COMMUNITY CORRECTIONS REPORT™

On Law and Corrections Practice

Volume 16, No. 4 | ISSN 1072-5415 | Pages 49 – 64 | May/June 2009

The Financial Crisis Hits the Justice System: Hard Times and Tough Choices

by William D. Burrell

It has been impossible to ignore the impact of the financial crisis on our society over the past year. Government at all levels is struggling mightily to deal with the shortfalls in revenue. In recent months, stories about the impact of the crisis on the courts and other institutions of justice have made front-page news. The downturn in revenues has forced drastic cuts in current budgets, and the forecasts for coming fiscal years suggest that this trend will persist for several years to come. Even the massive fiscal stimulus package from the federal government can not fill all the gaps in state and local budgets.

Court systems across the country are taking unprecedented actions to balance their budgets. Half of the state court systems face budget shortfalls, according to the National Center for State Courts (Schwartz, 2009). States are closing courthouses one day per week, furloughing staff (including judges) and cutting their pay, eliminating weapons screening at courthouse entrances, suspending

See THE JUSTICE SYSTEM, page 60

Using Third-Generation Assessment Tools: It's the Hand That Turns the Screw

by Brad Bogue

Have you ever found yourself in the frustrating position of having to do a job with really inadequate tools? Maybe it was doing some trim painting on a house with a brush that was too big, raking leaves with a hard, straight rake, cutting meat with a dull knife, or framing with a finish hammer. Whatever the mismatch was, the task quickly became tiresome, didn't it? And so it is with the tools of our trade in corrections: If they do not address the demands of the job, they soon become more of a hassle than a helper. Having the right tools to use at the right times can make a difference in getting the job done.

Although tools play an important role, other factors may be more important determiners of performance and outcomes, however. For example, is the job in question the right one? Is it something that will add value when it is accomplished? If it is not, then tools, at best, can only be an accessory to a trivial outcome. On the other hand, if the job does produce a valuable outcome, how much of that outcome was a function of the skills of the person using the tool, as opposed to the tool itself? Quite often, the lion's share of tribute for a job well done should go to the persons doing the job and how *they* used their tools.

The same applies to offender assessment. You can put a mediocre assessment tool in the hands of insightful probation or corrections officers and get relatively good assessments of offenders who are beginning their supervision or confinement. Conversely, you can put an excellent tool in the hands of a mediocre staff person, and you are likely to get a mediocre assessment. At best, tools are a necessary, but not a sufficient, ingredient in the assessment process.

Far more important to good assessment are factors like these:

- The quality of training in using the tool;
- The individual staff member's capacity for insight into other people; and
- The staff person's motivation and attitude regarding the task (i.e., sizing up offenders).

The ability to size up other human beings in terms of their risk and protective factor patterns, their criminogenic needs (e.g., antisocial attitudes, association with

See ASSESSMENT TOOLS, next page

Also In This Issue

ASSESSMENT TOOLS, from page 49

criminal peers, low self-control, etc.), and their general temperament and orientation to treatment/interventions represents a complex set of skills. Furthermore, this is a skill set that is arguably as complex as mastering a musical instrument, being a good poker player, or having a good golf swing. When people are improperly trained in such complex skills as these, it can either shut them down at the gate or make for a long and frustrating learning curve.

Learning to implement evidence-based practices satisfactorily while simultaneously becoming a "learning organization" is quite a challenge for most corrections agencies.

Training Overview

Corrections agencies in the United States and other industrialized countries are slowly but steadily retooling themselves to adopt validated third-generation offender assessments and practices that are consistent with current evidence-based practice (EBP) on what works to facilitate reductions in offender risk for recidivism. In addition to adopting these new practices, agencies are also beginning to explore what it takes to learn and adapt to change more quickly. Learning to implement EBPs satisfactorily while simultaneously becoming a "learning organization" is quite a challenge for most corrections agencies.

Accumulating Knowledge. Since the early 1990s, evidence has been consistently accumulating about the kinds of corrections interventions that really work to reduce subsequent crime, revictimization, and recidivism on the part of offenders currently under some form of supervision. This body of research (McNeil et al., 2005; Aos et al., 2006), international in scope, is in considerable agreement concerning the effectiveness of certain principles and practices for working with offenders.

This same research (Bonta et al., 2008) also indicates that most of our current practices need some realigning in order to become more consistent with best practices. The new alignment that is usually implicated needs to occur at all levels of corrections, from policy through line-level practice. Consequently, these changes demand significant system collaboration externally (Bogue et al., 2004b) and organizational development internally (Bogue et al., 2004c). Simplistic interventions, such as "Go do X program, or Y intervention, or Z technique, and sin no more!," no longer promise a viable solution.

The deeper solution involves longer-term, more strategic initiatives that can establish processes that provide more businesslike accountability and results. These initiatives generally require planning that involves many stages over many years. The National Institute of Corrections (NIC) model for EBP (Bogue et al., 2004a), for example, represents a comprehensive sea change for most corrections agencies. This model organizes eight principles to assess offenders with actuarial tools, engage offenders in a manner that encourages internal motivation, and determine interventions and programming (e.g., those based on risk-need responsivity) in a specific sequence for optimizing influence on positive offender change.

This model suggests how interventions can occur with offenders according to their respective risk levels. Very low-risk offenders probably do not require much of a treatment intervention once they have been adequately assessed, while higher-risk offenders likely warrant multiple modes of engagement that embody multiple principles. To date, very few jurisdictions have been able to adopt with fidelity more than a few of the principles in this model. It is not uncommon for many systems to need several years to shift and actualize new services according to just one principle, such as the full use of actuarial assessment

See ASSESSMENT TOOLS, page 52

COMMUNITY CORRECTIONS REPORT™

Executive Editor **Todd R. Clear, Ph.D.**
Editor **Russ Immarigeon, MSW**
Consulting Editors **Fred Cohen, Esq.** **William C. Collins, Esq.**
Contributing Editors **William D. Burrell** **Frank Domurad** **Ken Kozlowski, Esq.**
Managing Editor **Laura A. Greeney**
Editorial Vice President **Deborah J. Launer**
Associate Publisher **Mark E. Peel**

** For information on subscribing or other service questions call customer service: (609) 683-4450 or e-mail: order@civicresearchinstitute.com.*

Community Corrections Report (ISSN 1072-5415) is published bi-monthly by Civic Research Institute, Inc., 4478 U.S. Route 27, P.O. Box 585, Kingston, NJ 08528.

Periodical postage rates paid at Kingston, NJ and at additional mailing office (USPS # 0011-833). Subscriptions: $165 per year in the United States and Canada. $30 additional per year elsewhere. Vol. 16, No. 4, May/June 2009.
POSTMASTER: Send address changes to Civic Research Institute, Inc., P.O. Box 585, Kingston, NJ 08528.

DUI Defendant Sentenced to Community Supervision Despite Best Efforts to Thwart Sentence

Mark Ivey was convicted by a jury of the misdemeanor offense of driving while intoxicated. Ivey had elected to have the jury assess his punishment if convicted and had even deliberately failed to file a sworn motion with the jury declaring that he had never before been convicted of a felony offense in Texas or any other state. Thus, he rendered himself ineligible for a jury recommendation that he be placed on community supervision under Article 42.12, Section 4.4 of the Texas Code of Criminal Procedure. Ivey had made apparent during pretrial preparation that he did not want any part of community supervision.

A Revealing Conference With the Jury

The jury, forbidden from conferring a sentence of community supervision because of the lack of the aforementioned sworn motion, assessed Ivey's punishment at 35 days of incarceration in the county jail and a $2,000 fine. After conferring informally with the jury off the record, however, the trial judge announced in open court that, even in the absence of a jury recommendation, she was suspending the imposition of Ivey's sentence, placing him on community supervision for a period of two years, and suspending all but $500 of the fine. The trial judge also imposed a 30-day jail term and a requirement that Ivey complete 60 hours of community service along with ignition interlock for one half of the term of probation, to begin when he exits the jail, as conditions of the community supervision.

The judge's decision was prompted by her talk with the jurors, which had revealed the jury's intent: that Ivey should receive some services in the community, which the judge also thought was appropriate. According to the judge, Ivey could also receive some counseling and be evaluated to make sure that there were no other problems that might prohibit him from moving forward with his life.

Ivey appealed his community supervision sentence, arguing that because he had elected to go to the jury for assessment of punishment, the trial judge lacked the authority to suspend any sentence that the jury assessed. He further argued that the trial judge's unilateral action in placing him on community supervision deprived him of his statutory right to a jury assessment of punishment.

In **Ivey v. State,** 2009 Tex. Crim. App. LEXIS 234 (Feb. 11, 2009), a majority of the criminal court of appeals panel disagreed with Ivey's arguments, holding that the trial judge had the authority to suspend the imposition of punishment assessed by virtue of Article 42.12, Section 3, of the Texas Code of Criminal Procedure, regardless of which entity (judge or jury) had assessed the punishment.

How Far Does a Trial Judge's Discretion Extend?

The court initially stated that although Ivey had no constitutional right to jury-assessed punishment, a defendant in Texas has the statutory right to elect to have his punishment assessed by a jury. The court, however, stated that it had previously ruled that community supervision "is not a sentence or even a part of a sentence." **Speth v. State,** 6 S.W.3d 530, 532 (Tex. Crim. App. 1999). Therefore, according to the court, when a trial judge suspends imposition of jury-assessed punishment, the judge does not encroach on the defendant's statutory option to have the jury assess his or her sentence. The court opined that it could be argued that community supervision, with all of its attendant terms and conditions, was in some sense part of the "punishment" that a defendant had a statutory right to have the jury assess.

It could be argued that community supervision was part of the "punishment" that a defendant had a statutory right to have the jury assess.

Despite the latter supposition, the court stated that a trial judge who granted probation despite a contrary jury recommendation was merely asserting independent statutory prerogative to suspend imposition of the sentence whenever, in a judge's best judgment, the interests of justice, the public, and the defendant would be served. If the Texas Legislature intended for a trial judge's discretion under Section 3 of Article 42.12 to extend that far, it was a legitimate qualification on a defendant's statutory right to have the jury otherwise assess his or her punishment.

The court then went through a rather tortuous review of the legislative history of the code section in question and determined that the Texas legislature had indeed granted a judge the power to circumvent a jury determination, finally holding that it was within the discretion of the trial court under the statute to do so, as long as Ivey had met the criteria for community supervision spelled out within the code. The judgment of the lower court was affirmed.

Comment: This decision was not unanimous. The dissenters stated that in the usual context, imposing a suspended sentence and community supervision was a form of clemency, not an additional punishment. As such, it should be meted out only to desirous defendants. The dissenting justice enumerated all 12 conditions of the community supervision and found them to be much harsher than the jury sentence. Even the reduction of the $2,000 fine to $500 was not especially fortuitous for Ivey, because he was now required to pay $60 in community supervision fees for 24 months (a total of $1,940 including the $500 fine). The dissenters stated that by imposing the harsher punishment, the trial court had violated Ivey's statutory right for jury assessment as well as the fundamental notions of fair play and substantial justice that are normally associated with due process of law. The dissenters further argued that by allowing this, the court would set up a system where even the most minor misdemeanants, against their best interest, can find themselves with lengthy and onerous community supervision terms. Additionally, the dissenters made a note of the "cause-and-effect relationship" between the trial court's "improper" ex parte meeting with the jurors and the court's decision to place Ivey on community supervision. ■

ASSESSMENT TOOLS, from page 50

tools (Bonta et al., 2001) or building staff/inmate relationships that promote offenders' internal motivation for change (Bogue et al., 2008).

Implementing Knowledge. The process of implementation and adoption of EBPs is challenging and protracted, because some core principles (e.g., risk, need, and responsivity) are oriented toward practices that are profoundly different from those on which corrections typically relies. Put simply, the field is beginning at last to work from a set of principles with a solid scientific basis.

The *risk principle* states that the higher the actuarial risk of an offender, the higher the level of services that should be applied to him or her within the context of supervision. In order to have strong fidelity with this principle, many systems must adopt better actuarial tools and stop confusing the severity of the present charges with risk for recidivism. Next, the system must mobilize a higher proportion of supervision and treatment services for these offenders.

While these steps may sound easy (especially if you have not managed a caseload for very long), they turn out to be quite difficult for many systems and staff to fulfill, for a number of reasons. High-risk offenders tend to be more manipulative and unstable in their accountability. Lower-risk offenders are more reinforcing for many agents to deal with. Local treatment communities do not really want higher-risk offenders. The list of barriers can be substantial. In addition, need and responsivity principles have their share of challenges as well. It is important to note, however, that systems can and have overcome these challenges and as a result have begun driving down subsequent levels of recidivism (Bonta et al., 2008; Taxman et al., 2006; Lowenkamp et al., 2006; Aos & Barnoski, 2005).

Another reason that corrections finds retooling with EBP challenging is that, like almost all other public-sector human service disciplines, corrections has not learned how to develop sufficient capacity for implementing new innovations. A new hard-won science governs implementation (Simpson & Flynn, 2007; Fixsen et al., 2005; Belenko et al., 2008) with plenty of guidelines, steps, and mechanisms for aiding implementations in human services, particularly EBPs that tend to involve a reasonable amount of complexity. Assimilating some of this knowledge can improve our field greatly.

Fixsen et al. (2005) describe three different levels of implementation:

1. The *paper level*, where an innovation has been introduced and training provided, but there are few policies or controls in place to guide the implementation and maintain the innovation;
2. The *process level*, when an innovation has been trained, and policies and procedures support its maintenance along with ongoing quality assurance and performance measures; and
3. The *performance level*, when an innovation has been introduced with a significant commitment to analyze and prove that there is a relationship between how well the innovation has been implemented (e.g., performance and process measures) and the outcomes that the organization has prioritized (e.g., reductions in recidivism).

Over 90% of all public-sector implementation never goes beyond the paper level, because most public-sector managers do not understand how to implement complex innovations successfully.

Fixsen et al. (2005) report the research finding that over 90% of all public-sector implementation never goes beyond the paper level, because most public-sector managers do not understand how to implement complex innovations successfully. Thus, the delays and the struggles that corrections experiences when trying to catch up with EBPs is not surprising.

Training for EBPs

The best method for training complex skills is to scaffold them up slowly, with one elementary skill building on another. Better training workshops focus on skills rather than concepts. In these workshops, trainers introduce one skill at a time, describe the skill and discuss how it fits into the task at hand, and then model it (often showing video demonstrations with actual offenders). Finally, the trainer facilitates opportunities for participants to practice their skills so that they learn them more thoroughly. This learning helps the participants later when they transfer newer, less familiar skills from the training room to the workplace. The "tell, show, and try" approach is a tried and true formula for success.

To complement this focus on skills, trainers have discovered that it is very helpful to encourage participants to coach one another in the classroom as well as back at the office. This peer coaching sometimes represents a new norm or standard of practice that keeps everyone engaged in shaping and improving each other's skills. Peer coaching takes place best when a participant's experience, expertise, and insights are respected and drawn on routinely.

One form of peer coaching that is very popular today among teachers is for one practitioner to demonstrate new skills to another practitioner and then invite feedback. This reciprocal process takes some courage and humility, but it leads to a more rapid acquisition of skills in areas like motivational interviewing (Yahne et al., 2004; Ruark et al., 2007) or generally picking up the "chops" of conducting offender assessments. Having informal "communities of practice" (Wenger & Snyder, 2000; Nickols, 2003) that involve agents' holding shared goals around skill improvement and mutually helping one another to become more proficient is one of the most effective means for developing new complex skills.

In the cases of motivational interviewing and offender assessment, it is extremely important to master the basic foundational skills before incorporating more elaborate skills. In motivational interviewing, we concentrate on client-centered, active-listening skills so that participants can experience some growth in their abilities to fluidly reflect and paraphrase what others are trying to express. Good offender assessment, on the other hand, depends on maintaining a conversational pace and tone throughout the interview so that clients can open up, drop some of their defensiveness, and disclose more high-quality information. In order to enable participants to respond in these ways, the staff needs to know from memory, almost intuitively,

See ASSESSMENT TOOLS, page 54

Sentencing Hearing Not Required After Revocation of Community Corrections Sentence

Patrick Sartain had pled guilty in Grundy County Circuit Court (Tennessee) on September 13, 2006, to one count of burglary of an automobile and one count of burglary of a business in Case Number 4271A. He received sentences of two years and three years to be served consecutively to one another and consecutively to previously imposed sentences arising from convictions in Marion County (Tennessee). The judgments further reflected that Sartain had been granted release on community corrections. The court stated that although the Marion County judgments were not included in the record on appeal, the court was able to ascertain that the convictions in Case Numbers 7213 and 7473 consisted of one count of statutory rape and one count of aggravated burglary for which Sartain had received consecutive sentences of two and three years, also to be served on community corrections. Therefore, the cumulative result of the convictions from both counties was an effective sentence of 10 years to be served on community corrections.

On March 28, 2007, a single revocation warrant was issued relating to the Grundy County and Marion County cases collectively. The warrant alleged that Sartain had violated the terms of his community corrections sentence by failing a drug screening and being expelled from his program of drug treatment. On May 16, 2007, a trial court entered an agreed order finding that Sartain had violated his community corrections sentence. The appeals court, again disappointed in the record before it, stated that the transcript from the May 2007 hearing was absent in the record. The court did, however, have a record of a discussion that took place at a later hearing on July 20, 2007, that indicated Sartain had admitted to the violations. At that July 2007 hearing, following some discussion between the court and the parties regarding sentencing alternatives, the trial court ordered the community corrections sentence revoked and the originally imposed sentence executed. In a twist, both the state and Sartain appealed, contending that the case should have been remanded for resentencing.

In **State v. Sartain,** 2009 Tenn. Crim. App. LEXIS 71 (Feb. 4, 2009), the Tennessee Court of Criminal Appeals affirmed the decision of the lower court but did remand for correction of judgments.

A Troublesome Case Record

As was previously stated above, the appeals court had found numerous problems with the record of the case. The court found that the revocation order issued on July 20, 2007 indicated that the three-year sentence for "burglary-motor vehicle" arising from Grundy County Case Number 4271A should be served in incarceration. The problem was that the latter conviction had resulted in a sentence of two years, while the other Grundy County conviction (burglary of a business) had yielded the three-year sentence, about which the order was silent. The court stated that it would remand the case back to the Grundy County Circuit Court with the direction to correct the revocation order to reflect accurately what had transpired in the trial court, including an accurate rendition of the sentences imposed and their related offenses as the revocation order relates to Case Number 4271A. Nevertheless, the court was confident that it knew, based on the transcript, what had transpired and would review the five-year effective sentence arising from that Grundy County case. Additionally, the court noted that both the May 2007 agreed order and the July 2007 revocation order were silent regarding the Marion County convictions, which comprise half of the 10-year sentence of incarceration that Sartain was attempting to challenge on appeal.

The appeals court found that the trial court had exercised conscientious and intelligent judgment and had not abused its discretion in revoking the community corrections sentence.

When Is a New Sentencing Hearing Required?

The court's review of the record found no evidence of a revocation order relating to the Marion County convictions. Although the trial court found that the sentences from both counties should be revoked, there was no order reflecting that action relative to the Marion County convictions included within the record, and apparently none was entered regarding the Marion County convictions. The court stated that it had no jurisdiction to address the Marion County revocation without having an appropriate final judgment. The court would thus limit its review to the revocation of the Grundy County sentences.

The court first stated that the decision to revoke a community corrections sentence rests within the sound discretion of the trial court and would not be disturbed on appeal unless there was no substantial evidence to support the trial court's conclusion that a violation had occurred. According to Tennessee law, a trial court was required only to find that the violation of a community corrections sentence occurred by a preponderance of the evidence. Once there was sufficient evidence to establish a violation of a community corrections sentence, the trial court has the authority to revoke the community corrections sentence and to order the original sentence to be served in confinement, or the trial court may resentence a defendant to any appropriate sentencing alternative, including incarceration, for any period of time up to the maximum provided for the offense committed with credit for time served while on community corrections.

When a trial court chooses to resentence a defendant to a more severe sentence, however, it may do so only after conducting a new sentencing hearing. A trial court may not arbitrarily increase the length of the sentence and must state on the record the reasons for the new sentence. See **State v. Ervin,** 939 S.W.2d 581, 583 (Tenn. Crim. App. 1996). Sartain argued that the trial court had erred in imposing a sentence of incarceration after

See SENTENCING HEARING, next page

SENTENCING HEARING, from page 53

revoking his community corrections sentence. The state contended that the case should have been remanded, because the trial court failed to hold a sentencing hearing upon revocation. The appeals court stated, however, that contrary to the state's argument, a trial court was not required to conduct a sentencing hearing upon every revocation of a community corrections sentence. Instead, a sentencing hearing was required only before imposing a new sentence. **State v. Samuels,** 44 S.W.3d 489, 494 (Tenn. 2001).

In the case of Sartain, the trial court had revoked the community corrections sentence and ordered the previously imposed sentence to be served in the Department of Corrections. Because a new sentence was not imposed, a resentencing hearing was not required. Additionally, the appeals court found that the trial court had exercised conscientious and intelligent judgment and had not abused its discretion in revoking the community corrections sentence and ordering the original sentence to be served in incarceration. The Grundy County court's judgment ordering Sartain to serve five years in prison was affirmed.

Comment: To be perfectly honest, there is not too much else to say about this decision. The lesson here is that a better case record should be kept, so that when cases go up on appeal, a higher court does not have to guess at what transpired in the lower courts. Additionally, at least in the state of Tennessee, do not expect a resentencing hearing when all that is happening after revocation is a reinstatement of the original sentence. (Go to jail, do not pass "Go," and do not collect $200.) ■

ASSESSMENT TOOLS, from page 52

what specific information is most important to gather throughout the interview. Thus, in training we concentrate on helping participants develop their own "maps" of the needed instrument content and how to navigate through common roadblocks that take place in offender assessment.

In addition to coaching, feedback plays a paramount role in learning complex skills. Imagine someone learning how to play golf by hitting a bucket of balls every night in complete darkness. That individual would not be a much better golfer after a month or a year of such practice than he or she would be after one night. It is only with feedback that we can adjust, experiment, and learn to perfect our new, complex skills (Yahne et al., 2004). In a training session for motivational interviewing and assessment, regular opportunities will exist for each participant to have his or her skills (e.g., abilities to reflect, affirm, summarize, and effectively probe) formally rated and to obtain written and graphic feedback. This formal feedback serves to reinforce the kind of learning progress that participants are capable of making in a very short time.

Good offender assessment depends on maintaining a conversational pace and tone throughout the interview so that clients can open up.

Implementation for Third-Generation Assessment Tools

To take one example, the implementation of the Level of Service Inventory-Revised (LSI-R) typically takes eight steps:

1. Pre-conference advance information;
2. Formal on-site training;
3. Workplace practice and agent ownership;
4. Communities of practice peer coaching and pride;
5. Quality assurance;
6. Tool usage (triage classification; conversing with offenders about important ongoing issues in their lives; setting change agendas with offenders in a collaborative fashion; informing stakeholders about offender case status and conditions; reassessment and reviewing gain scores to assess impact and progress on recidivism; and gap analysis for treatment service delivery improvements);
7. Reassessments for individual accountability and supervision plan revisions; and
8. Gap analysis for treatment and intervention system improvement.

A similar number of suitable steps are also required for implementing and ultimately realizing the full potential of third-generation assessment protocols in general.

Let us look more closely at the steps or stages for third-generation tool implementation (e.g., the LSI-R and the Correctional Offender Management Profiling for Alternative Sanctions [COMPAS]). At the earliest point, implementation begins with what you are doing right now (i.e., reading and obtaining a broad mental model for what the actual training will entail). Next comes participation in the training and sufficient practice of the skills so that they can be applied and reapplied with some confidence and fidelity in the workplace.

When a staff member has practiced the given tool interview four or five times in the "real world" conditions of the workplace, his or her skills begin to set up and the given tool interview begins to become part of his or her own style and application. When participants are lucky, informal "communities of practice" emerge about them as they and their colleagues begin to appreciate what improvements take place in their innate assessment skills with practice and feedback. Formal quality assurance mechanisms typically are installed as people become more aware of the larger patterns for errors and deficiencies in assessment.

As soon as assessment practice begins in the office, different opportunities for using the completed given tool begin to present themselves in a predictable sequence. First, triaging or establishing the risk classification levels for given offenders, where risk, need, and responsivity principles come into play, can guide everything from sentence and supervision condition recommendations to treatment assignment and case plan objectives.

Another use of the completed given tool is providing feedback to offenders, when they are interested, about where they stand compared to other offenders in terms of their risk factors and the criminogenic needs that are likely to continue driving them into crime and deviance. Feedback and frank discussions like this can often be followed by some agenda setting in a session where

See ASSESSMENT TOOLS, page 56

Getting Lost Does Not Justify a Charge of Escape

On February 6, 2008, James Williamson was housed at Hope Hall, a halfway house in Camden, New Jersey. That day, he went to a job interview as a condition of his incarceration and was required to return to Hope Hall by 2:00 P.M. At 10:02 A.M., Williamson called Hope Hall and informed a staff member that the bus had dropped him off at the wrong job site for the interview. Later, Williamson again contacted Hope Hall to request an extension of the time for his return, which was denied. He says that the counselor with whom he spoke told him to complete the job application and interview and to bring receipts from the bus to establish when he got on the bus. Williamson also stated that the counselor told him that if he followed these procedures, he "would be covered." Williamson continued on the job interview, again phoning Hope Hall at 1:52 P.M. to request an extension and to inform the staff that he was "on his way back."

Missed Connections

Shortly after 2:00 P.M., Hope Hall contacted the local police, hospitals, and the job site in order to locate Williamson. At 2:50 P.M., a Hope Hall employee determined that Williamson had filled out an application at the job site, but that he "had left an hour ago." At 2:52 P.M., an escape report was filed by Hope Hall. At 3:45 P.M., Williamson returned to Hope Hall, and he was subsequently charged with the escape violation. At a hearing, Williamson entered a not guilty plea.

The hearing officer reviewed the disciplinary and escape reports, the resident log, and other logs, which indicated that officers had contacted the police, hospitals, and the prospective employer in order to locate Williamson. The reports also showed that Williamson was denied his request to delay his return to Hope Hall. The hearing officer found that the "state reports [that] they went to the inmate's job interview worksite to check on him; he was not there. They did not know where he was."

The hearing officer found no reason to discredit the state's report and upheld the charge against Williamson. Williamson appealed, contending that the Department of Corrections had abused its discretion by improperly finding him guilty of escape.

In **Williamson v. New Jersey Dep't of Corr.,** 959 A.2d 1213 (N.J. Super. 2008), the court agreed with Williamson.

A Degree of Discretion

The court first looked at the definition of "escape" within the New Jersey Administrative Code and found that although the guidelines were very straightforward, there was also built into the framework a degree of discretion to accommodate unforeseen or unexpected circumstances. For example, one section of the Code allows for the extension of time to return "for a legitimate reason," and another section allows a time deadline to be adjusted where, though the inmate could not be reached by the facility, the inmate nevertheless checks in and requires additional time to return. The court stated that although ultimate discretionary decision lies in the hands of the administrator, the regulation was structured so as to avoid rigid application. The conditions built into the regulation, according to the court, were tailored as checks on the director's capricious use of this discretion.

The court recounted that Williamson had contacted Hope Hall to inform the staff that the bus driver had let him off at the wrong stop and that he had requested an extension on the time allotted for his return. A counselor denied that request but then informed him that he should continue with the job application and interview and bring his bus receipts to establish the time that he caught the buses.

Although Williamson returned to Hope Hall approximately one hour and 45 minutes late, technically qualifying him as an "escapee," the court stated that the circumstances suggested that he never intended, even temporarily, to commit an escape or otherwise violate the rules of his residential community program. He had called numerous times to check in and request extensions, as he was required to do, and was told that his lateness would be excused. Williamson did complete the interview and, after calling Hope Hall to inform the staff that he was catching a bus back, returned. At all times, Williamson had recognized the control and authority of Hope Hall and had acted in compliance with that authority.

The court concluded that the determination of escape did not take into account the circumstances surrounding the events of that day; therefore, the court reversed the finding.

At all times, Williamson had recognized the control and authority of Hope Hall and acted in compliance with that authority.

Comment: Williamson was helped by the fact that New Jersey's Administrative Code included some discretionary language. The court also seemed to be more inclined to agree with him because of the actions that he had taken in keeping Hope Hall staff informed of his whereabouts, and because the Department of Corrections had not considered any of the extenuating circumstances surrounding the events of the day in question. For an opposing view as to willfulness or intent to break probation, see ***State v. Watkins,*** 2008 Tenn. Crim. App. LEXIS 912 (Nov. 17, 2008) (discussed in *Community Corrections Report, 16(3),* p. 37). ■

ASSESSMENT TOOLS, from page 54

the conversation centers around what life changes the client would genuinely like to make. This exchange sets the stage for formulating case or offender management plans that are more collaborative and thus more likely to be fulfilled by offenders.

Still another use of a given tool involves providing a short graphic summary of the results of individual assessments to prospective treatment providers. This summary helps them to understand the dynamic risk factors and needs of each client being referred to them for treatment and intervention services. When reassessments are conducted (most typically, every six to 12 months), "gain scores" can be generated to depict the difference between the initial assessment and follow-up assessment measures on the tool. Gain scores are predictive of recidivism and signify the direction and magnitude of change taking place in a given case, or, if averaged, a caseload.

Finally, one of the last uses of a third-generation tool is to generate a form of gap analysis where big treatment and intervention gaps are identified for a particular aggregate sample or population of offenders. To conduct a gap analysis, an aggregate profile on the tool's subscales is formulated and then a profile of the available local treatment service for that same sample population is generated. The two profiles are then compared to see where the biggest system gaps exist between the needs of the population and available resources.

Actualizing all the potential uses for a third-generation assessment is a protracted, iterative implementation process. Reassessments, along with gap analysis, are usually later stages in the implementation of a tool. Other optional uses of third-generation tools include:

- Flagging potential psychopaths for subsequent Hare Psychopathy Checklist-Revised (PCL-R) screening;
- Establishing a workload model based on workload analysis;
- Assigning cases to caseloads based on risk levels and/or criminogenic needs;
- Conducting program evaluations with designs that can control for the risk levels of the participating offenders; and
- Triaging lower-risk cases to private corrections or administrative banks to assure that active caseloads warranting active supervision are kept relatively small (an average of 50) and manageable.

Use of a third-generation assessment tool can influence a wide variety of practices throughout the agency. The most important use of any third-generation tool, however, is the opportunity to have conversations with each offender about those factors in his or her life that are likely to influence subsequent criminal and deviant behavior. Bonta et al. (2008) and Trotter (1995) report that talking about criminogenic needs with offenders, rather than having discussions that revolve around terms and conditions, is apt to result in a fundamental improvement in outcome.

Talking about criminogenic needs with offenders, rather than having discussions that revolve around terms and conditions, is apt to result in a fundamental improvement in outcome.

Short of being well trained in a systematically planned implementation, corrections agents may find a third-generation assessment tool an abstract impediment to their normal way of doing business. The irony, however, is that knowing how to use this kind of tool skillfully has proven instrumental in helping offenders connect some of the most important dots in their lives (i.e., understanding their criminogenic needs).

References

Aos, S., & Barnoski, R. (2005). *Washington's Offender Accountability Act: A first look at outcomes.* In *Washington Administrative Office of the Courts.* Olympia, WA: Washington State Institute for Public Policy.

Aos, S., Miller, M., & Drake, E. (2006). *Evidence-based adult corrections programs: What works and what does not.* Olympia, WA: Washington State Institute for Public Policy.

Belenko, S., Wexler, H.K., & Taxman, F. (2008). *Technology transfer of evidence-based practice (EBP) in substance abuse treatment in community corrections settings.* Washington, DC: National Institute of Corrections.

Bogue, B., et al. (2004a). *Implementing evidence-based practice in community corrections: The principles of effective intervention.* Boulder, CO: Author. Available at: *http://cjinstitute.org/files/evidencebased/pdf.*

Bogue, B., et al. (2004b). *Implementing evidence-based practice in community corrections: Collaboration for systemic change in the criminal justice system.* Boulder, CO: Author.

Bogue, B., et al. (2004c). *Implementing evidence-based practice in community corrections: Leading organizational change and development.* Boulder, CO: Author.

Bogue, B., Diebel, J., & O'Connor, T.P. (2008). Combining officer supervision skills: A new model for increasing success in community corrections. *Perspectives, 32(2),* 30–45.

Bonta, J., Bogue, B., Crowley, M., & Motiuk, L. (2001). Implementing offender classification systems: Lessons learned. In G.A. Bernfeld, D.P. Farrington, & A.W. Leschied (Eds.), *Offender rehabilitation in practice.* Chichester, UK: John Wiley & Sons, pp. 227–245.

Bonta, J., Rugge, T., Scott, T., Bourgon, G., & Yessine, A.K. (2008). Exploring the black box of community supervision. *Journal of Offender Rehabilitation, 47(3),* 248–270.

Fixsen, D., Naoom, S.F., Blase, D.A., Friedman, R.M., & Wallace, F. (2005). *Implementation research: A synthesis of the literature*. Tampa, FL: University of South Florida, Louis de la Parte Florida Mental Health Institute, The National Implementation Research Network (FMHI Publication #231), p. 119.

Lowenkamp, C.T., Peale, J., Smith, P., & Latessa, E. (2006). Adhering to the risk and need principles: Does it matter for supervision-based programs? *Federal Probation, 70(2),* 3–8.

McNeill, F., Batchelor, S., Burnett, R., & Knox, J. (2005). *Twenty-first century social work: Reducing re-offending: Key practice skills.* Edinburgh: Scottish Executive.

Nickols, F. (2003). *Communities of practice: What's it like inside?* Available at: *http://www.nickols.us.*

Ruark, B., Bogue, B.M., & Diebel, J. (2007). Training and coaching: In for a penny, in for a pound? *Offender Programs Report, 10(6),* 83+.

Simpson, D.D., & Flynn, P.M. (2007). Moving innovations into treatment: A stage-based approach to program change. *Journal of Substance Abuse Treatment, 33(2),* 111–120.

Taxman, F.S., Yancey, C., & Bilanin, J.E. (2006). *Proactive community supervision in Maryland: Changing offender outcomes.* Available at: *http://nicic.org/Library/021333.*

Trotter, C.J. (1995). The supervision of offenders: What works? In L. Noaks, M. Maguire, & M. Levi (Eds.), *Contemporary issues in criminology.* Cardiff, UK: University of Wales Press, pp. 236–250.

Wenger, E.C., & Snyder,W.M. (2000). Communities of practice: The organizational frontier. *Harvard Business Review, 78(1),* 139–145.

Yahne, C.E., Miller, W.R., Moyers, T.B., & Pirritano, M. (2004). *Teaching motivational interviewing to clinicians: A randomized trial of training methods.* Washington, DC: Center on Alcoholism, Substance Abuse, and Addictions.

Brad Bogue, M.A., is President of Justice System Assessment & Training (JSAT), 2450 Central Ave., Ste 1-A, Boulder, CO 80301, (303) 544-9876, (e-mail) Bradbogue@aol.com, (web site) www.j-sat.com. ■

Important Reading

by Russ Immarigeon*

What Works and What Doesn't

Do Prisons Make Us Safer? The Benefits and Costs of the Prison Boom

edited by Steven Raphael and Michael A. Stoll
Russell Sage Foundation
354 + x pages (2009)

Recently the *Philadelphia Daily News* editorialized, "Our approach to criminal justice has become so criminally dysfunctional that it may no longer shock to learn that in Philadelphia, we spend twice as much for housing each offender as we do educating each child." For many years now, criminal justice reform advocates and organizations have been raising the same specter of fiscal irrationality. Nowadays, however, this message seems to have gained widespread acknowledgement and credibility, not just in Philadelphia but also in many rural and urban jurisdictions across the country.

In this context, this new collection of original articles is especially timely as it challenges contemporary correctional practice and expands a skeptical body of literature that has been building strength over the past several decades. As the editors of this volume note, "[W]e find that [criminal] behavior plays a small role in explaining the increase in the nation's incarceration rate."

The nine original articles in *Do Prisons Make Us Safer?* are divided into four parts:

1. Raphael and Stoller, who teach public policy at the University of California, introduce the volume;
2. The editors review why so many Americans are imprisoned, and Columbia University economists David Weiman and Christopher Weiss examine "the origins of mass incarceration": specifically, New York's recently (largely) repealed Rockefeller drug laws;
3. Then various authors describe and discuss "benefits and costs of the prison boom": specifically, the impact of prisons on crime, criminal psychology, state spending, and the employment and earnings of young workers; and
4. Finally, Yale University law professor John J. Donahue III assesses the relative benefits of incarceration.

Raphael and Stoller state that criminal behavior is only one determinant of incarceration rates; the attitudes and actions of voters, elected officials, and criminal justice personnel are also major contributors. Incarceration rates are also subject to some complex, multifaceted factors. The editors note, for instance, that:

> Conditional on the violation that led to the prison sentence, the average time one can expect to serve has increased considerably in the United States. But, in the aggregate, increases in time served are not readily observable. That is, the average prisoner entering today will not serve more time in a given prison spell than the average prisoner admitted twenty-five years ago. The reason for this apparent anomaly is that the composition of prison admissions across violation or offense type has shifted decisively toward less serious offenses, with particularly large increases in the proportion of admissions accounted for by drug offenses and parole violations.

In this context, Weisman and Weiss affirm the editors' perspective that "the nation's incarceration rates [are] driven principally by policy changes and not changes in the behavior of individuals" in their extensive analysis of the 35-year reign of New York's mandatory drug laws, which were first imposed in the early 1970s. As Weisman and Weiss note, "[T]he dramatic surge in incarceration rates [in New York] especially among inner-city minority populations depended on critical decisions made at the local level— by mayors, police commissioners, and district attorneys and judges—in implementing and hence enforcing the sentencing policies enacted in state and federal capitals.

In subsequent articles, various findings include the following:

- Criminologists Shawn Bushway and Ray Paternoster, of the State University of New York, Albany and the University of Maryland, find only weak links between punishment policies and practices and their intended aims and "countless criminal justice policies (such as laws that provide for enhanced punishment for gun crimes) with no evidence that such laws effectively prevent crime";
- Princeton University political scientist Amy Lerman, using California corrections data, finds significant adverse effects of confinement in high-security prisons, but only for those inmates who have few, if any, prior arrests, convictions, probation terms, or jail commitments;
- University of California, Berkeley public policy professor Rucker Johnson, using income data, finds that 20% of black children have fathers who have been incarcerated, and the figure increases to 33% for black children with fathers who were not high school graduates; even more notably, he finds "a strong correlation between children from families with a strong incarceration history and children's behavioral outcomes";
- John Ellwood and Joshua Guetzkow, of the University of California, Berkeley and the University of Arizona, using state budget data, find that state corrections spending, which generally varies a great deal, may crowd out other spending priorities, but not necessarily

There is reason to believe that alternatives to incarceration might well be more socially attractive than our current reliance on incarceration as the predominant crime-fighting strategy.

See IMPORTANT READING, next page

**Russ Immarigeon, the Editor-in-Chief of Community Corrections Report, writes this review column each issue. Review materials can be sent to him at 563 Route 21, Hillsdale, NY 12529; (518) 325-5925; russimmarigeon@taconic.net.*

IMPORTANT READING, from page 57

those involving welfare, education, or health care; and

- Georgetown University public policy professor Harry Holzer finds probable but mixed correlations between imprisonment, post-prison employment prospects, and, eventually, recidivism.

In conclusion, Donahue urges policy makers to broaden their perspective to include not just "narrow cost-benefit calculation of incarceration" but also "alternative crime-fighting approaches." He suggests that "there is reason to believe that alternatives to incarceration might well be more socially attractive than our current reliance on incarceration as the predominant crime-fighting strategy." Donahue adds, especially in the case of growing numbers of mentally ill prisoners, that "alternative and more humane forms of handling such individuals may well be more cost effective if the human toll of mass incarceration is considered in the calculation."

Copies: $39.95, Russell Sage Foundation, 112 East 64th St. New York, NY 10065, (212) 750-6021.

Research Into Practice: Bridging the Gap in Community Corrections

edited by Edward R. Rhine and Donald Evans
American Corrections Association and International Community Corrections Association
414 + xvii pages (2009)

Between 1996 and 2005, the International Community Corrections Association (ICCA), usually in conjunction with the American Corrections Association (ACA), published eight volumes of research papers originally delivered at ICCA-sponsored "What Works?" conferences. These volumes appeared annually from 1993 through 1997 and biannually until 2005. While the themes of these conferences varied from year to year (e.g., substance abuse, effective community corrections, interventions with "special" or "special needs" offenders, offender reintegration in the community, women and corrections, reentry), these volumes typically consisted of groundbreaking articles from leading practitioners and researchers in the field of community corrections (e.g., Paul Gendreau, Doug McDonald, Alan Harland, Joan Petersilia, Ed Latessa, Lynn Lightfoot, Mark Moore, Larry Motiuk, Frank Cullen, Creasie Finney Hairston, Lynn Stewart, Vivian Gadsden, and James McGuire).

Overall, these articles and these volumes played a cutting-edge role in describing and shaping the emergent "what works" movement. They were, and remain, valuable resources because they connected research and practice, a connection that was at the heart of this new approach to criminal sanctioning, community supervision, and offender management. (As far as I know, all of these volumes are still available from either ACA or ICCA, except for the first volume, which was published by SAGE Publications and may be out of print.)

Overall, these articles and these volumes played a cutting-edge role in describing and shaping the emergent "what works" movement.

Research Into Practice: Bridging the Gap in Community Corrections is the ninth in this venerable series, and the first to appear in several years. In this volume, editors Edward Rhine and Donald Evans stress "the use of academic research to inform the practice of community corrections." The seven major articles in this collection were originally given as papers at ICCA's 2005 and 2006 Research Conferences in Atlantic City, New Jersey and Norfolk, Virginia. This volume not only kick-starts a slightly stalled tradition, but also promises the long-term continuity of the series: ACA and ICCA are currently working on future volumes.

The articles in this volume are divided into five sections:

1. Offender assessments across the generations;
2. Behavioral health in special-needs offenders;
3. Correctional treatment, behavioral management, and community supervision;
4. Families and communities as natural support systems for offenders; and
5. Civic engagement, the community, and reentry.

The papers presented at the conference, and in these sections, are by Don Andrews, Norman G. Hoffman, Nancy Wolff, Marilyn Van Dieten and David Robinson, Faye Taxman, Donald Braman, and Gordon Bazemore and Rachel Boba. A new feature for this volume is the inclusion of reaction essays, also by leading practitioners and researchers, including David Simourd, Gerald D. Schulman, Charley Flint, Bill Burrell, Marilyn Van Dieten, Carol Shapiro, and Phyllis Lawrence. Editors Edward Rhine and Donald Evans offer introductory and reflective remarks at the start and the end of the volume.

In his concluding remarks, coeditor Evans praises the role of professional organizations in the development of effective correctional intervention and assesses the role of three sets of critics of the "what works" movement:

1. Those debating "rehabilitation vs. punishment";
2. Those supporting rehabilitation but disagreeing with aspects of "what works"; and
3. Those accepting the goals of "what works" but fretting about the limitations of research findings on the actual effectiveness of this approach.

About the critics, Evans stresses the importance of engaging with them. I think he is right about that. (My colleague Shadd Maruna and I are listed among the critics.) But I think, too, that "what works" advocates and practitioners should possess (and probably do) a self-critical dimension that essentially incorporates aspects of each of these three critical stances, because each of them adds something to the development of "what works" initiatives. That said, like Evans, I too tire of ill-informed positive references to the alleged benefits of punishment-oriented approaches.

Copies: $35.00, American Corrections Association, 296 N. Washington St., Suite 200, Alexandria, VA 22314, (800) ACA-JOIN.

Sentencing

Principled Sentencing: Readings on Theory and Practice, Third Edition

edited by Andrew von Hirsch, Andrew Ashworth, and Julian Roberts
Hart Publishing
400 pages (2009)

Thirty-five years ago, Judge Marvin Frankel wrote about the injustice of disparate (unequal) sentences. First in law review articles, and later in book form,

See IMPORTANT READING, next page

IMPORTANT READING, from page 58

Judge Frankel argued that "unfettered discretion" was a culprit. "The vague, indefinite, and uncritical use of indeterminate sentences," he wrote, "calls for restriction through meaningful definitions and discriminating judgments." Soon thereafter, other groups started to frame more determinate forms or constraints of criminal sentencing practices. Much of this discourse was aimed at liberal objectives, such as reducing racial disparity or prison use. But the unintended consequences of these reform measures aggravated many of the factors that were of great concern to early reformers. Consequently, a cottage industry of sentencing research, sentencing reform legislation, and sentencing advocacy arose to address those matters of concern for Judge Frankel and others who followed him.

In this third edition of *Principled Sentencing,* original coeditors Andrew von Hirsch (University of Cambridge) and Andrew Ashworth (University of Oxford) have joined with Julian Roberts (University of Oxford) to produce a collection of 44 excerpts divided into eight "chapters." These chapters cover the following topics:

1. Rehabilitation;
2. Deterrence;
3. Incapacitation;
4. Desert;
5. Restorative justice;
6. Structuring sentencing discretion;
7. Sentencing young offenders; and
8. Diversity and sentencing.

The last two chapters are new to this edition. Each chapter contains four to seven excerpts from significant past or relatively recent readings; each chapter is given an introduction by one of the coeditors.

The editors affirm the baseline importance of considering sentencing practices early on: "That the imposition of sentence is a decision of critical importance can hardly be doubted," they proclaim. "It determines how much an offender must suffer for his or her offense, and that suffering may include the deprivation of the individual's liberty. Moreover, when the facts of the offense are undisputed, as is often the case, the nature and quantum of sentence is the primary decision to be made."

The importance of sentencing can not be overstated. It establishes a context, and perhaps much of the content, for community corrections. Yet it remains poorly understood and often overlooked. As the material in this volume ably demonstrates, sentencing is a complex process, with significant perils as well as great promise.

Overall, the editors pave a multidimensioned path: Introducing the section on rehabilitation, Ashworth cautions that positive rehabilitation outcomes, which he finds feasible for some subcategories of offenders, might therefore become "an auxiliary penal aim." Meanwhile, Roberts, introducing restorative justice, suggests that it promotes victim satisfaction, achieves offender desistance, and saves the state money. And von Hirsch cautions against criminal justice's ability to assess the "curability" of offenders.

Notably, there is no discussion of capital punishment. "A civilized state," the editors agree, "should not employ this atrocious sanction at all, so there should be no occasion for the courts to have to decide whether, when, and why it should be imposed as a legal penalty."

Copies: $52.00, International Specialized Book Services, Inc., 920 NE 58th Ave., Suite 300, Portland, OR 97213-3786, (503) 287-3093.

Roberts, introducing restorative justice, suggests that it promotes victim satisfaction, achieves offender desistance, and saves the state money.

Sentencing Guidelines: Lessons From Pennsylvania

by John H. Kramer and Jeffery T. Ulmer
Lynne Rienner Publishers
273 + xiv pages (2009)

The 1970s and 1980s were periods of rapid and significant changes in American sentencing practices. Foremost among these changes were the expanded use of mandatory sentencing (eventually evident in most states in one form or another) and sentencing guidelines (now practiced in more than 15 states, as well as in the federal criminal justice system). For more than 20 years, John Kramer and Jeffry Ulmer have been studying and administering sentencing guidelines. Over this period, both men have been associated with Pennsylvania State University as faculty members in the school's sociology and "crime, law, and justice" departments. Kramer also served as long-time director of the Pennsylvania Sentencing Guidelines Commission and, for several years, director of the U.S. Sentencing Commission. This volume is the culmination of their research work.

In this book, Kramer and Ulmer "examine in depth the history, development, and impact of sentencing guidelines in Pennsylvania." In early chapters, they report the historical development of sentencing guidelines, the context for Pennsylvania's investment in them, and the evolution of these measured interventions. Next, they examine local court adjustments to, including departures from, the guidelines; unwarranted disparities based on race, ethnicity, or gender; the impact of county and court variations on sentencing severity; the nature and extent of so-called "trial penalty" outcomes; and the problems presented by mandatory minimum sentences. Kramer and Ulmer also examine the impact of various revisions of the guidelines over the years.

The research data reported on in this volume, which the authors originally gathered through interviews with a wide range of criminal justice practitioners in Pennsylvania, including judges, prosecutors, defense attorneys, and probation officers, resulted in six significant "lessons" for the authors:

1. Sentencing severity and decision criteria, use of guidelines, and compliance and departure from guidelines are all likely to vary among local court communities;
2. Sentencing decisions are joint acts reflecting the influence of prosecutors, defense attorneys, and judges and are based on blameworthiness, community protection needs, and "practical constraints and consequences";
3. Blameworthiness and dangerousness are determined largely through formal legal and policy structures such as guidelines, but also through local decision makers' interests, attitudes, and stereotypes;

See IMPORTANT READING, next page

IMPORTANT READING, from page 59

4. The influence of defendants' social status (e.g., race, age, gender, or ethnicity) on sentencing decisions depends on conditional factors, such as conviction and geographic base;
5. Local court and community culture, politics, organization, and resources affect guideline implementation; and
6. Sentencing guideline systems less restrictive of sentencing discretion result in more local interpretations of focal concerns and a greater likelihood of disparity.

Nonetheless, the evolution of sentencing guidelines, in Pennsylvania and elsewhere, is far from over. That said, the Pennsylvania experience contains important lessons. Referencing the work of the Pennsylvania Commission on Sentencing (PCS), Kramer and Ulmer conclude that "information, credibility, and persistence are important factors in an agency, creating legitimacy and ultimately having an impact."

While having legislative members on the commission might cause some political problems, the fact that PCS had legislative members gave it entrée to the legislative process.

The authors confirm that the inclusion of legislators in the commission's work was essential:

> While having legislative members on the commission might cause some political problems, as politicians might tend to focus on the political liability of their decisions on a sentencing commission, the fact that PCS had legislative members gave it entrée to the legislative process. Importantly, this meant that it had access to proposed legislation *before* it became a public issue. This often enabled the commission to stay ahead of coming developments, and allowed it to deflect or at least blunt the impact of sentencing initiatives that it opposed.

Copies: $65.00, Lynne Rienner Publishers, 1800 30th St., Ste. 314, Boulder, CO 80301-6684, (303) 444-6684. ■

THE JUSTICE SYSTEM, from page 49

jury trials, and leaving vacant judgeships unfilled. In February, Massachusetts Chief Justice Margaret Marshall told the American Bar Association that the state courts across the country were in crisis because of these budget issues (Woolhouse, 2009).

The pressure of declining budgets is being felt at all levels throughout the court systems. This pressure extends to the litigants and defendants as well. Because a portion of the courts' budget comes from fees and costs imposed by judges, many courts are putting increased pressure on staff to collect unpaid obligations. In some systems, fees are being raised, and new fees are being imposed. In the instances of continued failure to pay, jail sentences are being imposed ("New Debtors' Prisons," 2009). In some instances, the debts owed are for reimbursement of costs for holding juveniles in detention facilities in Los Angeles (Hennessey-Fiske, 2009) and Michigan ("New Debtors' Prisons," 2009).

The idea of incarcerating parents or guardians for failing to pay a part of the cost of detaining their children struck me as wrong. That, combined with the renewed emphasis on generating revenue for governments through fines, fees, assessments, and penalties, got me to thinking again about the whole issue of court-imposed financial obligations. During my career in probation in New Jersey in the 1980s and 1990s, I was directly involved with policy and practice related to the imposition and collection of court-ordered financial obligations. These included restitution, fines, and child support, as well as a bewildering and ever-growing array of fees, penalties, and assessments, all designed to bring in revenue to state and local governments without using the dreaded word "taxes."

As an article on the growing use of fees throughout government noted, "politicians tend to regard fees as more palatable than taxes…" (Segal, 2009). It is clear from the expansion of these "user fees" that politicians and policy makers have found a path through the budget thicket that reduces their risk of being caught up in the thorns of the tax conundrum: "We want services, but we don't want to raise taxes to pay for them."

As I reconsidered this issue, I revisited my original conclusion, reached many years ago, that our governments have made some serious strategic and tactical errors in enthusiastically and uncritically embracing the concept of "user fees." This strategy relies on offenders, other litigants, and now parents and guardians to fund portions of the justice system. For reasons that I will present and discuss, I still believe that we have pursued an unwise and counterproductive policy in this area.

A Short History of Court-Ordered Financial Obligations

Courts have been imposing financial obligations on criminal offenders from the beginning of legal history. Three categories of obligation form the historical core: fines, restitution, and court costs. *Fines* are designed as a punitive measure, intended to deprive the offender of some money as punishment for the criminal act. Fines also serve as a deterrent for members of society (general deterrence) and for the individual offender who has to pay the money (specific deterrence). *Restitution* to victims of crime is restorative, designed to compensate victims for injuries, damage to property, and other losses. Restitution can also serve a rehabilitative purpose for the offender. *Court costs* are designed to offset some of the costs of operating the courts. Given the nominal amounts usually imposed as court costs, I wonder why judges bother, because it seems that the revenue from costs would fail to have even a modest impact on the court's budget.

Another major area of court-ordered obligations is child support, but that is usually imposed in the family court system and is not routinely handled by probation as extensively as are fines, restitution, and court costs.

See THE JUSTICE SYSTEM, next page

THE JUSTICE SYSTEM, from page 60

In the 1970s, the landscape of court-ordered collections began to change. The victims' rights movement emerged and began to exert significant influence on law and policy. One area of focus was the poor performance of courts and probation departments on the imposition and collection of restitution. States began to establish victim compensation boards and commissions, which provided funds to victims of crime to compensate them for losses that were not being addressed adequately (or at all) through court-ordered restitution. These services met a need and became very popular—and before long, very expensive as well. The demand for compensation exceeded the supply of resources. The solution to this funding dilemma was a *victim compensation fee*, paid by offenders to fund the compensation. The appeal of this concept was powerful: Needy victims got help, and blameworthy offenders were held accountable and had to pay. Soon all types of offenders, whether or not they caused injury, damage, or loss to a victim, were paying into the victim compensation funds.

The victim compensation fees established a powerful precedent. In community corrections, the cost of supervision could be offset by imposing *supervision fees*. These fees are now in place in almost every jurisdiction in the country. In New Jersey, for example, there are now more than 20 types of financial obligations that can be imposed on an offender. It is not uncommon for an offender to leave court owing thousands of dollars on a variety of obligations.

The obligations fall into a number of categories. Some are directly related to the offense committed by the offender, such as fines and restitution. Others are fees related to the services "provided" as part of the processing of the case. These services can include:

- Cost for prosecution and defense;
- Public defender application fees;
- Laboratory analysis fees for drug cases;
- Drug testing fees;
- Presentence report fees;
- Detention costs; and
- Many miscellaneous other fees.

In some instances, the fee revenue goes to the collecting agency (probation) for use in its budget. In other instances, the revenue goes to the jurisdiction's general fund and is used for a variety of purposes (Diller et al., 2009). Still other fees are strictly revenue generating, with little, if any, direct relationship to the offender or the offense. These include fees for drug education and prevention programs, fees to fund computer systems, and fees to provide body armor for law enforcement officers.

The range and scope of these fees is limited only by one's imagination. I recall seeing a fee schedule from a California probation department that filled a full page, enumerating dozens of charges that could be imposed.

Fiscal Crises and Political Philosophies

The popularity of fees and penalties was no doubt enhanced in the 1980s by the impact of fiscal crises and shifting political philosophies. California in particular in the aftermath of Proposition 13 (passed in 1978) was forced to cut back drastically on county government (Chaiken et al., 1981). Fees became a popular and increasingly necessary means of keeping agency doors open and providing minimum services.

The election of Ronald Reagan as President in 1980 ushered in a new, more conservative political era. The goals of this new era included reducing the burden on taxpayers, reducing the size of government, and engaging the private sector to provide services at lower cost. It was very attractive to espouse the idea of shifting the burden of the cost of government away from the taxpayer and toward the offender. The synergy of political conservatism and fiscal crises fueled the tendency to impose user fees to fund services. This policy was politically very popular, and it had no downsides—at least none that were apparent at the time.

Citizen support for user fees was broad and continues to be so today. In response to a recommendation that parole supervision fees be abolished, the president of the Maryland Taxpayers Association said, "I would suggest that, rather than be abolished, this fee should be raised. Fees save taxpayers money. I think it is fair that the individual bear some of the cost of their parole" (Scharper, 2009).

The result of this broad public and political support has been the establishment, reinforcement, and solidification of "user fees" as a core element of funding strategies across agencies and branches of government at all levels. Rarely did anyone take the time to examine the implications of this strategy.

I would suggest that it is useful and informative to explore fully the implications of a "user fee" based model of government revenue enhancement. It seems prudent that legislators and policy makers would examine such implications thoroughly prior to embarking on such a strategy. The following are some of the major implications of the user-fee model:

1. *The user-fee model establishes a legally binding obligation, a debt between the individual and the unit of government.* The greater the number of fees and the more extensive and frequent their use, the larger the body of debt becomes between government and its citizens.
2. *Once a debt is established, the state is obligated to enforce it and to collect it.* Failure to do so undermines the integrity of the court's order. While a judge noted the unpleasant nature of enforcing collections, he made it clear that judges had no choice but to take enforcement action: "Do you allow the orders of your court to go ignored?" (Schwartz, 2009).
3. *All of the powers of the state's legal structure can be brought to bear to enforce and collect on that debt.* This use of powers includes the employment of formal sanctions up to and including incarceration. The U.S. Supreme Court has ruled several times on the use of incarceration to compel payment, so it is important to use such sanctions carefully to avoid legal challenges.
4. *The state needs an array of tools and techniques to enforce court orders.* Jail is a blunt instrument that often has unintended

Caseloads that are inflated with offenders who simply owe money make it difficult for probation officers to spend time with offenders who truly need supervision.

See THE JUSTICE SYSTEM, next page

THE JUSTICE SYSTEM, from page 61

consequences that can further hinder an individual's ability to pay (e.g., losing a job because of a jail sentence). A more comprehensive, precise, and graduated set of sanctions is needed to allow measured responses that produce the desired results.

5. *Enforcement and collection activities have real costs attached.* Those include *opportunity costs* for probation officers, who could be spending their time working with higher-risk offenders on their criminogenic risk factors instead of chasing after offenders whose sole remaining obligation is that they owe money. Patrick McGee, Director of Maryland's Division of Parole and Probation, said that supervision fees have "a huge impact on our workload." Without them, he continued, "We'd have more time to work with offenders on things like finding jobs" (Scharper, 2009). Caseloads that are inflated with offenders who simply owe money make it difficult for probation officers to spend time with offenders who truly need supervision.
6. *The process of collecting on these debts must be reviewed to ensure that the agency does not spend more money on the enforcement and collection process than is actually collected.* It is important to prioritize collection efforts to ensure that resources are not wasted trying to get "blood from a stone." When I worked in the public defender's office early in my career, I recall being told that our collection efforts yielded one dollar for every two dollars spent on collecting, which was hardly a good use of scarce resources.
7. *Debt has a significant impact on offenders and litigants at all levels, but particularly on those with meager financial resources.* They are obligated to pay large amounts of money that they do not have. If they fail to pay, they face consequences that may include civil judgments, liens, credit-bureau reporting, and a variety of other practices that can be damaging to individual credit ratings. The ultimate sanction is incarceration, which is damaging to present and future employment, disruptive of family ties and relationships, and generally not conducive to full and voluntary payment of debts.

From this limited analysis, one can see that traveling down the "user fee" road has serious implications for policy and practice, not to mention the impact on those who have to pay the fees. A thorough and objective analysis would seem a wise exercise.

Analysis of the User-Fee Strategy

While the strategy of relying on user fees is well intentioned (with the goal of reducing the cost of government to the taxpayers) and well established in the United States, it suffers from two serious flaws. First, it assumes that there is a substantial amount of money in the pockets of offenders just waiting to be tapped. Second, it assumes that we have an effective collections infrastructure and proven technologies.

The notion that offenders are a ready source of revenue is a popular and convenient but ultimately incorrect and dangerous presumption. As a rule, most offenders live on the margins of financial viability. Too often they have low education levels, few skills, and limited work experience. Even those who have skills, such as the trades and construction, are vulnerable in times of economic downturn. Those without skills remain at the bottom of the employment ladder and are the first to be dismissed when times get hard. Because of their limited and sporadic income, they have no financial cushion, no savings, and limited, if any credit availability. These factors make them unlikely to own real assets, such as a home. Offenders are often subject to child support orders and may carry commercial debt, further limiting their ability to pay. In sum, offenders do not have much disposable income, and they are individually and collectively an ineffective and unreliable source of revenue.

So, where did the notion of the wealthy offender with resources just waiting to be tapped come from? It was reinforced by the rhetoric of the war on drugs. The media and popular culture created the image of extravagantly wealthy drug kingpins and dealers with bags of cash, just waiting to be caught and relieved of their ill-gotten gains. But the reality is that the kingpins are rarely caught and even less often caught with much, if any, of their money. The vast majority of those swept up in the drug enforcement net are street-level dealers, runners, and users. The money that they made went to support their habits or their extravagant lifestyles. This is not a savings and investment crowd: Whatever money they got, they spent.

The second flaw in the strategy is the assumption that we have an effective infrastructure and the technology to enforce and collect these debts. Most courts and probation agencies take a very haphazard approach to collections, treating it as an unpleasant distraction that has to be done as quickly as possible, with a minimal investment of time and resources. This approach produces predictable results. In Maryland, only 17% of parole supervision fees are collected by the end of the supervision term (Diller et al., 2009). In Texas, only 9.6% of parolees discharged between 2003 and 2008 paid all of their restitution (Vogel, 2008).

If we are serious about seeking to make the collections process more effective, we need to approach it systematically, as a profit-making entity would. In 1989, we commissioned a study of our collection efforts in the New Jersey courts and probation. The principal finding of that study was that we had to approach the task more as a business would (Arthur Andersen, 1989). Subsequent changes based on recommendations from that report have significantly increased the effectiveness of the collections effort. Between 1995 and 2006, collections statewide increased $14.4 million, or 63% (Administrative Office of the Courts, 2008). The adult probation department in Maricopa County, Arizona is another example of an agency that has approached collections and enforcement in a systematic, businesslike manner, with positive results. Between 1995 and 2005, restitution collections increased 113%, from $4.7 million to $10.2 million (Maricopa County Adult Probation Department, 2006).

A Businesslike Approach

Because most of us in community corrections do not have a business degree and do not come from a business background, we can legitimately ask, "What does it mean to be more businesslike?" The following are seven principles of such an approach to user fees:

1. *Assess an offender's ability to pay and use that information to tailor the total obligation in order to develop a realistic payment plan.* Imposing huge obligations that can never be paid (absent the offender's winning the lottery or some equally unlikely event) is like giving a huge adjustable-rate mortgage with balloon payments to someone with no assets or income: As we have recently learned the hard way in this country, that loan is destined to fail. The U.S. Supreme Court highlighted the importance of the *ability to pay* issue in 1983, when it prohibited incarcerating probationers for failure to pay court-ordered obligations unless it was demonstrated that

See THE JUSTICE SYSTEM, next page

THE JUSTICE SYSTEM, from page 62

the probationer had the *ability to pay* but willfully failed to do so. (See *Bearden v. Georgia,* 461 U.S. 660, 1983).

2. *A payment plan should be established by the court, which requires full payment of the obligation within the term of probation.* The common practice in many jurisdictions is to accept whatever payments are made and then to extend the term of probation to allow continued payments. This practice consumes scarce and valuable probation officer resources, inflates caseloads, and discourages regular payments.
3. *Reasonable total amounts and realistic payment plans will make the process seem fairer in the eye of the offender.* Research into procedural justice conducted by Tom Tyler suggests that people will be more likely to pay and pay willingly if they feel that the process is fair (Tyler, 2006). The comment from a citizen who was cited under a new fee law in Florida said it best: "I'm not paying, because it isn't fair" (Segal, 2009).
4. *Make paying easy for the offenders.* Payment windows and clerk's offices should be open whenever the probation office is open, including evening and weekend hours if necessary. You would never see a department store refuse to accept a payment on a charge account because a customer showed up with money after 5:00 PM, even though the store was open for business.
5. *Align all business practices to ensure maximum collections.* All participants, from judges to probation officers to finance clerks, should coordinate their efforts to support the idea that regular payments are expected behavior. Judges should announce their expectation of regular payments from the bench at sentencing and should require a substantial payment at that point. Probation officers should establish their expectation that payments will be made regularly and should follow up on that requirement at each contact. Payment offices should be open and accessible and should accept debit and credit cards.
6. *Reward desired behavior and provide incentives to offenders.* Consistent payments should be noted and commented on positively. If possible, incentives should be created to secure payments. Reduced reporting frequency or perhaps early discharge from supervision could be offered if payment in full is made ahead of schedule and all other criteria are satisfied.
7. *Make use of technology to track payments by offenders, collections by officer and unit, and overall agency performance on collections.* The courts and probation departments should track and report on collections performance in order to reinforce it as an agency priority.

It is common for probation officers to say, "I didn't go to college to be a collections agent" and to make disparaging remarks about the collection function. I think that a good deal of that attitude stems from the fact that they are expected to collect money in a system that does not approach the function in a businesslike manner, and thus the officers are frustrated because they have to waste time and energy on a process that could be done much more effectively. The attitude of probation officers in the New Jersey study cited above was described as follows: "Although they do not like to consider themselves collection agents, they are the best persons to perform this function" (Arthur Andersen, 1989, p. 1). I suggest that making collections more businesslike would reduce the probation officers' frustration and dislike for this function.

A comprehensive review and recommendations for improving collections and offender accountability can be found in the recent report *Repaying Debts,* from the Council of State Governments (McLean &Thompson, 2007).

The Future: Mitigated and Improved User Fees

Despite the problems that I have cited, I do not think that it is reasonable to expect that the reliance on user fees will fade any time in the near future. That is in part because such fees are entwined in the funding scheme for a public policy model that is extraordinarily expensive. For the past three decades, the predominant public policy for criminal justice has been long-term incarceration. This policy is based on incapacitation and deterrence as crime-control strategies. In other words, we will lock up convicted offenders for a long time, keeping them off the street, and away from the public. The long sentences are also designed to send a strong deterrent message to other potential offenders.

Incarceration is costly, averaging $23,000 per year to house an inmate and approximately $65,000 to build a medium-security bed. The cost of running prisons has more than doubled since 1987, consuming scarce revenue that could be used for courts, probation and parole, and other justice system agencies, as well as education, health care, transportation, and many other important and valuable programs and services (Pew Center on the States, 2008).

Not only is incarceration expensive, but it also has been shown to be ineffective at the long-term goal of reducing crime by convicted offenders. Research has consistently shown that prisoners released from custody fail at a high rate (Langan & Levin, 2002).

This combination of high costs and questionable effectiveness is pushing many states to examine critically their commitment to incarceration. In many states, laws and policies once held sacrosanct are being changed to reduce the reliance on incarceration and invest in alternative strategies, many community based, to handle offenders. (For more information, see *www.justicereinvestment.org.*)

Perhaps this willingness to rethink such a well-entrenched public policy suggests a willingness to examine other policy models, including the extensive reliance on user fees. The report on Maryland's parole supervision fee provides an excellent analysis of the complete and largely negative impact of supervision fees on people released from prison. It documents many of the flaws inherent in implementing user fees with a largely indigent population that is struggling with basic issues like housing and employment. The results of such a review convinced the state of Virginia that its parole supervision fee was both inconsistent with correctional goals and too difficult to collect. As a result, the parole supervision fee was abolished in 1994 (Diller et al., 2009, p. 26).

Where fees exist, we should work to reduce the extent to which operational budgets of justice agencies rely on user fees (McLean & Thompson, 2007, p. 34). Fees should be tied to actual services delivered to offenders, not general revenue enhancement, and should be based on the actual cost of delivering the service.

Even as user fees continue to be a core element of our policy model, we must work to do a better, more businesslike job of collection and enforcement. That initiative alone would alleviate some of the most egregious problems and make the process more effective. Improvements in the process would better serve the offenders (the "users"), victims of crime, and society by mitigating the negative impact of court-ordered

See THE JUSTICE SYSTEM, next page

THE JUSTICE SYSTEM, from page 63

financial obligations on offenders, increasing payment rates and the amount collected, and making the entire system of collections more honest, effective, and accountable.

References

Administrative Office of the Courts, New Jersey (2008). *Comprehensive enforcement program: Impact on collections.* Trenton, NJ: Administrative Office of the Courts.

Arthur Andersen & Co. (1989). *Operations review of non-child support collections.* Trenton, NJ: Administrative Office of the Courts.

Chaiken, J.M., Walker, W.E., Jiga, A.P., & Polin, S.S. (1981). *The impact of fiscal limitation on California's criminal justice system.* Santa Monica, CA: Rand Corporation.

Diller, R., Greene., J., & Jacobs, M. (2009). *Maryland's parole supervision fee: A barrier to reentry.* New York: Brennan Center for Justice.

Hennessey-Fiske, M. (2009). L.A. county probation department suspends aggressive billing of guardians. *Los Angeles Times,* February 14, 2009. Available at: *http://www.latimes.com/news/local/la-me-probation-fees14-2009feb,0.4015050.story.*

Langan, P.A., & Levin, D.J. (2002). *Recidivism of prisoners released in 1994.* Washington, DC: Bureau of Justice Statistics.

Maricopa County Adult Probation Department (2006). *Financial compliance program.* Showcase in Excellence Award Application. Phoenix, AZ: Maricopa County Adult Probation Department.

McLean, R., & Thompson, M.D. (2007). *Repaying debts.* New York: Council of State Governments Justice Center.

The new debtors' prisons. (2009). Editorial. *New York Times,* April 6, 2009. Available at: *http://www.nytimes.com/2009/04/06/opinion/06mon4.html.*

Pew Center on the States (2008). *One in 100: Behind bars in America.* Washington, DC: Pew Charitable Trusts.

Scharper, J. (2009). Parole fee burdens ex-offenders. *Baltimore Sun,* March 23, 2009. Available at: *http://www.baltimoresun.com/news/local/balmd.parole23mar23,0,431181.story.*

Schwartz, J. (2009). As courts face deep cuts, some states squeeze defendants. *New York Times,* April 7, 2009. Available at: *http://www.nytimes.com/2009/04/07/us/07collection.html?pagewanted=2&_r=1&sq=as%20courts%20face%20deep%20cuts,%20some%20states%20squeeze%20defendants&st=cse&scp=1.*

Segal, D. (2009). Cities turn to fees to fill budget gaps. *New York Times,* April 11, 2009. Available at: *http://www.nytimes.com/2009/04/11/business/11fees.html?scp=1&sq=cities%20turn%20to%20fees%20to%20fill%20budget%20gaps&st=cse.*

Tyler, T.R. (2006). *Why people obey the law.* Princeton, NJ: Princeton University Press.

Vogel, C. (2008). Crime doesn't pay(back): A Houston press report on court-ordered restitution in Texas. *Houston Press,* December 4, 2008. Available at: *http://www.houstonpress.com/2008-12-04/news/crime-doesn-t-pay-back-a-houston-press-special-report-on-court-ordered-restitutions-in-texas.*

Woolhouse, M. (2009). Bay state's top jurist says courts are in crisis. *Boston Globe,* February 17, 2009. Available at: *http://www.boston.com/news/local/massachusetts/articles/2009/02/17/bay_states_top_jurist_says_courts_are_in_crisis.*

William D. Burrell is an independent consultant located in Lawrenceville, NJ. ■

COMMUNITY CORRECTIONS REPORT
Civic Research Institute, Inc.
P.O.Box 585
Kingston, NJ 08528

PERIODICALS
U.S. POSTAGE
PAID