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Punishment Before Trial: An Organizational Perspective of Felony Bail Processes

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PUNISHMENT BEFORE TRIAL: AN ORGANIZATIONAL PERSPECTIVE OF FELONY BAIL PROCESSES. By *Roy B. Flemming*. New York: Longman. 1982. Pp. xiv, 175. $20.

Given the constitutionally required presumption of innocence,[1] American pre-trial detention policies depend for their justification on the need to assure the appearance of the accused at trial. For many judges setting bail for a defendant they believe likely to commit additional crimes pending trial, this justification is surely a fiction. And regardless of the reason, confinement or enforced expense amount to punishment. In the context of the bail system, Roy Flemming refers to this phenomenon as "punishment before trial" (p. 2).

The application of this "punishment," however, varies greatly among jurisdictions. Flemming's *Punishment Before Trial: An Organization Perspective of Felony Bail Processes* attempts to explain why bail policies differ so markedly from court to court. By focusing on the decision-making process and the contextual or environmental factors that influence bail decisions, Flemming has developed an organizational theory that explains why courts make the bail choices they do. No other commentator has explained the variation in bail policies so completely.[2]

At the outset, Flemming notes that the scope and severity of punishment before trial varies widely in American courts (pp. 4-5). He reinforces this observation by presenting the results of an empirical study of two specific court systems, Detroit and Baltimore. Flemming examined the initial bail decisions for fifteen hundred felony defendants in each city in 1972 (p. 6). Detroit emerged as a "less punitive" city, releasing almost fifty percent of its felony defendants on their own recognizance. In contrast, Baltimore's court followed a substantially stricter bail policy. Only twelve percent of the total number of defendants received recognizance releases and in those cases in which a money bail was set, it was significantly higher than bail amounts set in Detroit for equivalent offenses (p. 9). Flemming seeks to explain these differences with an organizational theory of court behavior.

Chapter two presents the conceptual framework for this theory. Flemming examines the processes by which courts make bail decisions. He distinguishes between "routine" and "situational" choice modes (pp. 30-33). A "routine" bail choice involves a brief disposition, based exclusively on the defendant's prior record and the nature of the alleged offense. The defendant plays no part in the proceedings. Courts with lighter caseloads, however, will tend to make their bail determinations pursuant to the "situational" mode, in which the defendant enjoys a participatory role. The

1. J. GOLDKAMP, TWO CLASSES OF ACCUSED: A STUDY OF BAIL AND DETENTION IN AMERICAN JUSTICE 3 (1979).

2. *See, e.g.*, R. GOLDFARB, RANSOM: A CRITIQUE OF THE AMERICAN BAIL SYSTEM (1965); J. GOLDKAMP, TWO CLASSES OF ACCUSED: A STUDY OF BAIL AND DETENTION IN AMERICAN JUSTICE (1979); R. MOLLEUR, BAIL REFORM IN THE NATION'S CAPITAL (1966); W. THOMAS, BAIL REFORM IN AMERICA (1976); B. WICE, FREEDOM FOR SALE: A NATIONAL STUDY OF PRETRIAL RELEASE (1974).

judge or court officer will question the defendant and consider the truthfulness of his responses in rendering the bail disposition.

While central to an understanding of how an individual court might function in setting bail for a particular defendant, this discussion of the decision-making process contributes little toward the goal of Flemming's work, which is to explain the differences in bail policy between Detroit and Baltimore and to show how changes in bail policies might be brought about. To understand why bail policies differed so greatly in the two cities, Flemming states that the context in which the bail decisions were made must be scrutinized (pp. 19-27). The environment in which a court makes its bail determinations is the most important determinant of the strictness or leniency of its policies. Within this notion of context, the author examines the factors of uncertainty, risk, and resources and notes their effects on the formulation of bail policy.

Even though a rational organization attempts to avoid uncertainty in its decision-making, "[u]ncertainty is intrinsic to the task of making bail decisions" (p. 19). Uncertainty can manifest itself in various ways. For example, if the court faces a defendant about whom it has limited information, classification of the defendant as either "good" or "bad" involves an extremely uncertain determination. Misclassification of a defendant as "good" results in the possibility that the defendant may not appear for trial or may commit a crime while free. Because courts act to avoid uncertainty, courts with limited information tend to detain defendants before trial to reduce the possibility of uncertain outcomes.

Flemming also believes that risk plays a major role in bail decisions (pp. 21-23). The public may scold or even sanction a judge or court official for making a bail decision that "backfired." An elected official even runs the risk of defeat at the polls for his bail decisions. Thus, those who make bail determinations attempt to minimize the risk of sanctions by adhering to public political sentiment.

Flemming also views resources — especially the detention capacity of jails — as a critical factor influencing bail policy (pp. 24-27). Without the facilities to hold pretrial detainees, punishment before trial could not exist. Conversely, excess jail capacity permits courts to pursue more restrictive bail policies, detaining a greater percentage of defendants awaiting trial.

This examination of the contextual factors that influence bail decisions is the most significant contribution of Flemming's study. Differing contexts explain the differing bail policies in the two subject cities. It is important for attorneys to know that while the particular defendant and the accusations against him will influence the bail determination, the overall possibilities for release depend upon the political and institutional context in which the court acts. Flemming's model illustrates that bail decisions are substantially the result of factors beyond the courts' control; therefore, attorneys may be powerless to win favorable dispositions for their clients. Because the extent of pretrial sanctioning is so dependent on the existing political climate, Flemming confirms that political power is critical to effectuate bail reform.

After developing his organizational theory, Flemming uses it to explain the differing bail policies existing in Detroit and Baltimore in 1972. Despite

Detroit's high crime rate dating back to the 1967 riots, the Detroit courts engaged in a surprisingly low amount of pretrial detainment (pp. 42-73). One of the explanations Flemming offers for this phenomenon is Detroit's political climate in 1972 (pp. 43-53). The court system had committed grave injustices against accused criminals during the riots. Most of these felony defendants were black. As the black population gained political effectiveness, it expressed its dissatisfaction with the criminal justice system. Since the judges who made the bail decisions were elected officials, they responded to public pressure for the increased use of recognizance releases.

Detention resources also played a significant, if not the preeminent, role in shaping Detroit's bail policies. Overcrowded jails (p. 63) sparked public pressure to alleviate the inhumane conditions (p. 66). When a Circuit Court decision placed a legal maximum on the jails' population, affirmative steps had to be taken to alleviate overcrowding. The Detroit courts were forced to adopt a bail policy which freely utilized recognizance releases (p. 68).

In contrast, stringent bail policies characterized the Baltimore courts (pp. 76-114). This is curious because Baltimore possessed one of the country's most permissive bail rules.[3] Flemming makes the important discovery that bail reform does not necessarily liberalize the conditions of release (pp. 80-83). Change is impossible without the requisite political power. Baltimore's conservative political climate superseded the statutory reforms and prevented change (pp. 77-78). Both the public and police were leery of defendants out on bail because two police officers had recently been killed by released defendants (p. 80). Further, the commissioners who made the bail decisions were extremely vulnerable to both criticism and dismissal by their superiors; thus, the commissioners were inclined to be strict with defendants and minimize the risks associated with making the wrong decision (pp. 83-86). In sum, the environment surrounding the Baltimore courts in 1972 did not permit a lenient bail policy.

Despite this contribution to the study of bail, Flemming's work is not free of defects. First, his heavy reliance on statistical data is often confusing.[4] Readers lacking some background in statistics may find the terminology and the significance of various tables and figures hard to follow. Also, long discussions often lead to obvious conclusions. For example, Flemming states that "the scope of pretrial punishment narrows as the frequency of recognizance releases increases." Similarly, after a lengthy discussion, Flemming concludes that the amount of a cash bail is directly related to the severity of the charge. Neither of these observations merits the attention the author pays them. Finally, Flemming's use of ten-year-old data is bothersome and taints the credibility of his results. It is difficult to authenticate

3. Rule 777: "Any defendant charged with an offense not punishable by death shall, at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance unless the officer determines that such release will not reasonably assure the appearance of the defendant as required." This rule carried a presumption that felony defendants would be released on their own recognizance. P. 8.

4. *See, e.g.*, p. 10 (utilizing "multiple correlation coefficients" to compare the severity of punishment in Detroit and Baltimore courts).

his explanations of the significant environmental influences facing the courts.

In the end, however, the problems are small compared to the task undertaken. Flemming provides perceptive analysis of an integral part of the criminal justice system. For the undertaking — as well as the results — he deserves praise.