

Get Smart?

By Alan J. Borsuk

Milwaukee County moves to the front of a national effort to apply data from thousands of cases toward making better criminal-justice decisions, reducing incarcerations, holding down costs, and making the community safer.

When Milwaukee County District Attorney John Chisholm came to Marquette Law School's Eckstein Hall this past February to deliver what he considered a significant message on the future of the justice system in Milwaukee, he hoped to find or establish some common ground. "Both sides of the political spectrum must acknowledge that talking tough on crime has reached its limits," Chisholm said that day in February. "Being smart on crime is the solution."

Chisholm had specific proposals that he wanted to see adopted. But his speech also raised underlying broad questions:

What are the *smartest* ways to fight crime? How strong is the evidence that they are, indeed, smart ideas? Can we really hold down costs while maintaining and improving public safety? Do Milwaukee and Wisconsin have the political will to undertake changes, some of which might trigger strong political opposition? What if all of the leaders who have central roles in fighting crime and dealing with its aftermath worked together on finding ways to get the most beneficial results from what they are doing?

The last question is the one where the response is clearest. Chisholm is a key figure in a collaboration that has brought together judges, prosecutors, defense lawyers, law-enforcement leaders, politicians, and others involved in the criminal-justice system. They formed the Milwaukee County Community Justice Council in 2007

as part of the settlement of lawsuits resulting from overcrowding in the Milwaukee County Jail and the county's House of Correction.

The council has developed into the engine for efforts to find answers to the other questions.

Its efforts are attracting national support and praise from advocates of "evidence-based deci-

sion making," the jargony term for getting "smarter" in deciding what to do at key points in the criminal-justice process. In August, the Milwaukee effort was one of only three initiatives around the country to win a grant competition through the U.S. Department of Justice's National Institute of Corrections (NIC); the grant will provide technical assistance to develop projects such as improved screening of people as they enter the criminal-justice system. One of the two other winners is Eau Claire, Wis. (The third is Mesa County, Colo.)

Lori Eville, one of five members of the federal panel that selected the winners, said, "That both Eau Claire and Milwaukee counties were chosen for these awards



John T. Chisholm, Milwaukee County District Attorney





At an August meeting of the executive committee of the Milwaukee County Community Justice Council (clockwise from lower left): Milwaukee County Chief Judge Jeffrey A. Kremers; Kit Murphy McNally, retired executive director of the Benedict Center, a nonprofit agency; Milwaukee County Sheriff's Inspector Richard Schmidt; Milwaukee County Sheriff, David A. Clarke Jr.; Milwaukee County Supervisor Willie Johnson, Jr.; Thomas J. Reed, State of Wisconsin First Assistant Public Defefender; Milwaukee County Executive Chris Abele; and (in the center) Milwaukee County District Attorney John T. Chisholm.



Chief Judge Jeffrey A. Kremers,
Milwaukee County Circuit Court

“We are on the cusp of making some pretty significant changes in the criminal-justice system in how we do business.”

is reflective of what they have been able to accomplish, which not many other jurisdictions across the United States have achieved.” Eville, a specialist with the U.S. Bureau of Prisons, manages the grant program.

Describing the initiative at a recent public-safety forum on the northwest side of Milwaukee, Chief Judge Jeffrey A. Kremers of the Milwaukee County Circuit Court told about 100 people, “We are on the cusp of making some pretty significant changes in the criminal-justice system in how we do business.”

Up to now, the Milwaukee council has worked with the National Institutes of Corrections on developing a framework for the council and setting priorities for its work. The new grant is aimed at implementing four projects that were at the top of the priority list: namely, more-extensive training of Milwaukee police officers in how to deal with people with mental illness; development of better ways to determine the risk and needs connected to diverting perpetrators into alternative programs; implementation of protocols now being developed for determining who should be released from jail without bail in advance of disposition of a case; and development of a “dosage-based” probation plan that would emphasize giving people with drug addictions or similar issues specified amounts of treatment rather than probation for specific periods.

Put the four together and justice council leaders believe that the number of people being held in jail or prison—already in decline in recent years—can be cut further, saving large amounts of money while maintaining or improving public safety. Judge Richard J. Sankovitz, presiding judge in Milwaukee County’s criminal division, said that the goal is to close the equivalent of one dormitory at the corrections facility in Franklin (previously known as the House of Correction).

But put them together and you also have a lot of sensitive issues and potential controversy.

Rob Henken, president of the Public Policy Forum, a nonprofit organization that researches and monitors government trends, said, “I have rarely seen this level of collaboration and this thoughtful an attempt to just step back and take a systemic examination of an important piece of local government.” Henken, who has assisted the justice council’s work, said that using data and factual information to drive decision making, rather than using intuition and political whims, could only lead to good things.

But calls such as Chisholm’s at Eckstein Hall for “smarter” decision making brought a strong reaction from Milwaukee County Sheriff David A. Clarke Jr., who responded with a column in the *Milwaukee Journal Sentinel*. It began: “Here they come again. Criminal sympathizers, armed with claims of ‘studies’ conducted by academic elites, are once again exploiting a period of declining crime rates to indoctrinate the public with their soft-on-crime agenda.” Clarke is a member of the justice council and has supported some—but obviously not all—of the council’s work.

Just what is “evidence-based decision making”? Ask a range of those involved in the issue and you’ll get varying definitions—and varying opinions on how strong the evidence is. In this context, the term “evidence” does not mean the case-specific facts that one might present during a trial. It means finding the historical outcomes of numerous analogous decisions made at key points in previous criminal-justice matters—decisions such as whether to release someone on bail and on what terms—and then using those outcomes to improve the decision in the next criminal case.

In short, evidence-based decision making rests on large-scale data analysis and making good use of what is learned from that analysis. For example, the council has been working with outside experts to develop a system for assessing people as they come into the criminal-justice system, in order to guide decisions on bond and conditions for

MILWAUKEE COMMUNITY JUSTICE COUNCIL

Milwaukee effort sets sights on better decisions at key points in criminal process

In its successful application to be selected as one of three places in the nation receiving advanced assistance from the National Institute of Corrections in pursuing initiatives involving evidence-based decision making, leaders of the Milwaukee County Community Justice Council outlined four goals they want to achieve by the end of 2013:

- Expand a program for training Milwaukee police officers in how to respond effectively to people with mental illness, including training dispatchers and booking officers. The goals: "Reduce by 25 percent the number of people with mental health needs who lose their benefits due to being jailed or losing housing and increase by 25 percent the number of individuals with mental health needs who are reconnected to the services they need within 20 days after arrest."
- Use risk/needs information to pinpoint cases for diversion or deferred prosecution. "The key to an effective strategy for diverting or deferring prosecution is knowing which cases are suitable for this expedited handling and which cases are not," the proposal says. The goals: "Safely release and/or supervise 15 percent more pretrial detainees in the community rather than in jail, generating at least \$1 million in savings . . . and at the same time reduce by at least 40 percent the already low rates at which defendants waiting for trial fail to follow pretrial rules."
- Adopt more rigorous risk/needs management of pretrial population. The proposal says that, currently, bail hearings include only two pieces of information: the charge and the defendant's criminal history. It says, "Bail decisions tend to be ad hoc and driven by intuition and unanchored professional judgment." Use of a more sophisticated "actuarial instrument" that has been developed for Milwaukee could change that. The goal: "Divert or defer prosecution in 10 percent more cases than we do currently . . ."
- Adopt a "dosage-based" probation plan. The proposal says, "There is a growing body of research that likens probation services to medicine and predicts that after a certain dosage, further services and supervision are unnecessary." The goal: "Demonstrate in a pilot project that by terminating probation as soon as an offender in need of treatment has received sufficient treatment, we can cut the cost of probation by at least 50 percent and at the same time reduce probation recidivism by 50 percent."

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David A. Clarke Jr., Milwaukee County Sheriff

pretrial release. Drawing from systems used elsewhere and from analysis of outcomes of pretrial decisions in hundreds of local cases, the council is close to launching a new protocol. It will call for making a risk assessment of each person: this will be based on factors such as the number of previous criminal-case filings against that person, the prior record of appearing in court, and whether the person is employed or is a primary caregiver. Points will be awarded based on the answers, and the total number of points will place each person in one of four categories for rating the risk he or she presents. That risk rating will then be weighed against the type of offense involved. Judges will be able to work from a grid in making decisions on bond and the conditions for any release (such as supervision levels ranging from “intensive” to “none”). A lesser offense but a high-risk factor could yield stricter release conditions than a more serious offense but a low-risk rating.

Kremers said judges now make their best professional judgments, but they have not had the guidance, based on track records from comparable cases, that the new system will give.

Kremers described an exercise he does when he leads training sessions for judges from around Wisconsin. He gives one group of 25 judges the facts in a hypothetical case and asks them to set bail. Their answers, he says, range from zero to \$50,000. The other 25 judges first hear an argument from a defense lawyer that the defendant should be released on personal recognizance and an argument from a prosecutor that he should be held on \$7,000 cash bail. When the second group gives its answers, the range is from zero to \$7,000.

“How is that evidence-based?” Kremers asked. He said neither approach uses anything more than professional guesses, whereas data based on similar cases could lead to better-founded outcomes.

There is little dispute about holding defendants in severe or alarming cases on high bail and, if they are convicted, giving them long sentences. Rather, the focus in the new effort is the large majority of cases that involve more-mundane circumstances.

The National Institute of Corrections listed 26 “meta-analyses” (summaries of research) in its April 2010 publication, “A Framework for Evidence-Based Decision Making in Local Criminal Justice Systems.” It concluded that evidence-based alternatives to imprisonment and programs to reduce the chances of re-offending yield positive results overall.

But even some who support efforts such as the ones underway in Milwaukee said that analyzing outcomes of cases and turning the results into guidance for what to do in specific cases is an art form as much as it is a science.

Richard Frase, a nationally recognized expert in sentencing and a professor at the University of Minnesota Law School, said in an interview that he viewed evidence-based decision making as “another way of talking about smart sentencing.” Frase said, “It may promise more than it can deliver with our current knowledge base, but it’s certainly better [than current practice], especially if we view criminal law enforcement and punishment as primarily existing for the purposes of controlling crime as opposed to just punishing people because they deserve it.”

Frase added, “It’s not a science; it’s all probabilistic. That means you’re going to be judging people and making decisions based on what category they fall into. Some people have a problem with that.”

Michael Jacobson, president of the Vera Institute of Justice in New York, said, “In theory, it means there’s some validated empirical evidence on which to make some policy decisions.” He said that not all evidence yields conclusions that are as clear as would be ideal, but

“you’re not looking for perfection, you’re looking to do things better than we do them now.”

Professor Walter Dickey, a criminal-law expert from the University of Wisconsin Law School, said, “I’m a bit of a skeptic about all of the evidence-based stuff. . . . The problem is, the research is so weak.” He added, “This field is one in which ideology is so prevalent and there’s so much cooked research these days.” But asked whether Milwaukee should continue its exploration of the subject, Dickey said, “I think it’s absolutely worth pursuing,” given the problems of recidivism and costs related to the prison system and jails throughout the state.

Milwaukee County’s Judge Sankovitz agreed that the field is more of an art than a science now, but said that it has method, rigor, and measurability, which he is confident will lead to more-effective policies.

Professor Michael O’Hear, associate dean for research at Marquette University Law School and an expert on sentencing, gave the leaders of the local justice council credit for tackling major issues with dedication and commitment to making the system work better. “They’re doing creative things with some political courage,” O’Hear said. “They get flack, but they stick to what they’re doing.”

Chisholm said that he regards the community justice council as “a tremendous success,” simply based on its accomplishments to date in improving communications and practices involving all of the parties to the criminal-justice system. Each entity has its own sphere and practices, and there are disagreements, he said. “But we can agree on about 90 percent of things. That’s good.”

In his speech at the Law School in February, Chisholm emphasized the pressure to hold down public spending and the potential for savings if use of alternatives to imprisonment expands.

“Absent from discussion is how wisely and effectively we use scarce public-safety dollars,” Chisholm said. “There is a better way forward. Milwaukee’s recent experience offers a road map to success. We can protect the public, address the impact of neighborhood crime, and do so in a way that ultimately reduces the prison population, increases local accountability for corrections spending, and does so without raising taxes.”

Describing the evidence-based initiative of the community justice council, Chisholm said, “What it promises is simply this: When a person contacts the criminal-justice system, we try to objectively evaluate the offender’s risks and needs and respond with the right tools. The goal is for the person to change behavior and not come back

to the system again. Risk evaluation presumes that some offenders must be incapacitated and removed from the community in an appropriate way for an appropriate time, but it also allows, based on validated experience, that the majority of offenders can respond effectively to intervention and not consume justice resources without changing behavior.”

Chisholm also backed two ideas that so far have gained no traction in the political system. One is to allow judges to give either determinate or indeterminate sentences, with indeterminate sentences to be permitted in cases of “offenders whose behavior can be controlled at the community level.” If anything, the momentum in the state legislature has gone the opposite direction, with the repeal this year of legislation passed in 2009 that allowed early release of some prison inmates.

The other Chisholm proposal was to have the state split the savings with local governments as the number of convicts sent to state prison is reduced by using community-based programs. Chisholm said, “I make this offer to the governor and legislature: Milwaukee will continue to reduce crime and reduce the numbers of people in prison, maybe even enough to justify closing a prison. In turn, we want the savings from our efforts reinvested in Milwaukee so we can continue to do what we know works best for us.” There was no action on that idea as the state budget was adopted in the first half of 2011, but Chisholm intends to continue to advocate it.

Kremers and Sankovitz said that some of the strongest resistance they have encountered is from fellow judges who feel that, as with sentencing guidelines, evidence-based policies will cut into their latitude and independence.

Kremers and other council members have been taking the case for evidence-based decision making to the community. Why? At the recent session on the northwest side of Milwaukee, Kremers told the audience it was not enough to show that crime has gone down or that there are benefits to change in terms of saving money. People have to perceive that the results are good for them.

In its application for the new National Institute of Corrections grant, the Milwaukee justice council wrote, “Our sense of safety is often measured in terms of the crime rate, but the community’s subjective perception of its safety may be more salient. Our challenge as we move forward with EBDM [evidence-based decision making] in our system is to demonstrate progress both in reducing crime and enhancing community perceptions that its streets are safe.”





Judge Richard J. Sankovitz,
Milwaukee County Judge

“The field is more of an art than a science now, but it has method, rigor, and measurability, which I am confident will lead to more effective policies.”

Kremers told the audience that about 26 percent of individuals in jail awaiting trials in Milwaukee are there on bail of \$500 or less. Evidence shows, he said, that releasing these people would not be risky to the community. Yet the practice has been to lock them up by the hundreds. “These people are costing you \$141 per person per night,” he said, and the community is not really any safer for that.

Leaders of the justice council said that all-day sessions it held at Eckstein Hall in December 2010 and May 2011 were large steps forward in training key figures in a wide range of agencies on what “evidence-based” practices are and how to use them. The potential of politics heating up around the issue is clear. Leaders of the council have discussed the fallout that can occur in cases where someone who was released pending trial went on to commit a high-profile offense. The *Milwaukee Journal Sentinel* has been running an occasional series of stories, under the logo phrase “Dangerous and Free,” describing such cases. Kremers and Sankovitz said it is important when such instances occur to learn from them, but to remain united in advocating for “smarter” answers than incarcerating large numbers of people. The small number of such cases, disturbing as they are, makes for good sound bites, but bad public policy, Kremers said.

When it comes to opposition to the justice council’s effort, the local focal point is Milwaukee County Sheriff David A. Clarke Jr. In an interview, Clarke said he was one of the founders of the council and continues to support the goal set at the start of creating good ways to share information among agencies involved in law enforcement, from arresting-officers to judges, in order to improve coordination and efficiency. But he said the council’s purposes had morphed to focus on treatment programs and alternatives to incarceration. “We ended up with a different animal than we started out with,” he said. “That’s been my disappointment.”

Clarke said that those who enter the system are “mainly a population that has criminal behavior firmly ingrained in their being.” That contrasts with the view of people such as Kremers, who say that, with well-chosen treatment or

monitoring, a large portion could be put on paths where it is unlikely they would reoffend.

In his *Journal Sentinel* column, Clarke wrote, “The only thing the habitual criminal truly understands is the force of law through swift and certain consequences—and that means incarceration.” Clarke said the way to hold down prison costs is to give prisoners more bare-bones conditions and to pay less in salary and benefits to prison guards.

Kremers called winning the National Institute of Corrections grant in August “a huge, positive step for Milwaukee.” He added, “It says a lot about how well we’ve been working together to be good stewards of the community’s money.”

The grant will not bring money to the Milwaukee effort, but it will bring a substantial amount of technical assistance from nationally recognized experts in launching steps such as the universal screening protocol. However, a second grant that Milwaukee recently won, under the Justice Reinvestment Initiative of the U.S. Justice Department, is expected to provide funding for much of the work, with the goal of creating savings that can be converted to pay for programs.

People at the heart of the effort think it could make Milwaukee a leader in handling routine cases in ways that hold down spending while protecting safety. Paige Styler, attorney manager for the Milwaukee Trial Division of the State Public Defender’s Office, said, “We’ve missed the boat far too often on these rinky-dink cases.”

What does it mean to be smart on crime? Sankovitz answered, “The smartness is measuring and being accountable for results. That’s tough on crime.”

Morris Thigpen, director of the National Institute of Corrections, wrote in the 2010 framework document that the goal of evidence-based decision making is to realize “a vision of the communities of tomorrow—stronger and more vibrant as a result of less crime, fewer victims, restored families, and offenders engaged in healthy lifestyles.”

Leaders of the Milwaukee council think they can push the criminal-justice system toward that idealistic goal. ■

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