

Rethinking Judicial Leadership in Responding to Violence

A Summit

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Introduction

Since the United States' high-water mark of incarceration in 2008, there has been a decrease in incarceration in many cities and counties across our country. To drive this reduction, communities have invested in alternatives to incarceration for misdemeanor or first-time offenses, the decriminalization of low-level crimes, and changes to police practices, amongst other reforms. This is important work; yet, in order to reverse our nation's over-reliance on incarceration, it is not enough to offer alternatives solely to those charged with non-violent crimes. Rather, we must begin to speak about, unpack, and understand violence.

Given the justice system's mandate to protect public safety, the conventional wisdom has been that incarceration is the only path to guarantee the safety of the community. This sentiment is reflected in practice, since those convicted of violent crimes make up the majority of states' prison populations.

Pretrial detention followed by jail and prison terms is the default response to violent crime in state courts across the country. This is driven in part by a cultural norm that alternatives to incarceration are only appropriate for non-violent offenders. Individuals charged with violence are mostly ineligible for alternatives to incarceration. Eligibility considerations are often painted with a broad brush, grouping charges together under the "violent" label without sufficient regard for context or nuance.

Judges play a unique role in all of this: they are the final arbiter in weighing the best interests of the community and the rights of the accused. Judges are well-positioned to ask some tough questions: How can and should we address people who have been charged with violence? How should we differentiate between types of violence? Is incarceration the only option? What kinds of alternatives could be more effective at preventing further harm? What kinds of cases might be appropriate for community-based responses?

To begin to address these and other questions, the Center for Court Innovation, with support from the Joyce Foundation and Latham & Watkins LLP, convened a small group of judicial leaders from across the country in October 2018 to grapple with the practical, ethical, and political challenges of alternative sentencing for cases that involve violent behavior. This paper distills the most salient takeaways from the discussion and concludes by identifying areas for further exploration.

The Summit

« *None of us could do this job if we're afraid. But that doesn't mean we don't have to be careful.*
— Judge Matthew D’Emic, Brooklyn, New York

Over the course of two days of conversation, participants engaged subject matter experts on a range of pertinent topics, including the link between violent crimes and mass incarceration; the efficacy of risk assessment tools for predicting violence; and new interventions that seek to offer safe and effective responses to those who have engaged in violent behavior.

The judges repeatedly grappled with the challenge of defining and categorizing violence. Jonathan Lippman, the former Chief Judge of New York, opened the convening by referencing the tragic case of Kalief Browder, a 16-year-old who had been incarcerated pretrial for three years due to an offense that had been statutorily categorized as violent, even though the charge (subsequently dismissed) was stealing a backpack. The case illustrated the ways in which categorical definitions of violence can obfuscate the lived realities beneath the charges. Under many states’ criminal codes, “violence” can include a spectrum of offenses ranging from burglary to homicide. Throughout the summit, the judges discussed how violence and violent charges can be improperly categorized. Some of the panelists also challenged the familiar dichotomy between “violent offenders” and “non-violent offenders,” noting that—in reality—individual behavior falls along a spectrum and may change over time.

Given these complexities, the goal of the summit was not to reach a consensus around a specific category of violent crime that should be considered eligible or ineligible for diversion. Rather, the discussions were aimed at creating a deeper understanding of what’s underneath a charge; what the actual risks of violence are, despite the charge; and how the justice system should address harm.

A three-part roadmap of the summit discussion about cases involving violence.



Assessing and Responding to Violence: Identifying Gaps and What “Works”

« *[I]f you can find good data that people can trust... it really changes minds and it also changes hearts.*
— Judge Timothy Kuhlman, Toledo, Ohio

Participants in the judicial summit explored evidence—and identified the need to build more evidence—in three areas: risk assessment; prosecutors’ decision-making and interfacing with judges in cases involving violence; and alternatives to incarceration for those charged with violence.

Risk Assessment

« *Judges saw it (risk assessment tools) as an attack on their discretion, and that somehow it was supposed to replace their discretion. And I said, “If you’re using it right, it’s not.”*
— Judge Ronald Adrine, Cleveland, Ohio

A growing body of evidence suggests that pretrial release and community-based sentencing decisions can simultaneously reduce incarceration and protect public safety. Supporters of risk assessment argue that increasing risk-based decision making would lead to judges employing these options more frequently. Despite three decades of research suggesting that the use of data-driven risk assessment can improve outcomes for defendants,¹ jurisdictions often struggle with the implementation of a risk-based decision-making model.² In particular, judges may view defendants charged with violence as appropriate exceptions to the risk-informed decision-making framework, despite evidence that a current violent charge is not a strong indicator that a defendant is “high risk.”³

The summit allowed judicial leaders to have candid discussions about the evidence regarding risk assessment and the need to improve the use of evidence-based risk models in violent cases. During the summit, experts in risk assessment presented the theory and evidence behind risk assessment instruments and risk frameworks that have increased the use of alternatives to incarceration. The group discussed the challenges of “real world” application of risk assessment to violent cases. In some of these cases, especially where an assessment suggests a defendant has treatable needs such as addiction, the use of therapeutic alternatives may be a more effective response than incarceration. Put simply, assessment tools can offer judges and others a way of making more nuanced distinctions among cases.

As the summit revealed, risk assessment can be an aid to decision-making in tough cases, but it is not a panacea. Judges and interested stakeholders must still grapple with the problem of racial and ethnic disparities. Some participating judges agreed that more education around the potential biases and disparate impacts of risk assessment tools is necessary.

Prosecutors' Approach to Violent Crimes

- « *If you have a D.A. who's willing to divert people out of the system, we need active judges who use common sense to pull the levers on the case, give second chances, and use some of the academic rigor that's out there to suggest the best way to hold people accountable without over-relying on incarceration as punishment.*
- District Attorney Eric Gonzalez, Brooklyn, New York

The summit sought to explore the ways that judicial and prosecutorial leadership are intertwined in cases involving violence. Participants focused both on the role the prosecutor plays in shaping decisions in violent cases, as well as strategies for local judges and prosecutors to work together to increase the use of evidence-based tools to facilitate release and alternatives to incarceration. The summit also explored the urgent need for more evidence regarding the impact of prosecutorial decision-making on outcomes for cases involving violence. Prosecutors are key leaders in this area, since prosecutorial discretion can serve as either a driver of mass incarceration or potentially as a powerful mechanism for moving in the other direction. Notably, prosecutors often share with judges the risk of public criticism for their treatment of violent offenses, which can lead to hesitation or outright opposition to alternatives to incarceration in these cases. In communities where prosecutors tend toward punitive rather than rehabilitative responses to crime, judges can serve as a bulwark against this tendency. Judges who are interested in improving outcomes and reducing over-incarceration must begin to build strong partnerships with prosecutors.

Summit participants discussed the possibility that more rehabilitative responses to violent crime might better serve the interests of many crime victims.⁴ One speaker at the summit described receiving greater engagement from victims of crime when restorative, rather than incarceratory, approaches are taken.⁵

The conversation highlighted the need for more information regarding prosecutorial decision-making around violent crimes. What kinds of conduct and circumstances influence charging decisions? How do risk assessment tools inform prosecutorial decision-making? The summit demonstrated the need for further research into these questions.

Another area explored during the summit is how judges can overcome prosecutorial resistance to rehabilitative outcomes in cases involving violence. Several judicial participants felt that prosecutors may be more willing to consider alternatives to incarceration for cases involving weapon possession, for example, or cases in which the individuals charged with a violent crime are young adults or first-time offenders.

- « *This prototype, this part of the country has been calling it [the] "progressive prosecutor"; it's a common-sense prosecutor who gets that it's not about being soft on crime or tough on crime, it's about being smart on crime.*
- Judge Jonathan Lippman, New York, New York

Minneapolis City Attorney Susan Segal described that in Minneapolis, Minnesota, prosecutors developed an alternative approach for young adults (ages 18-26) charged with misdemeanor gun possession; those individuals receive mentorship and complete trauma-informed programming in order to avoid incarceration.⁶ Additionally, Brooklyn District Attorney Eric Gonzalez described an initiative in Brooklyn, New York, which allows young men (ages 14-22) who are charged with firearm possession offenses to complete cognitive-behavioral therapy, among other steps, and potentially avoid prosecution altogether.⁷ For other violent charges, such as assault, individuals can complete skills-based programming—including peacemaking and anger management. Clinicians at the Brooklyn District Attorney’s Office assess program participants beforehand to tailor a criminal justice response that addresses participants’ underlying needs, such as employment, education, and substance use disorder.

When prosecutors lend their leadership to approaches such as these, it makes it easier for judges to support alternatives to incarceration.

Roundtable participants also discussed the influence of risk assessment instruments on prosecutors, with some arguing that there is a need to incorporate more evidence-based tools in pretrial and sentencing recommendations. Notably, in line with the evidence on risk assessment, prosecutors might consider looking beyond the charged offense (since charge is not necessarily a proxy for risk of recidivism) or including specific case types involving violence to determine eligibility for alternatives to incarceration. Here, too, partnership with judicial leaders is critical.

Alternatives to Incarceration

- « *I think that one of the ways that you can change the culture in the judiciary is to have data to show people, “Hey, you know, you’re thinking this way because this is the culture, but there’s scientific data that shows us something else.”*
— Judge Colleen Sheehan, Cook County, Illinois

The second day of the summit kicked off with a presentation on promising alternatives to incarceration for individuals charged with or convicted of violent crimes. Following the presentation, the judges participated in a closed-door discussion on tailored alternatives that might appeal to judges making release or sentencing decisions in violent cases. Alternatives could include risk-based supervision; trauma-informed violence prevention models; or therapeutic courts. Judges who have access to such programming can lead the way for other judges around the country who may be interested in responding more effectively to violent crime.

Encouragingly, numerous community-based alternatives to incarceration that serve defendants who have committed nonviolent crimes also show promise for those charged with violent crimes. For instance, the New York City Department of Probation serves more than 2,500 new felony clients each year, approximately 30 percent of whom are convicted of a violent felony offense. In this context, a risk- and needs-based tracking system ensures that high-risk individuals on probation receive intensive supervision and are linked with appropriate services. Further, some veterans treatment courts serve individuals charged with violence using a combination of intensive judicial monitoring and therapeutic services.⁸

At the pretrial stage, evidence-based pretrial supervision models have been shown to reduce recidivism among nonviolent and violent defendants alike.⁹ Further, a smaller number of promising models have been developed specifically to respond to high-risk behavior such as gun carrying.¹⁰ This initial evidence sets the stage for more reforms, including the expansion of alternatives to incarceration for cases involving violence.

Filling the Gaps in Responding to Violence: Areas for Growth and Evaluation

- « *We are a nation of abundance. We can afford everything that we can dream up and right now it's wrapped up in jails and prisons. And so, I think that the beauty of pilots is being able to say, once we shut down a jail or prison, okay, let's reinvest it in these other programs.*
- Amanda Alexander, Detroit, Michigan

One of the clear takeaways from the summit was the need for more research. Determining which community-based alternatives are appropriate will require the evaluation of promising alternatives to incarceration. Evaluations should focus on multiple impacts beyond the reduction of incarceration, including public safety, reduction of racial disparities, efficiency, and perceptions of fairness. Contrary to conventional wisdom, there is some evidence that it is possible to reduce both incarceration and crime.

For example, New York City has reduced its jail population from more than 22,000 people to less than 8,000, all while maintaining a higher safety rate than the city has seen in years. New York's network of alternatives to incarceration is one of the things that has long distinguished it from other American cities. For example, the Brooklyn Mental Health Court works with many individuals who are charged with violent felonies, including assault, robbery, and burglary—but who also have serious and persistent mental illness. In this model, individuals charged with more serious violence are reviewed on a case-by-case basis.¹¹ Instead of being sentenced to prison, participants in the program remain in the community, where they receive treatment for their mental illness. Independent evaluators documented that the odds of being re-convicted were 29 percent lower for program participants, compared with similar defendants who did not go to the Mental Health Court.

- « *When you look at New York City, and you deconstruct the big systemic changes, I think you go back to basics and find that successful pilots lead to more ambitious pilots that lead to institutionalized programming.*
- Julian Adler, New York, New York

There are other examples of tailored programs across the country, such as Roca in Boston, that have shown promising outcomes for young people and adults who have committed violent crimes. An Iowa-based program, Achieving Change Through Value-Based Behavior, delivered promising results among those charged with domestic violence, by reducing violent re-offending by nearly fifty percent.¹²

Yet, because the evidence base is still developing, for the time being, judicial leaders will need to rely on their peers for support as they look to advance alternatives to incarceration for violent charges. Summit participants emphasized the power of a peer network to support reform in this area, helping judges track and elevate emerging best practices.

Moving Forward: Leveraging Judicial Leadership

- « *I don't care whether you're a local judge, whether you're a Justice of the Supreme Court, it doesn't matter. Judges have the ability of bringing people together through the power of the robe.*
— Judge Glenn Grant, Newark, New Jersey

Judges can serve as crucial leaders in reducing incarceration for cases involving violent charges. Indeed, for many other justice system stakeholders, the will to push forward on this issue, and to ask tough questions about the effectiveness of our current responses to violent cases, is in its infancy. This is where judges, who have long held a moral authority, can fill a gap.

Yet to promote judicial leadership and confidence in responding differently, more information is needed on evidence-informed or evidence-based alternatives to incarceration for cases involving violence. Judges across the country need to understand which programs have worked, and with which populations.

Where evidence is lacking, deeper investments in rigorous and applied research are needed. And in making these deeper investments, stakeholders must identify which jurisdictions may be ripe for pilots—and query whether those jurisdictions have the local leadership, political will, and community members calling for an end to mass incarceration and improved public safety. These inquiries would be even more powerful if judicial leaders could share what they find with a network of judicial leaders interested in promoting reforms in this area.

In those jurisdictions where pilot programs are already demonstrating reductions in incarceration without detriment to public safety, judges and their criminal justice peers need to double-down, replicate, and share information about successful models. And, where pilots are falling short or encountering implementation challenges, judicial leaders can help communities embrace trial and error, learn from failure—and try again.

Endnotes

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