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CENTER
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NEW YORK STATE
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The Journal of Court Innovation

The *Journal of Court Innovation* is published by the Center for Court Innovation, the New York State Judicial Institute, and Pace Law School to promote and highlight innovative programs and strategies in court systems around the United States.

The *Journal* invites submissions of articles about innovative programs and strategies in court systems. Topics of interest include, but are not limited to: jury issues, case management, judicial selection and evaluation, court structure, judicial training, technology, problem-solving courts, and efforts to create stronger links between courts and communities. Submissions, which can be anywhere from eight to 35 pages, will be reviewed by the executive and managing editors as well as outside reviewers.

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WELCOME TO THE *JOURNAL OF COURT INNOVATION*

Judith S. Kaye
Chief Judge of the State of New York

In New York, we are constantly seeking new ways to enhance our operations. Signs of this commitment can be seen throughout the New York court system, from reforms in jury service to improvements in how judges handle everything from petty crime to complex commercial cases.

In your hands is a publication I've long been hoping for, aimed at promoting new thinking in state courts. We have so much to learn from one another!

The *Journal of Court Innovation* is a collaboration of the New York State Judicial Institute, the Center for Court Innovation and Pace Law School. Its mission is to bridge the worlds of theory and practice. It therefore does not seek to expound on new legal theories or explore arcane areas of the law (worthy as those pursuits are). Rather the *Journal* is written for those on the front lines of the justice system: court administrators, judges, lawyers, scholars, non-profit executives, legislative and executive branch officials—basically anyone working to improve the court system or the administration of justice.

Although this is our first issue, and the *Journal* will need to prove itself over time, I am confident that it will become an important resource—promoting innovation, sparking new thinking and helping our courts to achieve the best outcomes for the citizens we serve.

It's my hope that you will enjoy this inaugural issue, and that you will want to be part of our conversation about improving the justice system. How can you contribute? There are countless ways, among them daring to tackle difficult problems, asking tough questions, starting new programs, developing partnerships, even submitting an article for publication in this journal.

We look forward to hearing from you.

A WORD FROM THE EXECUTIVE EDITORS

Welcome to the first issue of the *Journal of Court Innovation*. We created this journal for a simple reason: to promote new thinking about how to initiate and implement change in courts.

The *Journal of Court Innovation* will publish writing by leading academics and practitioners in the field. You will find longer, in-depth examinations of complex topics. You will also find shorter pieces describing discrete experiments, as well as roundtable transcripts, interviews, and book reviews.

This eclectic format is purposeful. We have created this journal in an effort to bridge the worlds of theory and practice. We hope to address a broad audience that includes attorneys, judges and court administrators, and also scholars, researchers, policymakers, non-profit executives and others.

In this first issue, you will find articles highlighting innovative applications of technology, a new approach to working with offenders returning from prison, new techniques for involving local citizens in court strategic planning and commentary on the appropriate role of federal courts interpreting and applying state law. Also included is a roundtable discussion focusing on lessons learned from failed criminal justice initiatives that are applicable to any new endeavor.

This diversity of content reflects the breadth of expertise that our three institutions—a think tank, a judicial education center, and a law school—bring to the *Journal of Court Innovation*. We hope to offer academic rigor and useful ideas—and perhaps a few surprises—in every issue.

We invite your feedback (and your subscriptions). Please tell us what you think of our first issue and what you would like to see in future issues. And if you would like to contribute an article, do not hesitate to send us your ideas. We look forward to hearing from you.

Greg Berman Robert G.M. Keating Michelle S. Simon

Crossing the 'Digital Divide': Using the Internet to Impanel Jurors in Travis County, Texas

Mary R. Rose
Michelle Brinkman[1]

Introduction

Since March 2002, prospective jurors in Travis County (Austin), Texas, have been able to provide information on their qualifications for jury service and to receive jury orientation by logging on to an Internet site known as "I-Jury." The I-Jury system allows prospective jurors to bypass the traditional jury assembly room and report directly to a courtroom for voir dire questioning. In addition, jurors report to voir dire on a date that has been coordinated as much as possible with their individual schedules.

This paper describes the I-Jury system and how it became part of the already-distinctive procedure Travis County developed for impaneling jurors for specific cases. We also present demographic data from juror questionnaires taken from both

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The authors gratefully acknowledge Paula Hannaford-Agor, Geoff Gallas, Dale Kasparek, William Kelly, Elissa Krauss, and Shaye Stevens, who provided helpful comments on previous drafts. We also thank Lydia Garcia, Danikae Doetsch, and Shaye Stevens for assistance with data coding. Lastly, the I-Jury system discussed in this paper would not have been possible without the efforts and vision of the Travis County District Clerk, Amalia Rodriguez-Mendoza.

pre- and post-I-Jury time periods. Although I-Jury use differs across racial groups—with African Americans and Hispanics comparatively less likely to use I-Jury than are whites and Asian Americans—I-Jury has not compromised the racial representativeness of jury panels in Travis County.

We conclude that under the right circumstances, I-Jury offers jurors a popular convenience, saves courts money, and does not undermine the fair cross-section requirement for jury panels.

Background

There are no jury assembly rooms in the courthouses of Travis County (Austin), Texas. Until the 1990s, large-sized courtrooms in the various courthouses served as sites for impaneling—that is, the assembly of qualified jurors who are later randomly assigned to courtrooms for case-specific questioning. Three different court systems within the county (district, county, and Austin's municipal courts) each independently used this courtroom-based approach to impaneling.

During the 1990s, the jury management systems for the separate courts were consolidated and placed under the auspices of a single office. As a result, the size of the jury pool available for impaneling increased. In some weeks, as many as 1,000 jurors were available for trial assignment across the different court systems. In these circumstances, using courtrooms as jury assembly rooms was impractical, as it tied up valuable courthouse space for several days.[2] In response, Travis County developed an alternative method to give jurors their panel assignments. The county conducted a mass impaneling session in an off-site facility on a biweekly basis, and it used this system successfully for several years. However, as we describe below, unexpected events called for additional innovations.

Since March 2002, much of the juror impaneling has taken place through an online system called "I-Jury." Those who use I-Jury report directly to the courtroom to which they have been assigned for jury selection (or "voir dire") questioning. Thus,

2. The largest courtroom had a maximum occupancy of approximately 200 people, so impaneling would last up to a week in order to accommodate 1,000 jurors.

prior to voir dire an individual does not have to leave work or home in order to appear at a courthouse for jury service. I-Jury has been in place for more than five years and has won awards for innovation.[3] Anecdotal comments from jurors reveal positive impressions of the system from its users.[4]

Travis County is home to more than 900,000 people[5] and has rural areas and a mid-size metropolitan area with Austin, the state capital, as its center. As is true of Texas as a whole, Hispanics are the largest minority group in the area—making up approximately 20 percent of jury-eligible adults but about one-third of the total population.[6] African Americans constitute about 8 percent of jury-eligible citizens in the county.[7]

Within Texas, Travis County is distinctive. Home to the flagship University of Texas, 43 percent of residents in the county have at least a bachelor's degree, compared to 25 percent of people statewide.[8] The area also has a substantial technology sector, with major employers like Dell, Advanced Micro Devices, and Samsung, to list but a few. On the one hand, this highly educated, tech-savvy population makes I-Jury an attractive and feasible option for many citizens. On the other hand, the architects of I-Jury in the district clerk's office,[9] judges and

3. Texas Association of Counties "Best Practices Award" 2004 and Center for Digital Government "Best Application Serving the Public Award" 2004.

4. In the remarks section of the Juror Impaneling Questionnaire, jurors have said, for example: "Thank you so much for providing the opportunity to report for duty online. I really appreciate that the county has created such a time-saving and logical approach to jury selection." Juror Impaneling Questionnaire (on file with author). "I feel this is so convenient to complete and it doesn't take a lot of your time. I am so happy you are considerate of the public's time and commitments. Thank you." Juror Impaneling Questionnaire (on file with author). "This is the coolest thing I've ever seen. THIS is what computers are for, to make long, dull things like jury selection quick and easy. It's great to see the web put to such good use as well. Bravo!" Juror Impaneling Questionnaire (on file with author). Jurors also have the opportunity to provide feedback on I-Jury at the end of the case on which they have served; judges relay negative feedback to the jury management office. To date, judges have not relayed any negative comments particular to I-Jury.

5. U.S. CENSUS BUREAU, 2006 AMERICAN COMMUNITY SURVEY DATA PROFILE HIGHLIGHTS: TRAVIS COUNTY, TEXAS, http://factfinder.census.gov/servlet/ACSSAFFFacts?_event=Search&geo_id&_geoContext&_street&_ county=travis&_cityTown=travis&_state=04000US48&_zip&_lang=en&_sse=on&pctxt=fph&pgsl=010.

6. *Id.*

7. *Id.*

8. *Id.*

9. In Travis County, the jury office is under the auspices of the district clerk's office, which also handles district court records and filings.

some members of the criminal defense bar were concerned that the system might disproportionately exclude from juries people who are less educated and who have less technical prowess. This could threaten jury representativeness because of a so-called "digital divide," a term used to describe the fact that low-income earners and minority group members have less Internet access and skill compared to middle- and upper-middle class, white individuals.[10] Before examining the issue of racial representativeness we explain how I-Jury works in practice.

Juror Qualification and Panel Assignment in Travis County

The distinctiveness of Travis County's approach to jury impaneling is most evident when considering how summoning and impaneling proceed in other areas of the United States. In a typical system, a given individual is notified by first-class mail that he or she has been summoned for jury service.[11] The mailing likely includes a questionnaire through which individuals attest to their statutory qualifications for service (e.g., a U.S. citizen, over 18, fluent in English, not a convicted felon).[12] In some locations, the summons also announces the date on which the person must appear at the county courthouse; in other areas, potential jurors are summoned to appear in court only after they have returned their completed qualification questionnaire. Jurors seeking an exemption from service or a short-term postponement contact the court to make their re-

10. *See generally* Robert W. Fairlie, *Race and the Digital Divide*, 3 CONTRIBUTIONS OF ECONOMIC ANALYSIS AND POLICY 1 (2004), *reprinted in* THE B.E. JOURNAL OF ECONOMIC ANALYSIS AND POLICY, *available at* http://www.bepress.com/bejeap/contributions/vol3/iss1/art15; KAREN MOSSBERGER, CAROLINE TOLBERT & MARY STANSBURY, VIRTUAL INEQUALITY: BEYOND THE DIGITAL DIVIDE (2003); Karen Mossberger, Caroline J. Tolbert, & Michele Gilbert, *Race, Place, and Information Technology*, 41 URBAN AFFAIRS REV. 583 (2006); PIPPA NORRIS, DIGITAL DIVIDE: CIVIC ENGAGEMENT, INFORMATION POVERTY, AND THE INTERNET WORLD-WIDE (2001).

11. *See, e.g.*, G. THOMAS MUNSTERMAN, PAULA L. HANNAFORD & G. MARC WHITEHEAD, JURY TRIAL INNOVATIONS (1st Edition) (1997) (describing summoning practices and showing a sample summons); ROBERT G. BOATRIGHT, IMPROVING CITIZEN RESPONSE TO JURY SUMMONSES: A REPORT WITH RECOMMENDATIONS 126 (1998) (giving a sample summons).

12. *See* GREGORY E. MIZE, PAULA HANNAFORD-AGOR, & NICOLE L. WATERS, THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT. (2006), *available at* http://www.ncsconline.org/D%5FResearch/cjs/statesurvey.html; DAVID B. ROTTMAN ET AL. STATE COURT ORGANIZATION 1998, at 263-272 (2000), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/sco98.pdf (describing juror qualifications across different states).

quests.[13] Otherwise, jurors reporting on the day in question go to a large juror assembly room.[14] From this room prospective jurors are randomly selected to go through voir dire questioning in a particular courtroom. Sometimes, an individual may appear at a jury assembly room only to wait around for several hours—or even a full day—before learning that he or she will not be needed on a trial or even for a voir dire. Many factors can lead to a juror leaving service without being called for voir dire, serving as a juror, or being challenged; substantial proportions of summoned jurors fall into these groups.[15]

In 1994, Travis County consolidated the district court jury management system (which assigned jurors to felony, civil, and family cases in district court and handled jury assignments for small claims, evictions, truancy, and some class C misdemeanors in justice court) and the county court system (which handled impaneling for some civil matters, as well as class A and B misdemeanors that may result in jail time). The county also later consolidated with the municipal court system (which handles class C misdemeanors punishable by fine only, and cases involving local civil or criminal ordinances). Because courthouses in the county lacked any reserved physical space for jurors to assemble and wait for courtroom assignment, after the first consolidation the county rented the City Coliseum, a large centralized facility, from the City of Austin. The district clerk's office used this facility on a single day every other week in order to impanel all jurors across the different court systems.

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13. In some areas (e.g., Hansford County, Texas, population 5,369) courts ask jurors to make an in-person appearance to request a hardship exemption or postponement (personal communication, on file with the authors). More typically, especially in larger-sized communities, jurors call or send a letter to request a service exemption or accommodation.

14. The common experience of jurors spending many hours or days in large juror waiting rooms is well known. So widespread is the practice that the National Center for State Courts' Jury Trial Innovations manual includes a chapter on "How to Relieve Juror Boredom," G. THOMAS MUNSTERMAN, PAULA L. HANNAFORD-AGOR & G. MARC WHITEHEAD, JURY TRIAL INNOVATIONS 39 (2d ed. 2006) (discussing options for how to outfit a jury waiting room).

15. In the federal courts, on average, 39 percent of petit jurors summoned in 2002 were either not selected or excused following voir dire (the range across districts was 6.5 to 71.2 percent). Marika Litras & John R. Golmant, *A Comparative Study of Juror Utilization in U.S. District Courts*, 3 J. EMPIRICAL LEGAL STUDIES 99, 106 (2006). In New York State approximately 82 percent of jurors who appear for service do not end up sitting on juries. Telephone interview with Unified Court System Jury Support Office, staff member (Dec. 18, 2007).

At this mass impaneling session, which typically lasted one and a half to two hours, assembled jurors were qualified for service, clerks and judges were on-hand to hear exemption requests, jurors received jury orientation (presented by a jury clerk and a judge), and jurors left with a concrete result: assignment to a particular panel—that is, they were told where and when to make a second appearance for a specific voir dire. Under this system jurors had to appear at the impaneling session, but they were also likely to save time at their subsequent appearance because they were instructed to arrive at court close to the true start time for proceedings (e.g., a noon appearance time for a voir dire slated to begin at one o'clock), thus allowing them to go to work or take care of other responsibilities prior to arriving. Certainly, just as in other systems, trial schedules would change, and some cases would be canceled at the eleventh hour. Jurors were given a phone number to call the night or morning before their appointed time. At that point they learned further information about their scheduled appearance, including whether their service was needed at all.[16]

Apart from limiting the amount of time jurors spent on impaneling and waiting for a voir dire to start, the consolidation and mass impaneling provided the jury clerks with an opportunity to do something truly unique: they could *ask jurors* to identify convenient times for jury service. During the mass impaneling session people were assigned to trials occurring across a wide time span—for example, an upcoming four-week or six-week period. If one week was not convenient, but the remaining three were, the clerks could assign jurors to trials during the available time period and avoid a conflict. This accommodation is not possible in traditional systems in which a summons announces a particular appearance date, and jurors must either change their schedules to accommodate the assignment or request a postponement. The volume of cases from the three court systems meant that clerks could almost always find a panel that coordinated with a juror's schedule.

16. In a recent article, Paula Hannaford-Agor used the term "multiple voir dire" to describe a system like Travis County's. *Jury News: A New Look at Term of Service*, 22 THE COURT MANAGER 33, 35 (2007).

Such flexibility is extremely valuable for prospective jurors because particular weeks in a given month can be busier than others. For example, month-end reports at someone's place of business may mean that the last week of a month is far less convenient than other times; for others, personal or work-related travel schedules may be heavier at some points during the month.[17] To accommodate jurors' personal schedules during the impaneling process, part of the mass session was devoted to having jurors identify one or two weeks in a given time period (e.g., over the next four to six weeks) when they could be available for jury service. Clerks then made assignments in accordance with the cleared weeks. For example, people who reported no conflicts during the upcoming month stood in one line and were handed their assignments. Those with limitations (e.g., "not free the week of June 8th") went to other lines. People who did not have at least one available week during the period could postpone, but clerks instructed them to clear their schedules when they returned in three months to repeat impaneling.

The mass impaneling system depended on judicial support. To be successful, the jury system managers needed to know the timing and required panel size for the specific trials to which jurors could be assigned during the session. In theory, such advance notice is always possible. Judges have to calendar cases for trial well before the start date in order, for example, to schedule courtroom space and to coordinate jury trials with the judges' other responsibilities. Judges, however, must be willing to routinely provide this information to the jury clerks. If judges balk at providing jury trial plans (and any changes to them) in a timely manner, or if they forget to do so, the system will fail.

In Travis County, the move to the off-site facility concretely benefited judges by freeing up valuable courtroom space (i.e., space previously devoted to impaneling), thus motivating

17. For example, the first author was called to jury service several years ago, and at the time, she was regularly commuting out of state as part of her job. She had airline tickets purchased well in advance of these travel days. When she appeared at the impaneling session itself (which happened to coincide with a week that she was in Texas), she submitted the sole two available weeks out of the next six. The court assigned her to a municipal court panel scheduled for the time she was in Texas.

judges and the judicial leadership to work with the jury management office to make the mass impaneling session run smoothly. As we next describe, the desire to avoid returning to an on-site courtroom assembly room also created support for an online impaneling system.

Necessity and the Invention of I-Jury

In 1998, Austin voters approved a plan to renovate the City Coliseum and transform it into a community events center. The renovation left the Travis County court system without a site for the mass impaneling sessions. Initially, the prospects of finding an appropriate alternative were dim. Other places were far more expensive to rent, were not centrally located, or lacked sufficient parking or mass transit access. If the county could not find a practical and affordable alternative, jury impaneling would have to return to a courtroom within one of the courthouses.

Coincidentally, the Chief Deputy to the District Clerk (this paper's second author) had been mulling over an idea that a relative had presented to her in 1997 after he had participated in a mass impaneling session. Expressing dismay over the procedure's inefficiency, he asked why he could not have used e-mail to do everything that the appearance entailed—which was essentially a process of exchanging information. She initially thought it impractical to swear in jurors and give appropriate orientation via the Internet; however, she continued to give the idea some thought. Given the threat that the county would not be able to find a suitable place to conduct the mass impaneling sessions, she discussed the possibility of using an Internet system with the district clerk (her superior), who supported investigating whether it could work.

Apart from questions concerning how the system would be designed and how it would function, the district clerk also needed information about the extent to which it could substantially alter the demand for in-person impaneling (i.e., would such a system mitigate the problem created by the closure of the City Coliseum?). In 2000, the district clerk surveyed jurors at some of the mass impaneling sessions. The survey explained that the City Coliseum would be closed for renovations and

that the county was considering having people impanel online. The questionnaire informed jurors that the system would provide Internet access at the courthouse, public libraries, or various other places throughout the community for people who did not have access from home or work. Respondents were asked about their preferences for retaining the in-person system versus allowing people to impanel online. The response was overwhelming: 85 percent said they would opt to go online, and just 15 percent of jurors said they would rather impanel in person than online. Of the former group, most all (90%) had Internet access at home or at work; only 10% said they would rely on a public site such as a library. Thus, the system would likely lower the size of the mass impaneling sessions, and most people would not have to make special trips to public sites to impanel. The district clerk shared the survey data when proposing the system to judges.

By and large, judges, including the presiding administrative judge, favored the idea of piloting the Internet program. Some expressed skepticism about its feasibility, but none thought their reservations should prevent the clerks from at least trying to develop and pilot the project, which the district clerk dubbed "I-Jury." Given that an online system might help avoid (or at least limit) the impact of returning to courthouse impaneling, the potential benefits were substantial. In addition, the costs of the project were low, involving primarily the $250 necessary to acquire a secured site certificate (which attests to the site's data security procedures) and the time of county staff who worked on developing the system. These developers included the district clerk, the chief deputy, the jury office manager, and three other critical county employees: the director of records management, the county's webmaster (who worked in records management) and the county's e-mail system administrator. The director of records management and the webmaster programmed the site, which involved creating the design layout and utilizing common programming methods to transform the data provided on the web forms into a single e-mail that went to an I-Jury e-mail account. Indeed, the heart of the initial version of I-Jury was this e-mail account and its sub-directories, which the e-mail coordinator helped design and automate using tools available in the county's e-mail program, Groupwise

(by Novell). Through the e-mail account, clerks managed the tasks associated with impaneling, including: automated acknowledgement of disqualifications, statutory exemptions, sorting qualified jurors based on availability, and notifying jurors of their assignment. As we describe later, I-Jury has since been upgraded. The system described here is the one in place during the time periods relevant to our analysis of jury composition before and after I-Jury.

How I-Jury Works in Practice

At its inception, the district judges and the district clerk set requirements on the system. All people would continue to receive the initial summons through first-class mail, and the I-Jury system had to be optional (i.e., in-person impaneling was retained).[18] Those who used I-Jury received the same accommodations (e.g., schedule coordination and opportunities to request exemptions) as they would through in-person impaneling, and the I-Jury website provided juror orientation.[19] Additionally, at the time of start-up, the county had to conduct a media campaign to educate people about I-Jury, as well as an outreach program to provide Internet access through local churches and libraries. I-Jury began its pilot phase in March 2002 and has been in continuous use ever since.

Under the I-Jury system, jurors receive a mailed summons which includes the I-Jury Internet address.[20] The I-Jury website starts with a welcoming greeting. The next two web pages provide an overview of what to expect from online impaneling.[21] As we discuss later, Travis County has since upgraded the sys-

18. Eventually the county found a place to hold in-person impaneling outside of the courthouse—an events center located just north of downtown which met the county's budget, accessibility, and parking requirements.

19. During the mass impaneling sessions, orientation had been provided through presentations by the jury clerks and a judge. Online orientation is done primarily through a link to the film, "The American Juror" (which is now also screened at the in-person sessions), as well as through Frequently Asked Questions. Additionally, in the initial system jurors received more specific orientation information through the series of subsequent notices they received about their jury panel assignment.

20. I-Jury Online Impaneling, http://www.co.travis.tx.us/ijury.

21. In the initial system, jurors were told at this point to expect to be assigned a service date range—that is, a set of dates within which the juror's ultimate panel assignment will take place—within six days.

tem so that a person now receives a panel assignment at the conclusion of the I-Jury session. The juror is then directed to web pages that capture identifying information such as name, address, and contact information.[22] The next web pages contain questions that screen for qualifications.[23] Disqualified jurors are excused while qualified jurors have the option of screening for excuses based on legal exemptions.[24] Qualified jurors are asked to identify schedule conflicts.[25] Next, jurors complete a standard questionnaire and, just as they would do by signing a form at the mass impaneling session, they certify the truthfulness of their responses.

In the initial system, once people submitted their information, the I-Jury website generated an e-mail that was delivered to the I-Jury e-mail account; only jury clerks had access to this account. Thus, there was no database of juror information stored on the World Wide Web, and protecting data from inappropriate access—i.e., hacking—required no additional steps other than those already taken to protect county e-mail accounts. The system also contained several automated features that managed the inbox of the e-mail account, such that jury clerks never even saw some of the incoming e-mails. For example, if a prospective juror indicated on the I-Jury website that he or she was not qualified for jury service, the subject line of the e-mail automatically generated by the I-Jury website contained a special "tag," or a unique code that was specific to each dis-

22. People can choose to be contacted further by providing an e-mail address. The system asks users if they would also like to provide a second e-mail address, which increases the means through which people can be contacted. People are not required to have an e-mail address in order to use the system (particularly in the newer system), and even if they have an e-mail address, they can choose not to provide it to I-Jury. Any user who does not give an e-mail address has assignments sent via first-class mail. Approximately 3 percent of jurors do not provide an e-mail address.

23. *See* TEX. GOV'T CODE ANN. § 62.102 (2007) (stating statutory juror qualifications, including: 18 years of age; citizenship of Texas and county of service; sound mind and good moral character; literate; candidate has not served as a juror during the preceding three months; candidate has not been convicted and is not under indictment or other legal accusation for misdemeanor theft or felony).

24. *See* TEX. GOV'T CODE ANN. § 62.106 (2007) (stating statutory juror exemptions, including: 70 years of age; legal custodian of a child under 10 years of age; students; certain state employees; members of the military).

25. Currently, qualified jurors are asked to consider their schedule over the next 75 days. As has been the practice in the mass impaneling sessions, jurors with too many conflicts are automatically postponed for 90 days and instructed to clear time for jury service.

qualification. The presence of this tag in the subject line told the system to route the e-mail into a designated folder, which then automatically generated a confirmation e-mail to be sent to the disqualified juror (if that person provided an e-mail address when using I-Jury).[26] A similar system tagged e-mails from people who exercised a statutory exemption.

For individuals whose e-mails did not contain disqualification or exemption tags, the e-mail went into a main inbox which jury clerks managed. The body of each incoming e-mail was simply a layout of all the information the juror provided on the website's pages (e.g., name, address, contact information, age, sex, occupation, prior jury service, etc.). The jury clerks reviewed the e-mails to confirm certain issues, such as whether the person was a resident of both the city and the county (these people are eligible for assignment to any court), just the county (ineligible for municipal court assignment), or just the city (ineligible for district or county court assignment).[27] The clerks also inspected the jurors' schedules and, based on the information provided, manually routed the e-mail to folders that matched the jurors' availability—thus creating an analogy in the virtual world to the lines these people would have been standing in had they attended the mass impaneling session. In this system, an individual with no conflicts might have been routed to a folder housing those who had time available, for example, across an upcoming three-week period; other folders would hold eligible jurors for trials commencing on other dates.[28]

Once an individual was routed to a time period folder for panel assignment, the system automatically sent the juror a con-

26. *See supra* note 22. For I-Jury users who did not supply an e-mail address, the e-mail went to the main I-Jury e-mail box but the field in which an e-mail address would appear said "none." This flag told the jury office staff that the person could not be contacted via e-mail. All subsequent communications with such jurors—regarding trial assignments, exemptions, or disqualifications—were done via first-class mail and, for some trial assignments, through a telephone reminder.

27. The City of Austin has incorporated areas that stretch into two neighboring counties, Williamson and Hays.

28. As with the mass impaneling system, clerks could nearly always find a trial to accommodate a person's schedule. A substantial percentage of jurors listed no conflict dates at all. For example, we reviewed panels scheduled for the middle of summer, when vacations usually pose a conflict, and 36 percent of people assigned to these panels listed no conflicts. During other months, this percentage would likely be 40 percent or more. Even those who list a conflict usually indicate only a few problematic days or a single conflicted week.

firmation e-mail explaining that a specific panel assignment would follow.[29] The juror's specific court assignment, including additional instructions, was sent via e-mail two weeks prior to the start of the service date.[30] This second e-mail provided essential information about reporting to court and, depending upon the practices of the assigned court, it included a special phone number to contact to learn about any last-minute changes to trial schedules. Jurors confirmed receipt of the assignment (by sending a reply e-mail) and then reported in accordance with the instructions in the assignment. Jurors also received a reminder e-mail within one week of their scheduled appearance.[31]

To manage two different impaneling systems (in-person and I-Jury), some critical issues had to be addressed in order to ensure a fair jury system. In particular, jurors who elected to use I-Jury could do so at any time during a three-week time frame, with an end-date specified on the summons. These people were assigned to panels (via the e-mail folder system) continuously during this three-week period. By contrast, jurors who elected to attend the impaneling session did so at a scheduled date and were all assigned on that date. To the extent that there were any demographic differences between those who use I-Jury and those who do not—an issue we discuss in detail below—a strict random assignment to panels and available trials would likely have resulted in non-random demographic variations among panels. For this reason, the county tracked the ratio of I-Jury users to non-users on a regular basis, and clerks assigned appropriate proportions of people to each of the jury panels.[32]

By itself, the ratio of users to non-users is a telling indicator of the success of the I-Jury system. Although the survey data indicated that a substantial percentage of people would

29. *See infra* Figure 1. Sample Initial E-mail That an I-Juror Receives.

30. *See infra* Figure 2. Sample E-mail for an I-Juror Who Has Been Impaneled.

31. If the juror did not reply to this reminder, the jury clerk's office phoned them.

32. The ratio affected the e-mail folders to which jury clerks assigned qualified jurors. Once folders reached a certain size, the folder was automatically marked as "Full." Based on trial demand and the proportion of jurors using I-Jury, jury clerks could alter how many slots were available in each folder for a given time period before the folder was marked as full.

prefer online impaneling, the district clerk and chief deputy conservatively told judges that, in practice, they expected perhaps half of those summoned to use the system. However, from the beginning, this estimate proved overly conservative. At its inception in 2002, 70 percent of people opted to impanel via I-Jury.[33] In 2006, that figure had grown to 87 percent, and data from the first quarter of 2007 put the rate of I-Jury use at 90 percent.[34]

The I-Jury system was designed to handle contingencies in the demand for jurors. In a traditional system, in which courts have a pool of jurors waiting nearby in a jury assembly room, a judge may be able to call up additional jurors if the judge did not, for example, correctly estimate the panel size necessary for a trial, or if some event during the voir dire required dismissal of a panel, such as the accidental disclosure of information that prospective jurors should not have heard. Further, some jury trials in Texas—for example, in eviction cases—occur on short notice.[35] As there is no pool of jurors sitting in a courthouse in Travis County, the system has had to incorporate a way to request additional jurors at the last minute. To do so, some people are placed on different types of contingency panels. "Supplemental" panels are formed in order to increase the number of jurors assigned to a district court on short notice (e.g., when the venire for a district trial is inadequate); "reserve" panels allow county courts to hold an additional short trial that might not have been anticipated; and "on-call" panels are formed for evictions and other emergency or short-notice jury trials. Jurors assigned to each of these panels receive special instructions. For example, some supplemental jurors are told to reserve an entire three-week period for a civil district court case and are instructed to routinely call in to see if they are needed.

33. That is, 70 percent of people who were not excused due to disqualification or exemption. Persons who are disqualified or exempt may register their excuse via mail, telephone, or I-Jury. Over a third of excused jurors use I-Jury to register such excuses.

34. *See infra* note 45, (describing how we estimated the number of users and non-users). Although precise estimates are not available, the usage rate appears to be even higher following the latest upgrade to I-Jury, as the number of people attending in-person impaneling is in decline.

35. Protests to evictions must be heard within three days of being filed, and parties in these cases can opt for a jury trial. *See* TEX. GOV'T CODE ANN. § 28.035 (2007).

On-call jurors are told to reserve a week in their schedule and to expect a phone call if they are needed. Thus, should an eviction case arise, or should a voir dire run short of jurors, these people can be summoned to appear on short notice, typically by the next day.

The I-Jury system has offered a number of benefits. Jurors who use the system do not have to take time away from work or home to attend a mass impaneling session. Addressing time management issues can create substantial improvements in people's views about serving.[36] The county has also benefited. With fewer people attending the in-person impaneling, the number of impaneling sessions scheduled each year declined from 24 (at the start of the system in 2002) to 10 (at the end of 2007), for a cost savings of over $30,000.[37] I-Jury has also reduced the number of postponements. In January of 2002, 24% of all summoned jurors were postponed; in January of 2007, that figure was 4%. We believe that the reduction likely stems from the fact that people no longer have to make time for two separate appearances (i.e., the mass impaneling session and voir dire).

As we have also noted, these benefits came with little cost. I-Jury was easily incorporated into an existing system that coordinated jurors' personal schedules with a centralized schedule of upcoming trials, and the county did not have to contract with a private company to design the system.

I-Jury and Jury Panel Composition

One remaining and longstanding concern about online impaneling is whether the system negatively affects the racial representativeness of jury panels. Aware of the "digital divide"

36. *See* Shari Seidman Diamond, *What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 282, 286 (Robert E. Litan ed., 1993) ("one of the primary dissatisfactions voiced by jurors is that their time has been wasted"); *see also*, Paula Hannaford-Agor, *supra* note 16 at 33 (stating "citizen convenience" as the "first and foremost" reason to restrict term of service to the shortest period consistent with the court's needs). Hannaford-Agor notes that the call to create appropriate terms of service for jury trials is part of Principle 2(c) of the new A.B.A. Principles for Juries and Jury Trials. *Id.*

37. This figure primarily represents the cost to rent an impaneling facility. The county also saves money indirectly because the staff and judges conducting the impaneling session are able to attend to other matters.

when they developed I-Jury, the district clerk and chief deputy considered the possibility that differences in Internet familiarity and use between the rich and the poor and between whites and some minority groups[38] could affect panel composition. Judges raised similar concerns when authorizing the pilot, and members of the criminal defense bar also informally discussed this issue with jury office personnel as details of the proposal became known.[39]

I-Jury could affect the representativeness of panels because the system might differentially reduce barriers to service. Jury panels in Texas tend to under-represent racial and ethnic minorities, particularly Hispanics,[40] in part because minority groups have lower incomes and face more economic barriers to service.[41] I-Jury only partially addresses this general issue, since it eliminates only the need to appear at impaneling. Additionally, because of the digital divide, groups who are already over-represented on jury panels might disproportionately use I-Jury and find it easier to serve, thereby serving more often than they would have before I-Jury. By contrast, those traditionally under-represented might not see any change in the ease of service. This could further widen any existing racial gaps in jury participation.

Although a concern of the district clerk's office, and of judges and attorneys, there was no way to observe the effects of I-Jury on the representation of minority groups without actu-

38. *See supra* note 10.

39. There have not been formal legal challenges to the I-Jury system. Since implementation of I-Jury, the second author has been called to testify in four cases in which a criminal defendant made general claims about the inadequate representation of minority groups in the jury pools for those cases. She did not testify about I-Jury, but rather about the reasons why the pool might not match the Census profile of the county, on which defendants had based their discussion of panel discrepancies. For example, demographic differences in residential mobility and disqualifications based on English proficiency, or felony status could make the pool of qualified jurors different from the basic Census profile. Defendants have not succeeded in any of these challenges. For a description of how impaneled jurors in Travis County compare to Census figures, *see infra* note 49.

40. *See, e.g.*, J. Ray Hays & Stacy Cambron, *Courtroom Observation of Ethnic Representation Among Jurors in Harris County, Texas*, 85 PSYCH. REP. 1218 (1999); Rob Walters et al., *Are We Getting a Jury of Our Peers?* 68 TEXAS B. J. 144, 145 (2005); Robert Walters & Mark Curriden, *A Jury of One's Peers? Investigating Underrepresentation in Jury Venires*, 43 JUDGE'S J. No. 4 at 17 (A.B.A. Fall 2004).

41. *See generally* HIROSHI FUKARAI ET AL., RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE (1993) (discussing race-based attrition in service).

ally implementing the system and then systematically analyzing whether panel composition changed over time, in particular whether differences in participation between whites and other groups increased following the start-up of I-Jury. To undertake this analysis, we compared the racial composition of jurors impaneled in 2005 and 2006 to those impaneled in 2002, before I-Jury was implemented.[42] We reviewed more than 22,000 juror questionnaires, spanning the time period from January 2002 and October 2006.[43]

The standard juror questionnaire provided a blank field for people to self-report their race. We coded each juror's open-ended response into one of several distinct categories: white, African American, Hispanic, Asian American, Native American, mixed-race, and "missing information."[44] (Only one per-

42. Several aspects of this analysis deserve mention and clarification. First, Internet proficiency and use could vary by factors besides race (e.g., age). The focus here was on race because of its centrality in the history and jurisprudence of jury panel composition; *see, e.g.*, FUKARAI ET AL., *id.* and Peter A. Detre, *A Proposal for Measuring Underrepresentation in the Composition of the Jury Wheel*, 103 YALE L.J. 1913 (1994). Sex is also a cognizable, protected category for purposes of forming jury panels. Taylor v. Louisiana, 419 U.S. 522, 533, 537 (1975). However, as we report below, we have no evidence that men and women differ in Internet use (*see infra* note 47) and therefore have no reason to believe that I-Jury has altered the proportion of men and women on jury panels.

For simplicity, the term "race" is used to encompass Hispanics as well as African Americans, whites, or Asian Americans, even though the U.S. Census Bureau classifies terms like "Hispanic" or "Latino" as denoting an ethnicity (i.e., Spanish culture or origin), not a race. According to scholars of race and demography, "(t)he growing tendency among journalists, researchers, and the public is to treat Latinos as a *de facto* racial group . . . ." Ann Morning, *Keywords: Race*. 4 CONTEXTS 44 (Am. Soc. Ass'n Fall 2005).

Finally, this article refers to the unit of analysis as "jury panels," which refers to the *aggregation* of numerous individual trial panels (or "venires"). That is, we examined the racial composition of the total set of people who were assigned to trials before and after I-Jury. Because sub-samples from this larger group will naturally vary to some extent, the composition of venires in any particular trial might have differed from the figures reported below.

43. Travis County did not systematically collect data on the racial composition of jury panels until 2002. Effective January of that year, the Texas Legislature authorized the State Supreme Court to formulate a standard juror questionnaire for all courts in the state and required that race be one of the questions included.

44. Although the questionnaire indicated that request for this information was mandated by state law, a subset of people left the space blank or wrote answers that could not be coded. Answers that were not coded included any that were illegible, as well as non-responsive answers such as "American," "no," "Human," "N/A," "none of your business," and "Homo Sapien." For the 2006 samples, missing values were less than 2 percent of the sample; this figure was far higher in the 2002 sample, an issue discussed in the section that analyzes jury panel representativeness across the two time periods (*see infra* note 52). At all time

cent of respondents described themselves as Native American or as mixed-race, and due to this small sample size, we omit them from the analysis reported below.) The vast majority of answers were straightforward and easy to code, even though people in the same category often used many different terms (e.g., "Chicano," "Latino," "Hispanic," and "Mexican-American" were all coded "Hispanic"). People who elected to respond in terms of ethnicity or nationality—e.g., "Chinese," "Vietnamese," "Irish," "Scot," "German," "Italian," "Slavic"—were coded into the racial group most closely associated with that ethnic or national origin.

There are 6,126 "pre-I-Jury" questionnaires from January and February of 2002. The "post-I-Jury" group includes three time periods, two of which are from 2006: 4,690 questionnaires from January and February of 2006; and 7,011 from August through October of that year. In January of 2006 juror pay in Texas increased from up to $12 per day to $40 a day. To control for any demographic shifts that may have been unique to 2006, we also examined 4,235 questionnaires from the months of March and September of 2005.

I-Jury Use and Juror Race

The concern that I-Jury will lead to under-representation of racial minorities depends crucially on the assumption that use of I-Jury varies across racial groups. If under- and over-represented groups use I-Jury at the same rate, then no group enjoys any relative advantage (fewer barriers to service) in relationship to another. To examine whether an association exists between race and I-Jury use, we analyzed the data from the post-I-Jury periods.[45] Table 1 presents the results for 2006.[46]

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periods, the most frequent reason that a questionnaire was coded as "missing" on race was because the person left the space blank.

45. The second author performed the coding for the project. Apart from examining the race of the juror, she tracked whether the person used the in-person or I-Jury system for impaneling. I-Jury use was evident from the questionnaire itself because these questionnaires were printed from the e-mail system, whereas in-person impaneling sessions jurors wrote directly on the questionnaires.

46. *See* Table 1. Self-Reported Race and I-Jury Use.

Table 1.
Self-Reported Race and I-Jury Use

	White	African American	Hispanic	Asian American
% of total sample	75	7	15	3
% among I-Jury users	78	6	14	3
% of group who used I-Jury	87	69	75	86

Note: N = 11,617 impaneled jurors from 2006. For test of race by I-Jury use: $\chi^2 = 308.80$, d.f. = 3, $p < .0001$.

The first two rows contrast the distribution of race in the total sample with the same distribution among I-Jury users. Whites were over-represented among I-Jury users (78 percent) compared to their total representation in the jury pool (75 percent). African Americans and Hispanics were slightly under-represented among I-Jury users (a disparity of one percentage point for both groups). Although these disparities may not seem substantial, the different patterns of use across racial groups are made clearer by tracking what percentage of each group used the I-Jury system. The bottom row of Table 1 lists these proportions and shows that over 85 percent of whites and Asian Americans used I-Jury. By contrast, Hispanics' and African Americans' usage rates were 75 percent or less. A chi-square test of association between race and I-Jury use is highly statistically significant ($p < .0001$).[47]

Although there are clear differences in usage rates across the racial groups, a review of the data from 2005 indicated that the gaps narrowed over time. Usage rates among whites in 2005 were consistent with the 2006 data, with 87 percent using I-Jury.[48] By contrast, 71 percent of Hispanics made use of I-Jury in 2005, compared with 75 percent in 2006. African Americans experienced the largest increase in use of I-Jury: In 2005, just 59 percent used the I-Jury system, compared with 69 percent in 2006.

47. Equal proportions of men and women—86 percent each—opted to use I-Jury in 2006.

48. The rate for Asian Americans in 2005 was 92 percent. The fluctuation in rates between 2005 and 2006 most likely reflects their small sample size in 2005 (n = 119 jurors).

Thus, our data show that in 2006 substantial majorities of *all* groups opted to use the I-Jury system rather than attend the in-person impaneling sessions and, further, the digital divide in use has narrowed. Nevertheless, the data also confirm the more basic supposition that racial minorities were not using the Internet-based system at rates equivalent to whites.

Jury Panel Representation Before and After I-Jury

Having shown that use of I-Jury differs by race, we turn now to the important question of whether there is a concomitant decline in the racial representativeness of panels after introduction of I-Jury. Table 2 herein presents our first analysis of this question, in which we examined all questionnaires that had no missing data for race. According to these results, jury panels have become modestly *more* diverse over time. Whites—the historically over-represented group on jury panels—constituted 80 percent of the members of jury panels in 2002 but just about three-quarters of panel members by 2005 and 2006.[49] The association between time period and racial distribution is statistically significant ($p < .0001$). The discrepancy between the 2002 and the later periods accounts for this association. When we omit the 2002 data and analyze only the three post-I-Jury periods, race and time period are not significantly associated: $\chi 2 = 5.82$, d.f. = 6, $p < .45$. In other words, the three post-I-Jury time

49. Compared to Census data, even the more diverse panels in the 2006 samples over-represent whites by about seven percentage points. According to 2000 Census Bureau figures, adjusted where possible for juror qualifications (e.g., citizenship, an age range of 18 to 70), non-Hispanic whites are 68 percent of Travis County; Hispanics, 21 percent; African Americans, 8 percent; and Asian Americans, 3 percent. Thus, Hispanics are the least well-represented among minority groups on jury panels, a pattern that is consistent with other large counties in Texas. *See, e.g.,* Hays & Cambron, *supra* note 40; Walters & Curriden, *supra* note 41. There are likely multiple reasons for Hispanic under-representation, including greater residential mobility among some segments of the Hispanic community. *See, e.g.,* Walters & Curriden, *supra* note 40 at 19. In other analyses of Travis County, the second author found that about 26 percent of undeliverable summonses went to people with Hispanic surnames. Michelle Brinkman, A STUDY OF COMMUNITY FAIR CROSS SECTION REPRESENTATION OF THE JURY VENIRE IN TRAVIS COUNTY, TEXAS UNDER THE I-JURY PROCESS, FINAL REPORT TO PHASE III COURT EXECUTIVE DEVELOPMENT PROGRAM, 50-51 (April 1, 2007) www.ncsconline.org/D_ICM/programs/cedp/papers/Research_papers_2007/Brinkman_JuryDemographics.pdf. (describing the analysis of undeliverable summonses, as well as how we arrived at the above estimates of the jury-eligible population of Travis County).

periods have equivalent levels of diversity, even after the increase in juror pay in 2006.[50]

Table 2.
Racial Representation on Jury Panels
Across Three Time Periods

		Percent of Total by Race			
	N	White	African American	Hispanic	Asian American
January and February, 2002	5,302	80	6	12	2
March and September, 2005	4,235	76	7	14	3
January and February, 2006	4,556	74	8	16	3
August-October, 2006	6,896	75	7	16	3

Note: Table excludes those "missing" on race. Due to rounding, percentages may not sum to 100. A chi-square test of association between time period and race is significant: $\chi^2 = 65.39$, d.f. = 9, $p < .0001$.

Although these results raise the tantalizing possibility that I-Jury *improved* jury panel representativeness, from these data alone, we cannot conclusively link I-Jury to such a shift. This is primarily because we have only two months of data for the pre-I-Jury time period, and our analyses do not account for everything that changed between 2002 and 2006.[51] In addition, an unanticipated aspect of the data for 2002 makes it less precise than the data for later periods: A large proportion of people failed to report race data in 2002—fully 13 percent of the sample. By contrast, in 2006 just two percent failed to respond to the race question.[52] With respect to missing data, the most plau-

50. *See* Table 2. Racial Representation on Jury Panels Across Three Time Periods.

51. A single period of time may be unusual because natural fluctuations will produce extreme values, but such short-term extreme trends tend to become less extreme over time. This concept is known as "regression to the mean" or "statistical regression." THOMAS D. COOK & DONALD T. CAMPBELL, QUASI EXPERIMENTATION, 52-53 (1979). Also, the shift across time could reflect some other unmeasured factors, such as historical changes that affect groups differently (called an interaction between "history" and "selection"). *Id.* at 73-74.

52. Although we cannot fully account for the high levels of missing data in 2002, it is clear that people were more likely to refuse the race question during in-

sible assumption is that the data in Table 2 offer correct estimates for the racial distribution of panels in January and February of 2002 because, in all likelihood, whites and nonwhites were equally likely to omit race data.[53] However, if just 379 of the 796 people (48 percent) who failed to report race were white, then the proportion of whites at the 2002 time period would be 75 percent, a value similar to the proportions for 2005 and 2006.

In all, we can confidently make the quite conservative assertion that racial representation on jury panels has not been harmed following the introduction of I-Jury. African-American and Hispanic jurors did not use I-Jury as much as white and Asian-American jurors; however, majorities of all groups take advantage of the system, and by itself, the more convenient In-

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person impaneling than via Internet impaneling. In the January-February period of 2006, for example, four percent of questionnaires from the mass impaneling were missing race data, whereas only one percent of the I-Jury sample had missing values. Because a majority of people use I-Jury, the proportion of missing values will systematically decrease when people who might have omitted the question during the in-person session are less likely to do so when using the Internet. The precise reasons for the in-person versus Internet impaneling difference on reporting race are unknown.

53. The data presented in Table 2 are consistent with a pattern of response in which missing cases are randomly distributed across the racial groups. In contrast, there are two theoretical "endpoints" to the range of estimates for white jurors in 2002. On the one hand, if *all* the missing cases came from whites, the percentage of whites on the panels would be 82 percent; African Americans, 6 percent; Hispanics, 11 percent; and Asian Americans, 1 percent. If, by contrast, *no* whites failed to report race, and only minority group members did so—and did so in proportion to their distribution in Travis County—then the resulting values would be as follows: whites, 69 percent; African Americans, 10 percent; Hispanics, 19 percent; and Asian Americans, 3 percent. We, of course, view either of these extreme cases skeptically, especially the latter analysis which, if accurate, would mean that in 2002 Travis County jury panels nearly perfectly represented whites and *over-represented* African Americans—an outcome that would be a notable first in the literature on jury panel representativeness. Hays & Cambron, *supra* note 40; Walters & Curriden, *supra* note 40.

We also have uncovered no study showing that in a situational context like jury service impaneling, minorities will be more likely than whites to leave a race question blank, or vice-versa. Situations in which African Americans are disproportionately likely to omit race data involve those in which an individual might fear discrimination and believe that, but for the disclosure on a form, others might not learn their race (e.g., a loan application; *see* JASON DIETRICH, MISSING RACE DATA IN HMDA AND THE IMPLICATIONS FOR THE MONITORING OF FAIR LENDING COMPLIANCE, Office of the Comptroller of the Currency Economic and Policy Analysis Working Paper, No. WP2001-1, 13, *available at* http://www.occ.treas.gov/econ.htm). This does not characterize the jury selection process. Thus, the most reasonable assumption is that the estimates in Table 2 are largely correct for January-February 2002—that is, the missing values are most likely distributed randomly across the racial groups.

ternet system did not entail increased participation among an already-over-represented racial group (whites). Indeed, if the 2002 data correctly represent jury panel composition before I-Jury began, and if no other factor accounts for the change in panels, then the greater convenience that I-Jury provided to all jurors may have actually increased panel diversity. Jurisdictions who consider adopting an I-Jury system should develop ways to test for this possibility by carefully measuring panel composition at multiple periods both before and after the innovation.

I-Jury, Version 2

Having established the feasibility and popularity of I-Jury, the district clerk and Travis County's Information and Telecommunications Services (ITS) department developed a major upgrade to I-Jury, which the county implemented in October 2007.

In the upgraded version, a computer program assigns jurors randomly to a jury panel taking place during the dates of availability listed during the I-Jury session. This assignment is presented to the juror at the conclusion of I-Jury impaneling, thus eliminating e-mail (or first-class mail if no e-mail address is provided) as the sole method for communicating a juror's service dates and assignment. The juror may elect to have the details of this assignment sent to multiple e-mail addresses and also can go online at a later date to look up those same details. People who do not provide an e-mail address have the assignment mailed to them.

To allow jurors to search for their trial assignment at a later time, the new system stores but three items of juror information on the Internet: a juror's date of birth, the juror number (listed on the person's summons), and the trial assignment. Jurors must enter both their date of birth and juror number to find the assignment; if they do not know one of those two pieces of information, they are instructed to phone the jury clerk's office to get further information. Otherwise, all remaining information provided by the juror during the I-Jury impaneling process is sent to a secure database on a server that is not accessible via the Internet (and is only accessible to jury clerks). Clerks use this database to manage trial assignment; the e-mail folder sys-

tem—to which clerks manually assigned jurors to panels—has been entirely eliminated. Future phases of the upgrade will further streamline administrative functions for staff, provide Internet access to last-minute instructions that jurors presently must call to obtain, and incorporate other improvements recommended by I-Jury users through the online feedback component of the site.

Travis County views its I-Jury system, including these upgrades, as an open source and has determined that it will be available at nominal or no cost to any court in other counties that wish to use it.

Conclusion

For the last decade, Travis County jury officials have responded to the absence of a centralized jury assembly room by developing novel approaches to impaneling, of which I-Jury is but one aspect. The impaneling process in Travis County recognizes and takes account of jurors' busy schedules—most simply, by asking jurors to indicate when service would be convenient for them. For those opting to use I-Jury, jury service is even more convenient because users report directly to jury selection, without leaving work or home to report for jury impaneling.

I-Jury has been an immensely successful addition to the jury impaneling process. At present, at least 90 percent of all eligible jurors—i.e., people who respond to a summons and are qualified and able to serve—use the I-Jury system. Although the proportions of Hispanics and African Americans who use I-Jury are lower than the rates for whites and Asian Americans, strong majorities of all these groups make use of the more convenient impaneling process, and the "digital divide" in I-Jury use shows signs of narrowing. Most importantly, we find no evidence that I-Jury has created wider gaps between whites and minorities in jury panel participation. In all, I-Jury has reduced costs to the court and to jurors, and such benefits have not come at the expense of jury panel representativeness.

We recognize that other jurisdictions might not implement a system like I-Jury as successfully as Travis County did. Schedule accommodation and I-Jury work well in a highly con-

solidated court system such as Travis County's, in which a single office controls panel assignment for all courts and judges are motivated to participate in the system by reporting their trial schedules as quickly and accurately as possible. Larger cities and counties with more complex court systems may find it more difficult to coordinate jury management in this way.

Some of I-Jury's success undoubtedly stems from the high levels of education among the citizens and the fact that Austin has a vibrant technology sector, with large segments of the population comfortable using the Internet. Even for those who do not have Internet access at home, Austin has multiple places where people can find free access to Internet-ready computers, including libraries, some religious organizations, and even in some retail outlets.[54] This technical sophistication extends to the Travis County work force. The start-up costs for I-Jury were negligible, but this was largely attributable to the fact that the county's records management director, webmaster and e-mail administrator developed and organized the technical aspects of the system. Other areas may not have such in-house expertise.[55]

Although technical sophistication can be a barrier to implementing a system like I-Jury, it bears repeating that Travis County adopted commonly-utilized web programming (which translates inputted data into an e-mail message) and e-mail management techniques (involving automated routing and replies) in devising the system. Further, Travis County considers itself a resource for other jurisdictions that may be interested in developing a system like I-Jury.

In all, the experience of Travis County reveals that given the right circumstances, I-Jury provides a popular, low-cost convenience to jurors, and it does not threaten the integrity of the juries on which these people serve.

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54. For example, Schlotzsky's, a prominent delicatessen chain based in Austin, offers free Internet access in several locations.

55. In addition to technical expertise, local culture will likely determine how comfortable court administrators feel about incorporating the Internet into the jury management process. A survey of local courts found that less than 20 percent provided juror orientation information online and about half that percentage allowed people to check their service status through the web. *See*, MIZE ET AL., *supra* note 12, at 20 ("Although web-based technology is ubiquitous in most areas of contemporary life, local courts do not appear to have embraced it for jury management purposes").

FIGURE 1. Sample Initial E-mail That an I-Juror Receives

Re: Juror, Ima (JURY DUTY BETWEEN JUNE 18 - JULY 6)
From: IJURY IJURY (iJury@co.travis.tx.us)
Sent: Mon 6/04/07 10:38 AM
To: ima_juror@hotmail.com

Thank you for using iJury. We have received and approved your registration. Your trial assignment will be sent to you at the email addresses you provided. You do not need to report in person until you receive this assignment.

IMPORTANT: Your service is scheduled to occur between the dates listed in the subject line. If you omitted listing a previously scheduled conflict not related to your work for those dates, you must let us know within the next SEVEN DAYS. Your service dates become final after seven days and CANNOT BE CHANGED by our office. If you have previously been rescheduled prior to these dates, we will not be able to accommodate any additional conflicts.

You can expect your actual court assignment about 1 to 2 weeks before you report to the judge. This assignment cannot be changed without the consent of the judge to which you are assigned.

WHAT YOU NEED TO DO NOW:

1. Do not schedule other conflicts during your service dates.

2. Inform others (such as your spouse, boss, or co-workers) about your jury service dates so they do not schedule anything for you during this time.

3. Watch for your court assignment, which will be emailed to you about one to two weeks prior to your report date.

4. Occasionally husbands and wives receive jury summonses at the same time. If you share an email address with your spouse, and your spouse has a jury summons, call the jury office when you receive your assignment to determine whether the assignment is meant for you or your spouse.

For more information, visit the jury website at:

www.co.travis.tx.us/district_clerk/jury/jury_duty.asp

If you have any questions or concerns, please let us know by replying to this message, and thank you for your service to this community.

Amalia Rodriguez-Mendoza
District Clerk

FIGURE 2. Sample E-mail for an I-Juror Who Has Been Impaneled

From: **417th District Court** (417th.districtcourt@co.travis.tx.us)
Sent: Mon 6/04/07 10:47 AM
To: ima_juror@hotmail.com

417th District Court Jury Assignment
VERY IMPORTANT: YOU MUST CONFIRM THAT YOU HAVE RECEIVED THIS E-MAIL IMMEDIATELY BY REPLYING BY E-MAIL STATING YOUR FULL NAME

ANTICIPATED REPORT DATE/TIME: **Monday, June 18, 2007 at 1:30 p.m.**
You must call 555-5833 at 10:00 a.m. that Monday to confirm your appearance time.
NOTE: Appearance times will not be available before 10:00 a.m.

JUDGE: Hon. Austin Jurist, 417th District Court
BUILDING: Room 500 Courthouse, 1000 Guadalupe St.
TELEPHONE: 555-5833

Dear Juror:

Your summons response has been reviewed, and you are now qualified to serve as a juror and have been assigned as designated above for jury selection in a particular trial. Please note the following:

YOUR LEGAL DUTY: You MUST report as directed. Failure to report may result in a special appearance before a judge and a fine of up to $1000.

IMPORTANT: BEFORE COMING TO THE COURTHOUSE, CALL 555-5833 to confirm your report date/time. You may avoid an unnecessary trip to the Courthouse.

DO NOT SCHEDULE ANY ADDITIONAL ACTIVITIES STARTING ON OR AFTER THE ANTICIPATED REPORT DATE LISTED ABOVE. This is to ensure your availability for the anticipated trial period. The conflict dates you submitted on your reporting form were accommodated, and this trial assignment should not interfere with those activities. We recommend you write this jury assignment on your personal calendar immediately as a reminder.

WE ARE UNABLE TO CHANGE OR RESCHEDULE THIS ASSIGNMENT. You are expected to report as directed above. If a health emergency arises that prevents you from reporting, please call 555-5833 as soon as possible.

UNFORTUNATELY, THERE IS NO RESERVED PARKING FOR JURORS AT THIS COURTHOUSE. We encourage you to use Capital Metro's 'Dillo service for transportation. You can contact Capital Metro at 474-1200 or http://www.capmetro.org for more information on this free service. You are welcome to make other transportation arrangements as best fit your needs. Allow sufficient time for the trip to the courthouse.

EXPECT TO GO THROUGH SECURITY SCREENING when you report. The security system is similar to that found at the airport. We recommend you leave behind pocketknives or any other sharp or pointed objects.

YOU HAVE NOT YET BEEN SELECTED TO BE A JUROR. You are reporting for jury selection. If you are concerned that serving as a juror will cause you economic hardship, you will have the opportunity to bring this issue to the attention of the judge.

BRING A COPY OF THIS ASSIGNMENT when you report to the courtroom. This will help eliminate any confusion over your assignment.

Most importantly, THANK YOU for performing this essential service for our community.

Austin Jurist, Judge, 417th District Court

Amalia Rodriguez-Mendoza, District Clerk

Risky Business: New Hampshire's Experience Inviting Citizens to Examine the State Courts

Laura Kiernan[1]

In April 2005 the New Hampshire Supreme Court embarked on a unique experiment in citizen participation. The 103-member New Hampshire Citizens Commission on the State Courts was created to engage non-lawyer citizen volunteers in an independent examination of Judicial Branch operations. The Commission's charge was to examine the court system from the viewpoint of the public and develop recommendations aimed at making the system more accessible, affordable, and efficient.

A little over a year later, after nine Commission meetings and 11 public "listening sessions," in June 2006, the Commission delivered its report to the New Hampshire Supreme Court with 30 recommendations covering areas it said warranted action by state policy makers: customer service, alternative dispute resolution, access to legal services, family courts, sentencing and public outreach. The Citizens Commission report became the framework for a Judicial Branch Strategic Plan intended to guide long-term decision making, including

1. Laura Kiernan is special assistant to Chief Justice John T. Broderick, Jr. and Communications Director of the State of New Hampshire Judicial Branch. The author worked with the Chief Justice in recruiting members to the New Hampshire Citizens Commission on the State Courts, and she was the court's liaison to the Commission throughout the 14-month project. She attended meetings of both the Commission and the steering committee and assisted with research requests, access to court facilities and providing other administrative assistance to the Commission at its request.

budget requests to the state legislature. This paper presents an insider's look at the value—and challenges—that come with encouraging large-scale citizen engagement in assessing a court system to see whether it is meeting consumer needs. The logistics of managing a group of citizen volunteers (two-thirds of whom were not lawyers and many with little knowledge about the courts) are discussed, as are organizational strategies used by Commission leadership to produce a comprehensive report in a limited period of time. Practical demands facing the citizen volunteers are also addressed. Because it was completely independent of the courts, the Commission was required to raise substantial funds, construct and maintain a website, hire administrative help and publish a final report—without assistance from court personnel or funds.

Introduction

"It forced us to consider a range of issues and ideas we would not otherwise have sat down and methodically discussed and analyzed," the state court administrator, Donald D. Goodnow said. The result, Goodnow said, is "a renewed sense of who we are and where we are going."[2]

The New Hampshire Citizens Commission on the State Courts (the Commission) gathered for the first time on April 18, 2005, on the granite steps outside the entrance to the Supreme Court building in Concord for a photo opportunity. The new "commissioners" included business executives, educators, a freelance writer, civic activists, members of the legislature, the former chief operating officer of Autodesk, one of the world's top software companies, a retired surgeon, the current and former directors of the state chapter of the AFL-CIO, and advocates for the disabled and the elderly. Chief Justice John T. Broderick Jr. stood at a microphone, with the four associate Supreme Court Justices at his side, and declared the occasion "a historic day."[3] No "citizen" driven effort to evaluate the courts from the public's view point, chaired by non-lawyers, had ever before been undertaken in New Hampshire.

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2. Interview with Donald D. Goodnow, Director, Admin. Office of the Courts (Nov. 7, 2007).

3. Nancy Meersman, *100 People Take on the NH Courts*, Manchester Union Leader, Apr. 19, 2005.

Katharine Eneguess, a community technical college president who had agreed to serve as a Commission co-chair, declared that "all the brainpower" that stood behind her "will be used to really think out loud about where we need to go and what we need to do to get there."[4] Eneguess and her co-chair, Will Abbott, then the executive director of the Mount Washington Observatory,[5] had already been hard at work for months devising a plan to carry out the Chief Justice's request that the Citizens Commission "take a comprehensive look at improving the administration of justice in New Hampshire"[6] from the viewpoint of court users. When it was Abbott's turn to speak, he said he was looking forward to working with the commissioners, and the court system. Then he paused: "Until this morning, we didn't appreciate just how daunting a task this really was going to be," he said.[7]

In June 2006, just 14 months after they first met, the commissioners returned to the Supreme Court to present Chief Justice Broderick with 30 recommendations for improvements and change in the courts. The Commission process was guided from the start by the tradition of a New England town meeting, listening with neighborly respect, and then engaging in orderly and efficient decision-making. The Commission divided into eight research groups, each of which proposed recommendations that were voted on in two sessions at the statehouse in Concord. Its final report was incorporated into a new Judicial Branch Strategic Plan—the first long range planning document the New Hampshire courts had produced since 1990.[8] The process was a catalyst for change in the way the New Hampshire court system does business.

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4. *New Hampshire Outlook: Citizens Commission on the Courts* (New Hampshire Public Television broadcast Mar. 22, 2006).

5. The observatory is a private, non-profit scientific and educational institution which maintains a weather station at the summit of Mt. Washington. *See* http://www.mountwashington.org. Abbott is now vice-president for policy and land management at the Society for the Protection of New Hampshire Forests.

6. Chief Justice John T. Broderick, Jr., State of the Judiciary Speech, Feb. 23, 2005.

7. *New Hampshire Outlook*, *supra* note 4.

8. As New Hampshire Approaches the Twenty-First Century (New Hampshire Supreme Court Long-Range Planning Task Force July 19, 1990). Of the 67 Task Force members, 14 were non-lawyers, principally business executives and academics. The chair and vice-chair were lawyers.

This paper presents an insider's look at the value and challenges faced by the Commission, including the logistics of managing a group of citizen volunteers; organizational strategies used by Commission leadership to produce a detailed report in a set period of time; and the practical demands the citizen volunteers faced because the Commission's operations were independent of the courts.

Why Do It?

> My colleagues and I believe that the challenges confronting the judicial system over the next decade and beyond need urgent attention. In order to reform the system to meet tomorrow's challenges, we are anxious to have substantial public input. The court system belongs to the people of New Hampshire and it is only fitting that they help identify the necessary changes so that justice can remain efficient, affordable and accessible.[9]

In his book "Creating the Judicial Branch: The Unfinished Reform," Robert W. Tobin, a longtime consultant at the National Center for State Courts, puts citizen involvement in decisions about court administration among the issues in an "emerging reform agenda" which Tobin predicted "will change the way courts deal with the public and affect the culture of the judiciary and the legal system."[10] Compared to what he calls "feudal courts" that insisted on putting their own house in order, he wrote, the new agenda is decidedly more open door.[11]

"The newer agenda is more external and person oriented, actively involving the courts in social problems, in collaboration with the citizenry, and in opening up the courts. Courts are being forced to consider lay concerns about the legal process and take on issues that go to the heart of the legal culture."[12]

Tobin traces development of the new reform agenda to influential public surveys[13]—dating back to 1978—which showed wide public dissatisfaction with courts and the legal system.

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9. Letter from Chief Justice John T. Broderick, Jr. to Future Members of the Citizens Commission (Mar. 9, 2005).

10. ROBERT W. TOBIN, CREATING THE JUDICIAL BRANCH: THE UNFINISHED REFORM x (1999).

11. *Id.* at xi.

12. *Id.* at x.

13. *Id.* at 196 n.1 (citing YANKELOVICH, SKELLY AND WHITE, INC., THE PUBLIC IMAGE OF COURTS: HIGHLIGHTS OF A NATIONAL SURVEY OF THE GENERAL PUBLIC, JUDGES LAWYERS AND COMMUNITY LEADERS (1978)).

Twenty years later, after surveys reaffirmed that attitude, the American Bar Association and major court organizations began focusing on what remains a very prominent theme in court administration—building public trust and confidence in the judicial system.[14] As Tobin recounts, much of what the surveys reported from citizens was about "the need to be served and to be treated with respect."[15] According to Tobin, they wanted the courts "to reach out to the community and involve citizens to a larger extent in the operations of the courts."[16]

David C. Steelman, a principal court management consultant for the National Center for State Courts, includes the New Hampshire Citizens Commission as part of the judicial reform effort in which court leadership tries to be "more responsive to the needs of society."[17] Steelman, who lives in New Hampshire and has worked with the court system there for decades, says what made the New Hampshire initiative unusual was that while other states have created "futures" commissions,[18] or assembled groups to study specific topics,[19] Broderick's charge

14. For example, in May 1999, the first ever conference on "Public Trust and Confidence in the Justice System" was held in Washington DC, attended by representatives from 46 states and sponsored by the ABA, the League of Women Voters and the Conference of Chief Justices, of which Chief Justice David A. Brock of New Hampshire was then president. Since then the National Center for State Courts has maintained a "Public Trust and Confidence Forum" on its website addressing the top three agenda items identified in 1999: unequal treatment in the justice system, the high cost of access to justice and lack of public understanding. http://www.ncsconline.org/projects_Initiatives/PTC/index.htm.

15. TOBIN, *supra* note 10 at 196.

16. *Id.* at 197.

17. Interview with David Steelman, Consultant, National Center for State Courts (Oct. 2007).

18. For example, in 1987, Virginia was the first state to launch a court "futures" commission, followed up almost ten years later with the Virginia Commission on Courts in the 21st Century (2006). A Commission on the Future of the New York State Courts was specifically charged in 2006 with modernizing the "archaic structure" of the state's trial courts. *See* Press Release, NY State Unified Court System, Chief Judge Appoints Special Commission on the Future of the New York State Courts Panel Charged with Redesigning State's Arcane Trial Court Structure (July 17, 2006).

19. In 1991, the Citizens Commission on the Texas Judicial System, with 74 members, was created by the state Supreme Court and charged, in a court order, with making recommendations on court system organization, budgeting, staffing, facilities and equipment. The court appointed the former dean of Duke University Law School to chair the commission. *See* Citizens Commission on the Texas Judicial System: Report and Recommendations, (Jan. 5, 1993), http://www.courts.state.tx.us/tjc/publications/cc_tjs.pdf.

was wide open.[20] Traditionally, in the world of court committees, the inclination would be for the high court to control the whole process: frame the charge, set the task to be completed and construct the committee from insiders, primarily members of the Bar, judges and court administrators.[21] In New Hampshire, Chief Justice Broderick chose many of the commissioners he named, but he also appointed people he did not know at all but who were recommended by others, which accounts, in part, for the Commission's large size.[22] Both co-chairs were non-lawyers, as was two-thirds of the Commission membership, which resulted in a consumer-driven effort directed at customer service, access, timeliness and cost.

A significant factor that contributed to the manageability of the New Hampshire project was the State's small size—fifth smallest in the country by geography and ninth by population (1.3 million residents). The distance from the border north to south is a four-hour car ride and east to west is two hours, making travel around the state to collect public input easy. As the Chief Administrative Officer of the New Hampshire courts, as well as a full time Supreme Court Justice, Broderick is in effect the CEO of a small company: 56 judges, about 600 employees, handling 225,000 cases per year with an annual budget of about $69 million. There are five components to the New Hampshire court structure: the five-member Supreme Court is the only appellate court; jury trials are held in the Superior Court by 22 judges around the state; the district courts handle small claims, landlord tenant, traffic and minor criminal cases in 35 locations, each of the state's ten counties has a probate court and there is a Family Division. The most significant change in the New Hampshire court system structure in 20 years has been the statewide expansion of the Family Division[23]—where judges

20. Interview with David Steelman, *supra* note 17.

21. *See* TOBIN, *supra* note 10, at 234 (discussion of citizen collaboration in court committees).

22. For example, Chief Justice Broderick and Abbott met for the first time when Broderick invited Abbott to take the job as Commission chair. Abbott recommended Eneguess as co-chair.

23. Justice Moving Forward: A Time for Change, State of New Hampshire Judicial Branch 2003-2004 Report, http://www.courts.state.nh.us/supreme/rpt03.04.pdf.

and marital masters[24] now do the work once spread among the Superior Court, district and probate courts. New Hampshire is one of only three states in which judges are appointed to lifetime terms[25] (in New Hampshire, they must step down at age 70).[26] During the first 14 months of his tenure as Chief Justice, Broderick visited every court facility around the state, stopping at every desk to shake hands and talk, from the northern most towns in the White Mountains down to the congested corridors of the state's southern tier, along the Massachusetts border. The Citizens Commission also took advantage of the state's relatively compact geography, beginning its work with a series of 11 "listening sessions" around the state during which citizens were invited to talk about their experiences with the court system, and offer suggestions for improvement.

Author Robert Tobin says that citizens do not expect to be invited to take a look at insulated institutions, like the courts, especially since they have little contact with them.[27] "I think most people think judges just shape everything for lawyers and it's kind of an inside job," Tobin said. Citizens are summoned into the courts when there is a need for a jury, for example, but otherwise "they resent the legal culture."[28] Still, Tobin said, recruiting citizens to take a look at the courts can serve an important purpose, especially if those citizens perceive the invitation is sincere.

"The purpose is people are glad you asked. That's what it boils down to."[29]

Taking a Risk: Recent History and Public Perception

To ensure that the Citizens Commission's review of court operations would be independent, no one from the Administrative Office of the Courts (AOC), which oversees the Judicial Branch budgeting process, accounting, technology and person-

24. Marital masters, confirmed by the governor and executive council, are assigned to preside over cases involving family law. Their orders must be signed by a judge.
25. N.H. CONST. part II, art. 73.
26. N.H. CONST. part II, art. 78.
27. Interview with Robert Tobin (Jan. 4, 2008).
28. *Id.*
29. *Id.*

nel, was named to the Commission, but the staff there were frequently called upon to answer questions from commissioners and to provide records and documents. The AOC director, Donald Goodnow, who is a former trial court clerk and a lawyer, felt it was not clear at first what the Commission was supposed to accomplish and it seemed "risky" to bring in people who did not know about the court system.[30] In hindsight though, Goodnow said he agreed that the open-door invitation to citizens was what the New Hampshire Judicial Branch needed to do at that point in time—demonstrate to citizens, and lawmakers, that the courts were open to change and innovation, committed to transparency and intent on creating a "customer service environment" by asking those customers what they wanted to see happen.

The formation of the Commission, and its examination of the state courts through the eyes of the public, came not long after a very difficult period of time for the New Hampshire Supreme Court. Just five years earlier, in 2000, the Supreme Court was the target of relentless criticism from lawmakers, editorial writers, and members of the public, involving court practices and procedures and was portrayed as a secret institution averse to public scrutiny and oversight.[31] Investigations by the Attorney General's office and the legislature, and lengthy public hearings, ended with impeachment charges[32] against the Chief Justice at that time, David A. Brock, who had been on the Supreme Court for 25 years, 17 as Chief.[33] After a dramatic public trial,[34] Brock was fully acquitted[35] and immediately returned to

30. Interview with Donald D. Goodnow, Director, Admin. Office of the Courts (Oct. 5, 2007).

31. See Jeffrey Toobin, *The Judge Hunter: An Unlikely Crusader Goes After New Hampshire's Political Establishment*, THE NEW YORKER, June 12, 2000.

32. N.H.H.R. Jour. 991-1071, 1095 (2000). The House brought four articles of impeachment against Brock, which it said amounted to "maladministration" and "malfeasance" in office; N.H. CONST. part II, art. 38. Chief Justice Broderick, who was then an associate justice, and a second justice, now retired, were also investigated by the House, but no charges were brought against them.

33. *See* Cynthia Gray, *Supreme Court/Legislature at Odds in New Hampshire*, JUDICATURE, March-April 2001, at 291-292.

34. New Hampshire Public Television provided gavel to gavel coverage of the House hearings and impeachment trial.

35. Day 15 Transcript of the Proceedings Held Before the New Hampshire Senate Court of Impeachment, Administrative Office Building, 33 North State Street, Concord, New Hampshire, 148-59 (Oct. 10, 2000) . (On file with N.H.State Library, Concord, NH).

work with the court. (He had taken a leave pending the outcome of the impeachment proceedings.) In the aftermath of a long period of public turmoil,[36] there was a clear need to rebuild confidence in the court system, in the eyes of the public, the legislature, and the organized Bar, and to do that by demonstrating that the court was committed to a new level of openness and public inspection. The working dynamic within the five member Supreme Court itself was also reenergized following the appointment of three new justices.[37]

In March 2001, four months after his return to the court, Brock and the four associate justices asked the National Center for State Courts to conduct an "operational review" of the Supreme Court. That project was followed by a series of reviews which would become required reading material for the Citizens Commission. In November 2003, after negotiations with the Supreme Court about the scope of the work and issues of judicial independence, legislative auditors completed a "Performance Audit Report" which had been suspended during the impeachment period. The report examined six years of court administrative operations and made recommendations to improve efficiency. With the audit's release, the Justices established a new "Committee on Justice System Needs and Priorities," chaired by a former Bar president and comprised of judges, lawyers and court administrators, to make recommendations to the judicial branch "for meeting challenges in the future."[38] Brock retired in December 2003 and six months later Broderick was sworn in as Chief Justice, pledging to continue the effort by the courts to build "cooperation and dialogue" with the gover-

36. *See* Pamela M. Walsh, *Lawmakers Throwing the Book at Judges*, CONCORD MONITOR (Jan. 21, 1999) (Supreme Court decisions in a long-standing battle over school funding and accusations that a local judge had stolen more than $1 million in client funds (he fled the state and committed suicide) had prompted a raft of court "reform" bills in the legislature during the year before the impeachment.).

37. Justice Joseph P. Nadeau, who had been chief justice of the trial court, was appointed in 2000, to a seat vacated by a retirement. Justice Linda S. Dalianis, another veteran trial court judge, came to the Supreme Court six weeks later following the resignation of the justice whose conduct led to the impeachment investigation. The third new appointee, also following a retirement, was Justice James E. Duggan, a former law professor who had represented hundreds of criminal defendants before the Supreme Court as the state's chief appellate defender.

38. Press Release, Judicial Branch, Chief Justice Commends State Auditors; New Committee to examine needs and priorities (Nov. 19, 2003), http://www.courts.state.nh.us/press/auditors.htm.

nor and members of the legislature, noting that they all "answer to the same constituency."[39] He set the stage for creating the Citizens Commission, by stating:

> In an ever-changing world, increasingly diverse and complex, the doors to our courthouses must be truly open and accessible to all who seek and deserve justice. My focus in the years ahead will be on the needs of those who use the courts so that we can timely, fairly and intelligently resolve the disputes that have impacted their lives. [40]

Three months later, in September 2004, the Committee on Justice System Needs and Priorities[41] delivered its report to the Supreme Court, endorsing a wide range of customer- service oriented improvements: more efficient case processing and scheduling, improved training of judges and staff, and more low cost legal services.[42] The Committee said its recommendations and report "set the stage for examination by a broad cross-section of public officials and citizens."[43] At a press conference in his Supreme Court chambers with the Committee's chairman, former Bar president Bruce W. Felmly, seated beside him, Broderick set in motion what would eventually become the Citizens Commission on the State Courts:

> Now that this detailed analysis has been completed by those who work so closely within the justice system on a daily basis, I will ask a broad constituency of the public to take this work and suggest how we can further improve access to justice for all citizens as they see it. . . . This is their court system.[44]

As Broderick saw it, if a large group of non-lawyers was invited to identify court system needs and propose changes, their independent review would carry weight with lawmakers, who sign off on the court budget, with the public at-large and inside the court system itself, where resistance to change is routine. The process would also contribute to much needed strategic planning.

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39. Chief Justice Broderick, Remarks After Taking the Oath of Office (June 4, 2004), *available at* http://www.courts.state.nh.us/supreme/chiefoath.htm.

40. *Id.*

41. A Vision of Justice, The Future of the New Hampshire Courts, Report of the New Hampshire Supreme Court Committee on Justice System Needs and Priorities (Sep. 2004), *available at* http://www.courts.state.nh.us/press/felmlyreportweb.pdf.

42. *Id.* at 6.

43. *Id.* at 3.

44. Press Release, NH Judicial Branch, Report Recommends Wide-ranging Enhancement of Court System Services (Sep. 22, 2004).

"We had nothing to hide and very real needs," Broderick said later, "[I]f citizens attested to that, it would be nothing but helpful."[45] The formation of the Citizens Commission also supported the message that Broderick, and the full Supreme Court, had repeatedly emphasized to lawmakers, the public, and the media that the New Hampshire court system is open and transparent.

The Commission's Charge

The Chief Justice, in his letter inviting the commissioners to their first meeting, cited four major court reports which he said "will help set the parameters for your work. . . ."[46] All had been produced by court insiders: judges, state bar leaders, legal assistance lawyers, public defenders and court staff. One was the report from the Committee on Justice System Needs and Priorities.[47] The others examined the most prominent challenges facing the New Hampshire courts: the growing number of self represented litigants and the statewide consolidation of all family-related cases, from adoption to divorce, into a single "Family Division" designed to improve efficiency and reduce the adversarial atmosphere that too often surrounds these very difficult cases.[48]

The invitation letter from Broderick also introduced the Commission co-chairs. Before focusing his career on environmental issues, Will Abbott, had been a field organizer for top New Hampshire Republicans, and he had been the state political director for President George H.W. Bush during the 1988 primary campaign. Eneguess, then serving as president of two

45. Interview with Chief Justice Broderick (Oct. 2007).

46. Letter from Chief Justice John T. Broderick, Jr. to Members of the Citizens Commission (Mar. 28, 2005).

47. A Vision of Justice: The Future of the New Hampshire Courts, Report of the New Hampshire Supreme Court Committee on Justice Needs and Priorities, *supra* note 41.

48. Challenge to Justice: A Report on Self-Represented Litigants in the New Hampshire Courts and Family Division Implementation Committee Report and Recommendations are available at http://www.courts.state.nh.us/cio/index.htm#reports. The fourth report, Findings and Recommendations of the Family Law Task Force, is available at http://www.nhbar.org/pdfs/FamLawTFRep 04CL.pdf.

community technical colleges 100 miles apart,[49] had been a longtime public policy analyst for the state's Business and Industry Association. She and Abbott had known each other for 15 years. Chief Justice Broderick established a broad mandate for the Commission:

> You have a stake in the quality of our justice system, whether or not you have ever spent a day in court or even read a line in the State Constitution. The health and welfare of our communities and our state depends on the ability of the justice system to fairly and efficiently resolve disputes that are inevitable in daily life—for men, women, children and families, business and government. The goal of the Citizens Commission is to determine if we are living up to that responsibility.[50]

Even before agreeing to participate in the Citizens Commission, co-chairs Abbott and Eneguess, had discussed the Commission with legislative leaders and colleagues in public policy circles. Both knew that the Citizens Commission needed support from lawmakers and the players in the state capitol who worked with them. "I just point blank asked a few Senators 'Do you think this is a shill for the courts?'" Eneguess said. The response was that the integrity of the Commission depended on keeping the public's view, not the courts', in the forefront. "It was going to have to be about keeping the court at arms length and making it truly a public discussion," Eneguess said.[51] Abbott was concerned that the public would see the Commission as an attempt to "whitewash" the whole impeachment period. Broderick, whom Abbott described as "a particularly good salesman," convinced him otherwise. In the end, Eneguess remembered, "Will (Abbott) and I were both clear that this could work."[52]

Creating and Executing a Game Plan

"I was really happy to be part of this."[53]

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49. Each campus now has its own president; Eneguess remained as president of the technical college in Berlin, which is now known as White Mountains Community College.

50. Letter from Chief Justice Broderick, *supra* note 46.

51. Interview with Katharine Eneguess, Co-Chair, New Hampshire Citizens Commission on the State Courts (2007).

52. *Id.*

53. Interview with Donna Davey, Commissioner, Citizens Commission (Oct. 18, 2007).

From the start, Eneguess and Abbott believed it was important for them to define their own roles as the Commission leaders. "We consciously made a decision that we would manage the process and would let others advocate,"[54] Abbott said later. Their job would be to run meetings—which was no small task considering the size and diversity of the group—and keep the work on track and on time: "When people saw we were sticking with that it helped establish the trust that made the process work."[55]

An operational structure had to be put in place to tackle the task of effectively managing 103 commissioners during what was expected to be at least a year of work.[56] The Commission itself had to start collecting public input immediately, since that was its core charge, and then decide what to do with it. Abbott called this process "managing the dynamic for decision-making."[57] Most importantly the members themselves had to decide how the Commission would operate and what its objectives would be. "We had to have a process that everybody bought into and had an opportunity to create,"[58] Abbott said.

All the commissioners left the initial April 2005 meeting at the Supreme Court with an e-mail link to the reports produced by other committees.[59] Abbott and Eneguess devised a "homework assignment" to launch the information gathering process and, perhaps most importantly, to keep the commissioners invested in the process until the next scheduled meeting in two months.

The "homework" included an informal survey, which asked "What would you like to see this Commission accomplish?"[60] The commissioners were also asked, based on their reading of the four major court reports, to list five items for the Commission to focus on, in order of priority. Finally, each commissioner was given a six-question "interview guide" which

54. Interview with Will Abbott, Co-Chair, New Hampshire Citizens Commission on the State Courts (Oct. 2007).

55. The co-chairs' insistence upon facilitating rather than directing avoided the traditional "top-down" approach experienced in government committees. *See* TOBIN, *supra* note 10.

56. Ultimately, 99 citizens made up the Commission.

57. Interview with Will Abbott, *supra* note 54.

58. *Id.*

59. *See supra* notes 47 & 48.

60. Commissioner survey (Apr. 18, 2005).

asked about his or her experience with the courts and knowledge of the courts and their operations. The commissioners were encouraged to interview family and friends for their input as well.

To provide overall structure for the Commission, Abbott and Eneguess formed a nine-member steering committee "to provide governance for the Commission as it does its work."[61] Except for one judge member, there were no lawyers or court staff on the steering committee.[62] An ambitious game plan was set: ten months of information gathering (including the 11 listening sessions); formation of research committees based on the information collected; three months of deliberation; submission of recommendations by each subcommittee; voting and then two months to compile the final report, for delivery on June 1, 2006.[63]

The information gathering process continued throughout the summer. The survey led to a seven-page single-spaced "feedback list" of what the commissioners wanted to accomplish. Survey responses ranged from developing a plan for a paralegal or lawyer for every person in court, creating user-friendly court rules and improved relations with the legislature to better technology, more mediation services and help for self-represented litigants and more public education about the court system. Small group discussions during one Commission meeting produced another long list of topics for discussion, including customer service, public access to the courts for disabled citizens, the need for interpreters, services for persons with mental health and substance abuse issues, judicial accountability, and greater flexibility in sentencing.

Since no administrative help was available from the court system, a project manager was hired to supervise and monitor communications (primarily e-mail and conference calls), sched-

61. The steering committee also prepared agendas for full Commission meetings, provided organizational guidance, and was responsible for assuring "full transparency of the Commission's work." The Commission's research committees were each chaired by a steering committee member who regularly reported back to the full steering committee. *See* New Hampshire Citizens Commission on the State Courts: Commission Meeting Minutes (July 25, 2005), *available at* http://www.nhcitcourts.org./meetings/pdf/2005-07-25_c_mtg-minutes.txt.

62. The author attended all steering committee meetings.

63. "Nobody is laughing out loud yet. Good!" Eneguess said after she announced the proposed calendar. *See* Commission Meeting Minutes, *supra* note 61.

ule Commission meetings, produce documents, keep records and make telephone calls. The co-chairs also were determined, and the commissioners agreed, that a public record would be available of all meetings and listening sessions—complete transparency again seen as key to the Commission's credibility with citizens and lawmakers. The Commission launched its own website, *www.nhcitcourts.org*, fully independent of the court system, which included schedules, mission statements, committee charges, transcripts of meetings and "listening sessions," and an "electronic library" of reports and other resources. The website content was assembled by the Commission's project manager, Julie Morris, who maintained it from her home office, on a laptop that had been purchased for the Commission. Morris also attended each of the 11 listening sessions and transcribed them from tape recordings for posting on the website.

In order to build a sense of cohesiveness and collective identity within the very diverse group of commissioners during their early meetings, the co-chairs invited Kathy L. Mays, the longtime director of judicial planning for the Virginia State Court Administrator and a key player in that state's 1987 "Futures" commission,[64] to brainstorm with them about techniques for effectively collecting and using citizen feedback. David Steelman also was there to talk about resources available to the Commission from the National Center for State Courts. Eneguess recalled it was Steelman who was able to reinforce with the commissioners that the job could be done, that it was a unique, and critical assignment, and that the process that she and Abbott were developing—drawn from the New England town meeting tradition of listening to your neighbors and making decisions—could work.

The composition of the Commission, and whether it was truly a "Citizens" Commission, was an ongoing topic of discussion. Commissioner Sally J. Davis, former president of the State League of Women Voters, said some commissioners thought there were too many judges and "people from the courts" in the

64. Interview with David Steelman, *supra* note 17.

group.[65] Seven judges (two retired) and the three top judicial administrators[66] were members, along with one marital master, more than 18 lawyers, including the current Attorney General and her predecessor, the head of the Public Defender Service, several well known trial court practitioners, Bar leaders and advocates of legal services for the poor. Since the commission membership lists on the website did not include titles or occupations, there was no way for fellow commissioners to see the occupational distribution of the membership.[67] There were just too many commissioners to gather or write even short biographies for the Commission website, which would have shown that there were many commissioners with no court connections at all.[68] Chief Justice Broderick and his staff, in assembling the committee early on, used a state map to make sure Commission membership was fairly distributed by population, and that non-lawyers were included from all geographic areas.

Commissioner Byron O. Champlin, a member of the steering committee, said that while the expertise of the lawyers and court personnel was important, in retrospect, the Commission "seemed weighted down with legal professionals. I think we felt we were empowered to talk, but you could certainly feel you are not as knowledgeable as these folks."[69] Nevertheless, no "non-lawyer" was shy about speaking up, he said.[70]

While others on the Commission may have understood more about politics and the court process, commissioner Donna Davey, a retiree, said she believed she had something to offer.[71]

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65. Interview with Sally J. Davis, Commissioner, Citizens Commission (Oct. 2007).

66. Chief Justice of the Superior Court Robert J. Lynn, Judge Edwin W. Kelly and Judge John R. Maher (now retired) were members of the Judicial Branch Administrative Council which meets monthly and advises the Supreme Court on matters involving court system operations.

67. Both co-chairs had reviewed Chief Justice Broderick's appointments to the Commission, and then added 15 members themselves whom they knew to have had experience with statewide issues, public policy and citizen engagement.

68. Interview with Sally J. Davis, *supra* note 65.

69. Interview with Byron O. Champlin, Member, Citizens Commission Steering Committee (Nov. 1, 2007). Champlin, who spent seven years working in communications for the state legislature and is active in many civic organizations, is assistant vice president and program officer of the New Hampshire office of a national financial services firm.

70. *Id.*

71. Interview with Donna Davey, Commissioner, Citizens Commission (Oct. 17, 2007).

She had had her own emotional experience with the court system, without a lawyer, and now she could speak to the lawyers and judges on the Commission from the perspective of a "regular citizen" trying to deal with the difficulties of going to court alone. She also served as the note-taker for the "Third Branch" research committee and found herself in a meeting with the Governor, and several prominent lawmakers. On another occasion, she had a seat at the table during a meeting with the Supreme Court justices in their conference room.[72]

Reaching Out to the Public

In the fall of 2005, either Abbott or Eneguess (sometimes both) attended the "listening sessions" scheduled around the state. They had urged commissioners to join them. (Commissioner attendance at these hearings was limited, although one commissioner, a former television executive, attended every session.) Afternoon and evening sessions were scheduled to make it as convenient as possible for citizens to attend, but building an audience was a difficult task. These listening sessions were not public hearings, as Eneguess pointed out, where pros and cons are debated. These were *listening* sessions. Citizens talked about their experiences with the court system without interruption or challenge, although they were politely advised that this was not the place to attempt to retry their case. Every word was recorded, transcribed and posted on the Commission's website by the project director, Julie Morris. "Will and I believe very strongly in the town hall concept of listening to the people,"[73] Eneguess said. Regardless of the sparse numbers in attendance at some sessions, the Commission co-chairs agreed that conducting these sessions conveyed to the public that the judiciary—long the least accessible and most reclusive branch of government—had launched an aggressive public outreach effort through the Commission.

72. *See* New Hampshire Citizens Commission on the State Courts: Minutes of the Subcommittee on the Third Branch (Dec. 14, 2005), *available at* http://www.nhcitcourts.org.

73. Interview with Katharine Enguess, Co-Chair, Citizens Commission (Oct. 2007).

The Commission's records show that 71 members of the public attended the 11 listening sessions. The commissioners heard from a prominent public defender, a well-known public policy analyst and a newspaper reporter concerned about access to court proceedings. Overwhelmingly, however, the testimony focused on the court system's role in overseeing the aftermath of divorce.[74] During a listening session in Tamworth, New Hampshire, a small village near Mount Chocorua, an emergency room doctor expressed his frustration with the way the marital master in his divorce case computed child support. The doctor testified, as his nine-year old son did his homework in a nearby room: "[T]he court system, I really felt like they didn't care, like it was rubber stamps(sic). . . . [W]hat is it here, is it political pressure . . . is it just the norm we say, well you know what, the mother gets preferential treatment."[75] Later, at a listening session in the town of Salem, a divorced mother of two who said she had been following the Commission's online forum, praised the commissioners "for their utmost patience in listening to what I perceive as constant ramblings and negativity towards the courts from disgruntled ex-husbands."[76] Her own case, which began in 1982, has been "long and painful," she said, but "through no fault of the court system."[77]

Overall, the Commission received 194 "contacts" from the public, including surveys and e-mails, and 93 of those contacts involved the Family Court.[78] By far the top concerns raised were the expense of going to court and "court bias" against fathers in divorce cases, followed far behind on the list by stories of denial of due process, court delays, false reporting of domestic vio-

74. The fathers' rights groups have a well-established communications network, and that, combined with the emotional impact of divorce issues and the high number of family cases, may account for the frequency of testimony about child support and custody issues at the listening sessions.

75. New Hampshire Citizens Commission on the State Courts: Tamworth Listening Session, at 7-8 (Nov. 7, 2005), http://www.nhcitcourts.org/public_participation/pdf/Listening_Session_Transcript_Tamworth.pdf.

76. New Hampshire Citizens Commission on the State Courts: Salem Listening Session, at 3 (Nov. 14, 2005), http://www.nhcitcourts.org./public_participation/pdf/Listening_Session_Transcript_Salem.pdf.

77. *Id.*

78. New Hampshire Citizens Commission on the State Courts: Report and Recommendations, app. at 44 (June 1, 2006), http://www.courts.state.nh.us/press/cc_report.pdf [hereinafter *Citizens Commission Report*].

lence and "ineffectiveness" of the committee responsible for complaints against judges.[79]

Broderick had appointed one of the most vocal "fathers' rights" advocates to the Citizens Commission, Paul M. Clements, the founder of the state chapter of "Dads Against Divorce Discrimination," who for years has pressed his case in newspapers and on television, contending that the court system is biased in favor of wives and mothers. Clements' own experience "shook him to the core" as Abbott described it, and while his very public crusade for fathers is fiercely determined, it is often laden with tension which made meetings uncomfortable. On the Commission's Family Court research committee, of which Clements was a member, the discussions were "polite and inclusive" and Clements "always got to speak from his perspective," said Michael Ostrowski, the president of a statewide mental health and child welfare agency and a co-chair of the research committee.[80]

Kathy Mays from the Virginia Futures Commission, and others had emphasized early that if the Citizens Commission wanted credibility it had to include well-organized court critics, including those with an established agenda, like the "fathers' rights" group. Abbott and Eneguess wanted to make it clear that the Commission was willing to listen, but also that no group would be permitted to dominate the discussion. At Clements' request, Abbott and Eneguess eventually agreed to meet privately with a group of fathers on a Sunday afternoon in October, in a church hall in Concord, the state capital. According to Abbott, at least 50 people, mostly men, showed up for the meeting and almost all of them wanted to be heard. They were allotted five minutes each, and the meeting lasted for almost three hours.[81] After listening to a wide range of testimony, from passionate to matter-of-fact, Abbott said it became clear to him that legitimate concerns had been raised by fathers who felt "the courts had wronged them." Abbott also felt that the turn-

79. *Id.*

80. Interview with Michael Ostrowski, Co-Chair, Family Court Research Committee, Citizens Commission (2007).

81. Since this was an informal meeting, and not part of the Commission's official business, the co-chairs asked to meet with the group privately to help them better understand the issues involved with the fathers' rights groups. There is no transcript of the meeting.

out alone that Sunday afternoon meant that the Citizens Commission had established credibility as a group that was willing to listen to all sides, including the harshest, and most fervent, critics of the judicial system.

The entire process required a "thick skin" as Abbott put it. Clements' aggressive approach on behalf of his issue did not waiver. A year after the Commission delivered its report to the court, he wrote a harshly critical letter to Chief Justice Broderick published on the op-ed page of a local newspaper and labeled the Commission "a group hug by friends of the court" and a "cruel joke."[82]

The Importance of Financial Support

The Commission's final expenses totaled $80,000.[83] Abbott and Eneguess believed that the credibility of the Commission, in the eyes of the public and particularly the state legislature, hinged on demonstrating that it was fully independent from the court system, so no court administrative staff, funds, or equipment were used for Commission operations. Both co-chairs are experienced fundraisers, but this particular assignment posed a series of unique constraints in the search for money. The Commission could not solicit gifts from private, individual or corporate donors because litigation involving their work might someday come before the state courts.

Funding for the Commission came in large part from two major, non-profit institutions each of which has a long and respected history of providing grant support for public-interest projects: The New Hampshire Charitable Foundation and the New Hampshire Bar Foundation.

The Charitable, as it is known in the state, is a non-profit public charity with more than $400 million in assets, and a board of trustees that includes former public officials, community leaders, educators, benefactors and others. The foundation provided a $30,000 grant to give the Commission the basic sup-

82. *See* Paul M. Clements, Op. Ed., *Citizens Commission on Courts Yet Another Sham,* CONCORD MONITOR, August 30, 2007.

83. *Citizens Commission Report*, *supra* note 78, at 46.

port it needed to get off the ground,[84] but, before it did so, the board met with Broderick and Eneguess[85] for assurance that this would be a "citizen-based" project and that the bar and the courts would let the process run its course without interference. The Charitable's president, Lewis M. Feldstein, said that the Commission needed to overcome "the suspicion and dubiousness and rank skepticism that these government things don't really go anywhere."[86] Feldstein joined the Commission and said it "seemed like a great opportunity to broaden the sense of a public stake in the courts" as part of the broader structure of democracy.[87]

The Public Opinion Survey

> "Unless you have a problem and end up in front of the court, the court is like Pluto. It's out there; you know it's out there. But you really don't know a hell of a lot about it."[88]

The New Hampshire Bar Foundation, a non-profit charitable foundation which supports justice and law-related programs,[89] gave a $30,000 grant to conduct a "consumer"[90] survey that would provide the Commission with "a solid core of information from which they can direct their work over the next 12-18 months."[91] The grant, which Chief Justice Broderick initiated, also covered administrative help needed to set up the statewide "listening sessions." In a letter to the Bar Foundation the Chief Justice wrote:

> Will [Abbott] and Katharine [Eneguess] are convinced, as I am, that before the Commission can even begin to set out on a course, it has to have a clear picture of how our citizens see the role of the

84. The commission also received another $17,500 from two "donor-designated" funds administered by the Charitable. *See Citizens Commission Report*, *supra* note 78, at 46.

85. Then Senior Associate Justice Joseph P. Nadeau, and the author, Laura Kiernan also attended.

86. Interview with Lewis M. Feldstein, Commissioner, Citizens Commission (2007).

87. *Id.*

88. Interview with Byron Champlin, *supra* note 69.

89. The Bar Foundation is separate from the state Bar Association and has non-lawyers on its board of governors. *See* http://www.nhbarfoundation.org/.

90. Letter from Chief Justice John T. Broderick, Jr. to Paul Chant, Chair, New Hampshire Bar Foundation (Mar. 30, 2005).

91. *Id.*

> courts and what experiences they may have had that will help the Commission devise changes and improvements.[92]

The survey was conducted by the University of New Hampshire (UNH) in August 2005. The questions asked were similar to those used in a national survey conducted in 2000 by the National Center for State Courts.[93] Respondents were asked if they or anyone in their household had personal experience with the courts. They were also asked whether they agreed or disagreed with a series of statements about the courts relating to fairness, timeliness, and cost. It turned out that many New Hampshire residents were unable to rate the courts' performance because few New Hampshire residents have any direct experience with the courts.[94] In fact, New Hampshire's residents' direct experience with the courts was lower than the national rate. In the New Hampshire sample, "fully 61 percent of the respondents said they had never had any personal involvement with the courts, compared to 37 percent of the national sample."[95] Only 13 percent of New Hampshire residents had a personal experience with the courts in the year prior to the survey, compared to 38 percent of United States residents in the NCSC national survey.[96]

UNH Survey Center director Andrew Smith told the Commission that New Hampshire residents' lack of knowledge about the courts may be a matter of demographics. New Hampshire has one of the highest per capita incomes in the country; one of the highest number of residents with college degrees; and a low poverty rate, all of which "are correlated with not being in the courts."[97]

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92. *Id.*

93. David B. Rottman Ph.D, Randall Hansen, Nicole Mott, Ph.D. & Lynn Grimes, NATIONAL CENTER FOR STATE COURTS, PERCEPTIONS OF THE COURTS IN YOUR COMMUNITY: THE INFLUENCE OF EXPERIENCE, RACE AND ETHNICITY (2003), http://www.ncsconline.org/WC/Publications/Res_AmtPTC_PerceptionsPub.pdf.

94. Telephone interviews were conducted between July 28, 2005 and August 12, 2005 with 765 randomly selected New Hampshire adults. The margin of error was +/- 3.5 percent.

95. ANDREW E. SMITH, Ph.D., NEW HAMPSHIRE STATE COURT SURVEY, at 4 (Nov. 2005), http://www.nhcitcourts.org/resources/NHSCS_report_FINAL.pdf.

96. *Id.*

97. New Hampshire Citizens Commission on the State Courts: Commission Meeting Minutes (Aug. 22, 2005) at 8, http://www.nhcitcourts.org./meetings/pdf/2005-08-22_sc_mtg-minutes.pdf.

Initially, Eneguess recalls, she was skeptical about the value of the survey, although its finding that New Hampshire residents knew little about the court resulted in a Commission recommendation for more civic education about the judicial branch.[98] She concluded, however, that its results created a helpful baseline for identifying problems.

Forming the Research Groups

Both the steering committee and the full Commission tackled the job of trying to organize all the topics that had been raised during the public input stage into core categories that would eventually guide the research groups. This was "the hard part."[99]

"Think about important issues, and then, identify manageable tasks," Abbott told the commissioners,[100] reminding them that a lot of work had already been done by others. "What are the issues that we, as a group of people, can bring to the table?" he asked.[101]

By November 2005, the steering committee had enough public feedback, including the UNH survey, commissioners' own interviews, letters, e-mails, and transcripts from the statewide "listening sessions" to finally designate eight research groups and give each a specific charge:

- ***Alternative Dispute Resolution*** What are the options available now in the court system, how are they made available, and do they/could they work effectively in New Hampshire?
- ***Communication and Customer Service*** How can state courts more effectively meet the information needs and service expectations of New Hampshire citizens who engage with the court system?

98. On the impact of the impeachment, which had been the concern when the survey was first discussed in 2001, the survey found 45% of the adults polled were at least somewhat familiar with the proceedings, but most of them (54%) said it had no impact on their respect for the Supreme Court. . Another 14% said it increased their respect for the court. The survey also found that the education funding decisions "had no serious impact on people's respect for the Supreme Court." *See Citizens Commission Report*, *supra* note 78, at 40-41.

99. Commission Meeting Minutes, *supra* note 97, at 25.

100. *Id.*

101. *Id.*

- ***Courts as a Business*** The state courts spend $60 million annually; what changes should be made to assure that we are getting the best bang for the buck?
- ***Family Courts*** Are we on the right track?
- ***Problem Solving Courts*** Are there programs and/or services the state's courts could offer that would result in a reduction in the demand for state court legal services?
- ***Public Access to New Hampshire Courts*** What barriers exist to public access to the courts and how do we clear them?
- ***Sentencing*** Is sentencing in New Hampshire courts fair?
- ***The Third Branch*** How can the New Hampshire judiciary work more effectively with the legislative and executive branches?

A steering committee member chaired each research group, and commissioners were given their assignments based on their responses to an e-mail survey asking them to state their top three preferences. The steering committee assigned 94 commissioners to the eight groups, each of which had nine to 14 members. Anyone not happy with his or her assignment could ask to be reassigned.[102] A note-taker was named for each research committee, and a summary of each meeting was posted on the Commission website.

"We wanted to focus on big issues and we didn't want to get dragged down by details," Abbott said about the effort to narrow down the long lists of potential topics into specific categories. The chair also did not want to get bogged down in research that the commissioners did not have the time or expertise to carry out. "What we wanted to avoid was a 300 page report with all this detail that nobody was going to read."[103]

The research committees were asked to report back by March with recommendations—no longer than two paragraphs—which would then be discussed and voted on by

102. Interview with Julie Morris, Project Manager, Citizens Commission (Jan. 2008).

103. Interview with Will Abbott, *supra* note 54.

the full Commission.[104] The commissioners were advised they "should be thinking outside the box."[105]

Making Decisions in "The People's House"

While the research committee work was underway, plans were made to hold the Commission's voting sessions in Representatives Hall at the statehouse, a cavernous chamber where the 400 members of the New Hampshire House, all volunteers, meet during the legislative session. Abbott thought the location—the people's house—would publicly underscore the mission of "Citizens" Commission on the State Courts and heighten the commissioners' own sense of the importance of their work.

The Commission held two three-hour sessions in the statehouse in March 2006, conducted in traditional New England town meeting style—civilized, orderly, efficient and completely public. The commissioners (a quorum of more than 50 members attended each session) received all 34 recommendations from the research committees in advance and were expected to be prepared to discuss and vote on them. Eneguess acted as the "town moderator" and enforced Robert's Rules of Order while Abbott acted as the "town manager" guiding the commissioners through each discussion to the vote.

The commissioners endorsed the creation of an office to improve mediation and arbitration in the courts (a Supreme Court committee was already deeply into a proposal to do just that); they wanted to create a "customer service" oriented environment in the courts, including a "greeter" at each courthouse; and they supported increased funding of legal services for the poor. They quickly killed a proposal to create "legal insurance" (too expensive) and another to have lawyers change their billing practices (an issue better left to the Bar).

There was extended debate about a recommendation that would have committed New Hampshire to the concept of a "civil Gideon" in which a state-paid lawyer would be provided for citizens who could not afford counsel in cases in which "es-

104. New Hampshire Citizens Commission on the State Courts: Commission Meeting Minutes, at 2 (Nov. 14, 2005), http://www.nhcitcourts.org./meetings/pdf/2005-11-14_fc_mtg-minutes.pdf.

105. *Id.*

sential rights" are at stake, such as housing, or child custody. The concept, a topic of discussion among legal services advocates nationwide,[106] stems from the right to counsel in criminal cases guarantee by the U.S. Supreme Court in *Gideon v. Wainwright*.[107] Some commissioners were concerned, however, that the concept carried an enormous price tag and raised the potential of abuse. In the end, the Commission adopted compromise language suggesting that the state "study" the implementation of a "civil Gideon."

A strong case was made for creating an "Office of Citizen Advocate," with a citizen advisory board, that would collect citizen input on the courts in the future, after the Commission ceased operations. This office would, in effect, be a permanent successor to the Citizens Commission. Commission member Ralph Littlefield, the executive director of a local community action program and co-chair of the Commission's Public Access Research Committee, said citizens needed a formal way to raise issues as they do in the Legislative and Executive branches:

> I can go to my State Senator in my district. I can come here to the legislative building. I can participate in offering legislation. I can go to hearings. I can lobby. And the Executive Branch, we're still a small enough state where we can go up and make an appointment with the Governor or his staff. Or we can talk to the folks in government that manage most of the programs that are out there. But in the New Hampshire court system, where do we go? Who do we talk to as citizens?[108]

The Attorney General said there were already procedures in place, such as the Consumer Protection Office, to address citizen concerns, and the Chief Justice of the Superior Court, Robert J. Lynn, said he was concerned that an "advocate's" office would make it seem like the court system was taking sides.[109] The full Commission voted to table the recommendation without further consideration.[110] The commissioners did approve a

106. *See* LAURA K. ABEL, BRENNAN JUSTICE CENTER, A RIGHT TO COUNSEL IN CIVIL CASES: LESSONS FROM GIDEON V. WAINWRIGHT (2006), http://brennan.3cdn.net/99d59f86456a2170c1_dwm6bhbc2.pdf.

107. 372 U.S. 335 (1963).

108. New Hampshire Citizens Commission on the State Courts: Commission Meeting Minutes, at 25 (Mar. 20, 2006), http://www.nhcitcourts.org./meetings/pdf/2006-03-20_fc_mtg-minutes.pdf.

109. *Id.* at 24, 27.

110. Minority report included in the final report of the Citizens Commission, at 22.

recommendation, however, that the court appoint a system-wide "ombudsman," citing models in the Maryland and New Jersey court systems. "Not only will this service aid the public in voicing concerns and complaints, but the existence of an ombudsman's office will also provide the judiciary with an important channel through which to obtain information often unavailable to it."[111]

Ultimately, the Judicial Branch Administrative Council,[112] working with court administrators, agreed not to seek funding for an ombudsman saying the position would "introduce [an] unnecessary and costly administrative layer between the public and court officials."[113] Instead, they said the Judicial Branch would increase access to the courts by promoting better communication with court officials, including establishment of "service centers" to provide more personal service to court customers.[114]

The Response From the Judicial Branch

The Commission's final report was officially delivered to the Supreme Court on June 28, 2006 in a brief gathering in the justices' courtroom, the same place where the Commission had conducted its first meeting 14 months earlier. The Citizens Commission Report contained 30 recommendations divided into six subject areas: Customer Service, Public Access, Alternative Dispute Resolution, Family Courts, Sentencing and Judicial Branch Outreach.

The commissioners understood that the Judicial Branch could not make all things happen in isolation and that some action would be needed by the state legislature, whether it was funding, amending laws or passing new ones to improve the work of the courts. "Formal adoption of many of our recommendations will require the support of all three branches of

111. *Citizens Commission Report*, *supra* note 78, at 6.

112. See *supra* note 66.

113. Judicial Branch Report to the NH Citizens Commission on State Courts (Dec. 18, 2006), *available at* http://www.courts.state.nh.us/aoc/budget0809/cs1.pdf.

114. Interview with Donald D. Goodnow, *supra* note 2.

government, executive, legislative and judicial and of the citizenry itself."[115]

Even before the Citizens Commission Report had been released, Chief Justice Broderick asked one of the commissioners, Eric B. Herr, a retired executive with 25 years of management experience in the high-tech, finance and consulting industry, to lead a retreat of 24 judges, court administrators and court staff to begin fashioning a Judicial Branch Strategic Plan that would integrate the recommendations and ideas of the Citizens Commission and the groups whose work had preceded their report.[116] A committee of participants, led by a Supreme Court Justice, synthesized those two days of discussion into five goals that would be the basis for the strategic plan: (1) Work to Serve and Educate the Public; (2) Achieve Progress through Change; (3) Keep Our Courthouses Safe; (4) Recognize Staff as Our Most Valuable Resource; and (5) Deliver Results Fairly and Efficiently.

In the months leading up to the opening of budget season in the legislature in January 2007, the court administrator, Donald Goodnow, systematically organized the 60 initiatives proposed by all five study groups into the Strategic Plan goals. He determined which would require legislative financial support, and which could be implemented cost-free, an important point to be made with spending-conscious lawmakers who in New Hampshire, like other states, have very limited money to spend. The Administrative Judges worked with Goodnow to list their requests for state funding in order of priority. At the same time, the Supreme Court reported back to the Citizens Commission on the status of each of its recommendations, some of which (such as establishing two probate court "service centers" for the public) were carried out at no cost.[117] All of the documents were also posted on the Judicial Branch website,[118] assembled

115. *Citizens Commission Report*, *supra* note 78, at 115.

116. The Task Force on Self-Represented Litigants (January 2004); The Committee on Justice System Needs and Priorities (September 2004); the Supreme Court Committee on Court Security (October 2005) and the Supreme Court Task Force on Public Access to Court Records (February 2006), *available at* http://www.courts.state.nh.us.

117. Judicial Branch Report to the NH Citizens Commission on State Courts, *supra* note 113. One Superior Court location will experiment with the service center concept in 2008.

118. http://www.courts.state.nh.us/.

into packets and hand-delivered to key lawmakers. "For the first time I can remember we looked at our budget and needs from the outside looking in, and that is an entirely different concept," said Judge Edwin W. Kelly, a Commission member and chief administrator for the District Court and Family Division.[119]

"In the past, the starting point for our discussions was an exercise which involved looking at what we currently had for resources—people, equipment and money," Kelly said, which meant "business as usual." The Citizens Commission Report and the directive from the Chief Justice that budget requests be based on its recommendations "forced everyone to change the lens. Not only did it give us permission to consider new ways of doing business, we were under a mandate to do that."[120] Like Chief Justice Broderick, Kelly believes that the lawmakers responsible for setting the budget appreciated this new direction and openness.

The Judicial Branch appropriation signed by the Governor in June 2007—one year after the Citizens Commission Report—was an improvement over past budget cycles, during which the courts had been flat-funded. For the first time in ten years, the courts received "new" money, which allowed court administrators, among other things, to fill gaps in staffing that had remained unfilled for years. In fact, the legislature voted a 6.1 percent increase the first year of the biennium and an eight percent increase for the second.

Broderick often gives credit for those additional funds to the Citizens Commission, which he called an "influential new voice"[121] in the court budget process, helping to supply legislators with input from people who actually use the courts, instead of solely from judges and court administrators. In an interview with the NH Bar News,[122] Broderick also acknowledged that an additional factor was a "good working relationship" with the Governor and the legislature, which the Supreme Court has

119. Interview with Edwin Kelly (Nov. 15, 2007).
120. E-mail from Judge Kelly to the author (Jan. 10, 2008).
121. Letter from Chief Justice John T. Broderick, Jr. to the Citizens Commission (July 25, 2007), http://www.nh.gov/judiciary/FINAL%20citizens%20Commission%20letter%20July%2025%202007.pdf.
122. *Talk With the Chief Justice, Part 1, Changes in the NH Courts*, 18 N.H. BAR NEWS 10 at 1 (Nov. 9, 2007).

worked hard over the years to develop, through improved communication and institutional transparency.

Five of the six top budget requests from the Judiciary were met:

- Funds were appropriated for 19 new hires, including nine case managers in the trial courts whose job is to help court users—especially self-represented litigants, whose need for assistance had been highlighted by the Citizens Commission;
- Thirteen of the 19 new hires will be in the Family Division—which had been the focus of so much criticism from fathers' rights advocates;
- One-year start up funds were set aside for the new Office of Mediation and Arbitration (the Commission strongly endorsed "out of court" options);
- $200,000 was appropriated for staff training directed at improving "customer service" which had been at the top of the Citizens Commission list of recommendations; and
- Four part-time judges were converted to full-time status, another longstanding request from the Judicial Branch that the Citizens Commission had endorsed. The legislature also allocated funds to hire a part-time "web coordinator" to help communicate with court users, with emphasis on improving the electronic "Self-Help" Center for self represented litigants.

However, no funds were allocated by the legislature for salary improvements for existing staff.

Lessons Learned

The New Hampshire Citizens Commission on the State Courts presents a useful model of management and organization for other states to follow. Some decisions like careful compilation of a public record of the Commission, for example, were crucial to its success. Others, like the large size of the commission, deserve more consideration:

- The size of the Commission, 103 volunteer members, was potentially unwieldy. However, considering the inevitable attrition rate for volunteer organizations, the

large number of commissioners at the start assured a fairly large number of participants at the end of the process. More than 50 commissioners attended each voting session.

- Care must be taken in the appointment process to strictly minimize the number of members who are lawyers or judges, while still assuring the expertise the citizen members would need. One paragraph biographies of each commissioner should be posted on the website.
- The Citizens Commission was not really representative of the constituency of the Judicial Branch—namely criminal defendants or non-family civil litigants. One commissioner suggested that focus groups of prisoners or persons who had been through divorce proceedings or other civil litigation would have provided valuable feedback.
- Commission leadership from the beginning has to run meetings with business-like discipline and clearly stated ground rules, including time limits for speakers, so that single-agenda interest groups, like the fathers' rights advocates, are fairly heard, but do not monopolize the discussion. Also, the likelihood that these well organized groups will dominate public hearings may argue for using organized "focus" groups to collect feedback on the courts instead of relying on "open mike" sessions in individual communities.
- Paid administrative assistance is essential to the success of an all-volunteer Commission. Strict independence from the court system was a "uniquely" New Hampshire approach. Other states should consider how to share the administrative responsibilities, to reduce Commission expenses.
- Commission co-chair Eneguess says she would have liked more time to go one-on-one with state lawmakers about court issues. On the other hand, if the Commission's work had gone on longer, there is a risk volunteers would have lost interest.
- Electronic communication and resources are economical and efficient. The website and the detailed record keeping provided a readily accessible bank of informa-

tion about the work. This online resource was available both to the public and to the busy commissioners, allowing them to read minutes and reports at their convenience.

- Guidance from outside experts is helpful. The Court Performance Standards researched by experts around the country for the National Center for State Courts[123] are a ready made framework for judges, administrators and citizens oversight groups. Looking to experts—within the institution you are charged with examining—does not compromise citizen independence.
- Attendance at the listening sessions could have been improved if there had been more time to build up community knowledge about the Citizens Commission and its mission—through media advertising or word of mouth. Getting citizens out to meetings is a labor intensive effort.
- It is unclear whether the general public was aware the Commission was looking for public input from non-members even though there was an e-mail link on its website "to have your voice heard." Commission organizers have to commit the time to get the word out about their work, through free or paid media, or by giving commissioners specific assignments to contact or speak to designated groups.
- Some topics addressed by the Citizens Commission, such as conditions in the Department of Corrections and rehabilitation resources within the prison system, were not under the responsibility of the Judicial Branch but were of special concern to the Citizens Commission. Those recommendations should be sent by the Judicial Branch, or the Citizens Commission itself, to the appropriate state agencies. The incoming New Hampshire Bar president has begun discussions with Chief Justice Broderick to address the Commission recommendations on sentencing and problem solving courts.

123. http://www.ncsconline.org/D_Research/TCPS/index.html.

Where to Go From Here

The real test of the Citizens Commission's work, as one court observer put it, may be how long the enthusiasm lasts within the court system to respond to its recommendations. Like all committee reports, there is no afterlife without follow up and sustained visibility. Customer service (through staff training), arbitration and mediation services, and meeting the needs of self-represented litigants, remain top priorities for Chief Justice Broderick. There is also no doubt that the discussions that were generated about the courts as a business—and the importance of measuring outcomes and productivity to improve effectiveness—has had a continued impact on administrative thinking.

Eric Herr, the retired executive who led the court retreat, emphasized those concepts throughout his tenure on the Citizens Commission. With encouragement from Chief Justice Broderick, Herr continues to push court administrators to take focused steps to improve the way the court does business. In December 2007, at Broderick's request, a second, smaller retreat for judges, administrators and court staff was held to continue discussion of a "Business Model Perspective"[124] in which Herr determined that funding was not keeping pace with expenditures and unless the court system improved efficiencies, there would be a $5.9 million funding deficit within ten years.[125] The discussion focused primarily on how to improve case clearance rates, timeliness of court orders and case processing, staff training (which Herr had emphasized throughout his tenure on the Citizens Commission), and technology and improvements in the court website to better serve self-represented litigants. Working groups were formed and asked to report back by June 1, 2008.

"The question that matters from my perspective is, 'Are we in a different place than we would have been without the Citizens Commission today, in the way we think, the way we

124. Eric B. Herr & Michael Conklin, A Business Model Perspective on the New Hampshire Judiciary (2007) (unpublished manuscript, on file with the author).

125. E-mail from Chief Justice John T. Broderick, Jr. to retreat participants (Nov. 16, 2007).

spend money and provide services?'"[126] Eric Herr said. The answer may take time. "Change comes slowly," he said, "[I]t is way too early to know what it is."

126. Interview with Eric Herr, Commissioner, Citizens Commission (2007).

A SLAPP in the Face: Why Principles of Federalism Suggest that Federal District Courts Should Stop Turning the Other Cheek

Lisa Litwiller[1]

I. Introduction

This article examines the nexus between state and federal law where Strategic Litigation Against Public Participation ("SLAPP")[2] and anti-SLAPP statutory schemes are litigated by a federal district court sitting in diversity. In particular, this article explores the standard the federal court should apply when an anti-SLAPP early motion to dismiss is brought by a SLAPP defendant and the plaintiff challenges dismissal on the basis of the Federal Rules of Civil Procedure pursuant to the regime established by the Supreme Court in *Hanna v. Plumer*.[3]

This article argues that a number of district courts are turning federalism principles on their collective heads, not to mention directly perverting the "twin aims" set forth in *Erie Railroad*

1. Professor of Law, Chapman University School of Law. The author would like to thank the Chapman University School of Law for the support received, Deans Williams and Eastman for their support and Isa Lang for her assistance. Any errors that remain are, of course, entirely my own.

2. SLAPP was originally coined by Penelope Canan and George W. Pring in their pathbreaking article, *Strategic Lawsuits Against Public Participation*, 35 Soc. Probs. 506 (1988).

3. Hanna v. Plumer, 380 U.S. 460 (1965).

Co. v. Tompkins[4] and its progeny, when those courts insist upon ignoring a state's statutory scheme for stemming what is plainly improper litigation.[5] The entire idea behind anti-SLAPP legislation is to put the brakes on lawsuits that are filed for the sole purpose of bullying the "defendant" out of exercising fundamental rights. The SLAPP plaintiff having no intention of winning the lawsuit, simply wants to silence the SLAPP defendant.

Moreover, no one seems to know what to do about this trend. There is a distinct split in the law coming out of the federal circuits, sometimes even within the same circuit. For example, in 1999, the Ninth Circuit held that there was no "direct collision" between the federal rules and the California rules, and therefore an "unguided" *Erie* analysis demands that the state law should be applied.[6] Two years later, the same court held that Rule 56[7] is in direct conflict with the early motion to dismiss in the anti-SLAPP statutory scheme.[8] There, the court quoted *Rogers v. Home Shopping Network, Inc.*: "Because the discovery limiting aspects of 425.16(f) and (g) collide with the discovery allowing aspects of Rule 56, these aspects of subsections (f) and (g) cannot apply in federal court."[9] The Ninth Circuit concludes: "We agree."[10] Applying *Hanna v. Plumer*,[11] the court determined that Rule 56 occupies the field, thereby nullifying an important weapon provided by the anti-SLAPP statutory scheme. Moreover, because Rule 56 is not unconstitutional nor does it violate the Rules Enabling Act, it trumps state legislation.[12] While the latter interpretation might warm the cockles of

4. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

5. Some may argue that if the SLAPP suit really is "improper litigation," then Rule 11 is more than equal to the task of curtailing such litigation. For reasons that may or may not become clear by the end of this article, this author believes that Rule 11 does not adequately address the issues at hand.

6. U.S. *ex rel.* Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963 (9th Cir. 1999).

7. FED.R.CIV.P. 56.

8. Metabolife Int'l, Inc. v. Wornick, 264 F.3d 832 (9th Cir. 2001).

9. Rogers v. Home Shopping Network, Inc., 57 F. Supp.2d 973, 980 (C.D. Cal. 1999).

10. *Id.*

11. Hanna, 380 U.S. 460 (1965).

12. Metabolife, 264 F.3d at 832.

Justice Story's heart,[13] it would almost surely horrify the Justices who went on to shape the modern *Erie* Doctrine.

Accordingly, part II of this article will sketch the typical anti-SLAPP regime and part III will briefly review the state of the *Erie* Doctrine as it exists as of the writing of this article. Part IV will argue that federal district courts sitting in diversity are remiss in ignoring anti-SLAPP early motions to dismiss under the *Erie* doctrine and the basic notions of federalism that underlie *Erie* itself.

II. Anti-SLAPP Regimes

Anti-SLAPP statutory schemes[14] have been enacted in

13. Justice Story penned the now infamous *Swift v. Tyson*, 41 U.S. 1 (1841).

14. California's statute is illustrative. CAL. CIV. PROC. CODE § 425.16 (2007) provides:

> (a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.
>
> (b)(1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.
>
> (2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.
>
> (3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.
>
> (c) In any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.
>
> (d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

twenty-three jurisdictions,[15] and considered in thirteen others.[16] These statutes are designed to give courts a mechanism for

(e) As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.
(f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.
(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.
(h) For purposes of this section, "complaint" includes "cross-complaint" and "petition," "plaintiff" includes "cross-complainant" and "petitioner," and "defendant" includes "cross-defendant" and "respondent."
(i) An order granting or denying a special motion to strike shall be appealable under Section 904.1.
(j)(1) Any party who files a special motion to strike pursuant to this section, and any party who files an opposition to a special motion to strike, shall, promptly upon so filing, transmit to the Judicial Council, by e-mail or facsimile, a copy of the endorsed, filed caption page of the motion or opposition, a copy of any related notice of appeal or petition for a writ, and a conformed copy of any order issued pursuant to this section, including any order granting or denying a special motion to strike, discovery, or fees.
(2) The Judicial Council shall maintain a public record of information transmitted pursuant to this subdivision for at least three years, and may store the information on microfilm or other appropriate electronic media.

15. These states are: Arkansas (ARK. CODE ANN. §§ 16-63-501-508 (2007)); Delaware (DEL. CODE ANN. tit. 10 §§ 8136-8138(2007)); Florida (FLA STAT. ANN. § 768.295(2007)); Georgia (GA. CODE ANN. § 9-11-11.1(2007)); Hawaii (HAW. REV. STAT. § 634F (2007)); Indiana (IND. CODE ANN. § 34-7-7 (2007)); Louisiana (LA. CODE CIV. PROC. ANN. art. 971 (2007)); Maine (ME. REV. STAT. ANN. tit. 14 § 556 (2007)); Maryland (MD. CODE ANN., CTS. & JUD. PROC. § 5-807 (2007)); Massachusetts (MASS. GEN. LAWS ch. 231, § 59H (2007)); Minnesota (MINN. STAT. §§ 554.01-554.05 (2007)); Missouri (MO. REV. STAT. § 537.528 (2007)); Nebraska (NEB. REV. STAT. §§ 25-21,241-25-21,246 (2007)); Nevada (NEV. REV. STAT. §§ 41.635-41.670 (2007)); New Mexico (N.M. REV. STAT. § 38-2-9.1-38-2-9.2 (2007)); New York (N.Y. CIV. RIGHTS LAW §§ 70-a and 76-a (2007)); Oklahoma (OKLA. STAT. tit. 12 § 1443.1

dealing with non-meritorious lawsuits. Broadly speaking, SLAPP suits are not brought to vindicate a legally cognizable right, but rather to annoy and harass the defendant/target of the suit.[17] The SLAPP plaintiff's objective is not to win, but rather to chill the target's constitutionally protected rights to free speech or to petition for redress of grievances.[18] As one court put it,

> while SLAPP suits masquerade as ordinary lawsuits, the conceptual features which reveal them as SLAPPs are that they are generally meritless suits brought by large private interests to deter common citizens from exercising their legal rights or to punish them for doing so. Because winning is not a SLAPP plaintiff's primary motivation, defendants' traditional safeguards against meritless actions . . . are inadequate to counter SLAPPs. Instead, the SLAPPer considers any damage or sanction award which the SLAPPee might eventually recover as a cost of doing business.[19]

The paradigm SLAPP suit, and the example most frequently given, is that of a real estate developer suing citizens who are protesting a locally unpopular land use for defamation or intentional interference with prospective economic advantage.[20] The developer does not intend to win, but rather hopes that the citizens will cease their obstructive behavior. In essence, the SLAPP plaintiff seeks to alter the playing field by morphing what is essentially a political dispute into one that purports to constitute a legally cognizable claim.[21] It is not, of course, but that does not prevent the SLAPP plaintiff from forc-

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(2007)); Oregon (OR. REV. STAT. §§ 31.150-31.155); Pennsylvania (27 PA. CONS. STAT. ANN. §§ 8301-8305 (2007)); Rhode Island (R.I. GEN. LAWS §§ 9-33-1-9-33-4 (2007)); Tennessee (TENN. CODE ANN. §§ 4-21-1001-4-21-1004 (2007)); Utah (UTAH CODE ANN. §§ 78-58-101-78-58-105); and Washington (WASH. REV. CODE §§ 4.24.500-4.24.520 (2007)).

16. The states with current or previous legislation pending include Arizona, Colorado, Connecticut, Illinois, Kansas, Michigan, New Hampshire, New Jersey, Texas and Virginia. *See* http://www.casp.net/menstate.html. The states that have judicial common law doctrine include Colorado and West Virginia. *Id.* Legislation is being advocated in North Carolina. *Id.*

17. Wilcox v. Superior Court, 27 Cal. App. 4th 809, 816-17 (1994).

18. Penelope Canan & George W. Pring, *Strategic Lawsuits Against Public Participation*, 35 SOC. PROBS. 506 (1988). Professors Canan and Pring quote an ACLU attorney representing a SLAPP defendant/target: "[t]he plaintiffs were hoping that the defendants would drop their petitioning activity because of the attorneys' fees involved in defending the suit." *Id.* at 514.

19. *Wilcox*, *supra* note 17 at 817. Internal quotations and citations omitted.

20. *See, e.g.*, Carol Rice Andrews, *Motive Restrictions on Court Access: A First Amendment Challenge*, 61 OHIO ST. L. J. 665 (2000).

21. Canan and Pring, *supra* note 18.

ing the defendant/target into expending resources to defend the SLAPP suit.

The primary purpose of anti-SLAPP legislation is to protect SLAPP defendant/targets from the expense and anxiety associated with litigating these lawsuits. For that reason, most of these statutes have provisions for staying discovery pending an early motion to dismiss or strike.[22]

In order to be considered a SLAPP suit, there must be a civil complaint, or counterclaim, filed against a group or an individual for monetary damages or injunction, which suit arises out of the defendant/target's communication to a governmental body or the electorate on an issue of public concern.[23] Thus, the SLAPP defendant/target bears the initial burden of making a prima facie showing that the SLAPP suit arises from the defendant/target's act in furtherance of rights to petition or to free speech under the Constitution.[24] Once the court determines that an act in furtherance of a protected right is being challenged by a civil suit, the burden shifts to the SLAPP plaintiff to demonstrate a "reasonable probability" of prevailing on its claims[25] The standard is similar to that when a court is weighing a motion for directed verdict. The court should grant the early motion to dismiss only if no reasonable jury could find for the SLAPP plaintiff.[26]

Anti-SLAPP regimes offer the SLAPP defendant/target an expedited form of adjudication, thereby freeing the defendant from defending against a meritless suit. Even more important to the defendant/target, however, is the fact that filing an early motion to strike under an anti-SLAPP regime typically stays discovery.[27] A stay in discovery while the anti-SLAPP motion to strike is pending makes the suit much less disruptive and harassing to the defendant/target, thereby thwarting the SLAPPer's primary motivation to maintain the suit, or even file it in the first place. The expedited review, in conjunction with a stay

22. *See, e.g.*, CAL. CIV. PROC. CODE § 425.16 (2007), *supra* note 14.

23. *See, e.g.*, Jerome I. Braun, *Increasing SLAPP Protection: Unburdening the Right of Petition in California*, 32 U.C. DAVIS L. REV. 965 (1999).

24. United States *ex rel.* v. Lockheed Missiles & Space Co., 190 F.3d 963 (9th Cir.1999).

25. Metabolife Int'l, Inc. v. Wornick, 264 F.3d 832 (9th Cir. 2001).

26. *Id.*

27. *See, e.g.*, CAL. CIV. PROC. CODE § 425.16 (2007).

in discovery, takes the "teeth" out of the SLAPP suit in that it is no longer a lengthy and expensive proposition for the defendant/target.

State legislatures that have adopted anti-SLAPP statutes want to curtail SLAPP suits by making them a less attractive means of challenging protected citizen behavior. These statutes are only as effective as the courts enforcing them. For the most part, state courts have been fairly consistent in applying anti-SLAPP statutes. The federal judiciary, on the other hand, appears to be reluctant to apply the expedited review and discovery-staying provisions of anti-SLAPP statutes.[28] Most federal courts that decline to enforce anti-SLAPP statutes do so, ironically, by relying on the *Erie* doctrine despite the fact that the states have a strong substantive interest in enforcement of this legislation for a variety of important policy reasons. Indeed, if the trend continues, SLAPPers will be encouraged to forum shop and file in federal court whenever possible in direct violation of one of the "twin aims" of *Erie* itself. Accordingly, the following part sketches the *Erie* doctrine before turning to the federal opinions interpreting the anti-SLAPP statutes.

III. A Brief Review of *Erie*[29]

Any discussion of the *Erie* doctrine must begin with the first judiciary act, which contained the Rules of Decision Act ("the Act" or "RDA").[30] The Act states, in its entirety, "[t]he laws of the several states, except where the Constitution or Acts of Congress otherwise or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." This was obviously a part of the Founders' desire to ensure the autonomy of the several states, a core principle of Federalism. Basically, the Act requires federal

28. *See, e.g.*, Milford Power Ltd. P'ship v. New England Power Co., 918 F. Supp. 471, 489 (D. Mass. 1996), stating "[g]iven the unsettled status of the scope and application of the Massachusetts anti-SLAPP statute, the special motion to dismiss by Milford and its affiliates will be DENIED without prejudice."

29. Portions of the following part have appeared in another of the author's publications: Lisa Litwiller, *Has the Supreme Court Sounded the Death Knell for Jury Assessed Punitive Damages: A Critical Re-Examination of the American Jury*, 36 U.S.F.L. REV. 411 (2002).

30. The Act is now codified at 28 U.S.C. § 1652 (2006).

district courts to apply the law of the state in which it sits; this is the core of *Erie*.

Long before *Erie*, however, the mischief began in 1841 in *Swift v. Tyson*.[31] There, Justice Story held the common law decisions of New York courts were not "law" in the sense used in the Act, and, therefore, the rulings of the New York courts were not binding upon federal courts. Rather, only the codified statutory schemes were to be considered "law" for purposes of interpreting the Act. The logical conclusion of *Swift* is that New York common law could be entirely ignored. On this point, Justice Story, writing for a nearly unanimous Court, stated that the Act applied only "to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the right and titles to real estate, and other matters immovable and intra-territorial in their nature and character."[32] Thus, the Court in *Swift* held that the Act required federal courts to apply state law only where there was an applicable state constitutional provision or state statute, or where the dispute concerned something uniquely tied to the state forum, such as real property.[33] The Court went on to state that the Act "does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence."[34]

Swift was taken to the absurd in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co*.[35] The Brown & Yellow Taxicab Company, a Kentucky corporation, entered into an exclusive dealing contract with a railroad, pursuant to which it undertook to transport passengers to and from the railroad station.[36] Despite the agreement, the railroad permitted a competing taxicab company, the Black & White Taxi-

31. Swift v. Tyson, 41 U.S. 1 (1841).
32. *Id.* at 18.
33. *Id.* at 18-19.
34. *Id.* at 19.
35. Black & White Taxicab & Transf. Co. v. Brown & Yellow Taxicab & Transf. Co., 276 U.S. 518 (1928).
36. *Id.* at 523.

cab Company, also a Kentucky corporation, to operate on the railroad's premises.[37]

Brown & Yellow wanted to enforce the exclusive dealing contract with the railroad, but it had a problem—Kentucky state courts had long since determined that such contracts were contrary to public policy, and, as a result, had refused to enforce them.[38] The federal judiciary, however, had no such "general jurisprudence," and was inclined to enforce such transactions.[39] Thus, if Brown & Yellow wanted to have its contract enforced, and successfully enjoin Black & White from soliciting passengers at the railroad station, it must somehow venue the action in federal district court, and must, therefore, find a valid basis of subject matter jurisdiction.

In order to create diversity jurisdiction, Brown & Yellow reincorporated in Tennessee and then brought suit against Black & White and the railroad company in a federal district court in Kentucky.[40] Black & White argued that the reincorporation was fraudulent, and done only to create diversity, and should therefore be insufficient to confer subject matter jurisdiction within the federal judiciary. The Court disagreed, noting that "[t]he succession and transfer were actual, not feigned or merely colorable. In these circumstances, courts will not inquire into the motives when deciding concerning their jurisdiction."[41]

Having found subject matter jurisdiction, the Court easily disposed of the case. First, the Court noted that Justice Story had "fully expounded" on the RDA,[42] in *Swift* and correctly held that "in determining questions of general law, the federal courts, while inclining to follow the decisions of the courts of the state in which the controversy arises, are free to exercise their own independent judgment."[43] Thus, the Court held that subject matter jurisdiction was established, notwithstanding the

37. *Id.*
38. *Id.* at 525 (citing McConnel v. Pedigo, 92 Ky. 465 (1892)).
39. *Id.* at 528. The Court stated that "[t]he cases cited show that the decisions of the Kentucky Court of Appeals holding such arrangements invalid are contrary to the common law as generally understood and applied."
40. *Id.* at 523-24.
41. *Id.* at 524.
42. *Id.* at 530.
43. *Id.*

artificial nature of it, and that federal "general common law" applied. Since the federal law permitted such exclusive contracts, the Court issued the injunction, a result that would never have occurred in a Kentucky court.

This holding prompted an eloquent dissent by Justice Holmes, which was joined by Justices Brandeis and Stone. In Justice Holmes' view, the rules arising out of *Swift* and its progeny amounted to "an unconstitutional assumption of powers by the Courts of the United States. . . ." He argued that "no lapse of time or respectable array of opinions should make us hesitate to correct it."[44] Justice Holmes was concerned with state sovereignty and worried that the *Swift* Doctrine "permitted the federal courts to declare rules of law in areas beyond the powers delegated to the federal government by the Constitution."[45]

Ten years, virtually to the day, after Justice Holmes issued his challenge in *Black & White*, the Court laid to rest the specter of *Swift* in *Erie v. Tompkins*.[46] The facts are familiar. Mr. Tompkins was walking along a pathway adjacent to the railroad tracks when he was struck and injured by an open freight door protruding from a passing train.[47] The injury occurred in Pennsylvania, where Mr. Tompkins was domiciled. He brought his action in federal district court for the Southern District of New York. Venue was proper because the Erie Railroad Company was a citizen of New York, and subject matter jurisdiction was based upon diversity.[48]

At issue was whether Pennsylvania decisional law or federal common law applied. Under Pennsylvania law, as announced by its highest court, Mr. Tompkins was a mere trespasser, and Erie would be liable only if its actions constituted "wanton or willful" negligence.[49] On the other hand, Mr. Tompkins contended that no such law had been established by the Pennsylvania courts, and, relying on *Swift*, argued that even if it had, because there was no statute in place, federal common law applied. Under federal common law, the railroad was lia-

44. *Id.* at 533.
45. 19 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4502 n.25 (2d ed. 1987).
46. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).
47. *Id.* at 69.
48. *Id.*
49. *Id.* at 70.

ble if it were guilty of simple negligence.[50] The trial judge refused to apply the Pennsylvania decisional law, and the jury awarded $30,000 in damages, which award was affirmed by the Second Circuit Court of Appeal.[51]

The Court framed the issue as "whether the oft-challenged doctrine of *Swift v. Tyson* shall now be disapproved."[52] Justice Brandeis, who joined the dissent in *Black & White*, began his analysis by quoting extensively from Justice Story's opinion in *Swift*, in which the Court concluded that the RDA was never intended by the framers to apply to anything other than positively stated statutory law.[53] Justice Brandeis then noted that "[d]oubt" had been "repeatedly expressed" regarding the correctness of the *Swift* Court's interpretation, and cited to an article by Professor Warren which, according to the Court, "established that the construction given to [the RDA] was erroneous. . . ."[54] The better construction of the Act, according to Professor Warren, and adopted by the Court, was that "in all matters except those in which some federal law is controlling, the federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the state, unwritten as well as written."[55]

Apart from its historical analysis, the Court cited several reasons for overruling *Swift*. The Court did refer to the difficulty in distinguishing between "local" matters governed by state law, and "questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation,"[56] but the primary bases for reversing *Swift* were twofold. First, the application of federal common law in diversity cases resulted in "grave discrimination by noncitizens against citizens" and thereby "rendered impossible equal protection of the law."[57] This unequal application of law, in the Court's view, improperly incentivized forum shopping.[58]

50. *Id.*
51. *Id.*
52. *Id.* at 69.
53. *Id.* at 71-72.
54. *Id.* at 72-73, *citing* Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 51-52, 81-88, 108 (1923).
55. *Id.* at 72-73.
56. *Id.* at 71.
57. *Id.* at 74-75.
58. *Id.*

This rationale gave rise to the oft-cited "twin aims" of *Erie*: to discourage forum-shopping and to avoid the inequitable administration of the laws as between state and federal courts.[59]

The second constitutionally based rationale was grounded in principles of federalism. The Court asserted that conferring upon the federal courts the ability to make law in abrogation of state law unconstitutionally exceeded the powers granted to the federal government and encroached upon authority reserved to the states.[60] In this regard, the Court declared that

> whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power on the federal courts.[61]

Although a number of other cases were decided in the intervening period, the next significant case in the line is *Guaranty Trust Co. v. York*.[62] The *York* plaintiffs brought a class action against a bond trustee alleging misrepresentation and breach of trust. In response, the defendant alleged that the suit was barred by New York's statute of limitations. The plaintiffs argued that the federal standard of laches should apply because the suit sounded in equity rather than in law, and, therefore, the suit was not barred. The trial court granted summary judgment in favor of Guaranty Trust on the theory that the suit was precluded by previous litigation. The Second Circuit found the suit was not precluded and further held that the suit was not time-barred because the equitable doctrine of laches applied.[63]

The Supreme Court disagreed. After discussing the traditional distinction between law and equity, the Court characterized the issue as having

> reduce[d] itself to the narrow question whether, when no recovery could be had in a State court because the action is barred by the statute of limitations, a federal court in equity can take cognizance of the suit because there is diversity of citizenship between the parties. Is the outlawry, according to State law, of a claim cre-

59. *Id.* Erie, 304 U.S. at 74-75.
60. *Id.* at 77-78.
61. *Id.*
62. Guar. Trust Co. v. York, 326 U.S. 99 (1945).
63. *Id.* at 100-01.

> ated by the States a matter of 'substantive rights' to be respected by a federal court of equity when that court's jurisdiction is dependent on the fact there is a State-created right, or is such statute of 'a merely remedial character,' which a federal court may disregard?[64]

In answer to that question, the Court created the now lamented "outcome determinative" test, and moved away from trying to make a principled distinction between "substance" and "procedure." In particular, the Court stated,

> [t]he question is not whether a statute of limitations is deemed a matter of 'procedure' in some sense. The question is whether such a statute concerns merely the manner and the means by which a right to recover, as recognized by the State, is enforced, or whether such statutory limitation is a matter of substance in the aspect that that alone is relevant to our problem, namely, does it significantly affect the result of a litigation for a federal court to disregard the law of a State that would be controlling in an action upon the same claim by the same parties in a State court?[65]

Further refining its outcome determinative litmus test, the Court continued,

> [i]t is therefore immaterial whether statutes of limitation are characterized either as 'substantive' or 'procedural' in State court opinions in any use of those terms unrelated to the specific issue before us. [*Erie*] was not an endeavor to formulate scientific legal terminology. It expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts. In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlies [*Erie*] is that for the same transaction the accident of a suit by a nonresident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result.[66]

Justice Frankfurter, writing for the Court, asserted that the purpose of *Erie* was to ensure that the happenstance of the forum should be irrelevant to the substantive rights of the parties. Therefore, the result of the litigation should be substantially the same in federal court as in state court, while allowing for differing methodologies by which that substantially similar outcome was achieved. It does not require an intuitive quantum leap to recognize that a statute of limitations, which is by definition,

64. *Id.* at 107-08.
65. *Id.* at 109.
66. *Id.* at 109.

outcome determinative to the extent that the case is barred, is "substantive" for purposes of the outcome determinative test.

The case is unfortunate not only because it ignores the federalism concerns expressed in *Erie* as further support for the result, but also because if the "outcome determinative" test is applied consistently, virtually every procedural rule will be outcome determinative. Suppose, for example, that a "local rule" requires pleadings to be three-hole punched. If a litigant failed to comply with the rule, the court clerk would refuse the filing, and the dispute would never be heard. The example is, perhaps, a trifle disingenuous, practically speaking (one assumes the litigant would simply three hole-punch the pleading and refile), but it does highlight the theoretical absurdity of the strictly outcome determinative test expressed in *York*.

Professor Floyd, expressing similar concerns, stated the problem as follows:

> *York* thus carried *Erie* well beyond rules of 'substance' as understood to encompass the prescription of rights and duties governing the primary conduct and relations of the parties and even beyond the realm of 'substance' as understood to refer to legal rules having objectives external to the fair and efficient conduct of the litigation process itself.[67]

The Court in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc*.[68] attempted to refine the outcome determinative test, but may have succeeded only in adding to the confusion.[69] At issue in *Byrd* was the statutory scheme adopted by the South Carolina legislature regarding workers' compensation for injured employees. The statute contemplated that the judge, rather than the jury, would decide the putative employee's status, which, in turn, would determine whether the plaintiff could seek compensation apart from that which he or she is statutorily entitled to receive, whereas in the federal scheme that was a factual matter for the jury.[70] The Court split five to four on this issue, but ultimately resolved it in favor of adopting federal

67. C. Douglas Floyd, *Erie Awry: A Comment on Gasperini v. Center for Humanities, Inc.*, 1997 B.Y.U. L. REV. 267, 274 (1997).

68. Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958).

69. Indeed, until the Court issued its opinion in *Gasperini*, the only reference to *Byrd* was in *Hanna*, and then only for the proposition that "'[o]utcome-determination' analysis was never intended to serve as a talisman." Hanna v. Plumer, 380 U.S. 460, 466-7 (1965).

70. *Byrd*, 356 U.S. at 533.

practice, thus signaling a retreat from the rigid outcome determinative test.

The Court began its analysis by asserting that *Erie* requires a federal district court to "respect the definition of state created rights and obligations by the state courts,"[71] and then modified the statement, saying that a state rule need only be applied where it is "bound up" with rights and obligations as defined by the state substantive law.[72] The Court concluded that there was no evidence that the allocation of decision making authority contemplated by the state statutory scheme was "an integral part" of the statute, but rather "merely a form and mode of enforcing the immunity," rather than "a rule intended to be bound up with the definition of the rights and obligations of the parties."[73]

The Court then proceeded to apply the outcome determinative test, and conceded that "[i]t may well be that in the instant personal-injury case the outcome would be substantially affected by whether the issue of immunity is decided by a judge or a jury."[74] However, the Court said, "outcome" was not the sole arbiter of the issue.[75] Rather, there were "countervailing considerations" in an independent federal system that "distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury."[76]

Having thus backed away from the pure outcome determinative test articulated in *York*, the Court reframed the test as follows: "the inquiry here is whether the federal policy . . . should yield to the state rule in the interest of furthering the objective that the litigation should not come out one way in the federal court and another way in the state court."[77] *Byrd* is generally read as establishing a "balancing test" which requires a federal court to balance the federal interest in applying a federal rule of procedure against the state's interest.[78] It should not,

71. *Id.* at 535.
72. *Id.*
73. *Id.* at 536.
74. *Id.* at 537.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*

however, be assumed that the pendulum has swung all the way back to the point where any federal interest trumps the state interest. As the *Byrd* Court made clear, the key to the analysis is whether the state rule is concerned only with the "form and mode" of the litigation and not some other state interest unconnected with the manner in which a substantive right is vindicated. Any other interpretation would violate the core of *Erie* by unconstitutionally permitting federal intervention into legislative authority reserved to the states by the Tenth Amendment and the Constitution's overall scheme of reserved powers.

The next significant development occurred in the landmark case of *Hanna v. Plumer*.[79] At issue in *Hanna* was whether the federal court should apply the state's requirement that an executor be served "in hand" or the standard adopted in Rule 4, which permits service by leaving copies of the summons and complaint at the defendant's residence.[80] The plaintiff had served the defendant by leaving copies of the summons and complaint at his residence with his spouse, but did not personally serve him within the statutory limitations period.[81]

Relying on *York*, the defendant argued that because service was inconsistent with the state standard, and that the plaintiff's case would be barred in state court for that reason, it should likewise be barred in federal court.[82] It is a reasonable argument, based upon the Court's prior precedent. Realizing, however, that the outcome determinative test includes too much in the sense that virtually every procedural rule could be outcome determinative in some sense,[83] the Court took yet another step away from *York*.

The Court began this distancing process by citing *Byrd* for the proposition that "'[o]utcome-determination' analysis was never intended to serve as a talisman."[84] Rather, the outcome determination test must be read with "reference to the twin aims of the Erie rule: discouragement of forum-shopping and

79. *Hanna*, 380 U.S. 460.
80. FED. R. CIV. P. 4(e)(2).
81. *Hanna*, 380 U.S. at 461.
82. *Id.* at 461-62.
83. *Id.* at 468 ("[I]n this sense every procedural variation is 'outcome-determinative.'").
84. *Id.* at 466-67.

avoidance of inequitable administration of the laws."[85] Moreover, the Court asserted, when there is a Federal Rule of Procedure on point, the correct analytic structure is that undertaken in *Sibbach v. Wilson & Co.*[86]

That is, the function of a district court in determining which rule to apply is to ascertain whether the Federal Rule in question is truly procedural in that it falls within the boundaries of the authority delegated by the Rules Enabling Act ("REA"). If it is, it controls, even where application of the Federal Rule will yield an outcome different from that which would be obtained in state court.[87]

The effect of *Hanna*, then, is to bifurcate *Erie* analysis even beyond the procedure/substance dichotomy.[88] First, if there is a federal procedural rule on point, it governs provided it is within the scope of the REA. This result is necessitated because Congress and the Supreme Court, pursuant to Articles I and III respectively, have the authority to promulgate rules of procedure to be applied in federal courts,[89] and the Supremacy Clause mandates that such rules take precedence over state created rules.[90] In short, so long as the Rule can be "rationally capable of classification"[91] as relating to the "practice and procedure . . . in the United States district courts,"[92] the Federal Rule applies, even where application of the Federal Rule would be outcome determinative. And therein lies the rub. It is the *Hanna* line of cases that causes the most trouble for anti-SLAPP early motions to dismiss filed in federal district court.

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85. *Id.* at 468.

86. *Id.* at 470-71 (citing Sibbach v. Wilson & Co., 312 U.S. 1 (1941)).

87. *Id.* at 470. As the Court put it, "[w]hen a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided Erie Choice: the court has been instructed to apply the Federal Rule and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions." *Id.*

88. *See, e.g.,* Richard D. Freer, *Some Thoughts on the State of Erie After Gasperini*, 76 TEX. L. REV. 1637 (1998).

89. *See* U.S. CONST. art. I.

90. U.S. CONST. art. III.

91. *Hanna*, 380 U.S. at 472.

92. 28 U.S.C. § 2072 (1988).

IV. The Intersection Between *Erie* and Anti-SLAPP

Among the first federal courts to consider an early motion to dismiss under an anti-SLAPP regime was the District Court in Massachusetts.[93] That court heard two cases, both of which were decided in 1996, and in both instances the court chose not to apply the state's Anti-SLAPP law. In the first case, *Milford Power Limited Partnership v. New England Power Co. et al.*,[94]

93. The court was construing the Massachusetts statute MASS. GEN. LAWS ANN. ch. 231, § 59H (1994), providing:

> In any case in which a party asserts that the civil claims, counterclaims, or cross claims against said party are based on said party's exercise of its right of petition under the constitution of the United States or of the commonwealth, said party may bring a special motion to dismiss. The court shall advance any such special motion so that it may be heard and determined as expeditiously as possible. The court shall grant such special motion, unless the party against whom such special motion is made shows that: (1) the moving party's exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law and (2) the moving party's acts caused actual injury to the responding party. In making its determination, the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.
>
> The attorney general, on his behalf or on behalf of any government agency or subdivision to which the moving party's acts were directed, may intervene to defend or otherwise support the moving party on such special motion.
>
> All discovery proceedings shall be stayed upon the filing of the special motion under this section; provided, however, that the court, on motion and after a hearing and for good cause shown, may order that specified discovery be conducted. The stay of discovery shall remain in effect until notice of entry of the order ruling on the special motion. Said special motion to dismiss may be filed within sixty days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper.
>
> If the court grants such special motion to dismiss, the court shall award the moving party costs and reasonable attorney's fees, including those incurred for the special motion and any related discovery matters. Nothing in this section shall affect or preclude the right of the moving party to any remedy otherwise authorized by law.
>
> As used in this section, the words "a party's exercise of its right of petition" shall mean any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding; any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding; any statement reasonably likely to enlist public participation in an effort to effect such consideration; or any other statement falling within constitutional protection of the right to petition government.

94. Milford Power Ltd. P'ship v. New England Power Co., 918 F. Supp. 471 (D. Mass. 1996).

Milford had argued that the anti-SLAPP legislation entitled it to an early motion to dismiss for a number of reasons. First, argued Milford, the statute broadened the right to petition by including a provision for a stay of discovery and attorneys fees. Milford also argued that the statute was "outcome determinative" for purposes of an *Erie* analysis. Lastly, Milford asserted that application of the statute would "discourage forum shopping, avoid the inequitable administration of laws, and effect Massachusetts public policy of encouraging public participation in all public fora."[95] The court disagreed and declined the invitation to engage in an *Erie* analysis, simply finding that the challenged counterclaims did not constitute a SLAPP suit.

In the next case that the Massachusetts court considered, the court did engage in an *Erie* analysis, at least to the extent that it found that the Federal Rules of Civil Procedure occupied the field under *Hanna*. In *Baker v. Coxe*, the court denied the special motion to dismiss stating that:

> [t]o the extent that the anti-SLAPP statute imposes additional procedures in certain kinds of litigation . . . it does not trump [Rule] 12(b)(6) . . . Accordingly, this [c]ourt will examine the allegations of the complaint under the well-worn standards governing [Rule] 12(b)(6) motions, not the hybrid statutory procedure in section 59H which is more akin to a summary judgment motion.[96]

The district court in Massachusetts remained hostile to anti-SLAPP legislation, and in *Stuborn Ltd. Partnership v. Bernstein* once again denied an early motion to strike. Relying on *Baker*, the court concluded that it was:

> persuaded that the Anti-SLAPP statute's special motion provision is predominantly procedural in nature and that it directly conflicts with the Federal Rules of Procedure. Because of the collision between the federal and state procedure noted above, in a diversity action the Federal Rules of Civil Procedure supplant the state Anti-SLAPP procedures as the Supreme Court instructed in *Hanna v. Plumer*.[97]

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95. *Id.* at 488.

96. Baker v. Coxe, 940 F. Supp. 409, 417 (D. Mass. 1996). Although not a federal case, and therefore only tangentially related to the present discussion, two years after *Milford* and *Baker*, the Supreme Judicial Court of Massachusetts demonstrated a similar hostility towards anti-SLAPP legislation. In denying the special motion, the court observed that the anti-SLAPP statutory scheme "alters procedural and substantive law in a sweeping way. . . ." Duracraft Corp. v. Holmes Products Corp., 691 N.E.2d 935, 943 (1998).

97. Stuborn Ltd. P'ship v. Bernstein, 245 F. Supp. 2d 312, 316 (D. Mass. 2003).

The court went on to lament that it would be ill-advised to decide the issue on the "scant evidence of record" thereby totally ignoring the immunity aspect of anti-SLAPP legislation, which is designed to free the SLAPP defendant/target from onerous discovery requirements.[98]

In *Card v. Pipes*,[99] the federal district court in Oregon was more receptive to that state's Anti-SLAPP statute.[100] In *Card*,

98. *Id.*

99. Card v. Pipes, 398 F. Supp. 2d 1126 (Or. 2004).

100. Although the *Card* court was construing OR. REV. STAT. § 30.142 (2001), the statue has been renumbered to OR. REV. STAT. § 31.150 (2003), and provides:

> (1) A defendant may make a special motion to strike against a claim in a civil action described in subsection (2) of this section. The court shall grant the motion unless the plaintiff establishes in the manner provided by subsection (3) of this section that there is a probability that the plaintiff will prevail on the claim. The special motion to strike shall be treated as a motion to dismiss under ORCP 21 A but shall not be subject to ORCP 21 F. Upon granting the special motion to strike, the court shall enter a judgment of dismissal without prejudice.
> (2) A special motion to strike may be made under this section against any claim in a civil action that arises out of:
> (a) Any oral statement made, or written statement or other document submitted, in a legislative, executive or judicial proceeding or other proceeding authorized by law;
> (b) Any oral statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a legislative, executive or judicial body or other proceeding authorized by law;
> (c) Any oral statement made, or written statement or other document presented, in a place open to the public or a public forum in connection with an issue of public interest; or
> (d) Any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.
> (3) A defendant making a special motion to strike under the provisions of this section has the initial burden of making a prima facie showing that the claim against which the motion is made arises out of a statement, document or conduct described in subsection (2) of this section. If the defendant meets this burden, the burden shifts to the plaintiff in the action to establish that there is a probability that the plaintiff will prevail on the claim by presenting substantial evidence to support a prima facie case. If the plaintiff meets this burden, the court shall deny the motion.
> (4) In making a determination under subsection (1) of this section, the court shall consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.
> (5) If the court determines that the plaintiff has established a probability that the plaintiff will prevail on the claim:
> (a) The fact that the determination has been made and the substance of the determination may not be admitted in evidence at any later stage of the case; and
> (b) The determination does not affect the burden of proof or standard of proof that is applied in the proceeding.

the primary issue before the court was whether Oregon's Anti-SLAPP early motion to strike was available in federal district court.[101] Relying on Ninth Circuit precedent,[102] the court held that, as a general matter, anti-SLAPP legislation applies in federal district court, but nonetheless denied the early motion to strike because the court had decided to dismiss the action for either insufficiency of process or failure to state a claim, thereby mooting the anti-SLAPP motion.

The district court in Georgia was likewise persuaded by the Ninth Circuit's precedent. In *Buckley v. DirectTV, Inc.*,[103] the court found, as a threshold matter, that the applicable Georgia statute could be used by defendant/targets in federal district court.[104] In this case, the issue turned on whether letters threat-

101. *Card*, 398 F. Supp. 2d 1126.
102. *See infra* pp. 17-22.
103. Buckley v. DirectTV, Inc., 276 F. Supp. 2d 1271 (N.D. Ga. 2003).
104. The Georgia statute, GA. CODE ANN. § 9-11-11.1 (1996) provides:

> (a) The General Assembly of Georgia finds and declares that it is in the public interest to encourage participation by the citizens of Georgia in matters of public significance through the exercise of their constitutional rights of freedom of speech and the right to petition government for redress of grievances. The General Assembly of Georgia further finds and declares that the valid exercise of the constitutional rights of freedom of speech and the right to petition government for a redress of grievances should not be chilled through abuse of the judicial process.
>
> (b) For any claim asserted against a person or entity arising from an act by that person or entity which could reasonably be construed as an act in furtherance of the right of free speech or the right to petition government for a redress of grievances under the Constitution of the United States or the Constitution of the State of Georgia in connection with an issue of public interest or concern, both the party asserting the claim and the party's attorney of record, if any, shall be required to file, contemporaneously with the pleading containing the claim, a written verification under oath as set forth in Code Section 9-10-113. Such written verification shall certify that the party and his or her attorney of record, if any, have read the claim; that to the best of their knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; that the act forming the basis for the claim is not a privileged communication under paragraph (4) of Code Section 51-5-7; and that the claim is not interposed for any improper purpose such as to suppress a person's or entity's right of free speech or right to petition government, or to harass, or to cause unnecessary delay or needless increase in the cost of litigation. If the claim is not verified as required by this subsection, it shall be stricken unless it is verified within ten days after the omission is called to the attention of the party asserting the claim. If a claim is verified in violation of this Code section, the court, upon motion or upon its own initiative, shall impose upon the

ening legal action against certain recipients of allegedly pirated satellite television constituted an act of public concern that could give rise to a SLAPP suit. The court held it could and further held that the plaintiff's complaint against DirectTV should be dismissed as a SLAPP.[105]

The remainder of the federal jurisprudence involves the construction of California's Anti-SLAPP statutory scheme.[106] The two leading cases are both Ninth Circuit opinions. Although they can be reconciled, it is difficult.[107] The first is *United States ex rel. v. Lockheed Missiles & Space Company*.[108] *Lock-*

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persons who signed the verification, a represented party, or both an appropriate sanction which may include dismissal of the claim and an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, including a reasonable attorney's fee.

(c) As used in this Code section, "act in furtherance of the right of free speech or the right to petition government for a redress of grievances under the Constitution of the United States or the Constitution of the State of Georgia in connection with an issue of public interest or concern" includes any written or oral statement, writing, or petition made before or to a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, or any written or oral statement, writing, or petition made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law.

(d) All discovery and any pending hearings or motions in the action shall be stayed upon the filing of a motion to dismiss or a motion to strike made pursuant to subsection (b) of this Code section. The motion shall be heard not more than 30 days after service unless the emergency matters before the court require a later hearing. The court, on noticed motion and for good cause shown, may order that specified discovery or other hearings or motions be conducted notwithstanding this subsection.

(e) Nothing in this Code section shall affect or preclude the right of any party to any recovery otherwise authorized by common law, statute, law, or rule.

(f) Attorney's fees and expenses under this Code section may be requested by motion at any time during the course of the action but not later than 45 days after the final disposition, including but not limited to dismissal by the plaintiff, of the action.

105. *Buckley*, 276 F. Supp. 2d 1271.

106. As of this writing, the author remains unaware of any other federal opinions construing other states' anti-SLAPP regimes. Any omission is entirely the fault of the author.

107. *See, e.g.*, Vess v. Ciba Geigy Corp., 317 F.3d 1097, 1109 (9th Cir. 2003) (*citing* U.S. *ex rel.* v. Lockheed Missiles & Space Co., 190 F.3d 963 (9th Cir. 1999) for the proposition that motions to strike under the California statute are permissible in federal court, but referencing Metabolife Int'l, Inc. v. Wornick, 264 F.3d 832 (9th Cir. 2001) as being in disagreement.).

108. *Lockheed*, 190 F.3d 963; *accord* Nicosia v. De Rooy, 72 F. Supp. 2d 1093 (N.D. Cal. 1999).

heed involved a *qui tam* action by a pair of realtors against Lockheed alleging that Lockheed had submitted millions of dollars of false claims associated with excessive unproductive labor costs. Lockheed then counterclaimed against the *qui tam* plaintiffs alleging that the whistleblowers had violated various fiduciary and contractual obligations. The district court initially followed the reasoning of the Massachusetts courts and found that the Federal Rules superceded the state legislation,[109] but the Ninth Circuit reversed.

The court began its analysis by determining whether there was a "direct collision" between the federal rules and the Anti-SLAPP legislation. It noted that the only two provisions of the legislation at issue were the motion to strike and the attorneys' fees sections—details that became important in the other Ninth Circuit case, discussed *infra*. The court concluded that the anti-SLAPP scheme did not conflict with Federal Rules 8, 15 and 56 and that they "can exist side by side . . . each controlling its own intended sphere of coverage without conflict. . . . We fail to see how the prior application of the anti-SLAPP provisions will directly interfere with the operation of Rule 8, 12, or 56. In summary, there is no 'direct collision' here."[110] The court went on to observe that although there was some overlap between the federal mechanisms for "weeding out meritless claims," the Anti-SLAPP legislation served another, more important, function which is the protection of "'the constitutional rights of freedom of speech and petition for redress of grievances.'"[111]

Having concluded that there was no "'direct collision'" and the two sets of rules could coexist, the court explained that it must then "make the 'typical, relatively unguided *Erie* choice.'"[112] Citing *Byrd*, the court attempted to balance the federal interests that would be undermined by applying the California statute and was unable to identify any. On the other hand, the court recognized that "California has articulated the important, substantive state interests furthered by the Anti-

109. U.S. *ex rel.* Newsham v. Lockheed Missiles & Space Co., Inc., No. C 88-20009 JW, 1995 WL 470218 (N.D. Cal. Aug. 2, 1995).

110. *Lockheed*, 190 F.3d at 972.

111. *Id.* at 973.

112. *Id.*

SLAPP statute."[113] The court concluded the opinion with language that is important for purposes of the instant discussion:

> We also conclude that the twin purposes of the *Erie* rule—'discouragement of forum shopping and avoidance of inequitable administration of the law'—favor application of California's Anti-SLAPP statute in federal cases. Although Rules 12 and 56 allow a litigant to test the opponent's claims before trial, California's 'special motion to strike' adds an additional, unique weapon to the pretrial arsenal, a weapon whose sting is enhanced by a[n] entitlement to fees and costs. Plainly, if the Anti-SLAPP provisions are held not to apply in federal court, a litigant interested in bringing meritless SLAPP claims would have a significant incentive to shop for a federal forum. Conversely, a litigant otherwise entitled to the protections of the Anti-SLAPP statute would find considerable disadvantage in a federal proceeding. This outcome appears to run squarely against the 'twin aims' of the *Erie* doctrine.[114]

This seems patently obvious, and further seems to be the right result.

But the Ninth Circuit departed from its prior precedent in its next decision. *Metabolife Int'l, Inc. v. Wornick, et al.* was a lawsuit filed by Metablolife against various defendants for defamation arising out of a television broadcast in which the defendant/targets alleged, among other things, that the product Metabolife was selling "can kill you."[115] The defendant/targets filed an early motion to strike pursuant to California's Anti-SLAPP statute. The district court initially granted the motion, but the Ninth Circuit reversed, holding that Metabolife was entitled to discovery.[116] The court did say that "[t]he anti-SLAPP statute was enacted to allow early dismissal of meritless first amendment cases aimed at chilling expression through costly, time-consuming litigation,"[117] but then proceeded to allow the "costly, time consuming litigation" to continue.[118]

The court's reasoning displayed an almost arrogant disregard of state law. It is not exactly the *Taxicab* case, but it appears dangerously *Swift*-esque. Judge Hawkins began the court's opinion by identifying a "direct collision" between the anti-SLAPP statute and federal law, stating that "the district

113. *Id.*
114. *Id.*
115. Metabolife Int'l, Inc. v. Wornick, 264 F.3d 832, 854 (9th Cir. 2001).
116. *Metabolife*, 264 F.3d 832.
117. *Id.* at 839.
118. *Id.*

court erred in not allowing [Metabolife] discovery because the discovery-limiting aspects of the anti-SLAPP statute conflict with Federal Rule of Civil Procedure 56."[119] Having found a "direct collision," the court distinguished itself from its prior precedent in *Lockheed* by noting that discovery was not in issue in *Lockheed.* With this distinction in place, the court decided that it need not engage in the "typical, relatively unguided *Erie* Choice."[120] The unguided *Erie* analysis would have required the court to balance the state's interest in providing SLAPP defendant/targets an extra weapon against meritless suits designed to chill constitutionally protected speech against the federal interest in the federal rules.[121] The court declined to do this, relying on a prior district court opinion in *Rogers v. Home Shopping Network*.[122] The court concluded that "the discovery-limiting aspects of [the Anti-SLAPP statute] collide with the discovery-allowing aspects of Rule 56. . .[and] cannot apply in federal court."[123]

This conclusion seems short-sighted. One of the primary aims of the anti-SLAPP statutory schemes is to protect defendant/targets from what is arguably the most expensive and bothersome part of litigation: discovery. Indeed, in the federal system, a motion for summary judgment pursuant to Rule 56 is generally improper until discovery has closed.[124] Thus, with one swipe of the pen, the Ninth Circuit essentially neutered the anti-SLAPP statutory scheme. The court blatantly disregarded the states' legitimate interest in curtailing lawsuits filed not in furtherance of redressing legitimate grievances, but rather soley to harass the defendant/targets and chill constitutionally pro-

119. *Id.* at 845.

120. *Id.*

121. Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958).

122. Rogers v. Home Shopping Network, 57 F. Supp. 2d 973 (C.D. Cal. 1999). District Judge Pregerson was especially caustic. Characterizing the California Anti-SLAPP early motion to strike as a "rule of procedure", the court held: "If a defendant makes a special motion to strike based on alleged deficiencies in the plaintiff's complaint, the motion must be treated in the same manner as a motion under Rule 12(b)(6) except that the attorney's fee provision of § 425.16 applies. If a defendant makes a special motion to strike based on the plaintiff's alleged failure of proof, the motion must be treated in the same manner as a motion under Rule 56 except that again the attorney's fees provision of §425.16(c) applies." *Id.* at 977, 983.

123. *Metabolife*, 264 F.3d at 846.

124. FED. R. CIV. P. 56(f).

tected rights. What better way to harass than to deluge a defendant/target with a barrage of discovery? Plaintiffs contemplating filing a SLAPP suit would be wise to shop for a federal forum.

Judge Rymer, concurring in part and dissenting in part in *Metabolife*, got it right: "we have no call to decide, let alone conclude (as the majority does) that the anti-SLAPP statute and the Federal Rules of Civil Procedure conflict because discovery can be . . . tailored by the district court to match the issues necessary to make an [anti-SLAPP] determination. . . ."[125] If discovery is necessary for the SLAPP plaintiff to prove a "reasonable probability of success," the statutes themselves provide for this limited discovery, and the Federal Rules can therefore peaceably "co-exist" with the various statutory schemes.

At least two district courts have agreed with Judge Rymer, and declined to follow *Metabolife*. In *New.Net, Inc. v. Lavasoft*,[126] Judge Feess distinguished *Metabolife* by citing to *Batzel v. Smith*[127] for the proposition that the anti-SLAPP legislation at issue authorizes limited discovery for "good cause shown." That being the case, the *New.Net* court saw "no inherent 'direct collision' between the expedited procedure contemplated in the anti-SLAPP statute and the provisions of Rule 56. Indeed, to find such a collision would undermine the holding in *Lockheed* permitting the use of the anti-SLAPP procedure in federal court."[128] Judge Feess is almost certainly right. If district courts elect to follow *Metabolife*, then *Lockheed* and *Batzel* must be ignored with the result being that anti-SLAPP protections are not available in federal courts.

The court in *Flores v. Emerich & Fike*[129] recognized that this was the case. There, the court recognized that:

> *Metabolife*, in contrast to *Lockheed*, draws almost no distinction between an anti-SLAPP motion and a motion for summary judgment. In so holding, *Metabolife* arguably conflicts with *Lockheed*'s holding that an anti SLAPP motion is a procedural tool that can be distinguished from a motion for summary judgment. Yet, *Metabolife* cited with approval to and did not overrule *Lockheed*'s

125. *Metabolife*, 264 F.3d at 852.
126. New.Net, Inc. v. Lavasoft, 356 F. Supp. 2d 1090 (C.D. Cal. 2004).
127. Batzel v. Smith, 333 F.3d 1018, 1024 (9th Cir. 2003).
128. *New.Net, Inc.*, 356 F. Supp. 2d 1102.
129. Flores v. Emerich & Fike, No. 1:05-CV-0291 OWW DLB, 2006 WL 2536615 (E.D. Cal. Aug. 31, 2006).

> holding as to [the Anti-SLAPP provisions]. The only way to interpret *Metabolife* without eviscerating *Lockheed* is to apply it narrowly only to situations where a plaintiff asserts **prior to decision on an anti-SLAPP motion** that discovery might influence the outcome of the motion to strike.[130]

A third Ninth Circuit case raised the issue of whether the denial of a motion to strike pursuant to the anti-SLAPP regime was subject to interlocutory appeal.[131] In *Batzel*, the district court denied anti-SLAPP defendants' motions to strike and the defendants sought appellate review.[132] The court noted that if the case were being litigated in a California state court, an anti-SLAPP motion would be immediately appealable.[133] In finding that the denial of a motion to strike is immediately appealable under the collateral order doctrine, the court sensibly observed that, "[b]ecause the anti-SLAPP motion is designed to protect the defendant from having to litigate meritless cases aimed at chilling First Amendment expression, the district court's denial of an anti-SLAPP motion would effectively be unreviewable from a final judgment."[134] In support of its position, the court looked to the legislative history of California's Anti-SLAPP law, and quoted from the Senate Judiciary Committee Report associated with the legislation as follows: "When a meritorious anti-SLAPP motion is denied, the defendant, under current law, has only two options. The first is to file a writ of appeal, which is discretionary and rarely granted. The second is to defend the lawsuit. If the defendant wins, the anti-SLAPP lawsuit is useless and has failed to protect the defendant's constitutional rights."[135] Citing to *Erie*, the *Batzel* court concluded that "[b]ecause California law recognizes the protection of the anti-SLAPP statute as a substantive immunity from suit, this Court, sitting in diversity, will do so as well."[136]

Although the courts in *Batzel*, *Ciba-Geigy Corp. USA*, *New.Net* and *Emerich & Fike* showed appropriate deference to the substantive anti-SLAPP legislation, some federal courts con-

130. *Id.* at 9.
131. *Batzel*, 333 F.3d 1018.
132. *Id.*
133. CAL. CIV. PROC. CODE § 425.16(i) (2005).
134. *Batzel*, 333 F.3d at 1025.
135. *Id.*
136. *Id.* at 1025-26.

tinue to be hostile. In *Bulletin Displays, LLC v. Regency Outdoor Advertising, Inc. et al.*,[137] the court asserted that

> [s]pecial procedural rules apply where an anti-SLAPP motion is brought in federal court. If a defendant makes an anti-SLAPP motion based on the plaintiff's failure to submit evidence to substantiate its claims, the motion is treated as a motion for summary judgment, and discovery 'must be developed sufficiently to permit summary judgment under Rule 56.'[138]

The court went on to hold that if the motion to strike is challenging the pleading itself, the court must review it in light of Federal Rules 8 and 12.[139] In other words, in this court's view, Federal Rules 8, 12 and 56 occupy the field and the anti-SLAPP statutory scheme may be effectively ignored.

Federal courts have limited the application of anti-SLAPP regimes in other ways as well. For example, in *Globetrotter Software, Inc. v. Elan Computer Group, Inc. et al.*, the court held that the Anti-SLAPP statute is not applicable to federal claims in federal court, but rather only to state claims asserted in diversity cases or pendant to a federal claim.[140] Anti-SLAPP motions are not available in bankruptcy court.[141] The Ninth Circuit has also held that plaintiffs may file an amended complaint in the face of an anti-SLAPP motion to strike because not allowing a plaintiff to file an amended complaint "would directly collide with [Rule] 15(a)'s policy favoring liberal amendment."[142] Thus, a duplicitous SLAPP plaintiff can amend until finding a theory that can avoid the federal standard either for failure to state a claim or for summary judgment.

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137. Bulleting Displays, LLC v. Regency Outdoor Adver., Inc. 448 F. Supp. 2d 1172 (C.D. Cal. 2006).

138. *Id.* at 1180.

139. *Id.*

140. Globetrotter Software, Inc. v. Elan Computer Group, Inc., 63 F. Supp. 2d 1127, 1130 (N.D. Cal. 1999); *accord* American Dental Ass'n v. Khorrami, No. CV 02-3853 DT(RZX), 2002 WL 32875154 (C.D. Cal. Nov. 18, 2002); Condit v. Nat'l Enquirer, 248 F. Supp. 2d 945 (E.D. Cal. 2002) (Court held that the anti-SLAPP suit statute did not apply and denied defendant's request for summary judgment and attorney's fees.); Optinrealbig.Com, LLC v. Ironport Systems, Inc., No. C 04-1687 SBA, 2004 WL 1737275 (N.D. Cal. July 28, 2004); IDEC Corp. v. Am. Motorists Ins. Co., Inc., No. C 02-1723 JF (RS), 2006 WL 2255235 (N.D. Cal. Aug. 7, 2006); Best v. Hendrickson Appraisal Co., Inc., No. 06-CV-1358 W(JMA), 2007 WL 1110632 (S.D. Cal. Mar. 28, 2007) ("Because federal law does not incorporate the California anti-SLAPP statute, the court will deny the special motion to strike").

141. *In re Bah*, 321 B.R. 41 (9th Cir. 2005).

142. Verizon Delaware, Inc. v. Covad Communications Co., 377 F.3d 1081, 1091 (9th Cir. 2004).

V. Conclusion

Federal district courts sitting in diversity should view anti-SLAPP regimes as the substantive law in which the district court sits. These legislative schemes should be viewed as providing the SLAPP defendant with qualified, substantive immunity to be free from having to litigate in the first instance. Those federal courts that reduce an anti-SLAPP motion to strike to a Rule 56 summary judgment do violence to the state legislatures' principal aim of rendering SLAPP defendant/targets immune from SLAPP suits. This is so because Rule 56 requires that substantial discovery must be done before the court will entertain such a motion. Therefore, the SLAPP defendant/target is required to incur exactly what legislatures sought to avoid. The federal scheme forces the defendant/target to litigate a meritless suit brought not for purposes of winning the lawsuit, but rather to harass the defendant/target and drain economic resources in the attempt to chill Constitutionally protected activity or speech.

Moreover, ignoring anti-SLAPP legislation in favor of the Federal Rules of Civil Procedure also requires that the district court ignore *Erie* and its progeny. The federal policy adopted by the courts following *Metabolife* greatly increases the chances that a SLAPP plaintiff will choose a federal forum because the federal forum likely will not provide the SLAPP defendant/target with the protections the various state legislatures intended.

Likewise, principles of federalism strongly suggest that federal district courts sitting in diversity should apply anti-SLAPP laws as substantive laws. To do otherwise would be to thwart the state legislatures in the twenty-three jurisdictions in which Anti-SLAPP schemes exist.

Perhaps of even greater concern is that the *Metabolife* line of cases not only greatly undermine *Erie* and its progeny, but the emerging federal doctrine encroaches dangerously on state sovereignty. States have a strong interest in protecting their citizens from meritless, harassing litigation which chills activity that is otherwise protected. Federal courts should not ignore the legislation that provides that protection.

Learning From Failure: A Roundtable on Criminal Justice Innovation

Greg Berman[1]

Criminal justice literature is full of "best practices"—depictions of how drug courts reduced recidivism, or how COMPSTAT[2] helped lower crime rates in New York City, or how DNA testing enabled a culprit to be nabbed. And rightly so: success in any endeavor is difficult to achieve and deserves to be celebrated. This is especially true in criminal justice, where for too long practitioners labored under the widespread assumption that "nothing works" and that it was impossible to reduce crime or change the behavior of offenders.

In general, it is human nature to shout about new ideas that have succeeded—while failure is discussed in hushed whispers, if at all. In truth, we know that it is impossible to

1. Greg Berman is the Director of the Center for Court Innovation. He would like to thank Adam Mansky and Phil Bowen, an official from the British Home Office who spent a year "on secondment" at the Center for Court Innovation, for helping to put together the roundtable that served as the basis for this article. Adam and Phil performed the difficult intellectual task of laying the groundwork for the conversation, identifying participants and defining a set of questions to be addressed. They also did the hard organizing work of getting everyone to the table and ensuring a smooth and productive event. Neither the roundtable nor this edited transcript would have been possible without them. Thanks also to Domingo Herraiz of the Bureau of Justice Assistance for helping to conceive this project over dinner at a Greek restaurant in Hell's Kitchen; to Julius Lang, Elizabeth Griffith and Kim Norris for their help in fine-tuning the project; and to Frank Hartmann for his masterful work in facilitating the day-long event.

2. COMPSTAT is the utilization of Computerized Statistics during weekly Crime Control Strategy Meetings in an effort to provide commanders with the knowledge necessary to manage their commands while also providing a convenient forum to express which tactics succeed or fail. NYPD, http://www.nyc.gov/html/nypd/html/chfdept/compstat-process.html.

have trial without error. No one is perfect. Nearly every criminal justice agency has attempted projects that have fizzled or failed to meet expectations. If we want to encourage criminal justice officials to test new ideas and challenge conventional wisdom, we need to create a climate where failure is openly discussed. We need to learn from our failures (and partial successes), examining whether an initiative works for some groups but not for others and figuring out what was wrong with the underlying assumptions that led us to try such an approach.

Unfortunately, the little public discussions there are of criminal justice failures tend to focus on corruption, gross incompetence or specific cases with tragic outcomes. While these kinds of errors should be publicized (and, needless to say, avoided), they typically offer few meaningful lessons for would-be innovators. Far more helpful would be a probing examination of the kinds of failures where decent, well-intentioned people attempted to achieve something noble and difficult but fell short of their objectives for whatever reason.

In January 2007, the Center for Court Innovation and the U.S. Department of Justice's Bureau of Justice Assistance set out to conduct just this kind of an examination.[3] The two agencies jointly convened a day-long roundtable in New York that brought together judges, court administrators, probation officials, prosecutors, police chiefs and defense attorneys from across the country to discuss lessons they have learned from projects that failed. The goal of this effort was not to give out grades, point fingers or assess blame. Rather, the goal of the roundtable was to gather experienced and thoughtful criminal justice professionals to take a deeper look at failed reform efforts and attempt to extract concrete lessons that might aid the next generation of innovators, as well as those who authorize and fund innovation. In so doing, the Center for Court Innovation and the Bureau of Justice Assistance sought to send a mes-

3. The failure roundtable is one of a series of roundtables convened by the Center for Court Innovation that have brought together practitioners, policy makers and academics to examine controversial topics in criminal justice and court administration. Past events have been devoted to thinking through such topics as how to define community justice, how courts should respond to low-level domestic violence cases, how to "go to scale" with drug courts, and how judges and attorneys can address ethical challenges in problem-solving courts. Center For Court Innovation, http://www.courtinnovation.org/.

sage that failure, while not desirable, is sometimes inevitable and even acceptable, provided that it is properly analyzed and used as a learning experience.

The roundtable, which was moderated by Frank Hartmann from Harvard University's John F. Kennedy School of Government, unfolded over the course of eight hours at the Center for Court Innovation's headquarters in midtown Manhattan. As is typical of events that bring together experts from different disciplines and different parts of the country, consensus proved elusive. Nor is it possible to reduce the conversation to a handful of simple answers—the causes of any individual failure are too complex and idiosyncratic to yield easy generalizations. Context matters. What works in one setting might prove disastrous in another—and vice versa. As the singer Billy Bragg once declared, "You can borrow ideas, but you can't borrow situations."[4]

For all of the above-mentioned caveats, the roundtable unearthed a rich array of perspectives about the subject of failure. The edited transcript that follows has been organized into five subject areas based on the topics that generated the most intense conversation over the course of the day-long roundtable:

Promoting Self-Reflection – The participants in the roundtable talked at length about how to balance two competing values of vital importance to successful criminal justice innovators: self-examination and relentless determination. Liz Glazer of the Westchester County District Attorney's Office started the day by talking about her desire to encourage criminal justice actors to be more thoughtful and to use data when identifying priorities and crafting policy. Other roundtable participants acknowledged the desirability of this as an aspirational goal. They highlighted the real-life difficulties that prevent most criminal justice officials from realizing the goal, including the daily pressures of managing large bureaucracies, a cultural suspicion of anything "academic," and the need to achieve visible results in order to meet the demands of the public, the media and political officials. Often, innovators find that they must sacrifice introspection in order to aggressively market their ideas and

4. BILLY BRAGG, *North Sea Bubble*, on DON'T TRY THIS AT HOME (Elektra Records 1991).

galvanize crucial allies. As one participant noted, "the only time real change occurs is when there is a maniac on a mission."[5]

Getting the Right People to the Table – The question of how inclusive to be during the planning of a new project generated significant debate among roundtable participants. Some participants, including Jo-Ann Wallace of the National Legal Aid and Defenders Association, argued forcefully in favor of broadening the representation at the table, highlighting the value of two often-overlooked groups in particular: local residents and rank-and-file criminal justice staff. In making their case, these participants pointed to failures that stemmed from agency leaders formulating decisions in a vacuum without relevant information that could be provided by outside parties. In response, several other roundtable participants, most notably Ron Corbett of the Massachusetts Supreme Court, talked about the dangers of being over-inclusive. They pointed out that the larger the group, the more difficult consensus is to achieve. Still other participants noted that every voice is not created equal—often, it is only budget officials and political leaders (elected prosecutors, mayors, chief judges) who wield the necessary authority to make change happen.

Defining Success, Recognizing Failure – One of the principal challenges standing in the way of successful reform efforts that the group identified was the "win-lose" nature of much of what goes on within the criminal justice system. Put simply, the players that comprise the system (prosecutors, police, judges, probation, defense attorneys, corrections officials, pretrial service agencies and others) often have competing agendas. As Michael Jacobson of the Vera Institute of Justice noted, "Failure depends upon where you stand." While all of the various agencies might agree on broad goals like reducing crime or promoting fairness, once the conversation moves to concrete strategies to achieve these goals, the consensus quickly evaporates. Phil Messer, the chief of police in Mansfield, Ohio, highlighted this reality when he talked about how a success for the

5. *See infra* p. 10 (Ronald P. Corbett *quoting* PETER F. DRUCKER, ADVENTURES OF A BYSTANDER 255 (John Wiley & Sons, Inc. 1998) ("Whenever you find something getting done, anywhere, you will find a mono-maniac with a mission.")

police (such as making more drug arrests) was viewed as a failure by prosecutors, who struggled to handle the new cases flooding their dockets.

Identifying Specific Examples – As facilitator of the roundtable, Frank Hartmann made a deliberate effort to push participants to go beyond bland platitudes and banal generalities. In general, the participants in the conversation rose to the challenge, talking frankly about specific examples of failures that they had been involved with either directly or indirectly. These included reforms designed to link prostitutes to long-term drug treatment, to improve the processing of felony cases and to enhance probation supervision of offenders. Implicit in this part of the conversation was the idea that it is possible to survive failure. While no career can survive a steady diet of failure, the participants in the roundtable—each of whom has risen to a position of prominence in his or her chosen profession—are living testimony that failed experiments do not always lead to ruin.

Learning Lessons – At the end of the day's conversation, participants attempted to distill their experience into pragmatic advice for would-be innovators. Tim Murray of the Pre-Trial Services Resource Center summarized the feelings of many when he said, "I disagree and agree with almost everything that's been said [today] because there is no universal truth in this business." While the roundtable did not produce any universal truths, it did highlight several distinct tensions that have to be managed thoughtfully. These include the tensions between a top-down and a bottom-up approach to change, between an inclusive approach to planning and one that emphasizes the use of "small platoons" of like-minded people, between engaging in self-reflection and being a cheerleader for reform, and between how success is defined for the criminal justice system and how it is defined for the individual agencies that comprise the system. While the answers will vary from place to place and project to project, few innovators can avoid having to make thoughtful choices among these options.

Building on these themes, what follows are selected highlights from the Center for Court Innovation and the Bureau of Justice Assistance's roundtable conversation about failure and criminal justice reform.

ROUNDTABLE PARTICIPANTS

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PROMOTING SELF-REFLECTION

HARTMANN: Let's begin by talking about a common tension faced by many innovators between the need for relentless determination and the need to occasionally pause and reflect to make sure the ship is pointed in the right direction. How do you achieve the proper balance?

GLAZER: I have an example of this tension—and a potential failure—that I want to tell the group about. I want to preface it by saying that law enforcement agencies are under enormous pressure to live in the moment. Whenever something horrible happens, [such as] a murder for example, there has to be an arrest. That is a demand that is rightly made by neighborhoods that are plagued by crime. Along with a need for constant action, I think there is also a real suspicion within many law enforcement agencies of reflection, of academia, of gathering statistics. The word "planning" can make people run screaming from the room. In Westchester, New York, we have a single prosecuting authority but we have 43 police departments. The district attorney I work for is newly elected so there is a real opportunity as she comes in to reorganize how things are done and to work with all 43 police departments collectively to solve the county's crime problems. However, in order to do that, we actually have to know what the problems are. And in order to know what the problems are, [we] have to check the data. At this point, I've lost a lot of my audience of chiefs and commissioners who are not terribly interested in planning. I think if you can show that gathering data helps solve crime in the here and now, then you can buy yourself time to have a real planning process. For me, this is an example of the kind of tension that Frank mentioned. In the law enforcement community, we always have to do something right now, but we don't always know enough to do something right now.

CORBETT: I think we need to acknowledge that there is a degree of cultural suspicion. I remember 15 years ago talking with other probation executives about how little practice was informed by any of the readily available academic resources—and I don't think things have changed very much since then. There was almost a complete disconnect between practice and the parallel universe of research.

SIEGEL: It reminds me of when I was at the New York City Department of Probation. We tried to make the argument that if the City would make a modest investment in probation, the savings would be enormous to other parts of the system. We thought that was a very persuasive argument, but it never prevailed. You need a commitment from the powers that be and we didn't have enough juice to secure it. I think many initiatives die because they're the beneficiaries of lip service from the top rather than a genuine commitment.

KEATING: The probation department in New York has had a lot of innovative ideas over the last decade—most of which have gone no place. My own perception of that agency is that it is pretty much politically powerless.

JACOBSON: You really can't talk about any of this stuff outside [of] political context. That is how success or failure happens. I don't think there is a lot of tolerance for failure in government, certainly not at the executive levels, because you can't take the politics out of the stuff. I don't think there is a lot of self-reflection. In general, if your plan fails, you are done. It's very tough to reconcile the highfalutin' rhetoric that we're using here today around failure with the practical, political, budget-driven reality of government. I think Liz's project to convene the police chiefs in Westchester is doomed to failure. If the goal is to create some sort of seamless web of communication, that is just not going to happen. I don't think the DA's moral authority alone is enough to get 43 police chiefs on the same page. It's simple math. If you are trying to do some big thing with 43 different entities, whatever it is, its not going to happen equally across all 43.

COOK: One of the challenges that I think Liz faces is that it is enormously difficult to build momentum for reform absent an immediate crisis. How do we improve the system without massive public support for dramatic change? It's like judges trying to improve the number of trials that are conducted. It's a wonderful goal, but no one much cares about it other than judges and attorneys. The public certainly doesn't—absent some horrific incident where a defendant is released because he or she was not tried in time.

HARTMANN: So Liz is doomed to fail?

COOK: No, she is not going to fail because the process of getting the police together with the DA on a regular basis and pushing towards a common goal will have an incremental positive benefit in the long run, but perhaps not the immediately huge benefit we'd all like to see.

MURRAY: When you are charging up the hill, do you ever really have time to stop and say, "Hey, am I going in the right direction?" In my limited experience, the answer is no. Say I've managed to convince a whole bunch of people to take a risk with me, to charge up the hill. The second I say, "Gee, I don't know, are we doing the right thing?" is when I lose them all. And I don't just lose all of them just for that initiative, I lose all of them for the rest of my professional life.

MANSKY: Tim hits the nail on the head. When you are trying to make the case for reform, to marshal your forces, you want to put your initiative in the best possible light. You want to show that your new program will work. But I think that often comes at the expense of self-reflection and continuing to improve. I don't think any of us want to end up being cheerleaders with no credibility.

SCHRUNK: How do you create the space for self-reflection? As a newly elected DA, I quickly discovered that before I started any project, I had to plan in advance for some early wins. You've got to market change. I found it enormously helpful to pick off low-hanging fruit and have some short-term successes that would help me build toward the larger, ultimate goal. You have to feed the beast. You have to show the public, the elected officials, your key constituents, that you are making progress. Otherwise, they won't have the patience to help you reach your ultimate goal. And if you get one or two of Liz's 43 police chiefs to have some immediate success, other people are going to look at it and say, "I want to be part of that success."

GETTING THE RIGHT PEOPLE TO THE TABLE

WALLACE: I would argue that you increase the likelihood of failure if you don't have the right people around the table. You

could have the right goal, but if everyone who needs to be there to address the goal isn't at the table in the planning stages, then you can still fail. And often we don't make a place at the table for the people from the community in which the problem lies. As an example, in Washington DC, we had to really battle to get some community representatives on our local criminal justice coordinating commission. When the commission looked at escapes from a local halfway house, the community representatives brought a unique perspective to this conversation. They said to all of the criminal justice agencies at the table, "Wait a minute, have you ever stepped foot in the halfway house?" They identified a number of concrete reasons that may have contributed to people leaving. For example, for the first three days of residency, you have to stay in the house. So if you have a job, you just lost your job. Without the voice of the community, I don't think that the response of the commission would have ended up being as effective.

GLAZER: I think we sometimes make a fetish of getting a lot of people around the table and then the problem is, "Okay, now we're all around the table. What do we do?" The goal has to be incredibly concrete and every person has to have a self-interested reason why they're around the table.

JACOBSON: Sometimes the only way to overcome the system's inertia and the self-interest of all the parties is not by getting people to come to the table. It's by hammering people essentially into submission.

CORBETT: I think there are myths about how to achieve change. I would propose that one of the myths is that you have to have the right people at the table.

HARTMANN: Why do you think that isn't really important?

CORBETT: Because you can't get the big elephants in line easily, and you'll wear yourself out trying. Success is often a zero sum game. Success for one agency will inevitably be a loss for another. In my 33 years, I've never seen real change come about from getting everyone at the table. Every time you add another big agency to your planning effort, the difficulty of getting people to agree and to coordinate goes up geometrically. As a result you are doomed before you start.

HARTMANN: Tell us the opposite way to proceed.

CORBETT: Little platoons. You bite off a small piece of this giant system and go after people that you know have both the will and the political power to make change happen. You find little corners of entities—what some have called "skunk works"—and you find staff with energy, ambition and talent. You experiment at the margins. You come out with a little product such as one drug court in the corner of the state rather than trying to get the entire statewide judicial infrastructure to agree they want to move forward with a specific solution. You get that first drug court and then you tinker with it. When it succeeds, all of a sudden one thing leads to two, leads to four, leads to ten.

JACOBSON: There are a lot of ways to do systematic change. I think you can do it by getting everyone at the table. However, as a former budget official, I'm pretty cynical myself about that approach. As a budget official, to be totally honest, I was able to get a lot done with absolutely nobody at the table.

GLAZER: I'm with Ron Corbett 100 percent. He is absolutely right as far as the little platoon. From the example we started with, I can tell you that with 43 police chiefs, it is like herding cats. You can't do it. When you have a multitude of people at the table, it's usually a disaster. But I think you can start with a small group of like-minded people, build up some momentum and hopefully attract the rest to join you. At the end of the day, everything is personal. There's nothing wrong with jump-starting the process by working with people who you already have a good relationship with for one reason or another. Sometimes you have to kind of dip your toes in the water before you take the plunge.

KEATING: Often the best ideas fail because we have not gotten a buy-in from the people that do the work. In the past, some great ideas have died a stillborn death because line staff would hear about them and say one of two things: (A) "We don't think that is a great idea so we're not going to do it." Or, (B), "We know [that] if we stall, there will be another commissioner and he will have a whole new set of ideas." For me, it always comes back to trying to figure out what is in it for the people

that do the work. How are we going to improve the quality of their workday? Unfortunately, a lot of times the new ideas we come up with create more work for people. When you stand in front of a probation officer . . . with these great ideas he is going to say "You're telling me that now I have to go to court more often or write more reports and I have to see probationers much more frequently? It's much easier for me to violate people and run to court and drop it in the judge's hands than to spend a lot of time working with people who are failures." Often, what looks like programmatic failure is really a crisis of marketing.

MESSER: One of the underlying themes to the conversation so far is the importance of communication. Often we fail to communicate with the troops in the trenches about what we're doing and why we need to do it. When we looked at our failures and traced them back, we often found a gap in communication between leadership and the people actually charged with doing the work. And the feedback we get from the folks on the frontlines is that, "If we had understood why you were doing this, we could have probably done things more efficiently."

CORBETT: The top-down model of change is more difficult than bottom-up change. For me, a better way to go is to catch some of your best line people doing something right by going around your organization looking for innovation at the street level. Shine a light on it. Reinforce it. Take those people and move them around the organization, give them a lot of credit. At the end of the day, you will have an innovation that has street credibility because it has already been practiced. Peter Drucker once said, "The only time real change occurs is when there is a maniac on a mission,"[6] and I believe that.

SCHRUNK: I love people who want to do the right thing for the right reason. I call them do-righters. I also have learned that sometimes people want to do the right thing for the wrong reason. The wrong reason could be [that] there is a pot of money to be divided. It could be the desire for a front-page headline. It could be that a commissioner needs an issue to get elected or even that a DA is on a crusade to be a congressman.

6. PETER F. DRUCKER, ADVENTURES OF A BYSTANDER 255 (John Wiley & Sons, Inc. 1998) ("Whenever you find something getting done, anywhere, you will find a mono-maniac with a mission.").

So I think we need to figure out what buttons are going to bring people in.

CORBETT: This leads me to another myth. And that is that people are interested in positive change. By and large, this is simply not true. In general, when you introduce the notion that criminal justice agencies ought to change the way they do things, this is treated as a toxin rather than a wonderful opportunity to move things forward.

MURRAY: I feel very conflicted listening to you guys. I disagree and agree with almost everything that's been said because there is no universal truth in this business. I think people who are good at making change—systemic or otherwise, because sometimes you can pull off larger reform—have a gift for figuring out who they need at the table and how to convince them that change is in their interest. And folks, if I can't do that, I don't have an idea that is going to work. The trick is to manage all of this without selling my soul. I can't say, "Oh no, so-and-so is not on board unless I wear shorts. . . . Okay, everybody go change into your shorts." And then all of a sudden you don't remember what the initial idea was. That is flat out failure too.

DEFINING SUCCESS, RECOGNIZING FAILURE

PARKER: What we often fail to do in government is to identify very clearly what the goal is. And for us in criminal justice, the goal is simple: to reduce crime. When you start talking about sharing information, why is that important? Well, that will reduce crime. Just connect the dots. Why should we collect DNA in a timely fashion? Because it can reduce crime. Everything has to be explained in terms of a clear goal, which we all share.

CORBETT: I'm not sure most criminal justice agencies recognize failure, let alone understand it. It is not my impression that most criminal justice leaders walk around having a clear notion in their mind as to whether they're succeeding or failing, other than in the most gross ways: "Is the newspaper running me down? Am I about to be indicted? Is the money missing?" That is not what we're talking about here today. Can we even recognize failure when it occurs so we can come to understand

it? Maybe I'm wrong, but I don't think it's common for any branch of criminal justice to engage, in any routine way, in after-action analysis. The U.S. Army model is that when something doesn't work the way you want it to, you should spend a little bit of time unpacking it so as to understand it and not repeat the same thing.

HARTMANN: Any reactions to Ron's point about the inability to recognize failure?

SCHRUNK: One challenge is that it's often difficult to recognize that within successes there are failures. We may have taken the hill, but we paid a horrible price climbing it.

MESSER: For us police chiefs, to recognize failure is not too difficult: we look at crime rates. The challenge is that law enforcement is often quick to blame others for their failures. It's easy to say, "The prosecutor dealt the case away," or "The judge let too many people out," or "The probation department failed." As a police chief, I can recognize failure based on what is occurring in my city. But if we're not happy with the answer, people are pretty quick to say, "Okay, now whose fault is this?"

SCHRUNK: What this highlights for me is the dynamic tension that exists between system success and the success of individual agencies. It's one thing to articulate clear goals and clear messages about improving the system of justice or reducing crime or what have you. But once you get past broad, systemic goals to actually come up with real, concrete strategies, you often find that my success is your failure. For example, if pretrial services succeeds in getting more people out of jail, they might define that as a success, whereas the local police force or prosecutor might not see that as being in their interest. So the tension that exists across roles when you are trying to do system-level improvements is really palpable. It is very difficult to get everybody at the table to agree on specific strategies, because a lot of times they see it as, "If you win, then I lose."

BOWMAN: Mike Schrunk is absolutely correct. I believe that there are two sometimes conflicting goals. One is reducing crime and the other is the administration of justice. And unless we resolve these conflicting goals, we're going to continue to

fail as a system. We call this a system, but of course there is no individual point of accountability for the entire system.

JACOBSON: Failure depends upon where you stand. I think of the issue of technical parole violations. To me those are failures, but if you ask parole officials they will say, "No, that is a success. We caught that guy before he was going down a slippery slope and slammed him back into prison." Not a speck of research says this is even remotely true. Take a place like California. There are 120,000 people on parole in California and each year they send back 70,000 for technical violations. They go back for an average of two and a half months at a total cost of almost a billion dollars. So you ask someone like me, and I say, "Who would spend a billion dollars sending 70,000 people back to prison for three months?" Who could possibly say that if we have a billion dollars to spend on law enforcement, what we want to do is catch 70,000 parolees after they test positive for drugs and slam them back into prison for two and a half months? But for parole officials in California, it's a success. You are getting people off your caseload. You're doing good law enforcement work. And you are minimizing your political risk. Meanwhile, the corrections people go berserk, because they have to spend a billion dollars on technical violators. The issue of whether that is a success or failure, is a really interesting, very highly politically loaded question.

SCHRUNK: I think of the young men and women that I hire, they want to slug felons. They want to put notches on their belts. They want to get the maximum punishment. It doesn't matter whether it's for a misdemeanor or property crime or violent crime. They view that as a success. I think that is wrong. So our individuals, we have a whole bunch of agencies that have individual criteria for success. Sometimes I think taken together, they contribute to overall failure.

PARKER: We are paid by tax payers to reduce crime. We're all in the public safety business. Although it's a challenge, when we work together, crime is going to go down. Where is it written that everyone gets to set their own goals? At the New York State Division of Criminal Justice Services, we made it a condition of all of our grants that you have to share information

across agency lines. That is now a condition of funding. If you don't do it, you lose.

CORBETT: Apart from the police, I don't think the rest of us have been very good about specifying what it is we are trying to achieve, and the failure to do that makes it difficult to recognize either success or failure.

NEWTON: If you said to me, is the criminal court of the City of New York working? I would say, yes. We resolve cases and controversies and we do that well. But I think the public has a very different set of expectations about what they want courts to do. If you speak to the administrators and judges, they would say, yes, we are meeting our mandate, but the public perception might be very different.

WALLACE: I actually think that in many instances the public has a greater understanding that failure is a part of success than we do. For example, from the drug court experience we learned that relapse is often a part of rehabilitation for drug addicts. We had to do a lot of work to train prosecutors, judges, defense attorneys to accept the reality of relapse, but a lot of the general public already knows this intuitively because they've seen their sons or daughters or cousins go through treatment and recovery.

FUSTER: In Puerto Rico, we have had a drug court for 12 years now. At the beginning it was only one district, now it's in every district. And it would appear that they're very successful. Those that graduate from the drug court program have a low recidivism rate. But only 25 percent of all of those that could have gone through the drug court got to the drug court. So the recidivism is very, very low, but maybe those guys were going to behave anyway, with or without the drug court.

MESSER: With drug courts, the fear of failure is almost corrupting the process. Sure, there's a high success rate. But I can remember asking, "Why don't you take this guy, or that guy, into drug court?" The answer was, "No way. We don't think that guy is going to make it and we don't want him showing up on our stats."

HARTMANN: I want to come back to this issue that a win for you is a loss for me. What happens if Phil Messer arrests a

bunch of people and shoves them into the court system. That's a win for him, he looks good. But all of a sudden the media is all over the court and the prosecutor for not moving the cases fast enough.

MESSER: We see it all the time in Ohio. I have a drug task force that I oversee. We have been very successful in making more arrests. But the second we do this, my phone starts ringing off the hook from local prosecutors who say, "What are you doing? Slow down on your arrests because the system can't handle it." Conversely, the court's success could be my failure. If we're not arresting people the way we should, the courts are able to keep up with their dockets, they're able to move cases on time. So there has to be a balance.

COOK: I can think of a couple of other examples, mainly prison and jail overcrowding. Right now, in Alabama, we are working to reduce overcrowding, but at the same time, we have some real public safety problems that need to be addressed. Our police chiefs are under a lot of pressure because of spiraling murder rates. So part of the system is busy working on how to get people out of jail and prison and back into the community faster. And there are plenty of communities that are not really interested in accepting these people back on their streets. So there is a lot of tension between the effort to solve prison overcrowding and local communities concerned about crime.

MURRAY: When you talk about judging the success or failure of new programs, you have to acknowledge that the status quo is not in fact a success. When you introduce a reform, the grading system is always applied to the innovation, but it's never applied to the status quo. The status quo is not something I would want anyone to aspire to.

KEATING: The manifest failure of the status quo helps make the case for change a lot easier. When we first started the Midtown Community Court [in New York in 1993], we based it on the fact that virtually any new way of doing business would have been better than the standard operating practice at that time. The criminal courts were dismissing 55 percent of the cases and no one was going to jail. So the standard we used as

our argument to do something different was the total bankruptcy of the system that was presently operating.

MURRAY: Usually change is being introduced to something that is already failing. In fact, because it's failing, you are trying in your own humble way to offer some kind of remedy. Because of this, you are put under the microscope, as you should be, to see if this change makes things better or worse. I remember testifying before Congress and somebody asking me, "Would an appropriate measure of the effectiveness of [the] drug court be to follow people around for seven years after they graduated and then have them pee in a cup and run a records check?" I said that that was an absolutely exquisite standard, but, if implemented, then we should do the same thing with people released from prison so that we get to compare.

IDENTIFYING SPECIFIC EXAMPLES

HARTMANN: What I would really like to hear now from you are specific examples of failures that you've either seen or been part of first-hand. I think it is important to send the message that it is often possible to fail and still survive to fight another day, provided you learn the right lessons.

KEATING: This goes back some time, but at one point in the early 1980s we were trying to do nighttime jury trials in felony cases in Brooklyn. This was an answer to a specific problem—we were having trouble getting defendants to trial in a timely fashion. And we thought if we did trials at night, there would be fewer distractions for the judges and it would be more convenient for witnesses to testify. We did the project for about a year and a half, maybe two years. And as it turned out we did try cases much more expeditiously. However, everybody involved in the system hated it. The lawyers hated it. The jurors hated it. Even the complainants whom we thought would benefit the most didn't like it. The only one who liked it was me, and of course I took great delight in saying, "This is a success, why doesn't anyone agree with me?" In the final analysis, we had not done enough talking to the attorneys. What we all forgot, was that most criminal attorneys do their office work between 4pm and 7pm. That is when they see clients. That is

when they prepare for their other trials. So this added responsibility was not such a great idea from their perspective. On reflection, we didn't really talk to the people seriously.

NEWTON: I want to share a failure of my own. Many years ago, the courts in New York came under court order to reduce the arrest-to-arraignment time to under 24 hours. Judge Keating, who oversaw the criminal courts at the time, was able to take the average from five days to 24 hours. So when I inherited the job a few years later, I decided that I would try to take it a step further by saying we no longer want to achieve an average of 24 hours but rather we want to ensure that every individual defendant is arraigned within 24 hours. Well, talk about an idea that went over like a lead balloon. People told me flat out, "It's too much to do. We're already doing some good and we don't want to do any more good." I was totally taken by surprise. We had the right people in the room. We had a financial incentive, because if we don't meet the court-imposed mandate, there are tremendous fines. Moreover, if we end up having to release people on the streets, it's a public safety issue. But it was a poorly conceived plan.

MURRAY: Sometimes you can pull the plug too early. I had a program in Miami. After the initial success of the drug court, law enforcement came to us and said, "You know, along a particular roadway in Miami, all of the prostitutes that we pick up have drug paraphernalia. Why don't you do something about it?" We said, "Absolutely." And so we started a new program. We took in 60 women, and 60 women absconded. That is failure. It scared us to our toes. We worried this failure would have a ripple effect on all of the other efforts underway to promote drug treatment within the justice system. So we chickened out. We pulled the plug. I think any time you pull the plug on a program, successful or failed, without taking the opportunity to see what was learned, you botched the job. We went back and found those women a year or so later and discovered that many of them had children, which ultimately was the cause of the failure of that program. They had children, and we were putting them in residential environments or therapeutic communities, which often required them to leave their children. So their fear of leaving their children and of the

government getting its hooks on their kids was a totally understandable fear and one that we could have programmed for if we had more awareness of what was being taught to us. So the real failure wasn't that 60 women absconded. The real failure was that we were so shocked by it, that we shut the program down and didn't use it as a learning opportunity.

SIEGEL: In New York City, there are something like 60,000 probationers. Someone is on felony probation for five years, and for the last three of those years, probation supervision is not terribly onerous. When I was at probation, we hoped they didn't re-offend, but if they didn't, it wasn't because we were doing anything affirmative to make that happen. Given this, we thought that we should find a way to move them off probation supervision earlier so that we could spend more time with people who we knew were more likely to fail, because the research, such as it was, very clearly stated that most people who fail do so within the first six months to a year. But the resistance to this idea was uniform. Politicians opposed it. Judges didn't want to sign off on early discharge applications. We wanted to do a better job with those probationers that we could influence, and nobody was interested. So I think sometimes failure is a product of the inability to articulate an argument and to marshal the right constituents to get behind it.

JACOBSON: When I started in the budget office, I wanted to speed up the processing of felony cases in New York City, which is an incredibly mundane goal. I can tell you first-hand that no one cares about it. And the reason I was so interested in it was that there are thousands of people who are stuck on Rikers Island simply because it is taking an excessive amount of time to process their cases. I thought that if we could speed up the process, then we could save literally hundreds of millions of dollars in incarceration costs, and that the mayor could take that money and put it in early childhood education. It just makes you cry, it's all so beautiful. But we couldn't do it because everyone was so invested in delay. It works for everyone. The prosecutors loved it. Judges didn't mind it. No one thought it was a particular problem and as much as we tried to push on all of those parties, to tell them that it was actually in

their self interest to do this, or simply to bribe them, nothing worked.

WALLACE: When I was at the public defenders' service in Washington, DC, I came to the conclusion that we were devoting the lion's share of our resources to felony cases at the expense of working with juveniles. Research tells us that is upside down. Prevention is critical. Many public defender offices train people by putting them in juvenile court first and then letting people work their way up to handling serious felonies. Our juveniles were suffering to some degree because people weren't staying in the juvenile court long enough to understand how kids think and the difference between children and adults. So my goal was to create a unit with special training for lawyers and wrap-around services for juveniles. Anyway, long story short, when I made the decision to leave the defenders office, the initiative just stopped.

COOK: Back in the early '90s, a friend of mine authored a piece of legislation called the Mandatory Drug Treatment Act.[7] In the process of signing up sponsors, we went to the administrative office of the courts. They agreed to sign on because they saw the bill as a vehicle for authorizing DUI schools. Thanks to their support, the legislation passed. It enabled folks around the state to set up DUI schools, which use the leverage of the criminal justice system to get people to pay them lots of money. The original intent—to promote the use of treatment—was never realized. It goes to show you how a good idea in the hands of a naive innovator can go wrong. We were naive about the politics.

MURRAY: There is another kind of failure that's worth talking about and that is when reforms ultimately become the very thing they sought to reform.

HARTMANN: Give us an example.

MURRAY: Drug courts. Drug courts have gotten so rigid in some places and so committed to maintaining an artificially high success rate. Bail reports are another great example. For many years, people were held in jail pending trial, despite the

7. S. 912, 110th Gen. Assem., Reg. Sess. (S.C. 1994).

presumption of innocence, only because they didn't have money in their pocket to pay bail. Not so long ago, some people got together to reform that. Let's collect information, do risk assessments, suggest ways to manage risk and give that to decision makers. Great. That is a reform, that is a fix. That is a success. Then over time as these programs get embedded more and more in the status quo, success becomes defined not by how many people get released but on the size of the agency budget. And success gets defined by the ability to stay out of the public view, to avoid controversy. And pretty soon, I tend to become more and more chicken, and then pretty soon I don't recommend anyone for release.

LEARNING LESSONS

HARTMANN: We've talked about some examples of failure. In the time we have left, I want to focus our attention on the lessons. Imagine that your brother or your sister who is 15 years younger than you was going into this business—what advice would you give him or her?

KEATING: When you are dealing with reforming large institutions in the criminal justice system, sometimes you need large people. You can talk about doing a platoon and all of this other stuff at the margins, but unless you have a mayor or a chief judge or someone with an enormous amount of political capital who is willing to go out and embarrass other people, change will not occur.

CORBETT: I don't know if you know a book called "Street Level Bureaucracy,"[8] but it argues that all public sector organizations are really run by line staff. Don't fool yourself that you can run a public sector organization from the top.

BOWMAN: I agree the rank and file have to be on board but sometimes the top has to show leadership. The rank and file are not always in a position to fully understand the program or potential results. But the rank and file, if not brought on board, can kill an otherwise good program with good potential. So I

8. MICHAEL LIPSKY, STREET LEVEL BUREAUCRACY (Russel Sage Found. Pubs. 1983).

think it's important that if you are introducing a new innovation to maybe go with the early innovators, those few key people who are willing to take a risk. And that buys you time to bring the rest of the rank and file into the picture.

MURRAY: One of the lessons that I have learned, first and foremost, is that the criminal justice system is a monster and [that] it has an amazing ability to regain whatever shape and behaviors it had before you started poking at it. So if anything, you never achieve the change you intended, and it's unrealistic to expect to. But that can't deter you from tilting at the windmills.

JACOBSON: Failure may be important to the natural process where you learn and eventually get to success. But that does not comport easily with the trend in government to get more and more specific about measurement and deliverables. Many government funding contracts are now performance-based and they're very specific. I yearn for the good old days where government could just dispense a bucket of cash, but those days are over. Today, there is less and less wiggle room. No one wants to give tax-payers' money out to just anyone or to tolerate cruddy performance. Even if you can get a government official to understand that you are dealing with a complicated problem and you are making progress, if you aren't meeting your deliverables, forget about it. So if we want to understand failure and [to] promote innovation, I think we need to get to a place where contracts do have concrete goals, but they aren't set in stone and there is some flexibility on the part of government. This is easy to say and hard to do.

NORRIS: What this really underlines for me is the value of trust. I think you need to develop trust with your partners—and with your funders. Trust is the only thing that can help you weather small failures along the way.

BERMAN: As the leader of a non-profit organization, I often feel like a professional supplicant. The truth of the matter is that the typical non-profit has next to no power. We always need someone else, usually in government, to authorize and pay for our work. We can't do anything without permission. And in my experience, it usually isn't possible to get that permission without over-promising what you will deliver. So my

question is, is it possible to generate the political will and momentum for reform without having to overestimate the number of people you're going to serve or the impact that your initiative will have? Can we introduce some realism into the process?

BOWMAN: If we're going to have an impact ultimately on encouraging change and innovation and tolerance of failure, I think we have to convince the general public, because they are the ones who put pressure on me when things don't work. Several people have raised the issue of fear of failure. I think you need to really understand the sources of that fear. And I believe that fear of failure is not driven internally, it's imposed externally from the folks who put us where we are. I don't lose sleep at night worrying that the crime rate is up one point or two points above where it should be. My stress comes from the authorizing environment, the citizens. If you can persuade them, then you can get me to implement whatever change is necessary. I've heard it said that change only occurs when the pain of the status quo exceeds the pain of reform.

SCHRUNK: I came across an article in a business magazine recently and it was talking about corporate managers promising less than they knew they would produce—they would deliberately underestimate to ensure that they didn't fail. I think that is good advice, but at the same time we all know that in order to get funding, we often have to promise that we're going to save the free world. That is a dilemma we all face.

SIEGEL: We're all in the business of taking risks. The question is, where do you go after you take the risk and failed? Do you have the guts to do it again? People don't like to admit failure. When you admit failure, it puts you at a disadvantage when you go to get funding or [to] get the support you need.

CORBETT: Surviving failure is crucial. At the end of the day, our job is to try stuff. If it doesn't work, try to fix it and roll it out again. If that doesn't work, try something else.

NEWTON: I think it is important to remember why we are doing this in the first place. What keeps us coming back to the job is that we have this notion of justice that we think is critical. Earlier today, Ron Corbett mentioned the idea of "maniacs on a

mission."[9] I'd like to think that the maniacs are still going to keep coming up with new ways to improve the system because it's the right thing to do.

9. DRUCKER, *supra* note 6, at 10.

ComALERT: A Prosecutor's Collaborative Model for Ensuring a Successful Transition from Prison to the Community

Charles J. Hynes[1]

Introduction

Times change. Fifteen years ago, even ten years ago, the term "re-entry" had not yet bloomed in the vocabulary of most criminal justice practitioners. Now, the term flourishes on a slew of websites, including those of the United States Department of Justice's Office of Justice Programs,[2] the Urban Institute,[3] and the Council of State Governments' Re-Entry Policy Council.[4] In addition, "re-entry" has increasingly entered the policy dialogues of law enforcement personnel. Surely, the primary impetus for this change is one titanic fact—namely, that the explosion of the nation's incarceration rate over recent decades has led to a corresponding boom in the rate of ex-offend-

1. Charles J. Hynes has been the District Attorney of Kings County (Brooklyn), New York since 1990. He has been a member of the American Bar Association's Commission on Effective Criminal Sanctions since 2005 and the First Vice Chair of the Association's Criminal Justice Section since 2007. He has also served as Vice President of the National District Attorneys Association since 2006.

2. United States Department of Justice, Office of Justice Programs, http://www.ojp.usdoj.gov/.

3. Urban Institute, http://www.urban.org/.

4. Council of State Governments' Re-Entry Policy Council, http://www.reentrypolicy.org/.

ers returning to their communities and attempting to re-enter and re-integrate into society.[5]

Each year, well over half a million people are released from state and federal prisons in the United States.[6] As formerly incarcerated individuals stream back into their communities, they all face a multitude of challenges to becoming productive law-abiding citizens. All carry the stigma of at least one, and often more than one, criminal conviction.[7] About half have not graduated high school.[8] Over two-thirds have engaged in substance abuse.[9] Many were unemployed before incarceration and have checkered employment histories and no job to go to upon their release.[10] Some have mental health problems or anti-social attitudes or personality traits, such as

5. In 1974, approximately 216,000 persons were incarcerated in U.S. prisons. THOMAS P. BONCZAR, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001, NCJ 197976, at 1 (2003). By June 30, 2006, the U.S. prison population had swelled to *over six times* that figure, to 1,471,822 inmates. WILLIAM J. SABOL ET AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISON AND JAIL INMATES AT MIDYEAR 2006, NCJ 217675, at 8 (2007). From 1980 to 1998, the number of federal and state inmates released to communities increased more than threefold, from 148,867 to 532,136. *See* U.S. GEN. ACCOUNTING OFFICE, PRISONER RELEASES: TRENDS AND INFORMATION ON REINTEGRATION PROGRAMS, at 3 (2001). And by 2005, the number of releases from state and federal prisons had climbed to 698,459. *See* WILLIAM J. SABOL ET AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISON AND JAIL INMATES AT MIDYEAR 2006, NCJ 217675, at 3 (2007).

6. Sabol, *supra* note 5, at 3 tbl.5.

7. For example, of the 26,784 inmates released from New York State prisons in 2001, approximately 57% had been sentenced as second felony or persistent felony offenders. LESLIE KELLAM, STATE OF NEW YORK DEP'T OF CORRECTIONAL SERVICES, 2001 RELEASES: THREE YEAR POST RELEASE FOLLOW-UP 24, 25 tbl.9.1 (2007).

8. The percent of state prisoners entering parole in 1999 who did not graduate high school was about 51%. TIMOTHY A. HUGHES ET AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, TRENDS IN STATE PAROLE, 1999-2000, NCJ 184735, at 13 (2001).

9. Of the state prisoners expected to be released in 1999, 84% reported being involved with drugs or alcohol at the time of the offense; nearly 25% were alcohol dependent; 59% had used drugs some time during the month preceding the offense; and 21% had committed the offense for drug money. *Id*. at 9. And the picture looks grim for future releases. According to a 2004 survey of state prison inmates, one-third said they had committed their current offense while under the influence of drugs. Over one half (56%) used drugs in the month before the offense. More than two-thirds (69%) had used drugs regularly at some time in their lives. In addition, more than a half (53%) of the state prisoners met the criteria for drug dependence or abuse. CHRISTOPHER J. MUMOLA & JENNIFER C. KARBERG, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, DRUG USE AND DEPENDENCE, STATE AND FEDERAL PRISONERS, 2004, NCJ 213530, at 2, 6 (2006).

10. Only about two-thirds (67%) of state prison inmates had full-time employment in the month before incarceration. Drug dependent or abusing state prisoners had an even lower rate of full-time employment (56%). *Id*. at 8 tbl.8.

anger management issues or lack of impulse control.[11] Some lack family support.

A constellation of these and other factors too often forecast re-arrest, violation of parole, and return to prison. According to a national study of the re-arrest, re-conviction, and re-incarceration of a representative sampling of state prisoners released in 1994, within three years of their release, just over two-thirds (67.5%) had been re-arrested for a new offense, close to one-half (46.9%) had been re-convicted of a new crime, and about one-quarter (25.4%) had been re-sentenced to prison for a new crime.[12] Many also returned to prison for violating the conditions of their release, so that, all in all, slightly more than half (51.8%) of those released were back in prison within three years.[13]

Recidivism by formerly incarcerated individuals takes a huge toll—in terms of both the immediate harm caused by the criminal activity and the direct and indirect costs of criminal recidivism, such as the criminal justice system costs of investigation and prosecution, incarceration costs, and social costs (health, foster-care, and welfare systems).[14] The potential for increased crime and the wholesale destabilization of communities looms large.[15]

Faced with such a threat to the public weal, law enforcement officials, including district attorneys, cannot help but sit up and take notice. Because the ultimate goal of law enforcement is increasing public safety, law enforcement, and a district attorney's office in particular, can and should play a leadership role with regard to re-entry. This article will examine the effort

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11. A recent report estimates that at midyear 2005, 56% of inmates in state prisons had a mental health problem. DORIS J. JAMES & LAUREN E. GLAZE, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES, NCJ 2136000, at 1 (2006).

12. PATRICK A. LANGAN & DAVID J. LEVIN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1994, NCJ 193427, at 1 (2002).

13. *Id*.

14. *See generally* JOAN PETERSILIA, U.S. DEP'T OF JUSTICE, WHEN PRISONERS RETURN TO THE COMMUNITY: POLITICAL, ECONOMIC, AND SOCIAL CONSEQUENCES, 9 SENTENCING & CORRECTIONS: ISSUES FOR THE 21ST CENTURY (Nov. 2000); *see also* AMY L. SOLOMON ET AL., URBAN INSTITUTE, UNDERSTANDING THE CHALLENGES OF PRISONER REENTRY: RESEARCH FINDINGS FROM THE URBAN INSTITUTE'S PRISONER REENTRY PORTFOLIO, JUSTICE POLICY CENTER (Jan. 2006).

15. *Id*.

of one metropolitan district attorney's office to address re-entry issues. In 1999, the Kings County (Brooklyn, NY) District Attorney's Office organized the first meeting of a prosecution-run re-entry program that would eventually become ComALERT—COMmunity And Law Enforcement Resources Together.

Creation and Evolution of ComALERT

As in the rest of the nation, the number of individuals released from New York State prisons rose in the late 1980s and the 1990s, corresponding to the rise in prison commitments during the eighties and nineties.[16] In 1985, 12,675 offenders were released from New York State prisons.[17] Just five years later, the number had gone up by more than ten thousand to 23,630.[18]

By 1999, the 1985 figure had *more than doubled* to 26,323.[19] Of those released, the overwhelming majority (24,238) were released to some kind of parole supervision.[20] Over two-thirds had originally been committed from New York City and these men and women were inevitably destined to return to their communities.[21] At this time (as of December 31, 1999), the population of parolees under supervision in New York City had swelled to 33,669.[22]

As a result, unless these returning ex-offenders were successfully re-integrated into the community, they threatened to become a disruptive force that would burden the city and state with the direct and indirect costs of crime and re-incarceration upon any new offenses. Unfortunately, parole resources were stretched thin, making it difficult to identify, address, and monitor the treatment and social services needs of parolees.[23] This

16. LESLIE KELLAM, STATE OF NEW YORK DEP'T OF CORRECTIONAL SERVICES, 2001 RELEASES: THREE YEAR POST RELEASE FOLLOW-UP 2 tbl.1.1 (2002).
17. *Id*.
18. *Id*.
19. E-mail from Elizabeth M. Staley, Program Research Specialist III, New York State Dep't of Correctional Services, Office of Program Planning, Research & Evaluation (September 7, 2007).
20. *Id*.
21. *Supra* note 19.
22. E-mail from the New York State Division of Parole, Office of Policy Analysis (December 20, 2007). On file with the author.
23. *See* William D. Burrell, *Trends in Probation and Parole in the States* (Nov. 26, 2007), http://web.appa-net.org/ccheadlines/docs/Trends_Probation_Parole.pdf. (providing a national perspective on challenges faced by parole and probation

public safety crisis demanded a collaborative response from the community and law enforcement.

The Kings County District Attorney's Office had already launched in 1990 the Drug Treatment Alternative-to-Prison (DTAP) program, the nation's first prosecution-run program, diverting chronic, non-violent felony drug offenders into substance abuse treatment. DTAP was grounded in the belief that there had to be a more successful and cost-effective way than re-incarceration to stop non-violent, drug-addicted offenders from perpetually recommitting crimes to support their habit. By treating the addiction of these offenders in a community setting and inculcating life and job skills, the DTAP program aimed to provide this population with the tools necessary to resist returning to drug-related crime. DTAP resulted from a boundary-spanning collaboration with residential drug-treatment providers, as well as the New York State Division of Parole, the New York City Department of Probation, the New York State Office of Court Administration, and the defense bar.[24]

Bearing in mind the success of DTAP's collaborative approach, I asked my executive staff to explore similar ways in which a district attorney's office, charged with promoting public safety, could assist this growing population of formerly incarcerated individuals in becoming productive members of society. Led by Patricia L. Gatling, at the time First Assistant District Attorney and now Commissioner and Chair of New York City's Commission on Human Rights, senior staff met with executives from Parole, Probation, and the New York Police Department. Then, taking advantage of the many contacts developed over the years by the Kings County District Attorney's Community Relations Bureau, the District Attorney's staff brought together representatives and leaders from a broad

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with increased workloads and on the strategic trends characterizing their efforts to improve effectiveness).

24. *See* CHARLES J. HYNES & ANNE J. SWERN, KINGS COUNTY DISTRICT ATTORNEY'S OFFICE, DRUG TREATMENT ALTERNATIVE-TO-PRISON SIXTEENTH ANNUAL REPORT (2007) (providing more information on DTAP); *see also* THE NATIONAL CENTER ON ADDICTION AND SUBSTANCE ABUSE AT COLUMBIA UNIVERSITY, CROSSING THE BRIDGE: AN EVALUATION OF THE DRUG TREATMENT ALTERNATIVE-TO-PRISON (DTAP) PROGRAM (2003), *available at* http://www.casacolumbia.org/Absolutenm/articlefiles/Crossing_the_bridge_March2003.pdf.

spectrum of community-based organizations, religious institutions, and social service agencies, discussed with them the problems faced by ex-offenders, and enlisted their aid in a coordinated re-entry effort.

Initially focusing on neighborhoods within three Brooklyn precincts, ComALERT held meetings at community halls and churches from 1999-2000. Potential participants were notified about the meetings by their parole or probation officers and through flyers and faith-based community outreach. At the meetings, attendees, after being alerted that their precincts were under heightened law enforcement scrutiny, were informed about the services available to them through a multitude of community-based agencies. The services were without charge and included various support systems for ComALERT participants and their families. If the attendees elected to participate in the ComALERT program, they completed an information card, checking off the services they needed in the areas of education, housing, job training, and drug treatment. The District Attorney's Office then referred the participants to service organizations throughout Brooklyn. The ComALERT resource network grew to include over 100 social services providers and community-based organizations. A total of approximately 290 individuals sought services at these ComALERT meetings.

Although the meetings generated interest in the issue of re-entry and led to the referral of many individuals to service providers, there was reason to believe that greater direct involvement by the District Attorney's Office could lead to more accurate assessments of clients' needs, facilitate the tracking of clients' outcomes, and allow for a better evaluation of the program's strengths and weaknesses.

Accordingly, in the spring of 2000, the District Attorney's Office hired a licensed social worker specifically dedicated to ComALERT, and the program changed from the community-meeting model to a model of direct assessment and referral. Parole officers who knew of ComALERT through the networking efforts of the District Attorney's Office would discuss the program with their parolees, and any parolees who were interested in ComALERT's services would then make an appointment to meet with the ComALERT counselor. ComALERT also contin-

ued to attract participants who had heard about the program through the District Attorney's Office's community outreach.

The ComALERT counselor interviewed each client, conducted a needs assessment, and discussed the client's goals. He would then refer the client to those social service providers that could best meet the client's specific needs. The counselor followed the client's progress, and acted as a case manager, offering re-assessments, counseling, and additional referrals as needed. In addition, he spoke with the client's parole officer to determine whether the client was complying with the conditions of parole. If the parolee was showing signs of violating those terms (for example by failing a drug test), the counselor would discuss with the parole officer how ComALERT could help to ensure that the parolee did not return to prison unless it was necessary for public safety (for example, by providing a referral to outpatient or residential substance abuse treatment).

In 2001, ComALERT formally partnered with the Doe Fund,[25] a non-profit organization that had been providing transitional employment and housing for the homeless since 1994. At the time, the Doe Fund's Ready, Willing and Able program (RWA)[26] was already operating a facility in the Bedford-Stuyvesant neighborhood of Brooklyn. Homeless men, some with criminal records, lived in and maintained the RWA facility while also engaging in transitional employment (usually street cleaning) and receiving counseling and supportive job-related services.

Many of ComALERT's clients needed the transitional work and job skills training provided by the Doe Fund's RWA program, but they already had a place to live. Thus, in partnership with ComALERT and Parole, the Doe Fund created a new program, RWA-Day, to meet the transitional employment needs of former prisoners on parole in Brooklyn who were not homeless.

Also, starting in about 2001, ComALERT increasingly focused exclusively on parolees, and phased out servicing probationers. ComALERT concluded that parolees, having been

25. Doe Fund, http://www.doe.org/.

26. Doe Fund's Ready, Willing and Able Program, http://www.doe.org/programs/?programID=1.

incarcerated in state prison and removed from their communities and families for substantial stretches of time, had more acute needs than probationers. In addition, the program had forged strong ties with individual parole officers who provided a steady stream of referrals. Furthermore, parole supervision was generally more intense than probation supervision, which made it easier to monitor a ComALERT participant's progress and influence his or her behavior.

Then, in 2004, Counseling Service of the Eastern District of New York (CSEDNY),[27] which had contracted with Parole to provide substance abuse treatment to mandated parolees, entered into a formal partnership with ComALERT. CSEDNY, a non-profit agency incorporated in 1974 and licensed by the New York State Office of Alcoholism and Substance Abuse Services (OASAS)[28] for the provision of outpatient services, was originally created as an alternative to incarceration program for substance abusers on federal probation or parole. CSEDNY now has sites spread over the greater New York City area and provides outpatient substance abuse treatment services to mandated clients for every jurisdictional level (city, county, state, and federal). In space donated by the City of New York through the Kings County District Attorney's Office, CSEDNY began providing treatment services in the county's Municipal Building in downtown Brooklyn. The CSEDNY counselors at this Municipal Building facility, the ComALERT Re-Entry Center, henceforth exclusively serviced ComALERT participants, all of whom would now be on parole.

After switching from the community-meeting model, ComALERT targeted five Brooklyn precincts (73rd, 75th, 79th, 81st, and 88th), which consistently absorbed a disproportionately high number of the approximately 3,500 former inmates returning to Brooklyn each year. However, in 2006, the Kings County District Attorney's Office received a grant from the New York State Division of Criminal Justice Services (DCJS)[29] to

27. Counseling Service of the Eastern District of New York, http://www.csedny.org/.

28. New York State Office of Alcoholism and Substance Abuse Services, http://www.oasas.state.ny.us/index.cfm.

29. New York State Division of Criminal Justice Services, http://criminaljustice.state.ny.us/.

renovate its space, enhance the on-site services, and expand the program. This grant allowed the program to broaden its efforts and enroll parolees from all the precincts in Brooklyn.

Salaries of ComALERT staff (including the director, deputy director, community resources coordinator, and research director) are primarily paid out of the DCJS grant, with the District Attorney's budget providing additional funds.[30] ComALERT relies substantially on subcontractors, who have established Memoranda of Understanding with the Kings County District Attorney's Office, to provide parolee reentry services, most on site at the District Attorney's office space in the Brooklyn Municipal Building. The subcontracting agencies providing these services currently include: (1) Counseling Service of the Eastern District of New York (CSEDNY), providing medically supervised, non-intensive, OASAS licensed outpatient substance abuse treatment; (2) the Doe Fund, providing transitional employment; (3) HealthFirst,[31] providing assistance for Medicaid and benefits enrollment; and (4) the Brooklyn Plaza Medical Center, providing HIV/STD/Hepatitis workshops.[32] Funding for these agencies comes from both government and non-government sources. For example, treatment services provided by CSDENY are paid in part by the New York State Office of Alcoholism and Substance Abuse Services (OASAS). The bulk of the Doe Fund's revenue comes from contracts for its services and from individual, corporate, foundation, and government grants.

ComALERT's Current Structure

Eligibility, Referrals, and Screening

To be eligible for ComALERT, the participant must: (1) be paroled to Brooklyn and must have at least six months remaining of parole supervision; (2) be at least 18 years old; (3) be in

30. In addition, a ComALERT social worker was, until recently, paid through a Public Safety Housing Initiative grant from the United States Attorney's Office for the Eastern District of New York. That social worker was supervised by CSEDNY. Now that the grant money has expired, the social worker is being paid directly by CSEDNY.

31. HealthFirst, http://www.health-first.org/.

32. HIV/AIDS Services in NYC, http://www.aidsnyc.org/servicesnyc/support.html.

need of substance abuse treatment; (4) not be a sex offender or arsonist, and (5) not suffer from a serious and persistent mental illness. Most participants are on parole either for a drug crime (41%) or a crime of violence, such as robbery, assault, and homicide (39%); the rest are on parole for crimes against the public order, such as weapons possession and criminal contempt (11%), and property crimes, such as larceny and possession of stolen property (9%).

The primary source of ComALERT referrals is the New York State Division of Parole, and the program's relationship with Parole ensures that parolees receive services *rapidly*, often within the first few weeks or less of their release. Speedy delivery of services may help reduce recidivism, especially for ex-offenders with drug and alcohol addictions who, removed from the controlled environment of prison and confronted with multiple opportunities to re-engage in substance abuse, may quickly fall on the road to re-entry.[33]

Prison inmates heading home to Brooklyn are directed to report, within 24 to 48 hours of release, to one of three Parole offices in the county. There, the parolee meets with his or her assigned parole officer and reviews with the officer the conditions of his or her release. These often include a condition to seek and maintain substance abuse treatment—a condition based on a pre-release assessment of the inmate.[34] If there is such a condition, the officer refers the parolee to a counselor from Parole's Access program, which is staffed with personnel who have expertise in substance abuse treatment and knowledge of a broad array of treatment providers throughout the city. Parole's Access program is located in a center in downtown Brooklyn.

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33. Among the 26,784 inmates released in 2001 from New York State prisons, 10,677 (40%) returned to custody within three years. Of those who returned, the median time-to-return was 14 months. Close to one-fifth (18%) returned within the first six months. LESLIE KELLAM, STATE OF NEW YORK DEP'T OF CORRECTIONAL SERVICES, 2001 RELEASES: THREE YEAR POST RELEASE FOLLOW-UP 5, 7 (2002).

34. According to data supplied by the New York State Department of Correctional Services, of those inmates released in 2006 who had originally been committed from Kings County on a new crime (*i.e.*, not on a parole violation), 81% were identified as having a substance abuse treatment need. E-mail from Elizabeth M. Staley, Program Research Specialist III, New York State Dep't of Correctional Services, Office of Program Planning, Research & Evaluation (September 12, 2007).

Access counselors interview parolees either at the Access Center or, occasionally, at the different Parole offices themselves when staffing permits such off-site visits. The Access counselor assesses the intensity level of treatment needed by the parolee. If the Access counselor determines that there might be a good match with the moderate intensity out-patient treatment provided by CSEDNY through ComALERT, the parolee meets with a ComALERT-CSEDNY counselor who is present, three times per week, at the Access Center. The ComALERT-CSEDNY counselor interviews the referred parolee, discussing, *inter alia*, past criminal activities and future goals, and conducts a thorough treatment needs assessment.

At this stage, the ComALERT-CSEDNY counselor may conclude that the client is not suitable for the program, based on, for example, the type of crime that the parolee committed or on a determination that the parolee, in fact, needs a more intense level of treatment than ComALERT provides.

If found eligible, the client is then directed to report to the ComALERT Re-Entry Center in the Municipal Building in downtown Brooklyn for a program orientation. Orientation sessions are held approximately four times per month. Immediately thereafter, an on-site licensed counselor from ComALERT-CSEDNY is assigned to the client and conducts a complete psychosocial assessment which provides the basis for any future re-entry planning and treatment at ComALERT. This primary counselor works with the parolee to help him or her comply with conditional release requirements.

Candidates may decide not to participate in ComALERT after their assessment by the ComALERT-CSEDNY counselor at the Access center and can also opt out of ComALERT after the initial orientation session. However, in only about 19% percent of the referred cases do parolees decide not to participate in the program. Although ComALERT requires attendance at substance abuse treatment, the treatment's moderate level of intensity and time commitment appeals to many participants who are trying to both comply with their treatment mandates and seek and/or maintain a new job. Additionally, for those without employment or housing, the prospect of preferential place-

ment in RWA's transitional work and housing (if necessary) program offers a strong incentive to join ComALERT.[35]

Although most of ComALERT's participants (approximately 80-85%) are newly released prisoners who have been referred to ComALERT by Parole in conjunction with its Access program, ComALERT also accepts participants through other channels. Some clients are referred to ComALERT from the Doe Fund's residential RWA program. These clients may have already been out of prison and on parole for months or even years. In need of transitional employment and housing, the parolees have enrolled in the Doe Fund's residential RWA program. Because the Doe Fund enforces a zero tolerance policy with regard to the use of drugs and alcohol, case managers at the RWA facility will, on occasion with the approval of Parole, refer participants to ComALERT for substance abuse treatment. The participants attend the orientation program and then are assigned a ComALERT-CSEDNY primary counselor.

ComALERT also receives a small number of self-referrals. These parolees may have learned about the ComALERT program while still incarcerated, through the informational sessions that ComALERT regularly conducts via video hookup at various prisons throughout New York State. Alternatively, they may have learned about ComALERT as a result of ComALERT's efforts to publicize the program in the community. The parolees who contact ComALERT are told to attend the next available orientation session. After orientation, they meet with a counselor for an assessment and, if appropriate, enrollment in the program and assignment of a primary counselor.

Treatment and Services

The ComALERT re-entry program emphasizes substance abuse treatment and employment assistance. Drug use and unemployment appear to be among the greatest stumbling blocks to successful re-entry and social integration. For example, it is known from the high numbers of drug-addicted predicate felons who re-cycle through the criminal justice system that pa-

35. Any parolees who decide not to participate in ComALERT must, of course, consult with their parole officer about how they will otherwise fulfill their substance abuse treatment mandate.

rolees who have an untreated drug addiction are more likely to re-offend than those without any substance abuse issues.[36] We also know from research data on the Kings County District Attorney's Drug Treatment Alternative to Prison (DTAP) program that the DTAP graduates who were working at the time of program completion were far less likely to get re-arrested in the three years post-graduation, than those graduates who were unemployed (13% v. 33%).[37]

CSEDNY, a substance abuse treatment agency licensed by New York State's Office of Alcoholism and Substance Abuse Services (OASAS), staffs ComALERT with professional counselors. Treatment can begin immediately at the ComALERT Reentry Center following the orientation program, even for those parolees without Medicaid, thanks to OASAS funding for this purpose. Additionally, one of ComALERT's social services partners, HealthFirst, provides on-site staff who assist with rapid benefits enrollment to ensure that Medicaid is obtained as soon as possible.

For most clients, the ComALERT program lasts three to six months. Each week, clients attend one individual counseling session and one or two group sessions which focus on specific issues such as anger management or relapse prevention. Treatment draws on different modalities: cognitive behavioral, client-centered supportive, and relapse prevention therapies, with motivational interviewing used throughout the therapeutic process. Counseling seeks to nurture and support the clients' inner resolve to build a new life.

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36. Released inmates who return to prison for a new felony offense (as opposed to parole violation), are most frequently recommitted for a drug offense. LESLIE KELLAM, STATE OF NEW YORK DEP'T OF CORRECTIONAL SERVICES, 2001 RELEASES: THREE YEAR POST RELEASE FOLLOW-UP 41 (2002). Further, over three-quarters of the drug offenders who returned to prison for a new crime were convicted yet again of a drug offense. *Id*. at 18-19. Most of these drug offenders (about 88%) are identified substance abusers. *See* State of New York, Dep't of Correctional Services, HUB SYSTEM: PROFILE OF INMATE POPULATION UNDER CUSTODY ON JANUARY 1, 2006 at 28 tbl.11-A (showing the total number of inmates committed for a drug offense was 14,257); STATE OF NEW YORK, DEP'T OF CORRECTIONAL SERVICES, IDENTIFIED SUBSTANCE ABUSERS, DECEMBER 2005 at 6 tbl.6 (showing the number of substance abusers who were committed for a drug offense as 12,554).

37. Hynes & Swern, *supra* note 24. *See also* AMY C. SOLOMON ET AL., URBAN INSTITUTE, FROM PRISON TO WORK: THE EMPLOYMENT DIMENSIONS OF PRISONER REENTRY, JUSTICE POLICY CENTER (2004).

In order to graduate from ComALERT, a participant must be drug-free for three consecutive months and be either employed or in school, if physically able. After completion of the treatment mandate, clients are encouraged to continue to visit the ComALERT Re-entry Center to receive aftercare counseling if they need it.

Clients may be discharged from the program for different reasons. The most common reason for discharge (accounting for about one-third of all the discharges) is that ComALERT loses contact with the client after he or she fails to attend treatment for more than 30 days and the primary counselor is unable to reach the client by telephone or mail. About one-quarter of the discharges occur because the client does not comply with program rules (*e.g.*, he or she refuses to be drug tested or attends counseling only sporadically). In addition, a ComALERT-CSEDNY primary counselor will occasionally refer a client to a more intensive drug treatment program (usually residential)—accounting for a little less than a quarter of all discharges. A client may also be discharged if he or she is re-incarcerated due to a parole violation or to an arrest for a new crime (about 16% of all discharges). Finally, a small percentage of the discharges are based on various other reasons, such as that the client has moved to a new location or that he or she cannot complete the program for medical reasons.[38]

Although approximately two-thirds of all ComALERT clients (68%) test negative for drugs and alcohol at entry into the program, almost a quarter (24%) test positive for marijuana. In much smaller numbers, participants test positive for cocaine (3%), opiates (2%), and alcohol and other drugs, including morphine and methadone (combined total of 3%). While in the program, clients undergo drug testing (urinalysis) at least twice per month, and about 36% test positive for drugs or alcohol at least once while in the ComALERT program. Random drug testing can be a powerful therapeutic tool, as a "dirty urine" test result

38. Depending on the circumstances of the case, clients who have been discharged from the program may subsequently be permitted to re-enroll in ComALERT. For example, a client may be referred to residential substance abuse treatment and discharged from ComALERT, and then, after completing residential treatment (which might last several months), may re-enroll in ComALERT with the approval of his or her parole officer.

forces a participant to confront the reality that he or she has relapsed, and it assists treatment staff in re-evaluating a participant's progress. Treatment staff may decide to increase the number of counseling sessions that the client must attend per week, or, if the relapse is severe, may conclude that the client must be referred to in-patient treatment. The client's parole officer is notified of the positive drug test and consulted about the recommended modification in the parolee's treatment plan.

Once drug testing results verify that a client has been drug and alcohol free for at least 30 days, he or she can begin utilizing other ComALERT social services, and, per the referral of the primary counselor, will meet with ComALERT's Community Resources Coordinator.

Approximately one-third of all ComALERT clients receive a referral to, and preferential placement in, the Doe Fund's RWA program, which provides transitional employment, transitional housing (if needed), job skills training, 12-step programs, and courses on financial management and other life skills. The program also offers financial assistance to clients who wish to obtain a commercial driver's license, provides courses toward computer skills certification, and offers a vocational program in extermination (called 'Pest@Rest'), through which clients can become licensed exterminators.

Those participating in the RWA program work full time in manual labor jobs, primarily street cleaning, and are paid $7.50 per hour. A portion of the salary is deposited directly into a savings account for the client. Clients receive meals and other services in a Doe Fund facility. After nine months of transitional employment, participants begin the search for a permanent job. During this process, they continue to receive a stipend. Once RWA participants secure permanent employment and housing, they graduate from the program, and the Doe Fund continues to provide them with $200 per month for five months.

ComALERT's periodic drug testing and weekly individual and group counseling sessions help clients maintain sobriety and their enrollment in RWA, which enforces a zero-tolerance policy for drug and alcohol use. The RWA-Day program is designed for ComALERT clients who have a place to live; however, for those RWA/ComALERT participants who do need

transitional housing, the Doe Fund maintains Stuyvesant House, a Doe Fund supervised facility in Brooklyn, New York, for their use.

In addition to providing referrals to RWA and other transitional employment programs, ComALERT's Community Resources Coordinator also links participants to a wide range of other social services offered by community-based providers, such as transitional housing, vocational training, GED test preparation, family counseling, and job readiness programs. Service referrals are specifically tailored to meet the needs of the individual clients.

ComALERT offers many on-site services as well. At the ComALERT Re-Entry Center, ComALERT participants may attend HIV/STD/Hepatitis workshops led by the Brooklyn Plaza Medical Center. ComALERT also has an on-site doctor who conducts physical health assessments and provides medical referrals as necessary. ComALERT participants who need mental health treatment, but only at a moderate level, may receive such treatment from their ComALERT primary counselor. If the client has a serious and persistent mental illness and/or needs treatment involving medication, the primary counselor or the on-site doctor will refer the client to an outside mental health treatment provider.[39] ComALERT plans to augment, in the near future, the range of wraparound services offered on site (this is discussed further in **Future Challenges**, *see infra* pp. 821-823).

This one-stop, multi-service model has distinct advantages. First, the one-stop center, at its easily accessible downtown Brooklyn location, ensures that, from a practical standpoint, clients can access a full range of necessary services quickly and easily. In addition, the one-stop model also fosters greater coordination in the delivery of those services. Coordination reduces the likelihood that a client will fall through the cracks. The one-stop model also symbolically reinforces the holistic approach to the parolee's re-entry. Re-integration into a community, especially after a long period of incarceration,

39. Because the Kings County District Attorney's Office has its own treatment diversion program for those suffering from serious and persistent mental illnesses, Treatment Alternatives for the Dually Diagnosed (TADD), and also participates in the Brooklyn Mental Health Court, the Office has well established links with mental health treatment providers throughout New York City.

poses challenges to every aspect of an individual's life—employment, housing, physical health, mental health, family relations, and so on. All of these facets interrelate and the multi-service, one-stop nature of the ComALERT Re-Entry Center acknowledges that complex relationship.

The Role of the District Attorney's Office

The leadership role and hands-on participation of the Kings County District Attorney's Office distinguishes ComALERT from other re-entry programs.

A district attorney's office is uniquely positioned to act as the lead agency for a parolee re-entry program. First, a district attorney's office often already has strong ties to both the parole and the police departments, agencies responsible for supervising ex-offenders and patrolling the neighborhoods to which they return. All three law enforcement entities have in common the paramount duty of protecting public safety, and each maintains a level of trust in the judgment of the others.

Working with the New York State Division of Parole ("Parole") and the New York Police Department ("NYPD"), ComALERT monitors its clients to ensure public safety. A failure to cooperate or a violation of any program condition is promptly brought to the attention of the client's parole officer. Graduated sanctions may be employed at the discretion of the parole officer. For example, if a ComALERT client tests positive for drug use, an increase in the number of counseling sessions that he or she must attend per week or more frequent drug testing may be mandated. The parolee may also be required to report more frequently to the parole officer. If the client has a serious drug relapse, he or she may be mandated to community-based residential treatment.

If a ComALERT client is arrested for a new offense, ComALERT counselors will act as a liaison between the prosecutor assigned to the case and with the client's parole officer. Depending on the facts of the case, it may be possible to resolve the case without the ComALERT client's parole being revoked and without re-incarceration. However, for serious breaches of the parole, revocation may be warranted.

Additionally, the Kings County District Attorney's Office's swift access to Parole and the NYPD offers reassurance to social

services providers, such as the Doe Fund, that they can participate in this re-entry effort without jeopardizing the safety of their employees or the integrity of their own programs. Moreover, the same kind of reassurance is extended to the public at large. Many communities are reluctant to offer a helping hand to parolees coming out of prison. But, by explaining that such help will in fact cut down crime and by exercising a leadership role through ComALERT, the District Attorney's Office plays a crucial role in enlisting community support for the re-entry effort. Finally, the District Attorney's Office's development and implementation of ComALERT reminds residents that prosecutors are community lawyers, responsible for more than seeking punishment for offenders.

ComALERT Outcomes

ComALERT's capacity has grown over the past few years, and the District Attorney's Office aims to continue expanding the program to meet the needs of all parolees re-entering Brooklyn. Since the program assumed its present structure in October 2004, almost one thousand parolees have participated in ComALERT. Over half of those who participate, graduate from the program. ComALERT graduates have low recidivism and high employment rates. Preliminary data confirm that ComALERT promotes parolees' successful re-integration into their communities.

Participant Profile

As of October 1, 2007, there were 144 active participants in ComALERT; 446 had graduated; and 401 had been discharged, giving ComALERT a graduation rate of 53%. Demographic characteristics of ComALERT clients have varied little over the last couple of years, fluctuating only a percentage point or two in either direction. Approximately 81% of program participants are African-American, 17% are Latino, and the remaining participants are either white or of other racial groups. Men make up the overwhelming majority of program participants (about 98%), at a slightly higher rate than their presence in New York

State's overall parole population.[40] About one quarter of ComALERT clients are 18 to 25 years old; a little more than one third are 26 to 35 years old; another quarter are 36 to 45 years old; and the remaining one-sixth are older than 45 years old. A little over one-half of the clients live with their mothers or other relatives, and close to one-fifth live with spouses or partners. Approximately one-eighth live in transitional housing, and the remaining clients live either alone, with a friend, or in a shelter. Only about 12% of those entering ComALERT are married. About 60% of clients have at least one child, and close to 20% have three or more children.

Criminal Recidivism

A key measure of ComALERT's success is the recidivism of its participants. In 2006, the New York State Division of Criminal Justice Services provided a research grant to the Kings County District Attorney's Office to fund an independent evaluation of ComALERT, including a recidivism analysis. The District Attorney's Office asked Professor Bruce Western to conduct the research, as he had previously expressed an interest in studying ComALERT.[41] Preliminary results of Professor Western's research are very promising, and indicate that ComALERT is indeed an effective model for reducing recidivism.

Recidivism can be measured by re-arrest, re-conviction, and re-incarceration rates. Re-incarceration rates can be parsed into re-incarceration based on a sentence for a new crime and re-incarceration based on a parole violation. Professor Western analyzed the recidivism rates of ComALERT graduates from July 2004 to December 2006, and compared those rates to all ComALERT attendees for that period (*i.e.*, for all participants

40. According to statistics on the New York State Division of Parole website, men made up 93% of the parole population in March, 2007. New York State Division of Parole, Program and Resources Statistics, http://parole.state.ny.us/PROGRAMstatistics.asp.

41. Professor Western has researched and written extensively on the intersecting subjects of crime, punishment, incarceration, employment, and race. Previously on the faculty of Princeton University, he is now a professor of sociology at Harvard University and the director of its Multidisciplinary Program in Inequality & Social Policy. His publications include the article *Lawful Re-Entry*. Bruce Western, *Lawful Re-Entry*, 14 THE AMERICAN PROSPECT 54 (Dec. 2003), *available at* http://www.prospect.org:80//cs/articles?article=lawful_reentry.

regardless of whether they graduated or were discharged) and to those of a matched control group of Brooklyn parolees who did not participate in ComALERT.[42] Professor Western's research indicated that ComALERT graduates were *substantially* less likely to be re-arrested, re-convicted, or re-incarcerated than were parolees in a matched control group, as can be seen in the table below.

Table I
Recidivism Outcome Percentages of
ComALERT Graduates, ComALERT Attendees, and
Members of Matched Control Group,
based upon time elapsed since release from prison

Status	*6 months*	*1 year*	*2 years*
Re-Arrest	**4** / 12 [16]	**11** / 21 [28]	**29** / 39 [48]
Re-Conviction	**3** / 6 [8]	**6** / 12 [18]	**19** / 28 [34]
Re-Incarceration (new crime)	**0** / 1 [1]	**0** / 2 [2]	**3** / 4 [7]
Re-incarceration (parole violation)	**1** / 4 [6]	**7** / 14 [14]	**16** / 25 [24]
Re-incarceration (total)	**1** / 5 [6]	**7** / 15 [16]	**19** / 29 [30]

- ComALERT Graduates in **bold**
- All ComALERT Attendees (discharges and graduates) in normal type
- Matched Control Group Members in brackets [ ]
- Note: Percentage figures have been rounded.

As Table I, *infra*, indicates, parolees in the matched control group (who did not have the benefit of ComALERT) were over twice as likely to have been re-arrested, re-convicted, or re-incarcerated within one year of their release from prison as were ComALERT graduates. Even two years out of prison, ComALERT graduates showed far less recidivism than the parolees of the matched control group. Twenty-nine percent of ComALERT graduates were re-arrested, 19% re-convicted, and only 3% re-incarcerated for a new crime.[43] By contrast, 48% of

42. Erin Jacobs, ComALERT's Research Director, collaborated with Professor Western on this research. A final report of their findings and evaluation was submitted to the New York State Division of Criminal Justice Services in October 2007.

43. Although the comparison is imperfect, the recidivism rates of ComALERT graduates were dramatically lower than for prisoners released from state prisons in general. A study conducted in 2002 of inmates released from prisons in 15 states in 1994 concluded that, two years after release, approximately 59% of ex-offenders had been re-arrested, 36% had been re-convicted, and approximately 19% had been re-incarcerated for a new crime. PATRICK A. LANGAN & DAVID

the matched parolees were re-arrested, 34% re-convicted, and 7% re-incarcerated for a new crime. Even re-incarceration based on parole violations occurred much less frequently for ComALERT graduates (16%) than for parolees in the matched control group (24%).

Graduate Characteristics

Because those ComALERT participants who graduated were less likely to recidivate than those who had merely attended the program but not graduated, it is useful to understand those characteristics, if any, which appear to have some relation to program success. Two particular client characteristics merit additional scrutiny. First, older clients, perhaps not surprisingly, often fare better than younger clients.[44] ComALERT clients in the youngest age group (18-25), a group that comprises approximately one-quarter of all ComALERT clients, are far less likely to graduate than clients in any other age group. Only about 39% of those in this age group complete the program. In contrast, graduation rates for all other age groups are above 50% and, in general, graduation rates seem to increase as age increases, so that three-quarters of those above 46 years old graduate.

Second, there also appears to be a strong relation between employment and completion of the program. Those who were already employed full-time when they entered ComALERT had a graduation rate of 60%. In comparison, those who were unemployed when they entered ComALERT were least likely to graduate, having a 42% graduation rate. Most strikingly, ComALERT clients who participated in the RWA transitional employment program had a 72% graduation rate.

LEVIN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1994, NCJ 193427, at 3 tbl.2 (2002).

44. These results are not aberrational when assessed in light of studies that show that younger ex-offenders are more likely to recidivate than are older ex-offenders. For instance, a study of all New York State prison releases from 1985-2001 determined that those offenders who were under the age of 25 at the time of their release returned to prison at much higher rates than older offenders. For example, the study found that 51.5% of those released between the ages of 19-20 returned to prison, whereas only 30.3% of those released between the ages of 46-49 returned to prison. LESLIE KELLAM, STATE OF NEW YORK DEP'T OF CORRECTIONAL SERVICES, 2001 RELEASES: THREE YEAR POST RELEASE FOLLOW-UP 21 tbl.7.1 (2002).

Employment

In October, 2004, ComALERT began keeping statistics on client characteristics, including data on clients' employment status at the time of entry into ComALERT and at the time of graduation. Analysis of the figures has revealed a startling before-and-after picture of the ComALERT graduates. Approximately 50% of clients entering ComALERT are unemployed, 23% are in transitional employment, and only 19% have full-time, non-transitional employment. (The remaining ComALERT clients are employed part-time, are disabled, or are students.) Upon graduation, the employment status of these clients has changed dramatically: only 14% are unemployed; 36% have transitional employment; and 34% now have full-time, non-transitional employment. (Again, the remainder are employed part-time, are disabled, or are students.)

Professor Western studied the employment and earnings of ComALERT graduates, and compared them to those of a matched control group of Brooklyn parolees. The results of his examination are heartening. ComALERT graduates were nearly four times as likely to be employed as the parolees in the matched control group. ComALERT clients who participated in the RWA program had an especially high rate of employment (nearly 90%). ComALERT graduates also had much higher earnings than parolees in the control group.

While the results of Professor Western's research highlight the strong connection between employment and successful re-integration into the community, the personal stories of ComALERT graduates make that case, as well. For example, one former client, a 53-year-old Latino, Vietnam War veteran, was employed for many years following his discharge from the military. But then, he began using drugs, and his previously steady life derailed. His addiction and drug use led to his divorce, the loss of his job, and two prison sentences. The second, for a robbery conviction, lasted about one and one-half years. While on parole after his latest release, the client entered ComALERT and began receiving drug treatment from the professional ComALERT/CSEDNY counselors. Through ComALERT, he also participated in the Doe Fund's RWA program.

He graduated from ComALERT, and after about one year, he landed a full-time job as a doorman. Satisfied in his job, he is very thankful to be in his present situation. He has remained clean for several years, and attends Narcotics Anonymous meetings to prevent relapsing. He used to live at one of the RWA facilities, but, while in the program, he managed to save about $5,000. With his savings and the salary from his present job, he is now able to pay for a room of his own. He aspires to get his own apartment by the end of this year.

Another ComALERT graduate, a 36-year-old African-American, served over 15 years in prison for a robbery conviction—his only arrest. He had been using drugs for several months leading up to his crime. After his release from prison, Parole's Access program referred him to ComALERT for mandated drug treatment. The client addressed several issues with his ComALERT primary counselor, including drug use, child custody issues, and employment. The client, who already had housing, was referred to the Doe Fund's RWA-Day Program. He went through RWA training, starting with street cleaning, and then participated in RWA's Pest@Rest exterminator training program. He is now employed full-time as an exterminator for a private company, and is also drug free.

For both of these men, employment has promoted stability, self-pride, financial independence, and sobriety. They have become productive citizens and have turned their lives around.

Future Challenges

While confirming the success and value of ComALERT's collaborative model, Professor Western's research has also helped identify aspects of the program that can be strengthened with the hope of thereby increasing positive outcomes.

In the near future, ComALERT will be offering additional job-related services on-site at the ComALERT Re-Entry Center, such as job readiness and resume writing workshops. The goal of these services will be to engage and retain a greater number of those clients who enter the program without full-time employment, but who, for various reasons, decide not to participate in the RWA program. Classes in computer use will also be made available on site. This will allow parolees, some of whom

have been incarcerated for several years, to develop marketable skills for today's quickly changing, technologically-driven world.

To further increase the employment prospects of clients, ComALERT, in partnership with Medgar Evers College,[45] will be offering on-site GED test preparation classes and transitioning-to-college classes. These classes may be particularly attractive to younger ComALERT clients and may help to raise the graduation rate of members of this age group.

ComALERT's Executive Director and Deputy Director already work hard at cultivating contacts within the business and labor communities in order to secure jobs for clients. Soon, a job developer will be joining the ComALERT staff to augment their efforts. ComALERT is also investigating possible partnerships with businesses and agencies, such as New York City's Department of Small Business Services, that would teach specialized job skills to ComALERT clients and assist them with job placement.

The Kings County District Attorney's Office hopes to increase the number of female clients, who currently make up only about 2% of ComALERT participants, even though about 7% of all New York State parolees are women.[46] The few women who have participated in ComALERT have a high graduation rate (77%). On-site services geared towards the needs of female clients—such as family counseling, sexual abuse and domestic violence counseling, and parenting classes—may help to attract more female clients. To that end, the District Attorney's Office is exploring the possibility of partnering with community-based organizations such as Family Justice's La Bodega de la Familia[47] to provide these services.

Obviously, all these services cost money, and securing adequate funding is a constant challenge. As already noted, most of ComALERT's present budget is covered by a grant from the New York State Division of Criminal Justice Services, and ComALERT's subcontractors, such as CSEDNY and the Doe Fund, receive their funding from a variety of government and

45. Medgar Evers College, http://www.mec.cuny.edu.
46. New York State Division of Parole, *supra* note 40.
47. La Bodega de la Familia, http://www.labodegadelafamilia.org.

private sources. In light of its success in reducing recidivism and increasing employment rates of ex-offenders, the ComALERT re-entry model should continue to attract fiscal support.

New York taxpayers pay over $2.5 billion a year to maintain state prison operations.[48] In New York City, it costs $67,000 per year to house an inmate in jail.[49] Each time a person is re-arrested and sent to jail, it costs $183 a day to house the person.[50] In contrast, providing a person with ComALERT's drug treatment and case management services costs only $10 a day and providing a person with wages for the Doe Fund's transitional employment costs only $44 a day. These figures show that an effective re-entry program targeted at reducing the number of parolees returning to prison has the potential to save New York a significant amount of money.

Thus, not only does ComALERT meet the long-term goals of reducing crime and increasing public safety, but this enlightened approach to law enforcement also makes sound economic sense. The New York State government has wisely decided to invest funds in ComALERT. The District Attorney's Office hopes that the program's success will also help persuade Congress to pass the Second Chance Act of 2007.[51] This bipartisan legislation would authorize federal funding for re-entry programs throughout the country, and would mark a tremendous stride forward in encouraging collaborative programs between law enforcement, community-based organizations, and social services providers.

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48. In 2001, New York's prison expenditures totaled $2.8 billion. JAMES J. STEPHEN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, STATE PRISON EXPENDITURES, 2001, NCJ 202949, at 2 (2004).

49. According to the New York City Independent Budget Office, this figure does not include a multitude of additional costs attributable to jail operations, including, but not limited to, pension and health care costs of jail employees and debt services costs associated with jail construction and renovation. If all those additional costs are taken into account, the average annual cost per city jail inmate vaults to $113,276 per year, or $310 per day.

50. *Id*.

51. H.R. 1593, 110th Cong. (2007); S. 1060, 110th Cong. (2007). On November 13, 2007, the House passed its version of the Second Chance Act, and the following day, the bill was received in the Senate and referred to the Senate Committee on the Judiciary.

Conclusion

Increasingly, district attorneys are embracing a more proactive, preventive, and holistic approach to crime reduction. Integral to that approach is a willingness to collaborate with partners, both within and outside the criminal justice sphere, in order to address the many interrelated causes of criminal behavior.

For district attorneys considering launching a re-entry program based on the ComALERT model, the Kings County District Attorney's Office has found the following steps to be key in creating an effective program:

- Learn about: who is coming back to the jurisdiction and in what numbers; which communities they are returning to; what social services they need, such as drug and alcohol treatment, transitional employment, transitional housing, vocational training, or family counseling.
- Exploit existing connections with prisons, with the parole system, and with the police. Channels of communication probably already exist, but talk to these entities about how a partnership, including one that involves rapid information sharing, could help connect individuals to needed services and ensure that they do not violate parole.
- Establish relationships with community leaders, faith-based organizations, and community-based service providers. Open a dialogue. These entities will provide links and services that are crucial in assisting the re-entry of ex-offenders.
- Form connections with transitional employment services, labor groups, and businesses within the community. Jobs are a key to success, but, given the competitive job market, may be difficult to come by. Educating these entities about the importance of re-entry and advocating on behalf of the re-entry program can help stimulate interest in the issue and generate employment opportunities.

- Create a program that can respond, to the greatest extent possible, to the specific needs of individual clients. Provide individual counseling if possible.
- Commit the resources of the District Attorney's Office to the re-entry effort—if not office space or a social worker, then at least the time and passion of an executive-level staff member. Assigning such staff to the re-entry program establishes its credibility and demonstrates law enforcement's commitment to the project.
- Advocate for a central location for the program, so that the delivery and quality of services can be better monitored and controlled, and so that a lack of transportation does not become a bar to accessing services.
- Track data regarding client outcomes. An examination of such data over the long term can help identify those parts of the program that are most effective and those that need improvement.

The influx of ex-offenders returning to their communities presents a stark challenge to district attorneys who seek to promote public safety and reduce recidivism. Too often, these formerly incarcerated individuals end up re-offending and landing back in prison—contributing to a cycle of destabilization within neighborhoods that are often impoverished and struggling. Scarce government funds get spent on criminal justice processing and incarceration, instead of on education, health, and social services.[52] By implementing a collaborative re-entry model such as ComALERT, a district attorney's office can steer these communities in a new and safer direction, toward social strength and fiscal health.

52. *See* DON STEMEN, VERA INSTITUTE OF JUSTICE, RECONSIDERING INCARCERATION: NEW DIRECTIONS FOR REDUCING CRIME 13-14 (Jan. 2007).

Two Places at Once: How the Virginia Supreme Court Uses Technology to Improve Efficiency and Safety

Bob Kelley[1]
Jim Scorzelli[2]

The Foxfield Races in Charlottesville, Virginia, draw a spirited crowd of 25,000 horse racing enthusiasts every April. At the 2007 event, Patrol Officer Dennis Hahn of the Albemarle County Police Department took part in the daunting job of keeping the peace. By the end of the day 60 spectators were arrested on various charges ranging from public drunkenness to disorderly conduct. Without leaving the site, Officer Hahn served warrants and received commitment orders for his arrestees, then turned the paperwork over to jail officials while the offenders were loaded onto a waiting Department of Corrections bus. Chief Magistrate Cheryl Thompson conducted the hearings via video and printed the signed warrants and commitment orders from her office in Culpeper, 40 miles away. Instant access to the magistrate and arresting documents via video was not available during the 2006 event, so arrestees were transported to the jail by the arresting officers themselves and

1. Bob Kelley, Magistrate Team Video Engineer Supreme Court of Virginia, joined the department of Judicial Information Technology in 1996 and worked as a computer programmer before becoming a Video Engineer. Bob was a primary participant in the development of the videoconferencing remote print technology.

2. Jim Scorzelli, Magistrate Team Technical Writer Supreme Court of Virginia, has been a support technician for the Magistrate Team in Virginia's Department of Judicial Information Technology for more than three years. Jim's primary responsibilities include customer support, technical documentation and user training for the eMagistrate system.

waited up to six hours before seeing a magistrate to complete the incarceration process.

Magistrates provide the link between law enforcement agencies or citizens and the judicial system in Virginia. Over 450 magistrates throughout the commonwealth issue arrest warrants and summonses as well as commitment, bond and release orders and a myriad of other court documents. These judicial officers fall under the purview of the Office of the Executive Secretary (OES), Supreme Court of Virginia. The Magistrate Support Team, under the Department of Judicial Information Technology (DJIT) of the OES, maintains two systems that are essential to magistrates in the performance of their duty: the eMagistrate system that is used to create court documents and a video system network connecting approximately 140 magistrate offices to a number of police departments, jails and other locations that need signed, original court documents. The effective integration of these two systems was a vital step toward timely and cost-effective processing of criminal and civil defendants across a wide geographical area.

The ability to produce legal documents from the magistrate's location and print originals to a remote facility was a key requirement of the integration of the eMagistrate and video systems. The Magistrate Support Team collaborated with the manufacturer of the video units, Polycom Inc. (*www.polycom.com*), to design and incorporate the printing technique in their current and future video products. The remote print feature that resulted from this collaboration allows the generation of signed documents over the same network used to transmit video signals during a video conference.

This unique application of video conferencing received state-wide recognition when the Department of Judicial Information Technology was selected for the 2006 Governor's Technology Award in the category of Increased Accessibility to Government.[3] "The Awards program honors outstanding achievements and recognizes successful technology and economic development initiatives in the public and private sectors

3. *See* Press Release, Commonwealth of Virginia, "Virginia's Secretary of Technology Announces Governor's Technology Award Winners," (Sept. 11, 2006), *available at* http://www.technology.virginia.gov/TechnologyNews/GovTechAwardWinners2006.pdf.

in the Commonwealth of Virginia."[4] The award also "recognizes [the] use of innovative technologies to improve citizen access to and service from governmental entities of any type."[5]

Remote Access to Magistrates through Videoconferencing

Videoconferencing has served the public significantly since its inception in Virginia's judicial system in 1998 by allowing patrol officers to return to the streets faster and increasing the effective geographic coverage of a single magistrate. The introduction of the remote print feature helps to ensure that all paperwork required to process an arrestee is produced at the remote location. Remote print provides the convenience of sending original documents as opposed to relying on a faxed copy of a document that in the best case needs to be reconciled with the original, or in the worst case lacks sufficient readability to be usable.

Over a recent 12-month period, magistrates issued a daily average of 437 warrants and other documents using the video remote print feature, nearly 15 percent of the total number issued. The video network is commonly used to connect magistrates to jails and police departments, but it can also be used to connect magistrates to hospitals (to process temporary detention orders and emergency custody orders) and sports stadiums or concert venues (to process intoxicated or disorderly offenders). Videoconferencing and remote print usage are expected to increase as deployment of video systems to additional courts and jails throughout the state continues for the foreseeable future.

The remote print functionality of the Virginia Supreme Court deployment is unique among court systems.[6] Polycom is currently the only provider of the remote print feature, and the Supreme Court of Virginia is its only customer using the tech-

4. *Id.* at 1.

5. *Id.*

6. *See, e.g.*, POLYCOM, POLYCOM VIDEO HELPS VIRGINA SUPREME COURT ENSURE DUE PROCESS, BOLSTER PUBLIC SAFETY, AND SAVE MONEY (2006), http://www.polycom.com/common/documents/company/customer_success_stories/government/virginia_supreme_court.pdf.

nology to print legal documents through the video connection to a remote location.[7]

Technical Overview

The Polycom VSX 7000 video unit located in magistrate offices not only provides two-way video and audio but also the means to send documents directly from the magistrate's PC to a printer at any Receiving Facility (See Figure 1). The Receiving Facility is also equipped with a Polycom VSX 7000 and a laser printer. The printer is connected directly to the Polycom video unit with a standard modem cable and a 25-pin converter box. With this configuration, no PC is required at the remote site.

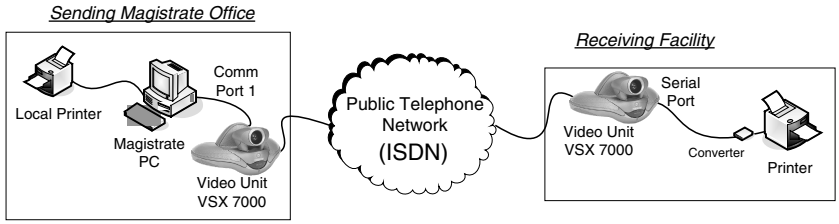

Figure 1. Remote Print Video Network

The technology to transmit video images generally falls into two categories: Integrated Signal Digital Network ("ISDN") and Internet Protocol ("IP"). Use of IP networking to transmit video images has become a common practice in the videoconferencing industry. IP networking easily permits multiple access points within internal, secure networks, but cannot be used in the public domain without stringent security measures to prevent unauthorized access. IP networking also requires fully twice the amount of information (bandwidth) as ISDN to convey the same quality video.

ISDN uses a dedicated phone line, similar to railroad tracks that connect Point A to Point B with no other access points in between. Each endpoint of a video connection, between a magistrate office and a jail, for example, often exists

7. *Id.*

within its own isolated network. The potential for unauthorized access between locations where there is limited control over endpoint security is greatly reduced using ISDN technology. Therefore ISDN is the method of choice for Virginia's magistrates who need to print official digital signatures and court documents at a variety of remote sites.

Return on Investment

There are three major aspects of the use of videoconferencing with remote print that provide significant return on capitol investment. The first is quicker access to the magistrate, where videoconferencing with remote print allows one magistrate to cover multiple jurisdictions from a single office. Without this technology, the magistrate would have to drive to multiple sites to cover the same territory.

The second is enhanced public and judicial officer safety, where videoconferencing with remote print is used in place of transporting dangerous criminals from jail to a courthouse for a hearing. With this technology, the criminal can attend his or her hearing from jail without putting the public or the judicial officers in danger.

The third way that the use of videoconferencing provides a return on investment is through savings on additional equipment and human resource costs. In a recent example from Richmond, Virginia, a facilities issue caused magistrates to be temporarily relocated and required them to process arrestees and jail inmates face-to-face in an open, office-like environment. Sheriff's deputies often worked overtime to provide protective services (transporting and escorting the offenders) while magistrates issued court documents. To eliminate the estimated $1 million cost of protective services to manage this potentially dangerous situation, the city deployed 13 video units at a cost of $140,000.

The initial capital investment required to install each video site is dependent upon several factors including configuration (whether documents need to be originated at either end), ISDN and long distance charges, and video quality desired (determined by the number of ISDN lines). The costs shown in Table 1 are for a basic video system only. Additional costs would be

incurred if the receiving facility were also required to double as an originating office (as would be the case for two magistrate offices alternatively covering each other).

VIDEO EQUIPMENT		
Originating Office	Polycom VSX 7000	$7500[8]
Receiving Facility	Polycom VSX 7000	$8500

NETWORK		
ISDN Lines (3 recommended)	Verizon	$120/month ($40 per month per line) + usage fees[9]

Table 1. Basic Video System Costs

With the remote print feature a PC is not required at the remote site thus reducing equipment costs. A process is issued at the local site and simply sent to the remote printer through the existing video connection. Remote printing allows savings on the cost of fax machines and extra phone lines. The efficiency of remote printing saves law enforcement the time it takes to transport offenders to staffed magistrate offices. Since the original document is printed and executed, it also saves office personnel the time it would have taken to match up the faxed copy with the original.

Quicker access to magistrates has been noted in the areas in which video is utilized. When an arrest is made, a police officer must either take the accused to the nearest on-duty magistrate or wait for an on-call magistrate to come in. In either scenario the magistrate may not be seen for at least 30 to 60 minutes depending on distance or traffic. With a video system in place, a third option is to take that person to the nearest remote video site. Using the video system, the magistrate conducts a probable cause hearing in the same way as it would be conducted in person. If the magistrate finds probable cause to issue the process, a warrant is issued from the magistrate's PC and printed at the remote site. Being able to print the original document with the appropriate signature allows the police of-

8. Can reach $12,000 for a customized configuration.
9. See comment above.

ficer to execute the original warrant immediately. In this way the remote video and print process provides the same judicial function as if the police officer had driven the person under arrest to the magistrate, but in a fraction of the time.

Quicker access to the magistrate in turn enhances public safety in a number of ways. A magistrate can perform a video hearing at any location within the judicial district. If the magistrate determines the person under arrest will be committed to jail, then all the necessary commitment paperwork can be produced via video prior to incarceration. The arresting officer does not have to be seen again by the magistrate and is able to return to duty or patrol sooner, which benefits the public by providing more active law enforcement coverage.

On several occasions video conferencing has been used to try civil cases in which a maximum-security defendant is violent, making transport to and from a courtroom costly and dangerous. The extent to which the video magistrate system has positively impacted public safety and law enforcement is incalculable.

Conclusion

The remote print technique requires no special software or hardware other than the video units and parts for the remote printer. As such, this solution could be used with any PC-based application. The only drawback noted since statewide deployment began was an instance where local police officers had to become accustomed to the idea that they must sometimes wait for a magistrate serving multiple jurisdictions to complete a video process with another officer before being served.

The practical use of video conferencing within Virginia's judicial system has been proven. Significant actual and intangible cost savings have already resulted from the use of video and will continue to grow as more systems are deployed throughout the state. With relatively minor adjustments, the techniques used to implement Virginia's Video Magistrate System can be successfully applied to any state's judicial system.

Interview

Law as Therapy: What Impact Do Drug Courts Have on Judges?

An Interview with Judge Peggy Fulton Hora

Robert V. Wolf[1]

If someone were to give an award for the most influential criminal justice innovation of the last 20 years, there is little doubt that drug treatment courts would be a top contender. And there is no question that within the drug court movement, retired Judge Peggy Fulton Hora is one of its most influential figures.

Drug courts, which link participants with judicially monitored drug treatment, burst onto the scene in 1989 with a new paradigm. While courts in the past had been known to order an offender to participate in treatment on an ad hoc basis, the nation's first drug court—the Miami-Dade County Drug Court—added unprecedented rigor. Court staff carefully screened participants, developed treatment plans attuned to individual needs, matched participants with appropriate treatment providers, administered frequent drug tests, required regular court appearances and allowed the judge to develop a rapport with individual offenders. In another innovation, the court also fos-

1. Robert V. Wolf is Director of Communications at the Center for Court Innovation.

tered a spirit of collaboration among the judge, court staff, prosecutor, defense counsel, and treatment providers.

But perhaps the most revolutionary aspect of the Miami-Dade experiment was that the court—following the advice of addiction specialists—acknowledged that relapse was often part of the recovery process, responding to each infraction with progressively more serious sanctions. Successes, on the other hand, were met with incentives—everything from applause in the courtroom to fewer court appearances to gift certificates. The ultimate reward, however, was the chance to not only avoid jail but receive help in building a drug-free life.

The Miami-Dade court and other drug courts around the United States that subsequently emerged developed policies that put a spotlight on results (did the participant get sober?), encouraged greater accountability (by responding swiftly to noncompliance, for example), and fostered information-sharing among the judge, prosecutor, defense attorney, court staff, probation, and treatment providers. These policies—eventually honed into 10 key components by the National Association of Drug Court Professionals[2]—made it easier for other jurisdictions to replicate the model. And, encouraged by reports of positive results, replications occurred apace. The U.S. Department of Justice, with congressional and presidential support, spent tens of millions on grants to support the planning, development and operations of drug courts across the U.S.[3]

While the nearly 1,700 drug courts (and more than 300 being planned) in the U.S. today might seem to be the Miami-Dade County Drug Court's greatest legacy, in reality the 1989 experiment helped give birth to something larger: problem-solving courts, in general.[4] Although many other factors have also gone into the growth of the problem-solving court movement (which includes under its umbrella an estimated 300 do-

2. *See generally* OFFICE OF JUSTICE PROGRAMS DRUG COURTS PROGRAM OFFICE, U.S. DEP'T OF JUSTICE, DEFINING DRUG COURTS: THE KEY COMPONENTS (1997), *available at* http://www.nadcp.org/docs/dkeypdf.pdf.

3. AUBREY FOX & ROBERT V. WOLF, THE FUTURE OF DRUG COURTS: HOW STATES ARE MAINSTREAMING THE DRUG COURT MODEL, CENTER FOR COURT INNOVATION, 13 (2004), *available at* http://www.courtinnovation.org/_uploads/documents/futureofdrugcourts.pdf.

4. JUSTICE PROGRAMS OFFICE, AMERICAN UNIVERSITY, BJA DRUG COURT CLEARINGHOUSE PROJECT SUMMARY OF DRUG COURT ACTIVITY BY STATE AND COUNTY 111 (2007), http://spa.american.edu/justice/documents/2150.pdf.

mestic violence courts,[5] more than 150 mental health courts,[6] and 29 community courts,[7] among other problem-solving models), it's clear that drug courts in many ways laid the philosophical and jurisprudential groundwork for other problem-solving courts to follow.

Peggy Fulton Hora, who retired from the California Superior Court in 2006, is a nationally recognized drug court expert.[8] The author of numerous articles, Judge Hora is associated not only with drug courts but with a related movement, therapeutic jurisprudence. First articulated by law professors David B. Wexler and Bruce J. Winick, therapeutic jurisprudence posits that the law and the criminal justice system play a role in participants' emotional health and psychological well being.[9] To Judge Hora, drug courts are prime examples of how legal procedures can be adapted to nurture positive, therapeutic outcomes.[10]

Like many judges who have presided over drug courts (she served six years at the helm of the Alameda County Drug Court in Hayward and chaired the committee that set up the first drug court in California in 1991), Judge Hora is an enthusiastic advocate. Her advocacy, she says, stems from the fact that drug courts appear to not only reduce recidivism but also save taxpayers money.[11] But her advocacy also has another source: the tremendous amount of satisfaction she derived as a judge

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5. Susan Keilitz, *Specialization of Domestic Violence Case Management in the Courts: A National Survey*, Williamsburg, Va.: National Center for State Courts, 2000.

6. Bureau of Justice Assistance, http://www.ojp.usdoj.gov/BJA/grant/mentalhealth.html.

7. Center for Court Innovation, http://www.courtinnovation.org/index.cfm?fuseaction=document.viewDocument&documentID=669&documentTopicID=17&documentTypeID=10.

8. For additional background on Judge Hora, visit her web site at http://www.judgehora.com.

9. David B. Wexler, *International Network on Therapeutic Jurisprudence*, http://www.law.arizona.edu/depts/upr-intj/ (last visited Nov. 15, 2007).

10. Hon. Peggy Fulton Hora, Hon. William G. Schuma, & John T.A. Rosenthal, *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America,* 74 NOTRE DAME L. REV. 439 (1999), *available at* http://www.ndci.org/admin/docs/notredame.pdf.

11. *See* AMANDA B. CISSNER & MICHAEL REMPEL, THE STATE OF DRUG COURT RESEARCH: MOVING BEYOND "DO THEY WORK?," CENTER FOR COURT INNOVATION (2005), http://www.courtinnovation.org/_uploads/documents/state%20of%20dc%20research.pdf.

working in a drug court. In the following interview, Judge Hora discusses therapeutic jurisprudence and a study she and a colleague conducted of job satisfaction among drug court judges.

How are the concepts of problem-solving justice and therapeutic jurisprudence related?

Therapeutic jurisprudence is bigger than problem-solving courts. Therapeutic jurisprudence is an academic field, and therefore can be applied to many different situations. You can use it in pure criminology, for example, in the way surveys are conducted and outcomes are reported in academic journals. You can use therapeutic jurisprudence principles in any form: in a mental health hearing, for example, or an administrative law or appellate court.

Therapeutic jurisprudence's question is: Can we enhance the likelihood of desired outcomes and compliance with judicial orders by applying what we know about behavior to the way we do business in court? And therapeutic jurisprudence's other question is: Can we reduce the anti-therapeutic consequences and enhance the therapeutic ones without subordinating due process and other justice values? Essentially, therapeutic jurisprudence is designed to make us ask whether the law does things to help people. It proposes that we should look at the law as a healing profession. It requires a new perspective that sees the court system as an interdisciplinary, problem-solving, community institution.

But to be therapeutic, the outcome has to be healing, right? So what about domestic violence courts whose primary goal is to hold offenders accountable for battering and for improving the safety of victims? Many domestic violence courts, in fact, reject the idea that you can rehabilitate batterers, saying there's no evidence that any kind of therapy works.[12]

12. *See, e.g.*, OFFICE OF JUSTICE PROGRAMS NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, DO BATTERER INTERVENTION PROGRAMS WORK? TWO STUDIES (2003), http://www.ncjrs.gov/pdffiles1/nij/200331.pdf; MELISSA LABRIOLA, MICHAEL REMPEL & ROBERT C. DAVIS, TESTING THE EFFECTIVENESS OF BATTERER PROGRAMS AND JUDICIAL

I feel that domestic violence courts can be therapeutic but if they're not emphasizing rehabilitation then they're not. But let me be clear: protecting a victim and the community is the primary and more important thing. Therapeutic jurisprudence never trumps fundamentals like equal protection or due process. Professors Bruce Winick and David Wexler say that protection of victims and public safety has to be foremost in the mind of any therapeutic or problem-solving court.

When you talk about domestic violence courts, however, you're talking about ultimately releasing batterers back into the community and back into their families where, if they're not rehabilitated, the crime will continue to occur. We know from the nature of the crime that it will not just recur but usually escalate. . . Any court that doesn't look at rehabilitation or reintegration is not a problem-solving court. Unless every crime results in a sentence of life without the possibility of parole, then you have to look at rehabilitation and reintegration of a peaceful partner in the family.

For rehabilitation in a problem-solving court to be effective, judges and staff need to be well informed about the best treatment modalities. Has there been enough research to guide practitioners about the best ways to treat complex problems like drug addiction and mental illness in each and every case?

Academics can do the research and practitioners can publish papers in journals of the highest caliber, but the lessons still need to be translated into practical applications in the therapy setting and the courtroom. This must include what's realistic for judges and what's available. A former client of mine used to say, "It's like parsley on fish; it don't mean a thing." In other words, unless you can find a practical application for the research, it's nice but totally useless to criminal justice.

But there are some things that we're fairly certain about and apply in drug court. In trainings for problem-solving

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MONITORING: RESULTS FROM A RANDOMIZED TRIAL AT THE BRONX MISDEMEANOR DOMESTIC VIOLENCE COURT: FINAL REPORT SUBMITTED TO THE NATIONAL INSTITUTE OF JUSTICE,CENTER FOR COURT INNOVATION (2005), *available at* http://www.courtinnovation.org/_uploads/documents/battererprogramseffectiveness.pdf.

courts, we teach everybody that a sanction doesn't necessarily mean jail. A judge saying to someone, "I'm so disappointed—I'm just shocked and upset that you did this," can have a huge impact. The judge's disapproval can be a bigger sanction than previously understood and probably bigger than sending them to jail for a few days.

When we first started this whole movement, we didn't want to be seen as a soft-on-crime initiative. We stressed the sanctions, the rigorous monitoring, how tough drug courts were. But now they're broadly accepted. They're state supported, federally supported, in tribal courts, international. Problem-solving courts have been endorsed by the conferences of chief justices and court administrators. With all that support, we as judges can start to look at other things, things like motivational interviewing, which tells us that you can interview participants in a way that will enhance the likelihood of compliance. . . .

All this is a work in progress, it's still a very new field, but we know a lot more than we used to know. The challenge is to not necessarily do more research—certainly more needs to be done—but the bigger challenge right now is to integrate what we already know into mainstream judicial education.

How do you respond to critics of therapeutic jurisprudence who say, "Not only aren't judges qualified to be social workers, but being part of the treatment team and playing a therapeutic role in the courtroom undermines judicial independence."

I absolutely agree. Judges shouldn't be social workers. Social workers should be social workers. But what judges should be is effective, and what they should rely on is the evidence we have to be most effective, and the most effective way we can operate is through a problem-solving matrix. We know that we get better outcomes, we know we reduce recidivism, we know we improve the health of the individual, family, and community by using an integrated and interdisciplinary approach to the problems that bring people to court.

Of course, we don't want to trump due process or equal protection for even the best therapeutic goal. Ultimately,

whatever the team decides, the judge is driving the bus and it is still a court of law. A judge has to act like a judge and follow judicial ethics.

If people could solve these problems themselves they wouldn't be standing in front of us every day. There is a genesis, with rare exceptions, of these behaviors that gets people into court. If we can improve their life situations, play on the strengths they have, then gosh, we're in the catbird seat.

What other criticism of problem-solving courts have you heard and how do you respond to it?

Is it more costly? No. It's clear that these courts save money.[13] Does it take more time on the docket? Yes. It's clear that you have to spend more time on individual dockets but it pays off in the lack of recidivism in the long run and lack of foster care for children reunited with their families of origin and the lack of emergency room visits for people with mental health issues who've gone off their medications and have to have them completely recalibrated and balanced out again.

In my drug treatment court, I had at one time three participants with schizophrenia. On average, they were hospitalized twice a year in emergency psychiatric settings, costing $50,000 a visit or $100,000 a year. On those three people alone, the drug court helped save $300,000 in a single year because they stayed on their medications and didn't have psychotic breaks that needed to be addressed. In California, according to the Administrative Office of the Courts, drug courts save $18 million annually.[14]

13. A study commissioned by the Judicial Council of California found that outcome benefits ranged from about $3,200 to over $20,000 per participant. SHANNON M. CAREY, DAVE CRUMPTON, MICHAEL W. FINIGAN & MARK WALLER, NPC RESEARCH, A METHODOLOGY FOR DETERMINING COSTS AND BENEFITS PHASE II: TESTING THE METHODOLOGY FINAL REPORT, at iv (2005), *available at* http://www.courtinfo.ca.gov/programs/collab/documents/drug_court_phase_II.pdf.

14. COLLABORATIVE JUSTICE COURTS ADVISORY COMMITTEE, PROGRESS REPORT 3 (2003), *available at* http://www.courtinfo.ca.gov/reference/documents/colljustrept2003.pdf. *See* Press Release, Administrative Office of the Courts, Judicial Council of California, New Report Shows Drug Courts are Cost-Effective, Help Rebuild Lives (Apr. 15, 2003) (summarizing the Collaborative Justice Courts Advisory Committee Progress Report), *available at* http://www.courtinfo.ca.gov/pressroom/newsreleases/NR26-03.HTM.

Yes, problem-solving courts ask participants to sign appropriate waivers about confidentiality of medical and treatment information, but is it a violation of the client's rights to have them waive those things? No. Rights are waived all the time. People on probation waive their constitutional rights. What about the Fourth Amendment prohibitions on search and seizure? Probationers regularly waive their rights and agree to conditions such as "submit to a search of your person, personal effects, automobile or home any time of the day or night with or without probable cause.". . . And the right to associate? You give that up when you're told that as a condition of probation that you can't associate with known felons. It's a normal procedure to have people give up their rights as a condition of getting a deal. Drug courts are no more or any less stringent in the waiver of rights in order to participate in the program.

You recently conducted a study of judicial satisfaction among drug court judges. What led you to pursue that line of inquiry?

In the mid-1990s I was in Washington D.C. at the National Association of Drug Court Professionals conference, sharing a room with a judge from San Diego, an old friend. We hadn't seen each other in months, and we're getting ready for bed and we're talking about everything: movies, books, and what the grandkids are doing, and then we started talking about our drug courts. And finally we said, "We have to go to sleep." And then one would ask, "Are you still awake?" and we kept going on like that, talking about our work until three in the morning. The next day, it's break time at the conference, and here are all these judges who can't shut up about their drug court and the wonderful things that are happening, and I said to myself, "I've never seen so many people get so excited about their work. I mean that just doesn't happen when judges discuss the Uniform Commercial Code." What is it that gets people so excited about this? I said to myself that something different is going on here.

So Deborah Chase [a psychologist and senior attorney with the California Judicial Council and The Center for Families, Children and the Courts] and I designed a survey, and the first

groups we surveyed were drug court judges and family court judges, and then we compared them. What we found was that on every measure the drug court judges were happier, more satisfied.[15]

Then we decided to ask family court judges who work in unified or integrated settings. We speculated that they might have greater satisfaction than regular family court judges because they handle all cases involving a single family. Since they handle everything, there aren't conflicting orders, services are more appropriate; it's grounded more in therapeutic jurisprudence than regular family law court. What we found was that, in terms of judicial satisfaction, the drug court judges came out first, unified family court judges came out second, and the regular family court judges came out third. Drug court judges also expressed more hopefulness, a greater belief in people's ability to change.[16]

So then we thought we should survey a fourth group: criminal court judges who don't work in problem-solving courts, and once again, drug court judges came out on top followed by unified family court judges, the two groups that work therapeutically.

We interpret this as saying that judges who take a problem-solving approach have higher degrees of judicial satisfaction. Some questions on the survey received a 100 percent positive response from drug court judges, like when they affirmed that "I feel that people can change and that I'm helping people."

Other research has shown that drug court judges affect participants, that participants feel connected to the judge and that what the judge thinks of them is important for achieving sobriety and mature recovery.[17] But what we didn't know was how much the judges were affected by that as well. What it seems to come down to is that if you believe that you're helping people, if you're watching people change and feeling effective, then you have a higher degree of job satisfaction.

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15. Peggy Fulton Hora & D. J. Chase, *The Implications of Therapeutic Jurisprudence for Judicial Satisfaction*, 37 CT. REV. 12, 12-20 (2000).

16. *Id.* at 8-28.

17. *See* AMANDA B. CISSNER & MICHAEL REMPEL, *supra* note 12 (summarizing and analyzing drug court research).

Don't drug court judges sometimes—because they spend more time on each case—have more work to do? Doesn't that counterbalance some of the satisfaction they feel?

They don't seem to care, and there are plenty of drug court judges who every single day are handling their drug court dockets in their spare time, who are doing it at lunch time or after five o'clock in jurisdictions that still think of it as some kind of boutique court. For them, is it more work? Hell yes. They're giving up their lunch time, they're free time. Why? Because they're incredibly satisfied with the work they're doing in drug court.

Satisfaction derives from being effective, from watching people whose lives are a mess being able to integrate back into society. That's what kept my friend and me up until 3 in the morning: to see something that actually works.

Are there lessons from your experience for non-drug court judges?

You don't have to be in a specific problem-solving docket to employ problem-solving techniques. The National Judicial College produced a brochure called "Effective Judging for Busy Judges" that explains how the basic principles of problem solving can be integrated into a judge's regular docket.[18] If I ruled the world, every judge would be a problem-solving judge by taking an integrated approach, linking participants to effective resources, monitoring outcomes, and having the most information available to make good decisions.

I don't think we went to law school saying our dream job would be calculating long prison terms for young men of color. Probation officers didn't come to their field to keep busting people on probation violations and sending them back to prison; they did it to help people rehabilitate. Police officers, too, were attracted to the job because they wanted to help people. And that's what the problem-solving approach is all about—and ultimately why it produces greater judicial satisfaction.

18. THE NATIONAL JUDICIAL COLLEGE, EFFECTIVE JUDGING FOR BUSY JUDGES (2006), *available at* http://www.judges.org/pdf/effectivejudging_book.pdf.

Book Review

The Great American Crime Decline

Franklin E. Zimring
Oxford University Press 2007
242 pp. with Appendices

Reviewed by Henry M. Mascia[1]

Franklin E. Zimring is the William G. Simon Professor of Law and Wolfen Distinguished Scholar at the University of California, Berkley. His most recent works include *Crime is Not the Problem: Violence in America* (with Hawkins, 1997), *American Youth Violence* (1998), and *The Contradictions of American Capital Punishment* (2003). In his latest book, *The Great American Crime Decline* (2007), Zimring addresses the academic community, and attempts to inspire a more ardent pursuit of interdisciplinary, empirical research to better understand the crime decline of the 1990's and crime trends in general. Nevertheless, every reader can gain important insights into crime trends from this book, which refutes many of the traditional explanations for changes in crime rates.

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1. Henry Mascia is a third-year, part-time student at Pace University School of Law where he is on the Editorial Board of the Pace International Law Review and a panelist on Pace Law School's Human Rights in Action Nomination Committee.

A coming storm of juvenile violence[2]; a blood bath[3]; 60,000 more juvenile murderers, robbers, and thieves[4]: these are just a few of the descriptions of the crime wave that American cities were predicted to face during the late 1990's. Fortunately, during the 1990's the United States experienced the most dramatic decline in the rate of crime per 100,000 inhabitants since World War II. Although no one predicted this historic decline in crime rates, there is no shortage of explanatory theories. Some credit the increased access to legal abortion, others increased incarceration rates, others demographics, and still others the booming economy. However, none of these explanations adequately account for the equally dramatic decreases in crime rates during the same period in Canada and the decline in New York City, which was twice as great as the national average.

In his seminal book *The Great American Crime Decline*, Franklin Zimring challenges orthodox notions about the causes of large scale crime rate declines by employing a comparative analysis of the national crime declines of Canada, the United States and the local crime decline of New York City during the 1990's. These analyses raise more questions than they answer, but Zimring clearly and concisely explains what conclusions can be drawn from the empirical data, and what areas need to be studied further to better explain the variable factors that influence crime rates. Most importantly, Zimring's findings demand a reconsideration of the most foundational principles upon which our ideas about crime and its causes are based.

Before arriving at conclusions about what caused the decrease in crime rates during the 1990's, it is necessary to understand the extent of the declines. According to the FBI's *Uniform Crime Report*, from 1990 to 2000 the rate of crime per 100,000 inhabitants in all seven categories decreased dramatically in the U.S., ranging from 23 percent in the case of larceny to 44 percent in the case of aggravated assault. As Zimring points out, these numbers may even underestimate the decrease in crime rates because the household survey done by the Bureau of Jus-

2. FRANKLIN E. ZIMRING, THE GREAT AMERICAN CRIME DECLINE 22 (Oxford University Press 2007).

3. *Id.*

4. *Id.* at 165.

tice Statistics estimated decreases between 44% and 65%.[5] Although these numbers indicate a precipitous decrease in the rate of crime, the most distinguishing characteristic of the American decline is its duration of nine years which demonstrates that it was probably not merely a cyclical decrease.[6] The slow, continuous decline over nine years also belies any single-cause theory.[7] In New York City during the same period, the decrease in crime rates was about twice the national average.[8] According to the FBI's *Uniform Crime Report*, in Canada during the same period, all seven categories of crime saw dramatic rate decreases, ranging from 13 percent in the case of robbery to 62 percent in the case of serious assault.[9]

Few dispute that the decrease in the rate of crime in the U.S. during the 1990's was a unique event; however, few can agree on what caused this historic event. An increase in incarceration rates, a decrease of young males as a percentage of the population, and a booming economy are often speculated to be indicators of crime rates. Zimring's comparative analysis offers new insight into the viability and explanatory power of these theories.

Although a historically high number of incarcerated persons and decreasing crime rates coincided during the 1990's, Zimring's international comparison contradicts the assertion that increased prison populations, alone, account for most of the crime decline in the 1990's. Zimring's unique comparison of the Canadian and American crime declines of the 1990's reveals two interesting facts. First, Canada and the U.S. experienced a strikingly similar crime decline during the 1990's. The decline in rates of crime per 100,000 inhabitants continued for nine years in both Canada and the United States. Additionally, the percentage of decreases in the rates of crime in the U.S. and Canada were astonishingly similar. However, Canada's prison

5. *Id.* at 8. Rape decreased by 65%, robbery by 44%, aggravated assault by 42%, burglary by 15%, auto theft by 58%, and larceny by 48%. *Id.*

6. *Id.* at 20.

7. *Id.* at 21.

8. *Id.* at 137. Homicide decreased by 73%, rape by 52%, robbery by 70%, aggravated assault by 46%, burglary by 72%, auto theft by 78%, and larceny by 52%. *Id.* at 137.

9. *Id.* at 108. Homicide decreased by 34%, rape by 22%, serious assault by 62%, robbery by 13%, burglary by 30%, larceny by 39%, and auto theft increased by 25%. *Id.* at 108.

population remained relatively stable, while the prison population in the U.S. grew significantly. While acknowledging that the best guess is that the increased prison population of the 1990's accounts for 10% to 27% of the crime decrease, Zimring carefully points out that there is no effective way to accurately test for or even measure the effects of the prison population on crime rates.[10] Accordingly, Zimring cautions against overemphasizing the affect of increased prison population on crime rates.

Zimring's comparative analysis also reconsiders the influence of demographics on crime rates. A large proportion of crimes are committed by males ages 15 to 29.[11] In the U.S., from 1990 to 2000 the proportion of the population between 15 and 29 dropped from 23.5% to 20.8%.[12] This decrease in the percentage of the most high risk demographic in the general population coincided with the major decline in crime rates during the 1990's. In Canada, the same high risk group dropped from 24% to 20.3% of the overall population.[13] This decrease in the high-risk demographic is the only trend which occurred in both the United States and Canada. However, New York City's decrease in the rate of crime was nearly double the national average; yet, the proportion of the city's population of males ages 15-29 declined only half as much as the national decline.[14] Zimring derives several important conclusions from this data. First, a smaller share of the population in high-risk groups clearly puts downward pressure on the rate of crime per 100,000 inhabitants.[15] However, as the case study of New York City illustrates, a change in demographics alone will never be a major explanation of crime rates dropping by half. Rather, major decreases in crime rates can occur without substantial changes to a population, as in New York City during the 1990's.[16]

Although there is no unified theory on the influence of the economy on crime rates, the rates of some offenses do rise and

10. *Id.* at 55-56.
11. *Id.* at 56.
12. *Id.* at 61.
13. *Id.* at 123.
14. *Id.* at 230.
15. *Id.* at 61.
16. *Id.* at 207.

fall with changes in rates of unemployment.[17] Zimring also points out there is some empirical evidence to suggest a relationship between crime rates and economic growth.[18] However, during the 1990's Canada experienced declines in crime rate similar to the U.S. without experiencing the same economic boom as the U.S.; in fact, Canada's unemployment rate was higher during the 1990's than it was during the 1980's, when crime rates increased.[19] Moreover, the economic conditions in New York City cannot explain why New York City experienced a crime decline that was largely double the national average.[20] In fact, New York City's unemployment rate was actually greater than the national unemployment rate during the 1990's.[21] Zimring concludes that overall economic growth is certainly "good news" for crime rates. However, its difficult to measure the degree to which economic growth influences crime rates. Indeed, some experts have estimated that the economy decreased property crime by six to seven percent, while others have estimated up to forty percent of property crime. Finally, Zimring concludes that the combination of increased prison populations, the economy, and demographics created a very favorable condition for a decline in crime rates. Therefore, they should have, at the very least, made the crime decline during the 1990's much less of a surprise than it was.

Zimring also addresses some theories which were inspired specifically by the 1990's crime decline.[22] Most notably, Zimring examines the theory that the increased availability of legal abortions in the early 1970's caused the crime decline of the 1990's. Zimring skillfully examines the methodology and substance of U.S. studies which purport to prove a connection between legalized abortion and crime decline. Yet, his most novel, persuasive analysis comes from a comparison of Canadian and American abortion policies. Zimring's comparative study reveals that the change in abortion policy does not explain Canada's crime decline during the 1990's. Canada first

17. *Id.* at 63.
18. *Id.*
19. *Id.* at 122-123.
20. *Id.* at 230.
21. *Id.*
22. *Id.* at 73.

allowed abortions on restricted grounds in 1969, but Canada did not remove the restrictions until 1989. Therefore, juveniles and those ages 18-24 were the only groups during the 1990's with 100% of their members born after 1970. Yet, they did not experience larger than average declines in crime rates during the 1990's.[23] In fact, the age group with the greatest decline in crime rates, those age 30-39, did not have any post-1970 births and thus, would not have been affected at all by Canada's legalization of abortion.

Zimring also reexamines practices previously thought to be ineffectual, such as an increase in police officers and improved police tactics.[24] Zimring admits that only a marginal national increase in police officers correlated with the crime decline during the 1990's.[25] Zimring also chronicles the inherent difficulty in accurately measuring a nationwide change in police tactics in a system with a decentralized, locally controlled police force.[26] The influence of these policies can be measured more accurately on a municipal than a national level. Zimring's analysis of trends in New York City suggests that changes in policing may have contributed to New York City's overall decline in crime rates.

During the 1990's New York City experienced no economic growth which would explain a crime decline double the national average.[27] Also, New York City's population of high risk groups declined at a slower rate than that of the nation as a whole.[28] Similarly, incarceration rates increased, but not enough to explain a decline in crime rates twice that of the U.S.[29] Therefore, the only distinctive trend that would explain New York City's dramatic decrease in crime rates is the increase in the number of police officers and changes in manner of policing.

The New York City police department employees increased by 35% raising the rate of employees per 100,000 citi-

23. *Id.* at 125.
24. *Id.* at 152.
25. *Id.* at 77.
26. *Id.* at 80.
27. *Id.* at 230.
28. *Id.*
29. *Id.* at 232.

zens by 23%.[30] This dramatic increase deserves careful attention, especially since the number of police employees in the next nine largest U.S. cities increased by only 14% and raising the rate of employees per 100,000 citizens by 2.5%.[31] In addition, the New York City police department instituted a policy of proactive policing which included various tactics such as aggressive stops, more misdemeanor arrests for drug offenses, and a variety of public-order offenses.[32] Finally, the New York City police department established a new system which facilitated the flow of information to management and stricter scrutiny of police activity.[33] Zimring recognizes that it is impossible to separately measure the influence of each of these changes on crime rates because all three occurred simultaneously.[34] Though he stops short of crediting a percentage of the New York City crime decline to changes in police tactics, he notes that a change in police tactics is the most plausible cause for New York City's disproportionate decrease in crime rates.[35]

Although Zimring's analysis of crime trends in Canada, the U.S., and New York City clearly and concisely summarizes what the current empirical data tells us about crime trends, it also highlights the areas where more empirical research is needed. For example, Zimring's comparison reveals that there was no single cause or group of leading causes of the crime declines during the 1990's. It appears that a convergence of auspicious circumstances like the booming economy, the decrease as a percentage of the population of high risk groups, and high incarceration levels, fortuitously laid the foundation for the crime decline of the 1990's, but they did not cause it. Moreover, none of these factors accompanied the crime decline in Canada, except for the change in demographics, which also occurred in both nations during the late 1980's, a time when crime rates increased. In light of this paradox, Zimring urges more scholarship comparing the American and Canadian crime declines. Additionally, Zimring insists on a revision of the

30. *Id.* at 150.
31. *Id.* at 149.
32. *Id.* at 150.
33. *Id.*
34. *Id.* at 150-151.
35. *Id.* at 151.

methodology of crime trend studies. First, he recommends an international and interdisciplinary approach to empirical research. While Zimring recognizes the difficulty of empirical research in a field where all of the research methods are imperfect, he points out that employing multiple, imperfect research methods, if the methods are imperfect for different reasons, can most effectively increase our knowledge of crime trends.

Most importantly, Zimring's comparative analysis calls into question some of the most fundamental assumptions about crime trends. For instance, many assume that certain portions of the population have a greater propensity to commit crimes than others. Others assumed that declines in crime rates could not be achieved without basic and substantial changes to the urban environment. However, Zimring's analysis of crime trends in New York City reveals that major declines in crime rates can occur with only marginal changes to the population or social and economic structure of the city.[36]

The dramatic crime decline in New York City illustrates that even relatively superficial environmental changes can yield tremendous decreases in crime.[37] Zimring's analysis points out one other important trend: Risk factors, such as demographics, may explain who is at greater risk of committing crimes, but changes in risk factors have proven to be an unreliable tool for predicting crime trends.[38]

Although Zimring's *The Great American Crime Decline* is sure to disappoint those searching for a simple, terse explanation for the decade-long decrease in crime rates, this work will inevitably alter the way we view crime trends, and hopefully it will encourage further empirical research on an international and interdisciplinary level.

36. *Id.* at 207.
37. *Id.* at 208.
38. *Id.* at 209.

Book Review

The Electronic Evidence and Discovery Handbook: Forms, Checklists, and Guidelines

by Sharon D. Nelson, Bruce A. Olson and John W. Simek
American Bar Association 2006
745 pp.

Reviewed by William V. Rapp[1]

Changes as of December 2006 in the Federal Rules of Civil Procedure as they relate to electronic evidence or e-evidence have brought the legal issues concerning the discovery of electronic materials into prominence along with their maintenance and preservation. As Jim Caitlan and Douglas Cohen have noted in a recent article: "The critical aspect of electronic discovery is not only finding relevant documents, but also clearly identifying and eliminating those that are *not*. In this new era of e-discovery, you must collect only what is necessary or suffer the tremendous burden of wasteful, redundant review."[2] In

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2. Jim Caitlan & Douglas Cohen, *The Natural Selection of Document Collection*, A.B.A. Sec. Law Practice Mgmt. 1 Law Tech. Today 3 (2007), http://www.abanet.org/lpm/ltt/articles/vol1/is3/Natural_Selection_of_Document_Collection.shtml.

turn "the newly amended *Federal Rules of Civil Procedure*, especially Rule 26(a)(1B), requires counsel to clearly understand the client's IT infrastructure and electronic retention policies."[3]

In many ways the new rules are attempts by the law, the courts, and counsel to begin catching up with the technology and organizational realities generated by the tremendous growth of e-mail, the Internet, and electronic databases that together have resulted in exploding and extensive electronic documentation and data storage. As U.S. Magistrate Judge for the District of New Jersey Ronald J. Hedges observed in his monograph on electronic discovery or e-discovery for the Practicing Law Institute,[4] "Computer files, including e-mails are discoverable," and the potential volume is huge compared to paper documents.[5] The judge notes "[c]omputerized data have become commonplace in litigation. The sheer volume of such data, when compared to conventional paper documentation, can be staggering. A floppy disk, with 1.44 megabytes is the equivalent of 720 typewritten pages of plain text. A CD-ROM, with 650 megabytes, can hold up to 325,000 typewritten pages. One gigabyte is the equivalent of 500,000 typewritten pages. Large corporate computer networks create back-up data measure[d] in terabytes, or 1,000,000 megabytes; each terabyte represents the equivalent of 500 billion typewritten pages of plain text."

Further this "electronic information can be stored in any of the following: mainframe computers, network servers, personal computers, hand-held devices, automobiles, or household appliances."[6] Anyone who saw the movie "Breach" would recognize the importance of even hand-held devices including ipods. The Federal Bureau of Investigation information break in catching the Russian mole that had eluded them for many years came when they were able to secretly download the data from his hand-held.

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3. Jim Caitlan is Senior Discovery Consultant and Douglas Cohen is Senior Vice President of Discovery Solutions at TrialGraphix, a national litigation consulting firm specializing in discovery, trial consulting, and presentations.

4. U.S. MAG. J. RONALD J. HEDGES, PSS SYSTEMS, DISCOVERY OF DIGITAL INFORMATION, (2d ed. 2006), http://www.pss-systems.com/resources/hedges_edition2.pdf.

5. *Id.* at 1.

6. *Id.* at 10.

The sheer quantity of available electronic data means an electronic data retention or "discovery plan must address issues relating to such information, including the search for it and its location, retrieval, form of production, inspection, preservation and use at trial."[7] Nor can one just plead inability or cost under Federal Rules of Civil Procedure Rule 26(b)(2) as a way to avoid production if the company has just failed to reasonably organize their files. As Judge Hedges succinctly states "[c]onclusionary or factually unsupported assertions by counsel that the discovery of electronic materials should be denied because of burden or expense can be expected to fail."[8] This is because a trial court's cost benefit balancing test will consider whether the company has made a good faith effort as well as the relative importance of the information to the case in question.

Rule 34(b)(1)(B) in particular allows the party to "specify the form or forms in which electronically stored information is to be produced," while Rule 37(f) gives this specification teeth because "[i]f a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f) the court may . . . require that party or attorney to pay any other party the reasonable expenses, including attorney's fees, caused by the failure." In addition to these general rules, parties are often subject to special local rules in different federal courts.

Furthermore, it is not just the Federal Rules of Civil Procedure that e-discovery issues have affected. Retention and production issues are subject to various state court rules as well.

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7. *Id.*

8. *Id.* at 78-79 (explaining the e-discovery process has affected the following Federal Rules of Civil Procedure: Rule 5.2 (Privacy Protection For Filings Made with the Court); Rule 11(b) (Representations to the Court); Rule 11(c) (Sanctions); Rule 16(b) (Scheduling; Management); Rule 16(c) (Attendance and Matters for Consideration at Pretrial Conferences); Rule 26(a)(1) (Duty to Disclose - General Provisions Governing Discovery - Required Disclosures - Initial Disclosure); Rule 26(b)(1) (Discovery Scope and Limits - Scope in General); Rule 26 (b)(2) (Limitations on Frequency and Extent); Rule 26 (b)(5)(B) (Claiming Privilege or Protecting Trial Preparation Materials, Information Produced); Rule 26 (c) (Protective Orders); Rule 26(f) (Conference of the Parties; Planning for Discovery); Rule 30 (b)(6) (Depositions by Oral Examination -Notice of Depositions - Other Formal Requirements - Notice of Subpoena Directed to an Organization); Rule 34(a) (Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes, In General); Rule 34 (b) (Procedure); Rule 37 (f) (Failure to Participate in Framing a Discovery Plan)).

Finally the Sarbanes-Oxley Act of 2002 has created criminal liabilities for organizations. Therefore even without the recent changes in the Federal Rules of Civil Procedure the fact that communication and transactions are increasingly being done via the Internet and e-mail combined with the rapid growth in cyber-crime has dramatically altered the electronic evidence gathering landscape and will continue to do so.

Indeed the fact that some evidence such as e-mail is only available in electronic form has played a critical role in several high profile cases such as *Zubulake v. UBS Warburg LLC*, cases I-V, and *Arthur Anderson LLP v. United States*,[9] as well as in recent congressional hearings and subpoenas issued to the White House over the firing of several U.S. prosecutors. The tremendous explosion in the need for and review of e-evidence when combined with the millions of documents a modern corporation or government can generate has created both large technical and legal challenges for attorneys and the courts. The challenges this situation can present to inside and outside corporate counsel or others involved in the discovery and litigation process can indeed be physically enormous and mentally mind-boggling.

Preparing for the omnipresent possibility of litigation plus keeping track of and monitoring the process when actual litigation or the prospects thereof arises clearly creates the need for more communication between counsel and the firm's Chief Information Officer (CIO) to decide on the appropriate organization and transfer of electronic information or e-information including selecting and contracting with e-discovery technology providers.

This is why most current law office technology support programs provide some sort of e-discovery software and processing. But this technological support varies quite widely from merely organizing the data in a discoverable fashion that will help provide any discovery process that is conducted to be done in a more organized and efficient manner to actually providing forensic services and specialized expertise by industry

9. There are five *Zubulake* decisions and they are seminal to e-discovery in terms of civil action whereas the *Anderson* case was a criminal prosecution. For the former, *see* 216 F.R.D. 280; 217 F.R.D. 309; 2004 WL 1620866 (S.D.N.Y.); 2005 WL 627638 (S.D.N.Y.). For the latter, *see* 125 S.Ct. 2129 (2005).

sector. However, where does one begin in sorting out the issues and developing an e-discovery plan?

The American Bar Association Law Practice Management Section addressed this issue in 2006 when it sponsored publication of *The Electronic Evidence and Discovery Handbook* by Sharon D. Nelson, Bruce A. Olson, and John W. Simek. This practical guide anticipated the changes in the Federal Rules of Civil Procedure plus the continued explosion of discoverable e-information. It is thus a laudable attempt to give assistance to counsel on how to manage and deal with complex e-discovery situations. It puts in one place items that will help attorneys looking to discover evidence and also corporate counsel looking to preserve and properly maintain electronic records in compliance with statutory obligations or court orders. It can also assist courts looking for guidance in responding to motions, issuing orders, or delivering judgments related to e-evidence. Further, the accompanying compact disc makes its various templates and materials user-friendly for producing or filing documents in electronic or printed form.

One such aid is a complete glossary of technical terms developed by the Sedona Conference for use in legal documents. Other assistance can be found in the form of checklists on requests for information or filing motions. The *Handbook* gives guidance as well on engaging and vetting e-experts or other e-discovery vendors including sample contracts and service checklists. There are form letters covering the preservation of e-evidence and form memos on e-information retention and preservation policies. There are form letters and motions directly related to e-discovery including interrogatories, requests for production, motions to compel, motions for protective orders, and motions for sanctions.

Completing the process the *Handbook* provides sample orders for the courts in order to support the various motions. Finally, there are concise readable summaries and cites for important recent cases related to e-discovery and e-evidence.

In sum, while this book is not a panacea or a complete handbook to the evolving and expanding e-discovery process, it is still an essential component to get an appropriate program started. It will certainly keep an attorney on track when combined with the sophisticated and well-tailored technology pro-

gram the authors advise lawyers and organizations to develop and for which the book gives acquisition guidance. Thus, it should definitely form a part of the library of any lawyer likely to be involved in e-discovery in the same way that a lawyer would keep a copy of Black's Law Dictionary to periodically check the precise meaning of certain legal terms.