

## Creating (and Teaching) the “Bail-To-Jail” Course

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Yale Kamisar has explained how events that occurred about fifty years ago led to the creation of a stand-alone criminal procedure course and, a few years later, led to the division of that stand-alone course into two courses. The second of those courses came to be called, almost from the outset, the “Jail-to-Bail” course. My focus today is on why that course was created and how it was shaped.

*Modern Criminal Procedure*, as Yale has noted, was the first coursebook designed for a stand-alone course in criminal procedure. *Modern* was published in 1966. A year earlier, the first version of *Modern* was published under a different title, *Basic Criminal Procedure*. *Basic*, a 350-page paperback, was presented as a replacement for the criminal procedure portion of the typical criminal law coursebook. The first-year Criminal Law course covered both substantive criminal law and criminal procedure in a four-credit course. While the titles of the major coursebooks gave equal billing to the substantive and procedural sides, the page allocation heavily favored the substantive criminal law. Livingston Hall was a co-author of one of the major criminal law casebooks, Hall and Glueck’s *Criminal Law and Its Enforcement*.<sup>1</sup> He agreed with Yale that a different approach was needed for the coverage of the criminal procedure portion of the Criminal Law course, and signed on as a co-author of the materials that Yale had already prepared. Hall and Kamisar’s *Basic Criminal Procedure* hopefully would be used by instructors assigning the Hall and Glueck coursebook. It could also be combined with various other coursebooks that followed the traditional approach to the presentation of the criminal procedure portion of the Criminal Law course.

That traditional approach presented materials designed for a survey-type coverage of criminal procedure in roughly 15 to 20 class hours. Thus, the Hall and Glueck coursebook included a combination of text, statutes, and cases on each major step in the process, starting with “methods of obtaining evidence” and finishing with “sentencing procedures.” Even where the materials on a particular procedure included more than a single case, the coverage tended to focus on only a

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added. Rather than citing numerous original sources, I have relied on the collected citations in the West treatise, CRIMINAL PROCEDURE (4th ed. 2015), which I co-authored with Wayne LaFave, Nancy King, and Orin Kerr. CRIMPROC is its Westlaw database.

<sup>1</sup> LIVINGSTON HALL & SHELDON GLUECK, CASES ON CRIMINAL LAW AND ITS ENFORCEMENT (Erwin N. Griswold ed., 2d ed. 1958).

few highlights in the governing law. Hall and Glueck placed greater emphasis on Supreme Court opinions than some of the other casebooks, sacrificing the completeness of the coverage of each step in the process found in those books (which included, for example, sections on such topics as extradition and pretrial motions). As Yale noted in his comments, the constitutional regulation of state criminal procedure was a topic covered in the Constitutional Law course, so most authors of criminal law coursebooks placed greater emphasis on the non-constitutional sources of criminal process regulation.

*Basic Criminal Procedure* was premised on a new approach. As Yale stated in the preface, “[t]he constitutional-criminal procedure field has undergone explosive change and evoked tremendous interest in recent years.”<sup>2</sup> There was a need to highlight that source of regulation in the criminal procedure portion of the Criminal Law course. This was an inevitable shift because Constitutional Law was being taught as a single four-credit course, and the growing body of constitutional criminal procedure law could not compete with other aspects of the Warren Court’s expansion of constitutional regulation (particularly in the First Amendment and equal protection areas).

*Basic*’s innovation was not limited to adding a growing body of constitutional regulation. As Yale noted in the preface to a later edition of *Basic*, only a limited number of hours could be devoted to criminal procedure in a “crowded first-year criminal law course.”<sup>3</sup> He generously suggested an allocation of a “third or a half” of the criminal law course, although it was more likely a quarter or a fifth of the course. *Basic*’s premise was that, considering this time limitation, it would be “much more useful and meaningful to explore in depth a relatively few fundamental and closely related areas (e.g., arrest, search and seizure, electronic surveillance, the right to counsel, confessions and lineups)” than to make a “whirlwind tour” through each and every step in the process.<sup>4</sup>

*Basic* had only 350 pages, but it still was longer than the sections devoted to criminal procedure in the typical criminal law coursebook. Then, as Yale mentioned, *Miranda v. Arizona*<sup>5</sup> was decided within a year of *Basic*’s publication. The Warren Court was on a path that produced each term at least two or three (and often more) major Supreme Court rulings in the field of criminal procedure. *Basic* could not readily be limited to 350 pages. Also, *Basic* had “orphaned” the various non-investigatory steps in the criminal justice process. If the students were to be exposed to those portions of the process, along with growing body of constitutional regulation, that would have to be done in a separate, stand-alone criminal

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<sup>2</sup> LIVINGSTON HALL & YALE KAMISAR, BASIC CRIMINAL PROCEDURE: CASES, COMMENTS AND QUESTIONS iii (Erwin N. Griswold ed. 1965).

<sup>3</sup> LIVINGSTON HALL & YALE KAMISAR, BASIC CRIMINAL PROCEDURE: CASES, COMMENTS AND QUESTIONS iv (Erwin N. Griswold ed., 2d ed. 1966).

<sup>4</sup> *Id.*

<sup>5</sup> 384 U.S. 436 (1966).

procedure course. That course would have the blessing of most criminal law instructors, as the growing importance of the Model Penal Code required more time for simply teaching substantive criminal law and adding in-depth coverage of sentencing was attracting attention.

Hall and Kamisar’s *Modern Criminal Procedure* was published in 1966 as the coursebook to be used in a separate criminal course. It started with the subjects that had been included in *Basic* (updated to include, in particular, *Miranda*, and even excerpts from the oral arguments in *Miranda*) and then added coverage of several post-investigation elements of the process, with the primary emphasis on constitutional limitations. Although *Modern* had roughly 800 pages, Yale viewed it as a stop-gap measure. He had produced all of the additional chapters himself, and while some dealt with subjects that fit nicely with his own research and teaching experience, (e.g., “administration of the exclusionary rules,” “entrapment,” and “trial by newspaper”), others did not. Also, he had not added chapters on many of the subjects that had been included in the traditional “whirlwind tour” of criminal procedure in the criminal law coursebook. Thus, shortly after *Modern* was published, Yale (with Livy Hall’s blessing) invited Wayne LaFave and myself to join in a reworking of *Modern*. We would basically prepare what Yale described as the “back-half” of the book—the portion that dealt with the post-investigation stages of the process (although Wayne, because of his Fourth Amendment expertise, also took over the search-and-seizure chapter in the first half).

For the post-investigation stages, we would produce largely new chapters on over a dozen topics: the setting of bail, the prosecution’s decision to charge, neutral body screening of the charge (i.e., preliminary hearing screening and grand jury screening), the scope of the prosecution (i.e., joinder of charges and defendants), the timing requirements as to prosecution (speedy trial and other speedy disposition requirements), the location of the prosecution (venue), pretrial discovery and related disclosure requirements, the resolution of the charges by guilty plea (including plea-bargaining), trial by jury, certain aspects of the trial (excluding issues covered in the evidence course), reprosecutions and multiple separate prosecutions, appeals, and habeas corpus and related post-conviction remedies.<sup>6</sup>

The dividing line between investigation and post-investigation broke down in a few places. Yale always considered the constitutional rights to counsel—under the Sixth Amendment, due process, and equal protection—to be a topic essential to understanding the confession and lineups cases. Thus, while the appointment of

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<sup>6</sup> As Yale noted in his presentation, the expanded version of *Modern*, published in 1969, included a chapter on “the administration of justice in the wake of civil disorders.” It also included a chapter on juvenile justice. The former disappeared as a topic of current interest, and the latter was later appropriately deemed worthy of its own course. We anticipated that the procedural aspects of sentencing would be covered in the Criminal Law course. When that did not occur, our next co-author, Nancy King, added that topic.

counsel for the indigent typically comes after the first appearance, the constitutional standards governing that appointment were considered in the first half of the book. The motion to suppress was also considered in the first half of the book, even though it came later in the process, because it defines the scope of the remedy for violations in investigative procedures. The grand jury investigation initially was placed in the second half of the book because it was thought important to tie together the dual functions (investigation and screening) of the grand jury. At my urging, we later reversed that decision. The material on grand jury investigations is now included alongside the chapters on police investigative authority, so it can be taught in the Police Investigations Course. Comparing the prosecutor's investigative authority, through the use of the grand jury, is more appropriately placed in that course (notwithstanding its title).

I stress the division between the first and second half of the book because it became a natural dividing point when Yale and I decided at Michigan to split the book into two courses. That initially was not our goal. When Wayne and I added the chapters in the back-half, our assumption was that the Criminal Procedure course could very well be expanded to a four-credit course and some of our chapters would be included in that course along with most of the chapters that had been in *Basic*. Our chapters relied far more heavily on non-constitutional regulation, so professors moving from constitutional law would have less interest in some of those chapters. Nonetheless, as the preface to the enlarged version of *Modern* noted, an instructor with that focus might still consider “teach[ing] a criminal procedure course dealing almost exclusively with police practices” but then adding the materials on “discretionary enforcement (including prosecutor’s discretion and negotiated pleas).”<sup>7</sup>

We started assembling the new material for the back-half in 1966 and the finished product was not published until 1969. You might wonder why it took us almost three years. Keep in mind, we did not have word processing available. Indeed, we did not even have photocopying (our librarian was quite unhappy when we used light-pencil markings on published reports to indicate to the typist which passages in a case should be included and which should be deleted). In doing our legal research, we did not have the advantage of Westlaw or anything similar. Also, the early and mid-1960s was a period of rapid change—and not simply as an aspect of the Warren Court’s criminal procedure “revolution.” Congress added significant federal legislation in the Bail Reform Act, The Jury Reform Act, and

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<sup>7</sup> LIVINGSTON HALL, YALE KAMISAR, WAYNE R. LAFAYE & JEROLD H. ISRAEL, MODERN CRIMINAL PROCEDURE: CASES, COMMENTS AND QUESTIONS (3d ed. 1969). With the 1965 edition of *Basic* treated as an earlier edition, the 1966 *Modern* was designated a 2nd edition, and the 1969 enlarged edition was a 3rd edition. The 14th edition, published in 2015 was designated a 50-year publication based on the 1965 publication of *Basic*. However the years are counted, the book’s originating author and first two co-authors have been at it for a long time. For myself, however, the 50-year reference in the SEALS workshop title is a slight exaggeration. I first taught a stand-alone criminal procedure course in 1967.

the Criminal Justice Act of 1964 (governing appointment of counsel in the federal system). This legislation led to the enactment of counterparts on the state level. The court-rules movement also was gathering momentum at the state level, as more states added court rules of criminal procedure.

We also wanted to take advantage of a dramatic change in the commentary relating to the topics covered in the back-half of the book. We suddenly had a substantial body of commentary that described how the process was actually being administered. The 1920s and 1930s had produced a series of empirical studies that examined the prosecutorial and judicial processing of criminal charges, starting with the seminal Cleveland Survey directed by Pound and Frankfurter.<sup>8</sup> While social scientists interested in police culture (and some law professors) continued over the years to produce studies of police activities, the post-charging stages of the process did not receive the same attention. That changed in the 1960s with the reports of President Johnson’s Crime Commission on Law Enforcement and the Administration of Justice,<sup>9</sup> the American Bar Foundation studies (under the editorship of Frank Remington);<sup>10</sup> and a series of studies by law professors examining specific stages in the process (e.g., preliminary hearings) in particular communities. Of course, as compared to what we have today, with the annual Sourcebook of Criminal Justice Statistics, the extensive state-caseload reports, the various studies available in the National Criminal Justice Reference Service collection, surveys funded by various foundations, and even empirically-based law review articles, the body of empirical work produced in the 1960s was a “drop in the bucket.” Still, it was a new type of contribution and we had to learn how to evaluate the reported data, the reported statements of lawyers and judges explaining their actions, and the conclusions drawn by the authors of a particular report. We also had to devise a format for presenting this material that conveyed its substance while avoiding lengthy quotations (the students had enough of that in the cases).

The end result was that the back-half revisions took more time than we anticipated and the end product was much longer than we anticipated. The enlarged *Modern Criminal Procedure* was now 1400 pages, double column. I will not say that we thought everything in the book had to be offered in the curriculum, but both Yale and I thought that the two halves of the book had independent pedagogical justifications, which justified offering a pair of courses in the field of

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<sup>8</sup> RAYMOND FOSDICK ET AL., *CRIMINAL JUSTICE IN CLEVELAND* (Roscoe Pound & Felix Frankfurter, eds., 1922).

<sup>9</sup> THE PRESIDENT’S COMM’N ON LAW ENF’T AND ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* (1967), <https://www.ncjrs.gov/pdffiles1/nij/42.pdf>. The key task force reports are cited in WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* § 1.6(g) nn.419–22, 433 (4th ed. 2015).

<sup>10</sup> The various publications in this series, including WAYNE R. LAFAVE, *ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* (Frank J. Remington, ed., 1965), are cited in WAYNE R. LAFAVE ET AL., *supra* note 9 § 1.9(c), n.59.

criminal procedure. The police investigation portion was largely about constitutional regulation. Constitutional law could no longer fit in a four-credit course. Schools were moving in the direction of spin-off courses, and a course on the constitutional regulation of police practices as they impacted upon individual liberty was viewed as just as deserving of spin-off treatment as the First Amendment course.

We viewed a course based on the second-half of the book as the natural successor to the “whirlwind tour” of procedure formerly provided in the Criminal Law course. Of course, the tour provided here was far more detailed, but was not criminal procedure as deserving of such thorough examination as civil procedure or administrative procedure? Although a certain amount of constitutional regulation would be considered, that was also true of those other procedure courses. Of course, the students had spent six credit hours examining a procedural system in the required Civil Procedure course. But here the special context of enforcing the criminal law offered an opportunity to examine the extent to which the content of the law being enforced and the sanction being applied shaped the procedural system. In many respects, it offered distinct advantages in providing this perspective even over the examination of administrative procedure in the Administrative Law course. With criminal procedure having been removed from Criminal Law and the Police Investigation course viewed largely as a Constitutional Law course, the Michigan curriculum committee found our reasoning persuasive and approved what I had described as a “true criminal procedure course,” (although I have to admit that the committee did have a “rubber stamp” reputation).

The two courses were to be offered as independent electives, but we hoped students would take both courses. With no required sequence, we did not want to describe them as Criminal Procedure I and II or as Basic Criminal Procedure and Advanced Criminal Procedure (although those titles were used for two spin-off paperbacks that covered each half of *Modern*).<sup>11</sup> Instead, Yale’s course was titled: “Criminal Procedure: Administration of Police Practices and the Courts.” For my course, I decided to simply identify the starting and ending steps in the process covered by the course. The steps were covered largely in chronological order, but bail was placed before the charging decision (although that decision typically came first) because we wanted the charging decision chapter to be followed by the chapters on the screening of that decision. Thus, my course was titled: “Criminal Procedure: From Bail to Post-Conviction Review.” From the outset, the Michigan students called the course “Bail-to-Jail.” At first, I resisted, in part because of the suggestion that each defendant (or even a majority of the defendants) started with a

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<sup>11</sup> The *Basic* title was retained for one spin-off, in part, because some schools continued to use that book in teaching criminal procedure in the first-year Criminal Law course. In such schools, a course covering the second-half of *Modern* would be an upper-level course, so the spin-off for that segment was called *Advanced Criminal Procedure*.

bail determination and finished with a jail (or prison) sentence. The available data noted in the book was only for felony arrestees, but even there, while a majority were convicted on felony or misdemeanor charges, less than a majority were actually incarcerated. In the end, however, the lure of alliteration prevailed, and I too began to refer to the course as “Bail-to-Jail” (although the formal title was never changed).

I have explained how the Bail-to-Jail course was created. Let me turn now to how the course was shaped. In large part, the content of the course was dictated by the focus of the back-part of *Modern*; our objective here was to present each major step in the process as a part of a system of administration, rather than to provide more coverage for an area-specific constitutional law course.

Initially, in presenting the law shaping the process, our focus was not limited to constitutional regulation. Supreme Court rulings would not be ignored, but they would not be included as major rulings simply because they addressed the subject matter without regard to their significance in the regulation of the particular step in the process. At the time, there were few non-investigatory aspects of the process that were the subject of multiple Supreme Court decisions. Apart from the Court’s earlier double jeopardy rulings, selective incorporation applied to the states a pre-existing body of federal constitutional precedents that infrequently addressed our subject matter. Today that has changed, as there is an extensive body of rulings addressing such topics as jury trial, ineffective assistance of counsel, and guilty pleas. At the outset, we had plenty of space for including materials on non-constitutional regulation.

In presenting the non-constitutional material, we always started with the law regulating the federal system. We did this for a variety of reasons. Although the federal system accounts for less than one percent of all criminal prosecutions, law students were geared, in part by the Civil Procedure course, to looking initially to the regulation of the federal system. Also, the federal system served as a model for criminal procedure regulation in many states. State court rules were based on the federal rules and statutes such as the Bail Reform Act served as a model for many state statutes addressing the same subject. Thus, in presenting the federal law, we were almost always presenting the legal standards governing in a substantial number of states, though not necessarily a majority.

Federal law also presented an advantage in selecting relevant materials due to the number of separate courts at the appellate level and the practice of district courts writing opinions. In fact, the federal opinions presented a more extensive body of caselaw than even a state with a criminal caseload eighteen times that of the federal system (as in California). Also, we wanted to go beyond the law in the books and look at how the law was administered. Here, the federal system offered extensive internal guidelines of administration (found in the United States Attorneys’ Manual and elsewhere) and received far more attention in the commentary.

Presenting the federal law at each stage of the process also served a major objective of any procedural system course—viewing the system as an integrated

whole, recognizing how each step in the process impacted the remaining steps. Some aspects of the integrated character of the federal law of criminal procedure are obvious. In looking at the extent of the notice of the prosecution's case presented to the defense, students readily recognize that they have to look beyond the Federal Rules on discovery and consider such other features as the Jencks Act, the federal law governing pleadings (especially the bill of particulars), and the federal prosecutor's ability to avoid a preliminary examination by promptly obtaining an indictment.

Students have more difficulty recognizing the connections between different procedures where the governing law for each does not point to the same central function (as in the procedures aimed at providing notice). Thus, when students consider the federal system's adoption of "same and similar character" joinder of offenses, they do not readily recognize the other elements of federal law that make such joinder feasible in the federal system (and highly impractical in others). They need to be reminded that the federal system facilitates charging together separate offenses involving separate places and separate victims through several of the system's other features. For example, prosecutors can obtain a charging instrument on all the offenses without requiring each of the victims and supporting witnesses to testify in a screening procedure—since a federal indictment can be based on the testimony of a federal agent summarizing the information received from these persons. Additionally, venue districts are larger than the typical state district and therefore more likely to include all of the offenses committed by an offender operating in a single geographic area. Finally, the plea bargaining process allows the prosecution to readily drop charges, with the trial court largely limited to providing rubber-stamp approval. We sought to provide materials that would allow the instructor to point to such relationships and ask what the prosecutor achieves by utilizing such joinder (e.g., asking how the jurisdiction's position on concurrent sentences impacts the use of such joinder).

One of our basic goals in presenting materials on the non-constitutional regulation of the process was to make students aware of the diverse approaches adopted by the states. Thus, for each step in the process, we included a reference to a state decision, court rule, or statute that rejected the federal approach. We looked here to contrary positions taken by a significant group of states. In 1967, I couldn't turn to our treatise to find a breakdown of jurisdictions on a particular issue, and the commentary referred to major divisions in only selected areas (e.g., the states rejecting or accepting the *Costello* position on the review of evidentiary case put before the grand jury).<sup>12</sup> Fortunately, the American Bar Association Standards project was underway and its reports typically reviewed the caselaw in a fair number of states, particularly where the ABA approach differed from the federal approach. Where the ABA Committee Report advocated a position that

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<sup>12</sup> See WAYNE R. LAFAVE ET AL., *supra* note 9 § 15.5(c) (discussing the state positions with respect to *Costello*).



was taken by only a small group of states, we typically would also take note of that approach (e.g., providing a preemptory challenge as to the trial judge—a position later withdrawn by the ABA).<sup>13</sup>

In some instances, I believe there is a place for considering idiosyncratic state approaches to a particular aspect of procedure. Sometimes these are approaches that have attracted the attention of commentators—as in the case of Hawaii providing the grand jury with its own counsel. Where students will be familiar with some widely reported instance of a case presenting that state’s unique approach, I often cite the case simply to make the point that not all states adopt either position A or position B. Thus, after the Jerry Sandusky case made headlines, I added a footnote on Pennsylvania’s establishment of a grand jury that can investigate, but not indict. The 13th edition had a note on the prosecutor’s use of the grand jury as a “buffer” in police shooting cases, so when the Ferguson, Missouri grand jury transcript was released, the 14th edition added a reference to the unique Missouri secrecy law that allowed disclosure of that transcript. In the next supplement, I will add a reference to the California law that directs prosecutors not to present police shooting or assault cases that result in death to the grand jury.<sup>14</sup> The California law insists prosecutors use the preliminary hearing screening process (a questionable route where the prosecutor believes that the evidence is insufficient, but wants the “buffer” of a magistrate’s agreement).

In making my Curriculum Committee pitch for the Bail-to-Jail course, I stressed the special pedagogical values this course would add to our procedure curriculum, standing apart from the practical importance of the subject matter. I had taught civil procedure and was aware of the occasional treatment of tactical considerations in civil procedure coursebooks. But the Bail-to-Jail materials, fitting for an upper-class elective, would make extensive use of the reports and other sources citing how defense counsel and prosecutors made tactical use of specific aspects of the process. In some instances, the caselaw recognizes that tactical use, such as in (1) pleading cases citing defense counsel sandbagging by delaying certain objections, (2) venue cases noting the need to adopt a structure that precludes the prosecutor from shopping for a place of trial that provides the most favorable jury, and (3) preliminary hearing cases citing the various defense uses of that proceeding for purposes other than challenging the presence of probable cause. We also sought to include references to other tactical uses noted only in the literature, citing not just law review articles and commission reports, but sometimes even newspaper articles. On occasion, I would also refer to tactical uses that I had come across in the course of interviewing practitioners for some law reform project. Thus, in the preliminary hearing chapter, I noted the use of the hearing to “educate” the client who refuses to recognize reality (believing, for

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<sup>13</sup> See *id.* § 22.4(d).

<sup>14</sup> An Act to Amend § 917 and § 919 of the California Penal Code, S.B. 227, 2015 Cal. Leg. Serv. Ch. 175 (Cal. 2015), discussed in WAYNE R. LAFAVE ET AL., *supra* note 9 § 15.1(g) n.373.

example, that the case against him will fall apart the moment that the defense counsel cross-examines the chief prosecution witness). In some instances, although I was certain that the tactical use existed in Michigan, I concluded it lacked the general applicability that characterized our practice discussions. Thus, I did not note the use of the preliminary hearing to ensure that the defense could remove the one trial judge in the district that sentenced more severely than any other (a result that could be achieved by challenging the bindover, thereby forcing the trial judge to read the preliminary hearing transcript, and subsequently asking for a bench trial, thereby forcing recusal of the judge because he had read the transcript).

In looking at the administration of the criminal justice process, we also sought to include materials that would facilitate examining the use of discretion. Students often shy away from considering questions that go beyond determining the legal limitations on the use of discretion. Within those limits, there arguably are no right or wrong answers. However, for future decisionmakers, exploring the case for and against taking into account various individual and institutional values in exercising discretion is certainly an important part of their education. Wayne utilized various materials to raise such considerations in a section titled “Some Views on Discretion in the Criminal Process and the Prosecutor’s Discretion in Particular.” There he included commentary written by former prosecutors, defense counsel, and academics, and he followed that with a series of hypotheticals drawn largely from situations he had noted in his book on the decision to arrest. Teaching that material convinced me that the problem method was the key to drawing out in-class discussion of potential differences in prosecutorial perspectives and to having students recognize (1) how values and institutional concerns (e.g., caseloads) can so readily shape the use of discretion, and (2) why the use of discretion varies to such a significant extent from one community to another—producing a criminal justice process that looks quite different in the handling of certain types of cases even though the governing law remains the same.

Another aspect of the materials designed to facilitate class discussion of administrative concerns was the inclusions of as much empirical data as we could find. We viewed the *Johnson Crime Commission* reports as an empirical bonanza, although later studies by the Bureau of Justice Statistics (established in 1979) suggested that the *Crime Commission* sometimes went beyond the limits of its data in describing the process. Empirical data can be deceiving without digging deeper. Consider the following scenario. In a particular county near the state border, a substantial portion of the misdemeanor arrestees are visitors from the adjoining state who violated state law in having “too much fun.” The practice is to release the defendants on a cash bond, paid to the court, in an amount roughly equal to the fine that would be imposed on conviction. These defendants are not told that if they fail to appear on the scheduled court date, a bench warrant will issue and they will be arrested. That would take too much effort (and not be feasible where the offenders are not local residents). Instead, on non-appearance, the bond will be forfeited, and the charges will then be dismissed. This gives the county an

advantage over a mailed-in guilty plea, since the fine for a conviction goes to the state’s coffers, while the forfeited bond subsidizes the court. The end result, of course, is a much higher no-show rate than typical, which hopefully does not wind up in some study of pretrial release outcomes.

The importance of administrative discretion is a theme that runs throughout the Bail-to-Jail course, and like other major themes presented in the course, it is readily recognized by the students. One theme, however, seems to escape them. Throughout the materials they come across cases in which the prosecution error appears to be the product of inattention or sloppy preparation. The legal issue presented is what consequence that mistake will have on a conviction obtained by a trial or a guilty plea. That issue is readily examined and comparisons can be drawn as to the consequences of different types of errors discussed in different chapters. Students rarely ask what produces that sloppy preparation or inattention and whether it can be reduced. Fortunately, with the new emphasis on experiential courses, that issue can be shifted to another part of the curriculum.<sup>15</sup> But when I was teaching, I could not resist reminding them that it can happen to anybody—citing the infamous filing error by a major law firm in *Coleman v. Thompson*.<sup>16</sup>

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<sup>15</sup> See James M. Doyle, *Learning from Error in American Criminal Justice*, 100 J. CRIM. L. & CRIMINOLOGY 109 (2010); NAT’L INST. OF JUSTICE, MENDING JUSTICE: SENTINEL EVENT REVIEWS (2014), <https://ncjrs.gov/pdffiles1/nij/247141.pdf>.

<sup>16</sup> See *Coleman v. Thompson*, 798 F. Supp. 1209 (W.D. Va. 1992), *aff’d* 966 F.2d 1441 (4th Cir. 1992), described in WAYNE R. LAFAVE ET AL., *supra* note 9 § 11.10(c), at n.262.