

Counsel at First Appearance An Object Lesson in Policy Implementation

In 1963, the Supreme Court famously enshrined the right to a lawyer for anyone facing incarceration, regardless of their ability to pay.^[1] But the *Gideon* ruling was silent on what this new right would look like in practice. Ever since, it has suffered from what could charitably be called “uneven implementation.” To take one example: 60 years on, in a little more than half of the states, there is no requirement you be represented by a lawyer for your first appearance before a judge.^[2] And even in states where there *is* a requirement, there is no guarantee it is being met, nor any assurance of the quality of that representation.

In denying the right to counsel at first appearance, jurisdictions have argued that the first appearance is not a “critical stage,” a designation that would trigger the constitu-

tional guarantee of counsel.^[3] Not all courts agree—and the Supreme Court has not specifically weighed in—and the legal murkiness has contributed to a confusing hodgepodge of efforts across the country to implement counsel at first appearance.

To state our position clearly: *every* stage along the legal continuum that can end with depriving someone of their liberty is a critical stage—your first appearance perhaps especially so. First appearance is where crucial decisions about bail and pretrial detention may be made. The moment you’re detained, your chances of winning your case plummet. You become far more likely to plead guilty, and there is a greater chance the sentence you’re now more likely to receive will be a longer one.^[4] Pretrial detention can

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also mean losing your job, your housing, and custody of your children. Decisions made at first appearance can have long-term consequences, not just for individuals, but for entire communities.

First appearance is also a critical front door for the court system itself. It is often the system's first opportunity to determine if there was probable cause for an arrest and to review the accuracy of the charges. With representation by a qualified lawyer, weaker cases are more likely to be scrutinized and, where warranted, dismissed, sparing valuable system resources. Without quality representation, in far too many places, the appearance amounts to a hasty rubber stamp.

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Where counsel at first appearance (hereafter known as CAFA) *has* been secured, the routes to implementation have varied: from well-funded statewide reforms following hard-fought legislative wins, to scrappy, do-it-yourself efforts pushed by local advocates and public defenders. There are two principal points to take from this.

The first is that, regardless of *how* CAFA is implemented, it works. Even a little bit of CAFA goes a long way, strengthening both public safety and the fairness of the system for all defendants. The second is that, even so, the *how* of implementation matters. Poor implementation will limit the impact of your reform. As the evidence base for its impact

grows, more jurisdictions are adopting versions of CAFA. But implementation can fall short, even with political will and resources behind the effort, underlining the need for more concerted implementation support. Here the evidence is similarly clear, but also counter-intuitive, as we will explain.

CAFA strengthens public safety and the fairness of the system.

In what follows, you will hear the voices of experts from across the country convened by the Center for Justice Innovation in March 2025 for a working session on the urgency of CAFA and the different roads to achieving it.

The Evidence Is In

There is abundant, high-quality causal evidence showing that CAFA can bolster public safety and make real progress towards leveling the playing field for people facing criminal charges who would otherwise be unrepresented. Professor Paul Heaton, Academic Director of the Quattrone Center for the Fair Administration of Justice, Penn Carey Law, University of Pennsylvania, reviewed 14 of the existing studies, going as far back as the 1980s.^[5] These studies examined metrics including bail and pretrial detention decisions, failure to appear rates, the likelihood of future arrests, sentencing outcomes, and perceptions of procedural justice. The verdict was clear: CAFA has a positive impact across a range of outcomes, with minimal evidence of harmful effects.

CAFA was shown to decrease the amount of bail set for individuals, reducing the often crippling financial burden of securing someone’s release.^[6] More affordable bail also means fewer people will be detained awaiting trial and the evidence shows CAFA lowered rates of pretrial detention overall.^[7] Having a lawyer from the start of your case also makes a conviction less likely,^[8] and for people who are convicted, those benefiting from CAFA received shorter sentences than those who were unrepresented.^[9] Evidence from the studies also suggests that having a lawyer early increases perceptions of procedural justice,^[10] which fosters better engagement throughout the adjudicative process.

The benefits to public safety are similarly clear. A large body of evidence now points to the criminogenic effects of pretrial detention.^[11] Sparing more people from detention—a signal effect of CAFA—makes them less likely to commit future crimes. The studies also found early counsel decreased the likelihood of future arrests^[12] and improved failure to appear rates.^[13]

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The State of CAFA

Given the evidence of CAFA’s benefits, there are jurisdictions, and even entire states, working to make guaranteed early counsel a reality. But the *implementation* of the reform is often uneven, even when ample political will and resources are behind the effort.

Before we look at strategies for meeting that challenge, let’s sample the state of CAFA in some representative jurisdictions across the country. Doing so gives a sense of the vagaries of conditions confronting any effort to implement early counsel, and of the different approaches for securing the right that might work in each jurisdiction.

The Absence of CAFA

It happens in a broom closet.

GEOFF BURKHART, a participant at the working session describing the environment where first appearance occurs across much of rural Texas

Only seven of Texas’s 254 counties provide CAFA. The appearance is referred to as “magistration” and in most places, especially outside of the major cities, there is no defense lawyer present or even a prosecutor.^[14] Instead, a magistrate—a position that can be held by a non-lawyer—determines if there was probable cause for the arrest, sets bail, and reads an advisement of rights (which includes the right to an attorney at a later date). The magistrate will have a police report and sometimes a criminal history record. The entire hearing in many of these rural counties “takes about 30 seconds,” according to Geoff Burkhardt, County Executive of Community Legal Services in Travis County, Texas.^[15]

How do you begin to implement CAFA when, in many rural areas, you’re starting with nothing? The key might be moving step-by-step. Start by getting defenders—or, as you will see in the example of Philadelphia below, even a proxy for a defender—into the broom closets.

Glimmers of CAFA, but It Works

Two minutes is a long arraignment.

KEISHA HUDSON, a participant at the working session describing the limitations of CAFA in Philadelphia

The public defender's office in Philadelphia has made substantial efforts to ensure everyone is represented at first appearance. Chief Defender Keisha Hudson points out the effort is unilateral and receives no outside support. "We get one minute to talk with our clients," Hudson notes. Yet even with the constraints, it works.

Defendants in Philadelphia are not transported to court for their preliminary arraignments, instead appearing virtually from the police district where they're detained. In 2017, the defender's office began piloting a program whereby a member of the defense team—a non-lawyer known as a "bail advocate"—interviewed clients on-site, prior to their appearances. The advocate then relayed the information they gathered to the defense lawyer, who was present in the courtroom with the judge and prosecutor.

With some modifications, that pilot program has become standard practice. Bail advocates now conduct their pre-arraignment interviews over a remote video link, using video equipment that was already stationed in police districts. You can think of the whole effort as an exercise in making the most of the existing infrastructure and resources when both leave much to be desired. Yet it is a testament to the power of CAFA that, even with those challenges, the reforms have had a significant impact. An evaluation found the introduction of bail advocates reduced future arrests by more than a quarter and decreased

the likelihood of a bail violation by almost two-thirds, while also alleviating racial disparities in pretrial detention.^[16]

Hudson isn't resting on those results, however. Along with more resources, she emphasizes that getting more from implementation of the reform will require educating judges and lawyers for a "culture change to support CAFA's long-term success."

When Early Counsel Is Just the Beginning

CAFA is part of a holistic model.

ANN MILLER, a participant at the working session describing CAFA in her jurisdiction

For the Tribal Defender Office for Confederated Salish & Kootenai Tribes in Montana, the mission centers on the needs of the client. Lawyers meet with clients *before* first appearances. This means defenders can make stronger arguments when the appearance takes place, stabilize the client early on if needed by making calls to family and other supports such as housing and employment, and get a jump start on important case investigations. As Ann Miller, the Office's Managing Attorney, explained during the working session: you infuse counsel at first appearance with *support* at first appearance.

The guarantee of early counsel is only the beginning of the commitment by the Defender's Office. There is a social worker on staff and a reentry program offering reintegration support. Other attorneys assist with family, civil, and housing court matters, and the Defender Office partners with the tribal public health department to ensure clients receive any needed treatment.

It's not a model currently within reach for most jurisdictions, and its impact has yet to be fully evaluated in Montana, but it is worth bearing in mind what a more ambitious implementation of CAFA can look like.

Making It Happen

We've established that CAFA *works*, and we've looked at some of the ways it is—and isn't—taking place in different parts of the country. Now the question: how to make it happen in your own jurisdiction?

Why do so many interventions with positive findings fail to become change on the ground?

Here's the counter-intuitive finding about implementation we promised earlier: the fact that CAFA has been shown to have so many positive outcomes does not matter as much as you think, *and may not matter at all*. Positive findings on their own are not strong predictors of what interventions get adopted into lasting policy change.

Of potential greater importance is understanding the mechanics of, and investments in, the status quo, the process you're attempting to change—in this instance, the procedures around first appearances.

These insights stem from the work of Professor Elizabeth Linos and her colleagues at the Harvard Kennedy School. They set out to understand why so many interventions with positive findings fail to materialize into

change on the ground. Of the 73 randomized controlled trials they looked at, conducted by 30 U.S. cities, almost four of five produced positive results, but five years later, only just over a quarter had been adopted into policy.^[17]

The chief explanation of Linos and her team for why so much evidence doesn't get used is organizational inertia. Changing processes is hard. The *strongest* predictor of whether a proposed policy is adopted is whether it tweaks an already-existing process. If it's more of a wrench than a tweak, or if it requires significant new infrastructure to become real, it's much less likely to take hold as practice, regardless of the evidence.

The version of CAFA operating in Philadelphia might leave something to be desired: preliminary arraignments are still rushed and the people charged are still appearing virtually. Yet the simplicity of the intervention—introducing non-lawyers at a pivotal moment in the process—has stuck because it's a tweak; it doesn't require an overhaul of the standard way of doing business.^[18]

This doesn't mean *only* incremental change is possible, but it does mean if you're attempting more than a tweak, it's going to take extra preparation and support. And even a tweak will fare much better with proper implementation support, tailored thoughtfully to the local conditions and context.

New York's history with CAFA is instructive here. Legislation passed in 2017 mandated fully funded CAFA statewide by 2023. But in the early years of implementation, the impact was uneven, particularly in rural counties with less infrastructure and more logistical challenges. Researchers found examples of counties where the introduction of CAFA led

to unanticipated outcomes such as a slight *increase* in the use of bail and/or a decrease in the proportion of people released pretrial.

The researchers hypothesized the controlling factor in whether a county generated the anticipated results was “local courthouse cultures and their receptivity to change.”^[19] As they concluded: “procedural reforms such as CAFA that alter the balance of power and influence in the courtroom and that may change the pace of decision-making will be *adapted* to local conditions by local actors.”^[20]

“Adaptation” does not have to mean resistance; in the case of New York, per the latest report from the state’s Office of Indigent Legal Services, CAFA is now available in *all* of New York’s 52 counties for arraignments where the person charged is in custody (with minimal gaps in coverage for non-custodial hearings).^[21] But there would appear to be an important lesson to be drawn from New York’s experience: the more the reform represents a break with the status quo, the more planning and support will be needed to make it a reality. And the more you can tailor your reform to *not* be received as a rupture, the more likely it is to succeed.

Include the people most affected by a new policy in its design.

Linós’s team suggests a useful tripartite division for the evidence you present to policymakers and stakeholders. Your goal should be evidence that is *useful*, *usable*, and *used*. Let us quickly explore each component in the context of CAFA.

- ***Useful*** – *The research answers questions leaders have asked.*

Present evidence that CAFA works in simple, short messages that focus on outcomes of value to your audience. For CAFA, whether the issue is jail overcrowding, racial disparities, connecting justice-involved clients to needed services, or sparing the public purse via less use of incarceration and fewer protracted court procedures, the evidence has shown positive results. Translating the evidence for policymakers in this way will ensure its usefulness.

- ***Usable*** – *The research is translated into the correct context.*

Support policymakers in designing “conceptual replications” rather than simply repeating an intervention in a “similar enough” context. This requires understanding the mechanics of why something works, not simply what works. Linós encourages including those most affected by the intervention in designing the adaptation for a local context. Directly-impacted clients, public defenders, and other frontline workers that are responsible for the policy shift toward CAFA can offer valuable insights. As your campaign takes shape, benefit from their expertise and ensure their buy-in.

- ***Used*** – *The research is adopted at scale.* Inertia will tilt systems back into the status quo. Tweaks to existing workflows and infrastructures are more likely to stick as compared to creating new ones from whole cloth.

From that perspective, rather than attempting the largest possible changes, it is important to focus on interventions that are more likely to be adopted. CAFA offers a unique opportunity for evidence-based adoption, as research shows net-positive outcomes despite variations in implementation. Incremental improvements can build on one another, and we encourage aiming for as many optimal system components as possible, while avoiding the bottlenecks.

Conclusion

For Linos, research going forward should seek to answer the question: How do we make it easier for policymakers to implement evidence when they know about it, value it, and it is readily applicable to their local context? The hard part in many jurisdictions will be crafting your intervention as only a “tweak” to already existing workflows and infrastructures. And even a tweak can upset the apple cart of long-entrenched courtroom practices.

Kristen Staley, the executive director of the Michigan Indigent Defense Commission and a participant at our working session, described a common pushback to CAFA reforms as “Judges who say, ‘Don’t touch my calendar!’”^[22] That is: don’t change anything about my standard operating procedure.

Yet change *is* possible and, given the absence of CAFA across much of the country, it’s urgently needed. Just know that sticking the landing on implementation will mean doubling down on preparation, carefully examining current processes, and weighing how, with the least disruption, to insert qualified defenders with the time and resources

necessary to zealously represent their clients at the critical moment of first appearance.

FOR MORE INFORMATION

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- [1] *Gideon v. Wainwright*, 372 U.S. 335 (1963).
- [2] See Brink, M. N., Yu, J. & Metzger, P.R. (2022). *Grading Injustice: Initial Appearance Report Cards*. Deason Criminal Justice Reform Center. <https://doi.org/10.25172/dc.9>. In 23 states plus Washington, D.C.; Guam; and the U.S. Virgin Islands, CAFA is required; in two states, it is limited; and in 26 states, it is not required.
- [3] See Metzger, P.R. (2003). *Beyond the Bright Line: A Contemporary Right to Counsel Doctrine*. Northwestern University Law Review, 97(4), 1635-1700. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=345061.
- [4] See Heaton, P., Mayson, S. G., & Stevenson, M. (2017). *The Downstream Consequences of Misdemeanor Pretrial Detention*. Stanford Law Review, 69(3), 711-794. <https://review.law.stanford.edu/wp-content/uploads/sites/3/2017/02/69-Stan-L-Rev-711.pdf>.
- [5] *What Does the Research Tell Us About Counsel At First Appearance?* Quattrone Center for the Fair Administration of Justice, Penn Law. [https://rise.articulate.com/share/dhlTC5b2uCMRTakUb1zE1OVGLoTT0qqL#/.](https://rise.articulate.com/share/dhlTC5b2uCMRTakUb1zE1OVGLoTT0qqL#/) Accessed March 2025.

- [6] See Anwar, S., Bushway, S., & Engberg, J. (2023). *The Impact of Defense Counsel at Bail Hearings*. Science Advances. <https://www.science.org/doi/10.1126/sciadv.ade3909>; see Colbert, D. L., Paternoster, R., & Bushway, S. (2002). *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*. Cardozo Law Review, 23(5), 1719–1793. https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1290&context=fac_pubs; see Fazio, E. J., Wexler, S., Foster, T., Lowy, M. J., Sheppard, D., & Musso, J. A. (1985). *Early Representation by Defense Counsel Field Test*. National Institute of Justice. [97595NCJRS.pdf](https://www.ncjrs.gov/pubs97/97595NCJRS.pdf); see Morgan, L. A., Shamserad, F., & Huebner, B. M. (2024). *Right to counsel? A mixed-methods evaluation of the St. Louis County initial appearance program*. Criminology & Public Policy, 23, 225–513. <https://onlinelibrary.wiley.com/doi/10.1111/1745-9133.12660?msocid=20c3d9dd6be4615e020fccb36a2e60ba>; see Naufal, G., Patterson, B., Danser, R., & Greiner, D. J. (2025). *The Causal Impact of Counsel at First Appearance: Evidence from Two Randomized Control Trials*. IZA Institute of Labor Economics. <https://docs.iza.org/dp17712.pdf>; see Worden, A. P., Morgan, K. A., Shteynberg, R. V., & Davies, A. L. B. (2018). *What Difference Does a Lawyer Make? Impacts of Early Counsel on Misdemeanor Bail Decisions and Outcomes in Rural and Small Town Courts*. Criminal Justice Policy Review, 29, 710–735. <https://doi.org/10.1177/0887403417726133>; see Worden, A. P., Shteynberg, R. V., Morgan, K. A., & Davies, A. L. B. (2020). *The Impact of Counsel at First Appearance on Pretrial Release in Felony Arraignments: The Case of Rural Jurisdictions*. Criminal Justice Policy Review, 31, 833–856. <https://nyapsa.org/assets/files/0887403419873018.pdf>.
- [7] See Anwar, Bushway, & Engberg (2023); see Colbert, Paternoster, & Bushway (2002); see Fazio, Wexler, Foster, Lowy, Sheppard, & Musso (1985); see Lacoe, J.; Fischer, B.; & Raphael, S. (2024). *The Effect of a Pre-Arrest Legal Representation Pilot on Pretrial Release and Criminal Case Outcomes*. Journal of Quantitative Criminology, 41, 269–291. <https://link.springer.com/article/10.1007/s10940-024-09596-1>; see Morgan, Shamserad, & Huebner (2024); see Naufal, Patterson, Danser, & Greiner (2025); see Worden, Shteynberg, Morgan, & Davies (2020); see Yarmosky, A. (2018). *Early Criminal Defense Yields Large Reductions in Pre-Trial Detention*. California Policy Lab, University of California. <https://capolicylab.org/early-criminal-defense-yields-large-reductions-in-pre-trial-detention/>.
- [8] See Fazio, Wexler, Foster, Lowy, Sheppard, & Musso (1985); see Heaton, P. (2021). *Enhanced Public Defense Improves Pretrial Outcomes and Reduces Racial Disparities*. Indiana Law Journal, 96, 701–750. <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=11415&context=ilj>; see Lacoe, Fischer, & Raphael (2024).
- [9] See Fazio, Wexler, Foster, Lowy, Sheppard, & Musso (1985); see Heaton (2021); see Lacoe, Fischer, & Raphael (2024); see Yarmosky (2018).
- [10] See Colbert, Paternoster, & Bushway (2002); see Fazio, Wexler, Foster, Lowy, Sheppard, & Musso (1985); see Heaton (2021); see Yarmosky (2018).
- [11] See Heaton, Mayson, & Stevenson (2017); see Heaton, P. (2022). *The Effects of Misdemeanor Bail Reform*. Quattrone Center for the Fair Administration of Justice. <https://www.law.upenn.edu/live/files/12290-the-effects-of-misdemeanor-bail-reformpdf>; see Lowenkamp, C.T. (2022). *The Hidden Costs of Pretrial Detention Revisited*. CCS. https://www.researchgate.net/publication/359797731_THE_HIDDEN_COSTS_OF_PRETRIAL_DETENTION_REVISITED; see Ropac, R., & Rempel, M. (2023). *Does New York's Bail Reform Law Impact Recidivism? A Quasi-Experimental Test in New York City*. Data Collaborative for Justice at John Jay College of Criminal Justice. <https://datacollaborativeforjustice.org/work/court-process/does-new-yorks-bail-reform-law-impact-recidivism-a-quasi-experimental-test-in-new-york-city/>.
- [12] See Dobbie, W., Goldin, J., & Yang, C. S. (2018). *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*. American Economic Review, 108(2), 201–240. <https://www.aeaweb.org/articles?id=10.1257/aer.20161503>; see Heaton (2021).
- [13] See Heaton (2021).
- [14] In Texas, magistrature hearings have traditionally been closed to the public. The practice was recently challenged on First Amendment grounds and the Fifth Circuit Court of Appeals, in *Texas Tribune v. Caldwell County, No. 24-50135 (5th Cir. 2024)*, ruled that access is required. Texas courts are working to implement this decision.
- [15] By contrast, Travis County, with Austin as its county seat, has been working since last year to ensure every defendant receives counsel at magistrature.
- [16] See Heaton (2021).

- [17] See DellaVigna, S., Kim, W., & Linos E. (2024). *Bottlenecks for evidence adoption*. Journal of Political Economy, 132(8). <https://doi.org/10.1086/729447>.
- [18] Heaton describes bail advocates as an intervention with “less disturbance to existing rules and structures” than, for example, introducing the use of a risk assessment tool, which could require major overhauls. Heaton, P. (2021); 743-744.
- [19] Worden, Shteynberg, Morgan, & Davies (2020); 849.
- [20] Worden, Shteynberg, Morgan, & Davies (2020); 849, emphasis added.
- [21] See New York State Office of Indigent Legal Services. [*Statewide Plan for Implementing Counsel at Arraignment: Year Six Report*](#). September 30, 2024.
- [22] Michigan, in many ways similar to New York, has statewide legislation and implementation support, and now provides CAFA in nearly all courts. To learn more visit <https://michiganidc.gov/>.

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