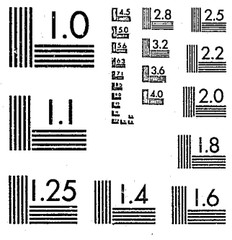

PRETRIAL RELEASE: A NATIONAL EVALUATION OF PRACTICES AND OUTCOMES

Introduction

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NATIONAL EVALUATION OF PRETRIAL RELEASE

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INTRODUCTORY NOTE

Pretrial Release: A National Evaluation of Practices and Outcomes presents the results of a national study. An *Introduction* provides a brief history of pretrial release practices and describes the overall evaluation. The detailed findings, conclusions and recommendations of the study appear in three volumes:

- *Release Practices and Outcomes: An Analysis of Eight Sites* analyzes the ways that defendants secure release pending trial as well as the extent and correlates of pretrial criminality and failure-to-appear.

- *The Impact of Pretrial Release Programs: A Study of Four Jurisdictions* examines the extent to which program activities result in different release outcomes or changed defendant behavior during the pretrial period.

- *Pretrial Release Without Formal Programs* considers the nature of release decision-making in selected jurisdictions that lack pretrial release programs, because such programs either were never established or lost their funding.

Each of these volumes is self-contained and can be read singly or in conjunction with other volumes. The *Introduction* provides background material pertinent to all of them.

A summary of the evaluation is also available. Entitled *Summary and Policy Analysis*, it provides a nontechnical discussion of the key features, findings and recommendations of the overall research effort.

Additionally, fourteen working papers have been prepared. Twelve of the working papers discuss the pretrial release practices in the individual jurisdictions studied; the remaining papers present detailed analyses of defendant outcomes for the two pilot test sites. Important findings from the various working papers have been included in the relevant volumes of the study.

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INTRODUCTION

A. Assessment of Present Pretrial Release Practices

In recent years, pretrial release practices have been of increasing concern to policy makers and the general public. In a February 1981 speech, Chief Justice Warren E. Burger commented on the "startling amount of crime committed by persons on release awaiting trial" and suggested that bail release laws include "the crucial element of future dangerousness based on a combination of the particular crime and past record, to deter crime-while-on-bail."[1]

Similar sentiments have also been expressed by members of the executive and legislative branches. In 1979 former Attorney General Griffin Bell observed that the criminal justice system releases too many people who endanger the public, and Senator Edward Kennedy described bail practices as posing "an unnecessary threat to the safety of the community."[2]

Concerns about release practices have been expressed by various criminal justice officials at the local level as well. For example, a 1979 survey of prosecutors found that almost 80 percent of them considered the reduction of crime on bail "absolutely essential" or "very important." Additionally, more than one-third of the prosecutors rated this an area of "serious unmet need" in their jurisdictions.[3]

The general public also shares this distress about release practices. In a 1978 public opinion survey, 37 percent of the respondents considered it a "serious problem which occurs often" for courts to grant bail to persons previously convicted of a serious crime. This concern was shared by various population subgroups, defined by ethnicity, income and self-described classifications of liberal, moderate and conservative. From 33 percent to 42 percent of each subgroup viewed the problem as a serious

one, occurring often.[4] This dissatisfaction was expressed within a context of low public confidence in State and local courts; the public reported greater confidence in the medical profession, police, business and public schools than in the courts.

Another indication of public discontent is provided by newspaper coverage of release practices. Hardly a month passes in any major city in the country without a story about someone who was arrested for a serious crime while awaiting trial on another charge. Occasionally, an individual defendant's release situation will receive national attention. This occurred when the "Son of Sam" was arrested in 1977 in connection with a series of murders in the New York City area. Although not released pending trial, he had been found eligible for release, based on criteria then in use by the local pretrial program (e.g., he had a steady job and stable residence). When Mayor Abraham Beame of New York cited this in a press conference and suggested the need for revised release procedures, newspapers around the country reported the event.

The widespread dissatisfaction with release practices has developed over several years. Thus, an understanding of the current situation is aided by a short historical review. Because the last two decades have seen major changes in release practices, the period before 1960 is summarized more briefly than later years.

B. Release Practices Before 1960

As developed in the United States, pretrial release practices modified those that had evolved in England over many centuries.[5] Prior to 1000 A.D., traveling judges administered justice during visits which might be several years apart. Local sheriffs were responsible for the administration of justice until the judges arrived. Rather than incur

the expense of imprisoning a defendant in the atrocious and insecure facilities available, the sheriff would often release the person into the custody of a surety, usually a friend or relative of the accused. The surety was responsible for delivering the defendant to the judge when required. If the defendant escaped, the surety had to appear before the judge. Although in earliest times the surety could have been made to suffer the punishment of the escaped prisoner, it soon became common for the surety to merely forfeit property instead.

Bail practices were first articulated in law in the Statute of Westminster I of 1275, which established the crimes that were bailable upon presentation of sufficient sureties and those that were not. Gradually, discretion in setting bail came to rest with the judges of the lower courts, rather than with the sheriffs. Moreover, unlike the earlier, unbridled discretion of the sheriffs, the judges' actions were constrained by statutes and by common law considerations of the type of case, character of the defendant and risk of flight.

In 1688, the English Bill of Rights included a provision forbidding excessive bail. The United States Bill of Rights contains a similar provision in the Eighth Amendment to the Constitution: "Excessive bail shall not be required." This is but one example of the way the United States adopted many of the bail practices which had been prevalent during the period of English colonial rule.

The Judiciary Act of 1789, passed before the adoption of the Eighth Amendment, guaranteed a right to bail in all noncapital criminal cases and made bail discretionary in capital cases, depending upon "the nature and circumstances of the offense, and of the evidence and usages of law." Most States incorporated similar bail provisions into their laws.

In 1789, a vast array of crimes were capital offenses, including at the Federal level robbery and counterfeiting, as well as murder, treason and piracy. State law was equally harsh. In 1837, North Carolina defined as capital such crimes as burglary, assault with intent to kill, arson, stealing bank notes, and being an accessory to murder, robbery, burglary, arson or mayhem.[6]

During the nineteenth century, legislatures greatly reduced the scope of the death penalty. Since this occurred without any explicit changes in the bail laws, many more defendants became eligible for bail as a matter of statutory right. Interestingly, penal reforms did not cause imbalances regarding bail in England, because magistrates there had always had discretionary authority to grant or deny release on bail in all cases.[7] It was only in the United States that such discretion had been limited solely to capital cases.

A second major development of the nineteenth century was the rise of commercial bondsmen, replacing personal sureties. As explained by Roscoe Pound and Felix Frankfurter:[8]

> [E]mphasis on the individual's absolute right to bail led to practical difficulties in a large country whose frontier territories beckoned invitingly to those with a dim view of their chances for acquittal....[S]ince private sureties could not effectively conduct nation-wide searches for their itinerant charges, their promise to produce the accused gradually became a promise merely to pay money should the accused fail to appear. This development ushered in the professional bondsman who saw an opportunity for financial gain. In return for the payment of a fee, the bondsman would post a bond on behalf of the accused.

Forrest Dill observes that commercial suretyship was not easily assimilated within the traditional legal doctrine of bail, which had presupposed a personal relationship between the defendant and the surety.[9] Nevertheless, by the time the twentieth century began, commercial bondsmen

played a vital role in the pretrial release process. Indeed, in most cases it was the bondsman, rather than a public official, who decided whether a defendant would be freed pending trial. As Federal Judge J. Skelly Wright explained:[10]

> [T]he professional bondsmen hold the keys to the jail in their pockets. They determine for whom they will act as surety—who in their judgment is a good risk. The bad risks, in the bondsmen's judgment, and the ones who are unable to pay the bondsmen's fees, remain in jail. The court and the commissioner are relegated to the relatively unimportant chore of fixing the amount of bail.

Besides their ability to affect release outcomes, bondsmen determine whether a defendant will have a financial incentive to appear for court. Such an incentive can only be provided by the collateral requirements imposed by the bondsman, since the initial fee paid to the bondsman is never returned. If no collateral is demanded, there is no pecuniary risk for the defendant, and thus no greater financial incentive to appear for court under a high bond than a low one. Consequently, the judge setting a bond does not decide, or even know, whether a higher bond will give a defendant a greater incentive to appear for court.[11]

In addition to criticism of the delegation of release authority to commercial bondsmen, the bond system has been attacked as inherently unfair to poor persons. As early as 1832 Alexis De Tocqueville observed:[12]

> [C]riminal procedure of the Americans has only two means of action—committal and bail....It is evident that a legislation of this kind is hostile to the poor man, and favorable only to the rich. The poor man has not always a security to produce,...and if he is obliged to wait for justice in prison, he is speedily reduced to distress.

Despite occasional nineteenth century comments questioning the bail system, it was not until the 1920's that major studies began systematically documenting reasons for concern. In the most detailed of these early

analyses, published in 1927, Arthur Beeley critiqued Chicago's bail system. He concluded that bondsmen had too great a role and reported some abuses by them (e.g., failure to pay forfeitures). He found little use of alternatives to bail, such as release on recognizance without security or issuance of a summons in lieu of taking the defendant into custody. Moreover, he noted the appalling conditions of the jail and that one-third of the defendants jailed prior to disposition of their cases were not convicted. He also found that bail was set primarily on the basis of the offense charged and observed that, as a result, the system was "lax with those with whom it should be stringent and stringent with those with whom it could safely be less severe." On the whole, Beeley concluded that "in too many instances, the present system... neither guarantees security to society nor safeguards the right of the accused."[13]

Almost thirty years passed before other major analyses of the bail system occurred. In the mid-1950's, Caleb Foote led two studies of bail practices in Philadelphia and New York City. Findings were similar to Beeley's: posting bail was the predominant way to secure release; the alleged offense was the most important factor affecting bail amount; bondsmen had a key role in the release process; jail conditions were terrible; and many jailed defendants were not found guilty of the charges against them. Moreover, the Philadelphia study was the first to observe that jailed defendants, when compared with those released on bail, were more likely to be convicted and, once convicted, more likely to receive prison sentences.[14]

Throughout the first sixty years of this century, scandals involving the bond system recurred. In the New York City area alone there were four full-scale grand jury investigations of bondsmen between 1939 and 1960. Indianapolis, Cleveland, Cincinnati, Pittsburgh, Philadelphia, Chicago, Houston and many other cities also experienced difficulties.[15]

Among the problems disclosed were:

- the infiltration of criminals and organized crime into the bonding business;
- payoffs by bondsmen to police officers and court officials; and
- failure to collect on forfeited bonds.

Corrupt bail practices were not the only reason for dissatisfaction with the bond system. Foote's study of New York City had shown that some defendants could not raise even low bail amounts and that defendants' financial means were often not considered when bail was set. This led him to suggest that the money bail system might be unconstitutional to the extent that it involved amounts beyond the defendant's ability to pay.[16] Such an argument rests on an interpretation that the "excessive bail" precluded by the Eighth Amendment refers to an amount "more than the defendant can pay," rather than an amount exceeding "what is customary or reasonable in the situation without regard to the defendant's financial situation."[17]

Since the Supreme Court has never provided a definitive interpretation of the Eighth Amendment, the constitutionality of various aspects of the bail system has never been tested. As Wayne Thomas has observed, the Eighth Amendment raises at least three different questions:[18]

> (1) Must bail be allowed in every case, or is it simply not to be excessive when it is available? (2) Even if not available in certain historically distinct categories such as capital cases, is bail required in all other cases? (3) How is excessiveness to be determined? Does this mean excessive as compared to other crimes and defendants of the same type, or does it mean excessive as to the amount that this particular defendant can pay?

The two major Supreme Court cases on bail in the Federal system, both decided in the same term (1951-52), are not definitive and to some extent

have increased, rather than abated, controversy about the meaning of the Eighth Amendment. As part of the opinion in Carlson v. Landon, a case involving four alien Communists who claimed that they were entitled to bail pending a hearing on deportation charges, the Court stated:[19]

> The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept. The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus in criminal cases bail is not compulsory where the punishment may be death.... [I]ndeed, the very language of the Amendment fails to say all arrests must be bailable.

In Stack v. Boyle, a case where twelve defendants awaiting trial on Smith Act conspiracy charges sought to have their bails of $50,000 each lowered, the Court agreed that the bails had not been set properly:[20]

> From the passage of the Judiciary Act of 1789...to the present Federal Rules of Criminal Procedure... federal law has unequivocally provided that a person arrested for a non-capital offense *shall* be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.
>
> The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty... Like the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of money subject to forfeiture serves as an additional assurance of the presence of an accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment...
>
> Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant.

A dissenting opinion to the same case discussed the philosophy behind the American bail system:[21]

> The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty...
>
> Congress has...[provided bail]...standards, stating that "...the amount thereof shall be such as in the judgment of the commissioner or court or judge or justice will insure the presence of the defendant, having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant."

Thus, by the end of the 1950's, the Supreme Court had decided two cases dealing with bail, but these cases had not provided unambiguous guidance concerning appropriate bail practices. Also by that time several studies had identified major problems with the bail system and, as a result, there existed a small group of persons who supported changed bail procedures. On the whole, however, the bail system operated much as it had since the nineteenth century.

C. Release Practices Since 1960

By 1960 there was growing dissatisfaction with the bond system, and that year a private individual took the action needed to introduce what became a major reform in bail practices. When Louis Schweitzer, a wealthy New York industrialist, visited the Brooklyn House of Detention, he was appalled by the large number of defendants jailed pending trial because they could not afford bail. He later learned that, although the detainees were not commonly sentenced to jail or prison terms when their cases were tried, they spent an average of more than a month in jail before

trial. To assist defendants who were too poor to post bail, Schweitzer created the Vera Foundation (later the Vera Institute of Justice), endowed it with $25,000, and hired social worker Herbert Sturz as director.

Although Vera initially considered establishing a revolving bail fund for indigent defendants, it soon concluded that this would only perpetuate reliance on money as the criterion for release. Consequently, Vera sought instead to increase the number of defendants released on their own recognizance, or "pretrial parole," without financial considerations. The resulting Manhattan Bail Project tested the hypothesis that defendants with strong community ties would appear for court and not flee the jurisdiction.

Using students from the New York University Law School, Vera—in cooperation with the Criminal Court in Manhattan—interviewed defendants prior to their release hearing, contacted references to verify the information obtained, and rated defendants on a "point scale." Defendants who scored a sufficient number of points for such factors as employment status, length of residence at current address, and extent of local family contacts were deemed good risks for release and eligible for own recognizance (OR) release.

In Vera's initial test, recommendations were provided to the court only for certain randomly selected defendants. The remaining defendants comprised a "control group" against which the impact of the Vera experiment could be measured. An early study showed that OR release had been granted to 60 percent of the experimental cases and only 14 percent of the controls.[22] The failure-to-appear rate was quite low for the experimental cases. Of 3,505 defendants granted OR release at Vera's recommendation over a three-year period, only 1.6 percent failed to appear in court.[23]

The Vera experiment, which soon expanded its operations, was widely acclaimed as a major success and spurred increased interest in bail reform. In the mid-1960's two national conferences were convened to consider the problems of bail. The 1964 conference, The National Conference on Bail and Criminal Justice, was attended by more than 400 judges, defense attorneys, prosecutors, prison officials, police officers and bondsmen. Every State except Alaska was represented at the three-day session, which discussed specific release alternatives, based largely on the experience of the Manhattan Bail Project. The second conference, called an Institute on the Operation of Pre-Trial Release Projects, was attended by approximately 300 persons already involved in local bail reform efforts around the country. This two-day gathering focused on exchanging ideas and evaluating the various bail reform undertakings.[24]

At about the same time, the Subcommittee on Constitutional Rights of the Senate Judiciary Committee held hearings on bills to reform Federal bail practices. The result was the Federal Bail Reform Act of 1966, the first major legislation concerning national bail policy since the Judiciary Act of 1789. The Bail Reform Act requires that defendants in non-capital cases be released on their personal recognizance unless this would not reasonably assure their appearance in court. When personal recognizance is not approved, judicial officers can impose release conditions. However, such conditions must be the least restrictive ones deemed necessary to prevent flight; money bond can be set only if nonfinancial release is considered unlikely to assure the defendant's appearance for trial.[25]

Following the Federal example, many States also revised their bail laws. Besides an increase in own recognizance release, these legislative

changes resulted in experimentation with a variety of other release options. In 1963 Illinois established the "Ten Percent Deposit Plan." This permits a defendant to secure release upon payment of the 10 percent bonding fee to the court, rather than to the bondsman. Moreover, most of the fee paid to the court, unlike the fee paid to a bondsman, is refunded to the defendant upon completion of the case; the court retains only a small service fee. This legislation effectively eliminated commercial bonding activities in Illinois, since defendants found it advantageous to deal directly with the court. Other States have also incorporated deposit bonds into their release options.[26]

Another release development was the increased use of citations, in the form of both stationhouse release and field release. In 1964 Vera—in cooperation with the New York City Police Department—began the Manhattan Summons Project, designed to release minor offenders at the police station on personal promises to appear and thus eliminate the need for custody until arraignment. This procedure was soon adopted throughout the city. At about the same time, several California police departments began experimenting with similar releases. In addition to stationhouse release, California law permitted a <u>field</u> release by the arresting officer, so that the defendant need not even be taken to the police station. By 1969 the State law <u>required</u> police agencies to investigate the possible use of citations for each misdemeanor arrest.[27] As with deposit bond, citation release became more widely used in other jurisdictions, as its successful adoption in New York and California became known.

Other release types also became more prominent during the 1960's as many areas sought to reduce their reliance on traditional money bond. Depending on local circumstances, jurisdictions adopted some, all or none

of these release alternatives. <u>Third party custody</u> permits the release of a defendant to a relative, friend, attorney or social service organization charged with responsibility for ensuring the person's appearance in court. <u>Conditional</u> release restricts a defendant's activities during the pretrial period, e.g., by requiring the accused to stay away from complaining witnesses, maintain a certain residence or remain employed. <u>Supervised</u> release imposes reporting conditions to ensure periodic contact with the defendant during the pretrial period. Such supervision is designed to increase the likelihood that the defendant will appear for court and may be coupled with conditions, including that the defendant report for drug treatment, alcohol counseling or employment assistance. Finally, <u>unsecured bond</u> represents an attempt to maintain a financial incentive for appearing in court without depriving an indigent defendant of pretrial freedom. Although a bond amount is set, no funds or collateral need be posted to obtain release. However, bond forfeiture in the amount set prior to release may be ordered if the defendant fails to appear for court.

The spread of these release types throughout the country and the development of new legislation concerning release were accompanied by the establishment of formal pretrial release programs. Within a decade after the experimental Manhattan Bail Project, more than one hundred pretrial release programs were in operation across the country.[28] Some were modeled after the Vera project, buth others were tailored to specific local needs and constraints. Consequently, the programs varied along a number of important dimensions. For example:

- Many programs used a formal "point system," similar to that of the Manhattan Bail Project, to determine eligibility for nonfinancial release, but other programs based release recommendations on more subjective criteria.

- Some programs verified all information provided by defendants, while other programs paid minimal attention to verification.
- Certain programs tried to serve the entire population of arrestees, including those who could have obtained the money needed to make bail, while other programs tried to serve only those individuals who could not have been released without the programs' assistance.
- Some programs recommended a wide range of release alternatives, while other programs considered only a very limited set of release options.

Thus, the 1960's witnessed the first major changes in release practices since the nineteenth century. The use of varied types of release was replacing exclusive reliance on money bond, newly passed legislation supported this great diversity, and in many jurisdictions formal programs helped implement the changed practices.

By the end of the 1960's, however, public attention turned to a new concern: crimes committed during the pretrial period. This concern spawned proposals for "preventive detention" of defendants considered high crime risks. Suggested by the Nixon administration for all Federal courts, preventive detention legislation as ultimately passed in 1970 applied only to the District of Columbia, which had been a prime target of concern for "law and order" advocates.

The District of Columbia Court Reform and Criminal Procedure Act of 1970 authorizes pretrial detention for sixty days without bond of certain defendants charged with "dangerous" crimes or crimes of violence (including murder, rape, robbery, burglary, arson and serious assaults), if a hearing determines that there is a substantial probability the person committed the offense and that no release conditions would reasonably assure the safety of the community. Persons so detained are entitled to have their cases expedited for trial and to be granted pretrial release if their

trial is not in progress by the end of sixty days.[29]

The merits of preventive detention were—and continue to be—vigorously debated. Opponents agreed with Senator Sam Ervin, former Chairman of the Subcommittee on Constitutional Rights of the Senate Judiciary Committee:[30]

> Manifestly, these proposals would authorize the imprisonment of persons for crimes which they have not yet committed and may never commit. Preventive detention is not only repugnant to our traditions, but it will handicap an accused and his lawyer in preparing his case for trial. It will result in the incarceration of many innocent persons.

On the other hand, advocates of preventive detention stressed the need to protect the public from possible harm by released defendants. They also observed that detention of defendants was common in capital cases and that, when the Eighth Amendment and the Judiciary Act of 1789 were passed, a vast array of crimes had been capital ones. They argued that many defendants were able to be detained in the eighteenth century and reinstituting this possibility in the twentieth was consistent with our traditions. In effect, they argued that the present problems with crime on bail stemmed partly from the nineteenth century reforms that greatly reduced the number of capital crimes but did not change the bail laws. As John Mitchell stated this position in 1969, when he was Attorney General:[31]

> As a class, persons held to answer for such dangerous offenses as robbery, rape or burglary if released pending trial pose as great a danger to the community today as they did in 1791. Accordingly, since the eighth amendment when adopted clearly permitted pretrial detention for capital crimes because of danger to the community, it should not today prohibit pretrial detention for such dangerous crimes merely because they are no longer capital.

This argument has been attacked, however, by those who assert that the detention of persons charged with capital crimes was not permitted

because they posed a danger to the community, as Mitchell maintained, but rather because of the greater risk that defendants whose lives were at stake would fail to appear for court.[32] Under this interpretation, removing the death penalty for a crime would greatly lessen the incentive of the accused to flee the jurisdiction, and thus it would be reasonable to release the defendant.

An important aspect of the preventive detention debate concerns the accuracy of predictions regarding future criminality. Two studies used the criteria in the preventive detention legislation for the District of Columbia to consider this topic. Researchers at the National Bureau of Standards analyzed arrest rates for a sample of defendants released in Washington, D.C., during the first half of 1968. The report concluded that if the legislation's "dangerousness" provisions had been applied to the sample, 17 rearrests would not have occurred, but 39 defendants who were not rearrested would have been detained, a result only slightly better than random chance.[33]

The second study, conducted by four Harvard Law School students, constructed a statistically best predictor of recidivisim from a set of 26 variables (related to the District of Columbia criteria) drawn from court records of a sample of defendants released in Boston in 1968. The best predictor of recidivism was not very accurate; it accounted for only 7.4 percent of the total variance in recidivism. Moreover, there was no point system which could be constructed from those variables which would have had the effect of detaining more recidivists than non-recidivists.[34] Thus, this attempt to predict dangerousness was also notably unsuccessful.

Despite the attention which the preventive detention statute received, and the expectations that its constitutionality would be tested in an early court case, the law has been little used in the District of Columbia.

A study covering the first ten months after the law was passed found that it was invoked for only 20 of the more than 6,000 felony defendants who entered the D.C. criminal justice system during that period. Moreover, preventive detention motions were even less frequent at the end of the ten-month study period than they had been at the beginning. Possible explanations for such infrequent use were proposed, including:[35]

- the questionable constitutionality of the statute and the concomitant fears of the prosecutor's office that each case might become a test case;
- a ruling by the District of Columbia Court of Appeals requiring exhaustion of the District's five-day hold provision before a preventive detention motion could be made; and
- the fact that the courts were willing to impose high money bond requirements, which accomplished sub rosa preventive detention without the need to invoke the cumbersome procedures of the statute.

Concerning the latter point, the study identified certain defendants who were eligible for preventive detention and tracked their cases. Although the government moved for preventive detention against only 1.4 percent of these potentially eligible defendants, about one-third of them were "continuously detained throughout the pretrial period in excess of 60 days almost exclusively because of an inability to post the required bond."[36]

The charge that high money bond is set because of a desire to obtain the sub rosa preventive detention of dangerous defendants, rather than because of concern about the defendants' likelihood of appearing for court, has been made in other jurisdictions and supported by various analyses. For example, a 1974 study of indigent defendants in New York City found that the following variables were significant predictors of bail amount:

- severity of the charge facing the defendant;
- prior felony and misdemeanor records;

- whether the defendant was facing another charge; and
- whether the defendant was employed at the time of arrest.

Although none of these variables was significantly associated with the probability of failure to appear in court, all except the last were significantly associated with the likelihood of being arrested on a new charge while awaiting trial.[37]

The existence of sub rosa preventive detention has led some persons and organizations to advocate its explicit adoption. For example, the Pretrial Release Standards proposed by the National Association of Pretrial Services Agencies (NAPSA) in 1978 support preventive detention—under specified procedures designed to preserve defendants' rights—when coupled with abolition of money bond.[38] Thus, the debate over preventive detention, an issue which recurred throughout the 1970's, seems likely to continue.

Besides the preventive detention arguments, other important release developments occurred in the 1970's. New legislation regarding release continued to be passed at the State level. Although much of this legislation paralleled that of the 1960's, in 1976 the State of Kentucky introduced a new approach to bail reform by abolishing commercial bonding. Although bonds can still be required to secure release, they can no longer be posted by commercial bondsmen, seeking to profit on the transactions. Most bonds in Kentucky are now deposit bonds, which require a 10 percent deposit with the court and return 90 percent of the deposit after the defendant has made all necessary court appearances. Unlike the Illinois system, discussed earlier, the use of deposit bonds in Kentucky remains an option of the court and cannot be exercised automatically by the defendant.

During the 1970's, additional court cases dealing with pretrial release matters were decided. One important Supreme Court case, decided in 1979,

affects the applicability of the presumption of innocence to conditions of pretrial confinement. In Bell v. Wolfish, the Court indicated that the presumption of innocence is important during a trial, but "has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun."[39] Lower courts had held that any limitation placed on a pretrial detainee during confinement had to pass a "compelling necessity" test. In rejecting that standard, the Supreme Court commented:[40]

> Once Government has exercised its conceded authority to detain a person pending trial, it obviously is entitled to employ devices that are calculated to effectuate this detention....And the fact that such detention interferes with the detainee's understandable desire to live as comfortably as possible and with as little restraint as possible during confinement does not convert the conditions or restrictions of detention into "punishment."... If a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissably may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees.

The Court also stated that ensuring a detainee's presence at trial is not the only objective that may justify placing conditions on a pretrial detainee:[41]

> The Government also has legitimate interests that stem from its need to manage the facility in which the individual is detained. These legitimate operational concerns may require administrative measures that go beyond those that are, strictly speaking, necessary to ensure that the detainee shows up at trial.

This opinion has been a controversial one, publicly attacked by Justice Thurgood Marshall and others concerned about the precedent it may set for subsequent cases involving detention (and possibly release as well).[42]

Jail overcrowding has been a continuing problem during the past few years, and many jurisdictions are under court order to reduce overcrowding

and improve jail conditions. In some areas this situation has increased the pressures to release as many defendants as possible and thus has supported the operations of pretrial release programs. In other areas the budgetary demands caused by the need to build a new jail or refurbish an old one have contributed to declining program funds.

While the early years of the 1970's saw the increased availability of funding for pretrial release programs, especially through the Law Enforcement Assistance Administration (LEAA), by the end of the decade many programs were experiencing budget cutbacks. These cuts were partly in response to the "Proposition 13" movement, started in California and designed to cut local taxes and reduce government spending. Throughout the bail reform years, some programs had had rather tenuous support. It was not uncommon for a program to exist for a year or two and then disband. Nevertheless, some programs were so well received locally that they became firmly established components of their respective criminal justice systems.

To facilitate the exchange of information among programs, the National Association of Pretrial Services Agencies (NAPSA) was formed in 1972. Five years later, the Pretrial Services Resource Center was established, largely with LEAA funds, to provide technical assistance and other aid to pretrial programs.

Thus, the decade of the 1970's witnessed an expansion of pretrial release initiatives in some areas and retrenchment in others. By the end of the decade, as noted at the start of this chapter, there was widespread dissatisfaction with the release system. Viewed in historical perspective, this dissatisfaction stems from disagreements over both the goals of the release system and the best methods for trying to reach those goals. These disagreements have been discussed at various points throughout this chapter; the following review summarizes the major controversies.

Pretrial release goals are shaped by local laws. In most jurisdictions, the legal basis of release decisions for most defendants is whether the defendant will appear for court. Consequently, release conditions (bail, supervision, etc.) can only be imposed, by law, if they are needed to prevent flight. Thus, a defendant who poses a poor risk of appearing for trial can have a variety of conditions imposed to increase the likelihood of appearing, but a defendant who poses a poor risk of being crime-free during the pretrial period cannot legally be subject to similar limitations designed to reduce the probability of crime.

This situation has been questioned by many persons as one which fails to protect the community adequately from dangerous defendants. Such critics often support some form of preventive detention, such as exists though is little used in the District of Columbia, that would permit detention of dangerous defendants. Opponents of preventive detention, however, stress the difficulties of predicting dangerousness with any reasonable degree of accuracy and suggest that preventive detention might violate certain Constitutional principles regarding the treatment of defendants who have been accused of crimes, but not found guilty of them.

The sharpness of the disagreement over the pretrial criminality issue is illustrated by the 1974 findings of a national survey of criminal justice policy-makers who were asked to rate 16 possible goals for pretrial release. The goal, "helping to ensure that individuals who might be dangerous to the community are not granted pretrial release," was ranked second in importance by police chiefs, fifth by sheriffs, sixth by judges and eighth by county executives and district attorneys. In contrast, public defenders and program directors ranked this goal fourteenth, or third from last.[43]

There was a high degree of consensus among most respondents on the importance of the goals of "making sure that individuals granted pretrial release through the program appear in court when scheduled" and "lessening the inequality in treatment of rich and poor by the criminal justice system." There was almost as strong a consensus on the importance of two additional goals: "minimizing the amount of time that elapses between arrest and release of defendants who are eligible for release" and "reducing the cost to the public by keeping people out of jail (and employed where possible) while awaiting disposition of their case."[44] This agreement on other goals makes the disparity over pretrial crime more striking.

Besides the disagreement over appropriate goals for the release system, there is debate about the best release methods to use to attain those goals. As discussed earlier, the major means of securing release in the country was, historically, through posting money bail. The legal concept underlying the money bond system is that financial incentives are needed to assure the appearance in court of certain defendants. In practice, however, it appears that many judges set a bond that they think is beyond a defendant's means, if they consider the defendant "dangerous." Although the setting of bail may thus be used as an attempt to achieve sub rosa preventive detention, the attempt may fail: if the bond amount can be raised, the defendant will be released. Consequently, the bond system has been attacked as an ineffective means of protecting the community by those who believe that community protection considerations should influence release decisions, not merely factors relating to the possible flight of the defendant.

The bond system has also been widely criticized as being inherently unfair to poor defendants, who may have difficulty raising bail amounts

and thus remain in jail, while more affluent defendants facing similar charges secure release quickly. The bail reform movement stemmed largely from this concern and led to the increased use of release on own recognizance, supervised release, citations, and deposit bond. These various release options were, however, superimposed on the money bail system, which continues to be used for some defendants in most jurisdictions. As a result, disagreements about the best methods of release—and particularly about the role of money bail—have continued.

D. The Need For Evaluation

Despite widespread dissatisfaction, there had been little systematic evaluation of release practices until quite recently. A 1974 review of policy-related research in the field concluded:[45]

> It is evident that there are considerable areas of the bail and no-money release systems about which knowledge is lacking. Systematic measurement of basic outcomes—failure to appear, pretrial recidivism rates per manday of exposure, rates of access to no-money release, penetration rates, rates of court acceptance of project recommendations—would go a long way in facilitating generalization of findings from one project to another.

A similar study, published in 1975, reached the same conclusion[46] and led LEAA's National Institute of Law Enforcement and Criminal Justice (now the National Institute of Justice) to initiate a "Phase I" study of pretrial release as part of its National Evaluation Program.

The Phase I study assessed the current state-of-the-art regarding pretrial release and found a serious lack of basic information concerning release practices and outcomes. A survey conducted as part of the study found very few programs (out of 115 questioned) that had any data on the rearrests of released defendants. Moreover, 25 percent of the programs had no data on the number of defendants they had interviewed,

and an even higher percentage of programs possessed no information on the number of defendants who were recommended for nonfinancial release or who were granted such release.[47]

The Phase I study identified several major gaps in existing knowledge about pretrial release and the effectiveness of programs. These gaps concerned program impact upon release rates; the extent of pretrial crime; failure-to-appear rates; equal justice; economic costs and benefits; the institutionalization process; program operating procedures; and conditions and consequences of pretrial detention.[48]

Thus, the Phase I study mirrored the conclusions of the earlier assessments of pretrial release. Despite the increased attention given to release practices since 1960 and the increased funding for programs during that time, there had been little systematic, cross-jurisdictional analysis of the release process and its outcomes.

E. The National Evaluation of Pretrial Release

To remedy the lack of information and analysis identified in past studies, the National Institute of Justice funded a "Phase II" National Evaluation of Pretrial Release. This study focuses on four major topics:

- the process by which release decisions are made and the release outcomes of those decisions;
- failure to appear by released defendants;
- pretrial criminality by defendants released pending trial; and
- the impact of pretrial release programs.

These issues were analyzed through a multi-faceted study involving detailed analysis of twelve jurisdictions. For each area the "delivery

system" for release decisions was studied, and a sample of defendants was tracked, via existing records, from the point of arrest to case disposition and sentencing.

In all jurisdictions, the overall release system was studied, not merely the activities of pretrial release programs alone. This is an important point, because many defendants may secure release without program assistance (or even despite adverse program recommendations).

The twelve jurisdictions studied were selected to reflect geographic representation, a wide range of release types and broad eligibility for program participation (especially in terms of criminal charges). Additionally, a selected jurisdiction was required to have a large enough volume of program clients and other releasees to warrant analysis, and local records had to be sufficiently complete and accurate for reasonable analysis to be conducted. Perhaps most importantly, a jurisdiction's criminal justice system officials had to be willing to cooperate with the study, both by making records available to the research team and by making themselves accessible for interviews.

These site selection criteria imposed certain limitations on the study. In addition, the evaluation was constrained by other decisions regarding its scope. These were:

- to limit the analysis to adults, rather than to consider also the special problems posed by the release of juveniles;
- to focus the evaluation of defendants processed through State and local, rather than Federal, courts;
- to analyze only trial courts and exclude release mechanisms associated with appeals of verdicts; and
- to study only pretrial release programs, rather than to

include such related programs as those concerned with pretrial intervention or diversion.

A summary report provides a brief discussion of the most important results of the evaluation. The detailed findings, conclusions and recommendations are documented in three volumes, corresponding to the major components of the study. As shown in Table 1.1, each component encompassed a different set of jurisdictions. As discussed below, this occurred because the various parts of the evaluation required different study designs.

Volume I of the evaluation analyzes pretrial release processes and outcomes in eight jurisdictions, located throughout the nation, that currently have pretrial release programs. In most cases the defendant sample studied was randomly selected from arrests over a one-year period falling between June 1976 and May 1978.

Extensive data were collected on these defendants, including background characteristics, type of release, nature of program intervention (if any), criminality during the pretrial release period, court appearance performance and case outcome. Such data provided the basis for detailed analysis of the outcomes (i.e., court appearance performance, pretrial criminality) of defendants released through different mechanisms (e.g., own recognizance versus money bond, as a result of a pretrial release program's recommendation versus not, etc.). Additionally, these data were used to assess whether certain types of defendants seemed especially likely to fail to appear for court dates or to commit pretrial crimes.

The pretrial release delivery system was also analyzed for each area. Thus, a comparison of defendant outcomes with delivery system characteristics permitted consideration of possible relationships between them.

TABLE 1.1
JURISDICTIONS INCLUDED IN VARIOUS PARTS OF THE PHASE II EVALUATION

Jurisdiction	Eight-Site Analysis (Volume I)	Experimental Analysis of Four Sites (Volume II)	Analysis of Sites Without Programs (Volume III)
Baltimore City, Maryland	X	X	
Baltimore County, Maryland	X		
Washington, D.C.	X		
Jefferson County (Louisville), Kentucky	X		
Dade County (Miami), Florida	X		
Santa Cruz County, California	X		
Santa Clara County (San Jose), California	X		
Pima County (Tucson), Arizona			
Felonies	X	X	
Misdemeanors	X	X	X
Jefferson County (Beaumont), Texas		X	
Lancaster County (Lincoln), Nebraska		X	
Milwaukee County, Wisconsin			X
Richmond, Virginia			X

Volume II of the study focuses on analysis of the short-term impact of pretrial release programs on release practices and outcomes. This analysis, conducted in four jurisdictions, used an experimental design in which defendants were randomly assigned to two groups: one group received the full processing of the pretrial release program and the other group did not. The random assignment of defendants required from three to nine months to complete in the individual jurisdictions and occurred between September 1978 and August 1979. The experiences of both groups in securing release appearing for court and engaging in pretrial criminality were compared to assess the impact of program intervention (such as providing release-related information or recommendations to the court, reminding released defendants of coming court dates or monitoring defendants' compliance with release conditions) during the pretrial period.

Volume III considers longer term program impact by studying jurisdictions which do not have pretrial release programs. It has been suggested that such programs may be needed only for a short time, if at all. Once the feasibility of nonfinancial release for defendants with strong community ties has been demonstrated, judges might themselves question defendants about these factors, if there were no program to provide such information. On the other hand, reforms might quickly dissipate if programs disbanded, because judges might revert to the release practices prevalent before the program was established.[49]

Because of the tenuous funding of many programs, it is particularly important to consider the extent to which release changes associated with program operations endure beyond the life of a program or, alternatively, cease when the program does. To analyze the issues related to long-term program impact, two special case studies were conducted of jurisdictions

without programs: one area, Milwaukee, Wisconsin, once had a program but no longer does; the second area, Richmond, Virginia, had never had a program at the time it was studied. Milwaukee was analyzed for three one-year periods (1972, 1975 and 1977-78), reflecting times before, during and after program operations; Richmond was studied for the July 1976 through June 1977 period.

In addition to these two areas, an analysis of the misdemeanor program in Tuscon, Arizona, is included in Volume III. This analysis is based on the "eight-site" data (discussed in Volume I), which covers a time period spanning the demise of Tuscon's program for misdemeanor defendants, and the experimental data (discussed in Volume II), obtained when the misdemeanor program was resumed. Volume III also presents the results of a brief "defunct" programs analysis, derived primarily from existing reports and telephone interviews with former directors, judges and other individuals in jurisdictions which once had programs but now do not.

Each volume is self-contained and can be read singly or in conjunction with other volumes. Additionally, the volumes can be read in any order; they are numbered merely for convenience.

FOOTNOTES

[1]Warren E. Burger, "Annual Report to the American Bar Association by the Chief Justice of the United States," February 8, 1981.

[2]For Mr. Bell's statement see The Pretrial Reporter, published by the Pretrial Services Resource Center, Washington, D.C., March 1979 issue, p. 3. Senator Kennedy's comments were made in an address to the National Governors Conference on Crime Control, June 1, 1979.

[3]Unpublished data provided by John Bartolomeo, Institute for Law and Social Research, Washington, D.C., September 1979.

[4]Yankelovich, Skelly and White, Inc., The Public Image of Courts: A National Survey of the General Public, Judges, Lawyers and Community Leaders, Volume I, May 1978, pp. 184-187.

[5]See Ronald Goldfarb, Ransom: A Critique of the American Bail System (New York: Harper and Row Company, 1965), pp. 22-27, for more information about early English and American release practices.

[6]Forrest Dill, Bail and Bail Reform: A Sociological Study, unpublished Ph.D. dissertation, University of California at Berkeley, 1972, pp. 36-37. Dill provides an excellent discussion of nineteenth century release developments; see pp. 36-41.

[7]Ibid., p. 38.

[8]Roscoe Pound and Felix Frankfurter, eds., Criminal Justice in Cleveland (Cleveland: The Cleveland Foundation, 1922), pp. 290-292, as quoted in Dill, ibid., p. 39.

[9]Dill, ibid., pp. 40-42.

[10]Pannell v. United States, 320 F. 2d 698 (D.C. Cir., 1963), concurring opinion.

[11]For a more detailed discussion of this topic, see Wayne H. Thomas, Jr., Bail Reform in America (Berkeley: University of California Press, 1976), pp. 12-13, and Pannell v. United States, ibid., especially the concurring opinion of Chief Judge Bazelon.

[12]Alexis De Tocqueville, Democracy in America, as quoted in Goldfarb, op. cit., pp. 233-4.

[13]Arthur L. Beeley, The Bail System in Chicago (Chicago: University of Chicago Press, 1927, reprinted in 1966). Other early studies include

Missouri Association for Criminal Justice, The Missouri Crime Survey (New York: The Macmillan Company, 1926); Pound and Frankfurter, op. cit.; and Wayne Morse and Ronald Beattie, "Survey of the Administration of Criminal Justice in Oregon," Oregon Law Review, Volume 11 (Supp., 1932), pp. 86-117.

[14]Caleb Foote, "Compelling Appearance in Court: Administration of Bail in Philadelphia," University of Pennsylvania Law Review, Volume 102 (1954), pp. 1031-1079, and John W. Roberts and James S. Palermo, "The Administration of Bail in New York City," University of Pennsylvania Law Review, Volume 106 (1958), pp. 693-730.

[15]For more information see Thomas, op. cit., pp. 16-17, and Daniel J. Freed and Patricia M. Wald, Bail in the United States: 1964 (Washington, D.C.: U.S. Department of Justice and Vera Foundation, Inc., May 1964), pp. 34-5.

[16]Caleb Foote, "The Coming Constitutional Crisis in Bail," University of Pennsylvania Law Review, Volume 113 (1965), p. 959.

[17]See the discussion in Thomas, op. cit., pp. 17-18.

[18]Ibid., pp. 240-4, passim.

[19]Carlson v. Landon, 342 U.S. 524 (1952).

[20]Stack v. Boyle, 342 U.S. 1 (1951). Italics in original.

[21]Dissenting opinion to Stack v. Boyle, 342 U.S. 1 (1951).

[22]Goldfarb, op. cit., pp. 157-8.

[23]Abt Associates Inc., Pre-Trial Services: An Evaluation of Policy Related Research (Cambridge, Mass.: Abt Associates, Inc., December 1974), p. 11.

[24]See National Conference on Bail and Criminal Justice, Proceedings and Interim Report of the National Conference on Bail and Criminal Justice (Washington, D.C.: U.S. Department of Justice and Vera Foundation, Inc., April 1965); Bail and Summons: 1965, Proceedings of the Institute on the Operation of Pretrial Projects; and the discussion in Lee S. Friedman, "The Evolution of a Bail Reform," Policy Sciences, Volume 7 (1976), pp. 300-301.

[25]Bail Reform Act of 1966, Public Law 89-465; 80 Stat. 214, Section 3146.

[26]D. Alan Henry, Ten Percent Deposit Bail (Washington, D.C.: Pretrial Services Resource Center, January 1980) provides a good discussion of the history and uses of deposit bond and includes an analysis of percentage deposit legislation in each State. See also John S. Goldkamp, Two Classes of Accused: A Study of Bail and Detention in American Justice (Cambridge, Massachusetts: Ballinger Publishing Company, 1979), pp. 56-59.

[27]Floyd Feeney, "Citation in Lieu of Arrest: The New California Law," Vanderbilt Law Review, Volume 25 (1972), pp. 368-9. Feeney observes that over 60 years ago persons arrested for traffic violations were taken into custody routinely. As the number of violations increased, this procedure became too cumbersome and was replaced by the use of citations. Thus the precedent for substituting citation release for custody is an old one. See p. 367.

[28]Hank Goldman, Devra Bloom and Carolyn Worrell, The Pre-Trial Release Program: Working Papers (Washington, D.C.: Office of Economic Opportunity, July 1973), p. 3.

[29]Court Reform and Criminal Procedure Act of 1970, 23 D.C. Code 1322.

[30]As quoted in Thomas, op. cit., p. 230. Also see Sam J. Ervin, Jr., "Foreword: Preventive Detention—A Step Backward for Criminal Justice," Harvard Civil Rights—Civil Liberties Law Review, Volume 6 (1971), pp. 297-8, for a critique of the preventive detention legislation for the District of Columbia.

[31]John H. Mitchell, "Bail Reform and the Constitutionality of Pretrial Detention," Virginia Law Review, Volume 55 (1969), pp. 1224-1230. See also Janet R. Altman and Richard Cunningham, "Preventive Detention," George Washington Law Review, Volume 36 (1967); and Frederick D. Hess, "Pretrial Detention and the 1970 District of Columbia Crime Act—The Next Step in Bail Reform," Brooklyn Law Review, Volume 37 (1971).

[32]See Laurence H. Tribe, "An Ounce of Detention: Preventive Justice in the World of John Mitchell," Virginia Law Review, Volume 56 (1970), pp. 371, 400-401, as quoted in Thomas, op. cit., p. 242. Also see Alan M. Dershowitz, "On Preventive Detention," New York Review of Books, Volume 12 (March 13, 1969).

[33]J. W. Locke, R. Penn, J. Rick, E. Bunten and G. Hare, Compilation and Use of Criminal Court Data in Relation to Pre-Trial Release of Defendants: Pilot Study, National Bureau of Standards Technical Note 535 (Washington, D.C.: U.S. Government Printing Office, 1970).

[34]Arthur R. Angel, Eric D. Green, Henry R. Kaufman and Eric E. Van Loon, "Preventive Detention: An Empirical Analysis," Harvard Civil Rights—Civil Liberties Law Review, Volume 6 (1971), p. 301.

[35]Nan C. Bases and William F. McDonald, Preventive Detention in the District of Columbia: The First Ten Months (Washington, D.C.: Georgetown Institute of Criminal Law and Procedure and the Vera Institute of Justice, March 1972). Also see the discussion in Thomas, op. cit., pp. 231-233.

[36]Ibid., p. 68.

[37]William M. Landes, "Legality and Reality: Some Evidence on Criminal Procedure," Journal of Legal Studies, Volume III (June 1974), pp. 325-326.

[38]National Association of Pretrial Services Agencies, Performance Standards and Goals for Pretrial Release and Diversion: Pretrial Release (Washinton, D.C.: National Association of Pretrial Services Agencies, July 1978), pp. 35-49, passim.

[39]Bell v. Wolfish, 441 U.S. (May 14, 1979).

[40]Ibid.

[41]Ibid.

[42]"In Rare Attack, Justice Marshall Says Court Erred," New York Times, May 28, 1979, p. 1.

[43]Russell V. Stover and John A. Martin, "Results of a Questionnaire Survey Regarding Pretrial Release and Diversion Programs," in National Center for State Courts, Policymakers' Views Regarding Issues in the Operation and Evaluation of Pretrial Release and Diversion Programs: Findings From a Questionnaire Survey (Denver, Colorado: National Center for State Courts, 1975), p. 25.

[44]Ibid.

[45]Abt Associates, Inc., op. cit., p. 16.

[46]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, October 1975), pp. xvii, xxii.

[47]Wayne H. Thomas, Jr., et al., National Evaluation Program Phase I Summary Report: Pretrial Release Programs (Washington, D.C.: U.S. Department of Justice, Law Enforcement Assistance Administration, April 1977), p. 84.

[48]Ibid., pp. 59-63.

[49]See the discussion in ibid., p. 35.

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