Equal Justice Under Law

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This nation is dedicated to the proposition of equal justice under law. Recognition that economic status is no longer a factor in this concept has almost been achieved. Thus, indigent defendants in this jurisdiction are represented by appointed counsel whose capabilities match or exceed those retained by persons of means.

The basic philosophical tenet of our criminal law is that all accused men are presumed innocent until proven otherwise by a jury of their fellow men. A corollary is that we abhor the imposition of criminal sanctions prior to conviction.[1] A modern Tocqueville would find it illogical that an accused indigent must languish in jail until either his guilt is established or innocence found. This is the product of a usage which has existed since before the Norman Conquest.[2] The right of bail is a privilege of an accused to remain free on security pending an appearance in court. It has been effected by hostageship, suretyship, deposit of money, collateral or personal recognizance.[3] Today, a man of means can exercise the privilege. An indigent cannot.[4] This inequality is the problem we face today.

The state has an interest in securing the presence of an accused at trial. Obtaining bail, in the modern era, by deposit of cash or collateral means, attempts to secure that interest. It is a deterrent to flight; forfeiture is insufficient.[5] Today, in this jurisdiction, most bails are professional bondsmen. While the bonds-

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[1] *Williamson* v. *United States*, 2 Cir. 184 F. 2d 280.

[2] *Bail: An Ancient Practice Reexamined*, 70 Yale L.J. 966.

[3] Id; *Is Bail a Rich Man's Privilege?*, 7 F.R.D. 309; Rule 46(d) of the Federal Rules of Criminal Procedure.

[4] It is surprising to learn that in the days of early English law an indigent could obtain a bail easier than he can today. *Is Bail a Rich Man's Privilege?*, 7 F.R.D. 309.

[5] *United States* v. *Field*, 2 Cir. 190 F. 2d 554, 555.

man is, in a certain sense, a jailor,[6] yet, the opposite is a fairer presentation of reality.[7]

Generally, a man of means secures his release through the payment of a premium to the bondsman and the acknowledgement of his indebtedness in the amount of the bond to the court. However, possession of the amount of the premium is insufficient as the accused must also find a professional bondsman who will take the risk. The latter is a non-judicial determination predicated upon the accused's contacts with the community. Thus, an accused with small means and insufficient contacts with the community may find himself in the same position as the indigent, despite lacking that status.

What constructive thoughts can we advance to alleviate, totally or in part, these inequalities.[8]

There are those who would advocate the elimination of bail predicated upon the deposit of cash or security. They would argue, and correctly, that flight today is not as easy as it was in England and during the earlier days of this nation. Modern police methods deny liberty to the accused who flees.[9] In addition, the sanctions imposed by the law on such flights would be a sufficient deterrent.[10] However, we are not prepared to eliminate with the stroke of a pen a system that has existed for at least nine hundred years.

We do propose certain resolutions which may tend to eliminate in part these inequalities.

As stated, the function of bail is to act as a deterrent to flight.

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[6] *Taylor* v. *Taintor,* 83 U.S. 366; *Golla* v. *State,* — Del. —, 135 A. 2d 137; See also *Extra-Jurisdictional Power of Bail,* 66 Dickinson L.R. 161.

[7] Today it is impractical for the professional bondsman to act as a jailer. It has been our experience that the bondsman rarely checks on his client during the period of the bail, except to notify him as to dates when he is required to appear in court.

[8] See: *The Institution of Bail as Related to Indigent Defendants,* 21 Louisiana L.R. 627; *A Symposium: Conditional Release Pending Trial,* 108 Univ. Penn. L.R. 290. See Note, 21 Columbia L.R. 592 where a Magistrate of the City of New York as early as 1921 suggested a philanthropic fund.

[9] Fingerprinting, automobile registrations, communications, etc., in a nation whose frontiers have been exhausted is a far cry from what existed in the eighteenth and nineteenth centuries.

[10] Act of August 20, 1954, c. 772, Sec. 1, 68 Stat. 747; U.S.C.A., Title 18, Section 3146, entitled, "Jumping Bail."

But, there are other major deterrents. U.S.C.A., Title 18, Section 3146 makes bail jumping from a court of the United States a crime. This clearly encompasses all cases before the District Courts and those cases before the United States Branch of the Municipal Court. However, there is no bail jumping statute applicable to District of Columbia offenses.[11] Therefore, we propose that the Congress enact a similar statute applicable to District of Columbia offenses. Further, the present statute distinguishes between felonies and misdemeanors. It seems to us that wilfull bail jumping, which is a serious flaunting of the judicial process, should be punished as a felony no matter what the offense be with which the accused was initially charged. Hence, we would also recommend an amendment to U.S.C.A., Title 18, Section 3146, reflecting this view.

The Congress recently enacted legislation [12] whereby a prisoner is given credit toward service of his sentence for any days spent in custody prior to the imposition of sentence for want of bail. However, you will note, that two conditions were attached: (a) the prisoner must be convicted or have pled guilty to the offense for which bail was originally set, and (b) the statute under which sentence is passed must require the imposition of a minimum mandatory sentence. We believe that a prisoner should receive credit for time spent in custody prior to the imposition of sentence for want of bail in all cases (the offense being bailable) without the conditions that now exist. This aids in equalizing the application of the law as to rich and poor alike.[13]

As we have already indicated, there exists a group of persons of small means who, because of the professional bondsman's

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[11] We are informed that it is the view of the United States Attorney's Office that U.S.C.A., Title 18, Section 3146 is applicable to the United States Court of the Municipal Court of the District of Columbia. The Judges of this Court act as committing magistrates with respect to felonies and conduct the trials of misdemeanors cognizable in that Court. We are also informed that bail jumpers from offenses triable in the other branches of Municipal Court (D. C. Offenses) have not been made the subject of the exercise of the contempt power, assuming that the Court does possess such power.

[12] Act of September 2, 1960, Public Law 86-691, 74 Stat. 738; U.S.C.A., Title 18, Section 3568.

[13] Cf. McKinney's Consolidated Laws of New York, Penal Code Law § 2193.

determination that they lack necessary contacts with the community, are denied the privilege of bail despite their ability to furnish the requisite premium. For these persons the professional bondsman will not entertain a risk because the defendant may have a prior criminal record, or lack employment, or not own property, or may be a newly arrived resident of the jurisdiction. This non-judicial determination of risk should be eliminated, and we propose that the United States District Court adopt rules permitting an alternative system of bail. This system would permit a defendant, who although having sufficient monies to pay a professional bondsman is unable to obtain such surety, to move the Court to reduce his bond and accept a deposit of cash with the Clerk of the Court in the amount of the premium that he would otherwise pay. Such a procedure would be discretionary with the Court; further, the Court could attach such additional conditions as are warranted by the circumstances. These conditions, coupled with the cash deposit subject to return if the conditions of the bail are fulfilled, would adequately protect the Government's interest. On the other hand, it would eliminate for the defendant an existing inequality based upon economic factors. The average of fifty-seven days between arrest and trial existing in this jurisdiction[14] could then be more profitably used for continued employment and preparation of defense. Additionally, it would give substance to that philosophical tenet that all men are presumed innocent until proven guilty by a jury of their fellow men.

Unfortunately, we have no statistics with respect to how many indigents, if released on bail, would flee the jurisdiction. We would, therefore, propose that an experiment be conducted with respect to indigents charged only with misdemeanors in the United States Court of Municipal Court of the District of Columbia. Courts have the power to admit persons to bail, upon

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[14] The Bureau of Prisons records the average length of detention between arrest and release for trial. The national average in Federal District Courts is 27 days. Our average of 57 days is accounted for, in part, because the District Court has jurisdiction over common law crimes.

It is further noted, according to a preliminary survey conducted in 1961 by the Junior Bar Association, that a sample of 285 criminal cases docketed in the Federal District Court about two-thirds of the defendants failed to make bail.

personal recognizance. We propose that the Judges of the Municipal Court of the District of Columbia in consultation with the Chief Judges of the United States Court of Appeals and the United States District Court agree to release all persons accused of misdemeanors on their personal recognizance.[15] If the Congress enacted legislation with respect to bond jumping of District of Columbia offenses then the experiment might be enlarged to all misdemeanors. The term of the experiment should be six months. Certainly, this procedure should be encouraged in the United States District Court in felony cases. We have incorporated this recommendation in the proposed resolution. Sufficient data could then be obtained upon which proper decisions could be made. We would further recommend that the Court must advise the accused of the existence and penalties provided by U.S.C.A., Title 18, Section 3146. We believe that this statute would provide sufficient deterrent to flight, thus protecting the interest of the state. The indigent defendant would receive greater equality under the law than he now receives and would have the freedom that is sometimes necessary in order to properly prepare his case for trial.

These proposals are, by necessity, temporary. Their results should be studied and evaluated. Further, a comprehensive examination of the current administration of the bail system in the District should be initiated. We have recommended such a program.

These proposals which we advocate, we trust are designed to bring about greater equality under the law. The English essayist, Joseph Addison, put it aptly when he said, "As to be perfectly just is an attribute of the divine nature, to be so to the utmost of our abilities is the glory of man."

[15] The privileges conferred by this experiment would not be applicable to any accused person who during the course of this experiment has violated his bail.