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Court Review

Volume 54, Issue 1

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

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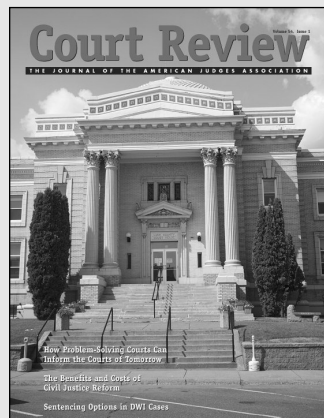
2018

EDITOR'S NOTE

This issue represents a first foray into a new era—one without Judge Steve Leben at the helm as editor. As you can see from Judge Leben's final *Editor's Note* in Volume 53:4, it takes a village of judges to replace him and the excellent job that he has done over the past 20 years. The five editors (Professor Eve Brank, and Judges David Shakes, David Prince, Devin Odell, and I) are grateful for his thoughtful leadership and guidance, and apologize to him and our readers in advance as we bumble our way through our first year as editors of this esteemed publication. Thank you all for your patience as we learn how to fill some very big shoes. Included in this issue is a tribute to Judge Leben, and I commend it to you so that you can better appreciate the impact that Judge Leben has had on this publication, and on the American Judges Association as a whole.

In addition to the tribute to Judge Leben, you'll find a number of articles of interest regarding a variety of issues of concern to judges in the U.S. and Canada. In our "Thoughts from Canada" column, Judge Wayne Gorman addresses a timely issue of interest to all judges: how stereotypical thinking can impact how we assess credibility of witnesses, particularly in sexual assault trials. Given the rise of specialty courts, Kaplan, Miller, and Wood review the history and practices of problem-solving courts and provide a look forward at how those courts can inform practices in the future. In that same vein of innovation, Paula Hannaford-Agor provides an assessment of civil-justice-reform practices. Victor Eugene Flango provides a thoughtful review of sentencing options in impaired-driving cases. And last, but certainly not least, Judge Kim Berkeley Clark shares with us her acceptance speech presented to the National Center for State Courts in November 2017, when she was awarded the William H. Rehnquist Award for Judicial Excellence. I found her words inspiring me to be the best judge I can be for the people in my jurisdiction. I trust you will be similarly inspired.

The crossword puzzle has a personalized theme honoring our retiring editor, so take a moment to enjoy that fun and subtle tribute. We are very pleased to announce that in future issues you will see a regular ethics column by Cynthia Gray. As many of you know, Ms. Gray is the director of the Center for Judicial Ethics that is part of the National Center for State Courts. In this recurring feature, Ms. Gray will share with us recent cases and advisory opinions that will help all of us to avoid ethical pitfalls that can sometimes sneak up on us. For a preview of her writing and an understanding of what a great repository of knowledge she is, check out her weekly blog: www.ncscjudicialethicsblog.org. Thanks for your patience during the transition of editors. Steve, you will be missed. —JKF



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 and Canada. 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 46 of this issue. *Court Review* reserves the right to edit, condense, or reject material submitted for publication.

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The Lafayette County Courthouse is located in Oxford, Mississippi and listed on the National Register of Historic Places. It was constructed in 1872 to replace an earlier building burned during the Civil War. The Courthouse also plays a significant role in William Faulkner's fiction, and is a centerpiece in the dramatic ending to *The Sound and the Fury*. Cover photo by Mary Watkins.

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President's Column

Catherine Shaffer

My dear colleagues and *Court Review* readers, greetings. As I wrote this, I had just returned from an excellent AJA Executive Committee meeting in the Napa Valley, which focused on our three linked goals this year: (1) enhancing the value of AJA membership for those who are unable to attend conferences, (2) building on AJA's advances toward greater diversity in our organization and on the nation's benches, as well as achieving better understanding of and responses to diversity issues in our courts, and (3) strengthening AJA's ties to other national court-oriented organizations, including reaching out to national minority-lawyer organizations with judicial divisions and finding new ways to collaborate with our national court-oriented partners. Since then, I have attended the Conference of Chief Justices (CCJ) midyear meeting in Henderson, Nevada, followed about two weeks later by a visit to the National Association for Court Management (NACM) midyear meeting in Orange County, California. My next update will talk in more detail about my latest trip, to our simply outstanding AJA midyear conference in Memphis, Tennessee. Justice Torres and Judge Betty Moore planned that excellent event, but I think Justice Torres and I both agree that it is Judge Moore, the conference chair, who really deserves a standing ovation for all she did to make that one of our best conferences ever.

I think our goals this year are important, and I have been reflecting on why, so that I could try to discuss that in this column. A recent jury-selection experience in my court helped to illuminate what I want to say. The lawyers asked the jurors to state their opinions about immigration and immigrants. The 50-odd jurors in the panel engaged very seriously with this question. They expressed some range of opinion: some indicated their desire that current immigration laws be enforced, some said they wanted to see both enforcement of existing law and reform to allow immigrants a path to citizenship, and some talked about how much they want to lower barriers to immigration. But what juror after juror discussed was how much stronger and richer the United States is as a nation because of our immigrant foundation. They pointed out that all of us who are not Native American or First Nations in heritage are immigrants or descended from immigrants to North America. They talked about the ways the United States has benefited from the work, patriotism, and enthusiasm of its immigrants. They discussed how fascinating and enriching it is to live in a place informed by many cultures, languages, and religious beliefs. The jurors, including the significant number who had been born outside North America, talked about their

passionate support for being part of a nation that is a haven for the persecuted, a beacon of liberty, and a respecter of every human being's right to pursue happiness and to receive equal treatment under the law.

Perhaps apropos of these reflections, I will highlight a book I read recently for the Law and Literature program at the CCJ conference. It is *Sweet Promised Land*, by Robert Laxalt. The book is about his immigrant father, Dominique, a Basque shepherd from the Pyrenees area who immigrated to the United States and married Laxalt's mother, also a Basque immigrant.

People with backgrounds like these became shepherders and cowboys in the mountains of western states like Nevada, Idaho, and Oregon. Dominique was wealthy and successful for a time, and when he was not, he returned to being a simple shepherd. America became his true home, as he realized when he finally returned to the Pyrenees for a visit late in life. His children were all successful, and one may be well known to you: Paul Laxalt, who was a Senator from Nevada, Governor of Nevada, and General Chairman of the Republican National Committee.

To me, this jury discussion and this book highlight some key common concepts on which our membership in the AJA rests. One of these is our appreciation of the immense value that our populations' diversity has brought to our national heritages as American and Canadian judges. Another is the respect we all feel for the rule of law and its bedrock assumption that all persons are equal before the law, equally endowed with rights and responsibilities, and equally deserving of opportunity, safety, and liberty. A third is the critical importance that we all thoughtfully share our experiences, discuss our common challenges, learn how to do our jobs to the very best of our ability, and work together professionally so that each of us can enhance the delivery of equal justice under the law to the people who appear in our courts.

I hope you agree with me that our association together can help to do these things, and—whether or not you come to conferences—that is a key value of being an AJA member. I hope, too, that you feel how worthwhile it is for all of us to rededicate ourselves to celebrating our diversity and enhancing it. And finally, I hope you agree that is fruitful and worthwhile for AJA us to reach out to and cooperate with other national court organizations, including both our existing partners and the national minority legal organizations with judicial divisions.

Please re-dedicate yourself to these goals in your AJA committees. I hope to see many of you at our fall conference in Kauai, Hawaii. I will be in touch with you again soon.



The Avoidance of Stereotypical Thinking

Wayne K. Gorman

There has been a great deal of controversy lately in Canada over trial judges purportedly resorting to stereotypical reasoning in assessing the credibility of witnesses, particularly complainants in sexual assault trials.¹

This issue came to a head with a recommendation by the Canadian Judicial Council to the Minister of Justice that a trial judge be removed from office based upon his conduct (i.e., comments during a sexual assault trial).² The recommendation arose out of a complaint had been made to the Canadian Judicial Council concerning former Justice Robin Camp.³ The Council's inquiry committee concluded that Justice Camp "relied on discredited myths and stereotypes about women and victim-blaming during the Trial and in his Reasons for Judgment" (at paragraph 6).⁴

In this column, I intend to review the decision of the Judicial Council in relation to former Justice Camp. I then intend to review how allegations of improper stereotypical thinking have been dealt with by various Canadian appeal courts and, in one case, the Supreme Court of Canada.

THE COMPLAINT

The Camp complaint arose as a result of a sexual assault trial conducted by Judge Camp in *R. v. Wagar*.⁵

In *Wagar*, the accused was charged with the offence of sexual assault. The complainant, A.B., testified that she was sexually assaulted by the accused in the bathroom of an acquaintance's apartment during a party. The accused testified that A.B. consented to the sexual activity.

Justice Camp acquitted the accused. On appeal, the acquittal was overturned (see 2015 ABCA 327). The Alberta Court of Appeal indicated that it was "persuaded that sexual stereotypes and stereotypical myths, which have long since been discredited, may have found their way into the trial judge's judgment" (at paragraph 4).

During the course of the trial, Justice Camp made comments and asked questions, which formed the subject matter of the subsequent complaint.

For instance, during the submissions of counsel, Justice Camp suggested that "young woman want to have sex, partic-

ularly if they're drunk" (see paragraph 92 of the Inquiry Report). In addition, during the examination of the complainant, Justice Camp asked the complainant several questions (at paragraph 137 of the Inquiry Report):

Q. But when—when he was using—when he was trying to insert his penis, your bottom was down in the basin. Or am I wrong?

A. My—my vagina was not in the bowl of the basin when he was having intercourse with me.

Q. All right. Which then leads me to the question: Why not—why didn't you just sink your bottom into the basin so he couldn't penetrate you?

A. I was drunk.

Q. And when your ankles were held together by your jeans, your skinny jeans, why couldn't you just keep your knees together?

A. (NO VERBAL RESPONSE)

Q. You're shaking your head.

A. I don't know.

Finally, in his reasons for acquitting, Justice Camp made the following comments to the accused (at paragraph 224 of the Inquiry Report):

And I don't expect you to concentrate the whole time, but I want you to listen very carefully to what I'm saying right at the beginning. The law and the way that people approach sexual activity has changed in the last 30 years. I want you to tell your friends, your male friends, that they have to be far more gentle with women. They have to be far more patient. And they have to be very careful.

Footnotes

1. Interestingly, one judge has cautioned against "the error of stereotypical thinking that sexual assault complainants are always truthful." See *R. v. Dufresne*, 2017 YKTC 45 (Can.).

2. Justice Camp subsequently resigned.

3. The Canadian Judicial Council is a federal body created under the Judges Act, R.S.C. 1985, c J-1. (Can.). It deals with complaints made against federally appointed judges (i.e., Supreme Court judges). Each province has a provincial judicial council, which

deals with complaints against provincial court judges.

4. CAN. JUDICIAL COUNCIL, IN THE MATTER OF AN INQUIRY PURSUANT TO S. 63(1) OF THE JUDGES ACT REGARDING THE HONOURABLE JUSTICE ROBIN CAMP, REPORT AND RECOMMENDATION OF THE INQUIRY COMMITTEE TO THE CANADIAN JUDICIAL COUNCIL (2016) [hereinafter the Inquiry Report]. The inquiry report can be found at www.cjc-ccm.gc.ca (search for "Inquiry Report").

5. [2014] CarswellAlta 2756 (Can. Alta.).

To protect themselves, they have to be very careful.

The Canadian Judicial Council convened a committee to consider the complaint and make recommendations.

THE INQUIRY REPORT

In recommending Justice Camp's removal from the bench, the Inquiry Committee suggested that Justice Camp's comments during the trial were designed to "promote discredited sexist stereotypes" (at paragraph 276). The Inquiry Committee indicated that "Judges are not viewed simply as participants in the justice system. They are expected to be leaders of its ethos and exemplars of its values" (at paragraph 289).

THE JUDICIAL COUNCIL

The Judicial Council accepted the Inquiry Committee's recommendation for removal. The Council indicated that "[t]he Judge's misconduct was manifestly serious and reflected a sustained pattern of beliefs of a particularly deplorable kind, regardless of whether he was conscious of it or not."⁶

The Council concluded that only the Judge's removal from office would restore the public's confidence in the criminal justice system (at paragraph 47):

In our view, the statements made by Justice Camp during the trial and in his decision, the values implicit in those statements and the way in which he conducted himself are so antithetical to the contemporary values of our judicial system with respect to the manner in which complainants in sexual assault cases should be treated that, in our view, confidence in the system cannot be maintained unless the system disassociates itself from the image which the Judge, by his statements and approach, represents in the mind of a reasonable member of the public. In this case, that can only be accom-

plished by his removal from the system which, if he were not removed, he would continue to represent.

THE HISTORICAL CONTEXT

The issue of stereotypical reasoning by judges has been an issue in Canada for a significant period of time. In *R. v. D.D.*, [2000] 2 S.C.R. 275 (Can.), for instance, the Supreme Court indicated that there is "no inviolable rule on how people who are the victims of trauma like a sexual assault will behave" (at paragraph 65). In *R. v. C.A.M.*, 2017 MBCA 70 (Can.), the Manitoba Court of Appeal suggested that "[o]ne of the unfortunate realities of the Canadian criminal justice system historically is the prevalence of the use by lawyers, judges and juries of myths and stereotyping to discredit female and child witnesses" (at paragraph 48).⁷

Over the last couple of years and early this year, a number of appeals have arisen in Canada based upon the argument that the trial judge's decision in a particular case was the result of improper stereotypical thinking. Though this has primarily involved complainants in sexual assault trials, as will be seen it can also apply to assessing the credibility of an accused person. In this column, I intend to review a number of decisions which might be of assistance in helping judges to avoid this mistake.⁸

APPELLATE CONSIDERATION

In the first decision, the trial judge made the mistake of assuming that victims of childhood sexual abuse should demonstrate behaviours consistent with that abuse.

"Judges are not viewed simply as participants in the justice system. They are expected to be leaders of its ethos and exemplars of its values."

6. CAN. JUDICIAL COUNCIL, IN THE MATTER OF AN INQUIRY PURSUANT TO S. 63(1) OF THE JUDGES ACT REGARDING THE HONOURABLE JUSTICE ROBIN CAMP, REPORT TO THE MINISTER OF JUSTICE, para. 24 (2017).

7. In *R. v. Achuil*, 2017 ABPC 292 (Can.), it was indicated that in "assessing credibility, generalized stereotypical thinking must be avoided regardless of the nature of the witness" (at paragraph 19). The Court suggested that "there are a number of such myths in sexual assault cases which have been reviewed in numerous cases. The myths in summary form are as follows:

1. The Court may not draw an inference with respect to a complainant's credibility based on perceptions as to how a complainant should react to a sexual assault.
2. No adverse inference against the credibility of the complainant may be drawn that is based on a lack of evidence of physical injury or struggle.
3. No adverse inference against the credibility of the complainant may be drawn that is based on the post offence demeanour or behaviour of the complainant.
4. No adverse inference against the credibility of the complainant may be drawn that is solely based upon evidence of questionable moral character such as the consumption of alcohol, controlled drugs, or other behaviour infringing on 'moral character.'

8. This issue arose in a rather peculiar fashion in the case of *R. v. Dowholis*, 2016 ONCA 801, (Can.). In *Downholis*, the accused was convicted of three counts of aggravated sexual assault. The offences involved the accused participating in homosexual sexual encounters. One of the jurors appeared on a radio show both during and after the trial. The juror made a number of homophobic comments during the radio shows. In setting aside the convictions, the Ontario Court of Appeal concluded that the juror's conduct created the impression of an unfair trial (at paragraphs 44 and 45):

The likelihood that a bias against gay men would affect the juror's decision-making process is greater given his willingness to publicly disregard instructions, engage in homophobic rhetoric, and mock the court process. The issue is not whether the juror meant what he said. Nor is it whether he was in fact unfair. The issue is the impression that his conduct created.

The impression created by the juror's conduct goes beyond a bias against gay men. A reasonable observer would have the impression that the juror lacked respect for the justice system. This goes directly to the perception of fairness.

“...it is neither logical nor a matter of common sense to expect a child [sexual assault] complainant to behave in any particular manner.”

R. v. A.R.D.

In *R. v. A.R.D.*, 2017 ABCA 237 (Can.), the accused was charged with the offence of sexual assault. The complainant testified that “over a number of years, when she was between the ages of 11 and 16, the respondent touched her sexually numerous times.” The trial judge entered an acquittal. He indicated that he had a reasonable doubt based upon the complainant’s evidence. In acquitting the accused, the trial judge placed significant emphasis on the complainant’s failure to avoid the accused after the alleged assault:

[G]iven the length of time that these events occurred over, and the fact that the most serious event occurred months before [the complainant] complained, I would have expected some evidence of avoidance either conscious or unconscious . . . [a]s a matter of logic and common sense, one would expect that a victim of sexual abuse would demonstrate behaviours consistent with that abuse or at least some change of behaviour such as avoiding the perpetrator . . . [w]hile I recognize that everyone does not react in the same way, the evidence suggests that despite these alleged events, the relationship between the accused and the complainant was an otherwise normal parent/child relationship . . . [t]hat incongruity is significant enough to leave me in doubt about these allegations.

The Crown appealed from the entering of the acquittal. The Alberta Court of Appeal indicated that the “appeal raises one issue”:

[D]id the trial judge err by relying on an impermissible stereotype, or myth, about the behaviour of sexual assault victims in assessing the complainant’s credibility and ultimately acquitting the accused? Specifically, that “one would expect that a victim of sexual abuse would demonstrate behaviours consistent with that abuse or at least some change in behaviour such as avoiding the perpetrator.”

A majority of the Court of Appeal answered this question succinctly: “The answer is clear: he did.”

The Alberta Court of Appeal indicated that “judges must be hypervigilant against the incursion of stereotypical analyses or assumptions into their judicial reasoning” because “speculative myths, stereotypes, and generalized assumptions about sexual assault victims . . . have too often in the past hindered the search for truth” (at paragraphs 49, 60). The majority of the Court of Appeal suggested that an “accused’s right to make full answer and defence and the criminal standard of proof beyond a reasonable doubt, do not allow reliance on prejudicial generalizations about sexual assault victims; this is of paramount importance when adjudicating matters involving child

complainants” (at paragraph 6).

A majority of the Court of Appeal also held that (at paragraph 43):

The most serious problem with the trial judge’s comparison-based assessment of the complainant’s credibility stems from his impermissible reliance on a myth or stereotype (masquerading as logic and common sense) about how a sexual assault complainant, in general and in this case, is assumed or expected to behave post-sexual assault(s). Put plainly, the trial judge’s reliance on his own “logic and common-sense” about how humans react following sexual assault, is itself highly questionable as to relevance and reliability. But it becomes particularly dangerous when reliance on that “logic” overshadows any resort to or assessment of the actual evidence at trial. The trial judge found reasonable doubt because this particular complainant did not exhibit expected predictive, avoidant behaviour. In our view, it is neither logical nor a matter of common sense to expect a child complainant to behave in any particular manner.

A majority of the Court of Appeal concluded as follows (at paragraphs 70 to 73):

The search for avoidant behaviour or a change of behaviour in a sexual assault complainant, particularly a child, is in its essence nothing more than a search for confirmatory evidence, without which a complainant becomes less worthy of belief. The problem with such a search is that there is no reliable support for the presumption that a sexual assault victim will invariably, more often than not, or even to a statistically meaningful degree, display any predictable behaviours following the abuse. Indeed, the converse may well be true: that a vast proportion of child sexual abuse victims are asymptomatic in the post-victimization period both before and after disclosure.

An accused’s constitutionally-protected right to make full answer and defence does not permit reliance on prejudicial generalizations about sexual assault victims. Reasonable doubt is not a shield against appellate review if that doubt is informed by inferences based on external, personal assumptions or expectations about how sexual assault victims behave either generally, or specifically. Appellate courts must carefully scrutinize reasons to ensure that findings said to be based on “common sense or logic” are reliably just that, and are not, in fact, unfair and inaccurate external viewpoints that find no foundation in the record.

For all of these reasons, the Crown has established an error of law that is directly tied to the acquittals in this matter. We are satisfied that the crucial credibility assessment of the complainant’s testimony was not solely based on an assessment of the evidence; instead, it was directly affected by an impermissible stereotype, or myth, that had a material bearing on the acquittals.

For these reasons, we allow the appeal, and direct a new trial.

THE DISSENT

In a dissenting judgment, Mr. Justice Slatter found no stereotypical thinking (at paragraph 108):

In conclusion, the reasons for judgment must be read as a whole and in context. Determining if there is a reasonable doubt based on the evidence or absence of evidence is the particular mandate of the trial judge. Trial judges are entitled to rely on logic and common sense, so long as inferences are not based on stereotypical thinking. This trial judge self-instructed on the need to avoid prohibited lines of analysis. Assuming this record engages a question of law, the Crown has not shown that the trial judge made the asserted error, and the appeal should be dismissed.

The accused appealed to the Supreme Court of Canada. In a brief oral argument (see 2018 SCC 6), the Supreme Court, in dismissing the appeal, concluded that the trial judge had erred in relying on the “expected behavior of the stereotypical victim”:

In considering the lack of evidence of the complainant’s avoidance of the appellant, the trial judge committed the very error he had earlier in his reasons instructed himself against: he judged the complainant’s credibility based solely on the correspondence between her behaviour and the expected behaviour of the stereotypical victim of sexual assault. This constituted an error of law.

The next decision illustrates the danger of accepting submissions of counsel based upon myths and stereotypes.

R. v. C.A.M.

In *C.A.M.*, the accused was convicted of the offence of sexual assault. On appeal, the accused argued that the trial judge erred in assessing the complainant’s evidence. The accused argued that (at paragraph 45):

[T]he Complainant’s actions encouraging the [Accused] to remain in the residence with her and physically comforting him after he had, as she described, violently sexually assaulted her multiple times and threatened her with a knife, was not at all considered in the analysis of the Complainant’s credibility and the plausibility of her version of events. Further her continued contact with the [Accused] in the days and months that followed and his continued time spent alone with the children, was not considered by the Learned Trial Judge as a factor to consider when assessing the version of events set forth by the Complainant. It is respectfully submitted that a close critical look at the Complainant’s evidence, as was applied to the [Accused’s], would have caused these factors to be of significant concern on the issue of credibility.

The Manitoba Court of Appeal rejected this submission. The Court of Appeal indicated, at paragraph 46, that the “strat-

egy of using myths and stereotypes to discredit the credibility of a complainant in an allegation of sexual violence is ‘invidious’ because such a submission is subtly persuasive by its appeal to common sense.”

The Court of Appeal noted that the “law is now well settled that the use of myths and stereotypes has no place in the determination of credibility because such reasoning corrupts and distorts the trial process and may result in an unfair trial” (at paragraph 50). The Court of Appeal also indicated that (at paragraph 51):

“[T]he law is now well settled that the use of myths and stereotypes has no place in the determination of credibility.”

[T]rial judges have a heavy responsibility to ensure that counsel do not introduce the spectre of such forbidden reasoning into a trial. If that occurs in a jury trial, it should be answered by a timely and appropriate instruction to the jury (see *R v Barton*, 2017 ABCA 216 at para 1, 159-61). In judge-alone trials, judges must not succumb to drinking from such a poisoned chalice in their assessment of credibility.

The Court of Appeal concluded that the accused’s submission was “unsound” (at paragraph 52 and 53):

The accused’s submission that the complainant’s credibility as to her version of events was undermined because it did not conform to some “idealized standard of conduct” (*R v CMG*, 2016 ABQB 368 at para 60) is unsound. I reject it unequivocally. Credibility determinations must be based on the totality of the evidence, not untested assumptions of a victim’s likely behaviour based on myths and stereotypes.

The judge properly looked at the evidence, as opposed to myth and stereotypes, and accepted that the complainant’s motivation for staying with the accused after being raped on July 23, 2012, and not telling the police, was to help him and to not further disrupt their family situation. The fact that the complainant did not tell the police that night about being raped was irrelevant to assessing her credibility The judge also accepted the complainant’s evidence that she sincerely believed that her children were not in danger and that, regardless of the conflict between her and the accused, he could continue to care for the children after the July 23, 2012 incident. There is nothing in the record to suggest other than the accused was a good caregiver for the children; particularly when the complainant was not around. I see no palpable and overriding errors in the judge’s conclusions as to the complainant’s credibility given the fact that she did not sever all contact with the accused after the July 23, 2012 incident.

The next decision illustrates that stereotypical thinking can also be improperly applied to the evidence of the accused.

“[T]he [accused’s] sexual orientation was not relevant to the charges against him.”

R. v. T.J.B.

In *R. v. T.J.B.*, 2017 BCCA 49 (Can.), the accused was convicted of the offence of sexual assault. The complainant was ten years of age at the time. The accused was twenty years of age. During the cross-examination

of the accused, Crown counsel asked a number of questions concerning the accused’s sexuality:

Q. So you consider yourself to be a heterosexual?

A. Yes.

Q. Okay. Have you ever talked with anyone about homosexuality, interests in that?

A. No.

Q. Okay. How about with your friends, do you talk about girls?

A. Oh, yeah.

Q. And I am not trying to cast aspersions or anything, but kind of—the sort of thing like you’re out with your friends and you see a good looking girl you’d be kind of she looks nice, make a comment kind of thing?

A. Yeah. Actually just on break.

Q. Okay. And have you had any girlfriends?

A. I’ve had relationships that haven’t lasted long.

Q. With women?

A. Yes.

Q. With any men?

A. No.

In convicting the accused, the trial judge made use of this evidence in concluding that the accused’s testimony was not believable (at paragraph 23):

[W]hen asked in cross-examination if he was gay, the accused strongly denied that he was anything other than heterosexual. When asked if he talked about girls, he said “Oh yeah”. He commented that he had seen a good looking girl during a break in the trial and he would comment on this sighting to his friends. He testified that he has had relationships with women, but they have not lasted very long. I found the accused highly defensive of his sexuality. He appeared to try too hard to convince the Court that he was heterosexual. I found his responses to be disingenuous and contrived.

The accused appealed from conviction.

The British Columbia Court of Appeal ordered a new trial. It indicated that (at paragraph 25):

[T]he [accused’s] sexual orientation was not relevant to the charges against him. It is settled law that with certain limited exceptions (where, for example the crime involves deviant sexual behaviour or the accused himself testifies to strong aversion to the sexual activity alleged, making his own sexual tastes an issue), evidence of sexual orientation is not probative of guilt and cannot be used to draw an inference that the accused is more likely to have committed the crime charged.

The British Columbia Court of Appeal concluded that the trial judge permitted the accused “to be put” in an “unfair position” and “it was unjust to judge the [accused] on the quality of his responses” (at paragraphs 35-37):

The reliance on the inadmissible evidence to assess credibility in this case is problematic. The examination of an accused on sexual orientation puts that person in an unfair position. There may be many reasons unrelated to guilt or innocence why a person may not wish to publicly assert their sexual orientation. Those reasons may be very strong in a small or religious community.

...

Similarly, a gay man charged with sexually assaulting a boy could properly harbour concerns that acknowledging his homosexuality would be wrongly taken as an acknowledgment of sexual attraction and could lead to an improper inference that he is more likely to have committed the crime charged. He could equally have concerns that a negative answer could be viewed as patently false. A negative answer might be viewed as an obvious lie even, as in this case, in the absence of evidence of its falsity, and as an attempt to avoid responsibility.

Finally, the most recent decision I wish to review illustrates that the line between stereotypical thinking and assessing the specific circumstances of a case can be a thin one and that it is not always the prosecution suggesting we erred.

R. v. ROBERTS

In *R. v. Roberts*, 2017 NWTCA 9 (Can.), the accused was convicted of the offence of sexual assault. The evidence presented at the trial established that both the accused and the complainant were under the influence of alcohol. The complainant testified that she had gone to bed and was awoken by the accused having sexual intercourse with her. The accused testified that the complainant initiated multiple sexual encounters with him, all of which were consensual. In convicting the accused, the trial judge stated: “On the accused’s evidence, every aspect of the sexual encounter between the accused and [the complainant] is instigated by [the complainant]. While that is not impossible, it certainly seems improbable.”

The accused appealed from conviction. He argued that the

trial judge “made a stereotypical assumption about the implausibility of the complainant initiating multiple sexual encounters which materially eroded the trial’s truth-seeking function and unfairly compromised the fairness of the trial, rendering the appellant’s conviction unsafe” (at paragraph 51). He argued that “in rejecting” his “evidence that the complainant had initiated the sexual contact as ‘implausible’, the trial judge resorted to myth-based assumptions and beliefs about how a woman would sexually engage in this situation” (at paragraph 51).

The Court of Appeal of the North West Territories suggested that it “may fairly be said that a bulk of judicial attention has been expended on various types of stereotypical thinking, assumptions or generalizations identified as being unfairly applied to sexual assault complainants” (at paragraph 47).

The Court of Appeal held that (at paragraph 62):

[T]he trial judge did not resort to impermissible stereotypes or assumptions about how a complainant would engage sexually in the circumstances of this case. There is nothing in the trial judge’s decision that hints at such a stereotype being considered or assessed, or any such generalized assumption being made; and the appellant’s reliance on one small portion of the decision concerning implausibility is no evidence of such an error, either in its own right or when necessarily considered in the context of the entire decision.

The Court of Appeal concluded that the conviction was “not based on a stereotypical generalized assumption about sexual behavior” (at paragraphs 65 and 66):

In our view, the conclusion reached by the trial judge was not based on a stereotypical generalized assumption about sexual behaviour, but was grounded in and arose directly from the evidence. Her conclusions were not impermissibly anchored in some personal worldview unrelated to the evidence, and did not find any genesis, or provenance, in dangerously presumptive generalizations or assumptions about the normative behaviour of a sexual assault complainant, or this particular sexual assault complainant.

Rather, we conclude that this finding rested upon the totality of the evidence the trial judge did accept: that in the factual matrix of this case, this complainant, would not have instigated multiple sexual encounters with the appellant. In her reasons, this finding was directly tied to the evidence of the complainant as to her distressed state

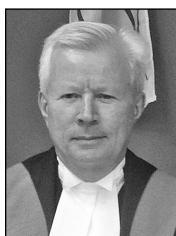
arising from an argument with her spouse and him leaving with the children, as well as the testimony of DE and MS – both of whom confirmed the complainant was upset a short while before the sexual encounter took place. It was also uncontradicted that the police had attended at the residence earlier that night on a domestic dispute call. The complainant further testified that she had gone to bed after the police left and awoke to the appellant having sexual intercourse with her; when she told him to get off, he punched her in the head and threatened her. She admitted she was intoxicated throughout.

CONCLUSION

It has been suggested that in assessing the credibility of a witness it can be “very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events.”⁹ It has also been suggested that it “is now acknowledged that demeanour is of limited value because it can be affected by many factors including the culture of the witness, stereotypical attitudes, and the artificiality of and pressures associated with a courtroom.”¹⁰

Whatever one might think of these suggestions, it is clear that the time when it was thought that “the ideal judicial voice would have sounded something like the voice of God” is long past.¹¹

It is also clear that there is no place for trial judges to assess credibility based upon assumptions as to how a true victim of a sexual assault should act or behave.¹²



Wayne Gorman is a judge of the Provincial Court of Newfoundland and Labrador. His blog (*Keeping Up Is Hard to Do: A Trial Judge’s Reading Blog*) can be found on the web page of the Canadian Association of Provincial Court Judges. He also writes a regular column (*Of Particular Interest to Provincial Court Judges*) for the Canadian Provincial

Judges’ Journal. Judge Gorman’s work has been widely published. Comments or suggestions to Judge Gorman may be sent to wgorman@provincial.court.nl.ca.

9. *R. v. Gagnon*, 1 S.C.R. 621 (Can.), at paragraph 20.
10. *R. v. Dyce*, 2017 ONCA 123 (Can.), at paragraph 12.
11. Richard Posner, *Judges Writing Styles (and do they matter?)*, 62 U. CHI. L. REV. 1421, 1426 (1995).
12. In *R. v. Richards*, 2017 ONCA 424 (Can.), the issue arose as a result of comments made in an unrelated matter. In *Richards*, the trial judge in a sentencing case held just before Mr. Richards’ trial commenced, referred to addicts as being “liars, cheaters, and thieves, every one.” The accused argued on appeal from conviction that these comments gave rise to a reasonable apprehension

of bias. In rejecting this argument, the Ontario Court of Appeal held that (at paragraph 58):

[T]he impugned remarks, made in unrelated proceedings after guilt had already been determined, is incapable of demonstrating any sound basis for perceiving that any decision made at trial was grounded in prejudice, generalizations or stereotypical reasoning. In coming to this conclusion, I in no way condone the word choice employed by the trial judge in the unrelated proceedings.

FILLING SOME BIG SHOES

A TRIBUTE TO RETIRING COURT REVIEW EDITOR JUDGE STEVE LEBEN

As noted in the final *Court Review* issue of 2017, Judge Steve Leben has stepped down from his co-editor position. Judge Leben passionately served the American Judges Association in this role for 20 years.

Below we have gathered tributes to Judge Leben from a few of the people who have had the pleasure of working with him as an editor of *Court Review*. In addition, please see the crossword puzzle in this issue developed by Judge Victor Fleming in honor of Judge Leben.

It was July 2008 when Steve Leben's email floated in over the electronic transom. The author of the annual reviews of the U.S. Supreme Court's past Terms was ill. A mutual friend, Phil Frickey, suggested that I might cover the Court's criminal law decisions. I have no idea why Steve thought I would be suitable, except that Phil was a fellow Kansan, and so Phil's judgment must have been impeccable. In any event, Steve graciously extended the invitation, and I was delighted to accept.

Steve edited my reviews for ten Court Terms. I've not had the good fortune to meet Steve in person, but I believe I know him well. He is a master of the big picture and the smallest of details. He manages to stay on top of an enormous number of tasks. Steve has a wonderful, dry sense of humor. He's loyal—even to someone who is not a Kansan. And I've never had a better editor: Steve combines a sharp eye with a light touch.

Along with the many readers of *Court Review*, I'll miss Steve's guiding hand. I'm so grateful to him for his years of service to *Court Review* and, especially, for the skill, patience and kindness he has shown to me.

Chuck Weisselberg
Shannon C. Turner Professor of Law
University of California, Berkeley

Judge Steve Leben's tenure with *Court Review* (20 years!) brought high quality information—via articles but also by means of white papers, reviews, essays, and a resource page (or two)—in highly readable prose that judges and others could directly utilize (e.g., "Recent Decisions of the United States Supreme Court") or be inspired to learn more about (e.g., "Procedural Fairness: A Key Ingredient in Public Satisfaction"). I served as Judge Steve Leben's Co-Editor for eight years starting in 2007. I have worked with a lot of collaborators in my academic history, from co-teachers to co-reviewers to co-editors. No one with whom I have collaborated has been as easy or gratifying to work with. He is a clear thinker and excellent writer, positively reflecting on a previous stint as a journalist. He is generous with his time, seemingly always available unless he was on the bench or writing an opinion. He was generous with providing opportunities, not only for a non-judge like me but also for my students and colleagues. I had been introduced to Steve by Dr. Pam Casey from the National Center for State Courts, who told me I would be grateful to her for making the contact. She was right. I learned

so much about law and the judicial profession from Steve. I am not alone, as Steve's 2014 William H. Rehnquist Award for Judicial Excellence ("a judge who demonstrates integrity, fairness and knowledge of the law") attests. Steve is one of the smartest people I know, and his knowledge about so many matters is both deep and extensive. He is a delightful person, with a dry wit and keen insights about law and its context in society. He is warm, and he is patient with his authors, journal production staff, and specifically this former Co-Editor! Steve's service will be missed. His impact on the journal will endure.

Professor Alan Tompkins
Co-Editor of *Court Review*, 2007-2015

I had the pleasure of working with Judge Steve Leben in my tenure on the Executive Board with the AJA. I witnessed him come up through the ranks as a new member and later serve as President of the Organization. If that wasn't enough, as it is for most, Steve went on to take *Court Review* under his wing and continued the tradition of a first-class publication for a first-class organization. His tireless dedication will be sorely missed in the future and we will never have another one man show like him again.

Chief Judge James F. McKay III
Court of Appeal Fourth Circuit

I served as Vice President when Steve was President of AJA so in some respects, I was his "understudy." Steve, a gentleman and a scholar, also co-authored the white paper for AJA on Procedural Fairness during my term as President. It was difficult enough for me to meet the deadline of writing the "President's Column" for the *Court Review* during my tenure. I cannot imagine the time invested to oversee the execution of such a fine periodical for 20 years! My thanks should be added to countless others for a job well done.

Eileen A. Olds
President AJA 2007-2008

Working with Steve when I was president of AJA gave me a much clearer insight into Steve's amazing contribution to the aspiration of AJA to make better judges. In further pursuit of all things intellectual Steve's intuitively practical and efficient mind organized the content of *Court Review* in ways which make it accessible to the minds of judges and scholars. I have come to appreciate how important his work as Editor of *Court Review* has been in attracting new members—our life's blood. Kudos to Steve for keeping the blood flowing during his 20 years editing *Court Review*.

Hon. Elliott L. Zide
Retired MA Trial Court Judge, Past President of AJA

While I was a longtime fan of *Court Review*, I did not meet Steve until 2013. I submitted a rather sorry start to an article on a new approach to civil case management. Steve could see the potential and paired me with the perfect editor to turn that raw idea into a viable article. He gave freely of his time and talent to help me develop the concept and then see the idea mature even beyond the article. Steve is one of those rarest talents in today's legal world, a gifted mentor giving of himself to help others reach their potential. I was truly honored when Steve asked me to be one of the co-editors that will try to follow in his footsteps.

David Prince
District Court Judge and Co-Editor of *Court Review*.

In my three years working with Judge Leben on *Court Review*, I was struck by how optimistic he was about the publishing process. While I was nervously waiting on a response to a last-minute author query or growing skeptical that a late article was going to materialize, Judge Leben seemed unconcerned. In his 20 years as editor, I guess he had learned that it somehow always worked out. Or maybe more accurately, he had learned how to make sure it always worked out. He used his connections across the country to put together insightful special issues, his social skills to get quick responses from authors, his flexibility to change the contents of an issue if necessary. Even after so many years at the editor's desk, Judge Leben still cared about the small details as well as the big picture. He sought out articles on important topics rather than simply relying on unsolicited submissions, and he recently added two regular features ("Thoughts from Canada" and a crossword puzzle). His confidence that we would put out a high-quality issue each quarter made it so, and his attitude and dedication made working alongside him a pleasure.

Justine Greve
Research Coordinator, Jackson County (Missouri)
Family Court
Associate editor of *Court Review*, 2014-2017

I have never met Steve Leben. However, I have had a great deal of contact with him. Since commencing my regular column for *Court Review* ("Thoughts From Canada"), we have communicated on a regular basis. It has been an absolute pleasure to work with Steve. He has been helpful, considerate and encouraging. Any time I needed assistance, he provided it immediately.

Steve, I will miss discussing the column with you.
Best wishes on your next project.

Judge Wayne Gorman

I had the honor and privilege of working with Steve Leben during my term as AJA President in 2015-2016. Steve was quick with a gentle reminder to send the "President's Column" to him. Over the many years Steve has been editor, *Court Review* has continued to improve. We will certainly miss his wisdom and wit in *Court Review* and, hopefully, will continue to benefit from his guidance as he assumes an advisory role. We trust that Steve will remain as an active AJA Past President and continue to add his insight and experience to AJA's continuing success.

Thank you, Steve, for a job well done and for your many sacrifices on behalf of all at AJA!

Judge John Conery

When he was looking for someone who might be willing to write an annual review of the Supreme Court's civil cases, Steve stumbled upon me through our mutual friend, Gail Agrawal. I'm grateful to her for introducing me to Steve, and I'm grateful to Steve for taking a leap of faith with me. Any opportunity to try to be of service to the AJA is an opportunity worth taking, but having the chance to undertake that work with someone of Steve's intellect and sensibilities has been beyond wonderful. I join countless others in wishing him many happy and productive years ahead.

Todd Pettys
H. Blair and Joan V. White Chair in Civil Litigation
University of Iowa College of Law

As AJA's Association Manager, I have worked with Steve during his entire tenure as Editor. Steve's dedication to producing a journal of which AJA can be extremely proud is inspiring. *Court Review* is a fitting product for "The Voice of the Judiciary™" thanks to Steve's many years of hard work!

Shelley Rockwell
AJA Association Manager

Getting to work as Steve's co-editor of *Court Review* has been a highlight of my career. As a law-psychology professor, I often do research or read other people's research wishing it could get into the hands of judges. Steve empowered me to do just that and along the way gave me insights into what judges wanted to know. I will also never forget the swiftness of his email responses. I would just barely be through the email from an author's submission of an article and Steve would be emailing me with his detailed and thoughtful responses about the article submission. It was clear on multiple occasions that he was some sort of time wizard!

Eve Brank
Co-editor of *Court Review*, 2015- present

I first met Steve when I was the law clinic director at Washburn Law School and he was a trial court judge in suburban Kansas City way back in 1996. Steve and I served on various panels together at different CLEs for the Kansas Bar Association and we instantly developed a professional collaborative connection around research, writing, and teaching. We edited one another's work, and challenged each other's assumptions before live (if captive) CLE audiences. When Steve became the editor of *Court Review* two decades ago, he invited me to serve on the board of editors. He told me it was his vision to raise the publication to a "must read" for judges in the US and Canada. And so he did, with grace and good humor. Soon after that invitation to advise him as a member of the board, he had charmed me into writing articles and ultimately edit-

ing more than one specialty issue on domestic violence. When I moved to Colorado and later became a judge myself, I continued to turn to Steve for his insightful guidance and expertise on the academic side of the law. I am proud to say that for over 22 years Steve has been a mentor and a friend. As one of the four individuals who will struggle to fill his legacy of excellence with *Court Review*, I can tell you that he will be missed but never far from our work. Thank you, Steve. I hope we make you proud.

Hon. Julie Kunce Field
District Court Judge
Fort Collins, Colorado
Co-Editor, *Court Review*

20 years working with Steve has given me an appreciation for his meticulous attention to language and the art of writing. As a graphic designer I focus on visual communication, the readability of text and graphics, but Steve's command of the word and the nuances of punctuation and grammar gave me insights into the importance of communicating meaning, especially to an audience of judges who's interpretation of language has such a great impact on our society. Thanks for two decades of dedication to *Court Review*, Steve ... and no, even you can't edit time!

Gratitude and best wishes for your future endeavors.

Mike Fairchild
"Our layout guy," m-Design Studio

THANK YOU, JUDGE LEBEN!

"Be a good editor. The Universe needs more good editors, God knows."
— Kurt Vonnegut

After hundreds of articles and many, many thousands of words, Judge Steve Leben is retiring as the Editor of *Court Review*.

A heartfelt "thank you" to Judge Leben for his steadfast stewardship of *Court Review* for the past two decades. Twenty years ago, Judge Leben envisioned changing *Court Review* into an important "must-read" journal for judges in the U.S. and Canada. He accomplished that goal and we are all the better for it. Thank you, Judge Leben, for sharing your editorial gifts and insights with so many of us over so many years.

We will miss your humor, passion, and light, yet thoughtful, editorial touch.

Put away your Blue Book and enjoy your free time!

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Looking Backward, Looking Forward:

How the Evolution of Specialty Courts Can Inform the Courts of Tomorrow

Tatyana Kaplan, Monica K. Miller & Emily F. Wood

LOOKING BACKWARD

The “war on drugs” in the 1980s led to more punitive drug-related legislation and exponential increases in arrest and incarceration rates. In 1980, there were 580,900 drug violation arrests. In 1989, the number of drug-related arrests increased to more than 1.3 million.¹ The substantial increase in arrests, many which were nonviolent, overburdened courts and resulted in increasingly overcrowded prisons. Laypersons and legal actors became frustrated with the traditional approach to case processing and the “revolving door” of repeat drug-related offenders.² In response to burgeoning dockets and prisons and drug-related recidivism, Miami-Dade County, Florida opened the country’s first drug court in 1989.

THE DRUG COURT MODEL

Miami-Dade County’s Drug Court integrated substance use treatment and legal sanctions to divert defendants out of prison and expedite case processes. To this end, the Miami-Dade County Drug Court targeted non-serious (e.g., possession), non-violent felony drug offenders and charged judges with long-term treatment adherence oversight.^{3, 4} Judges held frequent hearings with participants and closely monitored their rehabilitation progress. If participants successfully completed (graduated) the program (e.g., series of negative drug test results, no additional arrests), they could have their charges reduced or case dismissed. If participants failed to comply, they faced a variety of sanctions, including incarceration.⁵ Participation was voluntary such that arrestees could plead guilty and choose to participate in the program, or they

could choose the standard legal proceedings (e.g., plea bargaining or trial).⁶

Miami-Dade County’s Drug Court was considered an innovative alternative to incarceration and the “business as usual” criminal justice approach to drug-related crime. The Drug Court was lauded for its collaborative efforts with drug treatment and social service agencies, and its emphasis on addressing underlying problems associated with criminal activity. Despite this, some considered this early attempt to lack coherence and coordination.⁷ Nevertheless, the Miami-Dade County Drug Court served as an exemplar for all future Drug Court models.

Evolving Drug Courts incorporated additional services, such as job placement, public health, education and vocational training.⁸ Some jurisdictions also shifted their focus from less serious to more serious offenders.⁹ The Drug Court model is now defined by 10 Key Components, which jurisdictions must comply with to receive federal funding.¹⁰ Currently, there are over 1,300 drug courts in operation in the U.S.¹¹ Although drug courts have evolved, it was the early or “first generation” models that facilitated a more “therapeutic” approach to crime and the advent of numerous distinctive problem-solving courts.

THERAPEUTIC JURISPRUDENCE

Although the Miami-Dade County Drug Court was not specifically modeled within a therapeutic jurisprudence framework, the court’s approach exemplified therapeutic jurisprudence principles.¹² Therapeutic jurisprudence is concerned

Footnotes

1. *Drugs and Crime Facts*, BUREAU OF JUSTICE STATS. (Feb. 6, 2018), <https://www.bjs.gov/content/dcf/enforce.cfm>.
2. Hon. Peggy Fulton Hora, *A Dozen Years of Drug Treatment Courts: Uncovering Our Theoretical Foundation and the Construction of a Mainstream Paradigm*, 37 *SUBSTANCE USE & MISUSE* 1469, 1470 (2002).
3. CAROLINE S. COOPER, ET AL., INTER-AM. DRUG ABUSE CONTROL COM’N, *ESTABLISHING DRUG TREATMENT COURTS: STRATEGIES, EXPERIENCES AND PRELIMINARY OUTCOMES, VOLUME ONE: OVERVIEW AND SURVEY RESULTS 6-7* (Apr. 2010).
4. Arthur J. Lurigio, *The First 20 Years of Drug Treatment Courts: A Brief Description of Their History and Impact*, 72 *FED. PROBATION* 13, 15 (2008).
5. Greg Berman & John Feinblatt, *Problem? Solving Courts: A Brief Primer*. 23 *LAW & POLICY* 125, 126 (2001).
6. Lurigio, *supra* note 4.

7. *Id.*
8. COOPER ET AL., *supra* note 3, at 7.
9. David Olson et al., *Implementing the Key Components of Specialized Drug Treatment Courts: Practice and Policy Considerations*, 23 *LAW & POLICY* 171 (2001).
10. WEST HUDDLESTON & DOUGLAS B. MARLOWE, *PAINTING THE CURRENT PICTURE: A NATIONAL REPORT CARD ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURT PROGRAMS IN THE UNITED STATES* 14 (July 2011).
11. SUZANNE M. STRONG ET AL., BUREAU OF JUSTICE STATS., *CENSUS OF PROBLEM-SOLVING COURTS, 2012* 1 (2016), *available at* <https://www.bjs.gov/content/pub/pdf/cpsc12.pdf>.
12. Bruce J. Winick & David B. Wexler, *Therapeutic Jurisprudence as an Underlying Framework*, in *JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS* 105, 106 (Bruce J. Winick & David B. Wexler, eds., 2003).

with the degree to which legal systems and actors yield therapeutic outcomes for criminal justice participants.¹³ The goal of therapeutic jurisprudence is to enable practitioners to enhance aspects of the law to be more therapeutic while comporting with other justice principles, such as due process.¹⁴ Hence, a court program that incorporates therapeutic outcomes for its participants can be considered an example of therapeutic jurisprudence.¹⁵ Judges who visited Miami-Dade County's first drug court soon implemented similar models within their own jurisdictions, and so began the rise of problem-solving courts.¹⁶

SPECIALTY COURTS

Specialty courts, also called problem-solving courts, seek to address social issues that facilitate criminal behavior and involvement. Although there is no one definition that encompasses all specialty courts, most specialty courts share some common elements. Specialty courts aim to reduce recidivism; produce better outcomes for clients; modify legal responses to crime; reform governmental and legal approaches to crime; incorporate mostly constant (and long-term) judicial monitoring; collaborate with outside agencies to achieve their goals; and promote a less adversarial courtroom dynamic.¹⁷ Generally speaking, specialty courts are known for their collaborative team approach to address recurring crimes and underlying problems facilitating criminal justice involvement.

Inspired by American models, specialty courts have also been established internationally. Iterations of American Drug Courts and Community Courts are operational in England, Ireland, Scotland, Canada, and Australia¹⁸ and a multitude of other countries.^{19, 20} There are Domestic Violence Courts in Australia, Scotland, England, and Canada. Australia and Canada also both have Mental Health Courts as well as Aboriginal Courts.²¹ Australia has also opened DUI/DWI, Homeless, and Prostitution courts.^{22, 23}

Specialty courts were named as such due to their "specialization" or focus of a target population or problem. However, as will be demonstrated, contemporary "hybrid" courts can address a variety of problems. As drug courts proliferated across jurisdictions, specialty court proponents expanded the

problem-solving approach to other populations and problems.

EVOLUTION

Specialty courts have expanded both in number and variation.²⁴ Most specialty court models utilize a team of attorneys, treatment or social service professionals, and trained court staff; engage in frequent monitoring and judicial supervision; and use a graduated system of incentives and sanctions. Some specialty courts focus on individualized justice and others seek to benefit entire communities. Some specialty courts place greater import on monitoring and compliance, and others are more concerned with rehabilitation.²⁵ Next is a brief review of common specialty court programs.

MENTAL HEALTH COURTS

In 2000, Congress enacted America's Law Enforcement and Mental Health Project, which funded the development and expansion of Mental Health Courts (MHCs).²⁶ Like Drug Courts, MHCs promote recovery and reduce recidivism.²⁷ MHCs vary across jurisdictions but share some common elements. Potential clients are identified through mental health assessments and participation is voluntary. MHC teams (e.g., court actors, mental health professionals) develop a judicially supervised treatment strategy and employ a variety of incentives and sanctions.²⁸ The first generation of MHC targeted nonviolent offenders charged with misdemeanors. Second generation MHCs are more likely to accept individuals charged with felonies and thus, are more likely to require a guilty plea and use jail as a sanction.²⁹ Research on MHCs suggests that participation is positively associated with reduced recidivism, however, definitive conclusions are hampered by methodologically weak studies.³⁰ As of 2012, there were over 300 MHCs.³¹

DRUG COURTS

Most first-generation Drug Court models focused on less-

"Currently, there are over 1300 drug courts in operation in the United States."

13. David B. Wexler, *Therapeutic Jurisprudence: An Overview*, INT'L NETWORK ON THERAPEUTIC JURISPRUDENCE (1999), <https://law2.arizona.edu/depts/upr-intj/intj-o.html>.

14. *Id.*

15. Hora, *supra* note 2, at 1472.

16. COOPER ET AL., *supra* note 3, at 7.

17. Berman & Feinblatt, *supra* note 5, at 131-32.

18. JAMES L. NOLAN JR., LEGAL ACCENTS, LEGAL BORROWING: THE INTERNATIONAL PROBLEM-SOLVING COURT MOVEMENT 2009.

19. HUDDLESTON & MARLOWE, *supra* note 10, at 42.

20. DIANA L. KARAFIN, COMMUNITY COURTS ACROSS THE GLOBE: A SURVEY OF GOALS, PERFORMANCE MEASURES AND OPERATIONS 1 (2008).

21. NOLAN, *supra* note 18.

22. *Id.*

23. See generally COOPER ET AL., *supra* note 3 for review of international Drug Courts.

24. DONALD J. FAROLE, CTR. FOR CT. INNOVATION, THE CHALLENGES OF GOING TO SCALE: LESSONS FROM OTHER DISCIPLINES FOR PROBLEM-

SOLVING COURTS 1 (2006).

25. ROBERT V. WOLF, CTR. FOR CT. INNOVATION, CALIFORNIA'S COLLABORATIVE JUSTICE COURTS: BUILDING A PROBLEM-SOLVING JUDICIARY 5 (2005).

26. Steven K. Erickson, et al., *Variations in Mental Health Courts: Challenges, Opportunities, and a Call for Caution*, 42 CMTY. MENTAL HEALTH J. 335, 337 (2006).

27. Ginger Lerner Wren, *Mental Health Courts: Serving Justice and Promoting Recovery*, 19 ANNALS HEALTH L. 577, 587 (2009).

28. Dale E. McNeil & Renée L. Binder, *Stakeholder Views of a Mental Health Court*, 33 INT'L J. L. AND PSYCHIATRY 227, 227 (2010).

29. Allison D. Redlich, *The Past, Present, and Future of Mental Health Courts*, in PROBLEM SOLVING COURTS 147, 156-57 (Richard Wiener & Eve Brank eds., 2013).

30. Christine M. Sarteschi, et al., *Assessing the Effectiveness of Mental Health Courts: A Quantitative Review*, 39 J. CRIM. JUST. 12 (2011).

31. Strong et al., *supra* note 11.

“Research . . . indicates that the Drug Court model works best with strict adherence to 10 Key Components and with a high-risk population.”

serious offenders and pretrial diversion. In this model, participants who successfully completed the program would have their charges dismissed (pre-plea dispositional model).³² As Drug Courts evolved, participation allowed for higher-level offenders who had to enter a guilty plea prior to participation (post-plea model). In some models, a participant who pleads guilty can have the conviction vacated (post-plea/pre-adjudication) or reduce or avoid incarceration or probation (post-adjudication).³³ Research on Drug Courts indicates that the Drug Court model works best with strict adherence to 10 Key Components and with a high-risk population.³⁴ Drug Court participation has been associated with a 12% reduction in recidivism.³⁵ Other specialty court programs have also incorporated the Drug Court model.

Research on Drug Courts indicates that the Drug Court model works best with strict adherence to 10 Key Components and with a high-risk population.³⁴ Drug Court participation has been associated with a 12% reduction in recidivism.³⁵ Other specialty court programs have also incorporated the Drug Court model.

DUI/DWI COURTS

The first court to specialize in DUI/DWI began in New Mexico in 1995.³⁶ Like Drug Courts, DWI/DUI Courts address the root causes of driving under the influence, such as alcohol addiction.³⁷ Some DUI/DWI courts target only DUI/DWI arrestees and others accept those with related misdemeanor charges. Research on DUI/DWI courts suggests similar results to Drug Courts except results for DUI/DWI courts were not definitive across all rigorous, randomized assessments.³⁸

REENTRY COURTS

Reentry Courts are designed to address problems that might be experienced by parolees transitioning from incarceration to community release. Reentry Drug Courts target transitioning offenders with a history of substance abuse.³⁹ Some Reentry Courts accept participants who pose a high risk to public safety, and some accept ex-offenders who are likely to return to jail or prison, typically “low-level drug offenders and the men-

tally ill.”⁴⁰ Eligibility criteria can vary substantially across jurisdictions. Some Reentry Court clients also receive vocational and housing assistance. Participants who graduate from a Reentry Court program can receive early discharge from supervision.⁴¹ Research on Reentry Courts indicates that clients were less likely to be rearrested for misdemeanor and drug charges and less likely to be reconvicted. However, participants were also more likely to have parole revoked for technical violations, likely due to enhanced supervision/monitoring.⁴² Evaluation of California Collaborative Reentry Courts suggested that participants are more likely to be rearrested but less likely to have parole revoked.⁴³

VETERANS COURTS

In response to the growing number of veterans appearing in court for substance abuse and/or mental health issues, jurisdictions institutionalized Veterans Courts. The Veteran Treatment Court in Buffalo, opened in 2008, typically accepts non-violent offenders diagnosed with serious mental health illness(es) or substance dependency, making a hybrid of Mental Health and Drug Court models.⁴⁴ The court also employs peer-to-peer mentoring.⁴⁵ Veterans Courts work closely with a multitude of veteran’s organizations and provide a variety of resources other than treatment, including financial assistance, housing, and employment training.⁴⁶ We could not locate evaluations of Veteran Treatment Courts. In 2014, there were 220 Veterans Courts.⁴⁷

DOMESTIC VIOLENCE COURTS

Domestic Violence Courts (DVCs) were facilitated by the Violence Against Women Act, which sought to empower domestic violence victims and hold domestic violence perpetrators more accountable.⁴⁸ Brooklyn, New York established one of the early DVCs in 1996. The “Brooklyn Model” provided resources for victims (e.g., victim advocacy, job training, counseling, housing) and closely monitored defendants to ensure court order compliance. Considering the focus on victim safety, monitoring is perhaps more crucial for DVCs than other types of problem-solving courts.⁴⁹ Some DVCs focus solely on civil restraining orders, and others adjudicate crimi-

32. HUDDLESTON & MARLOWE, *supra* note 10, at 24.

33. *Id.*

34. *Id.* at 14, 17.

35. Ojmarrh Mitchell et al., *Assessing the Effectiveness of Drug Courts on Recidivism: A Meta-Analytic Review of Traditional and Non-Traditional Drug Courts*, 40 J. CRIM. JUST. 60, 64 (2012).

36. Scott M. Ronan et al., *The Effectiveness of Idaho DUI and Misdemeanor/DUI Courts: Outcome Evaluation*, 48 J. OFFENDER REHAB. 154, 154 (2009).

37. C. WEST HUDDLESTON III ET AL., PAINTING THE CURRENT PICTURE: A NATIONAL REPORT CARD ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURT PROGRAMS IN THE UNITED STATES VOLUME II, NUMBER 5 (May, 2008).

38. Mitchell et al., *supra* note 35.

39. HUDDLESTON & MARLOWE, *supra* note 10, at 44

40. ROBERT V. WOLF, CTR. FOR CT. INNOVATION, REENTRY COURTS: LOOKING AHEAD: A CONVERSATION ABOUT STRATEGIES FOR OFFENDER REINTEGRATION 5-6 (2011).

41. *Id.* at 3.

42. ZACHARY HAMILTON ET AL., CTR. FOR CT. INNOVATION, DO REENTRY COURTS REDUCE RECIDIVISM?: RESULTS FROM THE HARLEM PAROLEE REENTRY COURT (2010).

43. ADMIN. OFFICE OF THE COURTS, JUD. COUNCIL OF CAL., A PRELIMINARY LOOK AT CALIFORNIA PAROLEE REENTRY COURTS (2009), *available at* <http://www.courts.ca.gov/documents/AOCBriefParolee0612.pdf>.

44. HON. ROBERT T. RUSSELL, VETERANS TREATMENT COURTS DEVELOPING THROUGHOUT THE NATION 3 (2009).

45. *Id.* at 131.

46. *Id.*

47. *History*, JUST. FOR VETS, <https://justiceforvets.org/vtc-history> (last visited Dec. 22, 2016).

48. Allison Cleveland, *Specialization Has the Potential to Lead to Uneven Justice: Domestic Violence Cases in the Juvenile & Domestic Violence Courts*, 6 MOD. AM. 17 (2010).

49. Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1621 (2012).

nal, divorce, and custody cases.⁵⁰ There are also hybrid Domestic Violence/Mental Health Courts.⁵¹ Research on DVCs shows mixed results for recidivism; however, a focus on deterrence, accountability, monitoring, and victim safety promotes better recidivism-related outcomes. Moreover, DVC participation positively associated with conviction and incarceration for male defendants.⁵² There are approximately 300 DVCs in the U.S.⁵³

COMMUNITY COURTS

Community Courts are “neighborhood-focused” courts that incorporate collaborative problem-solving principles to address issues in the local community.⁵⁴ The Midtown Community Court in New York opened in 1993 to address “quality-of-life” crimes (e.g., disorderly conduct, graffiti, shoplifting, public intoxication, prostitution, and minor drug possession).^{55, 56} The Red Hook Community Justice Center in New York, which opened in 2000, also handles low-level crimes, including landlord and tenant disputes and juvenile delinquency cases.⁵⁷ Some Community Courts also focus on mental health.⁵⁸ The most common services offered or mandated by Community Courts include treatment readiness classes, individual counseling, job skills, anger management, and substance abuse treatment.⁵⁹ Community Courts are especially focused on community engagement and impact.⁶⁰ An evaluation of the Red Hook Community Justice Center suggests an estimated taxpayer saving of \$4,756 per defendant and 10% reduction in adult recidivism.⁶¹ As of 2008, there were almost 40 domestic and 33 international Community Courts in existence.⁶²

HOMELESS COURTS

The first Homeless Court originated in San Diego, California in 1989.⁶³ The purpose of the court is to resolve outstanding misdemeanor citations by offering progressive plea bargaining and alternative sentencing (e.g., participation in lieu of custody). Clients, many of whom are veterans, participate in

mental health treatment, vocational training, life-skills education, and substance use treatment.⁶⁴ Twenty-five jurisdictions currently operate at least one Homeless Court (or specialized court session).⁶⁵

FATHERING COURTS

The nation’s first Fathering Court originated in Jackson County, Missouri in 1997. The target population included individuals ordered to appear in court for child support non-payment. As such, the program promoted “participation as an alternative to incarceration.”⁶⁶ Other Fathering Courts have since opened in other states, and many states have noncourt-based problem-solving programs (e.g., Texas and Alabama).⁶⁷ The District of Columbia opened the first hybrid Fathering Reentry Court, which focuses on child support cases that include a noncustodial parent transitioning out of incarceration.^{68, 69} Fathering and Fathering Reentry courts place considerable emphasis on employment services, vocational training, and education programs, which can be essential for reentry and noncustodial parent populations.^{70, 71} Fathering Court (designated and hybrid) programs can also include curriculum to engage noncustodial parents in responsible co-parenting (e.g., parental engagement, money-management) in addition to substance-use and mental-health treatment options.⁷² Few evaluations have been conducted of Fathering Courts. Initial assessments indicate an overall improvement in child-support payments.⁷³

ANIMAL COURTS

Animal Courts were established in response to the low priority that animal cruelty cases receive in the criminal justice system and to prevent and reduce animal abuse and neglect.⁷⁴ There are currently three animal courts in the U.S.⁷⁵ The first,

“Specialty courts have shifted the focus from punishment to rehabilitation and prevention”

50. Cleveland, *supra* note 48, at 18.

51. NOLAN, *supra* note 18.

52. AMANDA B. CISSNER ET AL., CTR. FOR CT. INNOVATION, TESTING THE EFFECTS OF NEW YORK’S DOMESTIC VIOLENCE COURTS (2013), *available at* <https://www.ncjrs.gov/pdffiles1/nij/grants/242583.pdf>.

53. WOLF, *supra* note 25, at 15.

54. Karafin, *supra* note 20.

55. CYNTHIA G. LEE, NAT’L CTR. FOR STATE COURTS, A COMMUNITY COURT GROWS IN BROOKLYN: A COMPREHENSIVE EVALUATION OF THE RED HOOK COMMUNITY JUSTICE CENTER (2013).

56. MICHELE SVIRIDOFF ET AL., CTR. FOR CT. INNOVATION, DISPENSING JUSTICE LOCALLY: THE IMPACTS, COSTS, AND BENEFITS OF THE MIDTOWN COMMUNITY COURT (2002).

57. LEE ET AL., *supra* note 55.

58. NOLAN, *supra* note 18.

59. Karafin, *supra* note 20, at 9.

60. LEE ET AL., *supra* note 55.

61. *Id.*

62. Karafin, *supra* note 20.

63. Steve Binder & Amy Horton-Newell, *Returning Home to Homelessness: San Diego’s Homeless Court Program Models Ways to Help*, 23 EXPERIENCE 34, 35 (2014).

64. *Homeless Courts*, A.B.A., https://www.americanbar.org/groups/public_services/homelessness_poverty/initiatives/homeless_court_s.html (last visited Dec. 19, 2016).

65. *Id.*

66. JANE MACOUBRIE & DANIEL J. HALL, NAT’L CTR. FOR STATE COURTS, ACHIEVING THE FULL POTENTIAL OF REENTRY AND FATHERS’ COURTS 5 (2010).

67. *Id.* at 3-4.

68. *Id.* at 4.

69. Hon. Milton C. Lee, *Fatherhood in the Child Support System*, 50 FAM. CT. REV. 59, 63 (2012).

70. *Id.* at 63-64.

71. MACOUBRIE & HALL, *supra* note 66, at 2-3.

72. Lee, *supra* note 69, at 65.

73. MACOUBRIE & HALL, *supra* note 66, at 20; see also for recommended best practices.

74. Terrill E. Pierce, *New Mexico’s First Animal Welfare Court Starts This Spring*, ST. B. N.M. (Jan. 25, 2016), <https://www.nmbar.org/nmbardocs/aboutus/sections/animallaw/AnimalWelfareCourt.pdf>.

75. *Animal Welfare Courts*, ANIMALS AND SOC’Y INST., <http://www.animalsandsociety.org/helping-animals-and-people/animal-welfare-courts/> (last visited Dec. 19, 2016).

“Addressing psychological and social problems is also good for offenders’ well-being, offenders’ families, and the community”

called Animal Welfare Court, was established in Tucson (Pima County), Arizona in 2012 and handles misdemeanor cases involving animals.⁷⁶ Clients might be mandated to complete intervention and/or treatment programs and might be fined, or receive jail or probation.⁷⁷ The Pre-Adjudication Animal Welfare Court (PAW) was established in New Mexico in May 2016.⁷⁸ This program convenes once a week and also hears animal-involved

misdemeanor cases; but in this court, participants are able to have their charges dismissed if they complete a 16-week intervention.⁷⁹ Both courts offer some judicial oversight. In 2016, Botetourt County, Virginia opened an Animal Court to address animal neglect and cruelty cases once a quarter, but there is currently no judicial supervision or intervention.⁸⁰

It is beyond the scope of this article to review every variation of problem-solving court. Suffice it to say that there are many, including Elder Courts, Prostitution/Human Trafficking Courts, Family Dependency Courts, Tribal Wellness Courts, Gambling Courts, Truancy Courts, Juvenile Drug Courts, Peer Courts, Gun Courts, and a variety of federal specialty courts. Different specialty courts have different emphases and different outcome considerations. However, many share common advantages and disadvantages, and most are still in need of rigorous evaluation.

PRESENT DAY

The number of specialty courts throughout the United States continues to increase.⁸¹ Specialty courts have shifted the focus from punishment to rehabilitation and prevention, which could be associated with several advantages and disadvantages. Furthermore, specialty courts need to demonstrate their true worth. Conducting methodologically weak evaluations might hinder a court’s ability to do just that. For example, a meta-analysis of MHCs indicated that methodologically stronger assessments showed reductions in recidivism but weaker evaluations did not.⁸² Finally, taking potential advan-

tages and disadvantages of specialty courts into account can also improve the quality of evaluations.

ADVANTAGES OF SPECIALTY COURTS

There are a number of advantages associated with specialty courts. First, specialty court judges are experts in specific areas (e.g., drugs, domestic violence). This expertise might result in more therapeutic outcomes for offenders because the judge has a better understanding of both the laws related to that area and of the challenges that offenders face (e.g., addiction).⁸³ Second, specialty courts might reduce recidivism by treating underlying social and psychological issues that contribute to criminal behavior. Third, addressing psychological and social problems is also good for offenders’ well-being, offenders’ families, and the community, as addressing these problems might result in increased employment rates and decreases in other social problems (e.g., homelessness). Fourth, reduced recidivism, as a result of treating underlying problems, can also help reduce prison overcrowding and judicial caseloads.⁸⁴ Fifth, reductions in recidivism rates might decrease costs over time.⁸⁵ Finally, specialty court judges might experience greater job satisfaction and less burnout.⁸⁶ In sum, there are many potential advantages to specialty courts, including benefits to offenders, judges, the courts, and communities.

DISADVANTAGES OF SPECIALTY COURTS

Although potential advantages of specialty courts make developing and maintaining specialty courts appealing, possible disadvantages also must be considered. First, specialty courts do not follow an adversarial model and, thus, certain protections afforded to defendants, such as due-process rights and the right to legal representation, might not be maintained.⁸⁷ Second, participation in specialty courts might result in harsher punishments than offenders would have received in traditional courts.^{88, 89} Third, offenders are often told that their cases will be dismissed upon successful completion of specialty-court-mandated requirements. A choice between sentencing in traditional courts or treatment and dropped charges in specialty courts can be perceived as coercive.^{90, 91} Fourth, there is also the possibility that judges will experience increased burnout and vicarious trauma.⁹² Specialty court

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Specialty Courts*, MASS.GOV, <https://www.mass.gov/specialty-courts> (last visited Dec. 20, 2016).

82. Sarteschi, et al., *supra* note 30.

83. STEPHEN H. LEGOMSKY, *SPECIALIZED JUSTICE: COURTS, ADMINISTRATIVE TRIBUNALS, AND A CROSS-NATIONAL THEORY OF SPECIALIZATION* (1990).

84. NOLAN, *supra* note 18.

85. LEE ET AL., *supra* note 55.

86. NOLAN, *supra* note 18.

87. Eve M. Brank & Joshua A. Haby, *The Intended and Unintended Consequences of Problem-Solving Courts*, in *PROBLEM SOLVING COURTS:*

SOCIAL SCIENCE AND LEGAL PERSPECTIVES 239, 242 (Brank & Haby, eds. 2013).

88. For example, individuals arrested for a drug-related crime might serve more jail time for relapsing during Drug Court participation than they might have if they had been sentenced in traditional court.

89. DRUG POLICY ALLIANCE, *DRUG COURTS ARE NOT THE ANSWER: TOWARD A HEALTH-CENTERED APPROACH TO DRUG USE* 14 (2011).

90. Brank & Haby, *supra* note 87, at 242.

91. NOLAN, *supra* note 18.

92. Vicarious trauma can be experienced by individuals whose profession involves working with individuals that experience trauma; see Jared Chamberlain & Monica K. Miller, *Evidence of Secondary Traumatic Stress, Safety Concerns, and Burnout among a Homogeneous Group of Judges in a Single Jurisdiction*, 37 J. AM. ACAD. OF PSYCHIATRY AND L. ONLINE 214-224 (2009).

judges hear the same types of cases and interact with similar offenders repeatedly, which could result in burnout.⁹³ Moreover, presiding over certain topics, like domestic violence, might result in judges experiencing vicarious trauma.⁹⁴ Finally, specialty courts might be costly (e.g., start-up costs, client services, staff and judicial training). The advantages and disadvantages associated with specialty courts should be considered in specialty court evaluations.

EVALUATION

According to Wolf,⁹⁵ there are six principles of problem-solving justice that specialty courts must adhere to to be effective: (1) enhanced information, (2) community engagement, (3) collaboration, (4) individualized justice, (5) accountability, and (6) outcomes (data collection and analysis). Ongoing data collection and assessment is especially important to improve future specialty courts and to increase the odds of sustainability. However, many evaluations focus only on some outcomes (e.g., recidivism, treatment adherence) and other considerations, like community engagement, might not be assessed at all or are poorly assessed.⁹⁶

To make informed decisions about whether specialty courts should be maintained, expanded, or discontinued, evaluations of specialty courts are necessary. Generally, evaluations and anecdotal evidence from various types of specialty courts (e.g., juvenile courts, drug courts, mental health courts) suggest that specialty courts are effective and successful.⁹⁷ However, many evaluations measure “effectiveness” as short-term recidivism rates and do not measure other outcomes (e.g., judicial satisfaction, positive outcomes for families and the community). Success is difficult to define in the context of specialty courts. Success for the courts might mean reduced costs, reduced caseloads, and reduced crowding in prisons. Success for the community might mean a decrease in social issues such as homelessness. Success for offenders and their families might mean gaining employment, not using drugs, and keeping families together. Thus, many outcomes should be considered when conducting evaluations to determine if specialty courts are effective and worthwhile to implement and maintain.

Additionally, many evaluations do not use methodically rigorous research methods; thus, the results should be interpreted with caution. Many evaluations do not use an adequate control group⁹⁸ when comparing outcomes from specialty courts and

traditional courts.⁹⁹ If offenders who participate in specialty courts differ significantly from a comparison group of offenders in traditional courts, the results might not be reliable. Ideally, experiments¹⁰⁰ would be conducted in which offenders would be randomly assigned to either a specialty court or a traditional court and outcomes between groups are compared. However, random assignment is not always possible because of ethical concerns. If random assignment is not possible, the two groups should be compared before going through the court process (specialty court or traditional court) to determine the extent to which the two groups differ. More evaluations that use methodically rigorous research methods are necessary to determine if specialty courts should be implemented and maintained.

“Many outcomes should be considered when conducting evaluations to determine if specialty courts are effective and worthwhile”

LOOKING FORWARD

The expansion and evolution of specialty courts reflects a transformation in the ways in which the criminal justice system approaches and responds to crime. Specialty courts might also shape and be shaped by the criminal justice system in the future. Problem-solving court programs might be taken to scale, whereby specialty court programs are applied to mainstream courts. In contrast, specialty court programs might be diluted and integrated with more conventional methods. Specialty court programs might also inspire states to place greater emphasis on diversion and decriminalizing legislation (e.g., marijuana use and possession). Problem-solving courts might also continue to develop across jurisdictions.

FUTURE TRENDS

The continued proliferation of problem-solving courts is perhaps an indicator that a problem-solving approach is perceived to be, at the very least, better than traditional approaches. After several decades, problem-solving programs are likely no longer considered tentative demonstration projects. The challenge then is to determine whether courts should continue to specialize in certain populations or crimes, whether problem-solving principles should be applied on a

93. Deborah J. Chase & Peggy Fulton Hora, *The Implications of Therapeutic Jurisprudence for Judicial Satisfaction*, 37 CT. REV. 12, 13 (2000).

94. Chamberlain & Miller, *supra* note 92.

95. ROBERT V. WOLF, CTR. FOR CT. INNOVATION, PRINCIPLES OF PROBLEM-SOLVING JUSTICE 2-9 (2007).

96. Karafin, *supra* note 20, at 25.

97. Mitchell et al., *supra* note 35; Sarteschi, *supra* note 30; David M. Stein, et al., *The Effectiveness of Juvenile Treatment Drug Courts: A Meta-Analytic Review of Literature*, 24 J. CHILD & ADOLESCENT SUBSTANCE ABUSE 80 (2015).

98. In research, a control group is the group that does not receive the intervention and whose outcomes are compared with the “exper-

imental” group (the group that does receive the intervention). A control group should not systematically differ from the experimental group as this could invalidate the results. To develop equivalent groups, researchers use random assignment—a process whereby study participants are randomly assigned to one group or another.

99. W. Clinton Terry, III, *Judicial Change and Dedicated Treatment Courts: Case Studies in Innovation*, in *THE EARLY DRUG COURTS: CASE STUDIES IN JUDICIAL INNOVATION* 1, 15 (W. Clinton Terry, III ed., 1999).

100. Experimental designs involve random assignment to a treatment or control group.

“Whether or not a problem-solving court should be established or maintained can be determined with a needs assessment and a cost-benefit analysis.”

larger scale, or whether states should consider increased diversionary tactics.

GOING TO SCALE

Specialty courts could be considered an improvement from the traditional adversarial system of criminal justice. However, even the most successful specialty courts are effective only on a small scale.¹⁰¹ Thus, effectively addressing a larger population might pose unique challenges. For example, some courts work best with a specific population.¹⁰²

Moreover, some specialty court variants have not established evidence-based “best practices.” Scaling up ineffective portions of a program might hinder progress and add unnecessary costs. Hence, a broader specialty court program application might be challenging, infeasible, or ineffectual. New York has taken Drug Courts to scale by implementing Drug Courts in every county.¹⁰³ In California, problem-solving courts are referred to as Collaborative Justice Courts and, like New York, California has expanded the use of problem-solving courts statewide.¹⁰⁴ California’s court planners have also continuously investigated ways in which to disseminate problem-solving practices into mainstream courts.¹⁰⁵ Future evaluations should be conducted to document challenges and triumphs associated with going-to-scale projects. It is also possible that specialty court programs will be modified for a broader application.

INTEGRATING CONVENTIONAL COURT PRACTICES

As of 2008, there were at least 1,600 counties that did not have a Drug Court.¹⁰⁶ According to surveyed judges, the top reasons for limited Drug Court capacity are insufficient funding (state and federal) and limited treatment availability.¹⁰⁷ Consequently, Drug Courts and other specialty courts might not be viable in all jurisdictions. To circumvent these limitations, some jurisdictions might modify problem-solving models to integrate them with mainstream court practices. However, this tactic should be approached cautiously for several reasons. First, research on Drug Courts has shown that “watered-down” versions are not as effective as those that strictly adhere to the 10 Key Components.¹⁰⁸ Second, a lack of rigorous and methodologically sound research makes it difficult to identify those components of a model that might be crucial for success.¹⁰⁹ Lacking this information might lead to poor integration decision

making. Therefore, modification and integration might reduce benefits associated with some problem-solving court models.

INCREASED DIVERSION

Specialty courts, including Drug Courts, are not without their critics. Some opponents believe that Drug Courts facilitate a more punitive approach to addiction. Participants who relapse are penalized, and some might be incarcerated for a longer period of time than if they had gone the more conventional route.¹¹⁰ The goal of the Drug Policy Alliance is to facilitate a more health-oriented response to drug use and eliminate incarceration altogether for petty drug use.¹¹¹ Over the last decade, several states have shifted to legislation that decriminalizes small-scale marijuana use. Considering this shift in community sentiment, decriminalization and pre-plea diversion methods might be realistic approaches in the future.

ESTABLISHING OR MAINTAINING A SPECIALTY COURT

Judges and court administrators planning for the future might consider establishing a problem-solving court or determining whether a preexisting problem-solving court should be maintained or modified. Whether or not a problem-solving court should be established or maintained can be determined with a needs assessment and a cost-benefit analysis, which provide judges with information to determine whether there is a demand for a specialty court and whether the problem-solving court program is cost-effective. Finally, if judges decide to adopt a specialty court internationally (and locally), they might face several challenges.

NEEDS ASSESSMENT

When considering whether to adopt a specialty court, judges and court administrators should first conduct an assessment to determine whether such a court is necessary. While anecdotal evidence and personal experience are useful, scientific “needs assessments” allow for thorough, unbiased assessment. Jurisdictions could hire professors and graduate students from local colleges, a research firm, or an intern to conduct the assessment. Alternately, a judge or court employee could learn to do the assessment. While professional assessments are ideal, informal assessments can be conducted simply and inexpensively. The Appendix contains some resources that describe needs assessments in more detail.

WHAT IS A NEEDS ASSESSMENT?

A needs assessment identifies problems and then suggests how to improve or develop programs, services, or infrastructure to address these problems.¹¹² The assessment uses established research methodologies to answer the questions “is

101. FAROLE, *supra* note 24, at 2.

102. HUDDLESTON & MARLOWE, *supra* note 10, at 17.

103. FAROLE, *supra* note 24, at 1-2.

104. WOLF, *supra* note 25, at 3.

105. *Id.* at 4.

106. HUDDLESTON & MARLOWE, *supra* note 10, at 27.

107. *Id.*

108. HUDDLESTON & MARLOWE, *supra* note 10, at 14

109. Emily F. Wood et al., Specialty Courts: Time for a Thorough Assessment __ (date) (unpublished manuscript) (on file with authors).

110. DRUG POLICY ALLIANCE, *supra* note 89, at 14.

111. *Id.*

112. See RODNEY A. WAMBEAM, THE COMMUNITY NEEDS ASSESSMENT WORKBOOK (Oxford University Press 2015).

there a problem?” and “is there a need for this service/program to address the problem?” The assessment determines the likely costs to the community and the legal system if the problem is addressed or if the problem remains unaddressed. For instance, will the number of people experiencing drug problems increase if there are no specialty drug courts? Will prison populations be reduced if drug courts are adopted? The assessment will determine whether the community will be able to meet the needs of this population. For instance, the assessment can determine whether the community has the psychological resources to have a mental health court. Finally, an assessment weighs the competing needs of the community. Any community has many needs at any given time, and thus is a specialty court one of the most pressing needs that demands urgent attention? An assessment can help determine the community’s priorities and possible solutions; it then helps determine how best to allocate resources such as money and people.

HOW IS A NEEDS ASSESSMENT CONDUCTED?

Data acquired during a needs assessment can come from many sources.¹¹³ Interviews, focus groups, and community meetings are common, and these methods typically involve open-ended questions, which provide in-depth answers. Data can also be acquired through mail, online, or in-person surveys. Surveys allow researchers to ask more questions and have more participants compared to the other techniques, but generally produce more shallow answers. Researchers can use these techniques to acquire information from the population to be addressed by the court. For instance, a researcher could ask veterans for their perceptions about factors (e.g., brain trauma, Post-Traumatic Stress, employment problems) that contribute to them committing crime. Researchers can ask defendants in the traditional court system if they would participate in a specialty court program if it existed. Researchers can also use these techniques to acquire information from the community and stakeholders (e.g., policymakers, service providers, judges).

A needs assessment can include interviews with key informants. Because some populations (e.g., homeless or prostitutes) are hard to find and study, often researchers interview those with the most knowledge about this group, such as therapists, advocates, or volunteers. For instance, advocates for victims of sex trafficking would be well-suited to know how many victims there are in the community and if this number has increased; they would know the needs of this group and whether the courts are the proper avenue to address these needs. Informants would also know whether the community has resources the courts could use or whether the courts would have to develop their own resources. Informants would also understand the minimum resources that would be needed to help people who often have numerous, intertwined problems. For instance, prostitutes are often abused, addicted, and emotionally attached to their handlers. They often have little or no

education, housing, money management skills, family or social support, employment history, or adequate clothing. Informants would know what would be required to address all these problems.

Needs assessments often rely on secondary data that is regularly collected by the criminal justice system or other entities.

Anecdotes and opinions are useful, but tend to be speculative and not representative of the complete scope of the problem. Data from court records can determine the quantity of repeat offenders and whether a proportion of a certain group (e.g., veterans) in prison exceeds the proportion of the general population that is not incarcerated.

Even if the assessment is done informally, the results can still help researchers and courts determine how to use this information. It is likely that a community has a number of related needs—and that any population will have many needs. The assessment can determine which needs are the most critical, addressable, and cost-effective. The costs and benefits of programs (including specialty courts) can prompt another type of assessment: a cost-benefit analysis.

COST-BENEFIT ANALYSIS

The future of any program can be highly dependent on program sustainability. An important consideration in determining whether to develop or maintain specialty courts is how the monetary costs will be defrayed. Thus, an economic assessment is essential in planning for future courts. Specialty courts can be funded through taxes, government grants, and/or fines paid by defendants who use the courts. There are other costs, too, such as the extra caseload of offenders seeking mental health services, which can overburden mental health service providers. Additionally, courts must consider the benefits of such courts. Specialty courts can benefit the defendants, the legal system, and society in general. They can ultimately save money, if they have outcomes such as preventing recidivism, promoting good health, and educating offenders. Such weighing of costs and benefits is aptly called a cost-benefit analysis (CBA). As described above with regard to needs assessments, such analyses do not have to be expensive, and can be conducted by a hired researcher or someone employed by the court. They are somewhat more complicated, however, and often do demand help from professionals. The Appendix contains some resources that describe needs assessments in more detail.

WHAT IS A COST-BENEFIT ANALYSIS? A CBA identifies all the costs (e.g., money, time) and benefits (e.g., reduction in recidivism or number of prisoners) to establish whether a program produces a net gain to society.¹¹⁴ If the benefits outweigh the costs, then generally the program or policy is worth-

“Specialty courts can be funded through taxes, government grants, and/or fines paid by defendants who use the courts.”

113. *Id.*

114. See generally Barry Williams, *Cost-Benefit Analysis*, 2 *ECON. & LABOUR MARKET REV.* 67 (2008).

“All specialty courts should have a clear mission statement and delineated benchmarks.”

while.¹¹⁵ CBAs are routine in crime policy analysis,¹¹⁶ although there are many variations of CBAs that range from very broad to very narrow and from very technical to very general.¹¹⁷ Jurisdictions that are considering whether to adopt or continue with specialty courts should conduct a CBA.¹¹⁸ Con-

siderations should be given to all stakeholders, which could include the defendants, the court system, the prison system, probation and parole systems, the service providers in the community, and society as a whole.

HOW IS A COST-BENEFIT ANALYSIS CONDUCTED? A CBA is designed to inform decision makers (e.g., policymakers) as to the best course of action by calculating the relative costs and benefits to all stakeholders. The list provided above is only a partial list of potential costs and benefits that would have to be assessed. Often these are monetary expenses (e.g., the cost to incarcerate a prisoner), but often the costs or benefits cannot easily be quantified.¹¹⁹ For instance, how does one put a dollar value on a reduction in crime or on having one fewer person addicted to drugs? Dominguez and Raphael¹²⁰ review a variety of ways to estimate the dollar value of the cost of crime to society; other non-monetary costs would also have to be quantified as well.

Some CBAs focus on a specific cost, for instance, the costs of putting children in foster care due to the parent's offending,¹²¹ while others focus on a variety of costs and benefits (e.g., increased earnings and ability to pay child support; mental health services).¹²² Some CBAs use secondary data to investigate the costs and benefits at a single point in time, without comparison to other alternatives,¹²³ while others use quasi-experimental designs, comparing the costs and benefits of individuals in specialty courts versus traditional courts or individuals not in specialty courts.¹²⁴ Ultimately, the results of a CBA would advise decision makers whether to continue, discontinue, or alter specialty courts.

As this review illustrates, a formal CBA is quite complex, and would require someone with specific training. However, a CBA could be much less formal if a jurisdiction did not have

the funds or personnel to conduct a more rigorous (and likely accurate) analysis. If specialty courts are requesting funding, they should build in the cost to have a professional CBA conducted. Such analyses can help ensure that the courts' efforts are maximally productive.

While a needs assessment can determine whether there is a demand for a specialty court and CBA can provide (sometimes estimated) dollar figures representing costs and benefits, interpretation is often subjective and a decision is inherently complex. The current political climate and justice philosophy can also influence whether money is spent on programs and policies that are retributive, are rehabilitative, or reach other justice goals. Thus, the pure dollar amount and economic assessments are helpful, but not definitive,¹²⁵ as are the perceived needs of the community. Ultimately it is the decision of the individual judges and court administrators whether a specialty court is needed and cost-effective for their jurisdiction.

CHALLENGES FACING INTERNATIONAL COURTS ADOPTING U.S. MODELS

Specialty courts might also proliferate internationally. Adopting preexisting American specialty court models could impede the success of future international specialty courts and prove challenging for international judges seeking to integrate American specialty court models in their country. For example, many specialty court models are likely modified to adapt to the local political, legal, and social climate. In England, probation officers and departments play a greater role in drug and domestic violence matters (e.g., drug testing and follow-up) than they do in American courts.¹²⁶ As such, judges might be less involved in judicial supervision and review, which is considered a prominent component of American problem-solving courts.¹²⁷ American problem-solving court models are also sometimes modified to account for cultural differences. In comparison to other countries, American specialty court dynamics might be viewed as especially emotionally expressive (e.g., hugging, applause). Judges in Scotland, England, and Ireland have expressed that more understated and less ceremonious interactions with clients are more appropriate in their countries.¹²⁸ To a lesser extent, judges in Canada and Australia have conveyed a similar sentiment. There are also differences in treatment approaches. For example, England is much more likely than the U.S. to incorporate methadone maintenance

115. See generally Patricio Domínguez & Steven Raphael, *The Role of the Cost-of-Crime Literature in Bridging the Gap Between Social Science Research and Policy Making*, 14 CRIMINOLOGY & PUB. POL'Y 589-632 (2015); Simon M. Fass & Chung-Ron Pi, *Getting Tough on Juvenile Crime: An Analysis of Costs and Benefits*, 39 J. RES. CRIME AND DELINQ. 363-99 (2002).

116. Daniel S. Nagin, *Cost-Benefit Analysis of Crime Prevention Policies*, 14 CRIMINOLOGY & PUB. POL'Y 583 (2015).

117. See generally Charles F. Manski, *Narrow or Broad Cost-Benefit Analysis?*, 14 CRIMINOLOGY & PUB. POL'Y 647-51 (2015).

118. See generally Jody Brook et al., *Family Drug Treatment Courts as Comprehensive Service Models: Cost Considerations*, 67 JUV. AND FAM. CT. J. 23-43 (2016); T. K. Logan et al., *Economic Evaluation of Drug Court: Methodology, Results, and Policy Implications*, 227

EVALUATION AND PROGRAM PLAN. 381-396 (2004) for examples.

119. Fass & Pi, *supra* note 115, at 365; Kwangseon Hwang, *Cost-Benefit Analysis: Its Usage and Critiques*, 16 J. PUB. AFF. 75, 76 (2015); Williams, *supra* note 114.

120. Domínguez and Raphael, *supra* note 115.

121. Brook et al., *supra* note 118.

122. Logan et al., *supra* note 118.

123. Fass & Pi, *supra* note 115.

124. See, for example, Logan et al., *supra* note 118.

125. Fass & Pi, *supra* note 115, at 386.

126. NOLAN, *supra* note 18.

127. *Id.*

128. *Id.*

treatment protocols rather than group programs like Alcoholics Anonymous.¹²⁹ Finally, some Domestic Violence Court practitioners in Canada consider violence to be more of a learned behavior than an illness and promote domestic violence education rather than treatment, which is more likely in U.S. specialty courts.¹³⁰ Of course, structural and cultural constraints can impact a host of American districts as well. In sum, future iterations of international (and domestic) specialty courts are likely to be molded by salient social and cultural factors.

RECOMMENDATIONS AND CONCLUSION

Problem-solving courts are a likely prominent fixture in the American, and perhaps international, landscape, at least for the time being. Specialty courts began with a single Drug Court in Miami and have grown exponentially. They have evolved considerably in the types of crimes and problems they address and the population(s) they target. Lessons learned from the past and present allow us to offer recommendations for their future.

Judges looking to adopt a specialty court should first conduct a needs assessment and consider starting with a small-scale pilot program that is adequately equipped with short- and long-term data-collection protocols and performance measures to identify strengths and weaknesses. All specialty courts should have a clear mission statement and delineated benchmarks.¹³¹ Specialty courts need to be adequately structured to effectively assess and identify appropriate participants and to quickly link them with suitable treatment or social service providers.¹³² Similarly, specialty courts need to make sure that adequate quantities of resources exist (e.g., treatment providers, affordable housing, employment opportunities) and that courts offer more than one type of service. Moreover, specialty courts need to have clear and effectual (e.g., evidence-based) protocols in place for noncompliance or reoffending. Finally, interpreting needs assessments and CBAs is a subjective endeavor. If 65% of the community is in favor of a specialty court, or if 1,000 people will benefit, does that mean it is “needed?” If the costs are \$5,000 a year more than the benefits, does that automatically mean the program is not worth it? Policymakers, judges, and court administrators have to decide whether a program or policy, even if it is costly, should be adopted or maintained.

Specialty courts certainly have the potential to positively impact clients, the criminal justice system, and society as a whole. However, it is not worthwhile to move forward without considering what we have learned from the past. Perhaps most importantly, specialty courts practitioners need to take steps to document and assess current practices to further research and inform future iterations (i.e., establish best practices)¹³³ so that favorable outcomes can be achieved for all those involved.



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APPENDIX

FURTHER READING ABOUT NEEDS ASSESSMENTS

Conducting Needs Assessment Surveys:

<http://ctb.ku.edu/en/table-of-contents/assessment/assessing-community-needs-and-resources/conducting-needs-assessment-surveys/main>

Conducting a Needs Assessment:

https://cyfar.org/film_1_9

How to do a community needs assessment:

<http://www.lgbtcenters.org/how-to-do-a-community-needs-assessment.aspx>

FURTHER READING ABOUT COST-BENEFIT ANALYSES

Jody Brook et al., *Family Drug Treatment Courts as Comprehensive Service Models: Cost Considerations*, 67 JUV. & FAM. CT. J. 23 (2016)

129. *Id.*

130. *Id.*

131. Karafin, *supra* note 20, at 13-14

132. HUDDLESTON & MARLOWE, *supra* note 10, at 14.

133. WOLF, *supra* note 95, at 15.

Kathryn E McCollister et al., *Estimating the Differential Costs of Criminal Activity for Juvenile Drug Court Participants: Challenges and Recommendations*, 36 J. OF BEHAV. HEALTH SERVICES & RES. 111 (2009).

INTRODUCTION TO STARTING NEW SPECIALTY COURTS

SCHOLARLY ARTICLES AND BOOKS

Problem Solving Courts Resource Guide:
<http://www.ncsc.org/Topics/Alternative-Dockets/Problem-Solving-Courts/Resource-Guide.aspx>

National Center for State Courts list of resources:
<http://www.ncsc.org/topics/alternative-dockets/problem-solving-courts/community-courts/resource-guide.aspx>

Jeffrey Butts, *Introduction: Problem-Solving Courts*, 23 LAW & POLY 121 (2001).

SPECIALTY COURT STARTING-POINT WEBSITES

<http://www.macoe.org/about/what-specialty-court>

<http://www.ncsc.org/Topics/Problem-Solving-Courts/Problem-Solving-Courts/ResourceGuide.aspx>

<http://www.mass.gov/courts/programs/specialty-courts/>

<http://www.nij.gov/topics/courts/pages/specialized-courts.aspx>

OTHER SPECIALTY COURT GENERAL INFORMATION

Problem Solving Toolkit:
<http://cdm16501.contentdm.oclc.org/cdm/ref/collection/spcts/id/147>

National Drug Court Institute:
<http://www.nadcp.org/sites/default/files/2014/Painting%20the%20Current%20Picture%202016.pdf>

America's Problem Solving Courts:
<https://www.nacdl.org/criminaldefense.aspx?id=20191&libID=20161>

Lessons from Problem Solving:
<http://www.courtinnovation.org/sites/default/files/Dont%20Reinvent.pdf>

Problem Solving in Conventional Courts:
http://www.courtinnovation.org/sites/default/files/Breaking_With_Tradition1.pdf

Problem Solving Justice and the Challenges of Statewide Implementation:
<http://www.courtinnovation.org/sites/default/files/Hardest%20Sell1.pdf>

DWI Courts:
<http://cdm16501.contentdm.oclc.org/cdm/ref/collection/traffic/id/44>

Problem Solving Courts: Models and Trends:
<http://cdm16501.contentdm.oclc.org/cdm/ref/collection/spcts/id/169>

Problem Solving Justice:
<http://www.courtinnovation.org/topic/problem-solving-justice>

Drug Courts:
<http://www.nij.gov/topics/courts/drug-courts/pages/welcome.aspx>

Drug Courts—Measures, Evaluation, Costs:
<http://www.nij.gov/topics/courts/drug-courts/Pages/measures-evaluation.aspx>

Domestic Violence Courts:
<http://www.nij.gov/topics/courts/domestic-violence-courts/pages/welcome.aspx>



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Benefits and Costs of Civil Justice Reform

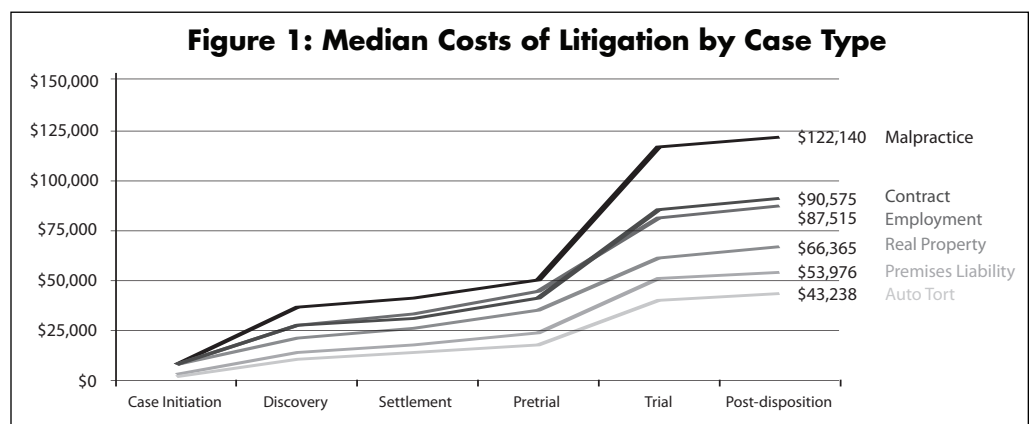
Paula Hannaford-Agor

For more than a century, excessive costs and delays have been a chronic complaint about the American civil justice system. Although some states took steps to improve civil case processing in the past, most of those efforts had only a negligible effect, if any, and few were able to sustain those effects over time. Recently, however, a number of states have implemented civil justice reforms that couple changes in procedural rules with improved civil case automation and staffing models that offer new hope for significant improvements in civil case processing. This paper focuses on four reforms implemented in the Eleventh Judicial Circuit Court of Florida (Miami-Dade); in Strafford and Carroll counties, New Hampshire; and statewide in Utah and Texas.¹

The working assumption for all four reforms was that streamlining the litigation process, providing more effective oversight, and reducing opportunities for satellite litigation would save litigants both time and money without compromising fairness. Assessing the impact of the reform on time is a fairly straightforward task. Time-to-disposition is a standard measure that courts have used for decades to assess performance. Many states have adopted explicit time standards for civil cases based on either the *Model Time Standards for State Trial Courts*² or state-specific time standards. Most states also monitor clearance rates to identify backlogs before they become excessive.³

Monetary savings, in contrast, have historically been difficult to estimate due to lawyers' reluctance to disclose the details of client financial transactions. In 2013, the National Center for State Courts (NCSC) surveyed experienced attorneys about the amount of time expended to complete litigation

tasks and used those responses to generate estimates of legal and expert witness fees for a variety of civil case cases (Figure 1).⁴ Trials were the single most expensive stage of litigation, followed by discovery, pretrial preparation, case initiation, and settlement negotiations. Theoretically, therefore, civil justice reforms that streamline discovery and that promote non-trial case resolution could reasonably be expected to reduce litigation costs. Cases that were disposed by summary judgment or trial would also benefit from a streamlined process that reduced discovery and pretrial costs. This article describes findings from the evaluations of those reforms and, where possible, combines estimates of costs expended in civil litigation with data from these evaluations to offer preliminary estimates of the cost savings to litigants.



ELEVENTH JUDICIAL CIRCUIT COURT OF FLORIDA

The 2008-2009 economic recession precipitated a spike in mortgage foreclosure actions across the country. In Florida, mortgage foreclosure cases increased by 233 percent between 2006 and 2009 statewide, and by 276 percent in the Eleventh Judicial Circuit Court (Miami-Dade). Traditional case management had been performed by judges, who examined the needs of

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Footnotes

1. The Eleventh Judicial Circuit Court collected data on the impact of its approach to the Florida foreclosure crisis to satisfy requirements imposed by state and local legislators as a condition of receiving additional funding. The other three reforms were rigorously evaluated by the National Center for State Courts (NCSC).
2. The *Model Time Standards for State Trial Courts* were adopted by the Conference of Chief Justices, the Conference of State Court Administrators, the National Association for Court Management,

and the ABA House of Delegates in August 2011. RICHARD VAN DUIZEND et al., *MODEL TIME STANDARDS FOR STATE TRIAL COURTS* (2011).

3. Clearance rates reflect the number of outgoing (closed) cases as a percentage of income (newly filed) cases. See *CourTools Measure 2* (2005).
4. The study reported estimated costs at the 25th, 50th and 75th percentiles (the interquartile range) for cases disposed at different stages of litigation. For each of the case types studied, litigation costs doubled from the 25th to the 50th percentile, and then doubled again from the 50th to the 75th percentile, resulting in a surprisingly broad range of costs at every stage of litigation. Paula Hannaford-Agor, *Measuring the Cost of Civil Litigation: Findings from a Survey of Trial Lawyers*, VOIR DIRE 22 (Spring 2013).

cases one by one as each case was presented by attorneys. The foreclosure crisis turned that model upside down, as attorneys had more cases than they could manage and quality control was erratic. To address the crisis, the Eleventh Judicial Circuit Court obtained funding to develop a case management system featuring four distinct tiers of processing and oversight: technology, clerical staff, skilled (professional) staff, and judicial staff.

The design of this staffing model was based on two key premises. First, judicial involvement in case management produces momentum toward resolution only if the case is in a position to move to the next stage in litigation at the time the judge is asked to intervene. Second, a judge is the most expert, highly trained, and expensive human resource in the court system. Thus, the intent of the staffing model was to ensure that judges would not perform routine case reviews that could be performed by less expensive court staff. Each staffing tier was assigned tasks that matched the training level of the individuals employed in that capacity. The staffing model was implemented in two divisions of the Circuit Court to address the backlog of foreclosure cases in 2011.

The court collected data for evaluation purposes on the clearance rates for all divisions managing mortgage foreclosure cases. The clearance rate for the two divisions using the staffing model was nearly double (281%) compared to the division that did not employ the staffing model (145%). Moreover, newly filed cases were disposed considerably faster under the staffing model. Nearly two-thirds of cases (62%) were disposed within 12 months compared to 45 percent of cases in the division that did not employ the staffing model. Eighty percent (80%) of newly filed cases were disposed within 18 months compared to only half (52%) of cases in the division that did not employ the staffing model.

The NCSC has not developed time and cost estimates for mortgage foreclosure cases, so it is not possible to estimate the financial impact of the staffing model on litigant costs. But it is reasonable to assume that the reduced disposition time translates to a reduction in litigant costs overall, particularly when the reduced disposition time is due to increased court oversight of litigant filings to prevent court hearings from taking place on cases in which the litigants are unprepared to proceed. While court hearings are necessarily expensive events, those costs are considerably more justifiable when they move the case toward resolution than when they merely result in a continuance to allow the parties more time to prepare.

NEW HAMPSHIRE PAD PILOT RULES

The New Hampshire reforms involved implementation of the Proportional Discovery/Automatic Disclosure (PAD) Rules on a pilot basis in two counties effective October 1, 2010. The rules were expected to change litigation practice in a number of ways, but the most significant changes involved changing

the pleading requirement from a notice pleading to a fact-pleading standard and the introduction of a mandatory disclosure requirement. The change in the fact-pleading standard was expected to reduce the time to disposition, mostly by reducing the amount of time expended on case initiation and discovery. The introduction of the mandatory disclosure requirement was expected to reduce the amount of time needed to complete discovery, which in turn would reduce overall time to disposition, as well as reduce the incidence of satellite litigation involving discovery disputes.⁵

Ironically, neither of the expected effects of the PAD Rules ultimately occurred. Anecdotal reports suggested that the cases were getting underway somewhat faster due to the new rules, but were not actually resolving at a faster rate. A possible reason was that the PAD Rules replaced a requirement for an in-court case-scheduling conference with a requirement that attorneys submit a joint case-scheduling order, but did not expressly impose expectations for timeliness. Consequently, attorneys adopted the same time frames for completing litigation tasks that they had before the rules went into effect.

The PAD Rules likewise did not affect the rate of discovery disputes, which arose in approximately one-tenth of civil cases in both the pre-implementation and post-implementation periods. These rates do not, on their face, suggest an overly litigious legal culture in which lawyers routinely complain of excessive discovery demands. This does not discount the possibility that discovery disputes occur, but if they are generally resolved without court involvement, they would be difficult to control through procedural rules.

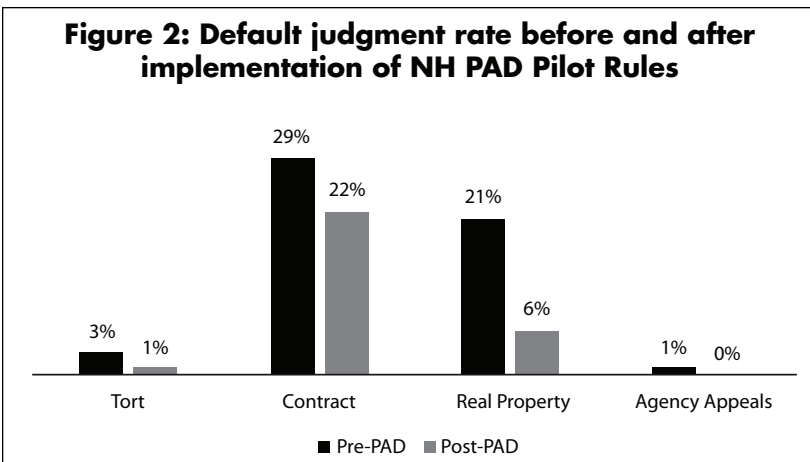
An unexpected impact of the PAD Rules was a decrease in the rate of default judgments from 19 percent to 12 percent overall, which was attributed to the increased amount of information disclosed about the plaintiff's claims under a fact-pleading standard. This effect was observed across all case categories (Figure 2). Yet the reduction in default rates did not uniformly translate to increased rates of other dispositions. Tort cases, for example, were more likely to be dismissed or withdrawn under the PAD rules, but there was no increase in judgment rates and a slight decrease in settlement rates. Contract cases experienced a significant increase in formal judgment rates that corresponded almost exactly with the decrease in default rates. Real property cases experienced a significant increase in both settlement and formal judgments rates under the PAD rules, but no difference was observed in the dismissal rate. For agency appeals, the decrease in the default rate was relatively modest, but the dismissal rate decreased by almost half (37 percent to 19 percent) and the judgment rate nearly doubled (12 percent to 23 percent).

Looking at these effects through the lens of litigation costs might reasonably prompt the conclusion that litigant costs had increased in many cases. By making an appearance, defendants

5. The NCSC evaluation compared key case-processing events and outcomes for civil cases filed before and after implementation of the PAD Rules. Debt collection and tort cases comprised nearly two-thirds of the civil caseloads in those samples (34% and 29%, respectively). NCSC staff also interviewed key stakeholders involved in the development and implementation of the PAD Pilot

Rules, as well as attorneys who had litigated cases under the PAD Pilot Rules, but who were not involved in their development. PAULA HANNAFORD-AGOR ET AL., *NEW HAMPSHIRE: IMPACT OF THE PROPORTIONAL DISCOVERY/AUTOMATIC DISCLOSURE (PAD) PILOT RULES* (August 19, 2013).

Figure 2: Default judgment rate before and after implementation of NH PAD Pilot Rules



would naturally incur the costs of filing an answer and otherwise engaging in discovery, pretrial motions, and possibly trial proceedings. Except for cases in which the plaintiff filed a motion to dismiss or to withdraw the case, plaintiffs likewise would have to take additional steps beyond filing a motion for a default judgment. Based on NCSC’s “Civil Litigation Cost Model Project” (CLCM) litigation cost estimates, the additional median costs incurred by the plaintiff in settling cases that would have resulted in a default judgment before the PAD Rules could range up to \$800 in a debt collection case, \$12,000 in an automobile tort case, \$14,400 in a premises liability case, and nearly \$20,000 in a real property case.⁶ Yet, by providing sufficient information on which the defendant can assess the legitimacy of the plaintiff’s claims, the PAD rules evidently made it worthwhile for defendants to respond to the lawsuit rather than accepting a default judgment. Like the mortgage foreclosure staffing model implemented by the Eleventh Judicial Circuit Court in Florida, the New Hampshire PAD rules introduced a procedural reform that increased the likelihood that meaningful litigation would take place, ostensibly improving the likelihood of a just outcome.

UTAH RULE 26 EVALUATION

The Utah civil justice reforms focused exclusively on the discovery stage of litigation. Amendments to Rule 26 and other rules governing discovery were implemented on a statewide basis on November 1, 2011. The rules introduced an explicit proportionality requirement in discovery, shifted the burden of demonstrating the relevance and proportionality of discovery requests to the party requesting discovery, and established three distinct “discovery tiers” with a presumptive scope of discovery based on amount-in-controversy for each tier. The amended rules also introduced a mandatory disclosure requirement and an expedited process for resolving discovery disputes.⁷ The

anticipated impact of the Rule 26 revisions included decreased time to complete discovery and a corresponding decrease in time to disposition in contested cases,⁸ a decrease in the frequency of discovery disputes, and a reduction in associated litigation costs.

The revisions to Rule 26 significantly decreased the time to disposition for all case types and at all discovery tiers in the post-implementation sample of cases. The most immediate impact occurred in debt collection cases involving amounts-in-controversy less than \$50,000 (Tier 1), which disposed at significantly faster rates beginning within 90 days after filing. Non-debt collection cases and civil cases alleging damages greater than \$50,000 also disposed at faster rates, but only beginning 12 months after filing.

Another impact of the discovery reforms was the manner in which civil cases disposed. Across all case types and discovery tiers, civil cases were more likely to settle, rather than be disposed by judgment, following implementation of the reforms. The single largest effect occurred in non-debt collection cases alleging damages less than \$50,000, for which settlement rates increased by more than two-thirds. Civil cases alleging damages more than \$50,000 also settled at significantly higher rates (Figure 3).

Cases that settle avoid the costs associated with proceeding to a disposition by summary judgment or trial. Based on the NCSC costs estimates, for example, parties in a non-debt collection contract case that settled rather than seeking a trial judgment would save as much as \$58,000 each in litigation costs. If the parties could settle without formal settlement negotiations or ADR, they could save up to an additional \$17,000 per side. These estimates assume that the settlement occurs after discovery is complete; however, the NCSC evaluation also found that more than half (54%) of the cases in the Utah evaluation resolved before discovery was complete. In fact, one-third of civil cases had no discovery other than mandatory disclosures. Moreover, fewer discovery disputes were filed following the Rule 26 revisions. Although it is not possible to quantify those savings in precise terms, reducing the amount of discovery and associated opportunities for disputes over discovery suggests the potential for additional savings of up to \$12,000.

TEXAS EXPEDITED ACTIONS RULES

The Texas Expedited Actions Rules, which became effective on March 1, 2013, impose restrictions on civil cases valued \$100,000 or less. The rules specify an expedited timeline for discovery and trial in which discovery commences immediately upon filing and must be concluded within 180 days of

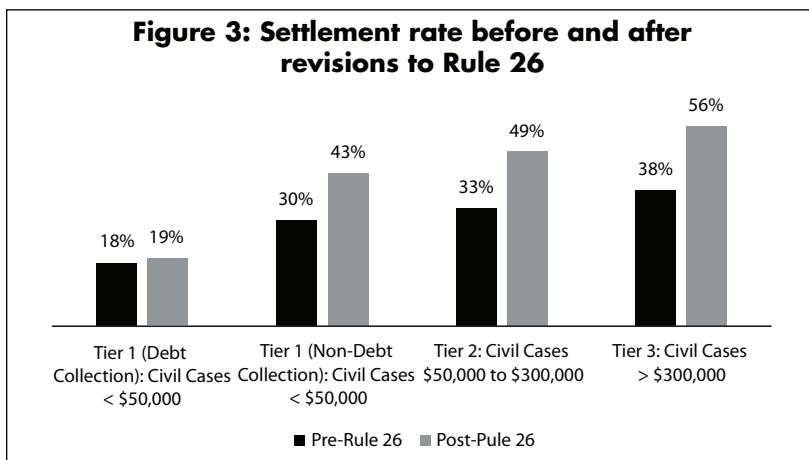
6. Automobile tort and premises liability cases comprised 45 percent of tort cases, and debt collection cases comprised 72 percent of contract cases in the New Hampshire caseload.
 7. For the evaluation, the NCSC analyzed case-level data for all cases filed January 1 to June 30, 2011 (pre-implementation sample) and January 1 to June 30, 2012 (post-implementation sample). The NCSC also surveyed attorneys who filed cases in the post-implementation sample and conducted focus groups with Utah district

court judges. The attorney surveys collected information about discovery practices that would not ordinarily be documented in the case management system, attorney opinions about the Rule 26 revisions, and estimates of the amount of time expended on various litigation tasks for different types of cases.
 8. Discovery does not occur in uncontested cases. Consequently, the NCSC evaluation focused only on cases in which an answer or other responsive pleading was filed.

servicing the first discovery request. The trial must be scheduled no later than 90 days after the completion of discovery. The rules also significantly restrict the scope of discovery to no more than 6 hours of oral depositions for all witnesses, no more than 15 written interrogatories, no more than 15 requests for production, and no more than 15 requests for admissions. Finally, the rules impose restrictions on court-ordered ADR. The NCSC evaluated the impact of the rules on contested cases filed in the courts at law in five urban counties.⁹

Like the Utah Rule 26 revisions, implementation of the Texas Expedited Actions Rules resulted in significantly increased settlement rates. Overall, the proportion of cases disposed by settlement increased from 49 percent to 66 percent, with commensurate decreases in summary judgment and trial rates. The settlement rate for commercial contract cases increased by more than half (54%), followed by debt collection cases (34%) and automobile tort cases (5%). In addition to increased settlement rates, settlements occurred on average (median) five months earlier than settlements that occurred before implementation of the expedited actions rules. More than one-third of the cases resolved with no formal discovery over than mandatory disclosures. Based on the NCSC estimates, the cost savings associated with settling cases with little or no formal discovery, rather than proceeding to summary judgment or trial, ranges from just over \$1,000 in debt collection cases to as much as \$70,000 per side in commercial contract disputes.

The increase in settlement rates was greatest in contract



9. The analysis focused on cases that either settled or were resolved by summary judgment, or bench or jury trial, or were pending at the time data collection concluded. The pre-implementation sample consisted of cases filed between July 1 and December 31, 2011, and the post-implementation sample consisted of cases filed between July 1 and December 31, 2013. The NCSC also surveyed attorneys who filed cases under the revised rules, focusing on attorney opinions about the new rules and documenting case information that is not ordinarily reflected in the case management system. To supplement the case-level and attorney survey data, research staff from the Texas Administrative Office of the Courts and students from Baylor University Law School conducted in-depth interviews with judges, case coordinators, and attorneys who had experience with the rules. Like the Utah Rule 26 revisions, implementation of the Texas Expedited Actions

cases, which comprised more than two-thirds of the civil caseload in the NCSC evaluation. The settlement rate in non-automobile tort cases decreased, however, due to a significant increase in trial rates.¹⁰ Moreover, nearly half of attorneys reported that it would have been economically feasible to bring the case to trial, even in cases that ultimately settled, which accomplished an explicit objective of the rules to ensure that parties who wanted a trial on the merits could afford to do so. Thus, while the increase in trial rates for those cases would result in up to \$45,000 in increased costs per side, litigants may view those costs as warranted to secure a fair outcome.

CONCLUSIONS

The four civil justice reforms discussed above have been the focus of intense interest by judicial and legal policymakers. Many of the concepts embodied in these reforms have been incorporated in the Recommendations of the CCJ Civil Justice Improvements Committee as necessary components of state court efforts “to promote the just, prompt, and inexpensive resolution of civil cases.”¹¹ Three of these reforms focus on discrete aspects of contemporary civil litigation (e.g., pleading, discovery, caseload management), while the Texas approach was somewhat more comprehensive in scope.

The precise nature of the impact of these reforms varied somewhat from jurisdiction to jurisdiction, but all of them ultimately had a positive effect on the manner of disposition, time to disposition, or other key case performance measures.

For example, the Utah and Texas reforms both resulted in substantial increases in settlement rates. All the reforms except the New Hampshire PAD Rules dramatically reduced disposition times. Increased settlement rates and reduced time to disposition intuitively support predictions of greatly reduced litigation costs. Cases that settle relatively early in the litigation process avoid the costs associated with expensive court proceedings such as summary judgment hearings and bench or jury trials. Of course, these effects would not apply to all cases and likely differ by jurisdiction and by case type. The impact of the New Hampshire PAD Rules is unusual insofar that the primary impact was a significant reduction in the default judgment rate. This results in a larger proportion of

Rules resulted in a significant shift from cases resolved by judgment to cases resolved by settlement and a significant decrease in the time to disposition. Attorneys reported high compliance with the rules, even with greatly restricted scope of discovery.

10. Cases disposed by summary judgment or trial appeared to take longer to dispose. Upon closer examination, however, it became apparent that the increased settlement rate was taking place in relatively uncomplicated contract cases that previously would have been disposed by bench trial early in the case. Only the more complex contract and tort cases remained for trial, and although these cases needed comparatively more time for discovery and pretrial motions, they were still being tried earlier than comparable cases before the expedited actions rules were enacted.

11. CONFERENCE OF THE CHIEF JUSTICES, *CCJ Civil Justice Improvements Committee, Call to Action: Achieving Civil Justice for All* 16 (2016).

defendants filing an appearance to contest the plaintiff's claims, which would necessarily incur additional litigation costs and time for both sides.

Perhaps the most important point about these reforms is that they provide incentives to litigants to engage in more meaningful litigation activities. Mandatory disclosures, for example, displace much of the need for traditional discovery practice as well as minimize opportunities for disputes to arise. An accelerated time frame for completing key stages of litigation prompts litigants to focus on the issues that form the crux of the dispute. And delegating routine case management to court staff facilitates more targeted and meaningful judicial involvement in the case, providing incentives for parties to prepare adequately for routine court deadlines and events. Consequently, when litigation activity takes place resulting in some cost to litigants, those costs are presumably incurred with the intent to bring the case to a fair outcome.

There are, of course, several additional questions related to the premise that litigation costs should only be incurred for tasks that are truly necessary to resolve the case. The first is whether the litigants themselves believe that the value of any individual task associated with the litigation justifies its actual costs. Although civil justice reforms may reduce litigation costs, it does not necessarily follow that litigants will agree that the value of those tasks outweighs the cost.¹² A second question is whether litigants have sufficient information about the

likely outcome of the litigation with which to make an informed judgment about undertaking various litigation tasks. A related question is whether litigants are given the opportunity to give informed consent to the anticipated costs of litigation before they are actually incurred. None of these questions are addressed in this article, but the types of civil justice reforms discussed here render those questions more salient insofar that litigants can have greater confidence that any costs expended in litigation are more likely to ensure a meaningful litigation experience than before.



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12. See, e.g., John M. Greacen, *How Fair, Fast, and Cheap Should Courts Be? Instead of Letting Lawyers and Judges Decide*, *New Mex-*

ico Asked Its Customers, 82 JUDICATURE 287 (MAY-JUNE 1999).



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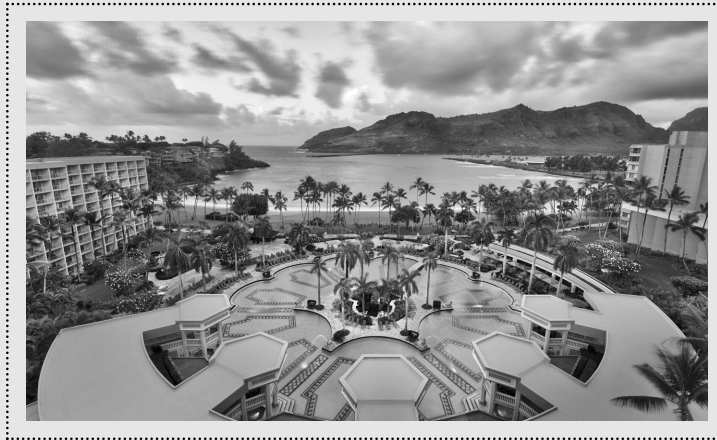
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Treatment or Punishment:

Sentencing Options in DWI Cases

Victor Eugene Flango

Alcohol-related crashes are responsible for many of the traffic fatalities in the United States, and the sad thing is that many of these are preventable. Yet the attitude of the public toward driving while impaired (DWI)¹ is conflicted, and that ambivalence is reflected in the criminal justice process. Unlike other crimes, or even smoking, the goal of the law is not to cease *all* drinking and driving, just drinking that impairs judgment and the ability to drive safely. The question then becomes how much drinking is acceptable before driving, which can vary by health, weight, and tolerance of the individual. On one hand, we as a society want to punish the offender who kills or seriously maims someone because of impaired driving, but on the other, we don't want to enroll the "social drinker" into the criminal justice system. Consequently, it was not unusual in our history to either let impaired drivers off the hook with a warning or reduce their charges to lesser misdemeanors. After all, many impaired drivers do not harm others and those that do did not intend to cause harm. Therefore, some observers argued that DWI offenders should not receive severe punishments.² Even if victims were severely injured or killed, prosecutions for manslaughter were rare, and even license suspensions and jail time were imposed infrequently.³ The words of Judge Robert S. Heise echo the thoughts of many:

The philosophy of some people is that you have to make the punishment fit the crime. But that's the wrong way to look at drunk drivers. These are social drinkers who went a little overboard. They're not alcoholics or criminals. Most of the time they've done nothing dangerous, but have merely violated a law...I just feel that some of these people [convicted of drunken-driving deaths] have already suffered more than I could impose on them.⁴

The traditional method of dealing with DWI cases has been to use the criminal justice system to arrest, prosecute, convict, and sentence impaired drivers. However, traditional remedies, such as incarcerating offenders, have not proven effective in preventing repeat offenders and may have even increased recidivism.⁵ Consequently, even the criminal justice system has recognized that addiction is a health problem and treatment of offenders is the preferred solution, either alone or in conjunction with other sanctions. This, however, leaves the unanswered residual question of whether any punishment is deserved, and if so, what type?⁶

Courts have a role to play in reducing the incidence of impaired driving, especially by selecting sentences that are effective. A significant amount of work on sentencing options has already been done by the National Highway Traffic Safety Administration (NHTSA) and the National Institute on Alcohol Abuse and Alcoholism (NIAA) in their *Guide to Sentencing DWI Offenders*.⁷ With advice from a multidisciplinary working group of experts, the *Guide* summarized 30 years of research on the effectiveness of various sanctions on impaired drivers.

Although the *Guide* does an excellent job in describing the various sentencing options available to judges, including a checklist of DWI sentencing options and precise estimates of their likelihood of success, it assumes that judicial sentences can *both* sanction and treat the offender. It is with this premise that sentencing can both punish and treat that I take issue with here. And the issue is not merely academic. Judges must be clear about what they want to accomplish with sentencing because the options available when rehabilitation is the goal are very different than when punishment is the goal.⁸ *Conflating the contradictory goals of treatment and punishment leads to a lack of clarity in sentencing behavior and, perhaps more importantly, to unclear measures of success.*

Footnotes

1. The term DWI is used throughout this essay as the designation preferred by the National Highway Traffic Safety Administration, and it is used interchangeably with the terms preferred in some states: DUI, driving under the influence and OWI, operating while intoxicated.
2. James D. Stuart, *Deterrence, Desert, and Drunk Driving*, 3 PUB. AFF. Q. 105-115 (1989).
3. BARRON H. LERNER, *ONE FOR THE ROAD: DRUNK DRIVING SINCE 1900* 6 (2011).
4. Joseph D. Whitaker, *A National Outrage: Drunken Drivers Kill 26,000 Each Year*, WASH. POST, March 22, 1981, at A1, A6.
5. David J. Wallace, *Do DWI Courts Work?*, in *FUTURE TRENDS IN STATE COURTS 92-95* (Carol R. Flango et al. eds., 2008).
6. Stuart, *supra* note 2.
7. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN. & NAT'L INST. ON ALCOHOL ABUSE AND ALCOHOLISM, *A GUIDE TO SENTENCING DWI OFFENDERS* (2d ed., 2005) [hereinafter NHTSA & NIAA].
8. The focus of this article is on the treatment versus punishment

dichotomy. Other purposes of sentencing will be subsumed under these broader headings. For example, deterrence is often listed as a purpose of sentencing. If deterrence is specific to an offender, incarceration may be considered a deterrent. But the threat of punishment is a specific deterrent and thus deterrence is listed in the punishment category. (The concept of seeing punishment meted out is a deterrent to others may or may not be valid, but is not relevant to this discussion, which is limited to sentencing options for specific offenses). Incapacitation is also often listed as a separate purpose of sentencing, but to me the goal of the incapacitation is what makes it relevant—it is to punish the offenders and to prevent them from harming themselves and others. Restitution is intended to at least partly return the victim(s) to status quo ante, and that could be seen as a combination of punishment and a first step in treatment. The options become clearer when the basic question is whether sentencing is intended to punish offenders who have harmed society or to rehabilitate the offenders so they will not offend again.

THE GOAL OF DWI SENTENCING: PUNISHMENT OR TREATMENT?

A LEGAL OR MEDICAL APPROACH TO DWI

NHTSA's *A Guide to Sentencing DWI Offenders* says "[s]entencing for DWI should be consistent from one court to another regardless of jurisdiction, yet balanced with the need for matching offenders to the most appropriate sanctions and extent of treatment."⁹ In their discussion of DWI courts, Tauber and Huddleston are even more direct in identifying the mixed purpose of sentencing:

...to make offenders accountable for their actions, bringing about a behavioral change that ends recidivism, stops the abuse of alcohol, and protects the public; to treat the victims of DWI offenders in a fair and just way; and to educate the public as to the benefits of DWI Courts for the communities they serve.¹⁰

Note that this mission seems to expect courts to treat the disease *and* to sanction the offender. The argument here is that it is logically impossible for sentences to be consistent across similar DWI offenses and at the same time tailored to meet the needs of individual offenders, whose needs and degree of addiction to alcohol vary widely. Consistency represents the legal approach to sentencing, whereas individual treatment represents a very different, medical approach to sentencing. These conflicting approaches need to be kept clear and distinct for judges to sentence DWI offenders appropriately.¹¹

The traditional legal approach emphasizes the crime by determining responsibility and then meting out punishment when the offender is deemed to be guilty. The basic premise of the legal approach is that humans are all equal before the law. In practice, that means treating "like cases alike"—that is, fairness requires that everyone who commits a similar offense receive a similar consequence. Conditions for finding an accused at fault should be the same for all individuals in similar circumstances. To do otherwise undermines citizen respect not only for courts but for law and government as well.

On the other hand, the medical approach to crime aims to correct the underlying problems that led to the crime. It focuses on protecting public safety by directly attacking the root cause of DWI—alcohol and substance abuse. In its simplest (perhaps oversimplified) terms, the medical approach, as originally applied in the corrections context, assumes:

... the offender to be "sick" (physically, mentally, and/or socially); his offense to be a manifestation or symptom of his illness, a cry for help. Obviously, then, early and accurate diagnosis, followed by prompt and effective therapeutic intervention, assured an affirmative prognosis — rehabilitation.¹²

"Different evaluation criteria are required to measure success depending upon whether the goal of the sentence is punishment or treatment."

The remedial approach attempts to alter the personal risk factors that lead to impaired driving.¹³ It treats the individual, which involves diagnosis of the problem and the development of an individualized treatment plan—which by its very nature is antithetical to treating like cases alike. Compliance with treatment is verified by frequent testing for alcohol and drug abuse, close community supervision, and frequent court hearings.

This approach is an extension of the trend toward what was once called *alternative sanctions*. Alternative sanctions were created, at least partially, by the perceived failure of punishment to stop the revolving door of recidivism. As summarized by one judge: "where the level of punishment required is diminished by the need to solve the underlying problem...so you'd rather solve the problem than punish the behavior"¹⁴

Restrictions on driving may be imposed as a punishment in and of itself or as a safeguard to the public until a program of treatment is completed. It is therefore necessary to classify sentencing options by their intended purpose—punishment or treatment. As an extreme example, persons involved may not perceive a distinction between solitary confinement as a punishment and confinement in a padded cell to prevent a patient from injuring themselves, but the intentions are different.

EVALUATION CRITERIA

Evaluating sentencing success is difficult. The argument proposed here is that different evaluation criteria are required to measure success depending upon whether the goal of the sentence is punishment or treatment. If punishment is the goal, consistency in sentencing is absolutely essential to assure fairness among offenders convicted of similar DWI offenses. How-

9. NHTSA, INITIATIVES TO ADDRESS IMPAIRED DRIVING 3 (2003).

10. JEFFERY S. TAUBER & C. WEST HUDDLESTON, NAT'L DRUG CT. INST., DUI/DRUG COURTS: DEFINING A NATIONAL STRATEGY 5 (1999).

11. The distinction between the legal approach to crime and the medical approach is discussed in VICTOR E. FLANGO & THOMAS M. CLARKE, REIMAGINING COURTS, Ch. 8 (2015) and reflects a much earlier debate on sentencing: should the punishment fit the crime or fit the criminal? The need for separating problem-solving processes and traditional adversarial court processes is discussed in Victor E. Flango, *Never the Twain Shall Meet: Why Problem-Solving Principles Should Not Be Grafted onto Mainstream Courts*, 100 JUDICATURE 30-36 (2016). Another way of portraying the different

models is that the sciences (including medicine) are inherently probabilistic and subject to revision as new information becomes available, whereas the law demands the appearance of certainty and irrevocability. See, e.g. GARY B. MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS 11-22 (3rd ed. 2007).

12. Donal E.J. MacNamara, *The Medical Model in Corrections: Requisite in Pace*, 14 CRIMINOLOGY 439, 439-40 (1977).

13. ALAN CAVAIOLA & CHARLES WUTH, ASSESSMENT AND TREATMENT OF THE DWI OFFENDER (2002).

14. Donald J. Farole, *Applying Problem-Solving Principles in Mainstream Courts: Lessons for State Courts*, 26 JUST. SYS. J. 65 (2005).

“The downside of using recidivism rates is that DWI arrests and crashes are infrequent occurrences even for intoxicated drivers.”

ever, consistency cannot be used to measure effectiveness of treatment programs, which by their nature must be tailored to the individual to be successful, regardless of how others similarly situated were sentenced. Reduction in recidivism is the primary way to evaluate the effectiveness of sentencing to treatment.

Before discussing in more detail the relationship between

sentencing for punishment and treatment, one other complication must be mentioned. Some offenders apprehended for the very first time may be unlikely to offend again even *without* treatment or punishment. Indeed, one study reports that about a quarter of DWI offenders become repeat offenders, but a *majority* of persons arrested for DWI do not repeat the offense.¹⁵ Which of the sentencing options is necessary for that majority of offenders?

Consistency of Penalties

The traditional legal approach, with its emphasis on determining guilt and meting out punishment, in one sense, provides a good control group. Except to establish a baseline, it is unfair to use recidivism to measure the success of sentencing options whose purpose is to punish the offender. If the goal is punishment, the only criteria for success is: did the offender complete the punishment, i.e., serve the required sentence, pay the fine, etc? Consistency of sentences becomes a major concern for the sake of fairness. Indeed, the consistency argument was used to make a case for specialized DWI enforcement agencies at the state level, separate incarceration facilities, and of course, specialized DWI courts.¹⁶ That recommendation for specialized DWI courts was made before the advent of the specialized problem-solving courts in existence today, but instead favored specialized courts similar to small-claims court to handle misdemeanor DWI offenses. The growth of problem-solving courts, including drug courts and their offshoot DWI courts, represents the increasing emphasis on the medical approach of treatment and rehabilitation of offenders, which in turn reduces the number of future arrests, prosecutions, and court cases. The advantages of specialized DWI courts are

more consistency in sentencing, the prevention of “judge shopping,” reduction in number of plea agreements, and fewer pleas to reduced charges, such as reckless driving, as substitutes for DWI guilty pleas.¹⁷

More than half (54 percent) of the law enforcement officers in the Traffic Injury Research Foundation survey reported they do not believe the penalties imposed by judges reflect the severity of the offense,¹⁸ which illustrates the problems caused by repeat offenders who continue to drive even when their driver’s licenses are revoked.

Without consistency, sentencing disparity results in some offenders not receiving appropriate sanctions. The causes of sentencing disparity may be understandable. The range of sentences that can be imposed on a DWI offender, despite a similarity in offender backgrounds and circumstances, is extremely broad.

Offenders may be less willing to comply with penalties perceived to be unfair. A California study concluded that individuals who do not believe they are affected by alcohol intoxication do not respond to the standard penalties for DWI and persist in driving after drinking.¹⁹ Thus, disparity detracts from the deterrent effect of sentences and reduces the potential for behavioral change. It encourages offenders to manipulate the system to obtain lesser sentences through practices such as “judge-shopping,” which is reported to occur either occasionally or often.²⁰ More importantly, the inconsistent application of penalties creates a public perception of unequal justice.

Reduction in Recidivism

Recidivism rates are the primary way we use to indicate the effectiveness of treatment programs and sentences. Recidivism rates have credibility. A survey of Michigan judges and probation officers found that half reported recidivism to be an important determinant of a program’s effectiveness.²¹

The downside of using recidivism rates is that DWI arrests and crashes are infrequent occurrences even for intoxicated drivers.²² One survey estimated that the number of times a person drives drunk before being arrested is 300.²³ A more recent estimate is one arrest per 772 episodes of driving two hours after drinking.²⁴ Obviously, recidivism rates depend upon not only the frequency of occurrence of impaired driving, but also on the level of enforcement in any given community.

Nevertheless, courts do require feedback on the success

15. NATHAN WARREN-KIGENYI & HEIDI COLEMAN, NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., DWI RECIDIVISM IN THE UNITED STATES: AN EXAMINATION OF STATE-LEVEL DRIVER DATA AND THE EFFECT OF LOOK-BACK PERIODS ON RECIDIVISM PREVALENCE I (2014), available at https://www.nhtsa.gov/staticfiles/nti/pdf/811991-DWI_Recidivism_in_USA-tsf-rn.pdf.

16. BOB MITCHELL, DRUNK DRIVING AND WHY THE CARNAGE CONTINUES 368 (2009).

17. *Id.* at 369.

18. ROBYN D. ROBERTSON & HERBERT M. SIMPSON, TRAFFIC INJURY RES. FOUND. OF CANADA, DWI SYSTEM IMPROVEMENTS: STOPPING THE REVOLVING DOOR 18 (2003).

19. Terry L. Schell, Kitty S. Chan & Andrew R. Morral, PREDICTING DUI RECIDIVISM: PERSONALITY, ATTITUDINAL, AND BEHAVIORAL RISK

FACTORS, 82 DRUG & ALCOHOL DEPENDENCE 33 (2006).

20. ROBERTSON & SIMPSON, *supra* note 18, at 18.

21. M. Lynn Breer et al., *How Judges Respond to Drunk Drivers*, 87 JUDICATURE 72, 75 (2003).

22. Robert B. Voas & Deborah A. Fisher, *Court Procedures for Handling Intoxicated Drivers*, 25 ALCOHOL RES. AND HEALTH 32, 33 (2001).

23. Robert B. Voas & Janet M. Hause, *Deterring the Drinking Driver: The Stockton Experience*, 19 ACCIDENT ANALYSIS & PREVENT. 81 (1987).

24. PAUL ZADOR, SHEILA KRAWCHUK & BRENT MOORE, NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., DRINKING AND DRIVING TRIPS, STOPS BY THE POLICE, AND ARRESTS: ANALYSES OF THE 1995 SURVEY OF DRINKING AND DRIVING ATTITUDES AND BEHAVIORS 5 (2001).

rates of various treatment programs if they are to improve sentencing effectiveness. Regardless of how recidivism is measured, recidivism rates should not only be calculated for the total number of DWI offenders receiving treatment, but also by types of individual treatment so that courts can determine which treatments or combination of treatments are most effective in reducing recidivism.

QUESTIONS TO PONDER BEFORE SENTENCING

Before deciding upon a sentence, judges should consider the following questions:

HAS GUILT BEEN ESTABLISHED?

Persons charged with DWI need to go through the full criminal justice process to determine guilt or innocence. Due process rights of defendants should be protected by a full adversary process until guilt is determined. Prominent drug court advocates agree that “[p]roblem solving courts emphasize traditional due process protections during the adjudication phase of a case and the achievement of a tangible, constructive outcome post-adjudication.”²⁵ This is the practice in DWI courts. Sentencing options should be considered *only* post-adjudication.

Diversion programs allow for completion of treatment after which the DWI charge can be dismissed. This results in no conviction on the driver’s record and allows repeat offenders to subsequently be treated as first-time offenders. For commercial drivers, federal law prohibits judges and prosecutors from allowing convictions to be deferred, dismissed, or left unreported. The Federal Motor Carrier Safety Administration (FMCSA) forbids a state to “mask, defer imposition of judgment, or allow an individual to enter a diversion program that would prevent a conviction” from appearing on a commercial driver’s record (no matter where he or she is licensed) for *any* state or local traffic violation in any type of motor vehicle.²⁶ Perhaps for these reasons, NHTSA has recommended that diversion programs be eliminated.²⁷

Post-adjudication treatment is the more appropriate model and preferable to deferred prosecution. Diversion programs in use pretrial are not included because they are not sentencing options for punishment, and many treatment programs require an admission of guilt as a precondition of treatment. The ethical question is: should technically innocent people be forced into treatment programs before guilt has been adjudicated? As one scholar noted, “it is not a court if you have to plead guilty to get there.”²⁸

WHICH SENTENCE GOAL IS MORE APPROPRIATE—PUNISHMENT OR TREATMENT?

After a guilty judgment or verdict, the next step is to decide whether the purpose of sentencing is to punish or treat the offender.

Punishment

The goal of punishment here is to prevent the offender from driving while impaired again. Punishment may incapacitate the offender while he or she is in custody, make them pay the costs, and ideally instill fear of future punishment to lower the chances of recidivism. These penalties are based on the assumption that drinking and driving occurs because the driver is not motivated to change his or her behavior and perhaps to accept inconveniences (e.g., relying on a designated driver or taxi) to avoid drunk driving. In these cases, punishment (or the threat of punishment) might favorably influence future decision making about drinking and driving.²⁹ However, some recent research based upon perceptions of risks of legal consequences found that increased law enforcement and sobriety checkpoints were a more effective strategy for reducing alcohol-impaired driving than enhanced penalties.³⁰

Traditional criminal sanctions for DWI include jail, fines, and actions against the driver’s license.³¹ If *punishment* is the goal, then sentences need to have consistency from offender to offender for the sentencing process to be deemed fair. That is not to say that recidivism rates should be calculated, but if they are, they should only be used as a control group—a baseline standard of comparison from which to compare the effectiveness of various treatment options.

Even using traditional sanctions, judges must consider the degree of danger to the motoring public. Is there some percentage of offenders who are so chemically dependent that incarceration is the only option? Clearly, incarceration is a deterrent to repeat DWI violations while the offender is in custody. But does incarceration have a longer-term impact, and does it depend upon the type of offender? What are the comparative advantages of jail versus fines, licensing options, and restrictions on vehicle use?

Treatment

If treatment is the chosen option, the assumption is that treatment for addiction will prevent future dangerous driving.

“Increased law enforcement and sobriety checkpoints [are] a more effective strategy for reducing alcohol-impaired driving than enhanced penalties.”

25. John Feinblatt, Greg Berman & Derek Denckla, *Judicial Innovation at the Crossroads: The Future of Problem-Solving Courts*. 15 CT. MANAGER 28 (2000).

26. 49 C.F.R. § 34.226.

27. NHTSA, *supra* note 9.

28. Candace McCoy, Book Review, 16 LAW AND POLITICS BOOK REV. 964, 964 (2006) (BERMAN, GREG & JOHN FEINBLATT, GOOD COURTS: THE CASE FOR PROBLEM-SOLVING JUSTICE (2005)).

29. Voas & Fisher, *supra* note 22, at 3.

30. Frank A. Sloan, Sabrina A. McCutchan & Lindsey M. Eldred, *Alcohol-Impaired Driving and Perceived Risks of Legal Consequences*, 41 ALCOHOLISM: CLINICAL & EXPERIMENTAL RES. 432 (2017).

31. RALPH K. JONES & JOHN H. LACEY, NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., ALCOHOL AND HIGHWAY SAFETY 2001: A REVIEW OF THE STATE OF KNOWLEDGE (2001).

“The judge is not a therapist, but she . . . needs to know what treatment options are most effective . . . [and] available.”

Effectiveness here is measured by recidivism rates. What types of offenders are the best candidates for treatment? What risk assessment instruments are available to help decide when treatment is most likely to lead to the preferred result, that is, reducing the likelihood that the offender will drink and drive in the future?

Most treatment programs begin with an admission that a problem exists, and it is often difficult

for the alleged perpetrator to take this first step. Incentives to the offender to encourage a successful treatment program would be couched in terms of being able to avoid incarceration, retaining a job so that the family would be supported, and keeping the family unit together.

How successful are treatment programs? A comprehensive meta-analysis of 215 interventions found a 7-9% reduction in DWI recidivism and alcohol-related crashes as a result of completing a program of intervention.³² That meta-analysis, however, was done over two decades ago, before newer interventions, such as ignition interlock technology, were available. A more recent meta-analysis of 42 studies done between 1995 and 2015 also supported programs that used intensive supervision and education.³³ Unfortunately, there is a dearth of high-quality evaluations of DWI intervention programs, and the methodologies used among the studies that do exist are weak, limiting confidence in the findings.³⁴

WHAT SCREENING INSTRUMENTS ARE AVAILABLE TO ASSIST CHOICE OF SENTENCING OPTION?

Marlowe contends that the critical question is: how to match offenders with the programs that best meet their needs, while still protecting public safety and keeping costs to a minimum?³⁵ He recommends a fourfold classification scheme to guide intervention based on the two dimensions of “need,” the offenders’ clinical diagnosis and need for treatment, and “risk,” or amenability to treatment.

Before judges can decide between punishment and treatment, and even decide from among various treatment alterna-

tives, offenders need to be screened *first* for treatment eligibility. Which offenders have a chance to benefit from treatment? By the same token, then, screening can identify candidates who would not benefit from treatment and for whom sanctions are necessary.

Screening is the use of easily and inexpensively administered tests and procedures in an attempt to establish the presence or absence of alcohol-use disorder, drug-use disorder, and recidivism risk.³⁶ Proper screening will help identify individuals who require more professional and higher cost diagnostic assessments. Determining the severity of alcohol dependence is critical to determining an appropriate treatment plan. Many jurisdictions use self-report instruments to evaluate alcohol usage, while some jurisdictions use personal interviews as well. Thirty-one states screen both pre- and post-trial, and 16 screen post-trial only. Most programs require clients to pay screening fees, although four states pay the fees themselves.³⁷

The issue is further complicated by the growing recognition that many people with alcohol or drug problems also experience other psychological problems that may affect the effectiveness of treatment services. For example, people who misuse alcohol may suffer from schizophrenia, eating disorders, or post-traumatic stress disorder.³⁸ Also, offenders with attention deficit disorder are more likely to commit motor-vehicle-related offenses during the follow up.³⁹

The diagnostic assessment of all convicted DWI offenders for alcohol problems, in contrast to screening, is an expensive proposition. Ensuring that assessments are conducted can be a major task, depending upon the number of treatment providers available in the jurisdiction.

When screening indicates the need for assessment, trained professionals should conduct the assessment. To avoid conflict of interest, assessment and treatment referral should be conducted by an agency not associated with any treatment program. Judges, prosecutors, probation officers, and other justice system staff should have general knowledge about screening, assessment, and other issues surrounding alcohol- and drug-abuse treatment.

The judge is not a therapist, but she not only needs to know what treatment options are most effective, but also which are available, or even statutorily permitted, in the local community.

32. Elizabeth Wells-Parker, Robert Banger-Drowns, Robert McMillen & Marsha M. Williams, *Final Results from a Meta-analysis of Remedial Interventions with Drink/Drive Offenders*, 90 ADDICTIONS 907 (1995).

33. Peter G. Miller et al., *Effectiveness of Interventions for Convicted DUI Offenders in Reducing Recidivism: A Systematic Review of the Peer-Reviewed Scientific Literature*, 41 AM. J. DRUG AND ALCOHOL ABUSE 16 (2015), available at <http://www.tandfonline.com/doi/pdf/10.3109/00952990.2014.966199>.

34. *Id.* at 13.

35. Dr. Doug Marlowe, *Dr. Doug Marlowe on a Vision for the Future of U.S. Drug Policy*, in ALL RISE: MAG. NAT’L DRUG CT. PROF’LS, Fall 2012, at 4.

36. LYIIN CHANG, CINDY GREGORY & SANDRA C. LAPHAM, AAA FOUND. FOR TRAFFIC SAFETY, REVIEW OF SCREENING INSTRUMENTS AND PROCEDURES FOR EVALUATING DWI [DRIVING WHILE

INTOXICATED/IMPAIRED] OFFENDERS (2002).

37. *Id.* at 22.

38. See e.g., Michael Soyka et al., *Prevalence of Alcohol and Drug Abuse in Schizophrenic Inpatients*, 242 EUR. ARCHIVES OF PSYCHIATRY AND CLINICAL NEUROSCI. 362 (1993); Claire C. Holderness, Jeanne Brooks-Gunn & Michelle P. Warren, *Co-Morbidity of Eating Disorders and Substance Abuse Review of the Literature*, 16 INT’L J. EATING DISORDERS 1 (1994); Richard W. Seidel, Fred D. Gusman & Francis R. Abueg, *Theoretical and Practical Foundations of an Inpatient Post-Traumatic Stress Disorder and Alcoholism Treatment Program*, 31 PSYCHOTHERAPY: THEORY, RES., PRAC., TRAINING, 67 (1994).

39. Sarah E. Nelson et al., *A Prospective Study of Psychiatric Comorbidity and Recidivism Among Repeat DUI Offenders*, 3 ARCHIVES OF SCI. PSYCHOL. 8 (2015).

The results of assessment and recommendations for treatment should be made available to the judge and prosecutor before sentencing. Judges and prosecutors should be familiar with the treatment providers in their jurisdictions and seek information about the quality of services they provide. Indeed, they could use their prestige to advocate for the development of supplemental services and programs as needed.

To ensure fairness in the provision of services to DWI offenders, courts and treatment providers should consider the following questions:

- How are priorities for treatment services determined?
- Are existing services available equally to individuals in court who need them?
- Are standardized protocols and risk-assessment inventories used to identify service needs and placement?
- Are the qualifications of the individuals involved in identifying service needs appropriate for the populations and problems they are expected to evaluate?
- Do recommended service plans address the specific needs of individual clients?
- What efforts are made to ensure services are culturally sensitive?
- Who monitors delivery of services and tracks client progress?⁴⁰

The preferred instruments for DWI screening are the MacAndrew Scale of the Minnesota Multiphasic Personality Inventory and the Alcohol Use Inventory.⁴¹ The screening instruments most widely used by the courts, however, are the Mortimer-Filkins and the Michigan Alcoholism Screening Tests, “despite the lack of published evidence that they are useful with the DWI population.”⁴² These tests are rated “medium” overall because they correctly classify offenders as having alcohol problems, but that is only an indirect measure of DWI recidivism. The tests are not as good at predicting DWI recidivism directly.⁴³

Courts in 21 states use the Mortimer-Filkins screening test. It was explicitly designed for assessing DWI offenders, and is based upon a self-report questionnaire and structured interviews, although the interviews are sometimes omitted.⁴⁴ The questionnaire does not have a component to assess truthfulness

of responses. It was developed using a sample of known problem drinkers and a sample of known non-problem drinkers and field tested on DWI offenders. Offenders are placed into one of three risk-categories—social drinker, presumptive problem drinker, or problem drinker.

Courts in 14 states use the Michigan Alcoholism Screening Test, or MAST. This 24-item questionnaire was also developed in 1971 by Melvin Selzer.⁴⁵ A Brief MAST of 10-items, a Malmo Modification of 9 items, and a Short MAST of 13 items also exist. It was created using five groups: a control group, hospitalized alcoholics, convicted DWI offenders, drunk and disorderly offenders, and drivers whose licenses were under review. The design of the MAST questionnaire has been criticized for the ease with which clients can falsify responses.⁴⁶

The Research Institute on Addiction (RIA) and the New York State Department of Motor Vehicles implemented a new alcohol-and-drug-screening instrument called the RIA Self Inventory (RIASI) for use in the New York Drinking Driver Programs.⁴⁷ This Inventory seems to be an improvement over the MAST. Follow up research shows that RIASI can identify individuals who will experience alcohol and drug problems in the future.⁴⁸

The Traffic Injury Research Foundation has published a more detailed review of risk-assessment instruments and treatment interventions for those practitioners interested in more discussion of the available instruments.⁴⁹

Questions remain about the accuracy of the screening instruments, especially the ones most popular with courts, and indeed *none* of the screening instruments in use meet the stringent criteria that are the accepted standard in medical practice.⁵⁰ Most screening instruments were first developed in the 1970s, 1980s, and 1990s and are in need of updating and validation. The screening instrument featured by NHTSA at its briefing on Impaired Driver Assessment Tools on October 14, 2015 was the American Probation and Parole Association’s Impaired Driving Assessment.⁵¹ Although advertised as a

“RIA Self Inventory can identify individuals who will experience alcohol and drug problems in the future.”

40. PAMELA CASEY & WILLIAM E. HEWITT, NAT’L CTR. FOR STATE CTS., COURT RESPONSES TO INDIVIDUALS IN NEED OF SERVICES: PROMISING COMPONENTS OF A SERVICE COORDINATION STRATEGY FOR COURTS 17-18 (2001).

41. CHANG ET AL., *supra* note 36, at 6.

42. *Id.*

43. Aubrey Wendling & Bohdan Kolody, *An Evaluation of the Mortimer-Filkins Test as a Predictor of Alcohol-Impaired Driving Recidivism*, 43 J. STUD. ON ALCOHOL 751 (1982).

44. JEROLD S. LOWER, RUDOLF G. MORTIMER & LYLE D. FILKINS, HIGHWAY SAFETY RES. INST., COURT PROCEDURES FOR IDENTIFYING PROBLEM DRINKERS (1971).

45. Melvin L. Selzer, *The Michigan Alcoholism Screening Test: The Quest for a New Diagnostic Instrument*, 127 AM. J. PSYCHIATRY 1653 (1971).

46. Linda E. Myerholtz & Harold Rosenberg, *Screening DUI Offenders*

for Alcohol Problems: Psychometric Assessment of the Substance Abuse Subtle Screening Inventory, 11 PSYCHOL. ADDICTIVE BEHAV. 155 (1997).

47. THOMAS H. NOCHAJSKI ET AL., RES. INST. ON ADDICTIONS, USE OF NON-OBVIOUS INDICATORS FOR SCREENING OF DWI OFFENDERS (1995) available at <http://casr.adelaide.edu.au/T95/paper/s17p3.html>.

48. Rania Shuggi et al., *Predictive Validity of the RIASI: Alcohol and Drug Use and Problems Six Months Following Remedial Program Participation*, 32 AM. J. DRUG AND ALCOHOL ABUSE 121 (2006).

49. ROBYN D. ROBERTSON, KATHERINE M. WOOD & ERIN A. HOLMES, IMPAIRED DRIVING RISK ASSESSMENT: A PRIMER FOR PRACTITIONERS (2014).

50. CHANG ET AL., *supra* note 36, at 6.

51. See <https://one.nhtsa.gov/nhtsa/symposiums/october2015/index.html>. See also: NATHAN LOWE, SCREENING FOR RISK AND NEEDS USING THE IMPAIRED DRIVING ASSESSMENT (2008).

“A quarter of all drivers arrested or convicted of DWI are repeat offenders.”

screeener to be used around the time of sentencing, this risk screener was originally designed to predict recidivism by offenders *already convicted* of a DWI offense to help probation officers discern the most appropriate level of education and treatment services.

At the same briefing in 2015, NHTSA highlighted The Computerized Assessment and Referral System (CARS), which does not predict DWI recidivism very well, but does predict criminal re-offenses generally.⁵² Like screening instruments, existing assessment instruments must also be improved and enhanced to better predict recidivism and to tailor sentencing options to individual DWI offenders.

SHOULD REPEAT OFFENDERS BE TREATED DIFFERENTLY?

Repeat offenders create a special situation with respect to the question of punishment or treatment. A quarter of all drivers arrested or convicted of DWI are repeat offenders.⁵³ The initial reaction is that repeat offenders are hardcore and should be given the most severe punishments to protect the public. After all, they have already demonstrated that some forms of punishment and treatment do not work, and that more intensive sanctions or treatment are required. At this point, milder sanctions, such as fines, would probably be used less frequently and more serious punishments, such as incarceration, house arrest with electronic monitoring, license revocation, and vehicle impoundment may come into play.

On the other hand, many alcohol-impaired offenders need to “hit bottom” before they take treatment seriously. The paradox is that some of these hardcore offenders, who have “hit bottom,” may be the most likely to benefit from treatment. In this situation, treatment providers do not “cherry pick” offenders to boost their success rates, but select the “hardcore” offenders. Only repeat offenders, for example, are eligible for treatment in DWI courts according to the National Center for DWI Courts, which believes that punishment unaccompanied by treatment is an ineffective deterrent for hardcore offenders.⁵⁴ Recidivism among DWI offenders is high. NHTSA has estimated that one third of all drivers arrested, convicted or adjudicated for impaired driving are repeat offenders.⁵⁵

How are repeat offenders treated now? A survey of Michigan judges found that the most frequently used sanctions for

repeat offenders were driver’s license suspension (91.9%), probation (88.8%), fines (85.2%), outpatient counseling (83.3%), support groups (78.3%), mandatory jail (78.1%), and monitoring by testing for alcohol (77.1%).⁵⁶ In a survey of the American Judges Association, monitoring by testing for alcohol, intensive supervision probation, and support groups, such as Alcoholics Anonymous, were perceived to be most effective, along with mandatory jail time.⁵⁷ Judges perceived suspended sentences and community service as least effective.

Much of the research on repeat offenders is dated, but the findings of most of the scientific literature is fairly consistent. A comprehensive review of the literature on repeat DWI offenders concluded that it cannot be determined with any degree of confidence the magnitude of the alcohol-crash problem caused by repeat DWI offenders.⁵⁸ The review cited research from California suggesting that repeat DWI offenders comprise a small, but not negligible, percentage of drivers (8% range) involved in traffic crashes. This is important to note because even if all repeat DWI offenders were taken off the streets, “at least 90% of all fatal crashes would still remain.”⁵⁹

This is the “prevention paradox” in which a larger number of lower-risk individuals may cause more harm than the smaller number of high-risk individuals.⁶⁰ Furthermore, Jones and Lacey contend that the involvement of repeat offenders in *all* crashes may be less than that of first offenders, because sober repeat offenders may drive more carefully than sober first offenders.

It is difficult to identify the hardcore, potential repeat offender. Most existing studies did not have as their primary purpose distinguishing repeat offenders from others, but were focused upon evaluating DWI countermeasures and treatment programs. Consequently, repeat DWI offenses were one of the variables in the evaluation of programs, but the repeat offenders in treatment programs are not representative of repeat offenders in general. Moreover, many repeat offenders have characteristics similar to those of first offenders, assuming this is indeed a first offense rather than the first time caught. Some older studies were unable to distinguish first offenders from repeat offenders.⁶¹ Nonetheless, it was found that repeat offenders tend to be involved in more crashes, take more health risks, and report being able to drive safely after more drinks than first offenders.⁶²

In their review of the literature, Jones and Lacey found that repeat offenders differed from first offenders in that they did have a high BAC of 0.18 or more, two or three prior DWI offenses as well as several “other” traffic citations, and more prior criminal offenses. They were likely to be single, white

52. Nelson et al., *supra* note 39.

53. WARREN-KIGENYI & COLEMAN, *supra* note 15. Much of the impaired-driving literature uses the estimate of one-third recidivism, which was based on a NHTSA study from 1995.

54. FAQs, NADCP, <http://www.nadcp.org/learn/faqs>

55. *Repeat DWI Offenders in the United States*, NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., <https://one.nhtsa.gov/people/outreach/traftech/1995/TT085.htm>.

56. Breer et al., *supra* note 21.

57. Victor E. Flango & Fred Cheesman, *When Should Judges Use Alco-*

hol Monitoring as a Sentencing Option in DWI Cases?, 44 CT. REV. 102 (2009).

58. RALPH K. JONES & JOHN H. LACEY, *STATE OF KNOWLEDGE OF ALCOHOL-IMPAIRED DRIVING: RESEARCH ON REPEAT DWI OFFENDERS* (2000).

59. *Id.* at 1.

60. LERNER, *supra* note 3, at 114.

61. JONES & LACEY, *supra* note 58.

62. T. H. NOCHAJSKI & W. F. WIECZOREK, *CENT. FOR HEALTH AND SOCIAL RES., DRIVER CHARACTERISTICS AS A FUNCTION OF DWI HISTORY* (2000).

males under age 40, with high school or less education and blue collar employment. They have also been found to have more severe mental health problems.⁶³

The National Center for DWI Courts website defines “hardcore” DWI offenders as “individuals who drive with a BAC of 0.15 percent or greater, or who are arrested for or convicted of driving while intoxicated after a prior driving while impaired (DWI) conviction.”⁶⁴ Indeed, the first alcohol-impaired driving incident (violation, not just conviction) is a predictor of future recidivism, as is the number of failed breath test results on an alcohol ignition interlock device.⁶⁵ The recidivism rate among first offenders more closely resembles that of second offenders than that of nonoffenders.⁶⁶

Repeat offenders do not seem to respond to punishment. There is some evidence that incarceration not only fails to reduce recidivism, but that recidivism increases with even longer periods of incarceration. Alternative sanctions were more effective. Jones and Lacey noted that license suspension or revocation combined with treatment was especially effective in reducing recidivism.⁶⁷

WHERE DO WE GO FROM HERE?

Historically, the greatest effort to reducing the impaired-driving problem has involved the legal system, with the enactment of laws, imposition of penalties, and strengthening of law enforcement. There is a growing consensus as to the limits of the law-and-order approach, which brought about the emphasis on treatment to begin with.

The public health perspective, broadly conceived, includes treatment for DWI offenders, as well as remedies like improved public transportation, reducing alcohol availability through taxation, and opposing alcohol industry sponsorship of events.⁶⁸ These remedies seem less directly related to impaired driving, so now the focus has turned more to technology. An Insurance Institute for Highway Safety survey found that two-thirds of Americans favor routine installation of alcohol detection devices in all cars.⁶⁹ These devices include ankle bracelets for more “hardcore” offenders, but more often involve ignition interlocks for even first-time impaired-driving offenders.⁷⁰ The ultimate technological solution, of course, would be the self-driving car.

For the present, what is the role of the legal system in the

reduction of DWI offenses? The *de facto* compromise that seems to have been reached is to distinguish “responsible” drinking and driving, which many people do, from irresponsible impaired driving. This perspective is supported by the alcohol industry, which tries to separate the majority of people who can drink responsibly from the “hardcore,” alcohol-addicted offenders. But is it the role of the court to encourage “responsible” drinking or to treat alcoholism unrelated to criminal offenses? Or should courts be solely focused on the crime of DWI?

If crashes occur with fatalities or serious injuries, equivalent to manslaughter, punishment is necessary, which means involvement of the criminal justice system. Although the treatment vs. punishment dichotomy probably is not useful from a treatment perspective, a key purpose of the legal system is to assign blame and responsibility, and then to punish the guilty. So, in law, the role of punishment cannot be ignored and punishment imposed should be consistent with sentences given to similar offenders.

If crashes occur with no fatalities or serious injuries, treatment may be the order of the day to reduce possibility of future recidivism. Then:

1. Screening instruments and assessment tools need to be updated and improved to help judges determine the most effective treatment for each offender. Screening is a quick and inexpensive way to identify individuals who require more in-depth and expensive diagnostic evaluation to determine the most effective treatment. Yet, ironically, the two best screening tools for predicting recidivism are the ones least used.⁷¹
2. When screening indicates the need for more in-depth assessment, trained officials should conduct the diagnosis. To avoid conflicts of interest, assessment and treatment referral should be conducted by an agency not associated with any treatment program.

“The ultimate technological solution, of course, would be the self-driving car.”

63. David L. McMillen et al., *Personality Traits and Behaviors of Alcohol-Impaired Drivers: A Comparison of First and Multiple Offenders*, 17 *ADDICTIVE BEHAV.* 407 (1992).

64. National Center for DWI Courts, www.dwicourts.org.

65. W. J. Rauch et al., *Any First Alcohol-Impaired Driving Event is a Significant and Substantial Predictor of Future Recidivism*, in *PROCEEDINGS OF THE 16TH INTERNATIONAL CONFERENCE ON ALCOHOL, DRUGS AND TRAFFIC SAFETY* (Council on Alcohol, Drugs and Traffic Safety, vol. 1 2002); Paul R. Marque, Robert B. Voas & A. Scott Tippetts, *Behavioral Measures of Drinking, Patterns in the Interlock Record*, 98 *ADDICTION* 13-19 (2003).

66. William J. Rauch et al., *Risk of Alcohol-Impaired Driving Recidivism Among First Offenders and Multiple Offenders*, 100 *AM. J. PUB. HEALTH* 919 (2010).

67. JONES & LACEY, *supra* note 58.

68. LERNER, *supra* note 3, at 172.

69. *New Survey Results: Stop Anyone Impaired by Alcohol from Driving Any Vehicle*, INS. INST. FOR HIGHWAY SAFETY, HIGHWAY LOSS DATA INST. (Sept. 17, 2009), <http://www.iihs.org/iihs/news/desktop-news/new-survey-results-stop-anyone-impaired-by-alcohol-from-driving-any-vehicle-public-says>.

70. Flango & Cheesman, *supra* note 57.

71. The Alcohol Use Inventory was developed in 1977 as an assessment tool for treatment planning, rather than a screening tool, and is currently used only in West Virginia. It is the most expensive of all of the testing instruments evaluated by CHANG ET AL., *supra* note 36 at 29. The McAndrew Scale detected about two thirds of recidivists, but that research is based upon only a single offender population and has not been confirmed in other DWI populations. It is currently used in Arizona, North Carolina and North Dakota. CHANG ET AL., *supra* note 36 at 31.

The checklist below can be found on <http://www.judicialfamilyinstitute.org>. The checklist suggests some ways to be thoughtful about your security, and the security of your family.

For further information about keeping yourself and your family members safe at home and online, see: <http://www.judicialfamilyinstitute.org/Topics-and-Programs/Security.aspx>.

Personal Security To-Do List

- Stay out of condition white-be situationally aware
- Communicate to staff, loved ones
- Report ANYTHING suspicious
- Demand feedback
- Lose the parochial thinking
- Listen to intuition and act upon it



- Manage social media accounts
- Practice what-if scenarios
- Change travel and personal routines
- Opt-out of online info
- Use a private mailbox
- Restrict chambers access (be mindful of pics)
- Don't start the dignity domino
- Remove personally identifiable info from social media
- Park in secured/anonymous locations
- Increase lighting around home
- Find the safe havens along travel routes
- Create a safe word (with family & staff)
- Install (and use) a home security system
- Fencing & gates
- Install an early warning system
- Get a dog
- Don't forget the milk and eggs

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REMARKS FOR ACCEPTANCE OF THE WILLIAM H. REHNQUIST AWARD HON. KIM BERKELEY CLARK

The William H. Rehnquist Award for Judicial Excellence is one of our nation's highest judicial honors.

Presented annually by the National Center for State Courts, this prestigious award honors a state court judge who demonstrates the outstanding qualities of judicial excellence, including integrity, fairness, open-mindedness, knowledge of the law, professional ethics, creativity, sound judgment, intellectual courage, and decisiveness. The William H. Rehnquist Award honors judges who are taking bold steps to address a variety of issues affecting their communities. Pennsylvania family court Judge Kim Berkeley Clark was named the recipient of this award in 2017 for her creation of a "trauma-informed" courthouse.

Good evening. I feel very honored, privileged and humbled this evening in receiving this most prestigious award. I must say that I have rather been in somewhat of a blur for the past few months since I received a call from my Chief Justice, Tom Saylor, informing me that I was chosen as the recipient of the Rehnquist Award. It was a busy day, and when my tipstaff, Callen Taylor, told me that the Chief was on the telephone, I was mildly annoyed, because it interrupted my work, but also because I thought that the Chief was going to ask me to serve on yet another committee. When he told me the purpose of his call, I was floored! (Almost literally—I had to sit down to keep from falling down!) And since that day, I kept feeling as if I would wake up to discover that this had been a most pleasant dream.

When I reviewed that list of previous recipients, including Judge Judith Kaye for whom I had great admiration, I questioned whether I was worthy of this award. One thing of which I am very sure is that I am not standing here this evening by myself. In other words, I am only here because of the support and teamwork of many others. Those who know me know that my mantra, so to speak is "Collaboration Rocks!" and I believe that it really does.

When I thought about what I wanted to or should say this evening, many thoughts went through my head. But I decided that I would share with you two things—my vision of our court system and the things for which I am most thankful.

Several years ago, my quest to create a trauma-informed court, began with what Oprah would describe as my "aha moment." For you to understand my transformation, I need to give you a little background about where my journey began.

Before taking the bench in 1999, I had been a prosecutor in the District Attorney's Office for nearly 16 years. In that capacity, I tried many serious cases, such as child abuse, sexual assault and homicide. I was known as a formidable prosecutor,



fair, but tough. I had a good relationship with the judges in the criminal division of our court and I thought highly of many of them, particularly the tough, no-nonsense judges. These judges took command over their courtrooms, the proceedings were orderly and formal, they made prompt decisions and no one dared to challenge their authority. They had my utmost respect and, as a result, I sought to emulate what I believed were the best traits in these judges.

So, when I took the bench, I brought with me 16 years of prosecutorial experience in an adversarial system. I sought to have an air of formality in an informal court system and decided that as the judge, it was acceptable to

impart my own values upon the parents and children who appeared before me in dependency and delinquency cases. It was not uncommon for me to "give a little lecture" or in other ways express my disapproval at their choices and their lifestyles. When I think back on some of the things that I said, I am, quite frankly, ashamed.

So, what was my "aha moment"? I will tell you. One day, I was sitting on the bench with a courtroom full of people. As always, the issues presented in juvenile court are weighty. So, as I looked out among the crowd, I realized that I am a public servant, paid by the taxpayers. I realized that the people sitting in my courtroom are the taxpayers, and so technically, I work for them and that I needed to act like I worked for them. And, with that in mind, I decided that I should treat them with the dignity and respect that I would give to any employer and that every human being and child of God deserves.

In order to truly embrace, foster and effectively promote dignity and respect in my courtroom, I needed to become a servant leader.

The phrase "Servant Leadership" was coined by Robert K. Greenleaf in *The Servant as Leader*, an essay that he first published in 1970. In that essay, he said:

“The servant-leader is servant first. . . . It begins with the natural feeling that one wants to serve, to serve *first*. Then conscious choice brings one to aspire to lead. That person is sharply different from one who is *leader* first; perhaps because of the need to assuage an unusual power drive or to acquire material possessions. . . . The leader-first and the servant-first are two extreme types. Between them there are shadings and blends that are part of the infinite variety of human nature.

“The difference manifests itself in the care taken by the servant-first to make sure that other people’s highest priority needs are being served. The best test, and difficult to administer, is: Do those served grow as persons? Do they, *while being served*, become healthier, wiser, freer, more autonomous, more likely themselves to become servants? *And*, what is the effect on the least privileged in society? Will they benefit or at least not be further deprived?”

In order to truly embrace, foster and effectively promote dignity and respect in my courtroom, I had to change or improve my role as a judge. I now understand that I am a public servant, nothing more and nothing less; that the title Judge defines my role in the judicial system, but this title does not change the fact that I am a servant. This realization has made me understand that I can carry out my job of judging without being judgmental.

My courtroom has been transformed from an adversarial, trauma-filled courtroom to a safe, quiet and peaceful place. While I have very good lawyers who practice in my courtroom, it is clear to me, that they are working in a respectful and collaborative way. It is a place where everyone has the right to be heard and to have their positions considered. It is a place of inclusivity, not exclusivity. And, when everyone is included, they feel like they are part of the solution—they own it and it works better.

I am thankful and blessed for the opportunity to serve my community. And the beauty of serving, is that you get so much more in return. Therefore, with Thanksgiving Day upon us, I find myself reflecting on things for which I am most thankful.

I am thankful for a career that is rewarding and fulfilling and for having realized things that my parents and grandparents could have only imagined. Obviously, I am thankful for each day that I open my eyes and live another day with my health and my senses intact. But, as an African-American woman, a lawyer, and a judge, and considering all that has transpired during the past year, I am most thankful that I live in a state and a country where, at least for the time being, judges are independent.

When I think about the events of the past year, including attacks on judges, efforts to strip away judicial independence by attempting to enact laws that would permit legislators and even our president to bypass judicial authority to further their own purposes, I am deeply concerned about the survival of the independent judiciary.

Judicial independence means that decisions of the judiciary should be impartial and not subject to influence from the other branches of government or from private or political interests. Sounds like a great idea, doesn’t it? I think so, but there have recently been efforts to change this doctrine that is rooted in the history of our nation. While right now, the independence of our judiciary seems to be intact, understand that efforts to

chip away at or erode judicial independence are likely to continue. We must therefore educate the public on the importance of the independent judiciary.

Judicial independence is important to me, not only because I am a judge, but also because I am a citizen of the United States, because I am a woman, and because I am a minority. If judges were not free to make decisions without being subjected to outside influences, I might not be sitting as a judge today or standing before you as the recipient of this award. If judges were constantly subjected to outside influence, would we have had a *Brown v. the Board of Education*? Without an independent judiciary, would judges in the South have felt free to uphold the civil rights legislation of the 60s, which sought to create equality in all aspects of life for *all* citizens regardless of color, gender or economic status?

Without judicial independence, would judges feel free to overturn, rule against, or declare unconstitutional laws that would deny entry into the United States to persons of certain religious and ethnic groups? Without judicial independence would we have ever had *Roe v. Wade*, *Loving v. Virginia* or would same sex couples have the constitutional right to marry?

In nearly every case, where a judge has to make a decision, there is a likely to be a winner and a loser. Someone is bound to walk away unhappy. Sometimes neither party is satisfied. That is the nature of an adversarial system. Nevertheless, what is important is the process—that judges make decisions based upon the law and the evidence and that judges only be accountable to the Constitution, to the laws of the land and to the taxpayers that they serve. It is important for all citizens to know and to believe that regardless of their political standing, their political power, their race or ethnicity, their gender or gender identification, their religion, or their economic status, that they have equal access to justice. For the lawyers in the room, this is what you should want for your clients. For the taxpayers in the room, this is what you should want for yourselves, your families, friends and neighbors. This is what I set out to do in every case that is before me. And I want to be able to do it without threat of political backlash or without threats from special interest groups.

For some, judicial independence is synonymous with judicial activism and for others it means that there is no way to hold judges accountable. When a judge is called upon to make a difficult or unpopular decision, that does not mean that the judge is an activist, it simply means that the judge is following the law. Judges are accountable. All decisions made by judges are on the record or put in writing for the world to review and inspect. Most cases are heard in open court, in a public setting. Nearly every decision that trial judges make in a case is subject to appellate review should a party be unhappy with the decision. There are also judicial conduct boards, which investigate complaints made against judges and that take action when appropriate.

When I think about the prospect of something other than an independent judiciary, I shudder. I think about the days during the civil rights era when courageous men and women were subjected to threats, cross burnings, and violence. I think about the judges who have lost their lives, who have been injured, or who have had family members injured or killed

because a party was unhappy with the outcome of a case. If we lose our independent judiciary, I fear that we would also lose the opportunity to attract some of our best legal minds to the bench, for who would want to work in an atmosphere of undue influence and the threat of impeachment or pay reduction?

So, when I give thanks this month and on Thanksgiving Day, I will be sure to give thanks to my family friends and colleagues and all who support me. But, I will also be sure to give

thanks for an independent judiciary. And I hope that I will be as thankful next year on Thanksgiving Day and for years to come. Alexander Hamilton, one of the framers of the United States Constitution, said it best, in *The Federalist* No. 78. "There is no liberty, if the power of judging be not separated from the legislative and executive powers. ... [L]iberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments." Well said, Mr. Hamilton—well said.

ABOUT THE WILLIAM H. REHNQUIST AWARD

The William H. Rehnquist Award for Judicial Excellence is one of our nation's highest judicial honors. Presented annually by the National Center for State Courts, this prestigious award honors a state court judge who demonstrates the outstanding qualities of judicial excellence, including integrity, fairness, open-mindedness, knowledge of the law, professional ethics, creativity, sound judgment, intellectual courage, and decisiveness. The William H. Rehnquist Award honors judges who are taking bold steps to address a variety of issues affecting their communities.

In the fall of each year, the judge receiving this distinguished honor is recognized during an award ceremony held at the U.S. Supreme Court. The award highlights the judge's work to provide model programs for court systems throughout the United States.

Chief Justice of the United States John G. Roberts Jr. will present the award during an evening dinner ceremony on Thursday, November 15, 2018, at the United States Supreme Court.

"His dedication to duty was an inspiration to me, and I know to many others. [Rehnquist] reinforced my view that a certain humility should characterize the judicial role. Judges and justices are servants of the law, not the other way around."

— CHIEF JUSTICE OF THE UNITED STATES JOHN G. ROBERTS JR.

For more information about the nominating process and previous recipients, please visit <http://www.ncsc.org/About-us/Awards/William-H-Rehnquist-Award.aspx>.

For more information about the Rehnquist Award Dinner please call 1-800-616-6110.

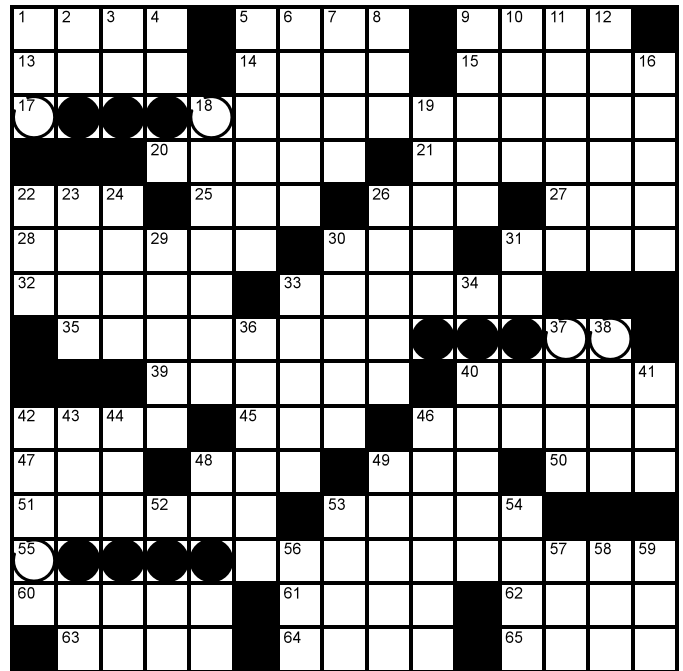
BIG SHOES TO FILL by Judge Victor Fleming

Across

- 1 Marina structure
- 5 Blow gently
- 9 Bulgarian or Croat
- 13 ___ fide (genuine)
- 14 Light bulb, in comics
- 15 Get closer, with a camera
- 17 Start of the oft-misquoted Matt. 7:1
- 20 Something additional
- 21 Waiting to talk
- 22 However, for short
- 25 Calligraphy need
- 26 '60s Pontiac muscle car
- 27 Nancy Reagan, ___ Davis
- 28 ___ Bros. ("Casa Blanca" studio)
- 30 "___ Sera, Sera"
- 31 Puts into type
- 32 Active
- 33 Throat
- 35 2000 rom-com starring Donal Logue, directed by Jenniphr Goodman
- 39 \$100 bills, slangily
- 40 Valentine decoration
- 42 Sampras of the court
- 45 NEA ad, maybe
- 46 "The Wizard of Oz" setting
- 47 Wilder's "___ Town"
- 48 Golf ball's platform
- 49 Raggedy doll
- 50 "___ Beso" (1962 Paul Anka hit)
- 51 Darwin's "The ___ of Species"
- 53 Hospital area for patients about to have surgery
- 55 1938 Bertolt Brecht play about the life of a 17th-century astronomer (Ger.)
- 60 Sport with clay pigeons

Down

- 1 Lunch with Peter Pan, perhaps, familiarly
- 2 Debtor's note
- 3 Last word in movies?
- 4 Go bananas
- 5 Cold season
- 6 Enhance with decorations
- 7 Greek-salad topper
- 8 Do lacy thread work
- 9 He played Goldblume on "Hill Street Blues"
- 10 Thin slat
- 11 "Tennis, ___?"
- 12 Part of ROY G. BIV
- 16 Some Degas subjects
- 18 Some witnesses
- 19 Monopoly assets
- 22 Bygone intl. carrier
- 23 "... why ___ thou forsaken me?"
- 24 Sports MD's specialty
- 26 Large bays
- 29 Sibling's daughter
- 30 Recruiter's goal
- 31 17th century painter Jan
- 33 Mother ___
- 34 Grain alcohol
- 36 Add, as an exhibit to a pleading
- 37 Flower vessel



- 38 Blocks of time
- 41 Chicken general?
- 42 Places for swimming
- 43 Cry of discovery ... and town in 46-Across
- 44 Chickasaw and Choctaw
- 46 Works on, as dough
- 48 Colors slightly
- 49 Debate
- 52 Nerd or dweeb equivalent
- 53 High-school jr.'s ordeal
- 54 Fruit centers
- 56 Ostrich's cousin
- 57 ___ & Perrins (sauce brand)
- 58 Pickled delicacy
- 59 Calligraphy need
- 58 Green veggies
- 59 Soften
- 60 Slim down
- 63 General address?
- 64 Summer, in Lyon

Vic Fleming is a district judge in Little Rock, Arkansas.

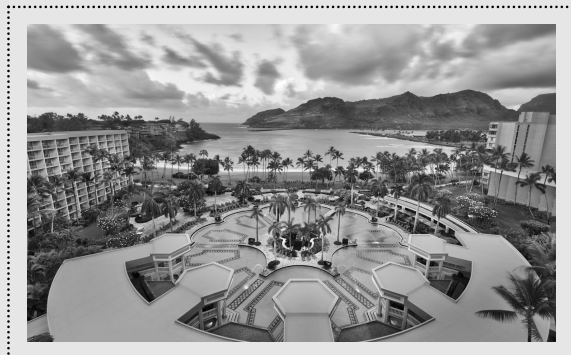
Answers are found on page 40.

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Court Review is received by the 2,000 members of the American Judges Association (AJA), as well as many law libraries. About 40 percent of the members of the AJA are general-jurisdiction, state trial judges. Another 40 percent are limited-jurisdiction judges, including municipal court and other specialized court judges. The remainder include federal trial judges, state and federal appellate judges, and administrative-law judges.

Articles: Articles should be submitted in double-spaced text with footnotes in Microsoft Word format. The suggested article length for *Court Review* is between 18 and 36 pages of double-spaced text (including the footnotes). Footnotes should conform to the current edition of *The Bluebook: A Uniform System of Citation*. Articles should be of a quality consistent with better state-bar-association law journals and/or other law reviews.

Essays: Essays should be submitted in the same format as articles. Suggested length is between 6 and 12 pages of double-spaced text (including any footnotes).

Book Reviews: Book reviews should be submitted in the same format as articles. Suggested length is between 3 and 9 pages of double-spaced text (including any footnotes).

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

Editing: *Court Review* reserves the right to edit all manuscripts.

Submission: Submissions should be made by email. Please send them to Editors@CourtReview.org. Submissions will be acknowledged by email. Notice of acceptance, rejection, or requests for changes will be sent following review.

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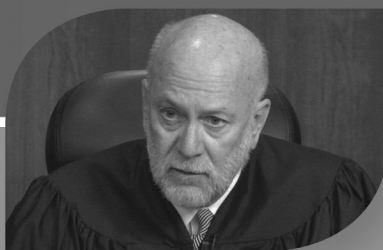
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The Resource Page



NEW PUBLICATIONS

Jon O. Newman *Benched: Abortion, Terrorists, Drones, Crooks, Supreme Court, Kennedy, Nixon, Demi Moore, and Other Tales from the Life a Federal Judge.*, William S. Hein & Co., Inc., 2017. 306 pp. (\$29.95).
<https://www.wshein.com>.

In contrast to many memoirs now being published, *Benched* is not the story of a miserable childhood, a struggle against enormous odds, or escape from a dysfunctional family. Rather, its author, Judge Jon O. Newman, tells of his balanced and uncommonly productive life, much of it spent as a federal judge for the district court and then the court of appeals for the Second Circuit.

Judge Newman's path to the federal appellate bench was paved with well-connected mentors, who seemed eager to provide him with opportunity after opportunity. However, the book shows that this "charmed" career was the result not just of luck, but of his obvious competence and deep willingness to take on thankless duties. Judge Newman attended Princeton University and Yale Law School and then served as a law clerk on the D.C. Circuit Court of Appeals. This clerkship led, remarkably, to an offer to serve as a clerk for Chief Justice Earl Warren, even though he had not formally applied for the position. The section on his time at the Court provides a fascinating, if all-too-brief, glimpse of its workings at the time.

The tales from the bench, including his important cases involving abortion, are more interesting from the years before his appointment to the appellate court, where even big cases with big names, can be fairly dry. What shines in the latter part of the book is the clarity of Judge Newman's mind and his ability to explain complicated legal issues clearly and concisely. In sum, the book offers an entertaining mix of political history, legal insights, war stories, and a glimpse inside the mind of a happy judge.

Andrea L. Miller, *Expertise Fails to Attenuate Gendered Biases in Judicial Decision-Making*, SOC. PSYCHOL. AND PERSONALITY SCI. 1-8 (8 pp)(Sage 2018).

<http://journals.sagepub.com/doi/pdf/10.1177/1948550617741181>

Professor Andrea L. Miller, a social psychologist at the University of Illinois, conducted a set of controlled experiences in which trial court judges and laypeople evaluated a hypothetical child custody case and a hypothetical employment discrimination case. Professor Miller compared judges' and laypeople's decision making and determined that judges were no less influenced by litigant gender and their own gender ideology than were laypeople, suggesting that expertise does not attenuate gendered biases in legal decision making.

Arizona Task Force on Digital Evidence Issues Report

In 2016 Arizona's Supreme Court directed the creation of a Task Force on Court Management of Digital Evidence (Hon. Samuel A. Thumma, Chair). Their report is available at <http://www.azcourts.gov/cscommittees/Digital-Evidence-Task-Force> and published in 13 WASH. J. L., TECH. & ARTS 2 (Winter 2018) (<http://hdl.handle.net/1773.1/1788>). The report includes 10 recommendations for how to approach the issue of digital evidence. Among them:

A standardized definition of basic terms used throughout rules of court, such as what exactly is "digital evidence," "electronic evidence," "video," etc.

Standardized set of formats and technical protocols for all courts and cases in the state along with a rules change requiring all digital evidence to be submitted in the standard format(s).

Deciding where and how the digital evidence is to be stored.

Amending court rules to balance public access to court records with the rights and privacy of victims and non-victim witnesses.



ONLINE RESOURCES

The National Center for State Courts has launched a webpage, *Opioids and the Courts*, as an online resource center to provide courts with materials and information about how best to respond to the opioid epidemic. Currently, the page provides statistics, a news roundup, and listings of available resources, including child welfare, medication-assisted treatment, and recommendations from national organizations. Materials developed and collected by the National Judicial Opioid Task Force will be located on this site as they are developed. Task Force co-chairs are Indiana Chief Justice Loretta Rush and Tennessee State Court Administrator Deborah Taylor Tate. <http://www.ncsc.org/opioidsandcourts>.

The National Center for State Courts has a Resource Center on "Improving Relationships with ICE." Among other resources, the site contains information from judges and justice stakeholders throughout the U.S., DOJ and DHS statements and materials, reference materials concerning the authority of courts to limit access to premises or information, state and local procedures and initiatives, and references to resources to understand potential legal or ethical issues related to actions by judges and court officials. <http://www.ncsc.org/Topics/Courthouse-Facilities/Improving-Relationships-with-ICE/ICE.aspx>.

The Cyberviolence Court Training Initiative referenced on the Resource Page in Court Review Vol. 53:1 is underway, and webinars and in-person trainings are available for judicial officers around the U.S. If you are interested in attending a webinar or in-person training, contact the National Network to End Domestic Violence, www.nnedv.org or the Safety Net Project at www.techsafety.org for information about upcoming events.