The *Bradshaw* decision goes far, at least in principle, in destroying this situation. But what is needed is some method by which it is possible to determine when the privilege is being asserted to defeat the interest of truth; and yet give to the claimant the protection for which the statute is enacted. *Bradshaw,* in theory, may force a claimant to keep off the stand entirely, or at least not to testify with regard to his condition at all, in order to claim the protection of the statute.. Alhough, as a practical matter, claimants will be unwilling to do this, they are thus faced with a waiver of the privilege. In any event, the Court has finally come to grips with the problem; by forcing the claimant either to waive the privilege, or to not disclose anything, the patient has his choice of telling all or hiding all.

The same result can be accomplished by merely permitting an inference that the evidence which the claimant fails to present concerning his condition is adverse to his cause. Such an inference is not only strong under the proper circumstances, it is likely to require the claimant to waive his privilege to prevent such inference.

Even in those cases in which the inference may be indulged, there are obvious limitations. Thus, if the evidence which was not produced was merely cumulative, or corroborative, or was equally available to both parties, no such inference should arise.[105] Also, the claimant ought to be permitted to explain his failure to produce the matter with regard to which he has a privilege before his is subjected to an adverse inference of its content.[106]

By imposing the burden of showing the proper foundation on the defendant, before the inference can be argued, or the jury instructed concerning it, solicitude can be shown to the claimant's interests of privacy; but once such showing is made, the inference is there and the defendant ought to be permitted to argue it.

The details of this procedure can be best left to case by case development; other states have adopted similar practices for guide.[107] The proposal is therefore one of concept only, but the concept is one of fairness to the litigants, with all due regard to a claimant's confidences, at least to the extent to which such confidences deserve protection.

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[105] See DeWitt §§ 94-96.

[106] *Ibid.*

[107] The Minnesota procedure is represented by Dubois v. Clark, 253 Minn. 556, 560, 93 N.W.2d 533, 536, note 1 (1958) ("This does not mean that a party examined by a physician and a number of medical specialists, as consultants, who has waived his privilege as to the examining physician should be required to call all such consulting specialists and waive his privilege as to the testimony of each in order to avoid the risk of comment by opposing counsel as to the adverse inference to be drawn from their failure to be called. Nor should opposing counsel be compelled to subpoena them to ascertain if the privilege as to their respective findings is to be exercised before being entitled to comment on the adverse inference arising from the failure to present their testimony. To avoid such difficulties and the expense involved in subpoenaing such witnesses, the party examined should take timely measures outside the jury's presence to advise the court and opposing counsel as to their names; the reason for not calling them; and that any privilege with respect to their findings was to be waived. Thereafter no comment as to the adverse inferences to be drawn because of their absence should be permitted. Should the court and opposing party be not thus advised and such witnesses be not called, it would then be proper for opposing counsel to make such comment without the necessity of first placing such witnessess on the stand to ascertain whether the privilege as to their testimony was to be exercised.")

DES MOINES PRE-TRIAL RELEASE PROJECT 1964-1965

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Judges, lawyers and laymen have long been dissatisfied with the inequities of traditional bail bond procedures. Several years ago a New York industrialist became interested in the problem and established the Vera Foundation. The Vera Foundation working with the New York University School of Law initiated a project designed "to gather data on the operation of the bail system and to explore the use of release on one's own recognizance . . . ."[1] The hypothesis the experiment hoped to prove was ". . . that more persons can successfully be released on parole if verified information concerning their (the defendants') character and roots in the community is available to the court at the time of bail determination."[2] The experiment was an astounding success and interested parties in Des Moines decided to test the hypothesis here.

The Des Moines Pre-Trial Release Project concluded its first year in operation on February 3, 1965. The Project acted as an investigator and reporter for the Des Moines District and Municipal Courts and some Justice of the Peace Courts by interviewing the criminally accused and putting information so acquired at the disposal of the judge so that he could determine whether or not an accused should be released by signing his own bond or be released on his own recognizance.

Once a person was charged, a Drake University law student interviewed him in the jail or courtroom. Persons accused of non-bailable offenses, sex crimes against minors, narcotics charges (other than illegal possession of prescription drugs), robbery with aggravation and intoxication (with some exceptions) were excluded. No one was required to submit to an interview; it was completely voluntary.

The interviewer, by use of a special questionnaire,[3] discovered relevant facts in relation to the defendant's residence, job record, family ties, and prior criminal record. The information acquired was transposed into points. The number of points obtained by the defendant is a relatively accurate reflection of this individual's degree of stability and community ties. This in turn reflects the likelihood of the accused appearing in court on the set date. If the accused received sufficient points then a formal recommendation was made to the presiding judge.[4] The judge then made the final decision as to whether or not the defendant would be released on his own recognizance.

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1 Ares, Rankin & Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole,* 38 N.Y.U.L Rev. 67 (1963).

2 *Id.* at 68.

3 *Id.* at 93 has an appendix containing an example of a questionnaire used for such purposes.

4 The Project is allowed to release individuals from 4:00 p.m. to 8:00 a.m. without approval of a judge, where the person is charged with a misdemeanor and otherwise qualifies for release.

As the appearance day approached the Project sent a letter reminding the defendant of the day and time he was to appear in court.

During the first year the Project interviewed 970 Polk County residents accused of crimes ranging from felonies to simple traffic offenses. To be more specific, (a) 263 were charged with felonies; (b) 237 were charged with indictable misdemeanors; (c) 331 with simple misdemeanors; and (d) 139 with assorted traffic charges.

Seventy-five per cent, or 740, of those interviewed qualified under the point system and were recommended for pre-trial release without bond. The courts released 716, or ninety-six per cent, of those recommended. (In the majority of those cases where the courts did not follow the Project's recommendation, the county attorney's office opposed release without bond based on special information or circumstances.) Ninety-eight per cent of those released made timely appearances in court. Ten people never showed up in court. Of these ten, seven were charged with traffic violations, two with forgery and one with breaking and entering. Six individuals came to court several days late.

It is interesting to note that 168 of the 237 accused of indictable misdemeanors were released on their own recognizance. Many of these cases still await action in the grand jury or on the trial docket. However, seventeen were dismissed at the preliminary hearing, twenty-one have been ignored by the grand jury and one was dropped by the county attorney. Only twelve out of the seventy-five that were found guilty or plead guilty went to jail or prison; the others received a suspended sentence or probation.

The American system of justice is founded upon the premise that the accused is innocent until proven guilty. This principle has been encroached upon by the professional bonding practices. Those laden with the burden of poverty are bound to stay in jail until their trial since they are unable to pay the fee of the professional bondsman. Those who can pay are, in effect, penalized by the fee of the bondsman. Both classes are, in fact, punished before they are proven guilty. Taking these things into consideration, .the benefits of pre-trial release, or pre-trial parole, are obvious.

Other benefits not so obvious and somewhat evasive of statistics are also present. The Project is confident that many of those released without bond have been able to keep jobs and retain money that otherwise would have been lost.[5] Having employment and retaining savings means that the defendant can afford competent counsel, that otherwise may be appointed and court compensated. Employment and retention of savings means the defendant's family may not have to receive relief from the welfare agencies. The city and county are also spared the costs of pre-trial incarceration in many cases.

Foremost, the Des Moines Pre-Trial Release Project, along with other such projects across the country,[6] has proven the hypothesis they are founded

[5] Approximate statistics show that if the 716 defendants had been required to pay a bondsman's fee at the initial bonding stage they would have paid out about $40,000.00.

[6] For extensive coverage of other Bail Bond Projects, and of the problems involved in bail bond procedures on both the state and the federal level, see *Hearings on Federal Bail Procedures Before the Subcommittee on Constitutional Rights and the Subcommittee on Improvements in Judicial Machinery of the Senate*

upon, namely that people with a certain degree of stability and community ties can be trusted to appear in court to face criminal charges without posting a monetary bond.[7]

Committee on the Judiciary, 88th Cong., 2d Sess. (1964). In particular, see pp. 348-352, containing a "Bibliography on Bail".

[7] The Hawley Welfare Foundation in 1965 appropriated $16,500 to finance and operate the Project and recently approved plans to continue full support in 1965.