

Comment

The Connecticut Bail Commission

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The use of surety bonds in pretrial release has been under fierce attack for a decade in the United States.¹ Beginning with complaints about the detention of indigents, the attack ultimately upset the traditional justification for money bail. Surety bonds are usually unnecessary to guarantee appearance at trial; hence the cost of these bonds to most defendants is unjustified. The most appalling aspect of the bail system is the incarceration of indigents for inability to post a bond. This detention causes loss of employment and disruption of family life, prevents the defendant from adequately preparing for trial, encourages him in criminal tendencies,² and increases his chances of ultimate conviction.³ Against these injuries, and the obvious cost

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1. See generally, Note, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031 (1954); Foote, *The Coming Constitutional Crisis in Bail: I & II*, 113 U. PA. L. REV. 959, 1125 (1965); LaFollette, *Bail Bond Law Administration: History, Criticisms, Release on Recognizance*, 27 GAVEL 12 (1967); Sturtz, *An Alternative to the Bail System*, 8 CRIME AND DELINQUENCY 12 (1962); Zander, *Bail, A Re-Appraisal*, 1967 CRIM. L. REV. 25, 100, 128 (1967); Note, *Bail: An Ancient Practice Reexamined*, 70 YALE L.J. 966 (1961); Comment, *The Institution of Bail As Related to Indigent Defendants*, 21 LA. L. REV. 627 (1961). For early discussions of bail problems, see, e.g., A. BEELEY, *THE BAIL SYSTEM IN CHICAGO* (1927); *CRIMINAL JUSTICE IN CLEVELAND* (R. Pound & F. Frankfurter eds. 1922). For a comparative law study of systems of pretrial release, see *Symposium: Conditional Release Pending Trial*, 108 U. PA. L. REV. 290 (1960).

2. Although statistical proof of the "jailhouse influence" on inmates is lacking, the exposure, particularly of young persons, to hardened criminals is widely believed to have the undesirable effect of encouraging criminal tendencies. See, e.g., R. F. Kennedy, *Criminal Justice*, 5 WM. & MARY L. REV. 167 (1964). Attorney General Kennedy wrote: "This time in jail—prior to trial—is equivalent, in the words of Justice Douglas, 'to an M.A. degree in crime.'" *Id.* at 171.

3. Wald & Rankin, *Pretrial Detention and Ultimate Freedom: A Statistical Study*, 39 N.Y.U.L. REV. 681 (1964); Note, *Compelling Appearance in Court*, *supra* note 1, at 1040; Note, *A Study of the Administration of Bail in New York City*, 106 U. PA. L. REV. 693 (1958). An early study showing similar results with respect to the effect of pretrial detention on disposition of cases at each stage of proceedings is Morse & Beattie, *Survey of the Administration of Criminal Justice in Oregon*, 11 ORE. L. REV. (Supp. 1932).

to the state of detaining these defendants, stands only the fear that without the threat of bond forfeiture, the defendants would never return to trial.

The contention that money bail is necessary to ensure the return of the accused to trial was attacked and conclusively proved false by the pioneer experiment in pretrial release conducted by the Vera Institute of Justice in New York City.⁴ Vera's bold experiment proceeded on the premise that if a defendant has roots in his community, especially through family ties or employment, he will return to trial even without the imposition of a surety bond. Screening defendants on the basis of a point-system interview, Vera gradually eased the criteria for its recommendations that the court release a defendant on his own recognizance. The hypothesis proved correct: the rate of willful non-appearance remained constant as releases without bond were vastly increased.

With the impetus of the Vera experiment, the bail reform movement grew into a challenge to the whole system of money bail. On the federal level, the new enlightenment in bail resulted in the Bail Reform Act of 1966.⁵ On the state level, a wave of bail reform projects, virtually all based on the Vera model, swept the United States.⁶ Probably the most ambitious of these reform projects was undertaken by the Connecticut General Assembly in 1967. The purpose of this Note is to describe the project, which went beyond Vera in several important respects, and until it was severely truncated in mid-1969, showed spectacular results.

The most remarkable features of the Connecticut program were, first, that it went far beyond an experimental model, to establish an independent bail commission operating statewide;⁷ and second, that

4. Formerly known as the Vera Foundation, the Institute made the important decision to move away from money bail in the release of defendants. In the Manhattan Bail Project, Vera workers used a point system to determine a defendant's risk of flight, and thus his eligibility for liberal release terms. For detailed examinations of the Vera story, see Address of Herbert J. Sturz, Director, Manhattan Bail Project, PROCEEDINGS, NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE 43 (1964); D. FREED & P. WALD, BAIL IN THE UNITED STATES: 1964, at 59 (1964); Botein, *The Manhattan Bail Project: Its Impact on Criminology and the Criminal Law Processes*, 43 TEX. L. REV. 319 (1965).

5. Pub. L. No. 89-465 (June 22, 1966); enacting 18 U.S.C. §§ 3146-3152, amending §§ 3041, 3141-3143 and 3568 (1966).

6. See generally BAIL AND SUMMONS: 1965, at 9 (1965); Freed & Wald, *supra* note 4, at 56-69; INTERIM REPORT, NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE xvii-xx (1965); Paulsen, *Pre-trial Release in the United States*, 66 COLUM. L. REV. 109 (1966); Note, *Bail Reform in the State and Federal Systems*, 20 VAND. L. REV. 948 (1967); Kennedy, *VISTA Volunteers Bring About Successful Bail Reform Project in Baltimore*, 64 A.B.A.J. 1093 (1968); Note, *Bail: An Examination of Release on Recognizance*, 29 MISS. L.J. 303 (1968).

7. The Connecticut Bail Commission was unique among bail agencies in that it

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virtually all bailable offenses⁸ were subject to the new administrative procedure it created. Incorporated into the state judicial department, the agency was dependent on neither local nor foundation financing. The most striking achievement of the Bail Commission was vastly to increase the release rate of defendants without a surety bond, from about 21 per cent of arrests on bailable offenses to 61 per cent on a statewide basis, while holding constant the rate of non-appearance.⁹

I. Origin of the Commission

Ground was broken in the area of bail reform in Connecticut in February, 1965, when the General Assembly authorized judges to release defendants on their own recognizance at arraignment in Circuit Court.¹⁰ Standing alone, however, this authorization had little impact. Under the authority of the 1965 Act, Connecticut judges promulgated a resolution in December, 1965, which carried "own recognizance" releases to the station-house level. Police at their discretion were au-

embraced the entire state; other bail programs operate only on the municipal, county or federal district level. Also, other programs have been staffed by existing agencies, using probation officers, family relations personnel or social workers, or have relied on volunteers such as VISTA workers or students.

8. "Bailable offenses" as used in the Bail Commission statute includes all criminal arrests except those for capital offenses and summons-type motor vehicle offenses, such as passing a stop sign. Serious motor vehicle offenses are subject to arrest and bail (*see* CONN. GEN. STAT. § 14-140). Throughout the periods under discussion, including the Commission period, "common drunks" were administratively excluded from the category of bailable offenses. The classification "common drunks" includes those who have a long history of arrests for drunkenness, and represents a total of about 15 per cent of all arrests on a statewide basis. Many of these "offenders" have no real wish to leave the police lock-up and do not attempt to post a bond. From the beginning of the Bail Commission these persons were excluded from interviews, as well as from the statistical tabulation of bailable offenses, on the theory that in most cases, an interview by a bail commissioner would be merely a sham.

The Bail Commission made the initial bail determination for all arrests on bailable offenses, except those made pursuant to a bench warrant from the Superior Court. CONN. GEN. STAT. § 54-63c; § 54-43 (1968). In Connecticut, the base-line trial court is the Circuit Court; this system of courts processes 97 per cent of all criminal arrests. Although the Superior Court decides cases of felonies carrying a maximum sentence of more than five years, initial disposition of these cases, in a hearing for probable cause, is made at the Circuit Court level. The prosecutor may ask the Superior Court judge to issue a bench warrant for the arrest of a defendant; in such cases, the probable cause hearing at the Circuit Court is omitted, and all proceedings take place at the Superior Court level. These bench warrants account for only three per cent of criminal arrests.

9. Budgetary complaints and the conservative political atmosphere of mid-1969 resulted in a sharp cutback of the bail program. Initial bail determination was restored to the police; the bail commission was reduced in both authority and manpower. Pub. Act No. 826, § 2 (July 1, 1969); § 54-63c(a), [1969] Conn. Legis. Serv. 1257. But recent data suggest that the period of liberal bail procedures will have a lasting beneficial effect on the operation of bail in Connecticut. *See* pp. 525-26 *infra*.

10. CONN. GEN. STAT. § 54-16 (1968). The Act provided that the judge of any Circuit Court may, at his discretion, release on his own recognizance any person accused of an offense which is bailable.

thorized¹¹ to set a \$150 non-surety bond for any person accused of a misdemeanor.¹² The police response, for reasons to be discussed later, was not notably enthusiastic. By December, 1967, the number of persons released under the \$150 non-surety bond had crept from an estimated 3 per cent to 21 per cent of bailable defendants.¹³

More substantial reform was made possible when the General Assembly in early 1967 set up the Bail Commission as an independent state agency for the determination of bail.¹⁴ The impetus for an independent bail organization came largely from the judiciary,¹⁵ on the basis of a successful experiment in pretrial release which had been conducted in New Haven.¹⁶ The Assembly freed the agency from an advisory role; the bail commissioner was given full authority to make the initial bail determination, in effect subject only to review by the courts.¹⁷ The Commission had a staff of eighteen commissioners,

11. Pursuant to this 1965 resolution, judges provided the police with an interview form with specific release standards based largely on the community ties of the defendant. However, there was a considerable amount of controversy over the legal authority of the judges' resolution. Some police departments refused to go along with the new procedure, on the grounds that the General Assembly had not intended to extend release on recognizance to the station house, but only to the arraignment proceeding.

12. The distinction between a simple written promise and a non-surety bond, institutionalized in Connecticut in 1967 by the Bail Commission Act, is somewhat illusory. Theoretically, when a defendant "posts" a non-surety bond, he is obligated to the state for the amount of the bond in the event he fails to appear at trial. Some bail commissioners tended to favor one method of release over the other. However, in practical effect the two methods of release are virtually identical; never has a non-surety bond been collected in Connecticut. For purposes of this discussion, the two methods of release have been treated as equally "liberal," as opposed to the traditional surety bond.

13. This figure of 21 per cent is the result of a compilation of bail dispositions of bondable offenders during December, 1967. This compilation is contained in the lengthy report, "An Analysis of Personnel Needs and Costs of the Proposed Connecticut Bail Commission," on file at the Yale Law Journal. This report was used as the basis for Bail Commission planning.

14. CONN. GEN. STAT. §§ 54-63a-g (1968).

15. The initial impetus for a statewide bail commission came largely from the then Chief Judge of the Circuit Court, Jay E. Rubinow, and the Director of the New Haven Legal Assistance Association, Frederick W. Danforth, Jr. In late 1966, Judge Rubinow requested the New Haven Legal Assistance Association to prepare a draft of a model bail reform act for submission to the 1967 term of the General Assembly. The ensuing draft formed the basis of Public Act 549, which was introduced to the Assembly in January 1967. The bill was endorsed by the Connecticut Bar Association, Governor John Dempsey and various civil rights groups. Perhaps the most effective proponents of the act were Judge Rubinow, Mr. Danforth, and Judge Robert Testo, who was then Speaker of the Connecticut House of Representatives.

16. The New Haven program was set up with private funds in August, 1965, to interview defendants who had not been able to post a surety bond at arraignment, and who thus were detained at jail. As director of the program, author O'Rourke supervised a team of student interviewers who made recommendations to the court concerning relaxation of release conditions. Over the experiment period the rate in New Haven of releases on "own recognizance" was substantially higher than the estimated statewide rate during this period. For a detailed examination of the New Haven experiment, see O'Rourke and Salem, *A Comparative Analysis of Pretrial Release Procedures*, 1968 CRIME AND DELINQUENCY 367.

17. In case a serious dispute arose over the propriety of the bail commissioner's action, police could request the prosecuting attorney to delay the release proceeding

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one for each of the eighteen circuits in the state; and every circuit had two or more assistant commissioners, depending on the volume of arrests, for a total staff of sixty-one.¹⁸ Because of delays in funding, the Commission did not begin actual operations until October 1, 1968.

The release standards used by the Commission were patterned to a great extent on those developed in the Manhattan Bail Project,¹⁹ except that no formal point system was used in interviewing the arrested person. Great emphasis was placed on ties to the community, whether through family, residence or employment; and the standard interview form provided for "discretionary factors," such as age or pregnancy, which would support further leniency.²⁰ One important feature of the system was that it was weighted in favor of release on a written promise or non-surety bond;²¹ if a traditional surety bond was set for the defendant, the interviewing commissioner was required to state his reasons for the harsher measure. The interview form, while protected from subpoena by the prosecuting attorney,²² could be used as evidence of unnecessary detention if the defendant sought judicial review of the bail proceeding.

II. Operation of the Commission

The effect of the Bail Commission was immediate and dramatic. By the second month of operation, a plateau in the statewide nonsurety release rate²³ had been reached, at about 60 per cent ofailable arrests, although this percentage varied considerably from circuit to circuit.²⁴ To a great extent these variations can be ascribed to the different backgrounds and personal inclinations of the bail commissioners.²⁵

until the next regular session of the Circuit Court. CONN. GEN. STAT. § 54-63c(b). This procedure to check the bail commissioner was invoked only once, to the knowledge of the Chief Bail Commissioner.

18. In each of the twelve smallest circuits, there was one commissioner and two assistants; in the six largest, one commissioner and three assistants. In addition, one "commissioner at large" was employed to work in various circuits when needed.

19. See note 4 *supra*.

20. A criminal record, even a serious one, did not necessarily preclude release on a non-surety bond. However a person who had been arrested frequently in the recent past or who had pending charges against him was generally not released, especially if in the pending case the arrested person had been released on a non-surety bond.

21. See note 12 *supra*.

22. CONN. GEN. STAT. § 54-63d (1968).

23. "Non-surety release rate" is used here and subsequently to mean both release under a non-surety bond and release on a written promise.

24. For example, Circuit 15 showed a non-surety release rate of 80 per cent, while Circuit 14, at the other extreme, released only 36 per cent on non-surety measures. See Appendix I, *infra* p. 529.

25. Although a precise correlation is impossible, we strongly feel that the variations

By the end of its period of unrestricted operation, the Commission achieved an overall non-surety release rate of 61 per cent ofailable offenses. When measured against the results of other bail reform projects, this figure is particularly striking. In almost all the other projects, numerous categories of defendants were eliminated from the possibility of interview and release.²⁶ In Connecticut, no such categories were put "off limits" because of a theoretical expectation of non-appearance.²⁷

Under the Bail Commission, the rate of initial non-appearances was about 2.8 per cent. It is important to note however that the definition of "non-appearance" upon which this percentage is based is very strict; it reflects the absolute number of defendants who were absent when their cases were called before the courts, without regard to the willfulness of the non-appearance. In many cases in which a defendant fails to appear, the failure is due to oversight on the part of the defen-

depended very little on differences in the types of offenses committed in the various circuits. By and large, those commissioners with the fewest preconceptions about bail, or criminal justice in general, most thoroughly accepted the idea of a liberal policy of release. Those bail officers with previous experience in the criminal courts proved more reluctant to abandon the old notion of the necessity for money bail.

The Chief Bail Commissioner was obliged to explain in its entirety the system of bail and traditional surety bonds to more than half the prospective commissioners. Beginning with virtually no preconceptions, these commissioners readily accepted the importance of community ties in determining a defendant's eligibility for non-surety release. Those commissioners with more knowledge of the existing bail system continued to depend to a greater extent on the use of surety bonds. This effect of previous knowledge and conceptions of bail is magnified when bail is set by the police officers themselves (see p. 524 *infra*). The problem of educating police departments to the virtues of non-surety release can in no way be divorced from the problem of "dis-educating" them from their habitual conceptions of bail.

26. In the Manhattan Bail Project, the leading example, about 20 per cent of defendants contacted in the detention pen were excluded from interview because of the nature of the offense category; "most narcotics offenses, homicide and certain sex crimes" were excluded. Sturz, *supra* note 4, at 50. Where the interviewer recommended release conditions to the court, the rate of such recommendations for release on recognizance gradually grew from 29 per cent to 65 per cent of interviewed defendants. *Id.* at 45-46. But the New York courts accepted the Vera recommendations in only about 60 per cent of the cases. *Id.* at 45. Although in Connecticut the courts occasionally set a surety bond when the defendant had been released on a written promise or non-surety bond, the extreme infrequency of this procedure weighs little against the virtually plenary power of the commissioners to set release conditions.

27. The only categories officially excluded were common drunks and arrests under a Superior Court bench warrant. See note 8, *supra*. There was, however, a certain amount of *de facto* exclusion because of police pressure and the unwieldy docket system of the Superior Court. See pp. 521-23 *infra*.

On the point of the relationship between the bail commissioner and the court, it is notable that the commissioner worked most efficiently at the station-house level. If the commissioner waited to make his bail determination at court, he had to become involved in the formal court procedure, by making a motion for whatever release conditions he deemed appropriate; and this motion was of course subject to objection by the prosecuting attorney. If the release was at the station house, much less of the commissioner's time was required, and the bail determination was rarely changed before trial. For various reasons, however, a few commissioners preferred to make all their recommendations in court.

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dant or his lawyer as to the date, or the time of day or the courtroom. Oversleeping, family problems and other similar causes contribute to non-appearance. While Connecticut statistics dividing the willful from the negligent non-appearances are not available, it is estimated that the willful "skip" rate was about 1.4 per cent.²⁸

Perhaps the most persuasive indication that the Connecticut skip rate was minimal comes from a comparison with figures released by the Surety Association of America, the national bondsmen's organization. The Association reports that losses from bond forfeitures are about 2.4 per cent.²⁹ This figure is based upon willful, ultimately successful "skips" by defendants; that is, only those instances are shown in which the bondsman was never able to bring the defendant to court. Bondsmen almost invariably are given a considerable length of time to produce the bonded defendant before the bond is forfeited;³⁰ and even after the forfeiture, the bondsman is usually eligible for a refund if he returns the defendant to court within a reasonable period.³¹ Thus the Connecticut rate of 2.8 per cent for all non-appearances, with a willful non-appearance rate estimated at 1.4 per cent, reflects a situation more favorable than the national rate of bond forfeitures of 2.4 per cent.³²

28. The results in Connecticut were comparable to the Manhattan project, where careful records were kept. Vera workers announced a one per cent "skip rate," with another one and one-half per cent who "did miss one or more court appearances, but, then either returned voluntarily or were rounded up by Vera Staff within a few days." Sturz, *supra* note 4, at 48.

In almost every case of non-appearance where the defendant was released on non-surety bond or written promise, the commissioner performed the function of a paid bondsman, and made an effort, ordinarily successful, to round up the truant defendant. The bail commissioner's standard operating procedure was to send the defendant a letter explaining that he had missed his appearance at court. The letter also pointed out that continued non-appearance would lead to a criminal offense; in the case of accused misdemeanants, it was a misdemeanor, while for accused felons, it was a felony. When possible, the bail commissioners also telephoned the defendant.

29. Milwaukee Journal, March 11, 1964, cited in Freed & Wald, *supra* note 4, at 29 n.25.

30. Freed & Wald, *supra* note 4, at 28.

31. *Id.* In Connecticut, for ease of collection, the surety amount may also be compromised, so that the bondsman actually is liable for an amount smaller than that pledged in the bond. And for the success of the Connecticut bondsmen in persuading the General Assembly to raise to six months the period which elapses before bonds are forfeited, see note 36 *infra*.

32. When we move from the rate of non-appearance to actual numbers, it may be true that under the liberal release policies the group of defendants who fail to appear is slightly larger than under surety bond release. The reasoning behind this conclusion is as follows: with the surety bonds set, a certain proportion of defendants were detained because of their indigence. Under the Bail Commission, most of these defendants are released. If we can assume that the rates of release and non-appearance applicable to the entire defendant population are valid for the segment of indigent defendants, then 1.4 per cent of these defendants would also willfully fail to appear at trial; that is, about 1.4 per cent of the defendants who would not have made bail under the old system, and who remained in jail until trial, would fail to appear at trial under the more liberal system of release. Even if the skip rate for released indigents were somewhat higher than for the defendant population as a whole, it would be very hard to maintain

In the Connecticut program, then, a major increase in the rate of non-surety release was achieved without an adverse effect upon non-appearances. On the basis of its accomplishments before it was cut back, the Connecticut experience is a model of successful bail liberalization.

III. Imposition of Surety Bonds

For a number of reasons, the commissioners set ordinary surety bonds in 39 per cent of bailable arrests. Some of these defendants were non-residents, for whom non-surety release was not believed justified.³³ In many instances, the personal biases of particular commissioners prevented the forthright application of Bail Commission release standards; these commissioners simply were never convinced of the efficacy of non-surety measures and used them sparingly. Often, however, surety bonds were set because of external pressures irrelevant to the purpose of bail. These pressures, in the form of police bias and tradition, an uncertain docketing procedure in the higher state courts, and the practice of setting bonds to match high mandatory fines, will be met in other jurisdictions where bail is reorganized; for this reason they bear consideration in some detail. If these pressures were eliminated, and the recalcitrant commissioners persuaded to use non-surety

that this slight numerical increase in non-appearances justified the abandonment of the non-surety release program. The cost to the community of the slightly increased skips, in terms of pretrial "recidivism" or of loss of "deterrent" effect of the criminal system, certainly would be more than offset by the well documented evils of the surety bond system. The detained defendant is demoralized, subject to the influence of professional criminals, forced to lose his pay, to see his family deteriorate, and perhaps worst of all, is much more likely to be convicted than his counterpart who was able to post bail. See p. 513 *supra*. To these effects on the defendant must be added the increased money costs to the state for the extra days of detention in jail.

33. The effect of using non-surety release for defendants without community ties—or the virtual abolition of money bail—can only be guessed at; no experiment has attempted to extend non-surety release to these defendants. It is certain that the rate of non-appearance for non-resident defendants is substantially higher than for residents, even where a surety bond is used. The question in moving to non-surety release is whether the non-appearance rate for non-residents would go even higher without the threat of bond forfeiture. The authors speculate that it would not. If a defendant is thinking of fleeing before trial he must be principally concerned with the legal consequences of his flight, rather than his money debt to the bondsman; that is, skipping bail will probably cause an additional jail term if he is ultimately apprehended, and it is the probability of this additional punishment which determines the defendant's decision. The use of non-surety release, of course, would not affect the additional penalties for flight. The only justification for the use of bonds for non-residents must be the policing function of the bondsman; because of his large stake in the defendant's appearance, the bondsman may be motivated to search for the defendant more vigorously than state resources would allow the bail commissioner, or even the police, to do. Whether or not these returns outweigh the inequities of detaining indigent non-residents, and the money costs of bonds to non-residents who are able to afford their release, is a question which certainly merits further study.

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release less hesitantly, the setting of surety bonds could be reduced to perhaps 10 to 15 per cent of bailable arrests; that is, up to 90 per cent of defendants would be eligible for non-surety release.

External pressures prevented the application of standard Bail Commission release criteria, and surety bonds were almost invariably set, in the following areas:

(1) *Serious felonies*. As least two factors in addition to their own predilections discouraged commissioners from using non-surety release where the offense carried a possible sentence of more than five years. First, the police often put considerable pressure on the commissioners to set surety bonds.³⁴ The reason for this pressure was their feeling that an "easy" release for a defendant charged with a serious offense would both damage police morale and fail to provide sufficient assurance that the defendant would return for trial. Available statistical evidence, however, undercuts the assumption that a serious offense demands a high surety bond to assure appearance at trial.³⁵

Second, judges demanded surety bonds for defendants charged with serious offenses, because of a defect in Connecticut criminal procedure. After arraignment in the Circuit Court, a defendant charged with a serious felony is usually bound over to the Superior Court to await trial. Because of the large backlog of pending cases, many months usually elapse before the defendant comes to trial in Superior Court; and

34. Although legally independent of the police, the bail commissioners necessarily maintained reasonably cordial relations with the police. The majority of their interviews were conducted within the police stations; and in the rural circuits, where distance often made the "interview" proceeding merely a telephone conversation with the arresting officer, full police co-operation was vital. Similarly, the size of the Bail Commission staff prohibited having a commissioner on duty at all times; commissioners were instead "on call" during hours of infrequent arrests. Thus arrests at extremely late hours were often handled by a telephoned interview. In almost one-third of all arrests the defendants "waived" an interview by a bail commissioner. These waivers were almost entirely in the rural circuits and were the result of the shortage of commissioners in relation to the distances to be traveled. An interview could be waived only in the event that the defendant would be able to meet the release conditions imposed upon him by the local police, in the bail commissioner's absence. Since the percentage of extremely poor defendants, as well as of serious offenses, is lower in rural than in urban areas, the usual situation in the case of a "waiver" was that the police set a non-surety bond or a relatively low surety bond, which the defendant posted. Often the bail commissioner was consulted by telephone as to the propriety of the release; but these brief consultations were often not recorded as formal "interviews," and hence a "waiver" notation was recorded. In no case did the "waiver" represent detention of a defendant. In the urban areas, where distance presented no problem, virtually all defendants were interviewed. The commissioner's role in the "waiver" practice was legally obscure; technically the police officers could have required the commissioner to appear for the interview, at whatever hour or distance. Hence, cordial relations with the police were necessary.

35. The Philadelphia Bail Study concluded that the vast majority of bond forfeitures are for minor violations, such as gambling, liquor or traffic offenses. Few forfeitures are for serious crimes. Note, *Compelling Appearance in Court*, *supra* note 1, at 1062.

the date of the trial is not announced to the defendant or his counsel until just before the trial is to take place. It is felt that this late notice of the trial increases the probability of non-appearance. By setting a surety bond, the court shifts responsibility for ensuring appearance at trial to a professional bondsman. Recently, there has been some movement among Circuit Court judges toward using non-surety devices in bind-over cases, probably as a result of the Bail Commission success.³⁶ But until Superior Court docket practices are improved, this pressure to require surety bonds will remain.

(2) *Minor narcotics offenses.* Although users of "hard," addictive drugs have long been thought to present a special problem in the area of pretrial release, few responsible critics suppose that extra measures are needed with respect to the typical youthful defendant arrested for possession of marijuana. In Connecticut, such arrests have increased more than 200 per cent during the last two years.³⁷ But in most of these cases the bail commissioners responded to pressure by police and prosecutors, and continued to set surety bonds, usually at \$500 or \$1000.

(3) *Offenses of resisting, vilifying, or abusing a police officer.* Here, surety bonds were invariably set, even though during the unrestricted Commission period the offense carried a maximum sentence of three months,³⁸ which was itself rarely imposed. Perhaps understandably, police seek retribution for these offenders. But so long as assuring appearance in court remains the only stated basis for release standards, police insistence on a surety bond in these situations is a clear abuse.

(4) *Offenses carrying high mandatory fines.* For certain offenses carrying high mandatory fines, surety bonds were usually set in an amount not less than the fine. A prime example of this type of offense is driving under suspension. The related offense of driving without a license usually carries a fine of about \$25; but for driving under suspension, the minimum fine is \$100, and the fine imposed is often higher, depending on the defendant's driving record. Invariably, a surety bond of at least \$100 is set in the offense of driving under suspension; the rate of non-

36. And the Superior Court personnel are not opposed to use of non-surety releases in bindovers; they have told author O'Rourke that they only wish to have a follow-up agency as efficient as the bondsman. The Bail Commission Act has been interpreted so that the commissioners operate only at the Circuit Court level; greater manpower would be required to extend the commissioners' follow-up service to the Superior Court system.

37. See New Haven Journal-Courier, Oct. 27, 1969, at 7, col. 1-2; and interview with John J. Daly, Chief Judge of the Circuit Court, Jan. 29, 1970.

38. The 1969 legislature changed the maximum sentence for resisting, abusing or vilifying a police officer from a \$250 fine and/or six months in jail to a \$500 fine and/or five years in jail. Pub. Act No. 452, § 4 (June 18, 1969); § 53-165, [1969] Conn. Legis. Service 479. This Act was inspired by fear of riots; it also extended coverage to firemen.

appearance is ordinarily quite high, and the bond forfeiture serves as the fine. In such cases most commissioners were unwilling to give a non-surety ruling.³⁹ This special use of surety bonds, although it does not stem from the general purpose of ensuring appearance at trial, is a handy device which is unlikely to be disturbed by the most radical bail reorganization. Although perhaps a quibble, it would be preferable to justify this matching of mandatory fines with bonds on other grounds; for this discussion, it is sufficient to note that the release statistics are depressed by the surety bonds set in these cases.

Even without statutory or administrative changes in the criminal justice system, time would certainly have reduced the commissioners' caution and the effectiveness of police pressure. As the bail commissioners felt more secure in their roles vis-à-vis the police and the courts,⁴⁰ they undoubtedly would have moved toward more reasonable release conditions in all areas. The Chief Bail Commissioner feels strongly that a non-surety rate of 85-90 per cent could eventually have been reached without a rise in the rate of non-appearance.⁴¹

IV. Curtailment of the Commission

The Connecticut bail program was severely curtailed by the General Assembly in June, 1969.⁴² Although the primary motivation for the cutback was economy,⁴³ political patronage in appointing Commission

39. When a defendant is arrested for driving without a license, a surety bond of \$100 is set because police cannot easily determine whether the defendant is driving under suspension or without a license; these defendants are often unable to post bonds. Such cases are normally continued for at least three weeks, for a transcript of the defendant's motor vehicle license record to be supplied from the state; that is, a defendant who cannot make bail is made to suffer in jail an inordinately long time. Yet here too the Bail Commissioners feel constrained not to depart from the practice of setting surety bonds.

40. The employment status of the commissioners was curiously unstable. Because the Commission was funded out of the judicial department budget, each commissioner was required to sign a "work agreement," which stated that in case of budget reductions he might be obliged to retire. This notice of the perhaps temporary nature of the employment, in addition to the political attacks on the Bail Commission beginning in January, 1969, probably dampened any adventurous moves by the commissioners toward reformation of the "problem" offenses which have been outlined.

41. Six circuits were consistently lower than the state average of 61 per cent non-surety releases, principally because of conservatism among the bail commissioners. If these circuits had moved to higher release rates, the state average would have been boosted considerably. See Appendices I & II *infra*. Further, it is likely that challenges to high surety bonds, on due process or equal protection grounds, may result in a loosening of release policies in some of the problem areas. And some day, of course, courts may require non-surety release if sufficient evidence is presented of community ties. But discounting the possibility of judicial intervention, forthright application of standard release policies across the board would certainly have raised the non-surety release rate substantially.

42. The bill which changed the Commission status was Pub. Act No. 826 (July 1, 1969); § 54-63, [1969] Conn. Legis. Service 1257-58. One important factor in passage of the measure was the organized lobbying of professional bondsmen, whose profits had

staff also drew fire; and in a "law and order" climate, the Bail Commission was unfortunately seen as a "pro-defendant" program. The staff of the Commission was cut from sixty-one to twenty-eight. Initial bail determination was returned to the police, and the role of the bail commissioner was reduced to interviewing only those defendants who have been unable to post the bail bond set by the police.⁴⁴ As to this group, the commissioner has discretion to reduce the amount of the bond or to change the release conditions to a written promise or non-surety bond. Thus indigents remain protected to some extent against bail abuses.

The non-surety release rate declined to 35 per cent after the police took over initial bail determination on July 1, 1969.⁴⁵ Police officers are as a rule unenthusiastic about departure from traditional bail bonds as a means of release.⁴⁶ Unless motivations and incentives for police, such as a reduction in their workload, are built into the system, they are unwilling to alter their usual methods. Moreover, in some classes of offenses, such as resisting arrest, bonds are set as a kind of pretrial punishment; this punitive effect is felt even when the defendant is able to post bond, in the form of the bondsman's charges. In addition, in some police stations there is a natural working relationship between the police officers and the bondsmen which tends to increase the use of surety bonds. Since bondsmen are often in a position to do favors for police,⁴⁷ the police are naturally sympathetic to them.

It is disturbing to observe that the Connecticut General Assembly did not seem inclined to debate the Bail Commission's effectiveness in terms

naturally dwindled during the Commission period. Bondsmen also succeeded in getting bond rates raised substantially, Pub. Act No. 206 (May 21, 1969); § 29-151, [1969] Conn. Legis. Service 188, and in having the period which must elapse before a bond is officially forfeited extended to six months, Pub. Act No. 512 (June 24, 1969); § 52-316, [1969] Conn. Legis. Service 630-31.

43. The annual salary for a bail commissioner is \$6670; for an assistant bail commissioner, \$5240. The estimated total budget of the Bail Commission for the first year of operation, including three months of reduced activity, was \$400,000.

44. Pub. Act No. 826, § 2 (July 1, 1969); § 54-63c, [1969] Conn. Legis. Service 1257-58.

45. See Appendix II *infra*.

46. There are notable exceptions in which police departments are releasing defendants on non-surety measures at rates near or equal to the Bail Commission. Under the direction of State Police Commissioner Leo Mulcahy, the Connecticut State Police as early as December, 1965, adopted a written interview form for setting bail and the use of non-surety release. Although precise statistics are unavailable, Commissioner Mulcahy has reported a high non-surety release rate, with about a one per cent "skip rate." In addition, during July and August, 1969, 31 of the 81 local police departments released on non-surety devices at least 50 per cent of all arrested persons.

47. For example, a former practice in urban areas was that when the police wished to have a defendant who was an informer released from jail, the bondsman often posted the surety bond for the informer without making the usual bondsman's charge. With the Bail Commission standard, however, it is rarely necessary for the informer to be released by this circuitous method, since most informers may be supposed to have "community ties."

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of either the non-surety release rate or the low "skip rate." To be sure, at the time the Commission was cut back, only rough estimates, rather than complete statistics, concerning Commission operations were available; but these estimates, as an indication of Commission performance, played no part in the legislative debate.⁴⁸

The Bail Commission has been only hamstrung, not destroyed. The important function of protecting indigent defendants remains in the commissioner's power.⁴⁹ But the larger Commission purpose—to ease needlessly harsh bail conditions—has been seriously impaired.⁵⁰

V. Commission Influence on Police

Three indications of Bail Commission influence on police attitudes can be found in release practices during the two months after Commission curtailment, July 1 to September 1, 1969:

1. As expected, the non-surety release rate dropped, but only to about 35 per cent. This "net" rise from the pre-Commission rate of 21 per cent can only be ascribed to the educational impact of the nine months of Commission operations.⁵¹

48. On June 2, 1969, the Senate of the General Assembly passed Public Act 826, which curtailed the Commission to its present role. This Act had previously been passed by the Connecticut House of Representatives. However, on June 4th, the last day of the regular session, the Senate passed a motion to reopen the Bill. No action was taken on the reopened bill, and the assembly adjourned. It was at first thought that the Senate motion had voided the amending act, and that the bail commission was to remain as it was. However, objections were raised to the Senate reopening of the measure by supporters of Public Act 826, and the Attorney General of Connecticut was asked to determine if the Senate action was valid. The Attorney General ruled that the Senate in reopening Public Act 826 was required to take more action than merely passing a motion to reopen, and that "inasmuch as the Bill was not authored or totally rejected by a concurrent vote of both Houses," it should be forwarded to the Governor for signature or veto. On the basis of this ruling, the Bill was forwarded to the Governor and signed. This parliamentary technicality was quite controversial.

For newspaper accounts of the debate over the changes in the Bail Commission, see The Hartford Times, March 30, 1969, Sunday Magazine at 4; The Hartford Times, June 16, 1969, at 1, col. 1-8; New Haven Journal Courier, June 18, 1969, at 1, col. 3-5; The Hartford Times, June 15, 1969; The Hartford Courant, June 11, 1969, at 28, col. 1-6; New Haven Journal Courier, at 1, col. 4-5; New London Day, May 7, 1969, at 1, col. 5-8.

49. The reduction in staff, of course, means that in the rural circuits, where defendants are scattered over large areas, commissioners will be somewhat slower to remedy unnecessary detentions. However, in Connecticut, detention of indigents for failure to post bond is less of a problem in rural than in urban areas.

50. Perhaps, the greatest problem presented by the change in the Commission role will be the bearing of relatively high bondsmen's charges (see note 42, *supra*) by those who are able to post bonds. If the system works properly, there ought to be few defendants detained who could have qualified for release under Commission policies. There is some danger, however, that bail commissioners, now in a somewhat chastened position with respect to the police, will be inclined not to disturb police determination of bail conditions.

51. This 35% release rate does not reflect the changes to non-surety conditions made by bail commissioners after surety bonds had been set by police. That is, the

2. Although statistics are unavailable, many bail commissioners report that arresting officers telephone them, apparently from habit, for advice as to bail determination for their defendants. If this pattern of independent consultation continues, then the "education" of police departments toward non-surety release can also be expected to continue.

3. Another carry-over from the Commission operations is the written interview form. Although not legally required,⁵² the standard Bail Commission written interview form, which is somewhat slanted in favor of non-surety release, has been adopted by most police departments.⁵³

VI. Conclusion

In its nine months of full-blown operation, the Connecticut Bail Commission demonstrated that a high rate of non-surety release, on a statewide basis and without the restrictions of an experimental program, can be achieved without a rise in the rate of non-appearances. The high release rate shows the value of an independent agent to interview and set bail, where police attitudes toward bail are generally conservative. It is deplorable that this program, highly successful under objective criteria, was curtailed.⁵⁴

Arguably the best model for a bail-determining agency is one in which the bail agent plays a "secondary" role, dealing only with detained defendants, as in the Connecticut program at present; the police officer is seen as the most efficient agent to fix bail initially, because of his proximity to the arrest process. And the bail commissioner is viewed as unnecessary until a defendant is demonstrably unable to secure his release through ordinary channels. This theoretical position is strengthened by the undeniably greater political attractiveness of a "secondary" system of bail commissioners. Not only is the budget of such a system

Commission efforts to release indigent defendants are not included in the overall release rate of 35 per cent. The impact of these changes in police-set surety bonds on the non-surety release rate cannot be precisely measured; but the Chief Bail Commissioner estimates that it is not more than five per cent.

52. Public Act 826 demands only that the "police officer shall promptly interview such person to obtain information relevant to the terms and conditions of his release from custody." Pub. Act No. 826, § 2 (July 1, 1969); § 54-63c, [1969] Conn. Legis. Service 1257.

53. A related factor which may add to the police use of non-surety release is that for the imposition of a surety bond the statute now requires specific written reasons, to which a police officer may presumably be held to answer in court. CONN. GEN. STAT. § 54-63c (1969).

54. The use of summons procedures for misdemeanants in lieu of actual arrest someday may reduce the inequities in bail. But until this advanced thinking permeates the legislative climate, and unless summons procedures are applied also to serious offenses, liberalization of pretrial release standards must be continued.

smaller, but also the authority of the police force is not materially diminished, which is important in a political climate of "law and order."

But the argument for such a secondary bail commission rests on the assumption that, since most defendants are in fact law-breakers, we are justified in imposing upon them the pretrial "penalty" of a cash outlay for a surety bond. If police officers would readily adopt the use of non-surety devices, of course, we would not need the commissioner. But the Connecticut experience has demonstrated that police cling tenaciously to the use of surety bonds. Their rigid attitudes toward bail are changeable only by startling institutional proof, probably effective only when seen by police at the local level, that the traditional system of surety bonds is less than God-given. Unless some vigorous method of altering police attitudes were devised to accompany it, the secondary system of bail commissioners would leave virtually untouched the imposition of surety bonds on non-indigent defendants.

The detention of otherwise releasable indigent defendants and the fees paid for unnecessary surety bonds are costs stemming from rigid police attitudes. Until these unjustified costs can be eliminated, they ought to be borne by the public at large, as an administrative cost of our system of criminal justice. A secondary system of bail commissioners would properly shift a part of the burden, in freeing indigents who meet the release criteria. But the fees paid by non-indigent defendants for unnecessary surety bonds would remain a barely visible but nonetheless impermissible assignment to defendants of what are properly social costs, and they would have the effect of a penalty assessed before trial.

Another objection to a secondary system of bail commissioners lies in its assumption that the police officer is the most efficient agent for setting bail. In terms of the effectiveness of public expenditure, it must be noted that the role of the bail commissioner can be adequately filled by a person with much less training than is necessary for a police officer; and in Connecticut the salaries of the bail commissioners are substantially lower than typical police salaries.⁵⁵ In addition, even in a political

55. The salary of a Grade A patrolman in New Haven is over \$9,000 per year; on July 1, 1970, it will increase to over \$10,000. The salary of an assistant bail commissioner working in the station house is only \$5240 per year. See note 43 *supra*. Also, in many cases the desk officer who is responsible for interviewing defendants is above the rank of patrolman.

A basic complaint of the opponents of a "front line" bail commission is its relatively high cost in the rural and suburban areas. In the twelve smallest circuits (see note 18 *supra*), one bail commissioner and two assistants were appointed to provide round-the

climate favorable to police expenditures, police departments today are hard-pressed to meet the various demands on their energies. Especially if the secondary system of bail commissioners necessitates a substantial interview of the defendant by police, a burden is being placed on the police departments which they can ill afford.⁵⁶

Wherever bail is thoroughly liberalized, whether by a primary system of bail commissioners or by intensive police education, there is the danger of a rise in the incidence of "pre-trial recidivism," or crimes committed by released defendants. In Connecticut, statistics on pre-trial recidivism are not available, but the lack of public discussion of the matter suggests that the problem was not seen as great. In Connecticut, the incidence of crimes by indigents is concentrated in the few densely populated urban areas. The generally lower non-surety release rates in the urban circuits may be in part explained by tougher treatment of indigents who are likely recidivists; and in all circuits, narcotics addicts and defendants with long records of serious crimes—those most likely to commit crime before trial—were rarely given a non-surety release.

This analysis suggests that, although the sole stated criterion for non-surety release is the probability of appearance at trial, the bail commissioners often consider the danger of recidivism in setting release conditions. This practice, of course, does not square with the constitutional purpose of bail, to return the defendant to trial. But as many have noted, bail in the United States has always been used to

clock coverage; this is probably the minimum number of full time persons needed to interview every defendant at all hours. However, the Commission personnel in the outlying areas were not as busy, nor did they interview as many persons as those in the urban centers.

If the salary expense of the full time Commission personnel in the smaller Circuits is viewed as unjustified, a possible solution would be to place them on a fee basis; that is, the Bail Commissioners would be paid only a certain fee when an interview is required, the cost to be borne by the State. However, the soundness of such an approach is questionable. For example, if the fee were five dollars, the Bail Commissioner might be reluctant to get out of bed and drive to a distant police station. Conversely, if the fee were much higher, the total cost of a fee system would probably exceed the cost of regular full time personnel.

56. Although some police officials were happy to see the initial bail determination returned to their jurisdiction, the administrative burden of completing even a relatively brief bail interview form in the major urban departments has not been welcomed. Some police officers report that it is not so much the time taken to interview, but the verification of the defendant's community ties that is too time consuming, sometimes taking hours. This is less of a problem for the rural and suburban departments, but nevertheless there have been complaints from these departments also. Before the Bail Commission, of course, police were not required to interview the defendant, much less to investigate his community ties.

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detain potential recidivists. Bail reform has spotlighted this *sub rosa* practice, without providing an effective alternative for protecting the community; and hence the demand has arisen for "preventive detention" of likely recidivists. Equipped with no explicit means of coping with the problem of crime by released defendants, the Connecticut bail commissioners seem to have dealt with it in the time-honored fashion, by refusing to grant non-surety release to those defendants they considered dangerous. Until criminal courts are given the resources to erase the large backlogs of pending cases, the problem will continue to be confronted either by departure from stated release standards or through some legal method of "preventive detention."

APPENDIX I BAIL COMMISSION STATISTICS OCTOBER 1, 1968, TO JUNE 30, 1969

Circuit	Bail Eligible	Released Without Bond	%	Surety* Set	%	Non-surety Cases Disposed of	Non-surety Cases Pending	Number Fleeing	%**
1	3211	1450	45	1559	48	1141	309	38	3.3
2	3930	2364	60	1556	40	1935	429	97	5.0
3	2260	1598	70	662	30	1202	396	16	1.3
4	2701	1399	52	1302	48	994	405	21	2.1
5	1409	915	65	494	35	753	162	23	3.1
6	4710	3324	70	1386	30	2645	679	90	3.4
7	1504	752	50	752	50	632	120	16	2.5
8	1420	903	64	517	36	752	151	21	2.8
9	1584	970	61	614	39	636	334	9	1.4
10	3628	2792	77	836	23	2253	539	47	2.1
11	1552	1187	76	365	24	954	233	20	2.1
12	2376	1454	61	922	39	1180	274	58	4.9
13	1682	924	56	758	44	670	274	13	1.9
14	6507	2348	36	3870	59	1681	667	56	3.3
15	2226	1789	80	437	20	1455	334	24	1.6
16	1001	810	80	191	20	648	162	15	2.3
17	1144	889	78	255	22	777	112	11	1.4
18	1329	966	73	363	27	837	129	18	2.2
State Total	44,174	26,834	61%	16,849	38%	21,145	5,689	593	2.8%

* Of bail-eligible defendants, 491 were unaccounted for in the Bail Commission records. Of these, 202 were in the 1st Circuit, 289 in the 14th Circuit.

** These percentages are computed by dividing the number fleeing by the total cases disposed of.

APPENDIX II

COMPARISON OF RELEASE RATES PRIOR TO THE COMMISSION, DURING FULL COMMISSION OPERATIONS, AND AFTER CURTAILMENT OF THE COMMISSION

Circuit	Percentage ROR* December, 1967**	Percentage ROR		Net Increase December, 1967 to July-August, 1969
		October 1, 1968, to July 1, 1969***	July 2, 1969, to August 31, 1969****	
1	22	45	30	+ 8
2	1	60	13	+ 12
3	18	70	55	+ 37
4	24	52	63	+ 39
5	9	65	10	+ 1
6	43	70	35	- 8
7	9	50	12	+ 3
8	9	64	44	+ 35
9	25	61	63	+ 38
10	20	77	49	+ 29
11	47	76	56	+ 9
12	36	61	53	+ 17
13	27	56	17	- 10
14	13	36	13	0
15	27	80	38	+ 11
16	26	80	32	+ 6
17	18	78	45	+ 27
18	23	73	77	+ 54
State				
Total	21%	61%	35%	+14%

* Released on Own Recognizance; these figures include those released on non-surety bond.

** Prior to the beginning of operations of the Connecticut Bail Commission.

*** During Commission operations.

**** The two months immediately following curtailment of the Bail Commission.