UIC Law Review

Volume 16 | Issue 1 Article 10

Fall 1972

The Illinois Bail System: A Second Look, 6 J. Marshall J. of Prac. & Proc. 33 (1972)

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THE ILLINOIS BAIL SYSTEM: A SECOND LOOK

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On January 1, 1964, a new bail system was instituted in Illinois. The initial result of this system was the elimination of the traditional bail bondsman and the substitution of a unique bail system in its stead.[1] Primarily, the new system provides for: first, the substitution of penalties of a penal rather than monetary nature to insure the appearance of a defendant by making bail jumping under any type of bond a separate criminal offense;[2] secondly, the liberal use of release on personal recognizance or release on the signature of the defendant;[3] and, finally, allowance of a defendant to be released from custody upon the "deposit with the clerk of the court . . . [of] a sum of money equal to 10% of the bail which had been set by the court and the clerk of the court . . . and retention of 10% of the amount so deposited as a bail bond cost."[4]

The position of the United States Supreme Court on admission to bail was stated by Justice Jackson in *Stack v. Boyle,* when he wrote:

> The practice of admission to bail, as it has evolved in Anglo-

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[1] Boyle, *Bail Under the Judicial Article,* 17 DEPAUL L. REV. 267 (1968).

[2] ILL. REV. STAT. ch. 38, §32-10 (1971):

> Violation of Bail Bond
> Whoever, having been admitted to bail for appearance before any court of record of this State, incurs a forfeiture of the bail and wilfully fails to surrender himself within 30 days following the date of such forfeiture, shall, if the bail was given in connection with a charge of felony or pending appeal or certiorari after conviction of any offense, be fined not more than $5,000 or imprisoned in the penitentiary not more than five years, or both; or if the bail was given in connection with a charge of committing a misdemeanor, or for appearance as a witness, be fined not more than $1,000 or imprisoned in a penal institution other than the penitentiary, not more than one year or both.

See Kamin, *Bail Administration in Illinois,* 53 Ill. B.J. 674 (1965).

[3] *Id.* §110-2.

> When from all the circumstances the court is of the opinion that the accused will appear as required either before or after conviction the accused may be released on his own recognizance.

[4] *Id.* §110-7(a), (f).

> American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty. Without this conditional privilege, even those wrongly accused are punished by a period of imprisonment while awaiting trial and are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense.[5]

Recent efforts of reform,[6] although severely criticized, have instituted a form of preventive detention abhorrent to Anglo-American jurisprudence.[7] A viable alternative must soon be found before such a system is instituted on a widescale basis.

It has been some years since any type of empirical study has been done of the Illinois bonding system. With the cooperation of the clerk of the court, the following statistics were compiled over a period of six months, forming the foundation of this article.[8] While acknowledging the brave advance of the new bail system, the results of this study are submitted with the belief that both modifications and reforms are presently needed.

PRELIMINARY STUDIES

Chicago Study

The Illinois bail system is founded on three fundamental premises. First, factual studies prove that the great majority of persons released on bail have no intention of violating bail and will appear for trial. Second, to the extent that pecuniary loss is a deterrent, such financial loss should be minimized in the case of the person who appears for trial. Finally, a person who will jump bail is not deterred by the prospect of pecuniary loss to himself or anyone else and other deterrents are therefore required.[9]

The factual studies supporting these premises were conducted primarily in the early 1960's, but as early as 1927, the then existing Chicago bail bond system was being severely criticized in the classic Chicago Study of Arthur Beeley.[10] This

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[5] 342 U.S. 1, 7-8 (1951).

[6] District of Columbia Court of Reform and Criminal Procedure Act. Pub. L. 91-358, 84 STAT. 473 et seq. (1970); Title II, §210, ch. 13, sub. ch. III §23-1321-32.

[7] Miller, *Preventive Detention — A Guide to the Eradication of Individual Rights*, 15 How. L.J. 1 (Fall 1970); Hruska, *Preventive Detention: The Constitution and the Congress*, 3 CREIGHT. L. REV. 36 (Fall 1969); Allington, *Preventive Detention of the Accused Before Trial*, 19 KAN. L. REV. 69 (Fall 1970).

[8] A sample technique was utilized only when a totality of figures for Cook County or Chicago could not be obtained. When a sample was required, a random technique was used based on a sample population where possible.

[9] Committee's comment, ILL. ANN. STAT. ch. 38, §110 (Smith-Hurd Supp. 1970).

[10] BEELEY, THE BAIL SYSTEM IN CHICAGO (1927).

study examined the background of 90% of the unsentenced jail population, establishing that 70% had families and reputable persons in the community to speak for them, and only 50% had any prior criminal convictions. Yet, release on personal recognizance occurred in only 50% of the cases, and those were only for minor offenses.

The most significant finding, however, was that 28% were needlessly detained, while undependable bail risks were allowed to be free on bail. In light of Beeley's conclusion that hardened criminals were allowed freedom while better bail risks were not, he recommended the following: (1) widescale use of the summons to replace the prevailing arrest procedure (75% of all criminal cases were initiated by arrests); (2) a constitutional amendment to allow selective preventive detention; (3) background investigatory procedures so that bail setting could be an individual determination rather than being geared to an arbitrary bond schedule as it was in 1927.[11] These findings formed the working hypothesis of each of the subsequent studies.

The Manhattan Project

(Vera Project)

This project, which was the foundation for all subsequent studies, was initiated by a wealthy chemical industrialist, Louis Schweitzer, upon discovery of the shocking jail abuses which existed in New York City. Mr. Schweitzer founded and funded the Vera Foundation, which conducted an experiment based on the premise that certain persons with strong community ties could safely be released on their own recognizance, and that if an investigatory procedure verified this background and supplied this information to the courts, the individual could be released without financial security. The initial procedures of the study were effectuated by New York University Law students who interviewed "indigent defendants."[12] To eliminate from the sample technique other exogenous variables which might introduce error and seriously impair the reliability of the study, there was a selective exclusion of certain offenses from the study including sex, narcotics, and homicide.[13]

[11] A summary of Beeley's pioneer study appears in Freed and Ward, BAIL IN THE UNITED STATES: 1964, prepared as a working paper for the National Conference on Bail and Criminal Justice held on May 27-29, 1964, at Washington D.C., under the co-sponsorship of the United States Department of Justice and the Vera Foundation, Inc. Beeley's treatise is also discussed in *Attorney General Commission*, REPORT ON POVERTY AND THE ADMINISTRATION OF CRIMINAL JUSTICE (Feb. 25, 1963).

[12] "Indigent" was defined as not being represented by an attorney at arraignment.

[13] Ralls, *Bail in the United States*, 48 MICH. S.B.J. 28 (Jan. 1969).

Four factors were selected as determinative of the risk inherent in releasing an individual on his own recognizance: (1) residential stability; (2) employment history; (3) family contacts in city; and (4) prior criminal record. Each individual interviewed was assigned a certain number of points per designated criterion, and if the point total was sufficient, he was recommended for release on individual recognizance. Preliminary figures indicated a favorable comparison with forfeiture rates on bail bonds. The first reports showed that among the 3,505 defendants released under the project, only 50 or 1.4% failed to appear, while this compared to a 3% forfeiture rate on bail bonds.[14] Later reports were not as favorable; the program expanded, and the forfeiture rate for those released on bail bonds was 4.4%; for those released on recognizance, 15.4%; and for those posting cash bail, 19.4%.[15]

The Vera study had the benefit of an earlier study, the findings of which differed only slightly.[16] The earlier study indicated that a defendant freed on bond had a substantially better chance to be acquitted than a jailed defendant. Thus, both studies reached the conclusion that the failure to grant the release on bond has a substantial and unreasonable effect upon the determination of a case.

In Des Moines, Iowa, a study parallel to the Vera Foundation Study in New York was sponsored by the Hawley Welfare Foundation. The Hawley Project excluded cases of murder, forcible rapes, narcotics, and sex crimes. At the end of the first year of operation, of the 750 released under the program, only 12 were bond forfeitures, or a rate of only 1.5%.[17] Many similar experiments were conducted in other cities.[18] The two most significant of these were the District of Columbia and Los Angeles studies. The only real difference between these projects, however, was the presence of a salaried investigator in the Los Angeles project.[19]

The San Francisco Bail Project

Instituted by the San Francisco Bar Association and augmented by VISTA volunteers in 1964, this project studied the bail setting procedure in San Francisco. The project was mod-

[14] Ares, Rankin, and Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole*, 38 N.Y.U. L. REV. 67 (1963).

[15] Schaeffer, *Report on Bail & Parole Jumping in Manhattan*, VERA INSTITUTE OF JUSTICE (1970).

[16] Roberts and Palerno, *A Study of the Administration of Bail in New York City*, 106 U. PA. L. REV. 693 (1958).

[17] *Workshop: Establishing Bail Projects*, 1965 U. ILL. L.F. 42, 45.

[18] Note 8 *supra*.

[19] Los Angeles Superior Court, RELEASE OF DEFENDANTS WITHOUT BAIL: PRELIMINARY PILOT STUDY REPORT (Sept. 1964).

eled after the Vera study; however, the standards for release were more liberal since capital crimes were excluded. Approximately 70% of those released were charged with a felony. An important procedure, followed to a lesser extent in the Vera project, was an intensive "follow-up" in which the defendants were notified of court appearances and assisted in obtaining counsel.

The following statistics indicate the number of persons accused of a crime who had been released on their own recognizance through the project from August 1 to July 31.

Table 1[20]

1964-1965	415
1965-1966	1,326
1966-1967	2,374
1967-1968	2,262
	6,377

Perhaps due to the more liberal release standards, the 10% forfeiture rate was quite high.

Other bail projects in which VISTA participated took place in Philadelphia, Miami, Tulsa and Baltimore. As a result of these projects, although more than 6,000 defendants were released, only an average of 3% failed to appear for trial.[21]

Kalamazoo County Study

A more recent study took place in Kalamazoo County, Michigan, differing from the other studies in that it took place in a small midwestern county and the release criteria were more stringent, since all crimes of violence were excluded from the sample technique.[22] Significantly, the results of the study were similar to those in more urban areas, in that of the 395 persons released on their own recognizance between October 31, 1966 and December 31, 1968, only three willfully failed to appear. Also, a definite correlation between pre-trial detention and eventual conviction or jail sentence was found.

Cook County Bail Project

The Cook County Bail Project[23] was a study, done basically by lay persons, of both the felony and misdemeanor versions

[20] Levin, *The San Francisco Bail Project*, 55 A.B.A.J. 135 (1969).
[21] Kennedy, *VISTA Volunteers Bring About Successful Bail Reform Project in Baltimore*, 54 A.B.A.J. 1093 (1968).
[22] Hawthorne and McCully, *Release on Recognizance in Kalamazoo County*, 49 MICH. S.B.J. 23 (July 1970).
[23] Mosely, *Analysis of Cook County Bail Bond Project*, a study by the Alliance to End Repression (1970).

of "Holiday Court."[24] The study was undertaken to determine the effect of the following section of the Illinois Bail Reform Act:

> When from all of the circumstances the court is of the opinion that the accused will appear as required either before or after conviction the accused may be released on his own recognizance . . . . This Section shall be liberally construed to effectuate the purpose of relying upon criminal sanctions instead of financial loss to assure the appearance of the accused.[25]

The purpose of the study was to record four main observations: (1) the time given to the consideration of each case, (2) the frequency of representation by counsel, (3) the frequency of release of the accused on his own recognizance, or as it is termed, on Individual or "I" bond, and (4) the extent of questioning by the court concerning the accused's financial ability to meet the bond levied. The statistics demonstrated that: (1) the average bail hearing lasted less than one minute, (2) bonds were set for hundreds of people each weekend without legal representation,[26] (3) too few persons were released on their own recognizance, and, finally (4) in the great majority of cases no inquiry was made concerning the financial ability of the accused to make bail. Moreover, the most disturbing statistics showed that only 45 out of 1,171, or 3.8% of the bonds set were "I" bonds.

These statistical studies vividly illustrate the substantial difference that can exist between the results obtained in a tightly controlled experimental environment and in actual everyday operation. Illinois did not adopt the background investigatory and back-up procedures followed by the various studies and, consequently, the Cook County Bail Project demonstrated the deplorable results.

Bail Operations in Cook County

Cook County is divided into six judicial districts composed of Chicago, which constitutes District I, and five outlying suburban areas. There are three types of bonds set in the Illinois court system: (1) the "I" bond or the individual recognizance bond; (2) the "D" bond in which the accused posts 10% of the judicially set bond in cash and 10% of this amount is retained by the county to meet administrative expenses;[27] and

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[24] A "Holiday Court" is one that regularly convenes at the criminal court building on weekends and holidays for purposes of setting bail for defendants arrested the night before.

[25] Ill. Rev. Stat. ch. 38, §110-2 (1971).

[26] As a result of this study, the Public Defender's Office of Cook County now assigns duty attorneys for Holiday Court.

[27] The constitutionality of this procedure was recently upheld by the

(3) the "C" bond, which is of a pre-set amount for a minor offense and involves no judicial discretion. The "C" bond is difficult to evaluate because of the entering of an *ex parte* judgment when the defendant fails to appear. The judgment is in the nature of a finding of guilty with the punishment being a court order that the bond be taken as a fine. For the purposes of this article, thus, only the "I" and "D" bonds are evaluated.

The following table demonstrates the positive effect of the Cook County Bail Project.

Table 2[28]

	Quantity			Percentage	
Year	D Bonds	I Bonds	Total D & I	D's to Total	I's to Total
1969	111,157	13,361	124,518	89.60	10.40
1970	120,939	14,752	135,691	89.13	10.87
1971	130,472	21,815	152,287	82.95	17.05
	Bonds Posted Municipal District I — Chicago				
1969	84,202	9,777	93,979	89.60	10.40
1970	90,938	10,553	101,491	89.60	10.40
1971	99,112	21,215	120,327	82.36	17.64

The "I" Bond

Release on individual recognizance, or "I" bond, is permitted in cases that fall within the purview of the first fundamental premise of the Ilinois bond system, that " . . . persons released on bail have no intention of violating bail and will appear for trial."[29] Moreover, the significant difference between the number of "I" bonds set by courts between 1970 and 1971 must in great part be attributed to the Cook County Bail Project. When compared with the first three years of operation of the Illinois bail system, these figures accurately demonstrate the weakness of the system.

Table 3[30]

Bonds Posted — Cook County

Year	D Bonds	I Bonds	Total D & I	D's to Total	I's to Total
1964	27,956	6,465	34,421	81.22	18.78
1965	46,418	10,002	56,420	82.27	17.73
1966	68,355	11,237	79,592	85.88	14.12

United States Supreme Court in the case of Schilb v. Kuebel, 404 U.S. 357 (1971).

[28] Administrative report from the office of the Clerk of the Court of Cook County to Judge Peter Bakakos, Chief Judge of Surety Division.

[29] Note 9 *supra* at 299.

[30] Note 1 *supra* at 272.

Although a novelty, judges and magistrates were cognizant of both the statutory provisions governing the new procedure and its legislative intent. However, as time passed the use of release on individual recognizance rapidly diminished, clearly reflecting both increased case loads and judicial apathy. The large percentage of bond forfeitures occurring among those defendants who were the beneficiaries of the "I" bond release resulted in the judiciary rapidly becoming wary of this particular pre-trial method.

A comparison of the early and later years of operation shows a disturbing trend.

Table 4[31]

I Bond Forfeitures — Municipal District No. 1, Chicago

Year	Bond Quantity	Quantity of Forfeitures	Percentage of Forfeitures
1964	6,465	446	7
1965	10,002	1,562	15
1966	11,237	2,324	20.5

I Bond Forfeitures — Cook County[32]

Year	Bond Quantity	Quantity of Forfeitures	Percentage of Forfeitures
1969	9,777	2,134	21.80
1970	10,553	2,260	31.41
1971	21,215	4,789	22.57

It is obvious that in Cook County the majority of all bonds were posted in Chicago. The results of a free operation of the system have been discouraging when compared with the other studies.

The "D" Bond

Clearly, many weaknesses did and still exist in the present system of setting "I" bonds. However, the "D" or 10% bond, based on the second fundamental premise that financial loss should be minimized for an accused, presents an entirely different situation. There is no apparent reason for the figure of 10%, except that this was the normal amount charged by the professional bail bondsman as a premium to meet an accused's bond. The Federal Bail Reform Act of 1966 was obviously modeled after the Illinois Act of 1964 and provides for the 10% deposit and individual release; however, this plan allows for the placement of a corporate surety.[33]

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[31] *Id.*
[32] Note 22 *supra.*
[33] 18 U.S.C. §3146.

An examination of the forfeiture record for "D" bonds shows that the rate has remained fairly constant over the years.

Table 5[34]

"D" Bond Forfeitures — Municipal District No. 1

Year	Quantity of D Bonds	Quantity of Forfeitures	Percentage of Forfeitures
1964	27,956	6,465	7.5
1965	46,418	10,002	10.5
1966	68,355	11,237	11
1969	84,202	11,402	13.54
1970	90,938	12,086	11.09
1971	99,112	13,172	13.29

Rate as Held Over the County as a Whole

Year	Quantity of D Bonds	Quantity of Forfeitures	Percentage of Forfeitures
1969	111,157	14,316	12.88
1970	120,939	15,098	12.48
1971	130,472	16,421	12.59

One apparent explanation for the rate difference between "D" and "I" Bond forfeitures is that the Illinois bonding system allows the bond monies to be refunded to the defendant's attorney, by court order, after the defendant has consented to such procedure in open court. Consequently, this refund right provides incentive for an attorney to move to vacate a bond forfeiture in order to protect his fee. Moreover, in Illinois there is a 30-day grace period before judgment is taken.[35] The differential created by this process can be observed by noting the following statistics of Municipal District No. 1:

Table 6[36]

	Quantity Forfeitures		Percentage Forfeitures to Received		Percentage Judgments To Forfeitures	
Year	I Bonds	D Bonds	I Bonds	D Bonds	I Bonds	D Bonds
1970	2,260	12,086	21.41	11.09	81.1	40.9
1971	4,789	13,172	22.57	13.29	77.8	52.6

[34] Statistics for years 1964-66, see note 1 *supra*. Statistics for years 1969-71, see note 8 *supra*.

[35] ILL. REV. STAT. ch. 38, §110-7(g) (1971).

[36] Note 28 *supra*, and figures compiled from the records of the Clerk of the Court of Cook County.

	Quantity Judgments		Quantity Bond Reinstatements		Percentage Reinstatements to Forfeitures	
Year	I Bonds	D Bonds	I Bonds	D Bonds	I Bonds	D Bonds
1970	1,868	6,361	392	5,785	17.3	47.8
1971	3,649	6,455	1,140	6,717	24.4	50.9

ANALYSIS

The criminal penalties for bail jumping and the basic theory on which the Illinois bond system is based are defined in section 32-10 of the Illinois Criminal Code.[37] Statistics indicate that this statute has been seldom enforced. For purposes of this article a sample was taken in the preliminary hearing and misdemeanor courts of some 3,500 cases in 1970 and 1971, which revealed that only three of these cases were being prosecuted for bail jumping. The post-indictment sample showed a far greater number of prosecutions; of the 750 cases in the sample population, 23 were being prosecuted for bail jumping. Yet, in 1970 and 1971 approximately 18,333 defendants were amenable to prosecution for violation of section 32-10. Thus, if the theory is that potential bond jumpers will be deterred by possible penal punishment, it has evidently not become reality. Certainly no court-wise defendant is deterred in the least, since the failure to initiate prosecution for violation of this statute has become common street knowledge.

A major reason for the failure to prosecute bail jumpers is that little effort is made to apprehend the defendant after a warrant is issued. There are few police officers assigned to this warrant duty; only two or three per police district. These officers are responsible for serving all warrants including the scofflaw multiple parking violations. Seemingly, the apprehension system depends on the defendant being picked up on another charge or traffic offense, and catching the warrant when he is fingerprinted and run through the Bureau of Identification, since rarely do these officers have time to search for a fugitive.

There are several possible explanations for the disparity between "D" and "I" bond reinstatement of forfeiture warrants. First, the defendant has a monetary interest in the "D" bond which he does not have in the "I" bond. Second, the defendant given an "I" bond has no prior criminal record or at least only a minor one, and is generally not picked up on another offense. Third, a judge who has once granted a defendant the privilege

[37] Note 2 *supra*.

of release might well hesitate to reinstate the bond once he has already trusted this particular defendant to be released on his own recognizance. Finally, both the court and prosecutor know that the attorney appearing before the court with the defendant, making a motion to vacate a bond forfeiture, in all probability depends on the proceeds of the bond as part or all of his fee, and would hesitate to deny or obstruct that motion. In essence, what has happened is that the greater portion of the retrieval function of these fugitives has fallen on the private attorney who must bring his defendant before the court in order to protect his fee. Consequently, one of the functions of a professional surety, supposedly obviated by the bond reform, has become the responsibility of the privately retained defense counsel.

The "D" bond or deposit of 10% is a seemingly worthless system without logical foundation. For instance, if a bond of $5,000 is set by a court, that defendant must post only $500 to obtain release. If the defendant fails to appear, a judgment is taken for the excess due on the bond. Generally, the county only collects the $500 posted as 10% of the bond. The records of the Clerk of the Court of Cook County indicate that in 1969 there were $519,764 in excess judgments; in 1970, $662,036; and in 1971, $733,519. Research efforts fail to reveal one cent in excess judgments being *collected* in Cook County.[38] Further, since the 10% requirement is altogether arbitrary, it should follow that if an actual bond is to be $500, the bond should be set at that figure.

On the positive side, allowing the attorney to collect his fee by having the defendant sign over the bond slip after the case has been disposed of in some manner has genuine merit. Such practice is a substantial crime preventive measure, since the defendant will not be under pressure to meet the monetary demands of his attorney or to make bond simultaneously.

Evaluation of the Illinois Bail System

While this broad evaluation demonstrates the basic weaknesses that now plague the Illinois bond system and will severely impair the Illinois criminal justice system in urban areas like Chicago, it is suggested that the initiation of the following might improve the Illinois bond system.

First, judges should be assigned whose sole function is to set bond. This action would remove the initial burden from the

[38] Recently a policy has been instituted in which excess judgments have been filed with the Recorder of Deeds so that if a defendant against whom a judgment has been taken attempts some sort of real estate transaction, that judgment will prevent the transaction until it is satisfied.

now overcrowded preliminary hearing courts, since the 1970 Illinois Constitution has guaranteed, unless expressly waived,[39] a preliminary hearing to practically every defendant. Illinois has already instituted a night bond court and a "holiday court," where judges are temporarily assigned only to make available to a defendant the quickest possible bail hearing. A defendant in a non-capital case would be taken first to this judge who would conduct the bond hearing and set bond. The defendant, in the case of a felony, would be assigned to a judge for a preliminary hearing; and, in the case of a misdemeanor, would be assigned to a court for trial. If the defendant continues to be detained as a result of his inability to meet the conditions of release initially imposed, he can ask that bond be reviewed by the judicial officer to whom he has been assigned. A time limit for review should be established as in federal criminal procedure, where after 24 hours the defendant can request review.[40] However, in federal procedure the review is first made by the judge imposing the conditions of release. The constitutional guarantee of a prompt preliminary hearing in Illinois would obviate this procedure. Hence, the reviewing judge would not be conducting a hearing *de novo,* since he would have before him the record of the previous bond hearing. Moreover, the time consumed by this review would be minimal.

Further review would be available to the defendant accused of a felony after indictment at the arraignment and trial court level. The judges sitting in the bond courts should be permanently assigned as are the judges in the night bond and "holiday court". Understandably, this is a difficult judicial position; however, it simply requires a jurist of substantial stature to establish procedural safeguards and proper administrative structuring.

Second, sufficient information should be supplied a judge so that he can set a proper bond. Personnel should be available to interview defendants and to verify that information. An attorney, as an officer of the court, should be required to provide the court with substantial background information, accurately verified by himself, and information supplied by the defendant or other witnesses should be brought before the court. Further, the witnesses should be advised of the danger of committing perjury and any violation should be vigorously prosecuted. Verification procedures should be maintained following release, and timely personal reminders to de-

[39] ILL. CONST., art. 1, §7, (1970).
[40] 18 F.C.A. §3146(a).

fendants of their court date would save a lot of bond forfeitures and paper work at a later date.

Third, both a vigorous system of apprehension of defendants not complying with bond appearance requirements and rigid prosecution of bond jumpers would put teeth in the penal provisions of the statute. Although the present ease of vacating bond forfeitures by attorneys who appear with their clients should not be eliminated, since it would both discourage fugitives from voluntarily appearing and cast the burden of rearrest on the police, the repetition of the process by a single defendant should be promptly discouraged by the court.

These first three recommendations are not novel, but in some form or other have been suggested by most bond studies. They would necessitate an increase and shift in manpower; however, any increase in expenditures would quickly be more than countered by savings in jail costs, administrative procedures, and other losses incurred under the present system.

A fourth suggestion adopts the highly controversial position of providing for the valuable alternative of placing the responsibility of a defendant's appearance on an ethical insurance company. The trend of the most scholarly thinking has been for the elimination of the professional bail bondsman.[41] The Illinois bond system was established to correct that problem and give the judge complete discretion in setting bail.[42] Notably, however, the federal statute governing bail did not eliminate the bail bondsman but, rather, made specific provisions for the existence of professional surety companies[43] and their power to arrest and deliver the defendant. The continued existence of these insurance companies within the federal system has certainly established their viability and usefulness. Consequently, the omission of this valuable tool in Illinois has limited the complete discretion of the judge.[44]

[41] Murphy, *Revision of State Bail Laws*, 32 OHIO ST. L.J. 451 (Summer 1971).

[42] Bowman, *Hearing S. 2839 and S. 2840 before the Subcomm. on Constitutional Rights and Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 88th Cong. at 164 (1964).

[43] 18 U.S.C. §§3142 and 3146(a)(4) (1969). §3142 provides: "Any party . . . who is released on the execution of an appearance bail bond with one or more sureties, may, in vacation, be arrested by his surety, and delivered to the marshal or his deputy . . . ."

[44] Absolute discretion does not exist in the federal system, since preferred release methods are stipulated by the Federal Bail Reform Act of 1966. 18 U.S.C. §3146(a)(4) (1969).

Release in non-capital cases prior to trial.

(a) Any person charged with an offense, other than an offense punishable by death, shall, at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines, in the exercise of his

Although the spirit of the Bail Reform Act is to favor non-financial conditions of bail where the defendant lacks "means and roots," it becomes appropriate to be as reasonably assured as is practical that the bail givers are not intending merely to free the defendant, but have a real interest in his appearance.[45]

There exist several cogent reasons why the insurance company alternative should be made available to the judge setting conditions of pre-trial release.[46] Where non-financial conditions appear insufficient to guard against flight, there should exist some provision by which the judge may require the placement of a surety bond with an ethical insurance company.[47] Also, the bond forfeiture rate prior to the Illinois Bond Reform Act was substantially lower than after the elimination of the professional bail bondsmen. Under the surety system, there was a 7.7% default rate in the First Municipal District of the Circuit Court of Cook County.[48] In recent years, the forfeiture rate on "D" bonds has lingered around 13% in the First Municipal District.[49] There would be a substantial monetary incentive to the pursuers of absent defendants as well, since the surety companies would be placing bonds of a more substantial amount.[50] Finally, adoption of this proposal would increase the number of civil judgments in cases where the surety company provides for the release of a defendant. Presently, there are no collections made of excess judgments on "D" bonds and "I" bonds. A vigorous enforcement and collection policy on

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discretion, that such a release will not reasonably assure the appearance of the person as required. When such a determination is made, the judicial officer shall, either in lieu of or in addition to the above methods of release, impose the first of the following conditions of release which will reasonably assure the appearance of the person for trial or, if no single condition gives that assurance, any combination of the following conditions:

. . . .

(4) require the execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof.

Failure of a federal judge to observe these established priorities is an abuse of discretion. United States v. Kirkman, 426 F.2d 747 (4th Cir. 1970).

[45] United States v. Melville, 309 F. Supp. 824 (N.D.N.Y. 1970).

[46] The existence of the bail bondsman and his function have been specifically recognized in Taylor v. Taintor, 83 U.S. 366 (1872).

[47] The extensive subcommittee hearings held prior to the passage of the Federal Bail Reform Act of 1966 did not reveal any weakness in the custodial function of sureties.

[48] Kamin, *Bail Administration in Illinois*, 53 ILL. B.J. 674, 680 (1965); Bowman, *Illinois Ten Per Cent Bail Deposit Provision*, 1965 ILL. L.F. 35, 39.

[49] In 1969 the figure was 13.34 per cent, 1970 — 11.09 per cent and 1971 — 13.29 per cent.

[50] Critics of the surety system hold that it should be completely eliminated; the most prominent of these, Foote, has stated:

> The claims that bondsmen provide any significant function in policing those on bail and finding them once they have absconded seem frivolous to me. There is no evidence that they actually perform any significant custodial function and it is unreasonable to expect them to do so.

Foote, *The Coming Constitutional Crisis in Bail*, 113 U. PA. L. REV. 1125, 1162 (1965).

outstanding bond forfeitures could realize substantial sums of money when added to the collections of the 1% administrative cost now placed on "D" bonds.[51]

CONCLUSION

The ideal situation is to have a well-informed judge with broad discretion make an unhurried determination of the pre-trial release condition necessary to insure the appearance of a particular defendant. The Illinois bond reform was a brave step, but as a working system there are some observable weaknesses which must be corrected.

What is recommended is to give the judge setting bail all the tools he needs: proper information, a selection of all possible pre-trial release procedures, and tools for vigorous enforcement and prosecution of bond jumpers.

The judicial official making the critical decision of what pre-trial release conditions should prevail as to an individual accused should have sufficient time to make that determination. In order to have the necessary and adequate time to weigh the myriad of variables, the judge cannot be forced to operate a priority system of preliminary hearings, bond hearings, motions to suppress, and misdemeanor bench trials. His task must be a singular one.

The individual who is incarcerated has a lesser chance of success at trial than the accused who enjoys his liberty on bail, and a judge must be aware of that fact in determining pre-trial release conditions; however, he must also fully appreciate the danger of providing for the easy release of a defendant with recidivist tendencies.

The inclusion of professional sureties in the bonding system will be a controversial suggestion. The many abuses which accompanied the professional bail bondsman in most jurisdictions are well known; nevertheless, the federal experience has demonstrated that the surety system can be a viable and valuable addition to a bonding system when properly regulated. Such regulation and administration are necessary to gaurantee that only solvent and ethical surety companies be allowed to operate. There should be, in addition, statutory definitions of the arrest and retrieval functions of bail bondsmen, with substantial penalties to attach if defined limits are exceeded.

If a judicial officer is given the necessary discretionary power, along with sufficient court time to render a decision, then the first brave promise of the Illinois bonding revolution can be realized in fairness to both the accused and society.

[51] Note 1 *supra*, at 276.