviewing a number of both of these types of studies, Mahoney determined the state of knowledge about pretrial release at the time he wrote his evaluation.

Mahoney listed a number of research questions that he felt had been resolved since the beginning of the bail reform movement and the Manhattan Bail Project. For example, practical alternatives to the traditional surety bail system -- including release on recognizance and deposit bail[25] -- had been proven feasible. In addition, Mahoney found that after the development of these alternatives to the traditional system, a greater number of defendants were released prior to their trial. Although he did not find a distinct pattern of lower FTA rates for any form of release, in the "same jurisdiction there was generally only a slight variation in the FTA rates" of ROR and money bond.[26] Although Mahoney recognized that many questions were yet unresolved, he felt more was known in 1975 than ten years before.

A number of the questions still to be answered were "key policy questions."[27] Mahoney proposed the following questions:

1. What are the comparative failure to appear rates for defendants on different types of pretrial release?

2. What factors tend to produce low failure-to-appear rates?

3. What are the comparative rearrest rates for defendants on different types of pretrial release?

4. What factors tend to produce low rearrest rates?

5. To what extent is it possible to develop criteria by which to accurately predict which defendants will flee the jurisdiction or commit crimes if released?

Mahoney felt these questions could be answered if sufficient resources for research were available.

EVALUATIVE STUDIES

Since Mahoney conducted his study, there have been a number of descriptive studies evaluating the different types of bail. Single jurisdiction and multi-jurisdiction studies have collected data and statistics to assess the bail alternatives. This review describes the studies which are fundamental to understanding the administration of bail. The single jurisdiction and national studies are divided into evaluative or descriptive works and into prediction studies (studies attempting to identify the characteristics which predict future defendant behavior.) The descriptive studies are discussed first.

Professor Michael Kirby of Southwestern At Memphis conducted an empirical study of the Memphis-Shelby County jurisdiction in 1974.[28] The study, entitled "An Evaluation of Pretrial Release and Bail Bond in Memphis and Shelby County," describes and evaluates the Pretrial Services Program and the bail bondsmen in the jurisdiction.

Professor Kirby described many findings in the Memphis system relevant to forming bail policy. He found the forfeiture (failure to appear) rate of defendants released on their own recognizance after a Pretrial Services recommendation was considerably lower than that of those released by bondsmen, or those released on their own recognizance without supervision. For felony defendants, the Pretrial Services releases only failed to appear seven percent of the time. Nineteen percent of the clients of the bail bondsmen failed to appear in court and 24 percent of the unsupervised own recognizance releases failed to appear. The study's find-

ings concerning FTA rates indicate that the Pretrial Services program either successfully selected defendants who were likely to appear in court, or effectively supervised the defendants released by the agency.

In addition, Kirby compared the rearrest rates for Pretrial Services and bail bondsmen. He found that while 25 percent of the defendants released by bail bondsmen were rearrested, only 16 percent of those released by Pretrial Services were rearrested. In addition, he showed that the bail bondsmen releases were rearrested on more serious charges. Kirby concluded that the Pretrial Services defendants are less of a threat to the community than the clients of the bail bondsmen.[29]

While examining the rearrest rates of the Memphis system, Kirby observed that interviews show that local judges considered a defendant's danger to the community when making bail decisions. However, Kirby found that more serious charges are rearrested in much lower percentages and that, except for non-person felonies, "the original charge does not predict the crime for which the defendant will be rearrested."[30]

Finally, Professor Kirby examined the Memphis system to suggest ways it could be improved. He believed the forfeiture rate could be reduced by 59 percent if the trial were held 90 days from arrest. Since he found that even when the size of bond is taken into account, the more serious charges forfeit in lower percentages, he said charge seriousness should not be a factor in a bail decision. Kirby noted that Pretrial Services used a notification system, helping to eliminate confusion about court dates. He suggested that this system could decrease the overall non-deliberate forfeiture rate if adopted by the City Courts. Due to resource restrictions, Kirby was not able to look at prior record and community attachment as predictors of defendant behavior. Yet, his

findings showed that in terms of appearance and rearrest, the Pretrial Services' defendants were more "successful" releases.[31]

In 1974, after revising and condensing his doctoral dissertation, Paul B. Wice published, as a book, Freedom For Sale.[32] Wice's study tried to assess the effectiveness of bail reform projects in many different jurisdictions. Wice based his study on questionnaires mailed to criminal court judges, prosecuting attorneys, public defenders, other attorneys, and bail reform project directors. In addition, Wice conducted personal interviews in eleven cities chosen from the original 72 in his mailed survey. Wice used the responses as a basis for analyzing the factors contributing to low failure-to-appear rates and low rearrest rates, as as well as for comparing the relative effectiveness of pretrial release programs in "reform" systems with traditional systems.[33] Although Wice himself recognizes there are opportunities for distorting information with his methodologies, both techniques did produce the same results.

After analyzing and discussing his findings, Wice concluded his book with a number of observations and suggestions. He found that bail reform projects were more effective than traditional systems that rely mainly upon bondsmen for the selection and supervision of released defendants. The bail reform cities released a greater number of defendants and had equal, or frequently lower, forfeiture and rearrest rates. Wice questioned the fairness of the community ties standard for choosing own recognizance releases, but said he felt the Vera Scale was the best available alternative. He recommended that no offenses should be excluded from a bail project's jurisdiction, observing that "it has repeatedly been shown in this study that there is no correlation between the seriousness of the crime of which the defendant is accused and his proclivity

toward forfeiting bond."[34] Wice stated "the most important procedural variable related to maintaining a high effectiveness raising a low forfeiture rate is the amount of supervision of the defendant during his pretrial release."[35] He said that notification of all court appearances and weekly contact through phoning in or appearing in person are essential to a program's success.

Bail Reform in America by Wayne Thomas assessed the accomplishments of the bail reform movement.[36] His book compares samples of 200 felony and 200 misdemeanor defendants drawn from court records of 20 major urban jurisdictions for the years 1962 and 1971. These two years were chosen to give one year before the bail reform movement and one year after. Thomas' study focuses on rates of detention and methods of release, as well as failure-to-appear rates for both the "before" and "after" years. Although Thomas' research design eliminated some of the methodological problems encountered by Wice, his study also had some problems. Incompleteness of court records, varying court structures, and discrepant definitions of felony versus misdemeanors led Thomas to write that "the results of the study are not offered as conclusive proof, but rather as an indication of what has been the apparent effect of the bail reform movement."[37]

Thomas reported a number of interesting findings. He found that overall the percentage of defendants detained dropped from 52 percent in 1962 to 33 percent nine years later. He found that about the same proportion of defendants were being released on money bail, but that the proportion of defendants released on their own recognizance increased from less than 6 percent to about 23 percent. Thomas found that the overall forfeiture rate had increased from 6 percent to about 10 percent, but in 1971 the rates for own recognizance and bail releases were almost identical. He

found the jurisdictions with the highest rates of nonfinancial release did not have the highest FTA rates, nor did the ones with the most defendants detained have the lowest FTA rates.[38]

Thomas' findings show that ROR was being set by judges almost four times as often in 1971 as it had been in 1962. The increased use of ROR shows the Bail Reform Movement had an effect on the bail policies of the 20 urban jurisdictions. However, his study also showed that in 1973, 77 percent of the defendants in these jurisdictions had either money bail or no bail set, and that 77 percent of these defendant never posted bond, thus waiting for their trial in jail.[39]

John Goldkamp published an evaluative study in 1979: Two Classes of Accused: Study of Bail and Detention in American Justice.[40] After explaining the basic background behind bail reform, Goldkamp reviewed various sources of legal policy. His aim was "not only to discover an 'official' definition of the legal purpose of bail and detention, but also to learn through instructions to bail judges . . . criteria that 'ought' to guide bail decisions."[41] Then, Goldkamp presented a critical review of previous literature of bail policy, to give an overview of what has been learned from past empirical research. Finally, after exploring the legal and empirical literature on bail, Goldkamp focused on Philadelphia as a case study to analyze bail decisions and pretrial statuses of defendants within the framework he had developed.

Goldkamp perceived two bail ideologies: bail strictly as a means to assure appearance, and bail with a concern for potential defendant dangerousness. The results of his study of legal guidelines suggests that danger "may be a constitutionally permissible use of bail," but at the least, the ambiguity of legal guidelines and definitions does make the

danger ideology potent "behind the scenes in all bail decisionmaking."[42] Goldkamp believed the discretion allowed judges by the bail laws through ambiguous instructions made dangerousness a sub rosa factor in all bail decisions. From the previous research, Goldkamp found that no decision criteria,

> including community ties, charge seriousness, or any others promulgated in the legal guidelines reviewed, have been found to do what they presumably are supposed to do.[43]

Goldkamp claims that whichever of the two bail ideologies is being used, past research shows that the available decision criteria "cannot predict risk of flight or pretrial dangerousness."[44]

After discussing the legal guidelines and past research, Goldkamp examined the Philadelphia jurisdiction. His empirical analysis of Philadelphia bail procedures showed that the Philadelphia jurisdiction resembled American bail systems before the bail reform movement. The seriousness of the charge predominated in bail decisions and defendants who could not make their money bond were still detained in jail. Goldkamp found that pretrial custody had a negative impact on the sentencing outcomes of defendants, leading him to question the link between charge seriousness and cash bail. He said the relationship between pretrial detention and sentencing, even after controlling for charge and prior record, suggests pretrial detention denied "equal justice to detained defendants."[45]

Goldkamp said the governamental purpose in bail decisionmaking should be the prediction of likely absconders and dangerous defendants. However, he did not think the state can demonstrate that the criteria now being used effectively serve these purposes. Since empirical findings have not shown prediction to be satisfactory, Goldkamp suggested the class-

ification of defendants be based on an equal protection point of view, or a "fairness" standard. A role for race or ethnicity or socio-economic factors, (such as owning a car or having a telephone) would not be acceptable. However, indicators such as warrants, open cases, probationary or parole status, seem to Goldkamp to meet the "logical" as well as the "fairness" standard. Goldkamp felt charge seriousness might logically meet this standard, but pointed out that research does not support the notion that the more serious the offense a defendant is charged with, the more likely he is to flee or be dangerous. Goldkamp concluded by observing that previous studies have not resolved the issues, but that more research is needed to determine what factors actually do and should determine a bail decision.[46]

The evaluative studies have confirmed the original findings of the Manhattan Bail Project. As Mahoney recognized, more defendants are being released before their trial, and more defendants are being released on their own recognizance than before the bail reform movement. The studies described show that the defendants given ROR usually have as good or better FTA rates than those released on money bail. In addition, jurisdictions with large numbers of own recognizance releases have been shown not to have higher FTA rates.

Research has shown that defendants released on their own recognizance are no more likely to be rearrested than other releases and that the number of own recognizance releases can be increased without affecting pretrial crime. Although the estimates for total rearrests varies, all the studies indicated that the rearrests of defendants for felonies against a person, or a dangerous crime, were rare.

Although the incidence of ROR has increased, both Thomas and

Goldkamp said a large number of defendants sit in jail until their trial because they cannot make money bond. If Goldkamp's analysis of one of the most progressive jurisdictions, Philadelphia, holds for the rest of the country, the American bail system is still suffering from the same type of problems Beeley recognized in 1927. Bail determinations are still based mainly on the charge and detained defendants have less favorable judicial outcomes than released defendants. These problems make the criteria for deciding whether or not to release a defendant on his own recognizance an issue.

The evaluative studies have shown defendants released on their own recognizance have not failed to appear, nor have they been rearrested more often than other defendants. Yet, the question of how many defendants can be safely given ROR has not been discussed. As Mahoney notes, an answer to this question depends on the ability of researchers to develop criterion that accurately predict which defendants will flee the jurisdiction. The studies that attempt to find predictive criteria need to be examined to see if Goldkamp's claim that "the available decision criteria cannot predict risk of flight or pretrial dangerousness" is correct.[47]

PREDICTION STUDIES

A major assumption of the Bail Reform Movement has been that information other than the type of offense is relevant to the bail decision-making process. Point scales are seen as attempts to predict which defendants will appear in court. The Manhattan Bail Project based the decision to recommend a defendant on "objective criteria" such as residential stability, employment history, family contacts, and prior criminal record. Beeley used the same type of criteria in 1927 when he decided some Chicago

defendants were "dependables." The prototype point scale developed by the New York Project, often referred to as a "Vera Scale", has been used as a model for fact-finding and recommendation decisionmaking in many jurisdictions, including Memphis-Shelby County.

Another assumption of the Bail Reform Movement was that defendant dangerousness was not supposed to be a factor when setting bail. However, the relationship between charge and bail amounts suggest dangerousness has been a historical consideration; most of the prediction studies have also attempted to predict defendant dangerousness.

In spite of questionable validity, the measure of a defendant's dangerousness has traditionally been the rearrest rate. Rearrests is a questionable criterion for several reasons. First, all defendants who commit crimes are not rearrested. Second, those arrested may not, and sometimes have not, committed a crime. Third, if "dangerousness" is the concern, the measure should clearly be for serious crimes, not all arrests. However, the adjudication for more than one offense at a time becomes exceedingly complex. Rearrest rates are still more practical than convictions as the measure of dangerousness.[48]

The same factors or variables to predict which defendants might fail to appear have been used too predict which defendants might be rearrested. Therefore, the studies predicting appearance and dangerousness are discussed together.

The ability of decisionmakers to predict which defendants will appear in court or will be rearrested depends on the validity of the criteria used to make a decision.A number of studies focusing on prediction are described and analyzed. The findings of these studies indicate whether the criteria are appropriate for determining whether a defendant

will be released on his own recognizance.

"An Empirical Analysis of Pretrial Release Decisions" by Michael Gottfredson[49] presents the findings of a special release program. The program was designed to examine the relationship between the information available to bail decisionmakers and the appearance and rearrest rates of defendants. By comparing the predictive abilities of the scale to subjective evaluations made by an investigator of the local release program, the study attempted to validate the Vera Institute Scale.

The special release program centered around 328 indigent defendants who were released under special arrangement with the judges. The defendants in the special group had petitioned the Los Angeles Superior Court O.R. Project for ROR release. They were denied release based on an investigator's subjective evaluation of the defendants risk. These special releases became the experimental group. The "control" group was 210 randomly selected defendants out of the 619 defendants who received positive recommendations from the investigator and were released on their own recognizance. The validation study attempted to assess the predictive validity of the Vera scale by comparing the defendants who would have met its objective criteria to the group that was released by the subjective criteria.

When court appearance was used as the criteria for success, the study found the subjective evaluations failed to accurately predict 73 percent of the defendants in the experimental sample who did not appear. The analysis of the Vera scale and the construction of an "improved" guide was no more successful at predicting behavior for this sample than the subjective method.

When rearrest was used as the criteria for success, the study

found the subjective evaluation failed to accurately predict 53 percent of the experimental sample as being successes, and 26 percent of the control sample as failures. In addition, if defendant dangerousness is defined as rearrests for crimes against the person, only 5 percent of each group were dangerous. Again, the Vera scale was not a better prediction guide than the subjective evaluations.

Gottfredson acknowledged some of the limitations of his study, and warned against generalization to other groups of defendants or other jurisdictions. He said that his study showed that "both failure to appear for trial and arrest for crimes while on pretrial release are relatively rare events."[50] His study also showed that the subjective evaluation unnecessarily detained a majority of the defendants who petitioned for ROR, but seemed to be a better predictor than the Vera scale. However, when comparing the performance of the defendants in the experimental and control groups, one must remember that the defendants were not randomly placed in each group. The experimental group consisted only of defendants who had been denied release by the subjective evaluation, but still qualified using the Vera scale. This methodological problem limits the validity of Gottfredson's claim that subjective evaluations are better predictors than the Vera scale.

A 1978 paper by Jan Gayton, "The Utility of Research in Predicting Flight and Danger," examined how far research has progressed in predicting defendant behavior.[51] The findings of six different studies were summarized. Although the studies reviewed found high point scale scores to be associated with low FTA rates, the presence of a telephone in the home was the strongest indicator that the defendant would appear in court. The second strongest indicator of appearance was evidence that a defendant had family or

friends who would promise to get him or her to court. Another factor that seemed to be related to the FTA rate was whether or not the defendant was supervised. However, only two of the studies looked at supervision. Gayton's paper found that the length of time on release is associated with appearance. The longer the period of pretrial release the higher the rate of failure to appear in court. Charge severity was not connected with failures to appear in any of the studies, but some studies found prior record and some types of crime were related to high FTA rates. However, other studies did not find a relationship with prior record, and different studies found different types of crimes to be related.

Gayton found that the only factor that clearly seems to be related to pretrial crime is the length of time between trial and rearrest. The type of charge is associated with rearrest, but the association is not as strong as the length of time to trial. In addition, the research indicates there may be a relationship between prior record and rearrest, but the research is not conclusive. Gayton decided the research available exploring the association between supervision and rearrest rates was inconsistent. Some studies suggested supervision had an effect on the number of rearrests, but one did not. Finally, no study found a relationship between socio-
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economic factors and rearrests.

Gayton's summary of six other studies showed that findings in different empirical research on pretrial release are not consistent. She also showed that the three factors found to be most closely associated with appearance in court -- a telephone, family or a friend promising to help get the defendant to court, and the length of time on release -- are not reflected in a Vera-type scale. The inconsistencies Gayton found in the other factors show the problems with basing release decisionmaking criteria

on empirical studies. The different studies did not agree on which factors were important as predictors of defendant behavior, including the importance of charge and prior record.

Glen Just performed a study in 1978 that takes a mathematical approach to prediction in Ramsey Clark County (St. Paul, Minnesota).[53] The objectives of this study were to determine what characteristics separate felons who fail to appear in court from those who appear as scheduled. Just's research suggested that the Vera Scale is inappropriate for use as a release instrument in that jurisdiction.

However, using discriminant analysis on the collected demographic variables, Just was able to ex-posto predict 98 percent of the non-FTA's and 31 percent of the FTA's in the 1975 sample. The author's scale properly predicts 91 percent of the defendant behavior.

However, close examination of his new prediction variables is not encouraging. First, Just does not break down his regression coefficients into a workable scale for a decisionmaker to use. Even assuming he can create a point scale using his regression analysis results, there would be objections to the scale. The analysis found nine variables used in the Vera-type scale and three additional ones to be statistically significant. Therefore, collecting the data would not be a problem. However, the variables he found to be statically significant would be a problem. The five most significant variables, in order, are private attorney, pension (a type of income), bad checks, auto theft, and Afro-American.[54] A recommendation against giving a defendant ROR because he is a black, cannot afford to hire an attorney, lives on a retirement pension, and is charged with bouncing some checks or stealing a car would not be acceptible in any court. Yet, this poor, old man could not be released on his own recog-

nizance if Just's "significant" variables were being used. It is interesting to note that even if one assumes the scale is acceptible, it still suggests that 70 percent of the defendants in the worst risk groups would appear in court if released on their own recognizance.

A report by Jeffrey Roth and Paul Wice published in 1980 constructed a model based on a multivariate analysis for releasing defendants in Washington, D.C.[55] The preoccupation of criminal justice reform efforts in the District of Columbia with pretrial release practices makes the nation's capital a "particularly appropriate" setting for an empirical analysis of pretrial release. The efforts of bail reformers in the District of Columbia and the Bail Reform Act of 1966 have drastically changed the bail policies in Washington. The number of defendants released on their own recognizance or to a third party custodian (nonfinancial release under the direct supervision of an organization or designated person) has been increased from almost none to 62 percent of accused felons and to 80 percent of accused misdemeanants. All the judges in the District rely heavily on nonfinancial release. In addition, the Preventive Detention Code of the District of Columbia passed in 1970 set procedures to enable pretrial detention of defendants deemed dangerous.[56] This legislation put Washington, D.C. at the forefront of the controversy over the right to bail.

The study found that of the 11 percent of felony defendants who failed to appear, only 4 percent willfully failed to appear (did not voluntarily return, without a bench warrant being issued). A multivariate behavioral analysis was used to identify the factors that predict which of these released defendants failed to appear for court or committed pretrial crimes. The study found failure to appear unrelated to the charge or to or to community residence, but related to unemployment and drug use. In

addition, the study found little correlation between the factors that are considered when setting money bail and those that indicate a rearrest while on release.

The authors constructed a model to predict the nonappearance and rearrest of defendants. This model estimated the probabilities of rearrest and nonappearance for each of 424 randomly selected defendants who were required to post cash or surety bail. The variables were found to be statistically associated with the criteria used in the analysis, but their predictive capacity was not strong. The model estimated that for the sample of 424 defendants, it could lower the actually 170 detained defendants to 141 detained, and maintain the failure to appear ratio to 26 out of 424. Furthermore, the model estimated that the 170 detained defendants could be reduced to 98, and still maintain the 22 rearrested defendants. Although the model does suggest an improvement, this "best" model applied to the "worst risk" group in the District, still incorrectly predicts 82 percent of the detained defendants would not appear for their trial and incorrectly predicts 78 percent of the detainees would be rearrested.[57]

Through a National Institute of Justice funded study, the Lazar Institute is conducting an extensive predictor study. In "The Outcomes of Pretrial Release: Preliminary Findings of the Phase II National Evaluation" they published some of their preliminary findings. The project is concerned with identifying those factors which best separate persons released from those not released, defendants who fail to appear from those who do not, and pretrial criminals from non-criminals. The article is based on on the findings from three of the sites included in the National Evaluation of 20 jurisdictions being conducted by the research team. The three

jurisdictions are Baltimore City, Maryland; Santa Cruz County, California; and Louisville, Kentucky.

The findings of the article are summarized in the table below that was in the article.

TABLE 2.1

SUMMARY OF CHARACTERISTICS AFFECTING RELEASE, FAILURE TO APPEAR AND PRETRIAL ARREST

CHARACTERISTIC	EFFECT ON FINANCIAL RELEASE	EFFECT ON FTA	EFFECT ON PRETRIAL ARREST
Longer prior criminal record	+	0	+
Current CJS involvement	+	+	+
Unemployment	+	+	+
Public assistance recipient	0	0	+
Lengthy case	N/A	0	+
Previous failures to appear	+	+	0
Less program supervision	N/A	+	0
Serious arrest charges	+	0	0
Less often a local resident	+	+	0
Less often living with a family member	+	+	0

IDENTIFICATION OF KEY FACTORS AND "HIGH RISK" DEFENDANTS

The table indicates two factors are related to the incidence of financial release, FTA rates and rearrest rates. Those factors are current involvement with the criminal justice system and unemployment. The table indicates some community ties factors affect both type of release and FTA rate, but have no effect upon pretrial crime. Supervision was found to affect the FTA rate, but not the rearrest rate. The length of the case was found

to affect the rearrest rate, but not the FTA rate. By summarizing the characteristics in the table which were found to be key factors, the researchers helped decisionmakers identify "high risk" defendants.

Although the editor of the Annual Journal claims that these findings add further credence to the importance of community ties in determining release conditions, the implications of the study are not conclusive. Intuitively, one would suppose that if most of the nonfinancial releases were unemployed, then most of the failures to appear would also be unemployed. The same logic follows for all of the relationships found in the table. No controls for these types of relationships were used when presenting the findings of the study. The authors plan to do further evaluation of their data, using discriminant and logit analysis, to find factors which reliably discriminate among the groups in question. Although the authors admit "past efforts at prediction of violations of release conditions have not been successful," they believe further analysis "is warranted by possible utility for pretrial release 'decisionmakers'."[59]

Although there has been extensive research, no demographic characteristics have been found that consistently predict defendant behavior. The Vera-type scale has been shown to be an unsatisfactory predictor of defendant behavior in a number of studies. Some studies have found variables which seem related to nonappearance. Yet, the best predictions of defendant behavior still predict the individuals with the worst characteristics probably will appear.

As with appearance, predicting pretrial dangerousness has been difficult. Although studies have found some criminal justice factors to be related to rearrest rates, the predictor studies have not been able to predict who should be preventively detained. As with appearance,

most of the defendants who are in the worst risk group will not be rearrested. The research to date has not been able to identify the criteria that designate which defendants should not be released.

In 1975 Mahoney decided that the studies he had reviewed implied

> the utility of the formal selection criteria employed by pretrial release programs is questionable insofar as such criteria have as their purpose the identification of defendants who would be reliable in terms of likelihood of reappearance.60

The two "most thorough studies" published when Mahoney conducted his review -- one by Feeley and Naughton, the other by Landes -- both indicated that it is "exceedingly difficult to find positive correlation between any of these variables (personal characteristics of the defendant), individually or in combination, and likelihood of appearance."[61] The studies reviewed here, published since Mahoney conducted his review, do not seem to have been any more successful in finding variables that predict defendant behavior.

There have been problems with the methodology used in the studies trying to predict defendant behavior. Studies have used groups of defendants released on their own recognizance or on other forms of bail release, usually surety bail. These studies fail to control for factors such as ability to raise the bondsman's premium or any supervision role the bondsman might play. Furthermore, the research excludes a certain group of defendants who are of potential interest. The behavior of the detained defendants cannot be determined unless they are released.

True experimental research, using randomly selected groups, is the best design for social science research. However, the potential social costs of an experiment releasing all defendants makes the approach impractical.

Therefore, experiments designed to predict defendant behavior exclude groups of defendants because of charge seriousness or prior record. Often even a a restricted experiment is not possible. Experimental studies raise questions about releasing a dangerous defendant or detaining a trustworthy defendant to satisfy the demands of the experiment.

A final type of methodology that has gained greater attention recently is ex-posto analysis of demographic variables based on multivariate analysis and regression coefficients. However, this type of analysis will not turn out to be a panacea. First, the method assumes a prediction of a rare event can be based on historical data. Second, the the variables the research tends to find "significant" are often legally unacceptible for decisionmaking purposes.

The evaluative studies discussed earlier found that defendants released on their own recognizance failed to appear in court at the same rate or less often than the defendants released on money bond. Yet, many of the ROR defendants were released by programs using a Vera-type scale which the research suggests is not predictive of defendant behavior. Even if a jurisdiction uses a method other than the Vera scale, the research to date suggests that criteria which a decisionmaker might use does not explain why ROR programs release defendants who behave as well or better than money bail defendants. Some factor in the criminal justice system other than defendant characteristics needs to be examined.

SUPERVISION

The descriptive studies show that Pretrial programs have been successfully releasing defendants on their own recognizance, yet the

prediction research suggests the community ties criteria might not be responsible for the low FTA rates of ROR programs. The supervision performed by these programs has been offered as an alternative explanation for their success. Kirby felt the notification of ROR defendants of their trial dates and the supervision of Pretrial Services could be responsible for the better FTA rate of own recognizance releases than the bail bond releases in his study. The preliminary report of the Phase II National Evaluation and the research evaluation by Gayton both indicated supervision had a positive impact on defendant behavior. Nevertheless, supervision has not received as much treatment in past research as other factors in the Criminal Justice System. The following studies give an idea of the findings of some of the research on supervision.

An evaluation study of a special program in Des Moines, Iowa, by Peter Venezia shows the effect supervision can have on "high risk" defendants.[62] The program was designed to enable the release of defendants who were unable to post bail and who did not meet the criteria for release established by the jurisdiction's release on recognizance program. The high risk project provided for extensive supervision, counseling, and other social services for defendants who were selected for participation. The defendants selected to participate in the program were those accepted through a subjective decision by a project interviewer.

To evaluate the high risk program the researchers compared the failure-to-appear rates and rearrest rates of the program releases with two other groups of defendants -- those eligible for project consideration who had made bail prior to project screening, and those

who were rejected by the project but who later made bail. The study found little difference among the three groups in terms of appearance rates. However, both the high risk project releases and those who made bail prior to project screening had an appreciably lower rearrest rate than the money bail releases who had been rejected by the project. These findings led the researchers to conclude that using subjective criteria "high-risk" defendants could be released without greater risk of failure to appear or rearrest prior to trial than would be incurred with defendants released on money bail.[63]

An article by Daniel Welsh, "Is Pretrial Performance Affected by Supervision," is based on a study using a true experimental design.[64] The study was conducted in Washington by the District of Columbia bail agency to determine whether increased levels of supervision improve pretrial performance. Defendants released on their own recognizance were randomly assigned to one of three levels of supervision: passive supervision consisting of defendant-initiated contact; moderate supervision in which the agency actively contacted the defendant; and intensive supervision which included outside contact with the defendant in the community. Court appearance, rearrest, and compliance with court-ordered conditions of release were used to measure the impact of supervision.

The study found that increasing levels of supervision improve the appearance rate of conditionally released offenders charged with felonies. The following table gives the pretrial performance based on appearance at court.[65]

TABLE 2.2

FTA RATES AND SUPERVISION IN WASHINGTON, D.C.

	Level of Supervision		
	Passive	Moderate	Intensive
Failure to Appear Rate	4.6%	4.2%	1.6%
"Willful" FTA Rate	3.2%	2.5%	0.4%

The table above shows that the level of supervision had an impact on the number of defendants who came to court. The FTA rate for the defendants who had contact with a supervisor in the community, or intensive supervision, shows that with sufficient supervision essentially every defendant will appear in court.

The study also found a similar relationship between the level of supervision and compliance with conditions of release. Supervision seemed to have an effect on "reporting" in to the agency, as well as cooperating with third party custody and drug treatment organizations. However, regardless of the level of intensity, supervision had no effect on the high rearrest rate for the releases in the study.

Although methodologically strong, one must remember this study discussed "increasing" levels of supervision. All clients in the study were charged with felonies, were considered "high-risk" releases, and received at least passive supervision. Yet, the study shows that the level of supervision has a definite impact on the probability of a defendant appearing for court in the District of Columbia. Furthermore, the study shows that a great majority of these "high-risk" defendants appeared in court. Only 3.2 percent of the defendants in the passive, defendant initiated, supervision group failed to appear. There were even smaller percentages for the other two groups.

In 1980, Bill Powell, a supervisor for Pretrial Services in Memphis, Tennessee, conducted a small study with 100 misdemeanor defendants that suggests supervision is critical in the Memphis jurisdiction.[66] The study assessed the validity of the point scale Pretrial Services uses to predict likelihood of appearing in court without money bond. Yet, the results show supervision is a bigger factor in determining defendant behavior.

The study examined four groups of defendants with 25 defendants in each group. The first group consisted of own recognizance releases who were recommended and supervised by Pretrial Services. This group averaged 6.7 points on the Vera-type scale used by the agency to measure community ties. The second group consisted of defendants not recommended by the Agency because they only had five points. Pretrial Services only recommends defendants with six or more points for release on recognizance. The defendants in the second group were rejected for ROR recommendation, but were released from jail when they posted money bond. The third group, identical to the second, consisted of rejected defendants who scored four (4) points on the Vera-type scale. The fourth group consisted of defendants who were interviewed and qualified for recommendation, but were able to post money bond quicker than a judge could be reached to accept the Pretrial recommendation. The fourth group averaged 7.6 points on the point scale and was originally included to control for the effect of Pretrial supervision.

The table below gives the findings of the study:

TABLE 2.2

FTA RATES AND POINT SCALE IN MEMPHIS

	Pretrial Releases averaged 6.7 points	Rejects 5 points	Rejects 4 points	Qualified-Posted Bond averaged 7.6 points
FTA	4%	16%	24%	20%
Rearrests	8%	28%	20%	28%
N =	25	25	25	25

As Pretrial Services expected, the failure-to-appear rate and the rearrest rate for the 4 and 5 points rejects was significantly higher than for the supervised releases. Taken alone, this fact appears to indicate the defendants who scored 6 or more points on the point scale were better releases than those who scored only 4 or 5 points. However, the defendants who qualified but were not supervised because they posted money bail, failed to appear in court or were rearrested at the same rate as the defendants who scored 4 or 5 points. Since the qualified but posted money bond group averaged 7.6 points on the Vera-type scale, this study indicates that the point scale is not as important a factor as supervision. In addition, this study suggests that requiring money bond is not as effective in assuring appearance as supervising the defendant.

Powell recognized that the size of his sample limited the validity of his study. However, he said even this cursory view indicates that Pretrial Services supervision is mostly responsible for the good FTA and rearrest rates the agency has. Recognizing that the 6 point cut-off is an arbitrary figure, he concluded many low-risk defendants in Memphis may be excluded from being released on their own recognizance because they do not meet Pretrial point scale requirements.

Additional research is needed to determine the effect of supervision on defendant behavior. Although the studies reviewed show supervision has an effect on appearance, there are many unanswered questions. For example, experimental research is needed to compare unsupervised defendants with minimally supervised and intensively supervised releases. If the defendants in a research design of this nature were randomly placed into one of the three groups, further conclusions could be reached. In addition, the effect of the supervision performed by the bondsmen has not been adequately researched. A possible explanation for the FTA rates of money bail releases not being higher than was found could be the bondsman's supervision, not the ability of the bondsman to choose the right defendants. Although limited resources keep the present project from exploring supervision as a factor that determines whether a defendant will appear in court, the question is one which needs to be examined more closely.

If supervision is established as the most important factor in determining defendant behavior, ROR programs will need to revamp the process used to decide which defendants to recommend to a judge for ROR. Presently, many programs use a point scale which is an attempt to predict the defendant's future behavior based on community ties. However, the prediction studies did not find community ties as measured by the Vera scale to be associated with appearance. The prediction studies found the presence of a telephone in the home and a family member or friend who promised to help make sure the defendant came to court to be associated with FTA rates. These two factors also appear to be related to supervision. If supervision, not community ties, is found to be the explanation for the success of ROR programs in the evaluative studies, programs will need

to attempt to devise a method for determining which defendants can be supervised.

PHILOSOPHICAL QUESTIONS

A discussion of the bail decisionmaking process needs to include the philosophical questions behind the bail outcomes a defendant receives. The purpose of bail is a legal question, but the actual outcomes of bail decisions need to be examined in an ethical or philosophical framework. To discuss some of the problems caused by bail decisions, the thoughts of three authors concerning determinations of dangerousness are reviewed and also applied to the bail decisions. The problems associated with decisions to detain a defendant because he is dangerous and to set money bail because he is a risk to flee are both discussed in order to provide groundwork for interpreting the findings of the descriptive and prediction studies in the summary.

Money bail is defined as "punishment" by Roy Fleming in his dissertation," Allocating Freedom and Punishment: Pretrial Release Policies in Detroit and Baltimore."[68] Fleming says that because the freedom and the economic welfare of persons accused of crimes are affected by the bail set by court officials, bail can be examined as a punitive measure. Indeed, Fleming claims defendants "are often more likely to be penalized for their alleged criminal activities when they are arraigned and bail is determined than at later stages."[69]

Fleming points out that unless a defendant is released on his own recognizance a defendant has money bail set. The defendant then may suffer one of three "outcomes": 1) the defendant may post bond he can raise the money required for his release; or 3) the defendant may remain in jail until the charges against him are disposed of by the

court. The bail decisionmaker can obviously be described as inflicting a penalty on defendants for whom he sets money bail since they sit in jail for a period of time. The denial of liberty is the most severe sanction, besides capital punishment, with which a court can sanction any person, convicted of a crime or only accused. Since obtaining release on money bail depends on the economic resources of the defendant, the less wealthy who are accused of a crime are the defendants sanctioned by the court. Penalizing a person, who at this stage is only accused of a crime, and applying the penalty more often to the poor, raises ethical (as well as legal) questions which are hard to answer.[70]

In addition to money bail being punitive because it incarcerates some defendants, Fleming believes money bond is punitive because it reduces the economic resources of a defendant. Since most defendants do not have the resources to post the full value of their bond with the court, a market has been created for the bondsman. By paying a bondsman a non-refundable premium usually 10 percent of the bond's full amount, and in many instances also pledging collateral equal to the balance of the bond as additional security for the bondsman, a defendant can purchase his release. In the process, the defendant's economic resources are reduced. In essence, he is fined by the court.[71]

Fleming says that the three outcomes imposed by judicial officials are justified by the defendants "presumed violation of the criminal law."[72] However, legally a defendant is "presumed innocent until proven guilty." Granted, the state has an interest in assuring the appearance of a defendant at his trial, and money bail is a means to accomplish that end. Yet, all three outcomes resulting from money bail punish the defendant who is only accused of committing a crime.

Two ethical questions are raised by this discussion. First, how much punishment of a person presumed innocent is the government allowed to assure the appearance in court of a defendant? Second, how much more effective or necessary must a means (money bail) that punishes the defendant be than another means (ROR) to justify the use of the more punitive one? An answer to both of these questions is influenced by the values an individual holds -- whether one places a higher priority on the defendant being in court to possibly receive society's punishment, or one places a higher priority on the civil rights of a person only accused of a crime. The Crime Control Model suggests assuring the appearance of the defendant is more important. The Due Process Model suggests the rights of the defendant are more important. Whichever values one holds, an answer to either question favoring using money bail would have to assume the decisionmaker can predict which defendant might need money bail to assure his appearance.

"Ethical Issues in the Prediction of Criminal Violence" by John Monahan[74] presents another perspective on criminal justice decisions. Monahan is concerned about the number of wrong decisions that are made when deciding whether to detain an individual. The paper reviews the empirical research on the ability of psychiatrists, psychologists, parole boards, and computers to accurately forecast violent behavior. Then, after drawing some conclusions about this empirical research, he discusses the ethical issues surrounding detention.

Monahan's article discusses two stages in the mental health system and five stages in the criminal justice system where predictions of violence may be introduced in the decisionmaking process. One of the areas he cites is the decision whether or not to grant bail, and, if bail is to be granted, decisions on the amount of bail. A decision to set high money

bail is seen by Monahan as an attempt to detain an individual who might be dangerous to society and is treated the same as a decision not to set bail.

First, the report explains the four possible outcomes that can occur when a prediction of future behavior is made. A prediction is made that the behavior, in this case violence, will or will not occur. Then, at a later time, observations are made as to whether the predicted behavior actually has or has not occurred. The table below displays the possible outcomes.

TABLE 2.4

FOUR POSSIBLE OUTCOMES OF PREDICTIVE DECISIONS

		Actual Behavior	
		yes (rearrested)	no (not rearrested)
Predicted Behavior (dangerousness) (rearrested)	yes (detained)	true positive	false positive
	no (released)	false negative	true negative

If violence is predicted to occur and it does later occur, the outcome is a true positive. If violence is not predicted and it does not occur, it is a true negative. These are the two outcomes one must maximize.

If violence is predicted to occur and it does not later occur, this outcome is a false positive. If violence is not predicted and it does occur, it is a false negative. These outcomes must be minimized. A false positive means a defendant will unnecessarily be detained, while a false negative means someone who goes free commits a violent act.

Monahan draws several conclusions from his review of the empirical research on predicting violent behavior that are germane to bail decisionmaking. First, he feels the ability to predict who will be

dangerous is weak. Regardless of how well-trained the decisionmaker, how adequate the available information, or how well-programmed the computer, a prediction of who will engage in violent behavior cannot be accurately made. He points out that when it has been shown that persons who have higher-than-average chances of committing a violent crime can be identified, the odds are still less-than-even that the individual will commit a violent crime. In other words, no model has been developed in any criminal justice field that produces more true positives than false positives.

In his review of the literature Monahan found past violent behavior to be the best predictor of future violent behavior. Other demographic variables such as age, sex, race, and socio-economic status also seem to be sensitive predictors. Actuarial tables based on these variables are more accurate than "expert" psychiatric or psychological assessments. However, Monahan points out the legal and ethical problems associated with using a variable such as race or socio-economic status. He suggests that if predictions of violence must be made, the decision could be based on actuarial tables. However, he warns the criteria for decisionmaking need to be open to judicial and public review, as well as tied directly to the offender's criminal history.[75]

Monahan's article discusses pretrial detention based on a defendant's predicted dangerousness, but his four possible outcomes can also be applied to setting bail strictly according to a concern for a defendant's appearance in court. Money bail can be seen as the type of bail set for defendants who are predicted not to appear if released on their own recognizance. The following table shows Monahan's logic applied to bail decisions concerned with court appearance.

TABLE 2.5

ACTUAL BEHAVIOR (if given ROR)

		yes (fails to appear)	no (appears in court)
Predicted Behavior (will not appear if given ROR)	yes (money will probably be set)	true positive	false positive
	no (ROR)	false negative	true negative

A defendant who is predicted not to appear in court and given money bail, but who would have appeared in court if he had been given ROR, is a false positive. Since some defendants who have money bail are effectively detained, the false positives must be minimized. On the other hand, a defendant who is predicted to appear if released on his own recognizance but fails to appear might also not appear if released on money bail. Therefore, one cannot describe the effect of minimizing the false negatives on the overall FTA rate of a jurisdiction. Minimizing the false positives will reduce the number of defendants who are punished prior to their trial, but minimizing the number of false negatives might not reduce the number of defendants who fail to appear in court.

"Dangerous People," by Nigel Walker, discusses the ethical questions surrounding imprisonment, and disagrees in principle with Monahan's article.[76] Walker's article is aimed at detention justified by the claim that a person must be detained to protect others. The article does not discuss imprisonment which is for deterrent, rehabilitative, or punishment purposes. As in Monahan's article, high bail or no bail is seen as causing incarceration to protect society.

Walker admits that a method has not been devised that can predict

probability of future violence approaching even 50 percent. Although he acknowledges that a period of custody could mean detaining two or three or even more individuals in order to prevent one of them from committing violence, he still rejects the position that no one should be detained for the protection of society.

First, he thinks that the attempts to find criteria that would define high-risk groups have not been very thorough. He recognizes the difficulties of this type of research, but says that his own impression is that

> a thorough, large scale piece of research, designed specifically for this purpose, would succeed in producing criteria that would enable us to define groups with a future violence rate substantially over 50 per cent.77

Second, he rejects the two assumptions that he says are behind the anti-protectionist's logic. One is that it is morally wrong to mistakenly detain a person. He agrees that it is regrettable, to mistakenly detain a person. However, if the decision is made as well as possible, he feels it is not morally wrong. The second assumption Walker rejects is that the decisionmaker's objective is to minimize the total number of mistakes. He says, mistaken detentions and mistaken releases do not count the same. After comparing the harm committed by the victim of a mistaken release to the temporary imprisonment of mistaken detention, Walker rejects the idea that there should be no preventive detention.

Walker offers a few rules to help decide when to apply protective measures. First, preventive detention should be used only "to prevent serious and lasting hardship to other individuals, of a kind, once caused cannot be remedied."[78] By excluding any type of property offense, his

rules include only serious crimes against a person. Second, there should be good reason to believe that the detainee would commit an offense again. Similar conduct on two or more previous occasions, or an expressed intention, are suggested as reasons to believe there will be future criminal behavior. Third, if any less drastic measure than detention could protect others, it should be used. Supervision and special requirements or prohibitions such as drug treatment or staying at a certain job or address are given as prospects. Finally, if a person must be detained, the conditions should be tolerable.

Walker's suggested rules for deciding whether or not to preventively detain a person would only detain a small fraction of the defendants who are charged with a crime. Walker feels that detaining some individuals is necessary to protect society. If a judge agreed with Walker, the judge would not give ROR to defendants he perceived as dangerous. Rather, he would set no bail or as high money bail as he thought allowable.

Furthermore, the reasoning Walker uses in discussing preventive detention can be applied to bail decisions based on likelihood of appearance. Although it might be regrettable to make someone post money bond to obtain pretrial release, it is not morally wrong if the decision is made as well as possible. He might also say that a mistake that releases someone on his own recognizance who does not come to court is more serious than a mistake that punishes by setting money bail for someone who would come to court if released on their own recognizance. Walker might argue that more harm is done by granting ROR to defendants who might have appeared if they had been required to post money bond than is done by making some defendants purchase their pretrial freedom and by detaining some poor defendants. Although Walker does not take this postition, judicial decisionmakers can probably be found who

hold these priorities.

Walker's rules to decide when to apply protective measures can also be applied to decisions concerning the type of bail set. First, money bail could be set only in cases in which the government has a strong interest in the appearance of the defendant. Serious charges or a highly publicized case could be examples. Second, good reason to believe the defendant would flee the jurisdiction could be required. Previous failures-to-appear or an expressed intention of fleeing could be reasons to give a defendant money bail. Third, if a less drastic measure than money bail could assure his appearance, it must be used. Again, supervision or prohibitions on activity could be methods short of money bail that could help assure that a defendant would come to court. If the above rule were implemented, a majority of the defendants would probably be released on their own recognizance, leaving money bail for special instances.

Of course, applying the suggestions Monahan or Walker make concerning decisions to detain defendants to decisions to set money bail for defendants assumes one accepts Fleming's premise that money bail is punishment. The "amount" of punishment given to defendants when decisions are made to set money bail is not as great for some of the defendants as the amount of punishment given to all of the defendants who are detained because of "dangerousness." However, a defendant who cannot afford to make his money bail does sit in jail. Whether the decision is to detain (or attempt to detain by setting high bail) a defendant or to set money bail for a defendant, the government is punishing an individual who is "presumed innocent until proven guilty." A defendant is not "proven guilty" until his trial. Therefore, theoretically, the government is punishing a man it presumes has done nothing wrong.

Monahan's work suggests that if the judge is making a prediction that a defendant would not appear if released on his own recognizance, the prediction must be right at least fifty percent of the time. If not, the government is unnecessarily punishing the people required to post money bail. Walker's work assumes the government has a greater interest in this type of decision than Monahan's work. Walker's work still suggests that rules need to restrict the type of defendants the government is allowed to punish before their trial. Both works indicate that as few defendants as possible should be punished prior to their trial. Therefore, ROR should be the predominant form of bail.

SUMMARY

The early literature recognized that the American bail system had a number of problems. Bail was being set according to the charge against the defendant, with little regard for other factors that might indicate the defendant did not need to post money bail to assure his appearance. Many defendants consequently sat in jail until their trial, unable to post their bond. The relationship found between being in jail during a trial and more negative final dispositions for detained defendants made this type of detention a more serious problem.

Later descriptive studies showed that the ROR programs, pioneered by the Vera Foundation, could effectively alleviate these problems for some defendants. Defendants released to the supervision of a ROR program have the same or lower FTA and rearrest rates as other releases. However, these evaluative studies have also shown that the majority of the defendants are not released on their own recognizance. Money bail is set, resulting in the same problems found in the early studies. Poor defendants still wait

wait for their trial in jail and the detained defendants may suffer adverse judicial outcomes.

The prediction studies have attempted to find the factors that can be used to make bail decisions. However, the studies have failed to find variables that can be used to consistently predict defendant behavior. Furthermore, the variables that have been found to be related to appearance or to rearrest are not reflected in the Vera-type point scale. The screening process used by most programs has not been validated. The empirical studies suggest the success in terms of appearance and rearrest that these programs have had may be due to some factor other than the point scale.

The supervision performed by ROR programs was offered as an alternative explanation for their effectiveness. Research on supervision shows that supervision does effect FTA rates, but the research reviewed does not provide enough evidence to say supervision is the causal factor for low FTA rates. If supervision is the factor behind the success ROR programs have with defendants appearing in court, the criminal justice system is vastly under-using ROR.

The implications of the studies reviewed is more pronounced when they are examined in the framework provided by the "philosophical" section. Predictions are being made in bail decisions on whether a defendant is likely to fail to appear for his court dates and possibly whether he might be dangerous. These predictions are made in spite of the fact that most of the defendants are false positives and without some of the rules suggested by Walker that would restrict judicial discretion. The studies have not shown how many defendants can be safely released on their own recognizance, yet the studies also have not shown how many defendants should not be released on their own recognizance.

Since setting money bail "punishes" defendants who are "innocent until proven guilty," the denial of ROR needs to be connected to a governmental interest.

ENDNOTES

1. Barry Mahoney, An Evaluation of Policy Related Research on the Effectiveness of Pretrial Release Programs, (National Center for State Courts, October, 1975), p. 9.

2. Mahoney, p. 10.

3. Roscoe Pound and Felix Frankfurter, eds. Criminal Justice in Cleveland: Reports of the Cleveland Foundation Survey of the Administration of Criminal Justice in Cleveland, Ohio (Cleveland, Ohio: The Cleveland Foundation, 1922; reprinted, Montclair, N.J.: Patterson Smith, 1968).

4. Pound and Frankfurer, p. 290, as quoted by Mahoney, p. 16.

5. Ibid.

6. Arther Beeley, The Bail System in Chicago. (Chicago: University of Chicago Press, 1927). As found in John S. Goldkamp, "Bail Decisionmaking and the Role of Pretrial Detention: A Critical Review of Empirical Research," (Albany, New York: Criminal Justice Center, Working Paper, No. 10, November, 1978), p. 5.

7. Ibid., p. 7., as quoted from Beeley.

8. Ibid., pp. 5,6.

9. Wayne Morse and R. Beattie, "Survey of the Administration of Criminal Justice in Oregon." Oregon Law Review (Supp. 1932) 100; as found in Goldkamp, 1978.

10. Ibid., pp. 8,9.

11. Caleb Foote, "Compelling Appearance in Court: Administration of Bail in Philadelphia." University of Pennsylvania Law Review, 102 (1954), 103-1079.

12. Foote, 1954, pp. 1038, 1050, 1052, 1053.

13. George Alexander, M. Glass, M. P. King. J. Palmero, J. Roberts, and A. Schurz, "A Study of the Administration of Bail in New York City," University of Pennsylvania Law Review 106 (1958), 693-730.

14. Ibid., pp. 726-727.

15. Charles Ares, Anne Rankin, and Herbert Sturz, "The Manhattan Bail Project: An Interim Report on the Use of Pretrial Parole," New York University Law Review, vol. 38:(1963), 67-88.

16. Ibid., pp. 77-85.

17. Goldkamp, 1978, p. 16.

18. Aves, et al., pp. 82-87.

19. Wayne Thomas, Bail Reform in America, (Berkeley, California: University of California Press, 1976), p. 24.

20. Ibid.

21. Mahoney, pp. 40-41.

22. Mahoney, p. 9.

23. Ibid., p. 37.

24. Ibid., p. 37 and p. 38, note 1.

25. Deposit bail requires the defendant to deposit a percentage of his money bail with the court. The bondsman is eliminated and the defendant has his deposit returned when he appears in court. Deposit bail is an alternative to traditional money bail offered by some bail reformers.

26. Mahoney, p. 72.

27. Ibid., p. xxii.

28. Michael Kirby, "An Evaluation of Pre-Trial Release and Bail Bond in Memphis and Shelby County," Memphis: Policy Research Institute, Southwestern at Memphis, published monograph, 1974.

29. Ibid., chapter II.

30. Ibid., chapter VI.

31. Ibid.

32. Paul B. Wice, Freedom for Sale, (Boston: D. C. Health Company, 1974). "Bail and It's Reform: A National Survey," (Ph.D. Dissertation, University of Illinois at Urbana-Champaigne, 1972).

33. Effectiveness is defined by Wice as release of a high percentage of defendants, as well as low forfeiture and rearrest rates.

34. Wice, p. 146.

35. Ibid., p. 147.

36. Wayne Thomas, Bail Reform in America. (Berkeley, California: University of California Press, 1976).

37. Ibid., p. 34.

38. Ibid., p. 253.

39. Ibid., p. 259.

40. John S. Goldkamp, Two Classes of Accused: A Study of Bail and Detention in American Justice, (Cambridge, Massachusetts: Ballinger Publishing Company, 1979).

41. Ibid., p. 10.

42. Ibid., p. 220.

43. Ibid., p. 221.

44. Ibid.

45. Ibid., p. 229.

46. Ibid., p. 227-229.

47. Ibid., p. 221.

48. Goldkamp, 1979, p. 95.

49. Michael Gottfredson, "An Empirical Analysis of Pretrial Release Decisions," Journal of Criminal Justice, vol. 2, 1974, pp. 287-303.

50. Ibid., p. 300.

51. Jan Gayton, "The Utility of Research in Predicting Flight and Danger," paper prepared for the Special Workshop on Pretrial Release, San Diego, California, April 2-4, 1978, mimeographed.

52. Ibid.

53. Glen A. Just, "Project Remand: Estimating Probability of Failure to Appear," (Ann Arbor, Michigan: University Microfilms International, 1978), (Dissertation, South Dakota State University).

54. Ibid., p. 94.

55. Jeffrey A. Roth and Paul B. Wice, Pretrial Release and Misconduct in the District of Columbia, (Washington, D.C.: Institute for Law and Social Research, 1980).

56. D. C. Code sections 23-1321 to 1333. See footnote Chapter III.

57. Roth and Wice, p.

58. Martin Sorin, Mary Toborg, and David Pyne, "The Outcomes of Pretrial Release: Preliminary Findings of the Phase II National Evaluation," Pretrial Services Annual Journal, Volume II, ed. by Alan Henry (Washington, D.C.: Pretrial Services Resource Center, 1979), pp. 140-157.

59. Ibid., p. 157.

60. Mahoney, p. 74.

61. Ibid., See also William M. Landes, "Legal Theory and Reality: Some Evidence on Criminal Procedure," Journal of Legal Studies, vol. 3 (June 1974) pp. 320-325, and Malcolm M. Feeley and John McNaughton, The Pretrial Process in the Sixth Circuit: A Quantitative and Legal Analysis (New Haven, Connecticut, March 1974), pp. 29-39.

62. Peter S. Venezia, et al., Pretrial Release With Supportive Services for High Risk Defendants Evaluation Report No. 3 (David, California: National Council on Crime and Delinquency, 1973). As found in Mahoney, pp. 38-40.

63. Ibid.

64. J. Daniel Welsh, "Is Pretrial Performance Affected by Supervision," Pretrial Services Annual Journal, ed. by D. Alan Henry (Washington, D.C.: Pretrial Services Resource Center, 1978), pp. 136-158.

65. Ibid., p. 144.

66. Bill Powell, an unpublished study conducted for Pretrial Services, Memphis, Tennessee, September, 1980.

67. Ibid., p. 2.

68. Roy Bernard Fleming, "Allocating Freedom and Punishment; Pretrial Release Policies," (unpublished dissertation, The University of Michigan, 1977.)

69. Ibid., p. 2.

70. A detained defendant can suffer consequences in addition to a loss of freedom. Effects which are less apparent include the possible loss of employment or welfare benefits, being represented by a public defender rather than privately retained counsel, limitations on the defendant's ability to assist in the preparation of his defense, and a greater likelihood of pleading guilty or being convicted. See Fleming, p. 10.

71. Fleming, p. 7.

72. Ibid., p. 12.

73. Ten percent of $1000, the minimum felony bond in Tennessee, is higher than the fine often levied as punishment by a court. For example, John Hinckley, the man who attempted to assasinate President Reagan, was fined $50 in 1980 in Nashville after trying to board an airliner while carrying three handguns. "John Hinckley -- A Misfit Who Craved Fame," U. S. News and World Report, April 13, 1981, p. 26.

74. John Monahan, "Ethical Issues in the Prediction of Criminal Violence," paper presented to the Conference on Solutions to Ethical

and Legal Dilemmas in Social Research, Washington, D.C., February 25, 1978.

75. Ibid., pp. 3-5.

76. Nigel Walker, "Dangerous People," International Journal of Law and Psychiatry, vol. 1, number 1, January 1978, pp. 37-50.

77. Ibid., p. 41

78. Ibid., p. 43.

CHAPTER III - LEGAL REVIEW

This chapter defines what legal policy-makers (legislators and judges) have intended for release on recognizance. A number of sources are consulted to show the formal guidelines that have been established for bail policy. These legal sources are supposed to shape the bail decisionmaking process. The legal guidelines help create a framework for studying release on recognizance.

Three questions need to be addressed when searching the legal sources for guidelines pertaining to bail and pretrial release policy:

1. What is the governmental purpose -- in legal jargon, "the state interest" -- behind bail and pretrial release?

2. On what legal bases or criteria should bail decisions be made in light of this purpose?

3. What is the status or role of own recognizance release in light of this purpose and these criteria?

Several sources of legal guidelines concerning bail policies will be used to answer these questions. These sources include the United States Constitution, United States Supreme Court and lower Federal Court cases, Federal legislation and "official" advisory guidelines. This legal review examines each of these sources to discover and describe a framework for bail decisionmaking, and thereby to establish the legal role for ROR.

THE CONSTITUTION OF THE UNITED STATES

The United States Constitution says little about the subject of bail. The Eighth Amendment only states that "excessive bail shall not be required." Bail is not defined, nor are instructions given that suggest when or what type of bail should be appropriate in a given case.

Caleeb Foote argues that the United States Constitution incompletely adopted the English law principles for securing the defendant's pretrial release while assuring his appearance.[2] The English protection against pretrial detention had evolved to include "three separate but essential elements."[3] The first element was a long line of statutes that spelled out which cases must be and must not be bailed by the lower courts. Discretionary power was also given to the King's bench, the highest court in England, to bail cases not bailable by the lower judiciary. The statutes provided some defendants with the right to bail, making bail a judicial option for others. The second element, the habeas corpus procedure, developed as a remedy for unlawful or unreasonable detention. This legal procedure gave the defendant a method of redress if his right to bail was violated. The third element, an excessive bail clause, was provided in the Bill of Rights of 1689. The excessive bail clause gave the defendant further protection against judicial abuse.[4]

Foote contends that the framers of the Constitution converted and even strengthened their English bail statutory heritage into constitutional dogma, but unaccountably left out one of the three essential elements. The principle of habeas corpus was established in Article I, section 9 of the Constitution, while the excessive bail clause was included in the Eighth Amendment. Yet, according to Foote, the pivotal right to bail which these other sections supplemented and guaranteed, was inadvertently omitted.[5]

However, Frederick D. Hess believes that the omission of a right to bail from the Constitution was deliberate.[6] There was a right to bail in English law only in those cases made explicit by statute. He notes that, even today in England, pretrial bail is discretionary, except for defendants charged with minor offenses. Hess feels that the right to habeas corpus and the ban of excessive bail were intended by the framers to assure "that when a statute granted a right to bail, that right would be preserved and not subverted."[7]

The Judiciary Act of 1789[8] can be used to bolster Hess' contention. The Act created a statutory right to bail in noncapital cases, while denying a right to bail in capital cases. The fact that Congress passed a statute that withheld the right to bail for a specific class of cases seems to refute the position that Congress intended the Eighth Amendment to provide an absolute right to bail.

The denial of a right to bail in capital cases in the Judiciary Act has been interpreted two different ways. The proponents of a right to bail, siding with Foote, argue that risk of flight is the only historical purpose for determining bail. The capital case exception is justified on the grounds that the probability of flight when the defendant's life is at stake is so much greater that denial of bail is allowed. Proponents of pretrial detention,[9] siding with Hess, point out that when Congress passed the federal bail statute a large number of criminal offenses were generally considered capital, including rape, arson, burglary, robbery, and sodomy. The capital case exception is maintained as having been intended to give a judge discretion not to release "dangerous" defendants charged with these crimes.[10]

Whether the rationale behind denying the right to bail to capital

offenses was because Congress considered these offenders a "danger to the community" or because Congress felt they would flee to escape the possibility of death is now impossible to determine. Arguments have been made to support both positions.[11] The purpose of bail as intended by the framers of our Constitution must remain ambiguous.

Nevertheless, the Constitution does say that for any bailable offense, the defendant has a right to not have excessive bail imposed. Other sources will have to be examined to establish the extent of the defendant's right to bail, to determine what "excessive bail" means when that right is exercised, and to define the criteria a judicial officer is supposed to use when making these decisions.

FEDERAL CASES PRIOR TO 1966

Two separate purposes for the bail decision have also been recognized in Federal cases. Although critics of the bail system claim that "appearance" is the only legitimate concern for bail decisionmaking, precedents have been set that "accord at least an equal role to protecting the community from dangerous defendants in bail determinations."[12]

The first significant United States Supreme Court decision concerning bail occurred in 1835 after a man named Lawrence was taken into custody. Lawrence was in custody after attempting to shoot President Jackson. When the defendant was brought before Chief Judge Cranch the district attorney asked for high bail because he feared the defendant's friends might secure his release so he could try again. The Chief Judge responded

> . . . that the Constitution forbade him to require excessive bail; and that to require larger bail than the prisoner could give would be to require excessive bail, and to deny bail in a case clearly bailable by law . . . . That as the

> prisoner had some reputable friends who might be disposed to bail him, he would require bail in the sum of $1,500. The sum, if the ability of the prisoner only were to be considered, is, probably too large; but if the atrocity of the offense alone were considered, might seem too small . . . .[13]

Although, the discussion of Lawrence's friends and "the atrocity of offense" make the opinion ambiguous, the Court recognized that "to require larger than the prisoner could give would be to . . . deny bail."[14] The opinion could have prompted further analysis of the problem, but instead the Courts "retreated to double talk and silence," waiting many years before seriously addressing the issue of bail.[15]

Two landmark cases for bail policy discussion were announced by the U.S. Supreme Court in 1951. Stack v. Boyle[16] is relied upon to support a right to bail and deny the constitutionality of preventive detention. Carlson v. Landon,[17] on the other hand, is used to assert that there is no constitutional right to bail. This case is also used to support the constitutionality of Preventive Detention Hearings.

Neither of these contradictory cases is directly applicable to the administration of bail in a state court. Both cases deal with questions of Federal law. Carlson also involves detention before a deportation hearing, a civil matter. However, the dicta[18] in these cases are still "acknowledged as the first major treatment of bail and detention issues by the Supreme Court."[19]

The Stack dicta provides the roots for concepts in later cases and reflects the position of bail reform in general. The Court quoted the Federal Rules of Criminal Procedure, stating that "a person arrested for an offense not punishable death shall be admitted to bail . . . before conviction."[20]

From this simple provision the Court derived that there is a presumption that all noncapital cases will be given bail. The Court also based this presumption for bail on the "traditional right of the accused to freedom before conviction."[21] This "traditional right," in turn,

> permitted the unhampered preparation on 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 all meaning.[22]

However, the Court said that release before trial is "conditioned upon the accused's giving assurance that he will stand trial." The Court directed that the fixing of bail "must be based on standards relevant to the purpose of assuring the presence of the defendant."[23] The standards alluded to in Stack are found in the Federal Rules of Criminal Procedure:

> . . . If the defendant is admitted to bail, the amount thereof shall be such as in the judgement of the court or judge or justice will insure the presence of the defendant, having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant.[24]

The Court did not give instructions on how these "standards" might be used to assess likelihood of a defendant's appearance, nor did the Court give instructions on how this likelihood should be translated, if necessary, into amounts of money.

Dicta in Stack does provide a general idea of the meaning of "excessive bail." The opinion says:

> The modern practice of requiring bail bond or the deposit of a sum of money subject to forfeiture serves as addi-

> tional assurance of the presence of the accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is "excessive" under the eighth amendment.25

The opinion further advises that "excessive" should be understood to mean "higher than usually set."[26] This definition of "excessive bail," suggests bail set high enough to detain a defendant might be unconstitutional. However, it leaves a great deal of discretion to the judicial officers in the different jurisdictions.

Stack appears to link a specified "right to bail" to a "right to release," with detention reserved for rare instances. The purpose, or state interest is the appearance of a defendant at his trial. Bail is not to be set higher then necessary to assure appearance. However, the Supreme Court has indicated that it will allow each jurisdiction to decide what amount of monetary bail is "necessary."

According to Stack, release before trial appears to rest upon three criteria: 1) whether or not the defendant is charged with a capital offense, 2) some assurance from the defendant that he will appear in court, and 3) whether or not the defendant would be able to meet the financial conditions of the monetary bail. The opinion in Stack suggests that most defendants should be released on bail while awaiting their trial. Yet, the lack of instructions and wide discretion left the individual judge in setting amounts of bail did not guarantee most defendants would be released.

Only four months after the Stack decision, a sharply divided Supreme Court announced Carlson v. Landon.[27] The case involved detention without bail for deportation proceedings for aliens who were members of the Communist Party. The Carlson dicta, quite different than that in Stack, provides the basis for a concern about defendant dangerousness in bail decisionmaking. In

Carlson the Court did not find a constitutional right to bail, nor even a presumption favoring pretrial release based on the "traditional right" discussed in Stack. Rather, the Court found that discretion to grant or deny bail should be predicted on the statutes passed by Congress:

> The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall not be allowed in this country . . . . Indeed the very language of the amendment fails to say all arrests must be bailable.28

The Court interpreted the admonition against excessive bail in the eighth amendment to mean that if bail was set, it should not be excessive. Carlson left the decision of whether or not to set bail to the discretion of the judicial officer, but within the limits of the appropriate statutory framework.[29]

Furthermore, the dicta in Carlson based the Court's decision on concerns other than appearance. The Court said that "there is reasonable apprehension of hurt from aliens charged with a philosophy of violence against this Government"[30] (Emphasis added). The concept of "apprehension of hurt" is used as authority for the "danger to the community" language in some pretrial release discussion. This phrase from the Carlson opinion is used to support the contention that dangerousness is a legitimate concern in bail decisionmaking.

Cases decided since 1951 can be seen as following either the dicta given in Stack or Carlson. Later cases were decided by individual Supreme Court justices sitting as Circuit Justices, thereby limiting the scope of the cases as precedent. However, these cases develop the appearance-oriented view and the dangerousness-oriented view as two distinct functions for the bail decision. The cases following Stack and Carlson will show the

development of the two views.

The first case following Stack the dicta in was decided in 1955. Herzog v. United States[31] emphasized the presumption in Stack that release before trial should be strongly favored. Justice Douglas wrote in his opinion that "doubts whether bail should be granted or denied should always be resolved in favor of the defendant."[32] However, Justice Frankfurter did indicate in Ward v. United States[33] that the "likelihood that bail within tolerable limits will not insure (the presence of the defendant) justifies denial of bail."[34] Yet, in 1959, Justice Douglas in Reynolds v. United States[35] alluded to the "traditional right to freedom before trial," stating that "the purpose of bail is to insure appearance," and adding that "it is never denied for the purpose of punishment."[36] This group of cases all assume that appearance is the only factor to be considered in bail decisions, ignoring any consideration of dangerousness.

In 1961, the first Bandy v. United States (Bandy I)[37] case addressed the issue of the defendant's financial status in bail decisionmaking. Rule 46(C) of the Federal Rules of Criminal Procedure, which was referred to in Stack, says that "the financial ability of the defendant to give bail" should be a consideration when bail is set. Relying on this rule of criminal procedure, Bandy I recognizes that even low bail may be "excessive" for an indigent defendant. Using Griffin v. Illinois[38] -- which held an indigent defendant is denied equal protection of the law if he is denied an appeal solely because of his indigence -- as precedent, Douglas said that a poor defendant cannot be denied pretrial release solely "because he does not happen to have enough property to pledge for his freedom."[39] Douglas observed that "in the case of an indigent defendant, the fixing of bail in even a modest amount may have the practical effect of denying him release."[40] Justice Douglas

instructed that factors such as residence, family ties, and the efficiency of the police "may offer a deterrent at least equal to the threat of (bond) forfeiture."[41]

Dicta in Bandy II went even further. In this case Justice Douglas stresses the principle that

> no man should be denied release because of indigence. Instead, a man is entitled to release on 'personal recognizance' where other factors make it reasonable to believe that he will comply with the orders of the court.[42]

In Bandy II Justice Douglas clearly stated that appearance is the only consideration in bail decisionmaking. Furthermore, if other factors suggest a defendant will appear in court, he should be released on his own recognizance. Douglas implied that ROR should be the most extensively used bail option.

This line of cases following Stack support the position that appearance is the sole concern in a bail determination. In addition, the Bandy cases contradict the Stack dicta that said "excessive" meant "not higher than usually set" by giving special status to indigent defendants. However, the position that a defendant has an absolute right to bail is not supported. Even if appearance is the sole concern, these cases show there are instances in which bail can be denied.

On the other hand, three cases decided in the early 1960's emphasize the idea found in Carlson that bail can be denied because of an "apprehension of hurt." Two kinds of hurt, or perceived dangerousness, are construed in these cases.[43] The cases following Carlson show how dangerousness may influence a judge's bail decision.

The first kind of dangerousness stems from the authority of the

judiciary to manage the conduct of proceedings before the court. In Fernandez v. United States,[44] Justice Harlan ruled that the court of original jurisdiction had the power to revoke bail, "when such action is appropriate to the orderly progress of the trial and the fair administration of justice."[45] In Carbo v. United States,[46] Justice Douglas extended a courts perogative so that bail could be denied in the first place if there was "a substantial probability of danger to witnesses should the applicant be granted bail."[47] Justice Douglas wrote that detaining a defendant "to render fruitless any attempt to interfere with witnesses or jurors may, in extreme or unusual cases, justify denial of bail."[48]

The second kind of dangerousness is the notion of a defendant's threat to the safety of the public or community. In Leigh v. United States[49] Chief Justice Warren said that bail "is to be denied only in cases in which it seems clear that the right to bail will be abused or the community will be threat by the appellant's release."[50] (Emphasis added). Warren seems to be giving legitimacy to the principle that protection of the community is a state interest in bail decisionmaking.

The above cases following Carlson recognize two types of pretrial dangerousness. The concern in Fernandez and Carbo for a threat to the normal court processes is a comparatively narrow definition of pretrial dangerousness. The rationale in Leigh of a threat to the community is general and a broader definition.[51] However, the cases following Carlson are also decided by single Justices. They are weaker precedent than if they had been decided by the full Supreme Court.

Although a line of precedent does support the Carlson philosophy that dangerousness is a purpose behind bail decisionmaking, the question before the Court in each of these cases was whether bail could be denied.

Dangerousness is not given as a legal concern to be used when setting the type or amount of bail in any case. Therefore, even if dangerousness is is accepted as a legitimate concern in bail decisionmaking, it should not effect the type or amount of bail set for a defendant.

In summary, the Federal cases prior to 1966 develop two distinct lines of precedent. One describes the bail decision in terms of assuring appearance; the other adds the concern of a defendant's potential dangerousness. The two lines of precedent do not mention one another. Either may be used to support whichever position one prefers as the "state interest" in setting bail.

None of these cases offer instructions on what criteria are to be used for bail decisions. Stack refers to the statutory "standards relevant to the purpose of assuring the presence of the defendant." Stack also says that excessive bail means "higher than usually set." The concern for the indigent defendant based on Griffin in the Bandy cases makes this interpretation of excessive bail questionable. Bandy II is also the only case discussed which made ROR an important bail option. Other legal sources need to be searched for further guidance concerning the decisionmaking criteria and the role for ROR.

THE BAIL REFORM ACT OF 1966

The Bail Reform Act of 1966 was the culmination of the early efforts of the bail reform movement. As a federal statute, it reformed bail procedures in federal jurisdictions and the District of Columbia. Moreover, the Act was put forth by Congress as a model for progressive bail legislation in the states.

This "model" legislation was based primarily on a concern for the

appearance of defendants. However, the state interest of protecting the community is not excluded from the Act.[52] When enacting the Bail Reform Act Congress stated that

> The purpose of this Act . . . is to revise the practices relating to bail to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges, to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest.[53]

The provisions of the Act can be examined to see how Congress provided for fulfilling the stated purpose of the releasing on bail "of all persons, regardless of their financial status."

The Bail Reform Act codifies presumption favoring pretrial release expressed in Stack and the suggestion of nonfinancial conditions to assure appearance found in the Bandy cases. The Act states that

> Any person charged with an offense, other than an offense punishable by death, shall, at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance . . . unless the (judicial) officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required.[54]

Another part of the Act even extends the preference for pretrial release to defendants charged with capital offenses. This section states that a person charged with an offense punishable by death or awaiting an appeal after conviction "shall be treated in accordance with the provisions of section 3146 (the section applying to noncapital offenses.)"[55]

Although the Bail Reform Act makes ROR the preferred form of release for both capital and noncapital offenses, parts of the Act give a judicial officer different criteria to use for the two types of cases. For noncapital

cases the appearance of the defendant is the only state purpose established for determination of bail. For capital cases and appeals, the judicial officer is instructed that when setting bail, he may also consider whether the accused will "pose a danger to any other person to the the community."[56] Although only allowed in a small fraction of the total number of cases, this section embeds in statute a Carlson-type state interest in protecting the community from dangerous defendants.[57]

The Bail Reform Act plainly articulates a presumption for ROR or its equivalent (release on an unsecured appearance bond). The wording of the Act has been interpreted in several cases as meaning a decisionmaker should release a defendant on his own recognizance unless the defendant might not appear in court. In addition the burden of proving a defendant is not likely to appear has been interpreted as being on the prosecutor.[58] For defendants who might flee,a judicial officer is given the discretion to set more restrictive conditions to guarantee the appearance of a defendant. The Act offers the following list of conditions of release that the judicial officer may impose:

> 1) place the person in the custody of a designated person or organization agreeing to supervise him;
>
> 2) place restrictions on the travel, associations, or place of abode of the person during the period of release;
>
> 3) require the execution of an appearance bond in a specified amount and the deposit in the registry of the court, in cash or other security as directed, of a sum not to exceed 10 per centum of the amount of the bond, such deposit to be returned upon the performance of the conditions of release;
>
> 4) require the execution of a bail bond with sufficient solvent securities, or the deposit of cash in lieu thereof; or

> 5) impose any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the person return to custody after specified hours.59

The judicial officer is instructed that if he feels conditions are necessary to assure appearance, he is to impose the first of these conditions which will reasonably assure the appearance of the defendant at trial. Therefore, short of part-time detention, setting money bail is offered as the most onerous of the bail options. Denying bail and compelling detention is not offered as an option.

The Bail Reform Act lists ten criteria to replace the four criteria referred to in Stack v. Boyle as the "standards relevant to the purpose of assuring the presence of the defendant." The Act instructs the judicial officer to consider:

> 1) . . . the nature of the offense charged, 2 the weight of the evidence against the accused, 3) the accused's family ties, 4) employment, 5) financial resources, 6) character and 7) mental health, 8) the length of residence in the community, 9) his record of convictions, and 10) his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court appearances.60 (Numbers supplied)

As in Stack, the Bail Reform Act does not indicate how these decisionmaking criteria are to be weighted in determining the likelihood of appearance. For example, does the judicial officer rely more heavily on the traditional factors such as the offense charged and prior record, or are the innovative factors measuring community ties more important? Furthermore, how is a defendant's "character" or "mental health" determined in the brief moments of a bail hearing?

The Bail Reform Act of 1966 makes clear that the purpose of bail

is to assure appearance and that personal recognizance is the preferred method of pretrial release. However, for a limited number of defendants, the Act allows protection of the community as a state interest to be considered, even when determining the type of bail.

The Act does not explicitly state that there is a "right to bail" or "a right to pretrial release." Although more specific decisionmaking criteria are given, the lack of instructions leaves an individual judge with a great deal of discretion. Even in noncapital cases, a defendant could be detained because he cannot meet monetary conditions a judge felt were warranted. Further sources for bail policy need to be searched to interpret how much discretion the Bail Reform Act.

FEDERAL CASES INTERPRETING THE BAIL REFORM ACT

The federal court cases following the Bail Reform act of 1966 are significant for three reasons. First, the interpretation of the Act by the Courts will show how the provisions for ROR have been implemented in Federal jurisdictions. Second, state courts often cite Federal cases as authority for state decisions. Many states have modeled their state bail statutes on the Bail Reform Act. Since state courts will presumably look toward the Federal opinions for guidance when interpreting a similar state law the interpretations in Federal cases indicate the interpretation in may states. Third, Federal Courts have assumed the responsibility for maintaining a minimum level of rights for defendants in criminal proceedings in all jurisdictions. Federal Courts can and have interfered with state bail practices. By looking at the Federal Courts' interpretation of the right to bail, a standard will be sketched against which state bail practices can be measured.

The Bail Reform Act does not give a judicial officer instructions on how the ten criteria are supposed to be used when determining if a defendant is likely to appear as required. Better guidelines on the proper weighting of the criteria are available in the Federal Court cases interpreting the Act. Although the Act creates a right to bail and a presumption favoring the release of defendants on their own recognizance, the application of the law by the courts will be the factor that determines how many defendants will actually be released prior to their trial. The cases interpreting the Act will indicate how a judicial officer is supposed to make his decisions.

Three cases heard by the U.S. Court of Appeals in the District of Columbia indicate that the Bail Reform Act should be interpreted with more emphasis on the community ties criteria than the offense charged or the prior record. The Bail Reform Act became law in the District of Columbia as well as in other Federal jurisdictions. Other Federal courts do not have the same type of jurisdiction as most local courts, but the District of Columbia does. Therefore, many of the first cases interpreting the Bail Reform Act come from the District of Columbia.

In the first case, White v. United States (1968)[61] the Court of Appeals overturned a District Court's order denying the appellant's pretrial release. The defendant was charged with a capital offense after participating in a scuffle that resulted in the death of a police officer. Since the defendant "was only attempting to pull the officer away from her husband by tugging at the back of his shirt," and was not even involved in the scuffle when her husband shot the officer, her actions did not "portend a risk of danger in this case."[62] Thus, the Court of Appeals said "the District Judge apparently rested his finding of a risk of flight upon the severity of the sentence."[63] The Court of Appeals added that:

> In evaluating the likelihood of flight, the potential penalty has relevance, but here we are much more persuaded by the stability of the appellant's relationship to the community. She has lived in the District for ten years, and has displayed a record of steady employment, the continuation of which upon release is assured. These community roots strongly dispute any threat of flight.

In this capital case, the lower Court was instructed that the community ties were the most important bail decisionmaking criteria.

A year later, in United States v. Alston,[65] the Court of Appeals in the District of Columbia again found fault with the District Court's reliance upon the offense with which the defendant was charged. The defendant, accused of armed robbery, was unable to produce the deposit necessary for his $5,000 bond. The District Court justified the bond on "the brazen act perpetuated in the instant case," the possibility that "he could be sentenced for life on this case," and the belief that "his past conduct does not reveal a person whose character is that of a man bound by a promise."[66]

The Court of Appeals disagreed with the District Court. The Court of Appeals recognized that "the nature and circumstances of the offense charged" and "the prospect of a long imprisonment" are relevant in determining the conditions of bail," but instructed that these factors "must be taken into into account as part of a balanced judgement."[67] In addition, the Court of Appeals said

> A District Court cannot fairly take past convictions into account, as showing tendency to flight, unless he at least makes inquiry whether in the prior proceedings the accused had failed to comply with bail, release, or other orders.[68]

This point was further emphasized by telling the lower court

> . . . it is not the purpose of the bail system either to punish an accused again for his past crimes, or to punish him in advance for crimes he has not yet been shown to have committed.69

The Court of Appeals stated that "to set $5,000 bail for this appellant, who is indigent, is also merely another way of compelling pretrial commitment."[70] The Court said that because of the defendant's 28 year residence in the community and his good employment record and prospects, he should be released. Therefore, the Court of Appeals ordered some form of nonfinancial bail be set.

In a 1970 case, United States v. Bronson,[71] the D.C. Court of Appeals ordered pretrial release on nonfinancial conditions for a robbery defendant, overruling another decision of a lower court. Bronson, a seaman apprentice in the United States Navy, did not meet the point scale requirements for ROR recommendation in the District of Columbia. He was also unable to post the $2,000 bond set by the Court of General Sessions and affirmed by the District Court.

The Court of Appeals recognized that bail decisions were "an attempt to predict future behavior on the basis of present information."[72] The court asserted that the "information on the accused's family and community ties, and on his employment record and past criminal record are generally given significant, even dominant, weight in making these determination."[73] However, the court felt the criteria developed for the ordinary civilian case, may not properly measure the likelihood of appearance of a serviceman. After affirming the importance of criteria other than the charge, the court ruled that the stability provided by his military unit are "an adequate substitute for the civilian associations which he lacks," and ordered Bronson

released to the custody of his unit commander.[74]

Other Federal Appeals Courts have made rulings which involve the interpretation of the Bail Reform Act. A Court of Appeals case in the Eighth Circuit, DeChamplain v. Lovelace, concluded that "due process requires the government to bear the burden of proving the necessity for confinement or lesser restrictions pending trial."[75] Moreover, the Court directed the judge making the release decision "to provide the accused with a short statement in writing of the basis for the decision" not to grant ROR.[76] The Court said that the "government should have to justify any curtailment of liberty since the accused is presumed innocent."[77] Clearly, the Court is saying "due process" requires the burden of proof to deny pretrial release to be on the government. It also requires the decisionmaker to provide in writing to the defendant the reasons for his detention. There have also been many other lower federal courts which have held that reasons for imposing pretrial restrictions must be spelled out in writing.[78] However, there have been no Supreme Court cases ruling on the criteria set out in the Bail Reform Act. Justice Douglas, in his Circuit Justice capacity, did order a defendant to be released on bail while awaiting appeal of his conviction because of his strong community ties. However, the question before him was not whether the criteria had been applied properly, but whether the defendant's appeal was "frivolous."[79] Id.

The majority of cases following the Bail Reform Act find fault with the setting of high money bail in cases where other forms of release would secure appearance. Many of the cases indicate that even for defendants appealing a conviction, more emphasis should be put on community ties than prior record or charge. However, the courts have not found an accused is automatically entitled to be released, even if the size of the bond is the condition which is keeping the defendant detained prior to trial.[80] For

instance in United States v. Melville,[81] factual circumstances existed for which the Court found no reasonable assurance of appearance following release seemed possible and release pending trial was impossible. The Bail Reform Act has been interpreted to mean many defendants should be released on their own recognizance, but has not been interpreted to include the absolute right to release mentioned in Stack.

A second group of cases following the Bail Reform Act interpreted and applied the provisions concerning dangerousness "to other persons or to the community." Legally, the Act restricted the dangerousness concerns to persons held in capital cases or to persons whose cases are on appeal. Yet, the concept of dangerousness is a central issue of pretrial release and is a sub rosa decision criteria in many judges' decisionmaking.[82] Even though the cases attempting to define dangerousness are not fully reviewed, the findings are mentioned to give some insight provided by cases that have wrestled with the concept of dangerousness.

Concern for potential harm to witnesses or jurors, first articulated in Fernandez and Carbo, can be seen in several cases after the passage of the Bail Reform Act. In Bitter v. United States,[83] the Supreme Court ruled a lower court could detain a defendant without bail in a noncapital case "to ensure the orderly and expeditious progress of a trial."[84] Two cases heard later in the U.S. Court of Appeals added the qualification that the defendant is entitled to a hearing to refute the charges that he would threaten the necessities of judicial administration.[85] The Bail Reform Act has been interpreted as leaving intact a Court's power to protect its own proceedings.

The more general concern of dangerousness to the community first found in Leigh is addressed in attempts to interpret the provisions for releasing defendants charged with capital offenses and those awaiting appeal

of their convictions.[86] Section 3148 of the Act gives no instructions on how to assess a defendant's potential danger, leaving the basis for such a process up to judicial interpretation.

A brief examination of the cases shows the concept of dangerousness is difficult to define. One U.S. Court of Appeals said in Leary v. United States[87] that the defendant must be predicted to engage in potentially dangerous "conduct," and not potential "advocacy," or use of the right to free speech. In this case the court overturned a District Court bail denial. Another Federal Court of Appeals said in Russell v. United States[88] that the defendant's prior convictions and arrests and his poor probationary record made him dangerous to the community. A Federal District Court allowed denial of bail in United States v. Tropiano[89] on the grounds of the nature of the offense, the defendant's previous convictions, threats of violence, and the alleged "bad reputations" of the defendant. In United States v. Long,[90] the defendant's performance on pretrial release and probation, his prior record of arrests, and the judge's assessment of the defendant's maturity led to a denial of bail.

Yet, defendants have been found to pose a danger when neither physical violence nor weapons were present. A Federal District Court, in United States v. Erwing[91] found that "the community must be protected from violations which prey on the weakness of mankind." For this reason and "in light of the known character and conduct of the defendant," the judge decided the community should be protected from the narcotics' peddler by denying him bail while awaiting appeal of his conviction.[92] Another Federal District Court ruled in United States v. Louie[93] that the defendant, who had seven criminal proceedings pending against him in the California and Federal courts at once could be denied bail pending appeal because of his "propensity

to commit crime generally even where pecuniary, and not physical, harm might result."[94]

The Federal cases interpreting the Bail Reform Act give guidelines in two areas -- appearance and dangerousness. The Federal courts interpret the criteria such as family ties, employment history, and length of residence as having more weight than the offense charged and the prior record when determining which type of bail to give an individual. Though ROR is the preferred type of release in federal jurisdictions, the courts did not find a right to be released. Dangerousness in the Bail Reform Act was restricted to appeals and capital cases. Yet, even in these limited types of cases the problems associated with deciding when a defendant is dangerous are evident in the discrepancy in the definitions of dangerousness.

A state court looking for guidance for interpretation of state laws would find the Federal Courts consider community ties to be the most important factors in determining likelihood of appearance. Dangerousness would be a concern only in limited types of cases, with no definite criteria for determining who can be considered dangerous. Although the Federal Court cases do not answer all of the questions raised about bail decisions, they supply some guidelines for the decisionmaker.

FEDERAL INTERVENTION IN STATE BAIL PRACTICES

The Federal Court system can control State bail practices through the "due process" and "equal protection" clauses of the Fourteenth Amendment to the Constitution. The Eighth Amendment admonition against excessive bail, can be applied to the States by either of these clauses. By explaining briefly these two doctrines and giving a few prominent examples of their application to bail policy, the potential for Federal Court

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interpretations of the rights surrounding bail decisionmaking will become apparent.

Three major positions have been developed to explain the due process clause of the Fourteenth Amendment. The strongest judicial position that would apply the Eighth Amendment and most of Federal bail policy directly to the States is the "total incorporation of the Bill of Rights to the states" through the "due process" clause of the Fourteenth Amendment. This position asserts that the "due process" clause mandated the total incorporation of the Bill of Rights to the states, which includes the Eighth Amendment. However, this position has never been accepted by a majority of the Supreme Court justices.

The second position is "selective incorporation" of the Bill of Rights. Selective incorporation, accepted by a majority of the Supreme Court justices since 1937,[95] takes those rights that are "of the very essence of a scheme of ordered liberty" and are "so rooted in the traditions and conscience of our people as to be ranked as fundamental"[96] and applies Federal interpretation of these rights to the States. This position incorporates many of the protections in the Bill of Rights, but not the excessive bail clause. The Warren Court used this position to extend the protection of many additional parts of the Bill of Rights to state proceedings, but the retrenchment of the Burger Court away from the progressive direction of the Warren Court makes the possibility of new parts being incorporated in the near future improbable.[97]

The third judicial position is that a "case-by-case" determination should be made according to the "fair trial" rule. The fair trial rule rejects the idea that the Fourteenth Amendment "incorporated" the Bill of Rights. Instead, a "case-by-case" approach is taken to examine on its own

merit each individual claim of violation of due process of law. If the governmental action does in effect "shock" the conscience" or violate "common standards of conduct," then due process of law has been violated.[98] Although not officially accepted as the position of the Court, the case-by-case approach is important because it is used for unincorporated parts of the Bill of Rights.[99] If the bail policies of a particular jurisdiction "shock the conscience" or violate "common standards of conduct," the Federal Courts might step in to remedy the situation using the case-by-case interpretation of the "due process" clause.

The second constitutional doctrine that can be used to challenge State bail laws is the "equal protection of the law" clause found in the Fourteenth Amendment. Challengers assert that the money bail system creates two classes of defendants: detained and released. The distinguishing factor between these two classes is wealth. Detained defendants cannot buy their freedom. Poor people claim they are being denied equal protection of the law because they are discriminated against according according to their financial status.

The courts have traditionally used two standards of review, "strict scrutiny" and "rational basis" for examining equal protection questions. Under the rational basis standard, the state law or practice need only rationally relate to a legitimate state interest. This standard strongly presumes that a statute is valid.[101] Under the strict scrutiny standard, the government must show a "compelling state interest" which cannot be realized through a less restrictive alternative. The Courts use strict scrutiny if the law discriminates on the basis of a "suspect class"[102] or infringes upon a "fundamental right" which is constitutionally protected.[103] Whether the strict scrutiny standard or the rational basis

standard is used is crucial to extent of protection afforded rights under the equal protection clause. Almost any state practice concerning bail could pass the rational basis standard, but the "compelling state interest" necessary for the strict scrutiny standard could invalidate many state bail laws.

Although the Supreme Court has not held that wealth per se is a suspect classification, the Court has indicated that "lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored."[104] In 1973 the Court rejected wealth as a suspect classification in San Antonio Independent School District v. Rodriguez.[105] However, the narrow majority (five to four) and the dicta in the opinion indicate that in the future some types of wealth-based discrimination may apply the strict scrutiny test.

In Rodriguez the Court held that "district property wealth," as taxed to finance public education, is not a suspect classification. The Court said the "poor" as defined in Rodriguez were "a large, diverse, and amorphous class," implying that a better defined group of poor might be a suspect class.[106] The Court also implied that a wealth classification which effectively discriminates with respect to a more important interest would call for the compelling interest test.[107] The Supreme Court claimed it "has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny."[108] The Court then added that "the child's superadded educational opportunity cannot compare in importance to the prisoner's freedom."[109] Therefore, wealth discrimination in conjunction with a right more important than a "superadded education," perhaps pretrial release, might require the strict scrutiny test.

The Court has shown in previous cases that it is sensitive to discrimination based on wealth when a defendant's rights are involved. In Griffin v. Illinois the Court invalidated a statute which required all

defendants, including indigents, to pay for transcripts of their trial proceedings which were needed for an appeal.[110] The Court has also struck down two different statutes which subjected indigents to incarceration only because they were unable to pay a find.[111] These cases indicate that at the present the Court might not be using either of the two traditional tests for classifications based on wealth when criminal rights are involved, but is using an ambiguous "middle level" test.

c The Supreme Court has not held that release prior to trial is a fundamental right. A statutory right bail exists in almost every jurisdiction,[112] but this right to bail has not been defined as a fundamental right to release that would be forced to meet the "strict scrutiny" standards of the equal protection clause. However, there are some lower federal court cases that have extended the presumption of innocence to mean pretrial punishment is a violation of a fundamental right, and therefore pretrial detention has been found to be unconstitutional.

Ackies v. Purdy,[113] a District Court case, uses both the due process clause and the equal protection of the law clause to change a local bail policy. This class action suit challenged the use of master bond schedules for setting of bail in Dade County Florida. Rather than releasing defendants that were good risks to come to court on their own recognizance, Dade County set an automatic bail according to the offense charged. The result was the creation of two categories of defendants: "One group, able to afford the master bond bail immediately secure their release. The second, unable to post the master bond bail, remain incarcerated."[114]

(First, the Court said that the defendants had been denied due process of law because "the setting of master bond lists deprives defendants of an opportunity to be heard."[115] The Court quoted Stack in stressing that the

function of bail was to assure the presence of the defendant by fixing bail for an individual defendant based on standards relevant to that purpose. The Bail Reform Act was quoted in a footnote as providing the relevant standards. The District Court, in order to avoid violating the due process clause, a jurisdiction must provide an opportunity for a hearing to determine if the defendant meets the standards relevant to assuring appearance.

Second, the Court held that the defendants had been improperly discriminated against because of their poverty. Stating that "the right to pretrial release under reasonable conditions is a fundamental right," the Court said "its constitutionality must be judged by the strictest standards of whether it promotes a compelling state interest.[116] Since a poor man with strong ties would be more likely to appear in court if released on his own recognizance than a man with cash and no community involvement, the Court said "the classification fails to meet the traditional test for equal protection."[117]

In Ackies v. Purdy, a Federal Court struck down the Dade County policy of setting money bail for all defendants. Using both the due process clause (the fair trial rule) and the equal protection clause (discrimination based on wealth affecting right to pretrial release) the District Court changed the bond policy of the local jurisdiction to force it to increase its use of nonfinancial bail. This case shows the Federal Courts will force a local jurisdiction to consider releasing each defendant on his own recognizance.

Pugh v. Rainwater[118] is another prominent case in which a Federal court interfered with the state policies of bail decisionmaking. A Fifth Circuit Court of Appeals decided that indigent pretrial detainees were being deprived of Fourteenth Amendment equal protection of the law. In the first hearing of the case, the Court decided that when a judge sets money bail in

Florida he creates two classes of defendants: those who can pay for their pretrial freedom and those who cannot. The Court said this type of classification must be "strictly scrutinized under the equal protection clause" because it discriminates against indigent defendants and "affects their fundamental rights to be presumed innocent and to prepare an adequate defense."[119]

The Court also said that although Florida has a compelling interest in assuring a defendant's appearance at trial, "money bail is not necessary to promote that interest because the bail bondsman system eliminates the basic premise behind such bail."[120] The Court said that since a defendant did not have the premium he paid a bondsman returned to him, setting money bail did not help assure the defendant's presence in court. The Court did not say that money bail would never be necessary to assure a defendant's appearance. The Court held that equal protection standards require "a presumption against money bail and in favor of those forms of release which do not condition pretrial freedom on an ability to pay."[121]

However, the Fifth Circuit Court of Appeals, sitting en banc, vacated parts of the earlier ruling in a rehearing of the appeal. The majority in the rehearing accepted the principles applied to indigent defendants and agreed that strict scrutiny and a compelling governmental interest were the proper tests. However, the presumption for release on nonfinancial conditions was not upheld. The majority in the rehearing held that a new Florida Supreme Court rule which left "to the sound discretion of the judge to determine the least onerous form of release which will still insure appearance" met Fourteenth Amendment requirements.[122] Since the record before the Court contained only evidence of practices of discrimination before the adoption of the new ruling, the majority opinion said the present

case could not be used to require a "presumption for release on nonfinancial conditions." the court reasoned that in some circumstances monetary bail might be "less onerous," and left the Florida Supreme Court rule intact.[123]

The Court in Pugh expanded the view taken by the Supreme Court in Griffin to include cases about pretrial release. Evidently, strict scrutiny is the standard to be used in the Fifth Circuit when a classification is made on wealth in connection with fundamental rights in criminal trials. The Fifth Circuit in Pugh includes the bail system as one of these fundamental rights because of the effects of pretrial release on the fundamental rights to be presumed innocent and to prepare an adequate defense. Whether the Supreme Court will embrace this expansion, however, remains to be seen.[124]

In Alberti v. Sheriff of Harris County, Texas,[125] a District Court held that overcrowding in the county jail led to conditions of confinement that violated the due process clause of the Fourteenth Amendment. A program utilizing ROR was the major part of the Court order to remedy the situation. The Court said that the state lacked authority to punish pretrial detainees, and that the "inhumane overcrowding of inmates" and the unnecessary detention" was in "violation of the law."[126] Although there are other cases concerning the deplorable conditions in local jails, Alberti is of special interest because the judge ordered changes in the Pre-Trial Release Agency to increase the use of personal recognizance to reduce the overcrowding in the county jail.

Harris County (which includes the City of Houston) already had a Pre-Trial Release Agency responsible for recommending ROR for defendants, but the political environment in the County had kept the Agency from being a viable element of the criminal justice system. The decision compared the consequences of the failure of the Agency to be effective to the success

of the Manhattan Bail Project. Using this comparison and a survey of the changes ordered by other Federal District Courts,[127] the judge ordered specific changes in the operation and policies of the Agency in Houston. The Pre-Trial Release Agency was ordered to develop a uniform objective point system designed to reduce "to a minimum the refusing of 'ROR' bonds on 'hunches'."[128] The Agency was ordered to evaluate every defendant as to his eligibility for ROR. The Court even suggested a minimum of ten full-time interviewers. Every defendant was to be informed of a right to be interviewed by the Agency for ROR and the City Jail was to be responsible for providing an interview area that gave the Agency immediate access to the prisoners. Finally, in an effort to improve the image of the Agency by reducing the ROR nonappearances, the Court ordered the Agency to send defendants a notification postcard a week prior to each court date and to require defendants to report in to the Agency office one hour prior to each court appearance.[129] The detail of these changes for the Pre-Trial Release Agency show the judge felt the Harris County jurisdiction was vastly under-using the ROR bail option. By ordering the system to make greater use of ROR, the judge expected to alleviate the overcrowded conditions in the jail.

In a paragraph in the appendix of the opinion the Court explained its philosophy of bail:

> The pre-trial release system should operate to make the community safer and to eliminate arbitrary bond decisions by shifting the focus of the evaluation scheme from an absolute reliance upon ability to pay and type of offense charged to two more relevant criteria: safety of the community if the person is released; and likelihood of the person's appearance in court if released on recognizance.[130]

The Court recognized that the reliance on money bail in the jurisdiction was not meeting either of the two purposes that a bail decision can be based upon. The Court found that money bail set according to the type offense charged failed to detain dangerous defendants and might detain defendants likely to appear in court. The Court does not explain in what context the "safety of the community" criteria are to be used, but one would assume their application would be limited to capital cases and to cases in which witnesses or jurors are threatened.

Whatever the role for appearance and dangerousness concerns, the District Court has imposed standards for ROR on the Harris County jurisdiction. In a case brought to the District Court under the due process clause, the reliance on ability to pay and offense charge is condemned, replacing these criteria with new ones which are implemented by the court order. The court order imposes upon Harris County a system to which emphazises the role for ROR. This system is similar to the type program used in Federal jurisdictions. The Alberti case shows that a Federal Court will step in and make a jurisdiction use ROR as a bail option if the Court feels conditions warrant this type action.

QUASI-LEGAL SOURCES

Official "advisory" guidelines are the final source included in the search for formal guidelines for bail decisionmaking. The advisory guidelines are attempts to define the legal and philosophical tenets for bail policy. Although advisory guidelines do not have the impact of law, they are supposed to be ideal policies and are often cited in legal opinions as support for court decisions.[131] Two advisory guidelines are reviewed to show the standards they set for pretrial release.

One source for guidelines applicable to ROR is The American Bar Associations Standards Relating to the Administration of Criminal Justice.[132] The ABA standards are the suggested policies and the comments of the members of the American Bar Association who are interested in the improvement of the American Criminal Justice System.

The Standards states that the law favors releasing all defendants. Detention is described as

> harsh and oppressive in that it subjects persons whose guilt has not been judicially established to economic and psychological hardship, interferes with their ability to defend themselves, and in many cases, deprives their families of support. Moreover, the maintenance of jailed defendants and their families represents a major public offense.[133]

In the "commentary," the standards points out that demonstrating beyond a reasonable doubt that a person is guilty is a basic premise of our criminal justice system. The Standards claim that depriving a defendant of liberty pending trial is "contrary to this premise," and the injustice which results when a defendant "is acquitted after eventual trial is obvious."[134]

In addition, the ABA Standards proposes that "it should be presumed that the defendant is entitled to be released on his or her own recognizance."[135] If this presumption is to be overcome, it should be by finding that there is a substantial risk of nonappearance. In determining this risk, the standards suggests the judicial officer take into account the community ties, prior record, and the nature of the charge, but only insofar as the charge is relevant to the risk of nonappearance. The Standards also proposes that if a judge decides that ROR is unwarranted, he should include in the record a statement of the reasons for his decision.

The Standards suggest every jurisdiction should have a Pretrial Services Agency. These agencies would conduct pre-release investigations to provide judicial officers with decisionmaking information, insure the defendants are adequately supervised, and provide or coordinate counseling and other post-release services. The agency would be designed "to avoid pretrial incarceration while protecting the legitimate interests of the community."[136]

Although the Standards say that release on monetary conditions might be necessary to assure the defendant's appearance in court, it stresses that some form of nonmonetary conditions should be used if it will reasonably assure appearance. Monetary conditions should not be set "to frighten or punish the defendant, placate public opinion, or to prevent anticipated criminal conduct."[137]

The ABA Standards provide for pretrial detention, but only after a judicial hearing. The detention should be after a "clear and convincing" showing that the "safety of the community, the integrity of the judicial process, or the defendant's appearance cannot be reasonably assured"[138] by any other possible method. The suggestion does say that a defendant should not be held on a generalized prediction of dangerousness, but only when he has committed new crimes or violated terms of his release.

The ABA Standards suggest a defendant should be released and that release on recognizance is the preferred form of release. Although the standards offer other types of release, even preventive detention, the requirements set forth for these other forms are strict enough that if the guidelines are followed, a majority of the defendant population could have ROR.

Another source for ROR guidelines is the Performance Standards and

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Goals for Pretrial Release and Diversion.[139] This is an effort by the National Association of Pretrial Services Agencies,(NAPSA) to establish standards for the implementation of sound release practices. The standards are "intended to represent realistically achievable goals . . . without sacrificing fundamental principals of justice."[140]

The NAPSA standards were similar to the ABA standards. The NAPSA Standards and Goals stated that there should be a presumption of release on own recognizance of a defendant, that no defendant should be detained prior to trial on the basis of inability to meet financial conditions, and that community ties, prior record and other individualized factors should be the criteria used by judicial officers for decisionmaking. The NAPSA also suggests Pretrial Services Agencies be established to fill investigative and supervisory roles, and that due process hearings be required if a defendant must be detained.[141]

There were some differences between the two standards. Unlike the ABA standards, NAPSA standards suggested that at the initial appearance "the prosecution should have the burden of rebutting the presumption of release on personal recognizance."[142] The NAPSA standards also differ from the ABA standards on the criteria necessary to find that a defendant may be detained prior to trial. In addition to the circumstances suggested by the ABA standards, the NAPSA standards propose that a defendant who has been convicted of, or has a pending charge of flight to avoid prosecution or has expressed or implied an intent to flee may be detained. The NAPSA standards also suggest allowing detention if the defendant if the defendant has been convicted of a crime of violence within the past ten years. Allowing more possibilities for preventive detention is an example of the NAPSA intention of setting "realistically achievable goals." The NAPSA allows more possibilities for detention,

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but requires a due process hearing and shifts the burden of proof to the prosecutor. The NAPSA is suggesting a method intended to protect the fundamental rights of the accused, but still consider the safety of the community.

The two advisory guidelines that are reviewed based their standards on previous statutory and case law, as well as tenets of jurisprudence. Therefore, the advisory guidelines can be seen as summaries of the legal framework for bail decisionmaking. The two guidelines reviewed has some minor discrepancies, but both found a dominant role for the ROR bail option.

SUMMARY

The legal sources show that there are three state interests behind bail decisions and pretrial release. The first State interest is releasing the defendant to keep him from being punished before his trial. The second State interest is assuring his appearance at the trial. The last, and most controversial State interest is protecting society from dangerous defendants. Although some legal sources do make a perception of dangerousness a reason to deny bail, none of the legal sources make it a consideration in a determination of type of bail or amount of money bail. Therefore, when a judicial officer does set bail, whether a defendant is likely to appear in court is the only acceptable governmental purpose.

The legal sources establish a number of criteria for judges to use when deciding whether a defendant is likely to appear in court. The defendant's prior record, financial resources, community ties and offense charged are some of the more important criteria. The legal guidelines also make the community ties criteria the most important. These legal criteria for determining the likelihood of appearance supposed to be the basis for deciding if a defendant is be released on his own recognizance.

The legal sources give release on recognizance a favored status as a bail option, indicating it should be the dominant form of bail. Unless the above criteria show a defendant is likely to flee, he is to be released on his own recognizance. Since the law creates a presumption that a defendant will be released on his own recognizance, a judicial officer must find that the criteria indicate the defendant will not appear in Court if given ROR. Even in these instances, legal sources indicate that restrictive conditions such as part-time detention should be considered before money bail is resorted to.

ENDNOTES

1. John S. Goldkamp, Bail Decisionmaking and the Role of Pretrial Detention in American Justice (Albany, New York: Criminal Justice Research Center, 1977), p. 26.

2. Caleeb Foote, "The Coming Constitutional Crisis in Bail," 102 University of Pennsylvania Law Review, 969-992.

3. Id., p. 968.

4. Id.

5. Id.

6. Frederick D. Hess, "Pretrial Dentention and the 1970 District of Columbia Crime Act -- The Next Step in Bail Reform." 37 Brooklyn Law Review 277.

7. Id., p. 307.

8. Judiciary Act of 1789, Act of Sept. 24, 1789, Ch. 20, Sec. 33, 1 Stat. 91.

9. Hess, p. 308.

10. John N. Mitchell, "Bail Reform and the Constitutionality of Pretrial Detention," 55 Virginia Law Review 1227-1229, note 17, 22.

11. See Foote, Hess, and Mitchell.

12. Goldkamp (1977:30).

13. United States v. Lawrence, 26 Fed. Cas. 887-889 (No. 150 (C.C.D.C. 1835).

14. Foote, 1965, p. 992.

15. Id., p. 993.

16. 342 U.S. 1 (1951).

17. 342 U.S. 524 (1952).

18. Dicta is defined as the opinions of a judge which do not embody the resolution or determination of the court . They are expressions in a court's opinion which go beyond the facts before court and therefore are individual views of author of opinion and not binding in subsequent cases. State ex rel. Foster v. Naftalin, 246 Minn. 181, 74 N.W.2d 249.

19. Goldkamp, 1977, p. 31.

20. Federal Rules of Criminal Procedure, Rule 46 (a) (1), 1951.

21. Stack, at 4.

22. Stack, at 4, 5.

23. Stack, at 4-5.

24. Federal Rules of Criminal Procedure, Rule 46(c). Rule 46 has been revised four times since 1951 (in 1956, 1966, 1972, and 1975). In its present form it reflects the innovations of the Bail Reform Act of 1966 (18 U.S.C.A. 3146-3152) and the Speedy Trial Act of 1975 (18 U.S.C.A. 3153-3156).

25. Stack, at 5.

26. Stack, at 6.

27. Justices Minton, Vinson, Clark, Reed, and Jackson formed the majority, while Black, Frankfurter, Douglas and Burton voiced strong dissents.

28. 342 U.S. at 545-6.

29. Goldkamp, 1977, pp. 33, 113.

30. 72 S.Ct., p. 535.

31. 75 S.Ct. 349 (Douglas, J., Circuit Justice, 1955).

32. Id., at 349.12

33. 76 S.Ct. 1063 (Frankfurter, J., Circuit Justice, 1956).

34. Id., at 1066.

35. 80 S.Ct. 30 (Douglas, J., Circuit Justice, 1959).

36. Id., at 32.

37. Bandy v. United States, 150981 S.Ct. 197 (Douglas, J., Circuit Justice, 1961), Bandy v. United States 82 S.Ct. 11 Douglas, J., Circit Justice, 1961). In Bandy I the defendant petitioned Justice Douglas for release on recognizance prior to his initial trial. In Bandy II, he had been convicted and was petitioning for ROR while the Supreme Court considered whether to grant certiorari.

38. 351 U.S. 12 (1956).

39. Bandy I, at 198.

40. Id., at 197.

41. Id., at 198.

42. Bandy II, at 13.

43. Goldkamp, 1977, p. 35.

44. 81 S.Ct. 642 (Harlan, J., Circuit Justice, 1961).

45. Id., at 644.

46. 82 S.Ct. 662 (Douglas, J., Circuit Justice, 1962).

47. Id., at 669.

48. Id., at 668.

49. 82 S.Ct. 994 (Warren, E.J., Circuit Justice, 1962).

50. Id., 996.

51. Goldkamp, 1977, p. 35.

52. Goldkamp, 1977, p. 39.

53. Public Law 89-465, section 2.

54. 18 U.S.C.A., section 3146(a).

55. 18 U.S.C.A., section 3148.

56. Id.

57. The District of Columbia Court Reform and Criminal Procedure Act of 1970 [Pub. L. 91-358, 84 Stat. 473 et seq. (1970)]y amended the Bail Reform Act of 1966. Congress directed non-federal judges in the District of Columbia to consider the safety of the community when making release d|ecision. Defendants are detained for up to 60 days if they commit a dangerous crime, in the past have committed crimes of violence, are a narcotic addict charged with a violent crime or are a threat to witnesses or jurors, and a pretrial detention hearing determines that no other conditions would reasonably protect the community. Only in rare instances has this provision been used. See Goldkamp, 1979, p. 41 or the D.C. Code section 23-1321 to 1333.

58. Dechamplain v. Lovelace, 510 F.2d 419 (Eighth Circuit, 1976).

59. 18 U.S.C. 3146(a).

60. 18 U.S.C.A. 3146(b).

61. 412 F.2d 145 (D.C.Cir., 1968).

62. Id., at 146.

63. Id.

64. Id., at 147.

65. 420 F.2d 176 (D.C. Cir., 1969).

66. Id., at 178.

67. Id., at 179.

68. Id.

69. Id., at 178.

70. Id., at 178-179.

71. 433 F.2d 537 (D.C. Cir., 1970).

72. Id., at 539.

73. Id.

74. Id., at 540.

75. 510 F.2d 419, 426 (Eighth Circuit, 1975).

76. Id., at 527.

77. Id., at 526.

78. Briggs v. United States, 476 F.2d 947 (Fifth Cir., 1973), Weaver v. United States, 405 F.2d 353 (D.C. Cir., 1968), United States v. Smith, 444 F.2d (Eighth Cir., 1971), and Wallace v. Kern, 520 F.2d 400 (Second Cir., 1975).

79. Harris v. United States, 404 U.S. 1232, 92 S.Ct. 10 (1971).

80. See Allen v. United States, 128 App DC 207, 386 F.2d 634 (1967) and United States v. Payne, 304 F. Supp. 1012 (1968).

81. 306 F. Supp. 124 (1969).

82. See Chapter IV. See also Beeley (1927), Morse and Beattie (1932) and Foote (1954).

83. 389 U.S. 15, 88 S.Ct. 6 (1971).

84. Id., at 16.

85. See Gilbert v. United States, 425 F.2d 490 (D.C. Cir., 1969) and United States v. Wind, 527 F.2d 572 (Sixth Cir., 1975).

86. 18 USC 3148.

87. 431 F.2d 85 (Fifth Cir., 1970).

88. 402 F.2d 185 (D.C. Cir., 1968).

89. 296 F. Supp. 280 (D.C. Conn., 1968).

90. 422 F. Supp. 712 (D.C. Cir., 1970).

91. 268 F. Supp. 877 (N.D. Cal., 1967).

92. Id., at 878, 879.

93. 289 F. Supp. 852 (D.C. Conn., 1968).

94. Id., at 852.

95. Palko v. Connecticutt, 302 U.S. 319 (1937).

96. Id., at 325.

97. For further discussion of the differences between the Burger and Warren Courts see "Stepping into the Breach: Basing Defendant's Rights on State Rather than Federal Law," 15 American Criminal Law Review 331-338, Spring 1981, or Donald E. Wilkes, "The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court" 62 Kentucky Law Journal 421-451, 1974.

98. Henry J. Abraham, Freedom and the Courts: Civil Rights and Civil Liberties in the United States (New York: Oxford University Press, 1977) pp. 96-98.

99. Id., p. 99.

100. "Challenging Bail Laws: Bellamy, Henson and Van Atta -- Background and Strategy." 13 University of California at Davis Law Review. 300-329, Spring, 1980.

101. Jefferson v. Hackney, 406 U.S. 535, 546, 549 (1972).

102. Dandridge v. Williams, 397 U.S. 420, 425 (1961).

103. The Supreme Court has held unconstitutional classifications based on race, Korematsu v. United States, 323 U.S. 214 (1944), national ancestry, Yick Wo v. Hopkins, 118 U.S. 356 (1886), and alienage, Graham v. Richardson, 403 U.S. 365 (1971).

104. The Supreme Court has included as fundamental rights travel, Shapiro v. Thompson, 394 U.S. 618 (1969), the right to vote Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665 (1966), the right to procreate, Skinner v. Oklahoma, 316 U.S. 535 (1942), and the right to marry, Loving v. Virginia, 388 U.S. 1 (1967).

105. Harper v. Virginia Bd. of Education, 383 U.S. 663, 668 (1966).

106. 411 U.S. 1 (1973).

107. Id., at 28.

108. Peter D. Roos, "The Potential Impact of Rodriquez on Other School Reform Litigation," Law and Contemporary Problems, vol. 38, winter-Spring, 1979, no. 3, pp. 566-601.

109. San Antonio Independent School District v. Rodriquez, at 29.

110. Id.

111. Griffin v. Illinois, 351 U.S. 12 (1956).

112. Williams v. Illinois, 399 U.S. 235 (1970) and Tate v. Short, 401 U.S. 395 (1971).

113. Goldkamp, 1979, p. 55-58.

114. 322 F. Supp. 38 (E.D. Fla., 1970).

115. Id., at 41.

116. Id.

117. Id., at 41, 42.

118. Id., at 42.

119. 557 F.2d 1189 (1977), rehearing, en banc, 572 F.2d 1053 (1978).

120. 557 F.2d 1189, at 1202.

121. Id.

122. Id.

123. Committee Note to Florida Court Rule 3.130, 343 So.2d 1251.

124. 572 F.2d 1053, 1058 (1978).

125. Washburn Law Journal, p. 656.

126. 406 F. Supp. 649 (1975).

127. Id., at 654.

128. Taylor v. Sterrett, 344 F. Supp. 411 (N.D. Tex. 1972) aff'd 499 F.2d 367 (Fifth Circuit, 1974), Hamilton v. Landview, 351 F. Supp. 549 (E.D. La., 1972); Jones v. Wittenberg, 330 F.Supp. 707 (N.D. Ohio 1971), aff'd 456 F.2d 854 (Sixth Cir. 1972).

129. Id., at 683.

130. Id., at 683-686.

131. Id., at 683.

132. The cases which cite this type of literature are so numerous Shepard's compiles a separate volume of case citations for them.

133. American Bar Association Standards relating to the Administration of Criminal Justice, Chapter 10, Pretrial Release (Washington, D.C., United states Department of Justice, 1978).

134. Ibid., p. 1.

135. Ibid., p. 1.

136. Ibid., p. 29.

137. Ibid., p. 33.

138. Ibid., p. 34.

139. Ibid., p. 44.

140. Performance Standards and Goals for Pretrial Release and Diversion: Pretrial Release (Washington, D.C.: The National Association of Pretrial Services Agencies, July 1978).

141. Ibid., p. 3.

142. Ibid., p. 76.

143. Ibid., p. 21.

CHAPTER IV - WHAT SHOULD HAPPEN

This chapter estimates how many defendants should be released on their own recognizance in the Memphis-Shelby County Criminal Justice system. Since the defendants arrested on criminal charges in Memphis-Shelby County are released or detained under Tennessee state law, the Tennessee Constitution, statutes, and cases are examined first. Then, the Tennessee law is compared to the findings of the literature review in Chapter II and the Federal Legal analysis in Chapter III. At the end of this chapter, these three sources will be used to address the role of ROR in the Memphis pretrial release policy.

The Tennessee Constitution provides that "all persons shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident or the presumption great."[1] An examination of state cases shows the Tennessee Supreme Court has interpreted this constitutional clause to mean "that the right to bail in all cases has been regarded as fundamental" and has declared that except for capital cases "the constitutional guarantee of the right to bail contains no exception."[2] Even though the United States Constitution has not been interpreted as granting a right to bail, the Tennessee Constitution contains this right. Therefore, unless the charge is first degree murder, a Memphis judge must set bail for every defendant.

Furthermore, the Tennessee Constitution states "that excessive

bail shall not be required."[3] Only one case from an Appeals Court in Tennessee has interpreted the phrase "excessive bail." In State ex rel. Hemby v. O'Steen,[4] the Tennessee Court of Criminal Appeals ruled that the defendant was illegally detained by excessive bond. Although the defendant was originally charged with assualt with intent to commit first-degree murder, the grand jury indicted the defendant for involuntary manslaughter and aggravated rape. The General Sessions Judge originally fixed bond at $25,000, which after a bail hearing, the trial judge in the Circuit Court retained. After the defendant had been confined three months due to to his inability to post his $25,000 bond, the Criminal Court of appeals ordered his bond reduced to $2,000 on the involuntary manslaughter and $1,000 on the aggravated assualt charge.

The Criminal Court of Appeals based the decision on the excessive bail clause in the Tennessee Constitution, saying that it was "unconstitutional to fix excessive bail to assure that a defendant would not gain his freedom."[5] The Court recognized that some previous Tennessee cases made the right of a convicted felon to bail "subordinate to the public peace and well being of society." However, these cases are "limited to the denial of bail after conviction."[6] The Court said if the trial judge deemed that the among of money bail was not sufficient to assure the defendant's appearance, "he may impose any reasonable and proper conditions he deems necessary."[7] In a footnote, the Court of Criminal Appeals suggested the American Bar Association Standards Relating to Pretrial Release as providing "excellent guidelines for situations of this nature."[8]

The Tennessee state legislature recently enacted into law reformed bail legislation. "The Release From Custody and Bail Reform Act of 1978"[9]

repealed the old Tennessee State bail statutes and replaced them with a new state bail system modeled after the National bail laws. The new Tennessee statutes state that "before trial all defendants shall be bailable by sufficient sureties except for capital offenses where the proof is evident or the presumption great."[10] A defendant who is awaiting an appeal after being convicted "may" be admitted to bail in most cases at the discretion of the judicial officer. However, a defendant who has been convicted for a Class X felony[11] shall not be released on bond "in every circumstance and without exemption."[12] Therefore, the Tennessee statutes also provide the right to bail for a defendant in Tennessee, unless he is charged with a capital offense or awaiting an appeal after conviction.

The new Tennessee statute also states that "any person charged with a bailable offense may . . . be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond."[13] The statute gives the following criteria to be taken into account to determine whether or not a defendant will appear as required and shall be released on his own recognizance:

> (a) The defendant's length of residence in the community; and
>
> (b) His employment status and history and his financial condition; and
>
> (c) His family ties and relationships; and
>
> (d) His reputation, character, and mental condition; and
>
> (e) His prior criminal record including prior releases on recognizance or bail; and
>
> (f) The identity of responsible members of the community who will vouch for defendant's reliability; and

> (g) The nature of the offense and the apparent probability of conviction and the likely sentence, insofar as these factors are relevant to the risk of nonappearance; and
>
> (h) Any other factors indicating the defendant's ties to the community or bearing on the risk of willful failure to apear.[14]

If the person setting bail finds that a defendant does not qualify for a release upon recognizance under the above criteria, then he is to set "the least onerous conditions reasonably likely to assure the defendant's appearance in court."[15] These conditions include one or more of the following:

> (a) Release the defendant into the care of some qualified person or organization responsible for supervising the defendant and assisting him appear in court . . . .
>
> (b) Place the defendant under the supervision of an available probation counselor or other appropriate public official.
>
> (c) Impose reasonable restrictions on the activities, movements, associations and residences of the defendant.
>
> (d) Impose any other reasonable restriction designed to assure the defendant's appearance, including but not limited to, the deposit of bail pursuant to section 40-1217.[16]

Section 40-1217 reads that "absent a showing that conditions on a release on recognizance will reasonably assure the appearance of the defendant as required," the judge setting bail shall set money bail.[17] The statutes further instruct that bail "shall be set as low as the court determines is necessary to reasonably assure the appearance of the defendant as required."[18]

The statute reads that a judicial officer must consider ROR first, setting financial conditions only when other conditions will not assure the defendant's appearance. Although there are no cases in Tennessee which interpret this policy, other state courts and federal courts have interpreted similar statutes as establishing release on recognizance as the presumptive form of relief. These cases put the burden of proof of likelihood of failure to appear on the prosecution.[19] Therefore, a judge in Memphis should presume each defendant is to be released on his own recognizance. He should only set money bail when the criteria in the law indicate this "onerous condition" is necessary.

The Tennessee laws have obviously been influenced by the bail reform movement. The Constitution and the statutory law contain an explicit right to bail for most defendants. In addition, appearance is the only state interest allowed in bail decisions. "The Release From Custody and Bail Reform Act of 1978" does not give defendant dangerousness as a criterion when setting bail. The case interpreting the excessive bail clause makes clear that high money bail cannot be set to detain a defendant a judge perceives as dangerous.

The decisionmaking criteria that are suggested in the 1978 Act are similar to the criteria originally used by the Vera Foundation. Community and family ties are emphasized, with the offense charged relegated to consideration only when it is "relevant to the risk of nonappearance." However, the prediction studies showed that many of the criteria measured by a Vera-type scale were not related to appearance, the only stated purpose given in the statute for bail decisions. The lack of predictive ability of these characteristics suggests that for a defendant to be denied ROR, he should have no community or family

ties and no responsible member of the community to vouch for him, or he should have been undependable during prior releases.

The conditions in the Act also give a favored place to increased supervision over money bail. The decisionmaker is instructed to impose "the least onerous condition." Several methods of increasing supervision are offered before the imposition of money bail. This section of the law implies the Tennessee legislators were conscious of the pretrial punishment given defendants who must meet money bail.

The Tennessee "Release From Custody and Bail Reform Act of 1978" is similar to the Federal "Bail Reform Act of 1966." The Federal court cases repeatedly interpreted the Federal legislation as putting more emphasis on the community ties than on the prior record or the charge, even when setting bail for a defendant appealing a conviction. The Federal Courts also said that the burden of proving a defendant should not be released on his own recognizance is on the government. The judge was required to spell out in writing his reasons for setting money bail. Although the Tennessee Appeals Courts have not ruled on these issues, state courts usually look to Federal decisions for guidance.

Tennessee has provisions in both its Constitution and statutes protecting a right to bail. This state right to bail appears to be stronger than that provided by Federal law. Although state court cases have not found a right to pretrial release, state law does not permit a general concern for a defendant's dangerousness of some Federal cases indicate Federal law allows. Therefore, if the State law does not secure a right to pretrial release, at least more defendants should be released under State law than might be under Federal law.

The literature review suggested that setting money bail is pun-

ishing a defendant who is presumably innocent. Therefore an effort needs to be made to maximize the number of defendants released on their own recognizance. No study has ever released every defendant in a jurisdiction, thus, Monahan's idea that there should be more true positives than false positives is hard to discuss. Since the prediction studies have been unable to even approach predicting fifty percent of the defendants who would fail to appear, the acceptance of this principal might mean money bail would be totally discarded. In fact, the NAPSA suggests that financial conditions should be eliminated.

The Walker type rules are also hard to apply to bail decisionmaking. Yet, here more conservative ideas appear more easily implemented than totally discarding money bail. If the Walker rules were applied, only defendants for whom the government has a strong interest in the defendant's trial and in which there is a strong reason to suspect the defendant might flee would have money bail set. A strong government interest could be interpreted as violent crimes, or felonies against a person. This type of crime accounts for 25 to 30 percent of the felonies in Memphis.[20] Past studies show defendants charged with serious crimes are more likely to appear than defendants charged with lesser crimes. However, for the sake of the discussion,these defendants are the ones in whom the government will have a "strong interest." If half of these defendants have no community ties whatsoever, or have failed to appear in the past, or express an intent to flee, money bail will probably be set for a small fraction (15%) of the total defendant population. In fact, if the government is assumed to have a strong interest in all cases, the number of defendants who would have shown a propensity to flee would still be low. A great majority of the defendants could be released on their own recognizance.

An estimate of 75 percent of the defendants having ROR set as their bail appears to be a reasonable estimate of the proper rate under these assumptions.

Suggesting that all or even 75 percent of the defendants in Memphis should be released on their own recognizance sounds idealistic. A more pragmatic and concrete approach would be to look at other progressive jurisdictions with similar bail laws. Although every jurisdiction is unique, a gross figure such as the proportion of defendants released on their own recognizance from another jurisdiction should be comparable to the Memphis jurisdiction.

Washington, D.C. and Dade County (Miami), Florida both have bail laws similar to Memphis, Tennessee. In Washington, 62 percent of the felony defendants are released on their own recognizance.[21] In Dade County 55 percent of the felony defendants are given ROR.[22] Under Tennessee's progressive bail laws, one would expect to find a similar number of defendants released on their own recognizance.

The discussion in this chapter has been purely speculative, but should be useful in evaluating the Memphis-Shelby County Criminal Justice System. First, the Tennessee law was shown to be reform oriented. The presumption towards release on recognizance, the right to bail, and the excessive bail clause suggest that Tennessee law requires for ROR to be the predominant form of bail.

Next, in light of the progressive orientation of the Tennessee law, three proposals for release rates were made based on the framework from the previous chapters. The first proposal suggested a radical alternative, releasing all defendants on some form of nonfinancial bail. The second proposal was more moderate; establishing strict rules which

require a clear reason for imposing money bail. A rough estimate of three-fourths of the defendants released on their own recognizance was made for this proposal. The final proposal was based on the release rates found in other jurisdictions. This proposal was the most conservative of the three. Based on the release rates in other jurisdictions, one would expect to find at least half, or 50 percent, of the felony defendants released on their own recognizance by the Memphis courts. Since the third proposal is the lowest, it is used as the criterion for evaluating the Memphis-Shelby County bail decisions. Any of the three proposals could be used. However if the memphis system does not at least match this lowest proposal, the bail decisions in Memphis need to be changed.

ENDNOTES

1. Tennessee Code Annotated, Constitution of Tennessee, Art. 1, s. 15.

2. Wallace v. State, 193 Tenn. 182, 184, 245 SW2d 192, 194 (1952).

3. Constitution of Tennessee, Art. 1, s. 16.

4. 559 SW2d 340 (Tenn. Crim. App., 1977).

5. Id., at 342.

6. Id.

7. Id.

8. Id.

9. 1978 Tenn. Pub. acts ch. 506, s. 1-18; Tennessee Code Annotated, s. 40-1201 to 1244.

10. Id.

11. Class X Felonies are violent crimes against a person for which the Tennessee Legislature has mandated set prison sentences.

12. 1978 Tenn. Pub. Act, ch. 506, s. 12.

13. Id., at s. 13.

14. Id.

15. Id., at s. 16.

16. Id.

17. Id., at s. 17.

18. Id., at s. 18.

19. 78 American Law Review, 3d 780.

20. See Chapter V, supra.

21. Roth and Wice, p.

22. Mary A. Toborg, et al., Pretrial Release: An Evaluation of Defendant Outcomes and Program Impact; Vol. I Release Practices and Outcomes: Cross Sectional Analysis of Eight Jurisdictions (Washington, D.C.: The Lazar Institute, 1981), p. 141.

CHAPTER V - WHAT IS HAPPENING

This chapter describes the bail decisionmaking process, the bail outcomes of defendant, and the success of bail decisions in terms of appearance. Since comparative data is necessary to understand the impact of ROR, all types of bail and their outcomes are examined. Due to resource limitations, only a cursory look at appearance rates is made and no information concerning rearrest rates is given. However, since the chapter is intended to explain what bail decisions are made and to lay the groundwork for later analysis, the information omitted is not essential.

The cases upon which this examination is based, felony cases in Memphis , involve a two-tiered court system. The City Courts have jurisdiction over the Preliminary Hearing to which every defendant has a right. This hearing must take place within thirty days after the defendant's City Court arraignment, the initial court appearance in which he is advised of the charge. After the Preliminary Hearing is disposed of by the City Court, jurisdiction over the case switches to the County which has the Criminal Courts and other facilities necessary to handle felony jury trials.

The discussion is also limited to individuals arrested on felony charges within the city limits of Memphis. The misdemeanor cases are excluded because in Memphis most misdemeanor cases automatically have bail set at fifty dollars, an amount almost all defendants can post. Although

some defendants charged with misdemeanors are released on their own recognizance, this number compared to the total number of misdemeanors is small. Cases outside of the Memphis City limits are also excluded because comparatively few people are arrested in Shelby County but not within the city limits. Including the small number of defendants from the general jurisdiction of the county would not add significantly to the discussion, but would complicate the explanation.

CITY BAIL OUTCOMES

Before bail is set, a defendant must enter the criminal justice system. A person may be arrested by a police officer at the scene of an alleged crime, by an officer because he matches a description of a wanted person, by an officer because a warrant was issued for the defendant's arrest, or after the defendant turns himself in upon learning the police are looking for him. After arrest, defendants are taken to the Memphis City Jail, locked up, charged, fingerprinted, and "booked".

After the defendant is booked by the police the bail setting process begins. The quickest method of having bail set is for an individual who already has an attorney to direct his attorney to ask any of the eight city Court Judges to set bail for his client. Based on the information obtained about the defendant from the attorney, and possibly on information obtained from the Police Department's Bureau of Identification about the defendant's prior record, the Judge may set bail. However, judges are difficult to locate at times and some judges refuse to set bail for an attorney. Most defendants also do not have a private attorney when arrested. Therefore, most bail decisions are not made in this manner. Defendants who have bail set in this manner have their arraignment the

next morning.

A second method of setting bail is in the open courtroom as soon as Felony Court opens on week day mornings. The defendant is brought from the jail before the judge sitting in Felony Court for his arraignment and has his bail set at the same time. This method of setting bail is usually used for defendants arrested at night. The prosecuting attorney tells the judge the charge, the facts of the case from the arrest ticket, and the defendant's prior record. If Pretrial Services has interviewed the defendant, the PTS representative tells the judge the personal background of the defendant and the PTS recommendation for type of bail, if any. The prosecutor may agree with the PTS recommendation or may object and make a counter-recommendation for bail. If the defendant has a defense attorney, the attorney will make some comments. However, the presence of a defense attorney at the initial bail setting in the courtroom is rare. Based on the information given in the courtroom, the judge decides on the bail for the defendant. About one-third of the felony defendants have bail set in this manner.

The third method of setting bail occurs in the private office of the judge, in the Pretrial Services Office in the Police Building, or, if on a weekend, over the telephone. Bail is usually set in this manner at 3:00 p.m. and 6:00 p.m. on weekdays and twice a day on weekends and holidays. The PTS employee tells the judge the name of the defendant, the facts from the arrest ticket, his prior record, the defendant's personal background if he was interviewed by PTS, and the PTS recommendation. The judge makes his decision solely on the information given him by the PTS employee. This method is used for defendants arrested during the day or weekend, about half of the total number of defendants. This method

of setting bail is intended to keep people from remaining in the City Jail for long periods of time without having an opportunity to be released. Defendants who have bail set in this manner have their arraignment the next morning when City Felony Court is held.

No part of the Criminal Justice System keeps complete records of which of the methods is used to set bail. The division of setting bail in the City Courts into three different methods is not official, but is based on personal observation and interviews with various actors in the system. Since information concerning the method used is not kept, the estimates of the proportion of bail decisions made through each method were based on the same observations and interviews.

Whichever method of setting bail is used, a felony defendant can have one of several types of bail set by a judge. The most common type is money bail. Although almost always a surety bond, a judge might specify that money bail be cash. Most defendants obtain release on a surety bond by getting a friend or relative to pay a professional bondsman a premium to sign for the defendant's release. Since some defendants cannot even afford the ten percent fee bondsmen demand or cannot find a bondsman willing to take them as clients, there are defendants who have bail set, but are not released. A second type of bail is release on recognizance upon a Pretrial Services recommendation. If PTS decides the defendant will be a "good risk" to appear in court as necessary, PTS recommends ROR to the judge. A judge might then release the defendant, under the supervision of the Agency on the defendant's written promise to appear.

A third type of bail is a combination of the first two. For some defendants PTS will ask the judge to reduce the surety bond and release the defendant under the supervision of Pretrial Services. This type of

bail is usually used for defendants who meet the PTS requirements for ROR recommendation, but ROR is deemed not appropriate. Either the judge or PTS may decide the qualified defendant should not be given ROR. Interviews suggest the seriousness of the case is the main reason for such a determination.

A fourth type of bail is unsupervised ROR. Some defendants are released on their own recognizance after their attorney talks to the judge. A judge on his own discretion may grant ROR to any defendant. These defendants are usually not supervised by PTS.

A final option available to a judge is to set no bail. No bail can be set if the defendant is charged with first-degree murder, the only capital offense in Tennessee, or if the defendant has a "hold" on him for escaping from prison or violating parole. Defendants who do not have bail set are detained unless the judge later sets bail they can post at another court appearance.

The following information describes the bail outcomes of felony defendants in Memphis City Court. Figure 5.1 provides the proportions of the different types of bail set in Memphis. This information is based on the initial bail decision. If information on the initial decision was not available, the criminal justice system computer was checked to determine if the defendant was released on bail. Since the computer only shows the type of bail set for a defendant who is released, there was no information on the bail set for 2.5 percent of the defendants. Personal observation and interviews suggest that most of these defendants originally had no bail set. The judge in most of these cases wanted to wait til the arraignment to set bail. Since most of the cases in which the records said "no bail set" also had bail set at a later court appearance, the defendants

for whom no information was available are grouped with the defendants for whom the records showed no bail set. In addition, all defendants who had to meet some financial condition to be released are grouped together.

FIGURE 5.1

THE DISTRIBUTION OF TYPES OF BAIL

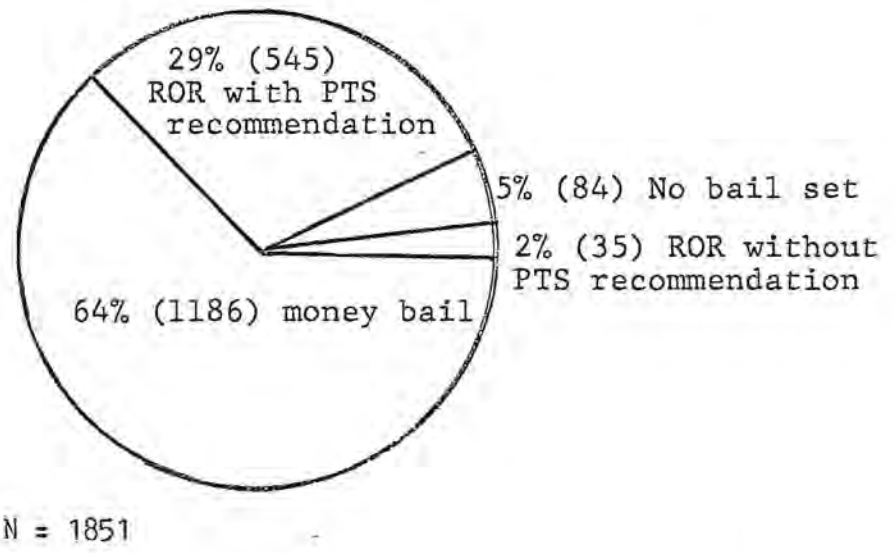


Figure 5.1 plainly shows money bail is set for a great majority of the felony defendants in Memphis. ROR with a Pretrial Services recommendation is a large proportion of the bail decisions, but the defendants given this type of ROR combined with unsupervised ROR still do not amount to even half of the proportion of defendants given money bail.

Table 5.2 provides the type of bail set and the proportion of defendants who are actually released for each type. In this table money bail is divided into "normal" and "large" bonds. The assumption was made that a judge may have been attempting to preventively detain a defendant with a large bond. Since noticeably few bonds were set between $5,000 and $10,000, $10,000 was used as the cut-off point for normal and large bonds.

Only 6.3 percent of the money bonds were $10,000 or over.

Table 5.2 shows how many defendants were detained while their case was processed in City Court. Since many defendants who initially had no bail set later had bail set (in every instance here, money bail) a proportion of defendants in the no bail group were released. However, the criminal justice system computer does not show if a defendant had no bail changed to money bail unless he was able to post bond. The no bail column does not show if defendants in that column were not released because of ability to post money bail or because no bond was ever set.

TABLE 5.2

The Types of Bail and Percentage of Defendants Released

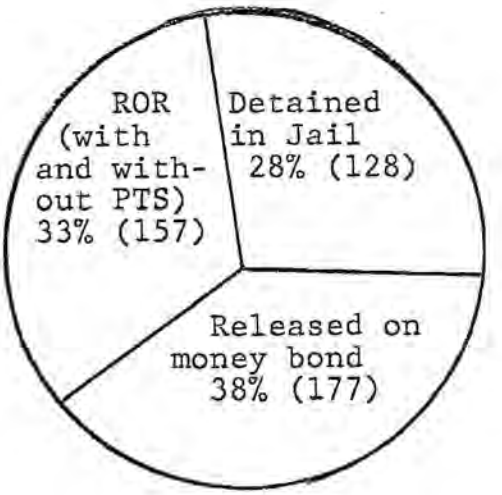
		Type of Bail					
		Money Bail		ROR		no	
		normal	large	PTS	not PTS	bail	Total
Custody Status	released	64	46	100	100	14	72
	not released	36	55	0	0	86	27
	Total =	100	100	100	100	100	100
	N =	254	22	152	5	29	462

The table shows that in the "normal" bond group over a third of the defendants were unable to post their money bond. In the large bond group over one-half were unable to post money bond.

The City Court bail outcomes of the defendants in terms of release is shown in Figure 5.3

FIGURE 5.3

Release Outcomes of Defendants



N = 462

Except for those defendants charged with first degree murder or appealing a conviction, Tennessee law mandates that bail must be set for all defendants. None of the defendants detained in the City Jail are appealing a conviction. Only eight of the 128 detained defendants, or less than two percent of the entire sample represented in the figure, were charged with first degree murder. Therefore, as 25 percent of the felony defendants in Memphis wait for their case to be processed through City Court, they wait in jail unable to post their money bail.

The defendants who were unable to post their money bond were finally released from the jail for a number of reasons. They could be held to the state and transferred to the county jail, have their case dismissed, or plea bargain if the prosecution was willing to reduce the charge to a misdemeanor. If a defendant pleaded guilty, he could either be released from the jail for time served or transferred to the county to the County Workhouse to serve his sentence. Table 5.4 gives these possible dispositions

for the defendants who were never released tabulated against the number of days the sample of defendants spent in jail.

TABLE 5.4

City Court Disposition and Days in Jail

		Held to the State	Dismissed	Plead Guilty Time Served	Plead Guilty Workhouse	Total
Days in jail as percentage of total defendants	0-1	3	7	0	14	5
	2-3	10	2	0	0	6
	4-6	10	7	25	50	13
	7-13	37	29	25	7	32
	14-20	13	29	0	8	17
	21-30	27	26	50	22	27
	Total =	100	100	100	101	100
	N =	70	42	4	14	130

Although one-fourth of the defendants were unable to post money bail, many of them did not spend much time in jail. The first week is divided into three parts to give a fuller picture of the amount of time defendants spend in jail.

Defendants who are held to the state either waive their Preliminary Hearing or have probable cause shown at their Preliminary Hearing. The fewer the number of days, the more likely it is that the defendant waived his hearing. The defendants who are held to the state are transferred to the County Jail. The defendants who have their case dismissed are released from the City Jail. The state has detained these defendants, half of them for more than two weeks, only to fail to prove probable cause at the Preliminary Hearing.

The above table shows almost all of the defendants unable to post money bail were not released from jail for some other reason during the first

week. Comparative data on City dispositions for detained versus released defendants was not gathered. Yet, the days spent in jail by defendants unable to post money bond and their city dispositions shows that poor defendants who have money bail set suffer consequences that defendants who can afford to post money bond do not suffer. The poor who have money bail set sit in jail, discriminated against according to their financial status.

The defendants who initially have money bail set often stay in jail for a number of days before they are released. Table 5.5 shows the type of bail and days until release for defendants in Memphis-Shelby County. The ROR defendants are included in the table so the days they spend in jail can be compared to the days money bail defendants spend in jail.

TABLE 5.5

Type of Bail and Days Until Release

		Type of Bail					
		Money		ROR			
		Normal	Large	PTS	Unsupervised	No Bail	Total
Days in jail by percentage of total defendants	0-1	49	40	97	80	25	71
	2-3	20	20	2	20	25	12
	4-6	14	20	0	0		7
	7-13	14	20	0	0	50	8
	14-20	2	0	1	0	0	1
	21-30	1	0	0	0	0	1
	Total =	101	100	100	100	100	100
	N =	163	10	152	5	4	334

The table shows that defendants who can afford to secure their release on money bail spend more time in jail than defendants released on their own recognizance. Not even half of the normal money bail defendants were released within 24 hours, while more than 95 percent of the ROR defendants were released within 24 hours. Furthermore, in addition to the 35.8 percent of the

defendants who have normal bail set who cannot post bond, 27.2 percent of the defendants who can make their bail still spend a week or more in the City Jail.

The small number of defendants in the large money bail, unsupervised ROR, and no bail groups make conclusions unreliable. There are, however, enough defendants in the relatively large normal money bail and Pretrial Services ROR groups for comparison. This comparison shows some defendants have trouble gathering the money needed to pay the bondsman's 10 percent fee. The fact that some defendant's who do eventually obtain release on money bond struggle to raise the necessary financial resources supports the earlier premise that the defendants who can secure their release on money bail are punished. Defendants who are released on their own recognizance, on the other hand, are released almost immediately after their bail is set. They do not remain in jail while friends or relatives try to pay a bondsman's fee.

The number of defendants who are sitting in City Jail even though they have had bail set is a problem. Over one-third of the defendants who have money bail set do not post bond before their case is disposed of in City Court. Other defendants remain in jail for days or weeks until a friend or relative can gather the money to pay the bondsman his 10 percent nonrefundable fee. Almost all of the defendants who are given ROR usually leave the jail within 24 hours. The contrast suggests someone who is presumed innocent should also be presumed to be released on his own recognizance.

PRETRIAL SERVICES

An important factor in the type of bail set is whether or not Pretrial Services interviews the defendant and makes a recommendation. A defendant cannot be disqualified from an interview by any type of charge, except con-

tempt of court for a previous failure-to-appear. However, not every defendant is eligible for an interview. In the year beginning with July, 1979, and ending with June, 1980, Pretrial Services' records show that 59.5 percent of the City Court felonies were interviewed.

Pretrial Services screens the defendants to be interviewed by using the information available on the criminal justice system computer and from the records of the Memphis Police Department Bureau of Identification. A defendant with a hold (which means the person is currently on parole or probation or is wanted by another part of the criminal justice system) is usually not eligible for an interview. Defendants presently on felony bond in either Criminal Court or City Court are also not interviewed. Defendants with one prior felony conviction within one year, two prior felony convictions within five years, two prior misdemeanor convictions within one year, three prior misdemeanor convictions within two years, or two or more prior convictions for assignation are not interviewed. Defendants who have already posted bond are not interviewed. Furthermore, PTS does not interview defendants who are "mental" cases, are presently in the hospital, or refuse to be interviewed.

After the interview, Pretrial Services must decide whether to recommend the defendant for ROR. PTS bases this decision on the information given by the defendant during his interview after booking. The Memphis system uses an objective point scale based on address, time in area, family ties, employment, character and prior record. The point scale used is similar to the one developed in the Manhattan Bail Project by the Vera Foundation. A copy of the interview form and further explanation appears in Appendix A. PTS recommends ROR if a defendant has the necessary required number of points and PTS can get two people who know the defendant

to verify the information given. If the defendant does not have the necessary points or if PTS is unable to verify the information, an exception can be made at the discretion of the interviewer. Exceptions must be justified and approved by an interviewer's supervisor.

Pretrial Services makes their recommendation in one of the methods of setting bail described in the beginning of this chapter. According to Pretrial Services records, they recommended 50.9 percent of the interviewed felony defendants for ROR in the year ending in 1980.

CITY COURT CASE PROCESSING

The bail is set for felony defendants by a City Court judge for the Arraignment and Preliminary Hearing after bail is set, a defendant is released and must appear in City Court each time his case is reset. If the defendant has money bond set which he cannot post, he sits in the City Jail and is brought from detention to court each time his case is reset. A defendant with money bail he cannot make may attempt to have his bond lowered. The process used in an instance like this is similar to the method of setting bail in the open court room discussed earlier, except PTS rarely makes a ROR recommendation.

Between the arraignment and the disposition of the case in City Court, released defendants are responsible for appearing in court for each reset of a case. Most defendants make at least two and as many as six or seven appearances in City Court. When a defendant is not in court, several different things can happen. If the defendant has already retained an attorney, the attorney can continue the case for the defendant. An accepted practice is for the defendant who cannot make his court date to arrange for his attorney to continue the case to another day. However, if neither the attorney nor

the defendant appear, or if the attorney shows up and does not know where his client is, the defendant can lose his right to a Preliminary Hearing and be "held to the state." The case is automatically held for action of the Grand Jury, passing the jurisdiction from the City Courts to the County's Criminal Courts.) A defendant who has his case held to the state keeps the same bail in the Criminal Court.

Before a defendant is held to the state for failing to appear in City Court, several informal court procedures may occur. The judge sitting in felony court may tell the court clerk "to call the attorney and see where he and his client are." If the defendant already has an attorney, the clerk can get the attorney's name from the jacket (folder containing all official information and papers pertaining to a case.) Instances occur in which both the attorney and the client believe the case was reset to a different day than the day the Court Docket shows. There are also occasions in which the defense attorney has made arrangements with the Attorney General's office prior to the opening of court for that day, but the information was not communicated to the judge or prosecutor in the court room. The City Felony Court docket can have over two hundred cases set for a single day, so mistakes of this nature occur rarely but are not unusual.

A second informal procedure is to place the case at the end of that day's docket. If he thinks the attorney or defendant is late or has stepped out of the courtroom temporarily, the judge will place the case at the end of the docket. Moving the case to the end of the docket gives either one of them a chance to appear and straighten the matter before court closes for the day.

A third informal procedure occurs only when the defendant is released under Pretrial Services supervision. If a PTS client is not in court the

judge usually turn to the PTS representatives in felony court and ask, "Pretrial, do you know where the defendant is?" Since defendants released under PTS supervision are supposed to check in with PTS before court adjourns, the PTS employees may have already tried to find the defendant. If the defendant has a valid excuse, such as in the hospital or in jail in another jurisdiction, some judges will let the PTS representative continue the case for the defendant. If the PTS representative could not locate the defendant, he might answer "I don't know." The prosecutor would then move to nolle prossequi the case (drop the charges) which relieves Pretrial Services from having the responsibility of supervising the defendant. However, if the PTS representative feels the defendant is not at fault for failing to appear and the judge refuses to continue the case, the PTS representative may ask that the defendant be held to the state. This move would assure that the defendant would have ROR as his bail upon reaching the county jurisdiction.

However, there are times when the PTS representative has been too busy to locate a defendant or is not aware that the defendant is missing until the defendant's name is called out in the courtroom. In these instances the reply to the judges question "Where is the defendant" probably would be "Let me see if I can find him." The PTS representative would then hurriedly check the hall to see if he is outside the courtroom, and the other courtrooms in the building to see if he is in the wrong court. If necessary, he might try to telephone the defendant. After this quick effort, the representative would return to the courtroom to explain what he had discovered and ask that the case be put at the end of the docket, the case be continued, or that the case be nolle prossequi.

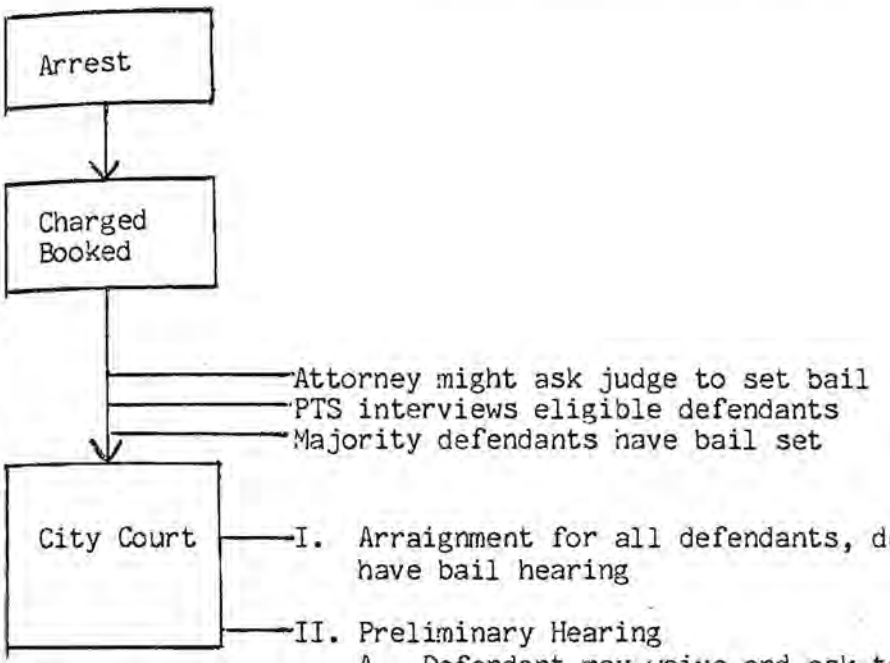
The informal procedures described above are one of the reasons information in the CJS computer is unreliable for drawing conclusions con-

cerning FTA rates. Another is that the computer often shows "HTS", held-to-state, for a defendant who really is a "FTA-Bindover." Since the City Court transfers the jurisdiction over all cases it holds to the Grand Jury in the same manner, the records concerning how a defendant is held to the state are not carefully kept. For these reasons, no effort was made to look at FTA rates in the City Courts.

After a felony case is disposed of in City Court (possible dispositions are listed on Figure 5.6 that follows), it may take one of three different paths. First, the case might be dropped, leaving the defendant with no need for bail. Second, if the defendant is held to the state for some reason, the defendant will keep the same bail in the County Criminal Court that he had in the City Court. Third, if the case was dismissed or nolle prossequi in the City City Court, but the Attorney General decides to prosecute the case anyway, the defendant has bail set all over again.

FIGURE 5.6

Bail Process in City Court



COUNTY CRIMINAL COURT

Figure 5.6 shows that cases change from the City to the Criminal Court in a variety of ways. Before entering the County Criminal Court, all cases are presented to the Grand Jury. If the Attorney General's office (prosecution) can show the Grand Jury that there is probable cause for believing the defendant committed the alleged crime, then the Grand Jury returns a True Bill of Indictment and the defendant is set for arraignment in Criminal Court. If the Grand Jury is not convinced there is probable cause, a Not True Bill of Indictment is returned. The Attorney General's Office claims it is careful which cases are presented to the Grand Jury, and therefore claims 95 percent of the cases are indicted.

Since about one fourth of the cases the Attorney General's Office (AG) presents for indictment were dismissed or nolle prossed in the City Court system, about one-fourth of the cases enter the County jurisdiction with no bail set. The Sheriff is empowered with the authority to set bail in such cases, but the AG in practice sets bail for these defendants. Legally, the AG is making a recommendation to the Sheriff for bail. These defendants who are indicted "out of custody" -- not presently detained or not already released on some form of bail -- have arrest warrants issued for their arrest. The AG recommends, and the Sheriff always accepts a type of bail so the defendant will have an opportunity to be released between arrest and Criminal Court arraignment. The types of bail available to the AG bto recommend are the same as those available to the City Court judges. One minor difference is that Criminal Court has a new Court rule that all defendants released on their own recognizance by the Criminal Court are placed under Pretrial Services supervision.

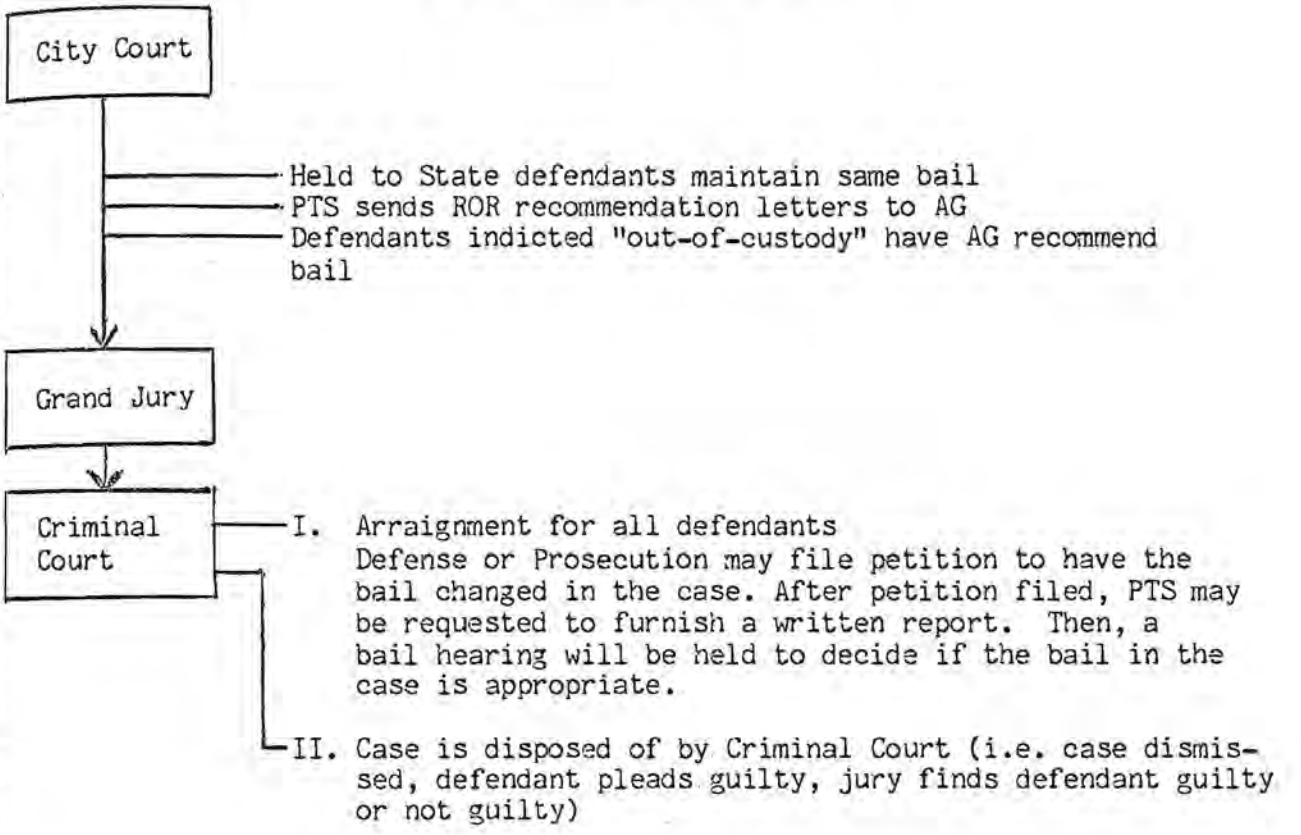
Defendants who had their charges dropped in City Court but are still

indicted by the Grand Jury can have ROR set as their bail in either of two ways. First, Pretrial Services sends a form letter to the AG when a defendant who PTS believes would be a "good risk" release might be indicted out of custody. The AG then decides whether to accept the PTS recommendation. He bases his decision on the form letter from PTS, the facts of the case, and the defendants prior record. Defendants the AG recommends for ROR are released before their arraignment in Criminal Court. Second, defendants who have money bail set and are unable to obtain release can file a written petition with the court to have their bail reviewed. After receiving the petition, most of the Criminal Court judges ask Pretrial Services to provide a written report on the defendant. A defendant meeting the PTS criteria described earlier is recommended for ROR or reduced bond.

Therefore, there are three methods by which bail can be set in Criminal Court. First, if the defendant is held to the state the defendant can bring the bail he was released on in City Court, whether ROR or money bail, with him to Criminal Court. Second, if the defendant had his case dismissed or nolle prossed in City Court, he has the Attorney General's Office set bail for him. Third, the defendant (or prosecution) can petition the court to have his bail changed.

As in City Court, no official record is kept on the three methods of setting bail. The Attorney General's Office estimates that they make 25 percent of the bail decisions for Criminal Court. Pretrial Services records indicate that about 10 percent of the defendants have a bail hearing. Therefore, about two-thirds of the defendants in the Criminal Court keep the same bail set by the City Court Judges.

FIGURE 5.7
Bail Process in County Court



BAIL OUTCOMES IN CRIMINAL COURT

The data collected by Pretrial Services is used to discuss the bail outcomes in Criminal Court. The CJS computer uses two different files and different identification numbers to record information concerning the City Court and the Criminal Court. Furthermore, the various dispositions for a Preliminary Hearing (Figure 5.3) make cases difficult to track from one jurisdiction to the other.

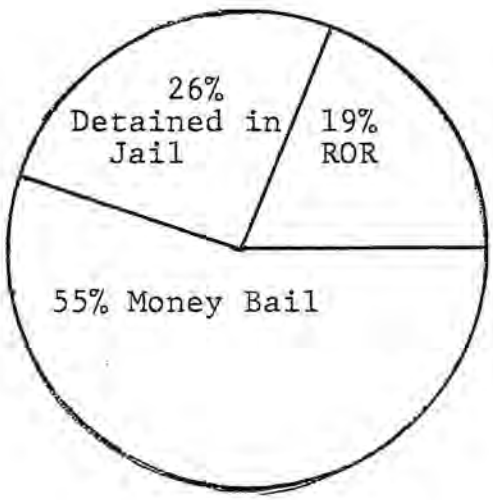
There are problems with the PTS data. First, in March 1980 the Memphis-Shelby County Criminal Justice System changed the method cases went from City Courts to Criminal Court. The way PTS collects data also changed at this time. For this reason, the data discussed here was drawn from eight

months, June, 1979, through February, 1980. The Pretrial Services data provides the number of defendants released to PTS supervision, not the number of defendants given ROR. The PTS data shows that 21 percent of the defendants who had their cases presented to the Grand Jury during that eight month period were released to PTS supervision. A good estimate would be that 18 percent of the Criminal Court defendants were released on their own recognizance to PTS supervision. Some of the unsupervised ROR defendants (1.9 percent of all releases in City Court) were also probably indicted by the Grank Jury. An estimated one percent of the Criminal Court defendants probably were released on unsupervised ROR. These estimates are used to simplify the discussion that follo

Pretrial Services also keeps data measuring the impact of the Agency's releases on the County Jail. Their data is used in Figure 5.8 to show the bail outcomes of defendants in the Criminal Court's jurisdiction. The information in the figure was adjusted according to the approximations made for ROR discussed previously.

FIGURE 5.8

Bail Outcomes in Criminal Court



N = 3888

The differences between the City Court bail outcomes and the Criminal Court outcomes are important. The number of ROR releases is noticeably lower in the Criminal Court and the number of money bail releases is greater. Two factors could explain this difference. The judges could be relying heavily on charge seriousness and prior record when deciding whether to release a defendant on his own recognizance or to set money bail. Defendants without prior records and charge with less serious crimes are the most likely to be put on diversion. They are also more likely to plea bargain their case to a misdemeanor. Both of these type defendants would not reach the Criminal Court. On the other hand, the judge could be relying heavily on the probability of conviction. If the judges are setting ROR for cases for which the evidence is weak, the ROR cases would be less likely to reach the criminal court.

The number of defendants detained in jail is disturbing. As with the City Court cases, the number of defendants in this group who are charged with first degree murder is probably a small fraction of the detained defendants. Since cases in Criminal Court take longer to dispose than those in City Court, the defendants who are detained in the County Jail might be in jail for longer than 30 days. Unless he pleas guilty, a defendant can sit in jail because he is unable to post the money bail set for him in Criminal Court for quite some time.

Although Pretrial Services does not keep records on all bail decisions in Criminal Court, they do keep records on how many defendants are released on their own recognizance through a letter to the Attorney General and by a bail hearing. For the eight month period used, 1.9 percent of all Criminal Court defendants were given ROR through an AG letter, and 1.4 percent of the defendants were given ROR after a bail hearing. The proportion

of defendants released on their own recognizance by each of the three bail setting methods used in Criminal Court is shown in Figure 5.9.

FIGURE 5.9

Distribution of ROR by Method of Setting Bail

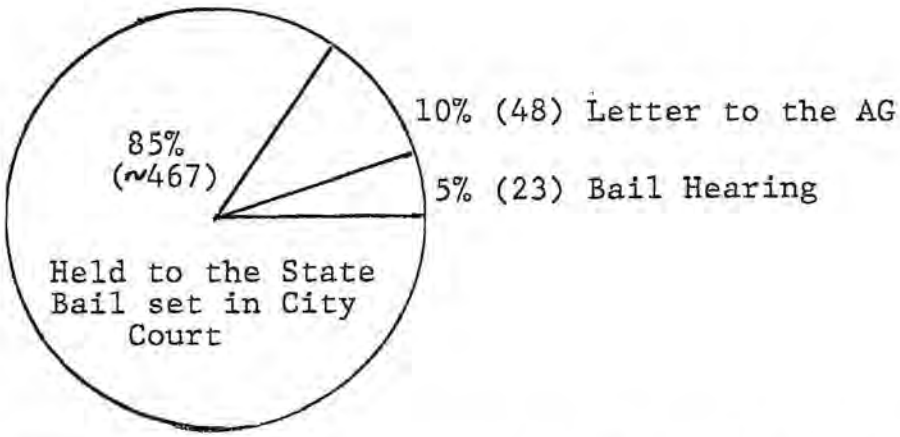


Figure 5.9 shows that almost all defendants released on their own recognizance had their bail set in City Court.

FAILURES TO APPEAR

A final issue to be discussed is the success of the bail decisions in Memphis-Shelby County. Since appearance of the defendant is the legal purpose of bail in Tennessee, the FTA rate of the different types of bail is used as the measure of success. An unusual method was used to research the FTA rates in the jurisdiction. First, the "Big Book" in the County Court Clerk's office was searched to obtain the indictment numbers for one month, January, 1980. Since some defendants are indicted on several charges at once and some indictments include more than one defendant, the number of defendants, not indictments, in the month were counted. There were 31 defendants indicted in January, 1980. Next, the "Capias Book" was searched to find all the defendants who were indicted in January and had a warrant issued for their

arrest for failing to appear in Court. There were 76 capiases issues for defendants who failed to appear in Court. The Court Jackets for these 76 defendants were searched to determine what type of bail these defendants were released on. This search found 53 of the defendants were released on money bail, eight were ROR under PTS supervision, two were released on reduced money bond under PTS supervision, one was unsupervised ROR, and two jackets could not be found.

Comparisons are made in Table 5.10 between the different types of bail. the table groups the PTS and unsupervised ROR together, the money bail and the reduced bail together, and excludes the two defendants whose jackets could not be found.

TABLE 5.10

FTA Rates for Money Bail and ROR

	ROR	Money Bail	Total
FTA Rate	13.1	32.7	28.0

Table 5.10 shows that twice as many of the defendants released on money bail fail to appear. However, the FTA rates for both types of bail are considerably higher than those found by earlier studies in Memphis. The high rate could be due to many factors. One possible explanation is the time of the year. Two-thirds of the warrants were issued before the end of February. The bad weather in January and February might have affected court appearances.

Another possible explanation might be that the behavior being measured is failures-to-appear and not forfeitures. Examining the nine ROR defendants who failed to appear will make this difference evident. Of the nine ROR's, eight were released to the supervision of PTS. Three of these

defendants were confused about their court date or courtroom. All three defendants appeared in court the next day and had the warrant recalled. Two of the defendants had been rearrested and were detained in another jail. When the Court was notified that the defendants were being held in jail, their warrants were also recalled. Therefore, only three, or 4.4 percent, of the PTS releases were forfeitures.

SUMMARY

The Memphis-Shelby County Criminal Justice System does not use the bail option ROR as frequently as Chapter IV proposes. The most conservative proposal suggested that 50 percent of the defendants be released on their own recognizance, but the research showed that only 31.3 (PTS and non-PTS) defendants were given ROR.

This chapter showed a number of factors in the Memphis Shelby County system that support the contention that the number of ROR defendants needs to be increased. First, about one-fourth of the defendants had money bail set which they were unable to post. Unless a defendant is released on his own recognizance, his release status depends on his financial resources; the wealthy and middle class post their money bail, while the poor are detained in jail.

Second, defendants who are able to post money bail often sit in jail for several days before they are able to obtain release. Not only do they lose the ten percent premium paid the bondsman, many are also forced to sit in jail. On the other hand, defendants released on their own recognizance are almost always release within 24 hours.

Third, the FTA rates of the two groups suggests defendants released on their own recognizance are much better about appearing in court than

defendants released on money bail. Although there could be a large number of other factors which were not controlled for, the vast difference found makes the comparison between the groups significant. As Professor Kirby's 1974 study suggested, releasing a defendant to Pretrial Services' supervision seems to be much more effective in terms of appearance than imposing money bail.

This chapter has described the bail outcomes of defendants in Memphis, showing that the proportion of defendants given ROR does not approach the proposals in Chapter V. The chapter has also explained the Memphis bail decisionmaking process that results in too few ROR decisions. The differences between the bail outcomes of defendants in Memphis and the theoretical proposals suggests that the bail decisionmaking process in Memphis needs to be more closely examined.

CHAPTER VI - WHY THIS IS HAPPENNING

This chapter examines the systemic factors that shape Memphis bail decisions. Part of the model for policy analysis involves explaining the the differences between "what is happening" and "what should happen". This chapter makes this explanation by examining the bail decisionmaking process, the actors involved in the process, and any outside factors that might influence the process. Since the majority of bail decisions in the system are made by the City Court judges, the bulk of the analysis centers around the bail decisionmaking in City Court.

Interviews and empirical analysis are used to explain the bail outcomes in Memphis. The interviews were designed to explore the opinions and attitudes behind bail decisions. The interviews attempted to determine what type of bail the actors felt "should" be set. The actors were presented with similar hypothetical cases and were questioned on how they decided what type or amount of bail a defendant deserved. After discussing the finding of the interviews, the empirical analysis is used to validate these results, as as well as more fully explain the bail decisions in the system. The analysis of the interviews and the empirical information should indicate areas for future efforts at changing the bail policy in Memphis so that the ROR rates will increase.

THE INTERVIEWS IN MEMPHIS-SHELBY COUNTY

The bail decisions in Memphis-Shelby County can be studied by

determining the type or amount of bail tha actors in the criminal justice system believe should be set. Before examining the influence of the actors on the decisionmaking process, the attitudes that lie behind the decision need to be established. The attitudes are not the characteristics that an actor might look for in a defendant when setting bail, but his opinion of what type of bail "ought" to be set for a defendant. The interview began by presenting the actor with six hypothetical cases, and asking the interviewee to suggest a bail option for each case. Judges, prosecutors, PTS employees and newspaper reporters were interviewed. Setting bail for the hypothetical cases accomplished two objectives: an objective standard was formed by which each actor could be compared to others in the criminal justice system; and a series of bail decisions were presented to each actor to base questions concerning the actors opinions.

The actors in the City Courts are accustomed to hearing information about a defendant and making a bail decision. Judges, lawyers, and PTS employees are all trained by the day to day routine of their occupations to quickly assimilate oral information about a defendant. Newspaper reporters are not accustomed to making such decisions, but the interviews with other actors suggested the newspaper was influential. The City Court reporters were presented with the information in the same manner as the other actors to make the answers comparable.

Since a majority of the bail decisions in Memphis City Court are made by a judge listening to a PTS employee, the format in the PTS Training Manual was used to present the information. The PTS format made the presentation of the six hypothetical cases as close as possible to the manner in which a judge would hear the information.

However, there are problems with an interview. For example, some

actors might set bail for the hypothetical defendants as if they were a judge, rather than playing their actual role. A prosecutor might feel his job in court is to protect society from dangerous criminals by demanding high bail. Yet, he might set bail in the hypothetical cases as he thinks a judge might, considering the interests of society and those of the defendant. Careful instructions were given to each actor, telling him to set bail as he thought it "should" be set.

The interviews were conducted with seven City Court judges, one former City Court judge, two City Felony Court prosecutors, two PTS employees and two City Court reporters. The City Court judges were interviewed individually. The other actors were interviewed in pairs. As questions were asked, the two members of each group often discussed the questions, usually reaching a consensus between them on an answer. This discussion should have made the answers more representative of the group as a whole from which these actors came.

Interviewees were told that whatever information they gave would be confidential. Therefore, they are not identified by name. Information which points directly to one individual was not used in a manner to identify that individual, though some of the information can narrow the identification to two or three actors. Finally, several interviewees made specific remarks about other actors. This information was used only when it would not directly identify that actor.

Showing that the actors in the Criminal Justice System believe that the type bail decisions actually made in Memphis are the type that should be made is important in an effort to explain why ROR is not used more frequently. If the actors in the system believe that proper bail decisions are being made, no one will attempt to reform the bail policy.

Actual implementation of the bail laws relies heavily on the discretion of the judges. If judges get feedback from other judges and other actors in the system that their bail decisions are predominantly the correct ones, they will not be likely to change their bail decisions. Furthermore, if new actors in the system learn what type of bail should be set from what is presently being done, the present bail policies will be perpetuated. Rather than looking at the law and empirical findings to form bail policy, actors might use what others in the system are doing to form their own attitudes concerning bail policy.

The six hypothetical cases were developed to create some variation in the answers from the interviews. Through observation of bail decisions made in the past, the cases could be devised so that different decisionmakers might set different types of bail. Six defendants were used because the selection would be large enough so that several factors could be examined. More cases were not used since the interviews might have bogged down in setting bail for hypothetical defendants or imposed too heavily on the interviewees' time. Table 6.1 summarizes the hypothetical choices presented to the actors.

TABLE 6.1

Summary of Defendant Characteristics

	1		2		3	
	A	B	A	B	A	B
Charge	Aggravated Rape	Possession Marijuana w/ intent to sell	Burglary 1	Burglary 1	Violation of Bad Check Law, over $100	Violation of Bad Check Law, over $100
Race/Sex	M/W	M/W	M/B	M/B	F/B	F/B
Age	28	28	23	22	20	21
Residence or Time in area	Yes 3 yrs. 6 yrs.	Yes 2.5 yrs. 8 yrs.	Yes 6 yrs.	Yes 5 yrs.	Yes Life	Yes 4 months
Family ties	Lives w/ Wife	Lives w/ Wife	Lives w/Parents	Lives w/Parents	Lives w/ Parents	None
Employment or Substitutes	Yes Construction	Yes Waiter	No Welfare	No Welfare	Yes 1 year	No
Prior Record	1 previous DWI	1 previous DWI	1 as a juvenile	3 felony convictions	None	None

Hypothetical facts were also constructed for each charge. The following form, similar to that used by PTS, gives the facts in each case as they were read to the actor:

> Set 1.A -- Aggravated Rape -- The defendant broke into the home of the victim. After threatening her with a knife he raped her. The 22 year old victim was not injured.
>
> B -- Unlawful possession of a Controlled Substance with Intent to Sell -- The police arrested the defendant after observing him on the street exchanging money with another man. The police found three one-ounce bags of marijuana on the defendant.
>
> Set 2.A and B -- Burglary, First Degree -- The defendant was arrested coming out of an East Memphis home with a television set in his hands.
>
> Set 3.A and B -- Violation of Bad Check Law (VBLC), over $100 -- The defendant was arrested after bouncing and failing to make good on a $200 check to a clothing store.

To draw attention away from the manipulation of charge (Set 1), prior record (Set 2), and community ties (Set 3), the demographic variables were varied slightly in each of the three cases. These differences in demographic variables are typical and should not affect the results of the interview.

Predictions were made based on observations of judges setting bail in open court. The bail expected to be set for each hypothetical defendant follows.

> Set 1 manipulates charge. A is accused of a very serious felony, B with a minor felony. Both A and B have 10 points on the PTS scale. A will have money bail set at $5,000. B will get ROR.
>
> Set 2 manipulates prior record for a serious felony. A has 8 points, but B ony has 4 because of his extensive previous record. A will get ROR. B will get $1,000 bail and ROR from one or two actors.
>
> Set 3 manipulates community ties for a minor felony. A has 10 points on the Memphis Vera-type scale, B, 2 points. A will be granted ROR, B will have $1,000 bail.

The cases were not presented in the order given above. When Pretrial Services presents a series of cases to a judge to set bail, the cases are read to him starting with the most serious and ending with the least serious. The same order was followed here. When presenting the case, the charge and the facts were read first. The community ties variables were read last. The sex and age of the defendant and of the victim in the rape case were not given unless an actor asked for them. As with the previous parts, this format conforms to Pretrial Services format, except no PTS recommendation was given. The attitude being examined is what type of bail "should" be set. A PTS recommendation might have changed the focus of the question to an actor's personal feelings for or against Pretrial Services.

CITY COURT JUDGES

With a few notable exceptions, the bail decisions by the judges were similar to the predictions. Table 6.2 shows the predicted decisions and the decisions of the judges together in one table.

TABLE 6.2

Bail Set by Judges for Hypothetical Cases*

Case	Prediction	Judge 1	Judge 2	Judge 3	Judge 4	Judge 5	Judge 6	Judge 7	Judge 8
Aggravated Rape	$5000	5000	75,000	5000	5000	5000	15,000	5000	2500
UPCS, marij. w/intent	ROR	1000 /ROR	1000 /ROR	ROR	1000 /ROR	ROR	5000	1000	1500
Burglary 1 no prior record	ROR	2500	ROR	1000	1000 /ROR	1500	5000 /ROR	3000	3500
Burglary 1 serious prior record	$1000	5000	5000	3500	5000	10,000	5000	1000	1500
VBCL over $100 w/ community ties	ROR	ROR	ROR	ROR	1000 /ROR	ROR	ROR	ROR	ROR
VBCL over $100 w/ community ties	$1000	2000	1000	1000	2000	1500	2500	1000	1000

*Many of the judges said they would set money bail, unless PTS recommended ROR. If PTS thought they could supervise a defendant, then they probably would give the defendant ROR. These cases are indicated by including the money bail and ROR on the table.

The variations in the bail decisions from judge to judge suggests that the bail a defendant has set may depend on which judge sets bail. However, the differences that Table 6.2 shows could be caused by other factors.

The presentation could have varied enough to change some of the bail decisions. The judges might have perceived what was being asked of them differently. For example, some of the judges assumed PTS would supervise some defendants, some asked whether PTS would supervise the defendants, and some seemed to assume PTS would not.

A close examination of the table reveals only a few unusual bail decisions. The aggravated rape case for Judges 2 and 6 is noticeable. The bond amounts are much larger than the amounts of money bail set by other judges for the same case. The judges might have been trying to preventively detain these defendants. The burglary 1 case without a prior record for Judge 6 is unusual because the judge considered setting both a relatively high bond of $5,000 and ROR with PTS supervision for one defendant. Prior record did not change the amount of bail for this judge, but did affect whether he was willing to release the defendant on his own recognizance.

The types of bail and the amounts of money bail suggested by the actors in the system other than judges can further explain the judges' opinions about bail. The bail decision of a typical judge was formed by taking the median bail given for every case. For all of the cases, at least four judges set the same bail. Table 6.3 gives the median judge compared to the other actors.

TABLE 6.3

Bail Set by Other Actors

	Typical Judge	PTS	Prosecutor	Newspaper
Agg. Rape	5000	7500	15,000	5000
UPCC, w/intent	1000/ROR	ROR	1000/ROR	50
Burglary 1 no prior record	1000	ROR	2500	1000
Burglary 1 serious prior record	5000	1500	7500	10,000
VBCL over $100 w/ community ties	ROR	ROR	ROR	ROR
VBCL over $100 no community ties	1000	1000	1000	500

The types of bail set by the other actors are what one might expect. The Pretrial Services employees suggested ROR more often than the typical judge. The prosecutor suggested ROR less often, as did the newspaper reporter.

The bail set by "other actors" is interesting. The PTS employees, the prosecutors and newspaper reporters essentially agreed on the type of bail to be set for the least serious charge cases. However, they disagreed more on the burglary and rape cases. This suggests they differ on the importance of the offense charged and the prior record. Within the three sets of cases all the actors reacted to the factors being manipulated in the same manner. Both the PTS employees and the prosecutors set more punitive bail for the more serious charge or more extensive prior record for the

first two sets of cases. The bail set by the other actors indicates that they reacted to the factors traditionally associated with defendant dangerousness in the same manner as the judges.

The prosecutors suggestions were not as high as some of the judges, nor were the Pretrial Service employees' suggestions as low as some of the judges. Since both of these groups said in the interviews that they perceived themselves as representing the interests on either side of the decision, they should have been the most extreme decisions found. The PTS employees and the prosecutors might base their opinion of what type of bail defendants deserve on the bail decisions they have seen judges make. However, the judges' opinions might also be influenced by the feedback they receive from the other actors. Whatever the reasons, the judges and other actors have similar opinions about the proper type of bail. The factors involved in these opinions need to be examined.

The hypothetical cases show some similarities in the way judges set bail. Examining the hypothetical cases by each pair that manipulates the same characteristic should reveal some of the factors judges look for when setting bail.

The first pair of hypothetical defendants had the same community ties but had different charges. Table 6.4 shows the effect the change of charge had on the bail the judge set.

TABLE 6.4

Bail Decisions and Charge Manipulation

Case	Prediction	Judge 1	Judge 2	Judge 3	Judge 4	Judge 5	Judge 6	Judge 7	Judge 8
Agg. Rape	5000	5000	75000	5000	5000	5000	15000	5000	5000
UPCS w/ intent	ROR	1000 /ROR	1000 /ROR	ROR	1000 /ROR	ROR	5000 /ROR	1000	1500

The bail decisions in Table 6.4 were obviously based on the crime with which the defendants were charged. Except for the offense charged, these two defendants were virtually identical. The judges had similar reasons for the bonds they set. Several of the judges asked for the age of the victim and whether she was hospitalized. The drug case on the other hand was described by judges as a "minor offense," and as "almost a white collar crime!"

Some of the judges made their decision on the basis of danger to the community. The judge who said he would set $15,000 bond admitted he was "trying to protect society." The judge who set $75,000 bond said he was intending "to hold the defendant in jail to keep him from repeating the crime or threatening the witness, who has been through a traumatic experience." Other judges said that they had considered the "nature of the offense" and "the aggravation involved in the crime." The discrepancy between the bail set for these two defendants suggests that the charge is a major consideration in Memphis when setting the type and the amount of bail.

The second pair of defendants had identical community ties and the same charge, but different prior criminal records. Table 6.5 shows the bail decisions that resulted from manipulating the prior record.

TABLE 6.5

Bail Decisions for Prior Record Manipulation

Case	Prediction	Judge 1	Judge 2	Judge 3	Judge 4	Judge 5	Judge 6	Judge 7	Judge 8
Burglary 1 no prior record	ROR	1000 /ROR	ROR	1000 /ROR	1000 /ROR	1500	5000 /ROR	1000	1500
Burglary 1 extensive prior record	1000	5000	5000	3500	5000	10000	5000	3000	3500

Table 6.5 shows that the prior record effects the type of bail. Some of the judges said a pattern of crime shows a disrespect for the law. These judges said a defendant's respect for the law indicated whether he would appear for his trial. Several of the judges also suggested the defendant might be eligible for Habitual Criminal prosecution. A defendant with three previous felony convictions can be declared an habitual criminal. The penalty for a defendant convicted of being an habitual criminal is a life sentence, which might make him more likely to flee. Whatever the reasoning, the bail decisions offered for this set of defendants shows that the extent of a prior record changes a defendant's type and amount of bail. The prediction for this case was an amount of money bail much lower than that set by most judges. The high bail set for this case shows prior record is a much bigger factor than originally thought.

The last pair of defendants manipulates community ties. They were charged with the same minor felony and had similar prior records. Table 6.6 shows the types of bail set for the defendants who only had different community ties.

TABLE 6.6

Bail Decisions and Community Ties Manipulation

Case	Prediction	Judge 1	Judge 2	Judge 3	Judge 4	Judge 5	Judge 6	Judge 7	Judge 8
VBCL over $100, w/ community ties	ROR	ROR	ROR	ROR	1000 /ROR	ROR	ROR	ROR	ROR
VBCL over $100 w/ no community ties	1000	2000	1000	1000	2000	1500	2500	1000	1000

Table 6.6 shows that community ties make a difference in the type of bail set. Every judge set ROR for the defendant with strong community ties and set money bail for the defendant without community ties. Some of the judges said they would be surprised if the defendant without community ties came back to court. Yet, every judge set lower money bail for this defendant than two of the other hypothetical defendants who had stronger community ties, but more "serious" charges. Furthermore, several judges said if Pretrial Services was willing to supervise this defendant, they would release her ROR despite the lack of community ties.

The hypothetical cases show that judges and the other actors react similarly to a more serious crime, to an extensive prior record, and to lack of community ties. A defendant with a serious felony against person charge has a high money bail. A defendant with a less serious charge and an extensive prior record also has a high bond. A defendant with no community ties and a charge that is not serious, gets a low money bond. The hypothetical cases show that all the decisionmakers felt that a defendant with a serious charge or an extensive prior record should not be released on his own recognizance. Therefore, although the earlier comparisons did not show

that the amounts or type of bail set by each judge were always the same, the hypothetical cases show they react similarly to the same type of defendant characteristics.

The interviews did not indicate that the judges always set the same type of bail. However, the findings do indicate that judges look for some of the same factors -- charge, prior record, and community ties -- when making a decision. The findings show that those involved in the bail setting process often believe the same type of defendant should have the same bail. Therefore, the hypothetical cases have shown that the reason defendants do not have ROR set more often is because the actors in the criminal justice system feel the type of bail they are having set is appropriate.

STATE PURPOSE BEHIND BAIL

The hypothetical cases suggest that community ties are not as important as charge and the prior record to judges when setting bail. The Federal law upon which the Tennessee law is modeled has been interpretted as placing greater emphasis on community ties. Furthermore, the Tennessee law does not allow consideration of dangerousness in setting bail, which the reliance on the charge and the prior record suggests is happening. Interviews with the City Court judges are examined to explain the state purpose the judges claim are behind their bail decisions.

Every judge, and the other actors as well, thought a state interest in setting bail was the appearance of the defendant at his trial. All of the actors seemed to be familar with the new state law passed in 1978. All of the actors mentioned most of the criteria suggested in the 1978 Act.

Some of the responses to the question of "how do you determine if the defendant will appear at the trial?" show criteria not specified in state

law that judges use to determine likelihood of appearance. Four of the judges said that the attitude of the defendant towards the court and the law in general were important. One of the judges described the influence of the defendant's attitude as the "turkey factor." A judge's perception of a defendant's attitude is a hard factor to measure, predict or change, but the interviews suggest it affects the bail set for the defendant.

The judges also cited criteria to determine whether a defendant would appear in court which seemed to be more related to a determination of defendant dangerousness. When responding to the question about appearance many judges stressed the charge and the prior record. Through the possible penalty the charge and prior record might be seen as related to the likelihood of appearance. However, the findings of the empirical studies in the literature review of Chapter II suggest they are not. Most studies found that defendants with serious charges had lower FTA rates than defendants with less serious charges. Furthermore, the Federal case law described in Chapter III shows that the possible penalty is a subordinate consideration when determining likelihood of appearance. The similarities between Federal and Tennessee law suggest that judges in Memphis-Shelby County should stress community ties rather than the charge or the prior record.

The statements of the judges concerning defendant dangerousness as a state interest in bail decisionmaking appear to show why ROR is not being set as often as Chapter V proposes. One judge said that "the nature of the crime is the main consideration when setting bail. The protection of society is necessary." The other judges did not state as directly that they set bail to protect society from dangerous defendants, but three of the judges did say they considered whether the defendant "is going to commit another offense." In addition, remarks by the judges in the interview show that

they all consider the possibility of future danger to society. The factors mentioned by the judges while setting bail for the six cases and in response to "how do you determine if a defendant might be dangerous to society?" were often factors not suggested by Tennessee law (See Chapter IV). Some factors judges mentioned are included in the state law, but the judges were emphasizing these other factors more than family and community ties.

Past literature suggests judges define defendant dangerousness as the offense charged and the defendant's prior record. The manipulation of prior record and charge in the six hypothetical cases discused earlier in this chapter showed that the charge and prior record affect the bail the judges set. Furthermore, every judge mentioned these factors as criteria when he set bail. If reliance on the charge and record in bail decisions means a prediction of future dangerousness is being made, the interviews show the judges are attempting to make such predictions.

Another factor mentioned by several of the eight judges was the status of the victim of the crime. The hypothetical rape case used in the interview elicited several questions from some of the judges concerning the victim. Most of the judges wanted to know the age of the victim. Another question asked by several of the judges was whether the defendant injured the victim or whether she was in the hospital. Some of the judges emphasized that rape was a "traumatic" experience for the victim.

The questions concerning the status of the victim suggest two state purposes might be manifested in a bail decision for a defendant accused of rape. First, the judge might be attempting to protect other possible victims by detaining the defendant with high bail. Second, the judge might be punishing the defendant for what he has allegedly done to the victim. Although both of these purposes are laudable state interests,

neither of them is legally permitted in a bail decision in Tennessee.

A final factor mentioned by six of the eight judges is the facts that surround the case. For example, several of the judges asked what time of night the two hypothetical burglary cases occurred. They were interested in the likelihood of people being in the home during the burglary. They would set different bail if the owners of the homes are likely to be there. Other examples are whether the defendant used a weapon and whether an assault was provoked in some manner by the defendant.

A reason offered by the judges for an strong interest in the facts of the case was to determine the strength of the prosecution's case. They were attempting to determine if the case was likely to be dismissed or if the charges were likely to be reduced. However, setting bail on a pretrial assessment of guilt or innocence is not a legal state interest for bail decisions. The strength of a case might be as important to a bail decision as the possible sentence. Yet, the empirical studies show the possible sentence is not an important factor in predicting likelihood of appearance, nor do the legal guidelines suggest it should be an important factor in setting bail.

The fact that judges seem to use defendant dangerousness as a state interest when setting bail cannot be over emphasized. The hypothetical cases used in the interview indicate that possible defendant dangerousness affects the amount and the type of bail set for a defendant. Some of the factors that judges examine when setting bail make a strong case for "the protection of the society" concerns being one of the reasons more defendants are not released on their own recognizance. Table 6.7 summarizes the factors that seem to be related to predictions of defendant dangerousness.

TABLE 6.7

Summary of Factors Related to Judges' Predictions of Dangerousness

		Judge							
		1	2	3	4	5	6	7	8
Factor	Charge	X	X	X	X	X	X	X	X
	Prior Record	X	X	X	X	X	X	X	X
	Victim Status	X	X	X		X	X	X	X
	Facts of Case	X		X	X	X	X	X	

An important fact to remember is that the factors summarized above were not direct answers to questions concerning those factors. The resulted from the discussion of the six hypothetical defendants, from the question about the state interest behind bail, and from a question asking how the judge determined whether a defendant was dangerous. Since the factors above were suggested by the judges they must be important factors to the judges. Furthermore, the judges who did not mention the victim or the facts of the case might still use these factors when determining bail. The factors might not have occurred to them during the interview.

One additional question was not discussed earlier because it was only used in the last four interviews. This question emphasizes the importance of the prior record and charge, and consequently defendant dangerousness, when the City Court judges set bail. During the fifth interview this additional question was added:

> "What effect does lack of community ties information for the defendants Pretrial Services have on your decision?

The defendants referred to in the question are almost always not interviewed by PTS because they were arrested while released on a previous case or because of their prior record. The judges set bail after hearing only the charge, the defendant's prior record, and the facts of the case.

The answers the judges gave show the emphasis the judges put on some factors for this type of case. Judges 1 and 6 said that for these cases the lack of community ties information made little difference. Judge 8 said this information probably would not make any difference. Judge 7 corrected me, claiming that PTS offered community ties information for every defendant. Judge 7 obviously sets bail for some defendants strictly on the charge, record and facts. Yet, the bail decisions of Judge 7 were not that different for the hypothetical cases than that set by the other judges. The answers to this last question show the role of predictions of defendant dangerousness when Memphis City Court judges set bail. Presumably, if a judge determines a defendant might be dangerous, he sets money bail, regardless of his qualifications to be released on his own recognizance. If a defendant does not appear to be dangerous, then community ties are used.

EMPIRICAL DATA

The discussion thus far has been based strictly on the interviews. As mentioned earlier, oral reports are not always the most reliable method of explaining a phenomenon. Therefore, empirical data was gathered to validate the findings of the interviews and to more fully explain the bail decisions in Memphis.

An obvious purpose of the interviews was to check the accuracy of the bail decisions made by the judge. If the bail decisions actually set by the

judges are similar to those set by the judges for the hypothetical defendants, the validity of the interviews will be supported. However, disparity between the two may be explained by reasons other than unreliable answers from the judges. The association between the ROR rate for each judge and the answers to the hypothetical cases might also indicate that other factors than the judge are important in bail decisions. The type of bail set by each of the eight judges is shown in Table 6.8. The sample is the same used in Chapter V.

TABLE 6.8

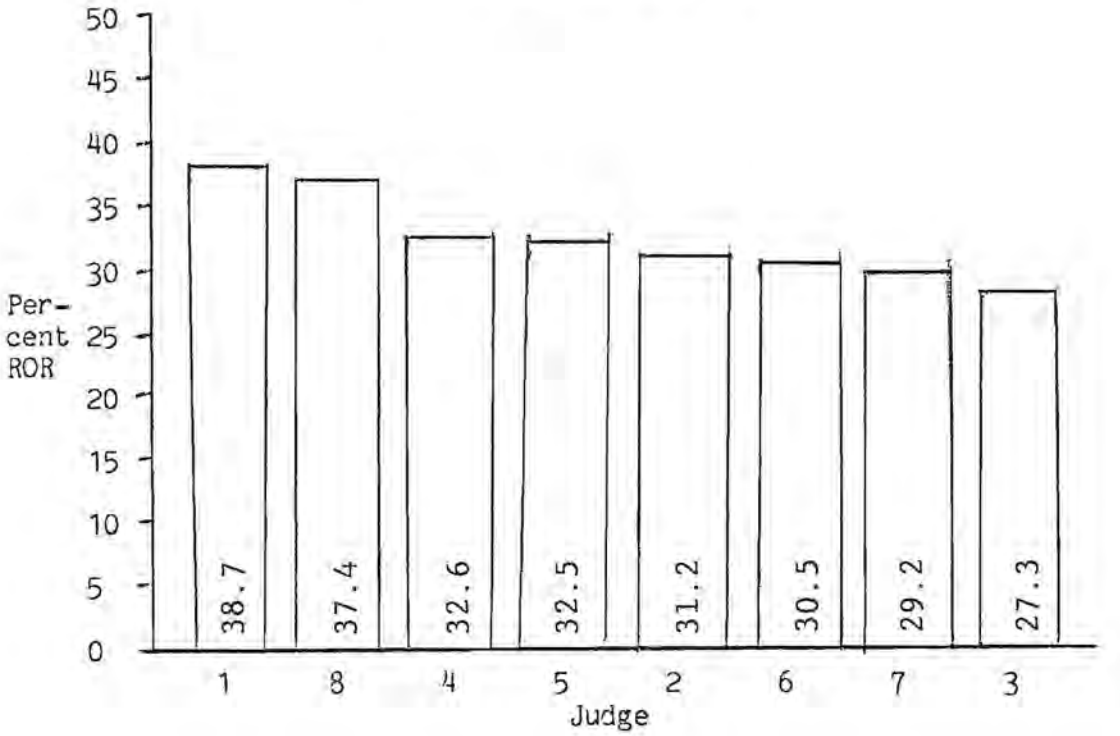
The Percentage of Types of Bail by Judge

	Judge							
	1	2	3	4	5	6	7	8
Unsupervised ROR	7	2	0	6	4	1	0	2
ROR w/PTS	32	29	27	27	30	30	29	35
Normal money bail	55	58	63	59	45	58	61	57
Large money bail	3	8	7	3	15	4	10	5
No bail set	3	3	3	6	8	8	0	1
Total =	100	100	100	101	101	101	100	101
N =	31	365	271	236	129	495	137	187

The table shows some variation between the bail decisions made by the different City Court judges. However, directly comparing the variation between the judges in the table is difficult. Therefore the information in Table 6.8 is simplified. The bar graph below emphasizes the differences in the number of own recognizance releases by each judge. The table combines ROR with PTS and unsupervised ROR.

FIGURE 6.9

Percentage ROR by Judge



Although none of the ROR rates for the judges approaches the ROR rates suggested as appropriate in Chapter IV, some of the judges came closer than others. The lowest proposed rate was 50 percent. The highest judge is 11 points below that mark. The lowest judge is 23 points away from the proposed rate. The data suggests that which judge sets bail is an important factor in whether a defendant is released on his own recognizance.

The association between the ROR rate for each judge and the answers to the hypothetical cases can be calculated by ranking the data and calculating Spearman's Rho. Spearman's Rho is a rank order correlation coefficient which ranges from zero to plus or negative one. The ranking for the hypothetical cases is based on the number of times the judges suggested ROR. If two judges suggested ROR the same number of times, the one who set lower money

bails was ranked higher. The ranking for the ROR rate is based on the data in Figure 6.9.

The Spearman rank correlation coefficient shows that a judge's attitude about when ROR should be set is not associated with how often he actually sets ROR. In fact, the association is slightly negative (-.10). The judges who suggested ROR the most during the interviews are not the same ones who have the highest ROR rates. This fact could mean that the responses of the judges were unreliable, or could mean that factors other than the judge could be influencing the decisions judges make. If other factors can be found to have impact on bail decisions, then the lack of association between the hypothetical defendants and the actual defendants might not be important.

The judge's remarks during interviews suggested that they perceived the role of Pretrial Services differently while setting bail for the hypothetical cases. Some assumed PTS would recommend and supervise eligible defendants, while some did not. In order to partially correct for this assumption, the judges were re-ranked according to their answers to the hypothetical cases. This time the amount of money bail for all the hypothetical cases was added together for each judge. This method assumes the judge with the highest total dollar amount sets the most punitive bail.

The two different methods of ranking the judges were compared. Spearman's Rho showed that there was negative association (-.36) between the ranking of judges according to the number of times they set ROR and the total amount of bail they set. This finding suggests some factor was indeed influencing the interview. The different assumptions by the judges might be such a factor. The total amount of bail set might be a more accurate ranking and needs to be compared to the actual ROR rates for the judges.

Ranking the judges according to the total amount of bail also showed no association (.01) with the actual ROR rate of the judges. The lack of association between the two methods of ranking the interview answers and the ranking of judges according to the actual ROR rate suggests further analysis of this relationship is needed. Examining the affect of the other factors in the criminal justice system might explain the lack of association.

The interviews suggested that the offense charged was an important factor in a bail decision. The data collected from the City Court records divided the offense with which the defendants were charged into eight general categories. The following list gives these eight categories and the type of offenses included in each category:

1. Homicide -- murder in the first and second degree and vehicular homicide.

2. Sex Crimes -- aggravated and nonaggravated rape and aggravated and nonaggravated sexual battery. Whether a charge is aggravated depends on the age of the victim, the amount of force used and whether a weapon was used.

3. Robbery -- robbery with a deadly weapon, strong arm robbery, and robbery.

4. Assualt -- aggravated assualt and arson.

5. Property Crimes -- first, second, and third degree burglary, petit and grand larceny, larceny of a vehicle and receiving and concealing stolen property.

6. Weapon Offenses -- unlawful possession of a sawed-off shot gun and convicted felon in possession of a firearm.

7. Drug Offenses -- unlawful possession of a controlled substance with intent to sell.

8. Document Crimes -- violation of the bad check law and possession of a stolen credit card.

The categories are listed in a reasonable assessment of most serious felony to least serious felony. The first four categories are crimes against a

person; the last four are nonperson felonies. Table 6.9 shows the percentage of the different types of bail set for each category of crime.

TABLE 6.10

Percentages of Types of Bail by Crime

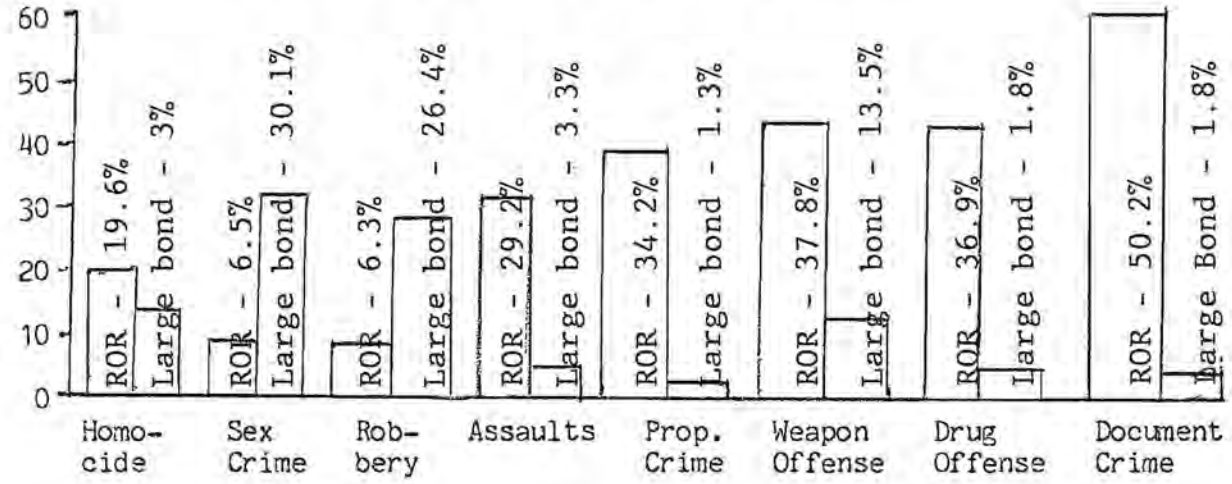
Type of Bail	Homo-cide	Sex Crime	Rob-bery	Assaults	Prop. Crime	Weapon Offense	Drug Offense	Doc. Crime
Unsuper-vised ROR	3	0	0	3	1	0	0	7
ROR w/ PTS	17	7	6	26	33	38	37	44
Normal money bail	39	47	52	65	63	43	61	47
Large money bail	19	30	26	3	1	14	2	2
No bail set	23	16	16	3	1	5	0	1
Total =	101	100	100	100	99	100	100	101
N =	97	93	159	154	983	37	111	217

The table shows that the type of offense charged seems to affect the bail set for a defendant. The more serious crimes obviously tend to result in more punitive bond being set.

Figure 6.11 reorganizes some of the information in the table to empnasize the effect of the charge on the type of bail. The percentage of defendants released on their own recognizance (PTS and unsupervised) and the number of defendants given large money bail (over $10,000) are given in the figure to show how City Court judges react to the different types of crime.

FIGURE 6.11

Percentage ROR and Large Bond by Crime



The bar graph above shows that the number of defendants given ROR and large bonds is associated with the charge. The more serious the crime the fewer defendants released on their own recognizance and more defendants given high money bail.

The fact that some defendants in every category were released on their own recognizance can be explained by several reasons. Some of the defendants might have had strong community ties. Yet, none of the judges set ROR for the hypothetical case with the defendant charged with rape. Another possible explanation might be that since some of the charges in each category were not as serious as others in that category, the defendants with less serious charges had ROR. The judges said in the interviews that if the case against a defendant was weak or if the charges might be reduced, the bail decision was adjusted accordingly. Although a determination that a defendant would appear for his trial might be responsible for some of the ROR releases, many of the defendants might also have been released on their own recognizance because the judge determined they would not present a danger

to society.

The fact that at least a few defendants in every crime category were given large bonds also says something about the judges' perception of defendant dangerousness. The interviews showed that if a defendant lacked community ties and was charged with a crime that was less serious (the VBCL defendant without community ties) he would be given low money bail. Large money bail is found in every category of offense. Since the judges do not set large bond for defendants without any community ties, some other factor, such as prior record, must be responsible for the large money bail set for defendants charged with less serious felonies. If this deduction is correct, judges are letting their perception of dangerousness even affect the bail they set for nonperson felonies. If this perception of dangerousness is responsible for the few large bail decisions in the nonperson felony categories, it might also be affecting the number of defendants released on their own recognizance for nonperson felonies.

Except for the homicide category, the percentages of ROR and large bail shown in Figure 6.11 are about what the assessment of seriousness predicted. Therefore, the homicide cases were listed first as the most serious. However, the differences in the bar graph between the homocide category and the sex crime and the robbery categories questions this assumption.

Since the homocide category includes the only capital offense in Tennessee, first degree murder, the smaller number of large bonds might be due to the larger number of defendants who had no bail set. As described in Chapter V, the no bail set group of defendants are similar to the large bail group in many respects. Figure 612 combines the no bail set and the large bail groups in the same format used in Figure 6.11.

FIGURE 6.12

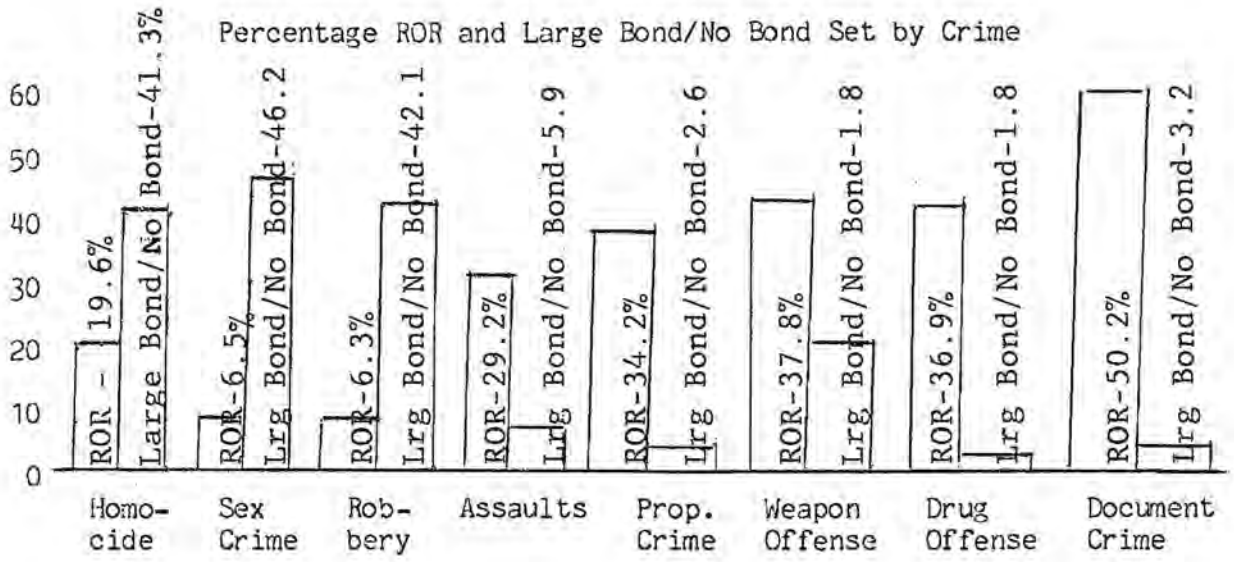


Figure 6.12 makes the homocide category of the bar graph look more like the sex crime and the robbery category than Figure 6.11 did, but the differences from the expectations are still noticeable. Not only are there fewer large bail/no bail set defendants in the homocide category, but there are also three times as many ROR defendants in the homocide category.

Two reasons could explain this result. First, the interviews suggest that many of the murder cases involve family disputes. The interviewees suggested a defendant whose charge resulted from a family dispute probably would have better community ties and no prior record. Second, many of the homocide defendants were charged with vehicular homocide. Although the proportion of vehicular homocide cases in the homocide category is not available, one would assume that these defendants would be perceived as less dangerous. Therefore, the aggregate bail outcomes for homocide defendants would be less punitive.

The effect of the charge on the type of bail set can be interpreted as supporting the finding of the interviews that possible defendant danger-

ousness changes a judge's bail decisions. The answers in the interviews for the hypothetical cases can be compared to the bail set by a judge for a similar category of offenses to further support this statement. The bail a judge sets for the hypothetical cases would be associated to the bail he set for the defendants from the sample if the charge was the controlling factor in these bail decisions.

The type of bail set for sex crimes by each judge is given in Figure 6.13. One of the hypothetical cases had an aggravated rape charge. Therefore, the types of bail set by the judges for sex crimes is used to examine the relationship between the hypothetical bails suggested by the judges and the bail actually set in the sample. Judge 1 is not included in the table because he only set bail for three defendants charged with sex crimes.

TABLE 6.13

Percentages of Types of Bail by Judge for Sex Crimes

Type of Bail	Judge 2	3	4	5	6	7	8	Total
unsupervised ROR	0	0	0	0	0	0	0	7
ROR w/ PTS	6	0	17	14	8	0	0	0
Normal money bail	33	60	58	43	31	33	91	47
Large money bail	28	30	8	14	46	0	9	30
No bail set	33	10	17	29	15	67	0	17
Total =	100	100	100	100	100	100	100	100
N =	18	10	12	7	26	6	11	90

The table snows that the bail set by the judges for sex crimes appears to vary substantially from judge to judge. However, the small number of cases limit any findings for sex crimes.

Even though there are only a few sex crime cases, the judges can be ranked according to the bail they set for these cases. If the judges set the same bail in the hypothetical aggravated rape case, the total bail amount was used to rank the judges. For the actual bail decisions the proportion of defendants for whom the judges set large bail was used to rank the judges. There were so few defendants charged with sex crimes released on their own recognizance to use the ROR rate to rank the judges.

The Spearman rank correlation coefficient shows that there is a strong association (.69) between the judges' bail for the hypothetical rape case and the percentage of sex crime defendants for whom they set large bail. This strong correlation suggests the judges' answers do accurately reflect the bail decisions they actually make. The bail for the other hypothetical cases needs to be compared to the same category of crime to look for similar associations.

Two of the hypothetical cases had a charge of burglary, a property crime. The type of bail set for property crimes by each judge is given in Table 6.14.

TABLE 6.14

Percentages of Types of Bail by Judge for Property Crimes

Type of bail	Judge 1	2	3	4	5	6	7	8	Total
unsupervised ROR	6	2	0	4	2	1	0	2	1
ROR w/ PTS	29	34	30	36	25	34	25	41	33
Normal money bail	65	63	67	59	55	64	74	57	63
Large money bail	0	1	3	0	8	1	1	0	1
No bail set	0	1	0	1	11	2	0	0	1
Total =	100	101	100	100	101	100	100	100	100
N =	17	199	133	117	67	270	83	97	983

The above table shows the judges differ substantially in the proportion of defendants they release on recognizance. One judge's ROR is a high 43 percent for property crimes, while another's is a low of 25 percent. Since there are a large number of cases for property crimes, these proportions are much more reliable than those for sex crimes.

The bail decisions actually made by a judge for property crimes can also be compared to the bail decisions in the hypothetical cases. For the actual bail decisions, the ROR rate (PTS and unsupervised) is used to rank the judges. For the hypothetical cases, both the number of times a judge suggested ROR and the total amount of money bail are used. These are the same two ranking used above.

There was no association between the ROR rate for property crimes

and the hypothetical cases using either method of ranking the interview answers. Spearman's Rho showed no association (.02) for the property crime ROR rate and the ROR ranking from the hypothetical cases. The rank correlation coefficients also showed a small positive association (.17) between the ROR rate for property crimes and the total amount of bail ranking. The lack of association for the property crimes and the bail the judges set for the property crimes suggests that another type of crime needs to be examined for a similar relationship.

The two female defendants were charged with a document crime. The type of bail set for document crimes by each judge is given in Table 6.12.

TABLE 6.15

Percentages of Types of Bail by Judge for Document Crimes

Type of Bail	Judge 1	2	3	4	5	6	7	8	Total
Unsupervised ROR	0	10	0	22	7	6	0	0	7
ROR w/ PTS	83	48	38	33	57	33	58	63	44
Normal money bail	17	42	55	44	29	58	32	37	47
Large money bail	0	0	4	0	7	0	0	11	2
No bail set	0	0	4	0	0	3	0	0	1
Total =	100	100	101	99	100	100	101	100	101
N =	6	31	29	27	14	72	19	19	217

This table shows a great deal of variance between the ROR rates for different judges for document crimes. Excluding judge 1 because of the number of cases,

the ROR rates range from 64 percent to 38 percent. This wide range of bail decisions shows the judges react differently even to the least serious felony charges.

If judges do let the charge effect whether they will ROR a defendant, no association would be expected between the ROR rate for document crimes and the large money bail rate for sex crimes. The premise is that judges who set bail the most according to charge would set the least punitive bails for document crimes and more punitive bail for the other two types of crime.

The document crime ROR rate for each judge was ranked to compare it to the two rankings from the hypothetical cases. Spearman's rank correlation coefficient showed slight negative association between the document crime ROR rate and the hypothetical cases ROR ranking (-.19) and between the document crime ROR rate and the hypothetical total money bail ranking (-.14). The association for the bail set for document crimes is no closer to the answers from the judges than the bail set for property crimes.

The empirical data shows that judges vary in the bail they set for certain types of crime, but no inferences have yet been made about whether the judges have similar patterns of setting bail for different charges. A judge with a relatively high ROR rate for document crimes would be expected to have a high ROR rate for property crimes. Moreover, if the different judges weigh dangerousness and appearance consistently, the judges with high ROR rates would also be expected to set high bail less often. By comparing the judges according to their ranking by ROR and large bail rates, these relationships can be examined.

Spearman's rank correlation coefficient shows there is a relatively strong association (.43) between the ranking of judges by ROR rates for

document and property crimes. There is also an even stronger association (.55) between the ranking of judges by ROR rates for property crimes and the ranking of judges (reverse order from previous usage) by large bail rates for sex crimes. These are the relationships that were expected.

However, there is a negative association (-.26) between the judges ranked by ROR rate for document crimes and by large bail rate for sex crimes. This association shows that the judges who are most likely to ROR a defendant charged with a document crime are also the ones who are most likely to set high bail for a defendant charged with a sex crime.

The relationship suggests that some judges rely on defendant dangerousness when setting bail. If the charge is not serious (a document crime), these judges are more likely to set ROR. If the charge is serious (a sex crime), they are more likely to set high bail to attempt to detain the defendant. This premise does not suggest that some judges set bail based on a concern for appearance and others on a concern for dangerousness. Instead, the association suggests some judges rely on their perceptions of defendant dangerousness more than other judges.

Of course, other factors could also explain the relationship. Defendants charged with document crimes might have less extensive prior records. Some judges may have been relying on prior record more than others. Some of the judges may have set bail for defendants with significantly different community ties. If the defendants for each category of crime had vastly different community ties for each judge, the ROR rates would show no association. However, this explanation is unlikely because of the large number of cases presented to each judge. The reason is probably either prior record, charge, or a combination of these two. If so, the association between the bail decisions for the three categories of crime indicates that a percep-

tion of defendant dangerousness influences the type of bail set by judges.

The answers given during the interviews with the judges do not seem to accurately reflect the decisions they actually make. Several explanations are possible for this relationship. For example, the smaller sample size for sex crimes suggests the associations found might be spurious. Another possible explanation is the instrument used to look for associations. Ranking the judges and computing Spearman's Rho is a crude statistical method that may miss some of the subtleties of the judge's decisions. The method does not account for judges who are bunched closely together in the ranking, nor does it show judges at extremes. The lack of precision of the statistical method used might account for the findings.

The judges might also not let outside factors or actors influence their decisions as much when setting bail for sex crimes. In a violent felony against a person, judges may depend strongly on the charge, not letting other factors influence their decision as much as for less serious charges. On the other hand, some outside factor may strongly influence the judges when setting bail for property and document crimes. The interviews suggested Pretrial Services might play such a role.

An attempt has been made to explain why the answers to the hypothetical defendants did not seem to be strongly related to the actual decisions judges make. If an explanation for the apparent lack of association between these two types of bail decisions cannot be found, the finding of the interviews are questionable. An examination of the different categories of charges produced more evidence that a prediction of defendant dangerousness affected bail decisions. The examination of the type bail set for the different categories of crime showed that the type bail set by the judges varied. Since the interviews did not explain the variation in the bail set by the judges,

other actors or outside factors need to be examined.

OTHER ACTORS

The description of the bail setting process suggests that actors other than the judges can have impact on the type and amount of bail set for a defendant. The interviews and empirical data can be used to examine the impact these actors have. If these actors are shown to have substantial impact on bail decisions, the small difference between what judges say they should do and what the empirical data shows they do might be explained.

The description of the bail setting process indicated the Pretrial Services employees are influential. They interview the defendants, make bail presentations to the judges, and recommend defendants for release on recognizance. In addition, all of the judges had high praise for the organization and said that they trusted the organization's judgment. Only one judge seemed even a little reserved about putting full faith in Pretrial Services.

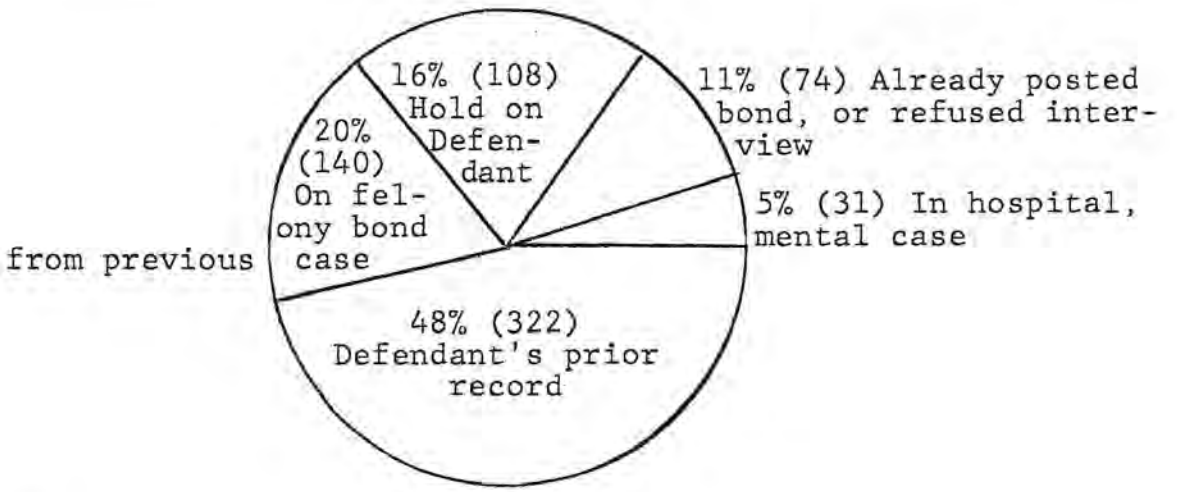
The decisionmaking process for PTS can be broken down into three stages. First, the PTS employee must decide whether to interview the defendant. Next, the interview responses are used to calculate the defendants point scale score. Finally, the PTS employee presents the case to the judge for a bail decision. Each of these three stages is examined to explain the role PTS plays.

For the four months used for the sample collected from the Memphis City Court records PTS interviewed 63.4 percent of the defendants. Less than one percent of the defendants that the agency initially decided not to interview were later released to PTS supervision. Only four percent of the defendants posted bond before an interview. The various reasons PTS decides

not to interview a defendant are shown in Figure 6.16.

FIGURE 6.16

Distribution of PTS Reasons for Not Interviewing Defendants



N = 675
(36.6% of the total defendant sample)

The pie diagram shows that a defendant's prior record is the most important factor in an interview decision. A number of the defendants excluded from interviews were already on felony bond for another case or because they had some type of hold on them. These defendants can reasonably be assumed to have also failed to meet the PTS prior record requirements. Therefore, the defendant's prior record probably excludes more than half of the defendants from a PTS interview.

Since judge's have no community ties information for defendants who are not interviewed, one might assume a decision not to interview a defendant would affect the amount of money bail as well as the type of bail. However, only 9.8 percent of the defendants had large bail set and 7.3 percent had no bail set. Most of the defendants not interviewed are in the

normal bail group. This fact suggests judges may be basing their decisions primarily on the charge. The prior record and community ties may be secondary considerations in a bail decision. Judges might set "large bail" for a defendant without community ties and with a prior record only when the charge is serious.

The charges for defendants PTS did not interview a shown in Table 6.13. The defendants who had already posted bail are excluded from the table.

TABLE 6.17

Defendants not Interviewed by Charge

	Homo-cide	Sex Crime	Rob-bery	Assualt	Prop. Crime	Drug Offense	Weapon Offense	Document Crime	Total
Percen-tage =	41	24	44	26	35	21	32	22	33
N =	40	22	70	40	346	23	12	48	601

The above table shows a large proportion of defendants for every category of crime are not interviewed by PTS. If the charge is the most important factor to some judges, PTS might not be recommending some defendants charged with a nonperson felony who have low point scale scores and would be acceptable ROR recommendations.

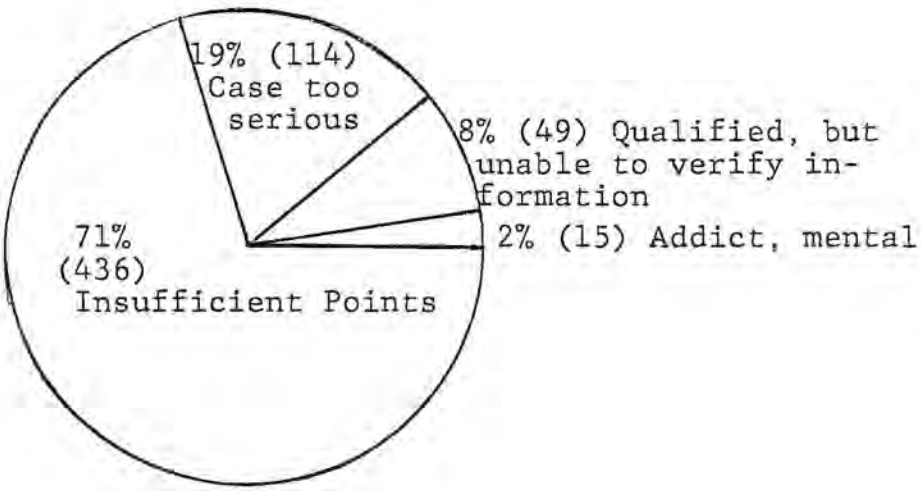
Most of the defendants are excluded from an interview because of their prior record, but no investigation is made of whether the defendant has ever failed to appear in court. State law states that prior releases on bail is a criterion for a bail decision. Judges are not provided with community ties or prior pretrial behavior information for these defendants. The lack of information suggests some defendants who might be reliable own recognizance releases are having money bail set because they are not being

interviewed.

After the interview Pretrial Services must decide whether to recommend the defendant for ROR. Figure 6.8 shows the reasons why Pretrial Services did not recommend interviewed defendants. The analysis of the sample shows that 33.3 percent of all defendants are interviewed but not recommended. The sample also shows 52.4 percent of the interviewed defendants are rejected. Figure 6.8 shows why PTS rejected these interviewed defendants.

FIGURE 6.8

Distribution of PTS Reasons for Not Recommending Interviewed Defendants



N = 614

The pie diagram shows that a large portion of the defendants are not recommended because they do not have enough points. Pretrial Services uses a Vera-type point scale to measure a defendant's community ties. If the screening device PTS uses is too restrictive, defendants who would be reliable ROR releases are not be recommended. At least one of the judges said he

would accept a PTS recommendation for a defendant who he would otherwise set bail as high as $5,000. The interviews showed all judges have similar faith in the PTS assessment of community ties. These facts suggest that if Pretrial Services changed its screening device to reject fewer defendants for insufficient points, the judges would accept the additional recommendations.

A significant proportion of the defendants shown in Figure 6.10 meet the point scale requirements, but are not recommended because the case is too serious. Almost all of these cases (88 percent) are crimes against a person. The decision not to recommend the defendant is a subjective one made by the PTS employee. The defendants not recommended are often recommended for reduced bond. Previous findings suggest that judges would not ROR defendants "with serious cases" if PTS recommended them. Yet, the fact that a category exists for rejecting an otherwise qualified defendant shows that PTS considers possible defendant dangerousnes before making an ROR recommendation.

The impact of the PTS decision to interview and to recommend a defendant depends on the number of PTS recommendations that the judges are willing to accept. The interviews indicate that the judges accept most recommendations. Table 6.9 shows the bail set for defendants recommended for ROR by PTS. Judge 1 is omitted because of the small number of cases.

TABLE 6.19

Bail Decisions by Judge for ROR Recommendations

	Judge							
	2	3	4	5	6	7	8	Total
ROR w/ PTS	98	97	94	95	96	97	99	97
Money bail	2	3	6	5	4	3	1	3
Total =	100	100	100	100	100	100	100	100
N =	108	75	66	39	151	38	67	544

The table shows that a PTS recommendation is rarely rejected. No judge accepted less than 94 percent of the PTS recommendations. The judges appear to rely heavily on PTS.

When asked in the interview, "what would make you reject a PTS recommendation for ROR?" all of the judges answered either the charge, the facts in the case, the prior record, or some combination of these three. If these factors are indicators of defendant dangerousness and not likelihood of flight, they are setting money bail instead of ROR to "protect the community." Furthermore, these answers imply judges do not make their own assessments of community ties. The data and the interviews suggest judges strictly rely on the PTS assessment of community ties as measured by the Vera-type scale when deciding whether to set ROR.

The PTS employees' decision appears to have significant impact on whether a defendant is released on his own recognizance. For many defendants, the number of points they have on the points scale is the crucial factor in determining the type of bail set. Since a PTS recommendation is influential, the decision to interview a defendant is important.

OTHER SYSTEMIC FACTORS

Factors besides the judges and Pretrial Services have impact on the type and amount of bail set for a defendant. As the actors most involved in bail decisionmaking, the judges and PTS employees have been emphasized in the analysis of why ROR is not set more often. Yet, the other actors and outside factors can influence the bail decisions made. Since none of the empirical data gathered for this study relates to these other factors, the responses in the interviews are relied upon to explain the effect they have on the number of times ROR is set.

If a defendant's bail is set in the open court room, the prosecutor can have direct influence on the type of bail. Occasionally a judge asks the Prosecutor for a bail recommendation. In Memphis, the prosecutor almost always suggests money bail. The prosecutors also occasionslly objects to PTS recommendations for ROR. The prosecutor usually objects to the recommendation because a weapon was involved, the victim was injured, or some other factor not traditionally associated with likelihood of appearance. The impact of the input of the prosecutor is hard to determine. Observations indicate that if PTS does not make a bail recommendation, the prosecutor is influential. The small number of rejections of PTS recommendations suggests that if PTS does make a recommendation, the prosecutor is not influential.

The interview with the two prosecutors indicate prosecutors base their bail recommendations on a concern for protecting the community. One of the prosecutors said "I don't want dangerous people on the street." They both agreed they did not want "ROR set for robbery or some other type of violent crime." They saw ROR as being for first offenders and non-violent crimes.

One of the prosecutors also said the purpose behind her bail decisions

was deterrence of future crime. She said bail should not be punitive, but that "sometimes a money bond is necessary to make the defendant realize the seriousness of the proceedings." She said a defendant should be made to realize that "if he picks up additional charges his bond will be set so high he cannot get out."

This prosecutor uses criteria not given by Tennessee law. Her reasons are particularly interesting since the bail decisions she gave (Table 6.3) are not that different from the "median judge" and are not as punitive as some of the judges in Table 6.2. This fact further supports the premise that judges set bail for reasons besides, or at least in addition to, appearance.

Defense attorneys can also directly influence the bail decision. A defendant's attorney can ask a judge to set bail. The interviews indicated that the defendants given unsupervised ROR had bail set in this manner. Only two percent of the defendants were given unsupervised ROR. The data also indicated that only four percent of all defendants posted bail after their attorney persuaded a judge to set bail. Most of these defendants were charged with some type of document crime or aggravated assault. The type of charge for these cases would appear to account for the large proportion of releases on recognizance for these cases.

The judges said in the interviews that they released defendants to an attorney because they expected defense attorneys to supervise their clients much in the same manner PTS supervises defendants. However, two of the judges said they refused to set bail for an attorney. They said the information given an attorney was not as reliable as that verified by PTS. They said they referred attorneys to Pretrial Services. The data show that these two judges were also the only ones who did not release any defendants on unsupervised ROR (see Table 6.8). Apparently, whether the

defense attorney can influence a bail decision depends on the judge.

The impact of defense attorneys on bail decisionmaking is not great. Only a small percentage of defendants have bail set when an attorney asks a judge. Furthermore, many of these defendants probably would have the same bail set if they did not have an attorney. The main difference attorneys appear to make is having defendants released on unsupervised ROR rather than to PTS supervison. A defense attorney has some impact on a bail decision, but probably not as much as the other actors in the criminal justice system.

The newspaper reporters appear to have an indirect affect on bail decisions. The bail set for serious cases usually makes the papers. Four of the judges said the paper had no affect on bail decisions, but four of the judges seemed to think the newspaper did affect bail policy. In addition, actors other than judges all thought the newspaper was influential, but that the amount of influence depended on the judge.

There were several reasons given for the newspaper's affect on bail decisions. Two of the judges said the newspaper stories were misleading. The "failure of reporters to be in court," "the sensationalizing of the news," and the failure of "the average person to understand the concept of innocent until proven guilty" were criticisms these two judges gave about newspaper stories. However, two of the judges who were not worried about the newspaper's stories said the stories were essentially accurate. The different perceptions judges have about the accuracy of the press might explain why some judges are affected by the newspaper. On the other hand, all of the judges might be affected by publicity. Some judges might not admit it to themselves or might not think the effect was important enough to mention.

Two explanations can be given for concern over publicity of bail

decisions. The first is the fact that judges face reelection every four years. although every judge said he or she did not let politics affect their decisions, their concern about publicity over setting bail for a "dangerous" defendant raises questions about these claims. Another possible explanation was offered by one of the judges. This judge said bad publicity affects a judge on a personal level. She said "I do not like to be attacked in the paper and see the article pinned up on the bulletin board."

Whatever the explanation, the newspaper does effect bail decisions. An anecdote told by one of the newspaper reporters clearly supports this premise. The reporter said

> A defense attorney had failed one morning to have his client's bail lowered when the press was present in the court room. The prosecutor tipped us (the newspaper) off that the attorney was going to try again to have the bond lowered. We were there and he did not.

Whether the judge would have lowered the bail if the press had not been present is debatable. Nevertheless, the prosecutor and the reporter obviously think the press is influential in some bail decisions. The extent of the newspaper's influence on a judge and the number of judges the newspaper might influence is not clear.

An outside factor which appears to affect bail decisions is the fullness of the City Jail. The City Jail is under a consent decree from a Federal judge not to let the jail population rise above a certain limit. Since most of the defendants in the City Jail are there because they cannot make their money bail, the bail decisions of the City Court judge would are related to the number of defendants in the jail. The fewer defendants given ROR, the more likely the jail is to be overcrowded.

The four judges who were concerned with the effect of the newspaper

also were concerned about the fullness of the City Jail. The four judges who claimed not to be worried about newspaper publicity also claimed not to let the number of defendants in the jail concern them. The perfect association between these answers suggests that some judges let outside variables affect their decisions, while others do not.

An interesting relationship is found when the answers to the questions about the newspaper and the jail are compared with the ROR rates. The four judges not concerned with the outside variables ranked first, second, third, and fifth in the percentage of defendants they released on their own recognizance. This relationship appears to be consistent with the answers about the newspaper, but inconsistent with the answers about the fullness of the jail. If a judge was not worried about perceived criticism of his bail decisions, he would be more likely to release defendants on their own recognizance. Yet, if he does not care how full the jail is, he should be less likely to release defendants on their own recognizance. The discrepancy found here suggests that the newspaper is a more important factor than the fullness of the jail. Perhaps the judges who let outside variables affect their decision whether to ROR a defendant are more often concerned with bad publicity than with decreasing the jail population.

Even if all of the judges claimed the fullness of the jail did not affect their bail decisions, a strong argument could be made saying it does. The unusual method used in the City Courts of having a PTS employee go to a judge's office or call the judge on the telephone was devised to alleviate the crowded conditions of the jail. By setting bail several times a day and by setting bail on weekends, defendants are released sooner. Frequently, they are released without having to spend a single night in jail. Much of the influence of Pretrial Services stems from this method of setting bail. PTS

is the only actor giving information to judges when over half the bail decisions are made. Being the only actor present should increase their ability to get ROR recommendations accepted. Therefore, the overcrowded conditions of the jail not only pressure judges to ROR more defendants, but also has led to the implementation of a method that increases the influence of the agency that usually pushes for more ROR releases.

SUMMARY

This chapter attempted to explain why ROR is not used as extensively as Chapter V proposes it should be. The interviews and empirical analysis are used to make inferences concerning the bail decisionmaking process in Memphis-Shelby County. These influences should indicate the areas efforts to reform the bail policy need to be aimed.

The judge was the focus of the analysis. The interviews showed that prior record and charge, as well as community ties are important criteria in a bail decision. The judges not only increased the amount of the money bail if there was a serious charge or extensive prior record, but also set the type of bail -- either ROR or money -- using these criteria. The empirical analysis of the effect of charge supported the findings of the interviews. The more serious the charge, the higher the money bail and the fewer ROR defendants. Since offense seriousness and prior record are criteria usually more associated with defendant dangerousness than with appearance, the assumption was made that protecting society was an interest behind bail decisionmaking in Memphis.

A Pretrial Services recommendation appears to be an important factor in a bail decision. Any defendant who the judges do not perceive as dangerous seems to be given ROR upon a PTS recommendation. The high acceptance

rate of PTS recommendations suggests the PTS interview and recommendation decisions are crucial to the proportion of defendants released on their own recognizance. If the PTS interview and recommendation criteria are too restrictive, reliable ROR defendants are having money bail set.

A number of other factors also appear to influence bail decisions. The prosecutor's concern with protecting society could lower the ROR rate. The impact of defense attorneys is unclear, but their effects do increase the number of unsupervised ROR. The publicity in the newspaper seems to lower the ROR rate. Perhaps a judge's concern with the newspaper reinforces his concern about defendant dangerousness. The overcrowded conditions in the jail also are been partially responsible for shaping the present bail decisionmaking process.

The examination of why the ROR rate is not higher seems to have found that a concern for possible defendant dangerousness is the best explanation. However, the Tennessee law does not allow dangerousness as bail setting criteria. The Literature review showed that no reliable method of predicting defendant dangerousness has yet been devised. Furthermore, the theme of this paper is release on recognizance as an alternative to money bail. No justification has been found in the literature review or the legal sources for setting money bail instead of ROR because of perceived defendant dangerousness. This preoccupation of the Memphis-Shelby County Criminal Justice System suggests that possible methods of changing the bail policy in the jurisdiction need to be explored.

CHAPTER VII - WHAT COULD HAPPEN

This final chapter speculates on what changes could be made to further reform Memphis-Shelby County bail practices. The Memphis bail system is a "reformed" jurisdiction when compared to the bail systems before the Manhattan Bail Project. However, when compared to the "ideal" proposals, "what is happening" in Memphis is not "what should happen." The previous chapters clearly showed that change is needed in Memphis if ROR is to be used as often as the empirical studies and the legal sources suggest.

This chapter offers some concrete suggestions to move bail practices in Memphis toward the proposals made for ROR based on the present law in Tennessee. First, an attempt is made to predict what will happen if the number of defendants released on their own recognizance is drastically increased. Then, the findings of Chapter VI -- the examination of "why" ROR is not used as often as it should be -- are used to devise strategies to increase the ROR rate. Finally, a new recommendation scheme is constructed for implementation by Pretrial Services. This recommendation scheme is intended to provide a rational, objective method of screening defendants, while still meeting the need to further reform the jurisdiction.

PREDICTION

Two methods are used to predict what will happen in the Memphis-Shelby County Criminal Justice System if the number of defendants given ROR is significantly increased. One method looks at jurisdictions that have the de-

sired ROR rate. How many defendants are released on own recognizance in other jurisdictions and how many of these own recognizance releases fail to appear, a reasonable guess can be made about what might happen to the FTA rate in Memphis if the bail policy is changed. The second method is to examine at historical data. Past increases in the ROR rate in Memphis will indicate what effect future increases in the ROR rate in Memphis might have on the FTA rates.

Washington, D.C. and Dade County are used for comparison. These are the two cities used earlier to show that other cities release significantly more defendants on their own recognizance, than Memphis. Table 7.1 gives the ROR detention and FTA rates for Washington, D.C. and Dade County. The rates found earlier in this study for Memphis are included for comparison.

TABLE 7.1

Various Rates for Comparing Cities[1]

	Washington, D.C.	Dade County	Memphis
ROR (nonfinancial bail)	62%	55%	31%
FTA for ROR	10%	22%	13%
FTA for all felony defendants	11%	18%	28%
Detained (not released from jail)	20%	16%	28%

The table suggests that a substantial increase in the number of defendants released on their own recognizance in Memphis would not adversely affect the FTA rate. The characteristics of the other two criminal justice systems might be different from Memphis and the data might have been collected in

a different manner. Nevertheless, the FTA rates for Washington and Dade County show that when a greater number of defendants are released on nonfinancial bail, it does not result in a vastly greater FTA rate for the system.

The vast difference in Memphis-Shelby County between the FTA rate for ROR and the FTA rate for all felony defendants suggests the FTA rate for the system might be lowered by a greater reliance on ROR. If the supervision of defendants by Pretrial Services is responsible for the vastly lower FTA for ROR, then the FTA rate for the system could be lowered by releasing more defendants to PTS supervision.

In addition, the detention rates for Washington and Dade County suggest that the number of defendants held in jail prior to their trial could be reduced by increasing the role of ROR in Memphis-Shelby County. If more defendants are given ROR, the number of defendants detained because they cannot afford to post money bail could be decreased. Decreasing the number of pretrial detainees will not only decrease the pretrial punishment of defendants, but should also save the criminal just system money. Housing, guarding, and feeding defendants in the City or County jail is expensive. If defendants are detained because they unnecessarily had money bail set, the criminal justice system is wasting financial resources.

The historical data is also used to predict what will happen in Memphis if there is a drastic change in the ROR rate. The data that comes from Pretrial Services records. There is a problem with using the data from PTS. Pretrial Services information is based on all defendants released to PTS supervision, not on all own recognizance releases. Yet, Chapter V showed that almost all defendants given ROR are released to PTS supervision. The Chapter showed that only a small percentage of the defendants released to PTS

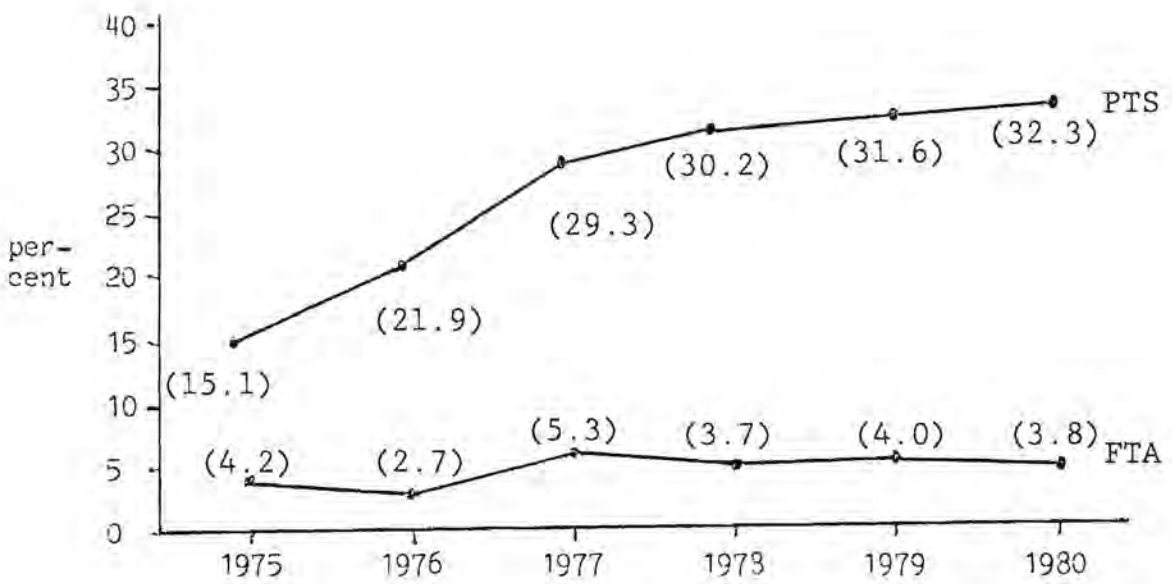
supervision were released on reduced money bail (not ROR). In addition, interviews suggest that the proportion of defendants in these two groups have been consistent over the past ten years. Thus, the problem with the PTS data is relatively small and it affects the data each year.

The information available from Pretrial Services measures the PTS release rate and forfeiture rate. Information concerning the detention rate for the system and the FTA rate for all releases was not available. Although the missing information would have been useful for comparison, the information available is sufficient to make some projections about the impact on FTA rates of future increases in the ROR rate.

The information from Pretrial Services is arranged by year in Figure 7.2. The broken line graph gives the percentage of the total felony population released to PTS supervision and the forfeiture rate for those defendants. Pretrial Services keeps its data for the fiscal year from July to June. The forfeiture rate is much smaller than the FTA rates discussed in Chapter V because of the stricter definition used by the Agency.[2]

FIGURE 7.2

ROR and FTA Rates by Year



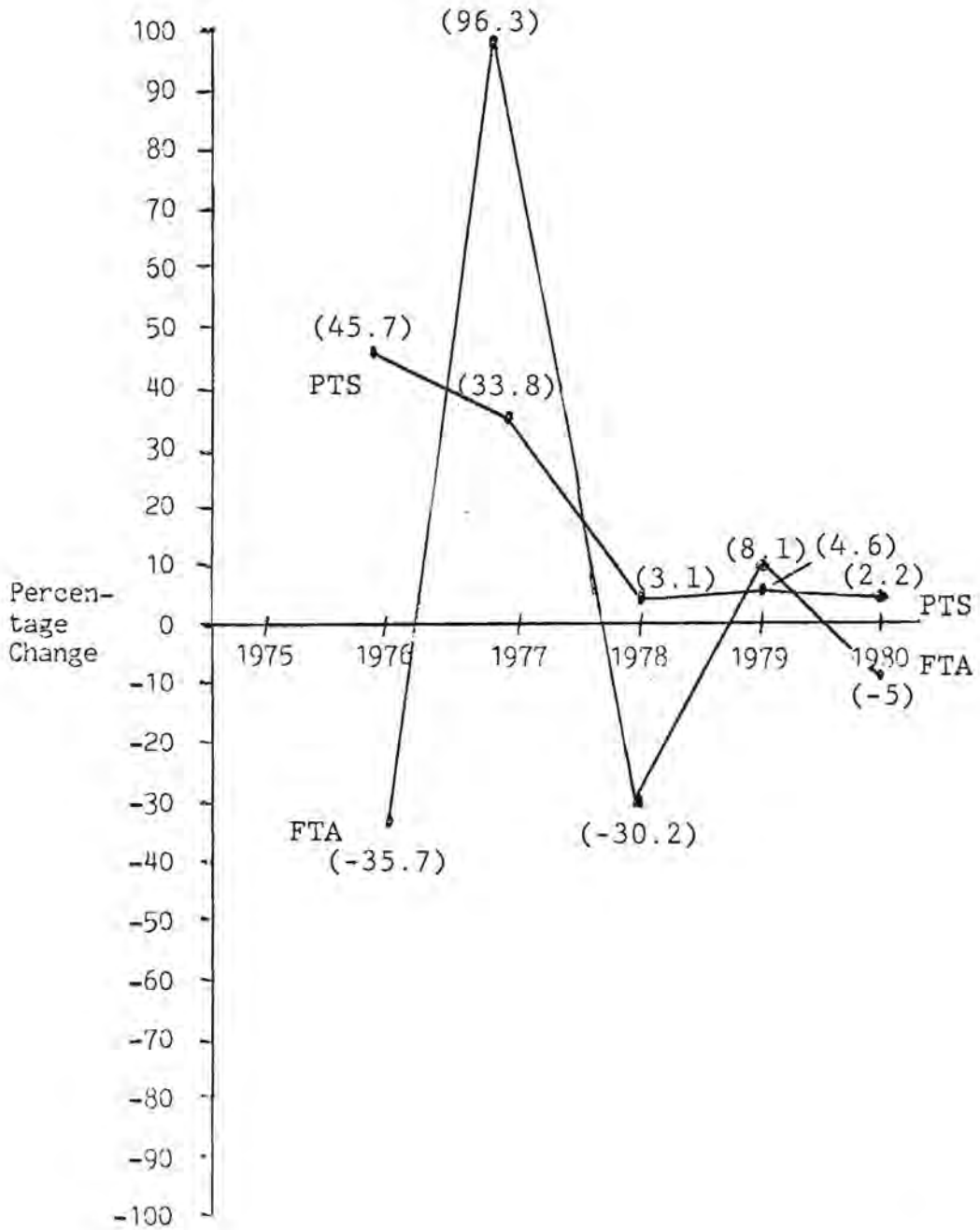
The figure suggests there is no relationship between the percentage of the total defendant population released to Pretrial Services supervision and the forfeiture rate of the Agency. The three years with the highest percentage of releases had a lower forfeiture rate than the year with the lowest percentage of releases. In addition, the year with the highest forfeiture rate was only the fourth highest in terms of release rates. These percentages indicate that the Memphis-Shelby County Courts could further increase the percentage of defendants released to PTS supervision without effecting the Agency's forfeiture rate.

Figure 7.3 specifies the relationship between the increases in the ROR rate shown in Figure 7.2 and the changes in the Agency's forfeiture rate. Figure 7.3 uses the same time series format, but shows the ROR and the forfeiture rates as the percentage change in one year from the previous year. Although the changes in the forfeiture rate were smaller than the changes in

the release rate in the previous graph, the small size of the forfeiture rate makes its percentage changes appear more extreme.

FIGURE 7.3

Percentage Rate Changes By Year



Analyzing the data by percentage change per year emphasizes the fact that to date there has been no relationship between the increases in the PTS release rate and the Agency's forfeiture rate. All of the percentage changes for the release rate have been positive. The changes for the forfeiture rate have been positive and negative. The release rate percentage has steadily decreased. The forfeiture rate has fluctuated, increasing and decreasing unpredictably. Furthermore, the year with greatest percentage increase in the release rate was the same year with the greatest decrease in the forfeiture rate.

The year with the second largest increase in the release rate (1977) is troubling because of the 96 percent increase in the forfeiture rate. However, a number of reasonable explanations could explain the change. For example, the forfeiture rates for all types of releases might have been high that year. The previous year (1976) also had an extremely low forfeiture rate. This makes the percent change look disproportionately large. Another explanation could be that the increase might have outstripped the Agency's resources. The two years together represent a 94 percent increase in the release rate. The large release increase might have caused problems because the Agency could not supervise the defendants.

Whatever the explanation, the forfeiture rate in 1977 indicate increasing the ROR rate would create problems. The subsequent years brought the forfeiture rate below the forfeiture rate for 1975. The fact that Pretrial Services was able to maintain a low forfeiture rate while more than doubling its release rate strongly supports the premise that future increases in the ROR rate will not adversely affect the number of defendant who appear in court.

STRATEGY

This chapter has tried to predict what will happen if the ROR rate is drastically increased. Nothing has been said about how to create an increase of this type. An increase in the ROR rate in Memphis-Shelby County will probably take a conscious effort on the part of actors in the Criminal Justice System. This paper has tried to establish what should be done. Actually moving the bail policies in the jurisdiction toward the ideal needs an innovative approach. Rather than attempting to form a detailed implementation plan some broad guidelines are suggested. These guidelines are an attempt to integrate paper by discussing how to use the findings.

As Chapter VI tries to establish, the bail policy in Memphis is partially based on the type of bail judges think a defendant deserves. Although, Tennessee law does not allow punitive bail policies or considerations of possible defendant dangerousness, governmental purposes other than likelihood of appearance enter bail decisions. Greater use of of ROR may depend on convincing judges that money bail unfairly discriminates against the poor without serving any useful state purpose. The judges are the actors in the system who actually set bail. Therefore, the ROR rate cannot be increased until the judge's attitudes about bail are changed.

A number of factors in the Criminal Justice System were suggested as shaping the judge's attitudes. One influence on a judge's attitudes might be other judges. Peer pressure might be successful in getting the Memphis-Shelby County bail policy changed. If one or two judges can be persuaded to substantially increase the number of defendants released on their own recognizance, their actions might be used to influence other judges. A judge who supports a greater role for ROR can be a strong advocast for that policy.

The other factors which might influence a judge's decisions might also be changed. If the prosecutor did not object to ROR recommendations, fewer recommendations might be rejected. If the prosecution suggested ROR for a deserving defendant, a judge would probably always set it. The prosecutors interviewed said they based their bail suggestions on factors other than likelihood of appearance. Therefore, changing their present impact on bail policy might also depend on changing how they make a bail decision.

The newspapers could be influential. The reporters seemed to be knowledgeable about the bail practices in Memphis. The press could publicize the "plight" of some defendants who sit in jail for months because they could not post money bail only to have their case dismissed. By assuming this type educational role, the newspapers might help change the attitides about bail of the general public and other actors.

Defense attorneys could affect the bail policy. Most defense attorneys probably already attempt to have ROR set as often as is practical. However, few legal efforts are made to change the system. Defense attorneys could routinely appeal decisions that set money bail. This might create an Appeals Court ruling mandating more own recognizance releases.

The nature of a bail decision makes the appeals process a difficult method to employ. Legal questions concerning bail are often moot before they reach a higher court. The infrequency of cases ruling on the subject indicates Appeals Court judges are reluctant to become involved in overruling bail decisions. Nevertheless, the legal path could be attempted. The examination of the Tennessee and Federal law suggested ROR should be the predominant form of bail; this study shows ROR is not.

Pretrial Services could have a profound affect on changing bail practices. Interviews show many PTS employees think more defendants should be

released on their own recognizance. Some of the employees said they thought the ROR rate needs to be doubled.

Further reform of the bail practices in Memphis can begin with Pretrial Services. Pretrial Services can increase the ROR rate by two methods: 1) persuading, convincing and educating other actors in the system; 2) recommending more defendants for ROR. The Agency was highly respected by every actor interviewed. Even the actors who disagreed with the Agency's orientation had positive comments about Pretrial Services. This prestige can be used to influence other actors to change the jurisdiction's bail practices.

Pretrial Services prestige appears to be based on its success in terms of appearance rate. The objective method the Agency used to make decisions is also important. Some objective method of recommending defendants needs to be devised which screens out defendants who are the most unlikely to appear in court and still recommends the number of defendants necessary to increase the ROR rate to where it "should" be.

PROPOSED SCREENING DEVICE

The inability of past studies to predict who will appear in court suggests that research efforts in the past have been asking the wrong question. Pretrial programs might be more effective if they changed what is measured in a screening device. The point scale used in Memphis-Shelby County tries to screen "bad risks" from "good risks" by measuring the defendants' community ties. Past research shows that community ties as measured by a Vera-type scale are incapable of predicting defendant behavior. Variables that have predictive capacity still predict that a defendant in the "worst risk" group will probably appear in court. In addition, constitutional principles make some of the predictors (race,

employment) unacceptable as decisionmaking criteria. Researchers and pretrial programs need to find a new orientation; predicting individual defendant behavior has not been a fruitful approach.

If programs should not base release criteria on demographic variables, what should the criteria be? Perhaps all defendants who can be supervised should be released on their own recognizance. Supervision has been shown to have some relationship to appearance. The level of supervision has been shown to have an affect on the appearance rate of those released on their own recognizance. Since objective methods are supposed to release, objective criteria to determine whether a defendant can be supervised are offered.

The method that is offered for screening defendants into those to be recommended for release is a modified version of what is not being used in New York City.[3] The New York Criminal Justice Agency abandoned the complicated "Vera-type" scale originally developed in that jurisdiction. Except for the emphasis on supervision, New York now uses a screening method similar to what is offered.

The following criteria are suggested for recommending a defendant for ROR:

1. A Memphis-Shelby County address
2. Two verifications of the information given by the defendant
3. No prior convictions for a failure-to-appear
4. Not a capital offense charge
5. Not a failure-to-appear charge.

If a defendant lives in the Memphis area, Pretrial Services should be able to supervise him. Verifications would guarantee that the defendant actually lives at the address he gave, and shows that the defendant has some community ties. (Two people know him well enough to know where he lives and some of the other following information.) The reasoning behind no previous FTA con-

victions and the charge not being an FTA is obvious.

Excluding capital offenses as a charge is question able on empirical grounds since seriousness of charge is shown not to be related to appearance rates. However, the reality of community concerns about dangerousness makes this requirement necessary. Capital offenses are legally separated from other types of offenses and include few defendants. At present, some noncapital felonies are excluded from recommendation because of charge seriousness, as are defendants with extensive prior records. If other limitations were considered necessary, Class X felony charges (crimes against a person with a guaranteed prison sentence) could be combined with prior record standards now being used. This type restriction would still probably result in more recognizance releases than under the present system. However, the prior record standards needs to be modified. No defendant should be excluded from recommendation because of his prior record if that record shows he has always come to court in the past.

A sixth criterion could be added. The defendant could not be released on his own recognizance if he is presently on release for a previous case. When given ROR a defendant is always told that one of the conditions of his release is to stay out of situations that might get him rearrested. He is given a copy of some guidelines that are directed to that end. A rearrested defendant has given at least the appearance of doing something illegal. The addition of this sixth criteria would satisfy some of the criticisms of being a "revolving door" occasionally leveled at pretrial programs.

The above criteria conform to the legal guidelines in earlier chapters. They should also be appropriate considering past empirical findings. However, scenarios are possible in which the criteria would not

release a deserving defendant. An indigent defendant who appears to have been mistakenly charged with murder is a good example. A defendant rearrested for violating the bad check law when the previous charge was for writing a bad check is another. Therefore, PTS supervisors should be given discretion to override the criteria if they feel the defendant will be a good risk. This human element is essential.

After deciding that a defendant is to be released, a decision must be made on the level of supervision. Three criteria are suggested for placing a defendant into a level of supervision.

First, whether a defendant has a telephone is important. A defendant without a phone would probably be more difficult to supervise. Two suggested conditions for phoneless defendants are more frequent reporting calls or reporting in to the Agency in person. Moreover the Agency could use written notification, mailing the defendant a letter with his court date. In extreme cases, the Agency could use home visits to notify and talk to the defendant, thereby increasing supervision.

Second, a drug or alcohol problem should indicate special supervision. Past studies have indicated a relationship between drug or alcohol problems and court appearances. The defendant could be referred to a treatment organization and assigned to a special counselor. Pretrial Services already performs this function for some defendants.

Third, interviewers should place defendants who are "bad risks" into a high level supervision category. Instructions should be given as to the nature of factors to be considered when placing a defendant into the category. Past research indicates criminal justice factors such as prior record and charge are more important than most other variables. Employment history has also been shown to be associated with FTA rates. High risk

defendants could be assigned to a special counselor who would have a smaller caseload.

If the program had unlimited resources, high levels of supervision could be used for all defendants. But the program is on a budget. Program resources should be directed where they do the most good. Overloading the "high risk" counselor, or all the counselors if they shared the high risks, would defeat the purpose of high supervision. A Counselor with too many releases could not do the job right. An interviewer would naturally figure the size of the high supervision caseload into his subjective determination, being more selective when the situation demanded.

Finally, a subjective system is acceptable because a study has not been done in Memphis to identify the "bad risks." Studies in other areas should not be relied upon to set formal criteria. They might direct areas for research, but conditions in Memphis are not exactly like those in Philadelphia or the District of Columbia. An empirical analysis of all of the factors that might predict "bad risks" in Memphis-Shelby County (thus indicating who should be placed under high supervision) is not a part of this research project. Besides, objective criteria of this sort have not been shown to be more effective than subjective criteria. Studies show that objective criteria increase the release rates, but the studies have not shown them to be better predictors of defendant behavior. Further research is needed before it can be said that an empirical analysis would lead to an objective system of placing defendants into levels of supervision that would be better than a subjective system.

The proposed method is simple. It still uses objective criteria, yet allows for discretion. Prejudices of the interviewer that would keep a defendant from being recommended for ROR are eliminated while

still allowing exceptions for unusually circumstances. Although the increased number of Agency recommendations would require more resources, the increased number of clients and the decreased number of pretrial detainees should justify a budget increase.

The method for deciding which defendants to recommend should increase the number of defendants released on their own recognizance. The method might use some variables for placing a defendant into higher levels of supervision that would not be allowed for deciding whether a defendant would be detained. However, placing a defendant under more supervision cannot violate his constitutional rights. While the method does not rely heavily on community ties, the research indicates judges mainly use charge and prior record anyway. The interviews indicate that for a minor charge most judges will grant ROR to any Pretrial recommendation (i.e., anyone PTS is willing to supervise).

The proposed screening device needs to be tried to see what effect its implementation will have on the ROR rate in Memphis-Shelby County. The proposal is based on past research and conforms to the legal guidelines in Tennessee. Whether its implementation has the desired effect of increasing the number of defendants released on their own recognizance to even the level of the lowest of the three rates suggested in Chapter IV remains to be seen. Only implementing the screening device will show if it recommends substantially more defendants and if those recommendations are accepted by the judges.

CONCLUSION

This chapter has suggested ways to reform the bail policy of the Memphis-Shelby County Criminal Justice System. Tennessee law as inter-

preted in Chapter IV proposes more defendants should be released on their own recognizance. The findings of this paper are used in this last chapter to make suggestions on how to increase the role of ROR within these legal guidelines.

However, this chapter ignores the tension between the Crime Control and Due Process Models discussed in the first chapter. Tennessee law gives the concern for the appearance of the defendant as the only governmental purpose for a bail decision. The concern with protecting society suggested by the values behind the Crime Control Model are not allowed as a state interest when setting bail. Nevertheless, judges appear to use their perception of the defendant's dangerousness when setting bail. Consequently, some defendants are preventively detained. The Due Process Model indicates these defendants have been denied their constitutional rights.

A final proposal can be offered which compromises between the values behind the two models. Tennessee law could be changed to allow for preventive detention hearings like those in Washington, D. C. Proponents of the Crime Control Model would not like the "waste" of resources on the hearings, but would want "dangerous" defendants kept off the street. Proponents of the Due Process Model would not like the pretrial punishment of defendants, but would want defendants preventively detained only after a full judicial proceeding.

Establishing preventive detention hearings brings the determination of defendant dangerousness into the open. This paper showed dangerousness is a factor in bail decisions. Even decisions on whether to give a defendant ROR were shown to be based on criteria that are traditionally thought to be indicators of dangerousness. Changing the state law to establish these hearings would make detention decisions subject to review by higher courts.

Establishing the hearings would also focus bail decisions on appearance. Focusing bail decisions only on appearance could greatly increase the role of ROR.

ENDNOTES

1. The data for this table was gathered from three sources:
Washington, D.C. -- Jeffrey A. Roth and Paul B. Wice, Pretrial Release and Misconduct in the District of Columbia, Washington, D.C., Institute for Law and Social Research, 1980.
Dade County -- Pretrial Release: An Evaluation of Defendant Outcomes and Program Impact, The Lazar Institute, Washington, D.C., 1981.
Memphis -- Chapter IV, supra.

2. An FTA in Chapter V, supra, is defined as any defendant for whom an FTA arrest warrant was issued. The FTA in PTS records is defined as any defendant who willfully forfeits. See Chapter V for a fuller discussion of the impact of an FTA definition.

3. Stephen Gettinger, "Has the Bail Reform Movement Stalled," Corrections Magazine, February, 1980, p. 32.

APPENDIX A

THE PRETRIAL SERVICES POINT SYSTEM

To be recommended, a defendant needs:
1. A Memphis address where he can be reached AND
2. A total of six verified points from the following:

POINTS	
	RESIDENCE (In Memphis area; NOT on and off)
4	Present residence 15 years OR buying home (has paid 3 or more years on mortgage).
3	Present Residence 2 years OR present and prior 3 years.
2	Present Residence 6 months OR present and prior 1 year.
1	Present Residence 4 months OR present and prior 6 months.
	TIME IN MEMPHIS AREA
2	15 years or more.
1	5 years or more.
	FAMILY TIES (In Memphis Area)
3	Lives with family.
2	Lives with non-family friend AND has contact with other members of his family.
1	Lives with non-family friend OR has contact with other members of his family.
	EMPLOYMENT OR SUBSTITUTES
5	Present job over 5 years where employer will take back.
4	Present job over 1 year where employer will take back.
3	Woman with children for whom she is responsible.
3	Present job over 6 months where employer will take back.
3	Receiving public assistance 3 or more years.
3	Student in GOOD standing with the school.
2	Worked less than 6 months at his job but employer can give satisfactory recommendation.
2	Laid off his job for reasons other than personal or ability to carry out job.
2	Receiving public assistance at least one year.
1	(a) Present job 4 months or less OR present and prior job 6 months. OR (b) Current job less than a month where employer will take back. OR (c) Unemployed 3 months or less than 9 months or more single prior job from which not fired for disciplinary reasons. (d) Receiving unemployment compensation, welfare, etc. (e) Full time student. (f) In poor health. (g) Pending workmen's compensation case.
	CHARACTER
-1	Prior negligent no show. OR run-away from juvenile Dentention Center
-2	Definite knowledge of drug addiction or alcoholism. (Rebuttable if on program).

PRIOR RECORD

Note: Use chart below for single offenses and for combination of offenses. For reasoning and offensive weights, see Explanatory Memo.

Code: One adult felony = 7 units if five years ago and no previous record within the five year period.

One adult felony = 10 units if within a five year period from present charge.

One adult misdemeanor = 2 units if within a five year period from the date of present charge.

One adult misdemeanor = 1 unit if five years ago and no previous record within the 5 year period.

0	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21
			-1							-2							-3				-4

PAST CONVICTIONS: Prior record limited to 15 years (include fines)

APPENDIX B

INTERVIEW QUESTIONS:

After assuring the interviewee that the interview was confidential, the six hypothetical defendants described in Chapter V were read to the judge so he could suggest bail for the cases and the cases could be discussed. Then the judges were asked the following questions:

1. What do you think about the bail policy in Memphis-Shelby County?

2. What are the interests of society that you see as being behind a bail decision?

3. How do you decide if a defendant is likely to appear at his trial?

4. How do you decide if a defendant is potentially dangerous?

5. What effect do these outside variables have on bail decisionmaking:
   A. the fullness of the jail?
   B. the number of cases on the docket?
   C. the newspaper?
   D. politics?

6. What effect does a PTS recommendation have?

7. What would make you disagree with a PTS recommendtion for ROR?

BIBLIOGRAPHY

Abraham, Henry J., Freedom and the Courts: Civil Rights and Civil Liberties in the United States. New York: Oxford University Press, 1977.

Alexander, George, et al. "A Study of the Administration of Bail in New York City." 106 University of Pennsylvania Law Review, 693.

Ares, Charles, et al. "The Manhattan Bail Project: An Interim Report on the Use of Pretrial Parole." 38 New York University Law Review 63.

Barbask, Fred. "Burger Says Legal System Is Too Easy on Criminals." The Washington Post, February 9, 1981, p. A1.

Beeley, Arther. The Bail System in Chicago. Chicago: University of Chicago Press, 1927.

"Challenging Bail Laws: Bellamy, Henson and Van Atta -- Background and Strategy." 13 University of California at Davis Law Review 300.

Dexter, Lewis A. Elite and Specialized Interviewing. Evanston, Illinois: Northwestern University Press, 1970.

Feeley, Malcolm M. and John McNaughton. "The Pretrial Process in the Sixth Circuit: A Quantitative and Legal Analysis.' Mineographed. New Haven, 1974.

Fleming, Roy Bernard. "Allocating Freedom and Punishment: Pretrial Release Policies," unpublished dissertation, The University of Michigan, 1977.

Foote, Caleb. "Compelling Appearance in Court: Administration of Bail in Philadelphia." 102 University of Pennsylvania Law Review 103.

----------. "The Coming Constitutional Crisis in Bail." 102 University of Pennsylvania Law Review 969.

Garlano, Ken. "Bail Problems Add to Jail Crowding." Memphis Press Schimitar, December 13, 1978, p. 1.

Gayton, Jan. "The Utility of Research in Predicting Flight and Danger." Paper prepared for the special workshop on Pretrial Release. San Diego, California: April 2-4, 1978 (mimeographed).

Gettinger, Stephen. "Has the Bail Reform Movement Stalled." Corrections Magazine, February, 1980, p. 32.

Goldkamp, John S. Bail Decisionmaking and the Role of Pretrial Detention in American Justice. Albany: Criminal Justice Research Center, 1977.

----------. Two Classes of the Accused: A Study of Bail and Detention in American Justice. Cambridge, Massachusetts: Ballinger Publishing Company, 1979.

Gottfredson, Michael. "An Empirical Analysis of Pretrial Release Decisions." 2 Journal of Criminal Justice 285.

Hess, Frederick D. "Pretrial Detention and the 1970 District of Columbia Crime Act -- The Next Step in Bail Reform." 37 Brooklyn Law Review 277.

Interviewers Manual, revised edition. Ann Arbor, Michigan: Survey Research Center, Institute for Social Research, 1976.

"John Hinckley -- A Misfit Who Craved Fame," U. S. News and World Report, April 13, 1981, p. 26.

Just, Glen A. "Project Remand: Estimating Probability of Failure to Appear." dissertation, South Dakota State Univesity. Ann Arbor, Michigan: University Microfilms International, 1978.

Kirby, Michael P. "An Evaluation of Pre-Trial Release and Bail Bond in Memphis and Shelby County." Memphis: Policy Research Institute, Southwestern at Memphis, 1974.

Landes, William M. "Legality and Reality: Some Evidence on Criminal Procedure." 3 Journal of Legal Studies 79.

Macrae, Duncan and James A. Wilde. Policy Analysis for Public Decisions. Belmont, California: Wadsworth, Inc., 1979.

Mahoney, Barry. An Evaluation of Policy Related Research on the Effectiveness of Pretrial Release Programs. National Center for State Courts. October, 1975.

Mitchell, John N. "Bail Reform and the Constitutionality of Pretrial Detention." 55 Virginia Law Review 1227.

Monahan, John. "Ethical Issues in the Prediction of Criminal Violence." paper presented to the Conference on Solutions to Ethical and Legal Dilemmas in Social Research. Washington, D.C., February 25, 1978.

Morse, Wayne, et al. "Survey of the Administration of Criminal Justice in Oregon." 100 Oregon Law Review (Supp. 1932). New York: Arno Press, 1974.

Novarro, Leonard A. "Bail: Protection for the Accused or for Society." Memphis Press-Scimitar, December 13, 1979, p. 1.

Packer, Herbert L. The Limits of the Criminal Sanction. Standord, California: Stanford University Press, 1968.

Performance Standards and Goals for Pretrial Release and Diversion: Pretrial Release. Washington, D.C.: The National Association of Pretrial Services Agencies, July, 1978.

Pound, Roscoe and Felix Frankfurter, Eds. Criminal Justice in Cleveland: Reports of the Cleveland Foundation Survey of the Administration of Criminal Justice in Criminal Justice in Cleveland, Ohio. Cleveland, Ohio: The Cleveland Foundation: reprinted, Montclair, N.J.: Patterson Smith, 1968.

Roos, Peter D. "The Potential Impact of Rodriguez on Other School Reform Litigation." 38 Law and Contemporary Problems 566.

Roth, Jeffrey A. and Paul B. Wice. Pretrial Release and Misconduct in the District of Columbia. Washington, D.C.: Institute for law and Social Research, 1980.

Sorin, Martin, Mary Tobors, and David Pyne. "The Outcomes of Pretrial Release: Preliminary Findings of the Phase II National Evaluation." Pretrial Services Annual Journal. volume II. ed. by Alan Henry. Washington, D.C.: Pretrial Services Resource Center, 1979, pp. 140-157.

"Stepping into the Breach: Basing Defendant's Rights on State Rather than Federal Law." 15 American Criminal Law Review 331.

Thomas, Wayne. Bail Reform in America. Berkeley, California: University of California Press, 1976.

Toborg, Mary A., et al. Pretrial Release: An Evaluation of Defendant Outcomes and Program Impact. Washington, D.C.:The Lazar Institute, 1981.

Venevia, Peter S., et al. Pretrial Release With Supportive Services for High Risk Defendants Evaluation Report No. 3. Davis, California: National Council on Crime and Delinquency, 1973.

Walker, Nigel. "Dangerous People." International Journal of Law and Psychiatry. vol. 1, number 1, January, 1978, pp. 37-50.

Weiser, Benjamin, "Prosecution Wants More Suspects Detained in Jail." The Washington Post. February 12, 1981, p. A1, A27.

Welsh, J. Daniel. "Is Pretrial Performance Affected by Supervision." Pretrial Services Annual Journal. ed. by D. Alan Henry. Washington, D.C.: Pretrial Services Resource Center, 1978, pp. 136-158.

Wice, Paul B. Freedom for Sale. Lexington, Mass.: Lexington Books, D.C. Heath.

Wilkes, Donald E. "The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court." 62 Kentucky Law Journal 421.