A Framework for Implementing Evidence-Based Practices in Pretrial Services

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Over the past 40 years, most states and the federal government have re-written statutes pertaining to the pretrial release decision with the purpose of introducing four major changes.

- The first change was to define all the factors that the judicial officer is to consider in making the pretrial release decision.
- The second was to define the range of options for pretrial release that are available to the decision-maker, including several non-financial release conditions.
- The third was to create a presumption of release on the least restrictive conditions.
- The fourth was to include danger to the community as a second consideration in the bail decision, to go along with appearance in court.

Many jurisdictions throughout the country established pretrial services programs to help the courts implement these changes. These programs interview and investigate defendants shortly after arrest, gathering the information that statutes require the court to consider, such as prior criminal history, family ties, length of residence in the community, and home and employment status.

Based on that information, pretrial services officers assess the risks of danger to the community and failure to appear, and they make recommendations to the court regarding the least restrictive release conditions reasonably calculated to assure the safety of the community and appearance in court. Most programs also supervise compliance with release conditions set by the court. Pretrial programs, like other publicly funded efforts, are under increasing pressure to show that they are using evidence-based practices in performing these functions.

Reviewing the Pretrial Research on Evidence-Based Practices

While pretrial services programs have been around for decades, research to identify evidence-based practices within these programs is "significantly limited."[1]

1. Marie VanNostrand, *Legal and Evidence-Based Practices: Application of Legal Principles, Laws, and Research to the Field of Pretrial Services* (Washington, D.C.: National Institute of Corrections, 2007), 9, *http://nicic.org/Library/022398.*

Moreover, pretrial services as a field is lagging behind other entities in the criminal justice system in developing such practices.[2]

A number of fundamental questions exist for pretrial services as it works to identify evidence-based practices that are specific to this work.

- Of the factors that the court is required to take into consideration, which ones are the most important for attaining which goals?
- What weights should be given to each factor?
- Are predictors of risk consistent across jurisdictions?
- To what extent does prediction of risk depend upon demographic variables, e.g., male versus female, or white versus black versus Hispanic?
- How can agencies use assessments of risks to best manage risks?
- What options are most appropriate for what populations?
- What non-financial conditions work best for what populations?
- What supervision techniques or treatment interventions work, and for whom?
- What are the least restrictive conditions necessary to assure the defendant's good conduct on pretrial release?

This article presents a possible framework for developing research geared toward identifying evidence-based practices in pretrial services.

Starting with the Goals

In thinking about research on evidence-based practices in pretrial services, it is helpful to start with the goals of those services. While many different goals can be set forth, most can be synthesized into the following:

> ***The goal of pretrial services is to maximize rates of pretrial release while minimizing pretrial misconduct through the use of least restrictive conditions.***[3]

2. For example, the community corrections field has accumulated sufficient research to develop a model for implementing evidence-based practices. That model may someday be found to apply, at least in part, to the pretrial field, but the field needs significantly more research before such determinations can be made. For a discussion of the Community Corrections model, see: Elyse Clawson, Brad Bogue and Lore Joplin, *Implementing Evidence-Based Practices in Community Corrections*, Crime and Justice Institute, 2004. (Online at *http://nicic.org/Library/020174*.)

3. Variations of this definition of the goals of pretrial services have been used before. Here are a two examples: "Effective release may be most simply defined as decision practices that foster the release of as many defendants as possible who do not fail to appear in court at required proceedings or

This statement implies a balance between the interests and rights of the defendant and those of society.[4] Both sides of the balance must be considered. For example, pretrial programs that focus only on the goal of minimizing failure at the expense of maximizing release, by working only with low-risk defendants, will not contribute much to the research on evidence-based practices. By staying away from higher-risk defendants, pretrial programs will never learn what interventions may work with those defendants that would bring their risks to manageable levels.

Using the Standards as Objectives

Standard 10-1.10 of the Pretrial Release Standards of the American Bar Association[5] lays out the tasks that pretrial services programs should conduct. This standard can be viewed as the objectives for pretrial programs seeking to achieve the goals of maximizing release while minimizing misconduct.

Below are several of those tasks, or objectives, accompanied by issues that should be addressed in research to identify evidence-based practices.

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Present accurate information to the judicial officer relating to the risks defendants may pose of failing to appear in court or in threatening the safety of the community or any other person and, consistent with court policy, develop release recommendations responding to risk.

This standard speaks to the need for pretrial programs to validate their risk assessment instruments. Recognizing the importance of this, in recent years many jurisdictions have evaluated the risk assessment procedures of their pretrial programs, and this has resulted in a growing body of valuable research.[6] But many programs have never subjected their risk assessment procedures to rigorous study. A 2001 survey of pretrial programs nationwide found that half had never validated

commit crimes during the pretrial release period," John Goldkamp, "Judicial Responsibility for Pretrial Release Decisionmaking and the Information Role of Pretrial Services," *Federal Probation* 57(1), March 1993, 31; "Pretrial release policy in the American criminal justice system has two goals: (1) to allow pretrial release whenever possible and thus avoid jailing a defendant during the period between his arrest and court disposition, and (2) to control the risk of failure to appear and of new crimes by released defendants," Stevens H. Clarke, "Pretrial Release: Concepts, Issues, and Strategies for Improvement," *Research in Corrections* 1(3), National Institute of Corrections, 1988, 2.

4. For a thorough discussion of those interests and rights, see VanNostrand, *supra* note 1.

5. *ABA Standards for Criminal Justice: Pretrial Release*, Third Edition (Washington, D.C.: American Bar Association, 2007).

6. See, for example, Marcy Podkopacz, *Fourth Judicial District Pretrial Evaluation: Scale Validation Study* (St. Paul: Minnesota Judicial Branch, Fourth Judicial District, 2006); Marie VanNostrand, *Assessing Risk Among Pretrial Defendants in Virginia: The Virginia Pretrial Risk Assessment Instrument* (Richmond: Virginia Department of Criminal Justice Services, 2003); Qudsia Siddiqi, *Prediction of Pretrial Failure to Appear and an Alternative Pretrial Release Risk-Classification Scheme in New York City: A Reassessment Study* (New York: New York City Criminal Justice Agency, 2002).

their risk assessment tools.[7] Without validation of the risk assessment, pretrial programs do not know whether they are being more restrictive than necessary with some populations and less restrictive than necessary with others. In other words, they cannot assess their progress in reaching the goals of maximizing release while minimizing misconduct.

The standard's call for "accurate" information stresses something that can easily be overlooked in risk assessment validation—the need to make sure that staff gather and record information and then make assessments of risk in a consistent manner, accurately following the guidelines in all cases. One researcher with extensive experience in risk assessment validation has identified inter-rater reliability as one of the most important steps in evaluating the validity of risk assessment procedures.[8]

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Develop and provide appropriate and effective supervision of all persons released pending adjudication who are assigned supervision as a condition of release.

According to this standard, supervision must be both appropriate and effective. Implicit in this standard is that supervision should be matched to the risks posed by individual defendants. It may prove effective—in terms of low failure rates—to provide intensive supervision to defendants who have been assessed as having mid-level risks, but would it be appropriate? Would it be a good use of limited resources? Thus, research on evidence-based pretrial supervision practices should focus on identifying the most appropriate level of supervision required, as well as measuring the effect of the supervision. It should also address issues such as caseload sizes, and the knowledge, skills, and abilities required of supervision staff in order for them to adequately perform their duties.

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Develop a clear policy for operating, or contracting for the operation of, appropriate facilities for the custody, care, and supervision of persons released and manage a range of release options, including but not limited to, residential halfway houses, addict and alcoholic treatment centers, and counseling services, sufficient to respond to the risks and problems associated with released defendants in coordination with existing court, corrections and community resources.

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7. John Clark and D. Alan Henry, *Pretrial Services Programming at the Start of the 21st Century: A Survey of Pretrial Services Programs* (Washington, D.C.: U.S. Department of Justice, Bureau of Justice Assistance, 2003).

8. James Austin, "How Much Risk Can We Take? The Misuse of Risk Assessment in Corrections," *Federal Probation* 70(2) September 2006, 59.

Implicit in this standard is that interventions—such as drug and alcohol treatment or counseling—are effective in reducing risks of misconduct within pretrial populations. Many pretrial programs refer defendants to drug, alcohol, or mental health treatment or other types of counseling under the assumption that addressing defendants' needs will reduce the likelihood of pretrial misconduct. This assumption should be subject to rigorous research to test its validity and to identify discrete populations for whom these interventions have the greatest chances of success.

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Promptly inform the court of all apparent violations of pretrial release conditions or arrests of persons released pending trial, . . . and recommend appropriate modifications of release conditions according to approved court policy.

In order for responses to violations to be evaluated for effectiveness, it is first important to ensure that staff apply those responses according to defined procedures and in a consistent fashion. A major assumption in pretrial services is that defendants who fail to comply with conditions of release are at higher risk of endangering the safety of the public or failing to appear in court. Research on responses to violations should be designed to test the validity of this assumption.

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Supervise and coordinate the services of other agencies, individuals, or organizations that serve as custodians for released defendants, and advise the court as to their appropriateness, availability, reliability and capacity according to approved court policy relating to pretrial release conditions.

Many pretrial programs make use of "third party custodians" to help supervise defendants on pretrial release. The programs and activities of these custodians need to be evaluated for effectiveness just as much as in-house supervision operations. The same questions apply: Are program procedures followed in a consistent manner? What type of program works with what type of defendant? What is the ideal caseload size? What knowledge, skills, and abilities are required of these custodians to achieve low failure rates among those they supervise?

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Review the status of detained defendants on an ongoing basis for any changes in eligibility for release options and facilitate their release as soon as feasible and appropriate.

In many jurisdictions, defendants who do not make the "first cut" at the initial bail hearing and are sent to jail often are forgotten until their cases are over—or at least until their next court appearance. With research showing which of these

defendants can be safely released, pretrial programs can come closer to meeting their goals of maximizing release while minimizing pretrial misconduct.

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Assist persons released prior to trial in securing any necessary employment, medical, drug, mental or other health treatment, and legal or other needed social services that would increase the chances of successful compliance with conditions of pretrial release.

Many pretrial programs invest significant resources into providing treatment and other services based on the assumption that these services do increase the defendant's chances of success on pretrial release. However, one methodologically rigorous study from 1985 showed that providing such services to pretrial defendants on supervised release did not reduce failures to appear and rearrest any better than supervision alone.[9] More research is needed to determine if this finding—now more than 20 years old—holds up.

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Remind persons released before trial of their court dates and assist them in attending court.

In a 2001 survey, more than half of pretrial programs reported either calling or sending mail to defendants a few days in advance of their court appearances to remind them of when and where they are due in court.[10]

At least one jurisdiction has examined the impact of court date reminders. With failure to appear rates of over 25% for misdemeanor defendants who had been released by police on citation and given a date to appear in court, the Flagstaff Justice Court in Coconino County, Arizona, implemented a telephone reminder pilot project. The FTA rate for citation defendants fell to 13% when they received a reminder call.[11] More research on a wider population is necessary to gauge the effectiveness of different types of court date reminders.

9. James Austin, Barry Krisberg, and Paul Litsky, "The Effectiveness of Supervised Pretrial Release," *Crime and Delinquency* 31(4), October 1985.

10. *Supra* note 7.

11. Wendy F. White, *Court Hearing Call Notification Project* (Flagstaff, Arizona: Coconino County Criminal Justice Coordinating Council, 2006).

Interpreting Research Findings to Assimilate Outcomes Into Practices

It has been suggested that outcomes in pretrial release decisions and practices be measured according to effectiveness, efficiency, and equitable treatment of similarly-situated defendants.[12]

- Measuring effectiveness is very complex in light of the balancing that is required between maximizing rates of pretrial release and minimizing pretrial misconduct.[13] Can it be said that practices and procedures that lead to low failure rates are effective if they are accompanied by release rates that are significantly lower than those in other jurisdictions? There is no national benchmark that defines "optimal" or even "acceptable" pretrial release and misconduct rates.

- The balance between maximizing release and minimizing failure has implications for efficiency as well. Inefficiency occurs whenever defendants who could be safely released are held and when those who are released disrupt court proceedings by failing to appear as required.[14]

- The equal treatment of similarly-situated defendants is suspect when the only factor that decides which defendant is released pretrial and which remains in jail is their access to money to post a bail bond.[15] Thus, pretrial systems that rely heavily on money bail for release determinations will have difficulty measuring the effects of changes in practice that can be used with their full defendant population, if those changes are tested only against a skewed sample of defendants who can make bail.

The role that research can play in addressing issues related to effectiveness, efficiency and equitable treatment cannot be overstated. Through research, pretrial programs can identify interventions that work for one risk group and start applying those interventions incrementally to higher-risk populations—testing for effectiveness, efficiency, and equal treatment each step of the way—thus moving closer to the goal of maximizing release. In short, science will guide the way toward defining maximum release with minimum failure.

One final thought: research may also produce results that challenge long-held beliefs about what works in pretrial services. Pretrial practitioners have to be willing to abandon practices that are shown by research not to work. ♦

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12. John S. Goldkamp, Michael R. Gottfredson, Peter R. Jones, and Doris Weiland, *Personal Liberty and Community Safety: Pretrial Release in the Criminal Court* (New York: Plenum Press, 1995).
13. Ibid.
14. Ibid.
15. Ibid.