Bail in the United States: A System in Need of Reform

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NOTES

BAIL IN THE UNITED STATES: A SYSTEM IN NEED OF REFORM

Bail, as it exists in the United States, is a constitutional concept, a lucrative business, a method of avoiding prolonged incarceration, and a system which intensifies the disturbing economic polarization found in American cities today.

Introduction

The bail system which we received from England is certainly not the one in existence in the United States today. In England, personal responsibility was emphasized: the accused and his sureties, who were friends and relatives, never commercial bondsmen, entered into a contract with the Crown whereby if the accused failed to appear as requested, he would forfeit what he and his sureties had promised. Such a system of personal responsibility has existed in England for centuries.

In the United States, however, this system would not have been feasible until late in the 19th century. A nation of colonies with rapidly expanding frontiers, with citizens who had no roots, no families, and few friends, could not rely on a personal bail system. Instead, a commercial bail system evolved rapidly in the colonies, a system wherein an accused could obtain a surety for the payment of a sum of money. But rather than dying out as our nation became more settled and populated, the commercial bail system became firmly entrenched, and a man's ability to pay the bondsman's fee determined whether he would in fact be released from jail pending trial or appeal. This system is lucrative for the bondsman and convenient for the courts, which do not have to concern themselves with the additional administrative work a personal bail system necessitates; it is convenient also for the well-to-do accused. In fact, only the indigent or unpopular accused is injured by the commercial bail system, but his injury is sometimes devastating.

Confusion in Concepts

As a legal concept, bail has caused great confusion in our courts because it is not settled whether the right of an accused to be admitted to bail pending trial is a constitutional right, implicit in the

1 McCree, Keynote Address: Bail and the Indigent Defendant, 1965 U. Ill. L.F. 1, 2.
eighth amendment, or merely a statutory right, subject to regulation by the Congress or by the respective state legislature. Also unsettled is the extent of one's right to be admitted to bail pending review of his case, when the presumption of innocence is gone.²

In 1895, the United States Supreme Court, speaking through Justice Gray, appeared to favor a statutory basis for the right to bail:

The statutes of the United States have been framed upon the theory that a person accused of crime shall not, until he has been finally adjudged guilty in the court of last resort, be absolutely compelled to undergo imprisonment or punishment, but may be admitted to bail, not only after arrest and before trial, but after conviction and pending a writ of error.³

In 1926, however, Justice Butler speaking as Circuit Justice for the Seventh Circuit in United States v. Motlow,⁴ said that the eighth amendment implies a right to bail at least before trial and that the purpose of the amendment is to prevent practical denial of bail by fixing the amount so unreasonably high that it cannot be given. “The provision forbidding excessive bail would be futile if magistrates were left free to deny bail.”⁵ In support of his interpretation of the eighth amendment, Justice Butler cited the recommendations of the Senior Circuit Judges Conference held in 1925:

The right to bail before conviction is secured by the Constitution to those charged with violation of the criminal laws of the United States. The right to bail after conviction by a court or a judge . . . is not a matter of constitutional right. The acts of Congress make provision for allowance of bail after conviction. . . .⁶

In the 1950's there were two important decisions regarding the existence of a constitutional right to bail. Carlson v. Landon,⁷ was a civil case involving the deportation of aliens accused of being Communists. Bail was denied to the defendants, and the Supreme Court said in a 5-4 decision that the eighth amendment gives no right to bail in all cases. That amendment only assures that bail shall not be excessive where it is proper to grant it.⁸ A vigorous dissent was entered by Justice Black who said that the interpretation of the majority, allowing Congress to permit confinement without bail, restricted the amendment to a mere limitation on judges and relegated

² It seems well settled that there is no constitutional right to bail after conviction. See Carbo v. United States, 82 S. Ct. 662, 666 (Douglas, Circuit Justice, 1962); United States v. Bentvena, 288 F.2d 442, 444-45 (2d Cir. 1961); text accompanying notes 19-23, 75-81 infra. Even before trial bail may be denied one accused of a capital offense. Fed. R. Crim. P. 46(a) (1); Cal. Pen. Code § 1270; cf. United States ex rel. Weber v. Ragen, 176 F.2d 579, 583 (7th Cir. 1949); Rowan v. Randolph, 268 F. 527, 528 (7th Cir. 1920).


⁴ 10 F.2d 657 (Butler, Circuit Justice, 1926).

⁵ Id. at 659.

⁶ Id. at 662. Neither case has in reality done much to settle the issue.


⁸ Id. at 544-46.
it "below the level of a pious admonition." Justice Black contended that the purpose of the amendment was to make it impossible for any agency of the government, even the Congress, to authorize the imprisonment of persons for a moment longer than was necessary to assure their attendance in court.

Contrasted with Carlson is Stack v. Boyle, in which an application for bail for violations of the Smith Act was heard. Although the holding was based upon the Judiciary Act of 1789 and the Federal Rules of Criminal Procedure, the Court in Stack said that the "traditional right" to freedom before conviction permits unhampered preparation of defense and prevents infliction of punishment before conviction. "Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, will lose its meaning." To this, Justices Jackson and Frankfurter added that bail evolved not as a device for keeping persons in jail on mere accusation until convenient to try them, but rather to enable persons to remain free until found guilty. Without this guarantee, even the wrongfully accused are punished, and are "handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense."

It is this language in Stack which has been relied upon recently as support for the proposition that the right to bail is guaranteed by the eighth amendment "by necessary implication." After citing Stack, the court in Trimble v. Stone stated that the right to bail pending trial is absolute, except in capital cases, no matter how unsavory the defendant's past record or how vicious the offense. Thus, the confusion in basic concept continues. The Supreme Court has not defined the scope of the eighth amendment, nor has it stated definitely and without reservation when a particular decision has turned on statutory requirements instead of constitutional mandates.

Another problem facing the courts is that of determining the circumstances under which bail may be denied. Regardless of the unsettled constitutional question, the right to bail before trial is guaranteed except in capital cases by rule at the federal level and by statute in many states. But the right to bail after the trial has

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9 Id. at 556.
10 Id. at 557-58.
11 342 U.S. 1 (1951).
12 Id. at 4.
13 Id.
14 Id. at 7-8.
15 Id. at 8.
17 Id. at 483.
18 Id. at 485.
19 Fed. R. Crim. P. 46(a) (1); see text accompanying notes 58-68 infra.
begun or pending appeal is not absolute,\textsuperscript{21} nor is it constitutionally guaranteed.\textsuperscript{22} Instead, the denial or granting of bail under such circumstances is largely a matter of judicial discretion within the framework of certain rules.\textsuperscript{23}

Bail is denied pending appeal to prevent further crime\textsuperscript{24} and to protect the public.\textsuperscript{25} It is terminated to assure orderly progress of the trial.\textsuperscript{26} Although such denials are subject to rigid scrutiny,\textsuperscript{27} they are an accepted part of the administration of bail. Since this is the case, it may be questioned what has happened to the traditional notion that an accused is not to be imprisoned until his conviction is upheld by a court of last resort.\textsuperscript{28}

But it is not the denial of bail in these situations which has caused the bail system to be described as "repugnant to the spirit of the Constitution and in direct conflict with . . . basic tenets . . . ."\textsuperscript{29} Instead it is the denial of bail to the poor, the unpopular, the suspected subversive, and the nonconformist that has brought criticism upon the system. It is the emphasis upon ability to pay, coupled with the often unwarranted reliance upon discretion at lower judicial echelons which has made the system susceptible to abuse. Whether these abuses are due to confusion of principles, vague laws, or mere abuse of judicial discretion will not be answered in this note. Instead, the remainder of the note will examine areas in which the bail system has either proved useless to provide freedom pending final determination of guilt or has been used as a weapon against unpopular citizens. Existent bail reform projects will be examined, their shortcomings discussed, and an alternative suggested.

\textsuperscript{21} Carbo v. United States, 82 S. Ct. 662 (Douglas, Circuit Justice, 1962); Williamson v. United States, 184 F.2d 280 (Jackson, Circuit Justice, 1950).

\textsuperscript{22} See note 2 supra.

\textsuperscript{23} Williamson v. United States, 184 F.2d 280, 281 (Jackson, Circuit Justice, 1950); CAL. PEN. CODE § 1272; see FED. R. CRIM. P. 46(a)(2).

\textsuperscript{24} Carbo v. United States, 82 S. Ct. 662, 687-69 (Douglas, Circuit Justice, 1962) (to prevent harm to the principal witness); see United States v. Bentvena, 288 F.2d 442, 444-45 (2d Cir. 1961).


\textsuperscript{28} See Hudson v. Parker, 156 U.S. 277, 285 (1895), discussed in text accompanying note 3 supra.

\textsuperscript{29} McCree, \textit{Keynote Address: Bail and the Indigent Defendant}, 1965 U. ILL. L.F. 1.
Bail in Practice

Problems in General: The Indigent and Unpopular in the System

Griffin v. Illinois\(^3\) was not merely a decision granting indigents the same right to appeal as that enjoyed by the economically favored; that decision enunciated the principle upon which later decisions, and whole legislative schemes (such as Legal Services for the Poor) were to be founded: "There can be no equal justice where the kind of trial a man gets depends upon the amount of money he has."\(^3\)

Since Griffin, indigency has been regarded as a relevant factor in any consideration of what is constitutionally acceptable practice in federal and state judicial systems.\(^3\) Since bail is and should be part of our judicial system and not a bastion of free enterprise, the treatment of the indigent in the bail system is constitutionally important. That such treatment had become insensitive and punitive was called to the attention of the public and the courts not by a judicial officer, but instead by Louis Schweitzer, a philanthropist, who on a tour of New York City's detention prisons was appalled to discover that, in 1960, people were serving excessive time in prison only because they were poor.\(^3\)

That poverty is a major factor in pre-trial detention was evidenced by a study in 1956 of New York City felony cases. This study, which preceded Schweitzer's report by four years, showed that of the 2,292 varied criminal cases in which bail was set, only 49 percent of those accused could furnish bail; 28 percent of those accused could not furnish $500 bail and 86 percent could not furnish $7,500.\(^3\) That these indigents suffer lengthy pre-trial incarceration has been amply documented, as in the case of a defendant accused of taking $14.05 from a subway change booth who was jailed for six months because he could not afford the bondsman's fee of $105 for his $2,500 bond. The defendant was later acquitted of the charge, but in the interim had lost his job and his apartment, and had spent half a year in jail with a homosexual, a drug addict and a veteran convict.\(^3\) In an-

\(^3\) 351 U.S. 12 (1956).
\(^3\) Id. at 19.
\(^3\) 32 See, e.g., Douglas v. California, 372 U.S. 353 (1963) (indigent must be provided with counsel on appeal); Smith v. Bennet, 365 U.S. 708 (1961) (indigent cannot be required to pay $4 filing fee for writ of habeas corpus); Burns v. Ohio, 360 U.S. 252 (1959) (indigent cannot be required to pay $20 fee to appeal felony conviction to Ohio Supreme Court). See also Note, The Indigent's Right to Counsel in Civil Cases, 76 YALE L.J. 545 (1967) (arguing that indigents should be given free counsel in certain civil cases); Note, Equal Protection and the Indigent Defendant: Griffin and its Progeny, 16 STAN. L. REV. 394 (1964).
\(^3\) R. Goldfarb, RANSOM 151 (1965) [hereinafter cited as RANSOM]. Schweitzer's determination to correct this situation gave rise to the Vera Foundation and the original Bail Project in New York City. Id. at 152.
\(^3\) Id. at 39.
\(^3\) Id. at 33.
other case, the accused was jailed for 54 days because he could not raise $300 bail for driving without a license. The maximum penalty for the offense was 5 days in jail. Such detentions occur often and cannot be considered extraordinary.

Since Schweitzer's investigation, which led eventually to the formation of the Vera Foundation, other criticisms have been raised concerning the bail system in the United States. For example, the system itself varies from state to state, and even from county to county within a state. In some areas, bail may be set by a judge; in other areas, by a magistrate, who may not be an attorney, or by a police officer or even the district attorney. The amount of bail set varies not only according to the individual accused's propensity to flee before his case comes to trial, which is the standard set by the United States Supreme Court for determining whether bail is excessive, but also by the offense charged. This, too, varies from county to county. For example, in one Idaho county, the typical bail for nonviolent felonies is $300, while in another it is $5,000; in one Indiana county, bail for manslaughter is $10,000, while in another it is $3,000. In urban areas it was found that bail is generally given by a commercial bondsman, while in rural areas, personal bondsmen are used. The percentage of defendants who cannot make bail varies also: in San Francisco it is 57 percent, in St. Louis 79 percent, in Miami 71 percent. And the number of days those who make bail must wait after bail is set until they are released varies from one to more than thirty days.

That the indigent are included within those who cannot make bail and must languish in jail until trial is obvious. Yet these are the very people who can least afford incarceration. Time spent in jail means loss of wages, usually loss of employment, disturbance of family life, probable dependency on welfare and an inability to pay for or participate in the preparation of an adequate defense. The accused is kept with convicted criminals and must enter the courtroom in the custody of an officer. His appearance is obviously not as im-

36 Id.
37 Id. at 36.
39 Id. at 26.
41 E.g., Cal. Pen. Code § 1275: "In fixing the amount of bail, the judge . . . shall take into consideration the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his appearing at the trial or hearing of the case. . . ."
43 Id.
44 La Fave, Alternatives to the Present Bail System, 1965 U. Ill. L.F. 8, 10.
pressive to the judge or jury as that of a man walking into the courtroom in the company of his family and friends. What is most tragic about pre-trial incarceration, however, is its effect on the outcome of the trial. An accused who has been released prior to trial, and who has kept his job and his social contacts, is more likely to be placed on probation than one who has been in jail. Statistics for the city of Philadelphia, for example, show that, of 529 serious criminal cases where defendants were bailed, 275 were convicted and only 22 percent of these were sent to prison, while of 417 other defendants who were not released, 340 were convicted and 59 percent were sent to prison. Thus the accused who cannot afford bail not only must suffer imprisonment without regard to his guilt or innocence, but also must incur the substantial risk that he will be found guilty and sent to jail for reasons other than solely those presented at trial.

In *Butler v. Crumlish*, the court said that it is common knowledge that the system of bail, based as it is on financial ability, is weighted heavily against the poor. This is especially true in the great urban areas where populations are highly mobile and family roots do not reach deep. The friend or relative who formerly tendered the security of a freeholder has been largely supplanted by the professional bondsman. He must be paid a premium in all cases, and he often requires cash or similar security before agreeing to guarantee the appearance at trial of a defendant who is personally unknown to him. The theoretical equality of the right to bail when all are not financially equal thus has become in reality a deep and wounding social inequality, increasingly oppressive to the poor and the vagrant. It brings to mind Anatole France's ironic epigram that the law in its majestic impartiality forbids the rich and the poor alike to sleep under bridges.

But the bail system does not militate solely against the poor. The system often is used against unpopular persons who normally

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47 That this situation gives rise to questions of equal protection was obvious to Justice Douglas in 1960 when he stated in *Bandy v. United States*, 81 S. Ct. 197 (Douglas, Circuit Justice, 1960), that in the case of a defendant without property, the demand by a court of a substantial bond, or even a bond in a modest amount, may have the effect of denying him release. He is clearly not on equal terms with other defendants because of his indigence—an inequality condemned by *Griffin v. Illinois*, 351 U.S. 12 (1956).

48 229 F. Supp. 556 (E.D. Pa. 1964). In this case Judge Freedman held, in issuing a preliminary injunction, that there was “substantial merit” in the claim that the practice of forcing an indigent, non-bailable defendant to appear in line-ups for crimes other than the one for which he was awaiting trial was unconstitutional. *Id.* at 568; *accord*, Rigney v. Hendrick, 355 F.2d 710, 715-18 (3d Cir. 1965) (Freedman, J.) (dissenting opinion); cf. *United States v. Evans*, 239 F. Supp. 554, 557 (E.D. Pa. 1965). But see *United States v. Evans*, 359 F.2d 776, 777 (3d Cir. 1966) (per curiam).

could afford bail set to deter flight, but cannot afford bail set to teach them a lesson, or to respond to public pressure and animosity against them, or to prevent suspected commission of future crimes, or to curb unpatriotic statements. That bail is set for such purposes is disclosed by the judges themselves in setting bail:

I disagree with you, Mr. District Attorney. I feel that the man should be punished and I don't feel that $500.00 is sufficient.

The only thing I say is this: I'm going to insist that these boys are not to be bailed out. I'm going to set such bail that they will not be bailed out. . . . Let them see what the inside of these jails look like. Maybe that will be a deterrent to them.

Such practices may result in tragedy for the accused who is to be "taught a lesson," as in the case of a 17-year-old first offender who was savagely beaten, sexually assaulted, kicked and stomped to death by two ex-convicts with whom he had been confined. The day before, when his older brother inquired about release on bail, the brother was told: "The boys in back are having a big time. Don't worry, we'll just give them a 'taste of jail' to scare them, but they are having more fun than you are on the outside."

Constitutional and Statutory Requirements

The Federal Rules of Criminal Procedure section 46(a)(1) give the accused the right to bail in all noncapital cases; decisions have construed the basic right conferred by this rule, so that judges have standards to which they can refer in setting bail. The amount to be set must be that which will assure the accused's presence at the trial. In setting bail, the judge may consider the nature and circumstances of the offense charged, the weight of the evidence

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50 See Stack v. Boyle, 342 U.S. 1, 4 (1951) (sole purpose of bail is to assure defendant's presence at trial and submission to sentence if found guilty).
54 Cf. Williamson v. United States, 184 F.2d 280, 282–83 (2d Cir. 1950).
55 Ransom 47.
56 Id.
58 E.g., Stack v. Boyle, 342 U.S. 1, 5 (1951); United States v. Radford, 361 F.2d 777, 780–81 (4th Cir. 1966), cert. denied, 385 U.S. 877 (1967); Warren v. Richardson, 333 F.2d 781, 784 (9th Cir. 1964); United States ex rel. Rubinstein v. Mulcahy, 155 F.2d 1002, 1004 (2d Cir. 1946).
60 Hodgdon v. United States, 365 F.2d 679, 687 (8th Cir. 1966), cert. denied, 385 U.S. 1029 (1967) (quoting from Fed. R. Crim. P. 46(a)(1), (3)).
against the accused,\textsuperscript{61} his financial ability,\textsuperscript{62} his character,\textsuperscript{63} and finally, the policy of the court against unnecessary detention before trial.\textsuperscript{64} It is unconstitutional to set bail in such an amount as to assure that the accused will not be released,\textsuperscript{65} but the mere fact that he cannot afford the bail set does not mean that it is excessive.\textsuperscript{66} Bail before trial may not be denied merely because the accused is thought to be dangerous to the community,\textsuperscript{67} but only if the conduct of the defendant significantly threatens the orderly progress of the trial.\textsuperscript{68}

Similar considerations govern in state proceedings. Palmer\textsuperscript{v. District Court}\textsuperscript{69} held that, where the right to bail was set forth in the state constitution:

Irrespective of the villainy of the accused or the heinousness of his offense [other than capital offenses], without regard for public opinion, or for the personal views of an individual officer as to the wisdom of the constitutional provision such provision is binding without qualification . . . .\textsuperscript{70}

Admission to bail pending appeal also is governed by rule and case law in federal courts. Section 46(a)(2) of the Federal Rules of Criminal Procedure allows the accused to be admitted to bail if his appeal is not frivolous or taken for delay. In setting bail after conviction, the courts are required to consider the danger of flight.\textsuperscript{71} If the defendant cannot afford a bond, the court is constitutionally obligated to inquire whether other assurances of his presence will suffice.

\textsuperscript{61}United States v. Radford, 361 F.2d 777, 780 (4th Cir. 1966), cert. denied, 385 U.S. 877 (1967) (quoting from Fed. R. Crim. P. 46(c)).

\textsuperscript{62}Id.

\textsuperscript{63}Hodgdon v. United States, 365 F.2d 679, 687 (8th Cir. 1966), cert. denied, 385 U.S. 1029 (1967).

\textsuperscript{64}United States ex rel. Rubinstein v. Mulcahy, 155 F.2d 1002, 1004 (2d Cir. 1946).

\textsuperscript{65}Bandy v. United States, 81 S. Ct. 197, 198 (1960).

\textsuperscript{66}Hodgdon v. United States, 365 F.2d 679, 687 (8th Cir. 1966), cert. denied, 385 U.S. 1029 (1967); United States v. Radford, 361 F.2d 777, 781 (4th Cir. 1966), cert. denied, 385 U.S. 877 (1967); White v. United States, 330 F.2d 811, 814 (8th Cir. 1964); Pilkington v. Circuit Court, 324 F.2d 45, 46 (8th Cir. 1963).


\textsuperscript{68}Bitter v. United States, 389 U.S. 15, 16 (1967); \textit{see} Fernandez v. United States, 81 S. Ct. 642, 644 (Harlan, Circuit Justice, 1961).

\textsuperscript{69}156 Colo. 284, 389 P.2d 435 (1964).

\textsuperscript{70}Id. at 287, 389 P.2d at 437; \textit{In re Scaggs}, 47 Cal. 2d 416, 303 P.2d 1009 (1956); Hobbs v. Lindsey, 240 Ind. 74, 182 N.E.2d 65 (1959); Application of Wheeler, 81 Nev. 495, 406 P.2d 713 (1965); State v. Konigsberg, 33 N.J. 367, 164 A.2d 740 (1960).

It is an invidious discrimination to deny appellant release because of his poverty, when for example, his ties in the community or such devices as release subject to the supervision of the United States Probation Office, would adequately insure his presence.\textsuperscript{72}

High bail is not justified simply because the defendant's character is "bad"; there is no presumption from this alone that the defendant is apt to flee.\textsuperscript{73} Justice Douglas in Cohen v. United States\textsuperscript{74} looked instead to the defendant's family ties and examined his record to ascertain if he had previously forfeited bail for flight.

Bail pending appeal is to be denied only in cases in which, from substantial evidence, it is clear that the right to bail may be abused or the community may be threatened by the defendant's release.\textsuperscript{75} Such considerations go to the question whether to allow bail, not to the amount of bail if once found to be allowable.\textsuperscript{76} Interruption of orderly process is still a valid consideration, and bail may be denied to assure safety of witnesses so long as the case is not finalized or where a new trial is likely.\textsuperscript{77} Conditions on bail may be imposed so long as they are relevant to the purpose of preventing flight or protecting the community. But in Rehman v. California,\textsuperscript{78} where a doctor was admitted to bail on condition that he surrender his license to practice medicine, Justice Douglas reconfirmed his earlier assumption that "it seemed to me dubious that the requirements of due process had been met."\textsuperscript{79}

These are the rules within which the courts supposedly must operate. They present the relevant factors which the courts are to consider in allowing bail, either before trial or pending appeal. Such rules are not followed when the judge or other bail-setting person wishes to teach the accused a lesson. They are not followed by some judges who make initial determinations or applications for bail

\textsuperscript{72} Pelletier v. United States, 343 F.2d 322, 323 (D.C. Cir. 1965). See also Timmons v. United States, 343 F.2d 310 (D.C. Cir. 1965).

\textsuperscript{73} Hairston v. United States, 343 F.2d 313, 314-15 (D.C. Cir. 1965) (Bazelon, C.J.) (dissenting opinion).


\textsuperscript{76} Compare Stack v. Boyle, 342 U.S. 1 (1951) with Williamson v. United States, 184 F.2d 280, 282-83 (Jackson, Circuit Justice, 1950). See also Hairston v. United States, 343 F.2d 313, 316 (D.C. Cir. 1965) (dissenting opinion).


\textsuperscript{78} 85 S. Ct. 8 (Douglas, Circuit Justice, 1964).

\textsuperscript{79} Id. at 9. For another example of an unconstitutional condition, see Cohen v. United States, 82 S. Ct. 526, 528 (Douglas, Circuit Justice, 1962), where the trial court had granted bail pending review, provided that the defendant apply a certain amount of the bail money toward his fine, if upheld: "The bail fixed would become 'excessive' in the sense of the Eighth Amendment because it would be used to serve a purpose for which bail was not intended. The purpose of a bail bond is to insure that the accused will reap-
pending appeal. They are prone to be ignored by judges confronted with those accused of participating in activities of which the judge does not approve.

Undesirables in the System: Subversives, Civil Rights Demonstrators, and Criminals

Subversives

Bail generally is set high if the accused is known to be a Communist, even if Party membership is irrelevant to the crime charged. For example, a Cleveland man was arrested for driving without a license. When the judge found out he was a Communist, bail was set at $25,000 with the comment: "This is how we treat Communists in this court." The Ohio Court of Appeals eventually reduced bail to $200. Likewise in Carlson v. Landon, a civil case involving deportation of aliens accused of being Communists, the District Court judge, in denying bail said: "I am not going to turn these people loose if they are Communists, any more than I would turn loose a deadly germ in this community."

In cases of subversion there may be justification for the fear that the accused will flee: in the Soblen case, the Eisler case, and the Dennis case, the defendants all jumped bail and left the country. Flight certainly is possible and is a legitimate fear in the case of any party member. But it would seem less likely to occur in the case of members other than high-ranking party officials.

..." Accord Cain v. United States, 148 F.2d 182, 183 (9th Cir. 1945).

Pelletier v. United States, 343 F.2d 322 (D.C. Cir. 1965); Hairston v. United States, 343 F.2d 313 (D.C. Cir. 1965) (dissenting opinion).


Stack v. Boyle, 342 U.S. 1 (1951) ($50,000 held excessive for Smith Act violation); United States v. Weiss, 223 F.2d 463 (7th Cir. 1956) ($35,000 held excessive for Smith Act violation); Forest v. United States, 203 F.2d 83 (8th Cir. 1953) ($40,000 bail set for alleged Smith Act violation reduced to $10,000); United States v. Schneiderman, 102 F. Supp. 52 (S.D. Cal. 1951); United States v. Spector, 102 F. Supp. 52 (S.D. Cal. 1951). See also Ex parte Monti, 79 F. Supp. 651 (E.D.N.Y. 1948).

RANSOM 49.

Id.

Id. at 550, where Justice Black, dissenting, quoted from the record on appeal.


Eisler v. United States, 338 U.S. 189, 190 (1949); RANSOM 55-56.

RANSOM 56-59.
As to the former group, an effort should be made toward more reasonable bail-setting practices than those which presently prevail.

Whether the threat of further crimes of espionage is a valid criterion\(^9\) for denial of any bail is questionable.\(^9\) Once a spy has been exposed, his ability to function effectively is obviously curtailed. Visceral reaction to such charges generally demands high bail or no bail, and the courts have sometimes condoned such reaction,\(^9\) allowing in effect preventive detention—a detention under most circumstances unauthorized by the law.\(^9\) Ideally, special procedures should be established for handling these cases, especially in time of war when irrationality tends to be prevalent, so that basic principles of criminal justice are not perverted.

**Civil Rights Demonstrators**

Perhaps the most unfortunate and the most persecuted persons to be caught up in misuses and perversion of the bail system are the civil rights demonstrators. Since they are constantly victimized by the easily-manipulated bail system, bail has become a prime consideration in the planning of any civil rights demonstration in the South.

Bail has a very serious effect upon us. We must always ask how much this or that project is going to cost us and where we can get the money to get past this hurdle and thus be able to get to the more important things we are aiming at. Often we cannot undertake a project simply because we are short of the money which we know we need.

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\(^9\) E.g., United States v. St. John, 254 F. 794, 798 (7th Cir. 1918); cf. United States v. Otis, 18 F.2d 689 (8th Cir. 1927).

\(^9\) United States v. Carbo, 82 S. Ct. 662, 667 (Douglas, Circuit Justice, 1962); Williamson v. United States, 184 F.2d 280 (Jackson, Circuit Justice, 1950), where, on the question of bail pending appeal, Justice Jackson answered the contention that the defendants would continue a "course of conduct and activity dangerous to the public welfare, safety and national security of the United States." Id. at 281. "If I assume that defendants are disposed to commit every opportune disloyal act helpful to Communist countries, it is still difficult to reconcile with traditional American law the jailing of persons by the courts because of anticipated but as yet uncommitted crimes. Imprisonment to protect society from predicted but unconsummated offenses is so unprecedented in this country and so fraught with danger of excess and injustice that I am loath to resort to it, even as a discretionary judicial technique to supplement conviction of such offenses as those of which defendants stand convicted." Id. at 282-83; accord, United States v. Foster, 79 F. Supp. 422, 423 (S.D.N.Y. 1948).

\(^9\) United States v. St. Johns, 254 F. 794, 797 (7th Cir. 1918); RANSON 56; see United States v. Otis, 18 F.2d 689 (8th Cir. 1927).

will need to meet the bail problem. 

“War chests” must be adequate before a demonstration is undertaken—if local demonstrators are not bailed out quickly, their morale drops and their participation in demonstrations ceases. “There is no question that the use of excessive bail to deter the demonstrations, which are constitutionally protected activities, illustrates the worst aspects of the American bail system.”

Opponents of the civil rights movement who are within the local legal power structure in the South may manipulate the bail system in many ways in order to injure those involved in the civil rights movement. One of the most effective misuses is to deny bail outright and then wait for an appeal or a writ of habeas corpus to be filed. Bail is often denied pending appeal because such denial is largely a matter of discretion with the judge under the applicable state law.

Another favorite tactic is to charge the demonstrators with a preposterous, but nonbailable offense such as criminal anarchy or attempting to incite insurrection. This was done in Georgia with a SNCC demonstration where the announced purpose of the charge was to deny bail. It was not until several months later that a federal court held the insurrection statute unconstitutional and reduced bail. This ruling was to be expected, since the United States Supreme Court had ruled the same statute unconstitutional in 1936.

Those demonstrators who are admitted to bail are generally given exorbitantly high bail so that the organization sponsoring the demonstration must choose between bankruptcy, if it bails out its members, or failure, if it must leave them in jail for long periods of time. Such tactics have been used as far north as Pennsylvania where a minister was charged with inciting to riot, unlawful assembly, and conspiracy—in his home town—and bail was set at $26,500. A similar situation occurred in Georgia in Jones v. Grimes, where the court on appeal reduced bail from $20,000 to $5,000 for a 67-year-old minister who had been convicted of disturbing divine worship—a misdemeanor—and sentenced to 12 months on pub-

96 Carl Rachlin, chief counsel for CORE, quoted in RANSOM 62.
97 John M. Pratt, legal counsel to the Commission on Religion and Race for the National Council of Churches, quoted in RANSOM 61.
99 RANSOM 63-64.
100 Herndon v. Lowry, 301 U.S. 242 (1937).
101 See Wizner, Bail and Civil Rights, 2 L. in TRANSITION Q. 111-12 (1965); Claiborne, Bail and Civil Rights, May 28, 1964 (staff report to the National Conference on Bail and Criminal Justice, Washington, D.C.); text accompanying note 96 supra.
102 RANSOM 65.
lic works, 6 months in jail and a $1,000 fine. Of course there was no evidence of bond forfeiture, flight, or danger to the judicial process. The Georgia Supreme Court held that $20,000 was excessive but that $5,000 was not.\textsuperscript{104} In the same vein is the action of the Alabama legislature in increasing the maximum amount of bail allowed to be set by a police court judge from $300 to $2,500 for misdemeanors.\textsuperscript{105}

Multiple bail resulting from mass arrests is an effective deterrent to civil rights activities, not only because of the vast amounts which must be raised immediately, but also because the money raised and used as bail is tied up for months pending appeals. The Freedom Rides of 1961 and the Birmingham demonstrations of 1963 are examples of the effectiveness of this use of the bail system against demonstrators. The Freedom Riders’ bond was raised at every stage of appeal so that the appeal cost CORE $372,000. CORE ran out of money and private donations were solicited. The bail money was still tied up in 1965.\textsuperscript{106}

Similarly in Tuscaloosa, in one afternoon, a march from a church meeting cost 74 persons $75,900 by the time bail on several offenses per person was totaled.\textsuperscript{107} Often when such demonstrators cannot or will not make bail, they are sent to penal farms or maximum security prisons.\textsuperscript{108}

Arrest on frivolous charges is often made in order to stop the demonstrators until their cases can be brought before appellate courts, commonly a wait of 45 to 60 days.\textsuperscript{109} Out-of-state cars are towed away and visitors arrested for such crimes as “cooking in their rooms.”\textsuperscript{110} Property bonds are required from these persons in order to make bail, because they are not residents of the arresting state.\textsuperscript{111}

Once bail is offered by attorneys for the demonstrators, the judge can raise the bail set and can add new charges.\textsuperscript{112} He can change bail from cash to bonds, from bonds to property, from property to unencumbered property.\textsuperscript{113} Different standards of valuation of property can be used so that many separate parcels of land are required to meet the bail set.\textsuperscript{114} This may continue until the attorneys for the demonstrators go into federal court for an order requiring the state officials to stop changing the standards for setting bail, as was done

\textsuperscript{104} The question whether $5,000 was also excessive did not arise, because at the hearing to lower the bail counsel indicated that $5,000 could be raised. Id. at 592, 134 S.E.2d at 793.
\textsuperscript{105} Id. at 68.
\textsuperscript{106} Id. at 68.
\textsuperscript{107} Id. at 69.
\textsuperscript{108} Id. at 72-73.
\textsuperscript{109} Id. at 75-76.
\textsuperscript{110} Id. at 77.
\textsuperscript{111} Id.
\textsuperscript{112} Id. at 80-81.
\textsuperscript{113} Id. at 78.
\textsuperscript{114} Id.; see Wizner, supra note 101, at 120-23.
Part of the bail problem in the South is caused by the bondsmen, who are obviously susceptible to local pressure because their business, except for the civil rights clients, is composed of local residents. Often the bondsmen are sympathetic with those setting bail and simply refused to get involved. This happened in Birmingham, Alabama, when Martin Luther King met “Bull” Connor in April, 1963, after the maximum amount chargeable for a misdemeanor bond had just been raised by the state legislature. Although one bondsman in Birmingham was willing to write bonds for the demonstrators, he quickly ran out of collateral to post with the court, and it was necessary for the United States Attorney General, Robert F. Kennedy, to request donations from four of the major labor unions to meet bail bond requirements. The hundreds of thousands of dollars involved in the demonstrations in this single city were still tied up in 1965.

Obvious constitutional questions are raised by these practices in the South. In addition to bail being excessive in most instances, the planned and persistent conduct on the part of the judiciary and those engaged in bail-setting could amount to a denial of due process and equal protection of the laws—a denial which will continue to exist simply because civil rights of a more basic nature—voting rights, freedom to sit anywhere in a bus, to use an indoor lavatory or the nearest drinking fountain, to send children to the nearest or most modern school—are of paramount consideration to the demonstrators in the South. Relief for the bail abuses discussed above ultimately must come from a source other than a test case before the United States Supreme Court, and such relief clearly must come from a source outside the South. The existing bail system is working perfectly for those in control of the legal power structure in the South who seek to utilize its inequities; they see no need for change. But bail reform is needed urgently and the reform necessary to curb these evils must be explicit, definitive, mandatory and must either by-pass local control or impose severe penalties for failure to comply.

Preventive Detention and the Criminal

The last group to be victimized by the present bail system comprises those persons thought to be dangerous to society or to be a threat to the orderly progress of judicial procedure. These are peo-

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115 Ransom 80.
116 Id. at 86-88.
117 First amendment guarantees of association, petition and assembly are involved whenever parading without a permit, blocking, failure to disperse and unlawful assembly are charged. The problems created by juveniles in jail are so gross as to “shock the conscience.” But none of these questions has been litigated to date and it will be some time before they are considered prime targets for the accused who are involved. Id. at 88-91.
ple whose detention before trial or pending appeal is said to be necessary to prevent further crimes, even though such detention may not be permissible under present law.\textsuperscript{118} This group is composed of recidivists of both major and minor crimes, of big-time gangsters, of the criminally insane and of some of the mentally disturbed.

Preventive detention is accomplished either by setting extremely high bail or by denying bail altogether. That high bail is not in itself sufficient in all cases to achieve the security this unconstitutional practice seeks is evidenced by the following example:

On April 3, 1963, in Brooklyn, New York, observing persons entering a church, Federal Bureau of Investigation Agent John P. Foley was seized, beaten with a pistol, knocked to the sidewalk and stomped on by four men who then fled into the church. John Lombardozi, described by the Chicago Crime Commission as a well known racketeer, was arrested as he was leaving the church and charged with assaulting a federal agent. Three other men, identified as Agent Foley's assailants, were arrested later. Each of the four men were placed under a $100,000 bond and released from confinement.\textsuperscript{119}

A similar situation is found in the Massari incident.\textsuperscript{120} On completion of a three-year sentence for burglary, Massari was released from the Illinois state penitentiary in 1961. On July 8, 1963, he was apprehended in the act of committing a burglary; he was indicted and released on bail of $7,000. On August 24, 1963, while free on bail, he was again apprehended committing a second burglary and was found to be in the possession of loot from an earlier burglary on the same day. Again he was indicted for burglary and released on $4,500 bail. On November 28, he was arrested again, in possession of a weapon and burglary tools. This pattern continued until trial on April 24, 1964. By this time, he had been arrested nine times from July 8, 1963 to March 5, 1964, indicted on ten counts and was free on $48,500 bail.\textsuperscript{121}

High bail is not confined to the person who commits a crime against an officer of the law or to the recidivist. Racketeers and notorious gangsters are often held on high bail or denied bail under the guise of protecting orderly progress of judicial procedure.\textsuperscript{122} In re-

\textsuperscript{118} Note, Preventive Detention Before Trial, 79 Harv. L. Rev. 1489 (1966).
\textsuperscript{120} The incident is in the records of the Chicago Police Department. La Fave, Alternatives to the Present Bail System, 1965 U. Ill. L.F. 8, 17.
\textsuperscript{121} Id. at 18. Had this man had a speedy trial much of what occurred would have been prevented and society would have been protected from his recidivism. The flaw in this simple solution is that often neither the defendant nor his counsel wants or is prepared for a speedy trial, within 30 days of arrest, so that continuances are requested and granted. If a speedy trial were forced upon the defendant and his counsel, the quality of legal representation might suffer.
\textsuperscript{122} Mastrian v. Hedman, 326 F.2d 708 (8th Cir.), cert. denied, 376 U.S. 965 (1964); Meltzer v. United States, 188 F.2d 913 (9th Cir. 1951); see Note, Preventive Detention Before Trial, 79 Harv. L. Rev. 1489, 1491 (1966).
ality, the courts are merely assuring that the threats made against witnesses for the prosecution, and against jurors, are not carried out by the accused.\textsuperscript{123}

An example of this type of criminal and of the problems the courts face in dealing with him is found in \textit{Carbo v. United States},\textsuperscript{124} in which Justice Douglas, sitting as Circuit Justice, denied bail pending appeal because strong evidence existed that the defendant and his partners and co-defendants had threatened witnesses. Since there was a great likelihood that a new trial would be necessary, the testimony of these witnesses would be imperative. In denying bail, the court emphasized that at a former re-trial of Carbo, the charges against him had been dropped because one key witness had been found dead and another had never been found. Although Justice Douglas said the court should not use denial of bail to make one serve a sentence for unproved or uncommitted crimes, the safety of witnesses, in this particular case, had "relevancy to the bail issue."\textsuperscript{125}

In \textit{Fernandez v. United States},\textsuperscript{126} Justice Harlan, in chambers, denied bail pending trial because of threats made to witnesses in open court, because of a number of incidents involving injury to jurors and because of spurious accidents used to delay the trial. Although the court mentioned these threats and incidents, denial of bail in fact was based upon the inherent power of the court to manage the conduct of a trial and to assure the fair administration of justice.

On the other hand, in \textit{Sica v. United States},\textsuperscript{127} one of Carbo's co-defendants was admitted to bail. This defendant had a home, family and business ties in the community. Although he also had a record of violence and although there was evidence that he had participated with Carbo in the threats to witnesses, the court said that the evidence of the threats was not sufficient to keep him imprisoned.

These three cases point out the dilemma facing the judge: he cannot detain merely because he suspects that a crime may be committed; he cannot call his action, if he does detain, preventive detention—it may be that in fact and in effect but it must be called something else. When the court has a record before it which shows past behavior and present threats, as in \textit{Carbo}, it is easy for it to protect the judicial process and protect society as well (like the theological principle of double effect) without acting unconstitutionally. Without such documentation, it is theoretically impossible to act.

\textsuperscript{123} Of course, this alone does not prevent the commission of additional crimes, because the henchmen of the accused may carry out his orders and see that people do not appear to testify or to act as jurors.


\textsuperscript{125} \textit{Id.} at 688.

\textsuperscript{126} 81 S. Ct. 642 (Harlan, Circuit Justice, 1961).

\textsuperscript{127} 82 S. Ct. 669 (Douglas, Circuit Justice, 1962). \textit{See also} \textit{Carbo v. United States}, 302 F.2d 458 (9th Cir. 1962); \textit{Carbo v. United States}, 300 F.2d 889 (9th Cir. 1962).
Preventive detention is used also to keep psychopaths and the criminally insane from committing additional crimes. Unfortunately, it sometimes takes several weeks to test an accused to ascertain whether he has such tendencies, and during this time, he is confined. It is not possible to predict when such a person will be driven again to commit a crime, although there is some evidence that it is possible to ascertain that he will act again in the same manner sometime in the future. Because of the slowness of psychiatric analysis, it is necessary to detain a first offender who may fall into this category solely on the basis of the offense charged, or, so often in reality, on the judge's reaction to the manner in which the crime was committed. This is unfortunate, since it seems clear that often a once-in-a-lifetime crime of passion, committed by a person who has shown no criminal or psychotic tendencies in the past and who will probably never be moved to behave violently again, is easily confused with the first crime of a seriously disturbed person, whose illness has advanced to the point where uncontrollable violent and destructive tendencies are manifesting themselves. Unless the judge setting bail is presented with ample evidence of the background of the accused charged with the commission of violent crimes, he cannot make the necessarily difficult distinctions essential to a correct decision.

A common method by which the above dilemma is avoided is to institute a civil commitment proceeding with its concomitant sanity investigation. The detention necessary for this procedure is not unconstitutional and there is no denial of criminal justice because the basic premise of such a proceeding is that the accused is so sick that he is not responsive to the deterrence provided by criminal law and cannot be dealt with within criminal procedure.

The last group to be held in preventive detention comprises those who may be considered either mentally disturbed but not psychotic, or recidivists, or both. Such are persons accused of incest, rape, child molestation—sociopathological behavior. It is obvious that if released, the danger of commission of additional crimes of this type is great, not only because the person committing them cannot control himself, but also because of the opportunity available to the accused who returns home to live with the victim of his incest, or who is released into a city full of unprotected women and children. That these persons are as much in need of treatment as those in the psychotic and dangerously insane group discussed above is clear; yet these persons do not receive treatment as quickly as those who

128 See 1965 NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE 173.
129 See Note, Preventive Detention Before Trial, 79 HARV. L. REV. 1489, 1504 (1965). The defendant in a civil commitment proceeding is represented at each hearing by legal counsel and is protected by elaborate statutory schemes which require prompt observation, analysis and treatment; such statutes provide for frequent review of the progress made by the committed person to ensure that one is not committed unnecessarily, or if committed, that one receives constant treatment. E.g., CAL. WELF. & INST'NS CODE § 5200.
commit barbarous murders. These persons still are kept within the
criminal law and are expected to respond to it, simply because they
have not lost touch with reality as a psychotic has. Detention of
these individuals may or may not result in preventing further crime.
It will not protect society in the long run and so long as a judge
can accomplish preventive detention sub rosa, and thus keep these
people within the confines of the criminal law instead of releasing
them to “suffer” civil penalties, injustice will be done.

In detaining accused persons falling within the above categor-
ies, the court is confronted with a conflict of principles and duties.
On the one hand, the court is obligated to protect society; on the
other, it is bound to honor the presumption of innocence and the
fundamental proposition that crime is deterred not by prejudgment
and prior punishment, but by conviction and incarceration after the
case is finally settled. The conflict is complicated further by the
absence of sufficient information concerning the scope of the problem
of recurrent crime. One study of Own Recognizance programs indi-
cates that less than 1 percent of those released are arrested for crimes
pending trial; however, since most of the persons who commit
homicide or sex crimes are excluded from OR projects, these statistics
are of questionable value. At the 1965 National Conference on
Bail and Criminal Justice, it was suggested that offenders in the
above categories compose about 3 percent of the criminal case load.

More information is needed before feasible solutions can be achieved.
At the present time, however, preventive detention is practiced sub

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130 See F. Lindman & D. McIntyre, Jr., THE MENTALLY DISTURBED AND THE
LAW 298–308 (1961); Tappan, Some Myths about Sex Offenders, 19 Fed. Probation
7 (1955). For an analysis of the treatment afforded the sexual psychopath under the law, see Comment, The Validity of the Segregation of the Sexual Psychopath Under the Law, 26 Ohio St. L.J. 640 (1965).

131 Judges who incarcerate these persons instead of giving them medical
treatment not only pervert the bail system and the fundamental concepts of
criminal justice, but also do society a disservice by not allowing these accused
the medical treatment which may enable them to become useful members
of society.

132 See Hudson v. Parker, 156 U.S. 277, 285 (1895); discussed in text
accompanying note 3 supra; United States ex rel. Rubinstein v. Mulcahy, 155
F.2d 1002, 1004 (2d Cir. 1946); Hobbs v. Lindsey, 240 Ind. 74, 162 N.E.2d 85
(1959); Mann, Panel Discussion: Pretrial Release Problems, 1965 U. Ill. L.F.
27, 29; cf. L. Carroll, Alice in Wonderland—Through the Looking Glass
226–27 (Mod. Lib. ed.): “‘For instance, now,’ [the Queen] went on . . . ‘there’s
the King’s Messenger. He’s in prison now, being punished: and the trial
doesn’t even begin till next Wednesday; and of course the crime comes last
of all.’

‘Suppose he never commits the crime?’ said Alice.

‘That would be all the better, wouldn’t it?’ the Queen said . . . ”

133 Note, Preventive Detention Before Trial, 79 Harv. L. Rev. 1489, 1496
(1965).

134 Id. at 1497.

135 1965 NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE 173.
rosa by the courts, who must violate fundamental principles of criminal justice and abuse the bail system in order to “protect society.”

Bail Reform

Bail and Summons Projects

Several bail reform projects are in operation in major cities throughout the United States. The most common project is based on the Vera Foundation’s Manhattan Bail Project and the Summons Project which has proved to be extraordinarily successful in aiding the indigent.

The bail project utilizes law students to interview the accused while in detention at the jail house. Questions are asked concerning the accused’s family situation, employment, habits, community ties, and past record. On the basis of the answers given, a point score is totaled and if the accused scores high enough, the information given is verified by the interviewer, and a report with a recommendation regarding the individual accused’s pretrial disposition is given to the judge, the prosecuting attorney and the counsel for the accused.

When the project began in 1961, judges and prosecuting attorneys followed Vera’s recommendations only 55 percent of the time. Today this figure has increased to 70 percent for the judges and 80 percent for the prosecutors. Reliance on Vera recommendations has proved to be justified. In its first two and one-half years of operation in New York City, it was found that of those persons recommended for release, only 1.5 percent failed to appear at the trial—a figure lower than that of their counterparts released on the traditional money bail. Most significant to the accused, and to a resolution of the constitutional questions raised by pretrial confinement of an indigent, are statistics which show that those released on Vera recommendations receive lighter sentences, if they are sentenced at all.

In a controlled experiment, Vera established two groups of defendants, both equally eligible for release according to Vera standards (which, incidentally, are the same standards used by the commercial bondsman). One group was released; the other group remained in jail up to the time of trial. Of the released group, 60 percent were not convicted and of the 40 percent who were convicted, only one-sixth went to jail. In the other group, only 23 percent were not convicted and of the 77 percent who were convicted, 90 percent went to jail. That those released before trial fared better is apparent—they were either acquitted or given suspended sentences.

136 Id. at 46.
137 Id.
138 Id. at 49.
139 Id. at 46.
140 RANSOM 158.
141 Id.
There has been some experimentation with variables such as the type of crime, quality of counsel, amount of bail, family ties and record of employment, as well as with pretrial detention, but the only factor which made any difference in the outcome of the case has been pre-trial detention.\textsuperscript{142}

While not scientifically conclusive, the Vera results to date do indicate at least that investigation is helpful in determining whom to release; that supervision without detention can be quite effective in assuring the presence of defendants at trials; that the availability of money for a bond premium is not necessarily related to whether a defendant will flee; that most defendants will appear for trial voluntarily if humanely assisted; and that a tremendous amount of pretrial detention is unnecessary and wasteful to the state, and terribly prejudicial to the defendant.\textsuperscript{143}

Another aspect of bail reform encouraged by Vera has been the expanded use of the summons in minor criminal cases. An investigation similar to that described above is conducted at the police station when the accused is brought in, and if the information given can be verified, he is released without making bail or being put in jail. All that is necessary is the completion of the paperwork required to give the accused notice to appear. Similar results have been obtained in the summons project. As in the bail projects, fewer nonappearances and lighter sentences were the results of the summons project.\textsuperscript{144}

The Ten Per Cent Plan

A third type of bail reform aimed not at the indigent, but rather at the accused who can afford bail, is the Illinois 10 percent plan. Prior to the initiation of this plan, it had been found that often bonds of several thousand dollars were required when the ultimate fine was as small as $50, and that several bonds ordinarily were required before the accused came to trial, so that it often cost more to be accused than to be convicted.\textsuperscript{145} To correct this situation, in 1963 the Illinois legislature revamped its criminal procedure code. Not only was credit to be given for pre-trial detention of an accused, but expanded use of the summons was encouraged and a quick trial resulted from the provision requiring the release of any defendant not tried within 120 days of his arrest, or if on bail, within 120 days from the time he demanded a trial.\textsuperscript{146} The major feature of the plan was its effort to restore the administration of bail to the courts by allowing the accused to deposit with the court 10 percent of the bail set. If the defendant appeared for trial, 90 percent of the initial deposit was refunded; 1 percent of the original amount was kept to

\textsuperscript{142} Id. at 163.
\textsuperscript{143} Id. at 165.
\textsuperscript{144} Id. at 169.
\textsuperscript{146} Ransom 200-01.
cover costs of administration and of chasing down bail jumpers, who are charged with an additional substantive crime. Anyone who could deposit the entire amount was refunded all of his money.\(^{147}\)

Statistics show that in 1964 in the circuit court for Cook county, bondsmen wrote 600 bonds and suffered forfeiture in 6.3 percent of the cases they handled, while the state, through its 10 percent provision, covered 686 bonds and suffered only 5.4 percent forfeiture.\(^{148}\)

### Practical and Constitutional Problems

It is clear, however, that neither the Vera Foundation type of bail and summons reform, nor the Illinois 10 percent plan, is the complete answer. Of course these plans were never meant to be panaceas, and perhaps their greatest shortcoming is that although they were designed to break patterns of bail and to stimulate new thinking about bail, they still operate within a system that is basically unjust and easily misused.

In the Vera-type projects, recommendation is not available for those who do not reside in or have ties within the community. Thus a transient or a new resident is excluded from consideration by the project. Those accused of major crimes are also excluded from the project.\(^{149}\)

Because the organization of the project differs from city to city, other problems arise. For example, although the interviewing agency should be an impartial fact-finding body, in some areas this task has fallen to the public defender or to the district attorney’s office, neither of which can be said to be impartial. In other areas, probation departments, which traditionally deal only with the convicted, handle interviews and pre-trial supervision. Sometimes welfare departments interview.\(^{150}\)

Also relevant to the problem of interviewing is the issue of what is to be done with the information obtained. In New York, it is given to the judge, prosecutor, and defender.\(^{151}\) The prosecutor may informally agree never to subpoena the interviewer as a witness for


\(^{148}\) *Id.* at 38.

\(^{149}\) It has often been stated by those who work for such projects that initial exclusion of homicide, sex and narcotic crimes is necessary for public relations but as the program is accepted in the community, the necessity for exclusion of such crimes disappears. Some projects, notably that in Washington, D.C., exclude no crime and report statistics close to those reported above. *See* Ransom 154; 1965 CONFERENCE ON BAIL AND CRIMINAL JUSTICE 44, 69; Baron, Workshop, *Establishing Bail Projects*, 1965 U. ILL. L.F. 42-43.

\(^{150}\) There is danger in having someone not trained in the law conduct the interview, since the accused inadvertently may reveal information relevant to the crime charged, or may make statements which should be made only within the privileged attorney-client relation.

\(^{151}\) 1965 NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE 44.
the prosecution, but such agreements are not made everywhere nor are there project regulations against use of the interviewer by the prosecution. Without an agreement or regulation excluding the interviewer from the reach of the prosecution, there is an obvious danger to the accused who gives such information.

The contents of the report are important, especially if the case is tried by the same judge who sets bail, without a jury, since the report often contains such information as the accused's past convictions, use of drugs, parole violations and the like. Such information should not be given to the trier of fact. A similar problem arises when the judge is accustomed to receiving a recommendation in certain types of cases and is not presented with one—where, for example, the accused is not a resident so that verification and recommendation is not possible. Whether the lack of recommendation prejudices the judge against the defendant and encourages suspicion against him is a problem which must be faced and resolved, especially in small communities, where the judge setting bail may also hear the case on trial.

The problem of the nonresident could be solved by using a police teletype device, or by shifting the burden of proof onto the prosecution to show why this person should not be released without bail. The danger of subpoenaing information could be obviated by an agreement or a regulation, as mentioned above. But the problems of who is to interview, who is to receive copies of the results of the interview, what information is to be contained on the result sheet, and what effect is to be given the absence of recommendation are not easy to resolve, since questions of equal protection, as well as of self-incrimination, are involved. Although project directors are aware that such constitutional problems exist, no solution has been suggested. Although services are beginning to be expanded to all economic brackets and to all crimes, perhaps with further expansion such problems will be solved. At present, however, they constitute major constitutional shortcomings.

The paramount defect in the Illinois 10 percent plan is that it is financially oriented so that the indigent must still remain in jail. He has the choice now between paying 10 percent to the state or to the bondsman. The problem, of which the Illinois legislature must have been aware when it began to consider bail reform, is that the indigent does not have 10 percent to pay anyone. All the Illinois plan has done is to return control of the bail system to the courts. It has not begun to go as far as the Vera-type program has gone in preventing the denial of equal protection or due process to the poor. This is unfortunate because it has been shown persuasively that pretrial detention has a marked effect on the quality of treatment which the accused receives at his trial.

In addition, neither project could remedy misuses of the bail system in situations involving civil rights demonstrators or other unpopular groups, or in cases wherein the judge thinks preventive detention is necessary. Because Vera-type recommendations can be
refused by the judge, such a project would be useless in the South, where judicial discrimination is at the core of the bail problem. Similarly, as long as a judge could refuse to follow a recommendation, he could accomplish preventive detention, at least until his decision is reviewed. Perhaps the only difference between the present bail situation and a Vera-type situation is that in the latter, a judge faced with a civil rights demonstrator, or a suspected racketeer, would have to specify for the record the reason for which he refused the recommendation.

The 10 percent provision would not be of great help in the South. The same amount of money would be necessary to bail out demonstrators; the only difference could be that some money would be returned when the demonstrators appeared. This advantage easily could be nullified by requiring even higher initial bail, which could be done at the judge's discretion, or by continuing to arrest for non-bailable offenses. Similarly the 10 percent provision would not help those in danger of being detained to protect society, or to protect the judicial process, because many of the offenses charged against members of this group are non-bailable offenses.

**Recommendations**

To reform adequately the present bail situation, several major changes would seem to be necessary:

1. **Bail should be stripped of its financial aspects.** Loss of money has not deterred anyone from fleeing and has only caused the indigent without money to remain in jail and thus suffer because of poverty, not guilt. Instead, any crime which is not so serious as to warrant preventive detention should be "bailable" by the accused when arrested and taken to the police station:
   
   (a) In the case of specified misdemeanors and nonviolent felonies, by the accused's merely making a promise to appear;
   
   (b) In the case of specified violent felonies, by the accused's receiving a summons to appear at a stated time.

2. **For those who are admitted to bail, either on their promise to appear or on summons, the commission of any additional crime should mean automatic loss of liberty.** There should be no method by which one who commits a second crime pending trial could "buy" his release. But to protect the accused from detention for a crime he did not commit, stringent standards of proof of the commission of the subsequent crime must be established; "reasonable cause to believe" that a crime has been committed should not be enough.

3. **Intentional failure to appear, or "bail-jumping," should be an additional substantive crime.**

4. **Officers "on the beat" should be required to issue summonses to appear in cases of misdemeanors or nonviolent felonies.** (The crimes wherein the summons is to be used and the circumstances under which it is to be issued must be explicitly delineated so there
will be minimal reliance on discretion and hence maximum protection against misfeasance or misuse.)

(5) Crimes in which the promise to appear on issuance of summons is used must be listed. There should be no reason for question by the court of whether a particular offense is “bailable” as set forth in (1), supra.

(6) (a) Pending trial, a person accused of a serious or violent felony should be required to report weekly to an officer of the court, a clergyman, a doctor, etc. He should be required to obtain employment. Other conditions may be required for enumerated “grave” offenses—conditions such as the relinquishment of a passport, sleeping in jail, geographic limitations on travel, etc.

(b) Those persons accused of misdemeanors should be required to report to an officer of the court on a bi-weekly basis.

(7) Pre-trial detention should be permitted only in the case of the psychotic and sociopathic, and even for such persons it should not consist of incarceration but rather of medical treatment. Explicit and detailed regulations providing for the time in which such detention is allowed are necessary, and a Vera-type investigation would be helpful in this particular situation to give the court the necessary background information. If it is found that these persons are seriously ill, their detention should not be criminal, but civil.

Detention should not be used for recidivists. Instead, such persons should be released into the custody of their attorney, as now is done in general in the Tulsa bail reform project.152 Under these circumstances, attorneys should welcome the opportunity to bring these persons to trial as early as possible so that any danger to society occasioned by their liberty would be minimized.

Detention should not be used against those who “may” endanger the judicial process; e.g., racketeers. Instead, these persons should be placed under close police surveillance, should be required to report daily to an officer of the court, and their release should be conditioned specifically upon their not contacting any witness or juror.

(8) The constitutional question whether bail is a right guaranteed implicitly in the eighth amendment or is merely a statutory right should be satisfactorily answered. Ideally, it should be considered a constitutional right so that states would be required to implement appropriate regulations for immediate relief, and so that recourse could be had to the federal courts.

(9) On appeal, the issue of the bail of one convicted of a crime should be implemented according to the category of crime applicable in each instance. If there is danger of flight, and evidence of this danger, the defendant should be required to report daily to a judicial officer and to sleep in.

(10) Bar associations or judges’ associations should discipline

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those judges who misuse bail and abuse the discretion granted them in setting bail. Provision should be made by either of these groups to hear complaints regarding bail-setting practices and to suspend or remove those judges who are shown to have reacted in a self-righteous or a malevolent manner.

These proposals leave little to the exercise of judicial discretion. Such action is necessary to insure that judges will not abuse their discretion and violate the law in order to teach people lessons or to punish unpopular groups. The proposed guidelines eliminate ability to pay as a factor in determining whether or not one is released. By providing the same requirements for all "bailed" persons, discrimination between residents and transients is eliminated. Although there is no Vera-type investigation, it is not believed that one is necessary to assure appearance in the vast majority of cases. Such an investigation should be undertaken though for those who are in danger of "preventive detention" as described in recommendation (7), supra. Recidivists and habitual offenders, released in the custody of their attorneys, are given speedy trials, thus curtailing potential dangers to the community. Those who are seriously disturbed are given medical treatment, not merely incarceration.

Although such a system is somewhat inconvenient for the accused and poses an administrative burden on the courts, it is certainly superior to one which discriminates against and punishes the poor and the unpopular and which allows the wealthy to buy their freedom. The danger inherent in such a system as that proposed is that its rigidity and its absence of discretion will be as abusive as is the present bail system, since no room is made for the exceptions which are always necessary when dealing with people and their problems. But given these as guidelines, it is hoped, at the very least, that a system based on the accused's own recognizance, on maximum bonds no greater than maximum penalties, and on judicial supervision of its own members will evolve from the reform projects and the resultant interest such projects have aroused in the general population.

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