PRISON REFORM TRUST

WINSTON CHURCHILL MEMORIAL TRUST

Breaking out of the courtroom: how free are US judges to engage and innovate?

Penelope Gibbs 2014

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Background

I have worked in the criminal justice sector for around eleven years, first voluntarily as a magistrate, then leading a programme to reduce child imprisonment for the Prison Reform Trust. Finally, three years ago, I decided to set up a new charity -Transform Justice- to work for a fair, humane, open and effective justice system in the UK. My experience as a magistrate, and work in the sector, has inspired a strong interest in the judiciary. For Transform Justice I have researched and written two reports on magistrates' training and development and on diversity. Over the years I read of problem solving courts in USA and of American judges who blogged and tweeted. I visited Red Hook Community Court when on holiday in New York in 2011 and met the charismatic judge Alex Calabrese, who had a strong relationship with both criminal justice agencies and the Red Hook community. I wanted to find out to what extent his approach was shared by other judges across the USA.

Purpose of the Winston Churchill trip

The aim of my trip was "to inform the debate in England and Wales on judicial reform, through understanding best practice from the US. I would like to come back understanding how US judges treat defendants in court, and the contribution made by recruitment, culture, training and development to that behaviour". Overall I wanted to understand how US judges are involved in and affect the reform of the criminal justice system.

I spent a month in June 2014 in three areas of USA – Washington DC, the Detroit area of Michigan and Portland, Oregon. I observed court hearings, attended meetings in the courtroom and interviewed judges, prosecutors, defence attorneys, campaigners and criminal justice practitioners.

While I was in USA, I blogged regularly and all the posts are in the appendix and on my charity's website www.transformjustice.org.uk/?page_id=8. I quote from the blogs in this report.

All the judges (and others) I met were open, and incredibly generous with their time. My thanks particularly to Julius Lang of the Centre for Court Innovation and Judge Kevin Burke, who smoothed the way; and to Judges Russell Canan, Kay Hansen, Elizabeth Hines and Ann Aiken.

Executive Summary

The US criminal justice system is seldom seen as worth emulating, particularly in its use of imprisonment. But some aspects are innovative and effective. This report looks particularly at the role of US judges in fostering innovation and engaging with the wider criminal justice system. I travelled to the USA in June 2014 to meet with and observe US judges, who exemplified these qualities.

The way judges are selected in much of USA explains why they are engaged with others in the criminal justice system, and with communities. Many are elected, and most are subject to renewable tenure. Competitive elections can have many negative effects, but they do encourage candidates to connect with people outside the courtroom and to be sensitive to their criminal justice needs. Even if appointed not elected, most judges do not have jobs for life. When they apply to have their tenure reviewed, their performance is evaluated and feedback sought from lawyers, and others, who have appeared before them. This encourages them to treat prosecution and defence advocates and their clients with respect and understanding.

Judges in USA operate within a court based, adversarial system, but they have considerable freedom in innovate in some ways. Judges pioneered and have championed the development of problem solving courts throughout the USA, starting with the first drug court set up twenty five years ago in Florida. Problem solving courts like community courts, drug courts and mental health courts involve judges with criminal justice agencies, with health practitioners and with fellow judges from across the country. These courts also enable judges to have a closer and more motivational relationship with offenders, whose rehabilitative progress they review regularly.

Many judges in US courts have little connection with communities and preside over their courts in a similar way to those in England and Wales. But my research in the USA for the Winston Churchill Fellowship suggested that a minority of judges there operate in a radically different way to judges in England and Wales. They tweet and blog, they are involved in local and state policy development and they have radically changed what courts provide and how they operate. The freedom enjoyed by these judges is dependent on the localised administration of US justice. Most courts are organised on a state or county basis, and the judges themselves make decisions about staffing and how courts and sentences are organised. They

cannot however change much in the sentencing framework, including the use of mandatory sentences.

The USA provides a different administrative and recruitment framework for judges from that of England and Wales. Few would ever want their judges to be elected in England and Wales, but it would be possible to foster greater innovation here, and greater judicial involvement with the wider criminal justice system through localising decision making and adapting judicial culture.

The US Criminal Justice System

The U.S. Constitution is the supreme law of the land in the United States. It creates a federal system of government in which power is shared between the federal government and the state governments. Both the federal government and each of the state governments have their own court systems. In cases of federal law, the same laws apply across all the states. Most federal laws deal with serious crimes. When it comes to state law, each state can make their own laws and rules, but they cannot take away rights guaranteed under the U.S. Constitution. Some states have unified court systems and they are run by the centralised state government, whereas some states administer their courts at a more localised county level. State courts handle some very serious crime but also misdemeanours (minor offences) charges, and local law violations that may not rise to the level of a criminal charge.

The US system is an adversarial system – defendants are represented by defence advocates and are prosecuted by prosecutors. Defendants are innocent until proven guilty. Most of the Chief Prosecutors in the United States are elected and are usually politically aligned. In specialist courts, sometimes known as problem-solving courts, the process begins in an adversarial manner until a plea or disposition is recorded. There are usually prosecution and defence advocates in specialist courts, but the process is not adversarial after the sentence/programme has been agreed upon.

Each state has a different policy on judicial training for state court judges. Some mandate introductory and ongoing training; some don't. No state makes judges undergo specific training to run a specialist court, but most judges will attend conferences and/or take relevant courses. There are many training opportunities for specialist court judges, and that training is

provided by both NGOs (non-governmental organisations) and state-run organisations.

Judicial Elections: Recruitment and Retention

Most US judges are elected, but that election is often a formality. In many states, the local government administration appoints judges to fill vacant posts. These judges must in theory be willing to stand against others next time there is an election, but judges often "stand" uncontested, and are then confirmed in their position. But in Michigan many of the judges I met had had to fight a contested election at least once. None of them relished the process - it was expensive, very few people voted (particularly since judges came at the bottom of a long ballot paper) and judges were sceptical as to whether people understood who to vote for. Candidates are not allowed to solicit for money, so had to persuade others to do it on their behalf. Their fund-raisers are often defence attorneys in private practice – colleagues who appeared in their court.

Most judges are opposed to judicial elections and concern about aspects of the system is growing. In Washington DC, I met Bert Brandenburg who runs Justice at Stake, a non-governmental organisation (NGO) which campaigns for judicial elections to be clean, open and low budget, and is supportive of states which don't elect judges. Bert told me of elections where judicial candidates had used TV advertising to besmirch their rivals, and others where huge sums had been spent. It appeared that the worst aspects of US political election campaigns are present in some judicial elections, though no judge is allowed to stand on a party political ticket. Every state that elects judges has different rules.

For all the negatives of the judicial election system, there are some positives. It opens up judicial posts to anyone suitably qualified who wants to put their hat into the ring and, more importantly, it means that judges have to connect with and listen to the concerns of both the criminal justice and the wider community. This can only be to the good.

In some states, such as Colorado, judicial elections have also prompted a very sophisticated evaluation system to help voters decide which judge to vote for. This evaluation system is managed by a committee with lay representatives, and involves surveys of court users. It thus gives members of the community an opportunity to be involved in the judicial electoral process and to contribute their own views.

Colorado's Commission of Judicial Performance

Colorado set up a Commission of Judicial Performance www.coloradojudicialperformance.gov (6 non-lawyers and 4 lawyers) in 1988. The commission presides over and organises the election of judges and the evaluation of judges. The judges' evaluations are developed through survey questionnaires completed by a random sample of people who have appeared in court before the judge: attorneys (including prosecutors, public defenders, and private attorneys), jurors, litigants, law enforcement personnel, employees of the court, court interpreters, employees of probation offices, employees of local departments of social services, victims of crime, and appellate judges. In addition, commissions consider a self-evaluation completed by the judge, courtroom observations, review of decisions, review of judge statistics such as relevant docket and sentencing statistics, and a personal interview with the judge. The commission gives advice to the electorate on each judge – retain/do not retain/no opinion. The descriptions of each judge's feedback are an amazing read. Each details the judge's best and worst points and whether the lawyers surveyed thought he/she should be retained. Advocates rate judges for "treating participants with respect", "doing the necessary homework and being prepared for cases", whether they are biased in favour of prosecution or defence etc. Every single result of the evaluation survey is published. (Blog June 24th 2014)

Even judges who are not elected are subject to evaluation in many states and districts. Many US judges have fixed tenure and the renewal of their tenure is often influenced by evaluation by the local branch of the American Bar Association, which represents both prosecution and defence lawyers. The American Judicature Society has analysed all the approaches of different states (www.judicialselection.us/judicial_selection/methods/judicial_performance_evaluations.cfm?state=). Most states don't evaluate judges' performance, but an impressive minority do. And most evaluation commissions are dominated by non-lawyers, though lawyers are always represented.

A more informal approach is represented by the Robing Room (www.therobingroom.com), a website enabling any lawyer to rate any judge. A list of the top and bottom ten judges in the country is on the front-page. It's not clear how popular or used this site is, but its very existence shows a thirst to give feedback on judges.

Specialist courts - judicial involvement in action

Specialist problem-solving courts are well established in the US system, and growing in number the whole time. The first type to be established were Drug Courts, which started in Florida as a result of judicial frustration. Judge Gerald Wetherington felt that drug addicted offenders were in a permanently revolving door to prison, and that no-one in the criminal justice system was helping address the root causes of addiction. He gave his Deputy, Judge Herbert Klein, a year-long sabbatical to research a fresh approach. Judge Klein found that fresh approach in Brooklyn where the hospital offered long term outpatient treatment to drug addicts, based on acupuncture. He came back to Miami and in 1989 the two judges started a programme for drug addicted offenders, offering services to these clients. If they complied with the programme, they could avoid prison. If they relapsed and were open about that relapse, they'd be given another chance. If they relapsed and lied, they would be sent to prison.

There are now drug courts of all kinds throughout the USA and elsewhere. Some are termed sobriety courts, some are oriented towards drunk drivers, some are targeted at veterans (people who served in the forces), others at those released from prison. They are set up in different ways from court to court – there are ten principles which courts follow but no absolute blueprint. Drug courts differ partly because each is set up by an individual judge, and there is no-one dictating how each individual judge does it.

Other specialist courts have grown up of which street outreach courts and mental health courts are the most popular.

Setting up a specialist court

In a small area, such as a rural county, I was told that a judge can set up a specialist court from scratch fairly easily. He or she will know all the players in the local criminal justice system. Judge Marco Hernandez, Federal District Judge in Portland, Oregon, used to be a state court judge in Washington County, Oregon. There, he set up a mental health court from scratch and said the process was fairly straightforward. He called all those who needed to be involved, and set up a working group to plan how the court would work. After a year, the court was ready to go. He did not have

to find any extra resources because all the criminal justice agencies agreed to incorporate work for the new court into their normal work, and most offenders in USA have to pay for their own treatment whether it is part of a sentence or not.

This ease of set up is not always the case, and some judges face quite a struggle to set up specialist courts. Of all I met, Judges Cylenthia LaToye Miller and Kay Hansen in Downtown Detroit had fought the hardest. The Downtown Detroit Street Outreach Court (www.socd.streetdemocracy.org) was actually the brainchild of a community organisation, but it could not have got off the ground without the judges' drive and enthusiasm. The two judges fought resistance from the Presiding Judge of the Detroit state court, and from the bailiffs, an important force in US courts. All those involved in setting up this court for homeless people wanted it to be held outside the courthouse itself, in an environment less intimidating to these clients. Most existing homeless courts are held in hostels or community centres. Homeless people are frequently terrified of courthouses. They fear that, as soon as they get in, they will be shackled and imprisoned for previous misdemeanours, or for non-payment of fines. But the bailiffs also fear the homeless people. Bailiffs provide security in courthouses and rooms. They search people and bags as they enter the courthouse and have strength in numbers in the courthouse, should any offender turn violent. The bailiffs were very concerned about the security implications of holding a court hearing in downtown Detroit, outside the courthouse itself. They felt that they would not be able to give adequate protection to the judge and court staff. Eventually the two judges persuaded both the new Presiding Judge and the bailiffs to let them start the court in a local hostel for the homeless. There has been no violence whatsoever in court hearings. And the court has been a success in other ways. Of those who graduated, 95% got stable housing, 82% had a stable income and none re-offended. (Blog June 18th 2014)

Engagement with practitioners and the community

One of the most impressive elements of the specialist court model is not the court hearing itself, but the pre-meeting and other informal meetings. All the specialist court judges I met held a meeting in the courthouse, to go

through all the cases before the hearing itself. This meeting was sometimes held just before the hearing, sometimes the day or week before. All the practitioners involved in that specialist court came to the meeting – in the

case of a drugs court, probation, addiction counsellors, therapists, prosecution and defence advocates attended. In Washington DC a forensic drugs expert also came. This meeting was as long, if not longer, than the

actual court hearing since every case was discussed in some detail. The probation officer led the discussion.

Ann Arbor Sobriety Court Pre-Meeting

"The progress of each case was discussed with great warmth, patience and understanding. The probation officer gave a summary of the progress of each offender, including whether they had been late for or missed any appointments, whether they had tested positive or negative for substances and what engagement they had had with AA (Alcoholics Anonymous) or NA (Narcotics Anonymous). Other practitioners chipped in with their observations on progress. The team agreed next steps in each case, so the court process the next day would be as supportive and free of conflict as possible – other than occasionally from a client utterly fed up with the strictness of the programme. The judge in the pre-meeting was the chair of the meeting, and the ultimate decision-maker. But he was not interested in imposing his will because he had the highest respect for the team, their expertise and their greater knowledge of the clients themselves – whether their relapses were just moments of weakness, or signs that they could not cope with the programme. A mental health practitioner observed that more and more of her sobriety court clients had eating disorders. She asked the court administrator whether she could have the money to start a new therapy group for this. The court administrator didn't say no, the programme is set in stone, and the resources finite. She listened carefully and promised to try to find the money. That conversation meant everyone was aware of a growing need amongst the clients. The court was not obliged to meet that need. But in treating their client group holistically, they were keen to support them as effectively as possible. The judge listened to this exchange and will undoubtedly follow the progress of the eating disorders group, and offer to help navigate the bureaucracy if needed". (Blog June 21st 2014)

In addition to the pre hearing meetings, I observed other informal meetings related to the specialist courts.

After the mental health court hearing in the Washington DC State Court, Judge Ann Keary chaired a regular "training" meeting. Attended by representatives of all the main mental health services, by defence, prosecution and probation, the meeting heard from practitioners who offered a group therapy programme focused on trauma. (Maybe English forensic therapists do trauma work, but dealing with trauma seems a more important part of sentences in US). The meeting also heard how providers

of residential mental health services had started to accept offenders on methadone, and how all felt there was a gap in services for those with learning difficulties/disabilities. The judge led the discussion and agreed to put this gap in services on the agenda of a wider stakeholders meeting she would be attending soon.

Engagement with offenders

In the Portland, Oregon, Federal Court, I observed an informal meeting of judges with an offender. Before anyone starts the re-entry court programme, Judge Marco Hernandez and Judge Paul Papak like to meet the participant, to ensure they understand the programme, and its "rules". A re-entry court is a specialist (usually Federal) court which deals with offenders on parole. In return for time off parole, those released from prison complete a strict programme of abstinence, attending NA and AA, voluntary work, seeking employment, and attending court regularly to report on progress. If they do not comply with the programme, they can be taken off it, thus losing the opportunity to be released from parole early. If they re-offend they are likely to be returned to prison.

After the re-entry court hearing, the two judges (and a few other practitioners) sat down with a young woman who had been referred to the programme. She was late, but they still made time to see her. Everyone met in a meeting room round a table; the judges had no robes on. The two judges explained to the woman what the programme involved, and asked her how she felt about it. She said she was nervous about speaking up in a court-room and they reassured her. It was a very normal, human conversation and illustrated the best of the way judges can interact with offenders in USA – humanely and with respect.

In specialist court hearings, the voices of defence and prosecution advocates are seldom heard, but the voice of the offender is. In all the specialist courts I observed, judges interacted directly with offenders - commenting on their progress, encouraging them to find an NA sponsor, chiding them if they had missed any group sessions, discussing how they might square the circle of working and having to attend many appointments and groups. In many courts, the judges had seen the participants in court many times, and they had a relationship. In the sobriety court in Ann Arbor, Michigan, "Client after client stood up to be congratulated for their progress, or encouraged to get a bit more organised or to "share" more at therapy meetings. All those in the A team (compliant) had their names put into a draw and the winner got a $25 voucher. And no-one swore or even sulked at the judge. He said he would miss one client, because she laughed at all his jokes. Another client asked the judge whether he liked the sketch he had drawn

of him. The atmosphere was warm and friendly but the judge still wore his robe, sat on high and commanded the respect of the court. The threat of imprisonment for non-compliance was still there". (Blog June 21st 2014).

Engagement with services

Each specialist court judge ran that court consistently, sometimes over a number of years. They knew the practitioners (some of whom had also worked with the court for years) and they understood in some detail the services offered. This meant that, in the court-room, they had the knowledge and understanding to have informed conversations with offenders about what different services and approaches could offer. Many of the judges were so engaged with services that they understood the gaps and tried to close them. In Washington DC, Judge Ann Keary sat on the mental health court every day. In the "training" meeting she convened, she agreed to press for better services for those with learning difficulties and disabilities. In Baltimore, Maryland, Judge Jamey Hueston presided over a long running drugs court. She knew and had visited all the addiction services in the vicinity of the court. She "noticed that young black men often did not do as well on the standard programmes as others. She heard of a new programme focussed on young black adults with addiction problems, tried hard to make Baltimore a pilot for the programme and, when that failed, manoeuvred to get the resources to try it in her court. Judge Hueston believes that a more therapeutic, holistic approach to addressing drug-driven criminal behaviour really works – and there is a growing body of evidence to prove it". (Blog June 11th 2014)

A judge from Michigan made a different kind of effort to improve services. He was concerned about access for poor court users. "Public transport is incredibly limited, so courthouses are not actually accessible (nor is work, shops etc) unless you have a car. This makes justice much less local if you don't have a car – if you are very poor, or if you have had your licence taken away. Hence the power of sobriety and homeless courts to help their clients – both help poor people to drive/drive again. However some offenders have to manage temporarily or permanently without a car. And they are reliant on buses. A judge I met yesterday (Tom Boyd who sits in Ingham County Michigan) determined to help his bus-using clients. He met representatives of the bus company and persuaded them not only to move the bus stop from a block away, to right outside his court, but also to give training to his staff in the bus network and service. He also persuaded them to give the court a discount on bus tickets and some free passes, so his staff could help the poorest offenders". (Blog June 21st 2014)

Perhaps the most unusual example of a judge fighting to improve services was the Chief Judge of the District Court of Oregon, Ann Aiken. When she was a state court judge in Eugene, Oregon "she did many family cases and was struck by the need of the families she saw for better childcare – both for the development of the children themselves and for the parents' education in parenting skills. The Relief Nursery in Eugene met that need – it offered "therapeutic early childhood services and comprehensive family support, including alcohol & drug recovery support services". So Judge Aiken rang up the manager and asked if there were nursery places for the children whose cases she was dealing with. The answer was a resounding no. The nursery was full and had a waiting list of children, all with high needs. But Judge Aiken isn't the type to take no for an answer, when she thinks there is a way through which would help stop the cycle of abuse and offending. She resolved to help build the capacity of the nursery through offering her time sitting on the committee planning a new building. As a judge she couldn't fund-raise herself, but she could and did spread the word about the important work the nursery did. Needless to say the nursery got the money, and they began to lay the groundwork for the building when Ann's first child was three days old. The new building had room for more children, including those involved in the justice system. This example shows how a committed, energetic judge in USA can get things done which benefit justice, but which are not strictly justice services. Not all US judges can be bothered, but if a judge has the energy and commitment, there is nothing to stop them". (Blog July 15th 2014).

Engagement with other judges

Judges in England and Wales meet over lunch, at training and in the dwindling number of judges' lodgings. But I'm not convinced that there are similar forums for the cross fertilisation of ideas as in the USA. A lot of the current ideas in the US judicial system are spread by judges talking to each other, on and offline, and going to conferences. The American Judges Association, the National Center for State Courts and the National Association of Women Judges have active memberships, and many of the judges I met had a network of colleagues in other states. There are also specialist forums in which judges meet others who share their passion – the National Council of Juvenile and Family Court Judges, the Center for Court Innovation (champions of community and other specialist courts), the National Association of Drug Court Professionals (NADCP). There are even local associations of drug court professionals in individual states. These organisations offer judges the opportunity to learn about new types of court,

and new approaches (eg procedural justice, therapeutic justice) from peers, and the spread of specialist courts is partly due to this interaction. Organisations like the NADCP help judges engage not just with other judges, but with practitioners and academics as well.

US Judges are not afraid to attend conferences run by NGOs. The Annie E Casey Foundation has run a programme to reduce the imprisonment of children for many years. I met the Director just after their bi-annual conference. He said many judges had attended the two day conference, and that judges had been instrumental in helping to reduce the number of children imprisoned in USA.

One of the simplest ways I observed of judges learning from other judges was in Portland, Oregon. There two judges – Hernandez and Papak – ran the re-entry court together as a team. They went to all meetings together and took turns to preside over the court hearing. When one judge was presiding, the other sat in the well of the court-room observing. Thus they learnt from each other and followed the progress of every programme participant, whether or not they were presiding.

Judges' ability to be open

US judges' ability to express themselves openly and to meet members of the community helps them innovate and connect. Judges cannot comment on court judgements, or on government policy. But they can and do blog and tweet on matters judicial. The American Judges Association hosts a popular blog by Judge Kevin Burke (www.blog.amjudges.org) on all matters judicial. Judges' campaigning on issues is unusual, but not unknown. Judge Mark Bennett of Iowa has campaigned against mandatory prison sentences for non-violent drug offenders. He wrote in the Nation, a mainstream magazine, "as a federal district judge in Iowa, I have sentenced a staggering number of low-level drug addicts to long prison terms. This is not justice" (www.thenation.com/article/170815/how-mandatory-minimums-forced-me-send-more-1000-nonviolent-drug-offenders-federal-pri#).

Judge Steve Teske of Georgia has campaigned successfully against the "school to prison pipeline" – the way children were being prosecuted for minor incidents in school, like playground fights. "Teske brought together educators, police and social service and mental health counselors, parents and students. After nine months, leaders settled on a new protocol for four misdemeanors: fights, disorderly conduct, disruption and failure to follow police instructions. Now, instead of making arrests, police issue warnings

for first offenders. Repeat trouble means workshops or mediation. Only then may a student land in court. For chronic offenders, a system of care is in place to help resolve underlying problems" (www.washingtonpost.com/lifestyle/style/judge-steve-teske-seeks-to-keep-kids-with-minor-problems-out-of court/2011/09/21/gIQA1y8ZsL_story.html).

The judges presiding over community courts are encouraged to liaise with community organisations and hold meetings with the community. The judges go out to find out what are the key concerns about crime and also to get feedback on whether the community feels the court is efficient and effective in improving community safety. I observed a community court in Washington DC this trip and had previously visited Red Hook Community Court in New York.

Judges and data

On the basis of my visit I cannot say that US judges have more access to and are more interested in data about the criminal justice system than judges elsewhere. However I did come across a few examples of judges who were trying to use data to improve the service offered by their court. Chief Judge Ann Aiken, whom I met in Portland, made a presentation to the Reinvent law conference (www.reinventlawchannel.com/hon-ann-aiken-reinventing-reentry-reducing-recidivism) appealing for someone to design an app which would help clients of her re-entry court access services. She said re-entry courts had spread across the states "there is a social network of judges who share information and who are hungry to get data, and to get the understanding of how we can do our jobs better. Because we can solve cases, we can make decisions, but what a legacy if we can change how we address criminal justice issues and make our communities safer for the next generation". Judge Aiken had commissioned a study on the evidence base for successful rehabilitation after release to inform the set-up of her re-entry court in Eugene, Oregon. She also commissioned an evaluation study early on. Judge Aiken wanted someone to design an app for those on her programme, partly to help them, partly to make it easier to gather data about their needs.

Judge Ann Keary in Washington DC, was also interested in tracking the outcomes of those who went through her court. When I met her, she was embarking on a study of people who had left her mental health court. She was interested in whether those who attended the mental health court remained engaged with mental health services after they graduated from the court programme.

It wasn't clear whether US judges had better quality data about the performance of their court, the outcomes of sentences and the effectiveness of specialist courts. But some judges were keen to gather what data they could and to conduct or commission their own evaluations.

Judicial involvement in government policy and its implementation

The involvement of the judiciary in the development of policy is controversial whether in England and Wales or in USA. But it happens much more in the States. In England and Wales, judges have conversations with ministers, and may be consulted on significant changes in legislation before they are drafted. Magistrates and judges appear before parliamentary committees. But that is as far as it goes. Judges in England and Wales never comment on the rights and wrongs of government policy.

In USA, judges are not officially politically affiliated, but many are unofficially. Appointments to Federal Courts are made by the Governor of the day, and some state court judges are former DAs – all of whom run for election on a political platform. These judges have strong connections to local politicians.

In Oregon, Democratic Governor Paul Kitzhaber in 2012 set up a commission to make policy recommendations that would improve public safety and save money on prisons. He appointed Chief Justice of the Oregon Supreme Court, Paul de Muniz, to head up the new Public Safety Commission. All the other members of the commission, bar one, were politicians. Judge Paul de Muniz was very active in shaping the recommendations of the commission. The commission recommended measures that would reduce the Oregon prison population, including abolishing much mandatory sentencing and introducing justice reinvestment models which would move resources from prison into community programmes. Pew Trusts (www.pewtrusts.org/en/research-and-analysis/fact-sheets/2013/05/28/public-safety-in-oregon), supported the work of the commission with research, and tried to influence politicians in the Oregon State legislature to pass legislation to support the recommendations.

De Muniz, who has now retired as a judge, was interviewed by Pew about his involvement.

Q: What motivated you and the judiciary to get involved in sentencing and corrections reform in your state?

"I saw Oregon's sentencing and corrections reform effort as an opportunity for judges to work closely with legislators in a setting that was not directly related to court funding. In addition, much of Oregon's sentencing policy was established through the initiative process, and that stripped away a lot of judicial discretion in favour of mandatory minimums. After 23 years on the bench, I saw the need for reforms that were evidence-based and used risk assessment tools to really deal with the character of the offender and the character of the offense.

Q: How did the process and outcomes benefit from having all three branches represented? How did you interact with the prosecutors and defense bar throughout the process?

It was tough. There were some very entrenched views. I think my relationship with the prosecution and the defense bar was helpful in getting us through different points of disagreement, but there certainly was never unanimity in the policy positions we presented to the Legislature. Still, I think the governor and legislators could be confident in the commission's final report, because it represented so many different perspectives.

Q: What aspect of your state's reforms are the most significant and why?

De Muniz: With the reforms that were ultimately enacted, prison growth will remain flat for at least five years, and projected savings for Oregon are $326 million over the decade. House Bill 3194 specified that the money we save will be used for justice reinvestment, primarily in evidence-based practices that are proven to make our community safer by reducing recidivism.

Q: What have you learned as a result of your efforts? Any surprises?

De Muniz: I learned from polling and focus groups that the public is poorly informed about crime rates and that, despite the drop in crime we've experienced, sensationalizing of crime by the media makes people unaware that they are safer. I also learned that once people are told that proven, evidence-based programs can make our communities safer, they are willing to spend money on those. If you show them the data, they favor alternatives and don't remain in lockstep supporting longer sentences and more incarceration.

I also think it's important to emphasize that the driving force is not cutting costs, but discovering what combination of sentencing and corrections policies will make our community safer and, at the same time, save taxpayer dollars. (www.pewtrusts.org/en/research-and-analysis/q-and-a/2014/01/24/judging-for-public-safety)

The Oregon Public Safety Commission did result in some significant changes in Oregon legislation including the introduction of justice reinvestment, and the modification of some mandatory sentences for drug possession. But it did not succeed in modifying measure 11, a measure which was passed in 1994 as a result of citizen pressure and which dictates mandatory sentences for a wide variety of crimes. Judge Paul De Muniz was always vocal about his support for judicial discretion and concern at high levels of incarceration. But an interviewee who worked closely with the commission, said very few sitting judges came out in support of the recommendations. Retired judges were more open in their support.

Sitting state court judges have been heavily involved in the implementation of one of the reforms – justice reinvestment. Each county has been able to apply for justice reinvestment funds. These funds are to reduce recidivism, protect public safety, control prison growth and provide funding for community based sanctions, services and supervision. Two of the state court judges I met in Portland, Oregon, sat on the Multonomah County Justice Reinvestment Program board, together with citizen representatives, police, prosecution and representatives of the Department of Community Justice (local government). The board proposed a new way of assessing the needs and risks proposed by offenders, and a new intensive 120 day programme which is an alternative to custody. If this new approach is successful in reducing prison sentences, the County will be able to apply again for justice reinvestment funds.

Judges I interviewed were also active in trying to influence judicial practice and local policy which affected the courts. In Michigan I spoke to a judge who had "campaigned" to get judges to change how they sanctioned those who did not pay court fines. In USA, as in England and Wales, non-payment of fines is "a big problem, exacerbated because the welfare system is less generous, and because some judges resort to imprisoning those who have not paid their fines. This is both unconstitutional and against case law, but in pockets the practice persists. A judge I met was very unhappy about the situation. She didn't imprison non-payers herself (unless it was absolutely clear that the person could in fact pay their fine), but was disturbed by the justice meted out to others. Her passion for social justice impelled her to use her networks to influence policy and practice. She thus persuaded the key stakeholders in her state to let her draft a protocol on the sanctions available for non-payment of fines. Imprisonment (apart from exceptional circumstances) was not on the list. This is an example of how judges in USA improved the system". (Blog June 19th 2014).

There is right wing criticism of "activist" judges in USA –they are accused of transgressing judicial neutrality and independence. But, of the judges cited, I think only Judge Paul De Muniz might be labelled an "activist". The other judges simply used their influence to improve the justice system or to make it easier to access the court.

What could English and Welsh judges learn from their US counterparts?

You cannot isolate US judges from the US criminal justice system. The sentencing regime is far harsher than in England and Wales, with offenders imprisoned for longer, and for less serious crimes. Sixteen year olds are punished as adults in many states (including New York), and many states still mete out the death penalty. At the lowest level, misdemeanours which might only attract a telling off by a local policeman in England, are processed into formal court hearings. But judges who preside over that harsher system have little choice about it. A minority of US judges try to innovate to make the system better.

- They set up community and specialist courts, sometimes in the teeth of substantial opposition.
- They engage directly with criminal justice, social, health and social services practitioners so that they can better understand the needs and the progress of the offenders in their specialist courts
- They engage directly with offenders in specialist courts, celebrating their success, comforting them for the relapses they admit to, and chiding them for those they try to hide.
- They try to change legal practice
- They try to improve the experience of court users and outcomes of offenders
- They engage with the community about their legal and safety concerns
- They engage actively in policy development

Most judges, apart from those who are appointed by the State – Federal judges – are also forced to have more interaction with the legal community and other communities because they are either elected or need to have their tenure renewed.

There are many lessons we would not wish to learn from the States, including over-use of incarceration and mandatory prison sentences. Despite some advantages, I do not advocate for the election of judges. But I was incredibly impressed by some aspects of the system, by the judges I met, and by the more local bureaucratic framework and culture within which they operated.

Our system in England and Wales is very different. It is more centralised and the judiciary more hierarchical. England and Wales has lay justices. However I think we could learn some "lessons" from the USA

1) Judges can engage effectively directly with offenders, motivating them to desist from crime and recover from addiction/access help for their mental health problems. This engagement does not compromise their judicial independence.
2) Judges can engage directly with a community in a particular area (in the community court model) to understand more about the impact of crime in that community and to hear concerns about the effectiveness of the criminal justice system.
3) Judges make more informed decisions in the court-room if they engage with the practitioners who work with offenders, and understand the programmes and services offered in some detail. That engagement with offenders is enhanced when the judge has engaged with practitioners about that individual offender.
4) Judges who understand gaps in services for offenders (and other court users) can be very influential in advocating for better services.
5) Judges can be involved in policy development without attracting criticism from the public, practitioners and politicians for their involvement. But the way they are involved needs to be carefully managed.
6) A more localised administration of justice can foster innovation.
7) Fixed tenure of judicial posts and judicial elections can lead to more scrutiny of judicial performance.

Some of these "lessons" are based solely on my observations and interviews on this trip, while others are backed up by other research. The main barriers to implementation in England and Wales are:

- The centralisation of our courts and judicial administration make innovation by individual judges more difficult
- The separate culture of our judiciary and the "doctrine" of judicial independence

- The paucity of problem-solving courts and the lack of political interest in setting them up
- Judges in England and Wales have job security and thus do not need to engage with the community, with other agencies and/or criminal justice practitioners in order to carry on working as a judge
- Lay justices are part time (some sit only 13 days a year) so have less time to engage with practitioners and communities; and it is more difficult to schedule their time so they might supervise particular offenders

Appendix

Itinerary

Washington DC

w/c 2nd June 2014

Angela Bellota and Marcy Mistrett, Campaign for Youth Justice
Professor Caroline Cooper, expert on drug courts, American University
Tim Curry, National Juvenile Defender Center
Suzanne Agha, Vera Institute of Justice
Diann Rust-Tierney, National Coalition to Abolish the Death Penalty
Marc Mauer, ehe Sentencing Project
Richard Jerome and Zoe Towns, Pew Trusts
Nate Balis, Annie E Casey Foundation

w/c 9th June

DC state court. Meet Judge Canan, observe community court, juvenile court, mental health court, drug court
Meet criminal justice partners, and the DC courts research team
Judge Jamey Hueston, Baltimore Drug Court
Bert Brandenburg, Justice at Stake
Lisa Pilnik, Coalition for Juvenile Justice
June Kress, Council for Court Excellence

Detroit area

w/c 16th June

Detroit state court, domestic violence court, meeting with those who set up street outreach court (Judges Kay Hansen and Cylenthia La Toye Miller)
Judge Cynthia Walker, Pontiac court
Dinner with judges
Conference call Pam Casey, Judge Roger Warren, National Center for State Courts,
Judge Brian MacKenzie, Novi sobriety court
Ann Arbor veteran's court graduation, homeless court, felony court, sobriety court (Judges Elizabeth Hines, Joseph Burke and Christopher Easthope)
Brian Mackie, Chief Prosecutor, Washtenaw County, Michigan
Dinner with Judges (inc Judge Tom Boyd)

Portland, Oregon

w/c 23rd June

Meeting with Michael Schrunk, retired DA
Judge Nan Waller, Presiding Judge State Court
Judge Julie Frantz, Multnomah County State Court
Rick Jenson, Juvenile Justice Centre
Craig Prins, Executive Director, Oregon Criminal Justice Commission
Ann Aiken, Chief Judge, US District Court
Marco Hernandez, Judge, US District Court
Observation US District Court, Portland, re-entry court (inc Magistrate Judge Paul Papak)

Blog Posts

June 4, 2014

US judges – more innovative than English judges but still lacking organisational power

It's depressing but also uplifting to hear about the US system of criminal justice. I'm here on a **Winston Churchill Memorial Trust Fellowship** finding out about the influence of US judges on the wider criminal justice system. This morning I met **Professor Caroline Cooper**, a mine of information on US judges and particularly drug courts. The story of their inception was inspiring. Gerald Wetherington, a judge in the Miami area, was fed up with having to send drug addicts to prison, where they would get no treatment and be likely to reoffend on release. In the late 80s Gerald, the Chief Judge of Dade County, decided to do something about it and gave his equally fed up Deputy, Herbert Klein, a year off sitting (!) to work out how the court system could better deal with drug addicted criminals. Herbert travelled the US, and was most impressed by the outpatient service at the Lincoln hospital in the Bronx, where addicts went on a 12 month programme involving acupuncture. He returned to Dade County and the two judges conspired to set up the first dedicated drugs court. This referred offenders to treatment based on the Bronx model – a public health solution to a justice problem. This and other drugs court were set up because of judicial enthusiasm. The contrast with England and Wales is telling. Nearly all specialist and community courts have been set up by civil servants, with judges going along with the will of the executive. Judge David Fletcher led the Liverpool Community Court with huge enthusiasm and ability. But the idea came from and was implemented from Whitehall. There is so much not to learn from the US, but we should emulate US judicial innovation.

But some things are similar, and not ideal for driving through change…judges in US have very little power over other judges, even if they are nominally their superior.

June 4, 2014

Are US judges interested in penal reform?

Marc Mauer of **the Sentencing Project** offered a sobering statistic. If the prison population of the USA declines at the same rate it has recently, it will take over 80 years to return to the level of 1980 ie the much-lauded decline has been extremely small. Marc felt that with the growing prevalence of mandatory sentencing provisions, particularly in the federal system, that judges had only limited power to reduce imprisonment. He said drug courts were good, but only dealt with the lowest level of drug offender, so had not impacted on prison nos. And he pointed out few Federal judges had exploited a 2005 Supreme Court decision allowing them greater discretion in sentencing. In the end, he felt the answer to reducing the USA's enormous prison population lay in changing legislation, not in influencing the judiciary.

Richard Jerome, of the **Pew Charitable Trust**, had a slightly different viewpoint. Pew tries to reduce imprisonment softly, softly. They offer their resources to States who wish to improve their criminal justice system. They only go in if accepted by all the key stakeholders in the State. Then, their promise is to make the criminal justice system more cost effective and effective, which incidentally involves less use of prison. They seek the support and collaboration of the Chief Justice in each State, even in deliberating on policy change. Richard says many judges welcome the opportunity to be part of the reform process, and support efforts to curb the prison population.

I can see how they are both right. Both see legislative change as the most powerful lever to reduce imprisonment, while they differ somewhat in their views on the judiciary's desire for change.

June 8, 2014

Reduction in child custody- a US success story

Its easy to get gloomy about mass incarceration in USA. The numbers are so huge and people imprisoned for so long. But there is a big success parallel to that in England and Wales. Child custody has gone down 40% since the peak in 1995. Its still too high, and way higher (at 225 per 100,000) than in England and Wales. Its difficult for an outsider to judge, but it seems huge credit is due to the Annie E Casey Foundation (AECF) for this drop. AECF has focused on reducing child custody (or as they call it juvenile incarceration) for around 10 years. Its a huge and complex job when every state has totally different legislation and criminal justice systems. AECP has focused initially on changing practice in each state, rather than changing legislation, setting up **Juvenile Detention Alternatives Initiatives** to encourage local stakeholders to use community approaches. Nate Balis, the new director, and I discussed how AECP has encouraged states to restrict these alternatives to those who genuinely would have got custody instead. The danger in creating any new and very attractive alternative is that judges use it as an alternative to community sentences, rather than an alternative to custody. I think this is what happened to women's centres in England and Wales. DJs and magistrates liked them and used them, but for offenders who were always going to get a community sentence. So initially women's centres, seemed to have little impact on women's imprisonment.

June 11, 2014

US judges – involved or aloof?

This morning in Washington DC I observed a very busy drugs court. The judge, Gregory Jackson, runsthe drugs court every day. He knows the providers of substance abuse services, the prosecutor and the public defender. He understands all the different drugs and the toxicology tests. The drugs court in DC is a diversionary court. The judge doesn't know and isn't interested in the offences of those before him. Others screen offenders for their suitability for the drugs court. All the judge is interested in is whether offenders complete the drugs treatment programme. Its pretty tough, with residential treatment for the most serious, frequent random drugs tests for all, and attendance at groups and one-to-one appointments. Compliance is about keeping clean. I got the impression that this, and honesty about relapses was the most important aspect. If the programme is completed, the case is dismissed and the offender has no criminal record for whatever offences brought them into the drugs court. The judge does little traditional judging, but does decide whether to give an offender another chance, or the benefit of the doubt. He celebrates those who do well and presides over a graduation every week for those who have completed the programme. I saw a judge totally engaged in and committed to getting offenders off drugs. Every morning, Judge Jackson met with prosecution, defence, toxicologist and drug treatment staff to discuss the pending cases. The meeting was collaborative. Nothing said in the meeting tied the hands of the judge, but they did share information and agree a starting point for later discussion. There is a question mark for me as to whether drugs courts are best suited to the US context. But what today's experience really showed was that judges could be very involved with agencies and work with all practitioners in a team, without losing their gravitas or ability to exercise independent judgement.

June 11, 2014

A mental health court in DC – adversarial or inquisitorial?

To my shame, I have never visited a mental health court in England. But I was hugely impressed by the one I saw this morning in Washington DC. Having heard that services in USA were sparse, I've been surprised to hear of what sound like pretty good mental health services available, with good access to residential treatment for mental health and drug abuse problems. Practically all those who attend the mental health court seem to have drug addiction as well as mental health problems. The court is a diversionary court. If the offender completes the programme, their case is dismissed, unless it is a felony (more serious) case, in which case the sentence is completing the programme.

Offenders were treated with infinite patience, with missed appointments for the most part tolerated, as long as there was some compliance. Like the drug court I saw yesterday, it was not really adversarial. Everyone, including the prosecutor, seemed to be working collaboratively to get offenders to access and turn up for treatment. Did it need a court to do this? Possibly not. But this seemed a very humane way to deal with mental ill offenders, if they are to be processed by the criminal justice system. Possibly more impressive was the meeting I observed afterwards, led by the mental health court judge – Ann Keary. Attended by representatives of all the main mental health services, of defence and prosecution, the meeting heard from practitioners who offered a group therapy programme focused on trauma. Maybe English forensic therapists do trauma work, but dealing with trauma seems a more important part of sentences here (I also came across it at Red Hook community court). The meeting also heard how providers of residential mental health services had started to accept offenders on methadone, and how all felt there was a gap in services for those with learning difficulties/disabilities. The judge led the discussion and agreed to put this gap in services on the agenda of a wider stakeholders meeting she was attending imminently.

The judge sat on the mental health court all week, and was an expert in offenders with mental health problems. She did or initiated research in her spare time on the outcomes of her court. She wanted to do a piece of work on whether those who attended the mental health court remained engaged with mental health services after they graduated from the court programme. Was her judicial independence compromised? I think not. Any offender who was charged with a new, serious crime, or who missed many appointments, was kindly ejected from the mental health court, back to the mainstream courts.

June 13, 2014

A glimpse into the juvenile court in Washington DC

Most children under 18 are seen by the juvenile court in DC. All court proceedings are closed and unlike in England and Wales, all judges who preside over the juvenile court specialise only in juvenile crime and family cases. I observed the trial and "sentence" of a boy accused of assault. As with a District Judge, the case was decided by the judge without jury. In this case the verdict was guilty, but what to do next was very complicated. The boy was already subject to an extensive mental health assessment and was recommended for residential treatment. The challenge for the judge was to persuade his mother to consent to her son being given medication. It took the judge much patience and determination to persuade the mother that he needed medication to help control his mood, and to facilitate treatment. I silently cheered when the mother eventually consented, since she evidently cared about her son, and her son needed the help. In the UK, the situation would be different. It is the consent of the child not the parent that is required, and there are few options for children for residential mental health treatment, particularly those in the criminal justice system.

June 14, 2014

Elections for the judiciary in USA – a barrier to penal reform?

In many states of the USA, judges are elected by the people. And in some of those states, Judges are allowed to spend unlimited amounts of money on elections campaigns. This morning I was shown some of the TV adverts prospective judges put out. Some were scary, particularly for penal reformers – negative advertising accusing rivals of letting criminals loose, and worse. Judges are not allowed to ally themselves with political parties, but they can pitch to attract the popular vote and/or accept funds from those who they may have to adjudicate over. This fight for votes, by those who should be independent, is bad for justice and not particularly democratic, since very few turn out to vote. **Justice at Stake** campaigns for any judicial elections to be clean, open and low budget, and is supportive of states which do not elect their judges. Bert Brandenburg, its director, does however agree that there are some advantages to having judges elected eg that it exposes them to public meetings, and gets them to engage with community concerns. However, Bert feels that this positive engagement could be incorporated in judicial practice without necessarily having elections. As well as CPD, he suggests judges should also do compulsory public education. What a great idea.

June 18, 2014

Setting up the Detroit homeless court- a truly collaborative effort

The effort involved in getting the **Street Outreach court** in Detroit off the ground was immense, but there are now more than 20 courts in USA for homeless people, so the effort has been multiplied. The first street court in USA was set up in San Diego, inspired by a passionate defence lawyer **Steve Binder**, who felt that homeless people had a particularly poor experience of the courts. They were faced with the kafkaesque situation – they often amassed a series of fines, which they could not pay. Given their criminal records, they could not get stable housing or jobs. Parking fines were a particular problem. So because they could not pay their parking fines, they could not get the means to pay their parking fines. The Street Outreach court idea in Detroit actually came from community organising. Molly Sweeney was working with Detroit Action Commonwealth, a homeless organisation run by the homeless. They had identified the court system as THE key barrier to reducing homelessness. Molly and her colleagues investigated San Diego, wrote their wish list for a Detroit street court, and starting searching for a friendly judge. Luckily, a pastor who was involved with the project had a parishioner – Cylenthia LaToye Miller – who was a judge. At the request of this pastor, Cylenthia went to a meeting about the project and was totally enthused. But then began a long struggle to get the court up and running. Judge Miller was aided in this by the support of one of the other judges in the Detroit state court, Judge Kay Hansen. One of the key barriers for all concerned was the proposed location of the court. Detroit Action Commonwealth and Street Democracy (the other homeless organisation involved) said homeless people were afraid of and distrusted the court itself and wanted the court to be sited in an environment in which homeless people felt comfortable. The court authorities said that the security of the judges and court staff would be at risk if the court was held in a non court building. In the end, amazingly, the powers that be did agree to let the Street Outreach Court be held in the Capuchin Soup kitchen, quite a way from the court. And the judges agreed that they would do this street outreach work in addition to their normal work. Just about two years ago the court started. In the first year recidivism was 0%. Security problems were non existent. 95% of participants got into stable housing. A homeless court like this would be unnecessary in England and Wales. The accumulation of fines is not the key barrier to homeless people getting on their feet. But this example of how a new court got off the ground speaks volumes about the ability of US judges to take an idea and run with it, to (with a lot of effort) improve the service they offer and get better outcomes.

A few **clips** and links about the court are **here**.

June 18, 2014

The veterans' court graduation – an emotional experience

I have never seen so many offenders say thank-you in a court as I did this morning. It was the first graduation ceremony of the Veterans' Treatment Court in Ann Arbor. Around 10 Veterans who participated in the programme (really a sentence) were congratulated for completing it, given certificates and each received a beautiful hand-made quilt made by a volunteer. There were speeches from local dignitaries and, one by one, each veteran-offender thanked the court and its staff for helping them get back on their feet. To a man, and one woman, they said that the court ordered programme gave them opportunities and services they would not have accessed otherwise. The whole thing was truly moving and it was easy to forget that they were talking about a very rigorous programme – of therapy, of no alcohol whatsoever and of sanctions for non compliance. Everyone who attended the ceremony was invited for drinks and cakes afterwards in the court building.

There is no doubt that such a court was unique to USA culture. They have a greater proportion of ex military than in UK and a weaker mainstream welfare system. But they do have a fair well funded veterans' health and welfare system dedicated to that group. Plenty of veterans fall through the cracks after discharge – they find it hard to cope without the structure of military life, and too often suffer mental health problems, drink too much and/or take drugs and commit crimes. When veteran offenders are convicted, probation officers filter them into the court, where they can benefit from the specialist services available to them.

It's not an American idea that could be easily translated. But the spirit behind it possibly could – of designing a programme to meet very particular needs, which is so supportive that those who complete it are deeply grateful for the court experience. They seemed genuinely grateful to the Judge Christopher Easthope, and he in turn was clearly proud that his court had achieved such positive outcomes. Having spoken to and observed a number of these problem solving courts, it is clear that the personality of the judge is key. They need to be committed to taking some risks, to engaging directly with offenders and to fighting for the services their offenders need. They need to care. Many English judges fit those criteria, but I'm not sure they are as able as US judges to use those skills, partly because we have so few problem solving courts.

June 19, 2014

Fines – a transatlantic problem

The imposition of fines is at the cornerstone of both US and English justice. Fines are imposed on court users for the lowest level of offences ("misdemeanours" in US). But the problem with fines is that, though relatively cheap to impose, those who need to pay them back are generally the poorest of the poor. Both countries have huge problems getting people to pay court fines. I suspect our system in the end loses money because the administration of processing and chasing and writing off fines probably costs more than the fines themselves. In US its also a big problem, exacerbated because the welfare system is less generous, and because some judges resort to imprisoning those who have not paid their fines. This is both unconstitutional and against case law, but in pockets the practice persists. A judge I met was very unhappy about the situation. She didn't imprison herself unless it was clear as day that the person could pay their fine, but was disturbed by the justice meted out to others. Her passion for social justice impelled her to use her networks to influence policy and practice. She thus persuaded the key stakeholders in her state to let her draft a protocol on the sanctions available for non-payment of fines. Imprisonment (apart from exceptional circumstances) was not on the list. This is an example of how judges here improve the system. Involvement with civic stakeholders is essential to success.

June 21, 2014

Therapeutic jurisprudence in action – the Baltimore drug court

In the short time I've been in USA I have seen some amazing judges. Or maybe judges allowed by the specialist court model to be amazing. Judge Jamey Hueston set up the drug court in Baltimore 20 years ago. It is was the fifth in the whole USA. Jamey started off as a drugs case prosecutor but was always interested in the harm drugs did to poor communities. Soon after she became a judge, she set up the new drug court, which is now established in Baltimore, as it is in many other US states.

Jamey is passionate not just about the drug court, but about therapeutic jurisprudence – a holistic model of judging which focuses on meeting the therapeutic needs of offenders. The drug court I observed was absolutely collaborative, with everybody in the court room willing the offenders to get clean. Most of the offenders have been on drugs for many years, so breaking a way of life is hard. Even the bailiff (security guard) in the court gives pep talks to offenders who are downcast. Any "client" who has done well since their last drug court appearance is marked on the blackboard as getting into the A team and the team claps. "Clients" early in their programme have to sit in court throughout the half-day session to learn from the others who appear before the court and provide a supportive audience for those who have done well. Relapses are tolerated as they are learning drug-free behaviours. They key is that "clients" are honest and Jamey is passionate not just about the drug court, but about therapeutic jurisprudence – a holistic model of judging which focuses on meeting the therapeutic needs of offenders. The drug court I observed was absolutely collaborative, with everybody in the court room willing the offenders to get clean. Most of the offenders have been on drugs for many years, so breaking a way of life is hard. Even the bailiff (security guard) in the court gives pep talks to offenders who are downcast. Any "client" who has done well communicate what is happening in their lives, for good or ill.

Judge Hueston is definitely the star of the show. Absolutely empathetic, rooting for those who do well and encouraging those who are having difficulties. She commands huge respect from court staff and the "clients", and her praise clearly means a lot to those struggling with addiction.

June 21, 2014

How to get the bus to stop right outside the court

Michigan has way more court-rooms per head of population than England. Every town of any size has its own court, and in a town like Ann Arbor there are two big courthouses, one for misdemeanours, and another for felonies. There are many courthouses with just two, three or four judges. Pontiac, a declining industrial community of 60,000, has four judges and a substantial court house. Novi, a suburb of Detroit, has a courthouse with three judges, even though there is a big courthouse in downtown Detroit. No city or county wants to close their courthouse, since it is seen as an essential part of community infrastructure. Budgets are tight, and in some cases, staff have been cut (in Pontiac the next judge who retires will not be replaced) but the courthouses remain. So everybody has a courthouse relatively near.

The rub comes with transport. Public transport is incredibly limited, so courthouses are not actually accessible (nor is work, shops etc) unless you have a car. This makes justice much less local if you don't have a car – if you are very poor, or if you have had your licence taken away. Hence the power of sobriety and homeless courts to help their clients – both help poor people to drive/drive again. However some offenders have to manage temporarily or permanently without a car. And they are reliant on buses. A judge I met yesterday (Tom Boyd who sits in Ingham County Michigan) determined to help his bus-using clients. He met representatives of the bus company and persuaded them not only to move the bus stop from a block away, to right outside his court, but also to give training to his staff in the bus network and service. He also persuaded them to give the court a discount on bus tickets and some free passes, so his staff could help the poorest offenders. People talk of activist judges as if they are involved in politics and policy. But in my experience of meeting judges, some are just more active and proactive than others.

June 21, 2014

Bitten by the specialist court bug?

I think I've been bitten by the specialist court bug and need to pinch myself to remember how different are some of the fundamentals of criminal justice in USA. For a start most of the crimes dealt with by the lowest (and specialist) courts in the US would not be dealt with in court at all in England and Wales. Unlawful driving away of a car and theft are considered so serious that they are dealt with by the higher courts. A second degree (unpremeditated) murder attracts a minimum sentence of 32 years in prison. And offenders here pay for their own sentence – they have to pay probation costs if they are fortunate enough to get a community sentence.

Nevertheless I do think the speciality courts are breaking the mould of court justice through changing the power dynamic and the atmosphere of the court. I observed two sobriety courts this week in different courthouses, one focused almost entirely on drunk drivers, the other more broadly on addicted offenders. The courts supervise and review the progress of those under-going intensive rehabilitation programmes. All such courts base treatment on the 12 step programme which starts with abstinence (from drink and/or drugs) and provides constant volunteer and professional support to help the addict stay sober. The pre-meeting of the second sobriety court was a superb example of team work. Attending were all the professionals involved in supporting the offenders, from police to mental health practitioners, from probation officer, to defence, prosecution, courts administration and the judge himself. The progress of each case was discussed with great warmth, patience and understanding. The team agreed next steps in each case, so the court process the next day would be as supportive and free of conflict as possible – other than occasionally from a client utterly fed up with the strictness of the programme. The judge in the pre-meeting was the chair of the meeting, and the ultimate decision-maker. But he was not interested in imposing his will because had the highest respect for the team, their expertise and their greater knowledge of the clients themselves – whether their relapses were just moments of weakness, or signs that they could not cope with the programme. A mental health practitioner observed that more and more of her clients had eating disorders. She asked the court administrator whether she could have the money to start a new therapy group for this. The court administrator didn't say no, the programme is set in stone, and the resources finite. She listened carefully and promised to try to find the money. That conversation meant everyone was aware of a growing need amongst the clients. The court was not obliged to meed that need. But in treating their client group holistically, they were keen to support them as well as possible. The judge listened to this exchange and will undoubtedly follow the progress of the eating disorders group, and offer to help navigate the bureaucracy if needed.

The actual court the next day was a fitting culmination of that in-depth team preparation. Client after client stood up to be congratulated for their progress, or encouraged to get a bit more organised or to "share" more at therapy meetings. All those in the A team (compliant) had their names put into a draw and the winner got a $25 voucher. And no-one swore or even sulked at the judge. He said he would miss one client, because she laughed at all his jokes. Another client asked the judge whether he liked the sketch he had drawn of him. The atmosphere was warm and friendly but the judge still wore his robe, sat on high and commanded the respect of the court. The threat of imprisonment for non-compliance was still there.

June 24, 2014

Judging the performance of judges – a US approach

There is no doubt in my mind that electing judges is a bad idea. Most people in the criminal justice system in US agree that those voting have no idea how to judge which judge to vote for, particularly as the latter are not party political. As a result, people can end up voting for individual judges because they know them personally or because they have seen their advertisements. Most potential voters will not have seen these judges in action or have any objective information by which to select one over another. But a few states have introduced systems to help the voters decide. Colorado has a well established **Commission of Judicial Performance** (6 non lawyers and 4 lawyers) which organises a comprehensive evaluation of each judge. "The trial judges' evaluations are developed through survey questionnaires completed by a random sample of persons who have appeared in court before the judge: attorneys (including prosecutors, public defenders, and private attorneys), jurors, litigants, law enforcement personnel, employees of the court, court interpreters, employees of probation offices, employees of local departments of social services, victims of crime, and appellate judges. In addition, commissions consider a self-evaluation completed by the judge, courtroom observations, review of decisions, review of judge statistics such as relevant docket and sentencing statistics, and a personal interview with the judge". The commission gives advice to the electorate on each judge – retain/do not retain/no opinion. The descriptions of each judge's feedback **are an amazing read** . Each one details the judge's best and worst points and whether the lawyers surveyed thought he/she should be retained….every single result of the evaluation survey is published.

Even judges who are not elected are subject to evaluation in many states and districts. Many US judges have fixed tenure and the renewal of their tenure may rely on evaluation by the local branch of the American Bar Association, which represents both prosecution and defence lawyers. The American Judicature Society has **analysed all the approaches of different states**. Most, it has to be said, don't evaluate judges performance, but an impressive minority do. And most evaluation commissions are dominated by non-lawyers, though lawyers are always represented.

A more informal approach is represented by **the Robing Room**, a website enabling any lawyer to rate any judge. A list of the top and bottom ten judges in the country is on the front-page. I have no idea how popular or used this site is, but its very existence shows a thirst to give feedback on judges. Whether they welcome it is another matter.

June 24, 2014

Why is it so difficult to embed problem-solving courts in England and Wales?

My experience in USA has made me ask why it is so difficult to embed problem solving courts in our system. My thinking has been strengthened by the new book **Transforming Criminal Justice? Problem-solving and court specialisation** by Jane Donoghue. Jane is a supporter of problem-solving justice, and of the specialist courts which practice it. She is despondent about the ability of the English Court System to incorporate problem-solving. I'd agree, particularly now. Our current Lord Chancellor seems to have little interest in specialist courts. There is no civil servant in the main bit of the Ministry of Justice working on specialist court policy and the demise of the West London Drugs Court seemed to go unnoticed by the centre. I suspect that many of the English specialist courts listed in Jane's book do not thrive any more. One of the problems Jane identifies is that of achieving judicial continuity with lay magistrates. The presence of the same judge is an essential part of problem solving courts. The specialist courts I saw in Michigan and Washington DC were definitely the fiefdoms of particular judges. Normally one, or in rare cases two, judges presided over a particular court. Each judge had their own court team of court recorder, bailiff and PA and they knew the whole practitioner team who worked with that particular group of offenders. There was no scheduling problem. The probation officer and court organiser screened suitable cases and they were then dealt with by that one judge. The hearing sometimes only lasted an hour and a half a week, or every two weeks, but was always in a regular slot. The only scheduling problem I came across was in Detroit where the judges had committed to do the Homeless court in their own time, which meant covering for each other.

In England and Wales, making the rota work is one of the big headaches. Lay magistrates do not sit every day. Some sit very irregularly. Therefore it is definitely not as easy to ensure judicial continuity. But is it as difficult as sometimes painted? Many magistrates sit on pretty regular days, or would be happy to if asked. And a whizzy software programme could surely match magistrates to the specialist courts they wanted to sit in. I think the problem is partly a cultural one: that many magistrates think all the most interesting work should be shared out, so everybody does a bit of everything. Sharing all the work equally is not compatible with specialist courts. In USA, the judges who want to do specialist courts are allowed to, and there are enough specialisms to go round those who are interested. In the UK, we would need to accept (at least in the short term) that only a few can sit in the specialist courts, from both district judges and lay magistrates.

Jane Donoghue points out that even in the most basic way we lack judicial continuity. Magistrates who preside over a trial are unlikely to sentence the offender, should he/she be found guilty. This is a crazy system, given that the sentencing magistrates have not heard the background to the case and have to sentence simply on what they learn from the pre-sentence report and the lawyers. US judges I have met would be shocked by this approach. Again, surely it must be possible to get at least two of the original bench back for sentencing? I'm with Jane in thinking if we can't even connect this piece of the jigsaw, we will never achieve problem-solving courts in England and Wales.

June 25, 2014

Measure 11- power to the people?

I'm all for giving power to the people, but only if the people are very educated about the matter in hand. I'm not convinced they should be electing judges if they know very little about the criminal justice system. Equally I'm appalled by Measure 11. Oregon has a system whereby citizens can propose and vote for new laws. A victims' group proposed whatbecame measure 11 – mandatory minimum sentences for a whole range of crimes starting with second degree robbery and second degree assault (minimum 5 years 10 months), to second degree rape (6 years, 3 months) to murder (25 years). The population of Oregon voted overwhelmingly in favour of the measure with 788,695 votes in favour, and 412,816 votes against. It was sponsored by the State representative Kevin Mannix in 1994 and all efforts to defeat it have been thwarted. Needless to say it hugely limits the discretion of judges and pushed up the prison population when first passed. Since it came into force though, lawyers have found ways to manoeuvre round it. People who want to plead innocent of all charges are instead persuaded to plead guilty to a lesser charge, in order to avoid a mandatory sentence. One of the worst aspects of Measure 11 in theory is that it applies to children from 15 up, who are treated as adults if they commit any of the crimes on the list. In reality very few children are ever imprisoned under Measure 11, since all concerned try to frame the charge so that it does not meet the criteria. The Governor, John Kitzhaber, set up a commission on public safety in 2012 which recommended that measure 11 should be repealed. The commission influenced the passing of new and progressive laws, but failed to repeal measure 11. It looks as if this law will remain on the statute books until public opinion changes, and the politicians follow.

June 25, 2014

Not all US judges are gung-ho about problem solving

I met the retired DA (elected public prosecutor) of Portland and enjoyed his take on judges and their thirst for innovation. Michael Schrunk was DA for 32 years. His motto was "do the right thing for the right reasons". A number of years ago he heard about community courts and resolved to get one started in Portland. But he faced a huge obstacle – the Chief Justice was opposed. Michael didn't give up. He found the money to fly the Chief Justice to New York to observe the midtown Manhattan community court and to meet the stakeholders involved. The Chief Justice was still reluctant. He said to Michael, if you get me a ticket to a Knicks basketball game and a Broadway show, I'll visit the New York community court with you. So Michael obliged and the Chief Justice was impressed by the midtown Manhattan Court. The Chief Justice didn't take an active role in setting up a community court in Portland, but he no longer stood in Michael's way. So Portland got its first community court and its first champion was a DA, not a judge.

July 15, 2014

Ann Aiken: a truly different federal judge

On my travels so far, people have distinguished the Federal Justice System from the State system. State judges generally depict Federal judges as more conservative and traditional, not interested in problem solving justice. A key difference is that Federal judges are always appointed and have jobs for life, and life means life because there is no compulsory retirement age. Federal courts deal with the most serious criminal and civil cases. Walking into the Federal Court in Portland Oregon, the atmosphere is completely different to the State Court just across the square. The Federal Court is huge and palatial and there seems to be no-one in it! But once I got into meeting and court rooms some of the differences with the state system disappear. And the Chief Judge of the district court of Oregon, Ann Aiken, was a case in point. This is a judge who attracted my attention when I came across a video of her presenting at a **Reinvent Law Conference**. She was passionate about the power of the re-entry programme she set up to help offenders turn their lives around, and sought help from the tech community to better use data. She spoke like no judge I had ever met. When I got the Winston Churchill Memorial Trust travel fellowship, I immediately contacted Judge Aiken and asked if I could visit her re-entry court. Unfortunately timing didn't work out for me to visit the Eugene re-entry court but I did meet her and observed another reentry court. She was as passionate in the flesh as on the video, and convinced that her success was due to her determination to innovate and to exert positive influence on the wider criminal justice system. She gave a great example of how she had tried to help offenders in her home town where she was then a state court judge. She did many family cases and was struck by the need of the families she saw for better childcare – both for the development of the children themselves and for the parents' education in parenting skills. The **Relief Nursery** in Eugene met that need – it offered "therapeutic early childhood services and comprehensive family support, including alcohol & drug recovery support services". So Judge Aiken rung up the manager and asked if there were nursery places for the children whose cases she was dealing with. The answer was a resounding no. The nursery was full and had a waiting list of children, all with high needs. But Judge Aiken isn't the type to take no for an answer, when she thinks there is a way through which help stop the cycle of abuse and offending. She resolved to help build the capacity of the nursery through offering her time on the committee planning a new building. As a judge she couldn't fund-raise herself, but she could and did spread the word about the important work the nursery did. Needless to say the nursery got the money, and they began to lay the groundwork for the building when Ann's first child was three days old. The new building had room for more children, including those involved in the justice system. This example shows how a committed, energetic judge in USA can get things done which benefit justice, but which are not strictly justice services. Not all US judges can be bothered, but if a judge has the energy and commitment, there is nothing to stop them.