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I. INTRODUCTION AND BACKGROUND

On March 5, 1984, a press conference was held in a conference room of the District of Columbia Superior Court. Before a small group of reporters, a photographer or two, and a camera crew, Chief Judge H. Carl Moultrie, I. announced a new program of on-site drug testing. Funded with a grant from the National Institute of Justice to the District of Columbia Pretrial Services Agency, the program was essentially a research project, designed to produce studies on the relationship between drug use and criminal behavior. With the latest in drug testing technology installed in a laboratory in the

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A 1967 graduate of the University of Wisconsin, Mr. Carver served with the Peace Corps in Bolivia for three years. He received his J.D. from Georgetown University Law Center in 1974, and is a member of the Bars of the District of Columbia and Virginia.

Mr. Carver has been active in the field of pretrial services both nationally and in the District of Columbia. He is a past president of the National Association of Pretrial Services Agencies, the current President of the Mid-Atlantic Pretrial Services Association, and a member of the Criminal Justice Section of the ABA.

The D.C. Pretrial Services Agency, which Mr. Carter heads, has achieved a national reputation for excellence. It serves as a neutral information source for judicial officers, both local and federal, in the courts of the District of Columbia. After interviewing and investigating the background of the persons charged with criminal offenses, it recommends nonfinancial release alternatives designed to assure appearance in court and community safety. Awarded the Department of Justice's designation as an "Enhanced Pretrial Services Program," the Pretrial Services Agency has frequently served as a model for criminal justice administrators in other jurisdictions.

Eight years ago, the agency set up a comprehensive program of pretrial drug screening of all arrestees--the first of its kind in the country. Based on the success of this program, the Department of Justice sponsored a replication effort in other jurisdictions.

courthouse, the program planned to collect urine specimens from each arrestee, analyze them, and report the results to the judge or hearing commissioner in "arraignment" court.

Following the press conference, a single article[1] appeared in the *Washington Post* describing the research aims of the new program, and including a photograph of the chemical analyzer purchased for the new program. Beyond that, there was little fanfare because the District of Columbia had been drug testing arrestees since 1970.[2] While law enforcement officials were concerned about the rise in drug-related crime, drug use was not yet perceived to be a national problem.

The apathy surrounding this announcement did not last long. Within a week, the test results documented the existence of a serious and virtually unrecognized problem of extensive phencyclidine (PCP) use among the arrestee population.[3] Figures compiled after the second week of testing confirmed these findings.[4] At about the same time, a series of articles in the *Washington Post* described, in lurid detail, the effects of PCP on some individuals.[5] For the first time, general concerns about drug use and crime could now be quantified and tracked with objective data — arrestee test results — summarized at the end of each month and distributed to an ever-growing list of public officials and interested persons. The District of Columbia, through its drug testing program, was able to document first the PCP epidemic of the mid-eighties, and then the rise of cocaine use, accelerated by the advent of "crack"

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[1] Ed Bruske, *D.C. Court Officials Start Defendants' Drug Tests*, WASH. POST, Mar. 6, 1984, at B1.

[2] Judge Harold H. Greene, then Chief Judge of the Court of General Sessions, issued an order in 1970 permitting officials from the City's Narcotics Treatment Agency to conduct testing of arrestees in the cell block of the courthouse. Based on the test results, releasees could be referred to drug treatment. Although in continuous operation since 1970, by 1984 testing was quite limited and sporadic.

[3] Memorandum from Bruce D. Beaudin, Director of the D.C. Pretrial Services Agency to the Honorable H. Carl Moultrie, I. (March 13, 1984) (on file with author). The memo stated that "drug use among adult criminal arrestees was substantially higher than anticipated," at 61% of those tested. The percentage that tested positive for PCP was 33%.

[4] Memorandum to Ernest Hardaway II, M.D., from Bruce D. Beaudin (March 19, 1984) (on file with author).

[5] Ronald Kessler, *Producing Hallucinogenic Drug Brought Profits and Risks, Chemist Says*, WASH. POST, Mar. 10, 1984, at A9. Ronald Kessler and Alfred E. Lewis, *Police See Use of PCP Rising at Rapid Rate*, WASH. POST, Mar. 10, 1984, at A1. Linda Wheeler, *A Life Lived in the Shadow of PCP*, WASH. POST, Mar. 11, 1984, at A1.

several years later. The latest arrestee drug tests were frequently cited by public officials and reported in both the local and national press.

The rest of the story is well known. The cocaine overdose death of Len Bias on June 19, 1986[6] profoundly affected the way in which the American public came to see drug abuse. By the time the 1988 election rolled around, the drug epidemic was consistently identified as a major problem facing the country.[7] During the early months of the Bush administration, a "Drug Czar" was appointed to direct the latest "drug war." The President went on television, armed with a bag of crack seized by the DEA in a staged drug buy in front of the White House, declaring the drug war to be the nation's highest priority. After the speech, there was an eight fold increase in news coverage of drug issues, according to the Center for Media and Public Affairs.[8]

Meanwhile, officials in the Justice Department, impressed by the success of the District of Columbia's drug testing program, initiated several related projects. The research arm of the Department, the National Institute of Justice, announced the Drug Use Forecasting program, or "DUF", which was designed to sample arrestee drug use on a quarterly basis from a cross section of American cities. The state and local assistance arm of the Department, the Bureau of Justice Assistance, set aside several million dollars in discretionary funding to see if the idea of pretrial drug testing could be replicated in other jurisdictions. When the White House issued the first National Drug Control Strategy, drug testing throughout the criminal justice system was an important component.[9] Congress enacted legislation for the federal court

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[6] Keith Harriston and Sally Jenkins, *Maryland Basketball Star Len Bias is Dead at 22. Evidence of Cocaine Reported Found*, WASH. POST, June 20, 1986, at A1.

[7] By 1989, a Washington Post-ABC News Poll indicated that public concern about illicit drugs had doubled in recent months, with 44% of those interviewed ranking drugs as the country's most serious problem. Among black Americans, seven out of ten said drugs were the most serious problem facing the nation. L.A. TIMES, August 23, 1989, pt. 1, at 2.

[8] Paul M. Barrett, *Moving On: Though the Drug War Isn't Over, Spotlight Turns to Other Issues. Departing Drug Czar Bennett Considers His Job Done; Progress but No Victory*, WALL ST. J, November 19, 1990, at A1.

[9] THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY 26 (1989).

> Probation, like parole, court-supervised treatment, and some release programs, should be tied to a regular and rigorous program of drug

system, establishing demonstration programs of mandatory pretrial drug testing in eight federal districts.[10] Finally, the Administration introduced legislation *requiring* states to implement criminal justice drug testing as a prerequisite for receiving block grant assistance funds.[11]

In contrast to the enthusiasm with which pretrial drug testing was embraced by the Reagan Justice Department, the reception within the community of pretrial services practitioners was mixed. At annual conferences of the National Association of Pretrial Services Agencies, there was considerable debate on a variety of related issues: the policy implications of research studies; the proper role of pretrial services agencies; and questions about whether drug testing advocates had simply been caught up in the "hysteria" of the drug wars at the expense of the traditional goals of the bail reform movement. Fundamental values were questioned and fears were expressed about the direction of pretrial services.

This article takes the position that pretrial drug testing is consistent with — indeed an essential component of — the principles of the bail reform movement as developed and refined over the past quarter century. Section II discusses the development of the bail system, its adoption and modification in the United States, and twentieth century efforts to reform it. Section III describes a "model system" of pretrial justice, as set forth by the National Association of Pretrial Services Agencies, the American Bar Association, and other commentators. Section IV turns to the drug issue, summarizing what we know about drug addiction, the relationship between drug addiction and criminal behavior, and the implications of this body of

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testing in order to coerce offenders to abstain from drugs while integrating them back into the community. Such programs make prison space available for those drug offenders we cannot safely return to the streets. But unless they rigidly enforce drug abstinence under the threat of incarceration, these efforts lose their teeth. Drug tests should be part of every stage of the criminal justice process—at the time of arrest and throughout the period of probation or incarceration, and parole—because they are the most effective way of keeping offenders off drugs both in and out of detention.

Id.

[10] Pub. L. No. 100-690, Title VII, § 7304, 102 Stat. 4464, Nov. 18, 1988. For a description of the experience of these federal demonstration programs, see ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FINAL REPORT: THE DEMONSTRATION PROGRAM OF MANDATORY DRUG TESTING OF CRIMINAL DEFENDANTS (1991).

[11] S. 635, 102d Congress, 1st Session (1991).

knowledge for criminal justice practitioners. Section V integrates the reality of drug abuse with the principles of a model system of pretrial justice. The concluding section sets forth a few thoughts on future directions for pretrial services.

II. ORIGINS OF THE BAIL SYSTEM

To understand pretrial drug testing, one must first understand the role of pretrial services agencies and the context in which they developed. The first programs were started as social experiments in the mid 1960s, dedicated to nothing less than overhauling the bail system. Bail — defined as "the mechanism by which the defendant's right to freedom prior to trial is squared with society's interest in the smooth administration of criminal justice"[12] — was seen as an unjust and inefficient system, operating most harshly against the least advantaged. The early experiments, such as the Manhattan Bail Project and the D.C. Bail Project were very much part of an effort by criminal justice reformers to change the bail system and eliminate (or at least reduce) the inequities inherent in it. The discriminatory aspects of the bail system had already been well chronicled, both in this country, and throughout the history of the English common law.[13]

The bail system dates back to medieval England.[14] It developed from the ancient Anglo-Saxon forms of sureties. At that time, individuals charged with crimes were the responsibility of the Sheriff until a trial could be held by a judge who appeared from time to time "riding circuit." The Sheriff, as the local representative of the Crown, had authority to release the defendant to someone willing to stand as "surety"

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[12] WAYNE THOMAS, BAIL REFORM IN AMERICA 12 (1976).

[13] In a frequently cited article in the University of Pennsylvania Law review, Professor Caleb Foote describes the early history of abuse in the bail system:

> Recognition of the importance of bail in order to avoid pretrial imprisonment was a central theme in the long struggle to implement the promise of the famous 39th chapter of Magna Carta that "no freeman shall be arrested, or detained in prison . . . unless . . . by the law of the land." It is significant that three of the most critical steps in this process--the Petition of Right in 1628, the Habeas Corpus Act of 1679 and the Bill of Rights of 1689--grew out of cases which alleged abusive denial of freedom on bail pending trial.

Caleb Foote, *The Coming Constitutional Crisis in Bail,* 113 U. Pa. L. Rev. 959, 965-966 (1965) (citations omitted).

[14] For a good, general description of the origins of bail, see THOMAS, *supra* note 12.

or personal guarantor that the defendant would appear for trial. If the defendant did not appear, the personal surety was literally liable for whatever punishment might be due the defendant if the surety could not produce the defendant for trial. Thus, the system was one of personal guarantees, where a respected member of the community took on the responsibility to "stand in the shoes" of the defendant in the event that the defendant absconded.

It was this system that was brought to Colonial America. It persisted well into the 19th century at which time it began to take on a uniquely American character. The system gradually evolved to reflect the changes in social structure in American life. As opposed to a feudal society, the young nation was mobile and expansionist in nature. Eventually, the system of *personal* sureties was replaced by one of *commercial* guarantees. Rather than being personally responsible for the defendant's punishment, the surety could now be required to forfeit a sum of money. From this change evolved the system of compensated sureties for profit that we know today. It should be pointed out, however, that of all the former Commonwealth countries, only the United States has a commercial system of bail bonds.

This evolution from a personal system to a commercial system was accompanied by persistent but largely ignored criticisms.[15] These criticisms encompassed several themes. To the extent that an individual's pretrial freedom was a function of his ability to pay a bondsman, critics charged that it discriminated against the poor. By the same token, to the extent the system permitted the release of more wealthy defendants, it did not adequately address other concerns of the

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[15] For general information on early criticisms of the bail system, see JOHN S. GOLDKAMP & MICHAEL R. GOTTFREDSON, POLICY GUIDELINES FOR BAIL: AN EXPERIMENT IN COURT REFORM (1985); THOMAS, *supra* note 12. *See also* Leary v. United States, 224 U.S. 567, 575 (1912) (noting that the bondsman's "interest to produce the body of the principal in court is impersonal and wholly pecuniary."). Underscoring the fact that little has changed in the 80 years since this observation was made in 1912 is an article in the *Washington Post* describing the recent crackdown in collecting bond forfeitures in the District of Columbia: "'On a $10,000 bond, I can ask for $11,000,' Williams [a bondsman] said, 'if he doesn't show, the court gets the $10,000, and I keep my $1,000.' Otherwise, the client gets $10,000 back. That may reduce the bondsman's incentive to hound the client into court, but in a high-risk, low-yield business, it's a safer bet than trying to collect a bond-jumper's car." Alison Howard, *Crime Rise No Bonanza for Bondsmen: Unpaid Bail Forfeitures, Disappearing Clients Plague D.C. Courthouse Businessmen*, WASH. POST, October 5, 1991, at C1.

justice system, such as the likelihood that the defendant would appear in court. In a classic 1927 study of bail practices in Cook County, Illinois, Arthur Beeley condemned the bail system, writing: "The Present system . . . neither guarantees security to society nor safeguards the rights of the accused. [It is] lax with those with whom it should be stringent and stringent with those with whom it should be less severe."[16] Forty years later, little had changed. In an influential article Professor Caleb Foote echoed earlier criticisms, arguing that "such discrimination against the poor cannot survive in its present blatant form."[17] Citing studies of the bail system in Philadelphia and New York in the late 1950's, as well as several other studies in the early 1960's, commentators wrote:

> These probes disclosed the dismal picture of a system which trades freedom for money. Each year, in federal and state courts, thousands of persons were held in jail for weeks or months awaiting trial solely because they could not raise money to pay bondsmen. Even when low bail of $500 or $1,000 was set, a $50 or $100 bond premium was more than many defendants could afford. Left behind in the wake of detention were lost jobs, abandoned homes, families destitute and without support, lawyers hobbled in preparing cases for trial. The chances for acquittal, or for probation if convicted, diminished. Dead time in jail awaiting trial sometimes exceeded sentence after conviction, and often was ignored in the computation of jail terms.[18]

Another theme was the way in which the bail bond system resulted in a transfer of control over the release process from the judiciary to private individuals. In a Supreme Court case upholding the Illinois Ten Percent Cash Bail System, Mr. Justice Blackmun wrote:

> Prior to 1964 the professional bail bondsman system with all its abuses was in full and odorous bloom in Illinois. Under that system, the bail bondsman customarily collected the maximum fee (10% of the amount of the bond) permitted by statute, and retained that entire amount even though the accused fully satisfied the conditions of the bond. Payment of

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[16] ARTHUR BEELEY, THE BAIL SYSTEM IN CHICAGO (1966).

[17] Caleb Foote, *The Coming Constitutional Crisis in Bail*, 113 U. PA. L. REV. 959, 999 (1965).

[18] Patricia M. Wald & Daniel J. Freed, *The Bail Reform Act of 1966: A Practitioner's Primer*, 52 A.B.A.J. 940-41 (1966).

> this substantial "premium" was required of the good risk as well as of the bad. The results were that a heavy and irretrievable burden fell upon the accused, to the excellent profit of the bondsman, and that professional bondsmen, and not the courts, exercised significant control over the actual workings of the bail system.[19]

In his dissenting opinion in the same case, Mr. Justice Douglas noted that:

> The commercial bail bondsman has long been an anathema to the criminal defendant seeking to exercise his right to pretrial release. In theory, the courts were to set such amounts and conditions of bonds as were necessary to secure the appearance of defendants at trial. Those who did not have the resources to post their own bond were at the mercy of the bondsman who could exact exorbitant fees and unconscionable conditions for acting as surety. Criminal defendants often paid more in fees to bondsmen for securing their release than they were later to pay in penalties for their crime.[20]

In a noted case from the D.C. Circuit, Judge Bazelon observed that the defendant may have no real financial stake in appearing in court, since it is the bondsman that decides whether to require collateral, and the court does not decide, or even know, if a given bond means a greater stake and a greater incentive not to flee.[21] Under the old system of personal sureties, the surety's standing up for a defendant was seen as testimonial to the defendant's good character. However, a commercial bail bondsman may prefer the repeat business of a career criminal, as long as he pays his fees and shows up for trial.

These were the practices that the early bail reforms set out to change. The first "experiments," viewed as revolutionary at the time, seem quaintly modest in retrospect. The bail projects of the mid 1960's set out to test a simple hypothesis—that *some* defendants could be released and would return to court *without* the payment of a bondsman's premium. Not surprisingly, the hypothesis was borne out. Statistics indicated that defendants released through the intervention of bail projects were just as

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[19] Schilb v. Kuebel, 404 U.S. 357, 359-60 (1971) (citation omitted).

[20] *Id.* at 373-74 (footnote omitted) (citation omitted).

[21] Pannell v. United States, 320 F.2d 698, 701-02 (D.C. Cir. 1963) (Bazelon, J., dissenting).

likely to appear in court as were defendants released after payment of bond.[22]

The bail reform movement received a boost when the U.S. Department of Justice and the Vera Foundation co-sponsored the National Conference on Bail and Criminal Justice in 1964 for the purpose of focusing "nationwide attention on the defects in the bail system, the success of experiments in improving it, and the problems remaining in its reform."[23] Convened by Attorney General Robert F. Kennedy, with an opening address by Chief Justice Earl Warren, the conference "for the first time exposed the scope and depth of the bail problem to a national audience of over 400 judges, prosecutors, defense lawyers, police, bondsmen, and prison officials."[24]

As a direct outgrowth of the National Bail Conference, Congress added to the momentum of reform by passing sweeping legislation for the federal system known as the Bail Reform Act of 1966.[25] This law created a presumption in favor of release on the least restrictive conditions reasonably calculated to assure the defendant's appearance in court. The impact of the new federal bail statute was significant. The language of the law served as a model, as many states set about to amend and reform their own bail statutes.

The 1966 Bail Reform Act was not without its critics, however. A number of commentators believed that the single purpose of the new act — to assure appearance in court — was too limited. "Crime on bail" was perceived to be a growing problem, and some believed that protection of public safety should be an explicit purpose of "bail."[26] Adherents of this

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[22] *See* NATIONAL CENTER FOR STATE COURTS, PUB. NO. R0016, AN EVALUATION OF POLICY RELATED RESEARCH ON THE EFFECTIVENESS OF PRETRIAL RELEASE PROGRAMS (1975).

[23] Nicholas deB. Katzenbach, *Letter of Transmittal* introducing PROCEEDINGS AND INTERIM REPORT OF THE NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE at iv (U.S. Dep't of Justice & The Vera Foundation, co-sponsors, 1965) [hereinafter PROCEEDINGS].

[24] PROCEEDINGS, *supra* note 23, at xiv.

[25] 18 U.S.C. §§ 3141-46 (1988).

[26] Senator Sam J. Ervin, Jr., Chairman of the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, in a hearing before the Subcommittee stated:

> Since its enactment, the Bail Reform Act has proved to be a great step forward in Federal criminal procedure. Notwithstanding these improvements, the act has not fully accomplished the purposes for which it was designed . . . . One major problem is that the provisions of the act which restrict the imposition of money bail and which require that any

position argued that public safety was in fact a consideration in every release decision, and that the law should, therefore, permit the Court to consider it openly — either through the use of restrictive release conditions or by outright "preventive detention." While attempts to amend the Federal Bail Reform Act in 1968 failed, these concepts were incorporated into the District of Columbia criminal code two years later. Thus, the District of Columbia became the first jurisdiction with a statutory procedure for detaining without bond certain defendants believed to pose threats to community safety. Significantly, the new bail/detention statute retained the "presumption in favor of release" that was the hallmark of the Federal Bail Reform Act.

Presently, in the District of Columbia, to hold a defendant under "preventive detention," several specific judicial findings are required. One key finding is that no condition or combination of conditions will reasonably assure community safety.[27] Thus, even if a defendant is found, based on past behavior, to pose a threat to community safety, release is still required *unless* the Court makes a specific, written, and appealable finding that *no* conditions can be imposed to protect the community. This concept — that even demonstrably "dangerous" defendants are entitled to pretrial release *if* their release can be safely supervised — is important to the position of this article, that drug testing is an essential component in completing the bail reform effort begun a generation ago.

Although controversial, the constitutionality of the detention statute was eventually upheld by the D.C. Court of Appeals.[28] Within 15 years, many states had adopted amendments to their own bail laws permitting judges to

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pretrial detention be justified in writing by the judicial officer as necessary to prevent flight to avoid prosecution have resulted in the release of many allegedly dangerous defendants who previously could have been detained extra-legally by setting high money bail. This has led many persons to suggest that the act be amended to authorize expressly the outright detention of defendants considered to represent a high risk of further criminal conduct, as well as those considered to represent a high risk of flight.

AMENDMENTS TO THE BAIL REFORM ACT OF 1966, REPORT OF HEARINGS BEFORE THE SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, 91st Cong., 1st Sess. 1 (1969).

[27] D.C. CODE ANN. § 23-1322 (1991).

[28] United States v. Edwards, 430 A.2d 1321 (D.C. 1981), *cert. denied*, 455 U.S. 1022 (1982).

consider community safety in bail determinations. In 1984, Congress passed sweeping amendments to the federal bail laws in the new Bail Reform Act of 1984.[29] The Constitutionality of this law was upheld by the Supreme Court three years later in the case of *United States v. Salerno*.[30]

III. A "MODEL" SYSTEM OF PRETRIAL JUSTICE

Encouraged by their initial successes, the early bail reformers set about to institutionalize and complete the revolution they had begun. Program directors and administrators representing a wide diversity of pretrial reform efforts organized themselves into the first professional association, the National Association of Pretrial Services Agencies, in 1972.[31] At this point, the concept of pretrial services was still in the formative stages. The early "pioneers" of the movement represented a wide diversity of programs, whose only common denominator seemed to be a willingness to try anything to make the pretrial phase of the criminal justice system work better.

Gradually, the field began to coalesce around a set of principles and beliefs regarding the way pretrial defendants *should* be "processed" through the criminal justice system. A number of criminal justice groups undertook projects to develop "standards" for different aspects of the justice system.[32] In 1976, The National Association of Pretrial Services Agencies (NAPSA), with financial support from the U.S. Department of Justice, initiated a two year project to develop "standards and goals" for pretrial release programs and pretrial diversion programs. Working independently, the American Bar Association also developed criminal justice standards for pretrial release incorporating many of the same principles.[33]

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[29] 18 U.S.C. §§ 3141-46 (1988).

[30] 107 S. Ct. 2095 (1987).

[31] Program directors at the first meetings of the National Association of Pretrial Services Agencies represented VISTA volunteers, anti-poverty programs funded by the Office of Economic Opportunity, church groups, revolving bail funds, pretrial diversion programs, programs dedicated to finding jobs for defendants, "own recognizance" programs, and heroin addiction treatment programs. Conference Proceedings of the First Annual Conference of the National Association of Pretrial Services Agencies (March 14-16, 1973) (on file with author).

[32] Among the organizations producing standards were the National Advisory Commission on Criminal Justice, the American Bar Association, and the National District Attorneys Association.

[33] For a comparison of these two sets of standards, see ROSEANNA KAPLAN,

These two sets of standards were intended to represent an "ideal" system of pretrial release decision-making.

In formulating standards for pretrial release, both the ABA and NAPSA adopted the view that public safety is a factor in almost every release decision (whether or not articulated) and that therefore the consideration of this factor should be open and governed by strict procedural safeguards. A "model" system, then, would *permit* public danger to be considered explicitly, but *end* the use of money bonds as the means for accomplishing "sub rosa" preventive detention.[34] Briefly, then, a model system of pretrial justice begins with a presumption in favor of pretrial release.[35] The presumption in favor of release on personal recognizance must be overcome in order to impose restrictive conditions of release.[36] If conditions of release are to be imposed, they must be the least restrictive conditions required to assure the appearance of the defendant or protect the safety of the community.[37] In determining conditions of release, the court should follow an ordered progression, from least restrictive conditions for "low risk" individuals to more restrictive conditions for higher risk individuals. Even defendants with prior convictions for dangerous acts are entitled to pretrial liberty *if* conditions can be imposed which will reasonably assure the safety to the community. For the cases posing the highest potential risk, such conditions might well include placement in a halfway house, regular drug monitoring, and participation in a drug treatment program.

One of the cornerstones of the "model" system of pretrial decision-making is the abolition of the use of monetary

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PRETRIAL SERVICES RESOURCE CENTER, A COMPARISON OF PRETRIAL RELEASE STANDARDS OF THE AMERICAN BAR ASSOCIATION AND THE NATIONAL ASSOCIATION OF PRETRIAL SERVICES AGENCIES (1983).

[34] "Sub rosa" preventive detention refers to the practice of setting a high bond ostensibly to assure return to court, but in reality to detain the defendant.

[35] *See* PERFORMANCE STANDARDS AND GOALS FOR PRETRIAL RELEASE, Standard I (National Assoc. of Pretrial Services Agencies 1978) [hereinafter NAPSA RELEASE STANDARDS]. *See also* STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, Standard 10-1.1. (American Bar Association 1980) [herinafter ABA STANDARDS].

[36] NAPSA RELEASE STANDARDS, *supra* note 35, Standard IV.

[37] Although adopted in 1978, long before drug testing gained popularity as a monitoring technique, the NAPSA Release Standards specifically mentioned, by way of example, the condition that the defendant "refrain from the use of alcohol or drugs, undergo treatment for drug addiction or alcoholism, and/or *submit to periodic testing*." NAPSA RELEASE STANDARDS, *supra* note 35, Standard IV-C-8 (emphasis added).

conditions of release. For decades, money had been the means by which judges sought (sometimes unsuccessfully) to detain defendants believed not to merit release. Even when judges believed that a low bond would lead to release, this did not always happen. Thus the use of monetary bonds often frustrated the intentions of the court, and at the very least did not promote the kind of careful assessment of the potential "dangerousness" of a defendant that both the community and the defendant were entitled to expect. Therefore, holding true to the early ideals of the bail reform movement, the pretrial association went on record in 1978 calling for the complete end to all forms of money bond.[38]

Acknowledging that *some* defendants would simply not be released, the NAPSA recognized that an alternative mechanism for pretrial detention would have to exist in any credible "model" of pretrial justice. Standards describing a pretrial detention procedure were developed.[39] The model procedure places limits on the kinds of defendants eligible for pretrial detention, stressing that one of the requisite judicial findings is that there are no conditions that will "reasonably minimize the substantial risk of flight,"[40] or "the substantial risk of danger to the community."[41]

A model system of pretrial decision-making envisions a continuation of the long-recognized presumption in favor of release, an end to monetary conditions of release, and a more honest and accountable process for determining which arrestees are to be locked up pending trial. If such a system were ever codified, it would, in the opinion of some bail reform advocates, at last eliminate the abuses inherent in our money bond system. It would bring pretrial release or detention practices into the light of day where the basis of a prosecutor's conclusion that a defendant is "dangerous" or flight prone would be subject to scrutiny in a due process hearing. Conditions of release take on major importance in this scheme,

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[38] NAPSA RELEASE STANDARDS, *supra* note 35, Standard V, states: "The use of financial conditions of release should be eliminated." The ABA standards did not go as far, but did state: "[c]ompensated sureties should be abolished." ABA STANDARDS, *supra* note 35, Standard 10-5.5, and that "Monetary conditions should be set only when it is found that no other conditions on release will reasonably assure the defendant's appearance in court." *Id.*, Standard 10-5.4.

[39] NAPSA RELEASE STANDARDS, *supra* note 35, Standard VII.

[40] NAPSA RELEASE STANDARDS, *supra* note 35, Standard VII(A)(1).

[41] NAPSA RELEASE STANDARDS, *supra* note 35, Standard VII(A)(2).

as even dangerous defendants are entitled to pretrial release *if* that release can be safely supervised. As will be discussed in Section V, an understanding of this conceptual framework is crucial to the position of this article that pretrial drug testing is an essential step in bail reform.

To a large degree, the bail reform movement, begun with such excitement and anticipation in the mid 1960s, is a revolution that has stalled in mid-stream. Progress has been made here and there, but by and large, pretrial practices in many jurisdictions operate as they have for decades. Only one state—Kentucky—has outlawed bail bonding for profit.[42] Some states have adopted cash deposit bail systems, effectively eliminating bail bondsmen, yet retaining money bonds and all of the inequities associated with financial conditions of release.[43] Most states and the federal system have adopted pretrial detention laws, but have not eliminated financial conditions of release.[44] Thus, rather than changing the mechanism for making release/detention decisions, legislatures have simply added a new procedure without eliminating the old one. There has been little pressure to change the structure of pretrial release decision making. Many of the inequities chronicled by Arthur Beeley more than half a century ago, remain with us today.[45]

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[42] Comprehensive bail reform was accomplished in Kentucky in February, 1976, through the enactment of KY. REV. STAT. ANN. § 431.510-550 (Baldwin 1991), which abolished the practice of bail bonding for profit, and required all trial courts to provide pretrial release and investigation services in lieu of commercial bail bondsmen. The establishment of the Pretrial Services Agency and guidelines to facilitate the pretrial release process were accomplished by the Supreme Court of Kentucky through revision of the Rules of Criminal Procedure relating to bail. KY. R.C.P. 4.00-4.58.

[43] D. ALAN HENRY, PRETRIAL SERVICES RESOURCE CENTER, TEN PERCENT DEPOSIT BAIL (1990).

[44] The futility of this approach has been documented in a study: GENERAL ACCOUNTING OFFICE, GAO/GGD-88-6, CRIMINAL BAIL: HOW BAIL REFORM IS WORKING IN SELECTED DISTRICT COURTS (1987) [hereinafter CRIMINAL BAIL]. In examining the effect of the Federal Bail Reform Act of 1984, the study found that after the law went into effect, detention rates went up, failure-to-appear rates remained very low under the old and the new law (around 2%), and re-arrest rates also remained very low (1.8% under the old law and 0.8% under the new law). Finally, in direct opposition to the plain language of 18 U.S.C. § 3142(c)(2) (1988) ("the judicial officer may not impose a financial condition that results in . . . detention . . . "), fully half of the detained defendants were detained because they could not afford the bail. In two districts the percentage was even higher.

[45] BEELEY, *supra* note 16.

IV. DRUGS, CRIME, AND THE JUSTICE SYSTEM

The premise of this article is that drug testing is an essential step in completing the bail reform revolution. This argument rests on four pillars: (1) the close association between drug abuse and criminal behavior; (2) the extent of drug dependency among criminal justice or "offender" populations; (3) the effectiveness of drug testing in identifying drug users and assessing risk; and finally, (4) the usefulness of drug testing as a monitoring technique for pretrial defendants.

A. The Drug/Crime Association

The close association between heavy drug use and criminal behavior is now beyond question. A large body of literature exists on heroin addiction and its connection to criminal behavior, and more recent studies are now appearing on the association between criminal behavior and other drugs, such as "crack" cocaine.[46] Some of the most thorough studies of heroin addicts have demonstrated that addiction tends to be a long term, chronic affliction, and that most addicts persist in high levels of criminal behavior for many years, despite periods of incarceration or treatment. Many studies have focused on the high correlation between heroin addiction and property crime,[47] and have established that addiction to heroin is followed by increases in these crimes. In studies of "career criminals" by the Rand Corporation, most of the inmates classified as "violent predators" among inmates in three states had histories of heroin use in combination with other drugs and alcohol. Among all factors analyzed, in fact, a history of drug abuse was one of the best indicators or predictors of high-rate criminal behavior.[48] Other studies have confirmed that arrestees using

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[46] James A. Inciardi & Anne E. Pottieger, *Kids, Crack, and Crime*, 21 JOURNAL OF DRUG ISSUES 257 (1991). "In conclusion," write the authors, "the crack-crime dynamic, at least for adolescent crack dealers, represents an intensified version of the classic drug-crime relationship originally described for (adult) heroin users. Both patterns rest on addiction, but for crack, addiction onset appears to be more rapid while maximum physiological--and thus financial requirements--seem more unlimited." *Id.* at 269.

[47] For a description of a longitudinal study of heroin addicts in Baltimore, Maryland, *see* John C. Ball et al., *The Criminality of Heroin Addicts--When Addicted and When Off Opiates*, *in* THE DRUGS-CRIME CONNECTION 39-66 (James A. Inciardi ed., 1981).

[48] JAN M. CHAIKEN & MARCIA R. CHAIKEN, VARIETIES OF CRIMINAL BEHAVIOR

drugs heavily are more likely to be committing crimes at very high (over 100 annually) rates.[49]

Given the correlation between high rates of drug abuse and high rates of criminality, the question often arises as to the *types* of crimes associated with drug use. Are most drug users involved in the kinds of income-generating or drug distribution crimes needed to "support a habit?" Or are high rate drug abusers also involved with other kinds of violent crime as well? While more research needs to be done on this issue, some data suggests that "heroin-using offenders are just *as likely* as their non-drug using or non-heroin using counterparts to commit violent crimes (such as homicide, sexual assault, and arson), and even *more likely* to commit robbery and weapons offenses."[50]

This theme—that drug use and criminal behavior are closely related among offender populations—is supported by many other studies. Looking at arrestees, for example, a study of self-reported drug use in the District of Columbia from 1979-1981 established that drug users released before trial were twice as likely to be rearrested than were non-users.[51] And in a more comprehensive evaluation of a program of pretrial drug testing in the District of Columbia using data from 1984, arrestees testing positive for one drug were more likely to be rearrested before trial, and arrestees testing positive for *two or more drugs* even *more likely* to be rearrested.[52] Similar findings have been reported from a sample of 2606 arrestees processed through the Manhattan Criminal Courts in New York City.[53]

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64 (1982).

[49] BRUCE D. JOHNSON & ERIC D. WISH, NARCOTIC AND DRUG RESEARCH, INC., CRIME RATES AMONG DRUG-ABUSING OFFENDERS, FINAL REPORT TO THE NATIONAL INSTITUTE OF JUSTICE (1986).

[50] BERNARD A. GROPPER, U.S. DEP'T OF JUSTICE, PROBING THE LINKS BETWEEN DRUGS AND CRIME (National Inst. of Justice, Research in Brief, February 1985).

[51] MARY A. TOBORG & MICHAEL P. KIRBY, U.S. DEP'T OF JUSTICE, NCJ 94073, DRUG USE AND PRETRIAL CRIME IN THE DISTRICT OF COLUMBIA (National Inst. of Justice, Research in Brief, October 1984).

[52] *See* Anthony M.J. Yezer et al., *The Efficacy of Using Urine-Testing Results in Risk Classification*, in ASSESSMENT OF PRETRIAL URINE TESTING IN THE DISTRICT OF COLUMBIA (Toborg Associates, Inc. eds., National Institute of Justice Monograph No. 6, 1987). For a general overview of this program, *see* John A. Carver, *Drugs and Crime: Controlling Use and Reducing Risk Through Testing*, NATIONAL INST. OF JUST. REP., SNI 199, September/October 1986, at 2.

[53] Douglas A. Smith et al., *Drug Use and Pretrial Misconduct in New York City*, 5 J. QUANTITATIVE CRIMINOLOGY 101 (1989). The study concluded that "[T]he percentage [of defendants] who fail, by either FTA or rearrest, increases with the number of positive test results." *Id.* at 109. "The data indicate that the number of drugs a person tests positive for is related to the probability of FTA and rearrest,

Just as drug addiction has been shown to be associated with very high rates of criminal activity, there is also considerable evidence for a corollary hypothesis—that *reductions* in drug use correspond with *reductions* in criminal behavior.[54] This observation is valid even when the reductions in drug use are non-voluntary, such as when drug-dependent offenders are "coerced" into treatment as a condition of probation or parole.[55] Finally, there is also considerable evidence for the proposition that the longer an addict remains in treatment, the better the outcome in terms of "drug free" days.[56]

These addiction studies have powerful implications for the criminal justice system. The most drug-dependent individuals are those most likely to commit crimes and at some point come under the jurisdiction of the court. The criminal justice system has significant power over criminal defendants, probationers, and parolees. This power is exercised by imposing conditions of pretrial release or conditions of probation backed up by the threat of sanctions (including incarceration) for violations of these conditions or contempt of court orders. To summarize, the most dysfunctional drug abusers tend to be the most crime-prone individuals who are already under the jurisdiction of the court. Thus, the court has existing authority to require treat-

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even after controlling for other factors typically available to the judge at the time of the pretrial release decision." *Id.* at 123.

[54] William H. McGlothlin et al., *A Follow-up of Admissions to the California Civil Addict Program*, 4 AM. J. OF DRUG AND ALCOHOL ABUSE 179 (1977).

[55] Carl G. Leukefeld & Frank M. Tims, *Compulsory Treatment: A Review of Findings, in* COMPULSORY DRUG ABUSE: RESEARCH AND CLINICAL PRACTICE 247 (National Institute on Drug Abuse Research Monograph No. 86, 1988). Writing in the same monograph, M. Douglas Anglin notes:

> The general conclusion . . . is that civil commitment and other drug treatment initiatives . . . are effective ways to reduce narcotics addiction and to minimize the adverse social effects associated with it. How an individual is exposed to treatment seems to be irrelevant. What is important is that the narcotics addict must be brought into an environment where intervention can occur over time. Civil commitment and other legally coercive measures are useful and proven strategies to get people into a treatment program when they will not enter voluntarily. The use of such measures . . . could produce significant individual and social benefits.

M. Douglas Anglin, *The Efficacy of Civil Commitment in Treating Narcotic Addiction, in* COMPULSORY DRUG ABUSE: RESEARCH AND CLINICAL PRACTICE 8, 31 (National Institute of Drug Abuse Research Monograph No. 86, 1988).

[56] NATIONAL ASS'N OF STATE ALCOHOL AND DRUG ABUSE DIRECTORS, THE TRAGIC COST OF UNDER-VALUING TREATMENT IN THE "DRUG WAR". A REVIEW OF 15 YEARS OF RESEARCH FINDINGS ON ALCOHOL AND OTHER DRUG ABUSE TREATMENT OUTCOMES (1990).

ment. Involuntary or coerced treatment *is* effective because it keeps drug-dependent individuals in treatment longer. Court intervention *can* reduce drug use which can lead to corresponding reductions in crime.

B. Extent of Drug Dependency Among Criminal Justice Populations

Criminal Justice practitioners have long recognized that society's drug-dependent members are well represented among arrestee and offender populations. This recognition has been supported by statistics on drug arrests, government sponsored surveys of prison inmates,[57] and research projects.[58] To a certain extent, all of these efforts to quantify the extent of drug dependency among "offender" populations were "educated guesses," hampered by methodological uncertainties. Many of these attempts to estimate drug use prevalence rates relied on interviews of inmates. Even in research interview settings with guarantees of confidentiality, there is a certain degree of underreporting about crimes and drug use. Rates of "sampling bias" are further compounded by a variety of factors in criminal case processing.

It has only been within the last four years that policy makers have been able to gain a much clearer picture of the extent of drug abuse currently flooding the system. The DUF, funded by the National Institute of Justice, is a quarterly sampling of arrestees in twenty-three cities. The survey consists of both a confidential interview consisting of a series of questions on current and past drug use, age of first use, treatment history, and other data. Unlike other drug abuse prevalence indicators,[59] subjects of this survey are requested to provide a urine

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[57] *See, e.g., Prisoners and Drugs*, 1983 BUREAU OF JUSTICE STATISTICS BULLETIN NCJ-87575 (reporting that "almost a third of all State prisoners in 1979 were under the influence of an illegal drug when they committed the crimes for which they were incarcerated."); *see also* Allen J. Beck, *Profile of Jail Inmates, 1989*, 1991 BUREAU OF JUSTICE STATISTICS SPECIAL REPORT NCJ-129097 (reporting that "inmates . . . in jail for drug violations increased from 9.3% of the population in 1983 to 23% in 1989," and that "during the month before their offense, more than 4 of every 10 convicted inmates in 1989 had used a drug—more than 1 of every 4 were users of a major drug.").

[58] For an excellent compilation of scientific studies in this area, *see* CRIMINAL CAREERS AND CAREER CRIMINALS (Alfred Blumstein et al. eds., 1986).

[59] Other indicators include the High School Senior Survey, the National Household Survey, and the Drug Abuse Warning Network (DAWN). For an overview and description of these and other indicators, *see* OFFICE OF NATIONAL DRUG

sample, which is then tested for the presence of ten drugs of abuse, with the results correlated with the data from the interview instrument. To the initial surprise of many, the arrestee population is thoroughly saturated with drugs.[60] While the percent positive for drugs varies from city to city, it is consistently over 50% in all sites surveyed. According to the 1989 *Drug Use Forecasting Annual Report*,[61] the percentage of males testing positive for any drug ranged from a low of 53% in San Antonio, to a high of 82% in San Diego. In eight of the seventeen cities surveyed, in 1989, 70% or more of the female arrestees tested positive for a drug. A subsequent study using DUF data estimated that "cocaine use in arrestees *in the prior 2-3 days* (based on the urinalysis) was 17 to 25 times greater than the use in the past month found in the general population. . . . These differences would be even greater if the window of detection for the urine tests extended to the prior 30 days."[62]

Drug use may be declining among the general population, but heavy or chronic use is still substantial.[63] These individuals are concentrated in the criminal justice system, as the DUF results amply demonstrate.[64] Moreover, the heavily-dependent

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CONTROL POLICY, WHITE PAPER S/N 040-000-00547-1, LEADING DRUG INDICATORS (1990).

[60] *See infra* Appendix, Tables I-VI for statistics on booked arrestees testing positive for specific drugs.

[61] *Drugs and Crime*, *in* NATIONAL INSTITUTE OF JUSTICE, 1989 DRUG USE FORECASTING ANNUAL REPORT 2 (1990).

[62] Eric D. Wish, *U.S. Drug Policy in the 1990s: Insights from New Data from Arrestees*, 25 INTERNATIONAL J. OF THE ADDICTIONS 377, 387 (1990) (emphasis in original).

[63] A recent report prepared for use by the Committee on the Judiciary of the United States Senate concluded that "there are 2.4 million hard-core cocaine addicts--about 1 out of every 100 Americans." STAFF OF SENATE COMM. ON THE JUDICIARY, 101ST CONG., 2D SESS., DRUG USE IN AMERICA: IS THE EPIDEMIC REALLY OVER? 23 (Comm. Print 1990). The report further found that "the national total of hard-core heroin addicts is 940,000, nearly twice the Administration's official estimate of 500,000. The Administration relies only on the Household Survey of Drug Abuse. Our data from many sources--including the Justice Department and state drug treatment centers--indicate a much higher total: 940,000. *Id.* at 30. *See also* Michael Isikoff, *Hospital Data Indicate Rise in Hard-Core Drug Abuse*, WASH. POST, May 13, 1992, at A-1 ("The federal government's Drug Abuse Warning Network (DAWN), considered a key indicator for measuring trends in hard-core drug abuse, reported yesterday there were 28,700 cocaine-related visits to hospital emergency rooms from July through September 1991, a 13 percent increase over the previous three months and nearly 46 percent higher than the comparable period in 1990.").

[64] *See Drugs and Crime*, *in* NATIONAL INSTITUTE OF JUSTICE, 1989 DRUG USE

drug users tend to be the most dysfunctional, most troublesome individuals, causing a disproportionate share of criminal acts.[65] Finally, the concentration of drug addicts in the criminal justice system is nothing new, but has been prevalent for many years.[66]

The close association between drug use and criminal behavior, coupled with the knowledge that reductions in drug use lead to corresponding reductions in criminal behavior, suggest two important reasons for conducting pretrial drug testing. First, the knowledge that there is an association (not necessarily a causal relationship) between drug use and crime means that knowledge about drug use is potentially useful for judges in assessing pretrial release eligibility. Second, to the extent that court "coercion" can be effective in reducing drug use and bringing about a corresponding reduction in criminality, drug testing (possibly coupled with treatment) offers the promise of improved monitoring pending final case disposition. Just how effective is a positive drug test result in assessing a defendant's likelihood of pretrial misconduct? The following section examines this question.

C. *Drug Testing as a Means of Assessing Risk*

One of the most basic functions of a pretrial services agency is to assist judicial officers by gathering information relevant to the first decision that must be made—whether, and under what conditions, to release a defendant pending trial. Since the earliest experimental pretrial programs were initiated in the 1960s, program personnel have questioned defendants about a variety of factors believed to be useful in assessing the defendant's potential for returning to court, and, more recently, avoiding rearrests. These factors have traditionally included

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FORECASTING ANNUAL REPORT 2 (1990); *Drugs and Crime*, *in* NATIONAL INSTITUTE OF JUSTICE, 1989 DRUG USE FORECASTING ANNUAL REPORT 2 (1991); Eric D. Wish, *U.S. Drug Policy in the 1990s: Insights from New Data from Arrestees*, 25 INTERNATIONAL J. OF THE ADDICTIONS 377 (1990). Dr. Wish notes: "The data that we have presented indicate that some of the most serious drug use can be found in persons being detained and monitored by the criminal justice system. As many as one half of the frequent cocaine users in the United States are contained in the arrestee population." *Id.* at 385.

[65] GROPPER, *supra* note 50.

[66] Herman Joseph, *The Criminal Justice System and Opiate Addiction: A Historical Perspective*, *in* COMPULSORY TREATMENT OF DRUG ABUSE: RESEARCH AND CLINICAL PRACTICE 106 (National Institute of Drug Abuse Research Monograph No. 86, 1988).

length of time in the community and at a given address, employment status, family ties, prior criminal history, and drug use. Deficiencies in any of these areas typically result in a lower "score" in the program's risk assessment instrument. Verification or corroboration of information supplied by the defendant is important, with verified information resulting in a more favorable recommendation.

In the area of drugs, virtually all programs ask the defendant about possible drug use and drug treatment status. Unlike residence information, drug use information (or more specifically, *denials* about drug involvement) have been difficult to verify. Drug testing offers the possibility of providing the Court with scientifically verified and objective information about the existence of drugs in the defendant's system shortly after arrest.

To obtain this information, two teams of staff of the D.C. Pretrial Services Agency enter the courthouse cellblock every morning. One team conducts the traditional pretrial interview, asking defendants where they live, work, whether they have been arrested before, whether they use drugs, and so forth. Another team collects urine samples from each arrestee. Prior to collecting the sample, the staff member identifies himself, requests a urine sample, explains the purpose for the request and the limitations on the use of the results.[67] Only about two percent of the defendants approached refuse to give a sample.[68] Samples are transported immediately to the Agency's

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[67] Agency procedures require the staff member to give the following warning before collecting a urine sample:

> My name is _____ and I work for the Pretrial Services Agency. I am here to collect a urine sample from you. You do not have to give a sample, but if you do, the sample will be tested for drugs and the results given to the judge or hearing commissioner for use at your bail hearing. The test results will be used only to determine conditions of release in your case. They cannot be used to determine whether you are guilty or innocent of today's charges. If you choose not to provide a sample, the Court may order you to provide one if and when you are released.

DISTRICT OF COLUMBIA PRETRIAL SERVICES AGENCY, TRAINING AND PROCEDURE MANUAL 159 (1991).

[68] Monthly Collection Rate Statistics Assembled by Michael Gunn, Supervisor, Adult Drug Detection Unit (Jan. - Dec. 1991) (on file with author). The low refusal rate is surprising to some, but perhaps can be explained by the common realization among defendants (many of whom have been through the system before) that even a positive result will not be the determining factor in the judge's release decision. Indeed, refusing to provide a sample will generally result in a court-or-

on-site lab, where they are analyzed for the presence of five drugs.[69] The drug results are then incorporated into the Agency's recommendation and made available to the judicial officer in arraignment court.

One of the empirical questions of great interest to program administrators was the usefulness of a drug test at this stage for risk assessment purposes. The National Institute of Justice sponsored an independent evaluation of the pretrial drug testing program of the District of Columbia Pretrial Services Agency. This evaluation looked at several research questions, including the question of the efficacy of using drug test results in risk classification of arrestees. This study, conducted by the research firm of Toborg Associates, found that "urine test results make a consistent, significant, incremental contribution to risk classification for arrestees in the District of Columbia."[70] In other words, looking at rearrests and failures-to-appear as the outcome measures, urine tests improved pretrial risk classification over and above the factors already in use for this purpose, such as community ties and prior criminal record. A separate evaluation of data from the D.C. program concluded that

> the most striking result in these analyses is the size of the risk multiplier associated with a positive drug test result. For subjects testing positive for a single drug other than PCP, the rearrest risk in the early weeks after release is three to four times as great as their drug-negative counterparts; and if two drugs are involved, it is nearly five times as great.[71]

D. Drug Testing as a Monitoring Technique

If the first priority of a pretrial services agency is to advise the court on a defendant's release eligibility, the second priority must be to supervise the release conditions once they are imposed by the judge. When the D.C. Pretrial Services Agency

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dered condition to provide one after release for purposes of evaluation, and if positive, to submit to regular testing. Many defendants may conclude that there is really nothing to be gained by refusing to provide a sample when first approached.

[69] The five drugs are: cocaine, opiates, methadone, amphetamines, and PCP.

[70] MARY A. TOBORG ET AL., U.S. DEP'T OF JUSTICE, ASSESSMENT OF PRETRIAL URINE TESTING IN THE DISTRICT OF COLUMBIA 10 (National Inst. of Justice, Issues and Practices, December 1989) (emphasis omitted).

[71] Yezer et al., *supra* note 52, at 10 (citing Christy Visher & Richard Linster, A Survival Model of Pretrial Failure, Draft Discussion Paper Presented at the 1988 Annual Meeting of the American Society of Criminology 23 (Nov. 9-12, 1988)).

began its drug testing program in 1984, a key component of the program was the introduction of drug testing *as a condition of release*. Recognizing that there was little value in identifying drug users unless the agency could recommend a release option to address the problem, the Agency devised a monitoring program with clear goals, and set about to evaluate it.[72]

Among the research questions investigated by the independent evaluator, Toborg Associates, was the usefulness of periodic urine testing as a post-release monitoring technique. To examine this question, drug-positive releasees were randomly assigned to one of three groups. One group was placed in periodic urine testing only; a second group was referred for treatment to the citywide drug abuse treatment agency; and a third group served as a "control" group released with neither urine testing nor referral to treatment. The outcome measures were: failure to appear; rearrest on new charges; or a combination of both, termed "pretrial misconduct."

Overall, the urine testing group performed slightly better than either the "treatment" group or the "control" group. More important, however, was the way in which the "drug testing" group quickly separated itself into two sub-groups with large differences in expected pretrial arrest rates, failure-to-appear rates, and overall pretrial misconduct rates. The first subgroup, termed "successful participants" by the evaluators, appeared as required for drug testing. The second sub group, dubbed "non-participants," quickly dropped out of the program. The rearrest rate of the "successful participants" was half that of the "non-participants." These differences appeared within four weeks of release. This research suggests that while drug-positive defendants as a group pose greater-than-average release risks, they can nevertheless be safely released, as long as the release is conditioned on periodic reporting for urinalysis. Participation in the drug testing program operates as a "signal" that the defendant possesses behavioral characteristics associated with a lower risk of pretrial misconduct. Those who "sig-

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[72] The goals were spelled out in various written descriptions of the program:

> Perhaps the most significant aspect of the new testing program was the development of regular drug testing as a condition of release. The goal of this aspect of the program was simple—to *reduce* the use of drugs, thereby *reducing* (it was hoped) the increased risks of pretrial misconduct posed by the release of drug users.

Carver, *supra* note 52, at 4 (emphasis in original).

nal" their unwillingness or inability to comply with court orders can be brought back to court for some sort of action or further intervention.

A separate analysis of the same data validated the Toborg findings, adding further refinement.[73] This secondary analysis confirmed that drug-involved defendants who fail to show up for their *first* drug testing appointment are more likely to be rearrested than those who do show up as required. However, looking only at those who *do not* appear, among those who had at least three of five additional characteristics.[74] *Sixty-one percent were rearrested* as opposed to just twenty-one percent of the sub-group with less than three of the identified characteristics. The author observes:

> In essence, this is a *two-stage* classification, which is recognized in some research on criminal behavior as a more accurate method for assessing risk than simply trying to identify high-risk offenders among a large heterogeneous group. The first stage is classifying the subset of defendants who fail to show up for the first postrelease urine test as much more likely to be rearrested than those who test negative or positive. Then, among this high-risk group, use of the five additional factors—the second stage—increases the accuracy of identifying those defendants at risk for rearrest.[75]

The policy implications of this research are quite powerful. They suggest that even those defendants in the category of highest statistical risk (i.e. chronic drug users with prior criminal records) can be effectively managed or supervised during the pretrial period. This is not to suggest that the supervision, in and of itself, is sufficient in every case, or even in most cases. It *does* suggest that many defendants can be safely released before trial, if such release is conditioned on periodic drug testing. With the drug testing capability, the research suggests that defendants will quickly sort themselves into two subgroups: those who comply, and those who don't. Those who do not or cannot comply (especially when non-compliance occurs in

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[73] Christy Visher, *Using Drug Testing to Identify High-Risk Defendants on Release: A Study in the District of Columbia*, 18 J. OF CRIM. JUST. 321, 325 (1990).

[74] The "five additional characteristics were: (1) defendant initially arrested for a felony (as opposed to a misdemeanor); (2) positive test result at arrest for heroin *and* cocaine; (3) at least one prior adult conviction; (4) the defendant was male; and (5) defendant was unemployed at the time of the arrest." *Id.* at 328.

[75] Visher, *supra* note 73, at 329 (footnotes omitted).

conjunction with several easily-identifiable risk factors) are statistically much more likely to be rearrested. Since these defendants have violated a court order, the court can then impose more restrictive conditions of release or revoke release.[76] In short, the monitoring capability permits the court to release a larger number of cases, and then concentrate its resources on those who fail to abide by the terms of that release.

V. DRUG ABUSE AND A MODEL SYSTEM OF PRETRIAL JUSTICE

True bail reform will not be accomplished until all forms of money bail are abolished. As long as money bail persists, it provides a quick and expedient way to avoid tough decisions. The money bail system is quick and easy. It does not require any kind of a hearing other than that required to set the amount. It puts off until another day the consequences of the decision. If, at some later date, the defendant's "friends" somehow come up with the cash to bail him out, then that "release decision" is not one taken by any actors in the system. The defendant's release does not occur before the eyes of reporters in the audience. The fact that the defendant posted the bond may not even be known to the judge or the prosecutor, except as possibly a computer entry should anyone bother to look. Attempts to impose accountability and fairness (by requiring detention hearings) without eliminating financial conditions of release have failed.[77]

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[76] Courts have broad authority to enforce their orders through a variety of mechanisms. Additional release conditions can be imposed in response to a violation. These additional conditions might take the form of increased frequency of testing, referral to treatment, enrollment in a residential treatment program, or possibly placement in a halfway house. Courts can also invoke their inherent powers to enforce their orders, convening a hearing at which the defendant is required to "show cause" why he or she should not be held in contempt of court for violating the order. *See* Michaelson v. United States *ex rel.* Chicago, St. P., M., & O.R., 266 U.S. 42 (1924) ("[T]he power to punish for contempts is inherent in all courts, has been many times decided and may be regarded as settled law. It is essential to the administration of justice."). In the District of Columbia, a separate provision of the law, D.C. CODE ANN. § 23-1329 (1991), spells out "penalties for violation of conditions of release," and states that "A person who has been conditionally released . . . and who has violated a condition of release shall be subject to revocation of release, an order of detention, and prosecution for contempt of court."

[77] Prior to passing the Federal Bail Reform Act of 1984, which authorized pretrial detention based on dangerousness in the federal system, Congress considered eliminating financial conditions of release. In one of the Senate Reports

As state and local governments face ever-tightening budgets, they can no longer afford to operate inefficiently in any sphere. Inefficiencies in the criminal justice system are especially costly. These costs are really a two-edged sword. On the one side, are the escalating costs in the budgets of corrections departments. To the extent that inefficiencies result in higher detention costs, the fiscal impact is staggering.[78] On the other side is the cost to public safety and welfare. To the extent that system inefficiencies result in the release of chronic drug abusers without the system knowing they are chronic users, and without imposing proper controls through drug testing and treatment, we now know that some of these individuals will persist in committing crimes at very high rates.

Because of the fact that both of these "costs" to the community are becoming intolerable, more and more jurisdictions are looking for ways to bring efficiency and accountability to pretrial release decision making. Herein lies the promise of pretrial services and the hope for reform.

The model system envisioned by the NAPSA offers a

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considering one of the many bills that was eventually enacted, the Judiciary Committee wrote:

> It is the intent of the Committee that the pretrial detention provisions of section 3502 replace any existing practice of detaining dangerous defendants through the imposition of excessively high money bond. Because of concern that the opportunity to use financial conditions of release to achieve pretrial detention would provide a means of circumventing the procedural safeguards and standard of proof requirement of a pretrial detention provision, the Committee was urged to do away with money bond entirely. Indeed, section 3502 of this bill as introduced did not provide for imposition of financial conditions of release. While the retention of money bond does create the potential for such abuse, the Committee concluded, after consideration of arguments for continuing to provide discretion to impose financial conditions of release, that the abolition of money bond at this time would promote unnecessary controversy. Instead, the bill assures the goal of precluding detention through use of high money bond by stating explicitly that "[t]he judge may not impose a financial condition that results in the detention of the person."

S. Rep. No. 307, 97th Cong., 1st Sess. 1155 (1981) (citations omitted). The United States General Accounting Office Report, CRIMINAL BAIL, *supra* note 44, at 25, notes that the intention of Congress has been thwarted, as many defendants continue to be detained in lieu of bond, without ever having the benefit of a detention hearing in which to challenge the presumption of dangerousness or flight, or to insist that release options be considered before ordering detention.

[78] The United States Department of Justice notes that "[prison] construction costs typically range between $50,000 and $75,000 per bed. Additional money is needed each year--about $10,000 to $15,000 per prisoner--to maintain, guard, and manage prisoners." ALFRED BLUMSTEIN, U.S. DEP'T OF JUSTICE, PRISON CROWDING 2 (National Inst. of Justice, CRIME FILE Study Guide).

framework for greatly improved pretrial decision making. According to this scheme, every release decision would be made on its own merits—not on the "roll of the dice" of factors beyond the Court's control. Defendants coming before the court would be entitled to a presumption in favor of release. Depending on the results of the background investigation by the pretrial services agency, the release decision process would follow an ordered progression from least to most restrictive conditions of release, tailored to that individual. In carefully limited situations, the prosecutor could invoke a detention hearing, but one of the requisite findings before detention could be ordered would be a judicial determination that there would be no conditions of release that could reasonably assure community safety.

Such a process brings us full circle back to drug testing. A model system can only work if the judge has complete, relevant, and accurate information to assess the need for conditions. Drug testing is a vital element in scientifically verifying, or corroborating, one of the most important factors relating to the potential risk posed by the defendant's release. Just as it would be ludicrous to take the defendant's word that he has never previously been arrested without checking his criminal record, so too does it appear inconsistent with the role of pretrial services as neutral fact-finder to take the defendant's word on drug use, without a corroborating drug test.

Assuming the judge has a full and complete background report, the question of release conditions must then be considered. A system in which criminal justice actors may no longer take refuge behind a money bond will *require* a full range of release alternatives for the full range of defendants flooding the system. Drugs are a major factor in the criminal justice system. Long after we have "won the drug war" in our workplaces and in our school systems, we will still be seeing chronic, hard-core addicts in our criminal justice system. Given what we now know about the drug/crime association, it is difficult to imagine a community tolerating the pretrial release of drug-abusing defendants without proper monitoring. If the system is to realize the full potential of bail reform—a system where *most* defendants are released, and only a few detained after full due-process hearing—it must have the means to deal with our most intractable and most persistent problem—drug abuse. Drug testing provides the means. It is not a panacea, but a necessary tool for managing risk among large numbers of people who are already the responsibility of the Court by virtue of their arrest.

VI. CONCLUSION

The challenges facing the criminal justice system have never been grater. Courts must process large numbers of criminal arrestees, many of whom are charged with increasingly serious offenses. Many, if not most of these arrestees are drug users, posing additional burdens on "the system." The devastating impact of drugs on certain communities has fueled intense political pressure which has in turn led to the enactment of new laws restricting bail or expanding the application of minimum mandatory sentences. Not surprisingly, all of these factors have contributed to unprecedented jail and prison crowding. As correctional facilities become ever more crowded, federal lawsuits are often brought challenging as unconstitutional the conditions of confinement. These lawsuits often result in court-ordered "caps" at certain institutions. Occasionally, entire prison systems are placed under court supervision.[79]

State and local governments are increasingly unable to pay for the seemingly endless demands of the justice and correctional systems, especially when schools, police and social welfare agencies are also feeling the budget "pinch." The gap between essential public services and the revenues needed to support them appears to be widening. In such an environment, public officials are being forced to re-think how their services are delivered. There is no longer any leeway to operate inefficiently. This is especially true in criminal justice.

The dilemma facing state and local governments is exacerbated by the drug problem. As had been detailed above, we now know a great deal about drugs, and the association between drug use and crime. We know, for example, that among offender populations, multiple drug use is often associated with high rates of criminal activity. We also know that drug addic-

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[79] A 1988 monograph prepared by the Edna McConnell Clark Foundation found that:

> There are now 15 states whose entire prison systems have operated under court orders because of consent decrees or by virtue of having been declared unconstitutional. In nine, special masters monitor corrections officials' remedial programs. Masters are also at work in seven states where individual institutions have been declared substandard. In additions, masters serve in at least 65 jail systems.

BRUCE PORTER, EDNA MCCONNELL CLARK FOUNDATION, SPECIAL MASTERS IN CORRECTIONS 4 (1988).

tion tends to be a long term, recurring phenomenon, where periods of relative abstinence from drugs are associated with lowered rates of criminal activity, and vice versa. Finally, we know that court-mandated treatment is more effective in reducing drug dependence (and lowering rates of criminality) than is voluntary treatment, and that when court-ordered treatment is enforced with regular drug testing, the results are even more favorable.

On the surface, this suggests we either "incapacitate" drug users by locking them up, or send them to quality treatment programs and insist they stay there. On closer examination, however, it becomes evident that no matter how attractive either option may be, the system simply does not have the capacity to incarcerate or treat more than a small percentage of the problem. Given the extent of drug use among arrestees, it is unrealistic to expect to find either a jail cell or a treatment slot for the high volume of new cases flooding the system every day.

What is needed is to rethink our way of doing things. Traditionally, we have used an "all or nothing" approach. At the various release points throughout the system, the alternatives are to release or detain. If released, the alternatives tend to be "do nothing" or revoke release. When confronted with the magnitude of the drug abuse problem, we can no longer afford to use our scarce resources in such an inefficient manner. We need to begin thinking of drug abuse among offender populations less as a "problem" in need of a "solution" and more as an almost permanent "condition" which, it if can't be solved by the court system, can at least be "managed" in a far more cost-effective way for society.

The experience of the D.C. Pretrial Services Agency in the monitoring of pretrial releasees through drug testing, offers encouragement for this approach. Monitoring alone, when set up to include quick responses to violations, has proven at least as effective as treatment for many when one looks at overall rates of pretrial misconduct. This is not to suggest that drug monitoring be viewed as a *substitute* for drug treatment. Rather, it recognizes that both jail space and quality treatment are expensive, scarce commodities. We should begin to look for ways to allocate them more effectively. Ongoing drug abuse monitoring is perhaps the best means of selecting those who really need treatment or jail. It also is a workable means of supervising vast numbers of releasees.

The foundation of this strategy would be to establish strict accountability with respect to drug use among all "drug offenders" under the supervision of the court system. A variety of responses (including treatment and jail) would be employed in a dynamic process to establish this accountability. Such a strategy would have to include the following elements:

- Comprehensive drug testing and monitoring, beginning at the point of arrest, and continuing through probation or parole.

- Greater use of existing drug testing and computer technology, whereby subjects await the outcome of each urine test, and are provided with *immediate feedback* as the results.

- A system whereby the individual would not only be confronted immediately with the drug test results, but would face *immediate consequences.*

- A *contingency management* approach, where specific responses would be used to impose *sanctions* for violations, or to *reward* compliance. The sanctioning philosophy would be based on graduated and escalating responses to drug use, rather that simply revoking release. In other words, the approach would be to "tighten the screws" by, say, intensifying the frequency of testing, referring the individual to treatment, and even using short (but increasing long) jail stays to deal with repeated violations, followed by re-release. In this way, strict accountability would be established. Some, of course, would not respond. This mechanism would be useful in identifying those individuals, and reserving our most expensive options for them.

- A bifurcated system would be forseeably necessary where the counselling and legal monitoring functions are split to avoid the inevitable conflicts that arise. This approach has been used successfully in some treatment settings and could be applied in the management of high numbers of individuals.

The proposed strategy outlined above should not be viewed as a "solution" to the drug problem. It does not deal with underlying societal problems. It does not address the critical need for more and better treatment, more education, greater resourc-

es. It *does* suggest that we are presently missing an opportunity to exert meaningful control over that segment of drug users that is most problematic--those drug abusers found in the criminal justice system.

The technology is here today to put this approach into effect. While legal issues must be carefully addressed, it must be remembered that we are talking about a population already under the jurisdiction of the court. Implementation of such a program would be difficult, but certainly not impossible. While it would be expensive, let us not lose sight of the fact that it would be *more cost effective* than any of the alternatives, including the alternative of doing nothing.

APPENDIX

Table I:

Booked Arrestees Testing Positive For Any Drug

PERCENTAGE OF BOOKED ARRESTEES TESTING POSTIVE FOR ANY DRUG										
		MALES					FEMALES			
	CITIES	1987	1988	1989	1990	1987	1988	1989	1990
EAST	New York City	79	83	79	79	N/A	80	76	71
	Philadelphia	N/A	81	81	80	N/A	79	82	81
	Washington, D.C.	77	N/A	67	59	N/A	N/A	83	85
SOUTH	Birmingham	N/A	72	64	69	N/A	65	56	66
	Dallas	N/A	66	65	66	N/A	65	47	71
	Ft. Lauderdale	65	62	66	61	N/A	N/A	63	79
	Houston	62	65	65	70	N/A	N/A	58	66
	Miami	N/A	75	70	N/A	N/A	N/A	N/A	N/A
	New Orleans	72	70	69	60	N/A	55	64	65
	San Antonio	N/A	63	53	63	N/A	51	48	44
MIDWEST	Chicago	73	80	74	75	N/A	77	N/A	N/A
	Cleveland	N/A	68	66	65	N/A	N/A	N/A	88
	Detroit	66	68	63	N/A	N/A	81	N/A	N/A
	Indianapolis	60	54	56	60	N/A	N/A	45	56
	Kansas City	N/A	54	60	57	N/A	70	74	76
	Omaha	N/A	56	N/A	N/A	N/A	N/A	N/A	N/A
	St. Louis	N/A	56	64	62	N/A	44	62	69
WEST	Denver	N/A	N/A	N/A	59	N/A	N/A	N/A	62
	Los Angeles	69	75	70	70	N/A	76	78	73
	Phoenix	53	63	58	60	N/A	60	70	69
	Portland	70	74	64	64	N/A	78	70	76
	San Diego	75	82	82	80	N/A	79	77	70
	San Jose	N/A	N/A	62	58	N/A	N/A	59	64

Source: National Institute of Justice/Drug Use Forecasting Program

Table II:

Booked Arrestees Testing Positive For Two or More Drugs

PERCENTAGE OF BOOKED ARRESTEES TESTING POSTIVE FOR TWO OR MORE DRUGS									
		MALES				FEMALES			
	CITIES	1987	1988	1989	1990	1987	1988	1989	1990
EAST	New York City	36	49	36	36	N/A	43	30	31
	Philadelphia	N/A	38	35	30	N/A	34	30	28
	Washington, D.C.	60	N/A	28	24	N/A	N/A	40	33
SOUTH	Birmingham	N/A	24	20	21	N/A	23	21	33
	Dallas	N/A	29	26	20	N/A	29	18	29
	Ft. Lauderdale	18	29	21	18	N/A	N/A	14	22
	Houston	24	31	22	18	N/A	N/A	23	30
	Miami	N/A	24	29	N/A	N/A	N/A	N/A	N/A
	New Orleans	38	40	28	22	N/A	26	27	26
	San Antonio	N/A	29	24	26	N/A	27	25	20
MIDWEST	Chicago	37	48	46	46	N/A	47	N/A	N/A
	Cleveland	N/A	22	20	22	N/A	N/A	N/A	29
	Detroit	31	30	19	N/A	N/A	38	N/A	N/A
	Indianapolis	17	12	19	19	N/A	N/A	13	18
	Kansas City	N/A	14	20	12	N/A	18	23	23
	Omaha	N/A	20	N/A	N/A	N/A	N/A	N/A	N/A
	St. Louis	N/A	17	27	18	N/A	20	24	16
WEST	Denver	N/A	N/A	N/A	16	N/A	N/A	N/A	15
	Los Angeles	32	36	26	28	N/A	36	35	30
	Phoenix	22	25	22	20	N/A	26	34	31
	Portland	33	35	26	21	N/A	43	33	36
	San Diego	45	55	50	50	N/A	45	45	34
	San Jose	N/A	N/A	24	23	N/A	N/A	22	24

Source: National Institute of Justice/Drug Use Forecasting Program

Table III:

Booked Arrestees Testing Positive For Cocaine

	PERCENTAGE OF BOOKED ARRESTEES TESTING POSITIVE FOR COCAINE							
		MALES			FEMALES			
	CITIES	1987	1988	1989	1990	1987	1988	1989	1990
EAST	New York City	63	74	72	67	N/A	75	67	67
	Philadelphia	N/A	72	74	70	N/A	63	70	64
	Washington, D.C.	52	N/A	59	49	N/A	N/A	74	78
SOUTH	Birmingham	N/A	51	53	50	N/A	38	43	40
	Dallas	N/A	49	51	44	N/A	48	36	57
	Ft. Lauderdale	46	42	50	47	N/A	N/A	53	60
	Houston	43	49	52	57	N/A	N/A	48	56
	Miami	N/A	64	65	N/A	N/A	N/A	N/A	N/A
	New Orleans	45	51	60	51	N/A	40	52	57
	San Antonio	N/A	27	26	30	N/A	26	28	18
MIDWEST	Chicago	50	58	59	59	N/A	70	N/A	N/A
	Cleveland	N/A	52	56	49	N/A	N/A	N/A	80
	Detroit	53	51	50	N/A	N/A	71	N/A	N/A
	Indianapolis	11	15	26	22	N/A	N/A	23	18
	Kansas City	N/A	41	44	38	N/A	57	63	66
	Omaha	N/A	21	N/A	N/A	N/A	N/A	N/A	N/A
	St. Louis	N/A	38	50	48	N/A	31	46	54
WEST	Denver	N/A	N/A	N/A	30	N/A	N/A	N/A	46
	Los Angeles	47	60	52	54	N/A	61	65	59
	Phoenix	21	30	32	27	N/A	36	53	38
	Portland	31	40	37	24	N/A	54	49	43
	San Diego	44	43	41	45	N/A	50	38	34
	San Jose	N/A	N/A	N/A	32	N/A	N/A	12	31

Source: National Institute of Justice/Drug Use Forecasting Program

Table IV:

Booked Arrestees Testing Positive For Marijuana

PERCENTAGE OF BOOKED ARRESTEES TESTING POSTIVE FOR MARIJUANA									
		MALES				FEMALES			
	CITIES	1987	1988	1989	1990	1987	1988	1989	1990
EAST	New York City	28	30	20	24	N/A	19	10	6
	Philadelphia	N/A	32	26	19	N/A	21	14	14
	Washington, D.C.	39	N/A	12	12	N/A	N/A	10	12
SOUTH	Birmingham	N/A	36	21	18	N/A	15	18	11
	Dallas	N/A	36	27	32	N/A	25	14	25
	Ft. Lauderdale	26	42	27	27	N/A	N/A	12	28
	Houston	39	43	24	21	N/A	N/A	16	13
	Miami	N/A	32	29	N/A	N/A	N/A	N/A	N/A
	New Orleans	48	49	28	20	N/A	25	18	16
	San Antonio	N/A	44	29	39	N/A	18	15	11
MIDWEST	Chicago	40	50	31	38	N/A	33	N/A	N/A
	Cleveland	N/A	26	20	26	N/A	N/A	N/A	14
	Detroit	29	33	21	N/A	N/A	26	N/A	N/A
	Indianapolis	48	42	40	48	N/A	N/A	23	35
	Kansas City	N/A	19	25	26	N/A	16	19	22
	Omaha	N/A	44	N/A	N/A	N/A	N/A	N/A	N/A
	St. Louis	N/A	17	27	26	N/A	15	20	15
WEST	Denver	N/A	N/A	N/A	37	N/A	N/A	N/A	15
	Los Angeles	28	32	20	19	N/A	22	13	12
	Phoenix	42	44	34	38	N/A	31	29	25
	Portland	44	50	35	40	N/A	38	23	34
	San Diego	44	49	42	37	N/A	20	29	16
	San Jose	N/A	N/A	25	26	N/A	N/A	12	10

Source: National Institute of Justice/Drug Use Forecasting Program

Table V:

Booked Arrestees Testing Positive For Opiates

PERCENTAGE OF BOOKED ARRESTEES TESTING POSTIVE FOR OPIATES									
		MALES				FEMALES			
	CITIES	1987	1988	1989	1990	1987	1988	1989	1990
EAST	New York City	26	24	18	20	N/A	26	19	24
	Philadelphia	N/A	11	10	8	N/A	18	15	16
	Washington, D.C.	10	N/A	12	15	N/A	N/A	25	20
SOUTH	Birmingham	N/A	6	5	6	N/A	14	5	6
	Dallas	N/A	6	8	7	N/A	9	7	15
	Ft. Lauderdale	2	5	3	0	N/A	N/A	2	1
	Houston	5	4	4	6	N/A	N/A	8	11
	Miami	N/A	1	2	N/A	N/A	N/A	N/A	N/A
	New Orleans	6	6	6	6	N/A	7	6	14
	San Antonio	N/A	18	15	17	N/A	20	20	17
MIDWEST	Chicago	14	18	27	27	N/A	21	N/A	N/A
	Cleveland	N/A	4	3	4	N/A	N/A	N/A	14
	Detroit	12	12	8	N/A	N/A	20	N/A	N/A
	Indianapolis	5	4	3	3	N/A	N/A	5	10
	Kansas City	N/A	2	2	2	N/A	6	5	1
	Omaha	N/A	1	N/A	N/A	N/A	N/A	N/A	N/A
	St. Louis	N/A	6	7	4	N/A	7	7	7
WEST	Denver	N/A	N/A	N/A	3	N/A	N/A	N/A	3
	Los Angeles	16	13	13	16	N/A	22	19	16
	Phoenix	5	7	8	5	N/A	12	15	16
	Portland	14	13	14	10	N/A	25	26	19
	San Diego	24	21	22	17	N/A	21	19	18
	San Jose	N/A	N/A	7	8	N/A	N/A	9	20

Source: National Institute of Justice/Drug Use Forecasting Program

Table VI:

Distribution of Arrest Charges For Booked Arrestees

DISTRIBUTION OF ARREST CHARGES OF BOOKED ARRESTEES TESTING POSITIVE FOR ANY DRUG					
MALES			FEMALES		
ARREST CHARGES	1989	1990	ARREST CHARGES	1989	1990
Drug Sale/Possession	83		Drug Sale/Possession	83	
Burglary	75		Prostitution	82	
Robbery	73		Robbery	75	
Larceny/Theft	71		Stolen Vehicle	73	
Stolen Property	70		Burglary	72	
Flight/Escape/Warrant	68		Flight/Escape/Warrant	72	
Probation/Parole Violation	64		Probation/Parole Violation	64	
Stolen Vehicle	64		Weapons	62	
Weapons	63		Larceny/Theft	61	
Prostitution	59		Stolen Property	59	
Public Peace/Disturbance	58		Other	59	
Fraud/Forgery	58		Damage/Destroy Property	57	
Homicide	57		Public Peace/Disturbance	56	
Other	56		Fraud/Forgery	55	
Assault	55		Assault	53	
Damage/Destroy Property	55		Family Offense	51	
Family Offense	50		Homicide	46	
Sex Offense	44		Traffic Offense	45	
Traffic Offense	37				

Source: National Institute of Justice/Drug Use Forecasting Program