

Implementing Evidence-Based Practices in Federal Pretrial Services

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WHAT A DIFFERENCE a year makes! One year ago I wrote the following paragraph on this topic and imagined we might be years from answering some of these questions with thorough research.

The application of evidence-based practices (EBPs) could potentially revolutionize the field of pretrial services. Pretrial services programs across the country are looking to apply these practices in hopes of seeing tangible results in the form of increased release rates, while maintaining or improving appearance and safety rates. Yet the revolution seems stalled as pretrial services agencies ponder questions about the applicability of post-conviction EBPs to achieving their outcomes: ensuring a defendant's appearance in court and protecting the community from crime. There are significant issues to consider: Do post-conviction evidence-based practices that were developed to reduce long-term recidivism rates impact these unique pretrial outcomes? And does the application of post-conviction supervision EBPs infringe on the constitutional rights of individuals not convicted of a crime?¹

Thanks to the research commissioned by the Office of Federal Detention Trustee (OFDT) and conducted by Luminosity Incorporated, the federal pretrial services system is now positioned to remake itself into an evidence-based system.

The study employed data from the Administrative Office of the United States Courts, Office of Probation and Pretrial Services (OPPS).

[The dataset] consists of all persons charged with a criminal offense in the federal courts between October 1, 2001 and September 30, 2007 (FY 2001–FY 2007) who were processed by the federal pretrial services system. The dataset includes defendants who entered the pretrial services system via a complaint, indictment, information, or superseding indictment/information (all others, such as material witness and writs were excluded,...The data represents all of the federal districts with the exception of the District of Columbia (93 of 94) and includes 565,178.²

Let's begin in the macro sense. One of the cornerstones of post-conviction supervision research for me has always been "First, do no harm." Post-conviction evidence-based practices research has borne out the wisdom of that mantra repeatedly: Implementing treatment, changes, or fixes

on offenders who pose little to no risk is fraught with failure. Therefore, I have long wondered if the same mantra would hold true for pretrial services supervision: What impact does over-supervising or treating low-risk federal defendants have on their outcomes? For the most part we have operated under the “well, it can’t hurt” theory when deciding which conditions to put in place. However, the research now shows that it can and does hurt when unnecessary alternatives to detention are placed on low-risk federal defendants.

First, the lower risk defendants, risk levels 1 and 2, are the most likely to succeed if released pending trial and in most cases release should be recommended. An alternative to detention, with the exception of mental health treatment when appropriate, generally decreases the likelihood of success for this population and should be recommended sparingly.³

In some areas, for example electronic (location) monitoring, level 1 defendants (the best risks) were 112 percent more likely to fail if they were placed on location monitoring as a condition of release. The quick refrain is that those are technical violations; however, they are not. They represent failure-to-appear and rearrest cases only. In addition, this finding is not limited to location monitoring: substance abuse testing and treatment defendants are 41 percent more likely to fail.

On average, defendants released to the alternatives to detention program who were lower risk, risk levels 1 and 2, were less likely to be successful pending trial while defendants in the moderate to higher risk levels (risk levels 3, 4, & 5) were more likely to be successful if released to the alternatives to detention program.⁴

This study establishes, apparently for the first time with hard national pretrial services data, the risk principle, which states “that the intensity of the program should be modified to match the risk level of the defendant.”⁵

Given the evidence we now have, the first step in implementing evidence-based practices in federal pretrial services is to stop doing that which we now know is harmful. It is now abundantly apparent that, with limited exceptions, this applies to placing alternatives to detention on low-risk defendants. However, reversing this practice will be a very difficult task, as the conditions in federal pretrial services are set by magistrate judges, generally after receiving the report and recommendation of a federal pretrial services officer. While the judge makes the ultimate decision, we can and must control our recommendations, no longer recommending alternative-to-detention conditions for low-risk defendants. In addition, OPPS, working through the Magistrate Judges Division, Magistrate Judges Advisory Group, and any other appropriate body, must help develop magistrate judge training on these findings to further facilitate their effective implementation into everyday practice.

The other tool the officer has available is to petition the magistrate judge to remove, after the defendant’s release, these conditions on low-risk defendants. Traditionally, this approach has not been fully utilized in federal court for a variety of reasons. With appropriate encouragement, the new evidence will, we hope, make the practice more routine. This will insure that even when ineffective conditions are placed on defendants, they are removed prior to long-term negative impacts on those defendants.

The more difficult, yet essential, component is developing a pretrial services equivalent to the vast academic research on post-conviction supervision practices. In addition, we need to determine what elements of that existing literature on post-conviction evidence-based practices pretrial services can utilize successfully. Finally, the finding that mental health programming helps defendants with mental health conditions to succeed regardless of their risk level could potentially be mined for practices that could also be applied elsewhere—in substance abuse treatment, for example. Why is this important? Because pretrial services professionals are generally a skeptical group, even when confronted with seven years of data. Citing just one example eerily reminiscent of “Doubting Thomas,” a chief pretrial services officer refused to accept the accuracy of the Risk Prediction Index despite seven years of data that supported it,

unless allowed to stick his/her hands in the proverbial “holes” in the data.

Given the positive effect of the “Money Ball” comparisons in post-conviction supervision, let’s now revisit those arguments in the pretrial services context, with all due respect and apologies to Cullen, Myer and Latessa, on whose tremendous article, “Eight Lessons from Moneyball: The High Cost of Ignoring Evidence-Based Corrections,” this inferior imitation is based.

1. Pretrial services treatment programs are the Oakland A’s of the federal criminal justice system.

This point perfectly represents pretrial services as the Oakland A’s to our post-conviction counterparts, the New York Yankees. For example, the workload measurement allocation methodology used in the federal criminal justice system awards post-conviction supervision cases nearly twice the work credit per officer as pretrial services supervision cases. Essentially, post-conviction receives nearly twice the credit given to pretrial services supervision. Even specialty supervision components like location monitoring are allocated significantly more resources than location monitoring in pretrial services. The data suggest that those under location monitoring in pretrial services represent the riskiest pretrial services defendants, while those same defendants are not offered location monitoring post-conviction, because they receive substantial sentences of incarceration. Finally, treatment services funding provided for pretrial services cases is insignificant compared to the treatment funding provided for post-conviction supervision.

The argument is certainly not that post-conviction is overfunded or undeserving of the money it receives. Rather, since post-conviction is itself underfunded and pretrial services is funded at fractional levels of post-conviction, it follows that pretrial services is drastically underfunded, not only in comparison to our corrections counterparts, but also in comparison to our community corrections counterparts. We must begin to make more successful arguments for the support and funding our programs need to be successful, or we will be left further behind by our related criminal justice disciplines, who are successfully implementing these methodologies.

2. Pretrial services is currently based on “common sense,” custom, and imitation—rather than on scientific evidence.

In pretrial services there is virtually no research to support evidence-based pretrial services investigation and supervision practices. While our counterparts in post-conviction may lament that “too few offender treatment programs have been based on empirically supported intervention strategies” (Cullen et al.), they at least have a solid body of research to base their programs on when they become so inclined. Pretrial services must now begin to develop that base of empirically supported practices, and this will require significant funding that the criminal justice system has yet to allot to pretrial services. Therefore, we must spend every research dollar wisely and with a laser focus toward the needs of the field of pretrial services if we are to become truly evidence-based.

3. In pretrial services “looks” are more important than effectiveness.

Like Billy Beane studying his contemporaries, chiefs (whether in districts that combine probation and pretrial services into one office or in districts that maintain a separate pretrial services office) desiring to employ scientific evidence in developing their pretrial services programs would have to develop the science themselves. The system as it operates is very much based on looks, raw numbers, or counts and not on outcomes, risk, or any appropriate scientific methodology. In administering the program nationally, we are essentially trying to build the foundation by developing a system-wide empirically-based risk assessment tool, commissioning research, and developing a data infrastructure that will facilitate or empower the Billy Beanes of federal pretrial services to lead the system into this new age. Unfortunately, we have a significant distance yet to travel, and many in the system continue to question the limited science that has been introduced in favor of what we think “looks” or “feels” good to us.

4. In pretrial services the wrong theory can lead to stupid decisions.

This point brings us to the crux of the issues we confront today in trying to move forward with evidence-based practices: How do we advance a base without incurring an out? Like our baseball counterpart Billy Beane, we must embrace walks and reject sacrifice flies and bunts, which reduce our resources by a third (out) while only gaining us a 25 percent improvement (one base) toward our goal (scoring a run).

5. In pretrial services actuarial data lead to more accurate decisions than personal experience and “gut level” decisions.

Pretrial services investigation and supervision practices, just like practices in post-conviction (and baseball and the insurance industry before it) will make more accurate decisions using actuarial data than relying on personal experience or gut-level decisions. The VanNostrand study brought that point home by establishing, for the first time, the risk principle in pretrial services. With this baseline confirmed we need to continue to move toward actuarial decision-making in federal pretrial services.

6. In pretrial services, knowledge destruction techniques will be used to reject evidence-based practices.

The best example of this occurring in federal pretrial services is the Risk Prediction Index (RPI), a tool that was admittedly developed for post-conviction supervision and merely applied, poorly in fact, to federal pretrial services subsequent to its development. However, despite the fact that it was developed for a different purpose, implemented poorly, and enjoyed no face validity with staff, the RPI is a very effective tool for predicting success on pretrial services supervision. We have the data and research to support that contention (VanNostrand), yet the tool continues to be dismissed by staff. The system must break out of that mindset and truly rely on the evidence; not on past judgments, feelings, or intuitions, in moving forward toward making the system evidence- and outcome-based.

7. In pretrial services there is a high cost for ignoring the scientific evidence.

As the Oakland A's of community corrections, we cannot ignore the scientific evidence available, because the costs to our program, its effectiveness, and probably its future funding are at stake. We can, as Grady Little did, do nothing to change our practices and continue to “win or lose with our gut feelings,” but if we do so, we will surely fail and become past managers of our programs, as Brady was relieved in Boston. Instead, we need to be good stewards of the public resources we receive by employing the scientific data we have, seeking to expand that knowledge with new research, and no longer insisting on going with our “gut.”

8. In pretrial services evidence-based practices will eventually be difficult to ignore.

For all of the reasons already stated, pretrial services is at the point where evidence-based practices are difficult to ignore. First, given our limited resources, we have no choice but to insure that every dollar is spent wisely. Common sense, customs, looks, and feelings are simply passe; we can no longer afford the luxury of executives who manage our resources using such ineffective methodologies. Finally, the components of the management structure of the federal judiciary (The Administrative Office of the U.S. Courts, Judicial Conference, and its Committees) are recognizing the need for and demanding outcome measures and evidence-based science in managing crucial federal criminal justice programs like the federal pretrial services system.

In conclusion, while we must not blindly bind ourselves to science, as one of our colleagues did in recommending the “Son of Sam killer” for ROR release (a decision which ultimately cost him his position), we must embrace the overarching scientific concepts and lead our staffs to improved risk management, better treatment options, and more consistent and effective outcomes for our programs. Our job is to lead pretrial services into the world of science while insisting as a minimum standard for our programs that we do more good than harm.

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immigration offense.

¹⁰ Bureau of Justice Statistics. Federal Justice Statistics Program Website (<http://fjsrc.urban.org>). Executive Office for U.S. Attorneys, LIONS data system, Fiscal Year 2007 (as standardized by the FJSRC).

¹¹ See, e.g., Darren Gowen, *Overview of the Federal Home Confinement Program*, 64 *Federal Probation* 11 (2000). Home confinement is interpreted by the federal judiciary to include curfew (whereby the defendant is prohibited from leaving his residence during specific hours), home detention (whereby the defendant is restricted to his residence at all times except for approved leaves such as for employment, education, medical treatment, and religious practices), and home incarceration (whereby the defendant is restricted to his residence at all times except for approved absences, medical treatment, or religious practice).

¹² Administrative Office of the U.S. Courts, Office of Probation and Pretrial Services, *The Supervision of Federal Defendants*. Monograph 111 (September 2004). Other alternatives to detention include sex offender treatment and computer monitoring. However, given the types of offenses for which persons are federally prosecuted, these conditions are infrequently imposed: 0.4 percent of persons included in the study were released pending trial to a sex offender treatment program; and 1.5 percent were required to have their computer usage monitored.

¹³ Bureau of Justice Statistics. Federal Justice Statistics Program Website (<http://fjsrc.urban.org>). Executive Office for U.S. Attorneys, LIONS data system, Fiscal Year 2007 (as standardized by the FJSRC).”

¹⁴ This observation is valid for all alternatives to detention with the exception of mental health treatment. Mental health treatment was equally effective at reducing pretrial failure for all risk levels.

¹⁵ The cost of pretrial release was based on the cost of supervision, the average cost of alternatives to detention, and the average cost of fugitive recovery given the probability of failure.

¹⁶ Title 18, United States Code, Section 3142(c)(1)(B)

¹⁷ Title 18, United States Code, Section 3142(e) contains three categories of criminal offenses that give rise to a rebuttable presumption that “no condition or combination of conditions” will (1) “reasonably assure” the safety of any other person and the community if the defendant is released; or (2) “reasonably assure” the appearance of the defendant as required and “reasonably assure” the safety of any other person and the community if the defendant is released.

¹⁸ Title 18, United States Code, Section 3142(g)

¹⁹ An illustrative list of conditions is set forth in Title 18, United States Code, Section 3142 (c)(1)(B)(i through xiv) which gives the judicial officer authority to impose conditions not specifically enumerated so long as the same serve the purposes set out in § 3142(c)(1)(B).

²⁰ VanNostrand, Marie and Gena Keebler. “Our Journey Toward Pretrial Justice” in *Federal Probation*, Volume 71, Number 2 (September 2007), pp. 20-25.

²¹ “Implementing Evidence-Based Practice in Community Corrections: The Principles of Effective Intervention” (National Institute of Corrections and Crime and Justice Institute (2004)).

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¹ Cadigan, Timothy “Evidence-based Practices in Federal Pretrial Services” *Federal Probation* (September 2008) at p. 87.

² VanNostrand, Marie “Pretrial Risk Assessment in the Federal Court” (April 2009) at 41.

³ VanNostrand at 10.

⁴ VanNostrand at 31.

⁵ Dowden and Andrews *International Journal of Offender Therapy and Comparative Criminology* “The Importance of Staff Practice in Delivering Effective Criminal Correctional Treatment: A Meta-Analytic Review of Core Correctional Practice” (2004) at 1.

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¹ *Putting Public Safety First: 13 Strategies for Successful Supervision and Reentry* (The Pew Center on the States, 2008).

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¹ 18 U.S.C. § 3672: The Director of the Administrative Office of the United States Courts, or his authorized agent, shall investigate the work of probation officers and make recommendations concerning the same to the respective judges and shall have access to the records of probation officers

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18 U.S.C § 3141 thru 18 U.S.C. § 3151, *The Bail Reform Act of 1984*.

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18 U.S.C. § 3672.

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