

12-1975

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Recommended Citation

Rogers, Susan R. (1975) "Special Project Report: Mercer Center for Law Reform–Bail Project," *Mercer Law Review*. Vol. 27 : No. 1 , Article 22.

Available at: https://digitalcommons.law.mercer.edu/jour_mlr/vol27/iss1/22

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SPECIAL PROJECT REPORT

MERCER CENTER FOR LAW REFORM BAIL PROJECT

In recent years there has been an increasing national awareness concerning the problems of pretrial detention procedures.¹ Shocking statistics have been forthcoming revealing the number of poor and indigent defendants who, due to insufficient funds with which to secure their release, are forced to spend weeks or months in detention facilities awaiting a determination of their guilt or innocence.² These detention facilities, usually county jails, are typically overcrowded and understaffed, a situation which greatly exacerbates the already depressing conditions of incarceration.³ These conditions may have more far-reaching consequences than are immediately evident:

[T]he frustration and boredom which living under these conditions induces, must have a deteriorative effect on the defendant's morale, which, in turn, may affect his desire properly to defend himself, with his despair in some cases resulting in a loss of faith in the judicial system and the entry of a plea of guilty.⁴

Besides the psychological problems and concomitant effects on the practical situation, other aspects of pretrial incarceration may damage the defendant's case. For instance, a defendant while incarcerated is not able to contribute to his own defense in the most productive manner since he is less accessible to his attorney.⁵ Also, due to incarceration, a defendant loses his present income and places his job in jeopardy. The families of some defendants are forced to accept relief due to this loss of income. These results occur before any determination of guilt or innocence, so that the defendant is in reality being punished for his indigence.⁶

Pretrial detention not only causes serious economic difficulties to the individual defendant but to the taxpayer as well since the taxpayer pays to support those held in pretrial detention, and also pays indirectly for their defense. In his concurring opinion in *Pannell v. United States*,⁷ a case

EDITOR'S NOTE: In addition to her work with the Mercer Bail Project, the author was a Probation-Parole Supervisor for two years with the Georgia Department of Offender Rehabilitation.

1. See R. GOLDFARB, RANSOM: A CRITIQUE OF THE AMERICAN BAIL SYSTEM (1965) [hereinafter cited as GOLDFARB].

2. *Id.* See also P. B. WICE, FREEDOM FOR SALE (1974) [hereinafter cited as WICE].

3. WICE, *supra* note 2 at 85.

4. Note, *A Study of the Administration of Bail in New York City*, 106 U. PENN. L. REV. 693, 725 (1958).

5. WICE, *supra* note 2 at 92.

6. GOLDFARB, *supra* note 1 at 32.

7. 320 F. 2d 698 (D.C. Cir. 1963).

involving an application for bail pending appeal, Judge Skelly Wright states:

Instead of being allowed the opportunity of obtaining worthwhile employment to support their families, and perhaps to pay at least in part for their defense, almost 90 per cent of the defendants proceed in forma pauperis, thus casting an unfair burden on the members of the bar . . . who are required to represent these defendants without pay.⁸

Traditionally, there have been several methods to avoid this pretrial detention. Once the bail figure has been established, the defendant may post the entire amount to obtain release. This cash bond is normally fully recoverable upon the defendant's appearance at trial.⁹ Obviously, many defendants would find it difficult if not impossible to accumulate such a sum of money.

In order to circumvent such difficulty, most defendants depend upon the services of a bail bondsman to obtain their release.¹⁰ These bondsmen, who have total discretion in their choice of clients, pledge the bail amount in the event of their client's default. The most common procedure followed is for the defendant to pay the bondsman ten per cent of the bail figure, an amount not usually refundable. Here again, many defendants are not able to afford such services, even if the bondsman elects to handle the case.¹¹

Many cities allow the defendant or his bail bondsman to offer property for the bail amount rather than cash. The problems inherent in this system are two-fold: courts are loath to cause a forfeiture of land, particularly when it belongs to an innocent citizen; and some bondsmen who own property misuse the system by satisfying more than one bail amount with the same property.¹²

A less common procedure for obtaining pretrial release is the personal bond, also known as release on own recognizance (ROR), personal surety, nominal bond, or signature bond.¹³ This type of bond may be offered to a defendant if it is determined that he is sufficiently reliable and established within the community to be released on his own signature.¹⁴ The criteria utilized in making such a determination include "such factors as their community ties, past criminal record, and the seriousness of the crimes of which they are accused."¹⁵ This method is advantageous since it entails no initial expenditure of money.

The purpose of the bail system is to assure the defendant's appearance

8. *Id.* at 699 (concurring opinion).

9. See P. B. WICE, *BAIL AND ITS REFORM: A NATIONAL SURVEY* at 10 (1973).

10. See GOLDFARB, *supra* note 1 at 96.

11. P. B. WICE, *BAIL AND ITS REFORM: A NATIONAL SURVEY* at 10 (1973).

12. *Id.* at 11.

13. *Id.* at 11-12.

14. *Id.* at 12.

15. *Id.* at 30.

at trial,¹⁶ and "bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment."¹⁷ This determination, according to the Supreme Court in *Stack v. Boyle*,¹⁸ "must be based upon standards relevant to the purpose of assuring the presence of that defendant."

In *Bandy v. United States*,¹⁹ Justice Douglas, speaking for the Court, expands upon the right of a defendant to be allowed bail in an amount commensurate with his ability to pay:

Under Rule 46 a defendant has a *right* to be released on bail before trial, save in capital cases.

. . . .
 . . . In the case of an indigent defendant, the fixing of bail in even a modest amount may have the practical effect of denying him release.²⁰

Often, though, bail is used for more than a means to assure the appearance of the defendant. A program of preventive detention²¹ is often present, though seldom admitted.²² Such a system runs counter to the holdings of the Supreme Court in cases such as *Stack* and *Bandy*, and poses "the theoretical legal problem . . . that if you imprison a person on the mere speculative possibility that he might commit a crime at some future time, you are denying him any presumption of his present or future innocence."²³ Judge Jackson, as Circuit Judge for the Second Circuit, expressed his concern over the problem in *Williamson v. United States*,²⁴ a case dealing with an application for extension of bail pending certiorari results:

Imprisonment to protect society from predicted but unconsummated

16. *Stack v. Boyle*, 342 U.S. 1 (1951).

17. *Id.* at 5. The eighth amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

In *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971), the Supreme Court stated that "application of the eighth amendment's excessive bail provision to the states through the fourteenth amendment has been assumed."

18. 342 U.S. 1, 5 (1951). The Court here cited FED. R. CRIM. P. 46(c), which provides: Amount. If the defendant is admitted to bail, the amount thereof shall be such as in the judgment of the commissioner or court or judge or justice will insure the presence of the defendant, having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant.

19. 369 U.S. 831 (1961)(denial of certiorari).

20. Although not reported in the official report of the denial of certiorari, Justice Douglas' statement appears at 82 S.Ct. 11, 12. (Emphasis in the original.)

21. "Preventive detention is the practice of either denying bail or setting bail at an unattainably high amount in order to imprison a person who presents a particular danger to society if left free before trial." GOLDFARB, *supra* note 1 at 128.

22. *Id.* See also WICE, *supra* note 2 at 2.

23. GOLDFARB, *supra* note 1 at 132-33.

24. 184 F. 2d 280 (2d Cir. 1950).

offenses is so unprecedented in this country and so fraught with danger of excesses and injustice that I am loath to resort to it²⁵

Even if we were to accept the proposition that preventive detention is proper for the purpose of protecting society, it is doubtful that the bail system provides an effective procedure for accomplishing this purpose.²⁶ There is no guarantee that the dangerous criminals will be the ones unable to afford release.²⁷

Due to the growing awareness of the problems and abuses in the existing bail system, bail reform projects have been initiated throughout the country.²⁸ From 1961 to 1971 over 100 such projects existed in this country, but there is little evidence of much expansion since that time.²⁹ An example of one of the first and most successful of these projects is the Manhattan Bail Project begun by the Vera Foundation in New York City.³⁰ The staff of the Manhattan Bail Project, primarily law students, interviews incarcerated defendants and, on the basis of their answers to questions concerning family, financial situation, community ties, and past criminal record, as verified by the staff, rates them according to a set formula in order to predict the defendant's likelihood of appearing for his trial if released on his own recognizance. Using the rating as a guide, Vera members recommend to the judge that those that appear most dependable be released on personal recognizance. Those who are so released by the judge are supervised by project members to assure their appearance at trial.³¹

The results of the Manhattan Bail Project are indicative of the need for more such programs. It was found that those defendants who were incarcerated between arrest and trial more often received unfavorable dispositions³² and more prison sentences than did those released on bail or on personal recognizance,³³ and those defendants released on their own recognizance defaulted on appearance less often than did those released on bail.³⁴ R. Goldfarb, in his *Ransom: A Critique of the American Bail System* (1965), sums up the effect of the Vera Foundation's Manhattan Bail Project as follows:

While not scientifically conclusive, the Vera results to date do indicate at least that investigation is helpful in determining whom to release; that supervision without detention can be quite effective in assuring the presence of defendants at trials; that the availability of money for a bond

25. *Id.* at 282-83.

26. Note, *Preventive Detention Before Trial*, 79 HARV. L. REV. 1489,1492 (1966).

27. GOLDFARB, *supra* note 1 at 127.

28. *Id.* at 150.

29. WICE, *supra* note 2 at 152.

30. For a more detailed discussion, see GOLDFARB, *supra* note 1 at 150 and WICE, *supra* note 2 at 99.

31. GOLDFARB, *supra* note 1 at 153.

32. *Id.* at 162.

33. *Id.* at 163.

34. *Id.* at 160.

premium is not necessarily related to whether a defendant will flee; that most defendants will appear for trial voluntarily if humanely assisted; and that a tremendous amount of pretrial detention is unnecessary and wasteful to the state, and terribly prejudicial to the defendant.

And in large part, Vera's Manhattan project /woke the country to the inequities and waste of the bail system. Much of the national reform which has begun is due to the stimulus provided by Vera.³⁵

In 1973, the Mercer Center for Law Reform was organized by a professor and twelve students of the Walter F. George School of Law. The Center is dedicated to the public interest in well-run, legitimate government institutions operating within the scope of their duly constituted authority. It is primarily engaged in determining how various institutions operate in fact, how these institutions are supposed to work in theory, and how the reality and the ideal can be brought closer together.

One of the Center's first efforts concerned the bail bonding system in Macon, Bibb County, Georgia. The Mercer Bail Project (hereinafter referred to as "the Project") states four primary goals: (1) to conduct an intensive study of existing conditions in the local bail bonding system; (2) to assist individual defendants in making arrangements for bond, obtaining bond reductions, and assuring the assignment of court appointed attorneys for those defendants who are not able to afford their own; (3) to formulate and propose changes in the system if any are found desirable or necessary; (4) to provide third-year law students with experience in interviewing clients, working within the system as it exists, assessing individual defendants' legal needs, and representing such defendants at their bail hearings. Such representation is made possible by the Law School Legal Aid Agency Act of 1967.³⁶

In processing clients, the Project members begin by interviewing all felony defendants placed in the Bibb County Jail during the preceding week concerning family, employment, criminal record, financial status, and community ties. The mean number of such clients has been approximately twenty per week, the majority of which do not have their own attorney. If it is ascertained that a defendant is not represented by an attorney, the information gleaned from the interview is verified by telephone and a recommendation is formulated concerning the defendant's case. A Project member then represents the defendant by pleading for a bail reduction if the amount is "excessive,"³⁷ and recommends that an attorney be appointed if, from the project member's investigation, it appears that the defendant is unable to afford one. Attorneys are appointed in virtually all cases where there is such a recommendation, approximately ten per week, and bail is reduced in an average of one case per week.

35. *Id.* at 165-66.

36. Ga. Laws, 1967, pp. 153-57; GA. CODE ANN. §9-401.1 (Rev. 1973).

37. See text accompanying note 17, *supra*.

In its first two years of operation, the Mercer Bail Project has firmly established itself as an important and productive part of the local judicial system. Much of this success is attributable to the cooperation received from the Bibb County Superior Court, District Attorney, and Sheriff. These three offices, fortunately for the success of the Project, perceived the advent of the Bail Project as an opportunity to improve the working of their own systems.

The first immediate result of the student involvement in the county jail was the establishment of a system of checks and balances—an additional and separate organization assuring that attorneys are appointed without delay in an appropriate case, and that no defendant is overlooked in the overcrowded jail situation.

A more sweeping change occurred in relation to the time an indigent defendant spends in pretrial detention before the court appoints counsel. No uniform system existed to accomplish this, and defendants were incarcerated up to two or three weeks or longer periods of time before counsel was appointed for those who could not afford to retain their own. With the aid of the Project, the district attorney's office has implemented an efficient system for assuring fast action in such cases: a specially designated time is set aside on Tuesday of each week during which time every defendant arrested on a felony charge during the previous week who has not obtained pretrial release is brought into court. While in court, the superior court judge queries the defendant as to whether or not the defendant has retained an attorney. If an attorney has not been retained, the judge inquires into the defendant's ability to afford one. If it is determined that the defendant has no attorney and cannot afford to retain one, the court will appoint one for him. This process is expedited by the Project representative who has interviewed the defendant and is present at the hearing to verify the information given by the defendant.³⁸ Due to these changes, counsel is now appointed to an indigent defendant within a week of his initial incarceration.

The Mercer Bail Project, having established itself within the existing judicial system of Bibb County, is now prepared to suggest and implement a viable alternative to the present system. The first step planned by the Project is the introduction of an ROR, or release on own recognizance program, such as that established by the Vera Foundation.³⁹ Bibb County has no such program, thereby depriving indigent defendants of opportunities for pretrial release even if they are "good risk" subjects or, in other words, there is a high probability that the defendant will appear at trial as required. Such a procedure is necessary not only to support the right of the individual to obtain pretrial release,⁴⁰ but in order to reduce the over-

38. Prior to the Project, no system for verification existed.

39. See GOLDFARB, *supra* note 1; WICE, *supra* note 2; and text accompanying notes 30-34, *supra*.

40. *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

crowded conditions in the detention facility.⁴¹

Such a program for pretrial release has received judicial support. For example, Judge Wright in his concurring opinion in *Pannell* stated that “[w]hen the long-delayed bail reforms finally become a reality, it is hoped that the accent will be on allowing defendants release on their own recognizance, with adequate and certain penalties for non-appearance.”⁴² Also, Justice Douglas, in *Bandy v. United States*,⁴³ expressed the opinion that

no man should be denied release because of indigence. Instead, under our constitutional system, a man is entitled to be released on “personal recognizance” where other relevant factors make it reasonable to believe that he will comply with the orders of the Court.⁴⁴

The Department of Justice has expressed itself along similar lines:

It is the view of the Department that the use of r.o.r. should be broadened in order to preserve the traditional right to freedom before conviction and thereby to insure that a defendant is able to provide financially for his family and his defense and to take an active part in the preparation of that defense.⁴⁵

In establishing an ROR program, the Mercer Bail Project would be encroaching upon the territory of the professional bail bondsman in investigation of the defendant, recommendation of release, and supervision until trial. The role of the bondsman has been under attack, and it is the opinion of some authorities that it should be reduced or eliminated altogether.⁴⁶ Judge Wright states:

Certainly the professional bondsman system as used in this District is odious at best. The effect of such a system is that the professional bondsmen hold the keys to the jail in their pockets. . . . The bad risks, in the bondsmen’s judgment, and the ones who are unable to pay the bondsmen’s fees, remain in jail.⁴⁷

The Mercer Bail Project, under the direction of the Mercer Center for Law Reform, intends to remain an integral part of the local judicial system and a responsible medium of instigation and implementation of long-awaited bail reform in Bibb County, Georgia.

SUSAN R. ROGERS

41. P.B. WICE, *BAIL AND ITS REFORM: A NATIONAL SURVEY* at 22 (1973).

42. 320 F. 2d at 699 (D.C. Cir. 1963) (concurring opinion).

43. 369 U.S. 831 (1961) (denial of certiorari).

44. Statement by Justice Douglas in 82 S.Ct. 11, 13 (1961).

45. GOLDFARB, *supra* note 1 at 187 quoting from Justice Department Memorandum of March 11, 1963.

46. WICE, *supra* note 2 at 98.

47. *Pannell v. United States*, 320 F. 2d 698, 699 (D.C. Cir. 1963) (concurring opinion) (emphasis in the original).

