THE JEFFERSON COUNTY BAIL PROJECT: LESSONS LEARNED FROM A PROCESS OF PRETRIAL CHANGE AT THE LOCAL LEVEL

PRETRIAL JUSTICE INSTITUTE

TIMOTHY R. SCHNACKE,
CLAIRE M.B. BROOKER,
MICHAEL R. JONES

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"If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice."

Judge Learned Hand[1]

Beginning in 2007, at the advent of the current pretrial justice reform movement, the Jefferson County, Colorado, criminal justice system initiated a process of: (1) educating itself on legal and evidence-based practices at bail; (2) describing existing issues, desired outcomes, and options for improvements to the administration of bail; and (3) periodically testing its hypotheses based on shared goals. That process involved extensive background research, consideration of that research by a committee having diverse criminal justice membership, the creation of an ambitious pilot project, data analysis, and ultimately a vote by the key justice system decision-makers to implement several recommended changes. Overall, the criminal justice system in Jefferson County has changed from one accustomed to the traditional money bail system to one that has moved away from that system in several meaningful ways. The system changed its practices, its mindset, and even its vocabulary. It furthered pretrial justice without changes in state law, and it did so while maintaining acceptable public safety and court appearance rates. While Jefferson County has not fully implemented all of the practices it envisioned and tested, it laid a solid foundation for further incremental improvement.

1 This statement was made in Judge Hand's keynote speech on the occasion of The Legal Aid Society in New York City's 75th anniversary on Feb. 16, 1951. *See Quote it Completely! World Reference Guide to More Than 5,500 Memorable Quotations From Law and Literature*, 530 (Wm. S. Hein & Co. 1998). The quote was used by Robert Kennedy in 1962 while talking about bail reform to the American Bar Association, and was later re-printed in a report by the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice (the "Allen Committee"), the Committee that first reviewed results from the Manhattan Bail Project and called on the federal government to "participate actively" in the process of re-examining and re-evaluating the American administration of bail. *See Attorney General Robert F. Kennedy, Address to the American Bar Association House of Delegates, San Francisco, California* (Aug. 6, 1962) *available at* http://www.justice.gov/ag/rfkspeeches/1962/08-06-1962%20Pro.pdf; *see also Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice* 1 (Univ. of Mich. 2011) (1963).

INTRODUCTION

"Bail reform," wrote an American Senator some thirty years ago, "is a complex matter."[2] In fact, bail reform is complex, difficult, political, frustrating, and occasionally visceral. Nevertheless, bail reform is also historically cyclical, often crucial, and ultimately inevitable. The history of bail in England and America is punctuated with reforms that now appear with hindsight as the unavoidable results of the abusive, irrational, or unlawful practices leading up to them. From the Statute of Westminster in 1275 to the Bail Reform Act of 1984, one can look at the administration of bail just prior to the numerous reform measures throughout history and see compelling bases for change.[3] Today is no different. The administration of bail in the late 20th and early 21st Centuries has led to high pretrial incarceration rates, a slow erosion of each American's constitutional liberty interest, and a criminal justice system perceived as rationing justice based on wealth – unfortunate consequences requiring attention and repair. Accordingly, as if in confederation, jurisdictions across America have begun questioning their practices and embarking on paths toward their necessary correction. Criminal justice leaders in Jefferson County, Colorado, started their journey toward bail reform in 2007. To date, that journey shows a mix of successes and failures. The successes can be attributed to a thorough attempt to educate system stakeholders on bail, and using collaboration to work toward improvements. The failures can be attributed to the relative novelty and complexity of the endeavor and the lack of more purposeful implementation. This paper summarizes the Jefferson County Bail Project, focusing on lessons learned from participating in a process of change at the local level.

Bail Project Beginnings

The Jefferson County Bail Project (Colorado) was inspired by the extraordinary bail projects of the early 1960s, which took a significant body of observational research showing the detriments of the traditional money bail system[4] and created alternatives to that system. Those projects embarked on "action research," which not only made concrete changes to the administration of bail, but also measured those changes to assist other jurisdictions with their efforts at bail reform. The most famous of these endeavors, the Manhattan Bail Project, operated under a hypothesis that money was "overrated" and "unnecessary" as a deterrent to flight, and that more defendants would be released if only judges had reliable information about those defendants'

2 Kennedy, Edward M., *A New Approach to Bail Release: The Proposed Federal Criminal Code and Bail Reform*, 48 Ford. L. Rev. 423, 429 (1980).

3 *See* Timothy R. Schnacke, Michael R. Jones, and Claire M.B. Brooker, *The History of Bail and Pretrial Release*, (PJI 2010) found at http://www.pretrial.org/download/pji-reports/PJI-History%20of%20Bail%20Revised.pdf [hereinafter *History*]. Reference to English bail reforms is entirely appropriate as the American founders borrowed heavily from the English system.

4 The authors have previously defined the "money bail system" or the "traditional money bail system" as any system of the administration of bail that is over-reliant on money. Some of its hallmarks include monetary bail bond schedules, overuse of secured bonds, a reliance on commercial sureties (for-profit bail bondsmen), financial conditions set in an attempt to protect the public from future criminal conduct, and financial conditions set without consideration of the defendant's ability to pay or without consideration of non-financial conditions that would likely reduce risk. *See Glossary of Terms and Phrases Relating to Bail and the Pretrial Release or Detention Decision* (PJI 2011) found at http://www.colorado.gov/ccjjdir/Resources/Committees/BailSub/Handouts/Glossary_Bail-PretrialRelease_DetentionDecision-PJI_2011.pdf [hereinafter *Glossary*].

ties to the community.[5] Its results – showing that when judges examined defendants' backgrounds, those judges released more defendants on their own recognizance, who, in turn, appeared for court more often than those who were allowed to pay their way out of jail[6] – was all the more remarkable when one considers it in context. For over 1,000 years, bail had only been done one way, with judges or other officials requiring property or money to be promised or put up by someone to help assure the defendant's court appearance. This, of course, had ultimately created in America what one publication described as a two-way door,

> opening outward to pretrial liberty for defendants with funds, but inward to prolonged confinement for defendants without money to post bond. Those on bail remained free to earn a living, support dependents and aid in their own defense; those without money could not. For them poverty itself became a crime, punishable by imprisonment.[7]

The architects of the Manhattan Bail Project perhaps understated the need for reform when they wrote that "a fresh look at the bail system was long overdue,"[8] but a similar feeling of dissatisfaction with the status quo led to the creation of an equally ambitious bail project in Jefferson County, Colorado.[9]

Indeed, going into the Project, general dissatisfaction was the most that anyone could express. Like many Colorado counties, until 2007 Jefferson County exhibited a lack of meaningful knowledge of bail and pretrial release law and administration other than that exemplified by rote and perfunctory practices. There was a general sense of unease that the prosecutors largely controlled the judicial function of bail, that a monetary bail bond schedule might be a somewhat arbitrary and unfair way to manage the bail process, and that there might be defendants languishing in the increasingly crowded jail who could instead be safely released into the community. In 2007, projected county budget

5 *See* Bernard Botein, *The Manhattan Bail Project: Its Impact on Criminology and the Criminal Law Process*, 43 Tex. L. Rev. 319, 326 (1964-65) [hereinafter Botein].

6 *See Toward Justice for the Poor: The Manhattan Bail Project*, Criminologica (May 1964) (reprinted from the Vera Foundation and Herbert J. Sturz). The study's surmise that, "it appears that verified information about a defendant's background is a more reliable criterion on which to release a defendant than is his ability to purchase a bail bond," has even more validity today. After nearly 100 years of scholarly research, there exist no empirically sound studies showing a public safety [in addition to a court appearance] benefit to the criminal justice system based on one's ability to pay a money bail bond while minimizing pretrial jail bed use.

7 *National Conference on Bail and Criminal Justice, Proceedings and Interim Report* (Washington, D.C. Apr. 1965) at xiii.

8 Botein, *supra* note 5, at 326.

9 Based on extensive research over time, the justice system has become better able to articulate the deficiencies in the traditional money bail system. Studies documenting the negative effects associated with that system (including effects on victims, taxpayers, criminal justice system employees, and defendants and their families) date back to the 1920s and are too numerous to list here. An overview of some of those effects is found in the American Bar Association's Standards for Criminal Justice on Pretrial Release (3rd Ed. 2007). Recent publications highlighting the negative aspects of the traditional system include a three-part series from the Justice Policy Institute: Melissa Neal, *Bail Fail: Why the U.S. Should End the Practice of Using Money for Bail;* Spike Bradford, *For Better or For Profit: How the Bail Bonding Industry Stands in the Way of Fair and Effective Pretrial Justice;* Jean Chung, *Bailing on Baltimore: Voices from the Front Lines of the Justice System* (2012) found at http://www.justicepolicy.org/research/4459, and in the document authored by the Pretrial Justice Institute and the MacArthur Foundation: *Rational and Transparent Bail Decision Making; Moving From a Cash-Based to a Risk-Based Process* (2012) at http://www.pretrial.org/download/featured/Rational%20and%20Transparent%20Bail%20Decision%20Making.pdf.

shortfalls and talks of jail expansion led the Jefferson County Commissioners to ask criminal justice leaders to examine a number of areas for improvements that could help the County with its budget. Those leaders selected seven projects, including one titled "Pretrial Release/Bonding/Supervision," which was designed to answer the question, "What changes can be made to current pretrial release/bonding practices to increase revenue, decrease costs, or decrease jail bed use." Meanwhile, the county's Criminal Justice Coordinating Committee (CJCC)[10] had also been considering pretrial release and bonding as a system-wide issue requiring examination for public policy reasons rather than budgetary ones. Accordingly, the CJCC articulated a strategic goal to "review and modify, if necessary, pretrial release/bonding practices." Together, these two broad inquiries formed the impetus for the Jefferson County Bail Project.

Unlike the Manhattan Bail Project, however, which has often been largely defined by its experimental component, the Jefferson County Bail Project is best defined as a process of change, taking a jurisdiction from vague notions of dissatisfaction to informed decision-making based on legal and evidence-based practices.[11] As a process, it necessarily involves incremental change though three important components: (1) education; (2) experimentation and evaluation; and (3) implementation. Like other areas of the justice system, it requires ongoing management to achieve sustained improvement.

10 At the time of the Bail Project, the CJCC (formerly the "Jefferson County Criminal Justice Strategic Planning Committee" or "CJSPC") was a coordinating committee similar to that described by Robert Cushman in the document, *Guidelines for Developing a Criminal Justice Coordinating Committee*, U.S. Dep't of Justice, Nat'l Inst. of Corr., NIC Accession No. 017232 (Jan. 2002).

11 *See* Timothy R. Schnacke, Michael R. Jones, Claire M.B. Brooker, and Hon. Margie Enquist, *The Jefferson County Bail Project: Project Summary Presented to the Attorney General's National Symposium on Pretrial Justice* (May 23, 2011) found at http://www.pretrial.org/download/research/The%20Jefferson%20County%20CO%20Bail%20Project%20Summary%20May%202011.pdf [hereinafter *Project Summary*].

EDUCATION

The justice system decision-makers' lack of substantive knowledge about bail led the CJCC to direct its staff (the Criminal Justice Planning Unit, or "CJP") to research the topic. The resulting document, *"A Proposal to Improve the Administration of Bail and Pretrial Release in Colorado's First Judicial District,"* was designed to be a comprehensive resource for current and future discussions about pretrial practices, and indeed, it continues to find use nationwide even today.[12] The document is comprised of five parts. The first two parts, a limited glossary of terms (providing a common vocabulary) and the history of bail and pretrial release and detention (providing a common frame of reference), were re-drafted for a national audience and are currently available online.[13]

The third part of the Proposal was devoted to state and local law, which provided county policy-makers with common boundaries and legal parameters. Federal law, as found in the laws of the United States and as articulated by the United States Supreme Court, is an important component of any discussion on bail, but state and local law will often set the parameters of any particular jurisdiction's attempts at change. At the time it was drafted, the authors made no attempt to question the desirability or rationality of any particular law because they examined improvements that could be implemented within the existing legal framework so that decision-makers could make improvements quickly and without the need for new legislation. After detailed research into other states' laws, however, the authors have since made presentations advocating change to those parts of Colorado's bail statute that were not optimal considering the entirety of the law, the research, and best-practices.

The fourth major part of the Proposal was the main substantive section. In it, CJP staff used the national "best-practice" standards on pretrial release (at the time, those published by the American Bar Association, the National Association of Pretrial Services Agencies, and the National District Attorneys Association) to weave a procedural path through a typical defendant's criminal case. In doing so, staff (1) identified current practices, (2) compared those practices to the national standards and existing research, including local data, and then (3) made recommendations for improvements. For example, initial issues in pretrial justice occur at arrest, and so the Proposal summarized current practices and made recommendations based on the national standards for using police citations versus arrests and for using bench summonses versus arrest warrants to the maximum extent possible. The Proposal also summarized issues and made recommendations concerning bond reviews and allocating resources to efficiently direct cost savings into supporting local practices based on legal and evidence-based methods for achieving pretrial justice.[14]

12 *See* Michael R. Jones, Claire M.B. Brooker. Timothy R. Schnacke, *A Proposal to Improve the Administration of Bail and the Pretrial Process in Colorado's First Judicial District* (Feb. 19, 2009) (available from the authors or from Jefferson County) [hereinafter *Proposal*].

13 *See History, supra* note 3; *Glossary, supra* note 4.

14 The Proposal puts forth many detailed and nuanced recommendations to comprehensively cover issues in the field of bail administration and the pretrial process. The areas addressed include: arrest v. citation – summons v. warrant; money bail bond schedules; compensated sureties; pretrial services programs; delegated release authority; first court appearance; the decision to release from secure detention; monitoring pretrial detainee status; and allocating resources. For a full recitation of the specifics in each recommendation, *see Proposal, supra* note 12.

In the fifth part, the Proposal made specific bail administration and pretrial process recommendations to the local jurisdiction. Lining up practices with national best-practice standards seems commonplace now, but at the time the Proposal was drafted, Jefferson County justice system decision-makers and CJP staff were unaware of other jurisdictions attempting such significant improvements in the field of pretrial release and detention. The abundance of today's publications addressing the law, research, and operations as well as national support for pretrial reform at the local and state levels did not exist at the time of the Jefferson County Bail Project, so Jefferson County stakeholders did not have much opportunity to benefit from the successes and failures of others. Now, other jurisdictions and national organizations have embarked publicly on similar endeavors, often using collaborative criminal justice coordinating committees or task forces to restructure bail processes to conform to best-practice standards.[15] The act of comparing local practice with national best-practices (in particular the ABA standards) has been one of the hallmarks of the Jefferson County Bail Project.[16] Virtually every document created during the Project, including its quasi-experimental bail research study, was structured around adherence to legal and evidence-based practices as articulated in the national standards.

The authors encourage jurisdictions to draft similar comprehensive papers – using the first Jefferson County Proposal as a template – to create goals based on the issues raised and researched in their particular regions. Only after preparing such a paper can a jurisdiction fully know which issues to pursue. In Jefferson County, for example, the judges' tendency to release all defendants on secured money bonds and the use of the monetary bail schedule seemed more acute than issues surrounding police citation policy and any perceived need for creating pretrial services functions. Other jurisdictions will undoubtedly discover different pressing issues (such as the need for prompt first advisements or perhaps issues surrounding the use of commercial sureties) based on their own analyses.

15 *See, e.g., Mecklenburg County Bail Process Re-Engineering* (Luminosity, June 2009), found at http://charmeck.org/mecklenburg/county/CriminalJusticeServices/Documents/MecklenburgBailProcessReengineeringPlan.pdf, and *2010, Bail Policy Review* (March 2011), found at http://charmeck.org/mecklenburg/county/criminaljusticeservices/documents/evaluations%20cjp/2011%20bail%20policy%20report.pdf (Mecklenburg County, N.C.); *Summit County Jail Crowding Reduction Project,* American Jails (Jan-Feb 2008), found at http://www.pretrial.org/download/research/Summit%20County%20Jail%20Crowding%20Reduction%20Project%20-%20American%20Jails%202008.pdf, and *National Symposium on Pretrial Justice* (PJI and BJA 2011) at 19 (remarks of Dr. Marie VanNostrand), found at http://www.pretrial.org/download/infostop/NSPJ%20Report%202011.pdf (Summit County, OH); *Pretrial Justice Institute Guides Innovative Reforms, Helping Justice Trump Tradition* (Fall 2008), found at http://www.pretrial.org/download/pji-reports/Case%20Study%201%20Allegheny%20County%20-PJI%202008.pdf (Allegheny County, PA); and *Presumption of Innocence: Report on Impact of House Bill 463* (June 2012), found at http://www.pretrial.org/download/law-policy/Kentucky%20Pre%20Post%20HB%20463%20First%20Year%20Pretrial%20Report.pdf (Kentucky).

16 *See generally, American Bar Association Standards for Criminal Justice (3rd Ed.) Pretrial Release* (2007). Because the ABA Standards are themselves based on legal and evidence-based practices, those Standards served as a basis for initial research, meeting discussions, initial data collection, the resulting pilot project, and the final Chief Judge Order terminating the jurisdiction's monetary bail bond schedule and implementing an improved "process and schedule." Moreover, recommendations from the National Symposium on Pretrial Justice in 2011 articulated the need to more forcefully adopt the many pretrial justice features found within those Standards. *See National Symposium on Pretrial Justice: Summary Report of Proceedings* (PJI and BJA 2011) at 38, found at http://www.pretrial.org/download/infostop/NSPJ%20Report%202011.pdf. For an article articulating compelling reasons for using the ABA Standards as an important source of authority, *see* Marcus, *The Making of the ABA Criminal Justice Standards, Forty Years of Excellence*, 23 Crim. Just. (2009).

Nevertheless, the comprehensive nature of the endeavor is the key to its utility. For example, when the Jefferson County Proposal raised the issue of judges using money at bail in ways that were perhaps contrary to the law, research, or national best-practice standards, some criminal justice decision-makers asked whether the courts could use a deposit bond option – that is, where a defendant provides some percentage of the total amount of the monetary bond obligation directly to the court. The answer, found in the local law section of the Proposal, was "no" because Colorado's State Supreme Court had so ruled several decades previously. Nevertheless, the Proposal provided numerous alternatives to improve the court's use of money at bail. As another example, when the bail insurance industry placed a proposition on the 2010 state election ballot mandating judges to set secured (cash or commercial surety) bonds on defendants in virtually all criminal cases, the measure was defeated using many arguments derived from the substance of the Proposal. The time necessary to draft such a document is minimal compared to the ultimate return on that investment.

Due to its comprehensive nature, the Proposal presented numerous opportunities for improvement, as it fully illuminated a criminal justice system steeped in the traditional money bail system. In Jefferson County, except for persons arrested on a no-bond hold, defendants were typically assigned a secured cash/property/surety bond with an amount based on top charge pursuant to a money bail schedule (often in thousands or tens of thousands of dollars). Persons who could afford to pay that amount were released without seeing a judge and without being assessed by the pretrial services program for risk to public safety or for failure to appear for court. System representatives explained that these persons rarely received pretrial supervision, and their conditions of release, if any, were minimally altered at subsequent court hearings except in response to new crimes or failures to appear while on bond. Defendants who could not pay the scheduled amount (as well as defendants on no-bond holds) were assessed for risk and remained in jail until first advisements, which occurred only on non-holiday weekdays. Because the judges reportedly rarely modified the scheduled bond amounts at the advisements, however, potentially low risk defendants continued to remain in jail awaiting their trials unless they or a bondsman paid their money bond.

As a follow-up to the Proposal, CJP staff attended hundreds of bail hearings to gather baseline observational data and general information for reference in their preliminary research. At those hearings, CJP staff observed that first advisement practices were hurried, lacked defendant representation, and focused mostly on articulating rationales for either keeping or deviating from the scheduled dollar amounts. While the state statute mandated individualized bail determinations (provisions that illuminated the possible unlawfulness of the County's reliance on bond schedules for persons released prior to the first appearance), the typical bail setting suggested a more generalized routine, with judges setting secured cash, property, or surety bonds in some stated amount of money (often matching the amount requested by the District Attorney's Office) coupled with pretrial services supervision in most cases. Indeed, throughout the process, the financial condition of any particular bail bond was typically the only condition warranting discussion at all; there was minimal discussion of risk of flight or to public safety, and virtually no discussion about which set of specific non-financial conditions could be used to respond to that risk. Money amounts were often set under the assumption that money helps to protect public safety – an assumption not supported by research, best-practice standards, or even Colorado law, which itself permits money bond forfeitures only for failure to appear. While no one in the criminal justice system would outwardly argue against a philosophy embracing the presumption of innocence and favoring release under least restrictive conditions, the system's "ap-

parent philosophy" (the philosophy that appears to outsiders to reflect the guiding principles of the justice system) projected presumptions of guilt and detention on a single, highly restrictive condition – money.

Equipped with this comprehensive research, the CJCC began a lengthy process of study, which included philosophical talks, debates, and discussions over trial runs of various recommended improvements. While the ABA Standards were used as a benchmark in the Proposal, the Committee's discussions delved even deeper into the rationale behind those Standards, and whether they made sense when held up to the local system's current practices and notions of public safety, etc. During those discussions, CJCC members also worked on certain concrete elements with which they found immediate consensus. For example, many of the most important recommendations in the initial Proposal required judges to have unqualified confidence in the local pretrial services program, and so the Committee worked for over one year to enhance that program's presentation of defendants' pretrial risk information, its overall management of defendant behavior while on supervision in the community, and its responses to defendant violations.

Likewise, many important discoveries during this one-year period led to immediate implementation of processes designed to better reflect the system's goals. For example, when Committee members learned that occasionally defendants ordered to GPS monitoring were being released from jail without a monitor and had the potential to not show up for their pretrial supervision intake, jail officials began holding those defendants at the Detention Facility for a short time until they could be fitted with the device. The work improving the functions of the local pretrial services program was time-consuming but fruitful. Accordingly, at roughly the same time the Committee was completing that work, the judges announced that they were ready to test some of the other recommended improvements from the Proposal, such as suspending the bond schedule, holding weekend advisements, and fostering a presumption of release on recognizance.

EXPERIMENTATION AND EVALUATION

In the spring of 2009, the judges announced that they were willing to embark on a fourteen-week pilot project which was ultimately named the "Bail Impact Study," which was designed to measure the impact of certain changes to the administration of bail in Jefferson County. This judicial leadership was fitting, given judges' important role in any bail reform efforts. The crux of the administration of bail is the actual decision to release or detain a defendant, and it is (or should be) solely the judge's province to make and effectuate that decision, weighing public safety and concerns about court appearance with personal liberty and other constitutional principles in an individualized bail-setting process. A jurisdiction can create a highly effective and efficient pretrial services program, but underutilize it as a result of judges setting unattainable cash, property, or surety bonds. Thus, it was especially important for the criminal justice system to move at the speed most comfortable to the bench. In some jurisdictions, judges have thwarted bail reform by refusing to engage in the process, while in other jurisdictions, judges have acted to improve the administration of bail unilaterally, forcing the rest of the system to catch up and adapt. To their credit, the judges and other decision-makers in Jefferson County purposefully attempted to take a more systemic and collaborative approach.

Nevertheless, the authors of this paper emphasize that jurisdictions do not necessarily need pilot projects to make improvements at bail, and we believe now that Jefferson County decision-makers could have made significant strides toward pretrial justice based on their review of the existing literature. Indeed, some of the most aggressive improvements in the administration of bail in America have come without the need to "find out for ourselves" whether those improvements are necessary, worthy, or risk-free. In 1963, for example, Robert Kennedy instructed all United States Attorneys to recommend release of defendants on their own recognizance "in every practical case" without first testing the practice in the federal courts.[17] States such as Illinois effectively eliminated commercial sureties without first trying it out in a pilot project.[18] Likewise, although the Jefferson County Proposal provided additional justifications for questioning the use of monetary bail bond schedules, a straightforward reading of the United States Supreme Court's opinion in *Stack v. Boyle*[19] should compel any court to do so. Moreover, logic should suffice to find agreement that universal assessment of all defendants for risk is superior to potentially letting high risk defendants out of custody based solely on their ability to pay some amount of money found on a bail schedule. Finally, the local head of the Jeffer-

17 *See National Conference on Bail and Criminal Justice, Proceedings and Interim Report* (Washington D.C. Apr. 1965) at 297.

18 *See id.* at 240-246; *see also* Wayne H. Thomas, Jr., *Bail Reform in America* (Univ. CA Press 1976) at 183-199.

19 342 U.S. 1 (1951). In *Stack*, the Supreme Court wrote: "Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant." The "standards" referred to by the Court were those found in Federal Rule of Criminal Procedure 46, which listed criteria for setting the amount, including the nature and circumstances of the offense charged, the weight of the evidence, the character of the defendant and his ability to pay – individualized criteria like that found in most state bail statutes today. In his concurrence, Justice Jackson observed that if the bail in *Stack* had been set in a uniform blanket amount without taking into account differences between defendants, it would be a "clear violation" of Rule 46. Bail schedules typically set non-individualized blanket money amounts based on charge alone, which bypasses any individualized bail-setting standards the state has enacted pursuant to *Stack* as necessary for limiting pretrial freedom, thus creating government action that is both constitutionally suspect as well as a potential violation under state statutory law.

son County Public Defender's Office could surely have insisted on a pilot to test whether defense counsel at bail would improve pretrial justice, but she did not; her decision to staff advisements was made on the basis of logic, the law, and evidence found in secondary research sources that was not tested locally.

Nevertheless, Jefferson County justice leaders were committed to testing and documenting the local impact of the proposed improvements at various levels before they committed to permanent change. Accordingly, Chief Judge Order 2009-09 authorized the Bail Impact Study to commence January 2010. Prior to the official start of the study, CJP staff collected data for six weeks of bail settings under current practices (including the use of a monetary bail bond schedule) to gain information about current practices and to obtain certain baseline data for comparison.[20] This led to the operation of a one-week "pre-pilot project," which was designed as a dress rehearsal for the fourteen-week study and which, had it not been successful, would likely have precluded the longer pilot. During that week, CJP staff collected additional data as the judge set bail according to a newly drafted process document that reflected the national standards on pretrial release. To the extent that this pre-pilot week was intended to show that system improvements to the administration of bail were even possible, then it was a considerable success. Nevertheless, it illuminated several logistical issues requiring attention before the justice system could undertake the next phase of the study on a larger scale.

The overall purpose of the Bail Impact Study was to measure whether better adherence to the national standards on bail and pretrial release, as well as to state and federal law, would impact the criminal justice system's ability to reasonably manage the risk to public safety and for failure to appear for court posed by defendants during the pretrial phase of their cases.[21] The hypothesis behind the study was that better adherence to the law and national standards would result in acceptable public safety, court appearance, and pretrial jail bed use outcomes. This purpose and hypothesis thus required analyses of the data on two fronts: (1) what were the observed procedural and behavioral changes toward better adherence to the law and the national standards (i.e., process measures); and (2) what effect did the changes have on public safety, court appearance, and pretrial jail use (i.e., outcome measures).

Major procedural changes to the administration of bail put in place for the fourteen-week study included the following: (a) suspension of the money bail bond schedule and other delegated release authority, with all defendants arrested for new crimes being held until they saw a judge; (b) assessment for risk of failure to appear and public safety of all

20 All bond setting judges were observed (for two days per week each) for the baseline period, except for the one judge who took part in the pre-pilot test week.

21 Chief Judge Order 2009-09: *In the Matter of the Jefferson County Bail Impact Study* (Dec. 22, 2009). This statement of purpose was also articulated in documents used to obtain an Edward Byrne Memorial Justice Assistance Grant through the U.S. Department of Justice's Bureau of Justice Assistance and the Colorado Department of Criminal Justice – Grant No. 29-JR-02-12-1, Grant Program No. 2009-SU-B9-0020 [hereinafter JAG Grant] which helped to fund the study.

defendants arrested for new crimes by the pretrial services program; (c) advisements every day, to include weekends and holidays; (d) public defender representation of felony defendants (at the time, state statute disallowed representation on misdemeanor offenses, but the public defender gave those defendants collectively some general instructions concerning bail); (e) implementation of different protocols for the Detention Facility and the Court Clerk's Office staff to facilitate the various changes; (f) changes to protocols of pretrial supervision; and (g) use of a new "process and schedule," guiding judges toward making meaningful release and detention decisions that follow legal and evidence-based practices, including decisions surrounding money at bail.

Prior to the study, CJP staff provided information to all, and met with most, of the fourteen judges who participated in the study. Staff provided relevant reference material and discussed the study's proposed changes designed to impact certain behaviors, including using less secured money bonds in general, and less commercial surety bonds in particular. Staff also met and provided similar information to the District Attorney's Office, the Public Defender's Office and the Colorado Criminal Defense Bar. During the study, CJP and Pretrial Services staff collected data on over 300 variables for over 1,200 cases during the study period, including advisements from fourteen weeks, thirteen weekends, and two Monday holidays. Whenever possible, data from the fourteen-week study were compared to data collected during the six-week observation baseline portion of the Bail Project performed several months prior. Given the nature of bail and the critical importance of the administration of bail and pretrial release, the Bail Impact Study was not, and could not be, a fully randomized and controlled experiment. Nevertheless, due to the nature of bail setting in Jefferson County and the varying levels of behavioral changes among the judges, the study allowed for robust analyses of public safety, court appearance, and pretrial jail bed usage (derived from bond posting rates) using a quasi-experimental design.[22]

22 Judges in Jefferson County rotate through the task of bail setting at first advisements with each judge taking a full day or full week at a time and with no control over case types or caseload. This official court procedure, in effect, created random assignment of cases among the judges during the study. While all judges saw similar cases, one group of judges set more unsecured bonds and fewer secured bonds, while another group set more secured bonds, with an emphasis on surety-option bonds and fewer unsecured bonds, thus making possible meaningful comparison between the groups on public safety, court appearance, and pretrial jail use. The official court procedure of judges rotating through bail setting at first advisements was also in place for the 2009 baseline and 2011 follow-up analyses. In addition to the quasi-experimental design employed in the study to determine the effect of bond type on pretrial outcomes, we also make some process comparisons between the baseline observation period, the study period, and the follow-up observation period. It was not possible to statistically control for chance or other confounding factors in comparing the results of these three observations. We believe that the difference in bond setting observed during the study as compared to the baseline and follow-up observation is most likely due to judges' efforts to purposely change their behavior for the study to determine impacts of change because the judges reported they made efforts to change their bond setting practices and no other reasonable explanation of the differences exists.

The final phase of the study involved analyzing the data and reporting back on the process and outcome measures.[23] The overall conclusion was that both the procedural changes as well as the behavioral changes by study participants demonstrated observable progress toward more closely following the law, the research, and the national best-practice standards on pretrial release. In the baseline observation, prosecutors recommended and judges set unsecured personal recognizance bonds 9% and 14% of the time, respectively. However, during the study, this percentage increased for both groups with prosecutors recommending PR bonds 16% of the time and judges setting PR bonds 30% of the time. When secured money was used, there was a shift away from commercial surety bonds. During the baseline, prosecutors and judges only recommended or set surety-option bonds[24] and never used cash-only bonds. However, during the study, prosecutors recommended cash-only bonds 20% of the time and judges set cash-only bonds 35% of the time.[25] Moreover, the results of the quasi-experimental study of judicial bond setting behavior showed that movement toward more legal and evidence-based practices could lead to higher release rates (and thus fewer pretrial jail beds used) with no measurable negative detriments to public safety or court appearance rates. These results, combined with the initial educational research, provided a powerful justification to continue moving forward with bail reform in Jefferson County.

23 *See Summary and Analysis of Bail Administration During Seven Weeks of Duty Division* (Oct. 21, 2009); *Jefferson County Bail Impact Study Midway Observations* (Feb. 23, 2010); *The Jefferson County Bail Impact Study: Initial Report on Process Data For the System Performance Subcommittee* (July 23, 2010). All three of these documents were prepared by the Jefferson County Criminal Justice Planning Unit and are public documents available from the authors or from Jefferson County. Outcome data was reported less formally, through meeting presentations and later through memorandums to stakeholders; however, a more formal and comprehensive recitation of the primary outcome measurements for the Bail Impact Study is being published as a companion to this paper. Due to the broad scope of the various standards, the number and type of substantive changes chosen for study, and several additional questions that the CJCC wanted answered, CJP staff analyzed a significant amount of data. Some interesting data showed that: (1) judges coupled surety-option bonds with pretrial supervision in 31% of the cases ordered to pretrial supervision, a practice in contravention of both ABA and NAPSA Standards; (2) judges set surety-option bonds (from $2,000 to $50,000) in six cases in which the Pretrial Services Unit had indicated that the defendant was too high a risk and that "no condition or combination of conditions" would suffice to reasonably manage the defendant in the community; (3) when defendants or their non-attorney advocates spoke about bond, they mentioned the merits of their cases 28% of the time, discussed relevant bail setting factors 80% of the time, but requested a specific bond type only 24% of the time; (4) when prosecutors spoke, they discussed the defendant's criminal history and/or affidavit for warrantless arrest in 84% of cases, but discussed other risk components from the Pretrial Services Unit's report in only 17% of cases; (5) when public defenders and private attorneys spoke, they discussed criminal history, affidavit, and other risk factors in almost equal measure – at 62% and 56% of all cases that they represented, respectively; (6) prosecutors also discussed information that was not already before the judge in only 5% of cases, but public defenders did so in 26% of cases and private attorneys did so in 53% of cases; and (7) non-attorney parties spoke against defendants at bail setting in only two cases (less than 1% of the total). These data were informative in answering specific questions about judicial action and intention, the need for defendant representation, the utility of bond arguments generally, and the need to make accommodations at bail hearings for groups who rarely, if ever, attend them (e.g., victims).

24 A surety-option bond includes both rarely used surety-only bonds, where the defendant must contract with a bondsman to secure the amount with the court, and the more frequently used combination cash/surety bonds, where the defendant has the option to either pay the full amount in cash or pay a bondsman to secure the amount with the court.

25 The percentage of bond types set during the Impact Study was calculated for all judges. However, because one judge's data were not included during the baseline observation period, this judge's data were also excluded from the Impact Study. Whether this judge's data were included during the Impact Study time period or not, the aggregate percentages of bond types set are within one percentage point or less. Thus, this judge's exclusion does not explain the observed differences in the types of bond set during the baseline and Impact Study time periods.

The Bail Impact Study was important, yet it represented only one part of the larger Bail Project's overall process of education and movement toward pretrial reform. Despite the overall success of the study, it also illustrated that there was room for improvement. For example, during the study, judges were still setting mostly secured money bonds,[26] and arguments at bail still focused largely on financial conditions. CJP staff identified three primary obstacles to improvement: (1) some decision-makers' perceptions that release on recognizance with an unsecured amount of money, and with potential pretrial supervision, was too "lenient" a response in certain cases; (2) routine use of practices associated with the traditional money bail system; and (3) the inevitable inconsistency resulting from inclusion of so many different participants (multiple judges and attorneys) in the bail-setting process.[27]

26 Although 96% of Bail Impact Study cases were legally eligible for unsecured (PR) bonds, and 66% of the study cases remained statutorily eligible without needing prosecutor consent, judges set PR bonds in only 30% of cases.

27 For example, individual judges set: PR bonds in as few as 23% of cases, and as many as 75% of cases; cash-only bonds in as few as 20% and as many as 76% of cases; and surety-option bonds in as few as 0% and as many as 48% of cases. Amounts of money for each type of bond also varied. For cash-only bonds, the minimum set by different judges ranged from $10 to $200, and the maximum ranged from $500 to $1 million, with the most commonly set amount ranging from $100 to $1,000. For surety-option bonds, the minimum ranged from $100 to $10,000, and the maximum ranged from $10,000 to $500,000, with the most commonly set amount ranging from $1,000 to $50,000. The data revealed that attorneys at bail hearings also varied in the types of bond and amounts requested. For example, individual prosecutors requested: PR bonds in as few as 0%, and as many as 43% of cases; cash only bonds in as few as 0% and as many as 85% of cases; and surety-option bonds in as few as 0% and as many as 86% of cases. Public defenders requested: PR bonds in as few as 17% and as many as 47% of cases; cash-only bonds in as few as 0% and as many as 36% of cases; and surety-option bonds in as few as 0% and as many as 18% of cases. It is important to note that judicial and attorney variation was also observed and measured during the 2009 six-week baseline observation when the monetary bail bond schedule was in place. This baseline data showed that there was a range in the percentage of PR bonds set from approximately 6% to 24%, and the most commonly set surety-option amount ranged from $2,000 to $10,000. Similarly, the three attorneys from the District Attorney's Office recommended PR bonds in different proportions (5%, 9%, and 19%) and the most commonly recommended surety-option bond amount also varied between each attorney ($1,000, $5,000, and $10,000). Overall, these observed variations appear to be due to the use of multiple judges and attorneys generally, despite whatever perceived consistency the bond schedule could have afforded the system.

IMPLEMENTATION

In November 2010, the CJCC took all that it had learned from the pilot project, from both national and local research, from numerous philosophical discussions about bail, and from the Committee members' independent knowledge, and collectively wrote that it

> found, through legal and social science research [that the] administration of bail is currently driven by a mixture of risk-based and cash-based (i.e., secured bonds) determinations, but also found, during the 14-week Bail Impact Study, that movement toward a less cash-based system (consistent with Colorado law and maintaining full judicial discretion) with enhanced pretrial risk assessment and supervision resulted in no observable difference in public safety or court appearance outcomes. These local findings are consistent with national research.[28]

The CJCC voted to create a Bail Implementation Team to implement permanent practices consistent with these findings, and the Chief Judge of the judicial district quickly created that Team. The Team met several times to work out some final details leading up to the issuance of an order by the Chief Judge on March 23, 2011, which was designed "to pursue improvements to the administration of bail believed to be consistent with legal and evidence-based practices identified through the [Jefferson County Bail Project]."[29] Specifically, the Order permanently terminated the previous money bail bond schedule and replaced it with a new "process and schedule" reflecting principles articulated in the national standards. The Order noted that the improvements "represented significant movement toward adherence to best-practice national standards on the administration of bail and the pretrial process."[30]

28 This language was presented to the CJCC by its System Performance Subcommittee in the "Proposed Action Item for System Improvement," which was approved by a near unanimous vote (one member dissented), during a public meeting on November 17, 2010.

29 Chief Judge Order 2011-02: *In the Matter of the Jefferson County Bail Project* (March 23, 2011).

30 *Id.*

Like the process and schedule used for the study, this new permanent process and schedule created an alternate mechanism for assessing defendants, holding first advisements, and providing community-based supervision, which was guided by an overall system philosophy that supported individualized, risk-based bail determinations with less emphasis on money. For the most part, the permanent changes mirrored the study's temporary changes: (1) elimination of the money bail bond schedule and other delegated release authority, with all defendants arrested on new crimes held until they are seen by a judge; (2) assessment of those defendants by the pretrial services program for risk to public safety and for failure to appear; (3) weekend advisements (albeit only one day per weekend); (4) felony defendant representation by the Public Defender's Office;[31] (5) implementation of different protocols for the Detention Facility and the Court Clerk's Office staff to facilitate the various changes; and (6) changes to protocols of pretrial supervision. These were significant changes to the administration of bail in the jurisdiction, and a clear shift away from the traditional money bail system. In May of 2011, the changes were significant enough to report to the National Symposium on Pretrial Justice that the Jefferson County Bail Project was an example of a local-level success.[32]

Throughout the spring, summer, and fall of 2011, CJP staff collected additional data to determine whether the various approved changes articulated in the Chief Judge Order were being fully implemented. Funded partially by a state grant, and as requested by the Bail Implementation Team, these data collection efforts focused chiefly on the use of money at bail.[33]

During that phase of research, CJP staff found that in addition to implementing these procedural changes, the criminal justice systems' mindset had appeared to change to one that now questions the use of monetary conditions and places more focus on appropriate non-financial conditions crafted to provide reasonable assurance of public safety and court appearance. In the fall 2011 observational follow-up to the study, CJP staff noted that the Public Defender's Office had continued to represent felony defendants, and that prosecutors had continued to recommend personal recognizance bonds and had considerably reduced their recommendations for commercial surety bonds as compared to their pre-study recommendations. Judges also continued moving away from the traditional money bond system by setting substantially fewer surety bonds than before the study.[34] Staff also noted that one judge in particular continued the practice observed during the study of consistently explaining, on the

31 While not a requirement in the Order, the Public Defender's Office continued this study practice.

32 *See Project Summary, supra* note 11.

33 Grant funding supported a bond review analysis of cases advised from April to September, 2011 which was conducted by Pretrial Services staff (*see* JAG Grant, *supra* note 21). In addition, in the fall of 2011 CJP staff conducted a similar observation of the bond-setting process as that completed for the Project's 2009 baseline analysis.

34 Prosecutors recommended surety-option bonds 19% of the time in the 2011 follow-up as compared to 58% in the pre-study baseline. Judges set surety-option bonds 17% of the time in the 2011 follow-up as compared to 84% in the pre-study baseline.

record, the court's rationale for choosing one monetary amount over any other (typically tied to the defendant's financial condition).[35] Additionally, the release rate for defendants within 48 hours of bail setting was actually higher the year after the study than during the study itself.[36] Further lasting improvements include the Pretrial Services Program's implementation of a statewide empirically-developed risk assessment instrument, which it uses for all arrestees.[37]

Nevertheless, there is still more to do to fully implement the recommendations resulting from the CJCC's Bail Project. During the 2011 follow-up observation, CJP staff found that the bail-setting judges had switched from using one form of secured bond (surety-option) with another (cash). For a number of reasons, including Colorado's less than desirable bail statute in place at the time,[38] a "low" cash bond could sometimes be the best secured-money option to facilitate a defendant's release. Further analyses by CJP staff showed, however, that the judges were setting cash-only bonds in amounts that many defendants could not meet.[39] During the Bail Impact Study, which guided judges' decision-making toward principles articulated in the national pretrial standards, the judges substantially increased their use of personal recognizance (PR) bonds (that is, bonds that did not require money to be paid up front to obtain release) from 14%, during the baseline observation, to 30%, and reduced their use of surety-option bonds (requiring money to be paid up-front, usually by a bondsman, to obtain release) from 84%, during the baseline observation, to 32%. In the fall of 2011, however, operating under the same process and sched-

35 This is important as arbitrariness in setting conditions at bail in a general sense typically stems from finding no rational reason for connecting the conditions to the individual defendants. Financial conditions suffer also from arbitrariness by degree; even if a judge may be able to articulate why he or she believes that money generally is an appropriate condition of release for a particular defendant, that judge typically cannot explain why one amount has been chosen over any other.

36 The percentage of bonds posted within 48 hours of setting increased from 55% during the study to 64% in a 2011 follow-up analysis (from the bond review data gathered from April to September, 2011).

37 *See Colorado Pretrial Assessment Tool (CPAT): Administration, Scoring, and Reporting Manual, Version 1*, at 3 (PJI 2013), available at http://www.pretrial.org/download/pji-reports/CPAT%20Manual%20v1%20(rev)%20-%20PJI%202013.pdf; *The Colorado Pretrial Assessment Tool (CPAT): A Joint Partnership among Ten Colorado Counties, the Pretrial Justice Institute, and the JFA Institute, Revised Report* (PJI/JFA Oct. 19, 2012), at 5, found at http://www.pretrial.org/download/risk-assessment/CO%20Pretrial%20Assessment%20Tool%20Report%20Rev%20-%20PJI%202012.pdf.

38 Colorado's bail statute was significantly changed in 2013, partly because the prior law lacked many provisions of what might be considered to be a statute that encourages legal and evidence-based practices. For example, the prior law required money to be set on every type of bond, including personal recognizance bonds, it allowed prosecutors "veto-power" on personal recognizance bonds in certain cases, and it lacked provisions that would help assure defendants are not unnecessarily incarcerated due only to their inability to pay. The new law has corrected many, but not all, of the prior law's deficiencies.

39 The Bail Impact Study data showed that defendants in 43% of cases with a secured bond did not post it before case closure, and the 2011 bond review follow-up data revealed that 74% of those not posting bond within 48 hours reported that they had no ability to do so. This phenomenon is not new. In New York, author Jamie Fellner wrote, "Whether deliberately, inadvertently, or carelessly, judges usually set money bail at an amount the defendant cannot afford, as evidenced by the fact that defendants in only 10 percent of all criminal cases in which bail is set are able to post it at arraignment." Jamie Fellner, *The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City* (Human Rights Watch 2010), found at http://www.hrw.org/node/94581.

ule, those judges continued to reduce their use of surety-option bonds, but had also notably reduced their use of PR bonds and substantially increased their use of cash-only bonds on the majority of defendants.[40] This practice has resulted in an overall increase in secured bonds set, with 81% of the cases observed in 2011 having secured money conditions compared to 70% of bonds during the study. And thus, while the 48-hour release rate has improved, many of those who remain in jail have secured bond amounts of $500 or less.[41] If the provisions dealing with money at bail in the national standards on pretrial release can be summed up as attempting to get jurisdictions to move from secured bonds (requiring money to be paid up-front) to unsecured bonds (requiring money to be paid only after a defendant fails to appear), then these data suggest that the progress demonstrated toward reform in the use of money at bail has not been fully maintained.

These observations indicate the need for ongoing conversations around achieving the goals of pretrial justice articulated by the criminal justice system after several years of careful study because "[o]nly when effective practices and programs are fully implemented should we expect positive outcomes."[42] However, there is no formal process in place for continuing implementation discussions.

A growing body of implementation research hints at why Jefferson County justice system decision-makers have not fully replicated tested practices. One of the most thorough reviews of implementation literature suggests that the justice system's choice to rely primarily on information dissemination and minimal training necessarily meant that full implementation of the Project might not be realized. Instead, the literature suggests, effective implantation requires a "longer-term multilevel approach," including practitioner selection, skill-based training, and practice-based coaching.[43] Such an approach is crucial in systems, such as in Jefferson County, where the bench spreads the bail-setting function among many judges with multiple attorney participation. Other organizational change methodologies suggest steps for major change that were lacking in the Jefferson County effort. For example, Dr. John Kotter lists steps aimed at decreasing failure when organizations decide to make improvements, many of which were not present in Jefferson County.[44]

40 In the 2009 baseline observation, judges set cash-only bonds 0% of the time, but during the study and 2011 follow-up observation, they set them 35% and 63% of the time, respectively. Excluding the one bond setting judge not included in the baseline observation, judges set PR bonds 14% of the time in the baseline, 29% of the time in the study and 15% in the 2011 follow-up observation.

41 In September of 2012, approximately 100 presentenced inmates in the Detention Facility were held on bond amounts of $500 or less. Ninety additional presentenced inmates had bond amounts between $501 and $1,000.

42 Dean L. Fixsen, Sandra F. Naoom, Karen A. Blase, Robert M. Friedman, and Frances Wallace, *Implementation Research: A Synthesis of the Literature* (Univ. S. Fla. 2005) at 4 [hereinafter *Implementation Research*].

43 *Id.* at 70.

44 *See The 8 Step Process for Leading Change*, found at http://www.kotterinternational.com/our-principles/changesteps.

Step one involves establishing a sense of urgency. In Jefferson County, however, whatever urgency was first articulated through budget shortfalls and a rising jail population in 2007 had clearly faded by 2011. As another example, Dr. Kotter urges leaders to create the proper guiding coalition (with the "right composition, a significant level of trust, and a shared objective") to lead a change initiative, to ensure that as many people as possible understand and accept the vision of that coalition, and to continue with change efforts over the long-term. While Jefferson County had a strong coalition in the CJCC, some decision-makers lacked complete trust and a uniformly shared objective and vision. Additionally, while this collaboration continued through the initial implementation efforts of the Bail Implementation Team, that group has not sustained formal conversations around the administration of bail.[45]

In summary, Jefferson County decision-makers took creating a proper pretrial process and testing its effectiveness seriously and made great strides in achieving that goal. To continue its movement forward toward pretrial justice, County leaders must be as purposeful in implementing that process.

45 The Bail Implementation Team was created by the CJCC in 2011 and met several times early that year to work out logistical issues culminating in Chief Judge Order 2011-02 in March, 2011. It met one more time in early 2012.

LESSONS LEARNED

1. BAIL REFORM AND PRETRIAL JUSTICE INVOLVES SIGNIFICANT SYSTEM CHANGE, AND SYSTEM CHANGE CAN HAPPEN INCREMENTALLY WITHOUT BLAMING CURRENT SYSTEM ACTORS FOR "DOING IT WRONG."

This lesson involves accepting a mindset that the justice system needs constant management, that incremental improvement is always desirable, and that correctable system flaws can occur despite everyone's best intentions. Most American jurisdictions strive to protect public safety in a fiscally responsible manner. That means, as a practical matter, constantly reassessing criminal justice policies and practices to determine their relative worth based on the best information and research available. It means correcting flaws to the system, and it means not automatically blaming people or agencies for the need for corrective action.

In the NIC initiative titled, *A Framework for Evidence-Based Decision Making in Local Criminal Justice Systems,* the authors illustrate the concept of incremental improvement in complex systems through the following example in the medical field:

> A 2000 report by the Institute of Medicine (IOM) revealed that hospital errors across the nation resulted in a loss of nearly 100,000 lives each year. The report demonstrated that these mistakes did not result from individual incompetence, but instead were primarily the result of system failures. '*People working in health care are among the most educated and dedicated workers in any industry,*' the authors wrote. *'The problem is not bad people; the problem is that the system needs to be made safer.'*
>
> The IOM report propelled the medical profession into a state of alarm. Healthcare professionals had always viewed themselves as being *safe* and *saving* lives, not costing lives [but] the IOM report revealed . . . [that] actions on the part of medical professionals – and in some cases inaction – were actually *increasing* the death rate.[46]

While the IOM report was shocking to many in that industry, one key group, the Institute of Healthcare Improvement (IHI), viewed it as an opportunity. Based on that report, IHI launched the "100,000 Lives Campaign," proposed a method for reducing unnecessary deaths, and persuaded 3,100 of the nation's hospitals to participate. Within two years, IHI estimated that its program prevented 122,342 deaths.

The authors of the NIC initiative observe that the fundamental similarity between the IHI experience and various issues facing criminal justice systems is likely the goal of improving outcomes in the face of daunting challenges. Moreover, they list five specific premises of the IHI program that are pertinent to all criminal justice systems:

> (1) Things can be improved; (2) Improvement will come over time, through a succession of actions, each of which will provide the opportunity for learning; (3) better than the status quo is, by definition, 'better' and we should not wait to solve everything before beginning to improve some things; (4) we should be modest and realistic about our insights and abilities; and (5) but, we need to do something, because in the absence of informed action, nothing will change. And we can learn as we proceed.[47]

46 National Institute of Corrections, *A Framework for Evidence-Based Decision Making in Local Criminal Justice Systems* (Center for Effective Public Policy, Pretrial Justice Institute, Justice Management Institute, and the Carey Group, May 2010) at 7, found at http://www.cepp.com/documents/EBDM%20Framework.pdf.

47 *Id.* at 10, citing Jeffrey Pfeffer, Stanford Graduate School of Business, from the Stanford Graduate School of Business, *Institute for Healthcare Improvement: The Campaign to Save 100,000 Lives*, Case L-13, January 21, 2008.

These five premises are clearly applicable to bail reform and pretrial justice, and through their lens the Jefferson County Bail Project can be said to have accomplished its initial goal of identifying, implementing, and measuring system changes to provide further opportunities to learn and improve. When other jurisdictions make a conscious decision to undertake an examination of the bail and pretrial release process with an eye toward incremental improvement, they too will have created a foundation for achieving pretrial justice.

2. BAIL EDUCATION IS CRITICAL.

This lesson cannot be overstated: the more people know about bail and pretrial justice, the more inclined they are to act to rectify pretrial injustices and inefficiencies that have crept into the American system. Justice system leaders in Jefferson County, Colorado, would likely not have made the improvements in pretrial justice that they have without undergoing the extensive education effort that they did. For example, in the initial conversations on bail improvement, expanding the bond commissioners' authority to release defendants prior to seeing a judge was put forth as a potentially viable option to pursue. However, after educating themselves on the legal and evidence-based practices, justice system leaders instead decided to hold all defendants until they see a judge who can set their bail at first advisement, among other pretrial justice improvements.

This trend of movement toward improving bail administration with the benefit of education is also seen nationally. Over the last ninety years, a body of research literature has been amassed to a point where both criminal justice professionals and ordinary citizens feel less comfortable with the bail system's status quo and more comfortable with change. For several decades this research has pointed in a single direction, a direction that has been documented, embraced, and/or standardized by multiple national organizations, such as the American Bar Association,[48] the National Association of Pretrial Services Agencies,[49] the National District Attorneys Association,[50] the National Association of Counties,[51] the Association of Prosecuting Attorneys,[52] the American Council of Chief Defenders,[53] the International Association of Chiefs of Police,[54]

48 *See Standards for Criminal Justice, Pretrial Release*, ABA (3rd ed. 2007) *passim* (recommending less reliance on money and more reliance on evidence-based practices, such as risk assessment and pretrial supervision).

49 *See Standards on Pretrial Release (3rd Ed)*, Nat'l Assoc. of Pretrial Servs. Agencies (Oct. 2004) *passim* (recommending same).

50 *See National District Attorneys Association National Prosecution Standards* (3rd ed. 2010) at 55 (stating a "clear preference for release of defendants pending trial" and recommending release on least restrictive conditions).

51 *See American County Platform and Resolutions*, NACo (2010-2011) at 8-9 (favoring non-financial release and recommending policies and procedures aligned with state laws and national professional standards).

52 *Association of Prosecuting Attorneys Policy Statement on Pretrial Justice* (2011) (recognizing the value of pretrial services program functions and validated risk assessment instruments).

53 *American Council of Chief Defenders Policy Statement on Fair and Effective Pretrial Justice Practices* (June 4, 2011) (calling on defenders to examine the justice system to identify areas for improvement, implement best-practice standards, develop collaborative efforts to foster improvements, and develop effective pretrial litigation strategies).

54 *Law Enforcement's Role Leadership Role in the Pretrial Release and Detention Process* (IACP, BJA, PJI, Feb. 2011), at 13 (calling for greater police involvement "to help create rational and transparent release programs").

the American Jail Association,[55] the National Sheriff's Association,[56] and the National Association of Criminal Defense Lawyers.[57] Most recently, the Conference of State Court Administrators ("COSCA") issued a policy paper on evidence-based pretrial practices in which it calls for pretrial reform (including changes to state law) based on the legal and empirical research,[58] and the Conference of Chief Justices (made up of the highest judicial officers in all American jurisdictions) has expressly endorsed the COSCA position.[59] Indeed, the increasing call for the use of "evidence-based practices" or "best-practices" in the field of pretrial release testifies to the fact that these practices, based on this body of research, do exist and can be implemented. Virtually all of this research continues to demonstrate that current bail practice – based on the traditional money bail system – is deficient, and the more people know about that research, the history of bail, the national standards, and the law, the more they want to move toward reform.

The recommendations from the National Symposium on Pretrial Justice include special training for judges, who are fundamentally responsible for deciding who to release or detain pretrial. This training must be deep and continuous if it is to be meaningful, however, as "consultation and coaching" is one of the core implementation components of established implementation science.[60] A bail-setting judge should receive the same type of in-depth training as do drug court or other specialty court judges. The authors believe that such extensive education, training, and feedback would be beneficial based, in part, on the experience with the two judges most involved with the Jefferson County Bail Project. Although those two judges were not participating out of a pre-existing desire to improve bail administration, they took their participation seriously by fully educating themselves and critically examining the Project each step of the way. As a result, they were the most active in furthering the goals of the Project by employing and supporting legal and evidence-based practices.

55 *Resolution on Pretrial Justice* (AJA 2010) (calling for the use of the traditional pretrial services program functions instead of commercial bail bonds).

56 *National Sheriffs' Association Supports & Recognizes the Contribution of Pretrial Services Agencies to Enhance Public Safety* (June 2012) (stating that "a justice system relying heavily on financial conditions of release at the pretrial stage is inconsistent with a fair and efficient justice system" and calling for support of high-functioning pretrial services agencies).

57 *National Association of Criminal Defense Lawyers Resolution* (July 28, 2012) (endorsing several pretrial justice policies including following national best-practice standards, creation of pretrial services programs, limiting financial conditions of bond, and the abolition of commercial sureties).

58 *2012-2013 Policy Paper: Evidence-Based Pretrial Release*, (COSCA 2012).

59 *See Conference of Chief Justices Resolution 3: Endorsing the COSCA Policy Paper on Evidence-Based Pretrial Release* (2013) ("The Conference of Chief Justices . . . joins with [COSCA] to urge that court leaders promote, collaborate and accomplish the adoption of evidence-based assessment of risk in setting pretrial release conditions and advocate for the presumptive use of non-financial release conditions to the greatest degree consistent with evidence-based assessment of flight risk and threat to public safety and to victims of crimes.").

60 *See Implementation Research, supra* note 42, at 28.

3. SUSTAINED STAKEHOLDER COLLABORATION AND SUPPORT IS CRUCIAL TO REFORM.

Success with pretrial justice depends on collaboration, and although some bail reform can occur unilaterally in the face of obstruction, the most successful attempts have come from justice system actors working together. While education is critical, and opposition within the justice system can almost always be reduced with information,[61] unanimous collaboration may not be feasible and thus the system's reaction to dissent and opposition can also be critical to meaningful progress. For example, the Jefferson County Bail Project had one criminal justice agency voicing dissent throughout the process, and thus the process likely took longer because of the time criminal justice system decision-makers spent to address the repeated questions and concerns from this agency,[62] which, in the end, remained opposed to the project.[63] Despite this opposition, however, the Jefferson County Bail Project succeeded in making great strides toward pretrial justice because it was done with near unanimous collaboration.

This collaboration must be deep and sustained, however, to be meaningful and effective. The support any particular jurisdiction enlists for pretrial improvements must go beyond one or two "champions" of reform. To be successful, jurisdictions should take care to develop multiple system leaders, and at various levels within the various agencies, who all share the same vision and commitment to full and sustained realization of that vision. The Jefferson County Bail Project largely succeeded in the ways it did because it had (1) a strong coalition of high level decision-makers and operational staff working together, and (2) a Chief Judge, who was also the CJCC Chair, who educated himself, thought through the critical issues, engaged other judges and decision-makers, and publicly and privately encouraged and supported others' efforts, all while requesting due dates for major steps. The culmination of this work was the Chief Judge Order making permanent the changes envisioned by the Project and tested in the study. However, since then the regularly scheduled, formal collaborative discussions have not continued around bail administration and the Chief Judge is no longer involved as he left the jurisdiction when he was appointed to the federal bench in 2011. While system leaders have continued with many improvements to bail administration in Jefferson County, these changes in leadership and formal collaborative efforts may have contributed to the incomplete implementation of all the practices envisioned and tested in the Project.

61 Opposition *outside* of the justice system from the for-profit bail bond industry is probably inevitable in those states that still allow the industry to operate. In Jefferson County, the bail insurance companies ultimately publicly opposed parts of the Bail Project that affected their ability to make money. When it comes to bail bondsmen and the insurance companies that profit from the money bond system, the lesson learned is simple: they will actively oppose any jurisdiction's attempt to reduce its reliance on money at bail.

62 There are now several examples of jurisdictions, some in Colorado, making significant improvements to the administration of bail in far less time than Jefferson County, Colorado.

63 This was perhaps due to the fact that the agency head was not directly involved in the working group devoted to the Bail Project. This opposition has continued after the Bail Project's study. For example, while the jail's population has been increasing recently, it is nearly all due to the rise in sentenced inmates. Nevertheless, this agency has publicly and inaccurately stated that the pretrial population is the source of this increase, and has attributed that false notion to changes made pursuant to the Bail Project. This agency has also lobbied the court to re-instate the money bail bond schedule.

4. DON'T BACK DOWN FROM A DECISION TO IMPROVE; RISK IS INHERENT.

Bail reform can be a highly-charged, political endeavor and jurisdictions may not recognize that their decision to improve pretrial practices can lead to extreme pressure to reverse course. In Jefferson County, several people expressed anxiety with their decision to change because of the perceived risk. With any process of system change, however, it is important to recognize that while a proposed new course of action may not be able to guarantee one hundred percent success, the changes may provide the same or better protections as the previous system while achieving other worthy goals. Other concerns expressed by Jefferson County decision-makers included the potential fallout from commercial bail bondsmen and other opponents to pretrial reform, and the potential media coverage of high profile portrayals of pretrial failure. However, there were also those in the system who became steeped in the law, research, and best-practices and, as a result, were able to confidently explain their decision-making processes and moved forward despite the potential for opposition. Within this lesson, jurisdictions should recognize three things: (1) bail reform and pretrial justice will inevitably lead to opposition – from those who simply want to maintain the status quo to those who openly fight reform to maintain their ability to profit off of the system; (2) systems should move toward better practices when they are identified, and should not wait for failsafe guarantees before taking action; and (3) some defendants will inevitably fail pretrial, so jurisdictions should be ready to support each other with public statements explaining why the system chose to implement a new way to administer bail based on principles that are rooted in the law and research and that are focused on risk versus money. As Justice Jackson explained in his concurring opinion in *Stack v. Boyle,* pretrial risk is inevitable to maintain a system of justice that keeps the government from locking up everyone merely accused of a crime.[64] Indeed, he wrote, "Bail . . . is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty."[65] It is up to each American jurisdiction to learn enough about bail to fully understand these words and to adequately explain them to the public.

5. IMPLEMENTATION REQUIRES ITS OWN PROCESS.

To the extent that the Jefferson County Bail Project has been defined as a success, it is because justice system decision-makers methodically explored issues at the pretrial phase of a criminal case and came up with a proposed set of practices that, when implemented, would provide better adherence to the law, the research, and the national standards on pretrial release while not diminishing public safety or court appearance rates. To the extent that the Project has stalled, it is because the jurisdiction has not approached long-term implementation of those practices with the same level of detail and intensity. The jurisdiction primarily relied on information dissemination alone to support its implementation efforts. However, the implementation literature indicates that this method is ineffective.[66] A more effective implementation strategy would include a more thorough, formal, longer-term approach and commitment to incorporating skill-based training, practice-based coaching, and evaluation.

64 342 U.S. 1, 8 (1951).

65 *Id.* At 7-8.

66 *Implementation Research, supra* note 42, at 70.

CONCLUSION

In his now famous dissent in *New State Ice Co. v. Liebmann*,[67] Justice Brandeis made the following comment concerning the role of the states in our federal system of government: "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." To Brandeis, the advances in natural and social sciences were largely due to experimentation – "The discoveries in physical science, the triumphs in invention, attest to the process of trial and error." And in the federal system, he wrote, the states could create and implement these experiments without risk to the country as a whole, discarding ineffective strategies while searching for solutions to the nation's most vexing problems.

The concept of state government laboratories experimenting with novel economic or social experiments is a concept easily adapted to criminal justice systems and particularly to bail. Moreover, the concept can be applied to any local governmental entity; states can serve as laboratories for the federal government, counties can serve as laboratories for the states, and cities can serve as laboratories for the counties. Indeed, within local government there often exist experimental practices by individual members of a larger criminal justice entity, such as a single judge experimenting with a novel bail setting practice. Sometimes, the smaller initiatives are created with broader applications in mind, and the experimental nature of the project is apparent. This is the essence of the Jefferson County Bail Project, a project aimed at improving pretrial justice in one county laboratory, but which may spark debate, exploration, and reform in similar county laboratories in Colorado and across America.[68]

67 285 U.S. 262 (1932).

68 In an effort to inform considerations of generalizability, we present some demographic data of the pretrial cases in Jefferson County. All cases requiring an advisement during the course of the Bail Impact Study were included. Of the over 1200 cases that were advised and bond was set during the 14-week pilot project, 79% were male and 21% were female. Fifty-two percent of the cases involved a felony top charge and 48% involved a misdemeanor/traffic top charge. The category breakdown of the top charge for these cases are as follows: 51% were for crimes against a person, 17% were for crimes against property, 13% involved a traffic or DUI offense, 12% were for crimes involving drugs, 5% involved compliance issues, 1% involved weapons, and < 1% were for other types of offenses. At the time of advisement, 39% had only one charge, 27% had two charges, 15% had three charges, 9% had four charges, 5% had five charges, 3% had six charges, and 2% had seven or more charges.

ABOUT THE AUTHORS[69]

Timothy R. Schnacke served as a planner/analyst for the Jefferson County Criminal Justice Planning Unit during the Jefferson County Bail Project. He is currently the Executive Director of the Center for Legal and Evidence-Based Practices in Golden, Colorado. He has a law degree from the University of Tulsa, a master of laws degree from the George Washington University, and a master of criminal justice degree from the University of Colorado at Denver.

Claire M.B. Brooker has served as a criminal justice planner/analyst for the Jefferson County Criminal Justice Planning Unit since 2007. She has a bachelor's degree in political science from St. Norbert College and a master's degree in public policy from the University of Colorado at Boulder.

Michael R. Jones served as the criminal justice planning manager for the Jefferson County Criminal Justice Planning Unit during the Jefferson County Bail Project. He partnered with Tim Schnacke and Claire Brooker to serve as staff support to the jurisdiction's criminal justice coordinating committee as it worked on the Bail Project. Before the Project was completed, he left his position to join the Pretrial Justice Institute to work on similar efforts nationwide. He has a Ph.D. in clinical psychology from the University of Missouri-Columbia.

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