National District Attorneys Association

The Prosecutor

VOLUME 53 / NUMBER 4 • OCTOBER 2019

• IN THIS ISSUE •

RAISING THE AGE OF JUVENILE DELINQUENCY: WHAT SCIENCE SAYS ABOUT THE AGE OF MATURITY AND LEGAL CULPABILITY

SEEKING JUSTICE: 'ARE WE PUNISHING PEOPLE FOR BEING SICK?'

MAKING YORK COUNTY SAFER BY TACKLING COMPLEX ISSUES IN CRIMINAL JUSTICE THROUGH COLLABORATION

WAYS PROSECUTORS CAN BOLSTER THE LOCAL CONTINUUM OF BEHAVIORAL HEALTH CARE AND ACCESS TO MENTAL HEALTH SERVICES

UNDERSTANDING HOW MENTAL ILLNESS IMPACTS THE DELIVERY OF JUSTICE

NON-CONSENSUAL PORNOGRAPHY AND SEXTORTION: A CASE STUDY IN VICTIMIZATION AND OFFENDER PROFILES

THE WORK OF JUSTICE BEYOND THE CONVICTION

COLLABORATIVE APPROACHES TO MENTAL HEALTH DIVERSION IN MIAMI-DADE


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04 **Raising the Age of Juvenile Delinquency: What Science Says About the Age of Maturity and Legal Culpability**
BY BRITTANY CICIRELLO

13 **Mastering Masking: Why and How to Avoid Masking CDL-Holder Convictions**
BY ELIZABETH EARLEYWINE

20 **The True Role of the District Attorney**
BY MICHAEL D. O'KEEFE

22 **Mastering Masking: The Legal and Ethical Consequences of Plea Negotiations Involving Commercial Driver's Licenses**
BY JEANINE HOWARD

24 **Meet A NDAA Member**

25 **New DNA Tool Helps Identify Murder Victims and Elusive Killers and Rapists**
BY MICHELE HANISEE

26 **Seeking Justice: 'Are We Punishing People For Being Sick?'**
BY JACKIE LACEY

28 **Making York County Safer by Tackling Complex Issues in Criminal Justice Through Collaboration**
BY DAVE SUNDAY

31 **Ways Prosecutors Can Bolster the Local Continuum of Behavioral Health Care and Access to Mental Health Services**
BY MELISSA NEAL STEIN AND SAM ROGERS

33 **Understanding How Mental Illness Impacts the Delivery of Justice**
BY KELLY SHELTON

37 **Non-Consensual Pornography and Sextortion: A Case Study in Victimization and Offender Profiles**
BY LOU LUBA, JENNIFER MILLER AND SARAH MARSHALL

43 **The Work of Justice Beyond the Conviction**
BY MARK A. DUPREE, SR.

46 **Collaborative Approaches to Mental Health Diversion in Miami-Dade**
BY JUDGE STEVE LEIFMAN, KATHERINE FERNANDEZ RUNDLE AND HALLIE FADER-TOWE

50 **Meet the NDAA Team**

The Prosecutor, ISS No. 0027-6383, National District Attorneys Association. Views expressed in the articles in this publication are those of the authors and do not necessarily represent the views of the National District Attorneys Association. *The Prosecutor* is published by NDAA for its members as part of their member benefits.

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Coconino County Courthouse (1895) The most notable feature is the four-story tall clock tower which can be seen from most of the downtown area. With the new addition completed in 2002, the 56,000 thousand square foot building now houses five divisions of the Coconino County Superior Court, the clerk of the court and administration offices, Flagstaff Justice Court, jury assembly rooms and conference rooms.

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Raising the Age of Juvenile Delinquency: What Science Says About the Age of Maturity and Legal Culpability

By **BRITTANY CICIRELLO**
Former Deputy District Attorney, 16th Judicial District, La Junta (CO)

In *Roper v. Simmons*, 543 U.S 551 (2005), the United States Supreme Court incorporated recent discoveries in developmental neuroscience to eliminate the death penalty for persons under the age of eighteen. Since that case, advocates have pointed to *Roper* to justify raising the age of juvenile delinquency and protect a newly-created category of emerging adults (aged 18–35 years old). While psychology and developmental neuroscience have made significant progress in documenting the development changes of adolescents (ages 12–18), both lack concentrated attention on emerging adults. Each discipline also comes to a different conclusion concerning an individual's maturity. Psychological studies, which focus on cognitive differences between adolescents and adults, recognize a person reaches maturity at age 16. So cognitively speaking, by age 16 a person has the same ability to logically reason as an adult. Behavioral, or psychosocial, studies document the non-cognitive factors that affect a person's maturity. Those studies found maturity, that is a person's ability to make pro-social decisions, peaks at age 19. Developmental neuroscience, however, shows brain development may well last until a person is 35 years old. Thus, developmental neuroscience may be the only scientific support for including emerging adults in the juvenile justice system. What proponents of developmental neuroscience, and of the psychological studies as well, fail to address is (1) how these differences in maturity affect a person's pro-social decision-making and (2) how these differences are legally significant.

These scientific developments do have a place in informing policymakers decisions regarding treatment options, sentencing mitigators, or changes to expungement laws. To stretch the science to support wholesale reform of the juvenile justice system and raise the age of juvenile delinquency from eighteen to twenty-five years old is unwarranted. Such a change has far-reaching impacts from the potential increase in gang recruitment of younger members who may commit crimes knowing the consequences do not involve prison sentences or college students who will rape with impunity, to raising the age of emancipation and the ability of emerging adults to contract, vote, drink, marry, and drive. Raising the age of juvenile delinquency would have a profound societal impact that is not appropriate at this time. The science, rather than providing an independent basis to reform juvenile justice, reinforces the need for juvenile justice programs for the current age range.

This article first discusses the recent developments in adolescent brain science and summarizes the most common conclusions. It then confronts what developmental neuroscience does not say and why advocates seeking to raise the age of juvenile delinquency push the science beyond its limitations to reach unsupported conclusions. Finally, this article argues that the appropriate role for adolescent science is to inform the treatment of persons between the ages of 18 and 35 years old. The science may support the need to include age as a mitigating factor at sentencing as well as increase the expungement opportunities for crimes committed by the emerging adult group. Any change beyond that is not supported by the scientific findings at this time.

I. WHILE THE SCIENCE SUPPORTS OUR COMMON SENSE ACKNOWLEDGMENT THAT ADOLESCENT BRAINS ARE DIFFERENT, IT NEITHER COMES TO A CONSENSUS ABOUT THE AGE OF "ADULTHOOD" NOR DOES IT EXPLORE THE LEGAL SIGNIFICANCE OF THE VARIOUS BIOLOGICAL, COGNITIVE, AND PSYCHOSOCIAL FACTORS THAT INFLUENCE A DEVELOPING BRAIN.

In the last three decades psychology and developmental neuroscience have confirmed what common sense already tell us: adolescent brains work differently than adult brains. Since the 1980s, adolescent brain science developed in three disciplines: cognitive, behavioral or psychosocial, and neuroimaging. Cognitive studies analyze how adolescents reason and think differently than adults.[1] Behavioral or psychosocial studies measure deficiencies in adolescents' social and emotional capabilities.[2] These two areas of psychology taken together influence a persons' "maturity of judgment,"

which describes how likely a person is to make an antisocial or a pro-social decision (i.e. the difference between robbing a store and not robbing a store).[3] Advances in neuroimaging technologies, which takes pictures of the brain to show its development, demonstrate the biological reasons why adolescents often lack the ability to make social or antisocial decisions compared to adults.[4] Each of these areas has come to a different conclusion regarding when an adolescent has reached an adult-like ability to make pro-social decisions. This section presents the generalized conclusions each of the three sciences regarding adolescent brain development and pro-social decision-making skills.

Before 2000, most psychological studies focused on the cognitive abilities of adolescents.[5] These studies focused on why adolescents take more risks, behave more egocentrically, and lack logical ability.[6] There is substantial evidence that adolescents are well-aware of the risk they take, but choose to take the risks anyway, which cannot be explained by their cognitive ability.[7] Cognitive studies also demonstrated that adolescents are no more likely than adults to behave egocentrically.[8] Furthermore, adolescents are "no less likely than adults to employ rational algorithms in decision-making situations."[9] To make matters worse, cognitive studies analyzed the effects of increasing an adolescents' awareness of the risks of certain conduct, such as smoking, and found that information has little impact on pro-social decision-making.[10] Thus, these studies concluded that adolescents are as cognitively capable by the age of 15-16 as adults and no substantial growth in logical abilities occur past the age of 16.[11] Simply put, an adolescent at age 16 is as cognizant as an adult of whether the actions taken are right or wrong.

The question remained unanswered as to why adolescents continued to make antisocial decisions if their logical abilities are nearly as refined as an adults by age 16. In 2000, a study published by Elizabeth Cauffman and Laurence Steinberg studied the non-cognitive (i.e. psychosocial) factors that might explain why adolescents make antisocial decisions. The research focused on the different capabilities of adolescents in three psychosocial categories: (1) "responsibility, which encompasses such characteristics as self-reliance, clarity of identity, and independence;" (2) "perspective, which refers to one's likelihood of considering situations from different viewpoints and placing them in broader social and temporal contexts;" and (3) "temperance, which refers to tendencies to limit impulsivity and to evaluate situations before acting."[12] The goal of the study was to measure a persons' "maturity of judgment," by hypothesizing that those who are more responsible, temperate, and perspective would make better

1 Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May be Less Culpable Than Adults*, 18 Behav. Sci. Law 741, 742 (2000) [hereinafter *(Im)maturity of Judgment*].

2 *Id.*

3 *Id.* at 749. It is important to note that "in theory, the maturity of a decision is independent of its social acceptance[,]" however when using this in the context of juvenile adjudication, we must know "whether juveniles have the competencies necessary to abide by the law." Therefore, equating "'good' decision-making with socially accepted behavior is consistent with everyday practice in the courts." *Id.* at 750.

4 Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 Notre Dame L. Rev. 89, 98–101 (2013) [hereinafter "*False Promise*"].

5 Cauffman, *(Im)maturity of Judgment*, at 743.

6 *Id.*

7 *Id.* at 744; *see also* C. Alexander et al., *A Measure of Risk Taking for Young Adolescents: Reliability and Validity Assessments*, 19 J. Youth & Adolesc. 559–69 (1990).

8 Cauffman, *(Im)maturity of Judgment*, at 744; *see also* M. Jacobs-Quadrel et al., *Adolescent (In)vulnerability*, 48 Am. Psycho. 102–06 (1993).

9 Cauffman, *(Im)maturity of Judgment*, at 744; *see also* B. Fischhoff, *Risk Taking: A Developmental Perspective*, in Risk-Taking Behavior, Yates J. (ed), Wiley: New York, 133-1162 (1992).

10 Cauffman, *(Im)maturity of Judgment*, at 744; *see also* Office of Technology Assessment 1991 a, b, and c, *Adolescent Health—Vol. 1, 2, and 3*, U.S. Gov't Printing Office, Washington, D.C.; M. Rotherram-Borus & C. Koopman, *AIDS and Adolescents*, in *Encyclopedia of Adolescence*, R. Lerner, A. Peterson, & J. Brooks-Gunn (eds.) Garland: New York; 29-36 (1990).

11 Most studies agree that by age 16, a person's brain has the same intellectual ability as an adult. Cauffman, *(Im)maturity of Judgment*, at 744, citing W. Overton, *Competence and Procedures: Constraints on the Development of Logical Reasoning*, in "Reasoning, Necessity, and Logic: Developmental Perspectives, W. Overton (ed.) 1-32 (1990). In certain situations a 16 year old makes the same, or better, decisions than a 35 year old. Beatriz Luna & John A. Sweeney, *The Emergency of Collaborative Brain Function: fMRI Studies of the Development of Response Inhibition*, 1021 Annals N.Y. Acad. Sci. 296, 302 (2004); Mary Beckman, *Crime, Culpability and the Adolescent Brain*, 305 Science 596, 597–99 (2004) (describing study showing "adolescents' prefrontal cortices were considerably more active than adults'" in an impulse-suppression task). Thus, an emerging adult has the capacity to understand right from wrong and form the appropriate mens rea. Maroney, *False Promise*, at 133.

12 Cauffman, *(Im)maturity of Judgment*, at 745.

decisions.[13] The sample was drawn from junior high and high schools in the Philadelphia area as well as local collages, and the college-aged sample was divided into those under twenty-one years old and those twenty-one years old and older. The study is unique in that it encompassed test subjects from ages 12 to 48.[14] Test subjects were asked a series of questions about themselves to test responsibility, perspective, and temperance. The study then asked subjects about a variety of scenarios to judge the persons decision-making ability with an emphasis on "antisocial" decisions such as shoplifting, joyriding in a stolen car, smoking marijuana, cheating on a test, and deceiving one's employer.[15] An "antisocial" decision was one in which the individual chose a socially unacceptable choice, thus the study focused on the legally significant factor of culpability or whether a juvenile has the ability to follow the law.[16]

The results of the study concluded that antisocial decision-making was significantly affected by age and sex, but not by the interaction between the two.[17] As for psychosocial maturity the same correlation exists. Adolescents in 8th and 10th grade displayed the lowest levels of maturity and females were more perspective and more temperate than their male counterparts. Overall, "older participants exhibit higher levels of psychosocial maturity, and females exhibit greater psychosocial maturity than males." The study concludes that while age may be a significant predictors of decision-making, the more powerful predictor is psychosocial maturity.[18] Additionally, "[a]lthough socially responsible decision-making is more common among older participants than among younger ones . . . it does not appear to increase appreciably after the age 19."[19] In fact, the differences between the college-aged participants under twenty-one and twenty-one and older were similar, which suggests that development of psychosocial skills is completed by age eighteen or nineteen.[20] In some cases, "psychosocially mature 13-year olds demonstrate less antisocial decision-making than psychosocially immature adults."[21]

As a generalization then, a person who exhibits higher levels of responsibility, temperance, and perspective will always make more mature decisions, and less antisocial ones, than a person who scores lower, *regardless of age*. Thus, "it is important to consider individual differences, rather than simply age, when assessing decision-making ability or maturity of judgment among adolescents."[22] Risk-taking among adolescents is better explained by adolescents' deficiencies in psychosocial factors, rather than cognitive defects, which is "out grown" by approximately age 19. The unspoken conclusion could be drawn then that if a person continues to make antisocial decision past that age, the person is unlikely to ever phase out of such behavior, and raising the age of juvenile delinquency would not appreciable help offenders who could arguable age-out of the system. In essence, psychological maturity, an individuals' ability to assess right from wrong, and desires to engage in risk taking behavior have no solid direct link to a person's age.

These cognitive and psychosocial studies present a number of problems if they are going to be used to argue the age of juvenile delinquency in Colorado should be raised to age 25. First, most cognitive and psychosocial studies focus on individuals between the ages of thirteen and nineteen, thus is fails to predict behavior for the emerging adolescent group (those aged 18-25). Even for those few studies that utilize a broader age-range, psychologically speaking, a person is adult-like by around age 19. Second, the psychological studies are careful to couch their findings with the recognition that **no single factor** can predict adolescent maturity, decision-making, risk to re-offend, or culpable mental state.[23] There are a number of other factors, hormones, upbringing, economic status, neighborhood locale, parental influences, deeply affect an adolescents' or even an adults' ability to make pro-

[13] *Id.*

[14] *Id.* at 756 (used more than 1000 adolescents and adults between ages 12 to 48).

[15] *Id.* at 750.

[16] *Id.*

[17] *Id.* at 751–52.

[18] *Id.* at 755.

[19] *Id.* at 756.

[20] *Id.* ("The steepest inflection point in the developmental curve occurs sometime between 16 and 19 years.") Until a more fine-tuned analysis of 16-19 year-olds is conducted, the inferences drawn from the developmental curve should be used with caution.

[21] *Id.* at 757.

[22] *Id.*

[23] Maroney, *False Promise*, at 96–97, n.23–28; see also Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Dev. Rev. 399, 340–41 (1992) ("The demarcation of the end of adolescence must always be somewhat arbitrary, since in most societies there is likely to be variance among individuals in the completion of that period of preparation."

social choices. The law already takes this into consideration by allowing judges to assess the individual circumstances of an offender during the sentencing phase, including any treatment options.

Third, there is such great variance among individuals as to be legally significant and make any boundary between juvenile and adult court arbitrary.[24] Any boundary is bound to be unfair. Either persons will be held responsible for actions for which they do not have the requisite ability to make a pro-social decision by setting the bar too high or society will be harmed by not holding those accountable who are capable of making pro-social decisions by setting the boundary too low. The argument that juvenile delinquency should extend as long as possible stems from a policy ideal which seeks to mitigate the possibility of punishing someone who was incapable of understanding his or her actions for as long as possible. Put another way, advocates for raising the age of delinquency believe justice can only be achieved by taking the route which offers the least disproportionate and least severe results for the most people. That philosophy, however, covers more people with safeguards than may be required once an individual assessment is done. This is an age-old problem in the law: the possibility of punishing those who are innocent and allowing the guilty to escape their justly deserved consequences. The entire justice system has been fined-tuned to mitigate both risks, but humanity is incapable of being perfect in this respect. Society has long-recognized maturity occurs at age 18. Raising the age based on inconclusive science is fanciful at best and would undermine the entire legal system as well as cover too many persons who are legally capable of understanding their actions and the associated consequences.

Finally, there are also significant differences between the sexes with females showing a greater ability to make pro-social choices at a younger age than males.[25] Juvenile delinquency cannot draw the boundary at a younger age for females without running afoul of constitutional protections. All of these problems are not new. The age of juvenile delinquency varies between the states because it is based on cognitive studies or psychosocial studies or both.[26] What emerged into this scientific uncertainty regarding age of maturity was developmental neuroscience. As neuroimaging became more prevalent, scientists turned imaging (making digital scans of the brain to determine its development) to understanding the brain's development from infancy through adulthood. Adolescent neuroimaging could explain why, biologically speaking, adolescents make more antisocial decisions than adults.

These studies showed that two processes occur during adolescences that affect the brain: myelination (insulation of neural axons with a fatty substance called "white matter") and changes in the volume and density of "grey matter" (neuron cell bodies and synapses).[27] White matter is what allows the brain to quickly and efficiently communicate among brain systems. It increases linearly from childhood through adulthood. Grey matter contains the neurons and comprises a large part of the brain areas that are involved in decision-making and self-control. When children are very young, they develop an excess of neurons in order to aid in development.[28] That same overproduction occurs in adolescent brains, which are subsequently "pruned" back based on use, life experience, and fine tuning of abilities. Both of these processes affect different areas of the brain at different times, but both affect the frontal cortex last.[29] The frontal cortex is responsible for higher-order reasoning and executive controls—fluid coordination of cognition and emotion, goal-directed planning and forethought, and impulse control.[30] These structural changes lead to the conclusion that to "the extent transformations occurring in adolescent brain contribute to the characteristic behavioral

[24] Maroney, *False Promise*, at 146–48; Cauffman, *(Im)maturity of Judgment*, at 758 ("In our view, the age differences observed here are appreciable enough to warrant drawing a legal distinction. They may not, however, be consistent enough, since significant numbers of adolescents exhibit high enough levels of maturity of judgment to outperform less mature adults. . . . [I]t is difficult to define a chronological boundary between immaturity and maturity.") (emphasis in original).

[25] Cauffman, *(Im)maturity of Judgment*, at 753 (noting gender affected psychosocial development with females demonstrating more perspective and more temperance than their male counterparts).

[26] National Juvenile Defense Counsel, State Profiles, available at http://njdc.info/practice-policy-resources/state-profiles/ (an interactive map showing, among other statistics, the ages of minimum and maximum juvenile court jurisdiction) (last visited Sept. 6, 2018).

[27] Maroney, *False Promise*, at 99; Johnson et. al., *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45 J. Adoles. Health 216, 217 (2009) [hereinafter *Adolescent Maturity*].

[28] Maroney, *False Promise*, at 99 ("[E]arly adolescent brain experiences an overproduction of neurons similar to one previously observed in very early childhood.").

[29] *Id.*

[30] *Id.*

predispositions of adolescence, adolescent behavior is in part biologically determined."[31] Thus, the science supports what common sense as told us for centuries: teenagers do not think or act like adults, and the reason is partly biologically.

But even these neurological studies come with caveats. First, there is the interplay of brain development with hormonal changes, which increase and change at the outset of puberty, and may continue to do so into middle adulthood.[32] Second, the imaging used by neuroscientists also found pronounced differences between males and females, with more antisocial decisions being made by males than females.[33] Third, neuroscience imaging does not take into account individualized differences between persons and their brain development.[34] Neuroimaging studies have not come to a consensus on a cut-off point for either cognitive or psychosocial maturity and this is true at either the population level or the individual level.[35] Put more simply, neuroimaging cannot look at a brain scan and determine whether the person is able to make pro-social decisions or not and it cannot draw any generalized conclusions about brain development and maturity levels. Common sense tells us that everyone develops differently and neuroimaging, at this point, as merely confirmed this banal generality. While there have been incredible advances in our understanding of the adolescent brain, both through neuroimaging and psychological study, no one area adequately explains all the differences between adolescent and adult brains, nor does any single discipline offer a bright-line cut off for when these developments cease and the mature, adult brain is fully developed.

It cannot be denied that advances have been made in our understanding of juvenile development through the use of cognitive, psychosocial, and neuroimaging. But the studies beg the question: what is their legal significance? The next section explores the impacts, or lack thereof, of the scientific developments on the juvenile justice system and why such studies still pose problems to wide-scale changes in the juvenile justice reform movement to push juvenile delinquency from eighteen to twenty-five in Colorado.

[31] L. P. Spear, *The Adolescent Brain and the Age-Related Behavioral Manifestations*, 24 Neuroscience & Biobehavioral Revs. 417, 447 (2000).

[32] Elizabeth C. Scoot & Laurence Steinbert, Rethinking Juvenile Justice at 40 (2008).

[33] Maroney, *False Promises*, at 157; Ronald E. Dahl, *Adolescent Brain Development: A Period of Vulnerabilities and Opportunities*, 1021 Annals N.Y. Acad. Sci. 1, 12–16 (2004) (studies have shown "a significant positive correlation between pubertal maturation and sensation seeking" in both boys and girls, which is associated with great risk-taking behaviors); Judy L. Cameron, *Interrelationships Between Hormones, Behavior, and Affect During Adolescence*, 1021 Annals N.Y. Acad. Sci. 134, 139 (2004); (because girls' brains mature faster, biology would say that they should be held to a different standard for accountability than boys); Louann Brizendine, *The Female Brain* at 44 (2006) (the female brain "matures two or three years earlier than the male brain"); Emily Buss, *Rethinking the Connection Between Developmental Science and Juvenile Justice*, 76 Chi. L. Rev. 493, 513 (2009) (raising concern that because girls' brains mature faster, biology would say they should be held to a different standard than boys).

[34] Maroney, *False Promise*, at 146–48.

[35] Johnson et. al., *Adolescent Maturity* at 217, 218 ("As of yet, however, neuroimaging studies do not allow a chronologic cut-point for behavioral or cognitive maturity at either the individual or population level."); Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court*, in Youth on Trial 9, at 24 (Thomas Griss & Robert G. Schwartz eds., 2000) ("Within any given individual, the developmental timetable of different aspects of maturation may vary markedly . . . . [D]evelopment rarely follows a straight line during adolescence—periods of progress often alternate with periods of regression . . . .Variability between individuals is still more important . . . ."); Bruce Bower, *Teen Brains on Trial*, Sci. News, May 28, 2004 at 299 (same).

II. ADOLESCENT BRAIN SCIENCE FAILS TO ANSWER WHETHER DEFICIENCIES IN ADOLESCENT BRAINS ARE LEGALLY MEAINGIFUL AND DOES NOT PROVIDE A REASON TO MOVE AWAY FROM AN AGE-BASED BOUNDARY OF EIGHTEEN FOR JUVENILE DELINQUENCY.

The question that looms large in all of the most recent studies, and the one that remains largely unanswered, is whether these deficiencies in adolescent brains are legally meaningful or significant. Many juvenile justice advocates and social scientist answer affirmatively: the science reinforces our original impulse to create a separate system to adjudicate and treat juveniles.[36] Because juveniles' brains are structurally immature, seek the pleasures of risky behaviors, have weak frontal cortices, and are psychosocially immature, juveniles are less culpable for their actions.[37] This is ultimately a mitigation theory that has been raised at every stage of a juveniles' interactions with law enforcement from waiver of *Miranda* rights to formulating the requisite *mens rea* or mental state defense. Some advocates seek to use these studies to argue the age of delinquency should be raised to 25, which is currently the age neuroimaging studies says represents "maturity" or completion of the developmental processes of the brain. Such a move would be premature for three reasons. First, there is no consensus among the cognitive, behavioral, and structural disciplines as to the age at which the brain is fully developed and "adult."[38] It is even less certain what the differences between the disciplines say about legal culpability and criminal punishments. Second, individual differences are so great that it precludes establishing an age-determinative benchmark for adult-like judgment.[39] This includes the noticeable and consistent differences across all three disciplines between the sexes and even between the races, making it difficult to justify a developmental benchmark that is not discriminatory. Third, there is a fallacy of affirming the adverse inference with the science to argue contradictory positions in the legal realm.[40] While the current age of juvenile delinquency may be developmentally arbitrary, changing it would require a herculean effort to reform not only the entire penal code but every societal right or privilege based on the "age of majority." It is, however, the best we have to offer right now, while we wait for the science to catch up and offer a better benchmark for determining when a person is developmentally capable of forming intent, committing an act, and being held responsible for that act.

A. There is no consensus amongst the disciplines through which a different benchmark could indicate the age of delinquency.

The first point cannot be stated too plainly: there is no agreement between the scientific disciplines as to the age of developmental majority. Cognitive studies have confirmed that by age 15 or 16, most juveniles have the cognitive ability to understand their actions, the associated risks, and some of the consequences. As the Cauffmann study found, however, a juvenile's psychosocial abilities do not mature until age 19, but some psychosocially mature 13 year-olds out-perform a less psychosocially mature 48-year-old. While psychological studies show juveniles are "consistently less able than adults to implement fast, appropriate, and mature responses to environmental challenges; [and] neuroscience

[36] Maroney, *False Promise*, at 110–11; Scott & Steinberg, *Rethinking Juvenile Justice*, at 49 (creating the basic theory, called "diminished culpability" that justifies the creation and maintenance of the juvenile justice system).

[37] Maroney, *False Promise*, at 111.

[38] Cf. Cauffman, *(Im)maturity of Judgment*, at 756 (finding, psychosocially, pro-social decision-making does not "increase appreciably after age 19.") *with* Johnson, *Adolescent Maturity*, at 216 (neuroimaging reveals that the frontal lobe "may not be fully developed until halfway through the third decade of life.").

[39] *See supra* n. 34.

[40] Johnson, *Adolescent Maturity*, at 219–20.

suggests that these relative deficiencies are partly attributable not to bad character but to biological constraints attending developmental processes[,]" this relative deficiency does not necessarily move juveniles below the legal threshold of culpability.[41] Put another way, juveniles make good decisions sometimes, but the capacity for making those good decisions and exerting self-control is less stable than that of an adult.[42] Neuroimaging studies give a wide variety of "maturity" benchmarks, with most settling around age 25, while some find the frontal lobes may not be fully developed until the mid-30s.[43] Even more startling is the discovery that the brain begins to deteriorate at age 45.[44] No one is advocating that those over the age of 50 no longer capable of understanding right from wrong of making a knowing, voluntary, or intelligent decision.

There is also no consensus among the disciplines as to how the cognitive, developmental, and neuroimaging differences correlate to predictable or uniform standards for determining culpability. This is particularly true of neuroimaging where a scientist can look at the structure of a person's brain to determine developmental maturity without deducing the functional maturity.[45] While it is "highly plausible that adolescents' behavioral immaturity mirrors the anatomical immaturity of their brains, science has not determined the nature or extent of that mirroring."[46]

Relative deficiencies are also apparent in all three disciplines. A relative deficiency is the difference between an adolescent's and an adult's ability to make "fast, appropriate, and mature responses to environmental challenges."[47] In each study, adolescents do not perform as well as or as quickly as their adult counterparts. But as the Cauffman study found, a psychosocially mature 13-year-old may outperform an adult. Relative deficiency do not establish that adolescents are not legally capable of understanding their actions or being held responsible for the results. At most, relative deficiencies show adolescents may exceed the legally significant threshold by a lower margin. Thus, relative deficiencies do not mean, systematically, juveniles or even emerging adults (18–25) require a new legal system in which their *mens rea* and culpability are automatically discounted due to their numerical age.

Age limitations have also posed a problem for juvenile justice. Some states cut off juvenile justice at age 18, and the science does not, at this point, necessarily justify raising that age to 19 or 20 or 25. While structurally the brain may be incomplete in its development by age 18, there is not yet a corollary between biological development and psychosocial functionality (which indicates that psychosocially the field levels off around age 19). Without further research into this area, the judiciary is left without guidance and stymied in making signification changes based on still-developing science.

B. Individual differences are so great that it precludes establishing an age-determinative benchmark for adult-like judgment

None of the scientific areas have a stable, consistent, generalized justification for moving the admittedly arbitrary legal decision that juvenile delinquency ends at age eighteen. Studies in all three disciplines consistently show wide variation among individuals. Cognitive studies recognize that adolescents are intellectually mature by the mid-teenage years, lending some support for age of delinquency to end before age eighteen.[48] Behavioral studies show psychosocial maturity does not increase appreciably after age nineteen. This may be a basis to increase age of juvenile delinquency to nineteen, one year beyond the current limitation. While age is a significant predictor of decision-making, psychosocial maturity is the more powerful predictor.[49] The problem with raising the age of juvenile delinquency based on this model is three-fold: first there are too many individualized differences to give a benchmark for an entire population; second,

[41] Maroney, *False Promise*, at 150 & n.242–44; see also Sarah Durston et al., *A Neural Basis for the Development of Inhibitory Control*, 5 Developmental Sci. F9 (2002) (While "younger individuals need to recruit greater neural resources to accomplish adult-like behavior" but it can be done, at least on an individual basis.)

[42] For example, in *State v. Garcia*, No. CR 2005-422 (N.M. Dist. Ct.) the juvenile defendant shot his girlfriend. The prosecution pointed out that on a previous occasion the defendant threatened his girlfriend with a gun but had not shot her. Experts could not explain this conduct except to say at one moment the defendant could exercise self-control and at the next he could not. Maroney, *False Promise*, at 151.

[43] Johnson et al., *Adolescent Maturity*, at 216.

[44] Bruce Bower, *Teen Brains on Trial*, Sci. News, May 28, 2004 at 301 (reporting results of another study that showed myelination peaks at approximately 45 years of age).

[45] Maroney, *False Promise*, at 148.

[46] *Id.* at 149.

[47] *Id.* at 150.

[48] *Id.* at 153

[49] Cauffman, *(Im)maturity of Judgment*, at 755.

there is limited ability in the current system to determine an individual's psychosocial maturity; and third, there is no scientific evidence as to the implications psychosocial maturity has on legal culpability.

Neuroimaging is an even worse model for predicting maturity. While the brain may continue to develop until the mid-30s, it also begins to decline as a person becomes older. There is also a paucity of empirical evidence describing the implications of brain image activity on behavior. It is also unrealistic to think that a person's performance in a neuro-imaging scanner directly correlates to real-world performance. It is important to not misinterpret a researcher's correlation to an area of the brain, such as the frontal cortex, to a causal connection. There is no one-to-one correspondence between brain regions and discrete functionality. So just because the frontal cortex may not be fully developed until 35 does not cause a legally sufficient deficiency in *mens rea* or culpability.

Overall the science does not draw the type of fine distinctions the judiciary and legislature is often most interested in distinguishing. There is, of course, a great distinction between a thirteen-year-old and an eighteen-year old, but where do you draw the line when months or days are involved before the numerical age changes.

All three sciences also recognize the distinctions between men and women, with women maturing faster, making better psychosocial decisions, and finishing brain development faster than men.[50] Women experience the early-adolescence neural exuberance, when the grey matter is growing exponentially, at least a year before men and sometimes more.[51] There are also noticeable differences between the races. African American women progress more quickly than white women, and men move slower than them both.[52] This begs the question of whether races and genders should age-out of the system at different times. The science would answer in the affirmative while most legal scholars would be quick to point out the constitutional challenges should a system would face.

C. Drawing conclusions when there are none: the fallacy of self-affirmation without correlation.

There is a fallacy of affirming the adverse inference with the science to argue contradictory positions in the legal realm by using cognitive, behavioral, and neuroimaging studies to develop juvenile justice benchmarks. Affirming the adverse inference, as explained by symbolic logic terminology, goes like this: "All dogs are mammals. Fred is a mammal. Therefore, Fred is a dog."[53] Not only does the science produce inconsistent ages of maturity, it does not provide a consistent population model to ensure fair treatment of all individuals. This danger is nowhere more apparent than looking at how policy makers have used this science to argue contrary positions. In *Roper v. Simmons*, the American Psychological Association ("APA") filed an *amicus* brief arguing that adolescents' developing brains made them fundamentally different than adults in terms of culpability. Previously, the APA filed an *amici* brief in *Hodgson v. Minnesota*, making the exact opposite argument: adolescents making decision on abortion was "virtually indistinguishable" from adults and thus had the moral capacity to take responsibility for that decision.[54] As Justice Scalia pointed out in his *Roper* dissent, "Given the nuances of scientific methodology and conflicting views, courts—which can only consider the limited evidence on the record before them, are ill equipped to determine which view of the science is the right one."[55] While the legislature is not bereft of guidance as much as the judiciary, it is important that policy have a solid foundation and does not overstep the scientific support in making sweeping fundamental changes to the criminal justice system.

[50] Maroney, *False Promise*, at 157.

[51] *Id.*

[52] *Id.* Conversely, the legal system should not impose more severe punishment for girls' violence for being less normative since boys have a greater propensity for violence and lawbreaking.

[53] Johnson et al. *Adolescent Maturity*, at 219.

[54] *Id.* at 230.

[55] *Roper v. Simmons*, 543 U.S. 551, 618 (2005), Scalia, J. dissenting.

CONCLUSION

The overall theme of adolescent brain science confirms what common sense already tells us: adolescent brains are different. What we now know is that adolescent brains are different for a variety of reasons, from cognitive processes and psychosocial skills to actual biological development of the brain. These studies should reinforce our dedication to the juvenile justice system for adolescents. But the studies leave us with many unanswered questions. First is the general lack of studies that go beyond the ages of 18 or 19. Without more, it is difficult to justify the monumental change that would be required to raise the age of juvenile delinquency to 25. Second, it is only developmental neuroimaging that supports the argument that maturity is not reached until 25 or 35 years of age. Psychologically speaking, maturity is reached much earlier on. Finally, it always is, and should always be, an individual determination as to the prosecution and sentencing of a juvenile or emerging adult. The facts of each case, the defendant's individual factors such as stable family upbringing, medical and mental health problems, schooling, and economic opportunities are all factors to consider in assessing the individual's culpability.[56] These factors are already considered at sentencing or treatment determinations. The only consensus from the various disciplines is that numerous factors play into an individuals' maturity and ability to make pro-social decisions. Science has not articulated which of these factors is preeminent in determining maturity nor has the science tied that maturity factor(s) to an individual's ability to distinguish right from wrong or formulate a culpable mental state. Any boundary suggested by the science different than the one dictated by common sense lacks a concrete basis in any scientific discipline. It would be irresponsible to raise the age of juvenile delinquency at this point without further research into the correlation between brain development and legal culpability.

[56] There is also the unconscious acknowledgment that persons should be tried by a jury of their peers and the judges live in the counties in which why preside. Every community is different. The community knows the difficulties faced by certain families or certain age groups. The community understands the hardships facing single mothers or teenagers in a rural area with nothing do to on a Friday night but get into trouble. And a community can take that into consideration when prosecuting a case, judging a case, or imposing a sentence on a case by case basis. The justice system has always relied on individuals to make the right call and thoughtfully assess each case. Until the science says differently, that is the best we have to offer.

Mastering Masking: Why and How to Avoid Masking CDL-Holder Convictions

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INTRODUCTION

Congress has charged the U.S. Department of Transportation (DOT) with regulating commercial motor vehicles (CMV) to promote the public interest in their safe operation, and to encourage economical, efficient, and fair transportation.[1] The Federal Motor Carrier Safety Administration (FMCSA) is the operating administration within the DOT charged with ensuring "the highest degree of safety in motor carrier transportation."[2] Congress has instructed FMCSA "to improve motor carrier, commercial motor vehicle, and driver safety" in part by "developing and enforcing effective, compatible, and cost-beneficial motor carrier, commercial motor vehicle, and driver safety regulations and practices."[3] To further this goal and its mission to reduce crashes, injuries and fatalities involving large trucks and buses, FMCSA has promulgated (and updates) the Federal Motor Carrier Safety Regulations (FMCSRs).[4]

Driving is a privilege, not a right. It is a privilege granted upon meeting certain qualifications, such as passing a test, and can be taken away for many reasons. A commercial driver's license (CDL) is not a standard driver's license. Driving a CMV[5] requires advanced skills and knowledge above those required to drive a car or other lightweight vehicle. To be granted a CDL and authorized to drive a CMV in interstate commerce, an applicant must meet additional specific requirements that do not apply to holders of non-commercial licenses.[6] As such, a CDL holder may be considered a professional driver. A CDL indicates that the individual has a unique privilege to operate a motor vehicle that is larger, longer, and capable of carrying heavier loads.[7] If the driver possesses further qualifications, he/she may have privileges to transport hazardous materials or drive a vehicle that holds large numbers of passengers.[8]

Not only is a person required to meet certain conditions in order to earn the privilege to drive a CMV, he/she must comply with special laws and regulations in order to retain the privilege. These conditions are more stringent than those placed on a person with a standard driver's license. For example, a CDL holder may not consume any alcoholic beverages within 4 hours of driving or having physical control of a CMV.[9] A CDL holder who operates in interstate commerce is also required to maintain physical qualification standards,[10] which, generally, the CDL holder must renew every two years.[11]

These higher standards reflect the nature of the inherent risk in operating a CMV. The fact is that CMVs are disproportionately involved in motor vehicle crashes and fatalities. Large trucks and buses represent 9.6% of all vehicle miles traveled in 2016, but accounted for 12% of all traffic fatalities.[12] In those crashes, the occupants of a car, pedestrians, bicyclists or motorcyclists accounted for more than 80% of the fatalities.[13]

This article focuses on the role of the courts in advancing FMCSA's safety mission. Promoting safe driving behavior starts on the roadside through a state's enforcement of its

1 49 U.S.C. § 31131(b)(1) (finding that "it is in the public interest to enhance commercial motor vehicle safety and thereby reduce highway fatalities, injuries, and property damage").

2 49 U.S.C. § 113(b).

3 49 U.S.C. § 31100.

4 *See, e.g.*, 49 U.S.C. §§ 31136, and 31142; 49 C.F.R. pts. 350-399.

5 49 C.F.R. § 383.5. A CMV is defined, in part, as a combination vehicle having a gross combination weight of 26,001 pounds or more or as a heavy straight vehicle having a gross vehicle weight of 26,001 pounds or more.

6 49 C.F.R. § 383.25(a).

7 *Supra*, note 1.

8 49 C.F.R. §§ 383.93; 383.117; 383.121.

9 49 C.F.R. §§ 382.207; 392.5(a)(1) (2018).

10 49 C.F.R. § 383.71(h)(3) (2018).

11 49 C.F.R. §§ 391.41; 391.45 (2018).

12 FMCSA Commercial Motor Vehicle Traffic Safety Facts, https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/safety/data-and-statistics/84856/cmvtrafficsafetyfactsheet2016-2017.pdf (last visited May 20, 2019) citing Fatality Analysis Reporting System (FARS) and Federal Highway Administration, Highway Statistics 2016 data.

13 Insurance Institute for Highway Safety-Highway Loss Data Institute, https://www.iihs.org/iihs/topics/t/large-trucks/fatalityfacts/large-trucks (last visited April 4, 2019).

traffic laws. The process continues in the courts, by holding the driver accountable for unsafe driving behavior. First, this article will provide a brief overview of how modern-day CDL safety measures came about, then it will discuss the prohibition against masking and define key terms. Lastly, the article will describe the ways in which masking can occur and some ways the court might act in conflict with the masking prohibition.

HISTORY OF CDL REQUIREMENTS

Prior to 1986, when Congress enacted the Commercial Motor Vehicle Safety Act (CMVSA),[14] regulation of CMV drivers was largely left to the states, resulting in piecemeal commercial driver qualifications and requirements. Some states did not require special licenses to operate 26,000 pound plus, articulated vehicles. Drivers could obtain licenses in multiple states and states did not communicate driver records with other states. The goal of the CMVSA was to improve highway safety by ensuring that drivers of large trucks and buses are qualified to operate those vehicles and to remove unsafe and unqualified drivers from the highways. In 1985, the year before Congress enacted the CMVSA, large trucks and buses were involved in just under .30 fatal crashes for every 100 million vehicle miles traveled.[15] By 2017, however, they were involved in .14 fatal crashes for every 100 million vehicle miles traveled.[16]

The CMVSA established the CDL Program with minimum standards for commercial drivers,[17] introduced the one driver/one license/one record concept, and mandated creation of the Commercial Driver's License Information System (CDLIS) to "…serve as a clearinghouse and depository of information about the licensing, identification, and disqualification of operators of commercial motor vehicles."[18] The CMVSA also required states to ensure that drivers convicted of certain traffic violations be prohibited from operating a CMV.[19] Congress determined that increased highway safety could be achieved by holding CMV drivers accountable for their driving behavior. A significant step toward that accountability was the CMVSA's prohibition on CMV operators from possessing more than one driver's license.[20]

In 1987, the Federal Highway Safety Administration (FHWA)[21] amended the FMCSRs to implement the requirements of the CMVSA and establish national CDL standards that states were responsible for enforcing.[22] As part of this rulemaking, FHWA defined the term "conviction" as "the final judgment on a verdict [or] finding of guilty, a plea of guilty, or a forfeiture of bond or collateral upon a charge of a disqualifying offense, as a result of proceedings upon any violation of the requirements in this part, or an implied admission of guilt in States with implied consent laws."[23] In this final rule, FHWA requested further comment regarding the term "found to have committed," from the CMVSA.[24] In 1988, FHWA published a notice of proposed rule-making, which, in part, proposed revising the definition of the term conviction in response to the comments received.[25] The proposal discussed adopting the Uniform Vehicle Code and Model Traffic Ordinance (UVC) definition.[26] Several states further suggested that the definition include administrative findings that a violation had been committed.[27] This early collaboration between the Federal government and commenters resulted in the definition that is used today.[28]

[14] Commercial Motor Vehicle Safety Act of 1986, Pub. L. No. 99-570, tit, XII, §§ 12001-12019, 100 Stat. 3207-170 (1986) (Codified as amended at 49 U.S.C. §§ 31301-31317) ("CMVSA").

[15] Large Truck and Bus Crash Facts 2017, Table 1, https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/safety/data-and-statistics/461861/ltcbf-2017-final-5-6-2019.pdf (last visited May 20, 2019).

[16] *Id.*

[17] CMVSA §§ 12005-6, codified at 49 U.S.C. §§ 31307-08.

[18] CMVSA § 12007, codified at 49 U.S.C. § 31309.

[19] CMVSA § 12008, codified at 49 U.S.C. § 31310.

[20] CMVSA, § 12002, codified at 49 U.S.C. § 31302.

[21] Prior to the creation of FMCSA, the FHWA was authorized to regulate motor carriers and motor carrier safety.

[22] *Commercial Driver Licensing Standards; Requirements and Penalties*, 52 Fed.Reg. 20574 (June 1, 1987).

[23] *Id.* at 20581, 20587.

[24] *Id.*

[25] *Blood Alcohol Concentration Level for Commercial Motor Vehicle Drivers; Notice of Proposed Rulemaking and Public Information Forum*, 53 Fed.Reg. 16656 (May 10, 1988).

[26] Conviction - means that a court of original jurisdiction has made an adjudication of guilt. The term includes an unvacated forfeiture of bail or collateral deposited to secure a defendant's appearance in court, a plea of nolo contendere accepted by the court, the payment of a fine, and a plea of guilty or a finding of guilt, regardless of whether the penalty is rebated, suspended or probated. UVC § 1-117 (2000)

[27] *Blood Alcohol Concentration Level for Commercial Motor Vehicle Drivers*, 53 Fed. Reg. 39044, 39047 (October 4, 1988).

[28] *See* 49 C.F.R. § 383.5 for this definition, discussed further, below.

Building on the improvements in CMV safety resulting from the CMVSA, Congress implemented additional safeguards in 1999 by enacting the Motor Carrier Safety Improvement Act (MCSIA).[29] The MCSIA created the FMCSA as a separate operating administration of the DOT, and authorized the agency to regulate motor carriers and motor carrier safety. In part, the purpose of the Act was to "reduce the number and severity of large-truck involved crashes through . . stronger enforcement measures against violators, . . . and effective commercial driver's license testing, recordkeeping and sanctions."[30]

Congress first prohibited states from masking violations committed by CDL holders in MCSIA.[31] The prohibition, codified at 49 U.S.C. § 31311(a), states in relevant part:

> (19) The State shall--
>
> (A) record in the driving record of an individual who has a commercial driver's license issued by the State; and
>
> (B) make available . . . all information. . . with respect to the individual and every violation by the individual involving a motor vehicle (including a commercial motor vehicle) of a State or local law on traffic control. . . . **The State may not allow information regarding such violations to be withheld or masked in any way from the record of an individual possessing a commercial driver's license**.[32]

A Joint Explanatory Statement issued by Congress in conjunction with the MCSIA makes clear that this provision is intended to prohibit states from both masking convictions, which includes using diversion programs or any other disposition that would defer the recording of a conviction on the CDL holder's record. The Statement clarifies that the MCSIA prohibits:

> both conviction masking and deferral programs by requiring every State to keep a complete driving record of all violations of traffic control laws (including CMV and non-CMV violations) by any individual to whom it has issued a CDL, and to make each such complete driving record available to all authorized persons and governmental entities having access to such record. This provision provides that a State may not allow information regarding such violations to be masked or withheld in any way from the record of a CDL holder.[33]

To implement MCSIA's prohibition against masking, FMCSA promulgated 49 C.F.R. § 384.226, which states:

> The State must not mask, defer imposition of judgment, or allow an individual to enter into a diversion program that would prevent a CLP[34] or CDL holder's conviction for any violation, in any type of motor vehicle, of a State or local traffic control law (other than parking, vehicle weight, or vehicle defect violations) from appearing on the CDLIS driver record, whether the driver was convicted for an offense committed in the State where the driver is licensed or another State.[35]

THE PROHIBITION AGAINST MASKING

To understand the intent of both Congress and FMCSA in codifying the prohibition against masking, we must look to the legislative history and to the definitions of key words

[29] Motor Carrier Safety Improvement Act of 1999, Pub. L. No. 106-159, 113 Stat. 1748 (1999) (codified as amended in scattered sections of 49 U.S.C.) ("MCSIA").

[30] MCSIA, § 4, 113 Stat. at 1749, 49 U.S.C. § 113 note.

[31] MCSIA § 202,

[32] 49 U.S.C. § 31311(a)(19), emphasis added.

[33] 145 Cong. Rec. H12870-12874 (daily ed. Nov.18, 1999); 145 Cong. Rec. S15207-15311 (daily ed. Nov.19, 1999).

[34] Commercial learners permit.

[35] 49 C.F.R. § 384.226 (2018) (as amended).

within the legislation and regulation. Certain terms, such as "conviction" are specifically defined in the FMCSRs. Other terms, such as "masking," "defer," or "diversion" are not defined in the FMCSRs, but otherwise have commonly accepted legal definitions.

"MASKING," "DEFERRED JUDGMENT," AND "DIVERSION" DEFINED

Masking "the act or practice of a defendant's agreeing by plea bargain to plead guilty to a less serious offense than the one originally charged, as by pleading guilty to parking on the curb when one has been charged with speeding in a school zone" or "the act or an instance of concealing something's true nature."[36] Taking the example from the definition, masking occurred because changing the charge and citation to parking on the curb had the effect of concealing the true nature of the violation. In this type of case involving a CDL holder, no record of the actual violation, often having more significant consequences, ever makes it to the driver's CDLIS record.

The purpose of deferring imposition of judgment or of a diversion program is nearly identical. They differ in procedure, however. "Deferred judgment" places a person convicted of an offense on some form of probation, "the successful completion of which will prevent entry of the underlying judgment of conviction."[37] A diversion program, however, takes place prior to any preliminary judgments being entered. It is a pre-trial program that typically refers the offender to a rehabilitative program and, upon successful completion of that program, results in the charges being dismissed.[38] In the first instance, a conviction, as it is understood in the criminal justice arena, enters against a person, but is not recorded. In the second, there is never

[36] Masking, Black's Law Dictionary (10th ed. 2014)

[37] *Id. Judgment.*

[38] *Id. Diversion Program.*

a conviction. The end result is the same, in terms of the prohibition against masking: no record of any violation ever makes its way to the driver's CDLIS record.

"CONVICTION" DEFINED

Also relevant to the discussion of masking is the definition of the term "conviction." Typically, the term "conviction" describes an instance in which a judgment of guilt is rendered against a person. However, as discussed above, "conviction" is defined more broadly in the FMCSRs, and includes actions beyond a judge entering a judgment of conviction for a substantive offense. To promote the Congressional goal of "improved, more uniform commercial motor vehicle safety measures and strengthened enforcement [to] reduce the number of fatalities and injuries and the level of property damage related to commercial motor vehicle operations,"[39] the FMCSRs define "conviction" as:

- An unvacated adjudication of guilt;
- A determination that a person has violated or failed to comply with the law in a court of original jurisdiction;
- A determination that a person has violated or failed to comply with the law an authorized administrative tribunal;
- An unvacated forfeiture of bail or collateral deposited to secure the person's appearance in court;
- A plea of guilty or nolo contendere accepted by the court;
- A payment of a fine or court cost; or
- A violation of a condition of release without bail, regardless of whether or not the penalty is rebated, suspended, or prorated.[40]

Where any of these actions occur, the violation must be reported from the court to the licensing agency to be recorded on the driver's record (and trigger any appropriate disqualifying action).

Note that, "a determination that a person has violated or failed to comply with the law in a court of original jurisdiction or by an authorized administrative tribunal" is considered a conviction.[41] As mentioned above, this language was added to the definition to include administrative findings, such as those originating from implied consent suspensions.[42] This occurs, for example, when a CDL holder refuses chemical testing upon arrest followed immediately by an administrative license suspension, but subsequently the substantive DUI prosecution does not result in a judgment of conviction (the defendant is found not guilty at trial, e.g.). In this case, the finding that the driver refused, for administrative license revocation purposes, must be reported to the licensing agency as a conviction.

Additionally, under the regulation, when a CDL holder fails to appear and his/her bond is forfeited (including any type of recognizance or promise to comply bond), the court is required to report the violation as a conviction to the state licensing agency. Finally, any type of cost or fine associated with the violation requires that the offense be reported as a conviction to the state licensing agency. This includes cases where a violation is dismissed "for court costs."

PLEA NEGOTIATIONS AND MASKING

The prohibition against masking is not meant to bar plea negotiations in cases involving a violation by a CLP or CDL holder. Caseloads are large, particularly in courtrooms handling traffic offenses. Offenders often are charged with multiple offenses arising from the same incident. Not every charge is provable to the standard of beyond a reasonable doubt. The statute and regulation prohibiting masking do not bar negotiations entered in good faith and supported by facts and law. The anti-masking regulation cannot supersede a defendant's due process or other Constitutionally protected rights.

[39] 49 U.S.C. § 31131(b)(2) (2017).

[40] 49 C.F.R. § 383.5 (2018).

[41] *See, e.g., Burdine v. Arkansas Dept. of Finance & Admin*, 379 S.W. 3d 476 (Ark. 2010) (The suspension of driver's license in Missouri constituted a conviction for driving while intoxicated, warranting disqualification of licensee's CDL); *Strup v. Director of Revenue*, 311 S.W. 3d 793 (Mo. 2010 (en banc) (Suspension of motorist's base driving privilege constituted a "conviction" for driving under the influence of alcohol for the purposes of the Commercial Driver's License Act, such as to merit disqualification of his CDL for a period of one year); *State v. Arterburn*, 751 N.W 2d 157 (Neb. 2008) (In state law, the phrase "authorized administrative tribunal" implicitly references Administrative LR proceedings.; and *State v. Burnell*, 966 A.2d 168 (Conn. 2009).

[42] Also commonly referred to as administrative license suspensions.

Plea negotiations may take many forms, some of which may contravene the prohibition against masking. In routine traffic matters, such as those involving offenses listed in Table 2 to 49 C.F.R. § 383.51, a common disposition may be that the driver agrees to plead guilty and pay court costs. So long as the driver pays the court costs and does not get another traffic violation in the subsequent 6 months, the charges are dismissed. This is a clear case of deferring judgment, which constitutes masking. If the driver is a CDL-holder,[43] and the violation is not reported as a conviction, as defined in 49 C.F.R. § 383.5, it has been masked.[44] Likewise, where a driver is charged with DUI, a common plea negotiation for a first offense could be a diversion program. Here, the driver agrees to certain terms, which typically includes substance abuse education or counseling, and the charges are dismissed upon successful completion of the terms. This occurs pre-trial or pre-disposition, so the driver never pleads guilty or is never found guilty. As with the previous scenario, if the driver is a CDL-holder and a conviction is not reported to the licensing agency, masking has occurred.[45]

Furthermore, just because a CMV operator has given up his or her CDL does not mean that deferral or diversion are legally permissible dispositions. If the individual had a CDL at the time of the offense, allowing the charge to be deferred or granting diversion would be prohibited by the anti-masking regulation.[46] In Indiana Bureau of Motor Vehicles v. Hargrave, the defendant, a CDL holder at the time of the offense, was charged with driving under the influence. He surrendered his CDL prior to pleading guilty to the offense and was granted diversion with the understanding that the charge would be dismissed upon successful completion of the program.[47] The defendant later filed a petition to reduce the time of his administrative suspension, which the court granted.[48] Upon receiving the order regarding the suspension, the Bureau of Motor Vehicles (BMV) petitioned the court to reconsider, arguing that the defendant was not eligible for a diversion program due to his holding a CDL at the time of the offense.[49] The appellate court agreed with the BMV, stating, "[a]llowing Hargrave to surrender his license, avoid his conviction, and possibly return to driving professionally with no record of the offense is precisely what the anti-masking law is designed to prevent. Hargrave's suggested interpretation of the law is unreasonable, as it would permit the very mischief that the law is designed to prevent."[50]

A more challenging scenario for prosecutors, defense attorneys, and judges occurs when the defense requests that a charge be reduced. Sometimes the request is for a reduction to an offense that would be considered a lesser included offense of the charge, while on other occasions, the reduced charge has no bearing on the original offense. In either scenario, the prosecutor and judge must determine the reason for the amendment. Is there a bona fide legal and/or factual issue with the original charges brought against the driver? Where the answer is yes, those legal or factual issues provide justification for amending or reducing the charge. If not, the intent behind the action is no different than that found in Hargrave. The driver will have avoided the conviction, and will continue to drive with no record of the actual offense. Where there are no legitimate legal or factual bases for a reduction, then masking has occurred, as the purpose of the plea is to conceal the nature of the offense.

CONCLUSION

While the rate of fatal crashes involving large trucks or buses and the number of fatalities as a result of these crashes per miles traveled has improved since Congress passed the CMVSA in 1986, the actual number of fatal crashes and fatalities has been rising since 2009.[51] In 2017 more than 5,000 people lost their lives in crashes involving large trucks and buses.[52] Part of this can be attributed to an increase in the number of large trucks and buses on the road and miles

[43] Or "someone required to hold a CDL." 49 C.F.R. § 383.51.

[44] 49 C.F.R. § 384.226

[45] *Id.*

[46] *See, e.g., Indiana Bureau of Motor Vehicles v. Hargrave*, 51 N.E.2d 255 (In. Ct. App. 2016) (Driver was not eligible to participate in a diversion program, or to have judgment deferred on that conviction, regardless of when he surrendered his CDL); People v. Meyer, 186 Cal.App.4th 1279 (2010) (Surrendering commercial driver's license did not permit defendant to attend traffic school in lieu of adjudication).

[47] *Id.* at 258.

[48] *Id.*

[49] *Id.*

[50] *Id.* at 260.

[51] Large Truck and Bus Crash Facts 2017, *supra* note 11, Table 1. (2014 was the only year in this time-frame to show a reduction in fatalities.)

[52] *Id.*

being driven in all types of vehicles in that same time frame.[53] Additionally, not all fatal crashes involving large trucks or buses are the fault of the driver of these vehicles. However, one only has to consider the size difference between a CMV (over 26,000 pounds)[54] and an average car (approximately 4,000 pounds)[55] to conclude that the truck will inflict the majority of the destruction.

The prohibition against masking is not an arbitrary rule. A driver record that accurately reflects the CDL-holder's driving behavior is critical to promoting highway safety. Operators of CMVs are professional drivers, held to a higher standard based upon the type of vehicle they drive. As stated in *Commercial Drivers' Licenses: A Prosecutor's Guide to the Basics of Commercial Motor Vehicle Licensing and Violations*, "without a clear picture of a driver's history, a prosecutor, judge, or even a perspective employer will be unable to determine the threat posed by that driver and what remedial actions should be taken to correct his poor driving. Driver's histories also are relevant to those handling impaired driving cases, as well as serious or fatal crashes caused by impaired or reckless driving."[56] Masking prevents the court system, state licensing agency, and motor carrier employers from taking the appropriate action against a potentially dangerous driver. Too often, we hear the lament after a particularly egregious crash involving a CDL-holder driving a CMV, "(s)he never should have been on the road." An effective way to avoid this is to follow the prohibition against masking and ensure a violation appears on the CDL-holder's driving record.

[53] *See, Id.*

[54] 49 C.F.R. § 383.5.

[55] https://www.autolist.com/guides/average-weight-of-car (last visited May 20, 2019).

[56] *Commercial Drivers' Licenses: A Prosecutor's Guide to the Basics of Commercial Motor Vehicle Licensing and Violations*, 2nd edition, 2017, p 41. https://ndaa.org/wp-content/uploads/CDLMono_REV2017_FinalWeb.pdf (last visited May 20, 2019).

The True Role of the District Attorney

By **MICHAEL D. O'KEEFE**
District Attorney, Cape & Islands District (MA)

There has been more attention paid to district attorney elections across the country than in years past as social justice candidates supported and funded by George Soros, a funder of left-wing causes, and the American Civil Liberties Union are urged to seek election to these positions. One of the selling points in pushing the 'social justice district attorney' agenda is how important the district attorney is in the community and that the general population is unaware of that fact. That is usually accompanied by apocryphal claims of people being warehoused in prison for small amounts of drugs.

The social justice candidate with little or no experience makes grand pronouncements, and as here in Boston, proclaims that entire categories of crime will no longer be prosecuted. This is done, it's claimed, to redress inequities in the demographics of who is in jail or prison.

This criminal justice philosophy, though well intentioned, is flawed in several respects.

First, district attorneys do not make laws, that is the job of the legislature. It is true and appropriate that district attorneys have the power of nolle prosequi, that is to end a prosecution in the interests of justice, and district attorneys have the authority to not commence a prosecution for the same reason. However, those decisions are made based on the facts and circumstances of an individual case. The district attorney does not have the power to nullify an entire class of criminal conduct. That is the sole prerogative of our legislature whose members are elected by the citizens to make the laws under which the citizen lives. The idea that we should exempt groups of people from having to obey the law is an insult to them and a particularly destructive form of pandering because it suggests that these people are lesser beings than those we expect to obey the law.

A second flaw in this reasoning is the suggestion that the criminal justice system in general, and district attorneys in particular, are somehow to blame for demographic inequities in the incarcerated population. This ignores the reality that the criminal justice system is reactive not proactive. It deals with those who are brought to it. And those who are brought to it are alleged to have committed a crime.

The social determinants that lead to the commission of crime are complex, yet the criminal justice system becomes an easy target. Far easier to blame than the disintegration of the family, a lack of respect for discipline and education and the glorification in some communities of a culture that celebrates disrespectful language and misogyny under the guise of art.

I am not a sociologist, but I suspect that the above are more influential regarding who is in jail or prison than an inert criminal justice system. But those phenomena are far more difficult to speak of much less address for fear of being labeled in some fashion.

Again, I am not a sociologist, but I am a prosecutor with thirty-six years of experience. I have seen various attempts at systemic reform over the years, all of it well intentioned and some of it even positive. The latest shiny new object, the social justice district attorney, is hopefully a fad as long term I think it will result in a deterioration of public safety and quality of life particularly in our urban centers.

The district attorney should pursue justice for his or her community without any predetermined agenda. I learned and have tried to teach the prosecutors who have worked for me over the years that there is a difference between human frailty and genuine evil, and to act accordingly in the disposition of their cases. I have seen the role of the district attorney expand as have the roles of other relatively stable societal institutions, our schools for example. Virtually every district attorney's office runs diversion programs to keep young people out of court, they run drug courts with an emphasis on rehabilitation, and they have mental health courts to deal with those suffering from mental health

issues. I even run a truancy program to keep kids in school. We have been doing these things long before they became fashionable. That social justice candidates talk of these things as if they invented them is disingenuous at best.

All of these programs are our attempt to act in loco parentis for the dysfunctional in our society and we do it willingly. But it begs the question, why do we have to do it? We are filling a void which used to be filled by parents and churches. But our primary function is the prosecution of the offenses the legislature has seen fit to make crimes. That is our job and doing it quietly without fanfare and without courting the media is the professional way to do it.

I am concerned that the attention paid to these social justice district attorneys without another voice being heard is giving the public an inaccurate picture of what a district attorney is and should be.

The fact that Massachusetts is forty-ninth in the nation in the rate of incarceration speaks to the work of the Massachusetts district attorneys. While we have fewer people in prison, we have the right people there. After all, our primary job is the protection of the public.

To be sure, there are demographic differences among the incarcerated population. The single biggest factor in determining the sentence a defendant receives is the defendant's prior criminal history. So when you hear that a person of one demographic receives a different sentence than a person from another demographic for the same crime, the defendant's criminal history is often the reason. There are other variables as well such as the severity of the offense itself. This is why virtually all crimes have a range of sentences which can be imposed by the court.

So, my respectful suggestion to those espousing a social justice agenda is to work in the community to prevent the commission of crime in the first place. This would be more beneficial to the community, particularly the hard working members of it who are trying to raise and educate their children in a safe environment. This would be real social justice.

Mastering Masking: The Legal and Ethical Consequences of Plea Negotiations Involving Commercial Driver's Licenses

By **JEANINE HOWARD**
NDAA Staff Attorney

On June 5, 2019, the National Traffic Law Center (NTLC), with funding provided by the Federal Motor Carrier Safety Administration (FMCSA), hosted 26 prosecutors and other traffic safety professionals for its inaugural presentation of "Mastering Masking: The Legal and Ethical Consequences of Plea Negotiations Involving Commercial Driver's Licenses," in Cleveland, Ohio.

This course was designed to provide prosecutors and other traffic safety professionals with the materials and techniques necessary to train others in their respective jurisdictions about the fundamentals of the prohibition on masking offenses.[1] The NTLC wanted attendees to be able to appreciate how the enforcement of these regulations results in reducing injuries and deaths by keeping unsafe commercial driver's license (CDL) holders off the roads and assuring that each driver has one driver's license and one complete driver's record.

In Cleveland, attendees participated in four modules which employed adult learning techniques to help facilitate the understanding of the federal definition of the terms "masking," "conviction," and "disqualification," pursuant to the Federal Motor Carrier Safety Regulations (FMCSRs).

The first course module was the *Convictions* module. During this module, attendees were introduced to the federal definition of the term "conviction,"[2] which is much broader than its traditional meaning. Understanding what constitutes a conviction is key to understanding the importance of CDL

[1] 49 C.F.R. § 384.226: The State must not mask, defer imposition of judgment, or allow an individual to enter into a diversion program that would prevent a CLP or CDL holder's conviction for any violation, in any type of motor vehicle, of a State or local traffic control law (other than parking, vehicle weight, or vehicle defect violations) from appearing on the CDLIS driver record, whether the driver was convicted for an offense committed in the State where the driver is licensed or another state.

[2] 49 C.F.R § 383.5.

record keeping and the sharing of CDL information from state to state. Participants also learned how convictions affect CDLs through disqualifications and what role convictions play in masking.

Masking and Ethics introduced the second module. During this module, attendees gained more in depth information pertaining to masking and why it is prohibited by the FMCSRs through a thorough examination of the statute.[3] Attendees participated in exercises designed to help them identify masking and determine the ethical considerations involved when prosecutors negotiate CDL cases. Attendees also learned that states are required, under 49 U.S.C.A. §31311(19), to comply with the FMCSR definition of masking and to create state specific versions of the FMCSRs, including the prohibition on masking offenses.[4]

The third module was *Disqualifications*. During this module, attendees learned to navigate the CDL disqualification tables found in 49 C.F.R. §383.51 and learned the difference between federal versus state disqualification of a CDL. The states' traffic control laws that are subject to disqualification were highlighted. Attendees learned that the regulations governing the disqualification of CDLs were established as a mechanism to ensure that each driver has one driver's license and one driver's record.

The fourth and final module was a *Panel* discussion. This optional module was designed to allow attendees to hear real world examples from instructors of their own experiences involving convictions, masking, and disqualification involving CDL holders, and the impact on traffic safety in their communities. The panel module was particularly powerful for our course attendees. One panelist, Stacy Emert, opened the discussion with the moving account of her parents who were tragically killed in a tractor-trailer crash. Elizabeth Matune, the Ohio prosecutor who handled Stacy's parents' case, was also a panelist. Other panelists included: Christopher Daniels, the Traffic Safety Resource Prosecutor (TSRP) from Indiana; Jennifer Cifaldi, the TRSP from Illinois, and Elizabeth Earleywine, FMCSA's Attorney Advisor.

The Mastering Masking course is designed to be used as a whole or as individual modules to be added on to other trainings. By providing course participants with all the course materials on a thumb drive, the NTLC has provided an option which allows for traffic safety professionals to seamlessly add portions of the course to existing presentations or trainings. Course materials are available upon request. Alternatively, NTLC staff is available to come to your jurisdiction to provide this course at no cost, subject to available funding. For more information on Mastering Masking, contact NTLC Staff Attorney, Jeanine Howard: jhoward@ndaajustice.org.

The Mastering Masking course is designed to be used as a whole or as individual modules to be added on to other trainings.

[3] 49 C.F.R. § 384.226.

[4] 49 U.S.C.A. § 31102(c).

LOLITA ULLOA

Civil Deputy

Hennepin County Attorney's Office, Minneapolis, MN

Job Responsibilities

Oversee the Divisions of Civil, Child Protection, Adult Services, Child Support and Victim Services

Qualifications

Suffolk Law School

Professional Memberships and Activities

Minnesota Hispanic Bar Association
Minnesota County Attorney's Association

MEET A NDAA MEMBER

1. **What is your proudest professional moment?**
My proudest moment was assisting in the coordination and the hosting of our 2017 NDAA Summit, which focused on violence against women.

2. **What are 3 words to describe NDAA?**
Innovation, Integrity, Leadership

3. **What are your hopes for the prosecution profession?**
That we continue to lead innovation while ensuing justice for victims and communities.

4. **What guidance do you have for NDAA members?**
Use all the resources and trainings available through NDAA to enhance and develop yourself as a professional. The relationships and connections you make will enhance your work in the community and develop your skills as a prosecutor.

5. **If you had to eat one meal, every day for the rest of your life, what would it be?**
Lobster and Ceviche

6. **People would be surprised if they knew:**
That I boxed

7. **What is your favorite childhood memory?**
Going to watch the Rockettes at Radio City Music Hall with my mother and four sisters

8. **What is your hidden talent?**
Salsa dancing

New DNA Tool Helps Identify Murder Victims and Elusive Killers and Rapists

By **MICHELE HANISEE**
President Of The Association Of Los Angeles (CA) Deputy District Attorneys

They're neighbors. Church leaders. Business executives.

They're also murders and rapists who share a common bond in addition to their horrific crimes: they were all identified with a cutting-edge new tool called investigative genetic genealogy, or IGG.

IGG itself is not new — it's what millions of genealogists, family historians and adoptees worldwide use to research their family trees and find birth parents by uploading their DNA to family-matching databases. What's new is its use by law enforcement.

"Dozens of suspected killers and rapists have been identified, arrested, charged and prosecuted using investigative genetic genealogy," says the nonprofit Institute for DNA Justice. "Most were living ordinary lives and living in plain sight."

The same technology has been used to identify Jane Doe and John Doe murder victims whose true identity was unknown to law enforcement. A family whose loved one disappeared decades past can find closure when the DNA from unidentified remains finally reveals the name of the deceased.

The mission of the Institute for DNA Justice is to raise awareness about the value of IGG to identify, arrest and convict criminals; exonerate people who were wrongly accused or convicted; and identify previously unidentified murder victims. The Institute encourages all 26 million Americans who have taken DNA tests to participate in family-matching databases that are available to the public and to law enforcement agencies.

Statistics underscore the importance of the Institute's mission. In the last year alone, law enforcement use of IGG has resulted in an estimated 50-plus arrests nationwide in cold-case violent crimes.

Two of the most high-profile arrests resulting from the use of IGG — the alleged Golden State Killer and the alleged NorCal Rapist — occurred here in California. And, while most of the criminal cases are pending, at least two people who committed unspeakable crimes — and got away with them for decades — have pleaded guilty and been sentenced to prison.

Raymond Rowe pleaded guilty earlier this year to sexually assaulting and murdering 25-year-old teacher Christy Mirack in Pennsylvania in 1992. And John D. Miller pleaded guilty late last year to sexually assaulting and murdering 8-year-old April Tinsley in 1988 in Indiana.

Here's how IGG works. By submitting cold-case DNA to genealogical databases, law enforcement receives a list of potential matches or relatives of the unidentified suspect or homicide victim. The list of potential matches becomes a lead that investigators use to narrow down the possible suspects or victim.

The process comes with important privacy protections. As Sacramento District Attorney Anne Marie Schubert points out, law enforcement agencies have the exact same access to the databases as any member of the public — nothing more. They are not able to search databases or obtain the DNA profiles of people who have uploaded their information. Moreover, an IGG search can only be used for unsolved violent crimes as a tool of last resort when all other investigative options have been exhausted.

To help identify and apprehend other predators like Rowe and Miller, the Institute for DNA Justice asks that everyone who has taken a DNA test through Ancestry, 23andMe or MyHeritage to become genetic witnesses. It's easy to do — you can potentially help put vicious criminals behind bars simply by uploading your DNA profile to the FamilyTree DNA and/or GEDMatch databases for free.

Michele Hanisee is President of the Association of Los Angeles Deputy District Attorneys, the collective bargaining agent representing nearly 1,000 Deputy District Attorneys who work for the County of Los Angeles.

Seeking Justice: 'Are We Punishing People For Being Sick?'

By **JACKIE LACEY**
District Attorney, Los Angeles County (CA)

This piece was originally published through Route Fifty as part of an ongoing series of pieces on criminal justice issues from the National District Attorneys Association.

The Los Angeles County jail has more than 17,000 inmates at any one time. More than 4,000 of the inmates have a serious mental illness. This makes the Los Angeles County jail the nation's largest mental institution.

As the District Attorney, it is my duty to seek justice — that means determining what is the right thing to do and then doing it.

The Los Angeles County jail has more than 17,000 inmates at any one time. More than 4,000 of the inmates have a serious mental illness.

I can still recall the first time I began questioning the interaction between the criminal justice system and those with mental illness.

It was 2011 and Miriam was just 28 years old when she moved to Los Angeles to attend graduate school. While in school, she began to have trouble sleeping and felt that demons were attacking her.

One day, Miriam ran into the hallway of her apartment building and began banging on a neighbor's door while holding a knife and uttering threats of killing herself. A security guard tried to intervene, but she assaulted him, which led to the police being called. She was placed on a 72-hour hold. During her hospital visit, she was not only heavily sedated, but was diagnosed with having a mental illness.

After a few days, the medication wore off and she once again felt that someone was out to harm her.

This led to a second incident where she jumped into a car whose owner had left it unoccupied and running. Miriam had driven a few feet before the driver confronted her. As he struggled with Miriam for the keys, he overheard her utter the phrase: "Please give me a piece of my mind." Not able to overpower the owner, she ran away leaving her purse in the man's car.

Two days later, she was arrested and charged with a felony — carjacking.

I remember the day Miriam's mom called on me asking for help. She said that her daughter was not a criminal, but suffering from mental illness and if the District Attorney's office dropped the charges, she would personally see that her daughter was medicated. As a mother, I identified with her pain. As a prosecutor, I weighed the crime against Miriam's actions.

That was several years ago. Recently, I wanted to find out what happened to Miriam. I learned that she was under the care of a psychiatrist and has not committed any new offenses.

In cases like Miriam's, prosecutors face difficult decisions. We could dismiss the case and let people like Miriam go free knowing that someday they could stop taking their medications and hurt someone. Or we could charge them with a crime and use probation to make them take their medication.

In Miriam's case, we insisted she plead guilty to a felony and be placed on probation. In addition, the judge ordered her to seek medical care, as we tried to get assurances that she would remain in treatment.

Although we were "successful" in prosecuting Miriam's case, there is an impact to her life in terms of career opportunities. When applying for jobs, she's saddled with the dilemma of disclosing this episode where she was accused of being a

thief or identifying herself as someone with mental illness. Either answer will make it difficult for her to get a job.

Yet Miriam is one of the fortunate ones. She takes medication — at least for now. Her felony conviction was later reduced to a misdemeanor.

Many people in the criminal justice system are not so fortunate. They are chronically in crisis due to mental illness, homelessness and, in some cases, substance abuse.

Miriam's story is important to this discussion: She puts a face on this terrible disease. Her story also gives us a place to begin discussing alternatives to incarceration for people with mental illness. In many circumstances, those who have a mental illness are stigmatized and blamed for their condition. There are instances where they actually do more time in custody than someone without a mental illness. This is wrong.

A person whose disease or disorder affects his or her mind should not be punished for his or her condition. We must do better.

Finally, there is widespread interest in helping those with mental illness. In 2013, I helped form the Criminal Justice Mental Health Task Force (now known as the Mental Health Advisory Board). It is a collection of knowledgeable stakeholders. Our mission is to evaluate the needs of those with a mental illness at risk of entering the criminal justice system in Los Angeles County. We believe we can intercept people at various stages of the criminal justice process — beginning with their first interaction with law enforcement. You can read about our findings on the LADA website in a report called "A Blue Print for Change."

In 2015, the Los Angeles County Board of Supervisors dedicated $120 million to address the treatment and housing needs of people with a mental illness by creating the Office and Diversion and Re-Entry Program (ODP).

Los Angeles County hopes to divert people living with a mental illness out of the criminal justice system and into effective treatment programs. There is one important stipulation to this plan: If the person hurts another person then jail may be the most appropriate place to receive treatment. However, we have concluded we can be far more effective if we commit to fully support the aggressive expansion of diversion programs and fully fund all available housing options.

The use of the jail as a massive mental health ward is inefficient, ineffective and, in many cases, inhumane. Then there is a moral question: Are we punishing people for being sick? We must do more to stop the practice of criminalizing people for having a mental illness. Public safety should have priority — but justice must always come first.

Making York County Safer by Tackling Complex Issues in Criminal Justice Through Collaboration

By **DAVE SUNDAY**
District Attorney, York County (PA)

Last month, Congressman Lloyd Smucker recognized York County on the floor of the United States House of Representatives as one of the leading counties in the nation for boldly addressing the heroin epidemic on all fronts. These measures included attacking the supply of illegal opioids through aggressive law enforcement and the prosecution of individuals distributing illegal opioids that result in the user's death. Early measures adopted by this office and law enforcement, along with our government and community partners, included naloxone use; extensive public outreach and youth education; advocating for an increase in treatment availability; and collaborating in the expansion of Wellness Courts and other evidence based criminal justice diversion practices.

The opioid crisis was yet another chapter highlighting the changing and complex methodology in which prosecutors must tackle criminal justice issues. On any given day in the York County District Attorney's Office, you will overhear conversations about how to get a defendant mental health treatment or substance abuse counselling. And right down the hall you may hear another team discussing how to keep a violent offender in prison for as long as the law permits.

Every case is different, and it is the ethical duty of prosecutors to evaluate the unique circumstances of each and every case to obtain justice. The National District Attorney's Association states that "the prosecutor is an independent administrator of justice. The primary responsibility of a prosecutor is to seek justice, which can only be achieved by the representation and presentation of the truth. This responsibility includes, but is not limited to, ensuring that the guilty are held accountable, that the innocent are protected from unwarranted harm, and that the rights of all participants, including victims of crime, are vigorously honored.

This view underscores what I tell our new Assistant District Attorneys: Our job is to do the right thing every day for the right reason. Doing the right thing may mean that a defendant receives drug and alcohol or mental health treatment. Conversely, the right thing may be to zealously advocate for a conviction resulting in a mandatory sentence of life in prison, for the safety of our community.

When is a prison sentence appropriate? Regarding sentencing, our legislature provided guidance to the courts through the Sentencing Code which states in part that "the court shall follow the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant."

Some crimes, due to the nature of the offenses and the impact on the victim outweigh rehabilitation as a sentencing consideration and incarceration is required. These principles require a balancing act, as the scales of justice demand. The prosecutor's job is to pursue the guilty and protect the innocent with the ultimate goal of keeping York County a safe and healthy place for everyone. Although incarceration is the appropriate option for some individuals, another way we try to accomplish this is by keeping certain low-level offenders out of prison. This concept is not new to York County as we have been a state-wide leader in many criminal justice areas. Through collaboration, York County established many great initiatives, whose partners include the District Attorney's Office, Law Enforcement, the Courts, Probation Services, Human Services, York County Prison, Coroner's Office, County Commissioners, and the Criminal Justice Advisory Board (CJAB).

The prosecutor's job is to pursue the guilty and protect the innocent with the ultimate goal of keeping York County a safe and healthy place for everyone.

Rehabilitation focused initiatives in York County began with Wellness Courts, which started as drug treatment courts in 1997. The Wellness Courts expanded through the decades to include 7 more that serve York Countians, which now include: Legacy Drug Court, Heroin Opioid Court, Veterans Court, Mental Health Court, DUI Court, Juvenile Mental Health Court, Juvenile Drug Court, and Juvenile Fast Track Drug Court.

Wellness courts are reducing recidivism and saving money. In 2018 alone, York County's Wellness Courts saved York County taxpayers over 1.8 million dollars. At the same time, we see decreased recidivism, which keeps York Countians safe, reunites families, supports workforce development and establishes a continuous cost savings as these individuals are not entering back into the criminal justice system.

As an offshoot of DUI Court expansion, York County collaborated to create the nationally recognized Target 25 Initiative. Having its roots in studied and validated initiatives, Target 25 is a supervised bail program run through Probation Services. Repeat and multiple offenders within a 10 year period from the current offense are monitored by a probation officer through an order of supervised bail. Conditions are imposed to ensure that defendants are not consuming alcohol or drugs through the use of alcohol monitoring bracelets and/or random drug testing. Most importantly, defendants are encouraged through their supervised bail interactions with probation officers to engage in rehabilitation and treatment. Since the inception of Target 25 in 2012, York County reduced victims of DUI crimes by an average of 10%.

With the success of Target 25 and further implementation of evidence-based practices, Probation Services obtained a grant to expand their Pretrial Services Unit in order to engage more individuals in need of substance abuse or mental health services that would otherwise be incarcerated. Probation officers again actively link offenders with necessary treatment services to rehabilitate defendants through early intervention. Probation Services then notifies this office, defense counsel, and the Courts, of Defendants who successful engage with such services. The DA's Office then recommends these offenders for plea and sentencing incentives due to their rehabilitation successes on supervised bail, supporting the best practice of early rehabilitation intervention.

Regarding mental health, the DA's Office is an integral partner the "Stepping Up Initiative", which specifically focuses on diverting and managing defendants with mental health diagnoses from prison at the time of arrest and identifying incarcerated defendants with mental health needs so that they may be diverted for appropriate mental health treatment. Stepping Up case management will also look at other factors facing the mentally ill in the criminal justice system, like housing and basic health needs. We need initiatives like Stepping Up so that our prisons are no longer used to warehouse people with mental health issues who commit crimes.

As a companion to Stepping Up Initiative, the DA's Office is also engaged in the development of the "Community Action for Recovery and Diversion (CARD)" initiative. CARD is a private/public partnership aimed at diverting individuals with substance abuse issues in addition to mental health needs from the time of arrest. This collaborative effort will look to break down silos by using and harmonizing existing resources, as well as identify additional need areas, so that eligible offenders with substance abuse and mental issues may be diverted away from prison and provided community treatment and other necessary support services like housing and transportation.

It is abundantly clear that we must increase access to long term treatment for individuals in the throes of addiction. For every $2 we spend on treatment we can save the community up to $7 in community justice costs. The CARD initiative will be a positive and important step to further these ends.

For individuals who do receive jail sentences, especially in York County Prison, the DA's Office partnered with CJAB and many public and private community agencies to create the York County Reentry Coalition (YCRC). The purpose is to connect reentrants with necessary support services, like housing, employment, and transportation, without which an individual is more likely to commit crime. YCRC has already established successful partnerships, as well as holding two job fairs and one services fair. YCRC works closely with Stepping Up and CARD to make sure that the best services are provided without duplicating efforts and wasting resources or money.

These collaborations are examples of how public and private partners are joining together to make York County safer by

improving responses and following best practices within the criminal justice system. Another illustration of this outside-of-the-box, collaborative thinking is illustrated as well through other responses by York County Law Enforcement to the devastating, generation altering opioid epidemic.

In the first instance, the District Attorney's Office along with York County Coroner Pam Gay spearheaded the Heroin Task Force, now the York Opioid Collaborative (YOC) a thriving non-profit with a full-time executive director. As the YOC Board Chair I have the pleasure of serving alongside members of the medical, treatment, education, non-profit, legal and recovery communities. The YOC's goal is to coordinate efforts in our region to reduce overdose deaths and to minimize the impact of the opioid epidemic in our community through 4 areas of focus: prevent, rescue, treat and recover.

Although not mandated by law, York County Police Officers were the second in the state to carry the lifesaving drug Naloxone. Many still do not. Since Naloxone became available in 2014, well over 700 lives have been saved by York County Law Enforcement. Also, when many of these individuals arrived at the hospital, they were greeted by a drug and alcohol counselor working for York County's "warm handoff" program. Individuals released from York County Prison are able to take advantage of a new program that provides Vivitrol to opioid addicts, a drug that blocks the effects of opioids and aids this highly at-risk population to avoid relapse during their first few months on the street. Like the criminal justice initiatives, the ultimate goal of these measures is to increase public safety by reduce the risk of these individuals committing more crimes, while preserving life, providing opportunities, and reuniting families of those in need.

Addicts need treatment and we will do everything in our power to help them get it. On the other hand, there must be a penalty imposed for engaging in an illegal act that kills people. Personal accountability must be a component of this multi-faceted approach.

Since 2014, York County also ranked second in the nation for Drug Delivery Resulting in Death (DDRD) charges filed. DDRD is a felony of the 1st degree and could carry a sentence up to 20 to 40 years in prison. The potential steep sentence requires careful charging considerations, which is why of the 65,000 criminal cases handled by prosecutors in the York County District Attorney's Office since 2011, only 70 have been DDRD cases.

To attack the supply side, York County Commissioners collaborated with my office to attack this issue head on through an increased the number of Drug Task Force Detectives. Those detectives work side by side with the York City Police Department, municipal police throughout the county, and the Pennsylvania State Police. Additionally, we continue to leverage strategic partnerships with the Office of Attorney General and our many Federal Partners.

And while we often think of our courts or legislature when criminal justice matters are discussed, we must never lose sight that the law enforcement officers on the street are on the front lines dealing with the harshness of addiction and mental health issues while they are happening. With each passing day, society puts law enforcement officers in the tenuous positions of protector, defender, servant, and social case worker — all at a moment's notice; many times all within an 8 hour shift. They are expected to have the answer to every question and solution to every problem. This all happens without the benefit of hindsight. We must do everything we can to get them the resources and training to do their job. And we must never forget that their work is the backbone of every initiative listed above.

With every arrow in our quiver, we simultaneously attack both the supply and demand side of addiction. Problem solving models such as this are currently being applied across a broad spectrum of criminal justice issues and will for decades to come.

In conclusion, U.S. Supreme Court Justice George Sutherland in 1935 famously wrote that the prosecutor's interest in a criminal prosecution is "not that it shall win a case, but that justice shall be done." The easy thing for us to do would be to ignore these unbelievably complex societal issues that impact victims, offenders, and ultimately justice. But that's not who we are as York County prosecutors; nor is it any of our great public and private partners throughout York County. York County is a state and national leader due to our collaborative approach. As a parent who happens to also be the District Attorney, I'm proud of the sustained, collaborative, forward thinking efforts of everyone working to ensure that justice shall be done.

Ways Prosecutors Can Bolster the Local Continuum of Behavioral Health Care and Access to Mental Health Services

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Prosecutors are not traditionally considered leaders in reducing the justice system involvement of individuals with mental health disorders, but they can play a critical role in increasing access of justice-involved individuals to treatment and services, as well as supporting the development of the entire local behavioral health care continuum. Prosecutors often become aware when individuals with mental health disorders are cycling through the local criminal justice system and become a familiar face. Nationally, people with mental illness are disproportionately represented in jails and prisons: approximately 44 percent of individuals in jail and 37 percent of individuals in prison have been told they have a mental health disorder. Without sufficient treatment and services, individuals with mental disorders often slip through the gaps and remain entangled in the justice system. Since prosecutors are elected officials in many jurisdictions, they can be a powerful force in making improvements to the criminal justice system. They can leverage their role and positional power to increase access of individuals with mental health disorders to critical treatment and services, thus reducing the cycle of these individuals in the justice system. However, many prosecutors are unsure how to advocate for better services, link individuals to treatment, or help support the local continuum of behavioral health care. Here are three general areas where prosecutors may begin.

IMPROVE SERVICES TO PEOPLE ON THE DOCKET

People experiencing a mental illness or an intellectual or developmental disability may struggle to comprehend the terminology and processes involved with their case. Prosecutors can provide written materials and verbal assistance to ensure that individuals understand what decisions are being made, what choices are available, and what requirements have been set. When a person has chosen to represent him or herself, actively listening and asking the individual to share back what they have heard can help prosecutors ensure that the right information has been provided and understood by the individual.

Early in the court case, it may be possible to refer the individual to a deferred prosecution program designed for individuals with mental health disorders or to treatment court programs, such as a mental health court. In some jurisdictions, prosecutors are taking a lead role by creating programs that allow an individual to be quickly diverted into services and, upon successful completion, enable the individual to avoid having a criminal conviction. By helping people experiencing mental illness to avoid having a criminal history, they are better able to access supportive housing programs and other benefits that are critical to their recovery. Some individuals may be better suited for a more intensive treatment court program — prosecutors can enable program participation by supporting referrals and participating as an active member of the treatment court team. Access to deferral or diversion programs, however, is not the same as being able to truly take advantage of them. To help close the gap between access and participation, prosecutors should work to ensure participation in such programs does not require payment of fees to participate. For example, prosecutors running deferred prosecution programs should ensure that requirements to pay fees do not inhibit participation due to financial limitations. Additionally, as members of treatment court teams, prosecutors can encourage other partners to not charge fees for participation (such as requiring supervision fees for mental health court participation).

PARTNER WITH STAKEHOLDERS

Other criminal justice agencies may have programs or processes in place to better support individuals experiencing mental health disorders. Prosecutors can partner with them to increase the level of support to these programs and ensure that their own processes are not causing any conflicts. For example, prosecutors supporting confidential assessments

of clients for mental health disorders can help increase the number of assessments made by partners, when clients aren't fearful that results could be shared with a prosecuting body.

Cross-trainings with local behavioral health professionals can increase awareness of the needs of people with mental health disorders among prosecutors while helping treatment agency staff better understand justice system processes.

Prosecutors can also convene or participate in committees focused on improving diversion options and services to individuals with mental health disorders in the local justice system. Having the District Attorney's Office represented can help support the legitimacy and impact of the group and the policy, program, or practice decisions that are made. If already participating in a leadership group that discusses the local justice system, prosecutors can advocate that these discussions also include the concerns and needs of individuals experiencing mental illness. Prosecutors can push for the following activities as part of these groups: Information and data collection, sharing, and analysis across justice system agencies to more fully understand how many individuals with mental health disorders are impacting the justice system, able to be diverted to treatment or services, or cycling through the system as a "frequent user" or "familiar face"; identifying and addressing gaps in services in the local behavioral health continuum; blending funding or resource sharing to enable the creation or sustainment of programs for individuals with mental illness; and fostering a culture change within the criminal justice system to develop effective partnerships with behavioral health professionals in addressing the needs of individuals experiencing mental illness.

SUPPORT SYSTEMS CHANGE

Due to their powerful voice, prosecutors can help build consensus to address gaps in behavioral health care by meeting with community leaders and local government officials and holding community listening sessions. Investing time and attention into behavioral health issues can increase the momentum of activities to reduce gaps in services. By involving traditional and new media sources (newspaper articles, televised interviews, and social media), prosecutors can communicate more widely the critical need for supporting behavioral health services and interventions. This is as important on the state level as it is on the local level. State legislators and directors may be interested in what district attorneys have to say regarding funding for mental health treatment services and may shape legislation, policies, or funding streams accordingly.

Traditionally, advocacy groups and public defenders have initiated community conversations about disability and civil rights concerns. However, prosecutors can also help educate fellow criminal justice stakeholders, community leaders, and the general public about potential or existing civil rights issues related to the justice involvement of people experiencing mental illness. By leveraging their knowledge of the legal code and system, they can convey the importance of ensuring constitutionally adequate treatment to individuals inside the criminal justice system, as well as, providing opportunities to route individuals away from the justice system into services that support their recovery.

CONCLUSION

While prosecutors juggle multiple priorities in their role to pursue justice and public safety, reducing the involvement of people experiencing mental illness in the justice system can bring benefits that impact the work of the entire District Attorney's Office by decreasing caseloads, freeing up time to work on criminal cases where a true threat to public safety has been identified, and decreasing case processing times. Some prosecutors may experience an increase in job satisfaction, knowing that fewer people are unnecessarily routed into the justice system due to mental illness symptoms and knowing that individuals who do come into contact are being connected to appropriate treatment or services. Finally, doing this work can strengthen the relationship of the prosecutor with the community by showing that efforts to appropriately and effectively administer justice are being made while also ensuring that people experiencing mental illness are appropriately safeguarded from justice involvement simply due to the symptoms of their illness.

Understanding How Mental Illness Impacts the Delivery of Justice

By **KELLY SHELTON**
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Today, the responsibility of a prosecutor goes well beyond just prosecuting the case. Prosecutors are responsible for promoting public safety and reducing recidivism in the communities they serve. This development is seen in the criminal justice system, most notably through bail reform and Drug Court initiatives sweeping the country. Equally important but sometimes less understood is how mental illness impacts the criminal justice system. As Warren County Prosecutor Richard T. Burke has said, "[k]nowledge and understanding of mental illness is essential to anyone working in the criminal justice system today. If our purpose is to do justice, all stakeholders ...prosecutors, law enforcement, treatment providers and the courts must collaborate to address the unique issues of those with disabilities, whether they be perpetrators or victims." This is a multi-faceted complex issue for prosecutors. Chiefly, prosecutors must gain a basic understanding of mental illness. Understandably, it is outside the wheelhouse of most prosecutors. It is not taught in law school generally beyond the issues of competency, insanity or diminished capacity. However, failing to understand mental illness impacts how prosecutors deliver justice.

First, prosecutors must be open to working with community partners. These relationships will present opportunities to understand the mental health resources available in their community. Mental health providers can assist prosecutors in understanding the fundamentals of mental illness and work toward shared goals with prosecutors. The role of mental health providers is generally to de-stigmatize mental illness, promote treatment, and reduce recidivism. Second, prosecutors must acquire a framework for addressing both crisis situations and criminal cases involving individuals with mental illness that promote treatment and public safety while reducing recidivism.

Mental illness is far more common in the population than most people want to recognize. According to the National Institute of Mental Illness in 2017, approximately 46.6 million adults in the Unites States live with a mental illness which is approximately one in five people or 18.9% of adults in the United States.[1] To put the prevalence of mental illness in perspective, according to the CDC, in 2017 9.4% of adults of the United States lived with diabetes.[2]

The broad category of mental illness, or AMI (Any Mental Illness), "is defined as a mental, behavioral, or emotional disorder whose impact varies from no impairment to severe impairment."[3] There are over 300 defined mental illnesses.[4] A small subset of those with mental illness are individuals with serious mental illness (SMI).[5] SMI is defined as a "mental, behavioral, or emotional disorder resulting in serious functional impairment, which substantially interferes with or limits one or more major life activities."[6] Individuals living with SMI account for 4.5% of adults in the United States.[7] Diagnoses including schizophrenia, severe bipolar disorder, and severe major depressive disorder are considered serious mental illnesses.[8] "However, when other diagnosis cause significant impairment the person is also considered to have a serious mental illness" according to the website mentalillnesspolicy.org.[9]

One of the serious misperceptions about individuals living with mental illness, especially those with a serious mental illness, is that they are more likely to be violent and the perpetrator of a crime. The reality is, in fact, just the opposite. Individuals with a severe mental illness "are over 10 times more likely to be victims of violent crime than the general population."[10] There can be little doubt that this misperception is a major contributing factor to the stigma

1 https://www.nimh.nih.gov/health/statistics/mental-illness.shtml
2 https://www.cdc.gov/media/releases/2017/p0718-diabetes-report.html
3 https://www.nimh.nih.gov/health/statistics/mental-illness.shtml
4 https://mentalillnesspolicy.org/serious-mental-illness-not
5 https://www.nimh.nih.gov/health/statistics/mental-illness.shtml
6 *Ibid.*
7 *Ibid.*
8 https://mentalillnesspolicy.org/serious-mental-illness-not
9 *Ibid.*
10 https://www.mentalhealth.gov/basics/mental-health-myths-facts

surrounding mental illness and dissuades individuals in need of help from seeking treatment. According to the Treatment Advocacy Center, "a small number of people with serious mental illness commit acts of violence" and "[a]lmost all of these acts of violence are committed by individuals who are not being treated, and many such individuals are also abusing drugs or alcohol."[11] It is in everyone's best interest to promote treatment.

In 2008, the Warren County Prosecutor's Office ("WCPO") review of complaints, affidavits and initial police reports revealed a number of people charged who were suffering from mental illness. Further exploration determined that the mental illness may have been a contributing factor in some individual's commission of crime.[12] At the same time, the Warren County Department of Human Services, specifically the Mental Health Administrator, reached out to the WCPO about the treatment of individuals with mental illness in the criminal justice system, especially those in the Warren County Correctional Center. The same year, Warren County established a Law Enforcement Mental Health Committee ("LEMHC"), spearheading the efforts in the county to address individuals with mental illness who become involved with the criminal justice system. The committee consists of community stakeholders including the WCPO, the Warren County Department of Human Services, the Warren County Mental Health Administrator, local leaders, the Warren County Correctional Center, the 911 center, local police departments, the New Jersey State Police, local mental health and substance abuse providers, hospitals in the county, members of the Warren County Metal Board, and NAMI. The efforts of the LEMHC continue today. Incarcerated defendants with mental illness is not an issue unique to Warren County. According to a 2014 joint report by The Treatment Advocacy Center and the National Sheriff's Association, "in 2012 there were estimated to be 356,268 individuals with severe mental illness in prison and jails" compared to "35,000 with severe mental illness in state psychiatric hospitals."[13] This data indicates that there are ten times more people with SMI in jails and prisons than in state psychiatric hospitals, a statistic that cannot be ignored by the criminal justice system or the mental health system.[14] The LEMHC fosters collaborative relationships between committee members. The LEMHC meets quarterly to discuss systematic issues, review policy and practices, and conduct case reviews as needed.

As a result of its involvement with the committee, in 2009, the WCPO established a Mental Health Unit ("MHU") to administer a Mental Health Program for defendants with mental health illnesses that contribute to the commission of non-violent crimes. The MHU has three primary goals: 1) training law enforcement officers on interacting with individuals with mental illness especially in crisis situations;

SUICIDE BY METHOD (2017) - DATA COURTESY OF CDC

SUICIDE METHOD	NUMBER OF DEATHS
Firearm	23,854
Suffocation	13,075
Poisoning	6,554
Other	3,690
TOTAL	**47,173**

[11] https://www.treatmentadvocacycenter.org/storage/documents/violent-behavior-backgrounder.pdf

[12] In New Jersey offenses are categorized as indictable and disorderly persons offenses which are similar to felonies and misdemeanors. The Warren County Prosecutor's Office is responsible for prosecuting indictable crimes.

[13] https://www.treatmentadvocacycenter.org/storage/documents/treatment-behind-bars/treatment-behind-bars.pdf

[14] Ibid.

2) providing immediate dispute resolution between mental health providers and law enforcement; and 3) handling of criminal prosecutions of individuals suffering from mental illness who want to participate in the Mental Health Program.

The reality is that law enforcement is more likely to interact with an individual with mental illness when the person is in crisis. In 2017, the CDC reported that suicide was the tenth leading cause of death with 47,000 people committing suicide.[15] The same CDC report also noted that among individuals between the age of 10 and 34, suicide was the second leading cause of death and the fourth leading cause of death for individuals between the age of 35 and 54.[16] To put this in perspective for prosecutors, "there were more than twice as many suicides as homicides" in 2017 according to the CDC.[17] When the Mental Health Unit began, mental health training was provided once yearly at mandatory agency training. The first training focused on two areas: 1) understanding the responsibilities of law enforcement officers regarding taking an individual in crisis to the hospital for evaluation and 2) assisting law enforcement in becoming familiar with the community-based services for mental health treatment in the county so law enforcement officers could advise community members where to go for help.

Recognizing the need for more in-depth training for first responders, in 2014, Warren County became the seventh county in New Jersey to participate with CIT-NJ Center for Excellence in Crisis Intervention Team training. This is an intense and interactive five-day, 40- hour certification course.[18] The training provides an in-depth look at mental illness and its implications for first responders. As Edward C. Dobleman, CIT-NJ Director and Retired Police Chief of Mt. Ephraim Police Department explains "CIT training provides law enforcement officers with a new framework for approaching situations involving individuals with mental illness. Officer safety as well as the safety of the individual with mental illness are the paramount concerns. The training focuses on building rapport and using time to slow down and de-escalate the situation law enforcement encounters. The framework taught during CIT will increase safety, result in less injuries and help law enforcement officers better serve their communities by linking individuals with mental illness with services. Law enforcement can be a leader in de-stigmatizing mental illness which will help individuals with mental illness feel comfortable seeking treatment."

The actions that law enforcement take while interacting with an individual with mental illness can help save lives. Law enforcement officers in Warren County who have received mental health training, especially those law enforcement officers who attended CIT training, have embraced the training and assisted many individuals with mental illness in crisis to obtain the help they need. Recently, New Jersey mandated training on mental illness for all law enforcement officers.[19] Training on mental illness for law enforcement officers shows officers how to build trust with the community and the individuals with mental illness. As a result, individuals with mental illness in crisis will be less likely to become involved in the criminal justice system while also ensuring the safety of first responders, the individual and the community.

In addition to training, another goal of the MHU is to provide immediate dispute resolution for both law enforcement and mental health providers, especially during crisis situations. In a crisis situation involving an individual with mental illness, law enforcement and Crisis workers have different responsibilities, but need to work together to aid the individual in crisis. As an assistant prosecutor, I act as a liaison for law enforcement in immediately resolving issues with mental health providers. For example, law enforcement may believe that an individual needs a mobile psychiatric screening but Crisis declines. Law enforcement can call and I will contact the supervisor of Crisis and try to resolve the situation. Conversely, if Crisis wants someone taken to the hospital and the police decline, the supervisor of Crisis will call me to discuss the issue and formulate a resolution. In the beginning of this initiative, those types of calls were frequent. However, over the years after training there are far fewer of those types of calls. Law enforcement and mental health providers are cross trained, have come to know each other, and built relationships that have led to smoother interactions.

[15] https://www.nimh.nih.gov/health/statistics/suicide.shtml

[16] Ibid.

[17] Ibid.

[18] On August 26, 2019, CIT International released Guide to Best Practices in Mental Health Crisis Response. See http://www.citinternational.org/bestpracticeguide.

[19] See New Jersey Attorney General Directive 2016-5.

Finally, as stated above, the MHU handles criminal prosecutions involving individuals with mental illness. The program is voluntary, and the individual must complete an application to apply for the program. Warren County's MHP is post-dispositional. Victims are consulted before a defendant is accepted into the MHP. Rarely will a victim object to eligible defendant's participation in the program. After consultation with the victim, the defendant's mental health records are obtained and reviewed. Alternatively, if the defendant has no prior treatment records, the defendant is required to obtain an evaluation by a WCPO approved evaluator to determine whether the defendant has a mental health illness that contributed to crime. Next, a decision is made whether a mental health treatment plan can be formulated to address the defendant's needs while balancing community safety. A provider or treatment provider is identified. The treatment plan becomes conditions of probation. Medication and substance abuse treatment, if necessary, are also conditions of probation. Each treatment plan is individualized and incorporates any potential housing or transportation issues. Stable housing is a key component to a defendant's ability to successfully complete the MHP. Missed appointments and positive substance abuse tests are immediately reported. Based upon experience, weekly contact with an agent in our office is an effective condition of probation. Prosecutors must also consider suitable charges required for a defendant's guilty plea, if appropriate. Convictions for certain crimes may impact where patients can receive inpatient psychiatric treatment or impact an individual's ability to receive public housing.[20]

There is no doubt that establishing a mental health program requires extensive preparation and interaction with community partners. It requires an experienced prosecutor who is willing to devote a large amount of time to the effort. The prosecutor assigned to the program should find counterparts in other jurisdictions to discuss and collaborate with on difficult issues. In New Jersey, a number of prosecutors' offices have implemented Mental Health Units including Union, Ocean, Sussex and Essex counties.[21] From a personal perspective, I prefer a Prosecutor-Led initiative as opposed to a court program. In running a mental health program, prosecutors can help individuals while seeking to promote public safety. An individual's need for treatment must always be balanced with consideration of victim's rights and public safety. Prosecutors are in the best position to make those decisions.

In conclusion, prosecutors as well as law enforcement must understand the communities that we serve. In terms of mental illness, prosecutors have a responsibility to work with mental health providers to understand what services are available in their communities, and train law enforcement to recognize and respond appropriately to an individual with a mental health illness, especially those individuals in crisis. Prosecutors are in a position to work with law enforcement and mental health providers to resolve issues between the two systems to best serve the needs of individuals with mental health issues. Prosecutors and law enforcement can help fight against the stigma of mental illness by ensuring accurate information is available to the public and to encourage linkage with psychiatric and psychological treatment services. Finally, prosecutors, through a mental health program can provide justice to victims while balancing the needs of a defendant with mental health issues in a manner that increases public safety.

I would like to thank Warren County Prosecutor Richard Burke for providing me with the opportunity to contribute an article on mental illness. I would also like to thank retired Warren County Mental Health Administrator Shannon Brennan for her assistance with this article, Caitlyn Spuckes, a criminal justice intern, for her research assistance and Assistant Prosecutor Jessica Cardone for editing the article.

[20] During one three-year period, WCPO was the recipient of a grant from the New Jersey Attorney General, Office of Consumer Affairs. One component of that grant was that research be conducted. The WCPO contracted with Farleigh Dickinson University to have Dr. Elizabeth Panuccio, Assistant Professor, School of Criminal Justice, Political Science, & International Affairs, Fairleigh Dickinson University, and Dr. Meredith Drew, Associate Professor, Counselor Education, Professional Counseling Program, Department of Special Education & Counseling College of Education, William Paterson University conduct research on the MHP.

[21] I would like to thank retired Union County Prosecutor Maureen O'Brien for sharing her knowledge on establishing a mental health program with me as well as Union County Assistant Prosecutor Tiffany Wilson and Ocean County Assistant Prosecutor Renee White who always serve as a sounding board when dealing with difficult situations or cases involving individuals with mental illness.

Non-Consensual Pornography and Sextortion: A Case Study in Victimization and Offender Profiles

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Sexual exploitation online has been a constant presence. From the advent of electronic bulletin boards and chat groups, to the development of multiple social media platforms and applications, production and dissemination of non-consensual pornography has found a home online. The prevalence and invasiveness of non-consensual pornography (NCP) has grown and expanded from unauthorized sharing of intimate images, to "revenge porn," to the criminal enterprise of sextortion. This article is an introductory primer presenting the growing problem of dissemination of non-consensual pornography & sextortion, delving further into issues of victimization and categorization offense and offender profiles.

Since its creation, the internet has been a convenient tool for criminal activity in light of its ease of use, breadth of scope, and relative anonymity. This is especially true in the realm of sexual exploitation. The illegal transfer of unlimited illicit images can now be conducted remotely and anonymously through a few keystrokes and has resulted in the growing problem of "non-consensual pornography" (hereinafter NCP) and sextortion. Although colloquially referred to as "revenge porn," such conduct extends far beyond the conventional connotation of disclosing/sharing intimate photographs of one's partner after a failed relationship, and delves into the devastating activities of predatory grooming, domination and extortion.

Although over 46 states have adopted various statutes addressing the issue of illegal dissemination of "intimate images," there is no singular legal definition of what constitutes NCP.[1] Its functional definition is "obtaining, sharing or distributing intimate images of another without permission."[2] With sextortion, an offender obtains NCP and subsequently threatens to expose or distribute these intimate images for the primary purpose of "obtaining additional images of a sexual nature, sexual favors, or money."[3] An offender's purpose in disseminating NCP is to publicly humiliate the victim, while the offender's purpose for committing sextortion is to privately coerce the victim to comply with their demands.[4]

VICTIMIZATION STUDIES

NCP and sextortion are growing problems that affect all users, regardless of age or gender. A 2016 study encompassing a nationally representative sample of 3,002 internet users 15 years of age and older found that overall, *4% of all internet users in the United States* had either "sensitive images" of themselves posted online without their consent,

[1] 46 States + DC + One Territory NOW have Revenge Porn Laws. 01 08 2019. https://www.cybercivilrights.org/revenge-porn-laws/.

[2] Eaton, Asia A., Holly Jacobs and Yanet Ruvalcaba. "2017 Nationwide Online Survey of Nonconsensual Porn Victimization and Perpetration." 2017. https://www.cybercivilrights.org/wp-content/uploads/2017/06/CCRI-2017-Research-Report.pdf.

[3] Federal Bureau of Investigations. "2018 Internet Crime Report." 2018. https://pdf.ic3.gov/2018_IC3Report.pdf. 15.

[4] Patchin, Justin W. and Sameer Hinduja. "Sextortion Among Adolescents: Results from a National Survey of U.S. Youth." Annals of Sex Research (2018), 4. https://www.researchgate.net/profile/Justin_Patchin/publication/327966075_Sextortion_Among_Adolescents_Results_From_a_National_Survey_of_US_Youth/links/5bb28a4a299bf13e6059f783/Sextortion-Among-Adolescents-Results-From-a-National-Survey-of-US-Youth.pdf

or had someone threaten to post "sensitive images" of them without their consent.[5] Other findings include:

- 3% of all male users experienced NCP or threatened NCP.
- 5% of all female users experienced NCP or threatened NCP.
- 10% of users between the ages of 18-29 years old (male & female combined) have experienced NCP or threatened NCP.
- 12% of women under the age of 30 years old have experienced NCP or threatened NCP.

A similar study was conducted in 2019, involving 3,044 adult online social media users. This study found that the rate of NCP victimization had increased to 9% of women and 7% of men.[6] A study focusing specifically on young adult victimization involving sextortion was conducted in June 2016, and involved 1,631 respondents between the ages of 18–25 years old.[7] The study looked at instances of sextortion in both personal (face-to-face) relationships (968 respondents) and online-only relationships (663 respondents). The results of this study disclosed the following:

- 71% of all respondents knowingly provided their images to the perpetrator.
- 56% of all respondents felt pressured, tricked or threatened/forced into providing images.
- 23% of those respondents involved in online-only relationships knew the perpetrator for less than one week before providing an image (as compared to only 7% of personal relationships), with 26% providing an image in 1 day or less after meeting the perpetrator.[8]

In examining sextortion victimization of minors (12-17 years old), a 2018 study revealed that out of a sample size of 5,578 respondents, *a total of 5% of all respondents reported being victims of sextortion.*[9] This study showed an equal split between males and females, with the most significant incidence of sextortion occurring amongst 15-year-olds.[10] Most disturbingly, *a total of 3% of all respondents stated that they had perpetrated some type of sextortion themselves.*[11]

Overall, 5% of students said they had been the victim of sextortion at some point in their lifetime. Three percent admitted to threatening another person who had shared an intimate picture with them.

Patchin, J. W., & Hinduja, S. (2018). Sextortion Among Adolescents: Results from a National Survey of U.S. Youth. Annals of Sex Research, 1-25.

METHODS OF OBTAINING NCP

The methods and manners in which offenders obtain NCP vary, and often depend on the offender's access to the victim. How an offender obtains NCP generally falls into two categories:

1. The offender knew the victim from a prior relationship (personal or online) and used images obtained during that relationship; or
2. The offender targeted the victim online and obtained images from the victim or an online source.[12]

In examining the second category, there are generally two manners in which these images are obtained: Voluntary Submission and Hacking.

VOLUNTARY SUBMISSION

As previously stated, 71% of victims of sextortion voluntarily provided images to the offender.[13] The process of obtaining images from victims used in NCP and sextortion is very similar to the "grooming" process many offenders use in child sexual exploitation cases.[14] Grooming is the process wherein

[5] Lenhart, Amanda, Michele Ybarra and Myeshia Price-Feeney. "Nonconsensual Image Sharing: One in 25 Americans Has Been a Victim of "Revenge Porn." 2016. https://datasociety.net/pubs/oh/Nonconsensual_Image_Sharing_2016.pdf.

[6] Ruvalcaba, Yanet and Asia Eaton. "Nonconsensual Pornography Among U.S. Adults: A Sexual Scripts Framework on Victimization, Perpetration, and Health Correlates for Women and Men." Psychology of Violence (2019). https://www.cybercivilrights.org/wp-content/uploads/2019/03/Psychology-of-Violence.pdf

[7] Wolak, Janis and David Finkelhor. "Sextortion: Key Findings from an Online Survey of 1,631 Victims." 2016. 74. http://www.unh.edu/ccrc/pdf/Sextortion_RPT_FNL_rev0803.pdf

[8] *Id.*

[9] Patchin and Hinduja, *supra* note 4, at 8.

[10] *Id.*

[11] *Id.*

[12] Wolak and Finkelhor, *supra* note 7, at 74.

[13] Wolak and Finkelhor, *supra* note 7, at 74.

[14] International Centre for Missing & Exploited Children. "Studies in Child Protection: Sexual Extortion and Nonconsensual Pornography." 2018. https://www.icmec.org/wp-content/uploads/2018/10/Sexual-Extortion_Nonconsensual-Pornography_final_10-26-18.pdf, 8-9.

the offender develops a relationship with the victim, builds a level of trust with the victim, and then exploits that trust for personal gains. The offender often approaches the victim in a chat group, social media account or dating app, posing as a similarly aged user looking for friendship or a relationship. After establishing that relationship, the offender begins to engage the victim in conversations of a sexual nature, eventually soliciting incriminating photographs, or inviting the victim to be part of a live video streaming contact.[15] As this occurs, the offender takes screenshots of exchanges, saves sensitive photographs, or records live video interactions with the victim, with the ultimate intent of "compiling a dossier of compromising material with which to blackmail [the] victim."[16] If done well, skilled offenders not only quickly gain the victim's initial cooperation, but also decrease the likelihood of disclosure by the victim and increase the likelihood of ongoing, repeated access to the victim.[17] This is especially true in situations involving adult offenders and adolescent victims.[18] Experienced sextortionists can easily manipulate multiple victims through multiple accounts and identities. As a result, there are cases where a single offender has victimized hundreds of individuals.[19]

HACKING

One of the less common (but still statistically significant) methods of obtaining NCP is via hacking.[20] Traditionally, people envision hackers as offenders who launch Trojans or other malware attacks to gain access to computer systems, but the more prevalent manner of gaining access to computer accounts (especially social media accounts) is through social engineering. Social engineering is a non-technical strategy that cyber attackers use, which relies heavily on human interaction and often involves tricking or manipulating victims into performing specific actions or providing confidential information that is subsequently used to gain access to their computer accounts.[21] Social engineering can generally be broken down into two manners of data collection: Active Social Engineering and Passive Social Engineering.

ACTIVE SOCIAL ENGINEERING

Active social engineering refers to affirmative actions that an offender takes to solicit and obtain personal information or credentials of the victim in order to gain access to a computer account (commonly known as "phishing"). It is the overt act of directly contacting or interacting with the victim for the sole purpose of obtaining information that would allow the offender to access the computer accounts of the victim. Commonly, active social engineering involves email or other communication that invokes urgency, fear, or similar emotions in the victim, leading the victim to promptly reveal sensitive information, click a malicious link, or open a malicious file.[22]

PASSIVE SOCIAL ENGINEERING

Passive social engineering refers to attempts to gain personal information by engaging in an individualized form of data mining. The hacker targets a victim and searches through the victim's social media postings and other open-source information to gain personal information about the victim that is commonly used to reset passwords on various internet accounts. Once the hacker obtains such information, he uses it to reset the victim's password on that account and gain access to the victim's personal information, photos, contact list, and other social media accounts. Unlike Active Social Engineering, which involves direct interaction with the victim to obtain personal information, Passive Social Engineering merely gathers a victim's information already available online.

In both instances, the hacker's goal is to obtain access to the victim's computer and internet accounts in order to download all of the victim's personal information for later use.

[15] "Securing Our Communities: Sextortion Scams." National Capital Region Threat Intelligence Consortium. 6 August 2019. https://www.ncrintel.org/post/sextortion-scams.

[16] *Id.*

[17] Lanning, Kenneth V. "Child Molesters: A Behavioral Analysis." 2010. https://www.icmec.org/wp-content/uploads/2015/10/US-NCMEC-OJJDP-Child-Molesters-A-Behavioral-Analysis-Lanning-2010.pdf. 27

[18] Wolak, Janis, et al. "Online "Predators" and their Victims: Myths, Realities and Implications for Prevention and Treatment." American Psychologist 63.2 (2008): 111-128. http://www.unh.edu/ccrc/pdf/Am%20Psy%202-08.pdf.

[19] Department of Justice. "National Strategy for Child Exploitation Prevention and Interdiction." 2016. https://www.justice.gov/psc/file/842411/download

[20] Wolak and Finkelhor, *supra* note 7, at 75.

[21] Lord, Nate. What is Social Engineering? Defining and Avoiding Common Social Engineering Threats. 11 September 2018. 12 August 2019. https://digitalguardian.com/blog/what-social-engineering-defining-and-avoiding-common-social-engineering-threats.

[22] Lord, Nate. Social Engineering Attacks: Common Techniques & How to Prevent an Attack. 15 July 2019. Document. 30 August 2019. https://digitalguardian.com/blog/social-engineering-attacks-common-techniques-how-prevent-attack.

"The majority of extortion complaints received in 2018 were part of a sextortion campaign in which victims received an email threatening to send a pornographic video of them or other compromising information to family, friends, coworkers or social network contacts if a ransom was not paid."

Federal Bureau of Investigations, 2018 Internet Crime Report. Department of Justice

SEXTORTION SCAMS

Increasingly, sextortionists are utilizing the newest iteration of the "scare scam," wherein offenders send out an email or other message claiming that they are in possession of NCP or other compromising images, and threaten to release them online or send them to the victim's contacts unless the victim complies with their demands. The email may provide some basic information or even a previously used password to an online account in order to provide an indication of authenticity. These messages are often sent to email addresses exposed in previously known data breaches in which the user database (email address and password) was indexed online.[23] The majority of extortion complaints received in 2018 were part of a sextortion campaign in which victims received an email threatening to send a pornographic video of them or other compromising information to family, friends, coworkers or social network contacts if a ransom was not paid.[24] Although the offender may not actually have any images or other information about the victim, the fear and psychological damage to victims are just as real as if the offender did actually have them.[25]

OFFENDER TYPOLOGIES

While significant research has been conducted into online child exploitation and child pornography, there is scant research available on the characterization or typology of sextortion offenders.[26] Many of the typologies developed concerning child pornography offenders have been found applicable to NCP and sextortion in that the collection and dissemination of child pornography involve many of the same motivations as those involved in the proliferation of NCP and sextortion.[27] Generally, there are four basic typologies of sextortionists and NCP offenders:

1. Revenge – Offender commits offense as revenge without further demands (predominantly seen in NCP offenses, commonly referred to as "revenge porn"). This type of offense is most commonly committed by someone that the victim knows and is driven by a failed relationship, with the primary goal of embarrassing the victim.
2. Profit – Offender demands monetary payment or additional pornographic images from the victim solely for monetary gain. Such images are often traded or sold online.
3. Domination/Gratification – Offender obtains sadistic pleasure or sexual gratification by controlling the victim. Offender will often demand that the victim perform increasingly degrading acts in order to demonstrate full control over the victim's actions.
4. Predatory – Offender grooms the victim for future in-person sexual victimization. Offender will use the sextortion process to gradually lower the victim's inhibitions and increase feelings of helpless, with the ultimate intent of arranging an in-person meeting in order to further sexually exploit the victim.[28]

[23] Petrow, Steven. "How not to fall prey to the latest 'sextortion' email threat." USA Today 11 September 2018. https://www.usatoday.com/story/tech/columnist/2018/09/11/sextortion-scams-how-not-fall-prey-latest-email-threat/1254679002/

[24] Federal Bureau of Investigations. "2018 Internet Crime Report." 2018. https://pdf.ic3.gov/2018_IC3Report.pdf. 15

[25] Fazzini, Kate. "Email sextortion scams are on the rise and they're scary — here's what to do if you get one." 7 June 2019. CNBC. 12 August 2019. https://www.cnbc.com/2019/06/17/email-sextortion-scams-on-the-rise-says-fbi.html?&qsearchterm=malwarebytes, International Centre for Missing & Exploited Children, 13

[26] Jurecic, Quinta, et al. Sextortion: The problems and solutions. 11 May 2016. https://www.brookings.edu/blog/techtank/2016/05/11/sextortion-the-problem-and-solutions/.

[27] International Centre for Missing & Exploited Children, *supra* note 14, at 9

[28] International Centre for Missing & Exploited Children, *supra* note 14, at 8-9, 13; Wolak and Finkelhor, supra note 7, at 75.

These categories are not mutually exclusive, and often offenders can either transition from one category to another (i.e., Revenge transitions into Domination/Gratification) or fall into multiple categories (i.e., Domination/Gratification & Predatory).

PUNISHMENT & DETERRENCE

Contrary to the general findings that incarceration does not deter criminality, a study conducted on 159 sextortion/NCP offenders showed that more than half of the offenders stated they would have stopped what they were doing if they were aware of the punishment related to the offenses, particularly concerning incarceration and sex offender registration.[29] As presented:

- 60% said they would have stopped if they knew they had to register as a sex offender
- 55% said they would have stopped if they knew they could be imprisoned for sending NCP
- 51% said they would have stopped if they knew it was a felony (state or federal)
- 45% said they would have stopped if they knew it was a misdemeanor (state or federal)[30]

This demonstrates that increased penalties related to these offenses do have a noticeable effect, particularly when requiring registering as a sex offender and classifying the offense as a felony, as opposed to a misdemeanor. One particularly disturbing result is the finding that 13% of all offenders stated nothing would have stopped them from committing the offense.[31]

THE DAMAGING EFFECT ON VICTIMS

The harm to victims of NCP and sextortion is immeasurable, often mirroring the experiences of sexual assault victims. Victims often felt helpless, with little recourse and little help.

[29] As previously presented, the offenders were presented with multiple choice and could choose up 5 answers as what would have had a deterrent effect on them. Eaton, Jacobs and Ruvalcaba, supra note 2, at 22.

[30] *Ibid.*

[31] *Ibid.*

Victims often suffer depression and anxiety, engage in self-harm (through various forms of self-mutilation, substance abuse, and self-destructive behavior), and in some cases attempt or commit suicide.[32] A study conducted by the Cyber Civil Rights Initiative of 341 victims of NCP or sextortion revealed the following:

- 93% of victims said they have suffered significant emotional distress due to being a victim
- 82% reported that they suffered significant impairment in social, occupational, or other important areas of functioning
- 42% sought psychological services
- 34% reported that being a victim jeopardized their relationships with family
- 38% reported that it jeopardized their relationships with friends
- 13% reported that they lost a significant other due to being a victim
- 37% reported that they were teased by others due to being a victim
- 49% reported that they were harassed or stalked online by users who had seen their images
- 30% reported that they were harassed or stalked outside of the internet by users who had seen their images[33]

CLOSING

Sextortion and NCP related crimes are on the rise, and the effects on the victims are devastating. These crimes affect do not discriminate based upon age or gender, and like child pornography, once an image is posted on the internet, it is almost impossible to remove. As prosecutors, we must work diligently with law enforcement and the public to identify the seriousness of these offenses and vigorously prosecute the offenders to appropriately deter potential offenders.

ADDITIONAL REFERENCES/WEBSITES ON NCP & SEXTORTION

National Center for Missing & Exploited Children:
http://www.missingkids.org/gethelpnow/isyourexplicitcontentoutthere

Cyber Civil Rights Initiative:
https://www.cybercivilrights.org/online-removal/

THORN:
https://www.thorn.org/sextortion/

Canadian Centre for Child Protection:
https://needhelpnow.ca/app/en/removing_pictures-other

Project Arachnid:
https://projectarachnid.ca/en/#top

[32] *Ibid.*

[33] Cyber Civil Rights Initiative. "End Revenge Porn - Revenge Porn Statistics." n.d. Cyber Civil Rights Initiative. Document. 23 August 2019. https://www.cybercivilrights.org/wp-content/uploads/2014/12/RPStatistics.pdf.

The Work of Justice Beyond the Conviction

By **MARK A. DUPREE, SR.**
Wyandotte County District Attorney, Twenty Ninth Judicial District (KS)

CONVICTION INTEGRITY UNITS

The U.S. Supreme Court ruled "As such, [the Prosecutor] is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape, nor innocence suffer. He may prosecute with earnestness and vigor — indeed, he should do so but, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Berger v. U.S., 295 U.S. 78, 88 (1935).

There are two mandates that jump out in the above ruling which are 1.) the guilt should not escape, 2.) nor the innocence suffer. Thus, pursuing and convicting the correct person is of the utmost importance to uphold the integrity of the American criminal justice system. Over 2,400 people have been exonerated since 1989, thus over 2,400 people have needlessly suffered. There is work to be done. As Ministers of Justice we take this mandate seriously, and we are ordered to administer justice fairly, justly, and correctly.

The American Bar Association (ABA) special responsibilities of a prosecutor states, "when a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction." ABA Rule 3.8h. In order for us to know if such a misfortune has occurred, we as prosecutors must have the willingness to investigate cases where such possibilities may exist. A Conviction Integrity Unit (CIU) does that investigation and is vital and beneficial in every prosecutor's office. More than 45 jurisdictions have conviction review units; establishing a CIU is a practical and prudent way to identify and remedy past injustices. The CIU examines credible and verifiable claims of innocence and constitutional violations with the highest standard of professional integrity.

Wyandotte County citizens supported, and our elected Commissioners funded, the first ever Conviction Integrity Unit in the state of Kansas. We are proud of this forward-thinking unit. We believe every conviction that comes out of any prosecutor's office must hold integrity, both now and in decades to come. The mission of the CIU is to ensure post-conviction justice through a commitment to search for truth. The CIU focuses on bringing the truly guilty to justice and developing greater faith in the criminal justice system within one's community by an independent review process of post-conviction claims of innocence. Wrongful convictions threaten the relationship between law enforcement professionals and the citizens we all serve, and even worse, allow dangerous criminals to escape justice and remain a threat to the community. The CIU assists in resolving this issue and honors the deeply rooted American values of fairness and justice.

As more time passes and my children grow older, I have an even greater appreciation for life's most valuable asset-time. Even though pursuing the Conviction Integrity Unit in Kansas was seen as a risky political move during my first term in office, I kept thinking of the value of a person's time. I kept remembering the oath that I took as a prosecutor for the citizens of Wyandotte County. I decided the office that I have the honor to hold should always put the citizens first, it's meant to propel change, demand justice, and use every legitimate means to bring about equality for all in the state of Kansas.

RECIDIVISM/EXPUNGEMENT

The goal for all prosecutors is to make their respective communities safer. Convicting the right person helps with this goal, however, we cannot forget about the importance of reducing recidivism. The data from the Bureau of Justice Statistics (BJS) indicates a large number of individuals who serve time in prison will reoffend within three years upon release.[1]

[1] Mariel Alper, Ph.D., Matthew R. Durose, BJS Statisticians, Joshua Markman, former BJS Statistician, *2018 Update on Prison er Recidivism: A 9-Year Follow-Up Period (2005-2014)*, May 23, 2018, http://www.bjs.gov/index.cfm?ty=pbdetail&iid=6266 (last visited Sept. 9, 2019).

As an elected prosecutor, it is my responsibility to represent my entire county. As such, I began having candid conversations with the entire community demographic, including those who were convicted of crimes and served their time. These conversations led my office to research the true access of expungements for everyday citizens.

We found a majority of those we spoke with indicated "checking the box" on the application was a barrier. Specifically, once they've checked the box acknowledging they were convicted of a crime they typically were not able to receive an interview. One individual stated, "when you are constantly prevented from gaining lawful employment to care for your family, it makes it that much easier to relapse back to those old criminal ways to provide for your children." Our office is a huge proponent of personal responsibility. However, if a person has paid their debt to society, and is diligently seeking to earn an honorable living, our employment system should not create unnecessary barriers. As Ministers of Justice, we must do our part to reduce crime and thus reduce the number of citizens who are victimized at the hand of those who fall back into criminal behaviors. An expungement can be the key difference between someone turning their life around or becoming a repeat offender. Since an expungement removes qualifying convictions from a citizen's record, it allows people to truly move on with their lives and removes a barrier to obtaining employment.

As many as 100 million adults have a criminal record.[2] A national survey of 1,528 human resources professionals found 96% of employers conduct background checks.[3] We expect (and demand) people with a conviction to turn

[2] Bureau of Justice Statistics, *Survey of State Criminal History Information Systems, 2012 (U.S. Department of Justice, 2014)*, available at https://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf.

[3] The National Association of Professional Background Screeners (NAPBS) commissioned HR.com to conduct a national survey, *National Survey Employers Universally Using Background Checks to Protect Employees, Customers and the Public*, https://pubs.thepbsa.org/pub.cfm?id=6E232E17-B749-6287-0E86-95568FA599D1 (last visited Sept. 18, 2019).

their lives around and become productive law-abiding citizens; we as prosecutors should do our part in making it feasible. Expungements are vital to our justice system. In Kansas, expungements are only available with the following conditions met: 1.) petitioning the court and granted only by order of a judge, 2.) only qualifying convictions may be expunged, 3.) fees and court costs must be paid, 4.) a specified time must have lapsed with no additional convictions, and 5.) the expungement must be consistent with public welfare.

We found the two biggest obstacles preventing many from expungements were: 1) knowing how to navigate the process, and 2) cost. Many of the individuals who could benefit the most from an expungement were not aware of the possibility of having their record expunged. The individuals who were aware of it, did not have the financial means to retain an attorney and pay the filing fee. Armed with this important information, our office created the very first Wyandotte County Kansas Expungement Fair.

Our expungement fair was a weekly program held one day a week throughout the summer of 2019. Individuals with certain criminal convictions were able to attend the fair and have an immediate assessment of their cases to determine if they could proceed with the paperwork. Our office partnered with our local community college, the Kansas City, Kansas Community College and we were able to provide citizens access to an entire computer lab to fill out the expungement paperwork. With the help of our local legal aid clinic, Kansas Legal Services (KLS), attorneys were onsite at the college and applicants had access to immediate legal answers. Additionally, the Wyandotte County courthouse staff graciously assisted applicants as they came in the dozens to file their paperwork. The barrier of cost was addressed by a state funded grant administered through Kansas Legal Services, which covered a large amount of the individual filing fees.

The Wyandotte County Expungement Fair was a massive success; 372 people came and signed up for expungements. To date, nearly 100 expungement petitions have been filed with the court. Not only are the numbers exciting, but the community collaboration to address a widespread issue was simply tremendous. Our citizens now have a better chance to become a contributing member of society. Our office is focused on community engagement, purposeful and accurate prosecution, and removing barriers to folks who choose to become productive members of Wyandotte County.

Not only are the numbers exciting, but the community collaboration to address a widespread issue was simply tremendous.

Collaborative Approaches to Mental Health Diversion in Miami-Dade



By **JUDGE STEVE LEIFMAN**
Associate Administrative Judge (FL)
KATHERINE FERNANDEZ RUNDLE
State Attorney, Miami-Dade County (FL)
HALLIE FADER-TOWE
Program Director, The Council of State Governments Justice Center

With over 500 counties passing resolutions in support of the Stepping Up initiative to reduce the number of people with mental illnesses in jails,[1] more and more communities are seeking to develop viable "offramps" from various steps in the criminal justice process to community-based treatment and supports through "diversion" programs. Numerous states are considering or have passed legislation authorizing and sometimes funding pre-plea diversion programs for those with mental illnesses and substance use disorders.[2] Federal funders, such as the Bureau of Justice Assistance's Justice and Mental Health Collaboration Program, are seeding programs throughout the country,[3] as well as tools focused on prosecutors,[4] and private funders, such as the John D. and Catherine T. MacArthur Foundation, see diversion as a critical tool in the toolbox for appropriately reducing jail populations as part of its Safety and Justice Challenge.[5]

Does diversion work? We are finally getting multi-site research that gives reason to be optimistic,[6] as well as a growing number of individual site evaluations.[7] In meetings and conferences across the country, the answer is often "Look at what they did in Miami." How did a large, diverse jurisdiction proud of its stance on public safety become a national leader in developing collaborative approaches to improving outcomes for people with mental illnesses and substance use disorders?

To answer these questions, we went to the source: Judge Steve Leifman and State Attorney Katherine Fernandez Rundle have worked together to lead change in Miami for over two decades. They shared candid reflections about their "19 year 'overnight success,'" and we added citations so that those who are interested in the Miami story can access tools and examples for their own jurisdictions.

There are so many areas of potential concern for an elected judge and prosecutor. Why this one? Why focus on people with mental illnesses and substance use disorders over such a long period of time?

State Attorney Katherine Fernandez Rundle (KFR): Under the current system, we are often releasing people with serious mental illnesses back to the community without treatment and supports, which threatens public safety, wastes critical tax dollars, and inhibits recovery for people with these illnesses.

Judge Steve Leifman (SL): Did you know that people with mental illness were no more dangerous that the general population and much more likely to be victims? And, on medication, they are even less likely to be violent than the

[1] For more on Stepping Up, visit https://stepuptogether.org/.

[2] The National Conference of State Legislatures tracks this information online at: http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-diversion.aspx.

[3] For more information on JMHCP, including information about diversion see https://csgjusticecenter.org/mental-health/projects/justice-and-mental-health-collaboration-program/.

[4] The Prosecutor-Led Diversion toolkit funded by BJA is available online at: https://www.diversiontoolkit.org/.

[5] See, for example, Effective Court Responses to Persons with Mental Disorders (National Center for State Courts, 2018) available online at: https://www.ncsc.org/~/media/Files/PDF/Topics/Criminal/Effective-Court-Responses-Mental-Disorders.ashx.

[6] M. Rempel et al, NIJ's Multisite Evaluation of Prosecutor-Led Diversion Programs: Strategies, Impacts, and Cost-Effectiveness (2018), available online at: https://www.ncjrs.gov/pdffiles1/nij/grants/251665.pdf.

[7] For example, see Kenneth J. Gill and Ann A. Murphy, Jail Diversion for Persons with Serious Mental Illness Coordinated by a Prosecutor's Office, BioMed Research International, Volume 2017.

general population. Additionally, recovery rates for this population are better than for people with diabetes or heart disease.

I've been confronted with this issue in my courtroom from the beginning of my time on the bench, and I knew I needed to do something. Fortunately, when you're a judge and you call a meeting, people come. I've also been fortunate to work with an elected prosecutor committed to working together to improve the outcomes on cases involving people with serious mental illnesses.

Judge, you have described Miami as a "19 year 'overnight success'" — What does that mean?

SL: The Miami-Dade Criminal Mental Health Project can be seen as a "19-year 'overnight success'" in improving how the criminal justice system connects people with mental illnesses and substance use disorders with appropriate community-based treatment. It did take time to build a robust collaborative approach from law enforcement through the courts, but as we broke ground this May on the new Miami Center for Mental Health and Recovery, it was hard to see our collaboration as anything but a success.

In Miami-Dade and throughout Florida, there were very few options for individuals charged with misdemeanors who had serious mental illnesses and were possibly incompetent to proceed. As a result, many of these individuals were returned to homelessness without any mental health treatment and continued to recycle through the criminal justice system. The status quo was not doing enough for either public safety or individual well-being and we decided to take action.

A first step was bringing together the relevant local leaders and stakeholders at a Summit in 2000 to "map" the existing connections between the criminal justice system and community-based care through a local Summit. The resulting Sequential Intercept Map[8] gave the stakeholders in Miami-Dade a common understanding of what was currently in place, as well as gaps to address.

A grand jury was empaneled in 2004 by State Attorney Fernandez Rundle to investigate the criminalization of mental illness in Miami-Dade County and to offer recommendations on how to improve the situation. It was a critical component to charting a course forward in tackling this very complex and difficult societal issue.[9]

We decided that a collaborative approach, rather than an adversarial one, was the best way to address this challenge and protect both public safety and public health. The courts, the state attorney, the public defender, law enforcement and community providers all entered into a written collaborative agreement, which established both a pre and post arrest diversion system to ensure individuals with serious mental illnesses either at risk of criminal justice involvement or already in the criminal justice system received access to treatment in the community.

"We decided that a collaborative approach, rather than an adversarial one, was the best way to address this challenge and protect both public safety and public health."

[8] The Sequential Intercept Model is a conceptual model developed by Policy Research Associates, which facilitates community "mapping" workshops. For more information, see: https://www.prainc.com/sim/.

Groundbreaking Photo — Miami MH Facility

Over the years, we've built numerous diversion programs, all based on this collaborative approach. We started slow, with non-violent misdemeanors, expanded to all misdemeanors, then non-violent felonies and now we have a competency restoration diversion program for individuals charged with non-violent felonies. We also added an Assisted Outpatient Treatment program for high utilizers charged with misdemeanors. It took time, and it took trust, but we've really made incredible progress.

How do you know it's working? What is the "success" that you see?

KFR: We have seen the number of arrests in Miami-Dade County go from high of 118,000 to 56,000. Our jail audit went from 7,300 to 4,000, and the County was actually able to close one of its three main jails at an annual savings of $12 million per year. The facility has now been closed for six years. Additionally, we have seen recidivism rates among our diverted misdemeanor and felony population significantly reduced. We've managed to save money and enhance public safety.

What advice do you have for others who are just getting started with tackling this issue or who are facing setbacks in their own diversion efforts?

KFR: It is clear that collaboration is key in addressing these complex issues such as mental health and substance use in the justice system. We need to work together because no one part of the system can solve this on its own. Prosecutors, judges, mental health providers; we all have a role to play.

SL: If you are first starting, we really benefited from getting everyone together for that first summit to map out the intersections between the community health system and the criminal justice system. Communities around the country have engaged in mapping exercises, some using the same process as Miami, and others using different approaches, such as focusing on a process flow and an inventory of community-based treatments and supports.[10] Think about both the traditional and non-traditional stakeholders; not just the courts and prosecutors, but also hospitals, schools and pediatricians to identify trauma much earlier than we do today.

For us, a written collaborative agreement was really helpful in establishing a common vision and a commitment to working together to make structural changes that may take awhile to happen.

What's next for Miami-Dade in addressing this issue?

SL: While our collaboration has led to significant improvements, there is still a small group of individuals who need a much higher level of services that are not available in our community and in most communities. As a result of the improvements, Miami-Dade County and Jackson Memorial Hospital together have allocated $42.1 million dollars to build the first of its kind forensic diversion facility. The Miami Center for Mental Health Recovery is projected to open in March 2021. This unique facility will offer both primary health and psychiatric treatment services along with all of the critically important social services necessary for recovery for the most acutely ill individuals who recycle the most through both the criminal justice and mental health systems.

For more information on national initiatives, research, and technical assistance in this area, Hallie Fader-Towe can be reached at hfader@csg.org.

State Attorney Fernandez Rundle can be reached at katherinefernandezrundle@miamisao.com.
Judge Leifman can be reached at sleifman@jud11.flcourts.org.

[9] This grand jury report, Mental Illness and The Criminal Justice System: A Recipe For Disaster / A Prescription For Improvement (2004) is available online at: https://www.miamisao.com/publications/grand_jury/2000s/gj2004s.pdf.

[10] For more information and examples, see Stepping Up: A National Initiative to Reduce the Number of People with Mental Illnesses, available online at: https://stepuptogether.org/products.

MEET THE NDAA TEAM

AGNITA KOTE

Director of Finance

Job Responsibilities

- Lead the Finance Department; responsible for the optimal use of the accounting and financial systems ensuring maintenance of accurate accounting records and implement policies, procedures and processes.
- Oversee all financial operations including accounts payable, accounts receivable, payroll, financial reporting, budgeting and forecasting.
- Manage cash flow to ensure funds are available for business needs.
- Ensure timely monthly financial closing and reporting while maintaining effective internal controls to reduce the chance of error, fraud, or misstatement.
- Prepare the association's financial statements for the Executive Director, Treasurer, EC and BoD.
- Ensure financial and administrative compliance with all federal grants; prepare drawdown requests, quarterly reports and reconciliations. Monitor grants to date budget vs. actual and report on significant variances. Prepare budget modification requests and submit to the appropriate federal agencies.
- Responsible for the annual financial audit preparation, audit fieldwork and draft and final statement review.

Qualifications

Graceland University, 2015
BA Business Administration
BA Organizational Leadership

Professional Memberships and Activities

American Institute of Certified Public Accountants

1 Before working at NDAA, what was the most unusual or interesting job you've ever had?

The most unusual work I've had is working as a supervisor in a telemarketing call center when I was in college. I was responsible for directing a team of 20 people.

2 What drew you to NDAA originally? And how has NDAA changed since?

I learned during the interview that NDAA had been through difficulties and my job would be a challenge. I also learned that the NDAA management and staff was working hard to strengthen the association. The challenge and the opportunity to work with passionate people is what initially drew me in. The progress for the past two years has been tremendous.

3 What do you like most about NDAA?

I like that in everything we do, we are thinking about our mission and how to give more back to our members.

4 What is your proudest moment at NDAA?

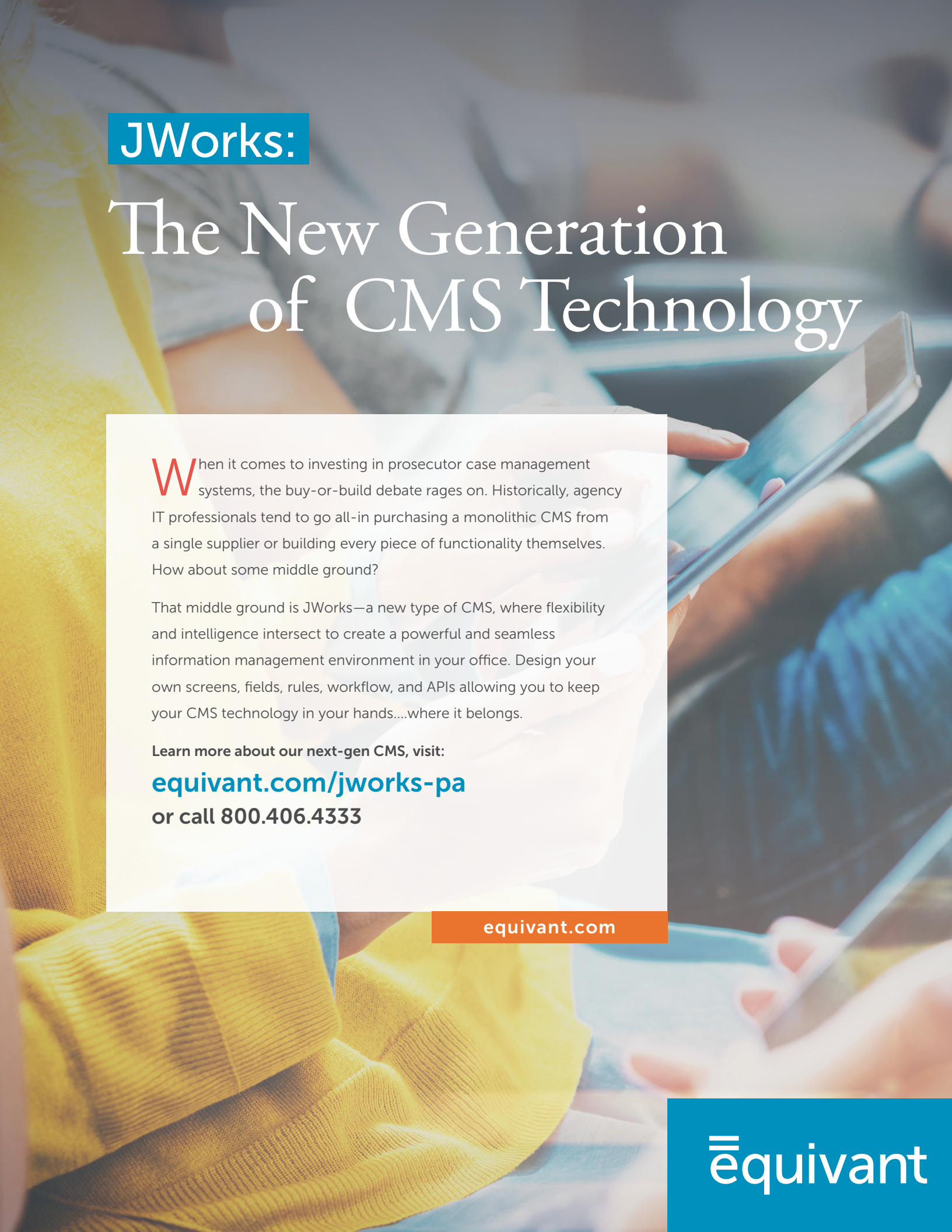
I am proud to have led NDAA through two consecutive clean financial audits that finally removed us from the high-risk auditee list.

5 Where is your hometown?

I was born and raised in Berat, Albania.

6 What do you like to do in your spare time?

I like to spend time with my family, read, work out, cook and take long walks.



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For more information, please visit

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