

## BAIL AS A MECHANISM OF LATENT JUSTICE

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THE PROBLEM: It is recognized that a considerable variance exists between the ideals of criminal justice and its practice. These differences can best be explained in terms of manifest and latent functions. Judicial 'ideals', that philosophical model based upon due process and the presumption of innocence, reflects the manifest or intended function of criminal adjudication, while judicial short-cuts or modification of these ideals, such as bargain justice and bail manipulation, illustrate latent or unintended functions. Variables such as discretion, court case attrition, bargain justice, inequitable sentences and bail all play important roles regarding the overall issue of selective justice. Bail is an ideal indicator of selective justice. It reflects the basic ideals of the criminal justice system - that of probable cause, reasonable doubt and due process, and it documents biases concerning the accused. Patterned biases, in turn, provide insight into the nature of selective bail, bringing to light the underlying latent functions served by this process.

This study looks at the selective process of bail within a visible criminal justice system - that of New Hampshire. The universe consists of the entire superior (trial) court docket for a two year period (1970-71). The analysis is based on Blumstein's (1974) research on the perceived seriousness of criminal offenses. Thus this study tests the fit of this model for the target area - New Hampshire.

Bail is one of the important constitutional guarantees provided for the defendant in his contest before the adversary court system. It is crucial since it is closely linked to the major premise that the defendant is assumed to be innocent until guilt is proven beyond a reasonable doubt. Thus, bail often means the difference between defendants being free to prepare their cases or their being incarcerated awaiting arraignment. This is important since it is not unusual to have defendants incarcerated for excessive periods, sometimes more than a year, prior

to arraignment (Task Force Report: Courts, 1967). Bail can also be used in the period between conviction and appeal. In either case, bail can constitute one of two types of release: money bail or personal recognizance. Money bail involves posting bond, while personal recognizance means giving one's word that he or she will appear before the court. Money bail can be abused either through the administering of excessively high bail or refusal to grant bail. Personal recognizance can also be abused by failure to appear. Both are so abused that the 1964 National Conference on Bail and Criminal Justice concluded that the present bail system is both wasteful and unfair (Task Force Report: Courts, 1967).

The only legal and constitutional use of bail, according to our judicial ideals, is to guarantee the appearance of the defendant at the prescribed court hearing. It is not to be used as a vehicle of discrimination or as punishment. Yet, the Task Force Report (1967) pointed out that bail is widely misused, usually reflecting class biases. Money bail abuse most often reflects discrimination against defendants from minority and lower strata backgrounds, while personal recognizance, as a form of bail, is widely used for middle or upper class defendants. The high level Watergate defendants were not only exempted from posting money bail but were spared the common practice of being fingerprinted and having their "mug shot" taken, once indicted. The irony of the existing bail system, then, is that often those who can afford money bail, mostly those members of society from the upper classes, are released without having to post bond, while those who are from the lower class are forced to do so. One recommendation stemming from the Task Force Report is that personal recognizance be more widely used among those who cannot afford money bail. This would also help rid the judicial system of the lucrative and highly questionable profits made by bail bondsmen.

"The Manhattan Bail Project" (1963) surveyed the major bail studies within the last fifty years and concluded that: "every serious study published since the 1920's has exposed defects in its (bail) administration. Yet proof of the need for reform has

produced little in the way of fundamental change," (Johnson, et. al., 1970: 146). The authors (Aver, Rankin and Stury) went on to say that the bail system fails to perform its theoretical function in several respects, such as misuse of professional bondsmen, misunderstanding of bail-setting procedures by local magistrates, and the improper use of bail as a pretrial device to "punish" defendants. The Manhattan Bail project summarized the current status of bail as being used to punish, to insure detention, to aid the prosecution, and to satisfy public and journalistic clamor. All these functions are contrary to its constitutional mandate, to insure the defendant's appearance before the court. Again, the Manhattan Bail Project presented arguments similar to those later reported by the President Task Force. The latter concluded that a central fault of the existing bail system is that it detains too many people, with serious consequences for defendants, the criminal process, and the community. They suggested that the aim of reform must be to reduce pretrial detention to the lowest level without allowing the indiscriminate release of persons who pose substantial risks of flight or of criminal conduct (Task Force Report: Courts, 1967: 38).

Richmond and Aderhold, in their work New Role for Jails (1969), elaborated more on the selective nature of bail. They stated that the system which permits accused persons with money to be free awaiting trial, while those without resources have to stay in jail, is one of the greatest blots on our notions of equal justice. By equal justice they referred to the judicial ideal that every accused person, rich or poor, is presumed to be innocent until proven guilty (Carter, et. al., 1972: 386). It becomes apparent from the available literature that bail is widely misused. Limitations restrict this inquiry to the availability of money bail. In fact, no provisions were made in the court records for anything other than money bail. More recently, the American Friends Service Committee (Wahrhaftig, 1977) argued for the adoption of model bail reform legislation such as that introduced into the Pennsylvania legislature in 1974. This bill, which did not pass, called

for pre-trial release in most, if not all cases, along with an end to money bail, preventive detention and discretionary decision making by bail setting authorities. This approach is similar to that offered by the Journal of Legal Studies (1973) which stressed the social, economic and legal benefits derived from pre-trial liberty suggesting that this practice provides beneficial gains to both the defendant and the community.

THE RESEARCH SETTING: New Hampshire provides an ideal setting for a study such as this due to the visibility of its criminal justice system. The state has a relatively small population with a clearly outlined criminal justice system. The state's nearly 300,000 residents are distributed throughout the state; with the vast majority (85%) residing in the industrialized southern half, while the other fifteen percent live in the rural northern half. In addition to its low population density, the state has few non-white residents (less than 2%). These factors account for New Hampshire's low crime rate which is less than half the national average.

Hence due to the low population density, racial homogeneity, and stable residence patterns, the control process in New Hampshire does not suffer from many problems which plague other states. The state has thirteen chartered cities and 221 towns with the overall population distributed nearly equally between the towns and cities. The criminal justice agencies operating under the jurisdiction of the cities and towns constitute the lowest levels of organization of the criminal justice system in the state. Local police agencies, municipal or district courts, and overnight holding jails comprise the major components of the system at these levels. The next level of the criminal justice system is the county, where we have the sheriff, state trial court, county attorneys, holding jails, houses of detention (serving jails) and other regional facilities. At the state level there is the state police, the supreme court, the attorney general's office, the state penitentiary, and the state industrial school (juvenile facility). The state also constitutes a federal district court jurisdiction with a federal marshal, a regional F.B.I.

office, and a U.S. attorney's office.

The state trial (superior) court convenes twice yearly at the county level. It consists of ten judges, each assigned to one county. It is the only court empowered to hold jury trials and has appellate jurisdiction over all lower courts. This study analyzes the nature of bail for those cases processed before this court system. The universe involves all felony and misdemeanor cases brought before the New Hampshire state superior court for calendar years 1970-71. Bail here could involve a number of circumstances. It could be used between arrest and arraignment and jury trial. Bail could also be used for the period between a lower court conviction and a trial court appeal as well as for habeas corpus writs. All told, some 2,000 cases were processed during this two year period; however, only major crime categories were analyzed, thereby reducing the total file to 1,310 cases. These offenses were then classified according to "type of offense": personal, property, and non-victim. The Federal Bureau of Investigation's "Crime Index" comprised a special sub-classification. These cases were then evaluated according to three bail classifications: bail awarded, bail awarded-but not met, and bail denied.

**Personal Offenses:** crimes in which another person is directly threatened. Criminal homicide, assault, rape, muggings and robbery are common personal offenses. This type of offense is considered to be the most serious in our culture.

**Property offenses:** These crimes involve the illicit possession or attempt to possess personal property. Personal contact with the victim is usually avoided while deceit is often used when personal contact cannot be avoided. These crimes include larceny, burglary, breaking and entering and larceny, auto theft, forger, uttering, and a wide variety of con games.

**Non-victim offenses:** In these crimes either no one else is involved in the criminal act such as in unlawful flight, violation of parole or probation, narcotic possession or use, and suicide; or the victim freely accedes to the criminal act, as in illicit sexual activity, gambling, and narcotic sales.

The three money bail categories signify

the different options allowed the judge in his discretionary powers to release or retain a defendant awaiting subsequent court action. Bail awarded usually implies reasonable bail, bail in which the defendant has little difficulty securing bond for his release. Bail awarded - but not met, on the other hand, most often means excessive bail for the accused. Here bail is often used as a device for retaining the defendant assuming that it will not be met. Involved here is the class factor whereby the lower class suspect (a large proportion of those arrested for 'Index' crimes) often finds money bail in the thousands of dollars, unreasonable even through bondsmen. On the other hand, a wealthy suspect such as Patty Hearst or Robert Vesco can afford high bail, such as Ms. Hearst's million dollar bond. Bail denied is self-explanatory. The accused is held in lieu of bail.

**THE FINDINGS:** Regarding personal offenses (Table 1.1) murder had the highest rate of bail denied while manslaughter and vehicle homicide had a considerable proportion of their cases (75% and 87%) resulting in reasonable bail. Similarly over 80 percent of the rape and aggravated assault cases resulted in reasonable bail. Armed robbery had a high proportion of unreasonable bail (65%) while robbery itself had 38 percent of its cases resulting in bail being denied. Overall 66 percent of the personal offenses resulted in reasonable bail, 21 percent in unreasonable bail while only 3 percent had bail denied.

For property offenses (Table 1.2) most cases (76%) resulted in reasonable bail, 21 percent in unreasonable bail while only 3 percent had bail denied. Similarly, 80 percent of the non-victim cases (Table 1.3) resulted in reasonable bail, 17 percent in unreasonable bail, while again 3 percent had bail denied. The exceptional property offense was auto theft with half of these cases resulting in excessive bail while for misdemeanor offenses, property destruction had a high rate of denied bail (36%).

TABLE 1  
BAIL STATUS FOR OFFENDERS

1.1 (N=243) <u>Personal offenses</u>	Bail:		
	Met	Not met	Denied
Murder	2	1	8
Attempted murder	3	2	3
Manslaughter	6	2	3
Kidnapping	2	1	1
Rape	17	2	1
Assault to rape	2	2	0
Attempted rape	5	1	1
Aggravated assault	87	15	3
Assault & robbery	5	4	0
Armed robbery	4	11	2
Robbery	13	5	11
Vehicle homicide	13	1	1
Incest	2	2	2

1.2 (N=769)  
Property offenses

Grand larceny	64	12	2
Burglary	365	110	14
Break & enter	7	3	1
Attempt burglary or larceny	30	8	2
Auto larceny	7	8	1
Forgery	20	7	1
Fraud	7	1	0
False pretense	4	2	0
Attempt false pret.	11	3	0
Receive stolen goods	21	3	1
Conceal stolen goods	12	1	0
Possess weapons	3	1	0

1.3 (N=97)  
Non-victim offenses

Lascivious behavior	6	3	0
Lewd & lascivious	3	0	0
Unnatural acts	9	1	1
Narcotic sales	59	11	0
Jail break, escape	1	1	2

1.4 (N=756)  
Index crimes

Criminal homicide	2	8	1
Forcible rape	17	1	2

Met Not met Denied  
Index crimes  
(cont.)

Aggravated assault	94	4	18
Armed robbery	9	2	15
Grand larceny	64	2	12
Burglary	365	110	14
Auto theft	7	1	8

TABLE 2  
VIOLENCE VERSUS PROPERTY  
OFFENSES (N=756)

	Bail:		
	Met	Not met	Denied
Violent offenses	122	15	36
Property offenses	436	113	34

$\chi^2 = 41.7, p = .001$

TABLE 3  
FELONY OFFENSES (N=1109)

	Bail:		
	Met	Not met	Denied
Personal crimes	161	49	33
Property crimes	581	165	23
Non-victim crimes	78	16	3

$\chi^2 = 43.7, p = .001$

DISCUSSION: Most of the cases (75%) resulted in reasonable bail thus indicating that the New Hampshire criminal justice system subscribes, for the most part, to the ideals governing the use of bail. For those cases in which either excessive bail was used or bail was denied outright a discernable pattern emerged, that corresponds closely with Blumstein's assertion concerning our cultural perception of serious offenses. Blumstein found a strong correlation between the F.B.I.'s Index Crimes and the Sellin and Wolfgang index. From this Blumstein concluded that personal crimes and common property offenses are viewed as posing the most serious threat to our society. This study supports this contention. Of those cases in which bail was not readily available personal offenses had the greatest proportion of cases resulting in bail being denied (14%) while both property and per-

sonal offenses shared the highest proportion of excessive bail situations. When "Crime Index" offenses were analyzed the same held true. Bail was denied in a fifth of the violent offense cases while a fifth of the property offenses resulted in excessive bail.

On the whole, over a quarter (26%) of the "Index Crimes" resulted in unreasonable bail or bail being denied. This compares with 34 percent for all personal offenses, 24 percent for all property offenses, and 20 percent for non-victim offenses. It can be concluded that the latent function of bail in a relatively smooth running criminal justice system, such as New Hampshire, is to restrain those suspects charged with "serious" crimes. Inference beyond this study to other jurisdictions could prove difficult since many of these suffer from additional factors such as chronic court congestion, significant non-white populations and high degrees of transitory residents. Controls on these variables would allow for a reasonable replication.

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