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Peace Bond--A Questionable Procedure for a Legitimate State Interest

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said that "all law is couched in general terms, but there are some cases upon which it is impossible to pronounce correctly in general terms."[100] Since experts are now able to give reliable, detailed testimony concerning the separate value of timber and minerals, it only seems logical that appellate courts should uphold the admissibility of such evidence where proper safeguarding instructions are given by the trial judge.

Roger D. Graham

Peace Bond — A Questionable Procedure for a Legitimate State Interest

I. Legacy from the Time of The Canterbury Tales

In the time when Chaucer was creating literary history in England with *The Canterbury Tales,*[1] King Edward III was creating judicial history, and perhaps a judicial albatross, with the peace bond.[2] Just as *The Canterbury Tales* survived the centuries and became a familiar part of our life, so has the peace bond. Today, in West Virginia, the peace bond operates as the common man's route to "justice."[3] The peace bond is used as the answer to altercations between spouses, neighbors, or strangers.

In practice, the peace bond is analogous to the old medicine man's claims for his "cure-all" tonic. However, notwithstanding its common law origin or its presence in most states,[4] this practice should

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[100] Aristotle, Politics Bk. III, Ch. 16, 1287a, 24 et. seq.; Nicomachean Ethics Bk. V, Ch. 10, 1137b, 13-31.

[1] Geoffrey Chaucer is believed to have lived from 1340 to 1400. 5 Encyclopedia Britannica 354 (1970).

[2] During this period mercenaries pillaged an English countryside already disrupted by war, famine, and plague. As a result Parliament enacted the Statute of Westminister, 34 Edw. 3, c.1 (1360), assigning "in every County of *England* . . . for the keeping of the peace, one Lord, and with him three or four of the most worthy in the county . . . ." Note, *Peace and Behavior Bonds—Summary Punishment For Uncommitted Offenses,* 52 Va. L. Rev. 914 (1966).

[3] Obtaining a peace warrant in West Virginia is a simple matter. The individual goes to the local justice of the peace, makes a complaint, pays his money and a warrant is issued. Later a hearing is held, in which the complainant and the defendant appear before the justice. Unlike trials before a circuit court judge, the whole process in the peace bond proceeding is very informal, and the usual citizen has little hesitation in instituting such an action.

[4] Ala. Code tit. 15, § 401 (1958); Alas. Code § 12.60040 (1962); Ariz. Rev. Stat. Ann. § 13-1221 (1956); Ark. Stat. Ann. § 42-215 (1964); Cal.

be re-examined in view of the limits of permissible government interference with man's liberty.

Unfortunately, because peace bond proceedings are seldom appealed,[5] the West Virginia Supreme Court of Appeals has rarely dealt with the issue. Thus, a hypothetical situation may facilitate examinating the constitutionality of the procedure.

The defendant husband has a history of excessive drinking. His wife causes a warrant to be issued by a justice of the peace charging him with an assault against her.[6] A hearing on the charges

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PEN. CODE § 701 (1960); COLO. REV. STAT. ANN. § 39-2-1 (1963); CONN. GEN. STAT. REV. § 54-5 (1958); DEL. CODE ANN. tit. 11, § 5903 (1953); FLA. STAT. § 37.21 (1961); GA. CODE ANN. § 76.21 (1961); ILL. REV. ANN. STAT. ch. 38, § 200-02 (1971 Supp.); IDAHO CODE ANN. 19-206 (1948); IOWA CODE Ann. § 760.1 (1950); LA. CODE, CRIM. PROC. art. 27 (1966); ME. REV. STAT. ANN. ch 15, § 1706 (1964); MD. ANN. CODE art 52, §46 (1970); MASS. GEN. LAWS ANN. ch. 275, § 2 (1959); MICH. STAT. ANN. § 28.1155 (1954), MINN. STAT. ANN. § 625.02 (1947); MISS. CODE ANN. § 2583 (1956); MO. REV. STAT. ANN. § 542.030 (1953); MONT. REV. CODE ANN. § 94-5101 (1947); NEB. REV. STAT. § 170.060 (1963); N.Y. CODE CRIM. PROC. § 84 (1971); N.M. STAT. ANN. § 36-14-1 (1964); N.C. GEN. STAT. § 15-29 (1953); N.D. CENT. CODE § 29-02-06 (1960); OHIO REV. CODE ANN. § 2933.02 (1954); OKLA. STAT. tit. 22, § 41 (1969); ORE. REV. STAT. § 145.120 (1969); PA. STAT. ANN. tit 19 § 23 (1964); R.I. GEN. LAWS ANN. § 12-4-3 (1956); S.D. CODE § 34.0302 (1960 Supp.); TENN. CODE ANN. § 38-302 (1955); TEX. CODE CRIM. PROC. art. 7.01 (1966); UTAH CODE ANN. § 77-4-1 (1957); VA. CODE ANN. § 19.1-20 (1960); WASH. REV. CODE ANN. § 10.13.020 (1961); WYO. STAT. ANN. § 7-58 (1957).

KAN. GEN. STAT. ANN. § 62-202, repealed 1970; WIS. STAT. ANN. § 962.02, repealed 1970.

[5] The reason peace bond proceedings are rarely appealed is that one must post a recognizance bond before an appeal can be taken, and if one can not post the bond and is subsequently sent to jail, naturally one is denied the appeal. *See* W. VA. CODE ch. 62, art. 10 § 3 (Michie 1966).

However, the United States District Court for the Northern District of West Virginia, recently decided a case involving the peace bond statutes. In *Roberts v. Janco*, Civil No. 71-97-E (N.D. W. Va. Dec. 22, 1971), the petitioner, a 25-year-old woman, sought habeas corpus relief from a jail sentence imposed after she pleaded guilty to the allegations in a peace warrant, and then was unable to post a bond to keep the peace. Judge Maxwell although upholding the constitutionality of the statutes held that defendants in peace bond proceedings have a right to counsel. In considering the petitioner's due process and equal protection arguments, he said "the legislature has the opportunity to consider the possibility of statutory changes in light of these constitutional challenges."

[6] Specifically, the statute setting forth the initial procedure is:

> If complaint be made to any justice, that there is good cause to fear that a person intends to commit an offense against the person or property of another, he shall examine the complainant on oath, and any witnesses who may be produced, reduce the complaint to writing, and cause it to be signed by the complainant. If it appear proper, such justice shall issue a warrant, reciting the complaint, and require the person complained of forthwith to be apprehended and brought before him or some other justice of the county.

W. VA. CODE, ch. 62, art. 10, § 2. (Michie 1966).

is held before the justice.[7] Upon determination of defendant's guilt, a recognizance to keep the peace, in the amount of $500, is set. Upon the husband's failure to post the recognizance bond for lack of funds, he is sent to jail.[8]

The object of the peace bond statutes is to prevent future acts of violence. Anyone can make a complaint to a justice of the peace that he has reason to believe someone will harm him, and the justice will issue the warrant. At a hearing, if it appears to the justice that the defendant has performed some act which justifies the complainant's trepidation, the defendant is required to give a recognizance, or, if unable, to go to jail for a term not to exceed one year. In the stated hypothetical the defendant went to jail, not because of the act committed, but because he had no money. The statute is clear — if money is unavailable, jail is the only alternative. However, it is necessary to follow the procedure one step further to appreciate the full effect of the inability to post the recognizance.

"A person from whom such recognizance is required may *on giving it*, appeal to the circuit court of the county . . . ."[9] Thus, *only if* the recognizance is tendered may the defendant appeal to a higher court. The right of the defendant to appeal is dependent upon his financial ability to post a recognizance bond.

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[7] "When such person appears, if the justice, on hearing the parties, consider that there is not good cause for the complaint, he shall discharge such person, and may give judgment in his favor and against the complainant for his costs. If he considers there is good cause therefor, he may require a recognizance of the person against whom it is, and give judgment against him for the costs of the prosecution, or any part thereof; and, unless such recognizance be given, he shall commit him to jail, by a warrant, stating the sum the time for and in which the recognizance is directed. A person from whom such recognizance is required may, on giving it, appeal to the circuit court of the county; and in such case the justice from whose judgment the appeal is taken shall recognize such of the witnesses as he may deem proper.
W. VA. CODE, ch. 62, art. 10, sec. 3 (Michie 1966).

[8] A person not giving and for whom no other person gives, a recognizance to keep the peace shall be committed to jail. He shall be discharged therefrom when such recognizance is given before the court or justice, or when the period for which it was required has elapsed, or when the discharge of such person is directed by the court or justice having jurisdiction thereof.
W. VA. CODE ch. 62, art. 6, § 2 (Michie 1966).
Every recognizance to keep the peace shall be conditioned to the effect that the person of whom it is taken shall keep the peace and be of good behavior for such time, not exceeding one year . . . .
W. VA. CODE ch. 62, art. 6, § 1 (Michie 1966).

[9] W. VA. CODE ch. 62, art. 10, §3 (Michie 1966) (emphasis added).

It is the purpose of this note to determine whether this system passes constitutional muster when viewed in light of equal protection and due process concepts.

II. Equal Protection Analysis

The dilemma of the indigent in the American judicial system has received increased attention recently in both civil and criminal cases. Frequently, the equal protection clause of the fourteenth amendment has been invoked to assure the protection of the indigent's rights. For instance, the Supreme Court in *Harper v. Board of Education*[10] declared the Virginia poll tax unconstitutional, concluding that a state violates the equal protection clause whenever it makes the affluence of the voter or payment of any fee an electoral standard. In the criminal context, *Griffin v. Illinois,*[11] *Douglas v. California,*[12] *William v. Illinois,*[13] and *Tate v. Short*[14] represent the landmark equal protection cases. The equal protection clause of the fourteenth amendment demands that people in like positions be treated the same under the law: wealth should not determine the outcome of a case. In *Griffin,* the Supreme Court held that because a transcript was necessary to obtain an appeal, an indigent prisoner desiring to appeal must be provided a free transcript. The requirement of a transcript to appeal a conviction is analogous to the requirement of posting a recognizance bond before an appeal can be granted. In *Griffin,* as in the hypothetical situation, lack of money resulted in loss of liberty and denial of equal protection. Thus, it seems to follow that if *Griffin* violates the equal protection clause, the peace bond proceeding also violates the equal protection clause.

The Court's holding in *Williams* similarly illustrates the unconstitutionality of the peace bond statutes. Williams was given the maximum sentence for petty theft under Illinois law — one year's imprisonment and a $500 fine, plus court costs.[15] After the expiration of the year's imprisonment, William's inability to pay the fine forced him to remain in jail to work off the fine. Mr. Chief Justice Burger, writing for the majority, used the equal protection rationale to declare the extended imprisonment invidious dis-

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[10] 383 U.S. 663 (1966).
[11] 351 U.S. 12 (1956).
[12] 372 U.S. 353 (1963).
[13] 399 U.S. 235 (1970).
[14] 401 U.S. 395 (1971).
[15] 399 U.S. 235 (1970).

crimination because it subjected some criminals to *additional* confinement solely because they were poor.[16]

In *Morris v. Schoonfield,*[17] the Court made its first application of the *Williams* doctrine. More importantly, four justices[18] joined in a concurring opinion, stating:

> [T]he same constitutional defect condemned in *Williams* also inheres in jailing an indigent for failing to make immediate payment of any fine, whether or not the fine is accompanied by a jail term and whether or not the jail term of the indigent extends beyond the maximum term that may be imposed on a person willing and able to pay a fine. In each case, the Constitution prohibits the state from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full.[19]

The *Williams* decision and the *Schoonfield* concurring opinion provided the basis for the *Tate* holding that one could not be confined because of inability to pay a fine. In *Tate,* the petitioner who was unable to pay $425 in traffic fines was committed to the municipal prison farm to work off his fines at the rate of $5 per day. The Court, in finding such confinement resulting from indigency unconstitutional discrimination, explicitly adopted the *Schoonfield* concurring opinion as its majority opinion.[20]

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[16] Chief Justice Burger said: "We conclude that when the aggregate imprisonment exceeds the maximum period fixed by statute and results directly from an involuntary nonpayment of a fine or court costs we are confronted with an impermissible discrimination that rests on ability to pay, and accordingly, we vacate the judgment below." *Id.* at 241.

[17] 399 U. S. 508 (1970). The case involved a Maryland statute providing for commitment to jail for nonpayment of fines and costs. In the lower court, a three-judge panel had held the statute itself valid, but ordered the release of the defendants because they were denied the opportunity to reveal their indigency. Morris v. Schoonfield, 301 F. Supp. 158 (1969). The Supreme Court, noting the Maryland statute had changed, vacated and remanded the judgment to the district court for reconsideration in light of the new legislation and *Williams.*

[18] Justice White wrote the concurring opinion and Justices Douglas, Brennan and Marshall joined.

[19] 399 U.S. at 509.

[20] The Court said:

> In Morris v. Schoonfield, 399 U.S. 508 . . . four members of the Court anticipated the problem of this case and stated the view, which we now adopt, that "the same constitutional defect condemned in *Williams* also inheres in jailing an indigent for failing to make immediate payment of any fine. . . ."

Tate v. Short, 401 U.S. 395, 396 (1971).

Is there a distinction between a fine and a recognizance bond that could operate to make the *Tate* and *Williams* decisions inapplicable to the peace bond proceedings? In the *Tate* situation, after a crime had been committed, the wrongdoer was punished by imposing a sentence in the form of a fine. If the wrong doer was an indigent, the fine converted into a jail term. In the peace bond situation, after a crime has allegedly been committed, the accused is punished by requiring the posting of a bond. If the defendant is an indigent, the bond converts into a jail term. While the sentence and the bond are distinguishable, the former relating to prior criminal acts and the latter to future criminal acts, the unconstitutional factor remains constant, *i.e.*, conversion into a jail term solely on the basis of indigency.

III. Due Process Analysis

Statutes can not arbitrarily infringe upon a constitutionally protected interest.[21] Due process requires that before an individual can be deprived of his liberty certain requirements must be met. Therefore, the West Virginia peace bond proceeding will be analyzed according to substantive and procedural due process standards.

A. Substantive Due Process

Due process dictates that a penal statute be definite in its wording, clearly outlining proscribed conduct. In *Connally v. General Construction Co.*,[22] the Supreme Court said:

> [T]he terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. . . . And a statute which either forbids or requires the doing of an act in terms so vague that men of common

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[21] Williams v. Illinois, 399 U.S. 235, 245 (1970) (concurring opinion). It is interesting to note that Mr. Justice Harlan concurred in *Williams* on the basis that the statute violated the due process clause, rather than the equal protection clause. He believed that the state legislatures had impermissibly affected an individual's liberty. He examined the state's interest in having the statute and determined that the state's interest did not outweigh the individual's right to be free. In *Tate*, Justice Harlan again concurred on the basis of his *Williams* opinion.

[22] 269 U.S. 385 (1926). This case involved a suit to restrain state and county officials of Oklahoma from enforcing a statute purporting to prescribe a minimum wage for workmen employed by contractors in the execution of contracts with the state. The statute imposed a fine or imprisonment for each day's violation, and the United States Supreme Court held the statute void for uncertainty.

> intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.[23]

The peace bond statutes provide that if there "is good cause to fear that a person intends to commit an offense"[24] a complaint may be sworn out and if the justice determines there is "good cause," a recognizance is required.[25] The statute contains three nebulous terms: "good cause," "fear," and "offense."

First, the "good cause" standard used to justify the issuance of a complaint and subsequently to require a recognizance is so vague that it leaves the justice of the peace with wide discretion in the application of the law. For example, under the good cause standard, is a verbal threat against one's life enough, or is a physically violent act required? Because the statute does not give the justice any clear guidelines, he must speculate as to the meaning of the statute. But more importantly, the individual must also speculate.

Second, is a complainant's testimony of 'fear" justification for the issuance of a peace warrant? By what standard is fear to be measured? Is the complainant's bare statement that he is afraid sufficient, or must there be some evidence to justify fear in a reasonable man?[26] Once again, the justice is left with wide discretion and inadequate guidelines.

Third, fear that a person intends to commit an "offense" offers no indication of what acts are proscribed or what conduct is expected; it offers no guidelines for behavior. As a Florida district court said in striking down a disorderly conduct statute, "Criminal statutes that do not clearly define the outlawed conduct . . . [compel] enforcement officers, . . . to guess at what violates the law, thus either setting the stage for arbitrary police action or, if police and prosecutors evolve their own rational standards of enforcement, constituting an inappropriate delegation of criminal lawmaking authority."[27] The Supreme Court in *Connally* struck down a law that

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[23] *Id.* at 391.
[24] W. VA. CODE ch. 62, art. 10 § 2 (Michie 1966).
[25] W. VA. CODE ch. 62, art. 10, § 3 (Michie 1966).
[26] In *State v. Cowger,* 83 W. Va. 153, 98 S.E. 71 (1919), the West Virginia court held that a peace warrant must state facts or circumstances which show the fear is well-founded or it should be quashed. It does not appear that such a decision established a clear-cut standard.
[27] Severson v. Duff, 322 F. Supp. 4, 6 (1970). The petitioner in this habeas corpus case was convicted and adjudged guilty of disorderly conduct

imposed a fine or imprisonment on those who did not comply with a minimum wage statute. The Court recognized that "[t]he dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions."[28]

As these varibles — good cause, fear, and the indefiniteness of what constitutes an offense — give rise to too many uncertainties, the peace bond statute does not meet the requirements of the United States Constitution.

However, one more factor must be considered. In some instances, the United States Supreme Court has found some statutes, in themselves vague, to be definite enough if any of the following tests are met: Could the person alleging vagueness have known of the statute? Could he have perceived its ambiguity without much inconvenience and have done something which would have made clear in his particular case the statute's meaning? Could he have complied with the statute under any interpretation?[29]

Because the "good cause" standard and "fear that a person intends to commit an offense" are not capable of precise definition by any interpretation, West Virginia's peace bond statute does not fall within this "curing doctrine."

B. Procedural Due Process

The degree of procedural safeguards that must be afforded a defendant vary with the nature of the proceeding. In civil actions, at the very least a defendant has a right to notice and a fair hearing.[30] In a criminal proceeding the defendant is afforded a greater degree of procedural protection.[31] Therefore, the protection afforded a

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in violation of Florida statutes. The statutes proscribed acts which are of a nature to corrupt public morals or outrage a sense of public decency or affect the peace and quiet of persons who may witness them. The statutes were declared unconstitutional because of vagueness and overbreadth.

[28] 269 U.S. 385, 393 (1926).

[29] Note, *The Void for Vagueness Doctrine,* 109 U. PA. L. REV. 67, n.99 (1960).

[30] *See* Goldberg v. Kelly, 397 U.S. 254 (1970). The question before the Court was whether a state that terminated public assistance payments to a particular recipient without affording him the opportunity for an evidentiary hearing prior to termination denied the recipient due process. The Court held that a hearing was required before the benefits could be terminated. *See* Comment, 73, W. VA. L. REV. 80 (1971).

[31] *See* Duncan v. Louisiana, 391 U.S. 145 (1968) (right to jury trial); Washington v. Texas, 388 U.S. 14 (1967) (right to subpoena witnesses);

defendant in a peace bond proceeding will vary depending on its classification as civil or criminal. The West Virginia Supreme Court of Appeals has never made such a determination, but it has recognized the penal nature of such a proceeding.[32] It is entirely possible that the court today might not concern itself with the classification of the peace bond proceedings as criminal or civil. Instead the court might look to the ultimate effect of the proceedings upon the defendant and rule that it is so grave in nature (potential confinement in jail up to one year) that the defendant is entitled to the same procedural safeguards that protect a defendant in any civil proceedings plus some added safeguards found in a criminal proceeding such as proof beyond a reasonable doubt and the presumption of innocence.

To convict the accused, due process requires that proof must be established beyond a reasonable doubt.[33] Under the West Virginia practice in the peace bond proceedings, the degree of proof needed to require a recognizance and subsequently send the defendant to jail is no more than good cause initially required to issue the warrant. The accused can in effect be adjudged guilty on no greater evidence than that required to support his initial arrest. Such a practice is clearly violative of due process.

Malloy v. Hogan, 387 U.S. 1 (1964) (privilege from self-incrimination); Pointer v. Texas, 380 U.S. 400 (1963) (confrontation and cross-examination); Gideon v. Wainwright, 372 U.S. 235 (1963) (right to appointed counsel in a felony trial); Powell v. Alabama, 287 U.S. 45 (1932) (fair tribunal); Tumey v. Ohio, 273 U.S. 510 (1927) (fair trial); Coffin v. United States, 156 U.S. 432 (1895) (presumption of innocence); Miles v. United States, 103 U.S. 304 (1881) (proof beyond a reasonable doubt); State v. Beatty, 51 W. Va. 232, 41 S.E. 434 (1902) (notice).

[32] Judge Poffenbarger in *State v. Gilliland*, 51 W. Va. 278, 280-81, 41 S.E. 131-32 (1902), stated:

> "It is said by Blk. Com., Book IV, 252 that this jurisdiction falls under the title of preventive justice, and he there discriminates between preventive justice and punishing justice. But this certainly does not mean a judgment requiring such recognizance is not punishment . . . It would be difficult to class it (recognizance bond) as anything other than punishment. When the bond is required and not given, the consequence is imprisonment. It is required under pain of punishment. How could it be anything else than punishment . . .?

[33] Miles v. United States, 103 U.S. 304, 312 (1881). In that case involving a bigamy trial, the Court said, "The evidence upon which a jury is justified in returning a verdict of guilty must be sufficient to produce a conviction of guilt, to the exclusion of all reasonable doubt." Because the Hawaii peace bond statute failed to require this degree of proof, the Supreme Court of Hawaii struck down HAWAII REV. STAT. ch. 709, Part II, "Bond to keep the Peace." Santos v. Nahiwa, civil no. 5054 (Supreme Court of Hawaii, July 6, 1971).

In conjunction with the proof beyond a reasonable doubt standard due process presupposes innocence until a person is found guilty,[34] but the West Virginia peace bond statutes shift the burden of proof to the accused. The hearing to determine whether a bond should be required of a defendant amounts to only a rehearing of whether there is *good cause* to support the original complaint and warrant for arrest. The accused appears before the justice confronted by a showing of facts and circumstances already sufficient to require recognizance. If the accused is to avoid adjudication against him, he must show that complainant's *good cause* does not exist, which necessarily shifts the burden of proof.

IV. Conclusion

The West Virginia peace bond statutes have a practical purpose. They provide a speedy remedy to settle minor disputes. However, this need cannot and must not be allowed to create an abuse of the accused's constitutional rights. Presently this proceeding lacks the fundamental requisites of equal protection and due process. Thus, the statutes should be revised to meet these constitutional demands.

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[34] In *Coffin v. U.S.*, 156 U.S. 432 (1895), the Court called the presumption of innocence the bedrock principle of criminal law.

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