52200

THE NATIONAL SYMPOSIUM ON PRETRIAL SERVICES 1978

This publication is supported by Grant number 76ED-99-0031 awarded by the Law Enforcement Assistance Administration, United States Department of Justice. Points of view or opinions stated in this publication are those of the Pretrial Services Resource Center and do not necessarily represent the official position of the United States Department of Justice.

PRETRIAL SERVICES RESOURCE CENTER
1010 Vermont Avenue, NW, Suite 200
Washington, D.C. 20005

PROCEEDINGS
OF

THE NATIONAL SYMPOSIUM ON PRETRIAL SERVICES 1978

SAN DIEGO, CALIFORNIA
APRIL 3-5, 1978

ANN JACOBS
Conference Consultant

ACKNOWLEDGEMENTS

The Pretrial Services Resource Center would like to thank all of the people who contributed to the Symposium and to this report. Many are to be credited with generously sharing their time:

- in the formulation of the program;
- in preparing for and making presentations; and
- in assisting in the on-site coordination.

Special gratitude is owed to those colleagues who worked along side of the Resource Center staff in doing registration, video taping, and in reporting on workshops.

Special thanks are due Audrey Barrett, of the Resource Center, who managed the production of this report and contributed to it in many substantive ways.

TABLE OF CONTENTS

INTRODUCTION.....1

PLENARIES.....3
- Welcome.....5
- Pretrial in Perspective.....7
- Legislation.....11
- Pretrial and the Issue of Danger.....15
- Mediation/Arbitration: Its Interface with Pretrial Services.....19
- Pretrial: An Update.....23

KEYNOTE ADDRESS.....27

WORKSHOPS.....35
- Point Systems v. Subjective Determinations.....37
- Lobbying, Using the Media and Developing Community Support.....39
- Affecting Change in Diversion: Case Law, Legislation, Court Rule.....41
- Intake Center Concept.....43
- Funding Alternatives.....45
- Fundamentals of Victim/Witness Services.....47
- Ethics of Restitution and Community Service Programs.....49
- Fundamentals of Diversion.....51
- Fundamentals of Release.....53
- Subsidies: A Better Source of Funding?.....55
- Pretrial and the Substance Abuser.....57
- Implementation of 10% Cash Deposit Systems.....59
- Fundamentals of Mediation/Arbitration.....61
- Title 28: Privacy and Security Act.....63
- Affecting Change in Release: Case Law, Legislation, Court Rule.....65
- Federal Legislation.....71

APPENDIX.....75
- Symposium Calendar.....77

INTRODUCTION

INTRODUCTION

The 1978 National Symposium on Pretrial Services was held April 3-5, in San Diego, California. The Symposium was sponsored by the Pretrial Services Resource Center in cooperation with National Association of Pretrial Services Agencies, and with the Assistance of a Law Enforcement Assistance Administration grant. These proceedings include summaries of the plenaries and workshops and the full text of the luncheon address given by Professor Caleb Foote. The commentaries have been included, in a summarized version, to provide the reader with an overview of what occurred. Separate inserts have been prepared for the convenience of the reader. One is a list of attendees organized alphabetically (with addresses and phone numbers) and cross-referenced by state. A second insert gives a description of the Symposium planning process, an overview of the attendee characteristics, and a summary of the Symposium evaluations.

The 1978 Symposium was the sixth national forum on pretrial issues. The themes of past years have highlighted the growth and maturation of the pretrial discipline as the field explored its identity, its role in the criminal justice system, and its relationship to the larger society. Significant developments have occurred in the last two years which have shaped the present and the future of the discipline. It was around these developments that the major themes for the Symposium took form.

Pretrial programs historically have been concerned with very basic survival issues. Many were forced to close down at the end of federal funding; others had to reassess and modify their original objectives in order to continue operations. However, despite the fatalities, considerable successes have also been achieved. In many areas, pretrial services have become an integral part of the criminal justice system. A sizeable number of counties and municipalities have taken responsibility for funding pretrial programs. In the last two years several statewide systems of release or diversion have been established by statute and by court rule. Some jurisdictions have developed comprehensive agencies which provide a range of pretrial services.

The pretrial discipline has matured in other ways as well. Emerging case law has helped to define the parameters in which pretrial must function. Through experience the discipline has developed better practices and begun to formulate performance standards. Better evaluations have started to create a body of information which will be crucial in determining the future direction of pretrial alternatives.

However, particular stress has been placed on those working in and around pretrial services. The public is disturbed and vocal about crime and about taxes. At the time of the Symposium, Proposition 13 had not yet passed, but was the subject of a raging debate in California and across the nation. Further, the media coverage of the Son of Sam and Hanafi cases was fresh in everyone's mind.

This general dissatisfaction with the status quo is not limited to the public but is also experienced within the criminal justice system. The difficulties for pretrial services are aggravated by ambivalent criminal justice policy. It is generally acknowledged that the criminal justice system is in crisis. Traditional corrections have been attributed with

being costly, often inhumane, and ineffective—prisons do not rehabilitate. At the front end of the system, jails are overcrowded and there are long pretrial delays. Courts are increasingly intervening and ordering that detention facilities meet constitutional standards, that speedy trial requirements be observed, and that defendants be accorded more equitable treatment in determining bail and eligibility for diversion. These moves toward a climate that would seem to favor pretrial alternatives are occurring at the same time as the seemingly contradictory proliferation of legislation for mandatory determinate sentencing and the death penalty.

It is in this context that the 1978 National Symposium on Pretrial Services was formulated. The Symposium provided a forum for consideration of the state of the art of pretrial alternatives and an opportunity to foster a better understanding of the complex issues that govern the field.

In particular, the program included:

- An exploration of the larger economic, political, and social systems in which pretrial must operate, make its goals understood and compete for acceptance and funding.

- An overview of the legislation that affects pretrial—as it authorizes and funds services, creates the parameters in which pretrial services can be provided, and reflects the public mood.

- An exploration of the issue of danger—how public safety can be reconciled with rights of the accused and how can programs confront the difficulties of predicting dangerousness.

- The increasingly popular concept of mediation/arbitration and its relationship to pretrial services—will it complement existing release and diversion programs or is it a competitor for public favor and funding?

- Tentative conclusions on the effect of pretrial services—an exploration of program impact on the criminal justice system, preferable locus for pretrial agencies, refinement of reasonable objectives, analysis of cost, and determination of areas in need of further assessment.

The text that follows reflects three days of intense discussion among pretrial practitioners, judges, prosecutors, and others concerned about the field in 1978 and its future.

PLENARIES

WELCOME

Richard Garcia, Special Assistant to Mayor Pete Wilson, greeted attendees of the National Symposium on Pretrial Services 1978 and welcomed them to San Diego. Garcia said that it was appropriate for the Symposium to be held in San Diego because his city had a special commitment to innovative criminal justice approaches. Although it was not going to be possible for Garcia to attend the full Symposium, he hoped that the attendees would accomplish much, and, at the same time, enjoy all the pleasure that San Diego had to offer. Garcia concluded by addressing the audience in Spanish, highlighting the cultural diversity and richness of the area.

Madeleine Crohn, Director of the Pretrial Services Resource Center set the tone for the Symposium by recalling the words of Robert Kennedy when he addressed the 1964 National Conference on Bail and Criminal Justice:

> *"There is a special responsibility on all of us here. It is a special responsibility to represent those who cannot be here: the million and a half persons in the United States who are accused of crime, who have not been found guilty, who are yet unable to make bail and therefore serve a time in prison prior to the time that their guilt has even been established. For these people—for those who cannot protect themselves, for those who are unfortunate—we here, over the period of the next three days have a special responsibility...I am sure we will meet that responsibility."*

Crohn observed that Kennedy's remarks were equally applicable fifteen years later: there is a national crisis in the jails and the system is still too often meting out unfair and unequal justice. The current vocabulary is not of rehabilitation or change; it is of punishment and new conservatism.

> *"We see it in some of the current legislation being proposed, we see it in the media, and we see it among ourselves."*

Reading from a recent article, Crohn suggested to the audience that the sweeping urban plans of the sixties were never implemented. They glittered in Lyndon Johnson's rhetoric, they were passed into law. Then under the Nixon administration, they were administered by the 'true disbelievers'.

Crohn asked the audience to remember why each of them had chosen to work in the pretrial field, to remember that they represented the million and a half persons in jail.

> *"I hope we are the 'true believers'....That we still have the energy and the commitment to affect change in the criminal justice system. It is not too late, we have many more allies than we sometimes recognize. But we must have the honesty and persistence to seek those allies, to work with them, and to understand that we work not only within the criminal justice system, but that the criminal justice system works in a larger framework of policies and issues that affect our everyday work."*

It was in this context that Crohn introduced the moderator of the first plenary session, Pretrial in Perspective, William Drake.

PRETRIAL IN PERSPECTIVE

DONALD DOYLE
WILLIAM DRAKE
GARRY MENDEZ JR.
RICHARD TROPP

The primary day to day reality for many pretrial practitioners is limited to interaction with judges, counsel and defendants. Administrators also must face funding crises and personnel issues. It is frequently difficult to maintain a balanced perspective on the criminal justice system, let alone to understand that system in the broader societal context of housing, transportation, health, education, employment, and welfare. That larger context is important, however, from at least two perspectives: it has an impact on the defendant and on the pretrial agency.

- The defendant is, however trite the phrase has become, a product of his/her environment. That environment determines both the present quality of life for the defendant and his/her family and the prospects for the future.

- The pretrial agency must function within parameters which are defined by persons (legislators, policymakers) who must continually balance a wide variety of problems and issues. Their decisions get translated through law, policy, legislative decisions, and funding allocations.

The first plenary of the Symposium was structured on the concept that, in order to be effective, pretrial practitioners need to be knowledgeable of the sometimes different focus and perspective of other public servants and public interest groups. This understanding is crucial to the bridge-building that must occur so that the pretrial discipline can achieve its goals and realize its desired impact.

The panelists of the first plenary were selected because they do not work in pretrial services, or even directly in the criminal justice system. Nor do they, necessarily, have a particular interest in the criminal justice field. Instead, they represent city governments, a state legislature, a minority special interest group, and non-justice federal agencies. They are concerned with the quality of life in the United States, with taxes, crime, and with social justice. This common ground has been increasingly recognized by advocates of pretrial alternatives.

William Drake is Director of Public Safety and Criminal Justice Programs for the National League of Cities. Reflecting on the last ten years of substantial federal activity and monies flowing into the criminal justice system from the Law Enforcement Assistance Administration and the Department of Labor, Drake said that "pretrial is past the early stages". Many programs have gone from federal to state and local funding and some have been fully integrated into the criminal justice system.

Of all the national criminal justice concepts and experimental programs introduced over the last ten to fifteen years, it is likely that pretrial has had the greatest impact, the greatest amount of acceptance, and done the most to alter the criminal justice process. But to go further, the pretrial field must face a variety of policy, administrative and political issues.

Drake reminded the audience of Dan Freed's reservations that the unbridled development of pretrial alternatives would, in fact, extend and expand the net of social control. Drake concluded by suggesting that it is time for the pretrial discipline to do a "self-analysis...accompanied by honesty and skepticism".

Richard Tropp, has been a consultant to the White House, the Department of Labor, and, most recently to the Secretary of the Department of Health, Education and Welfare. As he stated, the rationale for pretrial services is well established. In theory, alternatives to the traditional system should benefit not just the defendant but the criminal justice system and society as a whole.

Tropp challenged the audience to consider the "unanticipated affects" of pretrial agency activities. For example, in Great Britain a system of cautioning was developed as an alternative to arrest. It was expected that the number of arrests would be reduced if police had the additional option to caution. In fact, this was not what happened. The persons who were cautioned were not the people who otherwise would have been arrested; they were the persons who probably would not have received police attention if the cautioning option had not existed. Thus, the result of this innovation was to "widen the net of social control".

In the same vein, Tropp questioned whether "routinizing judicial decision-making" by increasing judges' reliance on agency recommendations improves or diminishes the quality and individualization of the decisions.

Similarly, the concept of diversion is undermined if prosecutors recommend poor risks for diversion in order to increase the likelihood of getting the maximum sentence after the person has failed in the program and been convicted.

"Pretrial programs have a lot of inadvertant effects. They get support or resistance based on those effects." Strategic thinking is necessary to realize the potential of pretrial services and to avoid the subversion of the programs' original goals and objectives. Tropp emphasized maximizing program effectiveness by:

- doing cost analyses;
- providing staff training; and

- reaching out to other agencies. He suggested that liaisons may be desirable with the Comprehensive Employment Training Act (CETA), Title XX, and the agencies concerned with welfare, drug abuse, and learning disabilities.

Garry Mendez is the Director of the Administration of Justice unit of the National Urban League, an organization concerned with the condition of blacks in the United States. Significantly more blacks than whites are arrested, convicted, and incarcerated in proportion to their total population. Blacks' prison sentences are usually longer, and a black person is more likely to be a victim of crime than is the population at large. Therefore, crime and criminal justice are important issues for the black community.

"The Urban League happens to think that the way to work on crime is to work on employment, education, and housing." Thus the Urban League does not focus directly on pretrial services or even on the criminal justice system itself. "The goal is not to build comfortable jails, but to keep people out of the criminal justice system. As soon as the person is arrested, he/she is lost."

Mendez outlined the Urban League's message to President Carter, which recommends:

- Federal leadership on human rights issues and attention to human rights violations in this country;
- support of the Humphrey-Hawkins full employment bill;
- revitalization of the cities;
- adequate health care;
- hand gun control;
- reduction of violence; and
- radical change in policies governing suspension of minors from school.

Mendez stressed that these are the issues that are related to crime. He invited the audience's support in pursuing the Urban League's objectives and suggested that pretrial agencies explore cooperative relationships with affiliates of the League in their own communities.

Donald Doyle has been an Iowa state legislator for 23 years. He presently chairs the Iowa House Committee on Corrections and is a member of the National Council of State Legislature. Doyle pointed out that it is not realistic to expect legislators to be experts in all of the areas in which

they must vote. "Legislators must be generalists." They have to deal with trucks, insurance regulations, gambling, energy, veterinary and agriculture problems, as well as with criminal justice, education, welfare, and labor. Therefore, groups with a particular interest in an area are expected to be the specialists. It is their responsibility to educate and inform the policymakers.

Doyle shared some clues with the audience to aid them in understanding and dealing more effectively with their legislators:

- Know your (potential) legislators as early as his/her filing for election;
- Be aware that legislators respond most swiftly when crises arise; and
- Find ways to "shift" monies from existing allocations to the one you are suggesting; avoid recommending a measure that would require additional funds in the budget.

In summing up, the panelists agreed that to counteract the current movement away from concepts of defendants' rights and rehabilitation, agencies "must work with judges and prosecutors to change their feeling that nothing happens to offenders". The importance of dealing with the judiciary was further underscored by the observation that, at many levels of decision-making, the judges are the only visible "experts" in the criminal justice system.

LEGISLATION

ALAN HENRY
TIMOTHY McPIKE
JEFFREY PADDEN
BRUCE ROGOW

Legislation can be important to pretrial services in several ways: as statutory authority for their operation, to clarify otherwise complicated definitions of roles (for the prosecutor, judge, and program), to define safeguards for defendant rights, or to provide funding allocations for support of programs. Legislation is also significant in that it is reflective of trends in public attitudes and priorities which have a relationship to the growth or decline of pretrial services.

A number of bills at both the federal and state level have shaped the present and future of pretrial services and, therefore, should be familiar to practitioners. The panelists reviewed significant legislative trends and aspects of the legislative process.

Alan Henry, Resource Center Technical Assistance Associate, highlighted some of the legislation that is pending or has been recently enacted:

- S. 1437 (pending)—would completely revise and codify the federal criminal code. It contains many controversial provisions, particularly relating to preventive detention and mandatory sentencing.

- S. 1819 (pending)—would formalize diversion services in the federal courts.

- The 1974 Speedy Trial Act—created experimental release programs in a number of federal districts. These programs are currently being evaluated. The results will be reported to Congress.

- S. 957 (pending)—would provide grants to states to improve existing or establish new alternative means for dispute resolution.

- HR. 7010/S.551 (pending)—would provide grants to states for compensation to victims of crimes.

Much of the federal activity is being paralleled at the local level:

- Perhaps most noteworthy to many concerned with bail reform is the action taken by Kentucky to eliminate the commercial bonding system entirely and to establish a statewide release program under the Administrative Office of the Courts. The program uses forms of personal recognizance release and 10% cash deposit.

- An Oregon statute authorizes the appointment of special release officers in the judicial districts. After bail is set, defendants have the option of electing 10% cash deposit or commercial bond.

- A bill is pending in Congress to further clarify the situations in which the existing District of Columbia preventive detention statute can be used.

- Through legislation, Florida has created a statewide system of pretrial diversion.

- Approximately 22 states have legislation authorizing compensation to victims of crime.

- California has a bill pending in committee which would allocate substantial sums of money to the development of neighborhood dispute mediation centers.

These examples of legislative action taken or pending are only the "tip of the iceberg". Much of the significance of legislation can only be seen if the legislative process is better understood.

Timothy McPike is a staff member for the Senate Committee on the Judiciary, Subcommittee on Improvements in Judicial Machinery. He spoke as a member of the team involved in formulating S. 1819, the federal diversion bill.

- Originally, the interest in applying diversion to the federal system was based on the assumptions that diversion would reduce costs and recidivism. However, in the course of its investigation, the Subcommittee concluded that these hypotheses had not been substantiated. If it has not been proven that diversion is more cost or time effective or that it results in a reduction in recidivism, then "why have diversion?". The answer to the Subcommittee seemed to be that diversion is desirable because it increases the prosecutor's flexibility by providing an additional option in handling a case. "Diversion leads to more perfect justice...it's easier to defend justice than recidivism. Then you can support your claims with war stories not statistics."

- Second, the Subcommittee questioned whether the best approach was to create diversion by statute versus court rule or prosecutorial discretion. After studying the experiences of various jurisdictions, it was decided that a statute was desirable because it clarified the role of the prosecutor in the diversion process and can also provide for safeguards to protect defendant's rights.

Jeffrey Padden, Michigan state representative, chairs the House Committee on Corrections which has been considering pretrial legislation. Padden, like McPike, feels that it is important to first question whether legislation is necessary or desirable. When it is determined that legislation is the preferred course, Padden recommends four components of a successful strategy to get a bill enacted.

- First, find a legislative ally to sponsor the bill. In selecting a sponsor it is important to evaluate whether you are comfortable

with his/her personal motivation. That motivation might be greed, altruism, or "sometimes, in part, fear...fear of constituents, of personal failure, of mortgage payments". It is also important to select someone with "clout".

- Even in those instances in which it is easy to get access to key people, it is critical that you maintain contact and persevere in your pursuit of action on the bill.

- Involve the sponsor in plotting a legislative strategy. Broad coalitions are necessary, although the larger they get, the less comfortable they may be. Avoid pre-judging potential allies and look for support in a variety of sectors which have influence: the Governor's Office, the Jacyees, other service groups, and churches.

- Continually monitor the progress of the bill and the mood of the public. The bill may have to be amended in order to pass. Even if enacted, litigation may be required to get the legislation implemented or to defend its implementation. Keep the coalition together long enough to see that the bill is successfully enacted.

In conclusion, Padden cautioned the audience to differentiate between losing and not having won yet. "If the goal makes sense, keep at it."

Bruce Rogow, Professor of Law at Nova University, Ft. Lauderdale, Florida, and counsel in Pugh v. Rainwater and other landmark criminal cases, told the audience they must be highly motivated. Working in pretrial services is important but not enough is presently being accomplished. The pretrial stage of criminal proceedings is a particularly important and crucial period because large numbers of persons are affected in very basic ways: their liberty, family, job, economics, housing, and their psychological and physical health are in jeopardy. Further, people's perspectives of justice are affected by their treatment at the pretrial stage. Their experience with the system shapes the way defendants look at self and society and contributes to their future behavior.

When analyzing legislation, Rogow said, it is important to understand that competing societal interests are involved: "One is fear...fear of crime, of being injured, of losing one's property. Others are racism, vengeance, lack of understanding of legal principles (like bail and probable cause), and the failure of the media and politicians to explain these concepts."

Rogow observed that relatively little headway has been achieved in the 12 years since the Federal Bail Reform Act. Money bond is still used, and as a result, the pretrial system still "turns on the dollar". Too many people are incarcerated awaiting trial simply because they are poor and cannot make the bail amount.

Reflecting on the current social climate, Rogow cautioned the audience that some of the trends embodied in legislation are not hopeful:

- In an increasing number of states, life imprisonment is being made mandatory for some offenses. Frequently, in those cases the defendant is not entitled to bail unless (s)he can show that 'the proof of guilt is not evident or the presumption great'.

- The move toward mandatory sentencing is paralleled by erosion of the right to release for certain categories of defendants.

- There should also be concern when diversion legislation sets eligibility standards so stringent that only "sure risks" qualify.

- A troubling aspect of the Florida diversion legislation, in particular, is the requirement that the victim consent to diversion of the defendant in the case. "Diversion should be focused on the defendant; the needs of the victim should be dealt with differently."

- Other potential abuses of diversion are presented by a reliance on prosecutorial discretion without safeguards to determine eligibility and termination. There are some cases in which the prosecutor may divert a defendant certain to fail in the diversion program in order to get a harsher sentence on the original charge.

- A recent Supreme Court case was cited as an example of the increasingly harsh and coercive treatment of defendants which is sanctioned by law. This case upheld the right of the prosecutor to threaten and then convict a defendant under a "habitual criminal" statute for refusing to accept a plea bargain on the original charge.

- Perhaps the most dramatic example of the current movement toward harsher treatment is the increase in the number of death penalty statutes. Seventeen states have passed statutes since Gregg v. Georgia.

- The worst omen of all is the jail crisis. If the pretrial system was working there would not be so many people in jail.

Rogow closed by saying: "You should be critical of what's going on. Don't rest on your laurels. Don't think that nothing else needs to be done in this area. Don't think that social justice is so easily achieved by half a dozen years of innovative programs.... The economic system will get worse, the disparity between rich and poor will increase. In an atmosphere that is getting worse, crime will increase. We need a commitment from you...to achieve social justice."

PRETRIAL AND THE ISSUE OF DANGER

JOHN CLEARY
CALEB FOOTE
ROBERT LEONARD
JEREMY TRAVIS

As public concern and fear about crime rises, so does the pressure on the judiciary, prosecutors and other actors in the criminal justice system to do something about the "dangerous defendant". But who is the dangerous defendant? Is (s)he the person charged with a felony or does danger only relate to a crime of violence? Is it just the present charge that is to be considered, or is the prior record a factor?

Danger is a particularly troubling concept to apply at the pretrial stage when the defendant is to be presumed innocent.

Most bail statutes only authorize the judge or magistrate to consider the defendant's likelihood of reappearing for trial when making release determinations. While there is no evidence of a correlation between financial forms of release and failure-to-appear, high bond is frequently set to accomplish detention. Thus, a system of sub rosa preventive detention has developed with the implicit expectation that judges are able to determine who is dangerous.

Considerations of dangerousness are also relevant to diversion. Diversion can reduce court backlog only when the cases would otherwise have been fully prosecuted. Similarly, diversion is only cost effective if the expenses involved in processing defendants through the system would be greater (measured in more time in detention, costs of trial, presentence investigations, more costly disposition) than the cost of diversion. Thus it can be argued that diversion makes more sense societally and economically if it deals with more "serious" offenders. Here again there is a definitional question: how can the dangerous defendant be differentiated from other "serious" offenders?

In the absence of established guidelines or definitions, and confronted with hazy or contradictory research, pretrial programs may be vulnerable to media accounts of sensational cases and to the strong public uproar that they elicit. The Hanafi and Son of Sam cases are good examples. Media coverage usually does not include a clarification of the complex issues involved:

- the rights of the defendant, including presumption of innocence, the lack of research and definitive criteria by which to determine risk; and

- the broad interests of the public (safety, costs, and potentially as defendants themselves).

The topic of danger was chosen for a major session of the Symposium because it is a complex and difficult one that the pretrial field is being forced to face squarely.

The panel was moderated by Caleb Foote, Professor of Law at the Center for the Study of Law and Society, University of California at Berkeley, and author of The Coming Constitutional Crisis in Bail. Noting the vagueness and lack of precision in the term danger, Professor Foote reflected on the voluminous evidence of our ability to predict danger. Criminal justice findings in this regard are supported by research in other fields (suicide, victimology, alcoholism, mental health). Factors can be identified which will enable an accurate prediction of risk. However, to date, no method has been developed which can successfully sort the cases of actual risk from the "false positives" (the instances where the individual has the right combination of predictive characteristics but will not manifest the predicted behavior).

This problem of false positives is the essential issue in dealing with danger. "We are seriously overpredicting, ...which is a moral problem, a problem of values." For example, to accurately predict one suicide, four to five will be incorrectly predicted. "How many non-dangerous accused defendants is it morally valid to lock up in order to prevent one rape, one robbery, or one murder? What is the real value of peoples' lives?"

Robert Leonard is the President of the National District Attorney's Association. As the prosecutor in Genesee County, Michigan, he was the orginator of one of the earliest formal diversion programs, the Genesee County Citizen's Probation Authority established in 1965. The program is still based in the prosecutor's office and is funded with county monies. Non-violent chargeable felony offenders are eligible for diversion.

Leonard said that in selecting cases for diversion, the program tries to differentiate between who is a criminal and who is a lawbreaker. The problem with assessing danger is that the criteria are, necessarily, subjective. "You have to ask where a person is in the system" to evaluate danger.

Jeremy Travis is Director of the New York City Criminal Justice Agency (CJA). CJA is a descendant of the early Manhattan Bail Project and now one of the largest pretrial agencies in the country.

Noting that it was the first time a major session at a national pretrial conference had been devoted to the topic of danger, Travis asked "How did we get here?". He speculated that danger was such a pressing issue because of: public concern about crime in general (especially about crime attributed to defendants on release) which has been translated into legislative concern and pressure on the judiciary.

Travis talked about the responsibilities of the pretrial community as they relate to danger:

- The first obligation is to deal forthrightly with preventive detention. Some believe that preventive detention is necessary in order to achieve the elimination of commercial bonding systems, the implementation of 10% cash deposit, or the increased use of

stationhouse release. "In fact, I don't think (the trade-offs) happen that way. I think the Washington, D.C. experience with preventive detention should be enough of a lesson to us."

- The second obligation is to shift the focus from the issue of danger to the issue of detention. Specifically, we should look at short term detentions where the delayed outcome is release. In many of those cases, there should have been no detention in the first place. Partly the problem is that most judges never know whether, as a result of their bail setting, the defendant is released or, if released, fails to appear.

- Further, there have to be better review systems developed in local jurisdictions. Reasons for detention decisions should be stated and the process should be appealable.

- Finally, we have to ask why is it that a particular defendant is brought into court? Ultimately it is important to get back to public expectations and concerns and to develop a range of options for decisionmakers.

John Cleary is Executive Director of the Federal Public Defenders in San Diego, California. He spoke of the difficulties in trying to observe the rights of defendants while responding to public outcry about crime. In essence, what we have in our system "is a statement of rights that can't exist".

Some of the weaknesses in our present approach are reflected in our inability to come to any agreement about danger: as defined, applied, and as percieved. "Who is more dangerous—the person charged with cocaine distribution or with crimes involving physical violence? Is it only street crime that threatens us or is embezzling dangerous too?"

In reality, the incidence of defendants released who fail to appear or who are charged with a second offense is not as widespread as currently believed. In fact, the significance of pretrial detention is then that it is simply too often just a subtle coercive method to induce guilty pleas in order to make our criminal justice system work. "(Detention) is a ritualistic formula to get the plea. It's too simple if the issue is just release v. detention... we have to go back to our principles. I have a view that we are able to practice this system only because it is people who have power dealing with people that are powerless, that we can get away with it at all."

This view was consonant with Professor Foote's closing statement. In response to a question from the audience on the moral dilemma he had presented in introducing the subject of danger:

"How many false positives can we allow?"

"I have a view that people are equally valuable."

MEDIATION/ARBITRATION: ITS INTERFACE WITH PRETRIAL SERVICES

DANIEL McGILLIS
STEPHEN STEINER
PAUL WAHRHAFTIG
ANN WEISBROD

Shortly after taking office, Attorney General Griffin Bell went on record in support of mediation and arbitration as alternatives to traditional justice system processing of certain categories of minor disputes. Bills are now pending at the national and state levels which would allocate large sums of money to the establishment and improvement of dispute resolution centers.

In fact, mediation and arbitration are not new concepts but they historically have been used primarily in the civil area. A handful of projects have taken the principles of mediation and applied them to situations that, otherwise, might have found their way to the criminal justice system: cases of vandalism or malicious mischief, intra-family assaults, and conflicts within a neighborhood.

Ten years ago the diversion movement was picking up momentum for some of the same reasons mediation/arbitration now seems promising. The courts were backlogged, efforts at rehabilitation within institutions were failing, and the whole process was far too costly in human and economic terms. It was hoped that diversion, as an alternative to prosecution would better meet everyone's needs: the defendant, the criminal justice system, and society. Rather than a panacea, diversion has been found to be a complex and difficult approach which can only be beneficial if carefully and correctly applied. Although there are significant differences between mediation/arbitration and diversion, they share many of the same complexities and difficulties. Some authorities think that many of the lessons learned through the evolution of diversion should be applicable to development of the field of dispute resolution.

With the increased attention to mediation and arbitration, a feeling of uncertainty has grown about the role for diversion and to an extent, for release agencies. Some fear that dispute resolution and diversion programs will be in competition for the same dollars and clients. Others argue that the two approaches are complementary. Some also wonder whether mediation/arbitration, if it handles a sizeable number of minor disputes, may impact on the number the release agency must handle. These relationships were the topic for the fourth plenary.

Dan McGillis, the moderator, is a Research Fellow at Harvard University and a consultant for Abt Associates. He was the senior author on a National Institute of Law Enforcement and Criminal Justice (NILE) publication, "Program Models: Neighborhood Justice Centers". McGillis distinguished mediation from arbitration. Mediation involves bringing the parties of a dispute together to work out a settlement. It is voluntary and the settlement will be applied only if both parties agree to it. On the other hand,

arbitration is legally binding. In the United States, mediation and arbitration are most frequently used in the labor/management field. Their application to cases traditionally under the criminal court is more widespread in other countries.

Forms of non-judicial dispute resolution are attractive for several reasons. They address the present problems of court delay, and the high cost of court processing. They are more appropriate to some cases because court adjudication does not get to the real problem, which is frequently irrelevant to the legal issue.

Sponsorship of dispute resolution projects may be with the prosecutor (Columbus Night Prosecutor's Program), the courts (Citizen Dispute Settlement Program), or a private agency (New York Institute for Mediation and Conflict Resolution). Most programs deal with minor civil and criminal matters. Hearing officers may be law students, lawyers, or citizens representative of their community.

The scope of proposed commitment to dispute resolution centers is substantial. Senator Kennedy's pending bill (S.957) would allocate $15 million for experimental programs and $3 million for a resource center and clearinghouse to serve the field. There is also proposed California legislation which would allocate $1½ million to experimental programs.

According to McGillis, although there may be some overlap in diversion and mediation/arbitration, they can be distinguished by:

- the stage in processing at which each occurs—diversion is more likely to be post-charge; and

- the relationship between the defendant and the victim—diversion usually involves strangers, mediation/arbitration involves parties with on-going interpersonal relationships.

Ann Weisbrod, Director of the New York Institute for Mediation and Conflict Resolution (IMCR) talked about her program. IMCR's major eligibility criteria is that the parties must be involved in a pre-existing on-going relationship. Eligible charges include both felonies and misdemeanors such as harassment, criminal mischief, and felonious assault. Referrals come from the police (in lieu of arrest) and off the street, as walk-ins. Parties must sign a form, which is binding, before submitting the case to arbitration. Weisbrod suggested that in states without statutes, consent may be required; the finding is then binding as is a civil contract.

When questioned whether mediation or normal criminal justice processing was more appropriate for dealing with battered wives, Weisbrod distinguished between assault (a single occurence) and being battered (where behavior is chronic). IMCR has found mediation effective in assault cases but not with the battered syndrome.

Steve Steiner, of the American Arbitration Association Community Dispute Services, San Francisco, California, represented a slightly different kind of program. Arbitration As An Alternative (4A's) uses mediation and arbitration. Mediation, however, is preferred because "it involves the parties more". In the hearings two "neutrals" are appointed who have been selected based on the appropriateness to that particular case (race, age, neighborhood considerations). Lawyers can attend the hearing, but their involvement is not required. The neutrals open the hearing with a statement on their background and an explanation that they are not authorized to fine or send persons to jail. They attempt to create a non-adversarial environment.

First the neutrals caucus with the individual parties in a confidential interview. Then they are brought together for a joint session, at which time they hear both sides. The neutrals try to facilitate and to look for underlying currents. They clarify points and look for trade-offs, seeking a lasting settlement. Hearings last between two and four hours and frequently deal with conflicts between landlord/tenant, employer/employee, or neighbors.

Steiner emphasized that the approach does not deal with guilt or innocence but with finding something workable in a situation where both parties have a stake.

Paul Wahrhaftig works with the Grassroots Citizen Dispute Resolution Clearinghouse, of the American Friends Service Committee in Pittsburgh. He has been involved in pretrial services for several years and attended a number of pretrial conferences in the past. Noting that there were not very many diversion people in the audience he queried whether that was indicative of "how irrelevant mediation/aribtration and diversion people see each other".

The Clearinghouse does not operate programs, but rather keeps abreast of developments in the field and of the range of program models. Wahrhaftig said that there is no hard data on who is the best mediator. "Ann (Weisbrod) would look for bartenders and beauticians. I suspect that lay people closely related to the community are more effective. They understand the symbolic and verbal language." This is consistent with the Clearinghouse's general predisposition toward community based programs. "Sponsorship may affect secondary goals, thus, it affects primary goals."

Wahrhaftig views mediation as a way of empowering the community. "It goes beyond solving individual disputes; even, perhaps, at the cost of an individual dispute. In the end, the decision on a model will depend on what institutional role you want to be strengthened."

PRETRIAL: AN UPDATE

ILENE BERNSTEIN
SALLY HILLSMAN BAKER
JOHN GALVIN
JAMES McMULLIN
MARY TOBORG

As is true with many reform movements, the pretrial field started and progressed for several years without any significant evaluation of its efforts or its impact. As program administrators became more concerned with validating their practices and as policymakers and funders started asking more sophisticated questions, the attention given to pretrial evaluations increased. Several good studies have been completed and some major evaluations are in progress. Rather than provide any definitive answers on the impact or effectiveness of pretrial services the research to date has served to underscore the need for more extensive study.

John Galvin is on the staff of the American Justice Institute (AJI), Sacramento, California. (AJI will be the coordinators of the LEAA funded national Jail Overcrowding and Pretrial Delay Program.) Galvin was project director of the National Institute of Law Enforcement and Criminal Justice (NILE) funded Alternatives to Jail Project which resulted in a five volume report which examined decriminalization, use of summons and citation, pretrial release, diversion, and sentencing of less serious offenders. In addition to a review of the literature, AJI staff visited 25-30 cities and counties. AJI found that many communities were not using fully the potential of alternatives to jail. For example:

- Many jurisdictions make no use of police citations, yet citations are an easy and effective method for reducing detention populations and the costs of processing arrestees.

- Too many diversion programs seem to be "blanketing themselves" by providing expensive services to a very restricted clientele. As a result they are as costly as normal processing would be in the same cases, and therefore are not cost effective.

It must be emphasized, concluded Galvin, that programs functioning at the very front end of the system have the most hope for reducing jail populations. Therefore citations, stationhouse release, and release on personal recognizance can impact on far greater numbers of people than can conditional release or diversion.

James McMullin is working on a General Accounting Office (GAO) study of the bail system in the federal courts. The study is reviewing how well programs are managed and what impact they have. The study compares what should be happening to what is happening. The key words from an auditor's perspective are included in The Bail Reform Act. The Act states a goal of "reducing unnecessary detention regardless of the financial status of defendants" and establishes the standard of "the least restrictive form of release".

McMullin said that the first finding was that "no one knows what is happening". Therefore, they had to do massive data gathering in eight courts. While the statement of findings is tentative and still in draft form, it substantiates that the federal system does not have a problem with failures to appear (which is well under 10%), or with new crime. "The problem is our detention rate." There is a wide variation of rates of detention among jurisdictions (between 10% and 30%) with similar failure-to-appear and new crime rates. Therefore, it's obvious that many are being unnecessarily detained. The study also found that different judicial officers consider a wide range of factors (some identified by The Bail Reform Act, others not) and give them varying weight.

It is a GAO finding that judges need better verified information and that they need to channel their discretion. McMullin believes that pretrial services agencies can have impact by providing information:

- to secure the release of some defendants that would otherwise be detained; and
- to minimize the inappropriate releases.

McMullin thinks that increased guidance and monitoring of release conditions is necessary:

- Feedback to the judicial officers on their present performance may affect what they do in the future; and
- Increased use of management strategies will channel discretion.

Mary Toborg is director of the National Evaluation Program Phase II Study of Pretrial Release being done by the Lazar Institute for the National Institute of Law Enforcement and Criminal Justice (NILE). Commenting on the current state of knowledge of pretrial services, Toborg said:

> "We really don't know whether release programs result in the release of any more people than would get out without the existence of the programs. We really don't know if diversion projects result in more harsh treatment by expanding the net of criminal justice and capturing defendants who would otherwise have their charges dismissed. Nor do we know about the reality of pretrial crime. We don't have these answers because the appropriate analyses have not been conducted."

Noting that the studies of the panelists alone will not fill all the gaps, Toborg went on to describe the NILE funded National Evaluation Program. The Phase II study underway is a study of the system, of defendant outcomes, and an attempt to understand different jurisdictions' approaches.

Two approaches are being taken to the study. In some areas, existing data will be used. In others, outcomes will be compared by using experimental

and control groups. Release rates, equity of treatment and the incidence of pretrial crime and failure-to-appear will be compared. "The questions are not new. They've been around a long time. What we know 10 years hence depends on what we do now. It's time for the field to do the analyses rather than restate the questions."

Sally Baker is directing a study by the Vera Foundation of the Court Employment Project (CEP) in New York city. CEP was one of the earliest pretrial diversion projects. Baker listed some questions that she hopes to be able to answer based on their study:

- Has pretrial diversion affected clients' behavior (future crime, employment, life style)?
- Who does the program affect and how?
- What impact does diversion have on the defendant's court case (in other words, are we increasing the level of social control)?
- Who gets diverted?

Summarizing the research to date, Baker said that impact can be found during program participation and that post-program success seems to be related to pre-program behavior. "So far, we can't be sure what contribution a program makes to the two previous observations." The problem is that control groups have not been used so that we can't tell whether it's the selection mechanism or the services which produce positive behavior. It's not known whether case outcomes would be similar with or without diversion. Control groups are particularly important in diversion evaluations because of the multi-faceted complicated selection mechanism for clients and the fact that many defendants refuse diversion. Nor is there an easily identified natural control group to assist in identifying affects.

The legal and ethical arguments often raised against experimental evaluation designs can be addressed through use of an overflow mechanism. To enable the study of CEP, eligibility criteria were temporarily expanded. This resulted in a larger number of potential diversion clients than the project could enroll. Of the 'eligible' pool, defendants were randomly assigned to the experimental group (CEP enrollees) or to the control group (not enrolled). The level of service delivery for diversion clients was not changed. With a good control group, program impact and defendant outcomes can be measured. Relying on records and lengthy interviews, the study looks at the program impact on special groups categorized by type of offense, record, personal and social characteristics. Baker is asking the question, "Does diversion impact on different groups differently?". This study follows up on unsuccessful terminees and on case outcomes for persons not accepted (rejects) in the program.

Baker closed by reaffirming that good evaluation does not have to be "big, expensive, complex, or last three years".

Ilene Bernstein is on the faculty at Indiana University Law School and director of a study funded by the National Institute of Mental Health (NIMH) to analyze decision making in the federal courts. She summed up by remarking that much remains to be done. Bernstein participated in this panel after a day and a half of attending the Special National Workshop on Pretrial Release for the judiciary which occured simultaneously with the Symposium. She commented that in the Workshop the judges were candid about their behavior in bail setting and that they acknowledged violations of the Bail Reform Act. "They were willing to confront the preventive detention issue." Bernstein noted that a sense of optimism had emerged from the Workshop and that there was talk of a policymaking conference on pretrial to include magistrates, judges, researchers, and program practitioners.

KEYNOTE ADDRESS

PRETRIAL 1978: A PROSPECTUS*

PROFESSOR CALEB FOOTE
CENTER FOR STUDY OF LAW AND SOCIETY
UNIVERSITY OF CALIFORNIA-BERKELEY
BERKELEY, CALIFORNIA

Author, The Coming Constitutional Crisis in Bail

> *"The prosecutor in a murder charge must at once demand bail from the defendant and the latter shall provide three substantial securities as approved by the court of judges in such cases who guarantee to produce him at the trial. And if a man be unable or unwilling to provide these sureties the court must take, bind, and keep him and produce him for his trial."*

That was written by Plato in ancient Greece. You see the problem with which we're dealing is not new. The consideration of it is not new and I suspect that perhaps from ancient Greece through today we have moved backwards not forwards in reaching any sort of a tolerable solution of it.

Given the political climate in which we exist in this country there isn't, of course, any perfect or even tolerable solution to the problem. Even if we put aside any concern about our presumption of innocence we can't lock everybody up because it would be economically prohibitive and would doubtless increase the overall crime rate. There is no way to prevent some flights from justice, no way to prevent some violent crimes by those on pretrial release. The level of crime, I suppose, can be reduced somewhat, but probably not very much. Even that little can't be done until the public learns that crime can no more be prevented than automobile fatalities on our highways or the deterioration of our environment. All three are prices we pay for the kind of civilization and economy in which we live.

During the oil crisis we learned that automobile fatalities could be reduced about 15% by imposing and enforcing a 55 mile an hour speed limit. That amounted to a savings of about 8,000-9,000 lives a year. That is more lives, I might add, than are taken by criminal homicides in the course of any given year. It is at least three or four times more lives than are taken in violent homicides by strangers in the course of a year. As we all know, most homicides result from domestic or friendship relationships. Of course, we no longer enforce the 55 mile an hour rule. We theoretically have a speed limit in California, but try to drive 55 miles per hour on one of our freeways. The 9,000 or so lives are not that important to us.

I think that gives us a measure of what we could do with the crime rate. Perhaps we could get a 15% reduction by a combined program that heavily decriminalized minor offenses in order to permit concentration on major offenses, by realistically deciding that we really want to face up to

---

*Transcribed and edited from a tape of Professor Foote's luncheon address.

and do something with our problems of heroin and cocaine, and by putting sufficient resources into the administration of justice so that it can at least operate with reasonable efficiency—for example, producing a speedy trial in something approaching the English conception of a speedy trial.

But to accomplish anything more than such a 15% or so reduction in crime would require a basic restructuring of our society to mitigate or remove our present gross inequalities in economic justice, and inequalities of opportunity. It would require removing the barriers behind which those of us who are white males, a minority of the whole population, skim off most of the cream. It would require the creation of equal opportunity to share in the good things of our society by the so-called racial minorities, by women, by the urban and rural poor, and by all those who presently enter the competition of our competitive society with two strikes against them before they even hit the starting line. I don't know what you can expect, short of that. What does one expect of black youth in an urban ghetto that has a 25-40% unemployment rate. What do we expect those people to do? Do we expect them to sit back in their sub-standard and overcrowded housing and play tiddlywinks while waiting for their monthly relief checks to arrive? It seems to me that we ultimately have to face those problems.

Short of facing those problems, we're not going to make a very significant contribution. But of course, even the short term program I outlined (of decriminalization and additional resources) is hopelessly utopian in the present political posture, let alone when considering a long-term program. So, just as we have to live with highway fatalities and an increasingly overcrowded planet, I think the public sooner or later has got to learn it must live with something approximating our present crime rate.

I'd like to return for a moment to the highway fatalities—the 55,000 or so of us who will die during the next year on the highways, plus all those who will be cripples for life or will suffer severe injuries over a long period of time. It's interesting to think about that kind of danger to our society in comparison with the danger to which this conference is devoted. We can do a pretty good job of prediction on highway fatalities. We can isolate the dangerous offenders with a fair degree of accuracy. They are the highway designers, the engineers who build in death traps to highways. They are the automobile designers and manufacturers who could make safer cars but who do not. They are the drunk drivers who, in most states, get a slap on the wrist while we put a $10 robber in jail for five years. In statistical terms these people are far more dangerous to your life and mine than robbers or burglars or murderers. But, do we lock them up in pretrial detention? We do not. Do we even consider them dangerous? We do not. No, to our view they are not the dangerous ones in our society. The dangerous ones are the blacks from the urban ghettos: the young men and women growing up in the kind of society I have described and the others who are coming up largely from the bottom of society. I think the reasons for the distinction, for the fact that we regard the relatively non-dangerous group as dangerous and the more dangerous group as not dangerous, are pretty obvious.

First, I think it's because the auto designers, the highway engineers, and the drunk drivers do not threaten the balance of power or the stratification in our society. Some criminal groups, predominantly black urban youth, do threaten it.

Secondly, I think that, at least at the subconscious level, we feel guilty. I don't see how we could help but be guilty about the discrepancy between our own privilege and the denial of privilege to so many others in our society. We resolve this psychological problem in an unfortunately traditional way: we project it on to those who cause us to feel guilty and it comes out in terms of fear of them.

This theory is, of course, not novel with me. It has been developed by a number of distinguished psychologists such as Theodore Sarbin at the University of California at Santa Cruz. Sarbin talks about the derivation of the word danger from the Latin dominium, meaning lordship or sovereignty. He talks about danger as a concept which has nothing to do with personal relationships or personal identities but which has to do with the distribution of power and the granting or denial of power in society. It seems to me that we might recognize this, but we don't change it.

Why does so little get done? The general question and the specific application for those of us in this room is "What has happened to bail reform since 1960?". Well, in the winter of 1960-61 I was teaching at Harvard and a young man came to see me who had been sent by his employer, a man named Schweitzer. I was, quite literally at that point, the only person in the United States who was working on any studies of the bail system. But I wasn't the pioneer. The pioneer, I discovered, was a man named Beeley. But Beeley had been forgotten until one of my students doing research found a dusty volume of his on the back shelf in the library. The volume had been published in 1927 and had not been taken out and read for the previous 25 years according to records in the book. At the time I was doing my work there was virtually nothing else being done on bail.

This young man, of course, was Herbert Sturz. He came with the plan that Schweitzer and he were working on at the time. It had originally been a plan to set up a fund out of which bail bonds would be paid for deserving people held in jail. Well, they speedily realized that plan would only enrich bail bondsmen. The idea evolved into a plan to set up a large revolving bail fund to raise a large sum of money to bail out on cash bond people who deserved to be bailed out, not to be held in pretrial detention. That plan was debated and finally what evolved as the Vera plan came out.

Unfortunately, in that early stage, a step was taken which I think has been critically important for the future of the movement. It was a decision not to engage in research but to become an action program. Many of us urged Vera to do a credible job of research right from the beginning by setting up control groups to test their criteria for release. (God knows it would be difficult, but maybe it wouldn't be impossible to find a judge in New York who would be willing to take the political heat if he was caught participating in an experiment where some people were released and others went into a control sample of people which were not released.) I thought it was imperative that they check both sides of the failure rate: both the failures who go out on the streets and the failures who are held in jail because they didn't meet their (the Vera) criteria.

That research was not conducted. Sturz was interested in it, but basically he was a man of action, not a scholar and not a researcher. In any event, he thought it was politically impossible to find a judge who would deliberately release poor risks to see if, in fact, they were poor risks. So it didn't happen. I think, in retrospect, that has been a fatal defect of the system.

The second thing that was noteworthy about 1960, '61, and '62 was that this was a 'reform movement'. It was a reform movement that was explicitly oriented to defendants and to defendants' rights. It was a reform movement that saw in pretrial detention a basic injustice and a violation of what Schweitzer called (I think correctly although, I grant you, not legalistically correctly) a violation of the presumption of innocence. There was a clear logical implication in that early movement, whether the very first people who went into it fully recognized it or not, that the ultimate outcome of what they were doing would be the release of everybody or of almost everybody. There was no logical or defensible stopping point short of that. I think that they moved unconsciously for a while toward that goal.

As such, of course, the concept of Vera represented a major threat to established criminal justice administration and its dependence on plea bargaining and on guilty pleas to make the criminal justice system work. What has happened to it over the years is that that movement has suffered the fate of most American reform movements. It has been transmogrified. It has been absorbed to a considerable extent by the institution it sought to change. It has been diverted, quite literally, by diversion programs. It has lost its thrust. And I think its vision has been seriously blurred. The lack of research and the lack of awareness of the bias in the field's own evaluations of itself are principally responsible for this.

I constantly see reports of agencies which tell about the number of FTAs they have among the population they released and which tell about the number of people released who are charged with a new crime while they are released. However, I see almost nothing on the side of the ledger which attempts to document the number of people who could be released perfectly, safely, but who are not being released. This is, presumably, the major source of failure in the state of the whole movement. This biased feedback which is built into the structure of the movement seems to me to feed and perpetuate the very injustice that the movement was originally founded to prevent and correct. It started as a movement concentrating its concern and its effort on those who were unjustly detained. It has become a movement which, far too much, has its sights fixed on those who are ORed or ten-percented or diverted, and which has either forgotten those who are still detained or assumes, without evidence, that they are no longer unjustly detained just because the system is in operation.

So it ends up as another chapter in the American success story: the success story, that is, of entrenched American bureaucratic institutions like the criminal justice administrative system, which over the last century has shown an infinite capacity to divert, render harmless, and co-opt the reform movements which threatened it.

I realize that this is a very harsh evaluation and there are many individual exceptions to my characterizations—probably including most of those who are in this room. But, overall, I think it's not an unfair evaluation of the movement. The pretrial detention system strikes me as a paradigm of what is worst about the criminal justice system. It exploits the powerless to save money for the powerful who could achieve virtually the same results that detention achieves if they were willing to spend a little more money on their system. It insists that the detained, rather than society, assume these costs of the system. So those whom law should be teaching, to whom a courtroom should be a model of fairness, objectivity, and equality are, instead, taught to have contempt for our institutions and to have contempt for what they regard as the complete hypocrisy of our application of equal justice. I think Schweitzer saw this. I think it was what motivated him. I hope we can recover our vision of the star by which he originally sailed.

WORKSHOPS

POINT SYSTEMS V. SUBJECTIVE DETERMINATIONS

GEORGE CORNEVEAUX
HORACE CUNNINGHAM
MICHAEL JAMISON
JEREMY TRAVIS

Throughout the bail reform movement, the appropriate method for arriving at release recommendations has been debated. While some programs have used a modified Vera "point" system to arrive at recommendations, other programs have chosen to employ a less rigid system, allowing the individual interviewer's subjective assessment to shape the decision. Many programs have started with an objective or subjective system and later discarded it, choosing the other as "the best" way to arrive at a sensible, realistic, and just recommendation for the individual defendant. The question of which system is "better" continues to evoke high interest, evidenced by the high attendance at this workshop.

The workshop was moderated by Michael Jamison who is doing a study for the American Justice Institute. Jamison cautioned the attendees not to decide in a vacuum which system would be best for their jurisdiction. Instead a program must first identify what their major goals will be: maximizing the release population, maintaining a failure-to-appear rate of less than 'x' percent, emphasizing the felony population, or something else. "Each system has its own problems." A point system may be so rigid that "...we end up throwing out equity in exchange for consistency." On the other hand, a subjective system without adequate supervisory review can lead to the interviewer having unbridled discretion in his/her recommendations, with little or no rationale for the recommendations offered.

Jeremy Travis, Director of the Criminal Justice Agency (CJA) of New York City (a descendant of the original Manhattan Bail Project which first employed the Vera point scale), followed with a description of the development of the point system in New York and an explanation of the current system. "At present, we don't recommend release", said Travis "we simply rate a defendant's probability of return based on community ties. We are not advocates for the defendant but rather for the point system." CJA has a failure-to-appear rate of approximately 3% for those defendants identified by the agency as having strong community ties. Travis noted that the point system and variations on it are not limited to a pretrial release application. "Los Angeles has a jail classification system for pretrial detainees that is a modified Vera point system."

Horace Cunningham and George Corneveaux of the Pima County Superior Court discussed their experience with the subjective system and its implementation in Tucson, Arizona. Corneveaux emphasized that "...our system works for our place...", pointing out that different locales might demand different systems. "There is a basic problem with point systems: point systems are not 'air tight' the one person who doesn't 'fit' gets screwed when a rigid point system is employed."

Cunningham summarized with the key distinction between the subjective and point scale systems: ""We use the same criteria applied to each individual defendant, but the <u>weighting</u> varies from individual to individual."

LOBBYING, USING THE MEDIA AND DEVELOPING COMMUNITY SUPPORT

WILLIAM BARKER
ARTHUR SPEARS

Funding is an issue that continually concerns and perplexes many project administrators. The mysteries of lobbying, using the media, and developing community support are critical to the survival of pretrial programs. William Barker of the Ingham County (Michigan) Bail Program and Arthur Spears, of the Detroit ROR Project of Detroit Recorder's Court are two project administrators who have been successful in securing local funding for their programs. They stressed that seemingly minor details can be crucial in convincing judges, district attorneys, and legislators that pretrial programs are worth funding:

- At the foundation of a successful strategy is evaluation and cost effectiveness data. Program representatives must be able to quote accurate statistics rapidly. Cost effectiveness must be explained in simple and clear terms. Influential figures are the cost of release v. detention and the cost of diversion v. prosecution. These figures are more persuasive when expressed in daily costs rather than yearly costs.

- There must be support at the grassroots level. Look for coalitions of business groups, community service organizations, etc. Get your name on a speaker's bureau list. Always provide a "sample resolu- for the group to adopt.

- Work closely with judges to get their support. Let the judges "break the ice" for the program with the media and legislators.

- The media can be very valuable. Contact and develop a relationship with the local criminal justice reporter. Provide him/her with information. Never say you are seeking 'publicity'. Strive to be truthful, non-political, and to stress social and humanistic values.

- Realize that county commissioners are a diverse group of people with different educational backgrounds. Deal with them on a clear and 'average' communication level. Provide them with an attractive and easily understood proposal in advance of the meeting in which your program is to be considered.

- Understand the legislative process. Work through committees and understand how each will review your proposal. Usually the bill will start with a judiciary committee then proceed through personnel and finance appropriations. Whenever possible, use commissioners to influence other commissioners. Sometimes state representatives can be supportive too.

A successful strategy is one that is well planned sufficiently in advance and includes a broad variety of actors within the system.

AFFECTING CHANGE IN DIVERSION: CASE LAW, LEGISLATION, COURT RULE

HON. RICHARD HUGHES

Citing his experiences as Governor and now as Chief Justice of New Jersey, Judge Richard Hughes hailed the accomplishments of diversion as a "valuable innovation" and "one of the most promising correctional treatment approaches in recent years". New Jersey has a statewide system of pretrial intervention implemented through court rule in large part because of the Chief Justice's consistent and strong backing.

While much of the discussion focused on the development of New Jersey pretrial intervention programs, the Chief Justice commented on other approaches that may be used to affect change in diversion.

- From a judicial point of view, court rule is the preferred option. Chief among the practical reasons for this is that judicial members rarely like being told by legislators (via legislation) how to carry out their respective responsibilities.

- Furthermore, court rule is less time consuming to implement and an effective mechanism through which members of the judiciary may set policy and procedures concerning diversion.

- If legislation is desired, Hughes suggested that the judiciary be involved in its planning.

Hughes additionally emphasized that neither court rule or legislation in and of itself was enough to effectively assure implementation of diversion. Pretrial intervention survives on public support. Communication with the press, media, and elements of the criminal justice system is paramount to enacting change and obtaining legislative support.

When questioned about the effectiveness of pretrial intervention in New Jersey, the Chief Justice stated that continual tracking since 1972 indicates a recidivism rate of 4.7%. Recidivism is defined as rearrest after successful completion of the diversion program. The average cost of processing a defendant through PTI in New Jersey is $331. In contrast, the average cost of the pre-sentence report and one years probation supervision for that same defendant would be $445. Hughes further compared the cost of diversion to the yearly cost of institutionalization which begins at an average of $7,500 per head.

The Chief Justice tempered his enthusiasm for the diversion concept by saying, "...the stake of diversion is high, both to the security of the community and to the taxpayer. But in comparison to traditional methods, pretrial intervention represents a less costly alternative...and the benefits which accrue by the defendant who avoids the stigma of court and conviction and who becomes a hard-working member of society are integral to the potential of diversion."

INTAKE CENTER CONCEPT

JOHN GALVIN

Between the time of arrest and trial, defendants encounter a very fragmented criminal justice system. Typically, there may be one representative collecting information for the release decision, another concerned with determining indigency for appointment of counsel, and yet a third screening for diversion. Meanwhile, the defendant with critical medical or personal problems may not be getting the necessary assistance.

Based on an extensive study of the pretrial justice system done by the American Justice Institute (AJI) for the National Institute of Law Enforcement and Criminal Justice (NILE), it has been suggested that the needs of the defendant and of the criminal justice system could be better met if the processing at the point of arrest was streamlined and the screening functions coordinated. At a central intake facility one interviewer could process the defendant shortly after arrest. Information collected would be the basis for decisions on release, diversion, referrals, and appointment of counsel. Additionally, at that time the arresting officer could review the case with the prosecutor to ensure early elimination of charges that are not legally sufficient.

Some facilities like an intake center already exist, usually based in jails. John Galvin, director of the AJI study on Alternatives to Jail discussed the potential for increased efficiency and effectiveness that an intake center offers. Galvin placed the intake center concept within the perspective of the criminal justice system where discretionary decisions are made at each step of the process from arrest through incarceration, parole and release. An intake center would provide decision makers with guidelines and information on persons moving through the system; thus enabling more informed decisions, more consistency in policy, and greater efficiency in processing cases.

Several issues were raised:

- Confidentiality of information gathered by intake center staff.
- Need for cooperation between decision makers in the system.
- Risks for extended authority given establishment of an umbrella agency.

Although most agree that the creation of intake centers presents risks for increased coerciveness and control within the criminal justice system it also seems likely that the participating criminal justice groups (police, corrections, public defenders, the courts, etc.) would be reluctant to relinquish the control necessary to see the concept realized. Cooperation would be crucial. Other potential problems include insufficient resources.

AJI will be working on behalf of LEAA in the establishment of model intake centers as part of the special LEAA program to reduce jail overcrowding and pretrial delay.

FUNDING ALTERNATIVES

DAVID SPEIGHTS
RICHARD TROPP

Funding, refunding, and general survival continue to be issues of great concern to pretrial administrators. Programs started with Law Enforcement Assistance Administration (LEAA) or Department of Labor (DOL) funds were expected to be "self-sufficient" at the end of three years of federal funding. Many programs successfully made the transition to local funding; however, others continue to struggle for support. There are two general categories of monies that have been relatively untapped by the pretrial field: foundations and non-criminal justice federal agencies.

Richard Tropp, Consultant to the Secretary of Health, Education, and Welfare (HEW), encouraged practitioners to think not just of start-up and continuation funding but of supplemental grants to expand segments of a program. Federal agencies with allocations applicable to some aspect of pretrial services include those discussed in the Resource Center publication, Money '78: LEAA, DOL/CETA (Comprehensive Employment Training Act), and several divisions of HEW.

Among those sources not addressed in the publication are the following:

- The Community Services Agency (the old Office of Economic Opportunity) provides financial support for public service job initiatives. One way pretrial programs can take advantage of this funding is to establish ties with local businesses in the community in order to have them sponsor employment programs. This could be a good way to provide jobs for the pretrial defendant.

- Housing and Urban Development (HUD) — Section 8 provides rent subsidies to indigent individuals who meet certain federal guidelines. These monies may also be used to subsidize rental cost of the pretrial program if the program is located within designated poverty areas or buildings. These monies are generally available to organizations whose goal is to reduce poverty.

- Third-party payments provide reimbursements to service providers that render specified services to individuals meeting certain guidelines set forth by the federal government. Third-party payments are usually reimbursements to service deliverers, frequently in the medical (including psychiatric or mental health) and social service fields, i.e., Medicaid, Title XX, etc.

David Speights, Project Manager for the National Association of State Drug Abuse Program Coordiantors discussed special funding available to programs serving the drug abuser. The primary sources of support for the treatment of addicted offenders at the federal level are the National Institute of

Drug Abuse (NIDA) and the Treatment Alternatives to Street Crime (TASC) program of LEAA. A national clearinghouse has been established, Project Connection, which acts as a brokerage of services and provides technical assistance and support to state agencies, community organizations, courts, probation and parole officers, etc.

There are a variety of local and national foundations which may contribute to pretrial services in one way or another. Essentially, one may approach a foundation in one of two ways: by using a systematic approach as detailed in Money '78 or by using an informal approach. The informal process includes a number of tactics:

- Check with local banks. The person who handles the non-profit organizations' accounts for that community should be able to give information on what foundations are located in that area and identify where they are located.

- Play the society circuit. Program administrators may benefit from attending social functions. Generally those persons who sit on the boards of voluntary organizations may know of foundations or may sit on the board of some foundation(s) themselves.

- Create an advisory board for your pretrial program. Include a cross representation of persons who either sit on a foundation's board or have friends who are involved with foundations. This process may take a great deal more investigatory time in selecting membership for the advisory board.

- Some businesses are eager to set up management training-type operations. Often they will finance the program entirely or are willing to loan an employee to conduct the training workshop. This avenue provides pretrial programs with an excellent opportunity to obtain additional management information.

In conclusion, two factors were consistently highlighted by both speakers: money-seekers must be aware of various funding agencies' guidelines and specific funding priorities, and they must be innovative.

FUNDAMENTALS OF VICTIM/WITNESS SERVICES

THOMAS TAIT

Thomas Tait is Coordinator of the Clark County, Nevada, Victim/Witness Assistance Center. He explained why programs geared to the needs of victims and witnesses are necessary. "The notion of personal retribution in this country was abolished in 1788, with the development of the American system of penology. Consequently, the victim was transported out of the criminal justice system as an active participant." Only recently, the system has begun to address itself to the problems resulting from the emphasis placed on the state, rather than the individual, as the victim. In a study conducted by the Institute for Law and Social Research (INSLAW), it was found that in the city of Philadelphia witness non-cooperation dropped from 25% to less than 3% after the institution of a Victim/Witness program.

In order to function successfully, a Victim/Witness program must first identify the special needs of the individual as both a victim and a witness. The needs and the types of services which should be provided will vary according to the seriousness and type of victimization and the different stages of witness participation in the prosecutorial process.

Tait identified three types of needs and corresponding services:

- Victim Needs—These are the immediate needs of the victim of a crime, prior to entry in the criminal justice system. The way in which these victim needs are addressed will have considerable impact on the amount of future cooperation, should the crime be prosecuted. Crisis intervention services, such as medical assistance psychiatric consultation, family shelter, and financial assistance should be made available to victims. It is also important at this time that evidence be secured, even from victims who express the wish not to testify, in the event that they may later change their minds.

- Victim as Witness Needs—Successful prosecution often depends on the testimony of a witness. It is extremely important that his or her responsibilities be specifically defined and made as convenient as possible. Witnesses should be informed of the prosecutorial procedures and how they affect them, as well as of the importance of their involvement in the case. As a victim/witness, they expect and should be entitled to a timely and satisfactory adjudication of the case and to assistance in matters such as security, property return, compensation, and restitution.

- Witness Needs—The Victim/Witness assistance program should be a consistent source of information and notification, thereby facilitating witnesses' continued appearance in court throughout the progress of the case. Services such as transportation, escort service, child care, and employer intervention could mean the difference between appearance and non-appearance of the witness.

In response to several questions concerning specific procedures, Tait explained the steps involved in the Victim/Witness Assistance Center in Las Vegas. The Center works out of the District Attorney's office, which is notified by the Police Department when complaints are issued. Cases are then screened and victim/witnesses are contacted by personal letters from the District Attorney's office. The letter is accompanied by a specially prepared victim/witness handbook, notification of the next court date and a telephone number to call for information. The staff consists of four consultants, two receptionists, and 26 investigators, who work under the auspices of the District Attorney's office on behalf of the Victim/Witness Assistance Center.

In discussing the feasibility of having Victim/Witness Assistance Centers run by agencies other than the District Attorney's office, it was suggested that centers run by the Police Department could also be appropriate because police are usually the first to become involved with the victim.

ETHICS OF RESTITUTION AND COMMUNITY SERVICE PROGRAMS

KENNETH KOTCH
PHIL PENNYPACKER

Restitution is an increasingly popular concept in criminal justice, but it presents special issues when applied to a pretrial setting in which the defendant is still presumed innocent. Kenneth Kotch, Administrator of the Lake County (Illinois) Deferred Prosecution Program discussed the basic rationale for restitution. Traditionally, the victim is ignored by the criminal justice system. The state becomes the moving party in a criminal action. It is the goal of restitution to "make right" whatever wrong has been done. Neither the victim nor the offender should gain from restitution, Kotch said. Instead, restitution should be a positive (rather than a punitive) experience in which the defendant accepts responsibility for his/her actions. Kotch stressed that if a conflict arises between the needs of the client and the victim, that the needs of the defendant have priority. This distinguishes a deferred prosecution program from a victim assistance program.

There are other potential problem areas in restitution on an operational level that Kotch identified:

- The system lacks clear guidelines and models for restitution programs.

- Because both victims and defendants form opinions about the criminal justice system quickly, fairness is a critical factor which must be demonstrated early.

- Victims can be a particular problem for restitution programs. They don't always respond, frequently avoid contacts with the system, sometimes are not interested, and occasionally move away. Restitution in those cases should be determined as best as possible and sent to even a non-responsive victim.

- Victims often inflate the amount of restitution. It is sometimes difficult to determine what is properly due a victim. Is the offender responsible for paying for the victim's "trauma" as well as the material goods stolen or damaged. Should victims be required to take a polygraph test when questions arise as to the amount of damage which has been done? One crime can mushroom into others. Victims may try to exploit the situation after they, themselves, have been victimized by filing false police reports and insurance claims.

- What should the offender be required to pay back: The full cost or replacement value? Time lost if a person was injured? Services necessary to repair damages? Related costs, i.e., rental cars, etc?

- A program must determine policies for: Methods of payment, maximum time limits for making payments, and assessment of the fair value

of property (IRS schedules); reconciling payments due with a client's ability to pay; and "community restitution" (work in the community instead of paying a dollar amount to a victim).

- Programs should work comfortably with the police, but should not judge restitution by police reports. "Do your own investigations by contacting the parties involved."

Reflecting on the complex legal issues involved, Phil Pennypacker, Executive Director of the San Diego Public Defenders, spoke on some of the concerns he had about use of restitution in a pretrial diversion setting.

- It must be stressed that an agreement to make restitution should not be a condition of entry into a diversion program. Without a judicial finding, the defendant is still considered not guilty. On the other hand, diversion may have a very useful and appropriate place as part of a service plan in which the victim is personalized and the client accepts responsibility for his/her actions.

- The involvement of a defense counsel is crucial to the restitution (and, in fact, the entire diversion) process.

- What impact does the original agreement to make restitution have on the case if the defendant is unsuccessfully terminated from the program (self-incrimination, etc.)?

- Does the program requiring restitution also have the obligation to see that the defendant is provided employment?

- How does the program avoid becoming merely a collection agency?

Kotch summarized the discussion with a check list of guidelines he had applied to his program:

- Written Policies—force consistency in staff members handling different, but related, cases;

- Cooperation with State Attorney's Office and other programs;

- Review of cases—by staff meetings or an independent panel—with emphasis on mediation;

- Face to face confrontation—with the best results when victim and offender are brought together for a meeting;

- Documentation of everything—agreements, contracts, letters, bills, etc.

FUNDAMENTALS OF DIVERSION

JAMES DAVIS
HENRIETTA FAULCONER
DENNIS LIEBERT

Project Crossroads (Washington, D.C.), Project DeNovo (Minneapolis), and the Florida statewide system of pretrial intervention programs represent three generations of diversion programs. Representatives of these programs discussed their operations and the ways in which they deal with often difficult legal issues.

Henrietta Faulconer, Director of Project DeNovo, started out as a screener in that program when it was originally funded by the Department of Labor in 1971 as a second-round pretrial intervention program. She noted that the program had started with conservative eligibility criteria because of a concern for developing credibility with the system. DeNovo targeted on the 18-23 year old first offender charged with a misdemeanor. Within six months it was clear that many felony cases more in need of service were 'falling through the cracks'. Some of these defendants had prior records but they were not the 'hard-core'. Instead, they were the blacks and Native Americans charged with 'survival' or economic crimes. Now everything from truancy to murder can be considered for diversion.

The Minneapolis program is now open to referrals from any interested party involved in a criminal case. The defense attorney can even recommend diversion to the judge in cases that the prosecutor has refused to divert. Although the prosecutor cannot be compelled to allow the diversion, the judicial inquiry can be persuasive and has the result of holding the prosecutor accountable to having a basis for refusal that (s)he is willing to express to the court. As an example of the kind of groundwork necessary to realizing these changes, Faulconer talked of going to law schools to discuss diversion. Now many of these students have become the prosecutors and defense attorneys that the project deals with on a daily basis.

Faulconer described the DeNovo system of three levels of supervision: minimum, moderate, and maximum. The needs of the defendant determine whether simple calling in (monitoring) is sufficient or whether more rigorous supervision and service delivery is required. DeNovo guards against 'overtreatment'. "Group counseling may not be required by the defendant busted for a joint."

James Davis, Director of Project Crossroads (one of the oldest diversion programs), moderated the workshop. As one of the original staff members of the program, he recalled that they assumed that the "sooner you got the body, the better". However, they found that it was impossible for the defendant in the cellblock to make a reasonable decision whether (s)he desired diversion. Now the defendant is notified after arraignment of the opportunity to be considered for diversion and the defense attorney is involved in the screening process.

Dennis Liebert is a corrections planner for Florida, where a statewide system of pretrial intervention has been implemented. Because diversion has been identified as one of Florida's primary priorities, money is "flowing in from both the state and local government". Liebert was instrumental in the development of standards and goals for Florida pretrial diversion. After having analyzed the various sets of standards for pretrial (ABA, NAPSA, NLADA, etc.), and the practices of several programs, he advised the audience to carefully consider the complexities of a pre-adjudication program.

Because the diversion client is required to waive basic legal rights, it is imperative that defense counsel be involved in the diversion process. "A defendant can be in diversion longer than the sentence would be if he or she were convicted." Citing several of the troublesome aspects of restitution in a pretrial program, Liebert asked how a defendant without money was supposed to make restitution. "What happens to the defendant who has agreed to restitution or made an admission of guilt (sometimes required for admission to a diversion program) if the person is terminated from the program unsuccessfully?"

Partially in response, a workshop participant, Judge Robert Bell of Maryland, commented that he is certain that some innocent defendants calculate the risk of going to trial and decide that the likelihood that they will be found guilty is sufficiently great that they prefer to 'cop' a plea and minimize the risk. Bell speculated that it was sometimes the same with the diversion client who should have a right to accept the option of restitution in order to avoid the risk of the uncertain.

Based on the Florida experience, Liebert advised the audience considering legislation to go for the best bill in the first place because it is so difficult to change a statute after it has been enacted. Diversion in Florida is governed by stringent parameters. One example of a problem with the legislation is its provision requiring victim consent to diversion. This gives the victim "the inappropriate role of the prosecutor".

Response from the audience highlighted other problems with the current state of the art of diversion. Few programs collect and disseminate accurate data on their operations or their effectiveness. Further, many programs have not even specified goals and objectives or developed measures of their effectiveness. Other problems are conceptual and semantic. "What does recidivism mean in terms of clients who have never been convicted in the first place?" According to the same attendee, the diversion field suffers from not knowing who its clients should be compared to; what services its clients are getting; and whether those services are even needed or are simply being "rammed down (clients') throats".

Acknowledging the many problems in diversion, including issues of voluntariness and social control, one participant suggested that it was time to try the approach proposed by Dan Freed. The prosecutor would say to the client, "O.K., I'm going to nolle prosequi this case; but if I ever see you before me again, I'm going to throw the book at you".

FUNDAMENTALS OF RELEASE

JO BAUMANN
DAVID FORREST, JR.
MELVENA OWENS

Release programs function under a variety of names (OR—own recognizance, PR—personal recognizance, bail projects, etc.), they intervene at a number of points within the traditional criminal justice processing scheme, and they operate under very different forms of sponsorship. But despite the differences in labels, loci, points of intervention, and operational procedures, release programs have certain basic goals in common:

- they are intended to increase the number of people released between arrest but prior to trial (alternately, to reduce detention populations);
- they are concerned that defendants appear for scheduled court dates (alternately, with minimizing the failure-to-appear—FTA—rate); and
- they are concerned with increasing the rate of release without increasing the incidence of pretrial crime.

The purpose of the workshop on Fundamentals of Release was to outline the basic objectives of a release agency and to orient the audience to the various operating procedures and vocabulary involved. Melvena Owens, Director of the Pittsburgh Community Release Agency, chaired the workshop. She asked the panelists to describe the fundamentals of their programs, including the initial interview, notification, supervision, and the recommendation scheme used.

David Forrest is the Brooklyn, New York, Borough Director of the Criminal Justice Agency (CJA). CJA uses two interview forms, one for the initial appearance and the second for conditional release candidates. Everyone arrested in Brooklyn is interviewed by CJA, except defendants with outstanding warrants, parole violations, or persons attempting to "beat the fare" on the metropolitan transit authority (because they have their own dispositional system). Using a point scale that is based on community ties, CJA can do one of three things: recommend an individual for release, "qualify" a defendant indicating that they have unverified community ties, or not recommend—as in homicide cases. "In the supervised release program we look to the use of community agencies or possible third party custodians."

CJA requires defendants to check in within 24 hours of release, or a warning letter is sent. Defendants are notified 6 days before their court appearance and are supposed to call the agency within 3 days of receipt of the letter. The Brooklyn borough has a willful FTA rate of between 3 & 8%.

Responding to a question on agency confidentiality, Forrest said that the CJA will give information obtained to other criminal justice agencies. There is an informal agreement with the District Attorney that CJA will not be subpoenaed, but there have been cases in the past when records and staff have been.

Jo Baumann is Supervisor of the Des Moines Pretrial Release Unit of the Department of Correctional Services, one of the more innovative community correctional systems with a pretrial component. One of the key differences between the New York City program and the Des Moines system is the recommendation scheme. While both programs gather substantial demographic data on the individual defendants, the Des Moines program includes subjective factors in the final decision of whether to recommend release.

Baumann distributed copies of the training manual they have developed for staff. In reference to the question of confidentiality, Baumann said that her program had never been subpoenaed, but that there was little formal protection from being subpoenaed in the future.

The program includes both OR release and conditional release. The services of a psychologist are available for consultation on the recommendation. About 75% of the arrested population is released pretrial.

According to Melvena Owens, the chief distinction between the Pittsburgh Community Release Agency (CRA) and the two programs described above is that the CRA only interviews defendants after bail has been set. The program offers supervised release and referrals to community resources based on the individual defendant's needs. Many programs across the country screen out defendant's arrested for probation or parole violations (holds). CRA interviews those defendants and tries to work with the parole and probation boards to develop a method of release pending a revocation hearing. "Keep in mind that what we do in Allegheny County is not necessarily what you should try to do in your jurisdiction, but simply another method of achieving a similar goal."

SUBSIDIES: A BETTER SOURCE OF FUNDING?

WILLIAM HAGANS
BILLY WAYSON

It has been suggested that subsidies are a good source of permanent funding for pretrial programs struggling to find local support at the termination of federal monies. Borrowed from the area of correctional services, the subsidy concept is a direct state-to-local government transfer of dollars to encourage greater local responsibility and initiative in developing alternatives to the traditional system.

Billy Wayson, Director of the Correctional Economics Center, commented on the growth of subsidy programs over the last fifteen years. In the early 1960's there were only five states with subsidy programs; by 1976 this had increased to 23 states (including 41 programs—26 juvenile, 10 adult, and 5 combined juvenile and adult services).

Subsidies reallocate the costs of a service from the locality to the state. It is hoped that by defraying the expense of a service that it becomes more attractive to implement. "Subsidies are used to elicit some form of desirable behavior...desirable, as defined by political powers."

Subsidies have been employed most often in providing probation services, although some states have already financed pretrial services through community corrections acts (such as Iowa).

Wayson outlined the general dimensions of subsidies:

- Type of Transfer (how the money is brought from the state to the local level): Cash, Services, In kind (technical assistance), Negative subsidies (taxes).
- Recipient: Individuals, Organizations.
- Payees: Third party, Level of government.
- Method of Payment: Grant, Reimbursement.

Generally, subsidies are awarded based on:

- an equalization formula (study populations, etc.); and
- a performance standard (set goals for results).

Formulas may often be too rigid and the factors in a formula may be too easily influenced. For example, a formula based on 'the rate of commitment' is subject to the personality of the trial judges.

According to Wayson:

- Subsidies should be performance based, the goals should be stated in terms that can be demonstrated.

- The administrative steps in the process of allocating subsidies should be minimized. Grant applications often go through a review board. This takes the 'power' of decision to an executive rather than legislative level which is not desirable when value decisions are being made.

Wayson concluded with a comment on the complexities of subsidy programs: "Many questions arise when government is about to use economic influence on local actions: Who should determine what is the 'desirable' effect? How can that goal best be achieved? What other effects will result?"

William Hagans, Research Analyst for the Washington State House of Representatives, became familiar with subsidy programs when he was formulating legislation for his state. The Washington juvenile subsidy program was developed in 1971 following the California model. Its goals were to reduce commitment rates and provide standards for services. The program provides services for juveniles who would otherwise have been committed to institutions

In Washington, the new juvenile bill will outline who gets released and who is held—rather than leave this decision up to the local authorities. The new adult bill is being fought by the judges because it includes regulations on what types of charges can and cannot be committed. This bill is designed so that the local county will literally pay for any commitments ordered for certain charge categories.

On a practical note, Hagans warned people interested in developing subsidy programs that the legislation will be heavily influenced by unions since all state programs employ large numbers of workers.

PRETRIAL AND THE SUBSTANCE ABUSER

JOHN BELLASSAI
CURTIS FOULKS
DAVID SPEIGHTS

The substance abuser presents special problems to the criminal justice system. Curtis Foulks, Director of the Toledo Legal Aid Pre-Trial Release Agency, spoke of the substance abuser as a pretrial risk. "The substance abuser, like any other defendant, should be entitled to release on his/her own recognizance, unless this presumption is overcome by the fact that (s)he is a risk of non-appearance or that (s)he has a need of special conditions to assure his/her appearance in court." Once past the release decision, the problem of control over non-appearance and recidivism will arise. As a solution to this problem, Foulks advised that release programs make use of treatment facilities to counsel, de-toxify and rehabilitate substance abusing defendants. Conditions of release which include reporting, supervision, and urinalysis are extremely useful.

The first and most important step for release programs is to properly identify the substance abuser and the type of abuse. Foulks outlined three basic types of substance abuse as follows:

- Primary—Usually a passive individual with personality problems who seeks drugs as an escape.
- Symptomatic—Individuals with aggressive psychotic tendencies with long histories of delinquency and heavy drug use.
- Reactive—Drug abuse not involving psychological dependence.

Once the substance abuser has been properly identified, conditions of release and treatment programs must be tailored to meet individual needs, Foulks said.

Although there are some diversion programs especially for the substance abuser, most diversion programs systematically exclude alcohol and drug related cases, noted John Bellassai, Director of the District of Columbia Narcotics Diversion Program. "However, most regular diversion programs are getting low-profile drug abusers, either unknowingly or without classifying them as such. These programs are afraid that substance abusers would have a detrimental effect on their performance rates and are unaware that their success rate suffers due to lack of proper identification techniques and drug treatment for low-profile drug abusers." Bellassai suggested to the attendees running diversion programs that they seriously consider asking sophisticated, drug abuse related questions at the intake interview to enable them to correctly identify the substance abuser.

The success rate of programs dealing with substance abusers will be predictably different and will vary with the type of drugs involved. "The question to be asked is, what kind of conditions are going to be expected?" Some programs

use community treatment centers for court-referred drug abusers as an alternative to incarceration. However, these are not true diversion programs when contrasted to programs which accept people identified as substance abusers, offer them treatment, and recommend dismissal of the charges if programmatic conditions are met.

Bellassai also stressed the importance of proper identification of the different types of drug abuse. He feels this is becoming increasingly difficult due to the fact that the wide spectrum of drugs between heroin and marijuana is growing.

David Speights, Project Manager, National Association of State Drug Abuse Program Coordinators, discussed two particular drug-related projects (TASC and Project Connection) which could be useful in alleviating some of the problems identified by the other panelists.

- Treatment Alternatives to Street Crime (TASC) is a LEAA-sponsored program to identify, refer, and monitor substance abusers involved in the criminal justice system, both at the pre- and post-trial stages. This year, LEAA will be able to fund 10 to 12 new TASC projects. Basic eligibility criteria for communities interested in TASC include a population of 200,000 in the greater metropolitan area or county, evidence of significant drug abuse problems and already existing treatment facilities in the community.

- Project Connection is a new program which provides consultation, information, and technical assistance to programs which deal with substance abusers. Connection offers telephone consultation, information referral, seminars and workshops. Also available is on-site technical assistance to aid criminal justice staff in utilizing treatment centers to complement supervision and in establishing joint planning that brings together court, corrections, and treatment personnel.

Discussion centered on the increasing number of drug-related programs and treatment facilities and on the rivalry between these programs for both clients and funding. It was suggested that the best solution to this problem was the sharing of staff and resources between programs with related functions.

IMPLEMENTATION OF 10% CASH DEPOSIT SYSTEMS

NICK GEDNEY
WILLIAM SANDBACH

Many jurisdictions have implemented court-managed systems of percentage bail as an alternative or supplement to an existing system of commercial bonding. In a deposit system, the defendant posts a percentage (usually 10%) of the bail amount with the clerk of the court, rather than working through a bondsman. This deposit is returned to the defendant after appearance at all scheduled court hearings. An administrative fee (typically 1%) may be deducted to offset the costs of running the program. In some jurisdictions the defendant may elect percentage bail whenever money bond is set as a condition for release; in other jurisdictions the court in its discretion may require fully secured bail.

Nick Gedney, Director of the Philadelphia Pretrial Services Division, spoke of some of the reasons that deposit bail is desirable:

- The system is public and therefore under constant scrutiny.
- Even though there is some evidence that the amount of bail increases when the deposit option exists, more people end up being released prior to trial.
- The increased rate of release occurs without significant growth in the rates of FTA or rearrest.
- In a deposit system the judge, not a bondsman, decides who will be released.
- The retained administrative fee provides an additional form of operating capital to the court.
- In contrast to commercial bonding situations where the money is retained by the bondsman, deposit bail is returned to the defendant who appears for trial. Thus, the deposit system provides an added incentive.

Gedney warned that if 10% is just an option of the court, rather than mandated in all financial forms of release, it will usually not be used.

William Sandbach is President of the California Advisory Board of Surety Agents, an organization representing the interests of bondsmen. He has been working in opposition to the percentage deposit option. Sandbach feels that bondsmen can work well in conjunction with an OR program by offering an alternative to

detention for defendants who are not released on some form of personal recognizance. "A 10% program, however, would replace the bondsman at the expense of the taxpayer, with no better results for the system."

When asked about the forfeiture system for bail bondsmen, their arrest powers, and responsibility for monitoring bail bonding practices, Sandbach acknowledged that there is considerable potential for abuse of a commercial bonding system. "Tighter laws are needed, as we have in California, to get rid of the 'bad' bondsmen that cause scandals and give the occupation a bad name."

In conclusion it was noted that a 10% system, although arguably an improvement over commercial systems, is still economically discriminatory against poor defendants because it conditions release on ability to pay.

FUNDAMENTALS OF MEDIATION/ARBITRATION

STEPHEN STEINER
PAUL WAHRHAFTIG

Mediation and arbitration are being used in some places to resolve disputes between parties with "pre-existing, on-going relationships"—commonly between family members, neighbors, and landlord and tenant. Conflict on Travis Avenue, a movie produced by the American Arbitration Association (AAA), was shown in the workshop to illustrate mediation/arbitration techniques. The movie portrays a conflict between a landlord and tenant that has resulted in the landlord confiscating the tenant's clothes and locking him out of the apartment.

"Mediation/arbitration is not an extension of diversion; many of us working in the field do not think of ourselves as working within the criminal justice system", according to Steve Steiner, Project Coordinator of the San Francisco 4A's Program (Arbitration As An Alternative), sponsored by the AAA. Instead of defendant and victim, mediation/arbitration involves a claimant and a respondent. The key to the mediation/arbitration approach is working with both parties toward an agreement that addresses the underlying problem and that is satisfactory to all sides.

Whether law students, community persons, or professional mediators, hearing officers must be trained in skills related to problem solving: communication, probing, diligence, clarifying, facilitation, empathy, and objective setting. Steiner pointed out that these skills would also be valuable to persons working within diversion programs and other parts of the criminal justice system.

In addition to the 4A Program, some of the better known mediation/arbitration programs are the Boston Urban Court Project, the Columbus Night Prosecutor Program, the Miami Citizen Dispute Settlement Center, the Institute for Mediation and Conflict Resolution Dispute Center (New York City), the Rochester Community Dispute Services Project, and the San Francisco Community Board Program.

These programs vary according to twelve dimensions:

- The nature of the community served
- The type of sponsoring agency
- Project office location
- Project case criteria
- Referral sources
- Intake procedures

- Resolution techniques
- Project staff
- Hearing staff training
- Case follow-up procedures
- Project costs
- Evaluation

Mediation/arbitration programs can be characterized by the coerciveness involved in the referral mechanism, and the resolution techniques employed. In some jurisdictions, participation is totally voluntary; in others, the district attorney or the court may dictate to the complainant and respondent that they must go to mediation to pursue the case. Similarly, mediation and arbitration can be differentiated in that the latter is "imposed" and binding.

Steiner said that the evidence to date reflects a high success rate whether programs are voluntary or not. Although the Neighborhood Justice Centers recently funded by the Department of Justice have an independant evaluation component, most mediation/arbitration programs have been responsible for collecting and analyzing their own performance data. Success is usually defined as:

- The satisfaction of the clients (disputants)—were they heard, were their needs met?
- Whether the settlement holds—is the problem resolved or does it just come to the attention of the system again?

Paul Wahrhaftig, Coordinator of the Grassroots Citizen Dispute Resolution Clearinghouse, noted the San Francisco Community Board program which is a non-profit organization supported by foundation funds. That program has a five person community board concerned with neighborhood problems. Community members are encouraged to attend the meetings as observers. Peer pressure is important in enforcing resolutions. Wahrhaftig feels that mediation/arbitration can be an important component of "empowering" a community.

Many of the problems in mediation/arbitration are shared by diversion. Years of accumulated hostility between family members may not be resolvable in a one-time hearing, no matter how extended or well run. Similarly, the defendant who has suffered years of economic and social deprivation may not be turned around by counseling and job placement. Related issues of social control and evaluation must also be faced. The interchange in the workshop made it clear that, while different and separate, mediation/arbitration and pretrial services have much to learn from each other.

TITLE 28: PRIVACY AND SECURITY ACT

JAY CARVER
BLYTHE GARR
JACK STILLWELL

The recent concern for individual rights of privacy in the context of government records, consumer credit reporting, and employment records has been extended to the area of criminal history record information. Blythe Garr, a consultant specializing in private security, Jack Stillwell, Research Analyst of the Pima County, Arizona, Attorney's Office, and Jay Carver, Deputy Director of the District of Columbia Pretrial Services Agency, discussed privacy and security issues and their implications for pretrial programs.

The workshop opened with a brief presentation of the legislative history of the current privacy and security regulations. Commonly known as "Title 28" (28 CFR Part 20), the regulations were promulgated by LEAA in 1974 to implement the 1973 Amendments to the Omnibus Crime Control and Safe Street Act of 1968. They apply to state or local agencies which have received LEAA funds for the collection, storage, and dissemination of criminal history records in either manual or automated systems since July 1, 1973. When agencies subject to Title 28 disseminate Criminal History Record Information, they must require recipient agencies to follow the rules of Title 28. As a practical matter, most pretrial release and diversion programs are subject to the regulation and would be well advised to study carefully the requirements.

Under Title 28 each state was required to develop a "State Plan" indicating how the agencies in the state would achieve compliance by December 31, 1977. Workshop participants were urged to obtain a copy of their State Plan in order to insure agency compliance. It was pointed out in the discussion that in addition to the requirements of Title 28, pretrial programs may also be subject to the confidentiality and dissemination rules of local statutes or court rules.

Concern for whether an interviewer is required to release certain defendant information to a judge, district attorney, or probation officer has expanded to matters impacting on day-to-day operations, specifically: accuracy of information, dissemination of information, quality control, security of records, and the right of access and review by defendants. The purpose of the workshop on Title 28 was to familiarize project directors and other personnel responsible for the maintenance of case files with the scope of the regulations as well as with trends in the area of privacy and security. It is important that the obligations of the criminal justice agency are understood and that project administrators are able to interpret the federal regulations.

Like most administrative regulations, Title 28 is complex and has been subject to differing interpretations. The purpose of the discussion was to highlight rather than resolve the many issues contained in the regulations.

One important issue is the completeness and accuracy of Criminal History Record Information. Agencies maintaining such records must show the most recent disposition made by their agency. A disposition is defined as any information indicating the stage in the criminal proceeding or a change in confinement status. To insure accuracy of records, states are urged to establish "central record repositories", and to query such a repository before any dissemination. Dissemination logs are required to enable criminal justice agencies to correct any erroneous information previously disseminated.

There are numerous regulations concerning dissemination. For example, there are restraints on the dissemination of arrest information which does not indicate a conviction. Other rules govern dissemination of information to individuals and non-criminal justice agencies. Under Title 28, agency personnel must never state whether or not an individual has a criminal record unless the recipient is authorized to obtain the record.

Another important issue is the requirement for annual random audits of criminal justice agencies to determine compliance with Title 28 regulations. Workshop participants indicated that little was being done in their respective states to comply with the audit requirement.

Othe issues discussed included individual rights of access and review of one's own criminal record; the right to challenge a record; and the right to administrative review and appeal.

Workshop panelists and participants discussed the impact the regulation had on their state and/or agency, and procedures which had been implemented by those agencies which were trying to comply with the regulations.

AFFECTING CHANGE IN RELEASE: CASE LAW, LEGISLATION, COURT RULE

PETER BAKAKOS
WALTER COHEN
BRUCE ROGOW

Although significant progress has been made through the bail reform movement, large numbers of people are still locked up prior to trial. Further, the majority of pretrial detainees are poor. Most jurisdictions still rely on a system of money bond to determine who will be released prior to trial despite the fact that there is no evidence of a relationship between financial forms of release and failure-to-appear or the incidence of pretrial crime. In fact, most of the evidence available indicates that the rate of release could be increased substantially without raising the FTA or pretrial crime rates.

Bruce Rogow, Professor of Law at Nova University and counsel in several landmark cases (including Argersinger v. Hamlin), advocated case law as a basis for defining the parameters of defendants' rights to release. At the time of the Symposium, Rogow was involved in the appeal of Pugh v. Rainwater, a federal case originating in Florida. Pugh would put the burden on the state to establish that no conditions short of money bond were adequate to ensure that the defendant would return to court. The judge would be required to consider all non-monetary forms of release before setting bail and would have to state in writing the reasons for resorting to financial conditions.

Although litigation is not the quickest way to affect change, it may sometimes be necessary to isolate inequities within the system and to bring about needed reform. Rogow also thought it might be helpful to change the terminology used when talking about release. In particular, the phrase "conditions of release" should be substituted for the word "bail". language that does not communicate monetary values will help people concentrate on the issue of a defendant's release and to focus on the conditions realistically necessary to ensure his/her appearance in court.

Walter Cohen, court appointed Master in Philadelphia and Executive Director of the Philadelphia Commission for Effective Criminal Justice, stressed the overcrowding of jails. "To decrease a jail population, you need to get cold hard facts: jail statistics and budgetary figures of what it costs to keep a person in jail."

- One of the most effective ways to reduce the pretrial jail population is to increase the police use of summons and citations.

- The goal of all changes in the system should be to bring release closer to the time of the arrest, either in the jail facility, at the stationhouse, or better yet, at the time of arrest on the streets.

- Requiring quick probable cause hearings will also reduce the jail population. In order to hold the defendant the prosecution has to prove a fair and reliable determination of cause. A third of all cases are "washed out" after a probable cause hearing in which evidence must be shown that a crime has been committed and that it is likely that the defendant did it.

Judge Peter Bakakos of the Cook County Circuit Court and Chairperson of the Illinois Judicial Conference Study Committee on Bail Proceedings, suggested that people working to change the conditions of release should find sympathetic judges who will take a chance. Those judges should be encouraged to make a commitment to pretrial release without financial conditions.

Bakakos was also in favor of inviting resistant judges to conferences to expose them to new concepts in pretrial and to meet practitioners and other judges who are working to make these ideas a reality. "Let the judges know how these changes can expand their role but reduce their case load."

Finally, Bakakos advised attendees to find other sympathetic groups in the community, like the Bar Association, which can influence the judges and other powers within the system. Communities that have developed fair practices of conditions of release should also reach out to surrounding communities and help influence their making changes.

Strategies to affect change in the release system and to eliminated the use of money bail must be multifaceted and focus on litigation, development of alternatives, and on encouraging policymakers to question their assumptions about release.

DEMYSTIFYING EVALUATION

DONALD PRYOR
MARY TOBORG
LEE WOOD

It is important that program administrators are knowledgeable and comfortable with evaluation concepts and jargon. Both project survival and efficient operations can result from a well structured evaluation approach. This workshop was planned to provide practitioners with a realistic introduction to good research practices and to promote a dialogue between evaluators and program persons. The session was chaired by Lee Wood, Director of the diversion component of the Monroe County Bar Association Pretrial Services Program. Highly respected evaluations and cost analyses of the release and the diversion components of the Monroe County program were influential in their securing local funding.

Two researchers specializing in pretrial services talked about the basics of a good study. Don Pryor is affiliated with the Governmental Research Institute which completed the study on the Rochester diversion program. Mary Toborg is the director of the NILE-funded Phase II Evaluation of Pretrial Release being conducted by the Lazar Institute.

The following were among the issues discussed:

- Why should a program become involved in evaluation? In addition to the stereotypical responses from researchers, program administrators provided a number of concrete examples where their programs had benefited from research and evaluation:

  —In one case, a meticulous evaluation showing program impact on clients changed a "no fund" decision to a commitment for permanent funding.

  —Research on failure-to-appear and rearrest rates of release agency clients stopped fallacious claims being made by bondsmen and which were being reported in the local newspapers.

- Why is comparison important? In order to determine the impact of a program, the rates (whether of recidivism, FTA, or case dismissal) of agency clients must be compared with another group of defendants similar in characteristics. For example, a program may have very low rates because it chooses low risk clients rather than because it has program elements which actually impact on FTA or rearrest. A program administrator pointed out that relying on "positive" statistics without a comparison group encourages a practice of selecting low risk clients when the program might more significantly affect another group of clients. Without the control or comparison group, one cannot be certain that the program with already good statistics might not impact more significantly on a higher risk population.

Although there was debate on this issue, the group generally agreed that either an experimental or quasi-experimental study was necessary for proper comparison to gauge program impact.

- Is the experimental design realistic? The researchers pointed out that experimental design with random assignment produced results that had the greatest degree of certainty. Program administrators argued that random assignment was not possible since they were not willing to deny services to defendants for the purposes of a "study". However, a number of examples were provided where experimental study was possible without denial of services:

  —Many programs cannot service all eligible clients. A short term study can be easily done through a random assignment process which will not change the number of clients accepted by the program.

  —Eligibility criteria can be expanded for a short period of time to create more eligible defendants than the program can handle.

  —Many programs cannot interview clients on weekends or defendants who arrive in the jail or court late in the day. By expanding interviewing for a short period of time, a control group can be created with these clients.

  —The focus of the study could change from "the program as a whole" to an assessment of the impact of particular operational practices. For example, many release programs claim that their notification and supervision practices result in low failure-to-appear rates. This could be tested without a denial of services by randomly assigning some defendants to supervision and other defendants to a group without supervision.

Examples were provided of studies which had involved experimentation.

- Is there a substitute for experimentation? Although uncomfortable with the experimental approach for legal and/or ethical reasons, program administrators still wanted objective data to determine their impact on clients. A solution is the use of an approximation: the quasi-experimental study using comparison groups. There was controversy on the validity of this approach which is generally agreed not to be as strong as an experimental study. But, carefully done, the quasi-experimental study can provide useful results. The Monroe County study (described in the 1978 Annual Journal of Pretrial Services) is a good example of this approach. The comparison group approach does not require random assignment, but involves the selection of a group of defendants who would have been eligible before the program started. This "paper match" always carries the risk that the earlier group may be different than those chosen for the program.

- Can evaluation have more impact? Too many evaluations have little impact. Most decision makers often ignore them. One approach to this problem might be to create an advisory committee made up of program administrators and decision makers with an interest in the evaluation. Consultation between the researcher and committee during the evaluation, as one example demonstrated, can result in a more readily understood evaluation which has a greater impact on decision making.

There is frustration with random assignment methods as well as a need for the certainty of results which they produce. This is a dilemma which will not be solved, but may have some solutions in the comparison group approach and in carefully designed experimental studies not involving denial of services. Further, a climate needs to be established in which under certain circumstances experimentation might be appropriate.

Finally, it is important that researchers and practitioners alike strive to demystify their work and better communicate with each other and with policymakers.

FEDERAL LEGISLATION

TIMOTHY McPIKE

To preface his remarks on S.1437 and S.1819, Timothy McPike, staff member for the Senate Committee on the Judiciary, Subcommitte on Improvements in Judicial Machinery, gave an overview of the federal legislative process. After a bill is submitted by a Senator it is referred to committee for consideration. Committee review can occur in several ways. It may be routed to a subcommitte for initial analysis. Where legislation falls under the purview of more than one committee, the assignment may be made consecutively (to one then the other) or jointly (to both at once). In committee, the bill may be scheduled for testimony. Mark-up may be done by members of the Senate or, more usually, by staff. Although much legislation is killed in committee, those bills that go from subcommitte through full committee will go to the floor of the Senate. It is while on the floor that amendments can be made. Amendments may be troublesome because they often occur without in depth consideration. They also result in legislation which is more difficult to interpret because it lacks the legislative history that develops with hearings.

Bills may be acted on by voice vote or by roll call. A problem with voice votes is that there is no evidence of a quorum. If passed, the bill goes on to the House where a similar process occurs. Sometimes, to avoid duplication of the entire process, bills passed by the Senate can be successfully enacted by being attached as an amendment to another House bill. In other cases, the bill is introduced simultaneously to the House and the Senate so that much of the process is happening concurrently. Frequently the House and Senate versions of a bill are different. The bills are then referred to conference for resolution of the conflicts. If a compromise bill can be reached in conference, the modified version is presented to both the Senate and the House for acceptance. No amendments can be made at that time. The bill is either "up or down".

Giving a brief history of the United States criminal code, McPike noted that 'code' is a misnomer. Federal criminal law is not a systematic organized body of statues enacted at one time. Rather, criminal statutes can be found randomly throughout legislation enacted over time.

In 1966 the Brown Commission was established to review the federal criminal law and to make recommendations on its reform to the Senate. Their report was submitted in 1971 at which time the President instructed the Department of Justice to assist Congress in their consideration of the draft report. The outcome was the controversial S.1 with its provisions for capital punishment, expansion of federal jurisdiction and limitation of the procedural rights of the accused.

In order to formulate a bill more acceptable, the Senate passed S.1437 sponsored by Kennedy and McClellan. S.1437 maintains the current law on the more controversial proposals of S.1. Nevertheless, the House has not

adopted the legislation as structured but instead is looking at the bill more critically and liberally than did the Senate. If a House version is adopted, the bill will be referred to a joint conference. Because the Congress adjourns in October for election campaigns, it is unlikely that an agreement will be reached this term.

McPike detailed some of the advantages of codification:

- Currently the federal statutes are scattered throughout the code. Through the proposed revision, all criminal law would be found in Title 18.

- The legislation would standardize definitions which currently vary tremendously because they were enacted at different times. For example, there are 79 terms which currently are used to denote mens rea. These would be reduced to four categories to indicate mental condition at the time of the crime.

- The legislation standardizes syntax and style.

- Whereas jurisdiction previously needed to be proven as an element of the crime, it now is determined prior to proceeding in a federal prosecution. This streamlines the process considerably.

- Perhaps most significant are the proposed sentencing reforms. S.1437 would establish a commission to develop guidelines of minimum and maximum sentences for particular crimes. Factors to be considered in determining sentence would be defined and judges would be required to state their reasons for setting sentence in writing. If a sentence were set outside of the guidelines, the defendant would have the right of appeal. Currently defendants can't appeal the length of sentence except under a provision which guards against cruel and unusual punishment.

On the other hand, there are also criticisms of the legislation as passed by the Senate:

- To achieve uniformity and eliminate the current loopholes in the law, the language has been framed very generally. Some think this creates potential hazards to civil liberties by increasing reliance on judicial interpretation of the law.

- Although some argue that the expansion of federal jurisdiction will not result in an increase in cases prosecuted because budgetary limitations prohibit an increase in federal prosecutors, others fear differently.

- The inchoate crimes of conspiracy, attempt, and solicitation have been expanded and applied across the board to all federal offenses unless specifically excepted. This creates a potential for abusive enforcement of the law.

In contrast to the traditional view of protecting the citizens from government, S.1437 has been characterized as protecting the government from its citizens through use of broad language and sweeping provisions.

McPike went through a detailed review of Title 18 and specifically through the provisions that relate to pretrial matters. Section 1312 of Chapter 35 clarifies the bail jumping statute, requirements of notification, etc. The court is only required to make a reasonable attempt at notification; actual notification is not required.

The Bail Reform Act dictates that the conditions imposed in conjunction with release should be the minimum required to ensure the appearance of the defendant. Money bond is only acceptable when no other condition would be adequate to assure appearance. Commenting on Section 3503, entitled Release Pending Trial in Capital Cases (otherwise know as the Dole amendment) McPike stated that the provision would probably not withstand judicial review. McPike noted that the problem with the federal preventive detention statute is that it doesn't require a hearing, as the D.C. statute does, to establish that there is reasonable evidence to believe that the crime as charged did occur and the defendant was involved.

Referring again to the hazards of voice votes and of amendments from the floor, McPike said, "The Dole Amendment passed without an understanding of five years of hearings and case law on the subject.".

Also discussed were Section 3504, Release Pending Appeal, and the sections dealing with release of juveniles.

McPike reviewed the federal diversion bill (S.1819) as originally submitted and as changed after testimony. The bill essentially establishes a prosecutorial diversion process but in setting eligibility criteria requires that the case is prosecutable. This is to avoid diversion becoming a dumping ground for 'bad' cases.

Another provision states that the offense in question did not involve threat of serious bodily injury. However, this is defined in sufficient detail not to eliminate certain categories of cases across the board, e.g., assault.

- Similarly, in an interest not to preclude everyone with a prior record, the architects of the bill established the standard that it be "reasonably foreseeable that the defendant does not present a risk to the community".

- Further, the defendant cannot exhibit a "continuous pattern of criminal behavior".

These last provisions are less rigorous than the earlier requirement that the defendant be a first offender.

Finally, the legislation states that these standards are simply the minimum standards and may be supplemented by the Department of Justice or the prosecuting attorney of the district. Basically it is a prosecutorial diversion program. The U.S. Attorney's decisions are not reviewable by the court unless they present a violation of equal protection or due process considerations.

The legislation also states that in each case there must be a diversion plan in the form of a written contract. The Act provides for representation by defense counsel and establishes a 12 month limit to the period of diversion unless restitution is to be paid. (It was suggested that a promissory note could be substituted for the longer period of supervision in those cases where restitution must be made.)

McPike summarized by reiterating the statement he made in the plenary on Legislation: the rationale for diversion is not properly rehabilitation or cost effectiveness but, rather, that it is an additional option for case disposition which is more suitable than any other in some situations.

APPENDIX

THE NATIONAL SYMPOSIUM ON PRETRIAL SERVICES 1978

SYMPOSIUM CALENDAR

MONDAY, APRIL 3, 1978

8:30-10:30 — THE EXCHANGE

Ballroom Foyer

Coordinated by:
Delores Fitzgerald
Pretrial Services Resource Center
Washington, D.C.

10:30-12 Noon — PLENARY SESSION

Cuyamaca Room

WELCOME

Madeleine Crohn, Director
Pretrial Services Resource Center
Washington, D.C.

PRETRIAL IN PERSPECTIVE

Donald Doyle, State Representative
Iowa House of Representatives
Des Moines, Iowa

William Drake, Director
Public Safety and Criminal Justice Program
National League of Cities
Washington, D.C.

Garry Mendez Jr., Director
Administration of Justice
National Urban League
New York, New York

Richard Tropp, Former Consultant
Office of the Secretary
Department of Health, Education and Welfare
Washington, D.C.

MONDAY CONT.

1:30-2:30 — PLENARY SESSION

Cuyamaca Room

LEGISLATION

Alan Henry
Pretrial Services Resource Center
Washington, D.C.

Jeffrey Padden, State Representative
Chairman, House Corrections Committee
Lansing, Michigan

Bruce Rogow, Professor
Nova University Law School
Ft. Lauderdale, Florida

2:45-5:00 — WORKSHOPS

FUNDING ALTERNATIVES

San Antonio Room

David Speights, Project Manager
National Association of State Drug Abuse Program Coordinators
Washington, D.C.

Richard Tropp, Former Consultant
Office of the Secretary
Department of Health, Education and Welfare
Washington, D.C.

ETHICS FOR RESTITUTION AND COMMUNITY SERVICE PROGRAMS

Santa Barbara Room

Kenneth Kotch, Program Administrator
Lake County Deferred Prosecution Program
Waukegan, Illinois

Phil Pennypacker, Executive Director
Office of the Public Defender
Sacramento, California

MONDAY CONT.

POINT SYSTEMS V. SUBJECTIVE DETERMINATIONS
San Carlos Room

Horace Cunningham, Director
Superior Court Correctional Volunteer Center
Tucson, Arizona

Michael Jameson
American Justice Institute
Sacramento, California

Jeremy Travis, Director
Criminal Justice Agency
New York, New York

FUNDAMENTALS OF VICTIM/WITNESS SERVICES
San Diego Room

Margaret Douglas
Community Relations Dept.
San Diego, California

Thomas Tait, Project Coordinator
Clark County District Attorney's Office
Las Vegas, Nevada

TITLE XXVIII: PRIVACY AND SECURITY ACT
San Gabriel Room

Jay Carver, Deputy Director
D.C. Bail Agency
Washington, D.C.

Blythe Garr, Consultant
New York, New York

2:45-5:30 PROFESSIONAL DEVELOPMENT SEMINAR
PRE-REGISTRATION REQUIRED
COST ANALYSIS
Alvarado Room (#326)

Michael Kirby
Pretrial Services Resource Center
Washington, D.C.

...continued

MONDAY CONT.

Donald Pryor, Research Analyst
Center for Governmental Research, Inc.
Rochester, New York

Billy Wayson, Director
Correctional Economics Center
Alexandria, Virginia

5:00-6:30 EXCHANGE
Ballroom Foyer

5:30-7:00 CASH BAR
Cuyamaca Room

TUESDAY, APRIL 4, 1978

9:30-10:30 PLENARY SESSION

Cuyamaca Room

PRETRIAL AND THE ISSUE OF DANGER

John Cleary, Executive Director
Federal Public Defenders Inc.
San Diego, California

Caleb Foote, Professor
Center for Study of Law and Society
University of California
Berkeley, California

Robert Leonard, Prosecutor
President, National District Attorneys Association
Flint, Michigan

Jeremy Travis, Director
Criminal Justice Agency
New York, New York

10:45-12:45 WORKSHOPS

SUBSIDIES: A BETTER SOURCE OF FUNDING?

San Antonio Room

William Hagans, Research Analyst
House of Representatives
Olympia, Washington

Robert Hanson, Director
Ramsey County Court Services
St. Paul, Minnesota

Craig Vos, Executive Director
Project Remand
St. Paul-Ramsay County Pretrial Services Agency
St. Paul, Minnesota

Billy Wayson, Director
Correctional Economics Center
Alexandria, Virginia

TUESDAY CONT.

FUNDAMENTALS OF RELEASE

Santa Barbara Room

Jo Baumann, Supervisor
Pretrial Release
Department of Correctional Services
Des Moines, Iowa

David Forrest, Jr., Borough Director
Criminal Justice Agency
Brooklyn, New York

Melvena Owens, Director
Community Release Agency, Inc.
Pittsburgh, Pennsylvania

PRETRIAL AND THE SUBSTANCE ABUSER

San Diego Room

John Bellassai, Director
Superior Court Narcotics Pretrial Diversion
Washington, D.C.

Curtis Foulks, Jr., Director
Pretrial Release Program
Toledo, Ohio

Andrew Mecca, Alcohol Administrator
Department of Health & Human Services
San Rafael, California

David Speights, Project Manager
National Association of State Drug Abuse Program Coordinators
Washington, D.C.

ETHICS OF RESTITUTION AND COMMUNITY SERVICE PROGRAMS

San Gabriel Room

Kenneth Kotch, Program Administrator
Lake County Deferred Prosecution Program
Waukegan, Illinois

Phil Pennypacker, Executive Director
Office of the Public Defender
Sacramento, California

TUESDAY CONT.

DEMYSTIFYING EVALUATION
Alvarado Room (#326)

Donald Pryor, Research Analyst
Center for Governmental Research, Inc.
Rochester, New York

Mary Toborg, Associate Director
The Lazar Institute
Washington, D.C.

Lee Wood, Deputy Director
Monroe County Bar Association Pretrial Services
Rochester, New York

10:45-12:45 PROFESSIONAL DEVELOPMENT SEMINARS (PART 1) PRE-REGISTRATION REQUIRED

PRETRIAL ADMINISTRATORS AND THE CRIMINAL JUSTICE SYSTEM: MANAGEMENT CONCEPTS
San Carlos Room

Ernest Friesen, Dean
Whittier College Law School
Los Angeles, California

PERSONNEL MANAGEMENT: UNDERSTANDING AND DEALING EFFECTIVELY WITH TODAY'S EMPLOYEES
San Fernando Room

Thomas Cameron, Director
Advanced and Continuing Education
Institute for Court Management
Denver, Colorado

David Fletcher, Associate Professor
Management and Public Administration
University of Denver
Denver, Colorado

...continued

TUESDAY CONT.

STYLES OF SUPERVISION FOR LINE STAFF AND MANAGERS
Carrillo Room (#330)

Eileen Ochse, Training Consultant
Salt Lake City, Utah

1:00-2:30 JOINT LUNCHEON
WITH ATTENDEES OF SPECIAL NATIONAL WORKSHOP ON PRETRIAL RELEASE
(Tickets must be purchased in advance)
North Terrace

PRETRIAL 1978: A PROSPECTUS

Caleb Foote, Professor
Center for Study of Law and Society
University of California
Berkeley, California

2:45-5:00 WORKSHOPS

POINT SYSTEMS V. SUBJECTIVE DETERMINATIONS
San Antonio Room

Horace Cunningham, Director
Superior Court Correctional Volunteer Center
Tucson, Arizona

Michael Jameson
American Justice Institute
Sacramento, California

Jeremy Travis, Director
Criminal Justice Agency
New York, New York

FUNDAMENTALS OF DIVERSION
San Antonio Room

James Davis, Project Director
Project Crossroads
Washington, D.C.

...continued

TUESDAY CONT.

Henrietta Faulconer, Director
Operation DeNovo
Minneapolis, Minnesota

Dennis Liebert, Corrections Planner
Bureau of Criminal Justice Planning and Assistance
Tallahassee, Florida

AFFECTING CHANGE IN DIVERSION: CASE LAW, LEGISLATION, COURT RULE
San Diego Room

Richard Hughes, Chief Justice
Supreme Court of New Jersey
Trenton, New Jersey

FUNDING ALTERNATIVES
San Gabriel Room

David Speights, Project Manager
National Association of State Drug Abuse Program Coordinators
Washington, D.C.

Richard Tropp, Formerly Consultant
Office of the Secretary
Department of Health, Education and Welfare
Washington, D.C.

IMPLEMENTATION OF 10% CASH DEPOSIT SYSTEMS
Alvarado Room (#326)

Nick Gedney, Director
Pretrial Services Division
Philadelphia, Pennsylvania

William Sandbach, Executive Director
California Advisory Board of Surety Agents
Sacramento, California

TUESDAY CONT.

2:45-5:30 PROFESSIONAL DEVELOPMENT SEMINARS (PART 2) PRE-REGISTRATION REQUIRED

Same rooms as 10:45

8:30-11:00 CRUISE OF SAN DIEGO HARBOR

Boat departs Sheraton Marina 9:00 pm.
Tickets must be purchased in advance.

WEDNESDAY, APRIL 5, 1978

9:00-12 Noon **PROFESSIONAL DEVELOPMENT SEMINARS**
PRE-REGISTRATION REQUIRED

NEEDS ASSESSMENT AND CASE PLANNING USING SERVICE CONTRACTS
San Antonio Room

Robert Nideffer, President
Enhanced Performance Associates
San Diego, California

CATEGORIZING THE DANGEROUS DEFENDANT AND DEVELOPING RELEASE RECOMMENDATION SCHEMES
San Carlos Room

Robert Meier, Director
Division of Criminal Justice
University of New Haven
New Haven, Connecticut

Daniel Ryan, Chief
Pretrial Services Agency
Brooklyn, New York

Kathleen O'Boyle
Pretrial Services Agency
Brooklyn, New York

9:30-10:30 **PLENARY SESSION**
Cuyamaca Room

MEDIATION/ARBITRATION: ITS INTERFACE WITH PRETRIAL SERVICES

Daniel McGillis, Research Fellow
Harvard Law School
Consultant, Abt Associates
Cambridge, Massachusetts

Stephen Steiner, Program Coordinator
Community Dispute Services
American Arbitration Association
San Francisco, California

...continued

Paul Wahrhaftig, Program Secretary
Grassroots Citizen Dispute Resolution Clearinghouse
Pittsburgh, Pennsylvania

Ann Weisbrod, Director
Institute for Mediation and Conflict Resolution Dispute Center
New York, New York

10:45-12 Noon **WORKSHOPS**

INTAKE CENTER CONCEPT
Santa Barbara Room

John Galvin, Project Director
American Justice Institute
Sacramento, California

TITLE XXVIII: PRIVACY AND SECURITY ACT
San Diego Room

Jay Carver, Deputy Director
D.C. Bail Agency
Washington, D.C.

Blythe Garr, Consultant
New York, New York

LOBBYING, USING THE MEDIA AND DEVELOPING COMMUNITY SUPPORT
San Fernando Room

William Barker, Director
Ingham County Bail Program
Lansing, Michigan

Peter Jensen, Counsel
House Criminal Justice Committee
Sacramento, California

Arthur Spears, Assistant Director
R.O.R. Project, Recorder's Court
Detroit, Michigan

WEDNESDAY CONT.

AFFECTING CHANGE IN RELEASE: CASE LAW, LEGISLATION, COURT RULE

San Gabriel Room

Peter Bakakos, Judge
Circuit Court of Cook County
Chicago, Illinois

Walter Cohen, Master
Court of Common Pleas
Philadelphia, Pennsylvania

Bruce Rogow, Professor
Nova University Law School
Ft. Lauderdale, Florida

FUNDAMENTALS OF MEDIATION/ARBITRATION

Alvarado Room (#326)

Stephen Steiner, Program Coordinator
Community Dispute Services
American Arbitration Association
San Francisco, California

Paul Wahrhaftig, Program Secretary
Grassroots Citizen Dispute Resolution Clearinghouse
Pittsburgh, Pennsylvania

12:15-1:15 PLENARY SESSION

Cuyamaca

PRETRIAL: AN UPDATE

Ilene Bernstein, Assistant Professor
Indiana University School of Law
Bloomington, Indiana

Sally Hillsman Baker, Project Director
Vera Institute of Justice
New York, New York

John Galvin, Project Director
American Justice Institute
Sacramento, California

...continued

WEDNESDAY CONT.

James McMullin, Project Manager
U.S. General Accounting Office
Seattle, Washington

Mary Toborg, Associate Director
The Lazar Institute
Washington, D.C.

SYMPOSIUM SCHEDULE

Monday	Tuesday	Wednesday
Exchange 8:30-10:30 Plenary 10:30-12 Noon	Plenary 9:30-10:30 Workshops 10:45-12:45 Professional Development Seminars 10:45-12:45	Professional Development Seminars 9:00-12 Noon Plenary 9:30-10:30 Workshops 10:45-12 Noon Plenary 12:15-1:15
Plenary 1:30-2:30 Workshops 2:45-5:00 Professional Development Seminar 2:45-5:30	Luncheon 1:00-2:30 Workshops 2:45-5:00 Professional Development Seminars 2:45-5:30	
Exchange 5:00-6:30 Cash Bar 5:30-7:00	Boat Ride 8:30-11:00	

END