

Court Reform: Why Simple Solutions Might Not Fail? A Case Study of Implementation of Counsel at First Appearance[†]

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Abstract

In this article we investigate the implementation of programs intended to ensure that defendants in criminal courts receive legal counsel at their first appearances before judges. Efforts to reform court practices are often stymied by courts' fragmented and adversarial structures and by reformers' misconceptions about how they operate. We find that the public defense administrators who voluntarily launched these programs largely overcame these difficulties by adopting incremental approaches to expanding defense services, designing programs that were adapted to local conditions, and by persevering in the face of political resistance.

I. INTRODUCTION

Reforming criminal courts is not for the faint of heart. A long line of social science research studies has demonstrated that few attempts to change court processes live up to expectations.¹ Some reforms fall short because they are based

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¹ See *Courts*, NAT'L INST. OF JUSTICE, <http://www.crimesolutions.gov/TopicDetails.aspx?ID=3> (last visited Feb. 26, 2017) (reviewing 66 programs where 13 are rated "effective," 10 are rated

on overly optimistic assumptions about how court decisions will affect defendants or victims. But other efforts fail because they are not implemented as their authors had envisioned. These “failures” seldom make headlines, but they represent missed opportunities to improve legal systems.

This article reports on the implementation of five upstate New York county programs designed to ensure that indigent criminal defendants were provided counsel at the first court appearance.² This phase of adjudication is extremely important. At first appearance, defendants should learn of the charges against them and of their right to counsel; they may be subjected to pretrial incarceration if they are not offered or are unable to post bail,³ and if the first appearance includes arraignment, they may even plead guilty before investigation or advocacy occurs.⁴

When first appearances include plea entries, the process is a “critical stage” of the prosecution and defendants have a right to counsel’s presence and effective assistance.⁵ Some courts, including New York’s highest court, extend the same right to first appearances that include decisions on bail and pretrial release.⁶ Unfortunately, requirements for counsel at first appearance (CAFA) are inconsistently realized in practice.⁷ New York responded to these problems with the three-year grant CAFA improvement projects discussed in this article.

In examining these programs’ development and implementation, we frame our inquiry around Malcolm Feeley’s thesis that court reforms are more likely to fail than to succeed,⁸ and draw conclusions about the conditions under which such reforms are likely to be successful. At first glance, it might appear that these initiatives’ chances for success were uncertain. They faced skepticism and opposition at state as well as local levels, and they deployed tax dollars for an unpopular constituency, people accused of committing crimes. Yet we found that all five programs overcame obstacles to implementation and launched largely as

“ineffective,” and the remainder are only rated “promising,” which typically reflects limited evidence of successful outcomes). See also Markus B. Zimmer, *The Challenge of Judicial Reform in Post-Conflict States*, 37 OHIO N.U. L. REV. 645 (2011).

² The study investigated six programs, but reports on five because the sixth county had not completed program implementation at the time of this writing.

³ See *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 202–03 (2008).

⁴ See *Hamilton v. Alabama*, 368 U.S. 52, 53 (1961).

⁵ *Id.*

⁶ See NAT’L RIGHT TO COUNSEL COMM., THE CONSTITUTION PROJECT, DON’T I NEED A LAWYER?: PRETRIAL JUSTICE AND THE RIGHT TO COUNSEL AT FIRST JUDICIAL BAIL HEARING 16 n.70 (2015), www.constitutionproject.org/wp-content/uploads/2015/03/RTC-DINAL_3.18.15.pdf [https://perma.cc/Q4S6-F8A4] (citing *Hurrell-Harring v. State*, 15 N.Y.3d 8 (2010)).

⁷ *Id.* at 24–30; see also SIXTH AMENDMENT CTR. & PRETRIAL JUSTICE INST., EARLY APPOINTMENT OF COUNSEL: THE LAW, IMPLEMENTATION, AND BENEFITS (2014); ALISA SMITH & SEAN MADDAN, THREE-MINUTE JUSTICE: HASTE AND WASTE IN FLORIDA’S MISDEMEANOR COURTS (2011) (showing a significant relationship between waiver of counsel and probability of guilty plea).

⁸ MALCOLM M. FEELEY, COURT REFORM ON TRIAL: WHY SIMPLE SOLUTIONS FAIL (2013).

originally planned.

We report our research in five sections. First, we review the emergence of CAFA as a law and policy problem. Second, beginning with Feeley's seminal court reform research, we inventory the challenges that attend court reform.⁹ Third, we describe the five programs that counties designed to provide CAFA. Fourth, we document the implementation processes in each county. Fifth, we consider the implications of our findings for not only CAFA, but also the broader issue of court reform.

II. THE EMERGENCE OF CAFA AS A LEGAL AND POLICY PROBLEM

In 2012, Attorney General Eric Holder directed attention to the importance of early access to counsel, and to the plight of “too many defendants [who] are left to languish in jail for weeks, or even months, before counsel is appointed.”¹⁰ That same year, *Lafler v. Cooper*¹¹ and *Missouri v. Frye*¹² focused on ineffective representation during plea negotiations, highlighting the need for lawyering at the earliest stage in criminal proceedings.

The outcomes of first appearances can include pretrial release rulings and plea entries, decisions that carry heightened risks for uncounseled defendants. Unfortunately, only 14 states guarantee CAFA.¹³ A recent survey of New York magistrates (judges who preside over village and town courts) revealed that almost half reported that CAFA was “seldom” available during regular court hours, and 89% reported the same for off-hours arraignments.¹⁴

In 2010, New York Court of Appeals highlighted this deficit in *Hurrell-Harring et al. v. State of New York*, holding that plaintiffs had been unconstitutionally denied CAFA.¹⁵ In 2011, the state legislature created the New York Office of Indigent Legal Services (ILS) “to monitor, study and make efforts to improve the quality” of public defense.¹⁶ As is true of almost half the states,

⁹ *Id.*

¹⁰ Eric Holder, U.S. Att’y Gen., U.S. Dep’t of Justice, *Address at the American Bar Association’s National Summit on Indigent Defense* (Feb. 4, 2012), <https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-american-bar-association-s-national-summit-indigent> [<https://perma.cc/3X8J-ZMG8>].

¹¹ 132 S. Ct. 1376 (2012).

¹² 132 S. Ct. 1399 (2012).

¹³ See NAT’L RIGHT TO COUNSEL COMM., *supra* note 6.

¹⁴ N.Y. STATE OFFICE OF INDIGENT LEGAL SERVS., SUMMARY REPORT OF THE 2014 SURVEY OF TOWN AND VILLAGE MAGISTRATES: COUNSEL AT FIRST APPEARANCE 22–23 figs. 8 & 9 (2014).

¹⁵ See *Hurrell-Harring v. New York*, 930 N.E.2d 217, 223–24 (2010) (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)).

¹⁶ N.Y. EXEC. LAW § 832 (1) (2011), <https://www.ils.ny.gov/files/Executive%20Law%20832-833.pdf> [<https://perma.cc/8FD2-2L5N>].

New York requires county governments to fund and organize indigent defense.¹⁷ ILS is authorized to grant partial funding for defense services, and it focuses primarily on the 57 counties outside of New York City.¹⁸ In 2012, ILS dedicated \$12 million in state funds for competitive three-year grants to counties to improve CAFA.¹⁹

Thus by 2012 upstate New York was primed for an overhaul of existing CAFA practices. But this overhaul required more than a statehouse commitment to a valued principle—it required significant changes in the everyday work of hundreds of courts. As we explain below, optimism and principle, even when accompanied by funding, often fall short of changing routines and practices.

III. THE CHALLENGES OF COURT REFORM

In his classic study *Court Reform on Trial: Why Simple Solutions Fail*, Malcolm Feeley argued that “[i]t is rare to find an innovation that is carefully initiated and even rarer to see one successfully implemented. But it is rarer still to find a workable new idea well institutionalized.”²⁰ Feeley’s pessimistic outlook was informed by his familiarity with historical, legal, practical, and political perspectives on court behavior.²¹ This section discusses Feeley’s five-stage framework, which inventories characteristics of courts that often compromise reform efforts.²² To summarize briefly, in the first stage a problem must be defined. Second, reformers must initiate a solution, typically a new policy or program. Third, someone must accept (or be given) responsibility for implementing the solution. Fourth, the new policy or program must be routinized and adjusted so that it is compatible with other organizational processes and objectives. Finally, the reform should be evaluated to assess whether its objectives

¹⁷ NAT’L RIGHT TO COUNSEL COMM., THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 54 (2009), <http://www.constitutionproject.org/wp-content/uploads/2012/10/139.pdf> [<https://perma.cc/6D4R-9LCE>]; see also COMM’N ON THE FUTURE OF INDIGENT DEF. SERVS., FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 15 (2006), http://nycourts.gov/ip/indigentdefense-commission/IndigentDefenseCommission_report06.pdf [<https://perma.cc/7RLF-5EJY>] (urging replacement of patch-worked local programs with statewide funding and organization).

¹⁸ See N.Y. STATE FIN. LAW § 98-b (2003).

¹⁹ Joel Stashenko, *25 Counties Get Grants to Provide Counsel at Arraignments*, N.Y. LAW J. (Aug. 8, 2013), <https://www.ils.ny.gov/files/NYLJ%20Counsel%20At%20First%20Appearance%20Awards%20080813.pdf> [<https://perma.cc/M7KG-7FPA>].

²⁰ FEELEY, *supra* note 8, at 126.

²¹ Professor Feeley’s scholarship spans almost five decades and addresses appellate court decision making, state and local crime and justice policy making, impact litigation, court reform, and studies of comparative and federalist government. See MALCOLM M. FEELEY, CURRICULUM VITAE (Sept. 4, 2013), <https://www.law.berkeley.edu/php-programs/faculty/facultyCVPDF.php?facID=37> [<https://perma.cc/HSB3-HYFT>].

²² FEELEY, *supra* note 8, at 25–26.

were achieved, and if so, at what cost and with what unanticipated consequences.

Under the most benign circumstances this sequence presents many pitfalls, but Feeley suggests that the criminal courts, more than most government organizations, are designed and operate in ways that leave little room for optimism. We focus here on what Feeley refers to as fragmentation, adversarialism, and the fallacy of formalism as potential barriers to effective reform.²³ We then review the conditions that Feeley identifies as critical to overcoming these challenges, and, in this context, evaluate the CAFA reforms in the five counties.

A. Fragmentation

Criminal courts and related agencies have competing interests.²⁴ Feeley asserts that the resulting interactions “are more akin to Adam Smith’s notion of unplanned, unconscious coordination in the pursuit of self-interest than to any theory of rational organization”²⁵ insofar as decisions are made and results are produced without central planning, goal-setting, or assessment. He places criminal justice actors’ decisions in the context of game-playing, each actor seeking to maximize advantage. But he also notes that not everyone is playing the same game: judges seek expeditious verdicts, prosecutors pursue public order and safety, and defense lawyers strategize to advantage their clients’ outcomes. The result is fragmentation: multiple actors pursuing different agendas from the same sets of charges, evidence, and rules.²⁶

Criminal justice organizations, particularly those engaged in adjudication, are accountable to different authorities. In most states trial judges²⁷ and chief prosecutors²⁸ are accountable to voters. Defense lawyers are ethically accountable for protecting their clients’ rights and interests, but lawyers in private practice must also look after the interests of their firms. Lawyers who practice in indigent defense agencies work in a variety of office settings, and those who administer such programs are also, as managers, accountable to local and state authorities.

Additional tensions arise from a scaffolding principle of American

²³ *Id.* at 6–8, 123, 125.

²⁴ *Id.* at 6–7.

²⁵ *Id.* at 7.

²⁶ *Id.*

²⁷ See AM. BAR ASS’N, FACT SHEET ON JUDICIAL SELECTION METHODS IN THE STATES, http://www.americanbar.org/content/dam/aba/migrated/leadership/fact_sheet.authcheckdam.pdf [<https://perma.cc/PXW8-ZJM4>].

²⁸ See STEVEN W. PERRY, U.S. DEP’T OF JUSTICE, PROSECUTORS IN STATE COURTS, 2005, at 2 (2006), <http://www.bjs.gov/content/pub/pdf/psc05.pdf> [<https://perma.cc/CRD9-2PKN>]; see also, e.g., SPECIAL COMM’N ON THE FUTURE OF N.Y. STATE COURTS, JUSTICE MOST LOCAL: THE FUTURE OF TOWN AND VILLAGE COURTS IN NEW YORK STATE 7 (2008) (discussing different constituencies to whom judges and prosecutors are accountable), http://www.nycourtreform.org/Justice_Most_Local_Part1.pdf [<https://perma.cc/5R4C-PMB5>].

government, the separation of powers between the legislative, executive, and judicial branches. That principle ensures that the lines of accountability in organizations at the courts' periphery, such as law enforcement and corrections agencies, are independent of those of court actors. Most law enforcement authorities answer to executives, such as mayors and governors; jails and probation are typically regulated by state agencies. Funding for these functions may be the province of local or state legislatures. Judicial authorities may write the rules for court administration. And the essential functions and missions of these organizations are not necessarily compatible. While in theory these actors might work together with the courts to provide satisfactory criminal justice process outcomes, in practice they operate along independent trajectories.²⁹

A second scaffolding principle of U.S. government is federalism: the stipulation of powers and authority that exist at each level of government. A federalist regime that grants some degree of autonomy to each level of government ensures that there are limits to what states can command local governments to do and guarantees that service delivery will reflect local resources, needs, and politics.³⁰ In New York, indigent defense is provided by a mix of institutional programs, assigned counsel panels, non-profit legal aid bureaus, and public defenders.³¹ Since court reforms rely on the voluntary cooperation of different criminal justice agencies, and typically do not clearly identify any central authority that can oversee and enforce changes, the responsibility for implementation cannot be traced back to all potentially responsible parties or organizations.

B. *Adversarialism*

In the United States, criminal adjudication is formally structured as a zero-sum adversarial process in which each party pursues a win at his opponent's expense.³² In this process, neither prosecutor nor defense has an incentive to contribute to objectives beyond his or her own case or career. Professor Gary Goodpaster described the logic behind the adversarial trial as the "truth theory:" the implied assumption that through lightly regulated verbal combat, an attentive but passive audience will discern the truth about contested facts.³³ This perspective is grounded at the level of the individual case. But the concept of adversarialism goes beyond individual cases: the dualism between "crime control"

²⁹ FEELEY, *supra* note 8, at 6–12.

³⁰ For an extended discussion and critique of federalism in the U.S. context, see MALCOLM M. FEELEY & EDWARD RUBIN, *FEDERALISM: POLITICAL IDENTITY & TRAGIC COMPROMISE* (2011).

³¹ N.Y. COUNTY LAW § 722.

³² JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 80–101 (1973).

³³ Gary Goodpaster, *On the Theory of American Adversary Criminal Trial*, 78 J. CRIM. L. & CRIMINOLOGY 118 (1987).

and “due process” concerns³⁴ may be expressed at the local level as policy and practice disagreements.

C. *The Fallacy of Formalism*

Understanding how trial courts work is a challenge for most newcomers, and understanding how to change them requires experience and expertise. Even for experts, it is difficult to explain to the public how fragmentation and adversarialism might confound new policies, and it is also difficult to present practical solutions to skeptical practitioners. Hence, many policies are crafted under the fallacy of formalism: “[r]eliance on formal description of the criminal justice process as a basis for diagnosing problems and constructing remedies”³⁵ Idealistic reforms have noble goals—for example, mandatory sentencing laws ought to reduce recidivism,³⁶ and mental health courts ought to reduce incarceration and recidivism by linking defendants who have mental illnesses to mental health services.³⁷ But such reforms are often based on textbook models of adjudication that include orderly progression of hearings and decisions, clear roles for all actors, formal trials, adherence to the law on the books and access to appeal. Overlooked in this model are the day-to-day disorderly realities of plea negotiations, tight schedules, resource deficits, and discretionary decisions. Simple solutions can appeal to simplified values, while conveniently sidestepping the real conditions that caused the problems in the first place.³⁸

D. *Obstacles and Opportunities*

Feeley offers some optimism about court reform, even in the context of the structural and political complications noted above. He argues that a practical and problem-oriented approach, though not commonly observed in court reform efforts, holds some promise.

This approach embraces a concept of responsive law and fosters a consumer perspective on the courts and in so doing identifies problems as perceived and actually experienced by those who daily use and work in the courts. It insists upon a realism and a sensitivity to the details of administration. As such, it can focus attention on solutions to concrete problems.³⁹

³⁴ Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 9–23 (1964).

³⁵ FEELEY, *supra* note 8, at 123.

³⁶ Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901 (1991).

³⁷ See Robert Bernstein & Tammy Seltzer, *Criminalization of People with Mental Illnesses: The Role of Mental Health Courts in System Reform*, 7 UDC/DCSL L. REV. 143 (2003).

³⁸ FEELEY, *supra* note 8, at 12–13, 123.

³⁹ *Id.* at 132.

1. Problem Definition

Defining policy problems is inherently political: the process involves disputes about whether the problem is weighty enough to require attention, who should be involved in addressing it, and how to frame it for public debate. Criminal justice problems are often defined in urgent terms that are chosen to generate strong emotions such as solicitude for victims, outrage against offenders, or dismay about violations of defendants' rights. Often the people doing this sort of framing—legislators, appellate court judges, and advocates—are quite removed from the people who work in the courts.⁴⁰

2. Initiation

It is not easy to match possible solutions to problems, because implicit in solutions are hypotheses about the causes of the problem. Solutions (policy proposals) may take the form of practical suggestions or symbolic expressions about values. Feeley suggests that the more remote the policy maker is from the reform site, the less likely the reform is to be effectively and successfully adopted. Feeley also suggests, however, that “problem-oriented” reforms, which address practical barriers and opportunities, rather than emphasize behavioral and moral imperatives, are more likely to succeed.⁴¹

3. Implementation and Routinization

Addressing the difficulties of transforming a general idea into practical policy changes, Feeley observed,

Given the lack of incentives for system wide changes within the courts, it is not surprising that innovation should often come from outsiders. Thus, another dilemma: those who are in the best position to assess the needs of the courts have the least incentive to innovate, while those who have the incentive do not have the detailed knowledge.⁴²

Feeley suggests that implementation is likely to be stymied when reform plans demand rigid adherence to protocols, are undertaken in overworked organizations with high caseloads, and are premised on prioritizing efficiency and costs savings.⁴³ Programs are more likely to be fully implemented when those responsible for participating are in concurrence about the significance of the

⁴⁰ *Id.* at 124.

⁴¹ *Id.* at 132.

⁴² *Id.* at 124.

⁴³ *Id.* at 26–27.

problem as well as the appropriateness of the reform, when organizational leadership is established and respected, when resources are adequate, and when the reform allows for local adaptations. Reforms are also more apt to become implemented in good faith when key actors across court organizations agree to collaborate, when the target organization has the capacity to acknowledge and accommodate those actors' needs, and when—importantly—the organization has the resources, political capital, and legitimacy to withstand criticisms from within the court community.⁴⁴

But getting a program off the ground does not ensure its long-term survival. Routinization—the long-term integration of a new policy or program into existing practices and protocols—can be compromised by loss of interest, loss of financial support (or even fear of such loss in the future), active lobbying by practitioners to return to old practices, and changes in advocacy and leadership. A failure of routinization can be as simple as quiet abandonment of an innovation, or as complex as a prolonged public challenge over continued funding.⁴⁵

4. Evaluation

Ideally programs and policies are assessed, using appropriate methods and standards, once they have become a routine part of the court's operations. The purpose of evaluation, of course, is to determine whether the programs—assuming they were implemented as planned—in fact have the positive outcomes they promised. But evaluations also should attend to the costs of such programs, the balance of measurable benefits to costs, and to any unintended consequences.⁴⁶ This is a critically important part of assessing reforms, and our current research will provide data on those outcomes within the next year.

IV. THE UPSTATE NEW YORK CAFA PROJECTS

In November 2013 ILS released a request for proposals⁴⁷ that invited upstate counties to devise programs to improve provisions of CAFA. The solicitation encouraged counties to identify approaches best suited to local circumstances. These improvements included shifts in staffing, plans for on-call arraignment representation, and a variety of accommodations that recognized variability in local needs. Twenty-five of 57 eligible counties applied, and all were granted funds at about requested levels. For this implementation study, we selected five

⁴⁴ *Id.* at 26.

⁴⁵ *Id.* at 27.

⁴⁶ *Id.* at 128.

⁴⁷ N.Y. STATE OFFICE OF INDIGENT LEGAL SERVS., FUNDING ANNOUNCEMENT: COUNSEL AT FIRST APPEARANCE DEMONSTRATION GRANT (2012), <https://www.ils.ny.gov/files/RFP%20For%20Counsel%20At%20First%20Appearance%20113012.pdf> [<https://perma.cc/9HWK-MWEB>].

counties that represented diverse program innovations, levels of urbanization, and systems for delivery of public defense services. One county included a large urban center surrounded by suburban townships, three had smaller cities and sizeable rural areas, and one was sprawling and sparsely populated. One county employed private assigned counsel as the primary means of providing representation, and four had public defender programs as primary counsel. We identify them as Bleek, Hudson, Lake, Moose, and Polar Counties.⁴⁸

Courts of original jurisdiction in criminal cases in upstate New York—at which CAFA must be provided—include 61 city courts (presided over by elected judges who must have practiced law for at least five years)⁴⁹ and over 1,000 township and village courts overseen by lay magistrates (who are required only to be local residents⁵⁰ and who more often than not never attended law school).⁵¹ In the counties outside New York City, a substantial majority of residents live within these rural and suburban townships and villages, not in the 61 cities with city courts.⁵²

New York law requires arresting officers to transfer any arrestee directly to the nearest court, or to one in an adjoining jurisdiction, for immediate arraignment, in both misdemeanor and most felony cases; usually misdemeanor charges remain in the arraigning court through disposition.⁵³ Hence, these town and village courts play a large role in the implementation of CAFA policies, and the remote character of the courts means that the logistics of providing CAFA can be enormously challenging.

These counties offered a variety of approaches to CAFA. Hudson, Lake and Polar Counties identified deficiencies in existing practices of ensuring CAFA and sought to ameliorate them. One county sought funding to provide CAFA in courts outside the large municipality where the service was already established. Two counties sought to expand existing programs to days or times when CAFA was not

⁴⁸ Program evaluation will not be completed until 2017, and we are committed to maintaining confidentiality until project completion and unless key participants agree to be identified. Although all statements are documented in our field notes (on file with the authors), we, therefore, do not specifically identify names of counties or individuals, nor do we identify documents, news reports, or observations by site.

⁴⁹ *Methods of Judicial Selection: Limited Jurisdiction Courts*, NAT'L CTR. FOR STATE COURTS (2016), http://www.judicialselection.us/judicial_selection/methods/limited_jurisdiction_courts.cfm?state= [https://perma.cc/6N77-5D4G].

⁵⁰ *Id.*

⁵¹ William Glaberson, *In Tiny Courts of N.Y., Abuses of Law and Power*, N.Y. TIMES (Sept. 25, 2006), <http://www.nytimes.com/2006/09/25/nyregion/25courts.html?fta=y> [https://perma.cc/4GEW-7RYJ].

⁵² *See List of Cities in New York*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_cities_in_New_York [https://perma.cc/V22C-5RHU] (last visited Mar. 16, 2017) (compiling 2011 population estimates).

⁵³ *See* N.Y. CRIM. PROC. § 140.20.

available—particularly at night and on weekends. In contrast, Bleek and Moose Counties had to start from scratch in planning programs to guarantee CAFA for the first time in a central location, at certain times, or for certain kinds of cases. Table 1 summarizes the five different programs.

Table 1. Summary of Five Programs as Designed and Implemented

County	Demography	Defense provider(s)	Design and scope...	
			...as planned	...as implemented
Bleek	Rural, one small city	Assigned counsel drawn from small firms; 20% participated in CAFA.	Arraignments in city court consolidated into 8–10am weekday sessions. Overnight arrestees no longer arraigned immediately, but held in jail pending session. Select pool of attorneys rotate CAFA assignments.	On call period extended to whole day.
Hudson	Urban, suburban, rural	Public defender office with about 15 attorneys; conflict defender office; assigned counsel as backup.	CAFA extended from weekdays in 1 city court to 24/7 in both city courts & 8 other courts; 2 attorneys hired for this purpose.	Coverage extended to more courts than expected.
Lake	Rural, two small cities	Public defender office with about 12 attorneys; small conflict defender office; assigned counsel for further conflicts.	Existing program consolidated arraignments from all magistrate courts & 1 city court in daily, centralized sessions; supplemented with counsel in other city court and scheduled arraignments of appearance ticket cases; funding used to add 2 attorneys, 1 support staff, and computer equipment.	As planned.
Moose	Rural	Public defender and conflict defender offices with assigned counsel as backup; fewer than 10 attorneys in all.	Pre-program, defenders appeared in courts during regular sessions. Funding used to improve staffing, freeing attorneys to be on call at off-hours arraignments.	Program provides CAFA in all felony cases.
Polar	Urban/suburban	Public defender office; conflict defender office for city; assigned counsel as backup; total of 60 attorneys.	Arraignment representation in the large, urban city court already provided; program expanded through “on call” program to all magistrates’ courts weekdays 8am–8pm. 3 attorneys would be hired.	Program implemented program in all courts, 24/7, through addition of other funds.

We investigated the CAFA reforms using a cross-case methodology,⁵⁴ a research design based on intensive investigation and comparison of community change efforts that all target a common objective. Professor Robert Yin suggests that “the case study is the method of choice when the phenomenon under study is not readily distinguishable from its context.”⁵⁵ We are interested in understanding whether CAFA programs were implemented as planned (and, ultimately, if they alter decision processes and outcomes), but differences in counties’ political climates, defense program leadership, resources and challenges form the contexts in which not only were plans hatched, but also the conditions within which they were to be carried out. Hence we purposefully chose sites that differed across these contextual features, in order to describe the impacts of context on implementation.

Our primary research questions are these: Did these five programs face the challenges that Feeley predicted? How did these challenges vary across sites? Most importantly, how if at all did program administrators address these challenges, and with what implications for implementation of their CAFA programs? Our methodological approach distinctly respects the differences in adaptation across courthouses and also acknowledges the need to understand the complexity, variability, and unpredictability of communities’ social problems and resources, and the unavoidable fact that specific innovation models will be adapted in different and sometimes unpredictable ways by practitioners in varying settings.⁵⁶ This approach also focuses attention on comparisons of local adaptations of policy ideals to practical constraints and opportunities.

We grounded our observations and conclusions on information gathered through on-site observations over multiple visits to each site (approximately one hundred days in total).⁵⁷ Visits typically included at least two authors, and comprised formal and informal meetings involving policy and practice topics as well as in-court observation. We also reviewed historical documents about the indigent defense programs, notes from conversations and meetings among ILS

⁵⁴ Kien S. Lee & David M. Chavis, *Cross-Case Methodology: Bringing Rigour to Community and Systems Change Research and Evaluation*, 22 J. CMTY. & APPLIED SOC. PSYCHOL. 428 (2012); ROBERT K. YIN, *APPLICATIONS OF CASE STUDY RESEARCH* (2d ed. 2003).

⁵⁵ YIN, *supra* note 54, at 4.

⁵⁶ Prudence Brown, *Evaluating and Learning From Community Change Efforts*, in VOICES FROM THE FIELD III: LESSONS AND CHALLENGES FROM TWO DECADES OF COMMUNITY CHANGE EFFORTS 95 (Anne C. Kubisch et al. eds., 2010); VOICES FROM THE FIELD II: REFLECTIONS ON COMPREHENSIVE COMMUNITY CHANGE (Anne C. Kubisch et al. eds., 2002); YIN, *supra* note 54, at 4.

⁵⁷ The project involves both the study of implementation of programs (as reported here) and gathering of case-level data from time periods before, immediately after, and one year after the CAFA programs were implemented, in order to test hypotheses about the effects of attorneys’ presence on interim and final case decisions and outcomes. Hence the research team spent significant time during these visits in court observation and meetings with defense program staff and others involved in the CAFA initiatives. We did not conduct formal (structured) interviews with these individuals; we did engage in conversations that they initiated.

staff, notes from informal conversations with court staff and defenders that unfolded while on site, tracking of media accounts related to the courts and indigent defense, programs' reports on caseloads and spending, and requests for funding submitted to ILS.⁵⁸

We present our findings using Feeley's framework outlined above, focusing on the stages of policy reform and attending to the conditions that might support, or compromise, reform efforts. We begin by distinguishing between the problem definition and solution stages, which were initiated at the state level and were adapted to local conditions, and then move to a description of the local policy solutions and their implementation and routinization.

V. FINDINGS

A. *Defining the Problem and Initiating Solutions: The ILS CAFA Initiative*

We observed above that in New York, ILS defined CAFA as an emergent problem with the imprimatur of the state's highest court. ILS also took the first step in initiating a solution by inviting indigent defense programs to apply for funding for new CAFA programs. However, ILS leadership adopted an uncommon strategy for soliciting programmatic responses. The agency's early outreach to defense providers included email and in-person contact with defenders across the state, through which all were asked about major challenges facing their programs, and particularly in relation to providing CAFA. These communications quickly revealed the diversity of issues faced around the state. Providers identified acute staffing and resource shortages as the root cause of a range of systemic deficiencies including the failure to provide vertical representation, attorneys' inability to communicate with non-English-speaking clients, and inefficient use of attorney time on administrative tasks.⁵⁹ Moreover, defenders felt many of those issues were more pressing than their inability to provide CAFA.

The agency's Request for Proposals encouraged applicants to adopt new and innovative approaches tailored to local conditions "in the varied jurisdictions across the state" including "city courts, as well as . . . town or village courts. . . ."⁶⁰ Recognizing that funding might not be sufficient to ensure comprehensive CAFA, ILS permitted proposals that offered incremental changes.⁶¹ Applicants were

⁵⁸ Prior to the start date of the NIJ-funded research project (Jan. 1, 2015), the second author and ILS colleagues interviewed indigent defense providers, and their notes on those interviews became part of office archives and thence background material for this study. Data collection protocols for the evaluation project were approved by the University's Institutional Review Board.

⁵⁹ N.Y. STATE OFFICE OF INDIGENT LEGAL SERVS., 'THREE DEFICIENCIES' (2012) (internal agency memorandum analyzing provider responses regarding their programs' top three challenges).

⁶⁰ N.Y. STATE OFFICE OF INDIGENT LEGAL SERVS., *supra* note 47, at 4.

⁶¹ *Id.* (stating applicants "need not propose county-wide, all-courts solutions").

encouraged to identify target courts based on “volume of arraignments or pretrial detention of persons arraigned, geographic considerations, or amenability to collaboration among the criminal justice entities involved in the proposal.”⁶²

Most proposals were drafted by local indigent defense programs’ offices, and they varied much. Feeley, who warns against the imposition of cookie-cutter solutions, would see this as a strength: “[I]f a single agency unilaterally implements a new policy that has system-wide impact, then it is likely to be greeted with resistance and adaptation.”⁶³ In opting for an open solicitation, ILS anticipated more promising prospects of locally imagined initiatives.⁶⁴

We note that for statutory reasons, ILS’s opportunity to address CAFA ultimately constrained practical plans. ILS funding comes from New York’s Indigent Legal Services Fund, a special revenue fund restricted to disbursement for specific purposes—in this case, indigent legal services.⁶⁵ As a result, ILS could not entertain proposals that directed resources to other local criminal justice entities, like judges and law enforcement, even if proposed programs had resource implications for those agencies. This restriction had two implications for those agencies’ interest in, and capacity for, participating in the new programs.

First, ILS’s enabling legislation limited the agency’s role to initiatives that would “monitor, study, and make efforts to improve” public defense in New York but did not create an agency that could provide services to indigent defendant clients directly. As a consequence, almost all of ILS’s budget, except funds needed to pay ILS staff, has historically been classified under “aid to localities”—funding which can only be used to fund local governments, albeit at ILS discretion.⁶⁶

Second, ILS imposed a preclusion: grant funds were only available for programs that provided for “the physical presence of counsel with the client in court.”⁶⁷ In New York, as elsewhere, courts have experimented with arraignments conducted by video links. ILS excluded such arrangements in the CAFA grant solicitation, citing concerns about quality of representation, compromises to confidentiality and quality of pre-arraignment attorney-client communication, and the compromise of trustful attorney-client relationships.⁶⁸

⁶² *Id.* (further noting that “[n]o one specific basis is required nor do the bases noted here constitute an exclusive list”).

⁶³ FEELEY, *supra* note 8, at 124.

⁶⁴ *Cf.* *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

⁶⁵ N.Y. STATE FIN. LAW § 98-b.

⁶⁶ N.Y. EXEC. LAW § 832 (1).

⁶⁷ N.Y. STATE OFFICE OF INDIGENT LEGAL SERVS., *supra* note 47, at 3.

⁶⁸ *See* Eric T. Bellone, *Private Attorney-Client Communications and the Effect of Videoconferencing in the Courtroom*, 8 J. INT’L COM. L. & TECH. 24 (2013) (discussing lack of

B. Adapting the ILS Invitation to Local Needs: County Initiatives

Not surprisingly, given the broad parameters of the solicitation, counties' proposals included many strategies. Mostly, they aligned with Feeley's recommendation of a problem-oriented approach to reform: one that focuses less on the symbolic, ideological, or political reasons for the reform and more on the practical needs of the practitioners who have to put it into action.⁶⁹ In planning reforms, program administrators in the five counties defined their task less in abstract terms regarding due process rights than in concrete problems to be overcome.

The problems included geography, infrastructure, and personnel. For instance, Moose County covers over 1,500 square miles with more than 2,500 miles of mostly secondary roads and one of the lowest population densities in the state. These facts posed formidable transportation challenges, since lawyers had to attend arraignments at over 30 widely scattered town and village courts. Bleek County, which a court clerk described as "a piece of spaghetti,"⁷⁰ stretches over 50 miles from north to south, much of that distance served only by two-lane roads. Moose County's administrator addressed the geography problem restricting CAFA to felony arraignments, which are less frequent than misdemeanors,⁷¹ while Bleek County initiated its CAFA program only within the city limits of its county seat.

Infrastructure constrained plans in almost all counties. The practical problem of where to keep arrestees prior to arraignment (when arraignments could not be conducted immediately) bedeviled parts of all jurisdictions. Arrests that occurred during regular courthouse hours could be arraigned right away, but many arrests took place on weekends, after hours, or—in the cases of many magistrates' courts—on days when the court was not open at all, requiring ad hoc arraignments. Where county jails were the only place to hold arrestees, program planners faced a Catch-22: law enforcement officers are not supposed to book defendants until they are arraigned, so if arraignments cannot be conducted promptly after arrests (and if they are delayed pending the arrival of a defense lawyer), police personnel and resources are tied up in monitoring arrestees, often outside of sanctioned holding facilities.

Some counties had certified short-term holding facilities (usually in police

confidentiality in many video-conferencing systems used in client communication); *see also* Shari Seidman Diamond et al., *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. CRIM. L. & CRIMINOLOGY 869 (2010).

⁶⁹ FEELEY, *supra* note 8, at 132.

⁷⁰ Conversation with Bleek County Assigned Counsel Administrator, in Bleek County, N.Y. (2015).

⁷¹ *See 2011–2015 Dispositions of Adult Arrests*, N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVS., <http://www.criminaljustice.ny.gov/crimnet/ojsa/dispos/index.htm> [<https://perma.cc/N8P4-C55B>] (last visited Mar. 16, 2017) (36% of criminal court case dispositions outside New York City were felonies; 64% were misdemeanors).

departments) but most did not. The lack of certified holding cells in courts in all five counties obliged law enforcement to take suspects to arraignments after hours when many judges and magistrates were hard to reach. Simply getting defendants to courts for arraignments presented an array of challenges, and the logistics of notifying a judge, estimating times for transports, and concerns about prosecutors' participation strained the capacity for ensuring CAFA in all five counties.

These logistical challenges made timely arrival of defense lawyers seem less daunting, but that problem also proved an enduring challenge. In Bleek County, where an assigned counsel program provided representation, the program administrator was candid about his reliance on "young and hungry" lawyers on the panel to pick up the arraignment calendars, but he also acknowledged that early plans to extend CAFA beyond daytime city court arraignments had stalled over the problem of timely dispatch of attorneys to distant town courts.⁷² The chief defender in Lake County asked all attorneys to rotate weekend shifts covering arraignments, while still allowing them the flexibility to trade shifts as needed. In Moose County, where only felonies were guaranteed CAFA, the public defender's young staff accepted the odd hours and taxing travel times as part of the costs of breaking into the business. But none of these program administrators took for granted that the goodwill of their lawyers would last for long; all were mindful that more stable plans for ensuring CAFA would be needed.⁷³

In Hudson and Polar Counties, program administrators used their funds to add new lawyers to their staff. In Hudson, the chief public defender assigned newly hired attorneys to off-hours arraignments, acknowledging that their patience for these assignments might wear thin.⁷⁴ In Polar County, the administrator of an already busy urban defender office used ILS grant funds to hire two additional on-call staff attorneys to exclusively cover arraignments in all town and village courts, starting with weekday business hours and then transitioning to 24/7 coverage through additional ILS funding.⁷⁵ While all of these decisions represent compromises to full implementation of CAFA, they also reflect realistic assessments about the limits of resources and personnel.

In short, in designing programs, administrators in all five counties focused less on the abstract or symbolic values of CAFA and more on the practical challenges of ensuring representation. Not surprisingly this played out differently across different contexts. Hence while ILS played a key role in advancing CAFA onto the reform agenda, and also established the broad parameters around which

⁷² Conversation with Bleek County Assigned Counsel Administrator, *supra* note 70.

⁷³ Conversations with a Lake County public defender, Lake County Public Defender's Office, in Lake County, N.Y. (2014, 2015).

⁷⁴ Conversation with a Hudson County public defender, Hudson County Public Defender's Office, in Hudson County, N.Y. (2015).

⁷⁵ Conversation with a Polar County public defender, in Polar County Public Defender's Office, in Polar County, N.Y. (2015).

programs might be designed, the agency left general strategies and details to local administrators, and those administrators' ingenuity and pragmatism in adapting to local conditions may have been determinative in the successful implementation of CAFA programs.

C. Implementation and Routinization of CAFA Programs

Feeley suggested that, once planned, reforms were in jeopardy if they were linked to rigid protocols, were over-focused on prioritizing efficiency and cost savings (which might discourage initiative and creativity and risk), and were attempted in courts with high caseloads and overworked staff.⁷⁶ The five counties' programs that we studied appeared to have escaped these risks, probably because programs were designed to fit within the limits of the grant funds the counties received, and they did not appear to directly compete with other initiatives that were underway in these counties' defense programs.

Feeley also suggested that new programs had better prospects if they were adopted under conditions of agreement (within and across agencies) about the significance of the targeted problem and the value of the reform plan: specifically, when organizational leadership was established and respected, when resources were adequate, when a system-wide culture of collaboration was in play, and when the initiating organization had the capacity to acknowledge and accommodate other actors' needs. Perhaps most important, when the organization responsible for implementing and routinizing the policy has sufficient political capital, legitimacy, and resilience to withstand criticism and challenges, its reform idea has a fighting chance.⁷⁷ We review here the five counties' experiences with (1) consensus on the salience of the problem of CAFA, (2) the adequacy of resources that might backstop defenders' plans for reform on CAFA (including plans for extending programs beyond the initial plan), (3) the character of indigent defense leadership and legitimacy within the broader courthouse and community culture, and (4) relatedly, the public defense programs' capacity to respond to challenges to their CAFA programs, in the context of the broadly defined community constraints.

1. Consensus on the Value of CAFA Programs

Indigent defense providers mostly agreed that adoption of CAFA could improve their work, though for different reasons. In all counties, defenders believed that when attorneys were present at arraignment or first appearance, justice was better served as more defendants were released on recognizance, were granted reasonable bail, or were released under supervision. In most counties,

⁷⁶ FEELEY, *supra* note 8, *passim*.

⁷⁷ *Id.*

defenders averred that CAFA allowed for (1) more opportunity to put together convincing bail arguments, (2) better odds of contacting, at an early point, family members who could assist defendants, and (3) better chances of ensuring that defendants who avoided pretrial detention might keep their jobs, stay with their families, and be routed into diversion and treatment programs. These objectives speak directly to the client-oriented concerns of defense lawyers. They saw CAFA as a new opportunity to intervene on behalf of clients and obtain benefits that perhaps had not existed previously. In Bleek and Moose Counties, two defenders were quite direct in explaining another way their presence helped clients: they could “get the client to shut up” and not utter incriminating statements in open court.⁷⁸

In most counties, program personnel noted practical advantages in early attorney-client contact: CAFA attorneys could advise defendants to complete indigent defense eligibility paperwork promptly and hence more quickly establish a relationship with the attorney assigned to the case, and they could pass along their notes and observations to that attorney as well. None of the programs attempted to initiate vertical representation at CAFA, for practical and professional reasons,⁷⁹ but they recognized the value of having the CAFA lawyer’s notes on the case as it was handed off. Although programs processed eligibility forms in different ways, and typically judges took responsibility for asking defendants whether they needed counsel and provided the applications for indigent defense, lawyers believed that their opportunity to advise defendants on the importance of this step resulted in higher rates of application and completion, and shorter periods from application to assignment. In Bleek, Hudson, Lake and Polar Counties, attorneys often had defendants complete eligibility forms at arraignment. In Bleek County we observed attorneys in the courthouse hallway after arraignment, carefully instruct defendants on the importance of completing the forms and submitting them within 48 hours. A long term result may be earlier assignment, which lawyers believed might reduce times to disposition.

Above and beyond these benefits, defenders in Moose and Polar Counties also emphasized that CAFA created opportunities to conduct more proactive and adversarial advocacy. For example, arguments for timely dismissals on the grounds of faulty accusatory instruments might facilitate a disposition on the spot. In Moose County, the chief public defender believed that law enforcement, facing the new prospect of coordinating with defense counsel to convene at court in minor cases, had begun to issue appearance tickets more frequently rather than take

⁷⁸ Conversation with Moose County defense attorneys, in Moose County, N.Y. (2015).

⁷⁹ For example, in Bleek County the administrator assigned cases to lawyers based on case seriousness and difficulty, as well as attorney experience. The CAFA attorney might not have the requisite credentials to handle the case all the way to completion.

suspects into custody.⁸⁰ In Bleek County, the program administrator and panel attorneys were confident that CAFA obtained more adjournments in contemplation of dismissal—a disposition that results in dismissal of charges and sealing of court files, in most cases, unless the defendant is re-arrested within six to twelve months.⁸¹ Defenders in all counties observed that with or without CAFA, most judges were inclined to seek bail recommendations from prosecutors and sometimes law enforcement, even if they had to do so over the phone. CAFA mitigated the inequity inherent in such proceedings by ensuring that defense counsel could counter those recommendations and develop a case for release or low bail.

2. Adequate Resources

Were the resources provided by ILS adequate for the CAFA programs in the five sites? Or to put it another way, did applicants accurately judge the cost of putting their programs in place? It appears that CAFA grants from ILS were adequate for the programs designed. Defenders seldom expressed disappointment in those funds, nor did they complain that their offices had underestimated the time and effort needed to implement the CAFA plans. With the exception of Moose County, where implementation plans were developed later than elsewhere, defense programs fulfilled their initial commitments to provide CAFA within their original timelines. In Hudson County, the chief defender observed that staff were spread thin, but nonetheless managed the caseload efficiently enough that all defendants brought into court “in handcuffs” were provided with CAFA, prior to any eligibility screening, and office eligibility standards were significantly more inclusive than those in many other counties.⁸² With the smallest staff, the Moose County Public Defender Office was the most vulnerable to short-term shortages, and the chief defender told us that “there’s not enough of us, and not enough time.”⁸³

These defenders acknowledged that although they were living up to their commitments as funded by the grants, they would face greater challenges in

⁸⁰ See MARY T. PHILLIPS, N.Y.C. CRIMINAL JUSTICE AGENCY, *THE PAST, PRESENT, AND POSSIBLE FUTURE OF DESK APPEARANCE TICKETS IN NEW YORK CITY* (2014), <http://www.pretrial.org/download/research/The%20Past,%20Present,%20and%20Possible%20Future%20of%20Desk%20Appearance%20Tickets%20in%20New%20York%20City%20-%20NYCJA%202014%20.pdf> [<https://perma.cc/SP8V-6JDT>] (discussing N.Y. CPL § 150.10).

⁸¹ See NASSAU COUNTY LEGAL AID SOC’Y, *ADJOURNMENT IN CONTEMPLATION OF DISMISSAL INFORMATION SHEET* (May 13, 2016), http://nassau18b.org/forms/adjournment_in_contemplation_of_dismissal.pdf [<https://perma.cc/S4XC-3GY8>] (discussing N.Y. CPL § 170.55).

⁸² Conversation with a Hudson County public defender, in Hudson County Public Defender’s Office, in Hudson County, N.Y. (2015).

⁸³ Conversation with a Moose County public defender, Moose County Public Defender’s Office, in Moose County, N.Y. (Aug. 2015).

expanding CAFA to all arraignments. Particularly in rural Bleek and Moose Counties, defenders discovered that their providing CAFA in, respectively, city court only and felony arraignments only, were manageable, but the prospective costs of expanding those programs loomed large. Facing increasingly clear expectations from state officials that CAFA might eventually be expected in all cases,⁸⁴ administrators became mindful of data that would inform the costs and resources attached to county-wide programs. For example, officials in Bleek County observed that few lawyers lived or worked in the remote sections of the county, which would make CAFA impractical for night-time and weekend arraignments regardless of reimbursement options. In Moose County, the small staff could be stretched across a vast and rugged county to cover felony arraignments, but the number of misdemeanor arrests is approximately twice that of felony arrests; tripling the number of arraignments would divert significant time toward arraignments, and away from other responsibilities.⁸⁵

In short, “resources” means more than funding, particularly in counties where the logistical challenges of delivering services would require more than marginal increases in existing activities and effort. In fact, some of the most valuable resources were precisely those that ILS grant money could not buy: the willingness and capacity of other criminal justice agencies to coordinate in providing CAFA. Those resources include information sharing, cooperation in notification and scheduling arrestee transport, and flexibility in timing. The CAFA grant program provided funds to be spent in defender programs, but no parallel resources were available to law enforcement, jails, city and magistrate courts, and district attorneys. Hence, the resource challenges that emerged in most counties revolved around capacity to leverage these agencies’ participation in the absence of incentives. Overcoming these challenges depended on the defense programs’ leadership and legitimacy with criminal justice agents, courthouses and county governments, and program leaders’ resilience and responsiveness in countering skepticism, resistance and threats to program continuity.

3. Leadership and Legitimacy with Criminal Justice Communities

Pushing through a change in process requires energy and commitment. It also requires cooperation from practitioners in other agencies whose work would be affected by the new program. We observed diverse administrative styles and

⁸⁴ See N.Y. STATE UNIFIED COURT SYSTEM, REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL LAW AND PROCEDURE TO THE CHIEF ADMINISTRATIVE JUDGE OF THE COURTS OF THE STATE OF NEW YORK 2–5 (2016), <http://www.nycourts.gov/ip/judiciary/legislative/pdfs/2016-CriminalLaw&Procedure-ADV-Report.pdf> [<https://perma.cc/B758-C9TU>] (reporting support for legislation to create centralized arraignments).

⁸⁵ In a ratio fairly typical of New York’s rural counties, in 2015 Moose County had approximately 500 felony arrests and over 1,000 misdemeanor arrests disposed in court. See *2011–2015 Dispositions of Adult Arrests*, *supra* note 71.

office cultures, which existed in the varying contexts of communities and cultures. Defenders' long-term organizational relationships with law enforcement, prosecutors, courts, and county governments appear to have influenced those actors' receptivity to CAFA.

The chief public defender of Hudson County has been with the office since the 1980s and has been chief for over five years. Office staff includes other lawyers with long tenure. The chief is a progressive manager as well as an advocate for the office and its clients. He is an active member of a local council of criminal justice agencies whose collaboration and endorsement he secured in developing the grant proposal; he maintains detailed records of case flow and outcomes; and he works in close consultation with the county's information technology chief. He is one of three public defenders in our sample who makes extensive use of a case management system for recording case notes and tracking case patterns. He has also taken the initiative in seeking outside funding to improve jail conditions, and has instituted a risk assessment system for making bail recommendations at arraignment. He is realistic about the limits of CAFA's promise—he opined that at present, in his county, a prosecutor's bail recommendation will almost always be accepted by a judge—yet his county was one of the first offices to implement its CAFA initiative. A fellow county administrator summed up their opinion of the chief defender as “such a visionary . . . [who] is also very persistent and patient.”⁸⁶

In this county, according to the public defender, most judges agreed that CAFA is important, particularly for incarcerated defendants. As was the case in many counties, the sticking point for implementing CAFA was the practical problem of getting arrestees, judges, and attorneys in one place, particularly outside of regular court hours. The public defender had initially lobbied for a program that would centralize arraignments in “hub courts”—several courts located strategically that would hear all arraignments from surrounding towns and villages. He reasoned that this would allow law enforcement to establish regular procedures for transporting arrestees between the county jail and these courts. But he expressed willingness to compromise when it became clear that judges preferred to retain their authority over their local courts, and the county jail was too crowded to accept more responsibility. Among the five counties, Hudson appears to have integrated CAFA most seamlessly into its day-to-day operations. But the chief defender was also frank about the process that brought key actors on board, “because it was the least common denominator option.”⁸⁷

Like the Hudson chief defender, Bleek County's Assigned Counsel Administrator is a long-time county employee who took over managing the program more than two decades ago. At that time, he inherited no more than “a

⁸⁶ Conversation with Hudson County administrator, in Hudson County, N.Y. (June 2015).

⁸⁷ Conversation with a Hudson County chief public defender, Hudson County Public Defender's Office, in Hudson County, N.Y. (Apr. 2014).

shoebox full of papers” and has since developed a detailed record-keeping system that appears to be widely admired by the lawyers who work for the panel.⁸⁸ The Bleek County administrator is not an attorney, but he prioritizes the professionalism and reputation of his panel: he stratifies the panel by expertise and abilities (saving the most challenging cases for the most experienced lawyers), and he removes from the panel lawyers whose work falls short of expectations. His open-door policy ensures that his lawyers stop by often to see him and catch up on courthouse gossip; he organizes CLE classes; and he visits all the courts in the county throughout the year to observe proceedings. His involvement in county politics, charitable organizations, the local community college, and the magistrates’ and county bar associations have allowed him to build both political capital and personal regard. The authors discovered quickly that it was nearly impossible to accompany the administrator to lunch without pausing to be greeted by business owners, county officials, and neighbors. At an early planning meeting about CAFA, this administrator secured the crucial endorsement of a key city court judge, lending additional legitimacy to his proposal to ILS.

Polar County’s chief public defender moved to the public defender office after establishing a reputation in private civil and criminal practice. After several years as a public defender, he was appointed to administer the office by the county legislature, an appointment that has been renewed multiple times by members of both parties. This would seem to affirm his reputation, both locally and statewide, as an effective administrator who is also a well-liked boss and a professional organizer.⁸⁹ He was characterized by an administrator in a nearby county as “the lawyer I’d want to have if I found myself in trouble.”⁹⁰ A lawyer in the same county characterized his leadership style (and office culture) as “system guys,” oriented toward advocating for client rights in opposition to an unbalanced legal system.⁹¹ This office was also an early adopter of CAFA, and the chief defender believes that his was one of the first counties to be able to provide CAFA in all arraignments in all courts.

Lake County’s chief defender advanced to that administrative role not long after the public defender office was created and, like colleagues in Hudson and Polar, had initiated a CAFA program before the ILS grant opportunity arose.

⁸⁸ Conversation with Bleek County Assigned Counsel Administrator, in Bleek County, N.Y. (2015).

⁸⁹ The Polar County office occupies a large floor in an aging downtown office building. As is typical of such spaces, the offices and cubicles are tightly spaced and often shared, and file cabinets line the hallways. As is atypical, however, every office is individually decorated with personal mementos, political posters, and strings of holiday lights. The chief public defender has also organized a regional association of defenders that meets regularly to discuss upcoming legislation, relevant court decisions, and best practices.

⁹⁰ Conversation with program administrator (Mar. 2016).

⁹¹ Conversation with a defense attorney on the Assigned Counsel Panel, in Bleek County, N.Y. (2015).

Despite a relatively brief tenure, the chief has established a strong reputation among colleagues as an innovator, and has successfully advocated for best practices for the office (such as caseload limits) and for innovations in the local courts (including participation in specialty courts). Like the Polar County public defender, the Lake County chief defender has built a state-wide reputation as a respected professional, and participates at that level in policy and practice discussions.

Establishing CAFA in Lake county required winning over the magistrates and city court judges, but a common challenge, winning over the sheriff responsible for transporting arrestees, was serendipitously already in play. In Lake, the sheriff had already organized consolidated weekend arraignments in conjunction with a city judge, which simplified the public defender's task to place counsel into the process. The chief public defender described the sheriff as "common sense"—willing to make accommodations to advance the CAFA program because they also advanced his agenda of managing jail and transit costs.⁹² This may be, in part, the result of the chief defender's strategic presentation of the program as not only an investment in due process, but also an opportunity to reduce county jail costs by diverting deserving defendants, at arraignment, from pretrial detention.

Lastly, the Moose County public defender, an able administrator in a small office, nonetheless seems to enjoy his reputation of an adversarial advocate and agitator at least as much as he is appreciated for his management skills. He candidly volunteered, in a conversation about the district attorney that he "just couldn't turn down a good fight."⁹³ During site visits, this chief defender was far more likely to initiate a conversation about a specific case, judge, or court than about a budget or staffing challenge, and he described with satisfaction his successful attempt to unionize his office staff. The youthful lawyers in the office appear to follow his example. Their banter often involves celebrating a disappointment suffered by the district attorney, and a chalkboard on the wall identifies each lawyer as an actor in action and adventure movies. The combative culture in this office plays out against a history of animosity between the district attorney and the public defender; the former, facing multiple challenges to the office's legitimacy and integrity, has over the past three years adopted controversial strategies and issued public pronouncements that overtly criticize not only the public defender but the CAFA project specifically.

4. Political Capital and Resilience to Challenges

To summarize, in Hudson, Lake, and Polar Counties, a confluence of circumstances allowed for relatively collaborative implementation of CAFA

⁹² Conversation with chief public defender, Lake County Public Defender's Office, in Lake County, N.Y. (2013).

⁹³ Conversation with Moose County Chief public defender, in Moose County (Aug. 2015).

programs. Program administrators faced initial skepticism, but key actors in the criminal justice environment were cooperative at best, and disengaged at worst. Successful implementation hinged more on indigent defense programs' capacity to accurately gauge their resource needs, mobilize and motivate their staff, and faithfully adhere to their programs' plans and objectives. That is not to say that these projects were easy to put (and keep) into place; rather, competent and attentive administrators with sufficient resources managed to respond to questions, doubts, and challenges as they built their CAFA programs.

However, all programs faced five potential critical logistical and political quandaries that CAFA grant funds could not directly address, and where these problems loomed largest, programs faced the biggest implementation challenges.

The first challenge was judges' reluctance to engage in the program lest they commit to more time-consuming proceedings than they thought necessary when they were called to arraign arrestees outside normal court hours. Many arrests occurred outside scheduled court sessions, and as we noted previously, in magistrates' courts, those sessions can be as seldom as bi-monthly. Hence arraignments might be held, in an ad hoc fashion, immediately after arrest, and wherever was convenient, and getting a defense lawyer to these events presented practical challenges. Judges repeatedly expressed concerns about long waits between the arrival of the arresting officer and his or her arrestee, and the defense lawyer.⁹⁴ The public defenders who successfully deflected this concern were those who minimized judges' responsibility for off-hours arraignments, as was the case in Lake County, or who arranged to have counsel show up quickly in all jurisdictions, as was the case in Polar County. In that county, the chief defender enlisted the support of the county's supervising judge to invoke the Judicial Conduct Committee's power to sanction magistrates who did not contact lawyers for arraignments.⁹⁵ And in Moose County, where driving distances and waiting times were always long, the defender proactively began tracking the average of fifty minutes that it took for lawyers to reach court in an attempt to dispel stories of indefinite wait times and inconvenience to judges.⁹⁶

The second challenge was judges' skepticism about the need for, and value of, CAFA. While few argued against its constitutional status, many nonetheless maintained that arraignment was a formality, that a lawyer's presence would not change decisions on pretrial release, bail, and disposition, and that the costs would

⁹⁴ In most counties the district attorney did not provide for staff to be present at these off-hours arraignments, but commonly magistrates or clerks phoned the district attorney for a bail recommendation, a practice we heard described often, and witnessed multiple times.

⁹⁵ Conversation with the chief public defender, Polar County Chief Public Defender's Office, in Polar County, N.Y. (May 2015).

⁹⁶ Conversation with the chief public defender, Moose County Public Defender's Office, in Moose County, N.Y. (Aug. 2015).

outweigh the theoretical benefits.⁹⁷ On this point, there was frank disagreement in all counties between at least some judges (particularly magistrates) and defense lawyers, and the latter's frustration was evident in the Polar County's chief defender's assessment: "Sometimes I feel like they forget about the Constitution."⁹⁸

The third challenge was judges' concerns about maintaining autonomy in arraignments in their jurisdictions. While New York permits arraignments in city or magistrate courts adjacent to those in which offenses allegedly occurred, and also permits city court judges, under some conditions, to arraign arrestees from anywhere in their counties, many magistrates felt that delegating their authority would be irresponsible, arguing that they were best suited to make judgements about local residents. Hence proposals that would remove that authority were not well received even if they promised efficiency.

The fourth challenge, therefore, was getting arrestees to courts, a problem for law enforcement as well as for judges. In Bleek County, on some nights only one sheriff's car was on road patrol, so diverting it for any period of time to oversee transport raised public safety concerns.⁹⁹ Particularly where no local holding cells were available other than the county jail, off-hours arrests taxed law enforcement resources.

The fifth potential challenge was resistance from the district attorney's office, a challenge more political than pragmatic. In Bleek County, the district attorney was running for re-election during the project's term, and was vocal in local news, county budget meetings, and hallway conversations regarding his disdain for the CAFA program. His primary complaint was that the program was not matched by a parallel funding opportunity for his office.¹⁰⁰ In Moose County, the district attorney likewise criticized the CAFA program, maintaining that the grant permitting defenders to appear at arraignments was not matched by any grant permitting prosecutors to appear alongside them.¹⁰¹ The Lake County district

⁹⁷ We observed this sentiment most clearly at a meeting of the Magistrates' Association in Bleek County, in 2015, when the question and answer session provided opportunities for attendees to pose questions about the CAFA program. A dominant theme in these questions was the questionable need for CAFA, as weighed against the perceived costs to magistrates (and law enforcement) in expeditious processing of arraignments.

⁹⁸ Conversation with the chief public defender, Polar County Public Defender's Office, in Polar County, N.Y. (May 2015).

⁹⁹ Conversation with a Bleek County magistrate, in Bleek County, N.Y. (2015).

¹⁰⁰ This district attorney's views were documented in the city newspaper, press releases, and election campaign materials throughout 2014 and 2015 (documented in authors' field notes and media records).

¹⁰¹ This district attorney further implied in local media reports that the inequities in staffing and resources between that office and the public defender forced a reduction in prosecutorial appearances across local courts (documented in local media coverage, 2014 and 2015, and recorded in authors' field notes).

attorney complained that with the new staffing provided by ILS grant money, the parity of attorney staffing with the public defender's office would be too close to his own.¹⁰²

VI. DISCUSSION AND CONCLUSIONS

This article describes the activities and the challenges that indigent defense program staff experienced as they attempted to implement CAFA programs in five upstate New York counties. All of these programs are works in progress. Nevertheless, we can draw some conclusions about the conditions that made these reforms—some of them quite radical changes to existing local practices—viable, at least in the short periods of time that we have had to observe their implementation.

When the National Institute of Justice awarded funding to study these CAFA reforms, the primary objective was to evaluate CAFA's effects on case outcomes and the widely held (but seldom tested) arguments that CAFA would result in better pretrial decision making, quicker dispositions, and more effective advocacy.¹⁰³ But we were mindful of the well-known cautions in evaluation research literature, and of Malcolm Feeley's assessments of the particular risks in attempting to reform criminal courts: if new initiatives are not adopted, and adapted, in practical terms—if implementation of good ideas fails—then there is no reason to expect to find that the program produced the desired results. Hence, we took advantage of the rare opportunity to investigate real-time implementation in these diverse counties even as we undertook systematic outcome evaluations. Here we address the limitations of the study, summarize the findings, and address the contributions of this study, and of this type of research, to practitioners, policy makers, and court researchers.

A. *Limitations of the Study*

There is an inherent tension between methodologies for understanding social and organizational behavior.¹⁰⁴ Standardized analysis of systematically sampled,

¹⁰² Conversation with a Lake County public defender, Lake County Public Defender's Office, in Lake County, N.Y. (July 2013).

¹⁰³ See Douglas L. Colbert et al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719 (2002). Social science research would seek a quantified estimate of the average or aggregated differences in outcomes associated with, and without CAFA, and draw policy conclusions at least in part from those results. Under this methodology, if it "works," it is a worthy policy. We allow for a more nuanced perspective: that as a Constitutional right, CAFA should be provided regardless of empirical evidence, and that it, on average, improves the administration of justice in measurable ways.

¹⁰⁴ See GARY GOERTZ & JAMES MAHONEY, *A TALE OF TWO CULTURES: QUALITATIVE AND QUANTITATIVE RESEARCH IN THE SOCIAL SCIENCES* (2012) (describing tension between these epistemologies and research methodologies in the social sciences as so pervasive and profound as to constitute a difference in cultures and paradigms).

quantified data are reassuring to social scientists trained in statistical analysis. The rigor offered by such methods can sometimes be had, however, only with the sacrifice of careful inquiry into the complexity of personal and organizational relationships, sequencing of events, and understanding of social and political contexts. While we learned a great deal about the dynamics of reform in five counties, this study of implementation cannot be generalized to all reform efforts, or even to all upstate New York CAFA reform efforts. Further, even though our observations and conclusions are based on extensive time on-site, and on ample observation and access to relevant information and documentation, we allow that with more information we might have drawn somewhat different conclusions. We have incorporated the insights of many defense lawyers and administrators, a number of judges and magistrates, and those of law enforcement as often as possible, but we have included the perspectives of prosecutors only through their public pronouncements and media interviews, not through direct conversation. And of course, the conditions we observed and monitored over two years might change in the near future.

B. Reprising Feeley: Fragmentation, Adversariness, and the Fallacy of Formalism

The findings from this study offer some insights into an important question: if many reform attempts fail to launch, why did these five counties seemingly succeed? Feeley's theory gave us little reason to expect any success, yet we observed five instances of faithful adherence to plans. We suggest that it was not because these programs faced no challenges but rather, because the process unfolded at the state, and then local, levels in a way that permitted them to bypass or overcome the roadblocks that Feeley described.

Feeley's cautions, in the main, are well founded. He described courts as fragmented and adversarial. He further described many attempted court reforms as fallacious, insofar as they were built on unrealistically formal notions of how court actors do their work. He concludes that, as a result, the politicians and high-level administrators who identify problems and advocate for solutions are often out of touch with people who must implement them. Furthermore, local administrators are frustrated by lack of consensus on the problem and doubts about the solution, as well as by the frequent unwelcome discovery that available resources fall short of actual needs.¹⁰⁵ Because few reforms can be implemented solely within a single organization, leadership may also lack legitimacy in courthouses and communities to sell key actors and organizations on the new program; indeed, some of those parties may actively oppose or even undermine the reform.

Did the CAFA reforms in upstate New York match this unpromising scenario? The answers are incomplete, but offer room for some optimism about court reform. First, having achieved a critical mass of state-level support for

¹⁰⁵ FEELEY, *supra* note 8, *passim*.

CAFA, ILS adopted a strategy for promoting reform that avoided the fallacy of formalism. The call for CAFA proposals explicitly acknowledged the heterogeneity of local conditions and challenges, the need to suit programs to existing practices, and the potential value of diverse models. Moreover, undertaking a CAFA program with ILS funding was optional, and very few constraints were placed on program plans. In essence, ILS invited program administrators to experiment.

And experiment they did. The open-ended model enabled administrators to tailor programs to the specific problems and opportunities in their jurisdictions—what Feeley calls a problem-solving perspective. As a result, in most counties we studied there was consultation, both inside and outside the defender offices, about what was and was not possible. Most programs centered on manageable changes, taking into account geographic, infrastructural, and personnel limitations. Administrators were candid about the need to consider their attorneys' incentives and constraints, and to distribute both the rewards and burdens of CAFA programs equitably; perhaps as a result, none reported that staff members resisted the new programs. Most counties' plans also were incremental, recognizing the virtues of a gradual process of change. Indeed, the first county to achieve CAFA in all courts, on all days, and at all hours, was Polar County, where the indigent defense program had initiated CAFA in its largest court well before the ILS program started.¹⁰⁶

Second, it is true that the criminal courts in upstate New York are fragmented:¹⁰⁷ the organizations and officials who work within them have independent and sometimes conflicting professional values, responsibilities, objectives, and lines of accountability. Because most CAFA programs relied on the collaboration of other criminal justice actors, and because no new resources were available to those actors, administrators relied on their leadership skills as well as their legitimacy and standing in their communities to get their programs off the ground. In Bleek, Polar, Lake and Hudson Counties in particular, defense program administrators already had institutionalized relationships with judges, law enforcement, and county officials, and they capitalized on this to get CAFA out of the gate. In counties where magistrates presided over many arraignments, they did not hide their loyalty to their own towns and villages and their skepticism about reforms. But two years after program adoption, administrators reported fewer

¹⁰⁶ This announcement was made at a regional meeting of indigent defense providers in March, 2016.

¹⁰⁷ See SPECIAL COMM'N ON THE FUTURE OF N.Y. STATE COURTS, A COURT SYSTEM FOR THE FUTURE: THE PROMISE OF COURT RESTRUCTURING IN NEW YORK STATE 7 (2007), http://nycourts.gov/reports/courtsys-4future_2007.pdf [<https://perma.cc/6CQK-AWGT>] (“New York State has the most archaic and bizarrely convoluted court structure in the country. Antiquated provisions in our state Constitution create a confusing amalgam of trial courts: an inefficient and wasteful system that causes harm and heartache to all manner of litigants, and costs businesses, municipalities and taxpayers in excess of half a billion dollars per year.”).

hold-outs and even some advocacy from magistrates for universal CAFA in their courts.

Third, adversarial adjudication systems are premised on conflict, formally expressed and practiced at the case level. We found evidence in all sites that some defense lawyers indeed defined their role in these terms. In Moose and Polar Counties, in particular, lawyers took some pride in leveraging opportunities presented by defective accusatory instruments, the discovery of arcane but useful precedents, and lapses of prosecutorial attentiveness. This working style played out at the level of individual case decisions, but also reflected an office culture that supported an aggressive style of lawyering. But at the policy level, the more relevant adversarialism was at the organizational and leadership levels and often appeared to have roots not in professional identities but rather in politics. Hence in Bleek and Moose Counties, the district attorneys' open challenges to the CAFA programs were seen by defenders as just another in a long series of public criticisms and complaints. In most counties, and especially in Bleek County, this sort of resistance from the prosecutors' offices was mitigated by the mutually supportive relationships that leadership had developed with other actors in county and local government. In Moose County, the public defender, who had the key support of his predecessor (a vocal advocate for CAFA at the state level), remained unperturbed by the district attorney's resistance.

C. Implications for Research, Practice and Policy

Much social scientific research on criminal court reforms focuses on finding correlations between court characteristics (such as caseloads and political environment) and outcomes such as case processing delays and average sentences, drawing inferences about how the former affect the latter. This study offered an opportunity to document, in real time, the implementation of a reform. By comparing sites that accepted invitations to create local interpretations of CAFA programs, we uncovered features of court environments that are sometimes overlooked by researchers, but that merit closer scrutiny in future scholarship.

First, we observed that rural and suburban magistrates' courts play an outsized role in reform implementation—yet these small local courts are seldom included in studies. Second, we recognized the importance of political relationships between public defenders and district attorneys. In our study we saw hints of successful political strategies by defenders, and also of collegial and respectful relations among court professionals seeking to implement reform, while maintaining their courtroom identities as adversaries. Third, particularly in Bleek and Moose Counties, we had the opportunity to observe the distinctive cultures of indigent defense programs.¹⁰⁸ We suspect that the office culture—the degree of

¹⁰⁸ See LISA J. MCINTYRE, *THE PUBLIC DEFENDER: THE PRACTICE OF LAW IN THE SHADOWS OF REPUTE* (1987); JAMES EISENSTEIN & HERBERT JACOB, *FELONY JUSTICE: AN ORGANIZATIONAL*

social solidarity and support, consensus on values, and dominant work ethic—shapes the potential for initiating reforms, and the chances for their successful implementation. In short, this research highlighted characteristics of courts and the professionals who work within them that are difficult to quantify, but important to investigate nonetheless.

The findings presented here are not conclusive, but they may have implications for practice and policy, particularly for court professionals who are contemplating or embarking upon similar reform efforts. It is worth noting that the sites we studied were not obliged to participate in the NIJ evaluation as a condition for receiving the ILS CAFA grant money, yet all have proven to be enthusiastic participants; throughout the process they have been accessible and generous with their time, knowledge and resources. We speculate that they are exemplars: offices that are particularly open to innovation, willing to experiment, and resilient to the sorts of challenges that Feeley described.¹⁰⁹ One might learn from their experiences not only about pitfalls, but also about problem-solving strategies. The ILS grant program expressly solicited plans that might serve as models for other counties, and perhaps ILS attracted those kinds of applicants: indigent defense programs whose leadership and experience promised enough traction to design and implement programs that might work.

In terms of policy, we observe that CAFA advanced from being a low-visibility concern in criminal proceedings to a centerpiece of reform advocacy in a relatively short time. Even more quickly, in New York, it progressed from an ILS agency priority to a statewide experiment and, during the writing of this article, was established as a key part a successful legislative proposal to reform upstate indigent defense.¹¹⁰ As we noted previously, there is scant information on how often CAFA is provided, but what exists suggests that it is not a regular protocol in

ANALYSIS OF CRIMINAL COURTS (1977); Johnathan A. Rapping, *Directing the Winds of Change: Using Organizational Culture to Reform Indigent Defense*, 9 LOYOLA J. PUB. INT. L. 177 (2008).

¹⁰⁹ The study of exemplars—organizations that are successful in providing good products or services, or that consistently overcome challenges that are common in their fields—requires attention to organizational history, culture, and leadership. To our knowledge, this methodology has seldom been applied to criminal justice organizations, but has been used by evaluators in other service provision settings. See, e.g., Karen Somerville, *Strategies to Improve Client Service: Exemplars in the Canadian Federal Government*, 16 INNOVATION J.: PUB. SECTOR INNOVATION J. 1 (2011); Greta Tubbesing & Frederick M. Chen, *Insights from Exemplar Practices on Achieving Organizational Structures in Primary Care*, 28 J. AM. BOARD FAM. MED. 190 (2015); Karen M. Emmons, Kasisomayajula Viswanath & Graham A. Colditz, *The Role of Transdisciplinary Collaboration in Translating and Disseminating Health Research: Lesson Learned and Exemplars of Success*, 35 AM. J. PREVENTIVE MED. S204 (2008).

¹¹⁰ See An Act to Amend the County Law, the Executive Law and the State Finance Law, in Relation to Indigent Defense Services, N.Y. Assembly Bill A06202C (June 2016), http://assembly.state.ny.us/leg/?default_fld=&leg_video=&bn=A06202&term=2015&Summary=Y&Actions=Y&Committee%26nbspVotes=Y&Floor%26nbspVotes=Y&Memo=Y&Text=Y [<https://perma.cc/N8SX-9U8K>] (requiring provision of counsel at all criminal arraignments).

many or most courts. But as it emerges as a national issue, states will need models for exporting this right, in useable form, out of the statehouse and into local courthouses.