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TO: Subcommittee on Penalty Alignment and Organization

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In advance of our meeting on August 6, 2014, allow me to share a few ideas about the work of our Study Committee as a whole, our two subcommittees, and a number of related issues that may be worthy of attention, either as part of our work or as separate future projects.

The basis for my suggestions lies in discussions with and observations of criminal justice professionals throughout the state. As director of the University of Wisconsin Law School's Prosecution Project, I recently completed visits to law student interns in eighteen different counties, part of my summer schedule each year. In each community I shared our work with local shareholders and asked for their ideas. To a large extent my suggestions are theirs, derived from their many years of experience.

The Scope of the Study Committee Mission

The basic charge of the study committee can be viewed narrowly or broadly. The initial directives to the two subcommittees suggest the former view. This certainly makes our task more achievable. However, I believe too narrow a focus could be a missed opportunity.

The study committee roster boasts a broad range of experience and expertise in criminal justice matters. While low level offenses rarely dominate public discussion of criminal justice issues, in the aggregate they represent the largest group of cases in our system. This being so, the manner in which they are defined, prosecuted and punished has profound fiscal and public safety consequences for all Wisconsin communities. A broader view of our mission could take advantage of the wealth of knowledge and experience of the committee membership to identify changes that would improve our state's criminal justice system.

Reliance on Experience and Available Data

There is great potential value in reaching out to state prosecutors, police, judges, public defenders, and court personnel to ask their views on what changes would best serve their communities. Our statutory scheme of criminal and non-criminal prohibitions is a complex array of provisions. Some statutes reflect careful drafting and others quite the opposite. Some were drafted in a manner sensitive to existing provisions and others have created confusion about the relevance of overlapping provisions. Some are indispensible tools for police and prosecutors others have never been used. Our system shareholders deal with these statutes daily. They are a resource we should not overlook.

The Subcommittee on Penalty Alignment and Organization

Range of Penalties for misdemeanors

The range of penalties for classified misdemeanors – probation to 9 months in jail and fines up to $10,000 – seems more than sufficient for minor crimes, whether classified or not. As mentioned by Dodge County District Attorney Klomberg at our first meeting, the focus of misdemeanor penalties is most often fines, probation and restitution. Jail time is infrequently imposed and long jail sentences are even less common. Offenders perceived as deserving of greater punishment can be charged with felonies or multiple counts that can accommodate punitive interests.

Thus, I suggest the penalties for unclassified misdemeanors be revised to fit into the existing structure for similar classified misdemeanors such that the maximum penalty for any misdemeanor offense is no more than 9 months. For the sake of consistency, fine ranges for all misdemeanors – classified and unclassified – should also be made uniform.

Mandatory Minimum Fines

There is little evidence mandatory minimum penalties serve any meaningful public safety purpose. Their primary effect is to remove flexibility from local actors to deal with unique cases and substitute a “one-size-fits-all” approach. They are rarely used in Wisconsin – of the more than one thousand crimes in our statutes I believe there are fewer than twenty with mandatory minimums – generally involving repeat drunk driving or sexual assault offenses. I would recommend they be repealed for those unclassified misdemeanors that are retained for the sake of consistency among misdemeanor offenses.

Number of Penalty Classes

Three penalty categories are adequate for offenses having a small penalty range – from probation to one year in jail, or, if unclassified maximums are rolled back to classified levels, 9 months. The need for a larger number of classifications for felonies derives not from the number of crimes but the large range of potential penalties – from probation to life in prison without parole. Additional complexity invariably adds hidden costs in administration and a greater likelihood of disparate treatment of similar cases. We should not make the statutes more complicated without a good reason to do so.

Treatment of Unclassified Misdemeanors

The work of our sister subcommittee will likely result in a recommendation to eliminate obsolete misdemeanors and convert others to non-criminal forfeitures. For those that remain, I would suggest two changes: (1) integration of unclassified misdemeanor penalties into the existing structure for classified crimes, and (2) some means of making unclassified offenses more accessible.

The organization of our criminal code by offense type makes it user friendly. For example, all crimes against the person can be found in chapter 940; all crimes against children in chapter 948, and so on. There is not currently a similar organizational structure to find unclassified misdemeanors. At least two possible revisions seem possible: (1) move unclassified misdemeanors into the criminal code, placing them in the most relevant chapter or (2) create some form of index that would identify where in the statutes they can be found. Because many of the regulatory chapters in which unclassified crimes now reside have no criminal code counterpart, I believe creation of an index would be the best approach.

Related Issues in Current Administration

The following are recurring issues for which the current statutory scheme creates problems in administration.

Financial Consequences of Conviction

Apart from any fine or restitution ordered, all persons convicted of a misdemeanor in Wisconsin are required by statute to pay certain fees and surcharges.[1] The minimum amount due is $443; if there are specific charges with additional fees, surcharges, and assessments, or if the defendant is convicted of multiple offenses, or if costs are imposed,[2] the amount due will be greater. It is not uncommon for a defendant in a minor case to leave court owing in excess of $1000, with little realistic chance of paying.

The statutes provide limited options for indigent defendants; community service is permitted only as a substitute for fines.[3] The only response for non-payment expressly included in the statutes is committing the defendant to jail.[4] In many counties warrants are issued for non-paying defendants who are then committed to jail for varying lengths of time. If the individual is able

[1] Attached is a chart prepared for law students that notes typical fees, surcharges, and assessments required by statute.

[2] Wis. Stat. § 973.06.

[3] Wis. Stat. § 973.05.

[4] Wis. Stat. § 973.07.

but unwilling to pay this may be an appropriate sanction; if they are indigent and unable to pay it not constitutional. Under either circumstance, it is costly to local taxpayers.

Local prosecutors, judges, and court personnel recognize the difficulty indigent defendants face when ordered to pay significant sums of money. In most counties, payment plans are arranged and managed by the clerks of courts – another cost to local taxpayers, and in some, courts suspend or waive certain surcharges or fees for pragmatic and fairness reasons.

Several judges and prosecutors have suggested statutory revisions that would (1) permit community service for any non-restitution financial responsibility and (2) provide explicit authority to suspend payment in situations where the defendant lacks any realistic chance of compliance.

It may be useful for this committee – or another – to more closely examine the real impact of the financial consequences of conviction. For example, we might inquire of county sheriffs how much bed space, at what cost, is spent on contempt sanctions for failure to pay. Similarly, we might ask clerks of court the amounts billed to offenders, the amounts actually collected, and the costs to county taxpayers of collection efforts. If, as I suspect, counties are incurring significant additional costs with no corresponding benefit, this information would be useful in revising our current statutory structure.

Expansion of Expungement and Conditional Plea Authority

At present, prosecutors and judges must decide if expungement is appropriate at the time of sentencing.[5] The same statute also imposes limits on what offenses this option may be applied to.

Similarly, a former practice in many counties involved conditional pleas of guilty. Under this approach, a person would plead guilty to a felony level offense, and, if certain future conditions were satisfied, have the conviction replaced by a misdemeanor. This generally applied with young offenders with no prior record, a supportive family, but who committed a serious offense. It was an attractive option to many prosecutors because it allowed for an immediate conviction and posed no risk of having to try a case months or years after the incident. If the defendant completed the conditions of the agreement, the charge would be changed to a misdemeanor. If not, the felony conviction would remain. In *State v. Dawson*, 2004 WI App. 173 (2004), the Wisconsin Court of Appeals concluded that the current statutory scheme did not allow conditional pleas. Several prosecutors have suggested this removed a valuable tool for resolving certain cases and that it might properly be included as a dispositional option.

[5] Wis. Stat. §973.015(1m)(a).

Diversion and a Victim's Right to Restitution

Nearly all Wisconsin counties have some form of diversion program. Defendants who successfully complete the program avoid having a criminal record and prosecutors save the time and effort of a formal prosecution. However, this can create a problem in cases where a crime victim is owed restitution[6] given that a judge's authority to order restitution is limited to cases in which the defendant is convicted.[7] Although payment of restitution is typically a condition of an informal diversion agreement, enforcement of such agreements can be more difficult than in situations where there is a judgment of conviction which incorporates a restitution order. There may be value in considering statutory revisions that would support the expanding use of diversion while strengthening the enforcement of victim's rights.

Misdemeanor Options for First Offense Drug Possession Cases

Wisconsin has seen an explosion of heroin and methamphetamine abuse. Related problems have touched communities throughout the state and users come from all economic, ethnic, and racial backgrounds. For some first-time offenders an arrest for possession of heroin or methamphetamine may be their only exposure to the criminal justice system. At present, first offense possession of either heroin or methamphetamine is a Class I felony.[8] A number of prosecutors have suggested a misdemeanor option for first offenses would be a useful tool to avoid marking a young person irrevocably as a felon.

[6] A Wisconsin crime victim's right to restitution is protected by statute, Wis. Stat. §950.04(1v)(q) and by the state constitution, Wis. Const. Art. I, sec. 9m.

[7] Wis. Stat. §973.20(1r).

[8] Wis. Stat. §§ 961.14(3) (k), 961.41(3g) (am), 961.14(5) (b), 961.41(3g) (g).