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## THE TORONTO BAIL PROJECT

FRANK N. WILLIAMS\*

"For instance, now," [the Queen] went on . . . "there's the King's Messenger. He's in prison now, being punished: and the trial doesn't even begin till next Wednesday: and of course the crime comes last of all."

"Suppose he never commits the crime?" said Alice.

"That would be all the better, wouldn't it?" the Queen said. . . .

CARROLL  
THROUGH THE LOOKING-GLASS

In a society which aspires to the ideal of justice, the wealth of a person charged with crime should not determine the manner in which he is treated by those who administer the criminal law. The traditional system by which a prisoner is released before trial only if he can post bail, makes an unfair distinction between rich and poor. An accused who cannot find sufficient security must suffer the loss of his freedom. He may be hampered in preparing his defence because of the difficulty in obtaining counsel and witnesses.<sup>1</sup> He may lose his job with a resultant loss to his family, his employer and the community. He must be housed, fed, clothed and guarded at the expense of society.<sup>2</sup> The threat of incarceration often induces those without financial means to plead guilty "to get it over with", particularly in cases where the alleged offence is punishable only by a fine.<sup>3</sup> The Toronto Bail Project is an attempt to remove some of the injustice in this area of the law by providing more equitable criteria for determining who must be detained, and who can be safely released pending trial.

Inspiration for the Toronto Bail Project was provided by the work of Mr. Louis Schweitzer, who established the Vera Foundation in New York City about seven years ago. In New York, as elsewhere, the courts set bail after considering only the nature of the charge against the accused and his record, factors which do not necessarily indicate whether he will appear for trial. The courts almost completely ignored any evidence of the reliability of the accused, partly because such information was not usually available at the time of arraignment, and because they did not yet recognize its importance.

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<sup>1</sup> M. FRIEDLAND, *DETENTION BEFORE TRIAL* (Toronto: University of Toronto Press) pp. 115-120. The Friedland study showed that there is a higher conviction rate among persons held in custody than those out on bail, even if the accused had no criminal record. Although this does not prove a causal relationship between custody and conviction rate, it cannot be ignored.

<sup>2</sup> *Id.* at 124. The annual cost at the time of the Friedland study was approximately \$300,000 for 62,000 detainee jail days subsequent to first court appearance.

<sup>3</sup> *Id.* at 61. This writer has found from personal experience with the Bail Project, that this is quite often the case.

Concerned with the large number of persons held in jail merely because they could not raise bail, Mr. Schweitzer believed that judges might be willing to release many of those charged on their own recognizance, rather than requiring the posting of cash bail, if they were given verified information relating to the reliability of the accused and his roots in the community. In co-operation with the New York University School of Law and the Institute of Judicial Administration, the Vera Foundation initiated the Manhattan Bail Project to provide the courts with this type of information.

The Project, which was begun as an experiment to run for three years, quickly gained the support of judges, defense attorneys and city officials. It received further financial support and continued to operate in New York City on a permanent basis.<sup>4</sup> By the time the pilot programme was completed it had established, beyond doubt, that there was an alternative to the existing bail system; that pre-trial release on recognizance can safely be extended by the courts. Within a year of the publication of the Manhattan Project findings about fifty similar projects were initiated in the United States.<sup>5</sup> Their experience with more than thirty thousand accused persons confirmed the success of the Manhattan Project; only 1.6% of those released on recognizance failed to appear for trial.<sup>6</sup>

In 1961-62 Professor Martin Friedland of the University of Toronto Law School made a detailed study of bail practices in Toronto. He found that the standard of bail is set according to the nature of the crime, and that the amount of property bail is usually double the cash figure.<sup>7</sup> A person who has ownership in the family home in joint tenancy with a spouse cannot use this property as security to gain his release.<sup>8</sup> During the term of the study a large number of persons were unable to raise the bail set at their first court appearance.<sup>9</sup> A substantial proportion of these had no previous record of indictable offences.<sup>10</sup> Approximately one-half of those who were able to find the required security were not released the day bail was set. In fact, some spent a further week in custody.<sup>11</sup> Professor Friedland discovered that more than 90% of persons remanded for pre-sentence report were remanded in custody, yet two-thirds of these persons were not eventually committed to jail but received a

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<sup>4</sup> The work of the Manhattan Project has now been taken over by the Office of Probation of the City of New York and extended from the original three experimental precincts, to include all seventy-nine station houses. As a result of the Manhattan findings, the International Commission of Jurists in London, England appointed a group to investigate the bail system in England. The Vera Foundation is now the Vera Institute of Justice which is financed by the United States Government and by the Ford Foundation.

<sup>5</sup> BAIL AND SUMMONS 1965, PROCEEDINGS OF THE CONFERENCE OF THE INSTITUTE ON THE OPERATION OF PRETRIAL RELEASE PROJECTS, NEW YORK CITY, AND OF THE JUSTICE CONFERENCE ON BAIL AND REMANDS IN CUSTODY, LONDON. (New York: Vera Institute of Justice, 1965) XIV

<sup>6</sup> *Id.* at XIV.

<sup>7</sup> *Supra*, note 1 at 128-30.

<sup>8</sup> *Id.* at 144.

<sup>9</sup> *Id.* at 130.

<sup>10</sup> *Id.* at 139.

<sup>11</sup> *Id.* at 141.

suspended sentence or a fine.<sup>12</sup> Unfortunately, time spent in jail before trial is not generally taken into account when the Magistrate pronounces sentence. An accused who has spent a week in the Don Jail may be confined for several days after trial because he cannot pay a twenty-five dollar fine.<sup>13</sup>

The present law of bail has encouraged the establishment of bondsmen in Canada.<sup>14</sup> Although it is illegal in theory,<sup>15</sup> this clandestine trade flourishes in the Toronto courts. If the bondsman believes he is a good risk, an accused with the proper connections and able to afford the fifteen per cent service charge can obtain bail money for almost any charge short of murder.<sup>16</sup> The bail bondsmen, who are generally either criminals or unscrupulous lawyers, commonly put up money for persons with long criminal records. They know that the habitual criminal will show up, either because of the pressure they are able to put on him, or because the accused has appeared in the past without any coercion. They rarely provide bail for persons who have no previous record because they usually do not know them. The bondsman is sensitive to public opinion in the community and is careful whom he bails out. Since the bondsman can withhold his services, the fate of the accused is in his hands rather than those of the magistrate. If he decides to remove the bond money the accused will be subject to re-arrest.

Ironically, the existence of the bail bondsman often tends to cause the bail rate for certain offences to be higher than would otherwise be the case. The going rate of cash bail for "Vag. C", prostitution, used to be fifty dollars. When magistrates became aware of the bondsmen, it was increased to five hundred dollars in an effort to raise the figure high enough that the accused would not be able to afford the bond premium. One can even argue that the bondsmen cause the rate of crime to increase, because the accused is tempted to resort to crime, while out on bail, to raise the bondsman's fee.<sup>17</sup>

Although the business of providing bail money is illegal<sup>18</sup> it is highly lucrative.<sup>19</sup> Aside from the fact that bondsmen are theoretically liable to prosecution, there is actually little risk involved, since estreat proceedings are rarely taken by the Crown. So long as the

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<sup>12</sup> *Id.* at 108. No figures are available for more recent years, but a quick study of the court calendar will show that this is still substantially true.

<sup>13</sup> Of course, some magistrates do give the accused time to pay.

<sup>14</sup> The operation of the bondsman in Toronto is not extensively documented. Most of the information on bondsmen in this paper was obtained through interviews with several Toronto lawyers.

<sup>15</sup> Criminal Code, S.C. 1953-54, c. 51, s. 119(2) (e).

<sup>16</sup> Bail Racket Reported Encouraging Crime. *Globe and Mail*, June 10, 1967. According to this article the bond premium may be as high as 25%.

<sup>17</sup> *Supra*, note 1, at 159.

<sup>18</sup> Bondsmen are legal in most states of the United States, but are regulated by legislation limiting the premium they can charge.

<sup>19</sup> R. GOLDFARB, RANSOM—A CRITIQUE OF THE AMERICAN BAIL SYSTEM (New York: Harper and Row).

accused voluntarily appears in court, or is picked up on a bench warrant, the court returns the security.<sup>20</sup>

The wide publicity throughout the United States, given to the Manhattan Project prompted Mr. Samuel Stanger, a member of the Rotary Club of Downsview, to investigate pre-trial detention in Toronto. With his encouragement, this club conceived the Toronto Bail Project in December, 1965. The Project was supported by Attorney General Wishart to the extent of authorizing its implementation in the courts of the Old Toronto City Hall for a two year trial period. The Amicus Foundation was organized to run the project and to this end was set up as a charitable foundation under the Income Tax Act.<sup>21</sup> It was supported by the Ford Foundation, which subscribed large sums through the Vera Institute of Justice, by the Laidlaw, Atkinson and Tippett Foundations, and the Rotary Club of Downsview.

The Toronto Bail Project is modelled after the Manhattan Project. It is an independent organization which provides objective verified information to the court for the purpose of assisting it in setting proper bail. The staff of the Project consists of two full time directors, a secretary, and law students who interview every new person in custody prior to his initial court appearance. The interview takes place shortly after eight in the morning in the cells of the Old City Hall. It is designed to determine the accused's stability in the community, and the probability of his appearing in court. All prisoners are interviewed except those charged with homicide, rape, prostitution, trafficking in narcotics or absconding bail.<sup>22</sup> The interviewer first explains his function to the defendant and obtains his consent to be interviewed. The questioning covers primarily, the length of residence of the accused in the greater Toronto area, whether he is living with his family and supporting dependants, current and past employment history, previous criminal record, and references. Finally, the accused is requested to sign an agreement which gives the interviewer permission to contact his references.

When the interview is complete the results are scored. Each answer, favourable or unfavourable, is rated on a point scale of which the values range from thirteen to minus one.<sup>23</sup> A total of five

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<sup>20</sup> *Supra*, note 1, at 165. The experience of the Amicus Foundation indicates that the situation has not changed since 1962.

<sup>21</sup> The project became operational on November 1, 1966.

<sup>22</sup> Persons charged with homicide or rape are not interviewed as they appear before a High Court Judge not a Magistrate. Prostitutes are not interviewed because they are usually held at least three days for a medical examination. The exclusion of those charged with trafficking in narcotics seems to be based solely on public opinion. Perhaps persons charged with these offences should be interviewed. There is no reason why a High Court Judge could not use a Project recommendation in the same way as a Magistrate. Also, it could be used by the Magistrates to release prostitutes after the examination.

<sup>23</sup> The point system is the same as the one used in New York. It was developed after five years of research to determine what factors best indicate the likelihood of the accused's returned for trial.

points must be acquired for a favourable overall rating. If the answers indicate a score of five or better, the interviewer attempts to verify the information which he has received, either by telephone, or by interviews in court with friends or relatives. Cross-indexed directories are used to reach neighbours when the accused does not have his own telephone. When verification is completed, the information is again rated, and if the accused still scores five or more points, a recommendation report is prepared for the Crown Counsel, Duty Counsel, and the presiding Magistrate.

A report will not be submitted if the interview cannot be verified, if the accused gives false or misleading information, if he has been convicted three times of an indictable offence and the last of these convictions was registered within the preceding five years, or if the accused is presently on bail or probation for a similar or related offence.

The report itself consists of one page which contains the verified information concerning the residence, family ties, employment and health of the accused. The introduction of this *verified* information to the Court has given a new dimension to bail setting procedures. In many cases the Crown Attorney will agree with the Amicus Foundation recommendation and advise the Court accordingly. In those cases where he does not agree, the Crown Attorney will mention the Amicus report, but will state why he disagrees with it. The accused's own lawyer or legal aid duty counsel may then adduce additional facts, unknown to the Amicus interviewer, and stress the fact that the accused has been recommended for release on recognizance. If he is released, a reminder letter is sent to the accused three days prior to the date of each of his court appearances.

During the last few years the number of persons released on their own recognizance before trial has steadily increased.<sup>24</sup> This

24	percentage summonsed	percentage arrested	percentage of those arrested, released by a Justice of the Peace or a Magistrate before their first court appearance <sup>(a)</sup>	percentage left in custody, of those arrested
1961-62	8.0	92.0	16.0	84.0
1964	13.6 <sup>(b)</sup>	—	—	—
1967	19.6 <sup>(c)</sup>	80.4	28.0 <sup>(d)</sup>	72.0

(a) According to section 438(2)(b) of the *Canadian Criminal Code* an accused can be held up to 24 hours if a Justice of the Peace is available. He must then be brought before the Justice "to be dealt with according to law". If no Justice is available, he must be brought before a Justice as soon as possible, *vid.*, s. 438(2)(C) C.C.C.

(b) The 13.6% represents 1,484 persons summonsed as compared with 10,731 persons charged with various offences.

(c) The 19.6% represents 1,779 persons summonsed as compared with 10,050 persons charged with various offences.

[Footnote continued on page 321]

may be, in part, a reaction by the magistrates to the publicity given to Professor Friedland's work and to the Bail Project. However, of those released in 1967 without any positive data as to which of them were likely to appear for trial, 14.8% absconded.<sup>25</sup> On the other hand, of the persons recommended by the Toronto Bail Project and released on recognizance in 1967 only 2.0% did not make the required appear-

(d) The 28% represents 2,047 persons released by a Justice of the Peace or a Magistrate, as compared with 7,271 persons arrested. (This does not include persons arrested for impaired driving or liquor offences.)

*DISPOSITION OF CASES AT FIRST COURT APPEARANCE*

	percentage given "own bail"	percentage given cash bail	percentage given no bail (or no mention of bail)(b)
1961-62	25.0	63.0	13.0
1964	30.5	43.5	21.6
1967(a)	38.4	40.0	18.0

The above figures represent accused persons who are not disposed of at their first court appearance (i.e., persons who aren't pleading guilty, or haven't had their case withdrawn).

(a)	total number of cases	number of persons given "own bail"	number of persons given cash bail	number of persons given no bail
1964	3,510	1,068	1,527	762
1967	3,554	1,365	1,420	641

(b) There doesn't appear to be any reason for the increase in the percentage of persons who were denied bail in 1964 and 1967 as compared with 1961-62. The increase in the percentage of persons who were denied bail is offset by the corresponding increase in the number of persons released on their own bail. Therefore the number of persons actually in custody is relatively smaller than in previous years.

Statistics for 1964 and 1967: by permission of the Amicus Foundation. Statistics for 1961-2: FRIEDLAND, *supra*, note 1 at 9, 46, 80.

The statistics for 1964 do not include the month of November, as accurate figures were not available at the time of this writing.

The statistics for 1967 represent the period from January 1 to September 31.

Both the 1964 and the 1967 statistics represent proceedings in 21, 22 and 23 courts in the Old City Hall, Toronto. The majority of persons who are charged with being intoxicated and driving while ability impaired appear mainly in 24 and 38 courts and are not included in these statistics.

Since the project does not operate on Saturdays, the 1964 and 1967 statistics represent proceedings from Monday to Friday only. No court sits on Sunday. (About 500 persons have appeared on Saturday from January to September in 1967.)

<sup>25</sup> In 1967, of the 1,369 persons released on personal bail by Magistrates, (Monday to Saturday) 202 absconded bail. The 1,369 persons do not include persons released on personal bail as a result of an Amicus recommendation. (It is worth nothing that approximately 70% of the persons who absconded bail were charged with summary offences, even though the larger percentage of persons released on personal bail, were those charged with indictable offences. Therefore, the seriousness of the charge is no indicator as to whether the accused will return for trial.)

ance,<sup>26</sup> an indication that the magistrate who can rely on objective, verified criteria is more likely to free those who in fact are good risks.

Since the beginning of 1967, the Project has recommended personal bail for more than 400 persons. Although in the first few months magistrates concurred in only a limited number of the project's recommendations, this number is increasing, and now about 80% of those who have received a favourable report are released on personal bail.<sup>27</sup> Unfortunately, 400 recommendations are not very many in light of the fact that from January to September of last year there were 3,682 persons in custody who intended to enter a plea of not guilty.<sup>28</sup> About one-third to one-half of these were not interviewed because the offences with which they were charged were excluded from the Project's sphere of operations.<sup>29</sup> When various projects in the United States, which also had been initially excluded from acting in specified cases, were given authority to conduct interviews with almost every prisoner, the number of recommendations increased with the increase in interviews.<sup>30</sup> Many of those brought within the ambit of the expanded projects had been charged with narcotics offences or prostitution, and these persons, more often than not, are good risks. Similarly, there would be many more recommendations made by the Toronto Bail Project if prisoners could be interviewed whatever the charge against them.<sup>31</sup>

The number of recommendations is also limited because the Amicus worker is not able to verify all the interviews of those who have the minimum five points in the short time available before the hearing. Since the Project makes positive recommendations only on the basis of verified information, no report is submitted on an accused, even though he appears to be reliable, if his references cannot be located in time, or he is from out of town. Obviously, the magistrate

<sup>26</sup> New Bail Plan Helps Free Many, But Has Woes. *Toronto Daily Star*, September 29, 1967.

<sup>27</sup> *Id.*; Bail Plan Enters Second Year in Canada. *New York Times*, October 29, 1967.

<sup>28</sup> Statistics by permission of the Amicus Foundation.

<sup>29</sup> This would also include a small number of persons who had been arrested for absconding bail. These persons along with those already on bail or probation for similar offences would still be excluded from the project. The "excluded offences" were omitted from the project in order to avoid adverse public reaction to the project while in its initial stages. It is hoped that the second year of the project will be carried out with no excluded offences. The projects in the United States have now reached the stage where only homicide and certain narcotic offences are excluded. In the District of Columbia, in the United States, the local bail project has gone so far as to interview persons who are charged with homicide; BAIL AND SUMMONS 1965, *supra*, note 5 at 79, 80.

<sup>30</sup> FREED & WALD, BAIL IN THE UNITED STATES. 1964 Conference on Bail and Criminal Justice.

<sup>31</sup> It can be argued, that persons arrested for prostitution, (especially first time offenders), should be released on personal bail rather than cash bail, since the setting of a cash bail only encourages the accused to ply their trade in order to make enough money to pay the bond. There is no reason why the young offender who is caught smoking marijuana, and who usually lives with his parents, cannot be released on personal bail. (Bail in such cases ranges from \$500 to \$2,000).

should not conclude that because no report is submitted the accused had an unfavourable score on the interview. The danger of this inference being drawn is decreasing as the Courts become better acquainted with the way the system works.<sup>32</sup>

One should keep in mind that the purpose of the Bail Project is not to get everyone out of jail on personal bail, but to insure that the person who is released is a good risk, and will return for trial. Any other criteria for release is beyond either its philosophy or capacity. It is for this reason that the Project does not concern itself with whether or not the accused may be a danger to society, or whether he may commit further crimes. The Project's sole purpose is to assist the court in setting proper bail. The final decision is, of course, made by the magistrate after he has weighed all considerations, both objective and subjective.

The recommendations now are based on objective not subjective criteria. Although it can be argued that a subjective appraisal might give a more accurate assessment of the reliability of the accused, the point system enables different staff members to come to the same conclusions about a particular individual. A system which involved a value judgment might lead to decisions which varied with the experience and qualifications of the interviewer. Its success would, of course, depend on the correctness of his opinions.

All the interviews must be conducted between eight and ten o'clock in the morning, since this is the only time that the prisoners are together in one place. This short period of time restricts the length of the interview to basic questions which will determine the accused's roots in the community. Questions related to the alleged offence are not only time consuming, but raise the problem of privilege between the accused and the interviewer. Under our law communications between interviewer and prisoner would not be privileged, and in theory the Amicus worker could be called as a witness at the trial. For this reason interviewers are instructed to avoid any questions about the circumstances of the arrest or the nature of the charge against the accused.<sup>33</sup>

<sup>32</sup> In 1968 the number of interviews which were verified increased by 30% as a result of better interviewing techniques and a greater effort to reach neighbours and employers. The court also assisted by holding over cases when requested by the Project in order to give more time to contact references at work.

<sup>33</sup> BAIL AND SUMMONS: 1965, *supra*, note 5 at 30. The following is an example of an admission which took place in the course of the operation of the District of Columbia Bail Project. The problems resulting from such an interview speak for themselves.

Question: "Mr. Y., where do you live?"

Answer: "33 such-and-such-a-street, Northwest, Washington, D.C."

Question: "With whom?"

Answer: "Mrs. X."

Question: "And who is Mrs. X?"

(Question obviously asked for the purpose of determining the relationship between the defendant and Mrs. X.)

[Footnote continued on page 324]

Finally, in the opinion of this writer, one of the most serious shortcomings of the Toronto Bail Project is that it only reaches people after they have already spent some time in jail.<sup>34</sup>

In 1961-62 it was discovered that very few persons were convicted for absconding bail.<sup>35</sup> Now the courts are taking a different view, and there have been approximately one or two convictions of this type per week. These usually bring a one to three month jail sentence. Perhaps fewer accused persons would fail to appear for trial, even if they were released on recognizance, if these sentences were increased.<sup>36</sup>

The Toronto Bail Project has shown that dramatic changes are required in our bail system if everyone is to be given justice regardless of his wealth. It has established that an assessment of the accused's "roots in the community" provides effective criteria for deciding whether pre-trial release should be granted. All but a very few of those recommended by the Bail Project have returned for trial. Since 1964, legislation encouraging use of release without bail or on nominal or cash bail, has been proposed, drafted or passed in several states in the United States.<sup>37</sup> In the Federal system a significant change in the attitudes of the judiciary is reflected in the new Bail Reform Act of 1966. It is hoped that the work of the Amicus Foundation during its two-year trial period has not been in vain, and that the Project will be continued on a province wide basis as part of our regular court procedure relating to bail and pre-trial detention.

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Answer: "She is the woman I killed."

(During exploratory questioning, the prosecution is able to learn that there may have been such a damaging admission made.)

<sup>34</sup> The Friedland study, *supra*, note 1, found that 180, or 4%, of all persons in custody eventually had their charges withdrawn at the first court appearance. In 1964 this figure amounted to 269, or 4.1% of all persons in custody. In 1967, 133 persons, 2.5% of those in custody before first court appearance subsequently had the charges against them withdrawn. These people, therefore, spent unnecessary time in jail. The time spent in jail may be short (up to forty-eight hours if arrested on a weekend) but is still an expense to the taxpayer, and loss of pride to the accused.

An example of where the project can do some good is in the area of impaired driving. Persons charged with impaired driving aren't interviewed by the Project, since they are usually released at 9:30 a.m. on the morning of their first court appearance. There is no reason (except perhaps to give the accused a taste of jail) why persons charged with impaired driving can't be released with a summons, or personal bail, and put in the custody of a friend or relative, or sent home in a taxi at his own expense.

<sup>35</sup> *Supra*, note 1 at 163. In 1960 there were three convictions for absconding in Toronto Magistrate's Courts.

<sup>36</sup> *Id.*, at 165. Professor Friedland believes that the threat of a jail term would be more of a deterrent than the mere loss of a bail bond. The Criminal Code, s. 125 provides that an accused who absconds is liable to imprisonment for two years.

<sup>37</sup> *Supra*, note 5 at XVI.