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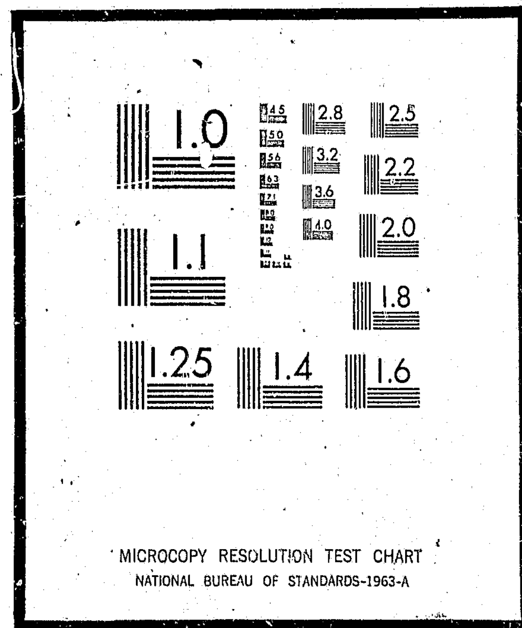

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PHASE I EVALUATION OF PRETRIAL RELEASE PROGRAMS

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PHASE I EVALUATION OF PRETRIAL RELEASE PROGRAMS

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Preface

The Phase I Evaluation of Pretrial Release Programs is being conducted by the National Center for State Courts under a grant from the National Institute of Law Enforcement and Criminal Justice, Office of Research Programs. It is one of several Phase I studies of innovative programs designed to reduce crime or improve the criminal justice system which together comprise the Institute's National Evaluation Program. The National Evaluation Program was undertaken in order to provide information for State Planning Agencies and local administrators which will assist them in planning and funding decisions.

The task of this Phase I evaluation is to determine what is currently known about the effectiveness of pretrial release programs, to assess whether existing knowledge is sufficient to be useful in planning and funding decisions, and to develop research designs for obtaining additional information which is felt necessary for a full evaluation. Based on the findings of this Phase I evaluation, a decision will be made by LEAA whether or not to implement a national scope research effort. This national scope research, which would be designed in accordance with Phase I results, would constitute Phase II of the National Evaluation Program.

The following Issue Paper represents the first of six deliverable work products to be produced during the Phase I evaluation. The purpose of the paper is two-fold. First, it is intended to give the reader a general familiarization with pretrial release programs. Section I is historical and consists of two parts. The first discusses the need for reform in American pretrial release practices and the second presents a brief overview of the development of pretrial release programs and the bail reform effort generally. Section II defines what is meant by a pretrial release program and discusses some of the

fundamental similarities and differences among the programs.

The second purpose of the paper is to set forth our tentative assessment of what the important evaluation issues are in the pretrial release field and the substance of expert views and opinions concerning these issue areas. In Section III we consider existing research in the topic area and identify the various approaches that have been taken to evaluating the effectiveness of pretrial release programs. Section IV presents our assessment of the current state of knowledge concerning pretrial release programs. The section is subdivided into issues which concern the effectiveness of individual programs -- issue areas discussed include release rates, speed of program operations, equal justice, failures to appear, crime while on pretrial release, and program economic costs and benefits -- and national, cross-program issues relative to identifying which organizational structures, operating procedures and methods of release produce optimum program results.

Much of this paper is based on a recently completed study by the National Center for State Courts. Under a grant from the National Science Foundation, the Center undertook an eighteen month study of research done to date in the pretrial release field. The resulting report, "An Evaluation of Policy Related Research on the Effectiveness of Pretrial Release Programs", is an analysis of the quality of research done in the area and an assessment of the extent to which that research provides a basis for generalization. In preparing the NSF report, an exhaustive literature search was conducted of material relating to pretrial release and over 200 articles and studies were screened for the relevance of the questions asked, the quality of the research employed, and the policy-utility of the findings. In addition, a questionnaire survey of release program directors, judges, prosecutors, public defenders, police

chiefs, sheriffs, and county officials was performed to probe their opinions regarding the goals of pretrial release programs, the effectiveness of the programs and the quality of evaluation research.

The results of the NSF study were disappointing but, in a way, predictable: a review of current literature showed that there is really very little that we can say with confidence about pretrial release programs. While numerous evaluations have been conducted of pretrial release programs, few are of sufficient technical quality in terms of the research methodology employed to produce findings useful to other jurisdictions. Also, few evaluations contained adequate descriptions of either the program studied or the local criminal justice system to allow meaningful comparisons with other research efforts.

In the following paper we build upon the foundation established in the NSF report. The information contained in the NSF report is incorporated into a broader based discussion which includes the subjective opinions of individuals involved in pretrial release reform. These opinions were gathered during the course of telephone interviews with release program administrators, on-site visits to a few programs and at a recent pretrial release conference in Chicago. We do not assume to have covered all opinions or issues on pretrial release; rather, we have attempted to raise and address those issues which have been highlighted in our discussions with various individuals and which seem to be of the utmost concern in evaluating pretrial release programs.

I

THE DEVELOPMENT OF PRETRIAL RELEASE PROGRAMS

A. The Call for Bail Reform

The American criminal justice system traditionally begins with the physical arrest of the accused. Whether or not there exists any real need for immediate or continued custody, the criminally accused is detained until he satisfies the conditions imposed for his release. Traditionally the conditions imposed have been financial.

Under such a system large numbers of criminal defendants are held in American jails for periods that range from a few hours to several months. Aside from the very real injustice of punishing a person before the adjudication of his guilt, even short periods of detention can be very damaging to the person incarcerated because of its effect on his job and family situation. Moreover, even short periods of detention in the kinds of crowded and unfit conditions that typify many American jails can be enormously destructive to a person's health, psychologically debilitating and often physically dangerous.

The pretrial detention issue is one which has long troubled persons concerned with problems of the poor as well as those concerned with the criminal justice system. In a pretrial release system which relies almost exclusively upon money bail it is axiomatic that impoverished individuals will suffer the most. Such a system makes pretrial freedom a commodity to be purchased. Those who can afford the price are released; those who cannot are detained. The discriminatory nature of the system is compounded by the fact that in setting the cost of pretrial freedom -- the amount of bail -- only rarely is allowance made for individual differences among defendants based on their likelihood to appear at trial or the amount of bond they can afford. In setting bail judicial officers generally know only the charge against the defendant and perhaps his prior arrest record.[1]

[1] Daniel Freed and Patricia M. Wald, Bail in the United States: 1964 (Washington, D. C., 1964), p. 18.

An advisory committee of the American Bar Association's Project on Minimum Standards for Criminal Justice criticized the traditional bail system in a 1968 report:

> The bail system as it now generally exists is unsatisfactory from either the public's or the defendant's point of view. It's very nature requires the practically impossible task of translating risk of flight into dollars and cents and even its basic premise -- that risk of financial loss is necessary to prevent defendants from fleeing prosecution -- is itself of doubtful validity. The requirement that virtually every defendant must post bail causes discrimination against defendants who are poor and imposes personal hardship on them, their families and on the public which must bear the cost of their detention and frequently support their dependants on welfare. Moreover, bail is generally set in such a routinely haphazard fashion that what should be an informed, individualized decision is in fact a largely mechanical one in which the name of the charge, rather than all the facts about the defendant, dictates the amount of bail.[2]

The routine manner in which bail decisions have traditionally been made belies the fact that the decision is one of critical significance. Bail is the mechanism by which society's interest in the smooth administration of criminal justice is squared with the individual's right to pretrial liberty. The consequences of the bail decision are, thus, important both to the defendant and to the community. In a 1967 report the President's Crime Commission discussed the importance of the bail decision:

> A released defendant is one who can live with and support his family, maintain his ties in the community, and busy himself with his own defense by searching for witnesses and evidence and by keeping in close touch with his lawyer. An imprisoned defendant is subjected to the squalor, idleness, and possibly criminalizing effects of jail. He may be confined for something he did not do; some jailed defendants are ultimately acquitted. He may be confined while presumed innocent only to be freed when found guilty; many jailed defendants, after they have been convicted, are placed on probation rather than imprisoned. The community also relies on the magistrate for

[2] American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Pretrial Release (New York; Institute of Judicial Administration, September 1968) p. 1.

> protection when he makes his decision about releasing a defendant. If a released defendant fails to appear for trial, the law is flouted. If a released defendant commits crimes, the community is endangered.[3]

Concern over the inequities and inadequacies of the American system of bail dates back at least fifty years.[4] The first major empirical study focusing upon the pretrial release system itself was Arthur Beeley's landmark book, _The Bail System in Chicago_, published in 1927.[5] Although a variety of pretrial release mechanisms existed in Chicago at that time, including the use of summons, release on recognizance without sureties and cash deposit bail, Beeley found that surety bail predominated and that the system was riddled with abuses. Among the problems disclosed by Beeley were the fact that unreliable bondsmen and inadequate securities were frequently accepted by the courts, that bondsmen often used non-existent property or property owned by others as collateral; that fraudulent practices by bondsmen went unprosecuted; that bail bonds were forfeited frequently with impunity; that bond forfeitures which were declared were commonly set aside without even collection of court costs, and that even where judgments were entered, the full bond amount was rarely collected.

Beeley was also concerned with the consequences of the bail system on persons accused of crime. He found that accused persons were often held an unreasonable length of time in police lock-ups, sometimes without formal charges

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[3]President's Commission on Law Enforcement and the Administration of Justice, _The Challenge of Crime in a Free Society_ (Washington, D. C.; U. S. Government Printing Office, 1967), p. 31.

[4]See R. Pound and F. Frankfurter, eds., _Criminal Justice in Cleveland: Reports of the Cleveland Foundation Survey of the Administration of Criminal Justice in Cleveland, Ohio_ (Cleveland, Ohio: The Cleveland Foundation, 1922; reprinted, Montclair, New Jersey: Patterson Smith, 1968), and Missouri Association for Criminal Justice, _The Missouri Crime Survey_ (New York: The Macmillan Company, 1926).

[5]A. L. Beeley, _The Bail System in Chicago_ (Chicago: University of Chicago Press, 1927; reprinted in 1966).

being placed against them; that the amount of money bail set in each case was determined upon the basis of the offense charged and that bail was often set in excessive amounts; that about 20 percent of the persons arrested in Chicago failed to post bail and were detained until disposition of their cases and that the detention facilities were appalling. Beeley concluded that:

> As criminal justice is presently administered in Chicago, however, large numbers of accused, but obviously dependable persons are needlessly committed to jail; while many others, just as obviously undependable, are granted a conditional release and never return for trial. That is to say, the present system, in too many instances, neither guarantees security to society nor safeguards the rights of the accused. The system is lax with those with whom it should be stringent and stringent with those with whom it could safely be less severe.[6]

Among Beeley's recommendations were a greater use of summons to avoid unnecessary arrests and the inauguration of fact finding investigations so that bail determinations could be tailored to the individual.

Little happened as a result of Beeley's disclosures but the period from 1930 to 1960 was marked by recurrent criticisms of the American bail system and the role and activities of commercial bail bondsmen. In city after city, studies and investigations by grand juries, bar associations, newspapers and academics revealed evidence of corruption and collusion in the day to day operations of the bonding business.[7]

Two such studies which were particularly dramatic in demonstrating the need for changes in the American system of pretrial release were undertaken in the mid-1950's under the direction of Professor Caleb Foote of the University of Pennsylvania School of Law. Foote's analysis of the administration of bail

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[6]_Ibid._, p. 160.

[7]See R. Goldfarb, _Ransom: A Critique of the American Bail System_ (1965); and D. Freed and P. Wald, _Bail in the United States: 1964_ (Washington D. C., 1964), p. 34.

in Philadelphia[8] and New York City[9] vividly demonstrated that the conditions Beeley found in Chicago in the 1920's still existed and that the situation had, in fact, deteriorated with far more defendants being held in pretrial detention. In Philadelphia, Foote estimated that 75 percent of the defendants charged with serious crimes -- e.g., arson, robbery, rape, sodomy, burglary -- were unable to post bail and that in the less serious cases, approximately 27 percent of the defendants failed to secure release. In New York City, Foote reported that 28 percent of the defendants were detained for failure to post bail in the low amount of $500 and that as the amount of bail increased, the ability of defendants to secure release decreased. In other respects, Foote's findings were similar to those of Beeley -- e.g., that the offense charged was the principal, often exclusive, criteria for setting bail; that while alternative forms of pretrial release existed, they were infrequently used; and that pretrial detention facilities were inadequate and unfit.

The Beeley and Foote studies when combined with the several other investigations which had been undertaken presented a very disturbing picture of the American system of bail. The studies showed the dominating role played by bondsmen in the administration of bail; the lack of any meaningful consideration to the issue of bail by the courts; and the detention of large numbers of defendants who could and should have been released, but were not because bail, even in modest amounts, was beyond their capabilities. The studies also revealed that bail was often used to "punish" defendants prior to a determination of guilt or to "protect" society from anticipated future

[8] Note, _Compelling Appearance in Court: Administration of Bail in Philadelphia_, University of Pennsylvania Law Review, Vol. 102 (1954), pp. 1031-1079.

[9] Note, _The Administration of Bail in New York City_, University of Pennsylvania Law Review, Vol. 106 (1958), pp. 693-730.

conduct by allegedly dangerous defendants; that defendants detained prior to trial often spent months in jail only to be acquitted or receive a suspended sentence after conviction; and that jails were severely overcrowded with pretrial detainees housed in conditions far worse than those of convicted criminals.

B. The Bail Reform Movement

By 1960 the inadequacies and unfairness of the American system of bail had been well documented. The challenge to reform this system, however, was accepted by a person outside the criminal justice structure. On the invitation of a friend, Louis Schweitzer, a wealthy New York chemical industrialist, agreed to visit the Brooklyn House of Detention. In an interview, Schweitzer recalled the horror of his visit:

> I'd never been in a criminal court, and hardly knew anybody who had, so I failed to realize that this was considered perfectly logical. I visited the prison and was appalled. The youngsters were treated like already convicted criminals, despite our treasured principle that people are presumed innocent until proven guilty. The only crime we know they committed was being too poor for bail. I found out later that most of them were eventually given suspended sentences or acquitted -- after an average wait in jail of more than a month each.[10]

Schweitzer decided to do something about the problem. With $25,000 of his own money, he created the Vera Foundation with the mission of assisting defendants who were too poor to post bail. Herbert Sturz, a young social worker, was selected to direct the Foundation and began to work on the problem. Within six months the Manhattan Bail Project was launched and with it began the first serious effort to reform bail practices in this country.

The idea behind the Manhattan Bail Project proved as powerful in practice as it was simple in concept. The project provided information to

[10] Oberdorfer, "The Bail Bond Scandal", Saturday Evening Post, June 20, 1964, p. 67.

the court about the defendant's ties to the local community and thereby hoped that the court would release the defendant without requiring the execution of a bail bond. Each morning the project staff - primarily law students from New York University Law School -- would interview arrestees who were awaiting arraignment in the detention cells in the Manhattan Criminal Courts Building. Since the project was intended to aid indigents who could not afford bail, only those arrestees represented by the Legal Aid Society were interviewed. Aside from those who had retained counsel, defendants charged with certain serious crimes such as homicide, narcotic offenses, sex offenses involving minors and assaults on police officers were also excluded. During the project's first year, however, the indigency requirement was dropped and the number of excluded offenses reduced so that only those defendants charged with homicides and narcotic offenses were not interviewed.

The interview was designed to elicit information bearing upon the defendant's stability in the community and reliability to appear if released on pretrial parole. Information was obtained in four areas: 1) residential stability; 2) employment history; 3) contacts with family members and other relatives in New York City; and 4) prior criminal history. The project then verified the information provided by contacting references submitted by the defendant and finally a decision whether or not to recommend the person for release was made. Initially, this decision was made subjectively on a case-by-case basis. However, an objective point scale was devised early in the project's history to permit a more uniform approach to the release recommendations.

Favorable release recommendations were then presented in court at the defendant's arraignment. The decision to release on pretrial parole was, of course, the sole province of the judge in each case, but a control group

experiment undertaken by the project during the first year revealed that judges were four times as likely to grant pretrial parole to defendants favorably recommended by Vera as they were to the control group which consisted of defendants equally qualified for release, but for whom Vera had withheld a recommendation.[11] The Manhattan Bail Project did not end with the release decision. Every defendant granted pretrial parole by the court was interviewed a second time prior to his release and was made aware of his obligation to appear in court as scheduled. Follow-up procedures including mailed reminders of court dates, telephone calls, and even personal visits continued after the defendant's release.

As the success of the Manhattan Bail Project became evident,[12] a nationwide bail reform effort began to take shape. The replication of projects modeled after the Manhattan Bail Project actually started in 1963 with the development of programs in St. Louis, Chicago, Tulsa and Nassau County, New York, but the magnitude of the bail reform movement became truly obvious in 1964. In retrospect, the bail reform movement as it exists today was largely shaped by developments in 1964. Among the developments in that year were the following:

(1) The convening of the first national conference to consider the problem of bail on a wider scale. Co-sponsored by the Vera Foundation and the United States Department of Justice under Attorney General Robert Kennedy, this Washington, D. C. conference was attended by over 400 judges, attorneys,

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[11] See, C. Ares, A. Rankin, and H. Sturz, The Manhattan Bail Project: An Interim Report on the Use of Pretrial Parole, New York University Law Review, Vol. 38 (1963), p. 67.

[12] During its first 2 1/2 years of operation (October 16, 1961 through April 8, 1964) the Manhattan Bail Project had assisted in the release of 2,195 defendants and less than one percent of these defendants failed to appear. D. Freed and P. Wald, Bail in the United States: 1964 (Washington, D. C., 1964), p. 62.

law enforcement personnel, and court officials representing major jurisdictions throughout the country. The conference was addressed by both Attorney General Kennedy and Chief Justice Earl Warren. The interest in bail reform generated by the conference led to the rapid proliferation of own recognizance release programs in the last half of 1964 and 1965 and to the convening of a second conference in New York City in 1965. By 1965, at least 42 jurisdictions had started bail projects, modeled more or less on the Manhattan Project.

(2) The Manhattan Bail Project, having proved so remarkably successful as a demonstration project, was fully institutionalized and made a part of routine court procedure in 1964 by transferring operation of the program from Vera to the New York City Office of Probation. Although a considerable number of the early OR release projects did not survive beyond their demonstration period, a number did follow Vera's lead in obtaining continued vitality through integration into a court agency, most often the probation department.

(3) Having turned operation of the Manhattan Bail Project over to the Office of Probation, Vera launched, in conjunction with the New York Police Department, another innovative pretrial release program -- the Manhattan Summons Project. This program was designed to release minor offenders on personal promises to appear at the police precincts and thereby eliminate the need for custody until arraignment. Started in a few select precincts in 1964, the Summons Project was extended to all of Manhattan in 1966, and adopted throughout the entire city in 1967. Also in 1964, certain police agencies in California were experimenting with the use of citation releases in the field, eliminating the need to physically arrest and transport the defendant to the police station.

(4) The State of Illinois, spurred by dissatisfaction with the commercial bail system in Chicago, took a different approach to bail reform in 1964. In that year the State Legislature implemented what has become known as the Illinois 10 Percent Deposit Bail Plan. This plan retained the use of money bail as the

predominate method of pretrial release but eliminated the need for defendants to secure the services of commercial bondsmen. Under this legislation the 10 percent bonding fee which previously was paid to a bondsman was now paid to the registry of the court. Defendants were thereby able to secure their release on less than the full bond amount and, moreover, the fee paid to the court, unlike the fee paid a bondsman, was refundable less a small service charge upon completion of the defendant's case. Although the initial legislation was temporary and due to expire by its own terms in 1965, the plan proved so successful[13] that the 10 Percent Bail provision was made a permanent part of Illinois law and by 1965 surety bondsmen were effectively eliminated in Illinois.

(5) Also in 1964, on the eve of the national bail conference in Washington, D. C., Senator Sam J. Ervin introduced a series of three bills on behalf of himself and others designed to reform bail practices in the federal courts. Eventually these bills culminated in passage of the Federal Bail Reform Act of 1966.[14] Most important of the many changes brought about by this Act were two. First, the Act recognized that defendants had a right to nonfinancial pretrial release and created a presumption in favor of the use of personal recognizance. Second, the Act formalized a system of conditional releases and instructed judges to impose the least onerous conditions reasonably necessary to assure the appearance of the defendant as required. Thus, under the terms of the Act, nonfinancial releases are to be preferred over financial

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[13] In 1964, the one year in which both 10 percent deposit bonds and surety bonds were permitted, defendants in Chicago released on deposit bonds had a lower failure to appear rate, 8 percent, than did defendants on surety bonds, 11 percent. C. Bowman, The Illinois Ten Percent Bail Deposit Provision, University of Illinois Law Forum, Vol. 1965, p. 37.

[14] 18 U.S.C.A. §3146 et seq.

releases and, when money bond is required, a deposit bond is to be favored over the use of a surety bond. The Federal Bail Reform Act has since served as a model for several state statutes and conditional releases have gained considerable usage, first in the District of Columbia and later in a number of jurisdictions through the influence of pretrial release programs.

Thus, as early as the mid-1960's a number of different approaches to the pretrial detention problem were in existence. It was not until the 1970's, however, that these alternative forms of release -- citations, deposit bail, conditional releases -- gained wide usage. The enthusiasm and excitement of the early bail reform years waned considerably in the latter part of the 1960's as "law and order" and "crime in the streets" became major national issues. Many of the own recognizance release programs started in the heady days of 1964 and 1965 ceased to operate and those that remained made little progress. The national concern over expanding the use of alternatives to money bail gave way to another concern coming from those who felt that the bail reform movement had gone too far. The issue of preventive detention arose.

The bail problem, as preventive detention advocates saw it, was how to keep allegedly dangerous defendants off the street and in jail during the pretrial period. A preventive detention proposal -- allowing for the detention of allegedly dangerous defendants for up to 60 days without bail -- was a major part of President Nixon's legislative program against crime. Although the Federal Bail Reform Act was never amended to authorize detention in all federal courts, the District of Columbia Court Reform and Criminal Procedure Act of 1970 did include provisions allowing preventive detention in some circumstances. Thus, the bail reform movement came to

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[15] Pub. L. No. 91-358, 84 Stat. 473

the end of its first decade with something of a counter-revolution in progress.

The 1970's, however, brought new impetus to the movement. A number of factors combined to bring this re-awakening about. The availability of federal money through Law Enforcement Assistance Administration (LEAA) grants enabled a number of new projects to start and also provided additional monies to already existing programs.[16] The interchange of information among pretrial release programs and a national concern for the status of the programs which the Vera Foundation had provided in the early years was reasserted in 1972 with formation of the National Association of Pretrial Services Agencies.[17] In 1974 NAPSA was considerably strengthened through the involvement of the National Center for State Courts in the planning of its annual meeting and in assisting programs in developing research and evaluation capabilities. The Office of Economic Opportunity's 1973 study of pretrial release programs[18] found the programs to be quite deficient in this area and the National Center for State Courts' 1974 study of policy-related research in the pretrial release field[19] confirmed this to be the case. While both of these studies were in many ways critical of pretrial release programs, their major contribution was in generating a greater national concern over the current status and future of the programs.

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[16] A 1973 study of pretrial release programs by the Office of Economic Opportunity found that over half of the programs responding to its inquiry were started in 1970 or later and that of the 46 programs starting in the 1970's, 24 were funded primarily by LEAA and that others were partially funded by this source. H. Goldman, D. Bloom and C. Worrell, The Pretrial Release Program (OEO, Office of Planning, Research and Evaluation, 1973) pp. 9-10.

[17] This organization composed principally of the directors and staff members of pretrial release and diversion programs has held annual meetings in each of the past four years.

[18] H. Goldman et al, supra Note 16.

[19] National Center for State Courts, An Evaluation of Policy Related Research on the Effectiveness of Pretrial Release Programs (Denver, Colorado: National Center for State Courts, 1975).

II

THE NATURE OF THE UNIVERSE: SIMILARITIES AND DIFFERENCES AMONG PRETRIAL RELEASE PROGRAMS

As the foregoing capsulized history has shown, the bail reform movement has progressed along a number of divergent paths. It is unified, however, in the common goal of reducing the American pretrial detention population through the safe use of alternative pretrial release mechanisms. While legislation and appellate court decisions have represented important milestones,[20] the heart of the movement has always been the pretrial release program. In this Phase I Evaluation of Pretrial Release Programs, our task is to assess the current state of knowledge concerning these programs. Does sufficient current information exist to evaluate the effectiveness of these programs in achieving their goals or is more information needed? What information, not now available, is necessary for a complete evaluation of pretrial release programs? How is this information to be obtained and at what cost?

The initial hurdle is to define what is meant by a pretrial release program. Logically, this should begin with the Manhattan Bail Project, a formally established program for the purpose of assisting pretrial detainees in securing pretrial release. While over the past fifteen years, police agencies and courts in a number of jurisdictions have altered their pretrial release practices in line with the goals of the bail reform movement, our concern in this Phase I Evaluation is with those jurisdictions in which formal pretrial release projects have been established. Like the Manhattan Bail Project, the programs we are concerned with evaluating are those which interview defendants in pretrial custody and submit either information or a recommendation concerning pretrial release to the court. They are unified, as is the bail reform movement generally, in the common goal of facilitating the safe nonfinancial pretrial release of criminal defendants.

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[20] The Federal Bail Reform Act of 1966 and the Illinois 10 Percent Deposit Bail Plan have served as models for several state statutes and court rules adopted over the past ten years.

Beyond this, however, pretrial release programs are as diverse as the bail reform movement itself. While it was obvious as early as 1964 that pretrial release programs were taking different approaches to the pretrial detention problem,[21] the differences between programs in terms of organizational structure, operating procedures and approaches to the pretrial detention problem have increased with the passage of time and the development of new release alternatives. We know, for example, that projects differ considerably in each of the following fundamental areas:

-- <u>Administrative Authority</u>. In the early years of the bail reform movement, own recognizance (OR) release projects were operated by a variety of organizations and individuals such as law students, bar associations, attorneys, public defenders, district attorneys, police agencies and private foundations as well as by the courts and probation offices. By 1973, however, the OEO study revealed that most of the pretrial release programs were being operated by public agencies, primarily either by probation departments or directly by the courts. OEO identified 69 projects operated by public agencies and just 19 by private organizations.[22]

-- <u>Funding</u>. The amount of funding with which projects operate varies enormously. Some projects survive through the ingenuity and perseverance of one or two

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[21] The Interim Report of the 1964 National Conference on Bail and Criminal Justice observed that,

> Under the heading of bail reform, some courts appear to direct ROR program efforts to releasing 'substantial' or 'respected' citizens who might well afford a bail bond premium, while detaining those who are poor. Some projects are interrogating the defendant as to his involvement in the alleged crime instead of confining their questions to the nature of the defendant's roots in the community. These projects even go so far as to disqualify from consideration a defendant who refuses to discuss the circumstances of his arrest. <u>National Conference on Bail and Criminal Justice Proceedings: Interim Report</u> (1965). p. XXVI.

[22] H. Goldman, D. Bloom and C. Worrell, <u>The Pretrial Release Program</u> (OEO, Office of Planning Research and Evaluation, 1973), p. 9.

individuals with no funding whatsoever; while the largest programs have operating budgets in excess of $1,000,000. Likewise, the source of project funding varies -- OEO reported that in 1973 project funding was about equally divided between the federal government through LEAA block and discretionary grants and county and municipality funding.[23]

-- Staffing. Projects differ both in the size of their staffing -- from one person operations to permanent staffs of 25 or more -- and in staff composition -- some programs relying heavily upon the use of volunteers and low salaried nonprofessional staff such as law students, while others operate with an exclusively professional staff of probation officers.

-- Project Clientele. Variations are found both in the number and type of defendants that projects service. The OEO study reported that 27 percent of the projects it surveyed in 1973 interviewed less than 1,000 defendants a year, while six percent of the projects were interviewing in excess of 20,000 defendants annually.[24] While such a variance is undoubtedly in part due to the size of the jurisdiction in which the project operates, it is quite obvious that other variables are also at work. One of the most important of these is the criteria a project establishes for selection of the defendants it will interview. Since the Manhattan Bail Project, virtually all pretrial release programs have established a formal or informal list of excluded offenses which limit the number of defendants it will interview. Some projects, for example, handle only misdemeanor defendants, others only felony defendants. Most projects will exclude defendants charged with certain specific offenses, serious felonies and narcotic offenses being the most prevalent.[25]

-- Point of Intervention. One of the most important factors affecting the number of defendants a project will interview and release is how quickly

[23] Ibid., p. 8. [24] Ibid., p. 6. [25] Ibid., p. 13.

the project operates. At what point in the criminal justice system does the project have initial contact with defendants and how long does it take the project to process a case? Again, projects differ enormously in this area. Some programs are situated to interview defendants within minutes or hours of their arrest, while other programs do not have contact with defendants until days or even weeks after arrest. How long it takes projects to process release recommendations is a function of several variables, e.g., verification procedures, evaluation procedures, the type of recommendations submitted, and when and to whom recommendations are made.

-- Verification Procedures. Some programs today have dispensed with the verification requirement in cases where the defendant is charged with a minor offense, at least insofar as to not require verification beyond that available from the papers carried on the defendant's person. Most projects, however, still require at least one independent verification of the information provided by the defendant; some programs require two verifications and at least one program, San Francisco's, requires three independent verifications before it will recommend release in a felony case. The vast majority of pretrial release programs rely exclusively on the telephone for verification, although a few have sufficient staff to do some field verifications.

-- Defendant Evaluations. One of the few areas in which projects do not differ is in the criteria used to measure a defendant's reliability to appear once released. Quite uniformly, pretrial release programs have accepted the original Vera criteria of employment, residence, family contacts and prior record for passing upon a defendant's eligibility for pretrial release. A very basic difference among pretrial release programs is, however, whether a defendant should be measured against these criteria by use of a common, predetermined point scale or whether each defendant should be considered individually and subjectively. The point system approach, which Vera adopted very early in the

Manhattan Bail Project, assigns a numerical value to each local contact and the defendant's release recommendation is contingent upon accumulating a set number of points. Most of the early pretrial release programs followed Vera's lead and adopted an objective approach to release recommendations; many programs did not. Projects operated by probation departments in particular tended not to use point scales, preferring the subjective caseworker approach instead. In light of the increasing number of programs situated in probation offices and with the increasing number of programs making recommendations other than straight own recognizance release, it is not surprising to see that the objective scale has largely given way to the subjective approach. In 1973, OEO reported that only about 10 percent of the pretrial release programs were relying exclusively upon a point scale, although an additional 46 percent of the programs were using a point scale as a guide in reaching an essentially subjective release decision.[26]

-- Release Recommendations. Most pretrial release programs make some type of release recommendation to the court.[27] The type of recommendations made, however, varies with some programs recommending only straight own recognizance release; while others will recommend supervised or conditional releases in appropriate cases. While the Manhattan Bail Project and most of the early programs would only present cases in which they were prepared to make a positive release recommendation, today most programs present negative as well as positive recommendations. Many programs will also make bail reduction motions in cases where nonfinancial release cannot be recommended.[28]

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[26] Ibid., p. 15.

[27] OEO found that just 10 percent of the projects simply submit information to the court without making any release recommendation. Ibid., p. 15.

[28] Ibid., p. 16.

The manner in which the recommendations are presented also varies. Some programs present recommendations only at a defendant's regularly scheduled court appearance, while others will present the recommendations personally to a judge in chambers as soon as they are prepared and still others have authority to contact judges by phone. A few projects have been delegated the authority to release qualified defendants charged with minor offenses on own recognizance without seeking prior judicial approval.[29] In presenting release recommendations, the early OR projects generally considered themselves advocates for the defendant. Some current programs still maintain this stance, but today most programs consider themselves as neutral, court service agencies.

-- Release of Defendants. The time from arrest to interview, the verification requirements and the writing and presenting of release recommendations all have a bearing on the time it takes to secure pretrial release for a defendant. Because of the different procedures discussed above, it is not surprising to find considerable variation among projects in the average length of time needed to obtain the release of defendants. In some projects, releases can be accomplished in a matter of hours, while in others it is days or even weeks before a defendant will be released.[30]

-- Procedures After Release. Most pretrial release programs undertake some effort to ensure that persons they have assisted in gaining release return to court as scheduled. At a minimum projects will generally send a reminder letter alerting defendants of upcoming court appearances and many also utilize phone reminders. Some programs require that a defendant contact them within 24 hours of release, while other programs require periodic check-ins by defendants over the entire release period. Beyond this, however, some programs -- those which have expanded into conditional releases -- are concerned with monitoring the performance of the conditions imposed on the defendant's

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[29] Ibid., p. 17. [30] Ibid., p. 18.

release. In these projects contact with the defendant is increased over the period of his pretrial release.

-- Procedures After Failure to Appear. Most projects will make some effort to locate defendants who have failed to appear and attempt to persuade them to return. In some projects, the staff will assist the police in locating the defendant for the purpose of making an arrest and a few projects have the authority to serve bench warrants and effect an arrest themselves.

The foregoing are by no means the only significant differences among pretrial release programs, but they do serve to highlight the fact that within the universe there are substantial variations in program organization and operating procedures. Given the wide differences which do exist, one would think that some effort would have been made to analyze the various approaches that have been taken in order to determine which procedures operate best. The need for such a study was sounded in 1966 in an internal Vera Foundation memo from Roger Baron, field coordinator for Vera and a former director of the Manhattan Bail Project, to Herbert Sturz:

> The five years since the Manhattan Bail Project has seen pretrial release projects of every shape and form spring up throughout the country. Since little was known about pretrial release projects at that time, this was envisaged as the best way to proceed. The theory was, let experimentation be the key to success. At some future point we will sit down, analyze the strengths and weaknesses of each project, and determine what the best procedure is. Well, that time has come now and, unfortunately, this determination cannot be made with any degree of certainty.
>
> The problems posed several years ago -- Who is best suited to administer pretrial release projects? What kinds of crimes and defendants should they cover? What do you do when a defendant does not meet your criteria for release on recognizance? Who do you present the information to? Do you use objective or subjective criteria? -- are still unresolved today. In fact, we have not even answered the basic question, are pretrial release projects really necessary? If we are to release all defendants on their own recognizance, how many would return?

Studies such as Baron was suggesting have not been done. While the experimentation philosophy of the bail reform movement should have provided a fertile ground for researchers to compare and contrast the relative impact and effectiveness of the different approaches that had been taken, the field is, for the most part, barren.

III

RESEARCH TO DATE: APPROACHES TO THE PROBLEM OF MEASURING THE EFFECTIVENESS OF PRETRIAL RELEASE PROGRAMS

The National Center for State Courts has recently completed a thorough study of the policy-related research which has been done in the pretrial release field. Three broad categories of empirical research were found to exist -- evaluations of individual pretrial release projects; studies of overall pretrial release systems in single jurisdictions; and national scope studies of the operation of pretrial release systems in different jurisdictions.

Virtually every pretrial release program that has been established has produced some type of written report or description of project activities that, loosely speaking, could be termed an evaluation. These evaluations, usually done by the project's own staff or by a hired outside evaluator, represent the bulk of the empirical research that has been done to date in the pretrial release field. For the most part, however, the National Center's study found these reports to be of only limited utility. The statistics presented were of value only in terms of analyzing the particular project's progress or development. They were not useful in comparing the project with others or in making conclusions of general applicability because each project used different procedures and terminology. Unfortunately, the evaluations were not sufficiently descriptive of the project's own operations to permit comparisons with other projects.

Even as to persons in decision-making positions at the local level, the studies were found to be of limited utility. Perhaps the single most serious

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[31] In this section the concern is simply with describing the type and quality of research which has been done. What existing research tells us about the effectiveness of pretrial release programs is discussed in Section IV, infra. For a more detailed discussion of the nature and quality of the research done in the pretrial release area, see National Center for State Courts, An Evaluation of Policy Related Research on the Effectiveness of Pretrial Release Programs (Denver, Colorado: National Center for State Courts, 1975) Chapter 4.

failing of these project evaluations was their failure to assess the project in the context of the overall pretrial system in which they functioned. For example, the number of defendants interviewed and released, which most studies did provide, are meaningless unless related to the total arrest population in the jurisdiction. Without such information it is impossible to know how vital a role the project is playing in the overall system of pretrial release. Also, although most studies contained information on the percentage of released defendants who failed to appear, most failed to adequately define what was meant by a failure to appear or how the FTA rate was determined. Another obvious measure of program effectiveness -- the percentage of released defendants who commit additional crimes while on pretrial release -- was ignored in most studies. None of the studies analyzed by the National Center meaningfully compared the project's record on failures to appear or pretrial crime with the performance of defendants on other types of release, particularly defendants on surety bail.

In addition, very few of the project evaluations made any use of archival data which could provide a basis for measuring the project's accomplishments against the system of release which existed previously -- did the project have any impact on the rate of nonfinancial release or on the overall rate of pretrial detention? Because of the lack of sound comparative analysis, the usefulness of most of these evaluation studies of individual pretrial release programs to both local and national level policymakers would seem relatively slight.

Studies which examine the overall pretrial release system in a single jurisdiction have a number of advantages over the evaluations of individual pretrial release programs. Most importantly they can produce data indicating what inroads alternative pretrial release mechanisms have made -- what percentage of the criminal defendants secure pretrial release and by what means? Secondly, they can provide a basis for comparing the operation of different types of

pretrial release within the same jurisdiction -- how, for example, do defendants on nonfinancial release compare to defendants on surety bail in terms of failures to appear and rearrests while on pretrial release? For these reasons studies of the overall pretrial release system in a jurisdiction are potentially far more valuable to local policymakers than are studies which focus solely upon the operation of a pretrial release program.

There have, however, been only a few such comprehensive studies undertaken. For the most part the studies of this type which have been done have involved examination of archival data (primarily court records, but sometimes also police records) in order to obtain data on the proportion of the defendant population released on each type of release, failure to appear and rearrest rates for defendants in each category, and the characteristics of defendants in different categories of release. The National Center's analysis of these single jurisdiction studies concluded that among the best were Forrest Dill's case study of bail reform in Oakland, California in the mid-1960's[32] and a recent comparative study of pretrial release systems in two urban counties in Ohio done by a group of Ohio State researchers.[33] The National Center also found that some of the best single jurisdiction studies were ones which focused upon a single issue area. Thus, two notable studies are Andrew Schaffer's on failures to appear in Manhattan[34] and the National Bureau of Standards' study of pretrial crime in the District of Columbia.[35]

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[32] F. Dill, Bail and Bail Reform: A Sociological Study (Ph.D. dissertation, University of California, Berkeley, 1972).

[33] M.A. Bell et al., Bail System Development Study (Columbus, Ohio: The Ohio University Research Foundation, 1974).

[34] S. A. Schaffer, Bail and Parole Jumping in Manhattan in 1967 (New York, New York: Vera Institute of Justice, 1970).

[35] J. W. Locke et al., Compilation and Use of Criminal Court Data in Relation to Pretrial Release of Defendants: Pilot Study, National Bureau of Standards Technical Note 535 (Washington, D. C.: U. S. Department of Commerce, (1970).

There have been only three efforts at national, cross-jurisdictional research in the pretrial release field. The first, Lee Silverstein's 1966 article, "Bail in the State Courts",[36] provides data on bail setting practices in 1962 in 190 counties in every state and the District of Columbia and provides an excellent base from which to measure the impact of pretrial release programs. One national scope study done in the 1970's, Wayne Thomas' unpublished manuscript, "A Decade of Bail Reform",[37] did attempt to measure the changes in bail practices which occurred in 20 jurisdictions over the period from 1962 to 1971. Since Thomas used a common format and set of definitions for both years and all courts, his data facilitate comparisons over time as well as across jurisdictions.

The third national scope study is Paul Wice's dissertation, "Bail and Its Reform: A National Survey".[38] The National Center for State Courts found Wice's work to be one of the most comprehensive efforts in the field in terms of the range of issues considered and the variety of methodological techniques employed. Wice does an excellent job of describing the bail systems and reform efforts in different jurisdictions, identifying key issue areas, and highlighting crucial variables whose impact upon the operation of pretrial release systems must be examined in greater depth. The major shortcoming in his work, which Wice himself recognized, is that much of his analysis of the relative effectiveness of pretrial release systems is based on responses to mailed questionnaires. The comparability of the responses and the accuracy of some of the findings is thus open to question.

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[36] L. Silverstein, Bail in the State Courts -- A Field Study and Report, University of Minnesota Law Review, Vol. 50, pp. 621-652 (1966).

[37] W. Thomas, A Decade of Bail Reform (Unpublished manuscript in draft form, February 1975).

[38] P. Wice, Bail and Its Reform: A National Survey (Ph. D. Dissertation, University of Illinois at Urbana - Champaign, 1972).

IV

EVALUATION ISSUES AND THE CURRENT STATE OF KNOWLEDGE
CONCERNING PRETRIAL RELEASE PROGRAMS

Where does the existing research leave us in terms of our knowledge as to the effectiveness of pretrial release programs? In this Phase I Evaluation we must be concerned with two levels of issues concerning pretrial release programs. On the first level are questions about the effectiveness of individual programs and on the second are national, cross-program issues concerned with identifying what programs--with what organizational structures, operating procedures and methods of release--produce optimum results.

A. Individual Programs

Until the National Center for State Courts' study of policy related research on pretrial release programs, very little attention had been given to defining what, from a policymaker's point of view, were the important evaluation issues. The great wealth of earlier research was, of course, an important starting point as evidence of what researchers felt were the important issues but the thoughts of persons in policymaking positions -- pretrial release program directors, judges, police chiefs, sheriffs, district attorneys, public defenders, and county officials -- were largely unknown. The National Center for State Courts surveyed these individuals as to what they felt were the critical evaluation issues in the pretrial release field and the results of this study are contained in a paper by Robert B. Stover and John A. Martin, included as Appendix C to the National Center's final report.

Stover and Martin's analysis of the questionnaire returns indicated that there was a broad consensus among all of the respondents that pretrial release programs should give high priority to four end-goals: making sure that released defendants return for trial, lessening the inequality in treatment of rich and

poor by the criminal justice system, obtaining speedy pretrial release for defendants who are eligible for release, and producing cost-savings to the public. In contrast to the unanimity on the importance of these four end-goals, the Stover-Martin paper revealed considerable disagreement among the respondents on the importance of several suggested goals that explicitly or implicitly raised the issue of the program's role in protecting the public safety. What role (if any) should the project play in guarding against the release of defendants thought likely to commit additional offenses once released? While some of the respondents believed that guarding against the release of defendants thought to be dangerous should be a primary goal of pretrial release programs, others felt that this was not a proper concern for the programs at all. Such disagreement typifies the deep split in opinion over the issue of preventive detention.

Based on the views of the policymakers as to what the important evaluation issues should be, coupled with the information available from existing literature, the National Center's Evaluation of Policy Related Research on Pretrial Release Programs discussed the current state of knowledge concerning pretrial release programs around six substantive issue areas. The same organization is appropriate here. The issue areas are:

-- Rates of Release
-- Speed of Project Operations
-- Equal Justice
-- Failure to Appear Rates
-- Pretrial Crime
-- Economic Costs and Benefits

Release Rates. Pretrial release programs are unified in the common goal of promoting the safe pretrial release of criminal defendants. This is their reason for being, and as such, an important issue in determining their success.

Release rates raise a dual concern -- what is the project's impact on the rate of nonfinancial releases in the jurisdiction and what is its impact on the overall rate of pretrial release.

Looking at the release rate issues in the broadest possible perspective, it is readily apparent that the bail reform movement has enjoyed a considerable measure of success. It is unlikely that anyone familiar with the criminal justice system would quarrel with the statement that, nationally, pretrial release practices have changed considerably over the past 15 years. The almost total reliance on money as the criterion for pretrial release has given way in many jurisdictions to the extensive use of nonfinancial releases. The magnitude of the change which has occurred in bail practices, of course, varies greatly from jurisdiction to jurisdiction and, undoubtedly, some jurisdictions have been left untouched by the movement. The best indication of the magnitude of the change which has occurred nationally, however, is Wayne Thomas' study of bail practices in 20 jurisdictions over the period from 1962 and 1971. Thomas found that in these cities nonfinancial pretrial releases had increased in felony cases from less than five percent of the defendant population in 1962 to 23 percent in 1971.[39] In misdemeanor cases the increase was from 10 percent in 1962 to 33 percent in 1971.[40]

Thomas' data also show that this observed increase in the use of nonfinancial releases was directly reflected in a decrease in the percentage of criminal defendants detained in custody for the duration of the pretrial period. In felony cases the detention rate in the 20 cities studied decreased from 52 percent in 1962 to 33 percent in 1971.[41] In misdemeanor cases the decrease in the detention population was not as dramatic, going from 40 percent in 1962 to 28 percent in 1971.[42] Thomas observed, however, that the detention percentage

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[39]W. Thomas, supra note 37, p. 39. [40]Ibid., p. 82. [41]Ibid., p. 37.
[42]Ibid., p. 75.

in misdemeanor cases was heavily influenced by the large number of cases which are terminated at the defendant's initial appearance. It was found that very few of the defendants involved in these cases secured pretrial release. Thus, considering only those misdemeanor cases which advanced beyond first appearance, Thomas found that the percentage of detained defendants decreased from 21 percent in 1962 to just 12 percent in 1971.[43] However, the extent to which these changes can be attributed to the establishment of pretrial release programs -- or even to the generalized influence of the pretrial release movement -- is a different matter. As the National Center for State Courts' Evaluation of Policy Related Research on the Effectiveness of Pretrial Release Programs observes, it is at least possible that some or all of the increase in the use of nonfinancial releases can be attributable to other factors. For example, a rapidly increasing arrest rate in the face of limited jail capacities could have been a major influence in causing the changes which did occur. It is possible that the increased rate of pretrial release resulted not from the bail reform movement alone, but rather from a number of factors including pragmatic considerations regarding the dangers of jail overcrowding and the availability of new alternative forms of pretrial release.[44]

In one sense, it is nonsensical to try to determine the extent to which increased pretrial release rates are due to the establishment of pretrial release programs. Since most pretrial release programs were established in situations of strong need, the initiation and structure of a program may be viewed as simply the vehicle through which existing pressures toward greater

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[43]Ibid., p. 81.

[44]National Center for State Courts, supra note 31, p. 86.

that those defendants released upon the recommendation of the pretrial release program had a considerably lower rate of nonappearances than did those defendants released on pretrial parole by the court without project involvement.[47] This finding is certainly worthy of further investigation as it is strong support for the continued operation of pretrial release programs.

What do we know, however, about the importance of pretrial release programs in terms of increasing the use of nonfinancial releases and reducing the pretrial detention population? How would discontinuance of a pretrial release program affect these rates? What could a jurisdiction considering a pretrial release program, expect to accomplish in these areas? For any particular jurisdiction it is impossible to answer these questions. The need for pretrial release programs is first and foremost a function of what the present release practices are and what the attitude of the local court is toward pretrial release. Generalizations cannot be drawn from the existing evaluations of pretrial release programs, as these efforts have not satisfactorily described the political environment in which the programs operate, have not considered the projects' releases in terms of the overall system of pretrial release in the jurisdiction, and have not collected data on release practices prior to project implementation so as to reflect what changes did occur.

Only one program, the original Manhattan Bail Project, successfully utilized a control group experiment in order to measure its impact. From this study, the project learned that defendants for whom it recommended release were granted nonfinancial releases four times as often as the control group, which consisted of defendants equally qualified for release but for whom the release recommendation had been withheld.[48] This study was, however,

[47] S. Schaffer, supra note 34, p. 4. [48] Ares, Rankin, and Sturz, supra note 11.

conducted at a time when own recognizance was a little used procedure; query whether the same results would obtain today?

Some pretrial release programs, such as the ones in Washington, D. C. and Philadelphia, have grown into large, comprehensive court agencies, and it is difficult to imagine the pretrial release system functioning as effectively without them. On the other hand, jurisdictions considering a pretrial release program are not likely to commit the money necessary for such a large program. It is the smaller projects, and particularly the small ones that have been operating several years, that must be studied. If a project has been operating for several years in servicing the same select group of highly qualified defendants, its continuing role must be re-assessed. Have the courts become accustomed to the use of own recognizance so that they would continue to use nonfinancial releases without project recommendations? Control group experiments such as the one Vera undertook in the Manhattan Bail Project would be particularly valuable in answering this question. The pretrial release or detention status of defendants in the control group -- a randomly selected group of defendants who are omitted from program consideration -- can be compared to the respective rates for defendants serviced by the project. If an on-going or periodic experimental design is used from the beginning of a release program's operation, the program's initial impact can be compared with its later impact and any observed increase in the release rate among the control group can be seen as an indicator of the program's success in changing judicial willingness to use nonfinancial releases on their own without program intervention.

Speed of Project Operations. As in so many areas of procedure, there are enormous differences between programs in terms of the speed with which they operate and the extent to which they are successful in minimizing the time delay between arrest and release. The two national scope studies done in the 1970s, by

Paul Wice and Wayne Thomas, both reported time lags from arrest to interview ranging from a few hours to several days. Illustrative of this variance are the Santa Clara County, California Pretrial Release Program in which in 1971 the average time from arrest to project release was just 2.4 hours in misdemeanor cases and 11.6 hours in felonies[49] and the pretrial release program in Dallas, Texas, which in 1971 had an average delay in excess of nine days from arrest to release.[50]

One of the few consistent findings found to exist in pretrial release studies is that there is a close relationship between a program's speed of operations and the number of defendants it releases.[51] The respective release rates in the aforementioned programs in Santa Clara and Dallas bear this out. The Santa Clara Project, which is located at the booking desk in the county jail, sees defendants within minutes of their arrest and booking and does not need judicial approval to release misdemeanor defendants. As a result, the project reported that 54.9 percent of the defendants in that jurisdiction were released on own recognizance in 1971.[52] By contrast, the Dallas program, with its nine day delay between arrest and release, secured the release of only 28 defendants out of a potential 1,199 clients over a ten day evaluation period in 1971.[53]

The correlation between the speed with which a project operates and the number of releases it generates is not a surprising finding. Conditions in American jails being what they are, it is not surprising to learn that defendants secure release by whatever method is fastest -- even surety bail --

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[49]American Justice Institute, Santa Clara County Pretrial Release Project First-Year Evaluation Report, in R. J. Obert et al., Pretrial Release Program in an Urban Area: Final Report, Santa Clara County Pretrial Release Program (1973), p. 53.

[50]R. L. Bogomolny and W. Gaus, "An Evaluation of the Dallas Pretrial Release Project," Southwestern Law Journal, Vol. 26 (1972), p. 510.

[51]National Center for State Courts, supra note 31, p. 93.

[52]American Justice Institute, supra note 49, p. 53.

[53]R. W. Bogomolony and Gaus, supra note 50, p. 250.

rather than waiting the time necessary for a nonfinancial release. Quite consistently projects which present their release recommendations at the defendant's initial bail hearing enjoy a higher rate of release than do those projects whose intervention comes at some point after the initial bail decision has been made.

What are the factors which enhance the ability of a project to operate swiftly? Existing research would suggest that these factors are quite obvious ones -- early access of the program to defendants for interviewing; a large enough staff to do prompt interviewing and verifications, prompt access to the defendant's past criminal record and to the police report on the current charge; the authority to grant releases without court review in routine cases and rapid access to judges where judicial approval is required.[54]

Equal Justice. The focal point of the earliest pretrial release programs was poverty. The injustice of the bail system for indigents was the motivating force behind the Manhattan Bail Project and initially the project handled only defendants represented by the Legal Aid Society. Very early in its development, however, the project dispensed with its indigency requirement and only a few of the projects started after 1964-65 ever had such a restriction. The injustice of persons unnecessarily paying to secure pretrial release was thought sufficient to merit project intervention in qualified cases. And yet, as the National Center's questionnaire of persons in policymaking positions makes evident, concern over the plight of the indigent defendant -- the one who cannot afford bail -- remains a dominant consideration in assessing the effectiveness of pretrial release programs.

It is quite evident that even if pretrial release programs have successfully expanded the use of nonfinancial releases, most persons would consider

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[54]National Center for State Courts, supra note 31, p. 95.

the effort a failure if the defendants now being released by the programs are the very same ones who previously would have posted bail. Asking to what extent a project is successful in releasing persons who cannot post bail is in a sense simply rephrasing the question as to what impact the project has upon the pretrial detention population. While a program can reduce the daily jail population simply by increasing the speed with which releases are effectuated (reducing the time each released defendant spends in jail prior to release), its major influence on the detention population, quite obviously, will be found in releasing persons who would otherwise remain detained.

Unfortunately, this important issue may be one of the most difficult to answer and certainly is one which has not been satisfactorily explored to date. For example, despite the dramatic increase his study showed in the rate of nonfinancial releases from 1962 to 1971, Thomas observed that it cannot be assumed that the use of OR in 1971 was going only (or even largely) to indigent defendants. Based upon his finding that there was some correlation between nonfinancial releases and the rate of bond releases -- cities highest in the use of nonfinancial releases tended to have the lower rates of bond releases -- Thomas could only conclude that those defendants released on OR in 1971 represented a mixture of persons who would not have otherwise been released as well as a substantial number of defendants who probably could have posted bond. Working on a national level, Thomas was unable to give this issue the attention it deserves.

The issue is one which should demand the attention of individual programs, particularly those which operate most swiftly. In projects which operate with a considerable time delay, the indication is that all of those defendants

who can secure release by posting bonds will have done so prior to the project's intervention. In these projects it is considerably safer to believe that each person released -- although the number may be small -- would not have otherwise been freed. Thus, every release these programs secure has a direct impact on the jail population. It is those programs which intervene close to the time of arrest that must be constantly concerned with whether their release criteria are excluding indigents. Such projects can succeed in generating a substantial number of releases but be failing those the bail reform effort was intended to benefit -- those who cannot afford money bail. The fact that indigency may be inversely associated with factors that projects consider in making release recommendations -- such as employment status, residence stability and family contacts -- greatly complicates the task projects face in lessening the inequality of the system's treatment of rich and poor defendants.

Failure to Appear Rates. The rate at which defendants who have been released on own recognizance appear in court as scheduled has been of great concern since the beginning of the bail reform movement. The success of own recognizance release projects was in large measure contingent upon maintaining acceptably low failure to appear rates. During the early years of the bail reform movement, bail projects consistently reported extremely low nonappearance rates. Generally failure to appear rates of five percent or less were reported.[55] Still today most programs are reporting similarly low FTA rates. There have been indications, however, that in cities making extensive use of nonfinancial releases, failure to appear rates have climbed to 10 percent and above.[56]

Computing nonappearance rates is a difficult task, fraught with serious methodological problems. The threshold problem is a definitional one -- what is

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[55]Figures compiled by the United States Department of Justice and the Vera Foundation for presentation at the 1965 National Conference on the Operation of Pretrial Release Projects showed that 34 of the 36 programs reporting failure to appear information had nonappearance rates of below 5 percent. Thirteen of the projects reported no failures to appear.

[56]S. Schaffer, supra note 34, found, for example, that in Manhattan in 1967 the failure to appear rate for defendants on own recognizance was 15.4 percent.

a failure to appear? Should every missed court appearance be considered a failure to appear or only those which were "willful"? If the latter, how is a "willful" nonappearance to be determined? Is the failure to appear rate to be computed on the basis of the number of defendants released or the number of appearances made? The OEO study revealed substantial disagreement on the part of pretrial release programs in how failure to appear is defined and how a nonappearance rate is computed -- the 51 pretrial release programs which reported FTA rates to OEO used 37 different methods of calculation.[57] It is readily apparent that inter-project comparisons of failure to appear rates -- which could be of prime importance in evaluating the relative merits of different operational procedures -- is not possible on the basis of the information now being reported by projects. Cross-jurisdictional comparisons of nonappearance rates is not without serious methodological problems even if a standardized definition of failure to appear is used. Thomas, the only person to attempt such research, found meaningful comparisons frustrated by the different jurisdictional procedures encountered in declaring and recording failures to appear. Thomas was unable to rule out the possibility that differences between jurisdictions in failure to appear rates were simply a function of differing court procedures.

It seems equally clear that it is impossible at this time to compare meaningfully the failure to appear rates by defendants on nonfinancial release with that of defendants on surety bonds. The best study on this subject remains Andrew Schaffer's work in New York City. His analysis of court records indicated that in Manhattan in 1967, defendants on surety bonds had the lowest rate of nonappearance, 4.4 percent; while defendants posting cash bail had the highest, 19.4 percent. The nonappearance rate by defendants on own recognizance was

[57]H. Goldman et al., *supra* note 22, pp. 21-22.

15.4 percent but for defendants released on the recommendation of the pretrial release program, the rate was lower, 9.4 percent.[58]

Thomas, on the other hand, found in the 20 cities he studied that there was little appreciable difference between the nonappearance rates for defendants on bail and own recognizance. In some cities defendants on bail had higher nonappearance rates; in others, defendants on own recognizance had the higher rate, but in either case the variance between the two groups was usually slight. In the 1973 OEO study only 16 projects were able to supply information on how their nonappearance rate compared to that of defendants on bail. The responses indicated a pattern similar to what Thomas found -- ten of the programs reported that their nonappearance rate was lower than the rate for bailed defendants, one said the two rates were the same, and five reported a higher rate for project releases.[59]

While cross-jurisdictional comparisons of failure to appear rates may be beyond the capabilities of individual programs, it does seem clear that greater attention must be given to the respective failure to appear rates by defendants on different forms of pretrial release within the program's own jurisdiction. One problem in this area which must be guarded against, however, is that the defendants on the different types of release may not be truly comparable in terms of their characteristics that may be relevant to their propensity to return to court as scheduled. Defendants released on bail may be quite different as a group from defendants released on own recognizance and it may be that it is these differences in the defendants and not the type of release that is being reflected in the nonappearance rates. Schaffer's study of releases in Manhattan found, for example, that persons charged with gambling offenses comprised a very large percentage of the defendants released on surety bail and had a nonappearance rate of only one percent. By contrast, defendants

[58]S. Schaffer, *supra* note 34, p. 4. [59]H. Goldman et al., *supra* note 22, p. 22.

charged with prostitution comprised a high proportion of those released on cash bail and had a jump rate of 27 percent.[60] This suggests that, at a minimum, comparisons of failure to appear rates by defendants on different types of release should control for the type of offense involved. Not only will this produce more accurate comparisons as to failure to appear rates, but it may also indicate which types of cases are particularly suited for nonfinancial release and which ones, if any, are not.

Two key issues in the failure to appear area are how far into the arrest population the use of nonfinancial releases can be extended before the nonappearance rate becomes unacceptable and whether the release criteria presently being employed by the projects are valid predictors of performance on pretrial release. The two issues are obviously related. It would seem logical to expect that as the percentage of defendants released increases, so will the rate of failure to appear, since presumably more "poor risk" defendants will be among the expanded releases. This is not necessarily true, however. It is predicated on the assumption that the release criteria presently being employed are accurately separating the "good" risks from the "poor". No study has shown this to be the case. What the past evaluations of pretrial release programs tell us is simply that the projects are successful in identifying and releasing defendants who return to court at least as well, and some times better, than defendants released on surety bail. We, thus, know that for a sizable segment of the arrest population, it is not necessary to demand the security of a monetary pledge. What we do not know -- the issue which has not been addressed -- is whether those defendants who are left in the jails, not qualified for own recognizance and not capable of posting bail, are any worse risks for pretrial release than those who are released.

[60] S. Schaffer, supra note 34, Table 8.b.

There is considerable evidence that most pretrial release programs could substantially increase the number of defendants released without negatively affecting the failure to appear rate. Thomas' data indicate that most jurisdictions have a nonfinancial release rate of about 15 percent in felony cases, a figure which pales in comparison to rates of better than 40 percent in cities such as Washington D. C., Des Moines, and San Diego.[61] The failure to appear rates in jurisdictions highest in the use of nonfinancial releases were not, however, any higher than in the other cities. The Brooklyn Pretrial Services Agency recently found that a significant increase in their release rate did not effect the failure to appear rate. During a two week period in 1974, the project's release rate increased from 42 to 66 percent of the defendant population - and in the expanded release group were defendants charged with quite serious felony offenses - and yet the project found that its nonappearance rate remained virtually unchanged.[62]

The criteria used in determining which defendants are suitable for nonfinancial pretrial release have remained largely unchanged from that employed by the Manhattan Bail Project. Although the manner in which defendants are evaluated varies, all programs consider the same factors -- employement, residence, family contacts and prior record -- in making their release recommendations. Are these valid predictors as to which defendants will be successful on pretrial release? Several researchers have attempted to determine the value of these factors as predictors of nonappearance and have reached the conclusion that it is exceedingly difficult to find a positive correlation between any of these variables, individually or collectively, and the likelihood of nonappearance. There appear to be a least two reasons for this inability to predict nonappearance. First is the fact that very few defendants fail to appear -- available data would indicate that the nonappearance

[61] W. Thomas, supra note 37, p. 41.

[62] James W. Thompson, Pretrial Services Agency Operations Report, April - April 28, 1974 (Brooklyn, New York, May 1975).

rate is less than 10 percent in most jurisdictions. Predicting the behavior of such a small proportion of the total released population is a very difficult task. Second, there is no theoretical framework in the area of nonappearance from which to draw inferences about what factors should be examined. Research to date has drawn almost exclusively on variables pertaining to the defendant's background, community ties, age, and socio-economic status. The problem with this approach is that if one is lucky enough to stumble on a variable which relates to nonappearance -- age, for example -- this does not add to our understanding of why failures to appear occur (why does age relate to non-appearance?). Should youthful offenders then be discriminated against on the basis of age per se?

Rather than attempting to devise a system for predicting which defendants are likely to fail to appear, the more fruitful course of action might be to analyze court procedures with a view toward minimizing failures to appear generally. For example, likely to enter into a defendant's decision not to appear in court is his perception of the sanctions to be imposed if he is apprehended. A defendant who has failed to appear once (or who knows of others who have failed to appear) without suffering any negative consequences may be more likely to fail to appear again. Defendants with a prior failure to appear are quite often assumed to represent the worst pretrial release risks. Court procedures in most jurisdictions are currently quite lax in serving bench warrants for nonappearance and, even in jurisdictions where willful failure to appear is a separate crime, prosecutions are extremely rare. What the impact would be on failures to appear if courts were more strict in enforcing the sanctions against nonappearance is an area worthy of further study.

The failure to appear problem is further complicated by the fact that many (if not most) failures to appear are not the result of a conscious decision on the defendant's part to avoid the court process. Inadvertent

nonappearances caused by a defendant forgetting or being confused as to where and when to appear, are due to a number of factors that can to a certain extent be overcome. Consideration must be given to how effective the flow of information is from the court to the defendant. At each court appearance the defendant needs to be fully advised as to the outcome of the hearing and the time and place of his next court appearance. Whether or not this information is communicated effectively to the defendant depends first upon the means the court uses to convey it. If the important court proceedings take place out of the defendant's hearing and/or if no one takes the trouble to explain to the defendant when and where he is to appear next, the probability increases that a failure to appear will occur. If, in addition, the defendant is unfamiliar with court procedures or has difficulties with the English language, the chances that a failure to appear will occur become increasingly greater. A greater effort on the court's part to fully and fairly advise the defendant as to when and where he is to appear next, including sending reminder letters, may be one means of reducing the failure to appear rate.

The amount of time passing between court appearances is another factor that might contribute to nonappearances. It can be hypothesized that the longer the period of time to the next court date, the more likely the defendant is to forget his appointment. Again, notification letters from the court may help to mitigate the adverse effects of delay. Likewise, the more appearances that the defendant is called upon to make with little perceived progress toward a disposition, the more likely the defendant might be to lose interest in the case and not continue with his appearances. It may, in fact, be that the most effective approach to the failure to appear problem is simply better calendar control of cases.

Pretrial release programs have given little consideration to the efficacy of their post-release procedures in minimizing failures to appear. It

has been assumed that some contact with defendants during the pretrial release period is important and most pretrial release programs do have some type of procedure for maintaining contact with released defendants. This contact generally involves one or more of the following: requiring of the defendant an initial "check-in" with the program, usually within 24 hours of release; requiring periodic "check-ins" (usually weekly) with the program; and phoned or mailed reminders of up-coming court dates. How important these procedures are in minimizing failures to appear is unknown and whether one approach is superior to another and for what types of defendants is equally unclear. This is a prime area for control group research, randomly assigning released defendants to different levels of post release contact.

In the last few years several pretrial release programs have sought to expand the number of defendants released on nonfinancial conditions by implementing supervised or conditional releases. Such programs impose third party supervision and participation in a social service program requirements on a portion of "high risk" released defendants. The assumption underlying this effort seems to be that closer supervision and social services can compensate for weak community ties. It is, therefore, important not only to determine whether supervision or social services is important at all but for which defendants it is particularly useful. If research shows that imposing these requirements can substitute for community ties, this may suggest that more defendants can be "safely" released with added requirements. If, on the other hand, a particular subgroup of released defendants is not identified as being particularly suited for conditional release, the validity of "supervised" or "conditional" OR must be questioned.

Pretrial Crime. One of the more sharply disputed issues in the pretrial release field is whether the risk that a defendant might commit additional crimes is a factor that should be considered in making the pretrial release decision.

One widely held opinion is that the purpose of bail is to assure the appearance of the defendant in court and that risk of flight is therefore the only legitimate consideration in the setting of bail. Others argue that risk of future crime is a perfectly legitimate and constitutionally permissible consideration in the setting of bail. Despite the divergent views on whether the risk of future crimes should be considered, the fact that it is frequently the determinative issue in the setting of bail is well recognized. While the District of Columbia stands alone in authorizing the pretrial detention without bail of defendants found to pose a high risk of committing additional crimes, allegedly dangerous defendants are detained in all jurisdictions through the imposition of high money bail requirements.

It is also clear from the responses to the National Center for State Courts' questionnaire survey that many policymakers in the criminal justice field -- particularly judges, county executives, district attorneys, police chiefs, and sheriffs -- feel that risk of pretrial crime should be treated as important by pretrial release programs. Moreover, no jurisdiction is likely to continue to operate a pretrial release program if a substantial number of the program's releasees engage in further criminal conduct during the pretrial period. The extent to which pretrial release programs are successful in obtaining release for persons who do not commit crime while on release is an important research issue.

The concept of preventive detention is evident in the operating procedures of many pretrial release programs through the use of a formal or informal categorization of excluded offenses. Defendants charged with the more serious offenses or defendants with serious prior criminal records are placed in these categories which preclude them from being interviewed for nonfinancial release. Depending upon how broadly the class of excluded offenses is drawn, the effect on the project's release rate can be substantial. Yet the area

of pretrial crime remains one of the least researched issues.

Despite the considerable debate over the constitutionality of preventive detention, very little is known about the problem of crime on bail. How frequently do pretrial releasees engage in criminal conduct? In the District of Columbia the percentage of defendants committing additional crimes while on bail has been variously estimated at from six to seventy percent depending upon how the sample was constructed.[63] (The 70 percent figure was derived from a study of robbery defendants.) The most thorough and methodologically sound study of pretrial crime in the District of Columbia was done by the National Bureau of Standards and it indicated that about 11 percent of the defendants on pretrial release in the District were arrested during the period of their pretrial release.[64]

Neither the National Bureau of Standards nor any other study has adequately considered the amount of pretrial crime as a function of the type of release. Some comparative data in this area appears in a few of the evaluations of individual pretrial release programs and would indicate that the type of release alone does not appear to make any appreciable difference in the likelihood that the defendant will be rearrested.[65] However, none of these studies made comparisons between defendants on bail and other forms of release that take into account other possibly relevant factors such as the original charge, prior record, age, or employment status.

The one factor for which the National Bureau of Standards' study did show a positive correlation with crime on bail was the length of time between release and case disposition. The longer the period of time a defendant is on pretrial

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[63]Report of the Judicial Council Committee to Study the Operation of the Bail Reform Act [illegible], printed in 1970 Preventive Detention Hearings, Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, p. 72[illegible].

[64]National Bureau of Standards, supra note 35.

[65]National Center for State Courts, supra note 31, p. 108

release, the greater the likelihood that he will be arrested for a new offense.[66] Beyond this there is some support in existing research for the generally held belief that defendants charged with certain felony offenses are the most likely to commit additional crimes on pretrial release. The NBS study, for example, reported that the rate of rearrest for defendants initially charged with felony offenses was nearly twice as high as the rearrest rate for persons initially charged with misdemeanors.

A study by William Landes in New York City went further and suggested that both the seriousness of the present charge and the defendant's prior criminal record were statistically significant predictors of pretrial crime.[67] The problem, however, is that even if there is some correlation between charged offense and prior record and crime on bail, we do not at this time know how strong the correlation is -- how many defendants would be needlessly detained in order to prevent how many additional crimes?

<u>Economic Costs and Benefits</u>. Conscious of the fact that their long-term existence was contingent upon securing and maintaining local government funding, pretrial release programs have been concerned with justifying themselves as cost-effective operations. It is, thus, not surprising to find that many of the evaluation studies of programs include sections discussing the program's cost and benefits in terms of economic impact.

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[66]National Bureau of Standards, <u>supra</u> note 35, pp. 48-50.

[67]William Landes, "Legal Theory and Reliability: Some Evidence on Criminal Procedure," Journal of Legal Studies (June 1974).

Pretrial release programs have generally attempted to show their cost effectiveness by computing the number of days the persons they release would otherwise have remained in detention and multiplying this figure by the cost per day of keeping a defendant in jail. Few, if any, jurisdictions have been fully persuaded by such calculations which usually indicate astronomical jail cost savings for the jurisdiction. A number of questionable assumptions defeat the validity of such calculations. For example, it is assumed in most of the studies that every defendant released through the project would otherwise have languished in jail. As discussed earlier, such an assumption is simply unrealistic -- it is likely that some of these defendants would have posted bail or been released on OR by the court anyway. Likewise, it is unrealistic to assume that a defendant would have remained in jail for the same length of time he was on pretrial release -- custody defendants generally have their cases resolved in less time than do defendants on pretrial release. Finally, it is not realistic to arrive at a "cost per jail day" figure simply by dividing the total costs of running the jail over a period of time by the total number of defendant jail days, as many studies have done. Such an approach fails to consider the difference between fixed and variable jail costs; only the latter will be affected by the number of defendants in jail.

Are pretrial release programs cost-effective? In light of the deficiencies in existing research, this question cannot be answered. First we need better information on how the project's activity relates to the overall pretrial release system -- how many persons released would have, in fact, not been released but for the program's effort? Until this question is definitively answered we cannot begin to assess what jail costs savings is represented in their operation. In the meantime, the programs would be on sounder footing

programs and suggested that probation officers, being accustomed to working with convicted offenders, did not have the proper outlook for passing upon the release eligibility of persons not convicted and presumed innocent. Forrest Dill, in his doctorial dissertation, was critical of the Oakland Pretrial Release Program operated by the Office of Probation in part because he found the program's staff assuming that the defendants were guilty and considering the likely sentence to be imposed upon conviction in making their pretrial release recommendation.

The sponsorship of an agency seems to be one of the key factors in understanding how it has evolved. Agencies tied closely to the courts (court-run or probation-run agencies) may find it far easier to gain cooperation from other parts of the criminal justice system in their work (for example, cooperation of the police in gaining access to defendants for interview, a high acceptance rate of their recommendations by judges, support for rather than opposition to their recommendations by the district attorney), but may tend to reflect the conservative orientation of the courts in deciding who should or should not be released. This may be reflected in a large number of persons excluded from consideration, stringent selection criteria, reluctance to use OR release without some types of conditions imposed and program intervention at a later stage in the process, thus reducing the proportion of persons released prior to trial. Programs more independent of the courts may, on the other hand, tend to be more liberal in their recommendation policies, but find that their effectiveness is severely curtailed by a lack of cooperation from the courts, the prosecutor or the police. Whether an independent program is more or less effective in the long run in securing releases than an initially conservative program which relaxes its restrictions over time once it has gained the confidence of the courts (if, in fact, such conservative programs do become more liberal over time) is a highly important area for evaluative research.

Regardless of the merits of an independent versus court agency, the fact is that most programs today are organizationally situated under the courts or with probation offices. This is largely a result of the institutionalization of pretrial release programs. Private foundations which supported a number of the early independent pretrial release programs are not willing to undertake the long-term funding of such programs and the type of creative individuals who would develop pretrial release programs are not the type of persons required to operate programs on a long-term day-to-day basis.

Institutionalization of pretrial release programs has not been without serious problems. The incentive to be of maximum service to criminal defendants and the commitment to expand the use of nonfinancial releases has sometimes been lost in the process. Indicative of the damage institutionalization can do to a pretrial release program is seen in the experience of the Manhattan Bail Project after it was turned over to the New York City Office of Probation in 1964. Harry I. Subin, associate professor at the New York University School of Law, described the probation run program as it operated in 1970:

> Now fully bureaucratized, the bail program run by the Office of Probation bears little resemblance to the original project: it is attempting to apply release criteria useful in isolating the highly visible good risks to defendants all along the risk spectrum, and it is doing even this in a half-hearted way. The information from probation comes to the court in only about one-half the cases, and it comes without verification, without oral advocacy, and without the promise of follow-up procedures, all of which were critical parts of the original project. The result is that the judges often do not have reports, and often do not read them when they do have them. Several judges have told me -- even if they have not told their superiors -- that the probation reports are useless.[68]

Some pretrial release programs have expanded and improved with institutionalization. The Washington, D. C. Bail Agency, for example, is much more comprehensive and active than the earlier independent D. C. Bail Project

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[68] H. Subin, "New York's Bail Riots", Legal Aid Review, Vol. LXVII (1970), p. 30.

and the Pretrial Services Division of the Philadelphia Municipal and Common Pleas Court is far superior to an earlier Philadelphia program operated in the mid-1960's by the Philadelphia Bar Association with funds from three private foundations. For one thing, these programs have considerably more money and staff than did the earlier programs but, as New York's experience would indicate, money alone does not guarantee success. Other factors in these programs' organization must be considered. Both, for example, although funded by government and under the ultimate authority of the courts, have remained essentially independent; both have dynamic, youthful program directors able to relate to public officials as well as criminal defendants, and both programs continue to employ law students and recent college graduates. The last factor may be important in that it allows for constant turnover in the program's staff; thus, interjecting constant new enthusiasm and commitment to the program. Programs with a more stable staff may suffer in that, once the routine of the job sets in, a tendency to prejudge defendants and conduct superficial interviews and verifications can occur. Given the fact that the trend of the pretrial release programs has been in the direction of institutionalizing the programs under the courts or probation, further study is needed to identify which programs survive best in this environment and why.

Operating Procedures. As discussed in Section II, projects vary enormously in their operating procedures. Undoubtedly, during this Phase I Evaluation other significant differences between programs will emerge. Unfortunately, very little is known about how these differences effect program success. In one area, however, -- speed of program operations -- we can say with considerable confidence that the sooner a project has initial contact with defendants and the faster it can process its release recommendations, the more defendants it will be able to release. Projects which operate more slowly, that do not present their recommendations at the first opportunity a defendant has to make

bail, will find that many defendants who could be released on own recognizance will have already secured a bond release.

In other areas all that is available at this time are opinions. For example, in the continuing debate over the merits of objective versus subjective evaluations of defendants for pretrial release, one side argues that the objective point scale should be used in order to ensure that all defendants are judged by the same standard and that, if the point scale is fairly and strictly followed, more defendants will be found eligible for release than if a subjective approach is taken. The opposing side just as vehemently argues that the point scale is too severe on indigent defendants - that few indigents qualify for release under it - and that if the scale were adjusted to fit indigents, it would become too easy for other defendants to qualify. The rate of program releases and the type of defendants released in programs using the objective and subjective approaches need to be studied in order to determine what difference, if any, the method of evaluation makes.

A second issue that has constantly plagued the pretrial release programs is whether the criteria employed -- employment, residence, family ties and prior record -- are biased against indigents. Two approaches might be taken to addressing this issue. First, one might look at the persons whom the project is releasing -- what is their economic status, could they have afforded bail? Or, even more instructively, one might look at the detained population -- applying the objective Vera point scale, how many would be qualified for release? In 1970 such a study was conducted of the pretrial detention population in the New Haven, Connecticut Correctional Center. It was found that the offense charged was the primary reason most defendants remained in custody and that "nearly one-half of those held in jail because of inability to make bond would meet the conditions for release under the criteria of community ties".[69]

Type of Release. In the early years of the bail reform movement, pretrial release programs were concerned exclusively with promoting the use of own recognizance. In the 1970's, however, the trend has been toward the implementation of other alternative forms of release -- police citations, supervised and conditional releases and deposit bonds in which money posted with the court is returned to the defendant after completion of his case. The obvious advantage of citation releases is that they are fast. If the police can safely release defendants in the field at the time of arrest or at the jail immediately after booking, there is no reason to involve pretrial release programs. Although the exact number is unknown, it is apparent that nationally many jurisdictions have implemented field or stationhouse citation release procedures for misdemeanor defendants. Only a few jurisdictions -- Connecticut, Minnesota and Vermont are examples -- provide for the citation release of felons. An important unanswered question is how far the use of citation can be extended. Since citations represent the quickest release possibility for defendants and also are a cost-savings procedure for the police, who do not have to expend time and money in transporting and booking defendants, maximum use of citations should be encouraged.

The need for jurisdictions to develop conditional release or deposit bail programs is not as obvious. It may be that a move in the direction of these more restrictive forms of release is premature. These reform alternatives are potentially valuable in expanding the number of defendants released without surety bonds in that they can accommodate a "higher risk" defendant population than will straight own recognizance. However, until the full potential

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69W. Brockett, Pretrial Detention: The Most Critical Period (Yale Law School: New Haven, Connecticut, 1970) p. 13.

of straight own recognizance is realized -- and what that potential might be is unknown at this time -- there is a danger present in giving the courts the option of using these more restrictive forms of release. Since judges bear the ultimate responsibility for bail decisions, one should expect that they would be cautious about the use of nonfinancial releases. Errors committed on the side of needlessly detaining persons who do not in fact represent pretrial release risks are not obvious, while errors in releasing defendants who do abscond or commit additional offenses are readily obvious. Judges may, therefore, be inclined to set monetary bail rather than to use own recognizance if there is any question of recidivism or flight since by doing so they are avoiding a clear-cut decision in favor of release. Likewise, if several forms of nonfinancial release are available varying in the amount of restrictions placed on the defendants, judges may be inclined to use the more restrictive options rather than own recognizance. Thomas' study of bail practices in 1971 showed that among those jurisdictions lowest in the use of straight own recognizance release were ones in which conditional release-- Washington, D. C. -- and deposit bonds -- Chicago -- first gained wide usage. The use of straight own recognizance release in the District of Columbia actually decreased from above 40 percent of the defendant population prior to the implementation of conditional releases to less than 10 percent in 1972.

In this Phase I Evaluation, we must be concerned with how these various reform alternatives might be integrated into a cohesive pretrial release scheme that will maximize the number and speed of pretrial releases and at the same time protect the integrity of the criminal justice system and the safety of the general population. What would the role of a pretrial release program be in such a system?

The task is, of course, much more complicated than just identifying a number of successful pretrial release systems and taking the best features of each to create an "ideal" system. Even where an extremely good pretrial release program or system is identified, there would be no guarantee that copying the same model in another jurisdiction would produce another successful result. The model which will work well in one jurisdiction may not work in another. Any evaluation of pretrial release programs would be incomplete without careful consideration of that program's environment. Not only will the environment in which a project operates shape that program's structure and procedures, it likely will have a great deal to do with the program's success.

The relationship between a pretrial release program and its environment is a transactional one. Environmental stresses, such as jail overcrowding, economic costs of detention, and public opinion, put pressure on the courts to release more persons prior to trial. Legal statutes, the courts, the district attorney's office, the police, the nature of the defendant population and the jurisdiction all act to shape the type of system through which persons are released and to determine the scope of the pretrial release program's operation. Once the pretrial release program is established, its ability to demonstrate that more persons can be safely released prior to trial may act to challenge existing attitudes toward pretrial release and thereby lessen the constraints under which the system operates. An understanding of this dynamic relationship between a pretrial release program and its environment is critical to assessing the impact of the program because at any given point in time, the maximum possible effectiveness of agency activities is determined by its environmental constraints.

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