

## THE NEXT STEP: BUILDING, FUNDING, AND MEASURING PRETRIAL SERVICES (POST-BAIL REFORMS)\*

GLORIA GONG\*\*

Bail reform offers a tantalizing promise: individuals who cannot afford bail but who will show up for court and pose no public safety risk will be able to return to their homes, families, and jobs instead of awaiting trial in jail. Bail reform may reduce the concentrated costs the criminal justice system imposes on poor people and communities, avoid unnecessary imprisonment and its attendant harms, and allow local governments to redirect scarce funds away from the machinery of incarceration toward prevention and reinvestment.

But to realize that promise, jurisdictions implementing bail reforms must navigate three implementation challenges that, unaddressed, threaten to undermine the reforms' success:

- 1) What system will local governments put in place in lieu of pretrial incarceration?
- 2) How will they pay for it?
- 3) How will they demonstrate to their stakeholders that the new alternative to pretrial incarceration is working?

Courts and governments considering transforming their pretrial practices have access to a wealth of national expertise and resources directed at catalyzing reform. They have many fewer resources, however, aimed at supporting them through the administrative hurdles of setting up a new system to replace the one that has been jettisoned after reforms are adopted. Yet getting implementation right is crucial to realizing the promise of criminal justice reforms, and poor implementation risks unintentionally reproducing harms or triggering backlash.

Over the past eighteen months, the Harvard Kennedy School Government Performance Lab ("GPL") has begun receiving requests from state and local governments for support in implementing reforms to systems closely

---

\* © 2020 Gloria Gong.

\*\* Director of Research and Innovation, Harvard Kennedy School Government Performance Lab. Thanks to Judith Resnik, Anna VanCleave, Abbye Atkinson, Brandon Buskey, Beth Colgan, Pamela Foohey, Lisa Foster, Paul Heaton, Alec Karakatsanis, Cortney Lollar, David Marcus, Maureen O'Connor, Jeffrey Selbin, Joanna Weiss, and other participants in the Yale Law School 2018 Liman Colloquium *Who Pays? Fines, Fees, Bail, and the Cost of Courts* and the Association of American Law Schools' 2019 symposium on court debt and remedies.

intertwined with court debt—namely, bail and related pretrial practices and community supervision. Based on the GPL’s work, this Essay briefly outlines the key challenges most often overlooked by governments considering pretrial reforms: designing and implementing pretrial programs that avoid replicating the harms of traditional community supervision, identifying and realizing anticipated cost savings, and evaluating the success of pretrial reforms. Each section notes an initial set of approaches that may be useful to consider as well as areas for additional exploration.

### I. GROWING CONSENSUS THAT CURRENT PRETRIAL PRACTICES ARE HARMFUL AND COSTLY

The cost of money bail to individuals and communities is high. Whether individuals post bail directly or purchase commercial bail bonds and pay interest, individuals, their families, and their communities bear the financial burden.<sup>1</sup> Those who cannot pay remain detained until trial and pay a different set of economic costs, including job loss and reduced earnings.<sup>2</sup> And those who cannot pay remain detained until trial. Recent research has demonstrated that pretrial detention leads incarcerated individuals to plead guilty at a higher rate, increases both the likelihood and the length of incarceration, and is possibly criminogenic.<sup>3</sup> Even short periods of incarceration can have harmful downstream effects, reducing labor force participation and decreasing receipt of benefits.<sup>4</sup> The combination of effective advocacy, targeted litigation, and mounting evidence around the harms caused by the use of money bail is galvanizing jurisdictions across the country to consider sweeping reforms.<sup>5</sup>

Results from some cash bail systems reforms have been very promising. New Jersey’s statewide shift toward use of risk evaluation and widespread elimination of cash bail resulted in a thirty-five percent reduction of the pretrial

---

1. See MATHILDE LAISNE, JON WOOL & CHRISTIAN HENRICHSON, VERA INST. OF JUSTICE, PAST DUE: EXAMINING THE COSTS AND CONSEQUENCES OF CHARGING FOR JUSTICE IN NEW ORLEANS 7 (2017), [https://storage.googleapis.com/vera-web-assets/downloads/Publications/past-due-costs-consequences-charging-for-justice-new-orleans/legacy\\_downloads/past-due-costs-consequences-charging-for-justice-new-orleans.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/past-due-costs-consequences-charging-for-justice-new-orleans/legacy_downloads/past-due-costs-consequences-charging-for-justice-new-orleans.pdf). [<https://perma.cc/XC3Z-FM9Q>] (showing that, in the cases studied, defendants paid \$6.4 million in nonrefundable bail costs).

2. See, e.g., Bruce Western, *The Impact of Incarceration on Wage Mobility and Inequality*, 67 AM. SOC. REV. 526, 528 (2002).

3. Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 715, 718 (2017).

4. Will Dobbie, Jacob Goldin & Crystal S. Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 201 (2018).

5. E.g., Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 492 (2018).

jail population.<sup>6</sup> Evaluations in some jurisdictions that have begun to experiment with reducing or eliminating the use of cash bail have shown that an increase in individuals released on personal recognizance has not led to an increase in failures to appear or recidivism.<sup>7</sup>

Launching bail reform requires government leaders to navigate several considerations, including shifting to a risk-based system, using risk-assessment tools, establishing ability-to-pay determinations, overhauling bail schedules, and responding to the use of commercial bail bonds in the existing system. Add to those considerations the resources required to push through the state constitutional amendments that have been necessary in some jurisdictions, new legislation, and shifts in judicial practice, it's no surprise that the question of how to implement pretrial supports and services after reforms have been adopted is often overlooked. For bail reform to be successful, though, governments must not only do the hard work of decarcerating thousands of individuals, but they must also set up pretrial systems that do not replicate the harms of the cash bail system they are replacing. To support long-term reform, these pretrial systems must be not only operationally effective but also fiscally and politically sustainable.

## II. PRETRIAL REFORM: IMPLEMENTATION CHALLENGES AND OPPORTUNITIES

Governments requesting pretrial implementation technical assistance from the GPL face three primary challenges: (1) designing effective pretrial supports and services, (2) identifying and capturing cost savings, and (3) evaluating and demonstrating impact. Below are key considerations for each of these areas, including a discussion of relevant tools that may present useful opportunities for governments to explore.

### *A. Designing and Implementing Pretrial Programs That Avoid Harms of Traditional Approaches, Preserve Public Safety, and Maximize Freedom*

Reducing the use of cash bail may result in sharp increases in the number of individuals released from incarceration prior to trial. Jurisdictions may assume that the easiest response to individuals on pretrial release is to replicate community supervision (probation and parole) in pretrial services or even to directly expand community supervision agencies to house pretrial services.

---

6. GLENN A. GRANT, N.J. JUDICIARY, 2017 REPORT TO THE GOVERNOR AND THE LEGISLATURE 4 (2017), <https://www.njcourts.gov/courts/assets/criminal/2017cjrannual.pdf> [<https://perma.cc/U9Q9-8CGB>].

7. CLAIRE M. B. BROOKER, PRETRIAL JUSTICE INST., YAKIMA COUNTY, WASHINGTON PRETRIAL JUSTICE SYSTEM IMPROVEMENTS: PRE- AND POST-IMPLEMENTATION ANALYSIS 2 (2017); Aurelie Ouss & Megan Stevenson, *Evaluating the Impacts of Eliminating Prosecutorial Requests for Cash Bail 1* (George Mason Legal Studies Research, Paper No. LS 19-08, 2019).

However, community supervision in its current configuration is often sprawling and costly and can create a slippery slope into continued criminal justice system involvement. In 2016, only fifty-seven percent of individuals exiting parole did so successfully; twenty-seven percent were incarcerated, and another three percent absconded or had an outstanding warrant.<sup>8</sup> Chronically underfunded, community supervision agencies often rely on burdensome user fines and fees, which in some cases may interact with a “retained revenue” system that generates incentives for perpetuating fines and fees.<sup>9</sup> Simply replicating probation and parole in the pretrial arena threatens to reproduce the shortcomings of community supervision systems and undermine the purpose of bail reform (to say nothing of bypassing important questions about whether supervision determinations prior to conviction can be treated similarly to those post-conviction). Rather than blindly replicating deeply flawed community supervision structures pretrial, jurisdictions building out pretrial services as part of bail reform should test new and innovative approaches that avoid the known flaws of traditional probation and parole.

For example, governments working to replace these traditional approaches are implementing lighter-touch, resource-targeted strategies focused on preparing recently released individuals for successful reentry and reducing their chance of revocation.<sup>10</sup> Innovations in the community supervision and pretrial space include replacing traditional systems of mass supervision with focused supervision that substantially reduces supervision intensity on low-risk offenders, which can mitigate deeper entanglement with the criminal justice system for these individuals.<sup>11</sup>

In addition to reducing the harms of over-supervision, pretrial service agencies can actively experiment with supports designed to improve the success of released individuals. These might take the form of practices that reduce

8. THE PEW CHARITABLE TRS., PROBATION AND PAROLE SYSTEMS MARKED BY HIGH STAKES, MISSED OPPORTUNITIES 9 (2018), <https://www.pewtrusts.org/research-and-analysis/issue-briefs/2018/09/probation-and-parole-systems-marked-by-high-stakes-missed-opportunities> [<https://perma.cc/G6N8-BATN>].

9. COLUMBIA UNIV. JUSTICE LAB, TOO BIG TO SUCCEED: THE IMPACT OF THE GROWTH OF COMMUNITY CORRECTIONS AND WHAT SHOULD BE DONE ABOUT IT 4 (2018) [hereinafter TOO BIG TO SUCCEED], <https://academiccommons.columbia.edu/doi/10.7916/D8709HV1/download> [<https://perma.cc/FF9F-TVUT> (staff uploaded archive)]; COUNCIL OF ECON. ADVISERS, EXEC. OFFICE OF THE PRESIDENT, FINES, FEES, AND BAIL: PAYMENTS IN THE CRIMINAL JUSTICE SYSTEM THAT DISPROPORTIONATELY IMPACT THE POOR 2 (2015), [https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215\\_cea\\_fine\\_fee\\_bail\\_issue\\_brief.pdf](https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf) [<https://perma.cc/DNK6-S4JC>].

10. See TOO BIG TO SUCCEED, *supra* note 9, at 7–8.

11. EXEC. SESSION ON CMTY. CORRECTIONS, HARVARD KENNEDY SCH., TOWARDS AN APPROACH TO COMMUNITY CORRECTIONS FOR THE 21ST CENTURY: CONSENSUS DOCUMENT OF THE EXECUTIVE SESSION ON COMMUNITY CORRECTIONS 3–4 (2017), [https://www.hks.harvard.edu/sites/default/files/centers/wiener/programs/pcj/files/Consensus\\_Final2.pdf](https://www.hks.harvard.edu/sites/default/files/centers/wiener/programs/pcj/files/Consensus_Final2.pdf) [<https://perma.cc/YRJ3-WZTU>].

barriers to appearing in court—for example, text reminders of appearance location and time, transportation, and child care assistance. It could also involve innovative approaches to supervision that rely on contracting with local, community-based nonprofits rather than expanding existing community supervision programs. And finally, pretrial services agencies could explore ways to offer voluntary referrals to preventative services that might address underlying conditions, such as housing navigation, permanent supportive housing, and mental and behavioral health treatment.

In Denver, for example, the GPL helped the city identify the costliest chronically homeless individuals who were also involved with the criminal justice system and provide them with safe, secure, long-term supportive housing.<sup>12</sup> The program used innovative data tools to provide permanent supportive housing services—including subsidized housing, behavioral health services, and an Assertive Community Treatment Team—to individuals experiencing homelessness and frequent interaction with the criminal justice system.<sup>13</sup> The program targeted individuals with eight or more arrests in three consecutive years, with three arrests marked as “transient,” meaning the individual arrested was likely experiencing homelessness at the time of arrest.<sup>14</sup> Interim project results have shown that the program has increased housing stability among participants.<sup>15</sup> Although participation in similar services should not be linked with pretrial release conditions or detention determinations, intentional linkages and warm handoffs to preventative services may have the potential to interrupt cycles of involvement with the criminal justice system that are driven by underlying challenges such as housing instability or mental and behavioral health issues.<sup>16</sup> The availability of high-quality voluntary

12. GOV'T PERFORMANCE LAB, HARVARD KENNEDY SCH., DENVER PERMANENT SUPPORTIVE HOUSING PAY FOR SUCCESS PROJECT 1–2 (2017) [hereinafter DENVER PERMANENT SUPPORTIVE HOUSING], [https://govlab.hks.harvard.edu/files/govlabs/files/denver\\_psh\\_pfs\\_project\\_feature.pdf](https://govlab.hks.harvard.edu/files/govlabs/files/denver_psh_pfs_project_feature.pdf) [https://perma.cc/NT5A-R9TD].

13. *Id.*

14. MARY CUNNINGHAM ET AL., URBAN INST., FROM HOMELESS TO HOUSED: INTERIM LESSONS FROM THE DENVER SUPPORTIVE HOUSING SOCIAL IMPACT BOND INITIATIVE 5 (2018) [hereinafter HOMELESS TO HOUSED], [https://www.urban.org/sites/default/files/publication/99181/from\\_homeless\\_to\\_housed\\_3.pdf](https://www.urban.org/sites/default/files/publication/99181/from_homeless_to_housed_3.pdf) [https://perma.cc/5FRR-M98T].

15. *Id.* at 36 (reporting that eighty-five percent of the program participants retained housing without exits).

16. DENVER PERMANENT SUPPORTIVE HOUSING, *supra* note 12, at 1–2. “Warm handoff” is a term (and practice) borrowed from the healthcare field. See Christine A. Pace et al., *Warm Handoffs and Attendance at Initial Integrated Behavioral Health Appointments*, 16 ANNALS FAM. MED. 346, 346 (2018) (behavioral healthcare); *Warm Handoff: Intervention*, AGENCY FOR HEALTHCARE RES. & QUALITY, <https://www.ahrq.gov/patient-safety/reports/engage/interventions/warmhandoff.html> [https://perma.cc/7KYT-AYPN] (primary healthcare). In the social services context, warm handoffs refer to practices that connect clients to services in a more intentional way. Compared to referrals in which clients are responsible for outreach and enrolling, warm handoffs typically involve some level of contact from a social worker, case manager, or equivalent who helps the client contact the service provider to initiate enrollment and may provide information about the client to the provider.

preventative services might also encourage judges to shift away from costly and ineffective conditions, such as drug testing.

*B. Funding and Cost Capture: Can Pretrial Systems Be Funded by Cost Savings from Bail Reform? How Much Do Reforms Actually Save and Can Those Savings Be Recovered?*

One of the key questions facing governments seeking to implement pretrial reforms is how the pretrial services replacing incarceration will be funded. Pretrial reform advocates often raise cost savings as a supporting rationale for undertaking bail reform or even as a potential mechanism for broader community reinvestment.<sup>17</sup> However, reforms do not automatically translate into savings. We see jurisdictions making two types of common errors in anticipating reform-generated savings: conflating average and marginal costs in a way that likely overestimates the magnitude of potential savings and failing to determine whether project cost savings can actually be recouped.

1. How Much Do Reforms Actually Save?

Predictions of potential savings generated by pretrial reforms often overestimate the value of savings. One of the most common mistakes is conflating average and marginal cost.<sup>18</sup> Savings estimates may calculate savings as a function of reduction in jail usage and the average cost of incarceration, but this approach ignores that funding is often committed in ways that do not scale down with marginal decreases in use. In fact, the average amount spent on incarcerating an individual for a day is very different than the amount of money saved if that individual is not incarcerated for one day. The costs of

17. PRETRIAL JUSTICE INST., PRETRIAL JUSTICE: HOW MUCH DOES IT COST? 5 (2017), <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=4c666992-0b1b-632a-13cb-b4ddc66faded&forceDialog=0> [https://perma.cc/CMD7-34JB].

18. See, e.g., BUCKEYE INST., THE FACTS: A COST SAVINGS ANALYSIS OF BAIL REFORM 1–3 (2018), <https://www.buckeyeinstitute.org/library/docLib/2018-03-30-The-Facts-A-Cost-Savings-Analysis-of-Bail-Reform.pdf> [https://perma.cc/U9G2-Q6CZ]. The analysis calculates savings by multiplying average incarceration costs by the projected number of released individuals. *Id.* at 1–2. However, the average costs used are based on costs reported by the Department of Rehabilitation and Correction and appear to include the full costs of expenditures on jails, which means that only a small fraction of those costs would translate into savings as the jail population is reduced incrementally. ROBERT MEEKER, OHIO LEGISLATIVE SERV. COMM'N, FISCAL NOTE & LOCAL IMPACT STATEMENT 2–3 (2018), <https://www.legislature.ohio.gov/download?key=9107&format=pdf> [https://perma.cc/JBK5-FWRD]. The Buckeye Institute's analysis was prominently cited in the Ohio State Supreme Court's Bail Task Force's recommendation to reform Ohio's bail system. See OHIO SUPREME COURT, REPORT AND RECOMMENDATIONS OF THE SUPREME COURT OF OHIO TASK FORCE TO EXAMINE THE OHIO BAIL SYSTEM 2 (2019), <http://www.sc.ohio.gov/Publications/bailSys/report.pdf> [https://perma.cc/ETT3-RUNH]. My point is not that the task force's recommendations were not sound, but that reformers often rely on analyses that are likely overstating the value of savings that will be generated by reforms—or, at the very least, will only come true should reforms generate full decarceration.

incarceration are likely locked into buildings, staff, and service contracts. In other words, jails continue to function even when prison populations decline. Reducing jail usage by pretrial detainees does not dent the fixed costs of running a jail; depending on the jail, marginal savings may be primarily generated from reductions in health care treatments, meals, laundry, or other services that are paid for on a per-unit basis. To realize larger savings, reforms would need to reduce jail populations by sufficient amounts to allow the fixed costs of physical and systems infrastructure to be recouped—closure of buildings or wings, reduction in staff, and renegotiation of service contracts at a lower amount.<sup>19</sup> Because of these “cliff points”—that is, the point at which the potential savings increase sharply because of the ability to recoup previously fixed costs—jurisdictions often do not stand to see significant savings until there are substantial reductions in incarceration rates overall. However, practitioners and decisionmakers who misunderstand this point may assume that any reductions in incarceration will yield the “average” amount of savings, leading them to either overestimate savings or underestimate the scale of decarceration necessary to achieve the desired projected savings.

## 2. Can Cost Savings Actually Be Realized?

The second important question for jurisdictions to address is whether cost savings, even if correct, can actually be recouped. Even if savings are real, jurisdictions may need to create innovative approaches to realize savings across siloed agencies and over time. Local analysis is needed to determine whether budgets will in fact see savings; if jail budgets are largely tied up in infrastructure and labor contracts, reductions in jail usage may not automatically yield significant savings. Jurisdictions seeking to capture cost savings face the “wrong pockets” problem, where the agency paying for the intervention is not the one where the benefits accrue.<sup>20</sup> In the case of bail reform, jurisdictions will have to figure out how to bridge the gap between pretrial services administered by courts or pretrial services agencies and the jail or sheriffs’ budgets that realize savings from reduced jail usage.

19. The financial model of the Pay for Success (“PFS”) contract used by the state of New York in its criminal justice PFS project advised by the GPL gives an example of calculations of cost savings that take into account the “cliff points” at which reductions in incarceration would allow greater savings to be generated by allowing the state to unwind larger spending areas, such as maintaining prison wings or whole prisons. See *New York State Criminal Justice Re-Entry Services*, GOV’T PERFORMANCE LAB, HARV. KENNEDY SCH., <https://govlab.hks.harvard.edu/new-york-state-criminal-justice-re-entry-services> [<https://perma.cc/9K87-QZDL>]; PAY FOR SUCCESS INTERMEDIARY AGREEMENT (Oct. 1, 2013), [https://govlab.hks.harvard.edu/files/govlabs/files/nys\\_ceo\\_pfs\\_contract.pdf](https://govlab.hks.harvard.edu/files/govlabs/files/nys_ceo_pfs_contract.pdf) [<https://perma.cc/H3KS-UWF2>].

20. See JOHN K. ROMAN, URBAN INST., SOLVING THE WRONG POCKETS PROBLEM: HOW PAY FOR SUCCESS PROMOTES INVESTMENT IN EVIDENCE-BASED BEST PRACTICES 2 (2015), [https://www.urban.org/sites/default/files/publication/71501/2000427-solving-the-wrong-pockets-problem\\_0.pdf](https://www.urban.org/sites/default/files/publication/71501/2000427-solving-the-wrong-pockets-problem_0.pdf) [<https://perma.cc/39W2-ZMPK>].

The wrong-pockets problem stands as a potential barrier to capturing cost savings effectively. When one agency underwrites the cost of an intervention, and the intervention yields benefits in a different agency, separate budgets, authority, and interests may prevent the savings from being captured by the beneficiary agency. This is particularly an issue if the savings were intended to offset the cost of the intervention. For example, if spending by a probation agency reduced recidivism drastically, but the cost savings from reduced incarceration all accrued to a separate department of corrections overseeing prisons, it is not a given that the intervention—even though successful—will have self-generated funding to continue unless the probation agency can find a way to convince the corrections agency or a central decisionmaker to redistribute the savings.

New Jersey's bail reform efforts resulted in a near-complete elimination of cash bail and a thirty-five percent reduction of the pretrial jail population.<sup>21</sup> However, program administrators identified lack of funding for the administration of pretrial services in the first year as a serious threat to the sustainability of the changes.<sup>22</sup> A report by the New Jersey Judiciary on the initial outcomes of the program flagged a "substantial annual structural deficit" as a major cause for concern and noted that unless corrected, pretrial services expenses would outstrip revenues a little more than a year into the reform.<sup>23</sup>

Another challenge is that benefits may accrue over time, but pretrial services agencies will need upfront funding to pay for their services. For example, reforms instituted today may create savings next year. Jurisdictions wishing to pay for pretrial services from cost savings must find methods to minimize the delay between the upfront spending required to set up the pretrial services bail and other pretrial reforms and the future generated savings.

Finally, savings may accrue in ways that are not technically or politically feasible to realize. For example, as jail populations decrease, jails may need fewer staff. However, contracts, union stipulations, or political ramifications of reducing staffing may bar jurisdictions from cutting staff in step with reduced jail populations.

Some jurisdictions may experiment with ways to recoup fixed costs by renting out jail beds to neighboring locales or to other agencies. These approaches may allow additional recovery of costs that otherwise would have been fixed. Yet, bed rentals function to recoup costs by continuing to incarcerate individuals and may simply shift the site of the cost and jurisdiction for incarceration.

---

21. See GRANT, *supra* note 6, at 4.

22. See *id.* at 25.

23. See *id.*



In our experience with assisting state and local governments in calculating, tracking, and realizing cost savings through Pay for Success (“PFS”) contracting,<sup>24</sup> recovering savings generated by preventative interventions requires some combination of the following conditions.

*a. Central Budget Authority*

A central budget authority, such as a state budget agency, can resolve the wrong-pockets challenge by allocating resources across the system. Although individual agencies do not have incentives to create savings for other agencies, budget offices are able to look across agencies to see how spending in one area saves the state government money, even if savings accrue in a neighboring agency or in the future. Central budget authorities, mainly legislatures, can authorize or fund preventative spending that will generate savings that the implementing agency could not capture alone.

*b. Ability To Calculate and Track Cost Savings*

Calculating and tracking cost savings puts government innovators in a position to be able to justify preventative interventions from a dollars-and-cents perspective. In order to do so, agencies must build the data and analytic capacity to calculate and track the value of savings generated.

*c. Ability To Count Social and Public Value Generated*

Many interventions may prove more costly than the amount of savings that governments are able to recoup. However, since most interventions have policy rationales, agencies that develop the ability to reflect a realistic and rigorously calculated public and social value of an intervention have an additional tool to persuade central budget authorities to shift funding toward preventative interventions or reform efforts.

*d. Ability To Make Changes in Spending on Infrastructure, Personnel, and Contracted Services*

Agencies are unlikely to be able to capture significant cost savings by reducing staffing, closing a wing of a jail, or shifting contracts because they lack the authority to make such decisions. One underexplored area is whether jails and other agencies that will see reduced utilization under pretrial reforms can

---

24. PFS contracting (or social impacts bonds) is a contracting model that allows governments to shift toward performance-based contracts with social service providers. In traditional PFS contracts, governments create a performance contract with a social service provider or an intermediary. Third-party investors loan funding to the project to cover the operating costs of delivering services. If the service proves successful and delivers pre-agreed upon results, the government makes payments that are used to repay the operating loan. If the services are not successful, the government does not pay for the services and the investors lose their capital.

innovate ways to shift internal budgets toward agency-funded preventative or pretrial services. For example, a sheriff's office experiencing sharp declines in jail populations might not be able to reduce staffing due to staffing contract structures but might be able to reallocate staff toward diversion, community service navigation, or other pretrial-related services. These types of shifts may prove to be more feasible than straight cost recapture and could allow jurisdictions another path toward funding pretrial or criminal justice reform interventions.

The GPL's work in PFS contracts and in helping jurisdictions shift toward preventative spending has sparked some creative approaches to contracting structures, redeployment of resources, and community reinvestment. This is one area in which we are particularly eager to create new solutions.<sup>25</sup>

### C. *Evaluating Programs and Demonstrating Success to Stakeholders*

Finally, long-term success for bail reform will depend on elected officials, judges, law enforcement, and constituents believing that the reforms have been good for their communities. In addition to responding to misleading information from entrenched interests<sup>26</sup> and effectively communicating the stories of affected individuals and communities, jurisdictions should prioritize the capacity to identify and demonstrate the impact of reforms on outcomes such as cost savings and public safety. This allows actors with often misaligned incentive structures to lend ongoing support.<sup>27</sup> Jurisdictions implementing bail reform should institute two types of measurement—rigorous evaluations to

25. See generally GOV'T PERFORMANCE LAB, HARVARD KENNEDY SCH., SOCIAL IMPACT BONDS 101 (2017), [https://govlab.hks.harvard.edu/files/govlabs/files/sibs\\_101\\_gpl\\_2017.pdf](https://govlab.hks.harvard.edu/files/govlabs/files/sibs_101_gpl_2017.pdf) [<https://perma.cc/5YWP-3DG4>] (discussing how governments across the country are testing the Pay for Success approach).

26. Bail bond companies have been relentless in their efforts to stymie bail reform. See, e.g., John Buntin, *The Fight To Fix America's Broken Bail System*, GOVERNING (Oct. 2017), <https://www.governing.com/topics/public-justice-safety/gov-bail-reform-texas-new-jersey.html> [<https://perma.cc/F2LT-CFA9>]; Sheila Cohen, *Bail Bond Industry Fights Back Against Moves To Limit or End Cash Bail*, WIS. PUB. RADIO (Jan. 21, 2019, 6:00 AM), <https://www.wpr.org/bail-bond-industry-fights-back-against-moves-limit-or-end-cash-bail> [<https://perma.cc/5BZR-Z9S5>]; Jon Schuppe, *Civil Rights Groups Want To Put Bail Bond Industry on Death Row*, NBC (Jan. 17, 2018, 6:42 PM), <https://www.nbcnews.com/news/us-news/civil-rights-groups-want-put-bail-bond-industry-death-row-n838531> [<https://perma.cc/4FW6-BE9N>].

27. Building in a comprehensive impact evaluation is one of the most straightforward ways to embed learning into a project. In the Denver project mentioned previously, a five-year randomized control trial was rolled out alongside the project, generating one of the longest and most rigorous studies of supportive housing in the country. DENVER PERMANENT SUPPORTIVE HOUSING, *supra* note 12, at 2; HOMELESS TO HOUSED, *supra* note 14, at 9–10. Even prior to the evaluation's end, interim results showing success now provide robust justification for continued service delivery.

determine the efficacy of the reform and real-time data measurement to allow the government to identify areas for improvement and respond immediately.<sup>28</sup>

#### GOING FORWARD

Over the next year, the GPL will select a handful of jurisdictions to collaborate with on developing and piloting solutions to key implementation challenges related to bail and pretrial reform. We will report back in the future on the lessons we learn as we attempt to carry the promise of bail reform forward through implementation.

---

28. As a field-tested example of how state and local governments can shift their traditional use of data toward practices that allow for timely identification of problems, continuous improvement, and transformative systems change, see generally GOV'T PERFORMANCE LAB, HARVARD KENNEDY SCH., ACTIVE CONTRACT MANAGEMENT: HOW GOVERNMENTS CAN COLLABORATE MORE EFFECTIVELY WITH SOCIAL SERVICE PROVIDERS TO ACHIEVE BETTER RESULTS, [https://govlab.hks.harvard.edu/files/govlabs/files/active\\_contract\\_management\\_brief.pdf](https://govlab.hks.harvard.edu/files/govlabs/files/active_contract_management_brief.pdf) [<https://perma.cc/T43X-CXDK>].

