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Mission Impossible: The Indigent Posts Bail

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court's activity, the verdict has to be reached by extended discussions which may last for days.

If a person is taken in the very act of committing a serious crime such as manslaughter or adultery, the damaged person may take the law into his own hands, and in the subsequent law-court the provocation for his act will be taken into account. He will either be acquitted or receive a light sentence, even though his retaliation may exceed the usual punishment.

Conclusion

It must be remembered that many of these customs are being deserted by the new westernized African States, in preference to the so-called Western customs; and that is what this paper is about. My opinion is that Africa should not abandon her social, political, economic and legal customs only to import new ones from abroad, but rather she should try to improve or develop her own. In short, I am saying that African customs as outlined in this work are worth the efforts of preservation and development.[1]

Mission Impossible: The Indigent Posts Bail

The concept of equal justice under law for all persons has little meaning for many of the hardcore people in America. Frequently unaware of his legal rights and responsibilities, the indigent is unaccustomed to using the services of a lawyer, reluctant to seek help, and mainly unable to pay legal fees.

One need not be poor to see the problems confronting the poor man but unless one is poor, he can neither appreciate nor understand the needs and the desires of the indigent.

The indigent is beyond an accurate description or comprehensive definition. "The laws of some states distinguish between paupers and

[1] Anderson, J. D., The Future of Customary Law in Africa, Leiden: Afrika Institut, 1955; Anderson, J. N. D., Changing Law in Developing Countries, London, Allen and Unwin, 1963; Ellis, G. W., Negro Culture in West Africa, New York, Neale Publishing Company, 1914; Elias, T. O., The Effect of British Colonial Law in Africa, London, Crown Agents Publishers, 1957; Foreign Bulletin of African Politics, November 2, 1964; Guggisburg, Sir Gordon, The Gold Coast: A Review of Native Customs, London, Crown Agents Publishers, 1927; Johnston, Sir Harry, Liberia, 2 volumes, London, Allen and Unwin, 1920; Mancheste, A. M., The Nature of African Customary Law, Manchester University Press, 1956.

indigent persons, the latter being persons who have no property or source of income sufficient for their support aside from their own labor, though self-supporting when able to work and in employment."[1] A definition adequate enough, although still not an all-inclusive one for the needs of this paper could be expressed as follows: an indigent is a human being who cannot, because of his very limited or often non-existent means, provide for adequate legal aid or bail.

It is a shame that a man's liberty prior to trial depends upon his worth. Too often the indigent is stereotyped as a bum, a lazy no-good, a person who refuses to work, or a person who can always be found on Main Street, U.S.A., begging for money. Too often also, this type of hazy picture is painted by people who are not qualified to discuss the poor man's problems. The following section will attempt to discuss some of the problems the indigent faces when he seeks pre-trial release. Frequently, this is an impossible mission for the indigent. In countless situations the indigent must rot in jail until justice decides to reach him, often entirely too long a wait, even for justice.

The Indigent Posts Bail

"The concept of bail arises out of a desire to balance the interest of the individual citizen who has been accused and the interest of society that he stand trial."[2] The practical purpose, however, should allow an accused, whether he be a rich man or a poor man, to enjoy his liberty until he is convicted at a trial. Most states through their constitutions guarantee the right to bail. Some states provide this right by statute.[3] Four states, following the common law, allow complete discretion with the judge in setting bail.[4] "The American judge's discretion in setting pre-trial bail in non-capital cases has consistently been interpreted to allow latitude only in determining the amount of bail."[5]

The word "bail" is derived from the French word, "bailer." It means "to deliver." Probably bail evolved "from the institution of hostageship where hostages were handed over as security for a promise."[6] Usually

[1] People v. Schoharle County, 121 N.Y. 345, 24 N.E. 830 (1890).
[2] U.S. *ex rel.* Rubinstein v. Mulchay, 155 F.2d 1002, 1004 (1946).
[3] *E.g.* Georgia Code Annotated, section 27-901 (1922).
[4] *E.g.* North Carolina General Statutes, section 15-102 (1953).
[5] A Report to the National Conference on Bail and Criminal Justice, Bail in the U.S., Washington, D.C. (May 27-29, 1964).
[6] Dettass, Concepts of the Nature of Bail in English and American Criminal Law, 6 U. TORONTO L.J. 385 (1945-46).

the promisor, later becoming the surety, became the caretaker or custodian of the accused, a power and position still prevalent in England and America today. After the Conquest, the surety or promisor was obligated to promise to pay a certain specified sum if the accused was not produced. Technically, when the accused was committed in such a way to the custody of his promisor, he was his surety's bail; "while if the surety simply gave security for the accused's appearance he was said to give mainprise."[7] Today, however, bail is most commonly referred to as the bond given and no longer are the sureties bound. The personal surety in America has given way to the commercial surety. We tend to stress security via money rather than via a man's promise. "To this extent the law of bail has become more rich man's law than it was in common law England."[8]

The Judiciary Act of 1789 was the first Act establishing a federal right to bail. Section 33(b), 1 Stat. 73, 91, provided:

> (U)pon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death in which case it shall not be admitted but by the supreme or circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion therein, regarding the nature of the offense, the circumstances of the offense, and of the evidence and of the usage of the law.

This act was passed by Congress during the same session but prior to the adoption of the Eighth Amendment to the Constitution, which provides that "bail shall not be excessive." Thus, we can see that the Constitution of the United States does not specifically grant a right to bail, only that bail when given shall not be excessive.

Judge Holtzoff in the Trimble Case stated:

> The right to bail before trial, except in capital cases, is guaranteed by the Bill of Rights. The Eighth Amendment to the Constitution of the United States, which is part of the Bill of Rights, provides that "excessive bail shall not be required." This clause has invariably been construed as guaranteeing the right to bail by necessary implication, and not merely meaning that when allowed, bail shall not be excessive.[9]

Today, Rule 46 of the Federal Rules of Criminal Procedure is largely a counter-part of the Judiciary Act of 1789. Rule 46 in its pertinent part provides:

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[7] Holdsworth, A History of English Law, 525-26 (1924).

[8] Sullivan, Proposed Rule 46 and the Right to Bail, 31 GEORGE WASHINGTON L. REV., 919-923 (1962-63).

[9] Trimble v. Stone, 187 F. Supp. 483, 484 (D.D.C. 1960).

> A person arrested for an offense not punishable by death shall be admitted to bail . . .[10] whereas a person arrested for an offense punishable by death MAY[11] be admitted to bail as a matter of judicial discretion.

Today bail means money, not promises. As early as 1912, the United States Supreme Court recognized that "the bondsman's interest to produce the body of the principal in court is impersonal and wholly pecuniary."[12] Idealistically this system of bail has been stated thus:

> The practice of admission to bail, as it evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary the spirit of the procedure is to enable them to stay out of jail until the trial has found them guilty. Without this conditional privilege, even those wrongfully accused are . . . handicapped in counsel, searching for evidence and witnesses, and preparing a defense.[13]

Theoretically or idealistically, the above description of our system is sheer utopia. Practically, however, it misses the mark. It it true that bail should be a device for keeping the accused out of jail, being put in that position in the first place usually on mere accusation. But is it such a device? Theoretically the spirit of the system is to enable the accused, whether he be rich or poor, to stay out of jail until the trial has found him guilty. But in practice does the system work that way? For the most part, the answer to both of the above questions is in the negative. Let's take the usual case. The indigent is arrested for a misdemeanor. The maximum penalty for the violation is 30 days in the county jail. Bail is set at $100. The average citizen has the necessary amount and means to post the bail. He may also have friends who are financially secure. The indigent, on the other hand, is by no stretch of the imagination the average man or citizen. His friends may suffer the same destitute plight. One hundred dollars to the indigent represents an impossible sum to acquire quickly. The indigent, not being able to post bail, or a bondsman not having any desire to act as a surety for the accused, must simply remain in jail until his trial. It is very possible for the accused to spend 40-80 days in detention just waiting for his trial. Where is the justice in our system should the accused indigent be found not guilty or even given

[10] Federal Rules of Criminal Procedure, section 46(a)(1).
[11] (Emphasis added.)
[12] Leary v. U.S., 224 U.S. 567, 575 (1912).
[13] Mr. Justice Jackson in his concurring opinion in Stack v. Boyle, 342 U.S. 1, 7, 8 (1951).

the maximum sentence? I can see none. So when we speak of what the system should do, we must also flip the coin to see what in reality it does do.

There are several points which underlie the theory of bail in America today. These are:

> 1. "To ensure appearance at trial,
> 2. The fact that some defendants are more likely than others to flee should not condone the denial of bail, and
> 3. Bail cannot be set excessively high."[14]

It has been held that "the inability of a defendant to raise bail gives the defendant no recourse but to move for trial."[15] But as pointed out earlier, the defendant who even moves for trial, may stay in jail waiting for the trial for a longer period than the maximum sentence could possibly bring him. The Federal Rules of Criminal Procedure set up certain standards for the amount of bail. "If the defendant is admitted to bail, the amount of bail should be such as in the discretion of the commissioner or the court, or judge, or *justice* will insure the presence of the defendant, having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, and the character of the defendant."[16] If the word *justice* in the above quote means a person who administers the law, then that is one thing; but if the word *justice* is used as meaning fairness, or to treat fairly or with due appreciation, then that is something else. If the latter definition is presumed, then I submit that a bail set at $25 for an indigent is unfair.

A major attack on the present bail system has been raised on behalf of the indigent defendant, who, from lack of funds and/or friends, cannot raise bail himself or obtain it from a bondsman. The continuing validity of requiring financial bail or security from an indigent has recently been challenged in the Bandy Case, in which Mr. Justice Douglas, acting as Circuit Justice, raised the interesting question:

> To continue to demand a substantial bond which the defendant is unable to secure raises considerable problems for the equal administration of the law. . . . Can an indigent be denied freedom where a wealthy man would not, because he does not have enough property to pledge for his freedom?[17]

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[14] Stack v. Boyle, 342 U.S. 1 (1951).
[15] U.S. v. Runrich, 180 F.2d 575, 576 (2d Cir. 1950).
[16] Federal Rules of Criminal Procedure, section 46(c).
[17] U.S. v. Bandy, 81 S. Ct. 197, 198 (1960); also see 82 S. Ct. 11 (1961).

Some authorities have suggested that requiring monetary bail an indigent cannot post may be excessive by definition, in violation of the Eighth Amendment. Others believe that to condition release on price that some can pay and others cannot, discriminates between rich and poor so as to amount to a denial of equal protection under the law.

These arguments coupled with the idea that a man is innocent until proven guilty at a trial, and some recent Supreme Court cases,[18] have provoked the suggestion that "monetary bail may at some future date (hopefully soon) be found unconstitutional when applied to the indigent."[19]

Some Suggestions

Recently there have been many projects initiated to help the indigent with the bail problem. The most successful one, in this writer's opinion, is the Vera Foundation's Manhattan Bail Project. In the fall of 1961, the Vera Foundation pioneered the fact-finding process in New York City by launching a program in the Felony Part of Magistrate's Court (now Criminal Court). Assisted by a $115,000 Ford Foundation grant and staffed with New York University law students under the supervision of an institute director, the Project has done wonders in the City since it began operation. The work of the project has been best described by the Vera Foundation's director, Mr. Herbert J. Sturz:

> The Manhattan Bail Project works like this: when a prisoner is brought to the detention pen prior to his first court appearance, a law student checks his previous record and current charge with the arresting officer to see if he is bailable in the Criminal Courts. The law student also determines whether he has been charged with one of the certain offenses excluded from the experiment because of the special problems they present (homocide, most narcotics offenses, and certain sex crimes). If the prisoner is eligible, he is interviewed to determine whether he is working or not, how long he has held his job, whether he supports his family, whether or not he has contact with any relatives in the city. . . . After the interview the defendant is scored according to a point weighted system. If the interview indicates that the accused would be a good release on recognizance risk, the interviewer obtains written permission from the prisoner to get in touch with a friend, relative or employer, for the purpose of verifying the information. Verifica-

[18] Griffen v. Illinois, 351 U.S. 12 (1956); Coppedge v. U.S., 369 U.S. 438 (1962); Gideon v. Wainwright, 372 U.S. 335 (1963); Hardy v. U.S., 375 U.S. 277 (1964); see also U.S. v. Bandy, *ibid.*, p. 9.

[19] A Report to the National Conference on Bail and Criminal Justice, Bail in the U.S., Washington, D.C. (May 27-29, 1964).

> tion is done either by phone or in the visitor's section of the court room. An interview usually takes about 10 minutes, and a verification less than an hour. If the case is still considered a good risk after verification, a summary of the information is sent to the arraignment court. Copies of the recommendation and supporting information are given to the judge, the district attorney, and the indigent's counsel.[20]

Approximately only one per cent of those released with the recommendation of the Vera Foundation have failed to appear during the first two years of the Project. "The Manhattan Bail Project has demonstrated that a defendant with roots in the community is not likely to flee, irrespective of his lack of prominence or ability to provide some type of monetary security."[21] I am inclined to believe that such a project as the one just discussed serves two useful purposes:

1. It frees numerous defendants who would otherwise be detained for the entire period prior to arraignment and trial.
2. It provides comprehensive and nearly accurate statistical data, never before obtainable, on such questions as what criteria are meaningful in deciding to release a defendant, how many defendants paroled on particular criteria will show up for trial, and a vast amount of other valuable data.

A second suggestion is the proposed amendment to Rule 46(d) of the Federal Rules of Criminal Procedure. The proposed amendment to the Rule would authorize the release of the defendant without security upon such conditions as may be prescribed to insure his appearance. The Advisory Committee's Note indicates that the language is designed to be flexible enough to permit individuality and tailored conditions of release. The amendment to this section "would allow the cash sum to be paid to be that amount which is substantially less than the bail asked for in the first instance."[22]

The third sound suggestion is the "summons in lieu of arrest" idea. By definition, release on recognizance (r.o.r.) is a device to restore the liberty of an accused who has been arrested and brought before a community magistrate. To bypass the arrest and bail in the less serious offenses, extended use of the summons or citation has long been urged.

[20] Proceedings and Interim Report of the National Conference on Bail and Criminal Justice, 44-45 (1964).

[21] Paulsen, Pre-trial Release in the United States, 66 COLUMBIA LAW REVIEW 109 (1966).

[22] Sullivan, Proposed Rule 46 and the Right to Bail, 31 GEORGE WASHINGTON LAW REVIEW 919, 936 (1962-63).

"Freeing the accused on a police citation to appear for arraignment or trial in a simple misdemeanor case can avoid jail altogether. It also frees the police officer to remain on his beat. Released defendants are warned that in the case of default, a bench warrant will be issued."[23]

The last suggestion I will discuss is known as the "credit against sentence" concept. Recognizing the injustice and inequality wherever discretionary credit is not given, some legislatures have taken action to correct this deficiency. In 1960, Congress amended U.S.C., Title 18, section 3568, to provide for a mandatory credit for any days spent in custody prior to the imposition of sentence . . . for want of bail. However, the amendment is limited to offenders sentenced under laws which require the imposition of a mandatory minimum sentence.

I must point out, however, even with this widespread movement for change in our present system of bail, it remains generally true that persons arrested, who can afford to post a bail bond are able to enjoy freedom, while the indigent must remain in jail. Under the existing law the mere fact that bail has been set for a penniless person does not establish that the bail is excessive. A passage which I feel adequately sums up the bail system today comes out of the Butler Case:

> The theoretical equality of the right to bail when all are not financially equal thus has become in reality a deep and wounding social inequality, increasingly oppressive to the poor and the vagrant. It brings to mind Anatole France's ironic epigram that the law in its majestic impartiality forbids the rich and poor alike to sleep under bridges.[24]

Deficiencies in the Civil Rights Act of 1964 Title VII, Equal Employment Opportunity

Introduction

The dramatic events erupting from our Negro ghettos in the past and threatening to erupt in the future are pointers to the fundamental alienation of working class Negroes from society. An alienated man is often an irrational man, and, in the case of the Negro, there is one main cause of the alienation—the lack of productive and meaningful employment.

Western civilization has developed an achievement-oriented society

[23] A Report to the National Conference on Bail and Criminal Justice, Bail in the U.S., Washington, D.C. (May 27-29, 1964).

[24] Butler v. Crumlish, 229 F. Supp. 565, 568 (E.D. Pa. 1964).