U.S. Pretrial Services: A Place in History

Donna Makowiecki
Retired Chief U.S. Pretrial Services Officer
Eastern District of Pennsylvania

[The following article originally appeared in the September 2012 issue of Federal Probation*, where it was part of a Special Focus section on the 30th anniversary of the Pretrial Services Act of 1982.]*

ON SEPTEMBER 27, 1982, President Ronald Reagan added his signature to those of Speaker of the House Thomas O'Neill, Jr., and Senate President Pro Tempore Strom Thurmond to "An Act to amend chapter 207, Title 18 United States Code, relating to pretrial services." Thus was created the legislation known as the Pretrial Services Act of 1982, which established pretrial services functions "in each judicial district . . . under the general authority of the Administrative Office of the U.S. Courts."

The Act culminated efforts to correct inequities in bail-setting practices, ensure the release of those who demonstrated ties and favorable background, and establish use of alternative conditions to cash and surety requirements. Despite the significance of this legislation, the fanfare accompanying its passage was probably limited to the offices of the then-existing 10 demonstration sites and of those who had long championed the cause of bail reform. In retrospect, however, the authorization of a nation-wide system of federal pretrial services agencies was vital to ensuring equal and just treatment for all persons charged with federal offenses. How could a system, upon experiencing the objective input of defendant data as well as the careful oversight of imposed conditions, return to the dark ages of insufficient information and limited release options? The Act promised federal magistrate and district court judges throughout the country an enhanced ability to make truly informed decisions regarding the prospects of pretrial release and to more carefully adhere to the promises of the Eighth Amendment.

Antecedents

Similar to author Joseph J. Ellis's description of the American Revolution in his book, *Founding Brothers,* the Bail Revolution that commenced in this country in the 1960s can be seen as both unlikely and yet inevitable. Unlikely in that the knee-jerk requirement of mandating that cash, bonds, or property be posted in exchange for pretrial freedom was an institutionalized practice for nearly 200 years. Bond amounts tended to be based solely on the severity of the charged offense; although in many instances even those charged with minor offenses were held on exorbitant sums. The system took comfort from detaining defendants, as residence in the local jail would ensure that defendants were available for future court appearances and eliminate the possibility of additional criminal charges while the defendant was in release status—a potentially embarrassing prospect for the judge who permitted release.

Viewed from another perspective, however, bail reform nonetheless was inevitable, because greater awareness had been generated about the consequences of existing excessive, unequal, and discriminatory bail-setting practices. The quest for equal justice in release decisions was compromised in at least three distinct ways. First, research documented that those held in custody were more likely than those released to the community to be convicted and, once convicted, would receive harsher sentences. Second, those with monetary assets were ensured release, while the indigent remained detained to populate the local jails—thereby making wealth the sole determining release factor. And finally, private individuals, known as bondsmen, were empowered to become the deciding, unreviewable authority as to who would be released and who would remain in custody. Recognizing the effect of these developments on pretrial justice demanded an innovative approach to bail consideration. Although thinkers of the past lamented those accepted practices, someone had to step up to institute a revolution of change.

Enter Vera

One of the most decisive steps toward launching the Bail Revolution came from an outside catalyst, Louis Schweitzer, a retired chemical engineer who toured the Brooklyn House of Detention in 1961. That event prompted him to take action to spare the poor from pretrial incarceration. Fortunately, he had the smarts, the savvy, the means, and the contacts to confront an entrenched culture by generating evidence-based proof that the release of pre-screened defendants would not increase the failure-to-appear rate. His foundation was called Vera (after his mother); his venture, the Manhattan Bail Project, was overseen by social libertarian Herb Sturz and became the first empirical pioneering effort in the pretrial services experiment.

As part of a one-year agreement to analyze and impact bail procedures in Special Sessions and Magistrates Felony Courts of New York City, Vera generated a 40-item "scale of rootlessness" survey to measure risk of flight or

non-appearance by focusing on "community ties." In cases where own recognizance (OR) bonds seemed possible, staff confirmed defendant background the old-fashioned way—with reverse telephone directories, quests for relatives in courthouse hallways, and home visits. Usually within the hour staff would consider the rootlessness score against the charges and prior record and determine if an OR recommendation was warranted. If so, a one-page summary was prepared for review by the court and attorneys.

For any experiment to pass muster, it must embrace a scientific methodology. From the outset, Vera sought to determine as empirically as possible if the new practice of release consideration resulted in a higher proportion of release without significant increase in the failure-to-appear rate. Thus, defendants were randomly divided into an experimental group (with Vera intervention) and a control group (no intervention). Near the end of the contracted period, results showed that 59 percent of the Vera-endorsed group and 14 percent of the control group were released. Only three Vera cases failed to return—a lower percentage than was typical for the money-released defendants. The Vera group also saw a higher percentage of exonerations and a lower percentage of sentences of incarceration. Thus, failure to secure pretrial release seemed to indeed predict conviction at trial and result in lengthier and more costly sentences.

These noteworthy outcomes propelled the bail issue to the forefront of the national agenda, and in 1964 the first National Conference on Bail and Criminal Justice was held in Washington, D.C. The audience at the opening session included 450 interested parties, among them Supreme Court Chief Justice Earl Warren, seven Associate Justices, and Attorney General Robert F. Kennedy. The AG announced that pretrial detention was predicated on one factor: "Not guilt or innocence . . . not the nature of the crime . . . not the character of the defendant. That factor is simply money." At his behest, federal prosecutors were directed to recommend release without bond when this was justified. Within a year's time the number of own recognizance agreements tripled to 6,000 defendants, with no increase in the failure-to-appear rate. A Conference speaker noted: "Changes have flowed not out of a crisis created by judicial decisions outlawing prevailing practices, but rather from education, through empirical research and demonstration, which has spotlighted the defects in a system and the ways available to improve it." The Bail Revolution was in full swing, impacting both federal and various local practices in a relatively short time.

With its eligibility point scale having received permanent status in the local New York system, Vera sought to perfect the scale, which consisted of five categories: family ties, job/school, residence, prior record, and miscellaneous. A defendant was considered qualified for a release recommendation if the final score reached five points and a local address was confirmed. The point scale itself was termed "revolutionary," as it incorporated the use of scientific methods to determine the efficacy of its predictions and otherwise created a standard for assessing the validity of other justice-related reforms.

Federal Bail Legislation

The climate created by the Vera study and the resultant National Bail Conference no doubt strengthened the impetus for passage of the first piece of federal legislation relating to bail since the Federal Judiciary Act of 1789. The Bail Reform Act of 1966, signed into law by President Lyndon Johnson, aimed to eliminate inequities in the existing federal bail system. To this end, the Act directed the assessment of risk of flight and nonappearance, identified the nature of the information to be utilized in an informed decision-making process, provided for imposition of conditions when OR release alone was not sufficient to ensure appearance, and mandated a presumption of pretrial release as well as release under least restrictive conditions. The President himself noted: "Under this Act, judges . . . would be required to use a flexible set of conditions matching different types of release to different risks." For the first time in its history, Title 18 of the U.S. Code included a section that gave judicial officers direction as to what factors should be considered in setting bond as well as a list of possible release condition options to be fashioned to address identified levels of risk.

Criminal justice thinkers believed the 1966 Act was a marvelous advance in the federal bail-setting apparatus; however, they noted two "deficiencies" that triggered eventual amendment. The Act restricted consideration of whether or not to release solely to risk of flight or nonappearance, even though concerns were voiced regarding the risk of danger to communities by released individuals. (Influential legislators of the time, primarily Senator Sam Ervin of North Carolina, thought the use of danger as a standard was outright unconstitutional.) In addition, the Act failed to create an agency to be responsible for the gathering of defendant information, preparing reports, and overseeing imposed conditions. The former issue was addressed when Congress passed and President Ronald Reagan signed into law the Bail Reform Act of 1984. That Act added consideration of safety to the community, expanded the number of possible release conditions; created standards for post-conviction release; and authorized preventive detention when clear and convincing standards (danger) or preponderance of the evidence standards (nonappearance) were reached. The use of cash-oriented bonds was de-emphasized, and the presumptions of innocence, release, and release under least restrictive conditions were reiterated as the core of the bail-setting process.

A Federal Pretrial Services Function

The second major concern—that the act failed to create an agency for information gathering and supervision—was resolved with the passage of the Speedy Trial Act of 1974. Under Title II, rule 4.02, Pretrial Services Agencies were authorized to "collect, verify, and report" defendant information with a recommendation for appropriate release conditions; provide supervision to released persons; report violations; arrange services; and perform additional functions as the court may require. Thus, a designated agency was empowered to assist the court in implementing the nearly decade-old Bail Reform Act.

In response to the 1974 law, 10 districts were selected for pretrial operations on a pilot basis. These districts were: California Central, Georgia Northern, Illinois Northern, New York Southern, and Texas Northern, to be overseen as part of the established probation office; and Maryland, Michigan Eastern, Missouri Western, New York Eastern, and Pennsylvania Eastern, founded under an independent Board of Trustees and overseen by a designated chief. During 1976 roughly 100 officers, at times called the "pioneers," were trained to perform the groundbreaking tasks of this newly created operation. Training included one week at the Dolley Madison House in Washington, D.C., and focused on legislative history, interviewing issues, legal matters, system interrelationships, procedural overview, client supervision, community resources, and program evaluation. The mutual problems workshop component addressed officer concerns with improving

relationships with the court and law enforcement agencies; dealing with unemployed clients; updating reports for bail review hearings; streamlining forms and interviews; and conducting post-bail interviews.

In spite of the receptivity toward bail reform during the 1960s, early pretrial services work proved to be frustrating and at times outright maddening. Not only were officers developing new skills to process and evaluate the accused for potential release, they were seeking viable ways to integrate the pretrial mission within existing court and law enforcement structures and cultures. Obstacles loomed at every turn, from cynical marshals and uncooperative defenders to distrustful prosecutors and skeptical judges. Even gaining access to a defendant in a timely manner could be a chore. Dan Johnston, the Director of the Des Moines Pretrial Release Project that was operational by the mid-60s, aptly captured the mood when he observed: "Most people thought we would fail within a week or two, we would fold up our tents and go home, that a reform which was dependent upon the reliability of those charged with crime was doomed to failure by its very premise." Like the original staff of Vera, we too were thought of as the "Very Easy Release Agency"—unprincipled, liberal, naïve, and ultimately, disruptive to the status quo.

Folding up the tents was not an option. Instead, the original pretrial officers created a winning recipe of six major ingredients:

- Building relationships with other members of the system and keeping communication as open as possible.
- Being tenacious in gaining defendant access, making reasonable requests, advocating for release when warranted; and securing defendants those services that impacted risk whenever possible.
- Providing facts: In the words of Herb Sturz, "The main thing we've done is to introduce the system [of bail setting] to fact finding. With facts, we can open up options." The days of "bail in the blind" were at an end.
- Establishing trust by following up on investigatory leads, conducting criminal records research, providing well-written background summaries with relevant information, and reporting violation behaviors.
- Generating solutions by locating available community resources, arranging assessments, finding third-party custodians, being creative in formulating plans that truly addressed risk. When concerns existed about the release of a defendant, the only answer to the question of "Who you gonna call?" was "Pretrial Services."
- Continuing the practice of recording and analyzing statistical information to assess the impact of the agencies and determine whether the pilot project should become a permanent part of the federal system. Thus, from its inception these agencies sought to be evidence-based.

That formula proved successful. Pretrial services was shown by subsequent studies to provide invaluable services to the court and defendants, to support the highest ideals of the system, and to potentially release a higher proportion of criminal defendants, thus impacting detention rates and the problems incurred with overcrowding and financing correctional facilities. Based on reports of favorable outcomes, Congress passed the Pretrial Services Act of 1982, thereby establishing the function as a permanent part of the system and allowing courts to decide the method of its administration—either under the auspices of the probation office or as an autonomous unit.

The Future

Although 30 years have passed since the passage of the Act, the challenges of pretrial work have hardly lessened. One of the closing statements uttered after the 1964 National Bail Conference is as true today as it was nearly a half century ago: "Though the bail system in the U.S. has been enlightened in the past year by developments such as those summarized, *there is a long way yet to go.*" Pretrial services must continue to evaluate itself to ensure that it is truly an objective, empirically-based program, not just a perpetuator of the knee-jerk habit of imposing excessive conditions with unproven relationships to risk of non-appearance and danger. Research has already disclosed that over-supervision, especially of low-risk cases, has negative impact on defendant behavior and otherwise wastes valuable officer time and system resources. The detention rates in many districts beg the question: Do we really need to hold each person who is presently in pretrial custody or can a greater percentage be safely released?

Answers to questions about the impact of location monitoring, residential placements, and other treatments and interventions are to be sought through careful analysis of data. That, in turn, requires the precise recording, input, and extraction of defendant information in each district. Without this level of quality of information, prediction becomes haphazard and the value of pretrial recommendations may plummet. Foresight into this need, coupled with a history of seeking evidence for developing bail practices, has already resulted in the generation of a pretrial assessment tool, based on years of data, that should only increase in validity with ongoing data collection and analysis. Although the original officers did a phenomenal job of integrating pretrial services functioning in the respective cultures of 10 districts; although numerous officers followed their lead to incorporate responsible pretrial practices across the nation; although administrators, researchers, work group members, and the field contributed to the perfecting of pretrial services operations—well, in the words of Al Jolson, "you ain't seen nothing yet."

Let the Revolution continue.