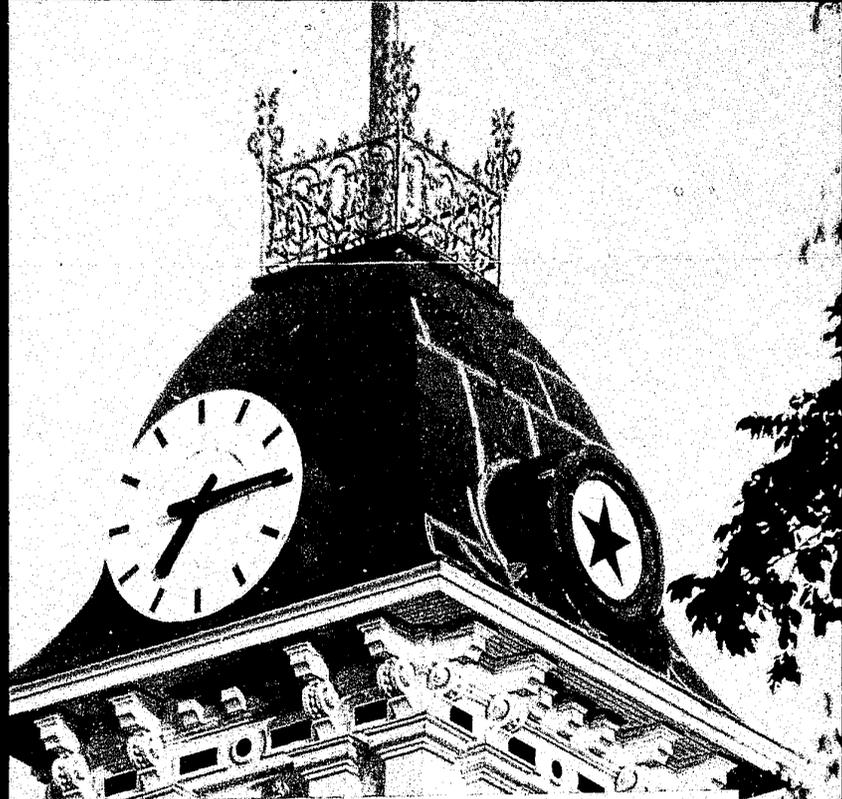


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The Judicial Response to the Drug Crisis



A Report of an Executive Symposium Involving Judicial Leaders of the Nation's Nine Most Populous States

Robert D. Lipscher

EDITOR'S NOTE: *Robert D. Lipscher is state court administrator of New Jersey. Last April, he and representatives from eight other states gathered for a symposium to discuss the state judiciary's response to the drug crisis. The final report of that symposium is printed here.*

A drug epidemic is sweeping the nation. It's been termed "a disaster of historic dimension" requiring a national mobilization by all our institutions. Because major responsibilities for controlling drug offenses devolve upon the criminal justice system, the judiciary,

as the fulcrum of that system, must perform its role with great competence if that effort is to succeed. However, campaigns to reduce drug supply and demand through vigorous enforcement of recently toughened drug laws have been mounted in many places without considering the

impact of these actions on the courts and on prosecutors' offices, the defense bar, and corrections agencies.

The effect of such policies can be highly counterproductive. When courts are swamped with cases, backlogs mount and delays increase. Particularly when prisons and jails are severely overcrowded and other meaningful sentencing alternatives are lacking, a massive increase in caseloads may undermine the credibility of a system in which resources are already severely strained.

The first steps toward mobilizing a response of the state courts took place in April 1989 with a conference in Philadelphia attended by court representatives from the nine most populous states (New Jersey, Pennsylvania, Illinois, New York, California, Florida, Michigan, Texas, and Ohio) and their guests. Because of their responsibilities for education, training, data collection, and budgets and system planning, the state court administrators called this conference, with the help of the Bureau of Justice Assistance and the National Center for State Courts, to assess the impact of drug initiatives on the courts and to begin determining steps the state courts might take in response.

This is a report of that conference.

Role of the courts

The conferees quickly established that the basic responsibility of the judiciary in drug cases is no different than in any other category of criminal offense: to determine guilt or innocence of the accused through timely and fair procedures and to sentence in accordance with the law. Drug cases include not only drug use, possession, and trafficking, but also criminal offenses stimulated by drug use.

The conferees noted that the ability of the courts to perform their role well is greatly affected by executive and legislative branch policies and programs. The executive branch, through its law enforcement agencies, determines how many alleged offenders will be arrested and prosecuted. The legislative branch determines which activities will be proscribed, sets limits upon the exercise of judicial sentencing and juvenile disposition power, and appropriates the resources that establish court capacity.

To assess the demands of the drug initiative on the judiciary, the conferees sought to understand the strategic directions of the executive and legislative branches with regard to drugs. Harvard University's Professor Mark Kleiman, a conference presenter, suggested that

since nationwide policies are still emerging, it may be too early to discern their full outline. Nevertheless, a document titled "Toward a Drug-free America: A Nationwide Blueprint for State and Local Drug Control Strategies" was distributed at the conference.¹ This document attempts to lay out a nationwide blueprint for state and local drug-control strategies based on the "combined thinking of state and local prosecutors, police, and sheriffs." This blueprint calls on state and local law enforcement agencies to control drugs through demand-reduction programs, focusing on the arrest of casual or recrea-

The general sense of the conference was that most trial courts are being overwhelmed by drug cases, but that hard data . . . were unavailable.

tional drug users and low-level dealers, and to leave to federal authorities the responsibility to curtail drug supply through interdiction programs and arrests of drug kingpins. It also asks legislatures to enact comprehensive and tough drug laws—laws that require stern punishment for *all* offenders—and enhanced punishment—including mandatory terms of imprisonment and periods of parole ineligibility—for the more egregious offenders. The document is largely silent on the crucial role of the judiciary.

The strategy of demand reduction proposed by this document contemplates a heavy increase in criminal sanctions well into the future—perhaps 15 to 20 years. This projection is founded on the hypothesis that it will require this length of time for tolerant social attitudes about drug use to turn around and for education, treatment, and prevention programs to become effective.

Increase in drug caseload

Few state judiciaries now have the ability to isolate information about their drug caseload on a statewide basis, but judges from major metropolitan courts have first-hand knowledge from what they see before them and offer reliable insight into how much of their caseloads relate to drugs. Almost all conferees from large urban courts reported a heavy volume of drug cases. Most representatives from state-level entities reported large increases in general criminal caseloads—most of which they felt, but could not be certain, were due to drugs. The general sense of the conference was that most trial courts are being overwhelmed by drug cases, but that hard data, collected on a broad and systematic basis to determine the extent and scope of the problem nationwide, were unavailable.

The conferees were concerned about the absence of this kind of information and expressed a strong interest in the regular and standardized collection of comprehensive drug data for several purposes: (1) to document the seriousness of the problem, (2) to define trends, (3) to establish and justify resource needs, and (4) to permit cross-jurisdictional comparisons.

Judges representing juvenile and family courts also noted an increase in drug-related crime in their jurisdictions. They pointed to many other unfortunate consequences of the drug crisis on court-involved youth: the hardening of the cases as youth crimes become more severe; the increased number of dysfunctional families because of parental addiction; the increase in child abuse and neglect cases; the greater number of children now being born with addiction problems; and the fact that children, on their own or with parental encouragement, are becoming involved in the drug business either individually or as part of juvenile gangs.

Reliable empirical data on the growth of drug usage were not available, but the conferees suggested that the heavy increases in drug cases now coming before the courts stem from concerted efforts by police to widen the criminal net and to make enforcement more strict. Some police departments consider no drug offense too minor to warrant an arrest. Police sweeps involving multiple arrests to displace trafficking activities are common.

The conferees noted that while demand-reduction arrests can be increased readily, sometimes on a wholesale basis, all court dispositions will still require the

same individual attention and careful processing through a complicated panoply of legal procedures. By their nature, these procedures are expensive and time consuming, and while some efficiencies can be gained, most of this caseload increase can be met only through expansion of court resources.

In the past, many prosecutors employed their discretionary authority to screen and thereby divert cases away from judges and out of the court system. In doing so, they functioned as gatekeepers to keep prosecutorial demands in line with court capacity. Conferees reported that prosecutors now exhibit much greater reluctance to serve that role with regard to drug cases. This unwillingness has helped open the floodgates to the courts.

Impact of drug cases on caseload

What, then, is the result of a burgeoning drug caseload combined with severe new penalties, strict prosecutorial policies, and no increase in court resources? Conferees report the situation is desperate. The overload causes backlog; backlog feeds delay; and delay (along with the lack of jail and prison space) imperils rights to timely consideration, undermines deterrence, and breeds contempt for the law. In some states, speedy trial programs based on the certain expectation of firm trial dates and court control of its calendar have been devastated. Defendants now play the system to avoid consequences they regard as overly harsh. As trial lists grow longer and jails fill up, more defendants are placed on bail, largely unsupervised, for longer periods of time. There are no figures to show the amount of crime they commit while on bail, but the number of fugitives is increasing.

Conferees warned of either an imminent or existing caseload crisis and possible breakdown of the system if solutions are not found soon. Courts are trying hard to adjust by diverting judges from civil to criminal calendars (further stretching already strained resources) and taking other internal management steps to improve productivity. But the sense of the conferees was that the scope of the new drug control initiatives are so momentous that judicial self-help measures, while necessary and desirable, fall pitifully short of actual requirements. Courts do not have the volume, no matter how they stretch and strain, to deal with a problem of this magnitude.

As one judge put it, the mouth of the funnel has been enlarged but the size of the neck remains the same. Under these conditions, overflow is inevitable. The conferees expect the drug problem to continue indefinitely, making permanent enlargement of the judiciary essential if courts are to do their job. More judges; more court staff; more probation officers; and more prosecutors, public defenders, and support staff were all deemed essential if the courts are to continue to perform effectively their mission of doing justice in individual cases with expedition and fairness to all.

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The conferees were not unaware that the call for additional resources goes hand-in-hand with a demonstration on the part of the judiciary that existing resources are being effectively used, but the conferees believed that additional productivity by itself would not be nearly enough to meet the explosion in drug cases; therefore, unless steps to add resources are taken soon, constitutional values and community safety could be jeopardized.

Further concern related to the impact on the civil justice system. Resources are now being diverted from the civil caseload to meet the drug emergency. Some observers predict that if nothing is done to remedy the current crisis within the next few years, civil jury calendars in the nation will, for all practical purposes, be shut down. Already, civil litigants who can afford to pay are beginning to resort to private courts.

While additional resources were seen as the single most important factor to restore proper functioning to the courts, there was general agreement that some additional capacity could be found through measures to improve productivity. Conferees recommended training in modern court management methods for more judges and investigations into better ways to manage drug cases. Agreement on caseload management methods that fix responsibility for case movement with the judiciary from arrest to termination of criminal cases was seen as essential.

Bail, pretrial supervision, and sentencing

Congested courts inevitably mean that disposition will be delayed. Yet the longer bailed defendants stay on the street without supervision, the greater the chance they will ignore their court date or perhaps commit another crime. Judges are frustrated by their lack of effective control over bailed defendants before trial and urge more supervised bail programs.

Conferees were very much concerned by the lack of realistic sentencing options and the scarcity of drug treatment facilities. Prisons are overcrowded, probation is underfunded, adequate alternatives to incarceration do not exist, and treatment programs are largely unavailable. Judges often see the same people appear in court over and over again. They want a court process that metes out effective sentences and that helps deter. Adequate prison space is required for those who must be incarcerated. Yet meaningful punishment also must be available for those offenders who are convicted but need not go to prison. Programs providing strict control and treatment of offenders in the community are critically needed. Overall, the conferees reported widespread feelings of frustration about the lack of sentencing alternatives.

Along with a broader range of sentencing alternatives, conferees were eager to identify successful programs that could be matched with offenders' needs. Therefore, in addition to more alternative sentencing programs, the conferees called for additional research on how to sentence drug offenders effectively.

Research and experimentation

Research and the search for more reliable knowledge about what is working were mentioned often during the conference. While conferees were especially inter-

ested in effective sentencing options, they also wanted to see more knowledge develop about better ways to manage drug cases from arrest to trial.

Some conferees were concerned about whether it was sound from a public policy perspective to emphasize criminal sanctions as the primary focus of the war on drugs. Research is needed to determine if the policy is achieving its objectives and to demonstrate how judges can best use their discretion to support the policy. Also, research is required to establish trends and point out directions for the future. To analyze trends, research must extend beyond the court experience. Trends analysis requires coordination with all other components of the criminal justice system. All need to compare notes about what they are seeing and to project the likely consequence of what is occurring.

The conferees called for greater creativity and innovation, more experimentation and testing, better information and analysis, and regular opportunities for exchange of knowledge among policymakers, court personnel, criminal justice practitioners, and researchers.

Communication and coordination

The surge of drug cases came upon the courts very fast. In passing harsher drug laws and implementing very aggressive law enforcement policies, the legislative and executive branches seem not to have considered the impact this huge flood of cases would have on the courts. Building the judiciary's capacity to respond must now become a priority. Recognizing that swift arrest, speedy trials, and certain punishment are all keys to deterrence, the conferees pointed out that punishment can neither be certain nor trials speedy unless courts and the entire adjudicative side of the criminal justice process are beefed up along with police and corrections. A weakened court system that doesn't have the muscle to deal effectively with accused offenders sends a message to the street that the system has neither the will nor the way to confront the drug problem. Once users and pushers know from their experience that swamped courts will treat criminal behavior lightly, the court system loses credibility and the rule of law is threatened. Therefore, if society hopes to resolve the drug problem through heavy reliance on criminal sanctions, it cannot ignore the courts.

The conferees expressed the desire for better communications and coordination among the courts and criminal justice agencies, placing particular stress on the importance of making the judiciary's situation known to the legislature, and recommended regular and continuous feedback to that body about court needs and priorities as well as successes and failures.

Education

The conferees agreed that the public, the legislature, and the various constituencies that deal with the judiciary need better information about the courts' role in deal-

A weakened court system that doesn't have the muscle to deal effectively with accused offenders sends a message to the street that the system has neither the will nor the way to confront the drug problem.

ing with drug cases and the problems the courts face in carrying out their mission. The conferees recognized the dangers of judicial involvement in partisan affairs, but many believed judges should accept greater leadership responsibilities, particularly in public education, and could do so without becoming involved in legislative policy matters. There was discussion of the judiciary becoming more proactive in educating the public, and the suggestion was made that judges might serve as conveners or coordinators of meetings to bring various parties together to discuss common problems without compromising their neutral position.

Summary and conclusion

In sum, the conference expressed the view that the courts face a profound emergency

brought on by the efforts to control the use and sale of illegal drugs and concomitant criminal and juvenile behavior problems.

Courts are falling behind because they do not have the resources to deal with the volume of criminal and juvenile delinquency cases now coming before them. The current number of judges and staff is too small for the task. An immediate increase in capacity is essential to move cases expeditiously and to do so in a way that guarantees constitutional protections, commands respect for the law, and retains the confidence of the public in its institutions.

If the criminal process is to be effective, judges must have meaningful sentencing options to deter and rehabilitate offenders. Judges need more effective sanctions and methods to treat and control drug offenders. More arrests alone will not solve the drug problem; a balanced response requires speedy court processes and sentencing programs that work.

Conference follow-up

The conferees requested that a summary of the deliberations be prepared and that as a follow-up to the conference, the state court administrators who were present develop a list of recommendations for further actions. Their recommendations follow.

CONFERENCE OF CHIEF JUSTICES AND THE CONFERENCE OF STATE COURT ADMINISTRATORS

The Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA) each have very important roles in fashioning the state judiciaries' response to the drug crisis. Both conferences should be asked to place this topic on the business agenda of their next available meeting, and a copy of these deliberations should be made available to all chief justices and state court administrators.

COORDINATION WITH THE FEDERAL GOVERNMENT AND ITS AGENCIES

To assist in coordinating the national and state-level drug programs, CCJ and COSCA should consider forming a small national group that could establish liaison with congressional committees, the National Drug Policy Office, and other federal agencies. In this way, the state courts can play a structured role in the develop-

ment of coordinated plans and programs, provide input into the allocation of federal funds, and recommend ways in which the state courts could best be served by federal assistance.

DATA FOR STRATEGIC PLANNING

As a basis for strategic planning and decision making, the state courts need detailed information about drug caseloads and the resources the courts have available to deal with them.

The National Center for State Courts (NCSC), through CCJ and COSCA, should be requested to coordinate a nationwide effort to collect this information. It would be particularly valuable to encourage some jurisdictions that may have the information capability already in place to develop prototypes immediately so they can be transferred at an early date.

DRUG CASE MANAGEMENT

Experiments are under way to determine the efficacy of "drug courts" and special management techniques, such as differentiated case management, to deal with drug cases. These experiments, and others of like nature, are valuable and should be continued. Evaluative results should be widely circulated.

The Bureau of Justice Assistance (BJA) should be encouraged to continue its efforts to explore effective drug management approaches. The State Justice Institute (SJI) should be requested to open up drug case management as a particular area for priority funding.

Courts cannot adopt one strategy for drug case management while prosecutors and defenders each follow their own. Case management strategies must be coordinated. State and local consensus might be more readily achieved if basic principles underlying effective case management strategies could be developed through national leadership. A national working group representing court, prosecutor, and defense communities should be convened, through NCSC, to attempt to develop these principles.

RESEARCH AND EVALUATION

Much is yet to be learned about drug cases. Which cases should be given priority, what sentences are effective, which treatment programs work and why, what is the average cost for processing various kinds of drug cases, does diversion work, what is the real impact of mandatory prison and parole ineligibility terms, is driver's license revocation an effective sanction,

what approaches best achieve general and specific deterrence, and—perhaps the most basic question of all—is demand-reduction working; if so, how can the courts help to make it most effective?

Judges need answers to these questions and others. More hard data are needed about pretrial diversion, drug testing, and alternatives to incarceration. Current information about the design, operation, costs, and effectiveness of such programs are insufficient. Cost-benefit information is especially important to help legislatures with their funding decisions.

The National Institute for Justice (NIJ), BJA, SJI, and other funding agencies

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should target questions such as these for immediate research and evaluation.

MULTI-STATE COLLABORATION

State courts should continue efforts to work together on drug-related problems. State court administrators, through COSCA, should be invited to appoint a liaison on their staffs to facilitate drug data collection and dissemination, to exchange program information, and to assist in sharing research results.

EDUCATION

The National Judicial College is developing a special educational program about drugs for judges. More educational efforts of this nature are needed to inform judges and court personnel. The National Association of State Judicial Educators should be alerted to this requirement. State court

administrators should assure that quality drug education is available to all judges and court personnel who handle criminal and juvenile delinquency matters.

State and local efforts to educate the public about the court's role in meeting the drug crisis are needed. At the national level, the help of the American Bar Association should be enlisted in making the public aware of the emergency the courts face. State and local bar associations also should be contacted.

STATEWIDE JUDICIARY DRUG TASK FORCE

Each state should consider establishing a judiciary drug task force or cooperating in an existing drug task force, as the case may be. Judiciary drug task forces could coordinate judicial branch efforts, establish liaison with criminal justice groups, and facilitate communications with the legislative and executive branches on drug-related issues.

BROOKINGS-INSTITUTE-STYLE MEETING

Several years ago, the Brookings Institute of Washington, D.C., brought representatives of the federal judicial, legislative, and executive branches of government together for an overnight meeting away from their chambers and offices in an atmosphere conducive to relaxed and informal conversations. Those meetings have proven successful, serving to open lines of communication that previously did not exist.

The depth of the drug crisis underlines the importance of improved interbranch communications. Each chief justice might consider inviting the attorney general, governor's counsel, and key legislators to join with judges in a Brookings-style meeting to discuss the drug problem.

NATIONAL DRUG CONFERENCE

CCJ and COSCA should consider a request to NCSC to convene a national conference on the drug crisis, involving as many states and groups as would want to participate. scj

Notes

1. "Toward a Drug-Free America: A Nationwide Blueprint for State and Local Drug Control Strategies." Report of the Executive Working Group for Federal-State-Local Prosecutorial Relations. National Association of Attorneys General, National District Attorneys Association, 1988.