1977

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WEALTH, BAIL, AND THE EQUAL PROTECTION OF THE LAWS

RICHARD A. COHEN†

I. INTRODUCTION

FROM SALES TAXES TO LICENSE PLATES to the disbursement of welfare funds, legislatures constantly draft statutory provisions having a differential impact on the citizenry according to wealth. In the field of criminal law, no statutory wealth classification has had more of an impact than the cash bail system. Perhaps because of the high emotions this system generates, courts and commentators alike have tended to assume polar positions. Proponents of bail reform, such as Professor Caleb Foote, stress the basic inequity of imprisoning the poor arrestee while allowing his wealthy counterpart to buy freedom.\(^1\) In marked contrast, opponents of reform, such as John Bell, former Chief Justice of the Pennsylvania Supreme Court, denounce mollycoddling judges who release “dangerous” criminals on bail to the jeopardy of the public.\(^2\)

Bail similarly raises issues as to the compatibility of our capitalistic system with the ideal of equal justice for the indigent. Again, positions taken are often extreme. According to Judge Frank, the courts “can and should wipe out all the litigious disadvantages of poverty whenever a man is charged with, or convicted of, a crime.”\(^3\) Justice Harlan of the United States Supreme Court, on the other hand, has consistently asserted that the government should not be obligated to provide indigents with the same advantages, be they transcripts\(^4\) or counsel on appeal,\(^5\) that are available for a price to wealthy defendants.

That the United States Supreme Court should equalize access to transcripts and counsel and not to pretrial freedom reflects what Professor Foote refers to as the “illogical compartmentalization” of

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the development of civil liberties. A prime example of this phenomenon is the case of Williams v. Illinois, in which the Supreme Court struck down the incarceration of convicts beyond the maximum term set by statute because of their inability "to satisfy the monetary provisions of the sentence." Although Williams dealt squarely with the issue of prolonged imprisonment solely attributable to indigency, no reference was made to the clearly analogous situation of bail. By refusing to address the bail issue, the Court has effectively shifted the substantive consideration of bail to the legislature.

Notwithstanding judicial reluctance to grapple with the constitutional issues of bail, this article will focus on the equal protection status of the bail system. Although explicitly applicable only to the states, fourteenth amendment considerations do impinge on the federal government through the due process clause of the fifth amendment. As the Court observed in Bolling v. Sharpe,

7. 399 U.S. 235 (1970). See Tate v. Short, 401 U.S. 395, 397–98 (1971) (state cannot impose a fine and then convert the fine to a jail term because of the indigent defendant's inability to pay the fine in full).
8. 399 U.S. at 236. The defendant in Williams was convicted of petty theft and received the maximum sentence of one year imprisonment and a $500 fine. Id. Under state law, if the defendant was unable to pay the fine and court costs, he would be forced to work off the amount at a rate of five dollars a day, thus adding 101 days to the maximum sentence. Id. at 236–37. The Supreme Court, however, ruled that a defendant could not be compelled to serve time beyond the maximum set by state law because of involuntary nonpayment of a fine or costs. Id. at 240–41.
9. Id. at 238. The Court ruled that "[s]ince only a convicted person with access to funds can avoid increased imprisonment, the Illinois statute in operative effect exposes only indigents to the risk of imprisonment beyond the statutory maximum." Id. at 242.
10. Applying the analysis used in Katzenbach v. Morgan, 384 U.S. 641 (1966), Congress, in the independent exercise of its constitutional judgment, could determine that bail is violative of the equal protection clause of the fourteenth amendment. U.S. CONST. amend. XIV, § 1. See 384 U.S. at 650–51. Congress would thus activate its power under section 5 of the fourteenth amendment to adopt "appropriate legislation" to enforce that amendment against the states. U.S. CONST. amend. XIV, § 5. See 384 U.S. at 651. The Court would then uphold such determination if it could "perceive a basis upon which Congress might predicate a judgment" that the state action violated the equal protection clause. Id. at 656. This basis could be recognized by the Court, even though the Court might not itself find such a violation. See id. at 649.
11. U.S. CONST. amend. XIV. The fourteenth amendment provides in pertinent part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Id.
12. U.S. CONST. amend. V. The fifth amendment to the United States Constitution provides in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." Id.
the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process. 14

The equal protection clause, then, applies to actions of the federal government insofar as discriminatory pretrial detention of arrestees impinges on their fundamental rights of fair trial and effective counsel. 15

Before analyzing the cash bail system under the equal protection clause, this article will examine the scope of the eighth amendment right to bail, 16 both pending trial and after conviction. This will be followed by a review of the present operation of the bail system, including the theoretical and actual criteria for fixing bail, and the problems of reviewing the initial bail determination. Next, empirical studies which attempt to draw a causal connection between pretrial detention and case disposition will be analyzed. The article will then explore possible explanations for the statistical findings based on the nature and effects of pretrial confinement. After considering the proper equal protection standard to be applied to bail created classifications, the validity of the current bail bonding system will be investigated. The article will conclude with a proposed system of pretrial release which, it is submitted, would be consistent with the fourteenth amendment.


15 See Note, supra note 14, at 439, 446-47.

16 U.S. Const. amend. VIII. The eighth amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Id. Although it is not specifically addressed to the states, the eighth amendment has been considered "incorporated" into the fourteenth amendment by a number of lower courts. See, e.g., Pankin v. Circuit Court, 324 F.2d 45, 46 (8th Cir. 1963) (per curiam); United States ex rel. Fink v. Heyd, 287 F. Supp. 716, 717 (E.D. La. 1968), aff'd, 408 F.2d 7 (5th Cir.), cert. denied, 396 U.S. 895 (1969). Subsequent discussion of the eighth amendment will thus be applicable to both the state and the federal governments.
II. THE SCOPE OF THE RIGHT TO BAIL UNDER
THE EIGHTH AMENDMENT

A. Before Conviction

As in the case of many constitutional provisions, the simple
admonition that "[e]xcessive bail shall not be required"17 has
occasioned exhaustive historical analysis as well as acerbic
controversy.18 To fully comprehend the potential constitutional
challenges to the present bail system, it is necessary to demarcate
the boundaries of the excessive bail clause. At least four distinct
interpretations of that clause have been adopted by the courts.19

According to the first theory, the eighth amendment itself grants
no right to bail, but simply precludes excessive bail in cases made
bailable by other provisions of the law.20 Although this view is by far
the predominant one,21 it raises a number of troublesome issues.
Absent a constitutional right to bail, the clause would not be "self-
executing," but would simply define the nature of the right to bail as
provided in legislation.22 Under this view, Congress could restrict
the application of the excessive bail clause at will by not providing for
the right at all in specified cases.23 In addition to making the
Constitution subservient to statutory law, the majority view would
render the eighth amendment meaningless until the legislature
established the scope of the right to bail.24 This interpretation
appears especially anomalous in view of other clauses in the eighth
amendment, such as the clause prohibiting cruel and unusual
punishment, which have been interpreted to protect against the
abuse of legislative rather than judicial discretion.25

17. U.S. CONST. amend. VIII.
(1965); Foote, supra note 6; Meyer, Constitutionality of Pretrial Detention (pts. 1–2), 60
GEo. L.J. 1140, 1382 (1972).
19. See text accompanying notes 20–40 infra.
F.2d 708, 710–11 (8th Cir.) (per curiam), cert. denied, 376 U.S. 965 (1964); United States
ex rel. Hyde v. McMann, 263 F.2d 940, 943 (2d Cir. 1958), cert. denied, 360 U.S. 937
(1959); United States ex rel. Covington v. Coparo, 297 F. Supp. 203, 205–06 (S.D.N.Y.
1969); People ex rel. Shapiro v. Keeper of City Prison, 290 N.Y. 393, 398, 49 N.E.2d 498,
500 (1943).
21. See Foote, supra note 18, at 970.
22. Id. at 969.
23. Id. Many state constitutions have resolved this problem by adding a right to
bail to prohibitions against excessive bail. See id.
24. Id.
(judicial practice of giving broad interpretation to provisions in Bill of Rights
designed to protect individuals from government oppression should be applied in case
denying bail, pending determination of deportability).
A second construction of the excessive bail clause holds that courts retain inherent discretion to deny bail entirely in the absence of statutory or constitutional restrictions.26 In cases in which the right to bail is judicially determined, however, courts cannot demand an "excessive" amount.27 This view, in contrast to the majority position, emphasizes judicial as well as legislative power to restrict the right to bail.28 Both positions would allow circumvention of the "excessiveness" limitation by the more extreme measure of completely denying bail.

The eighth amendment has also been interpreted to imply a constitutional right to bail, at least prior to conviction.29 Justice Butler, sitting as Circuit Justice in United States v. Motlow,30 noted that "[t]he provision forbidding excessive bail would be futile if magistrates were left free to deny bail."31 In United States v. Fah Chung,32 the argument for implying a right to bail from the excessive bail clause was cogently advanced: "If, then, it be unlawful under our system to deprive any person of his liberty by fixing excessive bail, which he cannot give, a fortiori would it seem also unlawful to deprive him of his liberty by refusing bail altogether."33 Though logic inexorably leads to the "discovery" of a right to bail in the eighth amendment, "the history of the law of bail negatives such an implication."34 Indeed, almost simultaneously with the adoption of the Bill of Rights, Congress enacted the Federal Judiciary Act of 1789 (Judiciary Act),35 which granted the right to bail in noncapital cases but allowed the courts discretion to deny bail in capital cases.36

26. See Foote, supra note 18, at 969-70.
27. Id. at 969.
28. See id. at 970. Judicial power to deny bail, of course, could still be limited under the eighth amendment's standard of reasonableness. See Carlson v. Landon, 342 U.S. 524, 563 (1952) (Frankfurter, J., dissenting).
30. 10 F.2d 657 (Butler, Circuit Justice, 1926).
31. Id. at 659 (dictum).
33. Id. at 110.
36. Id. For a view that the Judiciary Act is incompatible with a constitutional right to bail, see Meyer, supra note 18, at 1455. Section 3141 of the current federal law provides:

Bail may be taken by any court, judge, or magistrate authorized to arrest and commit offenders, but only a court of the United States having original jurisdiction in criminal cases, or a justice or judge thereof, may admit to bail or otherwise release a person charged with an offense punishable by death.

If the framers had intended to establish a right to bail in the eighth amendment, they could have said so directly, as Congress did in the Judiciary Act. Moreover, if the intention was to establish a right to bail, it is inexplicable why Congress would immediately give the courts discretion to deny bail in capital cases. Yet no one claims that the denial of bail in capital cases is unconstitutional, even though the eighth amendment implies no exception for those cases.

Finally, Justice Roberts of the Pennsylvania Supreme Court has argued that the eighth amendment establishes not only the right to have bail set in some amount, but also the right to have the amount set within the defendant’s means. This position hinges on the view that the excessive bail clause was intended to preclude the de facto denial of bail by the setting of an amount higher than could be furnished by the accused. Precedent, nevertheless, overwhelmingly rejects the notion that mere inability to raise bail makes it


The argument in favor of a right to release on bail reached an apex in the series of cases decided under rule 46 of the old Federal Rules of Criminal Procedure, which stated that “[a] person arrested for an offense not punishable by death shall be admitted to bail.” Sup. Ct. R. 46(a)(1), 327 U.S. 868 (1945) (emphasis added). In Bandy v. United States, 81 S. Ct. 197 (Douglas, Circuit Justice, 1960), Justice Douglas held that “[u]nder Rule 46 a defendant has a right to be released on bail before trial, save in capital cases.” Id. at 197 (dictum) (emphasis in original). This interpretation of rule 46 flew in the face of precedent holding that, until conviction, a defendant had only a right to be admitted to bail, rather than to be released. In Bandy v. United States, 82 S. Ct. 11 (Douglas, Circuit Justice, 1961), Justice Douglas again concluded:

Further reflection has led me to conclude that no man should be denied release because of indigence. Instead, under our constitutional system, a man is entitled to be released on “personal recognizance” where other relevant factors make it reasonable to believe that he will comply with the orders of the court.

Id. at 13 (dictum). However lofty the ideal expressed, Justice Douglas’ logic is puzzling. If, in the case of an indigent, for example, the court could not find nonmonetary factors which would indicate the likelihood of appearance at trial, there would be no constitutional entitlement to release under Justice Douglas’ reasoning. In a similar situation, however, a wealthy defendant could presumably obtain his release on cash bail. The above quotation, then, would still leave the poor defendant at a disadvantage vis-à-vis the nonindigent who could make bail regardless of whether it was reasonable to believe he would comply with the court’s orders. For a comprehensive account of the complex history of the Bandy litigation, see Foote, supra note 6, at 1153–56 & 1154 n.274. In 1972, rule 46(a) was amended to provide that “[e]ligibility for release prior to trial shall be in accordance with 18 U.S.C. § 3146 [release in noncapital cases prior to trial], § 3148 [release in capital cases or after conviction], or § 3149 [release of material witnesses].” Fed. R. Crim. P. 46(a). See notes 60 & 62-65 and accompanying text infra.

38. Justice Jackson noted that setting bail in a prohibitive amount for the purpose of keeping the defendant incarcerated, rather than merely assuring his presence at trial, “is contrary to the whole policy and philosophy of bail.” Stack v. Boyle, 342 U.S. 1, 10 (1951) (Jackson, J., concurring).
excessive.\textsuperscript{39} Rather, as long as bail is set at a “reasonable” sum, even if the defendant cannot raise it, the requirements of the eighth amendment have been satisfied.\textsuperscript{40}

Attempting to resolve the ambiguity of the excessive bail clause, Professor Caleb Foote and Dr. Hermine Herta Meyer each compiled thorough studies of its historical background.\textsuperscript{41} The English antecedent of the eighth amendment bail clause arose from an attempt to halt abuses of the Habeas Corpus Act of 1679,\textsuperscript{42} which provided for speedy judicial review of certain arrests and a release on bail if by law the prisoner was bailable.\textsuperscript{43} Since this statute did not actually establish a right to bail,\textsuperscript{44} political dissidents had been imprisoned by the imposition of exorbitant bail.\textsuperscript{45} To prevent this, the 1689 English Bill of Rights provided: “[E]xcessive Bail ought not to be required . . . .”\textsuperscript{46} There is general agreement that the language of the eighth amendment of the United States Constitution was derived from the English Bill of Rights.\textsuperscript{47} Professor Foote theorizes, however, that the form in which the bail provision appeared in the Constitution is a consequence of historical accident.\textsuperscript{48} The ambiguity of the eighth amendment, according to Professor Foote, can be resolved most plausibly by finding that it impliedly grants a right to bail.\textsuperscript{49} Although citing no direct evidence of intent, he proceeds to infer it from circumstances surrounding the adoption of the eighth amendment.

\textsuperscript{39} White v. United States, 330 F.2d 811, 814 (8th Cir.), cert. denied, 379 U.S. 855 (1964); Mastrian v. Hedman, 326 F.2d 708, 711 (8th Cir. 1964) (per curiam); Pilkington v. Circuit Court, 324 F.2d 45, 46 (8th Cir. 1963). See Stack v. Boyle, 342 U.S. 1, 10 (1951) (Jackson, J., concurring). See also Compelling Appearance in Court: Administration of Bail in Philadelphia, 102 U. PA. L. REV. 1031, 1035 (1954) [hereinafter cited as Philadelphia Bail Study].

\textsuperscript{40} For a discussion of whether the amount of bail can be “reasonable” if the defendant cannot afford to raise it, see Philadelphia Bail Study, supra note 39, at 1035.

\textsuperscript{41} See Foote, supra note 18, at 959–99; Meyer, supra note 18, at 1180–90. Without impugning the scholarly integrity of the authors, it should be noted that the historical analysis of Professor Foote and Dr. Meyer was an intrinsic facet of their respective advocacy of bail reform and preventive detention.

\textsuperscript{42} 1679, 31 Car. 2, c.2. See Foote, supra note 18, at 967–68; Meyer, supra note 18, at 1189–90.

\textsuperscript{43} 1679, 31 Car. 2, c.2. See Meyer, supra note 18, at 1188–89.

\textsuperscript{44} See Meyer, supra note 18, at 1188.

\textsuperscript{45} See Foote, supra note 18, at 967, 999; Meyer, supra note 18, at 1190.

\textsuperscript{46} 1689, 1 W. & M., c.2, rights, cl. 10. Clause 10 of the preamble to the English Bill of Rights stated that excessive bail had been used “to elude the benefit of laws made for the liberty of the subjects.” Id., preamble, cl. 10. See Meyer, supra note 18, at 1189–90.

\textsuperscript{47} See Foote, supra note 18, at 968; Meyer, supra note 18, at 1190.

\textsuperscript{48} Foote, supra note 18, at 965.

\textsuperscript{49} Id.
amendment. Professor Foote argues that the framers meant to provide a constitutional right to bail, but failed to adopt language adequate for that purpose. The reason for this oversight, he explains, was because George Mason, a layman unfamiliar with technical legal language, formulated an ambiguous bail provision in the Virginia Declaration of Rights, which "was thereafter carried forward [into the eighth amendment] with so little discussion that the latent ambiguity of the clause was never noticed."

Regardless of the persuasiveness of Professor Foote's analysis, however, the Supreme Court found otherwise in Carlson v. Landon, the only instance in which it was confronted with the issue of the right to bail. The appellants in that case brought a habeas corpus proceeding to challenge the constitutionality of a federal law which gave the United States Attorney General discretion to detain alien members of the Communist Party without bail pending determination of their deportability. In Carlson, the Attorney General defended the denial of bail on the grounds that there was reasonable cause to believe that the aliens' release would endanger the safety and welfare of the United States. Relying on historical analysis directly contrary to that of Professor Foote, the Court upheld the challenged statute:

The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to

50. Id. at 989. The circumstantial evidence which Professor Foote considered in finding an implied right to bail in the eighth amendment included:
the critical place of protests against abusive pretrial detention in the evolution of English liberty, the nondiscretionary character of contemporaneous English law, the colonial experience with liberalizing bail law, the contemporaneous legislation during the period of the Confederation, the circumstances surrounding the Virginia Declaration of Rights, Mason's expressed intent to provide "effectual securities for . . . essential rights," and the objective through the Bill of Rights to provide protection against legislative abuse.

51. Id. at 986, 989.
52. Id. at 985-86. For a review of the history and impact of the Virginia Declaration of Rights, see 1 A. Howard, Commentaries on the Constitution of Virginia (1970).
53. Foote, supra note 18, at 986. Dr. Meyer disagreed with Professor Foote, arguing that the absence of an express right to bail in the eighth amendment reveals the framers' intention to leave the matter to Congress. Meyer, supra note 18, at 1179. See also Note, Costs of Preventive Detention, 79 Yale L.J. 926, 926 n.5 (1970).
56. 342 U.S. at 529.
57. See notes 48-53 and accompanying text supra.
provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept. The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country.\textsuperscript{58}

The right to bail, according to Carlson, is purely statutory.\textsuperscript{59} Most state statutes and constitutions provide for a right to bail except in specified cases.\textsuperscript{60} Under the federal Bail Reform Act of 1966 (Bail Reform Act),\textsuperscript{61} a person arrested for an offense not punishable by death should be admitted to reasonable, or “nonexcessive,” bail.\textsuperscript{62} In capital cases, the court has discretion under the Bail Reform Act to set bail only if it is satisfied that the defendant will not flee the jurisdiction or pose a danger to the community.\textsuperscript{63}

\textbf{B. The Scope of the Right to Bail Pending Appeal}

The Bail Reform Act provides that prior to conviction in a noncapital case, a defendant “shall . . . be ordered released pending trial” unless “such a release will not reasonably assure . . . [his] appearance.”\textsuperscript{64} In capital cases, and after conviction in noncapital cases, however, “[i]f . . . a risk of flight or danger [to the community] is believed to exist, or if it appears that an appeal is frivolous or taken for delay, the person may be ordered detained.”\textsuperscript{65} This

\textsuperscript{58} 342 U.S. at 545 (footnotes omitted). For Professor Foote’s vigorous attack on the Court’s historical conclusions, see Foote, supra note 18, at 979. Perhaps anticipating the defeat of his bail clause argument, Professor Foote acknowledged the callous attitude toward the poor in the eighteenth century. \textit{Id.} at 990–91. He thus conceded that when considering bail problems faced by indigent defendants in our more enlightened age, the “potential usefulness of historical evidence sharply diminishes.” \textit{Id.} at 989.

\textsuperscript{59} 342 U.S. at 546. In the words of the Court: “We think, clearly, here that the Eighth Amendment does not require that bail be allowed under the circumstances . . . ” \textit{Id.}


\textsuperscript{62} See \textit{id.} § 3146(a). See text accompanying note 64 \textit{infra}.


\textsuperscript{64} \textit{id.} § 3146(a).

language imports a degree of judicial discretion to deny bail in the postconviction context wholly lacking in the pretrial context. On policy grounds, however, the argument can be made that since appeal is an integral part of the judicial process, admission to bail should be as nondiscretionary after conviction as it is before.\textsuperscript{66} As the Eighth Circuit recognized in \textit{Rossi v. United States},\textsuperscript{67} "one who suffers imprisonment after conviction and during pendency of his writ of errors suffers the same injustice if his case is reversed and he is acquitted than one who is denied bail before his trial and is subsequently acquitted endures."\textsuperscript{68} Similarly, in \textit{Hudson v. Parker},\textsuperscript{69} the United States Supreme Court at least paid homage to the policy against incarceration until the exhaustion of appeals:

The statutes of the United States have been framed upon the theory that a person accused of a 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.\textsuperscript{70}

Indeed, the Ninth Circuit, in \textit{Bridges v. United States},\textsuperscript{71} held that where a meritorious question was raised on appeal for purposes other than delay, bail was a matter of right, not of grace.\textsuperscript{72}

\textsuperscript{66} See Foote, \textit{supra} note 6, at 1179–80.
\textsuperscript{67} 11 F.2d 264 (8th Cir. 1926).
\textsuperscript{68} Id. at 265. Although the court in \textit{Rossi} refused to uphold a right to bail pending appeal, it did emphasize that only in rare cases should bail pending appeal be denied. Id.
\textsuperscript{69} 156 U.S. 277 (1895).
\textsuperscript{70} Id. at 285.
\textsuperscript{71} 184 F.2d 881 (9th Cir. 1950).
\textsuperscript{72} Id. at 884. In this distinctively McCarthy era case, the Government contended that the lower court's revocation of the petitioner's bail was justified because he was a Communist, and the outbreak of the Korean hostilities rendered him dangerous to the national security. Id. at 886. The Ninth Circuit rejected this tenuous argument, expressing concern lest the imprisonment of the appellant make him appear a "victim of judicial tyranny," and thus provide ammunition for Communist propaganda. Id. at 887. In the words of the court:

It has frequently been remarked in the federal decisions, and is clearly the correct principle, that bail after conviction should not be allowed if it appears
The prevailing view, however, is that there is no constitutional right to bail pending appeal from a conviction,\textsuperscript{73} even if the appeal is neither frivolous nor taken for delay.\textsuperscript{74} Factors which in the preconviction context may only be used to determine amount of bail are cited after trial as justification for denying bail entirely. Bail has been denied appellants, for example, on the grounds of their likelihood of absconding.\textsuperscript{75} Even so liberal a Justice as Douglas held that danger to the public or to witnesses requires the preventive detention of an appellant: "If... the safety of the community would be jeopardized, it would be irresponsible judicial action to grant bail."\textsuperscript{76}

The breadth of judicial discretion to deny bail after conviction is demonstrated by Williamson \textit{v. United States},\textsuperscript{77} in which Justice Jackson, as Circuit Justice, held that a defendant's noncriminal postconviction conduct could be considered in determining whether to grant an extension of bail.\textsuperscript{78} In the same vein, it has been held that the character and extent of an appellant's prior offenses could afford a basis for denying bail.\textsuperscript{79} With conviction, then, and the concomitant "rebuttal" of the presumption of innocence, judicial

\begin{footnotesize}
\begin{enumerate}
\item[77.] 184 F.2d 280 (Jackson, Circuit Justice, 1950).
\item[78.] \textit{Id. at 282}.
\item[79.] \textit{See United States v. Wilson}, 257 F.2d 796, 797 (2d Cir. 1958). \textit{But see Cohen v. United States}, 82 S. Ct. 8 (Douglas, Circuit Justice, 1961). In \textit{Cohen}, Justice Douglas held: "Though it is not available as a matter of right in every case... equal justice under law requires that bail not be denied even a notorious law-violator if he has a substantial question to be resolved on appeal." \textit{Id. at 9}.
\end{enumerate}
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discretion to deny bail pending appeal appears to be limited largely by due process considerations. 80

III. PRECONVICTION PREVENTIVE DETENTION
IN NONCAPITAL CASES

While postconviction denial of bail has been readily accepted by courts and commentators alike, the issue of denial of bail prior to a judicial determination of guilt has triggered bitter controversy. 81 It has been pointed out by opponents of preventive detention that the danger to society of releasing defendants has been greatly exaggerated. 82 Studies, for example, have shown that between 7% and 12.3% of felony releasees were rearrested. 83 Furthermore, only 5.9% of the persons indicted in the United States District Court for the District of Columbia allegedly committed offenses while on bail. 84 According to a Boston study, only 4.1% of releasees were rearrested and convicted for a second dangerous crime. 85 These findings lend support to the conclusion that offenses committed by defendants out on bail comprise a small component of the crime problem.

Opponents of preventive detention point out not only the difficulty of predicting offenders, but also the susceptibility of the whole process to abuse regardless of whether standards are codified or left to judicial discretion. 86 Commentators have also argued that,

80. See note 106 and accompanying text infra. The Bail Reform Act, which liberalized the release of convicted defendants pending appeal, provides in pertinent part:

A person (1) who is charged with an offense punishable by death, or (2) who has been convicted of an offense and is either awaiting sentence . . . or has filed a petition for a writ of certiorari, shall be treated in accordance with the provisions of section 3146 [for pretrial release in noncapital cases] unless the court or judge has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or the community.


82. See An Answer to the Problem of Bail: A Proposal in Need of Empirical Confirmation, 9 COLUM. J.L. & Soc. PROBS. 394, 432–36 (1973) [hereinafter cited as Bail Proposal]. The author notes that the only research testing whether those who have committed a serious crime may commit another while on bail found that there was no effective means of prediction. Id. at 431.

83. Id. at 432. These figures are, of course, understated to the extent of unreported or unsolved crimes committed. They also seem deficient in not specifying the percentage of rearrests for violent or "dangerous" crimes.

84. Tribe, supra note 81, at 371 n.3.


as a moral proposition, it is offensive to imprison presumptively innocent arrestees without at least affording them the opportunity for release on bail.\textsuperscript{87} As Professor Tribe contends, the history of bail supports the hypothesis that pretrial detention was not intended to protect the community, but simply to assure the presence of the accused at trial.\textsuperscript{88} In \textit{Trimble v. Stone},\textsuperscript{89} Judge Holtzoff fully concurred, reasoning that the right to bail pending trial is absolute no matter how vicious the alleged offense or how unsavory the arrestee’s record:

[I]t may be desirable in the interest of the public, or even in the interest of the individual, in some instances to confine the accused while awaiting final disposition of his case, instead of permitting him to be liberated on bail. . . . Yet the Constitution forbids this result. . . . Immediate myopic vision must not be permitted to interfere with a long range view of the protection of personal liberty.\textsuperscript{90}

Justice Jackson, in \textit{Williamson},\textsuperscript{91} similarly referred to preventive detention as “unprecedented in this country,” and “fraught with danger of excesses and injustice.”\textsuperscript{92} Courts have frequently held, despite public clamor to the contrary, that bail is not a method of crime prevention.\textsuperscript{93} Rather, as Justice Butler noted in \textit{Motlow}, “[a]bhorrance, however great, of persistent and menacing crime will not excuse transgression in the courts of the legal rights of the worst offenders.”\textsuperscript{94}

Other courts, however, have ruled that there is “inherent” judicial discretion\textsuperscript{95} to deny bail for purposes of protecting wit-
nesses,96 the community,97 or for ensuring "the orderly progress of the trial and the fair administration of justice."98 Despite these authorities, the weight of precedent opposes preventive detention, at least as a matter of judicial discretion.99 If the right to bail under Carlson100 is statutory in nature, it is the legislature rather than the judiciary which may permit the denial of bail in specified situations. The eighth amendment, according to Carlson, would at once support the legislative power to detain arrestees without bail and preclude judicial discretion to detain arrestees preventively.101

The argument may still be made that even if the eighth amendment does not restrict the legislature, the due process clause forbids denial of bail as antithetical to the presumption of innocence.102 Although Carlson did not address that issue, its holding that statutory authorization to deny bail to an alien under certain circumstances is not invalid103 implicitly supports the proposition that preventive detention is not unconstitutional per se. Conceding that at least in some cases the denial of bail is not violative of due process,104 it would be within the province of the legislature to establish the boundaries of preventive detention.105 At


99. See notes 86-94 and accompanying text supra.

100. For a discussion of Carlson, see notes 54-59 and accompanying text supra.

101. 342 U.S. at 546.

102. Meyer, supra note 18, at 1438.

103. 342 U.S. at 536.

104. For a discussion of the process by which the individual's interest in personal liberty is balanced against society's interest in self-protection, see Bail Proposal, supra note 82, at 394-406.

105. See District of Columbia Court Reform and Criminal Procedure Act of 1970, 23 D.C. Code §§ 1301-1332 (1973) (District of Columbia Act). This statute permits the pretrial detention for up to 60 days of a person charged with a "violent" or dangerous
a minimum, the criteria used to justify a denial of bail must be sufficiently narrow to provide meaningful legal standards amenable to judicial administration. Arguably, the "safety of the community" standard is so intrinsically vague as to be susceptible to judicial abuse.

Having established viable criteria for denying bail, it would still be necessary to formulate a procedure for preventive detention in conformance with the due process clause. The District of Columbia Court Reform and Criminal Procedure Act of 1970 (District of Columbia Act) contains elaborate procedural safeguards. The defendant, for example, is afforded an immediate hearing before a judicial officer at which he may exercise a right to counsel, to present information, to testify, and to present witnesses in his own behalf. In addition, none of the testimony of the accused may be used against him on the issue of guilt in subsequent judicial proceedings.

Even with relatively narrow substantive criteria and adequate procedural safeguards, there remain serious administrative problems in any system of preventive detention. First, as a practical matter, it is arguable that even elaborate bail hearings cannot distinguish those defendants likely to commit future crimes. Justice Roberts of

crime whose release on bail would constitute a threat to the community, or who, with the purpose of obstructing justice, threatens, injures, or intimidates any prospective witness or juror. Id. § 1322. One of the purposes of the District of Columbia Act was to eliminate the hypocrisy of incarcerating defendants through the device of the high money bond. H.R. REP. NO. 907, 91st Cong., 2d Sess. 82, 87–89 (1970). For a thorough discussion of the procedural and substantive provisions of this statute, see Meyer, supra note 18, at 1166–70.

106. See Blunt v. United States, 322 A.2d 579 (D.C. 1974). In Blunt, a defendant, detained before trial pursuant to the District of Columbia Court Reform and Criminal Procedure Act, 23 D.C. CODE § 1322 (1973), challenged his confinement on due process grounds, alleging that such confinement violated the presumption of innocence, and also that he was not allowed to cross-examine adverse witnesses at the hearing. 322 A.2d at 585. The court rejected both contentions, holding that the presumption of innocence applies only at the trial itself, and that the defendant waived his right to call witnesses by not asking for a continuance of the hearing. Id. at 585–86. The court also upheld the use of a "clear and convincing" evidence standard to show that the defendant should not be released, rather than requiring proof beyond a "reasonable doubt." Id. at 586. For United States Supreme Court decisions upholding hearings against due process challenges, see Richardson v. Perales, 402 U.S. 389 (1971); Williams v. Zuckert, 371 U.S. 531 (1963).


108. 23 D.C. CODE § 1322(c) (1973). The District of Columbia Act provides for a hearing to be called by the United States attorney before detention is permitted. Id. § 1322(b)(1), (c)(1). The hearing must be held immediately unless the defendant asks for a continuance of five days or the United States asks for a continuance of three days. Id. § 1322(c)(3). The rules of evidence do not apply, and the finding that the defendant should not be released need only be supported by clear and convincing evidence. Id. § 1322(b)(2)(A), (c)(5).

109. Id. § 1322(c)(6).
the Pennsylvania Supreme Court, dissenting in Commonwealth ex rel. Hartage v. Hendrick,110 supported this view.111 Indeed, judges would not appear to be well equipped, either by training or experience, to engage in the delicate task of predicting criminality.112 Perhaps more significant is the fact that procedural due process requirements, such as the virtual full scale adversary hearing under the District of Columbia Act,113 would greatly burden the courts and impair the likelihood of a speedy trial.114 A court’s determination in a preventive detention hearing would be a “final order” under federal law and, as such, appealable.115 An appeal process would result in the further expenditure of time and judicial resources which might be more profitably directed toward a speedy trial on the issue of guilt or innocence.116

IV. THE QUESTION OF INDIVIDUALIZATION: STANDARDS FOR SETTING BAIL AMOUNT

In cases where the legislature has not mandated preventive detention, it becomes necessary for the courts to make the crucial determination of bail amount.117 In this undertaking they are guided

111. Id. at 597 n.3, 268 A.2d at 457 n.3 (Roberts, J., dissenting). In a footnote, Justice Roberts decried the added time and expense that pretrial detention hearings would impose on already overcrowded court dockets. Id. Such costs would be wasted, according to Justice Roberts, since he did “not see how even these pretrial adversary hearings can accomplish their goal, which is the differentiation between those accused who are likely to commit further crimes, and those who are not. Such distinctions are not, in my opinion, easily made with any degree of accuracy.” Id.
112. For a discussion of this problem of prediction and examples of factors used by judges and magistrates in determining bail, see Philadelphia Bail Study, supra note 39, at 1037-41.
113. See note 108 supra.
114. See 439 Pa. at 597 n.3, 268 A.2d at 457 n.3 (Roberts, J., dissenting).
115. See § 28 U.S.C. § 1257 (1976). This section provides in pertinent part:
Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

116. See Foote, supra note 6, at 1175-76; Note, supra note 53, at 937. For example, upon appeal, free transcripts of the bail proceedings would presumably have to be provided the accused in accordance with Griffin v. Illinois, 351 U.S. 12 (1956).
117. For a discussion of the federal rules governing release on bail, see Meyer, supra note 18, at 1164-75. In the federal courts and in some state courts, there is the
by the eighth amendment's criterion of nonexcessiveness,\textsuperscript{118} and secondarily by the due process prohibitions of arbitrary or discriminatory administration.\textsuperscript{119} The leading case on the issue of the excessiveness of bail is \textit{Stack v. Boyle}.\textsuperscript{120} In that case, the defendants were charged with a Smith Act\textsuperscript{121} violation, and moved to reduce bail on the grounds of excessiveness under the eighth amendment.\textsuperscript{122} To rebut the petitioners' submission of statements as to their financial resources, family situations, and prior criminal records, the Government only produced evidence that four persons previously convicted under the Smith Act had forfeited bail.\textsuperscript{123} The Court decided in defendants' favor,\textsuperscript{124} holding that the practice of requiring a cash bond "serves as additional assurance of the presence of an accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment."\textsuperscript{125} The question to be considered in fixing the amount of bail, then, is what sum will adequately assure the appearance of the accused at trial.\textsuperscript{126}

\textsuperscript{118} For the text of the eighth amendment, see note 16 supra.

\textsuperscript{119} See Mastrian v. Hedman, 326 F.2d 708 (8th Cir.) (per curiam), \textit{cert. denied}, 376 U.S. 965 (1964). In \textit{Mastrian}, the defendant, charged with murder, brought a due process challenge to the setting of bail of $100,000. 326 F.2d at 711. The court rejected the claim, but indicated that in future cases, it would examine whether the "bail right provided . . . had been so arbitrarily or discriminatorily administered as to amount to an improper denial or deprivation of that right to petitioner." \textit{Id.}

\textsuperscript{120} 342 U.S. 1 (1951).

\textsuperscript{121} 18 U.S.C. § 2385 (1976). This highly controversial statute made it a felony, punishable by up to twenty years imprisonment and a $20,000 fine, to knowingly advocate or teach the desirability of overthrowing the United States government, or to publish matter or organize to that end. \textit{Id.}

\textsuperscript{122} 342 U.S. at 3.

\textsuperscript{123} \textit{Id.}

\textsuperscript{124} \textit{Id.} at 7.

\textsuperscript{125} \textit{Id.} at 5 (citation omitted). See \textit{Ex parte} Milburn, 34 U.S. (9 Pet.) 702, 709 (1835).

\textsuperscript{126} See United States v. Field, 193 F.2d 92, 98 (2d Cir.), \textit{cert. denied}, 342 U.S. 894 (1951); United States v. Accordi, 241 F. Supp. 119, 120 (S.D.N.Y. 1964). After setting bail in the first instance, the court may modify the amount if the government shows factors which may lessen the likelihood of defendant's appearance, or otherwise indicate his intention to delay or interfere with the trial. See Brown v. Fogel, 387 F.2d 692, 697 (4th Cir. 1967) (Bryan, J., dissenting), \textit{cert. denied}, 390 U.S. 1045 (1968); Christoffel v. United States, 196 F.2d 560, 567 (D.C. Cir. 1951). The Supreme Court has also recognized judicial discretion to revoke bail "when and to the extent justified by danger which the defendant's conduct presents or by danger of significant interference with the progress or order of the trial." Bitter v. United States, 389 U.S. 15, 16 (1967) (per curiam) (footnote and citations omitted).

For a discussion of the inaccuracy of the premise of the cash bail system that depositing money with the court will deter defendants from "skipping," at least in the case of commercial bonding, see text accompanying notes 433–50 infra.
Chief Justice Vinson, writing for the Stack majority, implied that when bail is set at an amount greater than that “usually fixed” for offenses with similar penalties, the burden is on the prosecution to justify the higher amount.127 Under that rationale, courts would be free to set minimum rates of bail for various criminal charges. Accordingly, Stack does not preclude high bail setting in particular cases, provided all individuals similarly charged are given the same amount. In that situation, Stack permits courts to ignore the individualized bail setting criteria mandated by the Bail Reform Act.128 Moreover, the Court’s implicit approval of standardized bail is inconsistent with its rejection of the Government’s evidence relating to prior Smith Act arrestees and the Court’s statement that “the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant.”129

If the Supreme Court bestowed its imprimatur on standardization in hopes of lightening the burden of the courts, that goal can only be realized at a heavy cost. For as Chief Judge Bazelon pointed out in Pannell v. United States,130 “the keynote to successful administration of any system of bail is the adequacy of the information upon which the decisions are based.”131 The “offense criterion” approved in Stack of course minimizes the courts’ factfinding obligations. Conversely, application of the more individualized criteria under the Bail Reform Act requires a greater expenditure of time and judicial resources. Yet an individually tailored bail determination seems essential to achieving the goal of

127. See 342 U.S. at 6.
128. See 18 U.S.C. § 3146(b) (1976). This section provides that a judicial officer should consider the following factors when deciding what conditions of release will assure the appearance of the defendant at trial:

[T]he nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused’s family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.

130. 320 F.2d 689 (D.C. Cir. 1963).
131. Id. at 702 (Bazelon, C.J., concurring in part and dissenting in part).
setting bail at the least possible sum that will ensure the accused's appearance at trial.\textsuperscript{132}

If, sub rosa, most courts rely on \textit{Stack}'s offense criterion to set bail amount, their opinions at least mention other factors relevant to the defendant's likelihood of absconding.\textsuperscript{133} One of the more controversial of these factors is the financial ability of the accused to post bail, which federal courts are required to consider under the Bail Reform Act.\textsuperscript{134} Without a proper consideration of this variable, a court may as a practical matter deny the opportunity to an indigent defendant to be released on bail.\textsuperscript{135} If the court fails to estimate the deterrent effect of a cash bail figure as a function of the accused's total wealth, it will "excessively" deter the indigent while inadequately deterring his richer counterpart. As Chief Judge Bazelon admonished in \textit{Pannell}:

\begin{quote}
[W]e should recognize that an impecunious person who pledges a small amount of collateral constituting all or almost all of his property is likely to have a stake at least as great as that of a wealthy person who pledges a large amount constituting a modest part of his property.\textsuperscript{136}
\end{quote}

Even assuming that courts consider the deterrent effects of a bail amount based on the individual's ability to pay, the question arises whether that sum may be set beyond the defendant's means. Courts have consistently held that the mere inability of the accused to post bail in the amount set is not sufficient to find "excessiveness" under the eighth amendment.\textsuperscript{137} Yet in cases where the defendant cannot make bail, it would seem that the amount set would be greater than that necessary to deter the defendant from skipping,
and therefore excessive. 138 The courts at present, however, are not willing to accept that conclusion, at least as a per se matter. 139

Other factors traditionally considered in fixing bail are likewise susceptible to abuse. Danger to the community, which is often considered in connection with preventive detention, 140 is also used by some courts in calculating the bail amount as a sub rosa method of circumventing statutory restraints on denial of bail. 141 Although ties to the community may be the civil libertarians' most widely accepted criterion, it nevertheless operates discriminatorily against the poor, who are more likely to be transient, unemployed, or without stable family ties. 142 Finally, the defendant's motivation and opportunity to flee similarly lack the narrowness required to avoid abuse of discretion and to ensure meaningful review of the trial court. 143 "Motivation" is too nebulous and unascertainable a concept in view of the state of psychology and the competence of the judiciary in the social sciences. "Opportunity" to abscond would apply too broadly, since even an indigent could hitchhike out of the jurisdiction.

As indicated above, the traditional bail setting criteria are sufficiently pliable to permit courts to effectively deny bail in many

\[\text{ parte Malley, 50 Nev. 248, 253, 256 P. 512, 514 (1927) (per curiam); Delaney v. Shobe, 218 Or. 626, 629, 346 P.2d 126, 127 (1959) (en banc) (per curiam). In Griffin, Justices Burton and Minton stated:}\

Persons charged with crimes stand before the law with varying degrees of economic and social advantage. Some can afford better lawyers and better investigations of their cases. Some can afford bail, some cannot. Why fix bail at any reasonable sum if a poor man can't make it?

The Constitution requires the equal protection of the law, but it does not require the States to provide equal financial means for all defendants to avail themselves of such laws.

351 U.S. at 28–29 (Burton and Minton, J.J., dissenting).

138. See In re Williams, 82 Cal. 183, 184, 23 P. 118, 118 (1889). But see Ward v. United States, 343 F.2d 313 (D.C. Cir.) (per curiam) (Bazelon, C.J., dissenting), cert. denied, 382 U.S. 856 (1965). In Hairston, Chief Judge Bazelon observed that "[s]etting high bail to deny release 'discriminate(s) between the dangerous rich and the dangerous poor.'" 343 F.2d at 316 (Bazelon, C.J., dissenting), quoting D. Freed & P. Wald, Bail in the United States 54 (1964).

140. See footnote 97 and accompanying text supra.

141. See supra note 6, at 1068.

142. See supra note 6, at 1068.
cases. In actual practice, judges have admitted using bail to “keep defendants off the streets,” give them a “taste of jail,” protect women from abuse, cut suspected drug supplies, and break crime waves. Generally, the only standards used for determining bail are the type of offense charged and the arrestee’s police record, largely because that is often the only information available to the magistrate when making a bail determination. The type of offense charged is certainly a relevant factor in predicting the likelihood of the defendant’s appearance. The more severe the crime and potential punishment, the more fearful the accused will probably be of submitting to the judicial process. On the other hand, the more egregious the offense, the more zealous will be the pursuit of an absconder. Nevertheless, the current federal statute requires the magistrate to also consider “the weight of the evidence against the accused, the accused’s family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance” in making the pretrial bail determination in noncapital cases.

Even more objectionable than the courts’ excessive reliance on the offense criterion is the great weight accorded to the prosecutor’s recommendation of bail amount. The determination of bail is too pivotal a stage of the criminal process to be ex parte in nature. As a matter of judicial administration, however, the prevalence of overly crowded criminal dockets has virtually necessitated the use of the ex parte procedure as a kind of modus vivendi. As one commentator

144. See New York Bail Study, supra note 138, at 705. This New York bail study revealed that “[f]ew cases of excessive bail ever reach the appellate courts; self-restraint and personal ethics are the only real controls over improper use of bail.” Id.
146. See Suffet, Bail Setting: A Study of Courtroom Interaction, in CRIME AND JUSTICE IN SOCIETY 293 (R. Quinney ed. 1969). This author concludes that the existence of a prior record is more important than the extent of the record in influencing the setting of bail. Id. To the extent that a prior arrest not followed by a conviction comprises part of the record considered by the magistrate, the bail determination would be objectionable under Menard v. Mitchell, 430 F.2d 486, 494 (D.C. Cir. 1970).
147. Philadelphia Bail Study, supra note 39, at 1038. The Philadelphia bail study found that in two-thirds of 856 hearings studied, evidence of the crime charged was the only information available to the judicial officer. Id.
148. Note, Bail: An Ancient Practice Reexamined, 70 YALE L.J. 966, 974 (1961). The author acknowledges that the “[g]ravity of the offense is of course relevant, for one might reasonably conclude that the incentive to flee will increase proportionately with the possible punishment awaiting the offender.” Id.
149. See Philadelphia Bail Study, supra note 39, at 1035.
has observed: "Arraignment proceedings are handled at breakneck speed with the arraigning judge arriving at his decision on bail within seconds . . . . In the vast majority of cases, the judge simply announces a sum and proceeds to the next case."

V. PROCEDURAL OBSTACLES TO THE REVIEW OF BAIL

The "assembly line" bail setting procedure on arraignment would be less disturbing were there an effective and speedy remedy for challenging the excessiveness of the initial amount. Under the present system, however, there is no adequate remedy for an improper bail setting.\(^{154}\) As a practical matter, courts, either because of time constraints or apathy, rarely articulate the reasons for fixing a given sum.\(^{155}\) Without the benefit of the ratio decidendi, the appellate court can only remand for further findings,\(^{156}\) unless the trial court sets bail abnormally high for the offense.\(^{157}\) For a state court defendant, a habeas corpus petition may be filed with the state appellate court.\(^{158}\) This procedure almost inevitably proves futile, however, because of the strong presumption against interfering with the trial court's bail setting discretion.\(^{159}\) The burden, then, rests on the accused to show such a flagrant abuse of discretion as to "shock" the appellate court.\(^{160}\) Some courts even set bail on the presumption that the defendant is guilty.\(^{161}\) The difficulty of obtaining meaningful review of the initial bail amount is graphically illustrated by the

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153. Id.
154. Foote, supra note 1, at 48. This commentator explained:
The indigence of many defendants, the practical unavailability of counsel to such defendants at this stage of the proceedings, and the short timespan before an appeal against deliberately high bail would become moot, preclude the likelihood that appellate review can provide the needed corrective influence. Indeed, although all states prohibit "excessive" bail, the practical difficulties of obtaining appellate review are so great that in 25 of the states there appear no reported decisions whatsoever relating to the amount of bail.

155. See Foote, supra note 6, at 1132–33.
156. See Fiano v. United States, 259 F.2d 135, 137 (9th Cir. 1958) (per curiam), cert. denied, 361 U.S. 964 (1960); Foote, supra note 6, at 1175. See also Pelletier v. United States, 343 F.2d 322, 323 (D.C. Cir. 1965) (per curiam) (Bazelon, C.J., concurring).
158. Id. In Stack, the Supreme Court explained that habeas corpus is a proper procedure for challenging the amount of bail as excessive under the Constitution. Id.
The Court emphasized, however, that the district court should deny this relief when an adequate remedy remains available in the criminal proceeding. Id. at 6–7.
161. See Ex parte Malley, 50 Nev. 248, 253, 256 P. 512, 514 (1927) (per curiam).
experience in California, where, at least until 1969, no setting by a lower court had ever been struck down.\textsuperscript{162}

Nor can the accused avoid the adverse presumptions of the state appellate courts by filing writs of habeas corpus in the federal district courts.\textsuperscript{163} The procedural roadblock is that after the defendant's motion for reduction, the order setting bail is "final" and therefore appealable through the state court system.\textsuperscript{164} The United States Supreme Court has held that collateral relief will be withheld until the petitioner has exhausted all presently available state appellate remedies.\textsuperscript{165} The attendant expense and delay of such a procedure effectively denies defendants a federal forum. Delay in this context is crucial, since cases in which the defendant remains incarcerated are usually placed on an expedited trial calendar.\textsuperscript{166} The resulting time squeeze prevents the defendant from exhausting his state remedies before his case comes to trial, and thereby moots his motion to reduce bail.\textsuperscript{167}

Similar problems impede attempts to raise bail issues on appeal after conviction. The accused may fully serve his sentence before state review procedures are exhausted, or his bail challenge may be mooted by a reversal of his conviction.\textsuperscript{168} Even if the defendant does obtain a reduction of bail on appeal, the relief may come too late. Irreparable harm may result, for example, because a witness only the accused could locate may have moved in the interim.\textsuperscript{169} Even if


\textsuperscript{163} Id. One author notes that many California defendants seek to avoid the refusal of state appellate courts to reverse the initial bail setting by filing writs of habeas corpus in the federal courts alleging infringement of a federal constitutional right to bail. Id. at 74. The federal courts, however, refuse to reach the merits of this issue, ruling that adequate and available state remedies must first be exhausted. See id.


\textsuperscript{166} See \textit{Philadelphia Bail Study}, supra note 39, at 1052. This study showed that the average case in which the defendant was incarcerated came to trial about a month after preliminary hearings, while the time period between hearing and trial for those released on bail was nine months. Id.

\textsuperscript{167} See Commonwealth \textit{ex rel. Hargete} v. Hendrick, 439 Pa. 584, 594, 268 A.2d 451, 459 (1970) (Roberts, J., dissenting); Foote, supra note 6, at 1131; \textit{Philadelphia Bail Study}, supra note 39, at 1036. In addition, the uncertainty of making bail, even if it is reduced, arguably operates on a psychological level to stifle the defendant's resolve to vigorously pursue his appellate remedies.

\textsuperscript{168} See \textit{Ellis} v. United States, 79 S. Ct. 428 (Warren, Circuit Justice, 1959). Chief Justice Warren granted bail in \textit{Ellis} because the defendant might otherwise have served his full term before his appeal was resolved. Id. at 428.

\textsuperscript{169} For a discussion of the effects of pretrial detention on trial preparation, including the location of witnesses, see \textit{New York Bail Study}, supra note 138, at
the defendant can locate witnesses and help prepare his case for appeal, it is difficult to estimate the irreparability of prejudice suffered on the trial court level. Since so few cases challenging bail ever reach the appellate courts, “self-restraint and personal ethics are the only real controls over improper use of bail.” As one appellate court has suggested, the remedy for not obtaining release on bail is to move for a prompt trial. As the law now stands, that remedy, however draconian, is probably the defendant’s best available alternative.

VI. THE CONDITIONS AND EFFECTS OF PRETRIAL DETENTION

A. Empirical Studies of Bail

A number of studies have been performed by opponents of the bail system to ascertain the causal relationship between making bail and the ultimate outcome and disposition of the case. This question assumes larger dimensions in the equal protection context, where infringement of a fundamental right, such as the right to a fair trial, may invalidate “suspect” statutory classifications. All of the above-mentioned studies indicate that the jailed defendant is more likely than his bailed counterpart to be convicted and to receive a stiffer penalty upon conviction. Even a cautious interpretation of the data would lead to the conclusion that bail does operate as a causal factor in outcome and disposition. Yet the degree of the causal nexus remains uncertain because of methodological deficiencies in the studies and the “imprecise” nature of much of the relevant data. To the extent the studies show that pretrial detention “causes” greater likelihood of conviction or more severe sentencing,
however, the case for the infringement of a constitutionally protected right is strengthened.

The initial study, which was undertaken in Philadelphia in 1953 under Professor Foote's direction, found that defendants able to make bail ("outs") were generally less likely to be convicted and sentenced to prison than those unable to make bail ("ins"). Unaccounted for variables, such as criminal record, financial condition, and family stability, however, could explain the positive correlation between bail status and case disposition, independent of any possible causal relationship. A 1956 bail study in New York City, similar in design to the Philadelphia study, found a less substantial connection between bail status and case disposition. Such variance in disposition as there was between "ins" and "outs" may be accounted for by "chance" or by any of the same methodological deficiencies that plagued the Philadelphia study.

Another New York City study, performed by the Vera Foundation, examined 60% of the cases handled by the New York County Court of General Sessions in 1960. Although that study found statistically significant correlations between jail status and case disposition for defendants in most offense categories, like the other studies, it failed to account for variables such as bail amount and weight of the evidence. The Vera Foundation, then, did little to improve on the superficiality of the prior studies in examining the status-outcome connection.

During 1961-1962, Anne Rankin, a staff member of the Vera Foundation, undertook another study in New York City for the express purpose of "exploring whether the marked statistical relationship between pre-trial detention and unfavorable disposition is a causal one." This study improved the design of the previous studies by examining whether five factors statistically related to detention and disposition — criminal record, bail amount, type of counsel, family integration, and employment stability — could account for the correlation between detention and disposition. Proceeding to hold each of the five variables constant, however, the study found that the difference in disposition between "ins" and

178. Id. at 1053–54.
180. See text accompanying note 178 supra.
181. Manhattan Bail Project, supra note 173, at 76.
182. Id. at 84.
183. Rankin, supra note 173, at 641.
184. Id. at 645.
185. Id.
"outs" did not disappear or diminish. Nevertheless, other important factors, such as weight of the evidence, were not taken into account.

In 1973, a far more rigorous study than the four prior ones was undertaken in connection with litigation by the City of New York Legal Aid Society in *Bellamy v. Judges of New York City*. This case involved an imaginative and daring frontal attack on the bail system. The plaintiffs were pretrial detainees who brought a class action requesting a declaratory judgment as to the constitutionality of bail under the due process and equal protection clauses. The study, submitted as proof by the plaintiffs, examined closed case files of 857 individuals represented by counsel associated with the City of New York Legal Aid Society. The independent variables examined tracked the multiple criteria for determining bail under New York law: pretrial status, seriousness of the charge and type of crime, weight of the evidence, presence of aggravated circumstances, prior criminal record, family ties, employment status at the time of arrest, character and mental condition of defendant, and amount of bail. Holding these variables constant, the study found in each instance that pretrial detainees were more frequently convicted and sentenced to prison than those released on bail.

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186. *Id.* at 646.

187. As in the prior studies, the differences in disposition could readily be accounted for by plausible rival hypotheses. For example, the "ins" perhaps were "ins" precisely because they had strong cases against them and commensurately high bail amounts. On that basis, regardless of the type of counsel, or other constant factors, the "ins" would fare more poorly than the "outs," not because of pretrial status, but because of the weight of the evidence which influenced both pretrial status and outcome.

This unconsidered "weight of the evidence" hypothesis could thus account for the differences in disposition when each of the five factors was separately held constant. In addition, where any one factor was held constant, the other four unconsidered factors could provide other plausible rival hypotheses as against the detention-outcome hypothesis.

188. 41 A.D.2d 196, 342 N.Y.S.2d 137 (1973). The New York Supreme Court held in *Bellamy* that the existing New York bail system did not violate the eighth or fourteenth amendments. *Id.* at 197, 342 N.Y.S.2d at 139. The court questioned the validity of the figures presented in the case and suggested that if change were needed, the task belonged to the legislature. *Id.* at 200-03, 342 N.Y.S.2d at 142-45.

189. *Id.* at 197, 342 N.Y.S.2d at 138-39. The court ruled that the action was not properly brought as a class action, since individual determinations are made in each bail application. *Id.*, 342 N.Y.S.2d at 139.


193. *Id.* According to the author, these findings point to "[t]he inescapable conclusion . . . that the fact of detention itself causes those detained to be convicted far more often and sentenced much more severely than those who are released." *Id.* For a detailed analysis of the statistical methodology of the *Bellamy Study*, see Hindelang, *On the Methodological Rigor of the Bellamy Memorandum*, 8 CRIM. L. BULL. 507 (1972).
Even cautiously analyzed in light of certain methodological deficiencies, the Bellamy study does provide persuasive evidence of the detention-outcome link. The Appellate Division of the New York Supreme Court, nonetheless, held for the defendants. The Bellamy court criticized the study in part because it was based on cases disposed of before September 1, 1971, when a more permissive state bail statute providing for unsecured surety and appearance bonds went into effect. The court proceeded to note that:

Both experience and logic show us that, all other imperfections and discrepancies aside, the plaintiffs' figures and statistics are but a shadow of reality, misconstruing cause and effect and putting the cart before the horse . . . . It is not because bail is required that the defendant is later convicted. It is because he is likely to be convicted that bail may be required.

The court thus displayed its misapprehension of the plaintiffs' fundamental claim that there was a causal connection between pretrial detention and conviction, not between the requirement of bail and conviction. Arguably, the problems of bail may best be ameliorated by statute rather than court order. By failing to address the complex and significant constitutional and societal issues posed by the plaintiffs, however, the Bellamy court abdicated its proper judicial role. An unprecedented opportunity to clarify the constitutional status of bail was thereby foregone.

195. 41 A.D.2d at 200–03, 342 N.Y.S.2d at 142-45. The court at the outset found no substance to the prisoners' objections, but added that "[w]hile the reasons for this bail system seem self-evident, a decent respect for the opinions of those sincerely interested in the proper administration of the criminal justice system leads us to examine further into the contentions of the plaintiffs." Id. at 197–98, 342 N.Y.S.2d at 139.
196. Id. at 202, 342 N.Y.S.2d at 143.
197. Id. 342 N.Y.S.2d at 144. The court further observed: "[T]he factors for allowing bail, when properly applied, generally lead to the conclusion that those denied bail are more likely to be convicted, and if the statistics prove this out, as they do, it shows the system is working rather than, as plaintiffs contend, that it is, instead, detrimental to a defense against an accusation." Id. at 202–03, 342 N.Y.S.2d at 144.
198. See Bellamy Study, supra note 173, at 481. According to the author, the study points to the "inescapable conclusion . . . that the fact of detention itself causes" the disparity in outcome. Id. The Bellamy court was, of course, also incorrect in stating that bail may be required on account of the likelihood of conviction. See 41 A.D.2d at 205, 342 N.Y.S.2d at 144. This factor may be considered in setting bail amount insofar as it relates to the likelihood of appearance at trial. See note 95 supra. As the United States Supreme Court has held, however, the only permissible purpose of bail is to assure the presence of the accused at trial. Stack v. Boyle, 342 U.S. 1, 5 (1951).
B. The Conditions of Confinement

The nature of imprisonment does much to explain the strikingly positive correlation between pretrial status and case disposition found in the above studies. Blackstone viewed the period of pretrial confinement as a "dubious interval" during which "a prisoner ought to be . . . [treated] with the utmost humanity." In contemporary America, however, the pretrial detainee is confronted with boredom, a lack of recreational facilities, poor food, unhygienic and crowded living conditions, strict discipline, and brutal guards. In addition, prisons restrict the detainee's communications with the outside world by imposing limitations on the number of letters that may be mailed, the number of telephone calls, the number of visitors, and the amount of visiting time.

Ironically, in part because penitentiaries are usually governed by minimum standards set by state boards, convicts live in a more humane environment than pretrial detainees. That is, facilities for convicts are better staffed, newer, and less crowded, and inmates are usually afforded the opportunity to participate in formal work and recreation programs. Pretrial detainees challenged this inequitable situation in Rheem v. Malcolm, a class action brought by inmates awaiting trial at the Manhattan House of Detention (the "Tombs"). The prisoners complained of overcrowding, excessive noise, lack of recreation, inadequate medical care, and restrictions on mail and visitors. The district court held that unconvicted detainees retain all the rights of ordinary citizens except to the extent necessary to assure their presence at trial. The prison was

199. 4 W. Blackstone, Commentaries 297 (1st Am. ed. 1772).
202. See Foote, supra note 6, at 1144-45; Bail Proposal, supra note 82, at 397.
204. 371 F. Supp. at 597.
206. 371 F. Supp. at 622. After extensive litigation, including two visits by Judge Lasker to the prison, the court recognized:

In judging the validity of these contentions, we take as our starting point that plaintiffs are unconvicted detainees who, but for their inability to furnish bail, would remain at liberty, enjoying all the rights of free citizens until and unless convicted. We are guided, therefore, not only by the modern judicial
C. The Effects of Confinement

Until the full implementation of enlightened decisions such as Rhem, the conditions of detention will continue to have far-reaching effects on the accused and his ability to defend himself. If, for example, the defendant is not convicted, an innocent man will have served time in jail. The result is a felt injustice, an

view . . . that all prisoners, convicted or detained, "(retain) all rights of an ordinary citizen except those expressly or by necessary implication taken from (them) by law," but also by the precept that, because of "the presumption of innocence . . . ," . . . a detainee retains all rights of the ordinary citizen except those necessary to assure his appearance for trial. Id. (emphasis in original), quoting Stack v. Boyle, 342 U.S. 1, 4 (1951).

207. Rhem v. Malcolm, 507 F.2d 333, 340 (2d Cir.1974). On the district court level in Rhem, Judge Lasker denied the defendant's motion to dismiss, and ordered a

conference with the parties to implement his ruling on the unconstitutionality of the prison conditions. 371 F. Supp. at 637. The defendants appealed from this ruling, and the United States Court of Appeals for the Second Circuit granted a conditional stay and expedited appeal. 507 F.2d at 335. The Second Circuit affirmed the district court's findings that the conditions at the prison were unconstitutional, but modified the relief. Id. at 336. Because of the financial condition of New York City, the appellate court ordered the city "to close the prison to detainees or to limit its use for detainees to certain narrow functions by a fixed date, unless specified standards are met." Id. at 340.

208. 371 F. Supp. at 633. The court also found impermissible the prison's punitive restrictions on mail and visitation. Id. at 633-34. Noting the regulation which prohibited such punishment of state prisoners, the court concluded that "[i]t is unnecessary to determine whether the City's contentions might be supportable under other circumstances, because we are persuaded that the equal protection clause bars the City from imposing on its inmates more severe punishment than may be imposed on convicted New York prisoners." Id. at 633. For a general discussion on the

mandates of the Constitution in the area of pretrial detention, see Constitutional Limitations, supra note 200.

209. For a discussion of Rhem, see notes 203-08 and accompanying text supra.


211. See Bellamy Study, supra note 173, at 468. This study found that 38% of the

detainees were not convicted. Id.

In some states the maximum period of pretrial confinement is limited by statute. Pa. Stat. Ann. tit. 19, § 781 (Purdon 1964) (providing for release on their own recognition of prisoners not tried within six months). But the duration between indictment and disposition can still be substantial. One bail study found a one month delay in "jail cases" and nine months in "bail cases." Philadelphia Bail Study, supra note 39, at 1052. A 1968 study in the District of Columbia found that the average time between indictment and disposition of all criminal cases was 162 days, although felony cases averaged almost a year. Note, supra note 53, at 938. Moreover, in Philadelphia Municipal Court in 1974, the average number of days between arrest and disposition was 79. See Philadelphia Common Pleas & Municipal Courts,
impairment of confidence in the fairness of law.\textsuperscript{212} Punishment without a finding of guilt further undermines the perceived legitimacy of the system of criminal justice.\textsuperscript{213} The consequent attitude of cynicism, if unquantifiable, strikes at the heart of voluntary compliance with the law. In a more immediate sense, the innocent detainee’s prospects for reentry into society are exacerbated by both the stigmatization caused by his jailing and his perception of the system of American “justice” as hypocritical and wealth oriented.\textsuperscript{214} Moreover, the detainee’s mere exposure to prison, a “breeding ground of crime,” may serve to enhance any criminal propensity with which he entered.\textsuperscript{215}

One immediate effect of pretrial detention, the loss of employment, may render the accused unable to care for his dependents, much less earn money to retain counsel.\textsuperscript{216} If the defendant is assigned a public defender whom he had no responsibility in selecting, he is less likely to feel that the representation is adequate. In addition, the detainee may feel that he is receiving second-class legal services simply because they are free.\textsuperscript{217} Such an attitude may


\textsuperscript{213} 212. See Williamson v. United States, 184 F.2d 280, 284 (Jackson, Circuit Justice, 1950).

\textsuperscript{214} For discussions of the impact of punishment without guilt upon the criminal justice system, see Glasser, \textit{Criminality Theories and Behavioral Images}, 61 AM. J. SOC. 433-44 (1956); \textit{Bail Proposal, supra} note 82, at 405.

\textsuperscript{215} 214. \textit{See Bail Proposal, supra} note 82, at 405.

\textsuperscript{216} 215. \textit{Id.} This problem is exacerbated by the failure to segregate first offenders from the so-called hardened criminals. \textit{Id.}

\textsuperscript{216} The social costs of incarceration, in purely dollar terms, are high. If the detainee was employed, tax revenue may be lost. His dependents may be forced to go on welfare. Additionally, the costs of maintaining the accused in prison are substantial. In 1971, for example, New York City spent $10 million on pretrial detention. \textit{Bail Proposal, supra} note 82, at 404. If the defendant is imprisoned, he is more likely to proceed in forma pauperis, with the government thus bearing the costs of transcripts, counsel, and other legal resources. See Pannell v. United States, 320 F.2d 698, 699 (D.C. Cir. 1963) (Wright, J., concurring).

\textsuperscript{217} Moreover, if the detainee is convicted, the court may be less likely to place him on probation precisely because of his unemployment. The convicted detainee on probation often shares the system’s expectation of his failure, which, again, operates as a self-fulfilling prophecy. Foote, \textit{supra} note 6, at 1147. The fact that he must find a new job also militates against his successful completion of probation. \textit{Id.}

\textsuperscript{217} 217. See Foote, \textit{supra} note 6, at 1147. According to Professor Foote, the fact that the public defender is paid by the state, the defendant’s adversary in the trial, enhances the feeling of inadequate legal representation. \textit{Id.} at 1147–48. \textit{But see Griffin v. Illinois}, 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring). Justice Frankfurter
impair the attorney-client relationship so as to create a self-fulfilling prophecy. Even if the accused desires to fully cooperate with counsel, prison rules may make it difficult to confer in privacy. Consultation may also be restricted if the accused is jailed far from his lawyer's offices. Pretrial detention may thus render ineffective the assistance of counsel.

The detainee may also have much more difficulty in gathering evidence for his defense than the defendant released on bail. Sometimes, acquaintances of the accused are reluctant to divulge information to the lawyer. Although the defendant may be the only one able to locate reluctant witnesses and induce them to testify on his behalf, his communications with the outside world are severely restricted. Courts have been unsympathetic to claims of prejudice because of the lack of opportunity to locate alibi witnesses. Judicial willingness to ignore the prejudicial effects of pretrial detention reached painful heights in United States ex rel. Hyde v. McMann, where the trial court magnanimously gave the defendant one day, in police escort, to locate a certain prostitute. Indeed, courts have refused defendants the opportunity to locate alibi witnesses on the grounds that the accused had competent, informed counsel, that counsel had ample time to search for witnesses, that the Federal Bureau of Investigation would be asked to locate the witness, or

remarked: "A man of means may be able to afford the retention of an expensive, able counsel not within reach of a poor man's purse. Those are contingencies of life which are hardly within the power, let alone the duty, of a State to correct or cushion." Id. at 1147.

218. Foote, supra note 6, at 1147.

219. Id.

220. At least one court has refused to examine such a claim in a habeas corpus petition brought by a prisoner who had been denied bail prior to conviction. See Corbett v. Patterson, 272 F. Supp. 602, 608 (D. Colo. 1967). Counsel may also be rendered ineffective if the detainee cannot afford investigators or expert witnesses. See United States v. Johnson, 238 F.2d 565, 572-73 (2d Cir. 1956) (Frank, J., dissenting), cert. dismissed per stipulation, 357 U.S. 933 (1958). In Johnson, Judge Frank indicated his approval of the practice in Scandinavian countries of placing the police department equally at the service of prosecution and defense. 238 F.2d at 573 (Frank, J., dissenting). One survey has in fact found that in only 18 of 184 defender associations are full-time investigators on the payroll. A. TREBACH, THE RATIONING OF JUSTICE: CONSTITUTIONAL RIGHTS AND THE CRIMINAL PROCESS 209 (1964). See generally Note, Right to Aid in Addition to Counsel for Indigent Criminal Defendants, 47 MINN. L. REV. 1054 (1963).

221. See Foote, supra note 6, at 1141; Philadelphia Bail Study, supra note 39, at 1058.

222. 263 F.2d 940 (2d Cir. 1958).

223. Id. at 942-43. The Second Circuit held that the lower court did more than necessary when it adjourned the trial to permit the defendant and two detectives to search for a woman who could serve as an alibi. Id. at 943.

224. See id.

225. See id.

226. See Fitts v. United States, 335 F.2d 1021, 1023 (10th Cir. 1963), cert. denied, 379 U.S. 979 (1965).
that the defendant had power to subpoena the witness.\textsuperscript{227} It may be an intrinsic drawback of capitalism that the wealthy will always be able to hire the better lawyers and pour money into the search for evidence.\textsuperscript{228} However, as Professor Foote succinctly put it, "from such a fact we should not rationalize a denial to the poor accused of even such succor as can be had from self-help."\textsuperscript{229}

A further prejudicial effect of pretrial confinement derives from evidence which may be obtained by the prosecution solely from the defendant's detention.\textsuperscript{230} The detainee, for example, is always available for lineups and interrogation.\textsuperscript{231} He is also vulnerable to the jailhouse "stoolie" and spying on the part of prison authorities.\textsuperscript{232} One of the more subtle harms of detention is its effect on juries.\textsuperscript{233} The detainee who must appear before the trier of fact in custody is typed as untrustworthy.\textsuperscript{234} The appearance of the defendant as a prisoner may thus cause the jury to judge him without attaching the proper presumption of innocence. In summary, then, pretrial detention not only causes psychological and economic harm to the incarcerated defendant, but severely impairs his preparation for trial and chances for a successful defense.

\textbf{D. Guilty Pleas and Pretrial Detention}

Pretrial detention in many ways impedes the ability of the accused to defend himself, thereby tipping the scales of the adversary process in the prosecution's favor. The government may employ this leverage to exact a guilty plea from the vulnerable

\begin{footnotes}
\textsuperscript{227} See White v. United States, 300 F.2d 811, 814 (8th Cir. 1963), cert. denied, 379 U.S. 855 (1964).
\textsuperscript{228} See Griffin v. Illinois, 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring).
\textsuperscript{230} Bail Proposal, supra note 82, at 401.
\textsuperscript{231} See Butler v. Crumlish, 229 F. Supp. 565 (E.D. Pa. 1964). In Butler, the district court granted a preliminary injunction prohibiting police from using the plaintiffs, detainees at the Philadelphia Detention Center, in a lineup for crimes similar to the ones for which they had been arrested. Id. at 566, 568. This injunction against the practice of using pretrial detainees in lineups was sought under section 1983 of the Civil Rights Act of 1871, 42 U.S.C. §1983 (1976), on the grounds that it violated the equal protection guarantee of the fourteenth amendment. 229 F. Supp. at 566, 568.
\textsuperscript{233} One study found that "[a]t trial, prison defendants obtained acquittals in only 20.2 per cent of the cases, while the bail defendants were acquitted in 31.4 per cent of the cases." New York Bail Study, supra note 138, at 727. Moreover, another study found that only 1% of the cases involving detainees were even tried. Bellamy Study, supra note 173, at 487.
\textsuperscript{234} See Bail Proposal, supra note 82, at 401.
\end{footnotes}
Because of the uncertain and brutal pretrial period and doubts as to the likelihood of acquittal, which pretrial confinement may itself engender, plea bargaining often becomes the most realistic alternative. The likelihood of "copping a plea" is thus as much a function of the defendant's stamina and faith in the system as a belief in his innocence. The psychological process which induces the accused to enter a guilty plea has been described as follows:

[T]he frustration and boredom which living under these conditions [of pretrial detention] induces, must have a deteriorative effect on the defendant's morale, which, in turn, may affect his desire properly to defend himself, with his despair in some cases resulting in a loss of faith in the judicial system and the entry of a plea of guilty.

The guilty pleas elicited on account of pretrial imprisonment prove advantageous to overburdened judges, prosecuting attorneys, and public defenders. These participants in the criminal justice system thus have a vested interest in maintaining pretrial detention as a means of inducing guilty pleas, and thereby keeping the judicial machinery rolling. Despite the practical "helpfulness" of pretrial detention in encouraging guilty pleas, such an advantage is surely illegitimate.

As Chief Judge Bazelon noted in *Scott v. United States*, plea bargaining is justifiable only where the outcome is uncertain and the

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236. See United States v. Johnson, 238 F.2d 565, 573 (2d Cir. 1956) (Frank, J., dissenting), cert. dismissed per stipulation, 357 U.S. 933 (1958). In the words of Judge Frank:

[A]s matters now stand, men are often "obliged to purchase justice" or go without it if they have not the wherewithal. Such are the coercions of poverty that a decent sensible lawyer may well advise an innocent man, too poor to obtain essential defense evidence, to bargain with the prosecutor to accept a plea of guilty to a lesser crime than that with which the defendant is charged.

238 F.2d at 573.

237. See *Bail Proposal, supra* note 82, at 398–99, 400.


239. *Bail Proposal, supra* note 82, at 398.


241. *See Bellamy Study, supra* note 173, at 467. This study found that 79% of incarcerated defendants pled guilty, compared with 49% of those defendants released on bail. *Id.*

242. See Miranda v. Arizona, 384 U.S. 436 (1966). In *Miranda*, the Court stressed that: "While authorities are not required to relieve the accused of his poverty, they have the obligation not to take advantage of indigence in the administration of justice." *Id.* at 472 (footnote omitted).

parties, therefore, want to minimize the risks of litigation by negotiation. Plea bargaining is, a fortiori, unjustifiable when it results from the demoralizing effects of detention, the information-gathering advantage which the prosecution reaps from detention, or the strong inducement of having already served most of the potential sentence. Pretrial detention, then, indirectly burdens the constitutional right to fair trial by offering such powerful, if illegitimate, inducements to cop a plea. Indeed, to the extent such plea bargaining occurs on a large scale, the vitality of the adversary system as a whole may suffer insofar as its strength depends on effective challenge.

VII. Bail and the Proper Standard of Equal Protection Analysis

The bail system implicitly creates two classes of defendants— the “ins” and the “outs.” The multiple disadvantages suffered by the imprisoned defendant vis-à-vis his free counterpart have thus led detainees and commentators alike to challenge pretrial detention on equal protection grounds. Their basic argument is that the jail/bail classification results in invidious discrimination based on wealth, which, in turn, impinges on liberty and the right to a fair trial, both fundamental interests. To more fully analyze this claim, it is necessary to first determine the applicable standard for an equal protection analysis of bail.

A. General Equal Protection Considerations

Through a long series of decisions, the United States Supreme Court has established that, as a minimum, the equal protection clause requires that state legislative classifications which affect some citizens differently than others be reasonably related to a legitimate state purpose. The legislature, of course, need not treat

244. Id. at 276 (dictum).
245. See New York Bail Study, supra note 138, at 725. In addition to the inducements resulting from pretrial detention, Chief Judge Bazelon recognized that “empirical evidence supports the proposition that judges do sentence defendants who have demanded a trial more severely,” so that arrestees always have an incentive to plead guilty. Scott v. United States, 419 F.2d 264, 269 (D.C. Cir. 1969) (footnote omitted).
246. See Packer, supra note 235, at 41.
248. See notes 401–12 and accompanying text infra.
all alike, since “[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.” Rather, the purpose of the equal protection clause is to ensure “that all persons similarly circumstanced shall be treated alike.” The traditional equal protection test is whether state action differentiating between two classes has a rational basis in a legitimate state interest. This test establishes a presumption of reasonableness which the assailant must overcome by showing the arbitrary or invidiously discriminatory nature of the classification. Once the plaintiff establishes a prima facie case, the state can offer the most tenuous of grounds to justify its classification. As the Supreme Court ruled in McGowan v. Maryland, “[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.” Under the rational basis standard, legislatures have wide discretion and may enact statutes which actually create or maintain some inequalities. This lenient standard of rationality has typically been applied to discriminatory state action in the context of economic matters. As the Court noted in Dandridge v. Williams.

255. See, e.g., Goesaert v. Cleary, 335 U.S. 464 (1948); Kotch v. Board of River Port Pilot Comm’rs, 330 U.S. 552 (1946). In Goesaert, the Court upheld a Michigan statute which prohibited the licensing of women as bartenders unless they were wives or daughters of male bar owners, finding that “Michigan evidently believes that the oversight assured through ownership of a bar by a barmaid’s husband or father minimizes hazards that may confront a barmaid without such protecting oversight.” 335 U.S. at 466. Similarly, in Kotch, the Court upheld the practice of nepotism in the selection of river pilots on the grounds that such procedure was related to the promotion of public safety. 330 U.S. at 564. See Note, supra note 252, at 1079–81.
257. Id. at 426 (citations omitted). But see Gunther, The Supreme Court 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1 (1972). The author viewed contemporary equal protection cases as suggesting a “means-focused model,” such that the “legislative means must substantially further legislative ends.” Id. at 20. This would involve a more intense review of the means-end nexus than McGowan posits, a diminished willingness to imagine facts that might underlie a questionable classification, and less tolerance of substantial under- and over-inclusiveness. See id. at 21–24. The model thus asks that the courts assess the rationality of the means in terms of the state’s purposes, rather than hypothesizing conceivable justifications on their own initiative. Id. at 21.
In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality."261

A test far more rigorous than the rational basis standard is applied to state legislation which classifies on the basis of a "suspect" category.262 Classifications which the Supreme Court has characterized as suspect263 include those based on race,264 national ancestry,265 and alienage.266 This more stringent test also applies when legislative classifications impinge on fundamental rights, based on the principle that certain rights and interests are so crucial to a democratic society that their infringement should not be permitted except for the most compelling reasons.267 Interests judicially designated as "fundamental" include the right to vote,268 to procreate,269 to travel,270 and to enjoy equal access to appellate review,271 as well as rights expressly protected by other constitutional provisions.272 When states discriminate on the basis of a

261. Id. at 485, quoting Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).
262. See Note, supra note 252, at 1088.
263. Although the Court has heard arguments that wealth and sex should be classified as suspect, a majority of the Court has never so held. In Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), the Court stated that "[l]ines drawn on the basis of wealth or property, like those of race . . . , are traditionally disfavored." Id. at 668 (citations omitted). The Court subsequently clarified that this language did not establish wealth as suspect. See San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 29 (1973).

With respect to gender-based categories, a plurality of the Court found sex to be a suspect classification in Frontiero v. Richardson, 411 U.S. 677, 682 (1973). However, later decisions have not so employed the "strict scrutiny" analysis. See Craig v. Boren, 429 U.S. 190, 197-99 (1976).
265. See Korematsu v. United States, 323 U.S. 214, 216 (1944); Hirabayashi v. United States, 320 U.S. 81, 100 (1942).
266. See Graham v. Richardson, 403 U.S. 365, 376 (1971).
267. See Note, supra note 252, at 1120-21.
272. See Note, supra note 252, at 1128. Although the Court has strictly scrutinized legislation imposing limitations on the exercise of first amendment rights, it is apparent that the more rigorous standard of review flows from the first amendment itself, rather than from the equal protection analysis. Id. See, e.g., Williams v. Rhodes, 393 U.S. 22, 30 (1968) (right of association for the advancement of political beliefs); Sherbert v. Verner, 374 U.S. 398, 403, 406 (1963) (freedom of religion).
suspect classification, or infringe on fundamental interests, the courts will examine the classification with "strict scrutiny."273 For a legislative scheme to survive this rigid standard, the state must demonstrate that the distinctions drawn are necessary to achieve a "compelling governmental interest."274 When the strict scrutiny test is invoked, the state classification is not entitled to a presumption of validity.275 Consequently, to survive this test, the legislative classification must be drawn with a high degree of precision,276 and "tailored" to serve a legitimate objective by the least onerous means.277

As has been recognized, the characterization of a class as "suspect" or of an interest as "fundamental" can be determinative of whether a legislative classification survives judicial review.278 The dichotomous tests of "rational basis" and "strict scrutiny"279 perhaps lend themselves to facile labeling rather than hard analysis of the relevant rights and interests at stake. Yet until a more overarching, sliding scale analysis suggested in several recent cases280 gains ascendancy, the courts are left with certain labeling obligations.

273. Note, supra note 252, at 1088, 1127.
280. Justice Marshall, in Chicago Police Dep't v. Mosley, 408 U.S. 92 (1972), and Justice Powell, in Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972), each tried to frame an "overarching" inquiry applicable to all equal protection cases rather than formulating the issue in terms of rational basis or strict scrutiny. 408 U.S. at 95; 406 U.S. at 172-73. Under this approach, the Court would look at the character of the classification, the constitutional and social importance of interests adversely affected, the invidiousness of the basis upon which the classification is drawn, the importance to individuals in the discriminated class of the benefits not received, and the asserted state interests in support of the classification. See San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 99 (1973) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 547, 519-21 (1970) (Marshall, J., dissenting); Gunther, supra note 257, at 17.

Another approach to equal protection analysis which avoids the two-tiered analysis is the "minimum protection" theory of Professor Michelman. Michelman, The Supreme Court 1968 Term, Foreword: On Protecting the Poor through the Fourteenth Amendment, 83 Harv. L. Rev. 7, 33-39 (1969). According to this theory, the courts would look for "instances in which persons have important needs or interests which they are prevented from satisfying because of traits or predicaments..."
In examining the system of bail, therefore, the threshold questions are whether it discriminates on the basis of a suspect classification or infringes on a fundamental interest. Bail, however, presents something of a hybrid constitutional issue. In one view, it appears to involve a state judgment as to the necessity of a system of economic deterrents to assure the presence of the defendant at trial. Bail, then, would arguably be a necessary incident of the state police power. Seen in this light, the bail system approaches those commercial and social welfare classifications to which the courts have traditionally deferred under the rational basis standard. Yet bail also classifies defendants into “ins” and “outs” on the basis of wealth, thereby impinging on the liberty of those pretrial detainees. Under this view, bail provisions would be examined with strict scrutiny by the courts. The equal protection argument, then, largely involves the characterization of bail. The following discussion will explore the dual issues of bail as a creator of suspect classifications and as an infringement of fundamental interests.

B. Pretrial Detainees: A Suspect Class?

The distinction between “ins” and “outs” created by the system of bail is essentially one based on wealth. It has been suggested that such a classification is per se suspect for purposes of equal protection analysis. Historically, “the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy

not adopted by free and proximate choice.” Id. at 35. When such instances arise, the question should be asked whether in a just society it is tolerable to risk the nonsatisfaction of the want in question. Id. It is questionable whether Professor Michelman’s test only differs semantically from the two-tiered analysis; and if not, whether its nebulous criteria open the sluices for the kind of substantive due process approach long rejected by the Supreme Court.

281. See note 259 and accompanying text supra. It may also be argued that bail occupies an especially sacrosanct station because it is somehow “sanctioned” by the eighth amendment. The eighth amendment, however, only provides that “excessive bail shall not be required,” not that “bail shall be required.” Arguably, it may be implied from the very reference to bail in the amendment that the framers thereby gave it their imprimatur. Without addressing the issue of the weight to be accorded legislative intent, such an implication, in the absence of a more complete legislative history, remains the merest speculation. The language of the eighth amendment is totally noncommittal on the question of the desirability of bail.

282. A nonfinancially oriented system, of course, could be formulated such that those arrestees who met certain standards would be released, and the others detained without recourse to bail. At present, however, with the exception of defendants charged with capital offenses and the narrow range specified in the District of Columbia Act, the wealthy can still obtain release unavailable to their poorer counterparts. See note 105 supra.

renders racial classifications "constitutionally suspect . . . ."284 That the common denominator of "suspectness" is not race or the immutable quality of race285 is indicated by the inclusion of classifications based on alienage.286 Similarly, theories based on the element of stigmatization, although "an explicit concern in many racial classification cases," appear to mistake "one type of harm commonly caused by suspect classifications with a requisite common denominator."287

One element shared by race, nationality, and alienage, however, is that they are "in most circumstances irrelevant" to any constitutionally acceptable legislative purpose.288 In addition, certain racial and ethnic groups have been recognized as "discrete and insular minorities"289 without sufficient political power to protect themselves in the legislative process.290 Where groups are politically impotent or wield less influence than their proportion of the population would warrant, it can be argued that the legislative judgment does not represent a proper majoritarian choice.291 When legislation adversely affects those politically disadvantaged groups vis-à-vis classes constituting the legislative majority, it is inherently untrustworthy.292 Judge Skelly Wright, in Hobson v. Hansen,293 viewed suspect categories as a product of the judicial attitude toward legislation involving impotent minority groups:

Judicial deference to these [legislative and administrative] judgments is predicated in the confidence courts have that they are just resolutions of conflicting interests. This confidence is

285. See Korematsu v. United States, 323 U.S. 214, 243 (1944) (Jackson, J., dissenting). The "unalterableness" theory of suspect classifications is predicated on the notion that individuals should not receive blame or reward for traits over which they have no control. See Note, supra note 252, at 1126–27. Since all people are created "equal," unalterable characteristics presumptively furnish no rational basis for classification. Id. at 1127.
often misplaced when the vital interests of the poor and of racial minorities are involved. For these groups are not always assured of a full and fair hearing through the ordinary political processes, not so much because of the chance of outright bias, but because of the abiding danger that the power structure . . . may incline to pay little heed to even the deserving interests of a politically voiceless and invisible minority.294

Applying the court's analysis to classifications on the basis of wealth, it is apparent that, unlike race, nationality, or alienage, wealth is generally relevant to a legitimate state purpose.295 Any disbursement of limited public welfare funds, for example, requires a distinction between the more and less needy applicants. Similarly, any state cultural or recreational institution, such as a museum or golf course, requiring an admission or membership fee, unavoidably distinguishes between citizens who can and cannot afford the charge.296 The obviously legitimate state purpose for the above classifications belies the characterization of wealth as per se suspect.

On the issue of "suspectness" as a function of political impotency, however, a different conclusion may be appropriate. It is common knowledge that the election of public officials and the influence on those officials by lobbyists is heavily dependent on financial resources.297 As Professor Michelman astutely reasoned:

[I]f money is power, then a class deliberately defined so as to include everyone who has less wealth or income than any person outside it may certainly be deemed, as racial minorities are by many observers deemed, to be especially susceptible to abuse by majoritarian process; and classification of "the poor" as such may, like classification of racial minorities as such, be popularly understood as a badge of inferiority.298

It may thus be argued that wealth classifications are often ill-suited to advance valid government interests, may be readily adopted by legislatures to oppressive uses, and tend to stigmatize the indi-

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296. See generally Michelman, supra note 280, at 28-29.
298. Michelman, supra note 280, at 21.
gent.299 Yet it can hardly be claimed that distinctions drawn on the basis of wealth divide any group into a “discrete and insular minority,”300 since it is questionable where the lines between wealth and poverty are to be drawn. The status of poverty is not immutable, but rather admits of relatively rapid change.301 Moreover, the poor are not insular since they at least occasionally interact with other economic levels of society.

Through the years a number of Supreme Court decisions have suggested that classifications along the lines of wealth are suspect.302 In Edwards v. California,303 where the Court struck down a statute making it a misdemeanor to knowingly assist in transporting an indigent into California,304 Justice Jackson stated in a concurring opinion:

[A] man’s mere property status, without more, cannot be used by a state to test, qualify, or limit his rights as a citizen of the United States. “Indigence” in itself is neither a source of rights nor a basis for denying them. The mere state of being without funds is a neutral fact — constitutionally an irrelevance, like race, creed, or color.305

Despite many “tantalizing statements’ from the Warren Court,”306 wealth discrimination alone has never been held to trigger strict scrutiny.307 Rather, such review has been invoked only where the classification infringes on an important individual interest, such as the right to vote.308

299. See id. at 21, 29.
300. See id. at 19–39; Reid, Equal Protection or Equal Denial? Is It Time for Racial Minorities, the Poor, Women, and Other Oppressed People to Regroup?, 3 Hofstra L. Rev. 1, 14–22 (1975).
303. 314 U.S. 160 (1941).
304. Id. at 173, 177. The Court held that this statute was “an unconstitutional barrier to interstate commerce.” Id. at 173.
305. Id. at 184–85 (Jackson, J., concurring).
306. Gunther, supra note 257, at 9–10. Professor Gunther elaborated: “The Warren Court left a legacy of anticipations as well as accomplishments. Its new equal protection was a dynamic concept, and the radiations encouraged hopes of further steps toward egalitarianism.” Id. at 8.
Insofar as pecuniary discrimination is inherent to the system of bail, the “in-out” classification merits at least the same “conditionally suspect” status as other wealth classifications.\(^{309}\) Unlike the general, nebulous class of indigents,\(^ {310}\) detained arrestees represent a clear case of a “discrete and insular minority.” Since the class constitutes a miniscule percentage, even of the poor, the class is easily identifiable,\(^{311}\) and it is hard to imagine a more “insular” category than those locked away in prison. Certainly the ability of prisoners to interact with the outside world is severely restricted.\(^ {312}\)

Moreover, pretrial detainees suffer not only the stigmatization generally incident to low economic status,\(^ {313}\) but also the added stigma of imprisonment. Pretrial detention, like personal poverty, “is not a permanent disability; its shackles may be escaped.”\(^ {314}\) Yet, as discussed above, the unalterable quality of a class is not the common denominator which inevitably renders a category suspect.\(^ {315}\)

Pretrial detainees share the same lack of political power as other relatively needy citizens.\(^ {316}\) In addition, serious obstacles may hinder the detainee’s exercise of the franchise.\(^ {317}\) In *McDonald v. Board of Elections*,\(^ {318}\) unsentenced inmates awaiting trial in Cook County, Illinois, although qualified electors, were unable to obtain absentee ballots.\(^ {319}\) The United States Supreme Court, applying the “rational basis” test, upheld the Illinois legislature’s failure to provide for absentee voting for such detainees.\(^ {320}\) Chief Justice Warren, writing for the Court, found that the statutory provision restricting absentee voting was not drawn on the basis of wealth.\(^ {321}\) What the Court myopically ignored was that while the statute was not explicitly formulated in terms of wealth, the plaintiffs for whom bail was set would not have been detained at all, and hence “indirectly” deprived of the vote, had they the requisite bail money.\(^ {322}\) Almost incredibly,

\(^{309}\) In other words, differential impact on the basis of wealth is suspect to the extent it infringes on a fundamental interest or an important individual interest. See *Bellamy Study*, supra note 173, at 460–61.

\(^{310}\) See text accompanying notes 300 & 301 supra.

\(^{311}\) See generally Reid, supra note 300, at 14–22.


\(^{313}\) See E. BANFIELD, THE UNHEAVENLY CITY 63, 75-76 (1970).


\(^{315}\) See note 285 and accompanying text supra.

\(^{316}\) See note 290 and accompanying text supra.

\(^{317}\) See Comment, supra note 312, at 129, 131.


\(^{319}\) Id. at 803.

\(^{320}\) Id. at 809.

\(^{321}\) Id. at 807.

the Court reasoned that the legislative scheme at issue had no impact on the ability to exercise the right to vote, but merely on the right to receive absentee ballots.\textsuperscript{323} However dubious the reasoning or result of \textit{McDonald}, it enables legislatures to effectively deprive pretrial detainees of the right to vote.\textsuperscript{324} A legislature may thereby completely insulate its exercise of power from those adversely affected by it. The political impotence of detainees could hardly be more complete.

The wealth oriented classification of arrestees in the bail system, however, like wealth differentiation generally, is not typically irrelevant to legitimate state purposes.\textsuperscript{325} To the extent cash bail operates as a deterrent to flight, the "in-out" classification serves a justifiable state interest. Logically, though, the test of a classification which is "in most circumstances irrelevant" to any constitutionally acceptable legislative purpose\textsuperscript{326} cannot be the proper one for "suspectness." The mere fact that a classification typically satisfies the rational basis standard only begs the question. The test of irrelevancy to a state purpose accordingly confuses a frequent characteristic of suspect classes with a common denominator. The only objection, then, to the conclusion that pretrial detainees comprise a suspect class is the Supreme Court's current disinclination "to create substantive constitutional rights in the name of guaranteeing equal protection of the laws."\textsuperscript{327} This disavowal of "substantive equal protection," however, virtually precludes the possibility of the Court holding that bail creates a per se suspect classification.

C. Bail: An Infringement of "Important Individual Interests"?

The courts will ordinarily regard with strict scrutiny any legislative discrimination affecting a suspect class or impinging on

\begin{itemize}
\item \textsuperscript{323} 394 U.S. at 807.
\item \textsuperscript{324} Cf. Goosby v. Osser, 409 U.S. 512, 521-22 (1973) (state statute absolutely precluded an inmate's right to vote).
\item \textsuperscript{325} See text accompanying note 129 supra.
\item \textsuperscript{326} Hirabayashi v. United States, 320 U.S. 81, 100 (1943).
\begin{quote}
[T]he Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights.
\end{quote}
\textit{Id.} at 669 (citation omitted).
\end{itemize}
the exercise of a fundamental right. As a conditionally suspect wealth classification, bail should trigger the equal protection clause to the extent it infringes on what Justice Marshall calls an "important individual interest" or a constitutionally protected right. If discrimination against the conditionally suspect class of pretrial detainees also requires the infringement of a fundamental right before strict scrutiny will be invoked, then the "conditionally suspect" element would be effectively eliminated from the equal protection calculus. If the "conditional" status of wealth classification means anything, therefore, it is that something less than the infringement of a fundamental right may call for strict scrutiny.

This "something less" could take either of two forms: 1) a level of interference with the fundamental right which is below the strict scrutiny threshold for an "infringement," or 2) the infringement of an important but nonfundamental interest. With respect to the latter alternative, Justice Marshall recognized that strict scrutiny has been applied to wealth classifications "where the discrimination affects an important individual interest." The following discussion will focus on the issue of what interests must be impinged by a wealth classification to call for the strict scrutiny test.


Two United States Supreme Court decisions have struck down wealth classifications which interfered with the effective exercise of the franchise. In Harper v. Virginia Board of Elections, Justice Douglas, writing for the majority, held a Virginia poll tax violative of the equal protection clause on the grounds that it made "the affluence of the voter or payment of any fee an electoral standard." Justice Douglas' reasoning, however, was unclear at several

328. See notes 262-77 and accompanying text supra.
330. See notes 267-77 & 303-08 and accompanying text supra.
331. See note 309 and accompanying text supra.
332. See notes 302-09 and accompanying text supra.
333. See id.
334. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 102 n.61 (1973) (Marshall, J., dissenting) (citation omitted) (emphasis added). See Van Dusartz v. Hatfield, 334 F. Supp. 870 (D. Minn. 1971). In Van Dusartz, the court, while neither holding wealth classifications suspect nor education a fundamental right, ruled that their cumulative constitutional significance required the application of the strict scrutiny test. Id. at 876.
337. Id. at 666.
points. Early in the opinion, for example, he suggested that the poll
tax was constitutionally defective even under the rational basis
test. 338 Later, he indicated that the characterization of the right to
vote as "fundamental" was crucial to the unconstitutionality of state
action which burdens that right. 339 If the tax were held violative of
equal protection because of its differential impact according to
income, however, the Court could have excused indigents and
"graduated" the tax, thus effecting equalization, rather than
abolishing it. Invalidation thus indicates that the Court was
actually relying on due process to forbid any burden on the
franchise, regardless of whether differential income was taken into
account. 340

To the extent that the wealth classification in Harper burdened
an admittedly fundamental constitutional right, 341 the case indicated
nothing as to whether encumbrances on lesser rights would
also trigger strict scrutiny. Bullock v. Carter, 342 however, held that
the deprivation of a nonfundamental right which infringes, but does
not totally preclude, the exercise of a fundamental right must be
"reasonably necessary to the accomplishment of legitimate state
objectives." 343 In that case, the United States Supreme Court struck
down a Texas statute requiring a candidate for public office to pay a
filing fee to have his or her name placed on the ballot in the primary
election. 344 The issue posed by Chief Justice Burger, writing for the
Court, was whether such a statute discriminated against prospective
candidates or against voters who wished to support them. 345 The
Court proceeded to apply strict scrutiny to the filing fee scheme both
because of its impact on the exercise of the franchise and because the
impact was related to wealth. 346 The filing fees thus invalidly
precluded candidates lacking personal wealth or affluent backers
from entering the race, 347 and limited the voters' choice of

338. Id. at 668. In the words of Justice Douglas, "[t]o introduce wealth or payment
of a fee as a measure of a voter's qualifications is to introduce a capricious or
irrelevant factor." Id.
339. Id. at 670.
340. See Note, supra note 252, at 1181 n.82.
341. See notes 267-72 and accompanying text supra.
342. 405 U.S. 134 (1972).
343. Id. at 144.
344. Id. at 149.
345. Id. at 141.
346. Id. at 144.
347. Id. at 146.
candidates, especially those voters in the less affluent part of the community.\textsuperscript{348} As Chief Justice Burger declared:

\[\text{[D]isparity in voting power based on wealth cannot be described by reference to discrete and precisely defined segments of the community as is typical of inequities challenged under the Equal Protection Clause . . . . But we would ignore reality were we not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status.}\textsuperscript{349}\]

Strict scrutiny was thus invoked in \textit{Bullock} because the statute's wealth classification infringed on the candidates' ability to run for office and the voters' choice on the ballot.\textsuperscript{350} Neither of these interests has ever been held fundamental for purposes of equal protection analysis.\textsuperscript{351} As the Court has recognized, however, these interests have an obvious impact on the exercise of the franchise, which is a fundamental right.\textsuperscript{352} Under \textit{Bullock}, then, if a wealth classification infringes on nonfundamental interests, thereby interfering with, but not entirely abrogating, a fundamental right, strict scrutiny is required.\textsuperscript{353}

In \textit{San Antonio Independent School District v. Rodriguez},\textsuperscript{354} however, the Supreme Court upheld a legislative wealth classification which did not preclude, but merely impaired, the effective exercise of a fundamental right.\textsuperscript{355} The plaintiffs in \textit{Rodriguez} brought an equal protection challenge against the Texas system of public school financing, which relied heavily on ad valorem taxes levied by the local districts.\textsuperscript{356} This financing scheme concededly resulted in substantial disparities in per pupil expenditures according to the property base of the school district.\textsuperscript{357} Plaintiffs thus asserted that such a legislative distinction based on wealth should trigger strict scrutiny because it infringed the right of education, which should be considered fundamental due to its impact on the effective exercise of free speech and the right to vote.\textsuperscript{358}

\begin{footnotesize}
\begin{enumerate}
\item 348. \textit{Id.} at 149.
\item 349. \textit{Id.} at 144.
\item 350. See text accompanying notes 347 & 348 supra.
\item 351. See notes 268–72 and accompanying text supra.
\item 354. 411 U.S. 1 (1973).
\item 355. \textit{Id.} at 23–24.
\item 356. \textit{Id.} at 4–5, 9–10.
\item 357. \textit{Id.} at 15 n.38.
\item 358. \textit{Id.} at 36–37.
\end{enumerate}
\end{footnotesize}
Although some precedent supported the plaintiffs, the Supreme Court upheld the Texas financing system based on its rational relation to a legitimate state purpose or interest, especially in view of the traditional deference accorded state taxation and disbursement of social welfare funds. Holding that wealth classifications alone cannot trigger strict scrutiny, Justice Powell, writing for the Court, found a lack of evidence that the Texas system discriminated against a definable category of poor people. He thus reasoned that the class of allegedly disadvantaged poor "is not susceptible of identification in traditional [equal protection] terms."

The Court also rejected the plaintiffs' argument that education should be considered a fundamental right "because it is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote." Justice Powell stressed that the Court has "never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice." He reasoned that, unlike cases such as Harper, the "lack of personal resources has not occasioned an absolute deprivation of the desired benefit." This

360. 411 U.S. at 55.
361. Id. at 28.
362. Id. at 22-23, 25, 28.
363. Id. at 25 (footnote omitted). The class involved, according to the Court, was "a large, diverse, and amorphous class, unified only by the common factor of residence in districts that have to less taxable wealth than other districts." Id. at 28 (footnote omitted). In contrast, the class of pretrial detainees may be characterized as small, discrete, and easily identifiable. See notes 309-15 and accompanying text supra.
364. 411 U.S. at 35. In dissent, Justice Marshall expounded a "nexus theory" for determining whether a right should be considered fundamental:
The task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution. As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly. Id. at 102-03 (Marshall, J., dissenting). Under the nexus theory, education would qualify for strict scrutiny because of its direct and predominant effect on the ability to exercise first amendment rights of free speech, and the crucial relationship between education and the political process, especially the informed exercise of the franchise. Id. at 112-16. (Marshall, J., dissenting).
365. Id. at 36 (emphasis in original).
366. For a discussion of Harper, see notes 336-39 and accompanying text supra.
367. 411 U.S. at 23. In any case involving a wealth classification, there is in a sense an "absolute deprivation of the desired benefit," be it a school book or a
notion that a wealth classification must totally deny a fundamental right to merit strict scrutiny is directly contrary to Bullock. Justice Marshall vigorously argued in his Rodriguez dissent that the majority's "absolute deprivation" theory also runs counter to the Griffin v. Illinois-Douglas v. California line of cases.

2. Griffin and its Progeny

In Griffin, indigent criminal defendants challenged an Illinois statute granting full appellate review of convictions only when the defendant, inter alia, furnished the appellate court with a certified report of the trial proceedings or bill of exceptions. The appellate procedure required that all petitioners seeking review, except those sentenced to death, pay for the transcripts. The Court struck down the statute, holding that while states are not constitutionally required to provide an appellate procedure, any procedure provided must apply equally to all persons regardless of indigency.

In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color. Plainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial.

transcript. See Griffin v. Illinois, 351 U.S. 12 (1956). Yet if Justice Powell had meant "benefit" to be construed in this manner, he obviously would have found an "absolute deprivation" in Rodriguez, which he expressly did not. See 411 U.S. at 23-24. Rather, in the context of the opinion, the term "benefit" is used to refer to those speech and voting rights alleged to have been impaired by disparities in the quality of education according to the wealth of the local districts. Id. at 35-36.

Arguably, the standard established by Justice Powell as a prerequisite for strict scrutiny is not "absolute deprivation of the desired benefit." At one point in the opinion, in distinguishing prior cases such as Douglas v. California, 372 U.S. 353 (1963), he noted that they involved "an absolute deprivation of a meaningful opportunity to enjoy ... [a] benefit." 411 U.S. at 20. It is difficult to know what Justice Powell meant by "absolute deprivation" in that context, if not total absence of an opportunity to enjoy a benefit. That construction would square the quotation with similar language in the opinion. See 411 U.S. at 23. In any event, the language by its very terms does not apply to Rodriguez, but is merely descriptive of prior cases. Id. 368. See notes 342-53 and accompanying text supra.


373. Id. at 14.

374. Id. at 18-19. Before Griffin, courts had reasoned that since no one had a right to appeal a judgment of conviction, discrimination against an appellant solely on the basis of poverty did not affect a constitutional right. See United States v. Johnson, 238 F.2d 565, 567 (2d Cir. 1956) (Frank, J., dissenting), cert. dismissed per stipulation, 357 U.S. 933 (1958).

375. 351 U.S. at 17-18.
In *Griffin*, then, the right to appeal was not *absolutely* denied to indigents unable to pay for transcripts, but was simply made less meaningful. In the words of the Court:

[T]o deny *adequate* review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside. . . . There can be no equal justice where the *kind* of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as *adequate* appellate review as defendants who have money enough to buy transcripts.\(^{376}\)

Although the language of *Griffin* refers to relative rather than absolute deprivation,\(^{377}\) the Court nonetheless seems to have held that a wealth classification that merely impairs, but does not deny, the right to appeal triggers strict scrutiny.\(^{378}\)

The progeny of *Griffin* similarly militate against the *Rodriguez* absolute deprivation theory.\(^{379}\) In *Mayer v. City of Chicago*,\(^{380}\) an indigent defendant attempting to appeal from a nonfelony conviction was denied a free transcript under a court rule providing for free transcripts only in felony cases.\(^{381}\) Although the lack of a verbatim transcript would not entirely prevent an appeal, the United States Supreme Court ruled that "[t]he indigent defendant must be afforded as effective an appeal as the defendant who can pay."\(^{382}\) As in *Griffin*, the *Mayer* Court emphasized that strict scrutiny would be invoked where wealth classifications render an appeal meaningless, ineffective, or otherwise inadequate.\(^{383}\)

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\(^{376}\) *Id.* at 19 (emphasis added).

\(^{377}\) *See id.*


\(^{379}\) *See Lindsey v. Normet*, 405 U.S. 56 (1972). In *Lindsey*, tenants, threatened with a suit for possession by their landlord, challenged the Oregon Forcible Entry and Detainer Statute, OR. REV. STAT. §§105.105 – 155 (1977)) (FED), which required a defendant to post bond on appeal in twice the amount of rent expected to accrue pending review. 405 U.S. at 59, 63-64. Relying on *Griffin*, the Court ruled that the double bond requirement places a heavy burden on the statutory right of FED defendants to appeal, and discriminatorily forecloses appeal by indigents unable to afford the bond. *Id.* at 77-79. The Court found that the statute bore no reasonable relation to a valid state objective, and therefore did not reach the issue of whether *Griffin* applies to civil appeals so as to require strict scrutiny of the FED bond requirement. *Id.* at 76-77. As in *Griffin*, the mere burden on a statutory right, rather than total preclusion of the right, was sufficient in *Lindsey* to invalidate the double bond. *See id.* at 77-79.

\(^{380}\) 404 U.S. 189 (1971).

\(^{381}\) *Id.* at 190-91.

\(^{382}\) *Id.* at 196 n.6.

\(^{383}\) *See id.* at 193-95.
In cases after Griffin, the Supreme Court invalidated state court denials of free transcripts to indigents filing habeas corpus petitions\(^{384}\) and to those appealing from convictions for quasi-criminal offenses,\(^{385}\) where transcripts were available to those who could afford them. In Roberts v. LaVallee,\(^ {386}\) the Court ordered that the minutes of a preliminary hearing be provided to an indigent appellant, stating that "differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution."\(^ {387}\) The question of free transcripts also arose in a case where an indigent defendant was denied the right to proceed in federal court in forma pauperis.\(^ {388}\) The Court held that where it appears that issues sought to be raised cannot adequately be ascertained from the face of the application to the appellate court, the prospective appellant must be provided with a transcript of the record sufficient to allow him to show that the trial court's certificate of lack of good faith is erroneous.\(^ {389}\)

Similarly, the United States Supreme Court has held that a free transcript must be made available to indigent defendants in state court even where the trial judge found that "justice would not be promoted"\(^ {390}\) or that the appeal raised only frivolous questions.\(^ {391}\) In so ruling, the Court reasoned that the trial judge's determination was an inadequate substitute for the full appellate review available to nonindigents.\(^ {392}\)


\(^{386}\) 389 U.S. 40 (1967) (per curiam).

\(^{387}\) Id. at 42 (citations omitted).


\(^{389}\) Id. at 446. In the federal context, an appeal may be taken in forma pauperis unless the district court certifies in writing that it is not taken in good faith, i.e., that the issues raised by the appellant are frivolous. See 28 U.S.C. § 1915 (1970).


\(^{392}\) Id. at 499; Eskridge v. Washington State Bd. of Prison Terms and Paroles, 357 U.S. 214, 216 (1958) (per curiam). For a similar conclusion, see Lane v. Brown, 372 U.S. 477 (1963). In Lane, the Court held unconstitutional an Indiana procedure whereby an indigent could only procure a free transcript of a coram nobis proceeding at the discretion of the public defender. Id. at 478–79, 485. But see Britt v. North Carolina, 404 U.S. 226 (1971). The Court in Britt held that mistrial minutes need not be provided free to indigent appellants if they are furnished alternatives "substantially equivalent" to transcripts. Id. at 230.

The line of cases in which the Court held docket fee requirements which denied indigents access to appellate review unconstitutional represents "absolute deprivation" as the phrase is used in Rodriguez. See note 267 and accompanying text.
In *Douglas*, the companion case of *Gideon v. Wainwright*, the issue of "absolute deprivation of a benefit" did not surface in as definitive a form as in the cases discussed above. The question presented in *Douglas* was whether counsel could be denied to an indigent defendant on a first appeal as of right where the state court had made an ex parte determination that the appointment of counsel would be of no advantage to the defendant. The Supreme Court found this determination discriminatory against the poor, and hence violative of the equal protection clause. The California wealth classification concededly resulted in the absolute deprivation of the right to counsel, a fundamental right under *Gideon*. Yet Justice Douglas, writing for the Court, emphasized the crucial role of counsel in ensuring meaningful review for the indigent appellant. The absence of counsel did not foreclose appeal, as the Court recognized, but only affected its quality. As Justice Douglas observed: "The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal." 

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394. 372 U.S. at 345–46.

395. *Id.* at 355–58. Justice Douglas, writing the majority opinion, emphasized: [Where the merits of the one and only appeal an indigent has are decided without the benefit of counsel, we think an unconstitutional line has been drawn between rich and poor . . . . There is lacking that equality demanded by the Fourteenth Amendment where the rich man . . . enjoys the benefit of counsel’s [assistance], while the indigent . . . is forced to shift for himself.

*Id.* at 357–58 (emphasis in original). But see Michelman, *supra* note 280. Professor Michelman cautioned: "I believe we ought to hear the teachings of *Harper* and the *Griffin-Douglas* line with an ear resolutely deaf to superfluous rhetoric." *Id.* at 32–33.

396. See 372 U.S. at 355–58.

397. See 372 U.S. at 340–43.

398. 372 U.S. at 355–58. *Gideon* also stressed that the poor could not be assured a fair trial without the assistance of counsel. 372 U.S. at 342, 344.

399. 372 U.S. at 356. But see Ross v. Moffitt, 417 U.S. 600 (1974). In *Ross*, the Court ruled that North Carolina was not required to provide counsel for indigents seeking discretionary review by the state supreme court or United States Supreme Court. *Id.* at 610, 615, 619.

400. 372 U.S. at 358. *Rodriguez* attempted to distinguish *Douglas* on the grounds that it "provides no relief for those on whom the burdens of paying for a criminal defense are, relatively speaking, great but not insurmountable. Nor does it deal with relative differences in the quality of counsel acquired by the less wealthy." 411 U.S. at 21. The *Rodriguez* Court thus ignored the fact that while *Douglas* was not concerned with the relative quality of counsel, it definitely was concerned with the relative quality of the appeal. See notes 398 & 399 and accompanying text *supra*. The
D. The Application of Equal Protection Cases to Pretrial Detainees

Contrary to Rodriguez, then, precedent has consistently held that absolute deprivation of a benefit is not required before wealth discrimination triggers strict scrutiny. Rather, the mere impairment of a benefit, such as less effective or meaningful appeal, is sufficient. Moreover, an interest, e.g., in a transcript, the total deprivation of which impairs a benefit, e.g., appeal, need not itself be "fundamental" in nature.

Applying these principles to the classification created by the cash bail system, the threshold question is the nature of the right impinged on by pretrial incarceration. Superficially, the answer would appear to be the right to liberty protected by the fifth and fourteenth amendments, but the pretrial detainee must be deprived of his liberty without due process of law. Arguably, under the "fundamental fairness" standard of due process the bail system strikes a satisfactory balance between society's interest in the defendant's appearance at trial and the defendant's interest in liberty pending conviction. Nor can pretrial imprisonment contravene the eighth amendment, since the excessive bail clause creates no right to bail in any circumstances, much less any right to pretrial release. It would therefore appear that the wealth classification created by the cash bail system causes no absolute deprivation of a constitutionally protected right.

Yet, as in the Griffin-Douglas-Harper-Bullock line of cases, pretrial confinement does impair the effective exercise of a number of the detainee's fundamental rights. The indigent defendant's right to counsel, for example, is severely hampered by restrictions placed on the detainee's communication with the outside world, in addition to the difficulty of consulting in privacy. The effectiveness of counsel's assistance, as well as the detainee's right to a fair trial, is generally hindered by the obstacles which imprisonment imposes on his ability to gather evidence. While in jail, the

402. According to Rodriguez and accepted equal protection analysis, the absolute deprivation of a "fundamental right" without due process would call for strict scrutiny. See 411 U.S. at 37–38. Yet such a result in the bail context would prove anomalous in view of the Court's holding in Carlson v. Landon, 342 U.S. 524 (1952), that there is no absolute right to be admitted to bail. Id. at 545–46. The above result would also contradict cases denying the "right" of a defendant to make bail where set at a reasonable amount. See text accompanying note 39 supra.
403. See notes 54–80 and accompanying text supra.
404. See notes 405–12 and accompanying text infra.
405. See notes 218–20 and accompanying text supra.
406. Id.
defendant can neither locate witnesses nor seek to induce them to testify on his behalf.407 The scales are further tipped in the prosecution’s favor insofar as it derives evidence solely from the defendant’s detention by his greater availability for lineups and interrogation.408 Incarceration may also engender subtle judge or jury prejudice to the detriment of the detainee’s right to a trial before an impartial trier.409 Moreover, as the period of pretrial detention approaches the potential sentence for the crime charged, the detainee’s right to a trial and appeal may be effectively precluded.410 If pretrial detention does not absolutely deprive the detainee of constitutionally protected rights, it does impair his right to effective counsel and fair trial.411 Because the pecuniary discrimination produced by bail at a minimum impairs the effective exercise of fundamental constitutional rights, the Griffin-Douglas-Harper-Bullock line of cases requires courts to examine bail with strict scrutiny.412

VIII. CAN BAIL SURVIVE STRICT SCRUTINY?

To survive the strict scrutiny test, a statutory classification must be a necessary means of accomplishing a compelling state purpose.413 Furthermore, the distinction must be precisely formulated in terms neither substantially overbroad nor underinclusive so as to achieve the compelling purpose by the least drastic means.414

407. Id.
408. See note 231 and accompanying text supra.
409. See generally Foote, supra note 18, at 960–61.
410. See generally Philadelphia Bail Study, supra note 39, at 1050. A perhaps more tenuous argument could be made that by “illegitimately” inducing guilty pleas, pretrial detention cuts off the right to appeal.
411. See notes 404–09 and accompanying text supra.
412. The fact that the bail system does not explicitly single out the poor for harsh treatment does not prevent the application of strict scrutiny. That the differential impact of a seemingly neutral law can violate equal protection was recognized by the Griffin Court: “[A] law nondiscriminatory on its face may be grossly discriminatory in its operation.” 351 U.S. at 17 n.11. See also Hobson v. Hansen, 269 F. Supp. 401, 507 (D.D.C. 1967), remanded sub nom. Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

Justice Harlan, dissenting in Griffin, reasoned that every financial exaction imposed by a state falls more heavily on the poor than the wealthy, but that such de facto discriminatory effect should not give rise to a violation of equal protection. 351 U.S. at 34 (Harlan, J., dissenting). In Justice Harlan’s words: “All that Illinois has done is to fail to alleviate the consequences of differences in economic circumstances that exist wholly apart from any state action.” Id.

Justice Harlan, dissenting in Douglas, further contended that the states have no affirmative duty under the fourteenth amendment to “redress economic imbalances,” or “to give to some whatever others can afford.” 351 U.S. at 361–62 (Harlan, J., dissenting).
413. See Note, supra note 252, at 1102–03.
414. See notes 274–77 and accompanying text supra.
Understandably, the Supreme Court has upheld few statutory provisions where strict scrutiny has been invoked. Applying the above standards to the system of cash bail, the initial inquiry is whether the state purpose of ensuring the appearance of defendants at trial is compelling. The state interest in any one defendant appearing in court may seem insignificant, especially in view of the relatively small cost of chasing "jumpers." Yet without the great majority of defendants appearing at trial and submitting to punishment when convicted, the element of deterrence on which the criminal justice system rests would be undermined. Accordingly, states do have a compelling interest — maintaining the integrity of their police function — in deterring the flight of arrestees.

The question of whether cash bail is a "necessary" means of achieving that compelling interest is less clear because of the paucity of experience with alternative methods and the inconclusive nature of studies of nonbail release systems. Certainly before courts began releasing defendants on their own recognizance (ROR) in the early 1960's, one could not confidently predict the effects of abandoning bail. The trend of nonbail release was continued in the Bail Reform Act, which made ROR, with supervision by the courts and the defendant's family or friends, the preferred alternative.

Even studies comparing the jump rate of ROR releasees and cash bail releasees provide little help in assessing the hypothetical situation of no bail. The Vera Foundation found that only 1.6% of 3,505 New York City ROR releasees willfully failed to appear, as compared to 5% of those released on cash bail. Other cities have reported similarly low failure to appear (FTA) rates for ROR programs; 1.98% in Los Angeles in 1968, and 5.9% in Philadelphia in 1974.
The low FTA rates for ROR defendants cannot be compared meaningfully to the rate of cash bail releasees, however, because of the incongruity of the respective populations. The people released on their own recognizance were those most likely to appear at trial, as measured by their ties to the community, stability, employment record, and other indicia of likelihood of appearance at trial. Moreover, the Vera Foundation excluded from ROR consideration those suspected of being on drugs, and included a disproportionate number of defendants charged with relatively minor crimes who would be likely to appear in any event. These findings, then, do not accurately reflect the probability of success of release systems not requiring cash bail as a condition of freedom.

TABLE 1 — FTA RATE AS A FUNCTION OF BAIL AMOUNT

<table>
<thead>
<tr>
<th>Bail Amount</th>
<th>FTA Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>$0–500</td>
<td>4.6%</td>
</tr>
<tr>
<td>$501–1000</td>
<td>6.4%</td>
</tr>
<tr>
<td>$1001–2500</td>
<td>10.7%</td>
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</tbody>
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<table>
<thead>
<tr>
<th></th>
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<tbody>
<tr>
<td></td>
<td><strong>Felonies</strong></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>$0–500</td>
<td>3.8%</td>
</tr>
<tr>
<td>$501–1000</td>
<td>7.9%</td>
</tr>
<tr>
<td>$1001–2500</td>
<td>11.2%</td>
</tr>
</tbody>
</table>

As Table 1 indicates, the jump rate increased sharply as bail amount increased. The ROR/cash bail differences in FTA rates can be explained by distinctions in community ties and seriousness of the crime charged. In addition, the lower jump rate for ROR defendants can at least be partially explained by the greater supervision exercised over them, and the responsibility given a friend or family member to assure the defendant's appearance in court.

Until studies comparing the FTA rates of ROR and cash bail defendants hold constant the "relevant" characteristics of each...
group, it will be difficult to appraise the "necessity" of bail.\textsuperscript{430} If the function of bail is to assure the defendant's presence at trial, the classification it creates is grossly overinclusive. Even if it were claimed that some cash bail releasees would skip if released on their own recognizance, the ROR-FTA rate nevertheless indicates the "imprecision" of cash bail. As the above studies demonstrate, the appearance rate for ROR releasees ranges between 94\% and 98\%,\textsuperscript{431} and thus, for a substantial percentage of criminal defendants, cash is not necessary to secure their appearance. Concededly, in an exclusively cash bail jurisdiction the FTA rate would be 0\% for arrestees who otherwise would have been released on their own recognizance since they all presumably would remain in jail until their trial.\textsuperscript{432} The cost of relying on cash bail, then, is the unnecessary imprisonment of 94\% to 98\% of at least those qualifying for ROR. Any classification which requires the imprisonment of one hundred arrestees to assure the presence of two to six can hardly be said to be drawn with the kind of precision demanded by strict scrutiny. A fortiori, because ROR can achieve such low FTA rates, at least with respect to defendants possessing certain characteristics, cash bail cannot be considered the least drastic means of achieving the compelling state purpose of ensuring the defendants' presence at trial.

\textbf{A. Traditional Equal Protection Analysis and Bail Bonding}

Insofar as the bail system hinges on cash bonds as a deterrent to flight, it is arguable whether bail would even pass the rational basis test.\textsuperscript{433} When a court fixes bail, it does not actually know what it is requiring unless the defendant himself pays the entire bond. Otherwise, the extent of financial deterrence to flight depends on the bondsman's requirements.\textsuperscript{434} In \textit{Hairston v. United States},\textsuperscript{435} Chief Judge Bazelon urged in dissent that where a defendant can furnish bail only through a professional bondsman, the court should inquire into the bondsman's conditions.\textsuperscript{436} For example, if no collateral were

\begin{itemize}
\item \textsuperscript{430} See generally Foote, \textit{supra} note 6, at 1149–50.
\item \textsuperscript{431} See generally \textit{Philadelphia Bail Study, supra} note 39, at 1070–71.
\item \textsuperscript{432} Since ROR systems generally do not effect the release of an accused until nine to ten days after arrest, it is assumed that he would obtain his release on bail before then if he had the requisite sum.
\item \textsuperscript{433} See notes 249–61 and accompanying text \textit{supra}.
\item \textsuperscript{434} See Pannell v. United States, 320 F.2d 698, 699 (D.C. Cir. 1963) (Wright, J., concurring); Note, \textit{supra} note 148, at 971–72.
\item \textsuperscript{435} 343 F.2d 313 (D.C. Cir.) (per curiam), \textit{cert. denied}, 382 U.S. 856 (1965).
\item \textsuperscript{436} 343 F.2d at 315–16 (Bazelon, C.J., dissenting). See Pelletier v. United States, 343 F.2d 322, 323 (D.C. Cir. 1965) (per curiam) (Bazelon, C.J., concurring).
\end{itemize}
demanded, "the threat of forfeiture would be less likely to deter the . . . [releasee's] flight than if he had a personal stake in the forfeiture." In the absence of collateral, the only one to lose money for nonappearance would be the bondsman, since the premium paid to obtain the bond is lost to the accused in any case. If collateral is not demanded, the amount of the bond would only operate to give the bondsman an incentive to pursue the releasee so as to avoid a forfeiture. Since the threat of such pursuit might deter flight, the question then becomes whether the bondsman would rely on his own resources in pursuing the defendant. If the bondsman were to rely on the police, the bond would serve no deterrent purpose at all.

Even where the bondsman demands a large amount of real property as security, the bond provides relatively little deterrent force, since only when the bond has been forfeited and paid to the court may the bondsman commence an action against the security. Yet even where the courts technically declare a forfeiture, they rarely compel the bondsman to pay it. According to the Surety Association of America, only about 2.4% of all bonds written result in payment of a forfeiture, although many more are technically forfeited. This laxity in the collection of forfeitures may be attributed in part to corruption and collusion between bondsmen, judges, police, and attorneys. Indeed, the Senate Subcommittee on Constitutional Rights has cited payoffs to police as necessary to the

437. 343 F.2d at 315 (Bazelon, C.J., dissenting).
438. See Pannell v. United States, 320 F.2d 698, 699 (D.C. Cir. 1963) (Wright, J., concurring). Despite the bondsman's risk of losing the face amount of the bond, in New York County only 5% of releasees were required to post collateral. See United States Dep't of Justice & the Vera Foundation, Proceedings and Interim Report of the Nat'l Conference on Bail and Criminal Justice 234 (1965). This situation reflects the bondsman's confidence that the bond will not be forfeited. See id. at 235. In addition, it suggests that the bondsman makes his profit on the premium rather than on collateral, so that he would rather charge the maximum premium in exchange for no collateral.
440. Id.
441. See State v. Hart, 198 Neb. 164, 165, 252 N.W.2d 139, 140 (1977). Moreover, if the defendant absconds, he cannot very well take along his realty regardless of the bond.
bondsman's survival.\textsuperscript{445} Moreover, the Philadelphia bail study indicated that most forfeitures occurred in minor cases, such as traffic violations, as a type of replacement for fines.\textsuperscript{446}

The amount of deterrent force exerted by a given bail amount is thus a complex function of the bondsman's premium requirement, security requirement, threat of pursuing the releasee, and risk of forfeiture. In sum, to the extent commercial bonding replaces private bonding,\textsuperscript{447} its degree of deterrence will be determined by the bondsman, rather than by the courts.\textsuperscript{448} As Judge Wright remarked in \textit{Pannell v. United States},\textsuperscript{449} the effect of the present bail system is that the professional bondsmen hold the keys to the jail in their pockets. They determine for whom they will act as surety — who in their judgment is a good risk. The bad risks, in the bondsman's judgment, and the ones who are unable to pay the bondsman's fees, remain in jail. The court and the commissioner are relegated to the relatively unimportant chore of fixing the amount of bail.\textsuperscript{450}

In \textit{Draper v. Washington}\textsuperscript{451} and \textit{Eskridge v. Washington Prison Board},\textsuperscript{452} the Supreme Court held that despite a trial court's judgment that justice would not be furthered by providing an indigent defendant with a transcript, it must nevertheless be furnished.\textsuperscript{453} Similarly, in \textit{Lane v. Brown},\textsuperscript{454} the Court held that a public defender's opinion as to the merits of an appeal cannot be the basis for denying a transcript to an indigent.\textsuperscript{455} Yet the bondsman, whose reputation even as a private person is often questionable,\textsuperscript{456} is

\textsuperscript{445} \textit{Bail Hearings}, supra note 444, at 270. For estimates of losses occasioned by failure to collect forfeitures, see id. at 266.

\textsuperscript{446} \textit{Philadelphia Bail Study}, supra note 39, at 1060-64. But see United States v. D'Argento, 227 F. Supp. 596 (N.D. Ill.), rev'd on other grounds, 339 F.2d 925 (7th Cir. 1964). In D'Argento, the district court ordered $40,000 of a $50,000 bond forfeited by the surety because the defendant merely left the jurisdiction without the court's permission. 227 F. Supp. at 599, 603-04.

\textsuperscript{447} "Private" bonding, as used by this author, means bonding by the defendant himself, his family, or personal acquaintances with no collateral, premium, or interest charge involved.

\textsuperscript{448} See Foote, supra note 6, at 1159.

\textsuperscript{449} 320 F.2d 698 (D.C. Cir. 1963). For a discussion of \textit{Pannell}, see text accompanying notes 130 & 131 supra.

\textsuperscript{450} 320 F.2d at 699 (Wright, J., concurring) (emphasis in original).

\textsuperscript{451} 372 U.S. 487 (1963).

\textsuperscript{452} 357 U.S. 214 (1958) (per curiam).

\textsuperscript{453} 372 U.S. at 499; 357 U.S. at 216.

\textsuperscript{454} 372 U.S. 477 (1963).

\textsuperscript{455} Id. at 481-82, 485.

allowed the discretion denied judges or public defenders to preclude a benefit\textsuperscript{457} which impinges on a fundamental constitutional right.\textsuperscript{458} Consequently, by allowing the bondsman unfettered discretion to determine the releasee’s real financial deterrent to flight, “the court does not decide — or even know — whether a higher bond for a particular applicant means that he has a greater stake.”\textsuperscript{459} It is thus difficult to discern even a reasonable relationship between the court’s bail determination and the effectuation of the state’s purpose of assuring the defendant’s presence at trial.\textsuperscript{460}

IX. A Proposal

As in the case of all complex legal and social problems, there exists no single “correct” solution to the infirmities of the present bail system. In conclusion, however, it would be appropriate to suggest an alternative system which, unlike the present one, would be both equitable and consistent with the fourteenth amendment. Some recent innovations such as ROR\textsuperscript{461} and the 10% cash deposit program\textsuperscript{462} have made substantial inroads into the cash bail requirement. Yet each system has serious deficiencies. For example, a large percentage of ROR applicants do not even reach the interview stage of the process, and thus are not recommended for release.\textsuperscript{463} Furthermore, the courts have declined the recommendations for release of many detainees.\textsuperscript{464} Notably, between 1964 and 1966, the District of Columbia Bail Project interviewed 5,144 defendants, recommending 49% for release, out of whom 85% ultimately were released.\textsuperscript{465} Of those defendants recommended for release, the courts still exercise discretion, thereby perpetuating the

\textsuperscript{457} Whether bail is characterized as a “privilege” rather than a “right” is irrelevant for constitutional purposes. See Graham v. Richardson, 403 U.S. 365, 374 (1971). See generally Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968).

\textsuperscript{458} See text accompanying notes 329 & 330 supra.

\textsuperscript{459} Pannell v. United States, 320 F.2d 698, 702 (D.C. Cir. 1963) (Wright, J., concurring).

\textsuperscript{460} Surprisingly, however, the Vera Institute has found a lower skip rate for releasees on commercial bonds — 4.4% — than on private bonds — 19.4%. Study of Pretrial Release, supra note 417, at 4. Possible explanations of this lower skip rate include the selectivity and supervision of bondsmen, as well as the belief of many releasees that surveillance occurs, even though it typically does not. See Bail Proposal, supra note 82, at 427. Whatever the reason, the existence of such low FTA rates for defendants released on commercial bond would arguably satisfy the minimal means-end nexus required by the rational basis test.

\textsuperscript{461} See note 418 and accompanying text supra.


\textsuperscript{463} Comment, supra note 162, at 81.

\textsuperscript{464} See id.

\textsuperscript{465} R. Molleur, supra note 422, at 31. Similar figures appear in other studies. The Manhattan Bail Project between 1961 and 1964 recommended for release 4,000
discriminatory practices of cash bail under a different label.\textsuperscript{466} Even if a defendant is released on his own recognizance, he will already have been subjected to imprisonment for at least ten days.\textsuperscript{467} Moreover, for those detainees who do not satisfy the ROR criteria, which reflect white, middle class values, there is no recourse.\textsuperscript{468} Finally, in the area of misdemeanors, ROR programs are almost nonexistent.\textsuperscript{469}

Similarly, the 10% cash deposit program is not without its problems.\textsuperscript{470} The program has not eliminated the bondsman, as it was designed to do.\textsuperscript{471} In addition, many defendants remain confused by the fact that "10%" is both the percentage of the bond required to be deposited with the court and with the bondsman — \textit{i.e.}, they fail to realize that 90% of the amount deposited with the court is refundable.\textsuperscript{472} For the defendants who are aware of this difference, many still cannot obtain the required 10%.\textsuperscript{473} These detainees may even be compelled to seek out the bondsman to raise the cash deposit. In some jurisdictions the 10% cash deposit system is inapplicable to traffic offenses, misdemeanors, and quasi-criminal violations.\textsuperscript{474} Consequently, a substantial number of defendants cannot obtain release under this program.\textsuperscript{475} ROR and the 10% cash deposit program can thus be considered no more than partial solutions to the problem of pretrial detention.\textsuperscript{476}

defendants out of 10,000 interviewed. D. FREED & P. WALD, supra note 151, at 62. The courts followed the ROR recommendations in 2,195 of these cases. \textit{Id.} In Philadelphia in 1974, 70% of the recommended interviewees were released. \textit{PHILADELPHIA ANNUAL REPORT, supra} note 211, at 55.

\textsuperscript{466} Comment, supra note 162, at 83.
\textsuperscript{467} Id. at 82.
\textsuperscript{468} \textit{See generally Manhattan Bail Project, supra} note 173, at 76–77.
\textsuperscript{469} Comment, supra note 162, at 83.
\textsuperscript{470} The 10% cash deposit program is tantamount to a 90% across-the-board reduction of bail. To obtain release the accused must deposit with the court clerk 10% of the bail set by the court. D. OAKS & W. LEHMAN, supra note 145, at 98. If the conditions of the bond are satisfied, 90% of the deposit is returned. \textit{Id.} The net cost of the bond is 1% of the face amount of the bail set, as compared to the 10% generally charged by bondsmen. \textit{Id.} The FTA rate for those obtaining release on this program is fairly comparable to that for full cash bond. \textit{See id.} at 101. In Cook County, Illinois, for example, in 1964, only 5.4% of the bonds were forfeited. \textit{Id.} at 101. In Philadelphia, in 1974, the FTA rate was 7.4% for the cash deposit releases. \textit{PHILADELPHIA ANNUAL REPORT, supra} note 211, at 58 (1974).
\textsuperscript{471} D. OAKS & W. LEHMAN, supra note 145, at 99 & n.160.
\textsuperscript{472} Id. at 99.
\textsuperscript{473} Id.
\textsuperscript{474} See id.
\textsuperscript{476} The scope of the problem can be appreciated from the fact that between 45% and 79% of arrestees in major cities were incarcerated pending their trials. See D. FREED & P. WALD, supra note 151, at 40; \textit{Philadelphia Bail Study, supra} note 39, at 1048; \textit{Note, Preventive Detention, an Empirical Analysis}, 6 HARV. C.R.–C.L.L. REV. 291, 300 (1971).
The starting point of any constitutionally valid program of pretrial release is the obliteration of the “in-out” classification based solely on wealth. In formulating a more inclusive system of release, while assuring the defendant’s appearance in court, cash bail cannot be totally discounted.\footnote{477}{See generally Note, supra note 148, at 973.} The cash bail system is violative of the equal protection clause only insofar as it results in the incarceration of some arrestees and the liberation of others solely as a function of wealth.\footnote{478}{See notes 302–07 and accompanying text supra.} Accordingly, so long as alternative means of release are available, there can be no constitutional objection to the simultaneous availability of cash bail. Although the “stationhouse bail” method, which sets specified amounts of bail for given offenses, has the advantage of allowing speedy release of the wealthier defendants, the failure to individualize may result in the release of the “risky” arrestee of means in preference to the “risky” poor.\footnote{479}{See Note, supra note 14, at 446–47.} The amount of cash bail should therefore be based, \textit{inter alia}, on the arrestee’s community ties, his prior conduct while released before trial, the nature of the charges, and his total wealth. Depending on the likelihood of appearance at trial based on ROR-type criteria, an “appropriate” percentage of the arrestee’s wealth should be required as a bond.\footnote{480}{The percentage of wealth criterion would have to be tempered with liberal provisions for the substitution of security so as to minimize problems of illiquidity of assets.} In no case should commercial bonding be permitted, since that practice undermines or alters the deterrent effect of the court’s bail determination, and provides a fertile source of corruption.\footnote{481}{See note 456 and accompanying text supra.} Instead, the arrested individual or his immediate family should be the only parties permitted to post bond.

Cash bail, however, should only be one option of a arrestee. Depending again on likelihood of appearance as predicted from ROR-type factors, varying conditions and degrees of supervision could be individually imposed on the arrestee,\footnote{482}{See 11 DEL. CODE § 2108 (1974).} and tailored to increase the likelihood of his appearance at trial.\footnote{483}{For cases supporting the trial court’s discretion to place territorial and other restrictions on the defendant as a condition of release, see Reynolds v. United States, 80 S. Ct. 30, 33 (Douglas, Circuit Justice, 1959); Yanish v. Barber, 73 S. Ct. 1105, 1108 (Douglas, Circuit Justice, 1953); United States v. Smith, 444 F.2d 61, 62 (8th Cir. 1971); United States v. Foster, 278 F.2d 567, 570 (2d Cir.), \textit{cert. denied}, 364 U.S. 834 (1960); United States v. Mitchell, 246 F. Supp. 874, 900 (D. Conn. 1965); United States v. Foster, 79 F. Supp. 422, 423 (S.D.N.Y. 1948).} In the case of an unemployed arrestee, for example, efforts should be made through appropriate state agencies to secure employment and appropriate
training. The drug-addicted arrestee should be directed to suitable counseling and therapy.\textsuperscript{484} Although tightly controlled studies have yet to be performed, preliminary findings strongly suggest the existence of a causal relationship between the degree of supervision and appearance at trial.\textsuperscript{485} Certainly the Bail Reform Act,\textsuperscript{486} as well as case precedent,\textsuperscript{487} supports the placing of arrestees in the custody of a third party as a condition of release. Moreover, the releasee should be subject to the alternative or additional duty of periodically reporting to a judge or some other public official.\textsuperscript{488} Supervision should also consist of administrative contact, especially to remind the arrestee of the time and place of his required court appearance. The surveillance incident to supervision may not only assure the defendant's appearance, but also may help deter the defendant from committing crimes pending trial.\textsuperscript{489}

The above-mentioned conditions and supervision would supplement the deterrent effects of close community ties, steady employment, and similar factors. In addition, skipping could be further deterred by speedier trials,\textsuperscript{490} which would be facilitated by freeing the judiciary from routine bail setting duties.\textsuperscript{491} A number of general deterrents would also exert pressure on defendants, such as the difficulty of successfully evading the police for long periods because of more sophisticated law enforcement techniques.\textsuperscript{492} Furthermore,

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{484} One delicate tactical question is whether violations of the imposed conditions or supervision should be sanctioned. If violations were punished by means of imprisonment, pretrial detention would be invoked under another name. Rather, the conditions and supervision should be less "imposed" than simply made available to the arrestee. If the defendant appears at trial, then regardless of any pretrial violation, no sanction should be imposed. If the defendant is convicted, pretrial violations could be considered by the court in assessing the suitability of probation or the defendant's amenability to rehabilitation. The "threat" of such adverse influence on disposition should be sufficient to minimize pretrial violations.
  \item \textsuperscript{485} See Bail Proposal, supra note 82, at 425–26. The FTA rate of the Manhattan Bail Project arrestees was 1.6\%, compared to a Probation Department program, using the same criteria, which recorded a 9.4\% FTA rate. Id. The only overt difference in the programs was the closer supervision maintained by the Manhattan Bail Project. Id.
  \item \textsuperscript{486} For a discussion of the Bail Reform Act, see notes 61–65 and accompanying text supra.
  \item \textsuperscript{487} See Brown v. Fogel, 387 F.2d 692 (4th Cir. 1967), cert. denied, 390 U.S. 1045 (1968). In Brown, Judge Haynsworth found no abuse of discretion where the trial court conditioned H. Rap Brown's release on his remaining in the custody of his attorney, 387 F.2d at 695.
  \item \textsuperscript{488} See Pelletier v. United States, 343 F.2d 322, 323 (D.C. Cir. 1965) (per curiam) (Bazelon, C.J., concurring).
  \item \textsuperscript{489} See Bail Proposal, supra note 82, at 441.
  \item \textsuperscript{490} See generally D. FELLMAN, THE DEFENDANT'S RIGHTS TODAY 112 (1976).
  \item \textsuperscript{491} See notes 493 & 494 and accompanying text infra.
  \item \textsuperscript{492} See Bandy v. United States, 81 S. Ct. 197, 198 (Douglas, Circuit Justice, 1960); Pannell v. United States, 320 F.2d 698, 699 (D.C. Cir. 1963) (Wright, J., concurring); Note, supra note 148, at 973–74.
\end{itemize}
\end{footnotesize}
jumping bail should either be considered a separate offense or grounds for imposing greater punishment for the original offense in the event of conviction.

As discussed above, on the basis of individual characteristics, the defendant should be given the option of electing cash bail, conditions and supervision, or some combination thereof designed to assure appearance at trial. In no event should cash bail be the only alternative. Individualization, of course, imposes serious factfinding and adjudicatory responsibilities on the courts. In view of the overburdened state of the judicial system, it would be preferable to establish an administrative body with sufficient personnel to make individualized decisions in each case. The procedure should neither be adversary nor ex parte in nature. Rather, the defendant should be given responsibility for providing relevant information to the administrative tribunal to supplement that supplied by pretrial service agencies. Dissatisfaction with the administrative body’s decision or alleged failure of that body to follow established criteria should be appealable to the courts with the full adversary panoply. Pending review, however, the appellant should be obligated to comply with the administrative judgment. The one exception to this procedure would be triggered in the case of an allegedly “dangerous” defendant, who should be referred by the administrative tribunal to the judicial system. The substantive and procedural provisions to govern pretrial release determination should follow the preventive detention provisions of the District of Columbia Act.

The pretrial release program suggested above represents only one of any number of permutations and combinations of possibilities. So long as our nation is capitalistic, the wealthy will always be able to hire better counsel and pour money into expert witnesses and investigation. The Constitution offers no remedy, for “the Equal


It could perhaps be argued that the presence of the cash option would give an advantage to the wealthier defendant. In many cases, however, cash bail could be supplemented with conditions and/or supervision. Moreover, since all defendants, with the narrow exception of those found by a judicial officer to present an immediate and substantial threat to the safety of the community, would be entitled to release, the cash bail element of this proposal would not create a classification based solely on wealth.

494. These agencies were authorized, under 18 U.S.C. §3152 (1976) to collect information relating to pretrial release, recommend conditions of release, supervise releasees, inform the court of violations of conditions, and generally assist the releasee in securing employment, medical services, and legal services. Id.

Protection Clause does not require absolute equality or precisely equal advantages." Yet any system of pretrial detention which creates a classification based solely on wealth, and thereby impinges on a constitutionally protected right, steps beyond any wealth inequality countenanced by the equal protection clause.