

Day One

**Treatment for Special Needs
(Women Offenders, Offenders with Mental
Health Issues, Sex Offenders, Native Americans)**

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SUMMARY

This panel discussed challenges often faced by women, people with mental health problems, people convicted of sex offenses, and Native Americans when they are under criminal justice control. While each group constitutes a diverse population of individuals, certain group needs must be addressed in order to provide adequate treatment for individuals and to reduce recidivism.

Women comprise less than ten percent of the prison population, but they are the fastest-growing segment. At least two-thirds of these women are convicted of non-violent offenses and pose a low risk to public safety. Alternatives to incarceration can impose effective and cost-saving sanctions which could help reverse the trend towards incarcerating increased numbers of women. Special needs of women should be considered when fashioning their punishment in order to facilitate positive change and reduce recidivism. Examples include the need to avoid retraumatizing victimized women by ensuring that their punishment environment is safe; to recognize that relationships are usually highly motivating to women; to acknowledge that many crimes committed by women are driven by low educational and socioeconomic status, and to provide opportunities to improve this status; and to avoid, insofar as possible, disruption to a woman's family life and responsibilities. One example of a program geared towards women is the one operated in New York by the Women's Prison Association. In addition to providing a secure place to live, components of the program include helping women secure lawful employment, offering mental health and drug dependency treatment, and family reunification efforts.

Approximately 16 percent of state prison inmates have a serious mental illness (such as schizophrenia-spectrum disorders, bipolar disorder, or major depression), and more mentally ill people are incarcerated than are hospitalized. Programs that divert mentally ill individuals from the criminal justice system are being used as alternatives to incarceration. Diversion programs include law enforcement crisis intervention teams, of which there are approximately 194 in the United States; post-booking diversion programs; and mental health courts. Approximately ten years ago, there were two mental health courts; now there are more than 172. These programs vary tremendously, should be tailored to the community in which they are operating, and require coordination with quality health services providers.

Individuals convicted of sex offenses have special supervision needs requiring treatment of the individual and protection of the public. These individuals form a very diverse population, and risk factors for recidivism also vary greatly. For example, statistics show that those convicted of certain types of sex crimes have lower recidivism rates than those convicted of other types of sex offenses. Supervision responses and treatment options must vary accordingly. Policy decisions also should vary accordingly, and should be based on evidence so that scarce resources are wisely expended.

Native Americans face historical, geographical, and socioeconomic challenges. There are 562 federally recognized Native American tribes in the United States; 73 percent of all federal convictions of Native Americans are prosecuted in Arizona, South Dakota, Montana, and New Mexico. In order to reduce recidivism, reduce incarceration, and work towards effectively meeting the needs of Native American offenders, one panelist suggested the following actions: amend the federal sentencing guidelines to allow for more probation and community-based treatment; examine the Tribal Justice Improvement Act of 2008 and determine its potential impact; and understand mediation programs based on tribal norms, which have reduced recidivism, and employ them as alternatives to incarceration.

**TREATMENT FOR SPECIAL NEEDS
(WOMEN OFFENDERS, OFFENDERS WITH MENTAL HEALTH ISSUES,
SEX OFFENDERS, NATIVE AMERICANS)**

MS. MONTGOMERY: I'm Pamela Montgomery, and I'm the director and chief counsel of training for the U.S. Sentencing Commission. We have a panel today of experts to talk to you about various special needs offenders. You will hear about the special needs for those who are sex offenders, women incarcerated, people who have mental health issues, and about the issues dealing with Native American populations.

Our speakers this afternoon, beginning to my left, Dr. Kurt Bumby, who is the senior manager at the Center for Effective Public Policy where he administers, in addition to lots of other national programs, the Center for Sex Offender Management Project. He is also on the Executive Board of Directors for the Association of Treatment of Sexual Abusers and serves on the National Advisory Committee for the Safer Society Foundation.

To his left is Ms. Georgia Lerner. She is the executive director of the Women's Prison Association in New York, New York. She is very attuned to the needs of women offenders, especially when it comes to post-incarcerative needs for housing and employment. She's a frequent speaker on these issues and knows about their issues upon reentry. She is an expert on gender responsive programming and issues arising at the intersection of child welfare and the criminal justice system.

Our next speaker is Dr. Allison Redlich. She is currently a senior research associate at the Policy Research Associates in Delmar, New York. She'll be starting a new job this fall at the School of Criminal Justice at the State University of New York at Albany, and her area of expertise today deals with mental health courts and other forms of community-mandated treatment for people with mental illness, and she'll share with you her thoughts on that issue.

And our last speaker today is Jeffrey Viken. He's the Federal Public Defender in the Districts of North and South Dakota. He's been there since 2005. He's had a long legal career, but in North Dakota he's been specializing in the needs of the Native American population. He represents many of them in our federal court.

And with that as an introduction to the panelists and that as a background to the focus of this panel, I'll turn to our first speaker, Dr. Kurt Bumby. We'll save some time at the end for questions.

DR. BUMBY: Well, thank you very much and thanks to all of you for being here this afternoon. I know it's Monday, first of all, and it's Monday afternoon after a long day of, I think, really intriguing presentations, so I appreciate that you were willing to come and listen to us talk about some special needs populations.

I think I got lucky because my last name starts with a B, so I get to be the first speaker and don't have to worry like you, Jeffrey, about whether or not we're going to have time at the end, but I assure you I will be brief.

I think it's interesting that we're going to be talking about these very unique populations, and I think that you'll see some overlapping issues. With sex offenders in particular I think you're, I'm certain, all very familiar with the fact that we have had a whole lot happening from a legislative perspective.

The National Conference of State Legislatures does a forecast each year of what they believe are going to be the top policy issues around the country, and in 2006 they predicted that of all of the issues—whether it was health care, childhood obesity, the Real ID Act—sex offender management and sex offender policy was the number five issue facing the nation, and so I think that really speaks to the importance of this issue and why people recognize that this is, in fact, a very unique population that warrants some attention.

I don't have a whole lot of time to talk about everything that I'd like to talk about, so I'm just going to hit some key highlights. I think it's interesting when you look at the proliferation of legislation, the proliferation of media reports on these kinds of cases, you get the impression, I think, that they represent a very significant proportion of the crimes that we see in our country, but in actuality, when you look at the arrest rates, they are less than one percent of all criminal cases that individuals are being arrested for. Similarly, when you look at federal prosecutions, very small numbers related to child exploitation or child sex crimes.

What I think is also interesting, and I don't have a trend to show this, is that when you look across the state it appears that arrests for sex offenses are actually on the decline. That's very different, however, when you look at what's happening at the federal level. The statistics have really skyrocketed in large part because of some of the new legislation that's been enacted, but we're seeing very, very, very significant increases primarily around child pornography cases and Internet crimes.

And what's challenging this special population already of sex offenders is that we don't know a whole lot about this new group of offenders, those Internet offenders, but we are seeing a lot more of them. As a result of these arrests and the attention that we're seeing, we're seeing a lot more of these sex offenders coming in and then subsequently going out of our institutions, both at the state and federal level. We're seeing a lot more sex offenders being placed on sex offender registries. Again, with some of the new legislation and the heightened registration requirements and the expanded registration requirements, I think we're going to see a whole lot more as states come into compliance with the Adam Walsh Act or the SORNA guidelines.

As a result, we're also seeing significantly increased caseloads for our federal and state and local and country probation and parole officers because we're having a lot of individuals come back into our communities. Not as many are coming out on [inaudible] going in on probation. Many more are coming out now from periods of incarceration, particularly those sex offenders at the federal level. I think the actual rate of incarceration with federal sex crimes this past year hovered about 96, 97 percent with like three to four to five-year sentences for that population.

And then, lastly, as I mentioned already, what we're seeing around the country in addition to these arrest trends and increased supervision caseloads are a number of laws, an enormous amount of laws, that have been proposed and enacted in each of the states as well as at the federal level. So there are a lot of influences that are happening right now.

The challenge with this population is that we tend to talk about sex offenders as if they are a single group of people. We have that label, “sex offender,” and, therefore, then we make assumptions and we make decisions. Whether those are policy decisions, practice decisions, the things that we do tend to reflect the notion that a sex offender is a sex offender is a sex offender, but the research is very clear that that’s not the case. What we do know from decades of research on the sex offender population is that it is a very diverse population.

The reasons that they engage in sex offending behavior varies significantly from person to person. The kinds of risk factors that increase their propensity to commit new sex crimes in the future vary significantly, their family circumstances, their employment circumstances, their mental health functioning. All of these types of factors vary from offender to offender. The types of crimes they commit vary significantly. Some are “hands-off” offenses, as we call them. Others are contact offenses. The kinds of victims they target, stranger victims, victims within their families, small children, older individuals. So, again, we have a significant issue around diversity with the sex offender population that makes this group particularly challenging to manage.

And the last point that I wanted to raise about the diversity is around recidivism. I think there are a lot of beliefs in our communities about what recidivism looks like with the sex offender population. Now one of the things that’s really important to note, and I’m sure that all of you are well aware of this already, is that sex offenses are largely under-detected and under-reported, so anytime we look at statistics about recidivism or arrest data or conviction data, it also has to be through that lens of under-reporting.

Nonetheless, I think there are a lot of myths and misperceptions that we have in our communities and sometimes at policy levels around how much sex offenders recidivate, and the common belief is that all sex offenders recidivate at extremely high rates. What’s interesting is that it’s highly variable. Because of the diversity, because of the different types of victims that they target, the different types of risk factors they have—and I’ll talk with you about some of those risk factors—the extent to which some individuals are likely to recidivate varies quite significantly from others.

This is an example of considering sex offenders as a single group, so if we just use that label, “sex offender,” these are the recidivism rates that we would see, over five, 10 and 15 years, going from about 12 up to about 25 percent 15 years out. Now those are detected, charged and convicted crimes, so again we’d want to add some numbers to that understanding that it’s under-reported, but as a group what you see here, and this is very consistent from study to study to study. Multiple meta-analyses have looked at these recidivism rates and come to very similar findings, but relatively low rates of sexual recidivism. But that’s when we look at sex offenders as a group, and what we don’t want to do is think about sex offenders as a group given their diversity.

So what happens is when you start looking at sex offenders based on the types of crimes they commit, for example, some very interesting findings emerge, and I think those findings have pretty significant implications for the policies that we’re going to establish, the ways that we’re going to supervise sex offenders, the kinds of treatment that they should be involved in, registration notification requirements, and even some of the issues that we need to deal with with respect to those victims of those offenses.

What you'll see at the very bottom line, which is yellow, is incest offenders' sexual recidivism rates from the time that they're released all the way out to 15 years, and it hovers at 15 years only at around 12 percent known sexual recidivism rates.

If you contrast that to the next line above, the pink or purple line, these are individuals who target girls outside of their families, so they're girls who are not related to them, generally prepubescent girls. The recidivism rates are slightly higher for that group than they are for the incest offenders, but nonetheless, somewhat low.

The next line is apparently green, but I don't know if it looks green to you. This is where you start to see the pretty significant differences, and the differences emerge very early on. So not long after individuals who commit forcible rape come out of prison, you see a dramatic increase in those first five years, and it continues over the next several years. So what we're seeing here is that individuals who commit rape appear to recidivate at much higher rates than incest offenders and those who offend against girls outside of their family.

Lastly, and I think this one is the most telling, and I think has many, many implications for our work, and that is individuals who molest boys outside of their families. If you look at that rate and how quickly it shoots up before that five-year period, recidivism rates for individuals who have committed sex crimes against young boys outside of their families have what appear to be the highest recidivism rates.

So if you think about how different these recidivism rates, and we're just talking recidivism rates alone, appear compared to looking at sex offenders as a group, it's very different, and I think, again, emphasizes and highlights just how important it is that we take into account the diversity of this population.

What you saw with the last slide were some implications for risk factors. If people who molest boys outside of the family recidivate at higher rates, that tells us then that we need to be focusing some of our attention, maybe more of our attention, and resources on those individuals when that variable is present.

Similarly, those who commit rapes, who look more like the general criminal offender, if you will, that appears to be a group that we may want to focus some of our efforts on as well, over and above what we might do with the extra-familial girl offenders and the incest offenders.

Now that's not to suggest that we don't want to address those other offenders, but if you're thinking about the resources that you have, oftentimes limited resources, and you think about those correctional principles, about risk and need and responsivity, and who we target and who we get the best bang for our buck with, we need to be focusing on those individuals who have those risk factors in addition to this particular risk factor, and that is prior conviction.

No surprise to most of you, I'm certain, but it's important because the rates are nearly double. For those individuals who have no prior sex crime, their rates are relatively low, five, 10 and 15 years out. However, if you look at the individuals who had a previous sex crime, again the number is nearly double. So, again, it gives us one additional risk factor that we need to be attentive to.

As I said earlier, we always have to remember that when we're looking at reporting rates, we need to remember that this is an under-detected, under-reported crime, so these are under-accounts. These are under-estimates, but consistently the research comes to the same conclusion, generally speaking, about what these rates are.

What's also been fascinating, I think, for the field, is to see that while sexual recidivism rates tend to be low with sex offenders, sex offenders do tend to recidivate in non-sexual ways at quite dramatic rates. We see more than double new convictions and new charges of sex offenders for non-sexual types of crimes.

So the message here is that while a number of sex offenders do recidivate depending on the type of offender they are, depending on the types of risk factors that are present, we do also know that if they're going to recidivate, it tends to be non-sexual in nature and, as I mentioned already, it differs by subgroups.

Now we talked about a couple of those risk factors already, but here are sort of the key risk factors that we're seeing, those static and unchangeable risk factors that are specifically associated with sexual recidivism among this special population. As you saw already, prior sex offenses, but also have a prior criminal history in general, having prior non-contact sex offenses which may be exposing oneself, having unrelated victims, people who are not victims in their family, targeting a stranger as a victim, and then, as you saw already, having a male victim. Those are some of the key static or unchangeable risk factors that are pretty robust predictors of sexual recidivism, and in many cases violent recidivism, as well.

We also know that sex offenders' risk levels and needs change over time, and there's been some, I think, really good research out of Canada that looked at those very changeable risk factors for sex offenders who are in the communities under supervision, probation or parole supervision. And what they found was when sex offenders in the community recidivated, these were the kinds of changeable factors that tended to be present when they analyzed their case records, having access to victims, having cognitive distortions that support sex-offending types of behavior. Having problems in intimate relationships was a significant factor, non-compliance with supervision, dishevelment, poor hygiene, these kinds of changes. When supervision officers identified them, they tended to be associated with higher recidivism rates. So these are some additional factors.

If you want to think of what we do from a supervision perspective, these are the kinds of factors that officers should be monitoring very closely, and there are a couple of tools that are designed specifically to help them do that.

So there are a number of implications. I've talked about several of them already. If we think about this population being a very diverse population with a range of risk, a range of victims, a range of needs, intervention needs, we have to think then about the kinds of policies that we put in place in our states at the federal level and in our own agencies, whether it's corrections or parole or treatment agencies. We need to keep in mind, and this is going to apply with each one of these bullet points here, that one size simply is not going to fit all because they differ.

So what we need to do is make sure to the extent that we can that we identify and create well-informed, and you've heard about this already today, evidence-based policies that are based on what we

know about the sex offender population, targeting higher risk offenders, not applying all of our resources on all sex offenders, but directing those precious resources toward those higher risk offenders—and again—we’ve talked about some of those risk factors, has implications to the point of prosecution and sentencing.

We don’t have a lot of research yet that gives us much about length of sentence or type of sentence with sex offenders, but what we’ve seen from the general correctional research is it doesn’t seem to have as much impact as perhaps some would hope. But an area where I think we have a significant need for research, is how are we prosecuting these cases and how are we sentencing them based potentially on risk.

I know the Virginia Sentencing Commission is a state that really did some great work around that where they looked at the kinds of risk factors that relate to recidivism and they incorporated that into some of their sentencing structures. The State of Missouri is doing the same thing. So I think those are some promising practices there.

With respect to probation and parole supervision, we’re seeing specialized caseloads, specialized officers who are trained specifically to understand the unique risk factors of this population. We’re seeing some pretty decent outcomes with specialized supervision, particularly when it’s paired with specialized treatment, which is the next bullet there. Treatment does, in fact, seem to work with sex offenders, but not all kinds of treatment, specific treatment, cognitive behavioral treatment, that relationship between the distorted thoughts that they have and how that ultimately drives their behaviors, well-implemented programs, particularly cognitive behavioral programs that focus on higher risk offenders. So treatment intervention is another key implication. Again, the diversity should drive how we approach and triage offenders for treatment.

We’ve got a lot of unique reentry and release needs with sex offenders. Now we hear a lot from the work that we’ve done from parole boards and paroling authorities about their understandable hesitation about releasing sex offenders. We hear a lot from sex offenders, from policy makers, from communities, from parole and probation officers about the challenges faced by sex offenders with reentry because of some of the legislation that prohibits residency in certain areas, so I think that’s another area that’s going to need some attention, how can we implement residency restrictions or certain types of registration notification? Who do we target to get the most effective outcomes?

And then, lastly, we always need to be thinking about—given the diversity of our sex offender population—we also need to recognize that the victims that they create have their own special and unique needs that need to be addressed, as well.

With that said, I’m going to turn it over to Georgia, leaving you with the slide that shows how important we believe it is that because one size doesn’t fit all and because there are so many disciplines that need to be involved, we need to think about this much more comprehensively from start to finish, from the time we investigate these cases, as they move through the courts, how we supervise, how we assess, how we treat, how we release and reenter, and then the application of the laws, always keeping in mind the diversity.

And my last comment before I turn it over to Georgia is that one of the interesting things, since we’re talking about special needs here, is that each of my colleagues here who are representing special

needs populations are the very kinds of special needs populations that we don't know yet much about with respect to sex offenders. What I've been talking about is the broad class of sex offenders, so I'll be very anxious to hear about some of the findings that you three have with some of your work and how maybe that applies to sex offenders. So, with that, Georgia, I will turn it over to you.

[Off topic.]

MS. LERNER: Hi. I'm Georgia Lerner. And I'm going to talk about women as an offender group, and I'm going to give you a quick overview of what we know works and what the research says, and then I'll talk to you about the program that we operate that takes into account some of those guiding principles and the research and what our results have been, and then some of our recommendations.

So I have to say when I heard that women were part of a group with special treatment needs, I thought, you know, I'm a woman, I don't need to be treated for being a woman, at least not most of the time, but there is a reason to focus on women separately. There are more than a million women under criminal justice supervision as of a couple of years ago, and most of them are in the community on probation or parole. And while women make up less than ten percent of the prison population, they are the fastest growing segment. [Inaudible.]

So it would be good to reverse this trend and effective alternatives to incarceration are a good way to do this and they also save money, not just on prison costs, but on the additional costs of locking up a woman, which are things like foster care, the cost of treatment while she's inside and when she's out. And then women are good candidates for community supervision because at least two-thirds of them are arrested and convicted of non-violent offenses and are generally a low risk to public safety.

So I'm going to really race through the research and what people know who have paid attention to gender responsive programming. First of all, gender does make a difference. Men and women are different. We arrive at the criminal justice system through different pathways. So it's very important in providing supervision and services to create environments that feel safe, that are supportive and respectful. It's hard to think about how that's consistent with most prison and jail environments and most, I would say, community-based treatment environments also. I think it's a difficult thing to do, but the goal is to avoid retraumatizing people or creating trauma.

Relationships are fundamentally important to women. They are highly motivating. In most cases the relationship with children is the primary motivating relationship for women. Services and supervision need to be comprehensive so that staff and the cluster of services can deal with a range of issues that women bring to the door, most often substance abuse, mental illness, and trauma.

Women who enter the system are poor and they generally do not have great educational achievement. About half of the women entering prison in New York State do not have a high school diploma or a GED and half of the women were not working at the time of arrest. So we really need to do something that will actually change a woman's ability to improve her socioeconomic status because often the crimes that she's committing are related to economic need.

And then reentry—women who are returning to the community after a period of being locked up need all of the things that women needed upon entering the system and then they need them even more because their lives have been disrupted and their families' lives have been disrupted. So I think it's

worth, you know, paying attention to the fact that reentry needs are even greater, so it's better if we can avoid removing women from the community in the first place.

Some of the underlying theories for the guiding principles are the perspective on pathways, the ways that women arrive in the criminal justice system, relational theory, recognizing that as men mature—maturing means becoming independent and self-sufficient, while women generally mature into having greater connections and relationships with others in the primary way that women define themselves, and recognizing that trauma and addiction are huge and interrelated factors to women's criminal behavior.

So what do women need and what do they want? Well, when women arrive at our doors they tell us that they want to reconnect with their families and with their children. They need a safe place to live. They need a legal way to support themselves and their families. They want to stay sober and healthy and they want to stay out of prison. We have also noted that it's very important for women to feel a sense of community and connection.

So, for so many women, retaining or regaining custody of their children is a key factor in motivating them, but traditionally services are designed so that a woman—you know, anybody, addresses one need at a time. You go to drug treatment to deal with your addiction. You go to a mental health day program to deal with your mental health needs. And they generally don't allow you or focus on dealing with a range of issues at the same time.

But our people here are familiar with the Adoption Safe Families Act that if a child's in foster care for 15 months out of a 22-month period, the foster care agency is presumptively supposed to file a petition to terminate parental rights, so we're talking about a pretty short period of time. So most women cannot afford to wait until they've graduated from a drug treatment program or become healthy or, you know, otherwise gotten their lives in order. They really don't have time to deal with "me first" and then deal with having their children, and I hear that all the time, "I have to deal with me and then I can deal with other people." Well, the other people may not legally be there for you to deal with them if you wait. So women might refuse to participate in other programs if they do not allow them to also focus on reunification at the same time.

So what do we do at WPA? Well, I think—we have an approach and it is really the foundation for the way that we work with women. It's driven by organizational philosophy. And I ask people about this at job interviews, "Do you believe that every person has the capacity to change and that all of us are works in progress?" And if people can't get their heads around that idea, then they really shouldn't be working with us, because we have to each believe that everybody who comes through the door and wants to make some change has the ability to make that change, and that we can help her do it.

We also recognize that healing and repair have to happen generally before a woman can move forward with her life, so we try to promote accountability. And we know that for somebody to be able to be accountable it really takes some guts and confidence to be able to look at the sum of their life histories and be responsible for everything, so we try to create an environment where it's safe for people to really think about what they've done and to stand for all of it and then to make repair and reach out to people and try to correct the harm or fix the damage that they've done so that then they're actually free to move forward with their lives and to have new goals after having defined themselves by their criminal behavior for so long.

So what are the features of our approach? Well, we recognize that in order to achieve stability, talking about interrelated issues in women's lives, we have to be willing to deal with a lot of different things at the same time. So we can't say, "First, you'll get a job, then we'll help you get housing, then you'll be sober, and then we'll help you get your kids back." We have to be willing to deal with all of these things at the same time, and we have to regularly review progress and help women see where they've made that progress.

We like to say that we have to meet people where they are. I hear this in harm reduction programs all the time, but what does it mean, what does it look like? Well, we have to believe people when they come in and tell us what they want, and we have to respect whatever their aspirations are and try to avoid our own tendency to decide what it is that people really need because, you know, I can walk in the door and say I want to be a movie star and somebody else could say, "Well, you need to be a lot taller, you need to do this, you need to do this, but that doesn't really help me move forward, and if I'm just getting a door shut in my face again, I'm not likely to come back. So we have to figure out what it is about my goals or my aspirations and try to key in on something about it and build from there.

So if someone comes in and says she wants to be a movie star, we try to find out, "Well, what is it that you admire about that?" and then remind them that even the greatest actress had to go to her first reading, and she had to be able to read, and she had to have carfare to get there. So we really try to break it down into steps and make it manageable.

A big part of what we do is try to work with people in the communities where they need to live. I really think that the best classroom is real life and that my favorite program that we run is a program that's based in the community where we work intensively with families. It's not particularly an ATI program, but where we work with families intensively where they live and try to help them in their own environment figure out how to manage things more successfully, and it's just done really well. And I think that there's such a difference between what I learn about somebody if somebody comes into my office and talks to me and what I learn if I am posted in someone else's environment and learn more about how that person operates.

A lot of what we do is take the mystery out of everyday life. I don't know how many of you—I mean I'm still really not great with the Metro here in Washington and I take the subway in New York. You know, women come home from prison or have been living in the community and have not really been connected with the community. And we say to someone, "Oh, but you can go to the public library and get a book that tells you how to look for a job and it's free." Well, if I haven't gone to the public library, I walk in. I feel like I don't know what I'm doing. We try to tell people exactly what to expect. You are going to go into the library. Somebody's going to ask you for identification that proves where you live. You can give this, this, or this.

We really try to tell people exactly what to expect. And, you know, if you go to the public assistance office and they're really nasty to you, it's not because you have a sign on your head that says you committed a crime, it's because they're nasty to everybody. Or if you go to this window, you can bet that if it's right before lunch she's going to be awful to you. So we try to help people realize that—just to take the surprises out of what should be mundane for us.

And then our staff, and we have peers also, try to model appropriate behavior in a variety of settings, and we think that's obviously important and it doesn't get said or paid attention to enough. And

then we create an environment—we help or we aspire to, where it's supportive and women start feeling more confident and willing to take risks by doing something differently.

So when somebody gets bumped on the subway and the first reaction is to lash out, you know, someone's going to be more willing to try to suck it up and not react because they know that there's somebody they can talk to about it after, or that there's somebody who will actually congratulate them on being able to restrain themselves and respond in a different way.

So the next slide is sort of a model that we use for thinking about what we should look at when we're working with women doing case planning. It's a multidisciplinary matrix that makes sure that if I come in and say I want to be a movie star, basically I'm just coming in and looking for a job, so you might want to just work with me on livelihood.

We recognize that in order to work on that we also have to look at these other areas in my life because if I don't have a way to get to my audition or I don't have a place to live to take a shower, those things obviously influence my ability to work towards the one goal that I identified. So we try to make sure that we're looking at the full range of issues and helping women find ways to engage and be sure that they're making progress in all of those areas so that they don't find themselves with a job, but, you know, nothing else.

We have an alternative to incarceration program called Harper Home where we have tried to integrate different aspects of what we've learned and what the experts have told us about what works. It's a 20-bed residence for women who are generally predicate felony offenders who are facing at least four to nine years. Twenty women are in residence and an additional 30 to 40 women are in community reporting, generally after having finished the residential program. Women live there for six to 12 months and most are in community reporting for an additional six months.

And it's very hard to measure recidivism, but I feel like I have to just come right out with it at the beginning so I can tell you we do pay attention, but it's hard to come to agreement on what the terms are, and also it's hard for us to get access to the official databases that tell us about arrests and different data.

But it's based on a cohort of women who graduated at least two years ago, so these are women who have been done with our program for between two and five years, the rate of those women having an arrest and conviction for a new crime is between five and 12 percent, depending on our definition of recidivism, so the women are pretty successful at avoiding crime after they finish the program.

So what are the features of it? Now, in addition to mandates that come from prosecutors and defense attorneys and everybody else who's involved in the case, which almost always include drug treatment and some assessment for psychological needs, we also make sure that everybody before she leaves the program has a place to live and a legal way to support herself.

What is it like in the program because, I mean, this is really where we take advantage of people being in a real life setting and try to help people model new behavior and learn from every day. So features of the program are that people gradually have more responsibility and privileges. The women in the program get individual case management, but are required to participate in activities within the community of the house and within the community at large. There is shared responsibility for household chores and cooking and management.

And then we take advantage of the fights and conflicts and difficulties that arise when you have 20 women living together and use those as a way to have people try out new reactions, different ways to express their emotions and to test responses to what's happening to them. And then we also help women reunify with family and get housing and meet educational goals.

So some recommendations on what we should be doing are that we should be broadening the scope of options that's available for alternative sentencing so that it's more than drug treatment and more than intensive mental health treatment. There are probably quite a few opportunities to add a criminal justice supervision component to existing activities and programs.

The program I told you that I loved so much, which is an intensive family case management program we operate, is actually funded by the child welfare system, and the women who are participating in that program have all avoided criminal activity. We've been operating that program for six years.

And I think that it makes a lot of sense to think about adding a criminal justice liaison to existing systems because this is where people live, and I think that people do better if we help them become better able to function in the environments where they are already functioning and need to function long term. And then, of course, using the situations that arise in people's real lives to examine the risks and benefits to them personally of different options.

And men and women are different. Women's programs should take into account the pathways to crimes. We need to recognize the importance of relationships in women's lives, that women are most engaged when we respect what they're telling us and we're willing to work on a variety of fronts at one time. And then as much as possible we should really be conducting our work with women, and I think with men also, in the environments where they live. And that's a little information about our agency and contact information. Thanks, and that is it for me. Thank you.

MS. MONTGOMERY: Ms. Lerner, could you tell us how women become a part of your program and begin participating in that?

MS. LERNER: Sure. Generally, the women are recruited. They hear about us. They're usually in the jail at Riker's Island and they hear about us, or there's a prosecutor or different prosecutors who know of our program and will see women and think that they're good candidates. We also have staff working at the jail who may hear of someone. Generally people seek us out, and there are a limited number of beds, so we get a lot of referrals.

MS. MONTGOMERY: Okay, good. So is this program in any place else other than New York?

MS. LERNER: WPA doesn't operate anywhere else. And, you know, the one thing that's different is it's a residence that's not also a drug treatment program and it's not a mental health program, but we coordinate people getting all of those needs met. It's really the residence and it's the life learning lab for people that goes along with the other work that they're doing. I think there are residential drug treatment programs that have some of these features.

MS. MONTGOMERY: Okay.

MS. LERNER: I don't know of another program that's just like ours.

MS. MONTGOMERY: Just like yours?

MS. LERNER: Just like ours.

MS. MONTGOMERY: Okay, then. Thank you.

QUESTIONER: Could I ask a question, please?

MS. MONTGOMERY: Yes.

QUESTIONER: You mentioned child pornography and they're now being classified as sex offenders. How does it get differentiated or pulled together? I don't know which.

DR. BUMBY: I'll give you a very, very, very quick answer and then I want to make sure that Allison and Jeffrey have plenty of time. There's very little research that we see out on the Internet offenders because it's a relatively new class of offenders that we're really paying a lot more attention to. I think the biggest question that people have is when we catch guys who are committing crimes on the Internet, what's the likelihood that they're going to go on and start having contact offenses? In a couple of studies, interestingly enough, that have followed Internet offenders once released to the community, they have found extremely low rates, like four and five percent, of contact offenses post-release. So it doesn't appear that this common perception is this progression. Certainly there are individuals who do that, but the research that I've seen most recently, 2005, 2007, indicates that some of them get in trouble for other things, much like we see with the other sex offenders, but still relatively low rates of new contact sex crimes.

Now I will also say they look fairly similar in terms of personality variables and other things to child molesters, which is no surprise because they tend to be looking at children, and about a fourth of these Internet offenders have a history of a prior contact offense. So we can talk more about that later if you have more questions about that. So sorry, Allison.

DR. REDLICH: That's okay. Will you let me know if I go over?

MS. MONTGOMERY: Okay.

DR. REDLICH: Okay. Thanks. I wanted to thank the Commission for inviting me. Can everybody hear me? What I want to talk about today is what is the problem, and if any of you are correctional officers, probation officers, defense attorneys, prosecuting attorneys, police officers, you know that people with mental health problems in the criminal justice system is a problem.

I'm going to talk about what can be done or what is being done about the problem, what your specific community can do and where you can get more information. There's just so much information out there, it's hard to tell you in a 15, 20 minute talk.

The basic problem is referred to as the criminalization of persons with mental illness. We always try to use our person-first language. And there are two main reasons for that. One is the deinstitutionalization which happened in the '50s, '60s, '70s. In the 1970s the number of state hospital beds were cut in half. You've all seen the kind of snake pits and *One Flew Over the Cuckoo's Nest*. Also

contributing to that was the development of psychotropic medications that really helped, that people with mental health problems didn't need to be in chronic mental health or living in state hospitals anymore.

And, in fact, I was just talking to someone at the California Department of Mental Health the other day and she mentioned to me that 92 percent of the state hospital beds in California are forensic. They're for offenders, which would surprise me.

The other thing that led to this problem is the tightening of civil commitment laws, so it moved from a medical model to more of a legal model in that it was no longer a doctor saying you need to be committed; it was more a judge and you had to demonstrate that the person was a harm to himself or to others.

So just some statistics—about 900,000 people with mental illness are booked into U.S. jails annually. That's about ten percent of the jail population. About a quarter of a million of state prison inmates have a serious mental illness. That's about 16 percent of the prison population. And about one million probationers or parolees have a serious mental illness. And by serious mental illness, what I'm talking about is usually there are three disorders. There's what's called schizo-spectrum disorders which are like schizophrenia, schizo-affective disorders, and psychotic disorders, two being bipolar disorder and three being major depression, so I'm not talking about all mental health problems.

Now why is this a problem? For one, the police spend a disproportionate amount of time with offenders with mental illness. They are at higher risk for injuries. I think in New York City the statistic is every six and one half minutes they respond to somebody with a mental health problem. Jails and prisons are constitutionally required to provide treatment. To my knowledge, this is the only place where you are constitutionally afforded treatment.

There are behavioral problems, suicidal risks in jail and prisons, and jails and prisons have become the de facto mental health institutions; a common statistic that's cited is the large urban county jails like in L.A., in Chicago, in Riker's jail in New York City. They house more people with mental health problems each on their own than any other hospital nationwide. And if you're a probation officer, you know that they're twice as likely to fail, as research has shown, than people without mental health problems when they're on probation.

So what can be done? Early in 2003, I believe, President Bush convened a New Freedom Commission on Mental Health. There were 15 subcommittees. One of the subcommittees was on criminal justice. They developed a report, published in 2004. They had three recommendations to deal with this problem, the first being diversion programs and really identifying people who needed to be in the criminal justice system, people with mental health problems, and people who did not need to be in the criminal justice system, providing adequate treatment in correctional settings and a focus on reentry programs specific to this population.

What I'm going to focus on today is diversion. So what is diversion? I think that's important because I think all of you in the room know, but when I talk about diversion what I mean are formal programs that divert persons with serious mental illness from the criminal justice system to community mental health treatment, and it's really those two prongs. You can't have one without the other. And, of course, public safety and perceptions of risks are important considerations when you are developing these programs and referring people into them.

It's a little hard to say. This is just something that we've developed at my company called the Sequential Intercept Model. You can see, if you turn your head this way, there's community on both ends and, really, the point of this slide is kind of a continuum of the criminal justice system as you can really divert people at any point along this continuum.

And what we find is that there are three primary forms of diversion programs for this population. There are what is called pre-arrest or pre-arrest diversion. Most of these are what's called Crisis Intervention Team, CIT. I don't know if you know of any or if any of you have that in your community. There's a little bit of debate about whether or not those are actual diversion programs because they actually focus on de-escalating crisis situations. There are 194 of those.

There are post-arrest diversion programs and a subset of post-arrest are mental health courts, but mental health courts are very specialized and they are distinguishable from other types of post-arrest diversion programs. I think add it all up—I wrote it down. I think it was 535 programs, something along those lines. And this is very different from ten years ago. They've grown exponentially. I think in 1997, excuse me, there were two mental health courts and now there are over 172 mental health courts.

And actually, jiggling down one more level from diversion, what I want to talk about are mental health courts today. But this is just a slide of all the types of diversion programs that are in the country. The red is those pre-arrest. Green is post-arrest. Blue is mental health courts. Purple is [inaudible], they have several different types of programs, and the white is no known programs.

So what is a mental health court? It's a criminal court. It's not a civil commitment court. Oftentimes people confuse the two. These are not assisted out-patient courts where you may have heard of things like Kendra's Law or Laura's Law. These are for criminal offenders. They were developed to decrease the repeated cycling through the criminal justice system. They are all of these things. They are problem-solving courts, they're diversion programs, they're specialty courts, and most of them tend to have this therapeutic jurisprudence model as their backdrop.

There's a saying among people who work within mental health courts, and it's if you've seen one mental health court, you've seen one mental health court. They just tend to be very site specific, and I think there's a good reason for that. They're developed for that community's needs and they're very site specific.

But I think there are at least five ways to operationally define the courts. One, as I said, they are criminal courts. They usually have a dedicated judge with a dedicated docket, so Thursday mornings the judge will hear all of the mental health court cases. There are certainly eligibility criteria to get into the court, to be accepted into the court. There are two main ones—clinical criteria—and this was from a survey that the Council of State Governments did where 37 percent required the participants to have an Axis I diagnosis, which is just kind of a way of defining serious mental illness, where other ones, they don't specify really. They have no restrictions. I know one mental health court judge. You know, he prides himself on taking anybody who has the need that other courts may reject, people with cancer, people with HIV. That's really an exception to the rule.

There's a criminal criterion. This was from a survey that we did early in 2005 where some are misdemeanor-only courts. Some are felony-only courts, like the Brooklyn mental health court, and most

take a combination. Actually, as we see the courts progress and get older, they become more and more willing to take in felony offenders.

It's a diversion program, like I said. There are usually two models. There's a pre- and a post-adjudication model. Now 67 percent of mental health courts require the defendants to plead guilty. Another 16 percent of courts sometimes require a guilty plea, so it's really person-dependent on that. But that is kind of controversial, and when you're talking about trying to divert people who a lot of people don't think should be in a criminal court system, requiring them to plead guilty as a condition of enrollment is actually quite controversial.

All mental health courts are intended to be voluntary, and I put "intended" in italics there. There's not much known about whether this decision is really made voluntarily as well as knowingly and intelligently. It's a decision that's made under stress. What we do know is that most people will accept the offer. You know, when you're faced with going to jail or prison or going into communities to get treatment, you know, how coercive is a choice like that?

I did a study recently where I just wrapped up where we asked people in two mental health courts at the onset of their participation if they had ever been told that their decision was voluntary, and 60 percent said that they had never been told or that they had only been told after they had already enrolled in the court.

And I'll just touch upon another finding from that study. We also looked at competence in that study because, as you can imagine, when you're dealing with people with mental health problems, the issue of competence to stand trial or [inaudible] comes up, although it's rarely, rarely discussed, and what we found is across those two courts, about 25 percent had clinically significant deficits in competence to stand trial.

Now, again, most of these courts or these two courts specifically that I studied required people to plead guilty, and competence is a threshold issue, so everybody, 100 percent, should have been or presumed competent at least.

Four, they mandate and monitor treatment, so although they're voluntary to enroll, once you are enrolled, everything becomes mandated, required. You know, there are consequences. You are subject to supervision. In terms of the mandated treatment, everybody gets an individualized treatment plan. Almost always it includes taking medication. You have to take your prescribed medications which, again, is very controversial because the right to refuse medication is a right that a person has, but not within this court.

Many require written or signed contracts, and then you are supervised both in the community, by either probation officers or mental health workers, and you are supervised by judicial monitoring where you're required to come back once a week, once a month, it varies, for status review hearings before the judge.

And there are positive and negative consequences to being in the court and to complying or not complying. There are incentives to enroll, such as being diverted out of jail or prison. There are incentives to maintain compliance so you often have certain phases where you meet. I know some courts actually give out Wal-Mart gift cards when people are doing well and they reach a certain phase. And, of

course, then you graduate, and upon graduation you may have your charges reduced or the conviction dropped, depending on the model.

There are sanctions for non-compliance that are usually in this therapeutic jurisprudence model. There are graduated sanctions and increased status review hearings where you have to come see the judge more often, community service and jail.

So should my community have a diversion program? Well, first, let me tell you that I can say with certainty that every community needs some kind of diversion program. Every community has a problem of the over-representation of people with mental health problems in their criminal justice system, but what diversion program is right for us, and I think you really need to do some kind of community needs basis of where are most of the problems, you know, do I need a pre-booking or pre-arrest program or those kind of things, and what kind of resources do you have?

And many times when they're developing diversion programs, communities don't ask themselves, "Do I have the two, do I have adequate and appropriate and effective mental health treatment services available in my community," and oftentimes they're lacking. And if they are there, is that system, the mental health system and the substance abuse system, willing to collaborate with you?

I've known mental health courts where the judge has actually had to threaten the treatment providers with a subpoena if they didn't show up and talk about and collaborate with the court. So you really need that all in play.

This I'm not going to go over in detail, but the Council of State Governments does a lot of work with mental health courts, and they've developed what they call the "Ten Essential Elements of Mental Health Courts," and they're just trying to standardize the development of these courts that, again, have exponentially grown, to kind of stop some of this jumping on the bandwagon effect that the courts have been criticized for.

And they even have five learning sites, what they call learning sites, that have fidelity to those ten essential models or elements, and they tried to pick a variety of courts that had been sustainable like the Akron Mental Health Court, and the Municipal Mental Health Court is a misdemeanor-only court.

The Bonneville County Mental Health Court or the Dougherty Superior Court in Georgia are more rural courts, so they try to get a variety depending on your needs. And I know that the Washoe County Court, which is the Reno area of Nevada, actually works without the district attorney's approval or participation, and I always think that's actually a wonderful thing, that they've made it work without their participation, so you can do it.

I just wanted to talk about briefly—is diversion successful? The short answer is yes, but we know that it doesn't work for everybody. We're conducting research to determine for whom and under what circumstances diversion works. I don't know if you guys got this NIJ report on drug courts. It was the second decade of drug court research. But I just wanted to read this to you.

It says, however, research has not uncovered which court processes affect which outcomes and for what types of offenders. So even though drug courts are much older and much more progressed than mental health courts, they really can say the same thing, and we're really trying to get a handle on that

because it's an intervention and we know that there's not one intervention that works equally well for everybody.

And whether or not they work in the long term is an open question. There's even a new term going around called "rediversion" because there are people who go through a mental health court, for instance, one, two, three times.

I'll talk a little bit about cost effectiveness. In the first year we see some cost shifting where we see funds being [inaudible] from the criminal justice system into the mental health system. You can save jail days, but a lot of criticism is there about saving jail days because people say if you're not going to shut down a wing or a unit of the jail, you're not saving any money because you're going to be filling those beds, maybe not with people with mental health problems, but those beds are going to get filled.

You can also do some cost shifting from county dollars to federal dollars, which obviously a lot of communities like if you get people on SSI or SSDI. And in the second year you do start to see some more cost savings instead of cost shifting, and the authoritative source on that is a study done by Rand on the Allegheny County and Pittsburgh Mental Health Court.

So for more information, I direct you to the National Gains Center. That's their web site up there. They have a lot of information. There are "how to" guides, how to obtain funding for your court, how to deal with confidentiality issues, which is a big concern in mental health courts.

And also another wonderful place is the Council of State Governments. They have a criminal justice mental health consensus project, and you can link into something that CSG has developed through its justice center that you can touch on all four of these areas, courts, law enforcement, corrections, community supports, and then within each of those four areas you can look at those six different areas of programs and research and so forth. Like I said, there's just so much information out there. If you happen to be a judge, I don't know if there are any judges, but there's even something about judges on the judges' leadership initiative.

And then if there are any questions, here's my e-mail address through August and then, like she said, I'll be moving over to Albany. Thanks.

MS. MONTGOMERY: Okay. Thank you. Mr. Viken will now talk to us about some issues regarding the Native American population in our prison system.

MR. VIKEN: Thank you very much. I'm your warm-up act for happy hour at this point. Electricity, having just arrived in the Dakotas, I will put this away. We don't make much use of those things out there.

I'm going to do two things and I'm going to do it as efficiently as I can. First, I'm going to talk about why Native American offenders are a special group in the federal criminal justice system. And, secondly, I'm going to make seven recommendations pretty quickly, but seven recommendations for a short-and-long-term factor that we might want to consider in seeking alternatives to incarceration for Native American people.

In the first area, why should we be concerned about American Indians in the federal criminal justice system? My perspective on this colors both my view and my recommendations. I was an assistant United States attorney for four-and-a-half years in the District of South Dakota. I took over the Rapid City office of the U.S. Attorney four years after Wounded Knee '73, the longest period of civil unrest since the Civil War in America, when the American Indian movement had an armed standoff with the United States Marshals Service and regular military people in a very unfortunate and very violent confrontation.

We had a higher murder rate on Pine Ridge Indian Reservation in South Dakota than Chicago at that time, and those were high crime years. It was a tough environment. Williams and Kohler, the two FBI agents, had just been killed on Pine Ridge. It was an extremely violent and dangerous place.

So I started out leaving law school, driving my U-Haul across the state, and took over an office that had some very serious problems that were of concern to the Attorney General of the United States. If I had any idea of what I was getting into, I would have been scared to death, but I had no idea, and it was a brilliant start—to have an opportunity work with Native American people. I ended that period after Reagan was elected. I was Acting U.S. Attorney for a brief period until he got his U.S. Attorney in place. So I was a federal prosecutor and that colors my perspective.

I did, after that, 21 years of private practice in Rapid City, South Dakota, mostly litigating against the United States Government on behalf of Indian tribes and individuals, a lot of Indian health service, medical malpractice, a lot of dead babies in Indian country because of the poverty and poor health care, did a lot of tribal litigation in tribal courts in that part of the country.

And then five years ago, the U.S. Court of Appeals appointed me as the Federal Public Defender for the District of South Dakota. Two years later we opened and expanded federal defender services into the District of North Dakota which had no federal defender system.

Probably the most powerful influence of my perspective on this subject is that my wife and I were adopted into full-blood Lakota families on Pine Ridge Indian Reservation 15 years ago in Hunkapi. The adoption ceremony is a very ancient, traditional adoption ceremony, and we have functioned for 15 years as family members with full-bloods on Pine Ridge.

The federal defender system, for me, is a wonderful opportunity to use those experiences on behalf of people charged with crimes in federal court who have no money to raise their voice in their own defense. Our organization is North Dakota and South Dakota. We have united the Dakotas as God intended in the federal defenders office.

Our area is 144,000 square miles of terrain, so one of the challenges in Indian country anywhere in the western United States is the extreme remoteness of these populations, of native populations on reservations. We are representing people and working with families from 13 reservations scattered across 144,000 square miles, so we have five offices and we're thinly staffed, but we are doing our best to fight for and advocate for that population group.

What makes them unique? Well, there are 562 federally recognized Indian tribes. But if you're looking at what we do about the federal criminal justice system when we consider Native American

issues, we can really boil down the areas, geographical areas, and study those and probably put some pilot programs in place because most of the federal crime comes from certain areas.

Seventy-three percent of all criminal charges against Indian people come from four districts—Arizona, South Dakota, Montana, and New Mexico. North Dakota is about fifth. And so if we're starting to think about policy ramifications on alternatives to incarceration, it's quite easy to identify geographically areas where we can concentrate our efforts and spend our resources.

Though American Indians are only one and one half percent of the U.S. population generally, based on the 2000 census, and only 1.7 percent of the federal prison population, there are some other statistics that are quite alarming. Of all the juveniles incarcerated by the United States Government, 61 percent of them are American Indian children. Indian women are twice as likely as white women to be incarcerated. Indian incarceration rates are 38 percent higher than for the general population. Where crimes are committed in Indian country, it is twice as likely in that offense setting that alcohol or some form of illegal chemical will be used by the offender at the time of the violation.

Now why is this? Well, this gets to the heart of why the federal government has to focus on Indian country. Let's bear in mind that Native American people owned this continent. Okay. Europeans came here and gradually reduced in size the land ownership of native tribal groups. Now there were treaties put in place which almost without exception have been violated. In our area, huge tracts of land were given in perpetuity to native peoples. They're now shrunk now to reservations which are relatively tiny.

The lands on which native peoples were placed in this country historically are largely lands that white people had no use for. They saw no gold. It was not agricultural land. It was not along a navigable river, so they were made into Indian reservations. When gold was found, as it was in the Black Hills of South Dakota in 1874 by General Custer, then that land was stolen also by force of arms.

So what do we have? We have somewhere between seven and ten generations of Native American people living on reduced reservations with very few natural resources, save for a few oil-based tribes, not many. They have the highest rates of alcoholism and chemical dependency. They have the lowest life spans for men and women. They have the highest infant mortality rate and high levels of unemployment.

On Pine Ridge Indian Reservation, unemployment is routinely between 70 and 86 percent, so when you start thinking about reentry programs, you start thinking about community-based treatment, you have remoteness, you have unemployment, you have seven generations of poverty and alcoholism, you have a very tough setting in which to deal with offenders.

So what types of offenses find their way into the federal criminal justice system? Well, the Major Crimes Act is the act passed at the end of the 19th century where the United States Government took exclusive control over felony jurisdiction in Indian country except for some states that have Public Law 280 jurisdiction where states treat Indian tribes just like they treat the rest of their state. Everywhere else in America, and in the districts about which I'm speaking, within the exterior boundaries of an Indian reservation, the United States Government has exclusive felony jurisdiction.

That means, unlike the county next door which is state jurisdiction, if you're within the

boundaries of an Indian reservation and you're an Indian person, charged with rape, murder, manslaughter, sexual abuse of a child, child abuse and neglect, larceny, burglary, arson, robbery, you will not be prosecuted by your tribe, certainly not in any final sense because it has misdemeanor jurisdiction only. You will not be prosecuted by the state. You will be prosecuted in United States District Court by the United States Attorney's Office, funded by the Department of Justice.

And, unlike committing a crime in the county next door, the same offender—rape, murder, manslaughter, burglary, larceny, sex offense— might receive a sentence in the state system which would be immeasurably shorter in terms of its punitive impact than if you're prosecuted by the United States government under the federal sentencing guidelines. So this population is needy, is identifiable, is located on identifiable land bases, and is subject to a highly punitive form of criminal justice.

When Congress does something like, passes the Adam Walsh Act and adds to the Major Crimes Act a specific target, Native American offenders who engage in sexual contact of children, all of a sudden instead of the white guy in the county next door who might get three years plus some probation for a first offense, aggravated sexual abuse will get you a 30-year mandatory minimum if you're an Indian in Indian country. So this is an inmate population with some very special needs.

It is part of the problem that when the Commission and Congress and presenters at various conferences tidily package up violent offenders, those who commit violent crimes, and sexual offenders and put them on a shelf and basically say, "Well, various forms of treatment just aren't available for people who commit violent crimes and sex offenders, but we have all these other programs available, you know," if you're a white collar criminal, or you're engaged in some kind of aggravated identity theft, or you commit some other federal offense, a gun violation maybe.

Because of the Major Crimes Act jurisdiction, the list of offenses that the feds prosecute in Indian country are almost all violent offenses and it includes all sex offenses. So we can't package up and set aside alternatives to incarceration or shortening sentences for reentry into the community or provide programs for Indian people and exclude those convicted of violent crimes or those convicted of sex offenses. Actually, we have to focus on them because those are the majority of offenses in Indian country. Seventy-three percent in the year 2000, for which we have the stats, seventy-three percent of all Indian country prosecutions were for violent crime.

So if we're going to recognize the United States government's unusual relationship with Native American people, we have to figure out how to use resources in Indian country and how to use them for violent criminals and sex offenders.

Now in Indian country, all over the western United States in particular, Native American families are large. The population of young people is expanding rapidly. So the families are large and close knit, but the communities are small. So when a sex offense is committed or a violent act is committed in that setting, it offends tribal cultural values, tribal spiritual values. It, of course, creates a victim and it also damages families, all of this in the context of a rural community far removed from any metropolitan setting, and usually far removed from any source of professional treatment or care providers.

So we have a very specific set of problems. How do you heal that? How do you approach the healing of an victim, an offender, an extended family, a community, tribal cultural values, tribal spiritual values? Well, I'd like to run through a few recommendations. My conclusion, after being a federal

prosecutor litigating for Indian people in private practice and now being a federal defender, is that incarceration as a general matter, incarceration a day longer than absolutely necessary for an Indian person in this country, returns them home broken and lost. American Indians had no prisons. Incarceration was not part of tribal values and not part of tribal justice systems.

Therefore, how do we get them home? Either by avoiding incarceration after an offense, if that's appropriate given the nature of the conduct, or get them out early and get them home where the community, the victim, and the offender can begin to heal.

My first recommendation is to the United States Sentencing Commission and that is to amend sentencing guideline 5C1.1. Zones A and B provide for probation or a split sentence, probation and some sort of halfway house or house arrest. But with the advent of the federal sentencing guidelines, in 2007, for example, the U.S. Sentencing Commission statistics show that only 7.8 percent of federal offenders were eligible for probation in Zone A. Only 6.8 percent were eligible for probation under Zone B. So of all the offenders, if you use the guidelines, almost nobody's eligible for probation. And certainly if you look at the nature of Indian country offenses, people are not eligible for probation.

So if we're serious about alternatives to incarceration, if we're serious about community-based treatment, if we're serious about avoiding recidivism, we've got to expand access to probation and other forms of community-based supervision. That was the recommendation of the Practitioners Advisory Group to the Sentencing Commission in 2007, and it will be a recommendation of the Federal Defender Sentencing Guideline Committee to the Commission this month, and I hope that that recommendation has legs.

My second recommendation is more long term, and that is, whenever Congress is looking at mandatory minimum sentences, mind you, it's for offenders generally, but especially for Native American people, they need to look at whether there is empirical data that justifies the statutory imposition of a mandatory minimum sentence. We are simply warehousing our fellow citizens. And in the Native American community, because of the nature of federal jurisdiction, those mandatory minimum sentences are falling disproportionately on American Indian people. So that should be considered.

Another consideration, my third recommendation, would be for Congress to take a serious look at 18 United States Code, section 4248. When the Adam Walsh Act, without public hearing and with precious little empirical data behind it, passed and became law, one of the provisions was civil commitment, potentially lifetime civil commitment, for persons deemed to be sexually dangerous offenders under this new civil commitment statute.

Any federal defendant who has competent legal counsel is going to be instructed not to participate in sex offender treatment in prison, not to talk about their sexual history, not to go into group therapy, because everything they say becomes a part of the official Bureau of Prisons's record. And we know from the Bureau of Prisons that within one year of release that prison file will be examined by a mental health team or by a prison caseworker for possible referral for certification to be considered for permanent incarceration as a sexually dangerous person.

That threat to every federal inmate is contrary to the good which is possible from sex offender treatment and competent therapy in prison. So Congress should take a look at that because it's at cross-purposes for what its trying to accomplish.

There is a very hopeful sign out of Congress. Recommendation four is that we take a hard look at, and probably support, a new Senate Committee of Indian Affairs's draft of a statute called the Tribal Justice Improvement Act of 2008. A letter went out June 12th of '08 asking for comment. Now what it does is it provides funding in Indian country for more law enforcement, which is understandable, but there's also a call in the statutory plan for a comprehensive study of criminal justice systems relating to Indian country and a recommendation specifically to explore alternatives to incarceration. So we may have a new statute with bipartisan support under consideration which could conduct a serious study of alternatives to incarceration in Indian country.

Another area for study, and my fifth recommendation, is that the United States courts themselves, the federal judiciary on the U.S. Sentencing Commission, take a look at the numerous alternatives to incarceration which the speakers have touched on today. Now at this point in 2005 we had 23 states which had in place statutory schemes for victim offender mediation, as either instead of incarceration or as part of the reentry program, a therapy based mediation program where victims and offenders met in an appropriate setting to discuss the offense, to discuss its impact. Those mediation programs are producing some pretty impressive statistics with regard to avoiding the recidivism. They should be studied.

In Indian country, there's a community holistic healing circle which came out of the Hollow Water Ojibwa community in Manitoba. That particular group of Indian people embraced the problem in their tribal community of incest and sexual abuse of adults and children. And instead of lengthy mandatory minimum sentences or lengthy incarceration, they developed a very regimented method using tribal traditional values, by which the offender and the victim get counseling and move through a series of steps to the point where they meet. People participate in this voluntarily. The offender and the victim meet in the presence of therapists. They exchange their views about what has happened and where they're at in their therapy. Then their family and extended family and ultimately the community are involved in a holistic healing circle.

One-hundred-and-seven offenders have participated in that program so far. Between 400 and 500 victims of those offenders have participated. The recidivism rate for sex offenders is two percent in that community, and it was a community with longstanding sexual abuse problems. For every dollar that was spent, converted to U.S., the Canadian government saved \$3.75 in incarceration costs by using that healing system. There are talking circles. There's motivational interviewing. There are drug courts in Indian country in some places. There are supervision courts and there are offender work force development programs. So those things are, I think, very much worth study and I urge the Commission and the federal judiciary to look at those programs.

The sixth recommendation is anytime you incarcerate an American Indian person you break their ties with family and community, and that starts a destructive process where they are in with people unlike themselves. Unfortunately, the recidivism rate for American Indians is the same as it is for the general population. They learn the skills if they're incarcerated.

So even on a pretrial basis, you know, we have a staff that shows about only 13 percent of American Indians who are released in the federal system on pretrial release have any problem with violations. It just isn't a problem to put Native American people on pretrial release in most circumstances, but here we go. You know, we pull them out of the tribal community on a federal indictment, and then the U.S. Marshals Service is permitted to contract and lock these people up pretrial, presumed innocent until proven guilty, in remote detention facilities. It's a problem throughout the

federal system for all pretrial people who are detained, but it's particularly destructive for American Indians.

So my sixth recommendation is that the Commission and the federal judiciary get concerned about the cost of remote detention facilities pretrial, because their probation officers have to go to those locations. CJA panel attorneys have to travel there. Federal and community defenders must travel there. That's a very expensive, heavy burden on the federal judiciary for remote detention locations pretrial that ought to be worked out with the U.S. Detention Trustee and the Marshals Service. Those contracts are a problem for all of us and they're a problem in Indian country.

Probably the simplest recommendation is the seventh one and that is, as a former federal prosecutor, if you look at the *U.S. Attorney's Manual*, Section 9-22.100, that is pretrial diversion. Pretrial diversion means that the United States Government identifies an offense, refers that case to United States Probation to determine if that is a case which is appropriate, given the nature of the conduct, the nature of the destruction caused by the conduct, the nature of the victim and whether or not this is a real offender, or whether it's somebody who is subject to care and supervision so that he or she need never be charged, that is, that his or her behavior can be resolved short of indictment.

That pretrial diversion program is seldom used by the United States Department of Justice in this day and age, and it's almost never used in Indian country. It avoids all the costs associated with federal prosecution. It avoids all the costs of incarceration. And so in its present form, addicts are excluded from eligibility for pretrial diversion, and the supervision under pretrial diversion is limited to 18 months, which is not enough for some people, especially those living in impoverished communities without much opportunity for work or treatment. And so, that's a simple recommendation. The Department of Justice could do that on its own, but it might take some advocacy to move them along. Thank you very much for your attention and the opportunity to speak to you today.

MS. MONTGOMERY: We've certainly heard a lot from our experts today. We have a few minutes left before our time is up. Does anyone in the audience have a question? Yes?

QUESTIONER: Mine is for Ms. Lerner. Hi. I was wondering, you spoke about the differences between women and men. I was wondering if there is a difference between the overall recidivism rate of women and men that they're exhibiting?

MS. LERNER: There is, but I don't have that for you right now. But I can find out. I can get you the answer.

QUESTIONER: Okay. Thank you.

MS. MONTGOMERY: Anyone else? Yes?

QUESTIONER: Dr. Redlich, I have a question about the point at which people are identified as candidates for mental health courts?

DR. REDLICH: That's a great question. Did everybody hear her question? She was asking about what point do people get referred, and the referral services vary. Sometimes they come from defense attorneys. Sometimes they come from pretrial services. Jails should have, but do not always

have, a way of screening people who come into their jails for mental health problems and suicide risks, so sometimes that mechanism of identifying people in the jail for treatment or assessment gets used as a mechanism to refer people. And some courts like the Brooklyn Mental Health Court uses Competency Order 730 exams in New York State as a referral mechanism, so it really varies across the courts.

MS. MONTGOMERY: Is there anyone else with a question? Yes?

QUESTIONER: Mr. Viken, did you say that 61 percent of juveniles in the juvenile justice system are Native American?

MR. VIKEN: Yes. Of the total number of juveniles incarcerated by the United States government, 61 percent of them are Native American kids.

MS. MONTGOMERY: That's in the federal court system.

MR. VIKEN: That's in the federal court system only.

QUESTIONER: Okay.

QUESTIONER: The feds don't bring many juveniles.

MS. MONTGOMERY: Otherwise, the feds don't bring many juvenile cases.

QUESTIONER: Well, the answer would be almost zero.

MS. MONTGOMERY: Right. Anything else? Okay. Well, let's get this out today.

QUESTIONER: I have one question.

MS. MONTGOMERY: Okay.

QUESTIONER: Dr. Bumby, do you have any opinion about the registration process, how broad the registration process is for the variety of sex offense crimes, some obviously being, you know, flashing someone in a park, and whether that's an effective mechanism for addressing—

DR. BUMBY: Yes. One of the concerns is that registration and notification is probably the longest standing policy trend that we've had from a legislative perspective with this population, yet we have very, very limited research on whether it actually reduces recidivism or not, or deters offenders. And so I think, given that question, it would be worth some research dollars and research investment to start taking a closer look at that.

I believe, given what we see in the general correctional field, that we may find that for higher risk offenders we may get better results than with perhaps lower risk offenders. I know there has been quite a bit of controversy with respect to registering some juvenile offenders, in particular, because of the potential, that experts believe there may be some negative impacts on social adjustment and school involvement and community involvement. So I think the question is vague, is there an approach to registration that is going to give us the effects that we want, and I don't think we yet know what that is,

but we've certainly widened the net. It started with high-risk offenders, and it's much, much wider now, so it's a good question to be answered.

MS. MONTGOMERY: Well, thank you very much. Oh, yes? One more question.

QUESTIONER: There's one Native American statistic that we need to know about, and that's that the highest percentage of service to this country in the Armed Forces are Native Americans.

MR. VIKEN: That's correct, and with great pride, too, sir. Thank you for pointing that out.

MS. MONTGOMERY: Okay. Well, thank you very much for your time and attention this afternoon. Let's give our panelists one more round of applause. That concludes our session for today.

