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Court Review

Volume 40, Issues 3-4
Winter 2004

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

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Court Review

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION
Volume 40, Issues 3-4 Winter 2004

EDITOR'S NOTE

The observant reader will already have noted that this is a double issue, constituting Issues 3 and 4 of Volume 40. It reflects, I'm afraid, one of the regrets of my tenure as your editor—I simply haven't been able to keep our publication on schedule. It is helpful, I think, to have a full-time judge serve as editor. Issues that arise in my daily work suggest a need for informative articles that I can solicit and the knowledge I get in my daily work helps me in determining which articles to select and how to edit them. But there's always the time commitment required by my day job as well.

With this double issue—and coming issues on jury reform and judicial independence in the trial court—we will be back on schedule by the time of the American Judges Association's annual conference in October in San Francisco. I have appreciated your patience as our publication schedule has lagged behind the calendar; I have also appreciated the many kind comments we've received regarding the quality of the articles you have received.

The first article in this issue was inspired by the anniversary of the *Brown v. Board of Education* decision. Hongxia Liu takes us on a tour of the sculpted friezes in the United States Supreme Court Building, noting the diversity of the 18 lawgivers depicted there. Aside from our cover photos, we don't normally pay much attention here to the buildings from which justice is dispensed. Liu ties together quite nicely the concepts of diversity that have come in decisions from the Court and the edifice from which they are crafted.

Two articles dealing with the criminal justice system follow. Jennifer Skeem and John Petrila review the increasing use of specialty probation dockets for offenders with mental illness. They note both problems and opportunities created by such dockets. Judge Michael Marcus of Oregon discusses his proposals for smarter sentencing—focusing on crime reduction as a primary goal.

In our next article, Elizabeth Neeley reviews the concerns of minority residents of Nebraska about their court system. These concerns were explored in extensive public hearings in 2002. Neeley reviews both the methods that can be used to explore such issues and the concerns that were expressed.

Our last article, by Gene Flango and Ann Keith of the National Center for State Courts, assesses the use being made of new laws in several states to curb aggressive driving. Surveys of judges, attorneys, and law enforcement officers in Virginia showed unexpectedly low interest in using these new statutes.

As always, we invite you to take a look at the Resource Page at the end of the issue. This issue covers resources for complying with the U.S. Supreme Court's new sentencing decision, *Blakely v. Washington*; background resources on the *Brown v. Board of Education* case; and the latest information on proposed changes to the Model Code of Judicial Conduct.—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 26 of the Summer 2003 issue. *Court Review* reserves the right to edit, condense, or reject material submitted for publication.

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President's Column

Michael R. McAdam

I have just returned from the annual meeting of the Canadian Association of Provincial Court Judges (CAPCJ) in Whitehorse, Yukon Territory. I must first tell you what a wonderful group of judges I met in Canada. I made many new friends and was treated as an old friend. I later realized that this treatment was not due to my overwhelming personality but to the fact that the AJA is respected by Canadian judges and has a great reputation in Canada. Thus the AJA president is treated as a friend.

The Canadian judges were also very curious about the judiciary in the United States. Being the only American judge at the conference, I was peppered with many excellent questions about our court system. For example: How are American judges selected and retained? How are salaries determined and who pays you? What is your court's jurisdiction? Are your courts independent of legislative control?

These questions confirmed to me the value of having Canadian judges in the AJA. Their interests are very similar to those of us who live in the United States. In fact, I was asked similar questions when I traveled to the National College of Probate Judges conference in South Carolina last year. These are universal concerns to all judges, even though our courts may operate with vastly different traditions, laws, procedures, and jurisdiction. It is reassuring to know that we ask the same questions as our Canadian sisters and brothers and are troubled by the same problems that impact the judiciary, no matter the country. This is another advantage of a national judges organization: the exposure to the many different approaches other courts have to the similar issues we face. As I've asserted many times, going to a judicial conference is a learning experience at the formal education sessions and the evening receptions as well.

It was a great conference and special thanks go to Judge Robert Hyslop of Newfoundland and Labrador, then CAPCJ president, and Judge Heino Lilles of Whitehorse, our host and the new CAPCJ president, for their warm hospitality. Also, the three AJA members and governors from Canada who looked after me in Whitehorse—Judge Irwin Lampert of New Brunswick, Judge David Orr of Saskatchewan, and Judge Morton Minc of Quebec—deserve thanks. Each of them helped make my visit memorable.

The 5,500-mile trip was also unforgettable for another reason: the weather. Whitehorse is the territorial capital of the Yukon and is located at approximately the same latitude as Anchorage, Alaska. As you would expect for such a northern town, the average temperature for Whitehorse in late June is in the mid-60's. Unfortunately the entire Yukon was sweltering from record heat that pushed temperatures into the mid-90's every day. And the days are long in Whitehorse in late June: the sun doesn't set until 11 p.m. and is up again at 4 a.m., leaving little time for cooling. Of course, being familiar with Kansas City summers, I felt right at home. One problem, however, was that I packed for the crisp, bracing chill of the great North.

Bulky sweaters and long-sleeved shirts filled my luggage. I was saved by my AJA Hawaiian shirt, which was to be worn only on travel days. Instead it became the workhorse of my Yukon wardrobe and much admired by my Canadian counterparts. Extra special thanks go to Judge Dave Orr, who anticipated my comfort needs and reserved an air-conditioned room in a very modest hotel (laundromat conveniently located in the lobby) a few blocks from the elegant, yet inferno-like, conference hotel.

On my way to and from Whitehorse I visited Vancouver, site of our planned joint annual conference with CAPCJ in 2007. It is a spectacular, beautiful city with jagged 10,000-foot mountains rising up behind the glittering downtown, which seemingly has a wonderful ethnic restaurant on every corner. This means we'll have to devise an equally glittering educational program if we are to have any hope of keeping judges indoors. I look forward to sharing that challenge with our Canadian colleagues.

One final note: Mary McQueen, who has served as Washington's state court administrator, has been selected to succeed Roger Warren as president of the National Center for State Courts. She is a dynamic leader and an energetic spokesperson for our courts and will ably fill the big shoes of Judge Warren. I expressed to her the AJA's desire to continue our strong relationship with the National Center and she assured me that she shares the same goal. The AJA looks forward to working with her in the years to come.



Court Gazing:

Features of Diversity in the U.S. Supreme Court Building

Hongxia Liu

“Diversity is its strength, just as it is the strength of America itself,” wrote Justice Sandra Day O’Connor about the United States Supreme Court.¹ The Court’s strength of diversity is manifested in various ways. To its thousands of visitors, the Supreme Court Building itself is perhaps the first and foremost exhibition of that strength of diversity.

In the nation’s highest court, high above the bench, are the figures of 18 historical lawgivers depicted in marble friezes. These 18 lawgivers are of different races and ethnicities, from Hammurabi to Moses to Confucius to John Marshall. They stand parallel, representing diverse legal traditions and heritages from around the world that have directly or indirectly shaped the concepts of law and justice in America.

From this building, so embodied with the ideal of diversity, the Court has issued a series of historical decisions, including *Brown vs. Board of Education*, transforming our nation in the last three quarters of a century into one that now finds strength in its racial and ethnic diversity. Buildings are human creations. Once created, they in turn become inspiration for human causes. This is especially true for such historical courthouses as the Supreme Court Building.



THE CREATION OF THE SUPREME COURT BUILDING AND ITS EMBODIMENT OF DIVERSITY

The Supreme Court Building, a classical Corinthian structure completed in 1935, is a masterpiece of architecture, majestic in size and rich in ornamentation. It serves as both home to the Court and as a metaphor for its power and legitimacy as an equal, independent branch of the federal government. Just as the Court stands as a guardian of the Constitution and the Bill of Rights, the Supreme Court Building symbolizes the notions of justice and the rule of law that have been popularized in our sacred documents. The gigantic columns, grand staircases, spacious corridors, and splendid artistic embellishments all become very powerful visual embodiments of justice. The artistic embellishments in particular, laden with values and ideals, have proven to be a real treat for those who wish to

admire in them the incarnation of our ideas about justice.

The 18 historical lawgivers catch our sight as soon as we step into the Court Chamber, which measures a grandiose 82 by 91 feet and rises 44 feet to a coffered ceiling. The lawgivers are depicted in larger-than-life size in the ivory marble friezes on the South and North walls, each measuring 40 feet long by 7 feet 2 inches high. On the South wall are historical figures from the pre-Christian era—Menes, Hammurabi, Moses,

Solomon, Lycurgus, Solon, Draco, Confucius, and Octavian (Augustus). On the North wall are historical figures of the Christian era—Justinian, Muhammad, Charlemagne, King John, Louis IX, Hugo Grotius, William Blackstone, John Marshall, and Napoleon Bonaparte.²

The effect of the friezes’ mingling of these great lawgivers—regardless of their differences in religion, geographic region, historical era, political philosophy, and race and ethnicity—is breathtaking. It reminds us immediately that the inherent nature of American society is open and diverse. It illustrates our regard for the collective contribution of great lawgivers to the development of law in the world in general, and to the formation of the legal system in America in particular. Occupying nearly the highest point of the grand and luminous courtroom, the friezes inspire, stimulate, humble, and awe

all who enter in the chamber.

Although the figures include religious figures, Justice John Paul Stevens has noted that the inclusion of secular figures among them makes clear that it is a group of lawgivers, not religious leaders:

[A] carving of Moses holding the Ten Commandments, if that is the only adornment on a courtroom wall, conveys an equivocal message, perhaps of respect for Judaism, for religion in general, or for law. The addition of carvings depicting Confucius and Muhammad may honor religion, or particular religions, to an extent that the First Amendment does not tolerate Placement of secular figures such as Caesar Augustus, William Blackstone, Napoleon Bonaparte, and John Marshall alongside these three

Footnotes

1. SANDRA DAY O’CONNOR, *THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE* 7 (2003).
2. Office of the Curator, Supreme Court of the United States,

Information Sheet, Courtroom Friezes: North and South Walls (2000) (available at <http://www.supremecourtus.gov/about/north&southwalls.pdf>).

religious leaders, however, signals respect not for great proselytizers but for great lawgivers.³

The diversity of legal heritages and traditions is also visible elsewhere in the building. The sculpted marble pediment of the east front entrance depicts Moses, Confucius, and Solon from three great civilizations in the East. The sculpted bronze panel doors at the west front entrance depict historic scenes in the development of law from the West: the trial scene from the shield of Achilles, as described in the Iliad; a Roman praetor publishing an edict; Julian and a pupil; Justinian publishing the Corpus Juris; King John sealing the Magna Carta; the Chancellor publishing the first Statute of Westminster; Lord Coke barring King James from sitting as a judge; and Chief Justice Marshall and Justice Story.⁴

The artistic depiction of diverse legal traditions and heritages embodied in the court building was mainly the product of six years' collective endeavor by a multidisciplinary team of architects, artists, librarians, and politicians, as well as jurists. The principal designers of the Supreme Court Building were tenth Chief Justice William Howard Taft and architect Cass Gilbert. Along with other members of the United States Supreme Court Building Commission, they believed in artistic freedom and allowed individual commissioned artists and sculptors to choose the subjects and figures that would best realize their vision of "a building of dignity and importance suitable for its use as the permanent home of the Supreme Court of the United States." Gilbert was best known for having designed the Woolworth Building in New York, the world's tallest building at the time. He was also the designer of the state capitols of Minnesota, West Virginia, and Arkansas.

Gilbert's choices of sculptors for the Court Chamber, the bronze panel doors at the West Entrance, and the pediment of the East Entrance of the Supreme Court Building were respectively Adolph A. Weinman, John Donnelly, Jr., and Herman A. MacNeil. Despite their different training and backgrounds, they shared the belief that there should be a correlation between the sculptural subject and the function of the building. They also believed that law as an element of civilization was normally and naturally derived or inherited in this country from former civilizations. Each relied on his own contacts and sources, however, for the selection of sculpted subjects.

The figures and symbols for the courtroom friezes were Weinman's own selection based upon independent research, and his carvings bore his training in the classical and Beaux-Arts tradition. After receiving the commission to create the friezes in 1932, Weinman, who lived in New York, spent con-

siderable time in the New York Public Library to gather materials on the evolution of law in written history from different civilizations. At that time, the library possessed not only extensive collections on western civilizations but also one of the best collections on eastern civilizations, spanning from the Orient to the Near East.

Weinman did not carry out this research alone. A researcher at the library named Harold A. Mattice provided him able assistance by compiling a list of short written descriptions of the major types of law and the key figures who developed them.⁵ Mattice was well regarded at the library for his bibliographical knowledge about comparative literature, ranging from Latin America to Japan and China. Based on Mattice's initial catalog, Weinman prepared a long list of possible lawgivers from many cultures for consideration, but his criteria for choosing the 18 who appear are not known. In 1933, Weinman submitted his final designs of the friezes to the United States Supreme Court Building Commission,⁶ which approved them with minor alterations. He then commenced carvings in 1934 and completed the friezes by early 1935.

The 70-year-old artworks by Weinman, Donnelly, and MacNeil in the court building have endured over time and are increasingly recognized and appreciated by the tens of thousands of visitors from the country and around the world. The only public complaint came in 1997, when some Muslim groups contended to the Court that Muhammad's image appearing in the courtroom was a form of sacrilege, since graven images are forbidden in Islam.⁷ That controversy was brief, however, as some of the Muslim community leaders spoke out in favor of the artistic rendering. Dr. Taha Jaber al-Alwani, chairman of the Fiqh Council of North America, published a formal legal opinion in the *Journal of Law and Religion* defending Muhammad's inclusion in the frieze:

[F]or every Muslim, the Messenger of God (Muhammad) is the greatest and most revered personality known between the earth and heaven, not simply one lawgiver among many. Still, it was an important gesture by those who did not believe in him as a Prophet and a messenger, who did not see him as anything other than a historic personality, to include him. In a culture whose literary heritage is replete with disdainful images of the Prophet Muhammad, it is comforting to note that those in the highest Court in the United States were able to surmount these prejudices, and display his image among those of the greatest lawgivers in human history.⁸

3. *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 652-53 (1989) (Stevens, J.) (concurring and dissenting opinion).

4. SUPREME COURT HISTORICAL SOCIETY, *THE SUPREME COURT OF THE UNITED STATES* (2003).

5. Based upon information obtained from the Public Information Officer, United States Supreme Court, and research conducted by the author in the New York Public Library archives, 2003.

6. The members of the United States Supreme Court Commission at that time were eleventh Chief Justice Charles Evans Hughes,

Associate Justice Willis Van Devanter, Senator Henry W. Keyes, Senator James A. Reed, Representative Richard N. Elliot, Representative Fritz G. Lanham, and Architect of the Capitol David Lynn.

7. Joan Biskupic, *Great Figures Gaze upon the Court*, WASH. POST, March 11, 1998 (available at http://www.dailyrepublican.com/sup_ct_frieze.html).

8. Taha Jaber al-Alwani, *Fatwa Concerning the United States Supreme Court Courtroom Frieze*, 15 J. LAW & RELIG. 1 (2000). 1



Franz Jantzen, Collection of the Supreme Court of the United States

MENES (C. 3200 B.C.)

Founder of the first dynasty of ancient Egypt, Menes personified the idea of a centralized government and is one of the earliest recorded lawgivers. Menes in the frieze is holding the ankh, an Egyptian symbol for life.

HAMMURABI (C.1700S B.C.)

King of Babylon and founder of the Babylonian Empire, Hammurabi is known for the Code of Hammurabi, the first surviving set of legal code covering both civil and criminal disputes.

MOSES (C. 1300S B.C.)

The Hebrew prophet is credited with deliverance of Israelites from slavery and receipt of the Ten Commandments. Moses in the frieze is holding two overlapping tablets, written in Hebrew, representing the Ten Commandments. Mosaic Law is based on the Torah, the first five books of the Old Testament.

SOLOMON (C. 900S B.C.)

King of Israel, Solomon's name is synonymous with "judicial wisdom."

LYCURGUS (C. 800 B.C.)

A leading legislator and statesman of Sparta in ancient Greece, Lycurgus is credited with being the guiding force of the reform of the Spartan constitution.

SOLOM (C. 600S B.C.)

Solon, whose name has become to mean "a wise and skillful lawgiver," was instrumental in remodeling the Athenian constitution and in codifying and reforming Athenian law, often revising the laws of Draco. He is credited with laying the foundation for the world's first democracy, although only a limited form of democracy for wealthier citizens.

DRACO (C. 600S B.C.)

One of Solon's predecessors in Athens, he was the first to commit an Athenian code of laws to paper. His code included harsh penalties and death sentences for some minor crimes. Hence, the meaning of "draconian."

CONFUCIUS (551-479 B.C.)

A Chinese philosopher, his teachings laid a comprehensive system of ideas for government and society based on learning, self-discipline, and virtues. At the center of his teachings was belief in balance and harmony. He said people in government should lead by example and emphasized a morality embodied in the idea that a person should not do to others what he would not want done to him. Among the aphorisms attributed to Confucius: "I could adjudicate law suits as well as anyone. But I would prefer to make law suits unnecessary."

OCTAVIAN (63 B.C – 14 A.D.)

The first emperor of Rome, also called Caesar Augustus, he restored order and modernized many aspects of Roman life. He allowed judges to exercise authoritative roles and supported their following decisions of previous cases to aid in determining the outcome of new disputes.

Descriptions of the contributions of each lawgiver are mainly adapted from the public information sheet published by the Office of the Curator, Supreme Court of the United States. Figures are described from left to right.

As a result of that brief dissension, the Supreme Court Office of the Curator revised its public information sheet about the courtroom friezes and added the following to the introduction about the depiction of Muhammad: "The figure above is a well-intended attempt by the sculptor, Adolph Weinman, to honor Muhammad and it bears no resemblance to Muhammad. Muslims generally have a strong aversion to sculptured or pictured representations of their Prophet."

It is fitting to highlight the only American, John Marshall, fourth Chief Justice of the Supreme Court, within the 18 great lawgivers. The presence of his image connects the diverse legal heritages and traditions of the world and the unique contribution of American legal and judicial systems to the historical development of law and justice. Chief Justice Marshall's 1803 declaration in *Marbury vs. Madison*—"It is emphatically the province of the judicial department to say what the law is"—caused the United States Supreme Court to become the world's most powerful court. Few other courts in the world have the same power of judicial review and none have exercised it for as long or with as much influence.

The Supreme Court has always been at the focal point of the most bitter constitutional, political, commercial, and social polemics in America. Even the Court views itself as the quiet spot in the eye of a hurricane, going about quietly applying

permanent canons of interpretation to the settlement of individual disputes, just as Marshall planned. He would, however, perhaps be surprised that the body of justices of the Supreme Court has expanded over time to include women as well as African-Americans, whose ancestors were slaves when he was Chief Justice. Although he was one of the greatest lawgivers of history, he was molded to his time, as were the other legendary figures depicted in the friezes. It may have been impossible for him to foresee, but surely he would be pleased at the racial, ethnic, gender, and other aspects of diversity that America displays today.

TOWARD THE CENTENNIAL OF THE SUPREME COURT BUILDING

As I recently admired this building from a distance, I remembered that the Supreme Court Building had in major measure been a winning battleground for bringing about the national strength of diversity today. From this building, the Court delivered since 1935 a series of landmark decisions of tremendous impact. The most legendary of all is *Brown vs. Board of Education* in 1954. The Court, with "Equal Justice Under Law" engraved on its edifice, has delivered the ever-so-basic message that human beings of all races are created equal. It provoked America, a country with a legacy of slavery and



Franz Jantzen, Collection of the Supreme Court of the United States

NAPOLEON BONAPARTE (1769 – 1821)

Emperor of France, amid his many wars, ordered and directed the recodification of French law into what became known as the Code Napoleon or Civil Code. Published in 1804, this code formed the basis for modern civil law and had major influence on laws in Europe, Latin America, Francophone Africa, and even in the United States in the state of Louisiana. Napoleon is reported to have said: “My glory is not to have won forty battles; for Waterloo’s defeat will destroy the memory of as many victories. But what nothing will destroy, what will live forever, is my Civil Code.”

JOHN MARSHALL (1755 – 1835)

Fourth Chief Justice of the United States, his opinion in *Marbury v. Madison* (1803) established the power of judicial review for the Court. Under his leadership, the nascent Supreme Court was able to advance to the position of a fully equal branch of the federal government as envisioned in the Constitution.

WILLIAM BLACKSTONE (1723 – 1780)

English law professor and jurist, he wrote the four-volume Commentaries on the Law of England, an extensive description of the state of the English law. His works had a major influence on England, the American colonies, and other regions with common-law tradition.

HUGO GROTIUS (1583-1645)

Dutch lawyer and statesman, he wrote *De Jure Belli ac Pacis* (Concerning the Law of War and Peace), which provided the basis of modern international law that nations are bound by common interests and mutual, enforceable agreements.

LOUIS IX (1213-1270)

King of France, he led the seventh and eighth Crusades to the Holy Land. He instituted the first court of appeals known as the “Curia Regis,” recognizing it as a citizen’s right to appeal a verdict in all cases. He was canonized as Saint Louis.

KING JOHN (1166 – 1216)

Born John Lackland, King John signed the Magna Carta, which ensured that neither he nor any future sovereign in England would be above the law. This document, only realized after a revolt, would lay the foundation of constitutional equality and liberty in England.

CHARLEMAGNE (C. 742 – 814)

The Roman Emperor and King of the Franks, he united and Christianized much of Western Europe in the Middle Ages, restoring order and education to what became the Holy Roman Empire. During his realm, he was also a reformer of judicial and military systems.

MUHAMMAD (C. 570 – 632)

The Prophet of Islam is depicted holding Qur’an (Koran), the sacred scriptures from God, or Allah in Arabic. The Qur’an provides the primary source of Islamic Law, covering all private and public behavior.

JUSTINIAN (C. 483-565)

The Byzantine emperor ordered the codification of Roman law and published *Corpus Juris Civilis* (“Body of Civil Law”), a coherent code that became the basis for modern civil law and inspired the term “justice.”

Descriptions of the contributions of each lawgiver are mainly adapted from the public information sheet published by the Office of the Curator, Supreme Court of the United States. Figures are described from left to right.

Jim Crow laws, to recognize human equality and the fundamental worth of every person without regard to race. It spurred a civil rights revolution that has widened from fighting discrimination against African-Americans to that against other ethnic minority groups, women, aliens, the elderly, the handicapped, and other classifications. Without the historical decision of *Brown vs. Board of Education*, it would be difficult for us to imagine today’s America. It would be even more difficult to visualize the modest diversity manifested in recent decades in the body of justices at the Court itself, an institution steeped in tradition and history.

As I ponder the underlying political, economic, social, and international factors that may have induced these landmark decisions, and as I pay tribute to those justices whose judgments and visions have shaped the nation’s strength of diversity, including Thurgood Marshall, who argued the case of *Brown vs. of Board of Education* and later became the first African-American to have served on the Court, I also feel more exulted pride in the Supreme Court Building. It has proved to be a standing symbol of our national strength of justice.

In little more than 25 years, the centennial celebration of

the Supreme Court Building will commence. I am confident that by that historical occasion, the nation will become more diverse and equitable, and will be even stronger as a result. I am also confident that by then the body of justices of the Supreme Court will include members from other minority groups such as the Hispanics, Asian and Pacific Islanders, Native Americans, and others. The ideal of diversity will at last not only be reflected obviously on the walls and doors of the Supreme Court Building, but also fully featured on the bench. At that moment, this monumental building will also become an indisputable symbol of national strength of racial and ethnic diversity.



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Problem-Solving Supervision: Specialty Probation for Individuals with Mental Illnesses

Jennifer Skeem & John Petrila

One of the most important developments in American law over the last decade has been the exponential growth of problem-solving courts. Such courts achieve efficiencies by consolidating certain types of cases before specially designated judges. Additionally, in many instances, problem-solving courts adopt a therapeutic focus by attempting to achieve outcomes (e.g., obtaining treatment for a defendant) that go beyond the traditional goals of the judicial system. A recent commentary in this journal noted that “problem-solving courts generally focus on the underlying chronic behaviors of criminal defendants.”¹ These courts include, but are not limited to drug courts, mental health courts, domestic violence courts, and teen smoking cessation courts. Perhaps the first prototypical problem-solving court was the juvenile court. Today, problem-solving courts exist in many countries throughout the world.²

Typically, problem-solving courts are designed to respond to larger social problems that impinge on the justice system. Drug courts and mental health courts in particular have emerged because of the disproportionately high prevalence of substance use and mental health disorders among criminal defendants.³ As judicial caseloads and correctional populations swelled with individuals charged with drug offenses, some judges and court administrators concluded that at least some defendants would be better served by treatment programs than incarceration. In addition, it was assumed that the creation of special courts would take pressure off other courts by removing certain types of cases (e.g. typical first-time, nonviolent drug offenders in drug court cases) from their dockets. As a result, drug courts were created: the first in Dade County, Florida, in 1989. Such courts proved immensely popular. Today there are more than 1,200 drug courts in existence or in planning, and more than 226,000 defendants have participated in drug-court-related programs.⁴

Mental health courts have been created more recently. Like

drug courts, they are designed to divert certain individuals with mental illnesses into treatment while consolidating their cases before designated “mental health court” judges. These courts are one response to the prevalence of mental disorders among defendants, which creates a burden that “threatens to overwhelm the criminal justice system.”⁵ In its *Criminal Justice/Mental Health Consensus Project*, the Council of State Governments recognized mental health courts as one of several “workable options” that communities with limited resources have developed to better fit the system to the needs of these defendants.⁶ The first mental health court of this era was created in Broward County, Florida, in 1997.⁷ Today it is estimated that there are approximately 80 mental health courts of various types throughout the United States.⁸ While at this point it is difficult to characterize the “typical” mental health court,⁹ most mental health courts appear to have a consolidated docket of cases involving mental illness, operate under a judge specially assigned to that docket, and attempt to divert defendants into treatment and other services. It appears that mental health courts are in a state of flux, with more recently created courts willing to take jurisdiction over some felony cases. This is in contrast to the “first generation” of courts that tended to limit jurisdiction to misdemeanors.¹⁰

Both drug courts and mental health courts are based on the theory of “therapeutic jurisprudence.” This theory assumes that legal principles and processes should be examined for their therapeutic or non-therapeutic effect on individuals.¹¹ Advocates for therapeutic jurisprudence generally assume that traditional adversarial court processes create impediments to achieving therapeutic outcomes for defendants. As a result, drug courts and mental health courts are usually less formal than traditional criminal court, with judges and lawyers committed to finding the best outcome for the defendant in concert with other parties in the community, including social service and treatment agencies.

Footnotes

1. Daniel J. Becker & Maura D. Corrigan, *Moving Problem-Solving Courts Into the Mainstream: A Report Card From the CCJ-COSCA Problem-Solving Courts Committee*, COURT REVIEW, Spring 2002, at 4.
2. John Petrila, *An Introduction to Special Jurisdiction Courts*, 26 INT'L J. LAW & PSYCHIATRY 3 (2003).
3. A 1999 report of the United States Department of Justice estimated that there are approximately 2 million individuals with mental illnesses under the control of federal, state, and local criminal justice authorities. BUREAU OF JUSTICE STATISTICS. U.S. DEP'T OF JUSTICE, MENTAL HEALTH & TREATMENT OF INMATES AND PROBATIONERS (1999). It is also estimated that more than 700,000 arrestees each year have a serious mental disorder, with 75% of them having a substance abuse disorder. BUREAU OF JUSTICE STATISTICS. U.S. DEP'T OF JUSTICE, PRISON & JAIL INMATES AT MID-YEAR (1997).
4. Aubrey Fox & Greg Berman, *Going to Scale: A Conversation About the Future of Drug Courts*, COURT REVIEW, Fall 2002, at 4.
5. COUNCIL OF STATE GOVERNMENTS, CRIMINAL JUSTICE/MENTAL HEALTH CONSENSUS PROJECT 6, 2002. Available at <http://www.consensusproject.org> (last visited Dec. 21, 2003) [hereinafter CONSENSUS PROJECT].
6. *Id.*
7. John Petrila, Norman Poythress, Annette McGaha, & Roger Boothroyd, *Preliminary Observations from an Evaluation of the Broward County Mental Health Court*, COURT REVIEW, Winter 2001, at 14.
8. COUNCIL OF STATE GOVERNMENTS, CONSENSUS PROJECT, *supra* note 5.
9. Henry J. Steadman, Susan Davidson, & Collie Brown, *Law & Psychiatry: Mental Health Courts: Their Promise and Unanswered Questions*, 52 PSYCHIATRIC SERVICES 457 (2001).
10. Henry J. Steadman, Allison D. Redlich, Patricia A. Griffin, John Petrila & John Monahan, *From Referral to Disposition: Case Processing in Seven Mental Health Courts*, BEHAV. SCI. & LAW (in press).
11. Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 PSYCHOL., PUB. POL'Y & LAW 193 (1995).

Drug courts are now assumed by most to accomplish their goal of obtaining treatment for defendants, and preliminary research suggests that mental health courts also may serve as an effective gateway to treatment services.¹²

The development of problem-solving courts is sufficiently advanced that discussions have begun about how to spread the principles that underlie them more broadly through the legal system.¹³ These discussions are occurring simultaneously with discussion about the changing role of trial judges, which has been hastened in part by the creation of problem-solving courts.¹⁴

Although these developments within the judiciary have occasioned healthy debate about their implications for the courts, the impact on other parties has received less notice. Drug courts and mental health courts may indeed facilitate access to treatment for defendants, and even influence the success of treatment through continued monitoring and the use of sanctions for noncompliance.¹⁵ However, the courts by necessity depend on others, including social service agencies, treatment providers, and probation officers, to *implement* the mandate to participate in treatment. Like the courts, these parties have been influenced by broader social phenomena and have adopted strategies to cope with the demands of maximizing dwindling resources to serve and supervise a growing high-risk population.

One particularly promising strategy is the development of specialty caseloads for probationers with mental illness (hereafter, PMI). Probation officers with specialty caseloads play a central role in monitoring and enforcing the conditions of probation, including the mandate to participate in treatment. Thus, these officers combine two functions: they seek to assure public safety (the traditional probation officer role), but also attempt to assure the rehabilitation of the probationer (a therapeutic role). Although such specialty agencies emerged at least two decades ago, nearly half have been created over the past five years, mirroring the growth of problem-solving courts.¹⁶ In the rest of this article, we describe the demands on probation officers of supervising PMIs, the unique response of specialty probation agencies to these demands, and the relation between these agencies and the courts. In doing so, we draw on recently conducted research that elicited the views of probation supervisors, probation offi-

cers, and probationers with mental illnesses regarding the management of PMIs. We conclude with a summary of issues that must be addressed if specialty agencies for PMIs are to continue growing and succeed.

I. THE UNIQUE DEMANDS OF SUPERVISING PROBATIONERS WITH MENTAL ILLNESS

In 2002, nearly four million probationers were supervised in the community, easily making probation *the* prototypic correctional disposition.¹⁷ Although no methodologically sound estimate of the national prevalence of mental disorder among probationers is available,¹⁸ the results of a self-report survey suggests that over one-half million (16%) of these probationers suffered some form of mental illness.¹⁹ For the typical officer carrying a caseload of 125 probationers, then, facing the unique demands of probationers with serious mental illness is an inescapable fact of practice.

These demands were described in two studies conducted by one of the authors (JS): one study involved a series of focus groups with PMIs and with their specialty and general probation officers in three major cities (Phoenix, Philadelphia, and Las Vegas, N= 52);²⁰ the other was a national survey of specialty and traditional probation agency supervisors (N=91).²¹ These studies suggest that probationers with mental illnesses create four significant demands beyond traditional probationers. First, PMIs often have pronounced needs for treatment and other social services (e.g., housing, SSI). These services not only fall outside the range of officers' ordinary practice, but also are difficult to access from underfunded and overburdened treatment and social service systems. Second, some PMIs' functional abilities are limited, such that they are unable to follow the basic conditions of probation (e.g., working, paying fees, reporting to their officer's office), let alone navigate the complex social service system. Third, probation officers are expected to monitor

One particularly promising strategy is the development of specialty caseloads for probationers with mental illness.

12. Roger Boothroyd, Norman Poythress, Annette McGaha, & John Petrila, *The Broward Mental Health Court: Process, Outcomes and Service Utilization*, 26 INT'L J. LAW & PSYCHIATRY 55 (2003); Merith Cosden, Jeffrey K. Ellens, Jeffrey L. Schnell, Yasmeen Yamini-Diouf, & Maren M. Wolfe, *Evaluation of a Mental Health Treatment Court with Assertive Community Treatment*. 21 BEHAV. SCI. & LAW 429 (2003).

13. Fox & Berman, *supra* note 4.

14. Roger Hanson, *The Changing Role of a Judge and Its Implications*, COURT REVIEW, Winter 2002, at 10. Hanson notes a number of developments over the last few decades, including case management and the development of alternative dispute resolution processes as contributing to the current debate over the role of judging, along with the emergence of problem-solving courts. See also, Arthur H. Garrison, *Drug Treatment Programs: Implications for the Judiciary*, COURT REVIEW, Winter 2002, at 24.

15. Patricia A. Griffin, Henry J. Steadman, & John Petrila, *The Use of Criminal Charges and Sanctions in Mental Health Courts*, 53 PSYCHIATRIC SERVICES 1285 (2002).

16. Jennifer Skeem, Paula Emke-Francis, & Jennifer Eno Loudon, Probation, Mental Health, and Mandated Treatment: A National Survey, (unpublished manuscript) (2003) [hereinafter *National Survey*].

17. Lauren Glaze, *Probation and Parole in the United States, 2002*. Available at <http://www.ojp.usdoj.gov/bjs> (last visited Dec. 31, 2003).

18. Harry Boone, *Mental Illness in Probation and Parole Populations: Results from a National Survey*, PERSPECTIVES, Fall 1995, at 32; James Byrne, *Mentally Ill Offenders: An Overview of Issues*, PERSPECTIVES, Fall 1995, at 41.

19. PAULA M. DITTON, BUREAU OF JUSTICE STATISTICS, MENTAL HEALTH AND TREATMENT OF INMATES AND PROBATIONERS, NCJ No. 174463 (July 1999).

20. Jennifer L. Skeem, John Encandela, & Jennifer Eno Loudon, *Perspectives on Probation and Mandated Mental Health Treatment in Specialized and Traditional Probation Departments*, 21 BEHAV. SCI. & LAW 429, 440 (2003) [hereinafter *Perspectives on Probation*].

21. Skeem, *et al.*, *National Survey*, *supra* note 16.

Probation officers may find these demands formidable, particularly while juggling a caseload of 125 or more probationers.

and enforce PMIs' compliance with the general conditions of probation as well as special conditions of treatment participation.²² Although probation personnel assume that treatment compliance is essential to successfully maintaining a PMI in the community,²³ the probationer's complex service needs render it rela-

tively difficult and time consuming for an officer to monitor and assure compliance.²⁴ Fourth, PMIs often have substance abuse problems. For probationers with both a mental illness and a substance abuse disorder, the two problems can interact with and exacerbate one another, rendering drug abstinence and treatment response less likely.²⁵

Probation officers may find these demands formidable, particularly while juggling a caseload of 125 or more probationers. This context lends credibility to the widespread perception that PMIs are at relatively high risk for probation violation and criminal recidivism.²⁶

II. MEETING THE DEMANDS: SPECIALTY CASELOADS

One response to these demands has been the creation of specialty probation caseloads designed exclusively for those with mental illness. Given the complexities of supervising PMIs, the Council of State Governments, in its *Criminal Justice/Mental Health Consensus Project*, recommends explicitly the creation of such specialty caseloads.²⁷

Probation agencies have a relatively long history of creating specialty caseloads for individuals perceived as having more complex needs than other probationers. For example, special caseloads or conditions of probation have been created for sex offenders,²⁸ domestic violence offenders, drug offenders, gang

offenders, youthful offenders, Spanish-speaking offenders, and the like.²⁹ Other relevant examples include the imposition of special conditions for individuals found "guilty but mentally ill,"³⁰ and for juveniles under the jurisdiction of a juvenile mental health court.³¹ Several jurisdictions use drug offender probation, often in conjunction with drug courts, and evidence suggests that properly designed probation programs can reduce recidivism and drug use.³²

Like mental health courts and drug courts, mental health probation has emerged as part of a larger movement in the criminal justice system toward specialization and problem-solving for defendants with needs that do not respond to traditional approaches. A recent survey of probation agencies in the U.S. suggests that today nearly 100 probation agencies have adopted specialty caseloads for PMIs, with 66 specialty agencies having more than one exclusive mental health caseload.³³ This survey compared the 66 specialty agencies with more than one mental health caseload with a sample of 25 traditional agencies matched by population size and geographic region. These survey results, combined with other work,³⁴ suggest that the prototypic specialty agency is unique in structure and function in four important respects: caseload structure, case management approach, the relationship between probation officers and probationers, and the use of problem-solving strategies when conditions of probation are violated. Each is discussed in turn below.

A. CASELOAD STRUCTURE

The foundation of the prototypic specialty probation agency consists of caseloads that are composed exclusively of PMIs, limited in size, and assigned to interested and specially trained probation officers. These caseloads' most distinctive and perhaps most important feature is their reduced size. Average caseload sizes for officers in specialty agencies (N=40) are less than one-third that of officers in traditional agencies (N=130).³⁵ In some agencies, mental health caseloads are considered "high risk" caseloads in need of intensive supervision, with appropriate

22. *Id.* See also U.S. PROBATION AND PRETRIAL SERVICES, COURT AND COMMUNITY (fact sheets on probation, Washington DC: Federal Judicial Center) (2001).

23. DENNISE ORLANDO-MORNINGSTAR, GLEN SKOLER, & SUSAN HOLLIDAY, A HANDBOOK FOR WORKING WITH MENTALLY DISORDERED DEFENDANTS AND OFFENDERS (1999).

24. Steven Wormith & Frances McKeague, *A Mental Health Survey of Correctional Clients in Canada*, 6 CRIMINAL BEHAV. & MENTAL HEALTH 49 (1996).

25. See, e.g., Robert E. Drake, Fred C. Osher, & Michael A. Wallach, *Alcohol Use and Abuse in Schizophrenia: A Prospective Community Study*, 177 J. NERVOUS & MENTAL DISEASE 408 (1989); and Roger Peters, William Kearns, Mary Murrin, & Addis Dolente, *Psychopathology and Mental Health Needs Among Drug-involved Inmates*, 11 J. PRISON & MENTAL HEALTH 3 (1992).

26. COUNCIL OF STATE GOVERNMENTS, CONSENSUS REPORT, *supra* note 5.
27. *Id.*

28. Kim English, *Special Theme: Sex Offenders: Scientific, Legal, and Policy Perspective: The Science of Sex Offenders: Risk Assessment, Treatment, and Prevention: The Containment Approach: An Aggressive Strategy for the Community Management of Adult Sex Offenders*, 4 PSYCH. PUB. POL'Y & LAW 218 (1998).

29. Unpublished data from Jennifer Skeem, Paula Emke-Francis, and Jennifer Eno Loudon, see *National Survey*, *supra* note 16, indicate that various probation agencies possess specialty caseloads of each type. For example, of traditional agencies surveyed, 76% had caseloads for sex offenders and 32% had caseloads for domestic violence offenders.

30. *Comment: People v. Lloyd: Michigan's Guilty But Mentally Ill Verdict Created with Intention to Help Is Not Really a Benefit at All*, 79 U. DET. MERCY L. REV. 75 (2001).

31. Agata DiGiovanni, *The Los Angeles County Juvenile Mental Health Court: An Innovative Approach to Crime, Violence, and Delinquency Among Our Youth*, 23 J. JUV. LAW 1 (2002/2003).

32. Joan Petersilia, *Probation in the United States*, 22 CRIME AND JUSTICE 149 (1997).

33. Skeem, *et al.*, *National Survey*, *supra* note 16.

34. COUNCIL OF STATE GOVERNMENTS, CONSENSUS PROJECT, *supra* note 5; Eric Roskes & Richard Feldman, *A Collaborative Community-Based Treatment Program for Offenders with Mental Illness*, 50 PSYCHIATRIC SERVICES 1614 (1999); Skeem, *et al.*, *Perspectives on Probation*, *supra* note 20.

35. Skeem, *et al.*, *National Survey*, *supra* note 16.

caseload caps set by agency policy.

Reduced caseloads are responsive to all four of the demands associated with supervising PMIs described earlier. Individuals with serious mental illnesses typically require substantially more time from the probation officer than other individuals. While this may not be true in every case, in general, a probation officer must exert sustained effort to implement both the general conditions of probation and special conditions that mandate treatment, especially with probationers who have serious mental health and substance abuse problems, and who need treatment and other social services that may be difficult to access and limited in capacity. Given these difficulties and their impact on the time an officer must spend on the case of an individual probationer, it is presumptively appealing to assign smaller caseloads to expert officers who carry these probationers exclusively. In traditional agencies, PMIs may be perceived as atypical “problems to the system” that drain resources from other cases. Reduced mental health caseloads provide officers with the time to develop and implement difficult social service referrals, handle crises, and intensively supervise these high risk individuals. As specialty officers gain experience, training, and connections with the social welfare systems, PMIs are transformed from “problems to the system” to routine cases with an array of workable options. As explained below, however, maintaining smaller specialized and exclusive mental health caseloads in the face of pressing demand for probation services is one of the most significant challenges facing the legal system today.

B. CASE MANAGEMENT APPROACH

Mental health caseloads, the foundation of the prototypic specialty mental health agency, are associated with a unique case management approach. First, as suggested earlier, these caseloads create important administrative efficiencies. Unlike traditional agencies, where officers attempt to find a way to fit round PMIs into a square supervision system on a case-by-case basis, officers in specialty agencies follow or develop routines and procedures tailored to the PMI. For example, specialty agencies often apply explicit definitions to determine which probationers are eligible for specialty supervision, and impose special conditions by which these probationers must abide. Although referral processes and eligibility criteria may vary from agency to agency, probationers must be mentally ill to be assigned to the prototypic specialty agency. Broward County, Florida, provides an example of how eligibility for mental health probation may be defined. The administrative order establishing mental health probation provides that “if deemed appropriate by the presiding Judge and otherwise permitted by law, and with the specific agreement and consent of the defendants themselves, defendants suffering from mental illness or mental retardation, as diagnosed by a qualified mental health expert, may be sentenced to a probationary period entitled ‘Mental Health Probation’ to be supervised by specially designated Probation Officers within the Department of Corrections.”³⁶ Additionally, a defendant placed

on mental health probation in Broward County may be required to comply with some or all of the following conditions:

- Sign an authorization for release of all medical and psychological records as deemed necessary for the treatment of mental illness and/or supervision by the Department of Corrections (in Florida, the State Department of Corrections oversees probation);
- Comply with a treatment plan approved by the court;
- Enter and actively participate in inpatient mental health and/or drug and alcohol treatment or other facility deemed appropriate by the Probation Officer;
- Enter and actively participate in outpatient treatment as deemed appropriate by the Probation Officer;
- Submit to random drug and/or alcohol testing;
- Take all medications prescribed for the treatment of mental illness;
- Not operate a motor vehicle;
- Submit to a mandatory curfew;
- Have no contact with the victim, directly or indirectly, unless approved by the victim, therapist and sentencing court;
- Be responsible for payment for programs and services if financially able.

[M]aintaining smaller and exclusive mental health caseloads . . . is one of the most significant challenges . . . today.

Second, in addition to creating administrative efficiencies, the prototypic specialty agency’s case management approach *integrates* internal (probation) and external (community) resources to meet the PMIs’ needs. The specialty officer is not merely an agent who “refers out” and then monitors compliance with the conditions of probation. This officer also uses his or her acquired skills and relationships with treatment providers and other social service agencies to help address the PMIs’ needs. Specialty officers typically work closely with treatment providers as part of a team. They attend team meetings, help secure social resources, and generally form connections with agencies that facilitate efficient work with PMIs.

These close working relationships are crucial because probation officers oversee compliance with treatment typically provided by other entities. Thus, communication with providers is essential for monitoring and ensuring treatment compliance. The nature of close provider-officer relationships, however, is critical. Close collaboration between treatment providers and officers relates to low rates of probation violation—if the provider does not merely become an extension of the oversight role provided by the officer.³⁷ When case managers become an “extra pair of eyes” for officers, however, probationers are much more likely to be threatened by their officer with incarceration for noncompliance.³⁸

36. Broward County, Florida, Admin. Order No. III-02-N-1A, In Re: Order Concerning Creation of the Mental Health Probation Program Within the Circuit Court Criminal Division (17th Cir. Jan. 9, 2002).

37. Roskes & Feldman, *supra* note 34.

38. Jeffrey Draine & Phyllis Solomon, *The Use of Threats of Incarceration in a Psychiatric Probation and Parole Service*, 71 AMER. J. ORTHOPSYCHIATRY 262 (2001).

[I]t appears that problem-solving is the hallmark strategy of specialty officers for addressing probationer non-compliance

C. RELATIONSHIP BETWEEN THE PROBATION OFFICER AND THE PROBATIONER

In addition to close collaboration with treatment providers to meet PMIs' needs, the prototypic specialty officer typically has a different view of his or her role and relationship with the PMI than the traditional officer. First, traditional proba-

tion officers tend to emphasize public safety ("control") as the primary goal of probation, whereas specialty officers tended to emphasize meeting the rehabilitative needs of probationers ("care") as well.³⁹ These two roles are not completely at odds. For example, specialty officers may assume that treatment and rehabilitation lead to more independent functioning on the part of the probationer: as the probationer becomes more stable and assumes responsibility for his or her conduct, he or she presumably becomes less likely to engage in antisocial conduct. Public safety may be particularly enhanced when the now-treated mental illness played a causative role in the probationer's prior criminal behavior.⁴⁰

Second, in the focus groups conducted with officers and probationers, specialty probation officers with mental health case-loads defined their relationships with probationers differently than traditional officers in three ways.⁴¹ First, specialty officers reported adopting a more friendly, less authoritarian relationship with probationers than traditional officers; probationers in turn tended to characterize their relationships with specialty officers as more caring, supportive, and flexible. Second, maintenance of such a relationship was perceived as being less contingent on good behavior and compliance than was the case with more traditional probation officers. Third, specialty officers were more concerned with establishing boundaries in their relationship with probationers in order to maintain a distinction between the support offered as part of the professional relationship (which was permissible) and friendship (which was not). This is not dissimilar to the boundaries that therapists establish with patients for ethical reasons.

Given this, the quality of relationships between officers and probationers may be defined by two related constructs: an alliance (bond, partnership, and confident commitment) and a "firm but fair" approach (clarity and voice, considerate respect, and flexible consistency).⁴² The preliminary research described

above suggests that relationships in specialty agencies may more often be characterized by a strong alliance and fairness than those in traditional agencies. These differences in relationships contribute significantly to a fourth unique feature of specialty agencies: officers' strategies for implementing the conditions of probation, especially mandated treatment.

D. PROBLEM-SOLVING STRATEGIES AS A RESPONSE TO VIOLATIONS

A traditional response to violation of conditions of probation is the imposition of sanctions, for example, threatening to revoke or revoking probation. In contrast, it appears that problem-solving is the hallmark strategy of specialty officers for addressing probationer noncompliance, with sanctions generally used only if other strategies failed.⁴³ In both the focus group and survey studies described earlier, specialty officers were much more likely than traditional officers to respond to a PMI who was noncompliant with treatment by talking with him or her to identify any obstacles to compliance (e.g., he or she might prefer a different medication than the one prescribed), resolving these problems, and agreeing on a compliance plan. The officer would often include the probationer's treatment provider in this discussion. In contrast, officers in traditional agencies were significantly more likely than specialty officers to respond to noncompliance by reminding the probationer of the rules or by threatening to pursue incarceration if the probationer continued to disobey. In short, traditional officers tended to respond to noncompliance with threats of sanctions and pursuit of sanctions, whereas specialty officers called on a more varied set of strategies and used a more graduated approach before pursuing revocation as "absolutely the last resort."⁴⁴

The effect of problem-solving and other enforcement strategies on PMIs' treatment adherence and outcomes compared to the use of sanctions such as probation revocation is unclear. However, probationers and many probation officers in focus groups viewed problem-solving approaches as more effective than threats in securing compliance. Probationers appreciated that their officers would have "fair conversations" with them about noncompliance, be reasonable in accommodating legitimate problems with adherence, and be open and honest about potential consequences. This sentiment is consistent with research on procedural justice, which suggests that individuals feel less coerced when they are treated with respect and allowed to state their views.⁴⁵ In contrast, probationers believed that threats often created fear and avoidance, or alternatively, anger

39. JON F. KLAUS, HANDBOOK ON PROBATION SERVICES: GUIDELINES FOR PROBATION PRACTITIONERS AND MANAGERS (1998).

40. Skeem, *et al.*, *Perspectives on Probation*, *supra* note 20.

41. *Id.* at 444-445.

42. Jennifer L. Skeem, Probation Officer-Probationer Relationships (2003) (unpublished measures for officers, probationers, and observers). See also D.A. ANDREWS & JERRY J. KIESSLING, *Program Structure and Effective Correctional Practice: A Summary of CaVic Research*, in EFFECTIVE CORRECTIONAL TREATMENT 439-463 (R. Ross & P. Gendreau eds., 1999); CHRISTOPHER TROTTER, WORKING WITH INVOLUNTARY CLIENTS: A GUIDE TO PRACTICE (1999).

43. Skeem, *et al.*, *Perspectives on Probation*, *supra* note 20; Skeem, *et al.*, *National Survey*, *supra* note 16.

44. Skeem, *et al.*, *Perspectives on Probation*, *supra* note 20, at 449-452; Skeem, *et al.*, *National Survey*, *supra* note 16.

45. Charles Lidz, Steven Hoge, William Gardner, Nancy Bennett, John Monahan, Edward Mulvey, & Lauren Roth, *Perceived Coercion in Mental Hospital Admission: Pressures and Process*, 52 ARCHIVES OF GENERAL PSYCHIATRY 1034, 1039 (1995); Norman Poythress, John Petrila, Annette McGaha, & Roger Boothroyd, *Perceived Coercion and Procedural Justice in the Broward County Mental Health Court*, 25 INT'L J. LAW & PSYCHOL. 517 (2002).

and further noncompliance (“the more they threaten you, the less a person will do”).⁴⁶

In summary, the prototypic specialty agency is unique in (a) its caseload structure (exclusive, reduced mental health caseloads managed by “expert” officers), (b) its case management approach (creation of administrative efficiencies and integration of internal and external resources to meet PMIs’ needs), (c) the roles of probation officers (emphasizing “care” as well as “control”) and their relationships with probationers (strong alliances and a “firm but fair” approach), and (d) officers’ use of problem-solving strategies to address probationer noncompliance. Notably, the prototypic specialty agency defines a category with indistinct boundaries: some specialty agencies share few features with the prototype, and thus are more similar to traditional agencies (and vice versa). Several features prototypic to specialty agencies parallel features of problem-solving courts. In the next section, we describe these parallels and address issues associated with linking specialty probation with mental health courts.

III. SPECIALTY MENTAL HEALTH PROBATION CASELOADS AND PROBLEM-SOLVING COURTS

Both specialty mental health probation and mental health and drug courts are confronting issues in the delineation of appropriate relationships with clients and in the use of sanctions for noncompliance with treatment conditions. First, both specialty probation agencies and problem-solving courts work with clients who are required to attend treatment. Specialty officers and judges alike may struggle to reconcile their “helping, therapeutic, or problem-solving role” with their “legalistic, or surveillance, role.”⁴⁷ There are divided opinions about the extent to which judges should embrace each role. Some judges who administer treatment courts assume explicitly that it is appropriate for judges to assume a “therapeutic relationship” with the defendant because the goals and values of such courts are explicitly therapeutic.⁴⁸ Others argue that this may create boundary issues if the judge later has to impose sanctions or that seeking to create this type of relationship with a defendant is at odds with the nature of judging.⁴⁹

The probation literature (if not agencies) appears to assume that both therapeutic and legalistic roles are an inescapable aspect of supervision, and that reconciling them is both the most

difficult and most important component of effective probation work.⁵⁰ In fact, according to Carl Klockar’s theory of probation supervision, effective officers synthesize treatment and control by making it clear to probationers over time that officers must abide by departmental rules, but want the probationer to succeed and will offer him or her every reasonable aid to do so. The legalistic, surveillance element of the officer’s role is transferred to the (largely fictional) oversight powers of the department, allowing a second critical tool for securing compliance, *i.e.*, rapport between the officer and probationer, to remain intact:

I tell my probationers that I’m here to help them, to get them a job, and whatever else I can do. But I tell them too that I have a job to do and a family to support and that if they get too far off the track, I can’t afford to put my job on the line for them. I’m going to have to violate them.⁵¹

The dual nature of the relationship between probation officer and probationer, or between court and defendant, is made even more complex by the expectations of other parties that may be involved in the client’s treatment. This is true particularly of treatment agencies that may wish to use the court or probation officer to exert leverage on the client to comply with treatment. Treatment providers may value coercive strategies for clients who are acutely ill or do not adhere to treatment.⁵² The therapeutic relationship between treatment provider and client may, however, be compromised if the provider issues threats or applies sanctions for noncompliance with mandated treatment. In such circumstances, it may be in the interest of both the provider and client to rely on the power of the probation officer or court to impose sanctions, holding the provider out of the fray. Transferring the controlling aspect of these relationships to the probation department may preserve the provider’s therapeutic alliance with the client, and the therapeutic alliance has been shown to strongly influence treatment outcomes.⁵³

[I]t may be . . . [wise] to rely on the power of the probation officer or court to impose sanctions, leaving the provider out of the fray.

46. Skeem, *et al.*, *Perspectives on Probation*, *supra* note 20, at 454.

47. TROTTER, *supra* note 42, at 3.

48. Judge Peggy Hora and her colleagues write, for example, “[We] propose to establish therapeutic jurisprudence as the [Drug Treatment Court] movement’s foundation.” Peggy F. Hora, William G. Schma, and John T. Rosenthal, *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System’s Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 440 (1999).

49. Judge Morris Hoffman asserts, “The scandal of America’s drug courts is that we have rushed headlong into them—driven by politics, judicial pop-psychopharmacology, fuzzy-headed notions about ‘restorative justice’ and ‘therapeutic jurisprudence,’ and by the bureaucrats’ universal fear of being the last on the block to have the latest administrative gimmick.” Morris B. Hoffman,

Commentary: The Drug Court Scandal, 78 N. C. L. REV. 1437 (2000).

50. See also Andrews & Kiessling, *Effective Correctional Practice*, *supra* note 42; Carl Klockars, *A Theory of Probation Supervision*, 63 J. CRIM. LAW, CRIMINOLOGY & POLICE SCI. 550 (1972); TROTTER, *supra* note 42, at 3.

51. Carl Klockars, *supra* note 50, at 554.

52. Charles Lidz, *Coercion in Psychiatric Care: What Have We Learned from Research?*, 26 J. AMER. ACAD. PSYCHIATRY & LAW 631 (1998); Edward P. Mulvey, J. Geller, & Lauren Roth, *The Promise and Peril of Involuntary Outpatient Commitment*, 42 AM. PSYCHOL. 571 (1987).

53. Ted P. Asay & Michael J. Lambert, *The Empirical Case for the Commo Factors in Therapy: Quantitative Findings*, in *THE HEART AND SOUL OF CHANGE: WHAT WORKS IN THERAPY* 23-55 (Mark A. Hubble, *et al.* eds., 1999).

The overall volume of probation cases means that vigilance will be required to maintain reduced mental health caseloads.

Second, like specialty agencies, problem-solving courts must address the appropriateness of applying sanctions, including incarceration for noncompliance. Drug courts are based explicitly on the use of a “carrot and stick” approach in which the offer of treatment is conditioned by the threat of punishment if the defendant does not comply with treatment.⁵⁴ There is also evidence that the threat of sanctions by

the court may increase defendant compliance with drug treatment.⁵⁵ Mental health courts were initially more ambivalent about the use of punishment, though this ambivalence may be eroded as mental health courts increasingly assume jurisdiction over felonies.⁵⁶ What is clear is that we do not yet know the comparative impact of sanctions, inducements, or a mixture of the two on client compliance with treatment. There is anecdotal evidence on all sides of the question, but until more definitive research is done, the adoption of one or another strategy regarding the use of sanctions will be guided as much by intuition and philosophy as empiricism.

Given parallels between specialty probation agencies and problem-solving courts in their basic goals and approaches, it is not surprising that the two are sometimes linked developmentally. For example, in our national survey of the use of specialty probation, 15% of specialty supervisors described being affiliated with a mental health court.⁵⁷ In Maricopa County, Arizona, the mental health court was created years after specialty mental health probation was established. As another example, in Broward County, Florida, a felony mental health court was created after the adoption of mental health probation, in part so that specialty officers would only have to deal with one judge rather than several judges and in part so that a uniform philosophy would govern the use of mental health probation in the county.⁵⁸ In other instances (e.g., Seattle), specialty probation officers were hired and trained specifically to work with referrals from the mental health court.

Although the implications of these linkages are not yet clear, logic and anecdotal evidence suggest that there may be both advantages and disadvantages. Specialty probation officers who work with a mental health court might enjoy the affiliation for its air of authority; familiar, team-based approach to ongoing problem-solving; and relatively predictable decisions. As court and probation personnel became more familiar with one another and with their shared caseloads, decision making may become more efficient. On the other hand, specialty officers may view the mental health court as a time-consuming process that increases

the risk that PMIs will be sanctioned. Because status hearings are a form of monitoring, their use may detect more violations. If more violations are detected and specialty officers’ discretion to apply problem-solving strategies and graduated approaches is reduced, sanctions may become more likely with the linkage. Further research undoubtedly will reveal more about the relationship between specialty probation and mental health courts.

IV. THE FUTURE OF SPECIALTY MENTAL HEALTH CASELOADS

As noted earlier, specialty probation for those with mental illnesses first emerged 25 years ago, with accelerating use in the last 5 years. Although it is unclear whether specialty probation will become a permanent part of the legal landscape, the average age of specialty probation agencies (approximately 10 years) suggests that they have some “staying power.” Moreover, certainly there is little evidence that the prevalence of mental illnesses among criminal defendants will abate in the near future, or that the trend toward specialization within the legal system to meet those needs has run its course.

As jurisdictions consider developing mental health agencies, four issues in addition to those already discussed will need to be considered. First, if specialty probation agencies have a “necessary ingredient,” that ingredient is probably structural, having to do with the size of the caseload. Available data suggest that virtually all probation supervisors, traditional and specialty alike, believe that a reduction in mental health caseloads with specialty officers is useful for supervising PMIs.⁵⁹ In fact, the ability of specialty agencies to succeed may well depend upon the department’s ability to maintain *small*, specialized caseloads handled by specially trained probation officers. In the national survey, the vast majority of traditional and specialty supervisors viewed reduced mental health caseloads as “very” useful, but the majority (56%) of traditional supervisors perceived reduced caseloads as “not at all” practical in their department. Similarly, some specialty agencies were being pushed toward larger caseloads. Although the majority (61%) of specialty supervisors perceived reduced caseloads as “very” practical, officers in nearly one-quarter (23%) of specialty agencies were carrying higher caseloads than those set forth in their policies. As explained earlier, larger caseloads necessarily limit officers’ resources for supervising and meeting the needs of high-risk PMIs. Notably, specialty agencies with larger caseloads shared relatively few features with the prototypic specialty agency. For example, large caseload specialty agencies are significantly less likely than other specialty agencies to use problem-solving approaches to address probationer noncompliance.⁶⁰

The overall volume of probation cases means that vigilance will be required to maintain reduced mental health caseloads. For example, in Broward County, Florida, an initial agreement to limit caseloads for five officers who volunteered and were

54. Heather Mactavish, *Profile: Janet Reno’s Approach to Criminal Justice*, 4 UCLA WOMEN’S L. J. 113, 116 (1993).

55. Sheila Maxwell, *Sanction Threats in Court-Ordered Programs: Examining Their Effects on Offenders Mandated into Drug Treatment*, 46 CRIME AND DELINQUENCY 542 (2000).

56. Griffin, *et al.*, *supra* note 15.

57. Skeem, *et al.*, *supra* note 16.

58. Broward County, Florida, Admin. Order No. III-03-S-1, In Re: Creation of a Mental Health Court Subdivision Within the Circuit Court Criminal Division (17th Cir. Oct. 17, 2003).

59. Skeem, *et al.*, *National Survey*, *supra* note 16.

60. *Id.*

trained to handle mental health cases was abandoned because the state Department of Corrections insisted that caseload ratios for probation officers be maintained at the level required for DOC funding. As a result, caseloads are now larger, mixed between mental health and general cases, and dispersed among twelve officers who volunteered or were “drafted.” It may be that legislative recognition of a special category of mental health probation is necessary in some jurisdictions to assure that reduced caseload size and specialization can be maintained. Indeed, some states have created line items in their budgets for supervising PMIs and parolees with mental illness in the community.⁶¹

Second, probation has long been a “practitioner-led”⁶² enterprise where the organizational culture of an agency and characteristics of individual officers strongly influence daily practice. Thus, there is today little uniformity in training offered to either traditional or mental health probation officers on topics associated with mental illnesses. Yet such training is essential, on a wide variety of topics, including signs and symptoms of mental illness; medications and their effects and side-effects; and creating and maintaining a relationship with an individual with a mental illness. Similarly, articulated philosophies or standards of practice for supervising PMIs would be helpful. Federal handbooks⁶³ and large, well-developed specialty agencies in the nation (e.g., Maricopa County, Arizona, Cook County, Illinois) provide examples of philosophies, policies, and training programs that could serve as models.

Third, the issue of confidentiality is a significant one that has become even more complicated with the adoption of the Health Insurance Portability and Accountability Act (HIPAA) regulations on protecting the privacy of individual health information.⁶⁴ There are provisions of HIPAA that permit the use and disclosure of protected health information as “required by law” including by court order.⁶⁵ In addition, conditions of probation may be written to require that the probationer consent to the disclosure of medical and mental health records. Given that the number of parties involved in specialty probation may include the court, the probation officer, and multiple treatment and social services agencies, however, it will likely become necessary in most jurisdictions to create formal agreements between the various parties, consistent with HIPAA and applicable state law, to govern the exchange of information. Alternatively, in the prototypic specialty agency, the probation officer often becomes part of the treatment team, such that as a practical matter “confidentiality ceases to exist.”⁶⁶

Finally, the recent explosion of mental health courts may facilitate the growth of specialty probation agencies in many jurisdictions, just as the creation of specialty agencies has prompted some jurisdictions to move toward problem-solving courts. As the opportunities to join these problem-solving agencies arise, communities must strive to maximize the administrative effi-

ciencies and unique therapeutic potential of both systems while avoiding the possibility of merely increasing surveillance of probationers. Achieving increased monitoring in the absence of increased treatment access may do little to address the serious treatment and social service needs of PMIs.

The unprecedented volume of individuals with mental illnesses and substance use disorders in the criminal justice system has resulted in sweeping philosophic and operational changes throughout that system. Specialty mental health probation is a clear example of the continuing struggle to integrate concerns with public safety and a more therapeutic approach to the needs of defendants with serious mental illnesses.



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61. Harry Boone, *supra* note 18.

62. KLAUS, HANDBOOK ON PROBATION SERVICES: GUIDELINES FOR PROBATION PRACTITIONERS AND MANAGERS (1998).

63. ORLANDO-MORNINGSTAR, *ET AL.*, *supra* note 23.

64. “HIPAA” refers to the Health Insurance Portability and Accountability Act of 1996. Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 18, 26, 29, and 42

U.S.C.). The Department of Health and Human Services promulgated rules governing the privacy of health care information effective October 16, 2000. The regulations, as initial 45 C.F.R. § 164.512(a)(1) (2002).

65. 45 C.F.R. § 164.512(a)(1) (2002).

66. Skeem, *et al.*, *Perspectives on Probation*, *supra* note 20, at 448.

Smarter Sentencing:

On the Need to Consider Crime Reduction as a Goal

Michael Marcus

In February, 2004, Oregon Governor Ted Kulongoski directed a newly created “Public Safety Review Steering Committee” to “look at our public safety system from beginning to end” and to develop “strategies to make the system stronger” wherever it does not sufficiently protect Oregonians.¹ In common with many states, Oregon long ago adopted a modification of the penal code to declare crime reduction among the purposes of sentencing. And in common with many states, Oregon has adopted a sentencing guidelines model that roughly directs sentencing to reflect crime seriousness, criminal history, and prison resources—largely or entirely ignoring crime reduction. Apparently in common with all English-speaking and European criminal justice systems, Oregon’s criminal justice system thus exhibits a profound dysfunction: The successful culmination of most combined law enforcement and prosecution activity is a conviction followed by a sentence in a criminal case. *Yet, most sentences imposed on most offenders fail to prevent future criminal behavior by the sentenced offender; most sentencing does not even expressly attempt crime reduction.*²

The participants in Public Safety Review Steering Committee represented the typical range of diverse and strongly held views as to the purposes, failures and successes of criminal justice. They held opposing positions as to mandatory minimum sentences,³ the viability of general deterrence, and the division of sentencing responsibilities between the judicial and the legislative functions (whether the latter is exercised by the people directly through ballot measures or by the legislature). My views on such matters are quite independent of the propositions asserted in this paper. The only debate we really need to

resolve before making real progress is already decided by Oregon law, and by the expectations of most citizens in all states: crime reduction is a major purpose of sentencing. Notions to the contrary are dangerously wrong, however motivated.

All rational and informed participants and observers should agree:

- Whatever the importance of other components of sentencing, crime reduction is a major purpose.
- Our actual accomplishment of crime reduction falls profoundly short of our proclamations and of our potential.
- To improve our crime reduction impact, we must change the behaviors of those involved in producing sentencing decisions.
- To succeed, we must pursue strategies to focus criminal justice participants on responsible, informed, competent, and effective pursuit of crime reduction through sentencing decisions.

CRIME REDUCTION IS AND MUST BE A MAJOR PURPOSE OF SENTENCING

Astonishing as it should seem, there is a body of literature that argues that sentencing should *not* be about crime reduction.⁴ But Oregon law is unambiguous, and no doubt typical of most states. Oregon law has long declared public safety to be at least among the purposes of sentencing,⁵ and that policy choice was more recently enshrined in our state constitution by vote of the people in Article I, section 15: “Laws for the punishment of crime shall be founded on these principles: protec-

Footnotes

1. Press Release, *Governor Calls for Complete Review of Public Safety*, Governor Ted Kulongoski, February 26, 2004, accessible at http://governor.oregon.gov/Gov/press_022604b.shtml.
2. See generally, Michael H. Marcus, *Archaic Sentencing Liturgy Sacrifices Public Safety: What’s Wrong and How We Can Fix It*, 16 FED. SENTENCING RPTR. 76 (2003).
3. Oregon’s “Measure 11” crimes range from mid-level sexual assault crimes; second-degree robbery, assault, kidnapping, manslaughter; and upward. ORS 137.700 provides mandatory minimum sentences ranging from 70 to 300 months for these crimes, and mandates that 15, 16, and 17-year-old offenders charged with these crimes be tried as adults. Unlike the “three-strikes” provisions of many states (and Oregon’s “repeat property offender” provision, ORS 137.717), the mandatory minimum provisions apply regardless of the offender’s criminal history, though some discretion to depart is afforded for some of the least serious of these crimes. See ORS 137.712.
4. E.g., Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventative Detention as Criminal Justice*, 114 HARV. L. REV. 1429 (2001). Professor Robinson actually argues that by diluting pure pursuit of just punishment with public safety objectives, we sac-

rifice public safety. His reasoning reduces to this: citizens despair that criminals are not suitably punished, lose respect for the criminal justice system, and are therefore less influenced by that system in evolving values such as those against drunk driving and domestic violence. I submit, however, that it is obvious in the real world that we do far more harm both to respect and to public safety by persistently producing recidivism while denying our responsibility for outcomes. “Preventive Detention” is a disparaging title opponents of incarceration assign to the incapacitation purpose of sentences. Their arguments are discussed later in this paper.

5. ORS 161.025(1)(a) declares the purposes of Criminal Code, including “To insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized, the correction and rehabilitation of those convicted, and their confinement when required in the interests of public protection.” This was based on the 1962 Model Penal Code: Sentencing §102.2. Tragically, there is at present a proposal drastically to retreat from the public safety focus of this provision of the Model Penal Code. See Michael H. Marcus, *Comments on the Model Penal Code: Sentencing Preliminary Draft No. 1*, 30 AM. J. CRIM. LAW 135(2003).

tion of society, personal responsibility, accountability for one's actions and reformation."⁶

SENTENCING DOES NOT RESPONSIBLY PURSUE CRIME REDUCTION

This is where some colleagues and attorneys begin to become annoyed with me, but bear with me. The critical word is "responsibly."

First, most sentencing hearings (and probation violation disposition hearings) make no mention whatever of crime reduction.⁷ The typical dispute, once the legal range of any discretion is settled, is whether a given sentence is "sufficient" to punish the offender adequately, or somehow "excessive" given any disadvantages or ameliorating circumstances urged on behalf of the offender. Indeed, as to felonies, Oregon's sentencing guideline regulations merely mention "security of people in person and property," while stressing "appropriate punishment," inviting dispute as to "aggravation" and "mitigation,"⁸ and approaching any attempt at meaningful consideration of crime reduction only within the three (of 99) grid blocks that address "optional probation."⁹ No fair reading of the guidelines or of the regulations can render crime reduction a significant target of their attention. To this extent, the rules are in substantial tension with the statutes and the Oregon Constitution.

True, we send thieves to theft talk, drunk drivers to alcohol

treatment, bullies to anger counseling, addicts to drug treatment, and sex offenders to sex offender treatment. But we do this as a matter of symmetry rather than of science: we do not select offenders based on their amenability to treatment, but on the crime they have committed. We do not select providers on their impact on criminal behavior, but on their ability to provide timely paperwork. We may ask providers if offenders complete "the program" but we do not ask if they reoffend after treatment. Again, the issue is *responsible* pursuit of crime reduction—not nominal pursuit. It is probably true that many people sent to these programs benefit, and that many do not. What is certain is that we have made no responsible effort to find out which programs reduce criminal behavior by which offenders—and, of course, no effort to use the results in making better use of these options.

Second, the public and some criminal justice participants seem to operate on the assumption that incarceration is crime reduction. There is a great deal to be said about the relationship between incarceration (incapacitation) and crime reduction. When all is said, it is obvious that while locking up some offenders is indeed the best path to crime reduction, as to others there are real issues as to which offenders to treat in the community, which to relegate to alternative sanctions, and which to lock up, for how long, and under what conditions. And it is abundantly clear that we are *not* smart about those issues because we make no responsible attempt to tackle them.

6. Constitution of 1859; Amendment promoted by Crime Victims United, referred by S.J.R. 32, 1995, and adopted by the people Nov. 5, 1996.

7. Although therapeutic courts also generally avoid using crime reduction as a measure of success, they are well outside my scope of concern because they purposefully pursue an objective—usually alcohol or drug abuse reduction—that in turn strongly correlates with crime reduction. There are undoubtedly a few offenders whose freedom from addiction actually increases their efficiency in criminal activities, but the net crime reduction impact of the therapeutic courts is quite probably far superior to the traditional means of processing the offenders they divert from the regular criminal dockets. *E.g.*, *Drug Court Resources - Facts & Figures*, National Criminal Justice Reference Service, U.S. Department of Justice (http://www.ncjrs.org/drug_courts/facts.html); *Looking at a Decade of Drug Courts* (Rev. 1999), Drug Court Clearinghouse and Technical Assistance Project (DCCTAP), American University, sponsored by the Drug Courts Program Office of the Office of Justice Programs, U.S. Department of Justice (<http://www.american.edu/academic.depts/spa/justice/publications/decade1.htm>). For a collection of more negative assessments, see *Drug Courts and Treatment as an Alternative to Incarceration* (http://www.reconsider.org/issues/drug_court/interesting_facts.htm), RECONSIDER: FORUM ON DRUG POLICY, and authorities cited. Even the latter source shows our local drug court (Multnomah County) as producing rearrest rates roughly one-third as high as those for graduates of the traditional approach. The sentencing support tools discussed in this article show that our DUI court correlates with greater success for most cohorts than our conventional correctional devices.

8. See OAR 213-002-0001, particularly:

(3)(d) Subject to the discretion of the sentencing judge to deviate and impose a different sentence in recognition of aggravating and mitigating circumstances, the appropriate punishment for

a felony conviction should depend on the seriousness of the crime of conviction when compared to all other crimes and the offender's criminal history.

(3)(e) Subject to the sentencing judge's discretion to deviate in recognition of aggravating and mitigating circumstances, the corrections system should seek to respond in a consistent way to like crimes combined with like criminal histories; and in a consistent way to like violations of probation and post-prison supervision conditions.

9. See OAR 213-005-006:

(1) If an offense is classified in grid blocks 8-G, 8-H or 8-I, the sentencing judge may impose an optional probationary sentence upon making the specific findings on the record:

(a) An appropriate treatment program is likely to be more effective than the presumptive prison term in reducing the risk of offender recidivism;

(b) The recommended treatment program is available and the offender can be admitted to it within a reasonable period of time; and

(c) The probationary sentence will serve community interests by promoting offender reformation.

(2) The sentencing judge shall not impose an optional probationary sentence if:

(a) A firearm was used in the commission of the offense; or

(b) At the time of the offense, the offender was under correctional supervision status for a felony conviction or a juvenile adjudication as defined in OAR 213-003-0001(11); or

(c) The offender's conviction is for Manufacture of a Controlled Substance involving substantial quantities of methamphetamine, its salts, isomers or salts of its isomers, as defined at ORS 475.996(1)(a).

(3) A probationary sentence imposed for an offense classified in grid blocks 8-G, 8-H and 8-I when not authorized by this rule is a departure.

Part of the problem is that of the several camps around the issue of crime and punishment, a deep divide undermines our ability to be smart about such issues. One camp—I'll use the label "anti-incarcerationists"—is fairly characterized by a strong conviction that we are in the midst of an unfortunate trend towards "mass incarceration," and that non-punitive responses are both more humane and more productive of community safety than punitive sanctions. This camp cites to a great volume of literature (produced by the bulk of academia, which is similarly inclined) suggesting that at least for many offenders, and at least as measured by recidivism *after* any jail or prison term, well designed and delivered treatment programs are substantially more likely to produce crime reduction than jail or prison (or poorly designed or delivered treatment, for that matter). There is even good evidence from this camp that punitive sanctions, as well as poorly designed or delivered treatment programs, are often associated with *increased* recidivism for at least some offenders.¹⁰

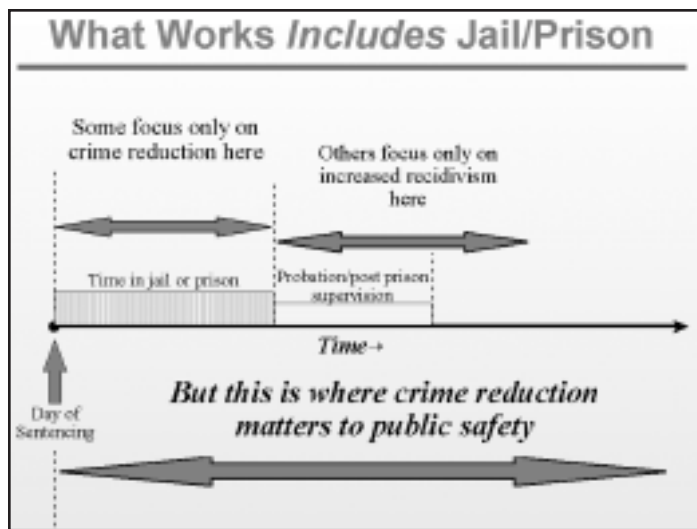
The anti-incarceration camp, however, is viewed with understandable suspicion by its opposite camp—for which I will use the label "incarcerationists"—which clings to the conviction that punishment and incapacitation offer the best road to public safety (and to just deserts) for all or virtually all offenders. The understandable part of this suspicion is that the anti-incarcerationists almost entirely avoid confronting the crime reduction touted by the pro-jail camp: people in custody simply do not commit crimes on the outside while they are inside.¹¹ This persistent avoidance of the strongest crime reduction function of "punishment" gravely undermines the credibility of most anti-incarcerationists except when they talk to each other. They are accomplished at doing that; they do a lot of good work; and they have much to teach us, but they rarely change or improve anything in criminal justice—they just publish and attend conferences to talk to teach other.

The anti-incarcerationists, for their part, are deeply suspi-

cious of the incarcerationists—whom they often deem "mass incarcerationists" or "populist punitivists," and disparage for making the United States a leader among nations in incarceration rates. The anti-incarcerationists suspect that the real agenda of their opponents is punishment for its own sake rather than crime reduction. On the other hand, some anti-incarcerationists resist careful assessment of the evidence surrounding the efficacy of incapacitation because they fear, essentially, that their opponents are correct—that the surest way to prevent crime on the outside, after all, is to lock up offenders for longer and longer periods of time.

The following graphic illustrates the divide and how both sides¹² avoid a full picture of public safety:

To make a *responsible* effort at crime reduction, a sentencing decision in which jail or prison is available must consider *both* how much crime is likely eliminated during incarceration *and* how post-incarceration criminal behavior is likely to be



10. See generally, D.A. Andrews, *An Overview of Treatment Effectiveness: Research and Clinical Principles*, Department of Psychology Carleton University, Ottawa Canada (1994); *Treatment Works for Youth in the Juvenile Justice System*, National Mental Health Association, and sources cited (<http://www.nmha.org/children/justjuv/treatment.cfm>); Mark Gornik, *Moving from Correctional Program to Correctional Strategy: Using Proven Practices to Change Criminal Behavior*, U.S. Department of Justice, National Institute of Corrections, and sources cited (<http://www.nicic.org/pubs/2001/017624.pdf>). P. Smith, C. Goggin, & P. Gendreau, *The Effects of Prison Sentences and Intermediate Sanctions on Recidivism: General Effects and Individual Differences* (User Report 2002-01) Ottawa: Solicitor General Canada, (http://www.sgc.gc.ca/publications/corrections/200201_Gendreau_e.pdf), cited in *The Effects of Punishment on Recidivism*, 7 RESEARCH SUMMARY No. 3 (May 2002), Office of the Solicitor General of Canada, (http://www.sgc.gc.ca/publications/corrections/pdf/200205_e.pdf).

11. I'll concede exceptions for the likes of Charlie Manson and organized crime bosses.

12. There is a third camp worth mentioning here; I'll call them the "managers." Their concern is short-run efficiency—literally the speed of the plea bargaining and trial process, and the economy and budgets of courts, law enforcement, indigent defense, and

corrections. They see the whole process as one calling for the control of the use of whatever resources we have, and have brought us the guidelines which generally seek to regularize the use of hard beds in proportion to crime seriousness (measured along an essentially deontological scale of just deserts) and prior criminal history, with discretion to depart based on aggravating and mitigating circumstances. They tout equal treatment and resource regulation as major accomplishments, although their success in both respects has its flaws. But they resist and avoid statutory and constitutional prescriptions to seek public safety through crime reduction because, in common with many in both other camps, they assume that "public safety" is incarceration, which they try to regulate as a matter of responsible resource management, and because they are suspicious of the efficacy of "rehabilitation." For the managers, public safety is a function of how much the public will be willing to spend on hard beds and some programs, but that is someone else's problem and responsibility: their's is to keep the system running efficiently—like public transportation officials who have no interest in what commuters do when they disembark. Of course, the managers' persistent myopia is their failure to appreciate the inefficiency of incarceration that fails to divert offenders from criminal careers and simply recycles them into the front end of the criminal justice system—after one or more new victimizations.

affected. Both camps are right, after all: longer jail sentences and prison *do* increase post-prison criminal behavior among some offenders; incarceration *does* reliably prevent criminal behavior (at least on the outside) during the period of custody—and, for some, after release. We cannot make these decisions responsibly by relying on the ideology, philosophy, or what poses as the entrenched wisdom of judges—unless of course our resulting enormous recidivism rates really are the best we can expect to achieve.

SENTENCING CURRENTLY DOES NOT ADEQUATELY ACCOMPLISH CRIME REDUCTION

It didn't take long for me to realize after taking the bench in 1990 that the first offender is a rare occurrence in our system.¹³ It became immediately obvious that most of those we sentence have been sentenced before, and that most would probably offend and be sentenced again—often having produced another victimization.¹⁴ The notion that we were actually managing criminal *careers* occurred to me early in my own career as a judge. That notion was soon followed by the suspicion and then the conviction that we could surely do a better job of diverting offenders from criminal careers if we made some substantial effort to do so—by employing data, evidence, and anything better than our various philosophies, assumptions, and untested beliefs about how people work.

Most tragic are the serious crimes. Typically, a victim has been grievously hurt, and the offender has been sentenced repeatedly before committing this latest crime, often beginning a criminal career as a juvenile. If only we had done something effective before, we might have prevented both the victimization and the years of incarceration. Though there are surely many crimes we could not have prevented, it is also certain that we have not exercised our best efforts to prevent those that we could have prevented—and highly likely that we would have diverted many offenders from criminal careers, and prevented many crimes, had we just made a responsible effort to do so.

In any event, there is no question but that recidivism rates are abysmal. There are many measures, but they surely represent the impact of sentencing that is not responsibly aimed at

crime reduction. Of the 2,395 people jailed in Portland, Oregon, during July 2000,¹⁵ 1,246 had been jailed in Portland on some other occasion within the previous 12 months. The same was true as to 22 of the 32 jailed that month for burglary, 22 of the 23 jailed for robbery, 20 of the 26 jailed for first-degree theft, 304 of the 372 jailed on drug charges, and 32 of the 39 jailed for vehicle theft. And “4% of our offenders accounted for 23% of [s]tandard bookings between 1995 and 1999.”¹⁶

Nationally, the figures are similar: the Bureau of Justice Statistics reflects that “[m]ore than 7 of every 10 jail inmates had prior sentences to probation or incarceration,” and that “[o]f the 108,580 persons released from prisons in 11 States in 1983, an estimated 62.5% were rearrested for a felony or serious misdemeanor within 3 years, 46.8% were reconvicted, and 41.4% returned to prison or jail.”¹⁷ “Sixty-seven percent of former inmates released from state prisons in 1994 committed at least one serious new crime within the following three years,” and “272,111 offenders discharged in 1994 had accumulated 4.1 million arrest charges before their most recent imprisonment and another 744,000 charges within 3 years of release.”¹⁸

Oregon's Department of Corrections publishes a recidivism rate of 30%, and a target of 28%, but these figures are profoundly misleading as they only reflect convictions for a new *felony*. This approach is typical of many state corrections departments. Almost 80% of criminal incidents involve misdemeanors, including most thefts, drunk driving, most assaults, and most crimes that affect public safety, so total recidivism after prison is quite probably at least as high in Oregon as the other statistics would suggest.¹⁹

The amount of custody available as a sentence varies as a matter of law and as a matter of prison and jail resources. As a matter of law, Oregon misdemeanors—again, almost 80% of the crimes committed in our communities—cannot result in more than one year in jail. As a matter of resource limitation, jails often release offenders well before their terms are complete simply because there are an insufficient number of beds. As a practical reality, the crime-prevention impact of custody through incapacitation may be extremely short in duration, and the possibility of any crime-increasing impact outweighing a short

13. The notable exceptions are impaired drivers and “johns” arrested for prostitution—having mistaken an undercover “prostitution decoy” for the real thing. There are recidivists among these offenders, of course, but they are relatively rare—a good thing, since they are also often quite dangerous.

14. We can choose to exclude drug crime as “victimless,” or recognize that users victimize themselves, family, or friends who care about or are dependent upon them, the communities that suffer from the public manifestations of abuse, or those from whom they may steal to support their addictions. Dealers may do all of this, and also victimize those whose substance abuse they support. Recognizing this extent of victimization, however, does not resolve whether deployment of the criminal justice system is the best way to combat substance abuse.

15. Portland Police Bureau Data Processing, August 25, 2000. The Portland Bureau of Police stopped producing these statistics in mid-2000; I am still awaiting their successor. An extract of the statistics is available at <http://www.smartsentencing.com>.

16. *The Booking Frequency Pilot Project in Multnomah County, Oregon:*

A Focus on Process and Frequencies, at i (The Multnomah County Sheriff's Office, Dan Noelle, Sheriff, in collaboration with the Multnomah County Department of Community and Family Services, Department of Community Justice, Health Department, and Corrections Health Division (January 2002)). Portland is the largest city in Multnomah County, Oregon. “DSS-Justice” is a data-warehouse-based criminal justice tool, which also supports the sentencing support tools discussed later in this paper. See <http://www.co.multnomah.or.us/dss/info/initiatives/DSSProjectOverview.shtml>; http://www.lpscc.org/dss_justice.htm; http://www.lpscc.org/docs/evaluation_capacity.pdf; and <http://ourworld.com-puterve.com/homepages/SMMarcus/SentSuptTools.htm>.

17. Bureau of Justice Statistics Criminal Offenders Statistics, found at <http://www.ojp.usdoj.gov/bjs/crimoff.htm>.

18. Bureau of Justice Statistics Criminal Offenders Statistics, found at <http://www.ojp.usdoj.gov/bjs/abstract/rpr94.htm>.

19. One measure is Multnomah County Court data showing new felony case filings in 2003 at 6,114, and new misdemeanor case filings at 23,737.

period of protection is very, very real.²⁰ As to this group, any unbiased and reasonable examination of the data about the outcomes of past sentences—particularly in connection with the abundant literature—must conclude that some offenders are more likely to be diverted from future crime with one approach at supervision, programs, jail, and other sanctions, while others are more likely to be diverted from criminal behavior by another approach. Consistently with most other human experience, different things play out differently with different people.

Even with felony crimes, we are again confronted with the reality that the far more common crimes are the least serious, for which neither the law nor corrections resources afford a great deal of potential for incarceration. Under our sentencing guidelines (which apply only to felonies), the more common, lower-level felonies (predominately including drug possession, property crimes valued at less than \$5,000, except those of “repeat property offenders,”²¹ and auto theft where the vehicle is worth less than \$10,000) are subject to a presumptive *probationary* sentence with jail not to exceed 30, 60, or 90 days.²² Prison becomes a presumptive sentence only at crime seriousness level 4 out of 11 levels (predominately including property crimes valued at \$5,000 or above, auto theft involving personal use vehicles worth \$10,000 or more, and the lowest level of drug-delivery crimes), and then only for offenders with at least two prior person felonies (or “repeat property offenders”). It is only at crime seriousness level 5 (including property crimes valued at \$10,000) that prison becomes presumptive for most felony offenders, and at 8 (including the most serious drug-dealing crimes, mid-level sex crimes, burglary of an occupied dwelling) for all. And the range of presumptive prison begins at six months and doesn’t exceed three years until we reach level 8, and then only for offenders with at least two prior person felonies. Even by departure, many of the lower-level offenses are capped at 6, 12, or 18 months. So for most felony

sentencing occasions, the opportunity to do more harm than good is entirely consistent with the recidivism data.

Even at the higher levels of felony crime, we often have substantial discretion to depart upward beyond mandatory minimum sentences, or to choose between consecutive and concurrent sentences. Our choices in this regard undoubtedly have a public safety impact—as with all of our sentencing choices. We would probably do a better job of exercising that discretion if we made some responsible effort to analyze the likelihood that offender characteristics, available programs in prison, or other variables would make one offender more likely than another to need extended incapacitation, or more likely to be safe to return to society after serving concurrent time. At the very least, our decision affects the availability of beds for those that should be locked up longer to protect society.²³

MULTNOMAH COUNTY’S APPROACH—SENTENCING SUPPORT TOOLS AND A REVISED ORDER FOR PRESENTENCE INVESTIGATION

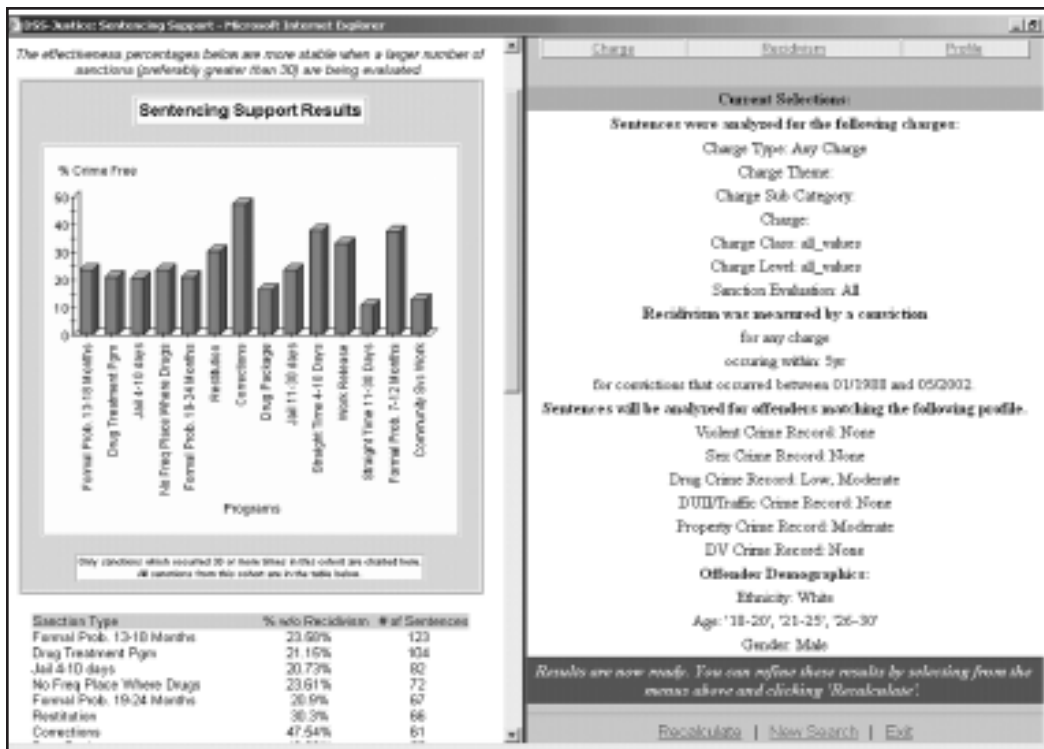
Although state law has since 1997 provided for the collection and management of criminal justice data to facilitate discovery of correlations between what we do to various offenders and their recidivism rates,²⁴ there is currently no effort at the state level to implement this function.²⁵ Multnomah County, with the assistance of a public safety technology bond issue, has constructed a data warehouse²⁶ and related criminal justice applications that provide this function to practitioners.

A user of this DSS-Justice sentencing support application (one of many criminal justice applications based on the warehouse) enters a case number and selects the charge for which a sentence is being imposed. The program constructs a bar chart based on data for the offender and the charge selected. The chart includes a bar for sentencing elements imposed on such offenders for such a charge, arrayed left to right in order of their

20. Our sentencing support data, discussed later in the text, confirms the impression of the literature that for low level offenders, short jail terms (one to five days) generally “work” better than longer ones (30 days or more) because the shorter terms are less disruptive of circumstances supportive of lawful behavior: employment, housing, and stable relationships. Higher up the range of incarceration, longer terms encourage accommodating life in custody and associating with a prison population, and are thought to enhance criminal thinking and values. See, e.g., Smith, Goggin, & Gendreau, *supra* note 10. Of course, for some offenders, good programming within prison can produce significant reduction in post-prison criminal behavior. In my view, our persistence in conducting the sentencing ritual as if crime reduction were not its purpose ultimately undermines the ability of correctional authorities to provide programs in and out of custody that would serve public safety if applied to the right offenders.
21. Oregon has adopted “repeat property offender” legislation to provide presumptive sentences of 13 or 19 months for persistent property offenders. ORS 137.717.
22. Oregon’s guidelines are accessible at <http://www.ocjc.state.or.us/SGGrid.htm> and the administrative rules are accessible at http://arcweb.sos.state.or.us/rules/OARS_200/OAR_213/213_tofc.html.
23. Even if proponents of prison can be confident in holding the line

against any reduction in the number of prison beds, economics can limit the growth in that number over time. Moreover, hard beds certainly compete with program expenditures for corrections dollars—and program expenditures, at least for some serious criminals, greatly affect the likelihood that they will reoffend when returned to their communities. Again, the trick is to aim the programs at the offenders who will benefit from them, and not to fill slots with those who will not.

24. See 1997 Or Laws Ch 433.
25. The Oregon State Police began work on a public safety data warehouse that would have eventually supported such an effort, but returned the balance of a federal grant and cancelled the project rather than come up with matching money in the early days of Oregon’s current budget crisis.
26. A data warehouse automatically collects copies of data stored in multiple systems, and stores the resulting information in a form and structure designed to facilitate analysis that would otherwise require separate access to each of those systems and manual compilation of reports. Multnomah County’s “DSS-Justice” data warehouse, constructed and maintained under the auspices of the Multnomah County Local Public Safety Coordinating Council, is refreshed nightly from the source systems, and supports a host of applications for criminal justice partners. See http://www.lpsc.org/docs/overview_dss-j.pdf.



Screen Shot of a Sentencing Support Display

declining frequency.²⁷ Each bar reflects the proportion of those receiving that sanction who were free of any new conviction for a similar crime within three years. Note that this approach displays incarcerative and non-incarcerative sanctions side by side, measured by precisely the same test.

The right side of the screen displays the variables upon which the bar chart is based. By default, the user's choice of crime for sentencing yields a variable that chooses one of six categories of crime as a "similar crime." For example, choosing first-degree theft yields a default of "property crime," so that the program is analyzing sentences imposed on similar offenders for any property crime. By default, a "similar offender" is one who has a similar criminal record and similar demographics (age, gender, and ethnicity). A "similar" criminal record is one that reflects the same rating, from "none" to "severe," in each of six crime categories: violent crime, sex crime, property crime, drug crime, major traffic crime (including impaired driving), and domestic violence.²⁸

Users can modify all of the variables and generate a new bar chart in seconds. For example, if we are dealing with a common cohort, we may be able to focus on only those offenders sentenced for the same crime as the offender before the court, so the program allows a user to change "property crime" to "Theft I." If the offender's cohort is less common, we may have

to expand it to compare offenders, like the one before the court, who have been sentenced for any crime. We may want to focus on those sentenced for felonies or only Class A felonies to distinguish among levels of drug involvement. We may also want to modify what we mean by "similar" offender. For example, the prosecutor may provide evidence of a criminal record from outside the data known to the tools. A user can access "profile" to revise the criminal history ratings in each of the crime categories. In a similar fashion, the user can correct age or even gender errors, or broaden or eliminate the "profile" categories to analyze a broader cohort.

Finally, users can modify the outcome measure. The default measure of recidivism is a new conviction for a similar crime

within three years. Users can specify instead conviction for a specific crime, for "any crime," or for a crime in any of the six crime categories. Users can also modify the period during which recidivism is tallied (six months, three years, five years, or any time since sentencing), and can choose to focus on arrests instead of convictions (particularly useful in domestic violence cases).²⁹

The point of all of this is not to rely upon technology to select a sentence, but to focus the attention of the sentencing process on public safety through crime reduction. Of course, the tools cannot tell us with whether the results were *caused* by the disposition, or if variables unknown to the program account for disparate results. But they give us a good look at our past results, and provide far more information than ever before available. More importantly, they focus the attention of the participants on crime reduction. Just as sentencing guideline grids, carried dutifully by practitioners into every courtroom, ensure the presence of the ephemeral calculus of guideline sentencing, sentencing support tools can encourage all to remember that we are supposed to be seeking crime reduction. With that focus, advocates and probation officers can supplement the data available from sentencing support tools with information about the offender's particular circumstances or treatment history, the availability or not of local community-based or custo-

27. Bars display only for those sentencing elements that have been imposed at least thirty times for the cohort in question, but a table below the bar chart displays all data for all elements imposed for the cohort. The thirty-occasion minimum discourages predictions based on insufficient data.

28. Data rules determine whether a given criminal history receives a rating of "none," "low," "moderate," "major," or "severe." In all

but domestic violence, only convictions count; arrests not followed by dismissal for want of merit (as opposed to mere loss of victim cooperation, for example) do elevate a domestic violence rating. The rules are accessible at http://www.ojd.state.or.us/mul/marcus_crimehemegrid.pdf.

29. A step-by-step description, with screen shots, and a link to a user manual are available at <http://www.smartsentencing.com>.

dial programs, or with research germane to a particular sentencing analysis.

As part of the same effort, we have begun building a new partnership between the courts and probation officers, encouraging officers to discuss their assessments and expertise around the literature of criminology and corrections with courts on the occasion of probation violation allegations. We have added a box to the standard order for a presentence investigation, requesting that the report include “analysis of what is most likely to reduce this offender’s future criminal behavior and why, including the availability of any relevant programs in or out of custody.” Pre-sentence investigation writers now regularly include an analysis of what is most likely to work, citing literature and sentencing support results to the court.

PROPOSALS FOR IMPROVEMENT

I have made some additional proposals to the Adult Sentencing Subcommittee and to the Public Safety Review Steering Committee, generally intended not as changes to substantive law but as strategies for increasing the focus of advocates and decision makers on the issue of crime reduction. Specifically, I proposed that data and research concerning crime reduction be expressly³⁰ recognized as a consideration in departures under the guidelines, decisions whether to impose consecutive or concurrent sentences, whether to “remand” a juvenile to adult court,³¹ and whether to continue, modify, or revoke a juvenile or adult probation. Because of suspicion of “research” and researchers in some quarters, these proposals remain on the table so far only because references to “data and research” have been replaced with references to “reduction in criminal conduct and crime rates.”

Another proposal still on the table³² is that the legislature direct the Criminal Justice Commission to explore the feasibility of incorporating crime reduction into the contours of the sentencing guidelines—which presently are organized around just deserts, criminal history, and prison resources to the virtual exclusion of crime reduction. It has been my position since the

guidelines were first under discussion that a sentence most likely to result in crime reduction ought to be the presumptive sentence absent a substantial and compelling reason to seek some other purpose—but merely *adding* crime reduction to the mix that determines what is a “presumptive” sentence would be a profound improvement.³³

Other proposals may find their way to other subcommittees of the Public Safety Review Steering Committee: that the Department of Corrections be directed to include misdemeanors in their published recidivism rates; that the statute governing presentence investigations be amended along the lines of Multnomah County’s modification to the form for ordering such investigations; that other counties somehow be encouraged to emulate Marion County’s “Project Bond;”³⁴ that probation officers’ roles be modified along the lines encouraged in Multnomah County.

But my overall hope is that this work actually produce something of real magnitude. If all we accomplish is some minor adjustment to a system that produces the recidivism I have described, we will not begin to reach our true goals. We may make some real progress by pursuing the sort of strategies I have suggested.

OBJECTIONS TO AND CONCERNS ABOUT THIS APPROACH

Subcommittee participants and others have raised a variety of objections and concerns about injecting crime reduction analysis into sentencing, plea bargaining, probation, or other criminal justice functions.³⁵ A discussion of a few follows. Of course, Oregon law *requires* that we consider public safety in sentencing. Whether or not we do so, however, our choices have outcomes in the sense that some choices will not prevent future victimizations while others may; our present performance is abysmal when measured by public safety. Trying harder to achieve best efforts should help. Avoiding those efforts certainly will not.

30. The law surely does not forbid consideration of public safety implications when a judge exercises discretion in any of these areas, but participants rarely address those implications. The hope is that when public safety impact is an expressly articulated consideration, it will receive more frequent attention than when its role is merely permissive and implicit.

31. The proposal would not affect the *automatic* remand of juveniles whose crimes and ages fit within mandatory minimum sentencing provisions introduced by “Ballot Measure 11,” ORS 137.700.

32. One withdrawn proposal is for resurrection of the Public Safety Data Warehouse and replication statewide of the Multnomah County sentencing support application. It was clear that this failed the “reasonably available economic resource” test in this budgetary climate.

33. There are endless possibilities, ranging from the modest to the comprehensive. In one real sense, making crime reduction impact an express consideration for departures would itself add a public safety dimension to the guidelines. The availability of a program in the community (or in custody, for that matter) that is more likely than other sanctions to reduce recidivism could be a consideration for all sentences that approach the divide between

presumptive prison and presumptive probation—or indeed, for all sentences. And it might make sense to use a risk prediction instrument to posit a presumptive period of incarceration for all crimes for which incarceration is plausible; it makes no sense to ignore psychopathy around violent crime in particular.

Ideally, within the limits of proportionality, risk prediction and assessment, criminogenic factor analysis, and resources would drive the articulation of a presumptive sentence for all crimes and criminal histories, with departures based on compelling and substantial reasons to forfeit crime reduction for some other purpose becoming the exception. But a journey of ten thousand miles begins with a single step.

34. “Project Bond” is an undertaking promoted by Circuit Judge Pamela Abernethy of Marion County. Based on literature documenting the crime-reduction efficacy of such intervention in the target “at risk” families, this effort involves adult offenders, whose household includes very young children, in parenting education and appropriate social services.

35. Space does not allow a full consideration of all of these, but most are considered at length on the “Frequently Asked Questions” page of my website at <http://www.smartsentencing.com>.

Concerns about the impact on the length of custodial sentences or the severity of sentences

As might be expected, one camp fears that adding any subject to sentencing analysis just provides another opportunity to find some excuse for a lighter sentence, while the other camp fears that pursuit of crime reduction will result in longer sentences. The combination is a de facto collusion in favor of the pursuit of other objectives, or a pursuit of crime reduction devoid of information. Whatever might be said of a system with unlimited jail terms and beds, for the vast majority of our sentences, law and resources make sentences long enough in their own right to achieve sustained crime reduction *simply unavailable*. Smarter sentencing for most occasions means using scarce resources more intelligently—using longer terms on those whose criminal behavior is best reduced with longer terms, and shorter terms with effective programs and treatments for those whose crime reduction is best achieved by that approach. Smarter sentencing does not inherently increase or decrease the total amount of jail and prison time served by offenders—its function is to make the allocation of that jail and prison time more efficiently productive of crime reduction through more intelligent decisions about which offenders to imprison for longer terms and which for shorter.

As to longer terms and more serious crimes, the stakes increase but the principles do not vary. Whether to run sentences consecutively or concurrently has a real public safety impact as to an offender's likelihood of reoffense. This decision also has a real impact on the distribution of prison resources—hard and soft—which in turn impact our success at crime reduction for other offenders. Making these decisions without attention to and information concerning crime reduction can only undermine their accuracy.

To those who favor prison I suggest that we have to face the reality that we cannot use it forever on everyone, that we must responsibly allocate what resources we have to achieve the greatest public safety, and that we must use intelligence and scarce resources—including alternatives, treatment, and programs as well as incarceration—to achieve our best efforts at diverting an offender from crime *before* the next victimization. If prison is always best, carefully examining the data should generate more support for hard beds.

To those who disfavor prison, I suggest that the limitation of jail and prison time at the lower levels provides the best opportunity to establish and exploit the efficacy of responsible treatment, that demonstrating *within the criminal justice process* the crime reduction impact of these approaches can only build support for improved and expanded treatment and alternative

resources. The public cannot be expected to relax the security it believes that it has gained from mandatory imprisonment until and unless it has been convinced that public safety is reliably achieved for some through other approaches.

Indeed, both camps are right about different offenders. The real question is which ones—and we cannot expect to answer that question without information.

Concerns about the impact on the “other purposes” of sentencing

Although we now may speak of “protection of society, personal responsibility, accountability for one's actions and reformation,”³⁶ these overlapping objectives capture but do not displace the traditional purposes of retribution, rehabilitation, deterrence (general and specific),³⁷ and incapacitation. Oregon law already identifies most of these as tools of crime reduction.³⁸

Although retribution per se has no purported role in crime reduction (outside the scope of the death penalty), the remaining functions are clearly not “displaced” just because we consider public safety. And to whatever extent general deterrence actually works to control crime, retribution obviously overlaps that function, as does any substantial sanction. My experience is that the overwhelming majority of cases evidence no tension whatever when we consider first our best public safety result, and next the remaining concerns. That which is best for public safety usually satisfies any need for denunciation, victim satisfaction, rehabilitation, or confinement. It is also my experience that many victims who exercise their right to be heard at sentencing spontaneously articulate the objective of preventing others from suffering a loss, injury, or other victimization at the hands of the offender.

There are some significant exceptions of course. Classic are the social drinker who kills a stranger while driving and in fact swears off alcohol for life as a result, or the truly opportunistic, intra-familial sex offender who will indeed benefit from treatment and avoid recidivism under supervision. Social and victim needs may well eclipse any sentence based on crime reduction alone in these and other cases. But my proposals do not urge or require that we abandon the “other purposes” of sentencing when they in fact conflict with best crime reduction practices. In the vast majority of cases there is no conflict. In those in which crime reduction conflicts with some other purpose, our task is to make the best choice—which may require displacing crime reduction as the primary objective of a sentence. That is no excuse, of course, for abandoning crime reduction as our lodestar in all other cases.

36. Or. Const, Art. I, § 15.

37. Specific deterrence is the effect on the offender who is punished, with the assumption that an offender will avoid behavior in the future that resulted in punishment in the past. General deterrence is the effect on potential offenders in general—the prospect of being punished makes some of these decide not to commit crimes they otherwise would commit. I suspect that the efficacy of specific deterrence is minimal to none for most offender cohorts, as poignantly demonstrated by persistently punished offenders. The literature around specific deterrence suggests that for some cohorts, punishment *increases* recidivism—at least as

measured *after* incapacitation, but it clearly appears to work on others. Literature suggests (albeit essentially on an a priori basis, hypothesized with the use of economic models) that any efficacy of general deterrence depends on the certainty and swiftness of a sanction—not its severity.

38. ORS 161.025(1)(a) provides that criminal sentences seek “[t]o insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized, the correction and rehabilitation of those convicted, and their confinement when required in the interests of public protection.”

Concerns about the competence of the participants and the reliability of risk prediction

Opponents of risk prediction by judges or with sociological instruments deem incapacitation in the interests of crime reduction “preventive detention” to disparage it, and point to literature stressing the “false positives” of incarcerating those who in fact would not reoffend if unconfined. Proponents of incapacitation for public safety insist that incarceration is the most reliable means of crime reduction while an offender is locked up, and fear that *releases* based on risk prediction will (as they have) produce “false negatives” in the form of victimizations, including rape and murder. Academics fear that judges and lawyers are not up to the task of handling this level of information.

Again, if the measure of success is crime reduction, we are doing a terrible job in light of our recidivism data. Determining the length of jail or prison terms by some measure *other than crime reduction* cannot improve its success at crime reduction. In other words, we surely have more “false positives” in terms of locking up those whose incarceration is not necessary for crime reduction if we do not even consider crime reduction in the mix—at least in the context of the nation with the highest rate of incarceration in the Western world. Those who fear “false positives” would change the definition of error, not improve our ability to avoid it. They also miss this important point: an offender who has committed a serious crime and represents a substantial risk of reoffending may and should be considered for longer incapacitation even if we cannot be certain he will reoffend.

As to false negatives, they, too, must be higher if we ignore information than if we make an attempt to use it wisely. After all, we almost always impose less than the maximum sentence, jail authorities are often forced to release many before the imposed sentence is served, and most offenders are released before trial. Indeed, jails already use risk-prediction instruments and matrices for these decisions, and are probably doing a much better job of keeping the worst offenders in custody than we would left to our own devices. Sentencing with knowledge of the matrix release realities, and with information upon which to exercise our own best efforts is more likely to reduce false negatives than rejecting the role of risk assessment and continuing the status quo, resulting in shorter than maximum terms, matrix releases free of the crucible of the adversarial process in court, and pretrial release compelled by limited jail space.

Academics worry that lawyers and judges are not up to this kind of work. Put aside that judges often resolve battles of experts—who often cite research—in litigation involving malpractice, product liability, and intellectual property rights. The fact is that most judges already try to choose sentences that may reduce crime, and many lawyers join in with snippets of wisdom or folklore about what works or not: “Do not lock up my client so long that he will lose his job; we all know that unemployment is criminogenic.” We are making decisions *daily* with this level of discussion and thought. Surely our results would be improved with increased attention to the data and to the literature, and increased application of competent advocacy to the examination of any such proposition and its application to a given offender.

If we disqualify participants from this subject, we certainly cannot expect best efforts or best results from the process.

Concerns about the reliability of research and data

The most extreme resistance to research takes the form of rejection of virtually all research as imperfect because it fails to follow the ideal research design of random assignment control group analysis. Even assuming it were somehow feasible to subject every sentencing option available in every jurisdiction to such a study, refusing to allow any increased attention to public safety or involvement of data and research in sentencing decisions until those studies were complete is itself wholly irrational. We are not assessing sentencing as a possible activity pending due diligence as to whether it should be done at all—sentencing is under way, daily, with demonstrably dangerous results. Those who insist on ideal research before using any research or making a better attempt at crime reduction hold their own views to no such standard (citing, for example, correlations between prison bed numbers and crime rates as proof of the efficacy of jail and prison). They surely offer no research—ideal or otherwise—to argue that continuing on our present course is more productive of public safety than making our best efforts with imperfect information. Moreover, what matters is what works on which offenders, and the best of studies will always leave unanswered the question why even a sanction that works so does on some but not all members of the group that proves “success.” True, we need to be critical and to recognize the limitations of predictability, the flaws in research, and the great deal we do not know. Demanding that the adversarial process employ information and address the goal of crime reduction is surely more likely to do a better job of reducing recidivism than awaiting perfect research while making no informed or serious attempt meanwhile to achieve smarter sentencing.

Concerns about the energy and time smart sentencing would demand

Judges, prosecutors, and administrators are concerned with how long hearings take, and are concerned that any change will increase the inefficiency of the process—on a case-per-unit-time basis. They fear that any attention to crime reduction will necessarily result in protracted hearings with experts, additional indigent expense funds to pay for them, and clogged dockets. It seems to be in the nature of social activities that they take on a life and meaning of their own, and that as participants we find ourselves blithely accepting the needs of the system rather than focusing on its public purposes. Managers of public transportation want the trains to run on time, but pay little or no heed to what the passengers do when they get where they are going. Likewise a criminal justice system that looks from the inside as if the highest objective is to resolve as many cases as quickly as possible, with plea bargains, jury waivers, truncated evidence—whatever it takes. Presiding judges and court administrators, supervising defense and prosecution attorneys, do not ask us how just a result we have facilitated, and they certainly do not ask how effectively we have reduced criminal behavior.

All that being said, there is nothing about considering crime reduction that takes it outside the normal systemic factors that determine how much energy a topic actually receives from the process. At the high-volume end of the system, where cases are negotiated in minutes, we can only expect fleeting references to the notions of criminogenic factors and incapacitation. Practitioners can gradually become more fluent in what we

know about which offenders, just as they do now on topics such as the latest alternative sanctions, jail practices, suppression case law, or changes in local court procedures. As they do so, they can replace some verbal content of typical plea negotiations with growing attention to routine factors affecting best crime reduction practices in a given set of circumstances—and they can do so without losing anything of value in the discussion, without adding to the duration of the exchange, and with some increased hope of improving the likelihood that a resulting sentence will actually prevent future crime.

At the other end of the spectrum, we already have hearings with experts and what amounts to risk assessment in death penalty and dangerous offender proceedings. There is room for varying levels of intensity in the consideration of relevant sentencing data and research along the entire spectrum of criminal practice; there is no level at which its increased presence would be unlikely to improve our public safety performance. Yes, we could afford to spend a bit more time and energy seeking smart sentencing across that range. But even if reducing the human cost of victimizations is not enough to convince the managers, this should be: The biggest inefficiency of time and resource is the persistent offender; to the extent that smart sentencing offers an opportunity to divert offenders from criminal careers, even managers should at least take heed that speed is not our most important product.

CONCLUSION

Oregon's governor gave his steering committee an ambitious charge—to ask “whether the system we have in place sufficiently protects Oregonians” and, if not “to look for short and

long-term strategies to make the system stronger.” The recidivism we produce by doing things the way we have been doing them answers the first question unambiguously. The strategies proposed here would make the system stronger by encouraging practitioners to bring crime reduction into actual focus in criminal sentencing proceedings.

Others may have better or additional strategies. But merely looking for places to tweak the skirmish lines among those who favor custody, those who fear mass incarceration, and those who mostly manage can never yield the substantially better results the public needs and deserves. Our public safety problem surely includes persistent offenders and pervasive recidivism. Can smarter sentencing not be among the responses?



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Craft Robe Ad

Racial and Ethnic Bias in the Courts: Impressions from Public Hearings

Elizabeth Neeley

Attitudes toward the courts can affect the way individuals perceive their role in the justice system: their willingness to comply with laws, report crimes, file legal suits, serve as jurors, and so on.¹ In short, a positive public perception of the courts is “critical to the maintenance and operation of the judicial system.”² Given the import of these perceptions, a substantial body of research has examined the factors that explain differing levels of support for the court system.³

Although many of these studies examine national samples or examine attitudes toward the U.S. Supreme Court, it is beyond the scope of those findings to measure attitudes toward state and local courts. Prior research shows that there is often an aura of remoteness concerning the U.S. Supreme Court, whereas state and local courts are not only more visible, but have a direct effect on citizens’ everyday lives.⁴ This is consistent with research by Tom Tyler, who found that personal experiences with legal authorities affect an individual’s evaluations of those entities.⁵ Additionally, state-level data can improve on nationally aggregated data, which can mask important differences and issues between states.

Of primary interest to this article is the role that race and ethnicity play in explaining varying levels of support. Research has shown that racial and ethnic minority groups in the United States hold more negative perceptions of the justice system than do whites.⁶ Although these studies have been successful at identifying different perceptions toward the courts (in terms of fairness, differential treatment, access to services, etc.) between whites and minority group members, the quantitative nature of these studies fails to provide insight into why these perceptions exist.

The present study expands upon past research on minority’s perceptions of the justice system by employing a qualitative methodology, allowing participants to explain in their own words their lived experiences and to express their perceptions of the justice system without the confines of a survey instrument.

In 2002, the Nebraska Minority and Justice Task Force, an organization established by the Nebraska State Bar Association and the Nebraska Supreme Court, conducted a comprehensive examination of racial and ethnic bias in Nebraska’s justice sys-

Footnotes

The author expresses her appreciation to the Nebraska Minority and Justice Task force for the use of their data and to Judd Choate, the Hon. John Gerrard, Jane Schoenike, and Alan Tomkins for their reviews of a draft of this article.

1. See Sara Benesh & Susan Howell, *Confidence in the Courts: A Comparison of Users and Non-Users*, 19 BEHAV. SCI. & LAW 199 (2001); Timothy Flanagan, Edmund F. McGarrell, & Edward J. Brown, *Public Perceptions of the Criminal Courts: The Role of Demographic and Related Attitudinal Variables*, 22 J. RES. CRIME & DELINQ. 66 (1985).
2. See Flanagan, *et al.*, *supra* note 1, at 66.
3. See Benesh, *et al.*, *supra* note 1; Flanagan, *et al.*, *supra* note 1; Gregory Caldeira, *Neither the Purse nor the Sword: Dynamics of Public Confidence in the Supreme Court*, 80 AMER. POL. SCI. REV. 1209 (1986); Tom Tyler, *Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want for the Law and Legal Institutions*, 19 BEHAV. SCI. & LAW 215 (2001).
4. See Benesh and Howell, *supra* note 1.
5. See Tyler, *supra* note 3.
6. An excellent overview of the differing views of whites, African-Americans, and Hispanics on the court system, based on a 1999 survey of 1,826 U.S. residents, is found in David B. Rottman & Alan J. Tomkins, *Public Trust and Confidence in the Courts: What Public Opinion Surveys Mean to Judges*, COURT REVIEW, Fall 1999, at

24. For other resources, see Richard Brooks & Haekyung Jeon-Slaughter, *Race, Income, and Perceptions of the U.S. Court System*, 19 BEHAV. SCI. & LAW 249 (2001); Caldeira, *supra* note 3; Flanagan, *et al.*, *supra* note 1; Rodolgo O. de la Garaza & Louis DeSipio, *A Satisfied Clientele Seeking More Diverse Services: Latinos in the Courts*, 19 BEHAV. SCI. & LAW 237 (2002); NATIONAL CENTER FOR STATE COURTS, HOW THE PUBLIC VIEWS THE STATE COURTS: A 1999 NATIONAL SURVEY (1999) [hereinafter, 1999 NATIONAL SURVEY]; DAVID ROTTMAN & RANDALL HANSEN, HOW RECENT COURT USERS VIEW THE STATE COURTS: PERCEPTIONS OF WHITES, AFRICAN-AMERICANS, AND LATINOS (2002) [hereinafter, *Recent Court Users*]; ROTTMAN, DAVID, ET AL., PERCEPTIONS OF THE COURTS IN YOUR COMMUNITY: THE INFLUENCE OF EXPERIENCE, RACE, AND ETHNICITY (2002); Tyler, *supra* note 3; BRYAN VARGUS, ET AL., PRELIMINARY REPORT FOR THE NATIONAL CENTER FOR STATE COURTS (2000).

These findings have also been confirmed for the state in question, Nebraska. See NEBRASKA MINORITY & JUSTICE TASK FORCE, FINAL REPORT (2003) [hereinafter, FINAL REPORT]. In 2002, Nebraska’s Minority and Justice Task Force replicated a study conducted by the National Center for the State Courts, see Rottman & Tomkins, *supra*, and 1999 NATIONAL SURVEY, *supra*, examining Nebraskan’s perceptions of the courts. Findings showed that in Nebraska, blacks, Native Americans, Hispanics, and non-English speakers were perceived to receive worse treatment by the courts than white Nebraskans. Additionally, minority groups were less likely to agree that courts were fair to minority Nebraskans. FINAL REPORT, *supra*.

tem. As part of their research program, the task force held eight public hearings in five cities across Nebraska between January and May of 2002 to obtain public perceptions about the courts. Data for this article are based on testimony obtained from these public hearings.

Public-hearing participants were asked to provide testimony related to their experiences, perceptions, and concerns with racial and/or ethnic bias or discrimination in Nebraska's court system. Participants were also encouraged to suggest recommendations for correcting racial and/or ethnic bias or discrimination in Nebraska's court system.⁷

Persons not willing to make public statements were encouraged to give private, one-on-one testimony, also provided for at each public hearing site. In addition to verbal testimony, written testimony also was solicited. The task force publicized the opportunity to submit written testimony in mainstream and nontraditional publications as well as noting it in the promotional campaign for each public hearing.

I. THE CONCERNS OF MINORITY RESIDENTS IN NEBRASKA

Several issues emerged as significant concerns across all nonwhite racial and ethnic groups. These concerns are differential sentencing and acquiring quality legal services. Other issues were of concern only to specific minority groups.

CONSISTENT CONCERNS OF NONWHITES

Differential Sentencing

One of the dominant themes to emerge from the public hearings was the perception that minorities receive harsher sentences than whites. This belief was held for all sorts of decisions made in the legal process, including the decision to prosecute, the setting of bail/bonds, length of sentence, and so on. One woman from eastern Nebraska described her observations this way:

When I sit through criminal trials—and I started when I was in college and I continually do it—do you want to know who is prosecuted, who gets bail, who is convicted and how long the sentence is? Each one of you know that. You know that it's the people of color who receive the longest sentence, most likely to be convicted, either get excessive bail or no bail, because half the time they're not able to make it, and who are prosecuted.

Some participants believed that differential treatment initially occurs when charges are filed (prosecutorial discretion). For example, several respondents reported the perception that due to the vagueness of the habitual criminal charge this charge is arbitrarily used against minorities. Similarly, one Nebraskan also described how the second-degree murder statute is misused:

The law allows an arbitrary choice between conviction for the crime of second-degree murder and manslaughter.

ter upon a sudden quarrel...The effect this problem has is to arbitrarily choose between convicting someone for second-degree murder or only for manslaughter. It is possible for the authorities to choose to prosecute and convict minorities of second-degree murder (with its greater punishment) and prosecute and convict non-minorities only of manslaughter.

One of the dominant themes to emerge from the public hearings was the perception that minorities receive harsher sentences than whites.

It is statements such as these that suggest that prosecutorial discretion is perceived as a mechanism of discriminatory treatment.

According to testimony, differential treatment also plays out in the setting of bail and/or bond. Several participants believed that judges give larger bonds to minorities than they do whites:

One of the things that I'm really concerned with here in Hall County is bonds and bails with the court system. It seems that frequently Latinos will get picked up for crimes—and I'm not making excuses for anybody's crimes or trying to stand up for those in that way. But it just seems that often people are getting bonded out or bailed out of jail with really excessive, excessively high bails. And comparing it to crimes that are committed by Anglos that live in the community and the bonds are much, much less.

Additionally, differential sentencing was also a primary concern across nonwhite racial and ethnic groups. To one man from Omaha, differential sentencing was evident not by examining specific cases but by the disparate incarceration of individuals of color:

There are two types of profiling: Police and judicial. Well, how can there be—what is it now—about 70 percent, of the African-American population at the penitentiary in Nebraska? About 75 percent in Douglas County. Now, isn't it strange that you have, for a state with less than 4 percent [black] population, but in the penitentiary, 65 to 70 percent. Now, are we to believe that African-Americans are that bad in Nebraska? I don't think so. I think that's why we are hearing that the court system would have that one person commits a crime, is African-American, gets a sentence, the white person doesn't.

There was also a specific concern with differential outcomes in juvenile court. Differential sentencing at this age has the potential to profoundly impact juveniles by establishing a crim-

7. Spanish language interpreters were available at each public hearing so that testimony in both Spanish and English could be obtained.

A second dominant theme . . . was dissatisfaction with legal services.

inal record that will follow them into adulthood. This is especially the case for juveniles tried in adult court, one citizen argued:

Juveniles of Afro-American or Hispanic, Latino are more apt to be sent to a correctional facility than any white youth. And

you can take two cases, and the same situation, and you can know which one is going and which one is staying because this one will need—"Let's give him some assistance, let's give him some inpatient care, let's do this." When you have cases which is determined should it be as a juvenile or an adult, as many as 99.9 percent of the time, if it is a young person of color, you know how they are going to be judged, in the adult court.

Legal Services

A second dominant theme to emerge from public-hearing testimony was dissatisfaction with legal services. Issues of concern included the availability of low-income services; the reliance on public defender services; and dissatisfaction with the plea-bargaining system.

Testimony suggests that there are not sufficient resources in Nebraska to provide legal aid to low-income individuals. A representative of Nebraska Legal Services⁸ described the lack of available legal help for low-income groups:

At Legal Services I spend most of my time telling people, no, I'm sorry, I can't help you. We've just become this huge rejection line. And that's because we have the funding and the staff and the resources to serve about 15 percent of the need. So I spend my time turning 85 people out of a hundred away who all have legitimate legal problems where a remedy at law or in equity exists for them but there's just no time, no money, not enough money to represent them. And when that number of people get turned away they have two choices, you know, they can just do nothing or they can try to defend themselves. If they do nothing, what happens generally is people become very hopeless and they give up on the system and huge amounts of potential are lost. If they try to represent themselves, you're going to see frustration . . . because they can't do it. They just don't have the training, the experience, the ability to do it themselves.

Cost appears to be a significant barrier to gaining access to legal representation. For instance, many participants hold the perception that quality legal services are directly affected by one's ability to pay. So, when arrested and charged in a criminal matter, many low-income minorities must rely on the services of public defenders. Unfortunately, the task force

received many comments voicing minority-group dissatisfaction with public defender services:

I have been to many, many people who have public-appointed attorneys, and almost 90 percent walk away feeling that they have not been served. We have a problem in terms of feeling that we are being treated justly.

An individual from eastern Nebraska elaborates on this sentiment toward public defenders:

I have sat through those court trials and I have seen our county prosecutor go up and make their comments, and a defending public defender, which, when it comes to people of color . . . it is so poor that they should be ashamed to even call it defending. You have inadequacy, you have those who have no compassion, and their purpose is—and I have heard them say, "He's guilty," and you are talking about the person you are supposed to be defending.

Several minorities of limited income relayed their specific dealings with court-appointed counsel. They believed that their court-appointed counsel did not work for their best interest or care about their case outcomes:

She assured me that if I pleaded guilty to two zero-to-five [year] felonies and eight zero-to-one [year] misdemeanors that I would receive no more than four to eight years due to the fact that they were not violent crimes. Well, on sentencing day I received 20 months to five years on each felony and six months to a year on each misdemeanor, all to be ran consecutive to one another. When I looked at my attorney she didn't look one bit surprised and packed up her briefcase and left without saying one word to me. I know that if I had money to obtain a prestigious lawyer I wouldn't have received that sort of sentence and if I was white I would not have received that sort of sentence.

Other individuals felt trapped by the insistence of lawyers to plea-bargain rather than devote time to their case. There is a general belief that the court is more concerned with closing cases quickly than in the administration of justice.

Many recommendations to improve the situation were offered. Solutions centered on increasing the amount of services available to low-income individuals. Participants suggested that this could be accomplished, in part by providing public defenders and other attorneys who dedicate themselves to a life of public service with competitive salary and retirement benefits and a loan forgiveness program. Additionally, participants argued that resources should be made available to aid individuals who choose to represent themselves pro se.

GROUP-SPECIFIC CONCERNS

A number of the themes emerged that were concerns specific to certain racial and/or ethnic groups. It is likely that minority

8. Nebraska Legal Services (NLS) is a nonprofit organization that provides free civil legal assistance to low-income Nebraskans.

NLS does not take criminal cases, so all references to NLS regard civil remedies.

groups' different views of the court system are based on group-specific experiences. For instance, a dominant theme to emerge from Latino/Latina populations was interpreter services. For Native Americans, jurisdictional issues were of primary concern. In addition to an overwhelming amount of testimony concerning the police (which is beyond the scope of this project on the courts), blacks were particularly concerned with the justice system's workforce being representative of the population (from justice system employees to representative juries). Descriptions of these group-specific concerns are revisited here.

Latinos/Latinas: Interpreter Services

Hispanics who took part in the public hearings expressed great dissatisfaction with interpreter services in Nebraska, including a lack of certified interpreters, the prevalence of misinterpretations, the lack of interpreter services both prior to and following court appearances, how interpreter services are compromised by an insistence on moving cases quickly, and a general lack of knowledge about courts and legal proceedings among new immigrants.

At present, there are only 11 certified court interpreters in all of Nebraska, making it nearly impossible for courts to utilize certified court interpreters in all cases. When certified interpreters are not available, respondents expressed concern about the quality:

When I first came here, anybody could be an interpreter in the court, and many times the court didn't bother to get qualified people for the court. And anybody that could, just because they spoke a little Spanish, was considered a competent translator or interpreter. And many times none of these people had any idea what they were doing.

It was not uncommon for people to report that children were providing interpreter services. As a Macy resident reported being told:

"I don't care, bring your friend, your cousins. Don't your kids speak both languages? Bring one of them." Well, what if the child is eight years old? How many of you would like to find yourself having violated a law in another country and have your eight-year-old child interpreting for you what's going on?

Additionally, the lack of available interpreters for certain languages—combined with an increasing number of dialects being spoken in the state—leads to situations in which more than one interpreter is needed. Not only is this process time consuming, it is likely that meaning is sometimes lost in translation:

I recently heard that in Hall County they needed—they had to go find a person that spoke Mayan and Spanish and then another person to speak Spanish and English to relay the information. So [as] anyone . . . who has worked with an interpreter or through an interpreter [knows], it is very true when you hear that something is lost in the translation.

Many incidences of incorrect translations were also reported across multiple public-hearing sites. As an individual from

western Nebraska explained:

I think that judges and all others involved in the judicial process should be more conscientious about this issue. I think that if they were able to understand the interpreters and what they were saying they would be appalled. I feel that if the transcribed recordings were to be played back and a competent interpreter were to listen to the interpretations he would find a lot of shocking misinterpretations and misstatements and it just appears that people just don't care.

It was not uncommon for people to report that children were providing interpreter services.

Several individuals believed that courts simply were not concerned with providing quality interpreter services. One court interpreter reported a particularly egregious situation:

And he [the judge] yelled at me right there in front of the court and he said, "I don't care if she doesn't understand what's going on. I don't have time to piss around with this." That's exactly how he said it. He said, "If she doesn't understand, that's her problem. I need to move my cases in a hurry." And I remember that because I was very upset, because that told me that the judge did not care if this lady knew what was going to happen to her or not, he just wanted to move the cases.

Native Americans: Jurisdiction over Sovereign Nations

Many Native American respondents were concerned about cross-jurisdictional problems related to sovereign lands. Nebraska has two sovereign territories in northeastern Nebraska (as well as another in northwest Nebraska that, unfortunately, was not visited in the public hearings). Citizens of these nations argued that often law enforcement officers as well as the courts use jurisdictional differences as reason to hold Native Americans for charges unworthy of bond. One Native American participant described the potential for conflict:

I am not sure about the judges. There has always been a jurisdictional problem here in this county with regards to who has jurisdiction over what area and where, whether it be the county roads, whether it be the state roads or whether it be private property or trust land. I know there seems to be a big division on that interpretation right now. Although it has not really come to a head yet.

Jurisdictional issues have extended into the justice system, creating barriers to access, particularly for Native Americans. For example, jurisdictional disagreements have created situations where criminals go uncharged. Additionally, jurisdictional disagreements sometimes have impacted a prosecutor's willingness to proceed with charges even in the most severe situations.

Blacks: Representation in the System

A significant justice issue for blacks in Nebraska is their rep-

Several black participants expressed the importance of having black judges in their community

resentation as court employees and legal professionals. The lack of representation of minorities as employees and administrators of the justice system leads to a perception of injustice. As one African-American woman who has worked in the court system for over thirty years explained:

People's perceptions are that when they go in to any system and they do not see anybody that looks like them, and that's whether they are African American, Native American, Hispanic, Latino, Asian, when they come in that system, if they don't see people that look like them administering those systems, working in those systems, then I think the perception automatically [is] that they're not going to get fair treatment. But when people come in and they are talking to me or they come into the office and they see other people in that office that are people of color, I think it kind of gives them a different notion, and so then they're at least more open to looking at their own behavior, as opposed to where you come in or when you come into a courtroom and when you don't see anybody else but whites in the system, and, I mean from the time you walk in the door to the clerk's office to the bankruptcy court to, you know, the judge's office and everybody in there, and those people are making decisions, well, it really for that person I think starts with their perception of am I getting a fair trial, am I getting a fair shake? And how can I possibly because, you know, the entire system's already set up against me.

Explanations such as these emphasize the need for increasing the number of people of color working for the system both as court employees and legal professionals. Several black participants expressed the importance of having black judges in their community:

And for a number of years, I think we only had one, which was Judge [name of Judge] for years and years, and then she retired. A lot of people liked her, a lot of people didn't, but the fact that she was a sitting black female judge was important to people.

Several participants explained that having a court system with a workforce that is representative of the community is important not only for the perception of justice but because a diverse workforce is likely to be a more accepting community, sensitive to racial and ethnic issues and the unrecognized biases of those in the majority.

To achieve a more diversified legal profession and court system participants advocated unbiased recruitment procedures, not preferential treatment:

And I'm not just saying, hire an attorney because they are of color, I'm saying hire attorneys of quality. But judge them, when you look at them and say, do they meet your standards, judge them on the same basis that

you judge you. That's what you ought to be looking at. Those are the changes and they should be mandated.

II. A WORD ABOUT METHODS

Before concluding with a discussion of the policy implications of comments made by minorities in Nebraska, I will review the process through which the underlying data was collected. Those more interested in conclusions than methodology can skip ahead to the next section.

Participants

Approximately 175 people gave public testimony and 25 attendees provided private testimony at a public-hearing site. Several tactics were employed to publicize the public hearings in an attempt to attract target populations (racial and ethnic minorities). First, press releases (in English and Spanish) were sent to city newspapers as well as radio and television stations in each region where a hearing was planned. Several news outlets held interviews with task force representatives to discuss the mission of the hearings and explain the logistics for testifying. The task force also sent invitations to community leaders and relevant groups throughout the state in an attempt to inform the largest possible constituency about each upcoming hearing. This list included all district and county court employees, members of the Nebraska State Bar Association and the Midlands Bar Association, Nebraska Legal Services Corporation, Nebraska Appleseed Center for Law and the Public, the Nebraska state senators, city council members, university groups and professors, members of the business community (including Hispanic and black business owners), clergy of minority-populated churches, local NAACP chapters, the Urban League of Nebraska, the Mexican American Commission, the Commission on Indian Affairs, and local chambers of commerce, among others.

Hearing Locations

Public hearing sites were selected based on the size and diversity of the population (see Table 1). The state's most populated city, Omaha, was site to three public hearings at three separate locations over a 75-day period. One hearing was held in both Lincoln and Grand Island, the state's second and fourth

TABLE 1: HEARING SITES AND PERCENTAGE MINORITY

City	Total Population	Minority Population	Percentage Minority
Omaha	390,007	96,131	24.7%
Lincoln	225,581	127,494	12.2%
Grand Island	42,940	8,980	18.6%
Scottsbluff	14,732	4,184	28.4%
Lexington	10,001	5,394	53.9%
Macy	956	942	98.5%

most populated cities. Scottsbluff, Lexington, and Macy were selected for their racial and ethnic diversity and their location in the state.

In order to create a comfortable and non-threatening atmosphere, great care was taken to hold the public hearings at sites within the cities that were considered “friendly” to minority populations. For example, minority-dominated schools, churches, and community centers were used at all eight sites.

Data Collection

Hearings were transcribed verbatim by professional court reporters and carefully read by the author for a full comprehension of the content. Cross-case thematic analysis was used to identify themes across hearings and racial groups. Although participants were asked to provide testimony concerning their experiences and perceptions of racial and ethnic bias in the court system, several participants made contributions outside the scope of the project.⁹ Testaments such as these were not included for analysis.

IV. POLICY IMPLICATIONS AND STUDY LIMITATIONS

Public perception of the courts is important.¹⁰ It affects both the actual work of the court and the perceptions of those within and outside the court. Existing research documents that racial and ethnic minority groups in the United States hold more negative perceptions of the justice system.¹¹ This research explores the root of these perceptions qualitatively through public-hearing testimony, where individuals of varying minority status were given the opportunity to explain their experiences and perceptions of the courts.

Minority group members discussed a number of topics relative to the courts, most notably their perceptions of differential sentencing, on the disproportionate number of incarcerated minorities within the state, differential treatment in terms of prosecutorial discretion, bail/bond amounts, being tried in juvenile vs. adult court, and actual sentences imposed by judges. Many minority-group members also commented on the issue of obtaining adequate legal services.

Further analysis reveals that many of the perceptions discussed here may be based on group-specific experiences and are not necessarily similar across groups. For instance, the Hispanic population in Nebraska was primarily concerned with the availability and quality of interpreter services. Native Americans’ perceptions, on the other hand, centered on jurisdictional issues, and blacks were particularly concerned with issues of representation within the system (as employees, lawyers, judges, etc). Since research suggests that individuals’ evaluations of the courts are affected by their personal experiences with the courts,¹² it seems less likely that the concerns identified in this article would even be identified as problematic by a white sample. In other words, whites do not face the same language, jurisdictional, or representational issues that

Hispanics, Native Americans, and blacks face in the state courts.

These findings have several policy implications. First, efforts to improve minority’s perceptions of racial and ethnic bias in the court system should be centered on the issues that they have identified as problematic. In other words, efforts should focus on the concerns of communities of color, rather than solely rely on the perceptions of fairness held by whites (which may be the concerns reflected in overall opinion surveys, given whites’ numerical majority in quantitative samples). More specifically, to improve Hispanic’s perceptions of fairness in the court system, efforts should be made to address the inadequacies in interpreter services. Similarly, working to solve jurisdictional issues and making court systems more representative of their respective communities will improve the perception of procedural and symbolic justice.

Second, this article demonstrates the utility of public hearings as a research method. Public forums are often held on local and state issues, but remain an untapped source of rich qualitative data. In researching concerns of racial and ethnic bias, public hearings serve as a valuable tool—one that can differentiate the real and complex issues between states or jurisdictions, issues that are often not brought to light through quantitative instruments. At the same time, these forums may provide participants with an outlet and a sense of agency.

There are several limitations to this study. First, there appears to be a lack of representation from the Asian community in the public hearings. According to the 2000 U.S. Census Bureau figures, 1.3% of Nebraska’s population is Asian. However, very few public-hearing participants identified themselves as Asian. Additionally, with the exception of needing interpreter services for an increasing Asian population, no specific concerns regarding the Asian community were expressed. It is not the intent of this article to ignore this population or suggest that their concerns with the legal system are nonexistent or of less importance. Future research should attempt to specifically gather data from this population.

Second, several public-hearing participants stated that some hesitation within the community was held concerning testifying at the public hearings. This hesitation stemmed from a fear of backlash—that judges, lawyers, police officers, and/or other court employees would find out who said what at the hearing and take action against those who spoke against them or their practices.

Finally, since this data was collected in a public-hearing setting, it is certainly possible that the positions of those responding are not representative of the public’s opinions or even those

[T]he Hispanic population in Nebraska was primarily concerned with the availability and quality of interpreter services.

9. The majority of these contributions were related to law enforcement. Research indicates that individuals often interpret “legal system” as including law enforcement. See Brooks & Jeon-Slaughter, *supra* note 6.

10. See Benesh & Howell, *supra* note 1; Flanagan, *et al.*, *supra* note 1; Caldeira, *supra* note 3; and Tyler, *supra* note 3.

11. See sources cited and discussed in note 6, *supra*.

12. See Tyler, *supra* note 6

of the specific racial or ethnic group of the respondent. This in no way affects the overall point of the study however, which is to illustrate how the one-dimensional picture of racial and ethnic dissatisfaction with the courts can be illuminated through an analysis of those participants suitably upset and/or motivated to give public testimony. It is unlikely that the concerns of these minority communities could have been as thoroughly expressed using a quantitative instrument.

In conclusion, this research supplements much of what is commonly inferred from court-related surveys of public trust and confidence. By attempting to demonstrate the basis for these differing attitudes through an analysis of public hearing testimony, this project illustrates the deep-seeded distrust of the courts held by many minority group members. It also demonstrates that what might appear monolithic in its dissatisfaction is actually contextual in nature. While blacks, Hispanics, and Native Americans may have some shared concerns and a shared lack of trust in the legal system, there are significantly different attitudes that underlie these feeling of dissatisfaction for each group.



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How Useful Is the New Aggressive Driving Legislation?

Victor E. Flango and Ann L. Keith

“Police chase’ took on a new meaning when a motorist angry about getting a speeding ticket decided to go after the officer who issued the citation, slamming her car into his cruiser several times.”¹

“Someone cut in front of someone else. Drivers exchanged ugly words. One of them hurled a bologna sandwich. Then a shot rang out.”²

Aggressive driving usually refers to a disregard for others on the road and is distinguished from the more extreme “road rage,” which involves violent, criminal acts. Nevertheless, with an 1,800 reported incidents of violent road behavior involving the use of an automobile in the United States in 1996, it is a national problem requiring attention. Aggressive driving is responsible for more than 27,000 fatalities per year as well as over 3,000,000 injuries, costing over \$150 billion dollars.³

A survey of 6,000 drivers by the National Highway Traffic Safety Administration (NHTSA) found that 60% of the drivers interviewed believed that unsafe driving by others is a major personal threat to them and their families.⁴ A December 2, 2003 AAA survey found aggressive driving to be the top threat on Washington, D.C. area roads. Forty-three percent of the respondents said that aggressive driving was more of a danger than traffic congestion and road conditions, and even impaired driving.⁵ Moreover, AAA notes that aggressive driving has been increasing 7% per year since 1990.⁶

The incidents that trigger aggressive driving in the average driver are usually simple matters of discourtesy—hand and facial gestures, loud music, overuse of the horn, tailgating, speeding, and failure to signal when changing lanes. These driving behaviors are just the trigger points, while the actual causes of aggressive driving can be traced back to all forms of stress in an individual’s daily life. “Road warriors” are the result

of a flashpoint of all the accumulated stresses in life.⁷ Like driving under the influence, aggressive driving is not a simple action, but a behavioral choice drivers make.

NHTSA defines aggressive driving as follows: “when individuals commit a combination of many traffic offenses as to endanger persons or property.” A more specific definition is “the operation of a motor vehicle involving *three or more moving violations as part of a single, continuous sequence of driving acts which is likely to endanger any person or property.*”⁸ Driving acts are ones you would expect: running stop signs, disobeying red lights, speeding, tailgating, weaving in and out of traffic, passing on the right, unsafe lane changes, going around railroad gates, flashing lights and blowing horns, facial and hand gestures.

Although some states have enacted laws specifically directed at aggressive driving, many do not distinguish aggressive driving from other traffic offenses. A national study of 2,858 cases showed that exceeding the posted speed limit was the most frequently used indicator of aggressive driving cases (914) and that improper lane changes (512) and driving too closely (233) were other common offenses that indicated aggressive driving.

A SURVEY OF STATES THAT HAVE AGGRESSIVE DRIVING LAWS

What is the experience of states that have aggressive driving laws? This question was posed to place Virginia’s experience in

This article was adapted from a study done for the Virginia Department of Motor Vehicles. The authors are grateful to Vincent Burgess for his help and support, to our colleague Don Cullen for his assistance on the project, to Neal Kauder for his graphics expertise, and to Mary McFarland and Walter Latham for surveying the states. Thanks to all of those who reviewed the drafts of the Virginia survey questionnaires: Judge Thomas Kelly of Arlington; Colonel W. Steve Flaherty, superintendent, Virginia State Police; Susan Williams, director of the Commonwealth’s Attorneys’ Services Council; Dana Schrad, executive director of the Virginia Association of Chiefs of Police, and Russell K. Cox, management analyst, Virginia State Police.

Footnotes

1. *Angry Motorist Slams Car Into Cruiser*, Associated Press, November 7, 2003 (filed at 11:55 a.m. ET).
2. David Chernicky, *A Tale of Road Rage, Bologna and Bullet*, DAILY PRESS (Newport News, Va.), May 2, 2002.
3. American Institute for Public Safety, *Aggressive Driving and the Law*, PowerPoint presentation, Aggressive Driving and the Law Symposium, Miami, December 2000. Data are from 1999.
4. NHTSA, *AGGRESSIVE DRIVING ENFORCEMENT: STRATEGIES FOR IMPLEMENTING BEST PRACTICES*, 4 (2000).
5. AAA, *Aggressive Drivers Remain Top Threat*, Mid-Atlantic news release (December 2, 2003). See www.aaamidatlantic.com.
6. Mark Pepper, *More about Road Rage*, U.S. NEWS WORLD REP. (June 1997).
7. *Id.*
8. NHTSA, *supra*. note 4, at 6 (emphasis added).

FIGURE 1: COMPARISON OF AGGRESSIVE DRIVING STATUTES BY STATE.

	Year Enacted	Penalty	Is Anger Management or Aggressive Driving Education Specifically Stated in the Statute?	Additional Penalties Specific to Aggressive Driving Conviction	Other Information
Arizona	1999	Class 1 Misdemeanor punishable by up to 6 months in jail, a fine up to \$5,000, or both.	Yes. Mandatory traffic school and education sessions may be ordered.	1st Offense: traffic school and possible suspension of driver's license for 30 days. 2nd Offense: within 24 months results in 1-year license revocation.	Reckless driving is a Class 2 Misdemeanor punishable by up to 4 months in jail, a fine up to \$750, or both.
California	2000	Punishable by not less than 5 days in a county jail nor more than 90 days or a fine of not less than \$145 nor more than \$1,000.	Yes. Anger management or road rage courses may be ordered.	1st Offense: 6-month suspension of driver's license and/or anger management or road rage course. 2nd Offense: 12-month suspension of driver's license and/or anger management or road rage course.	Road Rage (or aggressive driving) is part of the reckless driving statute.
Delaware	1999	Fine \$100-\$300 or jail 10-30 days or both.	Yes. Mandatory anger management course is ordered.	1st Offense: \$100-\$300 fine or jail 10-30 days or both. 2nd Offense: within 36 months results in \$300-\$1,000 fine or jail 30-60 days or both. Mandatory suspension of driver's license for 30 days.	Suspended sentences are not permitted for aggressive driving violations.
Florida	2001	None	No	No	The designation of aggressive careless driving does not create a new violation or offense. The purpose of the designation is to provide a method to collect data of such instances that might arise through the inclusion of a checkbox on uniform traffic citations
Georgia	2001	Points are assessed against driving record.	Yes. Anger management course may be ordered.	If assessed points meet prescribed levels, suspension of driver's license is ordered.	Penalties are based upon cumulative points assessed against driving record.
Maryland	2001	Fine not exceeding \$500.	No	5-point penalty on driver's license.	
Nevada	1999	Misdemeanor	Yes. Traffic safety course is ordered.	1st Offense: Traffic safety course and possible suspension of driver's license for < 30 days. 2nd Offense: within 24 months, revocation of driver's license for 1 year.	
Rhode Island	2000	Fine not less than \$20 nor more than \$500.	Yes. Anger management course may be ordered.	Possible suspension of driver's license for 30 days.	
Virginia	2002	Class 2 Misdemeanor punishable by up to 6 months in jail, a fine up to \$1,000, or both.	Yes. Anger management course may be ordered.	1st Offense: Anger management course may be ordered.	Aggressive driving with the intent to injure another person is a Class 1 Misdemeanor. Reckless driving is a Class 2 Misdemeanor.

context. Virginia's law went into effect July 1, 2002, making it the eighth state to enact a law against aggressive driving. Figure 1 summarizes the aggressive driving legislation in each state. (Statutory citations are detailed in Appendix A.)

Aggressive driving laws in Florida, Maryland, Nevada, and Rhode Island are described below.

Florida

Florida has two applicable statutes: reckless driving and aggressive careless driving. The reckless driving statute requires intent be proven. The aggressive careless driving statute requires only that the offender to be guilty of "two or more of the following acts simultaneously or in succession": exceeding the posted speed; unsafely or improperly changing lanes; following another vehicle too closely; failing to yield the right-of-way; improperly passing; or violating traffic control and signal devices. Note the following citation statistics for Florida (note the different time periods):

<u>RECKLESS DRIVING</u>	<u>AGGRESSIVE DRIVING</u>
January 2002 – December 2002	October 2002 – September 2003
13,589*	8,335

*NOTE: Includes both reckless and DWI.

The Florida contact indicated that the Florida Highway Patrol's policy is to cite the most serious offense. Reckless driving is the more serious offense because the only ramification of aggressive driving is that the officer checks off a box on the citation indicating that the driver has met the statutory definition of "aggressive driving." Aggressive driving is not a punishable offense under Florida law. In 2001 the Florida legislature passed a new designation "Aggressive Careless Driving," but this offense is a designation of existing offenses as constituting Aggressive Careless Driving and is used only to collect data on the number of such instances that might arise through the inclusion of a checkbox on Uniform Traffic Citations.⁹

9. William P. Cervone, *State Attorney's Office*, LEGAL BULL. 2002-2003 (Eighth Judicial Circuit), 1 (July 2002).

Maryland

Reckless driving citations are clearly more frequent than aggressive driving citations in Maryland. Aggressive driving is much more difficult to prove because three violations must occur consecutively. The fine for reckless driving also is much higher (\$575) than the fine for aggressive driving (\$355). Law enforcement respondents reported that the distinction between the two laws was clear, but that aggressive driving was rarely used because of the difficulty in prosecuting those cases. Law enforcement informants also believed that behavior at the stop did not affect the charge, as the offense was clear before the stop was made. From the court's perspective, aggressive driving citations have rarely been seen, and the differences between reckless and aggressive driving were not clear. Nonetheless, the court contact felt confident that police officers would be clear on the details of the law. He felt, as far as reckless driving citations go, that there were plenty of sentencing options, although fines were the most common. Only in cases involving younger drivers were driver improvement classes and treatment programs used to any extent. None of the contacts had any information on recidivism.

Nevada

As in Maryland, aggressive driving offenses are cited much less frequently in Nevada than reckless driving offenses. In the Reno Municipal Court, from the enactment of the law in 1999 until November 2003, there have been four aggressive driving charges initially filed, but only one has resulted in a final charge of aggressive driving. Prosecutor contacts suggested that because of evidentiary problems and the technical nature in proving aggressive driving beyond a reasonable doubt, aggressive driving charges are often plea-bargained or reduced. In the same court, over the same period of time, there have been 621 initial reckless driving charges and 213 reckless driving final charges. The number of reckless driving charges grew from 19 in 2000, to 211 in 2001, and to 224 in 2002, but dropped to 167 in 2003. Both prosecutors and law enforcement reported that the distinction between aggressive and reckless driving laws was clear, and prosecutors found the Nevada Highway Patrol to be very thorough when it made attempts to cite aggressive driving over reckless driving. Aggressive driving can have a greater penalty than reckless driving, in that the driver's license can be suspended. If the experience of the Reno Municipal Court is representative of other Nevada counties, then aggressive driving is hardly ever used, and the charge is amended down over half the time.

Rhode Island

The aggressive driving law in Rhode Island went into effect in August 2000. The Rhode Island Training Academy is responsible for instructing law enforcement officers. Training academies are held every four years. The aggressive driving statute will be covered at the next session of the training academy, scheduled for August 2004. Since the law was enacted in 2000 until November 6, 2003, there have been 52 aggressive driving

convictions. In the same time period, there have been 222 reckless driving convictions. Law enforcement believed that one citation was not necessarily more difficult to prove than the other. All were clear on the distinction between reckless and aggressive driving, and noted that intent is not needed to convict on aggressive driving. Most contacts replied that the law was effective to the extent it was used, but it is used infrequently.

One law enforcement contact had only written two or three citations since the law was enacted, but believed that citations for aggressive driving were just as easy to write and prove as those for reckless driving. Aggressive driving in Rhode Island requires excessive speeding or two other violations in sequence (e.g., tailgating, rapid lane changes, etc.) and is a summons offense, whereas reckless driving is a misdemeanor. Officers said behavior at a stop could be taken into account, but it was at the officer's discretion. Where it is possible, police would prefer to cite reckless driving because it carries a greater penalty.

SUMMARY OF STATE SURVEY

Four of the seven states with aggressive driving laws (not counting Virginia) were asked about their experience with that legislation. Aggressive driving is not cited frequently in three of the four states. Law enforcement officers prefer to cite reckless driving when it is an option because it carries a greater penalty. Although the remaining state, Florida, has a significant number of aggressive driving violations, the violations do not carry a separate penalty.

AGGRESSIVE DRIVING IN VIRGINIA

On April 7, 2002, the governor of Virginia approved legislation that makes aggressive driving punishable by up to six months in jail, a fine up to \$1,000, or both.¹⁰ Virginia is the first state that empowers judges to order violators to take a course in anger management. The governor also approved legislation to establish a driver improvement clinic program. Section 46.2-490 provides for a curriculum, which includes instruction on alcohol and drug abuse, aggressive driving, distracted driving, and motorcycle awareness. According to the legislation, approved on March 22, 2002,

the driver improvement clinic program shall be established for the purpose of instructing persons identified by the Department and the court system as problem drivers in need of driver improvement education and training and for those drivers interested in improving driving safety.

The National Center for State Courts (NCSC) proposed to evaluate aggressive driving programs in Virginia to determine which are most effective in reducing recidivism. The goal of these programs is to help traffic offenders avoid aggressive driving tactics by managing their own angry behavior behind the wheel.

After more than a year of study, and several site visits dis-

10. *Governor Makes Law "Aggressive Driving" Bill*, DAILY PRESS (Newport News, Va.), April 8, 2002.

cussing the issue with judges, commonwealth's attorneys, and law enforcement, NCSC project staff found aggressive driving was simply not being charged as an offense by law enforcement and commonwealth's attorneys, and consequently, cases were not being filed in courts or referred by courts for services. Under those circumstances, evaluation of anger management and other treatment alternatives was not possible.

Anecdotal evidence from many interviews conducted throughout Virginia led project staff to reach tentative conclusions. First, police officials regard aggressive driving as more egregious than reckless driving (although the statute defines aggressive driving as an intermediate offense—i.e., an offense less severe than reckless driving but more severe than many traffic offenses). Second, because there were comparatively few cases being cited by law enforcement and prosecuted by the commonwealth's attorneys, few aggressive driving cases were filed in court. As a result, there was no incentive to modify existing treatment programs or to create new ones.

THE SURVEY

Draft questionnaires were written for law enforcement, prosecutors, and district judges to solicit their perspectives on the current operation of the aggressive driving statute, as well as any suggestions for changes.

The law enforcement questionnaire was drafted in June 2003 and sent to the Department of Motor Vehicles and several police associations for review. Law enforcement questionnaires were prepared so they could be completed in electronic form. Three hundred ninety usable responses were received.

The questionnaire for the commonwealth's attorneys was received by the director of the Commonwealth's Attorneys' Services Council, and 32 commonwealth's attorneys responded. A similar questionnaire for district judges was drafted and revised based on comments from the Virginia Department of Motor Vehicles and a district judge. This questionnaire was distributed to district judges at the 2003 Judicial Transportation Safety Conference held August 13-14, 2003, and 42 judges responded.¹¹

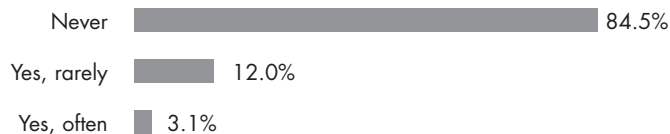
HOW OFTEN ARE AGGRESSIVE DRIVING LAWS USED IN VIRGINIA?

The first question on all three surveys was designed to determine the frequency of use of aggressive driving laws.

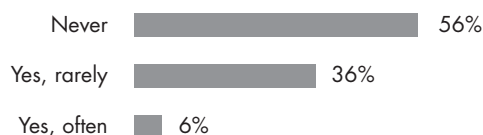
Ninety-six percent of the law enforcement officers who completed the questionnaire said they rarely or never wrote a citation for aggressive driving. Only 3% said they "often cite an offender for aggressive driving." Similarly, 56% of the prosecutors said they have never charged a person with an aggressive driving violation, and 36% said they do so only rarely. Thirty-one percent of judges have never heard an aggressive driving case, and another 67% heard them only rarely.

FIGURE 2: HOW OFTEN ARE AGGRESSIVE DRIVING LAWS USED?

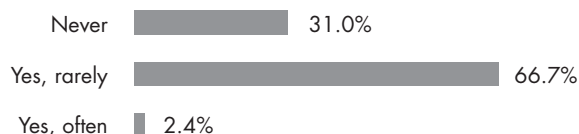
Law Enforcement Officers (written a citation)



Prosecutors (charged a case)



Judges (presided over a case)



1. Law Enforcement

Figure 3 shows the reckless or aggressive driving citation options used by law enforcement officers.

Law enforcement officers were asked, "In approximately what percentage of the traffic violations do you have the option of citing either reckless driving or aggressive driving?" Nearly half (48.5 percent) said that it was rare (less than 5 percent) that an incident afforded them the option to cite *either* reckless driving or aggressive driving. A small percentage of the officers (7 percent), however, believed that they could have written either offense in half of the incidents. Given the choice, where such an option was legitimate, 74 percent of the law enforcement officers who responded to the survey said they would write the ticket for reckless driving, as opposed to 22 percent who would choose the aggressive driving offense. Of the other legitimate options, "improper driving" was the most frequent choice listed.

Most law enforcement officers (70 percent) said that the behavior of the driver at the scene did not affect their decision to cite for either reckless driving or aggressive driving, but a significant proportion (28 percent) said that driver behavior did influence their decision. For the primary reasons police do *not* cite vehicle operators for aggressive driving, see Figure 4.

11. Judges who attended the traffic safety conference may be more interested in traffic cases than other judges.

FIGURE 3: RECKLESS DRIVING LAWS IN VIRGINIA

Source: VCC Codes (reckless.doc)

	Misdemeanor Offense Class	Statute	Penalty (Y= Years) (M = Months)
Aggressive Driving			
Aggressive driving	Class 2	46.2-868.1 §	0-6M
Aggressive driving with intent to injure	Class 1	46.2-868.1 §	0-12M
Pass			
Emergency vehicle, overtake or pass	Class 1	46.2-829§	0-12M
Pass at railway crossing or intersection	Class 1	46.2-858§	0-12M
Pass two vehicles abreast	Class 1	46.2-856§	0-12M
Pass without visibility	Class 1	46.2-854§	0-12M
Police Command, Disregard			
Disregard police command to stop, endangerment	Felony 6	46.2-817(B)§	1Y-5Y
Fail to stop for police, attempt to escape or elude	Class 3	46.2-817(A)§	Fine
Racing			
Racing	Class 1	46.2-865§	0-12M
Racing, aiding or abetting	Class 1	46.2-866§	0-12M
School Bus			
School bus flashing lights, fail to stop for	Class 1	46.2-859§	0-12M
Speeding			
20 MPH or more over speed limit-limit is 30 MPH or less	Class 1	46.2-862(i)§	0-12M
20 MPH or more over speed limit-limit is 40 MPH or more	Class 1	46.2-862(iii) §	0-12M
60 MPH or more when limit is 35 MPH	Class 1	46.2-862(ii)§	0-12M
Speed, truck-exceed 65 MPH on two-lane highway	Class 1	46.2-862§	0-12M
Speed over 80 MPH	Class 1	46.2-862(iv)§	0-12M
Speed unreasonable for conditions	Class 1	46.2-861§	0-12M
Other			
Control, load or passengers interfere with	Class 1	46.2-855§	0-12M
Endanger life or limb	Class 1	46.2-852§	0-12M
Enter highway, fail to yield right of way	Class 1	46.2-863§	0-12M
Fail to yield right of way, sign posted	Class 1	46.2-863§	0-12M
Out of control or bad brakes	Class 1	46.2-853§	0-12M
Parking lots, drive in endangering life or limb	Class 1	46.2-864§	0-12M
Riding abreast in one lane	Class 1	46.2-857§	0-12M
Signal turn or stop, fail to	Class 1	46.2-860§	0-12M

Note: Misdemeanors also carry a monetary penalty.

FIGURE 4: WHY DO LAW ENFORCEMENT OFFICIALS NOT CITE VEHICLE OPERATORS FOR AGGRESSIVE DRIVING?

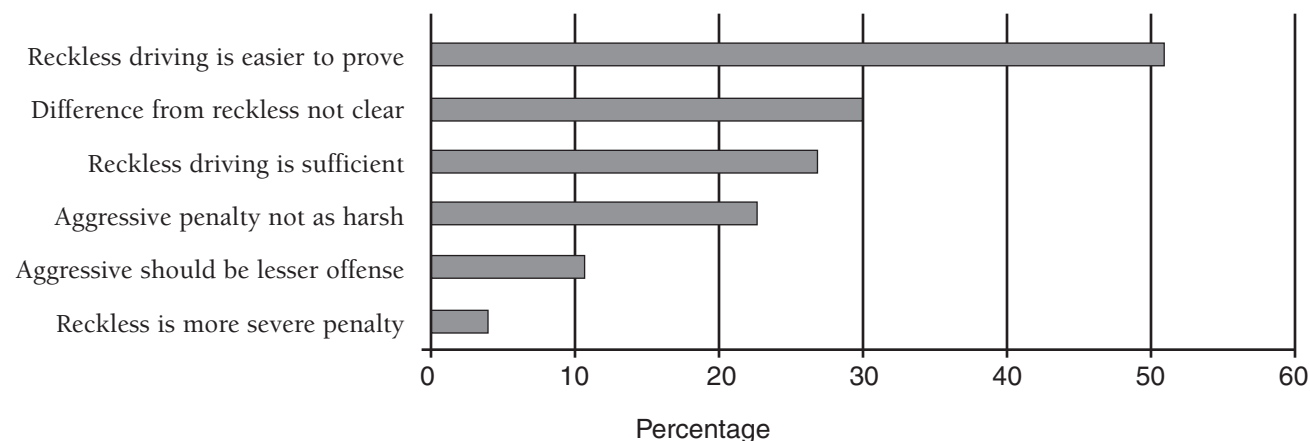


FIGURE 5: WHY DO PROSECUTORS NOT CHARGE VEHICLE OPERATORS FOR AGGRESSIVE DRIVING?

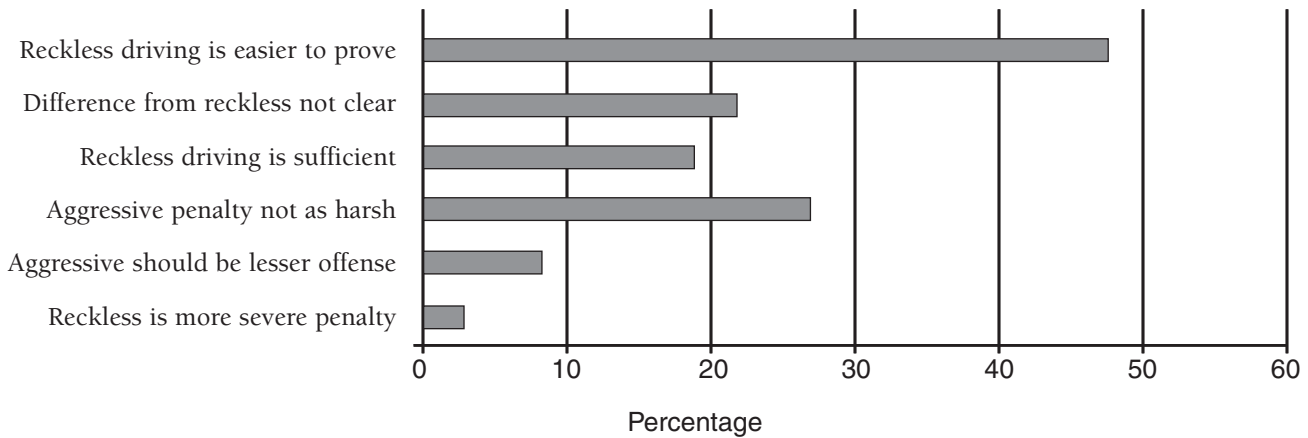
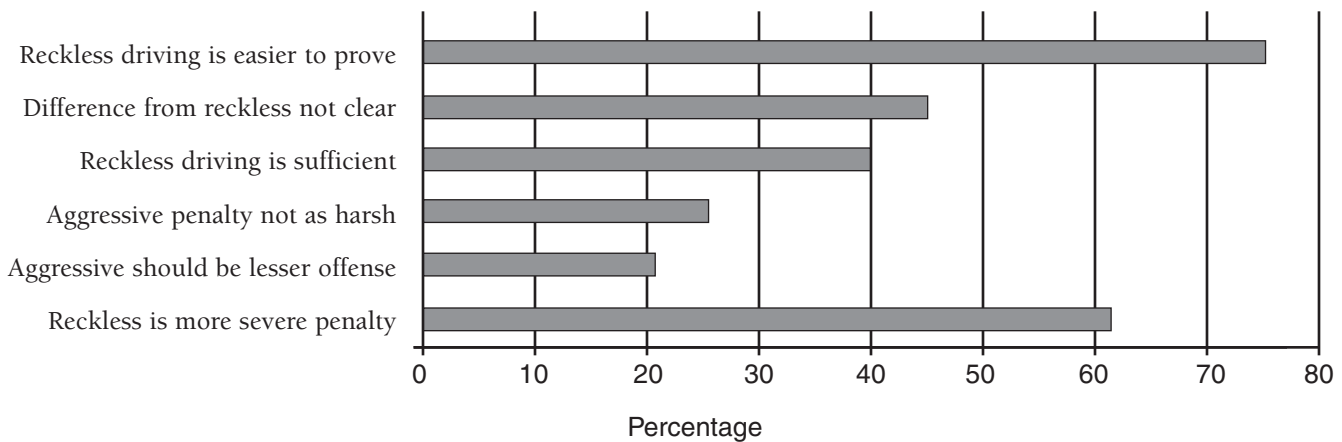


FIGURE 6: WHY DO JUDGES NOT CONVICT VEHICLE OPERATORS FOR AGGRESSIVE DRIVING?



2. Prosecutors

When presented with a similar option for the charging decision, an even stronger majority (65%) of the commonwealth’s attorneys said that rarely (less than 5% of the time) do they choose aggressive driving when reckless driving is an alternative. If they did have a legitimate choice of charges, 56% of the prosecutors would prefer to charge reckless driving, compared to the 32% who would prefer aggressive driving. Driver behavior has more of an influence on the prosecutor’s than on the law enforcement officer’s decision. More than half (55%) of the commonwealth’s attorneys who responded to the survey said that the driver’s behavior does affect their decision on which offense to charge, and 45% said it did not.

For the commonwealth’s attorney’s primary reasons for *not* charging drivers for aggressive driving, see Figure 5.

3. Judges

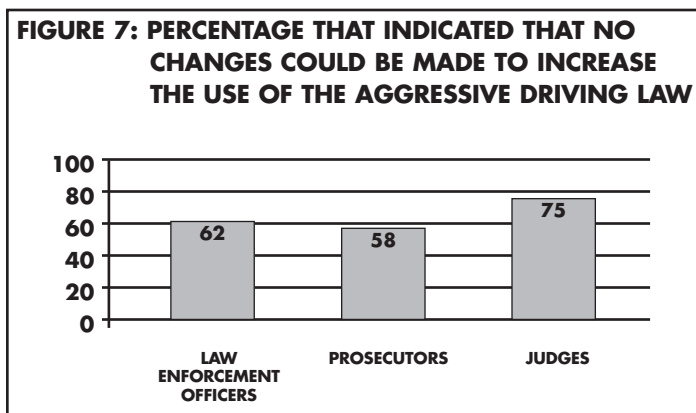
The majority of district court judges (57%) said that aggressive driving was a viable alternative in less than 5% of reckless driving cases that came before them. Many of the judges did not answer the question of how often an aggressive driving conviction is a viable alternative to a reckless driving conviction, and those who did said that such convictions were rare (see figure 6).

In summary, the fact that reckless driving is easier to prove was the major reason law enforcement officers did not cite, prosecutors did not charge, or judges did not convict aggressive drivers. With one exception, a significant proportion (20% to 40% percent) of all three types of groups reported that the difference between reckless driving and aggressive driving was not clear and that the reckless driving offense is sufficient. The exception was district judges, of whom over 60% said a charge of reckless driving was to be preferred to aggressive driving because it carries a more severe penalty.

WHAT CHANGES IN THE LAW OR PENALTY WOULD INCREASE USE OF THE AGGRESSIVE DRIVING LAW?

With regard to law enforcement officers, 62% reported that no changes could be made in the law that would cause them to cite aggressive driving offenses more frequently. Fifteen percent of the respondents said that they would be more likely to write aggressive driving citations if the charge were pre-payable, thus reducing the time law enforcement officers needed to spend in court. Twenty-three percent of the respondents did suggest some changes in the law. Most said “stiffer penalties,” but others said to make the offense easier to prove (remove the intent provision) or the law clearer. Yet, a vast majority of the officers (78%) said that even if the penalty for aggressive driving was

more severe, they would not write more tickets. Several of the officers said “anger management” classes were needed, and some preferred that the classes be mandatory.



Like law enforcement officers, most prosecutors (58%) said that neither changes in the law nor changes in the penalty would cause them to charge aggressive driving more frequently. About a quarter of the judges did not respond to this set of questions, but the 28 judges who did said a change in law was required if the aggressive driving statute was to be used more often. An even higher proportion (79%) responded that changes in penalty would not affect the use of aggressive driving laws. Most judges (71%) are satisfied with the sentencing options available to them now and have not noticed any specific penalties that reduce recidivism rates.

CONCLUSIONS FROM THE VIRGINIA SURVEYS

- The aggressive driving law is rarely used. Law enforcement officers rarely, if ever, write tickets for aggressive driving; prosecutors rarely charge the offense; and judges rarely see these offenses in court.
- About half of the judges believed that reckless driving laws were sufficient and that there was no need for specific aggressive driving legislation. About a quarter of police officers agreed, but commonwealth’s attorneys were much more likely to believe that the legislation was necessary.
- Most often the offense is clear, so the officer will cite either reckless driving or aggressive driving; therefore, the commonwealth’s attorney does not often have to decide between the two offenses. When the option is available, law enforcement and prosecutors both prefer to cite or charge reckless driving. Aggressive driving requires a proof of intent that reckless driving does not. About half of the police and prosecutors and three-quarters of the judges said reckless driving is easier to prove than aggressive driving.
- Most law enforcement officers reported that the behavior of the driver at the scene did not affect which offense was charged, but prosecutors are much more affected in their charging decision by the behavior of the driver at the scene.
- Overall, law enforcement officers did not believe that changes in the law or in the penalty would result in them writing more tickets for aggressive driving. Most commonwealth’s attorneys came to the same conclusion with respect to charging.
- Overall, judges were satisfied with the sentencing alterna-

tives available, but more judges than law enforcement officers or prosecutors said a change in the aggressive driving law, but not in the penalties, was needed. Most judges believe that the reckless driving offense is sufficient and that an aggressive driving law was not needed, although a strong minority (21%) believed that aggressive driving should be a lesser-included offense under reckless driving.

Aggressive driving legislation in Virginia was designed to be an intermediate option for use when standards of proof for reckless driving could not be achieved. In practice, aggressive driving is often more difficult to prove than reckless driving is. There are perhaps three reasons for this. The first is the need to prove “intent” in aggressive driving cases, but not in reckless driving cases. Furthermore, in the current legislation, aggressive driving has both a subjective and an objective component. Reckless driving is easier to prove because the subjective element of “intent” is not part of the burden of proof.

Second, by its very nature, the definition of aggressive driving requires that a series of unsafe acts occur in a sequence, consequently making aggressive driving more difficult to prove than any single traffic violation. Finally, reckless driving carries a more severe penalty. Given the choice among offenses, law enforcement, prosecutors, victims, and the public would prefer using charges of reckless driving to deal with serious traffic violations.

Given this situation, three legislative responses are possible:

1. Remove “intent” as an element of proof for aggressive driving.
2. Propose more severe penalties for aggressive driving.
3. Add an “aggressive driving” tag to other traffic offenses to permit enhancing the existing penalties and to track the incidence of aggressive driving for statistical purposes that may lead to changes in legislation.

We did not recommend additional education and training of law enforcement officers because most understand the difference between aggressive and reckless driving. The question is what is the incentive to cite aggressive driving if reckless driving is an option? Reckless driving does not require proof of intent and the penalties are more severe.

Because aggressive driving laws are a relatively new experiment in Virginia, as in all states, we recommended that the experiment continue to unfold until Virginia and other states obtain sufficient experience to determine with more certainty what, if any, legislative changes are required. Many states are struggling with the issue of aggressive driving, and there is an opportunity for states to learn from each other the relative effectiveness of various aggressive driver programs in reducing the incidence of aggressive driving.

The idea of employing anger management techniques to reduce the incidence of aggressive driving remains promising. However, until Virginia is able to identify a sufficient number of aggressive drivers who may benefit from such treatment, an assessment of the types of treatment that are most effective is simply not possible. This is another reason to wait for the situation to “ripen” in Virginia, at which time the issue of anger management treatment for aggressive driving should be reopened.



Victor Eugene Flango is vice president, Research and Technology Services, at the National Center for State Courts. He leads the approximately 40 research and technology staff members in developing and managing the national-scope, multijurisdictional, revenue-generating projects and programs. His Ph.D. degree is from the University of Hawaii (1970) and he is a Fellow of the Institute for Court Management. He is currently directing a project on the court's role in impaired driving for the National Highway Traffic Safety Administration



Ann L. Keith is currently a consultant for the Research, Knowledge and Information Services, and Development divisions of the National Center for State Courts. While a court research associate at the National Center, her research projects included the Court's Role in Reducing the Incidence of Impaired Driving, Expediting Dependency Appeals, and Improving Judicial Campaign Conduct. Before joining the National Center, she was an elementary school principal in Tucson, Arizona. She received a J.D. at the William and Mary School of Law, an M.Ed. in educational leadership from Northern Arizona University, and a B.A. in elementary education from the University of Arizona.

APPENDIX A: STATES WITH AGGRESSIVE DRIVING LEGISLATION, JULY 10, 2003.

Currently, eight states have enacted aggressive driving laws.*

Arizona	A.R.S. § 28-695 (2003) <i>Aggressive Driving; Violation; Classification; Definition</i>
Delaware	21 Del. C. § 4175A <i>Aggressive Driving</i>
Florida	Fla. Stat. § 316.1923 (2002) <i>Aggressive Careless Driving;</i> Fla. Stat. § 316.650 (2002) <i>Traffic Citations</i>
Georgia	O.C.G.A. § 40-6-397 (2002) <i>Aggressive Driving; Penalty</i> O.C.G.A. § 40-5-57 (2002) <i>Suspension or Revocation of License of Habitually Negligent or Dangerous Driver; Point System</i>
Maryland	Md. TRANSPORTATION Code Ann. § 21-901.2 (2002) <i>Aggressive Driving</i> Md. TRANSPORTATION Code Ann. § 16-402 (2002) <i>Assessment of Points</i>
Nevada	NRS § 484.3765 (2003) <i>Aggressive Driving</i>
Rhode Island	R.I. Gen. Laws § 31-27.1-3 (2002) <i>Aggressive Driving Defined</i> R.I. Gen. Laws § 31-27.1-4 (2002) <i>Penalties</i>
Virginia	Va. Code Ann. § 46.2-868.1 (2003) <i>Aggressive Driving; Penalties</i> Va. Code Ann. § 46.2-492 (2003) <i>Uniform Demerit Point System</i>

An additional 17 states have introduced aggressive driving bills from 1999 to 2003: Connecticut, Hawaii, Illinois, Kansas, Louisiana, Massachusetts, Michigan, Missouri, New Hampshire, New York, North Carolina, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, and Washington.

* New York enacted a "road rage" law in July 2002 that requires that pre-licensing and defensive driving courses to contain a component of road rage awareness education.

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2006 Midyear Meeting
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Coeur d'Alene Resort
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\$160 premier room

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The Resource Page



SENTENCING AFTER *BLAKELY*

ANNE SKOVE, *BLAKELY v. WASHINGTON: IMPLICATIONS FOR STATE COURTS* (2004). Available at http://www.ncsconline.org/WC/Publications/KIS_SentenBlakely.pdf

As many of you know, the U.S. Supreme Court's June decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004), invalidated an upward sentence departure that was based on the fact findings of a judge, not a jury. Substantial questions have been raised as to the impact of *Blakely* on sentencing guidelines and practices in state and federal court.

Anne Skove, an attorney in the Knowledge & Information Services section of the National Center for State Courts, has prepared a detailed memorandum providing a preliminary appraisal of questions raised by *Blakely* and its potential impact. The memo includes a state-by-state review of practices and a discussion of potential impacts on sentencing guidelines, pleas, jury trials, and court budgets.

Skove's analysis will not be the last word on this topic and she does not claim otherwise. Everyone's analysis is tentative at this point. But she has provided a useful starting point for anyone beginning their consideration of the impact of *Blakely*. For some of the issues, she suggests that the answers are uncertain at present, but suggests some ways in which application of *Blakely* may play out. For example, she reviews its potential impact on probation and parole, including revocation hearings. She asks, "Are the fact-finding processes in probation and parole decisions similar enough to a presumptive sentence to come under *Blakely*'s purview?" Although no final answer is given to that question, she reviews cases and practices from around the states that suggest potential answers. She also reviews potential impacts on consideration of criminal history information, mandatory minimum sentences, truth-in-

sentencing provisions, consecutive sentences, and due process notice issues.

Final sections include a review of solutions already in use around the country. Kansas, for example, had already determined that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), required jury findings for upward sentencing departures and provided for bifurcated jury trials. Thus, jury instructions for such a procedure already exist in Kansas. Skove suggests that a new statute may not be needed in many states to allow bifurcated trials. Other options—rights waivers, making guidelines voluntary, and amending guidelines—are also discussed.

Skove's memorandum provides a useful overview of the *Blakely* decision and its aftermath.



BROWN V. BOARD OF EDUCATION EDUCATIONAL MATERIALS

MARGARET FISHER, *JUDGES IN THE CLASSROOM: BROWN V. BOARD OF EDUCATION* (2004).

Available at <http://www.courts.wa.gov/education/lessons/BrownvBoard.doc>

Many commemorations have been held in connection with the 50th anniversary of the decision in *Brown v. Board of Education*, 347 U.S. 483 (1954). For any judge who might have an opportunity to make a presentation to a school group, Margaret Fisher of the Washington State Administrative Office of the Courts has put together an excellent set of teaching materials on the case.

The materials are designed for a one-hour class to a high-school group. Students are given roles to get them involved and work through the facts of the case in some detail. They are given a good background of the racial segregation prevalent as of the 1950s and of the available options for dealing with it. Suggestions are made for judges to conclude with comments regarding the role of the courts in handling the case.



JUDICIAL ETHICS

ABA Joint Commission to Evaluate the Code of Judicial Conduct

<http://www.abanet.org/judicialethics/drafts.html>

The ABA Joint Commission to Evaluate the Code of Judicial Conduct is now seeking comments on its draft proposals of new provisions for Canons 3 and 4. Comments were previously sought on Canons 1 and 2. (See Resource Page, Summer 2003.)

You can review the proposals—and a redlined version showing the changes—at the web address listed above. Comments and suggestions regarding the proposed changes to Canons 3 and 4 may be sent until October 8, 2004 to Eileen Gallagher at gallaghe@staff.abanet.org or by mail to her attention at the American Bar Association, 321 North Clark Street, Chicago, Illinois 60610.

Proposed changes to Canons 3 and 4 include:

- Adding "ethnicity" and "sexual orientation" to the list of factors that must not be the basis for discrimination in the policies of groups to which judges may belong.
- Limiting a judge's use of judicial letterhead to write a letter of recommendation to situations in which the judge's statements are based upon "information obtained through the judge's expertise or experience as a judge."
- Providing examples of when appearances by judges before various governmental bodies are permissible.
- Allowing a judge to speak, be recognized, or honored at an event sponsored by a variety of law-related entities—even when the event raises funds for its sponsor.
- Providing that a judge shall not disclose or use nonpublic information acquired as a judge for any purpose unrelated to their judicial duties.