

Caleb Was Right: Pretrial Decisions Determine Mostly Everything

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Abstract: Caleb Foote's scholarship targeted pretrial processes: police misconduct, bail, own-recognizance release. He was concerned about poor people and how court interventions made their lives worse, and his groundbreaking research sparked reforms such as non-cash bail and pretrial diversion programs. This paper reviews statistics on what has happened in the decades since ROR programs were widely implemented, then summarizes a case study of bail guidelines reform in Philadelphia. Concluding that the system has slid back into a heavy reliance on cash bail and has failed to improve release rates for poor and minority defendants, the author suggests that disillusioned reformers return to Foote's main points: the reason to change bail practices is to make the system more equitable for poor people, and the inputs at the earliest stages of criminal prosecution determine the outputs of convictions and sentences. Any concern for reducing disparities should thus start at the earliest stages of prosecution, not the last ones. Finally, the paper reviews new research undertaken by the New Jersey Criminal Disposition Commission, raising the question of whether pretrial diversion programs widen the control net or are a promising way to reduce inequities.

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 question of whether and how to apply the criminal sanction from the viewpoint of interest-group politics; he was primarily concerned that everyone understand that the Constitution was designed to protect unpopular minorities (in Madison's sense) from being crushed. To him, examples of unpopular minorities were vagrants (who today we would call "the homeless"), poor people, people of color, political dissidents – but most comprehensively, anybody 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 ended up focusing 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 go into small group meetings and try to explain this to clever undergraduates who 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 us, tell them that the problem is arrests to begin with – in other words, over-criminalization. And naturally, things got rollicking from there on.

In any event, although he taught the usual subjects that such course has to cover – arrests, confessions, exclusionary rules – the most important thing his students learned was primarily methodological. Caleb demanded that his students regard the criminal justice system, and the law that glued it together, as an organic entity. All the parts fit together and if one stage of prosecution would change, the others would adjust. The goal was to learn to predict and observe the effects of justice system interventions – whether they were new court decisions, guidelines designed to limit judicial discretion, changes in standard operating procedures internal to a justice agency, etc. – on other parts of the system. Caleb taught me the concept of hydraulic discretion. 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 usually, 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's where you're likely to see adaptation to the change. I remember particularly being very interested in controlling judicial discretion in sentencing; Marvin Frankel's book was very big then and sentencing guidelines were just getting up steam. When I talked to Caleb about sentencing, to which his book devoted considerable ink, he said "ah, you want to study plea bargaining." No, I said, I was interested in recent developments in sentencing. "Candace," he said, sending me a withering look, "plea 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 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 decision making, 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 decision maker might moosh 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, determining proper legal responses to vagrancy, or demanding reform of the system of pretrial detention, 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. 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 explained this in terms of huge nets of control¹ that so many people could get thwacked and the system was 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 thus remained in jail pretrial, plea bargaining and trial processes would evolve so as to affect his decision making at that pretrial point. For instance, a

¹ 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 Berkeley and his beautiful home in Point Reyes.

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.

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 “ROR – Release on Own Recognizance” pretrial projects nationwide. Like all highly-touted reforms, that one 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 10% bonds funded by the court and not bondsmen) but fell far short of its major goal, 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.² This essay will not dive into those deep waters, interesting though they are. 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.”

How many people accused of crimes are given own-recognizance release? How many are released after posting bond equal to 10% of the bail amount imposed? How many remain in jail awaiting trial, unable to pay their bail? Observed over time, this is

² See Malcolm Feeley, *Court Reform on Trial*, chapter 3 (get cite)

the factor that maps the effects of bail reform. 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

Here: section on the latest reports from the Pretrial Services Resource Center and its SCPS database, reported by Bureau of Justice Statistics, US Dept. of Justice “Felony Defendants in Large Urban Counties, 2002” the most recent report we have www.ojp.usdoj.gov/bjs

“From 1990 to 2002 the percentage of felony defendants released prior to case disposition remained fairly consistent, ranging from 62% to 64%. From 1990 to 1996 release on personal recognizance (ROR) was the most common type of pretrial release, accounting for 38% to 41% of releases, compared to 21% to 29% for surety bond. [But] in 1998 surety bond was the most frequently used type of release, and by 2002, surety bond accounted for 41% of releases compared to 23% for ROR.” (highlights, p. iii)

Interpretation: release rate of 62- 64% is actually low compared to heyday of ROR projects, which at the time was about 70 – 75%. Some of that difference may be attributable to better economic times in which working defendants are able to post 10% 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 50% in the 1970s to 23% in 2002.* Presumably many people who previously would have been released on own-recognizance instead were required and able to post 10% surety bonds, and that

accounts for the rise in the percentages of their use. The remaining 35% 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, and thus holding in a *de facto* preventive detention those defendants that judges worried would be dangerous if released.

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 that city.³ Beginning with Roscoe Pound's calls for bail reform in the classic *Criminal Justice in Cleveland*, and continuing on to Caleb's 1954 article in the *University of Pennsylvania Law Review* calling for controls on judicial discretion at bail-setting, with the primary goal of eliminating monetary inequities, 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. Goldkamp recounts the history of how Philadelphia's bail guidelines were designed and implemented. (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, though if a judge departed from them, he or she had to give written reasons for the departure. The guidelines were intended to increase release rates by giving feedback

³ John Goldkamp, "Judicial Discretion and Bail Reform: Lessons from Philadelphia's Evidence-Based Judicial Strategy," in Austin Sarat, ed., *Studies in Law, Politics and Society* (forthcoming 2007).

to judges as to what happened with defendants released and those held. 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 76% of bail decisions were made within the guidelines once they were fully implemented. Only 25% of defendants were still in jail 24 hours after their arrests. Only 12% were jailed throughout the entire pretrial period. (The guidelines did not allow ROR release for murder, rape, or serious assault.) Defendants' failure to appear rates stayed the same.

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. (This was consistent with developing law and policy about predicting dangerousness while on release.) The guidelines provided for 10% surety bonds to be posted in "middle level" categories of violent offenses or less serious offenses in which the defendant was not a good risk for appearance at trial. Goldkamp says that the result was that the courts began to administer the 10% programs and Philadelphia became "essentially bondsmen-free." But there was still an economic equity problem, because the poor could not post even 10% 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.⁴ This is a critical point, perfectly illustrating Caleb's injunction that any reform of outputs must first change the inputs.

⁴ See Goldkamp's *Two Classes of Accused*, a study of the bail system in Philadelphia prior to implementation of their bail guidelines. Goldkamp found that cash bail was used as a means of detention for people judges either thought would be dangerous or against whom the judges had various personal prejudices.

This “Philadelphia Story” does not end well. Just at the point at which the guidelines were working and judges had bought into their basic assumptions, other justice agencies took actions that 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 timeframes. 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. 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.

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. Bench warrants became the norm. 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 druggies,⁵ the Philadelphia courts have designed a system in which an entire class of offenders are 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 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.

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

None of this history is particularly encouraging. Nevertheless, hope springs eternal. The way forward would have to emerge from some different concerns which could prompt re-examination of the fundamentals of bail reform that Caleb developed. If this were undertaken with a clear-eyed understanding that each part of the prosecutorial

⁵ 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 the 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 Berman and Feinblatt, *Problem-Solving Courts*, Law and Politics Book Review

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 nearly Caleb’s *only* reason. Somehow 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 much 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. The mission of the CDC is “to 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 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.”

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.) 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 minority offenders are. Members of the Commission held several meetings to review research on this topic that had already been conducted in the state and determined that one of the main factors accounting for this disparity in imprisonment rates was that minority offenders had much longer prior criminal records than white offenders typically did. 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. (This is not the only factor, of course. 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 coupled with mandatory sentencing for the primarily black offenders caught in drug trade and use. 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.)

New Jersey recently set up a Commission to Review Criminal Sentencing, which has made recommendations to expand drug courts and revise mandatory sentencing for drug offenders arrested within 1,000 feet of a school so as to apply only to those arrested

within 200 feet. Sentencing reform is an important undertaking, but the Criminal Disposition Commission has other concerns.

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. In turn, the guilty pleas become the lengthy records that determine the in/out decision at sentencing. 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. (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 determine create disparate conviction and incarceration outcomes for minority defendants who have been arrested for similar crimes, under similar circumstances, as white offenders. It is currently creating 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 effect of programs such as Pretrial Intervention and drug courts will be examined, and the possibility of instituting mental health screening and treatment at pretrial stages, will be examined. 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 don't 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 that "governing through crime" is now normal. Furthermore, I believe he would be very cautious and skeptical about pretrial reforms involving program and treatment options for people who have not 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.