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UNEQUAL JUSTICE UNDER LAW: AN ANALYSIS OF INDIGENTS IN THE CRIMINAL JUSTICE SYSTEM—THE INDIANA EXPERIENCE

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I. INTRODUCTION

When examined from the perspective of indigents, particularly those who are incarcerated prior to trial, the criminal justice system is not working well. Their experience in the system demonstrates that a gap exists between rules of law and actual practices. Procedural protections supposedly guaranteed by the Federal Constitution and state statutes are not equally available because they carry a price that indigents are not able to pay. The legitimacy and credibility of the system is thus seriously eroded. Without the respect of those who come into contact with it, our criminal process is severely undermined and rendered incapable of accomplishing its purpose.[1]

This article discusses some of the apparent inequities in the system. Much of the impetus for the article was provided by several federal court cases in Indiana which challenged various aspects of

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1. While there are certainly exceptions, most persons will respect the system if they feel they were treated fairly and given a reasonable opportunity to fully present a defense.

the system. While the article is not intended as a commentary on these cases, the cases do provide a useful framework for analysis and, more important, supply much information relating to actual operation of the system. Evidence presented in these cases reveals information not otherwise gathered and disseminated. One of the purposes of this article is to make this information known and to ask the serious questions raised by the information. For example, it was found that people were incarcerated for extensive periods by local police on mere suspicion prior to the filing of criminal charges and prolonged delays between arrest and initial court appearance were documented in several counties. A thorough study of the money-based bail system, which keeps those without resources in jail prior to trial, shows that it causes not only a temporary loss of liberty but also has an adverse impact on the ultimate outcome of the criminal proceeding. Another study demonstrated a difference in case outcome based on type of counsel, with those represented by court-appointed counsel obtaining less favorable results than those with private counsel.

In examining the system from an indigent's perspective, the totality of the circumstances becomes important to a full understanding of the impact the criminal justice system has on such individuals. Therefore, we will review the process from the point of arrest until the time of trial. Although this process defies neat, concise categorization, the discussion is divided into three areas: (1) the period between arrest and initial court appearance; (2) the role and impact of a money-based bail system; and (3) the significance of court-appointed counsel. The interrelationship between these aspects of the system will become obvious. For example, the inability to post bail results in detention prior to the initial court appearance. Delay in initial court appearance results in a delay in the appointment of counsel, and the lack of counsel makes it more difficult to obtain a bond reduction. A defect in any one of these areas can have detrimental effects; because these defects are almost invariably combined, the result is intolerable.

Some of the unlawful and inequitable procedures found in the criminal justice system are the product of long-standing tradition and official neglect. The needed changes can be made at the local level. Reform of practices prior to the initial court appearance requires no change in legislation. Rather, it is a matter of enforcing existing law. With respect to bail and public defender practices, state statutory law, though not mandating the changes which will be recommended, does permit them. Despite the fact that change is

possible within the existing statutory scheme, few communities have implemented any meaningful reforms. This unwillingness to initiate reform is particularly troublesome when the costs of the existing system are examined. Not only are human lives needlessly disrupted and fundamental rights violated, but present practices result in unnecessary costs to taxpayers and are not effective in serving the states' legitimate interests. The needed changes would not only protect the constitutional and statutory rights of the indigent accused, but would also provide the community with as much or more protection at a lower cost to the taxpayers. Thus the system could be made more equitable without additional cost to the community.

II. DELAY BETWEEN ARREST AND INITIAL COURT APPEARANCE—THE EVILS OF UNSUPERVISED POLICE/PROSECUTOR CONTROL

The period between arrest and initial court appearance can be most devastating. Even short-term incarceration can have disastrous consequences on the lives of arrestees. Family relationships are disrupted, employment is threatened, and loss of job undermines the economic stability of families. In addition, pre-trial detention facilities are notorious for overcrowding, poor living conditions and treatment which infringe on basic human rights and dignity.[2] Being incarcerated, the accused is also under the total control of the police/prosecutorial branch of the criminal justice system; neither of the two "protective" branches of the system, namely, defense counsel and the impartial court, are even aware of the arrest. Important rights can be waived by the terrified, unknowing arrestee during this period and harmful statements to the police are not uncommon.[3] The availability of counsel can both guard against the waiver of legal rights and alleviate some of the human concerns during this critical period. It will be shown, however, that counsel is often not appointed until much later.[4]

A greater potential for abuse during the period between arrest

2. *See, e.g.*, Culbertson & Decker, *Jails and Lockups in Indiana: A Case of Neglect*, 49 IND. L.J. 253 (1974); Justice, Glendening & Wildey, *Pilot Justice Project: A Survey of Six Indiana County Jails*, 49 IND. L.J. 260 (1974). The plaintiffs in Dommer v. Hatcher, 427 F.Supp. 1040 (N.D. Ind. 1975), *rev'd in part sub nom.*, Dommer v. Crawford, 653 F.2d. 289 (7th Cir. 1981), discussed *infra* text accompanying notes 20-23, also challenged conditions and treatment at the jail.

3. COURTS, Standard 13.1 commentary 254 (National Advisory Commission on Criminal Justice Standards and Goals 1973).

4. *See infra* notes 115-16 and accompanying text.

and initial court appearance exists in cases in which the arrest is made without a warrant and thus without any judicial sanction. While warrantless arrests are appropriate in some circumstances,[5] the police must nonetheless have probable cause[6] at the time of the arrest to believe that the person has committed a crime. The Supreme Court in *Gerstein v. Pugh*[7] held that police judgment relating to probable cause must be promptly reviewed by a judicial officer.[8] The procedures challenged there allowed persons arrested without a warrant to be jailed pending trial without any opportunity

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5. The Supreme Court has expressed a preference for the use of arrest warrants when feasible, however, "it has never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant." Gerstein v. Pugh, 420 U.S. 103, 113 (1975) (citations omitted). The allowance of arrests without a warrant "represents a necessary accommodation between the individual's right to liberty and the State's duty to control crime." *Id.* at 112. The Court recognizes that "[m]aximum protection of individual rights could be assured by requiring a magistrate's review of the factual justification prior to any arrest, but such a requirement would constitute an intolerable handicap for legitimate law enforcement." *Id.* at 113.

6. Because the fourth amendment protects against "unfounded invasions of liberty and privacy," *Id.* at 112, the standard for arrest has been set at "probable cause." *Id.* This has been defined in terms of facts and circumstances "sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense." Beck v. Ohio, 379 U.S. 89, 91 (1964). This standard allows for mistakes on the part of the police as long as the mistakes are those of reasonable persons. It does not permit a police officer to arrest a person based on suspicion, hunch, or "for investigation." Rather, objective and substantial evidence is necessary to justify such a "seizure." *See* Brinegar v. United States, 338 U.S. 160, 177 (1949) (officer's "whim, caprice or mere suspicion" insufficient).

The probable cause standard has existed for many years, *see, e.g.*, Albrecht v. United States, 273 U.S. 1, 5 (1927), and has withstood various efforts by its opponents to allow the police to make arrests on a less stringent standard. A proposed Uniform Arrest Act, adopted by three states, authorizes short-term detention on less than probable cause. Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315 (1942). As demonstrated by Gerstein v. Pugh, 420 U.S. 103 (1975), and the cases cited therein, the Supreme Court has steadfastly maintained the probable cause standard. *Id.* at 112.

7. 420 U.S. 103 (1975).

8. In order to minimize the effects of police mistakes, "the Court has required that the existence of probable cause be decided by a neutral and detached magistrate whenever possible." 420 U.S. at 112. The basis for this has been described as follows:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Johnson v. United States, 333 U.S. 10, 13-14 (1948). As a compromise, in some situations police are allowed to exercise their discretion on the spot and make arrests without a judicial review of the factual circumstances; however, a prompt subsequent review by a judicial officer is required. This compromise was recently described by the Supreme Court as follows:

for a probable cause determination by a judicial officer.[9] The prosecutor in *Gerstein* contended that his decision to file an information was a sufficient determination of probable cause. The Court, however, concluded that the "prosecutorial judgment standing alone [does not meet] the requirements of the Fourth Amendment."[10] In reaching this conclusion, the Court stressed the need for an assessment of probable cause by someone independent of police and prosecution.[11]

The critical holding of *Gerstein* is that "the Fourth Amendment requires a timely judicial determination of probable cause as a prerequisite to detention."[12] While *Gerstein* provides a constitutional

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> Under this practical compromise, a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest. Once the suspect is in custody, however, the reasons that justify dispensing with the magistrate's neutral judgment evaporate. There no longer is any danger that the suspect will escape or commit further crimes while the police submit their evidence to a magistrate. And, while the State's reasons for taking summary action subside, the suspect's need for a neutral determination of probable cause increases significantly. The consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships. . . . Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint of liberty. . . . When the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty. . . . Accordingly, we hold that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest.

Gerstein, 420 U.S. at 113-14 (citations omitted).

9. In contrast, a person arrested pursuant to a warrant would have received a prior judicial determination of probable cause.

10. *Gerstein*, 420 U.S. at 117.

11. *Id.* at 118. *See also* United States v. United States District Court, 407 U.S. 297,316-17 (1972); Shadwick v. City of Tampa, 407 U.S. 345 (1972); Coolidge v. New Hampshire, 403 U.S. 443, 449-53 (1971); Albrecht v. United States, 273 U.S. 1, 5 (1927).

12. *Gerstein*, 420 U.S. at 126. It did not, however, require that the determination be made in an adversary context. Rather, the Court indicated that the fourth amendment protection could be provided in a variety of ways.

> There is no single preferred pretrial procedure, and the nature of the probable cause determination usually will be shaped to accord with a State's pretrial procedure viewed as a whole. While we limit our holding to the precise requirement of the Fourth Amendment, we recognize the desirability of flexibility and experimentation by the States. It may be found desirable, for example, to make the probable cause determination at the suspect's first appearance before a judicial officer,. . . or the determination may be incorporated into the procedure for setting bail or fixing other conditions of pretrial release. In some States, existing procedures may satisfy the requirement of the Fourth Amendment. Others may require only minor adjustment, such as acceleration of existing preliminary hearings. . . . Whatever procedure a State may adopt, it must pro-

basis for requiring a prompt judicial determination of probable cause, federal law has long required that arrested persons be brought before a magistrate without unnecessary delay.[13] This requirement has not unduly interfered with the processing of criminal cases in the federal courts.

The *Gerstein* requirement of prompt judicial determinations of probable cause can easily be accommodated under existing procedures. Indiana law allows police to make warrantless arrests, but the legislature, similar to many other states,[14] has also mandated early judicial determinations of probable cause. One statute requires that a person arrested without a warrant be brought before a court within twenty-four hours in most situations.[15] Other provisions, not quite as

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vide a fair and reliable determination of probable cause as a condition for any significant pretrial constraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest.

Id. at 123-25.

13. In McNabb v. United States, 318 U.S. 332 (1943), and Mallory v. United States, 354 U.S. 449 (1957), the Supreme Court, in the exercise of its judicial supervision of the federal criminal justice system, prohibited the use of evidence obtained during lengthy delays between the arrest of suspects and their initial appearance before a magistrate. The decisions were based on Rule 5(a) of the Federal Rules of Criminal Procedure which provides:

> An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate or, in the event that a federal magistrate is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041 [(1982)].

14. At least forty-one states and territories have statutes requiring that arrested persons be promptly brought before a magistrate. *See* MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE 256-57 app. I (Tent. Draft No. 6, 1974). These statutes typically provide that the appearance shall be "immediately," "without unnecessary delay," "with reasonable promptness" or within a set time period. *Id.* Both these statutes and the constitutional holding in *Gerstein* reflect long-standing practice.

> At common law it was customary, if not obligatory, for an arrested person to be brought before a justice of the peace shortly after arrest. 2 M. Hale, Pleas of the Crown 77, 81, 95, 121 (1736); 2 W. Hawkins, Pleas of the Crown 116-17 (4th ed. 1762). *See also* Kurtz v. Moffitt, 115 U.S. 487, 498-499 (1885). The justice of the peace would "examine" the prisoner and the witnesses to determine whether there was reason to believe the prisoner had committed a crime. . . . This practice furnished the model for criminal procedure in America immediately following the adoption of the Fourth Amendment,. . . and there are indications that the Framers of the Bill of Rights regarded it as a model for a "reasonable" seizure. *See* Draper v. United States, 358 U.S. at 317-320 (Douglas, J., dissenting).

Gerstein, 420 U.S. at 114-16 (footnotes omitted).

15. IND. CODE ANN. § 36-8-3-11 (Burns 1981) provides:

> Whenever an arrest has been made by a police officer, the officer making the arrest shall bring the person arrested before the court having jurisdiction of the offense, to be dealt with according to law. If the arrest is made during the

specific, also require an early appearance before a judicial officer.[16] These provisions illustrate a legislative intent to insure that all warrantless arrests be reviewed promptly by a judicial officer. If the judicial officer finds probable cause for the arrest, then detention or conditioned release is appropriate. If probable cause is not found, immediate release is mandatory.

In Indiana, moreover, the purpose of the initial appearance before a judicial officer is not limited to a probable cause determination. The Indiana Supreme Court has articulated four purposes of this appearance:

> (1) Advise the arrestee of the charges against him; (2) Advise the arrestee of his constitutional rights; (3) Provide arrestee with an attorney if arrestee was without funds to hire one; (4) Determine whether there is sufficient evidence that the crime charged has been committed and the accused committed it.[17]

Thus, the prompt appearance required by *Gerstein* can easily be accommodated within the statutory scheme as interpreted by the Indiana Supreme Court.

Against this background, it is instructive to examine practices uncovered in several Indiana counties. While it is not suggested that the abuses found in these counties exist throughout the nation, they may be far too representative.[18] At a minimum, they demonstrate

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> hours when court is not in session, or if the judge is not holding court, the person shall be detained in jail until there is an opportunity for a hearing at the earliest practicable time or until he is released on bail. But a person may not be detained longer than twenty-four (24) hours except when Sunday intervenes, in which case a person may not be detained longer than forty-eight (48) hours.

In Grooms v. Fervida, 396 N.E.2d. 405, 411 (Ind. 1979), it was held that this section, formerly IND. CODE § 18-1-11-8 (1978), applies only to city and town police, and not county police.

16. *See generally*, IND. CODE ANN. § 35-33-7-1-7 (Burns Supp. 1983).

17. Nacoff v. State, 256 Ind. 97,102, 267 N.E.2d 165, 168 (1971). More recently, in Williams v. State, 264 Ind. 664, 348 N.E.2d. 623 (1976), the Indiana Supreme Court cited *Nacoff* in stating that "[d]etention beyond a reasonable period necessary to bring a suspect before a magistrate is illegal,"*Id.* at 671,348 N.E.2d at 629, and *Gerstein* in recognizing the importance of "protecting citizens from illegal procedures which insulate arrested persons from judicial safeguards."

18. The statistics compiled through discovery in the two cases discussed below, *infra* text accompanying notes 20-28, are unique in that they represent some of the few instances in which these abuses have been documented with such detail. Police departments and court personnel do not keep records of illegal arrests and delays in presenting arrestees to the court. Despite the lack of hard statistics, observers have long suspected that these illegal practices are common. *See, e.g.*, Foote, *Safeguards in the Law of Arrest*, 42 NW. U. L. REV. 16, 20-27 (1952); LAFAVE, ARREST 437-82 (1965). A generation ago unconstitutional arrests were estimated to number several million per year. Hall, *Police and Law in a Democratic Society*, 28 IND. L.J. 133, 152-54 (1953).

the need for law enforcement officials in all communities to scrutinize closely their practices.

One of the most serious abuses by law enforcement officials[19] was found in Lake County, Indiana, and it led to the far-reaching opinion of Judge Sharp in *Dommer v. Hatcher*.[20] The Gary, Indiana police department had developed a practice of jailing persons on "suspicion" and holding them while investigations were conducted to establish probable cause. Numerous persons were jailed under this practice—often for extended periods—*before* they were charged with a specific crime. As a result, neither a determination of probable cause by a judicial officer nor the opportunity for release through bail was available. The *Dommer* case challenged both the holding on "suspicion" and the delay in initial court appearance.[21] Because anyone with access to counsel would quickly be freed through a habeas corpus petition or the threat of a petition, it was not surprising that most of the persons detained in accordance with this practice were indigent and without legal counsel.

Referring to this "extensive abuse of plaintiffs' rights," the district court in *Dommer* observed:

> [I]n the one-year period from March, 1973, through March, 1974, defendants have admitted holding thirty-one (31) individuals, twelve (12) of whom were never charged, but were held in jail an average of. . . eleven and four tenth (11.4) days before being released. The remaining nineteen (19) individuals were held an average of. . . [8.1] days before being charged with an offense. Defendants have also admitted that during the four month period from May, 1974, through August 26, 1974, thirty-seven (37) individuals were held, fifteen (15) of which were never charged, but were incarcerated an average of six and eight tenth (6.8) days

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19. Rather than attempt to allocate blame between the police, prosecutors and judges, we will simply include all of them as law enforcement officials with some responsibility to guard against the abuses discussed here.

20. 427 F Supp. 1040 (N.D. Ind. 1975), *rev'd in part sub. nom.*, Dommer v. Crawford, 653 F.2d. 289 (7th Cir. 1981). The Seventh Circuit reversed the lower court only insofar as the relief included the prosecutor who had not been in office when the facts arose. Otherwise, the relief was affirmed.

21. There are two possible points of delay between arrest and initial court appearance: one between the arrest and filing of a criminal charge and the other between the filing of a criminal charge and the actual court appearance. Extensive delay at either of these points is contrary to both Indiana statutes and the United States Constitution. Wherever the delay and whatever the cause, it results in the indigent accused being confined in what is often a less-than-decent facility, isolated from the detached, impartial officer ultimately responsible for the fairness of the system, the judge. This situation exists despite the fact that the accused is presumed to be innocent at this point.

> before being released. The remaining twenty-four (24) were held an average of five (5) days before being charged.[22]

While this information is alarming, the court's opinion understated the full breadth of the problem. Discovery obtained through warrant records and daily jail logs indicates that during February, 1974 at least 158 of 370 inmates (43%) were held for three days or longer without being charged. The records also reveal that February was fairly typical. A sampling of 106 cases of persons jailed for more than three days between March, 1973 and August, 1974 demonstrates that people were being held up to twenty-five days without charge and that incarceration from four to ten days was not at all uncommon.[23]

A greater abuse of the police power can hardly be imagined, and it is tragic that the practice was allowed to continue as long as it did. While the system provided a prompt remedy for those with counsel (who could quickly file a writ of habeas corpus), this was not feasible for indigents without counsel. No one knows how many persons lost jobs or suffered other serious consequences as a result of the illegal detention. Also unknown is the number of persons who were eventually released without being charged, or, if charged, were

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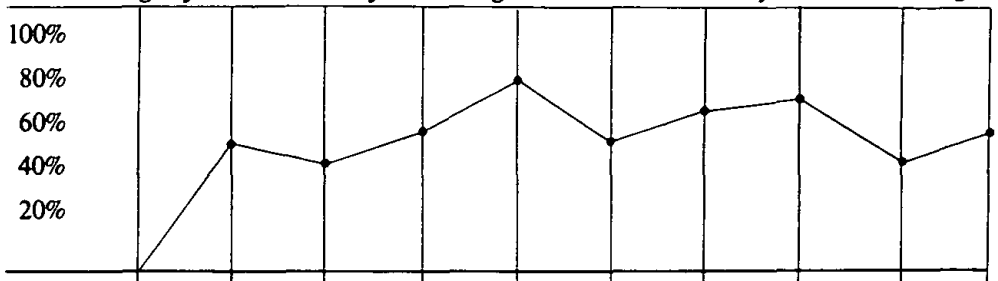
22. 427 F. Supp. at 1041-42.

23. *See generally*, Requests for Admissions filed in *Dommer* on Apr. 17, 1974, and Sept. 26, 1974, and response filed Oct. 24, 1974. Some of this can be graphically illustrated:

A. *Percentage of Inmates Held for Investigation More than 3 Days Without Charges.*



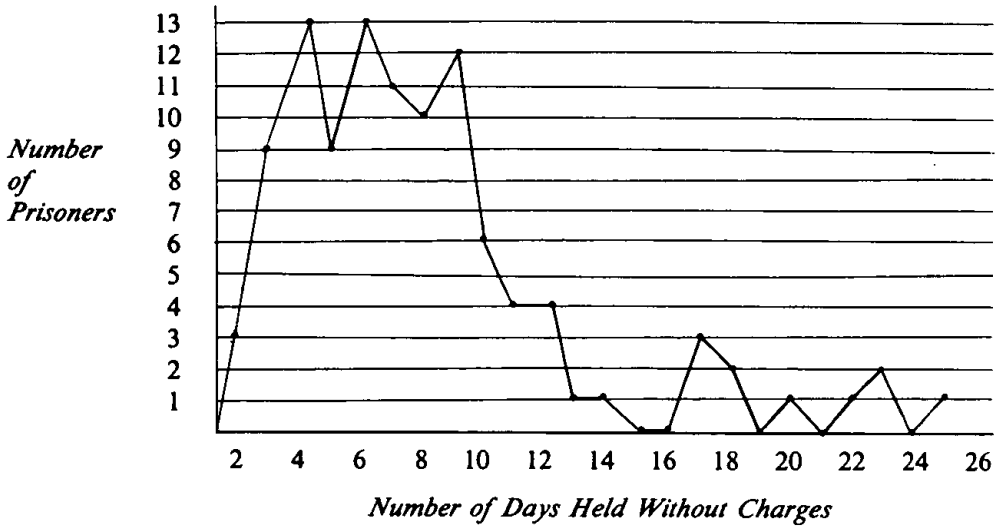
Date	Apr. 1 1973	May 1 1973	June 1 1973	July 1 1973	Aug. 1 1973	Sept. 1 1973	Oct. 1 1973	Nov. 1 1973	Jan. 1 1974
Total No. of Inmates	34	39	54	34	33	32	39	52	37
	(53%)	(41%)	(54%)	(76%)	(42%)	(62%)	(67%)	(38%)	(54%)

eventually acquitted or had the charges dismissed.

Another type of abuse, perhaps more prevalent throughout the state,[24] was found in Delaware County, Indiana, where arrestees, though promptly charged, were not promptly brought before a judicial officer. The plaintiff in *Fox v. Jordan*[25] was arrested on September 27, 1978 and not brought before a court for his arraignment until more than seven days had passed. Because of his indigency, he was able neither to post the set bail nor obtain counsel to seek his release from jail. When Fox was finally brought before a judicial officer on October 5, 1978, he pleaded not guilty and was released on his own recognizance. In the interim, Fox lost his job.[26]

Discovery in the *Fox* case reveals that during the months of August to October, 1978, approximately seventy-five percent of the persons arrested and held in the Delaware County Jail were not brought before a judicial officer within twenty-four hours of their arrests, contrary to Indiana law. Over half of the persons arrested waited more than two days for their initial court appearance. Several

B. *Number of Days Held Without Charges—106 Inmates Jailed Between March, 1973, and August, 1974*:



It should be noted that juveniles and persons with mental health problems were included among those being held.

24. American University Criminal Courts Technical Assistance Project, *The Structure and Funding for Criminal Defense of Indigents in Indiana* 24 (1974). This survey noted that in some Indiana counties the initial appearance in court may be delayed a week. Often this results from the practice of scheduling only one arraignment day per week.

25. No. IP 78-643-C (S.D. Ind., filed Oct. 5, 1978).

26. Plaintiff's Motion for Summary Judgment, Attachment A, *Fox* (dated June 14,1979).

waited a full week.[27] Most of these persons were victims of a practice which limited arraignments to one day per week in non-traffic cases[28] and therefore the length of one's detention depended solely on the day of arrest. Again, the role of counsel is crucial at this stage because counsel could likely get an appearance before a judge, at least for purposes of considering a bail reduction. Absent counsel, the detained person must simply wait until the next day for a court appearance.

One would like to think that the practices documented in *Dommer* and *Fox* are isolated. However, there is no reason to assume that those situations are atypical and have been corrected. An even more recent example was found in Kokomo, Howard County,Indiana. The practice there combined the worst aspects of the practices in Lake and Delaware Counties. When an arrest was made without a warrant, the arrestee would wait in jail up to several days while the arresting officer prepared a written report for the prosecutor. After the prosecutor received the report there would be another delay until a charge was filed and the court issued a warrant indicating the amount of bail.

Another day or two often passed before the warrant was served on the detained arrestee. If the arrestee could post the bond at that time, he would be released and given an arraignment date. But if the arrestee could not post bond, there would be an additional delay until the first court appearance because there was no formal procedure for scheduling arraignment of incarcerated persons. When finally brought before the court for arraignment—the arrestee's *first* court appearance—counsel would normally be appointed and the arraign-

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27. *Id.* Attachments B-1 and B-2. This data can be graphically illustrated also:

Number of Persons Held in Delaware County Jail for Various Periods of Time — August - October,

Number of Prisoners	Hours Held
46	0-24
34	24-48
37	48-72
11	72-96
29	96-102
12	120-144
10	144-168
3	168-192
2	192-216
184	Total

28. Deposition of defendant prosecutor, Jordan, at 36. This is similar to, but worse than, the practice noted by the Indiana Court of Appeals in Grooms v. Fervida, 396 N.E.2d at 408.

ment would be postponed further.[29]

A good example of the impact of the Howard County practices is found in the case of an individual arrested for shoplifting in late November, 1980. The person was incarcerated in the county jail for fifteen days until charges were filed and did not appear in court until the twenty-third day after his arrest, at which time he was tried and acquitted. It is not known how much longer the delay would have been had the person's sister not appeared at the courthouse on the fifteenth day after his arrest to inquire about his status. At that time she was referred to an attorney who was in court on other matters and he was able to intervene and have the case set for prompt trial.[30]

The fact that these situations have continued to exist demonstrates the urgent need for law enforcement officials and courts to examine closely the procedures between arrest and initial court appearance, at least when the arrest is made without a warrant. Even if officials are not particularly concerned about the constitutional rights of the persons arrested, such a review should be conducted because of the expense of pre-trial detention[31] and because illegal detention can subject the responsible officials to damage actions.[32] The evils of delays in appearance before a judicial officer are particularly acute for those incarcerated during the interim and, not surprisingly, there is reason to suggest that the illegal practices described here are concentrated in the poor and minority communities.[33] With few exceptions, persons incarcerated prior to the initial court appearance are those without the resources necessary to obtain their freedom.

III. PRE-TRIAL DETENTION—THE INEQUITIES OF A SYSTEM WHICH CONDITIONS RELEASE ALMOST SOLEY ON ABILITY TO PAY

Intertwined with the aspect of the system described above and

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29. Interview with Dan J. May, Kokomo attorney(December 1980). Mr. May has practiced criminal law in Howard County for several years.

30. *Id.* The practice in Howard County was apparently corrected in January, 1981. An article in a local newspaper reported that as of January 19, 1981 a judge would be available each morning to review arrests made without a warrant, determine probable cause, set bail, and advise the persons arrested of their rights. Kokomo Tribune, Jan. 18, 1981, at 1.

31. *See infra* note 65 and accompanying text.

32. *See, e.g.*, Grooms v. Fervida, 396 N.E.2d 405, 411 (Ind. 1979).

33. *See, e.g.*, PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE: TASK FORCE REPORT — THE POLICE 178-89 (1967); Note, *Philadelphia Police Practice and the Law of Arrest*, 100 U. PA. L. REV. 1182 (1952).

extending through trial is the impact of the money-based bail system. Most of the human and legal concerns expressed above disappear if the accused is released promptly after arrest. Such early release is available, almost without exception, to those who have the financial resources to purchase their freedom. Release on some form of bail presumes, of course, that a criminal charge has been at least tentatively identified.[34] Since persons charged with criminal offenses are presumed innocent until the state proves otherwise, the state's sole interest in detaining them prior to trial is to assure that they will appear in court when required.[35] This means that persons arrested should be released pending trial unless there is some reason to believe they will not make court appearances.

The historical and, in many states, the current means of preserving the presumption of innocence while also serving the state's interest in assuring court appearances has been to require the posting of monetary bail.[36] This is normally done by executing a bond with an insurance company providing the surety. Generally, a premium of ten percent of the total bail is paid to a surety bondsman who makes a commitment to either produce the accused in court when scheduled or forfeit the total amount of the bail. As this ten percent premium is not returned to the accused, regardless of whether court appearances are made, there is little financial incentive for the defendant to appear.

There is no better example of the inequities of money bail than the situation presented to the federal court in the case of *Mudd v. Busse*.[37] This class action, brought by two individuals incarcerated in the Allen County jail in Fort Wayne, Indiana, sought to reform the bail practices of the Allen Circuit Court which relied almost exclusively on money bail and where the initial amount of bail was based on a master bond schedule. Because the Allen Superior Court had implemented a bail project which provided for release on one's

34. The situation described in *Dommer* was particularly offensive because people were being held on mere suspicion without the identification of a criminal charge. Therefore the opportunity to post bail was not even available until the police investigation was completed and a charge filed.

35. Stack v. Boyle, 342 U.S. 1 (1951); Duran v. Elrod, 542 F.2d 998 (7th Cir. 1976); Hobbs v. Lindsey, 240 Ind. 74, 162 N.E.2d 85 (1959). Preventive detention may frequently be the real, but unarticulated, reason for pre-trial incarceration. *See infra* notes 67, 79 and accompanying text.

36. The right to bail is found in the eighth amendment to the U.S. Constitution and Art. 1, Section 17 of the Indiana Constitution. Indiana law, IND. CODE ANN. § 35-33-8-3(1)(Burns Supp. 1983) expressly provides for the use of a surety.

37. 68 F.R.D. 522 (N.D. Ind. 1975), 437 F. Supp. 505 (N.D. Ind. 1977), *aff'd*, 582 F.2d 1283 (7th Cir. 1978), *cert. denied*, 439 U.S. 1078 (1979).

own recognizance or non-monetary conditions, the availability of pre-trial release in Allen County often depended upon the court selected by the state. Under the local practice, the prosecuting attorney had the unfettered discretion to choose between these two courts. The named plaintiffs in *Mudd* graphically illustrate the inequity and arbitrariness of the system.

Both plaintiffs had been arrested in late November, 1974, on preliminary charges of burglary which were filed in the superior court. After officials of the bail project conducted their normal inquiry, both were released without being required to post any monetary bail. One of them had been similarly released by the project on an earlier charge, and both made their scheduled court appearances. In early December, the prosecutor filed the formal charges for the same burglary against the two plaintiffs in the circuit court which refused to participate in the bail project. Bond was set at $5,000, the amount prescribed by the master bond schedule.[38] As a result, there was no individual determination as to whether a $5,000 bond, or any bond, was necessary to assure their appearance in court. Their prior history of making court appearances was not considered. Because of their indigency, neither plaintiff was able to obtain his release from jail at that time.[39]

This led to the initiation of the federal court action in which the plaintiffs argued that the Constitution, because of the presumption of innocence and the deprivation of their fundamental right to freedom, required the courts to use the least restrictive means available to assure that the accused will appear in court as scheduled. In any case, the least restrictive condition would obviously be an outright release based on the accused's promise to appear in court. Therefore, it was argued that other non-monetary conditions could be imposed only if the state demonstrated that an outright release would not be sufficient to assure appearance. Examples of such conditions would include reporting to an officer of the court, restrictions on leaving the county, maintenance of employment, and deposit of a refundable ten percent of the bond with the court.[40] Only in extreme cases might money bail be justified.[41]

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38. 437 F. Supp. at 508.

39. *See generally*, Pre-Trial Order, *Mudd* (filed April 4, 1977).

40. *See* the Federal Bail Reform Act of 1966, 18 U.S.C. § 3146(a)(1982), and IND. COD ANN. § 35-33-8-3 (Burns Supp. 1983) for an indication of other non-monetary conditions available.

41. The *Mudd* case was never decided on the merits because, after certifying a class, the federal court determined that principles of federalism and comity prevented it

As part of the preparation of the plaintiff's case in *Mudd*, an extensive study[42] was made of the bail system as it operated in Allen County to determine how it affected indigent persons accused of a crime. The study examined 411 closed criminal felony cases filed in the circuit court during 1974 and 1975. Its primary purpose was to determine whether pre-trial detention affected the outcome in criminal cases. Most significantly, the study confirmed what was already generally believed: that pre-trial detention adversely affected the outcome of a criminal case. Those detained prior to trial were more likely to be convicted and much more likely to be sentenced to prison than those released prior to trial.[43]

The evidence showed that persons charged in the circuit court and detained prior to trial were convicted fifteen percent more often and sentenced to prison sixty percent more often than those who were released on bail immediately upon arrest.[44] In other words, seven out of ten persons detained prior to trial received a prison term compared to only one out of ten persons released upon arrest. This unfavorable relationship between pre-trial incarceration and ultimate outcome was tested by examining other variables that might explain the observed disparity. These included the type of crime charged, prior criminal record of the accused, type of counsel, race, and amount of final bail imposed.[45] None of the factors, considered individually and collectively, explained the disparity in outcome between those detained and those released prior to trial. Consistently,

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from becoming involved in the issue. 437 F. Supp. at 510-13. This determination to avoid the merits was made, however, only after the conclusion of discovery and the matter had been submitted to the court for a ruling on the merits of cross-motions for summary judgment.

42. *See infra* Appendix A.

43. *See, e.g.*, Ares, Rankin & Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pretrial Parole*, 38 N.Y.U.L. REV. 67 (1963); Wald, *Pretrial Dentention and Ultimate Freedom: A Statistical Study*, 39 N.Y.U.L. REV. 631, 633 (1964); Wilson, *New Approaches to Pretrial Detention*, 39 KAN. BAR ASS'N 13, 15 (1970); Note, *An Answer to the Problem of Bail: A Proposal in Need of Empirical Confirmation*, 9 COLUM. J.L. & SOC. PROB. 394, 402-03 (1973); Note, *A Study of the Administration of Bail in New York City*, 106 U. PA. L. REV. 693, 726-27 (1958); Note, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031, 1051-54 (1954); Ervin, *Preventive Detention-A Step Backward for Criminal Justice, 6* HARV. C.R.-C.L. L. REV. 291, 347 (1971).

44. *See infra* Appendix A at 309-10.

45. This process, known as elaboration, tests an observed relationship between two primary variables by examining other variables that might be responsible for the relationship. Thus, if the relationship between the primary variables disappears when the third variable is held constant, it is said to "explain" the relationship. However, if the relationship between the primary variables still holds when the third variable is introduced, then the new variable does not explain the relationship. If no variable can be

detained arrestee's were convicted more often and sentenced much more severely than those who were released. This strongly suggests that there is a causal relationship between pre-trial detention and outcome in criminal cases.[46]

The causal relationship found in the study is not unique to Allen County, Indiana. In fact it is one of the defects listed by Professor Zeisel in his criticism of money bail.

> The American bail system has been under serious criticism on a variety of grounds. It has been charged with three specific failures, all of which discriminate against the indigent defendant

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found to explain the relationship between the primary variables, it can be concluded that the relationship is causal.

In this study, the elaboration analysis examines the apparent correlation between pretrial status and outcome (the "independent" and "dependent" variables respectively) by investigating other factors, such as prior criminal record, type of counsel, etc. (the "test" variables), that might be responsible for this relationship. First, the relation between a particular factor (*e.g.*, type of crime) and pretrial status is examined; next, the relationship between that factor and outcome is examined. According to the logic of elaboration, if there is no significant correlation between the factor examined and pretrial status and/or outcome (*e.g.*, if type of crime does not make detention or conviction more likely), then that factor cannot explain the relationship between pretrial status and outcome. If, however, there is a positive correlation between the factor and both pretrial status and outcome (*e.g.*, if type of crime makes detention and conviction more likely), that factor may explain the relationship.

To test whether this factor (type of crime) or any of the other test variables account for the relationship between pretrial status and outcome, that factor must be held constant and the relationship between status and outcome must be reexamined. If the disparity in outcome between the detained and the released no longer exists when this is done (*e.g.*, if persons accused of robbery have the same conviction rate whether they are detained or released), then that factor explains the relationship, and pretrial status is shown not to have had a causal impact on outcome. On the other hand, if the disparity persists when the factor under examination is held constant, then the factor does not explain the relationship. This process is repeated with all relevant factors and, if none is found which explains the relationship between pretrial status and outcome, then the relationship is causal. This study examines such factors, one by one, and also in combination. *See infra* Appendix A at 310-22.

46. The authors realize that the statistical methods utilized here might have been supplemented with other methods, *e.g.*, a multivariate analysis. It is not our goal, however, to prove to a legal certainty through statistics that there are defects in the system. Rather, we are attempting to call attention to certain aspects of the system which need closer scrutiny at the official level. The evidence does demand a serious consideration of certain reforms.

The present study and its results are similar to the one conducted in New York City about the effects of bail. Dr. Eric Single was responsible for both studies. *See* Single, *The Unconstitutional Administration of Bail: Bellamy v. Judges of New York City*, 8 CRIM. L. BULL. 459 (1972). A methodological critique of that study is contained in Hindelang, *On the Methodological Rigor of the Bellamy Memorandum*, 8 CRIM. L. BULL. 507 (1972). After noting a number of statistical shortcomings, the critique concludes that the evidence is "persuasive that making bail is a factor important to outcome." *Id.* at 513.

> who cannot make bail: (1) that it keeps in jail defendants who would have returned to court if they had been released, some of whom are not even convicted; (2) that it releases defendants who should not have been released; (3) that the very fact of pre-trial detention increases the likelihood that defendants will be convicted and, if convicted, will receive a custody sentence.[47]

Professor Zeisel termed the relationship between pre-trial incarceration and conviction and sentencing, "the most serious congenital defect of the system."[48] Another comprehensive study found that "the convicted person who had been held in lieu of bail had a 25 percent greater chance of getting a prison sentence than the convicted person who made bail."[49]

The correlation between pre-trial incarceration and increased conviction and sentencing rates is not surprising at all. As Professor Zeisel points out:

> If a defendant at the time of sentencing has spent some time in jail, the court will be tempted to make the time served "legal" by imposing a jail sentence rather than allowing a "walk" sentence that may raise doubts about the merits of the earlier imposed pre-trial detention.[50]

There are other obvious reasons for this correlation. Not only is the victim of pre-trial detention of little value to his counsel in the preparation of the defense, the pre-trial detainee is also subject to constant pressure to plead guilty. After several months of pre-trial detention, even innocent persons enter a plea of guilty rather than remain in jail indefinitely awaiting trial.[51] In addition, the person incarcerated prior to trial and sentencing has not had an opportunity to develop a favorable record, maintenance of employment and fam-

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47. Zeisel, *Bail Revisited*, AM. B. FOUND.J. 769, 769 (1979).

48. *Id.* at 779.

49. HERMAN, SINGLE, BOSTON, COUNSEL FOR THE POOR 62 (1977).

50. Zeisel, *supra* note 47, at 781.

51. Zeisel, *supra* note 47, at 785-87; Barkai, *Accuracy Inquiries for All Felony and Misdemeanor Pleas: Voluntary Pleas But Innocent Defendants*? 126 PA. L. REV. 88,97, (1977); Finkelstein, *A Statistical Analysis of Guilty Plea Practices in the Federal Courts,* 89 HARV. L. REV. 293, 307-12 (1975); White, *A Proposal for Reform of the Plea Bargaining Process,* 119 U. PA. L. REV. 439, 443-45 (1971). As to the impact of this factor in attacking a guilty plea, *compare* United States v. Barrett, 514 F.2d 1241, 1242 (5th Cir. 1975)(jail conditions prior to plea constituting cruel and unusual punishment did not authorize vacating sentence and, in view of the artful pleadings, contention of coercion could not be heard), *with* Pettyjohn v. United States, 419 F.2d 651, 662 (D.C. Cir. 1969) (if the court is to uphold bargained pleas, it must also delineate the power and duty of the trial court to conduct a further inquiry), *cert. denied*, 397 U.S. 1058 (1970). Conditions in jails certainly provide some pressure to plea bargain. *See supra* note 2.

ily ties for example, which would argue strongly in favor of probation rather than imprisonment.[52]

This relationship between pre-trial status and case outcome demands that the system be reformed absent some compelling state interest in maintaining the system as operated in the circuit court.[53] The need for reform is further supported by the failure of the money bail system to serve its purpose, assuring court appearances. A comparison of the Allen Circuit Court with the superior court, which has operated a bail services program since 1972, confirms that a less restrictive means is available which better serves the state's interest in several respects. Through the bail services program, a court-appointed commissioner interviews persons charged with a crime within a few hours after their arrests to determine whether they should be released on their own recognizance or conditions other than monetary or property bond. The services of this project were also available to the circuit court, but the judge chose not to participate.[54] Allen County, therefore, provided an ideal situation for comparison of the effectiveness of the two types of release in promoting the state's sole interest in the pre-trial release process, ensuring an accused's presence in court for all scheduled appearances.

To make this comparison, a second study was undertaken as part of the *Mudd* case. It is based on 297 cases filed in the superior court and 203 cases filed in the circuit court, representing all the felony cases filed in the superior and circuit courts during 1976. The data revealed that eighty-two percent of the defendants in the superior court were released at some point prior to final disposition compared to only sixty-six percent of the defendants in the circuit

52. Under IND. CODE ANN. § 35-50-1A-10 (Burns 1979), the pre-sentence investigation includes gathering information relating to employment history and family situation. *Id.* Clearly, a person who is employed and able to support any dependents at the time of sentencing can make a more persuasive argument for probation. Why should the court disrupt a stable situation by imprisonment? STANDARDS FOR CRIMINAL JUSTICE, The Defense Function, commentary to Standards 4-3.6 and 10-1.1 (1980). While information on employment and family was not available through the sources used in *Mudd* study (Appendix A) and therefore not included with the other variables examined, disruption of employment and family ties is a necessary consequence of pretrial detention. This helps explain why detention adversely affects sentencing.

53. It is indeed difficult to imagine any compelling state interest, particularly in light of the fact that there seems to be an attractive alternative to money bail. *See infra* notes 55-60 and accompanying text.

54. *See generally*, Pre-trial Order, *Mudd* (filed April 4, 1977).

court.[55] This difference is very significant in light of the high costs of detention, both to the detainees and their families and local taxpayers. There is also an important difference in the way defendants in the two courts were released. The superior court released forty-seven percent of the persons through its bail services program. In contrast, the circuit court relied primarily on surety bondsmen; seventy-nine percent of those released purchased a bail bond.[56]

The study also showed that the bail services program not only resulted in a greater percentage of arrestees being released, it was far more successful in achieving the state's sole interest, appearance in court. In the superior court, defendants who were released under the bail services project were more than three times as likely to appear at all court hearings as were those released through bondsmen.[57] Moreover, the ten defendants released by the bail project who missed at least one court appearance missed a total of only fourteen court appearances, whereas the thirty-four defendants released through bondsmen missed a total of sixty-one court appearances.[58]

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55. *Pretrial Status by Court*

	Circuit	Superior
Released	66	82
Never Released	26	12
N.A.*	8	6
	100%	100%
	(203)	(297)

*" N.A." means nonascertainable. These 14 cases are excluded from subsequent analysis.

56. *Type of Release by Court*

	Circuit	Superior
Bail Service	—	47
Bondsmen	79*	45
Cash or Property Posted	11	2
Court Releases (ROR)	3	6
Jailer's Release	4	—
N.S.	2	—
	99%	100%
	(134)	(244)

* Ninety-two percent (92%) of the 106 circuit court defendants released by bondsmen were released by only two bondsmen.

57. *Appearance Rate by Type of Release in Superior Court*

	Bail Project	Bondsmen
Appeared	91	69
Not Appeared	9	31
	100%	100%
	(114)	(111)

58. Affidavit of Biesiada at 5-10, Brief of Appellants, A-78 to -80 app., *Mudd*.

Opponents of bail reform might respond to such statistics by stating that bondsmen get only the poor risks in the superior court because the bail project gets the first opportunity to select the better risks. But during the period studied, the bail services program in Allen County released seventy-eight percent of all interviewed persons charged with a felony.[59] More significantly, similar nonappearance rates were found in the circuit court where, because the judge did not participate in the bail project, bondsmen had the opportunity to release both the good and bad risks. In fact, the nonappearance rates of surety releases between the circuit and superior courts were almost identical: thirty percent in circuit court and thirty-one percent in superior court.[60] Moreover, the thirty-two defendants in the circuit court who missed at least one court appearance missed a total of sixty-three court hearings—a figure again strikingly similar to that (sixty-one) obtained in the superior court.

The significantly higher nonappearance rate in cases which defendants were released through surety bondsmen is not surprising. Because bondsmen keep the ten percent bond premium, whether or not court appearances are made, defendants have no financial incentive to appear in court. Therefore, the money bail system not only deprives persons of basic constitutional rights and imposes a disproportionate impact upon indigents, it is not as effective as lesser restrictive alternatives in promoting the only legitimate state interest — assuring court appearances.

What was found in Allen County, Indiana, is certainly not unique to that community; it is probably typical of the bail system in Indiana and the nation as a whole. Testimony at an early hearing in the *Mudd* case suggested that there were only a few bail projects operating in Indiana.[61] On the national level, one report identified 115 bail projects operating in the country as of mid-1975.[62] With some variations, the general approach of such projects is to make an

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59. Affidavit of James R. Seely at 11(dated May 9, 1977); Plaintiff's Motion for Summary Judgment app., *Mudd*(filed May 16, 1977). Mr. Seely is the bail commissioner of the Allen Superior Court.

60. *Appearance Rate of Surety Releases by Court*

	Circuit	Superior
Appeared	70	69
Not Appeared	30	31
	100%	100%
	(106)	(111)

61. *Mudd*, 68 F.R.D. at 528.

62. U.S. DEP'T OF JUSTICE, NATIONAL EVALUATION PROGRAM PHASE I SUMMARY REPORT: PRETRIAL RELEASE PROGRAMS 7 (1977). The projects identified were de-

individual determination, promptly after arrest, of the most relevant factors tending to indicate whether or not the accused will make scheduled court appearances. These factors typically include length of residence in the community, employment status, family ties, prior criminal record, character references, nature of the offense charged and, if not the first offense, prior appearance record. The success of these projects is generally accepted and they result in the release of many accused persons prior to trial without posting any type of monetary or property bond.[63] This method both saves the taxpayers the expense of unnecessary detention and protects the state's interest.

Despite the well-documented success of these bail reform projects and the continuous criticism of money bail,[64] many states like Indiana continue to rely almost exclusively on the money bail system. This is true even though, at an average cost of $20.00 per day, it costs taxpayers nearly $20,000.00 per day to "house" the persons being held in Indiana jails awaiting trial.[65] The most disturbing element in most cases is that there has never been an individualized judicial inquiry into the need for monetary bail. In most Indiana

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scribed as "pretrial release programs that provided an alternative to the traditional money bail system."

63. *See generally*, W. THOMAS, BAIL REFORM IN AMERICA (1976); Goldkamp, *Philadelphia Revisited: An Examination of Bail and Detention Two Decades After Foote* 26 CRIME AND DELINQUENCY 179 (April 1980); Report of the Director of the Administrative Office of the United States Courts on the Operation of Title II of the Speedy Trial Act of 1974 (Sept. 30, 1978).

64. Courts and commentators alike have written of its evils and inequities. Commenting on the roles of the commercial bondsmen and the court, Judge J. Skelly Wright has observed:

> They [commercial bondsmen] determine for whom they will act as surety—who in their judgment is a good risk. The bad risks, in the bondsmen's judgment, and the ones who are unable to pay the bondsmen's fee, remain in jail. The court and commissioner are relegated the relatively unimportant choice of fixing the amount of bail.

Pannel v. United States, 320 F.2d 698, 699 (D.C. Cir. 1963); Comment, *Constitutional Law: Equal Protection for Indigents in the Bail System*, 17 WASHBURN L.J. 648 (1978); Note, *Bail in the United States: A System in Need of Reform*, 20 HASTINGS L.J. 380 (1968); *The Bail System: Is It Acceptable?*, 29 OHIO ST.L.J. 1005 (1968); Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U.L. REV. 641 (1964).

65. In Indiana, as of February 1978, there were approximately 2,453 persons being held in local jails. U.S. DEPT. OF JUSTICE, LEAA, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1980, Table 6.8, at 482. At that time, on the national level there were 158,394 persons held in local jails, *id.*, and roughly 40% of them were awaiting trial. *Id.*, Table 6.10, at 483. Assuming the same percentage in Indiana, the daily population of persons awaiting trial in Indiana jails is at least 980. The cost per day per inmate averages around $20.00. This figure is based on the average charge to the federal government for housing federal pre-trial detainees in local Indiana jails. Telephone conversation with the office of the U.S. Marshall for the Northern District of Indiana(Aug. 1981).

counties, bail is set pursuant to a schedule which takes into account only the crime charged, not the individual accused.[66]

If there are so many defects in the money bail system, both in terms of costs to taxpayers and the accused and in promoting the state's interest in assuring appearance in court, the obvious question is why has it been allowed to survive? There are several possible explanations, but two seem most compelling: the insurance industry's self-interest in maintaining the status quo and law enforcement's inclination to use pre-trial detention as a preventive measure.[67]

The powerful insurance industry obviously has a vested interest in maintaining the money bail system. Because the premium paid for a bail bond is never returned, even after all of the appearances are made as scheduled, bail bonding is very profitable. In Allen County, Indiana, for example, during the three-year period of 1974-76, bondsmen wrote bonds totalling $1,243,000 for the 440 circuit court defendants they released, of which they received ten percent or $124,300.[68] As noted, in 1976 alone, thirty-two of their 106 clients missed a total of sixty-three court appearances. Yet during the period 1974-76, only seven judgments were entered against bondsmen in the total amount of $11,000. Bondsmen thus received a gross in-

66. For example, the study of the Allen Circuit Court revealed that bond was set pursuant to the master schedule in 77% of the cases. *See infra* Appendix A at 308. Under Indiana law each court must adopt a bond schedule. IND. CODE ANN. § 35-33-8-4(a)(Burns Supp. 1983).

67. The merits and legality of preventive detention are currently the subject of much debate. An attorney general task force recently came out in favor of preventive detention. N.Y. Times, Aug. 17, 1981, at A1, col. 5. *See also* Kennedy, *A New Approach to Bail Release: The Proposed Federal Criminal Code and Bail Reform*, 48 FORDHAM L. REV. 423 (1980); Duke, *Bail Reform for the Eighties: A Reply to Senator Kennedy*, 49 FORDHAM L. REV. 40 (1980); Castle, *Trends Restricting the Right to Bail: The Constitutionality of Pretrial Detention in Non-Capital Offenses*, 3 CRIM. JUST. J. 433 (1980); Flemming, Kohfeld & Uhlman, *The Limits of Bail Reform: A Quasi-Experimental Analysis*, 14 L. & SOC'Y REV. 947 (1980); Stevens, *Preventive Detention and Equal Protection of the Law in Texas*, 10 ST. MARY'S L.J. 133 (1978). A recent decision, Hunt v. Roth, 648 F.2d 1148 (8th Cir. 1981), *vacated sub nom.*, Murphy v. Hunt, 455 U.S. 478 (1982), raises questions about the constitutionality of preventive detention. The court declared unconstitutional under the eighth amendment a provision of the Nebraska constitution which denies bail to persons charged with certain sexual offenses. 648 F.2d at 1165. The Supreme Court vacated and remanded with instructions to dismiss based on mootness. 455 U.S. at 484. A New York statute, authorizing pretrial detention of juveniles where there is a serious risk that the accused would commit certain crimes before his return date, was found unconstitutional in Martin v. Strasburg, 689 F.2d 365 (2d Cir. 1982), *prob. juris. noted sub nom.*, Schall v. Martin, 103 S. Ct. 1765 (1983).

68. Two bondsmen wrote $1,072,000 (85%) of this amount. This information was obtained as part of the second study in the *Mudd* case. *See supra* text accompanying notes 55-60.

come of $113,300 ($124,300 minus $11,000) in a three-year period alone.[69]

For this profit, bondsmen are expected to apprehend the defendants and return them to court. Although data regarding their success in this endeavor was not available, it is noteworthy that in 1976 the circuit court issued twenty-three bench warrants for the sixty-three times surety-released defendants failed to appear. Thus, in over one-third of their cases, bondsmen are assisted by law enforcement officials in apprehending fugitives—a job which bondsmen are paid to do themselves.

This point is further demonstrated by some statistics from California:

> Last year [1979] bail bondsmen in California collectively wrote bonds having a face value of approximately $350 million. Ninety percent of these bonds were underwritten by just four insurance or surety companies at little risk and enormous profit. In order to protect their profits, these companies and their bondsman agents, operating through professional lobbyists, annually mount an effective campaign to defeat any bill that would modify, no matter how modestly, the status quo.[70]

Like California, in Indiana there are only a small number of insurance companies licensed to write surety bonds.[71] There is relatively little risk in the business because the experience in Indiana suggests that forfeiture of the bond is rarely ordered.[72]

The intensity of the lobbying efforts by the industry is illustrated by the recent conviction of an Indiana state senator for accepting bribes from a lobbyist for the industry.[73] Indiana is not the only state in which there is evidence of illegal lobbying on behalf of bondsmen. In the past several years, sixty-two court officials in three states, including a Michigan Supreme Court justice, were convicted

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69. This assumes the judgments were collected but the information available did not indicate whether they had in fact been collected. *Id.*

70. Kline, *The Politics of Bail Reform and the Need for Judicial Intervention*, 12 WEST L.A. L. REV. 1, 6 (1980).

71. A list supplied by the Indiana Department of Insurance in 1981 indicates there are only six companies licensed to write surety bonds.

72. For the Allen County experience during 1974-76, *see supra* text accompanying notes 68-69. A telephone conversation with an Indiana Department of Insurance official indicates there is no current statistical data available concerning this.

73. Indianapolis Star, Dec. 19, 1980, at 1, col. 6. State Senator Martin K. Edwards was convicted on several counts of bribery in attempts to influence bail bond legislation. *Id.*

of taking or extorting bribes from bail bondsmen.[74] The Federal Trade Commission has investigated the bail bond industry for rate-fixing and rate-enforcing boycotts.[75] An example of an effective boycott is found in Tennessee where bondsmen protested a reform effort by refusing to write bonds. The reform effort was withdrawn, when, as a result of the boycott, the jail population tripled.[76]

The efforts of bondsmen are not limited to lobbying. The project operated by the superior court was subjected to a court challenge by a bondsman in Allen County.[77] In Kentucky several suits were filed by bondsmen after legislation outlawed commercial bail bonding entirely.[78] The point is simply that the powerful insurance industry is not allowing bail reform without a battle.

A second factor contributing to the maintenance of the bail system is that the prevailing mood in the country is not sympathetic toward persons accused of crime. The presumption of innocence becomes important to most people only when they have first-hand experience with the criminal justice system. The current trend seems in favor of legitimizing the use of bail to keep potentially dangerous persons in jail prior to trial — a practice known as "preventive detention."[79] Judges are obviously not immune from or out of touch with this mood. The failure of the Allen Circuit Court to participate in the bail services project is an excellent example of how firmly the monetary bail system is entrenched.

The need for reform is obvious but it has not progressed rapidly despite efforts by well-respected organizations such as the American Bar Association.[80] Probably the most comprehensive reform is the Federal Bail Reform Act of 1966,[81] which requires that any person charged with an offense, other than one punishable by death,

> *shall*, at his appearance before a judicial officer, *be ordered released pending trial* on his personal recognizance or upon the exe-

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74. DeRhoda, *Whither the Bail Bondsmen?*, NAT'L L.J. Jan. 22, 1979.

75. *Id. See also*, *e.g.*, *In re* Texas Ass'n of Professional Surs. & Ass'n of Professional Surs. of Houston, 95 F.T.C. 300 (1980).

76. DeRhoda, *supra* note 74, at 1.

77. Lee v. Bail Comm'rs, No. C-76-153 (Adams Cir. Ct., dismissed Nov. 30, 1976). The plaintiff in this case is one of the bondsmen referred to *supra* note 68.

78. *See* KY. REV. STAT. § 304.34-010(1)(1981). *See also* Benboe v. Carroll, 625 F.2d 737 (6th Cir. 1980); Johnson Bonding Co. v. Commonwealth of Kentucky, 420 F.Supp. 331 (E.D. Ky. 1976); Stephens v. Bonding Ass'n, 538 S.W.2d 580 (Ky. 1976).

79. *See supra* note 67.

80. *See generally* ABA STANDARDS RELATING TO PRETRIAL RELEASE (Approved Draft 1968).

81. 18 U.S.C. §§ 3146-52 (1982).

> cution of an unsecured appearance bond in an amount specified by the judicial officer, subject to the condition that such person not commit an offense under [certain statutes], *unless* the officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required.[82]

To some extent, this presumption of release absent a showing of a need for conditions has been achieved in California through a recent state supreme court decision.[83] The federal act goes further and requires, when the judicial officer determines something other than personal recognizance is necessary, that the least restrictive means of assuring appearance be used. It requires that the officer "impose the first [of a list of] conditions of release which will reasonably assure the appearance of the person for trial."[84] The judicial officer is further required, in determining which conditions to impose, to take into account certain specified individual circumstances.[85]

In addition to the federal reform, a few states have enacted reform legislation. The Kentucky law imposing an absolute ban on commercial bail bonding has been previously discussed.[86] Oregon, while not banning bail bonding entirely, has established a range of alternatives which have had the effect of eliminating many bail

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82. 18 U.S.C. § 3146(a) (1982) (emphasis added).

83. Van Atta v. Scott, 27 Cal. 3d 424, 613 P.2d 210, 166 Cal. Rptr. 149 (1980).

84. 18 U.S.C. § 3146(a) (1982). The possible conditions are:

> (1) place the person in the custody of a designated person or organization agreeing to supervise him;
>
> (2) place restrictions on the travel, association, or place of abode of the person during the period of release;
>
> (3) require the execution of an appearance bond in a specified amount and the deposit in the registry of the court, in cash or other security as directed, of a sum not to exceed 10 per centum of the amount of the bond, such deposit to be returned upon the performance of the conditions of release;
>
> (4) require the execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof; or
>
> (5) impose any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the person return to custody after specified hours.

Id.

85. 18 U.S.C. § 3146(b) (1982).

> [T]he nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.

Id. These are similar to factors considered by projects which release on the inmate's own recognizance (ROR).

86. *See supra* note 78 and accompanying text.

bondsmen. The Oregon law provides that the judge shall impose the least onerous condition necessary to assure a defendant's appearance at trial.[87]

Illinois was one of the first states to enact bail reform legislation with what has become known as the "ten percent deposit plan."[88] Under this system a defendant posts ten percent of the amount of the bond directly with the court clerk and, upon meeting all scheduled court appearances, most of the deposit is returned.[89] The obvious advantage of this system is that, unlike a system utilizing bonding companies, it gives the accused a financial incentive to make the scheduled court appearances.[90]

The "ten percent deposit plan" was approved by the Indiana Court of Appeals in a case upholding the inherent power of trial courts to give the accused an option of either using a surety bond, a property bond, a full cash bond or posting ten percent of the total bond with the court clerk.[91] This result was codified in 1980 with the

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87. OR. REV. STAT. § 135.230-290 (1981). In Burton v. Tomlinson, 19 Or. App. 247,255, 527 P.2d 123, 128 (1974), the court rejected a challenge by bondsmen to the Oregon statute, stating:

> Because the legislature saw fit to greatly enlarge the opportunities of a defendant for release prior to judgment, with resulting drastic diminution in the demand for plaintiffs' services, it did not thereby deprive them of property but, at most, only of the benefit to them flowing from the previously existing status quo.

Id.

88. ILL. ANN. STAT. ch. 38, § 110-7 (Smith-Hurd 1980).

89. Under the Illinois plan, 90% of the deposit was returned and the remaining 10% was retained by the court as the administration fee. This reform measure was upheld in Schilb v. Kuebel, 404 U.S. 357, 359 (1971), in which the Court stated:

> Prior to 1964 the professional bail bondsmen 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.(Footnote omitted)

90. It also has the advantage of making the same funds available to pay for counsel, i.e., the amount posted with the clerk can be assigned to the attorney. This helps relieve the public defender system. For example, assume a criminal charge with bond set at $5,000; the accused would have to pay $500 to the clerk; of this, $50 would be retained as the administrative fee and $450 would be returned to the accused. However, the accused might have assigned this to a private attorney in order to obtain representation. The net result is that more criminal defendants are able to afford to pay for their own counsel, thus reducing the load of public defenders. *See generally* Minutes of the Indiana Legislature's Interim Study Committee on Bail Bonding, July 17, 1979 (testimony of Jim Drogge), September 18, 1979 (testimony of Judge Richard Muroc).

91. Board of County Comm'rs v. Farris, 168 Ind. App. 309, 342 N.E.2d 642 (Ct.App. 1976). Retention of 10% of the deposit by the clerk as an administrative fee was also upheld by the appellate court.

passage of a new bail act in Indiana.[92] While this act clarified the courts' options in terms of the ten percent deposit system and the use of non-monetary conditions[93] and codified the factors to be taken into account in setting bail or conditions,[94] importantly it did not mandate the use of the least restrictive alternative. Nor did it address the issue of who had the burden of establishing the need for conditions other than release on the recognizance of the accused.[95]

The primary advantage of the 1980 legislation in Indiana is that it clearly gives courts the ability to implement bail reform measures without questions of their legality. It is hoped that more court systems will realize the state's only interest can be better served through methods other than the monetary bail system at a substantial savings to the community by reducing the number of pre-trial detainees whose incarceration is so costly.[96]

As demonstrated above, the evidence in favor of reform, both in terms of equity and in achieving the state's purpose is overwhelming. Professor Foote has indicated that, as applied to indigent defendants, the money bail requirement represents the "incredible failure of the Supreme Court, courts in general and lawyers to do anything about what has become the most pervasive denial of equal justice in the entire criminal justice system. . . ."[97] Even absent reform, however, the existing system would be more responsive to indigents if they had effective counsel, who immediately upon arrest could petition the court on their behalf, for bond reduction and/or release without monetary conditions. Clearly, the evils of the monetary bail system are exacerbated in situations where the accused is either without counsel or provided with counsel who routinely ignore the opportunity to seek a reduction of bail.

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92. IND. CODE ANN. § 35-33-8-3(2) (West Supp. 1983-84).

93. IND. CODE ANN. § 35-33-8-3 (West Supp. 1983-84).

94. IND. CODE ANN. § 35-33-8-4 (West Supp. 1983-84).

95. It should be noted that this act was never intended as a "reform" measure in the sense that it would make release more attainable for more people. Rather, it was proposed by the Marion County prosecuting attorney as a revision "that would protect the public and not encourage crime." Minutes of the Indiana Legislature's Interim Study Committee on Bail Bonding, Aug. 16, 1979. More specifically, he advocated the provisions of IND. CODE ANN. §§ 35-33-8-5 through 6 (West Supp. 1983-84)concerning revocation and detention for up to 15 days if charged with an offense while on parole or probation. *Id.*

96. *See supra* note 65 regarding the cost of housing pretrial detainees.

97. Foote, *Pretrial Detention: Bail or Jail?, Crime and Justice in America, Part 11*, The Gainesville Sun, Nov. 21, 1977, at 8, col. e, *quoted in* Pugh v. Rainwater, 572 F.2d 1053, 1068 (5th Cir. 1978).

IV. THE RIGHT TO COUNSEL—THE PROBLEMS OF BOTH INDIGENT DEFENDANTS AND ATTORNEYS WHEN COUNSEL IS APPOINTED BY THE COURT

The competent assistance of counsel, court-appointed if necessary, is now a clearly established constitutional right in any criminal case where a sentence of imprisonment can be imposed.[98] Precisely what is required of competent representation, however, is less clear. Although the trend is toward a more demanding minimum standard of professional representation,[99] it is still difficult to obtain reversal of a conviction based on incompetence of counsel. This reluctance to overturn otherwise valid convictions can be explained, at least in part, by the need to show that counsel's shortcoming affected the outcome.[100] Reversal of a conviction might also be viewed as too drastic a remedy. In view of the absence of an effective remedy at the appellate level, it is even more critical that trial courts assure effective assistance of counsel in the first instance.

Inadequacy of representation is more likely to be raised when the accused has been represented by appointed counsel,[101] than when the accused has retained counsel of his choice.[102] This is true

98. Since its landmark decision in 1932 in Powell v. Alabama, 287 U.S. 45 (1932), requiring counsel in capital cases, the Supreme Court has recognized that the sixth amendment right to counsel is incorporated through the due process clause of the fourteenth amendment and therefore applicable to the states. This case also established that the assistance of counsel must be "effective and substantial." *Id.* at 53. Subsequently in Gideon v. Wainwright, 372 U.S. 335, 341-45 (1963), the Court extended *Powell* and held that the states must provide attorneys for indigent defendants in all felony cases. Finally, in Argersinger v. Hamlin, 407 U.S. 25, 40 (1972), the Court held that defendants could not be imprisoned in misdemeanor cases unless represented by counsel. *See also* Scott v. Illinois, 440 U.S. 367 (1979).

99. An earlier standard, known as the "mockery of justice" test, was based on the due process clause. The representation would be found ineffective only when the defense counsel's efforts had been so perfunctory or outrageous as to render the entire trial such a farce, mockery, travesty or sham that it shocked the conscience of the reviewing court. *See, e.g.*, United States v. Dilella, 354 F.2d 584 (7th Cir. 1965). More recently several courts have abandoned the "mockery of justice" test and have held that the sixth amendment "guarantees a criminal defendant legal assistance which meets a minimum standard of professional representation." *See, e.g.*, United States *ex rel.* Williams v. Twomey, 510 F.2d 634, 640-41 (7th Cir.), *cert. denied*, 423 U.S. 876 (1975). *See generally* Note, *Effective Assistance of Counsel: A Constitutional Right in Transition*, 10 VAL. U.L.REV. 509 (1976).

100. *See, e.g.*, United States v. Decoster, 624 F.2d 196 (D.C. Cir. 1979) (en banc); Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 974 (1979).

101. Burt, *Conflict and Trust Between Attorney and Client*, 69 GEO. L.J. 1015, 1039 (1981).

102. While an indigent is clearly entitled to court-appointed counsel, this does not include the right to select a particular attorney. *See, e.g.*, United States v. Davis, 604

for a number of reasons, including delays in appointment of counsel for indigents, overly burdensome caseloads of public defenders, and the inability of an incarcerated client to go to the attorney's office and actively participate in his defense. Direct employment of the appointed attorney by the court can lead to less than complete allegiance to the indigent client. These problems exist where the attorneys are full-time defenders, but they are magnified when the defenders are part-time because of the inevitable tension between public defender responsibilities and the demands of a private practice.

Another explanation for more claims of inadequacy when represented by appointed counsel might be clients' unfavorable perception of their attorney. A recent study comparing the predispositions of clients toward private defense counsel and public defenders[103] revealed that defendants have "strikingly different images" of private counsel and defenders.[104] Whether the clients' perceptions are correct is unimportant because the existence of the perception will normally lead to an unsatisfatory attorney-client relationship; dissatisfaction with the relationship often leads to claims of incompetency, whether or not the service provided was adequate.[105] Pub-

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F.2d 474, 478 (7th Cir. 1979); Harling v. United States, 387 A.2d 1101, 1105 (D.C. 1978); State v. Irvin, 259 Ind. 610, 615, 291 N.E.2d 70, 74 (1973). Nor does it include the right to a "meaningful relationship" between the accused and the attorney. Morris v. Slappy, 103 S. Ct. 1610, 1617 (1983)(quoting Slappy v. Morris, 649 F.2d 718, 720 (9th Cir. 1981)).

103. Casper, *Improving Defender-Client Relations*, 34 NLADA BRIEFCASE 114, No. 4 (Aug. 1977). *See also*, Burt, *Conflict and Trust Between Attorney and Client*, 69 GEO. L.J. 1015, 1020-21, 1035-45 (1981). It is important to keep in mind the fact that many, if not most, public defender clients are detained prior to trial. Some courts have a practice of refusing to appoint counsel to any defendant who can make bail, but the Indiana Supreme Court has recently ruled that "the fact that the defendant was able to post a bond is not determinative of his non-indigency but is only a factor to be considered." Moore v. State, 401 N.E.2d 676, 679 (Ind. 1980).

104. First, there are relatively large and consistent differences in perceptions of retained counsel and defenders, with larger numbers of defendants endorsing favorable views of private lawyers. What is important is not whether defendant perceptions are correct — and there is a good deal of evidence that their views of private lawyers miss the hasty and often exploitive character of many criminal practices — but that substantial numbers of defendants bring to their encounters with defenders, doubts about their potential lawyers' commitment. . . .

To put the matter crudely, it appears that most defendants do not believe that public defenders want to sell their clients out — indeed large numbers have the opposite belief — but that many are skeptical about the extent to which defenders really are inclined to fight hard to achieve their clients' goals. Although they may be incorrect, relatively few entertain such doubts about private lawyers.

Casper, *supra* note 103, at 116.

105. In other words, "public relations" is an important part of practicing law and the appointed counsel who is "forced" upon a client goes into the relationship having to

lic defenders who are in fact doing a competent job for their clients end up with disgruntled clients simply because of the general jailhouse perception of defenders.

This raises several questions: first, whether it is merely a problem of perception or do defender-clients really suffer from poor quality representation; and second, whether the problem is merely perceived or real, can anything be done to alleviate it? These questions are important because of the vital role played by counsel in the criminal justice system. The advantage of having an advocate familiar with the legal system is tremendous, particularly when an accused is incarcerated prior to trial without any meaningful access to the procedural safeguards that can be readily invoked by an attorney.[106]

There is evidence in at least one Indiana county that the jailhouse perception of the defender system is accurate. The method of providing appointed counsel in this county is by no means unique. In Indiana the means of providing court-appointed counsel is left almost entirely to the discretion of the trial courts.[107] The trial courts determine indigency[108] and most appoint attorneys who are part-time employees of the court as "pauper counsel." Under such an arrangement one or more attorneys, depending on the number of criminal cases in the county, are employed on a part-time basis on

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overcome an adverse mind-set. This is consistent with general American philosophy that you "get what you pay for."

> The extent to which defendants choose the financial transaction as the reason for the better performance of private attorneys suggest that what most attracts defendants to private attorneys is the notion that, because of the financial exchange between lawyer and client, the lawyer will be more committed to the defendant's interests. It is the money that provides a sense of control, the leverage to insure that lawyers will listen to their client, take instructions from them, and generally exert themselves on their behalf. Public defenders, however, are not only paid by someone other than the client, but that "someone other" is "the state" — the very institution that is proceeding against the defendant. Thus, public defenders suffer not only from the fact that they are imposed upon the defendant rather than being selected, and from the absence of financial exchange, but from the idea that they are employed by "the enemy."

Casper, *supra* note 103, at 126. To the extent that money is the key, Casper suggests that public defender clients are simply being "good Americans." *Id.*

106. These safeguards include a prompt appearance before a judicial officer, a release unless there is probable cause for a criminal charge, an individualized bail determination, the right to refuse making statements, discovery and a pretrial investigation.

107. *See, e.g.*, IND. CODE ANN. § 33-9-10-1 (West 1983). It provides that "[t]he judges of any court having criminal jurisdiction,. . . shall have the power to contract. . . to provide legal counsel for. . . poor persons. . . ." *Id.*

108. Moore v. State, 401 N.E.2d 676, 678 (Ind. 1980).

the court budget and are expected to handle all "pauper" cases.[109] Generally, these attorneys also maintain a private practice in the community.

The "system" described above existed in Lake County, Indiana in 1974 when the adequacy of court-appointed counsel was challenged in *Noe v. County of Lake.*[110] In this case, the plaintiffs raised several issues, including the general lack of resources made available for the representation of indigents and the inherent conflict, or lack of independence, resulting from the fact that the court-appointed attorneys were employees of the court.[111] The complaint did not attack the competence of any particular attorney, but rather challenged the system within which they operated.

As part of the presentation to the federal court in *Noe*, a study of the system was prepared.[112] This study, based on a sample of 1,730 cases[113] from the Criminal Division of Indiana's Lake County Superior Court, sought to measure objectively, and make comparisons between, the performance of retained and appointed counsel. Because all of the defenders were employed by the court on a part-time basis and several maintained a private criminal practice, the Lake County system provided a unique opportunity to compare the

109. Criminal Courts Technical Assistance Project, The Structure and Funding for Criminal Defense of Indigents in Indiana 16-25 (1974) (unpublished report); Kittel, *Defense of the Poor: A Study in Public Parsimony and Private Poverty*, 45 IND. L.J. 90, 91-95 (1969). While court-appointed attorneys were generally referred to as "pauper counsel" in the Lake County system, we will hereinafter refer to them as "public defenders".

110. 468 F. Supp. 50 (N.D. Ind. 1978), *aff'd*, 601 F.2d 595 (7th Cir. 1979).

111. According to the evidence in *Noe*, the chief judge of the criminal division of the Lake County Superior Court personally hired the public defenders as well as their support staff. In addition, he occasionally attended staff meetings of the defenders and could discharge any defender or staff member at will. All the public defenders were employed on a part-time basis, and most were also engaged in private law practices which often included the representation of criminal defendants in the same court.

In 1972, the year before the case was filed, only two part-time defenders had the responsibility for representing all indigents charged with felonies in Lake County. Two additional part-time defenders were added in 1973, and the budget has steadily increased so that by 1977, $242,130 was allocated solely for the salaries of 13 part-time defenders, two investigators, and two secretaries.

The determination of an accused's eligibility for representation by a public defender was not made until the first court appearance and normally several days elapsed between the date of arrest and this initial appearance by the defendant. Assuming the accused was found eligible, the judge then appointed the defender staff as an entirety, and a specific attorney would not begin representation until designated by the chief defender. Thus, indigents would not know who would ultimately be representing them until after arraignment. *See generally* Pretrial Order, *Noe* (filed Feb. 2, 1977).

112. *See infra* Appendix B.

113. These cases were filed in 1975-76 and disposed of by July 31, 1977. *See infra* Appendix B at 323.

performance of an attorney acting in a private capacity with that of the same attorney serving as appointed counsel.[114] This comparison would suggest that any difference between appointed and private counsel could be ascribed not to general incompetence or lack of ability on the part of appointed counsel, but to the "system." Important conclusions can be drawn from this study which reflect the problems of indigents represented by court-appointed counsel in a system such as that which existed in Lake County.

The study showed there was a significant delay between the date of arrest and the appointment of a public defender. The average length of delay was twelve days and, in one-fourth of the cases, the defender was not appointed until at least fourteen days after arrest.[115] This reflects only the delay in appointment and not the additional delay between appointment and actual contact between attorney and client. The accused indigent is thus going through a critical point in the process without the benefit of counsel.[116]

The study compares the results in cases in which the defendants

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114. Of the 19 attorneys who were employed as part-time defenders during the period studied, 14 also handled criminal cases in the same court in a private capacity. Twenty percent or 188 of the 920 cases handled by private attorneys were handled by defenders acting in their private capacity. *See infra* Appendix B at 323-24.

115. *See id.* The *Mudd* study showed a similar delay in appointment of counsel in the Allen County Circuit Court. *See* Brief of Appellants A-86 app. filed in *Mudd*.

116. The early stages are critical for several reasons. Waivers of fundamental constitutional rights, e.g., self-incrimination and consent to searches and seizures, occur most frequently during the pre-arraignment stage. Factual development is most effective at the earliest possible date. A good example is the need to obtain experts before perishable or transitory evidence is lost. In addition, particularly in situations where the prosecutor makes the determination of whether and what to charge, defense counsel can do the most effective plea bargaining very early and may even affect the charge that is filed. Finally, if counsel enters the case at the "focus of suspicion stage," he or she will be better prepared at the initial court appearances.

> For these reasons, the standards of the National Legal Aid and Defender Association (11-2), the National Study Commission on Defense Services (1.2), all call for representation at the point at which the person comes under, or appears to come under, the focus of suspicion of crime. Representation that first attaches at the initial hearing may be too late to protect vital constitutional rights that the defendant has waived. A defense counsel who enters the case at a still later point may find that his ability to render effective assistance to his client may have been totally negated by the very time at which appointment was made.

Affidavit of Laurence A. Benner (September 29, 1977); Mr. Benner, through his affidavit, testified as an expert witness in the *Noe* case. At that time he was National Director of Defense Services for the National Legal Aid and Defender Association and had extensive experience in criminal justice, both as defense counsel and through studies of defense services. *See also* COURTS, Standard 13.1 commentary 254 (National Advisory Comm. on Crim. Justice Standards and Goals 1973).

were represented by public defenders with those in private counsel cases and, where the information was available, results when defenders acted in their private capacity. Three aspects of representation were examined: (1) motions to reduce bail,(2) motions for change of venue from the judge, and (3) case outcome.[117] Not surprisingly, criminal defendants with appointed counsel were far more likely to be detained prior to trial than those represented by private counsel (70% vs. 22%).[118] With a significantly higher percentage of clients incarcerated prior to trial, one would expect appointed counsel to file more motions to reduce bail. Yet, just the opposite was true. Reduction motions were filed by appointed counsel in only 19% of their cases while private counsel filed such motions in 42% of their cases.[119] Not only did appointed counsel file fewer motions to reduce bond, when such motions were filed there was an average lapse of thirty-eight days between arrest and filing of the motion in appointed counsel cases compared to only eighteen days in private counsel cases.[120] Private attorneys were successful in 88% of the reduction motions while appointed counsel succeeded in 75%.[121] Where such motion was successful, in 97% of the cases handled by private counsel the defendant obtained release while 88% of the clients of appointed counsel actually obtained their release after a successful bond reduction motion.[122]

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117. *See infra* Appendix B at 324. These factors were chosen because they are both objective and important to the accused. For example, it was generally believed that two of the four judges in the criminal division were harsher in sentencing and, therefore, private counsel rarely tried their cases before them. A reduction in bail might mean the difference between pretrial freedom and continued detention.

118. *See infra* Appendix B at 325.

119. *Id.*

120. *Id.* In part, this difference might be explained by the delay in appointment of a public defender.

121. *Id.* With a success rate of 75%, one might expect that reduction motions would be routinely filed in nearly every case. Yet appointed counsel did so in only 19% of their cases.

122. *See* Brief of Appellants, A-187 app., filed in *Noe*. Before simply assuming that these figures suggest public defenders are less competent, we must consider some other possibilities. First, even though ability to post bond and eligibility for appointed counsel cannot be equated, Moore v. State, 401 N.E.2d 676, 679 (Ind. 1980), it can generally be assumed that the clients of appointed counsel are more indigent and thus less likely to benefit from a reduction in bail. Second, those who are "more indigent" are less likely to have the community ties which would argue a favor of bond reduction or release without monetary bond. Thus, resources play a role, although less direct, even when ability to pay is not the sole factor considered. Third, the perception of some judges might be that an accused who is paying for counsel is, at least in part, already paying the price of being brought into the criminal justice system. None of these, however, would explain why fewer reduction motions are filed by appointed counsel.

Perhaps even more significant is the defenders' practice with respect to motions for change of venue from the judge. In the cases studied, 199 such motions were filed and 63% of them were directed at one of the four full-time criminal division judges.[123] The study showed that this judge imposed a prison sentence in a significantly higher percentage of the cases in which there was a conviction,[124] and the number of venue motions directed at this judge suggests attorneys were well aware of this fact. Since, at the time of the study, Indiana law required that a motion for change of venue[125] had to be granted, it represents an important right of the accused. Significantly, appointed attorneys filed only seventeen (8%) of these motions (in 2% of their 737 cases) whereas private counsel filed 182 (92%) motions (in 20% of their 909 cases).[126] Not surprisingly, then, indigents' cases were far more likely to be heard by this judge than the cases of defendants with private counsel.

This disparity is even more striking when the performance of appointed counsel is compared to their conduct when acting as private counsel. While they filed venue motions in only 2% of their appointed cases, these same attorneys filed venue motions in 26% of their private cases.[127] This demonstrates that these attorneys recognize the importance of getting the "right" judge. Also, it suggests that despite their own judgment, attorneys, when acting in their capacity as defenders employed by the court, were reluctant to follow a practice which could result in one of the four judges, their employers, having few, if any, cases.[128]

Significant disparities in case outcome were also present. Of the cases which went to trial, 70% of the clients of appointed counsel were convicted whereas only 49% of the clients of private counsel

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123. *See infra* Appendix B at 326.

124. *Id.*

125. IND. CRIM. R. 12; for a discussion of Rule 12 *see* Benjamin v. Criminal Court, 264 Ind. 191, 341 N.E.2d 495 (1976); Spugnardi v. State, 171 Ind. App. 272, 356 N.E.2d 1199 (1976). Rule 12 was amended, effective July 1, 1981, and there is no longer a right to a change of venue.

126. *See infra* Appendix B at 327.

127. *Id.*

128. It should be noted that the initial assignments of cases to particular judges do not explain the disparity discussed here. *See* Appendix to Brief of Appellants, A-188 to -189 app., filed in Seventh Circuit in *Noe*. The potential influence of the employment relationship has been noticed by others. Burt, *Conflict and Trust Between Attorney and Client*, 69 GEO. L.J. 1015, 1036-37 (1981); J. CASPER, AMERICAN CRIMINAL JUSTICE 105 (1972); A. BLUMBERG, CRIMINAL JUSTICE 66 (1967).

were convicted.[129] The overall conviction rate, whether by plea of guilty or by conviction following trial, was 67% for clients of appointed counsel and 58% for clients of private counsel. Because most clients with appointed counsel are incarcerated prior to trial, the evidence in *Mudd* suggests that the disparity is explained in part by detention.[130] Nevertheless, even when the clients of appointed counsel were not detained prior to trial, these case outcome statistics remain approximately the same.[131]

Not only are the clients of appointed counsel convicted more often than those represented by private counsel, they are also given prison sentences twice as often. Clients of appointed counsel received a prison sentence in 49% of the cases while the clients of private counsel in only 23% of the cases. In contrast, clients of defenders acting in a private capacity received a prison term in only 22% of the cases.[132] Examining only the cases in which the accused was convicted, 73% of the clients represented by appointed counsel received a prison term compared to only 40% of those represented by private counsel. While some of this disparity can be explained by pre-trial detention, it is significant that among those released—where pre-trial detention played no role—defender clients fared worse than clients with retained counsel; that is, defender clients were sentenced to prison more often.[133]

What can be concluded from these statistics? A fair inference is that a public defender system, structured like that in Lake County, Indiana, provides less effective representation to indigents than private counsel. Notably, the problems stem from the system rather than the individual attorneys because the same attorneys who served as public defenders achieved results and performed similar to or better than other private counsel when they were retained by their clients.

Can anything be done to improve this situation? Regarding defender-client relations or clients' perceptions of defenders, there are several possibilities. Because the unfavorable perceptions are not contrary to the evidence, fewer convictions and less harsh sentences due to attorney efforts would produce higher levels of client satisfac-

129. *See infra* Appendix B at 328. Fifty-nine percent of the clients of public defenders acting in a private capacity were convicted. *Id.*

130. *See supra* notes 42-46 and accompanying text.

131. *See infra* Appendix B at 329.

132. *Id.*

133. *Id.*

tion.[134] In addition, it has been suggested that a non-adversary disposition, a plea of guilty, for example, is likely to produce a less favorable evaluation because it reduces substantially "the occasions upon which a client can observe his attorney fighting on his behalf."[135] This does not mean that plea bargaining should be abandoned when it is advantageous. It does indicate that a reputation of bargaining all cases can be disastrous. Discussing the reasons for strategy decisions can be beneficial, "both so the client can make a considered choice and be given a chance to reflect upon the fact that waiving a hearing or 'copping a plea' is in his interest and not simply the product of laziness or indifference on the part of his attorney."[136] Defenders can generally improve their relations with clients by involving them in the defense and spending more time with their clients.[137] Clearly there are some things which public defenders can do to enhance their reputations among their clients and, consequently, improve client satisfaction.

The "system" can also make a satisfactory appointed counsel/client relationship more possible by further distancing the appointed attorneys from their employer, the court. The issue of professional independence is addressed in the ABA's "Standards Relating to Providing Defense Services":

> The plan should be designed to guarantee the integrity of the relationship between lawyer and client. The plan and the lawyers serving it should be free from political influence and should be

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134. Casper, *supra* note 103, at 130.

135. *Id.*

136. *Id.*

> Moreover, to the extent that the defendant can participate in or be made aware of the degree to which the attorney actually argues on his behalf even in the bargaining context — for example, the possibility of permitting the client to be present at bargaining sessions, or short of this, simply giving the client a clear and detailed account of what occurred — the arguments presented here suggest that there may be a possibility for increasing the client's confidence that the attorney has done a satisfactory job.

Id.

137. [T]he data suggests that such time does have a payoff in terms of client satisfaction. The data also suggests that this payoff revolves largely around the effective dimension of the client evaluation, not around obtaining more favorable outcomes. If we define an adequate legal defense strictly in terms of obtaining the most favorable outcome possible for the client, it might be argued that time spent with clients is not important. But if we enlarge the concept of what is an adequate legal defense to encompass providing the client not only "justice" in terms of outcome but also providing him a sense that he has had adequate legal representation, then time spent with the client does appear to make a difference.

Id. at 130-31.

> subject to judicial supervision only in the same manner and to the same extent as are the lawyers in private practice. One means for assuring this independence, regardless of the type of system adopted, is to place the ultimate authority and responsibility for the operation of the plan in a board of trustees.[138]

An expert's reflection on the Lake County system is informative.

> The direct employment of part-time public defenders by the chief judge of the criminal division. . .places those public defenders in a conflict of interest having constitutional magnitude. . . .[T]his employment relationship jeopardizes the duty of defense counsel to fulfill their role as active and independent advocates. Indeed, this relationship creates the appearance of impropriety while presenting multifarious possibilities for subverting the adversary system. The loyalties of defense attorneys should lie solely with their clients, and regardless of the integrity of individual public defenders, the *system* for employing public defenders in the criminal division of the Lake Superior Court violates this precept. [In such a system] public defenders are placed in the dilemma of serving both their clients and the judge, and the result is apt to be less than the vigorous advocacy the accused have a right to expect. Moreover, clients may understandably view public defenders with suspicion and distrust insofar as they are aware of the employment relationship with the chief judge, and this is not conducive to building attitudes of cooperation with counsel and respect for the criminal justice system.[139]

These observations are certainly consistent with findings of the study, particularly the reluctance of the defenders to change venue.

The relationship between the independence of the defenders and the outcome of cases was demonstrated by a study comparing two cities which utilize independent defender offices with a third city where the court assigned private attorneys to represent indigents.[140] In New York and Los Angeles, indigents represented by the independent defender offices obtained outcomes equivalent to those of defendants who retained private counsel. In Washington, D.C., indigents with counsel appointed by the court fared worse than de-

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138. STANDARDS RELATING TO PROVIDING DEFENSE SERVICES § 1.4 (Approved Draft 1968).

139. Affidavit of John E. Ackermann (Oct. 6, 1977); through the affidavit, Mr. Ackermann testified as an expert witness in the *Noe* case. At that time he was Dean of the National College of Criminal Defense Lawyers and Public Defenders at the Bates College of Law, University of Houston.

140. HERMAN, SINGLE, BOSTON, COUNSEL FOR THE POOR 5 (1977).

fendants with retained counsel.[141] While both the conflict-of-interest theory and its argument that it reaches a constitutional dimension were rejected by the court in *Noe*, it is certainly a factor to be considered in establishing a public defender system.[142]

Although any improvements in the indigent clients' perceptions of their appointed counsel would obviously be of great benefit, the question remains whether case outcomes can ever be equalized or whether the difference in outcome is an inherent obstacle when facing the system without the resources to fully exploit the safegaurds provided. Even if some disadvantages are inherent, they are not the sole factors causing the difference in outcome. The three aspects of the system discussed in this article are related and intertwined. Delays between arrest and initial court appearance can forever prejudice the indigent accused; pre-trial detention makes conviction and a prison term much more likely; those who suffer a delay between arrest and court appearance and those detained prior to trial are most likely to be represented by appointed counsel. Could things be equalized if independent defenders, appointed shortly after arrest, and had sufficient resources to fully prepare the case? Would release prior to trial serve as an equalizer in that it would enhance the attorney/client relationship and give the accused an opportunity to develop a favorable record on the outside while awaiting trial? Or, are indigent persons in our society simply more convictable and more imprisonable? Even assuming an affirmative, there are possiblities for reform which would minimize the discrepancies. Some of these are explored in the following section.

V. "LEGALIZING" THE CRIMINAL JUSTICE SYSTEM — WHO CAN MAKE THE REQUIRED CHANGES?

The budget cuts implemented by the Reagan administration make it apparent that few, if any, federal dollars will be available to local communities in the near future for the purpose of revamping their criminal justice systems. While the constitutional rights of per-

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141. *Id.* at 153-66.

142. Judge Sharp, in *Noe*, concluded:

> In view of the impartial and neutral role played by the judge, it is difficult to imagine how the employment of pauper attorneys by the Court could be considered an "inherently compromising" situation. In any event, it is not a situation which case law holds to be constitutionally defective.

468 F. Supp. at 53. *But cf.*, People v. Barboza, 29 Cal. 3d 375, 381, 627 P.2d 188, 191, 173 Cal. Rptr. 458, 461 (1981) (held that contracts between courts and public defenders presented inherent and irreconcilable conflicts of interests).

sons accused of a crime cannot be made contigent on the availability of funds, as a practical matter, cost does play a major role in decisions relating to the functioning of public institutions. The criminal justice system is no exception. Fortunately, the reforms needed in most Indiana counties, for example, would not cause a substantial drain on public funds. In fact, reforms would probably result in a substantial savings to the local communities.[143] This is not, of course, intended to suggest that the needed reform should take place only if it is financially feasible or that financial savings should be the primary motive for reform. Because constitutional rights are at stake, the suggested reforms *must* take place. The fact that the reforms may actually result in substantial savings should simply provide an additional incentive to budget-conscious public officials.

The purpose of this section is not to attempt to assess blame or fault for any shortcomings in our present criminal justice system. Instead, it represents a plea to public officials to scrutinize closely the system as it currently operates in their area and assess its strengths and weaknesses in light of what has been said in the preceding sections. If defects are identified, it is mandatory that corrective steps be taken.

The most obvious vehicle for any of the suggested changes is the state legislature. For example, legislation mandating (1) an appearance before a judicial officer promptly upon arrest in all cases; (2) the use of the least restrictive alternative for release pending trial; and (3) the prompt appointment of counsel for indigents, would help alleviate the problems. Such legislation would help fulfill the legislature's obligations to keep state laws in conformity with constitutional requirements and to safeguard the public treasury. Even if such legislation were passed, the responsibility for implementation would fall upon local officials. Absent a local commitment to comply with the law, state statutes would simply represent a hollow promise. Therefore, it is necessary to look primarily to local officials.

Even without legislative change, all of the necessary changes can be made on the local level. As none of the shortcomings in the current system are mandated by statute, local officials are not pre-

143. For example, substantial savings would result from a reduction in the cost of housing inmates if more people were brought before a judicial official immediately upon arrest and released prior to trial. There would be less need for public defenders if people were released pending trial and employed (in public work programs if nothing else is available). The need for public defender services would be further diminished if funds used to pay bail could also be used to pay for an attorney and if there were fewer appeals challenging the competency of appointed counsel.

vented from making the needed changes. Since they, too, have an obligation to protect the rights of citizens, it is suggested that local officials must make the changes required by the Constitution and laws. Unquestionably, the courts must bear the primary responsibility for legalizing the criminal justice system.

Several things could be done by local judges to protect the rights of indigents charged with a criminal offense. First, an order could be directed to the police officials responsible for operating the jails requiring them to bring all detained persons before the court within a set time of their arrest, normally twenty-four hours. This could be easily facilitated by having one court in each county available, at a certain time each day, to consider such cases. Both the police and the prosecutor would be forced to demonstrate probable cause in cases in which an arrest was made without a warrant—a minimal burden since no lawful arrest can be made without probable cause. Second, at this initial appearance the court could determine whether or not appointed counsel was necessary,[144] thereby facilitating competent representation.[145] At the same time it could consider release and require the state, through the prosecuting attorney, to make a showing of the necessity for conditions on the pre-trial release of the individuals detained.

Third, regarding appointed counsel, state law[146] places the burden on the local courts to make appointed counsel available. Nothing would prevent the local courts from contracting with an independent agency to provide such services.[147] The only role of the court then would be to determine whether the accused was indigent and, if so, the agency would be appointed to provide representation. The contractual agreement would assure the independence of the agency and include as part of its terms minimum standards relating to the defense function.[148] Fourth, the courts could establish programs designed to divert people from incarceration, both prior to trial and after conviction.[149]

Other local officials also have an obvious role to play in initiating and implementing changes in the system. Prosecutors, who have

144. As indicated, this is required in Indiana by Nacoff v. State, 256 Ind. 97,102, 267 N.E.2d 165,168 (1971).

145. *See supra* notes 115, 116.

146. Moore v. State, 401 N.E.2d 676, 678 (Ind. 1980).

147. *See, e.g.*, IND. CODE ANN. § 33-9-10-1 (West 1983), *quoted supra* note 107.

148. *See* STANDARDS FOR CRIMINAL JUSTICE, The Defense Function (Approved Draft 1968).

149. *See, e.g.*, NAT'L DISTRICT ATTORNEY'S ASS'N, A PROSECUTOR'S MANUAL ON SCREENING AND DIVERSIONARY PROGRAMS (1972).

an obligation to uphold the Constitution, must take steps to assure that the local procedures do not systematically infringe upon the rights of the accused. While they have an obvious interest in eliminating any defects that can result in the reversal of otherwise valid convictions,[150] their obligation goes beyond that.[151] At a minimum, prosecuting attorneys should be expected to cooperate with the court by being available for the early appearances before a judicial officer for determining probable cause, the need for conditions upon release and the appointment of counsel.

The police responsible for pre-trial detention have a definite monetary interest in preventing delays between arrest and initial court appearance. This is true at least in part, because they are subject to false imprisonment actions, possibly resulting in damages which may be assessed against either the individual police or the general budget of the department.[152] They are also fully aware of

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150. It has been held that defects in pretrial detention are not grounds for reversal of the conviction unless they result in improper confessions. Williams v. State, 264 Ind. 664, 678, 348 N.E.2d 623, 632 (1976). Similarly, bail decisions are mooted upon conviction and not a basis for challenging the conviction. Holguin v. State, 256 Ind. 371, 374, 269 N.E.2d 159, 160-61 (1971); Bozovichar v. State, 230 Ind. 358, 363, 103 N.E.2d 680, 682 (1952). Competency of counsel can be a factor on appeal of a conviction; however, as indicated earlier, it is difficult to obtain a reversal based on incompetency. *See supra* notes 99-100.

151. It is an important function of the prosecutor to seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, he or she should stimulate efforts for remedial action.

STANDARDS FOR CRIMINAL JUSTICE, Standard 3-1.4 (1980). The commentary to this standard is even more specific.

> As the public official in constant contact with the day-to-day administration of criminal justice, the prosecutor occupies a unique position to influence the improvement of the law. As one national study has noted, the prosecutor "affects the development of legal rules by his arguments in court. He can help bring about needed reform by pressing for changes in bail practices, for example, or in procedures for the appointment of counsel." (footnote omitted). . . . It is in the public interest for the prosecutor to foster good working relationships with the defense bar, including defender agencies, and to participate in such activities as criminal law sections of the organized bar and joint seminars on criminal law and procedure. Reforms and improvements in the criminal law will more readily gain the approval of legislative bodies and the public if they are the joint work product of both prosecutors and defense lawyers.

Id. See also, Standard 3-1.1(c). ("The duty of the prosecutor is to seek justice, not merely to convict.")

152. Individual as well as governmental liability is contemplated by Indiana statutes. *See* IND. CODE ANN. §§34-4-16.5-5, 34-4-16.7-1 (West 1983). Under recent Supreme Court decisions, local governmental entities can be liable for the actions of their employees and agents in civil rights cases filed under 42 U.S.C. § 1983 (1976). *See* Monell v. Dept. of Social Services, 436 U.S. 658 (1978); Owen v. City of Independence, 445 U.S. 622 (1980).

the cost of pre-trial detention and should be expected to look for ways to reduce this cost through the release of inmates whenever possible.

Finally, the public defenders appointed to represent indigent persons certainly have an ethical obligation to enforce all pre-trial rights of their clients. Their ability to protect these rights is enhanced significantly by an appointment promptly after arrest so they can insist upon an early court appearance for the accused and the appropriate individualized inquiry relating to pre-trial release. Regarding the effectiveness of appointed counsel, the individual attorneys have both an ethical obligation to provide competent representation and a financial interest in avoiding malpractice.[153]

The potential agents for change on the local level are several. It is suggested that they, individually and collectively, have an obligation both to the community they represent and the persons charged with a crime to assure that the criminal justice system operates in a manner which protects the constitutional and statutory rights of all persons who come into contact with the system. Fair, equal treatment cannot be contingent upon ability to pay. No responsible local official associated with the criminal justice system should tolerate practices or policies that in any way reduce the opportunity of an indigent person to obtain treatment comparable to that afforded to those with resources. A criminal justice system is acceptable only if it guarantees complete protection of the rights of those least able to protect themselves.

VI. CONCLUSION

It is not clear whether the availability of financial resources can ever be eliminated as an outcome determinative factor in the criminal justice system. What is clear, however, is that most communities in Indiana have not taken all reasonable steps to minimize the impact and significance of the wide disparity in the resources available to criminal defendants. Until this is done, it is impossible to determine whether the difference — between those with and those without resources — is inherent in the system.

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153. The Supreme Court recently held that a public defender is not subject to liability in suits by former clients under 42 U.S.C. § 1983 (1976) because "a public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." Polk County v. Dodson, 454 U.S. 312, 325 (1981). This, of course, does not eliminate "liability for malpractice in an appropriate case under state tort law." *Id. See also*, Ferri v. Ackerman, 444 U.S. 193, 201 (1979).

It is difficult to take issue with anyone who argues in favor of fairness and equity in the administration of our criminal justice system. Inequities, whether real or perceived, can only detract from its credibility and legitimacy. Without these qualities the system is undermined and generally ineffective. Nevertheless, pleas for fairness and equity often become controversial because they are blindly interpreted as demands for more procedural protections for "criminals" that will further handicap law enforcement officials.

We are not advocating more or fewer procedural safeguards; rather we are suggesting that those safeguards which do exist must be enforced and made equally available to everyone charged with a crime, regardless of wealth. Our Constitution and any minimal sense of justice can tolerate nothing less. The demonstrated discrepancies between rules of law and local practices are intolerable. Such "official lawlessness" is always most devastating to those with the least power and influence — the poor.

The irony of the situation is that very significant improvements in our system could be made with a minimal cost to society in terms of either dollars or protection. In fact, as shown, some of the needed changes would decrease cost and increase protection. Where there is a need for greater protection, it should be provided through laws and rules equally applicable to all. For example, if society is concerned about the number of crimes committed by persons released pending trial, this should be confronted by making the propensity to commit another crime a ground for denying release, not by increasing bail so only those with resources get released. Of course, there are many arguments opposing preventive detention. Those with money do not want freedom removed from the list of things that can be purchased. Those without money are concerned with the potential for discriminatory application of preventive detention. The point is simply that responsible officials must address the merits of preventive detention as applied equally to all rather than imposing it upon some solely because of their lack of resources.

While, in the eyes of many, procedural protections are nothing more than devices for "coddling criminals," it is unlikely that any one would reject those protections if confronted with criminal prosecution. The presumption of innocence, pre-trial release, the right to counsel, checks on police practices, and other similar protections are extremely important and serve a critical function in our adversary system of justice. We ask only that those responsible for the operation of our system take the time to determine whether these protections are enforced and equally available to all.

APPENDIX A

Mudd v. *Busse*: Study of the Effects of Pretrial Detention in Allen County, Indiana

This study of pretrial detention in the Allen Circuit Court was undertaken to test the frequently expressed observation that accused persons detained during the pendency of their criminal proceedings are convicted more often, and, once convicted, are sentenced to prison more often than those released prior to disposition.[1]

The sample population selected for study consists of 441 felony cases[2] taken from the criminal causes which were filed in the Allen Circuit Court during 1974 and 1975 in which a final disposition was reached before November 22, 1976.[3] The vast majority of the defendants studied (96%) were charged with only one crime, and the most serious crimes charged were broken down as follows:

Type of Crime Charged

Crime	*No.*[4]	*%*
Armed Robbery	49	11
First Degree Burglary	51	12
Forgery and Uttering	40	9
Second Degree Burglary	115	26
Theft	95	22
Other	91	21
	441	101%[5]

1. The study was done under the direction of Dr. Eric W. Single, a senior research scientist with the Alcoholism and Drug Addiction Research Foundation in Toronto, Canada. Dr. Single has supervised and conducted many similar studies. *See e.g.*, *Counsel for the Poor: Lawyer & Clients in Urban Criminal Courts* (Lexington Press, 1977); *The Unconstitutional Administration of Bail*, 8 CRIM. L. BULL. 459 (1972).

2. The term "case" is used to indicate a single criminal defendant. Thus, one criminal cause may consist of several defendants or "cases."

3. There were 510 cases filed in 1974 and 1975 which were disposed of by November 22, 1976. Of these, 69 (13.5%) were excluded from the study for the following reasons: (a) all murder cases (16) and all cases in which the defendant was charged with either extradition (4) or being a fugitive (23); (b) all cases (11) which were venued in or out of the Circuit Court; (c) all cases (9) in which the court docket sheet could not be located; and (d) all cases (6) which were dismissed before the defendant ever made a court appearance. These cases were excluded primarily because bail was not set or because they would not accurately reflect the typical process of criminal justice in the Allen Circuit Court. Pending cases were not considered because they were missing one of the important elements of the study, *i.e.*, case outcome.

4. Refers to the number of cases in each category.

5. Here, as in subsequent tables, totals of 99% of 101% are due to rounding to the nearest whole number for purposes of readability.

As the following table shows, the typical accused was male (95%), white (63%), young (71% under age 26), and had a prior criminal record (58%):

Demographic Portrait of Sample Population

		No.	*%*
(A)	*Age*		
	15-17	25	6
	18-20	175	40
	21-25	109	25
	26-29	54	12
	30-39	40	9
	40 and older	35	7
	NA[6]	2	—
		441	99%
(B)	*Sex*		
	Male	418	95
	Female	23	5
		441	100%
(C)	*Race*		
	White	278	63
	Black	149	34
	Other	12	3
	NA	2	—
		441	100%
	Prior Criminal Records		
(D)			
	No Prior Convictions	125	41
	Juvenile Record Only	34	11
	Misdemeanor Record	25	8
	Felony Conviction(s)	120	39
	INAP[7]	101	—
	NA	36	—
		441	99%

6. "NA" means not ascertained. In the subsequent analysis, all cases where the particular variable under scrutiny was not ascertained have been excluded from that question.

7. "INAP" means inapplicable. The 101 cases which are indicated as INAP are those where no presentence report was filed (defendants were either acquitted or had their case dismissed) and consequently, information concerning prior record was unavailable.

Of the 441 cases in the sample, only five were initially released on their own recognizance ("ROR")[8] and another 13 obtained ROR following a motion to reduce. Thus, in 96% of all cases, money bail was the only available method of pretrial release.

Bail was fixed in sums of $1000, $2,000, $5,000 or $10,000 in all but 3% of the sampled cases:

Amount of Initial Bail

Amount	*No.*	*%*
ROR	5	1
$1,000	98	22
$2,000	168	38
$5,000	106	24
$10,000	56	13
Over $10,000	8	2
	441	100%

The Allen Circuit Court followed the master bond schedule 77% of the time. Furthermore, codefendants in the study had bonds identical to their fellow codefendants 98% of the time. This data suggests that virtually no individual consideration is given to what amount of bail, if any, is initially appropriate in any case.

Among those cases where pretrial status was ascertained (92% of all cases), over one-fourth (28%) never obtained their pretrial freedom, about one-fifth (22%) were never jailed and the remaining half (50%) spent some time in jail pending the outcome of their cases. At the time of disposition (*e.g.*, dismissal, guilty plea), 41% of the sample were incarcerated, and 59% were released.

As one might expect, there is an inverse relationship between the amount of bail and the likelihood that the accused can post the required security. In short, the higher the bail, the lower the percentage who made it:

8. Ironically, in two of these cases the defendant was Jack Lee, the highest volume bondsman in Ft. Wayne.

Pretrial Status By Amount Of Initial Bail

Amount	*No.*	*Percentage Released*
ROR	5	100
$1,000	92	86
$2,000	149	81
$5,000	97	66
$10,000	61	36

Most of the sampled cases were disposed of by either a guilty plea (70%) or a dismissal of the charges (19%). Only 11% of the cases ever went to trial. About three-fourths of the accused (77%) were convicted; about one-fourth (23%) were not. The study data plainly shows a relationship between pretrial status and case outcome. As shown below, defendants who were in jail continuously between arrest and final adjudication ("in") were more likely to be convicted than those who were free on bail during all ("out") or part ("part") of the proceeding:

Disposition By Pretrial Status

	In	*Part*	*Out*
Not Convicted	13	25	28
Convicted	87	75	72
	100%	100%	100%
	(113)	(201)	(90)

Another way of looking at outcome is in terms of ultimate result. Thus, for much of the subsequent analysis three possible outcomes are considered:

(1) The accused is not convicted, *i.e.*, acquitted or, more commonly, obtains a dismissal of the charges;

(2) The accused is convicted but avoids a prison term, *e.g.*, suspended sentence, probation, fine; and

(3) The accused is convicted and sentenced to prison.

The table below shows not only that detained persons are convicted more often than released persons (87% vs. 72%), but also that they are given prison sentences seven times as often as those who are never detained pretrial (70% vs. 10%):

Outcome By Pretrial Status

	In	*Part*	*Out*
Not Convicted	13	25	28
Conv., No Prison	17	34	62
Conv., Prison	70	40	10
	100%	99%	100%
	(113)	(201)	(90)

Thus, those who are never detained pretrial have one chance in ten of ultimately going to prison; in stark contrast, seven out of ten of those jailed full time receive prison sentences.

Having demonstrated the stark discrepancy in case outcome between those who are detained and those who are released, the next inquiry must be whether there is any explanation for the discrepancy other than detention. What follows is the elaboration analysis of the relationship between pretrial status and outcome.[9] Several factors are considered to determine whether they explain the apparent correlation between detention and less favorable outcome:

1. Type of Crime Charged
2. Prior Criminal Record
3. Type of Counsel
4. Race
5. Amount of Final Bail

As the following analysis demonstrates, none of these factors, either individually or in combination, explains the disparity in outcome between the detained and the released. This suggests detention itself causes a less favorable case outcome.

1. *Type of Crime*

The discrepancy in case outcome between the detained and the released might be thought attributable to a difference in the type of crime charged between these two groups. Indeed, the circuit court's use of a bond schedule makes it more probable that one charged with a more serious crime will be detained. Further, it might be thought that independent of the bail determination, the person charged with a more serious crime will be more likely to be prosecuted vigorously, adjudged guilty, and given a heavy sentence.

Not surprisingly then, the likelihood of an accused being detained before disposition varies widely according to the type of crime

9. *See supra* text accompanying note 45.

charged. As the table below shows,[10] persons accused of armed robbery and first degree burglary were more likely to be detained than those accused of theft and second degree burglary.

Pretrial Status By Type of Crime

	Armed Robbery	*1st Degree Burglary*	*Forgery*	*Theft*	*2nd Degree Burglary*	*Other*
In	59	47	26	16	19	25
Part	39	51	55	53	50	49
Out	2	2	18	32	32	25
	100%	100%	100%	100%	100%	100%
	(46)	(47)	(38)	(89)	(97)	(87)

It is also generally true that those charges most likely to result in detention are also the most likely to result in conviction and a prison sentence.

Outcome By Type Of Charge

	Armed Robbery	*1st Degree Burglary*	*Forgery*	*Theft*	*2nd Degree Burglary*	*Other*
Not Conv.	20	13	24	25	24	25
Conv. No. Prison	—	36	45	43	42	36
Conv. Prison	80	51	32	33	34	39
	100%	100%	100%	100%	100%	100%
	(46)	(47)	(38)	(89)	(97)	(87)

Because there is a positive correlation between the type of crime charged and both the rate of detention and the likelihood of conviction and a prison term, it might be hypothesized that the reason for the disparity in outcome between the detained and the released lies in the type of charge. The table below, however, disproves this hypothesis because it shows that detained persons in any crime group were more likely to be convicted and vastly more likely to be sentenced to prison than were the released people charged with the same crime.

10. In this and subsequent tables, the 37 cases where pretrial status was not ascertainable have been deleted from analysis.

Outcome by Pretrial Status, Controlling for Type of Crime

	In	*Part*	*Out*
Armed Robbery			
Not Convicted	15	28	—
Conv. No Prison	—	—	—
Conv. Prison	85	72	(1)
	100%	100%	—
	(27)	(18)	(1)[11]
1st Degree Burglary			
Not Convicted	9	17	—
Conv., No Prison	27	46	—
Conv. Prison	64	38	(1)
	100%	101%	—
	(22)	(24)	(1)
Forgery			
Not Convicted	10	33	(1)
Conv., No Prison	40	38	(5)
Conv., Prison	50	29	(1)
	100%	100%	—
	(10)	(21)	(7)
Theft			
Not Convicted	14	28	25
Conv., No Prison	29	32	68
Conv., Prison	57	40	7
	100%	100%	100%
	(14)	(47)	(28)
2nd Degree Burglary			
Not Convicted	11	23	32
Conv., No Prison	22	35	64
Conv., Prison	67	42	3
	100%	100%	99%
	(18)	(48)	(31)

11. In this and subsequent tables where there are less than ten cases, percentages are omitted and raw figures are presented in parentheses.

	Other		
Not Convicted	18	26	32
Conv., No Prison	4	42	54
Conv., Prison	77	33	14
	99%	101%	100%
	(22)	(43)	(22)

Consequently, the type of crime cannot explain the outcome disparity between the detained and the released groups, since the disparity persists within each crime category.

2. *Prior Criminal Record*[12]

Forty-one percent (41%) of those in the sample[13] had no prior criminal record; 19% had never been convicted of a felony, but did have a misdemeanor or juvenile record; and 39% had at least one prior felony conviction. As one might expect, persons with a criminal record were more likely to be detained than those without a record:

Pretrial Status By Prior Criminal Record

	Record	*No Record*
In	33	28
Part	57	37
Out	10	34
	100%	99%
	(162)	(116)

It was imposible to determine whether defendants with a prior record were more likely to be convicted than those without a criminal record because the data on prior record was derived from presentence reports and thus it was available only for those convicted. However, for those convicted it was possible to determine the effect of prior record upon sentence, and not surprisingly, those with a record were twice as likely to receive a prison term:

12. Prior criminal record here means having at least one of the following: a juvenile record, a misdemeanor conviction, or a felony conviction.

13. The sample population for prior criminal record is 340 rather than 441. This smaller number is a result of the fact that information concerning prior criminal record was obtained from presentence reports, and the 101 cases in which the accused was not convicted could not be considered since a presentence report on such individuals was never made.

Sentence By Prior Criminal Record
Among those Convicted

	Record	*No Record*
Conv., No Prison	30	66
Conv., Prison	70	34
	100%	100%
	(162)	(116)

Nonetheless, when detained persons are compared with released persons having comparable prior records (the factor of prior record being held constant), the disparity in sentence outcome between the detained and the released remains strong:

Sentence By Pretrial Status,
Controlling For Prior Criminal Record

	Record			*No Record*		
	In	*Part*	*Out*	*In*	*Part*	*Out*
Conv., No Prison	13	33	75	27	70	92
Conv., Prison	87	67	25	73	30	8
	100%	100%	100%	100%	100%	100%
	(54)	(92)	(16)	(33)	(43)	(40)

This table shows that among persons with a prior record, detained persons are more that three times as likely to be sentenced to prison as are released persons. Moreover, among those defendants with no prior record, detainees are nine times as likely to receive a prison term. Indeed, detained persons without a prior record were sentenced to prison almost three times as often (73% vs. 25%) as were those persons with prior record who were released.[14]

Because the detained received a much less favorable outcome than those who are released even when prior record is taken into account, the factor of prior criminal record must be rejected as an

14. The gross disparity persists even when one controls for only those with a prior felony record (at least one felony conviction):

Sentence By Pretrial Status,
Controlling For Prior Felony Record

	Felony Record			*No Felony Record*		
	In	*Part*	*Out*	*In*	*Part*	*Out*
Conv., No Prison	16	24	(6)	20	62	92
Conv., Prison	84	76	(3)	80	38	8
	100%	100%	—	100%	100%	100%
	(37)	(63)	(9)	(50)	(72)	(47)

explanation for the different outcomes experienced by released and detained persons.

3. *Type of Counsel*

The third characteristic to be considered is the type of counsel, distinguishing between the defendant who employs his own attorney and the defendant with a court-appointed public defender. As the table below shows, there is a pronounced relationship between type of counsel and pretrial status. Defendants represented by public defenders were far more likely to be detained than defendants represented by privately retained lawyers.

Pretrial Status By Type Of Counsel

	Public Defender	*Retained Counsel*
In	63	6
Part	36	58
Out	1	35
	100%	99%
	(155)	(249)

Similarly, there is an apparent correlation between the type of outcome which an accused obtains and the type of counsel.

Outcome By Type Of Counsel

	Public Defender	*Retained Counsel*
Not Convicted	14	28
Conv., No Prison	19	46
Conv., Prison	66	26
	99%	100%
	(155)	(249)

Because there is a positive correlation between type of counsel and both the rate of detention and the likelihood of conviction and a prison term, it might be hypothesized that the reason for the disparity between the detained and the released lies in the type of attorney. Indeed, the statistics above support the commonly held assumption that defendants are worse off if they are appointed a public defender as opposed to retaining a private attorney. But the type of attorney does not explain the case outcome disparity between the detained and the released. Detained persons, regardless of the type of counsel, were still more likely to receive an unfavorable case outcome

than were the released:[15]

Outcome By Pretrial Status
Controlling For Type of Counsel

	Public Defender			*Retained Counsel*		
	In	*Part*	*Out*	*In*	*Part*	*Out*
Not Convicted	10	21	—	31	27	28
Conv., No Prison	19	21	—	6	39	64
Conv., Prison	71	57	(2)	62	34	8
	100%	99%	—	99%	100%	100%
	(97)	(56)	(2)	(16)	(145)	(88)

Among those represented by the public defender, jailed defendants were more likely to be convicted and imprisoned than those released. Among those with privately-retained counsel, the detained had a conviction rate approximately equal to the corresponding rate among the released but they were much more likely to receive a prison term if convicted (62% vs. 8%). Because the detained consistently fared worse, the type of defense counsel does not explain the disparities in case outcome.

4. *Race*

It might be expected that one's race may affect both detention and case outcome and the data indeed shows that a greater percentage of non-whites were incarcerated pretrial than whites:

Pretrial Status By Race

	White	*Black*	*Hispanic*
In	22	37	50
Part	50	51	33
Out	28	12	17
	100%	100%	100%
	(253)	(138)	(12)

Although race was not related to the rate of conviction, there was a strong correlation between race and whether one received a prison term — blacks were sent to prison far more often than were whites.

15. These findings were confirmed in the *Noe* study. *See infra* Appendix B at 329.

Outcome By Race

	White	*Black*	*Hispanic*
Not convicted	22	23	33
Conv., No Prison	43	22	33
Conv., Prison	36	54	33
	101%	99%	99%
	(253)	(138)	(12)

Because of the relationship of race to both the likelihood of detention and the likelihood of unfavorable case outcome, it might be that the outcome disparity between the detained and released was attributable to race. However, when detained persons are compared with released persons of the same race, the disparity in outcome persists:

Outcome By Pretrial Status, Controlling For Race

	In	*Part*	*Out*
		White	
Not Convicted	16	19	30
Conv., No Prison	20	42	63
Conv., Prison	64	39	7
	100%	100%	100%
	(56)	(127)	(70)
		Black	
Not Convicted	10	34	18
Conv., No Prison	12	21	59
Conv., Prison	78	44	24
	100%	100%	100%
	(51)	(70)	(17)
		Hispanic	
Not Convicted	(1)	(3)	—
Conv., No Prison	(2)	—	(2)
Conv., Prison	(3)	(1)	—
	(6)	(4)	(2)

Because the detained within each race category recieved worse case outcomes than did those who were released, race must be rejected as an explanation for the different outcomes experienced by released and detained persons.

5. *Amount of Bail*

The amount of final bail is the last factor examined. The table below demonstrates what common sense would dictate: pretrial status is related to the amount of bail; the higher the bail amount, the lower the percentage of people who make it:

Pretrial Status By Amount Of Final Bail

	ROR	*$2,000 or Less*	*$2,000+*
In	—	18	51
Part	71	52	43
Out	29	30	6
	100%	100%	100%
	(17)	(253)	(134)

The amount of bail is also related to case outcome:

Outcome By Amount Of Final Bail

	ROR	*$2,000 or Less*	*$2,000+*
Not Convicted	47	22	19
Conv., No Prison	41	44	19
Conv., Prison	12	33	62
	100%	100%	100%
	(17)	(253)	(134)

Because of the strong relationship between the amount of final bail and both the rate of detention and case outcome, it might be argued that the amount of bail explains the disparity in outcome between the detained and the released. If this theory were correct, one would expect to find an increasing likelihood of the accused's being detained, being convicted, and getting a prison term as the bail amount increases. But, as the table below shows, the disparity in outcome between the detained and the released persists even among groups of people upon whom substantially the same bail was imposed. Regardless of the bail set, the released consistently received far fewer prison sentences than did the detained.

Outcome By Pretrial Status, Controlling For Amount Of Final Bail

(A) *ROR*	*In*	*Part*	*Out*
Not Convicted	—	42	(3)
Conv., No Prison	—	42	(2)
Conv. Prison	—	17	—
	—	101%	—
	(0)	(12)	(5)
(B) *$2,000 or Less*			
Not Convicted	11	24	26
Conv., No Prison	27	38	65
Conv., Prison	62	37	9
	100%	99%	100%
	(45)	(131)	(77)
(C) *$2,000+*			
Not Convicted	15	24	(2)
Conv., No Prison	10	24	(4)
Conv., Prison	75	52	(2)
	100%	100%	—
	(68)	(58)	(8)

The discrepancy in treatment between those detained and those released persists even when the amount of bail is controlled for and therefore the amount of bail does not explain the disparity in case outcome.

6. *Combination of Characteristics*

So far, it has been shown that no other single factor accounts for the disparate case outcomes experienced by detained and released persons, even though several of the factors discussed above — including prior criminal record, type of counsel, and bail amount — are by themselves related to pretrial status and outcome. The final possibility is that these factors explain the disparity when considered in combination, even though taken alone they do not.

This possibility is tested by holding constant several characteristics at the same time. A characteristic associated with higher frequencies of obtaining pretrial release and of receiving a favorable case outcome is called favorable. Earlier tables indicated that lack of a prior criminal record, a low bail amount, and a private attorney are favorable characteristics in this sense. Thus, a defendant classified as having three favorable characteristics is one who has no pre-

vious record, a final bail of $2,000 or less, and a private attorney. A defendant with two favorable characteristics is one having two of the three, *etc.*

Not suprisingly, there is a direct relationship between the number of favorable characteristics and pretrial status:

Pretrial Status By Number Of Favorable Characteristics

	None	*One*	*Two*	*Three*
In	68	57	11	—
Part	32	39	67	37
Out	—	4	22	63
	100%	100%	100%	100%
	(40)	(102)	(114)	(57)

The table above shows that the number of favorable characteristics a defendant had was closely related to his ability to obtain his pretrial release. Sixty-eight percent (68%) of the defendants who had no favorable characteristics remained in jail all of the time. This percentage steadily declines as the number of favorable characteristics were detained all of the time.

A similarly strong relationship was apparent for sentencing.[16] Among those convicted, nine of ten defendants with no favorable characteristics ultimately received prison sentences, compared to only one in ten of the defendants with three favorable characteristics:

Sentence By Number Of Favorable Characteristics

	None	*One*	*Two*	*Three*
Conv., No Prison	10	21	60	88
Conv., Prison	90	79	40	12
	100%	100%	100%	100%
	(40)	(102)	(114)	(57)

Because of the positive correlation between the number of favorable characteristics and both pretrial status and the avoidance of a prison sentence, it might be argued that the combination of characteristics considered explains this disparity in outcome between the detained and the released. However, the table below disproves this hypothesis because it shows that detained persons were sen-

16. It was not possible to relate the number of favorable characteristics to conviction because data on prior criminal record was only available for those defendants who were convicted.

tenced far more frequently than released persons in the same category:

Sentence By Pretrial Status, Controlling For Number Of Favorable Characteristics

	In	*None Part*	*Out*
Conv., No Prison	15	—	—
Conv., Prison	85	100	—
	100%	100%	—
	(27)	(13)	(0)
		One	
Conv., No Prison	14	28	(2)
Conv., Prison	86	72	(2)
	100%	100%	—
	(58)	(40)	(4)
		Two	
Conv., No Prison	54	57	76
Conv., Prison	46	43	24
	100%	100%	100%
	(13)	(76)	(25)
		Three	
Conv., No Prison	—	71	97
Conv., Prison	—	29	3
	—	100%	100%
	(0)	(21)	(36)

Consequently, even when highly relevant characteristics are considered in combination, they do not provide an explanation of the outcome disparity between the detained and the released. The detained consistently fare worse.

This study has shown that one factor — whether an accused is released or detained pending trial — substantially influences both the outcome of his case and the likelihood of his receiving a prison sentence. By examining the type of crime charged, prior criminal record, type of counsel, race, and the amount of bail, the study demonstrates that neither independently nor in combination do any of these factors account for the disparity in case outcome between those detained and those released. This suggests that the fact of detention

itself has a direct and deleterious impact on the likelihood of conviction and the likelihood of receiving a prison sentence.

APPENDIX B

Noe v. *County of Lake*: Study of the Pauper Counsel System in the Lake County Superior Court

This study of criminal defense attorneys in Lake County, Indiana was undertaken to test the frequently expressed observation that defendants represented by pauper attorneys fare worse than defendants represented by private counsel and whether any disparity is due to the system within which attorneys work.[1] It is generally difficult to make such a determination because any disparity may be explained by the caliber of the attorneys rather than the system itself. However, because pauper counsel in Lake County are hired on a part-time basis, their performance as pauper counsel can be compared directly with their performance in criminal cases when privately retained.

The sample population selected for study consists of 1730 cases[2] taken from the criminal causes which were filed in the Lake County Superior Court, Criminal Division during 1975 and 1976 and in which a final disposition was reached before July 31, 1977.[3] During this 31 month period, the pauper staff was appointed in 43% of the cases.[4] A substantial period of time elapsed before indigent defendants obtained the services of counsel. The average length of time from arrest to appointment was 12 days. In one-fourth of its cases (25%), pauper counsel was not appointed until at least 14 days after arrest, and in 8% of the cases over one full month elapsed before appointment.

There were 19 attorneys who were employed as part-time pauper attorneys during the period studied. Of these, 14 also handled

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1. This study, like the *Mudd* study, was done under the direction of Dr. Eric W. Single. *See* Appendix A *infra* at 306 n.1.

2. The term "case" is used to indicate a single criminal defendant. Thus, one criminal cause may consist of several defendants or "cases."

3. There were 2009 cases filed in 1975 and 1976 which were disposed of by July 31, 1977. Of these, 279 (13.9%) were excluded from the study for the following reasons: (a) all cases (149) involving appeals from city courts; (b) all cases (19) in which the most serious crime charged was a misdemeanor; (c) all cases in which the defendant was charged with either extradition (16) or being a fugitive (62); and (d) miscellaneous (33), *e.g.*, change of venue from the county, inability to locate docket sheet. These cases were excluded primarily because they would not accurately reflect the typical process of criminal justice in the Lake County Superior Court. Pending cases were excluded at the request of the clerk's office and because they were missing one of the important elements of the study, *i.e.*, case outcome.

4. The type of representation at final disposition was proportionately identical to the initial representation, pauper counsel handling 42% of the cases. The type of representation changed during the pendency of the proceeding in only 8% of the cases (134).

criminal cases before the same court in a private capacity. These 14 attorneys handled 188 (20%) of the 920 cases handled by private attorneys.

The sections below compare the results in cases where defendants were represented by pauper attorneys with cases where defendants were represented by private counsel.[5] Although the primary comparison is between pauper and private attorneys, the tables also generally include a third category consisting of pauper attorneys acting in a private capacity ("P-Private"). This was done so that a direct comparison can be made between the results achieved by the same attorneys, the only difference being that in some cases they are employed by the judge rather than by their clients.

The first hurdle in any study such as this is to identify criteria by which an attorney's performance can be measured objectively. This inquiry is, of course, limited by the raw data which is available. The information for this study was obtained from court docket sheets, and it was determined that three areas would be examined:

(a) motions to reduce bail;
(b) motions for change of venue from the judges; and
(c) case outcome.

The reasons for selecting these criteria are readily apparent. Case outcome, particularly the receipt of a prison term, is obviously the most important consideration to any criminal defendant. Moreover, as noted in the *Mudd* study, *see supra* Appendix A, because case outcome may be adversely affected by one's pretrial detention, motions to reduce bail are extremely important to defendants incarcerated prior to trial. Finally, a motion for a change of venue from the judge can also be important to a criminal defendant because judges can also be important to a criminal defendant because judges have highly divergent sentencing practices.

A. *Pretrial Status & Motions to Reduce Bail*

Slightly less than half of the sample population (45%) never obtained their pretrial freedom ("in"); the remaining 55% were able to make bail at some point during the pendency of the proceedings ("out").[6] As one might expect, defendants with pauper attorneys

5. Since the purpose of the study is to examine the performance of attorneys, the 89 cases in which the defendant was not represented by counsel at final disposition are excluded from analysis.

6. Pretrial status could not be ascertained in 37 cases (2%). The study excludes these 37 cases when pretrial status is considered.

were far more likely to be detained pretrial than those represented by private attorneys:

Pretrial Status by Type of Attorney

	Pauper	*Private*
In	70	22
Out	30	78
	100%	100%
	(719)	(891)

With a significantly higher percentage of clients in jail, one would expect that pauper attorneys would file a greater number of motions to reduce bail. The evidence, however, shows that just the opposite occurs: pauper attorneys filed significantly fewer reduction motions.

Private attorneys filed 383 motions to reduce bail while pauper attorneys filed only 140. As a percentage of their caseload, pauper counsel filed motions to reduce in 19% of their cases and private attorneys filed such motions in 42% of their cases.

Pauper attorneys also filed reduction motions much later following arrest. Whereas private attorneys filed their motions to reduce on the average of 18 days following arrest, pauper attorneys did not file their motions until an average of 38 days had passed. As a result, indigents spend a longer time in jail before they even get a chance to have their initial bail reduced.

Somewhat surprisingly, pauper attorneys were almost as successful as private attorneys in having their motions to reduce granted. Whereas the court granted 88% of all reduction motions filed by private attorneys, it granted 75% of the pauper attorney motions. In view of this success, it is significant that pauper attorneys filed reduction motions in only 19% of their cases.

B. *Motions for Change of Venue from the Judge*

There are four full-time judges in the Lake Superior Court, Criminal Division, and, at times, other visiting or part-time judges sit as well. The sentencing practices among these judges differ widely. A convicted defendant's chances of being sentenced to prison are appreciably higher with Judges B and D than with the other judges:[7]

7. One might suppose that the sentencing disparity among the judges is explained by the fact that Judges B and D handle a higher percentage of cases in which judges

Proportion Imprisioned Among Those Convicted-by Judge at Final Disposition[8]

	Judge A	*Judge B*	*Judge C*	*Judge D*	*Other*
No Prison	53	35	54	31	52.5
Prison	47	65	46	69	47.5
	100%	100%	100%	100%	100%
	(194)	(199)	(313)	(259)	(59)

Under Indiana law, at the time of the study, a criminal defendant had an opportunity for an automatic change of venue from the judge originally assigned to his case.[9] In view of the divergent sentencing practice, this right to a change of judge was very important to the accused.

One hundred ninety-nine motions for change of venue were filed in the sampled cases. The overwhelming majority of the motions (85%) were directed at the two judges who sentenced most harshly, Judges B and D:

Presiding Judge at Time of Venue Motion

	No.	*%*
Judge A	25	13
Judge B	126	63
Judge C	4	2
Judge D	44	22
Other	0	0
	199	100%

As with motions to reduce bail, private attorneys filed venue motions much more often than did pauper attorneys. Of the 199 motions, pauper attorneys filed only 17 of them (8%) whereas private attorneys filed 182 (92%).[10] As a percentage of their caseload, pau-

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traditionally give prison terms, *e.g.*, violent crimes as opposed to misdemeanors. If this theory were correct, one would expect to find a similar percentage of prison sentences among judges when one controls for the crime involved. But except for murder (where all convicted defendants were imprisoned), the disparity in sentencing practices among the judges continued even when the crime convicted is isolated and controlled, *i.e.*, regardless of the crime considered, Judges B and D sentenced defendants to prison more often than the other judges. Thus, the type of crime does not explain the disparity in sentencing practices.

8. It should be here noted that disparity of sentencing by individual judges is not the focus of this study. The actual sentence received may be a product of many factors. Rather we are here addressing the performance of pauper counsel.

9. *See supra* note 117 of article.

10. Twelve of the 19 pauper attorneys never filed any venue motions. Of the 7

per attorneys filed venue motions in only 2% of their cases:

Percentage of Cases in Which Venue Motion Was Filed by Type of Attorney

	N of mtns	*N of cases*	*% of total*
Pauper	17	737	2%
Private	182	909	20%

In sharp contrast is the pauper attorneys' performance when acting in a private capacity. Whereas they filed venue motions in only 2% of their pauper cases, these same attorneys filed venue motions in 26% of their private cases — a rate noticeably higher than that of non-pauper, private attorneys:

Percentage of Cases In Which Venue Motion Was Filed By Type Of Attorney

	No of mtns	*No of cases*	*% of total*
Pauper	17	737	2%
Pauper-Private	49	188	26%
Other Private	133	732	18%

As the following table shows, defendants with pauper attorneys were twice as likely as defendants with private counsel to have Judge B at final disposition:

Final Judge by Final Attorney

	Pauper	*P-Private*	*Other Private*	*Total*
Judge B	28	16	14	20
Other Judges	72	84	86	80
	100%	100%	100%	100%
	(721)	(188)	(732)	(1641)

At final dispostion, 61% of the cases before Judge B were pauper cases. In contrast, only 40% of the cases before the other judges were pauper cases.

The fact that pauper attorneys handled a disproportionate number of cases before Judge B had a disparate effect on their indigent clients. This disparity can be explained only by pauper counsel's systematic failure to file venue motions in their pauper cases.

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pauper attorneys who did file such motions, 12 of the 17 motions were filed by only two of the attorneys.

C. *Case Outcome*

A criminal case can be disposed of in one of four ways: guilty plea, trial, dismissal, or diversion, *e.g.*, commitment to a state hospital. Most of the cases in the sample were disposed of either by a finding of guilty pursuant to a guilty plea (49%) or a dismissal of the charges after a plea of not guilty (33%). Seventeen percent (17%) of the cases went to trial and 1% were diverted out of the criminal process.

By type of attorney, the form of disposition was as follows:

Form of Disposition by Type of Attorney

	Pauper	*P-Private*	*All Private*
Guilty Plea	54	52	50
Trial	20	15	16
Dismissal	26	32	33
Diversion	1	—	1
	101%[11]	99%	100%
	(721)	(188)	(920)

The table above shows that overall the disposition by type of attorney was rather similar. Pauper attorneys were slightly more likely than private counsel to try a case (20% vs. 16%), whereas private attorneys were more likely to have a case dismissed (33% vs. 26%). While there was little difference in the rate of guilty pleas (54% vs. 50%), there was a significant disparity between counsel as to the conviction rate following trial:

Conviction Rate at Trial by Type of Attorney

	Pauper	*P-Private*	*All Private*
Convicted	70	59	49
Acquitted[12]	30	41	51
	100%	100%	100%
	(142)	(29)	(151)

A defendant's chance of conviction following trial were greater than two-to-one if represented by pauper counsel and an even one-to-one if represented by a private attorney. Thus, although the rate of going to trial was not that different, the success rate following trial was.

11. Here, as in subsequent tables, totals of 99% or 101% are due to rounding to the nearest whole number for purposes of readability.

12. Acquittal here includes mistrials, hung juries, and not guilty by reason of insanity.

A more pragmatic way of looking at case outcome is in terms of ultimate result. Three possible outcomes are considered:

(1) The accused is not convicted, *i.e.*, acquitted, or more commonly, obtains a dismissal of the charges;

(2) The accused is convicted but avoids a prison term, *e.g.*, a suspended sentence, probation, fine; and,

(3) The accused receives a prison term.

The table below shows not only that defendants represented by pauper counsel are convicted more often than defendants represented by private attorneys (67% vs. 58%), but also that they are given prison sentences twice as often as those who retain their own attorneys (49% vs. 23%).

Outcome by Type of Attorney

	Pauper	*P-Private*	*All Private*
Not Conv.	32	39	42
Conv., No Prison	18	39	35
Conv., Prison	49	22	23
	99%	100%	100%
	(721)	(188)	(920)

Thus, those who employ their own attorneys have one chance in four of ultimately going to prison; in stark contrast, one of two defendants represented by the pauper staff receive prison sentences.

Part of the disparity in case outcomes may be explained by pretrial status, *i.e.*, whether a defendant was able to make bail. Among those jailed pretrial, defendants with pauper attorneys were somewhat more likely to be sentenced to prison than those with private attorneys (55% vs. 49%). Significantly, however, the disparity remains constant among those who are not detained pretrial — indigents with pauper attorneys are still twice as likely to receive a prison term as are defendants represented by private counsel:

Outcome by Type of Attorney Among Those Who Obtain Their Pretrial Release

	Pauper	*P-Private*	*All Private*
Not Conv.	24	39	40
Conv., No Prison	40	47	44
Conv., Prison	36	14	16
	100%	100%	100%
	(200)	(150)	(707)

This study shows that there was a significant disparity between the performance of pauper attorneys and that of private counsel. Pauper attorneys filed fewer motions to reduce bail even though their clients were jailed prior to trial far more often. They also filed a significantly lesser number of motions for change of venue from the judge with the result that they handled a disproportionately high number of cases before a judge who imprisons defendants more often. Finally, defendants represented by pauper attorneys were more likely to be convicted and upon conviction, were imprisoned far more frequently than were defendants represented by private counsel.

The study also showed that the difference between pauper and private cases cannot be ascribed to any general lack of ability of pauper attorneys. Pauper attorneys acting in a private capacity consistently did as well, if not better than, other private attorneys. The difference must therefore be explained not by the abilities of the attorneys but instead by some part of the system of indigent representation which constrained pauper attorneys from pursuing their clients' interests fully and effectively.