

The Impact of the Front End on Federal Sentencing and Beyond: Recidivism and More

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I. Introduction

These words from the federal courts' *Guide to Judiciary Policy*¹ establish the crucial importance of pretrial services' unique position to positively influence downstream criminal justice outcomes:

Pretrial Services is the front door to the federal criminal justice system and has the unique opportunity to lay the foundation for each defendant's success, not just during the pretrial period, but beyond ... preventing the front door from becoming a revolving door.

Though this ideal applies to every case released on pretrial supervision, nowhere is it exemplified more than in alternative to incarceration (ATI) programs. We highlight recent research on the outcomes of federal ATI programs, including the rates of rearrest for participants as compared to a statistically matched group who did not participate. This research significantly advances the state of

knowledge about the efficacy of these programs in the context of federal court.

In this article, we will discuss the "front end"—the pretrial stage of the criminal justice process—and its critical importance in establishing the tenor and trajectory of a defendant's entire journey. We will discuss how the pretrial stage impacts the downstream outcomes that affect the defendant arguably for the remainder of his or her life and the deleterious effects of pretrial detention and incarceration; we will also demonstrate how mass detention and mass incarceration are inextricably linked. In addition, we will discuss recent movements to incorporate science into federal criminal justice decision-making and sentencing reforms, and finally, how alternatives to incarceration programs can be a useful strategy that mitigates mass detention as well as mass incarceration.

II. Bail Decision—the Hinge Moment

The bail decision sets the stage for the remainder of the defendant's case and beyond. The decision to release or detain a defendant pending case outcome is—in the words of U.S. District Court Judge James Carr—the "hinge

moment"² that has material consequences that cannot be overstated. In his article "Why Pretrial Release Really Matters," Judge Carr argues that mass detention begets mass incarceration.³ That is, pretrial detention invites a greater likelihood of conviction and, once convicted, a greater likelihood of a prison term. And prison terms have life-long consequences. Judge Carr states, "Except for the District Court Judge's decision at sentencing, no decision in any criminal case is more important or consequential."⁴

In 2011, in their article entitled "Preentry: The Key to Long Term Criminal Justice Success?," Lowenkamp and Cadigan posed the question of whether the front end, i.e., the pretrial period, has long-term impact upon outcomes.⁵ Enough evidence has accrued that we can confidently answer that question with an unequivocal *yes*. The connection between the bail decision and downstream outcomes

² Carr, J.J.G.(2017). Why pretrial release really matters. *Federal Sentencing Reporter*, 29, 217-220.

³ *Id.*

⁴ *Id.* at 219.

⁵ Cadigan, T., & Lowenkamp, C. (2011). Preentry: The key to long term criminal justice success? *Federal Probation* 75(2), 74-77.

¹ The Administrative Office of the U.S. Courts: *Guide to Judiciary Policy*, Volume 8, Part C, p. 2. This document is available internally to employees of the Judiciary only.

is well documented. Long-standing evidence, dating back to the 1960s, shows that pretrial detention itself is associated with poorer case outcomes and undesirable criminal justice effects downstream.⁶ Existing empirical evidence suggests that defendants subjected to pretrial detention are more likely to plead guilty and receive harsher sentences. In a 2017 study by Heaton et al. on misdemeanor pretrial detention, the authors found that detained defendants are more likely to plead guilty and more likely to receive custody sentences and longer custody terms.⁷ In a 2018 study on the effects of pretrial detention on conviction, future crime, and employment,⁸ Dobbie et al. found that though pretrial detention has no net effect on future crime, it decreases formal-sector employment and the receipt of employment- and tax-related government benefits. A more recent (2022) study concludes that pretrial detention is associated with future prison admissions and decreased formal labor market employment and results in an increased risk of technical violations because of more intensive probation supervision.⁹ In another 2022 study on how the consequences of pretrial detention vary between misdemeanor and felony cases,¹⁰ the authors found that pretrial detention has a larger effect on misdemeanor defendants, who are more likely to plead guilty and receive a custodial sentence.

Studies conducted in the federal system produce consistent findings. A 2014 study of federal pretrial detention¹¹ and its impact upon

sentencing reflects that detained defendants are more likely to receive prison sentences, and when they do, custody terms are longer. More recently, Diwani concludes that pretrial release lowers the possibility that a federal defendant receives a mandatory minimum sentence.¹² A 2021 study of the impact of the release/detention decision on federal sentences posed the question of whether downward variances were granted. The results provide more direct evidence that being placed in pretrial detention results in less favorable sentencing outcomes. Using United States Sentencing Commission (USSC) data, DaGrossa and Muller found that defendants who were detained pretrial were 49 percent less likely to receive a downward variance, and of those who did, the variances were 26 percent smaller when detained pretrial.¹³ The authors conclude that “meaningful reduction in the prison population can and should be accomplished, in part, through more widespread use of pretrial release.”¹⁴

Pretrial detention can bring about a host of ill effects to defendants. Loss of employment (and benefits, especially health insurance), residential instability, financial insecurity, and harmed family relationships are but a few of the many potential collateral consequences of even a brief period of detention. In contrast, meaningful interventions that can only be delivered to a person released to the community, such as substance abuse and mental health treatment, cognitive behavioral therapies, vocational and education services, can result in significantly more favorable sentences and substantially improve defendants’ lives in the long run.

III. Default to Incarcerate Sentences

Beginning with the 2005 Supreme Court decision in *Booker v. United States*, changes in the legal landscape significantly affected sentencing. *Booker* ruled that the formerly mandatory sentencing guidelines were advisory only, and subsequent decisions provided the courts with additional flexibility in sentencing. Notwithstanding these substantial shifts in the law, the sentencing guidelines remain the core of federal sentencing determination, and

the vast majority of sentences are imposed using this structure. Despite these changes in law, the federal criminal justice system continues to rely heavily upon incarceration. In fact, incarceration is imposed in 90 percent of cases.¹⁵ Further, the Sentencing Guidelines’ structure does not incorporate ATI participation into consideration at sentencing.

This high rate of incarcerate sentences is especially disconcerting in light of considerable evidence of harm. A comprehensive meta-analysis of 116 studies of prison and recidivism conducted by Petrich, Pratt, Jonson, and Cullen found that custodial sanctions have no effect on reoffending or, worse yet, slightly increase reoffending.¹⁶ Though some justify incarceration to serve the purposes of retribution and punishment, the analysis concludes that incarceration cannot be justified on the grounds that it promotes public safety by decreasing recidivism, in that prison is criminogenic and has less favorable outcomes compared to non-custodial community supervision options. In essence, community supervision options are superior at producing desired outcomes of community safety.

In this article, we discuss recent outcome studies that suggest that federal alternative to incarceration programs may provide a meaningful alternative to unnecessarily harsh and costly—in both human and financial terms—custodial sentences *without expense to community safety*. We review the earlier studies on short-term supervision outcomes of new arrests, failures-to-appear, technical violations, employment, and illicit drug use. Finally, we discuss the results of a more recent quasi-experimental study that examines the impact of ATI participation on post-program recidivism rates.

IV. Recent Outcome Studies on Federal Alternative to Incarceration Programs

History of Outcome Studies

The recidivism study is built upon earlier work. Seven districts collaborated in 2018 to study the impact of ATI programs on defendant pretrial supervision outcomes. The study found that pretrial outcomes of rearrests, failures to appear, technical violations, employment, and drug use were superior.

⁶ Ares, C. E., Rankin, A., & Sturz, H. (1963). The Manhattan Bail Project: An interim report on the use of pre-trial parole. *NYUL Rev.*38, 67.

⁷ Heaton, P., Mayson, S., & Stevenson, M. (2017). The downstream consequences of misdemeanor pretrial detention. *Stan. L. Rev.*, 69, 711.

⁸ Dobbie, W., Goldin, J., & Yang, C. S. (2018). The effects of pre-trial detention on conviction, future crime, and employment: Evidence from randomly assigned judges. *American Economic Review*, 108(2), 201-240.

⁹ Menefee, M. R., Harding, D. J., Nguyen, A. P., Morenoff, J. D., & Bushway, S. D. (2022). The effect of split sentences on employment and future criminal justice involvement: Evidence from a natural experiment. *Social Forces*, 101(2), 829-863.

¹⁰ Thomas, C., Cadoff, B., Wolff, K. T., & Chauhan, P. (2022). How do the consequences of pretrial detention on guilty pleas and carceral sentences vary between misdemeanor and felony cases? *Journal of Criminal Justice*, 82, 102008.

¹¹ Oleson, J. C., VanNostrand, M., Cadigan, T. P., Wooldredge, J. (2014). Pretrial detention choices and federal sentencing. *Federal Probation*, 78(1), 27-33.

¹² Didwania, S. H. (2020). The immediate consequences of federal pretrial detention. *American Law and Economics Review*, 22(1), 24-74.

¹³ DaGrossa, J., & Muller, J. (2021). Pretrial detention and the sentencing variance: An analysis of fixed effects across U.S. district courts. *Federal Probation*, 85(3), 27-33.

¹⁴ *Id.* at 32.

¹⁵ U.S. Sentencing Commission. (2021). *Annual report and sourcebook of federal sentencing statistics*, 61.

¹⁶ Petrich, Custodial sanctions and reoffending: A meta-analytic review. *Crime and Justice: A Review of Research*, 50, 352-424.

Furthermore, the case dispositions for this population were far more favorable, with half of the participants having their cases dismissed, versus none for non-participants. Additionally, significantly fewer defendants received custodial sentences, and of those who did, sentences were a fraction of the length of matched counterparts.¹⁷

Replicating these favorable findings from the first study with a larger and more recent data set (additional programs were included), researchers published their findings in “Expanding the Analysis: Alternatives to Incarceration across 13 Federal Districts.” The replicated findings¹⁸ lend greater confidence that these positive outcomes are generalizable to other like programs in federal court.

The same research also examined demographic parity within ATI programs, finding apparent racial disparity in program participation, with Black participants represented at a lower rate than their representation in the general defendant population, while White and Hispanic defendants were over-represented. This disparity persists even after statistical controls were applied to account for possible explanatory factors of risk, citizenship status, and charged offense. Though there is no evidence to suggest that program administrators practice *disparate treatment*, disparities in admission do suggest the possibility of *disparate impact*. The study made no attempt to discern the causes of such disparity, but causes are likely multi-faceted and variable by program. Importantly, the study found no disparity in program graduation rates among those admitted to the program. In fact, high success rates were comparable across all demographics.

Three-Year Follow-up Recidivism Study

Though research on smaller, one-program studies in the federal system have been done, Wolff et al. recently completed the first multi-jurisdiction study of recidivism rates for persons who participated in an ATI compared to a statistically matched comparison group who did not.¹⁹ Programs from 13 districts

were assessed, and the results were presented in the aggregate. Official criminal history data obtained from the Federal Bureau of Investigation’s repository served as the source of the operationalized measure: arrests for criminal conduct one, two, and three years after program exit.

This study, like its predecessors, assembled data from the probation and pretrial services national case management system, Probation and Pretrial Services Case Tracking System (PACTS), for the participating districts and joined it with arrest data obtained from the FBI, comprising a sample of 26,283 defendants, 1,000 of whom participated in an ATI. Of participants who were no longer in the program at the time of the data draw, 81 percent completed the program successfully.

To assess the effectiveness of exposure to one of the ATI programs, however brief, the study examined rearrest rates for all who participated in an ATI, regardless of whether they completed the program successfully. Propensity score matching on important measures ensured maximum comparability of the two groups, allowing the research team to attribute differences more confidently in the outcome variables to program participation. In addition, because typically only participants who successfully complete a federal ATI program benefit from non-incarcerate sentences or dismissed dispositions, it examined the outcomes of those who successfully completed the program in comparison to their statistically matched counterparts.

Results of this novel analysis were encouraging, especially for the one-year follow-up period. For all 480 participants available for one-year follow-up, including both successful and unsuccessful participants, the ATI group exhibits statistically significant²⁰ lower rearrest rates for major offenses²¹ than the comparison group. Further, the ATI group was rearrested at a lower rate for miscellaneous

major offenses. No differences in minor offenses were observed. The rearrest rates for 421 ATI defendants who successfully completed the program versus their counterparts were lower for the ATI-successful participants as well. Notably, those who completed the ATI program successfully were arrested at a statistically significant lower rate for violent offenses as well as miscellaneous major offenses.

The results for years two and three were more neutral, however. No statistically significant differences in rearrest rates for major or minor offenses were observed for all 436 successful and unsuccessful participants available for two-year follow-up. The same pattern holds when comparing successful completers against their matched counterparts.²² Likewise, for all 347 successful and unsuccessful participants available for three-year follow-up, no statistically significant difference in rearrest rates for major offenses was observed. Authors did however observe a statistically significantly higher rearrest rate for minor offenses for the ATI group. However, investigation of district differences in minor offense rates led researchers to conclude that these higher minor arrest rates were likely due to reporting differences by the state of Illinois and are likely not meaningful differences after all. The same holds when comparing the 324 successful ATI defendants against their matched counterparts.

Recidivism—whether defined as new arrests, new convictions, supervision revocations, or returns to prison—is often the sole measure commonly used by the “what works” literature to assess program performance. As context to their findings, Wolff et al. discuss the measure, citing scholars who point out its limitations. The authors argue that it is “inherently limited in its ability to account for the sometimes lengthy and uneven trajectories by which defendants internalize pro-social cognitions, slowly adopt a law-abiding identity, gain life skills that allow them to function responsibly, and experience turning-point life events, such as marriage, parenthood, and

¹⁷ Wolff, K. T., Baber, L. M., Dozier, C. A., & Cordeiro, R. (2020). Assessing the efficacy of alternative to incarceration across seven federal districts. *Justice Evaluation Journal* 3, No. 1, 26-53.

¹⁸ Baber, L., Wolff, K., Dozier, C., & Cordeiro, R. (2021). Expanding the analysis: Alternatives to incarceration across 13 federal districts. *Federal Probation*, 85(3).

¹⁹ Wolff, K., Baber, L., Muller, J., Dozier, C., & Cordeiro, R. (2024). Recidivism in alternative to

incarceration programs across thirteen federal districts. *Federal Sentencing Reporter*, 36(3), 141-150.

²⁰ Statistical significance was assessed using a significance level of $p < .05$, indicating a 5% probability or less of obtaining the observed results if there is no true effect or difference.

²¹ Major offenses included those designated as felonies on the criminal history record and minor offenses include those designated as misdemeanors. When a designation was missing, the offense was given the designation that closely resembled the offense description of a similar offense(s). Infractions and arrests pursuant to warrants for community supervision technical violations were not included in the tabulations.

²² The large proportion of non-significant differences is at least partially due to the infrequent occurrence of rearrests in both the Alternative to Incarceration (ATI) group and non-ATI defendants. The modest sample sizes being analyzed along with the rarity of recidivism diminish the statistical power of analyses, making it challenging to detect effects even if they are present. Consequently, the potentially substantive differences in recidivism observed between the two groups may not necessarily lead to a statistically significant result.

employment, that are inconsistent with criminal behavior.²³

As a *binary* measure (one simply recidivated or did not), the concept is at odds with the decades of desistance literature that acknowledge that desistance from criminal behavior is not a discrete event, but rather a process that is lengthy and complex, subject to interplay by complex internal and external forces. Recidivism measures alone fail to capture indicators of *progress* toward a law-abiding life, such as reductions in the seriousness of criminal activity or increases in time between release and criminal event.²⁴

Wolff et al. write about federal ATI programs:

Many present with severe criminal risks, needs, and responsivity factors. In addition to substance abuse disorders, which is the interventional focus of many programs in the federal system, many also have extensive and early-onset criminal histories, deeply entrenched criminal thinking patterns, anti-social friends and family, childhood and adult traumas, unstable childhoods and adolescence, educational and vocation deficits, and mental health disorders. The programs are typically 12 to 18 months, though in some programs, program length may be extended for struggling participants. The reality is that the intensive rehabilitation of the ATI program represents only a tiny but meaningful fraction of a defendant's life. With a three-year follow-up post-program exit, these recidivism statistics reflect a small window into the participants' journey toward desistance.²⁵

Recognizing the limitations of recidivism as the sole measure of program efficacy, the authors are currently conducting a comparative analysis of the impact on ATI participation on important life domains that are markers of successful integration into the community, such as employment, family relationships, social support networks, health care, and financial stability. The goal of this study is to provide a more complete understanding of

the impact of these programs as told by the participants themselves. Though not on the immediate horizon, a study of participants' life journey from crime would provide a more rounded picture of the overall program impact. Such a study would investigate the nature, seriousness, and frequency of criminal behavior over time.

Efforts to Further Federal Alternatives to Detention and Incarceration—Incorporating Science into Decision-Making

The support of ATIs among a large contingent of judges has prompted the U.S. Sentencing Commission (USSC) to take a greater role in evaluating the impact of alternatives to incarceration initiatives and in educating federal stakeholders. At an October 2023 summit on alternatives to incarceration, Commission Chair Judge Carlton Reeves criticized sentencing guidelines that have resulted in “default to prison in nearly every case” and have exacerbated disparate outcomes among minority populations. Judge Reeves expressed his hope that federal sentencing practices can “reflect empathy, deliver mercy, and embrace alternative ways of delivering justice.”²⁶ Commissioner Judge John Gleeson reflects that the Sentencing Reform Act of 1984 specifically directs the USSC to ensure that the policies and practices reflect advancements and knowledge of human behavior related to criminal justice. Judge Gleeson states unequivocally that it has failed to do so.

The Commission's 2022-2023 priorities include a study of court-sponsored diversion and alternatives-to-incarceration programs, including consideration of possible amendments to the Sentencing Guidelines that incorporate completion of an ATI into sentencing considerations.

Judge Reeves' recent communication to federal judiciary stakeholders seeking information on alternative to incarceration programs and practices²⁷ demonstrates the Commission's follow-through on the 2023-2024 priority. The Commission's website points to studies, including those sponsored by the collaboration of 13 districts and discussed herein, and additional relevant

information that can inform these discussions. The Commission promises future workshops and seminars to encourage dialogue and further exploration of the role of these programs in the federal system. Additionally, USSC's statutory imperative stated in the Sentencing Reform Act provisions of the Comprehensive Crime Control Act of 1984 to “reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process”²⁸ compels the Commission to consider the substantial research in existence.

Local Initiatives to Reduce Mass Detention and Incarceration

Districts are piloting various initiatives that impact bail and sentencing. To provide a more complete picture of the defendant, some include information about the defendant that speaks to critical aspects of their psychosocial development. For example, some include the Adverse Childhood Experiences (ACES) screening assessment²⁹ in bail and presentence reports.³⁰ ACEs are traumatic experiences directly experienced or witnessed that involve neglect, violence, suicide, or pervasive instability that occur in childhood and can cause enduring brain dysfunctions. Such brain dysfunctions may be contributors to the defendant's criminality, and trauma-informed therapies may be appropriately recommended to the court. Moreover, we must not lose sight of the fact that parental incarceration is frequently an adverse experience, a serious collateral consequence imposed on the children of mass detention and incarceration. Parental incarceration has the potential to perpetuate harm for generations to come.

Others are incorporating measures to increase recommendations for non-incarcerate sentences and increase downward variances where appropriate. Others have amended the presentence report to reflect more meaningful consideration of defendant characteristics and circumstances in crafting an appropriate sentence recommendation, including special conditions of supervision.

In their article entitled “Supporting Responsive Federal Drug Sentencing Through Education” in the Workshop on Science Informed Decision Making, authors Gertner,

²³ Wolff, *supra* note 19 at 147.

²⁴ National Academies of Sciences, Engineering, and Medicine. (2022). *The Limits of Recidivism: Measuring Success After Prison*. <https://nap.nationalacademies.org/catalog/26459/the-limits-of-recidivism-measuring-success-after-prison>

²⁵ Wolff, *supra* note 19 at 147.

²⁶ Center for Justice and Human Dignity. (October 26-27, 2023). Rewriting the sentence II: Summit on alternatives to incarceration at George Washington Law.

²⁷ Email dated Oct 11, 2023, from Chair Carlton Reeves to Chief Probation and Pretrial Services Officers, District Court Clerks, and Chief Judges.

²⁸ 18 USC § 991(C).

²⁹ Adverse Childhood Experiences (ACEs) (cdc.gov), <https://www.cdc.gov/violenceprevention/aces/index.html>.

³⁰ Ninth Circuit Judicial Conference. (July 31-Aug. 3, 2023). What happened to you? A conversation on trauma, resilience and healing. Portland, OR.

Edersheim, Kinscherff, and Snyder discuss the innovative education program³¹ of the Federal Judicial Center (FJC), which brings together legal and medical experts, federal court practitioners, and researchers to collaborate on an evidence-based approach to sentencing. Learning about behavioral sciences, and the neuroscience of addiction specifically, workshop participants examine how to craft individualized court responses using the most recent evidence available. One participant commented, “Perhaps in no federal criminal court context, other than federal problem-solving courts,³² are criminal court actors with different roles in the case given space to convene with a shared purpose of devising a coordinated response to a single person’s case.”³³ Federal judges and practitioners have taken lessons from this workshop to implement in their districts and apply to a broader population than problem-solving court participants. One judge described this as “transformative” to her practices, while others expressed significant inspiration from a model that integrates the medical, behavioral, and criminal justice sciences.

V. Conclusion

Important questions remain about ATI programs in the federal system. What we do know, however, is that had it not been for their success in the ATI program, participants would have received a significantly more punitive sentence, and advanced in their journey—as well as their children’s journey—to the “revolving door.”

The default to incarcerate sentences in nearly every case is especially disconcerting in light of considerable evidence of its harm, as we discussed above. Effective, less

punitive options must be exercised. Front-door programs and practices like ATIs can spare most defendants the harmful effects of pretrial detention and incarceration, preserving resources for the most egregious offenses and risky defendants. The recent research on federal ATIs discussed in this article demonstrates that pretrial detention and post-conviction incarceration *can* be minimized without expense to community safety. The research demonstrates a substantial reduction in rearrests, greater compliance with release conditions (such as fewer positive tests for illicit substances), and responsible behavior (such as greater employment) among ATI participants while on supervision, offering an effective alternative to costly and harmful detention. Those benefits further accrue when defendants who successfully complete the arduous requirements of an ATI demonstrate rehabilitation and remain in the community following conviction. They remain in the community—as research is showing—*without* attendant expense to community safety in the form of increased arrests or arrests for violent crimes.

Unfortunately, as currently practiced in the federal system, ATIs have limited *systemic* impact on mass detention and incarceration. The limitation is clearly one of scale. Wolff et al. write,

ATIs represent a promising, yet—as currently practiced—inherently limited strategy in federal criminal justice reform. They allow persons charged with federal crimes to avoid the life-long adverse consequences of lengthy custody terms, which most scholars agree are criminogenic. As the studies

discussed in this article suggest, defendants can be diverted from otherwise harsh custodial sentences without risk to community safety. The programs are an effective escape hatch from deeply entrenched, overly punitive practices. They seek to intervene with the most intractable defendants with severe deficits who—absent the program as a viable alternative to detention—would almost certainly be detained pending case outcome. Detained without substance abuse or mental health treatment services. Detained with hindered access to counsel and deprived of the opportunity to work. Detained and estranged from family and support systems. Detained without an opportunity to demonstrate to the Court that given the right support, they can be rehabilitated, and that a more favorable case disposition or sentence can in fact better serve the fair administration of justice.³⁴

Scalability and long-term sustainability of alternatives to incarceration programs depend upon the judiciary’s commitment, demonstrated by adequate funding, policy support, and rigorous evaluation. Such programs in the context of larger criminal justice reforms—that are informed by advances in the behavioral sciences, sentencing reforms that de-emphasize incarceration, and bail practices that reserve detention as the “carefully limited exception”³⁵—move us forward towards the ideal: “*to lay the foundation for each defendant’s success, not just during the pretrial period, but beyond ... preventing the front door from becoming a revolving door.*”

It is long overdue.

³¹ Gertner, N., Eldership, J., Kerscherff, R., & Snyder, C. (2021). Supporting responsive federal drug sentencing through education in the workshop on science-informed decision making. *Federal Sentencing Reporter*, 34, 12-22.

³² Along with reentry courts, which focus on those on post-conviction supervision, alternative to incarceration (ATI) courts fall under the umbrella term of “problem-solving” courts. Both types typically target defendants with particular “problems” (e.g., substance abuse or mental health), that if addressed can lead to reductions in criminal future behavior.

³³ *Id.* at 18.

³⁴ Wolff, *supra* note 19 at 149.

³⁵ *United States v. Salerno*, 481 U.S. 739, 755 (1987).