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NOTES

JUDICIAL DISCRETION IN GRANTING BAIL

Introduction

The "judicial hunch" has undoubtedly played a major role in granting bail in criminal prosecutions. The first setting of bail, when discretionary with the judge is by nature conducive to snap judgment and many times is done in haste. Often public opinion persuades the arraigning magistrate to deny bail or set it at a prohibitive sum. The public, though alert to condone judicial odium vent upon a local thug or communist, may be slow to comprehend the necessity for uniform protection of constitutional and statutory rights.

Often the hasty judgment of such judges must be tested by tempered considerations of an appellate court. A reviewing court will not generally set aside an order denying bail or fixing it at an inordinately high amount, unless there has been a clear abuse of dis-

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1 When the accused first makes application to be released pending trial the judge might conceivably, in various factual situations, applicable statutes permitting, do any one of the following: (1) release defendant on his own recognizance, with or without security (see Ex parte Tittle, 37 Tex. Cr. R. 597, 40 S. W. 598 (1897); Commonwealth v. Phillips, 16 Mass. 423 (1820)), (2) require that a bond be posted by one or more sureties in a reasonable amount, (3) require a bond in a prohibitive amount and thus effectively deny bail, (4) deny all bail, and order defendant to be committed to jail pending trial.


3 "... the defect in the proceedings below appears to be that provoked by the flight of certain Communists after conviction, the Government demands and public opinion supports a use of the bail power to keep Communist defendants in jail before conviction." Id. at 10. See Ex parte Stegman, 112 N. J. Eq. 72, 163 Atl. 422, 428 (1932).

4 An extended discussion of the procedural aspects of bail will not be attempted. A few basic principles may be outlined. The traditional method of obtaining release at common law after bail was denied by habeas corpus. In New York and other states habeas corpus is also employed to challenge the bail set as excessive. People ex rel. Deliz v. Prison Warden, 260 App. Div. 155, 21 N. Y. S. 2d 435 (1st Dep't 1940); see Evans v. Foster, 1 N. H. 374, 378 (1819). But see In re Polizzi, 61 Ohio App. 354, 22 N. E. 2d 569 (1939). The proper procedure in the federal courts, however, in the absence of extraordinary circumstances, is by motion to reduce bail. An order denying a motion to reduce bail is a final decision, and therefore appealable. Stack v. Boyle, 342 U. S. 1, 6 (1951).
The constitutional and statutory provisions relating to bail in most jurisdictions, are broadly drawn leaving the amount to be set to the wide discretion of the trial judge but the appeal court will also test orders denying or granting bail by judge-made criteria. These criteria include: (1) nature and gravity of the offense, (2) character of the defendant as evidenced by his conduct, (3) probability of his guilt, (4) his financial ability to post bond, and (5) special circumstances of each case. The working value of these criteria has seldom been challenged or examined. Like other rules in law generally, the ones for bail may be measured in terms of means and ends. The value of each rule in bail depends upon the extent that it serves the overall purpose of bail, which is universally stated to be: "... to secure the due attendance of the party accused ...".

I. THE "RIGHT" TO BAIL

a. The Federal Rule

The question whether the United States Constitution guarantees one the right to bail was answered by the Supreme Court on March 10, 1952 in Carlson v. Landon. Petitioners, members of the Com-
communist party, were detained without bail pending determination of their deportability pursuant to Section 22 of the Internal Security Act of 1950. The Act provides that an alien awaiting a deportation hearing may "... in the discretion of the Attorney General ... be released under bond in the amount of not less than $500. ..." Petitioners contended that they were entitled to bail as a constitutional right, and that the provision for detention without bail violated the Eighth Amendment's guarantee that "... [e]xcessive bail shall not be required. ..." In upholding the constitutionality of the Act, Mr. Justice Reed speaking for a majority of the court, stated that the Amendment, like its English predecessor, does not guarantee the right to bail in all instances but is merely a safeguard to prevent excessive bail in the instances where it is properly granted.

However, less than six months before the Carlson case, the same Court in Stack v. Boyle holding that a bail of $50,000.00 for each of twelve defendants charged with conspiring to "teach the overthrow of the government by force and violence," was excessive, declared in an opinion by Mr. Chief Justice Vinson that, "... unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." The petitioners in the Stack case, active leaders of the Communist party, were charged with an infamous crime, while those in the Carlson case were only members of the Party, constituting a ground for deportation but not as yet a criminal offense. A number of the Carlson petitioners had enviable records in their communities. Yet the right to bail was extended only to the defendants in the Stack case.

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12 Internal Security Act § 23.
13 U. S. Const. Amend. VIII.
14 Frankfurter, J., dissenting; Burton, J., dissenting in a separate opinion. Neither the majority nor the dissenting opinion cited any case either squarely upholding or denying the applicability of the Eighth Amendment to a denial of bail. The absence of authority is understandable because: (1) The Eighth Amendment only applies in the federal courts, where the right to bail is guaranteed by statute, (2) the right to bail is guaranteed by most state constitutions.
15 Mr. Justice Black, dissenting in a separate opinion, stated that under the view adopted by the majority "[T]he Eighth Amendment's ban on excessive bail means just about nothing." Id. at 542. Douglas, J., dissented on a ground totally unconnected with the Eighth Amendment.
16 342 U. S. 1 (1951).
18 Supra note 15 at 4.
19 72 Sup. Ct. 525 (1952).
These two cases, when contrasted, illustrate one of the anomalies of bailing procedure. While the right to bail is not constitutionally provided for, a defendant if admitted to bail at all is entitled constitutionally to a reasonable bond.\(^{20}\) However, the right to bail is guaranteed in the Federal Rules of Criminal Procedure, which since the "passage of the Judiciary Act of 1789" have "... unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail."\(^{21}\) Though the right to bail does not extend to those charged with an offense punishable by death, it may nevertheless be granted in the court's discretion,\(^{22}\) in which case the federal judge is to give "... due weight to the evidence, and to the nature and circumstances of the offense."\(^{23}\)

### b. State Constitutional Guarantees

In many states, the right to bail before trial is expressly guaranteed by constitutional provisions,\(^{24}\) which make bail mandatory in all cases except "... for capital offenses when the proof of guilt is evident or the presumption thereof is great."\(^{25}\) These provisions, attempting to draw a clear-cut distinction between bailable and non-bailable offenses, have resulted in confusion. Whether the accused first makes application for bail, or thereafter institutes habeas corpus proceedings for his release when it is denied, the result is invariably a "trial before trial" to determine first, whether the offense is capital and second, whether the presumption of guilt is great.

A capital offense is usually interpreted as one punishable by death;\(^{28}\) and in some states treason and murder are the only capital crimes within the meaning of the bail provisions.\(^{27}\) Ordinarily, where the defendant is charged with a capital homicide, it must be shown that he can be convicted of murder in the first degree to properly deny him bail. Therefore, in states where the burden is on the accused\(^{28}\) to prove his right to bail in a hearing for that purpose, he

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\(^{23}\) *Id.* Rule 46(c).

\(^{24}\) The constitutional and statutory provisions have been compiled in a comprehensive note: *The Administration of Bail*, 41 Yale L. J. 293 (1931).

\(^{25}\) *Okla. Const. Art. II, § 8.* "All persons shall be bailable by sufficient sureties, except for capital offenses when the proof of guilt is evident, or the presumption thereof is great." *See Ex parte Frey*, 85 Okla. Cr. R. 198, 187 P. 2d 253 (1947).

\(^{26}\) *Ex parte Berry*, 198 Wash. 317, 88 P. 2d 427 (1939) (kidnapping capital offense).


\(^{28}\) In seven states the burden is upon the applicant defendant in a habeas corpus proceeding to be admitted to bail to show the proof is not evident, and
will have to produce exculpating evidence or mitigating circumstances. This evidence, usually offered on trial to show innocence or to reduce the murder to a lower degree, is thus made the sine qua non for bail. Thus, the prisoner in a bail hearing is presumed guilty and while, for trial purposes, he is protected from adverse inferences which may be drawn from his failure to testify, in a bail hearing his "... [s]ilence ceases to be golden."

It is the established rule in a number of states that an indictment for a capital offense, in itself, raises a presumption of guilt sufficient to effectuate a denial of bail. In some states this presumption is rebuttable while in others it is conclusive. The rule originated from the practice of keeping grand jury minutes sealed and secret. Where the accused was committed by a magistrate, the bailing judge could conceivably look to the minutes of the proceeding as an aid in determining the accused’s probable innocence or guilt. Where a sealed indictment was handed down, no corresponding source of information was available, thereby giving rise to the rule that an indictment based on secret minutes is presumptive evidence of the prisoner’s guilt—for bail purposes. There seems to be no justification for the rule’s continuance since grand jury minutes are now preserved and recorded for the court’s use.

Some jurisdictions, with a view toward consistency, place the burden on the state to show the “presumption great” and the “proof evident” when the right to bail is in issue, reasoning that “[t]he


Ex parte Key, 189 P. 2d 619 (Tex. Cr. App. 1948) (testimony pointing toward fact that homicide was accidental); Ex parte Frey, supra note 25 (testimony that accused killed in self defense in a fight started by decedent).

In re Perry, 19 Wis. 711 (1865).

Ex parte Stegman, 112 N. J. Eq. 72, 163 Atl. 422 (1932) (by implication).

See Ex parte Burgess, 309 Mo. 397, 274 S. W. 423, 426 (1925).

Rogers v. State, 30 Ala. App. 226, 4 So. 2d 266, cert. denied, 241 Ala. 633, 4 So. 2d 267 (1941); In re Scott, 38 Neb. 502, 56 N. W. 1009 (1893).


presumption of innocence goes with the defendant at all times, and for all purposes . . . ." 37

c. When is the "Presumption Great"?

In those states where the indictment itself creates no presumption of guilt of the capital offense there are divergent views on the quantum of evidence necessary to create such a presumption, and conversely to rebut it. On one side it has been held that the evidence must indicate with certainty that defendant will flee 38 if bailed, and on the other that it must indicate guilt beyond a reasonable doubt. 39

Usually testimony to the effect that a homicide was accidental 40 or was committed in self defense 41 will be sufficient to rebut the presumption. It has been held insufficient to establish guilt where the sole evidence against a defendant charged with rape was the uncorroborated testimony of a thirteen-year-old girl. 42 A joinder by the state's attorney in defendant's motion for bail is held to be an admission that the proof is not evident. 43

d. Discretion under New York's Statutory Scheme

The New York Constitution, like the Federal Constitution, guarantees no right to bail. 44 However, in prosecutions for misdemeanors, bail is a matter of right by statute. 45 But in cases of felony, the defendant's freedom before trial is discretionary with the court 46 which is to be governed by common law rules. 47

Superimposed upon this foundation of basic rules is a system of procedural "hedging in" 48 based upon the lack of jurisdiction of some courts to give bail, under certain circumstances. Thus, persons charged with a crime punishable by death, or with inflicting an

37 Commonwealth v. Stahl, 237 Ky. 388, 35 S. W. 2d 563, 564 (1931). The court stated that the fact that grand jury proceedings were secret and ex parte is another reason for holding that no presumption of guilt should be created by the indictment "... the accused is not present and in many instances is ignorant of the fact that charges against him are being considered . . . ." Id. at 564.
38 Ex parte Welsh, 236 Mo. App. 1129, 162 S. W. 2d 358 (1942).
39 Pair v. State, 32 Ala. App. 90, 22 So. 2d 100, cert. denied, 246 Ala. 672, 22 So. 2d 101 (1945).
41 See Ex parte Frey, supra note 25, 187 P. 2d at 254.
42 Ex parte Hathorn, 148 Tex. Cr. R. 576, 189 S. W. 2d 1021 (1945).
43 Mendenhall v. Sweat, 117 Fla. 659, 158 So. 280 (1934).
44 The only constitutional provision in New York relating to bail is that "[e]xcessive bail shall not be required . . . ." N. Y. Const. Art. I, § 5.
45 N. Y. Code Crim. Proc. § 553(1).
injury, which if death ensued, would be murder, are bailable only by a judge of general sessions, a justice of the supreme court, or a judge of the county court.\textsuperscript{40} Also, those charged with the commission of a second felony, or with a second designated misdemeanor\textsuperscript{60} fall within the same proscription—and cannot, therefore, obtain preliminary bail from a magistrate.\textsuperscript{61} Even when such persons can obtain bail from a court having jurisdiction to grant it, they must, as a prerequisite, be fingerprinted,\textsuperscript{62} if facilities therefor are available.

These provisions, enacted in 1926\textsuperscript{53} "in response to an asserted necessity for more stringent penal laws,"\textsuperscript{54} are undoubtedly effective in discovering the recidivist. They have, however, operated, on at least one occasion, to delay pre-trial freedom for a defendant charged with a technical violation.\textsuperscript{55} In People v. Hevern,\textsuperscript{56} the defendant, whose car struck a pedestrian, was detained without bail two days on a charge of "felonious assault," because "the magistrate refused to fix bail for lack of power."\textsuperscript{57}

An additional paragraph grants to the Justices of the Court of Special Sessions of the City of New York jurisdiction to admit to bail any defendant charged with a misdemeanor in that court "notwithstanding the foregoing limitations." N. Y. Code Crim. Proc. § 552(3).

In addition, the right to bail from a magistrate is effectively denied to a person charged with "a felony or with any of the misdemeanors or offenses specified in this section and it shall also appear from the defendant’s fingerprints, or otherwise, that there is reason to believe that he has either (a) been previously convicted within the state of a felony, or an attempt to commit a felony, or a crime under the laws of another state, government or country which if committed within this state would be a felony; or (b) has been twice so convicted of any one of such misdemeanors or offenses or convicted of any two of them." N. Y. Code Crim. Proc. § 552(3), as amended, Laws of N. Y. 1947, c. 672, § 1; Laws of N. Y. 1950, c. 606; Laws of N. Y. 1951, c. 708.

\textsuperscript{51} N. Y. Code Crim. Proc. § 552-a.
\textsuperscript{52} Laws of N. Y. 1926, c. 419.

Defendant’s automobile struck a pedestrian. He was arrested and charged with felonious assault. He was arraigned in night court on a Saturday and was refused bail. Defendant remained overnight in the police station. He was again arraigned in Magistrate’s Court Sunday. He was admitted to bail late Sunday by a county judge and held for arraignment on Monday. When the defendant was arraigned on Monday, the arraigning magistrate
e. Scope of Constitutional and Statutory Guarantees

The "right" to bail is considered not to attach until the defendant is within the indicting jurisdiction. The Uniform Extradition Act adopted in New York, and, in varying forms, in many other states, permits the courts of the arresting jurisdiction to admit a non-capital defendant to bail in the extradition proceeding, but does not require it. A statute providing for pre-trial detention of parties charged with certain crimes in order to examine them for communicable diseases has been upheld as not denying the constitutional right to bail. A similar statute authorizing the detention of sex psychopaths without bail was upheld.

It has been held that the right to bail may be waived by pleading guilty, or by asking for adjournments. Since a probation or parole violator may be committed to prison on the original charge, he may claim no constitutional or statutory right to bail before trial.

refused to enforce the "felony" and "fingerprinting" provisions of the new bail laws, characterizing them "unconstitutional." Id. at 146, 147, 215 N. Y. Supp. at 417, 418. A few days later, the arraigning magistrate received a letter from the chief magistrate stating in part: "As to the broad and sweeping questions such as the constitutionality of the law, that remains to be decided by the higher and reviewing courts." The New York Times, April 28, 1926, p. 27. See Legis., The Baumes Bills, a Beginning in the Reorganization of Criminal Procedure in New York, 26 Col. L. Rev. 752, 753 (1926). The "higher" and "reviewing" courts have not had occasion to pass on the sections. They have been amended periodically, and new misdemeanors have been added to the list of "non-bailable offenses." N. Y. Code Crim. Proc. § 552(1)(2)(3) as amended, Laws of N. Y. 1947, c. 672, § 1; Laws of N. Y. 1950, c. 606; Laws of N. Y. 1951, c. 708. Subd. 3, as amended, Laws of N. Y. 1950, c. 606; Laws of N. Y. 1951, c. 708. N. Y. Code Crim. Proc. § 552-a (fingerprinting), as amended, Laws of N. Y. 1947, c. 283.

59 Uniform Extrad. Act § 16; 9 Uniform Laws Annotated 169.
61 See Annotations in 9 Uniform Laws Annotated 175 et seq.
62 N. Y. Code Crim. Proc. § 845. "Unless the offense with which the prisoner is charged is shown to be an offense punishable by death or life imprisonment under the laws of the state in which he was committed, a justice of the supreme court or county judge in this state may admit the person arrested to bail . . . in such sum as he deems proper . . . ." (emphasis added).
63 People ex rel. Baker v. Strautz, 386 Ill. 360, 54 N. E. 2d 441 (1944). Petitioners were charged with soliciting to prostitution and were held without bail pursuant to Ill. Rev. Stat. 1943, cc. 2, 3, § 392, for physical examination to determine if they were infected with communicable venereal disease. Petitioners, on appeal, challenged the constitutionality of the statute, as depriving them of the right to bail. Held: The statute is constitutional. "The power to detain a person who is suspected of having a contagious disease rests in the police power of the state." Id. 54 N. E. 2d at 443.
64 People v. Chapman, 301 Mich. 583, 4 N. W. 2d 18 (1942). See also Bail for Sex Psychopaths, 31 Neb. L. Bull. 95 (1951).
65 See Devine v. People, 20 Hun 98, 100 (N. Y. 1880).
66 See N. Y. Code Crim. Proc. § 933. "Whenever within the period of pro-
II. Judge-Made Criteria

It is against this background of statutory and constitutional guarantees that a court weighs each bail application. Where statutory provisions have no application, and bail is granted in varying amounts, or denied entirely, in the court's discretion, several criteria guide the judge in his determination.

a. Nature and Gravity of the Offense

Common sense dictates that the atrocity of the offense charged, and the probable length of the accused's incarceration if found guilty, should bear on whether bail is granted, or if granted, in what amount. One charged with murder, though wrongly, is more likely to flee the jurisdiction if bailed than one charged with vagrancy.

Undoubtedly the "Capital Crime" distinction previously discussed, which evolved at common law and found its way into many state constitutions, crystallized from the realization that the atrocity of the offense is directly proportional to the probability of the defendant absconding. This common place has found expression in numerous holdings.

Where, however, the atrocity of the offense has induced the judge to deny bail or set it at a prohibitive sum, not for insuring the defendant's presence at the trial, but to satiate an outraged public, it has been held error. Thus, an accused may not constitutionally be incarcerated because "public opinion" demands it, or because he is charged with a crime that, in the eyes of the committing magistrate and prosecution, make him "unfit to mingle in society." Conceivably, a judge, actually persuaded by the demands of an outraged public, may deny bail or set it at a prohibitive sum, assigning as an ostensible reason his fear that the defendant will abscond, if given an opportunity. Where, however, the methods employed by the judge have indicated a preconceived intent to incarcerate a defendant before trial, bation any probationer shall violate his probation, the court may issue a warrant for his arrest and may commit him, with or without bail. . . ."

67 See Section Ib, this Note.
68 See, e.g., People v. Van Horne, 8 Barb. 158 (Sup. Ct. N. Y. 1850). "Where the punishment is death or a degrading imprisonment, the presumption is strong that the accused will attempt to elude the demands of justice." Id. at 165.
70 Gusick v. Boies, 72 Ariz. 309, 234 P. 2d 430 (1951). The accused was charged with sex crimes which outraged the community. The method pursued to keep defendant in jail was the practice of filing multitudinous charges against him, and obtaining orders from the magistrate requiring additional bail on these charges. Id. 234 P. 2d at 431. See also Stack v. Boyle, 342 U. S. 1 (1952).
merely to succumb to public opinion, the order denying or setting excessive bail has been held unconstitutional.\textsuperscript{71}

Nevertheless, it is difficult in many instances to determine the extent to which the atrocity of the crime contributes, consciously or unconsciously, to the bailing judge's decision.

\textit{b. Character of Defendant as Evidenced by His Conduct}

The defendant's previous criminal record,\textsuperscript{72} the circumstances surrounding his arrest,\textsuperscript{73} his demeanor in court, his reputation in the community, are testimonials to his character, and proper items for the court's examination in ruling on a bail application.

The fact that the defendant voluntarily surrendered to the police is said to indicate his lack of intent to flee the jurisdiction\textsuperscript{74} thereby justifying his admission to bail in a reasonable amount even if charged with a serious offense, and even if he had previously been indicted for "jumping bail."\textsuperscript{75} But other influencing circumstances must of necessity be considered. Habitual criminals have been known to surrender in the hope of being permitted to plead to a lesser charge, and this does not indicate an intent to remain. Likewise, the fact that accused surrendered to the police had little significance where the surrender took place in Paraguay, and extradition proceedings were necessary.\textsuperscript{76} An accused's past record may be strong evidence of a propensity to flee.\textsuperscript{77} While a previous conviction should not alone warrant setting bail at a prohibitive sum,\textsuperscript{78} nevertheless, a record revealing that the accused has previously "jumped bail"\textsuperscript{79} or has been a fugitive from justice\textsuperscript{80} would seem to justify strong measures. In a number of cases, however, bail has been reduced as being excessive where defendants had previously forfeited bonds posted in connection with other charges,\textsuperscript{81} or even in connection with the same

\textsuperscript{71} Ibid.
\textsuperscript{72} Ex parte Lonardo, 86 Ohio 289, 89 N. E. 2d 502 (1949).
\textsuperscript{73} Infra, Section Ie of this Note dealing with "Circumstances of the case."
\textsuperscript{74} See Rex v. Lord Baltimore, 4 Burr. 2179, 98 Eng. Rep. 136 (1768).  . . . [V]oluntary surrender was a strong indication that he had no intention of absconding from justice . . ." Id. 98 Eng. Rep. at 137.
\textsuperscript{75} People ex rel. Lobell v. McDonnell, 296 N. Y. 109, 71 N. E. 2d 423 (1947).
\textsuperscript{76} People v. Mott, 97 Misc. 86, 162 N. Y. Supp. 272 (Sup. Ct. 1916).
\textsuperscript{77} Ex parte Lonardo, 86 Ohio 289, 89 N. E. 2d 502, 504 (1949).
\textsuperscript{78} Ex parte Nabors, 135 Tex. R. 528, 121 S. W. 2d 596 (1938).
\textsuperscript{79} Ex parte Calloway, 98 Tex. R. 347, 265 S. W. 699 (1924).
\textsuperscript{80} In re Grimes, 99 Cal. App. 10, 277 Pac. 1052 (1929); In re Scott, 38 Neb. 502, 56 N. W. 1009 (1893) (defendant fled to Mexico); Ex parte Thomas, 91 Tex. Cr. R. 49, 237 S. W. 302 (1922) (accused sawed his way out of jail).
\textsuperscript{81} People ex rel. Lobell v. McDonnell, 296 N. Y. 109, 71 N. E. 2d 423 (1947). This is vividly illustrated by the following passage from Waite, \textit{Code of Criminal Procedure: The Problem of Bail}, 15 A. B. A. J. 71 (1929). "A man was arrested in Detroit on the charge of picking pockets; he secured release on bail and while the first case was pending he was arrested four additional times for picking pockets and secured bail each time." Id. at 72.
Similarly, defendants have been bailed in a prosecution brought for a breach of the peace, where the breach also constituted a violation of a prior bond posted in an arson prosecution. A habeas corpus proceeding has resulted in reducing bail in New York for a defendant charged with a felony, and whose "... record ... showed several previous indictments, including one for 'jumping bail' ...".

Threats made by the defendant to escape if allowed the opportunity may be considered in determining the reasonableness of the amount of bail, but do not constitute a ground for the denial of bail entirely.

There has been a tendency in recent years to give greater weight to the prior criminal record of the accused. People ex rel. Sammons v. Snow appears to be the starting point. The petitioner Sammons, arrested on a vagrancy charge, brought a habeas corpus proceeding to be admitted to bail in a reasonable amount. Bail had been originally set at $10,000.00 and subsequently increased to $50,000.00. The maximum penalty for the vagrancy charge was six months at hard labor, or a fine of $100.00. A bail of a few hundred dollars seemed in order. But Sammons had an impressive record. He had been convicted of rape, and paroled. He obtained a reprieve from a death sentence for murder, and was sent to prison for life; he escaped, was returned, paroled, and finally discharged. Less than seven months later he was sentenced to a federal prison for conspiracy. The Appellate Court, on hearing the writ, reversed the action of the trial court in setting the bail at $50,000.00, declaring that such sum was required for "... no other purpose than to make it impossible for him to give ... bail," but it proceeded to set petitioner's bail at $5,000. This sum is clearly excessive for an ordinary vagrancy charge, and was obviously imposed to insure the confinement, if possible, of the petitioner before the trial. It should be noted however that the petitioner previously had escaped from penitentiaries, and this alone would justify high bail, without an extensive examination of accused's record.

Cf. Ex parte Calloway, 98 Tex. Cr. R. 347, 265 S. W. 699 (1924) (bail allowed was not excessive, however).

State ex rel. Whitesides v. Judge, Twenty First Judicial District Court, 48 La. Ann. 95, 18 So. 904 (1896).

People ex rel. Lobell v. McDonnell, supra note 81 at 412, 71 N. E. 2d at 425.

See Ex parte O'Clare, 136 Tex. Cr. R. 123, 124 S. W. 2d 141 (1939).

Kendrick v. State, 180 Ark. 1160, 24 S. W. 2d 859 (1930).

People ex rel. Lobell v. McDonnell, supra note 81 at 412.

Id. 173 N. E. at 9.

Id. 173 N. E. at 10.

Id. 173 N. E. at 9. Petitioner also had other charges pending against him, but the court recognized that "... bail ... cannot be fixed with reference to securing his appearance to answer the other crimes with which he is charged. ..." Ibid.
Later cases, however, have considered a prior criminal record itself sufficient ground for setting an inordinately high bail, and the Sammons case has been cited as authority.

In Ex parte Lonardo the defendants had been previously convicted of serious crimes, and were, in the words of the prosecution, "... members of an organized band of law breakers." After being held in default of $75,000.00 bail on charges of being "suspicious persons," defendants petitioned for bail in a reasonable amount. The highest court of Ohio, holding the bail excessive, set the bond at $15,000. After discussing the Sammons case at length the court concluded that: "... [I]n view of the records of criminality of the petitioners, we deem the sum of $15,000.00 to be reasonable." It is significant to note that in the Lonardo case it did not appear that any of the petitioners had known propensities for escaping, or forfeiting bonds. The court recognized that ordinarily the charge of being a "suspicious person" would warrant a small bail, but relied upon the general criminal tendencies of the petitioners, as justifying a high bond. Apparently such courts infer a strong propensity to flee from the defendant's general bad character.

While this practice is perhaps susceptible to logical objections— the converse, *vis.* , that a person of previous good character and reputation is *not* likely to flee is commonly recognized, and empirically defensible. Previous good character indicates that the defendant may be wrongly accused of the charge, and willing to stand trial, confident of vindication. A first offender has a good possibility of being permitted to plead to a lesser degree of the crime charged, thereby receiving a lighter sentence. Persons of good character and reputation generally do not readily break home and family ties by

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91 Ex parte Holden, 55 Okla. Cr. R. 51, 24 P. 2d 665 (1933). See also Ex parte Burnette, 35 Cal. App. 2d 358, 95 P. 2d 684 (1939). Bail of $50,000 pending appeal of rape conviction. *Held,* not excessive. "The trial judge, at the time he fixed the bail was familiar with the evidence... [H]e knew the defendant was a recidivist; that he had been sentenced to Folsom; that he faced a possibility of a fifty year term." *Ibid.*

92 Ex parte Lonardo, 86 Ohio 289, 89 N. E. 2d 502 (1949).

93 Ibid.

94 Ibid. 89 N. E. 2d at 503.

95 Ibid. 89 N. E. 2d at 504.

96 Ibid.

97 Ibid.

98 The argument that a defendant with a criminal record is likely to flee from justice does not take into account the following considerations: (1) a habitual criminal is more likely to be familiar with bailing procedure, and the consequence of bail jumping than a first offender, (2) a habitual criminal recognizes that he may at any time need the privilege of bail again: and doesn't wish to forfeit his ability to get bonds from the same or other bondsmen, by jumping bail, (3) in jurisdictions like New York, where bail jumping is a crime, the habitual criminal will consider the fact that his bail jumping will add another offense to his record and place him that much closer to the "fourth offender" category.
absconding when charged with a crime. Family ties and "deep roots" in the community have been recognized as factors influencing discretion in granting bail, and are entitled to great weight in cases involving youthful offenders. It has been stated that the "... age, character and family situation of the [youthful] defendant have far more bearing on the danger of flight than has the nature of the offense charged." 108

c. Probability of Defendant's Guilt

The practice of looking to the prisoner's probable guilt in determining whether or not he should be let to bail originated with the ancient writ de odium et atya (of hatred and malice).101 The writ was invoked by the prisoner to test the "causa" for his arrest, that is: to determine whether he was arrested for reasonable cause or purely out of the prosecutor's malice. Malice could be shown by lack of proof of guilt, and the accused was forthwith bailed. Gradually the search for malice became figmentary, and the only question considered was the probability of the prisoner's guilt as indicated by the weight of the evidence.102 It has been said that in England the "probability of guilt has come to be the main guiding test in bail." 103 In the United States, however, the probability of defendant's guilt is generally considered secondary to the gravity of the accusation against him.104 "Bail is not allowed or refused on account of the presumed guilt or innocence of the person accused, though the existence of doubt... must be considered in determining the amount of the bail." 105

The probability of guilt for bail purposes is not determined objectively but solely by the relative strength or weakness of the prosecutor's case against the accused. An innocent defendant, with a strong prima facie case against him, is as likely to flee as the guiltiest. Conversely an obviously guilty defendant will have little reason for absconding before trial, if, because of a lack of evidence against him, or public sympathy in his favor, the charge is likely to

99 See United States ex rel. Potash v. District Director of Immigration, 169 F. 2d 747, 753 (2d Cir. 1948).
100 The Forgotten Adolescent (1940), a publication of the New York Law Society, reprinted in Michael and Wechsler, Criminal Law and Its Administration 956 (1940).
101 Stephen's History of the Criminal Law 239 (1883).
102 Ibid.
104 Cole's Case, 6 Park. 695, 4 Abb. Pr. (N. S.) 280 (Sup. Ct. 1868).
106 An exception to this may be seen in cases where the accused has been charged with larceny. The fact of whether he committed the crime has a very important bearing on his ability to post bail and flee the jurisdiction, since the stolen property may be a source of funds to obtain bail, or to indemnify the surety.
be dropped. *People ex rel. Delis v. Prison Warden* 107 is an illustration. The petitioner was indicted for perjury arising out of a proceeding in which he sought to obtain custody of his children, confined to a home. Bail was set at $5,000 in General Sessions but at a subsequent Habeas Corpus proceeding before the Supreme Court the bail was reduced to $1,000. The Appellate Division, affirming the action of the Supreme Court, stated that "[t]he circumstance of the alleged offense were such that ultimate conviction is doubtful, although a *prima facie* case has been made out." 108

The likelihood of an acquittal, determined by the result of a previous trial, has been held sufficient grounds for admitting to bail a defendant charged with murder. 109 Where the crime charged is larceny, the presumption of guilt arising where the defendant is found in possession of the loot has been considered strong enough to deny him bail. 110 As previously indicated, the weight of evidence against the defendant is a paramount consideration in those states where bail in capital cases is denied when "the proof [of guilt] is evident or the presumption thereof is great." 111

d. Financial Ability of the Accused

The federal and state constitutional assurances that "excessive bail shall not be required," compel the court to consider accused's financial ability to post bond. 112 The fact that the accused is personally unable to give security in the amount set, does not by itself, render the bail excessive, 113 but a bond manifestly out of all proportion to the fund raising ability of the accused, effecting a practical denial of bail, will generally be considered violative of the constitutional mandate, and a reduction will be in order. 114

The burden is on the applicant in a proceeding to reduce bail to show his financial inability to meet the amount set. 115 Proving that he is of limited means, 116 or verging on insolvency, 117 or that

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108 Id. at 156, 21 N. Y. S. 2d at 436.
109 Cole's Case, *supra* note 104.
110 People v. Ferris, 1 Wheel. Cr. C. 19 (N. Y. 1822).
111 *Supra* Sections I b, c, this Note.
113 *Ex parte* Glass, 81 W. Va. 111, 93 S. E. 1036 (1917). To the effect that the defendant's financial ability alone is not conclusive upon whether the bail is excessive, see *Ex parte* Nelson, 123 Tex. R. 439, 69 S. W. 2d 126 (1934).
114 Mendenhall v. Sweat, 117 Fla. 659, 158 So. 260 (1934); *Ex parte* Martin, 71 Tex. R. 333, 159 S. W. 1182 (1913).
115 *Ex parte* Thompson, 92 Tex. R. 92, 243 S. W. 910 (1922) (must be shown after bail is set, not anticipatory of it); *Ex parte* Neyland, 77 Tex. Cr. R. 642, 179 S. W. 715 (1915).
116 Jones v. Cunningham, 170 So. 663 (Fla. 1936).
he has posted large bonds in connection with other charges\textsuperscript{118} is usually sufficient to sustain this burden. Where, however, the defendant is penniless, and has no source for borrowing, it would be an idle gesture for the court to reduce bail.\textsuperscript{119} In such a case, the accused, if the crime charged is too serious to allow him to go on his own recognizance, must of necessity be committed until trial.

The nature of the crime charged is an important factor to be considered by the courts in conjunction with the accused's financial ability. Thus, where the charge is larceny of a sum of money, bail set at a fraction of the amount which the defendant is accused of stealing, will invariably be considered insufficient, since \textit{if guilty} (and in many jurisdictions the accused is presumed guilty in bail proceedings),\textsuperscript{120} the defendant could conceivably indemnify his bail sureties and flee with the remainder of the loot.\textsuperscript{121}

Similarly, where the only punishment for the crime is a fine, the amount thereof is often the criterion\textsuperscript{122} the courts rely on in setting bail, placing the bailed defendant in the dilemma of forfeiting the same amount whether he absconds, or is found guilty of the offense charged.

Closely connected with a consideration of the defendant's financial ability to post bond, is the additional factor of his financial ability to flee the jurisdiction and live in wealth and comfort elsewhere. It appears well settled that "... ability to leave the jurisdiction is not necessarily consistent with \textit{intent} to do so,"\textsuperscript{123} and from the decisions it may be gathered that "something more" must be shown to sustain an inordinately high bail against a charge of excessiveness. Thus, a defendant charged with a violation of the Selective Service Act, had his bail reduced from $500,000 to $50,000 although it was shown that he had extensive resources in, and was a citizen of, a country from which the United States could not require extradition.\textsuperscript{124}

Nevertheless, a defendant's ability to leave the jurisdiction is a weighty factor where he is involved in criminal activities crossing many jurisdictional boundaries. Thus, bail set at $25,000 for a de-

\textsuperscript{119} \textit{Ex parte} Smith, 141 Fla. 434, 193 So. 431 (1940).
\textsuperscript{120} \textit{Supra} Section Ib, this Note.
\textsuperscript{121} United States v. Averett, 26 F. 2d 676 (W. D. Va. 1928).
\textsuperscript{122} \textit{In re} Scott, 38 Neb. 502, 56 N. W. 1009 (1893).
\textsuperscript{123} United States \textit{ex rel.} Rubenstein v. Mulcahy, 155 F. 2d 1002 (2d Cir. 1946).
\textsuperscript{124} See also People \textit{ex rel.} Lobell v. McDonnell, 296 N. Y. 109, 71 N. E. 2d 423 (1947). "Relator's previous record ... showed several previous indictments, including one for 'jumping bail' ... He has business interests in New York and California ... There is nothing whatever in the papers to suggest any intention to flee the jurisdiction." \textit{Id.} at 112, 71 N. E. 2d at 425.
fendant charged with selling heroin was sustained on appeal, largely because of "... the international ramifications of [the defendant's] operations, and the financial means ... which might lead him to leave the jurisdiction." 125

In determining the accused's ability to give bail, the court will consider not only his personal resources, but those of his friends who offer to go bail for him. 126 Of late the courts have been confronted with a wellspring of "friends" who are willing to go bail for defendants of designated political persuasions. Some of them, notably the Civil Rights Congress, have been willing to provide bail for defendants whose defaults have resulted in a loss to the organization's contributors of thousands of dollars. 127

In attempting to cope with the situation where jumping bail means little to the defendant or the organization providing his bail, a number of distinct approaches have been attempted by the courts. The huge resources of these organizations have been taken into account, and bail set at an amount which would otherwise be considered exorbitant. However, such attempts to secure communist and other well financed defendants to trial have been struck down as inconsistent with the Eighth Amendment. 128 Another more successful approach has taken the form of exercising the discretionary power vested in the federal courts by statute to refuse bail supplied from an undependable source. 129 In Christoffel v. United States 130 the surety, the Civil Rights Congress, was held undependable, because there was presented evidence of repeated defaults, and failure to carry out the functions of a bail surety. But quae: Must the Government wait for each of these organizations to suffer repeated defaults, 131 before they may be considered unreliable? Apparently, yes. Concededly, bail cannot be denied a defendant, 132 nor can a surety,

126 Ex parte Lewis, 38 S. W. 1150 (Tex. 1896).
127 In Christoffel v. United States, 196 F. 2d 560 (D. C. Cir. 1951), the prosecution alleged, and proved to the satisfaction of the court, that "... said Civil Rights Congress ... acting in ... capacity as bondman for ... numerous defendants and convicts ... has failed to produce and to secure the attendance of such defendants and convicts ..." Id. at 563.
129 Christoffel v. United States, 196 F. 2d 560, 566 (D. C. Cir. 1951). Rule 46(e) Fed. R. Crim. P. provides "... [N]o bond shall be approved unless the surety thereon appears to be qualified."
130 196 F. 2d 560 (D. C. Cir. 1951).
131 Ibid.
132 Mr. Justice Jackson stated this forcibly in Williamson v. United States, 184 F. 2d 280 (2d Cir. 1950): "My task would be simple if a judge were free to order persons imprisoned because he thinks their opinions are obnoxious, their motives evil and that free society would be bettered by their absence. The plea of admitted Communists ... is so hypocritical that it can fairly and dispassionately be judged only with effort.
who presents sufficient evidence of financial ability, be refused merely because of his political persuasions.\textsuperscript{133} Thus the discretionary power of the court to refuse sureties does not adequately cope with the problem. Apparently the solution lies in another direction. As added leverage to secure the defendant to trial, New York enacted a statute making “bail jumping” a crime.\textsuperscript{134} There is no analogous provision in the Federal Code.

Recently, however, a federal court devised a new method (or revived an old one)\textsuperscript{135} to coerce the appearance of flighty defendants well supplied with bail funds. The defendant, pending an appeal from a conviction for violating the Smith Act, had applied for, and was granted, bail by an order of a judge of the Federal District Court of New York.\textsuperscript{136} The order expressly stated that “for any violation of any of the conditions . . . the bond . . . shall be forfeited.”\textsuperscript{137} The defendant “jumped bail,” and in a subsequent criminal contempt proceeding, brought by the United States for the violation of the order, he contended that the sole penalty for “bail jumping” is a forfeiture of the bond, since the Federal Code of Criminal Procedure does not make “bail jumping” a crime.\textsuperscript{138} Defendant was nevertheless convicted of criminal contempt under Section 401 of the Code for a willful disobedience of an order of the court.\textsuperscript{139} The court did not consider an order granting bail different from any other court order, a violation of which would be punishable by contempt.\textsuperscript{140} Although the court’s action may be justified by prece-
dent, the decision raises a number of questions. Will any willful breach of a bail order, not including an absence from the jurisdiction, be contemptuous? Can the decision extend the court's contempt power to include defendants who flee while on pre-trial bail, as well as from bail after conviction?

It is submitted that New York, by enacting a statute making bail jumping a crime, and sharply defining the punishment to be inflicted therefor, has followed a better course. New York has succeeded in some measure in preventing pre-trial and post-trial "bail jumping," and has also provided defendants with notice of non-permissible conduct, a requisite for any criminal sanction. The practice of assuming broad powers to punish absconding defendants for contempt, it would seem, is an unwarranted extension of the contempt power, which, it is recognized, is a weapon to be used with caution.

e. Special Circumstances of Each Case

The problem of granting or denying bail in any case, is essentially one for balancing two conflicting interests. On the one hand, the public policy of the state demands that defendants stand trial, and the most certain method of securing defendants is by pre-trial detention. On the other is the policy that no man should be deprived of his freedom until found guilty on a criminal charge. Where this balance is relegated to judicial discretion, it is appreciable that any rules laid down cannot be treated as more than signposts. Any attempt to synthesize a reasonably symmetrical pattern of judicial


142 See Ludwig, Control of the Sex Criminal, 25 St. John's L. Rev. 203 (1951). "Closely related to the ideal of protection of the individual's civil liberty is the principle of Anglo-American criminal justice that there can be no punishment for behavior unless it is prohibited by existing law (nulla poena sine lege). This principle is in sharp contrast to the totalitarian doctrine that there can be no wrong committed against the state which is incapable of being punished (nullum crimen sine poena). Id. at 211. It is recognized that the court's power to punish summarily for criminal contempt is an exception, but this power is restricted (infra note 143). It is interesting to note that the defendant in United States v. Hall, 101 F. Supp. 666 (S. D. N. Y. 1951), aff'd, 198 F. 2d 726 (2d Cir. 1952), was sentenced to three years imprisonment for conduct which was not generally recognized as criminal (bail jumping).

143 The results of abuses of the contempt power, which led to the enactment of federal and state legislation to define the class of cases in which this form of summary punishment might be used, are graphically illustrated in Frankfurter and Landis, Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers, 37 Harv. L. Rev. 1010, 1024 et seq. (1924).

conduct from the maze of decisions would be incomplete without a reference to all the influences.

A delay in the trial of a case has been considered a proper basis for granting bail or for reducing the amount originally set, in a number of cases. A delay from one term of court to the next has been held sufficient to allow the prisoner to go at large on his own recognizance. Where the delay was caused by the jury's disagreement in a prior trial for the same offense, the defendant's claim for admission to bail was thereby greatly enhanced. Where the accused was a delicate woman charged with murder it was nevertheless held proper to admit her to bail, where she could not be tried for a matter of months. However, a delay granted at the accused's request and for his own benefit is not a ground for granting him bail.

Poor health has often secured pre-trial freedom to offenders not otherwise bailable. "The humanity of our laws, not less than the feelings of the court favor the liberation of a prisoner . . . under such circumstances." While it is not necessary to procure bail to show that imprisonment will place the accused in immediate danger of his life, it ordinarily must appear that a serious impairment of health will thereby result. A plea of insanity forfeits a defendant's right to bail since, by that plea, he places himself under the guardianship of the court and may be confined.

Although it is universally conceded that the true function of bail is to secure the defendant's presence at the trial, in numerous instances, other ends have been attempted and some successfully achieved by the use of prohibitive bail, notwithstanding the constitutional provision that "excessive bail shall not be required." The use of prohibitive bail has been unsuccessfully attempted where the purpose was to confine the defendant in his protection from an outraged public.

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147 Cole's Case, supra note 104.

148 Ex parte Black, 21 Okla. Cr. R. 69, 204 Pac. 937 (1922).


151 Ibid.


155 State v. Richardson, 176 La. 750, 146 So. 737 (1933). The defendant, a negro, was indicted in Louisiana for the manslaughter of a white man. After having a judgment of conviction set aside, Richardson was bailed at $500, pending a new trial. This bail was raised to $5,000 because the sheriff had notified the trial judge that there "... was much ill feeling against Richardson..."
The New York Court of Appeals, in two recent cases, approved the use of prohibitive bail for material witnesses, who it was feared, would not, because of the circumstances of the case, testify. Two material witnesses were held in default of $250,000 bail, in connection with the famed Scottoriggio killing. Three years later, the Court in People ex rel. Gross v. Warden, recalling the Rao case, sustained a bail of $250,000 for a gambler held as a material witness in connection with the investigation of an extensive crime ring in Kings County, New York.

In the Rao and Gross cases, bail was exacted pursuant to Section 618-b of the New York Code of Criminal Procedure, which grants to a judge of a court of record the power to require "... a written undertaking ... in such sum as he may deem proper" from a person who has been proved upon oath, to the court's satisfaction, to be a "necessary and material witness for the people." The discretion granted the judge by this statute relates solely to the amount of the required undertaking, since the witness, who is not a defendant in a criminal proceeding, is entitled to bail as a matter of right. But as the New York Constitution provides that "... excessive bail shall not be required," such witness is also entitled to bail in a reasonable amount. Since Section 618-b, like the statutory provisions governing bail for defendants, lays down no criteria to guide a judge in setting the amount of the bond, the judge's discretion appears entirely unfettered.

It would seem, however, that a mere witness is at least entitled to a bond which would be considered reasonable if he were the accused. Until People ex rel. Rao v. Warden, there was little men-

in his home town and that he 'might get hurt'—meaning that he might get lynched, if released on bail. The Supreme Court of Louisiana reversed, however, holding that Richardson's right to reasonable bail, guaranteed by the Louisiana Constitution, was paramount to any protective purpose of the lower court.


157 People ex rel. Rao v. Adams, supra note 156.

158 Supra note 156.


160 Ibid.

161 Ibid.

162 Judge Desmond, dissenting in the Rao case, supra note 156, stated that relators: "... not indicted or convicted, had an absolute right to be released on their undertaking to appear when the case should be called." 296 N. Y. at 235, 72 N. E. 2d at 171.


165 The constitutional provision against "excessive bail" would be meaningless if it afforded protection from oppressive security requirements to indicted de-
tion of what factors influenced the court in setting bail for witnesses. It was recognized, however, that a substantial amount of exorbitant bail will protect a witness is by causing his detention, for failure to produce the required sum, and if the bail is designedly exorbitant to effect this purpose, the constitution is violated.

In the Rao case, the Court of Appeals relied upon certain extraordinary facts as justifying a bail of $250,000, but the possibility of misapplying Section 618 to "keep a witness locked up" is a formidable one. The Gross case should not be used as an argument for extending the practice of requiring exorbitant bail for witnesses, since in that case, perhaps even more so than in the Rao case the extraordinary facts justified an extraordinary bail. There have since been indications that the "judge is not free to make the sky the limit in witness bailing."

fendants, and operated with less rigidity in favor of an unindicted witness. That the constitutional protection against excessive bail extends to a witness as well as a defendant, see People ex rel. Richards v. Warden, 277 App. Div. 87, 98 N. Y. S. 2d 173 (1st Dep't 1950).

See People ex rel. Weiner v. Collins, 22 N. Y. S. 2d 774 (Sup. Ct.) ($50,000 bail sustained, little discussion of ground for high bail except to "protect the relator" and "the rights of the people"), aff'd no opinion, 260 App. Div. 806, 22 N. Y. S. 2d 775 (2d Dep't 1940).

Ibid. See also People ex rel. Ditchik v. Sheriff of County of Kings, 171 Misc. 248, 12 N. Y. S. 2d 341 (Sup. Ct.), aff'd no opinion, 256 App. Div. 1081, 12 N. Y. S. 2d 232 (2d Dep't 1939). "Section 618-b is an effective instrument by which law enforcement agencies endeavor to cope with offenders whose proclivities for spiriting away witnesses have... defeated many just prosecutions." 47 at 251, 12 N. Y. S. 2d at 344.


296 N. Y. at 234, 72 N. E. 2d at 170, 171. The court considered:

(1) The seriousness of the crime under investigation (murder).
(2) The background and extensive criminal records of petitioners.
(3) Their relationship to others against whom they might have been called to testify.
(4) The possibility of flight to avoid giving testimony.
(5) The difficulty of procuring their return if they do leave the state.


It was stated that "Gross... betting operations exceeded $50,000.00 daily." 277 App. Div. at 548, 101 N. Y. S. 2d at 273. "He also told the Judge that if he talked he would implicate many police officials and furnish corroborating evidence of gifts and payments of money to them." 277 App. Div. at 549, 101 N. Y. S. 2d at 273. Gross was also being held under an information accusing him, with others, of "... conspiracy, and on sixty-five additional substantive counts of bookmaking." Id., 277 App. Div. at 552, 101 N. Y. S. 2d at 276 (dissenting opinion).

Stack v. Boyle, 342 U. S. 1, 8 (1951).

Conclusion

A review of current bail decisions reveals that by and large, bail has been granted in accordance with established principles. While there have been instances where the judiciary was "more executively-minded than the executive,"\(^\text{174}\) glaring errors have been rare. In fact, Stack v. Boyle\(^\text{175}\) decided in 1951, represents the first case in which the Supreme Court saw fit to discuss bail procedure at length.\(^\text{176}\)

Still there is need to fill in some gaps in the statutory scheme. Though bail has perhaps justly been called a rich man's privilege,\(^\text{177}\) a general practice of letting poor defendants at large on their own recognizance in prosecutions for serious crimes would be indefensible. An alternative method, requiring poor defendants to report to police authorities periodically, would be worthy of extensive study. This practice has been employed in the past with some success in Italy.\(^\text{178}\)

It is doubtful whether statutory enactments enumerating factors to be weighed by the judge in admitting a person to bail will appreciably decrease the number of instances where excessive bail is set.\(^\text{179}\) Stack v. Boyle testifies to the fact that it is possible for a bailing judge to ignore the statutory law of his jurisdiction as well as the common law principles. Judge Desmond\(^\text{180}\) of the New York Court of Appeals has suggested\(^\text{181}\) that the concurrence of three judges be required in setting bail above a certain figure,\(^\text{182}\) ostensibly to encourage more reflection in bail applications. While this requirement would possibly increase those instances in New York where bail could not be had before a magistrate immediately following arrest,\(^\text{183}\) since a

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\(^{174}\) Qasem, Bail and Personal Liberty, 30 CAN. B. Rev. 378, 396 (1952).

\(^{175}\) 342 U. S. 1 (1951).

\(^{176}\) Ibid.

\(^{177}\) See "Is Bail a Rich Man's Privilege" by George F. Longsdorf, Member of the Advisory Committee on Federal Rules, 7 F. R. D. 309 (1948).

\(^{178}\) "The Italian code provides a substitute for bail for poor defendants. If the accused cannot put up the bail bond, the judge may release him at the same time obliging him to report periodically to police authorities. The police, informed of this measure, must bring to the attention of the judge any infrac-

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\(^{179}\) 342 U. S. 1 (1951).

\(^{180}\) It is interesting to note that Judge Desmond dissented in a separate opinion in People ex rel. Rao v. Adams, Warden, 271 App. Div. 640, 67 N. Y. S. 2d 193 (1st Dep't), aff'd, 296 N. Y. 231, 72 N. E. 2d 170 (1947), wherein the court sustained a bail of $250,000 for two material witnesses to the Scotto-

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\(^{181}\) Desmond, Bail—Ancient and Modern, 1 BUFF. L. Rev. 245, 248 (1952).

\(^{182}\) Judge Desmond suggested a figure of: "... say, $25,000. . . ."

\(^{183}\) A magistrate desiring to set high bail would have to decide between setting a bond under $25,000 and holding the defendant without bail (as was done in People v. Hevern, supra note 55), until the concurrence of three judges could be obtained.
magistrate would be put to the choice of setting bail at a figure under the statutory sum, or waiting for the time when three judges could hear the application, the suggestion is indeed worthy of consideration. Rather than extend the contempt power of the court to prevent “bail jumping” by defendants bonded by irresponsible sureties, it is suggested that “bail jumping” statutes, similar to the New York statute, be considered.\textsuperscript{184}

The various systems of bail procedure throughout the nation suggest themselves as “experimental laboratories,” to aid in the development of flexible, constantly improving methods of securing the attendance of defendants at trial. It would be remiss to ignore this vast proving ground.

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\textbf{Equitable Mortgages—A Wavering Doctrine in New York}

\textit{Introduction}

The munificence of equity is perhaps best exemplified by the evolution therein of the law of mortgages. At common law, a mortgage was to all intent and purposes a conveyance of the legal estate, subject to defeasance only if the mortgagor repaid the debt on a prescribed day; failure to comply on that date vested absolute title in the mortgagee.\textsuperscript{1} To relieve against grievous hardships resulting to mortgagors in many instances, equity developed a distinct theory of mortgages, based on the ancient maxim that equity regards the substance rather than the form, and will relieve against forfeitures whenever the party can be fairly compensated by an award of money. The mortgagor was given a right in equity to redeem the property even after his default; it is this right to which the abbreviated term “equity of redemption” refers.

Gradually, the concept arose in equity that certain security transactions, wherein the debtor pledged his property to the repayment of an obligation, could be effectuated, although title to the property did not pass to the creditor. No legal right existed in the creditor; merely an equitable right, \textit{in personam}, to compel the debtor to apply the subject of security to the debt. This form of security transaction has come to be known as an equitable mortgage.\textsuperscript{2}

\textsuperscript{184} New York is the only state making bail jumping a crime. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 127 n. 97 (1947).

\textsuperscript{1} POMEROY, EQUITY JURISPRUDENCE § 1179 (5th ed. 1941).