Use of a Master Bond Schedule: Equal Justice Under Law?

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USE OF A MASTER BOND SCHEDULE:  
EQUAL JUSTICE UNDER LAW?

STEVEN WISOTSKY*

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Millions of men and women are, through the American bail system, held each year in “ransom” in American jails, committed to prison cells often for prolonged periods before trial.

R. GOLDFARB, RANSOM 1 (1968).

The methods we employ in the enforcement of our criminal law have aptly been called the measure by which the quality of our civilization may be judged.


I. INTRODUCTION

The last decade or so may justifiably be considered a revolutionary period in American criminal jurisprudence. During that time, the federal judiciary, with the United States Supreme Court in the vanguard, continually rolled back the frontiers of procedural due process in criminal law, thus limiting the methods by which the awesome powers of government may be brought to bear upon the individual accused of crime. Generally speaking, this revolution has been aimed at restricting the states from infringing upon most of the specific guarantees of the Bill of Rights. Federal courts have imposed these constitutional limitations on the states through the medium of the due process clause of the fourteenth amendment. As a result, the once vigorously argued “incorporation debate” has for all practical purposes been laid to rest.

Thus, under the present status of federal constitutional law, the operation of the criminal processes of the several states is subject to most of the restrictions of the Bill of Rights. Specifically, the following constitutional limitations now apply to state judicial process through

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the operation of the due process clause of the fourteenth amendment: the prohibition of the fourth amendment against unreasonable search and seizure (and the concomitant exclusionary rule); the prohibitions of the fifth amendment against double jeopardy and compulsory self-incrimination; the guarantees of the sixth amendment to a speedy trial to a trial by jury for serious offenses, to the confrontation of opposing witnesses, to compulsory process for obtaining defense witnesses, and to the assistance of counsel; and the prohibition of the eighth amendment against cruel and unusual punishment.

In addition to this package of constitutional rules governing the conduct of the trial itself, stringent restrictions are operative at the time of arrest and interrogation and at other pretrial stages of criminal prosecution as well. Furthermore, the courts have expanded the purview of the equal protection clause of the fourteenth amendment to impose upon the states the affirmative duty of minimizing the effects of indigency upon a defendant in a criminal case.

Notwithstanding this judicial activism in certain areas of the criminal law, the courts have remained aloof from other problems which might be characterized by low visibility but which are nonetheless urgently in need of solution. Perhaps, foremost among these is the dismal failure of the American bail system to secure for the poor the full measure of benefits attributable to the legal presumption of innocence. The impact on the indigent defendant of the practice of requiring a money bond as a condition of pretrial release is obvious: he stays in jail, sometimes for periods longer than the sentence typically imposed for commission of the crime for which he is charged.

But, despite this condition, which is widely deplored and thor-

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13. United States v. Wade, 388 U.S. 218 (1967) (a lineup is a critical stage of criminal prosecution at which a defendant has the right to counsel).
14. See the discussion in regard to the equal protection attack on stationhouse bail at section III, p. 822 infra.
15. See, e.g., R. Goldfarb, Ransom 4, 5 (1968) [hereinafter cited as Ransom]. The American bail system is a scandal. It typifies what is worst and most cynical about our system of justice. It discriminates against the poor, against those who advocate or represent unpopular courses of action. It compromises and prostitutes the administration of justice by the courts. It is not only unfair; it is illogical; it does not even work well. The bail system is to a great degree a socially countenanced ransom of people and of justice for no good reason.
oughly documented by legal commentary, the courts have not been responsive to this fundamental problem. Notwithstanding the valiant service which has been extracted from the fourteenth amendment in the aforementioned areas of the criminal law, a state of dormancy has prevailed with respect to its application to the problem of pretrial detention of indigent defendants in state jails. Neither due process nor equal protection have, in the hands of the courts, yielded an amelioration of the injustices wrought by the adoption in America of the fixed-bond bail system. Whether the evolution of a more humanitarian national ethos in regard to the problems of poverty, and the development, pari passu, of a corresponding body of case law, have rendered the fixed-money-bond per-offense system constitutionally vulnerable is the subject of this comment.

Before undertaking to explore the constitutional ramifications of certain aspects of the bail system, a note on scope and methodology is in order. First, it is necessary to establish the relevant factual context in which the legality of the bail system will be tested. For this purpose, this paper will have recourse to the bail practices of Dade County, Florida, although this is not a case study in the strictest sense. That is


17. Discussion in this paper will be directed primarily to the bail practices of the states and therefore will raise the applicable constitutional issues under the fourteenth amendment. The practice of the Federal system, while far from Elysian, is rendered much more civilized by Fed. R. Civ. P. 5(a) which requires the arresting officer to “take the arrested person without unnecessary delay before the nearest available commissioner . . .” for a preliminary examination, the conduct of which is governed by Fed. R. Civ. P. 5(c). Rule 5(c) further requires that “[t]he Commissioner shall admit the defendant to bail as provided in these rules.”

Adherence to this requirement of a prompt arraignment is encouraged by the McNabb-Mallory exclusionary rule. Unfortunately, however, the exclusionary rule does not obligate the State of Florida to adhere to its own counterpart to Fed. R. Civ. P. 5, which is simply not enforced. Furthermore, this executive nonfeasance has received judicial aprobation. This point will be further developed below. See note 40, infra and accompanying text. In any event, the constitutional principles that will be raised under the fourteenth amendment will be fully applicable to the federal government through the operation of the fifth amendment. This follows despite the fact that the fifth amendment contains no equal protection clause since the due process clause of the fifth encompasses invidious and gross discrimination. See *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937).

18. The bail system had its origin in England when the Statute of Westminster (1275) first defined bailable offenses. The practice of pledging security for one’s liberty developed later and was administered on an individualized basis. The schedule of bail bonds is an American engraftment which facilitates the administration of a mass criminal justice system. See generally *Note, Bail: An Ancient Practice Reexamined*, 70 YALE L.J. 966 (1961).
to say, Dade County offers a typical example of the operation of the
bail system in large metropolitan communities throughout the United
States, but the facts of Dade's practices are chosen primarily for il-
lustrative purposes. Additionally, reference will be made to a civil rights
action filed in the United States District Court for The Southern Dis-
trict of Florida to permanently enjoin the operation of Dade's master
bond system because of its alleged constitutional infirmities.9

Finally, it should be noted that the scope of what is undertaken
here is relatively narrow. There will be no discussion with respect to
the question of whether there is a "right" to bail under the Federal
Constitution.20 Although several inferior courts have assumed that the
excessive bail clause of the eighth amendment is carried over into the
due process clause of the fourteenth,21 the United States Supreme Court
has never ruled directly on the issue. In any event, speculation in the
legal literature22 is rendered academic by the fact that the right to bail
is granted by statute in the federal system,23 and by nearly all state

19. Ackies v. Purdy, Civil No. 69-1062 (S.D. Fla. 1969). The suit is a class action
brought under the Civil Rights Act, 42 U.S.C. § 1983 (1964) for declaratory and in-
junctive relief against the application of a master bond schedule to indigent defendants on
the grounds that it violates the due process and equal protection clauses of the fourteenth
amendment, and the "right" to bail under the eighth and fourteenth amendments. (In its
decision, unreported at the time of publication, the southern district did find the use of
the master bond lists to be violative of due process and equal protection, and the court
permanently enjoined the use of such lists unless the accused has first been informed of his
right to have conditions of release set by a magistrate and thereafter knowingly and
voluntarily waives his right to a hearing).

One of the attorneys for the plaintiffs in this action is Bruce S. Rogow of E.O.P.I.
Legal Services. The author wishes to gratefully acknowledge the generous assistance of
Mr. Rogow, who provided resource materials and much of the original inspiration for this
commentary.

20. A literal reading of the eighth amendment yields no "right" to bail, as the
Supreme Court has observed:
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 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 . . . . Indeed, the very
language of the Amendment fails to say all arrests must be bailable.

21. See, e.g., Mastrian v. Hedman, 326 F.2d 708, 711 (8th Cir. 1964), cert. denied,
376 U.S. 965 (1964); Pilkinton v. Circuit Court, 324 F.2d 45, 46 (8th Cir. 1963).

22. See, e.g., Foote, supra note 16, at 986-87, 1125. Professor Foote concludes, based
on an analysis of the historical evidence, that the only sensible interpretation of the
eighth amendment is that it creates a right to bail, not merely a limitation on amount in
those cases where it is set at all.

23. 18 U.S.C. § 3146(a) (1964) provides:
[a]ny person charged with an offense, other than an offense punishable by death,
shall, at his appearance before a judicial officer, be ordered released pending trial
on his personal recognizance or upon the execution of an unsecured appearance
bond. . . .

The statute is unusually progressive in favoring the pretrial releases of accused
persons without the necessity of posting a bail bond or deposit of cash. Such conditions,
among others specified, can be imposed, singly or in combination, according to the de-
termination made by the judicial officer in the exercise of his discretion, which he deems
necessary to "reasonably assure the appearance of the person for trial. . . ."
Neither will there be presented any assertion that the money-bail system is an unmitigated evil which ought to be abolished in toto. In short, the scope of the discussion herein will be limited to the questions whether the widespread practice among the states of setting bail on the sole basis of a bond schedule without regard to the particular circumstances of the individual case violates, when applied to indigents, either the due process or the equal protection clause of the fourteenth amendment.

II. Operation of the System—The Invisible Man

In 1958, an informal directive was issued by the Judges of the Criminal Court of Record of Dade County, Florida, directing the Sheriff of Dade County to set bail for defendants charged with crimes triable in the criminal courts and in the justice of the peace courts of Dade County according to a master bond schedule provided by the judges of these courts. A similar directive was also issued to the Sheriff by the Metropolitan Court of Dade County, for cases returnable to that court. Changes in the master bond list are made from time to time upon orders of the various courts.

Thus, upon arrest for a crime, the defendant is brought to the Dade County jail where he is "booked," i.e., custody of the defendant is transferred from the arresting officer or the transporting officer to the booking officer at the jail, and the charges against the defendant are recorded. As part of this booking procedure, bail is set by the booking officer by reference to the master bond list which establishes bond amounts for the most common offenses. No discretion is exercised; the process is strictly mechanical. No inquiry is made by the booking

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   Every person charged with a crime . . . shall be entitled to release on reasonable bail with sufficient surety unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great.

This new constitution supercedes Fla. Stat. § 903.01 (1967) and the identical Fla. R. Crim. P. 1.1130(a) which provide that "[a]ll persons in custody for the commission of an offense, not capital, shall before conviction be entitled as of right to be admitted to bail. . . ." In any event, in all cases where the offense charged is not punishable by death or life imprisonment, the right to pretrial bail is absolute.

Bail pending appeal is quite another matter, being severely restricted by statutory provisions. See Fla. Laws 1969, ch. 69-1, 2, 307.

25. The use of a master bond schedule is a great convenience for all defendants with sufficient resources to meet the required amount because it permits them to secure instant release. It is only the indigent who suffers for lack of a prompt preliminary examination. See note 122 and corresponding text infra.


27. Id.

28. Plaintiff's deposition of Jack Sandstrom, Supervisor of Correctional Div. of the Pub. Safety Dept. of Dade County, Florida, at 14, Ackies v. Purdy, Civil No. 69-1062 (S.D. Fla. 1969) [hereinafter cited as Deposition]. The master bond list is itself a compilation of both oral directives and formal written orders of the Chief Judge of the Criminal Court of Record, the Chief Judge of the Metropolitan Court, and the four individual Justices of the Peace. Id. at 35.

29. Id. at 6 et seq.
officer into the background of the defendant before bail is set. Thus, no
classification is given as to whether the defendant has appeared or failed
to appear in prior cases in which he may have been released on bond.80
Neither is any inquiry made with respect to the length of time the de-
fendant has resided in the county, his employment status, family ties,
income or assets.81 The booking officer merely refers to the list for the
established bond figure for the offense charged, and the defendant
either makes bail (whether by posting the cash bond or by paying the
premium on a bond posted by professional bondsmen), or goes directly
to jail.82 He will remain there unless he can get the court to reduce bond.
Failing that, the defendant stays in jail until his court date. No judicial
determination as to the proper amount of a bond for the individual
defendant is made in a normal case.83 Furthermore, nonjudicial assess-
ment of the defendant's situation is not made with regard, for example,
to such factors as the apparent weight of the evidence against the de-
fendant. Actually, such investigation by the booking officer is rendered
impossible by the fact that the transporting officer is frequently not the
arresting officer and thus has no personal knowledge of the case.84

To anyone who respects the law as a just and viable institution,
the most shocking facet of this "procedure" is that it constitutes a
flagrant violation of the law. Two Florida statutes relating to arrests
with and without a warrant unequivocally require that the arrested
person be brought before a committing magistrate "without unnecessary
delay."85 Furthermore, "[w]hen the defendant is brought before the
magistrate upon an arrest, either with or without a warrant . . . ," it is
the statutory duty of the magistrate to conduct a preliminary examina-
tion unless the defendant exercises his right to waive it.86 The purpose
of a preliminary examination is, of course, to determine whether there
is probable cause to believe that the defendant has committed the of-
fense of which he is accused. If cause is lacking, the defendant is to be
discharged from custody;87 however, if probable cause is found, "the
magistrate shall hold him to answer" and "'[i]f the defendant is bail-
able as of right by the magistrate, he shall be admitted to bail."88 Ob-
viously, if no preliminary hearing is held, all defendants who lack the

30. Id. at 10.
31. Id. at 10, 11.
32. Id. at 12.
33. For capital offenses and those carrying a penalty of life imprisonment, there is no
listing on the Master Bond Schedule and thus no bond is set at all at the booking. Bond
can, however, be set by a judge having jurisdiction over the case. Id. at 28, 29.
34. Id. at 41.
35. FLA. STAT. § 901.06 (1969) provides that in the case of an arrest pursuant to a
warrant, "the officer making the arrest shall without unnecessary delay take the person
arrested before the magistrate who issued the warrant . . . ." FLA. STAT. § 901.23 (1969)
requires that "'[a]n officer who has arrested a person without a warrant, shall without
unnecessary delay take the person arrested before the nearest or most accessible mag-
istrate . . . ." "
36. FLA. STAT. § 902.01 (1969); FLA. R. CRIM. P. 1.22(a).
37. FLA. STAT. § 902.13 (1969); FLA. R. CRIM. P. 1.22(b)(2).
means to make the bond amount required by the master list must con-
tinue to languish in jail until their cases come to trial. On the other
hand, those who have made bond suffer no prejudice from the lack of
a hearing because they have secured their pretrial freedom.

Notwithstanding the mandatory language of the statutes, however,
they are routinely not enforced,89 with the express condonation of the
Florida courts which adhere to the position that a preliminary ex-
amination is not essential to due process of law.40 Moreover, attempts
to require their enforcement, such as the contention that the McNabb-
Mallory exclusionary rule be adopted, have been rebuffed.41 Thus, as a
general rule no preliminary examination is conducted and bail is not
set, as required by law, by a judicial officer at a judicial proceeding.

Occasionally, however, bail is set or modified by a judge in an
informal manner. One possibility is that a defendant who is represented
by counsel may have his attorney contact the judge by phone to request
a reduction in bond from the amount set by the master bond schedule,
to set bond where there is no provision for it in the master bond list,
or to permit release on recognizance.42 Occasionally, the reverse of this
occurs; that is, the arresting officer may call the judge and request an
increase of bond over the master bond amount for a defendant he re-
gards as too dangerous to be at liberty or otherwise a poor risk for
bail.43

For indigents, however, the street is strictly one-way. The Public
Defender's office does not maintain a staff at the jail to consult with
persons booked into the jail, and it never interviews a prisoner until
assigned to do so by court order.44 Thus, the Public Defender does not
become involved in a case at the booking stage and cannot act in behalf
of the defendant for the purpose of securing a reduction in bond or a
release on recognizance.

A precise statistical portrait of the human effects of this procedure
is difficult to compose. According to the estimates of the Supervisor of
the Dade County jail, approximately 36,000 separate bookings into the
jail occur in a typical year, of which about 50 percent are for traffic
or other county ordinance violations. Of the remaining 18,000 cases
triable before the criminal court of record or justice of the peace courts,
the supervisor estimates that approximately 75 percent bond out, the
vast majority doing so through the services of a professional bonds-
man.45 The 75 percent figure seems a bit high in comparison with the
findings of a national field study46 done in various communities across

89. Deposition, supra note 28, at 31.
41. Young v. State, 140 So.2d 97 (Fla. 1962).
42. Deposition, supra note 28, at 38, 39.
43. Id. at 37.
44. Id. at 39, 40.
45. Id. at 44.
46. Silverstein, Bail in the State Courts—A Field Survey and Report, 50 MINN. L. REV.
621, 634 (1966).
the nation. The study found that in Dade County, out of a sample of 197 felony defendants, only 29 percent were released on bail. This figure was significantly lower than the 47 percent average for a representative sample of large counties in the country, a large county being defined as having 400,000 or more persons.

In any event, the precise percentage of defendants released on bail is not crucial, for it is beyond dispute that a substantial percentage of defendants are unable to make bail. The consequence of such inability is that the defendant remains incarcerated in the Dade County jail an average of nearly 33 days between the time of arrest and his eventual presentation to a court, and delays of 60 days or more are not uncommon. The inescapable conclusion is that the effects of the bail system upon defendants financially unable to bail out of jail is to confine them for a significant period of time, prior to the commencement of any judicial processes. And, of course, the bail system entraps the innocent as well as the guilty, thereby destroying the value of the constitutional presumption of innocence. This destruction occurs not only because of the pretrial incarceration itself, but because defendants who

47. Id., Table 5 at 634.
48. Id.
49. Studies of the operation of the bail system have demonstrated that even at the very lowest levels of bail—say five hundred dollars—where the bail bond premium may be only twenty-five or fifty dollars, there is a very substantial percentage of persons who do not succeed in making bail and are therefore held in custody pending trial.


50. Affidavit of Richard N. Tilton, Ackies v. Purdy, Civil No. 69-1062 (S.D. Fla. 1969). The data was gleaned from the files of the clerk of the Dade County Criminal Court of Record for the period between November 17, 1969, to February 18, 1970. Of the sample of 126 defendants who were unable to make bond for one reason or another, the average number of days of incarceration between arrest and initial presentation to a justice of the peace or a criminal court judge was 32.92 days. The minimum period of incarceration was 4 days, and the maximum 92.

51. The presumption of innocence has constitutional status, i.e., it is a requirement of due process of law. In re Winship, 90 S. Ct. 1068, 1072 (1970). Nevertheless, those who style themselves realists may object to the rhetoric in the text, as inconsistent with the statistical reality that most persons arrested for serious crimes are in fact guilty. For example, of the 300,000 persons charged with felonies each year, an average of 69% plead guilty. Of the 12% whose cases go to trial, 80% are convicted. Combining these two bits of data yields a “guilt factor” of approximately 79%. (Most of the remaining 19% of cases are dismissed before trial.) L. Silverstein, Defense of the Poor 9 (1965).

On the other hand, a substantial percentage of those accused are never adjudicated guilty. See Rankin, The Effect of Pretrial Detention, 39 N.Y.U.L. Rev. 641, 642 (1964) [hereinafter cited as Rankin] (27% of a sample of 358 jailed defendants were not convicted); Note, A Study of the Administration of Bail in New York City, 106 U. Pa. L. Rev. 693, 727 (1958) [hereinafter cited as New York Bail Study] (20% of sample not convicted). In addition, reversals on appeal often lower the proportion of defendants who are legally not guilty.

Ultimately, the controversy is reducible to a conflict between two antipodal conceptions of the criminal process and the value accorded the abstraction of human dignity. See Packer, Two Models of the Criminal Process, 113 U. Pa. L. Rev. 1, 38-44 (1964), in which the author posits two antithetical value systems—the Due Process Model and the Crime Control Model.
remain in jail pending trial are statistically significantly more likely to be convicted than those who are released on bond. Furthermore, it is obvious that pretrial loss of liberty has other adverse consequences on the personal life of the indigent defendant, among which are loss of employment, disruption of family life, and social ostracism merely from being in jail, regardless of the ultimate disposition of the case.

Before proceeding to the constitutional implications of this system, it is advisable to emphasize that the procedures employed in Dade County are not atypical and do not represent a deviant practice. On the contrary, "in many localities . . . [there is] a fixed schedule geared to the nature of the offense. As a rule, little or no inquiry or allowance is made for individual differences between defendants based on the likelihood to appear at trial." Stationhouse bail is "[o]ne of the most prevalent forms of mechanical bail setting," and while it has the virtue of insuring the prompt release of a defendant with money, it also raises serious questions of fairness: "Set automatically on the basis of the offense, it bypasses any effort to determine the accused's likelihood to return and discriminates most forcefully against defendants without money."

All available studies confirm two dominant characteristics in the national bail pattern: In a system which grants pre-trial liberty for money, those who can afford a bondsman, go free; those who cannot stay in jail.

III. CONSTITUTIONAL DIMENSIONS

A. The Due Process Question

The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure, is to enable them to stay out of jail until a trial has found them guilty.

Stack v. Boyle, 342 U.S. 1, 7 (1951) (concurring opinion of Mr. Justice Jackson).

52. Rankin, supra note 51. This study disclosed "findings [that] provide strong support for the notion that a causal relationship exists between detention and unfavorable disposition." Id. at 655. The study was scrupulous in its attempts to isolate the effect of certain seemingly important variables such as prior record, amount of bail, type of counsel (privately retained or court-appointed), family integration, and employment stability, and concluded that "when considered separately [they] do not account for the statistical relationship between detention before adjudication and unfavorable disposition." Id. at 655. The point is developed further at p. 822 infra. See also the foreword to this study, Wald, Pretrial Detention and Ultimate Freedom: A Statistical Study, 39 N.Y.U.L. REV. 631 (1964) [hereinafter cited as Wald].

53. RANSOM supra, note 15, at 32.

54: FREED & WALD, BAIL IN THE UNITED STATES: 1964, 18-21 (1964) [hereinafter cited as FREED].

55. Id.

56. Id.
Query: Does the use of a master bond schedule to set bail in uniform amounts for a given category of offense without regard to the particular circumstances of the case deprive an accused of his liberty without due process of law? It has already been demonstrated that the effect upon indigent defendants of this system is to keep them incarcerated for substantial periods of time, before the commencing of any judicial processes. Certainly, this runs counter to elementary notions of fair play, but is it also repugnant to the Federal Constitution?

The starting point of analysis is the proposition that, although it is frequently utilized for a variety of other purposes, the setting of bail has only one legitimate, i.e., officially sanctioned function, to wit: to ensure the presence of the accused at his trial and his amenability to orders of the court resulting therefrom.

57. See note 50 supra.

58. "The system of bail is used also by society as a social and political weapon to punish in advance of trial and sentence those it does not like." RANSOM, supra note 15, at 2. Goldfarb is not alone in perceiving a credibility gap. "Although bail is recognized in the law solely as a method of insuring the defendant's appearance at trial, judges often use it as a way of keeping in jail persons they fear will commit crimes if released before trial." PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 131 (1967) [hereinafter cited as CHALLENGE OF CRIME]. "The Theory that bail serves solely to insure appearance for trial may be universally expounded by appellate courts, but the practice of trial courts tells quite another story." FREED, supra note 54, at 11.

59. Despite the hypocrisy documented in note 58 supra and the corresponding text, a legitimate case can be made for using bail to maintain incarceration of the accused where he poses a threat to society, whether because of this propensity to commit another crime, flee the jurisdiction, intimidate witnesses, etc. The practice has in fact received judicial approbation. See Sellers v. United States, 89 S. Ct. 36 (1968) (Black, Cir. J.) (dictum); Rehman v. California, 85 S. Ct. 8 (1964) (Douglas, Cir. J.); Carbo v. United States, 82 S. Ct. 662 (1962) (Douglas, Cir. J.). It should be noted, however, that the foregoing cases involve the question of a denial of bail pending appeal, which is distinguishable from pretrial detention because the presumption of innocence is destroyed upon conviction.

In any event, it is quite clear that the case for pretrial detention has nothing whatsoever to do with the determination of the proper bail amount in a given case; on the contrary, it is relevant only to the initial determination of whether to set any bail at all. Furthermore, even a total denial of admission to bail affords the defendant minimal due process guarantees because a hearing is held to consider the circumstances of the individual's case; bail is not granted or denied, as in the manner of bail setting under a master bond schedule, simply by reference to the name or category of offense charged.

Considered in this regard, the preventive detention bill now pending in Congress, S. 2600, 91st Cong., 1st Sess. (1969), would amend the Federal Bail Reform Act of 1966, 18 U.S.C. § 3146(b) (Supp IV 1964) to permit the denial of bail if pretrial release would jeopardize the safety of any other person or the community. But even in that event, a hearing would be required at which the full array of due process guarantees would be afforded, e.g., the right to counsel and to cross-examination, the government would bear the burden of proof of the defendant's alleged dangerousness, and a judicial officer would have to make written findings of fact in addition to concluding that "there is substantial probability that the defendant committed the offense with which he is charged." Finally, the pretrial detention would be limited to a maximum of 60 days. For a discussion and summary of the bill, see Mitchell, Bail Reform and the Constitutionality of Pretrial Detention, 55 VA. L. REV. 1223 (1969).

Ironically, the safeguards included in a proposal to deny totally admission to bail in limited circumstances far surpass in fairness the procedures, or lack thereof, employed under a master bond schedule system, which purports to grant pretrial freedom.
A recognizance of bail, in a criminal case, is taken to secure the due attendance of the party accused, to answer the indictment, and to submit to a trial, and the judgment of the court thereon.\textsuperscript{60}

The foregoing conception of the role of bail was articulated by the United States Supreme Court in 1834, and more than a century later that formulation was still adhered to in the leading case of \textit{Stack v. Boyle}.\textsuperscript{61}

The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty. Like the ancient practice of securing oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused.\textsuperscript{62}

Given this limited function, "the fixing of bail for any individual defendant must be based upon \textit{standards relevant to the purpose of assuring the presence of that defendant}.\textsuperscript{63} These standards have been recognized by the law for many years. For example, four traditional criteria are adopted in Federal Rules of Criminal Procedure. They are the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail, and the character of the defendant.\textsuperscript{64} Under the 1966 Federal Bail Reform Act,\textsuperscript{65} several additional criteria\textsuperscript{66} were adopted in order "to assure that all persons, regardless of financial status, shall not needlessly be detained pending their appearance . . . , when detention serves neither the ends of justice nor the public interest."\textsuperscript{67}

\textsuperscript{60.} \textit{Ex parte Milburn}, 34 U.S. 704, 710 (1835). \textit{Accord}, Cheney v. Trammell, 65 Fla. 451, 62 So. 916 (Fla. 1913), State \textit{ex rel.} Crabb v. Carson, 189 So.2d 376 (Fla. 1st Dist. 1966); \textit{Fla. Stat.} § 903.12 (1967); \textit{Fla. R. Crim. P.} 1.130(d).

\textsuperscript{61.} 342 U.S. 1 (1951).

\textsuperscript{62.} Id. at 4, 5.

\textsuperscript{63.} Id. at 5 (emphasis added).

\textsuperscript{64.} \textit{Fed. R. Crim. P.} 46(c).


\textsuperscript{66.} In determining which conditions of release will reasonably assure appearance, the judicial officer shall, on the basis of available information, take into account the 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.

\textit{Id.} Ironically, nearly identical criteria are adopted by \textit{Fla. Stat.} § 903.03(2)(a) (1969), which only comes into operation \textit{after} an accused is held to answer by a magistrate. Thus, for indigents, the lack of a preliminary examination renders the statutory criteria for pretrial release a nullity.


\textsuperscript{66.} 80 Stat. 214 § 2 (1966).
Obviously, the use of a master bond schedule necessarily means that there are no "standards relevant to the purpose of assuring the presence of the defendant." Under a master bond system, there is only one relevant question: What is the name of the offense with which the defendant is charged? To answer this question, of course, no inquiry into the particular circumstances of the individual case is necessary. But then, what of the principle that "[e]ach defendant stands before the bar of justice as an individual"? If this is indeed a principle of American jurisprudence, and not merely a rhetorically ringing but meaningless dictum, then one thing becomes absolutely clear: a hearing is required by the Constitution before any substantial confinement may occur. Although "[m]any controversies have raged about the cryptic and abstract words of the due process clause . . .," there can be no doubt that "[t]he fundamental requisite of due process of law is the opportunity to be heard." This proposition is so well ensconced in the constitutional pantheon that no further citation is necessary.

It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard, as that no man shall be condemned in his person or property without due notice and an opportunity of being heard . . . .

Not only is a hearing the sine qua non of due process for ideological reasons, but it also serves a vital pragmatic function as well. The United States Supreme Court has characterized the hiatus between the institution of formal charges and the commencement of trial as "perhaps the most critical period of the proceedings . . . when consultation, thoroughgoing investigation and preparation [are] vitally important . . ." Without this conditional privilege [of bail], those wrongly accused are punished by a period of imprisonment, while awaiting trial and are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense.

These are only a few of the impediments to the conduct of the trial itself, and they are relatively obvious. In fact, the handicap placed

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68. Stack v. Boyle, 342 U.S. 1, 9 (1951) (Jackson, J., concurring).
72. The second objective . . . [in addition to assuring the reliability of the guilt-determining process] traditionally deemed a part of the due process of law is more elusive and subtle. But its vitality is manifest in a number of requirements not fully explicable in terms of the first objective. . . . Central to these requirements is the notion of man's dignity, which is denigrated . . . by procedures that fail to respect his intrinsic privacy . . . .
74. Stack v. Boyle, 342 U.S. 1, 7 (1951) (Jackson, J. concurring).
upon a jailed accused in the preparation of his defense are overwhelming. But like a stone cast into a pond, pretrial detention has ever-widening ramifications.

The economic facts of the bail system go even further. When the defendant who cannot afford bail goes to jail before trial, he loses his present earning capacity, and often his job. His family suffers. Some people have been forced onto relief rolls as a result of lost earning capacity caused by pre-trial detention. All of this happens before trial, without regard to their guilt or innocence. It is, in effect, punishment for the crime of poverty.75

Thus, the gravamen of the due process argument with respect to a bail process that incarcerates the poor for substantial periods of time before trial has two components: first, the confinement is tantamount to punishment before trial, a flagrant violation of procedural due process requirements; and second, its consequences are so prejudicial as to deny fundamental fairness at trial. The latter proposition is a demonstrable reality, as the following table illustrates:

**TABLE 1**

<table>
<thead>
<tr>
<th>Disposition</th>
<th>Bail</th>
<th>Jail</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sentenced to prison</td>
<td>17</td>
<td>64</td>
</tr>
<tr>
<td>Convicted without prison</td>
<td>36</td>
<td>9</td>
</tr>
<tr>
<td>Not convicted</td>
<td>47</td>
<td>27</td>
</tr>
<tr>
<td>Number of defendants</td>
<td>(374)</td>
<td>(358)</td>
</tr>
</tbody>
</table>

The statistics speak volumes, but perhaps in order to realize their full impact it is necessary to verbalize them:

What is surprising, even shocking, is the fact disclosed by this study that jailed first offenders not only are twice as likely to be convicted and six times as likely to receive prison sentences as bailed first offenders, but that bailed first offenders are half again as likely to receive prison sentences as bailed repeat offenders. According to this study, a defendant with a prior record who manages to obtain bail stands a far better chance of probation or suspended sentence than a first offender who is held in detention.77

75. Ransom, supra note 15, at 32 (emphasis added).
76. Rankin, supra note 51, at 642. The sample is composed of felony defendants charged in New York City during the years 1961 and 1962.
77. Wald, supra note 52, at 635. Further, prejudice may result from the ever-present pressure on jailed defendants to plead guilty. One study showed only 74.6% of the bailed defendants, as opposed to 89.6% of the jailed defendants, pleaded guilty. New York Bail
With respect to the former contention, i.e., that loss of pretrial liberty is punishment in advance of judgment, the conclusion is not quite as compelling. The concept of due process requires a fair proceeding before a forum with jurisdiction prior to the rendition of final judgment. This is obviously distinguishable from incarceration resulting from inability to make bail pending the commencement of the trial. Nevertheless, pretrial detention, apart from the prejudicial consequences flowing therefrom, is not rendered less "final" in a nonlegal sense by the absence of a final judgment; the time spent in jail is irretrievably lost to the defendant.

At this juncture, comparison with judicial decisions which require a hearing in administrative proceedings as the minimum requisite of due process is illuminating. Thus, the courts have held that a hearing is required prior to discharging an employee from public employment, 78 prior to a revocation of a security clearance of a civilian employee, 79 prior to a denial of admission to a state bar, 80 prior to the expulsion of a student from a publicly operated school, 81 and prior to the termination of welfare benefits. 82

Keeping in mind that these are all nonjudicial proceedings, that the consequences of administrative arbitrariness generally result in the detriment of property rights rather than the loss of individual liberty, and that the standards of procedural due process are, and should unquestionably be, more stringent in criminal proceedings, the compelling conclusion is that the failure of the state to accord a hearing prior to imposing pretrial detention is a deprivation of liberty without due process of law. In fact, if it is true that "[p]resentence liberty may be one of the most significant rights that a free society can grant an accused," 83 there can be only one conclusion: In a society which ostensibly respects the integrity of human personality, a person accused of crime has a right to expect and to be accorded a prompt hearing for inquiry into the individual circumstances of his situation before being condemned by neglect to suffer pretrial imprisonment. 84

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83. Wald, supra note 52, at 631.
84. Consider in this regard the recommendation of the Presidential Comm'n on Civil Disorders contained in the report of the Nat'l Advisory Comm'n of Civil Disorders—1968. In chapter 13, "The Administration of Justice under Emergency Conditions," the Commission recommended a hearing for each defendant arrested under riot conditions:
When the riot defendant comes before the court, he should receive an individual determination of bail amount. He should be represented by counsel and the judge should ascertain from counsel, client and bail interviewer the relevant facts of his
B. The Equal Protection Question

The American bail system discriminates against and punishes the poor. The rich can afford to buy their freedom, and do; the poor go to jail because they cannot afford the premium for a bail bond.

R. Goldfarb, Ransom, 32 (1968).

Query: Does the equal protection clause of the fourteenth amendment forbid the fixed-schedule setting of bail without regard to the individual circumstances of an "indigent" defendant on the theory that it is an unreasonable and arbitrary discrimination? While no case has directly considered this point, there is substantial case authority by analogy for the proposition that it is an unreasonable and arbitrary economic discrimination. Beginning in 1956, the Supreme Court of the United States has rendered decisions in an unbroken chain of cases which suggest the broad constitutional rule that any deprivation of fundamental rights incident to criminal prosecution which is based on the poverty of the accused is a violation of the equal protection clause.

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background, age, living arrangements, employment and past record. Uniform bail amounts based on charges and riot conditions alone should be shunned as unfair. 

Id. at 192 (emphasis added).

If this is the recommended procedure under riot and mass arrests where fixed bail schedules would facilitate the awesome problem of processing the arrests, it should follow, a fortiori, that a hearing should be required in the case of an ordinary arrest.

85. A major definitional problem inheres in use of the word "indigency", which is employed throughout this article. The establishment of satisfactory criteria for the determination of indigency is, of course, a necessary precondition to the achievement of a fair bail system for the poor. Yet, a definitive answer to the question is rendered impossible by the infinite permutations of financial status. A man with $100,000 in assets and $101,000 in liabilities (and no current income), for example, is technically insolvent, while a man with four dependents, no debts, and an annual income of $3,500 is not indigent, although he falls below the Federal Government's guidelines on poverty.

The key seems to lie in liquidity, i.e., the possession or availability of cash. Thus, for purposes of assigning court-appointed counsel, the prevailing test of indigency is whether the accused is able to make bond. This, of course, brings us full circle to the question initially posed. Suppose a defendant has a few hundred dollars with which he can either hire counsel or post bond. Is he indigent for the purpose for which he does not use the money? Further, should he be required to go into debt to raise the money for either purpose? Suppose he has nonliquid assets, such as a car, which he uses for transportation to and from his job. Should he be required to sell it? Questions of this kind can be multiplied ad infinitum, and no very satisfactory answer for any of them is apparent. See generally L. Silverstein, Defense for the Poor 106-09 (1965).

For purposes of this article, the author will fall back upon the compromised but liberal definition suggested by the Allen Report:

An impoverished accused is not necessarily one totally devoid of means. A problem of poverty arises for the system of criminal justice when at any stage of the proceedings lack of means in the accused substantially inhibits or prevents the proper assertion of a right or a claim of right.

This definition is useful in a discussion of bail because it recognizes the concept of the near-indigent or the person of insufficient means, rather than dwelling on the less common status of total destitution. For both, the emphasis must be on noneconomic factors which demonstrate reliability for release without bond.

This "new fetish for indigency," as Mr. Justice Clark scornfully referred to it, began with the seminal case of *Griffin v. Illinois*. In *Griffin*, full and direct appellate review from an Illinois conviction required at least a partial stenographic transcript of the trial. By a vote of 5 to 4, the Court upheld the contention that the due process and equal protection clauses of the fourteenth amendment required that all indigent defendants be furnished without cost a transcript necessary for the prosecution of an appeal. Justice Black announced the four man plurality opinion.

In criminal trials a State can no more discriminate on account of poverty that 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 . . . .

It is true that a State is not required by the Federal Constitution to provide . . . appellate review at all . . . But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty.

There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.

The principles of the *Griffin* case were reaffirmed in the case of *Douglas v. California*. In that case, petitioners were convicted of 13 felonies in a California court. Thereafter, they appealed as of right to the California District Court of Appeal and requested the appointment of counsel to assist them. The request was denied, and the Supreme Court of the United States held that such a denial was a violation of their constitutional rights.

[W]here the merits of the one and only appeal an indigent has of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor.

Again, the leitmotif appeared: "[T]here can be no equal justice where the kind of an appeal a man enjoys 'depends on the amount of money he has.'"

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89. *Id.* at 18.
90. *Id.* at 19.
92. *Id.* at 357.
93. *Id.* at 355, *citing Griffin*. The view of the issues taken by the dissenters was
The principles first articulated in *Griffin* and *Douglas* have been expanded and further entrenched in a sequence of subsequent cases in which the Court has invalidated many state provisions in criminal law which impose intolerable burdens upon the poor man. In *Burns v. Ohio*, for example, the Court invalidated the practice of requiring a $20.00 filing fee before the Ohio Supreme Court would consider motions to hear appeals of felony convictions. As applied to indigents, the fee was held violative of the equal protective clause, based on the authority of *Griffin*. "The imposition by the State of financial barriers restricting the availability of appellate review for indigent criminal defendants has no place in our heritage of Equal Justice Under Law." Similarly, in *Smith v. Bennett*, the Court held Iowa's statutory requirement that a $4.00 filing fee accompany petitions for writs of habeas corpus to be violative of the equal protection clause. The Court declared that "to interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny that prisoner equal protection of the laws."

Even procedures which impose lesser burdens of a nonmonetary nature upon indigents have similarly fallen to the proscription of the equal protection clause under the hand of the Supreme Court. For example, in *Lane v. Brown*, Indiana's public defender act providing for assistance of counsel to represent indigent prisoners in postconviction proceedings was held unconstitutional. The defendant had unsuccessfully filed a petition for a writ of error *coram nobis* in the trial court. The statute required the public defender's approval before an indigent criminal defendant could obtain a free transcript of record which was necessary to perfect an appeal from a denial of a petition for such a writ. The case was decided on the authority of *Griffin*. In *Draper v.*

quite opposed to this line of thought. The opinion by Mr. Justice Harlan, in which Mr. Justice Stewart joined, put the whole controversy into sharp relief:

The States, of course, are prohibited by the Equal Protection Clause from discriminating between 'rich' and 'poor' as such in the formulation and application of their laws. But it is a far different thing to suggest that this provision prevents the State from adopting a law of general applicability that may affect the poor more harshly than it does the rich . . . . Every financial exaction which the State imposed on a uniform basis is more easily satisfied by the well-to-do than by the indigent. Yet I take it that no one would dispute the constitutional power of the State . . . to impose a standard fine for criminal violations, or to establish minimum bail amounts for various categories of offenses.

Id. at 361.

Laws such as these do not deny equal protection to the less fortunate for one essential reason: The Equal Protection Clause does not impose on the States 'an affirmative duty to lift the handicaps flowing from differences in economic circumstances.'

Id. at 362.

95. Id at 258.
97. Id. at 709.
Washington,\textsuperscript{99} the affirmance by the state supreme court on the sole basis of a stenographic record of a hearing on a motion by an indigent defendant for a trial transcript which was necessary for an appeal of the trial was held to violate the equal protection clause because it did not constitute a record of sufficient completeness as required by the fourteenth amendment. This too was decided on the basis of Griffin.

Dispensing with the citation of numerous other cases, the proposition seems well-established that the denial or unavailability to an indigent defendant of important rights or procedures in the criminal process which are available to the man with means is violative of the equal protection clause of the fourteenth amendment. But there is an ambiguity in the broad meaning of this body of case law. It cannot fairly be read for the strict proposition that in all situations the state must afford precise economic equality in its criminal procedures. "Absolute equality is not required; lines can be and are drawn and we often sustain them."\textsuperscript{100} It may be that the more reasonable interpretation of these cases is that, rather than being required to put all defendants upon a footing of equality regardless of their financial status, the state need only guarantee equal access to its established criminal procedures.

In all cases the duty of the State is to provide the indigent as adequate and effective an appellate review as that given appellants with funds—the State must provide the indigent defendant with means of presenting his contentions to the appellate court which are as good as those available to a non-indigent defendant with similar contentions.\textsuperscript{101}

What, then, is the lesson of these cases with respect to the question of setting bail for an indigent? In the absence of decisional authority directly on point,\textsuperscript{102} analogy to traditional judicial criteria for determining whether a classification violates the equal protection clause must be relied upon. The traditional test states that equal protection is denied only if the classification is "without any reasonable basis and therefore is purely arbitrary."\textsuperscript{103} However, where a classification relates to "fund-
mental" rights, "its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest." Under either test, the constitutionality of the master-bond-schedule method of setting bail is suspect. The use of the master lists creates two categories of persons; those who can afford the master bond bail and secure their release from jail, and those who cannot. The question then arises, whether this system of classification bears a rational relationship to a legitimate power of the state, which is to secure the appearance of the defendant at trial. It is difficult to find such a rational relationship in the system, given the fact that the majority of bail bonds are procured through the services of a professional bail bondsman. In that event, the premium once paid is lost forever, and the defendant who posts a bail bond instead of the cash itself has no monetary stake in returning to stand trial. Furthermore, "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." Analogously, the ability to make bond bears no rational relationship to the likelihood that the defendant will appear for trial. If, then, the poverty of the accused is not a constitutionally permissible basis upon which to deny him the guarantees of procedural due process at trial, can it be sustained as the sole criterion upon which to deprive him of pretrial liberty?

Even if the classification established by the master bond list could pass constitutional muster under the traditional standard of a rational basis, there is a much greater obstacle to be surmounted under the compelling interest test of equal protection. Since the classification which

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105. In New York City, for example, nearly all bail is posted through commercial sources. New York Bail Study, supra note 51, at 703-04.
108. We reject appellants' argument that a mere showing of a rational relationship between the [statute] ... and these four admittedly permissible state objectives will suffice to justify the classification ... [A]ppellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.

results from a master bond list relates to the asserted fundamental right not to be deprived of liberty without due process of law, the use of the list must be scrutinized under the stricter test. In other words, the state must show that a compelling interest is promoted by the use of the master list without a hearing and its resultant classification. Given the tenuous rationality of the classifications, it follows, a fortiori, that the master bond schedule fulfills no such vital function. On the contrary, the plausible conclusion is that the setting of bond for indigents solely by reference to a master bond schedule, and without an individual hearing, creates an arbitrary, unreasonable, or invidious discrimination in violation of the equal protection clause. In short, the use of a master bond schedule is inconsistent with the judicial command that “all people charged with crime must, so far as the law is concerned, ‘stand on an equality before the bar of justice in every American court.’”

To reach this conclusion, however, is not to solve the problem but merely to raise a further question. If the fourteenth amendment prohibits pretrial incarceration of defendants who cannot make the bond required by the master schedule, then what is to be done with them? Unless the entire bail system itself is to be abolished, the states cannot be prohibited from setting any bail for indigents, for that would produce the absurd result of automatic release for indigents, but not for those who merely lack enough money to make bond. It must be remembered that the law grants a right to be released on bail and only requires that it not be excessive. But this is an empty guarantee for that percentage of the population for whom any bail is excessive.

Perhaps, the best approach to this conundrum is to adopt the position advanced by Mr. Justice Douglas sitting as a Circuit Justice


111. See Walls v. Genung, 309 So.2d 30 (Fla. 1967), wherein the court rejected the petitioner’s claim that the requirement of a money bond (low in his case—$850) from an indigent defendant was inconsistent with due process and equal protection because it “would make of indigency a pass-key to all places of restraint to which he might be committed prior to trial.” Id. at 31. See also Ex parte Smith, 141 Fla. 434, 193 So. 431 (1940), where it was stated that it would be a futile gesture for the judge to grant a motion for reduction of bond where it did not appear that petitioner could make bail in any amount.

112. The right in Florida is granted by constitution, statute, and rule of procedure. See note 24 supra.

113. Jones v. Cunningham, 126 Fla. 333, 170 So. 633 (1936). Reasonable bail is determined by the circumstances of the case. Mendenhall v. Sweat, 117 Fla. 659, 158 So. 280 (1934). Ironically the latter case also holds that the fixing of excessive bail is tantamount to a denial of bail, and that a reasonable amount is one that does not “preclude the probability of the ordinary citizen in like circumstances and conditions of those of the accused being able to furnish [it] . . . .” Id. at 663, 158 So. at 282. This formula is readily adaptable to facilitate the pretrial release of the poor by setting no bail or low bail (e.g., §1). There is no Florida case authority for this proposition, however.
in *Bandy v. United States*. Mr. Douglas first stated the problem in a manner which provides authority, albeit by way of *obiter dictum*, for the proposition that *Griffin* and its progeny may be specifically applicable to the problem posed by the application of the money bail system to an indigent defendant:

>[The] theory [of bail] is based on the assumption that a defendant has property. . . . We have held that an indigent defendant is denied equal protection of the law if he is denied an appeal on equal terms with other defendants, solely because of his indigence [citation omitted]. Can an indigent be denied freedom, where a wealthy man would not, because he does not happen to have enough property to pledge for his freedom?

Evading a direct answer to his own question, Justice Douglas went on to say that "I approach this application with the conviction that the right to release is heavily favored and that the requirement of security for the bond may, in a proper case, be dispensed with." Douglas did not, however, order Bandy's release without bond, which had already been set at $5,000.00 upon a prior petition. Bandy soon renewed his application for release without bond, whereupon Justice Douglas delivered another important statement in the form of dictum:

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.

This, it is submitted, provides a reasonable alternative to the problem of how indigent defendants should be treated for purposes of admission to bail. Stated simply, a judicial examination into the individual

114. 81 S. Ct. 197 (1960) (Douglas, Cir. J.). There are actually three *Bandy* cases concerned with bail. The complicated history of the litigation is set forth in detail by *Foote*, *supra* note 16, at 1154 n.274.

115. The application of the *Griffin* rule to the bail problem runs, in skeletal form, as follows. The State of Florida grants an absolute right to bail in all cases except those where the offense is punishable by death or life imprisonment. In all other cases, there is a right to bail, limited however, by the requirement of "sufficient sureties." Upon arrest in the typical case, the only way to secure prompt pretrial release is to post a cash bond or pay a bondsman to post it. This monetary requirement is a blatant economic discrimination against the poor which is lacking in any rational justification, or, in the alternative, which fails to promote a compelling state interest for its infringement of a fundamental right, i.e., the right to pretrial liberty.


117. *Id.*


119. *Bandy v. United States*, 82 S. Ct. 11, 13 (1961) (Douglas, Cir. J.) (emphasis added). Compare this proposition with the statement in *Challenge of Crime*, *supra* note 58, at 131, which goes even further in recommending that "money" bail should be imposed only when reasonable alternatives are not available.
circumstances of the case should be held to determine whether the accused should be released, the determination to be made according to the sole criterion whether the defendant will return to stand trial. If his appearance seems reasonably assured, then bail can be totally dispensed with or set in a nominal amount. This approach has the further virtue of eluding the definitional problem of indigency. If, for example, a poor, but not destitute, defendant can raise five dollars, and he is otherwise a good risk for pretrial release, bail can be set in the nominal sum.

Ultimately, the crux of the matter is the necessity of a pretrial hearing at which such inquiry can be made. Thus, the solution to the equal protection problem lies in the minimal guarantee of procedural due process. Nevertheless, regardless of the constitutional label applied to the approach, the important thing is that a conditional right of pretrial release should be established for all accused persons regardless of income or wealth. This would make a reality of the Supreme Court's pronunciamento that "the Fourteenth Amendment weighs the interests of rich and poor criminals in equal scale, and its hand extends as far to each."121

IV. CONCLUSION

Having arrived at the conclusion that both due process of law and equal protection of law are violated by the master-bond-schedule bail system employed in Dade County and in many other metropolitan areas, the next phase of inquiry shifts to focus upon reform of the repugnant aspects of that system.

The author's suggestion is not that the master bond system should be swiftly and totally excised; on the contrary, it is a device of great social utility for those accused persons who have sufficient money to meet the scheduled amount since it enables them to obtain instant release from custody.'2 What is necessary is a dual system of admission to bail whereby those who cannot make the scheduled amount at the book-

120. If the state wishes to adopt a preventive detention measure for recidivists or others about whom it is reasonable to perceive a threat to the peace and safety of the community, it might pass constitutional muster if properly restricted. The real point, however, is that in either case a prompt hearing would be held to determine whether the accused should be released, and if so, upon what conditions.
122. The same rapid release could also be accomplished without station house bond if magistrates are located at the jail or wherever the booking is performed. This, of course, would require the presence of committing magistrates on a 24-hour basis; however, this represents the most progressive reform. But, since it entails considerable additional expense for a jurisdiction that has no committing magistrate system, it is not likely to be adopted. The best that can realistically be hoped for is a compromise version which insures a prompt preliminary examination, preferably within twenty-four hours. Other proposals have been even more tolerant of delay; the President's Comm'n on Law Enforcement and Administration of Justice: Task Force 85 (1967) recommended a maximum delay of 72 hours. For this reason, station house bond should be retained.
ing are given a prompt hearing at which a reduction of bond and/or other conditions of release are considered by the judicial officer. In addition, those persons who were able to meet the stationhouse bail amount could be examined to determine whether that amount is proper or is in need of revision up or down in light of the individual circumstances of the case.

To accomplish this end, existing machinery is adequate; all that is required is the strict judicial enforcement of Florida Statutes sections 901.06 and 901.23 so that persons arrested will be taken before a committing magistrate "without unnecessary delay."

This, in turn, almost certainly requires the adoption of the McNabb-Mallory rule or some modified version, although statutory compliance might be achieved through new legislation assessing penalties against police officers who violate their statutory duty. Recently, proposed legislation was introduced into the Florida Legislature which was a hybrid of the two approaches. Whichever road is traveled, the destination must be the same: an absolute requirement of a preliminary examination promptly after arrest, at least for those unable to make stationhouse bond.

At this hearing, which need not be an adversary proceeding (although the assignment of counsel to indigent defendants is desirable), the judicial officer must inquire into all relevant factors of the defendant's background according to prescribed criteria. The standards set forth in the Federal Bail Reform Act of 1966 provide adequate guidelines which Florida has already adopted in the form of Florida Statutes section 903.03. Whatever the standards applied, the focus of the in-

123. See note 35 supra.
124. See note 17 supra.
125. H.B. 647 (April 11, 1969). The bill would require the presentation of the arrestee within the first six daylight hours after arrest; failing that, he is to be released from custody immediately. The McNabb-Mallory exclusionary rule is also included in that "[a]ny evidence obtained from the arrestee prior to his being taken before a committing magistrate shall be inadmissible in court." Finally, the failure of a law enforcement officer to adhere to the requirements of the act may be considered an indirect civil contempt of court for which the arrestee may recover money damages against the officer at the rate of $50.00 per hour.
126. See note 66 supra.
127. FLA. STAT. § 903.03(1) (1969):
(1) After a person is held to answer by a magistrate, the court having jurisdiction to try the defendant shall have jurisdiction to hear and decide all preliminary motions as to bail.
(2) (a) The Florida parole and probation commission shall have the authority and upon the request of the judicial officer . . . in whose court a person charged with a bailable offense is held . . . to make an investigation and report to said judicial officer, which may include the following:
1. The circumstances of the accused's family ties, employment, financial resources, character and mental condition, the length of residence in the community;
2. His record of convictions and record of appearance at court proceedings or record of flight to avoid prosecution or failure to appear at court proceedings; and
3. Such other facts as may be needed to assist the court in its determination of the indigency of the accused and whether he should be released on his own recognizance.
(b) The judicial officers shall not be bound by such recommendations.
BOND

quiry should be the determination of conditions of release adequate to assure the appearance of the defendant at trial. The right to release should be favored strongly, and those arrested of limited means ought to be released on nominal bail: the completely destitute should be released on personal recognizance or in the recognizance of another if they are otherwise good risks.

The adoption of these procedures will certainly not usher in the millenium, but they can do a great deal to increase respect for the law and to elevate the threshold of injustice that American society now tolerates with such insouciance. Most of all, what is needed is an act of reform which demonstrates convincingly that justice in the criminal law is not the special province of the well-to-do.

We should say now, and in no uncertain terms, that 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.

128. Preventive detention for "dangerous" defendants or hard-core repeaters is also a legitimate social objective, and may be incorporated into the standards adopted for the conduct of the preliminary examination. However, as stated previously, preventive detention bears on the completely different question of whether to set any bail at all, not the amount that should be set. See note 59 supra. It thus works no discrimination among accused persons according to their economic status.


130. No general respect for, nor adherence to, the law as a whole can well be expected without judicial recognition of the paramount need for prompt, eminently fair and sober criminal law procedures.

Coppedge v. United States, 369 U.S. 438, 449 (1962). Consider specifically the disrespect for law likely to be engendered by the nonenforcement of the Florida statutes which require a preliminary hearing:

In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent, teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.
