

LEARNING FROM FAILURE: A ROUNDTABLE ON CRIMINAL JUSTICE INNOVATION

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Criminal justice literature is full of “best practices”—depictions of how drug courts reduced recidivism, or how COMPSTAT² helped lower crime rates in New York City, or how DNA testing enabled a culprit to be nabbed. And rightly so: success in any endeavor is difficult to achieve and deserves to be celebrated. This is especially true in criminal justice, where for too long practitioners labored under the widespread assumption that “nothing works” and that it was impossible to reduce crime or change the behavior of offenders.

In general, it is human nature to shout about new ideas that have succeeded—while failure is discussed in hushed whispers, if at all. In truth, we know that it is impossible to

1. Greg Berman is the Director of the Center for Court Innovation. He would like to thank Adam Mansky and Phil Bowen, an official from the British Home Office who spent a year “on secondment” at the Center for Court Innovation, for helping to put together the roundtable that served as the basis for this article. Adam and Phil performed the difficult intellectual task of laying the groundwork for the conversation, identifying participants and defining a set of questions to be addressed. They also did the hard organizing work of getting everyone to the table and ensuring a smooth and productive event. Neither the roundtable nor this edited transcript would have been possible without them. Thanks also to Domingo Herraiz of the Bureau of Justice Assistance for helping to conceive this project over dinner at a Greek restaurant in Hell’s Kitchen; to Julius Lang, Elizabeth Griffith and Kim Norris for their help in fine-tuning the project; and to Frank Hartmann for his masterful work in facilitating the day-long event.

2. COMPSTAT is the utilization of Computerized Statistics during weekly Crime Control Strategy Meetings in an effort to provide commanders with the knowledge necessary to manage their commands while also providing a convenient forum to express which tactics succeed or fail. NYPD, <http://www.nyc.gov/html/nypd/html/chfdept/compstat-process.html>.

have trial without error. No one is perfect. Nearly every criminal justice agency has attempted projects that have fizzled or failed to meet expectations. If we want to encourage criminal justice officials to test new ideas and challenge conventional wisdom, we need to create a climate where failure is openly discussed. We need to learn from our failures (and partial successes), examining whether an initiative works for some groups but not for others and figuring out what was wrong with the underlying assumptions that led us to try such an approach.

Unfortunately, the little public discussions there are of criminal justice failures tend to focus on corruption, gross incompetence or specific cases with tragic outcomes. While these kinds of errors should be publicized (and, needless to say, avoided), they typically offer few meaningful lessons for would-be innovators. Far more helpful would be a probing examination of the kinds of failures where decent, well-intentioned people attempted to achieve something noble and difficult but fell short of their objectives for whatever reason.

In January 2007, the Center for Court Innovation and the U.S. Department of Justice's Bureau of Justice Assistance set out to conduct just this kind of an examination.³ The two agencies jointly convened a day-long roundtable in New York that brought together judges, court administrators, probation officials, prosecutors, police chiefs and defense attorneys from across the country to discuss lessons they have learned from projects that failed. The goal of this effort was not to give out grades, point fingers or assess blame. Rather, the goal of the roundtable was to gather experienced and thoughtful criminal justice professionals to take a deeper look at failed reform efforts and attempt to extract concrete lessons that might aid the next generation of innovators, as well as those who authorize and fund innovation. In so doing, the Center for Court Innovation and the Bureau of Justice Assistance sought to send a mes-

3. The failure roundtable is one of a series of roundtables convened by the Center for Court Innovation that have brought together practitioners, policy makers and academics to examine controversial topics in criminal justice and court administration. Past events have been devoted to thinking through such topics as how to define community justice, how courts should respond to low-level domestic violence cases, how to "go to scale" with drug courts, and how judges and attorneys can address ethical challenges in problem-solving courts. Center For Court Innovation, <http://www.courtinnovation.org/>.

sage that failure, while not desirable, is sometimes inevitable and even acceptable, provided that it is properly analyzed and used as a learning experience.

The roundtable, which was moderated by Frank Hartmann from Harvard University's John F. Kennedy School of Government, unfolded over the course of eight hours at the Center for Court Innovation's headquarters in midtown Manhattan. As is typical of events that bring together experts from different disciplines and different parts of the country, consensus proved elusive. Nor is it possible to reduce the conversation to a handful of simple answers—the causes of any individual failure are too complex and idiosyncratic to yield easy generalizations. Context matters. What works in one setting might prove disastrous in another—and vice versa. As the singer Billy Bragg once declared, “You can borrow ideas, but you can't borrow situations.”⁴

For all of the above-mentioned caveats, the roundtable unearthed a rich array of perspectives about the subject of failure. The edited transcript that follows has been organized into five subject areas based on the topics that generated the most intense conversation over the course of the day-long roundtable:

Promoting Self-Reflection – The participants in the roundtable talked at length about how to balance two competing values of vital importance to successful criminal justice innovators: self-examination and relentless determination. Liz Glazer of the Westchester County District Attorney's Office started the day by talking about her desire to encourage criminal justice actors to be more thoughtful and to use data when identifying priorities and crafting policy. Other roundtable participants acknowledged the desirability of this as an aspirational goal. They highlighted the real-life difficulties that prevent most criminal justice officials from realizing the goal, including the daily pressures of managing large bureaucracies, a cultural suspicion of anything “academic,” and the need to achieve visible results in order to meet the demands of the public, the media and political officials. Often, innovators find that they must sacrifice introspection in order to aggressively market their ideas and

4. BILLY BRAGG, *North Sea Bubble*, on DON'T TRY THIS AT HOME (Elektra Records 1991).

galvanize crucial allies. As one participant noted, “the only time real change occurs is when there is a maniac on a mission.”⁵

Getting the Right People to the Table – The question of how inclusive to be during the planning of a new project generated significant debate among roundtable participants. Some participants, including Jo-Ann Wallace of the National Legal Aid and Defenders Association, argued forcefully in favor of broadening the representation at the table, highlighting the value of two often-overlooked groups in particular: local residents and rank-and-file criminal justice staff. In making their case, these participants pointed to failures that stemmed from agency leaders formulating decisions in a vacuum without relevant information that could be provided by outside parties. In response, several other roundtable participants, most notably Ron Corbett of the Massachusetts Supreme Court, talked about the dangers of being over-inclusive. They pointed out that the larger the group, the more difficult consensus is to achieve. Still other participants noted that every voice is not created equal—often, it is only budget officials and political leaders (elected prosecutors, mayors, chief judges) who wield the necessary authority to make change happen.

Defining Success, Recognizing Failure – One of the principal challenges standing in the way of successful reform efforts that the group identified was the “win-lose” nature of much of what goes on within the criminal justice system. Put simply, the players that comprise the system (prosecutors, police, judges, probation, defense attorneys, corrections officials, pre-trial service agencies and others) often have competing agendas. As Michael Jacobson of the Vera Institute of Justice noted, “Failure depends upon where you stand.” While all of the various agencies might agree on broad goals like reducing crime or promoting fairness, once the conversation moves to concrete strategies to achieve these goals, the consensus quickly evaporates. Phil Messer, the chief of police in Mansfield, Ohio, highlighted this reality when he talked about how a success for the

5. See *infra* p. 10 (Ronald P. Corbett quoting PETER F. DRUCKER, ADVENTURES OF A BYSTANDER 255 (John Wiley & Sons, Inc. 1998) (“Whenever you find something getting done, anywhere, you will find a mono-maniac with a mission.”))

police (such as making more drug arrests) was viewed as a failure by prosecutors, who struggled to handle the new cases flooding their dockets.

Identifying Specific Examples – As facilitator of the roundtable, Frank Hartmann made a deliberate effort to push participants to go beyond bland platitudes and banal generalities. In general, the participants in the conversation rose to the challenge, talking frankly about specific examples of failures that they had been involved with either directly or indirectly. These included reforms designed to link prostitutes to long-term drug treatment, to improve the processing of felony cases and to enhance probation supervision of offenders. Implicit in this part of the conversation was the idea that it is possible to survive failure. While no career can survive a steady diet of failure, the participants in the roundtable—each of whom has risen to a position of prominence in his or her chosen profession—are living testimony that failed experiments do not always lead to ruin.

Learning Lessons – At the end of the day’s conversation, participants attempted to distill their experience into pragmatic advice for would-be innovators. Tim Murray of the Pre-Trial Services Resource Center summarized the feelings of many when he said, “I disagree and agree with almost everything that’s been said [today] because there is no universal truth in this business.” While the roundtable did not produce any universal truths, it did highlight several distinct tensions that have to be managed thoughtfully. These include the tensions between a top-down and a bottom-up approach to change, between an inclusive approach to planning and one that emphasizes the use of “small platoons” of like-minded people, between engaging in self-reflection and being a cheerleader for reform, and between how success is defined for the criminal justice system and how it is defined for the individual agencies that comprise the system. While the answers will vary from place to place and project to project, few innovators can avoid having to make thoughtful choices among these options.

Building on these themes, what follows are selected highlights from the Center for Court Innovation and the Bureau of Justice Assistance’s roundtable conversation about failure and criminal justice reform.

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PROMOTING SELF-REFLECTION

HARTMANN: Let's begin by talking about a common tension faced by many innovators between the need for relentless determination and the need to occasionally pause and reflect to make sure the ship is pointed in the right direction. How do you achieve the proper balance?

GLAZER: I have an example of this tension—and a potential failure—that I want to tell the group about. I want to preface it by saying that law enforcement agencies are under enormous pressure to live in the moment. Whenever something horrible happens, [such as] a murder for example, there has to be an arrest. That is a demand that is rightly made by neighborhoods that are plagued by crime. Along with a need for constant action, I think there is also a real suspicion within many law enforcement agencies of reflection, of academia, of gathering statistics. The word “planning” can make people run screaming from the room. In Westchester, New York, we have a single prosecuting authority but we have 43 police departments. The district attorney I work for is newly elected so there is a real opportunity as she comes in to reorganize how things are done and to work with all 43 police departments collectively to solve the county's crime problems. However, in order to do that, we actually have to know what the problems are. And in order to know what the problems are, [we] have to check the data. At this point, I've lost a lot of my audience of chiefs and commissioners who are not terribly interested in planning. I think if you can show that gathering data helps solve crime in the here and now, then you can buy yourself time to have a real planning process. For me, this is an example of the kind of tension that Frank mentioned. In the law enforcement community, we always have to do something right now, but we don't always know enough to do something right now.

CORBETT: I think we need to acknowledge that there is a degree of cultural suspicion. I remember 15 years ago talking with other probation executives about how little practice was informed by any of the readily available academic resources—and I don't think things have changed very much since then. There was almost a complete disconnect between practice and the parallel universe of research.

SIEGEL: It reminds me of when I was at the New York City Department of Probation. We tried to make the argument that if the City would make a modest investment in probation, the savings would be enormous to other parts of the system. We thought that was a very persuasive argument, but it never prevailed. You need a commitment from the powers that be and we didn't have enough juice to secure it. I think many initiatives die because they're the beneficiaries of lip service from the top rather than a genuine commitment.

KEATING: The probation department in New York has had a lot of innovative ideas over the last decade—most of which have gone no place. My own perception of that agency is that it is pretty much politically powerless.

JACOBSON: You really can't talk about any of this stuff outside [of] political context. That is how success or failure happens. I don't think there is a lot of tolerance for failure in government, certainly not at the executive levels, because you can't take the politics out of the stuff. I don't think there is a lot of self-reflection. In general, if your plan fails, you are done. It's very tough to reconcile the highfalutin' rhetoric that we're using here today around failure with the practical, political, budget-driven reality of government. I think Liz's project to convene the police chiefs in Westchester is doomed to failure. If the goal is to create some sort of seamless web of communication, that is just not going to happen. I don't think the DA's moral authority alone is enough to get 43 police chiefs on the same page. It's simple math. If you are trying to do some big thing with 43 different entities, whatever it is, its not going to happen equally across all 43.

COOK: One of the challenges that I think Liz faces is that it is enormously difficult to build momentum for reform absent an immediate crisis. How do we improve the system without massive public support for dramatic change? It's like judges trying to improve the number of trials that are conducted. It's a wonderful goal, but no one much cares about it other than judges and attorneys. The public certainly doesn't—absent some horrific incident where a defendant is released because he or she was not tried in time.

HARTMANN: So Liz is doomed to fail?

COOK: No, she is not going to fail because the process of getting the police together with the DA on a regular basis and pushing towards a common goal will have an incremental positive benefit in the long run, but perhaps not the immediately huge benefit we'd all like to see.

MURRAY: When you are charging up the hill, do you ever really have time to stop and say, "Hey, am I going in the right direction?" In my limited experience, the answer is no. Say I've managed to convince a whole bunch of people to take a risk with me, to charge up the hill. The second I say, "Gee, I don't know, are we doing the right thing?" is when I lose them all. And I don't just lose all of them just for that initiative, I lose all of them for the rest of my professional life.

MANSKY: Tim hits the nail on the head. When you are trying to make the case for reform, to marshal your forces, you want to put your initiative in the best possible light. You want to show that your new program will work. But I think that often comes at the expense of self-reflection and continuing to improve. I don't think any of us want to end up being cheerleaders with no credibility.

SCHRUNK: How do you create the space for self-reflection? As a newly elected DA, I quickly discovered that before I started any project, I had to plan in advance for some early wins. You've got to market change. I found it enormously helpful to pick off low-hanging fruit and have some short-term successes that would help me build toward the larger, ultimate goal. You have to feed the beast. You have to show the public, the elected officials, your key constituents, that you are making progress. Otherwise, they won't have the patience to help you reach your ultimate goal. And if you get one or two of Liz's 43 police chiefs to have some immediate success, other people are going to look at it and say, "I want to be part of that success."

GETTING THE RIGHT PEOPLE TO THE TABLE

WALLACE: I would argue that you increase the likelihood of failure if you don't have the right people around the table. You

could have the right goal, but if everyone who needs to be there to address the goal isn't at the table in the planning stages, then you can still fail. And often we don't make a place at the table for the people from the community in which the problem lies. As an example, in Washington DC, we had to really battle to get some community representatives on our local criminal justice coordinating commission. When the commission looked at escapes from a local halfway house, the community representatives brought a unique perspective to this conversation. They said to all of the criminal justice agencies at the table, "Wait a minute, have you ever stepped foot in the halfway house?" They identified a number of concrete reasons that may have contributed to people leaving. For example, for the first three days of residency, you have to stay in the house. So if you have a job, you just lost your job. Without the voice of the community, I don't think that the response of the commission would have ended up being as effective.

GLAZER: I think we sometimes make a fetish of getting a lot of people around the table and then the problem is, "Okay, now we're all around the table. What do we do?" The goal has to be incredibly concrete and every person has to have a self-interested reason why they're around the table.

JACOBSON: Sometimes the only way to overcome the system's inertia and the self-interest of all the parties is not by getting people to come to the table. It's by hammering people essentially into submission.

CORBETT: I think there are myths about how to achieve change. I would propose that one of the myths is that you have to have the right people at the table.

HARTMANN: Why do you think that isn't really important?

CORBETT: Because you can't get the big elephants in line easily, and you'll wear yourself out trying. Success is often a zero sum game. Success for one agency will inevitably be a loss for another. In my 33 years, I've never seen real change come about from getting everyone at the table. Every time you add another big agency to your planning effort, the difficulty of getting people to agree and to coordinate goes up geometrically. As a result you are doomed before you start.

HARTMANN: Tell us the opposite way to proceed.

CORBETT: Little platoons. You bite off a small piece of this giant system and go after people that you know have both the will and the political power to make change happen. You find little corners of entities—what some have called “skunk works”—and you find staff with energy, ambition and talent. You experiment at the margins. You come out with a little product such as one drug court in the corner of the state rather than trying to get the entire statewide judicial infrastructure to agree they want to move forward with a specific solution. You get that first drug court and then you tinker with it. When it succeeds, all of a sudden one thing leads to two, leads to four, leads to ten.

JACOBSON: There are a lot of ways to do systematic change. I think you can do it by getting everyone at the table. However, as a former budget official, I’m pretty cynical myself about that approach. As a budget official, to be totally honest, I was able to get a lot done with absolutely nobody at the table.

GLAZER: I’m with Ron Corbett 100 percent. He is absolutely right as far as the little platoon. From the example we started with, I can tell you that with 43 police chiefs, it is like herding cats. You can’t do it. When you have a multitude of people at the table, it’s usually a disaster. But I think you can start with a small group of like-minded people, build up some momentum and hopefully attract the rest to join you. At the end of the day, everything is personal. There’s nothing wrong with jump-starting the process by working with people who you already have a good relationship with for one reason or another. Sometimes you have to kind of dip your toes in the water before you take the plunge.

KEATING: Often the best ideas fail because we have not gotten a buy-in from the people that do the work. In the past, some great ideas have died a stillborn death because line staff would hear about them and say one of two things: (A) “We don’t think that is a great idea so we’re not going to do it.” Or, (B), “We know [that] if we stall, there will be another commissioner and he will have a whole new set of ideas.” For me, it always comes back to trying to figure out what is in it for the people

that do the work. How are we going to improve the quality of their workday? Unfortunately, a lot of times the new ideas we come up with create more work for people. When you stand in front of a probation officer . . . with these great ideas he is going to say “You’re telling me that now I have to go to court more often or write more reports and I have to see probationers much more frequently? It’s much easier for me to violate people and run to court and drop it in the judge’s hands than to spend a lot of time working with people who are failures.” Often, what looks like programmatic failure is really a crisis of marketing.

MESSER: One of the underlying themes to the conversation so far is the importance of communication. Often we fail to communicate with the troops in the trenches about what we’re doing and why we need to do it. When we looked at our failures and traced them back, we often found a gap in communication between leadership and the people actually charged with doing the work. And the feedback we get from the folks on the frontlines is that, “If we had understood why you were doing this, we could have probably done things more efficiently.”

CORBETT: The top-down model of change is more difficult than bottom-up change. For me, a better way to go is to catch some of your best line people doing something right by going around your organization looking for innovation at the street level. Shine a light on it. Reinforce it. Take those people and move them around the organization, give them a lot of credit. At the end of the day, you will have an innovation that has street credibility because it has already been practiced. Peter Drucker once said, “The only time real change occurs is when there is a maniac on a mission,”⁶ and I believe that.

SCHRUNK: I love people who want to do the right thing for the right reason. I call them do-righters. I also have learned that sometimes people want to do the right thing for the wrong reason. The wrong reason could be [that] there is a pot of money to be divided. It could be the desire for a front-page headline. It could be that a commissioner needs an issue to get elected or even that a DA is on a crusade to be a congressman.

6. PETER F. DRUCKER, *ADVENTURES OF A BYSTANDER* 255 (John Wiley & Sons, Inc. 1998) (“Whenever you find something getting done, anywhere, you will find a mono-maniac with a mission.”).

So I think we need to figure out what buttons are going to bring people in.

CORBETT: This leads me to another myth. And that is that people are interested in positive change. By and large, this is simply not true. In general, when you introduce the notion that criminal justice agencies ought to change the way they do things, this is treated as a toxin rather than a wonderful opportunity to move things forward.

MURRAY: I feel very conflicted listening to you guys. I disagree and agree with almost everything that's been said because there is no universal truth in this business. I think people who are good at making change—systemic or otherwise, because sometimes you can pull off larger reform—have a gift for figuring out who they need at the table and how to convince them that change is in their interest. And folks, if I can't do that, I don't have an idea that is going to work. The trick is to manage all of this without selling my soul. I can't say, "Oh no, so-and-so is not on board unless I wear shorts. . . . Okay, everybody go change into your shorts." And then all of a sudden you don't remember what the initial idea was. That is flat out failure too.

DEFINING SUCCESS, RECOGNIZING FAILURE

PARKER: What we often fail to do in government is to identify very clearly what the goal is. And for us in criminal justice, the goal is simple: to reduce crime. When you start talking about sharing information, why is that important? Well, that will reduce crime. Just connect the dots. Why should we collect DNA in a timely fashion? Because it can reduce crime. Everything has to be explained in terms of a clear goal, which we all share.

CORBETT: I'm not sure most criminal justice agencies recognize failure, let alone understand it. It is not my impression that most criminal justice leaders walk around having a clear notion in their mind as to whether they're succeeding or failing, other than in the most gross ways: "Is the newspaper running me down? Am I about to be indicted? Is the money missing?" That is not what we're talking about here today. Can we even recognize failure when it occurs so we can come to understand

it? Maybe I'm wrong, but I don't think it's common for any branch of criminal justice to engage, in any routine way, in after-action analysis. The U.S. Army model is that when something doesn't work the way you want it to, you should spend a little bit of time unpacking it so as to understand it and not repeat the same thing.

HARTMANN: Any reactions to Ron's point about the inability to recognize failure?

SCHRUNK: One challenge is that it's often difficult to recognize that within successes there are failures. We may have taken the hill, but we paid a horrible price climbing it.

MESSER: For us police chiefs, to recognize failure is not too difficult: we look at crime rates. The challenge is that law enforcement is often quick to blame others for their failures. It's easy to say, "The prosecutor dealt the case away," or "The judge let too many people out," or "The probation department failed." As a police chief, I can recognize failure based on what is occurring in my city. But if we're not happy with the answer, people are pretty quick to say, "Okay, now whose fault is this?"

SCHRUNK: What this highlights for me is the dynamic tension that exists between system success and the success of individual agencies. It's one thing to articulate clear goals and clear messages about improving the system of justice or reducing crime or what have you. But once you get past broad, systemic goals to actually come up with real, concrete strategies, you often find that my success is your failure. For example, if pre-trial services succeeds in getting more people out of jail, they might define that as a success, whereas the local police force or prosecutor might not see that as being in their interest. So the tension that exists across roles when you are trying to do system-level improvements is really palpable. It is very difficult to get everybody at the table to agree on specific strategies, because a lot of times they see it as, "If you win, then I lose."

BOWMAN: Mike Schrunk is absolutely correct. I believe that there are two sometimes conflicting goals. One is reducing crime and the other is the administration of justice. And unless we resolve these conflicting goals, we're going to continue to

fail as a system. We call this a system, but of course there is no individual point of accountability for the entire system.

JACOBSON: Failure depends upon where you stand. I think of the issue of technical parole violations. To me those are failures, but if you ask parole officials they will say, “No, that is a success. We caught that guy before he was going down a slippery slope and slammed him back into prison.” Not a speck of research says this is even remotely true. Take a place like California. There are 120,000 people on parole in California and each year they send back 70,000 for technical violations. They go back for an average of two and a half months at a total cost of almost a billion dollars. So you ask someone like me, and I say, “Who would spend a billion dollars sending 70,000 people back to prison for three months?” Who could possibly say that if we have a billion dollars to spend on law enforcement, what we want to do is catch 70,000 parolees after they test positive for drugs and slam them back into prison for two and a half months? But for parole officials in California, it’s a success. You are getting people off your caseload. You’re doing good law enforcement work. And you are minimizing your political risk. Meanwhile, the corrections people go berserk, because they have to spend a billion dollars on technical violators. The issue of whether that is a success or failure, is a really interesting, very highly politically loaded question.

SCHRUNK: I think of the young men and women that I hire, they want to slug felons. They want to put notches on their belts. They want to get the maximum punishment. It doesn’t matter whether it’s for a misdemeanor or property crime or violent crime. They view that as a success. I think that is wrong. So our individuals, we have a whole bunch of agencies that have individual criteria for success. Sometimes I think taken together, they contribute to overall failure.

PARKER: We are paid by tax payers to reduce crime. We’re all in the public safety business. Although it’s a challenge, when we work together, crime is going to go down. Where is it written that everyone gets to set their own goals? At the New York State Division of Criminal Justice Services, we made it a condition of all of our grants that you have to share information

across agency lines. That is now a condition of funding. If you don't do it, you lose.

CORBETT: Apart from the police, I don't think the rest of us have been very good about specifying what it is we are trying to achieve, and the failure to do that makes it difficult to recognize either success or failure.

NEWTON: If you said to me, is the criminal court of the City of New York working? I would say, yes. We resolve cases and controversies and we do that well. But I think the public has a very different set of expectations about what they want courts to do. If you speak to the administrators and judges, they would say, yes, we are meeting our mandate, but the public perception might be very different.

WALLACE: I actually think that in many instances the public has a greater understanding that failure is a part of success than we do. For example, from the drug court experience we learned that relapse is often a part of rehabilitation for drug addicts. We had to do a lot of work to train prosecutors, judges, defense attorneys to accept the reality of relapse, but a lot of the general public already knows this intuitively because they've seen their sons or daughters or cousins go through treatment and recovery.

FUSTER: In Puerto Rico, we have had a drug court for 12 years now. At the beginning it was only one district, now it's in every district. And it would appear that they're very successful. Those that graduate from the drug court program have a low recidivism rate. But only 25 percent of all of those that could have gone through the drug court got to the drug court. So the recidivism is very, very low, but maybe those guys were going to behave anyway, with or without the drug court.

MESSER: With drug courts, the fear of failure is almost corrupting the process. Sure, there's a high success rate. But I can remember asking, "Why don't you take this guy, or that guy, into drug court?" The answer was, "No way. We don't think that guy is going to make it and we don't want him showing up on our stats."

HARTMANN: I want to come back to this issue that a win for you is a loss for me. What happens if Phil Messer arrests a

bunch of people and shoves them into the court system. That's a win for him, he looks good. But all of a sudden the media is all over the court and the prosecutor for not moving the cases fast enough.

MESSER: We see it all the time in Ohio. I have a drug task force that I oversee. We have been very successful in making more arrests. But the second we do this, my phone starts ringing off the hook from local prosecutors who say, "What are you doing? Slow down on your arrests because the system can't handle it." Conversely, the court's success could be my failure. If we're not arresting people the way we should, the courts are able to keep up with their dockets, they're able to move cases on time. So there has to be a balance.

COOK: I can think of a couple of other examples, mainly prison and jail overcrowding. Right now, in Alabama, we are working to reduce overcrowding, but at the same time, we have some real public safety problems that need to be addressed. Our police chiefs are under a lot of pressure because of spiraling murder rates. So part of the system is busy working on how to get people out of jail and prison and back into the community faster. And there are plenty of communities that are not really interested in accepting these people back on their streets. So there is a lot of tension between the effort to solve prison overcrowding and local communities concerned about crime.

MURRAY: When you talk about judging the success or failure of new programs, you have to acknowledge that the status quo is not in fact a success. When you introduce a reform, the grading system is always applied to the innovation, but it's never applied to the status quo. The status quo is not something I would want anyone to aspire to.

KEATING: The manifest failure of the status quo helps make the case for change a lot easier. When we first started the Midtown Community Court [in New York in 1993], we based it on the fact that virtually any new way of doing business would have been better than the standard operating practice at that time. The criminal courts were dismissing 55 percent of the cases and no one was going to jail. So the standard we used as

our argument to do something different was the total bankruptcy of the system that was presently operating.

MURRAY: Usually change is being introduced to something that is already failing. In fact, because it's failing, you are trying in your own humble way to offer some kind of remedy. Because of this, you are put under the microscope, as you should be, to see if this change makes things better or worse. I remember testifying before Congress and somebody asking me, "Would an appropriate measure of the effectiveness of [the] drug court be to follow people around for seven years after they graduated and then have them pee in a cup and run a records check?" I said that that was an absolutely exquisite standard, but, if implemented, then we should do the same thing with people released from prison so that we get to compare.

IDENTIFYING SPECIFIC EXAMPLES

HARTMANN: What I would really like to hear now from you are specific examples of failures that you've either seen or been part of first-hand. I think it is important to send the message that it is often possible to fail and still survive to fight another day, provided you learn the right lessons.

KEATING: This goes back some time, but at one point in the early 1980s we were trying to do nighttime jury trials in felony cases in Brooklyn. This was an answer to a specific problem—we were having trouble getting defendants to trial in a timely fashion. And we thought if we did trials at night, there would be fewer distractions for the judges and it would be more convenient for witnesses to testify. We did the project for about a year and a half, maybe two years. And as it turned out we did try cases much more expeditiously. However, everybody involved in the system hated it. The lawyers hated it. The jurors hated it. Even the complainants whom we thought would benefit the most didn't like it. The only one who liked it was me, and of course I took great delight in saying, "This is a success, why doesn't anyone agree with me?" In the final analysis, we had not done enough talking to the attorneys. What we all forgot, was that most criminal attorneys do their office work between 4pm and 7pm. That is when they see clients. That is

when they prepare for their other trials. So this added responsibility was not such a great idea from their perspective. On reflection, we didn't really talk to the people seriously.

NEWTON: I want to share a failure of my own. Many years ago, the courts in New York came under court order to reduce the arrest-to-arraignment time to under 24 hours. Judge Keating, who oversaw the criminal courts at the time, was able to take the average from five days to 24 hours. So when I inherited the job a few years later, I decided that I would try to take it a step further by saying we no longer want to achieve an average of 24 hours but rather we want to ensure that every individual defendant is arraigned within 24 hours. Well, talk about an idea that went over like a lead balloon. People told me flat out, "It's too much to do. We're already doing some good and we don't want to do any more good." I was totally taken by surprise. We had the right people in the room. We had a financial incentive, because if we don't meet the court-imposed mandate, there are tremendous fines. Moreover, if we end up having to release people on the streets, it's a public safety issue. But it was a poorly conceived plan.

MURRAY: Sometimes you can pull the plug too early. I had a program in Miami. After the initial success of the drug court, law enforcement came to us and said, "You know, along a particular roadway in Miami, all of the prostitutes that we pick up have drug paraphernalia. Why don't you do something about it?" We said, "Absolutely." And so we started a new program. We took in 60 women, and 60 women absconded. That is failure. It scared us to our toes. We worried this failure would have a ripple effect on all of the other efforts underway to promote drug treatment within the justice system. So we chickened out. We pulled the plug. I think any time you pull the plug on a program, successful or failed, without taking the opportunity to see what was learned, you botched the job. We went back and found those women a year or so later and discovered that many of them had children, which ultimately was the cause of the failure of that program. They had children, and we were putting them in residential environments or therapeutic communities, which often required them to leave their children. So their fear of leaving their children and of the

government getting its hooks on their kids was a totally understandable fear and one that we could have programmed for if we had more awareness of what was being taught to us. So the real failure wasn't that 60 women absconded. The real failure was that we were so shocked by it, that we shut the program down and didn't use it as a learning opportunity.

SIEGEL: In New York City, there are something like 60,000 probationers. Someone is on felony probation for five years, and for the last three of those years, probation supervision is not terribly onerous. When I was at probation, we hoped they didn't re-offend, but if they didn't, it wasn't because we were doing anything affirmative to make that happen. Given this, we thought that we should find a way to move them off probation supervision earlier so that we could spend more time with people who we knew were more likely to fail, because the research, such as it was, very clearly stated that most people who fail do so within the first six months to a year. But the resistance to this idea was uniform. Politicians opposed it. Judges didn't want to sign off on early discharge applications. We wanted to do a better job with those probationers that we could influence, and nobody was interested. So I think sometimes failure is a product of the inability to articulate an argument and to marshal the right constituents to get behind it.

JACOBSON: When I started in the budget office, I wanted to speed up the processing of felony cases in New York City, which is an incredibly mundane goal. I can tell you first-hand that no one cares about it. And the reason I was so interested in it was that there are thousands of people who are stuck on Rikers Island simply because it is taking an excessive amount of time to process their cases. I thought that if we could speed up the process, then we could save literally hundreds of millions of dollars in incarceration costs, and that the mayor could take that money and put it in early childhood education. It just makes you cry, it's all so beautiful. But we couldn't do it because everyone was so invested in delay. It works for everyone. The prosecutors loved it. Judges didn't mind it. No one thought it was a particular problem and as much as we tried to push on all of those parties, to tell them that it was actually in

their self interest to do this, or simply to bribe them, nothing worked.

WALLACE: When I was at the public defenders' service in Washington, DC, I came to the conclusion that we were devoting the lion's share of our resources to felony cases at the expense of working with juveniles. Research tells us that is upside down. Prevention is critical. Many public defender offices train people by putting them in juvenile court first and then letting people work their way up to handling serious felonies. Our juveniles were suffering to some degree because people weren't staying in the juvenile court long enough to understand how kids think and the difference between children and adults. So my goal was to create a unit with special training for lawyers and wrap-around services for juveniles. Anyway, long story short, when I made the decision to leave the defenders office, the initiative just stopped.

COOK: Back in the early '90s, a friend of mine authored a piece of legislation called the Mandatory Drug Treatment Act.⁷ In the process of signing up sponsors, we went to the administrative office of the courts. They agreed to sign on because they saw the bill as a vehicle for authorizing DUI schools. Thanks to their support, the legislation passed. It enabled folks around the state to set up DUI schools, which use the leverage of the criminal justice system to get people to pay them lots of money. The original intent—to promote the use of treatment—was never realized. It goes to show you how a good idea in the hands of a naive innovator can go wrong. We were naive about the politics.

MURRAY: There is another kind of failure that's worth talking about and that is when reforms ultimately become the very thing they sought to reform.

HARTMANN: Give us an example.

MURRAY: Drug courts. Drug courts have gotten so rigid in some places and so committed to maintaining an artificially high success rate. Bail reports are another great example. For many years, people were held in jail pending trial, despite the

7. S. 912, 110th Gen. Assem., Reg. Sess. (S.C. 1994).

presumption of innocence, only because they didn't have money in their pocket to pay bail. Not so long ago, some people got together to reform that. Let's collect information, do risk assessments, suggest ways to manage risk and give that to decision makers. Great. That is a reform, that is a fix. That is a success. Then over time as these programs get embedded more and more in the status quo, success becomes defined not by how many people get released but on the size of the agency budget. And success gets defined by the ability to stay out of the public view, to avoid controversy. And pretty soon, I tend to become more and more chicken, and then pretty soon I don't recommend anyone for release.

LEARNING LESSONS

HARTMANN: We've talked about some examples of failure. In the time we have left, I want to focus our attention on the lessons. Imagine that your brother or your sister who is 15 years younger than you was going into this business—what advice would you give him or her?

KEATING: When you are dealing with reforming large institutions in the criminal justice system, sometimes you need large people. You can talk about doing a platoon and all of this other stuff at the margins, but unless you have a mayor or a chief judge or someone with an enormous amount of political capital who is willing to go out and embarrass other people, change will not occur.

CORBETT: I don't know if you know a book called "Street Level Bureaucracy,"⁸ but it argues that all public sector organizations are really run by line staff. Don't fool yourself that you can run a public sector organization from the top.

BOWMAN: I agree the rank and file have to be on board but sometimes the top has to show leadership. The rank and file are not always in a position to fully understand the program or potential results. But the rank and file, if not brought on board, can kill an otherwise good program with good potential. So I

8. MICHAEL LIPSKY, *STREET LEVEL BUREAUCRACY* (Russel Sage Found. Pubs. 1983).

think it's important that if you are introducing a new innovation to maybe go with the early innovators, those few key people who are willing to take a risk. And that buys you time to bring the rest of the rank and file into the picture.

MURRAY: One of the lessons that I have learned, first and foremost, is that the criminal justice system is a monster and [that] it has an amazing ability to regain whatever shape and behaviors it had before you started poking at it. So if anything, you never achieve the change you intended, and it's unrealistic to expect to. But that can't deter you from tilting at the windmills.

JACOBSON: Failure may be important to the natural process where you learn and eventually get to success. But that does not comport easily with the trend in government to get more and more specific about measurement and deliverables. Many government funding contracts are now performance-based and they're very specific. I yearn for the good old days where government could just dispense a bucket of cash, but those days are over. Today, there is less and less wiggle room. No one wants to give tax-payers' money out to just anyone or to tolerate cruddy performance. Even if you can get a government official to understand that you are dealing with a complicated problem and you are making progress, if you aren't meeting your deliverables, forget about it. So if we want to understand failure and [to] promote innovation, I think we need to get to a place where contracts do have concrete goals, but they aren't set in stone and there is some flexibility on the part of government. This is easy to say and hard to do.

NORRIS: What this really underlines for me is the value of trust. I think you need to develop trust with your partners—and with your funders. Trust is the only thing that can help you weather small failures along the way.

BERMAN: As the leader of a non-profit organization, I often feel like a professional supplicant. The truth of the matter is that the typical non-profit has next to no power. We always need someone else, usually in government, to authorize and pay for our work. We can't do anything without permission. And in my experience, it usually isn't possible to get that permission without over-promising what you will deliver. So my

question is, is it possible to generate the political will and momentum for reform without having to overestimate the number of people you're going to serve or the impact that your initiative will have? Can we introduce some realism into the process?

BOWMAN: If we're going to have an impact ultimately on encouraging change and innovation and tolerance of failure, I think we have to convince the general public, because they are the ones who put pressure on me when things don't work. Several people have raised the issue of fear of failure. I think you need to really understand the sources of that fear. And I believe that fear of failure is not driven internally, it's imposed externally from the folks who put us where we are. I don't lose sleep at night worrying that the crime rate is up one point or two points above where it should be. My stress comes from the authorizing environment, the citizens. If you can persuade them, then you can get me to implement whatever change is necessary. I've heard it said that change only occurs when the pain of the status quo exceeds the pain of reform.

SCHRUNK: I came across an article in a business magazine recently and it was talking about corporate managers promising less than they knew they would produce—they would deliberately underestimate to ensure that they didn't fail. I think that is good advice, but at the same time we all know that in order to get funding, we often have to promise that we're going to save the free world. That is a dilemma we all face.

SIEGEL: We're all in the business of taking risks. The question is, where do you go after you take the risk and failed? Do you have the guts to do it again? People don't like to admit failure. When you admit failure, it puts you at a disadvantage when you go to get funding or [to] get the support you need.

CORBETT: Surviving failure is crucial. At the end of the day, our job is to try stuff. If it doesn't work, try to fix it and roll it out again. If that doesn't work, try something else.

NEWTON: I think it is important to remember why we are doing this in the first place. What keeps us coming back to the job is that we have this notion of justice that we think is critical. Earlier today, Ron Corbett mentioned the idea of "maniacs on a

mission.”⁹ I’d like to think that the maniacs are still going to keep coming up with new ways to improve the system because it’s the right thing to do.

9. DRUCKER, *supra* note 6, at 10.