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THE COMING CONSTITUTIONAL CRISIS IN BAIL: II ^{a1}

In the first part of this article ¹⁸² I described the circumstances surrounding the adoption by the first Congress of the excessive bail clause of the eighth amendment and traced its antecedents in both colonial and English history. The historical evidence showed that preconstitutional protection against pretrial imprisonment rested not only on a proscription against excessive bail but, more importantly, upon statutory provisions fixing the right to bail and guaranteeing through habeas corpus an effective and speedy remedial procedure. The ambiguity of the eighth amendment was traced to the fact that the Constitution, while preserving habeas corpus and prohibiting excessive bail, failed to provide explicitly for the underlying right to bail which the other clauses served to implement. This failure was ascribed to the inadvertent draftsmanship of George Mason, and it was concluded that the only reading of the eighth amendment consistent with Mason's purpose to provide "effectual securities for ... essential rights" reveals a right to bail secure against both legislative and judicial abridgement. While such an interpretation leaves unresolved the precise scope of the right and its possible limitation in extreme *1126 situations, the alternative is to reduce the amendment to surplusage and to disregard (1) the important role of bail as a fundamental right in the development of English liberty following Magna Carta; (2) the nondiscretionary character of contemporary English and colonial bail law; (3) the significant trends in colonial legislation which went far beyond English law in their liberality and excluded judicial discretion in determining the right to bail; and (4) the objective of the Bill of Rights to protect against congressional abuse.

From the assumption that the eighth amendment establishes the right to bail, I proceeded to examine the constitutional standard of what constitutes "excessive" bail for indigent defendants and concluded that existing interpretations which exclude the poor from pretrial release are seriously out of step with current constitutional concern for the poor. These interpretations derived from an era which had no more regard for the rights of paupers generally than for the narrower problems posed by the indigence of many criminal defendants. This conflict between an historically derived discrimination and a growing thrust towards equal protection led to the prediction that major constitutional problems in the relationship of indigents to the bail system are in the offing, and it is to these problems that I now turn.

III. CONSTITUTIONAL ADJUDICATION OF A BAIL CASE

The precise nature of the constitutional dilemma in bail is best illustrated by examination of an example. Accordingly I will put a hypothetical case which poses in perhaps their most difficult form the issues which must be faced in reaching a resolution of the pretrial detention problem. The hypothetical case will then be analyzed in light of our previous discussion of the extent of the constitutional right to bail and the rights of a pauper against "excessive" bail. Finally, the constitutional scheme will be contrasted with a possible alternative system of preventive pretrial detention whose operation is based on the application of standards of dangerousness applied to rich and poor alike.

A. The Hypothetical Case

About 3:10 a.m. on Sunday morning a robbery occurred at an all-night service station in a large, northeastern city. The sole attendant on duty, Allen, was waiting on a customer, Williams, as the robber's car drove up and the driver got out. After Williams left and Allen went over to the robber's car, the robber suddenly lunged at *1127 him, knocking off his glasses and pressing the open blade of a small knife against his stomach. The robber forced Allen to give him 130 dollars from the cash register and, before leaving, also took two new Atlas tires and an electric lantern from displays in the station. Allen, who had very poor vision without his glasses, could only describe his assailant as a Negro of medium build and height, age about 25. Another customer, Watson, who arrived as the robber drove away, was able to describe the car as an old, dark, two-door sedan. Watson could not state the car's make and did not obtain the registration number, but he did note that it carried Virginia plates.

Late the next afternoon (Monday) an alert police officer, who had read about the foregoing facts in a police circular and who was on duty on Grand Avenue, in a lower class Negro district, noticed an old two-door black sedan with Virginia plates illegally parked on a garage lot, partially blocking the sidewalk. When he investigated he saw two very new Atlas tires mounted on the rear wheels. The officer asked the garage operator, Inman, about the car and tires. Inman stated the car belonged to a man named Daniels, who had mounted the tires himself the day before and "had acted kind of suspicious." As another man approached, Inman volunteered, "There's Daniels now." The officer called Daniels over and asked Inman, "Is this the man?" Receiving an affirmative reply, the officer questioned Daniels about his ownership of the car, his whereabouts the night of the robbery and his acquisition of the tires. He received answers he regarded as evasive and unsatisfactory, including the assertion that Daniels had possessed the tires "for about a week." When the officer noticed an electric lantern on the back shelf of the car, he took Daniels into custody. A search produced forty-two dollars in cash and a small pocket knife; a check of the tires and lantern showed them to be of the same variety as those stolen from the service station. The attendant, Allen, was unable to identify the defendant.

On Tuesday morning after a preliminary hearing defendant was ordered held for the grand jury on a charge of armed robbery and committed to jail in default of 2,500 dollars bail. On Thursday a white man, Williams, came to the police station and identified himself as one of the customers who had been in the service station at 3:10 a.m. on Sunday. He said he had just learned of the robbery, that he had had a good look at the robber when he drove up as the attendant was servicing his car and that he thought he could identify him. The police obtained an order enabling them to get defendant from the county jail in order to parade him in a line-up at which Williams picked him out as the man he had seen at the service station.

*1128 On the following Monday the defendant Daniels was interviewed by an attorney from Legal Aid. Defendant complained that he had asked to see a Legal Aid lawyer repeatedly over the past week, but the lawyer explained that Legal Aid did not have the staff to represent all defendants at preliminary hearing and that this was the first opportunity they had had to see him. In response to the lawyer's inquiry about how he was being treated, defendant complained bitterly about "lousy" food, being locked in a cell eighteen hours a day, and having been given a "going over" by the police for an hour the previous Thursday. He explained that he had been taken from the jail and put in a line-up, after which "three or four of them" had questioned him for about an hour. He said that they had been trying to get a confession but that he "knew his rights" and refused to talk. He also said that he was not physically abused.

At the lawyer's request defendant briefly described his background, stating that he was twenty-six years old and had been born and raised in Virginia, where his parents rented a small farm. He admitted that he had previously been convicted once each for vagrancy, drunkenness, disorderly conduct, theft and assault, and had served two short jail sentences. He had left Virginia in his car about a year ago, had stayed in several other cities where he had had occasional jobs and in one of which he had served one of his sentences, and had arrived in this city three weeks ago. After staying a few days with a sister who had come here a few years ago and whom he hadn't seen for years, he had moved to a rooming house. He had obtained several days' work as a day laborer and on the day of his arrest had found a job at a car wash and was just returning from his first day's work when he was apprehended. His only assets were his clothing, a cheap radio in his

room, and the money and car which the police had confiscated. Asked about the electric lantern, he explained that he had purchased it in Cincinnati three months previously.

On the Saturday before the robbery he said he was dead broke and tried to borrow ten dollars from his sister, who didn't have it to lend him. That afternoon he had been with a fellow whom he knew only as Joe; they had gotten into a crap game with a group of other men he did not know but some of whom he could probably find; luck was with him and he had won over one hundred dollars. Early in the evening he visited his sister and gave her thirty dollars from his winnings. Around 11:00 Saturday night he was in a Grand Avenue tavern and met a girl he could identify only as Jo Ann but whom he would certainly know if he saw her again. About midnight he went with Jo Ann to her room nearby; by that time he was quite drunk, *1129 but he knew generally, within a block or two, where the room was. He was with Jo Ann until midmorning on Sunday and when he left, went to get his car, only to find he had two flat tires. The tires were so old as to be hardly worth repair, and while he was contemplating his predicament a man whom he had seen before and whose name might be Charlie approached him and asked him if he would like to buy two new tires cheap. Defendant purchased two Atlas tires from Charlie for fifteen dollars, asking no questions as to how Charlie had obtained them. He stated that the reason he had lied to the officer about how long he had had the tires was because he suspected there might be something fishy about the transaction. Defendant described Charlie as a Negro, age about twenty-five to thirty, about five feet ten and 170 pounds, with a small moustache. He then went to the garage operated by Inman, whom he knew slightly, and borrowed the necessary tools to mount the tires. He said he was mad at Inman for getting him into trouble by identifying him to the arresting officer and by what Inman had told the officer. "If he'd kept his mouth shut, I wouldn't be here."

The attorney was sufficiently impressed by the defendant's demeanor and possible innocence to make special arrangements to have a Legal Aid investigator sent immediately to the Grand Avenue neighborhood where defendant lived to try to check out his story. The investigator reported that he had found defendant's sister, who was unmarried, pregnant and had two small children; she was living on welfare and unable to help defendant financially; she confirmed that defendant had first tried to borrow money from her on Saturday and later, "about ten" that evening, had given her thirty dollars. He verified defendant's rooming house and his employment at the car wash, where someone else had been hired to replace him after he failed to show for work on two successive days. He also located Inman's garage and confirmed the account of the tire-mounting episode on Sunday, but he was unable to find any trace of Joe, Jo Ann or Charlie. When later informed of this last fact by the attorney, defendant exclaimed: "Those people won't talk to you, man. Get me out of here and I'll find them."

B. A Note on Strategy

The hypothetical defendant is typical of the many urban accused who are bad bail risks by any of the orthodox standards. He has no money, no ties to the community, no respectable local relatives, and a prior criminal record. He represents the cases which are not likely to *1130 be helped by reforms such as the Vera Foundation's Manhattan Bail Project, which deal in relatively good risks.¹⁸³ But his story also illustrates the fact that such a person may not be guilty of the particular crime with which he is charged. His defense at trial will have to turn on his own credibility and his ability to produce alibi witnesses. The case thus poses three major problems of bail in indigent cases: pretrial punishment of a defendant who may not be guilty, the possibly critical importance in the trial of a close case of any contamination of the adjudicatory process which may result from a defendant's jail status, and special circumstances which may impair the right to prepare a defense.

The threshold problem for counsel for the hypothetical defendant is to determine what procedure can be employed for immediate relief from pretrial detention. A combination of factual circumstances and rules of procedure has made it very difficult to obtain effective review of alleged excessive bail. Counsel could use the state courts to attack the bail amount by habeas corpus or motion, alleging that any financial demand upon an indigent constitutes constitutionally excessive bail. This immediately brings one up against rules created to insulate the original determination of the amount of bail from

attack. A so-called presumption against interfering with the discretion of the court originally setting bail¹⁸⁴ requires the defendant to assume the burden of showing a flagrant abuse which shocks the court,¹⁸⁵ and some courts even examine the amount of bail in the context of a further presumption *1131 that for this purpose the defendant is assumed to be guilty.¹⁸⁶ In one case where an appellate judge thought that bail in half the amount set would have been sufficient to secure the defendant's appearance, it was held that the lower court's action was not sufficiently arbitrary or capricious to warrant relief.¹⁸⁷ These rules, coupled with the factors of time, poverty, obstacles to obtaining an original setting of bail,¹⁸⁸ and the uncertainty of being able to obtain actual release even if a bail reduction case is won on appeal¹⁸⁹ probably account for the fact that about half the American jurisdictions have no reported cases dealing with allegedly excessive bail. Of course many bail reduction cases are unreported, but the inference is strong that present procedures for obtaining relief from an original determination of allegedly excessive bail are grossly inadequate.

The state court system, moreover, is almost certain to be relatively unsympathetic to novel federal constitutional claims, and access to a federal forum is of great importance. But if we are dealing with a typical jurisdiction, jail cases are expedited on the calendar and within thirty to fifty days of arrest the defendant will be brought to trial, thereby mooting pretrial procedures for relief. This time squeeze is almost certain to prevent exhaustion of the state appellate system in time to obtain review in the United States Supreme Court.¹⁹⁰

*1132 An alternative tactic, and one that would have to be resorted to if processes of judicial review could not be exhausted before trial was had, would be to raise the bail issue on appeal from conviction. This tactic would probably succeed, for where federal constitutional issues are at stake the defendant would probably not be barred by a holding that the only remedy for excessive bail was by pretrial motion and that the issue might not be grounds for reversal on appeal after conviction.¹⁹¹ The most obvious defect of the tactic is that the delay in obtaining an adjudication of the detention issue would deny the hypothetical defendant any relief at all should he in fact not be convicted at his trial. While the cynical might argue that for practical purposes nonconviction and avoidance of a possibly long prison sentence is remedy enough, it is precisely the case where the defendant is ultimately not convicted in which pretrial punishment by detention is most offensive to our concept of justice. Such cases are not rare—for example, twenty-seven per cent of a recent sample of jailed New York City felony defendants were not convicted¹⁹²—and point up the urgent need of procedures which will resolve detention issues before trial and before irreparable harm has been done.

In the hypothetical defendant's case, moreover, tactical considerations suggest that the only effective relief is a speedy, pretrial remedy. If he is detained, not permitted to search for his alibi witnesses and then convicted, how is he to show after his trial that he has been prejudiced by the detention? If in fact he is innocent of the robbery, he will continue because of his imprisonment to be unable to prove it. Even if he were released at some later date to search for Joe, Jo Ann and Charlie, passage of time is likely to have speedily erased all trace of them. The best and probably only way to find out whether or not the defendant is being prejudiced by detention in preparing a defense is to release him immediately and see, for example, if he can produce those witnesses whom he claims he alone can locate.

Recent developments in civil rights litigation may have laid the groundwork for a method whereby a prompt pretrial adjudication of *1133 the constitutional bail issues can be obtained in a federal court. In both *In re Shuttlesworth*¹⁹³ and *Dresner v. Stoutamire*¹⁹⁴ civil rights defendants faced the prospect of having to serve jail sentences while pursuing state remedies after conviction since the state denied bail pending appeal. The defendants then applied for federal habeas corpus. In *Shuttlesworth* the Supreme Court ordered the federal district court

... to hold the matter while petitioner pursues his state remedies ... including an application for bail to state courts pending disposition of petitioner's application for state relief. In the event of failure to secure such relief, or to secure admission to bail pending such relief within five (5) days from the date of application for

bail, ... [the district court] may then consider all state remedies exhausted and proceed to hear and determine the cause, including any application for bail pending that court's final disposition of the matter.¹⁹⁵

In *Dresner* the state court was given only three days to afford release on “nominal bail.”¹⁹⁶

The bail situation is sufficiently analogous for the same procedure to be available. The civil rights defendants in the absence of extraordinary federal relief would have had to serve their sentences, thereby suffering the punishment alleged to be unconstitutional and mooting any adjudication of constitutional claims. In the bail situation a substantial proportion of defendants jailed pending trial are sentenced upon conviction to time already served or are given credit for that time against a longer sentence.¹⁹⁷ Realistically, therefore, for most defendants time in detention constitutes anticipatory service of all or part of a punishment formally imposed at a later date. Insofar as *Shuttlesworth* and *Dresner* rest on the prevention of imposition of punishment pending adjudication of constitutional objections, therefore, the analogy of the bail cases is very close. To the extent that the reasoning of those civil rights cases is to prevent mootness, the bail situation presents a somewhat different case. If *Shuttlesworth* had finished service of his sentence before his appeal had been adjudicated, his case would have been irrevocably moot; but if a defendant is forced to trial without pretrial liberty, is then convicted and sentenced *1134 to further imprisonment, his constitutional bail claims could still be raised on appeal. This distinction, however, should not be dispositive for three reasons. First, if the bail defendant is convicted, and should win his bail question on appeal, we have noted that relief may come too late to be helpful if he can no longer locate his missing witnesses. In that event the court would have to face the unpleasant choice of allowing a retrial after unconstitutional deprivation of pretrial liberty has already done irreparable damage or of freeing the defendant outright. Second, it is much more difficult to estimate the degree of prejudice suffered by the defendant if the issue is to be determined only on appeal after conviction. Third, if the defendant is not convicted, his constitutional claims will have been mooted in precisely the same manner as in *Shuttlesworth* and he will have served allegedly unconstitutional anticipatory punishment which has proven to be unjustified without any opportunity for adjudication of his claims. These considerations suggest why the federal courts should and probably would follow the *Shuttlesworth* precedent in bail cases.

This important development in federal habeas corpus jurisdiction should for the first time open an effective procedure for testing constitutional issues in bail cases. Counsel could file simultaneous petitions in the appropriate state and federal courts, alleging that if the petitioner is not released forthwith on his own recognizance he will continue to be deprived of specified constitutional rights. The federal petition, citing *Shuttlesworth* and *Dresner*, would ask the court to take jurisdiction unless immediate relief was forthcoming in the state proceeding. If counsel is adequately prepared,¹⁹⁸ legal developments in civil rights cases have shown that very speedy adjudication in the federal system is possible even if it is necessary to go to the court of appeals or the Supreme Court.

C. Constitutional Issues for Decision

Under existing bail law the hypothetical defendant has little chance of prevailing in his effort to achieve immediate release without financial security. As we have seen, by the federal rule of *Stack v. Boyle*,¹⁹⁹ which is generally applied in the states as well, bail in an amount usually fixed for the crime charged is not deemed excessive; individualized standards for bail setting, for example, [Federal Rule of Criminal Procedure 46](#), apparently do not apply, and in practice are not applied, where bail has been set in such an average amount.²⁰⁰ The hypothetical *1135 defendant is held in 2,500 dollars bail on a charge of armed robbery, and counsel's investigation would speedily disclose that this amount is not beyond the average range for so serious a charge.

Reliance will have to be placed, therefore, on hints in very recent cases²⁰¹ that *Stack v. Boyle* may not be the last word as far as indigents are concerned; on theories of due process which, although frequently applied, have never been invoked in the bail field; and on an attempt to tie together eighth amendment and equal protection theories which explicitly invite the courts to create new law notwithstanding strong historical tradition to the contrary. While there is inevitable overlapping among the claims relevant to the hypothetical defendant's case, it is helpful for purposes of analysis to state each separately.

1. He is being denied the fundamental fairness guaranteed by the due process of law because, although he alleges he is innocent, he is being punished by imprisonment before he has been tried.
2. He is being denied procedural due process because detention adversely affects the disposition of his case and thereby deprives him of a fair trial.
3. He is denied equal protection of the law because, solely on account of his poverty, he is being denied pretrial liberty.
4. His right to bail under the eighth and fourteenth amendments is being violated because the proscription against "excessive" bail must be construed in such a way as not automatically to foreclose for indigents the fundamental right to freedom pending trial.

Two threads run through all of these allegations. First are the underlying values of a democratic administration of justice which make up due process of law. Kadish has described them in this way:

The various procedural safeguards traditionally demanded in the name of due process appear to be directed to two objectives. One is the goal of insuring the reliability of the guilt-determining process—reducing to a minimum the possibility that any innocent individual will be punished. It is not of crucial importance whether the individual tried is in fact guilty or innocent, but it is of crucial concern that the integrity of the process of ascertaining guilt or innocence never be impaired

The second objective ... traditionally deemed a part of the due process of law is more elusive and subtle. But its *1136 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 equally by procedures that fail to respect his intrinsic privacy or that ... exhibit a disdain for the value of the human personality²⁰²

When applied to an analysis of the bail system, these central due process values are infused with the ideals which cluster around the concept of equal justice. Pretrial detention may be regarded, in all or at least in some instances, as an infringement of the minimum essentials of a fair trial because it prejudices the disposition of the detainee's case. It may be categorized as an unjustifiable invasion of individual privacy and dignity because it imposes the punishment of imprisonment before final determination of guilt. As the application of these values of fairness and privacy necessarily involves drawing along a continuum an inevitably arbitrary line dividing the constitutionally permissible from the impermissible, the purpose of the detention becomes an important factor to be considered in determining the precise locus of division. If the only reason for detention is that the defendant is poor, as would be true in the case of an indisputably good bail risk, a very slight showing of prejudice or invasion of privacy should be sufficient to tip the constitutional scales.

The second thread connecting the hypothetical defendant's various allegations relates to the purpose of his detention. His claim that he is being discriminated against solely on account of his poverty may be his strongest appeal to our sympathy,

but it is also the weakest link in his argument. The state's reply is a simple one: the 2,500 dollars bond is not intended to discriminate against the poor but to give the state some security that all defendants will appear for trial. We will have to return to the problem this reply presents below; it is sufficient here to note that the question of intention is seldom an easy one. It is rare that a stated objective is so patently false that the mask can immediately be torn away to reveal an underlying illicit purpose.²⁰³ It is rare, too, that one can meet the burden of proof required to show that a statutory policy fair on its face is actually discriminatory in its application.²⁰⁴ Clearly the state has a strong and legitimate interest in compelling appearance at trial or after final disposition of an appeal. *1137 It is far from clear, however, that bail in its predominate modern form—commercial bonding—bears any significant relationship to this legitimate state interest. As Judge J. Skelly Wright of the District of Columbia recently put it,

... bail has become a barnacle on the back of the criminal law. Theoretically a defendant out on bond is in the custody of his bondsman. Thus the bondsman is allowed to charge a modest fee, ten per cent of the bond, for the service he renders and the risk he runs. Actually a defendant on bond is in the custody of no one and the police and the FBI are much more familiar with his whereabouts than his bondsman. Moreover, if the defendant fails to appear for trial, it is the FBI or the police who pick him up—yet the bondsman gets the fee. In short, the bondsman gets paid for rendering no real service²⁰⁵

Or, to look at the other side of the coin, the indigent defendant is jailed for inability to put up the fee for the purchase of something which renders no service to the state.

D. Problems of Due Process

1. Prejudice From Pretrial Detention

The hypothetical defendant's due process claims involve two quite different kinds of prejudice. The first is unrelated to fair trial or the method of adjudicating guilt or innocence. It turns instead on the second limb of Kadish's analysis: the "notion of man's dignity" and "the value of the human personality."²⁰⁶ That punishment by imprisonment prior to conviction is an evil to be tolerated, if at all, only because of compelling social necessity needs no elaboration. We have noted that probably at least one-quarter of the total pretrial jail population is never convicted.²⁰⁷ As there is no question that such a statistic represents a prejudicial invasion of human values, the only problem is how much to weigh it against the supposed necessity that has produced it. Nor is the prejudice limited to those who are never convicted. Among the entire population subjected to pretrial detention—and their relatives and friends—the felt injustice of punishment without a finding of guilt cannot but impair that confidence in the law's fairness which must be the touchstone of a jurisprudence dedicated to respect for human dignity. The only plausible explanation for the gross *1138 undervaluation of this shocking result of the bail system in the due process market place of competing values is that the population which is prejudiced is stigmatized by accusation of crime and rendered powerless and voiceless by poverty.

The second type of prejudice which contemporary bail law imposes on the poor is the adverse effect on the guilt-determining and punishment-setting process through which the unbailed indigent defendant must pass. It is helpful to distinguish three kinds of infection which can sap the vitality of the trial: (a) special circumstances which, when they exist, may prejudice the particular defendant concerned; (b) pretrial detention conditions which themselves pollute the impartiality of the trial process but which could be corrected through general reforms; (c) inevitable concomitants of detention which corrupt the fairness of the trial afforded detained as compared with bailed defendants. All three of these kinds of trial prejudice are involved in the hypothetical defendant's case.

In some respects this three-part classification parallels the sources of prejudice examined in the right to counsel controversy. The first suggests the rule of *Betts v. Brady*;²⁰⁸ the second, the ways in which, without affording counsel, it was maintained that a trial could be nonetheless made fair as, for example, through the protective role of the trial judge;²⁰⁹ and the last, the presumption of prejudice from want of counsel which finally produced *Gideon v. Wainwright*.²¹⁰ Indeed, the problems of bail and of counsel for indigents present some striking similarities. In the initial stages of each development, logic, analysis and policy were all subordinated to the amorphous but pervasive force of a conditioned historical reflex. Once a breach was made in the wall of historical tradition in the counsel cases, the ultimate ascendancy of fairness over history was assured; in retrospect one only wonders why it took us so long to act upon the obvious proposition that fairness in criminal defense requires the assistance of counsel. It will be interesting to see whether the development of bail law will again subject us to a gloomy interregnum of the kind that prevailed between *Betts* and *Gideon*.

a. Factors of “Special” Prejudice

The hypothetical defendant is set apart from the mainstream of the detained in at least three respects. Where the majority of criminal *1139 cases pose only an issue of treatment of a concededly guilty defendant, there is at least some doubt about the hypothetical defendant's guilt, and in close cases any possible prejudice resulting from detention status therefore takes on added significance. Moreover, unlike most of that minority of cases in which there is a disputed issue of fact, here possible verification of the defendant's version of the facts poses particular investigative problems for whose resolution the accused himself is uniquely qualified. Finally, this defendant, because of the lineup and post-hearing interrogation, was subjected to interference with his qualified right to be left alone which went beyond anything required to keep him in secure custody pending trial.

Any one of these deviations from the mean of normal pretrial indigent detention may provide the necessary ingredient for a meritorious claim based on the first limb of Kadish's due process model; and in each instance the claim can be seasoned by the fact that except for the defendant's indigency he would have been exempted from having to take on that added risk.

The defendant's alibi sounds improbable but it cannot be entirely discounted. The fact that those parts of his statement which the investigator could check out were truthful gives some support to his credibility. Perhaps most significant, we know that while he tried to borrow ten dollars from his sister on Saturday morning, by that evening—before the time of the robbery—he had acquired enough assets to make her a gift of thirty dollars. In contrast, two of the strongest links in the prosecution's evidence—the similarity of his car to the one described at the scene of the robbery and the identification of the defendant by the white customer, Williams—need to be viewed with some scepticism. The first is damaging but far from conclusive in these days of northward Negro migration, when the presence in Negro sections of northeastern cities of “old, dark” cars with Virginia plates is not uncommon. As for the identification, one needs to recall the experience drawn from studies of cases in which persons were convicted of crimes of which they were later proved innocent:

Perhaps erroneous identification of the accused constitutes the major cause of the known wrongful convictions. In many such a case the witness lied, sometimes at the prompting or with the knowledge of the police or the prosecutor. More often, however, the witness made an honest error.²¹¹

*1140 If lineup identification evidence is unreliable at best, moreover, it is least reliable when it requires a white witness to distinguish one Negro from another.²¹²

Because the tendency of any system of criminal justice is to bury its own mistakes, we have no way of estimating the incidence of erroneous identifications which result in unjust convictions. There is cause for uneasiness, however, when

one considers those cases in which a mistake has been established. They are characterized not only by the resistance of officialdom to any admission of error but also by the fortuitous character of the events which led to exoneration.²¹³ The actual criminal may have been later arrested for another crime under circumstances which happened to instigate a reopening of the earlier case, the conscience of some public official or the curiosity of a newspaper reporter may keep a case alive despite the finality of conviction, or in very rare instances the unjustly convicted person himself may after release devote his remaining years and resources to the search for vindiction.²¹⁴ The fact that it takes such a combination of luck, concern and resources to correct a mistake long after the fact suggests that the ratio of undiscovered to discovered error may be far higher than we would like to imagine.

One of the most damaging facts implicating the hypothetical defendant is also the most elusive: the apparent general worthlessness of the defendant as a person. To establish his alibi he will have to take the stand himself and through cross-examination to test his credibility his life will become an open book. It would not be surprising if a jury reacted to him as did a former British Home Secretary in commenting upon the case of an innocent person hanged for murder:

If Galley was wrongfully convicted, he certainly assisted very much in his own conviction by the irregular and improper life he led It is something like contributory negligence on his part.²¹⁵

But since we are concerned only with whether this man perpetrated this particular robbery, the search for truth is elusive and in constant danger of contamination from damaging but irrelevant factors. Under these circumstances pretrial detention itself may be a significant source of such contamination. The hypothetical defendant must appear ***1141** before the jury in custody and thereby be typed as one not to be trusted; his testimony reveals him as a parasite, yet but for his detention he would be holding down his job at the car wash.

A second but related form of prejudice posed in the hypothetical case which might provide the foundation for a due process claim arises from the nature of the evidence needed to corroborate defendant's alibi. If the alibi witnesses are to be located, it would appear that the defendant needs the opportunity for self-help. Any indigent defendant will lack the resources to finance a pretrial investigation by others and it is a melancholy fact of the administration of our legal aid offices that investigatory services are normally not provided. While the problem is being attacked in the federal system, at the time of the Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice in 1963 a "fundamental deficiency" was the "failure of the practices prevailing in all the district courts outside the District of Columbia to provide assigned counsel with resources" for investigation.²¹⁶

It is not possible to determine the percentage of cases in which these deficiencies reach serious proportions.

It is clear, however, that the impact on the individual defendant is devastating when it does occur²¹⁷

Another report states that in not more than eighteen out of 184 defender organizations are full time investigators on the payroll; indeed, in many there was not even a full time lawyer.²¹⁸

Even where, as stipulated in the hypothetical case, the defense afforded indigents includes some facilities for pretrial investigation, an indigent defendant may suffer substantial prejudice if he is incarcerated. In part this would depend upon the time, resourcefulness and interest of the investigator, who is probably attached to a public or voluntary defender office which may have a tendency to become mechanical when harassed by large case loads. More important, it will also turn on the type of evidence which is needed. The Attorney General's Committee was informed "by experienced defense counsel that in some cases it is only the accused who can locate and induce reluctant witnesses to come forward."²¹⁹ Where racial or class differences isolate a subculture, the type of situation reported from New Haven may apply:

*1142 Student directors of the Yale Law School Public Defender Association report that Negroes are most reluctant to talk to white people regarding any criminal matter. They have found it impossible to locate Negro witnesses that the accused could probably find within a short period of time if permitted to search for them.²²⁰

Social workers and others doing investigative work in Negro slum areas would probably substantiate the existence of this problem, which would be particularly acute in this case where one of those sought (Charlie) would be a prime suspect himself were defendant's story true.

The traditional approach of the courts, by which this problem is reached only at trial or on appeal after conviction, has severe limitations. In one case the trial court recessed for half a day to permit the previously jailed defendant, accompanied by two detectives, to search for a missing witness whom his legal aid counsel had been unable to locate.²²¹ How adequate this device might prove to be in our hypothetical case is a matter for speculation. One would suppose that a search limited in time by a defendant with two (white?) detectives at his elbow might be substantially less fruitful than to permit him to circulate at his leisure in the neighborhood and at its bars. Another court summarily rejected a similar claim of prejudice due to the jailed defendant's inability to search for an alibi witness.²²² In an opinion that perhaps represents the ultimate in the isolation of an appellate court from reality it was held sufficient for the defendant to be advised "of the subpoena power available to him and that the Federal Bureau of Investigation could be asked to locate the witness."²²³ It seems clear that in the hypothetical case there is no practicable substitute to pretrial release for investigative purposes.

A third kind of "special prejudice" is posed by the hypothetical case. The defendant was involuntarily exhibited in a lineup, which resulted in substantial new prosecution evidence against him, and the *1143 police attempted to exploit the psychological effect of Williams' identification of the defendant by an interrogation which they hoped would produce a confession. The prosecution was able to obtain this dual advantage solely because of the defendant's pretrial detention status; if he had been enlarged on bail, police jurisdiction over him could not have been obtained without his consent.²²⁴

Whether or not involuntary subjection to the lineup of a detained indigent for the purpose of investigating other crimes of which he is suspected violates the Constitution has recently been the subject of conflicting decisions in the Eastern District of Pennsylvania.²²⁵ In *Butler v. Crumlish*²²⁶ Judge Freedman entered a preliminary injunction to restrain the police, finding "substantial merit" in the claimed violation of the equal protection clause. Although he deplored the "deep and wounding social inequality" of the bail system,²²⁷ he stated that "differences that necessarily result from imprisonment while awaiting trial and freedom on bail cannot be made the foundation for any constitutional objection because of discrimination."²²⁸ But this "furnishes no justification for any additional inequality of treatment beyond that which is inherent in the confinement itself."²²⁹ While this case became moot before it came on for full hearing on the merits, two others were subsequently brought before a different judge and decided contra,²³⁰ and one of these is now on appeal.²³¹

b. Prejudice Created by Unnecessary Conditions of Detention

Like a small hole in a weakening dike, Judge Freedman's approach in *Butler v. Crumlish* though presently permitting but a trickle *1144 of doubt, may in time become the source of a torrent of change. If his standard—that what makes the lineup bad is that it goes beyond "those restraints which are an essential part of the management of a prison"²³²—is

accepted, it will be but a short step to apply that same measuring rod to other aspects of pretrial detention. It is common knowledge that the county jail typically used for pretrial detention is, in the words of a leading penologist, “the lowest form of social institution on the American scene.”²³³ That the existing conditions of pretrial imprisonment—poor food and housing, overcrowding, inadequate or no recreation and exercise facilities—are neither “essential” to sound prison management nor “inherent in the confinement itself”²³⁴ is ironically demonstrated by the fact that at the point when an accused is convicted and sentenced to imprisonment, his standard of living is almost certain to rise.²³⁵

Nor can the necessity for reasonable security against escape justify the kinds of restrictions on communication with the outside world which are common in detention jails: limitations upon and censorship of mail,²³⁶ restrictions on newspapers and periodicals, a frequently total prohibition on the use of the telephone, inadequate facilities for confidential conversations with lawyers and others,²³⁷ *1145 visiting privileges only for close relatives,²³⁸ restriction of visits to times which are particularly inconvenient to members of the working class, conducting visits under restrictions which impede or censor communication and humiliate visitor and visited alike. These limitations are as unnecessary to the legitimate purpose of detention—security—as is the lineup, and, in their contempt for man's dignity and their probable tendency to coerce guilty pleas, far more pernicious as a contamination of the values for which due process stands. Whether or not such restrictions are deliberately intended to punish and humiliate, they certainly have that effect, and some judges use pretrial detention explicitly for punitive purposes, for example, to give the accused “a taste of jail.”²³⁹

From at least the time of Blackstone, who saw the period between confinement and trial as a “dubious interval” during which “a prisoner ought to be treated with the utmost humanity,”²⁴⁰ it has proved as impossible politically and administratively to bring detention conditions up to minimum standards as was the effort to use legislative, administrative, or political means to put effective curbs on unlawful police search prior to *Weeks v. United States*²⁴¹ and *Mapp v. Ohio*.²⁴² Blackstone put the blame on the goalers, who “are frequently a merciless race of men, and, by being conversant in scenes of misery, steeled against any tender sensation.”²⁴³ Today we would suspect that, while administrative insensitivity to human values remains an important factor, much deeper forces are at work. Existing conditions of pre-trial detention are an example of the limited efficacy of an ideal such as the presumption of innocence, particularly where such detention advantages the prosecution and the reduces the judge's burdens by contributing to a high rate of guilty pleas. Packer, in his exposition of a “crime control model” in criminal administration, states the prosecution position as follows: “If the present system of requiring bail for some reason or other stopped producing a high rate of pretrial *1146 confinement, it would have to be replaced by one that did.”²⁴⁴ If this represents the practicalities of the situation as seen by the prosecution and probably by many trial judges as well, then it is idle to expect the administrative machinery to press for any real reform of pretrial detention.

The only proposed solution likely to have any success in raising the level of detention conditions is one patterned on the exclusionary rule: to condition the right to detain, which benefits the prosecution, upon minimization of prejudice and the maintenance of standards commensurate with the untried status of the detention population. The remedy for failure to meet this test would be immediate release on recognizance pending trial. Whatever may be the merits of the judicial doctrine that the courts will not interfere with the management of institutions for sentenced prisoners,²⁴⁵ it should be inapplicable insofar as pretrial detention is concerned. The courts have a direct responsibility to supervise what happens between arrest and trial in order to preserve the integrity of the trial process.

c. Inevitable Prejudice in Any Form of Detention

Some of the inevitable concomitants of detention are obvious and need to be reiterated only because they are so significant. Most important, the detained prisoner cannot hold a job, which is probably the principal explanation of the empirical data to be discussed below which demonstrates that jail defendants fare far worse in the sentencing process,

particularly in obtaining probation, than bail defendants. Second, if the defendant cannot earn a lawyer's fee he has no choice of lawyer and must take the counsel provided by the state. Third, the detained defendant's relationship with his family is curtailed and the possibility of his supporting them is terminated.

What is in danger of being overlooked, however, are more subtle facets of the problem. The following hypotheses have not been proved empirically; some of them probably are not susceptible to such proof. They are, however, plausible and should not be ignored in an attempt to calculate the extent of the detention system's contamination of the trial process.²⁴⁶

***1147** (1) The expectations of all those connected with the administration of criminal justice—police, jailers, prosecutors, defense counsel, judges, probation officers—prejudge the jail case as a failure, and this prejudgment colors their actual disposition; for example, a probation officer assigned to write up a jail case has a bias before he begins because of the defendant's jail status. If this is true, then the statistics showing that jailed defendants do in fact fare comparatively badly in the disposition process may in part demonstrate nothing more than the operation of a self-fulfilling prophecy.

(2) The fact that the defendant himself shares this expectation of failure tends, along with the fact that he will generally have to find a new job, to reduce the chances of his successfully completing a period of probation.

(3) The quality of representation which a jail defendant obtains is adversely affected by pretrial detention because, instead of the defendant coming to his office, counsel must go to the jail to see the defendant, often under conditions unfavorable to privacy and mutual dignity. The added economic burden this places on the lawyer may be considerable in large cities where, as in Philadelphia, the detention prison is geographically remote from lawyers' offices. The result is a reduction in the frequency of pretrial consultation below that which is desirable and which would take place were the defendant on bail and able to come to the lawyer's office. The burden on the lawyer may also intensify his resentment if he is already concerned about the low work-to-fee ratio of much criminal representation.

(4) The quality of the lawyer-client relationship is adversely affected by pretrial detention because the jailed defendant will have less confidence in counsel and is more likely than a bailed defendant to feel that he is getting inadequate representation. Jail house consultation with the lawyer intensifies the defendant's disassociation with counsel because he has had no responsibility in the selection of the lawyer; confirms his opinion that because he has no money he is receiving second class legal services;²⁴⁷ induces that resentment which ***1148** the poor feel because they are treated as charity cases; and adds to his suspicion that the adversary system may in fact not be very adversary when counsel is a public defender who is paid by the state and whose professional career is the representation of jail house failures.

(5) The defendant's prospects for rehabilitation turn in part upon his outlook towards the fairness of the administration of justice, which is adversely affected by his detention experience. A defendant's attitudes are crystallized in prison, where the most obvious lesson of the pretrial period is that if you have money you go out, *i.e.*, that justice is for sale. Those familiar with detention prisons are aware that this cynical attitude dominates the value culture of the jail.

2. Empirical Evidence on Results of Detention

We have already noted some of the empirical data which documents the unfavorable effects of pretrial detention upon the ultimate disposition of jailed defendants' cases.²⁴⁸ But the fact that there are correlations between pretrial jail status and less favorable dispositions does not of itself prove that there is a causal relationship. The problem of causation is nicely illustrated by some data reported by Professor Anders Bratholm at the University of Oslo. In discussing the kind of cases in which pretrial detention is ordered in Norway he says:

The incidence of detention is highest for those persons who are later convicted and sentenced to an unconditional term of imprisonment. In round figures, about seventy percent of those persons were given

an unconditional term of imprisonment for a felony have been remanded in custody while their cases were being investigated. Remand is common, too, in the case of accuseds who are subsequently to be let off with suspended sentences for felonies committed: about one-third of those who received a suspended term for a felony in Oslo in 1955 had been detained during the period of investigation. On the other hand, detention is comparatively rare in cases which are later disposed of by conditional suspension of the prosecution or dropped for lack of evidence.²⁴⁹

Bratholm's underlying data apparently parallel American studies in showing a correlation between frequency of pretrial detention and severity of ultimate disposition, but he seems to assume, quite plausibly, *1149 that this shows not that pretrial detention causes more severe disposition but rather that more dangerous offenders are more likely both to be detained and to receive a term of imprisonment. Furthermore, even if we assume that some unfavorable dispositions of jailed prisoners are caused by pretrial detention, we have no data to help us understand what particular aspect of detention is primarily responsible for this prejudicial effect. It has been suggested that it

would be intriguing to see whether as simple-minded a precaution as assuring detained prisoners access to a shower, a shave, and a clean shirt, and allowing them to enter the courtroom not under guard but in the temporary custody of their counsel, would have any perceptible effect on the pretrial-post trial prison syndrome.²⁵⁰

How much this type of experiment as well as correction of other abuses noted in the preceding subsection would reduce possible prejudice as reflected in dispositions statistics is now unknown and will probably remain unknown.

By far the best attempt to control this and other variables which might explain the more severe disposition of jail cases in terms other than as a result of the pretrial jail experience is Rankin's 1964 study in New York.²⁵¹ Like the other studies, Rankin's has demonstrated the strong correlation between pretrial jail status and a more unfavorable disposition; the following table summarizes this finding:

TABLE 1 [From Rankin]²⁵²

RELATIONSHIP BETWEEN DETENTION & UNFAVORABLE DISPOSITION

<i>Disposition</i>	<i>Bail (%)</i>	<i>Jail (%)</i>
Sentenced to prison	17	64
Convicted without prison	36	9
Not convicted	47	27
Number of defendants	(374)	(358)

Rankin has gone beyond other researchers, however, in introducing controls for some of the more obvious variables which might explain the association between detention and more unfavorable dispositions. *1150 Of greatest interest for our purposes are the controls for previous criminal records, whether the bail required of the defendant was low or high (over 500 dollars) and whether the defendant was represented by private counsel or by court-assigned counsel. The first two variables give some indication of the defendant's potential dangerousness, while if court-assigned counsel were noticeably less effective than a private attorney this too could have a significant effect on disposition. Each of these three factors, considered separately, was found to be significantly related both to detention and to the likelihood of a prison sentence; thus of defendants with a previous record, sixty-one percent were detained in jail and sixty-three percent were sentenced to prison, compared with thirty-eight percent and twenty-nine percent respectively for defendants

with no previous record. “Therefore, it is possible that detained defendants receive more prison sentences than freed defendants not because they are detained but because the detention population contains a much higher proportion of defendants with previous records than does the free population.”²⁵³ To hold such a factor constant, the defendants were separated into two groups, “defendants with and defendants without previous records. Each group of defendants was then studied separately to learn if differences in disposition exist between bail and jail defendants.”²⁵⁴ When one considers the importance supposedly given to the presence or absence of a prior criminal record in determining sentence, the results of holding the factor of prior record constant are startling:

Among those with no record, fifty-nine per cent of the jailed defendants received prison sentences, compared to ten per cent of the bailed defendants. Among those with prior records, eighty-one per cent of the jailed defendants were sentenced to prison, compared to thirty-six per cent of the bail defendants. Thus, jailed defendants were forty-nine and forty-five per cent more likely to be sentenced to prison. These percentages are no smaller than the original difference of forty-seven per cent, which existed before the factor of previous record was held constant.²⁵⁵

Similar results were obtained when the factors of bail amount and type of representation were controlled separately, and when all three factors were held constant at once, the difference between disposition of bail and jail defendants was only slightly reduced. “These findings,” Rankin concludes, “provide strong support for the notion that *1151 a causal relationship exists between detention and unfavorable disposition.”²⁵⁶ Unless and until Rankin's data are disputed by later empirical evidence, courts dealing with this problem should assume that pretrial detention has a direct adverse effect on the disposition of the accused's case.

3. The Due Process Dilemma

What, then, are the implications under due process theory of the probably prejudicial effects of pretrial detention? We noted above that, in the case of a good bail risk where the only cause of detention was poverty, a very slight showing of prejudice should be sufficient to tip the constitutional scales. The difficult problem is presented by a case such as our hypothetical defendant's in which circumstances besides indigency create risks for the community were the accused released on bail. We have also noted that balancing of risks is typical of due process adjudications, so that for the hypothetical defendant we would be required to weigh the risk of prejudice to him as a result of detention against the risk to the community that if released he might abscond, commit further crimes, or injure the Government's informer. A court might find that in the case of the hypothetical defendant the risks to the community were of sufficient magnitude to take precedence, and therefore refuse to enlarge the defendant on his own recognizance.

The difficulty with the application of this traditional due process reasoning to the case of the hypothetical defendant, however, is that its practical consequence is to deny release to a bad risk indigent while still leaving open the possibility of release on bond for a bad risk rich defendant. While the hypothetical defendant would remain in jail because he constitutes a bad risk, successful professional criminals and racketeers retain an absolute right to bail preserved by state guarantees, probably by the eighth amendment, and in any event in federal cases by [Federal Rule of Criminal Procedure 46](#). The question, therefore, is whether such discrimination can survive the scrutiny of the equal protection clause.

E. Equal Protection

In 1956 the Supreme Court decided in *Griffin v. Illinois* that indigents could not be deprived of the benefits of a state's system of appellate review by a requirement that appellants purchase and submit *1152 a transcript.²⁵⁷ Subsequent cases have consolidated the rule²⁵⁸ and, have within narrow confines extended it beyond appeal to collateral proceedings²⁵⁹ and to invalidate restrictions on indigent appeals which, while they do not entirely cut off appellate review, limit its quality as compared with the kind of review available to nonindigents.²⁶⁰ It also now seems clear that the Court in these equal protection adjudications is beginning to engage in a kind of balancing of interests very similar to that which has obtained in due process cases.²⁶¹ Indeed, the *Griffin* rule probably rests on both clauses.²⁶²

The precise holding of *Griffin* is not particularly startling; "... the more one considers the *Griffin* case in context, the more he becomes persuaded that the result is squarely in the main current of [a] ... constitutional development which has been steadily unfolding for a generation and more."²⁶³ Nor should the decision have been entirely unexpected in the light of earlier case law.²⁶⁴ Despite its generally *1153 accepted equal protection label, the decision's rationale is closely related to the parallel due process development in the indigent counsel cases.

What most attracted attention to *Griffin*, I think, was the potential power of its logic to open a score or more of Pandora's boxes. The kind of sweeping language used by Mr. Justice Black in the opinion that announced the Court's judgment has a profoundly unsettling quality, for example, "There can be no equal justice when the kind of trial a man gets depends on the amount of money he has."²⁶⁵ But such language standing by itself cannot be taken too seriously. One of the more fascinating aspects of the development of civil liberties in American law has been its illogical compartmentalization. To name only three examples which come immediately to mind: (1) the extensive development of the fourth amendment in the seizure of tangible evidence with, until very recently, parallel underdevelopment of the fourth amendment's restriction on seizure of the person; (2) our law of right to counsel for indigents with parallel neglect of important problems such as provision for adequate pretrial investigation; and (3) the startling failure to apply to fact finding in the field of sentencing any of the due process controls used in the adjudication of guilt.²⁶⁶

Experience should teach us, therefore, that the *Griffin* rationale may well be restricted to the compartment in which it germinated. If it is to escape, however, bail law certainly provides fertile soil. The first suggestion that the *Griffin* rule might apply to the financial barriers of the bail system came from the dissenting justices in the case itself:

... some [accused] can afford bail, some cannot. Why fix bail at any reasonable sum if a poor man can't make it?

The Constitution requires the equal protection of the law, but it does not require the States to provide equal financial means for all defendants to avail themselves of such law.²⁶⁷

But the principle authority to date for the proposition that *Griffin* might have application in the bail field is a pair of dicta of Mr. Justice Douglas in the *Bandy* case.²⁶⁸ In deciding on Bandy's application for release without financial security in 1960, Justice Douglas cited *Griffin* *1154 and asked: "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?"²⁶⁹ He did not answer the question but noted 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."²⁷⁰

Seven months later, when application for release before him was renewed, he took up his question again:

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.²⁷¹

The *Bandy* case was an illustration of particularly aggravated discrimination;²⁷² at the time Justice Douglas made this last statement, Bandy had been in jail pending appeal for more than two years.²⁷³ During this time the trial court had certified that his appeal was not taken in good faith; the Eighth Circuit then appointed a lawyer to represent him on his motion for leave to appeal and four months later dismissed the appeal as frivolous; the Supreme Court vacated that judgment and remanded the case for hearing on appeal; and nearly seven months after that remand the appeal had still not been decided. Justice Douglas, however, declined to act in Bandy's behalf because the application before him posed the same question as that presented to the full Court in a pending petition for certiorari from the refusal of the Eighth Circuit to reduce bail and release Bandy on his own recognizance.²⁷⁴ The result was that Bandy spent *1155 another three and a half months in prison until the petition was *1156 denied,²⁷⁵ followed by nearly six months more until the appellate process was finally terminated.²⁷⁶

I have difficulty understanding why in this case Justice Douglas thought he should not act, and it is even harder to justify the denial of certiorari by the full Court. The ambiguity in the power of an individual Justice to bail in these circumstances which restrained Justice Douglas²⁷⁷ was noted but not decided in *Stack v. Boyle* and discussed at length in that case in a concurring opinion by Mr. Justice Jackson.²⁷⁸ Thus aside from the important substantive question raised by Justice Douglas, the *Bandy* petition posed an important question of prompt access to bail which only the Court could resolve and which needed to be resolved.²⁷⁹ The *Griffin*-bail question, moreover, was put to the Court again in the same case by a dissent of Justice Douglas when the Court denied a later application by Bandy, which Justice Douglas would have treated as an application for recognizance release.²⁸⁰ One is not supposed to draw conclusions on the merits from *1157 a denial of certiorari, but under these circumstances the suspicion lingers that at least for the time being the other Justices are not in a hurry to indorse Justice Douglas' dictum on the applicability of *Griffin* to bail.

Be that as it may, seldom has a dictum born in chambers under such circumstances, and apparently stillborn at that, travelled so far so fast. It has been discussed sympathetically by the Chief Justice in an address to the National Bail Conference,²⁸¹ cited by the Attorney General's committee²⁸² and in the proposed revision of the federal rules governing bail,²⁸³ and cited and discussed in the Court of Appeals for the District of Columbia.²⁸⁴ In the recent District of Columbia case of *Alston v. United States*, the issue was apparently squarely posed.²⁸⁵ The court of appeals had previously set bond at a figure defendant could not afford, and when the Government moved to postpone argument and this was granted, Chief Judge Bazelon took the position that the postponement should be conditioned upon the court sua sponte reducing bond to an amount defendant could afford. Pending trial Alston had been released on a one hundred dollar personal bond on recommendation of the District of Columbia Bail Project, and he had “long-standing ties to the community, excellent prospects for employment on release, and no prior criminal record.”²⁸⁶ Thus Alston was precisely the kind of defendant Justice Douglas envisaged as constitutionally entitled to release.²⁸⁷ A divided court of appeals, however, declined to act on the suggestion.

Probably the applicability of *Griffin* to the bail situation will in large measure depend upon the kind of analysis which is made of the purposes of the bail administration. I have already noted²⁸⁸ the difficulty of this determination. In part, certainly, bail administration serves the legitimate objective of compelling appearance in court, but the method used to achieve this purpose is one that necessarily prejudices the poor.

*1158 Given the result of substantial discrimination, the mere existence of a legitimate state objective does not preclude the applicability of the *Griffin* rule. In the *Griffin* line of cases, too, the legitimate purpose of the invalidated practices was evident and conceded: to control frivolous appeals and needless expense to the state. The state's position was succinctly stated by Mr. Justice White in his dissent in *Draper*, where he noted that the decision in that case “severely limits the power of the States to avoid undue expense in dealing with criminal appeals. It places their appellate processes in an unflexible procedural strait-jacket.”²⁸⁹ Presumably it was not entirely arbitrary for a state to conclude that frivolous appeals were an unjustified burden upon appellate machinery; that the cost of an appeal, much of which consists of legal fees and the expense of a transcript is a significant deterrent to frivolous appeals by nonindigents; and that as indigents are not subject to this self-regulating mechanism, they will impose a heavy burden upon the state²⁹⁰ unless their appeals are subject to some form of control. If this control means that the poor are denied appeal,²⁹¹ or restricted in their access to appellate courts,²⁹² it is an unfortunate by-product of a rule justified as the most practicable method of achieving a legitimate end. Presumably the state could limit frivolous appeals by screening out indigent and nonindigent appeals according to a common standard, as the Court suggested in *Draper*²⁹³ and as is required in federal in forma pauperis procedure.²⁹⁴ But such screening is an expensive and time-consuming task, itself imposing on courts a major burden which they cannot delegate.²⁹⁵ Screening, moreover, is fraught with risks of great injustice, for the Court's opinion in *Draper* stresses the limitations of a hearing on an inadequate record,²⁹⁶ which is the only way to screen if the screening procedure itself is not to turn into a full hearing on the merits.

*1159 One would suppose that this kind of argument would find a sympathetic ear in a Court which knows first hand from its own certiorari practice the burden and limitations of screening cases. That it was rejected means that we can paraphrase the *Griffin* rule as follows: at least as to appeals, a state cannot seek a legitimate objective by means which result in substantial discrimination against the poor even if the only alternatives result in a considerable added burden in expense and judicial administration.

An important parallel between the equal protection cases and the bail problem involves delegation of power by the judiciary to control enjoyment of a basic right. *Lane v. Brown*²⁹⁷ invalidated an Indiana statute by which, in post-conviction procedure, the transcript required for an appeal from denial of a writ of coram nobis could be obtained by an indigent only in the discretion of the public defender. A unanimous Court²⁹⁸ found the vice in this procedure to be that it “confers upon a state officer outside the judicial system power to take from an indigent all hope of any appeal”²⁹⁹ In bail practice the bondsman—not a state officer and often of questionable reputation even as a private person—is vested with somewhat similar discretion in the administration of the eighth amendment.

It will be recalled that the hypothetical defendant's only cash resource is the forty dollars taken from him on arrest. Let us suppose that the police returned this to him, that his sister managed to raise an additional sixty dollars, and that a court impressed with his need to search for his witnesses reduced his bail to 1,000 dollars. In theory he should now get out in a jurisdiction where the fee is ten per cent. We should note at the outset that if this theory prevailed and the hypothetical defendant goes free, he stands to gain nothing financially by waiting around for trial. Whether he waits or absconds, he will still owe his sister sixty dollars and be out his own forty dollars. The only person who stands to lose from his flight is the bondsman, whose security is his civil cause of action against a missing indigent.

Because of this risk and the bondsman's role as a private businessman free to accept or reject customers, the mere fact that the hypothetical defendant's bond has been reduced to 1,000 dollars and that he has 100 dollars in cash is no guarantee that he will get out. In practice his release is entirely up to the bondsman, who may be satisfied with the 100 dollar fee,³⁰⁰ or demand an additional under-the- *1160 table sweetener,³⁰¹ or require collateral less than, equal to or greater than the amount of the bond,³⁰² or simply refuse to do business with the defendant at all.³⁰³ Thus when a court decides that

1,000 dollars bail is sufficient, in fact it does not know what it is requiring of the defendant, who may still be denied all release or have to put up anything from 100 dollars to the full amount of the bond.³⁰⁴ As Judge Wright has noted:

The effect of such a system is that the professional bondsmen hold the keys to the jail in their pockets The court and the commissioner are relegated to the relatively unimportant chores of fixing the amount of bail.³⁰⁵

What the government gets out of this shoddy business is of critical importance to resolution of the constitutional question. If a *1161 defendant absconds the government is entitled to a forfeiture of the bond; the cost of returning the fugitive to the jurisdiction when he is located elsewhere may be borne by the bondsman. In the latter event, the practice is to remit at least part of the forfeiture. But while a few cities have followed a policy of strict collections on forfeitures, "collection of forfeited bonds has often been lax or tinged with scandal";³⁰⁶ probably the fullest examination remains that done more than ten years ago in the *Philadelphia Bail Study*, which found a collection rate in 1950 of twenty per cent on forfeited and unremitted bonds.³⁰⁷

In determining collection policy, the government is caught in a vicious circle. The objective of the bail system is to get defendants out of detention, but tough forfeiture and collection policies increase the bondsman's risk and force him to be more selective,³⁰⁸ thereby magnifying the problem of presumably unconstitutional delegation of bail setting and increasing the proportion of defendants held in jail. Bondsmen, however, have threatened to go on "strike" and in 1961 and 1964 in New York in part carried out this threat, refusing to write bonds except on one hundred per cent collateral in bankbooks or real estate.³⁰⁹ These strikes were "said to be in retaliation for tighter enforcement policies of forfeitures instituted by 'uncooperative' district attorneys" and the effect in 1961 was "overcrowding the city's detention facilities and jailing numerous minor offenders for want of small bonds"³¹⁰ A New York bar committee has noted that a concerted strike "would have a genuinely chaotic effect upon the City prisons in very short order."³¹¹ Nothing could more graphically demonstrate the extent to which the important governmental function of regulating pretrial detention has been delegated to private business.

An additional factor affecting government collection policy is that not all bonds are written by professional bondsmen. In Philadelphia in 1950 forty-five per cent came from private sources.³¹² Unlike commercial bond, private bail presumably does put some pressure on the defendant not to abscond, and one would expect what was in *1162 fact found in the Philadelphia study: that the forfeiture rate for private bond was less than half that of professional bond.³¹³ A tough collection policy, however, appears to drive private bail off the market. In Detroit, which has prided itself on one hundred per cent collections, ninety-five per cent of the bail was written by surety companies, and when Philadelphia instituted more vigorous collection policies in the fall of 1952 the proportion of bonds posted by private sources declined sharply.³¹⁴ In most large cities it is probable that this result has already occurred; in New York it was reported that almost no private bail is being posted.³¹⁵ It is ironic that the form of bail one would suppose to have the most deterrent value has been or is being destroyed.

All the available evidence indicates that under present conditions the risk of absconding is low. The four district survey of the Attorney General's Committee found the rate of failure to appear ranged from one to seven per cent:³¹⁶

Many such instances presumably involved minor technical defaults. It is thought that comparatively few of them were cases of "bail jumping" in which the defendant disappeared to avoid trial or punishment.³¹⁷

The Committee then added: “Thus qualified, these ‘failure’ figures may be thought to raise a question whether pre-trial liberty involves a substantial enforcement problem.”³¹⁸ The forfeiture rate in the *Philadelphia Bail Study* was two and a half per cent, and a survey of other cities showed rates as low and usually much lower.³¹⁹ Furthermore, most of the forfeitures involved petty cases; the two and a half per cent dropped to 1.35 per cent when gambling, liquor and traffic offenses were eliminated.³²⁰ Other more recent data is consistent with these findings.³²¹

The claims that bondsmen provide any significant function in policing those on bail and finding them once they have absconded seem frivolous to me. There is no evidence that they actually perform any significant custodial function, and it is unreasonable to expect them to do so. As for finding fugitives, it is the police and the FBI *1163 who have the communications network necessary for this task, not the bondsmen.³²² What does happen is that the government receives partial remuneration for the cost of returning a fugitive once he has been found from forfeitures and from the bondsman's services. The equal-protection-on-appeal cases make short shrift of any claim that the petty financial economies which thus accrue to the state can justify the discrimination implicit in the system.

These data suggest a compelling case for the application of the *Griffin* rule to bail. Because bail denial both affects the quality of the original trial and imposes imprisonment before there has even been a first finding of guilt, the discrimination is more aggravated than at the stage of appeal with which *Griffin* was concerned. The major factor which distinguishes bail from the *Griffin* cases is the unknown of what would happen if all defendants now detained pending trial were instead released during this period. It is impossible to determine whether the low forfeiture rates for bailed defendants would prove to be a reliable index for the rate of absconding to be expected from presently jailed defendants. There is no reason, however, to expect an alarming rise. The principal deterrent against flight is the danger of being caught again and suffering an added detriment as a result. If this is reinforced by the provision of explicit criminal sanctions for flight³²³ and a policy against release a second time of defendants who have previously absconded, it should be sufficient to control the problem. Provision could be made for additional protection in cases of unusually high risk: supervision of the defendant by a probation officer, or a system of daily or weekly reporting,³²⁴ or advancing the date of trial for the particular defendant to shorten the duration of the risk period. Failure of a defendant to comply with such conditions or his use of unreasonable delaying tactics in going to trial could then be made the basis for subsequent detention.

*1164 It should be recalled that although other major constitutional reforms in the last decade—search and seizure, right to counsel, and *Griffin* itself—were accompanied by predictions of dire and unmanageable consequences, there is no evidence that an accommodation may not in fact be achieved. If in the case of bail reform experience should prove that the rate of absconding rises unreasonably, a solution should be sought within the rationale of the eighth amendment's policy of pretrial release, through measures which are applicable to rich and poor alike, and not by financial discriminations.

IV. PREVENTIVE DETENTION AND THE EIGHTH AMENDMENT

It will be recalled that Mr. Justice Douglas' *Bandy* dictum concluded that “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.”³²⁵ Resting as it does on *Griffin*, the statement is puzzling because it would still leave the indigent at a substantial disadvantage vis-à-vis the nonindigent, who would continue to have an absolute right to release on bond if he could afford the price whether or not it was “reasonable to believe that he will comply with the orders of the court.” As we have seen, *Griffin* has been extended to bar limitations on the quality of appellate review made available to indigents compared to that afforded non-indigents.³²⁶ If *Griffin* is applicable to the bail situation, as I believe it should be, I would suppose that the whole doctrine is applicable and that selective detention of indigents by standards not applied to non-indigents would be invalid.

Nonetheless Justice Douglas' suggestion has inspired a number of recommendations³²⁷ and legislative proposals³²⁸ for reform. While at first these were put forward in a form which would make them applicable only to indigents, the logic of *Griffin* is leading to consideration of a system of preventive detention which would be applicable *1165 to rich and poor alike. In a Senate speech on March 4, 1965, Senator Ervin stated:

... [M]any commentators on the American bail system ... recommend that the present laws providing an absolute right to bail should be discarded, that release should be optional, and that procedures for a prompt review of bail decisions should be developed. It is argued that these modifications would not only be more effective in protecting society from dangerous offenders who can meet financial bail requirements or flee the jurisdiction of the court, but would also provide a more reliable bail system for releasing persons whose community ties qualify them for release.³²⁹

This position, of course, rests upon an interpretation of the eighth amendment squarely opposed to that advanced in this article. Senator Ervin took the position that the eighth amendment “does not appear to confer an absolute right to bail,”³³⁰ citing *Carlson v. Landon*,³³¹ which I have discussed above and which does not appear to be very persuasive authority for that position.³³² Aside from the constitutional question, however, it will be useful to examine the concept of preventive detention on its possible merits as sound policy.

Such proposals have all the seductive appeal of the maxim that an ounce of prevention is worth a pound of cure, but the impropriety of the application of that maxim to a democratic system of criminal law should give one pause. Behind the proposals are certain assumptions:

- (a) that the contingencies which are to justify detention are sufficiently narrow and precise to be capable of administration as meaningful legal standards;
- (b) that we have the ability to predict the probability of occurrence of these contingencies in individual cases;
- (c) that there is or will be an investigatory structure which can develop the facts necessary for decision;
- (d) that there is or will be an adjudicatory system before a person competent to make the necessary prediction, with right to counsel, hearing, an opportunity to contest the facts and their application to law, and provision for appellate review;
- *1166 (e) as time is of the essence in a process where even a day's delay is important and five or six weeks moots the entire issue, that the fact-finding, adjudication, and appellate review can all be accomplished with great dispatch.

A. Standards for Detention

In determining the substantive standards which might be proposed for preventive detention, lack of precision is as much a vice as is vagueness in the substantive criminal law. A standard which provides merely for detention if the accused is deemed a danger to the community³³³ or if it would not be “proper”³³⁴ to release him gives no guidance to trial judges, permits no effective appellate review and invites abuse by allowing the trial judge to indulge his own feelings and prejudices.

More specific grounds usually advanced as possible bases for preventive detention include the risk of nonappearance for trial, the danger that the accused will commit a crime while on pretrial release, the danger that he will intimidate

witnesses, harm a complaining witness or attempt to influence a juror, or anticipation that the community would be incensed were the accused not locked up pending trial. I would reject this last proposed standard as inconsistent with our whole philosophy of accusatorial procedure. The community is always likely to be intolerant of due process and equal protection in cases where feelings run high, and I see no more reason to give in to the temporary popular feelings in this situation than in any other. As Mr. Justice Douglas said in a case involving bail pending appeal: "... equal justice under law requires that bail not be denied even a notorious law-violator if he has a substantial question to be resolved on appeal."³³⁵

The risks of flight and criminality need further narrowing if they are to be used as standards. What kind of nonappearance for trial, for example, should warrant detention? The *Philadelphia Bail Study*, as we have noted, found that out of an overall forfeiture rate of two and one-half per cent, most failures to appear resulted from flight pending charges of minor crimes.³³⁶ In view of the strength of *1167 the policy against detention, is bringing a gambler or a prostitute to trial of sufficient importance to warrant detention if there is a finding of a risk of nonappearance? Second, most nonappearance is temporary. In Philadelphia a common complaint was that defendants on bail did not appear on the day scheduled if they were slated to appear before a "hanging judge," but instead would show up soon thereafter. Such judge-jumping is a nuisance and complicates court calendars; is it enough to warrant detention? One of the Vera Foundation's New York studies examined the reasons for nonappearance given in the 785 cases in 1963 in which actions were instituted for remission of forfeitures.³³⁷ The most frequent reasons for missing court were: illness (32.4 percent); forgot or confused on date (22.8 percent); incarcerated elsewhere on that date (14.3 percent); problems in notification of the defendant of the date (11.1 percent); and was in court on scheduled day but, *inter alia*, went to wrong room, or appeared at wrong time (9.2 percent).³³⁸ All these were technically instances of nonappearance; that they were not, however, regarded as serious may be seen from the fact that remission was not opposed by the District Attorney in 96.3 percent of the cases.³³⁹

The narrowness and precision with which the standards are stated will to some extent avoid the temptation to base a case for detention on what Chief Judge Bazelon has called "the government's conclusory allegations."³⁴⁰ Unless the standards are sufficiently narrow to require proof of particular circumstances which set the individual case apart from the general run of cases, there are no real limits on detention. Judges in bail cases which come up on appeal where denial of bail is discretionary frequently refer to a defendant's prior criminal record or the fact that he faces the probability of a substantial prison sentence as grounds for denying bail in a particular case. But a high proportion of defendants share one or both of these characteristics.³⁴¹ Unless something more precise than such variations on the themes of bad reputation and bad prospects is required, probably a majority of all defendants would be detainable and the decision from among this group of whom to detain and whom to free would turn *1168 not on legal standards relevant to the state's legitimate objective but rather on the vagaries of judicial temperament or the masking of illicit objectives, for example, to give the defendant "a taste of jail."

These considerations are particularly acute in determining what standards to use to evaluate the risk of nonappearance. Any defendant who thinks he is going to be convicted and sentenced to prison, an entirely subjective contingency we cannot estimate with any certainty, has an incentive to flee. Any defendant who is free has the means to accomplish flight—all he has to do is to go, hitch-hiking if he has no better means of transportation. To find as facts, therefore, "that there is considerable motivation for these defendants to flee the court's jurisdiction and that they have ample means to accomplish this purpose"³⁴² is almost entirely meaningless, for the facts found fail to distinguish the case being decided from most others. More superficially plausible would be suggestions to use the extent of defendant's ties to the community as a measure. It should be noted, though, that this is merely an hypothesis; to my knowledge there is no data to allow us to assess the comparative risk of flight of a no-ties-to-the-community defendant and a strong-ties defendant. More important, even if the no-ties defendant is three times as likely to flee, it proves very little, for only around one out of thirty or forty defendants is likely to flee in any event.³⁴³ The kind of reasoning that underlies the tie-to-the-community standard is premised on statistical sleight of hand. If, being a pipe smoker, I am informed that pipe smokers are three

times more likely to get some dread disease than nonsmokers, this sounds like black news indeed. But if the incidence of the disease in question is only one per one hundred population, my chances of succumbing are still very small.

An added problem with a standard such as the defendant's reliability and roots in his community is that in application it will inevitably result in discrimination against the poor and, indirectly, the Negro. One aspect of that fifth of the population that might be considered as living in poverty is that relatively speaking it is rootless. An accused drawn from this stratum is less likely than the average individual to own property or to have a job and more likely to be a "drifter." Because law enforcement at the police discretion level also operates discriminatorily against the poor, an indigent is also more likely to have a criminal arrest record for conduct which would not produce such a record in a better class neighborhood, for example, for "corner-lounging." Our magistrates, justices of the peace, and *1169 lower judiciary who set bail today are conditioned by long custom to seeing the poor denied pretrial release because they are poor. Any reform has difficulty uprooting such ingrained habits of procedure. To permit preventive detention because an accused has shallow roots or is vaguely dangerous is to invite perpetuation of the present discriminatory pattern under new labels.

Enough has been said to indicate the kinds of problems facing anyone who tries to draft a statute which would introduce preventive detention as a substitute for the financially-oriented bail system. Difficulties of this kind may have prompted Mr. Justice Jackson, urged to deny bail because of alleged danger of the applicant's "anticipated but as yet uncommitted crimes," to say that "imprisonment to protect society from predicted but unconsummated offenses is so unprecedented in this country and so fraught with danger of excesses and injustice that I am loath to resort to it"³⁴⁴

B. The Feasibility of Prediction

Evaluation of the desirability of attempting to predict such criteria for determining pretrial detention as flight, anticipated serious criminal conduct, or intimidation of witnesses turns both on our underlying set of values and on whether or not we possess the knowledge which such predictions would require. This can best be illustrated if we take an example.

We have seen that existing data show a very low incidence of flight for the purpose of avoiding trial and that there is no reason to expect that this would be significantly increased by the release of indigents.³⁴⁵ Leaning over backwards to overstate the risk, I will assume that under present conditions the rate of absconding to avoid trial is one and one-half percent of bailed cases, and then I will double this rate to allow for any additional risk created by the release of all indigents. This leaves us with a pretrial defendant population of which we would expect three percent to try to avoid trial by flight.

In any situation in which the event to be predicted occurs so infrequently in the population concerned, any attempt to individualize prediction must start off against very heavy odds.³⁴⁶ By the simple expedient of releasing every defendant pending trial, the implied prediction *1170 made as to each one that he would not flee would be right ninety-seven percent of the time. The only way in which individualized prediction could improve upon this success rate would be if individualization made less than three mistakes out of every one hundred cases. This is clearly impossible in dealing with the treacherous quicksand of future human conduct, and I will note below some of the reasons why this is so. Moreover, even if a slight improvement could be achieved, for example, a reduction to only two mistakes in a hundred instead of three, it is very questionable as a practical matter that so slight an improvement would be worth the cost of processing every case individually. Individual prediction, after all, is expensive for all concerned—for the state because it requires time for adjudication and assignment of counsel; for the accused because it delays the decision as to his right to be released promptly after arrest.

All of the criteria which might be used as standards for preventive detention share this characteristic of being statistically infrequent. Probably we know least about the degree of probability that a defendant during the period of pretrial release will commit a serious crime. Here we have no data at all, but it is inconceivable that the probability is higher than five

percent and more likely it is considerably lower. The other criteria noted—that the defendant will intimidate witnesses or jurors or injure a complainant—are apparently very rare, statistically well below one percent.

The foregoing probability analysis rests on a value judgment: that all mistakes in prediction are equally bad, and that it is as unfortunate mistakenly to detain *A* because of our erroneous assumption that he would flee as it is mistakenly to release *B* only to find that he will abscond. I think this is the proper value judgment to apply, for it seems to me just as important for the administration of the criminal law not to lock up an accused unnecessarily as it is not to permit a defendant to escape trial by flight. But as it seems so obvious that proceeding upon the assumption of this value judgment leads to rejection of the claim for preventive detention, I am forced to the conclusion that the advocates of preventive detention must make a different underlying value judgment. It is worthwhile, then, to examine an alternative value hypothesis.

Let us suppose that the flight of one defendant to avoid trial is regarded as a more serious occurrence than the erroneous detention of one defendant who in fact would not have fled if released. We might *1171 paraphrase but reverse another old maxim and conclude that the prevention of one flight is ten times as important to society as the prevention of one unnecessary detention. We would have to devise a different method which would allow for this weighting in an evaluation of success or failure of prediction. This could be done by assigning a score of one point for each defendant who does not flee and ten points for each one who does. Thus in our sample of one hundred cases, a perfect score would be ninety-seven points for that many defendants correctly predicted not to flee plus thirty points for three defendants correctly predicted to flee, or a total of 127 points. Applying this measure to the method of automatic release of every defendant, we see that its success rate falls sharply: it earns ninety-seven points (one for each defendant who does not flee) out of the possible total of 127 points, or only about seventy-six and one-half per cent of perfection. Thus a competing system of preventive detention which tries to do better by predicting on an individualized, case-by-case method faces odds which, while still formidable, are no longer over-whelming. An example of the most favorable kind of result we could expect from individualized prevention under ideal conditions might come out as follows: Eighty-five defendants would be predicted not to flee, of whom one in fact does flee and eighty-four do not; and fifteen defendants would be predicted to flee, of whom in fact two flee and thirteen do not. The evaluation score for this result would be eighty-four (for those correctly predicted not to flee) plus twenty (for the two cases correctly predicted to flee), a rating of nearly eighty-two per cent of perfection (104 out of the possible 127 points). Thus although the method of individualized prevention has made fourteen mistakes against only three mistakes for automatic release, we might still prefer it if we make the hypothesized value judgment that one escape is ten times as serious as one unnecessary detention.

It may be objected that the example just given is not fair to the method of individualized prevention because we have assigned it too many mistakes. On the contrary, by assuming it would make eighty-six correct judgments in one hundred cases we have given it a success rate probably higher than anything to be expected. In all areas where prediction of future human conduct has been subjected to empirical validation the results have proved to be very modest indeed. The critical part of the foregoing sentence is subjection of *all* the results to empirical validation. When we use prediction today in the criminal law, as in imposing a prison sentence instead of probation or in granting or withholding parole because of anticipated future dangerousness, the validity of the predictions made are not subjected to *1172 scientific study; instead the system conceals most of its mistakes. Thus when a judge or a psychiatrist advising him concludes that a particular defendant poses too great a risk to be released on probation, the prison sentence which the judge imposes as a result of the prediction prevents any evaluation of its accuracy. The only errors which show up—and they are ones of which judges and parole boards are made painfully aware—is where a defendant given probation or parole turns out to be dangerous. The errors on the other side of the ledger—the cases of those sent to prison as bad risks but who in fact would not have proved to be bad risks—are never identified and therefore cannot be counted. But all experience with the scientific study of prediction shows that this back side of the moon is where most of the errors will in fact occur.³⁴⁷

What causes this overprediction of a criterion, a phenomenon which has plagued all efforts at systematic prognosis of future conduct, can be better understood if we retrace our steps for a moment and put ourselves in the shoes of the judge

who made the predictions of risk of flight in our last example. We hypothesized a sample of one hundred defendants and an average flight rate of three per cent. The judge's job, then, is to identify those three, and only those three. In this real and far from perfect world, the judge is faced at the outset by two fundamental limitations on his work: the inadequacy of the *1173 factual data available to him and the inadequacy of our knowledge—we simply do not know much about the human mechanics which cause three of our sample, and only three, to decide upon the desperate and probably self-defeating expedient of flight. Perhaps seventy of our defendants will be relatively easy to classify as good risks—their records will not be as bad as the others and as to each there is no special reason to think they will abscond. Another fifteen or so will be borderline—they give us a lot of trouble, but they are not as bad as the worst. As a good judge will be keenly aware of the low incidence of flight, constantly reminding himself that only three out of the one hundred are actually likely to flee, he will give these fifteen the benefit of the doubt and also classify them as good risks. There is a substantial likelihood, however, that this group of eighty-five so far granted release from detention will contain one of the three who will actually flee, an error due either to the omission of critical information from the factual record submitted to the judge or to the vast unknowns in our knowledge of human conduct. There will remain, then, fifteen defendants who will be almost indistinguishable from one another according to any of the standards which the judge might reasonably guess (because we have little tested knowledge) to be relevant to an assessment of the risk of flight. All of these fifteen will have prior criminal records, inadequate ties to the community, a sketchy employment history, and the prospect of probable conviction and a probable substantial prison sentence. Application of such standards to this group, therefore, will not help the judge to distinguish the two or three who will flee from the twelve or thirteen who, despite their equally bad records, will not. This places the judge in a dilemma³⁴⁸—and this is the dilemma of preventive detention. If he decides to select only three for detention, because he knows from the statistical probabilities that only three will actually flee, he has no method for choosing these three from the other twelve better than using a pack of cards, although he may choose to call this process intuition or otherwise mask what he is doing behind some similar label. If he decides nonetheless to try picking just three, he would avoid the error of a high rate of unnecessary detention. The trouble with this, of course, is that *1174 he is more likely than not to miss both the two remaining cases of actual flight, while to identify them both would require luck of the order needed to draw a full house in poker. So I hypothesized instead that the most reasonable thing for the judge to do would be to detain all fifteen, which gave us the results noted above. At least the judge has identified and thereby prevented two out of the three flights—a modestly successful result. If the cost of this success is that he was wrong about thirteen of the fifteen bad risks whom he detained, this is unavoidable. The only way to reduce this error would also reduce his chances of identifying even as many as two-thirds of those who in fact will flee.

As the same analogy applies to other criteria of detention, it is again apparent that the critical threshold problem in an evaluation of preventive detention is the judgment of how much to weigh the mistake of allowing a defendant to flee (or commit a serious crime, or intimidate a witness) relative to the weight assigned to a mistake of unnecessary detention. Unless we choose to give the first kind of mistake much more weight, the case for preventive detention collapses and we need to proceed no further. Moreover, even if we make the alternative value judgment that unnecessary imprisonment of the untried is the much less serious error, it will be recalled that we postulated ideal conditions for our judge who, in our hypothetical, achieved eighty-two percent of perfection. In practice the judging function would be diffused, a process which could only reduce the effectiveness of prediction. As for the other ideal conditions, these include the provision of adequate factual data and no delay in achieving release for the eighty-five percent who are not to be detained. Failure to meet these ideals would, in the first instance, introduce additional sources of error, and in the second (delay), increase the cost of preventive detention in terms of its prejudice to defendants.

C. Fact Finding

The method first developed by the Vera Foundation for the Manhattan Bail Project to provide a rapid method of developing certain basic factual data in the space of a few hours the morning after arrest has already been described.³⁴⁹ That kind of quick check should prove to be effective for screening out the low risk cases and getting them out to pretrial release with a minimum of delay. For more difficult cases—perhaps that half or one-third of the defendant population

who are not obvious candidates for immediate release under whatever standards have been adopted—presumably a more thorough factual *1175 investigation would be required.³⁵⁰ How this might be accomplished within the time reasonably available may prove to be a very difficult problem. The more precise the standards for preventive detention are made, the more will be required of the prosecution to establish a case for detention, with corresponding increase in the complexity of the fact finding process.

D. Adjudication and Review

Today there is virtually no hearing on bail issues in the bail setting process,³⁵¹ and we have already examined the total inadequacy of existing judicial review.³⁵² An acid test for evaluation of proposals for preventive detention will be the procedures advanced as remedies for these defects. The principal problems will probably turn on delay, noted below, the necessary provision of counsel, and the method of adjudicating facts. Where more than a superficial fact check is required, the type of data typically provided in a presentence report is what might be desired. Note, however, that (1) the presentence report in present practice requires two or more weeks to prepare, (2) is based on the information of anonymous informants and is frequently treated as confidential by the court, and (3) presupposes guilt, so that the propriety of making this kind of investigation and report before adjudication is open to serious question. Moreover, if there is to be a meaningful appeal, it would appear that the original judge or magistrate would have to write an opinion or in some way indicate the reasons for his decision. If the appellate court receives nothing but the trial court's conclusions it will have no basis for review, being “left in a welter of assertion and counter-assertion in affidavits from which we have no adequate means of emerging.”³⁵³ Nor will review become a meaningful reality unless the standards for detention are narrowly drawn. The kinds of predictions involved in preventive detention are not easily susceptible to close control by an appellate court:

... when it is a question of the application of duly recognized standards, and such application turns on what may fairly be called “facts,” or on a necessarily prophetic judgment like the trustworthiness of a convicted defendant [applying *1176 for bail pending appeal], I do not conceive it to be the function of a Circuit Justice to exercise an independent judgment as though he were sitting in the district court.³⁵⁴

E. Delay in Disposition

All of the procedural difficulties suggested above come into sharp focus if attention is explicitly directed to the problem of delay. It is self-evident that time is of the essence, and the chief merit of the present bail system for those who can afford it is that it is usually able to achieve very rapid release, often without requiring of the defendant anything more than a few hours of detention. In Philadelphia, of a sample of 368 defendants who had obtained bail after it was set by a magistrate in preliminary hearing, 297 were released the same day and twenty-four more on the day next following.³⁵⁵ In New York in 1961-1962, of a sample of 372 accused who eventually made bail before trial, 190 or more than half spent no time in jail.³⁵⁶

Under a system of preventive detention it is impossible to know what would happen, but the ingredients for delay exist at every step of the way. Overloaded, mass production urban courts of first instance, which have been accustomed to set the amount of bail by rote and without evidence from a schedule of bail amounts by crimes, will have to hold real hearings, to wait for the facts, to wait for defense counsel, and to wait for the prosecution to present its evidence. How fast can a judicial system work with this kind of problem? Three examples from other areas of current criminal procedure hardly permit a favorable prognosis.

The first is the administration of habeas corpus, where the urgency of achieving a speedy disposition is the very history of the development of the great writ. The landmark English statute of 1679 is replete with time limits upon judges and others, with penalties for their violation.³⁵⁷ Some of these controls against delay found their way *1177 into our federal statutory provisions.³⁵⁸ Current federal procedure requires that the judge, unless the petition is invalid on its face, “forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted”³⁵⁹ In either event, respondent is to file a return within three days and a hearing on the merits is to follow within five more days. It is significant that even under this ideal procedure eight days is felt to be required, and even more significant that in practice final disposition after hearing is probably almost never achieved within the eight-day limit. The statute itself permits additional time for “good cause” at both the return and hearing stages. Moreover, the rule-to-show-cause device, which was judicially created and finally authorized by statute in 1948,³⁶⁰ serves as “a dilatory plea or demurrer.”³⁶¹ As federal courts “appear almost invariably to issue the rule and not the writ,”³⁶² and as there will frequently be a hearing on the rule to show cause before the writ issues and the case then moves to a hearing on the merits, the typical result is a three, rather than a two, stage procedure, with ample opportunities for delay all along the line. In practice, too, it is likely that extensions of time are the rule rather than the exception apparently envisaged by the statute³⁶³ and certainly by the history of the writ. While a broadly based empirical investigation of the administration of habeas corpus in both federal and state preconviction and postconviction practice is *1178 needed, it seems probable that delay is also typical in state administration of the writ.³⁶⁴

The second example is the administration of the preliminary hearing, which is designed as a control against unjustifiable arrest and detention. If the hearing is to perform its important exculpatory and protective function, it should follow arrest as promptly as possible. But if it does come quickly after arrest, one study has found that it tends to be superficial and protects the defendant “against only egregious police error. The principal objection to a more probing preliminary hearing is that anything more than a superficial showing of probable cause places an unrealistic burden upon police”³⁶⁵ in the time available. It is common knowledge that, in practice, the hearing frequently or usually is continued, and the federal rules provide that, whereas the appearance before the commissioner for notification to the accused of his rights must be “without unnecessary delay,”³⁶⁶ the hearing shall occur “within a reasonable time.”³⁶⁷ Where defendant has to obtain or be provided with counsel, delay is probably necessary, and counsel for prosecution frequently ask for a continuance. The continuance practice is subject to great abuse, defendants may be subject to pressure to waive the hearing entirely, and the principle of a prompt independent judicial check on arrests is impaired.

Third, a careful study of the efficacy of appellate review of denial of bail pending appeal under the discretionary standards now applied in the federal courts should give us data valuable for our present purposes.³⁶⁸ This federal system is probably the closest existing *1179 analogue to proposals for preventive detention. To the extent that published reports give information about the time required to process an appeal from denial of bail they suggest that delays from a few days to up to a week are routine,³⁶⁹ that much longer delays are frequent,³⁷⁰ and that a very common tactic is for the appellate court, instead of deciding yes or no on the right to bail, to remand the case back to the district court for further hearing—a procedure sure to entail added delay.³⁷¹ Judge Yankwich has reported the history of five cases in Los Angeles where to appeal a denial of bail “[all] you had to do was to find a [circuit] judge on the Sixteenth Floor of the same building”³⁷² The interval in days elapsing between the denial of the appeal in these cases in the district court and the filing in the district court of the appellate order to release on bail was: four days, ten days, fifteen days, seventeen days and thirty-two days.³⁷³

Taken together, experience with these comparable proceedings gives no reason for optimism that it would be possible to develop *1180 procedures for adequate hearing on preventive detention and administer them with sufficient dispatch to avoid serious complications. The volume of cases, the low calibre of judicial officers typically assigned at this stage of proceedings, and the added complication of having to build in some method of expeditious review all indicate that

it would be administratively impossible to create a system that for many defendants, who would be promptly bailed today and would ultimately achieve release under preventive detention, would avoid some days of detention before the right to pretrial release could be adjudicated. It is worth recalling that our hypothetical defendant was fired from his job after failing to show up on two successive days. Pretrial detention is a situation where it is particularly true that justice delayed is justice denied.

V. CONCLUSION

1. From the analysis of equal protection I conclude that extension of the *Griffin* rule to bail is particularly appropriate, and that pretrial detention of an accused who would go free but for differences in financial circumstances is a violation of the equal protection clause. As is now required with appeals, the government should be required to control the problems of the pretrial period by methods which do not result in invidious distinctions in the treatment of rich and poor.

2. From the analysis of the eighth amendment the only interpretation which seems to me consistent with its historical antecedents and what must have been its purpose is to find in it protection from pretrial detention which is secured against abridgment by legislation or the vagaries of judicial discretion. The words “excessive bail” in the amendment must be given an interpretation consistent with the *Griffin* rule as forbidding any financial discrimination against the accused. Such an interpretation pierces the literal guarantee and focuses upon the fundamental interests with which the amendment is concerned: the right not to be punished before conviction and the right not to be prejudiced in preparing for trial. These were the ends; a financial bonding system was merely a means, perhaps suited to an earlier age, but at any rate now obsolete and offensive to current values.³⁷⁴ The concept of excessiveness would continue to be pertinent as a check against the imposition of unjustifiably onerous conditions of pretrial release.

***1181** Construed as embodying the fundamental protection of the accused during preconviction procedure, the amendment is restored to the role it must have been intended to fill as a part of the basic charter of our liberties. Those parts of the Bill of Rights which are today interesting only as historical curiosities—for example the third amendment on quartering soldiers—have become relics because the subjects with which they dealt are no longer problems. But the eighth amendment does not deserve such a fate, for the issues with which it is concerned are as alive and important today as in 1789. Where we have a specific provision which, given a reasonable interpretation, deals satisfactorily with today's manifestations of the problem concerned, it seems far better to use that provision than to load pretrial detention problems upon the already overburdened and not very secure shoulders of due process.³⁷⁵

An eighth amendment given its proper role as an integral and important part of our basic rights should also be incorporated in the fourteenth amendment and made applicable to the states. Indeed, I have assumed throughout that such incorporation exists, although the question has not been authoritatively decided.³⁷⁶ Other collateral problems would then have to be resolved, for example, the express exception historically provided for capital cases and possible application of the amendment to bail after conviction pending appeal.³⁷⁷ The first problem contains difficult questions at a time when offenses declared capital by legislation remain common but the actual imposition of the death penalty is declining rapidly. The appeal problem is simpler and the proper answer seems to me self-evident. The question did not arise when the rights embodied in the eighth amendment were being forged simply because “the criminal appeal can be regarded almost [as] a modern innovation” which was “very largely a product ***1182** of the nineteenth century.”³⁷⁸ As appeal has now become an integral part of the judicial process in criminal cases, the same constitutional protection should be applied pending appellate disposition as prior to conviction, a result dictated not only by the logic of the eighth amendment, but also by unsatisfactory experience with discretionary power to deny bail pending appeal.

3. From the analysis of the very substantial prejudice which results from pretrial detention contrasted with the at best conjectural value of the bail system in supporting the incidence of appearance for trial, I conclude that detention is consistent with the due process demand of fundamental fairness only in situations of extraordinary risk. In most cases,

if whatever security bail may provide were removed, no alternative protection against absconding would be required beyond the provision of sanctions for wilful flight and existing knowledge by the accused that flight will prejudice him at sentencing.

In high risk cases alternatives available to the government should suffice to provide for essential public interests. These alternatives include speedy trial at the discretion of the government, with the possibility of detention as a sanction for unjustifiable delaying tactics by the defendant; probation control over the accused, daily reporting to the police or restrictions on travel; and discretion to detain an accused who has absconded in the instant or in a prior recent case (perhaps within five years). Only where the government can establish that release would create a high risk of violent injury to a specific victim, complainant, or witness should detention be permitted as a preventive measure. Even then detention should be contingent upon a speedy trial, and conditions of confinement should permit defendants to communicate freely with counsel, family and friends, and provide them with a standard of living substantially better than that of sentenced prisoners. Default by the government in meeting these conditions in any case should abrogate its privilege to detain.

4. The analysis of preventive detention leads me to its rejection except in the very limited situation just noted. If my constitutional analysis is accepted, this result is compelled; but even if preventive detention is held not to be constitutionally proscribed, it should be rejected on policy grounds. The addition of the label “preventive” does not cleanse detention of its vices: pretrial punishment and impairment of a fair trial. The overwhelming objection to such detention is that the kinds of precise prediction of future conduct which it requires cannot *1183 be made with significant reliability even under the best of fact finding and diagnostic circumstances. As it would have to be administered on a mass scale before the lowest level judiciary with no practical possibility of fast and effective appellate review, it would deteriorate into the worst kind of uncontrolled discretion.

The impossibility of individualized preventive prediction in this area and the statistical demonstration that the least number of mistakes will be made by releasing everyone is a convincing modern vindication of the wisdom of the absolute right to bail which has been an important part of our history since the Massachusetts Body of Liberties in 1641.

5. As for the hypothetical defendant, he should be released on recognizance pending his trial. Even if he is in fact innocent, he may be unable to find his witnesses, or get them to testify, or if they take the stand the jury may refuse to believe them. But a system of justice which is inevitably going to make some mistakes should have an easier conscience if it has given him at least this much chance to defend himself.

It is also quite possible that the defendant's alibi and his witnesses may be nothing more than figments of a lying imagination. In this event, if he is released he may try to manufacture witnesses and produce a perjured defense. He may, in the common usage which reveals the extent of our prejudgment, “repeat his crime.” Or he may abscond, either because he knows he is guilty or because he knows he is innocent but doubts that a jury could be so persuaded. Still another conceivable, if unlikely, result is that he would abuse pretrial freedom by doing harm to the informer, Inman, against whom he has expressed some resentment.

The weighing of such imponderables, whose probability cannot be determined, against the possibility of injustice to the accused, a risk whose magnitude is unknown, poses for adjudication on an individual case-by-case basis an impossible task. For the class of accused criminals of which the hypothetical defendant is a member, however, we either know or could discover what these probabilities are. On the one hand, perhaps a quarter of defendants like him will not be convicted; on the other hand, fair estimates are that the statistical incidence of attempted flight followed by ultimate rearrest is small, of permanently successful escape far smaller, and of the other risks, so small as to be statistically insignificant. The genius of specifically enumerated Bill of Rights guarantees such as the eighth amendment is that they make policy equally applicable to all members of a class, instead of succumbing to the seductive delusion that by prediction in individual cases one can reduce the total number of errors.

*1184 6. At first blush there appear to be substantial disadvantages for the government in the position which is here taken both as constitutional exegesis and as the wisest resolution of the bail problem. In the long run, however, my conclusion is that the government's administration of criminal law is less likely to be harmed than benefited from the abolition of pretrial detention.

The possible losses are immediately apparent. To an unknown but perhaps significant extent the government would be deprived of some advantages it now derives from pretrial detention, for example, detention's contribution to the present high rate of guilty pleas, or the government's superior negotiating position in plea bargaining with jailed defendants. Such advantages, however, are illegitimate and are exacted in a discriminatory fashion only from the poor. If there were to be a significant decrease in the proportion of guilty pleas and a corresponding increase in the proportion of those going to trial, a problem with which we are already familiar as a result of provision of assistance of counsel for all defendants, the pressure for additional facilities to deal with criminal administration would increase. But there is no escape from the fact that more equal justice for the indigent is going to impose new and heavy burdens on the state.

Such burdens can, however, have advantages as well. Increased pressure might promote greater efficiency in prosecution, especially in early screening of cases. It might speed the urgently needed re-examination of the role of the criminal law in conjunction with possibly increased reliance on other noncriminal sanctions and controls. Every stage of the criminal process from the police lockup to the penitentiary is now loaded with unnecessary cases: for example, we use arrest where summons would suffice, fail to screen out cases efficiently early in the prosecution process, fail fully to utilize probation and parole, and apply criminal sanctions where they are inappropriate or unnecessary. Thus Packer has persuasively argued that the time has come “to reexamine the uses now being made of the criminal sanction with a view toward deciding which uses are relatively indispensable and which might with safety (and perhaps even with some net gain to the public welfare) be restricted or relinquished.”³⁷⁹

Very sharp curtailment of pretrial detention would bring many compensating advantages, for example, vast savings in present high detention costs, reduced exposure to county jail life (aptly characterized as training in crime), and probably an increased incidence of probation as previously detained defendants would be in a better position to qualify for it. More subtle, but perhaps even more significant, *1185 would be a change in the image the law presents to the economically depressed levels of our population. Equal justice should be more than charity for the poor; it should build that respect for law which in the last analysis is the only secure foundation for effective enforcement.

If these conclusions about bail appear to be strong medicine, disrupting the familiar and entailing risks which are probably magnified in our imagination because they are unknown, then to that extent the bail crisis will force us to probe again what we really mean by due process and equal justice. It will also test the quality of our democracy, for, as has been repeatedly observed, a revealing measure of any civilization is found in its treatment of citizens accused of crime and—I would add—of those crippled by poverty in the adversary struggle with the state.

Footnotes

a1 This is the second part of Professor Foote's article, the first part of which appeared in the May issue. Footnote and subdivision numbers continue from the final footnote and subdivision numbers in Part I.

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182 Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959-99 (1965) [hereinafter cited as *Crisis in Bail: I*].

183 *Crisis in Bail: I*, at 961. In *Short v. United States*, 344 F.2d 549 (D.C. Cir. 1965) (per curiam), bail was denied pending appeal. Short's record was more favorable for release than that of the hypothetical defendant—for example, he would “reside with relatives in the District of Columbia and he will be employed by a former employer.” *Id.* at 550. (Bazelon, C.J., dissenting). But pending trial The District of Columbia Bail Project, similar to the Vera Manhattan Bail Project, “which has been of great

help to our courts in such matters, looked into the matter of his possible release on personal recognizance ... and found he did not qualify for such release under the criteria of the Project.” *Id.* at 550. (Fahy, J., concurring).

- 184 See, e.g., *Gusick v. Boies*, 72 Ariz. 233, 233 P.2d 446 (1951). For an extreme case see *State v. Kjelstad*, 230 Wis. 579, 284 N.W. 554 (1939), where after original release on \$1,500 bail defendant was rearrested on motion of the district attorney, and bail was increased to \$5,000. In the supreme court the district attorney sought to uphold the increase by arguing that it was designed to protect defendant from mob violence. The court said this would constitute an improper basis for detention but that, as the argument did not appear in the record, relief would be denied because of the presumption that the court below had proper reasons.
- 185 *Ex parte Morehead*, 107 Cal. App. 2d 346, 237 P.2d 335 (1951) (must appear per se that amount fixed clearly disproportionate); *Ex parte Duncan*, 53 Cal. 410 (1879) (amount must “shock the common sense”); *Reid v. Perkerson*, 207 Ga. 27, 60 S.E.2d 151 (1950) (must be flagrant); *Delaney v. Shobe*, 218 Ore. 626, 346 P.2d 126 (1959) (must show clear abuse). Compare *Noto v. United States*, 76 Sup. Ct. 255, 257 (Harlan, Circuit Justice, 1955) (“Ordinarily I would be unwilling to disturb the action of the two courts below in a matter of this kind”); *Mastrian v. Hedman*, 326 F.2d 708, 711 (8th Cir.), cert. denied, 376 U.S. 965 (1964) (in federal habeas corpus proceeding, amount set in state court must be shown to be “beyond the range within which judgments could rationally differ ...”).
- 186 *Ex parte Ryan*, 44 Cal. 555 (1872) (assuming defendant is guilty, is bail too high?); *Ex parte Malley*, 50 Nev. 248, 256 Pac. 512 (1927); *Ex parte McWhorter*, 48 Okla. Crim. 397, 292 Pac. 393 (1930). *But see Gusick v. Boies*, 72 Ariz. 233, 233 P.2d 446 (1951) (presumed innocent).
- 187 *Braden v. Lady*, 276 S.W.2d 664 (Ky. 1955) (bail pending appeal). Fifteen months after reduction was refused Braden's conviction was reversed and the indictment dismissed, *Braden v. Commonwealth*, 291 S.W.2d 843 (Ky. 1956).
- 188 See, e.g., Foote, Markle & Wooley, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031, 1032-43 (1954) [hereinafter cited as *Philadelphia Bail Study*]; Note, *A Study of the Administration of Bail in New York City*, 106 U. PA. L. REV. 693, 699-703 (1958) [hereinafter cited as *New York Bail Study*]. In *Ex parte Stegman*, 112 N.J. Eq. 72, 83, 163 Atl. 422, 427 (1932), the court found “as a fact” that bail had been refused because “the quarter sessions was co-operating with the prosecutor ... to hold petitioners in confinement in order to obtain confessions by oppressive means”
- 189 A defendant held in \$5,000 bail who succeeded in getting a very substantial reduction to \$1,500 would only moderately improve his statistical chances of being able to make bail. See, e.g., *Philadelphia Bail Study* 1032-43; *New York Bail Study* 707 (giving figures for the proportion of New York defendants able to make bail at varying amounts, for example, 25% at \$5,000 and 55% at \$1,500).
Moreover, a defendant who obtains his freedom by having his bail reduced on appeal is still subject to possible harassment. For a flagrant example, compare the two opinions in *Gusick v. Boies*, 72 Ariz. 233, 233 P.2d 446 (1951), and 72 Ariz. 309, 234 P.2d 430 (1951) (after getting appellate relief, defendant was rearrested twice as prosecutor added new counts to indictment on which additional bail was demanded).
- 190 This conclusion assumes that a state order denying bail is a final state judgment for the purpose of review by the Supreme Court. 28 U.S.C. § 1257 (1958). See, e.g., *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555 (1963), which suggests that a state bail denial would be final, but that it has not been explicitly so held. For an analysis of *Mercantile Nat'l Bank* and other recent cases see AMSTERDAM, THE DEFENSIVE TRANSFER OF CIVIL RIGHTS LITIGATION FROM STATE TO FEDERAL COURTS 339-42 & n.189 (1965). Compare *Stack v. Boyle*, 342 U.S. 1 (1951) (federal district court denial of bail “final” for purpose of review under 28 U.S.C. § 1291 (1958)).
- 191 E.g., *State v. Petrucelli*, 37 N.J. Super. 1, 116 A.2d 721 (Super. Ct. 1955). *But see State v. Teeter*, 65 Nev. 584, 609, 200 P.2d 657, 670 (1948) (possible alternative holding: improper denial of discretionary bail “substantially affect[s] the validity of the judgment” in murder case).
Compare *Timmons v. United States*, 343 F.2d 310, 311 (D.C. Cir. 1965) (per curiam) (Bazelon, C.J., concurring): “Because the issue [of pretrial detention as an interference with preparation for trial and consultation with counsel] has been raised for the first time on appeal, it is not possible to assess the prejudice which appellant may have suffered.”

- 192 Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U.L. REV. 641, 642 Table 1 (1964) [hereinafter cited as Rankin]. Compare *New York Bail Study* 727 (20% of much smaller sample not guilty); *Philadelphia Bail Study* 1052 (18% of sample of 340 jail cases not convicted).
- 193 369 U.S. 35 (1962) (per curiam).
- 194 No. 21802, 5th Cir., Aug. 5, 1964.
- 195 369 U.S. 35 (1962) (per curiam).
- 196 For an illuminating discussion of this strategy see AMSTERDAM, *op. cit. supra* note 190, at 281-84.
- 197 See discussion *id.* at 324-25. In a sample of 958 jail cases examined in the *Philadelphia Bail Study* 1049 n.72, 472 defendants were sentenced to further imprisonment with credit for time served before trial and 90 were released after being convicted and sentenced to time served awaiting trial.
- 198 See the discussion in AMSTERDAM, *op. cit. supra* note 190, at 324-25.
- 199 342 U.S. 1 (1951); see *Crisis in Bail: I*, at 994-96.
- 200 See *id.* at 995 nn.165-66.
“In Los Angeles in the Superior Court we have a bail schedule. Let us take just one example, assault with a deadly weapon. Slight injuries, \$500; slight injuries with prior felony, \$1,000; serious injuries, \$2,000; serious injuries with prior felony, \$3,000.” PROCEEDINGS, NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE 198 (1965) [hereinafter cited as NATIONAL BAIL CONFERENCE] (statement of Judge Joseph A. Wapner, presiding judge, Superior Court, Los Angeles).
- 201 See notes 268, 284-85 *infra*.
- 202 Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 346-47 (1957).
- 203 *E.g.*, Guinn v. United States, 238 U.S. 237 (1915) (Oklahoma “grandfather clause” invalidated under fifteenth amendment even though by its terms it made no discrimination on racial grounds).
- 204 One case in which a statute fair on its face was held arbitrarily applied is *Yick Wo v. Hopkins*, 118 U.S. 365 (1886) (ordinance regulating laundries in wooden buildings systematically administered so as to discriminate against Chinese but not Caucasian laundries).
- 205 Wright, *Criminal Law and the Bill of Rights*, The Reporter, June 3, 1965, p. 23. See also Judge Wright's concurring opinion in *Pannell v. United States*, 320 F.2d 698, 699 (D.C. Cir. 1963).
- 206 Kadish, *supra* note 202, at 347.
- 207 *E.g.*, Rankin 642 (27% of sample of 358 jailed defendants were not convicted); *Philadelphia Bail Study* 1052, Table 1 (depending on offense, proportion of jailed defendants not convicted ranged from 7% to 27%); *New York Bail Study* 726-27.
- 208 316 U.S. 455 (1942).
- 209 See, *e.g.*, *Gibbs v. Burke*, 337 U.S. 773, 781 (1949): “... [T]he fair conduct of a trial depends largely on the wisdom and understanding of the trial judge. He knows the essentials of a fair trial He may guide a defendant without a lawyer past the errors that make trials unfair.”
- 210 372 U.S. 335 (1963).
- 211 FRANK & FRANK, NOT GUILTY 61 (1957). In most of the cases discussed there were identification mistakes. See also BORCHARD, CONVICTING THE INNOCENT (1932); HALE, HANGED IN ERROR 45, 76, 115-16 (1961); PAGET & SILVERMAN, HANGED—AND INNOCENT? (1953).

- 212 Empirical studies done under the auspices of the Institute of Legal Research, University of Pennsylvania Law School, as yet unpublished, indicate that white subjects perform significantly more poorly in the identification of Negroes than they do in the identification of whites.
- 213 *E.g.*, FRANK & FRANK, NOT GUILTY 74-78 (1957).
- 214 See, *e.g.*, *id.* at 74-78 (the case of Clifford T. Shepard).
- 215 Robert Lowe, as quoted by HALE, HANGED IN ERROR 119 (1961).
- 216 ATT'Y GEN. COMM. ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE, REPORT 26 (1963) [hereinafter cited as ATT'Y GEN. REP.].
- 217 *Ibid.*
- 218 TREBACH, THE RATIONING OF JUSTICE: CONSTITUTIONAL RIGHTS AND THE CRIMINAL PROCESS 209 (1964).
- 219 ATT'Y GEN. REP. 71.
- 220 Note, 70 YALE L.J. 966, 969-70 & n.27 (1961).
- 221 [United States ex rel. Hyde v. McMann](#), 263 F.2d 940, 942-43 (2d Cir.), *cert. denied*, 360 U.S. 937 (1959):
Hyde asserts that during the afternoon and evening he succeeded, where his counsel had failed, in locating the house where he claimed to have spent the night of February 7-8 and that he learned that a girl answering the description of Jo Ann had resided at the house but that she had left about seventeen days after the date of his arrest when the bar in which she worked was raided by the police.
The trial court refused a further continuance and on application for federal habeas corpus the Second Circuit found no denial of due process, the state being required to do no more than afford an opportunity for search *by counsel*. 263 F.2d at 943. The court was apparently convinced of Hyde's guilt ("It is small wonder that a jury convicted Hyde" *Id.* at 942.) and never discussed the bail issues which were pressed in the Brief for Petitioner pp. 2, 8-29.
- 222 [Fitts v. United States](#), 335 F.2d 1021 (10th Cir. 1964).
- 223 *Id.* at 1023.
- 224 Compare [Lee v. United States](#), 322 F.2d 770 (5th Cir. 1963), where after indictment and fifteen days of detention two special agents went to the indigent prisoner's cell and questioned him. The court held that the admissions obtained by the agents were inadmissible and reversed, motivated in part by the unreliability of the testimony about the interrogation which the agents had never reduced to writing. The thrust of the majority's argument was that the evidence was the product of an "invidious discrimination against indigent defendants." *Id.* at 777. Strangely, however, the court never mentioned bail. As the crime was not capital and thereforeailable, Lee must have been detained because of inability to post bail and he was repeatedly referred to as indigent. Instead, the court found a violation of the right to counsel because Lee had not yet been assigned a lawyer, the Government conceding that "secret, ex parte interrogations of defendants are not conducted when a prisoner has counsel," and "legal ethics forbid ... bypass[ing] the lawyer of a defendant fortunate enough to have the means to engage counsel." *Ibid.*
- 225 Compare [Butler v. Crumlish](#), 229 F. Supp. 565 (E.D. Pa. 1964), with [Morris v. Crumlish](#), 239 F. Supp. 498 (E.D. Pa. 1965), and [Rigney v. Hendrick](#), E.D. Pa. No. 37791, April 7, 1965.
- 226 229 F. Supp. 565 (E.D. Pa. 1964).
- 227 *Id.* at 568. The inequality is "increasingly oppressive to the poor and the vagrant. It brings to mind Anatole France's ironic epigram that the law in its majestic impartiality forbids the rich and poor alike to sleep under bridges." *Ibid.*
- 228 *Id.* at 566.
- 229 *Id.* at 567.

- 230 Rigney v. Hendrick, E.D. Pa., No. 37791, April 7, 1965; [Morris v. Crumlish](#), 239 F. Supp. 498 (E.D. Pa. 1965).
- 231 Rigney v. Hendrick, *supra* note 230.
- 232 [Butler v. Crumlish](#), 229 F. Supp. 565, 566 (E.D. Pa. 1964).
- 233 McGee, *The Administration of Justice: The Correctional Process*, 5 NATIONAL PROBATION & PAROLE A.J. 225, 228 (1959).
- 234 [Butler v. Crumlish](#), 229 F. Supp. 565, 567 (E.D. Pa. 1964).
- 235 *New York Bail Study* 723-25. The “pattern of custody” in New York detention prisons “is more restrictive than that ordinarily imposed on convicted prisoners in sentence institutions Overcrowding is particularly in evidence [D]etention is a period of oppressive inactivity.” *Id.* at 724-25. See also FREED & WALD, BAIL IN THE UNITED STATES: 1964, at 43-45 (Report to the National Conference on Bail and Criminal Justice, 1964) [[hereinafter cited as FREED & WALD]. In Trebach's sample of 359 convicted prisoners living in penitentiaries, those expressing a judgment as to the relative conditions between their pretrial jail and their sentence serving institution preferred the penitentiary by a ratio of 12 to 1. TREBACH, *op. cit. supra* note 218, at 83, 264.
... [M]ost men came forth with critical comments ... One ... inmate ... told me, “I'd rather do six months here than the two months I did down there [a New Jersey county jail]. They starve you to death, don't give you no exercise. They should do something about that place.”
Id. at 82.
- 236 I have in mind censorship of ideas and content, as distinguished from inspection of incoming mail to prevent importation of, for example, narcotics or files. As for limits on mail, see, *e.g.*, *Philadelphia Bail Study* 1055 (untried prisoner may write two letters a week).
- 237 *Cf.* [Lanza v. New York](#), 370 U.S. 139 (1962), where the state conceded it had used electronic devices to eavesdrop on the conversation of a prison inmate with his visitor.
It has been reported that a New York trial judge found it necessary to release a prisoner without bail so that he would be able to consult his attorney, the judge not being able to feel confident after [the Lanza] incident that there was any jail in the State where the prisoner and his lawyers could be secure against electronic eavesdropping.
Id. at 149 (Warren, C.J., concurring).
- 238 For an extreme application, see [Akamine v. Murphy](#), 108 Cal. App. 2d 294, 238 P.2d 606 (1951), upholding refusal of jail to permit husband held pending trial to be visited by his wife, recently released from same jail, because of jail rule prohibiting released inmate from visiting any other inmate within thirty days of release.
- 239 *E.g.*, *New York Bail Study* 705. Compare the remarks of magistrates setting high bail in Philadelphia as indicative of their motives, for example: “He is a Puerto Rican. What a bum.” “Anyone who hits his father ought to be electrocuted.” “I'm going to make an example of you.” *Philadelphia Bail Study* 1039. Chief Judge Roy W. Harper of the United States District Court, St. Louis told the National Conference on Bail and Criminal Justice that “one of the best deterrents is detention for about 24 to 48 hours to see the inside of a jail house.” NATIONAL BAIL CONFERENCE 192.
- 240 4 BLACKSTONE, COMMENTARIES 297 (1st Am. ed. 1772).
- 241 232 U.S. 383 (1914).
- 242 367 U.S. 643 (1961).
- 243 4 BLACKSTONE, COMMENTARIES 297 (1st Am. ed. 1772).
- 244 Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 41 (1964).
- 245 See, *e.g.*, [Mahaffey v. State](#), 87 Idaho 228, 392 P.2d 279 (1964) (for prisoner to obtain relief in courts from prison regulations, he must show such shocking treatment as to amount to cruel and unusual punishment). See generally [Note](#), 110 U. PA. L. REV. 985 (1962).

- 246 Research by Dr. Jerome H. Skolnick, of the Center for the Study of Law and Society, University of California, Berkeley, who is preparing a book tentatively entitled *Justice Without Trial*, will prove relevant to further study of these hypotheses. Sociological inquiry of the kind being done by Skolnick should give added insight regarding the problems posed in all of these hypothetical propositions.
- 247 For the purpose of the defendant's attitude and its effect on his relationship with his lawyer, the fact that the state appointed lawyer may be as able as a retained counsel is not significant if defendants' opinion is to the contrary. The author on several occasions has observed a lawyer come into a detention jail where newly admitted prisoners are brought to him one by one. The lawyer's opening question was, in effect: how much money do you have or can you raise? The interview was terminated immediately if the answer was unsatisfactory. These rejected prisoners were later represented by the public defender and probably received better legal services than would have been provided by the private lawyers, who had reputations as fixers and as being legally incompetent. But the psychological undertones of such transactions are obvious and must impair the defendant's opinion of the fairness of the trial process.
- 248 See *Crisis in Bail: I*, at 960.
- 249 Bratholm, *Arrest and Detention in Norway*, 108 U. PA. L. REV. 336, 340-41 (1960).
- 250 Wald, *Forward, Pretrial Detention and Ultimate Freedom: A Statistical Study*, 39 N.Y.U.L. REV. 631, 637 (1964).
- 251 Rankin 641.
- 252 *Id.* at 642. The sample was drawn from defendants arraigned on felony charges in New York City during 1961-1962 and studied as part of the Vera Foundation's Manhattan Bail Project. Defendants are categorized as "bail" cases if they were free for some or all of the time pending disposition, and were listed as "jail" cases only if they were in jail all of the time from arrest until disposition. The entry "convicted without prison" includes suspended sentence or choice of fine or prison.
- 253 *Id.* at 646.
- 254 *Ibid.*
- 255 *Id.* at 647-48.
- 256 *Id.* at 655.
- 257 351 U.S. 12 (1956). Four justices found this requirement in both the due process and equal protection clauses. Mr. Justice Frankfurter, whose vote was needed to make up the majority, rested his concurrence only on equal protection grounds.
- 258 *E.g.*, *Burns v. Ohio*, 360 U.S. 252 (1959) (state cannot compel indigent to post filing fee before supreme court would hear appeal); *Eskridge v. Washington*, 357 U.S. 214 (1958) (per curiam) (*Griffin* rule applied retroactively).
- 259 *Lane v. Brown*, 372 U.S. 477 (1963) (state coram nobis); *Smith v. Bennett*, 365 U.S. 708 (1961) (filing fee for state habeas corpus).
- 260 *Douglas v. California*, 372 U.S. 353 (1963) (state must appoint counsel to help indigent in first appeal whenever nonindigent could appeal and enjoy assistance of counsel).
- 261 Compare *Norvell v. Illinois*, 373 U.S. 420 (1963), with *Douglas v. California*, 372 U.S. 353 (1963), and *Eskridge v. Washington*, 357 U.S. 214 (1958). Outside the *Griffin* area this same balancing has occurred. Thus even racial classifications have been upheld when balanced against what was considered to be compelling wartime necessity, *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943); but the same classification has been rejected where the equities on the other side were deemed less compelling, *Oyama v. California*, 332 U.S. 633 (1948). And see *Kotch v. Board of River Pilot Comm'rs*, 330 U.S. 552 (1947) (apparently offense classification allowed to stand where it was causing little prejudice in results). See generally Note, 16 STAN. L. REV. 394, 400-05 (1964).
- 262 Part of Mr. Justice Harlan's objections to *Griffin* rest on his view that if a classification, here between rich and poor, is invidious, it would be so "in all cases, and an invidious classification offends equal protection regardless of the seriousness of the consequences." *Griffin v. Illinois*, 351 U.S. 12, 35 (1956) (Harlan, J., dissenting). Thus to approach the problem of the poor

in criminal cases “in terms of the Equal Protection Clause is, I submit, but to substitute resounding phrases for analysis The real question ... is whether or not the state rule ... is consistent with the requirements of fair procedure guaranteed by the Due Process Clause.” [Douglas v. California](#), 372 U.S. 353, 361, 363 (1963) (Harlan, J., dissenting). The Court seems to lump both together, as it has done in some appeal cases, see note 261 *supra*. If one takes the position that a balancing of state interests and the seriousness of the consequences of an invidious classification is a factor to be considered in equal protection cases, then it would appear to make little difference which label is used. See [Norvell v. Illinois](#), 373 U.S. 420, 423-24 (1963): “Exact equality is no prerequisite of equal protection [S]ome practical accommodation must be made.”

263 Allen, [Griffin v. Illinois: Antecedents and Aftermath](#), 25 U. CHI. L. REV. 151, 156 (1957).

264 *Id.* at 152-54.

265 [Griffin v. Illinois](#), 351 U.S. 12, 19 (1956).

266 [Williams v. New York](#), 337 U.S. 241 (1949). *But see* [Townsend v. Burke](#), 334 U.S. 736 (1948) (sentencing judge cannot crack jokes while imposing on un-counselled defendant long prison sentence premised on misinformation).

267 [Griffin v. Illinois](#), 351 U.S. 12, 29 (1956).

268 [Bandy v. United States](#), 81 Sup. Ct. 197, 198 (Douglas, Circuit Justice, 1960); [Bandy v. United States](#), 82 Sup. Ct. 11, 13 (Douglas, Circuit Justice, 1961).

269 [Bandy v. United States](#), 81 Sup. Ct. 197, 198 (Douglas, Circuit Justice, 1960).

270 *Ibid.*

271 [Bandy v. United States](#), 82 Sup. Ct. 11, 13 (Douglas, Circuit Justice, 1961).

272 See the history of the case in note 274 *infra*.

273 [Bandy v. United States](#), 82 Sup. Ct. 11, 13 (Douglas, Circuit Justice, 1961).

274 Some indication of the complicated history of the *Bandy* case is required. Bandy was convicted of filing and collecting refunds on false and fictitious income tax returns. His first appearance in the reports was at [272 F.2d 705 \(8th Cir. 1959\)](#) (per curiam), where it is said that he had already been convicted and the trial judge had certified that his appeal was not taken in good faith. The court of appeals appointed a lawyer to represent Bandy on his motion for leave to appeal in forma pauperis. This was on December 10, 1959. On April 25, 1960, the court denied his motion to appeal in forma pauperis and dismissed his appeal as frivolous, [278 F.2d 214 \(8th Cir. 1960\)](#) (per curiam). Bandy then filed a petition for certiorari in the Supreme Court. Meanwhile he was in jail, for not surprisingly the court of appeals had denied him bail; given the view it took of the case—that the appeal was frivolous—it had no option but to deny bail, see [FED. R. CRIM. P. 46\(a\)\(2\)](#). Pending disposition of the petition for certiorari, Bandy filed an application for bail with the circuit justice for the Eighth Circuit, Justice Whittaker, which was denied on July 29, 1960. Always the diligent litigant, Bandy then filed a similar application with Justice Douglas. Justice Douglas, although “most reluctant to take contrary action” to that of Justice Whittaker, made inquiry of the Solicitor General, who stated that the petition for certiorari presented “substantial questions of law.” Justice Douglas therefore granted bail in the amount of \$5,000. [Bandy v. United States](#), 81 Sup. Ct. 25 (Douglas, Justice, 1960). (At some point while the Eighth Circuit case was being litigated, Bandy was moved to a jail in Idaho, in connection with a pending prosecution in that district, which may account for the fact that Justice Douglas, who is circuit justice for the Ninth Circuit, acted in all subsequent reported individual applications.)

As Bandy was indigent, however, he was unable to post bond and he filed another application with Justice Douglas, this time requesting release on “personal recognizance” pending certiorari. While this application was pending, on December 5, 1960, the Court granted Bandy's petition for certiorari, vacated the judgment, and remanded the case for a hearing of the appeal. [364 U.S. 477 \(1960\)](#) (per curiam). On the same day, Justice Douglas decided the application for release and issued what has erroneously been called his “first” *Bandy* opinion. After speculating on the right of indigents to release, Justice Douglas denied the application without prejudice to another application in the courts below for a hearing as to whether or not Bandy posed a substantial risk of absconding were he to be released without bond. [81 Sup. Ct. 197 \(Douglas, Circuit Justice, 1960\)](#).

Apparently the court of appeals refused to reduce the \$5,000 bail figure previously set by Justice Douglas, and while the appeal was pending in the Eighth Circuit, Bandy filed a new battery of petitions for certiorari in the Supreme Court, one of which

asked the Court to review the judgment of the court of appeals refusing to reduce bail and release him on his own recognizance. He also renewed his application for similar release before Mr. Justice Douglas, and on June 28, 1961, Justice Douglas acted upon this application in his so-called “second” Bandy opinion, in which he reached the conclusion “that no man should be denied release because of indigence.” 82 Sup. Ct. 11, 13 (Douglas, Circuit Justice, 1961). Although his reason for denying without prejudice the earlier release application was because the Government’s claim that the petitioner posed a risk “troubles me,” 81 Sup. Ct. at 198, he now stated (82 Sup. Ct. at 13):

... I reject the Government’s argument, in opposition to these applications, that Bandy is a “poor risk.” That argument was not made when release was sought on a \$5000 bond. No reason is now put forward which makes it more relevant to release without security than to release on bond. The showing in this respect does not overcome our heavy presumption favoring freedom. However, Justice Douglas declined to act because Bandy had asked for the same relief in his petition for certiorari, and if “the relief were granted by a single Justice, it would make the petition for certiorari moot.” *Ibid.* As the petition for certiorari was not denied until October 9, 368 U.S. 852 (1961) (two petitions from Bandy’s then pending Ninth Circuit case were also denied on the same day), Bandy spent another summer in jail.

The basis for Justice Douglas’ abstention is a possible conflict between Federal Rule of Criminal Procedure 46(a)(2), which clearly gives “the circuit justice” the power to grant bail pending certiorari (query whether Justice Douglas was “circuit justice” in this Eighth Circuit case, but he apparently assumed he was within the rule), and the decision in *Stack v. Boyle*, 342 U.S. 1 (1951), that the denial of a motion to reduce bail is a final, appealable decision which can be brought to the Supreme Court on certiorari. The concurring opinion of Justices Jackson and Frankfurter in *Stack v. Boyle* includes a lengthy analysis of the various sources of the power of a Justice to grant bail, *id.* at 7, 11-18. The Court is explicit in not determining “the power of a ... Justice to fix bail pending disposition of a petition for certiorari” on the bail issue, *id.* at 4 n.2. Justices Jackson and Frankfurter would apparently restrict Federal Rule of Criminal Procedure 46(a)(2) to petitions for certiorari on the merits and not allow the circuit justice to act individually on bail if a petition for certiorari involving bail was pending, *Stack v. Boyle*, 342 U.S. 18 (1951). This view, which Justice Douglas apparently accepted, not only does violence to the literal wording of rule 46(a)(2) but seems wrong on the merits. It invites precisely the kind of delay which occurred in *Bandy*, where a petition was filed during vacation. If the Jackson-Frankfurter position prevails, then a petitioner has no remedy at all during the summer and a less speedy one at other times. The purpose of rule 46(a)(2) is to avoid just such a contingency.

In any event, Justice Douglas had other courses of action open to him besides outright denial of Bandy’s application. He dealt with the same question differently in *Stack v. Boyle* itself, referring the individual bail application to the full Court for prompt disposition. 342 U.S. at 4. In 1955 Justice Harlan faced the problem in *Noto v. United States*, 76 Sup. Ct. 255 (Harlan, Circuit Justice, 1955). He expressed similar concern because “my disposition of the application necessarily involves prejudging the very questions with which the Court must deal should the petition for certiorari be granted.” But instead of denying the application, “I have consulted my brethren and have their approval of my considering this interim application.” *Id.* at 257. He then proceeded to reduce bail to \$10,000. The Court apparently did not regard Justice Harlan’s action as having mooted the petition, for it later granted it and reduced bail to the same amount as that previously set on the individual application. 351 U.S. 902 (1956). Justice Douglas apparently used the same circulation device in another bail case before *Bandy*, *Cohen v. United States*, No. 795, 1961 Term, October 21, 1960 [*sic*] (Douglas, Circuit Justice), see Note, 112 U. PA. L. REV. 981, 997 n.114 (1964), and used it again later in a comparable situation. In *McGee v. Eyman*, 83 Sup. Ct. 230 (Douglas, Circuit Justice, 1962), he was individually presented with an application for stay of execution while a petition for certiorari on the same subject was concurrently before the Court. He proceeded to decide it after circulating the petition “to each of my Brethren.” *Id.* at 231.

275 *Bandy v. United States*, 368 U.S. 852 (1961).

276 The appeal was decided on November 15, 1961, 296 F.2d 882 (8th Cir.) (conviction affirmed), and the petition for certiorari to review this decision denied on March 26, 1962, 369 U.S. 831.

277 See note 274 *supra*.

278 342 U.S. 1, 7, 11-18 (1951). See discussion in note 274 *supra*.

279 The question may not come up again, for in the present state of the law any well advised petitioner denied bail in the court of appeals will file an individual application with the circuit justice, and only if it is denied will he follow with a petition for certiorari, thereby gaining two bites at the apple. The proposed changes in the federal rules have not dealt with the problem. See PROPOSED AMENDMENTS, RULES OF CRIMINAL PROCEDURE FOR THE UNITED STATES DISTRICT

COURTS, COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (2d Prelim. Draft 1964).

- 280 See [Bandy v. United States](#), 369 U.S. 815, decided March 19, 1962. This was a “motion for leave to file petition for writ of habeas corpus,” and Justice Douglas’ dissent would have treated “this application as one for release on personal recognizance,” and he makes the statement that “as of the date of this application the appeal had not been disposed of.” But the appeal had been decided months before and the following week the Court denied the petition for certiorari from that decision. See note 275 *supra*.
- 281 NATIONAL BAIL CONFERENCE 6, 8.
- 282 ATTY GEN. REP. 85-86.
- 283 PROPOSED AMENDMENTS, TO RULES OF CRIMINAL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS, COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 52-53 (2d Prelim. Draft 1964). See also Sullivan, *Proposed Rule 46 and the Right to Bail*, 31 GEO. WASH. L. REV. 919, 929-32 (1963).
- 284 [Pelletier v. United States](#), 343 F.2d 322, 323 (D.C. Cir. 1965) (per curiam) (Bazelon, C.J., concurring); [Pannell v. United States](#), 320 F.2d 698, 699, 701 (D.C. Cir. 1963).
- 285 [Alston v. United States](#), 343 F.2d 345 (D.C. Cir. 1964) (per curiam).
- 286 *Id.* at 346 (Bazelon, C.J., dissenting).
- 287 [Bandy v. United States](#), 82 Sup. Ct. 11, 13 (Douglas, Circuit Justice, 1961). See note 271 *supra*.
- 288 See text at pp. 1136-37 *supra*.
- 289 [Draper v. Washington](#), 372 U.S. 487, 509 (1963) (state practice used to screen applications for transcripts invalid, even though transcript not a prerequisite to appeal, where nonindigents could obtain more complete appellate review with transcripts).
- 290 “We all know that the overwhelming percentage of *in forma pauperis* appeals are frivolous. Statistics of this Court show that over 96% of the petitions filed here are of this variety.” [Douglas v. California](#), 372 U.S. 353, 358 (1963) (Clark, J., dissenting).
- 291 *E.g.*, [Griffin v. Illinois](#), 351 U.S. 12 (1956).
- 292 *E.g.*, [Draper v. Washington](#), 372 U.S. 487 (1963).
- 293 *Id.* at 499.
- 294 [Coppedge v. United States](#), 369 U.S. 438 (1962) (indigent’s appeal can be held frivolous for purpose of denying certificate of good faith for appellate review only if appeal would be dismissed as frivolous in case of nonindigent appellant; [Ellis v. United States](#), 356 U.S. 674 (1958) (per curiam).
- 295 [Lane v. Brown](#), 372 U.S. 477 (1963) (delegation to “state officer outside of the judicial system” of final power to foreclose appeal by refusing to order transcript invalid).
- 296 372 U.S. 487, 498-500 (1963).
- 297 372 U.S. 477 (1963).
- 298 Justices Harlan and Clark concurred on due process grounds. *Id.* at 485-86.
- 299 372 U.S. at 485.
- 300 The likelihood that this would happen depends in major part on the jurisdiction’s forfeiture policy; where the rate of collections on forfeiture is high, the requirement of collateral is probably close to one hundred percent, for example in Detroit. FREED & WALD 26. In New York most bondsmen require collateral although “occasional exceptions are made when the defendant

has ‘strong ties in the city and a good record.’” *New York Bail Study* 704. One New York bondsman stated: “If a person comes in and I don’t know him or his lawyer, we look for collateral; if they don’t have it, we don’t bother with them.” FREED & WALD 27.

Defendants who probably have the least difficulty obtaining release for the stated premium are members of criminal syndicates, where provision of bond is part of “the smooth operation of the criminal enterprise,” with the security to the bondsman not the resources of the individual defendant but the syndicate. FREED & WALD 35, quoting a 1964 New York Bar Report.

Conversely, defendants held on nominal bail may have considerable difficulty. In an opinion which gives considerable information on the mechanics and economics of the bonding business in New York the court noted that “it is generally the minor or low bail offender, whose even temporary detention is not justified by the crime charged, who finds himself” not solicited by bondsmen “because his low bail is unprofitable.” *People v. Smith*, 196 Misc. 304, 307, 91 N.Y.S.2d 490, 494 (1949).

301 On the frequency of illegal overcharging see FREED & WALD 33; *Philadelphia Bail Study* 1047. Bondsmen may also condition their services on other factors, for example, hiring a particular lawyer with whom they have an illegal tie-in arrangement. *Ibid.*

302 FREED & WALD 26-27; *New York Bail Study* 704; see note 300 *supra*.

303 FREED & WALD 33-34 & n.46:

Estimates by individual bondsmen respecting the percentage of cases they reject vary from 5% in Baltimore and Greenville, South Carolina, 25% in Denver, Colorado, Champaign-Urbana, Illinois and Jackson, Mississippi; 45% in Asheville, North Carolina and 50% in Philadelphia, Elizabeth City, North Carolina and Atlanta, to 60-85% in Birmingham. These figures presumably do not include indigents who cannot raise the money to call a bondsman in the first place.

“Civil rights demonstrators have reported extraordinary difficulties in finding bondsmen to bail them out in some southern cities.” *Ibid.* See also *Hairston v. United States*, 343 F.2d 313, 316 (D.C. Cir. 1965) (per curiam) (Chief Judge Bazelon’s dissent referring to refusal to write bonds in the District of Columbia).

304 The only court reports I have seen which give any indication that judges are aware of this problem have come from the District of Columbia, and those in recent years. See, e.g., *Hairston v. United States*, 343 F.2d 313, 315-17 (D.C. Cir. 1965) (per curiam) (Bazelon, C.J., dissenting); *Pannell v. United States* 320 F.2d 698, 699-702 (D.C. Cir. 1963) (concurring opinion and opinion concurring in part and dissenting in part).

305 *Pannell v. United States*, 320 F.2d 698, 699 (D.C. Cir. 1963) (Wright, J., concurring).

306 FREED & WALD 30.

307 *Philadelphia Bail Study* 1061-62.

308 For methods of selection see FREED & WALD 33: e.g., “bondsmen generally avoid narcotics defendants (‘they usually don’t wake up on time to get to court’), prostitutes (‘they have no roots’), forgers (‘they travel too much’), scofflaws, and alleged subversives (‘bad publicity’). Because of the speed with which the bondsman’s decision is made, it is often based on pure intuition.” Compare *Philadelphia Bail Study* 1065-66 (bondsman has little flexibility within system to protect himself against bad risks). See also *Crisis in Bail: I*, at 997-98.

309 FREED & WALD 27.

310 *Id.* at 28.

311 *Id.* at 27.

312 *Philadelphia Bail Study* 1060.

313 *Id.* at 1063, figure 4.

314 *Id.* at 1060-61.

315 *New York Bail Study* 703-04.

316 ATTY GEN. REP. 129-30.

- 317 *Id.* at 130.
- 318 *Ibid.*
- 319 *Philadelphia Bail Study* 1061-62.
- 320 *Id.* at 1062.
- 321 For example in the Eastern District of Michigan, 1962: 553 defendants released, eight defaults; District of Columbia: bail jumping “in a very small proportion” of cases. FREED & WALD 29.
- 322 *Philadelphia Bail Study* 1067.
- 323 *E.g.*, 18 U.S.C. § 3146 (1958) (failure to surrender within thirty days of forfeiture of bail—five years if original crime felony, one year if misdemeanor); MINN. STAT. ANN. § 609.49 (1964) (felony defendant who fails to appear within three days—one year and \$1,000). See the discussion of these statutes in *Philadelphia Bail Study* 1068. For a proposed statute making nonappearance a criminal offense, see *id.* at 1073 n.157; the statute provides a severe penalty for fugitives who do not appear within 30 days of the time required; proscribes “judge-jumping” by providing a lesser penalty for those who do not appear on the day required but do appear within 30 days; protects the defendant when he has a lawful excuse for non-appearance, but makes proof of non-appearance constitute prima facie evidence of a violation; and protects both the state and the defendant by requiring fingerprinting before release and by appropriate notice provisions.
Id. at 1073-74.
- 324 See *Sica v. United States*, 82 Sup. Ct. 669, 670 (Douglas, Circuit Justice, 1962) (Sica's bail pending appeal conditioned on his staying in the district and “personally reporting each day, excluding Sundays and holidays, to the United States Marshal ...”).
- 325 *Bandy v. United States*, 82 Sup. Ct. 11, 13 (Douglas, Circuit Justice, 1961).
- 326 See notes 260, 261 *supra*.
- 327 *E.g.*, ATT'Y GEN. REP. 76 (recommending “release of the accused on his own recognizance without additional financial securities, in proper cases ...”).
- 328 *E.g.*, S. 1357, 89th Cong., 1st Sess. (1965), which would revise bail practices in accordance with a congressional finding that “persons reasonably expected to appear at future proceedings should not be deprived of their liberty solely because of their financial inability to post bail” § 2(a)(2). Provision is made for use of a wide range of alternatives to traditional bail, § 3(a), and provides for an appeal from a decision on release (presumably made by a commissioner) to the district court, an appeal which emphasizes the delay difficulty by the requirement that it be decided within ten days. It would also provide that time spent in custody pending conviction would be credited against any sentence of imprisonment imposed. § 4. This is a much needed reform; for a discussion of current federal statutes on the subject and their inadequacies see *Short v. United States*, 344 F.2d 550 (D.C. Cir. 1965).
- 329 111 CONG. REC. 3993 (daily ed. Mar. 4, 1965).
- 330 *Ibid.*
- 331 342 U.S. 524 (1952).
- 332 See *Crisis in Bail: I*, at 979.
- 333 *Rehman v. California*, 85 Sup. Ct. 8 (Douglas, Circuit Justice, 1964) (denying bail pending appeal where state court held appellant's enlargement would present “an immediate, clear and present danger imperiling, jeopardizing, and threatening the health, safety, and welfare of the community”); D.C. CIR. R. 33(f), cited in *Hairston v. United States*, 343 F.2d 313, 316 n.13 (D.C. Cir. 1965) (per curiam) (Bazelon, C.J., dissenting) (providing for denial of bail pending appeal when “the safety of the community would be jeopardized”).

- 334 ATTY GEN. REP. 76.
- 335 *Cohen v. United States*, 82 Sup. Ct. 8, 9 (Douglas, Circuit Justice, 1961).
- 336 *Philadelphia Bail Study* 1061-62; see p. 1162 *supra*.
- 337 A Summary of the Reasons Given by Defendants for not Appearing in Court (Vera Foundation, New York, 1964) (unpublished mimeo).
- 338 *Id.* at 8.
- 339 *Id.* at 4.
- 340 *Pannell v. United States*, 320 F.2d 698, 701 (D.C. Cir. 1963) (Bazelon, C.J., concurring in part and dissenting in part).
- 341 See, for example, the concern of Judge Clark, who denied bail in a case where an applicant with a long criminal record, “many incentives to skip bail,” and “little to hold him,” but who added: “I do not want to get into the position of saying that a charge as a multiple offender automatically renders the accused ineligible for bail.” *United States v. Wilson*, 257 F.2d 796, 797 (2d Cir. 1958) (Clark, J., sitting alone).
- 342 *Ward v. United States*, 76 Sup. Ct. 1063, 1066 (Frankfurter, Circuit Justice, 1956).
- 343 See p. 1162 *supra*.
- 344 *Williamson v. United States*, 184 F.2d 280, 282 (Jackson, Circuit Justice, 1950).
- 345 See p. 1163 *supra*.
- 346 See, e.g., Rosen, *Detection of Suicidal Patients: An Example of Some Limitations in the Prediction of Infrequent Events*, 18 J. CONSULTING PSYCHOLOGY 397, 402 (1954)
The low incidence of suicide is in itself a major limitation in the development of an effective suicide detention device, for in the attempt to predict suicide or any other infrequent event, a large number of false positives are obtained (patients incorrectly classified as suicides) A suicide detention device is not feasible until much more is learned about the differential characteristics of patients who commit suicide.
- 347 See, for example, a very recent prediction study of problems closely analogous to those of pretrial preventive detention: MOLOF, PREDICTION OF FUTURE ASSAULTIVE BEHAVIOR AMONG YOUTHFUL OFFENDERS (California Youth Authority, Research Rep. No. 41, 1965). An actuarial prediction instrument was applied to two samples of male first parole releases from California institutions, the first consisting of 2,060 cases and the second of 8,017. Those groups predicted to produce the highest proportions of assaultive offenders did so to a statistically significant degree, but the number of false predictions was also so high that “the prediction instruments are neither accurate nor efficient.” *Id.* at 58. For example, for the score category predicted to produce and which did produce the highest proportion of assaultive offenders, only 29 out of 128 offenders so classified in one sample, and 29 out of 334 in the other, actually turned out to be assaultive offenders; all the rest were false predictions. *Id.* at 56-57, Tables 13, 15. Molof’s work uses actuarial or statistical prediction techniques. An analysis of the comparative efficacy of statistical and clinical methods of prediction in twenty-seven studies in which both methods were used showed that in seventeen the statistical method was superior, in ten they were about the same, and in none was clinical prediction superior. See MEEHL, CLINICAL V. STATISTICAL PREDICTION 83-128 (1954).
Predictions by psychiatrists attempting to assess the probability of future breakdown of army inductees show similar results on evaluation. For example, Berlien studied 248 World War II inductees who fell in a class usually rejected for service as risks of becoming psychiatric casualties but who in the instance studied had been inducted. One year later 209 were still in service, 32 had been discharged, five died and two were commissioned as officers. Berlien, *Psychiatric Aspects of Military Manpower Conservation*, 111 AMERICAN J. PSYCHIATRY 91, 95, Table 4 (1954).
Other studies showing similar results are summarized by GINZBERG, THE INEFFECTIVE SOLDIER: THE LOST DIVISIONS 167, 180-89 (1959). See especially a summary of a study by Glass based on intensive evaluation and prognosis by six psychiatrists of 505 Korean war inductees during their basic training. It was predicted that 123 were likely failures

as soldiers for psychiatric reasons, but only thirty turned in unsatisfactory performance; four times as many failures were predicted as subsequently occurred. *Id.* at 187.

- 348 This problem has been beautifully analyzed by Freud:
Even supposing that we thoroughly know the aetiological factors that decide a given result, still we know them only qualitatively, and not in their relative strength. Some of them are so weak as to become suppressed by others, and therefore do not affect the final result. But we never know beforehand which of the determining factors will prove the weaker or the stronger. We only say at the end that those which succeeded must have been the stronger. Hence it is always possible by analysis to recognize the causation with certainty, whereas a prediction of it by synthesis is impossible.
Freud, *The Psychogenesis of a Case of Homosexuality in a Woman*, in 2 COLLECTED PAPERS 227 (1959).
- 349 See *Crisis in Bail: I*, at 961.
- 350 “Of course, the keynote to successful administration of any system of bail is the adequacy of the information upon which the decisions are based.” *Pannell v. United States*, 320 F.2d 698, 702 (D.C. Cir. 1963) (Bazelon, C.J., concurring in part and dissenting in part).
- 351 See *Crisis in Bail: I*, at 994.
- 352 See pp. 1130-31 *supra*.
- 353 *United States v. Hansell*, 109 F.2d 613, 614 (2d Cir. 1940) (per curiam).
- 354 *Ward v. United States*, 76 Sup. Ct. 1063, 1066 (Frankfurter, Circuit Justice, 1956). In this case, involving bail pending appeal, Justice Frankfurter was apparently precluded from any significant appellate function. [T]he District Judge felt that the likelihood of flight was a danger not to be disregarded. I cannot reject this conclusion of the District Court because it was based on confidential probation reports Such a judgment is, to be sure, a prophecy but I cannot sit as the district judge and make my own.
Ibid.
Compare *United States v. Williams*, 253 F.2d 144, 146 (7th Cir. 1958), where the court complains of the “meager record” brought up for review. The district court gave no reasons for denial of bail, but the court of appeals, denying bail though remanding for new hearing, said that “We can assume that he had a confidential probation report before him” *Id.* at 148.
- 355 *Philadelphia Bail Study* 1044 n.52.
- 356 Rankin 643 n.6.
- 357 31 Charles 2, ch. 2.
- 358 Judiciary Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 81, as amended, REV. STAT. §§ 751-53 (1875).
- 359 28 U.S.C. § 2243 (1958). In habeas corpus procedure, of course, issuance of the writ is not a disposition of the petition but merely moves the case to a hearing on the merits. For a prisoner to win, he must be granted the writ and then obtain an order for discharge.
- 360 Act of June 25, 1948, ch. 646, § 2243, 62 Stat. 869 (now 28 U.S.C. § 2243 (1958)).
- 361 Longsdorf, *Habeas Corpus: A Protean Writ and Remedy*, 8 F.R.D. 179, 187 (1949).
- 362 AMSTERDAM, THE DEFENSIVE TRANSFER OF CIVIL RIGHTS LITIGATION FROM STATE TO FEDERAL COURTS 389 (1965).
- 363 A study of sixty habeas corpus petitions filed in the United States District Court for the Eastern District of Pennsylvania in 1963 showed a time sequence for ten of the cases that reached the stage of issuance of a rule to show cause. The time set for the return was thirty days in one case, twenty in a second, and the average of the remaining eight was nine days; in only two cases was the respondent directed to answer in the statutory three days. Weiser, *An Analysis of the Petitions for Writ of Habeas Corpus Filed in U.S. District Court for the Eastern District of Pennsylvania by the State Prisoner*, February 1964, p. 12 (unpublished paper in Biddle Law Library, University of Pennsylvania Law School). See also *Dorsey v. Gill*, 148 F.2d

857, 865-66 (D.C. Cir. 1945) (listing ten alternative procedures for handling habeas corpus petitions, most of which will delay a disposition on the merits).

The simile of the procedure for and upon the great writ to the behavior of Proteus is not strained. Just as the suppliant of Proteus has to lay firm hold on him and cling sturdily until he ceased his apparitional antics ...; so must the applicant for habeas corpus [be] steadfast and persistent

Longsdorf, *supra* note 361, at 192.

364 Thus in Philadelphia, where the statute gives the district attorney up to twenty days to make his return on an order to show cause, PA. STAT. ANN. tit. 12, § 1904 (1951), after which the case must be listed, the delay between petition and hearing is routinely at least two weeks. Letter From Herman I. Pollock, Defender Association of Philadelphia, to the Author, May 13, 1965.

365 Note, *Preliminary Hearings on Indictable Offenses in Philadelphia*, 106 U. PA. L. REV. 589, 606 (1958).

366 FED. R. CRIM. P. 5(a).

367 FED. R. CRIM. P. 5(c). Compare PA. R. CRIM. P. 116, which formally distinguishes between an informative “preliminary arraignment” and a later “preliminary hearing” which shall occur “not less than three nor more than ten days” later “unless extended for cause shown” For an attempt to limit the period of delay, see ALI CODE OF CRIMINAL PROCEDURE § 43 (1931) (no single postponement for more than two days, and all postponements combined not to exceed six days).

368 See FED. R. CRIM. P. 46(a)(2): “Bail may be allowed pending appeal or certiorari unless it appears that the appeal is frivolous or taken for delay.” For the purpose of this rule “frivolous” has the same meaning as not taken in “good faith” for the purposes of 28 U.S.C. § 1915 (1958) (proceedings in forma pauperis). According to *Ellis v. United States*, 356 U.S. 674, 675 (1958) (per curiam), not taken in “good faith” and “frivolous” mean issues “so frivolous that the appeal would be dismissed in the case of a nonindigent litigant” For the application of this doctrine in bail cases see, *e.g.*, *Barnard v. United States*, 309 F.2d 691 (9th Cir. 1962).

The use of the word “may” in Federal Rule of Criminal Procedure 46(a)(2) has been construed to permit the court to deny bail even if the appeal is not frivolous or taken for delay. See *Ward v. United States*, 76 Sup. Ct. 1063 (Frankfurter, Circuit Justice, 1956).

369 *E.g.*, *Timmons v. United States*, 343 F.2d 310 (D.C. Cir. 1965) (per curiam) (appeal against denial of bail argued January 5, decided January 28); *United States v. Galante*, 290 F.2d 908 (2d Cir. 1961) (per curiam) (appeal on bail filed May 18, argued May 23 and denied June 1, in case where twenty day contempt sentence was running); *United States v. Esters*, 161 F. Supp. 203 (W.D. Ark.), *aff'd*, 255 F.2d 63 (8th Cir. 1958) (per curiam) (bail denied in district court April 12, appeal decided April 29). Of course the overwhelming majority of appellate court decisions in bail cases are probably not reported, and an empirical study of time taken in these unreported decisions would be useful.

370 For particularly egregious examples see the history of the *Bandy* case, note 274 *supra*, and the long litigation involving bail for one Sica. Sica, along with his co-defendant Carbo, was engaged in repeated appeals in the federal courts before his conviction was finally upheld on the merits *sub nom.* *Carbo v. United States*, 314 F.2d 718 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964). In February, 1961 Sica's bail was revoked during his trial; the revocation was reversed, 288 F.2d 282 (9th Cir.), *cert. denied*, 365 U.S. 861 (1961); on remand bail was denied on new grounds and this affirmed, 288 F.2d 686 (9th Cir. 1961). After conviction on May 30 and sentence on December 2, Sica continued in jail, the district court denying bail pending appeal on grounds that his release would endanger government witnesses. The court of appeals remanded the denial of bail on January 22, 1962, holding that potential harm to witnesses was not justification for denying bail pending appeal. 300 F.2d 889 (9th Cir. 1962). The district court again refused release, resting denial on the ground that bail would not be a sufficient deterrent to flight. The court of appeals affirmed on February 13, 302 F.2d 456 (9th Cir. 1962) (per curiam), although the court decided that it would be “appropriate that the appeals be expedited.” *Id.* at 457. Thirteen months after bail was first denied Sica obtained an order for bail from Justice Douglas. 82 Sup. Ct. 669 (Douglas, Circuit Justice, 1962); *cf.* *Carbo v. United States*, 82 Sup. Ct. 662 (Douglas, Circuit Justice), *application for review denied*, 369 U.S. 868 (1962) (denying release to Sica's codefendant). The “expedited” appeal was decided after another year, 314 F.2d 718 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964). The case is an apt illustration of the kind of procedural runaround made possible by ill-defined standards for denial of bail, and is the more significant because Sica had highly skilled counsel throughout these proceedings.

- 371 *E.g.*, [Hairston v. United States](#), 343 F.2d 313 (D.C. Cir. 1965) (per curiam) (applied to court of appeals for reduction of bail on December 5, district court ordered to file opinion explaining setting of high bail and opinion filed December 31, decided February 2).
- 372 Yankwich, *Release on Bond by Trial and Appellate Courts*, 7 F.R.D. 271, 277, 278-79 (1948).
- 373 *Id.* at 278-79.
- 374 Compare the judicial response to the new morality implicit in changing concepts of race relations: “In approaching this problem, we cannot turn the clock back to 1868 when the [fourteenth] Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation.” [Brown v. Board of Education](#), 347 U.S. 483, 492-93 (1954).
- 375 Compare Mr. Justice Black's protest in [Rochin v. California](#), 342 U.S. 165, 177 (1952) (concurring opinion): “Of even graver concern, however, is the use of the [due process] philosophy to nullify the Bill of Rights. I long ago concluded that the accordian-like qualities of this philosophy must inevitably imperil all the individual liberty safeguards specifically enumerated in the Bill of Rights.”
- 376 [Collins v. Johnston](#), 237 U.S. 502 (1915), which held that the eighth amendment did not apply to the states was a cruel and unusual punishment case and on that clause was overruled (without being cited) by [Robinson v. California](#), 370 U.S. 660 (1962). Recent cases in dictum and without authority have assumed incorporation of the excessive bail clause in the fourteenth amendment. [Mastrian v. Hedman](#), 326 F.2d 708, 711 (8th Cir.), *cert. denied*, 376 U.S. 965 (1964); [Dye v. Cox](#), 125 F. Supp. 714, 715 (E.D. Va. 1954) (incorporation assumed); [People ex rel. Schildhaus v. Warden](#), 37 Misc. 2d 660, 672, 235 N.Y.S.2d 531, 546 (Sup. Ct. 1962). The most recent examples of the march to incorporate the Bill of Rights in the fourteenth amendment are [Pointer v. Texas](#), 380 U.S. 400 (1965) (sixth amendment right of confrontation applies to states); [Malloy v. Hogan](#), 378 U.S. 1 (1964) (fifth amendment guarantee against self-incrimination applies to the states); *cf.* [Griffin v. California](#), 85 Sup. Ct. 1229 (1965).
- 377 I intend to examine these questions in a subsequent article.
- 378 Allen, *Griffin v. Illinois: Antecedants and Aftermath*, 25 U. CHI. L. REV. 151, 154 (1957).
- 379 Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 67 (1964).

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