

FOREWORD: COMMENT ON THE NEW YORK BAIL STUDY†

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What to do with an accused between his arrest and his trial has long posed one of the most puzzling problems in criminal administration. At least from the time of Plato¹ the institution of bail has been a recognized method by which we have attempted to resolve the clash between the danger that the accused will abscond and his rights to prepare his defense and not to be subjected to punishment prior to a conviction that may never eventuate. Through this use of financial incentive as a deterrent against flight we have sought to maintain our "traditional right to freedom before conviction. . . . Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."²

In theory, at any rate, our policy of conditional release pending trial is probably the most liberal in the world. Unlike the British,³ a danger that the accused will engage in criminality in the interval before trial⁴ provides no justification for denial of bail, either directly

† New York Bail Study, published *infra* p. 693, was carried out by seven students of the University of Pennsylvania Law School with the co-operation of the New York City Department of Correction and was financed by a grant from the Fund for the Republic. The students were George J. Alexander, Melvin D. Glass, Michael P. King, James S. Palermo, Frederic M. Reuss, John W. Roberts, and Allen G. Schwartz. The project was administered by the Institute of Legal Research, University of Pennsylvania, and the work was done under the supervision of Associate Professor Caleb Foote of the Law School and Associate Professor Marvin Wolfgang of the Department of Sociology.

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1. "The prosecutor, in a murder-charge, must at once demand bail from the defendant; and the latter shall provide three substantial securities—as approved by the court of the judges in such cases—, who guarantee to produce him at the trial, and if a man be unwilling or unable to provide these sureties, the court must take, bind and keep him, and produce him at the trial of the case." 2 PLATO, LAWS 261 (Bury ed. 1952).

2. *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

3. *E.g.*, *Rex v. Phillips*, [1947] 32 Crim. App. R. 47.

4. It is significant that countries which use this reason for denying bail usually phrase it in terms of fear that the defendant will commit "another" crime while on bail, which of course assumes that he is guilty of the first offense for which he is still to be tried. See, *e.g.*, Yugoslavia Code of Criminal Procedure of 1954, art. 182 (pre-trial confinement): "3) if exceptional circumstances should justify the fear that he will repeat a criminal offense. . . ." (Emphasis added.)

or by the subterfuge of setting prohibitively high bail. Unlike continental procedure, "a danger that the accused may, by destroying material or other evidence of the offense or by influencing witnesses or accomplices, make it more difficult to ascertain the truth"⁵ is irrelevant in determining the question of pre-trial release. Bail setting is to be a delicate adjudication whereby the court will require only so much financial security—and no more—as will insure the defendant's appearance for trial;⁶ and "the spirit of the procedure is to enable [defendants] to stay out of jail until a trial has found them guilty."⁷ Beside the fact that such a policy is implicit in the presumption of innocence, the soundness of our theory will be apparent to anyone who contemplates the almost insuperable difficulty of trying to contact witnesses and prepare and finance a defense from the enforced idleness of a prison cell.

Where the defendant or his close relatives are financially responsible, the bail system as a means of achieving this end probably works tolerably well, for the accused has the means to obtain conditional liberty until trial and the danger of risking his financial security doubtless exerts some deterrent pressure against flight upon him. Especially if white collar crimes are excluded, however, a majority of those accused of more serious crimes today are probably indigent⁸ and are thus not amenable to the threat of bail forfeiture, for they cannot fear losing what they do not possess. Applied to this class of defendants, it would be reasonable to suspect that the traditional bail system would break down and would place courts in the dilemma of releasing the indigent accused without any financial deterrent against flight or of keeping him imprisoned simply because he is indigent.

How serious the bail system's deficiencies have become under current urban conditions with their large load of indigent defendants is graphically demonstrated in the New York bail study which is published herein. Before turning to its merits, it should be noted that this study is a striking example of a small but growing trend in legal research. Beginning in 1951, the University of Pennsylvania Law School undertook a policy of subsidizing summer research by selected students. Besides its value as an educational device, the result of this policy has been, in addition to the present bail report, the production of ten studies on varied aspects of the factual administration of the

5. Federal Republic of Germany, Code of Criminal Procedure, art. 112(2).

6. *E.g.*, FED. R. CRIM. P. 46(c).

7. Mr. Justice Jackson, concurring in *Stack v. Boyle*, 342 U.S. 1, 8 (1951).

8. *E.g.*, in Philadelphia the Defenders Association estimates that they handle at least half of all serious cases.

law.⁹ Produced at a nominal cost,¹⁰ this research policy has shown a remarkably high return on the dollar. These publications demonstrate both that a wide range of problems in the administration of our legal rules can be researched at very low cost and that law schools can make a major research contribution through such utilization of their students.¹¹

The New York bail study is the most ambitious of these summer research projects, and in addition to its research importance it has significant ramifications for legal education. Although imprisonment is both an end product and an interim concomitant of criminal prosecutions, the amount of significant interaction between the legal profession and correctional administration has been negligible. Many of the deficiencies of jail administration, particularly at the local level, can be traced in part to the surprising lack of concern on the part of the bar for the development of a detention and correctional system which will make a maximum contribution to the law's urgent concern for the reduction of recidivism. If the penal system is inadequate, that fact will negate much of what can be accomplished by an efficient administration of the criminal law. All too frequently a correctional program is the whipping boy of budget-cutters because it lacks the community support required to protect itself. As the legal profession is deeply involved in the problem of criminality and has a special concern for the value of individual dignity, it is logical to look to the lawyer for the development of such support; in its teaching of criminal law administration, legal education should therefore inculcate such a sense of responsibility in law students.

In sponsoring the New York bail study the Fund for the Republic and Commissioner Anna M. Kross of the New York City Department of Correction hoped that the project would also serve as a practical

9. Note, *Philadelphia Police Practice and the Law of Arrest*, 100 U. PA. L. REV. 1182 (1952); Note, *The Administration of Divorce: A Philadelphia Study*, 101 U. PA. L. REV. 1204 (1953); Note, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031 (1954); Note, *Criminal Registration Ordinances: Police Control Over Potential Recidivists*, 103 U. PA. L. REV. 60 (1954); Note, *Prosecutor's Discretion*, 103 U. PA. L. REV. 1057 (1955); Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603 (1956); Note, *The Philadelphia Constable*, 104 U. PA. L. REV. 508 (1956); Note, *Administration and Enforcement of the Philadelphia Housing Code*, 105 U. PA. L. REV. 437 (1958); Note, *Preliminary Hearings on Indictable Offenses in Philadelphia*, 106 U. PA. L. REV. 589 (1958); Note, *Curfew Ordinances and the Control of Nocturnal Juvenile Crime*, 106 U. PA. L. REV. — (1958).

10. Previous studies have been financed by the Thomas Skelton Harrison Foundation, the Wiley C. Rutledge Memorial Fund for Studies in Law Enforcement and Individual Liberty (contributed by Jacob Kossman, Esq.) and the school's Alumni Annual Giving.

11. For an example of the application of the same policy in another law school, see Note, *Metropolitan Criminal Courts of First Instance*, 70 HARV. L. REV. 320 (1956).

demonstration of the educational values available when law students are brought face to face with correctional problems. In addition to research duties, each of the seven student participants served for three weeks as a uniformed officer in detention prisons, under a program that gave each student experience in a number of different aspects of prison administration. This direct, behind-the-scenes education proved to be very significant, and the development of such summer internships for law students would appear to be a practical and stimulating way of injecting concern for prison administration into a legal education.

Seven men with only a summer to spend on the job cannot exhaust a subject of such scope as the administration of bail in a city the size of New York. Despite such limitations of time and manpower, however, they have completed what is unquestionably the most authoritative study ever made of the effects upon the accused of the institution of bail.¹² The work is based on a sample of more than 3,000 cases, comprising about half of the felony prosecutions instituted in three of New York City's counties in 1956. What effect would have resulted from the extension of the study to misdemeanor cases or whether what is representative of New York felony practice is also true elsewhere cannot, of course, be established from this study and must await further research.¹³ It seems probable, however, that the most striking finding would be generally true of urban areas: that the deficiencies of the bail system operate to deprive half of all felony defendants of their pre-trial freedom, and that as many as three-fourths of those accused of some of our most important crimes like burglary or robbery are jailed pending trial.

If conditional release pending trial is to be the norm under our system of criminal prosecution,¹⁴ this study makes it obvious that New York's administration of bail is falling far short of that goal. The authors of the study pinpoint some of the causes of this failure. They show how the law imposes needless technicalities which serve to delay or deny bail. For those who cannot post bail, they illustrate how, in the administration of the detention prisons, restrictions caused by crowding and insufficient financing handicap the imprisoned accused far beyond the limits of what would be required solely to achieve ade-

12. Cf. BEELEY, *THE BAIL SYSTEM IN CHICAGO* (1927), which is almost exclusively concerned with protection of the state's investment against "straw" bail. An earlier University of Pennsylvania study in Philadelphia was based on less adequate statistics. Note, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031 (1954).

13. Cf. the similarity of the New York findings with those of the earlier Philadelphia study. Note, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031 (1954).

14. See text at notes 2, 7 *supra*.

quate security. Indeed, the most ironic finding in the whole study is the revelation that accused persons, whom our law presumes to be innocent and who are not to be punished, are confined pending trial under conditions which are more oppressive and restrictive than those applied to convicted and sentenced felons.

Another major contribution is the statistical data which gives us for the first time reliable information on the relationship between the levels of bail normally set for various crimes and the ability of defendants in different criminal categories to make bail at the differing levels. It has been implied that the amount of bail "usually fixed" for a particular category of crime is *prima facie* reasonable bail.¹⁵ This data shows how far removed customary bail is in fact from bail that is reasonable in the context of the ability of most defendants to meet it. Either the judges who set bail are unaware of these trends or they are deliberately setting high bail in order to impose pre-trial imprisonment. The study suggests that both explanations play a part, and proposals are made for more reasonable bail setting practices, for increased use of release without financial security and for better conditions for the untried prisoner.

To the extent that the high level of bail required by New York judges and their negligible use of release without financial security are due to the fact that they are unaware of these statistics, the facts revealed by this study should constitute a major impetus for reform. But if the policy of high bail is a deliberate one, the prospects for significant change in the fate of the indigent accused under the bail system are not very bright. The indigence of many defendants and the short time span before an appeal against deliberately high bail would become moot preclude the likelihood that appellate review can provide the needed corrective influence.¹⁶ As for the study's proposal for better jail conditions for those who are detained, expensive reforms for the benefit of unpopular minorities unfortunately have little practical appeal.

It would appear that the impressive statistics which have been compiled warrant some much more drastic inferences than the proposals for improved bail administration advanced by the authors of the New York study. The findings suggest that no adjustments made within the traditional confines of the bail system can resolve the ugly fact that our pre-trial criminal administration today discriminates according to

15. *Stack v. Boyle*, 342 U.S. 1 (1951).

16. The inadequacy of appellate policing of bail setting is suggested by the fact that, although "excessive" bail is prohibited by all states, either by constitutional provision (46 states), or by statute (Vermont) or judicial decision (Illinois), in 25 of the states there appear to be no reported decisions relating to the amount of bail.

economic status. No system of conditional release which places exclusive reliance upon *financial* incentives can be justified under conditions where indigents, transients and others without economic security constitute so large a proportion of the defendant population. The fact that the New York study found that even for those for whom bail was set at the purely nominal figure of \$500 the result was pre-trial imprisonment in twenty-eight per cent of the cases bears eloquent testimony to the existence of a hard core of defendants who can offer no reasonable financial security whatsoever. Of course the bail system tries to adjust to such a contingency, and one of the traditional bail-setting standards is "the financial ability of the defendant to give bail."¹⁷ It would be possible to adopt the interpretation of the Korean Code of Criminal Procedure that "the court shall not fix bail money beyond the financial ability of the accused."¹⁸ Our courts, however, have not so construed it,¹⁹ for the obvious reason that such a construction really abolishes the bail system by granting freedom to most accused with no financial sanction at all or with one that would be regarded as wholly inadequate in more serious cases.

Our law has not distinguished itself in the protection of indigent defendants, and even such an obvious factor as the necessity of counsel if there is to be a fair trial has received gingerly treatment in cases arising under the fourteenth amendment.²⁰ Moreover, the application of the equal protection clause to the problem has, until recent years, been conspicuous by its absence. The dawn of a more realistic approach, however, may be seen in *Griffin v. Illinois*²¹ where the Court ruled that an indigent state prisoner cannot be denied an otherwise available appeal because of his inability to pay for the required transcript. Also significant are the holdings that, where state remedies which must be exhausted are inaccessible to a state prisoner because of his poverty, he can nonetheless bring federal habeas corpus.²² Doubtless denial of appellate or federal review because of poverty is a more extreme situation than the denial of conditional release pending trial to

17. FED. R. CRIM. P. 46(c).

18. Korea, Code of Criminal Procedure, art. 98(2), translation in YEARBOOK OF HUMAN RIGHTS 184-89 (1954).

19. *E.g.*, *Ex parte Malley*, 50 Nev. 248, 256 Pac. 512 (1927).

20. A state is required to provide an indigent defendant with counsel only where "there are special circumstances" showing that otherwise a fair trial could not be had, *Bute v. Illinois*, 333 U.S. 640, 677 (1948), although recently the "special circumstances" requirement has been liberalized, *e.g.*, *Pennsylvania ex rel. Herman v. Claudy*, 350 U.S. 116 (1956). In contrast, many other countries make the right absolute. *E.g.*, *Holgado v. People* (Supreme Court of the Philippines, 1950), reported in YEARBOOK OF HUMAN RIGHTS 230 (1950).

21. 351 U.S. 12 (1956).

22. *E.g.*, *United States ex rel. Embree v. Cummings*, 233 F.2d 188 (2d Cir. 1956).

an accused because of his poverty, but there are strong similarities between the two situations. As denial of an appeal leaves unresolved questions about the validity of a judgment, denial of conditional release affects the quality of a defendant's trial by impairing his ability to prove his innocence. The indigent or near-indigent accused is seriously handicapped at best in this respect, for he is often thrown back upon an overworked public or volunteer defender and no public funds are available for investigative purposes.²³ We cannot get around the situation that a rich defendant is always going to be in a preferred position because of his ability to hire the best lawyer and to pour money into the search for evidence, but from such a fact we should not rationalize a denial to the poor accused of even such succor as can be had from self-help. There is always the possibility that a poor defendant, if given conditional release, can find employment in order to finance otherwise unavailable legal or investigative assistance.

Clearly then, the spirit of the *Griffin* case ought to control our policy of conditional release for indigent defendants. The words of the Court, applied in the context of the denial of a transcript, are equally relevant to the accused who because of his poverty is denied conditional release:

"Such a denial is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law. There can be no equal justice where the kind of a trial a man gets depends on the amount of money he has."²⁴

The trial handicap which detention imposes on the poor defendant is not limited to the pre-trial preparation of a defense. In addition to the determination of guilt or innocence, the criminal trial process also involves the sentence to be imposed on the convicted. Among the most interesting of the findings made in both the New York study and an earlier Philadelphia bail study is that defendants on bail are placed on probation three times as frequently as defendants coming to court from a detention jail. As a matter of statistics this is inconclusive, for the many variables involved preclude any direct cause-and-effect argument, but, as the study points out, it is consistent with common sense. A bailed defendant who can come before the sentencing court

23. "Such are the coercions of poverty that a decent sensible lawyer may well advise an innocent man, too poor to obtain essential defense evidence, to bargain with the prosecutor to accept a plea of guilty to a lesser crime than that with which the defendant is charged." *United States v. Johnson*, 238 F.2d 565, 573 (2d Cir. 1956) (dissenting opinion of Judge Frank). See also Address by Judge Frank, ABA Diamond Jubilee Meeting, Aug. 26, 1953, reported in 15 F.R.D. 93, 100-01 (1953).

24. 351 U.S. at 19.

and argue that he is currently holding a job and supporting his dependents has a status favorable to probation which pre-trial imprisonment destroys.

There is also an additional factor in the conditional release problem which was not present in the *Griffin* case, but which also involves an implicit violation of the spirit of equal protection. The bail system reflects the importance attached to the prevention of punishment for an accused who turns out to be innocent.²⁵ At present, however, this policy has practical effectiveness only on a discriminatory basis. This invidious class distinction will remain in the absence of some means to accomplish for the poor what the bail system can do for the well-to-do.

It would appear, therefore, that the statistical contribution of this study poses a challenge to the law to develop methods of insuring appearance which will protect the state without requiring a violation of the spirit of equal protection. An important factor in reducing the state's risks would be the provision of a speedy trial. The fact is that we do not afford such speedy trials today, but the failure of the state to provide machinery for rapid adjudication of criminal cases hardly gives that same state clean hands in arguing for pre-trial imprisonment to protect against risks which it could mitigate. The study suggests a statute making it a criminal offense for an accused to fail to appear in court after due notice,²⁶ and the argument that this would be an adequate alternative rests on the fact that most people whom the police really want to find are sooner or later apprehended.²⁷ If such sanctions and the provision of speedier trials are insufficient to bring all accused to justice, it must be remembered that the bail system itself rests on the premise that admission to bail "is a calculated risk which the law takes as the price of our system of justice."²⁸

25. The proportion of detained defendants who are ultimately never convicted will reflect the efficiency of magistrates and district attorneys in screening out weak cases at the preliminary hearing level. The high proportion of actually guilty defendants shown in the New York bail study is a commendation of New York prosecutive efficiency. In Philadelphia the proportion of jailed defendants who were not convicted was somewhat higher. Note, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031, 1052 (1954) (18% of jailed defendants not convicted). In many jurisdictions the figures may be much higher. See Van Vechten, *Differential Criminal Case Mortality in Selected Jurisdictions*, 7 AM. SOC. REV. 833 (1942).

26. See Bail Study at p. 722 *infra*. See also statute proposed in Note, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031, 1073 n.157 (1954); the same suggestion by a New York grand jury, N.Y. Times, Dec. 13, 1956, p. 38, col. 3.

27. *E.g.*, only seven escapees from federal prisons between 1937 and 1954 were still missing in 1954. Bennett, *Evaluating a Prison*, 293 ANNALS 10 (1954).

28. *Stack v. Boyle*, 342 U.S. 1, 8 (1951) (concurring opinion of Mr. Justice Jackson).