Volume 71 Number 2

Federal PROBATION
a journal of correctional philosophy and practice

Enter...Stage Left...U.S. Pretrial Services

Donna Makowiecki, Chief U.S. Pretrial Services Officer, Eastern Pennsylvania
Thomas J. Wolf, Retired Senior Supervisor, Eastern Pennsylvania,
Pretrial Services Pioneers

History of Pretrial Release
Pioneers
Battle Won
An Evolution
Final Assessment

SHAKESPEAR HAD IT in *As You Like It*: "All the world's a stage and all the men and women merely players. They have their exits and their entrances...." By 1976 approximately 100 individuals entered the stage of the Federal Criminal Justice system with a new role as U.S. pretrial services officers. This experimental position was created by virtue of the passage of the Speedy Trial Act of 1974, which identified ten demonstration districts—five as independent agencies and the rest under the auspices of federal probation. This was a new, rather exciting role, and was prompted by the successful execution of both the Manhattan Bail Project in the early 1960s by the VERA Foundation and the D.C. Bail Agency. The Manhattan Bail Project identified relevant personal factors and provided a point scale by which to identify promising risks for release on Own Recognizance bonds. The intent of the newly created agency was to assist the federal court in the implementation of the Bail Reform Act of 1966. Since judges were then given a recipe whereby informed decisions regarding pretrial release could be made, a need was created for an agency that would provide factual information to support those decisions.

back to top

History of Pretrial Release

The passage of the Bail Reform Act of 1966 was indeed significant, because it was the first piece of legislation that proved to be instructive to those deciding who merited release without posting large money or property bonds. An early piece of legislation, the Federal Judiciary Act of 1789, addressed the issue of bail in these terms: "And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which cases it shall not be admitted, but by a justice of the supreme or circuit court..., who shall exercise their discretion therein, regarding the nature and circumstances of the offence, and of the evidence, and the usage of law." (Section 33) However, the lengthy list of crimes then punishable by death made the pool of bailable crimes indeed small. As had been the custom in England, judicial officers continued to set high cash money that resulted in significant levels of pretrial detention, filling the nation's holding cells with indigent inmates. Although the Eighth Amendment touted that "excessive bail shall not be required," and the Fifth Amendment promised due process, the system nonetheless lacked guidelines as to how to determine what constituted "excessive" bail and what criteria—other than bondable assets—should be used to determine who should be held

and who should be free pending trial.

Perhaps a 1951 U.S. Supreme Court decision helped pave the way for the philosophical changes that eventually brought the 1966 Act into existence. In Stack v. Boyle the Court defined bail as excessive "when it is set at a figure higher than an amount reasonably calculated to ensure the asserted governmental interest" (342 US 1, 4-6). And that interest consisted in assuring the defendant's availability for prosecution and possible sentencing. Thus, the first Bail Reform Act was written with the intent of having risk of flight and future non-appearance examined. Relevant factors to be considered included family and community ties, employment, character and mental condition, financial means, prior convictions, and record of appearance in previous cases. The need to assemble this identified information comprised the first tier of pretrial services duties. The Act also provided for the imposition of conditions in those cases in which a personal recognizance bond was considered insufficient to reasonably insure court appearances. Those conditions included use of third-party custodians; restrictions on travel, residence, and association; maintenance of prescribed contact; the posting of a bond or cash; and any other stipulation deemed reasonably necessary to insure appearance. With this, the second tier of pretrial services duties was thereby generated: to insure compliance with the prescribed conditions of pretrial release. Foremost to embrace, however, was the pre- sumption of innocence and the use of least restrictive conditions. Pretrial services was created to facilitate the promise of the Bail Reform Act of 1966.

back to top

Pioneers

The first 100 or so individuals entrusted with pretrial services functions between 1975 and 1976 came to be known as "The Pioneers." The title was apt as those officers had to navigate unchartered territory in the federal system, performing a service to court and defendant that had never been offered in the history of the system. (Although one might argue that John Augustus, rather than having served as the country's first informal probation officer, was actually operating as a pretrial services officer, as he "bailed" individuals, worked with them, and returned them to court in better circumstances than he found them.) One might imagine that these early days were full of glamour, romance, and adventure. Although adventure was there aplenty, glamour and enchantment were in short supply. Pioneering meant taking something away from the system as much as providing something new. Few welcome mats rolled out when pretrial services came to town. Not only did the Pioneers have to learn to provide a new and distinct function, they had to convince other parts of the system of its necessity and benefit. Some veterans wondered, often aloud, why an agency was created to perform a task that had been accomplished without it for 200 years. "Congress said so" was hardly a winning response. The existence of this agency disrupted, at least in the assessment of other system components, the smooth processing of defendants. After all, pretrial services officers needed time and space to conduct interviews, thereby imposing on law enforcement agencies and at times, the Court. So the battle ensued—to prove competence and capability, make a mark, and persuade an established system that this new agency could and would make a difference.

back to top

Battle Won

But the battle was won by pretrial services. In 1982 Congress passed and President Ronald Reagan signed into law a bill transforming the pretrial services agencies from an experimental project to a permanent part of the federal criminal justice system. While waiting for a final decision on the future of pretrial services, some officers sought the security of a position with U.S. probation or elsewhere. After the passage of the law, the remaining officers sighed with relief, knowing those monthly mortgage and car payments would continue to be made. However, most significantly, the law affirmed the importance of pretrial services work and the need for a

neutral agency to provide the court with relevant background information and supervision services.

The Bail Reform Act of 1966 was augmented by its successor, the Act of 1984. While the earlier act strove to eliminate inappropriate pretrial detention of the financially impaired, the later Act focused on protection of society from dangerous defendants. The 1984 rendition improved on its 1966 predecessor in the following ways: by focusing consideration on community safety; expanding the number of potential release conditions; allowing preventive detention when clear and convincing evidence of danger existed; providing standards for post conviction release; permitting temporary detention on conditional release cases; articulating procedures for revocation; and de-emphasizing the use of cash-oriented bonds.

Rather than focus solely on defendant appearance as a criteria for release, the 1984 Act allowed judicial officers to consider danger to the community prior to conviction and to use preventive detention when "no condition or set of conditions" was available to reasonably assure community safety. This new dimension enhanced the role of pretrial services officers in making recommendations, as officers were required to assess danger and, where danger was determined to exist, fashion conditions to reasonably address it.

Many in the legal profession wondered if the preventive detention provision of the 1984 law would pass constitutional muster. Would such a practice be construed as allowing punishment prior to conviction of a crime? In 1986, the Second Circuit of Appeals in *U.S. vs. Salerno* issued such a ruling. However, the following year, the U.S. Supreme Court (481 U.S. 739) reversed the decision, finding the preventive detention statute constitutional. Not envisioning the practice as punishment, the Court recognized the need to utilize preventive detention as a means to regulate those defendant behaviors that placed a society at risk and in lieu of any feasible alternative that permitted release under restrictive conditions. The determination to hold an individual "without bail" is to occur after an adversarial hearing at which defendant procedural rights are preserved, standards are utilized, and findings are articulated.

Despite the emphasis on community safety and use of preventive detention where so indicated, the new law did not diminish the presumption of innocence or negate the use of least restrictive conditions—thereby providing a continuity in the role of pretrial services officers. So too officers continued to assess risk of non-appearance and fashion conditions to address this variable, as had been their task from the inception of the agency.

back to top

An Evolution

Although we celebrate the 25th anniversary of pretrial services on the national level, the agency has existed for 32 years, counting those early, critical experimental years. The mission, although more enhanced and better formulated, is the same as that conceived by Congress, indeed as conceived by VERA, over three decades ago. And yet the day's work feels different from those early days in the mid-1970s. Officers continue to performed the tasks prescribed in 18 U.S.C. section 3154B, conducting assessments, providing supervision, reporting violations. What are the differences?

To start, we seem to live in more complicated times. Technological advances, philosophical changes, societal and political expectations, greater insistence on accountability and documented outcomes place more responsibility on pretrial services to identify effective methods to accomplish system goals. In those early days, at least in Philadelphia, we had to walk a few blocks to have record checks conducted and otherwise depend on the defendant or contacts to relay information regarding drug usage. A few taps at a desktop terminal now accomplish the record checks, while various drug-testing devices provide nearly instant information on recent usage. (Imagine a life without having to collect urine samples daily...) Although some tasks have certainly gotten easier, the needs of the defendant have changed and with that change, the challenge to become more creative, inventive, and innovative has grown more demanding. The

federal system no longer wears the stereotype of the white collar prosecutorial agency; rather, many accused are drug addicted, psychiatrically impaired, unemployed, medically compromised, and homeless. Add a prior sexual assault conviction that results in a Megan's Law registration requirement and it may well become impossible to formulate a viable pretrial release plan—even for those charged with more minor offenses. The struggle has required officers to become Neo-Pioneers—with a new attitude toward finding model resources and proven strategies to address a significant portion of this more impaired population. Otherwise, we are remiss in our duties and are not serving the system with the flair it has come to expect.

Today's managers, officers, and support staff must focus not only on function, but on the infrastructure of the agency. New mobile and office-bound technological advances must be evaluated for relevant impact. Software programs and remote devices must be explored. Using proven drug detection equipment and mastering new methods of location monitoring are not optional practices. Strong, defined policies and practices are required to address a host of issues, and insurance must be generated so that the office can continue to function even if the physical site is compromised or eliminated. And today, as always, one has to develop excellent relationships with community-based vendors—to secure needed drug/alcohol, mental health, sexual offender treatment, and vocational training services, keeping an eye on those that can provide the outcome-driven programs that are desired. With all these challenges, managers must develop strategies to help all staff become all they can be, exercise practices that address safety, and come together as a team to generate the best product possible: addressing court and defendant needs in an effective, competent, and fiscally responsible fashion.

back to top

Final Assessment

Few of the original Pioneers remain in the system, most having become eligible for the final reward of retirement. Those who are left undoubtedly continue to accept the challenges, both old and new, that pretrial services work presents. The work has been rewarding beyond description. Those who were part of this release experiment have had the satisfaction of being on the cutting edge of a new practice and making a difference—in the lives of the defendants, in services to the Court, on future generations, and on communities that shelter accused individuals. No regrets are possible. But the job is never over, and responsible, committed individuals are needed to continue the work. Without that level of "commitment to and passion for our mission," as cited in our *Charter for Excellence*, pretrial services might well find its exit, stage right. And society and the system would suffer for it.

back to top

Published by the Administrative Office of the United States Courts www.uscourts.gov
Publishing Information