

4-1-1969

# The Bail System and Equal Protection

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## Recommended Citation

Patrick J. Duffy III, *The Bail System and Equal Protection*, 2 Loy. L.A. L. Rev. 71 (1969).  
Available at: <https://digitalcommons.lmu.edu/llr/vol2/iss1/4>

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## THE BAIL SYSTEM AND EQUAL PROTECTION

There is probably no section in the Bill of Rights whose interpretation is more nebulous than the Eighth Amendment's right to reasonable bail. There is probably no section which has been defined more closely within its own terms rather than in conjunction with the other sections of the Constitution. There is probably no section whose interpretation is left so extensively to the province of the lower courts.<sup>1</sup> The effect of this restricted definition and the inability to obtain a reversal of any bail setting<sup>2</sup> has resulted in a dearth of case law and a general apathy within the bar.

Stagnation has resulted from failure to consider the equities of the bail system as a whole. To rekindle interest at the appellate level, the efficacy and fairness of the bail system itself must be put into issue instead of merely questioning the exercise of discretion by a judge in a particular case.

If progress is to be made, in addition to arguing that a defendant qualifies for low bail under the accepted criteria, attorneys must question the criteria themselves. Attorneys are great pragmatists, as they must be if they are to be of real aid to their clients. The lawyer cares not how he gets his client out of jail, but only that he does. Working from this frame of reference it is a natural temptation for counsel to plead with the court that this particular defendant is exceptional and to hope that with luck a low bail setting will be granted. This approach has not worked. It is time for attorneys to admit that their clients are not special and to argue that as a matter of right they are entitled to low bail settings. It is time to argue that it is the bail setting criteria and not the defendants which are the causes of high bail settings. It is time to urge that when the Eighth Amendment establishes a right to release on bail, but most defendants cannot exercise that right, it is the system and not the defendants that must be the cause. That must be the new tack—release for the individual defendant by forcing the system to give a real chance for release to all defendants.

### I. FACTORS IN SETTING BAIL

In California several factors are made relevant to bail setting by statute or case law. The courts have concluded that the most important single

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<sup>1</sup> For examples of the difficulty in California of appealing a bail setting by an arraignment or trial court see *In re Morehead*, 107 Cal. App. 2d 346, 237 P.2d 335 (1951); *In re De Mello*, 18 Cal. App. 2d 407, 63 P.2d 1157 (1937); *In re Black*, 140 Cal. App. 361, 35 P.2d 355 (1934).

<sup>2</sup> A review of every appellate case in California involving bail setting reveals no reversals.

factor is that sufficient bail should be set to secure the presence of the defendant at all of the various court proceedings.<sup>3</sup> The California Supreme Court has concluded:

It is not the intention of the law to punish an accused person by imprisoning him in advance of his trial. Such inhumanity or injustice as inflicting punishment upon him before his guilt has been ascertained by legal means, is not to be imputed to the system of law under which we live . . . .<sup>4</sup>

The very reason for a bail system is to avoid punishment of a man presumed innocent until he is proven guilty.<sup>5</sup> The purpose of bail is not to secure money for the state as a tax or fine.<sup>6</sup>

The probability of the defendant's appearance at trial is not the only consideration in setting bail, however. For example, the Penal Code provides:

In fixing the amount of bail, the judge or magistrate shall take into consideration the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his appearing at the trial or hearing on the case.<sup>7</sup>

The courts have suggested various other criteria. It has been suggested that the court should consider the moral turpitude of the crime alleged as well as the danger to the public from the commission of crimes similar to the one with which the defendant is charged.<sup>8</sup> It has also been urged that courts consider the number of criminal counts alleged against the defendant because the larger the number of counts, the greater the chance of conviction.<sup>9</sup>

In *In re Grimes*<sup>10</sup> the appellate court sustained a trial court's bail setting for one defendant which was ten times higher than that set for the seven other co-defendants, noting that the trial court could take into consideration the fact that the defendant was a fugitive from justice at the time of her arrest. Since the appellate court was unable to consider whether

<sup>3</sup> *Stack v. Boyle*, 342 U.S. 1 (1951); *Ex parte Duncan*, 54 Cal. 75 (1879).

<sup>4</sup> *Ex parte Duncan*, 54 Cal. 75, 77 (1879).

<sup>5</sup> *Hudson v. Parker*, 156 U.S. 277, 285 (1895); *In re Newbern*, 55 Cal. 2d 500, 360 P.2d 43, 11 Cal. Rptr. 547 (1961); *People v. Doe*, 172 Cal. App. 2d Supp. 812, 342 P.2d 533 (1959).

<sup>6</sup> *People v. Doe*, 172 Cal. App. 2d Supp. 812, 342 P.2d 533 (1959); *People v. Calvert*, 129 Cal. App. 2d 693, 277 P.2d 834 (1954); *General Casualty Co. v. Justice's Court*, 41 Cal. App. 2d 784, 107 P.2d 663 (1940).

<sup>7</sup> CAL. PEN. CODE § 1275 (West 1956). However, this section cannot constitutionally be interpreted to mean that a purpose of bail is to protect society "from predicated but un consummated offenses" of the defendant and that bail must be set accordingly. This practice was held violative of the Eighth Amendment by Justice Jackson, sitting as Circuit Justice, in *Williamson v. United States*, 184 F.2d 280, 282-83 (2d Cir. 1950).

<sup>8</sup> *In re Williams*, 82 Cal. 183, 183, 23 P. 118, 118 (1889). This criterion, too, is subject to the limitation discussed *supra* note 7 and established by *Williamson v. United States*, 184 F.2d 280, 282-83 (2d Cir. 1950).

<sup>9</sup> *Ex parte Ruef*, 7 Cal. App. 750, 753, 96 P. 24, 25 (1908).

<sup>10</sup> 99 Cal. App. 10, 277 P. 1052 (1929).

the appearance and demeanor of the defendant influenced the trial court, it felt compelled to affirm the bail setting.

The California Supreme Court has by dictum established a criterion for setting bail<sup>11</sup> which is highly important but largely ignored by the inferior courts of at least the Los Angeles Judicial District.<sup>12</sup> That criterion is the ability of the defendant to post the bail set. While the logic of this dictum has not been followed in California, it has been adopted in the majority of other American jurisdictions.<sup>13</sup> The federal courts have posed the rule most strongly.<sup>14</sup> The United States Supreme Court stated in *Bandy v. United States*<sup>15</sup> that in a case clearly bailable by law, requiring bail greater than the prisoner is able to post is in effect denying bail and violates the constitutional provision against excessive bail. In *United States v. Brawner*<sup>16</sup> the court of appeals reduced bail from \$5,000 to \$2,500 where the defendant signed an affidavit stating that he could post the smaller but not the larger amount. The court held that refusal to lower bail to \$2,500 violated the defendant's Eighth Amendment rights.

States have varied in their treatment. Diametrically opposed to the California approach is that of Texas. In that state the question was settled by holding that the trial court must consider the defendant's ability to post bail.<sup>17</sup> This rule is enforced by liberal reversals of bail settings through habeas corpus review.<sup>18</sup>

The various courts and jurisdictions cited, as well as the California Supreme Court, have realized that application of the Eighth Amendment right to reasonable bail without consideration of a defendant's ability to post the bail set de facto denies the right.

## II. REMEDY FOR IMPROPER BAIL SETTINGS

When the right to reasonable bail has been denied, the problem is how to cure that defect for the average defendant. The quickest procedure would be to file a writ of habeas corpus with the county superior court.<sup>19</sup> This procedure has proved ineffective, however, because of the California appellate courts' treatment of bail settings as wholly within the trial courts' discretion. This rule is so rigid that no bail setting by a lower court has

<sup>11</sup> *Ex parte Duncan*, 54 Cal. 75 (1879).

<sup>12</sup> This statement is based on the author's experience working in every Los Angeles Arraignment Court for the Public Defender during the summer of 1968.

<sup>13</sup> See cases collected in Annot., 72 A.L.R. 801 (1931).

<sup>14</sup> *Bandy v. United States*, 81 S. Ct. 197 (1960); *Bennett v. United States*, 36 F.2d 475, 477 (5th Cir. 1929); *United States v. Brawner*, 7 F. 86 (W.D. Tenn. 1881); *United States v. Lawrence*, 26 F. Cas. 887 (No. 15,557) (C.C.D.C. 1885).

<sup>15</sup> 81 S. Ct. 197 (1960).

<sup>16</sup> 7 F. 86 (W.D. Tenn. 1881).

<sup>17</sup> See cases collected in Annot., 72 A.L.R. 801, 803-10 (1931).

<sup>18</sup> *Id.*

<sup>19</sup> CAL. PEN. CODE §§ 1490-91 (West 1956).

ever been reversed in California.<sup>20</sup>

In order to obtain reversals of bail settings, California defendants have sought to avoid this rule by filing writs of habeas corpus with the United States Federal District Court alleging State denial of a federal right, *viz.*, the right to reasonable bail. These writs, however, have been denied by the United States Supreme Court even before reaching the merits of the cases. The procedural problem is that after motion for reduction, an order setting bail is final and appealable through the California courts. Therefore, the United States Supreme Court has held that federal habeas corpus does not lie because collateral relief should be withheld while there is an "adequate" remedy of state appeal available.<sup>21</sup> To successfully appeal a violation of the Eighth Amendment right to reasonable bail to a federal court, it is necessary to exhaust rights of appeal in California courts and then to seek review by certiorari in the United States Supreme Court. Because of the attendant expense and delay, such procedure is clearly impractical.<sup>22</sup>

Under the present system there is no effective remedy for an improper bail setting. This is true, at least, unless the system itself is attacked by an appeal pursued to the United States Supreme Court in a test case.

The need for such an attack could be alleviated if the California Legislature were to establish an effective review of bail settings. This cannot be done by legislative change of the existing judicial remedy, for the application of such legislation would still be under the control of the California courts. Instead, an administrative remedy should be established. An appointive state bail review board similar to the state parole board should be initiated. This board should set bail initially in accord with the criteria that will be discussed later in this article. It is hoped that such a board, set above the political pressures that are exerted on elected officials, would constitute a real remedy to the defendants now languishing in jail, their Eighth Amendment right totally denied. If the board fails to follow the established criteria, however, appeal may be taken through the regular judicial system commencing with the trial court.

### III. AN IMMEDIATE REMEDY

Until such an administrative remedy is established, defendants must continue to seek review of bail settings through the judiciary. One answer to the immediate problem is to construe bail rights in conjunction with the other protections of the Federal Constitution in order to force bail reform

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<sup>20</sup> *Supra* note 2.

<sup>21</sup> *Stack v. Boyle*, 342 U.S. 1 (1951); *Johnson v. Hoy*, 227 U.S. 245 (1913); *Ex parte Royall*, 117 U.S. 241 (1886).

<sup>22</sup> D. FREED & P. WALD, *BAIL IN THE UNITED STATES*: 1964, at 87; M. FRIEDLAND, *DETENTION BEFORE TRIAL* 148-49 (1965); G. WILLIAMS, *THE REFORM OF THE LAW* 189 (1951).

by a test case. A basis for attack exists in the equal protection clause of the Fourteenth Amendment. This issue has been raised in only three cases and then only under the extreme claim that denying an impecunious felony defendant freedom without bail denies him equal protection of the Eighth Amendment.<sup>23</sup> The practical problems inherent in this claim foreshadowed the result in these three cases.<sup>24</sup> Such a ruling would, of course, ignore society's legitimate interest in assuring a defendant's presence at trial. This interest was considered by the court when it concluded that this proposition "would make of indigency a pass-key to all places of restraint to which he [the defendant] might be committed prior to trial."<sup>25</sup>

Equal protection of the laws under the Fourteenth Amendment is not denied by refusing to release a defendant without bail, but by refusing to adjust bail according to a defendant's ability to post it. By setting bail at an arbitrarily high standard that can be met only by the propertied classes, the non-propertied are denied equal protection of the laws. As stated by the United States Supreme Court:

The guaranty [of equal protection] was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. . . . [It secures] equality of protection not only for all, but against all similarly situated. . . . [It] is a pledge of the protection of equal laws.<sup>26</sup>

As stated by Justice Douglas the question is, "Can an indigent be denied freedom, where a wealthy man would not [be denied freedom], because he does not happen to have enough property to pledge for his freedom?"<sup>27</sup> The answer has been a resounding "no," for any other answer denies the indigent the equal protection of the laws.<sup>28</sup> This does not mean that if a defendant is wealthy, his bail must be raised to the limit he can post, nor does it mean that bail must be lowered to the level a defendant can easily post. It means that after the court considers other factors, it must also consider the defendant's ability to post the bail set. If the amount is higher than what he can post, it must be lowered as much as possible without defeating the other purposes of bail. If it is not so lowered, the

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<sup>23</sup> *Fitts v. United States*, 335 F.2d 1021 (10th Cir. 1964); *Pilkinton v. Circuit Court*, 324 F.2d 45 (8th Cir. 1963); *Walls v. Genung*, 198 So. 2d 30 (Fla. 1967).

<sup>24</sup> *Id.*

<sup>25</sup> *Walls v. Genung*, 198 So. 2d 30, 31 (Fla. 1967).

<sup>26</sup> *Truax v. Corrigan*, 257 U.S. 312, 332-33 (1921).

<sup>27</sup> *Bandy v. United States*, 81 S. Ct. 197, 198 (1960).

<sup>28</sup> *Pannell v. United States*, 320 F.2d 698 (D.C. Cir. 1963); Bail Reform Act of 1966, 18 U.S.C. §§ 3141-52 (Supp. II, 1965-66); D.C. Bail Agency Act, 80 Stat. 327 (1966); Ares, Rankin, & Stutz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole*, 38 N.Y.U. L. REV. 67, 79 (1964); ABA PRE-TRIAL RELEASE STANDARDS 1 (1968); D.C. BAR ASS'N, BAIL SYSTEM OF THE DISTRICT OF COLUMBIA 2 (1963); R. MOLLEUR, BAIL REFORM IN THE NATION'S CAPITAL at A-9; VERA FOUNDATION, NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE, PROCEEDINGS AND INTERIM REPORT (1965).

defendant will have been denied equal protection of the laws.

It is no answer to argue that the California bail procedure cannot be attacked because it is regular on its face, for a defendant clearly also has standing to attack its application.<sup>29</sup> A State may not set up a bail system which appears on its face to grant equal protection, but as applied denies that constitutional right.<sup>30</sup>

The concept is clearly illustrated by the case of *Griffin v. Illinois*.<sup>31</sup> There the defendant succeeded in attacking the appellate procedure of Illinois. Although the procedure was regular on its face, giving all defendants the right to appeal a conviction, Griffin demonstrated that as applied the procedure denied indigent defendants, such as himself, equal protection of the laws. The denial was effected by an appellate procedure requiring payment of printing costs by any defendant requesting the trial transcript for use on appeal. Griffin could not pay the fee. The Supreme Court held that while a state is not constitutionally required to provide an appellate procedure, any which it provides must apply equally to all defendants. Requiring indigent defendants to pay a fee for preparation of transcripts was held to be "invidious discrimination." The State had established two classes of defendants, the propertied who could pay the fee and receive the benefit of the transcript on appeal and the indigent who could not. Griffin was not only able to reverse his own conviction, but was also able to strike down as unconstitutional an appellate procedure which had systematically denied the indigent equal protection of the laws.

Equal protection was also denied the defendant in *Douglas v. California*.<sup>32</sup> While California allows appeals by all defendants as of right,<sup>33</sup> prior to the *Douglas* case an indigent defendant was required to make "a preliminary showing of merit"<sup>34</sup> before an attorney would be appointed for him on appeal. Reviewing the procedure, the Court found that it discriminated against indigents. Justice Douglas, writing for the majority, stated that "there can be no equal justice where the kind of an appeal a man enjoys depends on the amount of money he has."<sup>35</sup>

<sup>29</sup> *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

<sup>30</sup> That the due process and equal protection clauses protect all persons from invidious discrimination is clear. *Dowd v. United States ex rel. Cook*, 340 U.S. 206, 208 (1950); *Cole v. Arkansas*, 333 U.S. 196, 201 (1948); *Cochran v. Kansas*, 316 U.S. 255, 257 (1942); *Frank v. Mangum*, 237 U.S. 309, 327 (1915); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

<sup>31</sup> 351 U.S. 12 (1956); *cf.* *Baker v. Carr*, 369 U.S. 186 (1962); *Brown v. Board of Education*, 347 U.S. 483 (1954); *Edwards v. California*, 314 U.S. 160, 181 (1941) (concurring opinion); *Chambers v. Florida*, 309 U.S. 227 (1940); *Powell v. Alabama*, 287 U.S. 45 (1932).

<sup>32</sup> 372 U.S. 353 (1963).

<sup>33</sup> CAL. PEN. CODE §§ 1235, 1237 (West 1956).

<sup>34</sup> *Douglas v. California*, 372 U.S. 353, 357 (1963); *cf.* *People v. Hyde*, 51 Cal. 2d 152, 154, 331 P.2d 42, 43 (1958).

<sup>35</sup> *Douglas v. California*, 372 U.S. 353, 355 (1963). This procedure was first

In similarly denying equal protection, the California bail system defies the United States Constitution and is open to attack on that ground.<sup>36</sup> The bail system invidiously discriminates against the poor defendant in that it refuses to consider the ability to post bail and therefore effectively denies bail to the indigent while allowing it to the wealthy.

#### IV. THE BONDING SYSTEM: INSTRUMENT OF FOURTEENTH AMENDMENT DENIAL

The current California bail system not only discriminates against the poor, but also fails to achieve its collateral purpose of insuring the presence of defendants at court proceedings. The bonding system, once an instrument of the bail system, has become merely a parasite feeding upon it and aids the denial of equal protection.

The assumption that the bail system, through bonding, aids society by giving a defendant a financial stake in appearing in court is fallacious. This fallacy has recently been pointed out in the federal courts.<sup>37</sup>

It is frequently urged that eligibility for release and the amount of the bond are intimately related, because the higher the bail the less likelihood there is of appellant fleeing or going into hiding. This argument presupposes that an appellant with higher bail has a more substantial stake and therefore a greater incentive not to flee. This may be true if no professional bondsman is involved. But if one is, it is he and not the court who determines appellant's real stake. [T]he court does not decide—or even know—whether a high bond for a particular applicant means that he has a greater stake. We should not, therefore, assume that it does.<sup>38</sup>

Setting a higher bail under the bonding system does not necessarily give a defendant a greater interest in appearing at trial, because the fee paid to the bondsman is not refundable under any circumstances.<sup>39</sup> The higher setting merely allows the bondsman to collect a larger fee. Appearance at court can be of financial interest to the defendant only if he has posted

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attacked by Chief Justice Traynor of the California Supreme Court concurring in *People v. Brown*, 55 Cal. 2d 64, 357 P.2d 1072; 9 Cal. Rptr. 816 (1960). Recently the California Supreme Court has expanded the principle in *In re Mitchell*, 68 Cal. 2d —, 437 P.2d 508, 65 Cal. Rptr. 897 (1968).

<sup>36</sup> The general denial of bail to indigent defendants could be effectively emphasized by the prosecution of a class writ of habeas corpus. This writ would be prosecuted by a general attack on the bail system through the state appellate system to the United States Supreme Court. It should be prosecuted by some interested agency such as the American Civil Liberties Union, the Criminal Courts Bar Association, or the office of one of the county public defenders. The class would be composed of all defendants in custody awaiting trial whose bails were set without consideration of their ability to post the amount set and who because of a lack of funds have been unable to post that bail. This class writ would have the benefit on certiorari of demonstrating to the court the importance of the issues involved.

<sup>37</sup> *Pannell v. United States*, 320 F.2d 698, 701 (D.C. Cir. 1963).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*



immovable security with the bondsman. Where the security is mobile, such as an automobile, or where none has been required, a fleeing defendant may suffer no financial loss.<sup>40</sup>

If collateral is posted with the bondsman, it still does not necessarily impose a strong financial burden on the defendant if he flees. Since financial ability is not considered in setting the amount of bail required of any defendant, the collateral pledged with the bondsman may be insufficient to burden a wealthy defendant. A proper bail system must recognize that an indigent defendant who pledges a small amount of collateral which constitutes substantially all of his property will have a financial interest at least as great as that of a wealthy defendant who pledges a large amount of property which constitutes a modest portion of his wealth. Instead, the bonding system continues today because the legislature has refused to recognize that this system fails to guarantee any defendant's presence at trial, and the courts have ignored the effects of bondsmen on the liberties of defendants. The result has been that the bondsmen have perverted the people's system of justice by effecting purposeless and unconstitutional discrimination against the poor.<sup>41</sup>

Even where the security is a large amount of real property, a wealthy, fleeing defendant risks little more while under bond than while not. If a defendant chooses to flee the jurisdiction, he must leave his realty behind regardless of bond. He can suffer loss only when the bond has been forfeited, paid to the court, and an action commenced against the security. Forfeiture and payment of the bond are essential to a cause of action against the security. The comfort to a defendant contemplating flight is that even though criminal courts may technically declare a bond forfeiture, they rarely force the bondsman to pay it.<sup>42</sup> The Surety Association of America reports that losses from bond forfeitures among all the nation's bonding companies are less than 2.4% of the bonds written, even though the percentage of technical forfeitures is much higher.<sup>43</sup> Detailed studies show that forfeitures are normally only for minor violations like gambling, liquor, or traffic violations for which they replace fines.<sup>44</sup> Very few are for serious crimes.<sup>45</sup>

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<sup>40</sup> Since the fee to the bondsman is lost when paid, a defendant can suffer no financial loss other than the one already imposed on him when he paid the bondsman.

<sup>41</sup> *Pannell v. United States*, 320 F.2d 698, 701 (D.C. Cir. 1963).

<sup>42</sup> *Hearings on S. 2838, S. 2839, and S. 2840 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 88th Cong., 2d Sess. 264-66 (1964); D. FREED & P. WALD, *BAIL IN THE UNITED STATES: 1964*, at 28-30. California gives the bondsman a six month grace period before even attempting collection. See CAL. PEN. CODE § 1305 (West Supp. 1967).

<sup>43</sup> *Hearings supra* note 42, at 265; FREED & WALD *supra* note 42, at 29.

<sup>44</sup> *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031, 1060-64 (1954).

<sup>45</sup> *Id.*

Not only is the bonding system inefficient in effecting forfeitures, but also collection of forfeited bonds has often been lax or tainted with scandal.<sup>46</sup> For example, in the three year period from 1956 to 1959, the Municipal Court of Chicago recorded only one forfeiture payment of \$5,955.<sup>47</sup> A 1962 investigation in Cleveland disclosed an estimated loss to the city of \$25,000 from failure to collect personal bonds.<sup>48</sup> North Carolina lost an estimated \$10,000,000 in uncollected forfeitures from 1954 to 1964.<sup>49</sup> A recent investigation in Houston produced \$70,000 on "bad bonds" in less than a year.<sup>50</sup>

The bonding business is plagued by charges of corruption and collusion among bondsmen, court officials, police, lawyers, and organized crime. The United States Senate Subcommittee on Constitutional Rights has cited pay-offs by bondsmen to police as essential to survival in the bonding business.<sup>51</sup> California found that police have arranged bonds and concurrently arranged for high bail to be set in exchange for kickbacks from bondsmen.<sup>52</sup> New York has conducted four full-scaled grand jury investigations of bondsmen, and in 1959 a Chicago judge was indicted for collusive vacation of bond forfeitures.<sup>53</sup>

Even though the bondsman's risk of forfeiture is extremely low and the estimated return on his capital exceeds 100% per annum,<sup>54</sup> he sometimes uses illegal and even felonious practices in hunting down the rare defendant who has caused him a forfeiture payment.<sup>55</sup> Considering only some of these facts, Freed and Wald, commissioned by the United States Senate to study the inequities of the bonding system, concluded:

The trouble with the present system is that by relying on money, it jails too many of the poor; it also protects too little against the dangerous. Financial conditions imposed on those who cannot meet them have already been condemned by the courts in other aspects of our system of criminal justice. These decisions suggest that financial bail systems might some day be held unconstitutional under similar circumstances.<sup>56</sup>

Judge Skelly Wright, concurring in *Pannell v. United States*,<sup>57</sup> has concluded:

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<sup>46</sup> *Hearings supra* note 42, at 266; FREED & WALD *supra* note 42, at 30.

<sup>47</sup> Statement of Carl M. Chatters, Comptroller of Chicago, April 8, 1959, in WEXLER, FIRST REPORT OF AMICUS CURIAE ON THE INVESTIGATION OF BOND FORFEITURES IN THE MUNICIPAL COURT OF CHICAGO and in the *Hearings supra* note 42, at 266.

<sup>48</sup> *Hearings supra* note 42, at 266.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 270.

<sup>52</sup> *Id.*

<sup>53</sup> FREED & WALD *supra* note 42, at 34.

<sup>54</sup> M. FRIEDLAND, DETENTION BEFORE TRIAL 156 (1965).

<sup>55</sup> See *United States v. Trunko*, 189 F. Supp. 559 (E.D. Ark. 1960).

<sup>56</sup> *Supra* note 53, at 110.

<sup>57</sup> *Pannell v. United States*, 320 F.2d 698 (D.C. Cir. 1963).

The effect of such a system is that the professional bondsmen hold the keys to the jail in their pockets. They determine for whom they will act as surety . . . . The bad risks, in the bondsmen's judgment, and the ones who are unable to pay the bondsmen's fees, remain in jail. The court and the commissioner are relegated to the relatively unimportant chore of fixing the amount of bail.<sup>58</sup>

Chief Judge Bazelon, writing for the majority, stated that one clear-cut issue should control every case. The only issue, he said, was whether a defendant may be said to qualify for bail release at all. If he does so qualify, the Chief Judge calls for the defendant's unconditional release if he cannot post bail.<sup>59</sup> He concluded that to do otherwise would deny reasonable bail.<sup>60</sup>

#### V. AN ALTERNATIVE TO THE BONDING SYSTEM

In recent years the concept of releasing a defendant from jail on his own recognizance, his promise to return, has acquired respectability in several states and the District of Columbia. In 1961 the Vera Foundation was created by the Ford Foundation to test the concept and to investigate the practical effects of O.R.<sup>61</sup> releases. From 1961 to 1964 the Manhattan Bail Project, instituted by the Foundation, interviewed 10,000 defendants and recommended O.R. release for 4,000. Of the 2,195 defendants actually released, only seven-tenths of one per cent failed to appear in court.<sup>62</sup> Since 1964 the city of New York has taken over the project, broadened it, and found that success has continued unabated.<sup>63</sup> In Washington, D.C., the Ford Foundation financed the D.C. Bail Project, also an O.R. project. From the program's inception in 1964 through 1966, D.C. project officials interviewed 5,144 defendants and recommended 2,528 (49%) for release. Of these, 2,166 (85%) were released, and all but three per cent of them made every court appearance faithfully.<sup>64</sup> Of the three per cent who failed to appear, numbering sixty-five defendants, only eleven actually fled the jurisdiction.<sup>65</sup>

The popularity of O.R. has spread. Since 1964, legislation encouraging the use of O.R. or nominal cash bail has been enacted in a number of states.<sup>66</sup> Other states have initiated O.R. by court rules.<sup>67</sup> Federal O.R.

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<sup>58</sup> *Id.* at 699.

<sup>59</sup> *Id.* at 701.

<sup>60</sup> *Id.* at 699.

<sup>61</sup> Commonly abbreviated form for *own recognizance releases*.

<sup>62</sup> *Supra* note 53, at 62.

<sup>63</sup> *Supra* note 53, at 63-64.

<sup>64</sup> MOLLEUR *supra* note 28, at 31.

<sup>65</sup> *Id.* at 31, n.77. For extensive O.R. data covering every phase of the operation see R. MOLLEUR, BAIL REFORM IN THE NATION'S CAPITAL 30-86 (1966).

<sup>66</sup> NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE, BAIL AND SUMMONS at XVI (1965). States included are Alabama, Alaska, Delaware, Florida, Illinois, Kansas, Maryland, Michigan, Missouri, New Jersey, Ohio, Oklahoma, Oregon, Texas, and Virginia.

has also been established.<sup>68</sup>

California has an O.R. program initiated in 1965 by the court system of Los Angeles County.<sup>69</sup> The Los Angeles County system may well be the most extensive in the country because defendants are eligible regardless of the crime of which they are accused, including murder.<sup>70</sup> The Los Angeles program has grown from 1,866 defendants processed in 1965 to 2,278 defendants processed in the first six months of 1968 alone.<sup>71</sup> O.R. releases have grown from 311 in 1965 to 504 during the first six months of 1968.<sup>72</sup> Failures to appear have dropped from 3.1% in 1965 to 1.98% in 1968.<sup>73</sup>

The procedure by which a defendant may request an O.R. release is very simple, though rather slow. After a defendant is brought before a municipal court judge and informed of the charges against him, he is given an O.R. application.<sup>74</sup> This application requires the defendant to supply a life history including employment information, armed service history, school history, and family relationships. This application is then reviewed at the county jail by an O.R. investigator.<sup>75</sup> Because of the limited staff, only about one-half of the applicants are actually interviewed and have their applications processed.<sup>76</sup> The interviewees are selected from the applications by the investigators, who grade each application on a "Social Factor Scale."<sup>77</sup> The applicants with the highest scores, hopefully the most likely to be granted O.R., are then interviewed and their applications are processed. This process includes an evaluation of the applicant by the investigator and a recommendation to the court. In 1968 seventy-nine per cent of the favorable recommendations were acted upon accordingly by the courts.<sup>78</sup>

An investigator arrives at a decision on the applicant by use of several

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<sup>67</sup> *Id.* States included are California, Connecticut, Minnesota, New York, and Pennsylvania. *Cf.* Fed. R. Crim. P. 46.

<sup>68</sup> Bail Reform Act of 1966, 18 U.S.C. §§ 3141-52 (Supp. II, 1965-66); D.C. Bail Agency Act, 80 Stat. 327 (1966); FED. R. CRIM. P. 46.

<sup>69</sup> Policy Memorandum, Los Angeles County O.R. Program, March 1, 1967 (Unpublished paper available at the O.R. Unit, 911 Hall of Justice, 211 West Temple Street, Los Angeles, California 90012).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* These statistics are partially published in the Los Angeles Court System's EXECUTIVE OFFICER'S REPORT (1967).

<sup>72</sup> *Supra* note 69. It should be noted that Oakland, Berkeley, and San Francisco also have O.R. programs.

<sup>73</sup> *Supra* note 69.

<sup>74</sup> *Supra* note 69, at 2.

<sup>75</sup> *Supra* note 69, at 2.

<sup>76</sup> *Supra* note 69. For example, the report reveals that during the first six months of 1968 only 2,279 applicants of 5,052 were processed.

<sup>77</sup> *Supra* note 69, at 2.

<sup>78</sup> *Supra* note 69.

factors. These include his personal evaluation of the character of the defendant garnered through the interview; the verification of the information supplied by the defendant, especially that given as to past, present, and future employment; discussions with personal references supplied by the defendant; booking information as to the defendant's prior criminal record; and any agency comments, including those of the arresting officer and the social worker.<sup>79</sup> This entire process takes at least one week, and then it may take two additional days to advance the case and obtain a judicial determination on the recommendation. Including the waiting period before the O.R. application is filled out, it may take a qualifying defendant from ten days to two weeks to obtain release. While the criteria used in selecting O.R. defendants appear to be fair, the limited size of the O.R. staff destroys some of the benefits the plan was intended to provide. Few employers will hold a job open ten days or two weeks, and few families have a sufficient cash reserve to support themselves while the head of the household is in jail awaiting the slow turn of justice.

In order to obtain full benefit from the O.R. program, the procedures must be streamlined. The application should be given to a defendant immediately after he is arrested and booked. There is no reason for waiting until his arraignment to do so. To preserve the jobs of employed defendants, the O.R. investigators should be given the discretion to recommend O.R. release immediately after conducting the personal interview and verifying the employment information provided in the application. The present O.R. staff should be expanded to allow the processing of all meritorious applications, thereby eliminating the need for the "Social Factor Scale." If these procedures were adopted, it would be possible for an employed defendant who makes a favorable impression on the O.R. investigator to be released at his forty-eight hour arraignment<sup>80</sup> instead of ten days to two weeks later.

With regard to the defendants released, the O.R. program satisfies both the need for equal protection of the indigent and the need of society to assure a defendant's presence at trial. There are many more benefits to society from the O.R. program. They include releasing defendants from jail and allowing them to return to work, thereby precluding their families' need for welfare.<sup>81</sup> Millions of tax dollars are saved across the country by relieving the taxpayer of the burden of supporting the defendant while in jail.<sup>82</sup>

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<sup>79</sup> *Supra* note 69.

<sup>80</sup> The forty-eight hour arraignment in municipal court is to be distinguished from the plea arraignment in superior court. The purpose of the former is to inform the defendant of the charges against him while the purpose of the latter is to have the defendant enter a plea to the charges against him.

<sup>81</sup> *Supra* note 69. In Los Angeles County alone 42,607 days of freedom have been given defendants by O.R.

<sup>82</sup> *Supra* note 69; *supra* note 64, at 87-96; *supra* note 66. In Los Angeles County there have been custody savings of \$161,888 in 1965, \$487,304 in 1966, \$606,272 in 1967, and \$340,856 during the first six months of 1968.

O.R., however, is not the entire answer. The O.R. program in any jurisdiction requires the submission of an application which may be denied by the program officials or by the court. Wherever such discretion exists, the possibility of prejudice or even honest misjudgment in its operation is possible. For that reason, the Eighth Amendment continues to assure the right of reasonable bail to those defendants denied O.R. In the past, as in the present, their right to bail has been served by the bonding system. This system of bonding is discriminatory, dishonest, and worst of all ineffective. It must be changed. The Committee on the Administration of Bail of the Junior Bar Section of the District of Columbia Bar Association has concluded:

The adoption of a system of pretrial release on *Personal* bond or Low Cash Bail would be instrumental in guaranteeing to indigents the equal protection of the laws. There is no reason, however, to limit such a system to indigents.<sup>83</sup> (emphasis added).

Considering both the need of society to assure a defendant's appearance at trial and the ability of any defendant to post the cash bail, a cash bail system would not only guarantee equal protection, but would also give the defendant a direct financial interest in appearing. Whereas under the bonding system a defendant loses the fee to the bondsman whether or not he appears in court, under a cash bail system a defendant's cash bail would be returned to him in full if he faithfully appeared in court.

Cash bail is especially needed in the area of misdemeanors, where O.R. programs are practically non-existent.<sup>84</sup> Not only do the arbitrary bail standards deny equal protection, but also the bonding system exerts iron-fisted pressure on a defendant to plead guilty at arraignment, especially in the area of minor misdemeanors. For example, the judge in Division 59 of the Los Angeles Municipal Court ordinarily will fine a defendant with few, if any, prior convictions \$50 for a guilty plea to charges like prostitution, petty theft, disturbing the peace, or simple assault. If a defendant pleads not guilty, a trial date will be set two weeks from the date of plea with bail set at \$500 plus a \$125 penalty assessment. The defendant then must either sit in jail two weeks doing "dead time"<sup>85</sup> or pay a bondsman to post his bail. The *non-refundable* fee paid to the bondsman will be \$62.50 (10% of the bond) plus a \$10 bond-writing fee, or a total of \$72.50.<sup>86</sup>

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<sup>83</sup> D. C. BAR ASS'N REPORT OF THE COMMITTEE ON THE ADMINISTRATION OF BAIL IN THE DISTRICT OF COLUMBIA 5 (1962). These conclusions were adopted in *MOLLEUR supra* note 65, at A-9.

<sup>84</sup> None of the bail projects have involved misdemeanor cases. While it is possible in Los Angeles County, for example, to get an O.R. release for a misdemeanor, there is no O.R. project, hence no court officials to verify a defendant's statements about himself, hence the judges usually deny O.R. releases.

<sup>85</sup> This is time in jail which normally will not be credited as time served toward fulfilling any sentence which may be pronounced should the defendant be found guilty.

<sup>86</sup> *Hearings supra* note 42, at 259-60.

Thus the defendant who pleads not guilty and is found innocent will be "fined" \$22.50 more than the man who pleads guilty at arraignment. Of course, if the defendant is found guilty, he will in effect be "fined" twice.<sup>87</sup>

## VI. FEDERAL LEGISLATION

Recognizing the need for national bail reform, the federal government recently initiated new legislation. While most of these acts have been concerned with the federal system and the District of Columbia,<sup>88</sup> a 1966 bill, if reintroduced and enacted, would apply to state procedures and local bondsmen.<sup>89</sup> This bill would establish federal standards for bondsmen to follow in pursuing fugitive bailees. Although it would be a dramatic step for Congress to pass legislation which would end the bonding system in all states, provide mandatory federal O.R. programs to be enforced on state courts, and enumerate complete federal bail standards, it would be within congressional granted powers. Acting under the theory set forth in *Katzenbach v. Morgan*,<sup>90</sup> Congress has the power to strike down California's bail system, as well as that of any other state, if it believes that this is necessary and proper to protect state residents from denial of their federal constitutional rights to reasonable bail. In *Katzenbach* the Court said that where Congress reasonably believes that some State action might result in invidious discrimination even though regular and non-discriminatory on its face, Congress can legislate against the State action.<sup>91</sup>

*Katzenbach* dealt with the constitutionality of section 4(e) of the Federal Voting Rights Act of 1965.<sup>92</sup> Section 4(e) provides:

[N]o person who has successfully completed the sixth primary grade in a public school in, or a private school accredited by, the Commonwealth of Puerto Rico in which the language of instruction was other than English shall be denied the right to vote in any election because of his inability to read or write English.<sup>93</sup>

<sup>87</sup> The statements as to fine procedures in Division 59 of the Municipal Court is based on unpublished charts of bail settings and fines levied made by the author while working in that court. The situation of narcotics charges is the same. In those cases, bail is always set at \$1500 plus a \$375 penalty assessment and almost never reduced. Fines for first time narcotics charges (exclusive of heroin use) are normally about \$125. To post bail a defendant pleading not guilty would have to pay \$197.50 to the bondsman.

<sup>88</sup> Bail Reform Act of 1966, 18 U.S.C. §§ 3141-52 (Supp. II, 1965-66); D.C. Bail Agency Act, 80 Stat. 327 (1966); FED. R. CRIM. P. 46.

<sup>89</sup> S. 2855, 89th Cong., 2d Sess. (1966). The Senate Judiciary Committee held hearings on this bill and reported it favorably to the Senate on May 18, 1968. No further action has been taken on the bill and it was not reintroduced into the 90th Congress. These hearing reveal the illegal practices used by bondsmen in pursuing fugitive bailees. See *Hearings on S. 2855 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89 Cong., 2d Sess. (1966).

<sup>90</sup> 384 U.S. 641 (1966).

<sup>91</sup> *Katzenbach v. Morgan*, 384 U.S. 641, 649-56 (1966).

<sup>92</sup> *Id.* at 641.

<sup>93</sup> *Id.*

After its passage, the Attorney General sought to enforce this act against New York City, which had an English literacy requirement for voting. The question before the Court was not whether this literacy requirement was invidious discrimination, but whether if Congress reasonably believed that it was, it could strike it down. Concluding that Congress could strike down state procedures if it reasonably believed that they effect a denial of equal protection of the laws, the Court held:

It was for Congress as the branch that made this judgment, to assess and weigh the various conflicting considerations—the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected by the nullification of the English literacy requirement as applied to residents who have successfully completed the sixth grade in a Puerto Rican school. It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.<sup>94</sup>

It is reasonable to believe that the bail system denies equal protection of the laws. If Congress comes to this conclusion, it may act to end the discrimination in the way it deems best.

## VII. CONCLUSION

In reviewing the present bail system and its appendage, the bonding system, it is an inescapable conclusion that indigents are systematically denied equal protection of the laws and that society is denied the guarantee that a defendant will appear at trial. Where established procedures are both unjust and ineffective, there is only one course available to those in control. The procedures must be changed.

The alternative to the bail-bonding system is clear. It is the establishment of statewide O.R. combined with cash bail settings reviewable by both the courts and an administrative body. No longer can we afford to enrich bondsmen through unconscionable fees and uncollected forfeitures. No longer can we risk degrading our police and judiciary by tempting them with a system that encourages kickbacks and collusion. No longer can a great democracy deny equal protection of the laws to the indigent.

The initiative must be taken by the state legislatures. Instead of abdicating their responsibilities so that the federal government is forced to act, states must move to eradicate these injustices.

In California the legislature must establish a statewide O.R. program so that defendants in all counties may have the benefit of release without bail. The legislature must abolish bail bonds and the corrupt bonding business that allows "the bondsman to hold the keys to the jail."<sup>95</sup>

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<sup>94</sup> *Id.* at 653.

<sup>95</sup> *Pannell v. United States*, 320 F.2d 698, 699 (D.C. Cir. 1963).



In short, the legislature must act to protect the interests of our people by both insuring the presence of defendants at trial and guaranteeing equal protection of the laws to all.

*Patrick J. Duffy, III*