



Lending Liberty to the Indigent: THE TEMPLATE TO ONE SOLUTION



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Alexi K. is a young man somewhat new to America. He had come from a country that was a former member of the Soviet Union. He is semi-skilled and works hard at odd construction jobs, when he can find them. He barely speaks the language but somehow he gets by.

One night, after a long day's work, Alexi decided to leave his rented room to go to the store. He wanted to buy cigarettes and a soda. He left his room, which contained all his belongings, including his tools and papers, and headed to the store. He cut across an empty lot between his room and the

store. Because there was construction going on nearby, there was a portable toilet set up on the lot, which Alexi decided to use. When he was finished, he opened the door and reemerged into the night. Suddenly, there were bright lights in his eyes. Someone shouted at him, "Freeze! Get down!" Alexi, startled and confused, had one response and it was automatic: run.

Alexi ran into a wooded area. It had rained recently and the ground was wet and muddy. The footing was unsure. As he splashed through the muddy bog he heard his pursuers slip and fall behind him, cursing loudly in anger. Then he, too, slipped in the mud and it was over.

Unfortunately, this young man's odyssey was just beginning. When the police finally caught up with him, they were angry. So angry they beat the 125-pound 19-year-old with their flashlights and then dragged him from the bog and back up to where the chase began.

Once there, one officer pinned him to the ground with a knee to the back. Another officer kicked him and stomped on his head, breaking his cheekbone against the concrete ground and leaving him heavily bruised. They brought him to the detention center, charging him with felony trespass and attempted burglary. The arrest and booking report claimed that a silent alarm had brought them to the scene but upon arrival and inspection nothing was found amiss, though there was a brick near the window of a nearby business and "a chip in the front plate glass window." The officers neglected to secure the brick as evidence, however.



It has been said that the true measure of a justice system is how it treats those on the economic fringe. Certainly, as defense counsel, we would place indigent defendants, like Alexi, among those residing

within that fringe. The problem with taking this measure of our justice system accurately is the social invisibility of the indigent. If the indigent themselves have specific pressures preventing them from being heard, and if their unique legal problems go generally unexamined by society, then unfair practices and procedures can become endemic to them as well as become corrosive to society at large. To prevent this, there must be a way for the indigent to be heard.

Generally, indigent clients present unique challenges for the Public Defender. Indigent individuals are often in close proximity to illegal activity and more visible to law enforcement, so they are at risk of more frequent encounters with the police. Once arrested, their indigent status often places them in a position to be strongly tempted by the plea bargain, that necessary evil used to manage our overburdened courts. This unusually strong temptation occurs because the indigents are most often unable to make bond at first appearance and therefore face detention until their cases resolve. For the innocent, and the unfairly detained, the term plea "bargain" can be perverse, as indigents are placed, ab initio, into an unfavorable, perhaps even a coerced, bargaining position. As a result, one major roadblock in defending these clients can often be simply getting them to trial.

Our criminal justice system, indeed our entire legal system, is based upon the premise of equal justice under the law. The reality of the situation, however, has often turned upon an individual's economic status: those who are economically able often receive a superior result over those less so. In almost every area, we have attempted to ameliorate this gap in treatment, to bring the indigent into rough parity with the economically solvent. One way we attempt to do this is by appointing counsel free of charge, for example. These attempts to provide economic parity are often frustrated at first appearance, however, when bond is set.



Alexi made his first appearance within 24 hours, as required by law. He sat shackled in the courtroom, his eye blackened, his head swollen, bruised and throbbing. His wrists were severely cut and bruised from the too-tight handcuffs placed there the night before. He stared blankly ahead as the public defender was appointed and made an argument for release pending arraignment, citing the lack of prior crimes and the apparent probable cause issues. The judge refused release and set bond at \$2,000. It may not have seemed like much to some, but to Alexi it may as well have been a million.



Even though almost every person is theoretically entitled to pre-trial release, local bond schedules, political expediency, strongly held personal beliefs and perhaps simple judicial inertia ensure that most folks with any factor of potential instability in their profile have some form of bond imposed.¹ For those with little or no money, anything other than release on their own recognizance is the functional equivalent of no bond at all. It is at this very early stage of their encounter with the justice system that the options available to many indigent become severely limited.

Consider the typical indigent person accused and in jail with no hope of making bond. This person may maintain his or her innocence outright. In addition, it may appear to counsel that the police have not gathered and preserved sufficient evidence to maintain a conviction, either due to a clear lack of evidence or because any evidence gathered was obtained as the result of an improper initial stop or subsequent search and seizure. In counsel's opinion, there is no way the State should or could obtain a conviction at trial.

But this information is of little comfort or practical use to the indigent accused. If charged with a felony, they face speedy trial dates of up to 175 days hence, and up to 90 days for misdemeanors. If they sit patiently in deten-

tion awaiting trial they may face loss of their property, housing, employment, and, sometimes, even families. It is at this point in which the often cruelly titled plea bargain process becomes the sole remaining viable option for many detained indigent regardless of the quality of the case against them.



Pictures of Alexi are ordered taken by his attorney. The personnel files of the arresting officers are ordered. The files reveal that the officers have a disturbing history of violent encounters with both citizens and suspects, especially when they are teamed together as they were that night. One officer had even threatened an attorney while attending a deposition. They had both, at various times, been ordered to attend anger management, been formally disciplined and been repeatedly reprimanded.

Alexi waits in the detention center. He has no money and, though he has family in the area, he cannot contact them or otherwise raise the money to bond out. His face heals on its own, medical care being severely lacking in the facility. He has headaches and his vision in one eye is blurry. After one week, he receives an offer from the state: plead guilty to the felony trespass and the attempted burglary charge will be dropped. Alexi learns that by doing this he will be subjected to potential deportation. Additionally, his pride prevents him from admitting to even the single charge, since he couldn't see the "no trespass" sign at night and didn't know he was on a construction site. He rejects the offer. He learns that his next court date is two weeks away and realizes that he will lose his room and everything in it if he waits that long. Even if he does wait, there is no promise he will get a bond reduction or other opportunity to regain his liberty any time soon. He is told by his attorney that if he holds out for a trial the state is likely to drop all the charges rather than present these facts to a jury, but waiting that long would represent a hollow victory, not to mention that by that time he will have

spent nearly six months in jail. Additionally, Alexi is fearful of retribution if he goes against the police. His attorney cannot blame him for feeling this way despite his assurances to the contrary.



While deals cut in jail may be genuine bargains for the truly guilty, they are very often poor substitutes for justice when offered to those detained by unreasonably high bond or simply unable to post any bond at all. Those who should fight the charges against them simply cannot find a way to pragmatically do so, forcing them, in essence, to accept the so-called bargain.

Rather than force people into a lose-lose position, defense counsel often wishes the State would evaluate the case in greater detail and determine whether there was a good faith belief in a successful prosecution long before the speedy trial date, but plea-bargaining usually seems to occur first. It would also be beneficial if sloppy, or downright illegal, police procedures could be exposed in open court, but plea bargains work to conceal such procedural defects. It would be nice if individuals could avoid creating an unnecessary criminal record, with its potential for eventual habitual offender status and all the collateral consequences a guilty plea makes possible, but plea bargains exacerbate rather than discourage this outcome. And, in a perfect world, the accused would gain their usually rightful pre-trial freedom and be permitted to make a free and informed decision as to whether fighting the charge is the best course of action, saving the taxpayer the expense of interim detention in the process.



After much negotiation, the state agrees to drop all the felony charges in exchange for a guilty plea to one count of simple trespass and one count of resisting without violence in exchange for a sentence of time served. This

former charge is perhaps fair; Alexi was trespassing if even in ignorance. The latter charge, however, is an insult. Alexi was unfairly and savagely beaten and abused and now he is asked to plead himself guilty to resisting without violence. The irony of his situation is not lost on his Soviet sensibilities. He swallows his pride and agrees. Things work in a similar fashion, after all, in the place Alexi had fled to come to America.



What seems to be lacking in our system is a method by which defendants like Alexi can gain some measure of economic parity with the economically solvent at the critical stage of proceedings when their pre-trial liberty is first evaluated. The outcome at this crucial stage will color all future decisions the accused makes, yet there is no systemic equivalent to the many equalizing social programs created to assist the indigent accused at every step thereafter, such as appointed defense counsel and expert defense witnesses. By what method can indigent clients gain legal parity to enable them to retain all possible options once accused in light of the realities facing them at first appearance?

One potential solution is for a private entity to step in and simply bond eligible candidates out.

The entity would be a non-profit, tax-exempt corporation independent from any existing agency. It would require a two-part financial structure: an ongoing operating budget and a "bond fund." It would initially be capitalized by an endowment, but also solicit contributions, offering a tax deduction to its benefactors. Thus, it would acquire its operating budget and bond fund wholly from outside sources, making it completely independent from the attorneys representing eligible candidates.

The entity, perhaps in conjunction with a local law school program, would then scan daily arrest records to single out likely candidates. Law students would essentially issue-spot the daily records and select those with

problematic probable cause, witness, evidentiary or search and seizure issues. It may also be possible for the entity to accept recommendations directly from local agencies, such as a public defender office or pre-trial services unit (PTSU). These units employ a methodology for selecting defendants who pose a low risk to the community and high potential success rates. Their selections are designed to divert criminal defendants from pretrial incarceration and can provide complete, accurate and non-adversarial information to improve the release/detention decision process in compliance with Florida Statutes and the Rules of Criminal Procedures. A great starting point for the entity could be where PTSU recommendations are ignored or declined by a judge.

As for the ongoing maintenance and operation of the entity, some consumable budget will be required. If local resources are employed to the full extent, such as PTSU reports and credit bearing programs in conjunction with local law schools, then it may be possible to staff the program with a single full-time person, or perhaps two part-time people, to provide continuity and administer the business functions of the entity as well as make the ultimate decision as to selection. It would probably be required that this ultimate selector be either an independent attorney or a layperson highly trained and experienced in local criminal law and procedure.

In order to elicit contributions, it would be desirable to obtain local press coverage of the entity's mission and results, if initial results are indeed positive and worthy of such coverage. The entity can be presented and seen as a sort of front-loaded "Innocence Project," seeking to intercept and settle in the fairest possible way the non-capital injustices of daily life rather than reverse capital convictions after the fact.² Both approaches seem to be required as a check on the criminal justice system where indigent people are involved if we are to adhere to both the letter, as well as to the spirit, of the law.

Selection of candidates would be

based partly on the legal analysis of the State's likelihood of making its case at trial and partly on the same factors of stability courts consider when determining who is likely to show up at the next appointed court date, such as length of time living in an area, family ties, employment history, prior crimes, etc. It would likely be required that candidates be interviewed by the entity to evaluate and educate the candidate, explaining what is proposed. A premium would be placed on two factors: a firm belief that the candidate will appear when required and an even firmer belief that the candidates pose no danger to the community or themselves. Failures in either of these two areas would be extremely harmful to this proposed program and to the indigent population it is meant to benefit.

Once candidates are selected, they would be notified that they are eligible for what is essentially an interest-free, short-term loan in the form of a paid cash bond providing instant, if temporary, economic parity. In exchange, all that is required of them is that they agree to return for their subsequent court dates. Nothing in this arrangement would prevent or discourage the candidate from exercising the full range of their legal options, including accepting a plea offer. At no time would the entity presume to tell the candidates what they should or shouldn't do in regard to their court cases; there would be no required commitment to strive for any particular result. That area of advisement is strictly the province of the attorneys representing the candidates. All that is required for the program to succeed is for the candidate to return to court at their next appointed time, thus fulfilling the conditions of bond.

Obviously, the entity takes the chance that those who are selected, and accept, may not appear for court as required, thus losing that bond amount forever. However, the real economic power of the plan is that those who do reappear will have their bond amount refunded in full, replenishing the bond fund. If the entity chooses well, the fund will



FACDL GRANTS SUPPORT TO FLORIDA INNOCENCE INITIATIVE

Tom Powell, past president of the Florida Association of Criminal Defense Lawyers, presents a \$10,000 check to Jennifer Greenberg, executive director of the Florida Innocence Initiative, helping defray costs expended by the many volunteer attorneys while representing clients falsely accused, convicted and incarcerated.

never become depleted but will instead perpetually recycle. This feature enables a relatively modest fund to assist, over time, a large number of indigent people. Reappearance failures that do occur will require obtaining only a replenishing contribution to maintain a particular fund balance.

The ramifications of this arrangement, if it proves to be successful in maintaining its bond fund, reaches far beyond the individual it assists. For example, over time a stable bond fund would be direct evidence that courts are being too cautious in setting bonds. Since the one factor that would be non-negotiable is public safety, the point on which the entity and courts most often differ will probably be the simple likelihood of reappearance. Data gleaned from a successful program could possibly provide statistical evidence sufficient to persuade courts to consider politically

acceptable adjustments to the criteria they employ. Ideally, this could eliminate the need for such a program at some future time.

Another systemic benefit may be that the State, after having to drop charges for numerous indigent clients on the eve of trial because those clients are now free on bond and not pressured to accept a plea offer, will reevaluate and modify the criteria by which they file charges in the first place. No longer will the State be able to obtain an almost automatic check mark in the conviction column whenever charges are brought against an indigent person. If, as a result, the quality of charged offenses rises, everyone wins.

Bonding out people like Alexi can also act as a check on police powers. Equality under the law means that the poor as well as the wealthy are entitled to the same Constitutional protections during police encounters. If the

