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Court Review

Volume 39, Issue 4
Winter 2003

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

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EDITOR'S NOTE

Before describing each of the articles in this issue, let me take a moment to comment on the sorts of problems that arise in editing a journal intended for both a United States and Canadian audience. The American Judges Association was formed in the United States and has most of its members there. It also has a substantial—and growing—membership in Canada. As our Canadian readers are well aware, there are some differences in the way the English language is used in Canada and in the United States. (For an entertaining and enlightening discussion of some of the differences, prepared by the Cornerstone Word Company of Ottawa, take a look at <http://www.cornerstoneword.com/misc/cdneng/cdneng.htm>.)

I raise this topic because the lead essay in this issue is by a Canadian judge, Ian B. Cowan, who wrote about Canadian events with appropriately Canadian spellings. Our journal, like most others, has made certain style choices, and we use U.S. English spellings. Thus, labour became labor and offences became offenses, all without either the labor or the intent of Judge Cowan. Meanwhile, on the Resource Page at the end of this issue, the word licence is spelled in the Canadian way—because it is part of the actual title of a Canadian publication.

I hope that our Canadian readers will not mind our choices. All publications try to achieve a single, consistent editing style. We spend a great deal of effort in the editing of each issue. Substantively, though, we also spend time trying to get articles and materials that will be of interest to all of our readers, both in Canada and in the United States.

Judge Cowan's essay should be of interest to many. He happened to be in the crosshairs of the SARS epidemic in Toronto, which forced careful consideration of both legal and practical concerns in handling quarantine orders against potentially infected citizens.

Our lead article, by Paula Hannaford-Agor, places efforts to help pro se litigants into their broader context. She describes the changes under way in some places to allow “unbundled” legal services, in which an attorney helps with some, but not all, aspects of a client's legal problem. She also discusses how these sorts of changes may impact the role of courts in helping self-represented litigants gain appropriate access to their judicial system.

Two other articles round out the issue. Andrew Fulkerson, a former judge, reviews the usefulness of ignition interlock devices as a way of preventing repeat impaired-driving offenses. We also include last year's winning entry from our law student essay competition. In it, Rosalind Alexis Sargent presents her views on racial inequities in the federal sentencing guidelines. —SL



Court Review, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States, Canada, and Mexico. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work. Guidelines for the submission of manuscripts for *Court Review* are set forth on page 38 of this issue. *Court Review* reserves the right to edit, condense, or reject material submitted for publication.

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Letters to the Editor, intended for publication, are welcome. Please send such letters to *Court Review*'s editor: Judge Steve Leben, 100 North Kansas Avenue, Olathe, Kansas 66061, e-mail address: sleben@ix.netcom.com. Comments and suggestions for the publication, not intended for publication, also are welcome.

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Photo credit: cover photo, Mary S. Watkins (maryswatkinsphoto@earthlink.net). The cover photo is of the old Bristol County Courthouse in Bristol, Rhode Island. The building is listed on the National Register of Historic Places.

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President's Column

Francis X. Halligan, Jr.

Upon assuming the presidency of the American Judges Association at the 2002 Annual Conference in Maui, I indicated that it was one of my goals for the AJA to have a greater participation in the activities of the United Nations. We have an association with the U.N. as a Non-Governmental Organization (NGO) affiliate.

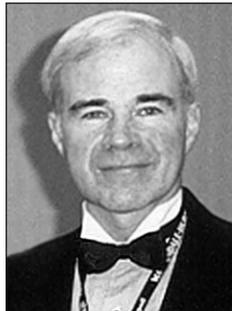
As you know, the U.N. headquarters is located at 47th Street and 1st Avenue in Manhattan, now known as United Nations Plaza. There are six main, interconnected structures comprising the New York headquarters, which is bordered by the East River. There are also other buildings adjacent to the headquarters that house other U.N. offices, including the Pass Office, the UNICEF House, the FF Building, and the Department of Economic and Social Affairs.

During my tenure as AJA president, I have attended meetings at the United Nations on several occasions. Prior to entering the U.N., you must obtain a pass to enable you to enter the grounds and buildings. Before my trips, I contacted the NGO Resource Center, requesting that they make arrangements through the Pass Office for the issuance of a pass. Security at the site has been increased as a result of recent world events. Those wishing to enter the facilities must fill out a detailed questionnaire, present several forms of identification, and be photographed. Once a pass is issued, which bears your photograph, it must be worn at all times while on the premises.

On one of my first trips to the headquarters, I met with Louis Delgadillo, who works within the United Nations at the NGO Resource Center in the Department of Public Information (DPI). When I first met with him, he informed me of the planning that was in progress for the 56th Annual DPI/NGO Conference, which was to be held September 8-10, 2003 at the United Nations. The theme of the conference was Human Security and Dignity: Fulfilling the Promise of the United Nations. After reviewing the materials for the conference, I thought it would provide an excellent opportunity both to interact and meet with other NGO members. I was not disappointed.

Since its founding, the United Nations has always played an important role in the affairs of nations, but perhaps never more so than now. The U.N. has traditionally served as a meeting

place for the countries of the world to both confer and mediate disputes that occasionally arise between member states. As this column was being written, the General Assembly of the United Nations is in session. The leaders of the world have been addressing the General Assembly, including President George Bush of the United States. Many of the speeches have addressed the issue of armed conflicts around the globe. The longstanding alliances between the United States and some of its oldest allies, such as France, are now being tested as a result of the United States involvement in Iraq. The interest of the world community in the proceedings of the U.N. has never been greater.



The annual conference began with an opening plenary session that was conducted in the General Assembly Hall on September 8. The session was called to order and welcoming speeches were then provided by various officials of the United Nations, including Kofi A. Annan, the U.N. Secretary General, and by the NGO officials. In addition to the plenary sessions, numerous workshops were conducted, enabling those in attendance to partici-

pate in programs that were of special interest to them. The afternoon session that was conducted on the first day was entitled, "Psychological Aspects of Human Security and Dignity." The second day sessions were entitled, "Educating for a Secure Future," and, "From Oppression to Empowerment." Actor Danny Glover, who has been involved with the U.N. for many years, moderated the second session. On September 10, the last day of the conference, the sessions were entitled, "Sustainable Development in the Context of Globalization," and "A Conversation with Eminent Persons on Global Trends and Strategies."

On Monday, September 8, I attended the conference reception, as did many of the individuals who had registered for the conference. At this reception, I was fortunate enough to both meet and briefly speak with the Secretary General, Kofi A. Annan. It was both an honor and a pleasure to meet this man. He surely has one of the most difficult jobs in the world today. My participation in the conference was both educational and rewarding. It is my sincere hope that our association continues to participate in the United Nations through our affiliation as an NGO.

The Day SARS Came to Town: The Court's Role in Preventing Epidemics

Ian B. Cowan

The phone message was as subtle and unexpected as the disease. It was from the lawyer for the medical officer of health for the region, who enquired if the court could deal with applications forcing people into quarantine, after normal court hours. It was to prompt a reaction and the introduction of procedures in the Ontario Court of Justice in Brampton, Ontario, to deal with a possible epidemic, which we never anticipated we would ever have to use.

Brampton, Ontario, used to be a sleepy county town outside of Toronto. Its motto is "Flowertown," and the center of town features a band shell in a shaded park setting. But with the rapid growth of Toronto in the latter part of the last century and the expansion of Toronto's airport, it had become part of the larger region of Peel, population of over one million people and location of the busiest court in the province of Ontario.

The newspapers in the last week of March and first week of April had reported a number of people falling ill from a mysterious illness called SARS (an acronym for Severe Acute Respiratory Syndrome). They had been part of a small group that had been at the Metropole Hotel in Hong Kong, who had come into contact with a doctor who was ill with the same disease. The reports were that one person had died in hospital and at least two others were very ill. It sounded as though it was a contained illness.

The information I received in my phone call back to the lawyer for the medical officer of health changed all that.

He told me that the medical officer of

health (medical officer) was preparing for a larger number of people who may have been in contact with the infected persons and he wanted to be prepared in the event that he made a quarantine order and they refused to comply. The medical officer wanted to invoke the special powers under the Health Protection and Promotion Act ("HPPA"),¹ a provincial statute, to obtain a court order forcing quarantine or treatment.

I had heard of this statute only once before, at a meeting with my regional senior judge in connection with its use for dealing with tuberculosis cases, which seemed then to be on the rise. The senior judge had conducted a hearing when a patient with tuberculosis was refusing treatment and the medical officer brought an application to force treatment. We had thought that "special arrangements," such as masks, should be put in place to deal with this sort of application. But apart from that, the existence of this statute was tucked away for future reference. We had no idea what "special arrangements" such proceedings might require in a disease outbreak.

The statute allows the medical officer to bring an application before a judge by way of a motion, supported by affidavit evidence that he has ordered a person into treatment or quarantine for medical reasons and that the subject of the order is refusing to do this. There is provision for the judge to order the person into quarantine or treatment as well as punitive provisions in the event they do not comply. The police can be ordered to assist in apprehending a person who does not comply. The time periods for motions and appearances were all to be done in

accordance with the rules of practice for provincial offenses.

Two days after the initial phone call, on the Friday of the week, a colleague in the suburban Newmarket court north of the city e-mailed me and told me he had an emergency SARS application and was going into court to deal with it. It turned out to be an application by his region's medical officer, without notice to the subject of the application, to have him quarantined, as he was a suspected carrier. Because of the urgency of the application and seriousness of the problem, the judge granted an order to have the subject detained by the police and taken to a quarantine facility at an area hospital, where on Monday there would be a hearing conducted by telephone with the subject calling the court.

On Monday, my colleague had arranged for the telephone hook-up to the hospital where the subject was now detained. A legal aid lawyer was online to advise the subject on legal issues and the hearing commenced early in the morning. The hearing gave little guidance to us in how to handle future hearings, however, because the lawyer for the medical officer began by announcing that he was now satisfied that the subject had not been exposed to SARS and he was withdrawing his application. My colleague asked the subject, "Do you understand?" His reply demonstrated his understanding. "Yes," he said, "but I will be speaking to my lawyer about this." He had been in the hospital since Friday.

Based on that slim experience our court began to gear up. An ad hoc group composed of the regional senior judge of

Footnotes

1. See Rev. Stat. Ontario 1990, ch. H.7., §§ 22, 36, 39. The procedures described in this article were designed to comply with the requirements of these statutory provisions.

PROTOCOL FOR HPPA APPLICATIONS IN THE DAVIS COURT BY THE MEDICAL OFFICER OF HEALTH

1. The contact persons in the courthouse for Health Protection and Promotion Act (HPPA) applications are the judicial secretary [telephone no.], the Local Administrative Justice [business, home, and cell phones], or the Trial Coordinator [telephone no.].
2. The normal hours of court operation are Monday to Friday from 8.30 a.m. to 4.30 p.m. Applications outside of normal hours may be done on an emergency basis and with prior permission of the Local Administrative Justice.
3. The Medical Officer of Health (MEDICAL OFFICER) or his counsel may bring an application before the court on short notice. The application will set out that, by direction of the Local Administrative Justice, the respondent *shall not* appear in person but only by telephone from his residence by calling (telephone of the trial coordinator) by 9.00 a.m. on the return date, at which time a court hearing will be conducted. In addition to appearing by telephone, the respondent may appear by counsel or agent.
4. At this initial hearing the respondent will be asked by telephone, if he/she wishes to dispute the making of the Order sought by the MEDICAL OFFICER. In the event he/she does not consent, the respondent will be asked if he/she is prepared to conduct a hearing by telephone. If this is not agreeable, then the hearing Judge, on the advice of the MEDICAL OFFICER and upon hearing from the respondent, will consider the manner and place of conducting a full hearing and any interim orders to be made pending the hearing.
5. The MEDICAL OFFICER will file the application with the Trial Coordinator on the second floor of the Davis Court, and deliver a copy to the contact person on the sixth floor at least on the day before the hearing. To prevent the appearance in person and to minimize the risks involved in the event the respondent appears in person, the hearing will be returnable in the Special Hearing Courtroom room H-1, at 7765 Hurontario Street, Brampton, at 9:00 a.m. on a date agreed upon with the contact person. In his application the MEDICAL OFFICER will give to the respondent the number of the contact person. It shall also set out that any attempt by the respondent to appear in court in person by the respondent may be treated by the court as a serious breach of court directive.
6. Upon notification by the MEDICAL OFFICER, the contact person will notify the following persons in the management group: the building manager, the Local Administrative Justice, the manager of court operations, Peel Police Inspector, and the Trial Coordinator.
7. The courtroom will be signed as "Special Hearing Room No. 1." Signage will be prepared indicating that the court proceeding is closed to the public.
8. The MEDICAL OFFICER will provide N-95 masks, alcohol hand wipes, and any other garments that will, in the opinion of the MEDICAL OFFICER, provide protection from SARS infection for participants in the hearing in the event the respondent appears in contravention to the directive in the motion. It is expected that the following persons will be involved: the Judge, a court reporter (the Judge may take a portable tape recorder to court to alleviate the need for a reporter), a police officer, counsel for the MEDICAL OFFICER, the respondent's agent or counsel.
9. It is desirable that the process to be followed be as close as possible to the following:
 - a) A police officer wearing a protective mask, and any other protective equipment deemed to be appropriate, should be stationed outside the special hearing court entrance;
 - b) Someone who can identify the respondent should be stationed by the main entrance to prevent the respondent from coming to the special hearing court;
 - c) Failure of the respondent to follow these instructions should be conveyed to the Judge before entering as well as any recommendations for the protection for all parties.

Dated this 19th day of April, 2003

Justice Ian B. Cowan
Local Administrative Judge

the Superior Court, the manager of court operations, the Peel Police inspector in charge of court operations, and the Royal Canadian Mounted Police (RCMP) liaison officer for federal operations at the airport met within days to discuss how we could deal with the applications we might receive. The Superior Court had an interest as they might have to deal with appeals from our decisions. The Peel Police and RCMP had an interest in the discussions, since they might have to detain subjects of these proceedings and orders.

Our first protocol to deal with applications was based on the medical advice that SARS was not airborne and if the subject or the court staff were masked, there would be adequate protection for those involved in a hearing. We talked about having a portable trailer brought into the parking lot, but securing and funding it were problems. We selected an unused office near a side entrance of the courthouse where the subject could be ordered to appear for the hearing. This would limit exposure to others coming into the main building and would allow the police to control the movements of a suspected carrier in the building.

By the time we set this procedure in place, however, the medical information was changing. Now more people in the city had been exposed to other carriers and were falling ill and dying. The latest information was that SARS could live outside the body for up to 24 hours and could remain on surfaces such as counters for this time. We could not risk having a subject come into the main courthouse and possibly contaminate others or having the courthouse quarantined.

Next to the main court building is an older building housing the land registry office upstairs and two unused courtrooms in the basement, with a private entrance leading to them. It would be perfect for a hearing in the event the person wanted to come to court to contest

the application as they would not come into contact with anyone else except the judge, the police controlling the entrance, and the medical officer. It was perfect—until the personnel in the registry office heard about us locating it there. Now, threatened labor issues prevented us from using the building.

By this time, the best medical information was that putting people who were suspected of having SARS into quarantine was the best way of containing its spread. And it was equally apparent that although we wanted to protect a person's right to a fair hearing, we could not risk having them come to court, but would have to direct them, by an *ex parte* order, to a place of quarantine (either their house or a hospital) and have a telephone hearing from there. They, of course, could have a lawyer or an agent attend, but they would be prohibited from attending in person. The courtroom in the basement of the registry building was kept as the hearing room because we then could make sure that the subject never entered the building.

By the time we had this in place, SARS started to retreat. The quarantine procedures had worked and the spread of the disease was under control. By the end, we did not have a single court hearing or application and our protocols went unused. SARS is no longer a problem and life has returned to normal.

Why had we not had more cases? I anticipated more cases coming from the airport. Many passengers came in daily from infected countries, but at the time there was no screening in place such as thermal scanners. These will be part of the future airport health procedures and are now arriving.

People generally complied with orders to go into quarantine. There were isolated cases of students leaving quarantine to write exams or workers going back to work early and plants being closed. But

people seemed to realize the importance of being quarantined.

As with September 11, our legal world changed in dealing with infectious diseases. This was our wake-up call. We are now preparing with federal, provincial, and local health officials in the event we have to deal with another SARS-like virus. The airport will likely be a front line of defense with inspection, detection and quarantine facilities. The court will have to have facilities to quickly deal with persons refusing to be quarantined or treated for suspected viruses. We will have in place videoconference hearing facilities, together with legal counsel on call to protect the legal rights of subjects.

Other courts must be prepared, with appropriate procedures in place. Any court in a major city of the world with an international airport has to be in a position to deal with the legal issues arising from the spread of an infectious virus. Perhaps the procedures we adopted—set out separately on the preceding page—will help others to address these issues. Hopefully, as in our case, the procedures will never have to be used. But if they do, the court will be an essential link in the health chain that will save lives.



Ian B. Cowan was a sole practitioner for 26 years in the Judicial District of Peel outside of Toronto. This included acting as prosecutor for the Department of Justice and as an assistant Crown Attorney for the District. He was appointed as a judge for the Ontario Court of Justice in 1997 and has been the local administrative justice for the Ontario Court in Peel since 1999.

Helping the Pro Se Litigant: A Changing Landscape

Paula L. Hannaford-Agor

For several years, judges, court staff, and a growing number of lawyers have recognized that at least one party is not represented by a lawyer in a sizeable portion of family law and smaller civil cases. Often both parties are self-represented. Two underlying factors associated with self-represented litigation—the relative scarcity of affordable legal services and an increased “do-it-yourself” attitude by many litigants—are fairly self-evident. What is less clear is how best to ensure that these litigants have sufficient access to the justice system to be able to resolve legal problems fairly and effectively.

Courts and legal service providers have tried a variety of approaches to address the needs of self-represented litigants. Some maintain that the best solution is to steer litigants back toward competent legal counsel and so have focused their efforts on promoting greater lawyer participation in pro bono programs and securing adequate funding for legal services agencies. Some provide self-represented litigants with basic materials and legal resources such as simplified forms and instructions to help litigants maneuver their way through the civil justice system. Still others champion the use of alternative dispute resolution programs, trying to divert self-represented litigants away from the more adversarial and procedurally complex venue of traditional court proceedings. Although each of these approaches can claim some measure of success, it is clear that none has been fully effective.

This article describes how the influx of self-represented litigants has forced many within the court and legal communities to reconsider some of the fundamental premises on which the civil justice system is based and to respond in new and creative ways to changing litigant demands on existing court and legal resources. It focuses on changes to the delivery of legal services to low- and moderate-income people, especially the emergence of “unbundled” legal services, and addresses the practical implications related to the distinction between legal information and legal advice. Finally, it describes how judges and court staff are rethinking the conceptual design of the civil justice system and addressing specific factors associated with legal

complexity and the inherent limitations of laypersons that create barriers to access for self-represented litigants.

SCARCITY OF AFFORDABLE LEGAL SERVICES

The major factor contributing to the increase in self-represented litigation is fairly obvious: a sizeable number of self-represented litigants proceed without a lawyer simply because they lack sufficient income to afford one. This trend has been well-documented for quite some time. In 1994, for example, the American Bar Association conducted an in-depth study of the legal needs of low-income Americans and found that 47% of low-income households experienced a new or existing legal need each year, but only 29% were addressed through the legal/judicial system and 38% went unaddressed altogether.¹ A second study of the legal needs of moderate-income Americans had similar findings. An estimated 52% of moderate-income households experienced a new or existing legal need each year, but only 39% of those needs were addressed through the legal/judicial system and 26% went unaddressed altogether.² Both studies indicated that the vast majority of legal problems encountered were relatively uncomplicated, both factually and legally. The Legal Services Corporation (LSC), which was created in 1974 to provide legal assistance to low-income Americans, estimates that four out of every five income-eligible people who apply for assistance are turned away because the LSC lacks the resources to help them all.³ Despite the best intentions of the legal community, two decades of pro bono recruitment efforts have not yet begun to fill the gap in legal assistance needs for these low-income Americans. Nor are they likely to do so in the foreseeable future.

The results of these unmet needs are two-fold. First, many people simply do without legal solutions. They give up on recovering damages from minor contractual disagreements or smaller civil claims, or fail to defend against claims asserted against them for which they would otherwise have a legal remedy or defense. Others delay filing for divorce until some unspecified time in the future when they or their estranged

Footnotes

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Center for State Courts, 300 Newport Avenue, Williamsburg, Virginia, 23185 (telephone: [757] 259-1556, facsimile: [757] 564-2065; e-mail: phannaford@ncsc.dni.us).

1. American Bar Association, Report on the Legal Needs of the Low-Income Public: Findings of the Comprehensive Legal Needs Study (1994).
2. American Bar Association, Report on the Legal Needs of the Moderate-Income Public: Findings of the Comprehensive Legal Needs Study (1994).
3. Legal Services Corporation, Serving the Civil Legal Needs of Low-Income Americans: A Special Report to Congress 14 (2000).

spouses might be able to afford a lawyer, and in the meantime muddle through with informal (and hence unenforceable) agreements for child support and the distribution of assets and debts. Most are unaware of the potential consequences of doing without legal assistance. Second, those who do not have the option to forgo a legal remedy are forced to navigate the civil justice system without a lawyer, becoming the ubiquitous pro se litigants that cause so much consternation for judges, court staff, and lawyers representing opposing parties or other litigants on the docket.

Judicial and legal policy makers have gradually come to the realization that there will never be enough affordable legal services to meet the demand for full legal representation for all eligible individuals. Given existing budgetary constraints, a 400% increase in funding for legal services is highly unlikely. Similarly unlikely is a dramatic increase in pro bono activity by lawyers, a dramatic decrease in legal fees, or a return to the barter system of an earlier era in which clients could pay for legal assistance with their own goods or services.

This new understanding has spurred two significant shifts in philosophy—one within the courts community about what constitutes the principal components of access to justice and another within the legal community about how best to deliver legal services. For judges and court staff, the initial concern was how to address the ethical and practical implications of increased numbers of self-represented litigants. The departure from the traditional model of litigants represented by competent attorneys posed enormous challenges for courts in terms of both increased staff time and administrative costs as well as perceived restrictions on the ability of judges and court staff to offer meaningful assistance.

An early response by many courts was to vigorously maintain existing barriers to self-representation—for example, by strictly enforcing “no legal advice” policies for court staff and holding self-represented litigants to the most exacting procedural standards—in hopes that these efforts would discourage litigants from seeking legal recourse in the courts without first obtaining competent legal representation. Over time, however, some courts changed their minds about the wisdom of this approach—in part, because it was largely ineffective and ultimately counter-productive. In spite of barriers, the number of self-represented litigants continued to rise, and the failure of courts to offer them any assistance not only exacerbated logistical problems but also undermined public trust and confidence in the courts as effective and responsive social institutions.

An even more important consideration was the growing realization that the majority of self-represented litigants had legitimate legal problems that could only be resolved through judicial intervention. The concept of access to justice has long been considered by the civil justice community as synonymous with access to a lawyer, largely out of recognition that the American justice system is an extraordinarily complex institution. This framework, however, has always been

premised on the assumption of an adequate supply of affordable legal services: judicial and legal policy makers had not contemplated how low- and moderate-income people would obtain access to justice if the cost of legal services increased beyond the financial means of

most households or, for that matter, of government agencies to provide to eligible individuals. As the new reality took hold, a growing number of judicial policy makers adopted the view that a fundamental requirement of access to justice is access to the courts and that access to lawyers, as articulated in the Sixth Amendment, is not sufficient by itself to ensure access to justice.⁴ This new outlook prompted a radical change in the willingness of courts to respond to the needs of self-represented litigants.

At the same time that the courts were grappling with the implications of growing numbers of self-represented litigants, the legal community, especially lawyers who regularly worked with low- and moderate-income individuals, was forced to confront how changing economic circumstances were affecting the delivery of legal services. The traditional view was that anything less than full-service representation was tantamount to unequal protection, in effect creating a lower or even non-existent standard of justice for the poor and near-poor. At first there was great resistance to abandoning this view. But recognizing the limitations of scarce resources, the LSC in the late 1990s adopted a dramatically different strategy for carrying out its mission to promote equal access to the justice system. Rather than insisting on full-representation for all of its clients, the LSC sought to increase the availability of legal services to eligible persons by providing legal information and limited assistance to those individuals with relatively uncomplicated problems. It could then reserve full representation for those individuals with more complicated cases, and those who, due to cognitive or emotional limitations, would be unable to pursue claims effectively on their own. This strategy was implemented by requiring local agencies to specify how they planned to meet the needs of self-represented litigants, and to document how effectively they had done so, as a condition of receiving federal funding.

A similar dynamic also took place in many local pro bono programs. Due to increased specialization within the legal profession as well as limitations on the amount of time and resources that individual lawyers could devote to full-representation on a pro bono basis, many local programs established legal hotlines and clinics in which lawyers could contribute a

[T]he majority of self-represented litigants had legitimate legal problems that could only be resolved through judicial intervention, but could not obtain affordable legal assistance.

4. See Conference of Chief Justices and Conference of State Court Administrators, Final Report of the Joint Task Force on Pro Se Litigation (July 29, 2002).

The rise in consumer demand for unbundled legal services has helped to draw a distinction between what are quintessentially legal services . . . and those tangential services that lawyers have traditionally performed

couple of hours each month for consultation on routine legal matters without undertaking ongoing responsibility for the case. Similar efforts include legal workshops or clinics that educate people about legal rights and provide minimal assistance in completing court documents.

Both the LSC and the pro bono approaches are the no-fee corollary of the “unbundled” model of legal services delivery

in which lawyers undertake discrete legal tasks—consultation and legal advice, preparation or review of legal forms, in-court representation—for a full or only slightly reduced fee. This model makes it possible for individuals to obtain access to competent legal advice and assistance on those aspects of their cases that they most desire help, without paying full legal fees for tasks that they feel comfortable doing themselves. It also accommodates the desires of many litigants to have a more active role in how their cases are managed, including the timeliness of a final resolution.

The unbundled services model has not been enthusiastically embraced in all parts of the country. Many lawyers express concerns about the ethical obligations of discrete task representation as well as the potential for professional malpractice liability. A secondary concern is whether the local judiciary will respect limited representation agreements. Recent changes to the Model Rules of Professional Conduct explicitly permit these types of arrangements, provided that they are reasonable under the circumstances and that the client gives informed consent to the agreement.⁵ Even with these assurances, this model poses challenges for lawyers. To be a cost-effective model for both lawyers and clients, for example, the lawyer must have the immediate knowledge required to provide competent legal advice and assistance in a timely manner: there is no opportunity for a lawyer to spend two to ten hours researching a legal question at \$100 or more per hour. Thus, lawyers must know the law very well and be fairly proficient with diagnostic interviews in order to provide competent legal assistance on an unbundled basis, skills that are generally not the province of younger, less experienced lawyers.

The rise in consumer demand for unbundled legal services has helped to draw a distinction between what are quintessen-

tially legal services—that is, the tasks that form the core of the ever-ambiguous phrase “practice of law”—and those tangential services that lawyers have traditionally performed for clients in the course of carrying out the representation. This then has become the starting point for how the court and legal communities address the second set of factors that impede access to justice for self-represented litigants: restrictions on the availability of legal information that litigants need to make informed decisions about how to pursue a claim or defense, including whether to retain a lawyer for some or all of the case.

LEGAL INFORMATION AND LEGAL ADVICE

Richard Zorza, lawyer, author,⁶ and consultant to many courts and legal organizations on access to justice issues, has a useful illustration to explain the distinction between legal advice and legal information: “If you ask a question of two lawyers, and get two different answers, and neither lawyer is committing malpractice, that is legal advice. But if there is only one right answer, that is legal information.” Legal information should be available to all people and from any source, including non-lawyers and even court staff (who are uniquely knowledgeable about legal information, especially local court procedure).⁷

Although obviously tongue-in-cheek, Zorza’s explanation is a useful one for thinking about what lawyers do for clients that clients are unable to effectively do for themselves. It also distinguishes those functions from those that individuals can do for themselves if given access to accurate legal information. A recent project of the National Center for State Courts, conducted in cooperation with the Chicago-Kent College of Law and the Illinois Institute of Technology’s Institute of Design,⁸ identified five categories of legal services, defining that term as the composite of legal advice and legal information that constitutes traditional legal representation in the civil justice system. These five categories—diagnosis, logistics, strategies, resolution, and enforcement—are the areas that self-represented litigants appear to struggle with the most. As we shall see, most of these categories have varying mixtures of legal advice and legal information, so identifying the aspects of each category that consist mainly of legal advice provides a preliminary template for the tasks that the legal community might provide through a model of unbundled legal services. Similarly, the specific aspects of each category that consist mainly of legal information can be the starting point for either the courts or the legal community to provide information services for self-represented litigants.

Diagnosis

The diagnosis category is premised on the assumption that most individuals, given the tools to do so, will attempt to

5. Model Rules of Prof. Conduct Rule 1.2(c) (“A lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent.”) and comments [6] – [8].

6. RICHARD ZORZA, *THE SELF-HELP FRIENDLY COURT: DESIGNED FROM THE GROUND UP TO WORK FOR PEOPLE WITHOUT LAWYERS* (NCSC, 2002).

7. John M. Greacen, *Legal Information vs. Legal Advice: Developments*

During the Last Five Years, 84 JUDICATURE 198 (2001); John M. Greacen, *No Legal Advice from Court Personnel! What Does That Mean?*, JUDGES’ J., Winter 1995, at 10.

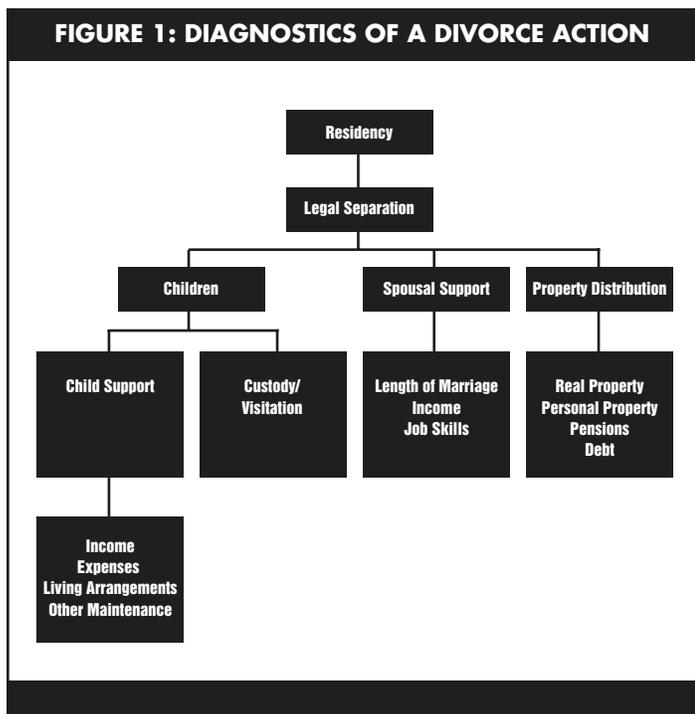
8. The project was funded by grants from the State Justice Institute (SJI-00-N-248), the Open Society Institute (No. 20001562), the Center for Access to the Courts Through Technology, and the Illinois Institute of Technology.

resolve problems in a rational and responsible manner—legally and effectively. So when confronted with a legal problem, the most important questions for which people seek answers are:

- What are my legal options?
- Are any legal, financial, moral, or other important implications related to those options?
- How are those options pursued?
- How much time, money, and other resources are needed to pursue those options?

To answer those questions, lawyers typically help guide their clients through a logical decision tree of varying complexity depending on the type of problem under consideration. Take, for example, someone consulting a lawyer about a divorce. Figure 1 illustrates the typical issues that would arise in the decision-tree analysis.

In most jurisdictions, the number of legal options available to a client is generally two, and at most three.⁹ The first option is to do nothing and stay legally married, which has obvious implications not only in terms of ongoing animosity (presumably the client is not seeking to dissolve an otherwise happy marriage) but also restrictions on future relationships (the client cannot remarry until the existing marriage is legally dissolved) and continued legal responsibility for the welfare and future legal obligations incurred by the spouse. The second option is to obtain a divorce from a court of competent jurisdiction. A good lawyer would first discuss with the client the requirements for filing for divorce, including residency in the jurisdiction and satisfaction of any statutorily-defined period of legal separation. Then the lawyer would discuss obvious implications of divorce including the need to decide on the disposition of children (custody, visitation, child support), spousal support, and property



9. Some jurisdictions, such as Virginia and Kentucky, permit divorce “from bed and board,” which operates to sever the spouses’ rights to property acquired after the divorce as well as legal responsibility

for liability incurred by the former spouse, but does not permit either spouse to remarry and does not affect inheritance rights (e.g., dower, curtesy).

It is only in the final step of providing advice based on the client’s facts that legal judgment and experience—the hallmarks of the practice of law—become more prominent

disposition. After explaining the available options and their implications, a lawyer would typically answer questions about how to pursue those options, such as where to file for divorce (forum selection) and what steps may be necessary before filing (such as legal separation, required in some states).

Finally, the lawyer would discuss with the client the time, money, and other resources that would be necessary to pursue each of these options. For example, the lawyer would advise the client about the probability of different outcomes of the divorce decree, such as the likely range of child or spousal support; the typical amount of time until the final divorce decree would be issued; the estimated costs including legal fees, court costs, and related expenses; the amount of out-of-court preparation required of the client for collecting relevant documents and affidavits for necessary witnesses; and the likely number of in-court appearances.

In this scenario, the initial steps are more accurately described as legal information. Typically they are stated as positive law in state statutes and court rules. It is only in the final step of providing advice based on the client’s facts that legal judgment and experience—the hallmarks of the practice of law—become more prominent and the intrinsic value of a lawyer becomes more evident. It is also precisely the kind of information and advice that people need to make an informed decision about whether they would be able to represent themselves effectively. Indeed, many self-represented litigants underestimate the amount of preparation needed for their cases and, if fully advised of the time and resources involved, might choose to seek assistance from a lawyer for some or all of the case. Obviously, this illustration is fairly straightforward. In other types of cases in which the positive law is less clear cut, the threshold where legal information blurs into legal advice might occur much earlier in the consultation.

Logistics

Once all the legal options have been explored and one option agreed upon, the next area of legal expertise for which clients traditionally rely on lawyers involves carrying out the myriad of logistical steps necessary to bring the matter within the legal jurisdiction of the court for consideration. Other than the choice of forum (where a choice even exists), knowledge of these steps mainly consists of legal information rather than legal judgment. But carrying out these logistics can involve a

Few self-represented litigants realize that the vast majority of cases are disposed of through a bilateral agreement of the parties (settlement) . . . , not by a trial on the merits.

staggering number of individual steps: drafting pleadings, including all accompanying forms and affidavits; filing the pleadings with the court; paying the court fees or applying for a waiver for indigent litigants; arranging for service of process, either through the court, with the sheriff, or with a private process server; fulfilling any mandatory requirements to proceed,

such as attending a parenting class or mandatory mediation; filing supplemental papers (separation agreement, financial affidavits); and then taking any formal steps needed to set the case on the calendar. After becoming aware of how tedious some of the steps can be, litigants who can afford to do so may opt to have a lawyer carry out some or all of these tasks, but there is little about these steps that requires the level of legal judgment that clients would ordinarily only receive from an experienced lawyer.

Strategies

After arranging for the logistics of a civil claim, the next step involves deciding on a strategy with which to pursue or defend the claim. The two most common strategies are to negotiate the dispute and try to arrive at a mutually agreeable settlement or to prepare for formal litigation before a judge or other judicial officer. As a practical matter, this decision is strongly tied to the litigant's objectives concerning the case. The litigant obviously has superior knowledge of his or her own objectives, and those preferences should ordinarily be given great deference by the lawyer.¹⁰ But the decision also relies heavily on the lawyer's judgment about which course of action would best secure the client's objectives, so there is a great deal of added value from the information and advice a competent lawyer can impart.

One common misconception by many self-represented litigants is that, once they have filed their case, the court takes full responsibility for future decisions on the merits of the case. Few self-represented litigants realize that the vast majority of cases are disposed of through a bilateral agreement of the parties (settlement) or a unilateral decision by one of the parties (default judgment or dismissal for failure to prosecute), not by a trial on the merits. Indeed, it is somewhat ironic that the collective body of law referred to as civil procedure exists largely to prepare for trial, an event that very rarely happens. Judges, of course, are well aware that if full judicial review of the facts and the law was required to resolve each case, the civil justice system would come to a grinding halt in a matter of days. There is an implicit expectation that parties will continue to

negotiate with one another even after the case has been filed, hopefully arriving at some mutually agreeable arrangement that will alleviate the need for the court to expend time and effort deciding the case, or at least restrict that effort to a review of the agreement to ensure that it meets minimum legal requirements (e.g., child support, visitation).

Unfortunately, there are few mechanisms to inform self-represented litigants about this implicit expectation. Consequently, many self-represented litigants are unaware that they retain the ability to formulate their own resolution, and indeed that their resolution might be more advantageous to both parties than any that the court might impose. Although some courts have implemented mandatory mediation or other alternative dispute resolution programs that provide an opportunity to inform self-represented litigants about the possibility of a negotiated disposition, and even provide a structured forum for conducting the negotiations, not all do so.

If self-represented litigants are largely unaware that they can negotiate rather than litigate their cases, they are also uninformed of what they must do to prepare for litigation. Most self-represented litigants work under the misconception that a hearing is their first opportunity to tell their side of the story. The reality is that, for many, it is their last. Lawyers, of course, understand the importance of preparation, which involves the factual and legal documentation of the case. Exchanging interrogatories, conducting depositions to discover factual information under the control of the opposing party, and issuing subpoenas to compel witness appearances are all part of trial preparation. As a practical matter, however, most cases involving self-represented litigants do not generally require a great deal of discovery or legal preparation in that they tend to be factually and legally quite straight forward. Another component of preparation is learning the niceties of court presentation, such as court etiquette (e.g., how to address the judge and how to address the opposing counsel or party, if at all) and trial logistics (e.g., the order of trial, how to get documentary or demonstrative evidence admitted, how to frame questions to witnesses on direct and cross-examination).

Both negotiation and preparation for trial are skills that lawyers acquire with training and experience, but they are not solely dependent on legal judgment. Some self-represented litigants can represent their interests quite well in negotiations, perhaps even better than lawyers, if they are only informed of the benefits of doing so. Trial preparation is another thing entirely. Many self-represented litigants are understandably intimidated by the courtroom environment and are uncomfortable with the formality of trial procedure. Although some do reasonably well with coaching from a seasoned legal professional, limited representation for in-court proceedings is another task for which many litigants would be willing to pay reasonable legal fees.

Resolution and Enforcement

In spite of the complexity of the trial process, a commend-

10. See Model Rules of Prof. Conduct Rule 1.2(a) ("A lawyer shall abide by a client's decisions concerning the objectives of the rep-

resentation and . . . shall consult with the client as to the means by which they shall be pursued.")

able number of self-represented litigants prevail in their cases each year. Some of those cases are largely administrative proceedings that require little more than dogged determination and perseverance. In other cases, self-represented litigants demonstrate a remarkable degree of legal sophistication despite their lack of formal legal education and training. Even so, one of the biggest stumbling blocks takes place when the judge issues an oral judgment in favor of a self-represented litigant, and then turns to the litigant and requests him or her to commit the judgment to writing and submit it to the court for the judge's signature—which leads back to the logistical problem of drafting court documents. There are few templates or model court forms that a self-represented litigant can examine to get an idea of what a written order might look like, much less what should be included in it. Many self-represented litigants, even though they have won their cases, lack knowledge about how to translate the judge's oral statement into a binding and enforceable written instrument—if, indeed, they have thoroughly understood the judge's oral judgment.

Even for cases in which the court drafts its own final orders, self-represented litigants are rarely knowledgeable about how to enforce these judgments in any meaningful way. Thus perpetuates the myth of the self-enforcing judgment in which, magically, the judgment-debtor pays the full amount of the debt, mortgage and finance companies are notified that a newly divorced person is no longer obligated on a previously jointly-held note, etc. Some self-represented litigants believe that the court pays the judgment, then collects from the judgment-debtor. Rarely are self-represented litigants given any information about their options for enforcing a judgment (e.g., lien or seizure of assets, garnishment), which brings them back to the beginning of the litigation cycle again: diagnosis of their legal options and the associated implications, the logistics of enforcement, and the most effective strategies and resolutions.

From an examination of the specific legal tasks involved in pursuing litigation, it becomes clear that access to legal information is the most critical need of self-represented litigants in the vast majority of cases. Legal judgment—the reasonable inferences that an experienced legal professional makes based on available information—can be critical to litigants in more complicated cases in which the sheer volume and complexity of legal information requires more time than the average layperson can commit to preparing his or her own case. But in less complex cases, self-represented litigants are typically able to make reasonable inferences from legal information, and thus the need for access to legal advice can be very helpful, but is not absolutely necessary. The question then becomes who is best situated to provide accurate legal information to self-represented litigants, and to encourage litigants to seek legal advice in appropriate circumstances.

WHAT COURTS AND LAWYERS CAN DO

Ethical constraints on judges, court staff, and lawyers mandate some separation of the spheres of assistance that can be offered to self-represented litigants. Judges and court staff operate under requirements of neutrality and objectivity, and lawyers operate under requirements of competence and the avoidance of conflicts. But there is no inherent ethical restriction on cooperation between the courts and the legal community in providing services that would meet the needs of self-represented litigants in a more-or-less seamless manner.¹¹ So how can courts and legal service providers address each of the categories described above to improve access to justice for self-represented litigants?

Much of the decision-tree analysis that takes place during diagnosis relies on legal information, rather than legal advice, meaning that either the court or the legal community could ethically provide this information, and many do. A popular approach for many courts is to provide model court forms and instructions for the most common types of cases, such as divorce (with or without children), child support initiation and modification, and small claims. The biggest problem arises in the context of how to help self-represented litigants evaluate their legal options, including the option to proceed without legal representation. Some courts have addressed this dilemma through collaborations with the local legal community to provide consultation services for a nominal fee (e.g., \$25 for a half-hour consultation) on an unbundled basis as part of the courts' assistance programs for self-represented litigants. Self-represented litigants get the advantage of early consultation with a lawyer, and lawyers have an opportunity for future business if the litigant chooses to hire a lawyer to handle some or all of the case.

The Circuit Court for Baltimore County, Maryland, has taken this approach a step further. Part of the lawyer's consultation¹² involves an assessment of case complexity as well as the self-represented litigant's emotional and intellectual ability to represent him or herself, and a formal recommendation about whether to proceed without a lawyer or not. (The vast majority of litigants—well over 90%—are given the green light to proceed pro se.) The Maryland Legal Assistance Network has also developed a technology application that provides a self-assessment tool for would-be self-represented litigants.¹³

Even for cases in which the court drafts its own final orders, self-represented litigants are rarely knowledgeable about how to enforce these judgments in any meaningful way.

11. John Greacen has written most eloquently about how courts can provide legal information to self-represented litigants without transgressing established ethical boundaries. See Greacen, *supra* note 7.

12. Lawyers who participate in this program are hired under a con-

tract with the court and do not receive fees from the litigants.

13. It is located on the web at <http://www.peoples-law.com>. Use the website's search function to locate the "Checklist for Divorce Self-Representation."

[T]he way for courts to address the logistical problems of self-represented litigants is to stop thinking of common mistakes as “operator error” and to begin thinking about how to correct the system errors that frequently cause operators to fail.

The online questionnaire helps litigants determine the advisability of proceeding without a lawyer by focusing on litigants’ personality traits, motivation, organizational skills, knowledge of basic legal concepts, and knowledge of specific issues or problems that add complexity to otherwise routine cases. The litigant’s responses to questions are then evaluated, and the scoring measures indicate the likelihood of success as a self-represented

litigant in terms of ability to navigate the civil justice system (but not in terms of case outcome). For those who score low on the self-assessment test, the website includes links to a variety of public and private legal service providers who offer reduced fee and pro bono services on either an unbundled or full-service representation basis.

Finally, most courts would be reluctant (and rightly so) to make predictions about cases filed by self-represented litigants (e.g., how long before a final decision is made, what will the outcome be). But there is no reason why courts cannot make general information available that could help self-represented litigants gauge such things for themselves (e.g., average filing-to-disposition times for uncontested divorce cases, average number of court appearances). Many courts collect this information routinely for caseload management purposes, and there is no apparent reason that it could not be provided to the public.

Addressing the logistics of self-representation is more challenging, since the actual process of initiating and carrying out litigation in most courts is extremely complex for persons without training or experience in civil procedure. Although the purpose of court procedure is to preserve the rights of litigants and to manage court caseloads efficiently, procedures that were created to address new situations or types of cases often accumulate in ways that are internally inconsistent or that obscure the underlying purpose of those procedures. Take, for example, process requirements concerning who can serve court papers on litigants. In the early days of the U.S. Postal Service, when timely delivery of the mail was less reliable than it is today, most courts required service of process to be performed by law enforcement or professional process servers to ensure that litigants actually received notice of the suit and could testify to that effect if necessary. Since then, of course, postal service has improved dramatically and many courts now explicitly permit service of process by first-class or registered mail. Case

law in some states provides that actual notice is sufficient even if the litigant has not adhered to formal service procedures. All too frequently, however, statutes and court rules retain references to outmoded procedures and as a result, litigants are led to believe that the process involves multiple steps, multiple forms, and sometimes even multiple agencies (e.g., local sheriff and private process server).¹⁴

The first step, then, to reducing the level of logistical complexity involves evaluating existing procedures to identify the steps of the process that cause self-represented litigants the most trouble and to focus on simplifying those steps. Doing so, of course, requires judges and court staff to shift their frame of reference about the cause of problems encountered by self-represented litigants. An example from the glory days of the American railroad helps to illustrate how this frame of reference affects the efficiency of the overall system.¹⁵ In the early days of the American railroad, head-on collisions of locomotives were a common occurrence, ostensibly due to “operator error” by signalmen who failed to alert conductors of oncoming rail traffic on the next segment of track. At some point, however, the railroad companies changed their frame of reference from thinking about these accidents as operator error to thinking about them as system errors. To address the systemic problem, they began laying two sets of railroad tracks side by side, with each set dedicated to trains traveling in a certain direction, thus eliminating the potential for signalman errors. Miraculously, the number of operator errors associated with head-on collisions declined precipitously.

In the context of the civil justice system, the way for courts to address the logistical problems of self-represented litigants is to stop thinking of common mistakes as “operator error” and to begin thinking about how to correct the system errors that frequently cause operators to fail. Take, for example, the common complaint of court staff of having to reschedule hearings due to failure to arrange for service of process on the opposing party, either because self-represented litigants didn’t know that service of process was required or they didn’t understand how to go about doing it. Both Delaware and Virginia addressed this issue by having the court take responsibility for service of process at the time pleadings are filed. Court staff there take all of the information needed to perfect service of process from the filing party, collect the appropriate fee, and provide the information to the appropriate agency. In most Virginia jurisdictions, the local sheriff serves the papers; in Delaware, the court has a contract with a private process server. From the litigant’s perspective, filing the necessary papers is a one-step process—there is no need to contact another agency within the court (or down the street or across town, depending on the location) or to pay another set of fees.

Another common problem that can be addressed through system reform is the large proportion of cases that seem to languish indefinitely because litigants do not know how to move to the next stage of the litigation process after they have filed the initial pleadings. Ultimately, many of these cases are dis-

14. Moreover, many court procedures carry on long after the conditions that led to their establishment have disappeared because the costs involved in removing or reforming obsolete systems or pro-

cedures often exceed available funding, especially at the local level.
15. Thanks to Richard Zorza, who often uses this illustration in educational workshops on self-represented litigation.

missed for failure to prosecute (and are then refiled at some later date). Instead of requiring litigants to take some affirmative step to alert the court that the case can proceed, some courts have made the process self-perpetuating—as soon as the litigant completes one step in the litigation process, the court automatically schedules the next step on the court’s calendar (e.g., registration for parenting classes, mandatory mediation, pretrial conference).¹⁶ A detailed set of instructions about the next procedural event is given to the litigant with information about how to request a change to the schedule and the consequences of failing to adhere to the schedule.

As explained above, assessing the dual strategies of negotiation and preparation for litigation requires some degree of legal judgment, but ultimately must comport with the litigant’s reasonable objectives in pursuing the claim. Although the assessment itself tends to fall more appropriately to the legal community, the court can play a role by informing self-represented litigants that settlement of outstanding disputes is always an option available to them and by making institutional resources (e.g., mediation or arbitration services) available that encourage settlement. For litigants who opt to pursue litigation, a brief pretrial conference with the judge or another court official provides an opportunity to inform litigants about the court’s expectations for trial. Emphasizing the importance of subpoenas for necessary witnesses and bringing all relevant documentation can go a long way to alerting litigants of the importance of pretrial preparation.

The same lessons about using instances of “operator error” to identify system errors apply to the resolution and enforcement stages of litigation. Many cases involving self-represented litigants require fairly routine final judgments that can easily be drafted at the bench using preprinted forms or a standardized template. Doing so immediately at the end of the hearing will relieve litigants’ discomfort as well as the potential for delay and inaccuracy associated with forcing litigants to draft final orders. In addition to providing the written judgment, however, the court should explain the terms of the judgment and advise self-represented litigants of the procedure to challenge the judgment (e.g., appeals) or to modify the order if appropriate in the future (e.g., child support). Doing so in person at the time of the hearing further emphasizes the finality of the order and also provides an opportunity to clarify misunderstandings about specific terms.

Because satisfaction of civil judgments relies heavily on the cooperation of the judgment-debtor, many courts are reluctant to offer self-represented litigants assistance with enforcement. A Colorado magistrate, however, has found a way to provide self-represented litigants with information that can later be used to assess the likelihood of collecting on a judgment and the options for doing so. At the end of the hearing, he provides the litigants with his written judgment and advises the judgment-debtor of any procedural remedies to challenge the judgment. But before the judgment-debtor is permitted to leave the courtroom, the magistrate requires him or her to complete a brief set

of interrogatories including place of employment and the location and account numbers of any existing assets (e.g., bank accounts), which is then given to the judgment-creditor. If the parties are unable to come to some agreement about how the debt will be satisfied, the judgment-creditor already

has in his or her possession sufficient information to decide whether to pursue legal enforcement of the judgment as well as the best way to do so (i.e., garnishment, lien, or seizure of assets). If the judgment-debtor has no job and no assets, for example, the judgment-creditor is saved the time and expense of a probably futile future attempt to satisfy the judgment.

Some judges and lawyers, upon hearing of this practice, question the propriety of having a magistrate provide assistance to the judgment-creditor in collecting on the debt. But the judges in that court agreed with the magistrate’s explanation that the practice does not violate judicial ethics of neutrality because, as soon as he renders the final judgment, he is no longer neutral with respect to the parties—he has just ruled that one party wins and the other party loses. Moreover, the magistrate also found the practice to be a significant benefit to the court in that the amount of post-judgment proceedings to locate and attach the assets of judgment-debtors declined dramatically. Again, we see a court that has simplified its process—removing the necessity for judgment-creditors to seek substantial court oversight in the collection of debts—in response to the needs of self-represented litigants. Further, this change to meet the needs of self-represented litigants has had a secondary effect of making the court system itself more efficient.

[T]his change to meet the needs of self-represented litigants has had a secondary effect of making the court system itself more efficient.

COLLABORATION FOR SEAMLESS ACCESS TO JUSTICE

This article has focused on three distinct issues related to self-represented litigation. The first is that the demand for affordable legal services has vastly outpaced the available supply. Over two decades of efforts to increase access to affordable legal services has not appreciably improved the situation and is highly unlikely to do so in the foreseeable future. It should be no surprise, therefore, that increasing numbers of people choose self-representation as the only feasible option for securing necessary legal rights and remedies. In recognition of the reality of litigants’ needs, the courts and the legal community have slowly shifted from insistence on full-representation for every litigant as a fundamental requirement of equal justice to a more pragmatic approach, offering information and limited counsel for those litigants who are capable of managing their own cases and reserving full-representation for those with more complex cases or fewer personal resources.

The effect of this shift has been increased awareness of the

16. In addition to fewer unresolved cases on the docket, many courts find that their calendar management improves significantly as well.

distinction between legal information and legal advice that is inherent in the specific tasks that lawyers traditionally perform for clients under the general rubric of the "practice of law." Much of the value added by a lawyer's services is the efficiency derived from the lawyer's existing knowledge of legal information about available options and how to pursue them. With access to legal information, many laypersons are capable of performing these tasks for themselves, albeit less efficiently. Certainly one implication of this awareness has been a dramatic shift in lawyer-client relationships as clients become more informed and more insistent on taking an active role in the management of their cases. Indeed, a large body of academic literature has developed that applauds the shift away from a paternalistic relationship on the lawyer's part to one of greater respect for client autonomy. It is possible that many who support the evolution of a more coequal lawyer-client relationship failed to appreciate the implications that it might have in terms of the mechanics of how lawyers practice law, especially the increased demand for unbundled legal services, but it is clear that this model of legal service delivery is becoming more popular in many parts of the country.

There is one aspect of the needs of self-represented litigants that can only be addressed by the courts, and that is the complexity of the judicial system itself. We have seen, for example, that much of the complexity of the judicial system has been allowed to perpetuate because lawyers, who had already assimilated information about the underlying basis for court procedure, could navigate the system more deftly and sometimes even use that information to gain a strategic advantage in litigation. The influx of large numbers of self-represented litigants who are unfamiliar with court procedures, however, places unmistakable burdens not only on the litigants, but also on the courts themselves. Although many judges and court staff express resentment at having to "dumb down" the system to prevent "operator errors" by self-represented litigants, doing so clearly benefits all litigants regardless of their representation status as well as the courts themselves in terms of increased efficiency.

The remaining dilemma, then, is how best to provide self-represented litigants with access to accurate legal information, including referrals to sources of legal advice in appropriate circumstances. As a practical matter, who actually provides legal information is a relatively minor consideration, although the experience in many jurisdictions is that a collaborative approach by the courts and the legal community is more effective

than either one acting alone. In terms of convenience and a logical starting place for litigants, however, most of these efforts should be housed within the courts or at least in fairly close proximity, even if the legal community is the primary source of information. This model of collaboration has worked well in the context of other types of service provision, such as court-annex mediation or other alternative dispute resolution programs, so there is little reason to think that it would not work equally well in terms of assistance programs for self-represented litigants.

From the perspective of the litigant, such arrangements provide relatively seamless access to justice, and do so with greater efficiency and less awkwardness in preserving the legitimate separation imposed by ethical constraints for both the courts and the legal community. Undoubtedly, the transition from the traditional framework of full-service legal representation to new models of access to legal information and legal advice has been unsettling for the courts and for the legal community. In the long run, however, these models provide better access to justice for far greater numbers of people than was previously possible and promote better accountability of the courts and the legal community to the people they serve.



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AMERICAN JUDGES ASSOCIATION FUTURE CONFERENCES

2004 Midyear Meeting

Jan. 30-Feb. 3, 2004
Hyatt Regency Hotel
Savannah, Georgia
\$135 single or double
(joint meeting with NACM)

2004 Annual Conference

Oct. 24-29, 2004
Grand Hyatt Hotel
San Francisco, California

2005 Annual Conference

Sept. 18-23, 2005
Hotel Captain Cook
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The Ignition Interlock System: An Evidentiary Tool Becomes a Sentencing Element

Andrew Fulkerson

Technology is becoming an increasingly pervasive aspect of the criminal justice system. One of the earliest technological innovations in the investigation of crimes was the use of fingerprints for identification of suspects.¹ Fingerprinting began as an investigatory tool and by the early 20th century was accepted as scientific evidence in court proceedings.²

Courts now increasingly rely upon expert witnesses to explain scientific evidence, which is often critical in the decision-making process for criminal and civil courts.³ While technology has routinely been utilized as both investigatory and evidentiary devices, only in the last decade has a technological device made the transition from investigation to evidence to sentencing element. The breath-analyzed ignition interlock is the device that has experienced this metamorphosis.

Drunken driving emerged as a new crime in the 20th century. DWI was unknown at common law. With the development of the automobile in the dawn of the last century, the predilection for the fruit of the vine of some members of society combined dangerously with this new mechanized mode of travel.

By the 1970s the streets and highways of America were plagued by drivers who were too impaired to safely handle a vehicle. Enforcement of DWI laws was, at best, spotty. In the early 1980s, activist groups such as Mothers Against Drunk Driving (MADD) began organizing and pushing for reforms in the approach to DWI. Simultaneously, legislatures began proposing and passing new legislation aimed at the DWI problem.⁴ As a result of a combination of this change in public opinion, more serious enforcement, and expanded penalties, the arrest rate fell from 1,124 per 100,000 drivers in 1986, to 809 per 100,000 in 1997.⁵ This is a 28% decrease in the DWI arrest rate. But there are still a substantial number of impaired drivers on the roads. Even with this decrease, alcohol plays a role in far too many motor vehicle crashes. The National Highway Traffic Safety Administration reported that in 1999,

alcohol was a factor in 38% of fatal crashes and in 7% of all vehicle crashes.⁶ In 1998, 1.4 million persons were arrested for DWI.⁷

TECHNOLOGY AND DWI

Technology has long been of great importance in DWI cases. Alcohol was proven to be statistically related to fatal automobile crashes by the "Manhattan Study."⁸ Studies of the association between degree of impairment and the amount of alcohol that is present in a person's system have concluded that even low doses of alcohol will impair one's visual perceptions and reaction times.⁹

Without the use of some form of test to ascertain alcohol levels in defendants, the court must rely entirely upon evidence of the defendant's demeanor. In cases of obvious intoxication, demeanor evidence may be sufficient, but impairment may be more difficult to establish from demeanor evidence alone.

The earliest tests for measuring blood-alcohol content were based upon venous blood samples. Alcohol, present in the breath of subjects, was determined to have a correlation with alcohol levels in venous blood. As a result, in 1953, the National Safety Council Committee on Alcohol and Drugs recommended that breath testing be used in drunken driving cases.¹⁰ The first breath-testing device was the "Breathalyzer," which was developed by Robert Borckenstein in 1954. It is cheaper and much more convenient for a police officer to administer a breath test than to transport a suspect to a hospital or clinic for a blood test. Breath testing soon became the most predominant method of ascertaining the level of alcohol in a suspect's system.¹¹ The breath test is now so common that nearly all DWI cases rely heavily on the results of the testing device used in the local jurisdiction.

The passage of "per se" DWI laws based entirely upon a person's BAC have made testing devices even more common as an investigatory and evidentiary tool.

Footnotes

1. Jennifer L. Mnookin, *Fingerprint Evidence in an Age of DNA Profiling*, 67 BROOKLYN L. REV. 13 (2001).
2. *Id.*
3. Graham C. Lilly, *The Decline of the American Jury*, 72 U. COLO. L. REV. 53 (2001).
4. Patrice N. Rogers & Steve E. Schoenig, *A Time Series Evaluation of California's 1982 Driving-Under-the-Influence Legislative Reforms*, 26 ACC. ANAL. & PREV. 63-78 (1994).
5. LAURA M. MARUSCHAK, *DWI OFFENDERS UNDER CORRECTIONAL SUPERVISION* (Bureau of Justice Statistics Report, 1999).
6. NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, U.S. DEPARTMENT OF TRANSPORTATION, *TRAFFIC SAFETY FACTS 1999* at 13, 43, 56 (2000), available at [http://www-nrd.nhtsa.dot.gov/pdf/nrd-](http://www-nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/TSFAnn/TSF1999.pdf)

[30/NCSA/TSFAnn/TSF1999.pdf](http://www-nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/TSFAnn/TSF1999.pdf) (last visited Sept. 20, 2003). NHTSA reported that 30% of all traffic fatalities in 1999 involved at least one driver or one person not an occupant of a vehicle in the crash who had a BAC of .10 or higher. *Id.* at 32.

7. *Id.* at 4.
8. J. McCarroll & W. Haddon, *A Controlled Study of Fatal Automobile Accidents in New York City*, 38 J. CHRONIC DISEASES 811 (1962).
9. R. B. Forney, Jr., *Recognizing Alcohol Impairment, Observation and Testing* (presentation at an American Bar Association Traffic Court Seminar, 1999).
10. *Id.*
11. Elizabeth Baker & Kenneth Beck, *Ignition Interlocks for DWI Offenders-A Useful Tool?*, 7 ALCOHOL, DRUGS & DRIVING 107 (1991).

THE IGNITION INTERLOCK DEVICE

It is not a great leap from the development of testing devices to determine blood alcohol level in a person, to the application of this technology to design “a car that drunks can’t drive.”¹² The use of breath-testing equipment for preventative purposes has been under consideration since 1970.¹³ Early vehicle-based breath-testing devices were plagued by problems with reliability and circumvention.¹⁴ A frequent means of cheating the early ignition interlock devices was the use of stored breath samples by drivers. When the technology was improved so as to effectively prevent circumvention, the stage was set for the widespread usage of the modern ignition interlock system.

The ignition interlock is typically a handheld device that is wired to a control unit under the dash of the vehicle. The driver must give a breath sample that has alcohol below a predetermined level. If the driver produces a sample above the programmed limit, the ignition system of the vehicle is shut down and the vehicle will not start. The unit is programmed to allow another attempt after a certain amount of time (usually 30 minutes) has elapsed.¹⁵

Circumvention may be prevented by requiring a “hum-tone” at the same time the sample is given. That is, the driver must hum and blow at the same time. Also required are “rolling re-tests,” which keep drivers from having a sober friend provide the initial sample. Circumvention is further discouraged by the use of a data recorder, which stores information about each time there is an attempt to start the vehicle. The data includes date, time, subject’s BAC, any lock-out events, and any attempts to bypass the interlock unit.¹⁶ The offender must report at regular intervals for the unit to be inspected and the data downloaded. The information is provided to—and should be reviewed by—the offender’s probation officer or the court.

California was the first state to enact legislation that authorized sentencing judges to require the installation of ignition interlock devices in the vehicles of DWI offenders.¹⁷ As of 2002, 41 states and the District of Columbia had passed laws autho-

rizing the use of the ignition interlock.¹⁸ Some backers of the ignition interlock have suggested that the device be made another piece of mandatory automotive safety equipment along with seat belts and airbags.¹⁹

DWI CASES AND THEORIES OF PUNISHMENT

Criminologists and researchers recognize four general purposes or goals served by the punishment of actions that society has deemed beyond the bounds of acceptable behavior: (1) retribution, (2) rehabilitation or reform, (3) incapacitation, and (4) deterrence.²⁰ Which of these four functions of punishment are effective in the handling of drunken driving cases?

Retribution

Retribution serves primarily to satisfy the urge to avenge the wrongful behavior of those who violate society’s rules of conduct. From that standpoint, the punishment must only be proportionate to the offense in order to be effective. Preventing or deterring future criminal behavior is collateral to the retributive theory of punishment.

Rehabilitation

Rehabilitation operates upon the presumption that there is something “wrong” with criminals—that they suffer from some form of sickness, which causes their aberrant behavior. Rehabilitative programs began to be used extensively in the United States for DWI offenders in the period of the 1970s and early 1980s. It has been reported, however, that these programs had only minimal beneficial effects upon recidivism,²¹ though Lucker and Osti²² caution that it is inaccurate to draw generalizations from the applicable studies because of the broad variety of penalties, rehabilitation programs, and offenders that were considered.

Circumvention may be prevented by requiring a “hum-tone” at the same time the sample is given.

12. Robert B. Voas, *Cars That Drunks Can’t Drive* (paper presented at the annual meeting of the Human Factors Society, San Francisco, California, October 15, 1970).

13. *Id.*

14. Baker & Beck, *supra* note 11.

15. Kenneth H. Beck, William J. Rauch, Elizabeth A. Baker & Allan F. Williams, *The Effects of Ignition Interlock License Restrictions on Drivers with Multiple Alcohol Offenses: A Randomized Trial in Maryland*, 89 AM. J. PUBLIC HEALTH 1696 (1999).

16. Gregory T. Neugebauer, *Alcohol Ignition Interlocks: Magic Bullet or Poison Pill?*, 2 PITT. J. TECH. L & POL’Y 2 (2002).

17. Barbara J. Morse & Delbert S. Elliott, *Effects of Ignition Interlock Devices on DUI Recidivism: Findings From a Longitudinal Study in Hamilton County, Ohio*, 38 CRIME & DELINQUENCY 131 (1992).

18. States that have authorized the ignition interlock are Alaska, Arkansas, Arizona, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee,

Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and the District of Columbia.

19. Gregory T. Neugebauer, *supra* note 16, citing Douglas J. Beirness, *Best Practices for Alcohol Interlock Programs* (publication of the Traffic Injury Research Foundation, Ottawa, Ontario, April 2001, available at <http://www.trafficinjuryresearch.com>).

20. H. Lawrence Ross, *Are DWI Sanctions Effective?*, 8 ALCOHOL, DRUGS & DRIVING 61 (1992).

21. G. W. Lucker & J. R. Osti, *Reduced Recidivism Among First-Time DWI Offenders as a Correlate of Pre-Trial Intervention*, 24 J. OFFENDER REHAB. 1 (1997); R. Mann, G. Leigh, E. Vingilis & K. DeGenova, *A Critical Review of the Effectiveness of Drinking-Driving Rehabilitation Programs*, 15 ACCIDENT ANALYSIS & PREVENTION 441 (1983); J. Nichols, *Treatment Versus Deterrence*, 14 ALCOHOL HEALTH & RESEARCH WORLD 44 (1990); R. Peck, D. Sadler, & M. Perrine, *The Comparative Effectiveness of Education and Treatment Programs for Drinking Drivers: A Decade of Evaluation*, in 1 ALCOHOL, DRUGS AND DRIVING: ABSTRACTS AND REVIEWS 15 (L. Goldberg, ed. 1985).

22. Lucker & Osti, *supra* note 21.

A recent study of recidivism rates of DWI offenders who were required to use the ignition interlock was conducted in northeast Arkansas.

Other studies have shown quite contrary results. Specifically, an examination of a treatment program used in lieu of a mandatory jail sentence for first-time DWI offenders demonstrated that offenders who went through this alternative program experienced a rate of recidivism that was almost one-half that of offenders who received the traditional jail sentence. The

jailed offenders had a 37% recidivism rate while the offenders who were sentenced to the alternative program had only a 19% rate of re-offending.²³

Incapacitation

The most severe form of incapacitation is incarceration. In the context of drunken driving, the punishment is effective because it keeps the offender off the road. But this efficacy is true only while the offender is incarcerated. Other less restrictive, but still effective, forms of incapacitative punishment are the utilization of ignition interlock devices, confiscation of vehicles, and suspension or revocation of driving privileges.²⁴

An effective form of incapacitation of impaired drivers is the suspension or revocation of driving privileges. One study has found that DWI offenders who have had their license suspended or revoked have fewer subsequent violations and fewer crashes.²⁵ It is quite important to note that many of these offenders are still driving even though their right to drive has been taken away. While they violate the requirement that they not drive, they are apparently doing so with some degree of restraint and caution. This increased level of highway safety and defensive driving is very likely to have some positive bearing on the number of motor vehicle crashes, alcohol related or not, that occur on the streets and highways.

Deterrence

The fourth purpose of punishment is deterrence. This punishment goal can be directed toward the individual offender in the form of specific deterrence, or to society as a whole in the form of general deterrence.²⁶ Deterrence theory is based upon the presumption that people make rational choices before they act, consciously weighing the potential benefits of certain behaviors against the potential costs of the behavior. The igni-

tion interlock operates independently of this rational choice. The motivation of the driver is irrelevant. Even if the subject, after making the choice to drive a motor vehicle after drinking alcohol, tries to drive, the ignition interlock will not allow the crime to be committed.

It has been observed that the deterrent effects of punishment for DWI are greatly reduced by the almost minimal risk of detection of offenders by law enforcement.²⁷ The perceived risk of arrest has a direct relationship to the numbers of persons who drink and drive. A greater perceived risk of detection and punishment to the potential offender will produce fewer occurrences of drinking and driving.²⁸ There is no certainty that an impaired driver will be stopped and arrested. Regardless of how severe the ultimate sentence may be, many persons will take their chances on the road because of the slim chance of being apprehended.

Each of the elements of deterrence interacts with one another. For example, even when an offense carries an extremely harsh punishment, if the certainty of detection and punishment is low, then there is little deterrent effect. Similarly, if the certainty of detection and punishment is high, and the punishment is also considered severe, but the process is extraordinarily slow, then the deterrent effect is lessened by this lack of celerity of punishment.²⁹

Recidivism is related to specific deterrence. If the theory of deterrence is valid, then the affected offender should exhibit less criminal behavior and a lower rate of future involvement with the criminal justice system. Incarceration of DWI offenders has not been proven to be any more effective at reducing future DWI offenses than other legal sanctions.³⁰

DOES IT WORK? RECIDIVISM STUDIES

A recent study of recidivism rates of DWI offenders who were required to use the ignition interlock was conducted in northeast Arkansas.³¹ This study compared offenders in Greene County, Arkansas, which utilized the interlock, with DWI offenders in neighboring Craighead County, which did not include the interlock in DWI sentences. The Greene County interlock group consisted of all DWI offenders in the District Court for the period from May 1, 1995 through June 30, 1996. There were 315 DWI offenders in this group. The Craighead County non-interlock group consisted of all DWI offenders in the Craighead County District Court between January 1 and June 30, 1996, a group that included 312 persons convicted of DWI.³² The Arkansas Office of Driver Control provided histories for all offenders in these two groups for

23. W. N. Evans, D. Neville, & J.D. Graham, *General Deterrence of Drunk Driving: Evaluation of Recent American Policies*, 11 RISK ANAL. 279 (1991).

24. H. Lawrence Ross, *supra* note 20; Jeffrey H. Coben & Gregory L. Larkin, *Effectiveness of Ignition Interlock Devices in Reducing Drunk Driving Recidivism*, 16 AM. J. PREV. MED. 81 (1998).

25. Ross, *supra* note 20.

26. *Id.*

27. *Id.*

28. Robert B. Voas, H. D. Holder & P. J. Gruenewalds, *The Effect of*

Drinking and Driving Interventions on Alcohol-Involved Traffic Crashes Within a Comprehensive Community Trial, ADDICTION 221 (2nd Supp. 1997).

29. *Id.*

30. Morse & Elliott, *supra* note 17.

31. Andrew Fulkerson, *Blow and Go: The Breath-Analyzed Ignition Interlock Device as a Technological Response to DWI*, 29 AM. J. DRUG & ALCOHOL ABUSE 219 (2003).

32. *Id.* at 224.

three years subsequent to the subjects' conviction dates for the DWI offenses in the respective courts.³³

The Greene County offenders were ordered to install an interlock in their vehicles for periods of either six months or one year. This requirement was also made a restriction on their driver's licenses for the court-ordered time period.³⁴ The three-year follow-up provided an opportunity to examine recidivism well after the time that the interlock was in place in the offenders' vehicles.

If reduction in future arrests is one of the goals of a sentencing judge, then recidivism must be examined. In the Arkansas study, the interlock group experienced three-year recidivism rates of 17.5%, compared with 25.3% rates in the non-interlock group.³⁵ Length of time for use of the interlock did not appear to make any difference in recidivism. The rates were nearly identical for the interlock offenders who were ordered to use the interlock for six months and the twelve-month interlock subjects.³⁶

The study revealed more significant differences between the interlock and non-interlock groups when controlling for other variables. Multiple DWI offenders in the interlock group had re-offense rates of 18.1% compared with recidivism rates of 36.9% for the non-interlock group.³⁷ The interlock subjects then, were less than half as likely to have a subsequent DWI conviction within three years. For first offenders, the difference was much less substantial. The interlock group first offenders had three-year recidivism rates of 17.2% compared with 21.1% for the non-interlock group.³⁸ This is a very minor improvement, and was not statistically significant.³⁹

Age also made a difference in future DWI convictions for the two groups. Interlock offenders under 30 had three-year recidivism rates of 12.2%. The under-30 non-interlock group had recidivism rates of 23.3%. For the over-30 offenders, 19.8% of the interlock group had another DWI conviction within three years, compared with 27.1% of the non-interlock group.⁴⁰ To summarize this data,

Selective utilization of the interlock appears to produce much more substantial results than across-the-board use. Offenders under 30 years of age in the non-interlock group had nearly twice the recidivism rate than the interlock group members in the same age group. The most important variable is prior DWI history. The offenders who had previously been convicted of DWI in the interlock group were less than half as likely to receive another DWI within three years than the multi-offenders in the non-interlock group.⁴¹

A Maryland study also found statistically significant reductions in recidivism by multiple offenders who installed interlock devices in vehicles.⁴² The Maryland study found that 5.9% of the offenders in the interlock group were arrested for an alcohol-related traffic offense compared with 9.1% of the offenders in the non-interlock group.⁴³ The Maryland study included random assignment of offenders who had applied for reinstatement of license privileges to the interlock or non-interlock groups. The fact that all subjects in this study had requested license reinstatement may result in some self-selection bias. The Maryland subjects were all motivated to at least try to obtain a license. Thus, this group did not include those offenders who had rejected this attempt to improve their lot. The Arkansas study included all DWI offenders in the subject jurisdictions.

The Maryland study was only a two-year follow-up, but was consistent with the Arkansas study in showing statistically significant reductions in recidivism for offenders who were required to use an ignition interlock. The Arkansas study had 14.6% recidivism after two years for the interlock group and 21.8% recidivism for the non-interlock group.⁴⁴ One must also keep in mind that the Maryland study examined only multiple offenders, while the Arkansas study looked at first offenders and multiple offenders. While there are clear differences in methodology between these two studies, both reveal significant reductions in recidivism by multiple DWI offenders.

An early interlock study in Ohio found recidivism rates were three times higher for offenders who received a license suspension compared with offenders placed in an interlock group.⁴⁵ The Ohio study examined a population of eligible DWI offenders in Hamilton County, Ohio. Offenders were eligible for the interlock if they had a DWI offense were a repeat offender with two or more DWIs in the last 10 years; or a first offender who had a BAC of .20 or higher; or refused to take a breath test at the time of arrest.⁴⁶

The Ohio study indicated overall recidivism rates that were much lower than in the Arkansas study. After 30 months, only 1.5% of the Ohio interlock subjects were rearrested, compared to 16.1% of the non-interlock group.⁴⁷ After 36 months, the Arkansas interlock group of multiple offenders had a recidi-

The study revealed . . . significant differences between the interlock and non-interlock groups when controlling for other variables.

33. *Id.*

34. *Id.*

35. *Id.* at 226. This study also utilized quantitative analysis of the data. The association between interlock use or non-use and recidivism was measured by Phi, which indicated a moderate-to-weak relationship between these variables. The higher the Phi value, the greater the association between the independent variable (interlock use) and the dependant variable (recidivism).

36. *Id.*

37. *Id.* at 228. The Phi value for the multi-offender variable was .211, which indicates a moderate-to-strong relationship. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 229.

41. *Id.* at 228-29.

42. Beck *et al.*, *supra* note 15.

43. *Id.*

44. Fulkerson, *supra* note 31, at 226.

45. Morse & Elliott, *supra* note 17. All offenders in this study had their driving privileges suspended. However, those in the interlock group were allowed to drive so long as the vehicle they were driving was equipped with an interlock device.

46. *Id.*

47. *Id.*

vism rate of 18.1% compared to 36.9% for the non-interlock group.⁴⁸

Differences in research design of these three examinations of recidivism rates and the ignition interlock make a comparison of the three studies extremely difficult. Even so, all three studies indicated a reduction in future DWIs through use of the ignition interlock. Based on these studies, the ignition interlock is statistically proven to significantly decrease future DWIs for multiple offenders, younger offenders, and high-risk offenders, such as those with high BAC levels or those who refused to be administered a breath test at the time of arrest.

PROBLEMS

The ignition interlock is not a perfect response to impaired drivers. As mentioned above, there is the opportunity for offenders to circumvent the system, if they are willing to risk dealing with a probation officer or the court. The interlock is specific to a particular vehicle, not a particular person. Thus, if an offender who is required to use an interlock has other persons in the household, then all of the other household members who drive that vehicle will have to contend with using the interlock on that vehicle—and the offender might still drive by using a different car.

There are some interlock devices that are not specific to alcohol, and can produce false positives from cigarette smoke.⁴⁹ A false positive prevents the driver from being able to use the vehicle for that period of time, which unfairly causes a hardship on the offender or family members.

Privacy issues have also been raised due to the data collection features of ignition interlock devices.⁵⁰ The data collected include all attempted starts, lock-outs, and BAC levels. This data will be collected regardless of who has been driving the vehicle.

Would society be willing to make the ignition interlock a mandatory piece of equipment for all motor vehicles? Universal use of the interlock has been suggested as a means of further reducing the still staggering number of traffic fatalities that are related to drunken driving.⁵¹

SUMMARY

Ignition interlock, as with many sentencing options, features both positive and negative aspects. The device has been

proven in empirical studies to reduce recidivism for repeat DWI offenders, young drivers, and persons with very high BAC levels. These reductions are substantial, and statistically significant.

The interlock is effective in preventing future violations even when the particular offenders have difficulty in controlling their own behavior. The interlock does not rely upon motivation or cooperation by the offender. It operates to prevent the offending behavior by intervening between the offender and the vehicle. It does not stop the person from drinking. It does not stop the person from driving. It only stops the person from drinking and driving in the vehicle equipped with an interlock. It thus, controls the “intersecting risk behaviors” of drinking and driving.⁵²

Society has made great strides in overcoming the problem of impaired drivers on the roadway. But with almost 1.5 million DWI arrests each year, there is still much room for continued improvement. The ignition interlock device is not the sole response to DWI, but it clearly has established itself as one more valid option for consideration by sentencing judges in DWI cases.



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48. Fulkerson, *supra* note 31, at 228.

49. Gregory T. Neugebauer, *supra* note 16. There are two basic types of sensors that are used in interlocks. One of these is the semiconductor sensor, which is not alcohol specific. The other type is a fuel cell sensor, which is alcohol specific.

50. *Id.* This article raises the issue of this information being used by a plaintiff's attorney to build a negligence case against a person who

may be a defendant in a personal injury case. The BAC levels would certainly build a case against the person.

51. *Id.*

52. Beck *et al.*, *supra* note 15, at 1696.

The Federal Sentencing Guidelines: An Infectious Antidote

Rosalind Alexis Sargent

Why should a bank robber in California get a different sentence than a bank robber in Texas? This was the rallying cry behind the legislative implementation of the Federal Sentencing Guidelines. The Senate Judiciary Committee found that a major source of the astounding variations in federal sentencing for identical crimes was the “judge factor.”¹ Federal judges had the discretion to select a sentence from anywhere within a broad statutory range for each offense. The judge had the sole responsibility of assessing each individual offender and deciding where, within that broad range, the offender should receive a sentence. As a result, sentences issued for the same offense differed dramatically, depending on the judge who handed down the sentence.

The congressional response to the dilemma of disparate sentencing was the enactment of the Sentencing Guidelines Reform Act of 1984.² The legislation passed 85 to 3 in the Senate and 316 to 91 in the House of Representatives.³ The broad bipartisan support for the Act suggests that the objective of eliminating unwarranted judicial sentencing disparity was an admirable and respectable goal that encompassed the concerns of the nation as a whole.

The Act provided for the creation of the United States Sentencing Commission, a novel federal rule-making agency. The Sentencing Commission was charged with the development of a sentencing range for each class of convicted persons based both on the offense and the offender. The Sentencing Commission accomplished this task with the establishment of the Federal Sentencing Guidelines, a set of guiding principles that were expected to promote a more deliberate, fair, and rational sentencing process than had previously existed in federal sentencing.⁴ The “judge factor” was, thus, narrowly confined as the range of possible sentences was strictly defined and allowed for very little judicial discretion.

As stated earlier, the proclaimed goal of the Guidelines was to eliminate disparity and create truth in sentencing. It was not intended to serve as a cure-all to every judicial inequality that lies within the criminal justice system. Supporters of the Sentencing Commission and the Guidelines, however, may have naively assumed that such a miraculous judicial recon-

struction would be a natural consequence of the 1984 enactment. The system of rules and procedure even lends an appearance of having been constructed on the basis of service and technocratic expertise, giving it a threshold credibility to a general public not familiar with its actual contours and operation.⁵ In reality, a new and equally devastating sentencing disparity has evolved with the implementation of the Federal Sentencing Guidelines, which can no longer be attributed to the “judge factor.”

Though originally created to produce a more equitable sentencing scheme, the Federal Sentencing Guidelines have had the opposite effect and become a major source of societal perpetration of racial inequality. The question that originally sparked legislative outrage and subsequent action in the realm of federal sentencing has been answered: *Why should a bank robber in California get a different sentence than a bank robber in Texas? He shouldn't!* A new question has arisen under the Guidelines, however, one that demands a response: *Why should a black drug offender in America receive a different sentence than a white drug offender?*

I. HOW THE GUIDELINES WORK

Federal judges are statutorily required to sentence defendants according to the Sentencing Guidelines. A typical case is governed by the sentencing table, which prescribes sentencing ranges in months of imprisonment. A sentence is derived by intersecting the offender's criminal history and the level of the offense. Federal judges must now engage in complex numerical calculations before imposing a sentence under the Guidelines.⁶ Chapter three of the Guidelines allows for judicial adjustments to the base level for certain aggravating or mitigating circumstances, such as victim impact, the offender's role in the offense, obstruction, multiple counts, and the offender's acceptance of responsibility.⁷

Following a guilty verdict or plea, a United States probation officer will conduct an independent pre-sentence investigation of a defendant and issue a Pre-Sentence Report (PSR) to aid the court in a sentence determination. The PSR is also provided to the Assistant U.S. Attorney prior to sentencing and any objec-

Footnotes

1. Patti B. Saris, *Below the Radar Screens: Have the Sentencing Guidelines Eliminated Disparity? One Judge's Perspective*, 30 SUFFOLK U. L. REV. 1027, 1028.
2. *Id.* at 1027.
3. *Id.*
4. See KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING

GUIDELINES IN FEDERAL COURTS, at xi (1998).

5. *See id.*; 28 USC 1991(b)(B)(1).
6. See LYNN S. BRANHAM, THE LAW OF SENTENCING, CORRECTIONS & PRISONERS' RIGHTS IN A NUTSHELL, 8-9 (5th ed. 1998).
7. See Johnathan E. Scharff, *Federal Sentencing Guidelines: Due Process Denied*, 33 ST. LOUIS U. L.J. 1049, 1054 (1989).

tions concerning factual disputes and applicable Guidelines issues must be resolved between the two government agents before a final PSR is given to the court.⁸ Also, a sentencing court is required to consider “all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction.”⁹ This designation includes conduct that was not formally charged, as well as offense conduct that was charged in the indictment, but for which the defendant was actually acquitted.

Another major consequence of the enactment of the Sentencing Reform Act is the evolution of mandatory minimum sentences. These sentences can greatly affect the sentence imposed on a defendant. Congress has set mandatory minimum sentences for more than 100 crimes.¹⁰ In practice, only four statutes are used with any type of regularity, all covering drug and weapon offenses.¹¹ These four statutes appear to be responsible for 94% of all federal mandatory minimum cases.¹² Mandatory sentences require offenders to serve their

entire sentence without parole. “Mandatory minimum sentences trump the guideline ranges.”¹³ Where the sentencing table places the low end of the sentencing range below the mandatory minimum, the court must follow the mandatory minimum sentence. Unless the government moves to depart below the statutory mandatory minimum, the court has no authority to do so.

II. THE PROBLEM

There is great irony in the fact that the original, motivating purpose behind sentencing reform was the elimination of discriminatory “disparity” in sentencing, yet racial and class inequalities in sentencing under the Guidelines persist. The Guidelines have, in a sense, created a bifurcation of society between “We the people” and “We the *other* people.”¹⁶ The sentencing reformers of the 1984 Congress attempted to rationally and reasonably solve an imperative governmental problem, but like the civil-rights hydra of the 1950s, many more

ILLUSTRATION 1

Defendant, Jamaal, pled guilty under Federal Rule of Criminal Procedure 11(e)(1)(B) to two counts pursuant to a plea agreement: conspiracy to possess crack with intent to distribute, involving over 500 grams of crack cocaine; and distribution of crack.

In preparing the PSR, the probation officer first computes the base offense level predicated on the offense conduct described by the Assistant U.S. Attorney. The base offense level is 36 because Jamaal possessed over 500 grams of crack with the intent to distribute, and there are no specific aggravating offense characteristics, such as possession of a firearm, to factor in. Then the probation officer has to determine whether any other adjustments are mandated under the five sub-parts of chapter three of the Act: (A) victim-related adjustments; (B) role in the offense; (C) obstruction of justice; (D) multiple counts; and (E) acceptance of responsibility. In Jamaal’s case, there are no adjustments to be made. Because Jamaal pled guilty he receives a three-level downward adjustment for acceptance of responsibility, so his total offense level is 33.

Jamaal’s criminal history category is I, because he has no prior convictions. Looking at the sentencing grid, which has criminal history categories along one axis and the offense levels along the other, a judge must conclude that for an offense level of 33 and a criminal history of I, the sentencing range is 135-168 months (approximately 11 to 14 years).¹⁴

ILLUSTRATION 2

Defendant, Johnnie, also pled guilty under Federal Rule of Criminal Procedure 11(e)(1)(B) to three counts pursuant to a plea agreement: conspiracy to import cocaine, involving more than 500 grams of cocaine; conspiracy to possess cocaine with an intent to distribute; and distribution of cocaine.

In Johnnie’s case, the base level at which the probation officer will arrive at for conspiracy to import more than 500 grams of cocaine is 26. Once again, no specific offense characteristics are present. In the “adjustments” stage of the process, however, the probation officer will adjust the base offense level with a three-level increase for the role Johnnie played in the offense, pursuant to Guidelines section 3B1.1(b), because he was a manager or supervisor of a criminal activity, which was otherwise extensive, and reaches a subtotal of 29. However, because Johnnie also pled guilty he receives a three-level downward adjustment for acceptance of responsibility, so his total offense level remains at 26.

Johnnie’s criminal history category is II, because he has three prior convictions. Looking at the sentencing grid criminal history axis and cross referencing that number with the offense level axis, a judge must conclude that for an offense level of 26 and a criminal history of II, the sentencing range is 70-87 months (approximately 5 to 7 years).¹⁵

8. *Id.* at 1033.

9. *Id.* (citing U.S. Sentencing Guidelines Manual, ch. 1, pt. A, cmt. 3 (1995)).

10. *Id.* at 1034.

11. Families Against Mandatory Minimums, *All About Mandatory Minimum Sentences*, available at www.famm.org.

12. *Id.*

13. Saris, *supra* note 1, at 1033.

14. *See id.* at 1036-37; 18 U.S.C. § 2D1.1(C). The illustrations used here are based in part on ones used by Judge Saris in her article. *See Saris, supra* note 1.

15. *See Saris, supra* note 1 at 1036-37.

16. A. LEON HIGGINBOTHAM, *SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS* 6 (1996).

[F]ederal judges frequently find themselves imposing sentences that they wholly disagree with and feel are unjust.

sentencing problems have come forth to take the place of judicial disparity.

A. Incarceration and Prosecutorial Sentencing

The figures boasted by the United States on current per capita incarceration rate statistical charts are astoundingly high.¹⁷ Billions of dollars have been and are being diverted from educational programs to pay the costs of building and operating a burgeoning number of prisons and jails.¹⁸ The United States has seen an explosion in numbers of federal offenders and an enormous financial burden has been placed on taxpayers. Judges find the fact that judicial power has been totally shifted and now lies in the hands of aggressive prosecutors to be a “scary notion” because prosecutors are hired without the careful scrutiny given to federal judges.¹⁹ As a result, federal judges frequently find themselves imposing sentences that they wholly disagree with and feel are unjust.²⁰

A fundamental United States principle, illustrated by the founding fathers’ implementation of a system of checks and balances, is that it is unwise to leave such power “unchecked in the hands of anyone, least of all in the hands of men and women whose decisions are made in the privacy of their offices, who are caught up in an adversarial role, and whose public function often serves as a stepping stone to higher political or judicial office.”²¹ In an intense critique of the Guidelines, Judge J. Lawrence Irving of San Diego commented upon his retirement, “If I remain on the bench, I have no choice but to follow the law. I just can’t, in good conscience, continue to do this.”²²

B. Racial Disparity

One major dilemma that has arisen and continues to tear at the social fabric of whole communities is the racial disparity perpetrated under the use of the Federal Sentencing Guidelines. The percentage of black men in both state and federal prison is

considerably higher than that of white men, even though blacks are only 12% of the male population.²³ Statistics show that, on any given day, one in three black men aged 20 to 29 is in prison or jail, on probation, or on parole.²⁴ Thus, there are more young black men in prison than there are in colleges across this nation.²⁵ Governmental statistics show that black people represent about 14% of the nation’s drug users, yet make up 35% of those arrested for drug possession, 55% of those convicted for drug possession, and 74% of those sentenced to serve time.²⁶ A recent report indicated that young Hispanic males have a one in six chance of spending time in prison.²⁷ In fact, the percentage of federal Hispanic prisoners grew 219% between 1985 and 1995, making Hispanics the fastest growing category of prisoners.²⁸ The percentage of federal Asian American prisoners also increased by a factor of four between 1980 to 1999.²⁹ Federal drug sentencing in the U.S. appears to purport a lofty goal of disparity elimination while, at the same time, creating yet another head on the hydra of racial injustice.

C. Perpetration of Racial Discrimination

The Guidelines have also served as an indirect source of the perpetration of racial discrimination in other areas. As young African-Americans continue to be disproportionately sentenced, the perception that most African-Americans are deviant and serve as the primary source of crime in this country becomes more prevalent in the mind of the white majority. In reality, whites commit drug crimes, too, but police enforcement strategies do not focus on white neighborhoods.³⁰ Drug arrests are simply easier to accomplish in impoverished inner-city neighborhoods than in stable middle-class neighborhoods.

It has been said that simply to make it through the day, blacks pay a psychic tax.³¹ Members of all classes of African-Americans, middle-class, working-class, and the poverty-stricken, often and perhaps increasingly agree on this point. When you see a fellow black man get stopped by the police, you wonder how race figured into it. When you go into a store and the sales people give you an extra bit of scrutiny, you wonder. When you’re on an elevator and it stops at a floor and the white woman waiting moves to another elevator, your first thought is race.³² Little things such as these remind the

17. *Sentencing Comm’n Review: Hearing Before the Subcomm. on Criminal Justice Oversight of the Senate Comm. on the Judiciary*, 106th Cong. (2000) (statement of Carmen D. Hernandez, National Ass’n of Criminal Defense Lawyers).

18. Branham, *supra* note 6, at 8-9.

19. U.S. District Judge Mark Bennett, Class Lecture (Oct. 23, 2001) (Drake University Law School); *Sentencing Commission Review: Hearing Before the Subcomm. on Criminal Justice Oversight of the Senate Committee on the Judiciary*, 106th Cong. (2000) (statement of Carmen D. Hernandez, National Ass’n of Criminal Defense Lawyers).

20. U.S. District Judge Mark Bennett, Class Lecture (Oct. 23, 2001) (Drake University Law School).

21. *Sentencing Comm’n Review: Hearing Before the Subcomm. on Criminal Justice Oversight of the Senate Comm. on the Judiciary*, 106th Cong. (2000) (statement of Carmen D. Hernandez, Nat’l Assoc. of Criminal Defense Lawyers).

22. Gerald F. Uelman, *Federal Sentencing Guidelines: A Cure Worse*

Than the Disease, 29 AM. CRIM. L. REV. 899, 899 (1992).

23. See CHRISTOPHER DARDEN ET AL., *THE DARDEN DELIMMA: 12 BLACK WRITERS ON JUSTICE, RACE, AND CONFLICTING LOYALTIES* 7 (1997).

24. The Sentencing Project, *Facts About Prisons and Prisoners* (April 2000), available at www.famm.org.

25. Darden, *supra* note 23.

26. John Conyers, *Points on Crack/Cocaine Disparity*, available at <http://www.house.gov/conyers/spst033101.htm> (last visited Dec. 17, 2001).

27. *Mandatory Minimum Sentences for Drug Crimes: Hearing Before the Criminal Justice, Drug Policy and Human Resources Committee on Government Reform* 106th Cong. (2000) (statement of Wade Henderson, Executive Director Leadership Conference).

28. *Id.*

29. *Id.*

30. *See id.*

31. Darden, *supra* note 23, at xi.

32. *Id.*

African-American community that, as a black person, you are paying your “black tax.”³³

Yet another tragic consequence of the disparity created by the Guidelines is the devastation of inner-city communities, in which family serves as the core foundation. These communities are predominately minority-populated. The disproportionate sentencing scheme has been referred to as the “warehousing” of the sons and daughters of minority communities.³⁴ This warehousing merely postpones the confrontation of a much more serious problem:

When we put an 18-year-old minority youth in the federal penitentiary for 10 years for possessing 50 grams of crack, we assure our society of having to deal with a 28-year-old far less able to be productive in a society that has progressed in the 10 years, while he was warehoused in the penitentiary. Welcome to our next nightmare. What do we then do with the 28-year-old less equipped to lead a productive life in this society than he was at the age of 18? How many prison building campaigns can America afford to endure? And how many thousands of minorities can we afford to incarcerate before we admit that this disparity is directed at the heart and soul of our communities: our youth.³⁵

It has been theorized that the ultimate effect of warehousing, yet to be realized, is a “raging epidemic of poor, dumb children.”³⁶ Irony lies in that fact that the United States boasts a label of the richest, most educated nation on earth. This epidemic and these children can be ignored for now, however, because they lack the power associated with constituency.

D. The War on Drugs

While facially neutral, the Guidelines contribute to continued racial discrimination in various insidious ways. This perpetuation is often carried out under the guise of America’s “War on Drugs.” It was under this guise that the base offense levels for various categories of drugs were set and the Anti-Drug Abuse Act of 1986 was passed.³⁷ Driven by the media-manufactured notion that crack cocaine would lead to the ruin of society, the legislature and its bureaucratic counterparts adopted the view that crack was far more dangerous than powdered cocaine.³⁸ During this time, Americans (constituents) cringed at the thought of becoming victims of random, irra-

tional assaults and the fear and frustration of the average citizen had grown to a level of anticipated “lynch mob mentality,” which became the common emotional reaction to crime.³⁹ The legislature accepted as fact the contention that crack does more harm to the body than powdered cocaine and does so faster.

Also, the legislature concluded that crack is more readily available than powdered cocaine and that its cheaper price makes it more rampant throughout society. This heightened view of crack as an epidemic that necessitated immediate action also came as a result of the crack overdose of 22-year-old, first round NBA draft pick, Len Bias, and the death of Cleveland Browns’ safety Don Rogers.⁴⁰

Subsequently, all committee work on the Anti-Drug Abuse Act was completed in five weeks.⁴¹ The legislative history of the 1986 Act is full of racially tinged references to ghettos and dealers of different ethnicities.⁴² For example, the following statement was made on the Senate floor in support of the legislation’s passage: “For the growing numbers of the white middle class who have become hooked on cocaine rock, buying the drug can be like stepping into a foreign culture.”⁴³

Certain members of Congress did express concern at the fast-paced passage of the Act. Representative Frenzel observed that the bill was “clumsy” and “put together in the style of a Great Society Program, as its hallmarks were lack of coordination, incomplete consideration, and misunderstood compromises.”⁴⁴ Senator Evans labeled the speedy legislative process a “sanctimonious election stampede,” which trampled the Constitution.⁴⁵ In his opinion, the actions of Congress with regard to the Anti-Drug Abuse Act resembled a lynch mob, as opposed to a legislature concerned with careful deliberation and implementation.⁴⁶ Senator Mathias also cautioned that sometimes “in our haste to do something about a serious problem, we create a whole new array of problems.”⁴⁷

Despite these objections and the fact that crime proposals should be considered in a deliberate fashion, without giving in to ineffective, tough-sounding non-solutions, the bill easily passed through Congress without regard to usual legislative procedures. The legislation merely provided a band-aid

The legislative history of the 1986 Act is full of racially-tinged references to ghettos and dealers of different ethnicities.

33. *Id.*

34. See *Mandatory Minimum Sentences for Drug Crimes: Hearing Before the Subcomm. on Crime of the House Judiciary Committee* 106th Cong. (2000) (statement of William B. Moffit, National Association of Criminal Defense Lawyers).

35. *Id.*

36. *Id.*

37. See Uelman, *supra* note 22, at 904.; Kimberly Mache Maxwell, *A Disparity That Is Worlds Apart: The Federal Sentencing Guidelines Treatment of Crack Cocaine and Powder Cocaine*, 1 RACE & ETHNIC ANCESTRY L. DIG. 21, 21 (1995).

38. See *U.S. v. Clary*, 846 F. Supp. 768, 770 (E.D. Mo. 1994), *rev'd*, 34

E3d 709 (8th Cir. 1994).

39. See 846 F. Supp. at 771.

40. Uelman, *supra* note 22, at 904.

41. *Id.*

42. *Id.*

43. See *e.g.*, 132 Cong. Rec. S4672 (daily ed. April 22, 1986).

44. See *e.g.*, 132 Cong. Rec. H10776-04 (daily ed. October 17, 1986) (Statement of Rep. Frenzel).

45. See *e.g.*, 132 Cong. Rec. S13748 (Remarks of Sen. Evans)

46. See *id.*

47. See *e.g.*, 132 Cong. Rec. S13769 (daily ed. Sept. 26, 1986) (Remarks of Sen. Mathias).

These provisions created a 100-to-1 ratio between crack and powder cocaine.

approach to crime, rather than treating its root causes. However, no political party wished to be labeled soft on crime in a nation preoccupied with crime and its proposed remedies. The provisions of the Act were then incorporated into the Federal Sentencing Guidelines.

The war on drugs has since proven to be an abysmal failure. The effort consumes more than an estimated \$75 billion per year of public money; exacts an estimated \$70 billion a year from consumers; is responsible for nearly 50% of the millions of Americans who are currently in jail; occupies an estimated 50% of the trial time of our judiciary; and devours the time of over 400,000 police officers.⁴⁸ Within the usage of a wartime metaphor, casualties are at hand—in this war, “we continue to inflict casualties upon ourselves.”⁴⁹ The war on drugs is targeted almost exclusively at inner-city communities and it basically serves as a war on young, highly visible, and wholly replaceable African-American street dealers. The provisions created by the Anti-Drug Abuse Act, however, are still in effect and continue to manufacture chaos.

These provisions created a 100-to-1 ratio between crack and powder cocaine.⁵⁰ A defendant convicted of selling 100 grams of powdered cocaine has committed a level 18 offense and may be sentenced to 27 to 33 months. In contrast, a defendant selling one gram of crack cocaine will also find himself at a level 18 offense and will be subject to the same sentence, assuming both have no prior convictions.⁵¹ A person would have to possess 500 grams of powdered cocaine to receive the same sentence as someone found in possession of 5 grams of crack and 5,000 grams of powdered cocaine to receive a sentence equal to someone found in possession of 50 grams of crack.⁵² Ironically, 5 grams of crack can create approximately 10 to 50 doses of the drug and may sell for an average retail price of \$225 to \$750 dollars.⁵³ Five hundred grams of powdered cocaine, however, represents anywhere from 2,500 to 5,000 doses and can sell for approximately \$32,500 to \$50,000.⁵⁴ The dosages and prices are dependent on the process used to manufacture and weigh the drug and the available market.⁵⁵

Crack cocaine, however, has not sufficiently been proven more harmful than powder cocaine. Crack and powdered cocaine are essentially the same substance. Cocaine is a product that occurs freely in nature in the coca leaf and is the basic building block of other cocaine compounds. Cocaine’s molecular formula is C₁₇ H₂₁ N₄, it has a molecular weight of 303, and it has a melting point of 98 degrees Centigrade.⁵⁶ Powdered cocaine is a salt-containing hydrochloric acid, which is inhaled through the nose.⁵⁷ Crack is made up of powdered cocaine mixed with baking soda and water, which is then heated and hardened and broken into small pieces that are sold as rocks that are smoked in a glass pipe.⁵⁸ DEA chemists define crack simply as a “lumpy” substance containing cocaine and bicarbonate of soda.⁵⁹ There is no evidence that the “lumpiness” contributes anything to the potential for abuse, and, of course, other forms of cocaine and its salts and isomers can also appear in lumpy forms unless they are milled into fine particles.⁶⁰

Though the Guidelines do not distinguish between white and black defendants, sociologists and criminologists will verify that use and distribution patterns for crack closely track inner-city ethnic and racial lines.⁶¹ Crack is cheaper than powdered cocaine and is easier to break down and package into small quantities for distribution. It is, therefore, prevalent in the inner cities, where minorities are substantially represented within the population.

“No one is suggesting that the street dealer is innocent,” noted U.S. Representative John Conyers, Jr., “he is not. But neither is he the one flying planes to Colombia bringing back million-dollar cargoes.”⁶² Since high-level dealers and drug wholesalers are more likely to handle powdered cocaine, it makes no sense to give them far lighter sentences than crack peddlers.⁶³ Peripheral agents of drug kingpins are receiving disproportionately harsh sentences. This agent is paid approximately \$200 dollars by a drug trafficker for manufacturing and transporting 50 grams of crack from one city to another and is subject to a mandatory 10-year sentence, which could quite possibly be a more substantial sentence than the trafficker who controls the drug organization and will receive the bulk of the profit, but deals only with powdered cocaine.⁶⁴ In a district court decision that has since been reversed, Judge Clyde Cahill stated that the disproportionate ratio has “created

48. Charles H. Whitebread, “Us” and “Them” and the Nature of Moral Regulation, 74 S. CAL. L. REV. 361, 368 (2000).

49. *Mandatory Minimum Sentences for Drug Crimes: Hearing Before the Subcomm. on Crime of the House Judiciary Comm.* 106th Cong. (2000) (statement of William B. Moffit, National Ass’n of Criminal Defense Lawyers).

50. See Uelman, *supra* note 22, at 904; 18 USC § 2D1.1 (c), Drug Quantity Table.

51. See 18 USC § 2D1.1 (c), Drug Quantity Table.

52. See 18 USC § 2D1.1 (c), Drug Quantity Table; Maxwell, *supra* note 53, at 21.

53. Nkechi Tafia, *Codification or Castration? The Applicability of the International Convention to Eliminate All Forms of Racial Discrimination to the U.S. Criminal Justice System*, 40 How. L.J. 641, 660 (1997).

54. *Id.*

55. *See id.*

56. *U.S. v. Davis*, 864 F. Supp 1303, 1305 (N.D. Ga. 1994).

57. Maxwell, *supra* note 37, at 21.

58. *Id.*

59. *Davis*, 864 F. Supp. at 1305.

60. *See id.*

61. *See Maxwell*, *supra* note 37, at 21.

62. Darden, *supra* note 23, at 25-26.

63. *See id.*

64. *See Sentencing Commission Review: Hearing Before the Subcomm. on Criminal Justice Oversight of the Senate Comm. on the Judiciary*, 106th Cong. (2000) (statement of Carmen D. Hernandez, National Association of Criminal Defense Lawyers).

a situation that reeks with inhumanity and injustice.”⁶⁵ Judge Cahill worried that the scales of justice had been turned and twisted so that the drug trafficking kingpins, the masterminds, escape detection, while those who play a trivial role are “hoisted on the spears of an enraged electorate and at the pinnacle of their youth are imprisoned for years while those most responsible for the evil of the day remain free.”⁶⁶ The war on drugs has been referred to as the reincarnation of Jim Crow laws.⁶⁷ It would seem to be not only logical, but economically sensible to devote scarce government resources to reducing the large ingress and wholesale distribution of powder cocaine by major traffickers, which would consequently reduce the existence of crack as a derivative product. Without cocaine, there would be no crack.

III. CONSTITUTIONAL CHALLENGES

“Sadly, . . . one wonders whether the majority [of the court] still believes that . . . race discrimination against non-whites is a problem in our society, or even remembers that it ever was.”⁶⁸ Justice Harlan first introduced the idea of a color-blind Constitution in a 1896 dissent from the Supreme Court decision regarding *Plessy v. Ferguson*.⁶⁹ Unfortunately, in the year 2001, blacks were roughly eight times as likely to end up in jail as whites and the very notion of color-blind justice remains endangered.⁷⁰ Danger lies in the absence of the kinds of common cultural commitments and shared values that are crucial to holding any society together. The extraordinarily difficult task confronting the Supreme Court lies in crafting a concept of justice that recognizes a policy-level need for the acknowledgment of racial differences where necessary to overcome biased practices still in existence.⁷¹

A. Excessive Delegation and Separation of Powers

Certain challenges to the constitutionality of the Guidelines revolve around the Sentencing Commission itself. The Commission consists of seven voting members and one non-voting member.⁷² The President appoints the voting members, at least three of whom must be federal judges.⁷³ The three judges are selected from a list of six judges recommended to the President by the Judicial Conference of the United States.⁷⁴ The commissioners are subject to removal by the President for “neglect of duty or malfeasance in office or for other good cause shown.”⁷⁵ Two claims generally raised by defendants challenging the Guidelines are that the Guidelines violate the

principle of separation of powers by requiring the appointment of three federal judges to the Commission and that they constitute an excessive delegation of legislative powers to the judicial branch.

Such defenses were raised by the defendants in *Gubiensio-Ortiz v. Kanahele*,⁷⁶ who were convicted of various unrelated offenses. The district and appeals courts both agreed. The Ninth Circuit held that executive or administrative duties of a non-judicial nature may not be imposed on judges holding office under Article III of the Constitution.⁷⁷ The court determined that the matters handled by the Commission, including the proper apportionment of punishment, were peculiarly questions of legislative policy and that, with the establishment of the Commission, Congress had effectively delegated legislative policymaking functions.⁷⁸ According to the court, these functions are tasks that only the legislative or executive branches, not the judicial branch, may constitutionally perform.⁷⁹ This decision was later vacated by the Supreme Court in *U.S. v. Chavez-Sanchez*⁸⁰ based on *Mistretta v. U.S.*⁸¹

The *Mistretta* decision halted all speculation and debate. In *Mistretta*, the Court concluded that, in the creation of the Sentencing Commission, Congress neither delegated excessive legislative power nor upset the constitutionally mandated balance of powers among the coordinate branches. The Court found that the functions delegated were non-adjudicatory and did not trammel the prerogatives of another branch of government.⁸² In the only dissent, Justice Scalia conveyed his concern over the broad discretion given to the Commission to make value judgments and policy assessments in creating the Guidelines.⁸³ This case marks the first and the last time that the Supreme Court has considered an issue that revolves around the Sentencing Commission or the Guidelines.

B. Due Process

Historically, federal courts have also shown reluctance to interfere with the type of grant of prosecutorial discretion involved in the application of the Guidelines. Most federal

Danger lies in the absence of the kinds of common cultural commitments and shared values that are critical to holding any society together.

65. *U.S. v. Clary*, 846 F. Supp. 768, 772 (E.D. Mo. 1994), *rev'd*, 34 F.3d 709 (8th Cir. 1994).

66. *Id.*

67. See ESSENCE NEWS, *Fight Mandatory Minimums*, available at http://www.essence.com/highlights/take_stand/ts_090800.shtml (last visited December 17, 2001).

68. *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 662 (1989) (Blackmun, J., dissenting).

69. See *Plessy v. Ferguson*, 163 U.S. 537, 552-564 (1896) (Harlan, J., dissenting).

70. Darden, *supra* note 23, at xv-xvi.

71. See *id.*

72. See JOHN R. HOWARD, *THE SHIFTING WIND: THE SUPREME COURT AND*

CIVIL RIGHTS FROM RECONSTRUCTION TO BROWN 351 (1999).

73. See *id.*

74. See *id.*

75. See *id.*

76. 857 F.2d 1245, 1246 (9th Cir. 1988), *vacated*, *U.S. v. Gubiensio-Ortiz*, 488 U.S. 1036 (1989).

77. See *id.* at 1251.

78. See *id.* at 1254.

79. See *id.*

80. 488 U.S. 1036, 1036 (1989).

81. 488 U.S. 361, 362 (1989).

82. See *id.* at 388.

83. See *id.* at 414 (Scalia, J., dissenting).

[C]ourts have repeatedly failed to find any discriminatory purpose in the legislative history of the Federal Sentencing Guidelines

courts of appeals and district courts have consistently upheld the disparity in sentencing between crack and powder cocaine convictions. Defendants have argued that the Guidelines are violative of due process because Congress did not give any legitimate purpose for the distinctions in crack and powdered cocaine sentencing.⁸⁴ This argument has

generally been deemed invalid due to three justifiable distinctions. First, courts have determined that crack and powdered cocaine are two distinct substances and that crack is far more addictive than cocaine.⁸⁵ Also, because crack is small in physical size and inexpensive per dose, other societal problems are created.⁸⁶ Last, Congress's purpose in establishing more stringent punishments for crack convictions was to discourage its use and distribution.⁸⁷

The defendants in *U.S. v. Davis*, however, obtained a rare victory based on the due process argument in the Northern District of Georgia. The defendants both pled guilty to possession of a cocaine base with the intent to distribute.⁸⁸ The only asserted challenge was to the constitutionally violative nature of the Guidelines.⁸⁹ The court in that case held that the statute was facially ambiguous because powdered cocaine and crack are derived from the same substance and have the same molecular structure, weight, and melting point. In other words, the terms "cocaine base" and "cocaine" are synonymous.⁹⁰ The court concluded that the physical form of the same drug has no rational relationship to any legislative intent to impose increased penalties that have nothing to do with potential for abuse.⁹¹ *Davis* was not heard on appeal, but has subsequently been disagreed with or distinguished in other decisions of the Northern District of Georgia.⁹²

C. Equal Protection

In federal cases, the Fifth Amendment has been interpreted to imply an equal protection component forbidding discrimination that is "so unjustifiable as to be violative of due process."⁹³ Crack offense defendants have asserted that the Guidelines violate the Constitution because they have a disproportionate effect on African-Americans due to the fact that this racial group is more likely to use and distribute crack than

powdered cocaine.⁹⁴ The argument has been dismissed based on the *Feeney* test, where the Supreme Court held that in order for a law that is facially neutral to be found unconstitutionally discriminatory against a racial minority, there must be a finding of discriminatory purpose on the part of the lawmaker.⁹⁵ The test set forth in *Feeney* defines discriminatory purpose as an aspect that implies more than intent as volition or intent as awareness of consequences.⁹⁶ According to the Court, discriminatory purpose requires that the decision maker selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.⁹⁷ *Feeney* adds to the conclusion first set forth in *Washington v. Davis*,⁹⁸ which stated that disproportionate impact on a certain group of people is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination. Also, the Court has determined that a certain degree of specificity is required in disproportionate impact challenges.

In *McClesky v. Kemp*,⁹⁹ the Court held that statistical proof of discriminatory impact in the administration of the death penalty was insufficient to show an equal protection violation. The Court concluded that in order for the defendant to demonstrate an equal protection violation, he "must prove that the decisionmakers in *his* case acted with discriminatory purpose."¹⁰⁰ In general, the courts have repeatedly failed to find any discriminatory purpose in the legislative history of the Federal Sentencing Guidelines, as the disproportionate racial impact has been deemed a mere consequence of a facially neutral law. The Guidelines have been measured only by a rational basis standard, which means that the state must show merely a reasonable connection between the statute and its justification of public welfare.¹⁰¹

Once again, a lone case serves as the antithesis of the general rule. The district court in *U.S. v. Clary*,¹⁰² held that the disproportionate penalties for crack cocaine violate equal protection generally and as applied in the case of the defendant. The court further held that purposeful discrimination was present in the enactment of the law.¹⁰³ Due to of the novel and controversial nature of the decision, the court made certain that every facet of its reasoning was explained in the opinion. The 18-year-old defendant in *Clary* was arrested for possession with intent to distribute 67.76 grams of crack cocaine.¹⁰⁴ *Clary* pled guilty to possession with intent to distribute crack, a crime punishable by a mandatory minimum sentence of ten years imprisonment.¹⁰⁵ Prior to sentencing, *Clary*, a black male, filed a motion challenging the constitutionality of the Guidelines that pertained to crack cocaine and contended that

84. See Maxwell, *supra* note 37, at 24.

85. See *id.*

86. See *id.*

87. See *id.*

88. *U.S. v. Davis*, 864 F. Supp. 1303, 1305 (N.D. Ga. 1994).

89. See *id.*

90. See *id.*

91. See *id.* at 1306.

92. See *U.S. v. Settle*, 1997 U.S. App. LEXIS 3103 at *4 (4th Cir. 1997) (rejecting *Davis*).

93. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

94. See Maxwell, *supra* note 37, at 24.

95. See *Administrator v. Feeney*, 442 U.S. 256, 258 (1979).

96. *Id.*

97. *Id.*

98. See *Washington v. Davis*, 426 U.S. 229, 242 (1976).

99. See *McClesky v. Kemp*, 481 U.S. 279, 286 (1987).

100. *Id.* at 292.

101. See Maxwell, *supra* note 37, at 24-25.

102. 846 F. Supp. 768, 797 (E.D. Mo. 1994), *rev'd*, 34 E3d 709 (8th Cir. 1994).

103. See 846 F. Supp. at 796-797.

104. *Id.* at 769-770.

105. *Id.*

they violated his equal protection rights. Early in the opinion the court agreed with Clary's assertion and recognized that the sentencing provision for cocaine base "has been directly responsible for incarcerating nearly an entire generation of young, black American men for very long periods, usually during the most productive time of their lives."¹⁰⁶ The opinion goes on to provide the reasons why the crack provision of the Guidelines "shocks the conscience of the Court."¹⁰⁷

The *Clary* court based its decision on the constitutionally foundational requirement that persons similarly situated must be treated alike.¹⁰⁸ The opinion first explains that the disproportionate racial effect that results from the crack provision places the provision in the category of laws that are discriminatory as applied.¹⁰⁹ In order to justify this determination, the court relied on *Village of Arlington Heights v. Metropolitan Housing Development Corporation*.¹¹⁰ In *Arlington*, the Supreme Court set out a non-exhaustive list of factors to determine whether a law was enacted with discriminatory purpose. These factors include the historical context of the subject matter, the ultimate effect of the law at issue, any deviation from standard practice, and the legislative and administrative history of the particular law.¹¹¹

With regard to the *Arlington* factors, the *Clary* court found that historically, Congress had been motivated along racial lines with respect to drug policy. The court based this finding on previous United States drug enactments, such as anti-opium legislation motivated by a notion of the "yellow peril" Far East military threat of the early 1900s.¹¹² The court also examined the Harrison Act of 1914, the first federal law to prohibit distribution of cocaine and heroin. The court relied on evidence that the Act was passed on the heels of overblown media accounts depicting heroin-addicted black prostitutes and criminals in the cities.¹¹³ The court found that the author of the Act, Representative Francis Harrison, moved to include coca leaves in the bill "since the leaves make Coca-Cola and Pepsi-Cola and all those things are sold to Negroes all over the South."¹¹⁴ In viewing the ultimate effect of the cocaine base provision, the *Clary* court found disproportionate impact obvious. The court relied on statistics that indicated that 98.2% of defendants convicted of crack cocaine charges in the Eastern District of Missouri between the years 1988 and 1992 were black.¹¹⁵ In comparison, 45.2% of defendants sentenced for powder cocaine were white, while 20.7% were black defendants.¹¹⁶ Concerning deviation from standard practice, the court placed great emphasis on the astoundingly expedient passage of the legislation that contained the crack provision. The opinion concluded that if such a law had been proposed in relation to pow-

der cocaine, it would have been much more carefully and deliberately considered due to its inevitable effect of sentencing droves of young white men to prison for extended terms.¹¹⁷ In the same context, the court also considered the biased statements discussed earlier, which were set forth on the House floor to gain perspective as to the legislative history.¹¹⁸ The court found that in reviewing the factors presented in *Arlington*, the crack cocaine provision of the Sentencing Guidelines was enacted with discriminatory purpose.

In *Clary*, the court also went on to explain that a new and equally dangerous breed of racism exists and serves as an additional motivation for the 100 to 1 crack/cocaine ratio enactment.¹¹⁹ This new breed is "unconscious racism" and, according to the court, it has arisen as a result of the myths and fallacies of white superiority, which the nation has been inundated with for centuries.¹²⁰ The court reasoned that this notion of superiority has become so deeply embedded in the white majority that its acceptance and socialization from generation to generation has become mere routine.¹²¹ In the view of the court,

A benign neglect for the harmful impact or fallout upon the black community that might ensue from decisions made by the white community for the "greater good" of society has replaced intentional discrimination. In the "enlightened and politically correct 90s," whites have become indignant at the suggestion that they harbor any ill-will towards blacks or retain any vestiges of racism. After all, they have black friends. They work with black people every day. They enjoy black entertainers on their favorite television programs every night.¹²²

As a result of its conclusions, the *Clary* court decided to impose a sentence in accordance within the range of the Sentencing Guidelines for powder cocaine, which would be for 21 to 27 months.¹²³ This initial decision, however, was reversed on appeal.¹²⁴ The appeals court illustrated tremendous concern at the district court's reliance on unconscious racism and found that the assertions offered by the defendant did not evidence that the crack cocaine provision was enacted

[T]he Clary court found that historically, Congress had been motivated along racial lines with respect to drug policy.

106. *Id.* at 770.

107. *Id.*

108. *See id.* at 773.

109. *See id.*

110. 429 U.S. 252, 253 (1977).

111. *See id.* at 253.

112. *Clary*, 846 F. Supp. at 775

113. *See id.*

114. *Id.*

115. *Clary*, 846 F. Supp. at 786.

116. *Id.*

117. *See id.*

118. *See id.* at 785.

119. *See U.S. v. Clary*, 846 F. Supp. at 779.

120. *See id.*

121. *See id.*

122. *Id.*

123. *Id.* at 797.

124. *U.S. v. Clary*, 34 F.3d 709, 710 (8th Cir. 1994).

The fact that criminal sentencing is a highly charged political issue in our society implies that reform in this area will be an even harder task.

“because of,” and not merely “in spite of” discriminatory purpose.¹²⁵

D. Cruel and Unusual Punishment

The final constitutional argument offered against the sentencing disparity is that the Guidelines are cruel and unusual punishment and violative of the Eighth

Amendment because the sentencing is unduly severe compared with the crime committed.¹²⁶ The courts have once again deemed that substantial deference must be granted to the broad authority that the legislature necessarily possesses in determining the types and limits of punishments for crimes.¹²⁷ However, one district court did find merit in this claim. In *U.S. v. Walls*, defendants Blakney and Campbell were employed as crack cocaine cooks.¹²⁸ The two were asked to cook amounts of powdered cocaine for undercover DEA officers.¹²⁹ Blakney was paid \$100 compensation, while Campbell’s payment was in the form of a small rock of crack cocaine.¹³⁰ Blakney faced a mandatory sentence of 10 years and Campbell faced 20 years.¹³¹ Both were drug addicts and it was this condition that led the court to a finding that such sentences would violate the Eighth Amendment.¹³²

The court’s finding was based on the 1962 Supreme Court decision of *Robinson v. California*.¹³³ The *Walls* court interpreted the *Robinson* holding as stating that criminal punishment of a drug addict on account of his addiction is cruel and unusual.¹³⁴ *Robinson* invalidated a state law that imprisoned a drug addict as a criminal, even though he had never touched any narcotic drug within the state or been found guilty of any irregular behavior there.¹³⁵ *Robinson* recognized drug addiction as an “illness which may be contracted innocently or involuntarily.”¹³⁶ Thus, the *Walls* court sentenced Blakney and Campbell in accordance with the ranges prescribed for powder cocaine offenses: 24 to 30 months in the case of Blakney, and 27 to 33 months for Campbell. Both were also to be subjected to six years of probation upon release.¹³⁷

The United States Court of Appeals for the District of Columbia determined that *Robinson* merely held that the Eighth Amendment forbids punishing a drug addict merely for the status of being an addict and that the Eighth Amendment does not command individualized sentencing and it does not

require consideration of mitigating factors in non-capital cases.¹³⁸ Thus, the decision was reversed and remanded for resentencing.

IV. REFORMS

Judicially, it appears that constitutional challenges to the Sentencing Guidelines present virtually insurmountable odds for the crack cocaine offender. Numerous reform proposals, however, have been offered in an attempt to halt the devastating impact inflicted upon minorities by the application of the Federal Sentencing Guidelines. However, reform has been tempered by a recognition that the Guidelines are likely to remain intact for some time to come because major legal reforms are always slow in coming. In our country, it seems that reshaping, redirecting, or eliminating any bureaucracy is a Herculean endeavor.¹³⁹ The fact that criminal sentencing is a highly charged political issue in our society implies that reform in this area will be an even harder task.

Principal critics of the Guidelines, federal judges, for all their vaunted independence and high status, are also poorly positioned and generally unable to influence national legislative policy.¹⁴⁰ The very complexity and intricacy of this large body of rules easily discourages any observer—policy maker, legislator, or lay citizen—tempted to take an interest in how federal crimes are punished.¹⁴¹

This historical reluctance to implement reforms in this area, which are so badly needed, along with the desire of our nation’s leaders to pretend that racism and discrimination are both phenomena of the past, could prove fatal for the Sentencing Guidelines reform movement. The public perception of African-Americans as inferior and venal beings has traditionally provided the basis of acceptability for the most outrageous of lies and, in some instances, continues to do so.¹⁴² “Progress toward racial equality has been halting, at best.”¹⁴³ Instead, the nation often seems to be retreating from the values of a time in which there existed substantial consensus on the need for racial pluralism in positions of power and for the opportunity of upward mobility.¹⁴⁴ Time is of the essence:

It will be impossible for African Americans to achieve justice through traditional politics, including exercising their hard gained franchise. Perhaps “impossible” is too strong; it’s better to say that it will take too long, and African Americans can’t afford to wait, considering the emergency nature of the crisis. It will take too long because the only way African

125. *Id.* at 713.

126. See Maxwell, *supra* note 37, at 24-25.

127. See *Id.*

128. *U.S. v. Walls*, 841 F. Supp. 24, 26-27 (D. D.C. 1994), *rev’d in part*, 70 F.3d 1323, 1331 (D.C. Cir. 1995).

129. 841 F. Supp. at 26-27.

130. *Id.*

131. *Id.*

132. See *id.*

133. See *id.* at 31.

134. See *id.*

135. See *Robinson v. California*, 370 U.S. 660, 667 (1962).

136. See *id.*

137. See *Walls*, 841 F. Supp. at 33.

138. *U.S. v. Walls*, 70 F.3d 1323, 1331 (D.C. Cir. 1995).

139. See Stith, *supra* note 4, at xi.

140. Stith, *supra* note 4, at xi.

141. *Id.*

142. Higginbotham, *supra* note 16, at vii.

143. *Id.*

144. *Id.*

Americans win in our winner-take-all democracy is to persuade white people to vote with them. For matters of racial justice, that is really tough. If it took the white majority more than 200 years to understand that slavery was wrong, and approximately 100 years to realize that segregation was wrong (and still many don't understand), how long will it take them to perceive that American criminal justice is evil? And in the meantime, what should African Americans do? When one's house is on fire, should one wait for the people who set the fire to put it out?¹⁴⁵

The criminal justice system places too much emphasis on punishment and not enough on justice. The Guidelines are based on the incorrect premise that incarceration is the only tough form of punishment. No one who has ever visited a jail or prison and seen fellow human beings locked in cages like animals can ever be unmindful of the enormity and severity of society's decision to deprive one of its members of his or her liberty.¹⁴⁶ The good news is that programs do exist that stop crime more effectively and that cost less than prison. The bad news is that most people, particularly lawmakers, seem not to care. An empirical study by the Rand Corporation found that the best way to prevent crime is to provide financial and health services to poor children and their families.¹⁴⁷ Per dollar spent, such intervention was shown to prevent more crime than sending offenders to prison.¹⁴⁸ It makes a great deal of sense. "If people commit certain kinds of crimes because they are poor and hopeless, give them money and hope."¹⁴⁹ Until we, as a society become as eager to provide those things for the young black population as we are to provide them with jail cells, reform seems to be nothing more than a distant, wholly unachievable idea.¹⁵⁰

A. Legislative and Executive Reform

The legislature has been granted a tremendous amount of deference and is viewed as the proper forum for eliminating the disparity. In May of 1995, the annual congressional report of the Sentencing Commission revealed a unanimous agreement among the commissioners that the 100-to-1 ratio is far too great.¹⁵¹ The Commission balanced statistics that evinced discrete and substantial harm to minority communities with the factors that had originally induced the vast ratio, such as availability of the drug and the harm caused by the substance.¹⁵² In doing so, the Commission determined that the

100-to-1 ratio was unwarranted and, in its report, the Commission recommended an amendment to the drug sentencing guidelines that would entirely eliminate the cocaine sentencing disparity.¹⁵³ The proposed amendment set sentences for an offense involving equivalent amounts of crack cocaine and

powder cocaine at the level currently provided for powder cocaine.¹⁵⁴ Congress rejected the suggested amendment and directed the commission to recommend further amendments imposing higher sentences for trafficking in crack cocaine.¹⁵⁵ Out of 500 recommendations submitted by the Commission since its inception, this rejection marked the first time that Congress overrode the Commission's advice.¹⁵⁶

Since the initial congressional rejection, at least one defendant has attempted to use Congress's refusal to adjust the ratio to prove the purposeful discrimination required under *Feeney*. However, the United States Court of Appeals for the Second Circuit found in *U.S. v. Teague*¹⁵⁷ that with Congress's reaffirmation of the 100-to-1 ratio, the legislative body simply decided that the 1-to-1 ratio proposed was inadequate. The court found no evidence that Congress reaffirmed the ratio "at least in part 'because of,' not merely 'in spite of'" its adverse effects upon African-Americans.¹⁵⁸

B. Capacity-Based Guidelines

Other proposals for reform include the adoption of rational, capacity-based sentencing guidelines. In effect, such guidelines would actually impose a sentence proportionate to the crime committed. These proposed guidelines would guide judges in the exercise of their sentencing discretion, not impose strict, rigid regulations.¹⁵⁹ They would also ensure that the criminal penalties imposed do not exceed the resources made available to the corrections systems.¹⁶⁰ This suggested system of Guidelines would also include the adoption of a requirement of a corrections impact statement, which would detail the increased number of prisoners predicted and the prison administration's capacity to house them.¹⁶¹ The impact statement would be submitted before any legislation that could raise the number of people subject to a particular sanction, such as imprisonment, is ever enacted.¹⁶²

The Guidelines are based on the incorrect premise that incarceration is the only tough form of punishment.

145. Darden, *supra* note 23, at 16.

146. *Mandatory Minimum Sentences for Drug Crimes: Hearing Before the Criminal Justice, Drug Policy and Human Resources Committee on Government Reform* 106th Cong. (2000) (statement of Wade Henderson, Executive Director Leadership Conference).

147. *Id.*

148. *Id.*

149. *Id.*

150. Darden, *supra* note 23, at xxv.

151. See e.g., U.S. Sentencing Commission Special Report to Congress: Cocaine and Federal Sentencing Policy (1995) (issued after a review of cocaine penalties as directed by Pub. L.

No. 103-322, § 280006).

152. See *id.*

153. See *id.*

154. See *id.*

155. See *U.S. v. Teague*, 93 F.3d 81, 85 (2d Cir. 1996).

156. Tafia, *supra* n. 53, at 662.

157. See *Teague*, 93 F.3d at 85.

158. See *id.*

159. See Branham, *supra* note 6, at 83.

160. See *id.*

161. See *id.*

162. See *id.*

C. Drug Court

Yet another proposal is the establishment of a federal drug court. By 2000, approximately 450 drug court programs had been implemented in states throughout the country.¹⁶³ Drug courts dispose of criminal cases while providing treatment to reduce the amount of drug abuse and its related social costs. They are premised on the assumption that it is infinitely better to keep a person out of prison, working, and paying taxes, as opposed to paying \$15,000 to \$25,000 per year to feed, clothe, secure, and provide medical care for that person.¹⁶⁴

Within the general confines of the drug court program, a defendant charged with a nonviolent, drug related or drug-driven felony can elect to plead guilty and enter drug court. The prosecution must approve the application. After the guilty plea is entered, the court defers sentencing and admits the defendant to a drug treatment program, which is court based, has three phases, and is expected to last for one full year.¹⁶⁵ During the treatment program, the defendant is required to attend weekly group treatment sessions and meet with a case manager and treatment counselor for individual review sessions.¹⁶⁶ Also, the defendant must submit to frequent drug testing, attend a prescribed number of Narcotics Anonymous or Alcoholics Anonymous meetings weekly, and pay the treatment fee of \$1,500 a year.¹⁶⁷ Another requirement of the program is the periodic court appearance ordered by the judge to verify program compliance.¹⁶⁸ The defendant must test drug-free for a minimum of six months prior to graduation.¹⁶⁹ Failure to meet the imposed requirements result in a custodial prison sentence without the need for further court proceedings.¹⁷⁰ Defendants who successfully complete the program have their guilty plea set aside and their cases dismissed at a formal graduation ceremony where friends, family, fellow drug court participants, and the judge are present.¹⁷¹

VI. CONCLUSION

The Federal Sentencing Guidelines were originally created to produce a more equitable sentencing scheme; however, the opposite effect has resulted and the Guidelines have become a major source of societal perpetration of racial inequality. The Guidelines have had a devastating effect on the minority population of the United States and the non-relenting, steadily rising incarceration of minorities serves a purpose of destroying minority communities by removing members of a certain race, mainly African-Americans, and isolating them during the most productive years of their lives.¹⁷² The lingering question—*Why should a black drug offender in America receive a different sentence than a white drug offender?*—presents another seemingly obvious answer: *He shouldn't!* The fact that this matter

has not proven to be blatantly obvious to Congress and its legislative agencies should invoke outrage and reform movements across the nation. Sadly, both outrage and reform remain mere aspirations, rather than realizations.

Six months before his death, former Supreme Court Justice Thurgood Marshall gave a Fourth-of-July address at Independence Hall in Philadelphia:

I wish I could say that racism and prejudice were only distant memories . . . and that liberty and equality were just around the bend. I wish I could say that America has come to appreciate diversity But as I look around, I see not a nation of unity but of division—Afro and white, indigenous and immigrant, rich and poor, educated and illiterate But there is a price to be paid for division and isolation.

. . . . We cannot play ostrich. Democracy cannot flourish amid fear. Liberty cannot bloom amid hate. Justice cannot take root among rage. We must go against the prevailing wind. . . . We must dissent from the fear, the hatred, and the mistrust.¹⁷³

The Federal Sentencing Guidelines have created fences of division that must be knocked down and literal walls of imprisonment that must be torn apart. The national legislature continues to play ostrich and, thus, democracy's flourish is hindered amid fear, while liberty's bloom remains stagnant in the face of hate. Society must go against the prevailing wind and must dissent from the disastrous consequences of the raging storm created by the Sentencing Guidelines.



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163. *Drug Court Review: Hearing Before the Senate Judiciary Committee Subcomm. on Youth Violence*, 106th Cong. (2000) (statement of Michael E. McMaken, Mobile, Alabama, Drug Court Judge).

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. See Darden, *supra* note 23, at 27.

173. See Higginbotham, *supra* note 16, at xxxi-xxxii (quoting Justice Thurgood Marshall).

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Pre-commitment: For previously published authors, we will consider making a tentative publication commitment based upon an article outline. In addition to the outline, a comment about the specific ways in which the submission will be useful to judges and/or advance scholarly discourse on the subject matter would be appreciated. Final acceptance for publication cannot be given until a completed article, essay, or book review has been received and reviewed by the *Court Review* editor or board of editors.

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spectrum ranging from initial summoning to final dismissal after verdict. Contemporaneously, prescriptive packages will be developed to describe practices that have proven to be highly effective in states that have already undertaken jury trial renovations.

To begin implementation, a “to-be-determined” number of courts will be selected. The chief justice and state court administrator will be approached and involved to the fullest extent in each case. When the court selections are made, program staff will work directly with the courts to establish an individualized plan of action from a full menu of jury innovations.

Measurable results of the program are expected to include: the increased use of innovative practices by judges, reduced “burden” upon jurors and employers, reduced citizen non-response to summonses, a greater proportion of our population actually serving on juries, less juror waiting time in court, fewer questions asked by deliberating juries, and a better trained judiciary. There will also be more instances of juries being representative of the community in terms of age, education, occupation, and profession. Across our land we should see more efficient and cost-effective jury systems. Trial jurors will be better informed. In other words, juror decision making and satisfaction will be enhanced. Importantly, there should be greater public trust in jury verdicts and the courts.

Court Review readers are urged to take every opportunity to spread word of the program to bar and community leaders. Moral and financial support for the program is needed. For more information, please contact Tom Munsterman [National Center for State Courts’ Center for Jury Studies] at tmunsterman@ncsc.dni.us or Ms. Priscilla Skillman [Council for Court Excellence] at skillman@courtexcellence.com.



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The Resource Page



ALCOHOL IGNITION INTERLOCKS & OTHER IMPAIRED DRIVING RESOURCES

In his article in this issue, Judge Andy Fulkerson provides a useful overview of the use of ignition interlock devices that can keep alcohol-impaired drivers from operating their vehicles (*see* page 18). For those who would like additional information, here are some other resources specifically on ignition interlocks and more generally on impaired driving:

DOUGLAS J. BEIRNESS & HERB M. SIMPSON, ALCOHOL INTERLOCKS AS A CONDITION OF LICENCE REINSTATEMENT. Traffic Injury Research Foundation, 2003 (available free on the web). 51 pp. Available at http://trafficingjuryresearch.com/publications/pub_details.cfm?intPubID=176.

The Traffic Injury Research Foundation is an independent, charitable road safety institute in Canada (thus the spelling of “licence” in the publication title). This report arose out of an international symposium on interlock devices held in Toronto in 2001. The symposium included attendees from Canada, the United States, Europe, and Australia. This report reviews research on alcohol interlock programs and common features of these programs. While the Toronto conference and the report were funded at least in part by an interlock manufacturer, the materials include a wealth of research data and a summary of current practice in this area.

NATIONAL CENTER FOR STATE COURTS, KNOWLEDGE & INFORMATION SERVICE, IMPAIRED DRIVING: DRUGS & ALCOHOL: RESOURCE GUIDE. National Center for State Courts, 2003. 7 pp. with links to additional materials. Available at http://www.ncsconline.org/WC/Publications/KIS_ImpDriGuide.pdf.

For a judge newly assigned to a docket that includes impaired drivers—or an experienced judge looking for greater understanding of the problem and potential solutions—this is an excellent starting point. As a web-based resource guide, it contains links to more than 25 resources available on the web, including both specific publications and other useful websites. It also lists many other publications that are available through the National Center for State Courts. The guide ends with a request form that can be used to order a copy of any of the listed resources that are not available on the web.



NATIONAL JURY REFORM PROJECT LAUNCHED

Whether it is an accounting fraud prosecution in New York or a mental retardation determination in a capital murder case in Richmond, the American jury is repeatedly being called upon to render verdicts in weighty and complex matters. Unfortunately, it is common for jurors across the country to perform these weighty tasks in unfit conditions and without the learning tools that we take for granted in school. While computers and interactive technology are becoming commonplace in our classrooms, juror note-taking and questioning of expert witnesses are customarily discouraged in most courtrooms.

In addition, there is the recurring diminishment of governmental funding for trial courts and widespread citizen reluctance to respond to summonses for jury duty. Is it any wonder that citizens are dodging jury service in record numbers?

It should be good news to readers that court leaders are taking steps to perform at a higher level with respect to jurors. Indeed a **National Program to Increase Citizen Participation in Jury Service**

Through Jury Innovations is being launched. The program builds on momentum from the first-ever National Jury Summit in 2001, led by Chief Judge Judith Kaye of the New York Unified Court System and the National Center for State Courts.

The purpose of the jury summit was to bring together representatives from across the nation to examine the state of America’s jury system, share innovative practices, and plan for continued improvement. Over 400 persons from 45 states attended, including state and federal judges from the trial and appellate benches, court administrators, clerks, attorneys, representatives from community-based organizations, and even jurors. The legacy of the jury summit is to encourage other states to follow suit and expand efforts to improve the jury system nationwide. The results have been encouraging—states like Kentucky, Georgia, and Nevada have begun measurable steps forward.

Following basic themes of the jury summit, this new program will center on citizen outreach and improving the conditions of jury service. The program will provide courts with methods to improve citizen attitudes toward jury service. It will also provide technical assistance to help jurisdictions make the jury trial itself a more information-centered endeavor.

The National Center for State Courts will lead these efforts through its Center for Jury Studies. It will be joined by other jury leadership organizations, including the Council for Court Excellence (Washington, D.C.) and the Maricopa County Trial Court Leadership Center (Phoenix).

The program will undertake a sequence of tasks. First, it will systematically develop a compendium of current state jury management practices known as the “State of the States.” This will establish the baseline measure of the statutes, rules, and customs that define jury systems across the country. The State of the States documentation will span an operational

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