Challenging Bail Laws: *Bellamy, Henson* and *Van Atta*— Background and Strategy*

Bail laws conditioning pre-trial release on a defendant's ability to post cash bail discriminate against indigent defendants. Although there are effective alternatives to money bail in operation, many jurisdictions have failed to deal with the difficult problem of defendants who cannot afford traditional money bail. This comment presents lawyers with the background and strategy necessary to challenge money bail laws in jurisdictions where reform is needed.

INTRODUCTION

On the evening of June 29, 1979, a Nashville police officer arrested Myrtle Henson and charged her with drunken driving.[1] The court set bail at $750. Henson, who supported two children on $170 a month, could not afford to post bail and therefore remained in custody. Henson was upset and concerned about her children.[2] She had never been in jail before and believed her only chance of release was through a bailbond service.[3] In the early morning hours of June 30 a bailbond agent agreed to post her bond for a $150 fee. Upon release, Henson attempted to raise the $150 by selling the family car. However, she was unable to raise the full amount and again faced pre-trial incarceration. The po-

* The author is grateful to Wayne Thomas and Professor Floyd Feeney for making available a data file collected for Thomas' book, BAIL REFORM IN AMERICA (1976).

[1] Henson v. Thomas, No. A-6181, slip op. at 2 (Tenn. App., Middle Section at Nashville, filed Aug. 2, 1978).

[2] The police told Henson that her children would be placed in juvenile detention until she was released from jail. Brief for Appellant at 16, Henson v. Thomas, No. A-6181 (Tenn. App., Middle Section at Nashville, filed Aug. 2, 1978).

[3] "Own recognizance"(O.R.) release is an alternative to the imposition of money bail. *See* note 41 and accompanying text *infra*. Henson, a resident of Nashville for five years, had family and friends in the area and had no previous criminal record. As such, she was an "ideal" candidate for O.R. release. Although O.R. release was within the court's discretion, Henson was unaware of O.R. release and therefore never sought an O.R. hearing. Instead she believed her only hope of release was to post bail. Brief for Appellant at 2-3,8,16, Henson v. Thomas, No. A-6181 (Tenn. App., Middle Section at Nashville, filed Aug. 2, 1978).

lice later dropped the charge.

Bail laws that condition pre-trial release on the ability to post cash bail place thousands of defendants in a similar situation. The costs of pre-trial detention are high, not only because of the loss of personal freedom but also because of the impact on the defendant's family and job. Effective alternatives to money bail practices have been in operation since 1961.[4] Nevertheless, many jurisdictions have not dealt with the difficult problem of defendants who cannot afford traditional money bail. As a result, poor defendants, like Myrtle Henson, have challenged the constitutionality of state bail procedures through the judicial system.

This comment examines the background and strategy of three challenges to money bail. Section I presents the purpose of bail and the effect of bail on a defendant. California bail statistics and a review of previous findings document why defendants are challenging bail laws. The following section discusses alternatives to money bail. Subsequent sections review strategies of bail challenges from the briefs of three cases: *Bellamy v. Judges,*[5] challenging the New York bail laws; *Henson v. Thomas,*[6] challenging the Tennessee bail laws; and *Van Atta v. Scott,*[7] challenging California bail laws. The final section analyzes the viability of the arguments and speculates on the development of future litigation in the area.

I. The Bail System

A. *The Purpose of Bail*

Bail refers to the security given by defendants in exchange for pre-trial release.[8] Courts require bail for one or both of two rea-

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[4] The Manhattan Bail Project pioneered a change in the traditional system of money bail. The project expanded the use of personal recognizance by identifying for the court indigent defendants who would appear for trial. For a complete discussion of how this was accomplished *see* Ares, Rankin, & Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole,* 38 N.Y.U. L. Rev. 67, 86 (1963). By 1965, bail projects were operating in 58 localities. W. Thomas, Bail Reform In America 25 (1976). The experiences of three successful localities (Philadelphia, Pennsylvania, District of Columbia, and Brooklyn, New York) are discussed in note 110 *infra.*

[5] 41 App. Div. 2d 196, 342 N.Y.S.2d 137, *aff'd without opinion,* 32 N.Y.2d 887, 346 N.Y.S.2d 812, 300 N.E.2d 153 (1973).

[6] No. A-6181 (Tenn. App., Middle Section at Nashville, filed Aug. 2, 1978).

[7] 84 Cal. App. 3d. 450, 148 Cal. Rptr. 717 (1978), *vacated and hg. granted,* No. S.F. 23946 (Cal. Sup. Ct. Nov 9, 1978).

[8] W. Thomas, *supra* note 4, at 12.

sons: to protect the public safety or to ensure the defendant's timely appearance in court. Concern for the public safety implies the defendant committed the crime charged and may commit other crimes if released. The constitutionality of this practice is unsettled.[9]

Ensuring a defendant's appearance in court, however, is the sole purpose of bail in each of the three states studied.[10] New

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[9] Former Senator Sam Ervin concluded that preventive detention is inconsistent with the due process demand of fundamental fairness:

> Manifestly (this purpose) would authorize the imprisonment and punishment of persons for crimes which they have not yet committed and may never commit. Preventive detention is not only repugnant to our traditions, but it will handicap an accused and his lawyer in preparing his case for trial. It will result in the incarceration of many innocent persons.
>
> If America is to remain a free society, it will have to take certain risks. One is the risk that a person admitted to bail may flee before trial. Another is the risk that a person admitted to bail may commit crime while free on bail. In my judgment, it is better for our country to take these risks and remain a free society than it is for it to adopt a tyrannical practice of imprisonment for crimes which they have not committed . . .

Report of the Judicial Council Committee to Study the Operation of the Bail Reform Act in the District of Columbia: Hearings on Preventive Detention before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 91st Cong., 2nd Sess. 736 (1970).

Professor Caleb Foote reasoned that detention is constitutional only in situations of extraordinary risk. Even then detention should be contingent upon a speedy trial and conditions of confinement which are less restrictive than those for sentenced prisoners. Foote, *The Coming Constitutional Crisis in Bail: II*, 113 U. PA. L. REV. 1125, 1182 (1965).

For an example of an operative preventive detention system, *see* D. C. COURT REFORM AND CRIMINAL PROCEDURE ACT OF 1970 (23 D.C. CODE § 1321-1332 (1973)). This act authorizes preventive detention for defendants charged with a "crime of violence" (including murder, rape, robbery, burglary, arson and serious assaults) or a "dangerous crime" (including robbery, burglary, arson, rape and sale of narcotics). The state may hold a defendant charged with a "crime of violence," only if the defendant has been convicted of another crime of violence within the previous 10 years, is on pre-trial release, probation or parole for another crime of violence when arrested, or is a drug addict. Suspects charged with a "crime of violence" or a "dangerous crime" can be held for 60 days without bond if a court determines that there is a substantial probability that the person committed the alleged offense and that no combination of conditions of release will assure the safety of the community.

[10] Case law and statutory authority underscore the purpose of the bail system in each state. In New York, People v. Brown, 96 Misc. 2d 127, 408 N.Y.S.2d 927 (1978) held that the purpose of bail is to ensure the appearance of a defendant in the courtroom. See also N.Y. CRIM. PROC. LAW § 510.30(2)(a) (McKinney

York, Tennessee and California courts should not consider the protection of society when setting bail.[11] For example, the California Supreme Court in *In re Underwood*[12] determined that it is unconstitutional to protect the public safety through the bail system.

At the time of each challenge, money bail was the primary means of ensuring a defendant's appearance in court.[13] Bellamy,

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1971), which states that "the court must consider the kind and degree of control or restriction that is necessary to secure (the defendant's) court attendance when required."

While the Tennessee bail statute, TENN. CODE ANN. § 40 (1975) did not expressly state the purpose of bail, Henson cited Stack v. Boyle, 342 U.S. 1 (1951), for the proposition that insuring the defendant's appearance at trial was the sole purpose for setting bail in Tennessee. Brief for Appellant at 6, Henson v. Thomas, No. A-6181 (Tenn. App., Middle Section at Nashville filed Aug. 2, 1978).

For judicial construction of the purpose of bail in California, see In re Underwood, 9 Cal. 3d 345, 348, 508 P.2d 721, 723, 107 Cal. Rptr. 401, 403 (1973), which states that the only purpose of bail is "to assure the defendant's attendance in court when his presence is required . . . ."

[11] At the time of the Bellamy challenge, the New York court considered the following factors when setting bail: the defendant's character, reputation, habits and mental condition, the defendant's employment and financial resources, the defendant's family ties and length of residence in the community, and the weight of evidence against the defendant. N.Y. CRIM. PROC. LAW § 510.30(2)(a) (McKinney 1971).

TENN. CODE ANN. § 40 (1975) did not list factors to be considered when setting bail.

CAL. PENAL CODE § 1275 (West 1970) states that a judge may consider only three factors when setting bail: the seriousness of the charge, the defendant's criminal record, and the likelihood of the defendant returning to court. The first two factors must be considered in relation to the likelihood of the defendant returning to court. *See* In re Underwood, 9 Cal. 3d 345, 348, 508 P.2d 721, 724, 107 Cal. Rptr. 401, 404 (1973).

[12] 9 Cal. 3d 345, 508 P.2d 721, 107 Cal. Rptr. 401 (1973).

[13] In a traditional money bail system, a defendant can post the full amount of bail with the court. A defendant who cannot afford to pay the required bail will seek out a bonding agent. A bonding agent's decision to post bail is entirely discretionary. Judge J. Skelly Wright summed up the effect of this discretion in his concurring opinion in Pannell v. U.S., 320 F.2d, 698, 699 (D.C. Cir. 1963) (Wright, J., concurring):

> The effect of such a system is that the professional bondsmen hold the keys to the jail in their pockets. They determine for whom they will act as surety — who in their judgment is a good risk. The bad risks in the bondsmen's judgment, and the ones who are unable to pay the bondsmen's fees, remain in jail.

A bond service that decides to post bail will usually charge a nonrefundable 10% fee. W. THOMAS, *supra* note 4, at 11. *But see* Henson v. Thomas, No. A-6181,

Henson and Van Atta asserted that money bail had harsh effects on defendants and failed to fulfill its purpose. More importantly, all argued that less restrictive alternatives existed to ensure a defendant's presence at trial. An empirical investigation of money bail helps document these assertions.

B. Bail Statistics

The following statistics are based on an analysis of a data file containing the bail records of several thousand California defendants.[14] Table I illustrates the relationship between the amount of bail set and the percentage of defendants who cannot post bail. The percentage of defendants offered bail but unable to post it increases steadily (from 7.8% to 87.5%) as the amount of bail increases.

TABLE I

AMOUNT OF BAIL V. DETENTION

Amount of Bail	*% Held in Custody*
$ 0 - 250	7.8%
$ 251 - 500	11.9%
$ 501 - 1,000	15.9%
$ 1,001 - 3,000	44.3%
$ 3,001 - 5,000	46.4%
$ 5,001 - 10,000	66.2%
$ 10,001 - 15,000	76.6%
$ Above 15,000	87.5%

A sharp contrast appears when defendants are grouped into two classes, those with bail of $3,000 or more and those with bail of

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slip op. at 3 (Tenn. App., Middle Section at Nashville, filed Aug. 2, 1978) where the bonding agent charged 20%. Additionally, a bond service may impose collateral or co-signature requirements on the bond. Brief for Appellant at 19, Henson v. Thomas, No. A-6181 (Tenn. App., Middle Section at Nashville, filed Aug. 2, 1978).

[14] The data file was originally collected for W. THOMAS, *supra* note 4. Thomas selected at random 200 felony and 200 misdemeanor cases for each year between 1962 and 1971 from 19 cities across the country. For a detailed account of how the sample was chosen, *see id.* at 265. The data used herein is a subset of that study's data consisting exclusively of California criminal defendants who were offered bail, a total of 2,596 cases. The California sample was drawn from the initial appearance calendars in the lower criminal courts of Los Angeles, Oakland, Sacramento, San Diego, San Francisco and San Jose.

less than $3,000.[15] The detention rate was thirty-four percent when bail wat was set below $3,000. This figure rose to sixty-six percent for defendants with bail above $3,000. Clearly, a defendant's wealth determines whether that defendant will be detained before trial.

The study also revealed a correlation between the amount of bail set, detention and a defendant's likelihood of conviction. Analysis of the California data is important because the Bellamy challenge in New York was in substantial part predicted on the results of a similar study. The *Bellamy* study showed a higher conviction rate for defendants who stay in jail than for defendants who are released prior to trial.[16] For example, the *Bellamy* study found that detained defendants charged with misdemeanors had an eighty-four precent conviction rate while their released counterparts had a fifty-four percent conviction rate. Similarly, defendants held in custody on a felony charge had a seventy-six percent conviction rate while those released had a forty-one percent conviction rate.[17] Overall, the conviction rate for detained defendants was seventy-nine percent while the rate for released defendants was forty-eight percent.[18]

The California study demonstrates a similar effect of detention, as represented in Table II.

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[15]

TABLE A

AMOUNT OF BAIL v. DETENTION

	Number Released	*Number Detained*	*Percent Detained*	*Total*
Defendants with bail less than $3,000	1,374	713	34%	2,087
Defendants with bail greater than or equal to $3,000	173	336	66%	509

[16] Bellamy examined the relationship between pre-trial detention and the final outcome of a criminal case to demonstrate the immediate and causal effect of pre-trial detention on a defendant. The factors used in the study were the seriousness of the charge, prior criminal record, weight of the evidence, amount of bail, community ties and employment history. *Compare* N.Y. CRIM. PROC. Law § 510.30(2)(a) (McKinney 1971). For a detailed explanation of how each factor was held constant and analyzed *see The Unconstitutional Administration of Bail: Bellamy v. The Judges of New York City*, 8 CRIM. L. BULL. 459, 462-81 (1972) (hereinafter cited as *Bellamy Study*).

[17] *Bellamy Study, supra* note 16, at 469.

[18] *Id.* at 468.

TABLE II[19]

CONVICTION RATE v. DETENTION

	RELEASED	DETAINED
	Convicted (%)	Convicted (%)
Misdemeanor	72%	80%
Felonies	70%	78%
Overall	76%	78%

Although the California results are not as dramatic as the *Bellamy* findings, the California study confirms the results of studies showing that persons held in custody are more likely to be convicted than those released prior to trial.[20] Critics have ad-

[19] The results in TABLE II are from TABLE B. TABLE B is derived from TABLE C *infra*.

TABLE B

CONVICTION RATE v. DETENTION

	RELEASED			*DETAINED*		
	Number Released	*Number Convicted*	*Percent Convicted*	*Number Detained*	*Number Convicted*	*Percent Convicted*
Misdemeanors	759	543	72%	128	101	80%
Felonies	689	475	70%	866	672	78%

TABLE C

CONVICTION RATE v. DETENTION

Amount of Bail	*Number Released*	*Number Convicted*	*Percent Convicted*	*Number Held*	*Number Convicted*	*Percent Convicted*
$ 0 - 249	215	155	72.1%	20	13	65.0%
$ 250 - 499	223	145	65.0%	37	34	91.9%
$ 500 - 999	321	243	75.7%	71	54	76.1%
$ 1,000 - 2,999	529	357	67.5%	558	423	75.8%
$ 3,000 - 4,999	91	65	71.4%	93	72	77.4%
$ 5,000 - 9,999	55	42	76.4%	138	112	81.2%
$ 10,000 - 14,999	12	9	75.0%	52	44	84.6%
$ 15,000 and above	2	2	100.0%	25	21	84.0%

[20] Similar studies have verified the causal relationship between custody and the disposition of the case. *See* Ares, Rankin, & Sturz, *supra* note 4, at 67; Rankin, *The Effect of Pre-trial Detention*, 39 N.Y.U. L. REV. 641 (1964); *Bellamy Study, supra* note 16; Comment, *A Study of the Administration of Bail in New York City*, 106 U. PA. L. REV. 693, 707 (1958).

vanced several hypotheses for this finding. They suggest that jailed defendants cannot locate important witnesses or otherwise help prepare their defense[21] and are more likely to plea bargain.[22] Moreover, guards escort jailed defendants into the courtroom, creating an unfavorable impression on jurors.[23]

Some authorities do not view higher conviction rates for detained defendants as indicating that detention has an adverse impact on the defendant. In *Bellamy*, the New York court reasoned that higher conviction rates meant "the system was working rather than . . . (was) detrimental to a defense against an accusation."[24] In New York, the court considered the weight of the evidence when setting bail.[25] The New York judges concluded that this consideration took into account the likelihood of conviction.[26]

In California, courts do not consider the weight of the evidence when setting bail. Instead, they emphasize the "seriousness" of the charge. The more "serious" crimes have higher bail settings.[27] Because California emphasizes the type of crime committed, crimes which exhibit higher "failure to appear" (FTA) rates[28] should have higher money bail.

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[21] Barker v. Wingo, 407 U.S. 514, 533 (1972) ("[i]f a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense"). Stack v. Boyle, 342 U.S. 1, 8 (1951) (detainees "are handicapped in consulting counsel, sending for evidence and witnesses, and preparing a defense"). Kinney v. Lenon, 425 F.2d 209, 210 (9th Cir. 1970) (release ordered to permit a black defendant to find and interview black witnesses when white attorneys would have difficulty doing so). Comment, *Pre-trial Release in California: Proposed Reforms of an Unfair System*, 8 PAC. L.J. 841, 843 (1977).

[22] Thaler, *Punishing the Innocent: The Need for Due Process and the Presumption of Innocence Prior to Trial*, 1978 WISC. L. REV. 441, 458-59.

[23] *Id.*

[24] Bellamy v. Judges, 41 App. Div. 2d 196, 203, 342 N.Y.S.2d 137, 144 (1973).

[25] *See* note 11 *supra*.

[26] But the *Bellamy Study*, *supra* note 16, asserted that the disparity in treatment between those detained and those released is not accounted for by the weight of the evidence. *See id.* at 472 for a detailed account of how the study demonstrated this assertion.

[27] A pre-set schedule usually determines the amount of bail. CAL. PENAL CODE § 1269b (West 1970). Defendants who cannot afford the pre-set amount have a right to a bail reduction hearing. *Id.* § 1269c.

[28] The FTA rate compares the number of defendants released on bail to those who were absent at one or more of their scheduled court appearances. The FTA rate is a direct indication of how defendants charged with particular crimes have behaved following release on bail. TABLE D describes the FTA rate for particular crimes.

In order to examine the relationship between a crime's characteristic bail setting and FTA rate, crimes were ranked in seriousness by the percentage of defendants receiving bail over $3,000.[29] If pre-set bail schedules are valid, the more "serious" crimes

TABLE D

FTA RATES FOR PARTICULAR CRIMES

	Number of defendants granted money bail*	*Number of defendants who posted bail*	*Number FTA*	*Percent FTA*
Sale/Dangerous Drugs	65	34	6	17.6%
Prostitution	40	30	5	16.6%
Auto Theft	61	16	2	12.5%
Petty Theft	168	121	13	10.7%
Burglary	323	93	10	10.7%
Grand Theft	144	76	8	10.5%
Attempted Murder	20	10	1	10.0%
Poss./Marihuana	122	82	8	9.7%
Robbery	187	43	4	9.3%
Poss/Dangerous Drugs	143	84	6	7.1%
Assault Deadly Weapon	84	47	2	4.2%
Sale/Marihuana	24	8	0	0
Kidnapping	13	2	0	0
Sexual Assault	42	19	0	0
Murder	2	1	0	0

*The figure excludes defendants released on O.R. and those held for committing a capital crime since the rankings in TABLE E, note 29 *infra*, rely on the amount of bail

[29]

TABLE E

"SERIOUSNESS" RANKING OF CRIMES

Crime	*% defendants with bail over $3000*
1. Murder	100.0%
2. Kidnapping	92.0%
3. Attempted Murder	65.0%
4. Robbery	64.7%
5. Sale/Dangerous Drugs	46.0%
6. Sexual Assault	38.0%
7. Burglary	26.0%
8. Grand Theft	24.0%
9. Assault/Deadly Weapon	23.0%
10. Auto Theft	21.3%
11. Sale/Marihuana	20.8%
12. Possession/Marihuana	9.8%
13. Possession/Dangerous Drugs	9.7%
14. Prostitution	5.0%
15. Petty Theft	0

should exhibit higher FTA rates.[30] However, the third and fourth most "serious" crimes (attempted murder[31] and robbery[32]) have relatively moderate FTA rates.[33] Surprisingly, the crime with the highest FTA percentage (sale of dangerous drugs)[34] is the fifth most "serious"[35] crime. Similarly, the crime with the second highest FTA rate (prostitution)[36] has a "seriousness" ranking of fourteen.[37] Thus, the minimal correlation between FTA percentages and the amount of bail suggests that actual court practices conflict with the stated purpose of the California bail system.[38]

In summary, the statistics show that imposition of money bail on a defendant affects not only the likelihood of pre-trial detention but also the likelihood of conviction.[39] Furthermore, there is little relationship between the bail characteristically set for a particular crime and the FTA rate for that crime.[40] These findings document the unsatisfactory nature of the money bail system. It adversely affects defendants and inadequately serves the purpose of ensuring a defendant's return to court.

C. Alternatives to Money Bail

Alternatives to money bail include "own recognizance" (O.R.) release and a ten percent cash deposit plan. "Own recognizance"

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[30] The theory is that defendants have more to lose if convicted for a serious crime.

[31] *See* note 29 *supra.*

[32] *Id.*

[33] *See* note 28 *supra.*

[34] *See id.*, TABLE D.

[35] *See* note 29 *supra.*

[36] *See* TABLE D, *supra* note 28.

[37] *See* note 29 *supra.*

[38] *See* note 10 and accompanying text *supra.* These results agree with a study conducted by the District of Columbia Bail Agency. Of the 190 felony and 160 misdemeanor defendants released on "own recognizance" in the District of Columbia in 1964, 12 of the 13 defaulting persons were charged with misdemeanors. McCarthy & Wald, *The District of Columbia Bail Project: An Illustration of Experimentation and a Brief for Change,* 53 GEO. L.J. 675, 714 (1964-65). For other relevant studies, *see* Comment, *Beyond the Bail System: A Proposal for Pretrial Release in California,* 57 CALIF. L. REV. 1112, 1119-20 (1969). Ackies v. Purdy, 322 F. Supp. 38 (S.D. Fla. 1970) held that the use of a bail schedule violated the equal protection clause. "(I)t is obvious that money amounts set solely by the charge have no relation to the function of bail. A poor man with strong ties in the community may be more likely to appear than a man with some cash and no community involvement." *Id.* at 42.

[39] *See* notes 15,19 and accompanying text *supra.*

[40] *See* notes 28, 29 and accompanying text *supra.*

release allows a defendant to return for trial on an unsecured bond — a promise to return to court. The ten percent plan permits the defendant to post a ten percent cash deposit in lieu of paying a bonding agent a non-refundable fee. Challengers of bail systems generally seek to implement one or both of these alternatives to traditional bail.

The O.R. plan appears in several forms. It may be granted with accompanying conditions, requirements which the defendant must meet to retain O.R. status. Common conditions include contacting the O.R. agency weekly, living at the same address, working at the same job and testing for narcotics usage. The court must first use nonmonetary conditions in an effective O.R. system. It will impose a money bond as a last resort and only if absolutely necessary.[41] The prosecution carries the burden of proving a defendant should *not* be granted O.R. release.[42]

An O.R. agency is vital to an effective O.R. system. The agency will interview and collect information about a defendant, present the information to the court and supervise the defendant as required.[43] Effective O.R. agencies exist. The drop in FTA rate exhibited by an effective O.R. system indicates the success of this approach.[44] Bellamy and Van Atta requested an effective O.R. remedy.[45]

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[41] The Bail Reform Act of 1966, 18 U.S.C. § 3146 (1966) provides for the nonfinancial conditional release of defendants in federal criminal cases. The act requires that a judge use nonmonetary conditions first and use deposit and surety bail bonds only if necessary. At least seventeen states — Alaska, Arizona, Delaware, Iowa, Kansas, Maryland, Minnesota, Missouri, Nebraska, New Mexico, North Dakota, Ohio, South Carolina, Virginia, Vermont, Wisconsin and Wyoming — have statutes or rules similar to the federal act. *See* W. THOMAS, *supra* note 4, at 181.

[42] The Bail Reform Act of 1966, 18 U.S.C. § 3146 (1966) establishes a presumption for O.R. in the District of Columbia.

[43] For example, the District of Columbia Bail Agency supervises a defendant released on O.R. by maintaining contact with the defendant once a week by phone or in person. When defendants call or come to the agency they are reminded of their next court date and O.R. conditions. A Bail Agency employee logs each contact with the defendant into a computer system. Thus, the agency is able to keep an exact record of the defendant's supervisor.

[44] *See* note 110 *infra,* documenting the FTA rates in three O.R. jurisdictions — Philadelphia, Pennsylvania, Washington, D. C., and Brooklyn, New York.

[45] Van Atta asserted that the San Francisco O.R. project was an example of an ineffective O.R. system. It was underfunded and understaffed. Many detainees were never interviewed for O.R. release. Furthermore, even when there was an interview and a hearing, the presumption against O.R. placed a heavy burden on the accused to show the application was meritorious. Moreover, the court

In contrast, the ten percent plan requires a defendant to post money bail. However, defendants receive a refund when they appear for trial.[46] The ten percent plan has also lowered FTA rates.[47] Henson asked the court to implement this remedy in Tennessee.

A successful bail challenge must convince the court that a money bail system violates either the fundamental right to bail, the equal protection clause or the due process clause. Bellamy, Henson and Van Atta used different strategies to convince the court of a constitutional violation. While all argued for an equal protection-due process resolution, Henson concentrated on an eighth amendment "fundamental right to bail" violation.[48]

II. The Fundamental Right to Bail Argument

The eighth amendment's "excessive bail clause" is ambiguous

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used arbitrary standards when granting O.R. release and failed to explain denials. The court did not consider conditional O.R. release. As a result, in 1974, only six percent of arrestees in San Francisco received O.R. release and half of all arrested persons remained in jail for lack of bail money. Brief for Petitioners at 26-30, Van Atta v. Scott, *appeal docketed,* No. S.F. 23946 (Cal. Sup. Ct. Nov. 9, 1978).

[46] Sometimes a small administrative fee is charged by the court. Illinois charges a one percent fee. The Court held that this fee is constitutional against an equal protection attack in Schilb v. Kuebel, 404 U.S. 357 (1971). Michigan and Wisconsin refund the full amount to an "innocent" defendant while returning 90% of the fee to a "guilty" defendant. W. Thomas, *supra* note 4, at 185-86.

[47] The ten percent plan's success was documented in Illinois, the first jurisdiction to establish a deposit system. The FTA rate for ten percent deposit bail was lower than for surety bonds. *See* Bowman, *The Illinois Ten Percent Deposit Provision,* 1965 U. Ill. L.F. 35, 38.

[48] Courts have traditionally decided complaints involving the inability to make bail under the eighth amendment. "Excessive bail shall not be required . . ." U.S. Const. amend. VIII. *See* Foote, *The Coming Constitutional Crisis in Bail,* 113 U. Pa. L. Rev. 959, 965-99 (1965) for an excellent discussion of the eighth amendment's history.

Griffin v. Illinois, 351 U.S. 12 (1956) gave birth to the idea that the fourteenth amendment might preclude the imposition of bail on an indigent defendant. "[N]or shall any state . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. *See* note 76 and accompanying text *infra.*

Professor Foote has stated that substantial prejudice resulting from pre-trial detention may violate the due process concept of fundamental fairness. "(N)o person shall . . . be deprived of life, liberty or property without due process of law . . ." U.S. Const. amend. V; Foote, *supra* note 9, at 1182. Professor Foote has advanced a viable theory about the interplay between the eighth, fourteenth and fifth amendments. *See* note 144 *infra.*

and open to several interpretations.[49] The majority view is that the eighth amendment does not grant a "right" to bail.[50] The minority view is that it grants a right to bail before conviction.[51] States have avoided the ambiguities in interpretation by granting the right to bail in state constitutions and statutes. For example, although the state constitution does not address such a right, the New York legislature has granted a right to bail in certain cases.[52] Tennessee and California grant a constitutional and statutory right to bail.[53]

Since New York, Tennessee and California have granted a right to bail, courts must decide the standard for determining whether bail is "excessive."[54] The leading case, *Stack v. Boyle*,[55] indicates

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[49] Foote, *supra* note 48, at 969.

[50] Carlson v. Landon, 342 U.S. 524, 545 (1952) (The Court announced in a *dictum* that the eighth amendment does not confer a constitutional right to bail and that Congress may define nonbailable offenses). *But see* Foote, *supra* note 48, at 979 which suggests that *Carlson* misinterpreted the history of the eighth amendment.

[51] United States v. Motlow, 10 F.2d 657, 659 (7th Cir. 1926). ("the provision forbidding excessive bail would be futile if magistrates were left free to deny bail"). Stack v. Boyle, 342 U.S. 1, 4 (1951) (the Court announcing in a *dictum:* "This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction . . . Unless this right to bail before trial is preserved, the presumption of innocence . . . would lose its meaning"). *Stack* has been distinguished on the ground that it dealt with a statutory right to bail. Blunt v. United States, 322 A.2d 579.

[52] N.Y. CRIM. PROC. LAW §§ 510.30, 530.20 (McKinney 1971) states the court must grant O.R. or bail as a matter of law for misdemeanors.

[53] TENN. CONST. art. I, §§ 15, 16 provides that "all prisoners shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident or the presumption great." The Tennessee Supreme Court has held that "the right to bail in all cases has been regarded by all the courts as fundamental" and declared that "[t]he constitutional guarantee of the right to bail contains no exception." Wallace v. State, 193 Tenn. 182, 184, 245 S.W.2d 192, 194 (1952). Identical language concerning the right to bail is found in TENN. CODE ANN. § 40-1201 (1975).

CAL. CONST. art. I, § 6 states that "all prisoners shall be bailable by sufficient sureties, unless for capital offenses, where the proof is evident or the presumption great." CAL. PENAL CODE §§ 1270-1271 has similar language.

[54] Even if there is a right to bail under the Federal Constitution, the Court has never directly decided if the eighth amendment is applicable to the states through the due process clause of the fourteenth amendment. However, New York has held that it is applicable to the states. People v. Warden, 37 Misc. 2d 660, 235 N.Y.S.2d 531 (1962). Tennessee and California have excessive bail provisions in their state constitutions. *See* TENN. CONST. art. 1, § 16 and CAL. CONST. art. I, § 6.

[55] 342 U.S. 1 (1951).

"bail set at a figure higher than an amount reasonably calculated to (ensure a defendant's presence at trial) is 'excessive' under the Eighth Amendment." Arriving at the correct figure requires, among other factors, consideration of the defendant's financial status.[56]

Bellamy and Van Atta argued this language meant bail determinations had to be individualized. Bellamy asserted that although the New York bail statute required the court to consider a defendant's financial status, courts, in applying the statute, did not consider the defendant's financial means.[57] Van Atta pointed out that a California court did not consider the defendant's financial status since the amount of bail was pre-set by a county bail schedule.[58]

There was additional language in *Stack*[59] indicating there must be evidence to justify an "amount greater than that usually fixed for serious charges of crimes." A leading authority has interpreted *Stack* as sanctioning pre-set bail schedules and requiring individualization only for bail set above that ordinarily imposed for like crimes.[60] Most cases since *Stack* have accepted this interpretation.[61] However, a Texas court recently found a defendant's bail excessive even though it was set at an amount normally imposed for similar crimes.[62]

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[56] *Id.* at 5.

[57] Bellamy did not make a separate eighth amendment argument. Instead he argued that "excessive" bail violated due process. He asserted that bail was set within a matter of moments with no effort made in advance to determine how much bail the defendant could afford. The court usually set bail in arbitrary multiples of $500. *Bellamy Study, supra* note 16, at 499.

[58] Van Atta did not make a separate eighth amendment argument. He asserted that infringement upon the "right to bail" violated the equal protection clause. Brief for Petitioner at 23-24, Van Atta v. Scott, *appeal docketed,* No. S.F. 23946 (Cal. Sup. Ct. Nov. 9, 1978).

[59] 342 U.S. 1, 6 (1951).

[60] *See* Foote, *supra* note 48, at 955.

[61] *See, e.g.,* United States v. Radford, 361 F.2d 777, 780 (4th Cir. 1966), *cert. denied,* 385 U.S. 877 (1966) (holding that the defendant's financial status is only one factor to consider when setting bail "and certainly should not control and require that other considerations be ignored"); White v. United States, 330 F.2d 811, 814 (8th Cir. 1964), *cert. denied* 379 U.S. 855, 858 (1964) (holding that "[t]he mere financial inability of the defendant to post an amount otherwise meeting the [*Stack*] standard does not automatically indicate excessiveness . . .").

[62] *Ex parte* Walton, 583 S.W.2d 786 (Tex. Crim. App. 1979). Appellant, arrested for murder, had bail set at $50,000. Bail was subsequently reduced to $25,000. On appeal, the court held this amount "excessive" pointing to the

Henson argued the *Stack* language meant that "excessive" was relative and required consideration of financial impact and less tangible burdens imposed on a defendant's liberty.[63] She asserted that, since the fundamental right to bail was at stake,[64] scrutiny of the alternatives must be as stringent as in other areas involving fundamental rights.[65] Henson pointed out that the ten percent deposit plan was just as effective in ensuring a defendant's appearance at trial. She asserted that the ten percent plan would have a less onerous impact on defendants and would not impose significant administrative costs.[66]

In the alternative, Henson argued there was no rational relationship between the commercial surety system and the purpose of bail.[67] The Tennessee court held that courts must decide "excessiveness" by the exercise of judicial discretion in each case —not by generalized judicial legislation.[68]

III. The Equal Protection Argument

Equal protection challenges are based on the assertion that the money bail system creates two classes of defendants: those detained and those released. Detained defendants lose their liberty solely because they lack funds to post bail.

The two traditional equal protection standards of review are "strict scrutiny" and "rational basis." The standard used is critical and frequently determines the outcome of the case. The Bellamy court applied the "rational basis" standard.[69] Under this standard, the law need only rationally relate to a legitimate state interest;[70] there is a strong presumption that the statute is

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defendant's youth, his indigency, his lack of a prior criminal record and his voluntary surrender. Bail was reduced to $15,000.

[63] Brief for Appellant at 38-39, Henson v. Thomas, No. A-6181 (Tenn. App., Middle Section at Nashville, filed Aug. 2, 1978).

[64] Henson argued that the right to bail is considered "fundamental" by both state and federal courts. *Id.* at 5-7.

[65] *See* note 74 *infra.*

[66] Brief for Appellant at 38-39, Henson v. Thomas, No. A-6181 (Tenn. App., Middle Section at Nashville, filed Aug. 2, 1978).

[67] *Id.* at 43.

[68] Henson v. Thomas, No. A-6181, slip op. at 9 (Tenn. App., Middle Section at Nashville, filed Aug. 2, 1978).

[69] Bellamy v. Judges, 41 App. Div. 2d 196, 342 N.Y.S.2d 137, 143 (1973).

[70] Jefferson v. Hackney, 406 U.S. 535, 546, 549 (1972) (holding that lower welfare payments for dependent children than for the aged was constitutional because there was some relationship between the classification and the state objective).

valid.[71] Therefore, Bellamy had the almost impossible burden of showing that the legislation was arbitrary and irrational.[72]

Bellamy, Henson and Van Atta urged their respective courts to adopt the more rigorous standard, "strict scrutiny." Courts will use "strict scrutiny" if the law discriminates on the basis of a "suspect class"[73] or infringes upon a fundamental right which is constitutionally protected.[74] Under this standard, statutes do not enjoy a presumption of validity. The strict scrutiny standard shifts the burden to the government to show a compelling governmental interest which cannot be realized through a less restrictive alternative.[75]

The Supreme Court has never held that wealth is a suspect class. However, it has treated wealth discrimination with hostility whenever the rights of criminal defendants are at issue. For example, *Griffin v. Illinois*[76] and its progeny indicate indigent

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[71] Dandridge v. Williams, 397 U.S. 471 (1970) (asserting that if there are any reasonable state of facts which will justify the statute, a statutory discrimination will not be set aside).

[72] McGowan v. Maryland, 366 U.S. 420, 425 (1961) (declaring that "the constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective").

[73] The Supreme Court has held unconstitutional classifications which were based on race (Korematsu v. United States, 323 U.S. 214 (1944) (classifying race as "suspect" though upholding an overtly racial discrimination against the Japanese)), national ancestry (Yick Wo v. Hopkins, 118 U.S. 356 (1886) (holding unconstitutional as applied a building code licensing procedure)), and alienage (Graham v. Richardson, 403 U.S. 365 (1971) (holding a state statute which denied welfare benefits to resident aliens unconstitutional)).

[74] Fundamental rights include the right to travel (Shapiro v. Thompson, 394 U.S. 618 (1969) (holding unconstitutional state and federal provisions denying welfare benefits to individuals who had resided in the administering jurisdictions less than one year)), the right to vote (Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665 (1966) (invalidating state poll tax)), the right to procreate (Skinner v. Oklahoma, 316 U.S. 535 (1942) (invalidating a state law providing for the sterilization of habitual criminals)) and the right to marry (Loving v. Virginia, 388 U.S. 1 (1967) (asserting that the freedom to marry has long been recognized as a vital personal right)).

[75] The Court has not agreed upon who has the burden of proof with respect to the less restrictive alternative. In his dissent in Kahn v. Shevin, 416 U.S. 351, 357 (1974), Justice Brennan said the "state bears the burden of [proving] that the challenged legislation serves . . . compelling interests that cannot be achieved by a more carefully tailored [statute] or by use of feasible less dramatic means." However, the Court has inconsistently allocated the burden of proof.

[76] 351 U.S. 12 (1956) (holding that the failure to provide an indigent criminal defendant with a trial transcript at public expense in order to prosecute an

criminal defendants cannot be deprived of constitutional rights solely because of their wealth. Bellamy, Henson and Van Atta argued that under the *Griffin* line of cases defendants must be accorded as far as possible the rights, privileges and advantages available to more affluent defendants. All urged the court to apply strict scrutiny to a wealth-based classification which impinged upon defendants' liberties.

The state in both *Henson* and *Van Atta* argued that *Schilb v. Kuebel*[77] and *San Antonio v. Rodriguez*[78] indicated wealth is not a suspect class when the rights of criminal defendants are involved. *Schilb*[79] applied the rational basis standard, holding constitutional the one percent fee required by the Illinois ten percent deposit plan. However, the Court emphasized that the fee "smacked" of administrative detail and hardly infringed upon a fundamental right or involved suspect criterion.[80] The Court stated: "In no way do we withdraw . . . from the *Griffin* principle. That remains steadfast."[81]

San Antonio v. Rodriguez[82] held that discrimination based on wealth, when coupled with the important interest of equal educational opportunity, does not trigger strict scrutiny. However, the Court left the question of the rights of criminal defendants open when it said: "[When the District Court concluded] that strict judicial scrutiny was required [for the Texas system of school financing] the court relied on decisions dealing with the rights of indigents to equal treatment in the criminal trial and appellate

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appeal is a violation of the equal protection clause). The Court declared that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Id.* at 19. In the years since *Griffin*, the Court frequently reaffirmed that justice should be applied equally to all persons. *See* Douglas v. California, 372 U.S. 353 (1963) (holding that an indigent defendant must be provided counsel where he has a right of appeal. Otherwise there would be a discrimination between the rich and the poor which violates the fourteenth amendment); Williams v. Illinois, 399 U.S. 235 (1970) (holding that a state may not constitutionally imprison beyond the maximum duration fixed by statute a defendant who is financially unable to pay a fine); Tate v. Short, 401 U.S. 395 (1971) (holding that it is a denial of equal protection to limit punishment to payment of a fine for those who are able to pay it but convert the fine to imprisonment for those who are unable to pay it).

[77] 404 U.S. 357 (1971), *rehearing denied*, 405 U.S. 948 (1972).

[78] 411 U.S. 1 (1973).

[79] 404 U.S. 375. *See* note 46 *supra*.

[80] 404 U.S. at 365.

[81] *Id.* at 369.

[82] 411 U.S. 1 (1973).

processes . . . this case in significant aspects is *sui generis* . . . ."[83]

Henson and Van Atta argued that *Pugh v. Rainwater*,[84] decided four years after *Rodriguez*, extended the *Griffin* line of cases. The Fifth Circuit Court of Appeals held that "[wealth] in the context of a criminal prosecution must be strictly scrutinized."[85] On rehearing, the 1978 *en banc* majority stated "at the outset we accept the principle that imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible."[86] *Henson* and *Van Atta* capitalized on the Fifth Circuit's dicta. *Bellamy*, litigated before *Pugh*, had to rely exclusively on the *Griffin* line of cases.

A. Bellamy's Strategy

Bellamy, the first major challenger of a money bail system, had little precedent on which to rely. Although the *Griffin* line of cases had not held wealth a suspect class, Bellamy used the cases to support his argument that defendants should not be imprisoned because of their indigency.[87] Bellamy relied upon *Williams v. Illinois*[88] for the proposition that the equal protection clause per-

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[83] *Id.* at 17-18.

[84] 557 F.2d 1189 (5th Cir. 1977). In Pugh, plaintiffs alleged that conditioning pre-trial release on a defendant's ability to post bail discriminated against poor persons as a class and violated their rights under the fourteenth amendment. The Fifth Circuit applied the strict scrutiny standard of review. The court found that the state's interest in ensuring a defendant's appearance at trial was "compelling" but found that there were less restrictive alternatives to money bail. The court held the Florida money bail system unconstitutional.

[85] *Id.* at 1196-97.

[86] 572 F.2d 1053 (5th Cir. 1978) (*en banc*). The *en banc* opinion agreed with the earlier three-judge panel that Florida had a compelling interest in ensuring a defendant's presence at trial. However, the court refused to decide whether there were less restrictive alternatives since the Florida Legislature passed a new bail statute during the pendency of the appeal. The court held that the question of the constitutionality of the statute as applied had lost its character as a present, live controversy and was therefore moot.

[87] Bandy v. United States, 82 S. Ct. 11 (1961) is the principle authority holding that the *Griffin* rationale applies to money bail systems. Justice Douglas, sitting as a circuit justice, denied petitioner's request for release on O.R. However, Douglas asserted that "[u]nder our constitutional system, a man is entitled to be released on 'personal recognizance' where other relevant factors make it reasonable to believe that he will comply with the orders of the Court," *Id.* at 13. For the history of Bandy's long and complex litigation, *see* Foote, *supra* note 9, at 1154-55.

[88] 399 U.S. 235, 243 (1970).

mits "qualitative differences" only. Thus, Bellamy attempted to show that the money bail system treated indigent defendants differently from more affluent defendants and that "qualitative" differences did not account for the disparity in treatment.

Bellamy's statistical evidence supported his claim that the New York bail system created two classes of defendants. Detained defendants were convicted more frequently and received longer sentences than released defendants.[89] Furthermore, his extensive study[90] showed that "qualitative" differences—such as type and seriousness of charge, weight of the evidence, aggravation of circumstances, nature of prior criminal record and personal background—were not the reasons for differing treatment. Detention itself explained the disparity[91] and detention turned on wealth alone. Wealth was not a "qualitative" difference. Bellamy emphatically argued that New York bail laws invidiously and irrationally discriminated against indigent criminal defendants.[92] Bellamy asked the court to set standards for an effective O.R. system — one with a presumption in favor of O.R. release.

The court held that a defendant's bail had a rational relationship to and was adjusted to reflect the defendant's circumstances.[93] The court gave little credence to Bellamy's statistics asserting: "Both experience and logic show us that the plaintiff's figures and statistics are but a shadow of reality, misconstruing cause and effect and putting the cart before the horse . . . To put it another way, figures don't lie but liars figure."[94] The court emphasized that revision of the bail system "is more properly within the province of the legislature."[95] During the pendency of the litigation, the New York Legislature reformed the bail laws.[96]

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[89] *See Bellamy Study, supra* note 16.

[90] *Id.*

[91] *Id.*

[92] Challengers of bail laws find themselves in a delicate situation. They want to convince a court, without offending it, that its method of setting bail is unconstitutional. It is interesting to contrast the "adamant" tone of the *Bellamy* brief with Van Atta's "softer" approach.

[93] Bellamy v. Judges, 41 App. Div. 2d 196, 203, 342 N.Y.S.2d 137, 143 (1973).

[94] *Id.* at 204, 342 N.Y.S.2d at 144.

[95] *Id.* at 205, 342 N.Y.S.2d at 145.

[96] The New York Legislature amended the bail statute in 1972. This important amendment shifts the emphasis from the most severe forms of bail to the least burdensome forms. Under N.Y. CRIM. PROC. LAW § 520.10(1) (McKinney 1971) the most severe forms of bail are cash bond, insurance company bonds and fully secured bonds. The intermediate forms of bail are partially secured bonds. The least burdensome forms are unsecured bonds. Under the statute in effect

B. Henson's Strategy

Henson employed a different strategy from Bellamy when she attacked the Tennessee bail laws. Henson asserted that *Pugh,* in conjunction with the *Griffin* line of cases, established wealth as a suspect class where the rights of criminal defendants are involved.[97] Henson argued that classifications based on wealth were also suspect under the Tennessee Constitution.[98]

While Bellamy contested the constitutional validity of the New York bail statute using an empirical investigation, Henson attacked the bailbond service, concentrating on personal testimony from "actors" in the system.[99] Henson argued that "affluent" defendants could deposit the full amount of bail and receive a refund on appearance. The bail system forced the "less wealthy" to pay a pre-trial fine in the form of a bondsman's fee or risk incarceration. Henson asserted that the ten percent cash plan was less restrictive because it did not require defendants to pay a fine for freedom.

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at the time of the *Bellamy* challenge, if a judge set bail, a defendant had to post cash bail, an insurance bond or a fully secured bond. Any other type of bond required special consideration from the court. Under the new statute, N.Y. CRIM. PROC. LAW § 520.10(2)(a) (McKinney Cum. Supp. 1979), the unsecured bond is assumed. The court must indicate when it wants a more severe category.

[97] *See* notes 76, 84 and accompanying text *supra.*

[98] This assertion was drawn from Hewell v. Cherry, 25 Tenn. App. 420, 158 S.W.2d 370 (1941). *Hewell* did not specifically address the equal protection clause but dealt with the right to appeal using the pauper's oath. The court said the "purpose of the law is to place the weak on a level with the strong and to allow every man, rich or poor, his day in court." *Id.* at 423, 158 S.W.2d at 373.

[99] Henson testified that although she was an ideal candidate for O.R. release (*see* note 3 *supra*) the judge denied O.R. and set bail beyond her means at $750. Her only access to pre-trial release was through a commercial bonding agent. Henson asserted that she was not alone in this predicament. A statistical study showed that 73% of arrested persons in Nashville used commercial sureties.

Commercial bonding agents testified that commercial sureties controlled the administration of bail. One agent testified that he refused to write bail bonds on defendants charged with burglary or car larceny. He preferred to write bonds for women rather than for men. However, he permitted women to languish in jail for longer periods of time because they were housed on an upper level of the jail and it was less convenient to talk to them. Brief for Appellant at 21, Henson v. Thomas, No. A-6181 (Tenn. App., Middle Section at Nashville, filed Aug. 2, 1978). Another bonding agent testified that a clerk, hired by and accountable to the bonding cartel, sits in night court next to the judge and parcels out new business as defendants are brought before the court. Since the bonding agent's purpose is to make a profit, the clerk does not notify the pre-trial release program when new defendants are brought before the court, *Id.* at 15.

While it failed to articulate a standard of review, the Tennessee court held that the bail system did not violate equal protection guarantees. The court acknowledged the distressing inadequacies of the present system of criminal bail but concluded that "until the proponents of reform can produce a satisfactory method of assuring the presence of indigents at their trial, the state interest must prevail."[100] During the course of the litigation, the Tennessee Legislature undertook a comprehensive reform of Tennessee bail laws.[101]

C. Van Atta's Strategy

Van Atta asked the court to apply "strict scrutiny," asserting that wealth is a suspect class and money bail impinged upon two fundamental rights—the right to personal liberty and the right to defend against criminal charges. The California Supreme Court earlier indicated that wealth was a suspect class under the state constitution.[102] Thus, the California court had laid a firm legal

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[100] *Id.* at 10.

[101] The Tennessee Legislature, like the New York Legislature, enacted a new bail statute, which stated that the least onerous conditions should be imposed upon the defendant. *See* TENN. CODE ANN. § 40-1216 (Cum. Supp. 1979). TENN. CODE ANN. §§ 40-1201 to 1247 lists the following factors to be considered when granting O.R. release: the defendant's length of residence in the community; the defendant's employment and financial condition; the defendant's reputation, character and mental condition; the defendant's family ties; the defendant's prior criminal record including prior releases on O.R. or bail; the existence of members of the community who would vouch for the defendant; the nature of the offense and the probability of conviction insofar as these factors are relevant to the risk of nonappearance; and any other relevant factors. TENN. CODE ANN. § 40-1217 (Cum. Supp. 1979) states that "absent a showing that conditions of release on recognizance will reasonably assure the appearance of the defendant as required, the magistrate shall, in lieu of the conditions of release set out, require bail to be given."

[102] *See* In re Antazo, 3 Cal. 3d 100, 473 P.2d 999, 89 Cal. Rptr. 255 (1970) where a defendant, unable to pay a fine, was sentenced to jail to work off the fine at a specified rate per day. The California Supreme Court said that even though the confinement appeared to apply equally to wealthy defendants and poor defendants, "(the poor defendant) has no choice at all and in reality is being imprisoned for this poverty. . . . We cannot countenance such a difference in treatment and, absent any compelling state interest necessitating it, we conclude that it constitutes an invidious discrimination on the basis of wealth . . ." *Id.* at 103-04, 473 P.2d at 1000, 89 Cal. Rptr. at 256. After trial, but before Van Atta's appeal, the California Supreme Court decided Serrano v. Priest, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976), *cert. denied sub nom,* Clowes v. Serrano, 432 U.S. 907 (1977), holding that wealth is a suspect class under the California Constitution.

foundation for Van Atta's equal protection challenge.

Van Atta argued that the United States Supreme Court had required strict scrutiny of wealth-based classifications where important rights and liberties were concerned.[103] Van Atta also asserted that a system which denied fundamental liberty to the poor[104] and prejudiced their trial[105] was irreconcilable with the requirement that a state must choose the least restrictive alternative to achieve its purpose.[106]

Van Atta's evidence focused on establishing an effective O.R. program for the first time in California.[107] Two groups of witnesses testified at trial. The first group uniformly agreed that defendants remained in jail only because they lacked money to post bail.[108] The witnesses asserted that existing O.R. avenues to release were ineffective.[109] The second group included a number of "actors" in more developed O.R. jurisdictions. These witnesses testified about the success of O.R. release.[110]

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[103] Van Atta cited Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (holding that equal access to voting is fundamental), Pugh v. Rainwater, 557 F.2d 1189 (1977), *vacated in part on rehearing en banc,* 572 F.2d 1053 (5th Cir. 1978) (asserting in dicta that wealth-based discrimination against criminal defendants is suspect), and the *Griffin* line of cases, *supra* note 76, for this proposition.

[104] *See* People v. Olivas, 17 Cal. 3d 236, 251, 551 P.2d 375, 390, 131 Cal. Rptr. 55, 70 (1976) (concluding that "personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and United States Constitutions."). *See also* TABLE I in text accompanying notes 14-15 *supra.*

[105] *See* United States v. Thompson, 452 F.2d 1333, 1340 (D.C. Cir. 1971), *cert. denied,* 405 U.S. 998 (1972) (declaring that "the rights of a criminal defendant are in some sense the most basic of all . . ."). *See also* TABLE II in text accompanying note 19 *supra.*

[106] *See* note 75 and accompanying text *supra.*

[107] *See* note 41 and accompanying text *supra.*

[108] One witness testified that 50% to 60% of the Public Defender's clients charged with felonies are still in custody at the time of their trials. Of those charged with misdemeanors, approximately 50% are in custody at the time of arraignment and 8% to 10% remain in custody for 20 to 50 days. Brief for petitioner at 31, Van Atta v. Scott, *appeal docketed,* No. S.F. 23946 (Cal. Sup. Ct. Nov. 9, 1978).

A prominent San Francisco bail agent, Al Graf, conceded that "[t]he people that are being released are the affluent. The poor people are staying in jail." *Id.* at 32.

[109] *See* note 45 *supra.*

[110] Van Atta brought in witnesses from three successful O.R. projects: Philadelphia, Pennsylvania, Washington, D. C., and Brooklyn, New York. The Director of the Philadelphia pre-trial release program testified that Philadelphia had

Furthermore, Van Atta asserted that California's bail system failed the rational basis test. "[T]here was no basis for a presumption that defendants who could not post money bail would flee . . . and incarceration was not necessary to prevent their flight. There was also no basis for the assumption that the more serious charges required higher bail settings."[111]

Van Atta delayed litigation while the California Legislature considered bail reform.[112] When the legislature failed to pass an adequate reform measure, Van Atta continued his challenge in the judicial system. The case was the first one litigated on a full record before a state's highest court.[113] At the time of this writing,

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reformed its bail system from one of using money bail to one which used either O.R. release or a ten percent deposit plan. The FTA rate under the old system for persons released on money bond was 10%. The FTA rate under the new system was 7.1% for those released on O.R. and 10% for those required to make a refundable cash deposit. Philadelphia released 98% of those arrested under some plan as compared with San Francisco's release rate of 50%.

The Director of the Washington, D. C. Bail Agency testified that 47% of defendants were released on O.R., 5% after posting a 10% refundable fee to the court and 10% after posting a traditional money bond. Five percent were held in custody, with the remaining 33% either dismissed or held for mental examination. The FTA rate for those released under the O.R. program was six percent. The director believed that those released on money bail had a higher FTA rate because a bondsman had a worse relationship with defendants than a pre-trial release agency.

The Brooklyn Director concurred with the Washington report. Of the 26,000 persons booked in 1974, 56% were released on O.R. The FTA rate for those released under the O.R. program was eight percent. It was also his impression that the FTA rate was slightly higher for those released on money bail. Brief for Petitioner at 33-36, Van Atta v. Scott, *appeal docketed,* No. S.F. 23946 (Cal. Sup. Ct. Nov. 9, 1978).

[111] *Id.*

[112] During the course of the Van Atta litigation, California Assemblymember Howard Berman sponsored A.B. 2 (1978 Regular Sess.) to reform the bail system. A.B. 2 provided for two major changes in pre-trial release: a presumption for nonmonetary forms of release for both misdemeanor and felony arrestees and a 10% refundable deposit with the court in lieu of the traditional money bail system. Van Atta asked the California Supreme Court to stay hearing on the case while the legislature looked at the reform measure. The legislature did not pass the proposed bill in its entirety. Instead it enacted a five-year sunset law reforming bail procedures for misdemeanor arrestees only. A.B. 2 (1979 Regular Sess.).

[113] Van Atta used taxpayer standing to bring his suit. *See* CAL. CIV. PROC. CODE § 526(a) (West 1979) which authorizes "an action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to . . . funds or other property of a county, town, city . . . of the state . . ." The Court of Appeal held that the action was an impermissible use of the taxpayers' suit,

the case is pending.

IV. Due Process

The decision to detain or release an arrested person is one of the most critical decisions in the criminal process. Defendants imprisoned in lieu of bail lose their liberty and are more likely to be convicted of the alleged crime.[114] Any arbitrary and unnecessary deprivation of defendants' rights transgresses substantive due process, the fundamental concept of fairness in the criminal justice system.[115] Furthermore, no person should be condemned to suffer a grievous loss without a due process hearing.[116] The issue at a bail hearing is whether the accused is likely to appear at trial, not whether the defendant is guilty or innocent. Thus, fundamental procedural safeguards require a bail hearing which is "meaningful"[117] and "appropriate to the nature of the case."[118] The procedural requisites for the hearing are determined largely by balancing the interests of the state against the extent to which defendants may be "condemned to suffer grievous losses."[119] Bel-

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on the ground that the pre-trial detainees themselves had plenary recourse to the courts. Van Atta v. Scott, 84 Cal. App. 3d 450, 148 Cal. Rptr. 717 (1978). Van Atta appealed from the decision. The California Supreme Court granted a hearing and concentrated on the merits of the case.

[114] *See* notes 15, 19 and accompanying text *supra*.

[115] McKeiver v. Pennsylvania, 403 U.S. 528, 554 (1971) (Brennan, J., concurring in part and dissenting in part) ("[t]he due process clause commands, not a particular procedure, but only a result; . . . fundamental fairness . . . (in) fact finding").

[116] This principle is firmly established in a number of recent decisions. A person may not, without a hearing, suffer: a revocation of probation (Gagnon v. Scarpelli, 411 U.S. 888 (1973)); a revocation of parole (Morrissey v. Brewer, 408 U.S. 471 (1972)); civil commitment (Specht v. Patterson, 386 U.S. 605 (1967)); public stigmatization (Wisconsin v. Costantineau, 400 U.S. 433 (1971)); pretrial detention without bail (United States v. Gilbert, 425 F.2d 490 (D.C. Cir. 1969)); detention on a prosecutor's information without a showing of probable cause relating to the commission of the crime (Gerstein v. Pugh, 420 U.S. 103 (1975)); or punishment for infraction of prison rules (Wolff v. McDonnell, 418 U.S. 539 (1974)).

[117] Armstrong v. Manzo, 380 U.S. 545, 552 (1965) (asserting that the opportunity to be heard must be granted at a meaningful time and in a meaningful manner).

[118] Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 313 (1950) (asserting that liberty adjudication must be preceded by notice and an opportunity for a hearing appropriate to the nature of the case).

[119] Goldberg v. Kelly, 397 U.S. 254, 263 (1970) (holding that it is unconstitutional to terminate aid to families with dependent children without prior notice and a hearing).

lamy, Henson and Van Atta claimed their respective state bail processes were shockingly barren of basic guarantees for an accused person.[120]

A. Bellamy's Due Process Argument

New York granted defendants an initial bail hearing. This hearing lasted between ninety seconds and three minutes with only a small portion of the time allocated to setting bail.[121] Bellamy asserted that at a "meaningful" hearing an accused should present evidence, confront information regarding the probability of returning to court and cross-examine. An "appropriate" hearing should include a presumption for O.R. release. The prosecution should prove by clear and convincing evidence that restrictions are necessary.[122] The court should require money bail as a last resort, minimizing the broad powers of bailbond agents.[123] The court should state the reasons for requiring money bail.[124]

Bellamy claimed that defendant's grievous losses included loss of liberty, disruption of families and loss of jobs. Incarcerated defendants survived under oppressive conditions, subjected to overcrowding, inadequate food, sexual assault and frequent violent acts. Moreover, detained persons were more often convicted and received harsher sentences.[125]

The governmental interest could be summed up by the two words "efficiency" and "cost." Bellamy argued that the present system was not efficiently using existing resources.[126] Further-

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[120] Each asserted that their respective bail hearings violated the due process clause of the fourteenth amendment to the United States Constitution and the analogous provision in their respective state constitutions.

[121] *Bellamy Study, supra* note 16, at 486.

[122] Bellamy asserted that some possible nonmonetary restrictions include: placing the accused under the supervision of a probation officer; placing reasonable restrictions on the defendant's activities, movements or residence; permitting daytime release or imposing other conditions requiring the defendant to return to custody on weekends or after specified hours. *Id.* at 493.

[123] *See* note 13 *supra.*

[124] United States ex rel. Keating v. Bensinger, 322 F.Supp. 784 (N.D. Ill. 1971) held that the failure to indicate the motivating reasons for the denial of bail was unconstitutional. Goldberg v. Kelly, 397 U.S. 254, 271 (1920) stated that such a statement need not amount to full opinion.

[125] *See* note 16 and accompanying test *supra.* See also *Bellamy Study, supra* note 16 at 462-81, which determined that pre-trial detainees receive harsher sentences than defendants who are released.

[126] Bellamy pointed out that one jail alone held 1,400 people each day at an average cost of $6.5 million. Improvements in bail procedures would reduce this

more, inadequate financial resources failed to justify a denial of due process.[127] On balance, Bellamy concluded that defendants' suffering outweighed the government's interest in summary adjudication. The New York court disagreed and held without explanation that the bail system satisfied due process requirements.[128]

B. Henson's Due Process Argument

Tennessee also afforded defendants the right to a bail hearing. Henson asserted that although a magistrate theoretically set bail, the bailbond agent made the operative decision. Thus, the commercial surety system functioned without pre-set, rationally developed and equitably applied standards.[129] Henson argued that even if the bailbond system employed constitutionally adequate procedures, the premise that pre-trial liberty could be bought and sold was at odds with basic notions of fairness. No amount of procedural due process could remedy the basic lawlessness of such a system.[130] Henson asked the court to continue to set bail but accept a ten percent refundable security on behalf of defendants.[131]

The Tennessee court held that the bail system did not violate due process.[132] It found that society's right to have accused wrongdoers brought to justice outweighed the accused's right to less restrictive bail procedures.

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cost. *Id.* at 488.

[127] See L. TRIBE, AMERICAN CONSTITUTIONAL LAW 539-43 (1978) for a discussion of when cost may play a role in deciding exactly what level of protection a right should receive. Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976) announced that the fiscal and administrative burden of procedural requirements can be factored into the government's interest. *But see* Stanley v. Illinois, 405 U.S. 645, 656 (1972) (asserting that the due process clause was "designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and cost which may characterize governmental officials). Thaler, *supra* note 22, at 468 states that the punishment imposed on each detainee far outweighs any administrative costs involved with the application of due process to the pre-trial process.

[128] Bellamy v. Judges, 41 App. Div. 2d 196, 342 N.Y.S.2d 137 (1973).

[129] Brief for Appellant at 45, Henson v. Thomas, No. A-6181 (Tenn. App., Middle Section at Nashville, filed Aug. 2, 1978).

[130] *Id.* at 46-47.

[131] *Id.*

[132] Henson v. Thomas, No. A-6181, slip op. at 10 (Tenn. App., Middle Section at Nashville, filed Aug. 2, 1978).

C. Van Atta's Due Process Argument

Van Atta, like Bellamy, argued that routine incarceration of indigent defendants, with the resulting prejudice to their defense, was inconsistent with fundamental concepts of fairness.[133] Van Atta asserted that such deprivation of liberty was arbitrary and unnecessary. Van Atta urged the state to adopt the least restrictive alternative of an effective O.R. program to cure substantive due process violations.

California, unlike New York and Tennessee, denied defendants an initial bail hearing. The state granted the right to a bail reduction hearing after bail had been pre-set by a county schedule. Van Atta argued that the fifth and fourteenth amendments protected against the incarceration of a defendant who has not been convicted of a crime.[134] He further argued that defendants were entitled to a hearing before a decision which could result in incarceration was made.[135]

Van Atta concluded that the nature of the hearing should encompass the *Bellamy* remedies: the establishment of an effective O.R. system, the consideration of a defendant's financial status and the requirement of a written statement of reasons for the bail decision. Van Atta asserted that these procedural safeguards would ensure that the bail hearing was "meaningful" and "appropriate to the nature of the case."

CONCLUSION

The *Van Atta* litigation provides a frame of reference for analyzing the legal arguments used to challenge the money bail system. At the time of the *Van Atta* challenge, the sole purpose of bail in California was to ensure the defendant's appearance in court.[136] Every California defendant had the right to bail unless that defendant had committed a capital crime.[137] A defendant's

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[133] Van Atta asserted that fundamental fairness entailed avoiding punishment of defendants prior to conviction and affording them an unhampered defense preparation. Brief for Petitioner at 48-60, Van Atta v. Scott, *appeal docketed*, No. S.F. 23946 (Cal. Sup. Ct. Nov. 9, 1978).

[134] U.S. CONST. amend. V: "No person shall . . . be deprived of life, liberty or property without due process of law." U.S. CONST. amend. XIV "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

[135] *See* note 116 *supra*.

[136] *See* note 10 and accompanying text *supra*.

[137] *See* CAL. CONST. art. I, § 6 set forth in note 53 *supra*.

wealth determined detention or release before trial.[138] A detained defendant was more likely to be convicted than a released defendant.[139] There was little relationship between a crime's characteristic bail setting and FTA rate.[140] The California Legislature had created a discretionary O.R. program but had hesitated to deal with the difficult problem of defendants who could not afford traditional money bail. Against this background, Van Atta sought reform of pre-trial release practices through judicial intervention.

Any suit challenging money bail must propose a suitable remedy. The principal alternatives to money bail are an effective O.R. system[141] and a ten percent cash plan.[142] Van Atta chose the former. A timely O.R. program is the better remedy because it does not depend upon a money deposit.[143] In contrast, a ten percent deposit plan may impose pre-trial detention on less wealthy defendants. However, the ten percent plan grants immediate release to defendants able to post bail. Both remedies give the court complete control of pre-trial release, eliminating the extrajudicial power of the bailbond service.

The primary arguments in a money bail challenge include the eighth amendment "fundamental right to bail" argument, the equal protection challenge and the due process argument. The traditional eighth amendment argument is the weakest.[144] Even

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[138] *Cf.* TABLE I in text accompanying notes 14-15 *supra.*

[139] *Cf.* TABLE II in text accompanying note 19 *supra.*

[140] *See* notes 28-29 and accompanying text *supra.*

[141] *See* notes 41-45 and accompanying text *supra.*

[142] *See* notes 46, 47 and accompanying text *supra.*

[143] Van Atta neglected to address the "timing" of the O.R. hearing. An effective O.R. system assures that defendants have a hearing as soon as possible. A defendant in the District of Columbia, for example, has an O.R. hearing within 24 hours of arrest.

[144] *But see* Foote, *supra* note 9, at 1180, suggesting a less traditional interpretation of the eighth amendment:

> The words "excessive bail" in the amendment must be given an interpretation consistent with the Griffin rule as forbidding any financial discrimination against the accused. Such an interpretation pierces the literal guarantee and focuses upon the fundamental interests with which the amendment is concerned: the right not to be punished before conviction and the right not to be prejudiced in preparing for trial. These were the ends; a financial bonding system was merely a means, perhaps suited to an earlier age, but at any rate now obsolete and offensive to current values. The concept of excessiveness would continue to be pertinent as a check against the imposition of unjustifiably onerous conditions of pre-trial release.

if the eighth amendment grants the right to bail,[145] it does not necessarily grant the right to pre-trial release. Thus, it will be difficult to convince the court that setting bail beyond a defendant's means violates a fundamental right to bail.[146]

It is uncertain whether equal protection arguments will support a successful federal constitutional challenge. The Supreme Court has never held that wealth is a suspect class.[147] Wealth is a suspect class under the California constitution,[148] however, and Van Atta relied heavily on the equal protection challenge. The equal protection argument is the most substantive and direct. Nevertheless, there are reasons why the California court would hesitate to find an equal protection violation. First, it would require the court to consider arguably different federal and state standards.[149] More significantly, a finding of an equal protection violation would require the court to specify an appropriate less restrictive alternative. Courts have generally abjured "legislating" in the field of bail reform.

During the *Van Atta* hearing,[150] the court indicated its reluctance to find an equal protection violation. Justice Tobriner remarked that the equal protection issue was a "can of worms" and asked counsel for Van Atta if a due process violation would not achieve the same end.

A procedural due process remedy is less "administrative" in nature. If the court finds that the imposition of money bail takes away a property or liberty interest, it will require a hearing.[151] Van

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[145] *See* note 51 and accompanying text *supra*.

[146] The court is more likely to require consideration of a defendant's financial status or reduce an individual defendant's bail under the "excessive bail" clause. *See* notes 61, 62 and accompanying text *supra*.

[147] However, the Court has treated wealth discrimination with hostility whenever the rights of criminal defendants were at stake. *See* note 76 and accompanying text *supra*. The Fifth Circuit has said that a classification based on wealth, in the context of a criminal prosecution, must be strictly scrutinized. *See* note 84 and accompanying text *supra*. Thus, the door is not entirely closed to an equal protection challenge under the federal constitution.

[148] *See* note 102 *supra*.

[149] However, the California Supreme Court has not hesitated to use a different standard from the United States Supreme Court in the past. *See* Serrano v. Priest, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976), *cert. denied sub nom*, Clowes v. Serrano, 432 U.S. 907 (1977) (holding that wealth is a suspect class under the California Constitution).

[150] The California Supreme Court heard Van Atta's oral argument on Oct. 17, 1979, in Monterey, California.

[151] *See* note 116 and accompanying text *supra*.

Atta requested that the nature of the hearing include a presumption for O.R. release[152] and a statement of written reasons for the court's decision. Basically, this is the same remedy that would result from an equal protection violation. However, the court can set minimum standards which would cure the procedural due process defect while permitting the legislature to define and implement the administrative details.

Van Atta is the first bail challenge to reach a state's highest court on a complete record. The California Supreme Court's willingness to consider the constitutionality of a money bail system which no longer effects the objectives it was designed to achieve has hopefully set a precedent which other states will follow. Of course, each state will have to resolve its bail problems in light of the structure of its particular bail system. By examining the legislative and judicial environments of three significant bail challenges, this comment presents lawyers with the background and strategy necessary to challenge money bail laws in jurisdictions where reform is needed.

Pamela Bateman Fyfe

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[152] This "presumption" would shift the burden to the prosecutor to show why nonmonetary forms of release would not guarantee the defendant's return to court.