

Federal Judicial Center
Off Paper Episode - 14:
The Case of the Addicted Bank Robber: How the FJC and Harvard
are Educating the Courts

Mark Sherman: From the FJC in Washington D.C., I'm Mark Sherman and this is *Off Paper*.

On a Saturday morning a man, we'll call him Joe, walks into a bank and hands the teller a note alerting her that he's robbing the place and that he has a gun. He doesn't show her the gun. It's just mentioned in the note. Ultimately, Joe is indicted on one count of bank robbery and he pleads guilty. As his case winds its way through the court, we learn that Joe is 60 years old. He has no high school diploma or GED. No clear work history. He does have a long history of involvement in the criminal justice system starting with larceny when he was eight years old. His record includes convictions for armed robbery and gun possession in his 20s and 30s each followed by prison terms.

In prison Joe was constantly disciplined. Each time he was released from prison he would violate his release conditions and the court would send him back. Joe's most recent prior offense took place 13 years before his current one. It was a similar type of bank robbery. In the years following Joe's release from prison for that offense he took part in an intensive federal court reentry program designed to help people who have a drug

addiction get treatment and reintegrate back into the community. It turns out that Joe had been using drugs, marijuana, cocaine, heroin, and alcohol for almost his entire life including while he was incarcerated.

During his participation in the reentry program Joe received drug treatment including medication-assisted treatment for his heroin addiction, as well as treatment for a co-occurring psychiatric disorder. Joe managed to become sober for the first time in his life. He got a job, got married, and adopted his wife's three-year-old daughter. It was a lot to handle for someone with Joe's history and health issues. He eventually relapsed. He began drinking and using drugs again. As Joe's life unraveled, he became desperate. Then on that Saturday morning he robbed the bank.

The prosecutor recommended to the court a sentence for Joe of 12-and-a-half years in prison. Joe's lawyer recommended that the court imposes a sentence of time served. The judge would need to consider these recommendations and decide what to do. The judge's decision would affect Joe for the rest of his life, not to mention the lives of his wife, his daughter, and the people in his community. Joe's case is not uncommon. Judges, pretrial services officers, and probation officers who work for the court must decide on a daily basis what will happen to many people who are just like Joe.

Nancy Gertner: There was sort of a trope that we were using, which was: Prison didn't work before, let's do it again even longer.

Mark Sherman: Today on *Off Paper* I'm joined by two of the creators of the science-informed decision-making education initiative. On the phone we have Judge Nancy Gertner, formerly of the U.S. District Court in Massachusetts and now a lecturer at Harvard Law School. In the studio is Cassandra Snyder, an education attorney in the Federal Judicial Center's probation and pretrial services education group. Later in the program two other very important contributors to the initiative, Dr. Judith Edersheim and Dr. Francis Shen both of the Center for Law, Brain & Behavior, will join our discussions by phone. Judge Gertner and Cassandra Snyder, welcome to *Off Paper*.

Nancy Gertner: Good to be here.

Cassandra Snyder: Thank you, Mark.

Mark Sherman: Judge Gertner, I know that Joe's case is familiar to you because it's a real case that came before the court in Massachusetts. Could you talk about how Joe's case was thought of at that time and how his type of case is thought about now?

Nancy Gertner: This is a case that we responded to - we, that it's to say the federal courts - the sentencing guidelines responded to in a knee-jerk way. It was a response that was

laid out for us in the guidelines. And that was the offense was tremendously serious, namely a bank robbery. The offender had a criminal record which was substantial. In a universe in which you look only at those two axis, then it is easy to say what the conclusion would be. In fact, that was the conclusion that most of the years on the bench I was feeling under pressure to do, criminal history on the one hand and the nature of the offense on the other.

But it was clear that this was a response that made no sense. In fact, I had come to believe that there was sort of a trope that we were using - which was prison didn't work before, let's do it again even longer - and that there was more going on here. What working with the Center for Law, Brain & Behavior looking at mental health and addiction experts enabled one to do is to ask the question why and how we can intervene that would make more sense.

In this particular case, actually I wasn't the judge in the case. But in this particular case, what the judge in the case did was to extend the date of sentencing over the course of a year to maximize the services so that this individual could get a continuation of the services that he had had when he was initially in the reentry program and to see what happened. He simply deferred the sentencing over that period of time and made certain that the services would continue. It was an approach

that was grounded in data and the science. This was a man who was deeply addicted and the addiction was untreated over the course of this period of time. It was an innovative approach for our time and it made a difference.

At the end of that period of a year she was able to sentence him understanding that he had created a record of compliance during the course of that year and dealing with his drug addiction, going back to his family, keeping a job. It made an enormous difference. The alternative would have been to send him to prison for 15 years which would have done nothing and would have accomplished nothing. The likelihood, given his history, is that when he got out again -- since, by the way, he used while he was in prison. The likelihood is that he would have gone back into drug taking if he had even stopped during prison.

The other thing was the scientists would tell us that relapse is part of the process of coming to grips with drugs. So rather than relapse being something that a judge would wag your fingers at and say we see you obviously can't be a rule follower because you relapsed, the science would lead us to understand that that's part of the recovery process. The question is how do you make the court, how do you enable the court to begin to reflect the kinds of observations that science

enables. And it worked. The man I know now has in fact not relapsed again. The judge's interventions made a difference.

Mark Sherman: Cassandra Snyder, you're coming at this educational initiative from a little bit of a different angle. You spent several years as a clinical legal educator, and then as a criminal defense attorney and public defender. So can you talk about, for example, why you think it's important to have pretrial and probation officers learn alongside judges in the program and what your goals are for it and how the program has evolved over time?

Cassandra Snyder: Sure. The first thing I'd like to I think talk about is the goals and the purpose of the program. As educators we have some formal educational learning objectives for the learners who come to the workshop on science-informed decision making. But what they all boil down to is really helping judges and officers make decisions and recommendations in cases that are clinically sound and backed in the science. Legally sound and mindful of all of the legal considerations involved, but they're also practically feasible in the cultures of the districts that they actually practice in in real life. So everything that we do in terms of design for the program is really targeted towards providing insights into the behavioral science that are actually practically useful to the officers and judges who come to the program.

We found over the five years that we've been doing this program that the value of judges and officers learning together is enormous. Not only do we have people who have different roles in the system and different roles in the individual's case that they're working on, but we also have folks who are working at different phases of the case. So we have got pretrial services officers who aren't working in a vacuum here; who touched the initial phases of the case learning alongside the district judge who, if that person is convicted or pleads guilty, is making the ultimate sentencing decision. And we found from participants that they're really able to identify opportunities for improving their response to this individual as they're learning together.

Mark Sherman: I want to come back to you, Judge Gertner. If you could sort of react to that, I'm interested to hear your perspective as sort of somebody who's been at the forefront of this program and helped to create it. There's this kind of black box that the general public at least thinks about in terms of judicial decision making and sort of what goes on, what types of decisions occur over the course of the judicial process. As Cassandra was saying, it's valuable to have pretrial services officers, probation officers, magistrate judges and district judges together to learn about this type of thing because their decisions are all connected with each other. I wonder as both

an educator but also as a judge what your thinking is about that.

Nancy Gertner: Well, I think that it's critical to have everyone at the table now in particular both for the public and for decision making. The reason is - I want to sort of take the historical view for a moment. I was a judge for 17 years. During most of that time the guidelines were mandatory. Then there were substantial mandatory minimums. That had been a reaction, not an inappropriate reaction to what had happened prior to the '80s when every judge had ultimate discretion to sentence. Then sentencing was truly a black box. There were no rules. There were no standards. There was no appellate review of sentencing. The judge was charged with determining what would rehabilitate the offender in front of him or her.

The system though it had some benefits was flawed. This is now prior to 1985 when the sentencing guidelines were passed. It was flawed precisely because there were no standard rules. There was no clinical data. It was based really on a judge's philosophy of sentencing. The public rightfully criticized that. There was substantial disparity. There was racial disparity. And it wasn't working. That led to, however, a very substantial overreaction which was the sentencing guidelines and mandatory minimums, which effectively eliminated judicial discretion and did a sort of one size fits all approach to

sentencing. It was transparent in the sense you knew what you were going to get, but it was irrational in the sense that what you got as a defendant didn't necessarily make sense. Like the case of the addicted bank robber.

There's a swing back in 2005 with the Supreme Court decision in *U.S. v. Booker*. The court tells us that the guidelines are now advisory. I am on the bench at that point. It was I thought a substantial advance. But the problem was that, unless there's a way of seeing sentencing independent of the guidelines, then there is no way to figure out how to exercise that discretion. In other words, there was either, I put this kidding around, I say it's the guidelines or the abyss.

The question here was what do you put in the interstices of the guidelines. What do you use to inform the new discretion? Clearly you don't want to inform the new discretion by going back to a rehabilitative model as to which there was no training and no data. What CLBB - the Center for Law, Brain & Behavior - has been trying to do is fill that gap with science, with real data, with real clinical results. It doesn't necessarily cover all offenders. We don't have the same assumption if 30, 40 years ago that everyone - quote - can be cured. End quote.

But for a subset of offenders, like the addicted bank robber, like those with certain kinds of mental health problems, like of those who have had toxic stress, there is the data. The

science has enabled decision-making which has then several benefits. One is it has more of a prospect of working than the nature of approaches of the past, A. And B, it's now grounded in data. Not what I ate for breakfast. That's the usual way of describing the exercise of discretion.

It deals with disparity in the sense that if my sentence grounded in real data and real clinical observations, if my sentence is based on that, then judges elsewhere will follow. If I say I'm sentencing you to X because I just feel like it, judges will not follow it. But if I say we know how to deal with X, we know how to deal with certain kinds of mental health, and my sentence is going to reflect that, then it will address both the fairness issue, the efficacy issue, and the concern about disparity.

Mark Sherman: When we come back, we'll be joined by Dr. Judith Edersheim and Dr. Francis Shen. They'll share their perspectives about how scientific research on addiction, mental illness, trauma, and human behavior generally can provide important insights to judicial decision makers interested in achieving better criminal justice outcomes.

Judith Edersheim: Our goal is really what does the law need to know about the brain that would help achieve just outcomes.

Francis Shen: Neuroscience is not a get out of jail free card. It's not an excuse all of your actions card by any means. It is one part of a collaborative process that can help everyone be better off.

Mark Sherman: You're listening to *Off Paper*. Support for this program comes from FJC probation and pretrial services education. At FJC probation and pretrial services education, we believe transformative education and training are essential to the administration of justice. We use proven learning methods to inform, engage, and inspire the people we serve to reach individual and organizational excellence. Visit us at fjc.dcn.

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Mark Sherman: Dr. Judith Edersheim co-founded the Center for Law, Brain & Behavior and Dr. Francis Shen is the center's executive director. Like Judge Gertner and Cassandra Snyder, Dr. Edersheim was one of the creators of the science-informed

decision-making education initiative. Dr. Shen joined the center fairly recently, but has for several years partnered with the Federal Judicial Center on similar educational programs.

Welcome to you both.

Judith Edersheim: Thanks so much for having me.

Francis Shen: Good to be here.

Mark Sherman: Judy Edersheim, I'm wondering first whether you have any reactions to Judge Gertner's or Cassandra's remarks from our earlier segment.

Judith Edersheim: Well, first I do want to make some observations. First it's been a pleasure collaborating with the Federal Judicial Center in this very innovative project. I think the case of the bank robber with the substance use disorder really indicates the desperate need for neuroscience and clinical input into the legal arena in order to be able to individuate responses for very complex people. I'll be talking more about that, but I think that's precisely the lens that we need to be using.

Mark Sherman: Thank you. Could you talk about how origins and the mission of CLBB, the Center for Law, Brain & Behavior correspond with what we're trying to achieve now educationally with the collaboration?

Judith Edersheim: The Center for Law, Brain & Behavior is quite different from other academic centers because we began as

clinicians. So the origins really are what distinguish us from other centers. We are clinicians in psychology, neurology, psychiatry, and the neuroscience. Thanks to both Judge Gertner and Dr. Shen, we have enlisted the top of legal and judicial scholarship to join with us and operate from essentially a clinically-based perspective.

Our goal is really what does the law need to know about the brain that would help achieve just outcomes. So what we do and what we strive to do more and more of is make neuroscience actionable for the legal community in order to ensure just outcomes for all of those who are affected by the law. So, that's the space that we occupy. The question is really I think, in order to explain for your audience, what is that realm? How can science help the law make better decisions? Our collaborative programming with the Federal Judicial Center has really been aimed at filling that void.

The law regulates a human animal essentially. It has a conception of what drives behavior that really differs very markedly from how physicians or neuroscientists think about the brain and behavior. A couple of specific examples, in the medical setting kids are treated very differently, teenagers, from adults. They're understood differently with respect to their brain development and their capacity. Kids don't make medical decisions, but out of respect for them we offer them

participation and opportunities for age appropriate assent. We understand that, along neurodevelopmental lines, teenage brains are remarkably different from adult brains with implications for risk perception and impulse control and the vulnerability to peer influence.

This understanding, when it is translated into legally relevant metrics, has really been of great service to the law when making improvements in juvenile justice settings. The same is true about the elderly. The law has an on/off approach to decision-making about capacity and cognitive impairment that really isn't reflective of our current understanding of cognitive decline. So the notion that everyone retains complete lucidity until something precipitous happens isn't really neurologically correct. It actually is a fiction that harms older people or people who are underdiagnosed or misdiagnosed in the criminal justice system.

The center actually deals with the specific clinical scenarios and those implications for the legal system. We teach. We help guide practice. We provide guidelines. *

Mark Sherman: So, Francis Shen, I'm interested to hear your reactions to anything that's been said so far; as well as your observations along the lines that Dr. Edersheim was just describing about how neuroscience and related research can influence judicial decision making and why it's important.

Francis Shen: Thank you to you and the Federal Judicial Center. It's been a great partnership. I'll echo what Dr. Edersheim just said. I did want to react to one thing or really just make a point of emphasis from the first segment, which is that this program is unique not just for its content but for the way that the information is delivered. I've had the pleasure of working with FJC on other I'd call more traditional programs where someone who is very learned in neuroscience and other fields stands at the front and delivers an awesome lecture. That matters. It's important to do that.

But one thing that the center learned and I think that many have learned is that's not enough. What this program has done, and it's been wonderful to come in and see how successful it is, is change the model of education delivery. It's not just that judges come, as was mentioned, they come with their teams. And it's not just that they come and receive information, they contribute to the discussion. In that way, it's more like Judge Gertner described. It almost is a grand rounds model which is what happens in medicine.

In medicine, the way they solve their most difficult cases is they come as a group. They present the case in detail and then collaboratively they work through what's worked, what hasn't worked, what might work in the future. So I just wanted to emphasize the collaborative teamwork nature of the program.

I think that's one of the reasons that it's been a big success and that there's such high demand for it. So that was one reaction to the beginning.

The other thing that I would add is that it's really challenging to do this work. This is not - and we say this in the program - a training in the sense that when new technology emerges in the courts, everyone has to be trained up on it. It might take a little while, but eventually you can get it. This is not like training. It really is this collaborative difficult effort to take the most complicated animal on the planet and the most complicated organ within that animal and understand why is he or she making the decisions that have been made and maybe not led to great outcomes. What can we in the justice system do to enable that individual and that individual's brain to make different decisions in the future?

One of the things that the center is big on, I want to pick up on a couple of words that Dr. Edersheim mentioned, there are two words that really guide our work. One is accurate, and the other is actionable, accurate actionable neuroscience. What does that mean?

The accurate part means that we have to take the science where it's at. Not where we want it to be. Substance use disorder is a great example. That's the example you led off with. Would that we could simply call in some experts who would

give us the solution to addiction, we can't do that because that is substance use disorder and its many variants. It's too difficult and too challenging. But just because we don't have the magic cure-all solution doesn't mean we don't know a whole lot. We do. But we have to figure out how you take that partial yet still very important information and translate it.

Here comes the actionable part, into the legal system. It's difficult enough to try and address the challenges of addiction. It's even more difficult when you're working within the confines of a legal system which has a variety of purposes, including punitiveness, including public safety. I want to stress that, and all of our speakers do this in the program, neuroscience is not a get out of jail free card. It's not an excuse all of your actions card by any means. It is one part of a collaborative process that can help everyone be better off improving public safety, punishing at the right amount and in the right ways, all aiming towards helping someone not end up in the same situation again. So it's not an easy task, but that's what we try and do. We need all of the people involved to keep working at it. It's been great to see how successful it's been.

Mark Sherman: So, Cassandra, I want to come back to you because Dr. Shen made a reference to the unique approach you all take in delivering this type of an educational program. It's an initiative. It consists of several parts. So I wonder if you

might want to elaborate on the methodology, the pedagogy, what makes it so different and effective potentially.

Cassandra Snyder: Sure, Mark. I'd love to. Just to describe the design of the initial in-person learning experience at the workshop, picking up on what Francis has had to say, it really is a mix of knowledge building sessions where folks hear from the foremost experts in the behavioral science and guided practical experimentation. With applying that science to the actual types of legal problems that folks are working on in their districts, I think Francis hit the nail right on the head with the idea that the science can't just give you the answer to how a judge or an officer should respond to an individual. We call this program a workshop because we're really asking folks to do some demanding work when they're coming to this program in interpreting the science for themselves and finding out how it applies to the practical challenges that they're facing.

So after each expert chunk of material that they hear from, we have folks break out into their district teams, the interdisciplinary teams of officers and judges who work through an actual federal criminal court case. We're starting at initial appearance and ending at sentencing and receiving real-time feedback from clinical experts in how they're applying the science and whether they're doing it with that accuracy that Dr.

Shen mentioned. That's the design of the initial in-person experience.

We also have found through delivering this program that, because of the complexity of the problems that folks are encountering in their districts, it's really important for ongoing educational support to be provided to the practitioners so that they can, not just learn things in person and then never apply them when they go back to their districts but so that they feel empowered to use the science and respond in science-informed ways. With that in mind, Judge Gertner has been incredibly generous in opening up the sentencing law seminar that she teaches each spring to the district judges and pre-sentence officers who come to the program so that they can receive additional practice opportunities.

That's one continuing education opportunity that we offer for this program, but we also have webinars that we offer for follow up to help support participants. We are constantly working as a collaborative planning team in trying to devise additional supports. That really is the future I think of this program, is in the scaffolding that we're doing for it to support our learners.

Mark Sherman: Thank you. Judge Gertner, as we've been doing this initiative, this educational initiative for a few years, both as part of the initiative but also on your own you

travel to federal judicial districts and conferences to deliver lectures and provide additional training to judges and officers. I'm interested to know what you're seeing in terms of the impact of the initiative but also what struggles you're observing among judges and officers as they try to bring the things they're learning from it back to their districts.

Nancy Gertner: Let me start with, you know, in terms of the spread of the program. We have the workshop in June. Some of the judges who come from that workshop will then participate in my class where the model is the same model. We give them actual cases and have experts in the room to talk about not just the law of sentencing but also what the science will show. That happens in my class using in one sense the case study method that a judge has, which is dealing with the case in front of you. It's not very different than the clinical method that physicians use. So we do that in my class.

Then, in addition, I've been asked to speak across the country in two respects. One is to give a lecture to judges about what we're talking about today, which is what is the way in which this science can inform the discretion that judges now have and have had now for several years in sentencing. How can it inform that? What are the ways in which this will enable them to do the job, as I said, more fair and with less disparity and more efficaciousness? So that's one, just giving a lecture.

In addition, I've been asked to go to particular jurisdictions to do the kind of presentation that we have in the workshop. Which is to have a case study presented to all of the judges, have the judges weigh in on what they think should happen in this particular case, and we can then talk about the science involved. In one sense that model is not very different than an interesting pre-sentencing guideline model when they are sitting in councils around the country in individual jurisdictions where judges would get together. No judge is bound by what other judges said, but judges would get together to discuss cases in much the same way that you do on the medical side with grand rounds and bad event reviews. Sentinel events reviews is what it's called.

So I've been asked to do that and I'm beginning to see judges say, well, there really is an alternative here to just either following the guidelines rigorously or doing whatever you want. There's something in between and it's something important. It can be informed by the science. Then I get letters from around the country. One judge wrote to me who had participated in our seminar who said, for example, that now he wants to deal with supervised release in a different way than he had before. Instead of sitting back and waiting for the inevitable violation notice from an addict, involving an addict because of relapse, he actually wanted to be proactive to start

dealing with the offender at the beginning with his release, to monitor, to talk to, get a sense of what's going on. So you're not just presented with the failure of supervised release. You're actually helping to fashion that and that was a direct result of our seminar.

So we're seeing changes now around the country. Again, it has to be said, and I think Francis said it a moment ago, this is not a get out of jail free card. This is a question of using the science to inform the discretion judges now have. It is not a cure-all. We don't have the sense that everyone can be, quote, cured, because we're doing this in a measured approach, as the science is measured. So the question is what's the subset of offenders for which we really can do something and make sure that what we do and what we recommend is grounded in that?

Mark Sherman: This is *Off Paper*. I'm Mark Sherman. I'm talking with Judge Nancy Gertner of Harvard Law School, FJC education attorney Cassandra Snyder, and Doctors Judith Edersheim and Francis Shen both of the Center for Law, Brain & Behavior at Massachusetts General Hospital about their collaboration on a science-informed decision-making education initiative for judges, pretrial services officers, and probation officers.

After a short break I'll ask our guests for their thoughts about what they've learned from the experience and what they'd like to accomplish with the initiative going forward, back in a moment.

Lori Murphy: Hi. I am Lori Murphy, a colleague of Mark Sherman and head of the Executive Education group at the FJC. We have a podcast that focuses on leadership in the federal courts called In Session: Leading the Judiciary that I think you'll like. Each episode features current research and cutting-edge insights into leadership.

Guests include Michael Lewis, ground-breaking author of The Undoing Project and Moneyball; professor Jennifer Eberhardt, implicit bias researcher at Stanford University; and Harvard Business School's expert on psychological safety, Amy Edmondson.

Each episode strives to enhance listeners' critical-thinking skills, encourage expression of authentic leadership and promote the use of best practices among judiciary executives.

Episodes are available wherever you get your podcasts or on FJC.dcn. Join us! The podcast is In Session: Leading the Judiciary!

Mark Sherman: Francis Shen, you've recently stepped into the role of executive director at the Center for Law, Brain & Behavior. You're no stranger to judicial education. I'm really curious to know more about your vision for the center and how you see this collaborative work on science-informed decision-making fitting into that vision.

Francis Shen: Well, the Center for Law, Brain & Behavior is a really I think a unique center. It's the reason that I agreed to come play a larger role in it. I'm very excited about where we're at. We work at the vanguard of applied neuroscience, really making, as I mentioned before, neuroscience actionable for the legal community. Our view is that the brain is complex and the law is complex, but our work is really quite simple - helping judges, lawyers, pretrial probation caseworkers and many others across the legal ecosystem determine the right solutions for the right people and cases. So we're in the business of promoting and enabling the sound application of, that word again - accurate neuroscience - to these areas like criminal sentencing. And I think we've laid a wonderful foundation with this program.

So where do we go next? One thing is we continue to expand and enrich the program to the great credit of my colleagues on the call today and the FJC. Every year the planning for this program begins the day after the last program and thinking about what worked and what could work even better. It's an evolution. This program, just like many other programs, will continue to get better and better.

A second thing that I think is really important is, in addition to some of the specifics that I know Dr. Edersheim will talk about what to do and how to handle particular cases, there's also something about a cultural change that we think is a part of this. Or certainly I do. I think it's captured wonderfully by a quote from our other colleague who plays a large role here, Dr. Robert Kinscherff, a JD/PhD, who's just been instrumental in this program.

In the last segment of our program he had this really awesome quote. Here's what he said. He said, "Instead of coming from the perspective of what's wrong with you, we shift to a perspective of what happened to you." I think that's really important. It's one of the reasons, for instance, that in the program we talked about toxic stress and early childhood adversity, a series of things that may have happened to someone well before that moment of their crime or alleged offense. What are the series of things leading up to that point that affected their brain and their decision making such that in this moment they made a decision that we wish they wouldn't have and often they wish they wouldn't have had?

The value of shifting that perspective, again it's not that we suddenly say, oh, you're excused from crime. You're not. But it allows us to do what Judge Gertner and Dr. Edersheim were talking about before. It's to say if we know what specifically

happened to you as an individual and we can harness neuroscience to help us understand how did those things that happened to you affect your decision making circuitry, your emotional circuitry, then we can begin to think about what are our available options and what's the best match between what we might be able to do for you and with you based on where you've been. So that's one thing, it's a cultural change.

The third thing in my mind and this is something that we've already started having discussions about. Again, as Cassandra said, this is starting to happen through Judge Gertner's additional training and teaching. But how do we provide on-call resources, continuing resources, so that it's not just a one time or one-and-a-half time program but an ongoing regular conversation between the justice system and the science and medical communities. Right now there is not a really good conduit for that ongoing conversation, so we hope to build that infrastructure.

For instance, perhaps there would be weekly office hours online where from across the country we call in and we bring in the best experts to work through difficult cases or to work through common cases that perhaps the traditional solutions aren't working. These are ways in which we really build on what we've done. We go both broader so that more can be involved and we go deeper so that we have this ongoing continuing extended

support all centered around understanding what happened to individuals and others like him or her. Given what's happened and what we think's happening with that individual's brain, how can we best intervene to promote the many aims of the criminal justice system.

Mark Sherman: Dr. Edersheim, I do want to ask you about what more you'd like to do with the program going forward. But before you do that, earlier in the program you had alluded to or explained sort of how an understanding of the neuroscience and the behavioral science can assist judicial decision makers - whether it's judges, pretrial officers, probation officers - engage in individuated responses. I wonder whether you might elaborate more on that before we get to what more you'd like to see come out of this educational initiative.

Judith Edersheim: Yes, absolutely. This really goes to providing legal actors with actionable neuroscience, as Dr. Shen mentioned. Judge Gertner had indicated in her previous comments that the focus should be on individuating approaches so that we can have better outcomes because we know that's what works. So before we get to networks, we really should explain that the goal of collaboration and the goal of the actual workshop is to provide that actionable neuroscience that the participants take home with them and implement immediately.

In that vein, we get very specific. We get specific in kind of three broad areas. One thing we teach is to try to get it right the first time. That sounds glib, but I don't mean it in a glib way. What we try to do is teach probation officers, pre-sentence officers, judges, defense attorneys, prosecutors to have the proper antennae for when they're dealing with an addiction, a mental illness, a trauma or other relevant neurologic disorders. If you get it right the first time, you can consult the proper people, so developing those antenna. Addiction is a perfect example. Many people keep addiction a secret. Many people have had periods of relapse, and recovery, and relapse again so that you have to have a longitudinal look at substance use disorders, what those specific substance profiles are, with highly specific interventions. Getting it right the first time is so much easier than getting it wrong and trying to undo the damage. That's the first principle of what people take home from the program.

The second one I think is really to know what works and why. Let's stay with the addicted bank robber and addictions as a paradigm. We offer during the program the clinically proven best treatments for each unique substance profiled with highly specified interventions. We know what works and why. We have a fairly good set of clinical parameters for how many relapses to expect.

For example, if you expected relapse as part of a disorder, you would take that into account when you are structuring a pretrial program. You would take that into account in what kind of relapse you would expect when someone is on probation and what steps are specifically indicated to tighten treatment, to enhance the treatment you've given, to prevent the next relapse, to get someone back into treatment. So we have those answers and we want to provide them. The same is true, for example, in the trauma realm.

We want to give people, to arm the participants of the program with the science that's going to buttress their successes with their programs. So what plan will offer the best chance of success for this specific person to be rehabilitated in court strategies? For the best way to communicate with folks with mental illness or addictions, active addictions issues, what are the best sequentially designed treatments? Are there neurocognitive barriers to success? Does someone have a cognitive impairment that might be interfering with a program that you set them up with? Instead of saying, well, they're recalcitrant, you're really going to look at what is interfering. Are there traumatic triggers which you would want to avoid in a program?

Finally, as people I think have already mentioned, it's important to have safety considerations in mind. Public safety

is always an issue. What are those safety concerns that you can build into programs for the specific impairments that might be present with this specific defendant? You're never going to have, as Judge Gertner would say, perfect outcomes. But you can have terrific outcomes, better outcomes. You can help recidivism rates by looking very specifically at these parameters. That's really what we aim to send people home with.

Mark Sherman: Judge Gertner, you were a federal district judge for 17 years. You've been a passionate teacher of sentencing law policy and practice. First at Yale and now at Harvard you're widely published on the topic. So you're sort of the consummate practitioner scholar. You've been a tireless advocate and faculty member for this initiative. How's it worked out so far from your perspective? What would you like to see the initiative include in the future? How would you like to see it evolve, that kind of thing.

Nancy Gertner: I would love to see the initiative become part of training for federal judges. Not just a program which people can opt into. As they do now, we have wonderful responses from judges all across the country. But I would like to see it integrated into the ordinary training that judges get, what now new judges get, you know, an introduction to the sentencing guidelines and the complexity of the sentencing guidelines which calls for the extended kind of teaching; then,

with the kind of insight that we're talking about, raised as almost an afterthought.

You have discretion judges and you can exercise that discretion, *United States v. Booker*, but no meaningful training as to how to exercise that discretion. As I said before, that's really a failure here because unless you teach people to guide that discretion, then discretion is unbounded. What we're talking about is a science-based way of guiding discretion. I'd like to see it become part of the regular curriculum. I'd like to see the kinds of programs, the kind of clinical models, the kind of clinical hypotheticals, rather - the case studies, let me put it that way - that we deal with. That if they result in a successful outcome, like the addicted bank robber, that they be posted in a way that other judges can look at it. In other words, here's a template to how to deal with this kind of a case and here are the outcomes that we are able to achieve. I'd like to see that widely distributed in the same way that an opinion might be widely distributed in a particular case.

I'd love to see individual jurisdictions return to the sentencing council approach which is to say, where the judges will identify their hard cases, everyone will meet around the table to discuss their hard cases. You bear in mind that no one is bound by what anybody else says, but it's a way of doing peer review, a judicial version of peer review. This worked in my

case, why don't you try it in yours? That's both a way of informing sentencing and a way of making certain that we deal with concerns about disparity which are certainly concerns in the in the system. So it's sentencing councils. Integrating this into regular training, not an optional program, publicizing case studies that reflect the kind of data and the kind of results that we're talking about, that way it becomes integrated into regular sentencing as opposed to something that only some judges will identify.

Mark Sherman: Cassandra, you spend a lot of your time at the FJC working with and training pretrial services officers and probation officers. You also spend a lot of time working in an educational capacity with magistrate judges. So from your perspective, what's in it for those groups in terms of participation in this sort of educational program? As the overall manager of the initiative, what's your vision for it moving forward?

Cassandra Snyder: Thanks, Mark. I have to echo everything that Judge Gertner and Drs. Edersheim and Shen have had to say so far about their hopes for the future of the program. I would really like to see the way that we're thinking about approaching real world problems become just a part of the culture of the judiciary in terms of folks feeling comfortable staffing their

cases with one another and receiving feedback from each other on their most challenging cases.

With regard to what the workshop has to offer for officers and magistrate judges, I would really say that there are some science-based insights about how to interpret the behavior of a person on pretrial supervision that can be really valuable and that just aren't self-evident that I think this workshop really sheds light on. Like Dr. Edersheim shared, there are specific interventions that are shown to work better than others. It's really important for judicial decision makers and recommendation makers, like officers, to understand which options are more appropriate. So I think there's a lot in this program for officers and judges who don't often have an opportunity to learn together and to learn from each other.

Mark Sherman: Judge Nancy Gertner, Cassandra Snyder, Judy Edersheim and Francis Shen, thank you all so much for taking the time to talk with us.

Judith Edersheim: Thank you, Mark.

Francis Shen: Thank you, Mark. It's been great.

Nancy Gertner: Thank you. It's a pleasure to be here with you.

Mark Sherman: *Off Paper* is produced by Shelly Easter. The program is directed by Craig Bowden. Our program coordinators are Anna Glouchkova and Olivia Pennock. Remember you can

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