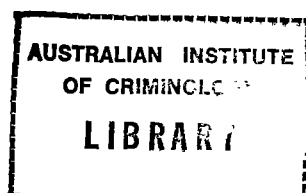


THE ISSUES OF BAIL

Administrative Report

prepared by

The Australian Institute of Criminology



Date: July 1976

This series of Administrative Reports is intended to provide for those charged with decision-making and/or the routine administration of the criminal justice services, a brief background of information on the issues and current thinking.

The reports make no pretence of being full scale research reports and in defining options they are necessarily selective. They do not necessarily represent the official position of the Institute on the subjects examined.

In preparing this report the Institute has had the valuable help of a paper on bail prepared by Roman Tomasic of The Law Foundation of New South Wales and has also referred to articles and reports by Judge A.B.C. Wilson, R.P. Roulston, B. Gateshill, P.G. Ward, the Committee of the Victorian Bail Council, A. Rankin, Dr. N. Parker and the Report of the Working Party on Bill Procedures in Magistrates' Courts Home Office London.

Finally the Institute has been privileged to include as a last item a very valuable and substantial comment on the practical applications of guidelines by Professor Leslie Wilkins, the Institute's Visiting Expert. This provides practical advice on future approaches to the administration of bail.

The Issues

The current discussion on bail systems and their administration in countries like the United Kingdom, Canada, the U.S.A. and Australia centres on -

- (a) the fairness of its application: why are some classes of accused persons granted bail more readily than others and charged with similar offences;
- (b) the effect of not granting bail on the assumption of innocence until proven guilty;
- (c) the invalidity of the assumption that it is possible to predict the future possible behaviour of the person charged;
- (d) the disadvantages of not granting bail - e.g. possible effect on both the likelihood of conviction and the likelihood of imprisonment rather than other sentences.

There is a pronounced movement in these countries to restrict the discretion of magistrates and judges to withhold bail and a growing demand for the establishment of bail as a right available to anyone accused.

Recently, in New South Wales, the granting of bail to a bank robber with a criminal record - which resulted in a further attempted felony and murder, has posed the opposite problem of avoiding liberal bail when there is reason to expect absconding or further offences.

In general the movement is towards the setting of guidelines -

- (a) to restrict discretion;
- (b) to avoid delays in trial;
- (c) to obviate the likelihood of bail being given when the record is serious.

The Arguments

(a) The Fairness of Granting Bail

The use of money bonds as a part of the bail system in the U.S. and Canada obviously favours those able to procure the funds necessary for release. This has enabled rich persons accused of very serious offences including those in organised crime, to obtain bail whilst poor persons accused of relatively minor offences have been held in custody. Canada by Sec. 3 of its Bail Reform Act 1971 which amended the Criminal Code made it difficult to indemnify sureties, the idea being to cut out professional bondsmen. Justice Douglas of the U.S. Supreme Court has pointed out that the idea of the threat of forfeiture of one's goods as a deterrent against breaking the conditions of a release proceeds on the assumption that a defendant has property. But, he asks whether an indigent can be denied freedom where a wealthy man would not because he does not have enough property to pledge for his liberty.

Attorney-General, Robert F. Kennedy, at a conference in 1964 on the subject of bail said that there was a special responsibility to pay attention to the poor i.e., the 1,500,000 persons in the U.S. accused of crime, not yet found guilty but unable to obtain bail and forced therefore to serve a term of imprisonment prior to their guilt being established.

A seminar held in Sydney in 1969 illicited bail statistics in a paper by P.G. Ward showing that $\frac{2}{3}$ of the persons then held in the Metropolitan Remand Centre in Sydney had no obvious history of previous convictions and about a half of those accused i.e., 2,000 in 1968 had spent on the average five to six weeks imprisonment before going to courts.

A Committee of the Victorian Bail Council studying

213 persons held in Victorian prisons on the night of the 17th and 18th October 1970 discovered that about 60% of the persons held in custody had no prior prison record and that a proportion (thought to be the majority) had been held in custody because they were unable to obtain sureties for bail. Needless to say this implied the difference in the social status of those who could obtain sureties and those who could not.

Innumerable studies in the U.S. have demonstrated that a person who is not in a socially advantageous position has greater difficulty in meeting the requirements for bail so that the operation of the system discriminates against those who are least well favoured economically or socially in the community.

(b) The Detriment of Not Granting Bail

Studies have shown that a person held in custody is more likely to be convicted and go to prison than if he was released on bail. Whilst there is much in this which begs the question because of the fact that bail granted might indicate a minor offence, extenuating circumstances or a better social position, it has emerged nevertheless that there is at least^a suggestion that courts find it easier to imprison persons who are already in custody than to impose the sentence upon a person who has been on bail. Some would go further and suggest that even the outcome of the trial is to some extent prejudiced by the appearance in court of a person who comes up from the cells accompanied by warders rather than entering the court from the outside accompanied by his Counsel. Anne Rankin (1964) examined the family background and employment records of defendants arraigned before the Felony Court in Manhattan and found that only 17% of the defendants on bail were sentenced to imprisonment whilst 64% of those not granted bail were sentenced to imprisonment. It was further discovered that the longer a person was in custody before his trial the greater was his likelihood of being sentenced to imprisonment. Later studies which question these findings still maintain that pre-trial detention has an independent

and adverse effect on the defendants sentence. Once again it has to be born in mind that a person held longer in custody may be there because he is the one being charged with the most serious offence or the one with the worst criminal record. On the other hand the research is persuasive and it seems impossible to rule out the operation of subjective factors in the granting of bail and in its effect in subsequent disposal of the case.

(c) The Questionableness of the Ability to Predict Future Criminal Misbehaviour.

The question of whether an offender should be released on bail because of the likelihood of him committing further offences has been one of the crucial issues in granting a release. It has always been assumed that a magistrate or judge knowing his past record or the seriousness of the crime would be in a position to make such a judgement in a reasonable way. However, in recent years not only in connection with release from prison on parole and in connection with release from mental hospitals it has been discovered that there may be only a likelihood of 25% success in this kind of prediction of future criminal misbehaviour. The justice therefore of possibly holding in custody considerable numbers of people who would not commit an offence simply because they are considered to have the potential to do so has been seriously questioned. From a statistical point of view the prediction of future offending even when based upon the best evidence of previous convictions and character includes a number of "false positives". These are persons who look as if they would commit a further offence but in fact would not do so. To incarcerate more for the sake of the few is therefore regarded as an unjust procedure.

The courts' ability therefore to predict future dangerousness is very much brought in question in recent writings on this subject.

Against this there are serious examples of persons having been granted bail only to commit further serious offences. His Honour Judge A.B.C. Wilson of South Australia has given an example of this where an offender had allegedly slashed his wife with a kitchen-knife. As Counsel, he was asked to seek bail in order for the accused to prepare his defense. He succeeded in the bail application upon which the man returned and murdered his wife! Similarly Dr Neville Parker a psychiatrist in Queensland in his studies of murder has shown a number of cases where it was likely that a person would commit the offence but no official action could be taken as a result of which murders took place.

The problem therefore is the extent to which a court knowing its own limited ability to predict a future offence should expose individuals to possible attack. Judge Wilson again has pointed out that in granting bail a court has to take into account:-

- (a) the likelihood of the accused tampering with the witnesses;
- (b) the likelihood of the accused committing further offences whilst on bail. There he explains that particularly as regards say the "assessment of a likelihood of this type involves prediction which is uncertain, unsatisfactory and potentially prejudicial to the interests of the individual" he quotes Everett V. Ribbards (1952) 1 A.E.R. 823 where it was said:-

" It is contrary to all principles for a man to be punished not for what he has already done but for what he may thereafter do".

The recent New South Wales case where a murder was committed by a person on bail who had a previous record poses the issue of whether in the interest of a single life (of a victim) the reasonable likelihood of future offending is a justifiable reason for not granting bail.

(d) The Disadvantages of Not Granting Bail

The prejudice to one's case of not being granted bail has been dealt with above both statistically and psychologically. The greater risk of a finding of guilt and subsequent imprisonment and the possibility of the sentence being longer according to the length of time held in custody has already been shown.

There are of course many other disadvantages both for the State and for the individual. If it be true that in 1968 there were 4,000 persons held in custody in Sydney awaiting trial, a larger number of whom could have been released then the saving to the exchequer would have been considerable. From the individual's point of view, freedom on bail allows the defence to be better prepared, the family to be maintained and prevents the kind of interruption in the work record which might make it more difficult for him to maintain his job.

The Reasons For Granting Bail

The criteria for granting or withholding bail are fairly well known, they relate to a balancing of the interests of the accused and society they may be summarised as follows:-

- (a) Ensuring appearances at the Trial - In R.V. Scaife (1841) 10 L.J.N.C. 144 it was remarked -

"The principle on which parties are committed to prison by magistrates, for trial, is for the purpose of ensuring the certainty of their appearing to take their trial.

In many studies in the U.S. it has been shown that the likelihood of the bailee absconding is much less than was previously supposed and therefore under this criteria it would seem that bail should be granted unless there is very strong reasons that the offender will abscond. In assessing the likelihood of the offender absconding a court will naturally consider the nature of the crime, the strength of the evidence and the severity of likely penalty. In re Robinson 23 L.J.Q.B. 286 it was said that -

"...the test to govern the discretion is the possibility of the prisoner appearing to take his trial: but in applying that test the court will not look to the character or behaviour of the prisoner at any particular time but will be guided by the nature of the crime charged, the severity of the punishment that may be imposed, and the probability of a conviction".

- (b) Seriousness of the Offence - The seriousness of the offence is an obviously important part of the decision made as to whether to grant bail and it seems questionable in cases of murder whether an accused should be allowed bail even where on any other ground it may be permissible. However, there are instances of bail being allowed in the case of murder and it is possible that the seriousness of the offence may be offset by other considerations.
- (c) The Probability of Conviction - Although the person is innocent until proven guilty the authority granting bail may have to take into account the strength of the case against him. It seems that if the case is likely to be very strongly maintained then he will have greater trouble obtaining bail, on the other hand, it could be argued that because the case is strong against him he needs bail in order to prepare a defense effectively. It is this predilection to determine bail upon the projected guilt of the offender which may be linked most closely with the evidence available for the bailee having a better chance of avoiding conviction or a prison sentence.
- (d) Severity of Punishment - Clearly if a person is standing in danger of a severe punishment it can be argued that he would be more likely to abscond if granted bail, on the other hand, this again would presumably be a very strong reason for him needing bail in order to prepare a defense.
- (e) Previous Record - Inevitably a person's previous record will be an important deciding factor in whether or not he should be granted bail, this is perhaps the most telling and least disputed factor in the criteria normally

used for granting bail. Even those who would change the system and grant bail as a right admit that a long history of offending may make it difficult for a court to grant bail. Moreover in the studies which have been done on releases on parole it has been shown that previous convictions are in fact the most reliable guide to future behaviour and therefore although there may be "false positives" it is acknowledged that these are difficult to avoid when the previous record is a guide to the decision-making.

(f) Possibility of Committing a Further Offence

- Presumably this cannot be predicted but is a possibility which might be reasonably drawn from the previous record, the seriousness of the present offence and the strength of the case against the offender. Taken alone it is difficult to use as a factor in granting bail because of the problem of penalising for probable future misbehaviour: taken together with the other factors like previous record, gravity of offence, probability of conviction etc., it is a prospect which cannot be overlooked if the objectives include the protection of possible victims.

General Considerations

Authorities concerned with the bail systems in Australia must take into account the general trend against the capacity of an authority to predict future behaviour and should probably allow for greater modesty by the courts in pronouncing upon the future conduct of an offender. Nevertheless the protection of the public is still a very important factor in the granting of bail. Consideration may

well be given to the possibility of bail being mandatory except where a court finds a good reason to hold in custody in this case the reasons could be stated clearly. Secondly, evidence is accumulating that far more people could be released on bail than those who are now granted bail without interfering with the criteria for the granting of bail. It would seem appropriate that judges and magistrates should be made aware of the numbers of persons held in custody and that the police could be given instruction in the extent to which bail might be more liberally used. It seems likely as a trend that there will be far less persons denied bail in the years ahead with the greater emphasis upon community solutions rather than incarceration.

Within limits it should be possible to specify guidelines for the granting of bail on the basis of a graph showing the gravity of offences on one axis and the risk (i.e. criminal record) on the other axis. This has already been done for parole. A points system has also been applied for bail in the United States.

A RESPONSE TO THE REPORT

By

Leslie T. Wilkins

1. I have read with considerable interest the Administrative Report (July 1976: Institute of Criminology) ISSUES OF BAIL. I was particularly attracted by the suggestion in the final paragraph that the provision of "guidelines" might be explored. In my opinion there is no doubt but that the approach provided by the development of "guidelines" could be applied to many of the problems noted therein and could be a most valuable assistance in decision-making regarding the granting of bail. I would also endorse most strongly the idea that experience with the use of "guidelines" in parole decision-making might indicate the style of attempting a model for the granting of bail in Australia.

2. Bail in the United States has been investigated and commented upon by countless authorities and the Report summarises the general trends of these inquiries. I understand that it has been suggested that the points system known as the Manhattan Bail Scheme (or Vera) might be adopted in Australia. I would not recommend this for two reasons. Bail in the United States is tied in with commercial bonding practices and the Manhattan Scheme functions in this environment. This is not the environment in Australia. The different environment suggests a different approach. Secondly, the Manhattan Scheme is based on too simple a single dimensional score.

3. There are, at least, two other models which are, in my view, superior to the Manhattan Bail Scheme and which might be more appropriately adapted to Australian conditions. One of these is the system developed originally in Washington D.C. and later extended quite widely, known as PROMIS, the other is the parole system method. PROMIS is specifically tailored to

issues of speedy trial and prosecution management. It may be that the question of speedy trial should be seen as associated in some ways with the issue of bail and with prosecution management and court scheduling. However, this would be an extension of the concerns as at present noted. Furthermore, no matter how that extended question may be seen, I would still hold to the view that the most satisfactory model for guideline development for bail determinations would be an adaptation of the guidelines which have been used by the United States Board of Paroles for some three or four years. Perhaps I might explore this possibility a little and raise some further questions in relation to the feasibility of guidelines for decisions with regard to the granting of bail in Australia.

Guidelines for Decisions regarding Bail

4. The three types of guideline models currently in use in the United States, (and others which are currently in the testing stages), are highly specific. Mere verbal guidelines do not seem to meet the problem. Some basis in hard factual data which is interpreted in some numerical form seems to be an essential ingredient of effective guideline models. This is at its simplest level in the Manhattan Bail System and perhaps at its most sophisticated in the guidelines used by the United States Board of Paroles (now known as the Parole Commissioners for the United States). I must stress that the guidelines for bail determination must be tailored both to the particular circumstances of bail and to the particular situation in Australia. The model provided by parole decision guidelines is useful only as a general indication of the method to be explored and developed to deal with specific issues.

5. Although the decision to grant parole is of a different kind from that of the granting of bail, the considerations

are rather similar. Parole is not to be granted where:-

- a) there is a substantial risk that the petitioner will not conform to the conditions of parole;
- b) his release would depreciate the seriousness of his crime or promote disrespect for the law;
- or c) his release would have a substantially adverse effect on institutional discipline.

6. The first criterion relates, in the main, to the assessment of the probability that the offender will commit another crime. The second suggests that there is an "expected amount of punishment" and that a very much reduced period of incarceration would "depreciate" the seriousness of the crime for which he was committed. The third category does not seem to have any related significance in respect of the granting of bail, except perhaps that the support of police opinion is relevant. It is also possible that the second category might be debated as a satisfactory criterion for the granting of bail. However, it seems likely that the public does have an expectation that persons who are charged with the most serious crimes will be held in custody, even though the probability that they would offend while on bail or fail to appear for trial is assessed as very low.

Acceptability of the Concept and Use of Guidelines

7. The guidelines of the United States Board of Parole have been tested in the United States courts in many different ways and not only has the constitutionality been upheld, but the courts have commended their use. Further, a Senate Bill was recently reported out of Committee with the following terms -

"The organisation of parole decision-making along regional lines, the use of hearing examiners to prepare recommendations for action, and, most importantly, the promulgation of guidelines to make parole less disparate and more understandable has met with such success that this legislation incorporates the system into statute, removes doubt as to the the legality of

changes implemented by administrative reorganisation and makes the improvements permanent". (1)

8. Earlier a decision by the Federal District Court of Connecticut⁽²⁾ in a Memorandum of Decision made the following comments -

"These cases present interesting issues concerning the procedures used by the United States Board of Parole in reaching and explaining its decisions concerning parole. The issues arise because the Board, though not constitutionally required to give any reasons for its decisions (Menechino v. Oswald, 430 F 2d. 2nd Cir 1970) has commendably adopted a new procedure designed to promote rationality in the decision-making process and to enhance understanding of the process by all concerned. ... Key ingredients of the new procedure are (a) the use of a table of guidelines as an aid to deciding the appropriate length of time a prisoner should serve before being paroled ..."

9. The guidelines of the United States Board have been in use for about three years and there is no doubt as to their acceptability to the judiciary and the legislature as well as to the administration of prisons and to the Board itself. The table of guidelines is more complex than those used in the so-called Manhattan Bail Project (Vera) and apply much more generally, since all cases coming before the Board are examined in terms of the guidelines, whereas the Manhattan guidelines are applied only to selective cases.

10. It should be emphasised that the parole guidelines are designed to be explicit and self-modifying so that the procedures are not enshrined in any mysticism nor will they tend to result in any rigidity in the decision-making processes. It is not appropriate here to go into the details of the procedures since, as has been noted, any procedures for bail will have important differences. I note the system in general terms because, as I have said, I think that it offers a better method of approach to the questions of bail now being raised in Australia than would be afforded by an adaptation of the Manhattan Bail scheme.

The Utility of Guidelines

11. It may reasonably be claimed that the development, promulgation and use of guidelines addresses adequately one of the major concerns of bail, namely, that of equity. (See page 1 of Report). Persons of similar backgrounds, charged with similar offences are indicated by the guidelines for similar treatment. Thus we can avoid one of the significant aspects of public criticism. A further advantage of the use of guidelines is to provide a logical constraint to public criticism in specific cases ("dramatic incidents"). Any public criticism of guideline-based decisions will tend to be directed at principles rather than isolating individual decision-makers for personal attack. The individual decision-maker can point out that principles are involved and that any other decision would have violated these principles. An argument with regard to the proper principles to be invoked can assist decision-makers, whereas an individual and personalised attack is unproductive.

12. If guidelines for bail determinations in Australia are developed along the lines of the United States Parole Commissioners guidelines, a continuous reassessment is built into the design. Accumulating experience is thus utilised in modifications of the guidelines. Public and other criticism (e.g. Memoranda by Courts) can be taken into account in these reassessment exercises. The machinery for such reassessment will, of course, have to be worked out in the course of any project to adapt the model to the particular problems in the several states of Australia. It must be noted, however, that the guidelines are designed to be a tool of management which can be modified in a variety of ways to accommodate changes in the situation, law, increasing scientific knowledge or even public attitudes. No guidelines model is satisfactory unless it has built into it a self-regulatory sub-system. The United States Parole Commissioners guidelines structure has such a self-regulatory sub-system. It may be that a similar system could be developed for bail guidelines or it may be that a rather different approach would be necessary in order to achieve this end.

HOW TO BEGIN

13. Let me assume that the basic idea of the development of guidelines along the lines suggested commends itself to those concerned. What are the first stages in preparing this tool of management? Perhaps it should be noted that there are several elements which need to be involved - there are research elements, administrative elements and there are procedural and jurisprudential elements which must be taken into consideration.

a) Some Preliminary Questions

14. Before we can begin to consider how to utilise the guidelines model -- either the parole model or other - there are several issues which cannot be resolved by research staff. These questions are noted below. Many may have simple answers which are unknown to the writer who is, at this time, relatively unfamiliar with Australian law and practice.

- a) Is Bail often granted, but the individual unable to raise the funds? If so, what are the characteristics of such cases?
- b) What are the presumptions regarding bail? Are there any statutory limitations or limitations from precedent?
- c) How much is the problem regarded as related to extremely rare events? (There is a requirement that some statistical data are available in relation to the recent past general experience).
- d) Is the concern about bail really limited to violence potential? In other words, is the failure to appear regarded as relatively insignificant where the individual has not been charged with a crime against the person?

- e) What is known about those who do not appear?
(In some places it has been ascertained that the individual often did appear but was not in the right court within the building. Witnesses also often get lost in court buildings).
- f) Are there figures of the cost and effectiveness of warrants issued on non-appearance?
- g) What would be the procedure for implementation of any rules or guidelines which might be produced?
- h) Is it possible that a central data base could be established for monitoring any guideline system which might be developed with a view to its continuous review, up-dating and improvement?
- i) What is the relationship (if any) of the problems of bail/no bail to the problems of speedy trial?
- j) Are data available with regard to time awaiting trial and the conditions under which this applies?
- k) What bodies (statutory or other) would it be desirable to include in any investigation of the feasibility of guidelines?

15. It is not necessary to assume that all the above questions can be answered or that they are answered in any particular way before work could proceed. Some have an impact upon the techniques which could be used, others upon the strategy of research, development and continuing review processes which would be required for a satisfactory solution.

b) The Basic Problem of Objectives (Criteria)

16. The most significant issues are those concerning the criteria. What precisely would the guidelines be expected to achieve? It is possible to state a number of probable items which might be considered, and it may be that there will not be complete agreement between all parties concerned about all items. Lack of concordance is not a bar to research nor to

the provision of guidelines as such, although clearly the nature of the criteria will influence the style and design of any models which could be prepared.

17. The criteria issues already addressed in the Administrative Report seem to be:-

Bail would be contra-indicated in cases where

- a) the instant offence was rated as very serious,
- b) a prior offence for which the accused was found guilty (or arrested?) was of a very serious nature,
- c) there was some probability that witnesses might be interfered with by the accused,
- d) there was a probability that new offences would be committed while on bail,
- e) there was a probability that the accused would not appear at the trial,
- f) the accused had a long prior record (but not one which met criterion (b) above) and
- g) had previously "jumped" bail.

The above list may not be exhaustive and it may contain some items which would not be considered as contra-indicative of the granting of bail.

18. It would be necessary for research staff to be informed of the validity of the above items and of any further considerations which should be added thereto. If possible, the relative strengths of the consideration (weight) should be indicated. If a ranking or weighting is not possible, then perhaps a list could be divided into three parts - heavy consideration; medium weight; little or no weight.

19. There is a particular concern in cases where there is a record of mental health problems, whether in terms of voluntary or statutory patient status in mental institutions or care under a psychiatrist or other medical practitioner concerned

with "mental health" treatment. It might be reasonable to distinguish certain kinds of mental difficulties. For example, mere mental deficiency (low I.Q.) would not, presumably, be regarded as a contra-indicator for the granting of bail unless there were other factors of note in the case. The main difficulty in such cases seems to be how such data might be expected to become available to the persons making bail determinations.

c) The Problem of Sureties

20. In what way, if at all, is the matter of bonds, sureties or other guarantees to be taken into account? Is there any information which suggests that bonds tend to result in a higher probability of appearance than mere "own recognisances"? Is there any suspicion that high bonds generate thefts to raise funds? Do we know who usually is the bond agent? Is there any evidence that certain kinds of bonds are preferable because they result in fewer "jumpings"?

21. Clearly the fixing of a sum which cannot be raised by the accused is operationally equal to a refusal of bail. Similarly a requirement that a third party go surety in a certain sum of money may, at times, be tantamount to a refusal of bail. It could be possible for any system of guidelines to be made nugatory by the setting of sums of money or by making other conditions apply to cases who might qualify under the guidelines. On the other hand it might be considered that the provision of a satisfactory bond was a necessary condition to bail. These matters will need to be decided in principle by appropriate authority. For the purposes of continuing an uncomplicated discussion of a model, let us suggest a compromise on this point. In straightforward cases bail may be granted or refused without consideration of bond (or, perhaps "own recognisances" would be regarded as sufficient). In marginal cases the provision of a third party bond might swing the balance from refusal to the granting of bail. Thus the bail decision will be considered in three categories for

purposes of exposition, namely,

- i) bail (no bond beyond own recognisances)
- ii) bail granted provided that satisfactory bond can be posted (or similar sureties found)
- iii) bail not granted.

The central category (ii) should be carefully studied and the outcomes analysed to provide feed-back with a view to changing these procedures when sufficient evidence is obtained to justify a modification. It would also assist in the analysis if in the marginal cases the authority granting bail noted the reasons for the selection of the particular form of surety or the amount of bail fixed. It would, of course, be most important to know for these categories of persons whether they appeared in court, and whether their conduct on bail was or was not totally satisfactory. It would be expected that only a small proportion of cases would fall within the marginal category and thus that the provision of reasons for the decision would not be onerous or time consuming.

AN EXAMPLE OF A SIMPLE TABLE OF GUIDELINES

22. On the assumption that there are three considerations of significance in the granting of bail, namely, the seriousness of the offence charged, the prior record and the probability of appearance without committing (another) crime, the following guideline table might indicate how the model might appear.

EXAMPLE OF THE STYLE OF GUIDELINE TABLE
WHICH COULD BE PROVIDED

Seriousness of offence charged (or most serious prior offence)	Probability of appearance (if granted bail) plus probability of committing crime (to be determined by actuarial research)			
	High	Medium	Low	Very low
Low	bail	bail	bail	bail with sureties
Low Medium	bail	bail	bail with sureties	refused
Medium	bail	bail with sureties	refused	refused
High	bail with sureties	refused	refused	refused
Very high	refused	refused	refused	refused

23. The levels of seriousness would exceed the five categories used in the illustrative table, but it would not seem necessary to define more than six or seven categories. The advantages of a two-way table may be seen in that a seven by four categorisation provides 28 individual classifications, and a seven by five would provide 35 individual classifications. Finer grading would not seem to be necessary. The level of seriousness might be determined in the first instance by limited research related to legislative codes or by some such list as that given in Appendix 1. As the tables begin to be put into use, the list of offences and their relative ratings of seriousness could be extended and modified. The seriousness scale is, of course, subjective. It is not expected that there would be any real difficulty in establishing this scale since six or seven categories do not call for fine discrimination. It is known that persons from quite different social groups tend to agree upon the relative seriousness ratings for crimes.

24. The probability scale could be as detailed as required but the number of categories would best be determined by the observed "power" of the prediction base. Initial explorations could begin with the use of subjective probabilities but there is overwhelming evidence that "clinical" (i.e. subjective) estimation of probabilities is far less reliable than actuarial methods. There are problems with prediction of probable behaviour as noted in the Report.

ESTABLISHING PREDICTION FACTOR SCORES

25. The problem of "false positives" (see Report page 3) is not limited to cases where estimations are made by statistical or similar methods - any predictive statement or decision which implicitly relies upon estimation of the likelihood of future events will have errors of two kinds. The event may be predicted and not happen, and the event may not be predicted and yet happen. These two kinds of errors are recognised in the commercial practice of quality control as "consumer" and "producer" risks. Statistical prediction methods make the relationship of these errors explicit but they cannot be avoided by using "clinical" or any non-statistical prediction. These errors and their effects are as much or more present where the basic probabilistic reference of the decisions is not stated.

26. The impact of the two kinds of error (the false positives and the false negatives) which arise from any predictive basis of inference and decision are serious, but the matter is not so serious in the proposed model because predictive statements form only one axis of the decision guidelines chart. In general it may be stated that where the estimate of a probability is only one of two or more dimensions in a decision* the problem is alleviated but not eradicated.

* Note that a "dimension implies much more than a "consideration".

27. It would seem that there are jurisprudential arguments which can be put forward to justify certain ways of treating the problem of false positives.** It is possible to see it as a fundamental human right that persons shall not be treated as "false positives". But perhaps this right, (as with other rights and privileges) may be considered in law and practice to be eroded by prior or current criminal behaviour. For example, persons in prison and on parole conventionally lose certain civil rights, as, say the right to sue for damages. By this form of argument we may come to terms with many of the problems of "false positives" as these arise from the overt use of predictive devices. We might regard it as morally acceptable that persons who have already a criminal record should not be entitled to the same level of protection against treatment as a "false positive" as persons who (at the time of applying for bail) have no known criminal convictions. Furthermore, the extent to which false positives might be tolerated could be closely related to (a function of) the seriousness of the proven criminal career.

28. If the concept of rights and privileges can be attached to the problems of false positives there would be no difficulty in operationalising the depreciation of the right in terms of length and seriousness of the criminal record. The same scales of "seriousness" which would need to be developed for other purposes could also be used for this.

29. A difficulty which will need further exploration is concerned with the predictability of certain kinds of offences. It is possible to derive fairly good predictability of the

** It is, of course, mainly the false positives which present a problem in terms of justice; the false negatives are usually related to a concern for efficiency. By analogy we are much more concerned that the innocent shall not be found guilty (false positive) than we are concerned that a guilty person might be permitted to go free (false negative).

probability of recidivism where the new crime is not specified as to form. Prediction of recidivism to crime against the person is much less satisfactory for two reasons

- a) the frequency of violent behaviour is small in proportion to all crimes, and
- b) on all profiles the violent offender tends to look more "normal" than the thief, housebreaker and robber.

A person granted bail might be expected to avoid all forms of crime while awaiting trial and not merely crimes of violence and the practical significance of this problem may be small at this stage.

30. Not only should the suspect avoid crime while on bail but he should appear in due course in court. It would seem that a conjoint probability would be the best form of estimation. For example, the probability of one coin tossing turning up heads is $\frac{1}{2}$; the probability of another coin turning up heads is also $\frac{1}{2}$; the probability of two coins both turning up heads is $\frac{1}{4}$. Coin tossings are, of course, independent events and the probability of committing a crime while on bail and the probability of appearance in court may not be independent. There is, however, a possibility that the false positive problem might be alleviated by the use of conjoint probabilities. The necessary assumptions for the use of joint probability are met for most of the kinds of bail decisions which might be considered.

31. Initially it might be desirable to examine the feasibility of different tables. For example, we might examine tables for

- 1) Seriousness of offences with the probability of committing a crime while on bail;
- 2) Seriousness of offences with the probability of not appearing in court.

It seems unlikely that a person who commits a crime while on bail will "appear" in any usual meaning of that term. It would be expected that he would probably not appear, but that

he would have no option being presumably under arrest for the (new?) crime. By this definition almost all cases of offences on bail are "non-appearances".

Conclusion

32. In summary, I believe that guideline tables for the granting of parole are feasible and I would recommend that a number of two-dimensional models be explored. I note that such models have been used for the last three years by the United States Board of Paroles (Parole Commissioners) and that these methods have been commended by the courts and the legislature in that country. It is most important that the development of the tables be carried out in full collaboration with those who will be most concerned with their use. Procedures for continuing review are an essential element of the design of such guideline models.

An Illustrative Classification of Offences by Seriousness

LOW SERIOUSNESS CATEGORY

Minor thefts
Simple possession of stolen property
Leaving the scene of an accident
Shoplifting (Value of property involved
less than \$500)

LOW MODERATE CATEGORY

Counterfeit currency (less than \$1,000.00)
Drug violations (simple possession of "non-hard"
substances)
Forgery or fraud of less than \$1,000.00
Income tax violation less than \$10,000.00
Theft of mail of less than \$500.00

MODERATE CATEGORY

Counterfeit currency of over \$1,000.00
Drugs (possession of "non-hard" with intent to
sell)
Embezzlement of less than \$20,000.00
Bribery of public officials
Receiving with intent to sell up to \$20,000.00

HIGH MODERATE CATEGORY

Theft of motor vehicle (not "joy-riding")
Embezzlement of over \$20,000.00
Other thefts not noted above

HIGH CATEGORY

Burglary (no weapons)
More serious drug charges than noted above
Transportation of stolen goods
Forged securities (between \$20,000.00 and \$100,000.00)
Organised vehicle theft

VERY HIGH CATEGORY

Robbery with weapon or threat (not fired/no
injury)

Extortion

Sexual acts with use of force (no major injury)

MOST SERIOUS CATEGORY

Kidnapping

Murder

Robbery with use of firearms

Espionage

Aircraft hijacking

Note: It would not be necessary to specify all possible kinds of offences since others not listed in any reasonably extensive list could be estimated by comparison with those given.

The above list is not presented as adequate even as a first approximation for actual use. The working out of such a table would be one of the first steps in the preparation of guidelines.

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