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Book Review: Detention Before Trial, by Martin L. Friedland

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DETENTION BEFORE TRIAL. By Martin L. Friedland. Toronto: University of Toronto Press. 1965. pp. xv, 202.

Studies of the bail system, and related problems, have become numerous in the United States in the last five years. Foreign observers of the American scene had always known that the administration of criminal justice was chaotic, unjust, corrupt and violative of due process of law. These outsiders, nodding wisely, had attributed these legal eyesores to political immorality, a soaring crime rate, inefficient police forces and politically appointed judgeships. British lawyers, judges and law enforcers had simply said that "it couldn't happen here". Professor Friedland has shown, by careful argument and empirical statistical analyses, that we were wrong. Although our system is not subject to the enormous problems facing the United States, it is far from perfect.

Detention Before Trial provides a welcome departure from the dry, even sterile, legalistic analyses in which so many Canadian academic lawyers have previously engaged. This study examines over one short period (*viz.* six months) the criminal cases tried in some of the magistrates' courts of one city, Toronto. By undertaking this

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study in the sadly neglected area of criminal procedure and the administration of criminal justice, the author has raised most important questions relating to arrest procedures, police practices, legal aid, jail conditions, the performance of the minor judiciary, the role of the bail bondsman and, of course, the efficacy of bail.

In a discussion of the use of arrest as opposed to the summons as a means of ensuring appearance at trial, Professor Friedland points out, by implication, the way in which Canadian practices in the administration of criminal justice have more closely followed the American, rather than the British system. Why should this influence be so strong, so that for instance, the use of the arrest, frequently illegal, should have replaced the more economically and administratively feasible summons? Is the criminal population of Canada so fraught with danger and recidivism that we cannot use the summons? The above discussion may appear to over-emphasize the importance of the summons but the author of *Detention Before Trial* shows that the use of the alternative arrest procedure, along with repressive police procedures and, to some extent, an ineffectual magistracy leads not merely to unnecessary detention before trial but degraded defendants, and the denial of fundamental rights. These infringements are substantiated by Professor Friedland's statistics which show that detention before trial impedes the work of a lawyer, increases the chances of conviction and even leads to longer terms of imprisonment than are imposed on those who are released on bail.

Professor Friedland says that

> [u]nnecessary arrests weaken the whole fabric of the administration of justice. They further community disorder and create bad will between the public and the police force. Many of the cases involving police violence, resisting arrest, and assault of police officers arise out of situations in which the police are legally but needlessly using the arrest procedure.[1]

An even stronger case can be made out, of course, when the arrests are illegal. Professor Friedland believes that this practice is far too common. Furthermore, the exaggerated resort to the arrest procedure has robbed the accused of the traditional safeguard of interposing the independent scrutiny of a justice of the peace between the police and the accused. Therefore the author believes that:

> Some substitute technique must therefore be found to ensure that the police exercise their power of arrest reasonably. It is unsound to have such an unfettered discretion solely in their hands. A discretion which cannot be challenged ceases to be a matter of discretion; it is naked power. Police officers are not neutral nor is it reasonable to expect them to be. They are protagonists in society's struggle against crime. In the eyes of many police officers all persons whom the police prosecute are guilty and the experience of being arrested and spending time in custody pending trial is a punishment justly deserved.[2]

The author refers to the legal action which may be taken against a police officer who makes unnecessary arrests. Since this book was written, the Police Act has been amended so that a municipality is

[1] P. 17.
[2] P. 25.

required to pay any damages or costs awarded "in respect to torts committed by members of the police force . . . in the performance or purported performance of their duties."[3] This provision might well result in more circumspection by the police because, to use Professor Livingston Hall's words, "[a] community which pays the bill will not tolerate habitual lawlessness."[4]

Similarly, the last year has seen constructive criticism of police practices by the Canadian Civil Liberties Association as well as suggestions from concerned citizens for some form of police review board which would be an independent tribunal divorced from the Police Commission.

Certainly there are faults in the present system which cannot be explained by criticizing that small percentage of any police force which resorts to violence or illegal practices. The present status of the summons is such that there is no penalty for wilful failure to appear in obedience to its terms. This is a major fault and must be corrected in the manner suggested in *Detention Before Trial.* The summons procedure could also become more effective if the police were given authority to issue summonses.

The recent controversy in the United States over the U.S. Supreme Court decision in *Escobedo v. Illinois*[5] is recalled by Professor Friedland's study which showed that 84 *per cent* of all persons arrested for criminal offences were kept in custody until their first court appearance. The author shows that there are relationships between "custody and the ability to retain counsel, between the retention of counsel and the outcome of the case, between custody and the outcome of the trial, and . . . between custody and the sentence imposed."[6]

There is a strong likelihood that the accused in custody prior to trial will plead guilty. The author suggests some reasons:

> . . . the possibility in fact and in the mind of the accused that if he pleads guilty he will not have to spend a further period of time in custody; the desire to be released from a distasteful experience; the effect of suggestions by the police and fellow accused that it is better to plead guilty; and the use of highly developed police interrogation methods, both proper and improper.[7]

Even more important than the fact that an accused may plead guilty in inappropriate cases is the related finding that "95 per cent of all persons who appeared in court in custody and pleaded guilty at their first court appearance did not have a lawyer".[8] This state of affairs is deplorable, particularly when one reads that the present state of the legal aid system is such that it bypasses these persons. The "one call" rule is hardly a solution to the problem.[9] Canadian

3 1965, c. 99, s. 6(1).
4 Cited by Professor Friedland at p. 27.
5 378 U.S. 478.
6 P. 124 and tables on immediately preceding pages.
7 Pp. 60-61.
8 P. 62.
9 See *R. v. O'Connor* (1964), 48 D.L.R. (2d) 110.

courts might be forced to remedy this dire situation with drastic measures similar to the rule in *Escobedo v. Illinois* which provides that "when the process shifts from the investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate and . . . the accused must be permitted to consult with his lawyer."

A large portion of *Detention Before Trial* is taken up with an examination of the bail system which has made the most substantial contribution to the problems already outlined. The bail system is unduly pre-occupied with monetary aspects. This study, along with the Manhattan Bail Project,[10] shows that there is little objective evaluation of the accused's background and the likelihood that he would be a good risk on his own recognizance or a small bail bond. The author also suggests that the English system of bail should be followed so that the requirement of security in advance is abolished. This procedure would not only be equally effective but would also eliminate the usurious and illegal bail bondsman.

This study shows that there is every likelihood that, contrary to the Canadian Bill of Rights,[11] the citizen is "being deprived of the right to reasonable bail without just cause." It also illuminates other defects in the present criminal process. In addition to the crucial effects of custody on the outcome of the trial, the author points out that ". . . custody infringes upon the personal life and dignity of the accused; it creates an unnecessary financial burden upon the state; and it lowers the status of the administration of justice in the public."[12]

This provocative book raises many issues which demand our closer attention.

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