BAIL IN NEW SOUTH WALES

BY SUSAN ARMSTRONG* AND EDDY NEUMANN**

> I figure, when it started, they said 'Well, we're gonna have to have some rules'—that's how the law starts, out of that fact.
> 'Let's see. I tell you what we'll do. We'll have a vote. We'll sleep in area A, is that cool?'
> 'O.K., good.'
> 'We'll eat in area B. Good?' 'Good.'
> 'We'll throw crap in area C. Good?' 'Good.'
> Simple rules. So, everything went along pretty cool, you know, everybody's very happy. One night everybody was sleeping, one guy woke up, Pow! He got a faceful of crap, and he said:
>
> 'Hey, what's the deal here, I thought we had a rule: eat, sleep and crap, and I was sleeping and I got a faceful of crap.'
> So they said:
>
> 'Well ah the rule was substantive . . . it regulates the rights, but it doesn't *do* anything about it. It just says, that's where it's at.'[1]

1 INTRODUCTION

Procedures for dealing with people accused of breaking society's substantive rules are obviously crucial to law enforcement. They involve at least one fundamental dilemma: it is desirable that those accused of crimes appear for their trial, yet it is undesirable to imprison people who have not been tried and convicted. The way a society resolves this conflict gives an important indication of its values and priorities.

Our society has adopted bail as its solution. Bail originally developed in mediaeval England: as an alternative to imprisoning people awaiting trial, sheriffs were given discretion to release them on their own promise, or that of an acceptable third party, that they would appear at court.[2] Later, forfeiture of money in default of appearance was introduced.[3] Modern bail has been defined as a

> security in the form of a bond required in respect of the release of an accused person, and conditioned for his appearance at a specified time and place to answer the charge. If the terms of a bail require a surety or sureties, the defendant is placed in the custody of such sureties, who at common law could reseize him.[4]

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1 J. Cohen (ed.), *The Essential Lenny Bruce* (1972) 121-122.

2 R. P. Roulston, "Principles of Bail", in *Proceedings of the Institute of Criminology: Seminar on Bail* 17, 18 (published by the Institute of Criminology, Sydney University Law School, 1969); substantially reproduced in (1970) 5 U. Richmond L. Rev. 99. See also A. K. Bottomley, "The Granting of Bail; Principles and Practice" (1968) 31 Mod. L. Rev. 40, 44-47.

3 Roulston, note 2 *supra* at 18.

4 R. P. Roulston, *An Outline of Criminal Law in New South Wales* 126 (monograph, Faculty of Law, University of Sydney, 1966).

Bail conditional on the payment of money is largely confined to common law countries—most other legal systems have developed less discriminatory alternatives. In Scandinavia, most defendants are simply summoned to appear in court on a particular date, and those arrested are generally released on their own recognizance, with or without non-financial conditions such as surrender of passport.[5] In France and Italy, where people are usually held in custody pending trial, money is seldom required from those released.[6] This at least has the virtue of treating all defendants alike; and decisions on pre-trial detention are likely to be more rational and better scrutinized where the rich, too, must cool their heels in gaol.

In 1971 unconvicted or unsentenced people made up 46 per cent of New South Wales prison receptions.[7] About a quarter of these were charged simply with offences against "good order" matters[8] ranging from vagrancy to fare evasion, which many defendants might confidently have predicted would not result in a gaol sentence. The number and proportion of unconvicted and unsentenced people entering gaol has risen dramatically in recent years—it is the factor singled out by the Department of Corrective Services as accounting for much of the increase in the New South Wales prison population.[9] Yet the problems of unconvicted prisoners have received scant attention in Australia, and most suggested reforms have only involved minor tinkerings with the present system.[10]

TABLE 1:
NEW SOUTH WALES PRISON POPULATION; RECEPTIONS NOT UNDER SENTENCE 1966-1971[11]

	1966	1967	1968	1969	1970	1971
Awaiting trial	916	744	1,236	1,089	6,296*	9,957*
On remand	4,273	4,704	5,371	5,025	—	—
TOTAL	5,189	5,448	6,607	6,114	6,296	9,957
Per cent of total receptions	31.1	33.0	40.0	38.8	38.9	46.0

* "Awaiting trial" and "On remand" are combined for 1970 and 1971.

1. *Bail in New South Wales*

In New South Wales,[12] people charged with a criminal offence may be granted bail by:

Police. Any member of the police force who is of or above the rank of sergeant or is for the time being in charge of a police station may grant

[5] P. G. McGonigal, "Bail in Foreign Climes", in *Proceedings of the Institute of Criminology*, note 2 *supra* at 87, 94-95.
[6] *Id.*, 95-97.
[7] N.S.W. Dept Corrective Services, *Report 1971-72*, sect. IV, at 96; see Table 50.
[8] *Id.*, sect. I, at 62.
[9] *Id.*, 7.
[10] See *e.g.*, *Proceedings of the Institute of Criminology*, note 2 *supra* at 9-11.
[11] Reproduced from N.S.W. Dept Corrective Services, *Report 1971-72*, sect. IV, at 96.
[12] The position is substantially the same in the other Australian States.

bail, and any gaoler has power to discharge any person who is in custody either upon that person entering into a recognizance, with or without sureties, for a reasonable amount, to appear before a Justice of the Peace or a Court, or upon that person giving security by an acknowledgement of the undertaking or condition imposed.[13]

Magistrates. Persons who are not released on bail by the police must be taken before a Justice as soon as practicable.[14] A magistrate may commit the defendant to a prison, a lock-up, or to some other safe custody; discharge the defendant upon his entering into a recognizance; or suffer the defendant to go at large.[15] Bail may be granted after arrest but before the committal proceedings; during adjournment of the proceedings; or on committal pending trial.[16] When any person is committed for trial the committing magistrate

(a) *may*, if such person is charged with any felony, assault with intent to commit a felony, attempt to commit a felony, concealing the birth of a child, wilful or indecent exposure of the person, riot, assault in pursuance of a conspiracy to raise wages, assault upon a police officer in the execution of his duty or upon any person acting in his aid, or neglect or breach of duty as a constable;

(b) *shall* if such person is charged with any other indictable misdemeanour, allow an amount of bail with or without sureties sufficient to ensure the appearance of that person at the time and place of trial.[17]

Supreme Court judges. If bail is refused by the magistrate, it may be granted upon application to the Supreme Court or to a Supreme Court judge. If an application is refused by one judge, the prisoner may make a fresh application to another.[18]

2. *The Criteria for Granting Bail*

If there has been little concern at the plight of the people in gaol awaiting trial there has at least been plenty of judicial attention directed to the criteria in accordance with which they were gaoled. The chief consideration is whether or not the accused is likely to appear at subsequent proceedings, and Michael Zander locates the *locus classicus* in a statement by Lord Russell of Killoran in 1854:[19]

> the test, in my opinion, of whether a party ought to be bailed is whether that party will appear to take trial . . . but . . . though I lay down that test I think it ought to be limited by the three following considerations . . . The first is what is the nature of the crime? Is it

[13] Justices Act of 1902-1973 (N.S.W.) s. 153(1).
[14] *Ibid.*
[15] *Id.*, s. 69.
[16] *Id.*, ss 31(2), 34, 45, 46. See Roulston, note 4 *supra* at 126.
[17] Justices Act of 1902-1973 (N.S.W.) s. 45(1).
[18] Roulston, note 4 *supra* at 127.
[19] M. Zander, "Bail: A Re-appraisal" (1967) Crim. L. Rev. 25, 100, 128, at 104-105. This study is a classic in the field, and should be the starting-point for any researcher.

> grave or trifling? . . . The second question is what is the probability of conviction . . . The third question is, is the man liable to a severe punishment?[20]

This view has been frequently and emphatically restated:

> The object of bail is to ensure and secure the attendance of the accused at his trial, and it recognizes that the liberty of the subject should only be restricted in such ways as will achieve this result.[21]

However, Lord Russell's three tests have been supplemented by other considerations which various courts have regarded as relevant:

Severity of the likely punishment. This factor is obviously related to the three major tests.[22]

Previous record and likelihood of committing further offences. As Roulston has pointed out, this has become the most important factor in justifying refusal of bail—at least in England and New South Wales.[23] This has meant the effective introduction of a system of preventive detention, which amounts to a reversal of the traditional presumption of innocence.[24]

The interests of justice and the safety of witnesses. This factor involves consideration of whether the course of justice may be perverted through intimidation of witnesses or whether the safety of the community is threatened by a grant of bail.[25]

Delay before trial. Bail has been granted in respect of a charge on which the accused had been committed where it appeared that there would be a substantial delay before the trial.[26]

The public interest in the right of the accused to be free to prepare his defence. Although this should logically be a major consideration, only recently has it been strongly advocated as an important factor.[27]

Despite the mass of judicial discussion, these tests and supplementary considerations do not permit uniformity in bail decisions. The courts have generally recognized that a careful balancing of interests is necessary, and have consistently held that discretion to refuse bail is not to be used as a means of punishing or coercing prisoners.[28] But they have failed to indicate how this balancing is to be achieved, and the actual cases make little of the need for information about the accused.

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[20] *R.* v. *Robinson* (1854) 23 Q.B. 286, 287.
[21] *R.* v. *Appleby* [1966] 1 N.S.W.R. 38. See also 8 *Australian Digest* (2nd ed.) 95-100; and Roulston, note 4 *supra* at 127.
[22] *R.* v. *Montgomery* (1958) 75 W.N. (N.S.W.) 233, 234; *R.* v. *Clancy* (1958) 75 W.N. (N.S.W.) 142, 143. See also Roulston, note 2 *supra* at 21-22.
[23] Roulston, note 2 *supra* at 22. See *H. M. Postmaster-General* v. *Whitehouse* (1952) 35 Cr. App. R. 8, 11; *R.* v. *Pascoe* (1961) 78 W.N. (N.S.W.) 59; *R.* v. *Clancy* (1958) 75 W.N. (N.S.W.) 142.
[24] Zander, note 19 *supra* at 107.
[25] *R.* v. *Harrison* [1950] V.L.R. 20.
[26] *R.* v. *Pascoe* [1960] N.S.W.R. 481.
[27] *R.* v. *Wakefield* [1969] W.N. (N.S.W.) 325 (Cross J. sitting as Chairman of Quarter Sessions). See also Roulston, note 2 *supra* at 25.
[28] *R.* v. *Greenham* [1940] V.L.R. 236.

Furthermore, the cases referred to above deal with bail determinations by magistrates, and make no reference to decisions by police; presumably the same general principles are meant to apply. There are peculiar problems associated with police decisions about bail, yet it seems that discussion of these has been limited because most accused who have been denied bail by the police are quickly brought before a court.[29] This is hardly satisfactory, if any principle of minimum interference with freedom prior to conviction is recognized. Police discretion to grant bail can be—and, it seems, *has* been—abused. For example, general police practice in the bailing of demonstrators arrested during the Springbok tour of Australia in 1971 was to set bail at the maximum monetary penalty for each offence or at $200, whichever was the lesser. Police at some stations insisted on each arrested individual being bailed by a separate person, and at times insisted on a personal relationship between bailor and bailee.[30] Police were aware that bail funds existed, and the unusually high amounts set had the effect —whether intended or unintended—of depleting the funds available and thus acting as a deterrent to potential demonstrators. Police also knew that most demonstrators were students who were likely to appear for trial, but this did not influence the figures set. The large number of arrests and the consequent strain on police resources made it physically difficult to apply the judicial tests in each case. However, it is also clear that the granting of bail should not be used as a punishment, and that physical difficulties should not prejudice those arrested.[31]

3. *The Consequences of Custody*

The bail process gives too little recognition to the consequences of pre-trial detention. Some of its effects are appreciated: the appearance of the accused is assured, and he is prevented from committing further offences or interfering with witnesses. However, the courts have failed to acknowledge certain other less desirable results:[32]

1. Defendants held in custody are more likely to be convicted than those released on bail,[33] and there is evidence that this relationship is a causal one.[34]

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[29] See *e.g.*, "Introductory: the Reasons for the Seminar", and F. Krahe, "Police Problems Relating to Bail", both in *Proceedings of the Institute of Criminology*, note 2 *supra* at 1 and 65 respectively.

[30] These statements are based on personal observation by the authors.

[31] For a description of analogous abuses in the United States, see Note, "Bail in the United States: A System in Need of Reform" (1968) 20 Hastings L.J. 380, 391-94.

[32] See generally Zander, note 19 *supra* at 26-39.

[33] Home Office Research Unit, *Time Spent Awaiting Trial* (H.M.S.O., 1960) 9; Note, "Compelling Appearance in Court: Administration of Bail in Philadelphia" (1954) 102 U. Penn. L. Rev. 1031, 1051; M. L. Friedland, *Detention Before Trial* (1965) 110-125; D. J. McCarthy and J. J. Wahl, "District of Columbia Bail Project: an Illustration of Experimentation and a Brief for Change" (1965) 53 Geo. L.J. 675, 694-695; Note, "A Study of the Administration of Bail in New York City" (1958) 106 U. Penn. L. Rev. 693, 726-727.

[34] A. Rankin, "The Effect of Pretrial Detention" (1964) 39 N.Y.U.L. Rev. 341, 342 ff; C. E. Ares, A. Rankin and H. J. Sturz, "The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole" (1963) 38 N.Y.U.L. Rev. 67, 87-88.

2. Defendants held in custody are more likely to receive a sentence of imprisonment than those released on bail, and there is evidence that this relationship, too, is a causal one.[35]
3. Defendants in custody are more likely to plead guilty than those released on bail.[36]
4. The private life and relationships of defendants held in custody for what may be a lengthy period prior to trial[37] obviously suffer, and families deprived of income may face real financial deprivation in meeting their needs and commitments.
5. Defendants in custody may lose their jobs—particularly as people unable to afford bail are not likely to have jobs permitting any substantial period of absence. This not only results in financial deprivation, but probably further weakens the accused's position at trial, as courts are often reluctant to imprison where such a sentence would mean loss of employment.
6. The clogging of prisons with unconvicted people is clearly undesirable. The lack of an adequate classification system may introduce unconvicted prisoners to the company of experienced criminals. Furthermore, it results in over-crowded gaols and high costs, particularly as processing such prisoners probably consumes a disproportionate share of administrative time and effort.
7. Defendants held in custody face great difficulties in adequately preparing their own defence. They are unable to obtain statements, seek evidence or interview witnesses, and restrictions on correspondence place severe limits on their activities in prison. Furthermore, the requirement that any consultation between an unconvicted prisoner and his legal representatives must be conducted at the gaol makes the defence more costly, and places additional burdens on administrative staff.

Apart from such practical considerations, "It seems quite wrong that persons should be detained before trial charged with offences that on conviction are unlikely to be dealt with by imprisonment".[38] Even where imprisonment is likely, in minor cases the time spent awaiting trial may exceed the probable sentence. This problem is accentuated because the usual policy of back-dating an offender's sentence to the beginning of his period in custody is not consistently applied.

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[35] Rankin, note 34 *supra* at 343 ff; Note, "Compelling Appearance in Court: Administration of Bail in Philadelphia" (1954) 102 U. Penn. L. Rev. 1031, 1053; McCarthy and Wahl, note 33 *supra* at 699-700; Note, "A Study of the Administration of Bail in New York City" (1958) 106 U. Penn. L. Rev. 693, 727; Friedland, note 33 *supra* at 117-24; C. Davies, *Pre-Trial Imprisonment: A Liverpool Study* 16 (mimeo.). See also comment by H. F. Purnell, "An Advocate's Look at the Problems of Bail", in *Proceedings of the Institute of Criminology*, note 2 *supra* at 79, 83-84.

[36] Home Office Research Unit, note 33 *supra* at 9; Friedland, note 33 *supra* at 61; Davies, note 35 *supra* at 15; Note, "A Study of the Administration of Bail in New York City", note 33 *supra* at 726.

[37] A 1969 study of unconvicted prisoners in custody at Long Bay Gaol in N.S.W. found that the mean time spent on remand was 32.5 days; P. G. Ward, "Bail Statistics" in *Proceedings of the Institute of Criminology*, note 2 *supra* at 31-32.

[38] Purnell, note 35 *supra* at 85.

4. *The Movement for Reform*

Recognition of the damaging results of pre-trial detention and of the need to rationalize bail decisions has recently led to large-scale reforms in other countries.[39] Most of these have involved attempts to substitute for money security an informed judgment on the accused's prospective behaviour,[40] and most have followed the trail blazed by the Manhattan Bail Project.

This Project was undertaken in the early 1960s by the Vera Foundation of New York. Despite the existence of a constitutional right to bail in the United States, large numbers of defendants were being held because they could not afford the 10 per cent fee charged by bail bondsmen.[41] In co-operation with New York University and the Institute of Judicial Administration, the Vera Foundation devised and administered a pro-

TABLE 2:

MANHATTAN BAIL PROJECT SCORING SYSTEM[42]

Points	*Category*
	(1) *Prior Record*
2	No convictions
1	One misdemeanour conviction
0	Two misdemeanour convictions or one felony conviction
–1	Three or more misdemeanour convictions or two or more felony convictions
	(2) *Family Ties*
3	Lives with family AND has weekly contact with other family members
2	Lives with family OR has weekly contact with family
1	Lives with non-family person
	(3) *Employment*
3	Present job one year or more
2	Present job four months OR present and prior job six months
1	Current job OR receiving unemployment compensation or welfare OR supported by family or savings
	(4) *Residence (i.e., continuous residence in area)*
3	Present residence one year or more
2	Present residence six months OR present and prior one year
1	Present residence four months OR present and prior six months
	(5) *Time in Area*
1	Ten years or more
	(6) *Discretion*
1	Pregnancy, old age, poor health or attending school.

[39] See *e.g.*, the United States Bail Reform Act of 1966, 18 U.S.C. ss 3141-52 (Supp. II, 1966); and generally, *Bail and Summons; 1965* (Proceedings of Institute on the Operation of Pretrial Release Projects and Justice Conference on Bail and Remands in Custody; published by the U.S. Conference on Bail and Criminal Justice, 1966).

[40] Address by Patricia Wald on the Operation of Pretrial Release Projects, 14 October 1965, in *Bail and Summons*: *1965*, note 39 *supra* at 25.

[41] America has developed a group of professional bail bondsmen, who provide cash for bail payment at a usual fee of 10 per cent. This has led to the setting of high bail in most cases, and bondsmen often have effective control over whether or not a defendant will be released prior to trial; J. V. Ryan, "The Last Days of Bail" (1967) 58 J. Crim. L. 542, 544; Note, "Compelling Appearance in Court: Administration of Bail in Philadelphia" (1954) 102 U. Penn. L. Rev. 1031, 1060 ff; Note, "Bail in the United States: A System in Need of Reform" (1968) 20 Hastings L.J. 380, 384 ff.

[42] Table adapted from Zander, note 19 *supra* at 137-138.

gramme designed to identify defendants who could safely be released prior to trial with no risk that they would abscond. The scheme hypothesized that people with sufficiently strong economic and social ties to the community would appear for trial even without the financial incentive of bail. During the three-year Project, arrested persons who agreed to participate were interviwed by law students for about ten minutes before their appearance in court. They were asked about employment, family ties, residence, and prior criminal record. Their answers were checked by the interviewer —usually by telephone—and given a score according to the points system reproduced in Table 2 above.

If defendants had an address in the area and scored a total of five points, the Project recommended to the court that they be released on their own recognizance without any bail money being required.

The Project was an outstanding success, and after the three years its administration was taken over by the city of New York.[43] The courts increasingly trusted and acted on its findings—judges accepted 55 per cent of the recommendations for release early in the Project, but this rose to 70 per cent within the three-year period.[44] It was found that judges were far more likely to release defendants if provided with verified information about them. In one experiment, defendants achieving a pass rating were divided at random into two groups, and recommendations of release were made for one group but withheld in the case of the other. Results showed that 60 per cent of the recommended defendants were released on their own recognizance, compared with only 14 per cent of the identical control group.[45]

During the three-year Project, 3,505 recommended defendants were released without bail being required. Only 1.6 per cent of these failed to reappear at trial, though the previous rate of absconding for those on bail had been 3 per cent.[46] The system was also enticingly cheap: defendants left at large could support themselves and their families instead of being expensively maintained in or by state institutions. New York police were initially apprehensive of a massive crime wave caused by released criminals, but when this did not eventuate they became sufficiently enthusiastic to adopt a similar scoring procedure for summonsing certain offenders charged with minor crimes such as petty larceny and assault rather than placing them under arrest. This innovation resulted in a huge saving of police time, and has since been successfully adopted in many American jurisdictions.[47]

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[43] *Id.*, 136.
[44] C. Sturz, "The Manhattan Bail Project and its Aftermath" (1965) 27 Am. J. Correction 15.
[45] Throughout the Project judges were informed that it was not possible to interview all defendants, and that no adverse conclusions could be drawn from the absence of a recommendation; *ibid.*
[46] *Id.*, 14-17.
[47] See generally, *Bail and Summons: 1965*, note 39 *supra* at 127 ff.

Procedures based on the Manhattan Bail Project have been instituted with unqualified success in dozens of American States.[48] Interviews have been variously conducted by gaolers, court officials, probation officers, ex-convicts, and specially appointed investigators.[49] Some schemes have discovered that it is unnecessary to verify the information provided, and that funds spent checking answers are better devoted to picking up the few absconders.[50] Studies suggest that in fact most defendants do reply truthfully, though there may be a tendency to conceal prior convictions.[51] The test itself has been liberalized in many jurisdictions; prior convictions for disorderly conduct and drunkenness have been ignored,[52] and it has been found that other ties such as university enrolment may substitute for having an address in the area.[53] Subsequent studies have also questioned the need to exclude from the schemes certain narcotics and sex offences, as was standard procedure in the original Manhattan Project.[54]

These schemes have consistently reported a low rate of absconding for defendants released on their own recognizance.[55] Furthermore, many of those who fail to appear at trial are not really "absconders" at all—many are simply careless or ignorant of the trial date. It is generally recognized that absconding rates overstate the real problem, and that few absconders are charged with serious offences.[56] That this is also true of New South Wales is suggested by the experience of one of the authors in researching whether the Manhattan test would accurately identify New South Wales absconders.[57] When police handling the cases were contacted, it was discovered that many persons listed as absconders from Quarter Sessions courts were simply careless of dates, and were picked up without difficulty.

5. *The Attitudes of Magistrates*

The sort of socio-economic information about defendants used by the Manhattan Bail Project is obviously crucial to any assessment of whether or not the defendant is likely to appear for trial—the basic issue in New

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[48] See *e.g.*, S. Mosk, "The Purpose of Bail in the Administration of Justice" (1973) 54 *Chicago Bar Record* 183, 188-189; P. M. Kennedy, "VISTA Volunteers Bring About Successful Bail Reform Project in Baltimore", (1968) 54 A.B.A.J. 1093; G. S. Levin, "The San Francisco Bail Project" (1969) 55 A.B.A.J. 135; McGonigal, note 5 *supra* at 90-91; and see generally *Bail and Summons: 1965*, note 39 *supra*. For an application of the Manhattan system to offenders in N.S.W., see S. Armstrong, "An Application of the Manhattan Bail System to New South Wales Offenders" in *Proceedings of the Institute of Criminology*, note 2 *supra* at 39.

[49] McGonigal, note 5 *supra* at 90.

[50] *Ibid.*

[51] *Ibid.*

[52] Kennedy, note 48 *supra* at 1095.

[53] L. B. Howard and H. W. Pettigrew, "R.O.R. Program in a University City" (1972) 58 A.B.A.J. 363, 365-366.

[54] McGonigal, note 5 *supra* at 90.

[55] See tables in *Bail and Summons: 1965*, note 39 *supra* at 8; and McGonigal, note 5 *supra* at 92.

[56] Canadian Committee on Corrections, *Toward Unity: Criminal Justice and Corrections* (1969) 118; Note, "Compelling Appearance in Court: Administration of Bail in Philadelphia" (1954) 102 U. Penn. L. Rev. 1031, 1062.

[57] Armstrong, note 48 *supra* at 39.

South Wales bail determinations.[58] Magistrates and judges have occasionally acknowledged this and defended their practices by claiming that such evidence is always considered when bail is set.[59]

The only attitude study of New South Wales judges and magistrates relevant to bail is a survey of fifteen magistrates conducted by Cedric Bullard of the Australian Institute of Criminology.[60] This study gave magistrates a list of factors conceivably relevant to the setting of bail, and asked them to state whether they considered each factor was "not relevant", "relevant", "very relevant" or "paramount".

The results suggested that a substantial portion of the State's magistracy was ignorant of certain criteria relevant to bail decisions. Astonishingly, not one magistrate regarded the financial means of the defendant and his family as "paramount", though any bail figure small enough to permit release yet large enough to secure reappearance must obviously be dictated by the defendant's ability to pay. Two magistrates thought that whether or not the defendant was represented amounted to a relevant factor, and a

TABLE 3:
ATTITUDES OF MAGISTRATES: FACTORS RELEVANT TO BAIL DECISIONS

Factor	*Not Relevant*	*Relevant*	*Very Relevant*	*Paramount*
Employment record	2	8	5	—
Criminal record	1	4	9	1
Previous record of absconding	—	—	6	9
Whether lives with family	2	8	4	1
Whether supports family	2	9	4	—
Likelihood of offences on bail	—	2	8	5
Ethnic background	9	6	—	—
Severity of likely punishment	1	2	11	1
Whether in ill-health	1	8	6	—
Recommendation against bail by prosecutor	6	7	2	—
Age of defendant	3	11	1	—
Financial means of defendant and family	4	10	1	—
Likelihood of delay before trial	—	9	5	1
History of stable residence	—	3	12	—
Likelihood of absconding	—	—	6	1
Whether represented	13	1	1	—
Likely tamper with evidence or intimidate witnesses	1	2	7	5
Whether looks respectable	15	—	—	—
Nationality of defendant	13	2	—	—
No bail adversely affect preparation for trial	1	7	6	1
Whether asked for bail	5	4	4	2

[58] See *supra* text to note 19.

[59] Such claims were made, *e.g.*, at the Seminar on bail held by the Institute of Criminology at the University of Sydney in 1969; see transcript of discussion, held by the Institute.

[60] In this study, an attitude scale was administered to 15 magistrates participating in a residential seminar on the administration of criminal justice at the Institute of Administration at Little Bay, N.S.W. in July 1973.

majority regarded it as relevant that a defendant specifically requested bail.[61] The results of the survey are summarized in Table 3.

Magistrates generally agreed that a defendant's socio-economic characteristics such as employment record, family ties, residence, and criminal record were relevant to decisions on bail. However, anyone familiar with procedures in most Petty Sessions courts might well suspect that magisterial practice falls short of the principles professed—there is no mechanism for providing magistrates with information about each defendant, and as figures supplied later in this article indicate, Petty Sessions courts do not undertake lengthy consideration of most of the cases parading before them.

This study strongly indicates the need for reliable criminal justice statistics. Quite often those involved in the administration of justice firmly believe that they are acting in a certain manner, whereas statistical data shows that they are in fact behaving quite differently. Bail proceedings—like sentencing proceedings—are susceptible to permeation by "myths". A concerted effort at a national level which also allows analysis at the local level should have as one of its aims the "de-mythologizing" of current practices.

II THE C.L.A.S. SURVEY

In an effort to assess how Petty Sessions courts do, in fact, make decisions about the granting or refusing of bail, and to establish what matters are taken into account by magistrates, Community Legal Aid Services[62] undertook a study of Petty Sessions bail hearings in Sydney.

The C.L.A.S. study was of necessity confined to courts in the inner Sydney metropolitan area, and was conducted for periods of between two to three months from May to July in 1969, 1971 and 1972. Law student volunteers were rostered to attend court sittings and to complete a questionnaire for every bail determination which they witnessed. (A copy of the questionnaire appears as an appendix to this article.) The questionnaire was designed to establish what took place in the course of each hearing. Only full determinations involving consideration of bail for the first time were considered; simple adjournments where it appeared that the accused was already on remand were omitted from the results.

In all, returns for 618 separate bail hearings were obtained. The study was mainly restricted to Courts No. 1 and No. 2 of Sydney Central Court

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[61] This finding is especially significant in the light of overseas evidence that many defendants fail to ask for bail because of ignorance or confusion about proceedings; K. A. Palmer, "To Bail or not to Bail" (1973) N.Z.L.J. 21, 22; A. Samuels, "Bail" (1973) New L.J. 53; "Bail—the Right to be Told" (1971) New L.J. 351.

[62] Community Legal Aid Services (C.L.A.S.) was an organization of law students at the University of Sydney. It was established in 1968 with the aim of undertaking research into areas of law and social justice. The authors would like to thank the 75 students of Sydney University Law School who participated in the survey. Our most particular thanks to Paul Ward of Sydney University Law School (but for whom this study might never have been undertaken), and to Michael Cass of the Australian Institute of Criminology (without whom it would certainly never have been completed).

of Petty Sessions. These are the city's general-business courts, and it is claimed that they are staffed by the State's most able magistrates.[63] In 1972, some students were also rostered to the inner suburban courts at Redfern and Newtown. Twenty-seven returns were obtained from Redfern, and thirteen from Newtown: these have been included in the survey data, but the inadequate numbers makes it impossible to draw valid comparisons between the courts.

Rostering difficulties and inadequate manpower made it impossible for C.L.A.S. to cover all court sittings even at one court within the period under consideration. The sample is therefore not random, and does not purport to cover fully the business of any court over the periods studied. Tests of probability should not, therefore, be applied to the results, and the statistical data concerning characteristics of defendants should be regarded as tentative. However, the results would include most of the bail determinations occurring at the relevant courts during the periods under study, and we can suggest no factors which might make them unrepresentative of the courts' general business.

Separate returns were obtained for 618 cases—247 in 1969; 146 in 1971; and 225 in 1972. However, students at times failed to fill in an answer to every question on the questionnaire form. In most cases this was probably because the question was not relevant to the hearing, and this would generally increase the significance of our figures. Despite this, only questions where a definite answer was given have been included in the data. Thus the number of cases in many categories does not total 618: percentages given are adjusted unless the contrary is specified.

1. *The Defendants*

(a) *Personal characteristics*

Of the total sample of defendants, 77.8 per cent were male and 22.2 per cent female.[64] Age was listed as "old" (7.5 per cent), "middle" (29.6 per cent), and "young" (62.9 per cent).[65] Students classified their appearance as "respectable" (29 per cent), "average" (43.9 per cent), and "shabby" (27.1 per cent). (It should be borne in mind that law students may possess atypical middle-class assumptions likely to affect the classification of appearance—for example, one student who listed a middle-aged man as "shabby" offered in explanation the comment "had beard".)

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[63] Interview, Mr W. Lewer S. M., Deputy Chairman of the Courts of Petty Sessions, November 1971.

[64] A statistical analysis of all defendants appearing before N.S.W. Courts of Petty Sessions in 1972 found that 83.6% were male and 16.3% were female; N.S.W. Bureau of Crime Statistics and Research, *Petty Sessions 1972*, at 4 (published by N.S.W. Dept of the Attorney-General and of Justice, 1973). The variations between the figures could probably be accounted for on the basis that women are more likely to appear in court in the urban area studied by C.L.A.S., see S. Dell, "Remands in Custody" (1972) New L.J. 418 for a similar situation in the United Kingdom.

[65] As information on age could be obtained only from observation of the defendant, these figures are included only because of their relevance to the problems discussed below. No statistical reliance can be placed upon them.

Nevertheless, the age distribution of defendants classified as "shabby" is revealing—23.6 per cent of "young" defendants, 22.8 per cent of "middle aged" defendants, and 59.1 per cent of the "old". This hints at a problem of poverty and homelessness already identified among the aged.[66] Significantly, fewer "old" defendants were represented by lawyers (11.1 per cent of the "old", 42.1 per cent of the "middle aged", and 40.3 per cent of the "young"). Bail was refused more often to the aged—to 42.2 per cent of "old" defendants, but only 18.5 per cent of the "middle aged" and 19.2 per cent of the "young" were refused bail. Many magistrates would regard this fact as a community service—generous provision by the courts of a bed for homeless vagrants. A high proportion of "old" defendants (32.5 per cent) were in fact charged with vagrancy, when compared with the "middle aged" (11.4 per cent) and "young" (3.6 per cent) offenders. Nineteen of the forty-five cases where bail was refused without any objection being lodged by the prosecutor involved charges of vagrancy. The conclusion is inescapable that, however benevolent their intentions, the contribution of Sydney Petty Sessions courts to solving the problem of Australia's old, poor, and homeless involves gaoling them as criminals.

The sample consisted of 78.1 per cent of defendants classified as "Australian", 17.5 per cent as "foreign", and 4.3 per cent as "Aboriginal".[67] The high proportion of Aborigines relative to their population strength would partly be accounted for by a dense concentration of Aboriginal people in the inner city suburbs around the Redfern area. But this may not be the full explanation. Of twenty Aboriginal defendants in the C.L.A.S. sample, more than half (twelve cases) were charged with vagrancy, though only 6.3 per cent of Australian defendants and 6.6 per cent of "foreign" defendants were charged with this offence. This finding is particularly significant in view of Aboriginal claims that police single them out for arrests. The use of vagrancy as a catch-all charge under which police can pick up people not otherwise committing any offence is well-known, and Aborigines do not appear to be so disproportionately represented among the city's homeless men. These figures may hint at substantial police victimization.

(b) *Charge*

Petty Sessions courts sit as preliminary courts in serious criminal cases as well as hearing summary charges and indictable offences where the accused chooses summary trial or pleads guilty; thus they experience every

[66] R. F. Henderson, A. Harcourt, and R. J. A. Harper, *People in Poverty: A Melbourne Survey* (1970).

[67] These figures should also be treated with caution, as they were based only on observation of the defendant in court and on his name in the list. A three-month study of offenders charged at Central Police Station found the sample to consist of 80% Australian people of Australian, British and New Zealand origin; 5.4% of "Aboriginal" origin; and the remainder coming from various foreign countries. N.S.W. Bureau of Crime Statistics and Research, note 64 *supra* at 42.

type of criminal charge from vagrancy to murder. The offences in the C.L.A.S. sample varied enormously, from the trifling (stealing two tins of salmon, offensive words) to the serious (one case of murder), and from the mundane (drunkenness, break, enter and steal) to the exotic (one case of uttering a forged fumigation certificate). For purposes of analysis the offences have been reduced to eight broad classifications: offences against a person; sexual offences; offences against property (mostly stealing of some kind); offences involving money; offences against good order (for example, offensive behaviour and drunkenness); traffic offences; vagrancy; and "other" matters. It should be noted that these categories bear no relation to the seriousness of the charges involved—offences against the person cover very minor assaults, and offences against property include the theft of very large amounts.

TABLE 4:
CHARGE AND NATIONALITY

Charge	*Australian*	*Foreign*	*Aboriginal*	*Total*
Person	46 (11.2%)	18 (19.8%)	4 (19.0%)	68 (13.0%)
Sexual	8 (2.0%)	3 (3.3%)	1 (4.8%)	12 (2.3%)
Property	164 (40.0%)	35 (38.5%)	2 (9.5%)	201 (38.5%)
Money	24 (5.9%)	5 (5.5%)	0	29 (5.6%)
Order	108 (26.3%)	19 (20.9%)	2 (9.5%)	129 (24.7%)
Traffic	26 (6.3%)	5 (5.5%)	0	31 (5.9%)
Vagrancy	26 (6.3%)	6 (6.6%)	12 (57.1%)	44 (8.4%)
Other	8 (2.0%)	0	0	8 (1.5%)
TOTAL	410 (100%)	91 (100%)	21 (100%)	522 (100%)

(c) *Previous record*

There was no way we could establish with certainty whether or not a defendant had a prior criminal record, as the survey was based purely on observation of the proceedings. However, in 27.3 per cent of cases, the fact that the defendant did possess a criminal record was mentioned in the course of the hearing.[68] Defendants in such cases were slightly more likely to be represented (43.6 per cent had a lawyer, compared with 37.7 per cent of the rest of the sample), and appeared to be better able to look after themselves. More of these defendants (74.8 per cent, compared with 62.9 per cent of apparent first offenders) actually asked the magistrate to set a bail figure. One may only conjecture as to whether this difference would have been shown more significant or less if a complete sample of those with prior convictions could have been obtained.

Clearly, whether bail is allowed should not be dependent upon whether or not a defendant is sufficiently *au fait* with procedures to ask for it, but there is some evidence that this may be the case. Bail was refused to only fifty (12.9 per cent) of the 389 defendants who specifically requested it,

[68] The statistical analysis of all 1972 Petty Sessions cases discovered that 42.3% of the sample had no previous convictions; *id.*, 5.

but to seventy (35.7 per cent) of the 196 defendants who did not. This difference may be partly accounted for by fifty-six cases in which the magistrate simply refused bail without any discussion or objection at all: in many of these, defendants may not have had time to ask for bail, or may have regarded such a request as futile. However, the problem of defendants being remanded in custody because they are too confused, inarticulate, or ignorant of court procedures to ask for bail has been identified in other countries.[69] Furthermore, the survey of New South Wales magistrates described above reveals that only five of the fifteen respondents regarded a specific request for bail as "not relevant".[70]

(d) *Representation*

Less than half the defendants in the sample (40.2 per cent) were represented, though it has been shown by the New South Wales Bureau of Crime Statistics and Research that unrepresented defendants have a significantly reduced chance of acquittal or of a non-penal sentence.[71] Women had more chance of being represented (63.4 per cent of women had a lawyer), and the old had significantly less (only 11.1 per cent of those classified as "old" had any legal representation). Nationality did not appear to greatly influence the likelihood of representation, but some students may have erroneously classified the presence of an interpreter as amounting to "representation". Furthermore, the activities of the Aboriginal Legal Service have certainly reduced the percentage of unrepresented Aborigines in the inner city area; the percentage of unrepresented Aboriginal defendants would be far higher in other centres.[72]

TABLE 5:
CHARGE AND REPRESENTATION

Charge	*Represented*	*Unrepresented*	*Total*
Person	36 (18.3%)	33 (9.8%)	69 (12.9%)
Sexual	5 (2.5%)	8 (2.4%)	13 (2.4%)
Property	61 (31.0%)	144 (42.6%)	205 (38.3%)
Money	11 (5.6%)	18 (5.3%)	29 (5.5%)
Order	66 (33.5%)	69 (20.4%)	135 (25.2%)
Traffic	8 (4.1%)	23 (6.8%)	31 (5.8%)
Vagrancy	6 (3.0%)	39 (11.5%)	45 (8.4%)
Other	4 (2.0%)	4 (1.2%)	8 (1.5%)
TOTAL	197 (100%)	338 (100%)	535 (100%)

[69] In England it has been proposed that all defendants should be automatically deemed to have requested bail in every case; Samuels, note 61 *supra* at 53. See also "Bail—the Right to be Told" (1971) New L.J. 351; Palmer, note 61 *supra* 22.

[70] See Table 3 *supra*.

[71] The survey of N.S.W. 1972 Petty Sessions cases (note 64 *supra* at 4) established that 33.3% of offenders were legally represented, and 66.6% were not. If any explanation is needed of the relatively minor difference between these figures, it might be found in the fact that city defendants are probably more likely to be represented than those in the suburbs or rural areas, where there are fewer lawyers and fewer assistance agencies.

[72] E. M. Eggleston, *Aborigines and the Administration of Justice: A Critical Analysis of the Application of the Criminal Law to Aborigines* (unpubl. Ph.D. thesis, Monash University, 1970).

New South Wales offers little legal aid for criminal cases in Petty Sessions courts, and thus it is reasonable to expect that those defendants with lawyers will be those who can afford to pay for them. The broad classification of offences used made it impossible to correlate the likelihood of representation with the seriousness of the charge, and no information on income could be obtained. However, 51.7 per cent of defendants with a "respectable" appearance were represented compared with only 40 per cent of "average" and only 21.5 per cent of "shabby" cases. This finding suggests that lawyers are substantially the preserve of the relatively affluent, so far as such people can be found in Petty Sessions courts. Table 5 sets out the charges involved according to whether or not the accused was represented.

2. *The Hearing*

(a) *Profile of a bail hearing*

The results of the C.L.A.S. survey clearly establish that the practices of the Sydney Central Court of Petty Sessions fall far short of the principles professed by its magistrates. A "typical" bail determination as revealed by the study took less than sixty seconds; involved no discussion of the need for granting bail; included no evidence about the defendant's economic or social situation, or about his general reliability and trustworthiness; and involved no inquiry as to the bail figure the defendant would be able to pay. The most common result of such a "hearing" was that the magistrate announced a figure which was to be "bail", specified whether sureties were required, and turned immediately to the next case. If the prosecutor lodged an objection to bail some discussion might result, though many such cases were also disposed of in one sentence by the presiding magistrate: "Bail is refused".

This criticism is not meant to be a blanket condemnation. For most of the law students involved, participating in the survey was their first contact with Petty Sessions courts, and many wrote comments on the back of questionnaires describing their reactions. Some praised individual magistrates for being understanding and considerate of defendants. Analysis of returns also revealed that some magistrates made a habit of asking defendants whether they could afford the bail figure set,[73] and others consistently released certain defendants on their own recognizance. But those cases were rare, and student criticisms at times bordered on outrage. Dozens of comments were made on the lack of time devoted to each case, apparent indifference on the part of the magistrate, and on the fact that no evidence about the accused was presented to the court:

> In a number of cases the only "evidence" presented to the court (classified "other") about his circumstances was a grim comment by the prosecutor that the accused was "well-known" to police.

[73] See *infra* at 315 and Table 8.

Many commented unfavourably on the way defendants seemed over-awed or intimidated by what was happening, or else were totally uncomprehending of proceedings:

> All but one seemed intimidated by the . . . Court. This could partly be explained in that it is still, in appearance, a "police" court, with the prosecution and one of the clerks (in a police uniform) sitting in the same area as the magistrate.
>
> No one seemed to understand the plea—or their rights in court.
>
> People looked scared—confused. The intricacies of "the law" and the workings of a Court of Petty Sessions sometimes had *us* beat.

Individual cases were often described almost with disbelief:

> Old, shabby man. Charged with stealing two tins of salmon. Bail of $100.00. Only evidence—he had once been in Gladesville (Psychiatric Hospital). Magistrate obsessed with drink—"You're probably an inebriate now!"
>
> Accused cowed and incoherent: unsure of himself. Magistrate demanded if he had anything to say—"if you don't say anything, there's no way I can help you". I thought the treatment in court was most unjust.

(b) *The results of the hearings*

The focus of the study was not upon the *results* of bail determinations but upon the *form* which those hearings commonly took. However, the outcome of the hearings in the sample generally suggests that decisions about whether or not to grant bail and about the amount set are not made on a particularly generous basis.

Bail was granted in 475 of the 618 cases (78.7 per cent) and refused in 128 cases (21.4 per cent). Only fifty-three of the 475 defendants granted bail were released on their own recognizance (that is, without being required to produce money or a surety for their appearance at trial). New South Wales magistrates obviously make little use of this option, and probably its use was less widespread than the figures suggest, because most such cases of release were granted by two or three magistrates.

Bail was generally set high, and many defendants granted bail would undoubtedly have been obliged to await their trial in prison because they could not afford to pay. In 1969 an attempt was made by the authors to

TABLE 6:
BAIL FIGURE SET AND REPRESENTATION

Bail Figure	*Represented*	*Not Represented*	*Total*
$20–50	18 (10.6%)	44 (19.7%)	62 (15.7%)
$60–100	66 (38.8%)	82 (36.8%)	148 (37.8%)
$150–200	24 (14.1%)	40 (17.9%)	64 (16.2%)
$200–500	36 (21.2%)	43 (19.3%)	79 (20.0%)
$600–1,000	19 (11.2%)	12 (5.4%)	31 (7.8%)
More than $1,000	7 (4.1%)	2 (0.9%)	9 (2.3%)
TOTAL	170 (100%)	223 (100%)	393 (100%)

establish how many of those defendants who had been granted bail were nevertheless detained in custody at Long Bay Gaol. Inadequate information obliged us to abandon this line of research, but it was obvious that a very substantial number of those granted bail had nevertheless been held in custody.

The high figures commonly set as bail are particularly significant because many defendants were remanded for substantial periods—only 35.6 per cent were for less than ten days, and 37.1 per cent were for periods of three weeks or more. Fourteen of the defendants remanded for three weeks or more were refused bail. Table 7 summarizes the relationship between the length of remand and the grant or refusal of bail.

TABLE 7:
LENGTH OF REMAND AND BAIL SET

Length of Remand (in days)	*Bail Set*	*Bail Refused*	*Total (approx. %)*
1–7	81 (24.7%)	49 (53.3%)	130 (32%)
8–14	83 (25.3%)	23 (25.0%)	106 (26%)
15–21	49 (14.9%)	14 (15.2%)	63 (15%)
22–28	37 (11.3%)	2 (2.2%)	39 (9%)
29–35	32 (9.7%)	3 (3.3%)	35 (8%)
36–42	17 (5.2%)	1 (1.1%)	18 (4%)
More than 42	29 (8.8%)	0	29 (7%)
TOTAL	328 (100%)	92 (100%)	420 (100%)

(c) *Length of hearings*

In more than three quarters of the cases, discussion of bail took two minutes or less. There was a high "unknown" rate for this question, and this was partly due to students omitting to mark the questionnaire in answer to Question 14(d) ("For how long was bail discussed?") where, in the words of one student, "There was no bail discussion at all". Most of these cases could probably be validly ranked in the "Not at all" category, and this would make the figures far more devastating. But even omitting these cases, to describe the determinations as "generally cursory" is to flatter them.

In 23.1 per cent of the cases for which responses were listed there was no discussion of bail at all; in 59.6 per cent of cases bail was disposed of in one minute or less; and in 77.6 per cent of cases in two minutes or less. It is not possible to explain these figures away on the ground that magistrates habitually set a bail figure, which they know is within the defendant's means. In 1971 and 1972 a question was added to the questionnaire to establish whether there was any indication in the course of proceedings that the accused could or could not pay the bail figure set. The results clearly disproved any suggestion that magistrates are short-cutting the need for full decisions by setting only figures which defendants can afford. In 1971 and 1972, 15.7 per cent of defendants indicated that they could afford to pay the bail figure set, and 14.8 per cent indicated that they could not.

No indication was given in the other cases. Representation did not appear to make any major difference to an accused's chances of being set a bail figure which he could afford, though it was of some assistance:

TABLE 8:
REPRESENTATION AND FINANCIAL ABILITY

Indication of Ability to pay Bail	*Represented*	*Not Represented*	*Total*
Could afford bail	28 (21.4%)	33 (14.3%)	61 (16.9%)
Couldn't afford bail	14 (10.7%)	41 (17.8%)	55 (15.2%)
Non indication	89 (67.9%)	156 (67.8%)	245 (67.9%)
TOTAL	131 (100%)	230 (100%)	361 (100%)

In 47.9 per cent of cases where bail was refused there was no discussion at all, and the figures suggest that those defendants who were fortunate enough to have their case discussed for up to two minutes were generally more likely to be released on bail.

TABLE 9:
DISCUSSION TIME AND BAIL FIGURE SET

Discussion Time	*Bail Figure Set*	*Not Set*	*Total*
Not at all	72 (17.7%)	45 (47.9%)	117 (23.2%)
Up to 30 secs	74 (18.2%)	12 (12.8%)	86 (17.1%)
30 secs – 1 min.	93 (22.9%)	5 (5.3%)	98 (19.8%)
1½ min. – 2 mins	78 (19.2%)	12 (12.8%)	90 (17.9%)
2½ mins – 3 mins	36 (8.8%)	8 (8.5%)	44 (8.7%)
3½ mins – 5 mins	47 (11.5%)	9 (9.6%)	56 (11.1%)
5½ mins – 10 mins	6 (1.5%)	1 (1.1%)	7 (1.6%)
11 mins – 15 mins	1 (0.2%)	2 (2.1%)	3 (0.6%)
TOTAL	407 (100%)	94 (100%)	501 (100%)

Having a lawyer made it more likely that some period would be devoted to discussion of bail. Bail was not discussed at all in 16.2 per cent of cases where the accused was represented, but in 27.2 per cent of unrepresented proceedings. However, the difference between these proportions is not such as should make New South Wales lawyers appearing in Petty Sessions courts complacent about their value to the accused. This is particularly so as it appears that in cases where a relatively substantial period of time was devoted to discussion, this commonly involved argument over the justification of a prosecutor's objection to bail rather than evidence about the accused—Table 9 shows that discussion periods of more than two minutes are of no apparent benefit to an accused in terms of his likelihood of being granted bail. Table 10 shows that the length of time devoted to consideration of bail is largely dependent upon whether or not the prosecutor has objected to bail being granted.

(d) *What happens in the hearings*

Fifty-six defendants in the sample were refused bail outright: no discussion took place, and no information about them other than a brief recitation

of their criminal record was presented to the court. These cases included offences from all the broad classifications listed, and eleven of the defendants were represented by lawyers. Although no discussion occurred in any of these cases, magistrates often (though by no means always) stated their

TABLE 10:
DISCUSSION TIME AND PROSECUTOR'S OBJECTION

Discussion Time	*Objection*	*No Objection*	*Total*
None at all	9 (12.0%)	99 (23.8%)	108 (22.0%)
Up to 30 secs	2 (2.7%)	82 (19.7%)	84 (17.1%)
30 secs – 1 min.	5 (6.7%)	95 (22.8%)	100 (20.4%)
1½ – 2 mins	21 (28.0%)	67 (16.1%)	88 (17.9%)
2½ – 3 mins	10 (13.3%)	34 (8.2%)	44 (9.0%)
3½ – 5 mins	18 (24.0%)	38 (9.1%)	56 (11.4%)
5½ – 10 mins	7 (9.3%)	1 (0.2%)	8 (1.6%)
11 – 15 mins	3 (4.0%)	0	3 (0.6%)
TOTAL	75 (100%)	416 (100%)	491 (100%)

reasons for refusing bail. The most common reasons were a suggestion that the accused might abscond (seventeen cases); a simple reference to prior convictions (fifteen cases); and a statement that the offence was too serious to warrant bail (thirteen cases). In five cases, the magistrate stated that bail was refused because of a risk that the accused might commit further offences before the trial.

In 219 cases—almost half of the cases in which bail was granted—the magistrate simply announced that a certain figure was required. No discussion occurred, and no evidence was presented about whether or not the defendant was likely to appear for trial. Not one of these cases involved releasing the defendant on his own recognizance. These cases also covered all charge classifications, and in ninety-four the defendant was represented by a lawyer. These cases conform to the classic and long-recognized abuse under which bail is set according to the gravity of the offence rather than the circumstances of the defendant.[74] The sum required in these cases was often substantial, ranging from $20 to $4,000.

Even where magistrates do not refuse bail outright or set an "off-the cuff" figure, proceedings were generally cursory. In most cases (69.6 per cent) bail was first mentioned by the magistrate rather than the defence, generally as an announcement: "Bail set at X". The defence made first mention of bail in only 21.1 per cent of cases, and the prosecution initiated the subject in all but one of the remainder—generally to say that bail was opposed. Representation by a lawyer, however, made a substantial difference to these figures. Bail was first mentioned by the magistrate in 78.6 per cent of unrepresented and 54.9 per cent of represented cases; by the prosecutor in 3.4 per cent of represented and 11.9 per cent of unrepre-

[74] See *e.g.*, Note, "A study of the Administration of Bail in New York City" (1958) 106 U. Penn. L. Rev. 693.

sented; and by the defence in 41.2 per cent of represented but only 8.9 per cent of unrepresented cases.

In 482 cases (83.5 per cent of the sample) the first figure nominated in connection with bail was the figure finally set, and no-one suggested any alternatives. In cases where alternatives *were* suggested, these generally amounted either to a request from the defence that low bail be set, or else

TABLE 11:
REPRESENTATION AND INITIATOR OF DISCUSSION

Person who first Mentioned Bail	*Represented*	*Unrepresented*	*Total*
Magistrate	112 (54.9%)	265 (78.6%)	377 (69.7%)
Prosecution	7 (3.4%)	40 (11.9%)	47 (8.7%)
Defence	84 (41.2%)	30 (8.9%)	114 (21.1%)
Other	1 (0.5%)	2 (0.6%)	3 (0.6%)
TOTAL	204 (100%)	337 (100%)	541 (100%)

a request from the prosecution that bail be refused. Alternatives were suggested by the defence in thirty-nine cases; by the prosecution in thirty-one cases; by the magistrate (where bail discussion was initiated by the defence or the prosecution) in twenty-three cases; and once by a Salvation Army representative. In only forty of these cases (the defence plus the Salvation Army) were the alternatives of value to the accused. It might have been predicted that the prosecution's recommendations would not be favourable, but it is disquieting that magisterial intervention was not to the defendant's benefit at least in some instances. Alternatives of "value" to the accused were: that less bail be set; that the accused be released on his own recognizance; and that no surety be required. The most common alternatives designed to prevent rather than facilitate release were that a surety be required; and that "substantial" bail be set.

Most magistrates were highly deferential to objections or suggestions from the prosecution, and on many occasions appeared to "deem" an objection to release even where none was made. In many cases, objection appeared quite unnecessary in view of the readiness of magistrates to refuse bail or impose conditions. For example, in the case of one Aboriginal defendant the prosecutor took the most unusual step of stating that he had "no doubt whatever" that the accused would appear. The magistrate, however, asked whether the prosecutor would like the accused to be required to report three times a week at Redfern Police Station. The prosecution agreed to this. It is difficult to interpret this incident as anything other than a gratuitous and totally unnecessary interference with the defendant's liberty—neither magistrate nor prosecutor inferred that this condition was needed to guarantee appearance at trial.

The prosecutor objected to bail being granted in 98 cases (16.9 per cent of the sample). Occasionally the simple statement that bail was

opposed was sufficient to end the matter, but generally one or more reasons for the objection were volunteered. The reasons most commonly given by the prosecutor were:

(a) suggestion that the accused might abscond (34 cases);

(b) accused might commit further offences while on bail (24 cases);

(c) offence too serious to warrant bail (23 cases); and

(d) simple reference to prior convictions (21 cases).

In more than half (fifty-four) of the cases where an objection was lodged, bail was refused. Where a figure was set it was generally substantial, and it is probably safe to assume that many of the forty-three defendants who were granted bail over a prosecution objection, nevertheless waited for their trial in gaol.

Cases where bail was refused without any objection from the prosecutor were, without exception, cases where the magistrate simply refused bail outright. It is tempting to regard these as cases where the magistrate anticipated a police objection and simply saved the prosecutor the trouble of making it. Whether or not this is a valid assumption, it is certainly true that an objection from the prosecution is generally decisive in causing bail to be refused or set at a high level.

TABLE 12:
PROSECUTOR'S OBJECTION AND GRANT OF BAIL

	Bail Granted	*Bail Refused*	*Total*
Objection	45 (9.1%)	53 (51.0%)	98 (16.7%)
No objection	438 (90.9%)	51 (49.0%)	489 (83.3%)
TOTAL	483 (100%)	104 (100%)	587 (100%)

TABLE 13:
GRANT OF BAIL AND PROSECUTOR'S OBJECTION

	Objection	*No Objection*	*Total*
Bail granted	45 (45.9%)	438 (89.5%)	483 (82.3%)
Bail refused	53 (54.1%)	51 (10.4%)	104 (17.7%)
TOTAL	98 (100%)	489 (100%)	587 (100%)

Being represented by a lawyer made no significant difference to the likelihood of an objection being lodged. Objections were lodged in 14.8 per cent of cases involving represented and 17.9 per cent of cases involving unrepresented defendants. This finding is not significant in the absence of more precise information about the sorts of cases in which lawyers commonly appear. However, more time was necessarily spent in discussing bail where objections were made: only 21.4 per cent of such cases were disposed of in less than one minute (see Table 10).

These results make it fairly clear that, regardless of whatever ideas magistrates may hold about their bail setting practices, what they in fact do is make a snap assessment of the "value" of the offence involved, modify

it by a snap assessment of the defendant's personal appearance and criminal record, and permit the prosecutor a substantial veto over the result. Claims by most magistrates that they consider the defendant's employment record, family relationships, financial means, residential history, and other social ties and qualifications are refuted by the survey.

Question 13 on the questionnaire sheet was designed to establish whether the clearly crucial information used in the Manhattan Bail Project was taken into account by New South Wales magistrates making bail decisions. The results were as follows:

(a) in only 89 cases (14.6 per cent of the sample) evidence was given as to whether the accused had a job at the time of arrest;
(b) in only 47 cases (7.7 per cent) evidence was given as to the length of employment of the accused;
(c) in only 88 cases (14.4 per cent) evidence was given concerning whether the accused lived with his family;
(d) in only 68 cases (11.1 per cent) evidence was given about whether the accused supported dependents;
(e) in only 50 cases (8.2 per cent) evidence was given concerning whether the accused had a stable residential history; and
(f) in only 89 cases (14.6 per cent) some other item of information on the accused's socio-economic circumstances was given (this usually concerned the accused's occupation—as distinct from whether or not he had a job).

In only fourteen cases (2.3 per cent of the sample) was evidence given covering each of the first five categories—information which should be standard procedure in any bail determination. Evidence relating to one of the categories was given in seventy-four of the 618 cases; evidence relating to two categories was given in thirty-seven cases; three categories in thirty-four cases; four categories in nineteen cases; and to four of the first five categories plus category 6 in only six cases. Not one case involved presenting to the court evidence in categories 1-5 and other socio-economic information as well. In 448 of the 618 cases, *no evidence at all was given to the court about any of these matters.* Clearly, whatever information New South Wales magistrates use in their bail determinations, it has nothing to do with the defendant's reliability and social characteristics.

Defendants who are represented appear to have little more chance of being disposed of in the light of adequate evidence than do those who fend for themselves. This fact may be explained on the grounds that experienced criminals with a social background that would bear concealing are more likely to be represented: such a supposition cannot be refuted on our figures, but the evidence does not support it. A more convincing explanation might be that many lawyers do function as much as a part of the court as a defender of their client, and deliberately avoid bringing lengthy evidence on personal characteristics which they are aware will be

regarded by both magistrate and prosecution as time-wasting and irrelevant.[75]

TABLE 14:
CATEGORIES OF EVIDENCE AND REPRESENTATION

	Represented	*Unrepresented*	*Total*
No evidence	175 (72.6%)	254 (68.4%)	429 (70.1%)
1 category	24 (9.9%)	50 (13.4%)	74 (12.1%)
2 categories	12 (4.9%)	25 (6.7%)	37 (6.0%)
3 categories	13 (5.3%)	21 (5.6%)	34 (5.5%)
4 categories	8 (3.3%)	11 (2.9%)	19 (3.1%)
5 categories	3 (1.2%)	3 (0.8%)	6 (1.0%)
All categories	6 (2.4%)	7 (1.8%)	13 (2.1%)
TOTAL	241 (100%)	371 (100%)	612 (100%)

The extra time generally devoted to determinations where the prosecution objected to bail (see Table 10) does not appear to have been devoted to considering the defendant's background: approximately the same proportion of defendants was favoured with some investigation whether or not an objection was lodged:

TABLE 15:
CATEGORIES OF EVIDENCE AND PROSECUTION OBJECTION

	Objection	*No Objection*	*Total*
No evidence	64 (65.3%)	342 (69.9%)	406 (69.2%)
1 category	15 (15.3%)	58 (11.8%)	73 (12.4%)
2 categories	6 (6.1%)	31 (6.3%)	37 (6.3%)
3 categories	7 (7.1%)	28 (5.7%)	35 (6.0%)
4 categories	3 (3.0%)	16 (3.2%)	19 (3.2%)
5 categories	1 (1.0%)	5 (1.0%)	6 (1.0%)
All categories	2 (2.0%)	9 (1.8%)	11 (1.9%)
TOTAL	98 (100%)	489 (100%)	587 (100%)

However, the finding of the Manhattan Bail Project that judges were more likely to release defendants if they were given verified information about them appears to be borne out by the survey. The figures are insufficient to provide any statistical proof, but it does seem that those defendants about whom evidence was given were more likely to be granted bail:

TABLE 16:
CATEGORIES OF EVIDENCE AND GRANT OF BAIL

	Bail Granted	*Bail Refused*	*Total*
No evidence	322 (67.5%)	97 (76.9%)	419 (69.5%)
1 category	59 (12.3%)	15 (11.9%)	74 (12.3%)
2 categories	31 (6.5%)	6 (4.7%)	37 (6.1%)
3 categories	31 (6.5%)	4 (3.1%)	35 (5.8%)
4 categories	18 (3.7%)	1 (0.8%)	19 (3.2%)
5 categories	5 (1.0%)	1 (0.8%)	6 (1.0%)
All categories	11 (2.3%)	2 (1.5%)	13 (2.2%)
TOTAL	477 (100%)	126 (100%)	603 (100%)

[75] A. S. Blumberg, "The Practice of Law as a Confidence Game: Organisational Co-optation of a Profession" (1967) No. 2, 1 Law and Society Rev. 15.

III CONCLUSION

It is clear from the C.L.A.S. Survey that magistrates are not basing their bail determinations upon any real assessment of whether or not the defendant is likely to appear for his trial. This assessment does not, however, reveal the criteria which are in fact being used. We can only suggest that a combination of two operations is involved:

(a) a "valuation" of the offence charged; and

(b) a snap judgment of the accused based simply upon his personal appearance and criminal record.

There is a limit, after all, to the information which a magistrate can assimilate in approximately sixty seconds when he is given no objective information about the accused.

Some indication about the sorts of "snap judgments" made by magistrates may be inferred from the results of the survey. Bail was more often refused to

(a) *the old* (42.2 per cent of the "old" defendants were refused bail, compared with 19.2 per cent of the young and 18.5 per cent of the young);

(b) *Aborigines*: (46.2 per cent of Aborigines, 19 per cent of Australians, and 20 per cent of "foreign" defendants);

(c) *the shabby* (28.9 per cent of "shabby", 19.6 per cent of "average", and only 13.9 per cent of "respectable" looking defendants);

(d) *defendants without a lawyer* (bail was refused to 27.8 per cent of unrepresented defendants, but only to 9.5 per cent of defendants with a lawyer);

(e) *defendants with a criminal record* (29.3 per cent of defendants with prior convictions, and 17.2 per cent of apparent "first offenders"); and

(f) *defendants who failed to ask for it* (35.7 per cent, compared with 12.9 per cent of defendants who specifically requested that bail be set).

The potential "bailee" most likely to benefit under this system is thus a young or middle-aged white person, respectable in appearance, of untarnished character who has hired a lawyer and who is sufficiently aware of the existence of bail to ask that it be granted. The old, the black, the shabby, those with a previous record, those without a lawyer, and those too inarticulate or ignorant to demand their rights, appear to get the same shabby deal in bail proceedings as they receive elsewhere in the criminal justice system.

Much research remains to be done before the real operations of the present New South Wales bail system can be fully exposed. We hope that such research will never be undertaken, because, whatever its limitations in scope, the C.L.A.S. survey is surely sufficient to prove that the system is urgently in need of fundamental reform. When courts demand large sums

of money from unconvicted people in return for their liberty but ignore information which would permit them to assess whether the defendant is likely to appear for trial and how much he can afford to pay, then a basically unfair system becomes an instrument of oppression and injustice.

We submit that any bail system consistent with notions of equality and "fair play" should exhibit the following features:[76]

1. All accused persons should be entitled to release, pending trial as of right, and this right should be confirmed in specific legislation such as a Bill of Rights. This right should be interfered with only where the prosecution produces specific evidence which makes it appear likely that the accused will abscond if released: unsubstantiated assertions that the accused is "likely to abscond" should not be sufficient.
2. All accused persons should have the right to release on their own recognizance without being required to produce bail or sureties or to comply with other conditions unless the prosecution adduces specific evidence which makes it appear likely that the accused will abscond unless such bail, sureties, or conditions are required. The accused should have power to waive this right, but any such waiver should be required to be in writing, and should be valid only if made after he has been informed in court of his entitlements.
3. Every person denied release by the court or unable to pay the bail figure set should have the right to lodge an appeal against that decision, and the appeal must be determined by a court or agency of review which has been provided with objective information about the accused's residential history, employment record, family responsibilities, living situation and any other relevant socio-economic matters.
4. Less cumbersome procedures for appealing against bail decisions should be introduced, and defendants wishing to lodge such appeals should be entitled to legal aid as of right.
5. The principles upon which release may be refused should be set out clearly and authoritatively in statutory form.
6. The suggestion that the accused might commit further offences while awaiting trial should not be a ground for refusing bail. Such preventive detention is inconsistent with any claimed presumption of innocence in criminal cases. We should not subscribe to any reduction of this principle, but if any qualification is regarded as necessary, it should in any event apply only where an accused person has previously been convicted for crimes committed while awaiting trial.
7. Any judge or magistrate refusing to release a defendant pending trial should be required to give reasons for his decision and to have these incorporated in the transcript.

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[76] The following proposals were substantially adopted by the Australian Law Reform Commission in its *Report on Criminal Investigation* (1975); and were adopted in two reports soon to be published: S. Armstrong, "Unconvicted Prisoners: The Problems of Bail" (a report prepared for the Commission of Enquiry into Poverty); and the *Report of the N.S.W. Bail Review Committee.*

8. All accused persons appearing before any court should be informed by the court that they have a right to release. They should be handed a pamphlet informing them of their rights, of how to consult a lawyer, and of how to appeal against any court decision relating to bail or release.
9. All accused persons should be deemed to have specifically requested release.
10. Release should in no circumstances be refused to defendants charged with offences that do not carry a penalty of imprisonment. Defendants held in custody should have an absolute right to release on expiration of the minimum period of imprisonment specified for the offence with which they are charged. Unless a danger to public safety is established by the prosecution, it should be possible to waive this requirement only if the defendant applies for an adjournment and agrees in writing at the court hearing that time should not run until the set date.
11. The court should be more vigilant in probing police objections to the granting of bail, and should require evidence or information supporting their assertions.
12. Bail hearings should be heard in camera at the request of the accused.
13. Time spent in custody prior to trial or sentence should automatically count towards sentence served.
14. Where a bail figure is set, cash should not be required: defendants should be obliged to demonstrate only that they have realizable assets within the jurisdiction capable of satisfying the debt.
15. The surety system should be abolished.
16. Failing to appear at trial should be an offence for which an accused person may be separately tried and convicted.
17. Better facilities should be provided for those people who must be held in custody awaiting trial, and they should be clearly segregated from convicted prisoners.

These proposals may appear extensive, but in fact they amount to little more than an attempt at making the present bail system work in accordance with its fundamental principles. In 1966 the United States Supreme Court said that the quality of a nation's civilization can be measured by the methods it uses in the enforcement of its criminal law. It is disturbing that Australia might be measured by a system which fails to give a fair hearing to people appearing before its criminal courts, and which offers the facade of "law and order" at the expense of justice.

APPENDIX

PETTY SESSIONS QUESTIONNAIRE

Name of Student..... *Date*.....

Court..... *Hours*..... to .....

1. (a) *Name of Accused*..... (b) *Sex* Male ☐ Female ☐

   (c) *Age* Old ☐ Middle ☐ Young ☐

2. *Nationality of Accused* Australian ☐ Foreign ☐ Aboriginal ☐ Other (specify).....

3. *Appearance of Accused* Respectable ☐ Average ☐ Shabby ☐

4. *Charge*.....

5. *Was the Accused represented by a Lawyer?* Yes ☐ No ☐

6. (a) *Was any prior record of arrest or conviction possessed by the accused mentioned in court?* Yes ☐ No ☐

   (b) *If yes, give details*.....

7. *How did the accused plead?* Guilty ☐ Not Guilty ☐ Plea not taken ☐

8. *Did the accused ask for bail?* Yes ☐ No ☐

9. (a) *Did the magistrate refuse bail without any discussion or objection?* Yes ☐ No ☐

   (b) *If yes, what reasons, if any, were given for the refusal*:

   - ☐ Simple reference to prior convictions
   - ☐ Suggestion that accused might abscond
   - ☐ Offence too serious to warrant bail
   - ☐ Accused may tamper with evidence
   - ☐ Accused may commit further offences while on bail
   - ☐ Other (specify).....

10. (a) *Did the magistrate simply announce a bail figure without any discussion or objection?* Yes ☐ No ☐

    (b) *If yes, what was the figure?* $.....

    (c) *Specify his reasons, if given, for setting that amount*.....

11. (a) *Who initiated discussion of bail?* Magistrate ☐ Prosecution ☐ Defence ☐ Other ☐

    (b) *What was the amount first suggested?* $.....

    (c) *Were alternative amounts suggested by* No-one ☐ Defence ☐ Magistrate ☐ Prosecutor ☐ Other ☐ (specify).....

(d) *If yes, what were the alternatives so suggested?*

- ☐ Less
- ☐ Substantial
- ☐ That a surety be required
- ☐ That reasonable bail be set and a surety be required
- ☐ That the accused be released on his own recognizance
- ☐ That no surety be required
- ☐ Other (specify).....

12. (a) *Did the Prosecution object to the granting of bail?* Yes ☐ No ☐

(b) *If yes, did the Prosecution give as reason*

- ☐ Simple reference to prior convictions
- ☐ Suggestion that accused might abscond
- ☐ Offence too serious to warrant bail
- ☐ Accused might tamper with the evidence
- ☐ Accused might commit further offences on bail
- ☐ Other (specify).....

13. *Did anyone (specify whom) give evidence concerning or indicate whether*

- ☐ Accused had a current job at the time of arrest
- ☐ How long he had held that job
- ☐ Whether he lived with his family
- ☐ Whether he supported a wife, children, parent, or others
- ☐ How long he had lived at his address (state address)

.....

- ☐ Any other information on accused's socio-economic circumstances (give details).....

14. (a) *Was a bail figure finally set?* Yes ☐ No ☐

(b) *If yes, specify amount* $.....

(c) *Did the defence indicate whether the accused could or could not pay that amount* Could pay ☐ Could not pay ☐ No indication ☐

(d) *For how long was bail discussed?*

Not at all ☐ Up to 30 secs ☐

30 secs– 1 min ☐ $1\frac{1}{2}$–2 mins ☐ $2\frac{1}{2}$–3 mins ☐ $3\frac{1}{2}$–5 mins ☐

$5\frac{1}{2}$–10 mins ☐ 11–15 mins ☐ More than 15 mins ☐

(Note: Q.14(d) refers to time spent discussing bail, NOT to the total length of the whole proceedings.)

15. (a) *Was a remand period set?* Yes ☐ No ☐

(b) *If yes, state its length in weeks and days*.....

(c) *Was there any discussion concerning the length of the remand period?* Yes ☐ No ☐

(d) *Were any reports requested?* Yes ☐ No ☐

(e) *If yes, specify psychiatric, probation, etc.*.....