Bail As a Preferred Freedom and the Failures of New York's Revision

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I. INTRODUCTION

This paper discusses the major civil liberties concerns presented by that portion of the Proposed New York Criminal Procedure Law\(^1\) (hereinafter referred to as Proposed Code) dealing with the question of bail. The bail sections are analyzed under three broad categories: (a) equal protection; (b) procedural and substantive due process; and (c) preventive detention, the latter being treated separately, although analyzed in the context of the first two categories.

Our concern for equal protection is predicated upon the generally accepted principle that, as nearly as possible, the rich and the poor must receive equal treatment before the law. Indeed, at least in the administration of the criminal law, that principle is a constitutional imperative.\(^2\) The present New York bail system is incompatible both in philosophy and in practice with the achievement of this goal. It is a money-based system resting largely upon the accused's ability to raise sufficient collateral to satisfy a private professional bondsman that his risk of loss is outweighed by the premium he receives for furnishing a bail bond. On its face then, the system falls most heavily upon the poor.

In contrast, the Federal Bail Reform Act\(^3\) represents an effort to move from a simple, money-oriented system towards a more flexible and individualized approach. The act establishes an order of priorities and requires the court to impose the least onerous, non-financial condition of pretrial release which will insure the defendant's future appearance.\(^4\) The Proposed Code perpetuates a con-

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\(^{3}\) 18 U.S.C. § 3145 et seq.

\(^{4}\) Section 3146 of the Federal Bail Reform Act provides: "Release in noncapital cases prior to trial (a) Any person charged with an offense, other than an offense punishable by death, shall, at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required. When such a determination is made, the judicial officer shall, either in lieu of or in addition to the above methods of release, impose the first of the following conditions of release which will reasonably assure the appearance of the person for trial or, if no single condition gives that assurance, any combination of the following conditions:

1. place the person in the custody of a designated person or organization agreeing to supervise him;

2. place restrictions on the travel, association, or place of abode of the person during the period of release;

3. require the execution of an appearance bond in a specified amount and the deposit in the registry of the court, in cash or other security as directed, of a sum not to exceed 10 per centum of the amount of the bond, such deposit to be returned upon the performance of the conditions of release;

4. require the execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof; or
cededly archaic and unjust system\(^5\) by reversing the order of priorities contained in the federal act and by providing that unless the court explicitly authorizes a non-secured form of bail, the defendant must furnish the collateral ordinarily required for release.\(^6\)

Before further discussing the specific provisions of the proposed code with which this paper is in disagreement, it is important to comprehend fully the consequences of pretrial detention.

**A. The Consequences of Pretrial Detention**

Nothing that has not been said before by other commentators will be found here.\(^7\) Yet those who are unfamiliar with the day to day operations of an urban criminal court system tend to view the bail problem as one which is wholly unrelated to the substantive adjudication of guilt or innocence. The issue is seen in terms of unjust detention for a relatively short period of time\(^6\) balanced against the state's interest in insuring the defendant's appearance at trial. If the defendant is convicted, he receives credit for the time served prior to trial. If he is acquitted or his case is dismissed, the system has unjustly deprived him of his liberty. That, it is felt, may be an unfair result; but, it is argued, (a) some system is essential to secure the state's objective; (b) under any system dealing with massive numbers of people, some will be treated unfairly; and (c) this system releases those persons who represent a minimal risk of flight (preventive detention is not often articulated as a legitimate purpose) and detains those who cannot give some assurance that they will not flee.

These arguments seem to make a good deal of sense until one examines the entire complex of values impinged upon by the bail system as presently constituted. In recent years, statistical data has been steadily accumulating which, although lacking in total mathematical certainty, tends to establish the following conclusions:

(1) The defendant who cannot post bail is under great pressure to plead guilty for reasons unrelated to actual guilt. This is because living conditions in pretrial detention centers are notoriously poor.\(^8\) Space and facilities are designed for temporary detention and are wholly inadequate to meet current needs. The

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5. impose any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the person return to custody after specified hours."

6. "Possibly the most archaic and poorly drawn provisions of the Criminal Code are those dealing with the subject of bail." Proposed Code, Title V, comm'n staff notes.


9. ". . . all detention institutions of the Department of Correction are grossly overcrowded. By way of illustration, it is reported that there is a total population in the City detention institutions of 4,133 persons, although their rated capacity is only 2,964 persons." The Judicial Conference Report at 69.
situation has become so critical that in New York City, defendants awaiting trial are frequently transported to the New York City Penitentiary on Rikers Island, an already overcrowded institution meant to house only convicted men, generally serving sentences of one year or less.

This writer has time and again encountered defendants unable to post bail who, solely because of intolerable living conditions, have insisted upon entering guilty pleas where they were either innocent in fact or where convictions could not have been otherwise obtained. These men preferred to begin "doing their time" in prison rather than to wait for a trial under such conditions.10

(2) Assuming, however, that the defendant is tenacious enough to withstand the rigors of pretrial confinement and insists upon trial,11 he is nonetheless at a serious disadvantage. A visit with one's client must be made in conformity with the often stringent rules and regulations of the detention center rather than at the attorney's convenience and in the comforting surroundings of his law office. This factor inevitably reduces the number of attorney-client consultations. It is impossible to know the exact degree of prejudice suffered by the accused who cannot consult with his attorney as frequently as others who are free pending trial. It seems fair to suggest, however, that there is some prejudice.

Even more important is the fact that the defendant cannot assist his attorney in the actual preparation of the case. He cannot secure witnesses; nor can he help in the investigatory process so essential to the defense of a criminal prosecution. If, as is often the case, the attorney is white and the client black, the attorney himself, even if he is willing to undertake the entire burden of investigation, is seriously handicapped; few people in ghetto communities will discuss criminal matters with white men. These factors, coupled with the fact that the incarcerated defendant is less likely to appear before the jury neatly dressed and, in general, as presentable as the defendant who is at liberty, may very well prejudice the fact-finding process and render counsel's representation less effective than would be the case had the defendant been free prior to trial.

(3) Assuming that the defendant has been convicted, the next step in the criminal process is the sentence. A probation officer will sift the available evidence and determine whether this defendant is a good probation risk or

10. There are, of course, many factors which will induce an accused into entering a guilty plea. He may, for example, be genuinely remorseful; he may be offered a lesser sentence; or he may be humiliated by the prospect of a jury trial. However, in this writer's view, the remarkable rate of defendants who enter guilty pleas in the state system must, in some unknowable percentage, be attributed to the fact of pretrial detention. Within the City of New York, for example, for the period beginning July 1, 1966 through June 30, 1967, out of 10,510 indictments disposed of (excluding 1,136 dismissed by the Court), 8,981 were disposed of by guilty pleas. (The Judicial Conference Report app. at 123). That pretrial detention is sometimes deliberately employed as a device for securing a guilty plea has received judicial recognition by at least one court. People ex rel. Thompson v. Warden, 214 N.Y.S.2d 171 (Sup. Ct. 1961). Detention is also sometimes used as punishment where the court feels that the defendant or counsel has been dilatory. See People v. Olan, 8 N.Y.2d 1084, 1086, 207 N.Y.S.2d 462, 463 (1960).

11. In New York County for the same period there were only 134 trials out of a total of 4,956 indictments. The Judicial Conference Report app. at 123.
whether a jail sentence is called for. He then makes a recommendation to the sentencing judge. Here, too, a jailed defendant is at a real disadvantage. The factors entering into the sentencing, apart from the criminal act itself, include such things as family ties, steady employment and the defendant's life circumstances during the pendency of the prosecution. A man who has been free prior to trial has had an opportunity to demonstrate his capacity to meet the responsibility of probation. He will probably have had a steady job (if for no other reason than to pay his lawyer). He will have been able to continue to support his family. He will have appeared in court at the appropriate times. The jailed defendant will undoubtedly have lost his job, and his family may have been forced to welfare, thus rendering his financial support less meaningful.

A study of approximately 750 defendants arraigned in Manhattan Magistrate's Felony Court between October 16, 1961 and September 1, 1962 disclosed that "... sixty-four percent of the 358 defendants who were continuously in jail from arraignment to adjudication were sentenced to prison. On the other hand, only seventeen percent of the 374 who made bail received prison sentences." Holding constant a number of other factors which might have explained this remarkable disparity in terms other than the bail problem, the author of the study, concluded as follows:

This study has demonstrated that each of five characteristics—prior record, bail amount, type of counsel, family integration, and employment stability—when considered separately do not account for the statistical relationship between detention before adjudication and unfavorable disposition. When the characteristics are considered in combination, they account for only a small part of the relationship.12

Finally, the sentencing judge is far more reluctant to imprison a defendant who stands before him as a free man holding a job and supporting a family than would be the case of a defendant already in jail. The former decision requires an affirmative and rather drastic uprooting of the defendant's life just at the point when he seems to be on the road to rehabilitation; the latter involves nothing more than continuing the imprisonment of a convicted felon who has not demonstrated his reformability. Understandably, the judge may overlook the fact that the essential difference between the two men may have been only the latter's inability to post bail. Furthermore, even where the defendant who has not been bailed is acquitted, he will have probably suffered irretrievable damage beyond the fact of detention. His job, his family structure, his housing—the totality of his life circumstances—are almost certain to have deteriorated during the period of confinement.

Thus, it is evident that the prejudicial effects of pretrial detention pollute the entire criminal process from the preparation for trial to the sentence or

12. Rankin, supra note 7 at 655.
acquittal. With these facts in mind, we may now turn to an examination of the Proposed Code and its resolution of the competing social interests.

II. Legal Implications Arising from the Bail Provisions of the Proposed Code

A. Procedural Due Process

First, section 280.10 sets forth in the following order eight authorized forms of bail: (a) cash bail; (b) an insurance company bail bond; (c) a secured surety bond; (d) a secured appearance bond; (e) a partially secured surety bond; (f) a partially secured appearance bond; (g) an unsecured surety bond; (h) an unsecured appearance bond. The court may designate the amount of bail without specifying the form or forms under which it may be posted, in which case only the first four methods may be used. These all require the posting of collateral to satisfy the face amount of the bond.

Here again, a working knowledge of an urban criminal court system is essential to an understanding of the practical impact of the order of priorities cited above. The chief characteristic of the New York City criminal court system is its staggering caseload.14 Arraignment proceedings are handled at breakneck speed with the arraigning judge arriving at his decision on bail within seconds. Although low cash bail is an available alternative under the present system, it is infrequently used. In the vast majority of cases, the judge simply announces a sum and proceeds to the next case. Were he to do anything else he could not complete his daily calendar of over one hundred cases.15

Since 1964, the New York City office of probation has been screening an increasing number of defendants for parole (R.O.R. or released on own recognizance) and submitting written findings to the court. However, their recommendations for release involve only a minute fraction of the total arraignment population, and even there only a relatively small percentage of their recommendations are acted upon by the court.16

14. One Criminal Court judge, with a reputation for exceptional ability and fair-mindedness, in granting a motion to set aside a conviction based upon a guilty plea, described the situation quite candidly: "The large number of cases assigned to be heard and disposed of at each session of the court creates a pressure for speed in hearing and determination which necessarily affects the administration of justice adversely. This pressure has made it most difficult for this court, although it has meticulously tried to do so, to observe all the safeguards required by due process, to insure that every defendant in the criminal matters coming before it is advised of the full extent of his right to counsel... This court has made clear its abhorrence of disposing of record numbers of cases in the briefest possible time if it hampers the doing of justice." People v. Sardone, 48 Misc. 2d 125, 130 (Rosenberg, J., N.Y.C. Cr. Ct., 1964).

15. The enormous number of cases disposed of each day in the New York City Criminal Court is often cited as a reason for denying the right to trial by jury in that court. See, e.g., People v. Morganbesser, 293 N.Y.S.2d 397, 402 (Sup. Ct. 1968).

16. Interviews with court personnel suggest that the increasingly strident cry for "law and order" has begun to seep into the courtroom in the form of higher bail and fewer R.O.R.'s. Criminal Court judges have reportedly ignored these recommendations far more often than in the past.
Given these courtroom conditions, the mere fact that the judge has available several new forms of bail is unlikely to result in a significant reduction of the pretrial prison population. This is underscored by the fact that the order of priorities set forth above conditions release without security upon the affirmative exercise of judicial discretion. Unless the judge carefully considers the possible alternatives and selects one which does not require collateral, the defendant will be compelled to furnish a secured bond or cash. In an arraignment process in which: (a) the judge must decide whether to assign an attorney; (b) the charges are read to the defendant; (c) a decision is made whether to reduce the charge, hold a preliminary hearing or waive to the Grand Jury in felony cases; and (d) an adjournment date is decided upon, all in a matter of a minute or two, it seems safe to predict that the judges will continue to fix bail in precisely the same manner in which bail is set today.

Second, the first four “automatic” methods of posting bail are not meaningful alternatives. The secured appearance bond is defined as nothing more than a “bail bond in which the only obligor is the principal.” A “secured bail bond” is one in which the security is furnished by “personal property which is not exempt from execution and which, over and above all liabilities and encumbrances, has a value equal to or greater than the total amount of the undertaking; or (b) real property having a value of at least twice the total amount of the undertaking.”

Currently, bail bondsmen will often write bonds requiring less collateral than this provision would command. The Proposed Code therefore offers nothing more than the saving of a very small premium with the added burden of furnishing collateral in an amount not presently required. It seems fair to suggest that any defendant unable to post bond under present conditions would likewise be unable to do so under the Proposed Code.

Third, the present Code of Criminal Procedure authorizes the judges of the New York City Criminal Court to admit to bail any defendant regardless of prior record so long as the District Attorney’s office is represented or has been notified. Notwithstanding the absence of evidence indicating that this discretion has been erroneously exercised in favor of defendants generally, the Proposed Code eliminates that discretion where the defendant has two prior felony convictions or is charged with a Class A felony. While as a practical matter few defendants so situated will be freed pending trial, there is no reason to eliminate the discretion to do so. Hopefully, the omission is inadvertent and will be corrected prior to passage.

Fourth, the Proposed Code carries forward a provision which requires fingerprinting in the more serious felony and misdemeanor cases prior to the setting

17. Proposed Code § 270.10(14).
18. Id. § 270.10(17).
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of bail. However, unlike the present Code of Criminal Procedure, it prohibits the fixing of bail unless and until "[t]he court has been furnished with a report of the New York State identification and intelligence system concerning the defendant's criminal record if any . . ." Presumably, in the event of a failure of communication or delay, the defendant will remain in jail.

Fifth, section 390.40(3) of the Proposed Code provides that only one bail application may be made to a superior court judge challenging the lower court's refusal to set bail or its fixing of excessive bail. This provision is particularly unfortunate since circumstances may and often do change during incarceration. Moreover, habeas corpus does not lie to exercise a de novo discretion, but only to reverse an arbitrary decision.

In New York, in previous years, all defendants who were incarcerated prior to trial for more than 48 hours would automatically have their status reviewed by a judge other than the arraigning judge. Many such bail reviews resulted in lower bail or parole. One of the important explanations for this is the fact that the arraigning judge, aside from being under severe pressure by the number of cases, is subject to more subtle pressures from the presence in court of complaining witnesses and the police officer. He often feels that parole of a defendant, even if there is no indication of flight, will seem too "soft" or too callous with respect to the complaining witness' grievance. An unhurried and automatic bail review in the absence of such pressures is valuable and should be restored in the Proposed Code.

Perhaps the most fundamental objection to the Proposed Code is its basic assumption that the right to bail is wholly discretionary, and that the legislature may withhold that right altogether or may delegate the power to withhold to the judiciary. Acting upon that assumption, the Proposed Code carries forward the present code provision which authorizes the discretionary denial of bail in all felony cases. The position taken here is that the eighth amendment to the United States Constitution establishes a right to bail which may

25. Id. Comm'n Staff Notes. Only a small minority of states have taken this position. Approximately 40 states guarantee a right to bail before conviction in non-capital cases. See, Index to State Constitutions, 5 (Colum. Univ. Press 1960). This right is generally regarded as absolute in non-capital cases. See, e.g., In re McGarry, 380 Ill. 359, 44 N.E.2d 7 (1942). New Jersey has taken the position that unless the proof of guilt is "evident and the presumption great," there is an absolute right to bail. The New Jersey Supreme Court held: "As a consequence of the Constitution the right of the individual to bail became a basic one. Now the courts are under a mandate to allow bail in all criminal cases, including capital offenses . . . excluding only those instances of capital offenses 'when the proof is evident or the presumption great.' . . . Release on bond is a concomitant of the presumption of innocence. Refusal of freedom in violation of the mandate of our organic law would constitute punishment before conviction, a notion abhorrent to our democratic system." State v. Konigsberg, 33 N.J. 367, 369-70, 164 A.2d 740, 742-43 (1960).
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not be abridged by state legislatures. The discussion which follows is in support
of that view.

B. Substantive Due Process and the Eighth Amendment

The eighth amendment provides as follows: “Excessive bail shall not be
required, nor excessive fines imposed, nor cruel and unusual punishment in-
fested.”

The leading New York bail case is People ex rel. Shapiro v. Keeper of
City Prison.27 There, the defendant, a thrice convicted felon was charged with
extortion under two indictments totalling 47 counts. The prosecutor opposed
the setting of bail in any amount. The Court of General Sessions thereupon
held a hearing to determine whether bail should be granted and, if so, its ap-
propriate amount. At the conclusion of the hearing, the court denied bail on
several grounds, among them, the defendant’s failure to surrender after the
affirmance of a conviction, and the existence of an extensive criminal record.
The defendant’s brother petitioned the State Supreme Court for a writ of
habeas corpus. The writ was granted and bail was set at $100,000. A divided
Appellate Division dismissed the writ28 and the Court of Appeals affirmed.

Judge Desmond, writing for a unanimous court, observed that while most
states have constitutional provisions making bail a matter of right in capital
cases, New York, whose constitutional provision in this matter is modeled on
the eighth amendment, “accords no accused any right to bail, but serves only
to forbid excessiveness.”29 This pronouncement of Judge Desmond provides
the judicial framework upon which the revisers have based their conclusion
that the right to bail is a matter of legislative discretion.

Carlson v. Landon,30 in which the Supreme Court upheld the denial of
bail in deportation proceedings, lends some support for the above position. Carlson,
however, was a deportation proceeding involving the rights of Communist aliens
and was decided at the height of the cold war by a 5-4 decision. Its applic-
ability to criminal proceedings was dubious to begin with, and, in view of the
heightened sensitivity to the rights of the criminal defendant,31 seems more
so today.

In Stack v. Boyle,32 decided during the same term as Carlson, the Court,
although relying primarily on the Judiciary Act of 178933 and Rule 46 (a) (1)
of the Federal Rules of Criminal Procedure, hinted strongly at a constitutional
right to bail. In remanding to the district court, for purposes of a bail hearing,

27. 290 N.Y. 393, 49 N.E.2d 498 (1943).
   526 (1st Dep't 1943).
29. 290 N.Y.2d at 398, 49 N.E.2d at 500.
   Texas, 380 U.S. 400 (1965).
32. 342 U.S. 1 (1951).
33. 1 Stat. 73.
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the case of twelve alleged Smith Act\textsuperscript{34} conspirators whose bail had been clearly excessive, the Court observed:

This traditional right to freedom before conviction permits the unhindered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. . . . Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose [i.e., assurance of the presence of an accused] is 'excessive' under the Eighth Amendment. (See United States v. Motlow, 10 F.2d 657 (1926), opinion by Mr. Justice Butler as Circuit Justice of the Seventh Circuit).\textsuperscript{35}

The Court's reliance upon Justice Butler's opinion as a Circuit Justice in the Motlow case is significant. In that case Justice Butler observed:

The Eighth Amendment provides that "excessive bail shall not be required."\textsuperscript{36} This implies, and therefore safeguards, the right to give bail at least before trial. The purpose is to prevent the practical denial of bail by fixing the amount so unreasonably high that it cannot be given. The provision forbidding excessive bail would be futile if magistrates were left free to deny bail.\textsuperscript{36}

The logic of that observation seems as compelling today as it was in 1926. Moreover, those who argue that the eighth amendment's bail provision does not imply a right to bail, but is simply a prohibition against the setting of "excessive" bail where the legislature has established the right, have serious difficulty reconciling that view with the clear intent of the entire Bill of Rights to impose limitations upon legislative rather than judicial action.\textsuperscript{37}

The second line of argument commonly advanced by those who would deny a federally guaranteed right to bail in state prosecutions is the inapplicability of the eighth amendment to the state criminal process. That position has little to recommend it. In Robinson v. California,\textsuperscript{38} the Court incorporated the eighth amendment's cruel and unusual punishment clause into the fourteenth, and, in view of the consistency with which the Court has incorporated virtually the entire Bill of Rights, it seems highly unlikely that the bail provision will be treated differently.\textsuperscript{39} One circuit court has already assumed its incorporation without discussion.\textsuperscript{40}

In light of the foregoing analysis it seems fair to suggest that the Proposed Code's basic premise—the discretionary nature of bail—may soon be entirely undercut by a Supreme Court decision which incorporates the eighth amend-

\begin{itemize}
  \item \textsuperscript{34} 18 U.S.C. (Supp. IV) §§ 171, 2385.
  \item \textsuperscript{35} 182 U.S. at 45.
  \item \textsuperscript{36} United States v. Motlow, 10 F.2d 657, 659 (1926).
  \item \textsuperscript{37} The historical evidence supporting a constitutional right to bail has been documented in Foote at 959 et seq. Some courts have taken the position urged here. See, e.g., Trimble v. Stone, 187 F. Supp. 483 (D. D.C. 1960). Cf. Mastrian v. Hedman, 326 F.2d 708 (8th Cir. 1964), cert. denied, 376 U.S. 965 (1964).
  \item \textsuperscript{38} 370 U.S. 660 (1962).
  \item \textsuperscript{39} See cases cited supra note 31.
  \item \textsuperscript{40} See Pilkington v. Circuit Court of Howell County, Missouri, 324 F.2d 45 (8th Cir. 1963).
\end{itemize}
ment's right to bail as interpreted here. The right to have bail fixed is, however, only the threshold question. The granting of bail in an amount beyond the defendant's reach works to deny an accused his freedom prior to trial as effectively as if no bail were fixed at all. The position taken here is that there is not simply a federally guaranteed right to have bail fixed but a federally guaranteed right to pretrial freedom which may be abridged only under extreme, high-risk circumstances.

C. Equal Protection

In Griffin v. Illinois, the Supreme Court held that Illinois could not, consistent with the fourteenth amendment's equal protection clause, deny an indigent defendant a stenographic transcript of his trial when such transcript was necessary to full appellate review and when it was available to an appellant who could afford it. The Griffin decision was unusual because, as Justice Harlan pointed out in dissent, the state had not discriminated against the indigent appellant, but rather had failed to place the indigent on an equal footing with the defendant of means. In his view, "the Equal Protection Clause [does not] impose on the States an affirmative duty to lift the handicaps flowing from differences in economic circumstances." Nor could the dissenting Justice find support in the due process clause for the concededly desirable policy of providing indigents access to the appellate process on an equal basis with the rich. The state's failure to provide a transcript was not, in Justice Harlan's view, a "denial of fundamental fairness, shocking to the universal sense of justice." Justice Black's majority opinion contained the simple and powerful response that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."

Justices Minton, Burton and Reed, also in dissent, applied the logic of the majority opinion to the bail problem when they observed that "[s]ome defendants can afford bail, some cannot. Why fix bail at any reasonable sum if a poor man can't make it." Griffin's progeny has transformed that question, intended then to point up the majority's erroneous reasoning, into a very real possibility. Recent decisional law strongly suggests that, in the area of criminal justice, the interplay between due process and equal protection requires that the inequality between rich and poor, whether a result of affirmative state action or failure to act, must be corrected where such inequality infects the fact finding process itself.

42. Id. at 34 (Harlan, J. dissenting).
43. Id.
44. Id. at 38.
47. Id. at 29 (Burton and Minton, JJ., dissenting).
In a footnote to the Court's opinion in *Miranda v. Arizona*, Chief Justice Warren cited with approval the following excerpt from the Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice:

> When government chooses to exert its powers in the criminal area, its obligation is surely no less than that of taking reasonable measures to eliminate those factors that are irrelevant to just administration of the law but which, nevertheless, may occasionally affect determinations of the accused's liability or penalty. While government may not be required to relieve the accused of his poverty, it may properly be required to minimize the influence of poverty on its administration of justice.

The Chief Justice then added that:

> [d]enial of counsel to the indigent at the time of interrogation while allowing an attorney to those who can afford one would be no more supportable by reason or logic than the similar situation at trial and on appeal struck down in *Gideon v. Wainright*, 372 U.S. 335 (1963), and *Douglas v. California*, 372 U.S. 353 (1963).

The Court in *Miranda* was concerned with the prejudicial effect of pretrial interrogation in the absence of counsel. The fourfold warnings required in *Miranda* were predicated upon both due process and equal protection grounds. Interrogators were required not only to advise an accused of his right to counsel and privilege against self-incrimination, but were also required either to provide counsel to an indigent who did not want to talk in the absence of counsel, or to forego interrogation until counsel was provided. Previously, the Court had ruled that an indigent must be provided with counsel at arraignment proceedings. In *Hamilton v. Alabama*, the Court reversed petitioner's conviction because he had been denied counsel at the time of arraignment which, under Alabama law, the Court found was a critical stage in the criminal proceeding.

In *Hamilton*, *Miranda*, *Gideon* and several other cases, the Court viewed the practical effects of denying to the indigent defendant the rights customarily accorded the accused with financial resources. While certain disabilities flowing from poverty are not subject to judicial fiat (e.g. it seems safe to predict that the Court will not reverse a criminal conviction on the ground that the indigent could not retain one of America's most noted trial attorneys as counsel), whenever the Court finds a real possibility of prejudice, it will require the state to elevate the indigent to equal status. All that has been said with respect to the


51. *Id.* at 472, 473, fn. 41, citing Rep't of the Att'y Gen'l's Comm. on Poverty and the Administration of Criminal Justice 9 (1963).

52. *Id.* at 473.


54. *See* cases cited supra note 48.

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consequences of pretrial detention, points to the fact that the decision to incarcerate an accused by the fixing of bail in an amount too high for him to meet is perhaps the most critical decision in the criminal process. An approach which simply incorporates the eighth amendment’s bail provision will not suffice. The prejudicial impact of pretrial detention is not ameliorated by the requirement that an accused indigent be permitted to make bail where it is obvious that he cannot.

In *Bandy v. United States*, Justice Douglas, sitting as a Circuit Justice in passing upon a bail application, observed:

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.

Justice Douglas’ dictum has received widespread attention and may well be the approach ultimately taken by the majority of the Justices when the issue finally reaches the Court.

Thus, there are two independent grounds by which the bail provisions of the Proposed Code may be rendered obsolete: (a) incorporation into the fourteenth amendment of an eighth amendment right to bail, or (b) a ruling under the equal protection clause of the fourteenth amendment narrowly circumscribing the right to impose financial conditions upon pretrial release.

There is a third approach, the philosophy of which closely resembles the approach taken by the Federal Bail Reform Act: the right to pretrial freedom should be elevated to a preferred status in the hierarchy of personal liberties. An analogy will be helpful in illustrating this point. In *Kent v. Dulles*, the Supreme Court held that the freedom of movement "... is a part of the liberty of which the citizen cannot be deprived without due process of law under the Fifth Amendment." Earlier in *Edwards v. California*, the Court had invalidated a California criminal statute which imposed sanctions upon persons aiding and abetting the immigration of indigents into the State. The Court made it clear that indigency was an insufficient basis for abridging freedom of movement within the United States. In *Apteker v. Secretary of State*, the Court elevated to a preferred status the freedom to travel established in *Edwards* and *Kent*. It did so because of its important relationship to first amend-

55. 82 S. Ct. 11, 13 (1961).
56. Id. at 13.
57. For an extensive history of the *Bandy* decision and its apparent currency with other Justices of the Court, see Foote at 1155.
60. Id. at 125.
61. 314 U.S. 160 (1941).
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ment rights (the securing of information, for example). By referring to these cases, it is not meant to suggest that the constitutional right to freedom of movement provides an independent ground for rejecting the state's power to detain a person prior to trial. The position taken here is that pretrial freedom has an independent constitutional basis beyond the right to bail (the simple right to bail does not meet current standards of equal protection); and that the freedom itself, because of its critical importance in securing another fundamental right—the right to a fair trial—should be accorded a preferential status. Of course, such freedom is not an absolute; neither is the freedom to travel.64 However, once we accept the notion that the right is constitutionally preferred, certain well established principles come into play.

The first and foremost principle is the necessity of limiting the abridgement of the right in the narrowest possible manner.65 This approach grew out of first amendment case law, but was applied in Aptheker. There the Court applied the principle to its analysis of section 6 of the Subversive Activities Control Act,66 citing Shelton v. Tucker:67

[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.68

It is submitted that the above principle has application to the bail problem. Accordingly, the Proposed Code is constitutionally deficient in several important respects. The Proposed Code not only establishes the widest discretion to "broadly stifle fundamental personal liberties," but indeed encourages that result when it establishes an order of priorities which makes the most difficult bail condition the easiest and most likely to be imposed.69 This order of priorities should be reversed, so as to require the court to at least make an affirmative decision if it is to deny an accused his pretrial freedom. Next, if that decision is to be made at all, it should be made visibly. If the bail conditions are too burdensome for the accused to meet, for all practical purposes the court has decided to imprison a man for an undetermined length of time, with all that decision entails in terms of the ultimate outcome of the prosecution. On the assumption that a fundamental and preferred freedom is being abridged, it seems obvious that the accused should be accorded a hearing with an opportunity to present the relevant facts; that the District Attorney should have the burden of proof; and that the court should be required to make findings of fact, setting forth whatever reasons it may have for its decision. In addition,

64. See generally, Zemel v. Rusk, 381 U.S. 1 (1965).
69. Proposed Code, § 280.10.
the burden of proof on the question of likelihood of flight should be allocated to the State, and the burden should be a heavy one.70

While it may be inappropriate to further stretch the first amendment analogy, it should be emphasized that we are dealing with a crucially important personal freedom which, until recently, has been treated in rather cavalier fashion. Judges have set bail without inquiry into the defendant's financial ability, and have given little thought to the consequences of their actions. Some men are detained while others, in exactly the same circumstances, are freed on their own recognizance because they happened to appear before a different judge.71

Although judicial discretion should not be completely eliminated in this area, the vague and invisible standards now employed in the setting of bail lend themselves to arbitrary decisions which result in the unnecessary imprisonment of large numbers of persons. One aspect of the Supreme Court's "void for vagueness" doctrine72 is the necessity to impose strict and enforceable standards governing state action which tends to abridge constitutional rights. The absence of such standards results in "... sweeping and improper application ... and to selective enforcement against unpopular causes."73 Thus, without strict standards in regard to bail, pretrial detention has at times been employed as a device for securing a guilty plea.74 Detention has also been used as punishment when the court has felt that the defendant or his counsel has been dilatory.75 Yet, despite the existence of these concededly improper motives, the Proposed Code endorses the questionable concept of preventive detention as a consideration in determining whether to set bail.

D. Preventive Detention

The preventive detention idea of the Proposed Code76 introduces to New York law a concept which until now has been almost universally regarded

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71. The Judiciary Committee of the New York State Assembly, in 1963, conducted an extensive investigation into the bail problem within the New York City Criminal Court System. The Committee concluded that bail is often fixed mechanically without regard to the individual defendant's circumstances. The applicable laws: "... are disregarded or are perverted in a disturbingly large number of cases. We believe that a large segment of the bench and of the Criminal bar (in which we include the staffs of district attorneys) have forgotten—or never really learned—that the only permissible function of bail is to assure reappearance." Judiciary Committee Hearings, N.Y. Legis. Doc., 963, No. 37, p. 249.
72. For a concise explanation of this doctrine, see Note, The Void-For Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67 (1960).
76. Proposed Code § 275.30(2) (b) states, in part: "To the extent that the issuance of an order of recognizance or bail and the terms thereof are matters of discretion rather than of law, an application must be determined on the basis of the following factors and criteria. ... Where the principal is a defendant in a criminal action or proceeding or a defendant-appellant in a pending appeal from a judgment of conviction, the likelihood that he would be a danger to society or to himself if at liberty during the pendency of the action or pro-
as an illegal consideration in the determination of whether to set bail. Because it seems that judges have taken the factor of preventive detention into account despite its presumed illegality, it was apparently felt that the concept should be candidly recognized. Another reason for condonation might be that the practice "has the approval of the general public." Furthermore, the revisers believe that such detention is necessary in many instances for the protection of the public.

Although this section of the Proposed Code does not on its face discriminate between the wealthy defendant thought to be dangerous and those who are poor, there is a de facto discrimination which works against the poor, with equally harsh results. "Wealthy" defendants, i.e., those defendants who are not indigent and who are able to post a reasonable amount of bail, are not likely to be accused of crimes which fall into the dangerous category; nor do they ordinarily confront the police in hostile relationships. The charges levelled against them are usually "white collar" crimes. Poorer defendants, on the other hand, tend to commit the majority of "economic" crimes which involve not only an ascertifiable victim who is likely to be injured, but also a forcible arrest. Even where the court suspects that a wealthy defendant represents a danger to society, it does not follow that the defendant will be held in preventive detention. Assuming that the defendant is able to make bail, it would seem that the state has gained nothing at the cost of authorizing the imprisonment of large numbers of poor people on the most speculative of grounds. The state has gained nothing because there is no reason to believe that an otherwise dangerous defendant will be rendered less dangerous simply because the bondsman requires greater collateral for his release. The condition under which the collateral is forfeited is simply the willful failure to return to court at the appointed time. The commission of other crimes is irrelevant. Therefore, the net effect of this section is to imprison the poor on dubious constitutional grounds and on even less tenable policy grounds.

When we consider that the Proposed Code authorizes a judicial finding of probable cause to hold a defendant in custody for grand jury action solely on...
the basis of hearsay or otherwise incompetent evidence, the preventive detention provisions take on an even more disturbing aspect. Consider the following hypothetical: The defendant is accused of molesting a little girl. The girl, 9 years of age, had identified him as her assailant three weeks after the event. She is the only witness. Fifteen years prior to the instant prosecution, the defendant had been convicted of statutory rape. The parents of the girl, as is most often the case, are understandably fearful of the harmful psychological effects of a court appearance. As a result, they testify at the preliminary hearing that their daughter identified the defendant at a stated time and place as the man who had attacked her. The girl does not testify. The judge, on the basis of this testimony holds the matter for grand jury action. Turning to the standards set forth in the Proposed Code which would authorize preventive detention, we find that the defendant meets all of the qualifications. Although the prosecution's case is exceedingly weak, the defendant may well be detained for months solely on the basis of the evidence elicited at the hearing and on the ground that he is dangerous.

While it must be conceded that there may be instances where release of a particular defendant would represent potential extreme danger to the public thus warranting pretrial detention, that decision should not be lumped together with the question of bail. It should be treated separately without regard to whether the defendant is able to post bail. If he is found to be dangerous, and no other alternative exists, he should be held in custody and special procedures should be instituted to guarantee a swift adjudication of guilt or innocence.

Clearly, however, the procedures and standards under which a determination of societal danger may be made need drastic revision. The finding of dangerousness should be predicated on substantial, competent evidence tending to establish guilt of the particular offense and offering clear and compelling evidence that the defendant is in fact a dangerous person. A preventive detention hearing should be authorized only under rigidly controlled criteria. Given the highly unpredictable quality of the determination that a particular defendant, as opposed to others similarly situated, is likely to commit a dangerous crime while on bail, the hearing itself should probably be authorized only in cases where the defendant by past record has indicated a propensity toward violent crime. It is suggested that propensity would be indicated by convictions for two felonies involving serious injury to the victims. Additionally, the crime with which the defendant is charged should be one of felony grade, involving violence.

Authorizing preventive detention under the loose standards set forth in the Proposed Code may well result in the detaining of defendants who, for one reason or another, have earned the enmity of the arresting officer. The question of dangerousness could be answered on this officer's word. This is particularly relevant in light of the escalating hostility between ghetto residents and the police. In this situation, disorderly conduct complaints often result in dubious

79. See, Proposed Code § 90.50.
felonious assault and resisting arrest charges. The latter are frequently dismissed in exchange for acknowledgment of guilt on the lesser disorderly conduct charge and imprisonment is rarely imposed. Pretrial detention under these circumstances would be a gross injustice. The Proposed Code should not open the door to that possibility by permitting too broad a judicial discretion.

As a final safeguard against unjust detentions, there should be a convincing showing that other means of assuring the complainant's safety and the safety of the public at large are unavailable. These could include such methods as daily reporting to a probation officer, police guard or some other means of protection short of absolute detention.

It would be anamolous indeed if the fourth amendment continued to prohibit the relatively brief detention of an arrest on less than probable cause, while lengthy pre-trial detentions, based on unjust considerations, remained valid.

III. Conclusion

This article has dealt solely with those aspects of the Proposed Code's bail provisions which this writer has felt are in need of serious revision. There are several bail reforms contained in the Proposed Code which merit praise, most notably the provisions relating to appearance tickets.80 Expressions of approval with respect to these provisions will be forthcoming, no doubt, from a variety of sources. However, the need for reform is so great and the failures of this proposal so serious that the critical approach is taken here in the hope that the needed revision will be incorporated before the proposal now before the legislature becomes law.

80. *Id.* § 75.10.