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Reflections on the 25th Anniversary of the Pretrial Services Act

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AS THE SYSTEM CELEBRATES the 25th year of the Pretrial Services Act of 1982, [1] it is important to reflect on the changes that have taken place since the inception of pretrial services in the federal system. The enactment of a law as a tool to implement public policy usually reflects the will or consensus of the people that there is a right and/or just course to follow. The usual pattern is that constituents cry out for legislators to do something to create change and to use the coercive authority of the law to accomplish that end. In many ways, however, the enactment of pretrial services throughout the federal system (and moreover within the state systems) is not a reflection of popular citizen consensus but an example of lawmakers, bureaucrats, and civil servants recognizing the essential ideal of justice and doing something about it. The initial motivation of lawmakers may have combined idealistic and monetary consequences, but never reflected the will or desires of the people. The vast majority of citizens, although recognizing the right to bail (especially if they are the arrestees), resent the fact that those arrested for crime are free on the streets and back in their neighborhoods. Safety is the concern, voiced most frequently by law enforcement frustrated that “criminals” (not defendants) are back on the street before they finish their paperwork.

The history and enactment of this legislation is well known to practitioners within both the federal and state systems. Have there been changes? In the system? In the legal environment? Within new legislation? Of course there have—perhaps more so in the last 25 years than in the previous 200 years. The impetus of lawmakers for reform 25 years ago was not only to create a federal agency to implement the Bail Reform Act but also to serve as a model for state and municipal systems. Yet today, as then, the word “bail” is still synonymous with money, and this interpretation, especially on local levels, remains unchanged. Policy can be enacted into law, but law does not always change perceptions, attitudes or practices. (After all, emotional debates persist on national policies such as abortion, civil rights, and anti-poverty programs.)

Given this enduring environment in American culture, what are some of the changes that have taken place in pretrial services? A recent study of pretrial services [2] by Marie VanNostrand reflects some of these changes. VanNostrand provides a detailed analysis of Legal and Evidence Based Practices, examining practices supported by evidentiary research. The paper details the legal foundations of pretrial services and then proceeds to distinguish pretrial services from community corrections through defined differences in practices. On the other hand, others seem to include pretrial services in community corrections or interpret it as a gateway component to community corrections. Cadigan and Pelissier recognize the continuity pattern that addresses and identifies drug addiction of defendants who enter the correctional system, whether with the Bureau of Prisons or while on release as defendants. [3] Clear and Pratt address the policy issue and identify community safety as the ideal for community justice. [4]

Whether viewed as integral or as a gateway, pretrial services is an essential component of the community correctional system, since it is mandated to address not only the risk of flight posed by defendants but also the danger these defendants may pose for the community. VanNostrand, [5] although appearing not to view pretrial services as an integral part of community corrections, presents the principles for Evidenced Based Practices in community corrections and describes their applicability to pretrial services (emphasizing the need to modify them based on her six identified principles of law that underpin the operation of pretrial services). Relying on the models of community corrections practices, she outlines how pretrial services may also look to Evidence Based Practices to measure outcomes.

One example here would be the rewards theory. In community corrections, rewards for increased adherence to regulations and guidelines imposed are essential and intrinsic to the motivational process of rehabilitation, but perhaps this is not quite so true for pretrial services functions. A few years ago, some administrative guidelines were issued suggesting that a “good time” concept should be applied to defendants on house arrest with electronic monitoring. In other words, defendants who had been on electronic monitoring for long periods of time without incident or infractions should be rewarded with time off for good behavior or compliance. As they got closer in time to the trial, court appearance or surrender that was the ultimate rationale of the electronic monitoring condition, as long as they had complied with the conditions, they should be rewarded. But this application of motivational reward for compliance flew right in the face of the limited research of electronic monitoring defendants. The research showed that flight occurred more frequently on the eve of trial, sentence, or surrender than at other times while on bail. In other words, what worked for other components of community corrections is the direct opposite of what the differing circumstances of pretrial services indicated would work for defendants. In fact, supervision practices should have increased rather than lessened as the surrender or court appearance date approached.

Twenty-five years ago, when the Pretrial Services Act was introduced, those of us who were there in its infancy possessed little or no experience in the field. (In fact, most of us had come from probation backgrounds.) At that time if someone asked us where we were employed, explaining the role and function of pretrial services was a challenge that demanded definitions of the right to bail and presumption of innocence. Students in college, criminal justice textbooks and professors had limited knowledge of the role of pretrial services in the system, usually confusing it with pretrial diversion. Criminal Justice texts usually covered its function in less than a paragraph. Today, students know pretrial services and actually seek employment in the field. Today, undergraduate courses in the Rights of the Defendant and Criminal Procedure address the legal and functional aspects that underscore the principles of pretrial services.

The introduction of preventive detention, based on risks of flight and danger, into the federal system as a result of the Bail Reform Act of 1984 [6] and the subsequent upholding by the U.S. Supreme Court [7] in the Salerno case made it clear that danger to the community must be addressed by pretrial services and that back-door detention of defendants via exorbitant cash amounts would not be permissible. Salerno not only established the usage of preventive detention but also emphasized its intended rarity. Again, two decades later, public perceptions and attitudes have perhaps given way to the over use of preventive detention rather than its use as a rare provision of the law. The events of 9/11 and Guantanamo Bay have inured us to the warnings of Chief Justice Rehnquist that preventive detention should be a rare occurrence.

In 1979 a national research project [8] was conducted to study the role of the pretrial services officer in the federal system (based on the two models then in place). There were major incongruities and inconsistencies in the perceptions of judges, assistant U.S. Attorneys and officers themselves between what was expected of the fledgling agency and what was actually occurring. This was not that surprising for an agency in its infancy with no strong underpinnings, a limited constituency, no popular support and opposition internally (no one spoke of stakeholders and customer satisfaction in the late 70s and early 80s). [9] The only model for pretrial investigations and the techniques for investigations was the presentence report, and the only model for supervision practices was the probation/parole model. Some tweaking was done

to accommodate the role of innocence and warnings were given not to discuss the charges, but essentially the model was the same, with limited substantiated research done by the Vera Institute. The development of unique functions and practices was still down the line a few years. Some of the findings of the 1979 study [10] (and subsequent research) was that much would be clarified when additional training was provided for officers, when major players of resistance both externally and internally retired or transitioned out, and when the agency became institutionalized (rather than viewed as a home for junior probation officers or probation officers in training). The Pretrial Services Act of 1982, de facto, institutionalized the concept. The strong opposition of FPOA (Federal Probation Officers Association) in the early years has changed, as reflected in its new name, the Federal Probation and Pretrial Officers Association. [11] Internally within the federal judiciary, this same transition took place for the U.S. Bankruptcy Court when enough time had elapsed to secure its role and function as distinct within the court system.

Of necessity (and as a combined result of the Sentencing Reform Act of 1984, crime patterns, prosecutorial emphasis on drug cases and pedophilia, and advances in technology), pretrial services has had to address the issue of safety within the community, establishing the Agency as the initial assessor of danger and the monitor of the defendant's activities that reveal that danger. The gateway concept took hold. The probation officer, when determining the supervision techniques to address danger with any given offender, has as resources the offender's pretrial services report and supervision records, the trial records, a well-developed presentence report, and reports and evaluations of the Bureau of Prisons. Using these resources, he/she bases his/her strategies to address danger. The pretrial services officer has limited knowledge of the defendant, based on agent and prosecutor information (which is usually limited to the criminal activity of the charge and not the danger that the defendant poses). The pretrial services officer is expected to provide for the safety of the community and develop strategies for addressing those issues or behaviors in the defendant's life that constitute danger for the community while assuming a stance that acknowledges the defendant's presumed innocence. This is an inherently contradictory task at best, and a unique challenge. It is a task that over the past 25 years has met with much success and some failure. Crime patterns have changed, as have types of crime. Models of supervision have emerged unique to pretrial services. These practices have been successful for individuals awaiting trial, sentence or surrender and have incorporated the least restrictive conditions with best practices to ensure the safety of the community. At times, since the inception of preventive detention, such detention has been used when effective strategies have not been developed or when the reluctance to risk the consequences of a bad decision actually drove the decision itself. Some defendants remain incarcerated because no one has yet developed the strategies to address the danger to the community that they pose.

Twenty-five years ago, training of officers consisted of a four-day stint at the Federal Judicial Center after almost a year of on-the-job training. Today officers attend a national training academy with comprehensive instruction in all areas of their role and function. Twenty-five years ago, personal safety consisted of the warning to be careful, go in pairs, and use common sense. There was no training in safety techniques, and officers relied on their own wits and good sense. Today, officers receive extensive training in awareness, typologies, and environment and are given the tools to ensure their safety. Twenty-five years ago, pretrial services reports were hand written (like notes to the judge), with no copies for the prosecutor or defense counsel, and with recommendations based largely on intuition and (at best) some experience. Today these investigations are increasingly solidly based on available technological resources and proven data with recommendations that rely on evidence-based information.

The goal of pretrial services remains the same as it was 25 years ago—to provide judicial officers with a mechanism to support their release/detention decisions and to ensure that these decisions do not place anyone in the community in danger. The tools have greatly improved over time. The policy issues remain the same. One suspects that 25 years from now, at the 50th anniversary of the Pretrial Services Act of 1982, twice as much will have changed but the fundamental goal will have survived.

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Endnotes

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[1] Pretrial Services Act of 1982.

[2] VanNostrand, Marie F., *Legal and Evidence Based Practices, Applicationof Legal Principles, Laws and Research to the Field of Pretrial Services*,The Crime and Justice Institute and The National Institute of Corrections, Washington,DC, April 2007.

[3] Cadigan, Timothy P. and Pelissier, Bernadette, "Moving Towards a Federal Criminal Justice 'System'," *Federal Probation* (September 2003), 61.

[4] Clear, Todd R. and Pratt, Christiana, "Community Justice as Public Safety," *Perspectives* (Winter 2004).

[5] Van Nostrand, *Ibid*.

[6] Bail Reform Act of 1984.

[7] *United States v. Salerno*, 481 U.S. 739 (1987).

[8] Henry, Thomas A., *Professional and Bureaucratic Orientation in the Role Perceptions and the Expectations for the Role of the Pretrial Services Officer:Organizational Implications*, University Microfilms International, Ann Arbor, Michigan, 1980.

[9] Bare, Mindy S., Miller, Dana L. and Wilcoxen, Travis E., "Assessing Customer Service Satisfaction with U.S. Pretrial Services, District of Nebraska," *Federal Probation* (June 2004).

[10] Henry, *Ibid*.

[11] Federal Probation and Pretrial Officers Association.