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Out on Bail

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Guests: Jeffrey Harris, Attorney General's Task Force on Violent Crime
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Your discussions may benefit from access to background information on the evolution of bail in the United States, on recent reforms in pretrial release procedures, and on current problems and controversies concerning bail and pretrial release.

The Evolution of Bail

Our system of justice emphasizes deliberation and due process to prevent passions from overwhelming a careful consideration of the facts of an individual case, and therefore to insure that an accused person is treated fairly. One aspect of this orientation is the establishment of a reasonable interval between the moment of an arrest and the moment of trial. This interval should be neither too long (lest the accused person suffer uncertainty too long) nor too short (lest the development of the relevant facts and careful deliberation be compromised).

However attractive this interval for due process reasons, its existence inevitably creates a pool of people who are in an awkward legal status. Defendants are not quite like other people in that there is probable cause to believe that they have committed an offense. This may justify some special level of state supervision. However, defendants have not been convicted and therefore cannot justly be punished. In addition, defendants know that the state intends to prosecute them, and if the case against them is strong enough, they may have strong reasons to flee rather than stand trial.

A variety of approaches have been developed to allow defendants freedom before trial and to guarantee their appearance at trial. The traditional approach was to require the defendant to find a "surety"—a friend or neighbor who would promise to see that the defendant would appear. This system allowed those with responsible friends to go free prior to trial, but jailed those who could not find a suitable surety. In the late 19th century, money bail came to be the dominant approach: a defendant was obliged to put up money that was subject to forfeiture if he failed to appear. This allowed those with money of their own to secure release. In addition, others could secure release by borrowing money from a bail bondsman—the modern, commercial version of a "surety," but those who could not raise the necessary amount of money stayed in jail. A third approach was simply to jail those who seemed particularly likely to flee, and to release *on a promise to appear* those who were likely to appear at trial without worrying about sureties or cash bail.

All of these approaches are now in use. The dominant approach until the mid-60's was to rely on money bail. In the 1960's, this approach was attacked because it seemed to discriminate against the poor and minority groups. Many people accused of crime are poor, and judges, for whatever reasons, often set bail at levels beyond defendants' means. This seemed to many to violate the eighth amendment's flat statement that "excessive bail shall not be required." In addition, the judges' decisions about bail did not seem to be guided by any explicit policies. Discretion was the rule.

Reacting to the economic inequality inherent in cash bail, the Vera Institute of Justice in New York City conducted the Manhattan Bail Project from 1961 to 1964 to test whether indigent defendants could safely be released without making financial arrangements. This release on one's own recognizance ("ROR") amounted to a simple promise from the defendant to appear for trial. The Manhattan Bail Project was a success in that the vast majority of ROR defendants did appear for trial. The use of ROR releases for many defendants soon spread to almost every major city.

Today's pretrial release agencies were set up at that time to interview defendants after arrest and to obtain information, the veracity of which they then verified, concerning the defendant's "community ties." Among the factors contributing to each defendant's point scale score were (and are) his residence in the jurisdiction, length of residence at this present address, employment, history of failures to appear for trial, and arrest and conviction record. Following the screening process, those with adequate point totals, today as then, are recommended for release on their own recognizance. This system has enhanced the explicitness and consistency of bail decisionmaking and reduced the number of defendants charged with minor offenses who were jailed because they were too poor to pay even minimal bail amounts. The value of this approach was recognized by the U.S. Congress which passed a bail reform law emphasizing ROR in 1966.

Since that time, a wider variety of release forms have come into use, often under rules of criminal procedure mandating that the least onerous conditions necessary to ensure the defendant's appearance for trial be used. These include street citation, ROR, third-party custody, bail deposited with the court, surety bond, and outright detention. In addition, post-release supervision such as weekly call-ins or drug, alcohol, or employment counseling may be required.

The pendulum had swung by 1970, however, and concerns were voiced that too many defendants were being released and that they were committing crimes while on pretrial release. Congress in 1970 passed the District of Columbia Court Reform and Criminal Procedure Act revising bail laws in the Nation's Capital. The phrase "preventive detention" was added to the vocabulary of pretrial release and a nationwide furor developed. The new law was backed by conservatives alarmed at the spread of nonfinancial pretrial release, by idealists anxious to do away with high bail detention, and by judges anxious to prevent the use of pretrial release as a license for the commission of additional crime.

The new District of Columbia law was hotly debated but seldom used. Under it, elaborate detention hearings were required for prosecutorial presentation of evidence that the defendant posed a danger to victims, witnesses, or the community at large. This new and controversial tool had little real impact on bail crime in Washington. Public and judicial fears persisted.

In response to these fears, some 30 States have recently amended their rules of criminal procedure to authorize judges, in setting release conditions and ordering pretrial detention, to consider both the likelihood of appearance *and* the defendant's "dangerousness" to himself or to the community. Congress passed its own Bail Reform Act of 1984. The new Federal law provides more explicit guidelines for judges than do the majority of State laws, which offer no standards for identifying "dangerous" defendants.

This program brought to you by the National Institute of Justice, James K. Stewart, Director. The series produced by WETACOM through a grant to the Police Foundation.

Current Facts About Bail and Pretrial Detention

Any decisions to alter current policies governing bail and pretrial detention must take account of the following facts about who is detained prior to the trial, how those who are released behave, and the quality of the decisionmaking process about bail.

Who is detained? The majority of defendants today, over 85 percent, are released in some manner before trial; some 70 percent of those released are freed nonfinancially.

A large number of jails in the country are extremely crowded, with many under court orders because their crowded conditions violate constitutional standards governing the custody of prisoners.

A large minority of those detained in jail are people who are charged with minor offenses; many apparently lack the resources to raise even the low bail imposed.

The conduct of those who are released. Among those who are released, seven of every eight return for trial or other disposition of their cases. On average, one of every six released defendants is arrested for an offense committed during the period of pretrial release. These new offenses, as a group, are slightly more serious than the initial charges in these defendants' cases and result in a rate of conviction equal to that in the pending cases.

Some 30 percent of those defendants who are rearrested while on pretrial release are rearrested more than once. In jurisdictions that emphasize appearance for trial as the only legitimate basis for setting release conditions, rearrested defendants are often (as many as two-thirds) rereleased with *no change* being made in their existing, usually nonfinancial, conditions of release. In fact, in such jurisdictions judges are usually not aware that defendants seeking release are already released in a pending case or are out on probation or parole.

One estimate is that pretrial offenses account for about one-fifth of all crimes resulting in arrests in the United States.

Bail decisionmaking. There is great variation in the pattern of pretrial criminality from jurisdiction to jurisdiction. Moreover, there is tremendous variation in the release conditions and bail amounts set by different judges within a single jurisdiction.

There is continuing confusion about whether and how society's interest in preventing crimes committed by people on bail should be accommodated within bail policies and decisionmaking.

Current Issues in Bail Policy

The crowding of many municipal jails and the relief-of-overcrowding decrees of Federal district courts have created pressure on magistrates to decrease the use of pretrial detention. This has occurred at a time when concern about pretrial crime has created counterpressures to jail more defendants. Hence, current concerns demand bail practices that neither detain large numbers of defendants who would probably not commit additional offenses if released—and would probably appear for trial—nor detain too few of those defendants who *would* commit additional offenses or would not appear for trial.

The only way to achieve this result is to improve the system's ability to predict which offenders are more or less likely to appear for trial and more or less likely to commit additional crimes. Yet there are strong objections to using predictions as the bases for bail or pretrial release decisions. One way to sort out the issues is first to consider whether concerns for crimes committed while on bail should be reflected in bail policies.

The most widely supported purpose of bail and pretrial detention is to guarantee appearances at trial. Indeed, practically no one disagrees that society has an interest in advancing this goal and has the right to impose restrictions on the freedom of individuals to accomplish it. What is less obvious is that the pursuit of this goal requires the system to make a prediction about who is likely to appear at trial and who is not. Indeed, the principal accomplishment of the reform movement in the mid-1960's was to show that a group of defendants could be identified who would show up for trial without any cash bail or detention. Essentially, this constituted an improvement in predictive capabilities, although what was being predicted was appearance at trial, not future crimes. So, traditional bail policies seem to sanction predictions.

Objections have been raised to the use of predictions in making pretrial release and detention decisions even when the predictions are about appearance at trial. One is that the predictions are sometimes inaccurate so that some are detained who will appear at trial, and others are released who will "skip." A second is that the characteristics used in making the predictions are said to be inappropriate because they are blameless in themselves, or not under the control of the individual, or are correlated with variables such as class and race and therefore produce *de facto* if not *de jure* economic or racial discrimination.

However, proponents of the use of predictions argue that pretrial release decisions inevitably involve predictions, whether explicit or implicit, and that the use of explicit and tested predictions improves the system by minimizing the use of detention and making decisions more consistent. This allows a policymaker to rule out the use of variables that are inappropriate. In short, if one accepts the idea that predictions are inevitable, one might as well make them as accurate and evenhanded as possible.

This discussion seems to change significantly when the thing being predicted is not appearance at trial, but the likelihood of future crimes. The arguments for and against the use of predictions are quite similar whether the subject is prediction of appearance at trial or prediction of crime on bail. The controversy, however, is over whether the goal of reducing crime by persons on bail is an appropriate objective of bail policy. Preventive detention involves deciding whether to detain defendants charged and convicted in the past of designated "dangerous or serious" offenses as a way of preventing bail crimes.

Many scholars view such a purpose as at least unworthy, and perhaps unconstitutional, although the Supreme Court has upheld preventive detention statutes. Others argue that such concerns may properly be a part of pretrial decision-making since society has a strong interest in controlling crimes committed by those out on bail. Still others think effective predictors cannot be found or that the problem of crime on bail can be attacked more effectively through other measures such as speeding up the trial process, or by making crimes committed on bail a special offense subject to additional punishment.

Indeed, one approach to controlling crime on bail by responding to actual criminal offenses rather than trying to predict them in advance, as in preventive detention, was used in Baltimore. This "one bite of the apple" approach was incorporated into the 1984 Federal Bail Reform Act. It consists of two major components. First, the defendant's release order prohibits both failure to appear for trial and the commission of a crime while released. Second, rearrest with probable cause constitutes evidence of untrustworthiness and authorizes revocation of release in the pending case. Hence, in this approach, violation of the court's release order rather than anticipated future criminality is penalized.

Public policy in America is cyclical. Today the balance can be said to have shifted slightly in favor of public safety, whereas in the recent past the interests of accused persons were paramount. Reforms have responded to public concerns and research findings. How you feel about bail and preventive detention may depend on whether you sympathize more with the point of view of public defenders and defendants or with that of prosecutors. Is the purpose of bail to protect the accused or to prevent crime? Can it do both?

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The 1970 District of Columbia Court Reform and Criminal Procedure Act, D.C. Code, secs. 23-1322 and 23-1331.

Discussion Questions

1. Should the probability of the defendant's appearance at trial be the only matter considered when setting bail or establishing pretrial release conditions?

2. Should the likelihood that the defendant will commit additional crimes while on bail or pretrial release be taken into account?

3. Should the degree of crowding in a community's jail be taken into account when pretrial release and bail decisions are made?

4. What do you think the term "preventive detention" means? What are the arguments for and against it?

5. A defendant who is held in jail until his trial suffers obvious disadvantages. The public suffers from crimes committed by defendants who are released before trial. How would you reconcile these conflicting interests in individual liberty and public safety?

6. If arrested persons are presumed innocent until proven guilty, how can the detention of defendants in lieu of bail be justified? Should it matter that police had probable cause to believe an arrest warrant would be issued when they made the arrest?

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