Pretrial Release in the 1990s: Texas Takes Another Look at Nonfinancial Release Conditions

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I. INTRODUCTION

The conditions under which an individual accused of a crime can remain at liberty prior to the resolution of the criminal charge against him have evolved over time in the American system of criminal justice.1 For most of this country’s history, pretrial release conditions were almost exclusively defined in financial terms, i.e., the amount of “bail” a defendant or his surety was required to pledge to assure appearance in court.2 Mounting dissatisfaction with the financially-based American bail system, however, ultimately resulted in a decade of bail reform in the 1960s during which various forms of nonfinancial release conditions designed to assure court appearance were developed.3 The introduction of these nonfinancial release conditions significantly expanded the extent of pretrial release.4 This expansion of

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1. See infra notes 22-105 and accompanying text.
2. See infra notes 22-47 and accompanying text. Some commentators trace the origins of the term “bail” to the Anglo-Saxon concept of “borh,” the financial pledge given by an accused or his surety to guarantee the accused’s appearance before the judicial tribunal. E.g., William F. Duker, The Right to Bail: A Historical Inquiry, 42 ALB. L. REV. 33, 35-36 (1977); see infra notes 13-14 and accompanying text. Other commentators associate the term “bail” with the medieval English practice of a defendant’s pretrial release into the custody of a personal surety who guaranteed the defendant’s court appearance by pledging his own liberty or by making a financial pledge. In this context, “bail” was the “bailment” or delivery of a defendant into the custody of his personal surety. E.g., Betsy K. Wanger, Limiting Preventive Detention through Conditional Release: The Unfulfilled Promise of the 1982 Pretrial Services Act, 97 YALE L.J. 320, 323 n.19 (1987); see infra note 16. The term “bail” in this article includes any undertaking required as a condition of pretrial release. Nevertheless, consonant with actual practice, the term is used primarily to describe financial conditions of pretrial release.
3. See infra notes 47-74 and accompanying text.
4. See infra notes 74-78 and accompanying text.
pretrial release, however, coincided with a period of increased public concern regarding crime which, in turn, resulted in the introduction of additional mechanisms to restrict or absolutely deny pretrial release when necessary to assure a defendant's court appearance or community safety.\textsuperscript{5} As a result of all of these developments, the American system of pretrial release and detention in the 1990s includes a broad range of options, from release on a defendant's mere promise to return to court, to the denial of pretrial release under any circumstances.\textsuperscript{6}

The evolution of pretrial release in Texas has followed many of the general national trends.\textsuperscript{7} Texas, however, has not yet adopted some forms of nonfinancial pretrial release.\textsuperscript{8} Moreover, other nonfinancial release mechanisms which have been authorized have not been fully utilized by local jurisdictions.\textsuperscript{9} Chronic problems of jail overcrowding, however, have required Texas and its local jurisdictions to reconsider nonfinancial release conditions as a means to reduce pretrial detention and resultant jail overcrowding.\textsuperscript{10}

This article reviews the evolution of the American and Texas systems of pretrial release.\textsuperscript{11} It then examines one Texas local jurisdiction's successful efforts to implement a nonfinancial release mechanism which could expand pretrial release without greater risk of pretrial misconduct (i.e., court nonappearance or pretrial crime) than that accompanying release on financial conditions.\textsuperscript{12} This jurisdiction's experience demonstrates the results that can be achieved when local jurisdictions "take another look" at nonfinancial pretrial release in the 1990s.

\section{The Evolution of the American System of Pretrial Release}

The evolution of the American system of pretrial release can be traced to the Anglo-Saxon period of England\textsuperscript{13} during which an

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\textsuperscript{5} See infra notes 81-92 and accompanying text.\textsuperscript{6} See infra notes 98-100 and accompanying text.\textsuperscript{7} See infra notes 106-28 and accompanying text.\textsuperscript{8} See infra notes 129-30 and accompanying text.\textsuperscript{9} See infra note 131 and accompanying text.\textsuperscript{10} See infra note 133 and accompanying text.\textsuperscript{11} See infra notes 22-104, 106-33 and accompanying text. The focus of this article is pretrial release and detention in noncapital cases. Release and detention in capital cases and at other stages of criminal proceedings (e.g., prior to sentencing or pending appeal) are generally referenced only when necessary to distinguish them from pretrial release and detention in noncapital cases.\textsuperscript{12} See infra notes 136-207 and accompanying text.\textsuperscript{13} Initial mechanisms for release pending judgment were incorporated into the legal system of compensation for wrongs suffered, which system was formalized during the seventh century. These pretrial release mechanisms evolved throughout the Anglo-Saxon
accused individual's appearance at trial was guaranteed by a pledge of his own property or by a pledge made by a personal surety. 14 Following the Norman Conquest in 1066, 15 determination of pretrial release was initially entrusted to local sheriffs who had significant discretion in establishing conditions of an accused individual’s release in the often lengthy period between accusation and trial by the itinerant royal justices. 16 As a result of widespread abuses in the sheriffs' administration of pretrial release conditions and in order to bring

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14. The personal surety was generally chosen from family members, friends, or business associates. If an accused individual had neither sufficient property nor sureties to guarantee his trial appearance, he was detained until judgment. June Carbone, Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail, 34 SYRACUSE L. REV. 517, 519-21 (1983); Duker, supra note 2, at 36. Although the Anglo-Saxon legal system authorized summary execution for one caught in a criminal act or escape therefrom, pursuit of legal redress in other circumstances was initiated by an alleged victim against one accused of criminal conduct. Viewed primarily as a mechanism to resolve private disputes, this early criminal justice system utilized compensation, in the nature of contemporary victim restitution, as the principal form of "punishment," with "post-conviction" enslavement, imprisonment, corporal punishment, and execution reserved for more exceptional circumstances. In the context of this compensation-based criminal justice system, the amount of the individual's or surety's pledge was generally identical to the accused's potential compensation obligation upon conviction. Thus, the pledge supported not only the guarantee of the accused's appearance at trial, but also the satisfaction of the accused's judgment upon conviction. Flight by the accused generated a presumption of his guilt. If pledged, the accused's property became subject to forfeiture. Otherwise, the surety became financially responsible for the satisfaction of his pledge. This contingent obligation to satisfy his pledge obviously gave the surety great incentive to make certain the accused's presence at trial as well as the accused's satisfaction of any judgment imposed. Flight by the accused was also discouraged by the authorization of summary execution upon capture. 2 POLLOCK & MAITLAND, supra note 13, at 48-49; Carbone, supra at 519-21; Duker, supra note 2, at 35-36.

15. Duker, supra note 2, at 39.

16. In the absence of clear guidelines governing pretrial release conditions and faced with limited and often inadequate available detention facilities, local sheriffs frequently allowed accused individuals to remain at liberty pending trial. This freedom was subject to various release conditions including: 1) an individual's personal promise to appear at trial, 2) that personal promise secured by a monetary bond, and 3) the additional or alternative guarantee of a personal surety—usually a relative or friend—that the accused would appear at trial. Upon the accused's flight, the personal surety's guarantee initially could be enforced by the surety's own surrender to the court in the defendant's place. It soon became common, however, for the surety to forfeit property or money instead as a penalty for the breach of his guarantee. 2 POLLOCK & MAITLAND, supra note 13, at 460-61; 1 POLLOCK & MAITLAND, supra note 13, at 138, 145-47, 152; WAYNE H. THOMAS, JR., BAIL REFORM IN AMERICA 11 (1976); Carbone, supra note 14, at 521-23; Duker, supra
greater uniformity to the English bail practices, Parliament enacted the Statute of Westminster in 1275, which specified the circumstances under which pretrial release by the sheriffs was authorized. Over the next several centuries, Parliament continued to add procedural safeguards to the administration of bail, including a prohibi-

This evolution of pretrial mechanisms accompanied more general changes in the post-Norman Conquest system of criminal law. The state—rather than private individuals—assumed the primary role in criminal prosecutions. Capital and corporal punishment replaced compensation as the principal punishment upon conviction for most offenses. The Statute of Westminster restricted only the sheriffs' authority to release these categories of accused individuals, not the authority of the courts. Although the statute was designed as a mechanism to curb the sheriffs' discretion, it also served to codify the existing common law and provide precedent for the courts' pretrial release decisions as well. The Statute of Westminster also identified more clearly certain categories of offenders who were "bailable" by the sheriffs. This was a rudimentary "right" to bail, at least for certain offenders. See, e.g., Carbone, supra note 14, at 523. But see Duker, supra note 2, at 50 (suggesting that bail was not mandatory even in these cases).

During the fourteenth and fifteenth centuries, the administration of bail was transferred from the sheriffs to the justices of the peace. Subsequently, the approval of two justices of the peace was required for the release of accused individuals. To further protect the integrity of bail determinations, requirements were added that bail proceedings take place in open court with recordation of evidentiary presentations before bailment. A series of seventeenth century reforms added further protections to the bail process: 1) the Petition of Right in 1628 prohibited detention by court without charge, 2) the Habeas Corpus Act of 1679 included procedures to avoid lengthy delays prior to a bail hearing, and 3) the Bill of Rights in 1689 included a provision which prohibited excessive bail. Throughout this period, trial appearance by a released individual was usually guaranteed
tion of excessive bail contained in the English Bill of Rights in 1689.21

The early American colonies generally adopted the existing English law concerning bail.22 Massachusetts, however, began the departure from English practice in 1641 by replacing the complex distinctions between "bailable" and "unbailable" offenses and offenders created by the Statute of Westminster.23 Massachusetts accomplished this with a provision that reduced the "unbailable" offenses to capital cases, contempt, and other instances authorized by express legislative act, and reduced "unbailable" offenders to those who could not provide sufficient security or bail or could not maintain good pretrial "behavior."24 In 1682, colonial Pennsylvania more emphatically departed from English bail practice by adopting a constitutional provision that "all Prisoners shall be Bailable by Sufficient Sureties, unless for capital Offenses, where proof is evident or the presumption great."25 Following independence, the Pennsylvania provision was used as a model by some states in enacting their new constitutions.26 Other states adopted the 1689 English Bill of Rights prohibition of excessive bail in their initial constitutions.27


21. 1 W. & M., ch. 2 (1689).
22. Carbone, supra note 14, at 529 & n.59; Duker, supra note 2, at 77-78, 80-81.
23. Carbone, supra note 14, at 524 n.38. See generally note 19.
24. The Massachusetts bail provision was included in the Massachusetts Body of Liberties and provided:

No mans person shall be restrained or imprisoned by any Authority whatsoever before the law hath sentenced him thereto. If he can put in sufficient securitie, bayle or mainprise, for his appearance, and good behaviour in the meane time, unlesse it be Crimes Capital, and Contempts in open Court, and in such cases where some expresse act of Court [legislature] doth allow it.

Carbone, supra note 14, at 530 n.62 (quoting THE COLONIAL LAWS OF MASSACHUSETTS § 8, at 37 (W. Whitmore ed., 1889)); Duker, supra note 2, at 79. Accompanying this simplification of bail provisions was a restriction of the scope of capital offenses in Massachusetts, which had the effect of further expanding the right to bail in the colony. Carbone, supra note 14, at 530-31 & nn.63-65; Caleb Foote, The Coming Constitutional Crisis in Bail: I, 113 U. PA. L. REV. 959, 975, 981 (1965).

25. Carbone, supra note 14, at 531 (citing 5 AMERICAN CHARTERS 3061 (F. Thorpe ed., 1909)). This bail provision effected a significant expansion of the right to bail because, in most instances, Pennsylvania restricted capital punishment at that time to cases of "willful murder." Carbone, supra note 14, at 531-32 & nn.69 & 71; cf. Duker, supra note 2, at 80 (arguing that the term "bailable" merely authorized, but did not require the granting of bail).

27. See Duker, supra note 2, at 81-82.
The United States Congress considered both approaches to bail during the First Congress in 1789. Congress included the prohibition of excessive bail in the Bill of Rights which it proposed to the states for ratification that year. The Eighth Amendment to the Constitution provides, in part, that "[e]xcessive bail shall not be required." Congress also followed the Pennsylvania model by including a provision in the Judiciary Act of 1789 that:

[U]pon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offence, and of the evidence, and the usages of law.

After 1789, most states established state constitutional rights to bail in noncapital cases and prohibitions of excessive bail. Over the next
century, as fewer offenses remained subject to the death penalty, theoretically more defendants became eligible to be released before trial. Further clarifying bail eligibility during this period, the United States Supreme Court (the “Court”) identified securing the defendant’s court appearance or attendance as the purpose of bail. Throughout the nineteenth century, financial conditions of release, primarily based on the nature and seriousness of the charged offense, continued to be

stool” which protected against pretrial detention). But see John S. Goldkamp, Danger and Detention: A Second Generation of Bail Reform, 76 J. CRIM. L. & CRIMINOLOGY 1, 57-58 (1985) (Appendix: Table 1) (describing status of state bail provisions as of 1984 and increase in provisions limiting the right to bail); Verrilli, supra note 26, at 353-54 (describing status of state constitutional right to bail provisions as of 1976 and initial constitutional amendments to allow expanded use of pretrial detention).

During the century following 1789, the federal statutory right to bail in noncapital cases remained substantively unchanged. See REV. STAT. tit. XIII, §§ 1015, 1016 (1873-74) (dividing 1789 provision into two sections with § 1015 providing, in part, “[b]ail shall be admitted upon all arrests in criminal cases where the offense is not punishable by death,” and § 1016 addressing bail in capital cases); Act of March 2, 1793, ch. XXII, § 4, 1 Stat. 333, 334 (maintaining distinction between bail in capital and noncapital cases).

34. During the nineteenth century, states gradually reduced the number of capital offenses, often retaining the death penalty only for murder or murder and rape. Some states abolished capital punishment completely. Carbone, supra note 14, at 535.

35. Although the Court’s statements were made in dicta, they clearly articulated the Court’s view of the purpose of bail. In addressing the lawfulness of a defendant’s custody following a previous failure to appear and forfeiture of his surety recognizance (similar to bond in purpose), the Court stated:

A recognizance of bail, in a criminal case, is taken to secure the due attendance of the party accused, to answer the indictment, and to submit to a trial, and the judgment of the court thereon. It is not designed as a satisfaction for the offence, when it is forfeited and paid; but as a means of compelling the party to submit to the trial and punishment, which the law ordains for his offence.

Ex parte Milburn, 34 U.S. (9 Pet.) 704, 710 (1835). In ruling on an indemnity and subrogation claim related to a surety recognizance, the Court similarly stated that “the object of bail in criminal cases is to secure the appearance of the principal before the court for the purposes of public justice.” United States v. Ryder, 110 U.S. 729, 736 (1884). See United States v. Feely, 25 F. Cas. 1055, 1057 (C.C.D. Va. 1813) (No. 15,082) (Chief Justice Marshall stated, sitting as a Circuit Justice in a ruling regarding a forfeited surety recognizance, that the “object of a recognizance is, not to enrich the treasury, but to combine the administration of criminal justice with the convenience of a person accused, but not proved to be guilty,” and referred to the recognizance as an “obligation entered into only to secure a trial.”); Duker, supra note 2, at 67-69 (discussing purpose of bail).

36. From Anglo-Saxon times through the American administration of bail in the nineteenth century, the seriousness of the charged offense was the primary, and often the only, determinant of the amount of bail or other condition of release. Carbone, supra note 14, at 540-43. During the nineteenth century, the federal courts, and subsequently the states, began to recognize the pecuniary circumstances of the defendant as an additional factor for consideration in determining conditions of release. See United States v. Lawrence, 26 F. Cas. 887, 888 (C.C.D.C. 1835) (No. 15,577) (noting that, in determining bail, the “discretion of the magistrate in taking bail in a criminal case, is to be guided by the
viewed as the optimal means to obtain a defendant's appearance.\textsuperscript{37} The personal surety system, however, was gradually replaced by a system of commercial bondsmen who posted a monetary bond with the court to obtain a defendant's release—in exchange for a generally nonrefundable fee from the defendant. These commercial bondsmen obligated themselves to assure defendants' court appearances or risk forfeiture of their bonds.\textsuperscript{38}

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\textsuperscript{38} The personal surety system—generally based on a reputable person (usually the defendant's relative or friend) pledging the surety's property or money to support his guarantee of the defendant's court appearance and his supervision of the defendant's pretrial conduct—functioned effectively in the limited geographical confines of England and within the limited population and settled areas of early America. By the mid-nineteenth century, however, the personal surety system began to falter in America for several reasons: 1) the significant expansion of the right to bail in noncapital cases after 1789 increased the demand for (but not the supply of) personal sureties; 2) Americans' pursuit of the rapidly expanding frontier as well as the growth of impersonal urban areas diluted the strong, small community ties and personal relationships supporting the personal surety system; and 3) the unsettled frontier increased the risks of a defendant's flight and created a further disincentive to the undertaking of a personal surety obligation. All of these factors made it increasingly difficult for a defendant to secure a personal surety and for the personal surety, if obtained, to effectively perform his obligations to the court. Increasingly, the personal surety's pledge became simply a promise to forfeit money upon the defendant's failure to appear. RONALD GOLDFARB, RANSOM: A CRITIQUE OF THE AMERICAN BAIL SYSTEM 93-94 (1965); THOMAS, supra note 16, at 11-12; Bernard Botein, The Manhattan Bail Project: Its Impact on Criminology and the Criminal Law Processes, 43 TEX. L. REV. 319, 322-23 (1964); Wanger, supra note 2, at 323-24; Note, supra note 16, at 967.

Seeing an opportunity for financial gain and filling the void left by the erosion of the personal surety system, a commercial or professional bondsman system gradually evolved during nineteenth century American bail administration. The payment of a generally nonrefundable fee by a defendant to a commercial bondsman replaced the personal relationship between the defendant and the personal surety. In exchange for this fee (and sometimes the defendant's posting of additional collateral), the commercial bondsman obtained the defendant's pretrial release by posting a monetary bond with the court in the amount of bail set. The risk of forfeiture of his bond upon the defendant's failure to appear in court gave the commercial bondsman incentive to make certain the defendant's court appearances. Although courts initially welcomed the emergence of this commercial bondsman system as a means to fill the void left by the erosion of the personal surety system, the commercial system's inability to duplicate the benefits of the personal surety system and the abuses that arose in the administration of the system were increasingly apparent by the turn of the century. GOLDFARB, supra at 94-95; THOMAS, supra note 16, at 12-13; Botein, supra at 322-23; Wanger, supra note 2, at 323-24.
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In the first half of the twentieth century, widespread dissatisfaction with the existing American bail system began to emerge. Significant studies of the administration of bail were conducted in several cities, which demonstrated the inadequacy and inequity of the financially-based bail system and interrelated problems associated with the commercial bondsman system. Concerns being expressed for greater individualization of bail determinations and alternative forms of pretrial release were addressed in 1946 in the initial bail provisions, Rule 46, of the Federal Rules of Criminal Procedure. Rule 46 maintained the 1789 requirement that a “person arrested for an offense not pun-


In his landmark Chicago study, Beeley found that the surety recognition posted by a professional bondsman was the typical form of bail. He also found that the amount of bail was usually based on the offense charged, rather than an accused person’s individual characteristics. Beeley, supra at 30-31, 39-46, 154-56. Based on a random sample of defendants detained prior to trial due to their inability to post a surety bond, Beeley concluded that approximately 28% of the group studied could have been safely released on other conditional forms of release. Id. at 156-60. To increase release opportunities in appropriate cases, Beeley proposed greater individualization of bail determinations by considering not only the nature of the offense, but also the weight of the evidence, the defendant’s character, the seriousness of the potential punishment, and the quality of the bail-security. He suggested a general reduction in bail amounts, acceptance of cash or collateral as well as real property as security, and a greater use of unsecured recognizance. To ensure that the courts were not inappropriately releasing defendants, Beeley also proposed allowing the denial of bail for “hardened” offenders charged with a felony, obviously mentally disordered persons (who would be hospitalized prior to trial), and persons in a post-conviction phase of proceedings. Id. at 166-67.

Almost 30 years later, Foote and his researchers found similar problems of unnecessary pretrial detention in Philadelphia and New York due to the reliance on financial release conditions based on the charged offense, without individualization based on defendant characteristics. Foote concluded that pretrial detention due to inability to post bond also had a negative impact on the likelihood of a defendant’s conviction and the severity of sentence. Caleb Foote, The Bail System and Equal Justice, FED. PROBATION, Sept. 1959, at 43 (summarizing major findings of Philadelphia and New York studies).

40. The studies of the systemic problems associated with the financially-based bail system and other independent investigations revealed widespread abuses and corruption in the commercial bondsman system, including the infiltration of criminals and organized crime into the bonding business, bondsman payoffs to police and court officials, and failure to pay off forfeited bonds. See, e.g., Beeley, supra note 39, at 39-46, 155-56; Thomas, supra note 16, at 15-17. See generally Goldfarb, supra note 38, at 95-126.

41. Pursuant to statutory authority, Act of June 29, 1940, ch. 445, 54 Stat. 688, the Court prescribed these procedural rules, which were reported to Congress and ultimately became effective in 1946. Fed. R. Crim. P., 327 U.S. 821-25 (1946).
ishable by death shall be admitted to bail," and also included provisions which 1) identified assurance of the defendant's presence as the guiding factor in determining the amount of bail, 2) required greater individualization in the determination of the amount of bail by prescribing consideration of specific circumstances in addition to the charged offense, and 3) authorized a range of alternative release conditions, including an unsecured appearance bond. Although the provisions of Rule 46 suggested a broadened federal interpretation of the administration of bail, the Court offered conflicting dicta concerning bail in two cases decided during the 1951 Term. In one case, the Court criticized the setting of a bail amount based solely on the nature of the offense as contrary to the excessive bail prohibition and Rule 46. Later in the Term, however, the Court upheld the denial of bail

42. Fed. R. Crim. P. 46(a)(1), 327 U.S. at 868 (section (a) denominated "Right to Bail" and subsection (1) denominated "Before Conviction"). Although the statutory designation had changed since the Judiciary Act of 1789, the federal pretrial right to bail in noncapital cases had remained substantively unchanged. See Stack v. Boyle, 342 U.S. 1, 4 (1951) (noting maintenance of right since 1789); id. at 14-17 (Jackson, J., joined by Frankfurter, J.) (reviewing, in a separate opinion, statutory changes regarding procedural aspects of statute); Duker, supra note 2, at 101 & n.422 (describing 1789 provision and statutory designations during subsequent century); supra notes 32-33 and accompanying text (also describing 1789 provision and statutory designations during subsequent century). Rule 46(a)(1) also preserved the separate pretrial bail provisions for capital cases. Fed. R. Crim. P. 46(a)(1), 327 U.S. at 868.

43. Fed. R. Crim. P. 46(c), (d), 327 U.S. at 869, provided:

(c) AMOUNT. If the defendant is admitted to bail, the amount thereof shall be such as in the judgment of the commissioner or court or judge or justice will insure the presence of the defendant, having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant.

(d) FORM, AND PLACE OF DEPOSIT. A person required or permitted to give bail shall execute a bond for his appearance. One or more sureties may be required, cash or bonds or notes of the United States may be accepted and in proper cases no security need be required.

See Bandy v. United States, 81 S. Ct. 197, 198 (Douglas, Circuit Justice 1960) (indicating express intention to authorize defendants' unsecured pretrial release by these provisions); Duker, supra note 2, at 101-05 (discussing factors in Rule 46(c)). These rules at least established an initial framework in the federal courts to address some of the criticisms increasingly being raised regarding the administration of bail. See infra note 72 and accompanying text (describing 1966 and 1972 changes in Rule 46); cf. Act of June 25, 1948, ch. 645, 62 Stat. 683, 821 (codified at 18 U.S.C. §§ 3141-3144 (1948)) (addressing additional aspects of federal bail law); Fed. R. Crim. P. 5(a)-(b), 327 U.S. at 835-36 (requiring admission to bail pursuant to the rules by a commissioner following a defendant's arrest).

44. Compare Carlson v. Landon, 342 U.S. 524 (1952) with Stack, 342 U.S. at 1. See infra notes 45-46 and accompanying text (discussing these cases).

45. In the habeas corpus proceedings in Stack, the twelve defendants had claimed that their bail, uniformly set based on their charge of conspiring to violate the Smith Act (regarding governmental overthrow or destruction) without regard to individual
based on the nature of the underlying conduct, despite a claimed
Eighth Amendment violation.\textsuperscript{46} In the absence of clear Court direc-

\textsuperscript{46} Id. at 8 (Jackson, J., joined by Frankfurter, J.).
tion regarding federal bail practices (much less the vastly more extensive state bail practices), concerns continued to mount that the typically financially-based and charge-oriented administration of bail resulted in the unnecessary and inequitable pretrial detention of countless accused individuals throughout the federal and state criminal justice systems.\textsuperscript{47}

In the 1960s, these concerns ripened into action as the country

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bail is not compulsory where the punishment may be death. Indeed, the very language of the Amendment fails to say all arrests must be bailable. We think, clearly, here that the Eighth Amendment does not require that bail be allowed under the circumstances of these cases.

\textit{Id.} at 545-46 (footnotes omitted).

Justice Black criticized the Court's general interpretation of the Eighth Amendment in the case:

Under this contention, the Eighth Amendment is a limitation upon judges only, for while a judge cannot constitutionally fix excessive bail, Congress can direct that people be held in jail without any right to bail at all. Stated still another way, the Amendment does no more than protect a right to bail which Congress can grant and which Congress can take away. The Amendment is thus reduced below the level of a pious admonition. Maybe the literal language of the framers lends itself to this weird, devitalizing interpretation when scrutinized with a hostile eye. But at least until recently, it has been the judicial practice to give a broad, liberal interpretation to those provisions of the Bill of Rights obviously designed to protect the individual from governmental oppression. I would follow that practice here.

\textit{Id.} at 556 (Black, J., dissenting). Justice Burton criticized the Court's application of the Eighth Amendment to the statutory framework under consideration:

[The Eighth] Amendment clearly prohibits federal bail that is excessive in amount when seen in the light of all traditionally relevant circumstances. Likewise, it must prohibit unreasonable denial of bail. The Amendment cannot well mean that, on the one hand, it prohibits the requirement of bail so excessive in amount as to be unattainable, yet, on the other hand, under like circumstances, it does not prohibit the denial of bail, which comes to the same thing. The same circumstances are relevant to both procedures. It is difficult to believe that Congress now has attempted to give the Attorney General authority to disregard those considerations in the denial of bail.

\textit{Id.} at 569 (Burton, J., dissenting). See \textit{id.} at 563-64 (Frankfurter, J., joined by Burton, J., dissenting) (criticizing the absence of individualization in the application of the statutory framework in the case); \textit{id.} at 568-69 (Douglas, J., dissenting) (criticizing factual application of statute).

47. The following sentiments are typical of many expressed concerning the American bail system as of the 1960s:

Millions of men and women are, through the American bail system, held each year in "ransom" in American jails, committed to prison cells often for prolonged periods before trial. Because they are poor or friendless, they may spend days, weeks, or months in confinement, often to be acquitted of wrongdoing in the end. ... Yet a man with means, accused of far more serious crimes and eventually to be found guilty, may have to spend no time
experienced an unprecedented decade of bail reform. This decade of action began in 1961 when the Vera Foundation launched the Manhattan Bail Project, designed to increase the use of pretrial release without financial conditions. To accomplish this goal, the project

in jail before trial; his only virtue the fact that he could pay his way out of jail and wait comfortably at home for his trial to begin.

The American bail system . . . is not only unfair; it is illogical; it does not even work well. The bail system is to a great degree a socially countenanced ransom of people and of justice for no good reason. It is an unworkable and unreasonable abortive outgrowth of historical Anglo-American legal devices which worked once in a far different time and place and in a far different way. Bail doesn't work.

GOLDFARB, supra note 38, at 1, 4-5. Major specific areas of concern regarding bail included that the American bail practices were

(1) arbitrary and chaotic; (2) that they discriminated among defendants based on their relative wealth or lack of it; (3) that judges abused their discretion in deciding bail and wielded bail and detention punitively or in line with other nonlegitimate purposes; (4) that judges used bail not only to assure the appearance of defendants in court but to detain defendants they viewed as dangerous; and (5) that detention before trial was tantamount to punishment prior to adjudication.


48. See infra notes 49-74 and accompanying text. Several of the bail studies prior to the 1960s recommended specific reforms of bail administration. E.g., BEELEY, supra note 39, at 165-71; Foote, Philadelphia Study, supra note 39, at 1072-79. However, few significant reforms had been accomplished prior to the 1960s.

49. The Vera Foundation was established with a grant from industrialist Louis Schweitzer after his observation of conditions in one of New York’s jails. The Foundation’s mission was to assist defendants who were too poor to post bail. THOMAS, supra note 16, at 4; Botein, supra note 38, at 326.

50. The Vera Foundation initiated the Manhattan Bail Project in cooperation with the New York University School of Law and the Institute of Judicial Administration. Law students staffed the project under Vera Foundation supervision. Ares et al., supra note 47, at 71-72.

51. The Foundation’s analysis of New York bail practices in 1960 showed little change in bail administration since Foote’s research in 1956. Ares et al., supra note 47, at 76-86; see Roberts & Palermo, supra note 39, at 693; supra note 39 (describing 1956 research). Initially the Foundation considered the idea of making a revolving bail fund available to indigent defendants to help them obtain their release, but determined that this approach would only perpetuate the reliance on financial conditions of release. To foster a fundamental change in pretrial release practices, the Manhattan Bail Project decided to
staff interviewed detained defendants prior to arraignment,\textsuperscript{52} gathering a variety of information concerning their family and community ties, employment status, and references, as well as the more traditionally gathered information concerning their current charge and prior criminal record.\textsuperscript{53} The staff of the Manhattan Bail Project attempted to verify the information given\textsuperscript{54} and then determined whether a nonfinancial release recommendation to the arraignment judge was appropriate.\textsuperscript{55} The underlying hypothesis of the project was that more defendants could be successfully released prior to trial without financial conditions if verified information concerning their stability and community ties could be presented to the court.\textsuperscript{56} The Manhattan Bail Project proved remarkably successful in confirming this hypothesis\textsuperscript{57} and became a model for bail reform efforts throughout the

\textsuperscript{52} Initially, the staff excluded from consideration those defendants charged with or having a previous record of homicide, various sexual offenses, narcotics offenses, and assault on a police officer. Ares et al., supra note 47, at 72.

\textsuperscript{53} The project staff completed a four-page questionnaire on each defendant interviewed. In order to investigate a defendant's release after the interview, he had to meet at least one of five established criteria or partially meet at least two of the criteria which included: 1) present or recent residence at the same address for six months or more, 2) current or recent employment for six months or more, 3) relatives in New York City with whom the defendant was in contact, 4) no prior convictions, and 5) New York City residence for ten years or more. Id. at 72-73.

\textsuperscript{54} The staff attempted to verify the information through references provided by the defendant. Verification was conducted by telephone, in person (if the references were present) or by field investigation, if necessary. Id. at 73.

\textsuperscript{55} The project's initial practice of subjective release recommendations was soon replaced by a quantitative scale which assigned different point values to aspects of the defendant's prior record, family ties, employment or school status, residential stability, and a limited miscellaneous factor category. To qualify for a release recommendation, a defendant had to be a New York area resident and achieve a minimum of 5 out of 11 possible points on the scale. Thomas, supra note 16, at 21-22; Ares et al., supra note 47, at 73-74.

Although the staff made release recommendation determinations in all cases surviving the initial post-interview screening, supra note 53, the cases were divided during the project's first year into experimental and control groups for analysis purposes. Release recommendations in the experimental group cases only were communicated to the court. Ares et al., supra note 47, at 72-74.

In addition to its release recommendation function, the project staff also notified released defendants of their court dates and assisted in locating any released defendants who failed to appear for their court dates. Id. at 75.

\textsuperscript{56} Thomas, supra note 16, at 4-5 (quoting Herbert Sturz); Ares et al., supra note 47, at 68; Botein, supra note 38, at 326.

\textsuperscript{57} In its first 11 months of operation, the courts granted pretrial parole to 60% of those defendants whom the project recommended. During the same period, only 14% of the control group defendants were placed on pretrial parole. Of the 250 defendants paroled on
the project's recommendation in approximately a year, only three "jumped parole" and only two were rearrested on new charges. Pretrial parole also had a favorable effect on disposition: a significantly higher percentage of the paroled experimental group than the detained control group were acquitted or had their charges dismissed (approximately 60% versus 23%) and a significantly lower percentage of the convicted parolees than the detained control group were sentenced to prison (21% versus 96%). Ares et al., supra note 47, at 86-87; Botein, supra note 38, at 327-28.

As a result of its initial successes, the project reduced the categories of offenses excluded from the project, removed the indigence requirement for project participation, and expanded the project to include women detained due to inability to post bond. The project also steadily increased the percentage of interviewed defendants it recommended for parole (up from an initial 27% to 65% by its third year of operation). Judicial acceptance of project release recommendations also continued to rise (up to 70% by the project's third year). Despite the increased utilization of pretrial parole, default rates for project parolees remained under 1% by the project's third year (compared to a 3% rate for defendants released on bail bonds). Thomas, supra note 16, at 23-24; Ares et al., supra note 47, at 86-92; Botein, supra note 38, at 327-28; Sam J. Ervin, Jr., The Legislative Role in Bail Reform, 35 Geo. Wash. L. Rev. 429, 437 (1967). The project's success during its initial three-year phase led to the program's ultimate adoption and expansion by New York's Office of Probation. Botein, supra note 38, at 327.

58. As early as 1963, four jurisdictions had initiated bail projects utilizing the Manhattan Bail Project model. Thomas, supra note 16, at 6; see Ervin, supra note 57, at 432, 447-50 (describing initiation of and first year results of District of Columbia Bail Project). By 1965, over 50 communities had initiated bail projects. Thomas, supra note 16, at 24-25.

In addition to the personal recognizance model developed by the Manhattan Bail Project, other jurisdictions experimented with different forms of expanded pretrial release. In 1963, Illinois authorized an experimental program designed to reduce the role of the commercial bondsman in pretrial release. Rather than paying a bondsman a nonrefundable fee to obtain his release, the Illinois program allowed a defendant to post with the court 10% of the face amount of the bond set to secure his pretrial release. If the defendant complied with his release conditions, his 10% deposit was returned at the completion of his case—minus an administrative fee of 1% of the bond amount. The experiment proved so successful that, in 1965, the legislature effectively eliminated the surety bond system by restricting monetary bonds to 1) the 10% deposit system and 2) the posting of full security in cash or collateral, which was an impractical system for bondsmen. In addition to these monetary bonds, Illinois authorized personal recognizance release without financial conditions. Ill. Ann. Stat. ch. 38, para. 110-2, 110-7, 110-8, 110-15 (Smith-Hurd 1963 and as amended 1965); Thomas, supra note 16, at 183-86; see Schilb v. Kuebel, 404 U.S. 357 (1971) (upholding the 1% administrative fee and describing the Illinois bail provisions).

In 1964, the Vera Institute of Justice and the New York City Police Department initiated the Manhattan Summons Project which applied the Manhattan Bail Project release procedures at the police precinct station to persons arrested on minor charges. Upon the precinct officer's acceptance of the project's release recommendation, the arrestee was given a summons to appear in court, significantly reducing the period of unnecessary detention following arrest. Over the next several years, this system of "stationhouse release" was expanded throughout New York City. Thomas, supra note 16, at 7-8, 202; Legislation, Bail Reform in the State and Federal Systems, 20 Vand. L. Rev. 948, 957 (1967).

Other jurisdictions expanded their utilization of police citation procedures through
National interest in bail reform continued to grow throughout the first half of the 1960s. Among those studying the possibility of bail reform was the United States Congress. This congressional study culminated in the Bail Reform Act of 1966, the first major change in federal bail policy since the Judiciary Act of 1789. With a stated purpose to assure that "all persons, regardless of their financial status, which a citation or summons for court appearance was issued by the police officer in the field in lieu of arrest. Although the citation procedure was widely used for traffic matters, some jurisdictions, led by California, began to expand its use in misdemeanor criminal matters. THOMAS, supra note 16, at 201-03; Legislation, supra at 957-58.

Still other jurisdictions began to experiment with other forms of conditional pretrial release designed to reduce the traditional reliance on monetary release conditions. THOMAS, supra note 16, at 171-82 (describing various forms of conditional release).

59. Interest in bail reform was stimulated not only by the success of the Manhattan Bail Project and other individual reform projects, see supra note 58, but also by a series of events in the first half of the 1960s that focused national attention on bail reform. In 1963, the Attorney General's Committee on Poverty and the Administration of Criminal Justice concluded two years of study with a comprehensive report which included a lengthy discussion of the relationship between poverty and inability to post a pretrial bond. Botein, supra note 38, at 328; Ervin, supra note 57, at 431-33. Spurred on by the report's findings, the Department of Justice and the Vera Foundation convened a National Conference on Bail and Criminal Justice in 1964. The approximately 400 conference participants included representatives from virtually every major jurisdiction and from all aspects of the criminal justice system. In panel discussions and workshops, participants identified problems in the existing administration of bail and explored mechanisms to address the problems. THOMAS, supra note 16, at 6; Botein, supra note 38, at 328-31. See generally NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE, PROCEEDINGS AND INTERIM REPORT OF THE NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE (1965). The interest in bail reform stimulated by this conference led to the convening of another national conference in 1965, the Institute on the Operation of Pretrial Release Projects, during which approximately 200 participants who were already involved in bail reform projects exchanged ideas and evaluated existing bail reform efforts. THOMAS, supra note 16, at 6. See generally BAIL AND SUMMONS: 1965, PROCEEDINGS OF THE INSTITUTE ON THE OPERATION OF PRETRIAL RELEASE PROJECTS (1965). Additional attention regarding the need for comprehensive bail reform was raised by the publication of national studies of bail practices in 1964, FREED & WALD, supra note 47; in 1965, GOLDFARB, supra note 38; and in 1966, Lee Silverstein, Bail in the State Courts—A Field Study and Report, 50 MINN. L. REV. 621 (1966).

60. Beginning in 1958, the Senate Judiciary Committee's Subcommittee on Constitutional Rights addressed a variety of issues related to the administration of criminal justice. S. REP. No. 750, 89th Cong., 1st Sess. 5 (1965). In 1961, the subcommittee began an investigation of bail reform. THOMAS, supra note 16, at 161-62; Ervin, supra note 57, at 429-34. Initial Senate bills addressing certain aspects of bail reform were introduced in 1964. As a result of Senate and House hearings, the scope of the initial bills was expanded to encompass an omnibus bail reform measure. S. REP. No. 750, supra, at 5-8; H.R. REP. No. 1541, 89th Cong., 2d Sess. 6-7 (1966); THOMAS, supra note 16, at 162-63; Ervin, supra note 57, at 434-54.


62. See supra note 32 and accompanying text.
shall not needlessly be detained pending their appearance to answer charges . . . when detention serves neither the ends of justice nor the public interest,"63 this legislation not only incorporated the concepts of the Manhattan Bail Project,64 it surpassed them.65 Rather than merely allowing an option of pretrial release without financial conditions, the Bail Reform Act of 1966 required a defendant's pretrial release in noncapital cases66 "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 discretion, that such a release will not reasonably assure the appearance of the person as required."67 Only if such a determination were made could the judicial officer impose additional or alternative conditions of release, specified in priority order of consideration, which the judicial officer deemed necessary to "reasonably assure the appearance of the person for trial."68 In the Act, Congress expanded the factors

63. § 2, 80 Stat. at 214; see S. Rep. No. 750, supra note 60, at 6-8; H.R. Rep. No. 1541, supra note 60, at 8-9 (describing inadequacy and inequity of existing bail system).
64. See supra notes 49-57 and accompanying text.
65. THOMAS, supra note 16, at 163-64; see infra notes 66-72 and accompanying text.
68. In this connection, the Act provided:

When [it is determined that personal recognizance or an unsecured appearance bond will not reasonably assure the accused's appearance,] 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:

(1) place the person in the custody of a designated person or organization agreeing to supervise him;
(2) place restrictions on the travel, association, or place of abode of the person during the period of release;
(3) require the execution of an appearance bond in a specified amount and the deposit in the registry of the court, in cash or other security as directed, of a sum not to exceed 10 per centum of the amount of the bond, such deposit to be returned upon the performance of the conditions of release;
(4) require the execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof; or
(5) impose any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the person return to custody after specified hours.
specified in Federal Rule of Criminal Procedure 46(c),\textsuperscript{69} which the judicial officer was required to consider in "determining which conditions of release will reasonably assure appearance,"\textsuperscript{70} to include additional factors reflecting a defendant's stability and community ties.\textsuperscript{71} Although the Bail Reform Act of 1966 applied only to the federal courts,\textsuperscript{72} the stunning leap forward in bail reform that it achieved

\textsuperscript{69} See supra note 43 and accompanying text.

\textsuperscript{70} The Act stated:

In determining which conditions of release will reasonably assure appearance, the judicial officer shall, on the basis of available information, take into account the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.

\section*{Notes and Footnotes}

\textsuperscript{71} S. REP. No. 750, \textit{supra} note 60, at 9-11. These prioritized conditions of release clearly favored nonfinancial forms of release. H. R. REP. No. 1541, \textit{supra} note 60, at 10.

\textsuperscript{72} In addition to individuals prosecuted in federal court for violations of federal criminal law, the Act's provisions also initially applied to those prosecuted for criminal offenses in the District of Columbia Court of General Sessions. § 3, 80 Stat. at 216 (codified at 18 U.S.C. § 3152 (1970)); S. REP. No. 750, \textit{supra} note 60, at 14-15. During the same legislative session, Congress enacted the District of Columbia Bail Agency Act which created a permanent agency to collect information necessary for judges in the District of Columbia federal and local courts to implement the provisions of the Bail Reform Act of 1966. Pub. L. No. 89-519, 80 Stat. 327 (1966); Ervin, \textit{supra} note 57, at 432 & n.11; see Wanger, \textit{supra} note 2, at 325-26 (noting that Congressional failure to establish pretrial agencies in all federal districts to collect and verify bail-related information prevented full initial implementation of Bail Reform Act).

During the period of congressional consideration of the Bail Reform Act of 1966, the Court prescribed and reported to Congress amendments to Federal Rule of Criminal Procedure 46 which were designed to encourage federal judges to set pretrial release terms so as to reduce or eliminate unnecessary pretrial detention. Although the amendments to Rule 46 were not as broad as the provisions ultimately included in the Act, the amendments did authorize the use of conditional release and percentage bonds in addition to the release mechanisms previously authorized. The amendments also added a new provision (Rule 46(h)) which required the court to maintain supervision over detained defendants "for the purpose of eliminating all unnecessary detention." In this regard, the prosecutor was required to make a biweekly report to the court explaining the nature of the
served as a significant additional catalyst to bail reform efforts throughout the country.\textsuperscript{73}

Substantial progress in bail reform had been achieved by the end of the 1960s.\textsuperscript{74} Gains in bail reform achieved during the 1960s were gen-

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\textsuperscript{73} See infra note 74. The American Bar Association's 1968 promulgation of pretrial release standards also encouraged bail reform efforts. In addition to reiterating and further developing the Bail Reform Act's preference for personal recognizance and other nonmonetary forms of pretrial release, these standards promoted the expanded utilization of police citation in lieu of arrest or continued custody and judicial summons in lieu of arrest warrants. \textit{ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Pretrial Release} (Approved Draft, 1968).

\textsuperscript{74} Two national studies assessed the progress of the bail reform movement during its initial decade. \textit{Thomas, supra} note 16; \textit{Paul B. Wice, Freedom for Sale: A National Study of Pretrial Release} (1974) [hereinafter \textit{Wice, Freedom}]. \textit{See Paul B. Wice, Bail and Its Reform: A National Survey} (1973) [hereinafter \textit{Wice, Bail}] (summarizing data of study). Both Thomas and Wice found that the bail reform's first decade was characterized by mixed results. The number of bail reform projects initiated in this decade had grown to over 100. \textit{Wice, Freedom, supra} at 152. Each researcher found progress in the expanded use of nonfinancial pretrial release conditions. Both, however, identified a variety of institutional problems in the bail reform effort which reduced the maximum potential progress of the effort. \textit{Thomas, supra} note 16, at 249-54; \textit{Wice, Freedom, supra} at 141-45, 151-59; \textit{Wice, Bail, supra} at 67-70.

In his study, Thomas compared samples from 1962 and 1971 of 200 felony and 200 misdemeanor defendants in 20 metropolitan areas to determine the changes in bail administration which had occurred as a result of the bail reform movement. \textit{Thomas, supra} note 16, at 32-36, 265-68. He found that the proportion of felony defendants released before trial increased from less than 50\% in 1962 to over 65\% in 1971. Thomas also reported that the proportion of released misdemeanor defendants increased from 60\% in 1962 to over 70\% in 1971. In both circumstances, the increased use of nonfinancial release conditions explained virtually the entire increase. Thomas found that the speed of pretrial release also increased. Although Thomas found that the nonappearance rate had risen from 6\% in 1962 to approximately 10\% in 1971, he found no significant variation in this rate between those released on financial versus nonfinancial release conditions. \textit{Id.} at 37-49, 65-79, 80-86, 87-109, 251-54.

Accompanying these statistics which indicated an overall increased use of pretrial release, Thomas found strengths and weaknesses associated with increased utilization of various mechanisms of pretrial release, such as conditional release, \textit{id.} at 171-82, deposit bail plans, \textit{id.} at 183-99, police field and stationhouse citations and summons, \textit{id.} at 200-10, and miscellaneous court and pretrial measures to assist in the prompt determination of release conditions, \textit{id.} at 211-24. Moreover, despite the statistics indicating increased use of pretrial release, Thomas found that bail reform projects themselves encountered problems in the latter half of the 1960s ranging from lack of funding and excessive bureaucratization,
erally maintained or extended in the 1970s and 1980s. States continued to expand their acceptance of nonfinancial or limited financial pretrial release conditions. The number of formal pretrial release programs, facilitating the use of these expanded release options, continued to grow. In addition, Congress authorized the establishment to the inability to overcome delays in interviewing, to improve verification procedures, or to reduce unnecessary project exclusions. Thus, the bail reform movement's progress during its first decade in increasing the use of pretrial release occurred despite its inability to overcome its operational difficulties.

Wice reached similar conclusions from his survey of bail practices as of 1968 in 36 cities with bail reform projects and 36 cities without such projects. He also conducted follow-up interviews and research in 1970 and 1971 in 11 of these cities. WICE, FREEDOM, supra at xv-xx, 169-82; WICE, BAIL, supra at ii, 1. Wice determined that the national average for the 72 cities in terms of pretrial release mechanisms was: 21% were released on personal recognizance, 40% were released through bondsmen, and 16% were detained. He found that 6.4% of the recognizance releasees versus 8.2% of the bonded releasees were rearrested. Wice concluded that 2.8% of the recognizance releasees "forfeited" their recognizance compared with 3% of the bonded releasees. WICE, FREEDOM, supra at 186. More than half of the bail reform cities ranked above the national average regarding overall effectiveness (release of relatively large numbers of defendants without adverse effect on forfeiture or rearrest rates) and percentage released on recognizance, and below the national average regarding forfeiture rates, rearrest rates, and percentage using bondsmen or detention. These proportions were reversed in terms of the national averages in the cities without bail reform projects (except for the forfeiture rate which matched the national average). Id. at 142. Despite the demonstrated greater effectiveness of the bail reform cities, Wice identified a variety of institutional problems in the bail reform projects which made them unable to solve the ills still plaguing the nation's pretrial release systems. Id. at 151-59. See WICE, BAIL, supra at 59-70 (summarizing study results); cf. JOHN S. GOLDKAMP, TWO CLASSES OF ACCUSED: A STUDY OF BAIL AND DETENTION IN AMERICAN JUSTICE 77-108 (1979) (comparing results of Thomas and Wice studies with those of previous and contemporary studies).

By 1984, the vast majority of states authorized pretrial release on recognizance or unsecured bond and almost half of the states adopted some version of the federal presumption of release on recognizance or unsecured bond. GOLDKAMP, supra note 33, at 10-11 & nn.36-40, 63-64. By 1984, the majority of states also explicitly authorized some, albeit widely varying, type(s) of conditional pretrial release. The most frequently authorized nonfinancial release conditions included release to the custody of a third party or organization; restrictions on travel, residence, or movement; and restrictions on contact with specified persons. In terms of financial conditions, deposit bail came to be as frequently authorized as, and sometimes replaced, cash and surety bail. Id. at 12-14 & nn.42-51, 63-64. Again, many states adopted the federal model concerning conditional release which emphasized release under the least restrictive or onerous condition(s). Id. at 14 & nn.49-51, 63.

The evolution of pretrial release programs during the 1970s and 1980s can be traced through the results of four national studies of pretrial release programs pertaining to this period: 1) a 1972 survey of 88 programs conducted by researchers for the federal Office of Economic Opportunity (HANK GOLDMAN ET AL., U.S. OFFICE OF ECON. OPPORTUNITY, THE PRE-TRIAL RELEASE PROGRAM: WORKING PAPERS (1973)); 2) a 1975 survey of 110 programs conducted by researchers for the National Center for State Courts (WAYNE H. THOMAS, JR. ET AL., NATIONAL EVALUATION PROGRAM: PHASE 1 REPORT: PRETRIAL

Much progress was made during the 1970s and 1980s in terms of raw numbers and stability of pretrial release programs. Whereas previous research had identified approximately 100 pretrial programs initiated during the 1960s, the NAPSA researchers in 1989 identified approximately 450 formal state and federal pretrial programs, plus over 250 additional agencies providing some pretrial-related services. WICE, FREEDOM, supra note 74, at 152; Segebarth, supra at App. A. These programs were able to survive the phase-out of federal funding in the 1980s, as county governments, and to a lesser extent state governments, became the primary funding source(s) for pretrial programs. PRYOR, supra at 21-23, 77. Indeed, the general "survival rate" of pretrial programs—which had been fairly poor during the 1960s and even the 1970s—had significantly improved by the end of the 1980s. PRYOR, supra at 20 (citing attrition rates of one-third or more regarding pretrial programs included in previous studies); id. at 20-21, 75; Segebarth, supra at 36-37 (indicating more than two-thirds of programs in the 1975 survey had been in existence for five years or less, but this proportion was reduced to less than one-third of the programs in the 1989 survey). Despite their increased number and greater stability during the 1970s and 1980s, pretrial programs continued to be operated in primarily urban areas by small staffs restricted by modest budgets. PRYOR, supra at 15-18, 73-74; THOMAS ET AL., supra at 70-72; Segebarth, supra at 15-19, 24-29.

Most of the operational strengths and weaknesses identified by the previous researchers continued in the pretrial programs of the 1970s and 1980s. Although the specific criteria varied widely, the majority of pretrial programs continued to utilize charge-based or non-charge-based criteria to automatically exclude some defendants from interviews regarding pretrial release. PRYOR, supra at 24-28, 78-79; THOMAS ET AL., supra at 20, 74-75; Segebarth, supra at 44-51. The programs typically considered release criteria reflecting community ties, stability, and prior criminal and appearance history, but they remained divided between utilization of objective (point systems based on the Vera model, supra note 55), subjective, and combination objective-subjective methods to assess these release criteria. PRYOR, supra at 31-33, 80-82; THOMAS ET AL., supra at 22-24, 77; Segebarth, supra at 60-63, 69-81. Most pretrial programs made some type of release recommendation to the court regarding interviewed defendants, but increasingly that recommendation included, in addition to or instead of a recommendation (or non-recommendation) of a defendant's unconditional release on personal recognizance, a recommendation of nonfinancial or financial release conditions or even a recommendation of pretrial detention. PRYOR, supra at 33-40, 82, 84-86; THOMAS ET AL., supra at 24-26, 78; Segebarth, supra at 68, 84-85. During this period, an increasing proportion of programs were granted some type of authority to make their own release decisions prior to certain defendants' initial court appearances. PRYOR, supra at 34, 83; THOMAS ET AL., supra at 81; Segebarth, supra at 66 (reflecting that proportion of such agencies grew from 15% in the 1972 survey to over 40% in the 1989 survey). The programs' primary post-release activities remained
notification regarding court dates, monitoring defendants' reporting and other condition compliance and, to a certain extent, providing counseling services or referrals and assistance in locating defendants who failed to appear in court. **PRYOR, supra** at 44-48, 87-89; **THOMAS ET AL., supra** at 27, 79-80; Segebarth, **supra** at 90-103.

There was similar relative consistency during the 1970s and 1980s with the earlier Wice and Thomas studies, **supra** note 74, regarding certain indicators of pretrial program “effectiveness.” Although differences in sample groups and definitional approaches make comparisons of data difficult, pretrial release rates calculated in national studies during the 1970s and 1980s remained at least as high as those computed by Thomas and Wice earlier. **BRIAN A. REAVES, U.S. DEP'T OF JUST., NATIONAL PRETRIAL REPORTING PROGRAM: PRETRIAL RELEASE OF FELONY DEFENDANTS, 1988, at 1-2 (1991) [hereinafter REAVES, 1988]** (reporting pretrial release of 66% of felony defendants in sample representing approximately 47,000 defendants charged with felonies in the country's 75 most populous counties in February 1988, with 35% released on nonfinancial and 31% released on financial conditions); **MARY A. TOBORG, NATIONAL EVALUATION PROGRAM: PHASE II REPORT: PRETRIAL RELEASE: A NATIONAL EVALUATION OF PRACTICES AND OUTCOMES 5-6 (1981)** (reporting pretrial release of approximately 85% of the approximately 3,500 defendants in an eight-site study using 1977 data, with 61% released on nonfinancial and 24% released on financial conditions). Similarly, at least three-fourths of the programs studied continued to report failure to appear and rearrest rates of 10% or less, with defendants reported released on nonfinancial conditions performing as well as or better than those released on financial conditions. **PRYOR, supra** at 49-52, 90-92; **THOMAS ET AL., supra** at 47-55, 82-83; Segebarth, **supra** at 109-12; cf. **REAVES, 1988, supra** at 5-6; **TOBORG, supra** at 15-16, 20 (Reaves' study, which was limited to felony rearrests, found that at least three-fourths of defendants studied made all court appearances and had no pretrial arrests.). See infra notes 176-91 and accompanying text (describing appearance and rearrest rates in other studies and authors' study).

77. In 1974, Congress authorized the establishment of demonstration pretrial services agencies in 10 judicial districts. **Speedy Trial Act of 1974, Pub. L. No. 93-619, § 201, 88 Stat. 2076, 2086 (1975) (codified at 18 U.S.C. §§ 3152-3156 (1976)); H.R. REP. No. 1508, 93d Cong., 2d Sess. (1974).** These agencies had the responsibilities to collect, verify, and report information regarding the pretrial release of each person charged with an offense, to recommend appropriate release conditions for each person, to supervise persons released into their custody, to provide or arrange the provision of ancillary services for released defendants, and to perform various reporting functions. § 201, 88 Stat. at 2087-88 (codified at 18 U.S.C. § 3154 (1976)); **Wanger, supra note 2, at 326-28; cf. supra note 72 (describing establishment of District of Columbia Bail Agency to implement Bail Reform Act of 1966 in the District's federal and local courts).**

Moreover, even in the absence of formal pretrial release programs, many courts indicated an increased willingness to utilize more of the pretrial options developed during the 1960s. Finally, reflecting the growing permanency of pretrial release, national standards governing its use were adopted.

Pretrial release during the 1970s and 1980s was characterized, however, not only by the maintenance of much of the bail reform progress of the 1960s, but also by a backlash against these reforms. Even as state and federal legislatures continued to adopt measures to expand the opportunity for pretrial release, in response to increased public concern regarding crime, legislatures also adopted measures that effectively restricted pretrial release opportunities. In contrast to much of the bail reform legislation of the 1960s, which made assurance of court appearance the sole criterion for determining pretrial

1988, 63% were released pretrial, with 46% released on nonfinancial conditions; less than 4% of released defendants failed to appear and less than 3% were charged with a new offense while on release; BUREAU OF JUST. STATISTICS, U.S. DEP'T OF JUST., FEDERAL OFFENSES AND OFFENDERS: PRETRIAL RELEASE AND MISCONDUCT 1-3 (1985) (analyzing 1979 data from districts with demonstration pretrial programs, 83% of defendants were released pretrial, and a total of approximately 10% of those released either failed to appear, were rearrested for a new crime, or violated other release conditions); BUREAU OF JUST. STATISTICS, U.S. DEP'T OF JUST., PRETRIAL RELEASE AND DETENTION: THE BAIL REFORM ACT OF 1984, at 1 (1988) (reflecting increase in pretrial detention rates following enactment of 1984 legislation). But see Wanger, supra note 2, at 330-40 (reporting problems in implementation, organization, and funding of federal pretrial programs and indicating evolving role of programs).

78. Research suggested that once judges had become familiar, through initial intervention of pretrial programs or otherwise, with the expanded forms of pretrial release, the judges often utilized a more expansive approach to pretrial release regardless of the presence or absence of a formal pretrial program. THOMAS, supra note 16, at 151-54; THOMAS ET AL., supra note 76, at 28-38; TOBORG, supra note 76, at 43-46.

79. NAPSA, established in 1972, developed performance standards and goals regarding pretrial release, as did the American Bar Association. ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE: PRETRIAL RELEASE (1979); NAPSA, PERFORMANCE STANDARDS AND GOALS FOR PRETRIAL RELEASE AND DIVERSION: RELEASE (1978). Other criminal justice organizations and commissions also developed standards relating to release practices. PRYOR, supra note 76, at 3 n.4 (including the National Advisory Commission on Criminal Justice Standards and Goals (1973), the National Conference of Commissioners on Uniform State Laws (1974), and the National District Attorneys Association (1977)). Most of these standards included a presumption favoring nonfinancial release under the least restrictive conditions, abolition of surety bonds, and establishment of pretrial agencies or offices to provide information to the court relevant to pretrial release decisions and to monitor defendants' compliance with release conditions. ANDY HALL ET AL., PRETRIAL RELEASE PROGRAM OPTIONS 9 (1984).

80. See supra notes 75, 77 and accompanying text.

81. See generally Goldkamp, supra note 33.
release conditions,\textsuperscript{82} growing numbers of legislatures in the 1970s and 1980s codified assurance of community safety as an additional and equal criterion for determining pretrial release conditions.\textsuperscript{83} The change in approach to pretrial release was even more dramatically illustrated by the increased enactment or expansion of preventive detention statutes which authorized the denial of any pretrial release conditions in certain circumstances.\textsuperscript{84}

Just as the federal Bail Reform Act of 1966 (the "1966 Act") symbolized the culmination of the bail reform movement of the 1960s,\textsuperscript{85}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{82} E.g., Goldkamp, \textit{supra} note 74, at 56-58; \textit{supra} notes 67-68, 70 and accompanying text.
\item \textsuperscript{83} It was widely acknowledged that, regardless of legislative authorization, judges generally considered a defendant's "dangerousness" when setting pretrial release conditions and that such consideration often resulted in the imposition of substantial financial conditions which effectively prohibited a defendant's ability to secure pretrial release. E.g., Eskridge, \textit{supra} note 76, at 55-56. Beginning in the late 1960s, and continuing steadily throughout the 1970s and into the 1980s, states increasingly began to codify the judicial practice of consideration of a defendant's dangerousness. Barbara Gottlieb, Public Danger as a Factor in Pretrial Release: A Comparative Analysis of State Laws 18 (1985). At the end of the 1960s, only a handful of states expressly identified a defendant's "dangerousness" as a criterion for pretrial release determinations. By the mid-1980s, over 30 states had codified some form of this criterion. Gottlieb, \textit{supra} at 17-20, 24-25; Goldkamp, \textit{supra} note 33, at 15 & nn.52-57; see Segebarth, \textit{supra} note 76, at 80-82 (indicating that majority of pretrial programs in 1989 NAPSA study considered risk of pretrial crime as well as flight risk).
\item The definitions of the "danger" criterion varied, including: 1) those identifying general community safety or public danger; 2) those limited to danger to specific categories of persons, such as victims, witnesses, or potential jurors; 3) those combining these two categories, such as "danger to any other person or the community"; and 4) those reflecting certain acts-based concepts of danger, such as the specific nature of the current charge, pending charges, and prior convictions. Gottlieb, \textit{supra} at 3-6, 17-20, App. B; Goldkamp, \textit{supra} note 33, at 17-19, 20-23, 27-28, 65-66. Similarly, there was significant variation in the statutory factors enumerated to assess the specified danger criterion; the mechanisms, if any, to assess or predict a defendant's "danger risk"; and the procedural safeguards associated with any of these matters. Goldkamp, \textit{supra} note 74, at 64-65; Gottlieb, \textit{supra} at 7-9, 13-16, 17-20; Goldkamp, \textit{supra} note 33, at 29-38.
\item Traditionally, the denial of bail has been widely authorized for those persons charged with capital offenses. Goldkamp, \textit{supra} note 33, at 6-7 & n.26, 19 & n.75, 57-58; \textit{supra} notes 24-26, 32-33 and accompanying text. The majority of states which enacted legislation codifying consideration of a defendant's dangerousness in determining pretrial release conditions also authorized the denial of pretrial release based on a defendant's dangerousness in certain circumstances. Gottlieb, \textit{supra} note 83, at 9-12, 17-20; Goldkamp, \textit{supra} note 33, at 19-20. The same variation regarding definitional approach and specificity, risk assessment criteria, and procedural safeguards that characterized the states' approaches to conditional release based on a defendant's dangerousness was also present regarding their preventive detention, or bail denial provisions. Gottlieb, \textit{supra} note 83, at 3-6, 9-25, App. B; Goldkamp, \textit{supra} note 33, at 15-20, 24-38.
\item See \textit{supra} notes 60-72 and accompanying text.
\end{enumerate}
\end{footnotesize}
the federal Bail Reform Act of 1984 (the "1984 Act") symbolized the backlash against these reforms during the 1970s and 1980s. Although the 1984 Act retained the presumption in favor of pretrial


Congress also considered enactment of preventive detention legislation long before the 1984 Act. During the hearings on the 1966 Act, the issue of preventive detention was considered. Ervin, supra note 57, at 443-44. Congress ultimately decided, however, not to address the difficult issue of preventive detention in noncapital cases in the 1966 Act, but to reserve the issue for further analysis and study. S. REP. No. 750, supra note 60, at 5; H.R. REP. No. 1541, supra note 60, at 5-6; cf. 1966 Act, § 3, 80 Stat. at 215-16 (codified at 18 U.S.C. § 3148 (1970)) (authorizing preventive detention in capital cases or after conviction by applying the 1966 Act's general release provisions unless the court concludes that "no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community" in which case detention authorized); S. REP. No. 750, supra note 60, at 19; H.R. REP. No. 1541, supra note 60, at 15.

Pushed, in part, by President Nixon's interest in preventive detention, congressional attention returned to the subject in 1969 and 1970 as hearings were held and legislation was considered regarding preventive detention. Due somewhat to hostile committee views regarding preventive detention, no congressional action was taken. THOMAS, supra note 16, at 227-30. Rather than risk an indefinite delay of any preventive detention legislation, its proponents added essentially the same provisions previously considered regarding the federal criminal justice system to the pending legislation which overhauled the District's courts and criminal procedure. Id. at 230-31. Following extremely limited study and debate regarding the inclusion of these provisions in the District's laws, they were enacted as part of the final legislation in 1970. 1970 District Act, § 210, 84 Stat. at 644-46 (codified at 23 D.C. CODE ANN. § 1322 (1989 & Cum. Supp. 1992)). See generally Paul D. Borman, The Selling of Preventive Detention 1970, 65 NW. U. L. REV. 879, 879-84 (1971); Sam J.
release on personal recognizance or an unsecured appearance bond, it conditioned such release not only on its reasonable assurance of the defendant's appearance, but also on a determination that such release would not "endanger the safety of any other person or the community." Similarly, conditional pretrial release was authorized subject


There were three categories of defendants subject to the District's preventive detention provisions: 1) a defendant charged with a "dangerous crime" (including robbery, certain burglaries, rape, and felony drug sales) regarding whom no release conditions would reasonably assure community safety; 2) a defendant charged with a "crime of violence" (including murder, rape, kidnapping, robbery, burglary, and certain assaults) who either had a prior conviction for a crime of violence within the previous 10 years or was on release, probation, or parole for another crime of violence at the time of the instant offense; and 3) a defendant charged with any offense who threatened or injured any prospective witness or juror in order to obstruct justice (including attempts regarding this conduct).

§ 210, 84 Stat. at 644, 650. Preventive detention was authorized only after an expedited hearing (accompanied by specified procedural safeguards) at which the court found: 1) by clear and convincing evidence, the defendant fell into one of the statutory categories; 2) no release conditions would "reasonably assure the safety of any other person or the community"; and 3) regarding the first two categories, there was a "substantial probability" that the defendant committed the offense charged. To assure expedited trial of detained defendants, authorization for preventive detention generally expired after 60 days unless trial had commenced or had been delayed at the defendant's request. § 210, 84 Stat. at 644-46. See id. at 646-48 (codified at 23 D.C. CODE ANN. §§ 1322(e), 1323, 1325 (1989 & Cum. Supp. 1992)) (authorizing preventive detention of addicts charged with crimes of violence, defendants charged with capital crimes or after conviction, and temporary detention (with a five-day maximum) of arrested defendants then on probation or parole who may "flee or pose a danger to any other person or the community if released"); id. at 643 (codified at 23 D.C. CODE ANN. § 1321 (1989)) (attempting to reduce or eliminate sub rosa use of high financial release conditions to achieve pretrial detention by prohibiting the imposition of financial conditions to "assure the safety of any other person or the community"). See generally Bruce D. Beaudin, Bail in the District—What it Was; Is; and Will Be, 20 AM. U. L. REV. 432 (1970-71); Borman, supra at 879; Frederick D. Hess, Pretrial Detention and the 1970 District of Columbia Crime Act—The Next Step in Bail Reform, 37 BROOK. L. REV. 277 (1971); Meyer, supra note 30, at 1139; Hermine H. Meyer, Constitutionality of Pretrial Detention (part 2), 60 GEO. L.J. 1381 (1972); John N. Mitchell, Bail Reform and the Constitutionality of Pretrial Detention, 55 VA. L. REV. 1223 (1969); Carl S. Rauh & Earl J. Silbert, Criminal Law and Procedure—D.C. Court Reform and Criminal Procedure Act of 1970, 20 AM. U. L. REV. 252, 287-302 (1970-71); Laurence H. Tribe, An Ounce of Detention: Preventive Justice in the World of John Mitchell, 56 VA. L. REV. 371 (1970); Arthur R. Angel et al., Project, Preventive Detention: An Empirical Analysis, 6 HARV. C.R.-C.L. L. REV. 289 (1971) (all analyzing specific provisions of 1970 District Act or contemporaneous general analysis of preventive detention).

Although Congressional attention turned away from bail-related issues for several years after enactment of the 1970 District Act, Congress returned more significant attention to modification of the 1966 Act in the early 1980s. E.g., S. REP. No. 147, 98th Cong., 1st Sess. (1983); S. REP. No. 317, 97th Cong., 1st Sess. (1982).

88. § 203, 98 Stat. at 1977 (codified at 18 U.S.C. § 3142(b) (1988)). In the Senate Committee Report accompanying the legislation, the Committee indicated that its
to the "least restrictive" conditions that the court determined would reasonably "assure the appearance of the person as required and the safety of any other person and the community." Additionally, the 1984 Act expanded the statutory factors to be considered in determining the appropriateness of pretrial release conditions in a way that significantly increased the "danger-related" factors. Finally, the 1984

proposed changes in federal law reflected an attempt to "address the alarming problem of crimes committed by persons on release and [to] give the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released." See generally H.R. Rep. No. 121, 98th Cong., 2d Sess. 9-25 (1984) (describing background of the 1984 Act).

89. § 203, 98 Stat. at 1977 (codified at 18 U.S.C. § 3142(c) (1988)) (emphasis added); S. Rep. No. 225, supra note 88, at 13. Release on personal recognizance or unsecured appearance bond and conditional release were subject to the automatic condition that a released defendant not commit a federal, state, or local crime during the period of release. § 203, 98 Stat. at 1977 (codified at 18 U.S.C. § 3142(b), (c)(1)(A) (1988)). With regard to conditional pretrial release, Congress significantly expanded the list of specific release conditions in the 1984 Act to include the conditions that the defendant remain in third party custody; maintain or seek employment; maintain or begin an educational program; abide by restrictions on association, residence, or travel; avoid contact with victims or witnesses; report to a designated agency on a regular basis; comply with a curfew; refrain from possessing a firearm or dangerous weapon; refrain from excessive use of alcohol or illegal use of drugs; undergo medical, psychiatric, or substance abuse treatment; execute a cash or property bond in an amount reasonably necessary to assure appearance and post any designated percentage of the cash or indicia of ownership of the property; execute a surety bond in an amount reasonably necessary to assure appearance; return to custody for specified hours; or any other condition reasonably necessary to assure appearance or the "safety of any other person and the community." § 203, 98 Stat. at 1977-78 (codified at 18 U.S.C. § 3142(c)(1) (1988)); S. Rep. No. 225, supra note 88, at 13-17; cf. supra note 68 and accompanying text (describing 1966 Act provisions); supra note 87 (describing 1970 District Act provisions). In an attempt to eliminate the sub rosa use of financial conditions to achieve pretrial detention, the 1984 Act prohibited the imposition of a financial condition "that results in the [defendant's] pretrial detention." § 203, 98 Stat. at 1978 (codified at 18 U.S.C. § 3142(c)(2) (1988)); S. Rep. No. 225, supra note 88, at 16; cf. supra note 87 (describing somewhat similar restrictions on use of financial conditions in the 1970 District Act).

90. In this connection, the 1984 Act provided:

(g) FACTORS TO BE CONSIDERED.—The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning—

(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug;
(2) the weight of the evidence against the person;
(3) the history and characteristics of the person, including—
(A) his character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or
Act authorized preventive detention for several categories of defendants and created a rebuttable presumption in favor of preventive detention with regard to certain categories of defendants.

1. Under the 1984 Act, the court was required to hold an expedited hearing to determine whether conditional release would reasonably assure the defendant's appearance and the "safety of any other person and the community" in a case:

   (1) upon motion of the attorney for the Government, that involves—
      (A) a crime of violence [offenses involving use of physical force against another's person or property];
      (B) an offense for which the maximum sentence is life imprisonment or death;
      (C) an offense for which a maximum term of imprisonment of ten years or more is prescribed in [the drug-related statutes]; or
      (D) any felony committed after the person had been convicted of two or more prior offenses described in subparagraphs (A) through (C) [or their state or local equivalents]; or
   (2) Upon motion of the attorney for the Government or upon the judicial officer's own motion, that involves—
      (A) a serious risk that the person will flee;
      (B) a serious risk that the person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.

2. If the defendant was accused of an offense described in one of the first four categories listed supra note 91 ((1)(A)-(D)), a rebuttable presumption in favor of preventive detention arose if the defendant had previously been convicted of such an offense which offense was committed while on pretrial release and not more than five years had elapsed since the later date of the conviction or release from imprisonment for it. A second rebuttable presumption in favor of preventive detention was established upon the determination of
The passage of the 1984 Act renewed the debate over the wisdom and constitutionality of preventive detention. With the Court's rejection of constitutional challenges to the 1984 Act's provisions which permitted preventive detention based on a defendant's future dangerousness, the constitutional debate subsid-


94. E.g., Alschuler, supra note 93, at 510; Berg, supra note 93, at 685; Goldkamp, supra note 33, at 44-46; Kevin F. Arthur, Comment, Preventive Detention: Liberty in the Balance, 46 Md. L. Rev. 378 (1987); see commentary cited supra note 87 (including discussion of constitutionality of 1970 District Act provisions); cf. supra note 30 (conflicting commentary regarding existence of constitutional right to bail).

95. In United States v. Salerno, 481 U.S. 739 (1987), the Court rejected Fifth Amendment Due Process and Eighth Amendment "Excessive Bail" Clause challenges to the facial constitutionality of the 1984 Act's provisions permitting preventive detention based on a defendant's future dangerousness. Id. at 755. The Court's decision in Salerno represented a watershed event in the long-standing debate over the existence of a constitutional right to bail. See commentary cited supra notes 30, 87, 94 and infra note 96. For years following the Court's conflicting statements regarding a constitutional right to bail in Stack v. Boyle, 342 U.S. 1 (1951), and Carlson v. Landon, 342 U.S. 524 (1952), supra notes 44-46, the Court had not directly addressed the issue. Cf. Greenwood v. United States, 350 U.S. 366 (1956) (upholding commitment of a dangerous defendant who was incompetent to stand trial).

The Court began, however, to develop the analytical framework to address the issue almost a decade before its Salerno decision in a case raising due process challenges to various conditions of confinement of pretrial detainees. Bell v. Wolfish, 441 U.S. 520 (1979). In evaluating the claimed due process violations in Wolfish, the Court identified the "proper inquiry" to be whether the conditions constituted "punishment" of the detainees which due process prohibited or whether they constituted a regulatory restraint which due process permitted. Id. at 535-37. Referring to the test adopted in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), involving forfeiture-of-citizenship provisions of the
immigration laws, to determine whether a governmental act is punitive in nature, the Court concluded that "if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.'" *Wolfish*, 441 U.S. at 537-39. Under the test established, the Court found that none of the challenged conditions of confinement violated the pretrial detainees' due process rights. *Id.* at 541, 560-62. Significantly, the Court was not asked to address the constitutionality of the initial decision to detain the pretrial detainees because—as the Court repeatedly stated—neither they nor the courts below had questioned the Government's authority to detain individuals pretrial to "ensure their presence at trial." *Id.* at 523, 531, 533-34, 534 n.15, 536, 537, 539-40. See *id.* at 563-79 (Marshall, J., dissenting) (criticizing analysis utilized by Court majority and its application in the instant case); *id.* at 579-99 (Stevens, J., joined by Brennan, J., dissenting) (also criticizing analysis utilized by Court majority and its application in the instant case).

Only months before the enactment of the 1984 Act, the Court addressed due process challenges to a state statute authorizing pretrial detention of an accused juvenile delinquent based on a finding that there was a "serious risk" that the juvenile would commit "pretrial crime." *Schall v. Martin*, 467 U.S. 253, 255 (1984). In this connection, the Court considered an issue not raised by *Wolfish*, i.e., whether there was a legitimate governmental objective other than assurance of a detainee's appearance which could constitutionally justify pretrial detention. *Martin*, 467 U.S. at 263-64; see also *Wolfish*, 441 U.S. at 534 n.15. The Court concluded that, "in the context of the juvenile system, the combined interest in protecting both the community and the juvenile himself from the consequences of future criminal conduct [was] sufficient to justify [pretrial] detention" and that such pretrial detention served a "legitimate regulatory purpose" compatible with due process requirements in juvenile proceedings. *Martin*, 467 U.S. at 263-68. The Court further found that the nature of the statutory preventive detention was regulatory rather than punitive. *Id.* at 269-74. Finally, the Court concluded that the procedural aspects of the statute satisfied due process and that the standard for detention, which required a prediction of future criminal conduct, was not fatally vague. *Id.* at 274-81. See *id.* at 281-309 (Marshall, J., joined by Brennan and Stevens, JJ., dissenting) (finding governmental objectives supporting pretrial detention insufficient to justify abridgement of juveniles' constitutional rights, that challenged pretrial detention constituted punishment in violation of due process, and that procedural safeguards were constitutionally inadequate).

Thus, by the time of the Court's decision in *Salerno*, the framework for its due process analysis had been established in *Wolfish* and the result regarding due process challenges to preventive detention based on dangerousness had been foreshadowed by the result in *Martin*. In *Salerno*, the defendants raised facial challenges—under the Due Process Clause of the Fifth Amendment and the Excessive Bail Clause of the Eighth Amendment—to the 1984 Act's provisions permitting pretrial detention based on future dangerousness. *Salerno*, 481 U.S. at 746. Using its then well-established punitive/regulatory standard to evaluate the substantive due process challenge, the Court concluded that the challenged preventive detention was regulatory and not punitive in that "preventing danger to the community is a legitimate regulatory goal" and the "incidents" of such pretrial detention (including a prompt detention hearing) were not "excessive" in relation to this regulatory goal. *Id.* at 746-48. In this connection, the Court noted that the challenged statutory provisions were narrowly drawn to encompass only those defendants presenting the greatest risk to "society's interest in crime prevention." *Id.* at 750. As the Court stated: "When the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community, we believe that, consistent with the Due Process Clause, a court may disable the arrestee from executing that threat." *Id.* at 751. In similarly rejecting the facial challenge to the 1984 Act's
procedures, the Court concluded that the procedures by which a court "evaluates the likelihood of future dangerousness are specifically designed to further the accuracy of that determination." Id. To this end, the Court specifically noted the detainee's right to counsel, to testify, to present information, and to cross-examine witnesses; the requirements that the court consider statutory factors in determining the appropriateness of detention and make written findings; and the availability of immediate appellate review. Id. at 751-52.

In responding to the defendants' claim that, as interpreted in Stack v. Boyle, 342 U.S. 1, 5 (1951), the Eighth Amendment's excessive bail provision granted them a "right to bail calculated solely upon considerations of flight," the Court noted that this provision "of course, says nothing about whether bail shall be available at all" and that the defendants themselves had conceded that the "right to bail they have discovered in the Eighth Amendment is not absolute." Salerno, 481 U.S. at 752-53 (citing refusal of bail in capital cases and when a defendant poses a threat to the judicial process by intimidating witnesses). After reviewing the Court's flight-based excessive bail ruling in Stack and its danger-based detention ruling in Carlson, the Court narrowly addressed the defendant's facial Eighth Amendment claim:

[We need not decide today whether the Excessive Bail Clause speaks at all to Congress' power to define the classes of criminal arrestees who shall be admitted to bail. For even if we were to conclude that the Eighth Amendment imposes some substantive limitations on the National Legislature's powers in this area, we would still hold that the Bail Reform Act is valid. Nothing in the text of the Bail Clause limits permissible Government considerations solely to questions of flight. The only arguable substantive limitation of the Bail Clause is that the Government's proposed conditions of release or detention not be "excessive" in light of the perceived evil. Of course, to determine whether the Government's response is excessive, we must compare that response against the interest the Government seeks to protect by means of that response. Thus, when the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more. Stack v. Boyle, supra. We believe that when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, as it has here, the Eighth Amendment does not require release on bail.

Id. at 753-55. But cf. Wolfish, 441 U.S. at 523 (suggesting here and several places in dicta that pretrial detention to assure appearance was legitimate).

The Court consequently concluded:

In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception. We hold that the provisions for pretrial detention in the Bail Reform Act of 1984 fall within that carefully limited exception. The Act authorizes the detention prior to trial of arrestees charged with serious felonies who are found after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel. The numerous procedural safeguards detailed above must attend this adversary hearing. We are unwilling to say that this congressional determination, based as it is upon that primary concern of every government—a concern for the safety and indeed the lives of its citizens—on its face violates either the Due Process Clause of the Fifth Amendment or the Excessive Bail Clause of the Eighth Amendment. Salerno, 481 U.S. at 755. See id. at 755-67 (Marshall, J., joined by Brennan, J., dissenting) (criticizing the majority's "cramped concept" of substantive due process and the "equally
ed.96 The debate over the wisdom and effectiveness of these and the other danger-based innovations of the 1970s and 1980s continued.97 Nevertheless, as a result of all of the bail-related innovations of the previous thirty years, judges determining a defendant’s pretrial release or detention in the 1990s have a virtual "cafeteria" of options.98 Financial release conditions, which often were the only form of pre-trial release prior to the 1960s, are now firmly accompanied by a host of nonfinancial release alternatives.99 On the other hand, as a result of

unsatisfactory" logic of the majority's Eighth Amendment analysis and combining the two aspects of the constitutional challenge to conclude that governmental interest in community safety cannot be constitutionally furthered through denial of bail in a criminal case; id. at 767-69 (Stevens, J., dissenting) (stating that Justice Marshall's dissent demonstrated that a criminal charge cannot, consistent with presumption of innocence and excessive bail provisions, be used to create a class whose members alone are eligible for detention based on future dangerousness); cf. United States v. Montalvo-Murillo, 495 U.S. 711 (1990) (finding failure to comply with 1984 Act's requirements regarding time of initial detention hearing does not require release of defendant who should otherwise be detained); United States v. Edwards, 430 A.2d 1321 (D.C. 1981) (en banc) (rejecting constitutional challenges to 1970 District Act provisions preventively detaining a defendant charged with a "dangerous crime" when conditional release would not reasonably assure community safety and finding no constitutional right to bail, concluding pretrial detention was regulatory and not penal in nature, and finding no claimed substantive or procedural due process violation or unconstitutional vagueness or overbreadth), cert. denied, 455 U.S. 1022 (1982); S. REP. No. 147, supra note 87, at 2-22 (reviewing history of bail and federal court treatment of it to conclude preventive detention constitutional).


98. See supra notes 48-92 and accompanying text.

99. See supra notes 36-79 and accompanying text; cf. BRIAN A. REAVES, U.S. DEP'T OF JUST., NATIONAL PRETRIAL REPORTING PROGRAM: PRETRIAL RELEASE OF FELONY DEFENDANTS, 1990, at 2-3 (1992) [hereinafter REAVES, 1990] (reporting pretrial release of 65% of felony defendants in sample representing approximately 57,000 defendants charged with felonies in the country's 75 most populous counties in May 1990, with 39% released on nonfinancial conditions (including 26% on personal recognizance, 8% on conditional release, and 5% on unsecured bond) and 25% released on financial conditions (including 15% on surety bond, 7% on full cash bond, 3% on deposit bond, and 1% on other financial forms of release). But cf. id. at 2 (indicating that 53% of studied felony defendants were subject to financial release conditions, including the 25% released pretrial on such conditions and 28% detained due to inability to meet conditions); REAVES, 1988,
the pretrial release backlash of the 1970s and 1980s, judges have additional mechanisms to absolutely assure a defendant's detention prior to trial.\textsuperscript{100} Ironically, during most of this period, there has been little change in the national pretrial detention rate.\textsuperscript{101} With overall jail population figures soaring,\textsuperscript{102} however, jail overcrowding\textsuperscript{103} is causing many jurisdictions, such as Texas, to take a "second look" at the adequacy and utilization of their pretrial release options.\textsuperscript{104} This perhaps indicates that the 1990s could experience a pragmatic, rather than philosophical renewal of the bail reform efforts of the 1960s.\textsuperscript{105}

III. THE EVOLUTION OF PRETRIAL RELEASE IN TEXAS

The evolution of pretrial release in Texas has followed many of the general national trends. As a Republic, Texas adopted a constitutional right to bail in noncapital cases and included this right in its

\textsuperscript{100} \textit{See supra} note 76, at 2 (reporting 62\% of studied felony defendants subject to financial release conditions, including 31\% released pretrial on such conditions and 31\% detained due to inability to meet conditions).

\textsuperscript{101} \textit{See supra} notes 81-92 and accompanying text; \textit{cf.} \textit{Reaves, 1990, supra} note 99, at 2 (reporting 6\% of studied felony defendants held pretrial without bail); \textit{Reaves, 1988, supra} note 76, at 2 (reporting 4\% of studied felony defendants held pretrial without bail).


\textsuperscript{103} Jail inmate populations had grown steadily from less than 35,000 in 1890 to over 160,000 in 1970. Between 1982 and 1991, however, the jail population more than doubled from approximately 210,000 to almost 425,000 inmates. \textit{Cahalan, supra} note 101, at 80; \textit{Jankowski, Jail Inmates 1991, supra} note 101, at 2.

\textsuperscript{104} In 1978, jails were operating with only 65\% of their rated capacity occupied. That percentage rose to over 100\% in 1988 and remained over 100\% through 1991. The overcrowding situation was even worse in jurisdictions with average daily inmate populations over 100 inmates. \textit{Jankowski, Jail Inmates 1991, supra} note 101, at 3. \textit{See generally Randall Guynes}, \textit{U.S. \textsc{Dep't of Just.}, Nation's Jail Managers Assess Their Problems} (1988) (ranking jail overcrowding as the most serious problem).

\textsuperscript{105} \textit{See supra} note 63 and accompanying text.
initial state constitution.\textsuperscript{106} Texas also included a parallel statutory right to bail in noncapital cases in its initial criminal procedural code.\textsuperscript{107} The Texas "bail system," established in this 1856 procedural code, remained largely intact for over 100 years.\textsuperscript{108} Bail was defined as the "security given by a person accused of an offence, that he will appear and answer before the proper court the accusation brought against him."\textsuperscript{109} Two forms of such "security" to assure a defendant's appearance were authorized: (1) a "recognizance," an unsigned "undertaking" in a fixed sum by a defendant and his sureties, and (2) a "bail bond," an "undertaking" in a fixed sum signed by a defendant and his sureties.\textsuperscript{110} Statutory factors were also prescribed for the court

\textsuperscript{106} The "Declaration of Rights" of the 1836 Constitution of the Republic of Texas provided, in part: "All persons shall be bailable by sufficient security, unless for capital crimes, when the proof is evident or presumption strong." Constitution of the Republic of Texas, Declaration of Rights § 10 (1836), reprinted in TEX. CONST. app. 523, 536 (West 1955). This basic provision, as well as the Declaration of Rights' prohibition of excessive bail and protection of the writ of habeas corpus, were also included in the Texas Constitutions' Bills of Rights following statehood. TEX. CONST. art. I, §§ 11-13; TEX. CONST. of 1869, art. I, §§ 9-11; TEX. CONST. of 1866, art. I, §§ 9-11; TEX. CONST. of 1861, art. I, §§ 9-11; TEX. CONST. of 1845, art. I, §§ 9-11; Constitution of the Republic of Texas, Declaration of Rights §§ 10-11 (1836), reprinted in TEX. CONST. app. 523, 536 (West 1955). See supra notes 24-33 and accompanying text (describing federal and state approaches to constitutional right to bail). But see infra note 121 and accompanying text (describing more recent constitutional restrictions on Texas right to bail).

\textsuperscript{107} The right to bail in noncapital cases, as well as the prohibition of excessive bail and the protection of the writ of habeas corpus, were included in the state's first Code of Criminal Procedure. TEX. CODE CRIM. PROC. arts. 2474-2476 (1856). See TEX. CODE CRIM. PROC. ANN. arts. 1.07-.09 (West 1977) (containing current provisions in substantially same form).

\textsuperscript{108} See, e.g., TEX. CODE CRIM. PROC. arts. 267-281 (1925); TEX. CODE CRIM. PROC. arts. 282-296 (1879); TEX. CODE CRIM. PROC. arts. 2725-2740 (1856). But see TEX. CODE CRIM. PROC. ANN. arts. 17.01-.15 (West 1977 & Supp. 1993).

\textsuperscript{109} TEX. CODE CRIM. PROC. art. 2725 (1856).

\textsuperscript{110} TEX. CODE CRIM. PROC. art. 2726 (1856). In this connection, the procedural code provided:

\textbf{ART. 2727.} A recognizance is an undertaking entered into before the supreme or district court, by the defendant to a criminal action and his sureties, by which they bind themselves respectively, in a sum fixed by the court, that the defendant will appear for trial before the proper court upon the accusation preferred against him. The undertaking of the parties, in such case, is not signed, but made a matter of record in the court where the same is entered into.

\textbf{ART. 2728.} A bail bond is an undertaking entered into by the defendant and his sureties for the same purpose as a recognizance; it is written out, and signed by the defendant and his sureties.

TEX. CODE CRIM. PROC. arts. 2727-2728 (1856); see Gay v. State, 20 Tex. 504, 507-08 (1857) (describing a recognizance as an "acknowledgment of a debt upon record" and distinguishing between a recognizance and a bail bond); Harold D. Teague, Comment, The
to consider in determining the "amount of bail" required.\textsuperscript{111} By the 1960s, however, the problems identified elsewhere with this type of surety-based bail system were also evident in Texas.\textsuperscript{112}

Texas responded to the bail reform movement of the 1960s\textsuperscript{113} by overhauling its pretrial release system in 1965.\textsuperscript{114} The Texas Legisla-

\textit{Administration of Bail and Pretrial Freedom in Texas,} 43 \textsc{Tex. L. Rev.} 356, 360-61 (1965) (regarding the nature of recognizance release).

\begin{itemize}
  \item[111.] The Texas Code of Criminal Procedure provided:
  \begin{quote}
  The amount of bail to be required in any case, is to be regulated by the court, judge, magistrate, or officer taking the bail; they are to be governed in the exercise of this discretion by the constitution of this state, and by the following rules:-1. The bail shall be sufficiently high to give reasonable assurance that the undertaking will be complied with. 2. The power to require bail is not to be used in such manner as to make it an instrument of oppression. 3. The nature of the offence and the circumstances under which it was committed, are to be considered. 4. The pecuniary circumstances of the accused are to be regarded, and proof may be taken upon this point.
  \end{quote}

  \footnotesize{TEX. CODE CRIM. PROC. art. 2740 (1856).}

\begin{itemize}
  \item[112.] After a study of bail procedures in Texas' six largest cities, the author concluded:
  \begin{quote}
  The administration of bail and pretrial freedom in Texas is obviously unsatisfactory. As the foregoing descriptions indicate, individuals determining and setting bail amounts misunderstand and misapply the criteria for pretrial release. The factors which should be given the most weight in determining the amount of bail—the character of the individual accused, his financial ability, and his roots in the community (economic and emotional attachments)—are given little or no consideration. Bail is generally set according to predetermined schedules based on the offense, and thus bears only a fortuitous relation to its sole lawful purpose. In addition, setting bail in this manner patently discriminates against the poor, making the freedom of the accused between arrest and trial depend upon his financial position.

  The crucial decision whether an accused is to be detained in jail is almost entirely in the hands of professional bondsmen. Despite the substantial likelihood that an individual accused will appear at trial, he must contribute a fee of at least ten percent of the amount of bail to a professional bondsman before he may be released from jail. Though an accused is in fact innocent and may be "no billed" or acquitted, he must pay the bondsman's fee, which cannot be recovered. This unnecessary economic loss to the innocent accused and the accused who has no intention of fleeing should be avoided when possible.
  \end{quote}

  \footnotesize{Teague, supra note 110, at 371-72. See id. at 373-79 (recommending reforms of Texas bail system, including factfinding procedures regarding a defendant's individual circumstances prior to bail determination; authorization for nonfinancial pretrial release and refundable cash bail and deposit bail; and establishment of sanctions for a defendant's failure to appear); cf. supra note 47 and accompanying text (describing general concerns regarding bail system).}

  \item[113.] \footnotesize{See supra notes 48-74 and accompanying text.}

  \end{itemize}
ture eliminated the "recognizance" form of release and added an unsecured "personal bond" release option. The Legislature retained the "bail bond" option, but authorized a defendant to satisfy his "bail bond" requirement by posting a refundable cash bond as an alternative to the use of a surety. The statutory factors for determining the amount of bail remained the same. Later in the 1960s, the Legislature authorized the employment of pretrial services personnel, in the state's largest counties, to facilitate the proper use of the newly created personal bond. To avoid abuse of the expanded


115. "Bail" was now defined as the "security given by the accused that he will appear and answer before the proper court the accusation brought against him, and includes a bail bond or a personal bond." Act of May 27, 1965, 59th Leg., R.S., ch. 722, § 1, 1965 Tex. Gen. Laws 317, 374 (codified at TEX. CODE CRIM. PROC. ANN. art. 17.01 (West 1977)). In this connection, the Legislature authorized the court in its discretion to release a defendant on "his personal bond without sureties or other security." Id. (codified at TEX. CODE CRIM. PROC. ANN. art. 17.03 (West 1977)). The Legislature required that the personal bond include a sworn, signed oath by the defendant that he would appear in court as directed or pay to the court a specified sum plus all reasonable expenses associated with any arrest for his failure to appear. Id. (codified at TEX. CODE CRIM. PROC. ANN. art. 17.04 (West 1977 & Supp. 1993)).

116. The definition of "bail bond" was revised in this regard:

A "bail bond" is a written undertaking entered into by the defendant and his sureties for the appearance of the principal therein before some court or magistrate to answer a criminal accusation; provided, however, that the defendant upon execution of such bail bond may deposit with the custodian of funds of the court in which the prosecution is pending current money of the United States in the amount of the bond in lieu of having sureties sign the same. Any cash funds deposited under this Article shall be receipted for by the officer receiving the same and shall be refunded to the defendant if and when the defendant complies with the conditions of his bond, and upon order of the court.

Id. (codified at TEX. CODE CRIM. PROC. ANN. art. 17.02 (West 1977)); see Ex parte Deaton, 582 S.W.2d 151, 153 (Tex. Crim. App. 1979) (panel opinion) (indicating posting of cash bond in lieu of use of surety is at defendant's option when court sets bail); cf. TEX. CODE CRIM. PROC. ANN. art. 23.05 (West 1989) (authorizing court to require defendant to post cash bond to secure release following bail forfeiture).


118. As part of legislation to provide counsel and investigative services to indigent defendants in counties with populations over 1,200,000, the Legislature authorized commissioners courts of such counties to contract with established bar associations or
release mechanisms, the Legislature also established criminal penalties for a defendant's failure to appear. 119

As elsewhere, 120 the post-1960s decades have brought both restriction and expansion of pretrial release opportunities in Texas. During this period, Texas amended its constitution to increase the categories of defendants who could be denied bail prior to trial. 121 Although the


120. See supra notes 75-95 and accompanying text.

121. Texas actually began limiting the constitutional right to bail in noncapital cases before the bail reform backlash of the 1970s. In 1956, a constitutional amendment was adopted providing that a defendant charged with a noncapital felony who had two prior felony convictions (regarding separate offenses) "may, after a hearing, and upon evidence substantially showing the guilt of the accused, be denied bail pending trial." TEX. CONST. art. I, § 11a (1956). The order denying bail was automatically set aside if the defendant was not given a trial within 60 days of his incarceration on the charge, unless the defendant had requested and obtained a continuance of the trial. The order denying bail was directly appealable to the Texas Court of Criminal Appeals, the state's highest appellate court for criminal cases. Id. See Ex parte Miles, 474 S.W.2d 224, 225 (Tex. Crim. App. 1971) (rejecting equal protection challenge to amendment).

In 1977, this provision was amended to add two more categories of defendants who could potentially be denied bail prior to trial: 1) a defendant charged with a noncapital felony committed while on bail for a prior indicted felony, and 2) a defendant charged with a noncapital felony involving the use of a deadly weapon who had a prior felony conviction. The "substantial" evidence of guilt requirement and the 60-day time limit were retained. In addition, the authority to order the denial of bail was restricted to district judges (who have jurisdiction regarding felony cases), whose authorization to issue such orders was limited to seven calendar days subsequent to a defendant's incarceration. Appeal from such orders was to be given preferential treatment. TEX. CONST. art. I, § 11a (1956, amended 1977). See Marvin Collins, The Right to Bail in Texas, 18 HOUS. L. REV. 495, 496-505 (1981); Daniel J. Smith, Comment, The Constitutionality of Preventive Detention in Texas, 40 BAYLOR L. REV. 467, 479-86 (1988); Mark Stevens, Comment, Preventive Detention and Equal Protection of the Law in Texas, 10 ST. MARY'S L.J. 133 (1978); cf. TEX. CODE CRIM. PROC. ANN. art. 17.291 (West Supp. 1993) (authorizing temporary detention no longer than 24 hours after a defendant has posted bond in certain family violence cases); TEX. CODE CRIM. PROC. ANN. art. 44.04 (West Supp. 1993) (requiring detention pending appeal of certain felony convictions and authorizing denial of bail pending appeal of other felony convictions if there is "good cause to believe that the defendant would not appear when his conviction became final or is likely to commit another offense while on bail").
Legislature maintained the appearance-based definition of “bail,”\(^\text{122}\) it did add victim safety to the list of statutory considerations in determining release conditions.\(^\text{123}\) The Legislature also authorized additional restrictive conditions that could be imposed on defendants released before trial.\(^\text{124}\) On the other hand, the Legislature expanded its authorization of “personal bond offices.”\(^\text{125}\) It also required a defendant’s release from pretrial detention—either on personal bond

\(^\text{122}\) TEX. CODE CRIM. PROC. ANN. art. 17.01 (West 1977); see supra note 115 (quoting statute); see Jones v. State, 803 S.W.2d 712, 717 (Tex. Crim. App. 1991) (indicating a defendant’s general pretrial danger to society not included among limitations on Texas constitutional right to bail).

\(^\text{123}\) TEX. CODE CRIM. PROC. ANN. art. 17.15 (West Supp. 1993) (stating that the “future safety of a victim of the alleged offense may be considered”). Although not explicitly included as statutory factors, the Texas Court of Criminal Appeals has recognized some additional appropriate considerations in the court’s determination of release conditions. Ex parte Parish, 598 S.W.2d 872, 873 (Tex. Crim. App. 1980) (panel opinion) (considering a defendant’s “strong and longstanding” community ties in reviewing bail); Ex parte Plumb, 595 S.W.2d 544, 546 (Tex. Crim. App. 1980) (panel opinion) (considering potential punishment on conviction in reviewing bail); Ex parte Vasquez, 558 S.W.2d 477, 479 (Tex. Crim. App. 1977) (considering community ties and absence of evidence of prior criminal record or failure to appear in reviewing bail); see Collins, supra note 121, at 512-13; cf. Smith v. State, 829 S.W.2d 885, 887-88 (Tex. Ct. App. 1992) (indicating that statutory factors plus all of the following additional factors should be considered in setting pretrial bail: the defendant’s work record, family and community ties, length of residency, prior criminal record, conformity with conditions of any previous bond, existence of any outstanding bonds, and aggravating circumstances regarding the instant offense).

\(^\text{124}\) These conditions include “stay away” orders regarding alleged child victims; home curfew or confinement; electronic monitoring; drug and alcohol testing, education, and counseling; and AIDS and HIV education and counseling in prostitution cases. TEX. CODE CRIM. PROC. ANN. arts. 17.03, 17.41, 17.43-.45 (West Supp. 1993) (alcohol testing and drug and alcohol education and treatment pertain to personal bond only). See Smith, 829 S.W.2d at 887 (stating that trial courts have discretion to set conditions on bail, as long as conditions bear rational relationship to purpose of bail, i.e., to secure the defendant’s court appearance).

\(^\text{125}\) In 1973, the Legislature enacted legislation authorizing any county, upon approval of the commissioners court, to establish a “personal bond office to gather and review information about an accused that may have a bearing on whether he will comply with the conditions of a personal bond and report its findings to the court before which the case is pending.” Act of May 24, 1973, 63d Leg., R.S., ch. 352, 1973 Tex. Gen. Laws 788, 788-89, repealed by Act of Feb. 22, 1989, 71st Leg., R.S., ch. 2, § 5.01(b), 1989 Tex. Gen. Laws 123, 127; Act of May 18, 1989, 71st Leg., R.S., ch. 1080, § 10(b), 1989 Tex. Gen. Laws 4354, 4358 (current version at TEX. CODE CRIM. PROC. ANN. art. 17.42 (West Supp. 1993)). The Legislature authorized collection of a fee from defendants released on personal bond on the office’s recommendation, which was to be used to help defray personal bond office expenses. Id.

Prior to the enactment of this legislation, only Austin, Dallas, and Houston had formal pretrial release programs. THOMAS, supra note 16, at 24; Robert L. Bogomolny & William Gaus, An Evaluation of the Dallas Pretrial Release Project, 26 SW. L.J. 510, 511 (1972). By 1976, a total of 12 pretrial release projects were operational. RONALD J. PRY, INSTITUTE
or through bail reduction—in cases in which the state was not ready for trial within prescribed time periods. Most recently, the Legislature authorized citation release and personal recognizance release regarding the most minor category of criminal offenses.

Thus, as Texas pretrial release enters the 1990s, the availability of release on personal bonds and refundable cash bonds has created the opportunity for a significant departure from the previous surety-based system. However, some forms of nonfinancial or limited financial pretrial release have not yet been authorized in Texas. Others,

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126. The Legislature required that a defendant detained prior to trial "be released either on personal bond or by reducing the amount of bail required, if the state is not ready for trial of the criminal action for which he is being detained within" time periods ranging from 90 days from the commencement of detention in a felony case to 5 days regarding a misdemeanor punishable by fine only. **Tex. Code Crim. Proc. Ann.** art. 17.151 § 1 (West Supp. 1993); see **Tex. Code Crim. Proc. Ann.** art. 17.151 §§ 2-3 (West Supp. 1993) (reciting exceptions and qualifications to provision); *Jones*, 803 S.W.2d at 712 (rejecting challenge to statute).


128. In 1989, the Legislature authorized a magistrate to release "without bond" a defendant charged with a misdemeanor punishable by fine only, who has no prior convictions for offenses other than fineable misdemeanors, once such defendant has been identified "with certainty" and ordered to appear for arraignment. **Tex. Code Crim. Proc. Ann.** art. 15.17(b) (West Supp. 1993).

129. Compare supra notes 115-16 and accompanying text with supra note 110 and accompanying text. Because citation and personal recognizance release are currently restricted to such a small class of criminal cases, their impact will be somewhat limited. See supra notes 127-28.

Although maintaining the surety bond system, the Legislature has attempted to license and regulate those individuals and entities serving as bail bondsmen. **Tex. Rev. Civ. Stat. Ann.** art. 2372p-3 (West Supp. 1993).

130. Although Texas has long had a form of "stationhouse release" through which a defendant can obtain release from a law enforcement agency prior to court appearance, such release has been limited to the taking of financial bail amounts previously set by the court and, in certain circumstances, the setting of such financial bail amounts—and does not include nonfinancial release options. **Tex. Code Crim. Proc. Ann.** arts. 17.05, 17.20-.22 (West 1977) & arts. 23.11-.14 (West 1989). Texas currently does not specifically authorize third party custody nonfinancial release or property bond or deposit cash bail financial release. **Tex. Code Crim. Proc. Ann.** art. 43.02 (West 1979) (requiring all recognizances and bail bonds to be collected in money only); Bogomolny & Gaus, supra note 125, at 513; Collins, supra note 121, at 516.
although authorized, are still not widely utilized.\textsuperscript{131} As elsewhere,\textsuperscript{132} the chronic problem of jail overcrowding\textsuperscript{133} will likely cause the Legislature to continue to authorize additional pretrial release options and perhaps will prompt local jurisdictions to utilize such options more comprehensively.

IV. ONE JURISDICTION’S EXPERIMENT WITH PRETRIAL RELEASE IN THE 1990S

Although Texas' largest metropolitan areas had some type of formal program to facilitate the utilization of pretrial release options by 1990,\textsuperscript{134} only a few of the more than 200 other Texas counties had such programs.\textsuperscript{135} Prompted by problems of overcrowding in its county jail, Denton County ("Denton"), a primarily urban jurisdic-

\textsuperscript{131} Perhaps reflecting the still limited use of personal bonds, there were only 14 responding Texas pretrial programs in the 1989 national survey conducted by NAPSA researchers. Segebarth, supra note 76 (including formal and informal pretrial programs, but not including federal programs in Texas); cf. supra note 125 (indicating 12 operational programs in 1976).

\textsuperscript{132} See supra note 103 and accompanying text.

\textsuperscript{133} As a result of Texas prison population caps imposed following Ruiz v. Estelle, 503 F. Supp. 1265 (S.D. Tex. 1980), aff'd in part, rev'd in part, 679 F.2d 1115 (5th Cir. 1982), cert. denied, 460 U.S. 1042 (1983), Texas jail population figures rose steadily throughout the 1980s, with increasing numbers of jails with occupancies exceeding their capacities. Rolando V. Del Carmen et al., Texas Jails: Law and Practice 43-45 (1990) (reporting results of 1989 survey of Texas county jails). Cf. Tex. Gov't Code Ann. §§ 499.101-126 (West Supp. 1993) (describing current prison capacity requirements and procedures to reduce jail backlogs). Jail overcrowding remains a major problem in Texas, with jails operating in the aggregate at 110% of capacity as of January 1, 1993, and several jails operating at over 150% of capacity. Tex. Comm'n on Jail Standards, Jail Population Report: Jan. 1, 1993, at 21-30 (1993). Pretrial detainees represented 36% of the total jail inmate population as of January 1, 1993. Id. at 10, 20, 30 (including convicted and non-convicted inmates, as well as detained parole violators, federal inmates, and those detained for miscellaneous other reasons). Compare id. (restricting analysis to convicted and non-convicted inmates only, pretrial detainees represented 45% of this population) with Del Carmen et al., supra at 47 (pretrial detainees represented 47% of this restricted portion of jail population in 1989 survey).

\textsuperscript{134} Programs responding to the 1989 survey included those located in Houston, Dallas, Fort Worth, San Antonio, Austin, and El Paso. Segebarth, supra note 76; see supra note 131 (regarding extent of Texas pretrial programs).

\textsuperscript{135} Although there are 254 Texas counties, there were only 14 jurisdictions which responded to the 1989 NAPSA survey of pretrial programs. See William E. Maxwell et al., Texas Politics Today 365 (4th ed. 1987) (citing number of counties); Segebarth, supra note 76 (describing NAPSA survey results); supra note 131 (regarding extent of Texas pretrial programs).

\textsuperscript{136} In the month before the pretrial program began, the Denton County jail operated at 122% of its capacity. Approximately 60% of the jail inmates were pretrial detainees. Tex. Comm'n on Jail Standards, Jail Population Report: Jan. 2, 1990, at 1 (1990); see Jim Fredricks, Jail Lawsuit Forces Action from County, Denton Record-Chronicle,
tion,137 initiated a pretrial services program in early 1990.138 The program was designed to facilitate greater use of pretrial release on personal bonds by providing the court with verified release-related information concerning certain defendants and by maintaining post-release supervision over defendants released on personal bond.139

In this connection, a "target" population of defendants eligible for the pretrial services program was identified, excluding those charged with the most serious offenses and those with certain other non-

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138. The establishment of a pretrial services program was supported by Denton’s county commissioners, judges, and sheriff (whose staff operated the county jail). The program was initially funded by the commissioners court and a grant from CJAD. The program was placed under the authority of the county’s judges and its supervisor reported to the Director of the county’s Community Supervision and Corrections Department (the redesignated adult probation department). See 1990-1991 Grant Application, supra note 136; 1990 Grant Application, supra note 136; cf. Pryor, supra note 76, at 21-23, 77; Segebarth, supra note 76, at 19-23 (describing increased role of county and state governments as funding sources for pretrial programs).

139. By facilitating supervised release on personal bond, the program attempted to reduce the jail population and its attendant costs through the release of appropriate defendants, while assuring their compliance with court release conditions through staff supervision. See 1990-1991 Grant Application, supra note 136; 1990 Grant Application, supra note 136; supra note 115 (describing personal bonds); infra notes 140-47 and accompanying text (describing Denton program).
The pretrial services staff interviewed defendants eligible for the program within forty-eight hours after their initial bonds had been set. Within forty-eight hours after

140. Absent a specific judicial request for a defendant’s consideration, defendants charged with the following offenses were not eligible for the program: capital murder, murder, deadly assault on various criminal justice personnel, aggravated assault, aggravated sexual assault, aggravated robbery, robbery, arson, the most serious felony drug violations, and other first degree felonies (the most serious noncapital felony classification). Absent judicial request, defendants having the following non-charge characteristics were also ineligible for the program: those who did not reside in a county contiguous to Denton, those arrested on fugitive-type bonds or warrants, those held on warrants or charges from other jurisdictions, those remanded without bond, and those held pending competency matters. All other defendants were eligible for consideration for the program. The program would also consider any defendant entitled to bail upon a judge’s specific request. 1990-1991 Grant Application, supra note 136; 1990 Grant Application, supra note 136; cf. ESKRIDGE, supra note 76, at 42-45; PRYOR, supra note 76, at 22-28, 78-79; THOMAS ET AL., supra note 76, at 20, 74-75; Segebarth, supra note 76, at 44-51 (describing similar automatic exclusions utilized to varying degrees by programs studied). But cf. PRYOR & SMITH, supra note 76, at 10-11 (concluding that risk of nonappearance or serious pretrial crime does not necessarily increase with seriousness of original charge); WICE, FREEDOM, supra note 74, at 72-73, 79-80, 130-32 (concluding that no significant relationship exists between the seriousness of the criminal charge and pretrial misconduct and indicating that programs studied with the most offense exclusions generally had the lowest release rates and highest forfeiture rates).

141. The pretrial program’s initial staff consisted of one full-time supervisor/office, a full-time clerical staff member, and a part-time interviewer. 1990 Grant Application, supra note 136; cf. PRYOR, supra note 76, at 16-18, 74; THOMAS ET AL., supra note 76, at 72; Segebarth, supra note 76, at 24-29 (reflecting typically small staffs of pretrial programs studied).

142. The program made a determination to conduct its defendant interviews after a defendant’s initial release conditions had been set. 1990-1991 Grant Application, supra note 136; 1990 Grant Application, supra note 136. But cf. PRYOR, supra note 76, at 28-30, 80; THOMAS ET AL., supra note 76, at 18-19, 76; Segebarth, supra note 76, at 52-56 (indicating that the majority of programs studied conducted most or all of interviews before or at defendant’s initial court appearance). This determination effectively restricted the program’s services to those who could not otherwise secure pretrial release under the initial release conditions established. See PRY, supra note 125, at 8, 26-27; PRYOR, supra note 76, at 29-30; THOMAS, supra note 16, at 133-37; THOMAS ET AL., supra note 76, at 18-19; WICE, FREEDOM, supra note 74, at 125-28 (discussing practical and political reasons for interviewing defendants after initial court appearance or bond setting).

To facilitate the program interview process, jail personnel identified (during the jail “book-in” process) those defendants who met the established eligibility criteria for program consideration, distributed interview questionnaires to them, and prepared criminal record histories regarding those defendants interested in an interview for program participation. The interview questionnaire sought identifying information regarding the defendant; current and previous residential and employment information; current and previous criminal record information; educational, military, and income information; and family and reference information; as well as agreement for alcohol or drug evaluation, testing, and counseling, if ordered. 1990-1991 Grant Application, supra note 136; 1990 Grant Application, supra note 136; cf. HALL ET AL., supra note 79, at 44-45, 67-68; Segebarth, supra note 76, at 59-64 (describing similar types of information sought by programs studied.
each interview, the pretrial staff conducted an investigation to verify
the information gathered about the defendant. The staff then
utilized a "point system," primarily based on residential, family,
and employment ties, and criminal history, to determine whether it
would seek court consideration of a defendant's release on per-
sonal bond under program supervision. For those defendants so

in background investigations regarding release). During the interview with a defendant
interested in the program, pretrial staff clarified and confirmed the information included on
the questionnaire. 1990-1991 Grant Application, supra note 136; 1990 Grant Application,
supra note 136.

143. 1990-1991 Grant Application, supra note 136; 1990 Grant Application, supra note
136; cf. HALL ET AL., supra note 79, at 45-46, 67-68; THOMAS, supra note 16, at 137-39;
THOMAS ET AL., supra note 76, at 20-22, 77; WICE, FREEDOM, supra note 74, at 132-33;
Segebarth, supra note 76, at 64-65 (indicating that majority of programs studied attempted
verification of background information and discussing advantages and disadvantages of same).

144. The general categories of the Denton point system—residential, family, and
employment ties, criminal history, and a limited miscellaneous factor category—followed
the Vera project format, although the specific point allocation and criteria differed
somewhat. 1990-1991 Grant Application, supra note 136; 1990 Grant Application, supra
note 136; see THOMAS, supra note 16, at 21-22; supra note 55 (describing Vera system). In
the Denton system, a defendant could receive up to a maximum of three points in each of
the residential, family, employment, and criminal history categories (e.g., the maximum
points were awarded if a defendant had a current address in the area for six months or was
a Denton resident for five years, lived with his family, had maintained his current job for
six months, and had no criminal history). An additional point could be gained through the
miscellaneous category for factors such as old age or poor health. Negative points could be
assessed for poor employment or criminal history records. For defendants receiving at
least 5 of the 13 possible points, pretrial staff completed personal bond forms for court
consideration of such defendants' release. Defendants receiving less than five points could
be considered for supervised release on personal bond accompanied by electronic
monitoring. 1990-1991 Grant Application, supra note 136; 1990 Grant Application, supra
note 136; cf. PRYOR, supra note 76, at 31-33, 80-81; THOMAS ET AL., supra note 76, at 22-
23, 77; Segebarth, supra note 76, at 72-80 (indicating growing majority of programs studied
used an objective or objective combined with a subjective measure to assess defendants for
pretrial release and used similar general assessment categories as Denton). See generally
ESKRIDGE, supra note 76, at 138-43, 148-51 (synthesizing previous studies to conclude
some correlation between failure to appear and prior criminal record and prior failure to
appear, but not community ties or socioeconomic variables, and inverse correlation with
current charge); GOLDKAMP, supra note 74, at 92-100 (reviewing prior studies to conclude
few, if any, consistently reliable predictors of pretrial crime or flight); HALL ET AL., supra
note 79, at 46-53 (discussing strengths and weaknesses of objective point systems);
MICHAEL P. KIRBY, PRETRIAL SERVICES RESOURCE CENTER, THE EFFECTIVENESS
OF THE POINT SCALE (1977) (recommending use of point scale based on individual
jurisdiction characteristics); PRYOR & SMITH, supra note 76, at 15-16 (recommending use
of objective criteria in release decisions, but noting limited ability to reliably predict pretrial
misconduct); THOMAS, supra note 16, at 143-50 (discussing strengths and weaknesses of
objective point systems); WICE, BAIL, supra note 74, at 65-67 (indicating community ties
and past appearance record are most reliable predictors of nonappearance, but no
consistently reliable predictor of pretrial crime); WICE, FREEDOM, supra note 74, at 73, 78-
released, \footnote{145} post-release supervision included program notification of court dates, defendant reporting requirements, defendant drug testing (if ordered), and monitoring of defendant participation in any required counseling or other ancillary social service program. \footnote{146} Failure to adhere to release and supervision conditions could result in revocation...
of a defendant's personal bond.\textsuperscript{147}

Because the Denton program represented the "second generation" of bail reform efforts in Texas, i.e., those newer programs attempting to expand the use of pretrial release outside of the state's largest metropolitan areas,\textsuperscript{148} the authors undertook a study of the program's first year of operation.\textsuperscript{149} The study focused on those adult defendants who had initially been identified, based on the established pretrial program criteria, as eligible for participation in the pretrial program and whose criminal cases were completed during the program's initial year.\textsuperscript{150} The final study group consisted of 210 defendants (the "total study group"): 56 pretrial program participants ("PTPs") and 154 nonparticipants ("NPs"). NPs included those defendants who either chose not to participate or were rejected from the program by the pretrial staff or court following an eligibility interview and information verification.\textsuperscript{151} Although the study compared several factors regard-

\textsuperscript{147} 1990-1991 Grant Application, \textit{supra} note 136; 1990 Grant Application, \textit{supra} note 136 (including new arrests); \textit{cf.} HALL ET AL., \textit{supra} note 79, at 81-83; PRYOR, \textit{supra} note 76, at 47-48, 89; THOMAS ET AL., \textit{supra} note 76, at 80; Segebarth, \textit{supra} note 76, at 100-02 (describing various actions taken by programs studied upon violation of release or supervision conditions).

\textsuperscript{148} \textit{See supra} notes 134-35 and accompanying text.

\textsuperscript{149} The Denton program conducted its first defendant interview on February 2, 1990. 1990-1991 Grant Application, \textit{supra} note 136. Primary data collection for this study occurred in January-May 1991. Data were collected concerning defendant demographic characteristics, education, employment, court processing time, appearance performance, Texas arrest history, current charge, conviction and sentencing outcomes, and pretrial arrests in Texas. Data sources included pretrial program files, court files, detention records, and Texas criminal records files regarding defendants in the study group.

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\textsuperscript{150} The initial study group included those defendants who had been identified by jail personnel as eligible for a pretrial program interview. \textit{See supra} notes 140, 142. However, because the primary focus of the study concerned pretrial performance and disposition measures, only defendants whose criminal cases had progressed through the sentencing stage were included in the final study group.

\textsuperscript{151} The 56 PTPs included those defendants who successfully completed the pretrial program (41 defendants) and those who entered the program, but failed to remain in it throughout the pendency of their cases for various reasons (15 defendants). The 154 NPs included those who secured pretrial release through release mechanisms other than the pretrial program (60 defendants, the "released NPs") and those who remained incarcerated throughout their criminal cases due to inability to meet release conditions or because they were being held for other reasons (94 defendants, the "detained NPs").
ing these groups, its primary purpose was to compare the pretrial performance, i.e., failures to appear and pretrial arrests, of the PTPs and the released NPs (the 60 NPs who secured their pretrial release through means other than the pretrial program) and the court dispositions of the PTPs and NPs. The study tested the hypotheses that the PTPs would have as good pretrial performance as the released NPs, and better court dispositions than the NPs.

The PTPs and NPs were fairly similar in terms of age, gender, and racial and ethnic background, i.e., they were predominantly twenty-five or younger, male, and non-minority. Approximately ninety percent of the PTPs and NPs completed high school or its equivalent or less, including approximately one-half of the total study group who completed school through the tenth grade or less.

Data concerning defendants' ages, gender, racial and ethnic backgrounds, education, and employment are primarily based on defendant self-reporting in program interview questionnaires (as verified). Reported percentages are rounded up to the next whole number if they include .006-.009 and rounded down to the previous whole number if they include .001-.004. Total reported percentages in any area may not equal 100% due to rounding. In addition, reported percentages may not reflect all 210 defendants in the study due to missing or incomplete data regarding certain defendants in certain categories.

The total study group was 89.5% male, with 89% of the PTPs being male and 90% of the NPs male. With regard to the released NPs, however, only 82% were male. On the other hand, 95% of the detained NPs were male.

Regarding the total study group, 64% were Anglo, 23% were African-American, 12% were Hispanic, and 1% were of other racial or ethnic backgrounds. The PTPs had slightly higher shares of Anglos (67%) and African-Americans (25.5%) and a lower share of Hispanics (7%). Overall, the NPs had slightly lower shares of Anglos (62%) and African-Americans (23%) and a larger portion of Hispanics (14%). With regard to released NPs, however, 68% were Anglo, 27% were African-American, 3% were Hispanic, and 2% were of other backgrounds. Detained NPs were 58.5% Anglo, 20% African-American, 20% Hispanic, and 1% of other backgrounds.

Regarding the total study group, 92% had completed the twelfth grade (or its equivalent) or less, with 94% of the PTPs at this level and 91% of the NPs (including 87.5% of the released NPs and 93% of the detained NPs at this level). The average educational background level for the defendants in the total study group was between tenth and eleventh grade completion.

There was some variation in the total study group regarding those defendants who had completed school through the seventh grade or less (2% of the PTPs and released NPs

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152. See infra notes 156-200 and accompanying text; cf. infra note 205 (describing certain measures of PTP supervision compliance).
153. See infra notes 176-91 and accompanying text; supra note 151 (distinguishing between the released and detained NPs).
154. See infra notes 192-200 and accompanying text.
155. See infra notes 184-85, 191, 200 and accompanying text.
156. Regarding the total study group, 63% were 25 or under. A larger portion of the PTPs were in this age range (70%) and a slightly smaller share of the NPs were in this range (61%, with little variation between the released and detained NPs). The average age of the total group was approximately 25, with a PTP average age of 23.5 and NP average age of 25.5.
157. The total study group was 89.5% male, with 89% of the PTPs being male and 90% of the NPs male. With regard to the released NPs, however, only 82% were male. On the other hand, 95% of the detained NPs were male.
158. Regarding the total study group, 64% were Anglo, 23% were African-American, 12% were Hispanic, and 1% were of other racial or ethnic backgrounds. The PTPs had slightly higher shares of Anglos (67%) and African-Americans (25.5%) and a lower share of Hispanics (7%). Overall, the NPs had slightly lower shares of Anglos (62%) and African-Americans (23%) and a larger portion of Hispanics (14%). With regard to released NPs, however, 68% were Anglo, 27% were African-American, 3% were Hispanic, and 2% were of other backgrounds. Detained NPs were 58.5% Anglo, 20% African-American, 20% Hispanic, and 1% of other backgrounds.
159. Regarding the total study group, 92% had completed the twelfth grade (or its equivalent) or less, with 94% of the PTPs at this level and 91% of the NPs (including 87.5% of the released NPs and 93% of the detained NPs at this level). The average educational background level for the defendants in the total study group was between tenth and eleventh grade completion.
160. There was some variation in the total study group regarding those defendants who had completed school through the seventh grade or less (2% of the PTPs and released NPs.
Further, approximately one-third of the defendants studied were unemployed at the time of their arrests. Of the remaining defendants who were employed at arrest, almost all were employed in unskilled or lower level skilled work.

Regarding their prior Texas criminal arrest records, the PTPs and 9% of the detained NPs. However, between 50%-52% of the members of every category of PTPs and NPs had completed the tenth grade or less.

161. Regarding the total study group, 34% were unemployed at the time of arrest, with 34.5% of the PTPs unemployed and 33% of the NPs unemployed (including 37.5% of the released NPs and 31% of the detained NPs). Moreover, approximately two-thirds of the total study group (66.5% overall, with percentages ranging between 64%-67% for the various subgroups) experienced at least three months of unemployment during the year prior to arrest.

162. With regard to occupational type, 26.5% of the total study group were employed as laborers at the time of arrest. Although there was virtually no difference in the portion of laborer PTPs (27%) and NPs (26%), only 17% of the released NPs were laborers and 32% of the detained NPs were laborers. Regarding the total study group, 18% were employed in skills and crafts-type work at the time of arrest. Again, there was little difference between the portion of the PTP and NP populations involved in this type of work (18% and 17.5%, respectively), but there was greater variation between the released NP and detained NP populations (21% and 15%, respectively). Finally, 15.5% of the total study group were employed in service-type work at the time of arrest. Once again, the PTP and NP service-worker proportions were similar (14.5% and 16%, respectively), with greater variations between the released and detained NP populations (21% and 13%, respectively).

Thus, over 90% of the total study group (and every subgroup) were either unemployed at the time of arrest, see supra note 161, or employed in laborer, crafts, skills, or service work.

In terms of the occupational level of the defendants employed at the time of arrest, 25% of the total study group were engaged in unskilled work (including 20% of the PTPs, 23% of the released NPs, and 31% of the detained NPs). Another 21.5% of the total study group were employed in semi-skilled work (including 29% of the PTPs, 17% of the released NPs, and 19% of the detained NPs). Skilled manual work accounted for 13% of the total study group (including 11% of the PTPs, 19% of the released NPs, and 11.5% of the detained NPs). Thus, over 90% of the total study group (and every subgroup) were either unemployed at the time of arrest, see supra note 161, or employed in unskilled, semi-skilled, or skilled manual level work. See generally Delbert C. Miller, Handbook of Research Design and Social Measurement 351-59 (5th ed. 1991) (describing occupational classifications).

163. Although defendants in the study group "self-reported" their prior criminal records on the program interview questionnaire, data regarding prior criminal history, as well as pretrial arrests, infra notes 188-90, reported in this study are based on information contained in the criminal history records maintained by the Texas Department of Public Safety. Because not all dispositions are reflected in these records, criminal record information included in this study is based on arrest and not conviction. Moreover, because the records reflect criminal matters initiated in Texas, the study data include only Texas arrests.
had somewhat better prior Texas felony\textsuperscript{164} and misdemeanor\textsuperscript{165} arrest records than the total NP group. However, the prior Texas arrest record of the total study group was relatively limited, with over eighty percent of all the defendants having zero or one prior Texas felony arrest\textsuperscript{166} and almost two-thirds having zero or one prior Texas misdemeanor arrest.\textsuperscript{167} Property offenses\textsuperscript{168} constituted the most frequent category of prior Texas felony and misdemeanor arrests for the total study group.\textsuperscript{169} Similarly, property offenses were the most frequent

\textsuperscript{164} Regarding the PTPs, 85\% had zero or one prior Texas felony arrest, compared with 79\% of the NPs (including 82.5\% of the released NPs and 77\% of the detained NPs). However, a larger portion of the released NPs (74\%) had no prior Texas felony arrests than the PTPs (63\%).

\textsuperscript{165} Of the PTPs, 68.5\% had zero or one prior Texas misdemeanor arrest, compared with 63\% of the NPs (including 61\% of the released NPs and 64\% of the detained NPs). A larger portion of the PTPs (54\%) also had no prior Texas misdemeanor arrests than the NPs (38\%, with not much variation in the NP subgroups).

\textsuperscript{166} Regarding the total study group, 62\% had no prior Texas felony arrests and 19\% had one prior Texas felony arrest. The average number of prior Texas felony arrests for all categories of defendants was less than one.

\textsuperscript{167} Regarding the total study group, 43\% had no prior Texas misdemeanor arrests and 22\% had one prior Texas misdemeanor arrest. The average number of prior Texas misdemeanor arrests for all defendant categories was approximately two or less.

Aggregating the prior Texas felony and misdemeanor arrest data, 31\% of the total study group had no prior Texas arrests (including 37\% of the PTPs and 29\% of the NPs, with little variation between the NP subgroups); 35\% of the total study group had one or two prior Texas arrests (including 31.5\% of the PTPs and 36\% of the NPs, with little variation in the NP subgroups); and 34\% of the total study group had three or more prior Texas arrests (including 31.5\% of the PTPs and 35\% of the NPs, with a slightly higher percentage for the detained NPs than the released NPs).

\textsuperscript{168} Defendants' prior arrests, current charges, and pretrial arrests were categorized as violent (assault, robbery, sexual assault, murder, and any aggravated form of these offenses), weapons (possession only), property (burglary, theft, fraud, criminal mischief (property destruction), and vehicle-tampering), drug (all drug-related offenses), public order (gambling, prostitution, driving while intoxicated, public intoxication, disorderly conduct, and liquor law violations), and "other" offenses (driving while license suspended and other miscellaneous offenses). Because this study was restricted to those defendants initially identified as eligible for the pretrial program, defendants initially charged with some of the above-listed offenses theoretically would not have been eligible for the program, absent judicial request for consideration, and thus would not be included in the study group. \textit{See supra} note 140 (describing types of automatic exclusions from program eligibility).

\textsuperscript{169} Over 90\% of the total study group (and almost every subcategory) had no prior Texas felony arrests in every offense category except property offenses. \textit{See supra} note 168 (describing offense categories). Only 71\% of the total study group had no prior Texas felony arrests regarding property offenses (including 68.5\% of the PTPs, 77\% of the released NPs, and 69\% of the detained NPs).

Although generally the percentages of the total study group with no prior Texas misdemeanor arrests were lower than those regarding felonies, the percentage was again lowest regarding the property offense category: 73\% of the total study group compared with violent and weapons offenses (over 90\%), "other" offenses (85\%), drug offenses
category of the total study group's current arrest charge, with approximately sixty percent of the total study group arrested for these types of offenses.\textsuperscript{170} Regarding the current offense level,\textsuperscript{171} however, a significantly higher portion of the PTPs were arrested for felonies than the NPs.\textsuperscript{172}

In sum, the PTPs and NPs were relatively similar in personal characteristics and prior Texas arrest records, but the PTPs had significantly more serious arrest charges than the NPs.\textsuperscript{173} Despite the (82%), and public order offenses (76%). Regarding prior Texas misdemeanor property offense arrests, however, this lower percentage is primarily the result of a significantly lower percentage of detained NPs who had no prior Texas misdemeanor property offense arrests (62%) compared with the PTPs (81.5%) and released NPs (82.5%).

170. Based on their most serious "book-in" charge, 60.5% of the total study group were arrested for property offenses, including 62.5% of the PTPs and 60% of the NPs (representing 50% of the released NPs and 66% of the detained NPs). A somewhat higher portion of the PTPs (16%) were arrested for drug offenses than the NPs (8%, including 13% of the released NPs and 4% of the detained NPs). A somewhat lower portion of the PTPs (9%) were arrested for public order offenses than the NPs (16%, including 17% of the released NPs and 15% of the detained NPs). There was also some variation in the remaining offense categories, with the released NPs having the most "other" and weapons offense charges (15% and 3%, respectively) and detained NPs having the most violent offense charges (6%). See supra note 168 (describing offense categories and noting that defendants charged with some of offenses would have been automatically ineligible for the pretrial program and thus not included in this study).

171. Arrest offenses were categorized according to the felony and misdemeanor classifications prescribed in TEX. PENAL CODE ANN. §§ 12.21-.23, 12.31-.34 (West 1974 & Supp. 1993). Three felony classifications were used (first, second, and third degree felonies, with first degree felonies being the most serious). Three misdemeanor classifications were also used (Class A, B, and C misdemeanors, with Class A being the most serious).

172. Of the total study group, 54% were arrested for a felony offense and 46.5% were arrested for a misdemeanor offense. However, 71% of the PTPs were arrested for a felony compared with 47% of the NPs (including 37% of the released NPs and 54% of the detained NPs). Moreover, 25.5% of the PTPs were arrested for first degree felonies (the most serious category) compared with 19% of the NPs (including 15% of the released NPs and 21% of the detained NPs). The largest arrest classification category for the PTPs was the third degree felony category (29% of the PTPs), but it was the Class B misdemeanor category for the NPs (43.5% of the NPs, including 53% of the released NPs and 37% of the detained NPs).

173. See supra notes 156-72 and accompanying text. Although it is obvious that the existence of more serious arrest charges did not systematically preclude participation of eligible defendants in the pretrial program, almost three-fourths of the presumptively eligible defendants (154 of the 210-defendant total study group) either chose not to participate in the program (51), or were rejected by the program (87) or the court (16) after interview and information verification. The impact of nonparticipation in the program was dramatic. As previously indicated, based on court and detention records, only 60 of the 154 NPs obtained pretrial release. All were released by posting the bail bond set by the court (63% were released by posting a surety bond of less than $2,500, 5% were released by posting a cash bond of less than $2,500, and 32% were released by posting a surety bond of $2,500 or more). See supra note 116 and accompanying text (indicating that defendants
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theoretically higher risk posed by the more serious charges against the PTPs, their pretrial performance in terms of court appearance and pretrial arrests was as good as that of the released NPs.

The court appearance performance of both the PTPs and released NPs was excellent. The PTPs' appearance record, however, was

can post bail bond through surety or cash bond). None was released on an unsupervised personal bond.

Although 31% of the detained NPs were jailed pretrial for various “no bond” reasons (e.g., pending warrants or “holds”), 69% were detained pretrial simply due to inability to post the bail bond set by the court. Moreover, 38% of these detained NPs were unable to post a bond of less than $2,500 compared with 31% who could not post a bond of $2,500 or more. In short, 65 defendants (31%) of the 210-defendant group were detained pretrial simply due to inability to meet financial release conditions.

Thus, although the pretrial program provided release opportunities for 27% of the total study group (56 defendants), approximately 60% of the total group (the 60 released NPs and 65 detained NPs who were unable to meet the financial conditions set) remained subject to traditional financial release conditions which more than half of them were unable to satisfy prior to trial. See supra notes 38-40, 47 and accompanying text (describing problems identified in financial system of pretrial release prior to bail reform efforts of the 1960s); supra notes 159-62 and accompanying text (describing limited educational and employment backgrounds of study group); infra notes 193-200 and accompanying text (comparing length of time between arrest and sentencing and dispositions and sentences of the various subgroups). Cf. supra notes 74, 76, 99 (reporting generally higher release rates in national studies conducted in late 1960s-1990s than the 55% release rate of the total study group (representing the 56 PTPs and 60 released NPs)). But cf. supra note 99 (reporting similarly high levels in the late 1980s-1990s of use of financial release conditions and detention due to inability to satisfy such release conditions).

174. See, e.g., ESKRIDGE, supra note 76, at 140-43, 148-50 (reviewing varying results of studies regarding relationship, if any, between nature of current charge and court appearance); PRYOR & SMITH, supra note 76, at 10-11 (reviewing varying results of studies regarding relationship, if any, between nature of current charge and court appearance and pretrial crime).

175. See infra notes 176-91 and accompanying text.

176. Court appearance performance data were obtained from the defendants' court files regarding their appearances at pretrial hearings (status hearings), plea or trial proceedings, and sentencing proceedings. A court appearance was considered “made” if the defendant appeared in person or through his attorney. A court appearance was considered “not made” if there was no such appearance, regardless of the issuance of a bench warrant or the length of time before the defendant subsequently appeared in court. See MICHAEL P. KIRBY, PRETRIAL SERVICES RESOURCE CENTER, FAILURE TO APPEAR: WHAT DOES IT MEAN? HOW CAN IT BE MEASURED? 9-18 (1979); PRYOR, supra note 76, at 49-50; THOMAS, supra note 16, at 87-88, 92-93; WICE, FREEDOM, supra note 74, at 65-67 (reflecting analysis difficulties associated with varying measures utilized by pretrial programs and studies regarding court appearance (e.g., those based on any missed appearance versus those distinguishing between technical or accidental and willful nonappearances); nonappearance calculation (e.g., those based on percentages of defendants missing court appearances versus those based on percentages of court appearances missed); and standards of completeness of data sources).

177. See infra notes 178-83 and accompanying text. Research has generally confirmed that most released defendants make all of their court appearances. See, e.g., PRYOR &
almost perfect. Using a performance measure based on the percentage of defendants who made all of their court appearances (i.e., a "defendant-based" measure), ninety-eight percent of the PTPs made all of their court appearances. Using a performance measure based on the percentage of appearances made by PTPs (i.e., an "appearance-based" measure), the PTPs made 99.6% of their court appearances. These percentages resulted from one missed appearance by one PTP. The PTP appearance performance surpassed the released NP defendant-based appearance rate of ninety-five percent and appearance-based rate of 98.8%.

Confirming one of the study’s hypothesis notes of studies to conclude that approximately 85% or more of all released defendants make all of their court appearances and that willful nonappearance, where the defendant absconds or is returned to court only after apprehension, typically does not exceed 4% of released defendants. This percentage does not include six PTPs whose cases were dismissed prior to their first court appearances. The 98% figure compares favorably with the defendant-based appearance performance reflected in previous multi-site and national studies. BUREAU OF JUST. STATISTICS, COMPENDIUM, supra note 77, at 25 (reflecting 96.5% of released federal defendants studied made all court appearances); Pryor, supra note 76, at 91 (indicating that 12.5% of the studied programs reported a nonappearance rate, based on any missed appearance, of 2% or less); Reaves, 1990, supra note 99, at 8-9 (reporting that 76% of released felony defendants studied did not fail to appear in court); Reaves, 1988, supra note 76, at 5-6 (reporting that 76% of released felony defendants studied did not fail to appear in court); Toborg, supra note 76, at 15-16 (reflecting 87% of all released defendants studied made all court appearances); Wice, FREEDOM, supra note 74, at 75 (indicating 97% of studied defendants did not forfeit bail); Austin et al., supra note 146, at 525 (noting 86% of defendants on supervised release studied made all court appearances); Segebarth, supra note 76, at 108-10 (indicating that 12% of the studied programs reported a nonappearance rate, based on any missed appearance, of 2% or less).

Again, the 99.6% figure compares quite favorably with the appearance-based performance reflected in previous multi-site and national studies. Pryor, supra note 76, at 91 (reflecting 20% of studied programs reported nonappearance rate, based on any missed appearance, of 2% or less); Toborg, supra note 76, at 16 (reporting that studied defendants made 94% of appearances); Segebarth, supra note 76, at 108-10 (reflecting that 25% of the studied programs reported a nonappearance rate, based on any missed appearance, of 2% or less).

One defendant, who otherwise completed the pretrial program, missed his initial appearance for a plea.

The released NP defendant-based appearance rate also compares favorably with the defendant-based appearance performance reflected in previous multi-site and national studies. Pryor, supra note 76, at 91 (reflecting 46% of the studied programs reported a nonappearance rate, based on any missed appearance, of 5% or less); Segebarth, supra note 76, at 108-10 (reflecting 50% of the studied programs reported a nonappearance rate, based on any missed appearance, of 5% or less); supra note 179 (reporting additional defendant-based appearance performance studies).

The released NP appearance percentages were attributable to three released NPs missing one status hearing appearance each. The 98.8% figure regarding released NPs again compares favorably with the appearance-based performance reflected in previous
ses, the PTP appearance rate was clearly as good as that of the released NPs\textsuperscript{184}—it was, in fact, better than the released NP appearance rate.\textsuperscript{185}

The Texas pretrial arrest performance\textsuperscript{186} of the PTPs and released NPs was generally good.\textsuperscript{187} The percentages of PTPs and released

multi-site and national studies. See supra note 180 (reporting comparable appearance-based performance studies).

184. Research has confirmed that defendants released on nonfinancial conditions generally have at least as good court appearance performance as those released on financial conditions. BUREAU OF JUST. STATISTICS, COMPRENDIUM, supra note 77, at 25 (reporting 97%-98% of studied federal defendants released on nonfinancial conditions made all court appearances versus 94% of defendants released on financial conditions); ESKRIDGE, supra note 76, at 93-100 (synthesizing results of previous studies); KIRBY, supra note 176, at 3-7 (synthesizing results of previous studies); Pryor & Smith, supra note 76, at 3-4 (also synthesizing results of previous studies); Thomas, supra note 16, at 98-101 (comparing appearance rates in selected cities); Thomas et al., supra note 76, at 48, 82 (reporting 67% of nonfinancial release programs studied had nonappearance rates of 5% or less versus 33% of financial release programs); Toborg, supra note 76, at 16 (reporting 88% of studied defendants released on nonfinancial conditions made all court appearances versus 86% released on financial conditions); Wice, Freedom, supra note 74, at 75 (reporting 87% of studied cities using nonfinancial release conditions had defendant-based nonappearance rates of less than 10% versus 80% of cities using financial release conditions); cf. Reaves, 1990, supra note 99, at 8-9 (reporting 64%-86% of studied felony defendants released on nonfinancial conditions did not fail to appear in court versus 76%-86% of defendants released on financial conditions); Reaves, 1988, supra note 76, at 5-6 (reflecting 73%-78% of studied felony defendants released on nonfinancial conditions did not fail to appear in court versus 73%-80% of defendants released on financial conditions).

185. Many researchers have concluded that post-release notification of court dates or supervision of defendants has a positive impact on defendant court appearance. Compare D.C. Bail Agency, supra note 146, at 16, 19-20; ESKRIDGE, supra note 76, at 146-51; Kirby, supra note 176, at 3-7; Pryor & Smith, supra note 76, at 12-13; WICE, Freedom, supra note 74, at 70-71; Austin et al., supra note 146, at 525, 531-32 and Clarke et al., supra note 146, at 366-77 (indicating some positive effect of notification or supervision on defendant court appearance) with Pryor, supra note 76, at 51; Toborg, supra note 76, at 35-38, 58 and Segebarth, supra note 76, at 110 (indicating mixed or limited effect of supervision or notification on defendant court appearance). But cf. Austin et al., supra note 146, at 525, 531-32 (indicating no impact of post-release delivery of social services on court appearance). Most researchers have concluded that higher release rates do not necessarily result in higher nonappearance rates. See, e.g., Pryor & Smith, supra note 76, at 5-6; Thomas, supra note 16, at 88-90, 101; Toborg, supra note 76, at 52. But cf., e.g., Kirby, supra note 176, at 5-6; Pryor & Smith, supra note 76, at 9; Clarke et al., supra note 146, at 372 (identifying greater length of time defendant was on pretrial release as a significant factor regarding pretrial misconduct).

186. Texas arrests were considered to be pretrial if they occurred between a defendant's arrest and sentencing dates. Each separate charge was counted as a separate arrest. Texas pretrial arrests were categorized by offense type (e.g., property and drug offenses) and general offense level (felony and misdemeanor). See supra notes 163, 168, 171 (describing data source and offense type and level categories).

187. See infra notes 188-90 and accompanying text. All of the PTP Texas pretrial arrests were attributable to PTPs who did not successfully complete the pretrial program,
NPs who had no pretrial Texas arrests were similar: 86.5% of the PTPs and 87.7% of the released NPs had no pretrial Texas arrests,188 which actually reflected an equal number (seven) of the PTPs and of the released NPs who had Texas pretrial arrests.189 In terms of average number of pretrial Texas arrests, the PTPs had a lower average

but whose arrests occurred during the period of their program participation. The Texas pretrial arrests of two PTPs were included in the PTP pretrial arrest figures even though their arrests occurred after the pretrial program had initiated action to terminate them from the program because such arrests occurred before termination had been finalized. See Apodaca v. State, 493 S.W.2d 859, 860 (Tex. Crim. App. 1973) (concluding that filing of affidavit to surrender principal and issuance of arrest warrant do not discharge surety until principal taken into custody). The pretrial arrests of two other PTPs (with one felony property offense arrest each) were not included in the PTP figures because the arrests occurred after these defendants had been discharged from the pretrial program and after they had subsequently been released on surety bond. Because these two defendants were not otherwise included in the released NP group, their pretrial arrests were not included in the released NP figures either.

188. A slightly lower percentage of the PTPs (92%) had zero pretrial Texas felony arrests than the released NPs (95%). These percentages reflect four PTPs with property or drug offense arrests and three released NPs with property offense arrests. A slightly higher percentage of the PTPs (94%) than the released NPs (91%) had zero pretrial Texas misdemeanor arrests. These percentages reflect three PTPs with property or drug offense arrests and five released NPs with violent, property, drug, public order, or “other” offense arrests. The PTP and released NP total pretrial arrest percentages are not as low as some, but are within the range of pretrial arrest rates reported in most previous multi-site and national studies. See, e.g., BUREAU OF JUST. STATISTICS, COMPENDIUM, supra note 77, at 25 (reporting 98% of federal defendants studied had no pretrial felony arrests and 99% had no pretrial misdemeanor arrests); ESKRIDGE, supra note 76, at 100-01 (reviewing studies reporting pretrial arrest rates between 3% and 15%); PRYOR, supra note 76, at 92 (indicating 95.5% of studied programs reported pretrial arrest rates of 10% or less, with 11% as highest reported pretrial arrest rate); PRYOR & SMITH, supra note 76, at 2-3 (reviewing studies reporting pretrial arrest rates ranging between 3% and 20%); REAVIS, 1990, supra note 99, at 9 (reporting 82% of studied felony defendants had no pretrial arrests, including 89% with no pretrial felony arrests and 93% with no pretrial misdemeanor arrests); REAVIS, 1988, supra note 76, at 6 (reporting 82% of studied felony defendants had no pretrial felony arrests); TOBORG, supra note 76, at 20, 73 (reporting 84% of studied defendants had no pretrial arrests); WICE, FREEDOM, supra note 74, at 75 (indicating pretrial arrest rate of approximately 7% in study); Austin et al., supra note 146, at 525 (reporting 88% of studied supervised defendants had no pretrial arrests); Segebarth, supra note 76, at 111 (reporting national research pretrial arrest rates between 3% and 20% and that 89% of studied programs had pretrial arrest rates of 15% or less, with 12% of programs in the 10%-15% range); cf. ESKRIDGE, supra note 76, at 101-02; PRYOR, supra note 76, at 51; TOBORG, supra note 76, at 19-20; Segebarth, supra note 76, at 106, 111 (indicating analysis problems due to limited number of programs that maintain pretrial arrest data, definitional problems regarding data kept, and use of arrest rather than conviction data).

189. Aggregating the pretrial Texas arrest data, two PTPs had two pretrial arrests each and five PTPs had one pretrial arrest each. This is to be compared with one released NP with seven pretrial arrests, two released NPs with three pretrial arrests each, one released NP with two pretrial arrests, and three released NPs with one pretrial arrest each.
number (0.17) than the released NPs (0.32). Thus, confirming another of the study's hypotheses, the PTPs' Texas pretrial arrest performance was at least as good as that of the released NPs.

In terms of case disposition, there was little difference between the total study group's arrest charges and conviction charges. Con-

190. The aggregate average pretrial Texas arrest figures are based on a total of 9 PTP arrests compared with 18 released NP arrests. The aggregate total pretrial arrest averages include 0.10 PTP average felony arrests (based on 5 arrests) versus 0.12 released NP average felony arrests (based on 7 arrests) and 0.08 PTP average misdemeanor arrests (based on 4 arrests) versus 0.19 released NP average misdemeanor arrests (based on 11 arrests).

191. Research has confirmed that defendants released on nonfinancial conditions have at least as good pretrial arrest performance as those released on financial conditions. BUREAU OF JUST. STATISTICS, COMPENDIUM, supra note 77, at 25 (reporting 98%-99% of studied federal defendants released on nonfinancial conditions had no pretrial felony arrests versus 98% of defendants released on financial conditions and slightly better misdemeanor arrest rates as well); Pryor & Smith, supra note 76, at 3-4 (synthesizing results of previous studies); Thomas et al., supra note 76, at 83 (reporting 79% of nonfinancial release programs had pretrial arrest rates of 10% or less compared with 25% of financial release programs); Toborg, supra note 76, at 20 (indicating 85% of studied defendants released on nonfinancial conditions had no pretrial arrests versus 82% of defendants released on financial conditions); Wice, Freedom, supra note 74, at 75 (reporting 94% of defendants released on nonfinancial conditions had no pretrial arrests versus 92% of defendants released on financial conditions); cf. Reaves, 1990, supra note 99, at 9 (reporting 77%- 89% of studied felony defendants released on nonfinancial conditions had no pretrial arrests versus 79%-87% of defendants released on financial conditions).

Research has also indicated that higher release rates do not necessarily result in higher pretrial arrest rates. Pryor, supra note 76, at 52; Pryor & Smith, supra note 76, at 5; Toborg, supra note 76, at 21. But cf. Pryor & Smith, supra note 76, at 9; Thomas et al., supra note 76, at 54-55; Toborg, supra note 76, at 48-49; Wice, Freedom, supra note 76, at 76-77, 79; Clarke et al., supra note 146, at 364, 372 (identifying greater length of time defendant on pretrial release as risk factor regarding pretrial arrest). Researchers differ over the positive impact of post-release supervision on pretrial arrest rates. Compare Pryor & Smith, supra note 76, at 12-13; Wice, Freedom, supra note 74, at 77-78 and Clarke et al., supra note 146, at 366-77 (indicating some positive impact of post-release supervision on pretrial arrest rates) with D.C. Bail Agency, supra note 146, at 2, 14-15, 19; Toborg, supra note 76, at 35-38, 58 and Austin et al., supra note 146, at 525-26, 531-32 (indicating limited, if any, effect of post-release supervision, intensive supervision, or social service delivery on pretrial arrest rates).

192. See supra notes 170-72 and accompanying text.

193. Although there was some variation in the percentages of the total study group's conviction charge types (e.g., property or drug offenses) from the arrest charge classifications, the variation was almost exclusively due to the fact that the cases of eight PTPs and two released NPs were dismissed prior to disposition. See Austin et al., supra note 146, at 528 (describing positive impact of supervised release on case dismissal rates; 14% PTP dismissal rate compares with 15%-67% dismissal rate reported in Austin et al. study). The majority of the total study group were convicted of property offenses (60.5% of the total group, including 60% of the PTPs, 50% of the released NPs, and 67% of the detained NPs). Although there was a very modest amount of conviction charge reduction, most of the variation in the conviction charge level percentages (i.e., the various felony and
sequently, a significantly higher portion of the PTPs were convicted of felony offenses than the NPs. Nevertheless, a substantially greater share of the PTPs (60%) than the NPs (34%) received probationary sentences. In addition, with regard to those defendants in the total study group receiving sentences of incarceration, the incarceration sentences of the PTPs compared favorably with those of misdemeanor levels) from those regarding the arrest charges also resulted from the above-described case dismissals.

Case disposition data were taken from the defendants' court files. The reported PTP disposition data include data regarding the PTPs who successfully completed the program through disposition (41 defendants, the "successful PTPs") and those who did not (15 defendants, the "unsuccessful PTPs"). Because only one defendant in the total study group had more than one conviction charge (one defendant received the same concurrent sentence for three property charge convictions), the study analysis of conviction data is confined to a single conviction charge.

194. Regarding conviction charges, 64% of the PTPs (including 58% of the successful PTPs and 79% of the unsuccessful PTPs) were convicted of felonies compared with 45% of the NPs (including 34.5% of the released NPs and 51% of the detained NPs). This included a higher portion of the PTPs with first degree felony convictions (19%, including 21% of the successful PTPs and 14% of the unsuccessful PTPs) than the NPs (17%, including 12% of the released NPs and 20% of the detained NPs); a higher portion of the PTPs with second degree felony convictions (17%, including 21% of the successful PTPs and 7% of the unsuccessful PTPs) than the NPs (9%, including 5% of the released NPs and 11% of the detained NPs); and a higher portion of the PTPs with third degree felony convictions (28%, including 15% of the successful PTPs and 57% of the unsuccessful PTPs) than the NPs (19%, including 17% of the released NPs and 20% of the detained NPs).

The punishment for a first degree felony includes potential imprisonment for 5-99 years or life imprisonment. \text{TEX. PENAL CODE ANN. § 12.32 (West Supp. 1993).} The punishment for a second degree felony includes potential imprisonment for 2-20 years. \text{TEX. PENAL CODE ANN. § 12.33 (West 1974).} The punishment for a third degree felony includes potential imprisonment for 2-10 years. \text{TEX. PENAL CODE ANN. § 12.34 (West Supp. 1993).} All of these punishment classifications also authorize the imposition of fines. \text{TEX. PENAL CODE ANN. §§ 12.32-.34 (West 1974 & Supp. 1993).}

195. The PTP figure includes 62% of the successful PTPs and 57% of the unsuccessful PTPs who received probationary sentences.

196. The NP figure includes 40% of the released NPs and 30% of the detained NPs who received probationary sentences.

197. Perhaps consistent with the larger portion of the PTPs receiving probationary sentences was the larger portion of the PTPs (77%) receiving fines than the NPs (70%). The portion of the released NPs receiving fines (75.5%), however, was roughly comparable to the PTPs. A higher portion of the PTPs (42%) were ordered to make restitution than the NPs (25%). Similarly, a higher share of the PTPs (31%) were ordered to perform community service than the NPs (16%).

198. With regard to the total PTP group, 29% received incarceration sentences of less than one year (including 32% of the successful PTPs and 21% of the unsuccessful PTPs); 8% received incarceration sentences of one to five years (including 3% of the successful PTPs and 21% of the unsuccessful PTPs); and 2% received incarceration sentences of more than five years (one successful PTP).
the NPs, despite the PTPs' more serious conviction charges. Confirming the study's final hypothesis, and overcoming the difference in conviction charges, the PTPs had better disposition outcomes than the NPs.

Confirmation of the study's hypotheses that the PTPs would have as good court appearance and pretrial arrest performance as the released NPs, and better disposition outcomes than the NPs, surely establishes the Denton program's supervised pretrial release on personal bond as a viable alternative to traditional release on bail bonds, with

199. With regard to the total NP group, 48% received incarceration sentences of less than one year (including 47% of the released NPs and 49% of the detained NPs); 9% received incarceration sentences of one to five years (including 3.5% of the released NPs and 13% of the detained NPs); and 9% received incarceration sentences of more than five years (including similar portions of the NP subgroups).

200. The PTP disposition outcomes surpassed the NP outcomes generally, as well as the component released and detained NP disposition outcomes. See supra notes 195-99 and accompanying text. See Goldkamp, supra note 74, at 185-211 (confirming, in study, negative impact of pretrial detention on sentence, but not on conviction); Reaves, 1990, supra note 99, at 11 (reporting, in study, negative impact of pretrial detention on conviction and sentence); Reaves, 1988, supra note 76, at 8 (reporting, in study, negative impact of pretrial detention on conviction and sentence); Ares et al., supra note 47, at 84-86, 87 (also reporting, in study, negative impact of pretrial detention on conviction and sentence); Austin et al., supra note 146, at 528 (confirming negative impact of pretrial detention on sentence, reporting over 70% of studied supervised defendants placed on probation, and finding relatively similar disposition outcomes of defendants on supervised release, unsupervised release, and financial release). See generally Pryor & Smith, supra note 76, at 7-8; Clarke, supra note 144, at 16-17; Wheeler & Wheeler, supra note 146, at 231-35 (reviewing prior studies generally confirming negative impact of pretrial detention on sentence and mixed results regarding negative impact on conviction).

In terms of delay prior to disposition, all defendants in the total study group were sentenced in less than one year following arrest (with 348 days being the longest period between arrest and sentencing). Not surprisingly, the detained NPs' cases were disposed of much more quickly than the PTPs' and released NPs' cases. In this connection, 70% of the detained NPs were sentenced within 90 days of arrest compared with 25% of the PTPs and 23% of the released NPs. Similarly, 97% of the detained NPs were sentenced within 180 days of arrest versus 71% of the PTPs and 77% of the released NPs. The average number of days between arrest and sentencing for the detained NPs was 70 compared with 150 for the PTPs and 144 for the released NPs. See Reaves, 1990, supra note 99, at 10; Reaves, 1988, supra note 76, at 7; Thomas, supra note 16, at 110-12 (finding significantly shorter periods of case disposition regarding detained defendants than released defendants). Just as the overall periods between arrest and sentencing of the PTPs and released NPs were similar, the average number of days between release and sentencing of the PTPs (117) and the released NPs (122) was similar. See Thomas, supra note 16, at 117-18 (describing comparable disposition periods regarding defendants released on nonfinancial and financial conditions); cf. supra note 142 (describing pretrial program practice to delay defendant interviews up to 48 hours after initial release conditions set, which resulted in somewhat slower release of PTPs (48% released within 7 days of arrest) than released NPs (53% released within 7 days of arrest)).

201. See supra notes 184-85, 191, 200 and accompanying text.
benefits both to the local criminal justice system and participating defendants. The Denton program, moreover, compares favorably with other supervised pretrial release program models. The Denton

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202. In addition to the obvious benefits to the local criminal justice system from the reduction of pretrial detention without a significant negative impact on pretrial misconduct, and the benefit to participating defendants of more favorable disposition outcomes which accompanied pretrial program participation, the Denton pretrial program provided other, less measurable benefits to the local criminal justice system, to the local community, and to participating defendants. Exact cost savings and benefits from the operation of pretrial release programs have proven extremely difficult to accurately quantify. See, e.g., Pryor & Smith, supra note 76, at 6-7 (reviewing studies to suggest that pretrial program expense compared favorably with costs associated with unnecessary pretrial detention); Thomas et al., supra note 76, at 45-47 (describing absence of methodologically sound calculations of costs and benefits of pretrial programs and difficulty of measuring various intangible costs and benefits associated with pretrial release and detention); Toborg, supra note 76, at 39-42, 58-59 (using experimental and control group studies to suggest cost-effectiveness of pretrial programs increased by including felony defendants, reducing level of post-release supervision, and reducing incarceration); Austin et al., supra note 146, at 528-30, 532-33 (determining that the most realistic cost analysis model regarding supervised pretrial release programs projected that such programs would not produce immediate cost savings due to general overcrowding and understaffing of jails, and would require additional revenues to fund programs, but would reduce future capital outlays for new jail beds).

In this connection, the PTPs did generate some revenue through payment of initial program fees and monthly supervision fees (less than $10,000). See supra notes 145-46 (describing fees). Depending on the pretrial detention cost savings measure used, the PTPs theoretically could have generated from $10,000 to over $125,000 in such savings, plus additional imprisonment cost savings due to the high proportion of probationary sentences the PTPs received. See Eskridge, supra note 76, at 102-07 (describing various pretrial release programs and other cost approaches); supra notes 195-200 and accompanying text (describing PTP and NP sentences and disposition time). These “direct” revenue and savings figures, however, cannot begin to calculate even less quantifiable benefits to the local community from pretrial release versus detention (e.g., potential wages and taxes generated through continued employment during release and reduction of welfare costs and potential reduced recidivism) or to the defendant (e.g., strengthened family and community ties and self-esteem) in order to balance them against pretrial program costs (e.g., program operational and administrative costs). See Eskridge, supra note 76, at 107-10 (concluding that nonfinancial pretrial release programs are capable of functioning and offering services at a cost less than that of traditional bail bond system). Balancing the tangible and intangible costs and benefits of the Denton pretrial program suggests it was at least as cost-effective as the bail bond system.

203. The Denton program was somewhat similar to the three experimental supervised pretrial release programs studied by researchers for the National Council on Crime and Delinquency (“NCCD”) as part of a national test design of supervised pretrial release. The target population for the study was felony defendants who had failed to secure release at their initial court appearances. All defendants selected to participate in the program (the “SPRs”) received some pretrial supervision and some SPRs also received social services. Austin et al., supra note 146, at 520-24; see id. at 522-23 (describing SPR demographic characteristics with many similar to the PTPs (in varying degrees); and regarding prior and current criminal history, indicating more extensive SPR prior criminal records and more SPR violent current charges than the PTPs). A higher portion of the PTPs (98%) than the SPRs (86%) made all of their court appearances. Id. at 524-25; supra note 179 and
program model, however, is certainly not the only, or even necessarily the best, pretrial release alternative to the Texas bail bond accompanying text. A similar portion of the PTPs (86.5%) and the SPRs (88%) had no pretrial arrests. Austin et al., supra note 146, at 525-26; supra notes 188-89 and accompanying text. The PTP probation rate (60% of the PTPs) was lower than that of the SPRs (73%-85%), but the commitment to state prison rate of the PTPs (10%, including 6% of the successful PTPs and 21% of the unsuccessful PTPs) was comparable to that of the SPRs (2%-17%). Austin et al., supra note 146, at 528; supra notes 195, 198 and accompanying text; cf. Austin et al., supra note 146, at 525, 528, 531 (indicating that SPR performance compared favorably with performance of defendants on other forms of pretrial release).

204. See, e.g., HALL ET AL., supra note 79 (describing range of pretrial release program options, including release mechanisms, post-release and supplemental services, and program management issues); Segebarth, supra note 76 (describing types of pretrial program models existing as of 1989 NAPSA survey). See generally HALL ET AL., supra note 79, at 25-27; Pryor, supra note 76, at 56-67; Thomas, supra note 16, at 127-33; Wanger, supra note 2, at 332-33 (describing programmatic impact of various organizational placements of pretrial programs).

205. In conjunction with their studies of pretrial release, some researchers have developed “model” pretrial release programs. For example, following his 72-city survey of bail reform and traditional release cities, Wice concluded that the model bail reform project would: 1) eliminate automatic exclusions from release based on the nature of the charged offense, 2) emphasize speed in defendant interview and release, 3) expand verification mechanisms beyond telephone contact, 4) utilize some variation of the Vera release criteria, 5) notify released defendants of all court dates, 6) maintain weekly contact with defendants (by telephone or in person), and 7) work with other social service agencies to aid appropriate defendants during the pretrial period. Wice, FREEDOM, supra note 74, at 145-47. In connection with their three-city study of supervised pretrial release, the NCCD researchers indicated that a model supervised release program would: 1) consider only defendants charged with felony offenses who were unable to satisfy or ineligible for other forms of release following their initial court hearings; 2) review social and prior criminal history, prior drug commitments, and other “stability” measures to determine release suitability; 3) require weekly in-person and telephone contacts during the first 30 days of release with reduced contact thereafter; 4) make delivery of social services optional and reserve it for cases of greatest need; and 5) strive for defendant-based appearance rates of approximately 90% and pretrial crime rates of 10% or less. Austin et al., supra note 146, at 534-36. In describing the “critical” elements of an effective pretrial services program, the United States Department of Justice’s Bureau of Justice Assistance included: 1) a targeted population, 2) information gathering and verification procedures, 3) primarily objective and measurable release criteria, 4) a court date notification procedure, 5) procedures for monitoring compliance with court-imposed release conditions, and 6) procedures to refer appropriate defendants for needed social services, with staff supervision of release conditions included as an optional element which could enhance program effectiveness. BUREAU OF JUST. ASSISTANCE, U.S. DEP'T OF JUST., PRETRIAL SERVICES PROGRAM: PROGRAM BRIEF 5-7 (1990).

The Denton program studied included several of these “model” program components. The above-described and other research cited in this article indicates, however, that some modifications of the Denton program could have been made to increase the scope of nonfinancial pretrial release without significant risk of increased pretrial misconduct. For example, although the range of the program’s automatic exclusions and its limited release recommendation record were not contrary to those of many other (and particularly new)
system. Denton's approach simply represents one jurisdiction's

programs, research indicates that automatic program exclusions can be significantly reduced (or eliminated) and pretrial release otherwise expanded without significant increases in pretrial misconduct. See supra notes 140, 144, 173 and accompanying text (describing Denton program release practices, citing research regarding release practices elsewhere, and referencing research questioning validity of some of practices); see also Pryor, supra note 76, at 50-51, 52 (suggesting, based on study, that restrictive release practices do not necessarily result in reduced pretrial misconduct); Pryor & Smith, supra note 76, at 5-6 (concluding, based on existing research, that effective release procedures can expand pretrial release without increase in pretrial misconduct); Toborg, supra note 76, at 59-62 (same, based on study).

Similarly, research indicates that the extent and intensity of pretrial supervision contact required of participants in the Denton program studied (i.e., weekly in-person reporting plus additional reporting in connection with court dates) could have been reduced or at least individualized according to defendant need without significant increases in pretrial misconduct. See supra note 146 and accompanying text (describing Denton program supervision practices, citing research regarding supervision practices elsewhere, and referencing research regarding relative benefits of post-release supervision); see also D.C. Bail, supra note 146, at 13-16 (finding defendant-based appearance rate ranged from 95% with passive supervision to 98% with intensive supervision; release condition compliance ranged from 52% with passive supervision to 71% with intensive supervision; and virtually no difference in nearest rate based on varying supervision levels); Austin et al., supra note 146, at 532, 535 (recommending varying levels of supervision and reduction of supervision after 30 days of pretrial release); Clarke et al., supra note 146, at 376-77 (suggesting benefit of no or varying amounts of post-release supervision according to defendant need). In fact, only 27% of the PTPs complied with all of their supervision reporting requirements. Nevertheless, the PTPs had excellent court appearance and generally good pretrial arrest performance. See supra notes 179-81, 188-90 and accompanying text. These facts indicate that, if post-release contact was being utilized to control nonappearance and pretrial arrest, the required level of post-release supervision could generally have been reduced, modified (perhaps by substituting more telephone contact for in-person reporting), or at least individually adjusted, thus freeing up additional staff time and resources for additional program participants. In appropriate cases, minimally supervised or unsupervised release on personal bond could have been considered—release options which apparently were not utilized in Denton during the study period.

The advisability of program adjustments concerning delivery of and referral for delivery of social services is less clear. Almost all of the PTPs (91%) were tested for use of marijuana, cocaine, and amphetamines (with an average of 13 individual drug tests per PTP) and 16 of the 51 PTPs tested (31%) had at least one positive individual drug test. In addition, 34.5% of the PTPs were unemployed at arrest and 52% of the PTPs had completed tenth grade or less. Consistent with the social service needs of the PTP population, the Denton program included delivery of or referral for delivery of alcohol and drug abuse evaluation or counseling and employment development counseling. Moreover, social service referrals have been included as a component of "model" pretrial programs. See, e.g., Bureau of Just. Assistance, supra at 6; Hall et al., supra note 79, at 83-86; Wice, Freedom, supra note 74, at 147. Research specifically focused on the impact of social service delivery, however, has indicated that pretrial programs' delivery of such services had no systematic impact on nonappearance or pretrial crime. Austin et al., supra note 146, at 524-25, 531 (comparing pretrial performance of experimental groups receiving supervision only or supervision plus services (generally employment training or alcohol/drug counseling)). But cf. Mary A. Toborg & Michael P. Kirby, U.S. Dept of Just.,
attempt to implement an alternative pretrial release mechanism that could reduce pretrial detention without greater risk of pretrial misconduct than that accompanying release on financial conditions. The study's demonstration of the Denton program's success in this regard, however, should encourage other Texas jurisdictions to develop their own mechanisms to take advantage of all of the statutorily authorized pretrial release options, rather than continue to rely exclusively or primarily on the traditional bail bond system.


Although research does not establish the necessity of social service delivery and uniformly intensive supervision to the reduction of pretrial misconduct, these program components may perhaps have been justified on other grounds, such as their potential to improve defendant case dispositions or reduce long-term recidivism. For example, PTPs who successfully completed the intensively supervised and rigorously structured Denton program—similar to a "pretrial probation"—might have presented themselves as better candidates for probationary sentences than other defendants (supra notes 195-96 and accompanying text describing significantly higher levels of probation for PTPs than NPs) and they may have had more "personal tools" to avoid future criminal conduct.

Pretrial release on nonfinancial conditions should not be expected to totally eliminate the risk of pretrial misconduct. Given its other benefits to the criminal justice system, supra note 202, nonfinancial pretrial release establishes itself as a viable release alternative to financial forms of release by controlling the risk of such misconduct at least as well as financial release conditions.

See supra notes 184-85, 191 and accompanying text.

Research indicates that securing advance input regarding program goals and procedures from affected agencies of the jurisdiction's criminal justice system, especially the courts, can be important in the initiation of a successful pretrial program. A pretrial program that does not acknowledge and address its local system's and community's needs and goals will have much greater difficulty gaining acceptance. See, e.g., Bureau of Just. Assistance, supra note 205, at 9; Hall et al., supra note 79, at 12, 101-02; Pry, supra note 125, at 5-11; Austin et al., supra note 146, at 534.

See supra notes 115-16, 125-28 and accompanying text.

In concluding his 1977 monograph concerning the initiation of a pretrial release program in Jefferson County, Texas, the program director stated:

As of May, 1975, only eleven Texas counties had operational personal bond programs. In 243 other Texas counties, the criminal courts have no practical method of obtaining verified background information on arrested suspects. Bond is set according to the alleged offense. Defendants with money are freed from jail; defendants without sufficient funds remain incarcerated.

Texas is in such dire need of more PTR programs that creating and directing a successful project is not only a challenge but also a worthwhile goal. Hopefully, this thesis will provide assistance to those progressive-minded individuals desiring to create a Texas bail system in which defendants
V. Conclusion

In the 1990s, jurisdictions throughout the nation, and in Texas, have a broader range of pretrial release and detention options than ever before. Many, if not most, of these jurisdictions are also experiencing significant rates of pretrial detention and jail overcrowding. As this article demonstrates, jurisdictions can utilize nonfinancial mechanisms to increase pretrial release without greater risk of pretrial misconduct than that accompanying financial mechanisms. The degree to which local jurisdictions choose to utilize these nonfinancial pretrial release alternatives will help determine whether jail overcrowding improves or worsens in the 1990s.