THE NATURE, SCOPE AND SIGNIFICANCE OF PRE-TRIAL DETENTION OF JUVENILES IN CALIFORNIA

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I. INTRODUCTION

AS IS SO IN MANY OTHER ASPECTS of juvenile law, the central defect of the California juvenile detention statute[1] and practices thereunder, is that the law, on its face and as applied, is inherently discriminatory *vis-a-vis* treatment of adults and, specifically, affords juveniles less protection than the right of bail guaranteed under the Eighth and Fourteenth Amendments.

Although much contemporary discussion is devoted to preventive detention statutes,[2] few persons have pointed out that for juveniles, such statutes have always existed[3] but, under the theory of *parens patriae,* have gone unquestioned.

The California law governing juveniles raises substantial questions of a minor's right to bail, equal protection of the laws and due process of law: Does the Eighth Amendment provision against excessive bail apply to juveniles? Is absence of bail or release on one's own recognizance, a denial of equal protection of the laws? Does the use of detention criteria (such as "for the protection of the person or property of another"[4]), not now a state statutory standard for adults, constitute a denial of equal protection? Since the juvenile's right to a fair trial is impaired by pre-trial detention (by reason, *inter alia,* of restricted consultation with counsel, and limitations upon ability to contact and screen potential witnesses), does state law deny him due process? Is the limitation upon the juvenile's access to the courts to determine the validity of pre-trial detention, a denial of due process?[5]

Not all of these issues will be treated herein, only those having peculiar significance for the black community. (No reiteration other than the following statement is needed herein to establish the differential treatment accorded blacks in being arrested and then pro-

1. Calif. Welfare and Institutions Code ("WIC") §§625 (re temporary custody by peace officers); 626 (re alternative dispositions by peace officers after taking minor into custody); 628 (re alternative dispositions by probation officer once he acquires custody of a minor child, and criteria for determining detention prior to a detention hearing); 630, 631, 632 (re holding minor in custody for up to 72 hours, *excluding non-judicial days,* prior to a detention hearing); 635, 636 (criteria utilized at detention hearing to determine whether or not it is "necessary" to further detain the minor pending trial).
2. See, e.g., District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 493 (July 29, 1970), §210, D.C. Code Ann. §§23-1321 to -1332,
3. *Compare* D.C. Code Ann. §§ 23-1321 to -1332, *supra,* n. 2, *with* WIC §§ 628, 635, 636, *supra,* n. 1.
4. WIC §§ 628(d), 635, 636.
5. Other issues include the following: incarceration for unproved, anticipated crime, rather than actual criminal conduct; the offense of "dangerousness" is unconstitutionally vague; preventive detention infringes upon the presumption of innocence and is a finding based on a standard of proof falling short of "beyond reasonable doubt;" coercion to waive privilege against self-incrimination; detention is imposed on the basis of hearsay and other forms of "evidence" not admissible at trial under accepted rules of evidence.

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cessed through the juvenile courts, for this is not a "study" to bring out what is already known and prolifically documented: ". . . Negroes, who live in disproportionate numbers in slum neighborhoods, account for a disproportionate number of [juvenile] arrests."[5a])

Under California law,[6] any peace officer may, without a warrant, take a minor into temporary custody[7] and deliver custody of the minor to the county probation officer.[8] The disposition (release or detention) of the minor then rests within the discretion of the probation officer.[9] The current position of juvenile court judges is that from the point a juvenile is delivered into the custody of the probation officer until the time of the detention hearing provided for in WIC §632, the juvenile court lacks jurisdiction to order the minor's release since the California statute (WIC) makes no such provision and the detention and incarceration of juveniles are matters solely in charge of the probation officer and his staff.

Thus deprived of access to the courts, juveniles, without being able to obtain release by posting money bail[10] can, and frequently are, detained for periods of at least 72 hours by the probation officer after having been taken into custody.

> "Whenever a minor . . . is taken into custody . . . [he] shall be released within 48 hours . . . *excluding nonjudicial days*, unless within said period of time a petition to declare him a ward or dependent child has been filed . . ."[11]
>
> "Unless sooner released, a minor taken into custody . . . shall be brought before a judge of referee of the juvenile court for a [detention] hearing . . . to determine whether the minor shall be further detained, as soon as possible but in any event before the expiration of the next judicial day after a petition . . . has been filed.[12]

Under this statutory scheme, a minor may be detained in excess of 72 hours (because of intervening holidays and

5a. President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 57 (U.S. Gov't. Printing Office, 1957).

6. Although the discussion herein is framed in terms of California law, the California statute is not atypical, and the issues are the same in many other states, for other jurisdictions also have juvenile preventive detention statutes. See, e.g., Ill. 1965 Rev. Stat. §§ 701-9, 703-4, 703-6; Ia. Laws, 1965, Ch. 215, § 17; Mich. Stat. § 712A.15; Minn. Laws 1959, Ch. 685, § 25 (260.171); Neb. Rev. Stat. §§ 43-205.03, 43-205.04; Ohio Stat. § 2151.314.

Nor are recent recommendations by "child welfare agencies" and others ameliorative. See, e.g., National Council on Crime and Delinquency *Standard Juvenile Court Act* (6th ed. 1959) § 16; National Conference of Commissioners of Uniform State Laws *Uniform Juvenile Court Law* (1968) §§ 14, 17; Children's Bureau, *Standards for Juvenile and Family Courts*, pp. 15-17 (1966).

7. WIC § 625.

8. WIC § 626(c).

9. WIC § 628.

10. *In re Castro*, 242 Cal. App. 2d 402 (1966)

11. WIC § 631 (emphasis added).

12. WIC § 632.

weekends—i.e., "nonjudicial days") before he can gain access to a court.

THE ONLY FACTOR determining whether or not the minor is to be released or incarcerated for such periods of time is the discretion of the probation officer.

In exercising that discretion, the probation officer considers both statutory criteria and certain *non-legal* factors (e.g., the nature[13] or degree[14] of the alleged offense; other non-legal factors include such matters as a juvenile's characteristics (ethnic background; prior police or probation department contacts as well as previous delinquency adjudications; economic status, etc.) and the goals of detention as perceived by the decision-maker (e.g., to deter from further delinquency; to remove the child from the home environment; to provide opportunity for short-term rehabilitative efforts; etc.)).[15]

The preventive detention provisions of the California Juvenile Court Law are found in the following statutory language:

> "Upon delivery to the probation officer of a minor who has been taken into temporary custody under the provisions of this article, the probation officer shall immediately investigate the circumstances of the minor and the facts surrounding his being taken into custody and shall immediately release such minor to the custody of his parent, guardian, or responsible relative unless one or more of the following conditions exist:
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> •
>
> "d) Continued detention of the minor is a matter of immediate and urgent necessity for the protection of the person or property of another.
>
> •
>
> "(f) The minor has violated an order of the juvenile court.
>
> "(g) The minor is physically dangerous to the public because of a mental or physical deficiency, disorder or abnormality."[16]

When the probation officer makes a decision to detain, there is no procedure available for the minor for setting bail or reversing the decision to detain.

California has long been recognized as having detention practices out of proportion with recommendations of specialists in the area of juvenile detention. For example, it has been noted that California "Rates [of detention] proportionately have for years far exceeded nationally recommended figures."[17] When compared with national standards for rate of detention, it should be noted that no county [in California] could be considered to have low detention rates,"[18] and "The overall range [of markedly varied detention rates among counties] was from 19 percent detained to 66 percent detained."[19]

Within that range of average detention rates, the *Summary*[20] contains the following detention rates on the basis of children's characteristics:

> *"Ethnic Background*
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> *"The largest proportion of children detained were Negro children.* Children classified as white were less often detained. The proportions were a third of the white children compared to nearly one-half those of the Afro-American group."
>
> *"Prior Offense* (considered a crime if committed by an adult) and *Prior Delinquency* (not considered a crime if committed by an adult)
>
> *"Nearly one-half* of the children falling in each of these two categories were detained."
>
> *"Probation Status*
>
> "Seventy-one percent of all children referred had never been placed on probation. Among these children, the detention rate was 25 percent. For those presently on probation, the rate was 67 percent. Of

13. E.g., *In re William M.*, 3 Cal. 3d 16 (1970).
14. E.g., *In re Macidon*, 240 Cal. App. 2d 600 (1966).
15. See Sumner, *A Summary of Locking Them Up: A Study of Initial Juvenile Detention Decisions in Selected California Counties* (a project sponsored by the California Council of the National Council on Crime and Delinquency, 1968), pp. 8-15; hereinafter cited as "Summary."
16. WIC § 628. Also see WIC §§ 635, 636.
17. *Summary, supra*, n. 15, at p. 1.
18. *Ibid.*, p. 2.
19. *Ibid*, p. 10.
20. *Ibid*, pp. 8-11.
    The data relating to the categories of prior offense, probation status, prior record and prior delinquency adjudications were chosen since blacks fall into those classes more frequently than is justified by their total numbers within the general population. Hence, use of such criteria in the detention decision bears significantly upon the black community.

those previously on probation, with probation revoked, 74 percent were detained."

"Prior Record

"This item was related to decision outcomes for both sets of counties. But *54 percent* of those children with a prior offense record were detained in high rate counties as against *23 percent* (less than one-half as many) in the low rate counties. Also, in low rate counties, considerably fewer children apprehended for alleged delinquency were detained with no history of past offense than was true for high rate counties.

"Prior Offense (considered a crime if committed by an adult) "Here again, there was association for both groups of counties between the item and the detention outcome. But *53 percent* were detained in high rate counties as against *32 percent* in low rate counties.

"Prior Delinquency Adjudication

"This item was closely associated with the detention decision in both sets of counties, but detention rates varied according to how many times a child had previously been found delinquent. Of those with a history of four or more prior offenses, high rate counties detained *87 percent.* For the same group, low rate counties detained *50 percent.* Where there was no history of past delinquency adjudication, high counties detained *32 percent* and the low *20 percent.*

Probation Status

On this item, although relationship was again established for both groups of counties, it was found that the number of children previously on probation was low for both groups, and the number of those with a history of revocation lower yet. *But* the high rate counties detained *91 percent* of such children as compared to *46 percent* for the low, or roughly almost twice as many."

IN 1960, the Governor's Special Study Commission on Juvenile Justice commented as follows on the rate of pre-adjudication detention in California:

"California has been severely criticized by national probation and child welfare organizations for excessive juvenile detention practices. The Commission's study, unfortunately, substantiates the validity of this criticism . . . [In 1958] almost three-fourths of the delinquent juveniles referred to probation departments by law enforcement agencies were detained in juvenile halls. In some communities, the ratio was even higher — virtually every juvenile referred by law enforcement officers to the probation department was detained, notwithstanding the fact that some minors were apprehended in error, many committed inconsequential offenses, and many others had responsible parents able to control the minor pending the juvenile court appearance."[21]

In spite of such criticism, California's record as regards pre-adjudication detention practices have worsened in the intervening years since 1961.[22] California's detention rate, as a percentage of arrests, averages three and one-half times the recognized norm,[23] and is currently *increasing* despite the recent emphasis on protection of the rights of minors, a trend which the California Bureau of Criminal Statistics characterizes as running "contrary to the tide of legal thought."[24]

Juvenile Hall Admissions of Minors Arrested for Delinquency and Delinquent Tendencies as Percentage of Arrests[25]

YEAR	ARRESTS	ADMISSIONS	PER CENT
1968	366,541	132,820	36.3
1967	323,427	115,100	35.6
1966	303,020	87,925	29.0
1965	277,649	78,669	28.3

In considering the foregoing statewide detention rates, it should be noted that the rates of detention as a percentage of minors referred to juvenile probation departments are even higher, since the police may admonish and dismiss a child

21. *Report,* Governor's Special Study Commission on Juvenile Justice, Part I, p. 41 (1960).
22. *Summary, supra,* p. 3.
23. "The number of children admitted to a detention facility should normally not exceed 10 percent of the total number of juvenile offenders apprehended by law enforcement officers, excluding traffic cases and cases outside the court's jurisdiction such as out-of-county runaways and federal court cases." National Council on Crime and Delinquency, *Standards and Guides for the Detention of Children and Youth* 18 (1961). More recently, NCCD has recommended detaining as little as two percent of juvenile arrestees. Letter from Central Office, NCCD, to San Francisco Bay Area Social Planning Council, 1/17/68, quoted in BASPC, *The San Francisco Juvenile Court, Background Information* 263 (1968).
24. Bureau of Criminal Statistics, *Crime and Delinquency in California — 1968,* 161.
25. Sources: 1968 figures: *Crime and Delinquency in California — 1968,* 126, 164; 1965-67 figures: BASPC, *supra,* note 23, 261-262, derived from *Crime and Delinquency in California — 1965, 1966, 1967.*

after arrest, or cite him to appear later before a probation officer. Thus in 1968, the detention figure of 132,820 equals *45.5 percent* of the 291,875 minors referred by police to probation.[26]

LOCKING UP CHILDREN charged with or suspected of offenses, prior to adjudication, is a self-defeating practice, for contrary to the avowed purpose of the Juvenile Court Law, to salvage young lives through rehabilitative efforts, the incarcerated child goes through a negative experience that is likely to contribute to future deliquent or criminal conduct.

Juvenile hall attendants have expressed surprise at the speed with which relative innocent youngsters succumb to the infectious miasma of "Juvy" and its practices, attitudes and language. But this is not surprising. The experience tells the youngster that he is "no good" and that society has rejected him. So he responds to society's expectation, sees himself as a delinquent, and acts like one. The President's Commission on Law Enforcement and Administration of Justice defined this psychological response:

> "Official action may actually help to fix and perpetuate delinquency in the child through a process in which the individual begins to think of himself as delinquent and organizes his behavior accordingly. The process itself is further reinforced by the effect of the labeling upon the child's family, neighbors, teachers, and peers, whose reactions communicate to the child in subtle ways a kind of expectation of delinquent conduct. The undesirable consequences of official treatment are maximized in programs that rely on institutionalizing the child."[27]

The California detention problem is that there is too much detention and that its imposition is inconsistent. A major reason for both aspects of the problem is widepsread detention for purposes which are not countenanced by the Federal Constitution, as much as it is due to utilization of subjective detention criteria, in a context where appellate review is as a practical matter unavailable.

Contrary to the espoused purpose of individualized treatment,[28] California pre-adjudicatory detention policies and practices on the whole result in processes in which persons are treated *en masse* and in a wholly undifferentiated manner."[29]

II. THE COSTS OF CALIFORNIA'S JUVENILE DETENTION STATUTE[30]

BECAUSE OF THE subjective nature of juvenile pre-trial detention criteria, the usual costs inhering in any system of pre-trial incarceration, assume peculiar importance for juveniles.

For blacks and other racial minority communities, the intangible human costs of pre-trial detention deserve specific mention at the "expense" of due process and equal protection discussions of general applicability.

A. PREJUDICE TO DETERMINATION OF GUILT

IT IS NO LONGER questionable that juveniles accused of acts of delinquency are entitled to the "essentials of due process and fair treatment" both in pre-jurisdictional adjudicatory proceedings[31] and

26. *Crime and Delinquency in California — 1968*, 126, 164. The figure for referrals is derived by adding the figures at p. 127 for "Total Delinquency" and "Delinquent Tendencies."
27. *The Challenge of Crime in a Free Society* 80 (U.S. Government Printing Office, 1967).
28. See *In re William M., supra*, 3 Cal. 3d 16, 31.
29. The problem in no small part is due to the refusal of the Juvenile Court to obey and implement appellate court decisions. See the description of the failure of this respect of the Los Angeles County Juvenile Court as described in *In re Larry W.*, 16 Cal. App. 3d 290, 292 (1971), a neglect of the courts which is borne out by this writer's own current experiences in Los Angeles County.
30. Discussion herein is limited to delinquency (WIC § 602) and "incorrigibility" (WIC § 601) cases, for dependency and neglect situations (WIC § 600) involve some entirely different considerations which warrant separate treatment not within the intent of this article.

    Other matters also need not be treated herein, e.g., certain due process implications of preventive detention statutes, such as those mentioned *supra*, n. 5. The Eighth Amendment right to bail and violation of the Equal Protection clause by denying bail to minors have been accorded ample treatment elsewhere; see Foote, *The Coming Constitutional Crisis in Bail*, 113 U. Pa. L. Rev. 959 (1965); Note, *Preventive Detention: An Empirical Analysis*, 6 Harv. Civ. Rts./Civ. Lib. L. Rev. (No. 2, March, 1971) 300, 317-370; *Rivera v. Freeman*, Memorandum in Opposition to Motion to Dismiss (U.S. Dist. Ct., Central District of Calif., Civ. Action No. 70-2089-WPG), and Appellant's Opening Brief (C.A. 9th Cir., No. 71-1351).
31. *Kent v. United States*, 383 U.S. 541 (1966).

during the adjudicatory hearing.[32]

Yet, under the existing California law, pre-trial detention of a juvenile charged with commission of a crime denies the juvenile of due process of law by infringing upon the juvenile's right to a fair trial since pre-trial incarceration seriously impairs one's ability to prepare for trial.

The juvenile's right to the "essentials of due process and fair treatment" at the adjudicatory hearing would be meaningless if the right did not extend to include those fundamental rights which touch upon, and vitally affect, one's ability to receive due process and a fair trial. The mere statement that the right to counsel *prior to* trial and the right to compulsory process to obtain witnesses do not bear upon the final outcome, reveals its fallacy.[33] Yet, all of these rights are affected by whether or not the defendant is free on some form of pre-trial release.

The wrong done by denying pre-trial release is not limited to the denial of freedom alone. That denial will have other consequences, perhaps the most harmful of which is the adverse effect upon the preparation of the accused's defense, since he will have no opportunity to investigate his case, to cooperate with his counsel, to earn the money that is still necessary or maintain community, employment and school contacts necessary for a disposition other than incarceration after adjudication should he be found guilty. In a recent case the Ninth Circuit ordered the release of a minor to the custody of his parents after finding that "failure to permit appellant's release for the purpose of aiding the preparation of his defense unconstitutionally interfered with his due process right to a fair trial."[34] The Court made the additional observation:

> "The ability of an accused to prepare his defense by lining up witnesses is fundamental, in our adversary system, to his chances of obtaining a fair trial. Recognition of this fact of course underlies the bail system. *Stack v. Boyle*, 342, U.S. 1, ((1951). But it is equally implicit in the requirements that trial occur near in time, (citation), and place (citation) of the offense, and that the accused have compulsory process to obtain witnesses in his behalf (citation). Indeed, compulsory process as a practical matter would be of little value without an opportunity to contact and screen potential witnesses before trial."[53]

The substantial impairment of one's ability while incarcerated, to contact and confer with witnesses who can testify on his behalf at trial is exacerbated in the case of a juvenile whose witnesses most often are other juveniles whom he many times knows only by their first names and whose whereabouts only he can ascertain. Then there is the added factor of race. To the task of overcoming the reluctance of potential witnesses to testify, counsel must surmount the barriers of age *and race*. Such social realities cannot be overlooked. The necessary ingredient of trust toward the lawyer on the part of witnesses as well as other intermediary communication functions, compounded as they are by race, can often be performed only by the client, who knows the community, will feel less intimidated therein, and *be* less intimidating than an attorney, and generally perform the necessary interpretive, communicative role.

FURTHERMORE, the adverse consequences of pre-trial detention extend beyond trial. The effects of pre-trial detention upon the (increased) probability of conviction and of sentencing to an institution after conviction, as opposed to being placed on probation, have been amply documented. Studies continuously establish that the injury to an accused, detained pending trial, often is severe and carries over beyond the initial period of pre-trial detention, prejudicing his chances of acquittal or non-jail disposition.[36]

32. *Application of Gault*, 387 U.S. 1 (1967).
33. See, e.g., *Kinney v. Lenon* (9th Cir. 1970) 425 F.2d 209, 210.
34. *Kinney v. Lenon, supra*, n. 33, 425 F.2d at 210.
35. *Ibid.* See also *Stack v. Boyle*, 342 U.S. 1, 4, 8 (1951).
36. *Stack v. Boyle, supra*, 342 U.S. 1, 4; Atty. Gen. Comm. on Poverty and the Administration of Federal Criminal Justice, Report 26 (1963); Bratholm, Arrest and Detention in Norway, 108 U.Pa.L.Rev. 336, 340-341 (1960); Foote, Crisis in Bail, *supra*, at 1138-43; Freed and Wald, Bail in the United States at 45-48 (1964).

In addition to the other costs of pre-trial detention,[37] the cost to the accused in terms of prejudice to the determination of guilt and dispositional alternatives has has been described as follows:[38]

". . . One of the most serious costs of pre-trial detention is the possibility of prejudice to the outcome of the case. Several recent studies indicate that defendants incarcerated before trial are more likely to be found guilty and committed to prison than those released. This prejudice results from factors which discriminate solely on the basis of detention. The Boston data show that 74% of the comparison group were found guilty and 69% served prison sentences for the initial offense while the rates for those released were 53% found guilty and 26% incarcerated. Other studies corroborate these findings.

"While many factors could explain these differences, at least one study demonstrates that differences in findings and sentencing between detained and bailed defendants remain consistently large and are not affected when prior record, amount of bail (which often correlates, in practice, with the weight of the evidence), quality of counsel, family situation, or employment are held constant. These findings appear to support the conclusion that disposition and finding are to some extent related to incarceration itself.

"One factor which might explain differences in guilty findings is that the incarcerated defendant cannot consult with his lawyer as freely or as often as the person not detained. Neither is he free to prepare his case fully, to gather witnesses, or to establish an alibi . . .

"Because detention often results in loss of employment those not released are less likely to retain private counsel. A recent study of the Massachusetts lower court documents the extent to which court-appointed counsel makes a guilty finding more likely. Sixty-five precent of those with appointed counsel are found guilty compared to 49% of those who have private attorneys. Of those with an assigned attorney, 17% are found not guilty compared to 35% with a private lawyer. Detainees also are less able to afford the service of paid investigators, or the expense of witnesses. Incarcerated defendants are also more readily available to law enforcement officials for involuntary participation in line-ups and other police processes that may increase the likelihood of a finding of guilt. Finally, defendants who come into court in the custody of police officers, stripped of their self-confidence by detention, and wearing prison clothes or the clothes in which they were arrested, may be prejudiced in the eyes of the jury.

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"The individual who is incarcerated is also prejudiced at sentencing. The defendant's loss of job and other economic and social dislocations resulting from pre-trial incarceration reduce a judge's reason to suspend the sentence or place the defendant on probation. The granting of probation for example, depends upon the likelihood of successful reacclimatization to society, the difficulty of supervision, and the risk of criminal instability. Unemployed defendants or those with unstable or impoverished families are prejudiced in the probation determination. Pre-trial incarceration contributes to both factors."

Another not atypical survey revealed the following:[39]

"An examination was made of one hundred consecutive felony cases in a Kansas county . . . The objective of the survey was to gain some insight into the relationship between pre-trial detention and the probability of subsequent conviction and imprisonment. The following table summarizes the findings.

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37. E.g., creation of a class of hardened criminals; economic disruption (loss of employment or of opportunity to pursue education, etc.); jail maintenance and administrative costs; erosion of community's sense of justice; imposition of punishment prior to determination of guilt; stigmatizing effect in the community resulting from the mere fact of detention.

38. Note, *Preventive Dententions: An Empirical Analysis*, 6 Harv. Civ. Rts./Civ. Liberties L.Rev. 289, 347-351 (No. 2, Mar. 1971) (footnotes omitted). The author cites numerous, extensive surveys to support his description, including the following: Foote, *Crisis in Bail, supra*, at 1137-1151; Wald, *Forward, Pretrial Detention and Ultimate Freedom*, 39 N.Y.U.L.Rev. 640 (1964); Freed & Wald, *supra*, note 36, at 45-48; Foote, *Compelling Appearance in Court*, 102 U.Pa.L.Rev. 1031, 1051-1053 (1954); Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U.L.Rev. 641 (1964). Also see Skolnik, *The Politics of Protest*, Report to National Commission on the Causes and Prevention of Violence 300, 301-311 (Ballantine Books, 4th ed., 1970).

39. Wilson, New Approaches to Pre-Trial Detention, 39 Jo.Kan.BarAssn. 13 (1970), reprinted in 28 Legal Aid Briefcase 212, 213-214.

Disposition of Felony Cases

CASE DISPOSITION	Bailed Accused (67 Cases)	Jailed Accused (33 Cases)
Dismissed by Prosecutor	38%	18%
Plea of Guilty	41%	60%
Trial and Conviction	5%	12%
Trial and Acquittal	16%	10%
Granted Probation*	54%	26%
Sentenced to Penitentiary	46%	74%

* Includes 59 convicted
33 bailed
26 jailed

B. Fulfillment of Prophecy of Criminality

In their report to the National Conference on Bail and Criminal Justice, Freed and Wald stated that "the costs of pre-trial imprisonment . . . in terms of time, money, *human suffering and justice* are staggering."[40]

Deplorable as prison conditions are for the already convicted, [41] there is evidence that conditions in pre-trial detention facilities are even worse[42] and offer less chance for rehabilitation.[43] The inescapable and lasting impressions imprinted by the experience, the exposure to sophisticates and to the hopeless and those resigned to failure, leave many defendants hardened, embittered and more likely to recidivate after release than they were before incarceration.

The degrading and degenerative effects are no less so on minors,[44] who because of age, immaturity and vulnerability possibly occupy a precarious position between criminal activity and creative, productive conduct.

C. Economic Disruption

Pre-trial detention results in serious economic disruption to the defendant, his family and the community. Involuntary removal from the community leads, for the great majority of defendants, who are indigent and live but marginal economic existences, to serious economic dislocation.

Even if there is not immediate loss of present employment, foregoing current income during the detention period will cause severe depletion of any economic reserves possessed at the beginning of incarceration. This further decreases one's ability to perform investigations needed in trial preparation or to engage counsel of one's own choice.

In addition, even in cases of acquittal, the individual's credit ratings and potential for future employment are jeopardized. Regardless of guilt or innocence, the mere existence of arrest records prejudices employment opportunities.[45]

40. *Op. cit., supra,* n. 36, at 39.
41. They have been described as follows:
"Although prisons might become centers of rehabilitation in some ideal future, it is apparent that they are at present overcrowded, understaffed, poorly funded, oppressively regimented, often openly abusive of the fundamental human rights of prisoners, and woefully incapable of providing the job training and education necessary to rehabilitate their charges. Note, 6 Harv. Civ. Rts./Civ. Lib.L.Rev., *supra,* at 351-352.
42. Note, *The Constitutional Limitations on Conditions of Pretrial Detention,* 79 Yale L. J. 941, 942-943 (1970); A. Trebach, *The Rationing of Justices Constitutional Rights and the Criminal Process* 83, 264 (1964); *Wright v. McMann,* 387 F.2d 579 (2d Cir. 1967); *Sostre v. Rockefeller,* 312 F.Supp. 863 (S.D. N.Y. 1970); *Holt v. Sarver,* 309 F.Supp. 362 (E.D. Ark. 1970).
43. Intensive rehabilitative service is advanced by some in justification of pre-trial detention of juveniles. See *Summary, supra.* But not only are the jurisdictional facts necessary as a precondition to treatment, not yet adjudicated; in addition, treatment is not a super objective of pre-trial detention. See *Report,* Governor's Special Study Commission, *supra,* n. 21, Part I, p. 42. "Although it is difficult to delineate what does justify detention of a minor, it is relatively easy to set forth a number of factors that . . . are *not* relevant to detention . . . (4) the belief that detention would have a salutary effect on the minor (the juvenile court does not have the right to exercise its jurisdiction over a minor for this purpose, if at all, *until an adjudication of wardship or dependency has been made*) . . ." *In Re William M., supra,* 3 Cal.3d 16, 30, n. 24 (emphasis added).
44. See n. 27, *supra* and accompanying text. Although being jailed is obviously a traumatic experience for anyone, regardless of age, certainly it is likely to be much more so for a minor. In addition, the harm caused by missing one or more weeks of school — or of being suspended or expelled due to arrest and detention — can have lasting consequences. More importantly, a minor is likely to be thrown in contact — often for the first time — with experienced law breakers or confirmed juvenile delinquents. "Detention for juveniles has been repeatedly scorned as 'a disruptive experience' and should be used selectively; detention as therapy is semantic acrobatics. It often leads to identification as a confirmed law breaker; status as a bona fide delinquent or 'big shot' among his peers; and perhaps, even more dangerous, introduces him to the philosophies and actual *modus operandi* of more experienced and sophisticated offenders." Freed and Wald, *Bail in the United States,* 1964, page 95; *id.,* at 101. Finally the stigma attached to having been confined for a period of time may be felt more deeply by a minor, and may well have a more profound effect upon his relationship with others.
45. See, e.g., *Gregory v. Litton Systems, Inc.,* 316 F.Supp. 401 (C.D. Cal 1970).

These results are especially pronounced because of the pervasive lack of training and skills on the part of the indigent defendant.

Although present employment might to some extent be less among juveniles than adult defendants, the consequences in terms of lost educational opportunity are no less grave than loss of a job. Education under present conditions is the necessary precondition to economic viability; and present pursuit of education affects disposition.

D. Maintenance of Detention Facilities and Administrative Costs

Mention is made of these monetary outlays (such as increased expenditures for construction, operation and maintenance of physical plant; additional administrative personnel; more courts, referees, clerks, prosecutors, public defenders and probation officers by reason of the added procedural elements in juvenile detention hearings; food and clothing for inmates) only to make the point that such expenditures should be allocated to badly needed community services that can replace institutionalization as the standard mode for dealing with accused juveniles.[46]

E. Erosion of the Community's Sense of Justice

> ". . . it is costly for society when the law arouses . . . a sense of persecution and hopelessness before official power, and hostility to police and other authority that may tend to generate the very conditions of criminality society is seeking to extirpate."[47]

Yet, this is just the result very often induced: because of the experience of being punished without a trial and a finding of guilt, and the impairment of the presumption of innocence, legitimacy of the agencies responsible for such results is undermined, and conditions leading to criminal conduct gain added impetus.

The sense of injustice is heightened by preventive detention such as inheres in the juvenile court law of California, for by incarcerating a person on the basis of a prediction of future "dangerousness," principles of individual culpability and responsibility are abrogated. Also, it negates corrective action, for past acts are irrevocable. The individual is incapable of conforming to the law's demands.

The rehabilitation or treatment myth is no longer offered in justification for detention since preventive detention is for the "protection of society." Thus, one cannot even avail himself of the solace, whatever it might be, of a system espousing rehabilitation.

Rather than cure causes of criminality or protect society, preventive detention only adds to unrest and dissatisfaction in poor and ghetto communities (upon whose residents preventive detention is more often imposed than upon others), and by detracting from the concepts of bail reform and release on recognizance, which at least have the theoretical potential for aiding most in racial minority communities could only impair the desired result of societal protection.

Preventive detention of the kind by which juvenile court laws are characterized, is the worst variety, for it is an absolute denial of bail, which is not a universal quality of preventive detention statutes.

III. Conclusion and Recommendation: Alternatives to Juvenile Court Preventive Detention Statutes

Juvenile law, in terms of the rights of the person, can be considered only to be part of the general lag in the rights of youth *vis-a-vis* adult criminal (procedural and substantive) law. But there are omnious portents about in this society

46. See "Conclusion and Recommendations," *infra.*

47. President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts* 104 U.S. Gov't. Printing Office 1967).

today. The juvenile law might be the precursor of things to come for adults—namely, an *officially sanctioned* system of preventive detention.

Before the adult law closes the gap (regresses) to the level of juvenile law, a strong effort must be made to eliminate the precedent of the juvenile court law.

One solution — the one most obvious and easiest to implement — is incorporation of money bail[48] into the law of juvenile courts. But this is only a partial solution, even if there is an "O.R." system, for (a) money bail is no bail for the indigent;[49] and (b) release on recognizance makes detention dependent upon such inherently discriminatory factors as family relations, monetary resources, employment and length of residence in the community.[50]

The better solution lies in a system of reform of juvenile preventive detention law, that will avoid the costs inhering in the present statutes and result in affirmative benefits for the individual and the community, by generally making the various alternatives for use of community-based services and resources, the norm rather than the extraordinary remedy.

This is based on the recognition that

> "Delinquency [as well as incorrigibility or neglect situations] is not so much an act of individual deviance as a multitude of pervasive societal influences . . ."[51]

This solution is offered not only in an effort to avoid the abuses inherent in

48. Though beyond the scope of this article, mention should be made of current discussions probing the meaning of "bail." The U.S. Supreme Court has not yet detailed the full significance of bail. When "bail" is mentioned, one most commonly envisions bail in the form of money or a surety. It is currently being contended, however, that implicit in the Eighth Amendment is the right that there be an adequate system of pretrial release, and that the "excessive bail" clause, construed in light of our jurisprudential history and predicates, together with other provisions of the Constitution, establishes at least a system which provides for money bail *and* as an alternative thereto, release of the person from custody on his own (non-monetary) undertaking or that of someone else, that he will appear in court at the time and place appointed, but not a system of release predicated exclusively upon money or surety bail. See Foote, "The Coming Constitutional Crisis in Bail," 113 U. of Pa. L. Rev. 959 (1965).

Although the word *bail* is often used to denote exclusively, and is equated solely with, money bail, to "bail" a person means nothing more than "To procure release of one charged with an offense by insuring his future attendance in court and compelling him to remain within [the] jurisdiction of [the] court," or "To procure the release of a person from legal custody, by undertaking that he shall appear at the time and place designated and submit himself to the jurisdiction of the court." Black's Law Dictionary, page 177 (4th Ed. 1051). And the "undertaking" may vary from release upon defendant's own recognizance to setting of money bail in varying amounts. Therefore, "bail" can be used to refer to the right to pre-trial release generally, rather than simply money bail.

49. But, that one's state of being able to post money bail — if "bail" is interpreted exclusively in the money or surety sense — places him in an advantageous position vis-a-vis persons unable to post the entire sum or to secure a surety and hence that such a system operates to the detriment of the indigent, may not be urged to negate the existence of such a constitutional right for juveniles, but rather punctuates the necessity for an alternative for protection of the rights of indigents. Because certain persons cannot afford money bail is no argument for abolition of the constitutional right; rather such a situation is persuasive that additional protective remedies should likewise be provided and made available for the poor. The present period of confinement is of no aid to either rich or poor but is detrimental to both classes.

In re Antazo, 3 Cal.3d 100)1970), illustrates that where a right is predicated on one's economic status, adiitional protective remedies must be developed for safeguarding access of that right to the poor. The issue decided in *Antazo* was whether a convicted defendant upon being sentenced or otherwise ordered to pay a fine and a penalty assessment can be required to serve them out in jail at a specified rate per day because he is unable to pay them. Just as "such a defendant has no choice at all and in reality is being imprisoned for his poverty," *id.*, at 103, so also an indigent juvenile under a money bail system would be confined prior to trial simply because he is poor. Hence, if provision is made for money bail, alternative and less intrusive means whereby the state can further its interest — namely, to insure appearance at court — must be devised for the indigent. Also see *Williams v. Illinois*, ... U.S. ....., 26 L.ed.2d 586, ...S.Ct. ....., 38 U.S.L.W. 4607 (1970).

If "bail" is viewed only as a money or surety concept, that still does not preclude the existence of a constitutional alternative; but the two are not mutually exclusive or incompatible.

50. Lack of employment and economic resources makes a minor a "poor risk" under criteria for release of adults on recognizance. "Immaturity" might also be advanced as an argument against O.R. for a minor. But these very factors, plus a greater "fear" that might grip an adult, makes it less likely that a juvenile will not return to court as ordered, for he lacks both the financial and psychological independence and sophistication for existing apart from the home or his familiar community environment.

Furthermore, juveniles are less likely to harm others. It should be noted that numerous cases allowing bail for adults involve persons who are suspected members of organized crime (see *Sica v. United States*, 82 S.Ct. 669 (1962)), suspected sexual psychopaths, (see *Ex Parte Keddy*, 105 Cal.App.2d 215 (1951)), and the like. Although no statistics as such can be cited here, surely it is far more likely than not that persons who are in their teens — many or most of whom have been taken into custody for minor offenses — will upon release pose less real danger to the safety of others than will adults who, among other things, usually have more money and mobility and hence more power to inflict harm on others than do minors still living at home.

51. Task Force Report on *Juvenile Delinquency and Youth Crime* 423 (U.S. Gov't. Printing Office 1967).

present detention criteria, policies and practices, but also, since pre-trial detention prejudices one's possibility for a fair trial and disposition other than institutional confinement, as an aid in advancing one's interest in a fair trial and continued physical liberty after adjudication; and furthermore to lend greater acceptance to the concept that since the ultimate objective is return to the community, proper adjustment or reacclimatization to the community requires close, continuing contact with that community.

DEVELOPMENT and utilization of community agencies can be a method, not only of circumventing present deplorable detention practices, but also of *diverting from* or screening out of the court system many cases which by resort to the juvenile court result in detriment rather than benefit to the individual.[52]

Since the only legitimate criterion for denial of pre-trial release is lack of assurance that the person will appear in court when ordered,[53] and since money bail is neither presently guaranteed to minors nor would offer the best possible resolution of the detention dilemma,[54] organizations in the minor's home community can form the supervisory link between the individual and the court to minimize non-appearance at the appointed time. The community organization can constitute the "assurance' 'for appearance in court.

But use of resources in the minor's immediate community as an "O.R." device would not necessarily involve "incarceration" at a community facility (except when, in narrowly delineated situations, deemed desirable, or when voluntarily chosen) but would be for the purpose of supervising the minor's release and providing a reporting agency.[55]

Elimination of the prosecutorial function of the probation officer would greatly aid in the necessary process of increasing trust between the community and the probation department and enable the latter, through affirmative action programs and publicizing its availability as another comunity resource, to break present barriers and penetrate into the community and become part of it.

IN ADDITION to the function of community based organizations in reducing the incidence of pre-adjudication detention, and hence in preserving one's right to receive a fair trial, those agencies can bring to the community an increased awareness of probation department functions, thus resulting in enhanced credibility, which in turn betters the probability for rehabilitation or effective treatment as well as makes possible greater diversion from the court system and increased non-judicial disposition on the part of probation personnel.

Since the ultimate objective of juvenile rehabilitation is return to the community, the isolation from the community inherent in juvenile facilities ill prepares one to return; and in cases of probation or supervised release, the "treatment" fails to offer anything in the way of positive programs since it is a system of merely overseeing technical conditions of release.

But release under supervision of probation personnel acting conjunctively with community-based services offers a potentially ameliorative alternative not only to pre-trial preventive detention but also to automatic resort to judicial adjudication and to present post-adjudicative treatment methods.

52. WIC § 654 (although in need of revisions to eliminate certain coercive factors inducing infringement of the privilege against self-incrimination) does provide a basis for use by the probation department in making use of community resources to avoid detrimntal court processing.
53. *Stack v. Boyle, supra,* 342 U.S. 1.
54. See nn. 48 and 49, *supra,* and accompanying text.
55. It should be noted that these suggestions for use of community agencies are only for individuals who under present policy and with existing resources would be detained. Absence of community resources should not be seized as an excuse to increase present detention rates or exacerbate prevailing detention policies.