

Federal Judicial Center
Off Paper Episode 5

Mark Sherman: From the FJC in Washington, D.C., I'm Mark Sherman. And this is *Off Paper*.

Although the Eighth Amendment to the U.S. Constitution prohibits the government from requiring a criminal defendant to pay excessive bail in order to get out of jail before trial, almost half a million people across the country are in pretrial detention. The collateral consequences of detention can affect everything from a defendant's employment status to their mental health. At the federal level, reasonable bail has been administered under the Bail Reform Act, the Pretrial Services Act, and relevant case law for about 40 years. Although reasonable bail is also a right at the state level, the use of money bail has raised significant concerns about the system's fairness in many jurisdictions.

In response, several states have changed their laws to reduce the use of money bail. While that may be an improvement, it hasn't cured the problem of inequality in the system. For example, while money bail hasn't existed in the federal system for decades, federal pretrial detention rates remain stubbornly high even though the vast majority of federal defendants post relatively little risk of flight or danger.

In our last episode of *Off Paper*, we talked to our guests, Chris Dozier, chief U.S. Pretrial Services officer for the District of New Jersey, and Cherise Fanno Burdeen, chief executive officer of the Pretrial Justice Institute, about the connection between mass detention and mass incarceration and issues surrounding the use of risk assessment tools. This time I talked with Chris and Cherise about bail reform methods at the state level, issues regarding jails, and the collateral consequences of pretrial detention. So stay tuned folks. Back in a moment.

I'd like to start by focusing on the bail reform trends we've been witnessing at the state level because these really seems to be where a lot of the action is in criminal justice reform generally right now.

Cherise, if you could, just give us an overview of what's been happening in the states regarding bail reform. And particularly just in the different flavors of reform - the differences and similarities among what the states are doing, what seems to be going well, what's going less well, those kinds of things. Certainly, I'm also very interested to know more about the work of PJI and the work you're doing in this area both at the policy and practice levels.

Cherise Fanno Burdeen: Sure. Thanks, Mark. So for ease of kind of categorizing, I kind of just lump things into a

couple of buckets. So I'll first start with kind of the activity of bail reform that we've seen over the last couple of years. The first is litigation. And so we've seen over the last two years in particular a turn towards litigation at the state and local level that we haven't seen in decades, and in fact, haven't really probably ever seen. As many know or I hope know, there have only been really two Supreme Court cases that have dealt directly with the issue of bond or bail - one in the '60s and one in the '80s. And so here we are 30 years later and we're seeing this rash of litigation. The underpinning of the litigation, the argument in the litigation is essentially this, that it is a violation of equal protection under the Fourteenth Amendment to have essentially two systems of justice: one for people who can afford to post money bond and be released and the other for people who cannot.

And so the strategy - and I'm not an attorney - but in layman's words, the strategy is and has been that the organizations who are doing this litigation across the country are first and foremost really attacking bond schedules. Taking municipal courts and municipalities into federal court or now more recently taking state courts into federal court under the premise of this violation of the Fourteenth Amendment.

The big case to watch right now is Harris County, Texas. If folks hasn't seen it, Judge Rosenthal's opinion in the

preliminary injunction case of a couple of weeks ago or maybe longer now, maybe a month or so ago, upheld this notion that people should not be detained simply due to an inability to be able to pay. In another week or so, we'll see that case have another hearing in federal court and we're looking forward to the outcome of that case as well, the furtherance of that case. So litigation is a strategy and it's focused almost entirely on one particular element which is ability to pay. I'm going to come back to that in a minute.

Another bucket is legislation. So we're seeing in states across the country folks trying to address the practice of local county jail pretrial justice practices, local court practices at the state level. As with the federal system in every state in the nation there are a set of statutes that govern kind of how far local jurisdictions can implement legal and evidence-based practice before they bump up against something in their state statute or in their state constitution.

I'll highlight two things. One is that many states are what we call right to bail states. And so they have constitutions that include a provision or a right to bail in almost everything except capital offenses and treason. And what that means in practicality is that in many states you cannot detain someone pending trial unless they've been charged with a capital offense or some other number of delineated offenses that

have been put in statute over the years. So it's not a dangerous assessment. It's not moving in the direction of assessment instead of charge-based detention. And so the only recourse courts have is to set a money bond high enough that they think a defendant would not be able to make it. And we know that that is actually a not legal way of causing detention. It violates essentially the premise in *Salerno* that folks are entitled to a preventive detention hearing.

So we're seeing a lot of legislative activity across the country, people trying to improve their statutes. Sometimes they need to do a constitutional amendment in order to trigger those legislative activities. Sometimes they can just work within the existing constitution and push reform through legislation.

There's a danger, a little bit of a danger we're seeing in legislation across the country. One is that, sometimes the legislation itself gets kind of so watered-down through the compromised process or through the influence of the insurance industry or the bail bonding industry across the nation that you essentially end up with a piece of legislation that has little to no impact. That may be the best of the cases. Sometimes we're worried that they're actually going to result in more detention that we're seeing today. So you do have to really be

cautious about the way legislation gets kind of walked through these processes.

So legislation, so litigation and legislation, we are still seeing some pretty good outcomes in terms of legislation causing hearings and dialogue in states where they may not have ever had an opportunity to raise these issues among voters. So that's sort of a good byproduct of the legislative process. We're also seeing some federal legislation mostly just in terms of providing a grant program to states who want to move in the direction of legal and evidence-based practice. But mostly the legislative activity is happening at the state level. So litigation and legislation.

The next bucket I'll talk about is kind of court rules. So in many states, you see the statutes are either sort of, kind of pretty good and if courts were actually following this hierarchy of consideration where money is the last thing that should be considered. The courts are actually just doing what the statute allowed for. You might see better outcomes associated with unnecessary pretrial detention.

And so we've seen a move as of late of chief judges across the country really taking a leadership role putting together task forces or commissions that study the issue or issuing -- going so far as to issue court rules that direct the state court in implementing better practices.

We're seeing kind of an uneven implementation of that. I think to issue a court rule without the requisite judicial training and investment, long term investment in judicial education, will often result in little or uneven change across the state. So we're hopeful that as courts continue to take a leadership role across the country that it comes commiserate with judicial education about both the law and the science.

And as Chris mentioned at the top of this segment, research showing that you get better outcomes when you get as many folks out of jail pretrial who are manageable in the community. You'll have better case outcomes. And you'll also have long term outcomes. We think if we could implement bail reform across the country that in a matter of a time you will see reduced recidivism due to not destabilizing people who have factors that keep them connected to employment and housing and family.

And then the last bucket I'll mention is community engagement. So we're seeing more so than any time folks have attempted bail reform in the last 40 or 50 years, we're seeing in addition to for the first time real engagement among the judiciary across the country which is highly positive. We're seeing incredible community engagement. So these are things - everything from kind of community bail funds which are not new but have been part of reform efforts at different times in our

history, but really increased awareness and engagement in this movement of criminal justice reform that's being driven by communities. And so everything from Black Lives Matter to bail funds that I've mentioned, to really getting involved in increasing transparency of decision making at system actors across all levels. We're seeing more engagement than we ever have before. I think that's an incredibly positive trend and can really counterbalance a lot of the fear mongering that's being done by folks in support of the status quo money bond system.

So community engagement is an important strategy. And there's sort of no one way to do it. But there is an important component to system actors really engaging at the very grassroots level - communities who represent either victims or reentry or other kinds of community groups that care about issues of community health and vitality.

Mark Sherman: That's an extraordinarily helpful summary in terms of thinking about how we should we thinking about bail reform that's going on across the country. I counted four buckets: litigation, legislation, court rules, and community engagement. I just think that's an extraordinarily helpful way of categorizing all that's going on because there is so much going on.

And Chris, because you're from New Jersey and because you're involved in pretrial issues at the national level, I have to ask you first about how things seem to be going in New Jersey in terms of the recent state reforms to significantly reduce the use of money bail. And then certainly, I'm very interested to hear your views about bail reform nationally and where you think it's going.

Chris Dozier: Yes. So our New Jersey state bail reform has really been a huge effort. All eyes of the country have been on New Jersey. Prior to this year, New Jersey operated on a cash bail system, a bail schedule to set bail. And there has been, for some time, some grassroots efforts grumbling about the need for reform. Many of our former federal prosecutors went over to our state government like our governor, like our chief justice, many of our judges, prosecutors, attorneys general. When they got there, they realized that the state law did not afford them the authority and the flexibility to be bailed the way the federal law had and the way that they needed to.

So several things have taken place in recent years. There were some jail overcrowding cases. A study was commissioned by the Drug Policy Alliance with Dr. Marie VanNostrand. And the report was published around 2013 or so that demonstrated that a lot of low risk cases were languishing in prison. Most of them were pretrial, and many of them on very low amounts of cash

bail, while some dangerous and violent cases were posting out with no monitoring whatsoever because they had resources.

So that report really reflected that our state needed to move from a resource-based system to a risk-based system. And our chief justice established a reform committee with all stakeholders from all branches of government in the state. Our governor was on board and his response to violent crime was supportive of a constitutional amendment for preventive detention.

So in November of 2014, it was on our ballot. The voters voted it in. So preventive detention was incorporated into our bail laws. Pretrial services was established. Prior to then, there was no pretrial services. A risk assessment was required for the practice. It began this year, January of 2017. Our New Jersey Administrative Office of the Court has been implementing it since.

We've seen a 30-plus percent reduction in the jail population since it started. So that is phenomenal. We are waiting for more data in terms of outcomes by the failure to appear rate, the recidivism rate. But by all accounts, it is going well.

Now, that doesn't mean it's not without its challenges. It certainly is. But I think what has made it successful is, number one, all the branches got on board. They collaborated.

Our leaders and state government came together and had a vision and did all the outreach they needed to do. Number two, our administrative office really did a ton of outreach all over the country to other jurisdictions that had gone through reform so they could learn from their lessons. They continued to do outreach to the federal system to the state and local systems to get support. So there really has been a groundswell of support.

It's not without its challenges, of course. Some of these cases are working their way through our legal system. But it is certainly a massive reform that by all accounts has created a system that works much more effectively and brings more justice to our system. Very little if any money bond has been used. So we are happy what we're hearing in these early stages.

Mark Sherman: So it sounds like, Chris, that the change has really been quite stark. As I think you said, this is the first year that the reform has been implemented. It sounds to me, I mean I think you said a 30 percent reduction in the jail population. That's pretty extraordinary for a system that's only been implemented this current year.

Chris Dozier: It is extraordinary. It is a huge culture change. And I think the ongoing work working with some of the communities that, I think -- we hope to have a better understanding of what's really working out there. At our recent NAPSA conference, we heard from the head of the Pennsylvania

Department of Corrections a person who was a warden and he worked in jail saying that we need to divert people back into the community because there are better outcomes by doing that and partnering with services in the community. They established a Justice Reinvestment Initiative. So I think doing that type of outreach with our law enforcement community, with some of the other stakeholders so they have a better understanding of what is working is what it takes. And that's what they're doing. So yeah, it is extraordinary.

Mark Sherman: And I take it and this is important for us to clarify that with that 30 percent reduction in the jail population, there has not been observed a concurrent increase in terms of crime or the risk of danger to the community or that kind of thing. Is that accurate?

Chris Dozier: So that is what the second part of their data analysis and evaluation will entail. And they hope to have some good data on that by the end of the year. I'll say anecdotally, I'm hearing very good things.

The other concern was the -- really, the concern that there was going to be a huge amount of detention. And that hasn't happened I think because there was such a focus on that in educating our courts and our stakeholders that that was a pleasant surprise that came out of it, that there was not a lot of kneejerk reaction to using preventive detention because they

had it available to them. So hopefully, we'll have more of those outcomes to speak to toward the end of the year. I'm sure we'll be hearing more about it.

Mark Sherman: So last, I have to ask you both about jails and the collateral consequences of detention. In the federal system, some districts have a federal detention center where some services are offered. But some don't. And they have to resort to local jails to house federal detainees. It's well-known that local jails often provide no services or inadequate services. We've heard the horror stories, for example, about defendants dying in jail while in pretrial detention. We all know about the notorious Rikers Island in New York City. And the state of New York had decided to close that facility.

So Cherise, what do you see happening in jails that most concerns you? And on the other hand, are there any developments occurring with the jails that are positive and give you some hope for further improvement?

Cherise Fanno Burdeen: Well, I mean there's a lot in jail that concern me. So one of the other projects I'll mention that I think will be providing a lot of good research over the coming years is the MacArthur Foundation's Safety and Justice Challenge. So while Chris referenced this 30 percent reduction in jail population in New Jersey which I think the most astounding thing about that is that it isn't a single

jurisdiction that that is happening in. But that is an entire state court system, which is really unbelievable in terms of being able to have invested the time and resources it took to educate those stakeholders over a course of two years prior to implementation. The 30 percent reduction in jail population which is, you know, obviously predominantly people who are pretrial defendants who shouldn't be in there in the first place, we've seen that in jurisdictions like Allegany County or Lucas County, again which happens to be where Judge Carr is located. Santa Clara County, places in Kentucky, Denver. Some of these jurisdictions are involved in or this was happening prior to their engagement. But many of these jurisdictions are also involved in a sort of large scale project to change the way we think about unused jails in this country.

I think MacArthur in its examination of what was the criminal justice issue, adult criminal justice issue they wanted to turn their attention to, researched lots of areas in which they could have an impact on reducing mass incarceration and settled on a focus, a laser focus on jails for a number of reasons, including that that's where the vast majority of mass incarceration is happening. More people will serve time in a pretrial detention status than will serve time upon conviction. Only about 6 percent of defendants who are arrested at the local

level will ever go on to state prison. So it's a huge population. And most of that detention is happening pretrial.

So let's think about the local jail. Local jails had always been meant as a temporary holding facility. I mean in our nation's history, you went to jail pretrial as a prelude to, after conviction going on to state prison. For a variety of reasons, we had seen an expansion of the use of the local jail. Not just as folks are serving sentences there and now serving longer sentences.

So in California, after realignment, you see local jails housing people for years and years and years, and facilities that were never meant to provide 10 or 15-year housing options. It's a difficult place then to get services. It's an inhospitable place to detox. It is an almost impossible environment in which to receive mental health treatment. And yet, that's what we're asking of local jails.

So all that said, I think that it is even more imperative that only the people who really cannot be managed in any other way, who cannot be held accountable in any other way except to be in a secure jail should be in there. And I do think that the goal of a project like the MacArthur Foundation project but also other efforts being done by funders across the country is attempting to reduce the collateral consequence that people are experiencing.

Especially if -- and this is the last thing I'll say. So especially if I spend six weeks in jail pretrial. And then upon conviction, I'm sentenced to a couple of years of probation. What you will do with me as a system in those first few months after I get out of jail in my probation department with my probation officer is you will try to connect me to employment. You will try to help me get my housing restabilized. And you will focus on some of the contextual parts of my life - family connections and the like - all things that got disrupted when I was incarcerated pretrial potentially unnecessarily. So I think we have an opportunity to really avoid the collection of those collateral consequences that we then spend so much time trying to mitigate when someone is ultimately released back in the community.

Mark Sherman: Chris, some final thoughts from you on this subject of jails and collateral consequences and sort of drilling down on some of the things that Cherise has mentioned.

Chris Dozier: Yes. So I do see a trend in our federal system for more recognition of the collateral consequences of mass incarceration and the impact of mass detention upon mass incarceration. And I point to a couple of things that have really created the focus on it. One would be the *Booker* case. And in a post *Booker* world in our federal judiciary where the judges are no longer bound by guidelines but the guidelines are

advisory and they have more flexibility to look at things like pretrial adjustment in personal circumstances of a defendant standing before them.

Coupled with the Department of Justice's Smart on Crime Initiative which encourage prosecutors to have less focus on incarceration and charging the maximum and encouraging diversion and the reentry effort as well. I believe that really helps stakeholders see the challenges that offenders coming back into the community were facing with all those consequences Cherise mentioned - having no job, no benefits, no housing, and maybe lost their family support. Mental health stability may have been impacted. Their children not having their parent and what that means to future justice involvement.

I think our Department of Justice and the other stakeholders really came to appreciate through reentry all those issues. And those of us in pretrial started raising the question of if interventions are good for them post-conviction, why isn't it good for them earlier in the process.

As a result, we're seeing the focus in federal pretrial expand from alternatives to detention to really helping impact on incarceration as well. We've seen a proliferation of frontend diversion and problem solving courts come up in recent years. There's a lot of support for these courts. We see the result of the dialogue that this has created - more judges and

stakeholders being open-minded to more variances at sentencing, less incarceration, maybe no incarceration, because of those personal circumstances and those challenges. And a recognition that our ability to manage those challenges in the community has really improved. And our outcomes are really good.

So there's been a lot more focus on those issues. We do need some research to help understand the benefits. And certainly cost benefit is a concern. And so we see many of these districts working with the FJC and the administrative office and other agencies out there to do some research. The 20 plus chiefs have engaged in a chiefs' research group. My district has engaged with John Jay and five other pretrial offices to try to do some descriptive analysis and hopefully have some informative data about these specialty problem solving courts that are going on, and therefore be able to better inform policy and practice. So that's really been the trend that we're seeing and I don't think it's going away anytime soon.

Mark Sherman: Chris and Cherise, I want to thank you both very much for talking with us.

Cherise Fanno Burdeen: Thanks for having me.

Chris Dozier: Thank you.

Mark Sherman: Chris Dozier is the chief U.S. Pretrial Services officer for the District of New Jersey. And Cherise Fanno Burdeen is CEO of the Pretrial Justice Institute based in

Rockville, Maryland. *Off Paper* is produced by Paul Vamvas. The program is directed by Craig Batten [phonetic]. I'm Mark Sherman. Thanks for listening. See you next time.

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