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Bail and Its Discrimination Against the Poor: A Civil Rights Action as a Vehicle of Reform

BAIL AND ITS DISCRIMINATION AGAINST THE POOR: A CIVIL RIGHTS ACTION AS A VEHICLE OF REFORM

INTRODUCTION

The present money-based bail system's most "glaring weakness is that it discriminates against poor defendants, thus running directly counter to the law's avowed purpose of treating all defendants equally."[1] Under the present money-based bail system, the judge sets the amount of bail according to a master bail schedule which is based on the seriousness of the criminal charge and ignores any consideration of the defendant's ability to pay.[2] Since the indigent defendant cannot pay the bail or even a bondsman the standard ten percent premium, he loses his pretrial liberty and languishes in jail awaiting his trial.

The indigent's rights in our criminal process have been recognized and safeguarded by a long series of cases. He is allowed an attorney during interrogation;[3] he is provided an attorney during his trial;[4] and he is guaranteed equal treatment in the appeal process.[5] Moreover he cannot be imprisoned because of his inability to pay a fine.[6] Yet despite this recognition and protection of the rights of indigents in these areas of the criminal proceedings, the question whether the present money-based bail system denies the indigent equal protection remains unanswered by the United States Supreme Court.[7]

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1. REPORT OF THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 131 (1967).

2. The widespread use of schedules that are based on the charge rather than the defendant's ability to pay is well established. ATTORNEY GENERAL COMMISSION ON POVERTY AND ADMINISTRATION OF CRIMINAL JUSTICE, REPORT 62 (1963) [hereinafter cited as Attorney General Report]; D. FREED AND P. WALD, BAIL IN THE UNITED STATES: 1964 9-21 (1964); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 30 (1967) [hereinafter cited as Task Force Report].

3. Miranda v. Arizona, 384 U.S. 436 (1966).

4. Gideon v. Wainwright, 372 U.S. 333 (1963) (felonies); Argersinger v. Hamlin, 407 U.S. 25 (1972) (misdemeanors).

5. Griffin v. Illinois, 351 U.S. 12 (1956); Douglas v. California, 372 U.S. 353 (1962); Lane v. Brown, 372 U.S. 477 (1963); Draper v. Washington, 373 U.S. 487 (1963).

6. Short v. Tate, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235 (1970).

7. Schilb v. Kuebel, 404 U.S. 357 (1971), did not answer this question. In that case the petitioner challenged the constitutionality of the Illinois bail system which provided a method for depositing ten percent of the bail amount with the court. On appearance at trial, the

This question probably remains unheard and unanswered because the usual method of raising the issue in the criminal process is difficult and presents certain shortcomings. Under the criminal process approach, the indigent would have to rely on his already overworked public defender who has difficulty having enough time and resources to defend the indigent adequately on the charges against him without raising the bail issue.[8] Furthermore, even if he could get the issue introduced and decided by the court in his individual case, the court might conclude that the bail was excessive in his individual case but not attack the use of the scheduled bail system in general.

An alternative approach could be bringing a class action in federal court under 42 U.S.C. § 1983.[9] This civil rights approach has distinct advantages over the criminal process approach. First, the civil action provides a broader scope of discovery which would permit the plaintiff to document the reliance by the courts on bail schedules and to demonstrate in general the consequences of pretrial detention on the trial (*i.e.*, higher conviction rates and harsher prison sentences for defendants detained prior to trial). Second, since it can be brought as a class action, it insures a broader impact and relief for all similarly situated indigents. Third, the civil action approach allows the court to design equitable relief to require the institution of a pretrial release system that does not discriminate against the poor.

This note will explore the possibility of bringing a § 1983 action attacking the present money-based bail system. It will discuss the possible procedural difficulties that such an action may present and ways to avoid or overcome them. It will also explore the substantive

accused received ninety percent of this deposit back. The petitioner alleged that the retention of the ten percent of the deposit (one percent of the actual amount of bail set) was a denial of equal protection since a person who paid the full amount of the set bail to the court received the entire amount back on appearance at the trial. The question presented in this note can be distinguished from *Schilb* in at least two ways: (1) the petitioner in *Schilb* was not denied his freedom prior to trial and thus did not languish in jail; (2) the petitioner did not allege that he was indigent or that the ten percent method was used by the poor any more than by the wealthier defendants. (The Court suggested that the ten percent provision may be more attractive to the wealthy than the full amount method.)

8. *See generally* Katz, *Gideon's Trumpet: Mournful and Muffled*, 6 CRIM. L. BULL. 529 (1970).

9. Questions may be raised as to whether there is a proper or sufficiently defined class, but these are typical issues in any class action and are thus not within the scope of this note.

issues of what equal protection standard of review should be employed in such a case and whether the present bail system is constitutional under that test.

PROCEDURAL ISSUES

At least three procedural issues are presented by bringing a § 1983 action against the state bail system and its administration by the county: (1) whether the writ of habeas corpus is the only correct remedy available;[10] (2) whether the federal court should abstain because of comity considerations;[11] and (3) whether the case is mooted if the defendant is tried or released before the federal court hears the case. These procedural difficulties can be surmounted by a precise delineation of the relief sought. The prayer for relief should be confined to a request for (1) a declaratory judgment that since the present bail system relies on money or cash bonds it is unconstitutional, (2) equitable relief requiring the institution of a system which does not rely on money bail or cash bonds and (3) damages against the county for collateral consequences (*i.e.*, loss of job and hardship on the indigent's family). If the relief sought is so defined, the possible procedural difficulties should not thwart a civil action in federal court against the existing money-based bail system.

Preiser v. Rodriguez[12] may at first glance appear to bar a § 1983 action against the bail system and limit the indigent to the remedy of a writ of habeas corpus. In that case the Supreme Court held that

> When a state prisoner is challenging the very fact or duration of his physical imprisonment and the relief he seeks is a determination that he is entitled to immediate or more speedy release from that imprisonment, his sole federal remedy is a writ of habeas corpus.[13]

10. Preiser v. Rodriguez, 411 U.S. 475 (1973). The plaintiffs in that case were state prisoners who brought a § 1983 action alleging that they were deprived of good time credits by the New York State Department of Correctional Services as a result of disciplinary proceedings that were unconstitutional. They sought injunctive relief to compel restoration of the credits, which in each case would result in their immediate release from prison.

11. Younger v. Harris, 401 U.S. 37 (1971). The defendant in a pending criminal trial sought to enjoin the state court trial by bringing an action in the federal court. He alleged that the statute he was being tried under was unconstitutional. The Court held that except for very limited circumstances the federal courts should abstain from enjoining state criminal trials because of comity and federalism considerations.

12. 411 U.S. 475 (1973).

13. *Id.* at 500.

The case of the indigent challenging the constitutionality of the present bail system can be distinguished from the case of a prisoner seeking immediate or more speedy release from prison in at least two ways. First, the indigent is not seeking his guaranteed release from pretrial detention; he is only seeking an opportunity for himself and other indigents to seek release under a fair system which does not discriminate against the poor.[14] Thus, since the indigent is not seeking his automatic release, a § 1983 action, rather than a writ of habeas corpus, is the appropriate remedy.

Second, even if the prayer for relief is construed as requiring the release of the plaintiff in such a case, the indigent is still not necessarily prevented from using a § 1983 action by *Preiser*. The Supreme Court stated that a § 1983 action is the proper remedy for a prisoner who challenges the condition of his confinement rather than the fact of his confinement.[15] If those released on bail are still "in custody," then the plaintiff seeks only to modify the condition of his being in custody and not the fact of being in custody. The term "in custody" is not limited to mere physical restraint.[16] This concept of "in custody" has been expanded by the Court to include a person released on bail or his own recognizance pending the appeal of his conviction.[17] This idea of being "in custody" while one is released on bail has also been employed during the pretrial period.[18] Thus, the indigent is not challenging the fact of being in custody but rather the condition (*i.e.*, physical confinement) of his being in custody. Since the *Preiser* decision allows a § 1983 action to challenge the condition of his confinement, it would not necessarily frustrate the use of a § 1983 action in challenging the present money-based bail system.

The *Younger v. Harris*[19] decision and its conception of comity

14. The desired relief does not require that all accused persons, or even that all indigents, be guaranteed automatic pretrial release. The state still could establish a system where some defendants may be detained prior to trial if they are sufficiently poor risks.

15. 411 U.S. at 499.

16. Jones v. Cunningham, 371 U.S. 236, 240 (1963). The petitioner sought to be released from parole.

17. Hensley v. Municipal Court, 411 U.S. 345 (1973).

18. United States *ex rel.* Russo v. Superior Court, 483 F.2d 773 (3d Cir. 1973); Burris v. Ryan, 397 F.2d 553 (7th Cir. 1968). *Contra*, Matysek v. United States, 339 F.2d 389 (9th Cir. 1964).

19. 401 U.S. 37 (1971); Samuels v. Mackell, 401 U.S. 66 (1971); Perez v. Ledesma, 401 U.S. 82 (1971).

and federalism may also appear on the surface to be an obstacle to the indigent's challenge in this situation. In *Younger v. Harris* and the series of cases that followed, the Supreme Court held that federal courts will not interfere with pending state criminal prosecutions unless irreparable injury is "both great and immediate"[20] or the state law is "flagrantly and patently violative of express constitutional prohibitions"[21] or there is a showing of "bad faith, harassment or other unusual circumstances."[22]

The indigent's attack on the bail system can be distinguished from the *Younger* line of cases because the relief which the indigent seeks is not the enjoining of a pending state criminal prosecution. The indigent is not requesting that the prosecution against him be enjoined, but only that he be given an opportunity to seek release under a nondiscriminatory bail system. The *Younger* series of cases dealt only with the proper policy to be followed in order "to intervene by injunction or declaratory judgment in a state court."[23]

Even if one could interpret the injunctive relief as interfering with a criminal proceeding because it deals with the setting of bail, challenging the constitutionality of the statute that one is being tried under can be differentiated from challenging the constitutionality of a criminal proceeding which would not necessarily interfere with the ultimate prosecution of the accused by the state. This distinction was pointed out in *Conover v. Montemuro*[24] where juveniles brought a § 1983 action to challenge the "intake" procedure of the state juvenile court on the basis of due process and equal protection violations. The court said that equitable relief sought did not amount to "an injunction which will halt or substantially interfere with a pending prosecution."[25] Just as the juveniles in *Conover*

20. 401 U.S. at 46.

21. *Id.* at 53.

22. *Id.* at 54.

23. *Id.* at 57 (Stewart, J., concurring). This qualification has been emphasized in other cases. *E.g.* Lake Carriers Ass'n v. MacMullan, 406 U.S. 498 (1972); Roe v. Wade, 410 U.S. 113 (1973); Wulp v. Corcoran, 454 F.2d 478 (1st Cir. 1972); Thomas v. Hefferman, 473 F.2d 478 (2d Cir. 1973); Lewis v. Kugler, 446 F.2d 1343 (3d Cir. 1971); Anderson v. Nemetz, 474 F.2d 814 (9th Cir. 1973).

24. 477 F.2d 1073 (3d Cir. 1973).

25. *Id.* at 1080. O'Shea v. Littleton, 94 S.Ct. 669 (1974), may appear to cast doubt on this distinction. In that case, the plaintiffs brought a civil rights class action against a magistrate and circuit judge, who allegedly engaged in a continuing pattern and practice of racial discrimination in bail, sentencing and jury fees. The Court stated that comity consider-

were not attempting to halt the prosecution against them, the indigent in the bail case is not seeking to halt or prevent the prosecution against him.

Although *Conover* was a juvenile proceeding, the same rationale is applicable to a criminal proceeding. The decision in *Conover* did not turn on the fact that it was a juvenile proceeding; it was based on the fact that policy and comity considerations are different when a person attacks the constitutionality of the statute he is being prosecuted under than when he attacks the constitutionality of a criminal procedure that would not halt or interfere with the actual prosecution. Where the constitutionality of the criminal statute that one is being tried under is challenged, the state can narrow its application so as not to declare the entire statute unconstitutional and stifle the state prosecution against the defendant. In the *Younger v. Harris* line of cases the Court was troubled that a federal court ruling before the state is given an opportunity to narrow its construction may bar the state from convicting the defendant.[26] But where a proceeding that would not directly affect the outcome of the actual prosecution is attacked for its alleged unconstitutionality, a decision by the federal court would not adversely affect the state's legitimate interest in prosecuting the defendant because the state could still prosecute the defendant.[27] Thus, the *Younger v. Harris*

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ations prevented the granting of injunctive relief. This case, however, does not necessarily preclude relief in the bail case for several reasons. (1) The decisive factor in that case was a question of standing. Since the Court concluded that it failed to present a "case or controversy," the Court's discussion of comity was merely dictum. (2) The subject matter of *Littleton* was more sweeping and did involve areas which were closely connected with actual prosecution (*i.e.*, sentencing and jury selection). A federal court decision on these matters would interfere more with the actual prosecution than a decision on bail setting. (The Court did not separate the bail issue from the other issues in the case.) (3) The real comity consideration in *Littleton* was not so much the actual decision of whether the practices were discriminatory, but rather the real comity consideration was with the enforcement of that decision in future cases. The Court feared that "an ongoing audit of state criminal proceedings" would be required. *Id.* at 678. The district court in the bail case could design a narrower equitable relief that would not require such a "periodic reporting system" to the federal courts. *Id.* at 679. (4) Even if injunctive relief would be precluded because of enforcement problems, the federal court could still grant declaratory relief. Request for injunctive and declaratory relief should not be treated as a single issue. Steffel v. Thompson, 94 S.Ct. 1204 (1974); Zwickler v. Koota, 389 U.S. 241 (1967).

26. The Supreme Court in *Younger v. Harris* emphasized the overriding comity and federalism considerations that the pronouncing of the statute one is being tried under as unconstitutional might strip the state of the power to prosecute the individuals. 401 U.S. at 51.

27. 477 F.2d 1091 (Adams, J., concurring).

doctrine of comity and federalism should not apply in the case of the indigent attacking the constitutionality of the present money-based bail system.

Even after the *Preiser v. Rodriguez* and *Younger v. Harris* procedural hurdles are surmounted, another procedural hurdle may exist. If the indigent is tried or released before his § 1983 action is decided by the federal court, there may appear to be a mootness problem. However, a closer analysis of the mootness doctrine suggests at least three ways around the mootness question. First, a cause of action is not rendered moot if it is "capable of repetition, yet evading review."[28] This idea has been applied to other cases concerning pretrial detention issues where the named plaintiff was acquitted or convicted before his civil action was decided by the federal court.[29] Similarly in *Conover v. Montemuro*, where the juveniles attacked the constitutionality of the "intake" proceedings, the court held that the completion of the juvenile court proceeding against the plaintiffs did not render the case moot.[30] The policy behind this doctrine is to prevent the setting "in motion such a litigatious merry-go-round where . . . there is a short-lived controversy of potentially recurring character."[31] Thus, even if the indigent who brings the § 1983 action challenging the bail system is acquitted or convicted in the state court before the federal court hears the bail issue, the case should not be treated as moot because it is an action "capable of repetition, yet evading review."

Second, the litigant in the bail suit still may assert collateral consequences which prevent the case from becoming moot.[32] While the plaintiff may no longer seek an opportunity to obtain his release

28. Roe v. Wade, 410 U.S. 113, 125 (1973) (abortion case); Dunn v. Blumstein, 405 U.S. 330, 333 n.2 (1972) (residency requirements for voting); Moore v. Ogilvie, 394 U.S. 814, 816 (1969) (voting requirements); Sibron v. New York, 392 U.S. 41, 52-53 (criminal conviction challenged where defendant had already served the sentence).

29. In Goosby v. Osser, 409 U.S. 512, 514 (1973), the petitioner challenged the constitutionality of the denial of the right to vote while the petitioner was in jail pending his trial.

30. 477 F.2d at 1081-82.

31. Indiana Employment Security Division v. Burney, 409 U.S. 540, 545 (1973) (Marshall & Brennan, JJ., dissenting). The majority remanded the case to the District Court of Northern Indiana to answer the question of mootness.

32. Powell v. McCormick, 395 U.S. 489, 495-500 (1969) (actual seating of congressman no longer possible, but question of back salary remains); Carafas v. LaValle, 391 U.S. 234, 237-38 (1968) (prison sentence has expired, but consequences of his conviction survive); Liner v. Jafco, Inc., 375 U.S. 301, 304-09 (1964) (injunctive relief mooted, but liability remains).

during the pretrial period by being considered for release on his own recognizance under a fair system, he may have suffered damages such as loss of his job and his family's loss of parental support and care during his pretrial detention. Because he and his family experienced these collateral consequences, the controversy remains alive.

Third, in a class action the controversy does not become moot as to the other members of the class if the named plaintiff's case is decided.[33] There are still indigents who must suffer pretrial detention and languish in jail solely because they lack the scheduled bail amount under the present bail system.

Therefore, although procedural issues do exist in bringing a § 1983 action against the existing bail system, these difficulties are surmountable. First, the *Preiser v. Rodriguez* prohibition on the use of a § 1983 action does not apply to such a case because the indigent is not seeking his automatic release from custody. It also does not apply because under a broad definition of "in custody" the indigent only seeks to modify the condition of his confinement (*i.e.*, physical detention) and not the fact of being in custody. Second, the *Younger v. Harris* concept of comity does not force the federal court to abstain from the case because it is not enjoining or interfering with a criminal prosecution. Third, the mootness problem does not exist because it is an action "capable of repetition, yet evading review,"[34] it entails collateral consequences and it remains alive as to other members of the class even if the named plaintiff is convicted or acquitted by the state court before the federal court hears the bail suit. Thus, despite these apparent procedural impediments, a § 1983 action appears to be a viable approach procedurally.

Standard of Review under the Equal Protection Clause

In determining whether a § 1983 action presents a viable substantive solution for the indigent who faces discrimination under the

33. Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968); Vaughn v. Bower, 313 F. Supp. 37 (D. Ariz. 1970); Kelly v. Wyman, 294 F. Supp. 887 (S.D.N.Y. 1968). The Supreme Court in *Indiana Employment Security Division v. Burney*, 409 U.S. 540 (1973), remanded the case to the District Court of Northern Indiana to see if the action was mooted when the named plaintiff received the desired benefit. The Court indicated that an adequate representative must be substituted. *See also*, Note, *Does Mooting of the Named Plaintiff Moot a Class Suit Commenced Pursuant to Rule 23 of the Federal Rules of Civil Procedure?*, 3 VAL. U.L. REV. 333 (1974).

34. *See* note 28 *supra*.

present bail system, the proper standard of review for the equal protection question must be established. The Supreme Court has developed at least two standards of review to determine whether a law violates the constitutional guarantee of equal protection. Under the traditional rational basis or minimum test, different classifications are constitutional if they bear a rational relationship to a permissible state interest.[35] Under the strict judicial scrutiny test, different classifications are constitutional only if they are necessary to promote a compelling state interest.[36] This more rigid test is applied to situations involving a suspect criterion[37] and to situations infringing upon fundamental rights.[38] This stricter test should be employed to judge the constitutionality of the present money-based bail system because it involves a suspect classification and intrudes on fundamental rights.[39]

When a scheduled bail system is used, the only criterion distinguishing those who gain pretrial freedom from those who remain locked behind bars is the defendant's economic status. The Supreme Court has implied in several decisions that classifications based on wealth should be treated as suspect as classifications based on race or alienage. In *Edwards v. California*[40] Justice Jackson sug-

35. McGowan v. Maryland, 366 U.S. 420 (1961); Morey v. Doud, 354 U.S. 457 (1957); Williamson v. Lee Optical Co., 348 U.S. 383 (1955); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 361 (1911).

36. Shapiro v. Thompson, 394 U.S. 618 (1969); Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964).

37. Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964); Bolling v. Sharpe, 347 U.S. 497 (1955) (race); Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Oyaam v. California, 332 U.S. 633 (1948); Koresmastu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943) (national origin).

38. Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel); Levy v. Louisiana, 391 U.S. 68 (1968) (family relationship); Harper v. Virginia Board of Elections, 383 U.S. 663 (1964) (right to vote); Bates v. City of Little Rock, 361 U.S. 516 (1960) (right of association).

39. Some members of the Supreme Court have suggested that instead of two clear tests there is a spectrum of different standards of review in equal protection cases. Vlandis v. Kline, 412 U.S. 441, 459 (1973) (White, J., concurring); San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting). They suggest that between strict and minimum scrutiny are other variations in degree of scrutiny. Under this view even if the court would find that wealth is not as "suspect" as racial classification or that the rights infringed by pretrial detention are not as "fundamental" as the right to vote, one would not be left with the mere rational basis test. *See* Gunther, *Forward, In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 12 (1972).

40. 314 U.S. 160 (1941).

gested that "the mere state of being without funds is a neutral fact—constitutionally an irrelevance like race, creed or color."[41] The Supreme Court in *Harper v. Virginia Board of Electors*[42] ruled that a state could not deny a citizen the right to vote because he was unable to pay a poll tax. The Court stated that "lines drawn on the basis of property like those of race are traditionally disfavored."[43] The Court has alluded to this same idea of the suspect quality of classifications based on wealth in the area of criminal procedure. In *Griffin v. Illinois*[44] the Supreme Court pronounced that "in criminal trials a state can no more discriminate on account of poverty than on account of religion, race or color."[45] In *McDonald v. Board of Election Commissioners*[46] the Supreme Court noted that strict scrutiny "is especially warranted where lines are drawn on the basis of wealth or race, . . . two factors which would independently render a classification highly suspect."[47]

Despite these indications by the Court that wealth is a suspect classification, *San Antonio Independent School District v. Rodriguez*[48] may on the surface appear to cast doubt on this view. In that case, the Texas method of financing education was challenged as unconstitutional since the poorest property districts paid a higher percentage of property tax but were unable to provide as much money per student for education. The Supreme Court, employing the more lenient test, held that it was not a denial of equal protection. This case, however, can be distinguished from the other cases involving wealth classifications and specifically from the case

41. *Id.* at 184.

42. 383 U.S. 663 (1966).

43. *Id.* at 668.

44. 351 U.S. 12 (1956).

45. *Id.* at 17. *See* Short v. Tate, 401 U.S. 395 (1972); Williams v. Illinois, 399 U.S. 235 (1970); Draper v. Washington, 372 U.S. 487 (1963); Lane v. Brown, 373 U.S. 477 (1963); Douglas v. California, 372 U.S. 353 (1962).

46. 394 U.S. 802 (1969). The Court denied the claim that the Illinois statute authorizing voting by absentee ballot in only specified classes of cases denied equal protection because it did not extend the absentee voting privilege to qualified voters who were in jail pending their trials. The Court noted that the record failed to indicate whether the state might allow the plaintiffs to vote by some other method.

47. *Id.* at 807. In Goosby v. Osser, 409 U.S. 512 (1973), the Court held that where pretrial detainees were denied the right to vote by any means there was a substantial constitutional question. The Court noted that strict scrutiny is required when "classifications were drawn on the basis of suspect criteria, such as wealth or race." 409 U.S. at 520.

48. 411 U.S. 1 (1973).

of the indigent under the present bail system in at least two ways. First, the Court noted that the school financing case lacked a "definite description of the classifying facts or delineation of the disfavored class."[49] The Court stated that there was no reason to believe that the poorest families were "necessarily clustered in the poorest property districts."[50] The Court failed to find a direct correlation between poor individuals and poor property districts. The indigent class in the constitutional challenge of the present bail system however presents a clear delineation of a disfavored class since under a scheduled bail system the economic status of the defendant is directly related to his opportunity to gain pretrial freedom. It corresponds with the other cases where the Court has struck down classifications based on wealth. Second, the Court distinguished the school financing cases involving wealth classifications on the grounds that the children were not absolutely deprived of an education.[51] The indigent under the present bail system is, however, absolutely denied his pretrial freedom. Furthermore, the Court implicitly suggested that wealth was a suspect classification by emphasizing the two distinctions between the school financing case and the other cases involving indigents.[52] Thus the Court did not eliminate wealth as a suspect classification.

Because classifications based on wealth share many similarities with classifications based on race or alienage, strong policy considerations dictate that wealth should be treated by the courts as a suspect classification. First, strict judicial scrutiny for suspect classifications has been justified by the Court because of the need to protect politically impotent minorities.[53] In *Hobsen v. Hansen*,[54] the

49. *Id.* at 19.

50. *Id.* at 23.

51. *Id.*

52. *Id.* at 20-22. The Court specifically distinguished the school financing case from Griffin v. Illinois, 351 U.S. 12 (1956), Douglas v. California, 372 U.S. 353 (1962), Williams v. Illinois, 399 U.S. 235 (1970), and Tate v. Short, 401 U.S. 395 (1971).

53. *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1125 (1969) [hereinafter cited as *Developments*]. The Supreme Court in United States v. Carolene Production Co., 304 U.S. 144, 153 n.4 (1938), stated that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities and which may call for a correspondingly more searchingly judicial inquiry." *Accord*, Graham v. Richardson, 403 U.S. 365, 370 (1971).

54. 296 F. Supp. 401 (D.D.C. 1967) *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

District Court of the District of Columbia emphasized this policy consideration in relation to poor or racial minorities:

> The explanation for this additional scrutiny of practices, which, although not directly discriminatory, nevertheless fall harshly on such groups relates to the judicial attitude toward legislative and administrative judgments. Judicial deference to these judgments is predicated in the confidence courts have that they are just resolutions of the conflicting interests. This confidence is often misplaced when the vital interest of the *poor* and of *racial minorities* are involved. For these groups are not always assured a full and fair hearing through the ordinary political processes, not so much because of the charge of outright bias; but because of the abiding danger that the power structure—a term that need carry no disparaging or abusive overtones—may incline to pay little heed to even the deserving interests of a politically voiceless and invisible minority. These considerations impel a close judicial surveillance and review of administrative judgments adversely affecting *racial minorities*, and the *poor*, than otherwise would be necessary.[55]

Since the poor are relatively powerless to protect themselves in the political process, stronger judicial scrutiny is required in dealing with classifications based on wealth.[56] Second, strict judicial scrutiny for suspect classifications is warranted because they involve unalterable traits "over which an individual has no control and for which he should receive neither blame nor reward."[57] Since classifications based on such unalterable traits are generally unsuited to the advancement of any proper governmental purpose, such classifications should be more strictly scrutinized.[58] Because poverty, like race or alienage, is beyond one's control, stricter judicial scrutiny is compelled.[59] Third, the strict scrutiny for suspect classifications is

55. *Id.* at 507-08. [emphasis added].

56. Michelman, *Forward, On Protecting the Poor through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 20 (1970).

57. *Developments*, *supra* note 53, at 1127.

58. Michelman, *supra* note 56, at 21.

59. POVERTY AMID PLENTY, THE REPORT OF THE PRESIDENT'S COMMISSION ON INCOME MAINTENANCE PROGRAMS 17 (1969):

justified to prevent further stigmatizing of a class already burdened with a badge of inferiority.[60] Since the poor often bear a stigma of inherent inferiority which resembles the stigma placed on other suspect classifications, strict judicial scrutiny is needed.[61] Thus, considering the need to protect powerless minorities, the unalterability of the trait coupled with its general unsuitedness to advance any permissible governmental purpose and the difficulty of escaping a stigma of inferiority, classifications based on wealth require strict judicial scrutiny.

Not only does the treatment of the indigent under a money-based bail system involve a suspect classification, but it also infringes on the fundamental right to a fair trial and his right to pretrial freedom. Pretrial detention impedes the indigent in achieving his "constitutional promise of a fair trial"[62] in several ways. Pretrial detention, for instance, handicaps the indigent because he is unable to assist his attorney in locating needed witnesses.[63] This difficult burden placed on the unassisted attorney to locate witnesses is even greater when he must find the needed witnesses in ghetto areas.

> Tracking down ordinary defense witnesses in the slums to support the defendant's alibi or to act as character witnesses often has a Runyanesque aspect to it. The defendant in jail tells his counsel he has known the witnesses for years but only by the name of "Toothpick," "Malachi Joe" and "Jet." He does not know where they live or if they have a phone, he is sure he could find them at the old haunts, but his descriptive faculties leave something to be desired. Since a subpoena cannot be issued for "Toothpick," of no known address, counsel sets off on a painstaking, often frus-

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For most of those currently poor changes in economic status are largely beyond their control. Generally, they are doing what they can considering their age, health status, social circumstances, location, education, and opportunities for employment. Poverty is not a chosen way of life.

60. *Developments*, *supra* note 53, at 1127.

61. Michelman, *supra* note 56, at 21.

62. Griffin v. Illinois, 351 U.S. 12, 17 (1956). Many of the pretrial detainees do not even receive a trial because the defendant pleads guilty. Pines, *An Answer to the Problems of Bail: A Proposal in Need of Empirical Confirmation*, 9 COLUM. J.L. & SOC. PROB. 396, 398 (1973):

> In light of the personal losses caused by removal from society, the uncertain and often long and brutal pretrial detention period, and the defendant's doubts of acquittal, plea bargaining becomes a defendant's most realistic course. Despite actual innocence, he confesses in order to begin serving a known, relatively light sentence in a more human prison facility.

63. Attorney General Report, *supra* note 2, at 11.

> trating, search of the defendant's neighborhood. He stops children at play; he attempts door-to-door conversations with hostile and suspicious slum dwellers.[64]

Furthermore, even if the defendant's attorney finds the needed witnesses without the aid of the accused, he faces the difficult task of inducing the witnesses to come forward at the trial without the help of the defendant.[65] The detained indigent is also hampered in conferring with his attorney prior to the trial. The attorney must spend additional time traveling to the client since his client cannot come to his office,[66] must wait for visiting hours which are often inconvenient,[67] and is unable to make needed spot calls to check details.[68] In short, while the defendant is guaranteed the assistance of counsel, "conditions in jail often make this guarantee meaningless."[69] The defendant is also handicapped in conferring with his attorney during the trial because he is under guard.[70] The detained defendant, moreover, suffers because the fact that he is in physical custody may have a negative psychological impact on the jury.[71]

Studies have verified the impact that pretrial detention has on

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64. P. Wald, *Poverty and Criminal Justice* in THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS (app. C) 139, 145 (1967). This problem of locating witnesses by an unaided attorney was also reported by student directors of the Yale Law School Public Defender Association. They reported that it was almost impossible for them to find the needed witnesses that "the accused could probably find within a short time if permitted to search for them." Note, *Bail: An Ancient Practice Reexamined*, 70 YALE L.J. 966, 969-70 n.27 (1961).

65. Attorney General Report, *supra* note 2, at 71.

66. Foote, *The Coming Constitution Crisis in Bail*, 113 U. PA. L. REV. 1125, 1147 (1965).

67. P. Wald, *Poverty and Criminal Justice* in THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS (app. C) 139, 144 (1967).

68. *Id.*

69. Note, *The Constitutional Limitations on the Conditions of Pretrial Detention*, 79 YALE L.J. 941, 942 n.6 (1970).

70. P. Wald, *Poverty and Criminal Justice* in THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS (app. C) 139, 147 (1967):

> A defendant under courtroom guard raises tactical as well as psychological problems. During the trial his lawyer may need to consult with him privately in the courtroom, but his guard is always in range. There can be no productive lunch or recess conferences, no quick trips to locate last minute rebuttal witnesses, no pretrial warm-ups or post-trial replays. Should a surprise witness or evidence materialize, the indigent's defense counsel must face such circumstances alone.

71. *Id.* at 145.

the defendant's trial. The New York study, which was done in 1964 as part of the Vera Foundation's Manhattan Bail Project, found that fifty-seven percent of those released on bail were not convicted while only twenty-seven percent of those detained were not convicted.[73] Furthermore, the jailed defendants were less likely to receive a suspended sentence or probation than a bailed defendant.[74] The New York study indicated that thirty-six percent of those released prior to trial did not receive a prison sentence, but it discovered that only nine percent of those detained prior to trial did not receive a prison sentence.[75] This difference may appear to be attributable to other independent factors such as a prior conviction or type of counsel received, but this difference remained the same when these and other independent factors were held constant. For instance, among those with no prior record fifty-nine percent of the detained defendants received prison sentences while only ten percent of the bailed defendants received prison sentences.[76] Similarly among those with prior records, eighty-one percent of the jailed defendants were sentenced to prison, but only thirty-six percent of the bailed defendants were sentenced to prison.[77] The difference was also not explained by the type of counsel that the defendant received. Among those with private attorney, forty-four percent of the bailed defendants were not convicted; however only eleven percent of the jailed defendants were not convicted.[78] Among those with a court-appointed attorney, fifty-four percent of the bailed defen-

72. Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U.L. REV. 641 (1964).

73. *Id.* at 642.

74. Task Force Report, *supra* note 2, at 38:

> The difference is explained because the accused who is free prior to trial is able to seek or retain employment, support his family, and demonstrate his reliability by reappearing in court. Thus he is considered a fit subject for probation or suspended sentence.

75. Rankin, *supra* note 72, at 642. Similar results were shown in a study done in Washington, D.C., by the Junior Bar Section of the District of Columbia Bar Ass'n, *The Bail System of the District of Columbia* in D.C. BAIL PROJECT, BAIL REFORM IN THE NATION'S CAPITAL A-33 (1966).

76. Rankin, *supra* note 72, at 647.

77. *Id.* Similar results were shown in conviction rate. Among those with no prior record, forty-eight percent of the bailed defendants were not convicted, but only twenty-four percent of the jailed defendants were not convicted. Among those with previous records, twenty-one percent of the bailed defendants were not convicted, but only fifteen percent of the jailed defendants were not convicted.

78. *Id.* at 651.

dants were not convicted, but only twenty-seven percent of the jailed defendants were not convicted.[79] The study concluded that detention was the significant factor in the relationship between detention and unfavorable disposition:

> This study has demonstrated that each of the five characteristics—prior record, bail amount, type of counsel, family integration, and employment stability—when considered separately do not account for the statistical relationship between detention before adjudication and unfavorable disposition. When the characteristics are considered in combination, they account for only a small part of the relationship.[80]

The findings of this study were not unique. Similar results were disclosed in a study by the New York Legal Aid Society in 1971.[81] Those bailed prior to trial were cleared in fifty-one percent of the cases; those detained prior to trial were cleared in only twenty percent of the cases.[82] Furthermore, those bailed prior to trial were not sentenced to prison in thirty-two percent of the cases; those detained prior to trial were not sentenced in only eighteen percent of the cases.[83] As in the previous Rankin study, this difference could not be attributed to other independent factors.[84] The study held many other variables—seriousness of the charge, type of crime, weight of evidence, aggravated circumstances, prior criminal charge, personal history and amount of bail—constant and found that these variables would not explain the fact that those detained prior to trial were more likely to be convicted and to receive harsher sentences.[85] Similar results were demonstrated in San Francisco,[86] Sacramento,[87] Boston,[88] and Kansas.[89] Thus, considering the verified

79. *Id.* Similar results were indicated for those convicted but not sentenced to prison.
80. *Id.* at 649.
81. Pines, *supra* note 62, at 402.
82. *Id.*
83. *Id.*
84. *Id.* at 403.
85. *Id.*
86. Wald, *Pretrial Detention and Ultimate Freedom: A Statistical Study*, 39 N.Y.U.L. REV. 631, 633 (1964). The study reported convictions for forty-three percent of those released and seventy-one percent of those detained.
87. *Id.* Conviction rates were thirty-four percent for those released and eighty-eight percent for those detained.
88. Note, *Preventive Detention, An Empirical Analysis*, 6 HARV. CIV. RIGHTS-CIV. LIB.

impact of pretrial detention on the defendant's trial, such pretrial detention infringes on the defendant's fundamental right to a fair trial.

Not only does the pretrial detention infringe on the defendant's right to a fair trial, but pretrial detention also infringes on the defendant's fundamental right to pretrial freedom. The defendant's fundamental right to pretrial freedom is based on at least three interrelated sources: (1) the eighth amendment and the concept of excessive bail, (2) the presumption of innocence until actual conviction, and (3) the right to privacy and human dignity. First, the fundamental right to pretrial freedom is implicit in the eighth amendment's prohibition against excessive bail which is defined as "a figure higher than an amount reasonably calculated to assure the presence of the accused at the trial."[90] The whole impetus of the excessive bail clause is "to insure fair access to pretrial liberty."[91]

Second, the fundamental right to pretrial freedom is premised on the basic presumption of this country "that one charged with a crime is innocent until after judgment of guilt."[92] Imprisonment and its inherent punishment prior to conviction is contrary to this most basic concept. Correspondingly this violation of the defendant's presumption of innocence may infringe on related fundamental rights. It may intrude on the defendant's right to due process and may even inflict cruel and unusual punishment:

> If the incidents of detention amount to punishment, then that detention violates the Fifth Amendment, because its imposition has not been preceded by a procedure comporting with due process. The only procedure which detainees have gone through is the bail hearing, at which it has been

L. REV. 291, 347 (1971). Fifty-three percent of those released and seventy-four percent of those detained were convicted. Seventy-four percent of those released and only thirty-one percent of those detained received probation.

89. Wilson, *New Approaches to Pretrial Detention*, 39 KAN. BAR ASS'N J. 13 (1970). Forty-six percent of those released and seventy-two percent of those detained were convicted. *Id.* at 15. Fifty-four percent of those released and twenty-six percent of those detained received probation. *Id.* at 39.

90. Stack v. Boyle, 342 U.S. 1, 4 (1951). In Schilb v. Kuebel, 404 U.S. 357, 365 (1971), the Supreme Court noted that "the Eighth Amendment's proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment."

91. Foote, *supra* note 62, at 998-99.

92. Bandy v. United States, 81 S.Ct. 197 (1960) (Douglas, J., sitting as a circuit judge).

> determined that they could not afford it and were not eligible for bail. Nothing about guilt has been established. Detention under such circumstances is so clearly disproportionate that it violates not only due process but also the Eighth Amendment proscription against cruel and unusual punishment.[93]

In short, the defendant is deprived of "fundamental fairness by being punished, imprisoned and presumed guilty before he has been tried."[94] Furthermore, while any detention is inherently punitive, "these detainees are subjected to the most severe deprivations and crudest indignities which exist in the entire penal system."[95]

Third, the fundamental right to pretrial freedom is related to the defendant's right to privacy and human dignity. This basic concept of privacy and human dignity was expressed by Justice Brandeis in his dissenting opinion in *Olmstead v. United States*:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feeling and of his intellect. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred as against the government the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.[96]

This essential right has been emphasized either explicitly or implicitly in a long series of cases.[97] The pretrial detainee is stripped of his ties with family, friends and associations that are intrinsic to the

93. Note, *The Constitutional Limitations on the Conditions of Pretrial Detention*, 79 YALE L.J. 941, 952 (1970).

94. Meltsner, *Pretrial Detention, Bail Pending Appeal, and Jail Time Credit: The Constitutional Problems and Some Suggested Remedies*, 3 CRIM. L. BULL. 618, 624 (1967).

95. Note, *Constitutional Limitations on the Conditions of Pretrial Detention*, 79 YALE L.J. 941 (1970). Pretrial detainees face overcrowded, unsanitary conditions. They often lack adequate food, clothing, medical attention and recreation. They are subjected to censorship of their mails and restricted visiting hours.

96. 277 U.S. 438, 478 (1928).

97. Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965). *See also* Loving v. Virginia, 388 U.S. 1 (1967); Prince v. Massachusetts, 321 U.S. 158 (1944); Skinner v. Oklahoma, 316 U.S. 535 (1942); Meyer v. Nebraska, 262 U.S. 390 (1923).

concept of privacy.[98] He suffers furthermore from the loss of his outward privacy by the very nature of imprisonment. But perhaps the most damaging invasion of the defendant's fundamental right of privacy and human dignity is his loss of inner privacy. He is stripped of his own self respect and he is regimented and institutionalized in his thoughts and acts. The pretrial detainee loses his most fundamental right—"freedom to be free."[99]

Because of these serious infringements of the defendant's fundamental rights, the court in *United States v. Thompson*[100] recognized the need to utilize the strict scrutiny test when faced with an equal protection challenge of the administration of the bail system. The petitioner in that case was denied bail because the District of Columbia Court Reform Act standards had been employed instead of the Federal Reform Act standards, although he had been charged with violation of a federal criminal statute having nationwide application. The court held that the petitioner was denied equal protection since there was no compelling reason to differentiate between residents of the District of Columbia and residents of the other parts of the country in setting bail.

The equal protection argument that is raised when the indigent is denied pretrial freedom solely because he cannot afford the scheduled bail must be judged under the strict scrutiny standard. It is a classification based on wealth which should be treated as a suspect classification. It is furthermore a classification which violates the indigent's fundamental rights to a fair trial and pretrial freedom.

Application of the Strict Scrutiny Test to the Existing Bail System

The strict scrutiny test is more rigid than the rational basis test in three respects. First, the classification does not carry the heavy presumption of constitutionality. Second, the classification must be necessary to promote a compelling governmental interest.[101] Third,

98. Pines, *supra* note 62, at 396.

99. United States v. Thompson, 452 F.2d 1333, 1340 (1971).

100. *Id.* This case involved the setting of postconviction bail pending appeal. If infringments on fundamental rights are involved in the denial of postconviction freedom pending appeal then surely infringments on fundamental rights are involved in the denial of pretrial freedom.

101. *See* note 33 *supra*.

it must be the least drastic means to achieve the governmental interest.[102] The classification based on wealth which is created by the reliance on a scheduled bail system is unconstitutional under this more rigid standard of review.

The primary purpose of bail is to insure the presence of the accused at trial.[103] To achieve this purpose the present bail system assumes "that the threat of forfeiture of one's goods will be an effective deterrent to the temptation to break the conditions of one's release."[104] But this theory fails to consider that the indigent defendant may not have any money to forfeit and the wealthier defendant may not be deterred from fleeing by possible forfeiture. Studies have indicated that under bail reform projects those released on their own recognizance were just as likely and in many cases more likely to appear for trial than those released on money bail. The money bail requirement, in short, does not bear any relationship to achieving this state purpose of bail. In New York City, the Manhattan Bail Project demonstrated that those released on their own recognizance failed to return in only one percent of the cases.[105] This low nonappearance rate is even more significant when compared with the willful nonappearance rate for money bail of about five percent.[106]

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102. Aptheker v. Secretary of State, 378 U.S. 500, 512-13 (1964); Shelton v. Tucker, 364 U.S. 479, 488 (1960).

103. Stack v. Boyle, 342 U.S. 1, 4 (1951).

104. Bandy v. United States, 81 S. Ct. 197 (1960) (Douglas, J., sitting as circuit judge).

105. Sturz, in Panel Discussion, RELEASE ON RECOGNIZANCE AND SUMMONS IN LIEU OF ARREST, NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE 43 (1964). Under the Manhattan Bail Project, which is sponsored by the Vera Foundation, the accused is interviewed to check his previous criminal record and the current charge to determine if he is bailable. Next he is interviewed about family ties and roots in the community. After this interview, the defendant is scored according to a point weighing system. If this indicates that he is a good risk for being released on his own recognizance, the accused is recommended to the judge to be released on his own recognizance.

106. Ares, Rankin & Sturz, *Manhattan Bail Project*, 38 N.Y.U.L. REV. 67, 81 (1963). A similar rate of nonappearance under money bail was verified by a similar study in New York City. VERA FOUNDATION OF JUSTICE, STUDY OF PRETRIAL RELEASE 33 (1970):

All Crimes

Bail Amount	Jump rate
$500 or under	4.6%
$501-$1000	6.4%
$1001-$2500	10.7%

Felonies

$500 or under	3.8%
$501-$1000	7.9%
$1001-$2500	11.2%

Similar bail reform projects throughout the country have produced comparable results. In San Francisco only one percent of those released on their own recognizance failed to appear.[107] The St. Louis bail project reported only 1.3 percent nonappearance rate for those released on their own recognizance.[108] Under a bail reform project in Los Angeles, the nonappearance rate was 2.1 percent.[109] The Allen County bail reform program in Indiana reported only a 1.5 percent willful nonappearance rate.[110] Similar low nonappearance rates were also reported in Des Moines,[111] Indianapolis,[112] and Baltimore.[113] In all of these projects the reported nonappearance rate was comparable to or even lower than the nonappearance rate for money bond.

This low nonappearance rate for those released on their own recognizance has not been limited to these special local foundation type projects or local governmental programs, but it has also been verified by broader governmental programs. In 1966 the Federal Bail Reform Act[114] greatly expanded the use of release on one's recognizance in the federal courts. The rate of bail jumping in the federal system by those released on money bail had been three percent nationwide.[115] But only two percent of the defendants released on their personal recognizance failed to appear for trial.[116] The Connecticut Bail Commission, which operated a state-wide reform program financed by the state, reported that only 1.4 percent willfully failed to appear at trial after being released on their own recognizance.[117] Thus these experimental projects and existing governmental

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Nonappearance rate for those released on their own recognizance was 1.6 percent.

107. Levin, *San Francisco Bail Project*, 55 A.B.A.J. 135 (1969).

108. O'Reilly and Flanagan, MEN IN DETENTION, REPORT BY CITIZEN'S COMMITTEE FOR EMPLOYMENT 2 (1967).

109. Kamin, *Bail Administration in Illinois*, 53 ILL. B.J. 674, 678 (1965).

110. Letter from James R. Seely, Bail Commissioner, Allen Superior Court, March 8, 1974.

111. National Council on Crime and Delinquency, DES MOINES COMMUNITY CORRECTION PROJECT: EVALUATION REPORT NUMBER TWO 5-6 (1972).

112. COOK COUNTY SPECIAL BAIL PROJECT, PROPOSAL FOR HOLIDAY COURT INTERVIEW —VERIFICATION PROGRAM 8 (1970).

113. Kennedy, *VISTA Volunteers Bring About Successful Bail Reform Project*, 54 A.B.A.J. 1093 (1968).

114. 18 U.S.C. § 3146 (1970).

115. R. CLARK, CRIME IN AMERICA 283 (1970).

116. *Id.*

117. O'Rourke and Carter, *The Connecticut Bail Commission*, 79 YALE L.J. 513, 523-24 (1970). The Bail Commission however was reduced in manpower and authority in 1969. This was not due to any real debate on the success of the program, but it was the result of a budget-cutting and law-and-order climate. *Id.* at 515.

programs have confirmed that the requirement of money bond is not necessary to assure the presence of the defendant at trial.[118]

Furthermore, even if some relationship could be drawn between the wealth of the defendant and appearance rate, detention is not the least drastic means of achieving appearance at the trial. Other less drastic alternatives are available to insure the defendant's appearance at the trial: criminal sanction for flight, a policy against release of defendants who have previously jumped bail, supervision during the pretrial period by a parole officer, and speedier trials.[119]

A second possible purpose of the present bail system is to prevent criminal conduct by defendants before trial. However, the wealth of the defendant and his ability to meet a scheduled bail is not related to his possible criminal conduct pending trial:

> Money bail is just as an inadequate measure against criminal conduct pending trial as it is against flight. Dangerous persons with sufficient funds to post bail or pay a bondsman go free; in fact a Commission study indicated that some professional criminals appear to consider the cost of bail a routine expense of doing business.[120]

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118. Some have criticized these conclusions by arguing that the bail reform projects only released a limited number of defendants on personal recognizance and that the criteria used still exclude many of the poor. They therefore claim that these results are unreliable. This criticism can be answered in several ways. First, the failure of the projects to release more defendants is attributable to insufficient staffing. Thus, some defendants are not interviewed and many of those interviewed did not have their references verified because of this lack of staffing. Pines, *supra* note 62, at 423. Second, studies have indicated that many of the poor who are held in jail because of their inability to make bond would meet the Manhattan Bail Project standards for release on their own recognizance. Brockett, *Presumed Guilty: The Pretrial Detainee*, 1 YALE R. OF LAW AND SOCIAL ACTION 10, 15 (1971). Third, the criteria used for release on personal recognizance could be expanded to include more defendants without any rise in the rate of nonappearance. O'Rourke and Carter, *supra* note 117, at 523. The Chief Bail Commissioner of the Connecticut program indicated that as many as 85-90 percent of the defendants could be released on personal recognizance without any rise in the rate of nonappearance. *Id.* Studies, moreover, have indicated that "roots in the community" is not the most important factor in assuring the appearance of the defendant when he is released on his own recognizance, but rather the most important factor appears to be the amount of supervision (*i.e.*, phone calls and letters to remind the defendant of the date of the trial and active searches for defendants who fail to appear). Pines, *supra* note 62, at 426.

119. Foote, *supra* note 66, at 1163. The federal program provides for such alternatives which minimize the willful nonappearance of the defendant at his trial but at the same time maximize the defendant's pretrial freedom. 18 U.S.C. § 3146 (1970).

120. Task Force Report, *supra* note 2, at 40. The Commission in fact noted that "the

Therefore, if bail is intended to prevent criminal acts by the defendant pending trial, the scheduled bail system is both under and over inclusive. It is under inclusive because it does not prevent the pretrial release of "dangerous" defendants who can afford the scheduled bail. It is over inclusive because it does prevent the pretrial release of "nondangerous" defendants who cannot afford the scheduled bail. Thus, since the ability to pay bail is unrelated to one's propensity to commit criminal acts pending his trial, the scheduled bail system is not required to prevent possible criminal acts.

Furthermore, even if there is some relationship between the wealth of a defendant and his tendency to commit criminal acts pending trial, detention is not the least drastic means to achieve this purpose. Less drastic means similar to those used to assure his presence at trial can be utilized: speedier trials,[121] imposition of restrictive conditions based on alleged "dangerousness "[122] or denial of the right to be released in future cases if found responsible for crimes during the pretrial release period.[123]

A third possible rationale for the state's reliance on bail schedules is for administrative convenience and economy because it saves the state from the time and expense of examining each individual case. This purpose for a scheduled bail system has dubious validity considering the cost of pretrial detention even with its grossly inadequate facilities. New York City, for example, spends over $10 million on pretrial detention compared with $14 million for the Criminal Courts of New York City.[124] Moreover, studies have indicated that the costs of bail reform projects have been more than paid for by the savings to the state by reducing the number of pretrial detainees. For instance, during a four year period the San Francisco Bail Project saved the city at least $1,240,000—ten times more than the

need to raise funds for bond premium may have the unintended effect of leading the defendant to commit criminal acts." *Id.*

121. Note, *Preventive Detention, An Empirical Analysis*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 291, 359-62 (1971).

122. *Id.* at 362-65.

123. *Id.* at 365-68.

124. Criminal Court of the City of New York Annual Report 6 (1971). It should be noted that skyrocketing costs of pretrial detention centers represent no real improvement in the conditions of these centers. If the recommendations proposed to mitigate the brutal conditions are put into effect, the annual cost will be many times higher. Pines, *supra* note 62, at 404 n.55.

cost of financing the project.[125] The cost of the Manhattan Bail Project was only about $28.20 per person released, while the average cost for detention before trial was $186. Thus, retaining the present system does not appear to be necessarily an administrative cost savings.

But even if it is less expensive to use a scheduled bail system, administrative costs and convenience cannot justify classifications under the strict scrutiny test.[127] While a state may legitimately attempt to limit expenditures, it "may not accomplish such a purpose by invidious distinctions between classes of its citizens."[128] Therefore, under the strict scrutiny test the scheduled bail system which discriminates against the poor cannot be justified.[129] The present bail system is clearly an unconstitutional denial of equal protection.

CONCLUSION

A § 1983 action in federal court appears to be a viable remedy for the indigent who faces discrimination under the present money-based bail system. It does present some procedural difficulties, such as whether (1) the writ of habeas corpus is the only remedy open to the indigent, (2) the federal court should abstain because of comity considerations, and (3) the case will be mooted if the indigent is tried or released before the federal court hears it. However, by a precise delineation of the prayer for relief to include (1) a declaratory judgment that the present bail system which relies on money bail or cash bond is unconstitutional, (2) equitable relief requiring

125. Levin, *supra* note 103, at 135.

126. L. Friedman, The Evolution of Bail Reform 88, December 1972 (working paper on the Center for the Study of the City and Its Environment, Inst. for Social and Policy Studies, Yale University).

127. Frontiero v. Richardson, 411 U.S. 677, 690 (1973); Goldberg v. Kelly, 397 U.S. 254, 266 (1970); Shapiro v. Thompson, 394 U.S. 618, 633 (1969). It should be noted that part of the state's rationale for the discriminatory practice against the poor in the *Griffin* line of cases was to reduce the cost of appeals. The Supreme Court rejected this rationale as justifying the discrimination between the poor and wealthy defendants in the appeal proceedings.

128. 394 U.S. at 633.

129. Even under the minimum scrutiny test the present bail system has doubtful validity. The requirement of a scheduled bail does not appear to bear any rational relationship to the prevention of flight or criminal acts pending trial or even the saving of administrative expense. Furthermore, Reed v. Reed, 404 U.S. 71, 76 (1971), suggests that even under the more lenient test administrative cost and convenience alone cannot justify such discrimination.

the institution of a system which does not rely on the use of money and (3) damages against the county and its officials for collateral consequences, these difficulties should not bar a § 1983 action. In such an action the courts should employ the stricter standard of review, because the reliance on bail schedules invokes a suspect classification based on wealth. The court should also apply the stricter standard because pretrial detention infringes on the defendant's right to a fair trial and pretrial freedom. Under this test the possible state purposes for a scheduled money-based bail system, (1) insuring the defendant's presence at trial, (2) preventing criminal conduct by the defendant pending his trial, and (3) saving the state administrative costs, fail to justify its discrimination against the poor. Thus, a § 1983 action appears to present the indigent with an effective remedy for his discriminatory treatment under the present money-based bail system.