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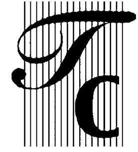

Article

"A good client gets arrested a lot": Constructing and maintaining profitable subjects through marking and surveillance

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Abstract

Criminal legal processing is an arduous classification, supervision, and extraction cycle increasingly administered by private entities. This article spotlights processing within commercial bail and uncovers profitable subjects—people (re)identified as future assets—as a stratifying and elusive construction with implications for criminal legal experiences. Bail agents deploy marking and surveillance like other legal professionals to process people. However, a profit objective and financial risk framework give rise to distinct applications. First, a shift in marking occurs in which legal involvement operates as credit and stratifies people into "classification situations" where they unevenly, and sometimes counterintuitively, access resources. Second, marked individuals are matched to different forms of surveillance that deviate in the degree of felt hassle and punishment. Surveillance is used for people to repeatedly prove their profitability in an environment where a dominant perception is that defendants are liabilities. Consequently, few can avoid the conditions that define their varying and unequal experiences.

Keywords

Privatization, commerical bail, financial risk, criminal legal processing, marking, surveillance

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Introduction

To navigate increasingly neoliberal institutions, like the US criminal legal system, is to encounter widespread marking and surveillance (Brayne, 2020; Gonzalez Van Cleve, 2016; Kohler-Hausmann, 2018; Pager, 2003) that stratify access and create distinctive experiences (Carruthers, 2013; Fourcade and Healy, 2013). Yet, the form these processing techniques assume and the sense-making underlying their operation vary according to which legal actors are centered and what specific realities, interests, and constraints they face (Martin et al., 2022).

Through a case study of commercial bail, the current article explores the relationship between profit and modes of marking and surveillance within the ostensibly public criminal legal system. Specifically, it asks how these techniques change when administered by for-profit, legal adjacent entities and what framework(s) might enable and legitimate observed differences. It then contends with what privately administered techniques reveal about the construction of system-involved people and their experiences of criminal legal contact.

Ethnographic and interview data suggest that bail agents administer marking and surveillance with an eye toward generating profit. Yet, the framework legitimating their enactment differs from those previously offered by scholars of monetary punishment. Financial risk, rather than its related counterparts such as neoliberal governance (Page and Soss, 2017), consumerism (Friedman et al., 2021), and financialization (Pattillo and Kirk, 2021), frames the pretrial context for bail agents and, in turn, is used to structure and justify their distinct application of marking and surveillance.

For instance, both popular portrayals and academic theories of the mark of a criminal record (Pager, 2003) would predict that those with limited prior contact or dated legal involvement would have the easiest access to bail. However, when profit is inserted into the calculation, traditional marking is flipped on its head because limited or dated contact renders defendants illegible to agents, thus at risk of receiving no or costlier bail assistance. Meanwhile, those with criminal histories that display recent records of court attendance are deemed profitable (i.e., low risk) and, in turn, able to access bail assistance more easily. Bail agents' use of criminal records diverges from traditional criminal legal accounts and is instead reminiscent of market-based credit scoring. Once defendants are marked according to their calculated profitability, they encounter "classification situations" or patterned differences in who will receive access to goods and services and with what associated rewards or punishments (Fourcade and Healy, 2013).

How a defendant is marked shapes the content of their "classification situation," such as the type of surveillance they are assigned (electronic or physical) and the degree of hassle and punishment they may feel. In other criminal legal settings, individuals who are marked as "low risk," who have paid their debts in full, or who have demonstrated compliance are sometimes given the option to opt out of surveillance (Huebner and Shannon, 2022; Martin et al., 2022). However, in the commercial bail domain, an overarching financial risk framework, or the sense that profit could be jeopardized at any time through a defendant's disappearance, means that surveillance must be maintained through case completion. It becomes a tool to assess risk and sustain profitability, expanding beyond its traditional monitoring role to detect compliance. That people must work to

preserve their profitability highlights the elusiveness of that status in an environment where the prevailing notion is that defendants are liabilities.

When bail agents and the profit motive informing their on-the-ground practice are centered, we observe the modification of techniques commonly used in other criminal legal spaces. Articulating this flavor of marking and surveillance is important because it reveals the construction of a different neoliberal subject that must move through the criminal legal system. In addition to demonstrating responsibility, desistance, and deservingness, as previous research has shown (Clair, 2020; Gonzalez Van Cleve, 2016; Kohler-Hausmann, 2018; Martin et al., 2022), defendants must also be (re)identified as future assets—what I refer to as profitable subjects. The construction of profitable subjects as both legible enough for stratification, but something that must continuously be achieved distinguishes it from more inclusive and permanent constructions like "willful nonpayer" (Fernandes et al., 2022), "captive consumers" (Plunkett, 2013) and "free-riding consumers" (Friedman et al., 2021) to name a few. Moreover, the concept of profitable subjects demonstrates how social constructions structure access to resources and perpetuate inequality within criminal legal processing.

Monetary sanctions and the broader financial context

Although people have long incurred costs through criminal legal contact (Harris, 2016; Scott-Hayward and Fradella, 2019), monetary sanctions ballooned in the wake of mass incarceration. In response to exploding prison populations and strained budgets, many states opted to transfer costs to institutionalized people and their families and to generate new revenue streams by broadening the scope of what could be charged for and at what amount (Harris, 2016; Soss et al., 2011; Wacquant, 2009).

The rise of neoliberal governance and its emphasis on "individual responsibility for the consumption of commodities" was critical in transforming a state fiscal burden, such as the cost of mandated incarceration, into a public good that should be funded by its "users" (Friedman and Pattillo, 2019; Friedman et al., 2021: 738; Page and Soss, 2017). This framework was also extended to basic life necessities for those imprisoned, casting them as consumers financially accountable for needs like telephone calls, commissary, and medical care (Friedman, 2021; Harris et al., 2019; Kirk et al., 2020).

Neoliberal governance is also detectable in a shift by social institutions like the criminal legal system to resemble profit-oriented enterprises (Friedman et al., 2021; Page and Soss, 2017). Monetary sanctions are one tool in the state's arsenal to generate revenue, although doubt has been cast on their actual profitability (Harris, 2016; Pattillo and Kirk, 2021). In any case, the growth of fines and fees has increased the number of people who cannot pay them and, in turn, must enter into payment plans with the state (Bannon et al., 2010; Pattillo and Kirk, 2021). Alternatively, they may take up legally binding financial contracts with private companies via carceralized market exchanges (Deckard, 2024; Page et al., 2019). Pattillo and Kirk (2021) identify court actors' layawaying of freedom through charging and billing, payment plans, and due dates as an instantiation of financialization. Another example can be found in commercial bail, where defendants access pretrial release from jail by entering into a lender–borrower relationship with third-party businesses. This article considers what

frameworks, social constructions, and techniques are necessary for or produced through the operation of commercial bail.

Social construction and financial risk: Case for profitable subjects

To make financial extraction possible and palatable, state actors often adopt frameworks (e.g., neoliberal governance, consumerism, financialization) and construct people with system contact in particular ways. For instance, pay-to-stay practice is legitimated by a consumerism framework in which lawmakers legally craft incarceration as a public commodity provided by a benevolent state (Friedman et al., 2021). Pay-to-stay fees are subsequently cast as necessary for people deemed "free-riding consumers" undeserving of using state resources (Friedman et al., 2021). Scholars have made sense of subjugation to an imposed loan regime wherein one becomes a "mandatory borrower" or "perpetual consumer" of their imprisonment through concepts like captive markets and consumers (Plunkett, 2013) and financial capture (Friedman, 2020), respectively.

Additionally, Fernandes and colleagues (2022) detect rent-seeking behavior or benefits sought at little to no cost to actors (Kaufman, 2004) and without regard to social cost (Fernandes et al., 2022) in pay-to-stay lawsuits. Financialization supports the lawsuits' efforts to seek rent for the costs of incarceration, providing social labels like "willful nonpayers" that aid in constructing both the willfulness and the nonpayment as fiscally and morally damaging to the state and its citizens (Fernandes et al., 2022). Meanwhile, Pattillo and Kirk (2021) find that courts rely on the normalization of creditor–debtor relationships to create and justify a template for putting freedom on layaway. The researchers write, "The courtrooms we observed are not market economies, yet they contractually obligated defendants through written and signed pleas and orders to fully pay the amounts charged as part of their sentence. This created a pseudo-lending relationship managed by the coercive arm of the state" (Pattillo and Kirk, 2021: 893).

I build upon these varied works to deconstruct the distinctive practice of commercial bail and, by extension, the unique neoliberal subjects it produces through profit-oriented marking and surveillance. Commercial bail's construction of freedom as a commodity and bail agents' daily work as service provision (Page, 2017) align with a consumerism framework. Yet, commercial bail diverges from that framework because all people, even those who can pay, may be denied access following evaluation. Related, the "willful nonpayer" label buttressed by financialization is not the predominant discourse or construction in this arena because bail agents strive to obtain full fee payment before approving a bond. In cases in which a payment plan is administered, agents seek to collect the sum as quickly as possible. Thus, the business is not designed to produce or support nonpayers, whether they are "willful" or not. Even when defendants pay partially or in full, they are not entirely free or given unbridled access to the purchased commodity of freedom. The same contract they must sign to facilitate their pretrial release from jail also permits their lending body to monitor them, impose restrictions in the interim, and revoke that granted freedom in the most consequential cases. In short, commercial bail is a business whose operational mandate is to make a profit and whose existence depends upon doing so. I contend that these hallmarks of commercial bail exist precisely because it is a market

economy organized by a related, yet distinct framework than those previously discussed by other monetary punishment scholars—financial risk.

Financial risk is the possibility of losing money or experiencing an economic loss due to various factors. If the state is framed as a creditor (Pattillo and Kirk, 2021; Plunkett, 2013) or public service provider (Friedman et al., 2021), it technically loses money when people do not pay for things framed as commodities or services rendered. Yet, the financial risk framework has likely not dominated, even in publicly operated court settings where bail is set, because there are limited conditions and infrastructure that frame people, or costs paid upfront by the state, as liabilities or investments. By design, commercial bail generates these framings. Bail companies and the insurance agencies that back them generally stand to make at least 10% per client. At the same time, they face a theoretical liability of 90% because courts can demand that they pay the total bail amount if a defendant absconds and is not apprehended within a specified time frame. My use of theoretical is intentional. Although some bail agents within my sample reported having to pay for failed court appearances at least once, this was irregular and paled compared with the money the business made. This aligns with multistate studies documenting that courts rarely require agencies to pay in full for client absences (Freeland, 2023; Page and Scott-Hayward, 2022). Nevertheless, the mere possibility of collection and memory among some agents of at least one payout is enough to make financial risk feel real and, importantly, inform their behavior.

One way to think about this model is that clients are indebted to bail agencies, whereas agencies are indebted to courts. This creates a "double hooking" that, to my knowledge, is absent from other criminal legal operations, even similarly privatized ones. Moreover, bail agencies do not profit when they bond a client out but rather when they complete their case(s). Because that date can be weeks, months, or even years into the future, defendants are framed as long-end "investments" that are "liabilities" in the interim. Bail agencies' capacity to profit and maintain their livelihood rests upon managing this financial risk, which dovetails with the carceral risk of pretrial flight.

I posit that bail agents strive to counteract financial risk by using marking to construct defendants as profitable subjects and surveillance to sustain that construction. Through marking, agents create "classification situations" (Fourcade and Healy, 2013) in which defendants are categorized as "low" or "high" risk and, in turn, constructed as profitable or less profitable. These constructions are critical in determining whether one is denied bail assistance or granted a bond with requirements presumably proportionate to the assumed risk. Although constructions of profitability may facilitate access to pretrial freedom, once a bail bond is granted, they become elusive or porous because defendants are framed as liabilities through the completion of their court cases.[1] In response, agents surveil marked subjects to continuously re-establish their profitability. I now discuss each processing technique in the contexts of both market and criminal legal institutions.

Marking

In the neoliberal era, market institutions, such as consumer credit, insurance, real estate, and employment, increasingly use scoring technologies to classify and price people (Carruthers, 2013; Fourcade and Healy, 2013). This differentiation process creates

what Fourcade and Healy (2013) denote as "classification situations" or positions within the market that are associated with different economic rewards or punishments and, thus, are consequential for one's experiences of debt and broader life chances.

Credit scores are a prominent classificatory tool that quantifies individual consumption and performance and aids in determining "economic opportunities through sharply differentiated pricing strategies" (Fourcade and Healy, 2013: 29). For instance, the quantitative value affixed to one's economic profile impacts what type of services can be obtained (e.g., home equity, payday loans), in what volume (e.g., how much credit is extended), and at what price (e.g., interest rate) (Dwyer, 2018; Fourcade and Healy, 2013). Through the differential pricing of people, credit scoring simultaneously expands the reach of the market and produces new forms of classification with profound stratifying effects (Fourcade and Healy, 2013).

Marking is a scoring technology within the criminal legal system that encompasses both a tangible indicator, like a score, and a stratification process wherein records about a person's criminal legal involvement are used for critical decisions (Kohler-Hausmann, 2013), such as what type of sanction or punishment one will receive and for how long. The domains of policing (Brayne, 2017, 2020), courts (Gonzalez Van Cleve, 2016; Kohler-Hausmann, 2013), and corrections (Feeley and Simon, 1992; Harcourt, 2006) all deploy marking, albeit in made-to-order forms that are valuable for their specific priorities and imperatives (Fourcade and Healy, 2017). Yet, regardless of the form marking assumes or the end it is put toward, an indication of criminal legal involvement (past or present) is usually considered a negative credential that is disadvantageous to the marked individual's prospects (Jacobs and Crepet, 2007; Pager, 2007; Stewart and Uggen, 2020).

Policing, courts, and corrections have also undergone privatization (Harris et al., 2019) such that the marks that people with criminal contact bear are now market-oriented and ladened with information that could be used for profit-making. This is true for commercial bail, wherein one's criminal legal record is used to predict a defendant's future court attendance behavior and, thus, their profitability. Fourcade and Healy (2017: 22) write that, "in the credit market, a person with a 'bad' score on some dimension might nevertheless be valuable for that very reason to a particular kind of company." This framing helps contextualize my seemingly contradictory finding that legal entanglement is sometimes read as a positive attribute and rewarded with bail assistance at a lower requirement threshold.

Surveillance

Literature on market institutions, specifically consumer credit, discusses surveillance in terms of data tracking, or the "systematic collection of individual-level data about people's consumption and saving habits [that] allow for the consolidation of scoring and analysis methods" (Fourcade and Healy, 2016: 12). Through aggregating digital traces of human behavior and subjecting it to scoring on a continuous scale, markets come to see people according to profit and stratification, learning "how to increase efficiency, how to save money, and how to better extract income" (Fourcade and Healy, 2016: 25).

Surveillance within the criminal legal system can assume a digital and data-driven form (Brayne, 2020; Lageson, 2020) as well as a geographical, physical, and bodily form, such that people experience routine monitoring of their physical movement, bodily comportment, and communication (Gonzalez Van Cleve, 2016; Kohler-Hausmann, 2013; Owens et al., 2021). The incorporation of big data and technology (Brayne, 2017, 2020; Lee et al., 2020) and the growth of privatized supervision (Huebner and Shannon, 2022; Phelps, 2020) have made surveillance both more efficient and encompassing.

The practice of commercial bail utilizes both digital and physical surveillance to monitor bonded-out clients. Beyond utilizing check-ins as avenues for defendants to demonstrate compliance, as previous scholarship has shown (Huebner and Shannon, 2022; Martin et al., 2022), agents use them as tangible proof that clients are local, locatable, and thus profitable. When check-ins are electronic, they become a data source useful for future tracking of on-the-run clients (restoring profitability).

Constructions of profitability are difficult to maintain in an environment where the dominating perception is that defendants are liabilities. Consequently, almost no one can opt out of surveillance, even if they have paid in full or demonstrated their compliance and low risk of absconding. Bail agents do, however, use their prior marking of defendants to determine what type of surveillance they will be matched to. That different forms of surveillance are associated with varying degrees of hassle and invasiveness is clear evidence of “classification situations” at work because people differentially experience their time on bond as more or less restricting, more or less punishing.

Data and methods

This study is based on research examining the experience of commercial bail from multiple social vantage points. Data are drawn from interviews with 19 Texan bail agents[2] and field notes based on six months of participant observation at a Harris County bail agency.

Agent interviews took place virtually over the summer of 2020 and ranged from 30 minutes to 2 hours and 30 minutes. Because my goal was to understand decision-making processes and practices as opposed to generalizability, I employed sequential interviewing, or case study logic, in which each interview was treated as an exercise in replicating the prior ones (Small, 2009). I was reasonably confident in my understanding of the “thought processes” at play and comfortable that I had approximated saturation—the goal of sequential interviewing—by my 19th conversation.

After reviewing the contents of these interviews and engaging in additional research, I narrowed my focus to Harris County. From June 2021 to December 2021, I interned at a Harris County bail bond agency called 24-Bail Out[3]. It is a self-identified “mom and pop shop” co-owned by Hispanic colleagues, and based on my observation window, I found it to predominantly serve repeat defendants within the local, working-class Hispanic community. I did not receive payment or participate in any bond decision-making. Instead, I shadowed agents and staff members—observed their actions, private conversations with each other, and phone calls and interactions with clients.

All field notes and interviews were transcribed and loaded into qualitative data analysis software (Atlas.ti). In the coding process, I began with a deductive approach wherein my initial set of codes ("risk," "valuation," and "mitigation") were based on an interest in understanding how agents evaluate and manage defendants. Independent analyses of these three streams of excerpts revealed that bail agents explicitly linked each to profit. These excerpts were then coded more intimately to make sense of the unique filtration of profit into the practice of defendant assessment and management (criminal legal processing). Subcodes for "criminal record" (under "risk" and "valuation" code) and "requirements" (under "mitigation" code) inductively emerged at this stage. "Criminal record" became a proxy for marking and was extended to capture the valence of criminal credit (good/beneficial, bad/harmful, neutral).

Next, I applied the combined deductive and inductive approach to data from defendant interviews not presented in this study. Here, "requirements" was the critical code, yielding subthemes like "check-ins," "payment," "paperwork," and "performative displays." The frequency at which check-ins were discussed and the depth of the responses prompted me to return to agent interviews and explicitly code for check-ins (as opposed to requirements more generally), which later became a proxy for surveillance. After marking and surveillance decidedly became the central empirical contributions, I had the task of connecting them to the origin point – the centrality of profit. Through retracing my coding trajectory, I came to view these two processing techniques as mechanisms through which defendants are constructed as profitable subjects.

Financial risk as a dominant framework

The legal demand of the pretrial system, cash bail included, is to ensure defendants return to court for judgment while maintaining public safety. This can be a tall order for courts, given that state agencies have limited budgets and staff. Incorporating private entities through the prospect of profit is one way to relieve the strain on public courts. For every individual bonded out and supervised through case completion, bail agencies make money in addition to what they collect through service fees and forfeited collateral. Yet, despite the undeniable presence of profiting, bail agents primarily see their universe as dominated by financial risk. Derrick, a Black agency owner of ten years, summarizes this phenomenon well:

> Risk, risk, risk. If they don't show up for court, then we lose money… So, everybody that walks through that door, I'm asking the same question: am I going to make a profit? Is this risk going to pay off? How can I make it pay off?

Here, Derrick describes the built-in financial incentive (or risk) that bail agents have to get their clients to appear in court. Upon a failure-to-appear, a time clock begins wherein agencies have six to nine months to get absconding clients back into custody. If a defendant is rearrested within this time frame, the company's liability is reduced to an interest fee, court costs, and, if applicable, a relocation fee. If the deadline is not met, courts can fine agencies up to the total bail amount, significantly more than the discounted premium offered to clients (usually 10%). Interviews and observations do not definitively uncover

whether courts consistently collect forfeiture costs from bail agencies in Texas counties. However, data collected across states suggests that courts irregularly require bond companies to pay up in full (NAPSA, 2009; Page and Scott-Hayward, 2022).

Regardless of what occurs in practice, bail agents in this study think and feel that financial risk is real, and that perception informs their actions. One way to understand this phenomenon is in terms of prospect theory (Kahneman and Tversky, 2013), where the probability of a gain or loss is assumed as being 50/50 even if the actual probability split is far different, like commercial bail where procedures are in place to minimize agency losses (Freeland, 2023). Nonetheless, when viewed through this risk-averse lens, two intertwined objectives emerge—ensuring defendants bonded under their license return to court and making money. Failing to meet the former objective (client court attendance) can hold a financial penalty and jeopardize the latter objective (profit). To mitigate this risk of financial loss, bail agents enact a particular form of marking and surveillance that veers away from traditional criminal legal applications and toward their deployment in market institutions. Articulating how and why agents administer these techniques reveals the construction and attempted maintenance of defendants as profitable subjects.

Marking: Constructing profitability through notions of credit

Kohler-Hausmann (2013: 353) describes marking as a state stamp on people that communicates something about their criminal legal involvement. In addition to being a tangible indicator, marking involves “the generation, maintenance, and regular use of official records about a person’s criminal justice contacts for critical decisions.” Marking in the context of commercial bail fits within this definition because bail agents utilize criminal records to decide whether and under what conditions a defendant will be bonded out. However, the profit-forward perspective agents use to interpret the same data distinguishes it from other marking instances. When applied, defendants are relabeled in ways that riskify them counter to the logic commonly applied in criminal legal settings. These newfound categories are akin to “classification situations” or market-based positions associated with different (non-)economic rewards or punishments (Fourcade and Healy, 2013).

Bail agents value information about the nature, number, and tempo/onset of charges. However, because their capacity to profit hinges on their clients’ court attendance behavior, the more significant data is the accompanying documentation of appearance or absence in court for said charges. Failure-to-appear is considered a “bond forfeiture,” and forfeitures create an index or history within a defendant’s larger criminal history.

It is helpful to think of criminal histories as credit to understand how profit informs bail agents’ use of criminal records. Like credit in a traditional sense, each denoted behavior adds or reduces confidence in future behavior favorable to the creditor. This then expands or limits the individuals’ access to more credit, such as a voucher for release from jail. An automatic way for a criminal record to be slotted as “high risk” is to be void of criminal credit or reflect no charges and no record of “court attendance behavior.” Rephrased, people without previous entanglement are illegible to agents and constructed as less profitable.

Katarina, a white office worker whom I interviewed nine months into her commercial bail foray, harbored hesitancy around bonding defendants who lacked credit or a record of their behavior. To make her point, she juxtaposes them against defendants with surplus credit:

> If they are a repeat offender and they go to jail every month to the day, ummm… you know, that's not really going to be a … well, it's kind of a safe bet because you've got a log of if they go to court or not. First time offenders… you're kinda leery on them because you don't know how they're going to handle it.

To some degree, Katarina's logic contradicts the sense-making of other legal practitioners. Generally, an individual with no criminal history or prior charges is viewed as posing little risk or threat across a handful of outcomes (Frase and Roberts, 2019). Even with bail determinations specifically, judges regularly grant bail or sign off on releasing individuals for whom the current charge is their first (Clarke, 1988; Garrett and Monahan, 2020). Yet, if we view criminal histories through the lens of profit, as agents do, no indication of (legal) risk translates to high (legal and financial) risk. This empirical point mirrors scholarship on consequences when records and documents created in one context are used in another (Kiviat, 2019, 2021; O'Brien and Kiviat, 2018). In this case, records containing information about a person's criminal legal behavior are read as a one-to-one comparison of their creditworthiness and broader financial behavior.

Still, having a record does not instantly confer positive criminal credit. It is possible to have several charges but no useful behavioral information for agents' risk assessment. This became clear during an afternoon shift at 24-Bail Out:

> Elena, a Hispanic woman co-owner, had just ended a call with a frantic Black mother caught between the arrest of one son and the sentencing of another to prison. I ask if she'll give the mother a break and do the bond, and she says she'll know after "some research to check his risk."
>
> After clicking through several windows on the district clerk's website, she learns that the last time he made bond or was released from jail before his court date was in 1996. Since then, he has been arrested ten more times but, on each occasion, was either denied bail by a judge, unable to afford the bail, or unable to convince an agent to bail him out. Biting her lower lip and shaking her head, Elena provides a judgment call, "This is not a good sign. We don't have any recent indication of what he's going to do."

In other words, having outdated credit is synonymous with no credit and works against the defendant. With suspicion now cast on their profitability or perceived likelihood of being a future asset, defendants in this category are turned away or required to shore up their profitability through increased payment, collateral, or number of cosigners. Which "differentiated pricing strategy" (Fourcade and Healy, 2013) is allocated to defendants heavily impacts if and with what level of ease they access pretrial freedom.

As previously noted, this profit-informed line of reasoning puts a positive twist on possessing a criminal record, traditionally viewed as a damaging, risk-exacerbating property.

When Derrick, a Black bail agent and agency owner, nonchalantly stated that "a good client is somebody that gets arrested a lot," I initially interpreted this as good clients are those always needing bail agents' services. However, more conversations and time in the field revealed a different interpretation. Summarizing agents' sentiments, Juan, a Mexican agent and agency owner, explains:

> Well in this business their criminal history is their credit. If you look them up and you go, okay, he's been in trouble like seven or eight times, but he's always bonded out and gone to court. Okay. Well, he looks like he's a good person to be on. He takes care of what he has done. That's a good sign.

Just like a creditor would be eager to take on a client who has successfully managed seven or eight lines of credit, so too would a bond agent be less doubtful about taking on a defendant who's been in trouble "seven or eight times" but "always bonded out and gone to court." Thus, routine engagement with the criminal legal system makes defendants legible to agents and either profitable or less profitable, "low" or "high" risk. These designations are critical because they can make the difference between a defendant receiving bail assistance or enduring pretrial detainment, the latter associated with harsher sentencing, loss of employment, and family fragmentation (Digard and Swavola, 2019). We can detect the operation and consequence of "classification situations" through the negative impacts on broader life chances (e.g., employment loss post detainment) that likely cluster among those with "less profitable/high risk" designations.

Ongoing surveillance to maintain profitability

Surveillance is a defining feature of processing because it operates as a solution to and punishment for criminal legal involvement. Beyond being a medium to monitor charged or convicted people, it is an avenue for detecting or demonstrating compliance and responsibility. Like other procedural requirements (e.g., drug and urine testing, payment), surveillance can be a hassle (Kohler-Hausmann, 2013) because it places demands on time (Slavinski and Spencer-Suarez, 2021) and financial resources (Harris, 2016; Martin et al., 2022), and can confuse (Harris, 2016; Pattillo and Kirk, 2021) and demean (Gonzalez Van Cleve, 2016; Martin et al., 2022) those subjected to it.

The same is true of the commercial bail process. Bail agents require defendants to consent to check-ins as part of their release conditions, and defendants commonly experience it as an arduous process. What distinguishes agents' check-in policy from that of other legal practitioners is that their profit objective inspires an additional function of surveillance that leaves little room for leniency. To increase their confidence in defendant court attendance and, thus, their odds of profiting, agents utilize check-ins as a risk-gauging instrument. Rather than singularly allowing defendants to demonstrate compliance, check-ins can provide tangible proof of maintained profitability or a seemingly safe investment. Even more, when the check-in is through a mobile app (i.e., virtual), it becomes a record of movement that can aid in future apprehension and, ultimately, the safeguarding of profit.

Check-ins were ubiquitous and standard across all three agencies I observed within. Each business had a designated day (usually Monday or Tuesday) for clients to check in by physically coming into the office, calling, or submitting a geo-tagged photo via a mobile app. As a result, my fieldnotes contain many iterations of the following description:

> Today is check-in day (Tuesday), so clients are calling non-stop to report their names and court appearance dates. A few clients, deemed higher risk, must come physically to check in, an interaction that lasts 1–2 min.

During such observations, the reactions of bail agents to those who did not comply revealed the intent behind their imposition of check-ins:

> 24 Bail Out – Week of September 12th
>
> Though bodies have paraded in and out of the office all day for check-ins, only one client is on Elena's mind – the "240,000 liability", as I had heard him nick-named.
>
> With 2 hours remaining in her shift, Elena could no longer contain herself. Swatting for the office phone, she dials the number highlighted among a sea of information documented on his application.
>
> Her eyes widen in surprise at the relatively quick answer, and then, in a stern tone, she communicates a short and clear message, "I need you to take this seriously. I need you to check in once a week. Come in today. Right now, matter of fact."
>
> After hanging up, she looks at me and shakes her head vigorously. Toying with the edge of the manila folder containing his case information, she comments, "He's got $240,000 worth of bail… and he's just like 'I'm on my way, I'm on the way' and never shows. Like no! For $240,000, we need to see you and keep seeing you until your court date."

All agents within the study appeared to make the same connection as Elena—check-ins provided proof that a defendant was still local and locatable after being bonded out and at a decreased risk of skipping court. Although not captured in this excerpt, when a client like the "240,000 liability" consistently fails to check in, agents can submit a "surrender" to the court[4] and, if approved, be removed from the bond, an act that initiates a warrant for that person's rearrest. Although I rarely observed agents move forward with surrenders, I routinely saw them leverage this tool to make resistant clients comply with check-in requirements.

Agents held differing views about which form of check-in provided the best indication of profitability. Differences in personal preference partially explain between-agent variation. For example, after learning that mobile check-ins were a practice in this domain, I incorporated a general question about technology use into my interview questionnaire. Juan's response reveals that for some bail agents, physical check-ins were king and preferred over the use of apps:

Interviewer: And now, what about technology? Are you using any? Management software, programs, apps? Have you integrated any technology into what you do?
Juan: Not really, because I still want to see the defendant. The body is the collateral, you know? I don't trust those apps because they could be checking in from anywhere.
Interviewer: Hmm, okay. I see your point.
Juan: Like you could be in New York and tell me you're home. Yeah. I don't, I don't trust those, but that's just me. I don't think it's too much to ask for somebody to come sign in once a week. Just your signature.
Interviewer: And that's all clients?
Juan: Yep, all of them. I'm old school like that.

For Juan, seeing the defendant's physical body was the only "collateral" or reassurance he could trust. Coming in once a week to sign and show one's face was viewed as the ultimate way to prove profitability, at least until the subsequent check-in, where confidence had to be reestablished.

For others, check-ins took the form of a sliding and even combinational scale wherein the level of perceived risk dictated form. I frame individual-level variation in surveillance assignments within the context of "classification situations." Ascribed labels (e.g., "less profitable/high-risk") determine which form of surveillance defendants are matched to, and each form strives to maintain or shore up profitability. Yet, surveillance methods shape bond experiences in polar ways because they are associated with dissimilar levels of hassle. When asked about his check-in policy, Alonso, a Hispanic agency owner since 2007, explained:

> For me, my check-in policy is … it is case-by-case basis, okay? So if it's like a little $500 DWI [driving while intoxicated] bond, it's always a check-in at least once, all right? And right now, we're currently using an app where they can check in from anywhere. They take a picture and it gives me their location on where they're checking in from. But if it's a bigger bond, I may say you're going to check in by the app, but you're also going to come in in-person, you know? Especially when you're getting into the 20s and the $30,000 bonds. And again, this is going to be something that's going to be case-by-case basis. There's some companies where they make you come in no matter what, in-person. So it's a company thing. It's your own policy.

Alonso's use of mobile check-ins as the cornerstone of his practice bears reiterating because it is a powerful surveillance tool that can be used for future tracking and apprehension. With each subsequent check-in, a log of the defendants' typical whereabouts is created and stored that can be used to potentially restore the profitability of "on-the-run" clients. Notably, although Alonso describes only requiring "at least one" mobile check-in from defendants he deems low risks ("a little $500 DWI bond"), those that are deemed high-risk ("20s and the $30,000 bonds") must check in electronically

and physically on a likely recurring basis. He not only alludes to his active construction of tiered surveillance, which varies in degree of burden, invasion, and restriction, but also how elusive constructions of profitability are in environments where "liability" is a dominating perception.

Being marked as profitable or less profitable informs which "classification situation" one is relegated to and, in this instance, how much surveillance hassle one might experience or have to overcome. Yet, a singular focus on difference can obscure that almost everyone is still experiencing surveillance. An overarching financial risk framework bars nearly everyone from opting out. Instead, bonded-out defendants must repeatedly check in to demonstrate their status as low-risk, profitable subjects. That there is no readily apparent pathway to leniency or even recognition of one's compliance efforts and communicated trustworthiness may accentuate the punitive aspect of processing.

Conclusion

This study finds that when a profit motive is transposed onto the criminal legal context, processing becomes a mechanism to not only punish (Feeley, 1979) or control (Kohler-Hausmann, 2013) charged or convicted persons, but also to generate and safeguard revenue. Scholars have identified various forms of marking and surveillance in the insurance and marketing industries, where profit-making is fundamental to the institution's mandate and operation (Fourcade and Healy, 2013; Kiviat, 2019). Although that is not true of the criminal legal system writ large, it is true of its public–private junctures wherein processing techniques have been little explored.

In the case of commercial bail, marking is used to transform criminal records—and humans by extension—into literal dollar signs, whereas surveillance is used to ensure that assets remain assets. Identifying that criminal legal actors derive profit from subjugated populations, or further, that they view them as revenue first and humans second, is far from new (Alexander, 2010; Harris, 2016; Page and Soss, 2021). Yet, a novelty of this study is identifying ubiquitous processing techniques as mechanisms for constructing defendants as profitable and stratifying their criminal legal experiences into "classification situations."

The pervasive presence of "cost points" (Harris et al., 2019) or predatory inclusion (Page and Soss, 2021) across the criminal legal domain can give the impression that profitability is static and innate. Yet, by focusing on the case of commercial bail, where financial risk is a dominant framework, I position profitability as an elusive construction that is sometimes ascribed (i.e., marking) and other times achieved (i.e., surveillance). The interplay between stratification and elusiveness distinguishes profitable subjects from previously theorized neoliberal constructions.

As efforts increase to abolish cash bail across the country, there is an enduring utility in the concept of profitable subjects. Release on non-financial conditions, such as ankle monitors and drug treatment classes, still require payment and are often time coordinated by for-profit entities. As a result, profit incentives and financial frameworks remain intimately intertwined with criminal legal processing and, when investigated, provide further insight into how and why experiences are varying and unequal.

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Notes

1. The (in)stability of the construction is reminiscent of Robert Werth's identification of "responsible yet precarious" subjects (2013).
2. I use bail agent liberally to refer to licensed individuals and those under their employment who directly interact with clients and engage in risk assessment and mitigation.
3. Reflects pseudonym
4. Surrenders can only be submitted for violations of bond conditions. No or partial payment for services rendered is not sufficient justification for being removed from a defendant's bond.

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