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The Institution of Bail as Related to Indigent Defendants

The institution of bail and conditional release in criminal law is viewed as a compromise between the conflicting considerations of the traditional presumption of innocence, and the desire to prevent an accused from taking flight from justice.¹ The possibility that an accused will violate his bail has been termed "a calculated risk which the law takes as the price of our system of justice."² Briefly stated, the purpose of bail is to insure that an accused will be present when required to face the charges against him, without the need for incarceration.³

Bail has been a continual source of legislative and judicial controversy throughout its development. Determination of the amount of bail has been one of the most difficult problems, and recent conflict has manifested itself in a segment of this problem, that relating to the bail to be demanded of an indigent defendant. Because one of the theoretical bases of bail is that a threat of financial loss will exert sufficient deterrent pressure against an attempted flight, problems are engendered when a defendant is not possessed of sufficient property to bear the cost of the bail.⁴

In a recent case⁵ involving an application by an indigent defendant for a reduction in bail pending disposition of a writ of certiorari to the Supreme Court, Mr. Justice Douglas, to whom the application was directed, made some observations on the law of bail as it relates to indigents which may be indicative of fu-

1. Foote, *Comment on the New York Bail Study—Foreword*, 106 U. PA. L. REV. 685 (1958). See also Stack v. Boyle, 342 U.S. 1, 8 (1951) (Jackson, J., concurring).

2. Stack v. Boyle, 342 U.S. 1, 8 (1951) (Jackson, J., concurring).

3. Bandy v. United States, 81 Sup. Ct. 197 (1960); Reynolds v. United States, 80 Sup. Ct. 30 (1959); Stack v. Boyle, 342 U.S. 1 (1951); United States v. Foster, 278 F.2d 567 (2d Cir. 1960); United States *ex rel.* Rubinstein v. Mulcahy, 155 F.2d 1002 (2d Cir. 1946); State v. Clark, 234 Iowa 338, 341, 11 N.W.2d 722, 724 (1943), *cert. denied*, 323 U.S. 739 (1944); Craig v. Commonwealth, 288 Ky. 157, 161, 155 S.W.2d 768, 770 (1941); State v. Chivers, 198 La. 1098, 1102, 5 So.2d 363, 364 (1941); State v. Alvarez, 182 La. 50, 54, 161 So. 17, 18 (1935); *Ex parte* Oliver, 127 Miss. 208, 210, 89 So. 915, 916 (1921); *Ex parte* Malley, 50 Nev. 248, 256, 256 Pac. 512, 514 (1927); Manning v. State *ex rel.* Williams, 190 Okla. 65, 66, 120 P.2d 980, 981 (1942). *Cf.* LOUISIANA CODE OF CRIMINAL PROCEDURE REVISION, tit. VIII, art. 1 (April 1960 draft), which defines bail as "the security given by the accused that he will appear before the proper court whenever his appearance may be required therein."

4. Foote, *Comment on the New York Bail Study—Foreword*, 106 U. PA. L. REV. 685, 686 (1958).

5. Bandy v. United States, 81 Sup. Ct. 197 (1960).

ture judicial treatment of the problem. He expressed his conviction that the rule providing that security may be dispensed with when there are other deterrents to flight⁶ might well prove applicable in many cases involving a defendant too poor to furnish security for a bond.

In order to place these statements in their proper historical perspective, this Comment will survey the history of existing state and federal rules governing the administration of bail, in an attempt to examine the effect which Mr. Justice Douglas' opinion may have on the law of bail.

History and Origin

The word bail is derived from the French term, *bailler*, which means "to deliver."⁷ It has been asserted that bail emanates from the institution of hostageship,⁸ a procedure used in early wars,⁹ in which the loss of the hostage was the result of failure to fulfill a promise. A later development, lessening the stringency of the hostageship arrangement, was the promise of a surety to pay the *wergeld*, which was the "life price" on a free-man in case of homicide, or a fine or compensation in the case of lesser crimes.¹⁰ This idea of suretyship later became merged with the "concept of keeper,"¹¹ which involved the power of the surety as the custodian of the accused,¹² a power which still adheres in both the English and American systems today.¹³ It appears that sureties were generally required to be relatives or friends of an accused,¹⁴ a requisite which is apparently still ob-

6. These alternative deterrents were: long residence in a locality, the ties of friends and family, and the efficiency of modern police. *Id.* at 198.

7. WEBSTER'S NEW INTERNATIONAL DICTIONARY 204 (2d ed. 1957).

8. deHaas, *Concepts of the Nature of Bail in English and American Criminal Law*, 6 U. OF TORONTO L.J. 385 (1946); Comment, 35 VA. L. REV. 496, 497 (1949).

9. deHaas, *Concepts of the Nature of Bail in English and American Criminal Law*, 6 U. OF TORONTO L.J. 385 (1946). See also 4 HOLDSWORTH, A HISTORY OF ENGLISH LAW 525, n. 8 (1923), wherein it is shown that at one time sureties were described as "the Duke's living prison."

10. deHaas, *Concepts of the Nature of Bail in English and American Criminal Law*, 6 U. OF TORONTO L.J. 385, 386 (1946).

11. 4 HOLDSWORTH, A HISTORY OF ENGLISH LAW 525, n. 8, 526, n. 2 (1923).

12. *E.g.*, Foxall v. Barnett, 2 El. & Bl. 928, 932, 118 E.R. 1014, 1015 (1853), in which the court said, referring to the status of a person under bail, "by being bailed, [he] was merely put into the hands of persons who might at any time have replaced him in gaol." Anonymous, 6 Mod. 231, 87 E.R. 982 (1704) ("The bail have their principal always upon a string, and may pull the string whenever they please, and render him in their own discharge"). See also deHaas, *supra* note 8, at 396; Longsdorf, *Is Bail a Rich Man's Privilege?*, 7 F.R.D. 309 (1945); Comment, 35 VA. L. REV. 496, 500 (1949).

13. Comment, 35 VA. L. REV. 496, 498 (1949).

14. 4 BL. COMM. *297; Comment, 41 YALE L.J. 293, 297 (1931).

served in England today.¹⁵ The first significant English bail statute appeared in 1275, and categorizedailable and non-ailable offenders.¹⁶ In 1554 the procedure for obtaining bail was clarified, and in 1688 the English Bill of Rights set out the right to bail and the protection against excessive bail,¹⁷ which rights were carried into the United States Constitution in the eighth amendment.¹⁸

English and American Systems Contrasted

The close personal relationship between accused and surety required under the English bail system has been largely divested in the United States through the widespread incidence of surety companies and professional bondsmen.¹⁹ A further divestment of this relationship sought to be possessed by the English system is the acceptance of worthless sureties in many instances.²⁰ The practice of using surety companies in the United States received its initial impetus from the decision of *Leary v. United States*²¹ in 1912, in which the Supreme Court held that a contract by which the defendant agreed to indemnify the surety was not void as against public policy. It was there stated that: "[T]he interest to produce the body of the principal in Court is *impersonal and wholly pecuniary*." (Emphasis added.)²² After this decision, the majority of the states held that such indemnity agreements are valid,²³ and the American system may be said to have accepted the bail relationship as nearly synonymous with the ordinary contract of suretyship.

Although the law pertaining to pre-trial bail has roots in Anglo-Saxon institutions, the right to bail pending appeal "is relatively an innovation."²⁴ In *Hudson v. Parker*,²⁵ the Supreme Court held that an accused may be admitted to bail "not only after arrest and before trial, but after conviction and pending

15. HOWARD, *CRIMINAL JUSTICE IN ENGLAND* 339, 340 (Macmillan ed. 1931).

16. 4 HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 527 (1923).

17. *Ibid.*

18. U.S. CONST. amend. VIII.

19. Waite, *The Problem of Bail*, 15 A.B.A.J. 71 (1929); Comment, 41 *YALE L.J.* 293, 297 (1931).

20. Waite, *The Problem of Bail*, 15 A.B.A.J. 71, 73, n.16 (1929).

21. 224 U.S. 567 (1912).

22. *Id.* at 575.

23. See Comment, 52 *COLUM. L. REV.* 147, 148, n.9 (1952).

24. Longsdorf, *Is Bail a Rich Man's Privilege?*, 7 *F.R.D.* 309, 311 (1945).

25. 156 U.S. 277 (1894).

a writ of error."²⁶ This rule is codified in Rule 46(a)(2) of the Federal Rules of Criminal Procedure.²⁷

General Rules Governing the Administration of Bail

From the eighth amendment, which directs that "excessive bail shall not be required,"²⁸ spring many statutory enactments, on the state and federal levels, governing the law of bail. Section 66 of the American Law Institute's Model Penal Code announces the generally accepted rule on the non-bailability of a person accused of a capital crime, before conviction, "if the proof is evident or the presumption great that he is guilty of the offense."²⁹ However, bail in non-capital cases is a matter of right in the great majority of states.³⁰ There has been some dispute as to whether the right to bail in non-capital cases may be said to emanate directly from the eighth amendment, as this amendment only declares a prohibition against *excessive* bail, without prescribing the cases in which bail is to be given. However, what appears to be the prevailing view was expressed in a recent federal case,³¹ in which it was said:

"The right to bail before trial, except in capital cases, is guaranteed by the Bill of Rights. The Eighth Amendment to the Constitution of the United States, which is a part of the Bill of Rights, provides that 'excessive bail shall not be required.' This clause has invariably been construed as guaranteeing the right to bail by necessary implication, and not merely meaning that when allowed, bail shall not be excessive."³²

This right has always been provided in the federal system,

26. *Id.* at 285.

27. FED. R. CRIM. P. 46(a)(2).

28. U.S. CONST. amend. VIII.

29. MODEL PENAL CODE § 66 (Official Draft 1930). The comparative state provisions are collected *id.* at 338-43.

30. *Ibid.*

31. *Trimble v. Stone*, 187 F. Supp. 483 (D.D.C. 1960).

32. *Id.* at 484. See also *United States v. Motlow*, 10 F.2d 657 (7th Cir. 1926); *United States v. Fiala*, 102 F. Supp. 899 (D. Ore. 1951). A contrary view is somewhat supported by the case of *Carlson v. Landon*, 342 U.S. 524 (1952), which would indicate that the right to bail is a purely statutory right. Four Justices dissented on the ground that such a construction of the eighth amendment was unduly restrictive. In a separate dissent Mr. Justice Burton said that the "amendment cannot well mean that, on the one hand, it prohibits the requirement of bail so excessive in amount as to be unattainable, yet, on the other hand, under like circumstances, it does not prohibit the denial of bail, which comes to the same thing." *Id.* at 569.

originally by statute, and now in the form of Rule 46(a)(1).³³ Under the Federal Rules, allowance of bail after conviction is not a matter of right, but is wholly discretionary and allowable only when the case involves a "substantial question which should be determined by the appellate court."³⁴ Most states also accord the right to bail pending review in non-capital cases.³⁵

As has been noted, the practice has grown up in this country of utilizing the services of professional bondsmen as the primary, and in some jurisdictions, almost the exclusive, source of bail.³⁶ The professional bond contains either an express or implied contract of indemnification by a levy on property the defendant has furnished as collateral. Less frequently utilized sources of bail are the cash, securities, or realty bonds of either the defendant or a friend or relative.

Determination of the Amount of Bail

This area of bail is guided by the rule of the eighth amendment that "excessive bail shall not be required."³⁷ The implementation of this rule, however, has been fraught with conflicting considerations. Generally, bail must be fixed at a level reasonably calculated to assure the presence of the defendant at the

33. FED. R. CRIM. P. 46(a)(1) states that a person charged with a capital crime may be admitted to bail by the court "in the exercise of discretion, giving due weight to the evidence and to the nature and circumstances of the offense." It is interesting to note that this rule differs from that which obtains in most state provisions with reference to bail in capital cases, in that the Federal Rule apparently gives the trial judge a wider discretionary control over the admission to bail. The typical state constitutional provision directs that all "persons shall be bailable by sufficient sureties, except the following: . . . persons charged with capital offenses where the proof is evident or the presumption great. . . ." LA. CONST. art. I, § 12.

34. FED. R. CRIM. P. 46(a)(1); *Bernacco v. United States*, 299 Fed. 787 (8th Cir. 1924); *Garvey v. United States*, 292 Fed. 591 (2d Cir. 1923); *United States v. St. John*, 254 Fed. 794 (7th Cir. 1918); *Ex parte Harlan*, 180 Fed. 119 (N.D. Fla. 1909); *Ex parte Green*, 165 Fed. 557 (S.D.N.Y. 1908); *McKnight v. United States*, 113 Fed. 451 (6th Cir. 1902); *United States v. Simmons*, 47 Fed. 723 (S.D.N.Y. 1891).

35. MODEL PENAL CODE 364-66 (Official Draft 1930). The Louisiana provision governing right to bail pending review is LA. CONST. art. I, § 12, which prohibits the release on bail pending review of any felon, except where a sentence of less than 5 years at hard labor is actually imposed, in which case the accused must be admitted to bail.

36. Some random illustrations serve to point up the extent of this practice: in 1956, in New York County, not a single personal bail bond was posted (see Comment, 106 U. PA. L. REV. 693, 704 (1958)) and it has been estimated that surety companies write 95% of the bail in Detroit (see Comment, 102 U. PA. L. REV. 1031, 1061, n. 114 (1954)).

37. U.S. CONST. amend. VIII. It is to be noted that although this provision does not extend to the states through the due process clause of the fourteenth amendment to the Constitution, most states expressly implement this rule in their own constitutions.

trial when required, and the amount is determined by the judge, according to the circumstances of the case.³⁸ Rule 46(c) of the Federal Rules of Criminal Procedure³⁹ sets forth the widely accepted factors which should be consulted in determination of bail — nature and circumstances of the offense, the weight of the evidence against the accused, the financial ability of the defendant to give bail, and the character of the accused. Although the fixing of bail is within the discretionary power of the trial judge, an accused has the right to apply to the court for a reduction in the bail on a showing that it is clearly disproportionate in view of all the relevant considerations.⁴⁰ Upon a denial of this motion, the proper federal procedure is by appeal to the court of appeal from the order denying the reduction⁴¹ or to seek review by a writ of habeas corpus.⁴² A similar procedure obtains generally in the state courts.⁴³

One frequent criticism of the administration of bail in the United States is grounded on the fact that the amount is often determined arbitrarily and in accordance with fixed schedules which give little effect to various factors which should be consulted prior to a final determination.⁴⁴ Speaking of this practice in a case in which it was contended by the defendants that the lower court had fixed a "uniform blanket bail" based on the nature of the charge, Mr. Justice Jackson remarked that this "is a clear violation of Rule 46(c). Each defendant stands before the bar of justice as an individual."⁴⁵ Recent studies indicate that the ideal of individual treatment and the actual practice of courts are separated by a gulf that "is so wide as to suggest that

38. *Stack v. Boyle*, 342 U.S. 1 (1951); *United States v. Weiss*, 233 F.2d 463 (7th Cir. 1956); *Heikkinen v. United States*, 208 F.2d 738 (7th Cir. 1953); *Forest v. United States*, 203 F.2d 83 (8th Cir. 1953); *United States ex rel. Rubinstein v. Mulcahy*, 155 F.2d 1002 (2d Cir. 1946); *United States v. Motlow*, 10 F.2d 657 (7th Cir. 1926); *Ex parte Malley*, 50 Nev. 248, 256 Pac. 512 (1927). See also 1 ALEXANDER, *THE LAW OF ARREST* § 188 (1949); Comment, 102 U. PA. L. REV. 1031, n.1 (1954).

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

40. *Stack v. Boyle*, 342 U.S. 1 (1951); *Kraft v. United States*, 238 F.2d 794 (8th Cir. 1957); *United States v. Weiss*, 233 F.2d 463 (7th Cir. 1956); *United States v. Stein*, 231 F.2d 109 (2d Cir. 1956), *cert. denied*, 351 U.S. 943 (1956); *Heikkinen v. United States*, 208 F.2d 738 (7th Cir. 1953); *Spector v. United States*, 193 F.2d 1002 (9th Cir. 1952); *United States v. Brawner*, 7 Fed. 86 (W.D. Tenn. 1881).

41. *Stack v. Boyle*, 342 U.S. 1 (1951); *Cohen v. United States*, 283 F.2d 50 (9th Cir. 1960).

42. *United States ex rel. Rubinstein v. Mulcahy*, 155 F.2d 1002 (2d Cir. 1946).

43. See, e.g., *State v. Chivers*, 198 La. 1098, 5 So.2d 363 (1941).

44. HALL, *CRIMINAL LAW AND ENFORCEMENT* 640 (1951); SUTHERLAND, *PRINCIPLES OF CRIMINOLOGY* 230-31 (Lippincott ed. 1934); Comment, 106 U. PA. L. REV. 693, 706 (1958).

45. *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (Jackson, J. concurring).

it cannot be bridged."⁴⁶ This practice of courts is in many cases dictated by administrative necessity and will probably so remain until provision can be made to alleviate the crush of business with which many jurisdictions are faced. One writer has suggested the establishment of a special bureau which would control all granting of bail, including the investigation into the background of the applicant.⁴⁷

Financial Ability of Defendant as Determinant of Bail

Stress upon the financial ability of the defendant is based on the proposition that a defendant who is deemed to be relatively stable will not risk a forfeiture of his own property in an attempt to flee justice, and some courts have, in relatively recent years, been giving more credence to this factor as a determinant of bail.⁴⁸ This factor has been recognized in the tentative draft for the proposed revision of the Louisiana Code of Criminal Procedure.⁴⁹ Although financial ability is admittedly a factor to be considered, it is not "determinative of the matter,"⁵⁰ and the inability of a defendant to pay the bail does not render the amount excessive.⁵¹ However, in the case of a person who is unable to furnish security for a bail bond, any requirement of bail will necessarily result in incarceration, which might be followed by consequences prejudicial to the accused.⁵²

Several means have been utilized in an attempt to avoid this

46. Comment, 102 U. PA. L. REV. 1031, 1070 (1954). See also Comment, 106 U. PA. L. REV. 685 (1958).

47. SUTHERLAND, PRINCIPLES OF CRIMINOLOGY 232 (Lippincott ed. 1934).

48. *E.g.*, Bennett v. United States, 36 F.2d 475, 477 (5th Cir. 1929): "The amount of the bail bond in a criminal case is largely determined by the ability of the defendant to give it, and what would be reasonable bond in a given case can usually be best determined by the trial judge, because of his familiarity with the facts and the financial ability of the defendant to give security."

49. The Louisiana State Law Institute's tentative proposal for revision of the Louisiana Code of Criminal Procedure would codify the Louisiana jurisprudential rule that the financial ability of a defendant is to be considered as a factor in fixing the bail amount. LOUISIANA CODE OF CRIMINAL PROCEDURE PROPOSED REVISION tit. VIII, art. 8 (April 1960 Draft).

50. *Ex parte Malley*, 50 Nev. 248, 251, 256 Pac. 512, 514 (1927)

51. *State v. Chivers*, 198 La. 1098, 5 So.2d 363 (1941); *State v. Alvarez*, 182 La. 50, 161 So. 17 (1935); *Heard v. Clark*, 156 Miss. 355, 126 So. 43 (1930); *Ex parte Malley*, 50 Nev. 248, 256 Pac. 512 (1927).

52. See Foote, *Comment on the New York Bail Study — Foreword*, 106 U. PA. L. REV. 685, 690-91 (1958), where some of the consequences of pretrial and post-conviction detention are discussed, *e.g.*: the possibility of lower quality of the preparation of the defendant's case, and the possible loss of employment of the defendant, resulting in even less funds available to the accused. See also Comment, 102 U. PA. L. REV. 1031, 1048-59 (1952), where the effects flowing from detention, as revealed by a study of the administration of bail in Philadelphia, are analyzed at length, and Comment, 106 U. PA. L. REV. 693, 722-29 (1958), a similar analysis of conditions existing in New York City.

problem. One is the release on a defendant's own recognizance, which involves an obligation by him to comply with the conditions of the bail undertaking without the need for any deposit of security or bond. This method has been expressly provided for in the Louisiana Law Institute's tentative draft for a revision of the Louisiana Code of Criminal Procedure.⁵³ However, the use of this device is limited to those persons who are financially responsible, and there is a financial obligation involved, though not one required to be substantiated by giving of security.⁵⁴

Although the indigence vel non of a defendant has risen in stature as a determinant of bail, difficult questions of policy are presented when a defendant is proved to be an indigent and unable to raise any bail. Treating this type of situation, Blackstone said "if the party cannot find bail, he is to be committed to the county gaol."⁵⁵ This simple formula is reflected in a 1950 federal case,⁵⁶ in which it was said that a "person arrested upon a criminal charge, who cannot give bail, has no recourse but to move for trial."⁵⁷ This view admits of no relief to the indigent in the form of conditional release without security, and appears to represent the general attitude of the courts on this question.⁵⁸

Bandy v. United States

The remarks of Mr. Justice Douglas in *Bandy v. United States*⁵⁹ cast some light upon the problem of a defendant who cannot raise bail. There, on appeal from a conviction of fraudulent filing of income tax returns, defendant sought leave to proceed in forma pauperis. The district court's certification that the appeal was not taken in good faith resulted in denial of this application.⁶⁰ Defendant petitioned the Supreme Court for a writ

53. LOUISIANA CODE OF CRIMINAL PROCEDURE PROPOSED REVISION tit. VIII, art. 26 (April 1960 draft) provides: "A person in custody may be released by order of the court on his personal obligation to comply with the conditions of the bail undertaking, and without the necessity of giving security."

54. Comment, 106 U. PA. L. REV. 693, 720-22 (1958).

55. 4 BL. COMM. *298.

56. *United States v. Rumrich*, 180 F.2d 575 (2d Cir. 1950).

57. *Id.* at 576.

58. *United States v. Rumrich*, 180 F.2d 575 (2d Cir. 1950); *State v. Chivers*, 198 La. 1098, 5 So.2d 363 (1941); *State v. Alvarez*, 182 La. 50, 161 So. 17 (1935); *Ex parte Oliver*, 127 Miss. 208, 89 So. 915 (1921); *Ex parte Malley*, 50 Nev. 248, 256 Pac. 512 (1927).

59. 81 Sup. Ct. 197 (1960).

60. *Bandy v. United States*, 272 F.2d 705 (8th Cir. 1959). The denial resulted from the operation of Rule 39(a) of the Federal Rules of Criminal Procedure under which a defendant is to be denied leave to proceed in forma pauperis if his appeal is shown to be in bad faith by a certification from the district court. It is to be noted that the court appointed an attorney to assist the defendant in

of certiorari, and, pending disposition of the petition, Mr. Justice Douglas granted bail of \$5,000.⁶¹ Defendant subsequently applied to Mr. Justice Douglas for a release on "personal recognizance," reciting that he was "unable to give security for the prescribed bond."⁶² The application was denied without prejudice for a renewed application in the lower court, in view of the fact that the Supreme Court, in a per curiam decision on the same day, had granted the motion for leave to proceed in forma pauperis and the petition for a writ of certiorari, but had remanded the case to the court of appeal for a hearing of the appeal.⁶³ In the course of passing on the application, the Justice made statements which have bearing upon the problem under discussion.

After setting forth the major premise upon which the institution of bail is bottomed, i.e., that the threat of loss of one's own property will serve as an adequate safeguard against the risk that the accused will flee, the opinion points out that the system is based on the assumption that the defendant has property.⁶⁴ Analogizing from the *Griffin* case,⁶⁵ which held that an indigent defendant is denied equal protection of the laws if denied an appeal on equal terms with other defendants, the Justice then posed the following *quaere*: "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?"⁶⁶ After a discussion of the ill effects which usually flow from incarceration before conviction or during review, he said, "the right to release is heavily favored, and . . . the requirement of security for the bond may, in a proper case, be dispensed with. Rule 46(d) indeed provides that 'in proper cases no security need be required.'"⁶⁷

Thus, Mr. Justice Douglas, faced with the conflict between "the need for a tie to the jurisdiction and the right to freedom from unnecessary restraint,"⁶⁸ appears to feel that in certain

showing that the appeal was not in bad faith, but later affirmed the conviction on the ground that the defendant had failed to prove that he was in good faith. *Bandy v. United States*, 278 F.2d 214 (8th Cir. 1960).

61. *Bandy v. United States*, 81 Sup. Ct. 25 (1960).

62. *Id.* at 197.

63. *Id.* at 244.

64. *Id.* at 197.

65. *Griffin v. Illinois*, 351 U.S. 12 (1956).

66. *Bandy v. United States*, 81 Sup. Ct. 197, 198 (1960).

67. *Ibid.*

68. *United States ex rel. Rubinstein v. Mulcahy*, 155 F.2d 1002, 1004 (2d Cir. 1946).

cases the latter consideration must override the former, even at the risk of according the defendant an unsecured freedom. This concept departs from the traditionally accepted practices which adhere in the United States presently, and seems pregnant with a possibility of abuse and danger to the community. Apparently realizing this, Mr. Justice Douglas advanced other deterrents to jumping bail: long residence in a locality, the ties of friends and family, and the efficiency of modern police. The third alternative would probably serve as some deterrent, but the effectiveness of the first two alternatives in most cases is open to question in view of the increased mobility of the modern criminal.⁶⁹

Another point in the opinion which seems to be at odds with traditional bail precepts is the reference to allowing an indigent to be set free on his "personal recognizance." The final draft of the Federal Rules of Criminal Procedure bears no explanatory comment on this portion of Rule 46(d), although the preliminary drafts of the rule did grant a permission to the court to release defendants on a bail undertaking "without requiring sureties or the deposit of cash or bonds or notes."⁷⁰ This method of conditional release is apparently rarely used,⁷¹ but when utilized, represents a personal obligation of the defendant to appear, and is inextricably bound up with the character and financial ability of the accused.⁷² Because of this, it is submitted that the proviso in Rule 46(d) that "in proper cases no security need be required" was probably not intended to be interpreted so as to allow a financially worthless person to come within the purview of its terms. It is to be noted, however, that there may be cases in which this method of conditional release could be utilized, even

69. See, e.g., Longsdorf, *Is Bail a Rich Man's Privilege?*, 7 F.R.D. 309, 311 (1945).

70. *Bandy v. United States*, 81 Sup. Ct. 197, 198 (1960), Mr. Justice Douglas' footnote.

71. See Comment, 106 U. PA. L. REV. 693, 721 (1958), where a study of the administration of bail in New York City revealed that only 88 out of a total of 3,038 defendants were released on personal recognizance, or a general average of 2.9%.

72. *Ewing v. United States*, 240 Fed. 241, 246 (6th Cir. 1917). The proposed revision of the Louisiana Code of Criminal Procedure defines a personal recognizance as "a personal obligation to comply with the conditions of the bail undertaking . . . without the necessity of giving security." The comment to this article sets out the reasons for the passage of such legislation: to relieve the defendant of the hardships of bail, to diminish contacts between defendants and occasional bondsmen-lawyer combinations, and to alleviate the overcrowding of detention facilities. Emphasis is placed on the requirement that the accused be a financially responsible person, and this is the requisite that makes the release on personal recognizance consistent with the underlying purpose of bail. LOUISIANA CODE OF CRIMINAL PROCEDURE PROPOSED REVISION tit. VIII, art. 26 (April 1960 draft).

though the defendant could be termed an "indigent."⁷³ Such a situation would be that of a college student who is personally impecunious, but whose family is well established in the community. This person would fit nicely into the classification of an "indigent" but would rarely flee, even though no security was involved in his conditional release, because the requisite assurance that the accused will appear for trial has been provided by strong family ties. This type of situation, probably not exceptional, points up the close affinity between the "release on personal recognizance," which involves a prospective financial undertaking by the accused, and the procedure of "release on parole," in which there is no attendant financial obligation.⁷⁴ In the above hypothetical case, it can be seen that, if the judge decides that the defendant is sufficiently bound to the jurisdiction by other than financial deterrents, he has the discretionary power to release the accused on his personal recognizance, setting the bail undertaking at a nominal amount. It is in this context that the two procedures become closely akin in actual practice. As applied to the class of "indigents" who do have sufficient non-proprietary ties to the community, this procedure might not be objectionable. However, if the remarks in the opinion are applied to all indigents, regardless of their standing in the community, detrimental inroads may be made into the primary objective of bail: to have the accused present at his trial.

Conclusion

Because of the departures which Mr. Justice Douglas' opinion makes from theoretical and practical bail considerations, it is submitted that a full implementation of the doctrines set forth therein would be less than desirable. In an article appropriately

73. "Indigent" is defined by Webster's as one who is "destitute of property, or means of comfortable subsistence; needy; poor; in want; necessitous." WEBSTER'S NEW INTERNATIONAL DICTIONARY 1266 (2d ed. 1957). However, there is a generally recognized distinction between an "indigent" and a "pauper." The former is sometimes classified as a person who has "no property or source of income sufficient for their support aside from their own labor, though self-supporting when able to work and in employment." BLACK, LAW DICTIONARY 913 (4th ed. 1951). Thus, the coverage of the term extends beyond the impecunious, poverty-stricken person, who would more correctly be categorized a "pauper."

74. An illustration of this method of release is a New York provision applicable to city magistrates: "In all cases where a defendant charged with a crime or offense is before a city magistrate, and such magistrate is authorized to admit him to bail, the magistrate may, in his discretion parole the defendant if reasonably satisfied that the defendant will appear when wanted." N.Y. City Crim. Cts. Act § 103, quoted in Comment, 106 U. P.A. L. REV. 693, 721 (1958).

entitled "Is Bail a Rich Man's Privilege?"⁷⁵ there appears a passage apposite to this problem:

"Judges cannot be asked to release a prisoner on his own recognizance in all cases where the prisoner has no means to procure bail. If it were possible to provide for bail in forma pauperis, Congress only could so provide."⁷⁶

It is believed that the best interests of society would be served by giving more credence to the historical bases of bail, more individual treatment of bail applications, and by disallowing freedom to those persons who are unable to make a proper showing of sufficient non-proprietary deterrents to flight, or to provide the proper security necessary to furnish the needed "tie to the jurisdiction."

James A. George

Effect of False Financial Statements on Debts Discharged in Bankruptcy— Section 17a(2) of the Bankruptcy Act

The policy of the Bankruptcy Act from its inception through the latest amendments by the Eighty-Sixth Congress has been to permit the financial rehabilitation of a debtor so as to allow him to resume a producing place in the economy.¹ To this end under certain conditions a debtor is allowed to petition for a discharge from his obligations.² However, under Section 14c of the Bankruptcy Act, creditors of the bankrupt are allowed to file objections to the discharge, one ground for objection being the fact that the bankrupt has obtained money or property on credit or as an extension or renewal of credit by issuing a false financial statement in writing.³ Further, even after the bank-

75. 7 F.R.D. 309 (1945).

76. *Id.* at 312.

1. 6 AM. JUR. *Bankruptcy* § 676 (rev. ed. 1950).

To this end "exceptions are confined to those plainly intended, and the exceptions are to be strictly construed in favor of the bankrupt." 8 REMINGTON, *BANKRUPTCY* 170 (1955). *Davison-Paxon Co. v. Caldwell*, 115 F.2d 189 (5th Cir. 1940), *cert. denied*, 313 U.S. 564 (1941). *Contra*, *Hancock v. Blumentritt*, 269 S.W. 177 (Tex. Civ. App. 1925).

2. Bankruptcy Act § 14a, 11 U.S.C. § 32a (1958).

3. Bankruptcy Act § 14c, 74 STAT. 408 (1960), 11 U.S.C.A. § 32c (Supp. 1960). The major change effected by this amendment is to allow a false financial statement to be a bar to the discharge of only a *businessman*. The legislative his-