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Bail in Missouri Revisited

Mark Berger
University of Missouri - Kansas City, School of Law

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By Mark Berger*

The past decade has been a busy one for proponents of bail reform. During the early part of the 1960's, interest in the civil rights movement generated concern over the inequities of bail administration.[1] In the latter part of the decade the same problems were revealed in major studies of the nation's criminal justice system.[2] Contributions to the legal literature in this period, encompassing statistical and evaluative studies[3] as well as academic analysis,[4] helped to focus further attention on bail. Moreover, a major effort was undertaken by the United States Department of Justice to promote the sharing of bail program information and ideas.[5]

There are signs, however, that some of the earlier interest in bail reform is being diverted from its initial focus. Increasingly, the question of whether there is a constitutional right to bail has become the center of attention, replacing the issue of how society can produce a fair and equitable bail system. The enactment of the District of Columbia's preventive detention statute[6] is the most direct reflection of this trend, but the controversy has also spilled over into the pages of numerous law reviews.[7] Of course the issue deserves comment, but the

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*Assistant Professor of Law, University of Missouri-Kansas City; A.B. Columbia University, 1966; LL.B. Yale University, 1969.

1. ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE, REPORT ON POVERTY AND THE ADMINISTRATION OF JUSTICE (1963).

2. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967). In addition to its general report, the Commission produced nine task force reports (POLICE, COURTS, CORRECTIONS, JUVENILE DELINQUENCY AND YOUTH CRIME, ORGANIZED CRIME, NARCOTICS AND DRUGS, DRUNKENNESS, SCIENCE AND TECHNOLOGY, AND ASSESSMENT OF CRIME) and published RESEARCH STUDIES AND SELECTED CONSULTANTS' PAPERS. *See also* PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA, REPORT (1966); NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT (1968); NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE, LAW AND ORDER RECONSIDERED (1969).

3. *See, e.g.*, Ares, Rankin, & Sturz, *The Manhattan Bail Project: An Interim Report on The Use of Pre-Trial Parole*, 38 N.Y.U. L. REV. 67 (1963); O'Rourke & Carter, *The Connecticut Bail Commission*, 79 YALE L. J. 513 (1970); Note, *An Alternative to The Bail System, Penal Code Section 853.6*, 18 HAST. L. REV. 643 (1967); Note, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U.PA. L. REV. 1031 (1954); Note, *A Study of the Administration of Bail in New York City*, 106 U.PA. L. REV. 693 (1958).

4. *See, e.g.*, Foote, *The Coming Constitutional Crisis in Bail*, 113 U.PA. L. REV. 959, 1125 (1965); LaFave, *Alternatives to The Present Bail System*, 1965 U.ILL. L. F. 8; Paulsen, *Pre-Trial Release in The United States*, 66 COLUM. L. REV. 109 (1966); Robinson, *Alternatives to Arrest of Lesser Offenders*, 11 CRIME & DELINQ. 8 (1965).

5. Bail reform was the subject of two 1965 Justice Department-supported conferences. *See* INSTITUTE ON THE OPERATION OF PRETRIAL RELEASE PROJECTS & JUSTICE CONFERENCE ON BAIL AND REMANDS IN CUSTODY, 1965 PROCEEDINGS: BAIL AND SUMMONS. *See also* Baron, *Workshop: Establishing Bail Projects*, 1965 U.ILL. L. F. 42.

6. D.C. CODE §23-1322 (1973). Very little use has been made of the statute. BASES & MCDONALD, PREVENTIVE DETENTION IN THE DISTRICT OF COLUMBIA: THE FIRST TEN MONTHS (1972).

7. *See, e.g.*, Meyer, *Constitutionality of Pretrial Detention*, 60 GEO. L. J. 1139 (1972); Mitchell,

attention it has received, particularly in the legislative arena, has detracted from the energy and resources available to pursue the still unfinished task of improving the administration of bail.

Many states, including Missouri, have been affected by the bail reform movement of the 1960's, although there appear to be significant differences in the character of their responses.[8] As recently as 1972, Missouri undertook a major revision of its bail statute to bring the state more in line with the national trend towards bail reform. A re-examination of the state's bail system in the context of the larger nationwide bail reform movement may help us to determine where the state stands in terms of the goal of insuring a fair and equitable bail system.

THE BAIL REFORM MOVEMENT: AN OVERVIEW

Bail reform has been a subject of concern in the criminal justice system for some time,[9] but it has only been in the past decade that the concern has been translated into substantive change. This development can be traced directly to the pioneering work of the Vera Institute of Justice in challenging the traditional and widely held assumption that defendants will return to court only if they have been required to post monetary security as a condition of their pretrial release. Even where the defendant himself may not have assumed the financial burden of meeting the bond amount set by the court, the criminal justice system has still adhered to the monetary bail requirement.

The Vera Institute's experimental Manhattan Bail Project,[10] begun in 1961 in the New York City Criminal Court system, sought to determine whether it was possible to release criminal defendants without requiring them to post monetary security. The effect of the traditional system, relying almost exclusively upon financial conditions of pretrial release,[11] clearly puts the indigent defendant at a severe disadvantage. For him, even a nominal bail may be beyond reach, with the result that he will spend the pretrial period in confinement. Since indigents constitute a substantial portion of the criminal defendant popu-

Bail Reform and The Constitutionality of Pretrial Detention, 55 VA. L. REV. 1223 (1969); Tribe, *An Ounce of Detention: Preventive Justice in The World of John Mitchell*, 56 VA. L. REV. 371 (1970); Note, *Preventive Detention Before Trial*, 79 HARV. L. REV. 1489 (1966); Note, *Constitutional Limitations on the Conditions of Pretrial Detention*, 79 YALE L. J. 941 (1970). *See generally Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970), for a review of the preventive detention controversy.

8. *See* Botein, *The Manhattan Bail Project: Its Impact on Criminology and the Criminal Law Processes*, 43 TEXAS L. REV. 319 (1965); Hawthorne & McCully, *Release on Recognizance in Kalamazoo County*, MICH. ST. B. J., July, 1970, at 23; Howard & Pettigrew, *ROR Program in a University City*, 58 A.B.A.J. 363 (1972); McCarthy & Wahl, *The District of Columbia Bail Project: An Illustration of Experimentation and a Brief for Change*, 53 GEO. L. J. 675 (1965); Teague, *The Administration of Bail and Pretrial Freedom in Texas*, 43 TEXAS L. REV. 356 (1965). *See generally* FREED & WALD, BAIL IN THE UNITED STATES (1964).

9. *E.g.*, NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON CRIMINAL PROCEDURE (1931).

10. VERA INSTITUTE OF JUSTICE, PROGRAMS IN CRIMINAL JUSTICE REFORM: TEN YEAR REPORT 1961-1971, at 19-41 (1972).

11. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 37 (1967).

lation,[12] the implications of a monetary bail system are serious; in a theoretical sense, it raises questions as to the sincerity of our commitment to treat rich and poor alike, while from a practical perspective it imposes heavy administrative and financial burdens on society for the care and custody of the pretrial detainee population.

The unfairness of incarcerating a defendant solely because of his indigency is compounded when the consequences of pretrial detention for the individual involved are also considered. It is primarily an insecure economic status which lies behind the pretrial detention of a defendant unable to meet the bail set for him by the court, but that economic condition is only worsened by jailing the defendant. If employed, he may lose his job, and if unemployed, he is clearly precluded from finding employment, both results stemming from his loss of freedom. Moreover, if dependents are involved, the state may wind up footing the bill not only for the defendant's care and custody in jail, but also for the support of his family. Added to these economic consequences are the severe personal strains of pretrial detention, including separation from family, friends and community, and the frustration that can be generated as a result of confinement without a finding of guilt. Pretrial detention also precludes the defendant from effectively assisting in the preparation of his defense, a condition which could lead to unjust conviction.

There are further indications that the pretrial detainee, once in court, faces more serious obstacles than the defendant who has been released pending trial. In particular, the data compiled by the Vera Institute suggest that pretrial detention increases both the likelihood of conviction and the chances of a prison sentence rather than probation after conviction.[13] Furthermore, pretrial detainees frequently suffer conditions of confinement which are worse than those afforded sentenced offenders.[14] It is difficult to justify such hardships for the pretrial detainee population when they are supposedly presumed innocent and are in jail solely as a result of their inability to post bond.[15]

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12. *See* OAKS & LEHMAN, A CRIMINAL JUSTICE SYSTEM AND THE INDIGENT 82-85 (1968).

13. One study covering the 1961-1962 period in New York City indicated that 73% of all defendants subjected to pretrial detention were ultimately found guilty whereas the comparable figure for those released during the pretrial period was 53%. Furthermore, only 17% of the pretrial group free on bond received prison sentences compared to 64% of the pretrial detainees. Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U. L. REV. 640, 641-642 (1964). *See also* ATTORNEY GENERAL'S COMMITTEE, *supra* note 1, at 72-77.

14. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS 99 (1973); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 24-25 (1967).

15. Although the pretrial detainee may be incarcerated in the same institution as a convicted offender, he is not in the same class for constitutional equal protection purposes. Rather, courts have held that the pretrial detainee should be treated like the bailed defendant and cannot be punished prior to a determination of guilt. Brenneman v. Madigan, 343 F. Supp. 128 (N.D. Cal. 1972); Hamilton v. Love, 328 F. Supp. 1182 (E.D. Ark. 1971); Jones v. Wittenberg, 323 F. Supp. 93 (N.D. Ohio 1971). *See generally* Note, *Constitutional Limitations on the Conditions of Pretrial Detention*, 79 YALE L. J. 941 (1970). The National Advisory Commission has recommended that the conditions of confinement for the pretrial detainee should meet the standard that they be reasonably and necessarily related to the state's interest in assuring appearance at trial and be the least restrictive alternative toward that end. NATIONAL ADVISORY COMMISSION, *supra* note 14, Standard 4.8, at 133-135. The Commission also recommended separation of convicted and unconvicted inmates, *id.*,

In light of these considerations, the Manhattan Bail Project's movement away from financial conditions of pretrial release represented an important innovation. At the same time, however, the effort was undertaken with due regard for legitimate criminal justice interests. The rationale behind monetary bail is that if the defendant's resources are committed as security for his future appearance in court, the likelihood of his flight to avoid prosecution is reduced. Without monetary bail to provide reasonable assurance of appearance in court, and in the absence of an adequate substitute, there would no doubt be an increased reluctance in the criminal justice system towards any form of pretrial release.

The Vera Institute's Manhattan Bail Project sought to replace monetary bail as a tool to assure appearance in court with a community ties standard and with an information collection system designed to insure informed bail decisions.[16] The assumption of the Project was that a defendant with sufficient roots in the community would appear in court to face the criminal charges against him even if no monetary bail was required. To evaluate the roots in the community standard, the Project developed an objective point system to focus attention upon relevant factors in judging community roots.[17] The defendant received points for strong residential, family and job ties which, along with other factors, determined his eligibility for pretrial release on recognizance, without bond, but with a written promise to appear in court. Moreover, rather than relying on the adversary system to bring this information out in court, the Project utilized bail interviewers to collect and verify the relevant information. The results revealed that judges were more likely to release without bond defendants for whom verified personal information was available and that individuals so released appeared in court as reliably as those who were required to post bond.[18]

The Manhattan Bail Project appeared to be a readily adaptable approach to the problem of unwarranted pretrial detention, and it is not surprising that its model was widely followed. However, the concept behind it did not stop there. Indeed, the Vera Institute itself, building upon the experience gained from the Manhattan Bail Project, proposed its extension to earlier phases of the criminal justice process.

It is relatively standard procedure for arrestees to be held by police in a detention facility pending presentment to a judge or magistrate.[19] The period of detention may be short if court is in session or a judicial officer is otherwise available, but in many cases it can last overnight or for an entire weekend. Pretrial detention under these circumstances is solely the result of administrative inefficiency. In the Manhattan Summons Project, the point system used for judicial bail decisions was simply transferred to the police stationhouse, and police were authorized to release defendants after booking.[20] The result was an

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while the 1967 President's Crime Commission advised construction of entirely separate facilities for the two groups. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT, *supra* note 14, at 24.

16. *See* Ares, Rankin & Sturz, *supra* note 3.

17. *See* AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO PRETRIAL RELEASE 52-53 (1968).

18. Ares, Rankin & Sturz, *supra* note 3, 89-90.

19. LAFAVE, ARREST 168 *et seq.* (1965).

20. New York City, location of the pioneering Manhattan Bail Project, also was the first munic-

earlier bail decision for the defendant and the avoidance of unnecessary detention. As an additional benefit, stationhouse bail offers the potential of conserving limited police resources.

With the acceptance of stationhouse bail, the step to a police field release or citation system seems to be a logical one.[21] Release is provided at the earliest available point in time and all but technical police custody is eliminated.[22] This is normally accomplished through the issuance of a notice-to-appear-in-court citation at the scene of apprehension. Further conservation of police resources and improved police-community relations are part of the potential benefit.[23]

Finally, the bail movement has also come up with reforms aimed at those defendants who do not qualify for recognizance release. If unable to post the entire monetary bond on their own, such defendants would normally make use of the services of a private bondsman who, for a fee, will post the required bail. The so-called ten percent bail program eliminates the role of the private bondsman in this process by providing for the pretrial release of defendants who can post ten percent of the face amount of the bond with the court.[24] While not necessarily increasing the overall rate of pretrial release, such programs at least reduce the financial hardship of bail by authorizing the return of the deposit if the defendant meets his obligation of appearing in court.[25]

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ipality to experiment with a police supervised release program, the Manhattan Summons Project. *See* BAIL AND SUMMONS, *supra* note 5, at XIV-XV. Connecticut and California, among others, have institutionalized police release authority in their jurisdictions. CAL. PENAL CODE §853.6 (West Supp. 1974); CONN. GEN. STAT. ANN. §54-63c (Supp. 1974).

21. Both the American Bar Association and the American Law Institute have recommended the institution of police field release programs. AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO PRETRIAL RELEASE, §§2.2, 2.3 (1968); AMERICAN LAW INSTITUTE, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, §3.02 (Tent. Draft No. 1, 1966). *See also* Berger, *Police Field Citations in New Haven*, 1972 WIS. L. REV. 382; Feeney, *Citation in Lieu of Arrest: The New California Law*, 25 VAND. L. REV. 367 (1972).

22. There is some definitional confusion as to whether the citation is issued in lieu of arrest or as a speedy form of post arrest release. The practical consequences, including the fact that the criminal justice process has been invoked against the accused and he must appear in court to respond, remain the same regardless of which approach is used. *See* MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, *supra* note 21, §3.02; Berger, *supra* note 21, at 391.

23. BAIL AND SUMMONS, *supra* note 5, at 135-141; Berger, *supra* note 21, at 411.

24. Bowman, *The Illinois Ten Per Cent Bail Deposit Provision*, 1965 U.ILL. L. F. 35; Rice & Gallagher, *An Alternative to Professional Bail Bonding: A 10% Cash Deposit for Connecticut*, 5 CONN. L. REV. 143 (1972). The cumulative effect of the entire set of bail reforms would be a reduction in the need for a private bail bondsman system. It has been argued that criminal law administration is public business and ought not to be delegated to private individuals where no safeguards protect the person involved. NATIONAL ADVISORY COMMISSION, *supra* note 14, at 122. The Commission therefore recommended improvement in the public bail system and elimination of the private bondsman system. *Id.* Standards 4.3, 4.4, 4.5, at 116-125. *See also* STANDARDS RELATING TO PRETRIAL RELEASE, *supra* note 21, §5.4, at 61-65.

25. The 10% bail program may provide a greater incentive to appear in court than does a private surety bond, since after appearance the defendant will be refunded all or a substantial portion of his deposit. *See* Bowman, *supra* note 24; Rice & Gallagher, *supra* note 24; Note, *Administration of Pretrial Release and Detention: A Proposal for Unification*, 83 YALE L.J. 153, 158-159 (1973). The Supreme Court has upheld the imposition of a 1% charge (10% of the deposit) for those released pursuant to a court deposit bail system, noting the success of such a program, even with an administrative charge, in reducing the influence of the private bondsman. Schilb v.. Kuebel, 404 U.S. 357, 360 (1971).

Although there are important differences in these various bail reform projects, a common pattern nevertheless emerges. It seems clear that a serious effort has been made to increase the opportunities for pretrial release. By looking at community ties rather than blindly setting a monetary bail, the bail system can at least give the indigent criminal defendant a chance for pretrial release. Additionally, the bail reform movement has created new opportunities for release at earlier stages of the criminal justice process. Indeed, field release programs permit the release decision to be made immediately after the decision to arrest. Finally, and most directly, the bail system has responded to pressure to eliminate its almost exclusive reliance on the posting of money bail to secure pretrial release. To the extent bail serves the function of insuring a defendant's appearance in court, the system now permits the release decision to be made on the basis of other factors reasonably related to that goal.

THE MISSOURI CONSTITUTIONAL FRAMEWORK

Consideration of bail in Missouri must begin, of course, with a look at the applicable provisions of the Missouri Constitution. However, while establishing the underpinnings of the state's bail system, the consitutional provisions received important amplification from a variety of statutes and court rules. The bail system, in its day to day operation, is a reflection of the combined effect of all of these in the light of relevant agency practice.

Missouri appears to be somewhat unusual in that portions of two separate constitutional provisions provide important rights with respect to bail. Article I, §21 closely resembles the Eighth Amendment to the United States Constitution in establishing the right to be free from "excessive bail."[26] The meaning of these words in Missouri, however, is subject to the same uncertainty applicable to the Eighth Amendment's language. Specifically, while bail, once set, cannot be excessive, the section leaves unclear whether there is any constitutional compulsion to set it at all.[27] Similarly, it is unclear what determines whether the bail set is excessive. If the defendant's ability to pay is controlling, then even nominal bail would be excessive with respect to an indigent. If the likelihood of the defendant's appearance in court is controlling, defendants in very serious cases might be entitled to release without posting bond at all. These issues have not been entirely resolved under either state or federal law.

In addition to the prohibition against excessive bail, the Missouri Constitution establishes an affirmative right to bail. Article I, §20 provides that "all persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great." This provision, when added to article I, §21, creates a comprehensive right to bail which appears to preclude the use of preventive detention. Nevertheless, while the two sections may establish a clear right to bail, they do not on their face establish criteria for initial bail determinations, nor do they give any indication as to what is meant by "excessive bail."

Some clarification of the intent and scope of Missouri's consitutional provisions on bail has been provided in a number of court decisions. The courts have

26. "That excessive bail shall not be required. . ." MO. CONST. art. I, §21.

27. *See* note 7, *supra*.

been quick to reaffirm the right of a defendant to post bail. In an en banc decision, Missouri's highest court indicated that:

> [I]t may be said generally, therefore, that one accused of crime is entitled to bail as an absolute right, subject to the limitation that it should be denied in capital cases where the proof is evident or presumption great.[28]

More significant, however, have been those cases which have rejected basing the bail decision upon the likelihood of the defendant's future conviction or use of the bail system as a form of pretrial punishment. In admitting a defendant charged with first degree murder to bail, the Missouri Supreme Court said:

> Confinement in jail prior to trial is not authorized because defendant may eventually be convicted of the charge by a jury, or as any part of his punishment, if guilty, but to assure his presence when the case is called for trial and during the progress thereof.[29]

This view was reaffirmed in another opinion in which the court stated that the "purpose of bail is not to punish the defendant ahead of trial, but to secure his appearance at the trial."[30]

On the affirmative side, an effort has been made to suggest the kinds of considerations which might enter into a bail determination. One court has suggested that:

> In determining the amount of bail it is necessary to consider the nature of the charge and the surrounding circumstances, for an accused might more easily succumb to the temptation to flee from some charges and under some circumstances than others. . . . Also to be considered is the ability of the accused to give the bail.[31]

Each of these criteria can be interpreted as consistent with the theory that the function of bail is to insure the defendant's appearance in court. Thus, the defendant's ability to give bond would assist the court in determining a level of bail that would provide a sufficient financial inducement to insure appearance. Similarly, it could be argued that certain offenses require higher bond because something in their intrinsic character, or perhaps the punishment which can be imposed following conviction, increases the likelihood of flight. Nevertheless, these are only the most general of criteria and only marginally instructive for purposes of analyzing the day to day administration of bail.

BAIL IN THE COURT

Missouri constitutional and decisional law provide the general framework within which the state's bail system operates. The daily practice, in contrast, is guided much more by statutes and court rules which attempt to set out a specific structure and procedure for bail administration. These touch upon the

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28. *Ex parte* Burgess, 309 Mo. 397, 406, 274 S.W. 423, 426 (1925).

29. *Ex parte* Verden, 291 Mo. 552, 563, 237 S.W. 734, 737 (1922). In the federal system, it has been said that the Eighth Amendment's proscription against excessive bail means that bail must be set at an amount "reasonably calculated to hold the accused available for trial and its consequence." Stack v. Boyle, 342 U.S. 1, 8 (1951) (separate opinion of Jackson, J.). *See also* Bandy v. United States, 82 S.Ct. 11 (1961) (Douglas, Circuit Justice).

30. *Ex parte* Chandler, 297 S.W.2d 616, 617 (Mo. 1957).

31. *Id.*

process of pretrial release at the scene of apprehension and in the police station-house, but to a much larger extent the formal law concerns itself with the formal bail determination in court.

The major legislative enactment governing bail practice in the courts is §544.455 of Missouri's Criminal Procedure Code, adopted in 1972.[32] The entire range of release options is set out in the statute, including:

1. Personal recognizance,
2. Custody of a third party,
3. Cash or surety bond,
4. Regular reporting to an officer of the court or a peace officer, and
5. Deposit of up to 10% of the bond with the court.

In addition, the court is given the authority to restrict the travel, associations and place of abode of the individual released and to impose any other requirement "deemed reasonably necessary to assure appearance." For those maintained in custody, the court has the authority to limit the confinement to specified hours.

The variety and scope of the release options available under Missouri law permit the courts to impose conditions of release which will provide reasonable assurance of appearance in court without the need for monetary bail. The least restrictive of the conditions is the personal recognizance release, which requires only that the defendant execute a written promise to appear in court. If this is deemed inadequate, the defendant may be released in the custody of a third party or be required, as one of the conditions of his release, to report regularly to a criminal justice official. The third party custody and reporting requirements serve to provide some additional control over the defendant and offer the court a responsible person or official who can help to insure the defendant's appearance. Even if this amounts to no more than reminding the defendant of his court date, the extra conditions would appear to increase the likelihood of appearance, enough at least to justify release without requiring financial security.[33]

If non-financial forms of release are deemed inadequate, the more traditional system of money bail may be used by the court. Here too an effort has been made to mitigate financial hardships to the defendant. The court may authorize the deposit of 10% or less of the face amount of the bond in lieu of full bond or surety.[34] And, finally, even if the defendant cannot meet the bail

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32. Mo. REV. STAT. §544.455 (Supp. 1974).

33. The National Advisory Commission noted that:

> Placing the accused under the care of a private citizen or organization may assist him in appearing for trial. Experience indicates that, particularly in large metropolitan areas, some persons accused of crime fail to appear owing to misunderstanding or forgetfulness. . . . A third person responsible for insuring that the person appears at trial should solve most such problems. NATIONAL ADVISORY COMMISSION, *supra* note 14, at 121.

Moreover,

> In some cases, more expert supervision may be thought necessary. . . .Periodic reporting to such an officer would give additional assurance that the accused will appear for trial. *Id.*

These options are analogous to the ancient practice of releasing a defendant into the custody of a surety. *See* STANDARDS RELATING TO PRETRIAL RELEASE, *supra* note 21, at 57.

34. The Missouri statute does not provide for an administrative charge when a defendant is released pursuant to a deposit of bail with the court. *See* text accompanying note 25, *supra*.

conditions set by the court, custody can be modified to permit the defendant to work or assist in the preparation of his defense.[35]

Even though a full range of release options is provided, the statute does not give much guidance to the courts in deciding the form and conditions of a release decision. There appears to be a preference for personal recognizance release, but it is weakly stated. The legislation provides that the court "may" order such a release, but it is clearly not required.[36] Moreover, the judge "in the exercise of his discretion" may determine that further conditions are necessary, but no preference for non-financial conditions is expressed.[37] Assurance of appearance seems to be the underlying standard for the bail process, but the statutory scheme provides the opportunity rather than pressure for meeting this goal through the use of non-financial tools.

Section 2 of the Missouri bail statute specifies the nature of the information the court must take into account in reaching a bail decision. The statute seeks to direct the court to inquire into factors which are relevant to a judgment of the defendant's likelihood of appearance in court and the release conditions needed to assure such appearance. Of major importance is the offense charged, and the court may consider the nature of the crime and the circumstances surrounding its commission, as well as the weight of the evidence against the accused. Presumably, this rests on an assumption that the more serious the charge and the stronger the state's case, the greater the temptation for the defendant to flee. There is no available proof of the validity of this assumption, but is is one used in many jurisdictions.[38]

Of more relevance is the statute's concern for information relating to the personal circumstances of the defendant, including his family, job and residential ties to the jurisdiction. In addition, the court may consider the defendant's mental condition and character. With such information, the court can make a rational determination as to what pretrial release conditions are necessary to assure appearance at trial. Burdensome conditions can be avoided in cases in which the court is aware that the defendant is not likely to flee because of some personal weakness or because nothing holds him to the community.

Of similar importance in judging the likelihood of appearance is the existence of a record of the defendant's prior non-appearances in court, and the

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35. The National Advisory Commission has suggested that:

> Programs comparable to work release for sentenced offenders should be available. The accused could be left at liberty for specific purposes including employment, consultations with counsel, and other legitimate purposes but be required to be detained during his leisure hours. NATIONAL ADVISORY COMMISSION, *supra* note 14, at 122.

See also STANDARDS RELATING TO PRETRIAL RELEASE, *supra* note 21, §5.2(b)(iv).

36. The American Bar Association general policy statement affirmatively favors pretrial release. STANDARDS RELATING TO PRETRIAL RELEASE, *supra* note 21, §1.1. Similar policies favor the use of citations and the summons in lieu of arrest. *Id.* §§2.1, 3.3(a). Indeed, in certain circumstances these procedures are mandatory. *Id.* §§2.2, 3.2. *See also* NATIONAL ADVISORY COMMISSION, *supra* note 14, Standards 4.3 (1), 4.3(5)(i), at 120.

37. "Legislative authority for alternatives to money bail should be drafted to encourage the use of non-financial conditions and discourage the use of detention or money bail." NATIONAL ADVISORY COMMISSION, *supra* note 14, at 121. *See also* STANDARDS RELATING TO PRETRIAL RELEASE, *supra* note 21, §5.3, at 58: "Money bail should be set only when it is found that no other conditions on release will reasonably assure the defendant's appearance in court."

38. STANDARDS RELATING TO PRETRIAL RELEASE, *supra* note 21, at 60-61.

statute authorizes the court to weigh such information where it exists. However, the legislation also allows the court to consider the defendant's financial resources in reaching a bail decision, and here the law strays from its focus upon non-monetary considerations.[39] Any inquiry into the financial sphere will clearly place the indigent defendant at a disadvantage. There are enough other factors for the court to take into account in judging the defendant's reliability to allow monetary factors to be disregarded.

While the legislation sets out factors for the court to consider in reaching a bail decision, it is important to recognize that no further guidance is provided. Thus, a defendant is not required to meet a minimum standard in any one area to qualify for pretrial release. Moreover, the statute does not assign any relative weight to the various factors. As a result, similar defendants charged with the same offense may well be faced with different conditions of pretrial release because of the differing views of the judges who set bail for them. The bail decision remains a highly discretionary one, guided perhaps, but not controlled.

Procedurally, the Missouri bail statute seeks to offer some extra protection to the defendant who fails to secure pretrial release. After twenty-four hours of pretrial detention, he may apply for review of his release conditions to the judge or magistrate who initially imposed them. Given the serious consequences of pretrial confinement to the defendant and the frequent problems of jail overcrowding, the state might be well advised to consider a mandatory and periodic review of bail for all pretrial detainees.[40] Neither the appeal process nor the petition for review can be counted upon to remedy all unwarranted bail decisions.

The statutory framework of the Missouri bail system is important in understanding the underlying principles for bail administration. Of equal significance, however, are the administrative efforts that have been made to implement the legislative policies. A bail system can be made to work in the context of an adversary criminal justice process, but given the press of other business, bail decisions are frequently not given the degree of attention by the courts which they warrant. An efficient *administrative* decision making process would help not only to resolve this problem, but also to give greater credibility to the information and recommendations presented to the court because of the neutrality of the data collection process.

In Missouri, the Board of Probation and Parole has become the agency responsible for collecting background information about the accused and presenting it to the court.[41] In Kansas City, two officers of the agency are assigned the task of bail investigation on a full time basis. They utilize an objective point system in their decision making process, and make bail recommendations to the courts based upon their findings. It is important to note, however, that their

39. Neither the American Bar Association nor the National Advisory Commission suggest that the bail decision be based upon the defendant's financial resources. STANDARDS RELATING TO PRETRIAL RELEASE, *supra* note 21, §5.3(d), at 58-59; NATIONAL ADVISORY COMMISSION, *supra* note 14, Standard 4.4(2), at 120.

40. The American Bar Association recommends automatic review in such cases. STANDARDS RELATING TO PRETRIAL RELEASE, *supra* note 21, §5.9(a), at 74.

41. The Board of Probation and Parole undertook bail investigation as one of its responsibilities pursuant to an L.E.A.A. grant. At the grant's expiration, the agency continued the program with state funds.

authority extends no further than the function of recommending bail conditions; the court is under no obligation to follow the recommendations.

Under current statutes, the limited character of the Probation and Parole Board's function in the bail system is understandable. In the absence of statutory authority, clearly it can do no more than provide information and a recommendation to the court. However, there is nothing in the character of the bail decision which, at least in terms of the decision to release without bond, requires that the investigating agency be so limited. Indeed, the State of Connecticut established an entirely independent agency, the Connecticut Bail Commission, and invested it with the power to determine fully the conditions of the defendant's release, including setting the amount of bail or ordering release on recognizance.[42] The court is available to review the conditions if either the prosecution or defense remain unsatisfied, but need not divert its energies and resources to a consideration of bail in every case.[43]

There are strong arguments in favor of endowing the bail investigation agency with decision making authority as opposed to restricting it to a recommendation function.[44] First, such a change would allow the decision to be made at an earlier point in time. The accused would not be forced to suffer unnecessary pretrial confinement while awaiting his appearance before a bail-setting official. More importantly, however, placing at least the initial bail decision in an administrative rather than judicial context allows for more control and uniformity in the decisional output, a goal certainly worth pursuing in a bail program.[45] The Missouri Board of Probation and Parole's use of an objective point system for its bail recommendations is an attempt to guide its personnel in the daily administration of bail. Thus, defendants with similar backgrounds will have similar conditions of release recommended for them. With increased administrative authority, it would be possible to provide greater assurance that the ultimate bail decisions, rather than merely recommendations, are uniform in character.

The lack of statutory authority has had further implications for the Probation and Parole Board's bail program, particularly in delaying the bail decision. It appears that the agency's primary responsibility is for bail investigations at the circuit court level. Although some municipal court judges may request and receive their investigative services, the primary focus of the agency's activities remains the circuit court. Thus, while the Probation and Parole investigation

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42. CONN. GEN. STAT. ANN. §54-63b,c (Supp. 1974). State law also specifically provides that the information collected as part of the bail interview is confidential and not subject to subpoena. *Id.* §54-63d. *See generally* O'Rourke & Carter, *The Connecticut Bail Commission*, 79 YALE L.J. 513 (1970). Congress similarly set up the District of Columbia Bail Agency to administer bail in Washington, D.C. D.C. CODE, §23-1301 (1973).

43. CONN. GEN. STAT. ANN. §54-63c(b), 64a, 69 (Supp. 1974).

44. *See generally* Note, *Administration of Pretrial Release and Detention: A Proposal for Unification*, 83 YALE L. J. 153 (1973). *See also* NATIONAL ADVISORY COMMISSION, *supra* note 14, Standard 4.6, at 126-128.

45. The National Advisory Commission has recommended that the responsibility for bail should be placed in the hands of the agency responsible for presentence investigations. NATIONAL ADVISORY COMMISSION, *supra* note 14, Standard 4.6(2). The control and uniformity of decision making that administrative responsibility would achieve can help to counterbalance the variations in bail determinations which are possible in a system in which each judge may approach the issue from a different perspective.

report and bail recommendation can be available twenty-four hours after the arrest, ten days may pass before the case has been bound over to the circuit court and the recommendation acted upon. And if the charge is reduced and there is no bindover, there is no opportunity for the agency to play any role in the bail process.

The nature of the bail decision is one that requires information about the accused to insure that the decision is a rational one.[46] The machinery to acquire this information is available, but its use is not mandated and it comes into play at a delayed point in the system. The first judicial bail decision, made by the magistrate or municipal court judge, should be based upon the information acquired by the investigating agency, rather than delaying the presentation of this information until the case reaches the circuit court.

Missouri's Rules of Court provide further legal authority to govern the administration of bail. Some of the court's bail rules merely fill in the details of the system and implement broader statutory mandates. In other respects, however, the rules establish important bail policies. In particular, the use of a summons in lieu of an arrest warrant is governed entirely by the Missouri Rules of Court.

As a tool of the bail system, the summons presently has only marginal utility which the Missouri Rules of Court do not enhance. Behind the summons lies the notion that if it appears before his apprehension that a defendant will obey a judicial order to appear in court, there is no need for the issuance of an arrest warrant which requires that the police take him into custody. The summons, then, is issued in lieu of an arrest warrant and is sufficient to invoke the criminal process against the accused without ever subjecting him to formal custody restrictions.

In practice the summons is used infrequently. At the point when police have acquired the probable cause necessary to invoke the criminal process by summons or warrant, they usually do not know enough about the accused to determine whether he will obey a judicial order to appear if no other controls are applied. Understandably, they take the safer approach of obtaining an arrest warrant, leaving it to the subsequent bail system to determine the appropriate conditions of release.

Perhaps the practical difficulties underlying the use of a summons in lieu of an arrest warrant account for the limited summons authority provided by the Missouri Rules of Court. Rule 21.05[47] would allow the summons to be employed in misdemeanor cases but Rule 21.08,[48] the comparable provision for felonies, contains no mention of the summons. Moreover, the presumption even within the misdemeanor category is against the summons and in favor of the warrant. Thus, Rule 21.05 provides that "a warrant for the arrest of the defendant shall be issued" after the filing of an information charging a misdemeanor. Only if "there is reasonable ground, in the discretion of the judge, magistrate or the

46. One of the major conclusions from the Manhattan Bail Project is that judicial officers are more inclined to release a defendant where verified information relating to the likelihood of his appearance in court is available. PROGRAMS IN CRIMINAL JUSTICE REFORM, *supra* note 10, at 31. *See also* Note, *supra* note 44, at 155.

47. MO. SUP. CT. R. 21.05 (1969).

48. MO. SUP. CT. R. 21.08 (1969).

prosecuting attorney, as the case may be, to believe that the defendant will appear upon a summons"[49] may one be issued. Clearly, such a system only serves to discourage use of the summons rather than the arrest warrant.

Consideration of the summons as a tool in the bail system must give recognition to some of its inherent limitations, but this does not mean that official state policy should discourage it. First, is there any substantial reason why the summons cannot be used at all in felony cases?[50] The prohibition appears particularly unwarranted where the felony is ultimately reduced to a misdemeanor, for then custody will turn out to be the result of an initial inappropriate charge decision. Even where no subsequent reduction occurs, however, the restriction does not appear necessary. The summons should at least be available in those cases where court and law enforcement officials feel it can be safely employed.

A more difficult question is whether our criminal justice system should in some way encourage the use of the summons. Its limited use at present is largely the result of the fact that information about the accused is normally not available at the time the warrant is sought, at least not to the extent necessary to justify the greater risk involved in the summons procedure. The criminal justice system could, however, reverse this existing state of facts.

One method of encouraging use of the summons might be to create a presumption in favor of a summons in lieu of an arrest warrant in certain classes of cases. Those which present minimum community danger and risk of flight need not be automatically handled by arrest in every case. The summons should be the normal mode of disposition except where other factors demonstrate the need for arrest.[51] The burden would then be on the prosecution to justify its choice of the warrant procedure.

It remains true, however, that the information to make a rational summons or arrest warrant decision is often not available at the time the decision is made. Yet under current procedures, even when relevant information is available there is no obligation to present it to the magistrate. Moreover, there is no requirement of an attempt to obtain the information even where it would require only minimal effort. Consideration is warranted for changes which would provide the data needed to make the warrant-summons decision a meaningful one. Specifically, police might be required to present to the magistrate information about the accused as well as his alleged offense, with the burden of explaining the lack of such information placed upon the state.[52] This would force at least a reasona-

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49. Mo. Sup. Ct. R. 21.05 (1969).

50. The ABA recommends authority for a summons in all offenses. Standards Relating to Pretrial Release, *supra* note 21, §3.1, at 39-40. *See also* National Advisory Commission, *supra* note 14, Standard 4.3, at 116-119. The Federal Rules of Criminal Procedure allow the summons to be used for any offense. Fed. R. Crim. P. 4(a). Although little used in the United States, it is employed frequently in Canada and England. Friedland, Detention Before Trial 9-44 (1965).

51. The ABA Standards require the issuance of a summons in lieu of an arrest warrant for offenses carrying maximum terms of six months or less. Standards Relating to Pretrial Release, *supra* note 21, §3.2, at 40-41. In contrast, the Missouri provision carries a presumption in favor of a warrant. *See* text accompanying notes 47-49, *supra*. The National Advisory Commission states further that the judicial officer issuing a warrant rather than a summons be required to state his reasons for the choice in writing. National Advisory Commission, *supra* note 14, Standard 4.3, at 116-119.

52. "The prosecutor or police official who applies for such warrant should be required to accom-

ble effort by police to provide the magistrate with the information needed for a summons decision.

BAIL IN THE POLICE STATIONHOUSE

The procedure for the administration of bail by the courts, described above, is supplemented by special statutory provisions which permit the police in St. Louis and Kansas City to perform some additional bail functions. The police in both cities are authorized to release defendants on bail at the police station level, prior to their initial appearance in court. The courts are thereby relieved of some of the administrative burden of bail since they will not have to determine it for those who have already been released. Moreover, a police bail system provides for pretrial release at an earlier point in the criminal justice process, thereby avoiding unnecessary pretrial confinement.

Section 84.650 of the Missouri statutes for Kansas City,[53] and its counterpart for St. Louis, §84.230,[54] establish police authority to take bail. They provide that the appropriate officers in charge of the police station may accept bail from an arrestee charged with a bailable offense. The wording of the relevant provisions clearly establishes that the decision whether or not to accept bail is entirely discretionary. Similarly, the amount of bail set by the police is not fixed by statute but rather is set at a "sum as may seem to be sufficient and proper with sufficient sureties for his appearance at the proper time before some magistrate or municipal judge."[55] Specific authorization, additionally, is granted to the Kansas City police to release a misdemeanant who "will sign a satisfactory agreement to appear in court at the time designated."[56] No comparable provision exists for St. Louis.

Increasingly, recommendations are being made for the extension of bail decision making to the police phase of the criminal justice process.[57] Moreover, there is a sufficient body of practical experience in this area from police departments which have experimented with pretrial release programs to assert that the idea is workable.[58] Yet there are features of Missouri's statutory structure which indicate a reluctance to accept fully a meaningful police role in the bail system.

It is unclear, for example, why the statutes provide for a police bail function only in St. Louis and Kansas City. The comparable provisions for first class cities authorize the arrest and detention of suspects "until they can be brought before the judge of the police court or other proper officer."[59] Yet detention by

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pany the request with the results of a brief investigation of the defendant's personal background and stability in the community." NATIONAL ADVISORY COMMISSION, *supra* note 14, at 118. *See also* STANDARDS RELATING TO PRETRIAL RELEASE, *supra* note 21, §3.3, at 41-42.

53. MO. REV. STAT. §84.650 (1969).

54. MO. REV. STAT. §84.230 (1969).

55. *Id.*

56. MO. REV. STAT. §84.710(3) (1969).

57. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 40-41 (1967); NATIONAL ADVISORY COMMISSION, *supra* note 14, Standard 4.3, at 116-119; STANDARDS RELATING TO PRETRIAL RELEASE, *supra* note 21, §§2.1 - 2.3, at 31-38; MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, *supra* note 21, §8.01(1), at 60.

58. *See* Berger, *supra* note 21; Feeney, *supra* note 21. *See generally* BAIL AND SUMMONS, *supra* note 5, at 125-165.

59. MO. REV. STAT. §85.230 (1969).

the police can be a more serious concern in smaller cities and towns. Judges in such jurisdictions may not be as readily available to set bail, particularly during evening or weekend hours. The result for the defendant is a period of unnecessary pretrial confinement. Some jurisdictions may use a fixed bail schedule to permit at least those defendants with adequate resources to secure their release. However, this is not a substitute for a system which allows police to tailor the bail decision to the individual characteristics of the accused.

Experience has shown that police jurisdictions of varying sizes can effectively administer a bail system. New York City's Manhattan Summons Project[60] demonstrated the feasibility of police supervised bail in a large urban setting, while the Contra Costa, California, police bail program, cited with approval in the 1967 President's Crime Commission study, illustrated the applicability of the concept in smaller jurisdictions.[61] Indeed, both California and Connecticut have enacted legislation permitting police in every municipality in the respective states to fix bail, regardless of size.[62] It would appear more logical to provide general authority for such programs absent a compelling reason for restriction, and no such reason is apparent. Moreover, the authority should be clearly set out in legislative form to avoid misunderstanding.

Legislation should also make clear that the power to release includes the authority to release solely on a promise to appear in court, without bond, in appropriate cases. The current wording of statutes applicable to Kansas City and St. Louis is not clear on this point, and could be narrowly read to require bond in every case. If the police release authorities feel sufficiently certain that the defendant will appear in court even if no bond is required, the risks involved in allowing them to make such a decision do not appear to be great. For an unknown reason, the police in Kansas City have been specifically authorized to release defendants without bond in misdemeanor cases, but St. Louis police have not.[63] The jurisdictional limitation appears to be without justification, and it is submitted that even the limitation to misdemeanor cases is inappropriate. The initial charge decision by the police is often later corrected by prosecution officials, and defendants should not be precluded from securing their release by virtue of what later turns out to be an inappropriate charge.

Finally, more direction to police in the administration of bail should be included in the statutory framework. The legislation uses the phrase "may release" in defining the authority of police in the bail function, a clear indication that the decision is a discretionary one. But without statutory criteria or guidelines, there is a danger that discretionary decision making may become arbitrary decision making. As in the court bail area, the statutes should at least direct police attention to relevant criteria in their bail decision and perhaps, as well, set a preference for non-monetary conditions of release.[64]

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60. *See* note 20, *supra*.

61. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT, *supra* note 57, at 41; Note, *An Alternative to the Bail System: Penal Code Section 853.6*, 18 HAST. L.J. 643 (1967). Police release programs are, in many ways, more suited to smaller municipalities due to greater familiarity with the local population.

62. CAL. PENAL CODE §853.6 (West Supp. 1974); CONN. GEN. STAT. ANN. §54-63c (Supp. 1974).

63. *See* text accompanying note 56, *supra*.

64. The ABA provides for categories of mandatory and permissive police releases. STANDARDS

Other jurisdictions in the state, while not authorized to allow police to set bail, may still make use of a bail schedule. Normally, this involves fixed bail figures keyed to the offense charged at arrest; police officials may then release the defendant if he posts the amount required for the offense which is the basis of the arrest.[65] Two factors serve to promote the use of such schedules. First, the Missouri twenty hour rule,[66] limiting the duration of custody of defendants arrested without a warrant, encourages the law enforcement system to utilize available tools for terminating custody. Second, without a process enabling police to release arrestees, they face the prospect that their detention facilities will not be able to accomodate the numbers who must be held.

Despite the fact the bail schedule procedure permits police to release individuals who otherwise would face further detention, it remains in conflict with recent reforms in the bail system. Such schedules fix the amount of bail on the basis of the offense alone, without consideration of the individual characteristics of the accused. They are relevant to the likelihood of the defendant's appearance in court only to the extent that the seriousness of the offense can be converted into a dollar figure that will insure appearance. But it is not clear that any such relationship exists and, even if one could be established, it remains only one factor in judging the likelihood of appearance. Of equal or greater importance are the individual's roots in the community, but the character of the bail schedule precludes the evaluation of any factor other than the arrest charge.

In a system in which police lack bail decision making authority, the bail schedule does perform a positive service in at least allowing police to release an arrestee.[67] As a result of the fact that police do not have the power to determine the conditions of release, these must be set by the judiciary. Understandably, the courts must rely on fairly conservative financial security conditions since they do not even have the opportunity to see the accused if he is released at the police station. The character of the system provides internal pressure to fix the bond amounts with the worst defendants in mind. This would not have to occur if judges were available to set release conditions on a round-the-clock basis, but a less costly solution would be to grant the police authority to set the release conditions themselves rather than merely administer conditions imposed by the courts.

The Kansas City Police Department, having such authority under state law, has established a formal administrative policy to guide the exercise of its daily bail decision making.[68] Particularly significant is the fact that Kansas

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RELATING TO PRETRIAL RELEASE, *supra* note 21, §§2.2, 2.3, at 33-38. The National Advisory Commission suggests factors to be considered by the police in reaching their release decision. NATIONAL ADVISORY COMMISSION, *supra* note 14, Standard 4.3(1), at 116-119.

65. The ABA, in contrast, has recommended that bail decisions be individualized, taking into account the special circumstances of each accused. They urge the abolition of fixed bail schedules determined only by charge. STANDARDS RELATING TO PRETRIAL RELEASE, *supra* note 21, §53(e), at 58-61.

66. MO. SUP. CT. R. 21.14 (1969).

67. The American Law Institute would permit the use of bail schedules where police do not otherwise have the authority to release an accused. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, *supra* note 21, §8.02, at 61-62.

68. Kansas City Police Department, General Order 70-29 (1970) (Bonding Procedure-Arrests on City Ordinances).

City's bail policy standards for police attempt to control the discretion inherent in the character of the bail decision. The applicable state legislation points only towards the likelihood of the suspect's appearance in court as the ultimate goal of the bail system and leaves almost total discretion in the decision maker to assess whether available information about the accused meets that goal.[69] This characteristic of unstructured and inadequately controlled discretion pervades much of our criminal justice system,[70] but pervasiveness alone is no proof of merit. Rather, it creates the clear danger of arbitrary administration lacking any semblance of uniformity, a condition which formal written policies can help to correct.[71]

The Kansas City Police Department's bail policy is applicable to all city ordinance offenses. The only arrests within that category excluded from its coverage are probation and parole violations and charges of escape or prior failure to appear in court.[72] The release decision is made on the basis of a point system which includes consideration of the defendant's length of residence in Kansas City as well as his job and family ties to the community. However, points are lost for prior convictions, and the police are authorized to withhold recognizance release if there are aggravating factors surrounding the arrest or circumstances which create a likelihood that the defendant will fail to appear.[73] Nevertheless, the system creates a strong presumption in favor of release if the defendant accumulates the requisite number of points. And it serves as a meaningful guide to control the exercise of administrative discretion in the bail system. It would appear to be a useful approach in other than municipal ordinance offenses, but the jurisdictional limitation remains in force.

BAIL ON THE STREET

One of the most innovative developments stemming from the bail reform movement has been the concept of street citations. Prevailing police practice requires that the arresting officer transport the defendant to a police facility where he is booked and then becomes eligible for release, either after presentment in court or through a police stationhouse bail program. All arrestees are thus subjected to at least some police custody, even if there are no reasons for it.

A few police departments have begun to experiment with street release programs which dispense with formal custody in appropriate cases.[74] If there is no danger that the suspect will flee or that further criminal violations will occur if the defendant is not removed from the scene, and if booking information can be obtained from the defendant at the time of arrest, the application of police custody authority is unjustified. Indeed, law enforcement agencies have a strong interest in dispensing with formal custody where it is unwarranted. First, street release frees police manpower from transportation and custodial responsibilities

69. *See* note 32, *supra*.

70. DAVIS, DISCRETIONARY JUSTICE, A PRELIMINARY INQUIRY 80-96, 126-141, 188-214 (1969).

71. *See* Caplan, *The Case for Rulemaking by Law Enforcement Agencies*, 36 LAW & CONTEMP. PROB. 500 (1971).

72. General Order 70-29, *supra* note 68, §111(A).

73. *Id.* §111(A)(5).

74. *See* Berger, *supra* note 21; Feeney, *supra* note 21.

and increases their ability to focus upon crime prevention and apprehension duties. Second, there is a potential police-community relations benefit in allowing police to invoke the criminal process without subjecting every defendant to the indignities of arrest and detention.[75]

Experience has shown police street release efforts to be both workable and effective. There are some legal questions surrounding the citation system, including the officer's liability for false arrest and his authority to conduct a search incident to arrest after issuance of a citation,[76] but these can be resolved by defining the citation as a post arrest release procedure rather than as an alternative to arrest.[77] However, in terms of the fundamental bail objective to produce defendants in court, street release programs have a record of reliability on a par with other forms of pretrial release.

Missouri has not yet taken advantage of the experience of other jurisdictions in authorizing law enforcement agencies to implement street release programs. However, writing on a clean slate can be advantageous, particularly insofar as there are no established traditions to overcome. The state can also more readily take advantage of the recommendations of such organizations as the American Bar Association, American Law Institute and the National Advisory Commission on Criminal Justice Standard and Goals.

Citation legislation ought to express clearly a state policy favoring pretrial release as early as possible in the criminal justice process.[78] The American Bar Association Pretrial Release Standards provide for this not only as a matter of general policy,[79] but also in the establishment of a category of offenses for which citation issuance is mandatory, except if specific justifications for custody are shown;[80] permissive authority to issue citations is granted for all other offenses.[81] The American Law Institute and National Advisory Commission on Criminal Justice Standards and Goals do not go so far as to establish a mandatory citation category. Both would encourage citation procedures, however, although the Commission recommendations are limited to misdemeanors and less serious felonies.[82]

The American Bar Association and American Law Institute specifically

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75. *See* text accompanying note 23, *supra*.

76. The American Bar Association provides that a police officer's authority to search is not affected by the use of a citation procedure. STANDARDS RELATING TO PRETRIAL RELEASE, *supra* note 21, §2.4. The American Law Institute provisions make clear that the protections afforded to arrestees cannot be subverted through the use of citations. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, *supra* note 21, §3.05(1).

77. Berger, *supra* note 21, at 390-391.

78. The National Advisory Commission recommends "that legislation be enacted to indicate clearly that the public policy is to encourage use of the citation in lieu of arrest." NATIONAL ADVISORY COMMISSION, *supra* note 14, at 117.

79. STANDARDS RELATING TO PRETRIAL RELEASE, *supra* note 21, §2.1.

80. In the mandatory citation category, covering minor offenses, arrest is authorized only if the accused fails to satisfactorily identify himself, refuses to sign the citation, has inadequate ties to the jurisdiction, has previously failed to appear in court in response to a citation, or where arrest or detention is necessary to prevent imminent bodily harm. STANDARDS RELATING TO PRETRIAL RELEASE, *supra* note 21, §2.2(c).

81. *Id.* §2.3.

82. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS, Standard 4.2, at 70-72 (1973).

recognize that many of the details of a citation procedure can only be resolved through administrative regulation.[83] Statutes of general applicability are inappropriate to provide detailed instructions for so complicated a procedure. Departmental policy statements would then be necessary in response to general statewide citation authorization.

It is important to note that citation authority confers upon police a major new source of power which, of course, is subject to potential abuse. This, in turn, imposes upon the administrative agencies charged with implementing such legislation the responsibility to control, or at least guide, the exercise of discretion inherent in the system. It is not enough to provide that an arresting officer may issue a citation if he believes the accused will appear in court. Rather, regulations must direct the officer's attention to specific factors upon which to base his decision, such as the community ties standard of the stationhouse bail programs. Moreover, a requirement that the officer specify his reasons for not issuing a citation might help to provide administrative support and encouragement for the program.

CONCLUSION

One aspect of the difficulty present in evaluating the Missouri bail system is the apparent lack of reliable data to indicate how the system works in practice. The system should keep track of how many defendants secure pretrial release and how many face pretrial detention. Furthermore, there is a need to know the nature of the conditions imposed upon those who secure release and the length of detention for those who do not. The lack of information stems partly from the diffusion of responsibility for bail decision making which exists in Missouri. But it may also be indicative of a low priority accorded to the problem of bail reform.[85]

Missouri has made significant progress in upgrading the administration of bail in the state in recent years. The enactment of §544.455 of the Missouri Criminal Procedure Code brought the state into line with bail reform efforts undertaken elsewhere in the United States.[86] In particular, Missouri courts are now directed to consider background information about the accused in reaching a bail decision and have a range of pretrial alternatives from which to choose as opposed to the traditional bond or jail ultimatum. Moreover, the Board of Probation and Parole now serves as a bail investigation agency to insure that background information is available to the court. Nevertheless, it is not clear how effective these reforms have been. Without a serious effort to compile the needed statistical information, valid judgments about the Missouri bail system are difficult to make.

The fundamental changes which have occurred in Missouri in recent years, however, do not mean that the system of bail cannot stand further improve-

83. STANDARDS RELATING TO PRETRIAL RELEASE, *supra* note 21, §2.3(b); AMERICAN LAW INSTITUTE, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, §120.2(4) (Official Draft No. 1, 1972).

84. *E.g.*, STANDARDS RELATING TO PRETRIAL RELEASE, *supra* note 21, §2.2(d).

85. The National Advisory Commission has urged that each criminal justice jurisdiction undertake comprehensive pretrial planning including the collection of extensive information on bail. NATIONAL ADVISORY COMMISSION, *supra* note 14, Standard 4.1, at 111-113.

86. *See generally* notes 5 and 8, *supra*.

ment. Rather, they are a strong basis upon which to build to make the bail system function with optimal efficiency and fairness. Consideration should be given to the incorporation of several principles into the existing bail structure.

First, a full range of release opportunities at the earliest stages of the criminal justice process should be available. In particular, police in a number of jurisdictions have shown that they are competent to operate a bail system which includes responsibility for determining the conditions of release, in large as well as smaller municipalities. The police release options can safely include field as well as stationhouse release.[87]

Second, bail legislation should not only include the catalogue of release options, but must also express a policy preference among them. Some legislative indication of a priority in favor of non-financial release conditions or a general goal that the conditions of release should be the least restrictive necessary to assure the defendant's appearance in court would appropriately indicate to the courts the public policy to be followed in the daily administration of bail.[88]

Finally, the necessary investigative resources must be provided for all phases of the bail process. If the information showing the likelihood that the defendant will appear in court is not available to the bail decision maker, the response of restrictive conditions can be expected. Verified information permits greater reliance on non-financial conditions and promotes pretrial release.[89] Each point at which a bail decision is made should have the benefit of information on which to base the decision.

The existing bail system in Missouri contains many features which promote efficient and fair bail decisions. However, a more consistent adherence to the principles of full information before the bail decision is made, a preference for non-financial release conditions and earlier bail decision points would provide further improvement. Moreover, these principles could be easily added to the existing bail system without major revision, and with a fairer bail system as the end product.

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87. *See* text accompanying notes 20-21, *supra*.

88. *See* text accompanying notes 37-38, *supra*.

89. The Manhattan Bail Project found that 59% of its pretrial release recommendations were followed while only 16% of a control group were released by a judge acting without a recommendation. The conclusion was that the judges were "clearly basing their actions on the availability of reliable information about the defendants." PROGRAMS IN CRIMINAL JUSTICE REFORM, *supra* note 10, at 31.