

## Presumed Guilty: The Pre-Trial Detainee

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*I know not whether Laws be right,  
Or whether Laws be wrong;  
All that we know who lie in gaol  
Is that the wall is strong;  
And that each day is like a year,  
A year whose days are long  
. . . The vilest deeds like poison weeds  
Bloom well in prison air;  
It is only what is good in Man  
That wastes and withers there:  
The anguish keeps the heavy gate,  
And the warder is Despair.*

—“Ballad of Reading Gaol”, Oscar Wilde

*This joint is driving me nuts!*

—Harry R., pre-trial detainee, April 3, 1970

The “New Haven Jail”, as New Haven’s Correctional Center was known in the past, was built in part in 1851.<sup>1</sup> The “new” wing of the jail was floated up from Sing-Sing in 1896 when it was declared obsolete in that institution. Legislative commissions constituted in 1932, 1934, 1936 and 1938 decried the inadequacy of the facility and called for the construction of a new plant. But conditions in the jail have remained substantially the same for the last fifty years.

There are a total of 300 cells, each about 5' x 8'. Since there are no plumbing facilities in the cells, buckets are used to serve the sanitary needs of the entire population. A few toilets and showers exist at the end of each cell block and are available to inmates when the cells are unlocked. The furniture in each cell consists of an iron cot and the cell bucket. The cells are built in tiers of three. Each cell block has a day room connected to it, with benches, tables and a TV set. Most of the inmates crowd into these day rooms 10:30-11:30, 1:00-3:50 and 4:45-10:00, their only "free" time. The rooms strike the outside observer as grotesque: they are filled with a few card-players, rows of humans of every description lining the walls staring sightlessly into the center of the room and a constant babble of voices cut through by the booming tones of a TV set whose un-winking white eye is always open.

Recreation other than card playing and TV watching is limited. When the weather is favorable, inmates are allowed into a courtyard that is surrounded on four sides by the Center's building. A volleyball net and sagging basketball hoop provide some diversion, and they are appreciated by the inmates for the few minutes they can be used. No library exists except for books that are received from the outside and passed from inmate to inmate. Only magazines on an approved list may be sent in.<sup>2</sup>

Of the 375 inmates at the Correctional Center, about 300 are awaiting disposition of their cases—of which ten to fifteen are federal prisoners. The remaining 75 are

serving state prison sentences of one year or less. This proportion of pre-trial detainees is unusually high—other correctional centers in the state have a convicted/unconvicted ratio of about 50/50.

What follows is a study conducted in 1970 of a sample of the pre-trial population of the Correctional Center. It considers why and how this sample came to be incarcerated, what the conditions of incarceration were, what difficulties the sample perceived in dealing with the criminal process from behind bars and what effects such incarceration seemed to have upon conviction and sentencing of jailed defendants.

(1) A majority of the detained population in the New Haven Correctional Center were employed at the time of their arrest, and a significant number possessed other indices of stability, such as long residence in a local city, minor or clean prior record and residence support of dependents. Thus, they would make good candidates for pre-trial release on non-surety conditions.

(2) For a sample of defendants represented by the Public Defender, the period of pre-trial detention averaged six months. Nearly all of these defendants eventually pleaded guilty. This six-month detention period was slightly longer than the average sentence awarded those clients of the Public Defender sentenced to the Correctional Center. Nonetheless, pre-trial detainees were denied participation in work or educational programs offered to the convicted defendant. The 119

year-old Correctional Center lacks funds, is understaffed and is unable to provide an effective correctional program for its inmates.

(3) Restraints on the pre-trial detainee seal him off from the outside world. This isolation includes, in a majority of cases, minimal contact in jail with an attorney. Many detainees feel that they suffer in relation to the bailed defendant in preparation and disposition of their cases, and for individuals represented by the Public Defender, the probability of sentences to jail or prison is approximately three times greater for pre-trial detainees than it is for those who are free before case disposition, regardless of the seriousness of the offense charged.

Most of the pre-trial detainees in the Correctional Center are being held because they are unable to make money bail.<sup>3</sup> Bail is an aspect of criminal procedure that has had the benefit of extensive examination, both from the theoretical standpoint and through massive field research: imaginative alternatives to conventional money bail have been tested in scores of cities,<sup>4</sup> and preventive detention is a live issue today and has been supported by a wide variety of sources.<sup>5</sup> In determining the adequacy and fairness of any system involving pre-trial restraints, some kind of balancing process must take place which must take into account at least these four factors:<sup>6</sup>

- (1) Society's interest in maximum freedom for the individual,
- (2) society's interest in not discriminating against those unable to meet financial conditions for pre-trial release,
- (3) society's interest in protecting itself from anti-social acts by defendants who are not detained, and
- (4) society's interest in the fair and efficient operation of its criminal justice system.

Past reports have touched on all four factors from varying perspectives. Advocates of maximum freedom for defendants have mustered statistical studies showing that the threat of recidivism by defendants free on bail is minimal and that the rate of non-appearance in non-money bond systems is negligible.<sup>7</sup> Their opponents cite statistics to the contrary, especially on the issue of crime while on bail.<sup>8</sup> The interest of the drafters of the United States Constitution in maximum freedom for the individual awaiting trial has been a topic treated extensively in scholarly articles, but skirted by the courts.<sup>9</sup> Courts have also refused to hold that detention creates substantial prejudice in the preparation of a defense.<sup>10</sup> Likewise, they have been generally silent about the rights of the individual detained in jail before trial.<sup>11</sup>

This study describes the interplay of the four factors in the Connecticut bail system, especially as it affects the plight of those detained at New Haven's Correctional Center and levies additional societal costs due to pre-trial incarceration.<sup>12</sup>

## Bail Setting

Bail-setting processes have been abused in many jurisdictions.<sup>13</sup> While defense attorneys interviewed in New Haven generally felt that local judges make a good effort at determining bail impartially, some of the defendants interviewed at the Correctional Center complained that police had used bail as a weapon to punish non-cooperation. Literature and pilot programs of the past ten years have pointed the way to new and imaginative bail programs which can benefit society without creating additional danger to the community or impeding the operation of the courts. Connecticut has an appointed bench, a progressive legislature and an independent Bail Commission. Nonetheless, except for accused misdemeanants, it has not yet explored some of these imaginative alternatives to conventional bail.

## Arrest and Booking

Normally, bail is set by the police at the station where the individual charged is booked. Booking is performed by the arresting officer and the desk sergeant. If the court is not in session, the booking sergeant will conduct a bail interview of the accused, using an interview sheet printed for the Connecticut Bail Commission. (See Appendix I) The police take into account factors such as ties to the community, prior record and current charges. They grant release on non-money conditions in 60-65% of all arrests.<sup>14</sup> The police rarely release accused felons on non-money conditions. Persons not released are placed in the lockup connecting the Detention Center and Circuit Court until arraignment when the court is in session. If the court is in session, an accused is usually sent directly to the judge for arraignment and initial bail-setting. In the New Haven's Sixth Circuit Criminal Court, a Bail Commissioner is always on duty when the court is in session, and the judge may ask him to interview a previously un-interviewed defendant and make release recommendations.

Bail is normally set at \$500-\$1000 for minor felonies such as breaking and entering or possession of narcotics. Sale of narcotics warrants a \$5000 bond, and the bond for a felony of violence or when an important criminal is involved varies widely.

High bail seems to accompany newspaper publicity. Members of a motorcycle gang accused of a well-publicized mass sex attack on a teenage couple were held in jail in lieu of \$75,000 bond on charges of indecent assault, while many individuals charged with forcible

rape under unpublicized circumstances had bonds of \$1000-\$5000 set. The current record for bond at the New Haven Correctional Center is \$250,000, set for a young man accused of bombing the Danbury police station in the course of a well-publicized bank robbery. There may be a rationale for this extraordinarily high bail: publicized offenders often have the book thrown at them if they are convicted, and knowledge that they probably face a long prison term may make them less likely to stay within the jurisdiction.

Bond is also affected by circumstances surrounding arrest. Several inmates told the author that the police had set a high bond on them because there had been name-calling or some scuffling at the arrest. The Chief Bail Commissioner for the Sixth Circuit said that this does happen but that when it comes to his attention, his Commissioners lower the bail to a normal level. Some inmates and most of the defense lawyers interviewed claimed that the police use the threat of a high bond or the promise of a lower one to attempt to get information from a subject. Of 87 defendants interviewed, 11 reported the use of bail as a bargaining tool by the police or prosecutor.

## Bail Commission

Under Connecticut statute, all arrested persons who are not released on no-money conditions and who are unable to post money bond are supposed to be interviewed by a member of the Bail Commission.<sup>15</sup> The statute requires that if the interviewing police officer

“ . . . finds custody to be necessary and such person has not posted bail, he shall immediately notify a bail commissioner of the circuit within which such a person was arrested who shall promptly conduct such interview and investigation as he deems necessary to reach an independent decision, and unless such commissioner finds custody to be necessary to provide reasonable assurance of such person’s appearance in court, he shall promptly order release of such person on the first of the following conditions of release found sufficient to provide such assurance:

- (1) upon his execution of a written promise to appear
  - (2) upon his execution of a bond without surety in no greater amount than necessary, he shall set forth his reasons therefor, in writing.”<sup>15a</sup>
- [Conn. Gen. Statutes § 54-63 (c)]

The Chief Bail Commissioner of the State of Connecticut has claimed “spectacular results” for the system that implements this statute. He states that the Connecticut bail system is superior to projects in other states because “In almost all the other projects, numerous categories of defendants were eliminated from the possibility of interview and release. In Connecticut, no such

categories were put ‘off limits’ because of a theoretical expectation of non-appearance.”<sup>16</sup>

The Commissioner admits that the system operates differently in practice than in theory: “. . . Connecticut Bail Commissioners seem to have dealt with bail in the time-honored fashion by refusing to grant non-surety release to those defendants they considered dangerous.”<sup>17</sup> It is also admitted that the necessity of working cordially with the police and avoiding conflict with judges discourages Bail Commissioners from using non-surety release where the offense carries a possible sentence of more than five years.<sup>18</sup> Investigation for this study led to the conclusion that the performance of the Connecticut Bail Commission in the New Haven area is discouraging and that only limited gains have been made by the creation of this statewide agency.

Some of these gains are: (1) facilitating release of most misdemeanants on non-money conditions, (2) rendering the bail process in Connecticut more visible, and (3) providing the framework for future broader bail projects.

Problems include: (1) the fact that few felons in the New Haven area are interviewed by a Bail Commissioner despite the statutory mandate, and (2) the fact that the Bail Commission has had little effect on the size of the Correctional Center’s population.

Bail Commissioners admit that the system is designed for misdemeanants and does not provide for interviewing felons except in unusual circumstances.<sup>19</sup> Of 85 accused felons awaiting trial in the New Haven Correctional Center, 75 stated that they had never been interviewed by a Bail Commissioner. Of the ten who reported an interview with the Commission, three stated that the Bail Commissioner *raised* their bail. A significant number of these arrested individuals would qualify for release under standards based on community ties. Files of the Public Defender of the New Haven Superior Court checked in April, 1970 revealed that for 74 individuals held for want of bail, no record of a Bail Commission interview existed.

Furthermore, at a meeting on February 25, 1970, the Chief Bail Commissioner requested the Warden of the New Haven Correctional Center to stop furnishing his office with a monthly list of individuals awaiting trial who had been incarcerated over two weeks with a bond of \$500 or less. The Chief Bail Commissioner stated that sending his assistants to interview these persons at night was a waste of time, since only four of the 52 individuals recently interviewed had been recommended for release. It was agreed that in the future the Center’s Counselor would report by telephone any deserving cases that came to his attention and that a special interview would be arranged. Because of the heavy workload the Counselor carries, this arrangement has effectively eliminated all such interviews.

An official of the Bail Commission indicates that the Commission felt that the lists provided them were not carefully enough screened and that too much time was wasted in interviews at the jail. But even when only four of 52 inmates interviewed are found to be good risks for non-monetary release, a cost-benefit analysis indicates that the interviewing process is a good bargain for the

state. It takes 15 minutes to complete one interview and make spot verification; this means that 52 interviews take 13 hours. Information tabulated in the text, *infra*, indicates that if the four persons had just been incarcerated, they would normally have spent 180 days awaiting case disposition, at board expense of \$2.85 per day. Direct expenses to the state could be cut by slightly over \$2000 with the release of these four persons, making it well worth 13 hours of labor by an Assistant Bail Commissioner. Other benefits to the state include the increased rehabilitative quotient of persons so released and the savings of public assistance benefits which would otherwise be paid to dependents of defendants who were working at the time of their arrest.

In July of 1969, the staff of the Bail Commission was cut from sixty-one to twenty-eight and the function of initial bail determination was given back to the police.<sup>20</sup> During its year of full-scale operation, “. . . the Commission [had] achieved an overall non-surety release rate of 61 percent of bailable offenses.”<sup>21</sup> It is claimed that this release rate was “striking” in contrast to other bail reform projects. However, after the cutback, following a dip to the rate of 35% in July-August 1969, the rate of release on non-surety conditions for September and October of 1969 climbed back to 65% — above the pre-cutback figure.<sup>22</sup>

Moreover, if the Bail Commission has truly effected a radical change in the bail-setting process, this change should be reflected in the numbers of people incarcerated at the New Haven Correctional Center.<sup>23</sup> But from July, 1967, to July, 1968, the year prior to the Bail Commission’s inception, the average inmate population was 304; from July, 1968, to July, 1969, containing the nine months of full Bail Commission operation, it was 300; and from July, 1969, to March, 1970, the period of truncated (but “effective”) Bail Commission operation, it was 303.<sup>24</sup> It appears that the Bail Commission has not made a significant dent in the numbers of individuals incarcerated before trial; it has simply shifted the *method* by which misdemeanants who almost always would have made money bail are released. While this allows the release on non-surety conditions of some individuals who would not have been able to make a low bond, and also relieves numerous misdemeanants of the financial burden of paying a bondsman’s fee, it is only a small step forward.

## Judicial Functions

If he has his bail reviewed, or set, the accused is booked while court is in session, by a judge of the Sixth Circuit Court. At this stage of the proceeding, the significant actors are the prosecuting attorney, the defendant’s attorney and the judge. In many cases, only two of these figures are active: thirty-five of eighty-six pre-trial de-

tainees interviewed reported that they had no lawyer present at their initial court bail-setting.

The prosecutor recommends bond to the judge. His primary consideration is often the danger posed to the public by the person charged.<sup>25</sup> It is reported that the police or prosecutor prefer surety conditions because a bondsman will act as a paging service for his client: if it is necessary to get an accused into court on short notice, the bondsman can provide this service, while the Bail Commission cannot. A prosecutor will often lower his bail when there are mitigating circumstances surrounding the offense or when the defendant has strong community ties. There is no table listing recommended bail amounts for various offenses, but the assistant prosecutors are instructed that in setting bail, their first job is “to protect the public”. At the local level, it is claimed that penalty bonds of overly high amount are not requested, but the Chief Prosecutor of the State admits using high bonds to “harass organized criminals.”

Judges at the circuit court level usually follow the prosecutor’s recommendation. Frequently, this is because the recommendation is not contested by the defendant’s attorney, if there is an attorney.<sup>26</sup> When defense attorneys do move for lowered bail, they feel that judges usually perform their judicial function impartially. Defense attorneys interviewed accepted the criterion of “public danger” for setting bail. On occasion, a defense attorney may request a high bond for an addicted client “for his own good”—to enable him to “dry out” and be examined for commitment under the Drug Dependency Act. A few defense attorneys may leave high bail uncontested for personal reasons—they need the bondsman’s fee for their retainer or they hope to use the promise of lowered bail to coax their fee from the defendant.<sup>27</sup>

What factors are considered at the bail hearing? The offense charged is reported to be the main or only consideration. The prior record of the accused may be reviewed. But this is rare because only three judges sit on the Sixth Circuit Court and by checking the past record, a judge risks disqualifying himself. Roots in the community may also be examined, but the good background of some individuals who are unable to make bail indicates that community ties are not especially important. A judge may also occasionally take into account the accused’s financial resources in setting bail. The “means” test can be a two-edged sword. One inmate contended that when the judge was informed that he could make \$2,500 bail, the bond was promptly raised to \$15,000.

Statutory provision is made for speedy appeal to higher courts, if bail remains set too high for the defendant. In practice, however, appeal is never taken to the Circuit Court and rarely to Superior Court. This is because it is difficult to win such an appeal<sup>29</sup> and because it is often a hollow victory to have bail for an indigent defendant reduced from \$50,000 to \$10,000.

## The Bondsman

In all stages of the process described above, the individual with the power to immediately free the defendant is the professional bondsman. As stated by a New York Grand Jury investigating bail:

“In the final analysis the fulfillment of the constitutional proscription pertaining to bail reposes with the professional bail bondsman, since he may refuse to write even the smallest bonds. The bondsman may act on whim or caprice and his decision is not reversible either in a court of law or by an administrative agency. The Supreme Court . . . cannot require that a bondsman write a bail bond no matter how arbitrary the bondsman’s refusal.”<sup>30</sup>

According to Connecticut General Statutes § 29-151 (1969) bondsmen may charge \$20 for any bond up to \$300, 7% of bonds between \$300 - \$5000 and 5% of bonds over \$5000. If a client does not show up in court, the bondsman has six months to produce him before the bond will be forfeited.<sup>31</sup> Much of the bond business in New Haven is done by a single individual. In considering bond risks, he is primarily concerned with the accused’s ties to the community or past credit rating. If at all possible, he will get collateral before posting bail for an individual.<sup>32</sup>

Danger to the community is not at all considered by this bondsman. In fact, professional criminals will often get preferred treatment if their dealings with the bondsman have been satisfactory in the past. Regular clients can even arrange payment on the installment plan. As in other jurisdictions, bondsmen in New Haven appear to be reluctant to come down to the jail to bail out someone who is being held on low bond, such as \$100 to \$200.<sup>33</sup> One pre-trial detainee remarked in an interview that he would have been better off if the judge had not lowered his bail from \$500 to \$100, since the bondsman would not make the trip to the Correctional Center to bail him out. A few of the 87 accused persons interviewed at the Correctional Center claimed that the bondsman demanded fees over the statutory rate, but in general the major complaint of pre-trial detainees was that promises to come down to bail out the detainee were not kept.

## Pre-Trial Detention

### Detainee Profile

The individual who ends up in the Correctional Center has, in theory, been through four screens that might have given him his freedom: the police officer setting stationhouse bail, the Bail Commissioner, the judge, assisted by the prosecuting attorney and defense attorney, and the bondsman. Yet, sixty-three per cent of a sample of bound-over felons represented by the Public Defender were imprisoned for the entire period while they awaited trial.<sup>34</sup>

Interviews for this study were conducted face-to-face in the Counselor’s Office of the New Haven Correctional Center. The subject was told by both the Counselor and the interviewer that the interview could in no way be used to help the subject with his own bail problems, and that results would be used only as statistics in a report that was under preparation. The interview sheet used is reproduced in Appendix II, *infra*. An effort was made to avoid asking questions that suggested answers: i.e., inmates were asked “Have the police or prosecution offered you any kind of deal?” not “Did the police offer to lower your bail if you named an accomplice?”<sup>35</sup>

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**Table 1**

*Community Ties Of 87 Accused Felons Incarcerated At The New Haven Correctional Center*

Current Residence in Connecticut or City of Arrest For Over One Year:	70 (80%)
Employed:	55 (63%)
Short or Clean Prior Record:	53 (60%)
Living with Relatives:	56 (64%)
Possessing all Four Factors:	20 (23%)
Possessing Three of Four Factors:	42 (48%)

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The figures in Table 1 indicate that nearly one-half of those held in jail because of inability to make bond would meet Manhattan Bail Project standards for release without surety conditions. But of the twenty individuals having all four factors in their favor, seven had bonds set of \$1,000 or under; of forty-two individuals having three of four factors, thirteen had bonds set of \$1,000 or under. And about two-thirds of those who should be viewed favorably on the grounds of ties to the community had high (over \$1,000) bonds set.

These high bonds may be set to protect the community from the danger of repeat offenders. However, a check of the offense-category of those forty-two individuals having three favorable factors shows that only sixteen of them were accused of crimes of violence or involving the sales of narcotics. Moreover, there is at least some evidence that the danger of repetition of crimes of violence is restricted to only a few classes of offenses.

In *Bail and Summons*, Herbert Sturz describes the initial concern of the Manhattan Bail Project with the danger possibly posed by its parolees. Their interviewing process originally excluded persons charged with homicide, forcible rape, felonious assault on a police officer, impairing the morals of a minor, carnal abuse and narcotics offenses. Three years after the project started, it had expanded its coverage to include all but homicide and certain narcotics offenses.<sup>37</sup>

It is apparent that of the approximately 300 persons currently awaiting trial in the New Haven Correctional Center, few have ever been interviewed by a Bail Commissioner, and a significant number qualify for release under standards based on roots in the community. Interviews with several officials of the Bail Commission revealed that these officials were not surprised at this fact. Felons are not interviewed because it is felt by Bail Commission officials either that such individuals are automatically unqualified for non-monetary release or that it cannot successfully process accused felons without additional funds and personnel.

Despite the humane efforts of the warden and the counselor, and their efficiency in restoring security to a facility that was recently inmate-run and subject to frequent turbulence, under-staffing of the Correctional Center and the age of the cell blocks make it one of the worst correctional institutions in New England.<sup>38\*</sup> As may be expected, such conditions prejudice those who await trial at the Correctional Center.

### Problems in Case Preparation

In other jurisdictions, the disposition of cases has been more unfavorable for the pre-trial detainee than for the person who is free before trial,<sup>39</sup> and this finding appears to hold true for those detained in New Haven. Although the following information is subjective and prone to exaggeration by the inmates interviewed, the complaints have been substantiated by the Counselor at the Center and the author. Twenty-four per cent of the detainees had difficulty in contacting witnesses; 18% complained of insufficient contact with their attorneys;

\*[A year ago, the Commissioner of Corrections for Connecticut admitted this himself. Now he is defending a suit initiated by the New Haven Legal Assistance Association alleging violation of numerous constitutional rights in the New Haven Correctional Center. —Ed.]

and 37% claimed that the sole fact of their isolation had adversely affected their case.

The problem of contacting witnesses has often been mentioned as a major difficulty for a detained defendant.<sup>40</sup> It may be a special problem when witnesses come from a black neighborhood and are unlikely to open up to a white middle-class lawyer or investigator, or when the attorney's case-load is so heavy and investigative services so sparse that witnesses cannot be interviewed unless the witness is brought to the lawyer's office.

The complaint of "not enough lawyer contact" was surprisingly uncommon (18%), considering the infrequency of attorneys' visits. Attorneys candidly admit their aversion to jail-house interviews, and this distaste is reflected in the statistics on attorney conferences revealed in the interviewing process.

Table 2

*Conferences With Attorneys For Pre-Trial Detainers Incarcerated For Two Weeks Or More*

Days Incarcerated	Number of Detainees	Attorney	Visits by Investigator
14-30	12	0	
14-30	3	2	3
31-60	7	0	
31-60	5	1	4
61-240	9	0	
61-240	9	1	4
61-240	4	5	10

For this group of 49, the median number of days incarcerated was 55; the modal number of visits by counsel was zero. Those who had not been visited by their attorney in jail stated that they would generally see their attorney for a few minutes in court before a scheduled appearance.

As for visits by an investigator, the Public Defender for the New Haven Superior Court is being assisted voluntarily by a Yale law student. The law student is able to conduct many of interviews that would otherwise not take place. However, the Public Defender of the Circuit Court does not have this kind of assistance, and there are problems inherent in using an investigator to conduct client interviews. The investigator does not enjoy protection of the attorney-client privilege, and can technically be subpoenaed by the prosecution to

testify to what is told him by a defendant. An investigator may not have the legal training to ask the follow-up questions necessary to determine the legal strength of the defendant's case. Finally, it is important for an attorney to discuss facts with the defendant in order to get an appraisal of his client's demeanor, an important factor in deciding whether or not to go to trial.

Fifty-five detainees who were represented by counsel were queried as to the type of attorney they would prefer. Twenty-seven of the defendants interviewed had never seen an attorney or investigator during their incarceration. Nine of these had retained attorneys. Three individuals had no attorney at the time of interview. Of the total of 66 visits made to the 49 defendants, 34 were made by private attorneys. Fourteen of the 49 were represented by private attorneys.

Correctional Center. Isolation was ranked as the number one complaint of the survey sample. Forty-three persons (nearly half of the sample) complained of either inadequate lawyer contact or other problems related to isolation. Many detainees wanted their lawyer to explain the options available to them and to evaluate strength of their cases. They wanted to be able to personally participate in bargains struck with prosecutor, to confer with co-defendants and to make restitution to, or reason with, complaining witnesses and to contact their own witnesses.

The insular quality of an inmate's life is created by the circumstance of imprisonment and a number of regulations that sharply limit his contacts with the outside world. When a pre-trial detainee enters the Center, he is placed in a one-man cell for orientation for the first three days. During this period he is unlocked only for meals. Generally, on the day he reports in or the following day he is taken to the Counselor, who will make one phone call for him to whomever he wants. This call and any others while he is at the Correctional Center are made through the Counselor. No one may speak personally on the phone to anyone on the outside. Following the first phone call, further phone calls must be requested by slip and will be made only in important situations. Phone calls to check case progress or to make routine family contact are not permitted, except that an individual who is not getting mail or visitors may be allowed to make a phone call to check on a family situation. Phone calls may be made only when the Counselor is on duty and the cells are unlocked, generally between 9:30 and 11:30 or 1:00 and 3:30. Only one phone and one Counselor are available to handle phone calls for the population of 375, and this Counselor has many duties in addition to relaying phone messages.

The new inmate will also be given several envelopes; he may write only to his attorney and immediate family. All incoming mail is checked for contraband, such as cash or drugs, and 50-60% of all mail is censored. Visits to un-sentenced prisoners are allowed two days a week, between 1:15 p.m. and 3:15 p.m. They are limited to fifteen minutes, although they are sometimes cut to seven or eight minutes, and the only visitors allowed are members of immediate family. Former inmates may not normally visit. If an inmate has no immediate family in the New Haven area, arrangements can be made to allow one non-family-member to visit. Visitors must stand in a row with a group of other visitors at a bar four feet from a wire mesh cage and shout their greetings across to the inmate. Visitors sometimes wait up to two hours to make their brief social calls. Professional people, such as lawyers, doctors and ministers, may visit at any time. They are allowed to enter the wire cage and talk face to face with the detainees at a small table.

The pre-trial detainee may be under some pressure to plea bargain to get out of the Correctional Center and into the far more salutary atmosphere of Somers State Prison. No law books are available to the inmate. The individual who had lost his job is usually unable to retain the services of a private attorney. Time in jail may alter the defendant's appearance for the worse. One inmate, when first seen, appeared to be a young, clean-cut and

Table 3

Present Attorney		Preferred Attorney		
Type	No.	Type	No.	%
Public Defender	29	Private Attorney	19	66
		Public Defender	10	34
Legal Aid	3	Legal Aid	3	100
Private Attorney	23	Same Private Attorney	22	96
		Different Private Attorney	1	4

The highest percentage of persons preferring an attorney other than their current one was to be found among those inmates represented by a Public Defender. This feeling exists despite the opinion among court officials and local bar members that New Haven Public Defenders are able to do a better job for their clients than the average criminal lawyer with a far lighter case load. Dissatisfaction among the accused may spring from the lack of lawyer-client contact when a Public Defender is appointed. This seems to be supported by the fact that most of those preferring the Public Defender had been visited one or more times by an attorney or investigator from the Public Defender's office. Inmates may also share the natural tendency to regard with suspicion something that is given for free when the same commodity is also for sale.\*

Problems with attorney-client communications are compounded by the near-total isolation that the pre-trial detainee finds himself thrown into when he enters the

\* [See Jonathon Casper "Did You Have a Lawyer. . .", this issue - Ed]

cheerful country boy. Two weeks later, the same inmate, who had spent his past few days in administrative segregation as an escape risk, had acquired an unmistakable pallor—"jailhouse grey"—had sunken eyes, trembling hands, a few days stubble on his jaw, and had become completely withdrawn, sinking his chin onto his chest and answering questions in monosyllables only. If he goes to trial, he is allowed to wear civilian clothes but is led into court by a guard from the lock-up adjoining the courtroom. The appearance of the defendant is not likely to go unnoticed by a jury.

It is evident that the accused who is detained before trial is substantially prejudiced in seeking favorable case disposition, partially by conditions that are correctable without eliminating detention altogether and partially by conditions that could be effected only by fundamental changes in the current system of pre-trial detention.

## Societal Costs

The costs to society of pre-trial detention under oppressive and unpleasant conditions are both direct and indirect. It is particularly important to study these costs in light of current pressure from some quarters to institute programs of preventive detention.

Direct costs to society include room and board expenses for each person imprisoned. At the New Haven Correctional Center, average costs are estimated to be \$2.85 per day per inmate, or \$1,040 per year per inmate.<sup>41</sup> Additionally, those people who had jobs and were supporting dependents lose their income, and the state is required to provide welfare benefits to these dependents. Of 79 pre-trial detainees polled, 34 (43.1%) reported that they had been supporting dependents. Persons who are able to keep their employment may be able to retain a private attorney. If they are jailed and are forced to request a Public Defender, another financial burden is placed on the state. Fifty-five of 87 accused persons interviewed had been employed when they were arrested.

Indirect costs to society are levied when individuals are treated in an unfair fashion. Despite sincere efforts on the part of the Warden, Counselor and staff of the New Haven Correctional Center, conditions of imprisonment for the pre-trial detainee in New Haven remain deplorable. The individual who awaits trial behind bars in New Haven—and in most jails—suffers the worst of two worlds: he suffers the loss of freedom that is enjoyed by those who are able to make bail and he is denied many of the benefits and privileges that are granted to *sentenced* persons in the inmate community.<sup>42</sup>

The problem of the inadequate jail is not confined to New Haven:

"American county jails have been often described as the penal (they cannot be called correctional) institutions that have most successfully resisted change and reform. Most of them have been rated by inspectors as unfit for human habitation. Old and unsanitary buildings, poorly qualified and constantly changing personnel, intermingling of all types of prisoners—sick and well, old and young, hardened criminals and petty offenders—in overcrowded cell-blocks and 'tanks', and the almost complete absence of even the most rudimentary rehabilitative programs constitute a scandalous state of affairs. . . ."<sup>43</sup>

A rating of the county jails in one of the nation's most progressive and wealthy states resulted in ". . . less than 10 per cent of the county jail systems [receiving] a rating of standard, and. . . about 60 per cent [receiving] a rating of very poor."<sup>44</sup>

Physical conditions at the New Haven Center are described above. Medical care meets minimal standards and some problems of contagion exist. The Warden reported that the court committed an alcoholic to the jail because he "had active tuberculosis and should not be allowed to go among the general public," and other instances of inmates with active TB have been reported.

Pre-sentenced inmates are not allowed to participate in the limited rehabilitative services of the center. Four possible reasons exist for this policy:

- (1) The presumption of innocence. Those who are innocent do not require rehabilitating.
- (2) Transience of the pre-trial population.
- (3) Lack of resources to provide rehabilitative services to both convicted and unconvicted inmates.
- (4) Security considerations.

The presumption of innocence should not bar rehabilitation; this presumption has already been ignored in the very fact of pre-trial detention. Likewise, transience of the pre-trial population should not be a factor in denying detainees rehabilitative services. A check of the records of 75 individuals detained before trial and represented by a Public Defender showed that these individuals spent an average time of six months in the Correctional Center awaiting disposition of their cases. A sample of nineteen persons represented by a Public Defender and sentenced to the Correctional Center showed that they received a mean sentence of 5.7 months.

This suggests that the pre-sentenced population may in fact be "serving" more time in the Center than sentenced inmates. Despite this, they cannot take advantage of work programs or a school conducted by two teachers and a teacher's aide. The pre-sentenced inmate suffers even more in comparison with the inmates at Somers State Prison, where the plant is modern, educational and employment opportunities are varied and complete, and the staff/inmate ratio is much higher.

The primary reasons for denying pre-trial detainees rehabilitative programs, then, are a lack of resources and security problems. The pre-trial detainee is viewed by the Center officials with a wary eye. He is likely to be accused of a serious crime, while his sentenced counterpart has been convicted of a relatively minor crime. Both the Warden and the Counselor of the Correctional Center feel that the unconvicted inmate is psychologically less stable than the convicted inmate, because he lives with uncertainty. Lack of a large enough staff frustrates any effort to classify the pre-trial population into risk categories, and so all detainees are treated as though they were maximum security risks.

The opportunity for inmates to work in the Center is limited to the sentenced population and consists wholly of maintenance and kitchen labor. The work available occupies only about 80% of the current sentenced population. It is a coveted privilege, not because of the wages—a pack of cigarettes—but because time hangs heavily on the inmate's hands.

Inmates, both convicted and unconvicted, are in need of extensive counseling to help them with personal problems, provide guidance and effect liaison with the outside world. The single Counselor at the New Haven Correctional Center does a capable job of maintaining rapport with the population of the Center and attempting to help with outside problems. He very much needs assistance. The American Correctional Association recommends that in prisons, where the population may be more stable than in a jail, the staff consist of 1 full-time psychiatrist, 3 full-time psychologists and 3 full-time counselors for every 600 inmates.<sup>45</sup> The lone counselor at New Haven is not able to effectively counsel, or even regularly see, the 375 inmates. His problems are exacerbated by the time he must spend making phone calls for any inmate wishing to place a call. Because he is overworked, he must concentrate on major problems, and the pre-trial detainee who has a minor problem or who just wants to talk things over may be ignored.

An additional consequence of the Counselor's heavy workload is that he is unable to do meaningful classification work with pre-trial detainees. Because he is unable to distinguish the recidivist major offender and troublemaker from a first offender, the mass of pre-trial detainees are treated as a homogeneous group. Since in the eyes of correctional officers, "the fundamental responsibility of prison management is the secure custody and control of prisoners",<sup>46</sup> all of the pre-trial incarcerated are treated as though they provide a maximum threat to the security of the Center.

Disciplinary sanctions that may be meted out, range from reprimand to punitive segregation (solitary confinement) with loss of privileges (commissary, visiting). Punishment may be imposed only by a three-man disciplinary panel, generally composed of the Warden and two of the corrections officers. The accused is present at the review of charges, but the complaining officer is not. All punitive segregation is reported to and approved perfunctorily by Commissioner of Corrections. Disciplinary procedure conforms generally to the guidelines laid down by the American Correctional Association.

Progressive prison administrations segregate the population into different types of offenders or accused offenders.<sup>47</sup> California statutes, for example, separation of males from females, juveniles from adults, convicted from unconvicted, they also require segregation of material witnesses, those incarcerated under civil process (non-support) or for contempt, and persons with infectious diseases. The state of California also recognizes a moral obligation to segregate the mentally disordered, sex deviates and recidivists charged with serious crimes.<sup>48</sup> In New Haven, due to the physical structure of the Center and the lack of time for classification, there is virtually no segregation. Some attempt is made to separate markedly homosexual individuals from the general population. Suspected trouble-makers or escape risks are kept in administrative segregation. Long haired or bearded prisoners are kept in administrative segregation until they agree to a shearing or shave, for "sanitary reasons."

In 1936, the Center was criticized because:

Under the present system there is no segregation of prisoners. The young and old, the hardened criminal and first offender, the diseased and the healthy, the mentally warped and the normal, the drug addicts and the perverts are all intermingled indiscriminately together. . . . One of the worst features of the present system is that the tried and the untried are both kept in the same institution. Since some of those awaiting trial are eventually proved innocent, this is an intolerable and grossly injurious procedure which should no longer be permitted. . . . The mental health cases are not segregated and treated unless they are so bad that the individuals can be sent to the state hospital, which is difficult to arrange.<sup>49</sup>

This assessment, made 35 years ago, is true word-for-word today. The major segregation of inmates in the Center is made on the basis of the bond that is set: the East Wing (150 cells) contains persons for whom a bond over \$15,000 has been set; the West Wing and Annex (150 cells) contain convicted individuals and those held under a bond of less than \$15,000. These groups are never allowed to mingle. Absence of separation by type means that a 16 year old accused of his first offense is thrown in with burnt-out alcoholics, bank-robbers who have spent most of their lives locked up, drug addicts, the violent and the abnormal.

The daily living conditions of those detained while awaiting trial are more unpleasant than those for bailed individuals, and indeed they compare unfavorably to the conditions for those sentenced to the State Prison or even to the same Correctional Center in which the pre-trial detainee awaits trial. Until a new facility, more funds and an increased staff are provided, it will be true, as in 1932, that "little more is possible under present conditions and with the present staff than a routine process of receiving and discharging again the never-ending flow of population."<sup>50</sup>

## Final Disposition

Studies in other jurisdictions have uniformly shown that the individual incarcerated before trial suffers in the final disposition of his case in comparison to his bailed counterpart. Incarceration appears to affect the likelihood of conviction, the likelihood that a prison sentence will be imposed and the severity of such sentences.<sup>51</sup> Locally, it was believed by prosecutors that the individual who was jailed while awaiting trial would be treated more leniently than the bailed individual and that judges would be likely to impose milder sentences on the person already "punished" by a stay in jail. But a study of the records of the New Haven Superior Court Public Defender indicates that this is not so.

A total of 153 cases that had proceeded to disposition were checked. Information was obtained concerning cases taken by the Public Defender for the New Haven Superior Court. An approximately equal sample of bailed and jailed defendants were selected. All cases tabulated below involved persons charged with a felony:

**Table 4**

	Bailed Group	Jailed Group
Mean Bond	\$1680	\$4210*
Median Bond	\$1000	\$1000
Mean Time from Arrest to disposition	6.8 months	6.0 months
Suspended Sentences	36 (47%)	12 (16%)
Nolles and Acquittals	10 (13%)	6 (8%)
Sentences to jail or Prison	<u>31 (40%)</u>	<u>58 (76%)</u>
Total	77 (100%)	76 (100%)

\*One bond of \$75,000 was not included in this calculation to avoid skewing the mean misleadingly.

This type of data is not itself conclusive on the issue of prejudice flowing from pre-trial detention. It may be that people are detained before trial because they are somehow viewed as "bad" or dangerous by the courts. To obtain more accurate results, the sample was broken down into cases in which bond was set at \$500 and \$1000. People with identical bonds can be viewed as equally "bad" or dangerous in the eyes of the court. The only difference is that one group was able to meet raise bail and the other was not. All individuals were represented by the Public Defender.

**Table 5**

	Bailed Group	Jailed Group
\$500 bond	23	17
\$1000 bond	<u>16</u>	<u>13</u>
Total	39	30
Suspended Sentences	17 (44%)	6 (20%)
Nolles and acquittals	7 (18%)	2 (7%)
Incarcerated	<u>15 (38%)</u>	<u>22 (73%)</u>
Total	39 (100%)	30 (100%)

Table 5 indicates that the percentage of individuals not receiving prison sentences is over two times as high for the bailed group as for the jailed group. It also appears that over three times as many defendants on bail were able to achieve dismissal of charges or an acquittal as were the defendants from the jailed group.

Sentencing results for the low bond groups appear in Table 6.

**Table 6**

	Bailed Group \$500 or \$1000 Bond	Jailed Group \$500 or \$1000 Bond
Incarcerated	15	22
Median Sentence	8 months	9 months
Mean Sentence	8.6 months	15.6 months

Sentences for both groups were distributed around the same approximate central figure, 8-9 months, but a number of long sentences for the pre-trial detained group caused the *average* length of sentences awarded to be 7 months longer for the jailed group. It should be noted that the above study is almost totally an examination of the plea-bargaining process. Only four of 153 cases studied went to trial. The vast majority of the remainder were settled by plea, with a handful being nolle by the state's attorney. Statistically, being jailed under the most adverse conditions did not seem to coerce defendants into plea bargaining any more than their bailed counterparts, although it cannot be discounted as a psychological factor and may lead to less favorable bargains with the prosecutor.<sup>52</sup> Table 5 does seem to confirm the conventional wisdom that pre-trial

detention has a pernicious effect on the defendant at the sentencing proceeding. As a Federal District Court Judge has remarked:

“Psychologically, it is easier for a sentencing judge to remand a defendant to jail or to sentence him to prison than it is to tear him away from his family and community. This likelihood is heightened by the fact that the defendant at liberty pending trial has the opportunity of demonstrating by his conduct that he may be a suitable candidate for probation, and he may thus persuade the probation officer to submit a more favorable presentence report.”<sup>53</sup>

It may be that some of the hidden statistics in this study would throw this conclusion into doubt. Possibly the defendants in the jailed low bail sample were in fact significantly different from their bailed counterparts: they may have had longer records, poorer employment histories, less binding family ties. But this hypothesis is cast into doubt by the results catalogued earlier in this paper showing that a large proportion of the pre-trial detained population in the New Haven Correctional Center does possess characteristics that would make it a good probation risk.

An important aim of any system of justice is to avoid penalizing the innocent. Six of the seventy-six persons imprisoned while awaiting trial were ultimately acquitted or had their cases dismissed. They served a mean time of 107 days in jail. When the number of people receiving suspended sentences or sentences equal to time already spent in the Correctional Center<sup>54</sup> are added to the number not convicted, 25 of the 76 persons not making bail were released after disposition of their case. The mean time served by persons receiving a suspended sentence, acquittal or dismissed charges was 4.6 months.<sup>55</sup>

## Conclusion

Connecticut possesses progressive bail legislation and an autonomous Bail Commission but has not yet explored the full range of release conditions suggested by projects elsewhere. The Bail Commissioners in the metropolitan New Haven area do not work in the area in which the problems are most acute, setting bail for identifying good bail risks among defendants accused of felonies.<sup>56</sup> In New Haven, such identification is not being made, and in spite of legislative requirements, no attempt is being made to identify these good risks. A preliminary survey of the population of the New Haven Correctional Center indicates that many of those awaiting trial would be almost certain to appear for trial if they were released and would present little threat to the community if they were freed prior to the disposi-

tion of their cases.

Recidivism is currently a rallying cry of those who would oppose more lenient bail practices. Statistics on the subject are muddled, as indicated by a Washington Post story on February 2, 1969, stating that “at least six statistical surveys—containing widely varying results—have been circulated in the current debate over bail.”<sup>57</sup> Statistics on recidivism usually use rearrest figures, ignoring the facts that arrest does not necessarily lead to conviction and that a bailed subject is likely to be arrested on suspicion by a police dragnet if a crime is committed in his neighborhood.<sup>58</sup> If a high recidivism rate is assumed, there are still a large number of persons being held for want of bail who are not accused of violent or strongly anti-social offenses and thus do not pose a true danger to the community.

Indiscriminate levying of bail shifts the responsibility for deciding the freedom of an individual from the courts to the bondsmen. Surety bail is an unsatisfactory device for ensuring the return to trial of the individual accused. In New Haven, as in most cities, bondsmen usually demand full collateral for posting bail for all who are not professional criminals. If full collateral is posted, the bondsman has no financial stake in ensuring the return to court of the accused, for the accused’s non-appearance presents no risk to him. If no collateral is posted, the bailee has no financial stake in his own appearance.

Jailing unconvicted persons creates direct maintenance costs for society and renders effective assistance of counsel difficult at a crucial stage in the criminal process. The interlude between arraignment and trial is,

“. . . perhaps the most critical period of the proceedings... when consultation, thoroughgoing investigation and preparation. . . [are] vitally important. . . . During this period defense counsel is retained or assigned, negotiations for dismissal or reduction of charges are carried on, indictments are handed down, motion to dismiss, to remove, to change venue, and to discover are argued, pleas are settled upon, witnesses are interviewed, evidence is sought, strategy is planned, and presentence reports may be written.”<sup>59</sup>

Attorney contact with the jailed accused is inadequate in New Haven. Conditions under which pre-trial detainees are incarcerated are harsh and penal rather than rehabilitative in nature. Sentencing appears to be adversely affected by the fact of incarceration prior to case disposition.

Meaningful bail reform cannot exist if judges aren’t willing to improve the bail system and to utilize information provided to them at the bail hearing. Funds and the administrative framework for providing of bail information already exist. It is essential for the Connecticut Bail Commission to disentangle itself from the time-consuming work of processing the large number of misdemeanants that flood the courts and to direct their energies toward the release on non-surety conditions of accused felons. Other methods of ensuring maximum release on recognizance of misdemeanants exist,<sup>60</sup>

recent statistics indicate that an educated police force, monitored by a watchful judiciary, may be able to perform this function on its own.<sup>61</sup>

Recidivism is of course always a concern when broader pre-trial release programs are considered. One approach to the question may be to release individuals on conditions similar to those imposed upon persons on probation. Such conditions range from periodic check-ins to release in the custody of a facility similar to "halfway houses" used to aid the transition of convicts from prison to normal community life. The drawback of such programs is the large allocation of resources necessary to properly administer them.

Liberal pre-trial release was called for in Connecticut in 1932 by the Governor's Commission. Today, with overcrowded jails and dockets so crowded that defendants wait an average of six months for their cases to be considered, this need is even more pressing. Projects in other jurisdictions have been notably successful, using flexible release standards for all but those accused of the most serious crimes.<sup>62</sup> The Congress of the United States passed perhaps the most comprehensive bail act in the country after deliberations that ran over 1,000 pages in two rounds of Senate hearings and one in the House.

If release on recognizance is not appropriate in all cases, consideration should be given to lowered bail or alternate bail. Table 8 shows the stated reasons why 87 persons awaiting trial in the New Haven Correctional Center were unable to make bail.<sup>63</sup>

**Table 8**

Stated Reasons For Inability To Make Bail

Reason	Number	%
Too High	40	46
No Collateral	23	27
Parole violator, hold from other jurisdiction	8	9
No time to contact bondsman	5	5
Bondsman won't post bail	4	5
Capital crime	2	3
Unknown	5	5
<b>Total</b>	<b>87</b>	<b>100</b>

Of 35 inmates polled who were unable to make bail for one reason or another, 18 stated they would have been able to post bond of \$1,000 or less. A study in New York indicates that the point at which most defen-

dants cannot post bail is \$2,500.<sup>64</sup> The present levels at which bail are set were not arrived at in any scientific fashion; courts should be willing to experiment with grouping their bail figures around a lower median for felony defendants. Skip statistics from numerous localities suggest that

"...the courts might...logically assume that all defendants will return and require rebuttal of the assumption by substantial evidence of flight."<sup>65</sup>

Over one quarter of the accused felons interviewed reported inability to make bail solely because they could not raise the collateral called for by bondsmen. These persons would be released in many instances if legislation were enacted allowing alternate bail, permitting a 10% cash deposit on the bail set, with a non-surety promise to pay the remainder in case of willful non-appearance. This system has been installed in various locales<sup>66</sup> and has been most successful in Illinois, where it has received greatest use; the procedure has significantly increased the number of persons released on bond, and has produced fewer forfeitures than conventional surety bond.<sup>67</sup> Since the system as installed elsewhere provides for a 90% refund of all cash deposited after all appearances have been made, a financial incentive to make appearances is provided for the bailee, which he would not have on a simple no-collateral surety bond with a non-refundable bondsman's fee.

It is important that the Bail Commission be a neutral fact-finding agency able to provide the data and recommendations required for an effective recognizance release program. The chief Bail Commissioner has admitted difficulties administering the system because of a staff that frequently echoes discredited notions of the functions of bail.<sup>68</sup> The Commission needs to be expanded to administer a broader bail system. Additional staff might consist of law students working part-time, and full-time personnel with the same backgrounds as the state's probation officers.

Programs releasing defendants on appropriate conditions would save the state money, increase the rehabilitation potential of individuals so released and, if carefully administered, impose a minimal additional tax in the form of recidivism or bail-skipping. They would also solve the problem of deleterious conditions of pre-trial detention, eliminating the prejudices catalogued earlier in this study. Release would ameliorate the conditions existing for those who must be detained by alleviating the severe overcrowding existing in the correctional centers of the State. If unconditional release is felt to be inappropriate for accused felons who are employed, conditional release or some sort of daytime release program could be utilized.

Defendants who are presumed innocent should not be allowed to languish in deplorable conditions for long periods of time while their final disposition is being negotiated in a process they rarely participate in.

Much of the blame for the long period of pre-trial incarceration for accused felons should be laid at the doorstep of defense attorneys.

Section 51-180 of the Connecticut General Statutes

gives any defendant held for want of bail the absolute right to a trial within one month of the time of his incarceration; defense attorneys never use this statute, according to all parties interviewed. The plea of guilty frequently takes months even when the defendant wants to expedite this plea. Delay by defense attorneys may be ascribed partially to tactical plea-bargaining. Failure to visit a client does not have a similar justification.

If defendants continue to be held for many months before the outcomes of their cases are determined, they should be guaranteed at least minimal contact with their attorneys. Courts have not held aid of counsel ineffective when pre-trial detention has made it difficult to locate witnesses but defendants who spend months without *ever seeing* their attorney a single time (except for hurried courtroom conferences) have a sound basis for claiming inadequate counsel.

Public Defenders in New Haven, a group of lawyers who are effective for their clients in the negotiations that comprise 90% of the criminal process, need additional manpower. This study revealed that individuals incarcerated in the Center who had been interviewed by a volunteer law student working for the city Public Defender for the Superior Court felt far more fairly treated than those who had not been interviewed at all. Funds should be provided to support one or more such investigators for all Public Defenders carrying a significant caseload.

Isolation was the problem most frequently complained of by pre-trial detainees. Correctional Center officials justify rigid limits on visiting, phone calls and correspondence by parading horrors that have resulted from more lenient policies in the past.

Following installation of an open phone one year ago, 10 inmates managed an escape. It was never proven that the escape was coordinated by phone, but it is difficult for the corrections officials to avoid this kind of *post hoc, ergo propter hoc* kind of reasoning. Letters have been known to contain heroin beneath the postage stamp, and visitors have casually thrown away crumpled cigarette packs containing drugs, to be picked up by an inmate sweeper.

To a lawyer, a balancing process may call for jail officials to take increased security risks in order to afford rights of communication to detainees unconvicted by the courts. A correctional official is likely to view the balancing process differently when he is ultimately responsible to an electorate that is concerned only where there is rioting or an escape. The Warden and Counselor in New Haven were willing to improve conditions in their institutions, but they demanded improved facilities, increased staff and more funds to enable them to hold the security line while otherwise improving the situation of inmates.

The restriction existing at the New Haven Correctional Center on telephone calls, can be altered without any increase in present staffing. The unconvicted population should not all be treated as high-security risks. Maximum freedom could be permitted all except those who would be classed as dangerous under standards like those outlined in some of the current preventive detention statutes. The escape of an "undangerous" individual

would be unlikely to create public concern, and greater risks could be taken in the restraint of such persons. Such a procedure would require a counseling staff sufficient to carry out classification procedures for incoming personnel.

Chief Justice Warren Burger has said that "to put a man behind walls and not to try to change him is to deny him his humanity—and ours."<sup>69</sup> This statement of principle should apply no less forcefully to the pre-trial detained than to the convicted, particularly when the pre-trial detainee spends, on the average, as much time or more behind jail walls as does his convicted counterpart. Improving the conditions of the New Haven Correctional Center, a long-standing imperative that may be acted on in the near future, will of course be a first step to making the lot of the jailed accused more bearable. Hand-in-hand with such improvement should go a rethinking of conventional approaches to the pre-trial detained, and a questioning of the philosophy that bars the pre-trial detainee from the educational, employment and other rehabilitative opportunities available to the convicted inmate.

Much of the public apathy toward the plight of the unbailed defendant probably stems from the common view that this group of people is in some sense "bad" and thus not deserving of much sympathy. One is reminded of the remark of a former British Home Secretary about a man named Gallery, who was hanged for a crime he didn't commit: "If Gallery was wrongfully convicted, he certainly assisted very much in his own conviction by the irregular and improper life he led. . . It is something like contributory negligence on his part."<sup>70</sup>

It is more important than ever today, when support for preventive detention is heard from many quarters, that proponents of such measures understand the cost of such detention for those ruled unbailable under the provisions of the pertinent statute. The merits or demerits of preventive detention are beyond the scope of this study, but if such legislation were to be enacted, the greatest care must be taken to keep the standards for detention precise and narrowly drawn. The danger of the "false positive"—Harvard Professor Dershowitz's term for the individual who is improperly predicted to be a poor bail risk—is great, and this study indicates that the costs of such detention—financial, legal and moral—are far too high to be imposed lightly.

## Appendix I

Bail Interview Form: Circuit Court, State of Connecticut

("Confidential-Not Subject to Subpoena [Conn. Statute 54-63d] ")

Place of Interview

Date of Interview

Time of Interview

Name; Date of Birth, Sex

Charge(s)

Family Ties: Marital Status; Residing w/Spouse; No. of Dependents; If Minor, living at home?; Living with?

Residence; Present Address, how long?, Phone Number, Length of Time In Area

Employment: Present Employer; how long?; If unemployed, means of subsistence?

Discretionary Factors (Student, Housewife, Old Age, Ill Health, etc.)

References: Name, Address, Position, Phone, Years Known

Previous Record; Other Case(s) Pending?; If so, what Court, Charge

Other Remarks

Defendant released from (Court, Police Station) on Written Promise

Defendant released from (Court, Police Station) on Non Surety Bond of \$ \_\_\_\_\_

Defendant not released from (Court, Police Station) on Written Promise or Non Surety Bond for the following reasons:

Surety Bond Set At \$ \_\_\_\_\_

Court Date

I agree to allow the interviewer to contact the people listed above as my reference if he wishes to verify my ties to the community. (signature of accused), (signature of interviewer)

Office Use: Disposed of, Rearrest Warrant Issued, Rearrested

## Appendix II

Interviews Accused Felons in New Haven Correctional Center

1. Name, address.
2. Birthdate, birthplace.
3. Charge.
4. Years lived in Connecticut: New Haven: latest address.
5. Person living with (wife, relatives, friend).
6. Where employed when arrested. Weekly pay.
7. Property owned, debts outstanding.

8. Previous arrest record, convictions.
9. Bail amount; changes in bail.
10. Attempts to raise bail; reason not made; amount that could be made.
11. Offers to reduce bail for deals with police or prosecution.
12. Contact with bondsmen. Reasons for refusal.
13. Representation at bail hearing. Other legal efforts to reduce bail.
14. Length of time in Correctional Center.
15. Number of conferences with lawyer or lawyer's representative.
16. Interview with Bail Commission.
17. Support of dependents.
18. Type of representation; desire for alternative representation; effect of jailing on securing private attorney.
19. Difficulties in preparing defense due to incarceration. (locating witnesses, etc.).
20. Unfair treatment from arrest to present.

Interviewer's Comments.

## Footnotes

1. *Report of the Legislative Commission on Jails - Connecticut* (1932) 51 (hereinafter cited as *1932 Report*).

2. The inmate weekly "paper" requested that "Popular Mechanics" and "Psychology Today" be added to the approved list. The general standard for exclusion of a magazine is that it cannot be "pornographic or inflammatory."

3. The interview process revealed that others are held because they are parole violators, have "holds" outstanding from other states (*Conn. Gen. Stats. §§54-170-173*), or are charged with a capital crime.

4. Forty-two separate projects are summarized in *Institute on the Operation of Pretrial Release Projects, Bail and Summons: 1965* (1966), foldout following 8.

5. Statement of the Hon. Charles W. Halleck, Judge, District of Columbia Court of General Sessions in *Hearings on Amendments to the Bail Reform Act of 1966 Before the Subcommittee on Constitutional Rights of the Committee of the Judiciary, United States Senate, 91st Congress, 1st Sess. 116* (1969) (hereinafter cited as *1969 Hearings*); statement of Harry I. Subin, Associate Director of the Vera Institute of Justice, New York, N.Y., *id.* at 226.

6. Interests (1) and (2) fall into the "Due Process Model" and (3) and (4) into the "Crime Control Model" discussed in Packer, *Two Models of the Criminal Process*, 113 U. Pa. L. Rev. 1 (1964).

7. Ares, Rankin & Sturz, *The Manhattan Bail Project: An Interim Report on the use of Pre-trial Parole*, 38 N.Y.U. L. Rev. 82 (1963). Also *1969 Hearings*, 35,6.

8. Recidivism statistics for the District of Columbia were included in the *Report of the Judicial Council Committee to Study the Operation of the Bail Reform Act in the District of Columbia, 1969 Hearings* 554.

9. The United States Court of Appeals for the Second Circuit on April 1, 1970, agreed to a rehearing *en banc* of United States *ex rel. Frizer v. McMann* No. 473 (2d Cir., April 1, 1970), in which a defendant unsuccessfully claimed that a thirteen month delay from arrest until trial denied him a speedy trial. Briefs *amici curiae* are being filed by numerous organizations and the appeal hearing should result in a thorough review of the troublesome matter of clogged court dockets.

10. See *Fitts v. United States*, 335 F. 2d 1021 (10th Cir. 1964) (rejecting violation of due process claim based on defendant's incarceration before trial and inability to find witnesses).

11. *McDonald v. Board of Election Commissioners*, 394 U.S. 802 (1969); *Taylor v. Ciccone*, 299 F. Supp. 684 (W.D., Mo. 1969); see generally Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 Yale L. J. 506 (1963).

12. See generally, *Mollour, Bail Reform in The Nation's Capital* (1966).

13. See *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. Pa. L. Rev. 1031 (1954); *A Study of the Administration of Bail in New York City*, 106 U. Pa. L. Rev. 693 (1958).

14. Comment, *The Connecticut Bail Commission*, 79 Yale L. J. 513, 515 (1970) (co-authored by Thomas O'Rourke, Chief Bail Commissioner, State of Connecticut) (hereinafter cited as *Bail Commission*).

15. Pub. Act No. 826, §54-63(c) [1969] Conn. Legis. Serv. 1257. The Act has been so interpreted as to block operation of the Bail Commission where the suspect has been arrested on a bench warrant from Superior Court, *Bail Commission* 522, n. 36.

15a. *Conn. Gen. Stat.* 54-63 (C).

16. *Supra*, fn. 15 at 518, 520 n. 33.

18. *Id.* 521, 523. The Commissioner acknowledged that the prosecutor's office prefers surety release to release on recognizance because an uncertain docket may create need to call for a court appearance on short notice, and the bail bondsman is equipped to produce his client quickly and efficiently. Defense attorneys interviewed for this study confirmed this predilection among certain judges and prosecutors for the "babysitting" service of the professional bondsman.

19. Interview with Chief Bail Commissioner, State of Connecticut, December 18, 1969. Some exceptions are made for felony charges arising from domestic quarrels, and for youths charged with possession of small quantities of marijuana.

20. Pub. Act No. 826, 54-63 (b) [1969].

21. *Bail Commission* 530.

22. Interview with Chief Bail Commissioner, State of Connecticut, December 18, 1969. The commissioner estimated that 350 of 550 "bail-eligible" cases were released on non-surety conditions in each of the months of September and October, 1969. At the time of this writing, no additional statistics were available.

23. In Cook County, Illinois, the introduction of a 10% cash deposit alternative to normal bail caused a drop in the yearly jail population from 23,225 in the year preceding the innovation to 20,929 in the year of the new system. For the previous seven years, the population had been climbing steadily at an average of 1,500 per year, Bowman, *The Illinois Ten Per Cent Bail Deposit Provision*, 1965 U. Ill. L. Forum 35, 40 (1965).

24. Interview, Business Manager, New Haven Correctional Center, April 16, 1970. Figures for earlier years are not available. An accurate evaluation on the positive impact of the Bail Commission would require scrutiny of records showing the number of total arrests and felony arrests before and after the inception of the Bail Commission, and the total number of persons released before and after its inception. Statistics obtained from the New Haven police department show the following arrest totals:

Total Arrests	Felony Arrests
1965 - 21,694	
1966 - 21,573	
1967 - 19,569	
1968 - 21,738	1968 - 3,100
1969 - 24,074	1969 - 4,684

These figures may indicate that the Bail Commission is responsible for keeping the Correctional Center population constant while the arrest figure rises. No total release figures before and after the Bail Commission's inception are available. Population totals of the Center don't show the number of pre-trial detainees in the totals; no figures are available, but it is estimated by Corrections officials that the number has risen sharply over the past few years.

25. Interview with Chief Prosecutor, Sixth Circuit Court, April 13, 1970. It was stated that the prosecutor's office considers dangerous those who are charged with: sexual crimes, crimes involving violence to the person, and sales of narcotics. Crimes against property are not viewed as seriously unless the accused has a long prior record.

26. Of 87 persons interviewed at the New Haven Correctional Center, 30 reported that their attorneys had made motions to have bail lowered. In 20 instances, bail was lowered. Compare the percentage of bail lowerings on review in other counties, Silverstein, *Bail in the State Courts - A Field Study and Report*, 50 Minn. L. Rev. 621, 634 (1966).

27. Interview with private attorney, April 14, 1970.

28. *Conn. Gen. Stat.* 54-63 (g).

29. See Foote, *The Coming Constitutional Crisis in Bail: II*, 113 U. Pa. L. Rev. 1125 (1965), cases collected at 1130 n. 185. A typical standard for granting a bail reduction on appeal is that the amount set must "shock" the court or be "beyond the range within which judgments could rationally differ. . .", *Mastrian v. Hedman*, 326 F. 2d 708, 711 (8th Cir. 1964), cert. denied 376 U.S. 965 (1964).

30. Note: *Bail: An Ancient Practice Re-examined*, 70 Yale L.J. 966, 971 n. 37 (1961) (quoting the Report of the Third February 1954 Grand Jury of New York County, New York, to Hon. John A. Mullen).

31. Connecticut General Statutes § 52-316 (1969).

32. Bondsman Interview, April 14, 1970. Similar policies have been reported in New York City, 106 U. Pa. L. Rev. 693, *supra* n. 19 at 704, and in Baltimore, Chicago and Detroit, *Bail, supra* n. 3 at 26.

33. The Counselor of the New Haven Correctional Center reports that it is frequent for a bondsman to refuse to make the trip to the Center to post a bond less than \$500. See statement of Bruce Beaudin, Director, District of Columbia Bail Agency in *1969 Hearings* 62-63; *Bail, supra* n. 3 at 33.

34. These figures were arrived at from a random sampling of 119 cases closed out over the past two years. Similar incarceration rates were reported for Philadelphia, 102 U. Pa. L. Rev. 1031, *supra* n. 13 at 1048 (3 of 4 defendants charged with serious crimes incarcerated between arrest and bail).

35. Fitch and Reynolds, *The Bail Reform Act and Pre-trial Detention*, printed in *1969 Hearings* 663 indicates that for a sample of completely verified interviews of the same nature compiled here, "the defendants gave extremely accurate information."
36. *Manhattan Bail Project*, *supra* n. 8 at 75. The characteristics tabulated for this study do not duplicate those used in VERA, but are quite similar. The "records" were categorized as follows: those with no record other than one or two arrests for intoxication or motor vehicle violations were described as having a "clean" record; those having *no* felony convictions and two or fewer felony arrests with no more than one felony charge outstanding were described as having a "short" record; those with *any* felony conviction, more than two felony arrests or two felony charges pending were described as having a "serious" record. These are stringent standards, and yet 52 of the sample of 87 had a clean or short record; 16 of those were first offenders. The Bail Reform Act of 1966, 18 U.S.C. §3146 mandates judicial officers setting bail to take into account: "The 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." 63% of those detained claimed employment at time of arrest, a result inconsistent with the public's picture of the average defendant as a non-productive ne'er-do-well.
37. *Supra*, for. 4 at 71.
38. Interview with the Hon. Ellis McDougal, Commissioner of Corrections, State of Connecticut, April 10, 1970. The Connecticut Correctional Institution, Somers has a staff of about 600 to supervise about 1,200 inmates; the New Haven Correctional Center, with a far more unsettled and unhomogeneous population of 375, has a staff of about 70.
39. 102 *U. Pa. L. Rev.* 1031, *supra* n. 19, at 1052, 1053 (statistics for Philadelphia); 39 *N.Y.U. L. Rev.* 642, *supra* n. 15, at 654 (statistics for New York); *1969 Hearings* 589 (statistics for Washington, D.C.)
40. 106 *U. Pa. L. Rev.* 685, *supra* n. 13, at 725-726.
41. Interview with Business Manager, New Haven Correctional Center, April 16, 1970. Total costs per inmate per day are \$8.45, or about \$3,000 per year per inmate. The Federal government pays the state \$8.00 per day for each Federal detainee.
42. "... the most ironic finding in the whole study is the revelation that accused persons, whom our law presumes to be innocent and who are not to be punished, are confined pending trial under conditions that are more oppressive and restrictive than those applied to convicted and sentenced felons," Foote, Foreword: *Comment on the New York Bail Study*, 106 *U. Pa. L. Rev.* 685, 689.
43. *ACA Correctional Standards* 17.
44. Adams and Burdman, *The County Jails of Calif. An Evaluation* (1957).
45. *ACA*, *supra*, at 424; also *Jails of Calif.* '69.
46. Conn. State Prison—Objectives and Program—Wethersfield, Conn. (1959) 4.
47. *ACA Correctional Standards* 410-413, *supra*.
48. *Jails of Calif.* 34 *supra* n. 56.
49. *1936 Report* 14.
50. *1932 Report* 55.
51. 102 *U. Pa. L. Rev.* *supra* n. 19, at 1052. *1969 Hearings* 589 (Washington, D.C.) 113 *U. Pa. L. Rev.* 959, *supra* n. 10 at 960.
52. James E. Hewitt, Attorney in Charge, Federal Criminal Defense Office, The Legal Aid Society of San Francisco, has stated that "Pre-trial custody does... have a clear coercive effect," *1969 Hearings* 267. The above statement is not supported by this study; in both the bailed and jailed groups, only two persons elected to press their case to trial. No further analysis was attempted.
53. McCree, *Proceedings of the Conference on Bail and Indigency*, 1965 *U. Ill. L. Forum* 1, 4 (1965).
54. Credit time is given sentenced persons for time spent in a Correctional Center awaiting disposition of their cases, *Conn. Gen. Stat.* §18-98.
55. A similar result was uncovered in New York, Wald, *Pretrial Detention and Ultimate Freedom: A Statistical Study; Foreward*, 39 *N.Y.U.L. Rev.* 631, 634 (1964).
56. Foldout, *supra* n. 4. This summary of 42 different bail projects shows that of the 42 projects, only 5 confine their scope to misdemeanors; 11 projects deal with felonies *only*.
57. American Enterprise Institute, *The Bail Reform Act, An Analysis of Proposed Amendments and an Alternative* 12 (1969).
58. Figures pointing to an extremely low recidivism rate in various bail projects are collected in Note, *Preventive Detention Before Trial*, 79 *Harv. L. Rev.* 1489, 1496 (1966).
59. *Powell v. Alabama*, 287 U.S. 45, 57 (1932).
60. *Bail and Summons* 77-78, *supra* n. 4.
61. The Police Department in New Haven thinks well enough of the non-money release program to recently urge legislation permitting stationhouse bail for those 18-21 years old, a group ineligible under the current system.
62. See *Manhattan Bail Project*, *supra* n. 7; *Bail* 65, *supra* (describing projects in Des Moines and St. Louis); 1965 *U. Ill. L. Forum* 1, 5, 6, (describing a successful project in the Eastern District of Mich., minutes from the Canadian border, releasing accused bank robbers, narcotics offenders and others accused of serious crimes).
63. For a comparative survey taken in New York City, see 106 *U. Pa. L. Rev.* 693, 709, *supra* n. 13.
64. *Id.* at 708.
65. *Manhattan Bail Project* 92, *supra* n. 7.
66. *1969 Hearings* 46 (Washington, D.C.); *Bail* 78-79 (Illinois); 106 *U. Pa. L. Rev.* 693, 719, *supra* n. 13 (New York City).
67. *Jail Report, Cook County Jail* (Unpublished, 1965) 4:2; Bowman, *The Illinois Ten Per Cent Bail Deposit Provision*, 1965 *U. Ill. L. Forum* 35, 38 (1965).
68. *Bail Commission* 520.
69. Quoted in *The New York Times Magazine* 25, April 26, 1970.
70. Hale, *Hanged in Error* 119 (1961).

