NEW AREAS FOR BAIL REFORM

A Report on the
Manhattan Bail Reevaluation Project
(June 1966 - August 1967)

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I. INTRODUCTION

In New York City, as in most American jurisdictions, pretrial detention of an accused person generally follows failure of the accused to post bail in the amount or form stipulated by the arraigning judge. Bail is set in virtually all non-capital cases, despite the fact that the New York State Constitution, unlike the constitutions of the great majority of American states[1], does not grant an absolute right to bail,[2] and the New York Code of Criminal Procedure makes bail discretionary where the charge is classified as a felony.[3]

In setting bail the judge is setting the conditions for pretrial release and implicitly sanctioning such release. Under these circumstances there has been no specific finding as to the desirability of detention and, in any particular case, it is likely as not to be unnecessary. Not surprisingly, the frequency with which the indigent are detained before trial has, in recent years, come under increasing criticism.[4] The response has been a concerted effort by judges, court administrators, and public officials to develop an approach to bail setting that will eliminate detention of persons who could safely be released.

A first step in this direction was taken in 1961 with the launching of a pilot program known as the Manhattan Bail Project in the New York City Criminal Court. The program was organized by the Vera Institute of Justice, (formerly Vera Foundation) in cooperation with the New York University School of Law. It worked like this: defendants were interviewed before arraignment and asked to give information about their ties to the community - their families, jobs and residences. Answers were verified by telephone and when the defendant appeared to have local ties, a recommendation for release on recognizance (r.o.r.) was presented to the court. The Project demonstrated that a report to the court based on verified information improved the defendant's chances of release without bail.[5] It showed also, that persons with ties to the community would return to court, whether or not they had been required to post bond.[6]

Success of the Manhattan Bail Project led reformers and administrators to expect that prearraignment investigations would offset inequities inherent in the bail system. In New York City, an appropriation of $181,600 was made to the Office of Probation in 1964 so that prearraignment interviews could become part of the arraignment process in all criminal courts of the City. Similar public appropriations and private grants were made during subsequent years in close to one hundred

other jurisdictions, in over half the states,[7] and legislation authorizing and encouraging release without bail was passed by Congress for the Federal system,[8] and by thirteen state legislatures.[9] Nonetheless, subsequent experience in New York City and other urban jurisdictions has indicated that concerted attack on the bail system requires more than a program of prearraignment investigations.[10] It now appears that in addition to a "bail project" an effective bail reform program for an urban area will probably have to include the following features:

1) A procedure for verifying information which was not verified prior to arraignment.

2) An automatic bail review with provision for subsequent reviews upon application, as new facts become available.

3) A plan for finding residences, jobs and/or community supervision for accused persons without community ties who are being detained pending hearings on first offenses or minor charges.

Also, a plan for developing forms of conditional release for material witnesses whose testimony cannot be satisfactorily perpetuated by deposition.

4) A system of direct outside telephone communication and liberal visiting rules within detention facilities to help accused persons who have not been released to raise bail or prepare their cases for trial.

The failure of the bail project to eliminate unnecessary detention in cities such as New York may be attributed largely to the high volume of cases, the accent on speed, and the insufficiency of manpower and physical resources which characterize arraignments in urban courts.[11] As might be expected the preparation of r.o.r. reports suffers under these circumstances as much as every other arraignment process, and even when well prepared, r.o.r. reports are apt to be slighted by the court in the rush to dispose of cases.

In view of the unsuitability of the arraignment hearing as a final forum for bail dispositions, the Vera Institute of Justice (hereafter referred to as the Vera Institute) set up the Manhattan Bail Reevaluation Project in June 1966, with a grant of $116,000 from the Office of Economic Opportunity (O.E.O.). This report is based on the findings of that project, conducted in the New York City Criminal Court and the New York State Supreme Court, in New York County, between July 1966 and September 1967.[12]

II. Bail Review

A. THE MANHATTAN BAIL REEVALUATION PROJECT: BACKGROUND AND FINDINGS

In approximately 44% of the felony and serious misdemeanor cases in which bail is set at arraignment in New York County, the judge has the benefit of an attempted

investigation by the R.O.R. Division of the Office of Probation with regard to the residence of the defendant, his family life, and his employment.[13] In about 28% of these cases (or 12% of the total) he receives a verified recommendation from the R.O.R. Division based on the pre-arraignment interview;[14] in the 88% of the cases in which no interview has been conducted or no recommendation prepared, he may or may not personally seek information from the accused about his community ties. On the basis of facts known to him he then sets bail.

As in most jurisdictions, the initial bail determination in New York City is subject to a number of forms of review, - all of which were available prior to the introduction of the Manhattan Bail Reevaluation Project in June 1966. An attorney with new information about the family life or finances of the accused can petition the arraigning judge to reconsider the bail or can file a motion for review in the higher court.

In addition, prior to May 1967 the bail would be reexamined even without application by counsel at an automatic review hearing held in the lower court within two days after arraignment. This review procedure was set up by the Administrative Judge of the Criminal Court in September 1962. It was established in response to record overcrowding in the detention facilities[15] and initially appeared to serve as an effective check against prohibitive

bails.[16] Unlike similar review procedures set up in other jurisdictions in response to crisis situations[17] it was not discontinued when the jail population returned to somewhat more acceptable levels the following year.[18] Nonetheless, the review rapidly lost effectiveness. Within months after its inception, cases were barely being considered. Bail conditions were changed in about 15% of the cases reviewed, but generally reductions were nominal and failed to affect detention status. The following - typical - scene was reported in the Spring of 1963:

> Prisoners were brought out from the pens in rapid succession as their names were called. The bridgeman[19] handed the papers to the Judge, who looked at them quickly, made the judgment (in all cases yesterday this consisted of "no change") and the prisoner was led away. In several instances the bridgeman handed the papers to the Judge (after reading the charge and bail) with the suggestive and rather precluding question "no change?" Many of the prisoners did not even come to a complete halt in front of the bench, having been "reevaluated" in the time it took them to walk the fifteen feet from the pen door to the position in front of the bench... (In one case) a prisoner was delayed somewhat in being removed from the downstairs pen after his case had been called. The handing of his papers from bridgeman to judge and back to bridgeman went on under the above-mentioned momentum and he was adjudged "no change" before he had taken more than a few steps in court. He made what could only be termed a technical appearance...20

Several reasons must be cited for failure of the review to operate effectively: In the first place, it took place without introduction of new information about the persons detained. Secondly, and of equal importance, defendants were not represented at the hearing by counsel - whether they had retained private attorneys or were represented by

the Legal Aid Society. Lawyers were barred from the proceedings because of its setting; when the review calendar was heavy, hearings for adult males (the largest group of defendants) were held within the confines of the Manhattan House of Detention -- a high-security - and overcrowded -- institution whose cell areas are, understandably, off-limits to the public. A third and final factor was the unwillingness of lower court judges to reconsider bail determinations made by judges of concurrent jurisdiction. Many judges, though assigned to review hearings, refused to consider cases -- either because they doubted the legitimacy of non-appellate review or believed it involved mere "second guessing" and a departure from professional courtesy.

The procedure whose format and inadequacies have been described was the starting point for the Vera Institute-O.E.O. effort to develop an effective bail review program. During the experimental period fo the Manhattan Bail Re-evaluation Project (June 1966 - August 1967) a number of new features were superimposed on procedures then in effect. The following steps were introduced:

1) After the setting of bail, detained persons were reinterviewed for new information and references. 2) Where possible, reports on reliability for release were presented within several days of the arraignment to the judge who set bail or another judge of concurrent jurisdiction. 3) Where

recommendations were presented and bail conditions were not modified so as to allow pretrial release, applications for reduction of bail or parole were presented to a judge of a higher court.

The Project worked like this:

Case papers were screened by a Vera staff member. Unless a defendant was excluded from the Project on the basis of his record or charge[21] an attempt was made to interview him in detention. During the course of the project, 3,811 persons were interviewed.

The 3,811 interviews resulted in the identification of 1,951 persons -- or more than 50% of the total interviewed -- whose responses indicated adequate ties to the community to make them good risks for pretrial release.

Of these, 650 were released on bail before verification was completed and 231 posted bail, pleaded guilty, or were discharged before recommendations were presented in court. The remaining 1,070 persons were recommended for release on recognizance at bail review hearings.

Recommendations for release were generally made first in the lower court -- in this case the New York City Criminal Court. The presentation was made at the regularly scheduled bail-review hearing, described above, or on special application by a Vera staff member. When a recommended defendant was not released as a result of this hearing, a second application was made in the New York State Supreme Court. Applications were

oral, and were heard without prior notice to the prosecutor or the court. Applications were made directly to the Supreme Court when the defendant was already in the jurisdiction of the Supreme Court, i.e., while awaiting grand jury action or after indictment in a felony case, or when immediate release was of particular urgency and certain project conditions had been met.[22]

Nine hundred and eighty-six recommendations for release on recognizance were made in the lower court. These recommendations resulted in the release of 266 persons -- on their own recognizance, in the custody of a responsible person or organization, or on low or nominal bail -- an acceptance rate of approximately 27%.

Eight hundred and four recommendations were presented in the higher court, either on initial review or after a review hearing in Criminal Court. The 804 presentations resulted in a release of 387 persons - or 48% of those recommended.[23]

A total of 653 persons were released by either court - 61% of the 1,070 persons recommended. More than 70% (464) of the released persons were charged with felonies.

The Impact of Review on the Detention Population

Although only three to five persons were released each day as a result of Vera's intervention in the review process,

the project nonetheless had a discernable impact on the number of persons detained during the experimental period. This can be understood when it is realized that a felony defendant who cannot post bail spends approximately fifty-three days in detention.[24] If he is released at bail review two days after arraignment he will have been spared fifty-one days in jail and the Department of Correction records will show a savings of fifty-one prisoner days.

An analysis of population changes in the Manhattan House of Detention for Men and the Brooklyn House of Detention for Men shows a dramatic drop in prisoner days during the duration of the project.[25] The analysis focuses on persons in each institution awaiting trial in the Supreme Court of New York County during the fourteen months between July 1, 1966 and August 30, 1967. The decrease in population in this group averaged seventy-three prisoners per day, or 31,171 prisoner days over the course of fourteen months. (This figure does not include reductions in population among misdemeanor defendants or females; both groups were included in the Project but have been omitted from this analysis for the sake of simplicity.)

The estimated reduction in prisoner days during the course of the project is arrived at by comparing the percentage of defendants awaiting trial who remained in detention prior to June 1966 with the percentage who were detained during the Project period.

Figure I. (p. 12) shows the percentage of defendants awaiting trial who were detained each month, before and during the Project period. Table I (p. 12) shows the averages of twelve month periods.

The figures show that in the five years prior to the Vera program between thirty-five and forty percent of all persons awaiting trial were detained. During the fourteen months of the Bail Reevaluation Project, the percentage was 33.4%, or a difference of 5.3%. The fact that the percentage remained at a lower level during the three months following the project may be attributable to the fact that detained persons remain in jail for two to three months awaiting trial.

The 5.3% reduction in the ratio of the number of persons awaiting trial to the number of persons in detention must be applied to the average jail population for the same period -- 1,383. Multiplying 5.3% times 1,383, we find a reduction of seventy-three defendants per day.

Figure I- The Percentage Of Defendants Awaiting Trial Who Are Detained- New York County Supreme Court. January 1962 - November 1967

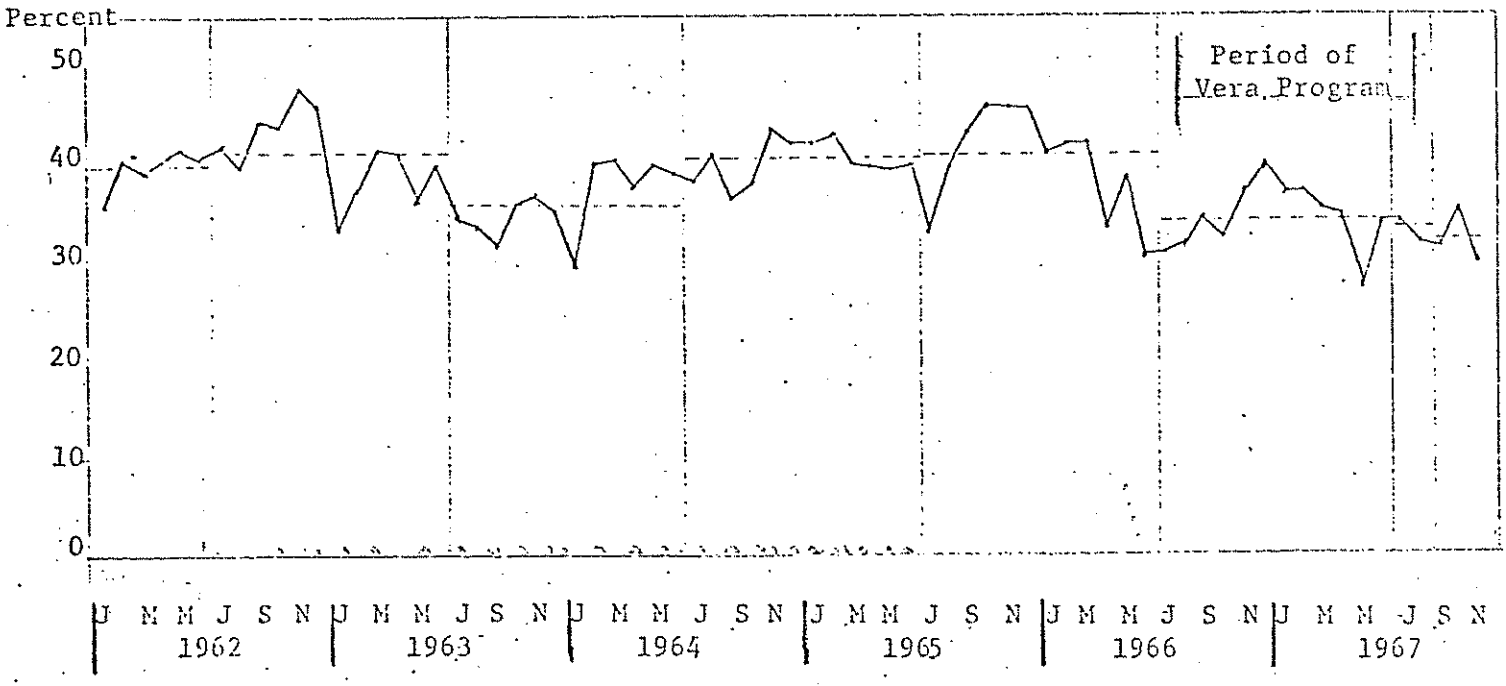


Table I - The Percentage of Defendants Awaiting Trial Who Are Detained January 1962 - November 1967

January - June 1962 (six months)		38.7%
July '62 - June '63 (12 months)		40.2%
July '63 - June '64 " "		35.3%
July '64 - June '65 " "		39.6%
July '65 - June '66 " "		39.6%
	Five year average	38.7%
Vera Program		
July '66 - June '67 " "		33.7%
July & August '67 (two months)		32.3%
	14 month average	33.4%
After Vera Program		
Sept. '67 - November '67 (three months)		31.4%

It is important to note that the decrease in population which took place among the target population in Manhattan was not part of a general city-wide decrease. In Kings and Queens Counties the detained population remained at a high level during the Project year and in the Bronx the population rose sharply; in Richmond the population remained the same, despite a decreasing rate of felony arrests in that borough.

Reduction of prisoner days was, of course, the main objective of the Project. While no attempt has been made to evaluate the intangible benefits of this reduction, the resultant dollar savings should be noted. In New York City, the Department of Correction estimates the cost of keeping a prisoner in detention at $12.50 per day.[26] Thus, by reducing the felony defendant population by seventy-three prisoners per day, the bail review program in Manhattan saved the City the cost of 31,171 prisoner days - or more than $389,637 over a fourteen-month period.[27] During the same period the Vera Institute spent less than $116,000 to run the project.

The reduction in the New York County detention population during the project year corroborates a fact that seems clear from staff experience - that those who were released from jail as a direct result of Vera bail applications would not otherwise have obtained release, either through

posting bail or through release on recognizance subsequent to arraignment. Since we can safely assume that virtually all of the 653 persons released through Project efforts would ordinarily have been detained before trial, it is startling to note that among the released defendants whose cases were completed as of January 1, 1968 only a small percentage received prison sentences.

Four hundred and seventy six of the project cases were completed as of January 1, 1968. Of these, 10% resulted in acquittal and another 41% in dismissals; the remaining 49% ended in convictions. Of the persons found guilty, 40% were sentenced to prison while 52% received suspended sentences or probation; 8% of those found guilty were given the alternative of fine or jail. Thus, of 476 persons whose dispositions were known as of November 17, 1967, 51% were not convicted and only 20% of the total, were sentenced to prison.

The 476 completed cases represent 73% of the total number of persons released in the course of the project. Twenty-two percent of the cases are still in process and in the remaining 5% defendants have failed to appear and dispositions are delayed.

In calculating the "jump rate" for a pretrial release program the formula has generally been the number of persons who have missed their last scheduled appearance divided by the total number of persons released during the course of the

project. Calculated in this manner, the jump-rate, as noted above, is 5% - a percentage higher than that encountered in either the Manhattan Bail Project or most other prearraignment projects.[28] In evaluating the significance of this figure in terms of policy; i.e., should we parole fewer persons or should we change other court procedures, it is useful to remember that each defendant is frequently called upon to make many appearances before his case is completed - often because the complaining witness is not present or the prosecutor is not ready when the case is called. As of January 1st, a total of 2,414 appearances had been scheduled for persons released in the review program - an average of 3.7 appearances per person. Only 3% of the defendants failed to appear on their initial appearance date and only 2.9% of the scheduled appearances were missed. It is also useful to remember that of the 95% of the released persons who did return to trial, 51% were ultimately cleared of charges. The implication of these facts may be that a higher jump rate indicates the need for speedier trials, rather than tightening-up of pretrial release requirements.[29]

II. AN EFFECTIVE BAIL REVIEW PROGRAM

In successfully reducing the number of New York County felony defendants detained before trial, the Manhattan Bail Reevaluation Project demonstrated the usefulness of a systematic bail review program. Many of the procedures which evolved in the course of the project can probably be adapted with similar success in other jurisdictions.

A precondition of an effective review program is the preparation of some kind of fact sheet on each of the defendants whose bail is in question. In jurisdictions without existing pretrial release programs, an attempt should be made to collect information from each person who indicates that he will be unable to post the bail amount set. Where prearraignment interviews have already been conducted, the focus will be on completing verifications and returning to interviewees who were passed over or inadequately interviewed first time around. In those jurisdictions with pretrial release programs where the judiciary has become accustomed to releasing without bail at arraignment, it may even be possible to use the post-arraignment period for the major verification effort. Unverified reports could be submitted at arraignment with detailed investigations and verifications limited to those persons who are, in fact, bound over and detained pending

their next appearance.[30] A shift of this sort would mean that the efforts of the interview staff were more efficiently utilized; the time-consuming task of verifying interviews would be undertaken only after it became clear that charges would not be dismissed and that parole or release on low bail would not be granted on the basis of known facts.[31]

Once the investigatory ground work has been completed, the bail conditions of all detained persons should be reviewed by the judge who set bail originally or another judge of the same court. This review should not depend on application or motion; the policy of reducing unnecessary detention demands that detention be challenged systematically, and where a new hearing is conditioned upon application by the accused, it is likely that review will be rare.

Failure of detained persons to initiate reviews on their own behalf can be explained by the fact that post-arraignment representation is inadequate in most jurisdictions - either because of court delays in appointing counsel or because appointed counsel have neither sufficient staff nor resources to devote time to a case before the preliminary hearing or trial. Hence, it is not surprising that in the Southern District of California, not a single prisoner took advantage of the review-upon-application provision of the Federal Bail Reform Act in the first nine months that the Act was in effect.[32] And, similarly, in the District of Columbia, while the detention population rose alarmingly, the provision was largely ignored.[33]

The review provisions of the Federal Bail Reform Act were supplemented in both of these Federal jurisdictions by court rules and decision in order to assure or at least encourage more systematic review.[34] The inadequacy of the review "upon application" provision also appears to have been recognized by the drafters of the newly-enacted Iowa bail law, modeled in all other respects on the Federal Bail Reform Act.

The Iowa law provides that a defendant who remains in custody twenty-four hours after bail or other conditions of release have been imposed

> "shall be brought forthwith before the magistrate... and informed of (his) right to have said conditions reviewed. If the defendant indicates he desires such a review and is indigent and unable to retain legal counsel, the magistrate shall appoint an attorney to represent the defendant for the purpose of the review."[35]

It has been suggested that the initial review be conducted by the judge who set bail originally or another judge of the same jurisdiction; this priority reflects a judgment that it might be unnecessarily cumbersome to transfer all detention cases from the court having jurisdiction over them to a higher court, and also, that doing so might divert the higher court from the kind of urgent determinations for which it should be reserved.

The Federal Bail Reform Act and some of the proposed and enacted state bail reform acts modeled on it[36] appear to reflect these considerations but impose the further requirement that an application for review (or the automatic

review, in the case of Iowa) be heard first by the officer who set the original bail and only if he is not available by another bail officer or magistrate.

Given the size of the arraignment caseload, and the complexity of the scheduling in the urban lower courts, many administrators will find it impossible to set up an automatic bail review which gives review priority to the judge who initially set bail. This means that under the procedure recommended, it will be a routine matter for judges to review determinations made by their colleagues.

In some jurisdictions -- including New York City, as noted above -- non-appellate review is frowned upon by judges as "second-guessing" and a departure from professional courtesy. In these communities, attorneys who make more than one bail application at the same court level are criticized for judge shopping.

Thus, clarification of the legal basis for review of this sort is appropriate, and judicial attention should be called to the New York case of People ex. rel. Manceri v. Doherty.[37] The court here describes a bail determination as an "ambulatory-interlocutory order", that is, an order which remains open and subject to change until it becomes mooted by the final disposition of the case.[39] The court explains that

> while judges of concurrent jurisdiction cannot overrule each other , it is wholly within their judicial power and duty to make new orders in ambulatory-interlocutory situations where new matter is presented to them in the regular course of their judicial duties....

Like an alimony order, the bail determinations can be raised or lowered on a showing of new facts.

When a defendant remains in detention after bail is set, at least one new fact can always be considered by a reviewing judge -- the fact that the accused was unable to post bail in the amount and form originally required. Although most courts have concluded that bail need not be keyed to the defendant's financial ability in order not to be "excessive",[39] bail should not be set beyond the minimum amount necessary to assure appearance in court.[40] Logic suggests that ability to pay should be a factor in assessing this minimum.[41]

Once it has been decided that bail conditions will be systematically reviewed within the lower court and the lower court judges have been instructed as to the legality and appropriateness of this procedure, a format for the review hearing should be established. Unless the conditions for effective review are institutionalized, the procedure designed as a check on the initial bail decision is likely to turn into a repeat of the initial hurried and perfunctory hearing. This, of course, is what happened in New York City,[42] where form was dictated largely by security considerations.

Time and Place

The scheduling of bail review should reflect policy favoring broadened access to new information about defendants through r.o.r. reports, applications by counsel, and statements by family members, as well as improved conditions for deliberation by judges, prosecutors, and defenders.

Thus, the review should be held at a regularly scheduled hour (for the convenience of family members and counsel) and should take place in a session exclusively devoted to bail re-evaluation (to avoid distractions of regular court business). And, although a detained person should be able to initiate review of his own bail conditions immediately after arraignment, the automatic review hearing should be scheduled at least twenty-four hours after the initial appearance to allow the investigatory staff time to complete necessary interviews and verifications. The review schedule used in New York City prior to May 1967 seems satisfactory; bails are reviewed on the second day after arraignment or, if arraignment falls on a Thursday or Friday, the first week day after the initial bail setting. Weekend scheduling should be avoided to increase the liklihood that private counsel will attend the hearing.

Notice

To allow investigatory staff and defense counsel to prepare for the hearing, a daily calendar should be prepared with the names of all persons who are eligible for review. The calendar should be based on a list prepared within the detention facility of all bailable persons arraigned forty-eight hours earlier and still in detention. Copies should be made available before the hearing to the prosecutor, the defender organization and to other interested agencies.

Participation of Defendants

To avoid imposing additional supervisory burdens on the Correction Department and to save courtroom space, New York City has been experimenting since May 1967 with a bail review procedure held without the court appearance of defendants.[44] Reviews are conducted on the basis of court papers and applications of counsel during pauses in sessions of trials and hearings.

Generally speaking, the presence of defendants at their own bail review hearings would seem to be desirable. A defendant may be able to bring special facts to the attention of the court, and, perhaps, create a favorable impression in response to direct examination. On the other hand, the defendant's appearance has often seemed to work against him at review hearings. His status as an indigent and a detained persons is apparent. He is usually unkempt and invariably has been without a change of clothes since his arrest. It has been an observable fact in New York County that applications for bail reduction made by attorneys and Vera staff members in Supreme Court, outside of the presence of defendants, have been treated with greater respect by judges and district attorneys than oral applications made directly by defendants at bail review hearings in the Criminal Court.[45]

The success of the Manhattan Bail Reevaluation Project applications in the Supreme Court has been described earlier. (Forty-eight percent of all applications resulted in release of the accused.) Defendants were never present when these

applications were made, but the hearings took place under conditions in which the district attorney and the judge could concentrate full attention on individual cases. It seems reasonable to assume that with strict attention paid to the format of the hearings, a similar atmosphere could be recreated in the lower court - even under circumstances in which all detention cases were being reviewed. The advantage of such a procedure would be the relative ease with which it could be administered and the avoidance of need for a large court room equipped with detention pens.

Authorization

Authorization for the kind of review described above should be included in bail reform legislation. In addition, court rules should be drafted which clarify procedural details. By formalizing rules about where and when hearings will be held and who may or must participate in them, some assurance is given that the review will survive as a viable procedure. Review provisions of bail review legislation proposed for New York State and a set of bail review rules proposed for the City are attached as Appendix I and Appendix II.

Under the provisions of the Proposed Bail Reform Legislation (Appendix I) two stages of review are contemplated: the initial bail reevaluation and an appellate stage. The right to petition for writ of habeas corpus is also preserved. A central feature of the review procedure is the requirement - similar to that found in the Federal Bail Reform Act - that a court which sustains bail conditions leading to detention set forth in writing the reasons for continuing these conditions. Although it may be

difficult to administer this requirement where bail review is automatic and the review calendar heavy, the importance of individualizing review and establishing a basis for appeal warrants introduction of the requirement.

Under the proposed legislation the initial review can be by a Supreme Court justice, as well as by a judge of the bail setting court, and upon a showing of new facts, an application for review can also be made to the Supreme Court following a prior Criminal Court review. As a practical matter, re-applications to Supreme Court justices, rather than actual appeal, will probably be the most effective means of securing second-stage review for the majority of detained persons. In New York City, at least, an opportunity for review in a superior court appears to be an essential part of an effective bail review program. (As noted earlier, close to 60% of the persons released through the Manhattan Bail Reevaluation Project were released following rejection of their applications in Criminal Court and a second hearing in Supreme Court.)

The bail conditions of all detained persons will be reviewed at least once by a judge of the bail setting court, but whether an individual's bail is reviewed a second time in the Superior court or appealed to a court having appellate jurisdiction will have to depend on a showing of new facts or

a strong argument based on community ties. Thus, it is important that the pretrial release agency or defender organization develop a system for screening detention cases so that those which should be reexamined in the higher court are not simply dropped after the lower court review.

If a single attorney is assigned by the defender organization to represent all unrepresented detainees at the initial hearing, it should be his duty to initiate the higher court review although not necessarily to become involved in following through in each case. He could forward papers to the pretrial release agency -- if it has standing in the higher court -- or if it does not, to the probation agency that services the higher court.

Greater efficiency might be achieved through creation of a single agency responsible for assisting on the pretrial release decision from before arraignment until trial. The agency would conduct the prearraignment interview and the further investigation for review purposes: it would present recommendations at arraignment and at the initial review and would see to it that recommended defendants still in detention were reconsidered by a judge of the higher court. The agency would also be responsible for reminding released defendants about

scheduled court appearances and seeing to it that persons who miss an appearance are assisted in getting back to court.

Bail determinations made in the superior court should be regarded as "ambulatory and interlocutory", and subject to further review by the same judge or a judge of the same jurisdiction as new facts become available.[46] And, because most detained defendants are indigent and represented by public defenders, counsel serving without fee, or private attorneys with limited resources, bail applications should be made returnable in the superior court as simply and inexpensively as possible. For example, in all counties of New York City except Manhattan, applications for reduction of bail must be based on written papers and preceeded by a notice of motion filed five or eight days (if by mail) before the hearing. In New York County, on the other hand, attorneys may file a simple form requesting court papers and, within a few hours seek reduction through oral negotiations and argument.[47] By allowing attorneys to avoid the delays, effort and expense involved in regular motion practice, the Manhattan procedure conforms with the recommended policy of encouraging routine reviews in the higher court.

Role of Appointed Counsel in an Effective Bail Review Program

Even with procedures that take account of the limited resources available to counsel for the poor (such as prearraignment investigations, automatic lower court review, and simplified applications in the superior court), the success of the bail review program will largely depend on the quality of defense advocacy. It will, of course, be necessary to appoint counsel to represent the indigent at the review hearing - both because "substantial rights" are affected at this stage[48] and because the hearing is unlkely to have its desired impact without representation of the indigent accused. In addition, it may be necessary for courts to set out minimum standards for representation on the bail question. It appears that despite traditional canons about the undivided loyalty owed by attorney to client, disagreement exists about the precise nature of the defender's duty on the issue of pretrial release.

For example, some appointed attorneys have declined to argue for release without bail - at arraignment or on review - for reasons such as the following:[49] 1) the judge will reject the argument and question their credibility on subsequent matters; 2) the judge will reject the argument and will be harsher in subsequent, more deserving cases; 3) the defendant is apt to flee or get in further difficulties if released and thus complicate his own defense; 4) the defendant will fare better at sentencing if he has served time in detention prior to trial,[50] or, 5) as "officers of the court" attorneys have a duty to restrict

release recommendations to defendants whom they "in good faith" would want to see out on the street.

The theory that defense counsel should act as "officers of the court" at the bail hearing appears to have been accepted by some supporters of the Federal Bail Reform Act.[51] This interpretation of counsel's obligation is based on the view that

> "the release hearing, unlike a trial, is designed to see that the processes of the court are not thwarted and that all parties share responsiblity for enabling the defendant to be released with assurance that he will return." 52

Under this interpretation, the defense attorney is a fact finder, rather than adversary. However, even under this interpretation, his duty to the court is limited to assisting in developing release conditions[53] that will assure the accused's court appearance; it is only insofar as these conditions cause some inconvenience to the accused that the lawyer's duty as an "officer of the court" takes precedence over his loyalty to his client. Counsel's duty to the court does not offset his duty to attempt to prevent pretrial detention.[54] Even assuming a non-adversary bail hearing, counsel's obligation, if he believes his client cannot safely be released on recognizance, is to seek reasonable bail conditions or non-financial conditions that provide necessary supervision.

Whether the adversary role of the lawyer should be diluted to even this extent is questionable. The defendant has much at stake at the bail setting stage and little redress if bail

is set beyond his means. Without zealous advocacy, procedural innovation appears to be largely ineffective at protecting the accused's and the community's interest in pretrial freedom. A fact-finding role must be filed at the bail hearing, but wherever possible, but it should be filled by an r.o.r. or probation officer leaving the lawyer free to do battle - as unobjectively as necessary.

Despite his close association with the court, the Legal Aid attorney - or public defender - has precisely the same obligation to his clients as any other attorney - appointed or retained.[55] Nonetheless, familiarity with courtroom routines and pressures may sometimes obscure this responsibility. Thus it may be helpful for the court to charge assigned attorneys with specific responsibilities with regard to review of the detention decision.[56]

At a minimum, the lawyer assigned to represent persons at the automatic bail review hearings should alert the court to any equity that might be relevant to bail reduction or supervised release. He should, for example, point out whatever ties the defendant has to the community- or even to a neighboring community and he should mention such factors as age or illness; the amount of time the defendant will be held until his next court appearance; the fact that his record is clear - or has been clear in recent years; or the fact that the defendant supports or takes care of a family.

Where the services of the defender organization are fragmented, and the defendant is represented by a different attorney at each stage of the proceedings, it may seem impractical to expect one lawyer to collect information for all cases on the review calendar. A solution may lie in the preparation of a check-off sheet to be filled in by the arraignment attorney. A form of this sort would allow the lawyer who has actually met and talked with the accused to summarize the facts relevant to bail review while the defendant is still in his presence. A proposed draft of such a form is attached to this report as Appendix III.

A lawyer representing a single client at the bail review hearing should attempt to gather facts about the community ties of the defendant and should be prepared to offer a plan for conditional relief in the event that the court is unwilling to release the defendant without bail.

Finally, appointed counsel should be responsible for calendaring cases for review when new facts come to light about a defendant subsequent to the automatic review, and, in addition, for initiating higher court review or appeal where such is warranted.

III. EXPANDING PRETRIAL RELEASE

1. The "poor-risk" defendant

A nineteen year old youth from a southern state takes a job on a farm on Long Island, New York. Within a few weeks he leaves this employment to shine shoes in the Port Authority Bus Terminal in New York City and, within a few more weeks he is in the Brooklyn House of Detention. A pair of shoes has been found in his possession and he is charged with receiving stolen property. Bail is set at $50 - a nominal amount - but he has no funds and knows no one in the City.

Although the charge is a misdemeanor and a first offense the boy is not released on his own recognizance. He has been interviewed by the Office of Probation, but has not been recommended for pretrial parole because he has no ties to the community.

In New York City, as in most jurisdictions with bail projects, only a small percentage of the persons interviewed by pretrial release agencies actually receive positive recommendations. In Philadelphia the figure has been given as 18%; in the District of Columbia, __%; in San Francisco, 31%; in Cleveland, 29%; in Nassau County, New York, 39%;[57] and in Manhattan, 30% (40% in misdemeanor cases, 28% in higher misdemeanor and felony cases).[58] Some of the nonrecommended interviewees are turned down because their interviews cannot be verified or because a record of previous convictions offsets community ties in an evaluation of reliability. Often, however, a total absence of local ties immediately disqualifies the defendant.

Bail projects modeled on the Manhattan Bail Project utilize a point system to measure likelihood of reappearance in court. The defendant is evaluated on the basis of five factors - length of residence in the jurisdiction, length of time at present employment, source of support, ties to family in the area in terms of frequency of contact, and prior conviction record. Each of these factors is assigned a point value and only by having sufficient points can the accused qualify for a release recommendation.

The point scale was based upon the findings of the Manhattan Bail Project (1961-1964) during its first year of operation. An analysis of the characteristics of recommended released defendants who returned to court and those who failed to do so indicated that certain characteristics could form the basis for predictions as to reliability to appear; these characteristics were assigned weighted point values. Introduction of objective criteria in the Manhattan Bail Project allowed non-professional staff to make more rapid and more accurate predictions. And, by eliminating the influence of impressions created by the defendant's poverty, his physical appearance, his record or even the charges against him, it led to a higher rate of recommendations.[59]

On the other hand, the point scale was not adequate to the task of distinguishing among defendants having no community roots. It seemed likely that some among this group could be trusted to return - dispite the fact that local ties did not bind them to the jurisdiction. Consequently, in the Manhattan Bail Reevaluation Project an attempt was made to explore

conditions under which persons without local ties could be released without bail. This aspect of the experiment was limited to first offenders and persons charged with minor crimes.

The youth described above fit into both of these categories. Consequently, he was recommended for release on recognizance at the time of bail review after a social worker from a local antipoverty agency agreed to help find him a place to stay and to keep in contact with him during the time before his trial. The court accepted the recommendation and when the defendant subsequently appeared for his hearing in the company of the social worker, charges against him were dismissed.

The recommendation in this case was part of an attempt to test the efficacy of bringing community organizations into the criminal process to assist in pretrial supervision of persons without community ties. A two month survey by one Vera Institute staff member turned up more than 50 organizations in New York City - including anti-poverty agencies, churches, labor unions, and settlement houses[60] - willing to assist in this aspect of the program. The degree of supervision promised by the organizations and actually contributed by them depended in part on the needs of the defendant and in part on the resources of the group. Sometimes it involved finding the defendant a place to stay or a job. Sometimes a representative of the organization appeared in court and subsequently, met with the accused at periodic check-ins.

Although this aspect of the Project did not lend itself to statistical analysis, it strongly suggested that inter-

vention by an interested agency at the bail review stage can make it possible to extend pretrial release to persons who ordinarily would fall in the "poor risk" category. This means that in jurisdictions with bail reform programs, the percentage of interviewed persons recommended for release by the bail agency can be increased through the introduction of systematic planning for supervised release. Release plans could be prepared prior to and introduced at the bail review hearing.

Supervised release may involve no more than informal contact with a recognized community organization. However, in the case of persons with neither resources nor places to stay (frequently adolescents who are unable or unwilling to return home), the bail agency may have to locate a temporary residence for the accused before a recommendation can be presented. The pretrial release agency should, therefore, attempt to develop a roster of contact agencies in different parts of the city and a listing of all shelter and residence facilities.[61]

2. Material Witnesses

Up until now this article has focused on the pretrial release of persons charged with crimes. Although the legal position of a witness to a crime is substantially different from that of the defendant, the witness, too, can be detained for failure to post bail.

The New York provisions with regard to detention of witnesses are typical of those in effect in most states.[62] Under the applicable statute, a material witness is defined as..

If the court finds there is some probability that a material witness will not appear to testify at trial, bail may be required and the witness detained.[63] Similar procedures have been upheld by the United States Supreme Court as constitutional.[64] It should be noted that during time spent in detention, a material witness may receive financial compensation; in New York the rate is three dollars per day.[65]

Notwithstanding this compensation, the equities favoring release on recognizance for witnesses - regardless of community ties - are certainly as great or greater than those favoring pretrial release of first offenders or persons charged with minor crimes. Consequently, an attempt was made in the course of the Manhattan Bail Reevaluation Project to see whether through investigation, planning and judicial review, release without bail could be secured for persons being detained as witnesses for New York County prosecutions.

During July 1966, seven persons were being held in the New York City Civil Jail as material witnesses. (According to an estimate by a jail official, the yearly number of persons so detained is approximately fifty.) Each of the seven witnesses had been detained for failure to post a bond. Interviews with five of the seven revealed that one was a domestic worker, three were on welfare, and one was employed

as a janitor. The bonds required ranged from $2,000 to $5,000.

Witnesses are held under commitment orders that expire after thirty or sixty days. At the end of this period they are returned to court and the release conditions re-examined. The fact that five persons interviewed had been detained for periods ranging from three to nine months indicated that in each case the bail amount had been considered and re-affirmed a number of times. Nonetheless, Vera staff members were ultimately able to secure release on recognizance for two of the three New York County witnesses interviewed. (The remaining three interviewees had been committed in Brooklyn and were not included in the experiment.) Subsequently, release was obtained for a third witness committed and interviewed several months later.

The persons interviewed and the nature of their involvement in the crime which they witnessed will be described briefly:

James P. Born in Virginia, James was thirty-four years old and a Bowery resident, with a history of occasional summer jobs as a dishwasher in upstate resorts. In early February 1966 he was residing at a Bowery "hotel" to which he had been sent by the local Welfare office. A fight occured at the dormitory between two men - both strangers to James - and one of the men was killed. James was the only witness.

He was detained at the scene of the crime, brought to the precinct station for questioning, and committed to Civil Jail as a material witness. Bond was set at $2,000.

Mary Ann D. Mary Ann was 19 years old, unmarried and the mother of two children. Two years earlier, Mary Ann had left her children with her stepmother in Thomasville, Georgia and came north to seek employment. Since that time she had worked in a New Jersey toy factory and as a live-in domestic on Long Island and sent monthly funds to Georgia to support her family. She was able to continue to send funds during her time in detention from the $3/day compensation allotted to material witnesses during time spent in jail. At the time of commitment Mary Ann had been living with the defendant in the case - her fiancee - and his mother. She witnessed the crime - the non-fatal shooting of a police officer during the course of a felony - and was detained following the setting of $5,000 bail, on January 30, 1966.

Charles J. Charles was 24 years old. He had been born in Richmond, Virginia and at the time of his interview lived alone in Brooklyn where he was employed as a janitor. He had originally been charged with homicide, but the charge was dismissed and he was committed as a witness in lieu of $5,000 bond.

Joseph P. Joseph was 23 years old. He lived by himself in Brooklyn, was employed as a cook in a local luncheonette,

and occasionally received welfare support. He had a record of two misdemeanor convictions, but was not involved in the homicide which he witnessed.

Walter G. Walter was born in Macon, Georgia. At the time of his commitment he lived with his mother in the Brownsville section of Brooklyn. He was 24, unemployed, a church member, and a welfare recipient. After witnessing a homicide, Walter sought protective custody; bail was set at $5,000 and on March 30, he was committed to the Civil Jail. Almost immediately thereafter, Walter regretted the request and unsuccessfully sought release. At the time of his interview, in July, a habeas corpus writ was pending which had been filed on his behalf by the Legal Aid Society.

Lawrence C. Lawrence was interviewed by a Vera staff member at the end of September, two months after his committal. A congenial man of fifty-two, Lawrence had lived in the Bowery for fifteen years. Once an automobile mechanic, he began to drink, left his family and job and drifted to the Bowery. He was the only witness to a felony murder, but was not implicated in the crime.

In cooperation with the Homicide Bureau of the Office of the District Attorney in New York County, the Vera Institute was able to develop alternatives to detention for James P., Mary Ann D., and Lawrence C. - the witnesses committed in Manhattan.

As Bowery residents and welfare recipients, both James and Lawrence had previously spent time at Camp LaGuardia, a facility of a few hundred acres operated by the Department of Welfare in upstate New York. Both men consented eagerly to placement there, and arrangements were made with the Department of Welfare so that their arrival and activities could be supervised.

James was released on July 8th after 6 months in jail. He told the interviewer who had arranged the release that "God must have sent (him) because no one else cared." He remained at Camp LaGuardia until the middle of September when he was summoned by the District Attorney for preparation prior to the trial. On return to the City, he was met by a Vera staff member at the bus station and brought to the District Attorney's office, then escorted to the Men's Shelter, a Welfare facility within the Bowery where arrangements had been made for him to spend the night. The next morning he missed his appointment with the District Attorney as the result of a drinking bout the night before. Consequently, it was believed necessary to have him recommitted to the Civil Jail for the two weeks remaining until trial.
At the time of trial, nine months after the original commitment, the defendant offered a plea of guilty and James' testimony became superfluous. He was dismissed by the District Attorney and he returned to the Bowery.

Lawrence C. was taken to Camp LaGuardia by a Vera staff member after three months in the Civil Jail. He stayed at

Camp LaGuardia until February when he became restless and requested permission to return to the City. Arrangements were made so that he could reside in the Bowery, but continue to check in with Vera and the District Attorney. He cooperated in this way and was able to maintain his freedom. As of this writing, fifteen months after his original commitment, the case has not yet come to trial.

Mary Ann D. was released from the Civil Jail to a Salvation Army residence on September 9, after seven months in detention. The Salvation Army placed her in a job as a domestic and she appeared to settle well into the routine of 10:30 curfews and meetings with a social worker. For about three weeks she appeared regularly for meetings with the District Attorney. One evening, after returning to the residence she threatened to jump from a window and had to be forcibly restrained. She was taken to the Bellevue Psychiatric Ward where she remained for three weeks. Subsequently, the District Attorney arranged for her return to jail. The trial was held in December, approximately 10 months after the original commitment. The defendant, Mary Ann's fiancee, was successfully convicted and Mary Ann, with the money owed to her as a material witness, returned to Georgia.

These histories are included because they illustrate both the usefulness of developing alternatives to detention for witnesses, and the difficulties which such placements involve. A program for developing these alternatives should include the following features:

1. Committal orders should come up for automatic review more frequently than every 30 or 60 days; two week intervals seem more appropriate.[66]

2. Before setting bail and prior to each review hearing, the judge before whom the commitment order is pending should request the R.O.R. agency or probation department to interview the witness and report on possible alternatives to detention. Department of Welfare facilities should be considered, as well as all other non-penal resources in the private and public sectors of the community; a further possibility could be Civil Jail residence with release during daytime hours.

3. As noted above a witness in New York City is entitled to be compensated for his time in detention at a rate of up to three dollars per day. Although present practice is to award this compensation only where the witness is detained in the civil jail, compensation should also be granted when the witness is paroled under conditions, such as those described above, which cut him off from his customary way of life. Whether or not compensation is appropriate in a particular case can be determined by the judge at the time of the commitment hearing.

IV. PRETRIAL DETENTION

Experience suggests that even a comprehensive bail reform program will not completely eliminate pretrial detention or even limit it to persons held on nonbailable offenses. Courts will

continue to set bail beyond the means of a certain portion of the defendant population - either because they deem non-financial conditions or low bail inadequate to prevent flight or because they believe it desirable to prevent release and the possible recurrance of criminal action.[67]

In these cases the defendant, though deprived of liberty, is not deprived of the presumption of innocence. And, even if the presumption is merely a rule of evidence having no legal significance until the time of trial,[68] it describes an attitude about criminal justice which should be reflected in the way pretrial detention is administered.

Pretrial detention should not be punishment and need not be rehabilitation; its purpose is to ensure that the poor-risk defendant is available at the time of trial. Consequently, the emphasis in correction institutions holding accused persons should be on maximizing their opportunities to try to raise bail, to prepare a defense, and to take care of business and family matters.

Once bail has been set, courts exercise little supervision over a defendant. If he fails to post bail, it is understood that the commissioner of correction or sheriff is responsible for assuring his next

appearance; the details of administration which such responsibility involves - for example, preventing escape and suicide - are generally considered off-limits by the courts.[69] Codes of criminal procedure are similarly silent with regard to rights or privileges to be accorded detained persons.

The right to communicate is, however, so basic to the right to prepare a defense, that to a limited extent it forms an exception to this general policy. Minimum standards for according prisoners the right to communicate are prescribed by the New York City Criminal Court Act and similar legislation in other states. In New York City, the "Prisoner's Right to Communicate with Friends" includes the right to have one free phone message or letter, and as many others as he can pay for, transmitted by a Correction officer; the law does not entitle the prisoner to direct access to a telephone.[70]

The Telephone Project

To explore the possible benefits and difficulties involved in going beyond the mandate of the legislature, the Vera Institute of Justice, in cooperation with the New York City Department of Correction, undertook an experiment in providing direct telephone calls for prisoners. The Telephone Project, financed by the Office of Economic Opportunity as part of the Manhattan Bail Reevaluation Project, was conducted

between August 1966 and December 30, 1967 in the Manhattan House of Detention for Men. Its purposes were, first, to see whether a system of direct phone calls could be effectively administered so as to avoid phone usage for improper purposes - such as harassment of witnesses or concealment of evidence - and, further, to see whether direct phone calls would have the collateral benefit of assisting detained persons to post bail.

Under the rules of the Project, inmates submitted requests for Vera telephone calls and, on the phone slip, indicated the purpose of the call. Requests were screened by the Vera staff worker and priority was given to prisoners indicating they wished to use the phone for bail raising. Calls were made in the telephone area - a small office in the Counsel Room - equipped with a pair of extension telephones on jack lines, a desk and chairs. One phone had a dial mechanism; the other did not. The dial phone also had a switch for cutting off conversations on the second phone. The procedure for using the phone was as follows:

The requested number was dialed by the Vera staff member who also asked the recipient if he would accept a call from the prisoner. If so, he monitored the call in the prisoner's presence and was prepared to use the cut-off switch in the event that the prisoner attempted to use the phone for improper purposes.

Under the conditions described there was virtually no improper use of the phone. More than three hundred calls were made each month and in only one case did a staff member

find it necessary to use the cut-off switch. In a second case harassment was alleged by the complainant, the defendant's wife. The wife accepted the call, but later complained to the District Attorney about the content of the conversation.

Although the primary purpose of the phone during the experimental period was to facilitate bail raising, it is apparent that it served a number of other purposes as well. Prisoners used the telephone to call about clothes, eye glasses, and money; to protect jobs and possessions; to contact attorneys, parole officers, and doctors.

The hypothesis that direct telephone calls can assist some defendants in raising bail was confirmed during the project period. A survey of the 1911 inmates who had used the phone during the first 6 months of the Project showed that 22% were subsequently released on bail, and that almost half of this group made bail within five days of making the call. This survey was followed by a controlled experiment which confirmed this indication that the phone call was a material factor in the defendant's release.[71]

During the experimental period (July and August 1967), a Vera researcher screening the telephone request forms disqualified defendants whose bail was over $2,000 or who had already been detained more than ten days. This screening left six to eight requests each day from defendants who were newly admitted and who had relatively low bails --

the group for whom the phone might be most useful in raising bail. The defendants in this target group were randomly assigned -- half to an experimental (treatment) group and half to a control group. The experimental group were allowed to make calls on the day they were screened; the control group were delayed seven days.

Since assignment to the experimental and control groups was random, both groups are statistically equivalent. The only difference between them was the timing of the call. The detention status of persons assigned to the experimental and control groups was compared seven days after screening. The results are shown in Table I.

Table I

Release Status of Treatment and Control Groups

	Treatment	Control
Released on bail within seven days	25.4%	12.5%
Not released on bail within seven days	74.6%	87.5%
	100.0%	100.0%
Total Number of Defendants	(59)	(61)

Table I shows that in the experimental group 25.4% were released on bail, whereas in the control group only 12.5% were released -- a difference of 13.9%.

Thus, while 12.5% of the persons who made direct calls and were released might have been released with or without the phone call, the phone call made a material difference in almost 14% of the cases.

This finding is reinforced by what happened to persons in the control group who were allowed to use the phone after seven days. The rate of release among persons in the control group rose sharply to 24%, a rate roughly equivalent to the 25% release rate of the treatment group during its first seven days. The percentage in each group released on bail after seven days is shown in Table II.

Table II

Release Status of Defendants Eligible for Release on Bail More Than Seven Days After Screening

	Treatment	Control
Released on bail after seven days	6%	24%
Not released on bail	94%	76%
	100%	100%
Total Number of Eligibles	(32)	(38)

It should be noted that the percentages are based on the number of defendants who were still held in pre-trial detention after the seventh day. That is, the table excludes defendants who were already released on bail or paroled, and defendants whose cases had already reached disposition. By the 14th day

after the original screening three more defendants in the experimental group had been released on bail. The final outcome for both groups is shown in Table III.

Table III

Final Outcome of Treatment and Control Groups

	Treatment	Control
Released on bail	33%	28%
Paroled	12%	8%
Detained until disposition	54%	64%
	100% (59)	100% (61)

The control group begins to close the gap after being given access to the phone, but never catches up to the experimental group: 33% of the experimental group raised bail as compared to 28% of the control group. This difference suggests that the earlier the telephone call is made, the more effective it is.

As of this writing, the future of direct phone service in the detention facilities of New York City is in question. An initial step in improving phone communications was taken by the Department of Correction in June 1967 with the issuance of an order by the Director of Operations allowing persons in the Manhattan Court pens to use the telephone directly

prior to intake in the detention facilities. (A copy of the order is attached as Appendix IV.)

However, telephone access should ultimately be expanded to every floor of every detention facility in the City. Monitoring of conversations during the experimental period indicated that the demand for use of the phone was overwhelmingly motivated by interest in making outside contact for legitmate purposes; the incidence of phone abuse was negligible. (Note that visiting takes place without monitoring of conversations.) A system of this sort would allow expansion of the phone project with a minimum of Department of Correction supervision. If greater supervision is found to be necessary, the project should have manpower priority with respect to other service activities within the detention facility.

In communities where defendants already have direct access to telephones, an attempt should be made by the bail agency or legal staff to see whether defendants are uniformly and satisfactorily notified of their right to use the phone and whether a satisfactory system has been worked out for extending phone privileges to persons without funds.

Visiting

A second aspect of prison communication that may need recvaluation is the area of visiting. The policy in favor of maximizing access to family and friends is sufficiently strong to warrant positive action by correction departments

in facilitating visitor contact. Such action might be taken in a number of areas.

The policy favoring visiting should initially influence the choice of site for a detention facility. The facility should be centrally located, preferably near the court. If an outlying site is selected,[72] direct free bus transportation should be arranged from a central area of the City.

Hours for visiting should reflect probable visitor convenience. For example, weekend and holiday visiting should be introduced despite the staff scheduling difficulties necessarily involved.[73]

Thought might even be given to establishing neighborhood visiting centers - especially where the detention facility is itself situated in an area remote from the City. Defendants might be bussed to these centers where visiting could take place under supervised conditions.

Within the facility, visiting areas should be designed with sufficient space to accomodate the predicted demand under liberalized visiting rules, to be discussed below.

Visiting Rules

In New York City visiting is restricted to adult members of the accused's immediate family - a category which does not include common-law wives.[74] Visitors must be able to identify themselves and also to present proof of relationship to the accused.[75] Where a defendant has no family in the area and has had no other visitors, he may be visited by a non-family

person - but only after the person has had an exchange of letters with the Warden and received written permission.[76] The same procedure must be followed by a family member where identification does not satisfactorily indicate the family relationship. These rules, like those in most jurisdictions, are not designed to maximize prisoner contact with the person they wish to see.

Strict enforcement of the rules described above result in the following kinds of exclusions:

Common-law wives are turned away, as are wives whose marriage certificates are unavailable and wives who do not satisfy the officer on duty that the marriage certificate presented is their own. Women claiming to be sisters of defendants may also be turned away if they cannot present their own marriage certificates or some other proof that their maiden name was the same as that of the defendant. A woman's recourse, if refused visiting privileges, is to write to the Warden to attempt to establish her legal relationship or to seek visiting permission as a common-law wife. In the latter case authorization may be limited to special permission for a single visit. In either case the exchange of letters may take four days - longer if a weekend intervenes - and will require some literacy on the part of the visitor.

Minors cannot visit. This includes wives of defendants where marriage certificates reveal that they are under 18 years of age.

Half-brothers and sisters are turned away if their surnames do not establish the family relationship. A birth certificate showing the name of a common parent must be presented. If the certificate is unavailable, special permission must be obtained from the Warden.

Friends, fiancees, and employers all require special written permission.

Since outsiders cannot telephone inmates, visiting is the only possible form of direct communication and limitations on visiting have far-reaching implications. It is not unusual, for example, for an employer to refrain from posting a bond for an employee because he is unable to visit with him to discuss the case or personally advance his salary.

It seems clear that the administration of the visiting rules requires reappraisal. A visit by a non-family person -- or a family member without identification -- should be honored if the defendant has had no other visits, claims no other family in the City, and expresses his desire to see the visitor requesting approval.

Studies of visiting rules are warranted. Restrictive policies could be relaxed gradually, with attention devoted at each stage to problems involved in administering a more comprehensive visiting program.

Future Developments

In attempting to come to grips with the question of detention for "preventive" purposes, legislatures might consider giving more attention to the nature of pretrial detention. The rights and privileges of detainees could, perhaps, be spelled out in law. Intermediary arrangements between pretrial release and detention in its present form could be created by legislation; these might include work release programs, for the pretrial period, or detention punctuated by home furloughs. Either would be logical developments of a nonpunitive concept of pretrial custody.

V. SUMMARY

Despite dramatic changes in bail administration which have taken place in the United States in the past six years, pretrial detention remains a problem -- even in jurisdictions

with bail reform programs. It appears that a program of prearraignment interviews of defendants is only one step in a comprehensive plan to mitigate the inequities of the bail system.

In most bail reform jurisdictions, the brief period before arraignment allows bail project staff to prepare complete investigations and convincing arguments for release for only a small percentage of the interviewed population. Consequently, a bail review program is needed which provides for further investigations, automatic reconsideration of bail in the lower court, opportunity for further rehearings in higher court, and an opportunity for appeal. Sections of draft legislation which could serve as a model for setting up a comprehensive review program are attached as Appendix I.

The Vera Institute of Justice experimented with a review program in the Criminal and Supreme Courts in New York County and concluded that a properly run program would, indeed, have an impact on the incidence of pretrial detention. A recommended procedure for an automatic lower court review is discussed on the basis of the experience of Vera's Manhattan Bail Reevaluation Project, and rules for setting up this kind of hearing are attached as Appendix II.

In addition to those persons detained because of inadequate r.o.r. investigation or judicial error, still others are detained because they are transients, newcomers to the city, or without local ties; because they

are not defendants but witnesses to a crime and outside the scope of bail project coverage; or, finally, because the court is unwilling to risk release without bail because of the strong possibilty of repetition of criminal conduct. The high incidence of pretrial detention in these cases suggests three further areas in which jurisdictions with bail reform programs can effectively increase their scope:

An attempt should be made by the bail agency to develop conditions under which certain rootless persons can safely be released on recognizance, particular attention being paid to persons who are first offenders or charged with minor crimes. Community organizations should be brought into the process and attempts should be made to find residences and possibly jobs, for those whose lack of community ties would otherwise mandate pretrial detention.

Material witnesses should be interviewed before commitment and an attempt made to develop alternatives to detention for those who cannot be released without bail.

And, finally, for the hard core of defendants likely to remain in jail prior to trial even under improved administration of the bail system, conditions in detention should be brought closer to those outside. Through improvements in prisoner communications, correction programs could themselves be made to reflect the emerging public policy favoring freedom before trial. Improvements could take the form of direct access to telephones, liberalization of visiting policies, and

development of forms of conditional and part-time release.

The significance of prisoner communication was demonstrated by the Vera Institute's Manhattan Telephone Project which gave prisoners the opportunity to make personal telephone calls and to speak directly with persons outside the jail. Telephone usage appeared to have a direct relationship to ability to raise bail - thus allowing prisoner[6]s who, in the court's view, could not safely be released without bail, to obtain freedom through their own efforts, on terms acceptable to the courts.

APPENDIX I

Figure I - THE PERCENTAGE OF DEFENDANTS AWAITING TRIAL WHO ARE DETAINED - NEW YORK COUNTY SUPREME COURT JANUARY 1962 - NOVEMBER 1967

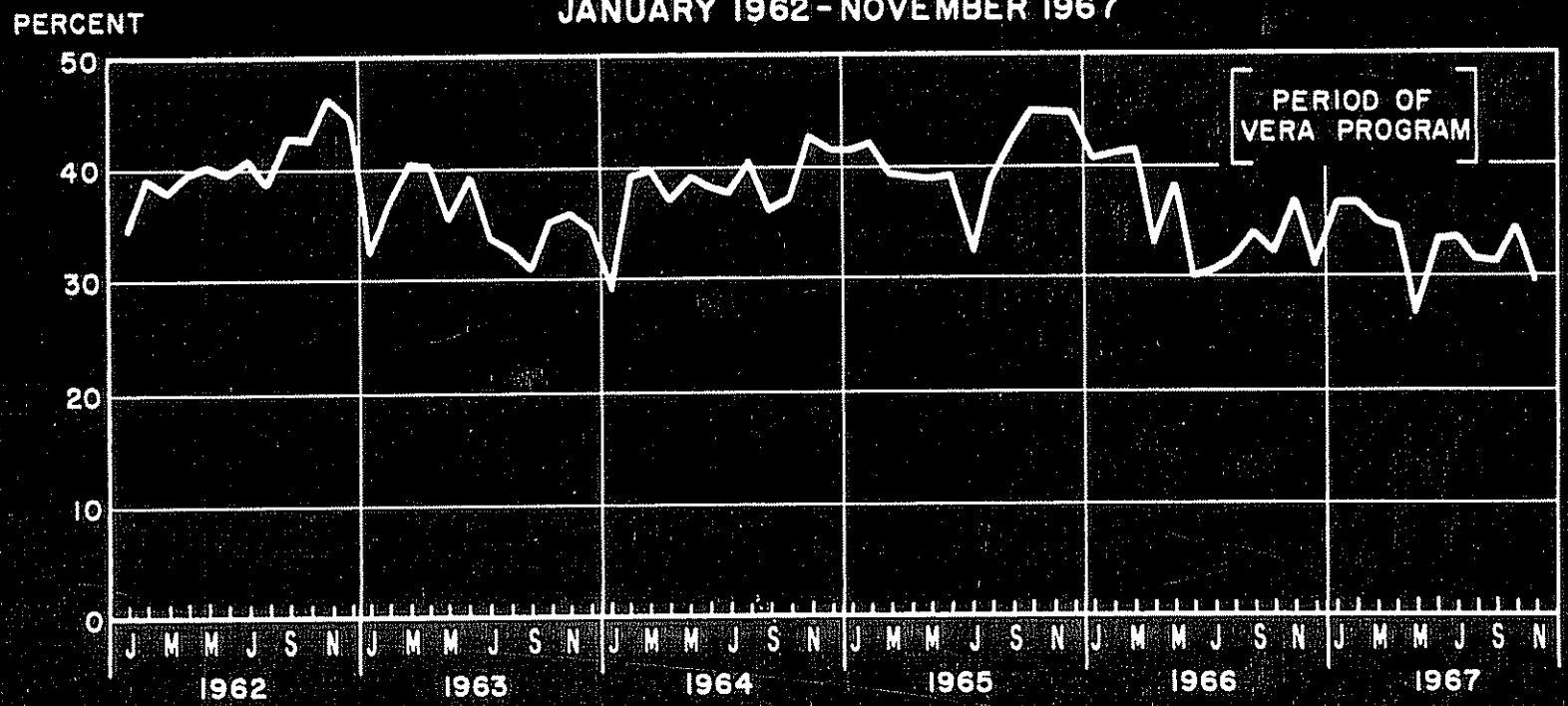
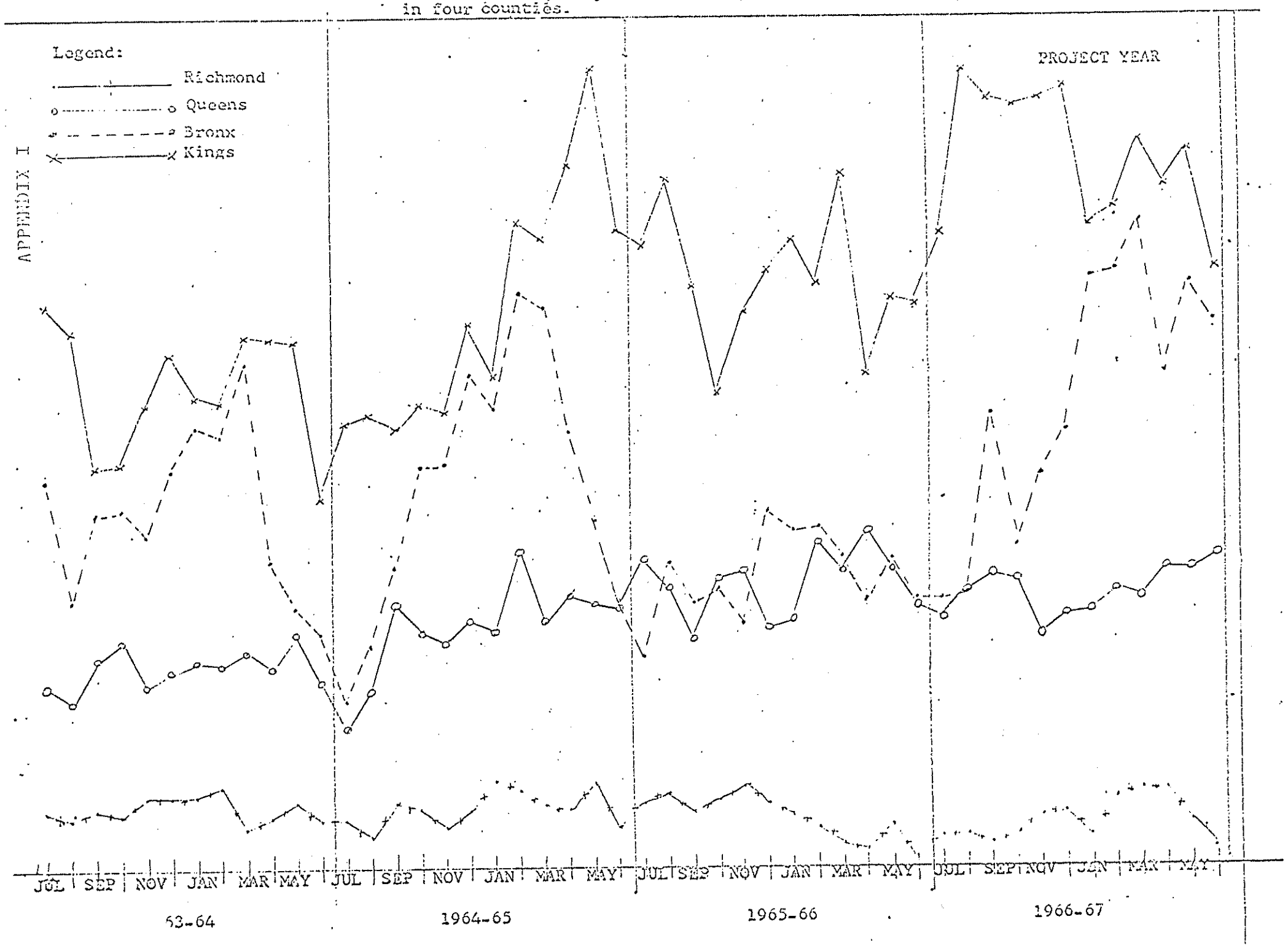
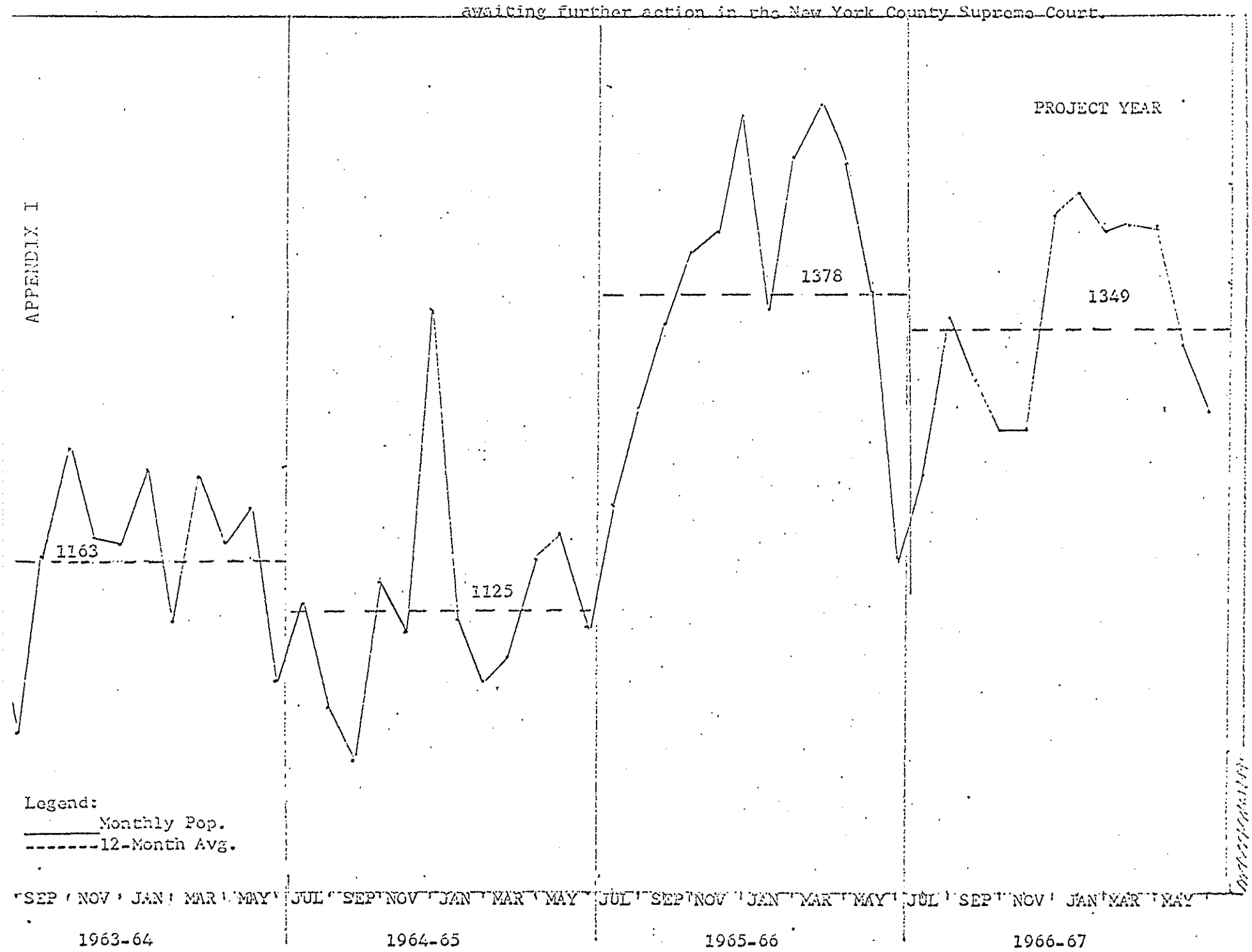


FIGURE IV- Detained Males, 16 years or older, indicted and awaiting Supreme Court action in four counties.



awaiting further action in the New York County Supreme Court.



APPENDIX I

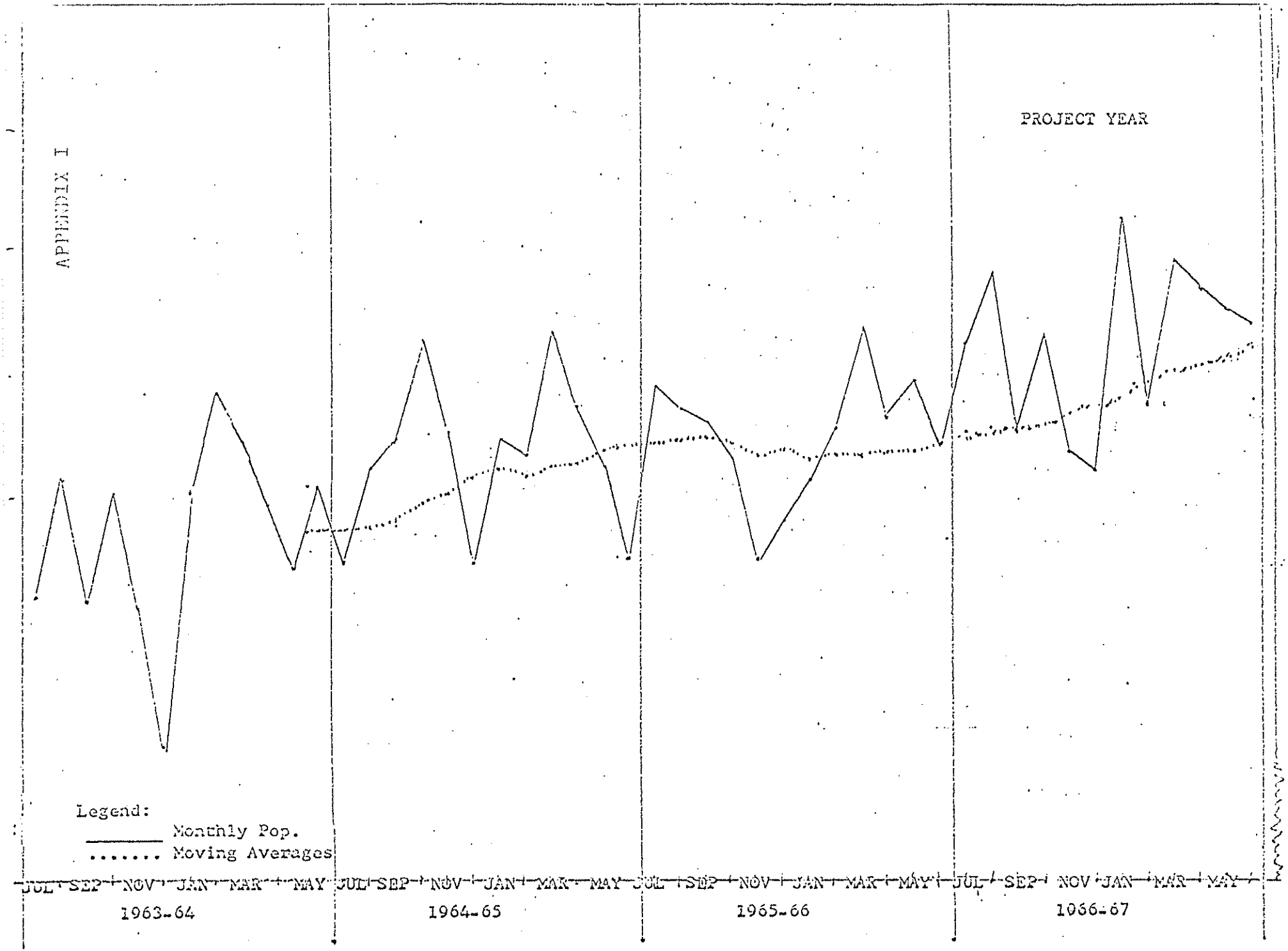
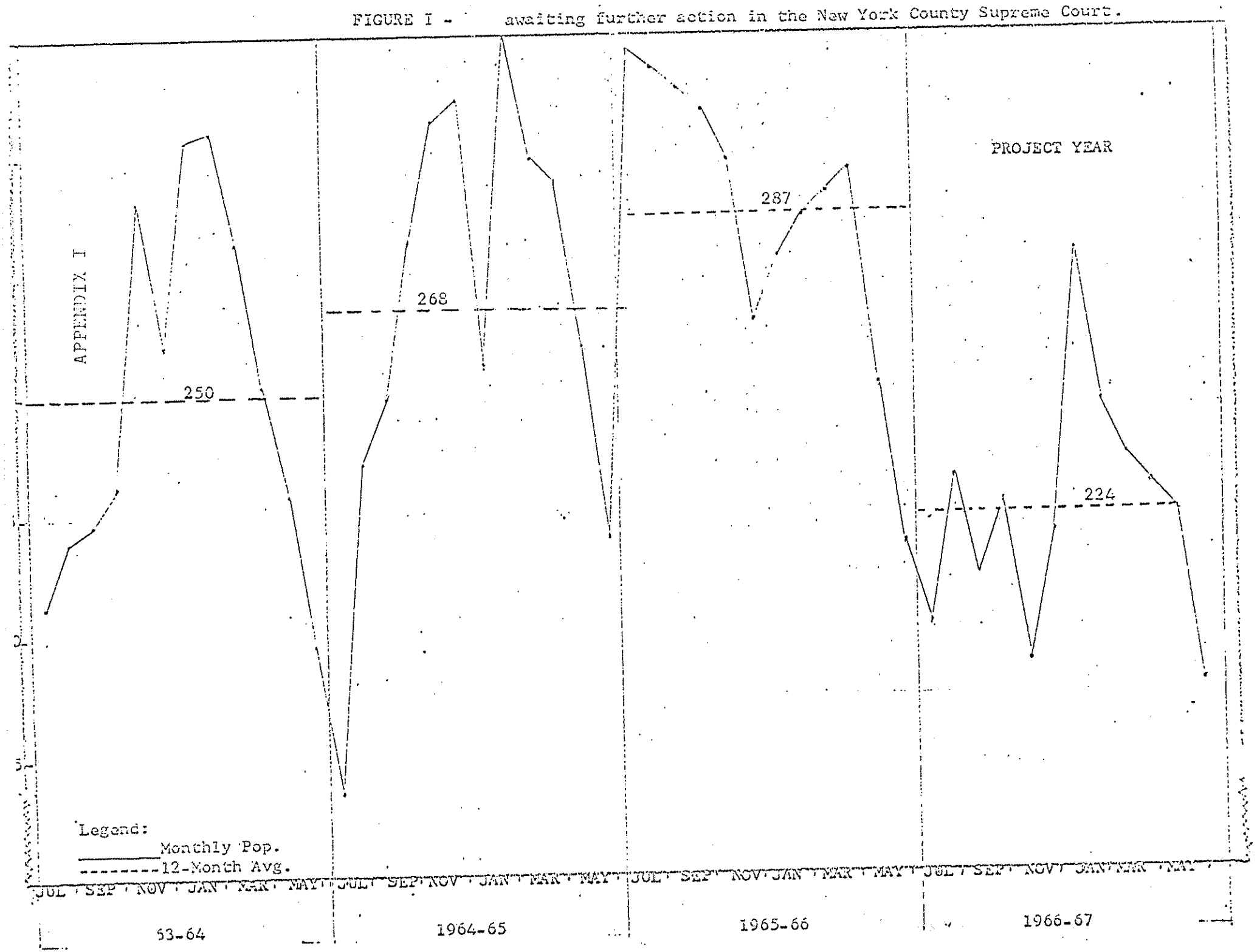

PROJECT YEAR
Legend:
Monthly Pop.
Moving Averages
JUL SEP NOV JAN MAR MAY JUL SEP NOV JAN MAR MAY JUL SEP NOV JAN MAR MAY JUL SEP NOV JAN MAR MAY
1963-64
1964-65
1965-66
1966-67

FIGURE I - awaiting further action in the New York County Supreme Court.



APPENDIX I

AN ACT

to Revise existing bail practices in courts of New York, and for other purposes.

....

Section 6. Review of conditions of release

a. Reevaluation of conditions

A person upon whom conditions of release are imposed and who is detained as a result of his inability to meet the conditions of release, or a person who is ordered detained, may, at any time after the conditions are imposed, make oral application to a judicial officer of the court which imposed the conditions, or to a Supreme Court justice whether or not a Supreme Court justice initially imposed the condition, for reevaluation of said conditions.

In the event that no application for reevaluation is made pursuant to this subsection, a judicial officer of the court which imposed the conditions shall, not more than 48 hours from the time of the initial determination, reevaluate the determination.

Unless the conditions of release are amended upon reevaluation and the person is thereupon released on other conditions or without conditions, the judicial officer or justice shall set forth in writing the facts upon which his decision is based, and the reasons for continuing the original conditions.

Nothing in this subsection shall prevent a reapplication for reevaluation upon a showing that new evidence relating to the release determination can be presented.

b. Review by appeal

In any case where a person is detained after reevaluation pursuant to subsection (a) of this section, review of the order of release or detention may be obtained by appeal or other appropriate remedy to a court, or judge or justice thereof, having jurisdiction. Such reivew shall be accelerated and determined promptly.

If the conditions of release or detention are supported by the proceedings below, the order of the court shall be affirmed. If the order is not so supported, the court may remand the case for a further hearing or may, with or without additional evidence, order the person released pursuant to Section 1.

c. Review by Habeas Corpus

Nothing contained in this Chapter shall interfere with or prevent the right of a person to petition for a writ of habeas corpus. In the event review by petition for writ of habeas

corpus is sought, the reviewing court, or judge or justice, shall take evidence by oral testimony, affidavits, or other appropriate means and determine whether such detention is justified. If the order of the court below is sustained, the reviewing court, or judge or justice thereof, shall state the reasons for such determination. If the order is not so supported, the court may, with or without additional evidence, order the person released pursuant to conditions authorized in Section 1.

APPENDIX II

Court Rules

to establish procedures for Bail Review in the New York City Criminal Court

Proposed Additions:

Bail conditions of all detained persons shall be reviewed in accordance with the following schedule: if the initial bail determination was made Saturday through Wednesday, bail shall be reviewed 48 hours later; if the initial determination was made on Thursday, bail shall be reviewed Friday; if the initial bail determination was made on Friday, bail shall be reviewed the following Monday. This provision shall in no way limit the powers of judges of the Supreme Court and Criminal Court to review bail at any time after arraignment in accordance with Code of Criminal Procedure, sec. 22 (8) and the New York City Criminal Court Act, sec. 47.

The reviewing judge shall release on parole if possible. In order to determine the appropriateness of pretrial parole, the reviewing judge shall examine the report of the R.O.R. Division of the Office of Probation and shall hear any person offering information about the community ties of the accused. Where pretrial parole is not deemed appropriate, the reviewing judge shall reexamine the determination of bail made at the initial bail hearing or at any hearing held subsequent thereto and, if the bail previously set is found to be in excess of the minimum amount of bail necessary to assure court appearance, the reviewing judge shall order an appropriate reduction.

Bail conditions of persons held for hearings or trial in Part 3 shall be reviewed in Part 3. Bail conditions of persons held for hearings or trials in all other parts shall be reviewed together in a special part set aside for bail review hearings. Bail review hearings shall be held at the same hour each day.

The daily calendar for each bail review hearing shall be based on lists of names prepared by the Department of Correction on the request of the Administrative Judge of the Criminal Court. The lists shall set forth the names, docket numbers, return dates, and bail conditions of all persons arraigned 48 hours earlier who are still in detention. (On Monday, the list will include persons arraigned on Friday; on Friday it will include persons arraigned the preceding Thursday.) In the event that new information about any person not appearing on the list shall have become available subsequent to a prior review of bail for said person in Criminal

Court, the name of said person may be added to the calendar, notwithstanding the prior review. Names may be added by the R.O.R. Division of the Office of Probation or by defense counsel at any time prior to one hour before the review hearing. Copies of the list prepared by the Department of Correction shall be made available before the hearing to the district attorney, the Legal Aid Society, the Office of Probation, and other interested agencies.

In the event that the reviewing judge wishes to examine the defendant personally before reviewing bail, the reviewing judge may have a new commitment order forwarded to the Department of Correction to obtain the defendant's presence before him on the following day. Where defendants are not before the judge, bail conditions shall be reviewed on the basis of the complaint; the criminal record; if available; the report of the R.O.R. Division of the Office of Probation; the application made by counsel; and any other information transmitted to the reviewing judge by family members or interested persons or organizations.

Legal Aid - Arraignment Screening APPENDIX III

Defendant's Name _____

Bail $ _____ Bail Posted in Court Yes /__/ No /__/

Will Bail be Posted? Yes /__/ No /__/ Unclear /__/

How Much Bail could be Raised? $ _____

Is there a HOLD on Defendant? Yes /__/ No /__/

ROR recommendation Yes /__/ No /__/

Request Additional Information from ROR:

New Interview Yes /__/ No /__/

Verification Yes /__/ No /__/

Family in Court Yes /__/ No /__/

ROR Information verified by Family Yes /__/ No /__

Family will Appear at Bail Review Yes /__/ No /__

CHECK OFF which of the following facts could be cited in support of Bail Reduction:

	Other Equities:
ROR recommendation or family ties verified in court	_____
Has job to return to	_____
Return date more than a week away	_____
No prior record	_____
Last conviction more than 4 years earlier	_____
Evidence probably won't support conviction	_____
Age (if over 50)	_____
Female with Dependent Children	_____
Illness or Pregnancy	_____

APPENDIX IV

600A---(8-65 80M)

Department of Correction — Interdepartmental Memorandum

LO : 1.

Date : June 12, 1967

From : Director of Operations

To : Deputy Warden-in-Command, Manhattan Court Detention Pens

Subject : FREE TELEPHONE CALLS FOR INMATES AT THE MANHATTAN COURT DETENTION PENS

1. Free telephone calls for inmates at the Manhattan Court Detention Pens as prescribed by the Rules and Regulations shall be made personally in all cases by the inmates concerned, effective 8:00 A.M., June 19, 1967. This shall be a pilot program to determine the feasibility of establishing a new departmental policy regarding telephone calls for inmates.

2. The following standard operating procedure shall be in full force and effect during the period of the pilot project mentioned above:

a. When an inmate requests a free telephone call, a designated correction officer shall dial the number requested and then permit the inmate to speak personally on the telephone. If the call can not be made for any reason whatsoever, other numbers, as requested by the inmate, shall be dialed until a call is completed.

b. All telephone calls made by an inmate shall be recorded in a special Telephone Record Book. Notations showing the date and time call was made, number called, name of party receiving the call, as well as the signatures of the prisoner and the correction officer supervising the call, shall be entered in said record book.

c. Whenever an inmate has made a telephone call as prescribed herein, the correction officer supervising the call shall make proper notations in the "Free Phone Call Given" space and sign his name in the "By Whom" space of Form No. 239A (Identification Record).

ANTHONY PRINCIPE
Director of Operations

APrshjm

FOOTNOTES

1. The constitutions of thirty-eight states guarantee a right to bail before conviction in non-capital cases and those of another four states limit the power to deny bail to treason and murder cases. See Freed and Wald, Bail in the United States: 1964, 2-3 (Report to the National Conference on Bail and Criminal Justice, 1964).

2. Constitution of the State of New York, Art. 1, §5.

3. N. Y. Code of Criminal Procedure §553.

4. Pretrial detention is costly to the community and damaging to individual defendants in terms of their economic well being, their bargaining position vis a vis the prosecution, their ability to prepare for trial and create a favorable impression at sentencing. See Freed and Wald, Bail in the United States: 1964 (supra.); Proceedings and Interim Report of the National Conference on Bail and Criminal Justice (Washington, D. C., 1965); President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society, 131 (1966).

5. During the first year of the project, persons with community ties were randomly divided into an experimental group and a control group. Recommendations were presented to the court for members of the experimental group. The result was that 60% of the persons in the experimental group were released without bail; the comparable figure for the control group was 14% Ares, Rankin, Sturz, The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole, 38 N.Y.U.L. Rev. 67, at ___(1963) (hereafter cited as the Interim Report.)

6. Of the 3,505 persons released on Vera recommendations during the three years of the project, fifty-six - or 1.6% failed to appear. Interim Report, p. 86

7. Bail and Summons: 1965, Proceedings, Institute on the Operation of Pretrial Release Projects New York City, October 1965, Justice Conference on Bail and Remands in Custody, August 1966, p. xiv. (hereafter cited as Bail and Summons: 1965).

8. The Bail Reform Act of 1966, Public Law 89-465, 89th Congress, §. 1357, June 22, 1966.

9. Connecticut, Florida, Iowa, Illinois, Louisiana, Maryland, Massachusetts, Ohio, Oklahoma, Oregon, Texas, Virginia, West Viriginia.

10. In Manhattan in 1966, 15,270 persons spent at least two days in pretrial detention. (New York City Department of Correction, monthly summaries of Bail Review) (Records of Bail Reevaluation 1966). This was approximately _____% of all persons bound over for hearings and trials. In the District of Columbia, 23% of arraigned persons were detained in the first four months of 1967 - despite the operation of the Bail Reform Act and the Bail Agency Act. [Fitch and Reynolds, The Bail Reform Act and Pretrial Detention, p. 1. (Unpublished Manuscript in files of Office of Criminal Justice, U. S. Department of Justice.)]

11. See Subin, Criminal Justice in a Metropolitan Court: The Processing of Serious Criminal Cases in the District of Columbia Court of General Sessions (Washington, D. C. 1966) p. xi.

12. The Project was conducted with the support and cooperation of Justice Bernard Botein, Presiding Justice of the Appellate Division of the New York State Supreme Court; Justice Saul Streit, Administrative Judge of the New York State Supreme Court; Justice Edward Dudley, Administrative Judge of the New York City Criminal Court; the New York City Department of Correction; the Office of Probation; the Supreme Court Probation Department; and the Legal Aid Society.

13. This figure is based on an analysis of arraignments in the borough of Manhattan between January and May 1967. It is included in an unpublished report, Subin, Twenty-four hour arraignment in Manhattan, (1967) p. 18.

14. Ibid, p. 20

15. An unpublished memo from the New York City Department of Correction (June 3, 1960) reports "an unprecedented and spiralling increase in inmate population." During May 1960, the prison census was at an all-time high; the combined population of the city institutions was fifty percent higher than the prescribed capacity of the institutions. The memo warned that the "increase in inmate populations has resulted in a most dangerous and critical situation in the correctional institutions of the city." Earlier, in March 1959, then Commissioner of Correction Anna Kross reported that because of concern about the dangers of overcrowding, the Department of Correction has instituted the practice of sending the Magistrates Court a weekly report of persons in detention more than a week, in the hopes that the bails of these persons would be reviewed. Commissioner Kross doubted that any such reviews would actually be conducted. (Transcript - Let's find Out," heard on WCBS Radio Sunday, March 29, 1959, at 11:05 A.M. EST. p. 6)

16. In 1963 the Judiciary Committee of the New York State Assembly conducted a special investigation into procedures in the newly unified Criminal Court of the City of New York. The committee reported that the judges appeared to be using the bail review hearing as an occasion to reduce bails drastically or release on recognizance Leg. Doc. No. 37 (1963) p. 37. (hereafter cited as New York Assembly Report).

17. Dangerous overcrowding in detention facilities is frequently responded to with emergency court sessions held for the purpose of reviewing bails of detained persons. Recent examples have been reported in St. Louis, Missouri and in the State of Connecticut. According to the St. Louis Globe Democrat, in April 1967 a probation officer was assigned to full-time duty in the St. Louis County Jail to increase the effectiveness of the R.O.R. program. Twenty-six prisoners were released through bail review, reducing the total number of prisoners in the jail to 70, the lowest number in several years.

    Similarly, a strike in the Hartford State Jail in the summer of 1967 brought attention to overcrowded conditions. As a result, interviews of prisoners held on bonds of $500 or less were conducted in jails throughout the state. On the first day of interviewing 18 of 50 men were released, and a recommendation to liberalize the rule of disqualifying prisoners for previous convictions was made to the Circuit Court.

18. Overcrowding of detention facilities was somewhat eased as a result of increased use of release on recognizance following introduction and expansion of the Manhattan Bail Project; the broadening of the powers of the lower court judges to set bail as of September 1962; and the accleration of trials under the unification of the courts and that went into effect in September 1962. New York Assembly Report, p. 37.

19. A "bridgeman" is court officer responsible for calling cases and informing defendants of their rights.

20. Unpublished memo from Lawrence Sullivan to Herbert Sturz, May, 1963, in the files of the Vera Institute of Justice.

21. Persons were excluded from interview where the charge was homicide, gambling, or prostitution; where an earlier charge was pending; where the papers showed a current probation or parole violation, an immigration warrant, or an outstanding warrant on another charge; or where the record contained three or more felony convictions or four or more felony misdemeanor convictions, or a prior probation or parole violation.

22. Agreements with the Administrative Judges of the Criminal and Supreme Courts established two conditions for applications for Supreme Court review by Vera staff members: 1) all facts forming the basis of the review application must have been passed on initially by a Criminal Court judge, at arraignment or bail review; 2) applications in felony cases must be accompanied by reports by the Supreme Court Probation Department on the recidivism potential of the defendant applicant.

23. The higher rate of acceptance in the Supreme Court than in the Criminal Court was partly attributable to the reluctance on the part of some Criminal Court judges to change determinations initially made by judges of concurrent jurisdiction, but attributable, also, to conditions in the Supreme Court that are more conducive to deliberation. As a court of second review the Supreme Court seldom heard more than five bail applications per day. Cases could be discussed in depth with the district attorney before presentation to the court and frequently prior consent of the district attorney could be obtained.

24. Fifty-three days is the median time spent in detention by an adult charged with a felony in New York County. [New York City Department of Correction Annual Statistic Report (1965), p. 38.] The 1965 report is the most recent Department report.

25. This analysis was done by Kenneth Lenihan. Data and a preliminary report entitled "Measuring the Effect of a Bail Reform: The Manhattan Bail Reevaluation Project," are on file at the Vera Institute of Justice.

26. Surveys conducted prior to 1964 show that direct per capita costs of pretrial detention ranged, at that time, between $2.56 per prisoner per day in St. Louis to $6.86 in Los Angeles. See Freed and Wald, Bail in the United States:1964, pp. 39-43. The New York City figure is based on estimates for 196_.

27. Each day during the 427 days of the fourteen months, the detention population was lower by seventy-three persons that it would ordinarily have been. Each day, each of these persons would have cost the city approximately $12.50. Hence, the savings suggested is the product of 73 X 427 X 12.50, or $389,637.

28. Of the 3,505 persons released during the course of the Manhattan Bail Project, only 1.6% failed to appear for trial. Comparable figures for jurisdictions with effective programs are District of Columbia, ____ (District of Columbia Report, p.___); Des Moines, 1.4% (The Des Moines Pretrial Release Project 1964-67, Report Published by_____, p.13).

29. The incidence of recidivism pending trial also appears to rise when trial dates are delayed. A study of persons released as a result of bail project efforts in the District of Columbia indicates an increase in crime for persons awaiting trial more than 30 days. (Report of D.C. Project)

30. Although the verification of prearraignment reports was initially considered an element of key importance in influencing the court's decision to release without bail, it now appears that once the concept of releasing good risks on recognizance is accepted as basically sound, verification becomes important only in cases where the facts appear dubious on their face or the charge is particularly serious. Hence, among defendants interviewed by the R.O.R. Division in Manhattan between January and March 1967, the court released on recognizance only ten percent more where verified reports were presented. Subin, "Twenty-four Hour Arraignment in Manhattan," p. 21. Moreover, the New York City Police Department Summons Project (Vera's adaption of the r.o.r. idea to the stationhouse level) has dispensed with virtually all verification of interviews. The summons program is presently limited to lesser misdemeanors, including petit larceny, simple assault, and disorderly conduct.

31. A shift of this sort might be effective in New York City. In Manhattan between January and May 1967, the R.O.R. Division of the Office of Probation interviewed only 30% of the defendants arraigned because of time pressures in the prearraignment period. Moreover, during that time, the court paroled 29% of felony and serious misdemeanor defendants who had not been interviewed by R.O.R. and about whom they had no verified information. Only slightly more (38%) were paroled among a comparable group of defendants having verified r.o.r. reports. These figures and recommendations are based on analysis detailed in the report by Harry Subin entitled "Twenty-four Hour Arraignment in Manhattan," pp. 22, 100, 101.

32. Evening Tribune, San Diego, California, May 25, 1967.

33. The Evening Star, Washington, D.C., September 8, 1967.

34. Judge James M. Carter of the U.S. District Court for the Southern District of California set up a procedure to review the bail of every detained prisoner, automatically, within 72 hours after arraignment, because provisions for review under the Federal Bail Act were not being invoked. And in an unsigned opinion handed down by Judges Warren E. Burger, J. Skelly Wright and Spottswood W. Robinson, III, the U.S. Court of Appeals in the District of Columbia ruled that attorneys appointed under the Criminal Justice Act of 1964

(34. cont.)
would have to provide more than "token" representation for persons awaiting court action. Adequate representation includes following through on applications for modification conditions. Evening Tribune and The Evening Star, supra.

35. House File 128, An Act, General Assembly of the State of Iowa. Sec. 2 (4). "A defendant who remains in custody twenty-four hours after bail or other conditions of release are imposed by a magistrate not a district court judge as a result of his inability to fulfill the conditions of release imposed shall be brought forthwith before the magistrate who imposed the conditions and informed of the defendant's right to have said conditions reviewed. If the defendant indicates he desires such a review and is indigent and unable to retain legal counsel, the magistrate shall appoint an attorney to represent the defendant for the purpose of such review. Unless the conditions of release are amended and the defendant is thereupon released, the magistrate shall set forth in writing the reasons for requiring conditions imposed. A defendant who is ordered released by a magistrate other than a district court judge on a condition which required that he return to custody after specified hours shall, upon application, be entitled to review by the magistrate who imposed the condition in the same manner as a defendant who remains in full-time custody. In the event that the magistrate who imposed conditions of release is not available, any other magistrate in the district may review such conditions."

36.

An Act to add new Sections 591, 591A, 591B, 591C, to Article 27 of the Annotated Code of Maryland, Sec. 591, 5d. Submitted to 1968 Session, General Assembly; An Act to Amend Chapter 903, Florida Statutes, Sec. 2, Ch. 903.02, (5), status (?); Massachusetts Act _____

37. People ex rel. Manceri v. Doherty, 192 NY.S. 2d 140 (Supreme Court, Special Term, Kings County, 1959).

38. According to Blackstone's Law Dictionary (1957), "ambulatory" means "moveable, revocable, subject to change." (p. 106); "interlocutory" means "provisional...temporary...not final." (p. 452).

39. See The People of the State of New York ex rel. Antonio Gonzales v. Warden of the Brooklyn House of Detention. (For correct cite, check H. Subin.) (New York Court of Appeals, 1967).

40. The applicable court rule in New York City reflects case law on this point: "Each defendant shall be afforded an opportunity to obtain his release, pending a determination of his guilt or innocence. To this end, bail shall be fixed in the minimum amount necessary to insure his appearance for subsequent proceedings, and in appropriate cases the defendant shall be paroled." New York City Criminal Court Act, Rule 9.

41. But, note that the New York Court of Appeals currently denied the contention that bail set beyond the financial capacity of the accused is constitutionally excessive where evidence demonstrates likelihood of appearance and the existence of non-financial conditions of supervision. United States Supreme Court did not reach the case in its 1967 session. See People of the State of New York ex. rel. Antonio Gonzales v. Warden of the Brooklyn House of Detention, cited at 39, supra.

42. For example, as noted on page ____ the setting of the hearing was selected by the Department of Correction. Use of the Manhattan House of Detention for the hearing determined much of the content of the review in so far as it closed them to the public - including defense counsel, although the district attorney was present at every bail review hearing.

43. In contrast, the Federal Bail Reform Act requires a waiting period of twenty-four hours before a review application can be heard. The Bail Reform Act of 1966. §3146 (d).

44. In the Spring of 1967 at the request of the Administrative Judge of the Criminal Court, the Vera Institute of Justice submitted a number of recommendations for modifying the criminal court bail review procedure. It was suggested at that time that the Department of Correction be relieved of responsibility for transferring defendants to the hearings. This recommendation was put into effect on May 15, 1967. (It did not effect review in the Supreme Court which already took place on application, outside the presence of the defendant.) Prior to this date judges of the Criminal Court were not authorized to release on recognizance when the defendant was not present in court; instead they sometimes set nominal bail of $1 - a practice based on Penal Law, §1694-6 which required the court to admonish the accused about his obligation to return before releasing him without bail. To satisfy the condition of §1694-6 without returning the defendant to court a written warning was introduced which could be read and signed by the paroled defendant before leaving the detention facility.

45. Bail Review in Criminal Court in Manhattan prior to May 15, 1967 resulted in changes in 15% of the bails reconsidered. The number of reductions which led to release is not known, but is believed to be considerably lower than 15%. In contrast Vera applications in Criminal Court were accepted in 27% of the

(45 cont.)
cases presented, and in the Supreme Court 48% of the cases. See report on Manhattan Bail Reevaluation Project, infra, p._____.

46. See proposed Bail Reform Legislation, §6 (a) Appendix II. In contrast statutory language specifically barring a second review is included in the proposed New York Criminal Procedure Law, §390.40 (3) reported by the State of New York Temporary Commission on Revision of the Penal Law and Criminal Code. In commenting on this limitation, the Commission says, simply, at p.440, that it is "designed to prevent repeated applications to, and 'judge-shopping" among, superior court judges." It does not say why the balance is struck as it is between the evils of "judge-shopping" and those of unnecessary pretrial detention. On the other hand, in §330.60 the proposed code provides that the bail for material witnesses must be reexamined upon application of the witness at any time after the material witness order has been issued. The Commission comments on p. 370, that "after the issuance of a material witness order, altered circumstances sometimes require vacation, modification or amendment of the original order." It does not, however, distinguish in this respect between material witnesses and persons charged with crimes.

47. The Rules of Supreme Court, New York and Bronx County, and the comparable rules for the other boroughs of New York City state that lower court bail determinations will be reviewed in these courts through "motion" in Bronx and Manhattan, and a "writ of habeas corpus or a motion in lieu thereof" in Brooklyn, Queens and Richmond. The procedure allowed in Manhattan evolved informally and is not described in the Rules.

48. Gideon v. Wainwright, (other subsequent cases defining "substantial rights" including most recent case on revocation of probation).

49. Based on conversations with (Legal Aid attorneys?) - (Query: should Legal Aid be cited here by name?) appointed counsel in New York City, 1966-67.

50. For evidence that time-served hinders rather than helps at sentencing, see "Pretrial Detention and Ultimate Freedom: A Statistical Study," Foreward, Patricia Wald; "The Effect of Pretrial Detention," Anne Rankin, 39 N.Y.U.L.Rev. 631 (1964).

51. Wald and Freed, "The Bail Reform Act of 1966: A Practitioner's Primer," 52 Am. Bar Assoc. Journal 940 October 1966. (Hereafter cited as Practitioner's Primer.)

52. Ibid.

53. Under the terms of the Federal Bail Reform Act, §3146 (a) when the bail-setting officer determines that release on recognizance "will not reasonably assure the appearance of the person as required," he shall impose the first of (five enumerated) conditions of release which will reasonably assure the appearance of the person for trial..."

54. Wald and Freed, Practitioner's Primer, 940.

55. Minimum standards for defender systems, adopted by the American Bar Association and the National Legal Aid and Defender Association, standards urge "1)...representation which is experienced, competent and zealous...5)undivided loyalty of defense counsel to client" 1. V. Municipal Court Briefs 2 (June 1965.).

56. In the District of Columbia, for example, the U.S. Court of Appeals held that attorneys appointed under Criminal Justice Act of 1964 would have to provide more than "token" representation for the indigent and defined adequate representation to include application for bail review under the Federal Bail Reform Act. See note 34.

57. Bail Project of the Philadelphia Bar Foundation - Progress Report (February - August 1966); Personal Bail Investigation, Court of Common Pleas, Cuyahoga County (April 20, 1965-April 29, 1967) p. 2; Nassau County Probation Department Annual Report (1966), p. 9. Figures for the San Francisco Project for August 1966 - February 1967 were reported in the Christian Science Monitor (June __, 1967) p. 1; Fitch and Reynolds, The Bail Reform Act and Pretrial Detention, p.__.

58. Subin, "Twenty-four Hour Arraignment in Manhattan," p. 20.

59. The number of defendants considered "recommendable" by Vera staff rose from 29% of those interviewed during the first year of the Project to 65% in 1964. See "Fact-Finding, Release and Summons in Lieu of Arrest," Address by H. Sturz to National Conference on Bail and Criminal Justice, Proceedings and Interim Report of the National Conference on Bail and Criminal Justice (April 1965) p. 45.

60. A partial list of participating organizations includes the following: East Harlem Tenant's Council, Hotel and Allied Services Union, United Organization for the Bronx, Universal-Hagar Spiritual Church, Mobilization for Youth, Dr. White Community Center, New York City Youth Board, New York City Mission, Joan of Arc Community Center, Harlem Teens for Self-Help, East Harlem Protestant Parish, Lower West Side Community Progress Center, and Hopper Home, Women's Prison Association.

61. Residence facilities for persons without resources will probably be difficult to locate. In New York City residence arrangements are extremely difficult to make - particularly for adolescents. The adolescent is eligible neither for a welfare grant to enable him to live independently and under supervision nor for foster care. And, group homes for adolescents are almost nonexistent. Short term private placements were occasionally made in the course of the Manhattan Bail Reevaluation Project, frequently through the intervention of interested church or anti-poverty groups.

62. Freed and Wald, Bail in the United States: 1964, p. 91.

63. N.Y. Code of Criminal Procedure §556.

64. Barry v. United States ex. rel. Cunningham, 279 U.S. 597 (1927).

65. N.Y. Code of Criminal Procedure §618 (6).

66. The practice of re-examining committal orders automatically should be retained. The proposed New York Code of Criminal Procedure, §330.60, provides that re-examinations take place upon application of the witness. Considering the poverty and the lack of effective representation of persons confined under material witness orders, the requirement that they seek review through application seems onerous and unlikely to be effective in providing regular re-examination of the commitment order.

67. It is well known that judges frequently set bail beyond the financial ability of an accused in order to assure pretrial detention and thus prevent repitition of criminal conduct in the pretrial period. This practice, sometimes known as "preventive detention," is not consistent with the constitutional right to bail existent in many states and the purposes of bail as defined in case law; nonetheless, it accounts for a considerable amount of the pretrial detention in the United States.

68. "There is much authority for the view that the right to a presumption of innocence does not accrue until the time of trial, and the phrase describes nothing more than...rules of evidence...." Wigmore on Evidence (Third Edition), sec. 2511.

69. For cases, see 7CJS 872, 334 F. 2d 906. Also, Criminal Law Bulletin (Civil Rights of Prison Inmates).

70. New York City Criminal Court Act, §56.

71. Kenneth Lenihan was responsible for the execution and analysis of the survey and controlled experiment. Data and further analysis are included in an unpublished report entitled "The Effect of Telephone Communication on Release from a Detention Prison" on file at the Vera Institute of Justice.

72. New York City has recently broken ground for a women's detention facility on Rikers Island. A facility for adolescents is also planned. This means that the prisoners will be housed in an area remote from court services, attorneys, bondsmen, and potential visitors.

73. At present there is no visiting on legal holidays in New York City detention facilities. The incongruity of this situation was highlighted when the wife of a well-known union leader, jailed for contempt, attempted to visit him in the Civil Jail on Christmas Day. She was turned away, and the press recorded her reaction sympathetically. "Scrooge must run this city," she said. The Reporter Dispatch, (White Plains, Dec. 26, 1967) p. 44.

74. Common-law relationships are not legally recognized in New York City. However, the status is frequently claimed by prisoners and their families.

75. Rules of New York City Department of Correction, section on visiting.

76. Ibid, sec._____.