

'Pre-trial liberty' a myth to the accused poor

(EDITOR'S NOTE: This is the 11th of 15 articles on crime and justice in America. They constitute the text for an Oakland University course taught by Prof. Jesse Pitts. The series was written for Courses by Newspaper, an extension program of the University of California.)

BY CALEB FOOTE

To an accused person spending many weeks or even months in jail awaiting trial, the doctrine that the accused is innocent until proven guilty seems a mockery. The accused is, in effect, being punished before conviction.

But if released from custody, the accused may escape justice by running away, compromise the trial process by intimidating witnesses or commit a crime before being brought to trial.

The failure to guarantee to all citizens, regardless of race or economic circumstances, due process and equal protection under the law constitutes one of the most pervasive denials of equal rights in the entire judicial system.

WHAT TO DO with the accused until trial has plagued every system of criminal justice at least since Plato wrote about the problem more than 2,000 years ago. The traditional Anglo-American response to this dilemma is the bail system, which uses financial incentives to deter flight.

The accused can be conditionally released upon the deposit of financial security to back up his promise to show up in court or trial. If he fails to appear, the security is forfeited.

The amount required to be posted is set by a judge at the accused's first appearance in court following his arrest. The amount is supposed to be determined after consideration of such



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factors as the seriousness of the crime charged, the accused's prior record and the strength of his ties to the community.

IN ALL, EXCEPT death penalty cases, this right to bail pending trial is guaranteed by federal law and almost all state constitutions.

"This traditional right to freedom before conviction," the U.S. Supreme Court said in 1951, "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, secured only after centuries of struggle, would lose its meaning."

It is important to recognize, however, that the "traditional right" is merely that of having a judge set the amount of bail which is required in a particular case to secure pre-trial freedom.

While the amount, according to the U.S. Constitution, cannot be "excessive," courts have held that the amount "usually fixed" for the offense charged meets this requirement. If the defendant cannot afford that amount, he stays in jail.

ORDINARILY, the amount of bail ranges from \$1,000 to \$5,000. In some cases bail has been set as high as \$1 million.

As most defendants do not have such assets, a bonding system has developed whereby a defendant can purchase the required security from a licensed bondsman for a premium usually around 10 per cent of the required bond.

Thus, if bail is set at \$5,000, a defendant can pay a bail bondsman \$500, which is not refundable, and the bondsman will post the \$5,000 bond in the defendant's behalf.

As the bondsman is liable to lose the \$5,000 if the defendant disappears, he frequently protects himself by demanding some collateral, and many people do not have sufficient collateral.

In any event, a bondsman is not required to put up bond for anyone and will only do so if he regards the defendant as a good risk. The result is that many defendants find themselves unable to obtain a bond.

THIS SYSTEM may have worked tolerably well when there was little concern for the rights of slaves or paupers, and when such protection of the Bill of Rights as the right to counsel or bail depended upon the ability of the defendant to pay for them.

The perpetration of such economic discrimination is incongruous, however, in a society that has abolished slavery and proclaims "equal justice under law" as its ideal.

Such discrimination has been recognized and at least ameliorated in connection with other civil rights; thus, the state must supply counsel and the means for appeal to a defendant even if he cannot pay for them. But a right to pre-trial liberty remains a dead letter as far as most poor persons are concerned.

FURTHERMORE, intensive studies conducted by my students and I during the 1950s show that persons detained because of inability to post bail receive more severe sentences if found guilty.

On the other hand, an 18-year-old heroin addict charged with larceny from a building is asked for \$3,000 bail. With his parents put up the \$300. A 20-year-old charged with breaking and entering: \$1,000 bond. A 22-year-old charged with attempted B&E: \$1,000 bond.

None of these people is a "crime virgin." If they wanted to, they could ask for a lie-detector test. If they pass, the odds are 98:1 the DA will release them immediately. Still, I do not see all these presumptive innocents line up at the tester's door.

What is likely to happen to them? For most young men, probation. Only one-third of the burglars apprehended in Detroit will go to jail or prison. So the only punishment most of these suspects will get is the time they spend in county jail prior to trial. Do these defendants cry out for swifter and more effective justice, as in Great Britain? Are you kidding?

THE AMERICAN system of justice, with its formalism, its fear of violating the rights of the defense, winds up being able to cope with street crime only through a form of preventive imprisonment. And preventive imprisonment is a form of "judicial vigilantism."

Such is the paradoxical consequence of the judicial establishment's search for perfect justice, a search which combines moral righteousness for the judges and profits for the lawyers — a hard combination to beat.

Is there a better way to cope with the flossam and jetsam of the criminal world than imprisonment? Probably not. Short of brain-washing, I cannot think of any way of "curing" these citizens. Furthermore, they would be deeply offended by being treated as "sick." That approach would rob them of the last shred of dignity they still retain.

Twenty per cent will be deterred by the few weeks they spend in jail, waiting for the chance to "cop a plea." For others it will take another sentence, aging, perhaps getting married. And a certain percentage will die an early death.

Still I am concerned for that 18-year-old on \$3,000 bail. Unless his mother comes up with \$300 soon, and unless he is physically rather tough, I am afraid his nights, in the company of other presumptive innocents, will be rather trying. Perhaps the county jail guards will put him in a private cell.



"The Tombs," Manhattan's House of Detention for Men, was used to hold men awaiting court hearings and trials. It was closed by federal court order in 1974 as unfit for inmates.

ers, taken no effective action to remedy these manifest infringements of due process, equal protection and unconstitutional punishment.

A SHORT-LIVED concern with the impact of poverty upon the fairness of the criminal justice system during the '60s resulted in the development of "pre-trial release" procedures which eliminate or minimize financial security.

The most common is "release on own recognizance," or "OR." According to procedures employed in federal courts and in many cities, a superficial social history of the accused is compiled soon after arrest. If the defendant is deemed to be a good risk, the judge is authorized — but not required — to grant OR release instead of demanding bail.

This reform has had only slight impact on the discrimination problem. It is not improved conditions in jail, and probably most of the limited number of defendants who have been released on OR could have afforded bail.

Perhaps the net impact of OR has been to intensify the discriminatory effect of poverty, for poor people now come into court under a double handicap: Not only do they suffer the prejudice that results from poverty in the disposition of their cases, but they are now often considered "unreliable" as well.

Consciously or unconsciously,

judges, juries and counsel may reason that if they had been worth anything, they would have been released on OR. SEVERAL REASONS account for this failure of OR and related reforms to resolve discrimination against the poor in pre-trial detention.

Most important is the judicial response to public demands for protection against crimes committed by defendants on pre-trial release. Although in theory the law is clear that risk of flight is the only relevant criterion for bail setting, judges usually demand high bail whenever they perceive the slightest risk of crime to the public.

To date, we have not developed any scientific techniques for predicting future criminality that do not involve gross errors of over-prediction.

But despite its illegality and its simplistically erroneous assumptions, preventive detention is not only tolerated but often demanded. For example, in New York City in 1976, a black judge who followed the law in generously granting OR releases was severely criticized: the pressure exerted by newspapers, police and prosecutors resulted in his transfer to a civil court.

Thus, the great majority who are not dangerous are detained because they cannot be distinguished from the minority who are.

The media aggravate this misuse of detention by systematically publicizing escapes or crimes by OR defendants, while ignoring both those

on OR who do not commit crimes, and the systematic discrimination against those who, although "safe," have been denied OR and are unnecessarily locked up.

BELOW THE SURFACE is another pervasive force operating to prevent effective reform. The administration of criminal justice in America is like a bargain basement, visible only if 80 to 90 per cent of all defendants plead guilty.

Plea bargaining is the heart of the system. Rightly or wrongly, it is believed that if most or all poor defendants were released pending trial instead of being jailed, the rate of guilty pleas would drop, the courts would then be unable to handle the increased volume of trials, and chaos would be the result.

This probably explains, if it does not justify, the otherwise incredible failure of the Supreme Court, courts in general and lawyers to do anything about what has become the most pervasive denial of equal justice in the entire criminal justice system.

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Prof. Pitts comments: 'An insult to the poor'

By JESSE PITTS

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There is indeed a problem about bail and pre-trial detention, but I do not think Prof. Foote gets to the core of that problem.

When he speaks of the poor kept in jail because they cannot make bail, you picture for yourself an emaciated man, dragged to jail because he has been accused by some Archie Bunker type of stealing some canned goods from the supermarket in order to feed his hungry children. I have to meet a guard who remembers admitting such an inmate.

I think the abuse of the word "poor" in Prof. Foote's article is an insult to the poor, the great bulk of whom are law-abiding citizens.

What he should have said is: young males, usually high school dropouts, impulsive, shiftless (although half of them will claim to have a job), often with a story of alcoholism and/or drug addiction, and practically all of whom have been in jail before.

True, they don't have the money to meet bail — i.e., they are already missing the payments on their installment loans, and their women — mothers, sisters, girl friends — have given up paying for their kingly, their drugs and their fines. Defendants who have few savings but little or no crime history, a good work history, and are married or living at home will get very low bail or will be released on OR (own recognizance).

SKILLED, PROFESSIONAL criminals will be able to meet bail unless the judge puts it in the couple hundred thousand dollars range. Otherwise, they will skip or be back on the street burglarizing in order to pay their fancy lawyers.

The flossam and jetsam of crime, the dumb amateurs, the career criminals with low skills, will remain unable to make bail and awaiting trial. Not that they are in a hurry. They may not be very smart, but they know that delay works for them: The memory of witnesses fades; the anger of plaintiffs cools, permitting the court-appointed lawyer to arouse their pity and get them to withdraw their complaint.

A good tactic will be for the lawyer to wait for trial day and ask for a continuance. After coming down to the court house a couple of times for nothing, the witnesses refuse to come a third time. Their memories have vanished.

WHAT DOES A typical spring day bring to the county jail, once the defendants who are granted or at arraignment are screened out?

A 46-year-old man accused of sexual abuse of his stepdaughter — \$10,000 bail. A 26-year-old man charged with

three attempted rapes and three breakings-and-enterings: \$115,000 bail (would you prefer \$1,000 for this "put in the jug" type of offender?); \$2,500. A 30-year-old "possessor" of heroin: \$5,000. A 35-year-old male charged with larceny and assault: \$10,000. A 32-year-old burglar: \$10,000 bail.

On the other hand, an 18-year-old heroin addict charged with larceny from a building is asked for \$3,000 bail. With his parents put up the \$300. A 20-year-old charged with breaking and entering: \$1,000 bond. A 22-year-old charged with attempted B&E: \$1,000 bond.

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