

Caleb Was Right: Pretrial Decisions Determine Mostly Everything

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Caleb Foote taught his students many things, and he taught them well. His criminal procedure class was basically a political science course. He looked at the questions of whether and how to apply the criminal sanction from the viewpoint of interest-group politics; he was primarily concerned that everyone should understand that the Constitution was designed to protect unpopular minorities (in the Madisonian sense) from being crushed. To him, examples of unpopular minorities were vagrants (today called “the homeless”), poor people, people of color, political dissidents—but most comprehensively, those finding themselves on the receiving end of the nasty business of criminal prosecution.

Perhaps he was so concerned and committed to social justice for people accused of crimes because he himself had been the object of prosecution as a conscientious objector. Perhaps his passion came from his Quaker ideals. Perhaps he was just contrarian by nature. Whatever its source, Caleb’s verve in analyzing how the criminal justice system was used to control unpopular people led to a focus on the earliest stages of prosecution because, as he once told me, “That’s where the greatest number of people get thwacked.” I suppose he was really thinking of a different verb, but he was polite, and I liked the comic-book sound of it. As one of the teaching assistants for his undergraduate course in criminal law and procedure, I had to lead the small seminar groups that discussed the concepts Caleb had presented in the class’s large lectures. The clever undergraduates were convinced that problems of crime and justice could be solved if the police could arrest a lot of people but good judges would later sort out any problems. “No,” Caleb directed his teaching assistants, “tell them that the problem is arrests themselves—in other words, over-criminalization. Tell them that at the lower levels of crime seriousness, judges don’t really care much about guilt or innocence, but about taking a swipe at these jerks who are committing anti-social acts—if not the act actually charged, then some other act recorded in a lengthy rap sheet—and moving the caseload

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along.” Naturally, the discussions got rollicking from there.

Although he covered the usual subjects of criminal procedure—arrests, confessions, exclusionary rules—the most important thing his students learned was methodological. Caleb demanded that his students regard the criminal justice system, and the law that glued it together, as an organic entity.¹ All the parts loosely fit together, and if one stage of prosecution would change, the others would adjust. Caleb urged his students to learn to observe and predict the effects of justice system interventions on other parts of the system, whether the interventions were new court decisions, guidelines designed to limit judicial discretion, or changes in standard operating procedures internal to a particular justice agency. Caleb taught me the concept of hydraulic discretion.² And he was enough of a pessimist to believe that whenever reforms at one stage of the process were undertaken, it was likely that the stage immediately preceding it (not *following* it, as the logic of most impact studies went) would be most affected and probably not for the best, constitutionally speaking.

Caleb said that whenever everyone’s eyes are on a particular stage of criminal prosecution, the smart thing to do is focus instead on earlier events because that is where you are likely to observe adaptation to the change. In 1982, I remember being very interested in controlling judicial discretion in sentencing; Marvin Frankel’s book³ was all the rage and sentencing guidelines were being widely discussed and were beginning to be adopted. When I suggested to Caleb that I might want to do a research project on sentencing, to which his book⁴ devoted considerable ink, he responded, “Ah, you want to study plea bargaining.” No, I insisted, I was interested in recent developments in sentencing. “Candace,” he said, sending me a withering look, “plea

1. Many contemporary criminal justice scholars reject this approach, claiming that the “system” is not interconnected at all, but rather is a mishmash of agencies with conflicting purposes which do not really communicate or work together well. This stance is usually stated just before the writer calls for some fundamental change in the mission of one or another of these agencies, often in the direction of “problem-solving” that would achieve more efficient and lasting social control or personal improvement for defendants. See, e.g., Kay L. Levine, *The New Prosecution*, 40 WAKE FOREST L. REV. 1125 (2005); GREG BERMAN & JOHN FEINBLATT, *GOOD COURTS: THE CASE FOR PROBLEM-SOLVING JUSTICE* (2005). Insofar as these approaches tend to jettison traditional values of due process and justice agency mission (i.e. police should arrest on probable cause, not because they think someone is a “problem;” courts should determine guilt or innocence, not demand a guilty plea before examining a case; probation departments should implement sentencing orders aimed at encouraging offenders’ improvement, not toward eventual revocation based on non-criminal misconduct, etc.), Caleb would surely have opposed them.

2. See Candace McCoy, *Determinate Sentencing, Plea Bargaining Bans, and Hydraulic Discretion in California*, 9 JUST. SYS. J. 256 (1984) (“Hydraulic discretion” compares the criminal justice system to a set of hydraulic brakes. When the driver presses on the brakes, the fluid is displaced and reappears elsewhere in the system. In the criminal justice system, if discretion is removed from one part of the system—for instance, from judges—it will reappear elsewhere in the system – for instance, with prosecutors.)

3. Marvin Frankel, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973).

4. CALEB FOOTE & ROBERT J. LEVY, *CRIMINAL LAW: CASES AND MATERIALS* (Little, Brown and Company, 1981).

bargaining *is* sentencing.”

Of course he was right. I use that line all the time. Caleb was the first person I knew who predicted that sentencing guidelines would place even more power in the hands of prosecutors than the considerable powers they already enjoyed, and that it would shift most sentencing decisions from judicial chambers to prosecutors’ and defenders’ offices. I ended up writing a dissertation on plea bargaining.

Caleb’s methodology of understanding each stage of prosecution and its effects on other stages basically involved an old-fashioned David Easton-style political science description: that is, find out what the inputs are, measure them and describe them, watch them go into the “black box” of decisionmaking, and you’ll have a pretty good idea of what the outputs will be. Unlike most analysts, he was not as interested in the outputs and only secondarily interested in the black box decisions. He thought that the inputs mostly determined what the outputs would be, no matter how much a decisionmaker might move them around with one reform or another. It is thus not surprising that the scholarship for which he is best known is all about the inputs of the criminal justice system: early pretrial stages of prosecution. By addressing police misconduct,⁵ determining proper legal responses to vagrancy,⁶ or demanding reform of the system of pretrial detention,⁷ Caleb hoped to reduce the overall impact of coercive state control on the lives of people who were basically poor and powerless.

Perhaps his best-known and influential scholarly work was about bail practices and pretrial release.⁸ He was concerned about poor people who couldn’t post bail and therefore suffered the pains of incarceration when their more well-off brothers were out on bail going to their jobs, staying with their families, and assisting their defense lawyers in preparing their cases. His concern was broader than a humanitarian response, though. It was institutional and legal. He was upset that so many people were subjected to incarceration when their guilt had not been proven. He described this in terms of huge nets of control,⁹ in which so many people could get thwacked and the system was

5. Caleb Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955).

6. Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603 (1956).

7. Caleb Foote, *The Coming Constitutional Crisis in Bail I*, 113 U. PA. L. REV. 959 (May 1965) [hereinafter Foote, *Bail I*]; *The Coming Constitutional Crisis in Bail II*, 113 U. PA. L. REV. 1125 (June 1965) [hereinafter Foote, *Bail II*].

8. Caleb Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031 (1954); see also Foote, *Bail I*, *supra* note 7; Foote, *Bail II*, *supra* note 7.

9. Interestingly, I do not recall that he used the sociological buzzword “social control.” Caleb was more a lawyer and political analyst than a sociologist, and I believe what he feared was state control. Perhaps at heart he was a libertarian. He didn’t make these views explicit to his students, though I suppose his colleagues would know how to categorize his views. Jerry Skolnick once told me that “Caleb wears a designer hair shirt” —he was always the critic, the burr under the saddle, the gadfly, but he very much enjoyed doing this work from his privileged post at

designed to do it with very little Constitutional restraint. The nets could expand or contract depending on the standards set at later stages of the process. That is, if a poor person could not afford bail and remained in jail pretrial, plea bargaining and trial processes would be designed so as to affect his decisionmaking at that pretrial detention point. For instance, a great number of people held pretrial for minor offenses—and maybe serious offenses—would be willing to plead guilty just to get out of jail. In a system that relies on guilty pleas, the tendency would be to increase the number of people held in jail without bail so as to encourage more guilty pleas.

This sort of thinking had a vaguely conspiratorial tinge. “Come on,” his students would say, “you don’t mean that a judge would deny own-recognizance release to a defendant just because he wants to get the guy to plead guilty? How nasty can you get?” To which Caleb responded, “No, nothing so rational. But that’s how it actually plays out.” I imagined this particular example could be one of unintended consequences; surely these nasty consequences were not *intended*, but they weren’t exactly unforeseen, either. Decades later, I listened to the critics of criminal justice operations who claimed that the various components of the system were so loosely-coupled (in organizational theory terms) as to have fallen into a situation in which they could not together be called a “system” at all, and I wondered whether these consequences might be avoided by better communication between bail-setting judges and plea-taking judges (to use the above example of pretrial detention affecting guilty plea rates). I wondered what Caleb would have said about that, but I have a fairly good idea: he would have said that the public officials have no backbones and will bend to whatever public opinion and their own political needs require. Poor people are never popular and, in the case of alleged criminal behavior, are potentially dangerous and embarrassing to the judges and legislators expected to control them. The only question is how nasty the control will get.

These examples of the “nets of control” are taken from my 1982 class notes, which amazingly I still have filed away at home. We have all heard these arguments before, but it was Caleb who explained them and focused the issues so well during the early 1960s, and he kept the drums beating about them throughout his teaching career. It was Caleb’s early work that did the intellectual spadework for the Vera Institute’s Manhattan Bail Project and subsequent “Release on Own Recognizance” (ROR) pretrial projects nationwide.¹⁰ This project was intended to contract the nets of control and hold back the degree of “nastiness” that criminal prosecution could exert on the lives

Berkeley and his beautiful home in Point Reyes.

10. VERA INST. OF JUSTICE, A SHORT HISTORY OF VERA’S WORK ON THE JUDICIAL PROCESS (2004), http://www.vera.org/publication_pdf/119_436.pdf. See generally Charles E. Ares, Anne Rankin & Herbert Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole*, N.Y.U. L. REV. (1963) (cited in *supra*).

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of poor people.

The initiative operated from the basic premise that arrestees enjoy a presumption of innocence and therefore cannot be punished until they are convicted. Holding people in jail before their trials, however, is of course a time-honored method of assuring they will actually appear at those trials, and it is well-settled common law that pretrial detention is acceptable for this purpose. Over the centuries, the system of cash bails developed under the assumption that someone who would lose large amounts of money if he did not appear for his trial would indeed show up to answer the charges, if for no other reason than to collect the money or property posted as a “surety.” Unfortunately, money is a corruptor, and judges tended to demand immense sums that defendants could not hope to pay, thus assuring that the defendants would stay in jail—or, conversely, expecting the defendant to flee, but knowing the court would then be able to keep the money. The Sixth Amendment’s injunction that “excessive bails shall not be required” showed that the Founders recognized how easily the money bail system could be abused. The tendency is to use cash bonds as a means of incarcerating the poor and, lately, as a means of preventive detention for those the court predicts will recidivate while on release.

The reforms in pretrial procedure that Foote and others championed in the 1970s evolved from the powerful observation that the primary purpose of bail is to assure a defendant’s appearance at trial, not to control unconventional or poor people without cause, or to incarcerate arrestees even before they are convicted because a judge assumes their guilt and predicts they will offend again. The primary innovation of pretrial reforms of the 1970s was to increase “own-recognizance releases” significantly, thus allowing poor people to avoid the cash bail system. To do so, arrestees had to provide proof that they met certain criteria that predicted they would appear for trial even if they did not post money. For example, holding a job, being married, or having children at home—even receiving welfare benefits—would indicate that the person was unlikely to flee because he or she was tied to the community. ROR was available for virtually all misdemeanor and low- to mid-level felonies, but seldom granted to people accused of serious violent crimes. Under the “likely to appear for trial” logic, this was so because a defendant facing a prison sentence would be willing to break the community ties to try to avoid such a serious sanction. By contrast, those facing non-incarcerative options would want to retain their jobs, homes, families, or locally-distributed government benefits.

Like all highly-touted reforms, ROR programs achieved much of what was intended (a significantly higher proportion of people who used to be held in jail pretrial were instead released on ROR or posted ten percent bonds funded by the court and not bondsmen) but fell far short of one of their major goals, which was to ameliorate the worst effects of poverty as criminal

defendants prepared to contest the accusations against them. Like any other large-scale court reform, pretrial release had multiple goals, both manifest and latent. Saying whether it “worked” or not is difficult without unpacking what the goals were and how the program changed over time.¹¹ This essay will not dive into those deep waters, interesting though they are. (And it cannot assess the impact of pretrial detention on guilty plea behavior—a topic, perhaps, for future research.) Instead, the most obvious and empirically observable factor that can map the progress of bail reform will be covered here, and then the results will be interpreted using Caleb’s observations about “nets of control.” That is:

How many people accused of crimes are given own-recognition release? How many are released after posting bond equal to ten percent of the bail amount imposed? How many remain in jail awaiting trial, unable to pay their bail? Have the percentages changed over time, and why? If Caleb’s recommendations have been realized, a lower percentage of people accused of crimes will be held in jail awaiting trial now than when bail reform got underway in the 1970s.

You know what is coming now. The statistics are not encouraging.

Trends in Non-Cash Pretrial Release

The most recent government-sponsored report on trends in pretrial release practices nationwide is “Felony Defendants in Large Urban Counties, 2002”¹² published by the U.S. Department of Justice’s Bureau of Justice Statistics (BJS), relying on statistics gathered by the Pretrial Services Resource Center and recorded in BJS’s State Court Processing Statistics (SCPS) database. The SCPS database records outcomes throughout the prosecution process from the most populous counties in the United States, and thus is an excellent picture of what is occurring in criminal courts in American cities where the proportions of poor people subject to pretrial detention for lack of money to post bail would be high. Looking back only over the past decade:

From 1990 to 2002 the percentage of felony defendants released prior to case disposition remained fairly consistent, ranging from sixty-two percent to sixty-four percent. From 1990 to 1996 release on personal recognizance (ROR) was the most common type of pretrial release, accounting for thirty-eight percent to forty-one percent of releases, compared to twenty-one percent to twenty-nine percent for surety bond. [But] in 1998 surety bond was the most frequently used type of release, and by 2002, surety bond accounted for forty-

11. MALCOLM M. FEELEY, COURT REFORM ON TRIAL: WHY SIMPLE SOLUTIONS FAIL 80-113 (1983).

12. THOMAS H. COHEN & BRIAN A. REAVES, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2002 (Feb. 2006), available at <http://www.ojp.usdoj.gov/bjs/abstract/fdluc02.htm>.

one percent of releases compared to twenty-three percent for ROR.¹³

In the heyday of ROR projects in the 1970s, the release rate for people accused of low-seriousness crimes was about seventy to seventy-five percent.¹⁴ Some of that difference may be attributable to better economic times in which working defendants are able to post ten percent bonds, though this is doubtful. The main point is that since the 1970s, the rate of ROR release from felony defendants has fallen nationwide from about seventy percent in the 1970s, to sixty-three percent in the 1990s, to twenty-three percent in 2002.

Of course, a person denied ROR release does not necessarily have to stay in jail. Other types of release are possible. According to the 2002 SCPS statistics, sixty-two percent of felony defendants were granted release on some type of bail.¹⁵ Thirty-four percent of these were released on financial bond, either posting the full amount of surety the court demanded or qualifying to post ten percent of the stated bail amount.¹⁶ Nevertheless, this precludes bail-posting by poor people. The SCPS data show that, of those who remained in jail, five in six were held because they were unable to post ten percent of their bond (type: ten percent surety bond).¹⁷

Presumably many people who previously would have been released on own-recognizance instead were required and able to post ten percent surety bonds, and that accounts for the rise in the percentages of their use. The remaining thirty-five percent of defendants in 2002 were subject to release only on full cash bail—often set quite high so as to prevent them from posting it, creating a *de facto* preventive detention for those defendants who judges worried would recidivate if released.

Recidivism and dangerousness are the two major concerns that percolate throughout the statistics about pretrial release over these decades. Most observers of justice policies would state that the law-and-order movement of the 1970s and 1980s and its attendant high fear of victimization prompted judges to hold defendants in custody without bail more often,¹⁸ which

13. *Id.* at iii.

14. WAYNE H. THOMAS, JR., *BAIL REFORM IN AMERICA* (University of California Press 1976). Thomas said that for misdemeanors, “In 1962 slightly more than 40 percent of the misdemeanor defendants studied did not secure pretrial release. By 1971, this detention rate had decreased to 28%.” *Id.* at 65. For felonies, “[b]etween 1962 and 1971, in the cities studied, the percentage of felony defendants detained from the time of their arrest to disposition dropped by one-third. In 1962, 52 percent of the felony defendants studied never secured pretrial release. By 1971 this number had dropped to 33 percent.” *Id.* at 37.

15. COHEN & REAVES, *supra* note 12 at 16.

16. *Id.* at 17.

17. *Id.* at 17 tbl.14.

18. This is one explanation, and there are others, complementary and not competing. These include the idea that “managing the rabble,” see JOHN IRWIN, *THE JAIL: MANAGING THE UNDERCLASS IN AMERICAN SOCIETY* (1985), through a “new penology” of prediction and management through actuarial prediction, see Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 *CRIMINOLOGY* 449 (1992), inevitably expands jail populations. Another explanation is that, as the “Broken

inevitably eroded the ROR movement. Fear of recidivism (and political fallout from it) was the operative dynamic in lower trial courts, so that defendants who had committed property or drug offenses, or one of a number of “public order” offenses in the past would be held without bail no matter what their community ties were. At the same time, higher courts which handle defendants charged with violent crimes took their direction from U.S. Supreme Court cases such as *United States v. Salerno*,¹⁹ in which the Court held that judges may take into account a defendant’s potential dangerousness in determining whether to grant release and, if so, how high the bail amount may be. The Court approved preventive detention of arrestees charged with violent crimes even if they could post bail.²⁰ Taken together, these political and policy developments eroded the gains of the own-recognition release movement of the 1960s and 1970s, producing low release and high detention rates with both managerial and preventive goals. How this happens and the outcome for racial and economic inequity is the subject of the next section.

An Inside Look at Bail Reform in One Exemplary Jurisdiction

Caleb was from Philadelphia and his earliest research was based on the criminal justice system of that city. Professor John Goldkamp has been perhaps the most avid researcher in bail reform over the past three decades, and he has recently published a history of bail policy changes in Philadelphia.²¹ Beginning with Roscoe Pound’s calls for bail reform in the classic *Criminal Justice in Cleveland*,²² and continuing on to Caleb’s two 1954 articles in the *University of Pennsylvania Law Review* calling for controls on judicial discretion at bail-setting with the primary goal of eliminating monetary inequities,²³ through the Bail Reform Acts of 1966 and 1988 and Supreme Court cases approving preventive detention, Goldkamp shows that judges have always been concerned about defendant dangerousness and will resist any efforts to increase release rates unless they can be reasonably assured the decisions will not come back to bite them.²⁴ Goldkamp recounts the history of

Windows Theory” took hold in cities nationwide during the 1990s, a criminological rationale for arresting and detaining low-level offenders trumped due process considerations such as the Sixth Amendment-based reform of bail detention policies. For a discussion of that theory, see George L. Kelling & James Q. Wilson, *Broken Windows*, ATLANTIC MONTHLY, Vol. 249, No. 3 (March 1982), available at <http://www.theatlantic.com/doc/198203/broken-windows>, and host of related commentary on the article.

19. 481 U.S. 739 (1987).

20. *Salerno*, 481 U.S. at 755.

21. John Goldkamp, *Judicial Discretion and Bail Reform: Lessons from Philadelphia’s Evidence-Based Judicial Strategy*, in STUDIES IN LAW, POLITICS AND SOCIETY (Austin Sarat ed., forthcoming 2008).

22. CRIMINAL JUSTICE IN CLEVELAND (Roscoe Pound & Felix Frankfurter eds. 1922).

23. Foote, *Bail I*, supra note 7; Foote, *Bail II*, supra note 7.

24. Goldkamp, supra note 21.

how Philadelphia's bail guidelines were designed and implemented.²⁵ (Bail guidelines are the norm in almost all jurisdictions now, though they differ in charge, risk, and release categories.) Philadelphia's guidelines in the 1980s were voluntary, but if a judge departed from them, he or she had to give written reasons for the departure.²⁶ The guidelines were intended to increase release rates by giving feedback to judges as to what happened with defendants released and those held.²⁷ Theoretically, judges would be more willing to grant ROR release in non-violent crimes (and even those of low violence) if they had some real information to use in predicting dangerousness and knowing how well the system was working.

The results, evaluated with a true experimental/control design, showed that seventy-six percent of bail decisions were made within the guidelines once fully implemented.²⁸ Only twenty-five percent of defendants were still in jail twenty-four hours after their arrests.²⁹ Only twelve percent were jailed throughout the entire pretrial period.³⁰ (The guidelines did not allow ROR release for murder, rape, or serious assault, as the *Salerno* preventive detention standard would allow.) Defendants' failure-to-appear rates stayed the same.³¹

Nevertheless, the use of detention overall was not significantly reduced. It became more concentrated in serious crimes, while release was granted more often for accused property criminals—a policy that was consistent with the developing law allowing detention for defendants who judges predicted would be dangerous while on release. The guidelines provided for ten percent surety bonds to be posted in “middle level” categories of violent offenses (i.e. in less serious allegations) in which the defendant was not a good risk for appearance at trial. Goldkamp says that the result was that courts began to administer the ten percent programs and Philadelphia became “essentially bondsmen-free.” But there was still an economic equity problem, because the poor could not post even ten percent of the bonds. This was particularly troublesome, as Caleb Foote stated as early as 1954, because there is a significant relationship between release and later acquittal.³² This is a critical point, perfectly illustrating Caleb's injunction that any reform of outputs must first change the inputs.

This “Philadelphia Story” does not end well. Just at the point at which the

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. Goldkamp, *supra* note 21.

31. *Id.*

32. See JOHN S. GOLDKAMP, TWO CLASSES OF ACCUSED: A STUDY OF BAIL AND DETENTION IN AMERICAN JUSTICE (1979) (a study of the bail system in Philadelphia prior to implementation of its bail guidelines). Goldkamp found that cash bail was used as a means of detention for people whom judges either thought would be dangerous or against whom the judges had various personal prejudices.

guidelines were working and judges had embraced their basic assumptions, other justice agencies took actions which had the unintended effect of killing the guidelines. First, as the result of a civil rights lawsuit, a federal court imposed remedies for overcrowding in the local jails, demanding that the jails reduce their populations by stated percentages within prescribed time frames.³³ Because judges had no idea who would be held or released if a consent decree trumped their decisions anyway, they threw up their hands and did not bother with the guidelines. Also, in the 1990s, the Philadelphia police began aggressive street-sweep operations against the drug trade and various disorders in poor Philadelphia neighborhoods.³⁴ The courts were swamped with drug-involved defendants on all levels of dangerousness and high levels of flight risk. Judges abandoned any attempts to impose rationality on release decisions in these circumstances.³⁵

Goldkamp's research also showed an interesting twist related to the drug cases. Judges were reluctant to release drug-involved defendants, even though they were not dangerous, because these defendants were not likely to return to court.³⁶ Bench warrants became the norm.³⁷ So a new form of pretrial release was developed: supervised release. If this sounds like probation, it looked like it, too. Soon another innovation was added: a "Treatment Court," which is basically a pre-adjudication drug court. Judges willingly released drug-involved defendants if they knew the defendants would be required to submit to urinalysis, get treatment for their addictions, and report to a judge often. This type of pretrial release, "supervised release," has only one drawback: none of the defendants were actually convicted of anything.

Caleb would probably be appalled. In the name of humane reform of bail practices and therapeutic help for addicts,³⁸ the Philadelphia courts have designed a system in which an entire class of offenders is subjected to intrusive state control *while on release and while they have not been convicted of anything*. Caleb's "nets of control" have been widened using the rhetoric of the well-intended goal of releasing a greater percentage of defendants from pretrial confinement.

On the other hand, if programs of supervised release were truly alternatives to pretrial custody, and did not result in widening the net so as to

33. Goldkamp, *supra* note 21.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. Regarding "problem-solving courts" in general, I have said that "it's not a court if you have to plead guilty to get there." In this example of importing the drug court model from the guilty plea stage to an even earlier pretrial stage (that of release on bail) the restatement might be "it's not pretrial release if you have to be on probation to get it." See Candace McCoy, *Review of Good Courts*, in 16 L. & POL. BOOK REV. 957 (2006), available at <http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/berman-feinblatt1206.htm> (reviewing BERMAN & FEINBLATT, *supra* note 1).

control defendants who previously would not have even been detained, and if defendants in the supervised programs can have their cases dismissed without prejudice if they successfully complete them, the idea might be worth exploring. None of that will erase the fact, however, that significant intrusions into citizen's lives are being made previous to trial and without criminal convictions. This fact might be insurmountable for those who would design new alternatives in pretrial release today.

*A Different Approach: The Effects of Pretrial Processes on Minority
Overrepresentation in Prison*

None of this history is encouraging. Nevertheless, policies continue to evolve, and it is possible that a renewed commitment to reducing inequities in criminal court outcomes could emerge. This would require re-examination of the fundamentals of bail reform. If this were undertaken with Caleb's clear-eyed understanding that each part of the prosecutorial process is linked to the others, and that inputs at an early stage shape the outputs expected at later ones, some moderate change might be possible.

Concerns about the effect of bail on poor people and their criminal cases has always been a major reason for urging bail reform, and it was almost Caleb's *only* reason. In the past three decades, the rhetoric of reform has moved to guidelines calculations, discussions of dangerousness and risk, and improving system efficiency in bail forfeiture collections—not to mention the invention of a powerful discourse of “therapeutic” or “problem-solving” justice (very different things) aimed at the early stages of prosecution and the less serious of criminals. Poverty and racism are not often discussed. If they were, how might bail reform proceed today?

The State of New Jersey is right now undertaking an examination of its pretrial processes with the stated goal of reducing the overrepresentation of ethnic minorities in the state's prisons. The state's Criminal Disposition Commission (CDC) is a statutorily-required body composed of the heads of all major state criminal justice agencies: the Attorney General, the Chief Justice, the heads of the Department of Corrections and the State Parole Board, the state prosecutors' association and the State's Public Defender, a state senator, a state assemblyman, and a public member.³⁹ The mission of the CDC is:

[T]o study and evaluate criminal justice policies of the State of New Jersey, describing criminal activity and case dispositions and assessing the impact of justice system policies on adult and juvenile offenders, victims, justice agencies and local communities, and to identify, analyze and understand specific systemic inefficiencies and inequities in the disposition of criminal offenses. The Commission may

39. N.J. Stat. § 2C:48-1 (2007).

recommend changes in these policies and devise strategies to address identified systemic problems in the disposition of criminal offenses as its inquiries indicate to be advisable, and may advise State officials on possible methods to implement any such changes or strategies.⁴⁰

In New Jersey, a majority of prisoners are racial minorities (including African-American blacks; Hispanics, both black and white; and smaller numbers of offenders from immigrant backgrounds).⁴¹ While the State prosecutes and convicts much larger numbers of white offenders than minority offenders, whites are placed on probation or in-community sanctioning programs at a much higher rate than are minority offenders.⁴² Members of the Commission held several meetings to review research on this topic, which had already been conducted in the state, and determined that one of the main factors accounting for the imprisonment rate disparities was that minority offenders had much longer prior criminal records than white offenders.⁴³ Minority offenders began building criminal records earlier than white offenders did, they accumulated them at a faster rate, and the records were worse when technical violations of probation and parole were added.⁴⁴ Delving deeper into the criminal records, it became clear that drug offenses and parole/probation revocations for drug use accounted for a large portion of the differences.⁴⁵ The primary factor seems to be New Jersey's "War on Drugs," in which aggressive law enforcement in the state's three impoverished urban centers merged with mandatory sentencing for the primarily black offenders caught in drug trade and use.⁴⁶ The result is that New Jersey has the highest proportion of drug offenders incarcerated in its state prisons, as opposed to other types of offenders such as violent or property offenders, of any state in the nation.⁴⁷

New Jersey recently set up a Commission to Review Criminal Sentencing,⁴⁸ which has made recommendations to expand drug courts⁴⁹ and revise mandatory sentencing for drug offenders arrested within 1000 feet of a school, reducing that distance so as to apply only to those arrested within 200 feet.⁵⁰ Sentencing reform is an important undertaking, but the Criminal Disposition Commission has other concerns.

40. CRIMINAL DISPOSITION COMM'N OF THE STATE OF N.J., MISSION STATEMENT (2007) (on file with the Comm'n, P.O. Box 080, Trenton, NJ 08625).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. CRIMINAL DISPOSITION COMM'N OF THE STATE OF N.J., *supra* note 40.

47. *Id.*

48. N.J. Pub. L. 2003, ch. 265, available at <http://www.njleg.state.nj.us/lawsconstitution/chapter.asp>.

49. N.J. COMM'N TO REVIEW CRIMINAL SENTENCING, REPORT ON NEW JERSEY'S DRUG COURTS, SPECIAL PROBATION AND PROPOSAL FOR REFORM 27 (Apr. 2007), available at http://www.sentencing.nj.gov/downloads/special_probation_report_April_2007.pdf.

50. *Id.* at 21.

Various Commissioners opined that some sources of over-representation of minority offenders in state prisons, in addition to the fact that minorities generally had longer criminal records, might be that accused persons of minority racial background are less likely to be released on bail and more likely to plead guilty to low-level offenses simply to get out of jail.⁵¹ In turn, the guilty pleas become the lengthy records that determine the in/out decision at sentencing.⁵² Furthermore, minority defendants were less likely to be granted "Pretrial Intervention," or PTI, an option available to first-time felony offenders who promise to follow a course of treatment or education worked out with the probation department, and if successfully completed will result in dismissal of the charges.⁵³ The similarity of the structure of this program and Philadelphia's Drug Treatment Court is somewhat disturbing. Again, because it is pretrial release, the defendants do the programs without actually having been convicted of anything.

The Commission has undertaken research with the expressed hypothesis that bail and pretrial diversion practices create disparate conviction and incarceration outcomes for minority defendants who have been arrested for similar crimes, under similar circumstances, as white offenders. It has created a database covering all persons arrested in the state for a randomly-chosen week in 2006, in which arrestees' cases can be tracked at each decision point and outcomes correlated with offenders' race, gender, educational level, and prior criminal records. The first look at statistics on pretrial detention confirmed the suspicion that race, bail types, and being held pretrial are closely related. For example, of people charged with felonies of low seriousness (drug and property crimes), and for whom cash bails were required for release, 784 could not post bail and were held in jail pretrial. Here are the simple statistics of the number of jail inmates with total cash bails under \$500, by race, on one sample day of September 5, 2006, where the total sample size was 784 inmates: 447, or 57.0% were African-American, 205 or 26.1% were White, 123 or 15.7% were Hispanic, and 9 or 1.1% were classified as "other."⁵⁴ These 784 people were in jail on that particular day because they did not have a few hundred dollars. Many were homeless, and the jail was being used as a shelter (not an optimum response to homelessness, but in fact a common one).⁵⁵ Sixteen of these inmates were in jail for inability to pay bail under \$100, while

51. See Candace McCoy and Melissa D'Arcy, Address at Mercer County Cmty. Coll., N.J., Pretrial Reform in New Jersey: Can It Reduce Incarceration Disparity? (Apr. 4, 2007) (referencing conversations in which McCoy participated as Criminal Disposition Comm'n Chair, and which occurred on the Comm'n's Pretrial Processes subcommittee).

52. *Id.*

53. *Id.*

54. CRIMINAL DISPOSITION COMM'N OF THE STATE OF N.J., DATASET (2006) (on file with the Comm'n, P.O. Box 080, Trenton, NJ 08625).

55. *Id.*

26.3% of them (206 inmates) did not post amounts between \$200 and \$300.⁵⁶ 44.5% (349) had bail set in the amount of \$400 to \$500, which they did not meet and so remained incarcerated.⁵⁷ It is clear that poverty and vagrancy remain a serious problem for jail reform, and insofar as a greater proportion of poor people are racial minorities, they will be disproportionately represented in pretrial detention populations.

The picture changes little when considering the 798 defendants charged with more serious crimes and prosecuted in Superior Court on this particular sample day in September 2006.⁵⁸ Only thirteen percent were given own-recognizance release, while ten percent were being held in jail for inability to post bails of less than \$500.⁵⁹ 18.8% were detained when unable to post bail amounts between \$1000 and \$5000.⁶⁰ The same racial disproportion was evident, with minority defendants unable to post bail as often as white defendants could, and a highly disproportionate number of minority defendants were held for inability to pay even the lowest bail amounts.⁶¹

The effect of pretrial detention on later case disposition is predicted to be great. The research question is whether people held pretrial will plead guilty at a higher rate simply to get out of jail, compared to defendants released on recognizance or on bail. Although the CDC has not traced the dispositions of cases for the latter group, preliminary statistics on those jailed pretrial are available. Of superior court defendants held in jail until disposition of their cases, seventy-one percent pled guilty, while twenty-five percent had all their charges dismissed.⁶² None went to trial.⁶³

Ultimately, the goal is to understand the effect of pretrial processes on final dispositions and whether the fact that offenders are minority or poor is significantly related to harsher outcomes at each stage of the process.

Caleb would have been very pleased to do research like this, I believe, because of his understanding that the inputs determine the outputs. I do not think he would have been sanguine about the chances of such research, even when conducted by such high-powered officials within the justice system itself, to change the operation of the system much. I think he would not have trusted procedural fixes, no matter how well-intentioned and well-informed. He would have returned to the point he told his teaching assistants to emphasize with the undergraduates: why do we arrest so many people to begin with? It is a good thing he is not here to see the surveillance society that is developing so strongly after September 11, or to hear his former student Jonathan Simon decry the fact

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. DISPOSITION COMM'N OF THE STATE OF N.J., *supra* note 54.

61. *Id.*

62. *Id.*

63. *Id.*

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that “governing through crime” is now normal.⁶⁴ Furthermore, I believe he would be very cautious and skeptical about pretrial reforms involving program and treatment options for people who have not even been convicted. However, he would be pleased to see a renewed commitment to reducing the over-incarceration of minorities and poor people. Perhaps if reformers return to the roots of bail reform and remind themselves that this was the point at the beginning, a better approach to this problem can be taken for the next three decades.

64. See JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (Oxford Univ. Press 2007).

