Bail
Issues and Prospects

Including a proposed guideline model

W. Clifford and L.T. Wilkins

Australian Institute of Criminology

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FOREWORD

This report grew out of a previous Administrative Report of the Australian Institute of Criminology. Since the publication of the Administrative Report comprising a survey of the bail issues by the Director of the Institute, Mr. W. Clifford (with the assistance of Mr. R. Bird), and a commentary by Professor Leslie Wilkins, the authors have been in touch with the investigators into bail proceedings in New South Wales, and with authorities in other States preparing or considering revised legislation on the subject. From these discussions the present expanded study has emerged.

The authors have had the advantage of access to the papers and publications of all those to whom credit was given in the original Administrative Report, namely Roman Tomasic of the Law Foundation of New South Wales, 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 Bail Procedures in Magistrates' Courts, Home Office, London.

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SECTION I

GENERAL ISSUES OF BAIL

By

W. Clifford

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 who are 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. More particularly there is a growing aversion to bail being set in money terms with or without sureties in such a way that the question of bail or not becomes a question of financial standing.

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. Evidence has also been given in Australia of many drug traffickers absconding whilst on bail despite the high amounts of the securities required.

On the one hand bail should be fairly administered and not withheld without good reason. On the other hand there are many good reasons in particular cases

why bail may not be granted. Unfortunately these are not the only questions of which a court must take cognizance and bail has frequently become a key issue in the balancing of human rights and social defence.

This accords with experience in other countries especially where the courts are over-burdened and have to delay hearings. If remand centres are overcrowded and/or court lists are too long to be expeditiously proceeded, the judges or magistrates may be constrained to take risks with bail which they appreciate should not normally be taken. Where more offences are being committed by bailed offenders it is sometimes because it has not been possible to deal with them for the original offences and because there could be no justification for keeping in custody for long periods persons awaiting trial and still therefore entitled to be regarded as innocent until proven guilty.

Bail, to be a useful and just method of providing for the adjournments and delays which are sometimes necessary, has to be fair to both the accused and the public: it has to be administered with an even hand and, in justice, not offered to some but not to others without the reasons being clear and declared. It must be a system which can be relied upon by any person who is charged with an offence which cannot be immediately dealt with either because of extra time needed by the prosecution or extra time needed to prepare the defence. At the same time bail must have the effective sanctions necessary to ensure the appearance of the accused at his trial, to discourage absconding and to protect the public.

The movement, wherever there have been studies or reviews of bail, seems to have been towards the setting of specific guidelines in order -

(a) to restrict discretion;

(b) to avoid delays in trial;

(c) to obviate the likelihood of bail being given when the criminal 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 while 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 happen to 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 elicited bail statistics in a paper by P.G. Ward showing that $^{2}/_{3}$ 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 in custody 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 inter alia 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.(1)

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(1) See Eugene A. Landis, Jr. "A Survey of Bail in the United States: Historical Development, Problems, Reforms and Importance to the Police Profession," Police v.10 (6) July/August 1966.

Also Caleb Foote: Introduction: "The Comparative Study of Conditional Release." University of Pennsylvania Law Review, v. 108, No. 3, January 1960, pp. 290-304.

(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 defendant's 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 which introduce discrimination into the granting of bail and 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, and not only 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 brought very much into 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 for this person Mr. Wilson (later Judge Wilson) was asked to seek bail in order to allow the accused to prepare his defence. 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 commiting further offences whilst on bail. There he explains that particularly as regards say the "assessment of a likelihood of this type involving prediction which is uncertain, unsatisfactory and potentially prejudicial to the interests of the individual" he quotes Everett v. Ribbands (1952) 1 All.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 large 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.

(e) Sureties, Bonds or Guarantors

It has seemed reasonable since the days of compurgation and collective responsibility for a person to find others who would vouch for him if he entered into a debt or bond. The bond or contract with a court by which an accused undertakes to present himself at a future hearing was no exception. Whether in terms of money or promises a person to be bailed often has to find sureties for his good behaviour - people who will render themselves liable if the offender does not appear.

In practice this has not worked very well partly because the circumstances of modern urban life have diverged so much from the largely rural peasant or guild type of life for which the bond and surety system was originally designed; and partly because it has seemed unfair to penalise someone who has offered his support to a friend or relative only to be let down by that person. The estreatment of bail i.e., making the surety pay for non-appearance of the accused, has been practised less and less in the countries considered here. The main reason has been a change of climate with changes in education and family life. It is difficult today for one person to have any great hold upon another - not even parents can genuinely guarantee their children and employers cannot compel employees as they once could. This leads to the view that sureties should not be expected. The system is likely to be costly and cumbersome without being effective.

If on the other hand society is looking for more community solutions and wishes to encourage neighbours, relatives and friends to take more interest in what happens should the effort not be made to find more reasonable ways to involve people as sureties. Would people take more interest in each other if they were expected to vouch for each other? Is this a trend which bail can foster and encourage by means of sureties?

These are gradations of surety which might be presented as follows:-

1. Accused is presented with writ or summons to appear (nothing else);

2. Accused is expected to swear that he will appear (penalty if fails to show may be determinate or indeterminate);

3. Accused is released on his own bond with a promise to pay if he does not appear;

4. As (3) but a percentage of the total bond is paid;

5. As (3) but the total sum set is paid into court;

6. Some guarantor is to be found who swears that accused is of good record and that he will appear. (Might be proceeded against if accused failed to appear, particularly if the sworn statement was believed to contain falsehoods);

7. Guarantor pays a percentage of a sum of bond;

8. Guarantor pays the total sum of bond (refunded if accused appears).

This list could be extended.

Whatever view one takes of the value and justification of sureties it would seem that unlimited quantities should not be required. Any person offering to stand surety should know what he will have to pay or suffer if the accused fails to appear. In Sweden this is frequently calculated on the basis of "day fine" which means the equivalent of one day's earnings. A person is expected to pay so many "day's earnings" as the court may determine. This could readily be adapted to the bond used for bail - a person's obligation (if he failed to appear) being fixed at one, two, or up to twelve days earnings. A surety's liabilities could be similarly calculated.

It is obviously undesirable -

(a) to fix an amount so high that it will lead to the accused being kept in custody. Instead bail should be refused (since this is the real intention);

(b) to continue with a system of sureties if in practice the sureties cannot be held fully liable and if they are rarely called upon to pay when the accused does not appear through no fault of theirs. Here the best course would be to discontinue the practice.

If the system of sureties is to continue it should either serve the community objectives mentioned and be viewed as a public service not a liability - or its terms should be so limited and clear that they can be readily enforced. It should not be overlooked that if the system of sureties were completely discontinued failure to appear for trial or after an adjournment would normally be a further offence which could be dealt with when the offender is apprehended - whether or not he was found to be guilty of the charge which led to the initial bail. Presumably a person who has once "jumped" bail has generally forfeited his right to future bail.

Finally, vagrants or people of no fixed abode who are so frequently held in custody in a prison might be better served and less disadvantaged if there were specified hostels to which they could be sent on bond until they have to appear in court. These could be special "surety" hostels or perhaps hostels which normally offer emergency accommodation and which could set aside a few beds for this purpose. Either way the State would save on the far higher costs of holding in a prison or remand centre.

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 criterion it would seem that bail should be granted unless there are very strong reasons for believing 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 the likely penalty. In re Robinson 23 L.J.Q.B. 286 it was said that -

> "...the test to govern the discretion is the possibility 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 taken 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 defence 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 defence.

(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 inferred 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 system 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 at regular intervals of the numbers of persons being 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 fewer 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. The new procedures which have been researched and are now in operation in various countries prompted the author to take advantage of the presence in Australia of Professor Leslie Wilkins of the New York State University at Albany N.Y. as a Visiting Expert of the Australian Institute of Criminology. In the sections which follow Professor Wilkins examines the models and procedures available.

S E C T I O N II

THE GUIDELINE MODEL

By

Leslie T. Wilkins

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 of bail and could be a most valuable assistance in decision-making in criminal justice. I would also endorse most strongly the idea that experience with the use of "guidelines" in parole decision-making indicates the style of attempting a model for the granting of bail in Australia.

Bail in the United States has been investigated and commented upon by countless authorities and the initial section of this report summarises the general trends of these inquiries. It has been suggested by some authorities that the points system known as the Manhatten 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 Manhatten Scheme functions in this environment. This is not the environment in Australia. The different environment suggests a different approach. Secondly, the Manhatten Scheme is based on too simple a single dimensional score.

There are, at least, two other models which are, in my view, superior to the Manhatten 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(2), the other is the parole system method. PROMIS is specifically tailored to issues of speedy trial and prosecution management. There is no doubt 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.

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(2) PROMIS: Prosecution Management Information System

GUIDELINES FOR DECISIONS REGARDING BAIL

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(3). This is at its simplest level in the Manhatten Bail System and perhaps at its most sophisticated to date 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(4). 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.

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;

(c) his release would have a substantially adverse effect on institutional discipline.

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

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(3) That is to say, some form of "points" system is needed.

(4) There may be a need for different forms in different States.

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

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 legality of changes implemented by administrative reorganisation and makes the improvements permanent".(5)

Earlier a decision by the Federal District Court of Connecticut(6) 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. 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..."

(5) Senate Report 94-648 (94th Congress)(2d) Parole Commission and Reorganisation (p20) Washington D.C.

(6) Lupo v. Nuton and Zagarino v. Attorney-General of the United States, Federal District (2d) Connecticut. 1970(430).

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 Manhatten Bail Project (Vera) and apply much more generally, since all cases coming before the Board are examined in terms of the guidelines, whereas the Manhatten guidelines are applied only to selective cases.

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, and 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 Manhatten Bail Scheme.

THE UTILITY OF GUIDELINES

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). 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.

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 in 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

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

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, others are of weighty moral concern, and perhaps can be determined only in a somewhat arbitrary manner.

i. Is bail often granted, but the individual unable to raise the funds? If so, what are the characteristics of such cases?

ii. What are the presumptions regarding bail? Are there any statutory limitations or limitations from precedent?

iii. 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).

iv. 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?

v. What is known about those who do not appear? (In some places it has been ascertained that on occasions the individual did appear but was not in the right court within the building. Witnesses also have been known to get lost in court buildings).

vi. Are there figures of the cost and effectiveness of warrants issued on non-appearance?

vii. What would be the procedure for implementation of any rules or guidelines which might be produced?

viii. 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?

ix. What is the relationship (if any) of the problems of bail/no bail to the problems of speedy trial?

x. Are data available with regard to time awaiting trial and the conditions under which this applies?

xi. What bodies (statutory or other) would it be desirable to include in any investigation of the feasibility of guidelines?

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)

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.

The criteria issues already addressed in the first part of this 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.

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.

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

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 recognizances"? 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"?

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 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 purpose 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 recognizances" 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 recognizances);

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 be necessary for the analysis that 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

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. (See table next page).

EXAMPLE OF THE GENERAL FORM OF
A GUIDELINE TABLE

Seriousness of offence charged+ (or most serious prior offence, if greater)	Conjoint Probability of failure to appear and Probability of Committing (another) offence in a Time Interval*				
	Very High	High	Medium	Low	Very Low
Very minor offence	**				Own recog-nizance
Minor offence	**				
Low Medium Seriousness					
Medium Seriousness					
High Seriousness					
Very High Seriousness	Bail Refused				

Most worthy of Bail

Least worthy of Bail

Notes: + A rating scale for a typical set of offence categories would be required. The numbers and types of examples in each category should relate to the legal code(s) which apply.

* To be determined from past experience by research.

** Entries in cells would be "Own Recognizance"; "Bail on Bond"; "Bail Refused" or similar options. The ratio of refused to granted bail would initially be set to accord with current practice as the general constraint. An equation (using the categories) would provide the necessary smoothing and relative weights to the two dimensions.

The levels of seriousness might exceed the six 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 five categorisation provides 35 individual classifications, and a seven by four would provide 28 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 in Appendix I. 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(7).

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 overwelming evidence that "clinical" (i.e. subjective) estimation of probabilities is far less reliable than actuarial methods. There are, of course problems with prediction of probable behaviour as noted earlier.

ESTABLISHING PREDICTION FACTOR SCORES

The problem of "false positives" (see page 4) is not limited to cases where estimations are made by statistical or similar methods - any predictive statement or decision which implicitly or explicitly 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.

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(7) See for example Sellin T and Wolfgang M. "Measurement of Delinquency". New York, Wiley, 1964.

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(8) the problem is alleviated but not eradicated.

It would seem that there are jurisprudential arguments which can be put forward to justify certain ways of treating the problem of false positives(9). 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(10)

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.

A difficulty which will need further

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(8) Note that a "dimension" implies much more than a "consideration".

(9) 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).

(10) See also, Wilkins L.T.; 'Current Aspects of Penology'. Proc Amei Phil Soc, 118(3) pp. 235-247.

exploration is concerned with the predictability of certain kinds of offences. It is possible to obtain fairly good predictability of the 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.

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 ½; the probability of another coin turning up heads is also ½; the probability of two coins both turning up heads is ¼. 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.

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

1. Seriousness of offences (by) the probability of committing a crime while on bail;

2. Seriousness of offences (by) 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".

In summary of the general argument, 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 have noted 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.

SECTION III

SOME POSSIBLE OPERATIONAL PROCEDURES

By

Leslie T. Wilkins

In Section II we discussed the feasibility of constructing guidelines for the determination of release on bail. This Section begins with the assumption that the basic concepts offered in Section II are considered to be worth exploring further. It is also assumed that the procedural issues raised in respect of the construction of guideline charts can be met.

Given that it is possible to construct guidelines and that their use does not seem to infringe any legal or moral constraints, we might begin to speculate as to how such a system might work in practice. Any system for the operational use of guidelines has to ensure that they are subject to continuous review. It is also intended that there should be some flexibility in their use. The need to avoid rigidity means that there must be provision for departures from the guidelines when such departures are justified.

DEPARTURES FROM THE GUIDELINES

The guidelines, in whatever form they are developed, are intended as an aid to decision-making rather than as a means of control of individual decisions. Control of bail decisions is to be exercised at all times by the appropriate judicial body(11).

The control of the bail decisions involves two forms of control:-

1. control of individual decisions;
2. control of policy decisions.

There is no need for individual decisions to duplicate any of the operations or considerations which have already been made at the policy level. The policy level relates to the statement of general decision rules which will normally include the majority of cases. Although it may be expected that the decision rules will cover most cases, care has to be taken that individual cases are not forced to fit the general policy. In other words, for the

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(11) For discussion of the possible form of this authority see paragraph below.

majority of cases it may be expected that the guidelines (by reason of their construction) will be based on information sufficiently descriptive of the case and hence adequate to determine the decision. It has to be recognised, however, that it is necessary to allow for the unusual cases where there are peculiar mitigating or aggravating factors. By definition such mitigating or aggravating factors relate to individual case (not policy) information and to information which is not included in the construction of the guidelines. How then do we deal with these unusual cases? Let us consider some examples of abnormal cases and attempt to derive some appropriate methods for dealing with them.

Perhaps the most frequent cases of aggravating factors which are not specifically covered by the guidelines as now proposed are those cases where there is good reason to believe that there would be interference with witnesses. Clearly the reasons for this belief must rest upon information not included in the guideline construction. (The seriousness of the charge or the prior record of the suspect are already taken into consideration in the guideline model and hence are inappropriate as a basis for assuming unusual aggravating or mitigating factors). Additional and appropriate reasons to conclude that special aggravating factors relating to possible interference with witnesses might be, for example, that there was specific evidence of behaviour on the part of the accused which pointed to this possibility or, perhaps that a witness had expressed such a fear. In such cases, if the guidelines indicated that bail would be granted, this might be set aside and the reason for departure from the guidelines noted by the decision-maker. Another aggravating factor would be where the accused had previously "jumped" bail. Similarly there can be unusual mitigating factors, such as cases where the accused had been particularly helpful to the police in their inquiries. In such cases, perhaps where the guidelines indicated that bail would not be granted, an exception might be made in favour of the accused, and again the reason for departure noted.

Decision-makers should be as alert to cases which may call for modification of the rules in favour of the accused as they might be about cases where the guidelines might be seen as too "liberal". A procedure to ensure that equal vigilance is taken by those who apply the guidelines is available in that the determinations can be "balanced".

THE BALANCE OF POLICY CONTROL

If the guidelines are correctly balanced (and they should eventually achieve such a balance), the departures from the indicated decisions should as often be

in favour of bail (special mitigating factors found) as they are modified against bail (special aggravating factors). If this balance is not achieved, then the guidelines indicate decisions which are biased in one direction or another. This balance is a mathematical representation of the concept of equity and the data derived from the reasons given for overriding decisions provide the essence of the policy control to this same end.

Part of the procedure to achieve balance is a policy research function, but research provides only the operational means for such control. The control function remains where it always has been - with the judiciary and the legislature(12). The problem is how to effect that control. How may the magistracy and judges be provided with machinery so that control of their own policy becomes as realistic as at the present time is their control of the individual decisions which they individually make for individual accused persons. Such control is posited in the assumption that, on appeal, decision-makers will indicate reasons for departures from the determination indicated by the guidelines. The chart may make the nature of the control mechanism clearer than this discussion. (See Chart 1)

JUDGES AS POLICY DECISION-MAKERS

If a means can be found whereby the judiciary control the guidelines (i.e. the policy) and also determine individual cases which depart from the guidelines, then there is no apparent reason (to me) why the judiciary (magistrates and judges) should make individual decisions where the guidelines apply. They have already done this in effect by setting the decision rules which take effect through the guidelines. It seems, then, that instead of the magistrates, judges or courts in any other form making individual decisions regarding bail, those who at present make these determinations could move to an appeals function. Individual cases which fitted the guidelines could be decided by the police. The police could "appeal" to a court (or similar body) where they wished to set aside the guideline-indicated decision because of either unusual aggravating or mitigating factors. Individuals who felt aggrieved might also appeal on grounds that:-

(a) the guidelines had not been properly applied to their case;

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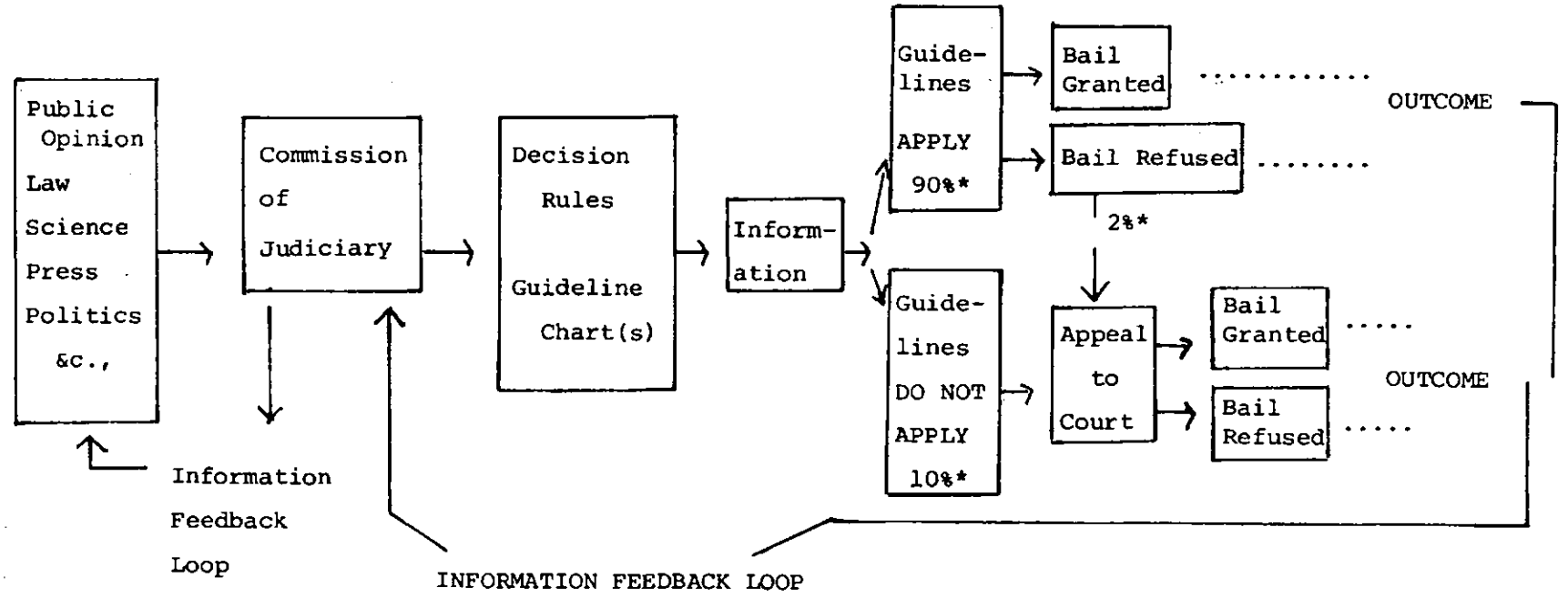
(12) By "judiciary" I mean those who apply or interpret the law at whatever level of decision-making. In operational terms, the body which sets up the guidelines in the first instance will, of course, be exercising control, and such body should clearly be made up of members of the judiciary.

CHART 1

CHART ILLUSTRATING THE LOGIC
OF BAIL GUIDELINES SCHEME



* Indications of possible magnitudes

(b) the guidelines should be set aside in their favour for specific reasons not taken into consideration in the construction of the guidelines.

The guidelines would provide a powerful screening against trivial appeals and eventually the precedents set by the appeals procedure could be embodied in the modified guidelines. The modification process would mean that grounds for valid appeal would continuously diminish as would the frequency with which such appeals had to be heard.

It is necessary that appeals should be accompanied by reasons, since they provide the basic information for the changes in policy which are to be considered for embodiment as modifications of guidelines. This procedure of the provision of reasons for the setting aside of the guidelines would be similar to the procedures of appeals courts and would serve a similar function. It would seem, however, that in general, the reasons would be capable of expression in a very few words. An example might be, "Probability of interference with witnesses sustained: main reasons given by police were ...", or, "Evidence of prior bail conditions violated, namely ...". Of course the need to give reasons such as these would cease if the guidelines were to be modified to include either of these two factors.

The reasons for departures from the guidelines provide the necessary information for expanding the coverage of the guidelines so that policy decisions can take over from individual decision-making. This should take place as soon as it becomes clear that an implicit policy has developed out of the individual departures from guidelines. Without the provision of reasons for departures the judicial body charged with the oversight of the guideline policy could not have effective control over general policy and the interpretation of law.

The question remains as to how information relevant to the departures from guidelines is to be co-ordinated into modifications of the decision rules. It may be suggested that whatever system is set up to develop the guidelines in the first place is the same as that which should be charged with monitoring, review and modification procedures. Three possible models come to mind -

1. The Statutory Law Reform Commissions;

2. A special Commission of the Judiciary;

3. A specifically established Bail Guidelines Reform Commission. (This might be chaired by a senior judge and have members from the police and magistracy).

The composition and status of any such body must be decided in terms of the special conditions which apply in the different States of Australia. The body should, of course, have adequate prestige and be concerned about the relevant issues. A staff member who would be able to advise on the research elements would also have to be involved in all the proceedings of the Commission or Committee.

MONITORING AND MODIFYING THE GUIDELINES

Whatever body (Commission?) were established to set up the guidelines, it should meet every six months to review the data regarding departures from the guidelines and to instruct staff as to whether any factors should be incorporated as modifications of the original chart(s). The Commission would also be concerned with the direction of research which could improve the efficiency of the guidelines as well as including new considerations. For example, while research would be necessary to derive prediction tables for one of the axes of the proposed guidelines chart, the prediction methods should also be reviewed as experience changed and the data base improved. It is likely also that the seriousness scale would require attention from time to time as social values might change. The Commission would ensure that the policy of bail determination was firmly in the hands of a judicial body, but there should be also a form of public accountability. Justice, it is said, should not only be done, but be seen to be done.

Justice in bail determinations should not only be done but should be known to the public to be done. It would seem desirable for the Commission to publish an annual report (covering two of the six-monthly meetings) showing the data with regard to departures from the guidelines and the balance of individual case determinations as well as other statistical data.

SECTION IV

SOME THEORETICAL BACKGROUND

By

Leslie T. Wilkins

DECISION NETWORK

It is, I think, possible to consider almost every social agency system, not excluding the criminal justice system as a network of decisions. A network is closely analogous to a railway marshalling yard and the decision points are the points or switches which determine whether a truck will go along route (a) or (b). Of course, we are not making decisions about the destinations of trucks, but our decisions make differences as to where people go and how long they might stay there, and influence their lives in many other ways.

We may speak of "making decisions about persons" and this description of the activity may serve for general description but it is hardly precise. It might be more accurate to say that we make decisions about (or with respect to) information about persons. But the information is subject to interpretation. It is, I think, self-evident that decisions are made with respect to information as that information is de-coded by the decision-maker. This information may be of many and varied forms. Nonetheless we might conclude that the concept of information is central to any discussion of decision processes.

(a) INFORMATION

If the idea of information and its interpretation may be accepted as the basis for our decisions, we may move quickly to ask ourselves about the processes whereby we seek out information - selecting some for use and discarding others. Perhaps the major way in which we influence the decisions we make is in terms of the information we select and reject rather than in terms of the interpretation we give that information having selected it. Clearly the question of interpretation cannot arise until an item has been selected. Thus we note a concern about the strategy of information search (as distinct from perception, but related to it) as an important aspect of decision research.

(b) KINDS OF DECISIONS

Very frequently the word "decision" is qualified by a preceding adjective or adjectival clause. We speak of "rational" decisions, or "fair" decisions, "significant" decisions, "correct" decisions or of "incorrect" or "unfair" decisions, and so on. There is some suggestion, usually implicit, that there is some relationship between the kind of decision ("good", "fair", "rational" and so on) and the processes whereby that decision was arrived at. However, it does not seem that we can classify decision processes in terms of the usual adjectives which we use to preface the word. Many of the ways in which we describe decisions relate to the outcomes of the decisions rather than to the decision processes. It seems to me to be highly probable that an "unfair" decision may be arrived at in terms of the same general processes as those which give rise to a "fair" decision. Similarly, whether a decision may be said to be "rational" or not may tell us little or nothing about the process taken by the decision-maker. There may be qualities which differ, but the processes of decision-making do not seem to reveal them at all directly.

In the field of law, for example, it has been held for a very long time that the quality of the act is determined by the intention of the actor. This is clearly no criterion for the quality of a decision. The intention of the decision-maker to make a "good", "fair" or "rational" decision does not guarantee that the outcome will be fair, good or rational. To pose this issue indicates that there are elements of technical competence involved in the process of decision-making. A well-intentioned but ill-informed decision-maker may be less effective or more dangerous than one whose information is more complete but whose intentions are of a lower order.

(c) METAPHORS AND ANALOGIES

There is a rather more difficult and fundamental problem. Of course, every layman knows what a decision is. For purposes of colloquial speech such an understanding may suffice, but perhaps we should be more precise as to what we mean by a decision. In our work the processes of decision-making are critical to persons in distress or social need. We need to be able to understand the processes of decision-making not so much for our own satisfaction as for the sake of the very basic nature of our task and the persons whom we claim to serve.

It is interesting to note that while it is a simple matter to say that "a decision has been made" it is not possible to identify the time at which it was made. Retrospectively we can identify the outcome of the process and label that outcome as a decision, but this does not qualify as a description of the process. Can anybody tell me the exact moment when they decided to get married (or not to get married, as the case may be!)? Can anybody describe the nature of that decision-making process? I doubt it. Of course, there would be no difficulty in saying after the event that the decision had been made, but to identify the precise moment it took place and in terms of what pieces of information, would present a very difficult problem. We could follow the process in an individual and observe that at one moment the decision was "no" and that a little later it had changed to "yes". This would be like the balance which tips when the weight on one side exceeds the weight on the other. We use this analogy to describe decisions. We also refer to the "last straw". The last straw does not strike us as having any special properties except that it is that which break the camel's back, or tips the scale. In this analogy there is no concern about the sequence of items of information which may be placed in the decision balance. The last straw is important in terms of the general result, but the nature of the particular piece of information is of no consequence.

The tipping of the scales is only one analogue. There are other analogies for the decision process which seem to suggest that the sequence with which information is considered is important. Indeed we have empirical evidence that we are influenced by the sequence of information. What then do we mean by a "decision"? We speak of "arriving at" a decision - we use the analogue of a journey. Is this any better for describing the process? Clearly it is a different description since evidently the journey analogy takes into account the idea of a sequence in that we cannot travel the last mile before the first! The idea of sequence is critical to this analogue. We might think that there may be two quite different decision processes, the one related to the scales and to the last straw and the other related to the journey. But that is not the end of the analogies we may select.

The word "decision" as it has come down to us is related to the word "deciduous", as with trees which lose their leaves in winter. It is a cutting off: a termination. This fits the idea that we "cut off" the process of information search when we decide. We would not accept a claim that a person had made a decision if he continued to seek for information on the subject. We might let him tell us that he had made an interim decision, but the idea of finality seems to be necessary before we

can accept the claim that a decision has been made. There may be other and related decisions further down the road, but a particular information search was terminated in the decision. The idea of a decision which I shall use is that of the termination of a process of information search.

(d) UNCERTAINTY

I wish to make one further general point to distinguish the difference between (what decision theorists call) data and information. Information reduces uncertainty with regard to a decision. It is a sub-category of data. Data may or may not reduce our uncertainty as to the decision to be made. Data which are not information are termed noise. If two or more pieces of information indicate the same thing, we would refer to the information as redundant. What is noise or information can only be determined with respect to the decision. Data which assist in one decision (i.e. = information) may not assist in another (i.e. = noise). A decision-maker's task may be seen as selecting information from a set of data.

INFORMATION SEARCH STRATEGIES

I hope that I have made it clear that information and the ways in which it is handled are critical to the decision process. It would seem that we should know something about the information retrieval methods employed by human decision-makers. In fact, we seem to know little, but that little is enough to be rather disturbing.

In judicial decisions the decision-maker may select items of information at his discretion from an "information-rich" field of data. There is a belief among most decision-makers in this area that the more information they consider, the better will be their decisions.

(a) COMPOSITE PROCESSES

All decision-makers seem to carry out two tasks in one operation and not be aware of the transition from one to the other. They first seek and use information in relation to the decision, but quickly switch from this task to the examination of a larger body of data to test the quality of the information used in the decision. The first task relates directly to the decision referent, but the second is concerned with the possibility that reliance might have been placed on unsuitable items. Thus there is a stage of testing of information for inconsistencies by reference to its correlates. We are able to suggest that the decision task move from decisions about specific decision matters towards decisions about information. The information search criterion changes as the task proceeds,

but the change is not clearly marked. This seems to be the best explanation of the observation that initially information is sought which is considered to be relevant to the decision, but later information is sought which is relevant to information. In the first stage, to use a statistical model, information correlated with the criterion of the decision would be sought, but later information which is expected to be correlated with the information already seen (used?) in the first stages is required. This is not an unreasonable strategy, but the two different tasks are likely to be confused and for neither to be carried out in an optimal manner.

(b) INFORMATION OVERLOAD

I must stress that the above finding is provisional. There are other results in decision research which are more firmly established and it is upon these which I rely in the main for my interpretation of case by case and policy decision procedures. These results will, I think, be considered to be the more surprising (or even suspect) by anyone who is not familiar with this area of research. A study carried out some years ago for the United States military establishment may be my best authority for the claim which my own data (and that of others also) has supported very strongly. Hayes (1962) states:

> "It is commonly assumed that the more relevant data one takes into account in making a decision, the better that decision will be. It is clear, however, that as one takes more relevant characteristics into account for comparing alternatives the opportunity for confusion increases. If confusion were to increase rapidly enough as the number of characteristics increased, it is conceivable that decision-makers would perform better if some of the relevant data were eliminated".

Thus Hayes noted the phenomenon of "information overload". He referred to relevant data (information) being eliminated; not to the suppression of "noise" nor to the reduction of "redundancy". Obviously a critical question arises as to the level of information which is likely to give rise to confusion. This problem is now well recognised and has been the subject of considerable research.

It is interesting at this stage to ask the reader to speculate as to how many characteristics (or items of information) they think they could handle before their decision-making performance began to fall off because of information overload. Most decision-makers when questioned about the information they want to see

say that they want to see all the relevant data. But, when pressed, they may agree that if they were given everything they might forget some items and hence that the span of useful information might be limited by the span of memory. Unless the person asked is aware of the research findings in this field, I would suspect that any number they may propose would be very wide of the mark. While people can recall, under certain circumstances, upwards of twenty items of data, the number of items which can be processed in any decision is eight or less. The figure of seven (or eight, at most) has been found in extensive testing by Hayes and others, including myself.

We have noted above, however, the tendency for decision-makers to sub-divide decision processes. If sub-division is effectively used, then a total of more than eight items may be utilised in a decision but this involves decomposition and restructuring of the decision process. Such restructuring must be under the (conscious?) control of the decision-maker to be of any real value. Guidelines provide a form of decomposition and restructuring of decision processes by separating policy from (deviant) case decisions.

DECOMPOSITION AND RESTRUCTURING

The separation of policy from (deviant) case decisions is to be achieved by the use of specific systems of guidelines. The two elements (policy and case) are combined in the determination of each individual case decided - in other words what happens to the person is determined by policy plus case information. Furthermore, each of the two elements is under control such that modifications are possible.

The "switch" from information search with respect to the original decision problem to the search for information with respect to information, is not a sub-division system which I have attempted to formalise. The reason for not attacking this problem directly is, that while it might indicate something about the human decision-maker's methods for data processing, it does not have a high priority in terms of potential utility. If the data base for any decision system can be relied upon then there is little or no need for testing. The power and function of the information-about-information approach is clearly related in some fairly direct ways to the quality of information. If data are somewhat unreliable (as indeed they often are!) there may be better ways of dealing with this than merely to attempt to produce models based upon an analogy without interpretations of human behaviour. This has been our approach - I have examined the problem of "noisy" (error-ridden) data sets as a specific problem rather than seeking to imitate or understand in more detail the procedures which seem to be adopted by human decision-makers.

A common method of sub-division of the decision problem is to break it down into smaller decisions in the form of a decision chain where each decision is independently determined and the outcome is a final step in this process. While this may seem to be the simplest method of improving the information handling power of decision-makers, it is not at all easy to ensure that the selected sub-division is optimal, nor is it a simple matter to "discover" the sub-divisions which could help.

While we had in mind the guiding theoretical idea of problem and information sub-division, the focus of our research was to try to find ways for assisting decision-makers in the criminal justice field. It was this research method which was basic to the whole of the development of guidelines (now in use across the United States for all prisoners released from all Federal prisons, and experimentally for sentencing in two court districts). It is essential that I introduce any further considerations by some notes of the research and related methods.

RESEARCH BASIS

Research must begin with the research worker attempting to understand the process he is investigating. The concept of "understanding" is a difficult one, and clearly the ability of the scientist to understand is no criterion of the scientific method. How the scientist believes he has come to "understand" may reveal his personal biases, and consequently the strategy adopted to this end must be open. In the initial attempt to understand the decision-making process the research worker may work with the actual situations or he may turn to simulation or to an admixture of both. And he will certainly have to refer to theory. Both real-life observation methods and simulations have limitations. Our strategy was to use an admixture of both.

In most criminal justice decisions the individual decision-maker is permitted to examine a file (or interview the candidates) and there is a large variety of items of information which he may seek to recover from the file or elicit from an informant. If we take the assumption as sound that no more than eight items of information may be processed in a decision we may think it reasonable, experimentally, to restrict a decision-maker to the selection of eight items. If we do this and allow decision-makers to nominate the eight items they would prefer from a large set of data (such as a file containing fifty items or more) we note that there is little agreement as to the eight items which different decision-makers elect to see(13).

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(13) See, for example, Wilkins L.T., Appendix IV of Social Policy, Action and Research, Tavistock, London.

There may be about 50% agreement as to the first and most important item selected, but the degree of concordance drops rapidly, until after the second or third item, only a small percentage of any group will elect to see the same item. Thus an "information-rich" field provides plenty of scope for decision-makers to select information according to their individual strategies of decision-making or other characteristics or preferences. The patterns of information search can be classified and there is some degree of association between the patterns of search and the nature of the decisions arrived at. These relationships are complex and are by no means fully explored at this stage. Many information search strategies do not seem logical if they are compared with other models of logical analysis. For example, the logic of regression analysis suggests that items of data which are correlated with the criterion, but not with each other, are to be preferred (given weight or greater weight) but decision-makers often seem to prefer to select items which are highly correlated with each other. For example, the transition probability in the search from an item which relates to the individual's mother, will, if selected, quite often be followed by the item which refers to his father, or the arrest record will be followed by reference to the conviction record. Such strategy makes sense if we are concerned to test the validity of the information. We expect a high correlation between the arrest and conviction record and any disagreement would indicate possible errors in the record or, perhaps, a very unusual kind of case.

Exploration of the reasons why people adopt different decision-making strategies would be interesting but research along these lines would require excursions into personality differences and much more. Perhaps decision-making is as complex an issue to investigate and understand as any other aspect of human behaviour. Moreover, even if we were to be successful in relating styles of decision-making with personality characteristics we might end only by recommending the all-too-obvious - to get better decisions, it is necessary to get better decision-makers!

EXPLAINING DECISIONS

The problems of decision-making in many social problem areas cannot await a complete understanding of human personality and decision-maker's personality profiles. We must attack the issues more directly. We began our research by considering the matter of "explanation" of the decision-making process at a rather different level. In statistical theory we are inclined to use the word "explanation" in a special way - as a substitute for the

word "prediction". If we find that we can predict a phenomenon, to some degree we take the view that we have an explanation or even some "understanding"; and of course, we can precisely specify the nature of the "explanation" or the "understanding" and the level of its power. This was the route we took.

The general logic of this approach is indicated in Chart II. A body of experience exists in the form of previous case decisions. This "experience" is converted into a data set - data concerning the individual cases and the decisions made by the collective of significant decision-makers (such as a parole board or judicial decisions regarding bail or other). Statistical or mathematical (logical) models are then tested to find one which best fits the decisions actually made. In all practical cases (parole and sentencing) to date it has proved possible to use the equations to predict the decisions with about 80% accuracy. Thus it seems reasonable to make the assumption that the equations (or logical networks) have "discovered" the implicit policy which determined the majority (80%) of the case decisions. This then may be seen as the "IS" (descriptive) world. This procedure can be itterative and the prediction equations (or other specific models) can be "honed" by further feed-back in respect of decisions which do not fit the model. However, there is no good reason to attempt to make the equations too complex by attempting to fit a small proportion of "deviant" cases. It is better to assume that there may always be deviant cases which cannot be legislated by policy nor accommodated by equations in any precise way.

The next step is, perhaps, the most significant and is shown on Chart II as a "decision break". If precise models can be formed which express general policy as it now is, and there seems to be no good reason to amend this policy at this stage, then the descriptive model can be taken as the prescriptive model for all except the "deviant" cases. This, then, is the Guideline Principle. This principle may be operationalised as shown in Chart III. The general logic indicated in Chart III is that which underlines the Guidelines of the United States Parole Commissioners and the guidelines in use in some courts in the United States at this time.

POLICY CONTROL

A few further notes may clarify some other elements in the process. Policy control can become, with this method, very closely analogous to Quality Control as carried out in industry. The machinery of control is provided by an interactive process akin to the initial stages of "honing" of the equations. The policy control body may be composed of the collective of all decision-makers (as in a small court district or as with parole boards) or by a statutory body or professional authority.

CHART II

LOGIC OF SYSTEM

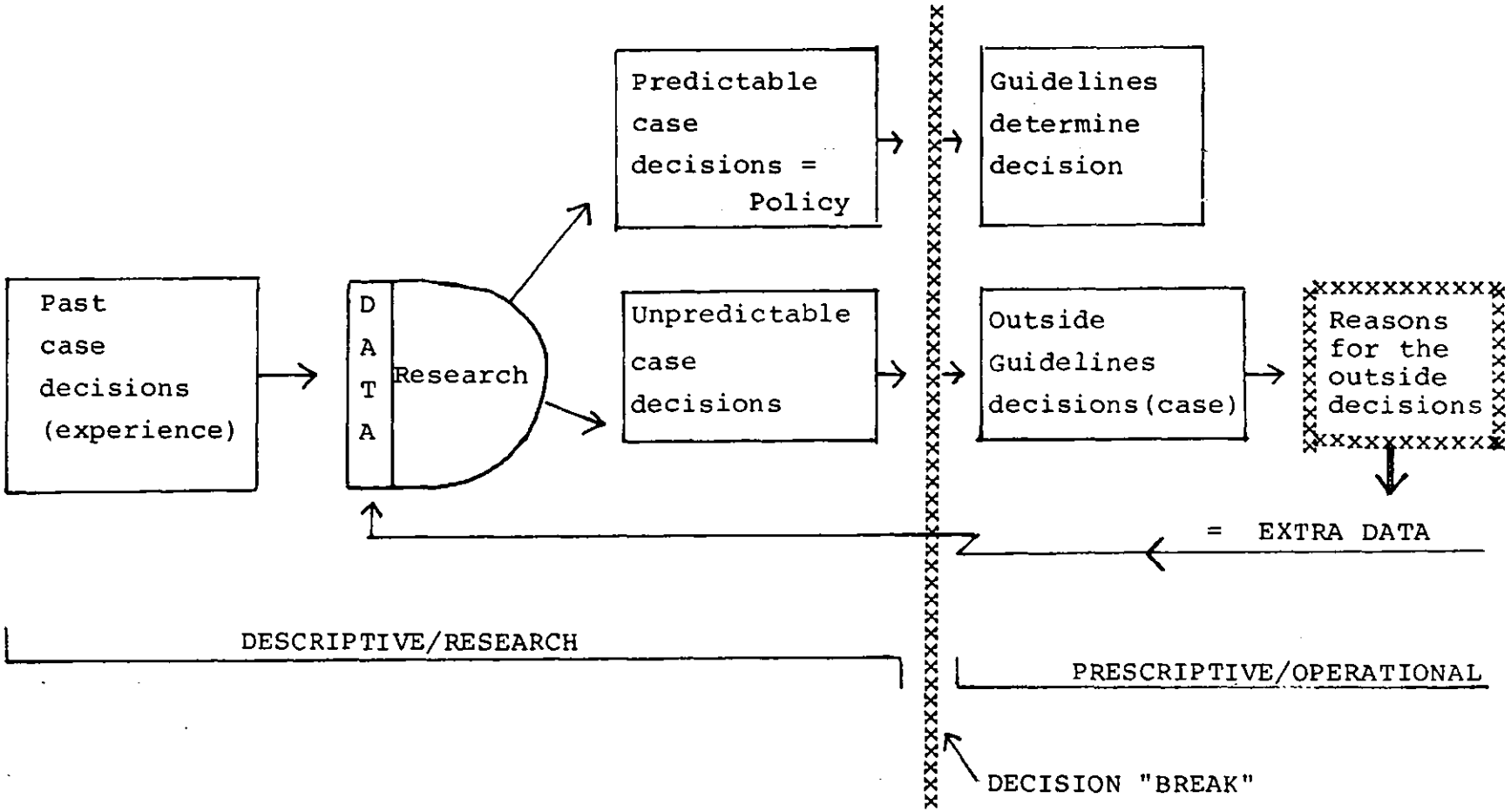
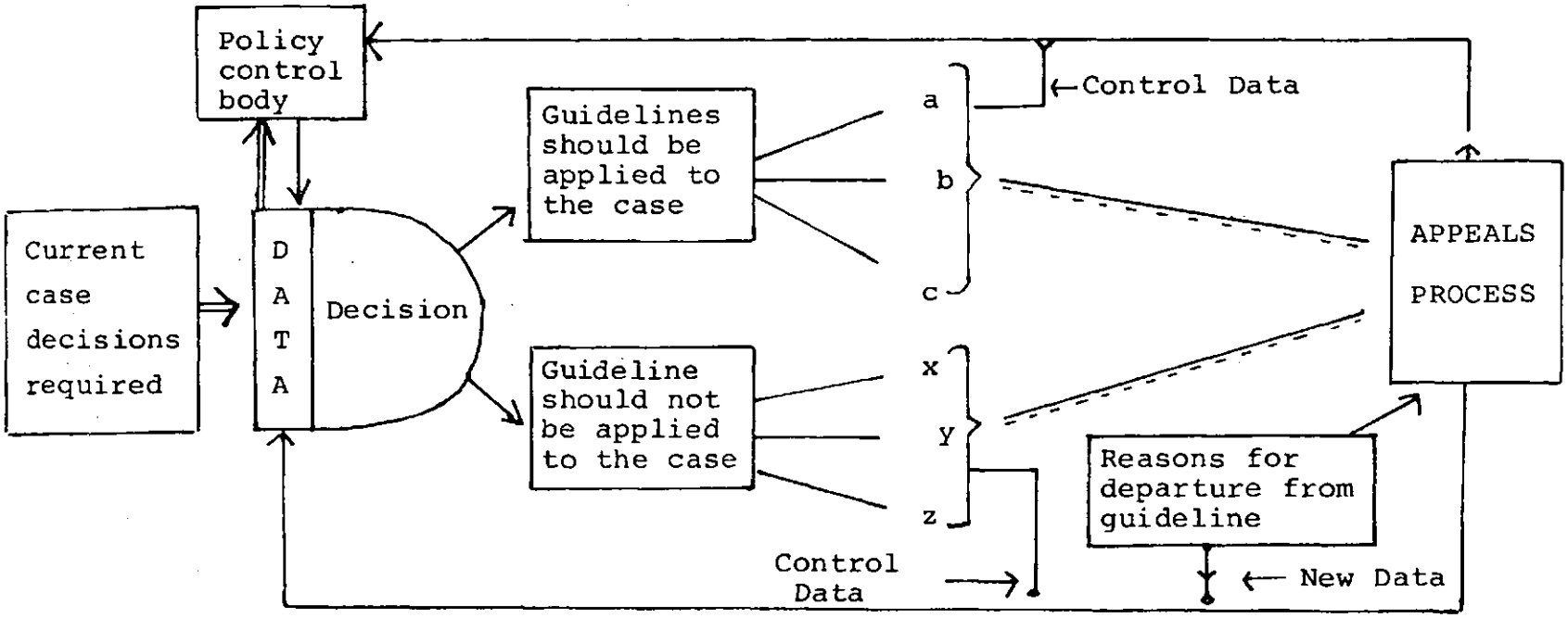


CHART III

OPERATIONAL FEED BACK LOOP



a, b, c, ---------- = Dispositions made by guideline model

x, y, z, ---------- = Dispositions made by individual decision-maker

It will be seen that we have achieved by these methods a sub-division of the original decision with a related restructuring of the decisions. There is the "case element" and there is the "policy element", and we can pay attention to these elements separately and seek information relevant to each. If follows, however, that although most cases are expected to fit the guidelines, it is necessary to identify cases which require that the guidelines be set aside because the rules for decisions enshrined in the guidelines do not apply to that individual case. This is the way in which decisions may be individualised; not by forcing them into the constraints of policy, but by identifying reasons why they should be seen as outside those constraints. The reasons should, of course, be appropriate reasons, and such reasoned departures should influence the future direction of policy. It must be stressed that the majority of cases are expected to be set within the guidelines because of the nature of the construction. The cases which are "outside" would require to have unusual mitigating or aggravating factors and these factors are to be determined from information which the guideline construction did not take into consideration.

It would seem to be unnecessary for decision-makers to give reasons for cases which they decide within the limits of the guidelines - the reason is obvious - they see no reason to set aside the general policy. As part of the price paid for the privilege of setting aside guideline indications, the individual decision-maker may be considered to owe it to his colleagues (or policy makers) to give an explanation. There are, of course, other reasons for requesting detailed reasons to be given in cases of departures. The collection and analysis of these reasoned departures will provide information as to whether the policy should be modified. (Cases which fit policy do not indicate how it should be changed). By this means each provides some control over all, and all have some control over each.

CONCLUSIONS

To summarise, the exercise of total and unbridled discretion seems to me to be as indefensible as the total abolition of discretion, even assuming that the latter were a possible alternative. Furthermore, with the trends in current political thinking, it may soon cease to be possible for any social decision-making agency to defend its total powers over dispositions. The concepts of accountability and of open government represent a tide which is flowing quite fast. It is better that we accommodate it rather than fight it. If the decision-makers who now have total discretion cannot clarify their use of it, their powers of decision-making may be removed. There is a need for public accountability, equity and methods of continuous

review and appeal. Specifically, it would be best for the courts to solve their own problems, rather than, in default, for the legislature to take extreme action to limit their powers. In general it might be better if policy were to be set by professional bodies and that control of individual decisions were a matter of colleagial activity. It is, however, essential if this approach is taken, that the professionals concerned show themselves to be worthy and competent, and in this they are answerable to the public through its democratic institutions.

I think that it is clear that in decision-making involving the disposition of unfortunate individuals, policy and case-by-case decisions can be separated, the decision process restructured, and decisions made more equitable. The rules of procedure are simple. First, ascertain whether decisions can be predicted and explore alternative models for such prediction. Secondly, if a fairly high level of predictability is possible, consider whether the latent policy thus revealed needs to be modified. Thirdly, consider making the (modified) statements of policy explicity and set up machinery for operating these as guidelines, providing also for means to identify cases of departure. Fourthly, establish a system for monitoring the operation of the guidelines ensuring their continuous review and necessary modification. Finally, the whole system should be explained to the public; criticism of the policy should be welcomed, including criticism which finds its effect in appeals which may be taken through the courts, ombudsman or other review bodies.

APPENDIX I

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)
Drug violations (simple possession of "non-hard" substances)
Forgery or fraud of less than $1,000
Income tax violation less than $10,000
Theft of mail of less than $500

MODERATE CATEGORY

Counterfeit currency of over $1,000
Drugs (possession of "non-hard" with intent to sell)
Embezzlement of less than $20,000
Bribery of public officials
Receiving with intent to sell up to $20,000

HIGH MODERATE CATEGORY

Theft of motor vehicle (not "joy-riding")
Embezzlement of over $20,000
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 and $100,000)
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.

APPENDIX II

PREDICTION TABLE ITEMS

Some items which may be considered in relation to the building of prediction tables for guideline horizontal axis. If a data base does not exist, these or similar items could be used to obtain a subjective probability using a Bayesian approach.

Record of hard drug use or sale : Yes or No

Motor vehicle theft : Yes or No

Prior incarcerations : None
1
2
3 or more

Number and type of prior convictions: None
1
2
3 or more

No fixed abode/ not living with family

Job stability data

e.g. not held job for more than 1 year
" 3 years

Present address less than 1 year
" 3 years

Resided in area for less than 10 years
" 2 years
" 3 months

Financial resources(debts) : Some or None

Community ties : Some or None

As a first approximation an application could be allocated "Brownie" points for every "good" grade in the above list. The score might then be divided so that there were five or six sets of equal numbers of bail applicants

in each. This score category is then taken as the horizontal axis for the Guideline Table with the "Seriousness" scale as the other axis. Present practice of bail awards may then be checked against this framework.