Bail: A Legal Analysis of the Bond-Setting Behavior of Holiday Court Judges in Chicago

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BAIL: A LEGAL ANALYSIS OF THE BOND-SETTING
BEHAVIOR OF HOLIDAY COURT JUDGES
IN CHICAGO*

The ultimate viability of our legal system depends upon its ability to
recognize its fallibility and correct its mistakes. Stability is an accepted goal
of social organization until it results in atrophy. At that point stability must
give way to change in order to insure a system responsive to the rights of
individuals who encounter that system.

In the case of bail, adherence to established practice has resulted in the
perpetuation of a system of injustice. The only way to eliminate this injus-
tice is to change the manner in which the bail right is administered. Over
the years many articles have been written¹ and many studies have been con-
ducted² with a view to revising the administration of bail in this country.
The attempts at reform³ have not been futile,⁴ but changes have come about
rather slowly.⁵

The Illinois bail laws were revised more than ten years ago, but the im-
plementation of the reforms has fallen far short of the goals. This article
will present statistical data showing that holiday courts in Chicago⁶ are nei-

* The author wishes to express appreciation to all of the people associated with
the Cook County Special Bail Project. This article could not have been written without
them. Special thanks is extended to Betty Schulte and Carol Leff, the present and
former directors of the Project, and Stephen A. Schiller for their individual assistance.

1. See, e.g., Conference on Bail and Indigency, 1965 U. ILL. L.F. 1; Harris, Bail
—The Case For Reform, 124 New L.J. 124 (1974); Kamin, Bail Administration in Illi-
nois, 53 ILL. B.J. 674 (1965); Pound and Leacy, Bail Reform—The Search for Constitu-
tional Realism, 11 Duquesne L. Rev. 14 (1972). See also notes 28 and 32 infra.

2. See, e.g., McCarthy and Wahl, The District of Columbia Bail Project: An
Illustration of Experimentation and a Brief For Change, 53 Geo. L.J. 675 (1965); Pines,
An Answer to the Problem of Bail: A Proposal In Need of Empirical Confirmation,
9 Colum. J.L. & Soc. Prob. 394 (1973); Rankin, The Effect of Pretrial Detention, 39
N.Y.U.L. Rev. 641 (1964); Note, The Development of Release on Recognizance and
the Dane County Bail Study, 1965 Wis. L. Rev. 156. See also notes 28 and 32 infra.

3. For an examination of one of the most comprehensive attempts at reform, see
ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING
TO PRETRIAL RELEASE (Approved Draft, 1968). Illinois' compliance with these stand-
ards is discussed in S. Schiller, The ABA Standards for the Administration of

§§ 23-1301 through 1332 (Supp. IV. 1971). The Act provides for preventive detention,
which is considered by many to be a step backwards in the movement towards reform
of pretrial procedures. For a comprehensive analysis of the D.C. provisions, see Borman,
discussion of preventive detention generally, see Hermann, Preventive Detention: A

5. It was not until 1963 that Illinois completely revised its bail laws. The federal
statute, the Bail Reform Act, 18 U.S.C. §§ 146-52 (1970), was not passed until 1966.

6. The holiday courts in Chicago are those of the First Municipal District of the
Circuit Court of Cook County. They are special courts set up to hear cases on Satur-
ther acting in accordance with the policies expressed by the legislature, nor in accordance with the requirements of due process, equal protection, and the eighth amendment prohibition against excessive bail.

First, it will be established that there is a right to bail in Illinois prior to conviction. Secondly, the ultimate purpose of bail will be shown to be that of reasonably assuring the accused's appearance at trial. Thirdly, the necessity of counsel at the bail hearing as a vital ingredient in securing the defendant's constitutional rights will be pointed up. Finally, the procedures available enabling the defendant to contest the bail decision will be presented.

**Data**

The data to be presented was obtained from the records of the Cook County Special Bail Project. The Project is a not-for-profit organization in which citizen volunteers attend holiday court sessions. Defendants in felony, misdemeanor and women's court are interviewed before the bail hearing to obtain information designed to help the judge in making a reasonable bail decision. This information is verified by calling a family member.

The Project also has some observers and an attorney present during days, Sundays and holidays. These are the only courts for which detailed information on bond-setting behavior was available. It should be noted that there may be differences in the bond-setting behavior of the weekday bail judges. The latter are full judges, whereas the holiday court judges are associate judges, in many cases traffic court judges. The holiday courts, however, unlike the weekday courts, do have ready access to verified information concerning the accused's family and community ties. Other possible differences between the two courts will be noted throughout the text wherever applicable.

This article will focus on the right to bail before trial. The right to bail after conviction, pending appeal, is not absolute. *See Ill. Rev. Stat. ch. 38, § 110-4 (1973).* The presumption of innocence no longer applies at this stage of the criminal process.

The data was obtained with the assistance of Stephen A. Schiller, J.D., Associate Professor of Criminal Justice at the University of Illinois, Chicago Circle, presently the executive director of the Chicago Crime Commission. Mr. Schiller has done statistical research on bail and the criminal investigator. He recently completed a study on Illinois' compliance with the ABA standards which is cited in note 3 *supra.*

Although the Bail Project does interview in women's court, complete data was not available from this court. As a result, women's court figures are not included in the analysis.

When called, the family member is not advised of the answers a defendant has given but must give his or her own answers to the same questions the defendant has answered. The answers are then compared to note any discrepancies. It has been observed, however, that some defendants learn on the street what information will help them to receive a low bond. Other defendants remember the procedure from previous appearances in holiday court. Thus the verifying process is not foolproof. The judge will be told by the Bail Project attorney whether the information is verified.

The family member contacted is also asked to come to court. Some judges give weight to the presence of family members at the bail hearing, but an analysis of the data obtained shows that that weight is minimized where the officer or complainant is also present.

The Public Defender's office also sends one of its attorneys to the holiday court bail hearing. Less than two percent of the defendants in the sample were represented by their own counsel.
the bail hearing. The attorney tries to persuade the judge to use the information obtained by the volunteers who have interviewed the defendants. The Project believes that by using the information they have obtained, the judge can make a more reasonable and just decision at the bail hearing. The observers record the bail decision with the information that has been presented to the judge. The recorded information provides the basis for the statistical data that is analyzed in this article.  

RIGHT TO AND PURPOSE OF BAIL

The eighth amendment to the United States Constitution prohibits excessive bail but does not provide an absolute right to bail. The Illinois Constitution provides an absolute right to bail before conviction with one exception. This exception involves capital offenses (those in which death is a possible punishment), where the proof is evident or the presumption great that the accused is guilty of the offense charged. The Illinois bail statute was similarly worded until 1973, when, in response to the Supreme Court's decision in Furman v. Georgia, the legislature amended the statute. The bail statute as amended provides an absolute right to bail except when the offense charged is murder, aggravated kidnapping or treason and the proof is evident or the presumption great that the accused is guilty. If charged

12. The sample consisted of 1,000 cases, all adult males (see note 9 supra), chosen randomly from the observation sheets. The period covered is from May 1, 1972, to April 31, 1973 (where information from other periods is available that fact will be noted). The population for this period was determined from the statistical records kept by the Bail Project showing the number of defendants who appeared at each session. The observation sheet total did not equal this amount, however. Twenty three percent of the cases—3,892 out of 16,671—were missing. Observers' reports of these cases were either mislaid or non-existent. The first sample that was chosen was meaningless because many observers had failed to take down relevant information. The sample population was therefore limited to those observation sheets prepared by conscientious observers. Four observers were chosen from felony and four from misdemeanor court, with the help of the then director of the Bail Project, Carol Leff. This resulted in more missing cases—11,739 or sixty nine percent of the total population. A respective proportion of felony and misdemeanor cases (determined from the population total of 16,671) was chosen randomly from the remaining cases.

The statistical work was done with the help of a computer. M x N tables are presented along with frequencies. A chi square (a measure of significance) could not be computed in any cases because of the presence of empty cells. Certain percentages were adjusted for purposes of this paper to exclude the dismissed cases from the computations. These cases do not involve a bail decision. They are usually minor city charges—cases in which the defendants were not interviewed by the Bail Project—although sometimes they were given legal representation.

13. The eighth amendment states that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. For a general discussion of the history behind its adoption, see Foote, The Coming Constitutional Crisis in Bail: I, 113 U. PA. L. REV. 959 (1965).


15. 408 U.S. 238 (1972). Furman made unconstitutional those death penalty provisions which were capable of being discriminatorily applied.

with one of these offenses, the accused has the burden of showing that he should be admitted to bail.17

Illinois courts have long recognized the right to bail before conviction under the Illinois Constitution and statute.18 As early as 1904, the Illinois Appellate Court indicated the position that the right to bail has assumed in our legal system. "The right to release upon bail is so firmly grounded in our system of jurisprudence... that one accused of crime, whether guilty or innocent, cannot be deprived of the right with impunity."19

The ultimate purpose of bail is to secure the appearance of the accused at trial.20 The interests of both the accused and the state have been balanced in determining the purpose of bail. The interest of the accused is represented by the principle underlying the granting of bail—the presumption that an accused is innocent until proven guilty at trial.21 The state's interest is having the accused appear for trial.22 Where the state fails to prove that the accused will not appear as required, the accused should be granted bail in the absence of extreme circumstances.

**LEGISLATIVE INTENT AND POLICY**

The Bail Article of 1963 contained four major innovations:23 release on recognizance (ROR) was instituted;24 failure to appear on ROR as a sep-

17. In People v. Anthony, 55 Ill. 2d 222 (1974), the Illinois Supreme Court was faced with the question of whether the abolition of the death penalty made bailable every criminal offense. In that case the defendant was indicted for aggravated battery, aggravated kidnapping, attempted murder, armed robbery and armed violence. The appellate court had reversed the order of the lower court denying bail, on the ground that the defendant was not charged with a capital offense and thus was entitled to bail under the Illinois Constitution. The state was granted leave to appeal. Because the defendant had already been tried, convicted and sentenced, the court considered the issue moot. The court vacated the order of the appellate court, however, "since its effect was to hold unconstitutional section 110-4(a), a question upon which we express no opinion." Id. at 223. The court also noted that since new legislation again provides for the death penalty in certain specified categories of murder, ILL. REV. STAT. ch. 38, § 1005-8-1A (1973), the problem will not have to be considered.


22. Id. at 625, 217 N.E.2d at 803.

23. ILL. REV. STAT. ch. 38, § 110 (1973). For further analysis of the Bail Article, see Board of Student Editors, *The Administration of Illinois Bail Provisions: An Empirical Study of Four Downstate Illinois Counties*, 1972 U. ILL. L.F. 341. The study showed recognizance bonds set in eleven percent of the felony cases and twenty-one percent of the misdemeanor cases during the period January 1, 1969, to June 30, 1969. These findings are comparable to those shown in Table 1, infra, in that the holiday courts analyzed in this article also gave twice as many ROR bonds in misdemeanor cases.

24. ILL. REV. STAT. ch. 38, § 110-2 (1973). The statute says that an accused may be released on his own recognizance, but the section also limits the court's discretion
arate criminal offense was initiated;\textsuperscript{25} posting of ten percent of the face of the bond was established;\textsuperscript{26} and guidelines to the courts for determining the amount of bail were presented.\textsuperscript{27} The reasons for these changes can be found in the comments of the committee that drafted the article.

The committee took a realistic approach in drafting the article, based upon many factual studies\textsuperscript{28} and what it recognized as the ultimate purpose of bail—to assure the accused's presence at trial.\textsuperscript{29} It discovered that financial loss was no real deterrent in most cases,\textsuperscript{30} and expressed concern over the anomaly of requiring a money bond from an indigent. Acknowledging that other factors\textsuperscript{31} are relevant to assuring the presence of the accused at trial,\textsuperscript{32} the drafters arrived at the conclusion that most persons have every intention of appearing for trial and should be released on their own recognizance rather than being required to post a money bond. For those cases where the court decided that financial loss would be necessary as a deterrent, a money bond was suggested, but the loss was to be minimized in the case of a person who appears for trial.\textsuperscript{33} The express purpose was to rely upon

by stating that this \textit{shall} be liberally construed to effectuate the purpose of relying upon criminal sanctions.

25. Id. The offense was made subject to the penalty provided in ILL. REV. STAT. ch. 38, § 32-10 (1973).

26. ILL. REV. STAT. ch. 38, § 110-7 (1973). For example, if the bond set is $250, the defendant need only post $25. The section, however, provides that no less than $25 be posted. When the conditions of the bond have been performed and the defendant has been discharged from all obligations in the cause, the defendant receives back ninety percent of the amount posted.

27. ILL. REV. STAT. ch. 38, § 110-5 (1973). These guidelines are set forth at note 38 \textit{infra} and accompanying text.


29. \textit{See note 20 supra} and accompanying text.

30. Where a bondsman was used, the accused lost his money regardless of whether he appeared. Where a bondsman was not used, it was his family and friends, not the accused personally, who suffered the loss in most of the cases.

31. These other factors are the community and family ties of the accused. They are discussed in more detail at note 53 \textit{infra} and accompanying text.


33. The loss that the legislature speaks of is apparently the loss of the use of the money required by the money bond, along with the one percent court cost that is retained. \textit{See note 26 supra.}
criminal sanctions rather than financial loss to assure the appearance of the accused at trial.\textsuperscript{34}

\textbf{GUIDELINES FOR DETERMINING BAIL}

The eighth amendment to the United States Constitution prohibits excessive bail. This prohibition is binding on the states through the fourteenth amendment.\textsuperscript{35} Although the point at which bail becomes excessive is not easily ascertained, the courts have set forth certain minimal requirements that must be met in order for the bail to be permissible under the eighth amendment. The accused must be released on the least restrictive conditions.\textsuperscript{36} "Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose [to assure the appearance of the accused] is 'excessive' under the eighth amendment."\textsuperscript{37}

The Illinois statute also provides certain minimal standards that the courts must adhere to in making the bail decision.\textsuperscript{38} The financial ability of the accused must be taken into account. The bail set must be sufficient to assure compliance with the conditions set forth in the bond,\textsuperscript{39} but it should not be oppressive. It should reflect the offense charged, as well as the past criminal acts and conduct of the accused.\textsuperscript{40}

The crux of this section appears to be the "not oppressive" clause. No court has attempted to define what is meant by the words "not oppressive," but it seems reasonable to assume that through this clause the legislature intended to adopt the prohibition contained in the eighth amendment. In ordinary usage, the word "oppressive" encompasses the term "excessive." If the bail that is set is excessive, it is also oppressive.

A clearer understanding of the meaning of the term "not oppressive" can be acquired by reading the clause in connection with the inequity the 1963 Bail Article was designed to eliminate. The legislature revised the bail laws to abolish a system which resulted in the setting of unjust and oppressive bonds. The inequity the legislature sought to eliminate was the require-

\textsuperscript{34} ILL. REV. STAT. ch. 38, § 110-2 (1973).
\textsuperscript{37} Stack v. Boyle, 342 U.S. 1, 4 (1951).
\textsuperscript{38} ILL. REV. STAT. ch. 38, § 110-5 (1973). Although the section is entitled "guidelines for determining the amount of bail," a reading of the provisions in connection with the comments of the drafting committee suggests that the legislature intended the section to apply to ROR bonds as well as money bonds. Section 110-2 on recognizance merely states, "when from all the circumstances . . . ," a clause broad enough to include the provisions of section 110-5 in addition to other information about the accused.
\textsuperscript{39} ILL. REV. STAT. ch. 38, § 110-10 (1973) provides that the conditions of the bond shall be that the accused will: 1) appear to answer the charges against him; 2) submit to the orders and processes of the court; 3) not depart the state without leave and; 4) such other reasonable conditions as the court may impose.
\textsuperscript{40} Justice Jackson, concurring in Stack v. Boyle, 342 U.S. 1, 10 (1951), stated that "misdeeds or a bad record should prejudice only those who are guilty of them." This suggests that only prior convictions should be considered in this regard.
ment of a bond in excess of that which was necessary to assure the accused's presence at trial. As a result, the legislature proclaimed that financial loss was not to be required unless it was needed to deter bail jumping, and if necessary, financial loss was to be minimized in the case of a person who appears for trial.\textsuperscript{41} Where the bond set is not commensurate with assuring the accused's presence at trial, it is oppressive.\textsuperscript{42}

**ROR Bonds**

The previous discussion has indicated that the legislature expressed its intention that the great majority of persons be released on their own recognizance. Table 1 suggests that this policy is far from being effectuated. Even the most recent figures do not show release on recognizance in a majority of the cases. Rather, ROR bonds are given in less than one-third of all the cases. In felony cases, the disparity is much greater.

<table>
<thead>
<tr>
<th>TABLE 1</th>
<th>ADJUSTED PERCENTAGE\textsuperscript{44} OF ROR BONDS SET IN HOLIDAY COURT\textsuperscript{45}</th>
</tr>
</thead>
<tbody>
<tr>
<td>Misdemeanor</td>
<td>25.9</td>
</tr>
<tr>
<td>Felony</td>
<td>13.4</td>
</tr>
<tr>
<td>Average</td>
<td>20.0</td>
</tr>
</tbody>
</table>

The data presented in this table suggests that some judges are abusing

\textsuperscript{41} See note 33 supra and accompanying text.
\textsuperscript{42} Since they mean essentially the same thing, "excessive" and "oppressive" will be used interchangeably in the text. The use of one is meant to imply the application of the other.
\textsuperscript{43} In practice, the courts give Individual (I) bonds rather than ROR bonds. In the case of an I bond, unlike an ROR bond, a monetary amount is set, although the defendant posts no cash. Usual practice is not to enter judgment for the amount if forfeited. The text speaks in terms of ROR bonds to avoid confusion when speaking of the bail statute.
\textsuperscript{44} The percentages were adjusted to exclude minor city cases, which are customarily dismissed by the court. See note 12 supra.
\textsuperscript{45} Figures obtained from Judge Peter Bakakos, Chief Judge of the Surety Division, indicate that there were even fewer ROR bonds set in weekday courts during 1972 and 1973 (figures for 1974 were not available). In Chicago in 1972 only 19.2\% of the 109,511 bonds posted were ROR bonds (The total number of bonds posted includes ROR bonds and ten percent bonds. The total consists of the figures for holiday court, weekday courts and police stations considered together). In 1973, 22.7\% of the 107,722 bonds posted were ROR bonds. The percentage for the county as a whole (suburban districts included) is even lower. In 1972, only 18.9\% of the 143,927 bonds posted were ROR bonds. In 1973, 21.1\% of the 150,869 bonds posted were ROR bonds. When one adds to the total number of bonds posted those cases where the defendant was unable to post the ten percent (this would amount to the total number of bonds set), the percentage of ROR bonds will be even lower.

A pilot project undertaken by the former Assistant Director of the Bail Project, Jon Moore, in the fall of 1973, showed that only 5 percent of the 168 defendants observed in Branch 24 (a weekday felony court) received ROR bonds. For an explanation of
their discretion in setting bail. Although the bail that is set may be "within the limits" prescribed by the legislature, the court abuses its discretion if it clearly appears that the type as well as the amount of the bail set constitutes a substantial departure from the fundamental law and its spirit and purpose. Setting ROR bonds in less than one-third of the cases is a seemingly substantial departure from the purpose of relying upon criminal sanctions instead of financial loss, and releasing a great majority of defendants on their own recognizance. Yet the following table shows that during the period May, 1972, through April, 1973, seventy-four percent (23 out of 31) of the judges set ROR bonds for less than thirty percent of the defendants. The recent figures indicate that some of the judges are giving even fewer ROR bonds than before. A few are giving more ROR bonds, but in most cases the increase does not appear to be significant.

TABLE 2
ADJUSTED PERCENTAGE OF ROR BONDS GIVEN BY INDIVIDUAL JUDGES IN HOLIDAY COURT

<table>
<thead>
<tr>
<th>JUDGE</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
<th>7</th>
<th>8</th>
</tr>
</thead>
<tbody>
<tr>
<td>% ROR</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>March-April</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1972-1973</td>
<td>14.3</td>
<td>33.8</td>
<td>4.8</td>
<td>0.0</td>
<td>36.4</td>
<td>9.1</td>
<td>7.1</td>
<td>14.3</td>
</tr>
<tr>
<td>Jan.-June</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1974</td>
<td>32.6B*</td>
<td>1.7F</td>
<td>25.1B</td>
<td>38.4B</td>
<td>(31.8F**)</td>
<td>(10.1F)</td>
<td>(15.8F)</td>
<td>36.9M**</td>
</tr>
<tr>
<td></td>
<td>(35.9M***</td>
<td>42.3M</td>
<td>62.9M)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>9</td>
<td>10</td>
<td>11</td>
<td>12</td>
<td>13</td>
<td>14</td>
<td>15</td>
<td>16</td>
</tr>
<tr>
<td>1972-1973</td>
<td>41.6</td>
<td>43.8</td>
<td>23.3</td>
<td>17.2</td>
<td>26.9</td>
<td>12.5</td>
<td>0.0</td>
<td>68.4</td>
</tr>
<tr>
<td>1974</td>
<td>38.7B</td>
<td>16.7B</td>
<td>18.4B</td>
<td>0.0F</td>
<td>(4.1F</td>
<td>(4.9F</td>
<td>(11.7F</td>
<td>31.6M)</td>
</tr>
<tr>
<td></td>
<td>(51.3M)</td>
<td>(35.9M)</td>
<td></td>
<td></td>
<td></td>
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<td></td>
<td></td>
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<tr>
<td></td>
<td>17</td>
<td>18</td>
<td>19</td>
<td>20</td>
<td>21</td>
<td>22</td>
<td>23</td>
<td>24</td>
</tr>
<tr>
<td>1972-1973</td>
<td>40.0</td>
<td>27.2</td>
<td>17.2</td>
<td>13.5</td>
<td>16.6</td>
<td>0.0</td>
<td>18.1</td>
<td>3.8</td>
</tr>
<tr>
<td>1974</td>
<td>22.7M</td>
<td>21.7F</td>
<td>35.6B</td>
<td>(28.6F</td>
<td>(45.3M)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(12.5F</td>
<td>23.2M)</td>
<td></td>
<td></td>
<td></td>
<td></td>
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<td></td>
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<td></td>
<td>25</td>
<td>26</td>
<td>27</td>
<td>28</td>
<td>29</td>
<td>30</td>
<td>31</td>
<td></td>
</tr>
<tr>
<td>1972-1973</td>
<td>10.0</td>
<td>20.0</td>
<td>12.1</td>
<td>11.5</td>
<td>47.8</td>
<td>40.0</td>
<td>25.0</td>
<td></td>
</tr>
<tr>
<td>1974</td>
<td>16.2B</td>
<td>21.7F</td>
<td>39.1M</td>
<td>6.1F</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

*B means both felony and misdemeanor considered together
***F means felony
***M means misdemeanor

these results, see note 56 infra. For an examination of the number of ROR bonds set from 1963 to 1972, see Smith and Reilley, The Illinois Bail System: A Second Look, 6 JOHN MARSH. J. 33 (1972) [hereinafter referred to as Smith and Reilley].

46. Within the limits in the sense that the court, after considering the surrounding circumstances, may choose whether to set an ROR bond or a money bond.

47. Cf. People v. Miller, 33 Ill. 2d 439, 444, 211 N.E.2d 708, 712 (1965), where the defendant argued that the court abused its discretion in sentencing.

48. It is undetermined for 1972 to 1973 which, or both, courts the judge was sitting in; accordingly, it is to be considered a "B".
When an accused is interviewed by the Bail Project, one would assume that the judge would be more likely to give an ROR bond, since he is more likely in such circumstances to have verified information regarding the accused. The following table indicates that at least ten (a third) of the judges do take the Bail Project seriously. These judges give more ROR bonds when an accused is interviewed by the Bail Project. The remaining judges, however, seem to give no credence to the Bail Project—an apparent violation of due process as well as legislative intent.49

### TABLE 3

**Adjusted Percentage of ROR Bonds Where BP Interview v. No BP Interview**

<table>
<thead>
<tr>
<th>JUDGE</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
<th>7</th>
<th>8</th>
<th>9</th>
<th>10</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes BP</td>
<td>0.0</td>
<td>30.0</td>
<td>11.1</td>
<td>No</td>
<td>50.0</td>
<td>0.0</td>
<td>0.0</td>
<td>0.0</td>
<td>0.3</td>
<td>60.0</td>
</tr>
<tr>
<td>No BP</td>
<td>13.0</td>
<td>31.7</td>
<td>0.0</td>
<td>Data</td>
<td>0.0</td>
<td>14.3</td>
<td>10.0</td>
<td>8.3</td>
<td>0.4</td>
<td>30.0</td>
</tr>
<tr>
<td>% ROR</td>
<td>11</td>
<td>12</td>
<td>13</td>
<td>14</td>
<td>15</td>
<td>16</td>
<td>17</td>
<td>18</td>
<td>19</td>
<td>20</td>
</tr>
</tbody>
</table>

| Yes BP | 30.0| 6.7| 0.0| 0.0| 0.0| 100.0| 37.5| 44.4| 33.3| 0.0|
| No BP  | 10.0| 19.1| 30.0| 18.8| 0.0| 62.5| 43.8| 0.0| 0.0| 8.0|
| % ROR | 21 | 22 | 23 | 24 | 25 | 26 | 27 | 28 | 29 | 30 |

| Yes BP | 18.2| 0.0| 0.0| 9.1| 0.0| 12.5| 20.0| 0.0| 11.1| 25.0| 25.0 |
| No BP  | 15.4| 0.0| 22.2| 0.0| 11.1| 28.6| 9.1| 10.5| 77.8| 66.7| 25.0 |

#### Money Bonds

For those cases where it is necessary for the court to set a money bond, where financial loss is necessary as a deterrent,50 the committee expressed the policy that such loss be minimized in the case of a person who appears for trial. To reiterate, criminal sanctions are to be relied upon rather than financial loss.

The following table shows the highest, lowest and average money bond set by each judge from May, 1972, through April, 1973. The money bonds that were set appear reasonable, when one considers that in fact the defendant will, in most cases, be posting ten percent of the amount set.51 Upon further reflection, however, the money bonds do not appear to be as reason-


50. It should be reiterated here that the committee felt financial loss is not necessary in most cases. See note 30 supra and accompanying text.

able as first impressions would imply. Subsequent analysis indicates that many of these persons did not need to suffer financial loss and should have received ROR Bonds. For those who are indigent, even fifty dollars is difficult to raise.

**TABLE 4**

MONEY BONDS SET FROM MARCH, 1972, TO APRIL, 1973

IN HOLIDAY COURT

<table>
<thead>
<tr>
<th>JUDGE</th>
<th>Amt. Set</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
<th>7</th>
<th>8</th>
<th>9</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Highest</td>
<td>5,000</td>
<td>10,000</td>
<td>2,500</td>
<td>15,000</td>
<td>20,000</td>
<td>20,000</td>
<td>20,000</td>
<td>1,000</td>
<td>3,000</td>
</tr>
<tr>
<td></td>
<td>Lowest</td>
<td>250</td>
<td>250</td>
<td>250</td>
<td>300</td>
<td>1,000</td>
<td>250</td>
<td>500</td>
<td>250</td>
<td>250</td>
</tr>
<tr>
<td></td>
<td>Average</td>
<td>1,187</td>
<td>2,426</td>
<td>822</td>
<td>3,000</td>
<td>6,000</td>
<td>2,900</td>
<td>3,077</td>
<td>667</td>
<td>1,105</td>
</tr>
<tr>
<td></td>
<td>10</td>
<td>11</td>
<td>12</td>
<td>13</td>
<td>14</td>
<td>15</td>
<td>16</td>
<td>17</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Highest</td>
<td>3,000</td>
<td>15,000</td>
<td>10,000</td>
<td>1,500</td>
<td>25,000</td>
<td>10,000</td>
<td>1,000</td>
<td>5,000</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Lowest</td>
<td>1,000</td>
<td>500</td>
<td>100</td>
<td>100</td>
<td>250</td>
<td>250</td>
<td>500</td>
<td>500</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Average</td>
<td>1,667</td>
<td>2,344</td>
<td>1,577</td>
<td>718</td>
<td>5,786</td>
<td>3,146</td>
<td>667</td>
<td>1,733</td>
<td></td>
</tr>
<tr>
<td></td>
<td>18</td>
<td>19</td>
<td>20</td>
<td>21</td>
<td>22</td>
<td>23</td>
<td>24</td>
<td>25</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Highest</td>
<td>20,000</td>
<td>10,000</td>
<td>7,500</td>
<td>5,000</td>
<td>10,000</td>
<td>7,500</td>
<td>25,000</td>
<td>1,500</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Lowest</td>
<td>500</td>
<td>500</td>
<td>500</td>
<td>250</td>
<td>1,000</td>
<td>500</td>
<td>1,000</td>
<td>250</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Average</td>
<td>3,156</td>
<td>3,208</td>
<td>2,391</td>
<td>1,263</td>
<td>6,636</td>
<td>2,722</td>
<td>4,940</td>
<td>806</td>
<td></td>
</tr>
<tr>
<td></td>
<td>26</td>
<td>27</td>
<td>28</td>
<td>29</td>
<td>30</td>
<td>31</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Highest</td>
<td>11,000</td>
<td>75,000</td>
<td>50,000</td>
<td>3,000</td>
<td>25,000</td>
<td>15,000</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Lowest</td>
<td>250</td>
<td>250</td>
<td>250</td>
<td>250</td>
<td>1,500</td>
<td>500</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Average</td>
<td>4,104</td>
<td>6,442</td>
<td>5,687</td>
<td>1,146</td>
<td>7,250</td>
<td>5,944</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Perhaps there is a reasonable explanation for the continued reliance upon financial loss as a deterrent. It is possible that the assumptions made by the legislature to arrive at the conclusion that most persons do not need to suffer financial loss and will appear for trial are not borne out in the cases of the defendants appearing before these courts. It becomes necessary, then, to examine the information available to the court in making these determinations. Through such an examination it will be possible to determine whether financial loss is, in fact, necessary to assure the accused's presence at trial.

**WHETHER FINANCIAL LOSS IS NECESSARY AS A DETERRENT**

For financial loss to be unnecessary, there would have to be other information about the accused indicating that he would appear. Studies have shown, as the legislature has acknowledged,\(^52\) that where an accused has strong family and community ties,\(^53\) there is sufficient deterrent to bail jumping so as to make financial loss unnecessary.\(^54\) The following table shows

---

\(^52\) *Supra* note 32.

\(^53\) Community and family ties include the characteristics set forth in Table 5 infra.

\(^54\) It should be noted that in many cases bail jumping may be just technical. For
that the defendants as a whole, when questioned, appeared to have very strong community and family ties.

### TABLE 5

**FAMILY AND COMMUNITY TIES**

**HOLIDAY COURT, MAY, 1972 TO APRIL, 1973**

<table>
<thead>
<tr>
<th>Characteristic</th>
<th>Findings (in percentages)</th>
<th>Percentage of times known(^{55})</th>
</tr>
</thead>
<tbody>
<tr>
<td>Family Ties</td>
<td>91.2 lived with family or relatives</td>
<td>75.8</td>
</tr>
<tr>
<td>Employment</td>
<td>77.1 presently employed or in last six months</td>
<td>64.8</td>
</tr>
<tr>
<td>School</td>
<td>92.5 in school</td>
<td>68.9</td>
</tr>
<tr>
<td>Residence</td>
<td>96.7 at present or prior address for one year</td>
<td>46.9</td>
</tr>
<tr>
<td>Time in Chgo.</td>
<td>84.6 in Chgo. for more than 5 yrs.</td>
<td>78.0</td>
</tr>
<tr>
<td>Age</td>
<td>81.9 under 24 years of age</td>
<td>76.4</td>
</tr>
</tbody>
</table>

One could conclude from this information that financial loss appears to be unnecessary in seventy-five percent of the cases.\(^{56}\) The data does, then, bear out the assumptions made by the legislature that the great majority of persons do not require financial loss as a deterrent. And yet, as has been shown previously in Table 1, less than one-fourth of those persons received ROR bonds. It would, therefore, appear that in as many as fifty percent of the cases the defendants received an oppressive bond.

In most cases there was no indication that the accused would not appear. In fifty-eight percent of the cases the accused's prior record consisted of two misdemeanors or less. Fifty percent had no prior record at all.\(^{57}\) No more than fifteen percent showed any indication of prior bond forfeiture.\(^{58}\)

example, the accused may have a problem relating to a firm schedule, or he may be unable to determine where he is required to appear.

\(^{55}\) This indicates the number of times the information was heard and recorded by the observer. Note, in relation to the findings: the 91.2% for family ties means 91.2% of those cases where the question was asked, only 28.9% of the total sample. See Table 7 infra.

\(^{56}\) This is an inference based on the percentages of findings in Table 5, none of which is lower than 77%. A defendant profile for Branch 24 (a weekday felony court, see note 45 supra) suggests that financial loss may be necessary as a deterrent more often for the defendants appearing in that court. The average defendant there is older, more likely to be unemployed, and moves more frequently than the defendants in holiday court. The observation made by individuals with experience in Branch 24 is that this court deals with major felonies and handles individuals with longer criminal records and less stability in the community. The crimes are more likely to be committed by design.

\(^{57}\) No prior record means no record of convictions. See note 40 supra and accompanying text.

\(^{58}\) The percentage of defendants with a history of bond forfeiture is probably even lower than 15%. The 15% figure also includes those having a prior record of three felonies or more, not necessarily bond forfeitures. Figures on forfeiture rates prior to 1972 are presented by Smith and Reilley, supra note 45 at 41. From 1964 to 1966 the forfeiture rate rose from seven percent to twenty percent for ROR bonds while the forfeiture rate for ten percent bonds only rose from seven percent to eleven percent for the First Municipal District. The figures reported for 1969 to 1971 are for the First Municipal District for ten percent bonds (from 13.5 percent to 13.3 percent), and for
Evaluating the money bonds set by the courts (Table 4) in light of this information, it appears that many of the money bonds that were set were also oppressive. In at least fifty percent of the cases it appeared that the accused would have shown up for trial.

INDIGENTS

One group that appears to be particularly discriminated against is the indigents. As previous discussion indicates, one of the main reasons for revising the Bail Article was to eliminate the anomalous requirement of a money bond from an indigent. The following table suggests that the courts are not acting in accordance with this policy.

**TABLE 6**

**BONDS SET WHILE CONTROLLING FOR FINANCIAL ABILITY**

<table>
<thead>
<tr>
<th>Bond</th>
<th>Financial Ability</th>
<th>ROR</th>
<th>$100</th>
<th>$250</th>
<th>$300</th>
<th>$500</th>
<th>$750</th>
<th>$1000</th>
<th>$1500</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Dismissed</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>No</td>
<td>4.8</td>
<td>4.8</td>
<td>0.0</td>
<td>4.8</td>
<td>0.0</td>
<td>23.8</td>
<td>0.0</td>
<td>14.3</td>
<td>4.8</td>
</tr>
<tr>
<td>Yes</td>
<td>0.0</td>
<td>3.6</td>
<td>1.2</td>
<td>2.4</td>
<td>1.2</td>
<td>25.0</td>
<td>3.6</td>
<td>32.1</td>
<td>7.1</td>
</tr>
<tr>
<td></td>
<td>$2000</td>
<td>$2500</td>
<td>$3000</td>
<td>$4000</td>
<td>$5000</td>
<td>$7500</td>
<td>$10000</td>
<td>$20000</td>
<td></td>
</tr>
<tr>
<td>No</td>
<td>14.3</td>
<td>9.5</td>
<td>4.8</td>
<td>4.8</td>
<td>4.8</td>
<td>0.0</td>
<td>4.8</td>
<td>0.0</td>
<td></td>
</tr>
<tr>
<td>Yes</td>
<td>6.0</td>
<td>3.6</td>
<td>3.6</td>
<td>1.2</td>
<td>2.4</td>
<td>1.2</td>
<td>4.8</td>
<td>1.2</td>
<td></td>
</tr>
<tr>
<td>TOTAL</td>
<td>NO</td>
<td>YES</td>
<td>21</td>
<td>84</td>
<td>105</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Although those found by the court to be financially unable to post bond received more ROR bonds than those who were able to post bond, the number of ROR bonds set appears to be insignificant. It has been shown in Table 5 that the defendants as a whole had strong family and community ties. Based upon this finding, it was concluded that financial loss was apparently unnecessary in a great majority of the cases. Yet the table shows that only 4.8 percent of the indigent defendants received an ROR bond. Overall, the indigent defendants appear to have received higher money bonds than those who were not indigent. This table suggests that some judges purposedly set an excessive bail in order to keep the defendant in jail—a violation of legislative policy as well as the eighth amendment.

*the county as a whole* for ROR bonds (from 21.8 to 31.4 to 22.6 percent). Based on information obtained from the Clerk's office, the Bail Project has determined that from 1969 to 1972 the forfeiture rate for ROR bonds increased only 11.5% while the rate for monetary bonds increased 13.3%, for the First Municipal District, Cook County (weekday and holiday court both included). Hyde, CCSBP Statistical Report Prepared For the Board of Directors, December, 1973 (unpublished report).
In addition to resulting in excessive bonds, the requirement of a money bond from an indigent also conflicts with the equal protection clause of the fourteenth amendment. In *Bandy v. United States*, Justice Douglas, as Circuit Justice, noted that the ability to advance a sum of money in order to secure release raises serious problems for equal administration of the law. Subsequent cases decided by the Supreme Court indicate that detention solely because of inability to pay constitutes a violation of equal protection. If an indigent defendant does not need to suffer financial loss to assure his appearance at trial, there is no reason for his detention other than his inability to pay.

**The Bail Hearing**

The analysis of the bail decisions made by the courts has indicated that many defendants received an excessive bond. The reason that excessive bonds are being set is that the court in most cases fails to make the determination of whether financial loss is necessary to assure the accused's presence at trial. Although no case on point could be found, the failure to make this determination would appear to be a violation of equal protection on the part of the court. Classifications based on criteria wholly unrelated to the objective of the statute have been held to violate equal protection guarantees. Although a statute may be fair on its face it may be administered in an invidious way so as to violate equal protection. If a money bond is set where financial loss is unnecessary, there is no rational connection between the objective of the statute or the purpose of bail and requiring the accused to post a money bond—a violation of even the traditional test of equal protection. Justice Douglas in his dissent in *Schilb v. Kubel* noted: "The record is silent as to how the system of release on personal recognizance as contrasted to release on ten percent is, in fact, administered. The manner of administration may, of course, raise serious equal protection questions." The following table indicates that the court rarely uses any information other than the prior record of the accused.

---

59. 81 S. Ct. 197 (1960).
60. See *Tate v. Short*, 401 U.S. 395 (1971) (holding that a defendant could not be imprisoned for inability to pay a fine for a traffic offense punishable by fine only); *Williams v. Illinois*, 399 U.S. 235 (1970) (holding that a defendant could not be imprisoned beyond the maximum sentence permitted by statute because of inability to pay the attendant fine); *United States v. Gaines*, 449 F.2d 143 (2d Cir. 1971) (holding defendant entitled to credit for pre-sentence custody because of inability to post the bond set).
63. The discussion in the text deals with the traditional test of equal protection. The other test, the fundamental rights test, requires that the state justify discrimination in regards to fundamental rights by a showing of a compelling interest. A discussion of the differences between the two tests is provided in *Schilb v. Kubel*, 404 U.S. 357 (1971).
64. 404 U.S. 357 (1971). In *Schilb* the Court held that the one percent court cost provision of Section 110-7 of the Illinois Bail Article was not a violation of equal protection.
65. *Id.* at 379.
### TABLE 7

**AMOUNT OF INFORMATION USED BY HOLIDAY COURTS**

**MAY, 1972, TO APRIL, 1973**

<table>
<thead>
<tr>
<th>Characteristic</th>
<th>Adjusted Percentage of Times Used</th>
<th>Characteristic</th>
<th>Adjusted Percentage of Times Used</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prior Record</td>
<td>66.066</td>
<td>Family Ties</td>
<td>28.9</td>
</tr>
<tr>
<td>Employment</td>
<td>32.5</td>
<td>School</td>
<td>7.0</td>
</tr>
<tr>
<td>Residence</td>
<td>15.7</td>
<td>Time in Chicago</td>
<td>12.0</td>
</tr>
<tr>
<td>Financial Ability</td>
<td>17.1</td>
<td>Age</td>
<td>24.5</td>
</tr>
</tbody>
</table>

**JUDGE**

<table>
<thead>
<tr>
<th>Avg. Amt. Used</th>
<th>% Times None Used</th>
<th>Avg. Amt. Used</th>
<th>% Times None Used</th>
<th>Avg. Amt. Used</th>
<th>% Times None Used</th>
</tr>
</thead>
<tbody>
<tr>
<td>.5</td>
<td>44</td>
<td>.2</td>
<td>19</td>
<td>1.7</td>
<td>25</td>
</tr>
<tr>
<td>2.0</td>
<td>15</td>
<td>3.7</td>
<td>8</td>
<td>.7</td>
<td>46</td>
</tr>
<tr>
<td>1.1</td>
<td>25</td>
<td>1.9</td>
<td>23</td>
<td>3.1</td>
<td>8</td>
</tr>
<tr>
<td>4.1</td>
<td>0</td>
<td>3.6</td>
<td>0</td>
<td>1.4</td>
<td>23</td>
</tr>
<tr>
<td>3.9</td>
<td>4</td>
<td>1.8</td>
<td>12</td>
<td>1.0</td>
<td>60</td>
</tr>
<tr>
<td>3.0</td>
<td>0</td>
<td>.9</td>
<td>47</td>
<td>3.3</td>
<td>0</td>
</tr>
<tr>
<td>2.3</td>
<td>4</td>
<td>1.3</td>
<td>29</td>
<td>2.1</td>
<td>13</td>
</tr>
<tr>
<td>1.0</td>
<td>0</td>
<td>1.0</td>
<td>27</td>
<td>1.4</td>
<td>52</td>
</tr>
<tr>
<td>1.1</td>
<td>39</td>
<td>2.1</td>
<td>28</td>
<td>.8</td>
<td>21</td>
</tr>
<tr>
<td>2.4</td>
<td>6</td>
<td>1.2</td>
<td>29</td>
<td>1.4</td>
<td>46</td>
</tr>
</tbody>
</table>

In addition to the prior record of the accused, the nature of the offense and its possible penalty also weigh heavily in the judge's decision. Twice as many ROR bonds were given in misdemeanor cases, as indicated in Table 1. The bond set was $1,000 or less in 72.7 percent of the misdemeanor cases, as compared to only 40.7 percent of the felony cases. The bond set was above $2,000 in 51.9 percent of the felony cases, as compared to only 16.5 percent of the misdemeanor cases. There was a positive correlation between the maximum penalty and the bond set.68

Although it is necessary and proper for the court to consider these factors,69 it is equally important that the court hear evidence of the defendant's

---

66. It is probable that the percentage is even higher, because the judge usually has the record before him and questions the accused in certain cases to test him.

67. Note: the figure shown is an average frequency, not a percentage. The highest possible amount is 8, each "one" representing one of the characteristics presented in the first half of the table. For example, a judge who has an average of "1" usually considered only one piece of information, probably the prior record of the accused.

68. Those who have attended holiday court sessions have observed that the judges also give much weight to the state's recommendations.

community and family ties. If the court does not consider this evidence, it is unable to determine whether financial loss is necessary to assure the accused's presence at trial. Not having made that determination, the court in many cases sets excessive bonds. Had the court considered community and family ties, it could have released more defendants on their own recognizance. The court also would have discovered that many of the defendants who were required to post a money bond were entitled to lower money bonds. This suggests that defendants are being denied their right to a "meaningful" hearing as required by due process.

It is well settled that one of the basic requirements of due process is that the accused be afforded an opportunity to be heard. This requirement is not satisfied if the accused is merely given a chance to speak at some point in time. In addition to requiring that the accused be given an opportunity to be heard, due process also requires that the opportunity to be heard be had at a meaningful time and in a meaningful manner. In order to insure that the defendant is given a chance to be heard at a meaningful time, it is necessary, in the absence of a compelling state interest, that the defendant be heard before any deprivation takes place. In the case of bail, this means that the defendant must be heard before bail is set by a judicial officer. The manner by which the defendant must be heard depends on the type as well as the extent of the deprivation. In certain cases the defendant must be given a hearing to insure that he is heard in a meaningful manner. Bail is one of those cases.

Two recent federal cases have indicated the type of hearing that due process requires. In Ackies v. Purdy, where bail was being set pursuant to a master bond schedule according to the offense charged, the court held that the lists themselves violated due process because the defendants were deprived of their opportunity to be heard as required by due process. The court issued a writ of mandamus prohibiting their use. The court then ordered that upon being booked, the defendant be given his "bail warnings": 1) that he had a right to a hearing before a judicial officer; 2) that bond would be set on consideration of his past record, community and family ties, employment and the offense charged; 3) that he would be presented with-

73. Id. Although Illinois statutory law does not expressly provide that a defendant be given a hearing on the issue of bail, such a requirement is implicit in the provision that the defendant be brought without unnecessary delay before the nearest magistrate. See Committee Comments, S.H.A. ch. 38, § 109-1 (1971).
75. It is unclear whether the court based this conclusion on due process, the Florida statute, or both. The case as a whole suggests that the court was basing its conclusion on due process, in that the court's discussion focused on the requirements of a due process hearing. Prior to its holding, in an earlier part of the opinion, the court makes a statement to the effect that Florida statutory law required these characteristics to be
out unnecessary delay; 4) that he may waive this right to a hearing.\textsuperscript{76}

In \textit{Reddy v. Snepp},\textsuperscript{77} the unchecked testimony of a police officer, which consisted of hearsay, was held to be inadmissible at the bail hearing. Such testimony is admissible only when the name of the informant is disclosed and the accused is given the opportunity to cross-examine the witness and offer evidence of rebuttal in his own behalf.\textsuperscript{78}

These two cases indicate that a defendant must be afforded a full, adversary hearing on the issue of bail. Evidence is not to be used against an accused unless he is given the opportunity to rebut it. In order to be able to effectively rebut any damaging evidence that has been introduced against him, the accused must be allowed to present evidence on his own behalf. If there has been adverse testimony by a state witness, he must also be given the opportunity to cross-examine that witness.

As indicated earlier, the holiday courts rarely use any information other than the nature of the offense, its possible penalty, and the prior record of the accused when determining bail.\textsuperscript{79} In those cases where the court refused to consider other information, the accused's due process rights were violated. If the defendant has strong community and family ties he must be allowed to introduce evidence of that fact. Without such evidence, the issue of bail is decided on the state's evidence alone, and the accused is denied his right to be heard.

Besides being deprived of a meaningful opportunity to be heard, the defendant may be prejudiced in other ways. If he is unable to make bond and is jailed, he may be deprived of a meaningful opportunity to prepare for trial. Whether or not the accused is released pending trial may also have an effect on the verdict and sentence he receives. A study has shown that those who are imprisoned are less likely to receive a suspended sentence than those who are out on bond.\textsuperscript{80} Those who are imprisoned are also more likely

considered. \textit{Id.} at 41. An analysis of Florida law in effect at that time does not support the court's statement. The Florida parole and probation commission would present a finding only on \textit{request} of the court. \textit{See Fla. Stat.} ch. 903, § 03 (1972).

\textsuperscript{76} The waiver must be both knowing and uncoerced. The defendant must be aware of the consequences and understand that he is foresaking a constitutional right. Ackies v. Purdy, 322 F. Supp. 38, 42 (S.D. Fla. 1970), \textit{citing} Johnson v. Zerbst, 304 U.S. 458 (1938).

\textsuperscript{77} 357 F. Supp. 999 (W.D.N.C. 1973). \textit{But see} Bates v. Ogata, 52 Haw. 573, 482 P.2d 153 (1971) (holding the question one to be considered on a case by case basis).

\textsuperscript{78} \textit{But see} Gernstein v. Pugh, 43 U.S.L.W. 4230 (U.S. Feb. 18, 1975), where the Supreme Court recently suggested by way of dicta that adversary safeguards are not required at the bail hearing. The case is discussed further in note 85 infra.

\textsuperscript{79} \textit{See} note 68 supra and accompanying text.

to be convicted and more likely to receive longer prison sentences than those who are out on bond.81

Given the fact that the defendant may be deprived of a meaningful opportunity to be heard, one would assume that it is necessary that the defendant be assisted by counsel at the bail hearing. When this argument was presented to a court in Maryland, however, the court held that counsel is not required at this stage of the criminal process.82 In Coleman v. Alabama,83 the Supreme Court expressed a different view, although it did not deal directly with the issue. In that case the Court held that the Alabama preliminary hearing was a critical stage at which the accused is entitled to counsel. One of the reasons given in support of that holding was that counsel would be influential in making effective arguments on matters such as bail.84 In pointing out the importance of counsel where a bail decision is involved, the Supreme Court suggested that the bail hearing is a critical stage of the criminal process, such that counsel is needed. This conclusion is supported by the decisions in Ackies v. Purdy and Reddy v. Snepp. A full, adversary hearing, as contemplated by those cases, is inconceivable without the presence of counsel.85

83. 399 U.S. 1 (1970). Concluding the Illinois procedure was essentially the same as that involved in Coleman, the Illinois Supreme Court held the Coleman decision applicable to Illinois in People v. Adams, 46 Ill. 2d 200, 263 N.E.2d 490 (1970), aff'd., 405 U.S. 278 (1972).
84. 399 U.S. 1, 9 (1970).
85. The Supreme Court recently suggested that the bail hearing is not a critical stage of the criminal process such that counsel is needed. In Gernstein v. Pugh, 43 U.S.L.W. 4230 (U.S. Feb. 18, 1975), after holding that the fourth amendment requires a judicial determination of probable cause as a prerequisite to extended restraint on liberty following arrest, the court went on to discuss, by way of dicta, the type of hearing that is required in this regard. Concluding that adversary safeguards are not necessary, the Court held that “the probable cause determination” is not a critical stage of the criminal process such that counsel is needed. The Court distinguished this case from its decisions in Coleman v. Alabama, supra note 83, and United States v. Wade, 388 U.S. 218 (1967) (holding the lineup a critical stage): “To be sure, pretrial custody may affect to some extent the suspect's ability to assist in the preparation of his defense, but this does not present the high probability of harm identified as controlling in Wade and Coleman.” The four dissenting justices took issue with the majority's reasoning, and admonished that more procedural protection had been granted in civil cases. They expressed concern that the majority had foreclosed any claim that the traditional requirements of due process are applicable to pretrial detention by basing their dicta on the fourth amendment. In a footnote the majority answered this contention by stating that the fourth amendment has always been thought to define the “process that is due” for detention of persons pending trial as well as arrests and seizures. The case can be distinguished on the ground that the Court was not dealing with the “bail determination” but with the “probable cause determination,” under circumstances where bail had been set. When directly faced with the question, the court may decide to modify its definition of a critical stage to include the bail hearing. The data presented in this article and the results of the studies on the effect of pretrial detention indicate that it is critical that the accused be afforded an adversary hearing and the assistance of counsel.
The need for counsel at the bail-hearing stage becomes more evident upon further analysis of the data. Some judges appear to set bail in willful and biased disregard of the information proffered. This type of bias not only constitutes an abuse of discretion and a violation of due process, but also points up the crying need for counsel if a defendant is to successfully counteract this bias. In support of this argument, the following table indicates that some judges actually use less information when an accused is interviewed by the Bail Project than when he is not.

### TABLE 8

**AMOUNT OF INFORMATION USED BY INDIVIDUAL JUDGES**

<table>
<thead>
<tr>
<th>JUDGE</th>
<th>Avg. Amt. Used</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
<th>7</th>
<th>8</th>
<th>9</th>
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<td>.9</td>
<td>No</td>
<td>4.3</td>
<td>3.1</td>
<td>1.4</td>
<td>0</td>
<td>.8</td>
<td></td>
</tr>
<tr>
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<td>.7</td>
<td>2.1</td>
<td>1.3</td>
<td>Data</td>
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<td>3.0</td>
<td>2.6</td>
<td>1.4</td>
<td>1.2</td>
<td></td>
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<tr>
<td>Avg.</td>
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<td>11</td>
<td>12</td>
<td>13</td>
<td>14</td>
<td>15</td>
<td>16</td>
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</tr>
<tr>
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<td>2.6</td>
<td>3.6</td>
<td>2.0</td>
<td>3.6</td>
<td>1.5</td>
<td>1.0</td>
<td>1.2</td>
<td>1.0</td>
<td></td>
</tr>
<tr>
<td>Avg.</td>
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<td>20</td>
<td>21</td>
<td>22</td>
<td>23</td>
<td>24</td>
<td>25</td>
<td>26</td>
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<td>1.9</td>
<td>.8</td>
<td>5.0</td>
<td>1.7</td>
<td>0</td>
<td>3.8</td>
<td>2.6</td>
<td></td>
</tr>
<tr>
<td>No BP</td>
<td>2.0</td>
<td>1.4</td>
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<td>1.1</td>
<td>2.6</td>
<td>2.0</td>
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<tr>
<td>Avg.</td>
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<td>30</td>
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<td></td>
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<td></td>
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<tr>
<td>Yes BP</td>
<td>.3</td>
<td>1.7</td>
<td>.8</td>
<td>3.0</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>No BP</td>
<td>1.3</td>
<td>1.2</td>
<td>1.0</td>
<td>.5</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Those judges who do use less information where an accused has been interviewed by the Bail Project do not, however, all view the Bail Project information in the same light. While most of these judges willfully refuse to give credence to the Project information, some of them do take the information seriously even though they do not actively use it. How a judge treats the Project information can be determined by looking at his bond-setting behavior.

Certain judges who use less information in a case where the Bail Project has interviewed the accused do give more ROR bonds in such a case. What often happens is that the attorney for the Bail Project recommends that the court release an accused on his own recognizance based upon the verified information that the Project has obtained. The judge follows this recommendation without inquiring as to the nature of the information. He accepts the Project information, but he does not actively use it.

86. See note 49 supra.
87. See note 67 supra.
88. This is the case for judges 3, 10, 11, 16, 18. See Table 3 supra.
NOTES AND COMMENTS

Certain other judges who use less information when the accused is interviewed by the Bail Project give fewer ROR bonds in such cases. This type of action is clearly biased activity, to the detriment of the accused who is interviewed by the Project. It shows an outright refusal on the part of these judges to make a meaningful bail decision and deprives the accused of an opportunity to be heard. It is these judges who show an abuse of discretion in violation of legislative policy and due process. The manner in which they administer the bail right makes it necessary for the accused to have the assistance of counsel to insure that he receives a due process hearing and does not receive an oppressive bond.

PROCEDURES AVAILABLE TO OBTAIN RELIEF

Action must be taken to question the bail that has been set. Such action must be made in a timely manner, before the issue has been rendered moot. The issue cannot be raised after conviction unless the conviction is affected by the decision—for example, when the defendant is deprived of the opportunity to prepare for trial.

The Illinois statute provides the defendant with an early opportunity to question the bail that has been set. The defendant may make a motion for reduction of bail in the weekday court to which his case is assigned when he appears for his first hearing. Section 110-6 of the Bail Article allows the state or the defendant to make a motion for increase or reduction of bail in the court before which the proceeding is pending. If this action proves futile, the resulting order is appealable pursuant to Supreme Court Rule 604(c).

If the defendant is incarcerated, he may apply for a writ of habeas corpus. An order denying bond or setting bond in an unreasonable amount may be reviewed by habeas corpus in Illinois, but the consideration will be limited to the issue of the denial or setting of bond in relation to the offense charged.

Additional remedies are available to the defendant at the federal level. The federal statute provides that federal courts may grant habeas corpus relief to state “prisoners” on the issue of bail provided certain requirements have been met. The accused must allege that he is in custody in violation of the Constitution or laws or treaties of the United States. The accused

89. This is the case for judges 7, 8, 9, 13, 17, 20, 25, 28 and 30. See Table 3 supra.
90. People v. Harris, 38 Ill. 2d 552, 555, 232 N.E.2d 721, 723 (1967).
91. Although the appeals procedure was designed with a view towards speedy review, those experienced with the process indicate that it has not served this function in practice. As a result, appeal of the bail decision is discouraged.
93. Id. at 263, 265 N.E.2d at 166.
must have exhausted state remedies, unless there is an absence of available state correction procedures, or the existing circumstances render such process ineffective. The court must hold that there has not been an exhaustion of state remedies if the accused has the right under state law to raise the questions by any available procedure. Federal courts will not disturb the decision of a state court unless it is beyond the range within which judgments could rationally differ.

In summary, procedures are available both at the state and the federal level to enable the defendant to obtain review of the bail decision. The accused must first exhaust his state remedies. If satisfactory relief is not obtained, and he is in custody in violation of the United States Constitution, he may then apply for relief in a federal court.

CONCLUSION

Holiday court is, for many, a preliminary entrance into the criminal justice system in this country. It is a means devised to insure that one accused of a crime is promptly brought before a judicial officer to determine whether he should be released pending trial. Under the Illinois Constitution and statute, an accused is entitled to bail as a matter of right, with few exceptions. This right is firmly grounded in our system of jurisprudence since it has long been recognized in this country that being accused of a crime does not in itself justify detention prior to trial. A person charged with a crime is presumed innocent until proven guilty at trial. The right to bail exists as an attempt to give meaning to this presumption and to prevent undue restraints on liberty. As is the case with other rights, release prior to trial is not absolute—the interest of the state in having the accused appear for trial must also be considered. The purpose of bail—to secure the appearance of the accused—reflects these two interests.

In practice, the right to bail has not been administered with the same reverence that history has accorded it. This article has presented a legal analysis of the bond-setting behavior of holiday court judges in Chicago. The data has shown that many judges are neither acting in accordance with the policies expressed by the legislature nor in accordance with constitutional mandates. In most cases the defendant does not have the assistance of individual counsel. As a result, the defendant is not afforded a meaningful opportunity to be heard, bail decisions are made arbitrarily, and excessive bond is set.

Action must be taken to change the manner in which the bail right is administered to insure a system responsive to the rights of the individuals who encounter that system. Procedures for reviewing the bail decision are available in both the state and the federal courts, but they are often ineffective in providing the immediate relief that is needed. Steps must be taken to insure that speedy review of the bail decision can be obtained. Reviewing courts must issue clear directives to the lower courts on the manner in which the bail right should be administered, if a movement towards the implementation of legislative intent and constitutional guarantees is to be initiated.

Other than the taking of a person's life, no deprivation is more extreme than the taking of a person's liberty. With the stakes so high, the accused should be afforded a full, adversary hearing and the assistance of counsel. The failure to assure the defendants these safeguards may result in loss of respect for our legal system. Without that respect, the system cannot survive.

DEBORAH A. SPERLAK