The University, the Arrested Student, and Bail

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The argument of this article is that where a transient college student is arrested, financial bail is seldom necessary to assure the defendant's presence in court. However, in such a case, financial bail is almost always required by the court, since in the area of bail, as with other criminal law problems, the pragmatic exigencies of the traditional American criminal law system place a heavy burden on any transient to realize the same protections, privileges, and rights provided the indigenous population (Foote, 1965: 1129-1130).

The objective of this article is to describe an alternative to the financial bail system for the arrested transient college student, who normally has negligible ties with the community in which his college is located, except for his ties with the university.

The modern university can and should provide the necessary assistance to this student between his arrest and trial by substituting a theory of *in loco altricis* for the superannuated and passing concept of *in loco parentis.* That is, the student-university relationship should be such that an important function of the university is to offer to the transient student those services which the student has lost due to the severance of his "home-town"

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community ties,[1] rather than to exercise surrogate authority for the parent in regulating the student's behavior.[2]

THE HYPOTHETICAL STUDENT-DEFENDANT

Mr. S, a twenty-year-old transient student, is arrested in a drug raid in the middle of the winter quarter. At the time of the arrest Mr. S was in his dormitory room with Mr R, his roommate, who was smoking a marijuana cigarette. Mr. S has never had a marijuana cigarette in his physical possession. Messrs. S and R are charged under state felony statutes for having a narcotic drug under their control and/or in their possession.

Bail is set at $2,500 each. Mr. S is a junior with a "C" average. He works summers and vacations to defray college expenses and recently has been working part-time during the academic year to meet the rising college costs. The socioeconomic level of the parents of Mr. S is middle-middle class. They have a daughter who is a freshman in college and two high-school-age children. All of their assets are mortgaged. The grand jury does not meet for four months. The family is told that the bondsman will require a premium of $250 and that the expense of competent defense counsel will probably exceed $500. Since the premium will be forever lost, even if Mr. S appears for all proceedings, what is its *raison d'etre* in this case? If the student somehow manages to secure bond, must he drop out of college to earn the necessary money for his defense, or will he qualify for court-appointed counsel as an indigent (Coleman v. State of Alabama, 1970)? Of course, he may have already been suspended from his university merely because of the arrest. Does it matter that four months later the grand jury does not indict Mr. S, or has the archaic system of bail already punished him?

The bail bond system, which postulates a monetary payment as a prerequisite to pretrial freedom, must, of necessity, allow the affluent to glean from the system certain advantages which are not accessible to the economically disadvantaged. The result of such dissimilarity of pretrial treatment is the creation of burdens to the public, to the accused, and to the integrity of the judicial system, which in turn provides impetus to the evolving constitutional doctrines which eschew the results of such economic disparity.[3]

PROPOSAL FOR ROR FOR TRANSIENT COLLEGE STUDENTS

Objective

At present, the judiciaries of most college towns and urban centers with transient student populations have neither the manpower nor ready access to information on the majority of accused parties in order to rationally predict whether an accused will appear for trial, should a financial bond not be required (Paulsen, 1966: 113).

The objective of this proposal is to ameliorate the economic and constitutional problems inherent in financial bail by assuring the courts that verified information as to the relevant factors of an accused's proclivities to appear at trial will be provided as a predicate for a more widespread release of the accused on his own word that he will return for all proceedings up to and including trial (hereinafter referred to as ROR).

Such an effort could eventually cover all defendants within the jurisdictions. However, because of the possibilities of lack of initial manpower, the project may be limited to the impecunious student and nonstudent defendant. Such an indigent would be defined as any party who by his own resources does not have the ability to make financial bail. In addition, initially the project may be limited to felonies or even only certain types of felonies.[4]

Both the local bar association and the university (Moneypenny, 1967: 739) should have the requisite commitments to the total community to provide resources and guidance for the success of such a project.

Methodology of Implementation

Each locale must develop its own program molded by many variables. One possible paradigm[5] is as follows:

(1) Members of the local bar, members of the general community, or university students may act as staff members. The university should provide the interviewers with training in the behavioral science aspects of interviewing and other interpersonal relationship training. The possibilities for the source of student-staff interviewers should include

law students and graduate students in such areas as psychology, sociology, and guidance and counseling, where the student would have developed a professional attitude toward such interviewing.

(2) The staff member assigned to that shift will contact the county or municipal jails. The desk officer will inform the project worker of any newly incarcerated defendants.

(3) Upon learning that an accused is incarcerated, the staff member will proceed to the jail and record the defendant's previous criminal record and the current charges against him.

(4) If the record indicates that he is eligible for bail and the accused indicates that he would like to receive ROR, he will be interviewed by the staff member to determine whether he is a good risk, in that he has ties to the community and, therefore, will return for trial.[6] The interview will take about fifteen minutes.

(5) A point system helps evaluate the answers to the questionnaire, and if the accused appears to be a good risk the above information is verified, where possible by telephone.

(6) For verification the staff members will only speak to those persons whom the accused has agreed in writing should be consulted. The verification process will take about one hour.

(7) If the case is still considered a good risk after verification, a summary of the information is taken to the court, where a recommendation that the defendant be released on his own recognizance is submitted to the judge. (Where a non-bar member executes the verification process, perhaps a member of the bar should review the recommendation before it is forwarded to the judge.)

(8) The court is, of course, free to accept or reject the recommendation for release OR.

(9) After a defendant is released OR, project staff members will notify him in writing of the date and location of subsequent court appearances. Often a friend or employer will agree to help get the defendant to court. If so, this person will be notified as well.

Academic Commitment as Community Tie

The traditional factors used in other bail projects for determination of community ties are (1) residence, (2) employment, (3) relatives in the area, and (4) any previous convictions. Such

limited criteria, in general, will not make a transient college student a likely subject for ROR.

In order to make the transient college student a more likely subject for ROR, the university may assist by creating particular community ties. Such community ties include allowing the student presently enrolled at the university to (1) consent in writing to have his academic and disciplinary records *checked* to ascertain his commitment to the university, and (2) separately consent in writing to have all of his academic records and degree *withheld* until that student appears at trial. The consent to the holding of records will provide the student with three points on the evaluation form toward the minimum required five points, which is necessary before ROR will be considered to be recommended for the accused. Of course, the office of every college dean and the student activities offices will be informed of the necessity for the judiciary to have access to verified information on the student-defendant.

The interviewer, upon being given the written consent of the student-defendant, will present the written consent card to the office worker in any of the above appropriate offices. The office worker will have a particular form that the office worker will fill out based on the information in the student's files. The total points from this office form will then be computed by the office worker who will give the total to the interviewer and deposit the calculation form in the student's academic file. The interviewer will then record this total on the student-defendant's consent card. Where the student has also consented to have his records held until his appearance at trial the office worker will take all steps necessary to put a hold on such records. The interviewer will never have actual knowledge of the facts on the accused's academic or disciplinary record. The interviewer will then total these points with any other points. The above procedure is in accord with the words and spirit of most university policies on the confidentiality of student files (Strahan, 1967: 727-729).

University-Student Relationship After ROR

The situation may occur where a student-accused, with full knowledge of the subject matter of the consent form, signs such

consent form to have his records held and then does not appear for trial, but later requests that his records be released. If the student was a minor at the time of giving consent he may attempt to disaffirm his consent contract by mail from outside the jurisdiction and request the release of his records. Of course, the university must remain firm on its commitment to hold the records and degree. On the other hand, should the student enter the state to bring a court action for the release of his records, the state authorities would probably assert jurisdiction over the student, arrest and try him for the original charge and the separate offense of bail-skipping.

Although it is difficult to conceive a state court or a federal court (where the jurisdiction is based on diversity of citizenship) allowing the student's suit to withstand the pleading stage,[7] where the cause of action goes to the binding nature of the consent contract, state substantive law[8] will control (Erie R.R. v. Tompkins, 1933) and should hold the contract binding. Even the minor's attempted disaffirmance should not succeed. That is, although the general rule of the jurisdiction may be that infants' contracts are voidable, (e.g., 28 O Jur 2d)[9] the public policy underpinnings of such a rule should disallow disaffirmance.[10] In addition, in many states where a student matriculates at a college or university, a contractual relationship is established under which, upon compliance with all the requirements for graduation, he is entitled to a degree or diploma (15 Am Jur 2d;[11] 54 O Jur 2d[12]). Every student on his admission implies a promise to submit to and be governed by all the necessary and proper rules and regulations which have been or may be adopted for the government of the institution (15 Am Jur 2d[13]). Presently, so long as those rules are fundamentally fair and precise and explicitly contained in the student handbook, there is little question that they will be binding upon the student (Ohio State Law J. [Note], 1968). Therefore, if an explicit explanation of the results of the consent form is included in the student handbook, the consent contract to hold all records may be binding even against attempted disaffirmance.

Although the deprivation of the benefits of college attendance, especially by a state institution, may raise serious state and federal

constitutional questions, it is felt that where the procedure is rational and fair and clearly consented to, it will be upheld.

CONCLUSION

An ROR bail program which reasonably assures the appearance of the accused student at trial, but allows him pretrial freedom without substantial financial loss is both desirable and workable. In addition, such a program may be a minimum necessity in reducing the schisms between and among the student, university administration, and nonuniversity community subcultures, assuming such divisiveness to be caused, at least in part, by the duplicity of the theory of justice in the American legal system and its application, as perceived by the respective parties.

NOTES

1. This concept may be somewhat analogous to the concept of the university in a fiduciary capacity. See Seavey (1957). However, unlike the *in loco altricis* doctrine, the logic of the fiduciary concept may be limited to on-campus student activities.

2. See Stanford Cazier (1970). On the college campus there is a growing tendency to reject the theory of *in loco parentis* entirely and three jurisdictions have recently done so.

3. The due process clause of the Fourteenth Amendment provides a multipronged argument to the effect that the contemporary financial bail practice often denies the accused (1) fundamental fairness, (2) procedural due process, (3) the effective assistance of counsel, and (4) the ability to make bail because the amount is excessive. In addition, the equal protection clause is the basis for the argument that no man should be denied release because of indigence–a man is entitled to release on personal recognizance unless the government overcomes heavy presumptions favoring freedom.

4. Although the Manhattan Project initially excluded certain categories of bailable offenses, they soon made recommendations as to all categories of bailable offenses. See Baron (1965).

5. The community of Athens, Ohio, with a nonstudent population of approximately 17,000 and an Ohio University student population of 18,000 is presently implementing a variation of the below-mentioned program. Suggested procedural forms are available by writing to the author, Department of Business Law, Copeland Hall, Ohio University, Athens, Ohio 45701.

6. Despite the interviewer's attempt to avoid the subject, defendants sometimes allude to the question of guilt. The relationship between the interviewer and the prosecution therefore needs to be clarified in order to assure the defendant that the information he gives will not be used against him at trial. The same problem exists in providing the judge with the defendant's past record where the defendant has committed only a misdemeanor and will later be tried by the judge (see Ares et al., 1963).

7. The rapidly burgeoning abstention doctrines permit, and in some cases may require, a federal court to decline jurisdiction, or to postpone its exercise, even though the requirements of the diversity statute are met (see Wright, 1970; see Federal Rules of Civil Procedure, sec. 12 [b]).

8. E.g., contract law and estoppel *in pais:* 11 O Jur 2d Contract Law sec. 1-302, 28 Am Jur 2d Estoppel sec. 28, 28 O Jur 2d Infants sec. 15.

9. Infants sec. 10.

10. E.g., an obligation imposed by law is an exception to avoidance of contracts by infants. Such an obligation is imposed by Ohio Revised Code sec. 2937.38 which states that in any matter in which a minor is admitted to bail, the minority of the accused shall not be available as a defense to a judgment against the principal or surety. The statute is not precisely in point; however, it is a close enough analogy to reveal a public policy behind the denial of the ability to disaffirm such a consent contract.

11. Colleges and Universities sec. 28.

12. Universities and Colleges sec. 54.

13. Colleges and Universities sec. 22.

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