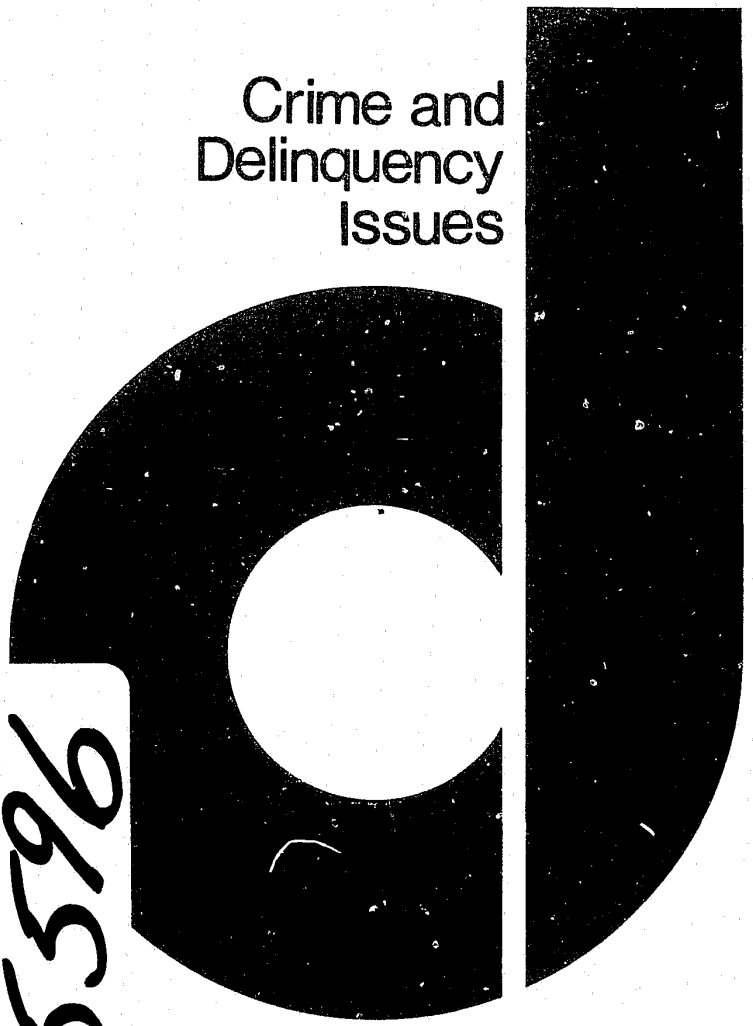
Decision-making in the Criminal Justice System: Reviews and Essays

Crime and Delinquency Issues



NATIONAL INSTITUTE OF MENTAL HEALTH

CHAPTER II

Uncommon Decisions—Common Problems

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DELINQUENCY

The problem of prediction of delinquency among children has received much attention; and the voluminous literature on it is varied with respect to the kinds of predictors used, methods for combining them, and validation evidence. A number of reviews are available (Argyle 1961; Blum 1957; Gottfredson 1967; Gough 1962; Mannheim and Wilkins 1955; Rose 1967; Savitz 1965; Schuessler and Cressey 1950; Venezia 1971). Despite this attention, resulting in many promising efforts, all extant prediction methods are in need of further validation, probable revision, and subsequent revalidation in specific jurisdictions before any attempt to use them in prevention applications would be warranted. (Craig and Glick 1963; Cureton 1957; Gottfredson 1967; Gough, Wenk, and Rozynko 1965; Gough 1962; Grygier 1964; Hanley 1961; Kvaraceus 1966; Meehl and Rosen 1955; Reiss 1951; Saline 1958; Shaplin and Tiedman 1951; Trevitt 1965; Venezia 1971; and Walters 1956.) Relatively low validity, problems of generalization from samples studied to other populations—perhaps with different proportions falling into the criterion categories—and inadequate or absent cross-validation evidence are common problems. Another is a lack of information on, or attention to, the relative costs and utilities of identifying and seeking to forestall delinquency in a predicted delinquent in relation to the possible costs of misclassifying an individual who will not become delinquent (Cronbach and Gleser 1957). This issue is related to concern with the "self-fulfilling prophecy"—that is, to apprehension with respect to the possible negative effects of a classification procedure itself upon the persons classified through labelling them undesirably (Toby 1965; United States President's Commission on Crime in the District of Columbia 1966, p. 59; Wellford 1967). Predictions thus may have the potential of enhancing their own accuracy.

The concept of the "self-fulfilling prophecy" calls attention in addition to the probability that the two types of error resulting from any prediction procedure—errors to be expected (since perfection is not)—may not have equal consequences. It may be much more damaging to treat as delinquents those persons misclassified as expected delinquents than to treat actual predelinquents as if they were not expected to be delinquent.

DETENTION

Juvenile detention is the preadjudication confinement of allegedly delinquent children. Its use, in terms of the proportions of referred children who are held, varies markedly in the United States (Sumner 1968; National Council of Crime and Delinquency 1967). Its purpose generally is held to be the temporary containment of children who, if released, would be likely to run away or harm themselves or the community.

Typically, children referred to probation departments (as arms of the juvenile courts) are screened by probation officers who decide whether or not the child shall be detained pending further study and disposition—which may or may not involve adjudication by the juvenile courts. Criteria used in arriving at this decision are poorly articulated or wholly absent, and evidence showing any relation of such criteria to the purposes of the decision is nonexistent since appropriate validation studies have not been done. In one study of detention (Sumner 1968, p. 162) about one-fifth of the variance in decision outcomes (detain or release) was attributed to variation in characteristics of the children studied—more specifically, to their prior records (of offense, court referrals, detention, and probation).

Another aspect of the same study showed that differences in attitudes (of the decision-makers) concerning the use of detention were associated with differing detention rates (Gottfredson and Gottfredson 1969).

In fairness to accused children, the juvenile courts, and the community, the problem of deciding which children must be detained pending an ultimate resolution of the allegation demands much more empirical study than ever has been attempted. A systematic study of experience with these decisions, identifying the criteria used and assessing the relation of these to the consequences of the decision outcomes in terms of the later behavior and life experiences of the children involved, could provide the information needed for a more rational, less arbitrary, more humane, less damaging handling of children in this circumstance.

JUVENILE PROBATION

A comprehensive, 4-year project conducted in seven California counties by McEachern and Newman (1969) resulted in development of a computerized aid to juvenile probation decision-making. The research had three phases: First, a conceptual model of the process was developed, specifying the major treatment and disposition points. Second, a followup study of 2,290 youths referred to the probation departments was completed, from which a conditional probability model—to predict outcome criteria from background and personal characteristics—was developed and tested. (Criteria were "recidivism," defined as the number of repeat offenses, and a "behavior improvement-deterioration" measure.) Finally, an experimental "on-line" computer system was developed with the aim of aiding probation officers to make decisions based on a Bayesian decision model.

PRETRIAL RELEASE

In the case of accused adults in the United States, the last decade has seen an expansion of interest in extending release, while trial is awaited, to larger numbers of persons while maintaining assurance of the defendant's availability for trial. (Freed and Wald 1964; United States Department of Justice 1964; United States Department of Justice and Vera Foundation, Inc. 1965; Vera Institute of Justice 1972). Traditionally, release on money bail has been the principal, and often the sole, method for avoiding confinement of the accused while awaiting trial (despite its obvious discrimination against the poor). In many parts of the United States programs of release on the person's own recognizance now have been added. The classification and prediction problems posed in this area are similar to those found at many other points of decisions in the criminal justice process; thus, their discussion serves to illustrate issues common throughout the system.

The necessity for more careful and thorough study in this important, complex area was aptly defined by Herman Goldstein (United States Department of Justice and Vera Foundation, Inc., 1965, p. 151-160). He commented that the traditional American presumption of innocence before trial, together with a concern for community security, places this problem within the same context as so many of the other critical issues surrounding criminal justice decisions. The issue is joined by the need for striking a balance between the concern for the

protection of society and the desire to guarantee maximum freedom for the person. The desire to prevent future crimes opposes the desire to allow the suspect to be free prior to trial. Not only the need for further study but also the form it should take was suggested by Goldstein:

> Like so many issues in criminal justice administration, the issue of preventive detention is complicated by the fact that we do not really know, in quantitative terms, what the social costs are of the several alternatives. We have only fragments of information on how many crimes are committed by individuals while on bail. And where such figures are available, we have no indication of the extent to which these figures are influenced by the prevalent practice of detaining those who would be the most serious risks. We do not know whether those crimes which are committed are similar to those with which the individual has already been charged. We do not know how many of these crimes could have been prevented. And we have little quantitative knowledge of the inconvenience or damage which prevalent practice in the use of bail causes the individual (United States Department of Justice and Vera Foundation, Inc. 1965, pp. 158-159).

Discussing the purposes of bail, he pointed to the necessarily predictive purpose of the judicial decisions concerned. He asserted:

> . . . Since the only purpose of bail which is set forth in existing Federal or State law is that of assuring the reappearance of the defendant for trial, it would appear that the question of whether bail is excessive must be determined on the basis of the criteria which predict the likelihood of reappearance.

Similarly stressing the central importance of the problem of prediction to issues of bail, preventive detention, and release on recognizance, Freed and Wald stated:

> Bail, devised as a system to enable the release of accused persons pending trial, has to a large extent developed into a system to detain them. The basic defect in the system is its lack of facts. Unless the committing magistrate has information shedding light on the question of the accused's likelihood to return for trial, the amount of bail he sets bears only a chance relation to the sole lawful purpose for setting it at all. So it is that virtually every experiment and every proposal for improving the bail system in the United States has sought to tailor the bail decision to information bearing on that central question. For many, release on their personal promise to return will suffice. For others, the word of a personal surety, the supervision of a probation officer or the threat of loss of money or property may be necessary. For

> some, determined to flee, no control at all may prove adequate (Freed and Wald 1964, p. 56).

A number of programs have been initiated as a means of improving the information upon which recommendations for release of defendants on their own recognizance may be made when this information suggests that there is no substantial risk of the defendant's failure to appear at the specified time and place. These programs for improved fact finding, described by Freed and Wald in the report cited, are underway in State or Federal courts throughout the United States.

The pioneer in this effort was the Vera Foundation's Manhattan Bail Project, started in the fall of 1961, which provided a model for other jurisdictions. The evaluation of risk was based upon data concerning residential stability, employment history, family contacts nearby, and prior criminal record. A point system was used in order to weight the various items considered, and, if the defendant scored a sufficient number of points (and if he could provide an address at which he could be reached), then verification of the information was attempted. The project staff then reviewed the case and decided whether to recommend release.

Freed and Wald reported results since found in many jurisdictions:

> . . . The Manhattan Bail Project and its progeny have demonstrated that a defendant with roots in the community is not likely to flee, irrespective of his lack of prominence or ability to pay a bondsman. To date, these projects have produced remarkable results, with vast numbers of releases, few defaulters and scarcely any commissions of crime by parolees in the interim between release and trial (Freed and Wald 1964, p. 62).

These authors pointed out that projects such as these serve two purposes:

> 1. They free numerous defendants who would otherwise be jailed for the entire period between arraignment and trial, and
> 2. They provide comprehensive statistical data, never before obtainable, on such vital questions as what criteria are meaningful in deciding to release the defendant, how many defendants paroled on particular criteria will show up for trial, and how much better are a defendant's chances for acquittal or a suspended sentence if he is paroled (Freed and Wald 1964, p. 62).

The general problem of prediction is thus a central issue in recognizance release decisions; and the specific prediction problem of greatest interest may be stated quite simply. We wish to know who reasonably can be expected to appear for trial and who cannot. How-

ever, there is considerable interest as well in the problem of prediction of offenses by arrestees who are released on their own recognizance. Finally, there is interest in a number of related further possible outcomes of the decision. These other outcomes, which also require empirical study, include a variety of other aspects of the administration of justice, where the consequences of release on recognizance are, at present, unknown.

Stressing the importance of this area of study are the results of an experimental project within the New York study. As summarized by Freed and Wald,

> . . . of all defendants believed by the project to be qualified for release, half were in fact recommended to the court, while the other half were placed in a control group, and their recommendations withheld. In the project's first year, 59% of its parole recommendations were followed by the court, compared to only 16% paroled in the control group. In short, recommendations based on facts nearly quadrupled the rate of releases (Freed and Wald 1964, p. 63).

This shows that the proportions released increased through the program; but what of other consequences of the release on recognizance decision—for example, consequences of acquittal or confinement. The report continues,

> The subsequent case histories of defendants in both groups were thereafter analyzed. They showed that 60% of the recommended parolees had either been acquitted or had their cases dismissed, compared with only 23% of the control group. Moreover, of the 40% who were found guilty out of the parole group, only one out of six was sentenced to prison. In contrast, 96% of those convicted in the control group were sentenced to serve a jail term (Freed and Wald 1964, p. 63).

What is needed is a thorough-going objective study of not only the procedures by which recommendations for (and against) release on recognizance are made and of not only the subsequent decision (for release or against it) but also of the relations between the information available for use in arriving at the recommendations and the decisions and the various consequences of the decisions. Such consequences may include not only changes in the probabilities of acquittal or conviction or of differing sentencing alternatives but also of later offenses. The comprehensive assessment of the prediction issues given by the nature of the decision problem thus could provide an evaluation of the effects of the procedures employed at this stage of the criminal justice system. It is the same in many others.

The Vera Foundation criteria, developed in the Manhattan Bail Project, work in one restricted sense. That is, experience reported thus far supports the view that persons released as a result of recommendations based upon the interview schedule rarely fail to appear for trial. However, there has been no demonstration that the items used actually are predictive. In order to be useful as predictors, it must be demonstrated that the items help to discriminate between the groups of persons who appear for trial and those who do not. A logical case may be made easily for the relevance of items presumably reflecting roots in the community or employment stability. That is, it is reasonable to hypothesize that these items have some predictive relation to appearance for trial or other outcomes of interest in the decision process. Until these items are studied systematically in relation to the various consequences of the decision, however, we must assume that actually they may be unrelated to these consequences. Such study is required also to answer a number of related questions. What is the degree of validity of the individual items, for example, in terms of correlation with appearance or nonappearance for trial? Are the items equally valid with respect to conviction for new offenses during the period of release? How are the items correlated with one another; and how should they be weighted in order to provide, in some specific sense, an optimal predictive guide to the court?

A recent study clearly demonstrated the needs for such investigations (Michael Gottfredson 1974). It had two objectives. The first was to assess the predictive validity of the Vera Institute's instrument and of its individual items. The second was to improve prediction from a variety of background characteristics of defendants. The design of the study, through a special arrangement with the courts, allowed comparisons of subjectively chosen good and bad risks. That is, not only were persons recommended by the O.R. (own recognizance) project staff and approved by a judge released on O.R., but also 328 defendants *not* deemed eligible by usual procedures were released. The latter group was compared with a randomly selected 201 defendants released normally. Although there were differences in the failure to appear for trial rates for the two groups, a striking result was that about 85 percent of the O.R. sample and about 73 percent of the experimental sample either appeared for trial or voluntarily returned. Similarly, about three-fourths of the O.R. sample and slightly more than half of the experimental sample had no arrests during the 90 days just after release. None of the individual items which make up the Vera instrument was substantially related to the criteria studied (appearance or arrests), and the total score accounted

for only 2 or 3 percent of the variance in these criteria. Although a variety of additional items were studied, the resulting prediction equations, when applied to a validation sample, failed to achieve better prediction than the Vera instrument.

Another recent project sought the safe pretrial release of defendants jailed as a result of inability either to post money bail or to meet Vera-type criteria for release on recognizance (Venezia 1971, 1972, 1973). During the project's first 8 months of operation, 81 of 141 defendants interviewed were released to a community treatment program. The cases of 61 defendants reached the court disposition stage, and all appeared for trial. The program was reported as ". . . showing that defendants, who have been considered poor risks for pretrial release, can be released with no greater danger to the community than that presented by persons on money bail," (Venezia 1971, p. viii). The released defendants, compared to members of a nonreleased control group, were less likely to be incarcerated after conviction.

PREVENTIVE DETENTION

The intertwining of issues of law with those of diagnosis, classification, and prediction is well illustrated by problems surrounding the concept of pretrial detention aimed at the prevention of possibly further crimes by an accused but not convicted person. A now former Attorney General of the United States argued in 1969 against challenges that a Federal proposal providing for preventive detention violates the Eighth Amendment, the presumption of innocence, and the due process clause of the Fifth Amendment (Mitchell 1969). Discussing these constitutional issues, he argued that there is no alternative to detention of persons who will commit additional serious crimes if released pending trial, if the community is to be protected. (See Hruska 1969, for a similar argument.)

Setting aside the legal issues, one must ask how such (additional?) offenses are to be predicted, by what classification schemes, with what degrees of reliability and validity, and at what costs (of correct and incorrect predictions). Among others arguing the presumed merits of preventive detention, Lindau supported the detention of the "most dangerous" defendants on the basis of the insight and experience of trial judges (Lindau, 1969-1970). It apparently is not needless to say that the validity of such predictions by trial judges is a question to be answered empirically and that evidence to date with such prediction problems must raise considerable skepticism. Others (e.g., Dershowitz, 1969-1970) noted the difficulties in predic-

tion (i.e., the inadequacy of presently available knowledge), pointed out the problem of ever knowing how many defendants were erroneously confined, and concluded that the cost in unnecessary confinement would in any case be too high to justify preventive detention. (See also, Allington 1970; National Council on Crime and Delinquency 1971; Hickey 1969; Tribe 1970; Borman 1971; Miller 1970; and Von Hirsch 1972.) For a discouraging present-day prognosis for violence prediction, see "Can Violence Be Predicted?" (Wenk and Emrich 1972).

COMPETENCY

Confusion concerning the concepts, diagnosis, classification, and prediction, also reigns notably around the issue of competency to stand trial, an issue which similarly illustrates the mixture of legal and scientific problems common to criminal justice decision-making. (See, e.g., Hess and Thomas 1963; Matthews 1970; McGarry et al. 1972.) Competency in this case is a legal concept referring to a person's ability to appreciate the nature of the proceedings against him and to participate adequately in his own defense. The concept thus concerns a *state of the person*, i.e., a diagnosis. The diagnosis, however, must address the issues of pretrial competency which are essentially legal, not psychiatric, concerns (McGarry et al. 1972). The criteria of competency focus essentially upon the protection of due process rights of the accused to a fair trial: The person must understand the nature of the proceedings and their consequences and must be able to cooperate with counsel. Otherwise, proceedings are suspended until the person is seen as able to participate in the defense. Diagnoses of physical or mental illness which often are provided the court ostensibly to assist in the competency determination are thus not necessarily relevant to the legal questions asked. Descriptions of states of persons involved or assignments to traditional psychiatric categories of mental illness may have little or no bearing on competency as legally defined. As a remedy, McGarry and his colleagues have developed more objective procedures for measurement of competency, seeking more adequate assessment of the specific areas of psychological functioning which are pertinent to the specific diagnosis required by the legal issues. Evidence from this study suggests that such procedures can help avoid costly, often lengthy, unnecessary confinement due to hospitalization for competency determinations.

POLICE DECISIONS

It is the police who first decide, in any person/event allegedly, apparently, or actually a crime, whether or not to invoke the law. Thus, police officers " . . . have, in effect, a greater degree of discretionary freedom in proceeding against offenders than any other public official" (Bittner 1970, p. 107). They decide, for example, whether or not an offense has occurred, whether to arrest, whether to issue a citation, whether to hold persons in custody, whether to refer persons to other social agencies; they decide whether to press for the invoking of the criminal law or to forget it.

If the judge decides to dismiss the case or acquit the client, there is a record. If the prosecutor decides not to prosecute, there is a record. But an officer's decision not to make an arrest is not a matter of record (Bittner 1970, p. 107). The police do not merely apply and enforce the law; rather, and to a great extent, they use discretion in invoking the law (Goldstein 1960; Packer 1964; Kadish 1962; LeFave 1962).

In chapter III, Professor Pepinsky discusses the police decision-makers and their decisions. He presents a theoretical analysis of police decisions in terms of objectives of legitimate and respectable control and he proposes a strategy for increased citizen participation and, hence, rationality in these decisions.

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