DISCRETION, EXCHANGE AND SOCIAL CONTROL: BAIL BONDSMEN IN CRIMINAL COURTS*

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INTRODUCTION

An impression widely held has it that American criminal courts are caught in a crisis. The manifestations of this presumably critical condition are well-known: ever-expanding workloads; indigent defendants held for weeks, months, and sometimes years of pre-trial confinement; officials and attorneys preoccupied with the mechanics of "plea bargains" instead of the intricacies of trials; protracted delays in settling some cases; disposition of other cases by means of arbitrary and prejudicial techniques; pervasive inequalities in sentencing decisions, and so on.

During the last five years, these symptoms have received attention from a number of respected journalists (James, 1971; Downie, 1972; Jackson, 1974). Criminal courts and their ailments have come under extensive study by several recent government commissions (President's Commission, 1967; Skolnick, 1969; National Advisory Commission, 1973). Social scientists have also shown increasing interest in these problems (Skolnick, 1967; Blumberg, 1970; Mileski, 1971; Levin, 1972; Mather, 1974).

What has given birth to the apparently mounting concern over criminal courts? Their general state of health may in fact be poor, but there is nothing about the underlying condition that deserves to be called new. Consider, for example, the comments of Raymond Moley (1930: xi-xii), a perceptive observer of American criminal courts fifty years ago:

> A large majority of persons whose guilt is established in our criminal courts plead guilty. The proportion varies from state to state and from city to city but it is a fair guess that approximately eighty per cent of those who are found guilty in felony

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> prosecutions plead guilty. The tendency is just as marked in the rural districts as in the cities. It is almost universal. The most reliable data show that the percentage in Chicago was in 1926 as high as 90 per cent. In New York in 1926 it was about the same. In Detroit in 1928 it was 70 per cent. In a number of Michigan counties outside of Detroit 90 per cent. In Indianapolis in the same year 60 percent. In rural districts in Indiana over 90 per cent. In Los Angeles 75 per cent. In a dozen California counties in the same year 85 per cent. In Connecticut in 1928, 90 per cent. In Iowa in 1928, 93 per cent. The practice is becoming standard.

Striking similarities with the contemporary situation are apparent, not only in the magnitudes of the figures presented, but also in the fact that the heavy dependence of criminal courts on guilty pleas was regarded then, as it is now, as the most prominent symptom of institutional breakdown. Thus, Moley wrote that the "tremendous importance of the plea of guilty in the administration of criminal justice" could quite clearly be seen as "a measure of the extent to which jury trial is supplanted by the process of administrative discretion" (1930: xii). Moley also estimated that the proportion of cases settled through guilty pleas in New York had risen from twenty percent in 1850 to eighty percent in the time he was writing, which suggests that treatment of defendants between arrest and disposition may have begun to deteriorate long before the start of this century. It does not appear that the situation of defendant in criminal courts has changed dramatically since Moley wrote (see Pound, 1945; Virtue, 1962: 79-135; Heumann, 1975).

But there has been one development of very great moment for criminal courts during this period. After the Second World War, the pace of civil liberties litigation quickened, partly in response to the shifting policy emphases of the U.S. Supreme Court. Among the cases that began to be heard with accelerating frequency were a number of novel claims to fair procedure by state and federal criminal defendants (Schubert, 1970: 49-50, 62-65). Over the next 20 years, the Court decided a long and complicated series of cases involving virtually the complete range of procedural problems in criminal law. By the middle of the 1960's what started as a trickle of appellate court rulings on criminal procedure had taken on the proportions of a flood (Cox, 1968).

It is common knowledge that many of these cases have resulted in decisions strengthening the rights of criminal defendants. That it has become more difficult to convict accused persons in court is also generally understood. Somewhat less appreciated is the true lineage of these decisions. In fact, they

are continuous with what Egon Bittner (1970:22) has termed "the progressive legalization of the criminal process." This trend has been evident in American society for at least a century and a half. Bittner claims that in recent decades the trend has accelerated "to the point where the rapidity of change bewilders even seasoned jurists"—an accurate perception, indeed, as shown by Leonard Levy's detailed study (1974) of the mixture of genuine bewilderment and intense political resistance that has dealt a serious setback to the legalization movement over the last several years. But without radical change in the American system of government, the possibility that this trend will be reversed is, as Bittner argues, "imponderable" (1970: 22-23).

This movement toward legalization has sent shock waves through the entire system of criminal justice during the last two decades. For example, it has prompted organizational changes in law enforcement (Milner, 1971) and has stimulated the adoption of new practices in corrections (Ohlin, *ed.* 1973). The movement for procedural reform has hastened the erosion of traditional boundaries between the two formerly separate systems of criminal and juvenile justice (Lefstein *et al.*, 1969; Lemert, 1970). Also, it has undoubtedly contributed to the declining rate of admissions noted by observers of American prisons over the past decade (Rothman, 1972).

Another place where signs of change have appeared within the criminal justice system is the procedural interstice occupied by the institution of bail. Numerous attempts to reform the bail system have been launched over the last fifteen years (Paulsen, 1966; Wice and Simon, 1970). Perhaps surprisingly, appellate courts have had no direct influence on this development. As Caleb Foote (1965:959) observed ten years ago, bail reform has been "the only major reform of recent decades in which the courts have played a wholly passive role." If this observation seems less puzzling now than it might have a decade ago, it may be that in the intervening years we have come to rely less upon the appellate courts to direct policy and shape reform. Yet it is curious that the last two decades produced no "landmark" U.S. Supreme Court decision about the rights of criminal defendants to release on bail.

This paper supplies part of the explanation for this puzzle. It reports on a study of the role of bail bondsmen in criminal courts. The paper also suggests why the financial bail system has retained its historic importance in the scheme of American criminal justice, despite more than a decade of effort to replace it with more rational and equitable arrangements.

THE STUDY

The legal purpose of bail is to enable persons accused of crime to remain at liberty while preparing for trial, and the only lawful reason for requiring defendants to post bail is to insure their presence for required court appearances. Nevertheless, bail can be and in fact is routinely used by court officials for other purposes not recognized by law—to detain some defendants who are believed dangerous or likely to flee, to punish other defendants who are regarded as disrespectful or troublesome, and to elicit information or confession from still others. In other words, the bail system serves as the key instrument by which officials maintain control over persons arrested for crime.

The perspective that I wish to develop concerns the assistance that bail bondsmen lend to criminal justice officials who are responsible for managing defendants in the period between arrest and disposition. Usually, officials can insure post-arrest confinement of particular defendants without difficulty, because the law allows wide latitude for setting bail amounts (as well as for making initial charging decisions upon which bail determinations are based). In any court system, however, there are customary limits to official discretion in bail setting and physical limits to the facilities available for pre-trial detention of defendants. Court officials therefore turn to bail bondsmen for informal cooperation in managing the population of arrested persons.

In the workings of the bail system, it is possible to discern a pattern of reciprocal sharing of discretionary powers between criminal court officials and bail bondsmen which facilitates the control of defendants in the pretrial period. Through legitimate discretionary actions of their own, bail bondsmen can help officials to overcome constraints set by resource limitations and to avoid the legal guarantees which are supposed to protect the rights of defendants to bail; officials reciprocate by exercising their discretionary powers in ways that benefit bondsmen. Naturally, this exchange has consequences for both parties. For bondsmen, the consequence is that many defendants who might otherwise represent poor business risks can be welcomed as customers, although other defendants whom the bondsmen view as good business risks must be turned down. The manifest contributions that bondsmen make to the management of arrestees lead court officials to develop a stake in neutralizing the regulatory structure designed by the legislature to govern the activities of bail bondsmen.

The bail bondsman has never been regarded as playing a substantial enough part in the criminal justice process to merit careful analysis. Most observers view the presence of this figure in the courts as an anomaly. A species of private businessman, the bondsman has long been associated in American legal folklore with corruption of officials and exploitation of defendants; recent efforts to reform the bail system have sharpened this image. One contemporary critic has bluntly described the bondsman as "an unappealing and useless member of the society who lives on the law's inadequacy and his fellowman's troubles," and argues that the bondsman "gives nothing in return, or so little as to serve no overriding utilitarian purpose" (Goldfarb, 1965: 102). Thus, although the bondsman's powers are lawful, his very existence strikes some observers as parasitical.

What little is known about the role of the bail bondsman has been strongly biased by the findings of reform oriented investigators. Grand jury studies, legislative investigations, and journalistic exposés have portrayed bondsmen as "fixers" of cases, corrupters of police and judges, and peddlers of illegitimate influence (see Goldfarb, 1965: 102-115; Wice, 1974). In short, bail bondsmen typically have been viewed as essential links in chains of official corruption. Such findings contain an element of truth, of course, but it is hardly surprising that bail bondsmen in corrupt jurisdictions participate in corrupting practices.

The following report is based mainly on direct observation of the activities of bail bondsmen in the criminal courts of two cities which gave no evidence of systematic corruption at the time the study was being done. Two months of field research were carried out by the author in Mountain City and Westville, both located in the same western state. An initial introduction to a Westville bondsman was arranged through a local criminal lawyer. A chain of subsequent introductions led to contacts with six other bondsmen in Westville and five in Mountain City. Periods of observation with individual bondsmen ranged from one to seven days. Bondsmen were observed in various settings, including business offices, restaurants, taverns, courts, and jails.

Although no attempt was made to spend time with all bondsmen working in the two cities (approximately ten in Westville and twenty in Mountain City), data gathered by observing contacted bondsmen were carefully checked against information obtained by interviewing lawyers and court personnel. In addition, available documentary materials on bail bondsmen were consulted. These included historical accounts of the development of the institution of financial bail (Beeley, 1927; Yale Law Jour-

nal, 1961), empirical studies of bail administration (Foote, 1954, 1958; Silverstein, 1966), and legal critiques of the bail system (Foote, 1965; Goldfarb, 1965). This examination of the literature suggests that the findings reported in the study represent general patterns.

BUSINESS IMPERATIVES AND ILLEGITIMATE PRACTICES IN BAIL BONDING

The bail system is at once an important legal procedure and a lucrative business enterprise. By allowing commercial intermediaries to post bail for the release of arrested persons prior to trial, the state has created a business operation within the criminal courts. The bondsman's role cannot be neatly catalogued. Freed and Wald (1964: 30) assigned the institution of bail "a hybrid status, somewhere between a free enterprise and a public utility." Bail bondsmen are private businessmen who render a sevice to individuals in return for remuneration at levels fixed by the state. In one sense, then, bondsmen are government sub-contractors. But their work injects them into direct participation in the business of criminal courts, where their actions can and do affect the outcomes of criminal cases. Their behavior must be examined from two different and somewhat conflicting perspectives, the first emphasizing business concerns and the second stressing legal responsibilities.

The Business Setting

Bail may be looked upon as a specialized insurance system. It is designed to reconcile the conflicting interests between defendants, who desire to be at liberty before trial, and the state, which insists that defendants be present for court proceedings. Bail bondsmen are the visible commercial operatives of this system.[1] In principle, these conflicting interests will be held in balance by the operation of a set of positive and negative incentives. There must be, on the one hand, sufficient financial gain to induce bondsmen to invest in defendants to relieve pressures on custodial facilities. Bondsmen, then, are legally permitted to collect non-refundable premiums or interest charges (usually 10% of the amount of bail) from defendants for whom they post

1. As one student of the bail system (Hoskins, 1968: 1136) has commented: "In essence, the bail bondsman acts as a broker to accommodate the conflicting interests of the state and arrestee by quickly bailing him out of jail—for a price. The bondsman performs a service for the state by promising to return the arrestee to the court at a specified time, thereby relieving the state of the expense of incarcerating large numbers of persons prior to their trials."

bail. Bondsmen regain the bail amounts posted when they have satisfied their promises that defendants will appear in court as required. On the other hand, the state needs to protect itself against the inconvenience and public outrage likely to arise when bailed defendants fail to appear for trial. Thus, the law requires that amounts pledged as security for defendants released on bail will be forfeited to the state in the event of nonappearance.

At one time, bondsmen were marginal, independent entrepreneurs operating with scant resources (Beeley, 1927). Today, major insurance companies stand behind the individual bondsmen who operate the bail bonding business. A dozen companies are said (Sutherland and Cressey, 1970: 404) to control nearly all the corporate bail bonds written in this country. The policies of these companies affect the activities of bondsmen and may thus indirectly affect the administration of criminal law. Bail bondsmen are located at the bottom of this business described by Goldfarb (1965: 95-96) as:

> a straight line beginning with the large national insurance companies and running down through the regional subadministrators and eventually to local agents (the bondsmen) who camp around the local court houses and actually hustle the business. . . . there is little real business interplay between these three levels. The business functions begin at the top; and the responsibilities and risks increase on the way down, while inversely the profit risks also increase on the way down. The insurance company on top sets the public image of a respectable business and within the working scheme of its bail setup takes no risk with its agents. The agents go about their business in their own fashion, and for this privilege agree to retain only a small percentage of the profit.

This surety-company dominance of the bail bond business is found in most states and in all large metropolitan areas—wherever criminal court activity is sizeable enough to attract and support corporate investment.

A key feature of the business is the low degree of risk for the surety companies. To protect themselves against loss, companies which sell bail bonds require bondsmen to deposit with the companies reserve funds, built up through assessments on fees or premiums bondsmen collect from customers. For each corporate bond used, the bondsman must contribute ten percent of the premium he collects from the customer to reserve funds. In addition, the surety company levies a twenty percent charge on each premium the bondsman collects for posting a corporate bond. This leaves the bondsman with a gross profit of seventy percent of each premium collected on a corporate surety bond. In theory, the amount of bonds that the bondsman can write is

determined by the amount in his reserve fund. Any forfeitures declared against bonds he has written are paid with the reserve fund. If forfeitures exceed the total amount of reserves, the company may take the remaining amount from future premiums the bondsman receives.

The sale of bail bonds is thus an immensely profitable, low-risk arena of enterprise within the insurance industry. Individual bondsmen supply nearly all the labor necessary for corporate profit from the sale of bail bonds and are sometimes said to work for the companies. Bondsmen in fact are not employees of these companies; they are independent businessmen who, by serving as agents of the surety companies, obtain financial backing necessary to satisfy solvency standards set by the state. Bondsmen are not salaried; rather, they receive their earnings on something nearer to a sales-commission basis. They pay their own business expenses, set their own hours, and work out their own local arrangements for conducting their affairs. For example, a bondsman who has developed a large business may employ additional persons on various terms—hourly wages, salaries, or commissions. Moreover, instead of using corporate bonds, they may post their own assets (*e.g.*, treasury bonds or cash) as bail and reap a higher rate of profit. In this respect, their business arrangement is quite different from that of other insurance salesmen.

Surety companies have little direct control over the activities of individual bondsmen despite—or possibly because of—the pattern of corporate authority. Corporate policy may make itself felt in a very general way by placing broad limits on the amount of bonds that particular bondsmen may write at any period of time. Where bondsmen represent several surety companies, corporate influence is weakened.[2] The ability of surety companies to insure themselves against loss reduces their need to exercise continuous supervision and control over bondsmen.

Competition for Business

Within the local court system, the bondsman's interactions with defendants, attorneys, law enforcement and court officials

2. The relationship between bondsman and surety companies is marked by competition between the companies to increase their shares of the market. In some areas where a company insists on conditions which a bondsman regards as unreasonable, he may elect to write bonds for a competitor company. Bondsmen may be associated with several companies at once. For the individual bondsman, this may be a matter of self-protection, since if one company loses its standing as a qualified surety—perhaps because of the improper actions of other bondsmen using bonds it guarantees—the bondsman can continue to write bonds issued by other companies. (See National Conference on Bail and Criminal Justice, 1965: 228-232.)

are permeated by a multitude of legal and illegal commercial possibilities. For this reason the bondsman's business affairs are subject to comprehensive legal regulation, and his work therefore has some unusual restraints. He must maintain detailed accounts of all his transactions and submit them to state insurance commission officials as matters of public record. He may not legally enter into any special agreements with government officials about when or on what terms he is to supply his services. Moreover, he is forbidden to offer as incentives to potential clients or as advantages to actual customers any extra services such as legal advice, attorney referral information, or assistance with court cases. Finally, he may bargain with potential clients over fees, but must sell his services at rates set by the state.

The bondsman's primary occupational difficulties stem from the fact that legal restrictions compel him to meet business imperatives without the use of many standard business techniques. Like many small businessmen, the bondsman operates in an environment offering neither steady demand for his services nor reliable means for guarding against incursions by competitors. In other business settings such conditions foster highly competitive modes of behavior. Legal regulations drastically narrow the initiative the bondsman can legitimately exercise, theoretically closing off all but a few forms of competition as illegal practices. Beyond rendering "prompt, courteous service twenty-four hours a day," the only legitimate business technique that the bondsman can use is advertising. In practice, however, only marginal returns are expected from this source.

The principal competitive devices employed by bondsman are illegal. Reciprocal referrals are a common business arrangement among bondsmen and criminal lawyers. All the bondsmen I talked to have client-sharing agreements with lawyers and assume that the practice is universal. Many bondsmen seek to develop illegal ways of gaining access to potential clients and transforming them into paying customers. They also attempt to cultivate informal exchange relationships with police, judges, and other officials for the information, protection, and administrative influence—in short, the business advantages—that such relationships can provide.

Bondsmen devote considerable effort to developing and expanding illegitimate sources of business within the legal system. One means of illegal recruitment of customers is the "jail-house lawyer." Typically this role is filled by a person who spends a great deal of time in jail on minor charges like intoxication, begging, or loitering. His job is to steer defendants from inside

the jail to a particular bondsman on the outside. These services may come quite cheaply, and the relationship is likely to be very casual. The arrangement is not capable of much formalization owing to the irregular habits of the destitute alcoholics available as personnel; for the same reason it is not very productive for bondsmen. Only a few customers are likely to be recruited in this way and they tend to be first offenders facing minor charges. Experienced defendants are more likely to know bondsmen from past encounters with the law or by reputation, and defendants arrested on serious charges are likely to make contact with bondsmen through other channels, usually lawyers.

Practicing attorneys offer a much more important opportunity through which the bondsman recruits business. The bondsman can count on criminal lawyers for a certain proportion of his clientele, since even attorneys not wishing to deal with bondsmen must occasionally enlist their services for defendants.[3] Attorneys may legitimately refer cases to bondsmen, but reciprocal client-referral agreements between lawyers and bondsmen are forbidden. When questioned during field observations, some bondsmen expressed apprehension about this subject and offered insistent denials that any such arrangements existed. In several instances, the subject of bondsmen-attorney arrangements had not even arisen in conversation before bondsmen began making unsolicited denials. The phenomenon is so widespread and so much a part of bail bonding and criminal law practice, however, that it is impossible to conceal for long.[4]

The following event[5] occurred after one week of steady ob-

3. However, attorneys and bondsmen are both interested in the same question—the defendant's ability to pay (see Wood, 1967; Blumberg, 1967). This means that attorneys may seek to avoid referring cases to bondsmen, and *vice versa*.

4. Such relationships are considerably more important to lawyers than to bondsmen. Bail bondsmen have direct access to persons who may need legal representation and thus they occupy an ideal position from which to steer such persons to attorneys. Furthermore, defendants facing minor charges may decide to forego the services of a private lawyer, even if they can pay a bondsman's fee for posting bond. On the other hand, most attorneys handle so few criminal matters that they cannot expect any advantages from offering to exchange business with bondsmen on a client-sharing basis. Even those attorneys specializing in criminal practice may find that clients typically arrive having already enlisted the aid of a bondsman. Accordingly, reciprocation by attorneys may often take the form of direct payment to bondsmen for referrals. Rates of payment vary over time and from bondsman to bondsman, and it is quite likely that local political conditions determine the power of bondsmen to set rates and conditions. For example, a 1960 investigation of bail practices in New York City revealed the influence of bondsmen to be so great that attorneys refusing to pay rates demanded by bondsmen for referral of clients could get no business (Goldfarb, 1965: 114).

5. All names used in this and other incidents described in this paper are pseudonyms.

servation with a bondsman in Mountain City. The case was instructive because the relationship between the bondsman and the attorney was still being defined at the time of the meeting:

> Late one morning, Walt told me that he would be meeting a young lawyer named Dave Redding for lunch. Walt explained that he had sent some cases to this attorney in the past. Opening his desk drawer to show me the business cards of several attorneys, he said, "It's against the law to refer attorneys, so I usually show the people these cards and allow them to choose which lawyer they want."
>
> When Redding arrived, Walt suggested that I join them for lunch, but qualified his invitation by saying to Redding, "If you have any private business to talk over, then we of course won't consider this." Redding's immediate reply was: "What do you mean, private business? We have nothing to hide. Our contacts are well regulated by the state insurance commission. Sure he can come along."
>
> On the way to the restaurant, Walt asked: "Well, Dave, what's the purpose of today's meeting, and what can I do for you?" Redding responded: "Oh, there's no special purpose. I just wanted to thank you for the business. This is a courtesy lunch, a social visit, if you will."
>
> After lunch, the two kidded each other about the $200 fee that Redding had collected from Martinez, a young Mexican-American whom Walt had bailed out two weeks earlier on charges of narcotics possession and suspicion of burglary. They also discussed another case involving a defendant's hit-and-run accident. Walt had referred this case to Redding, who had taken it without hesitation. Now some question had arisen about the defendant's ability or willingness to pay Redding's fee. Walt assured him that the defendant had money and counseled Redding to "work on him."
>
> Then Redding said, "I certainly appreciate the business you've sent me. I'm trying to build up a practice and this helps a great deal. I knew this wasn't a get-rich-quick business, but I had no idea it would be this hard." Walt assured him that the future held great promise for a fine young attorney like himself, and then added: "Sure, I'll send you some more cases. And let me ask that in return you refer your cases to me. Now if you ever have anybody who needs to get out and you know he's a good risk, just call me and tell me that he's good as gold and I'll take him right out without collateral. Understand?"

As this case illustrates, the bondsman may have vital knowledge of the defendant's financial situation. First-time defendants in particular may unwittingly reveal financial information to the bondsman during "routine" questioning. Such defendants frequently do not understand the nature of the bondsman's role and may see him as yet another official whose powers must be respected. Inexperienced defendants are more vulnerable to the attorney-referral arrangement. Bondsmen in some other cities are said to exploit defendants by requiring them to take their cases to certain attorneys as a condition of posting bail for their release (Goldfarb, 1965, 114). No evidence of this practice could be found in Westville or Mountain City,

where the bondsman-attorney referral system may have been working in favor of defendants. One lawyer speculated that attorneys needed to exercise caution with cases referred from bondsmen. "They have to give these clients a fair deal," he said, "or the defendants might resent the attorney and mess up the system. It's too risky for the attorney working with a bondsman not to give good representation."

Collusion with jail personnel may be another valuable means of customer recruitment for the bondsman. During the period of field observation, it became apparent to me that certain jail police in Mountain City were assisting certain bondsmen in getting customers. The simplest and most reliable method was one that required only a moment's effort by an individual jail staff member. "All he has to do," an attorney explained, "is find out if the defendant has a bondsman lined up. If not, he points to a particular bondsman' number in the telephone directory and pushes a dime into the guy's hand." Even this simple arrangement can result in unexpected complications, as the following account reveals:

> I was present with Walt in his office when he received a call from a woman requesting that bail be posted for one of her employees. The defendant had been arrested the night before for driving on a suspended license. Walt told the woman that he would call the jail to determine the amount of bail and then call her back. Bail had been set at $296, making the premium charge $39.60—ten percent of the amount of bail plus an additional $10 charge which bondsmen are allowed to collect on all bails under $500. Walt called the woman back advising her that she would need to submit the premium as well as her signature to a deed promising to pay the full amount of bail if the defendant failed to appear in court. The woman said that she would send another of her employees with the money to Walt's office.
>
> When the second employee arrived, Walt and I went to jail across the street "to get the body." At the jail another bondsman was waiting to post bail for the defendant Walt had come to get. Walt immediately sensed what was happening and informed one of the jailors that he wanted to talk to the defendant. A jail policeman stepped forward and said, "No, Alvarez wants to go with the other guy." There was some discussion, and eventually it was decided that the defendant would determine which bondsman would "get the bail."
>
> Alvarez (a black) was brought out, and he turned to the other bondsman (also a black). The two spoke briefly in hushed tones. Then Walt (not black) approached Alvarez and said, "Mrs. McGee called me to help you. Your friend Smith is over in my office right now waiting for you." Alvarez turned to the other bondsman, shrugged apologetically, and said, "I guess I'll have to go with him," indicating Walt. As we rode down in the elevator, the other bondsman mumbled that he had also received a telephone call. Walt remained silent. Alvarez said, "Well, that's the way it goes."
>
> After Alvarez and Smith left, I asked Walt how the other bondsman had become involved. Walt speculated that someone in

> the jail had persuaded Alevarez to call the other bondsman. Smith, Alvarez's co-worker, knew nothing about the other bondsman. I asked whether one of the jail police we had just seen had been responsible for the other bondsman's appearance. Walt replied, "Well, you saw the way he wanted Alvarez to be taken out by the other guy, didn't you?"

The same bondsman related an incident illustrating another variation of this method:

> A man entered Walt's office and presented a slip of paper on which had been written the name of the defendant, the charge in exact penal code section terminology, the date of the next court appearance, and the amount of bail. The man was a supervisor in a public utility company where the defendant, a woman, was employed. The slip of paper, Walt was convinced, was *prima facie* evidence that one of the police had recommended a bondsman. Apparently the man had come to the wrong address.
>
> Walt gladly cooperated with the man, however, and immediately went to the jail to take the woman out. When one of the jailors asked about the slip of paper, Walt "played dumb," saying that he never got any slips of paper from the jail. With great reluctance, the jailor released the defendant to Walt, who patiently explained several times that the woman's supervisor was waiting over in his office. "That guy was pretty unhappy, because he'd lost some sure money in the mix-up."

Other methods requiring collective efforts by jail police may sometimes be employed. These are more complicated and carry greater risks of discovery and failure. A Westville bondsman recounted an experience of his at the Mountain City jail:

> "I got a call from the relative of a guy who had been put in jail over there. It was a pretty good bail, so I decided to drive over and take him out myself. When I got there I found a police hold on him. Now that hold wasn't on him when I left Westville only a half an hour before, so whoever put it on him should have still been around. But I couldn't find anybody who knew anything about it. They passed the buck and I went from one office to another trying to find out whose hold it was. Nobody knew, and finally they said they were going to let him go. Next thing I knew another bondsman came walking out with the defendant. Then they told me that they had taken the hold off him, but actually they were keeping him for this other bondsman."

In general, collective agreements among jail officials appear necessary to protect the system of collusion. Since this system functions as a means of restricting competition, its value depends on excluding some bondsmen so that business can be channeled to other bondsmen. But competition among bondsmen may result in some degree of participation in the system by nearly all local bondsmen.

There was no evidence to indicate the existence of collusion between jail police and bondsmen in Westville at the time of my study. With a smaller population, a more professionally disciplined police force, and a different political complexion, Westville

presented relatively poor opportunities for collusive relations to develop between police and bondsmen. All of my informants claimed that defendants selected bondsmen on their own from inside the jail. If the Westville police were collaborating with particular bondsmen, the arrangement was either very well concealed or quite minor in scale.

In some cities, bondsmen reportedly refuse to extend services to defendants accused of minor offenses which require "nominal"—i.e., low—bail, because they view the modest premiums in such cases as not worth the trouble and risk of posting bond (Freed and Wald, 1964: 33). It seems likely that this practice would be found only where bail bonding had fallen under monopoly control by a small number of bondsmen. By assuring priviledged bondsmen a guaranteed share of the profits, monopoly conditions would make it possible for bondsmen to neglect defendants in minor cases.

Aside from some petty collusion in Mountain City bail practices, bail bonding in the two cities seemed to offer relatively undisturbed market conditions. For most bondsmen operating there, defendants in minor cases appeared to constitute the bulk of business and the most reliable source of income. Such cases were especially attractive because the bondsman could post his own assets and thereby avoid the costs of using corporate surety bonds. Although minor cases yield small premiums, they may be attractive to bondsmen as business opportunities precisely because of the low bail amounts on which the premiums are based. Also, by permitting bondsmen to charge defendants an extra $10 for posting bail in amounts less than $500—as done in the state where this research was carried out—the legal system increases the attractiveness of such cases.

PROFIT MAXIMIZATION AND CASE MANAGEMENT BY BONDSMEN

Shortly after bondsmen enter the criminal justice process, some defendants are granted pre-trial liberty and others are ordered held in detention to await further action in their cases. The timing of these events has created the impression that bondsmen are "purveyors of freedom" who play a key role in determining whether defendants will obtain release before trial (Wice, 1974). This view greatly exaggerates the influence that bondsmen have in such determinations, however.

Although bail procedures in different parts of the country are far from uniform (Silverstein, 1966), it is clear that bail

administration everywhere belongs primarily to law enforcement and court officials. The most critical decisions—the bail amounts set in particular cases—are entirely controlled by local criminal justice officials, with prosecuting attorneys taking the dominant role. Bondsmen do not participate at all in these decisions for cases making up the largest volume of criminal court business. This is because of the widespread use of the bail schedule, a form approved by local judges listing uniform bail amounts for the most common misdemeanor violations (e.g., disorderly conduct, petty theft, simple assault, and certain vehicle offenses). It is true that bondsmen can and sometimes do refuse to post bail for defendants in such cases, but decisions as to the amounts required in particular cases are determined more or less automatically as a matter of clerical routine, usually by station-house police.

For cases involving charges of serious misdemeanor and felony offenses, bail setting typically takes place in court at the time of arraignment. This process involves negotiation between the judge, prosecutor, and defense attorney; the prosecutor's recommendations usually determine the final decision (Suffet, 1966). The bondsman plays no formal part in this process, either. In many cases of this kind, the defendant or his attorney may contact a bondsman before the bail hearing, and the bondsman may supply informal advice to the judge or the prosecutor concerning his willingness to post bail for the defendant. This may help the defendant by inducing the judge to set bail at a level which the defendant can afford. It can hardly work to the defendant's disadvantage.

Unlike the standardized bail amounts required in the most common misdemeanor cases, amounts set in cases involving serious offenses often vary a good deal, even when the charges are identical. Defendants who are unable to secure release at amounts initially set may request that bail be lowered. The frequency of bail reduction probably provides a rough measure of the extent of excessive bail in various jurisdiction, although in general bail reduction does not occur with much frequency in most places (Silverstein, 1966: 634-637). Both the bail schedule and the bail hearing lead to decisions that discriminate against sizeable proportions of the defendant population (Foote, 1954, 1958; Ares and Sturz, 1962; Silverstein, 1966). But it is mistaken to attribute these discriminatory results to bail bondsmen, given the economics of the situation in general and the bondsmen's inclinations to seek profits in particular.

The Bondsman's Interest in Court Efficiency

If bondsmen play only a minor role in determining defendants' chances for release, the same cannot be said of their role in handling defendants who are released on bail. Bondsmen actively employ a number of different techniques of case management. These practices are aimed at protecting investments and maximizing profits, but they also have positive functions for the court system. Nominally, bondsmen are private businessmen situated outside the criminal courts. Examination of their routine activities, however, indicates that they serve as agents of the court system responding to many of the problems that concern those who occupy official positions within it.

The strategies bondsmen use in managing cases reveal many generic similarities to the practices of lawyers, probation officers, and other agent-mediators within the court system (Blumberg, 1970). An important first step is often to establish a good relationship with the defendant. The bondsman usually extends a cordial, businesslike manner to each customer, seeking to convey a willingness to separate the defendant's specific dereliction from his or her general moral character. He therefore treats in a routine or "professional" way matters that his customers may regard as emergencies, but his mode of dealing with particular customers may vary depending on his perception of situational demands. A bondsman explained, "Each one of these people is different, and you've gotta handle them in different ways." Thus when the customer is a first-time defendant charged with a relatively minor offense, the bondsman's strategy may be to play down the seriousness of the defendant's plight by reciting such homilies as, "We get cases like this every day. Don't worry, it'll come out all right." In other minor cases where the customer is an experienced defendant and perhaps an old customer behind in payments for previous bail bond services, the bondsman may act in a slightly patronizing and officious manner, counseling the defendant to "be a good boy, don't get into any more trouble, and bring that money in next Friday." In cases involving more serious charges, the bondsman may deal calmly and quietly with the customer, emphasizing his neutrality by carefully avoiding any mention of the alleged offense.

Another and more important element of case management involves giving various forms of legal assistance and advice. Bondsmen always remind their customers of future court dates and instruct them about how to find the room in the court building where their cases will be heard, what time to show up,

and what to expect during the proceeding. An indirect form of advice is sometimes employed if the defendant has already retained an attorney or has a particular attorney in mind. In this situation, the bondsman may issue a reassuring comment to the defendant, as, for example, "Oh, I know Bart will give you all the help he can. He's a fine lawyer." In another instance, I observed a bondsman attempting vigorously to persuade a defendant whom he had just bailed out to call an attorney whose name the defendant had mentioned as we walked from the jail to the bondsman's nearby office. The defendant was allowed to leave the office only after promising that he would go directly to look up the attorney. Bondsmen may also refer unrepresented defendants to attorneys. Here, the practice of recommending attorneys appears in a different light, for it has the same purpose as is intended by congratulating the legally sophisticated defendant on his choice of attorney. Both of these techniques serve to increase the customer's feeling of personal competence and to reinforce his self-definition as a "defendant"—a person who is going through the court process and who will accept its judgment. The chances of panic and flight are thereby reduced.

In other cases, the bondsman gives direct legal advice. The following observed instances, both involving the same bondsman, suggest typical possibilities. In the first case, the bondsman counseled against retaining an attorney:

> At about one o'clock one afternoon, one of Al's customers came into his office. The man had been arrested for drunk driving many weeks before. His court date was for two o'clock that day. Al told him that he had two alternatives: either he could demand a jury trial and hope that the complaint would be withdrawn, or he could plead guilty and ask the judge for probation and some time "to put a few beans aside and pay the fine."
>
> Al explained: "If you ask for a jury trial, you'll need a lawyer and that can run into money. It might easily run you $250, and then you have no guarantee that you'll be acquitted. Of course, if you get a jury trial and an attorney, you will have a better judge. But with no priors the fine's only $296, so you might as well plead guilty, ask the judge for probation, and then get the money together over a period of time."
>
> The customer contemplated Al's advice, then gave a resigned shrug and said, "Well, I guess I'll plead guilty. See you later."

The second case also involved a motor vehicle code violation:

> Shortly after lunch on another afternoon, a young man who had been charged with littering and possessing open containers of beer in his car stopped by to see Al about his case. He was apprehensive about the outcome because the girl who had been arrested with him had already "copped out as charged." He asked: "What will happen if I change my earlier plea to guilty?"
>
> Al answered: "It won't make any difference. They got the girl and all they want are guilty pleas. The judge will fine

you $25, and that will be the end of it."

Al was correct. Later that afternoon the client returned and jubilantly told Al, "It's all over. I got out for $29."

Two features of these incidents deserve attention. First, each involved a minor offense. The bondsman's ability to offer sound legal advice depends on the degree to which court processing of the kind of case involved is routinized and therefore predictable. His legal expertise thus seems to be confined to traffic violations, public order offenses such as drunkeness and disturbing the peace, and minor property crimes. For the bondsman this may be a happy coincidence, since the typically small penalties facing defendants in such cases may take much of the risk out of the prospect of confronting the court without legal representation.

Second, the examples suggest that bondsmen share the interests of court officials in guilty pleas. More generally, both groups are interested in efficiency. The bondsman's liability for each bond he posts does not end until the defendant's case is cleared from the court docket. Every new customer represents a case that will remain open and a bond that will remain "out" for an indeterminate but roughly predictable amount of time. For example, after posting bail for a woman charged with welfare fraud, a Westville bondsman explained why this had been a good business decision: "She'll plead guilty and be put on probation. The case will be over in about two and a half months." The strength of the bondsman's business position depends on the volume of cases he handles: the amount of bonds in use is inversely related to the amount of new bonds that he can post. Therefore, his interests lie in efficient, routinized court procedures and compliant defendants. Anything that lengthens the duration of criminal cases—disorderly judicial administration, militant defense attorneys, non-appearance by defendants, new and unfamiliar legal procedures—weakens the bondsman's position.

The Quasi-Bureaucratic Role of the Bondsman

An important consideration for understanding the bondsman's activities is that cooperation from defendants may be contingent on the administrative practices of courts. Some defendants may fail to make required court appearances because they get lost in the system. For example, they may have separate appearances scheduled in two different court departments at exactly the same time, or they may be uninformed or confused about the court dates. In other cases, defendants may be unable

to comply with required court appearances because of employment obligations or family emergencies.

Such problems are less likely to arise for defendants who have private legal representation. One of the key functions performed by attorneys in the criminal process is to direct the passage of cases through the procedural and bureaucratic mazes of the court system (Blumberg, 1967). For unrepresented defendants, however, the bandsman may perform the crucial institutional task of helping to negotiate court routines. In order to protect his investment, the bondsman may find it not merely desirable but necessary to guide defendants through the court process. By providing legal advice to his customers, arranging more convenient court dates for them, and negotiating their passage through the court process, the bondsman increases his chances of collecting fees and reduces the amount of time that his assets are encumbered. At the same time, these methods of case management promote orderly and efficient court administration. They also implicate bondsmen in unauthorized practice of law.

Efforts by bondsmen to organize the actions of individual customers in relation to the actions of court officials deepen the involvement of bondsmen in the criminal justice process. Not only do these efforts require frequent visits to court rooms, but they may also require informal assistance from court personnel. The experienced bondsman knows each of the bailiffs, court clerks, and accounting office members on a first-name basis and how much and what kinds of assistance each is willing to provide. The bondsman typically takes advantage of mutualized exchange opportunities at Christmas and New Year to reciprocate favors received through court "connections." If it is consistent with his personal style, he may seek to improve his relations with court clerks, bailiffs and other court participants by "buttering them up" through flattery and other forms of interpersonal artifice. He may also supplement his day-to-day dealing with officials by occasionally dispensing gifts (such as free passes to professional sports events) and supplying drinks at nearby bars in after-hour gatherings.

One measure of the degree of cooperativeness of court officials is whether they will comply with the bondsman's request to bring a case forward on a particular day's court calendar. This small but nonetheless significant service, which can be easily rendered by the court clerk, is a favor that the bondsman may seek in order to keep track of his cases or to accelerate release of a new customer for whom bail has just

been posted. Without this assistance, the bondsman cannot "move" cases in court. Where such influence is available, however, the bondsman can sometimes negotiate convenient court dates, coordinate multiple appearances and forestall issuance of bench warrants.

A more important form of assistance that the bondsman may wish to arrange is for certain of his customers to be released on recognizance, i.e. without being required to make financial bail. If a defendant is returned to jail because of new difficulties with the law before he has paid his debt to the bondsman, the bondsman's fee may be jeopardized. When this happens, the bondsman may face two unsatisfactory options: either lose the balance of the money owed by the defendant or assume a greater risk by posting another bail bond in hopes of collecting the fees owned on the original bond. If a judge or prosecutor can be persuaded to grant release without requirement of financial bail on the new charges, however, the need for deciding between the two options is eliminated.

By now it has become evident that the court clerk is a figure of major importance to the bondsman. In high-volume urban courts, there are many persons with this designation—one, in fact, for every separate court "part" or "department" to which each of the judges of a given court district are assigned. The administrative position of the court clerk makes him an object of continuous attention from other participants seeking information about or access to the court calendar. The resources he holds may be an important means for the bondsman's efforts to protect his investments. One bondsman stated:

> "The court clerk is probably one of the most important people I have to deal with. He moves cases, he can get information to the judge, and he has control over various calendar matters. When he's not willing to help you out, he can make life very difficult. He knows he's important, and he acts like it."

Observations confirmed the value of cooperation from the court clerk for case management strategies employed by bondsmen. Two examples are given below:

> A bondsman and a court clerk were chatting amiably during a recess in one of the Westville courtrooms. They kidded each other for a short time, each complaining about the "easy life" of the other. Then the court clerk asked the bondsman: "Hey, what about O'Hanlon? Isn't he your case? He didn't show this morning and I've got a bench warrant on him sitting on my desk right now. You'd better get in touch with Sheldon [an attorney] and have him call the judge for a continuance right away or that warrant is gonna be on its way."
>
> On another occasion, a Westville bondsman was summoned to a nearby city by a prospective customer. After obtaining a verbal promise from the defendant's brother that the premium

would be paid, the bondsman went to that city to post bail. When we arrived there at mid-morning, the bondsman's first contact was with the court clerk:

Al: You've got Mallen scheduled to come up this afternoon, don't you?

(The clerk checked his records and nodded affirmatively.)

Al: Look this guy was picked up last night on plain drunk and he's still got a george heat on. I don't think he's fit to appear in anybody's court. He's still so stiff I swear I could smell it over the phone.

Clerk: Hmmm.

Al: I'm going over to the jail and take him out. How's about putting the guy on for tomorrow? He's gotta get himself cleaned up.

(After momentary hesitation, the clerk agreed.)

Clerk: Okay, I'll set him up for nine tomorrow.

As we walked to the jail, the bondsman told me that he had done a favor for the defendant. The postponement would give the defendant an extra day to sober up and would enable him to appear in court freshly shaved and wearing clean clothes. "Makes a much better impression on the judge if the guy looks decent." A short time later the defendant appeared at the jail booking desk. A middle-aged man, he had spent the night and most of the morning in jail. He was now completely sober, and although he presented a shabby appearance there seemed little doubt that he could have stood trial that afternoon. After posting bail, Al counseled the man: "Go home and get some rest, and then come back tomorrow morning at nine and put on your best manners. I don't think you've got anything to worry about. Judge Gardner is one of the best in the country."

In later conversation, the bondsman said that he regarded the man as "an alcoholic obviously beyond the point of being helped." He revealed that the reason for arranging postponement of the man's case was to increase the likelihood that the man would make his court appearance. "I've seen hundreds of cases like this guy—just simple drunks. In that condition, they're likely to wander off somewhere and fall asleep for a whole day. This way the guy doesn't have to worry about it. He can go home, sack out, and his chances of being able to make a court appearance in the morning are much better than if he has to hang around the court building for a couple of long, dry hours until his case is called."

Court "connections" are primarily useful to the bondsman for managing minor cases. One bondsman reported that a high proportion of his clientele consisted of persons arrested for traffic warrant violations. When asked about the business consequences of this fact, he replied:

"Great! [Laughter] What I mean by great is that these cases make up a lot of the bread and butter in this business. But they're much more work than the big cases. Felony cases can't be moved around in the courts, but chicken-shit cases can. With traffic cases, you sometimes find yourself doing a lot of extra work in getting postponements and that kind of thing. You know, like when a guy is afraid he'll lose his job if he has to appear in court on a working day without permission from his boss."

This parallels the situation described above in which dispensation of legal advice appears to be confined to relatively trivial, although statistically frequent, criminal matters. Thus, minor cases provide a more reliable basis of income, higher returns on investments, and greater opportunity to exercise influence in the process of criminal justice.

BAIL ADMINISTRATION AND CONTROL OF ARRESTEES

Bail administration does not come to an abrupt end with the release of some defendants and the detention of others. On the contrary, it extends throughout the entire period between arrest and disposition. Official actions in this process have been described in several empirical studies (Foote, 1954, 1958). This section shows how the bondsman's decisions to post bail are linked to considerations of subsequent decisions by court officials. Through collaborative exercise of their respective discretionary powers, bondsmen and court officials exchange outcomes which strengthen legal control over arrested persons in the period before disposition.

Decisions to Post Bail

Compared with its importance for official decisions, the factor of offense appears to play a very minor role in the bondsman's assessment of defendants as possible customers. More serious crimes involve high bails, of course, and bondsmen have greater reason to be concerned over the possibility that defendants in these cases will "skip." At the same time, higher bails mean higher premiums. Some bondsmen believe that drug addicts and certain kinds of violent offenders tend to be less reliable than other criminals, and in such cases the bondsman may exercise special care in deciding to post bail. In general, however, bondsmen do not make categorical judgements about defendants based upon the offenses with which they are charged.

Similarly, bondsmen are not concerned about the possibility that released defendants might be re-arrested on new charges while at liberty. Bondsmen believe, just as do criminal justice officials, that chances of re-arrest may be quite high among certain classes of defendants, especially those accused of minor offenses like prostitution and shoplifting. Indeed, bondsmen share the view of many law enforcement and court officials that for some defendants, release on bail and return to "the streets" signals a period of intensified criminal activity in order to earn

money to pay fees owed to bondsmen and attorneys. But bondsmen cannot afford to base their decisions on the probability of recidivism by released defendants. One bondsman revealed the tough-minded outlook required by his business:

> "I don't care what any bondsmen's association says on this score. We don't care and we can't care about protecting society. We have means and methods of making these people pay, so we take the risks and the gambles. That's what we're in business for. There is almost nobody I won't take out, including people I'm certain will repeat their crimes."

The most important question is whether the defendant is likely to pay the premium for his bail. Ideally, full payment of the premium is demanded before the bondsman agrees to post bail. Depending on his assessment of the defendant's background, character, and financial capacity, however, the bondsman may decide to post bail on credit, i.e., to allow the defendant to pay the premium in installments. The financial qualifications of family members and friends may become an important consideration at this point. Surety companies seem to discourage installment agreements, but bondsmen generally operate on the assumption that it is better to extend credit broadly, accepting the risks of non-payment and partial payment that this method implies. Therefore, bondsmen usually have collection problems.

Bondsmen sometimes appear to make attempts at estimating the probability of defaults or "skips" by prospective customers before posting bonds, but not primarily because they entertain any special concern for the efficiency or integrity of court operations. The dominant question is rather the defendant's reliability as a paying customer. One bondsman said that he regarded the family life of defendants as being particularly important in this respect. "If a man is happily married and loves his kids, he's not going to leave town." Another bondsman attempted to sum up the problem by stating, "the good people are gonna cooperate and the bad people are gonna run." Later, however, he qualified this by explaining that he, like other bondsmen, looks into each defendant's criminal record, exployment history, residence and family situation before deciding to post bail. A third bondsman commented, "good actors have roots in the community."

Having determined that a defendant has the ability to pay the premium, however, the bondsman is extremely likely to accept the defendant as a customer. He may refuse to post bail on a defendant who already owes him a considerable amount of money for past services. Similarly, he will probably refuse to

extend credit to a defendant whom he knows—either from his own past experience or occasionally on the advice of another bondsman—to be a "wise guy" or a "bad actor," i.e. a person likely to withhold payments or to go into hiding. Hesitancy on the bondsman's part is also likely when police records indicate outstanding warrants, for in such cases the defendant may be re-arrested and returned to custody before the bondsman has collected his fee. The police follow the business dealings of bondsmen with special interest and can sometimes use this knowledge to advantage when they wish to prevent particular defendants from gaining release.

Indemnification Agreements

Of course, if he chooses to do so, the bondsman can insure himself against all losses from forfeited bonds by requiring each customer to complete a collateral agreement. To accomplish this, the defendant signs a collateral form or persuades another person to act as guarantor. This step would eliminate all uncertainty in client selection, since such an agreement guarantees complete indemnification of the surety for any losses he may incur. But bondsmen usually do not require indemnification contracts from their customers, for most criminal defendants are extremely poor and are unable to find guarantors to co-sign indemnification agreements on bail bonds posted for defendants. Although the guarantor may not fully understand the legal significance of his role,[6] he generally recognizes that he is being asked to pledge an amount of money or perhaps his property for the defendant's good conduct. The guarantor must place great trust in the defendant, which for most defendants narrows the field of potential guarantors to a small circle of persons.

It is difficult to determine the frequency with which bondsmen post bail unaccompanied by collateral agreements. No offi-

6. "The guarantor who puts up collateral incurs several liabilities. A typical bail agreement contract between the surety company and the guarantor provides that the guarantor will pay the surety company the full amount of the bail bond immediately upon its forfeiture. The guarantor is also liable up to the full amount of the bail bond for the actual expenses which the surety incurs in securing the defendant's release and in recapturing him, if necessary, and if a bail forfeiture is not set aside, the guarantor's liability may extend to the expenses incurred in the attempted recapture in addition to the amount of the forfeiture. Finally, the surety may require the guarantor to pay as collateral upon demand the full amount of the bail bond whenever the surety deems such payment necessary for his self-protection, due to any material change in the risk he has assumed. The recording of the bail agreement constitutes a lien on the specified property of the guarantor in favor of the surety until the surety's liability has been completely exonerated." (Hoskins, 1968: 1140-1141).

cial figures are collected to indicate how often this happens, but some reasonable estimates can be made. During field interviews, bondsmen stated that they receive "hard" collateral—indemnification contracts backed up by specific assets such as bank accounts or property deeds—in five to ten percent of their cases. These are probably cases involving more serious offenses and thus higher bail amounts. Estimates of the frequency of "hard"collateral were all within this range (see National Conference on Bail and Criminal Justice, 1965: 234). Similarly, another study of bail practices (Hoskins, 1968: 1141) concluded that "complete indemnification is seldom achieved" by bail bondsmen. However, in a fairly large proportion of cases, written promises of indemnification are obtained.

In these cases, the bondsman accepts from defendants or guarantors the pledge of such possessions as automobiles, jewelry, or household furnishings and appliances as collateral. Estimates by bondsmen of the frequency of such agreements ranged from forty to sixty percent. The realizable market value of these items is often considerably less than the personal value they have for the guarantors who offer them. Thus it appears that most of the indemnification agreements obtained by bondsmen have relatively little value as collateral.

This impression is strengthened by bondsmen's reports concerning the difficulties of enforcing collateral agreements. "Unless you hold the collateral in your hand, it isn't worth anything," stated one bondsman. In five years of writing bail bonds, this informant claimed, three guarantors had reimbursed him for forfeited bonds without protesting. Another bondsman said that he had received voluntary compensation from a co-signor only once in fifteen years. Legal remedies are available to the bondsman, and when enforcement of collateral agreements becomes necessary the bondsman can turn to these. In many states, for example, co-signers are legally liable to pay costs incurred by bondsmen in attempting to recapture fugitive defendants up to the limit of the outstanding bond. Given the inevitable costs and uncertainties of litigation, however, bondsmen are more likely to resort to informal means of enforcing indemnification agreements with defendants and co-signers. The overriding purpose of indemnification agreements appears to be their presumed "psychological" value for protecting investments by underlining the obligations of defendants and co-signers to the bondsman.

In practice, therefore, whether to post bail on a defendant without obtaining collateral is the most important decision fac-

ing the bondsman. Because most defendants are unable to provide adequate collateral, the bondsman confronts this decision often. It is in exercising discretion not to impose "hard" collateral conditions on defendants and guarantors that the bondsman runs his largest risks and stands to make his highest profits. The bondsman must summon all of his business acumen and skill in "human relations" to make this decision. It is here that the bondsman's greatest impact on the justice system occurs, and it is here also that cooperative relations with court officials become most important.

Non-Enforcement of Bail Forfeitures

The key factor in this aspect of bail bonding is the discretionary power of judges to exonerate outstanding bonds and to set aside bail forfeitures. When a bailed defendant fails to appear in court, the bondsman may have to forfeit the bail he has posted if he is unable to produce the defendant within the legal "grace" period (six months in the state where this study was done). Whether forfeiture is actually imposed is decided by the judge who presides in the case. Remission procedures, which permit this decision to be made, set out the conditions under which judges may authorize the return of forfeited bonds to sureties.[7]

The law gives judges wide latitude in these procedures, creating the suspicion that such decisions may sometimes reflect judicial improprieties. The opportunity for official misconduct would, of course, be present even if judges were not directly involved in approving requests for exoneration of forfeited bonds. But from another standpoint, the existence of these procedures is fortunate, for without them officials would be compelled to carry out a policy of strict and uniform enforcement of forfeited bail bonds. This would probably lead to a considerable increase in the number of persons unable to gain release on bail. Bondsmen ordinarily obtain complete indemnification on only a small percentage of all defendants for whom they post bonds, and insistence of bondsmen on full collateral would be a very

7. From the standpoint of legal theory, the need for some means to allow equitable relief of bail forfeitures can be justified on grounds that primary responsibility for assuring the defendant's return to court should be placed on the defendant rather than the bondsman. If it can be established legally that the surety has exercised reasonable diligence in trying to fulfill his promise to assure the defendant's appearance for trial, the surety should not be penalized for the defendant's irresponsibility or intentional failure to appear. For this reason, contemporary bail law contains several different procedures whereby sureties can secure remission of bail forfeitures. A detailed discussion of these issues is found in Hoskins, 1968: 1145-1150.

likely adjustment to a policy of strict enforcement. Many defendants would thus fail to qualify for the services of bondsmen due to inability to raise collateral. This might be compounded by another effect of a policy of strict enforcement of bail forfeitures: such a policy quickly drives non-corporate sources of bail, including friends and relatives of defendants, out of the system (see Foote, 1954: 1060-1066).

Virtually every study of bail administration ever conducted has found that a large proportion of forfeitures are set aside by judges. This generous use of judicial discretion stems from one or more of several possible sources. As already suggested, one possibility is that forfeitures are routinely set aside because judges recognize the dependence of the court on the willingness of bondsmen to post bail for defendants who cannot provide full collateral. That bondsmen accept many defendants as customers without securing legally enforceable indemnification agreements not only increases the overall profitablility of writing bail bonds, but it also enables large numbers of defendants to obtain release who would otherwise face pre-trial detention, thereby preventing intolerable pressures on detention facilities. The stake of the criminal justice system in the willingness of bail bondsmen to depart from norms of conservative business practice is considerable.

A second reason that judges so often exercise their power to remit bail forfeitures in favor of bondsmen is that they sometimes need reciprocity from bondsmen to prevent defendants from obtaining release. When court officials desire that a particular defendant not be released, they may pass the word on to local bondsmen (National Conference on Bail and Criminal Justice, 1966: 118). I learned of no such instance during my study, but it is fairly common knowledge that bondsmen in various cities were subject to severe pressures against writing bonds for persons arrested during civil rights protests during the last decade (Goldfarb, 1965: 84-85). Because bondsmen need the court's cooperation for a variety of reasons, they are unlikely to offend court officials by posting bail in such instances. In this way, judges can prevent release without actually denying bail or setting bail in an amount that the legally competent defendant might challenge as "excessive." The effective discretion exercised by court officials is therefore augmented by informal relationships with bondsmen.[8]

8. Another explanation for the frequency with which forfeited bonds are remitted is that some judges may be rewarded financially by bondsmen and surety companies with contributions to election cam-

These relationships also help explain why it is that bondsmen ordinarily make no efforts to supervise defendants for whom they post bail. Bondsmen require only those defendants who owe money to make regular reports, and then the purpose is not to remind the defendant that his behavior is under scrutiny but to enable the bondsman to collect his fee. Even when a defendant fails to make a required court appearance the bondsman is likely to make only minimal efforts to locate the defendant—for example, by placing a few telephone calls to persons whom the defendant has named as references or by sending a telegram to an address given by the defendant. Only once during field observations did I learn of a case in which a bondsman was actively attempting to locate a defendant for reasons other than payment.

Despite the extensive protection afforded, bail bondsmen cannot place complete reliance on court officials to return all forfeited bonds. In some instances, particularly when large bail amounts are at stake, bondsmen may need to attempt to locate fugitive defendants. Bondsmen have extraordinary powers of arrest and extradition over bailed defendants who have fled.[9] No criminal justice offical possesses the degree of legal authority over citizens that the bondsman holds and occasionally wields over his customers. Under powers vested in him by law, the bondsman can compel a defendant for whom he has posted bail to return with him to court at the point of a gun. The bondsman does not need to obtain a warrant for this purpose, and the defendant legally cannot offer resistance. The frequency with which bondsmen exercise their powers to retrieve fugitive de-

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paigns, political slush funds, and personal bank accounts. (Bail setting may also be affected by similar considerations.) It is true, as Chambliss (1971: 1156) has suggested, that discretion is always a "structural invitation to corruption." However, I found no evidence of improper influence on judges during my investigation, though it was rumored that insurance industry lobbyists were attempting to "buy" members of a state legislative committee looking into the problems of bail and poverty.

9. These powers described in a still authoritative 1872 U.S. Supreme Court opinion:

> When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge; and if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights in person or by an agent. They may pursue him into another state; may arrest him on the Sabbath; and, if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is needed. It is likened to the rearrest by the sheriff of an escaping prisoner (*Taylor v. Taintor*, 83 U.S. 366, 371 [1872]).

fendants is not readily ascertainable and officials hold divergent views. Some law-enforcement officials claim that the most important service the bondsman renders to the state is in retrieving defendants who have absconded (Hoskins, 1968: 1144; National Conference on Bail and Criminal Justice, 1965: 237). But others assert that bondsmen rarely make special efforts to locate defaulting defendants for whom they have assumed bail obligations and that fugitive defendants are returned only when they later commit crimes for which they are re-arrested (U.S. Senate, 1964: 131). Of course, both of these views may be correct.

Even when bondsmen make use of their powers to capture and return fugitive defendants to court, they rarely engage directly in efforts to locate defendants. During field observations, several Westville bondsmen mentioned a legendary case in which one of their colleagues had spent considerable time and money "chasing a $14,000 skip all over the country" without result. But the more common practice involves indirect search operations whereby the bondsman seeks to purchase information about the location of a fugitive defendant for whom he is financially responsible. A Westville bondsman described one possibility:

> "I have a case right now of a $1,100 skip. The guy is down in Valley City somewhere, I know that much. I've got a pimp down there working on it for me. There's no way anybody could find out that this pimp works for me, because he's cool and I'm cool. He's going to ask around to see if he can locate this guy. Then I'll go down there with another guy and we'll bring him back to Westville. It'll cost me about $150 to catch the guy, so I'll just about break even on this one." (The bondsman had already collected the $110 premium.)

Other bondsmen indicated that they contract with specialists—either professional detectives ("skip tracers") or underworld figures—to locate defaulting defendants. Such persons receive a certain proportion of the bail amount for information leading to successful capture of the defendant.

The bondsman's legal powers of arrest and extradition, like his discretion in posting bail, may occasionally be put to the advantage of criminal justice officials. Bondsmen "own" defendants for whom they post bail. Therefore, law-enforcement officials can informally borrow the bondsman's legal authority to avoid having to comply with expensive and cumbersome procedures necessary for inter-state extradition of fugitive defendants. Under this arrangement, defendants who have been arrested in another state are turned over to bondsmen for return to face original charges in the state where they jumped bail. It is not known how widespread this practice is, but the use of bail

bondsmen to circumvent formal extradition procedures is thought to be quite common in some states (see U.S. Senate, 1966: 23-24; Yale Law Journal, 1964).

SUMMARY AND DISCUSSION OF FINDINGS

The presence of bail bondsmen in American criminal courts rests upon the right of bail to which all persons accused of non-capital crimes are said to be entitled. The basis of this familiar legal concept is embedded in a tersely ambiguous clause of the United States Constitution. Most state constitutions and particularly those adopted after ratification of the U.S. Constitution, contain similar provisions. But the Eighth Amendment clause in question simply states that "Excessive bail shall not be required of defendants" in criminal cases. It says nothing about bail bondsmen, the surety companies which stand behind them, forfeitures of bail, and so on. These and other details of bail administration are spelled out in statutes and case law at both the federal and state levels (see Foote, 1965; Paulsen, 1966).

The bail system has come in for much criticism in the past decade and a half, mostly directed at the excessive reliance placed on money as a means of securing the presence of defendants for hearings and—on the rare occasions when they are held—trials. The problem, however, is not only that the bail system makes release before trial hinge on the defendant's financial situation. It is also that American law refuses to entrust officials with formal power to detain citizens who are only accused of crime.

Two comparative law scholars (Mueller and Le Poole-Griffiths, 1969: 23-4) highlight the problem in the following way:

> Continental law has faced this issue with greater candor. Pretrial detention, despite the probable guilt of the defendant, is always an exceptional measure and can be imposed only when . . . extremely high standards for issuance of a warrant can be met. But when, thus, the guilt of the perpetrator is highly probable, when the offense is major, when there is danger that he will flee, tamper with the evidence and repeat his offense, why then bother with an insurance contract insuring the defendant's next appearance? To release a suspect under those circumstances would be more than a gambler's folly, or the premium should have to be so high that nobody could meet it, Realizing this, continental law rarely insists on preliminary detention when we do, and, while nearly all codes have provisions on bail, there is rarely any occasion to apply them. When the risk of release is worth taking, release is ordered. Any other system is non-utilitarian and would only discriminate against the poor, a reason which led Sweden to abandon this institution.

In contrast, American law forbids criminal court officials from detaining a defendant who may appear dangerous or likely

to flee if released. Our procedures, by defining pre-trial release decisions as questions of judicial and prosecutorial responsibility, are also unique in the extent to which they aim at excluding the police from such decisions (Goldfarb, 1965: 213). American-law's institutionalized suspicion of official discretion[10] is apparent in the case of bail. Admittedly, the bail system fails to guarantee pre-trial freedom to every defendant claiming it as a right. But even if such claims often go unrecognized, it is clear that officials are not absolutely free to ignore them.

Bail bondsmen serve several functions in the criminal court system. First, they facilitate pre-trial release of large numbers of arrested persons. Of course, the defendant must pay for this "service." However, in deciding whether to post bail for a defendant's release, the only question in which the bondsman has any real interest is whether the defendant will pay the fee for what is in effect a loan of money. This means that monetary considerations override other concerns, such as the offense with which the defendant is charged, the likelihood of guilt, the probability of re-arrest, or even the risk of flight.

Bondsmen can afford to ignore these matters because of their intimate knowledge of court operations and the personalized relationships they cultivate with court officials. In large part, their work consists of drawing upon these resources to manage cases and protect investments. This is related to a second function performed by bondsmen, which is to help move defendants through the courts. Because their earnings depend directly upon the number of customers they handle, bondsmen gear their activities toward promoting rapid disposition of cases.

Third, bondsmen aid officials in dealing selectively with difficult cases. In one such arrangement, for example, the bondsman acts upon his legitimate business prerogatives by refusing to bond a certain defendant for pre-trial release, thereby tacitly carrying out official wishes. In another, the bondsman exercises his legal power of interstate extradition in order to help officials avoid the problems and expense of securing the return for prosecution of a fugitive defendant who has been apprehended in another state. Both of these arrangements work on the same principle. They require bondsmen to carry out informal and extra-legal directives issued by court officials. In turn, officials cooperate with bondsmen because of the organizational benefits

10. Cf. Lawrence Friedman's (1973: 504) observation that there is a "pervasive feature in American legal culture, horror of uncontrolled power. [The theory is] . . . that courts should be guided—ruled—by words of objective law, enacted by the peoples' representatives. . . ."

that bondsmen confer on the legal system. Official reciprocity takes several forms, the most important of which is judicial non-enforcement of forfeited bail bonds.

The bail system, then, links the personal interests of bondsmen with the organizational requirements of criminal court operations. This linkage is accomplished by means of discretionary exchanges of outcomes which augment the effective authority of law enforcement and judicial personnel and which also take much of the risk out of bondsmen's business transactions. This system of interlocking obligations strengthens official control over arrested persons at the same time that it increases the profitability of selling bail bonds.

CONCLUSION

The last twenty years of appellate court rulings on criminal procedure have had profound effects on local court operations. For example, one articulate judge, viewing the scene from an intermediate appellate court, maintains that the cumulative impact on criminal courts has been literally devastating.[11]

The mood of alarm expressed by contemporary observers of American criminal courts can be more readily understood by recalling that at no time since the beginning of this century has anything but the roughest kind of justice been available for the majority of the cases in these courts. As the appellate judiciary over the last two decades has attempted to raise the standards of treatment accorded criminal defendants by local criminal justice officials, the resulting improvements have been slight by comparison with expectations for change which have been generated by these decisions.[12]

In addition to the tensions generated by the politics of local justice, criminal courts now face a qualitatively different set of problems arising from the fact that their activities have been drawn into the politics of constitutional law.

In this vastly changed situation, the practical achievements

11. Fleming (1974: 6) sees the root of the problem in a misguided quest by members of his own profession for "perfect justice," which has led to an "overload of court machinery with retrials, rehearings, and collateral proceedings. . ." The result is "an unworkable system unable to function, like the ostrich that has wings but can't fly, or like the beautiful mockup of the SST that never got off the ground."

12. This statement is borne out quite forcefully by numerous studies in "impact" analysis by political scientists (see Wasby, 1970). However, these studies seem predisposed to come to this conclusion, because they are typically concerned with the effects of some particular decision rather than with the possibly cumulative effects of a line of decisions. See, *e.g.*, the study by Ingraham (1974) and other works cited there.

of criminal court administration seem always to be lagging farther behind the evolving constitutional criteria of fair treatment. One should not imagine that this growing divergence has gone unrecognized by criminal justice officials or that it has caused them only minor inconveniences. In fact, as gaps between written law and official practice have widened, the exact role that trial courts are to play in the criminal justice system has become increasingly unclear.

Ambiguity is reflected in many ways. For instance, one innovation which has received great acclaim from judges and prosecutors in recent years is the idea that some individuals accused of crime can usefully be channeled away from the coercive context of court proceedings and toward the beneficient environment of informal "treatment" (Vorenberg and Vorenberg, 1973). In point of fact, every program based on the concept of "diversion" uses "the threat or possibility of conviction of a criminal offense to encourage an accused to do something," and the agreement thus obtained "may not be entirely voluntary, as the accused often agrees to participate in a diversion program only because he fears formal criminal prosecution" (National Advisory Commission, 1973: 27). There can be little doubt that the growing appeal of this concept among local criminal justice officials has an intimate and paradoxical connection with developments in constitutional law over the past two decades (Balch, 1974).

At the same time, a controversy has arisen over the question of whether and to what extent it falls to criminal courts to supervise the police in order to assure their compliance with changed procedural requirements (Milner, 1971). For it can be argued that the changes in police practices which have been mandated by appellate decisions over the last two decades are so sweeping, and the lack of any alternative enforcement mechanism so patent, as to presuppose a substantially new function for local level judicial officials. Many of these decisions, indeed, seem aimed precisely at extending the political doctrine of separation of powers, and the companion doctrine of judicial supremacy, to the administration of local criminal justice. The core assumption in nearly all of them has been that criminal courts must counter-balance the activities of police agencies in order to prevent mistreatment of citizens accused of crime. In this view, it becomes the responsibility of trial courts to monitor the actions of law enforcement officials and, using the remedy of dismissal as a sanction, check any tendencies toward official lawlessness (LaFave and Remington, 1965).

The period between arrest and disposition has special importance in American criminal law, for it is during this period that defendants are supposed to begin taking advantage of the procedural protections to which appellate courts hold them entitled (Karlen, 1967: 135-166). In practice, however, relatively few defendants get any opportunity to do so. In most cases the period after arrest involves perfunctory official acknowledgment of the defendant's rights, followed by out-of-court negotiations aimed at rapid disposition. In lower criminal courts, the defendant's first appearance tends to be his only appearance (Mileski, 1971). The disposition process is somewhat less abbreviated in higher level trial courts, but the same tendency toward truncated procedure can be observed there (Blumberg, 1970).

The conception of the criminal court as a supervisor of police activites and the essentially hierarchical model of the criminal justice system implied in this conception have been criticized before (Bittner, 1970:22-30; Feeley, 1973). The present article casts further doubt on these assumptions. It focuses on the stage of the criminal justice process that begins when law enforcement functions give way, in principle a least, to judicial functions. The findings indicate that the business of court administration virtually merges with the enterprise of law enforcement at this period and strengthen the argument that the criminal court actually serves as an agency of law enforcement (Skolnick, 1969: 236-43). Thanks to the growing interest in criminal courts among social scientists, we now have some idea of why this merger takes place and how it affects the treatment of defendants. We are also coming to realize that the problems of criminal courts are both causes and effects of the chronic crisis in American criminal justice.

CASE

Taylor v. Taintor, 83 U.S. 366 (1872)

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