Duquesne Law Review

Volume 8 | Number 1 Article 10

1969

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R. Stanton Wettick Jr.

Frank M. McClellan

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*R. Stanton Wettick, Jr.**
*Frank M. McClellan***

THE BAIL SYSTEM as it now generally exists is unsatisfactory from either the public's or the defendant's point of view. Its very nature requires the practically impossible task of translating risk of flight into dollars and cents and even its basic premise—that risk of financial loss is necessary to prevent defendants from fleeing prosecution—is itself of doubtful validity. The requirement that virtually every defendant must post bail causes discrimination against defendants who are poor and imposes personal hardship on them, their families and on the public which must bear the cost of their detention and frequently support their dependents on welfare. Moreover, bail is generally set in such a routinely haphazard fashion that what should be an informed, individualized decision is in fact a largely mechanical one in which the name of the charge, rather than all the facts about the defendant, dictates the amount of bail. ABA PRE-TRIAL RELEASE STANDARDS[1]

I. INTRODUCTION

The administration of bail involves two separate questions: (1) is the defendant eligible for bail; and (2) if he is eligible, what conditions of release should be imposed.

The first question is readily answered by reference to federal and state constitutional and statutory provisions. Generally anyone charged with a non-capital offense is eligible for bail.[2]

The second question is not as easily resolved. Federal and state statutes set out only general considerations. Typical is Rule 46c of the Federal Rules of Criminal Procedure which provides that the amount of bail should be such as

* B.A. Amherst College, 1960; L.L.B. Yale Law School, 1963; Associate Professor of Law, University of Pittsburgh, School of Law; Executive Director, Neighborhood Legal Services Association.

** B.A. Rutgers University, 1967; 3rd year law student and member of the Duquesne University Law Review.

1. STANDARDS RELATING TO PRE-TRIAL RELEASE OF THE AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE RECOMMENDED BY THE ADVISORY COMMITTEE ON PRE-TRIAL PROCEEDINGS (Tentative Draft, March, 1968), 1, [hereafter cited as ABA PRE-TRIAL RELEASE STANDARDS.]

2. The Federal Judiciary Act of 1789 provides that "upon all arrests in criminal cases, bail shall be admitted, except where punishment may be death" and that if the punishment may be death, the guarantee of bail is discretionary. 1 STAT.73 at 91 (1789).

> will insure the presence of the defendant, having regard to the circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant.[3]

Relevant to the determination of conditions of release is the Eighth Amendment's prohibition against "excessive bail."[4] There is, however, almost no case law construing this provision—even its applicability to state proceedings through the Fourteenth Amendment is unsettled.[5]

One criticism of the traditional bail system is that it inevitably discriminates against defendants with limited or no resources.[6] The defendant with available resources posts a cash or property bond to secure immediate release. The cash or property is returned when the defendant appears for trial; thus this class of defendants secures immediate release at no cost. Defendants with limited or no resources, on the other hand, are subject to severe hardships. A defendant with limited resources will secure his release by paying a professional bondsman approximately 10 per cent of the face amount of the bond. This fee is not returned to the defendant when he appears for trial and a defendant with no resources must remain in jail until trial—a stay of approximately three months in most jurisdictions.[7]

Because the traditional bail system operates to penalize only a defendant with limited or no resources, critics of the system focus on the Equal Protection Clause of the Fourteenth Amendment.[8] They argue that to impose monetary conditions of release on an indigent defendant who is eligible for bail—at least when other relevant considerations show a reasonable likelihood that the defendant will appear for trial in the absence of the imposition of monetary conditions of release—is a violation of the Equal Protection Clause; the effect of

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3. FED. R. CIV. P. 46(c).
4. The Eighth Amendment of the United States Constitution provides, "Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted."
5. *See*, Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959 (1965).
6. See generally Sachs, *Indigent Court Costs and Bail*, 27 MD. L. REV. 154 (1967).
7. THE BAIL SYSTEM OF THE DISTRICT OF COLUMBIA, a study published by the Junior Bar Section of the District of Columbia Bar Association in 1963, found that the average detention period in the District of Columbia lasted 51 days.
8. For various arguments on bail and the standards of equal protection see Foote, *The Coming Constitutional Crises in Bail*, 113 U. PA. L. REV. 1125 (1965); Comment, *The Bail System: Is it Acceptable*, 29 OHIO ST. L.J. 1005 (1968); Note *Bail and the Indigent: Is There Equal Justice Under the Law*, 9 ST. LOUIS L.J. 268 (1964); Note, *Bail: An Ancient Practice Re-Examined*, 70 YALE L.J. 966 (1961).

imposing monetary conditions in such circumstances is to jail only the poor.

While the United States Supreme Court has not passed on this issue, in other areas of criminal procedure the Court has required that advantages previously accorded only a defendant with resources be extended to the indigent defendant: in *Gideon v. Wainwright,*[9] the Court required the state to provide free counsel to the indigent defendant at all crucial stages of the criminal proceeding; in *Miranda v. Arizona,*[10] the Court required the state to advise all defendants of their rights, including the right of the indigent to free counsel prior to police interrogation; in *Griffin v. Illinois,*[11] the Court required the state to provide transcripts on appeal for indigents free of cost; and in *Douglas v. California,*[12] the Court required the state to furnish free counsel on appeal to the indigent defendant. Also in *Bandy v. United States,* Justice Douglas, sitting as a circuit court judge, suggested that the *Griffin* principle may be applicable to the bail situation. He asked:

> Can an indigent be denied freedom where a wealthy man would not, because he does not happen to have enough property to pledge for his freedom?[13]

And in *Pannell v. United States,* Judge Bazelon asserted that once it is decided that a defendant is eligible for bail, "To impose a financial requirement which is beyond his means is unreasonable and, of course, makes the determination of eligibility purposeless."[14]

It is clear that the imposition of monetary conditions of release upon indigents works a special hardship on that class of persons.[15] Once the special hardship is recognized, the state must show the reasonableness of its bail procedures; in judging the reasonableness, a court will consider whether there are other means of regulation which would work less hardship.[16] Current bail studies (these are reviewed

9. 372 U.S. 335 (1962).
10. 384 U.S. 436 (1965).
11. 351 U.S. 12 (1956).
12. 368 U.S. 815 (1961).
13. 82 S. Ct. 11, 12 (1961).
14. 320 F. 2d., 699 at 701 (D.C. Cir. 1963)
15. See Note, *Compelling Appearance in Court, Administration of Bail in Philadelphia,* 102 U. PA. L. REV. 1031 (1954), [hereinafter cited as *Philadelphia Bail Study*]; Ares, Rankin and Sturz, *The Manhattan Bail Project,* 38 N.Y.U.L. REV. (1963), [hereafter cited as *Manhattan Bail Project*]; Rankin, *The Effect of Pre-Trial Detention,* 39 N.Y.U.L. REV. 621 (1964).
16. The concept of Equal Protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged. Where evidence is presented that a State's action does not treat

in section II of this report) raise serious doubts that the state can demonstrate a rational relationship between the imposition of the monetary conditions of release and the likelihood of defendant's appearing for trial, particularly since most defendants released on bail have secured their release through a bondsman and hence have no financial incentive to appear.[17] Moreover, it would seem that the imposition of non-monetary conditions of release (such as releasing the defendant into the care of a qualified person, imposing restrictions on the defendant's activities, movements, residences and associations, etc.) would be equally effective to secure the defendant's appearance in court in many situations. For example, in *McCoy v. United States,* after a bondsman refused to write a five hundred dollar bond for a juvenile defendant, the Court permitted the defendant's release upon execution of an unsecured bond of $500 signed by the defendant's parents, saying:

> We think it appropriate for the courts to avail themselves of their flexibility to vary terms and conditions as well as amounts of bail, and provide substitutes, in the case of indigent defendants, for conventional bonds of professional bondsmen.[18]

On the basis of accepted equal protection concepts, the case for replacing the traditional bail system with procedures which ameliorate its harsh treatment of the defendant with limited or no financial resources is compelling. Unless state and local governments are willing to reform their bail practices, court intervention through the Equal Protection Clause is likely.

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uniformly persons who stand in the same relation to the governmental action, the State must justify this unequal treatment by showing some reasonable ground supporting it—some difference which bears a just and proper relation to the classification and not a mere arbitrary factor. The existence of an alternative means of regulation which treats uniformly all persons in the same relation to the government action makes it difficult for the state to justify a regulation which has an unequal effect.

For a discussion of the alternative means of regulation available in the bail situation, see parts III and IV *supra.* Also see FREED AND WALD, BAIL IN THE UNITED STATES 56-92 (1964).

17. *Manhattan Bail Project, supra* note 15 reported the following in 1963: 43% of the bail bonds in New York City were written by one surety company; an additional 56% were written by four other companies; the financial risk taken by the surety companies appeared very small; few people failed to appear when required, and only a fraction of these had their bonds forfeited.

18. 357 F.2d 272 at 274 (D.C. Cir. 1966). Judge Burger dissented in this case on the grounds that the court needed more detailed information on the appellant's record. However he went on to say:

> I agree with Judge Leventhal's approach to the need for experimenting with various devices for release on personal assurances to the end that more discriminating release procedures can be developed.

Other procedures are available that provide fairer treatment to the defendant with limited or no resources without increasing the risk of flight. The remainder of this article will be concerned with such procedures. Primary attention will be given to Allegheny County, Pennsylvania, bail practices, including a close examination of its nominal bond program and suggestions for additional bail reform.

II. Bail Studies

A. *Traditional Bail Practices*

Studies of bail practices in major metropolitan areas reveal glaring discrepancies between bail theories and practices. Most of the studies find too much emphasis placed on the nature of the offense charged in determining the bail amount. As early as 1927, a study of Chicago bail practices contrasted the theory of bail—an informed decision which takes into account the individual character and circumstances of the defendant—with the actual practice—a mechanical decision based on the nature of the offense charged.[19] In 1963, prior to the passage of the Federal Bail Reform Act, the Attorney General's Commission reported that the only facts considered in the initial bail decision in federal courts were the charge against the defendant and the circumstances of the alleged offense as described by the prosecuting attorney.[20] In the same year the Judiciary Committee of New York State Assembly came to a similar conclusion about New York City bail administration:

> Statutory and judicial rules are disregarded or are perverted in a disturbingly large number of cases. We believe that a large segment of the Bench and the criminal bar . . . have forgotten—or never really learned—that the only permissible function of bail is to assure appearance.[21]

Bail practices criticized by the Committee included limiting bail hearings to facts concerning the alleged offense and the defendant's criminal record; setting high bonds to give the defendant a "taste" of jail; using bail to coerce the defendant in some aspect of the case; and relying too much on the recommendation of the district attorney in setting bond.[22]

Other studies have compiled data showing that defendants who are

19. Beeley, The Bail System in Chicago, (1927).
20. Freed and Wald, *supra* note 16, at 17.
21. *Id.* at 13.
22. *Id.* at 11-18.

confined to jail until trial receive an unfavorable judicial disposition in comparison to defendants released on bail. A 1954 study of the disposition of 1,000 cases in Philadelphia showed that only 18 per cent of the jailed defendants were acquitted at trial as compared to 48 per cent of the bailed defendants. And of those convicted, jailed defendants received prison terms over two and one-half times as often as the bailed defendants.[23] A similar study in New York City in 1958 showed that sentences were suspended for jailed defendants less than one-fourth as often as for bailed defendants (13.5% vs. 54.2%).[24] Also, in Washington, the District of Columbia Bar Association Junior Bar Section found unequal treatment of bailed and jailed defendants—only 6 per cent of the jailed defendants were released on probation after trial as compared to release on probation of 25 per cent of the bailed defendants.[25]

Findings of a 1962 Manhattan bail study reject the thesis that the differences between judicial treatment of jailed and bailed defendants can be explained by relevant differences between these defendants. This study examined differences among defendants with respect to prior criminal records; bail amounts; type of counsel; family integration and employment stability and found that these factors did not fully account for the different sentencing treatment between jailed and bailed defendants (64 per cent of the defendants included in this study who remained in jail until trial received jail sentences as compared to 17 per cent of the defendants released on bail).[26] Other explanations for the different treatment between bailed and jailed defendants include the inability of jailed defendants to assist counsel in preparing a defense, the unfavorable psychological effect that a jailed defendant's appearance in the custody of jail authorities has on the trier of fact, and the practice of setting higher bail in cases with aggravated factual situations.

Studies have also demonstrated that the monetary demands of the bail system confine many innocent persons to jail because of poverty. A 1958 New York study found that no consideration was given to how much bond defendants could afford: 25 per cent of the defendants included within the study were unable to meet $500 bail, 45 per cent

23. *Philadelphia Bail Study*, 1049, *supra* note 14.
24. Foote, *The Administration of Bail in New York City*, 106 U. PA. L. REV. 693, 727 (1958).
25. FREED AND WALD, *supra* note 16, at 16.
26. Rankin, *supra* note 15, at 643.

were unable to meet $1,500 bail, and 63 per cent unable to meet bail of $2,500.[27]

The 1963 Bar Association study in Washington revealed that pre-trial prisoners comprised 30 to 40 per cent of the District of Columbia jail population; that 84 per cent of these prisoners had bail set but had been unable to post it; that the average detention period lasted 51 days at a cost of $500 to the state; and that pre-trial penalties were at least as severe as the penalties imposed after sentence.[28]

B. *Success of Release on Personal Recognizance*

To correct certain inequities of the monetary bail system many jurisdictions have turned to the practice of release on recognizance; this practice allows a defendant's pre-trial release on the basis of his personal promise to appear at trial. The United States District Court of the Eastern District of Michigan has been a vanguard among the courts in this practice. In 1964 this Court released 773 persons on their own recognizance as compared to 80 on monetary conditions. The forfeiture rate for defendants released on their own recognizance was 1.1 per cent as compared to 7.5 per cent for those released on monetary bail.[29]

A survey of the Federal Courts by the Justice Department in 1964 showed that over 6,000 defendants in federal criminal cases had been released on recognizance within the past year with a default rate of only 2.5 per cent.[30]

In New York City the Vera Foundation has operated a most successful pre-trial release project. The Foundation interviews all persons arrested and uses a point system to decide whether to recommend the defendant's release on his own recognizance. Criteria used includes employment, family, residence, references, charges, and previous record. A request for release on recognizance is made to the courts only for defendants who on the basis of the point system are found to be good risks.[31]

From October 16, 1961, through April 8, 1964, 2,195 persons were released on their own recognizance pursuant to this program. Only 15 of these defendants avoided trial—a forfeiture rate of less than

27. Foote, *supra* note 23, at 727.
28. FREED AND WALD, *supra* note 16, at 16-17.
29. *Id.* at 69-70.
30. *Id.* at 68.
31. See generally *Manhattan Bail Project, supra* note 15.

1 per cent. Significantly, the District Attorney's Office which originally concurred in only about one-half of the recommendations was by 1964 agreeing with almost 80 per cent, and the rate of judicial acceptance of the recommendations had risen from 55 per cent to 70 per cent.

Recent data on the San Francisco Bail Project shows that from October 1, 1964, through July 31, 1968, 6,377 persons were released on their own recognizance pursuant to the program. Approximately 90 per cent of these defendants voluntarily appeared for their trial on the scheduled date and another nine per cent were tried thereafter, leaving only about one per cent of those released on personal recognizance who have avoided trial.[32] During the same time period more than six per cent of defendants released on monetary bail in San Francisco failed to appear for trial.

As of 1965, pre-trial release programs promoting release on personal recognizance were in operation in more than 40 major cities.[33] The sponsors of these projects include courts, private foundations, bar associations, sheriffs, public defenders and law schools. While the criteria used by these various projects in processing applications for pre-trial release on recognizance varies widely, each program has been successful in assuring the trial appearance of a high percentage of defendants released on personal recognizance.

III. Bail Practices in Allegheny County

A. *Role of the Issuing Authority in Setting Bail*

Within twelve hours of arrest, a defendant arrested in Allegheny County is usually brought before a magistrate, alderman or justice of the peace (hereinafter referred to as an issuing authority) for preliminary arraignment.[34] At this hearing the defendant is seldom represented by counsel.[35]

32. Levin, *The San Francisco Bail Project*, 55 A.B.A.J. 135 (1969).

33. The cities include Los Angeles, Oakland, San Francisco, Denver, New Haven, District of Columbia, Atlanta, Chicago, Louisville, Boston, St. Louis, Newark, New York City, Cleveland, Tulsa, Salt Lake City and Charleston. See National Conference on Bail and Criminal Justice, Bail and Summons, 8 (1965).

34. In the City of Pittsburgh the issuing authorities are police magistrates and aldermen. Outside of the City they are justices of the peace. The magistrates are paid a salary; the costs from the defendant are turned over to the City.

There is no requirement that issuing authorities be attorneys, and few issuing authorities are attorneys. Issuing authorities are either appointed by elected officials or elected to office.

35. Rule 116 of the Pennsylvania Rules of Criminal Procedure requires that a defendant be taken without unnecessary delay before the issuing authority for his preliminary

In most instances the issuing authority will at this time set bail. The issuing authority, however, is without authority to admit to bail any defendant charged with arson, rape, mayhem, sodomy, burglary, robbery or involuntary manslaughter without consent of the attorney for the Commonwealth.[36] In addition, only a court may admit to bail a defendant charged with a capital offense.[37]

The Pennsylvania Rules of Criminal Procedure provide that the issuing authority is to select an amount of bail which will insure the presence of the defendant. The amount is to be determined according to, but not solely upon, the following criteria: the nature and circumstances of the offense; the stage of the prosecution; the age, residence, employment, financial standing and family status of the defendant; the defendant's character, reputation and previous criminal history; and the defendant's mental condition.[38] When an issuing authority believes that no bail is necessary to insure the defendant's presence, he is empowered to release the defendant on nominal bond.[39]

In practice the issuing authority usually looks only to the nature of the offense to determine the amount of bond.[40] The issuing authority is usually unaware of other criteria mentioned above.[41] But even where he is made aware of such criteria, it has little effect on his determination of the amount of bail.

It is customary for the issuing authority to set a bond of at least $500.

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arraignment. At the preliminary arraignment the issuing authority is to inform the defendant of his right to counsel, including the right to be assigned counsel if he is indigent; of the amount of bail demanded if the offense is bailable before the issuing authority; and of the date of the preliminary hearing.

36. See PA. R. CRIM. P. 4002(a).

37. See PA. STAT. ANN. tit. 19 § 51. A defendant, however, has no right to bail for capital offenses "when the proof is evident or presumption great". Art. 1, § 14, Pennsylvania Constitution.

38. See PA. R. CRIM. P. 4005.

39. See PA. R. CRIM. P. 4007.

40. Descriptions of Allegheny County bond practices contained in this report are based on observations of the authors and other Neighborhood Legal Services Association attorneys and discussions with issuing authorities, law enforcement officials, court personnel and other attorneys. Neighborhood Legal Services Association is the only agency which provides free legal services in criminal proceedings before issuing authorities and in bail proceedings, so its attorneys probably have had the broadest range of experience in this area. The descriptions are based primarily on experiences before City Magistrates (City Magistrates hear all cases involving arrests within the City of Pittsburgh by City Police) and a small number of aldermen and justices of the peace who handle a large number of criminal cases. For another description of bail practices in Allegheny County see Farley, *Admission to Bail in Allegheny County: A Study for the Allegheny County Bar Association*, 144 PITTSBURGH LEGAL JOURNAL 3 (1966).

41. At the time of the preliminary arraignment there has been no check of the defendant's record or background.

Defendants are seldom released on nominal bond by an issuing authority.[42]

In setting bond the issuing authorities rely heavily upon a "suggested bond schedule" prepared and circulated by the District Attorney of Allegheny County. The schedule places approximately 65 specified crimes within the following six classes and recommends that bail be set for crimes within each class within the following maximum and minimum amounts:[43]

Class one	Felonies punishable by life imprisonment	$5,000 to $15,000
Class two	Crimes for which the law prohibits the admission to bail by the issuing authority without the District Attorney's consent	$3,000 to $10,000
Class three	Other felonies of a violent or corrupt nature	$3,000 to $10,000
Class four	Felonies involving cheating or defrauding	$2,000 to $ 7,000
Class five	Misdemeanors punishable by imprisonment of at least two years	$1,000 to $ 4,000
Class six	Misdemeanors punishable by not more one year	$ 500 to $ 2,000

To illustrate the effectiveness of the District Attorney's recommendations, on August 24, 1968, the District Attorney issued a statement "notifying all aldermen, magistrates and justices of the peace that henceforth they would require that a minimum bond of $10,000 and a maximum bond of $25,000 be posted" by individuals charged with assault and battery on a police officer.[44] Thereafter, although the crime of assault and battery on a police officer is only a misdemeanor carrying a maximum jail sentence of one year and $500 fine, in almost all cases the issuing authorities have set a $10,000 bond for defendants charged with simple assault and battery on a police officer.[45]

B. *Description of the Nominal Bond Program*

At any time[46] the Common Pleas Court may entertain an application for bail where no bail has been set;[47] a petition to reduce the

42. Many issuing authorities state to defendant's counsel that they are without authority to release persons on nominal bond.

43. This schedule has no legal significance except for the seven crimes for which the District Attorney's consent is a prerequisite for admission to bail. For the remainder of the crimes it is solely within the discretion of the issuing authority to determine the amount of bail.

44. The reason given in the District Attorney's August 24, 1968, statement for recommending the imposition of this amount of bail is "to curb the mounting number of assaults and batteries on police officers as well as our citizens. . . ." "This policy will keep the hoodlums off the streets and in the County Jail where they belong."

45. A sample of 34 defendants charged with simple assault and battery on a police officer within the past few months was taken. For 29 of these defendants, a bond of at least $10,000 dollars had been set by the issuing authority.

46. In situations in which the defendant knows that he will be arrested on a specified charge—particularly on a minor charge such as an assault and battery or surety of the

amount of bail when bail has been set by an issuing authority;[48] and a petition to release a defendant on nominal bond.[49] Most bail petitions presented to the Court are requests for nominal bond pursuant to a nominal bond program operated by Neighborhood Legal Services Association.[50]

The nominal bond program is primarily a fact finding operation.[51] Full-time lay investigators hired by Neighborhood Legal Services Association and volunteers gather information relevant in determining the risk that the defendant will not appear for trial. The information includes the period of the defendant's residence in Allegheny County; his employment record; his family status; his prior criminal record including unpaid costs arising from prior convictions; outstanding criminal charges; and his military record.

The information is obtained in most instances by interviews with the defendant in the County Jail; by interviews with relatives and friends of the defendant; and by checking various records of the Clerk of Courts, District Attorney and the County Detective Bureau.

After the information is gathered and included within the petition for nominal bond, the petition is presented to the Office of the District Attorney for review. This office notes on the petition its recommendation for approval or denial or its lack of jurisdiction if no preliminary hearing has been held.

The petition is then presented to the Court.[52] On days when the Court is in session it will normally consider bail petitions at least two times a day, and most petitions are immediately approved or denied.[53] If the petition is approved, the nominal bond undertaking is valid through trial unless revoked by the Court for cause.[54]

In presenting nominal bond petitions, Neighborhood Legal Services Association makes no recommendation to the Court; it serves as a fact finder and not as an advocate. The petitions are presented to the Court

peace suit filed by a private person—the Court has granted a nominal bond release prior to arrest; this enables the defendant to secure immediate release following arrest.

47. See PA. R. CRIM. P. 4002(b).

48. See PA. R. CRIM. P. 4002(b)(2).

49. See PA. R. CRIM. P. 4002(b)(2), 4007.

50. Neighborhood Legal Services Association is a non-profit corporation which operates the Office of Economic Opportunity-funded legal services program for Allegheny County.

51. A sample form may be acquired from Neighborhood Legal Services of Pittsburgh, Pa.

52. A nominal bond can usually be obtained within two to three hours following the interview of the defendant.

53. In questionable cases the Court sometimes postpones decision on the nominal bond petition until after the preliminary hearing in order to gain additional information.

54. See PA. R. CRIM. P. 4005.

by investigators who have worked on the case and consequently are in the best position to provide relevant information to the Court. The investigators furnish the Court with all information relevant to the case even if it is not specifically called for in the petition.

The Court has handled these petitions in a consistent manner. For minor charges the petitions are granted unless the defendant presents a serious risk. For the more serious charges, unless there are extenuating circumstances, the petitions are frequently denied in the following instances: The defendant has not established an Allegheny County residence;[55] the defendant has a criminal record which includes convictions for serious crimes and convictions within a recent time period;[56] the defendant has outstanding court costs from prior convictions (in appropriate cases arrangements are made for partial or installment payments within the defendant's means);[57] the defendant has serious emotional or mental problems including possible drug addiction;[58] the defendant has previously been released on bail for other outstanding charges or is currently on probation or parole,[59] and, the defendant is accused of engaging in extremely violent conduct.[60] If none of these situations exist, the defendant's nominal bond petition is normally granted.

The nominal bond program has no formal procedures for selecting defendants for whom nominal bond petitions shall be prepared. The program conducts investigations for most defendants referred to it or who contact it by mail, telegram or letter. Referrals are generally made by family and friends of the defendant, social workers, persons associated with various OEO or other community programs, and Court personnel. A petition is completed and presented to the Court unless

55. The experience of the Allegheny County nominal bond program, as well as similar programs of other jurisdictions, indicates that this may be the most important factor. It is unusual for a person who has resided for a lengthy time within a local community (even though he may have had numerous places of residence in that community) to flee the jurisdiction.

56. This defendant has more to lose at trial (i.e., he will receive a greater sentence if found guilty) and hence more incentive to flee. Also certain judges are reluctant to release such defendants without imposing any conditions of release because they believe that there is a greater likelihood that such defendants will commit "additional" crimes while on release, while other judges are reluctant to release such defendants because of the public opinion it may generate against the nominal bond program.

57. The defendant with outstanding court costs will be released once he makes a down payment and arranges a payment schedule with the Clerk of Courts of Allegheny County. This restriction on a nominal bond release is imposed by the Court to induce the defendant to make such arrangements for payment.

58. There is serious doubt that such defendants will appear for scheduled hearings.

59. *supra,* note 56.

60. *Id.*

it becomes obvious that the defendant will not qualify for nominal bond.

C. *Nominal Bond Data*

1. *Release Data.* From January, 1968, through September, 1969, Neighborhood Legal Services prepared and presented to the Court approximately 1,130 nominal bond petitions. Seven hundred and eighty-five of these petitions—about 70 per cent—were approved and the remaining 340 were denied. In about 55 per cent of the cases the petition was acted upon prior to the preliminary hearing—68 per cent of these petitions were granted by the Court. The remaining 45 per cent of the petitions were acted on after the preliminary hearing and 64 per cent of these petitions were granted. In most instances the Distrist Attorney's Office noted its recommendation for approval or refusal only on nominal bond petitions presented to the court after the preliminary hearing. The Office recommended approval of these petitions approximately 20 per cent of the time. Petitions for which the District Attorney recommended approval were granted in practically every case, and the petitions for which the District Attorney recommended refusal were granted about 50 per cent of the time.[61]

Over a period of approximately six (6) months in 1969, the number of nominal bond consents and refusals for various crime categories were as follows:[62]

Crime Categories	*Number Granted*	*Number Refused*	*Percentage Granted*
Assault & Battery (including Surety of the Peace)	26	9	74
Assault & Battery on a Police Officer	19	8	70
Aggravated Assault & Battery and Assault With Intent to Kill	21	27	44
Aggravated Assault & Battery on a Police Officer	7	10	41
Resisting Arrest	16	4	80
Robbery	10	6	63
Armed Robbery	13	23	36
Burglary (including Receiving Stolen Goods)	52	33	61
Larceny (including Auto Larceny)	53	20	73
Narcotics	27	21	56
Arson	2	9	18
Fraudulent Transactions	21	8	72
Motor Vehicle Violations	16	9	64
Morals Offenses	30	10	75

61. These percentages are based upon a sample of approximately four hundred (400) nominal bond petitions.

62. Defendants charged with more than one crime are included in the category deemed to be the most serious crime.

2. *Bond Revocation Data.* Sixty-five of the defendants—about 8 per cent—released on nominal bond in 1968 and 1969 had their bonds revoked. No records listing the reasons for these bond revocations are available. Reasons for revocation include the defendant's arrest on other charges; misstatements on the bond petition; discovery of additional information about the defendant; the defendant's failure to appear for scheduled hearings;[63] and the defendant's appearance at trial without securing counsel.[64] Since the reasons why various defendants had bonds revoked are not known, it is not possible to compare the "show-up" rate of defendants released on nominal bond with the "show-up" rate of defendants released on bonds written by a bondsman. The rate of bond revocation of defendants on nominal bond, however, is similar to the rate of revocations of bonds written by a bondsman.[65]

3. *Conviction and Sentencing Data.* The following figures show the disposition of the case for most defendants released on nominal bond in 1968:

Disposition	*Number of Defendants*	*Percent*
Convicted	99	33
Sentenced to Prison	18	6
Not Guilty	197	67
Total	296	

These figures show that 67 per cent of the defendants released on nominal bond were not found guilty and that another 27 per cent of the defendants were convicted but given no sentence.

D. *Benefits of the Nominal Bond Program*

Liberal use of nominal bond release substantially reduces the inequities of the bail system by lessening the discriminatory treatment of the defendant with limited or no resources. In the absence of a nominal bond program many reliable defendants will either remain

63. This includes defendants that didn't receive notice of the trial because notice was improperly sent or the defendant had changed his place of residence.

64. The Public Defender of Allegheny County represents only those defendants who have requested representation by the fifth working day prior to trial. Thus defendants who learn they can't pay the fee of the private attorney whom they had expected to retain and defendants who neglect to promptly notify the Office of the Public Defender will have their bonds revoked for failing to have counsel at trial.

65. From July 1, 1968 through June 1, 1969 approximately eight percent of the defendants released on surety bond had their bonds revoked—104 of the 1354 surety bonds issued during the period were revoked.

in jail awaiting trial or pay a substantial premium to a professional bondsman.

In theory the traditional bail system works no hardship on the reliable defendant because his deposit of cash or property is returned when he appears for trial. In practice, however, the system does not work in this manner because few persons who are arrested have sufficient funds to put up the full amount of the bond. In Allegheny County in 1968, for example, only approximately 130 cash or property bonds were posted—this represents only about seven per cent of the defendants released on bond in 1968. The remaining defendants arrested in 1968 either remained in jail until trial or made premium payments to a professional bondsman (unless of course they were released on nominal bond).

If the traditional bail system penalized primarily those defendants who eventually received jail sentences, reform might not be as essential because in setting a jail sentence a judge will take into account the penalty imposed by the bail system. This, however, is not the case. In Allegheny County bond is required in almost all cases. Few persons can post cash or property bonds. And a significant percentage of defendants are either not convicted or given a suspended sentence. The injustice of the traditional bail system is illustrated by the conviction and sentencing data for defendants released on nominal bond in Allegheny County in 1968.[66] But for the nominal bond program these defendants would have had to remain in jail for approximately three months awaiting trial or to pay a premium to a professional bondsman although ninety-four per cent were eventually found innocent or deserving of a suspended sentence.

From a purely economic standpoint, liberal use of nominal bond release is sensible. It costs over five dollars per day to maintain a person in the County Jail. Assuming that the defendant who does not make bail spends 80 days in jail prior to trial and that most of the defendants released on nominal bond from January 1, 1968, through October 1, 1969, would have remained in jail until trial,[67] the nominal bond program saved the County during this twenty-one month period more than $250,000 in reduced detention costs.

66. *See supra* p. 86.

67. Probably at least one half of the defendants released on nominal bond would have been unable to post bond. Defendants with limited resources will usually secure a bond through a professional bondsman to obtain prompt release rather than remain in jail until a nominal bond petition is prepared (See p. 86).

One argument frequently used for supporting release through a bondsman over release on nominal bond is that the bondsman has a financial interest in the defendant's appearance and hence an incentive to supervise the defendant and to discover his whereabouts if he fails to appear for a scheduled hearing. While the statements concerning the bondsman's financial interest in the defendant's appearance[68] and his supervision of the defendant are questionable,[69] it is true that the bondsman frequently locates and jails defendants who have failed to appear for scheduled hearings and that this results in some savings to the county.[70] But it is submitted that for the same reason that the enforcement of the law was placed in the hands of professional law enforcement agencies rather than the bounty hunter or the posse—the protection of individual rights—the state should refrain from relying upon such anachronistic practices to save funds.[71] Moreover, the savings

68. Discussing the bondsman's financial interest in the defendant's appearance, FREED AND WALD, *supra* note 15, at 30 said:

> Collection of forfeited bonds has often been found lax or tinged with scandal. In the 3-year period from 1956-59, the Municipal Court of Chicago recorded only one forfeiture payment, of $5,955. A 1960 investigation disclosed that $300,000 in forfeitures had been set aside by one judge. This reinstatement caused five bonding companies to go out of business. A 1962 investigation in Cleveland disclosed an estimated loss to the city of $25,000 from failure to collect personal bonds. Milwaukee discovered an $18,000 loss. Bond collections may also be thwarted by companies inadequately financed to pay up when the time comes. North Carolina has lost an estimated $10,000,000 in uncollected forfeitures over the last ten years from small surety companies gone bankrupt. Philadelphia's collection rate in 1950 was only 20% on forfeited and unremitted bonds. A recent crackdown in Houston produced $70,000 on "bad bonds" in less than a year.

Our investigation of bond forfeiture collections in Allegheny County revealed that from 1963 to the present, only 38% of the bonds forfeited in Allegheny County were satisfied by payment or other means satisfactory to the County such as apprehending the defendant.

69. "In original theory the bondsmen served to maintain close contact with the defendant in order to deter his flight. In urban communities this is now seldom true." ABA PRE-TRIAL RELEASE STANDARDS 63.

70. "Another justification advanced for the bondsmen's existence is that he saves the state money by recapturing the defendant who fails to appear. The argument highlights the anomalous role of the bondsman in an era when procedural rights of criminal defendants are so carefully protected." ABA PRE-TRIAL RELEASE STANDARDS 63. *Also see* Note, *Bail: An Ancient Practice Re-Examined,* 70 YALE L.J. 966 (1961); Note, *Bail—Bondsmen and the Fugitive Accused—the Need for Formal Removal Procedures,* 73 YALE L.J. 1098 (1964).

71. *See* Commonwealth *ex rel* Ford v. Hendrick 215 Pa. Super. 206, 231, 257 A.2d 657, 669 (1969) (Dissent by Hoffman, J.), where it was stated that:

> It has been suggested that bondsmen facilitate the recapture of those who jump bail. Even accepting this contention arguendo, however on balance with our concern for constitutional rights, we should not sanction professional bounty hunters who are unrestrained by constitutional limitations. Such a task is more properly the concern of the police.
>
> . . . .
>
> [T]he modern professional bondsman must be considered an anachronism who makes no constructive or necessary contribution to the administration of criminal justice.

provided by the nominal bond program from reduced detention costs far exceed the costs which the state incurs in supervising and locating defendants released on nominal bond. Promoting release on nominal bond for reliable defendants and expending a portion of the savings from reduced detention costs to supervise and locate defendants released on nominal bond will result in substantial savings.[72]

IV. Need for Additional Bail Reform

1. *Release on 10% Cash Deposit.* Even a liberal nominal bond program benefits only the defendant who is able to satisfy certain conditions. As before, the defendant who cannot satisfy these conditions will remain in jail until trial if he is indigent or gain release by paying a premium to the bondsman if he has limited resources.[73] Moreover, the program seldom benefits the defendant with limited funds who can meet the conditions for nominal bond. Release on nominal bond usually entails jail detention of one or two days awaiting processing of the nominal bond petition.[74] For most persons jail detention of even one night represents a harsher penalty than the loss of the premium payment to a bondsman. Thus a defendant with limited resources will usually obtain release through a bondsman rather than stay in jail to await the processing of this petition. This is particularly true of defendants arrested on minor charges for which a low bond of $500 to $2,000 is set.

72. Other immediate financial savings include contributions to the economy by the defendant during the time period he would have remained in jail; elimination of welfare payments which would have otherwise been made to the defendant's family if the defendant were unable to return to his job; elimination of costs of providing free counsel to defendants who are able to hire a private attorney from funds earned following their release on bail. Other costs include the cost of operating a nominal bond program (about $15.00 per defendant—this is paid by the federal government in Allegheny County) and costs of future crimes committed by the defendant on nominal bond.

73. The defendant released through a premium payment to a bondsman has no financial or other incentive to appear for court. Such release effectively negates the Court's ruling that the defendant's release in the absence of financial incentive to appear for court is too risky. *See* Commonwealth *ex rel* Ford v. Hendrick, 215 Pa. Super. 206, 231, 257 A.2d 657, 669 (1969).

74. While the nominal bond program can process a nominal bond petition within about three hours, bonds can be processed only during the working hours of the Clerk of Courts, Office of the District Attorney, Office of the County Detectives, and Common Pleas Court personnel and during the visiting hours of the County Jail (9:00 a.m. to 4:00 p.m. on Mondays through Fridays). Moreover, there is frequently some delay between the time of the defendant's arrest and the time the defendant's name is referred to the nominal bond program. Also in the event of a backlog there is further delay until the program can process the defendant's petition, although in many instances if the name of the defendant is referred to the program by the middle of the morning, the petition will be processed and the defendant released, assuming that the petition is granted, by late afternoon.

One change which would eliminate many of the inequities that are not corrected by the nominal bond program is the adoption of a release procedure which permits a defendant's release upon executing a personal bail bond and making a cash deposit with the court or issuing authority of not more than ten per cent of the face amount of the bond.[75] This deposit less a filing fee to cover administrative costs is returned if the defendant appears for all scheduled hearings. If he fails to appear, on the other hand, the deposit is kept by the state and the state also has a cause of action against the defendant for the remaining 90 per cent of the amount of the bond (in most situations this cause of action is worthless).

This method of release eliminates the penal aspects of the existing bail system for the defendant with limited funds; he is neither required to remain in jail awaiting the processing of his nominal bond petition nor to pay a premium to the bondsman which is never returned. At the same time it does not operate to the prejudice of the state, because release on ten per cent cash deposit makes it no easier to be admitted to bail.[76] Under the present bail system the defendant with cash of ten per cent of the face amount of the bond can be released by retaining a bondsman.[77] The only change effected by release on ten per cent cash

75. Illinois adopted this method of release in 1963. ILL. REV. STAT. ch. 38, § 110-7 (1963). The rate of forfeitures for defendants released in this manner is smaller than where surety bonds are required. See Bowman, *The Illinois Ten Percent Bail Deposit Provision,* (1965) U. ILL. L.F. 35, 39. Also the Federal Bail Reform Act of 1966, 18 U.S.C. 3146, creates a preference for use of this method of release when money bond is necessary to assure the defendant's appearance.

76. This statement is subject to one qualification: the defendant with cash of ten per cent of the amount of the bond can be released today only if a bondsman agrees to act as surety. Release through ten per cent deposit on the other hand, will permit every defendant with cash of ten per cent of the face amount of the bond to be released—the bondsman will no longer have a veto power. This represents another point in favor of release through ten per cent cash deposit. A decision of such significance should be made by the court, and not left to the bonsdman. As stated by Judge J. Skelly Wright in *Pannell v. United States,* 320 F.2d 698 at 699 (D.C. Cir. 1963), (concurring opinion):

> Certainly the professional bondsman system . . . is odious at best. The effect of such a system is that the professional bondsmen hold the key to the jail in their pocket. They determine for whom they will act as surety—who in their judgment is a good risk . . . the Court and the Commissioner are relegated to the relatively unimportant chore of fixing the amount of bail.

77. In Allegheny County a premium of between eight (8%) and ten (10%) per cent of the amount of the bond is presently quoted by the bondsmen. Through bargaining, bondsmen will frequently reduce this rate to as little as five per cent of the amount of the bond. The Professional Bondsmen's Act, PA. STAT. ANN. tit. 19 § 90.1 (1953), limits the premium rate to ten per cent for the first $1,000 and five per cent for the remaining amount of the bond. The Act excludes surety companies from its coverage, and most bonds are written by bondsmen acting as agents for a surety company. Despite repeated requests by the authors and others to the Pennsylvania Insurance Commission, including the presentation of evidence showing that the rates charged by the surety companies in the bail bond business exceed their rates on file with the Commission, the Commission has taken no steps to regulate the bail bond activities of surety companies.

deposit is that the bondsman is replaced by direct dealings with the state.

One objection made to this method of release is that it reduces the financial incentive to appear of the defendant who would otherwise post a cash or property bond in the full amount. Defendants who post cash or property bond, however, comprise only a small percentage of the total number of defendants released on bond (such defendants comprised only seven per cent of the total number of defendants released on bond in Allegheny County in 1968). Judge Hoffman of the Pennsylvania Superior Court noted in his dissent in *Commonwealth ex rel Ford v. Hendrick* that:

> In the vast majority of cases, and in all cases involving indigents, who are judgment proof, the posting of bail by an accused has little effect on his decision to appear at trial. The amount forfeited in most instances is of a minimal nature, and requiring that bail be posted acts more to inconvenience the accused, than to advance any legitimate interest of justice.[78]

Thus the normal situation—release on bond posted by a bondsman or on nominal bond—is not altered by release on ten per cent deposit.

Another objection to release through a ten per cent cash deposit is that in most situations in which the defendant fails to appear for trial, the state will recover only ten per cent of the face amount rather than the 100 per cent which is available under the present system. This objection is based on a misunderstanding of the present bail system. Today in Allegheny County and most other jurisdictions the property bond is seldom forfeited—in fact the recovery may not exceed 10 per cent.[79]

In addition to removing inequities within the existing bail system, the ten per cent cash deposit method of release affords several other advantages over the existing bail system.

First, the ten per cent cash deposit method of release will be used by defendants who would normally have retained a bondsman. Since the defendant's deposit is returned if the defendant appears for his trial, the defendant released under this method has a financial incentive to appear. This is not the case for the defendant released through the bondsman. Since his premium payments are not returned, he has

78. 215 Pa. Super. 206, 226-7, 257 A.2d 657, 666-7 (1969).
79. *supra* note 68.

no more financial incentive to appear for his hearings than the defendant released on nominal bond. Hence to the extent that a financial incentive to appear for court hearings deters flight, the ten per cent cash deposit method of release affords the state more protection than the existing bail system.

Second, release through a cash deposit would eliminate the bondsman. The bail bond business is subject to a variety of allegations of corruption. The charges range from alleged tie-ins with police and court officials involving kick backs for steering defendants to particular bondsmen, to collusion and corruption aimed at setting aside forfeitures of bonds where the defendants have failed to appear, to unlawful profiteering through fees which exceed legal limits.[80] Release through ten per cent cash deposit eliminates possibilities for corruption since it affords no profit to private individuals. As the American Bar Association Advisory Committee on Pretrial Release note:

> If releases without bail are increased, closer supervision of a released defendants employed, bail amounts reduced, and the ten . . . per cent cash deposit utilized, cases in which the services of a professional bondsman would be required should be practically non-existent. . . . The professional bondsman is an anachronism in the criminal process. Close analysis of his role indicates he serves no major purpose that could not be better served by public officers at less cost in economic and human terms.[81]

Third, release through a cash deposit creates a source of funds from which the state can collect costs or fines imposed on defendants who are found guilty, particularly if the provisions for release on ten per cent cash deposit permit the state to deduct any fines or costs out of the funds on deposit prior to their return. This would eliminate the common situation in which the state does not receive payment of costs and fines. In many situations funds presently paid to the bondsman would instead be paid to the state in the form of the payment of costs and fines.

2. *Imposition of Non-Monetary Conditions.* Bail reform should also include the availability of non-monetary conditions of release to be imposed on defendants for whom release on nominal bond is deemed inappropriate. The existing bail system which provides the court with

80. In Pittsburgh, for example, in 1964 it was reported that certain jail officials get part of every premium written. See FREED AND WALD *supra* note 16, at 34-38.
81. ABA PRE-TRIAL RELEASE STANDARDS 44.

only two alternatives—unrestricted release or the imposition of monetary conditions—is too inflexible. For many defendants unrestricted release is too risky while the imposition of monetary conditions makes release impossible. Release of many defendants under specified conditions and prohibitions would both protect the public and minimize burdens placed on the defendant.

Conditions of release to be imposed in appropriate cases include: (a) release of the defendant into the care of a qualified person or organization agreeing to supervise him; (b) placing the defendant under the supervision of a probation officer or other appropriate official; (c) requiring the defendant to report regularly to an officer of the court, law enforcement official, etc.; (d) imposing restrictions on the activities, movements, associations and residences of the defendant; and (e) release of the defendant only during working hours or only until a specified number of days prior to trial.

Release subject to specified conditions provides more protection to the state for many defendants ineligible for nominal bond than does release under existing bond practices. Most defendants ineligible for nominal bond who are released on bail secure their release by paying a fee to the professional bondsman. Since this fee is not returnable, these defendants have no financial incentive to appear for trial. If such defendants were released on nominal bond subject to specified non-monetary conditions, there is a greater likelihood that they would return for trial.[82] At the same time, release in this manner would be more advantageous to most defendants because it would be at no cost.

V. Conclusion

It is submitted that a liberal use of nominal bond release; release on specified non-monetary conditions in many cases; and release of most defendants for whom a cash bond is necessary through a ten per cent cash deposit with the court or issuing authorities.[83] Current

82. If the defendant violates any conditions of release, the Court may impose different or additional conditions or revoke the defendant's release to assure the public's protection —See Pa. R. Crim. P. 4005(b).

83. Certain judges and issuing authorities attempt to use the bail system to deny release to a defendant who they fear will commit "additional" serious crimes if released. While we seriously question the use of such practices, the reforms recommended in this report do not make it any more difficult for a judge to set bail beyond a defendant's release. Also, attempts to detain a defendant until trial through high bail are often thwarted because the defendant's "organization" has ample resources to meet the bail. The recommendation of this report that a judge in appropriate cases release a defendant on nominal or personal bond subject to restrictions on the defendant's activities, move-

studies, demonstrate that many defendants can be safely released without bail; that the existing system in which most pre-trial releases are dependant upon the professional bondsman affords no greater protection to the state than release through nominal bond; and that the existing system imposes unjust hardship on many indigent defendants. In Allegheny County, for example, the same percentage (8) of bonds are evoked for defendants released on nominal and surety bond; over 90% of the defendants released on nominal bond in 1968 received no jail sentence; and the nominal bond program has resulted in savings of more than $250,000 to the Allegheny County taxpayers in reduced jail costs over a 21 month period. By liberal use of nominal bond release and the replacement of the professional bondsman with the imposition of non-monetary conditions and the ten per cent cash deposit release, a bail system can be established which will provide more protection to the state and fairer treatment to the defendant.

Such proposals are patterned after the Federal Bail Reform Act of 1966 which applies to all federal criminal cases, and the American Bar Association Pre-trial Release Standards. Both the Federal Rules and the ABA Standards provide that the sole purpose of monetary bail is to assure the defendant's appearance; that money bond should be set only when no other conditions of release including non-monetary conditions will reasonably assure the defendant's appearance in court; and that a defendant should be released on his own recognizance unless the court finds a substantial risk of flight or a need for non-monetary conditions to be imposed.[84] Where money bond is needed, both create a preference for requiring the execution of a bond accompanied by a deposit of cash or securities equal to ten per cent of the face amount of the bond. The ABA Standards also recommend that the practice of employing compensated sureties be abolished.

ments, associations and residences gives the judge who uses bail to "protect the community" more opportunity to control the professional criminal by imposing conditions of release which prohibit the possession of weapons, the association with certain persons, the frequenting of certain places, etc.

84. *See* Judge Hoffman's dissenting opinion, Commonwealth *ex rel* Ford v. Hendrick, 215 Pa. Super. 206, 208, 257 A.2d 657 (1969).