

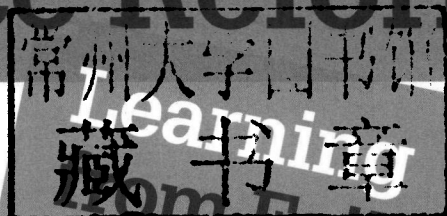
Trial & Error in Criminal Justice Reform

Learning
from Failure

Greg Berman
and
Aubrey Fox

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Trial & Error in Criminal Justice Reform



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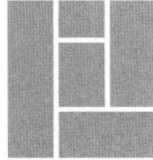
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Acknowledgments

The origins of this book can be traced to a Greek restaurant in Hell's Kitchen on an unseasonably warm evening in the fall of 2005. At the table that night were Domingo Herraiz and Elizabeth Griffith from the U.S. Department of Justice's Bureau of Justice Assistance and Greg Berman and Julius Lang from the Center for Court Innovation. Much of the discussion was devoted to the subject of best practices in criminal justice. While everyone at the table agreed that it was important to identify and disseminate effective programs, there was also a consensus that the field of criminal justice was not particularly good at talking honestly about the reverse: projects that had failed to achieve their goals for one reason or another.

We didn't know it at the time, but that dinner conversation would ultimately spark a new initiative. Together, the Center for Court Innovation and the Bureau of Justice Assistance have spent the past several years studying failed criminal justice experiments and attempting to identify lessons for would-be innovators. This investigation, which is now led by Aubrey Fox of the Center for Court Innovation, has proven extraordinarily productive. Our partners at the U.S. Department of Justice deserve enormous credit for this. Our thanks to Laurie Robinson, Jim Burch, Drew Malloy, Betsi Griffith, Kim Norris, and Preeti Menon for their good humor and insight as well as their courage in supporting a project with the word "failure" in the title.

In attempting to put together a book on the subject of failure, we are fortunate to work for an organization, the Center for Court Innovation, that prizes both intellectual inquiry and the written word. These values were imprinted at the Center for Court Innovation by its founding director, John Feinblatt, who also helped spark our interest in criminal justice and sharpen our thinking about how to do good in the world. We owe him a great debt.

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During our research for this book, we have been inspired, both in print and in person, by a number of scholars and practitioners who have sought to advance a more forthright conversation about criminal justice reform. Among these are Joan Petersilia, Jeremy Travis, Eric Lane, Malcolm Feeley, David Kennedy, Lee Schorr, Michael Jacobson, Tony Thompson, Carol Weiss, Judy Harris Kluger, Anne Swern, Mindy Tarlow, Joel Copperman, Robin Steinberg, Mike Thompson, Geoff Mulgan, Tim Murray, Liz Glazer, Robert Keating, Gil Kerlikowske, Frank Hartmann, Herman Goldstein, George Kelling, Rick Rosenfeld, Michele Sviridoff, Michael Scott, Eric Lee, Herb Sturz, and Ron Corbett.

We also wish to thank all of those we interviewed for our case studies. Having seen our own work reflected in both the popular press and academic publications, we are sympathetic to how it feels to be on the other side of the fence. We are enormously grateful for the time and access we were given and have tried to honor that commitment by being even-handed in our reporting and sensitive in our analysis.

The process of finding a publisher for a book on failure—no easy task even in the best of times and certainly nothing to take for granted in the current publishing environment—was aided and abetted by Malcolm Feeley of Berkeley Law School, Niko Pfund of Oxford University Press, and Candace McCoy of John Jay College. Thanks as well to David Shenk, Elizabeth Shreve, and Andy Postman for helping us learn the rules of the publishing game. We are grateful to have landed at the Urban Institute Press and the capable hands of Kathleen Courrier, Scott Forrey, and the rest of their team.

Finally, we wish to thank our families, who bore the brunt of supporting us through all of the ups and downs of writing a book while we simultaneously performed our day jobs.

For Greg, this includes Carolyn Vellenga Berman (who continues to set a high bar in terms of her commitment to her craft, her intellectual curiosity, and her ability to generate new ideas); Milly and Hannah Berman (whose talent and inventiveness as writers are a constant source of inspiration); and M. J. Berman, Allan Berman, and Michele Berman (who have provided living examples of the kind of grit and determination that are necessary to complete any significant task). I hope this book is some small recompense for the accommodations I have asked of all of you over the years.

For Aubrey, this book is dedicated to Robin Berg for her love, support, and good humor (not to mention editing skills), as well as to Robert Fox and Anita Sperling for encouraging a love of reading and writing from an early age.

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Introduction

Men are greedy to publish the successes of [their] efforts, but meanly shy as to publishing the failures of men. Men are ruined by this one-sided practice of concealment of blunders and failures. (Burlingame 1997, 358)

—Abraham Lincoln

Name a social problem and chances are that someone has written a book about how to solve it. Interested in improving failing schools? Check out Wendy Kopp's *One Day, All Children: The Unlikely Triumph of Teach for America and What I Learned along the Way* (2003). Eradicating poverty? Try *Banker to the Poor: Micro-Lending and the Battle against World Poverty* by Muhammad Yunus (1999). Creating new jobs while saving the planet? There's *The Green Collar Economy: How One Solution Can Fix Our Two Biggest Problems* by Van Jones (2008). We could go on, but you get the picture. In general, the world of public policy is inundated with books about "best practices" and "evidence-based programs"—exemplary ideas and initiatives that offer the promise of guaranteed success.¹

In truth, the world probably does not need another book that markets success. But failure . . . well, that's a different story. Failure is typically discussed only in hushed whispers in the world of civic affairs.

In his effort to usher in "a new era of responsibility," President Barack Obama has demonstrated a refreshing candor about his own mistakes. But this is still the exception and not the rule in public policy. Fear of failure is, of course, part of human nature. And experience tells us that the instinct for self-preservation can kick into overdrive when careers, reputations, and dollars are on the line. The higher the stakes, the less likely you are to hear the "F word."

But there are real consequences when we fail to talk about failure. Most obviously, it leads to an environment that stifles innovation. Without a willingness to try new ideas and risk failure, it is impossible to imagine how we are ever going to challenge conventional wisdom or address our most difficult social problems.

Unfortunately, the field of criminal justice has been particularly slow in embracing the value of trial and error. In other disciplines, most notably science and medicine, solving problems is viewed as an iterative process.² There is an old quote, attributed to Thomas Edison, that neatly encapsulates the importance of the scientific method: “I have not failed 5,000 times. I have successfully discovered 5,000 ways that do not work and I do not need to try them again.” More recently, Eli Lilly & Company’s chief science officer was renowned for holding “failure parties” as a way of acknowledging outstanding scientific work even if it ultimately failed to lead to new drugs for the company.³

Needless to say, there are no failure parties in criminal justice. Criminal justice officials are rarely afforded the opportunity to engage in a trial-and-error process, partly because the consequences of failure are so immediate (people can die) and partly because the media and political environment that surround the crime issue will not let them (people get fired). Is it any wonder that a “cover your ass” mentality dominates many criminal justice agencies? Policing expert and University of Wisconsin Law School Professor Michael Scott describes the problem this way: “Very seldom do police chiefs say, ‘We had a great idea that didn’t work. We’re going back to the drawing board to do it differently.’ That’s what a scientist would say without batting an eye, but a police chief often doesn’t feel that he or she has that kind of latitude” (Scott 2008).

To be fair, it is not accurate to say that there is no discussion whatsoever about failure in the criminal justice system. There are, in fact, built-in mechanisms for dealing with certain kinds of failures—most notably, civilian complaint review boards and the appellate review process. Partially because of these kinds of institutions, public discussion about the shortcomings of the criminal justice system tends to focus on such hot-button issues as police misconduct and the death penalty. As important as these topics may be morally and philosophically, they involve very few people and have only a marginal impact on public safety. They also offer few meaningful lessons for policymakers and would-be innovators.

Learning lessons from the past is not a particular strength of the criminal justice system. Indeed, the history of criminal justice in the United

States can be read as a swinging pendulum, as policymakers have veered from punitiveness to leniency and back again, without pausing to remember why they initially favored one approach over the other. The reluctance of criminal justice policymakers to talk openly about failure has helped fuel this dynamic. It has stunted the public conversation about crime in this country and stifled new ideas. It has also contributed to our inability to address such problems as chronic offending in low-income neighborhoods, an overreliance on incarceration, the misuse of pretrial detention, and the high rates of recidivism among parolees. Unless criminal justice policymakers and practitioners are given the time, space, and encouragement to learn from their predecessors and analyze their own foibles, the field will forever find itself haunted by Georges Satayana's dictum that "those who cannot remember the past are condemned to repeat it."

We have chosen to write a book on failure in the criminal justice system in an effort to escape this fate. Our goal is to encourage a more forthright dialogue about criminal justice, one that acknowledges that many new initiatives fail and that no one knows for certain how to reduce crime. For us, this is not a source of pessimism but a call to action. By openly discussing and even celebrating failure, we seek to help foster a climate that encourages the development and implementation of new ideas based on rigorous reflection.

To be clear, when we use the term "failure," we do not mean errors of incompetence or corruption—the judge who mistakenly rules a crucial piece of evidence inadmissible or the police officer who is on the payroll of local drug dealers. Nor are we focused on the kinds of societal failures—poverty, racism, the breakdown of the American family—that are so often intertwined with the criminal justice system.

Rather, this book is devoted to examining well-intended efforts that for one reason or another fell short of their stated objectives. These efforts include high-profile national programs, such as the Drug Abuse Resistance Education (D.A.R.E.) program, which has sent thousands of police officers into local schools to educate students about drugs without making a dent in teen substance abuse. We also look at lesser-known local initiatives, such as the St. Louis police department's creative, but ultimately flawed, program to reduce gun violence by asking the worried parents and guardians of teenagers for permission to inspect their homes for firearms in return for a promise not to make any arrests based on what they found.

By design, we examine several initiatives that have been widely hailed as successes, including drug courts (which link addicted offenders to drug treatment in lieu of incarceration) and Operation Ceasefire (a strategy to send a more coherent message of deterrence to individuals who are responsible for the lion's share of violence in a given jurisdiction). While drug courts and Operation Ceasefire have achieved impressive results in many places, in some locations they have struggled to succeed. Our implicit message in looking for failure amid success is that the line between the two is not as clear as some may think.

In writing this book, we drew upon three years' worth of research into the failed criminal justice experiments of the past. This research, which was underwritten by the U.S. Department of Justice's Bureau of Justice Assistance, included a literature review, roundtables, on-site observations of innovative projects, and interviews with dozens of leading practitioners and scholars in the field.

This research has been buttressed by our own life experience. For the past decade, we have worked at the Center for Court Innovation, a not-for-profit organization that seeks to help the justice system reduce crime, aid victims, and promote public trust in justice. The Center for Court Innovation has won national prizes for innovation from the Drucker Institute, American Bar Association, National Criminal Justice Association, National Association for Court Management, Ford Foundation, and Harvard University's John F. Kennedy School of Government.

In particular, the Center has been honored for its success in conceiving, planning, and implementing model projects that seek to focus the energies of the justice system on addressing the problems of addiction, mental illness, domestic violence, and quality-of-life crime. These "problem-solving courts" include two projects that the two of us served as lead planners for: the Red Hook Community Justice Center and Bronx Community Solutions.

The Red Hook Community Justice Center is a community court located in a Brooklyn neighborhood that has long been notorious for drugs, crime, and disorder. In response, the Justice Center—a joint project of the Center for Court Innovation, the New York State Unified Court System, the City of New York, the Kings County District Attorney's Office, and others—has sought to reduce fear and improve public safety.

Operating out of a refurbished Catholic school that previously had been vacant for decades, the Justice Center is home to a multifaceted courtroom, presided over by the Hon. Alex Calabrese, that handles minor

criminal matters, landlord-tenant disputes, and juvenile delinquency cases. Whenever possible, the Justice Center seeks to link defendants and litigants to social services, including drug treatment, job training, and mental health counseling, with the goal of helping them avoid a return to court. At the same time, the Justice Center serves as a launching pad for an array of crime prevention and community engagement initiatives, including but not limited to a youth court, youth baseball league, police-teen theater workshop, and an AmeriCorps community service program.

The Justice Center's novel approach to justice has contributed to the transformation of what was once a dreary neighborhood. Crime is down, investment in the community is up, and researchers have documented improved attitudes toward government.

In 2005, we brought some of the ideas piloted by the Red Hook Community Justice Center to the Bronx, but with a twist. Instead of working in a single neighborhood with just one judge, we have attempted to go to scale with problem-solving justice by providing the four dozen judges who handle misdemeanor criminal cases in the Bronx, a borough of 1.4 million people, with the same kind of sentencing options that Judge Calabrese in Red Hook utilizes.

Our goal in the Bronx is a simple one: to make justice in low-level cases more meaningful. While this experiment is still relatively young, there are encouraging results to report. The project already has changed sentencing practice in the Bronx—in thousands of cases, the use of short-term jail has been replaced by community restitution and social services. Bronx Community Solutions also has won considerable neighborhood support by contributing tens of thousands of community service hours to the Bronx each year, putting minor offenders to work sweeping the streets, painting over graffiti, and cleaning local parks.

Both the Red Hook Community Justice Center and Bronx Community Solutions have been hailed as national models. Each year, these projects are visited by hundreds of criminal justice officials from across the country and around the world. Replications have been spawned in places both near (New Jersey and Connecticut) and far (Canada, Australia, and England).

As gratifying as this attention has been, we know that every success that the Red Hook Community Justice Center and Bronx Community Solutions have experienced has been the result of a laborious trial-and-error process that inevitably involves disappointment along the way. We have had a role in creating technology applications that frustrated end

users, mentoring programs that struggled to find mentors, antiviolence initiatives that proved impossible to sustain over time. . . . The list goes on and on.

In reflecting upon our failures as well as the failures of others, we have identified four principal themes that come up time and time again. These are the themes that animate this book.

1. *Not all failures are alike.* Failure is usually the product of a complicated chemistry involving a specific time, a specific place, and specific personalities. While every failure has its unique elements, failures generally fall into four distinct groups. The first two are relatively straightforward: failure of concept (a bad idea) and failure of implementation (poor execution). Sometimes, reformers just get it wrong, fundamentally misunderstanding the nature of the problem they are trying to address or failing to pay the necessary attention to service delivery. Two other kinds of failure are less obvious: failure of marketing and failure of self-reflection. These are essentially opposite sides of the same coin. On one hand, innovators will not get very far if they do not manage politics well or if they are incapable of winning the necessary resources to implement their ideas. On the other hand, some reformers become so intent on drumming up support that they fail to assess their own weaknesses or to respond quickly as facts on the ground change. In chapter 1, we use the Consent to Search program in St. Louis to highlight the various ways in which a criminal justice experiment can fail.
2. *Failure is rarely black and white.* While the press and politicians tend to want bottom-line answers (“Does this program work or not?”), the reality usually is more nuanced: some initiatives work for some people some of the time. Moreover, the definitions of success and failure often depend on where one stands—and what one values. This is particularly true in the criminal justice system, where the principal actors often have conflicting agendas. Michael Schrunk, the elected prosecutor in Portland, Oregon, offers this example: “If pretrial 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. . . . 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’ ” (Berman 2008). In our final chapter, we explore the difficulty of defining failure