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Current Issues in Public Policy

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DOING THE BARE MINIMUM: WHY A PREFERENCE SHOULD BE EXPRESSED FOR PERSONAL RECOGNIZANCE RELEASE.

Charles White [1]

[1] Graduate, University of South Carolina School of Law; J.D., 2015. Graduate, Chapman University Fowler School of Law; Master of Laws LL.M. with an emphasis in Taxation, 2019.

I. INTRODUCTION

Rena Lee's case started and ended with a bond.

> "[Lee] was adjudicated indigent and counsel was appointed for her preliminary hearing in the City Court of McComb, bond being set at $50,000. On April 18, 1979, the preliminary hearing was held, Lee was bound over to the October Term of the Pike County Circuit Court, and bond was reduced to $10,000. [Lee] then filed a petition for writ of habeas corpus seeking release on her own recognizance. After a short hearing, the county judge refused to order her release on her own recognizance, but reduced her bail to $2,500, which [Lee] was still unable to post. From that order, Rena Lee appealed."[2]

In addressing the issue on appeal, the Supreme Court of Mississippi noted that courts have applied two conflicting approaches regarding the presumption favoring personal recognizance wherein some do not express any preference based on the assumption that the risk of incarceration solely due to poverty exists with any approach.[3] Other courts, however, express a preference for personal recognizance release based on poverty concerns unique to indigent defendants.[4] This essay argues against approaches that fail to express a presumption against money bail and in favor of approaches that express a preference for personal recognizance release.

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[2] Lee v. Lawson, 375 So.2d 1019, 1020 (Miss. 1979).

[3] *Id.* at 1022.

[4] *Id.*

II. PRETRIAL RELEASE FRAMEWORK

The Eighth Amendment to the United States Constitution states "*[e]xcessive bail shall not be required,* nor excessive fines imposed, nor cruel and unusual punishments inflicted."[5] In *Thomas v. State*, where the court addressed the Eighth Amendment, the following occurred:

> "In refusing to hold a pretrial release inquiry pursuant to Ark. Rules of Crim.Pro., Rule 8.5 the municipal judge stated: It's going to be my position today and tomorrow that everybody that's charged with the possession of marijuana with intent to sell or some other hard drugs, it will be Twenty Thousand Dollars to start and reduced then after the Court hears more about the facts to a minimum of Five Thousand unless the Prosecuting Attorney comes in with additional information and recommends a lower bond. That has been my policy. It's going to be my policy and there's no use of anybody taking this Court's time trying to change my mind…."[6]

After addressing the Eighth Amendment, the Supreme Court of Arkansas indicated:

> In this connection we must note that The Honorable Municipal Judge was fearful

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[5] U.S. CONST. amend. VIII; *See also* COLIN MILLER, CRIMINAL ADJUDICATION, 14 (12th ed. 2013) [hereinafter CRIMINAL ADJUDICATION].

[6] Thomas v. State, 542 S.W.2d 284, 285 (Ark. 1976).

> that such inquiries would seriously impede the business of the municipal court. However, we must point out that the Constitution of this State and the foregoing Rules place much stress on the individual rights of persons and were drafted with the view that the authorities would discharge their responsibilities by providing sufficient courts and courtroom facilities for the protection of those individual rights.[7]

In addition to the courts, the American Bar Association has created pretrial release standards aside from the constitutional perspective. The American Bar Association Pretrial Release Standard 10-1.4(d) provides "[f]inancial conditions should not be employed to respond to concerns for public safety."[8] Furthermore, the Standard 10-1.4(d) Commentary provides:

> "This Standard strongly emphasizes the principle that financial bail is not an appropriate response to concerns that the defendant will pose a danger if released. Such concerns are appropriately addressed through a special hearing process to determine whether a person will be detained, pursuant to Standards 10-5.8 through 10-5.10. Money bail should not be used for any reason other than to respond to a risk of flight. The practice of setting very high bail in situations where the defendant is

[7] *Id.* at 289-90.

[8] *Pretrial Release*, A.B.A. CRIM. JUST. SEC. 10-1.4(d) (3d ed. 2007) [hereinafter *Pretrial Release*].

> regarded as posing a risk of dangerousness is explicitly proscribed by this Standard."[9]

In another provision, Standard 10-1.4(e) indicates that "[t]he judicial officer should not impose a financial condition of release that results in the pretrial detention of a defendant solely due to the defendant's inability to pay."[10] The Standard 10-1.4(e) Commentary indicates that:

> This Standard prohibits the imposition of financial conditions that the defendant cannot meet. The intent behind this limitation is to ensure that financial bail serves only as an incentive for released defendants to appear in court and not as a subterfuge for detaining defendants. Detention should only result from an explicit detention decision, at a hearing specifically designed to decide that question, not from the defendant's inability to afford the assigned bail.[11]

For example, in *State v. Rogers*,

> "[Rodney Rogers] was ordered to appear for a pre-trial conference on June 4 and [Rogers] was ordered released N.B.R. (no bail required). On June 4, [Rogers] personally appeared with counsel at the pre-trial conference before Judge James Rogers. When the court asked the status

[9] *Id.*

[10] *Id.* at 10-1.4(e).

[11] *Id.*

of the matter, defense counsel said the parties desired a trial date. The following then ensued:

THE COURT: Do you wish to continue with RPR on this matter, Counsel?

MR. BIRRELL: I didn't know that there was an RPR, Your Honor. My understanding was he's NBR'd.

THE COURT: We'll either have bail setting or RPR, whichever you wish.

MR. BIRRELL: I would like to argue for NBR, Your Honor.

THE COURT: Whichever you wish. If you don't want to take the responsibility, or you don't feel comfortable with it, that doesn't bother me. I'm not going to insist upon it. Whichever you wish.

MR. BIRRELL: What I want to do is argue bail, Your Honor.

THE COURT: Fine.

MR. BIRRELL: I want to argue for an NBR. I think that's our right under the Rules of Criminal Procedure.

THE COURT: There is no right to an NBR. You can either have-

MR. BIRRELL: There is a presumption-

THE COURT: Counsel, you can either have an RPR or bail. I don't care.

MR. BIRRELL: For the record, Your Honor, I would like to make an offer of proof as to what I would advise the Court in seeking a release without bail. May I do that, Your Honor?

THE COURT: You may.

MR. BIRRELL: If permitted, Your Honor, I would prove the following: The defendant is 30 years old. That he is

single. That he's a lifelong resident of the State of Minnesota. That the only thing that he has ever had by way of a record is a petit misdemeanor, failure to obey a semaphore in 1982. That he has made all of his court appearances. That he's not chemically dependent. That he has worked since he was 17 years old. That he has been constantly employed with Metalmatic in a full-time position as a welder. That he brought someone with him to drive here today. That he has made all of his court appearances. That he has faithfully contacted and kept in contact with his attorney. That he has been released NBR, that the police apparently released him on NBR. That there is absolutely no reason to require an RPR in this case. That the Rules of Criminal Procedure provide a presumption of release without bail, and that I believe it's an abuse of discretion to require bail or an RPR in this case. That I am willing to take an RPR only because of the issue-only because of the manner in which the court has presented the issue.

THE COURT: If you wish an RPR, fine. If you don't feel comfortable with it-

MR. BIRRELL: I feel eminently comfortable, Your Honor. I think it's suppressing and unreasonable.

THE COURT: Okay. That's why we have RPR's, so the attorney takes responsibility. It's part of what you are getting a fee for.

> MR. BIRRELL: Your Honor, I believe this Court is the only Court that requires bail or an RPR on every case."[12]

The court also mentioned Minn. R. Crim. P. 6.02 and acknowledged that "[t]hese Standards derive from the Bail Reform Act of 1966 and generally follow the ABA Standards for Pre-trial Release."[13] The court suggested:

> "The ABA Standards for Criminal Justice (1985) provide in section 10-5.1(a): It should be presumed that a defendant is entitled to release on his or her own recognizance on condition that no new offense be committed. The presumption may be overcome by a finding that there is substantial risk of non-appearance, or a need for additional conditions* * *."[14]

The court noted:

> "The rules presume that a defendant be released on his own personal recognizance. In this case, the record shows Judge Rogers did not even consider N.B.R. To not even consider the presumed policy reflects an abdication of discretion which this court cannot condone. It must also be kept in mind that we are dealing with pretrial detention,

[12] State v. Rogers, 392 N.W.2d 11, 12-13 (Minn. Ct. App. 1986).

[13] *Id.* at 13.

[14] *Id.*

> when an accused is presumed innocent."[15]

The court concluded that "there are potential ethical and constitutional considerations in a general policy which in effect puts defense counsel in a position where counsel must accept R.P.R. or have a client go to jail if the client cannot afford to post the bail."[16] According to the court, "[t]he trial court's order requiring bail or R.P.R. is hereby vacated."[17] All in all, the order requiring bail or R.P.R. was vacated in a state with standards that generally follow the ABA Standards for Pre-trial Release.

III. ABA PROJECT ON MINIMUM STANDARDS RELATING TO PRETRIAL RELEASE

According to the Supreme Court of New Jersey in *State v. Johnson*,

> The approved draft of the *A.B.A. Project on Standards Relating to Pretrial Release, supra*, noted that all the facets of the pretrial detention question had been thoughtfully explored and the Committee concluded that "at this time and on the basis of present knowledge it should not recommend the adoption of preventive detention."[18]

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[15] *Id.* at 14.

[16] *Id.*

[17] *Id.*

[18] State v. Johnson, 61 N.J. 351, 362 (1972) (emphasis in original).

According to the Superior Court of New Jersey in *State v. Fann*, "The *A.B.A. Standards Relating to Pretrial Release* (Rev. 1985) 10-5.3 provide in part: The sole purpose of monetary conditions is to assure the defendant's appearance. Monetary conditions should not be set to punish or frighten the defendant, to placate public opinion, or to prevent anticipated criminal conduct."[19] The court noted:

> The American Bar Association, in the introduction to its *Standards Relating to Pretrial Release* (Approved Draft 1968) at [2-3] underlined the significance of bail from the standpoint of a defendant: The consequences of pretrial detention are grave. Defendants presumed innocent are subjected to the psychological and physical deprivations of jail life, usually under more onerous conditions than are imposed on convicted defendants. The jailed defendant loses his job if he has one and is prevented from contributing to the preparation of his defense. Equally important, the burden of his detention frequently falls heavily on the innocent members of his family. Moreover, there is strong evidence that a defendant's failure to secure pretrial release has an adverse effect on the outcome of his case. Studies in Philadelphia, the District of Columbia and New York all indicate that the conviction rate for jailed defendants materially exceeds that of bailed defendants.[20]

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[19] State v. Fann, 239 N.J. Super. 507, 511 (Super. Ct. 1990).

[20] *Id.* at 512-13.

Lastly, according to the Supreme Court of Mississippi in *Lee v. Lawson*,

> The American Bar Association Project on Minimum Standards Relating to Pretrial Release serves as a guide to the conservator in the release decision. The standards are the result of a great deal of research and have been formulated by some of the finest observers of criminal justice in this country. Adherence to these standards will go far toward the goal of equal justice under law. There is incorporated in these standards a presumption that a defendant is entitled to be released on order to appear or on his own recognizance.[21]

Use of the Standards is increasingly being sought in bond matters. For example, Hawaii House Concurrent Resolution NO. 134 requesting the judiciary convene a task force indicates that:

> WHEREAS, the American Bar Association Criminal Justice Section Standards for Criminal Justice: Pretrial Release sections 10-1.2, 10-1.4, and 10-5.3 (2007) provide that "the judicial officer should assign the least restrictive condition(s) of release that will reasonably ensure a defendant's attendance at court proceedings and protect the community, victims, witnesses or any other person", and financial conditions "should not be employed to respond to concerns for

[21] Lee v. Lawson, 375 So.2d 1019, 1024 (Miss. 1979).

> public safety", nor should financial conditions result "in the pretrial detention of the defendant solely due to an inability to pay";[22]

It provides:

> BE IT RESOLVED by the House of Representatives of the Twenty-ninth Legislature of the State of Hawaii, Regular Session of 2017, the Senate concurring, that the Judiciary is requested to convene a Criminal Pretrial Task Force to:
>
> (1) Examine and, as needed, recommend legislation and revisions to criminal pretrial practices and procedures to increase public safety while maximizing pretrial release of those who do not pose a danger or a flight risk; and
>
> (2) Identify and define best practices metrics to measure the relative effectiveness of the criminal pretrial system, and establish ongoing procedures to take such measurements at appropriate time intervals; and
>
> BE IT FURTHER RESOLVED that the task force be comprised of members that represent the various perspectives of public officials with significant roles in the criminal pretrial system and include:

[22] H.R. 134, 29th Leg. (Haw. 2017).

> (1) The Chief Justice or the Chief Justice's designee, who shall serve as the chairperson of the task force;
> (2) A judicial officer representative of each Circuit Court […][23]

In general, the American Bar Association standards relating to pretrial release have been successful thus far.

IV. THE PREFERENCE FOR PERSONAL RECOGNIZANCE

A. The Business as Usual Approach

Confronted with bonds the defendant is unable to afford, some courts have applied an endorsement dependent approach, typically not expressing a preference for pretrial release. For example, in *Webster v. Roesel*, the District Court of Appeal of Florida concluded that:

> it [further appears] that the current bond in the sum of $25,000.00 for each of said Petitioners is in fact excessive in view of the charge for which they are held to answer, and the prosecuting attorney having evinced his consent or acquiescence to the reduction of bond for each of said Petitioners to the sum of $3,000.00, and the court being otherwise duly advised in the premises, it is thereupon.[24]

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[23] *Id*.

[24] Webster v. Roesel, 253 So.2d 491 (Fla. Dist. Ct. App. 1971).

The court acknowledged:

> Ordered that the said Petition for Writ of Habeas Corpus be, the same is hereby granted, and further, that bail bond of $25,000.00 heretofore set for each of said Petitioners be, and the same is hereby reduced to and set at the sum of $3.000.00 for each of the several Petitioners herein.[25]

At the cases conclusion, bond was reduced by endorsement without expressing a preference for personal recognizance release.

B. The Stricter Approach

Other courts have expressed a preference for release on own recognizance in cases involving poverty. In *Ex parte Avila*, Angel Avila "was arrested and jailed on September 27, 2005 for allegedly shooting three men.[26] The next day, a magistrate set bail on each shooting at $300,000."[27] Avila then "filed an application for a writ of habeas corpus and requested release under a personal recognizance bond or, alternatively, a bail reduction to $10,000."[28] Finding for Avila, "trial court reduced bail to $10,000 on each count."[29]

The Court of Appeals of Texas later reversed, holding that the trial court abused its discretion by failing to follow the *Rowe v. State* directive.[30] This dictates that it must set bail at an amount that the

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[25] *Id.*

[26] *Ex parte* Avila, 201 S.W.3d 824, 825 (Tex. App. 2006).

[27] *Id.*

[28] *Id.* at 825-26.

[29] *Id.* at 826.

[30] Rowe v. State, 853 S.W.2d 581, 583 (Tex. Crim. App. 1993).

record reflects Avila can make, or release him on a personal recognizance bond.[31] The court found that:

> The evidence adduced at the hearing shows: Avila was self-employed as a car painter and earned approximately $1,200 per month, which he used to support his wife and child; Avila has had no means of support since his September 2005 incarceration; his wife and parents have no money to give him to post a bond; he has no money or a vehicle; and the trial court had found Avila indigent. The record shows that Avila could not post bond in any amount; accordingly, the trial court should have released Avila on a personal recognizance bond.[32]

Specifically, the court observed that "We reverse the trial court's order setting bail at $10,000 on each count and remand the cause to the trial court with instructions to release Avila on a personal recognizance bond."[33]

The Court of Criminal Appeals of Oklahoma reached a similar conclusion in *Petition of Humphrey.*[34] In *Humphrey*, Granville Humphrey posted a bond in the sum of $3,000.00 and $5,000.00.[35] Later, the District Attorney, through James McKinney, filed an

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[31] *Ex parte Avila*, 201 S.W.3d at 826.

[32] *Id.* at 826-27.

[33] *Id.* at 827.

[34] *In re* Humphrey, 601 P.2d 103, 107-08 (Okla. Crim. App. 1979).

[35] *Id.* at 104.

application to strengthen bail asking the Court to revoke Humphrey's bond and deny bond alleging that it had come to the attention of the District Attorney's Office that Humphrey was "a danger to society."[36] The Court of Criminal Appeals of Oklahoma reaffirmed the order granting bail to Humphrey and noted:

> We, therefore, find that Petitioner is entitled to bail in the two cases pending at the time of his arrest and in the four cases filed subsequent thereto in the amount set forth in our order entered July 31, 1979, wherein we set bail in accordance with the stipulation and recommendation of Mr. D. C. Thomas and Mr. Andrew M. Coats attorneys for Petitioner and Respondent, respectively.[37]

Specifically, the court concluded that:

> In fixing the amount of bail the judge in this proceeding, and henceforth the judges in this State should give consideration to the following guidelines:
> (1) the seriousness of the crime charged against the defendant, the apparent likelihood of conviction and the extent of the punishment prescribed by the Legislature;
> (2) the defendant's criminal record, if any, and previous record on bail if any;
> (3) his reputation, and mental condition;
> (4) the length of his residence in the community;
> (5) his family ties and relationships;

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[36] *Id.*

[37] *Id.* at 107-08.

> (6) his employment status, record of employment and his financial condition;
> (7) the identity of responsible members of the community who would vouch for defendant's reliability;
> (8) any other factors indicating defendant's mode of life, or ties to the community or bearing on the risk of failure to appear.[38]

The court should apply the guidelines to fix the amount of bail for defendants.

One court to recognize a problem with not considering the American Bar Association minimum standards relating to pretrial release was the Supreme Court of Mississippi in *Lee v. Lawson*.[39] In *Lee*, Rena Lee filed a petition for a writ of habeas corpus alleging that she was indigent and unable to afford any sum of money for a bail bond and praying that she be released on her own recognizance.[40] The lower court reduced her bond from $10,000 to $2,500, but refused to release her on her own recognizance.[41] The Supreme Court of Mississippi noted that "Rena Lee, the nineteen-year-old indigent accused, has been incarcerated since April 14, 1979, solely because of her poverty."[42] Specifically, the court concluded about the Bail Reform Act that:

> The Act incorporates a presumption involving favoring personal recognizance

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[38] *Id.* at 108.

[39] Lee v. Lawson, 375 So.2d 1019, 1024 (Miss. 1979).

[40] *Id.* at 1020.

[41] *Id.*

[42] *Id.* at 1021.

> release, unless the judicial officer determines that such a release will not reasonably assure the appearance of the person as required. In the latter instance, the Act requires a mechanical consideration of priorities among various other modes of release, including the execution of a bail bond with sufficient sureties, or the deposit of cash in lieu thereof. A number of states have enacted legislation providing for a similar approach to the bail problem for indigents. See Annotation, 78 A.L.R.3d 780. Florida Rule of Criminal Procedure 3.130(b)(4) provides for several alternative means of pretrial release, but unlike the Bail Reform Act, does not express a preference for personal recognizance release.[43]

That said, the court ultimately mentioned the Minimum Standards Relating to Pretrial Release and suggested:

> In determining whether there is substantial risk of non-appearance, the judicial officer should take into account the following factors concerning an accused:
> (1) The length of his residence in the community
> (2) His employment status and history and his financial condition;
> (3) His family ties and relationships;
> (4) His reputation, character and mental condition;

[43] *Id.* at 1022.

> (5) His prior record, including any record of prior release on recognizance or on bail;
> (6) The identity of responsible members of the community who would vouch for defendant's reliability;
> (7) The nature of the offense charged and the apparent probability of conviction and the likely sentence, insofar as these factors are relevant to the risk of non-appearance; and
> (8) Any other factors indicating the defendant's ties to the community or bearing on the risk of willful failure to appear.[44]

In *Lee*, the judicial officer took the ABA Standards and factors into account where Lee successful. These standards should be used frequently and regularly.

V. EXPRESSING THE PREFERENCE

The split of authority acknowledged by the Supreme Court of Mississippi in *Lee* also suggests the test that should be used for determining whether the court should express a preference for personal recognizance release: If the risk of incarceration with a presumption is the same as the risk with no presumption, a preference should not be expressed for personal recognizance release. But if there is a higher risk of incarceration with no presumption courts should consider a

[44] Lee v. Lawson, 375 So.2d 1019, 1024 (Miss. 1979).

presumption that a defendant is entitled to be released on order to appear or on own recognizance.

A. The Higher Pretrial Detainment Risk Associated with Failing to Express a Preference

Assume the prosecution claims that the bond amount is reasonable while the defendant claims that the bond amount is too much for the defendant to afford. How easy will it be to determine whether the bond amount should be reduced? American Bar Association Criminal Justice Section Standard 10-1.1 indicates that "These Standards limit the circumstances under which pretrial detention may be authorized and provide procedural safeguards to govern pretrial proceedings."[45] But Standard 10-1.1 Commentary rejects the position that detainment is the preferred option and notes "The statement that 'the law favors the release of defendants pending adjudication of charges' is consistent with Supreme Court opinions emphasizing the limited permissible scope of pretrial detention."[46]

Standard 10-5.1(a) in turn notes "It should be presumed that defendants are entitled to release on personal recognizance on condition that they attend all required court proceedings and they do not commit any criminal offense."[47] The Standard 10-5.1(a) Commentary proffers that "The presumption that defendants are entitled to release on personal recognizance is one of the core principles of these Standards."[48] In other words, the pretrial release structure erected by the Standards is based upon the belief that a defendant should not be detained pretrial

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[45] *Pretrial Release*, *supra* note 8 at 10-1.4(e).

[46] *Id.*

[47] *Pretrial Release*, *supra* note 8 at 10-5.1(a).

[48] *Id.*

solely due to the defendant's inability to pay. This supposition is borne out by Standard 10-5.3 which indicates that:

> (a) Financial conditions other than unsecured bond should be imposed only when no other less restrictive condition of release will reasonably ensure the defendant's appearance in court. The judicial officer should not impose a financial condition that results in the pretrial detention of the defendant solely due to an inability to pay.
> (b) Financial conditions of release should not be set to prevent future criminal conduct during the pretrial period or to protect the safety of the community or any person.
> (c) Financial conditions should not be set to punish or frighten the defendant or to placate public opinion.[49]

The Court of Appeals of Texas opinion in *Ex parte Castellano* indicates that the defendant might be financially unable to post the bond set by the Court. In *Ex parte Castellano*, the following exchange occurred between the trial court and Castellano at the writ hearing:

> THE COURT: So we're faced with a situation where the initial bond is set; then because of the delay of getting test results back from the DPS lab with regard to what the seized substance is, a defendant is entitled to a personal recognizance bond. And then after

[49] *Pretrial Release*, *supra* note 8 at 10-5.3.

> indictment when I set a bond—Tim, your position is: He's still entitled to remain out on personal recognizance bond?
> [Castellano's counsel]: That's correct, Judge.
> THE COURT: Okay. I'm going to deny [the] application for writ of habeas corpus.[50]

But the appellate court notes, "Accordingly, we sustain Castellano's only issue, reverse the trial court's order denying habeas relief, and remand this case to the trial court with direction to enter an order releasing Castellano on personal bond."[51] In other words, this flip in the court allowed Castellano to be out on personal bond after all.

Standard 10-1.4(e) in turn allows preventing pretrial imprisonment of the poor solely as a result of their poverty meaning that "[t]he judicial officer should not impose a financial condition of release that results in the pretrial detention of a defendant solely due to the defendant's inability to pay."[52] The Standard 10-1.4(e) Commentary indicates that

> This Standard prohibits the imposition of financial conditions that the defendant cannot meet. The intent behind this limitation is to ensure that financial bail serves only as an incentive for released defendants to appear in court and not as a subterfuge for detaining defendants. Detention should only result from an explicit detention decision, at a hearing specifically designed to decide that

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[50] *Ex parte* Castellano, 321 S.W.3d 760, 762 (Tex. App. 2010).

[51] *Id.* at 765.

[52] *Pretrial Release*, *supra* note 8 at 10-1.4(e).

> question, not from the defendant's inability to afford the assigned bail.[53]

In other words, the Standards try to correct the situation where indigence prevents the defendant from bonding out. That supposition is borne out by the Standard 10-5.3(a) Commentary which provides that "This Standard, like the federal and District of Columbia statutes, prohibits judicial officers from requiring a monetary bond in an amount beyond the reach of a defendant as a means of assuring the defendant's detention."[54]

Conversely, it is uniquely easy to set and difficult to reduce bond fixed in an amount a defendant cannot afford to pay. According to Standard 10-1.1, "The judge or judicial officer decides whether to release a defendant on personal recognizance or unsecured appearance bond, release a defendant on a condition or combination of conditions, temporarily detain a defendant, or detain a defendant according to procedures outlined in these Standards."[55]

It is exceptionally easy for the defendant to not have the financial ability to bond out of jail. Such a feat can usually consist of simply not being able to make bail in any amount, which can be accomplished by something as simple as a bondsman not being willing to post a bond for the defendant, or a more complex method like not being able to borrow money to pay a bond amount. In the end, the proof of the ease of setting bond in an amount causing incarceration solely because of poverty is largely in the pudding.

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[53] *Id.* at 44.

[54] *Id.* at 112.

[55] *Pretrial Release*, *supra* note 8 at 10-1.1.

First, there was no financial ability to pay any amount of bond in *Ex parte Hicks*. According to the Court of Appeals of Texas, the evidence before the trial court on what amount of bail Hicks could make was:

> Q. And you have informed me that you do not have the financial ability by borrowing money or financial reserves yourself to pay these amounts of bonds, correct?
> A. Yes, sir.
> Q. And, in fact, you don't have the financial ability to really pay any amount of bond; is that correct?
> A. Yes, sir.
> Q. And you're not able to borrow any—
> A. Yes, sir.
> Q. —correct? You—how long have you lived in the Waco Community?
> A. All my life.[56]

The court noted "The record shows that Hicks could not post bond in any amount; accordingly, the trial court should have released him on a personal recognizance bond."[57] Second, the case *Ex parte Calhoun*, illustrates the susceptibility of a defendant being confined and unable to post bond.[58] The Court of Appeals of Texas reversed denial of relief for the $25,000 bail amount Dustin Calhoun could not pay:

> We reverse the trial court's order denying relief on appellant's application for writ of habeas corpus. We remand this case to

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[56] *Ex parte* Hicks, 262 S.W.3d 387, 387-89 (Tex. App. 2008).

[57] *Id.* at 389.

[58] *Ex parte* Calhoun, No. 05-16-01150-CR, 2016 WL 7473911, at *1-2 (Tex. App. Dec. 29, 2016).

> the trial court with instructions to either release appellant on a personal bond or reduce the amount of bail required to an amount that the record reflects appellant can make in order to effectuate his release from custody pending trial."[59]

The court ultimately provided relief to Calhoun's confinement because he was unable to post bond.

B. Avenues to Setting Bail

Such concerns about bond amounts that the defendant cannot afford to pay might be acceptable if courts expressed a preference that substantially quelled concerns about the defendant being financially incapable of posting such a bond. As noted, courts typically allow for release from custody after arrest upon posting a bond. The problem is that, as currently applied not expressing a preference against money bail is a poor rule in an impoverish world. For example, in *Lee,* "Rena Lee the nineteen-year-old indigent accused, was incarcerated since April 14, 1979, solely because of her poverty.[60] If she had been able to raise $250, the ten percent fee charged by professional bondsmen for posting a $2,500 bond, she could have been released."[61] Using a bail schedule to set bond might raise issues. Also, the A.B.A. Minimum Standards Relating to Pretrial Release provide an avenue to set bail without such a schedule.

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[59] *Id.* at 2.

[60] Lee v. Lawson, 375 So. 2d 1019, 1021 (Miss. 1979).

[61] *Id.*

1. A.B.A. Minimum Standards Relating to Pretrial Release

First, a court may consider the A.B.A. Standards Relating to Pretrial Release as the reason to set a particular amount of bail. As support for this proposition consider the Supreme Court of New Jersey's decision in *State v. Johnson*.[62] In *Johnson*, it then appearing that if upon trial Craig Johnson was found guilty of murder in the first degree he could not be sentenced to death, Johnson's motion for bail was renewed.[63] The case hinged on whether the record made on the bail hearing in the trial court would constitutionally support a denial of bail.[64] The Supreme Court of New Jersey found that:

> A number of factors must be considered in fixing the amount of the bond: (1) the seriousness of the crime charged against the defendant, the apparent likelihood of conviction and the extent of the punishment prescribed by the Legislature. It may be recognized that the same urge for flight is not-present where the death penalty is not involved. But exposure to a life sentence for murder may well stimulate a substantial urge to flee-even if not as intense as where the accused faces the possibility of death. And the urge may intensify in the future if the recent elimination of the death penalty results in a more restrictive parole policy; (2) the defendant's criminal record, if any, and previous record on bail if any; (3) his reputation, and mental

[62] State v. Johnson, 61 N.J. 351 (N.J. 1972).

[63] *Id.* at 353.

[64] *Id.* at 364.

> condition; (4) the length of his residence in the community; (5) his family ties and relationships; (6) his employment status, record of employment and his financial condition; (7) the identity of responsible members of the community who would vouch for defendant's reliability; (8) any other factors indicating defendant's mode of life, or ties to the community or bearing on the risk of failure to appear[…][65]

According to the court "The cause is remanded to that court for purposes of fixing the amount thereof."[66]

In the 21st century, however, the extraordinary has become ordinary, and the notion that the defendant would not be confined based on being unable to make bail seems quaint. And yet, many courts set bond in amounts defendants are unable to afford. In *Payret v. Adams*, the District Court of Appeal of Florida denied Manuel Payret's writ of habeas corpus for the $100,000 bond because of the determination as to the provision indicating Payret was entitled to personal recognizance release.[67]

In *Norris*, it was determined that even if one judge disagrees with another judge's ruling, or if there is disagreement between

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[65] *Id.* at 364-65.

[66] *Id.* at 365.

[67] Payret v. Adams, 471 So. 2d 218, 219 (Fla. Dist. Ct. App. 1985) ("We conclude that the provision conflicts with a rule of criminal procedure, and consequently, we invalidate the conflicting provision and deny the writ.").

attorneys, the defendant's bond may not be reduced because "the Chief Judge of the Fifth Judicial Circuit issued administrative order A99-6, which authorizes the judge who issues a capias or warrant to establish the amount of bond and prohibits any modification of the bond amount by any other judge without the consent of the issuing judge."[68] In *Norris* as the District Court of Appeal of Florida dissent acknowledged:

> I respectfully dissent. In my experience, the reason the judge issuing an arrest warrant may want to restrict the authority of the first appearance judge to modify a bond amount is because the issuing judge has unique knowledge of the defendant or of the facts of the case. This is often the situation in cases involving violation-of-probation warrants. Under most circumstances, a dispute of this kind would not be brought before us. Courtesy among judges usually precludes controversy of this nature. In the usual course of events, the first appearance judge will respect the judgement of the issuing judge, and if a defendant disputes the initial bond decision, a modification hearing can promptly be scheduled before the issuing judge.[69]

According to the District Court of Appeal of Florida in *Norris*:

> This case is one of several from the same circuit involving the same issue. My reading of the transcripts leads me to believe that the real controversy is deeper than the issue presented. We, as a

[68] Norris v. State, 737 So. 2d 1240, 1242 (Fla. Dist. Ct. App. 1999).

[69] *Id.* at 1242-43 (Goshorn, J., dissenting).

> profession, are giving much attention to the matter of civility between attorneys. I suggest that a meeting of all the judges, if approached in a cooperative and conciliatory manner, would do more for the current problem than anything that we can write.[70]

All of these cases reinforce the reality that we live in an impoverished world where the ability to pay bail is almost always uncertain. There is tension over which way to consider bail and calculating bail is contentious. Moreover, once a bondsman based on the defendant's prior record decides not to post a bail bond for the defendant the word can almost be removed from the previous sentence. Thus, it seems appropriate to express a preference for personal recognizance release.

Webster reflects the reality of modern bond settings and the fact that needing to be bailed out is truly needing to be bailed out in the bond setting realm. The District Court of Appeals of Florida noted "the prosecuting attorney having evinced his consent or acquiescence to the reduction of bond for each of said Petitioners to the sum of $3,000.00. . . ."[71] Accordingly, courts should rely on something more than unanimous endorsement to conclude that such bond amounts are peculiarly reasonable within the meaning of the Eighth Amendment.

In *Brangan v. Commonwealth*, Jahmal Brangan was held at the Hampden County jail for over three and one-half years because he was unable to post bail in the amounts ordered by a Superior Court judge

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[70] *Id.* at 1242 n.1 (Goshorn, J., dissenting).

[71] Webster v. Roesel, 253 So. 2d 491 (Fla. Dist. Ct. App. 1971).

following his arrest and indictment for armed robbery while masked.[72] The basis of Brangan's appeal was that the bail order violated his right to due process because the judge failed to give adequate consideration to his financial resources and set bail in an amount so far beyond his financial means that it resulted in his long-term detention pending resolution of his case.[73] The Supreme Judicial Court of Massachusetts concluded that:

> In this case, nothing in the bail judge's September 19, 2016, order or in the record establishes that he considered Brangan's financial resources in setting bail at $40,000. We cannot say for sure whether he did or did not. But as we explain below, the judge must address this issue in writing or orally on the record in every case where bail is set in an amount that is likely to result in a defendant's long-term pretrial detention because he or she cannot afford it.[74]

The court acknowledged that "Here, the record shows that Brangan is indigent and that bail has been set in an amount that is unattainable for him, resulting in his long-term pretrial detention."[75] The court also noted that "In this case, Brangan has been held for more than three and one-half years."[76] Finally, the court suggested:

> For the reasons stated above, we reverse the order of the single justice and remand

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[72] Brangan v. Commonwealth, 80 N.E.3d 949, 954 (Mass. 2017).

[73] *Id.*

[74] *Id.* at 959.

[75] *Id.* at 963.

[76] *Id.* at 966.

> this case to the county court for entry of an order directing the Superior Court judge to conduct a new bail hearing for Brangan as soon as possible in accord with the standards set out in this opinion."[77]

Luckily, the court emphasized the need for haste in *Bragnan* for reconsideration, however that is not always the case. As outlined above, defendants and their families who cannot afford bail and who are indigent to begin with are pushed even further into poverty due to the lack of release."

In order for the American Bar Association Standards for Criminal Justice to apply, the court can suggest application of the Standards. Thus, in *People ex rel. Hemingway v. Elrod*,[78] the Supreme Court of Illinois was able to indicate:

> In our opinion, by the proper application of the American Bar Association Standards and sections of the Code of Criminal Procedure both cited above, together with the conclusions of this court contained in this opinion, an appropriate balance can be achieved between the right of an accused to be free on bail pending trial and the need of the public to be given necessary protection. The petitioner is remanded to the custody of the respondent sheriff, and the circuit court of Cook County is directed to proceed not

[77] *Id.* at 967.

[78] People *ex rel.* Hemingway v. Elrod, 322 N.E.2d 837 (Ill. 1975).

> inconsistently with the views expressed in this opinion.[79]

Louisiana also took action to consider expressing a preference for personal recognizance release by passing House Concurrent Resolution No. 100 which provides:

> WHEREAS, the ABA's work in this area is reflected in the *ABA Standards for Criminal Justice (Standards)*, a list of principals articulating the ABA's recommendations for fair and effective systems of criminal justice that were developed and revised by the ABA Criminal Justice Section comprised of prosecutors, defense lawyers, judges, academics, and members of the public; and
>
> WHEREAS, the United States Supreme Court and other courts have looked to the Standards for guidance about the appropriate balance between individual rights and public safety in the field of criminal justice; and
>
> WHEREAS, the Standards reflect the ABA's conclusion that "although there may be narrow circumstances in which monetary conditions of release are necessary to ensure a defendant's appearance, inflexible money-bail requirements drawn from a present schedule of offenses, which takes no account of a defendant's individual circumstances, should be abolished" as such systems discriminate against the

[79] *Id.* at 843

> indigent, seriously impair the rights of persons accused of crimes, and provide little benefit to the public;[80]

Meanwhile, the digest for Louisiana House Concurrent Resolution Number 100 indicates:

> [The Resolution] requests that the La. State Law Institute review La. laws regarding bail and study whether a system which provides for the presumed release of a person on unsecured personal surety or bail without surety in lieu of preset bail schedule would be more successful in ensuring the appearance of the defendant and the public safety of the community. [The Resolution] requires the La. State Law Institute to report its finding no later than Feb. 1, 2019.[81]

A New Jersey court considered the A.B.A. Standards Relating To Pretrial Release like the Louisiana House did. The Superior Court of New Jersey in *State v. Fann* illustrates problems with setting bail for indigent defendants. In that case, the court found that:

> It is time for insistence upon a rational approach, achievable only if judges are required to provide reasons for their actions. The reasons requirements need not be burdensome. A brief written statement placed in the file of the case or attached to the bail report will suffice.

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[80] La. H.R. Con. Res. No. 100 (La. 2018).

[81] *Id.*

> *Johnson* provides helpful guidelines: But release on bail is not simply a formal or automatic matter. A number of factors must be considered in fixing the amount of the bond: (1) the seriousness of the crime charged and the defendant, the apparent likelihood of conviction and the extent of the punishment prescribed by the Legislature. It may be recognized that the same urge for flight is not present where the death penalty is involved. But exposure to a life sentence for murder may well stimulate a substantial urge to flee-even if not as intense as where the accused faces the possibility of death. And the urge may intensify in the future if the recent elimination of the death penalty results in a more restrictive parole policy; (2) the defendant's criminal record, if any, and previous record on bail, if any; (3) his reputation, and mental condition; (4) the length of his residence in the community; (5) his family ties and relationships; (6) his employment status, record of employment and his financial condition; (7) the identity of responsible members of the community who would vouch for defendant's reliability; (8) any other factors indicating defendant's mode of life; or ties to the community or bearing on the risk of failure to appear. See A.B.A. Standards Relating to Pretrial

> Release, *supra* sec. 5.1 and commentary pp. 54-56[.][82]

According to the court, "The bail decisions affecting the within defendants shall be reviewed within 48 hours from the date of the filing of this opinion subject to all of the procedural requirements set forth herein."[83] Some courts are trying to appropriately identify the need for haste in these bail decisions, like in *Bragnan* and *Fann*, due to the ramifications of a defendant not making bail and being stuck in jail as discussed above.

To summarize, any bond amount is too much for people who cannot afford to pay anything. Lee was indigent and unable to afford any sum of money for a bail bond and prayed that she be released on her own recognizance.[84] In *Avila*, as the Court of Appeals of Texas acknowledged, Avila could not post bond in any amount.[85] In *Ex parte Hicks,* there was testimony Hicks didn't have the financial ability to pay any amount of bail.[86]

Jurisdictions also seem to grasp the way that the American Bar Association Criminal Justice Pretrial Release Standards work. One jurisdiction to recognize the benefit with considering the Standards was Hawaii. A Hawaii Senate Concurrent Resolution requesting the judiciary convene a task force indicates that:

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[82] State v. Fann, 571 A.2d 1023, 1033 (N.J. Super. Ct. App. Div. 1990).

[83] *Id.* at 1034.

[84] Lee v. Lawson, 375 So. 2d 1019, 1020 (Miss. 1979).

[85] *Ex parte* Avila, 201 S.W.3d 824, 827 (Tex. App. 2006).

[86] *Ex parte* Hicks, 262 S.W.3d 387, 388 (Tex. App. 2008).

> WHEREAS, the American Bar Association Criminal Justice Section Standards for Criminal Justice: Pretrial Release sections 10-1.2, 10-1.4, and 10-5.3 (2007) provide that "the judicial officer should assign the least restrictive condition(s) of release that will reasonably ensure a defendant's attendance at court proceedings and protect the community, victims, witnesses or any other person", and financial conditions "should not be employed to respond to concerns for public safety", nor should financial conditions result "in the pretrial detention of the defendant solely due to an inability to pay[.]"[87]

It provides:

> BE IT RESOLVED by the Senate of the Twenty-ninth Legislature of the State of Hawaii, Regular Session of 2017, the House of Representatives concurring, that the Judiciary is requested to convene a Criminal Pretrial Trial Task Force to:
> (1) Examine and, as needed, recommend legislation and revisions to criminal pretrial practices and procedures to increase public safety while maximizing pretrial release of those who do not pose a danger or flight risk; and
> (2) Identify and define best practices metrics to measure the relative effectiveness of the criminal pretrial

[87] Haw. H.R. Con. Res. No. 134 (Haw. 2017).

> system, and establish ongoing procedures to take such measurements at appropriate time intervals; and
> BE IT FURTHER RESOLVED that the task force be comprised of members that represent the various perspectives of public officials with significant roles in the criminal pretrial system and include:
> (1) The Chief Justice or the Chief Justice's designee, who shall serve as the chairperson of the task force;
> (2) A judicial officer representative of each Circuit Court[.][88]

Given the difference between expressing a preference for pretrial release and not, courts should apply something approximating the more rigorous analysis utilized in the American Bar Association Criminal Justice Section Pretrial Release Standards. It should not be enough that the bond is constitutionally reasonable; instead, courts should require additional evidence that indicates the defendant is financially able to post the bond.

2. Bail Schedules

Second, the use of a bail schedule may be the reason the amount of bond is reduced. Standard 10-5.3(e) rejects the notion a court should use a bail schedule when fixing the amount of bail and notes that:

> (e) Financial conditions should be the result of an individualized decision taking into account the special circumstances of each defendant, the defendant's ability to

[88] *Id.*

> meet the financial conditions and the defendant's flight risk, and should never be set by reference to a predetermined schedule of amounts fixed according to the nature of the charge.[89]

The Standard 10-5.3(e) Commentary reinforces the notion that we live in an impoverish world:

> This Standard emphasizes [sic] the importance of setting financial conditions through a process that takes into account of the circumstances of the individual defendant and the risk that the individual may not appear for scheduled court proceedings. It flatly rejects the practice of setting bail amounts according to a fixed bail scheduled based on charge. Bail schedules are arbitrary and inflexible: they exclude consideration of factors other than the charge that may be far more relevant to the likelihood that the defendant will appear for court dates. The practice of using bail schedules leads inevitably to the detention of some persons who would be good risks but are simply too poor to post the amount of bail required by the bail schedule.[90]

In *Thompson v. Moss Point*, the United States District Court found, "the use of a secured bail schedule to set the conditions for release of a person in custody after arrest for an offense that may be prosecuted by the City of Moss Point implicates the protections of the

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[89] *Pretrial Release*, *supra* note 8 at 10-5.3(e).

[90] *Id*.

Equal Protection Clause when such a schedule is applied to an indigent."[91] The court acknowledged:

> No person may, consistent with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, be held in custody after an arrest because the person is too poor to post a monetary bond. If the government generally offers prompt release from custody after arrest upon posting a bond pursuant to a schedule, it cannot deny prompt release from custody to a person because the person is financially incapable of posting such a bond.[92]

As previously discussed, using a bail schedule to set bond might raise issues because every defendant and every situation is different.

VI. CONCLUSION

Courts are increasingly at a crossroads with regard to pretrial release issues. Some courts believe that the risk of incarceration with a presumption is the same as the risk with no presumption and continue to apply considerations put in place when the "concept of a surety bond" was still primarily unsure. A few courts, however, are beginning to recognize that failing to express a presumption is a poor rule in an impoverished world that must be enriched to address an unsure world where the ability to pay bail is almost always uncertain. There are the

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[91] Thompson v. Moss Point, No. 1:15cv182 (LG-RHW), 2015 WL 10322003, *1 (S.D. Miss. 2015).

[92] *Id.*

American Bar Association Project on Minimum Standards Relating to Pretrial Release—doing the bare minimum – where people are unable to afford any sum of money for a bail bond and need to be bailed out.

This essay is a first attempt to address how to express a preference for personal recognizance release. To summarize, courts should let the American Bar Association Project on Minimum Standards Relating to Pretrial Release serve as a guide in the release decision.