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Strange, Unusual, and Creative Sentences: Analyzing "Outside the Box" Criminal Sentencing

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ABSTRACT

This is an exploratory study of "non-traditional" criminal punishments, particularly focusing on the attitudes toward these sentences among prosecutors, defense attorneys, and judges. Through interviews with practitioners, this study explores among other things, if they had used, or advocated for, these types of sentences and why or why not. There was a broad openness to doing something different from the status quo of fine or jail, however it was tempered by concerns of bias and fairness. With considerations of mass incarceration dominating the reform conversation, we find that openness to individualizing sentences, albeit with "guardrails," is reentering the reform conversation.

KEYWORDS

Sentencing; criminal justice reform; incarceration; punishment; mass incarceration

Introduction

One may not expect a pig, a yoga class, or flowers on a grave to be connected to criminal sentencing. Yet periodically we have all read media accounts of what can only be called "strange sentences." Unlike media outlets, that may be covering these stories on a slow news day or from a quirky human-interest perspective, these sentences piqued our interest because of the questions that they raised about their use and/or role in the criminal justice system. To get a better handle on these sentences and their use in the criminal justice system we decided to go directly to the individuals involved in their application: namely, practitioners in the criminal justice system (judges, prosecutors, and defense attorneys). These individuals are key to understanding the use of these unusual sentences, both practically and theoretically. We wanted to know how these sentences came about, if judges are allowed to do this, why the judge felt this was a better or more appropriate sentence, and what those on the ground thought of them more generally.

Through a series of interviews, we surfaced views about strange sentences, and presented interviewees with several real-world examples that might exemplify an unusual sentence. These cases ranged from one involving a man who was sentenced to walk a pig on a leash and carry a sign that said "THIS IS NOT A POLICE OFFICER" after an altercation with police, to a case involving a woman who was required to place flowers on the grave of the man whose death she caused while driving drunk. While we began by looking for quirky cases, sentences that struck us as odd and unexpected, we soon added the presumption that unusual sentences were any sentence outside the normal range of fines and incarceration.

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We also asked respondents if they were aware of any such cases either personally or anecdotally, ultimately uncovering an additional kind of sentencing consideration – namely "creative sentencing." After completing our interviews and revisiting the unusual sentences we came across, we struggled to define this class of cases. We were generally in agreement about which cases were creative but could not figure out why.

After some discussion, a common theme emerged. All of the creative sentences we found used details from the case pertaining to either the crime committed, victim, or perpetrator's lives in the crafting of the sentence. Of course, pre-sentence reports have been widely used in the federal system; however, the report's impact is not seen in the actions the defendant is required to take. In short, unusual sentencing is unusual because the defendant is asked to complete a task fashioned using details from the case, their own, or their victim(s)'s personal life *in an unexpected way*. The details of a case are not boiled down to a number of months but instead used by the judge in a clearly recognizable way. Further, the sentence is not passive with something being done *to* the defendant (imprisoned or fined) but active with something being done *by* the defendant. Each sentence is unusual because each defendant and violation of statutes is unique and requires a new approach. Should this method of sentencing become mainstream, the process will no longer be recognized as unusual, but the outcome still may.

Creativity vs implicit and explicit biases

Martinson's (1974) misunderstood conclusion that "nothing works" when it came to rehabilitating criminal offenders painted a dismal picture of the criminal justice system. Murakawa (2014) argues that once rehabilitation of the offenders was abandoned, Democrats focused instead on "rehabilitating the sentencing process" and in doing so they "aided, abetted, and legitimated a punitive law-and-order regime" (pp. 98, 99). While the Sentencing Reform Act and the US Sentencing Guidelines may have been intended by some to address disparities in sentencing, ultimately what resulted was a ballooning of the prison population because parole was abolished, good time shortened, and alternatives to incarceration were discouraged while growth in prison capacity was allowed to go unchecked (Murakawa, 2014). Yet, despite the rise of mass incarceration and all of the fiscal and social costs that have come with it, many judges have been reluctant to embrace the availability of some promising alternatives.

Freed and Mahoney (1990) detailed several reasons for this over three decades ago – many of which, ironically, surfaced in our interviews as still being concerns of practitioners today. They argued that many judges were simply unaware of the various options. When they were, they were skeptical about "back up sanctions" (poor monitoring) or worried about public safety concerns and the politics that go along with it. Another constraint is either lack of sentencing precedent, or alternatively codified sentencing guidelines or mandatory minimums that restrict judicial discretion. Of the obstacles in Freed and Mahoney's (1990) list, "inadequate information about offenders" is the only thing our practitioners did not discuss, and may be less prevalent today due to the use of presentencing reports.

But while information about offenders has in many cases improved, concerns about the misuse of that information through implicit and explicit biases arose instead with many scholars arguing that that application of discretionary departure provisions disadvantaged

minority defendants (e.g., Albonetti, 1997; Kramer & Steffensmeier, 1993; Kramer & Ulmer, 1996; Steffensmeier & Demuth, 2000). This concern for disparity is not limited to judicial decisions as more recently, Galvin and Ulmer (2022) explore whether offender race, gender, and prior history of substance abuse affect a prosecutor's decision to refer an offender for treatment and find that black offenders are substantially less likely to be referred. Fear of race, gender, and class disparities has been a critical roadblock to the use of alternative sentences, and these concerns were raised almost universally by our interviewees.

Still, as prisons became overcrowded and increasingly expensive, every state in the nation looked seriously at alternatives to incarceration (Beckett et al., 2016; Dagan & Teles, 2016; Petersilia, 1999; Tonry, 1998; Wilhelm & Turner, 2002). Policymakers increasingly began to make use of alternative or intermediate sentences which served as a middle ground between incarceration and probation which was viewed as too lenient. These intermediate sentences came in various forms: intensive supervision, home confinement, community service, boot camps and day fines (Petersilia, 1999; Tonry, 1998), as well as the emergence of drug courts and other specialty courts (Marlowe et al., 2016).

Research attempting to answer the "what works?" question began to assess the effectiveness of these alternatives and are far too numerous to detail here, but in an assessment of systematic reviews, Weisburd et al. (2017) found that while the answer is complicated, it is more optimistic than "nothing." They reviewed a wide range of studies that reported on the effectiveness of interventions at various points in the criminal justice process, but relevant here are those pertaining to sentencing/deterrence and drug treatments. In her systematic review of studies on sentencing interventions (defined as any sanction imposed by a judge via legal proceedings) between 1999 and 2012, Perry (2016) finds that boot camps are relatively ineffective. She also finds that drug courts had uncertain impacts, but that programs addressing mental health needs were more promising.

Holloway and Bennett (2016) conduct a similar review of 23 meta-analyses pertaining to the effectiveness of drug treatment in reducing crime and find significant and positive effects in eight, no effect in thirteen, and significant and negative effects in two of the studies. These are not court ordered treatments, and so fall out of the scope of our alternative sentences. However, they find that naltrexone drug treatment and therapeutic communities had the largest and most consistent positive effects. This finding, in combination with Wilson's (2016), in a systematic review on correctional interventions, which finds that prison-based therapeutic communities for substance abusers are also shown to be effective, suggests that despite the inconclusive results of Perry's (2016) analysis, drug courts may eventually bear fruit.[1]

While disparity concerns are real, all individualization in sentencing does not have to equate to these types of biases. It has become clear to scholars and even many practitioners that the "one size fits all" cookie-cutter guidelines are not working and are, in fact, inappropriate. Gertner (2021) applauds those judges who have "led the movement toward problem-solving courts" and bemoans the fact that they "have not led to a fundamental reexamination of ordinary sentencing ... as if we found that the COVID-19 vaccine worked well on one group but then did not bother to try it out on anyone else" (p. 14). Not only is it clear that a more tailored approach to corrections is necessary, but many also argue that creativity cannot be limited to low level crimes or to first time, nonviolent offenders (Gottschalk, 2015; Jacobson, 2005; Patterson, 2020; Pfaff, 2017). While the need to do something

different is clear, the use of creative or "out of the box" approaches to sentencing is understudied – especially relative to incarceration – and, to our knowledge, no one has taken the approach of our study: to sit down with those on the ground and get their take on "what works."

Methods

We conducted 32 interviews with judges, prosecutors, and defense attorneys working in courts throughout the United States. Those interviewed were a mix of active practitioners, and several retired or semi-retired judges. While not a representative sample, the interviewees had experience with courts from the municipal to State Supreme Courts and came from court systems from across the United States, including communities both small and large. Some were identified through their participation in courts that give particular attention to unusual sentences (e.g., restorative justice courts), some because of our prior teaching and research experiences with these criminal justice practitioners, and some by snowball suggestions from interviewees of others they thought would have important perspective and be willing to contribute to our research. We make no claim whatsoever to having a representative sample. This is a classic exploratory study, and the goal is to generate hypotheses for more systematic future research.

Each interview consisted of a single interviewee and was conducted over Zoom by three or four members of the research team. A benefit of the Zoom format was that it allowed for interviews to be conducted with practitioners from across the country. While the research team produced lengthy notes for each interview which were collectively taken in a shared document, no recording was made, a decision which presents clear tradeoffs. Lacking a recording, verbatim transcriptions were unavailable, so we were unable to perform a more quantitative analysis. However, we believe this made the interviewee more comfortable and willing to open up to the research team and express genuine views. This belief was reaffirmed as many of those interviewed, whether elected or not, expressed a sensitivity to public perceptions and potential backlash.

These semi-structured interviews followed a predictable sequence of events, but the specific questions were adapted to suit the individual interview (Leech, 2002).[2] Interviews lasted, on average, between one to two hours, with at least one lasting more than three hours. Typically, the interviews began with the interviewee giving a brief explanation of their professional background. As a way of introducing topic, we then asked them what comes to mind when we say "unusual sentence." This quasi-Rorschach test allowed us to have a conversation where the subject offered a definition to us. We would then supplement some of our own ideas not only ensuring that subjects were aware of what we were talking about, but also that we were discussing similar concepts across interviews.[3] Interviews concluded by asking about five of the unusual sentences referenced in the introduction. During the initial stages of this project, we had begun by collecting media reports of these unusual sentences, and this early exploration provided the basis for the examples.[4]

Throughout the rest of the paper, the cases below are frequently referenced by shorthand, for example "the pig case" or "the slumlord case." The descriptions below provide necessary context and background so that comments made by the interviewees are clearer.[5] While not the only examples of unusual sentences uncovered by the team, these examples vary both in the severity of the offense and in the nature of the unusual sentence handed down and

provided a useful framework to begin to tease out different attitudes toward the use of unusual sentences.

(1) After a verbal altercation with police in which a man called the officer a "pig," the man was sentenced to walk a "locally sourced" pig on a leash carrying a sign stating, "this is not a police officer."
(2) A landlord found to be in contempt of court after not addressing several building code violations on numerous rental properties was sentenced to 6 months home confinement in one of the run-down properties he owned.
(3) A man who struck his wife in the face after an argument about her alcohol consumption was sentenced to weekly yoga sessions as part of anger management counseling.
(4) A woman who drove drunk and caused a collision that killed a man was sentenced to 6 months of home confinement, as well as to write letters of apology to the victim's family, carry a photo of the man in her wallet, and place flowers on the man's grave on the anniversary of his death for five years.
(5) In a collection of cases, criminal defendants were required to get the Covid vaccine in order to be released from jail.

While we do not systematically analyze the cases, each interviewee was presented with the facts of the case and the sentence. We then asked if they would propose or support this type of sentence, their thoughts on its appropriateness, and why they felt that way. Reactions to the cases were mixed and nuanced and throughout these discussions, broader sentencing themes emerged. We conclude that the most effective and parsimonious way to present these findings is to surface and address them individually in the analysis.

Analysis

While the interviews involved individuals with varied backgrounds, consistent themes emerged across these conversations. Broadly speaking, we found receptivity to the idea of unusual sentences, but as discussed below that receptivity was tempered by several concerns, both abstract and concrete. In the following sections, we begin with a brief discussion of legal issues surrounding the use of unusual sentences. However, much of the analysis focuses on the significant themes that emerged in the in the interviews, while also making clear dissenting views, qualifications, and cautions respondents raised.

Legal issues

Space and time do not permit a full exploration of a number of legal issues surrounding the use of the types of unusual sentence we focus on in this paper. We briefly note two that we think the imposition of unusual sentences raises. First involves the authority of judges to impose the types of sentences discussed in this paper. After all, it is primarily the job of the legislature to set punishments for crimes and many of the respondents who were less receptive to creative sentencing held that view specifically because they believed they did not have the authority to do so. Second, if judges have the authority to impose such sentences, what, if any, limits does the Constitution impose on these types of punishments?

While some respondents felt their hands were tied when it comes to creativity, others felt less constrained, frequently describing maneuvering that involved making use of pre-trial probation, continuances until a particular requirement had been met followed by a dismissal of charges, or some combination of the two. Sentences similar to those described by our respondents have been imposed as conditions of supervised release following incarceration, generally falling under some sort of vague statutory authority. For example, in the federal system, 18 U.S.C. §3583 of the Sentencing Reform Act, authorizes a court to impose, as a condition of supervised release, conditions of probation as set forth in 18 U.S.C. §3563, plus any "other condition it considers to be appropriate." A second provision in 18 U.S.C. §3553, sets out the factors to be considered in the exercise of this authority. Several cases consider the exercise of this authority and raise the question of whether the types of sentences considered here are consistent with the statutory scheme.[6] A secondary source of authority is found in the court's ability to impose conditions as part of probation, even without a term of imprisonment preceding the condition. But are some unusual sentences void for being inconsistent with the goals of probation?[7]

Even more intriguing, but beyond the scope of this paper, is whether the types of sentences we consider in this paper run afoul of the Eighth Amendment, or analogous provisions of state constitutions, prohibition of cruel and unusual punishments. In *U.S. v. Gementera*, the Ninth Circuit considered the implications of the 8th Amendment in connection with the unusual sentence the court had imposed. The court noted that no court had found such a sentence to violate the constitutional provision. Still, consideration of the 8th Amendment's prohibition of cruel and unusual sentences cannot be simply ignored. Drawing on Justice William Brennan's concurring opinion in *Furman v Georgia*, some commentators have separated "cruel" from "unusual" and suggested that a sentence which would not qualify as "cruel" under any reasonable interpretation of the word might still be "unusual" if it departed drastically from societal conventions and expectations. Moreover, some state constitutions, such as Maryland's, Texas', and California's, expressly prohibit "cruel or unusual" punishments. So, it is a possibility the 8th Amendment and similar provisions in state constitutions do set a limit, even if it is unlikely to be breached. Where that line is crossed is interesting, and while we do not take that up in this paper, we do acknowledge the importance of such legal issues.

Receptivity and skepticism

Why are some interviewees more amenable to creative sentences while others are more content with the status quo? One explanation could rest with the backgrounds of the practitioners and could cut in different ways. Not only might their role in the court matter (i.e., prosecutor, judge, public defenders, or private criminal attorneys), but also the ways in which these actors were socialized (i.e., whether a critical mass of others in their position will endorse, or condemn, greater creativity). But backgrounds alone do not appear to explain all the reasons that many interviewees looked favorably toward creative sentencing.

A clear finding that emerged in the interviews was that, overriding any kinds of specific concerns they had with examples discussed, there was a general willingness to consider something beyond what was the norm. Lurking in their world was the often-seeming futility of the system, coupled with the escalating reality of mass incarceration. We found, across many of our respondents, interest in the possibility of more creative thinking, though the

obstacles to pursuing these were also bedeviling and openly recognized, leading some to worry about the applicability of creative sentences.

Receptivity

In general, there was a surprising openness to creative or unusual sentences. However, few interviewees leaned heavily into the types of creative sentences that generate media attention, and many pointed to the sentencing guidelines as a constraint on their ability to deviate in creative ways. Yet even those who felt constrained were open to the idea of doing something different and a number had used, or advocated for, creativity. In and of itself, this is a significant finding. While it is the outlandish examples that get much of the media focus, creativity is present, albeit more subdued, in the system. Some explanations for greater receptivity, which will be discussed further in the following sections, include political and community pressure, a sense that the standard punishment of a fine and/or time is inappropriate in the given circumstance, or even a more basic frustration with the seeming ineffectiveness of existing punishments in addressing issues of criminal justice.

Over the course of the interviews, we found that many had this creativity in their background without realizing it. For those who initially denied it, once offered examples, some would recognize creativity in something they had done and would proceed to tell us their version of a creative or unusual sentence in their experience. These lightbulb moments suggests that while creativity may not be at the forefront of all practitioners' minds, it is nonetheless present. Based on our interviews, we found several locations within the criminal justice system where creative sentencing was either used or suggested.

Further, through interviews of those involved with various municipal level courts, we found a surprising level of creativity and diversion from fines and time at this level of the system. While it may not be the type of sentence to grab headlines, we found a level of openness to creativity both in theory and in practice among many practitioners. Additionally, this may also reflect a shared ambiguity regarding the concepts of unusual, strange, creative, or weird sentences, something the research team has struggled with as well. When asked about an unusual sentence, a practitioner may have something like the pig case in mind, which is both unusual and a dramatic example, and thus, they overlook some of the less dramatic examples of thinking outside the box in which they have engaged.

In Figure 1 below, we have identified locations in which creative sentences could emerge in the circles and situated them within a snapshot of the traditional and community court systems. In traditional courts, some practitioners described how they might place requirements on an offender such as enrollment in or completion of an educational program to be completed within a specified period in lieu of jail time. Once the offender completed the requirement, their charges could either be dismissed or disposed with no jail time required. Others, like the pig case, involved a type of exchange which we discuss in a later section. There was also some discussion of unusual components of a sentence that were given in addition to time.

Skepticism

While we did find a general openness to the idea of creative sentences, some respondents were skeptical either in part or in whole. The skepticism came in several different forms. Some questioned the effectiveness of unusual sentences while others wondered what the point of creativity was. For others, creative sentencing raised concerns about potential

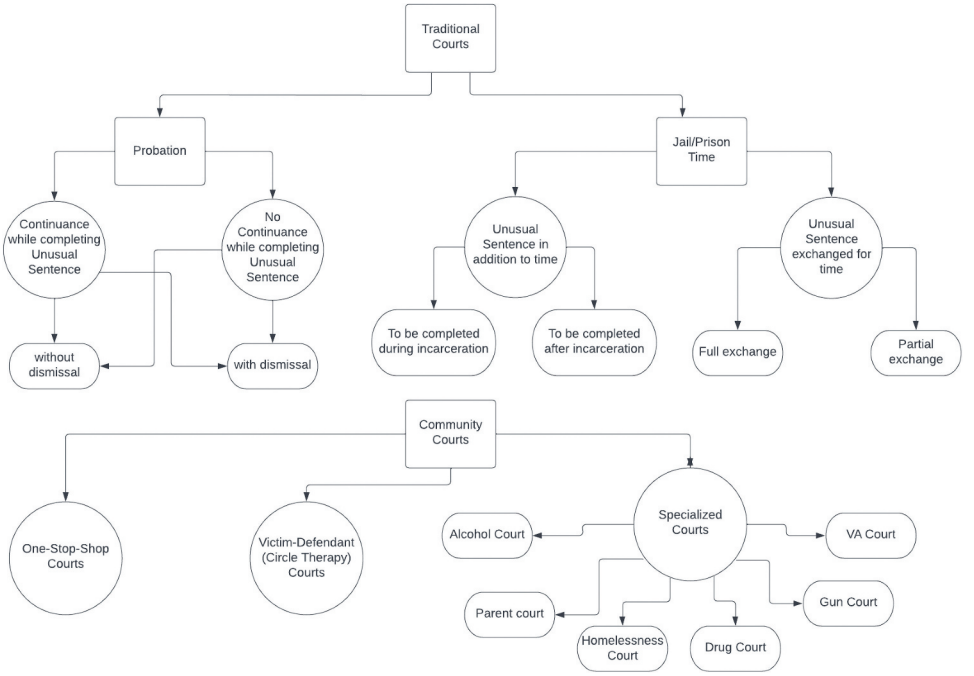


Figure 1. Places creative or unusual sentences were found.

disparity or bias. Finally, many questioned whether the courts had the authority to fashion unusual sentences and expressed concern about logistical or practical problems associated with these sentences.

Even for those who were receptive to creative sentencing, some simultaneously were concerned about its effectiveness. For example, one judge expressed frustration that their own experience with creative sentencing of treatment and manual labor for a serial offender, was ineffective as the individual continued to reoffend. The failure of a creative sentence is possibly more frustrating than traditional failures of the system due to the level of involvement and effort spent on them. A related concern raised by some interviewees is that they lacked the ability to meaningfully measure the effectiveness of their sentences. While there may be some comfort when one doesn't reencounter someone where a creative sentence was used, that does not mean the sentence was effective.[8]

Some interviewees also questioned either the purpose of unusual sentences or the motivation of the judge that handed them down. Many of these simply did not think creative sentences would work. For example, one prosecutor stated about the DUI case that "forced expressions of anything are worthless." Additionally, many reacted negatively to the pig case and questioned what it accomplished. Some went a step further and argued the sentence may, in fact, exacerbate the problem and reinforce hostility toward the police. The prosecutor who remarked on the DUI case also stated that, "all judges have Google Alerts for themselves" and these sentences were just an attempt to be "cutesy" and get publicity. This skepticism took the question of what motivates a sentence and flipped it on its head. Instead of trying to unpack what the broader goal of the sentence was in reference to the offender, the skepticism here questions what the goal of the sentence was for that judge. The

question, and implied skepticism, of why the judge would hand down a specific unusual sentence also underlay some of the concerns about disparity that interviewees raised.

When given the option to use punishments besides fines and time, the individuality of a judge will come through. While the benefits of this individualization are a topic that we explore later, several of the skeptical interviewees raised the concern that individualization may lead to disparity, particularly disparity that exacerbates existing inequalities. For example, one judge posed to us the following question: "Are we going to use more creative sentences in a rich county, compared to a poor county?" They followed this up by recognizing that some defendants are always going to be presented as more sympathetic saying, "look they're on their way to college you don't want to disrupt that", but then juxtaposed that with a kid that came from a low-income area and isn't going to college. This questioning of who gets a break given their "future" has recently come to the forefront of broader public attention given the lax treatment of some sexual offenders like Brock Turner,[9] and the ensuing backlash in that case toward the sentence and judge was something that may have been in the back of practitioners' minds. This judge recognized that implicit in their own use of these creative sentences was the idea of a "break", but they also raised the important concern that by removing some of the restraints on judges and allowing for more individualization, we can reinforce what the judge called existing middle-class biases.

This judge's comments demonstrated a skepticism with unusual sentences regarding human biases that was raised by many interviewees, even those who were open to their use. It is important to highlight a subtle but significant finding that this line of skepticism was rooted in a recognition of human biases more so than in a concern about the creative sentence itself. One judge summed up their feelings about this by saying because of these biases they would be open to creative sentences "with guardrails." Judges are already powerful in our criminal justice system, and creative sentences further empower them. While many are motivated by good intentions, it would be foolish to suggest that implicit, and even explicit, biases do not play a role in the criminal justice system.

One prosecutor, who overall supported more tailored sentences, nevertheless felt the system did not enable them to do so stating, "criminal law does not favor complexity. KISS, Keep It Simple Stupid." Additionally, most interviews ended by discussing the series of COVID vaccine cases. Across the board, we found that the response from the interviewee was some variation of "look, I'm vaccinated, boosted, double boosted, I believe in vaccines and science, everyone who can – *should* – get the vaccine. But, sentencing someone to get vaccinated is completely inappropriate for a judge to do, and I would not do that." So, the issues raised in these COVID cases represent one clear outer limit for situations in which respondents would not entertain creative sentencing or, more broadly, what the court itself had the authority to do.

Finally, skepticism of creative sentences took the form of practical concerns. Many interviewees recognized these types of sentences require more supervision and management. Setting aside the question of effectiveness, in the pig case, for example, a judge must procure a pig and then ensure the sentence is completed. Many judges also lamented that they were unable to follow up with those they sentenced over time. Unusual and creative sentences are a diversion from what is often cast as assembly line of justice (Packer, 1964) and thus would, as several interviewees said, add on to an already overburdened and overworked system.

Individualization

Interviewees often evidenced a sense of futility about the current approach to sentencing and punishment. As such, across interviews we found a receptivity to doing something different based on the specifics of the offender, the nature of the offense, and/or the community in which the offense occurred. Some interviewees pointed out that incarceration does nothing to remedy potential underlying issues with which the person may be dealing; instead, they would use the discretion they were afforded, or get creative using a deferred sentence. Here it is important to distinguish between random instances of individualization as done by individual judges, and systematic changes to sentencing designed to emphasize individualization as seen in community courts. Across the interviews we found a renewed receptivity to individualization not only as a way to battle mass incarceration, but also as a way to more effectively address many of the goals of punishment and the broader criminal justice system.

Mass incarceration

A recurring theme in interviews was the overwhelming problem of mass incarceration. There was an almost complete acknowledgment of this concern, and a concomitant receptivity to "fresh thinking" about criminal justice sentencing as a result. However, beyond the surface level recognition of the problem, the interviews reflected a range of views and considerations.

A municipal court judge whose jurisdiction included what they described as a college town with "college town problems," as well as a sizable homeless population said they did not see the traditional approach of fines or jail as an effective solution for low level offenses such as vagrancy or public intoxication. The judge bluntly stated that fines would never be paid by homeless individuals because they simply lacked the resources and further, created a barrier to successful reintegration. Additionally, jail failed to address the root cause of the issues that brought them before the judge in the first place. For the community, not only did unpaid fines serve no purpose, while jail may temporarily incapacitate the individual, it ultimately comes at the community's expense. For college students, the judge stated that it was frequently parents that paid the fine, thus not directly impacting the student offender, and the judge believed that incarceration was inappropriate for such offenses.

This same judge's approach was to use resources available as part of a homelessness court to try to respond to the root causes of the violations of the homeless offenders, such as a lack of identification or mental health services. For the college students, their approach was to bring them together with the community in a more restorative type of process. For example, to address noise complaints, they felt it was more effective to bring the student offenders face to face with the community members to hear how their behavior had negatively impacted the community. In this judge's approach, we saw a recognition that the standard approach of jails or fines were ineffective and inappropriate for the offenses before them and for the communities they served. Rather than adding to the jail populations, which would be less work, they embraced an approach that sought to keep individuals out of the prison system in the short term while also reducing the likelihood of them reoffending in the long term.

Goals of punishment and the criminal justice system

While interviewees recognized that mass incarceration was a problem and that creative sentences present a possible alternative to incarceration, we also found that they thought of these sentences as serving other goals of the criminal justice system. For example, we found greater openness to the seemingly abandoned goal of rehabilitation, particularly among those working primarily in lower courts. Additionally, we found that respondents believed creative sentences may offer a more holistic approach toward the goal of restoration. We repeatedly heard passionate arguments for solutions that address "root causes" of criminal behavior, and the futility of giving routine in/out sentences. Despite this, the discussion of sentencing in more serious cases still seemed to revolve around retribution. Further, though not a standard goal of punishment, discussions of shaming repeatedly surfaced. Below we detail discussions of goals, specifically addressing rehabilitation, restoration, retribution, and shaming.

Rehabilitation. While the rehabilitative purpose of sentencing was an element in many cases, it was especially prominent in the community court overseen by one judge. This community court was aimed at those struggling with substance use. Rehabilitative practices in this community court were distinct, and this was exemplified by the language used by court professionals which focused on treating the offender with respect rather than contempt. Language and terminology in this court placed a great deal of importance on speaking to defendants with respect and praising their progress through the program. For example, punishments were referred to as sanctions, and "could even be considered a reward." Additionally, several court professionals were assigned to each case, including case managers, mental health professionals, and attorneys. The judge, whose decisions were "informed by their expertise," coordinated their efforts to help defendants. In this court, we found that each sanction necessitated some therapeutic component, and every element came back to rehabilitation.

While creativity in these rehabilitative courts only extended to low level offenses or "victimless" crimes, the judges felt that by addressing the root causes of the individual's addiction through rehabilitation, this reduced recidivism.[10] Echoing this reasoning, some of the interviewees from traditional courts framed their use of alternatives as a means of addressing the root cause of the offender's problem, thereby preventing things from escalating to more serious crimes. Nevertheless, we did not find many addressing the root causes of more serious offenses.

Restoration. Another goal of sentencing that emerged for practitioners in community courts, in particular, was that of restorative justice. Punishments doled out by these courts focused on a holistic view of the defendant's needs while also involving the victim and community where possible. Judges spoke of specialized courts designed much like the now popular drug courts for countless demographics (Marlowe et al., 2016) such as veterans' courts, homelessness courts, and more.[11] Creating these specialized courts allowed restorative measures to be taken that were both individualized yet somewhat standard, seeming to resolve the disparity dilemma that arises with hyper-individualization of sentencing. The restorative aspect of these courts, seeking to reintegrate the offender into the community while also serving the victim, was where opportunities for creative sentences emerged. Some courts have programs called "circle sentencing" in which mediators bring the defendant

together with either the victim (if willing) or a proxy for the victim. The second prong of restorative efforts comes in with "one-stop-shop" courts, in which defendants are provided with resources.

One judge told us that they personally "didn't want to process cases" and instead "wanted to work with people", they contrasted this with other judges they viewed as "never consider-[ing] they were working with human beings." This judge was able to use the public library as a space in which all offenders were aided in applying for mental health services, social services, drivers' licenses, registration for GED programs, and even eye-care for those who needed glasses to read the necessary paperwork. They explained that having these resources in one place made a positive impact on defendants who were in dire need of such services. Further, the judge discussed the advantage of using the library rather than a traditional courtroom because it was less intimidating, making it more likely the defendants would appear when required. The goal of this judge's court was primarily restoration of the community by helping defendants get the services they needed to function in society, and punishment took a secondary role.[12]

One significant caveat we found with this approach, designed to both treat the defendant and respect the victim(s)'s wishes, was the requirement of substantially more personnel. Courts frequently had several caseworkers in addition to an attorney for each defendant, raising the question of the financial feasibility of such courts. One could argue that investment in such courts will provide a future return of lowered incarceration, arrest, and crime rates.[13] The question of the costs and benefits of community courts versus traditional courts is beyond this project's scope but is a clear avenue for future research.

Retribution. As noted, many respondents were hesitant to extend the opportunity for rehabilitation to serious offenders. Many believed at this point the defendant has sacrificed the underlying exploration of their issues by committing a serious offense, and that prison time was either appropriately earned or statutorily required but either way, creativity was inappropriate. We found, however, many nuances to this position. For some it was simply viewed as correct – punishment, or retribution, coupled with sensitivity to victim concerns, justified incarceration. For example, the DUI case illustrated this nuance well as opinions toward the sentence varied greatly. Some interviewees were uncomfortable with the requirement of placing flowers on the grave of the man killed because the family would likely want to visit the grave on the anniversary of his death. Others flatly rejected the idea of lessening the sentence for an offender who had taken someone's life through their own reckless actions and felt the individual deserved jail time as a retribution for their offense.

Traditionally, a common assumption of retributive sentencing is that this is a "zero sum game;" what is bad for or harms the offender, is good for the victim (Zimring et al., 2001). While this may be true in some instances, creative sentences may nevertheless offer a chance for the victim to, as one interviewee put it, "get their pound of flesh." To the extent that retribution is a goal of the criminal justice system, we found some of our interviewees to believe that creative sentences could actually meet that goal in a way that better serves a victim's wishes compared to the status quo of fines or incarceration. For example, while there was some skepticism of the sentence, the slum lord case elicited varied responses from interviewees. Even those who were uncomfortable with the sentence remarked there was some justice in making the slumlord experience the same conditions to which they had subjected their tenants, what one prosecutor who

disagreed with the sentence described as "how do you like that bitch?" justice. Instead of a purely restorative sentence here, for example fixing all the code violations or giving tenants a break on rent, we found some openness to the retribution aspect of this sentence.

Shaming. While it is tempting to think of shaming and the types of sentences we are discussing as the same, they are not. Before the rise of the penitentiary system, sentences that did not involve death were usually shaming sentences, so considered in a broad historical time frame, a sentence that focuses on shaming is not unusual (see: Kelly, 1999; Massaro, 1991; Powers, 1966). Nor do all unusual sentences that we have encountered include a shaming element. While it may no longer be politically correct to acknowledge shaming as a "goal" of punishment, given its historical context, and for reasons we argue below, we include it here among the other goals.

Shaming was one of the less popular versions of creative sentencing because interviewees felt that through it may punish, it was unlikely to be either rehabilitative or restorative.[14] We found nearly all participants to believe that shaming in the context of sentencing was morally wrong. One expressed hope that we'd moved past an "eye for an eye" system as a society.[15] However, some differences arose among interviewees in what could be classified as shaming.[16] Almost all considered walking a pig on a leash to be shaming, while none identified the domestic violence yoga case as shaming. Yet, we found the interviewees' classification of house arrest of the slumlord to vary, as did considerations of whether requiring the DUI offender to leave flowers at the grave and carry the photo of the person they killed about drunk driving was shaming.

We note here that while interviewees tended to balk at the use of shaming in unusual sentencing, they did not consider traditional punishments (i.e., prison, jail, fines, community service, criminal record) as shaming. Perhaps to someone with entirely fresh eyes, the idea of being made to wear an orange jumpsuit, live in decrepit conditions, and follow a strict schedule is just as or more shameful, than walking a pig on a leash.[17] Yet, we found our interviewees, who often had decades of experience with the criminal justice system, to view jail as substantially more dignified than wearing a sign reading "This is not a police officer" for two hours. The different approaches to identifying and using shaming in punishment point to a broader question: can you punish without some element of shame? Being singled out as someone who has broken a rule and brought to court is arguably always shameful regardless of what the punishment that follows might be.

The view seen in many of the interviews that shaming is, on its face, wrong ignores the reality of our current criminal justice system and especially the carceral system. Perhaps it is that interviewees, through their combined decades of experience, have become desensitized to orange jumpsuits and the civic death that have become routine, or perhaps it reflects a deeper discomfort. The current shaming inherent in our system is hidden; incarceration happens behind the walls of a prison and the civic death occurs indirectly after the individual has left contact with the practitioner. These forms of shaming are easier to ignore while the pig case and the slumlord case require that the practitioner be directly involved in the shaming which may be more uncomfortable than hiding from the reality of what results from more conventional sentences. The punishment can either intensify or ameliorate the shame; however, to remove shame entirely from the criminal justice system would require fundamental changes both in ideology and practice.

Interchangeability

In the interviews we explored the idea of "interchangeability," or whether the interviewee would be open to exchanging time in prison or fines for something else. Generally, this would take the form of community service related to the offense or service that takes advantage of the offender's skills or abilities. Another type of interchangeability was an idea of a sentence that was creative and, in the view of the interviewee, more effective. For the former, what we have called "skills for time," we found some level of receptivity in the abstract but resistance or skepticism to its application. However, for the idea of exchange that involves doing something different, as we have already alluded to, there was some openness.

Pig vs. ride-a-long

Rooted in the concept of creative sentences is the idea that there will be individualization based on the offender and/or the offense. Respondents considered what the appropriate creative sentence would be in exchange for time in the pig case. Generally, we found broad skepticism of the actual sentence because most did not feel like this was something that should have been charged in the first place. However, there was some discussion, even among those who thought the charge was inappropriate, about what type of sentence would best achieve a positive outcome here. Several interviewees said the pig on a leash sentence, while creative, may very well make the offender dislike police and the criminal justice system even more. Alternatively, they could even lean into it and view it as a positive quasi-badge of subversive honor. Instead, they suggested if the goal was to get the offender to understand, appreciate, and respect the job of police, then maybe a ride-a-long would be more effective as it humanizes the police instead of shaming the offender. In this instance, interviewees were suggesting that they might have exchanged prison time or a fine for something creative which would better achieve a positive outcome.

Skills for time

Interviewees were less receptive to another type of interchangeability. One of the lines of questioning, the product of an early interview with a defense attorney, was the idea of using the skills or talents of an offender to provide some form of targeted community service in exchange for a reduced, or even dismissed, prison sentence. The initial interview from which this emerged raised the prospect of taking a doctor who was convicted of a nonviolent offense, such as white-collar fraud and, rather than sentencing them to time in jail, having them provide free medical services to an underserved community. The interviewee who raised this quipped that nothing would be more of a punishment to a professional than having to provide services and not be paid for them. Intrigued by this idea, we used this example in future interviews. While the original interviewee who raised it might have considered this a viable alternative, future interviewees were much less receptive.

A former prosecutor best captured much of the skepticism we encountered to this idea. Their initial reaction was a flat out "no," to which they added two lines of criticism that were echoed by others; 1) what goal is this achieving, and 2) this would exacerbate the existing racial and class biases already present in the criminal justice system. The prosecutor stated

that in a purely utilitarian sense of doing the most social good, maybe this type of sentence would make sense, but they rejected that approach.[18]

We found an overarching and recurring concern in our interviewees to be that implicit in the discussion of exchanging skills for time was the idea that these options would necessarily contribute to the existing biases of the criminal justice system, a concern raised in the discussion of unusual sentences more generally. A common criticism of the United States' criminal justice system is that it is better to be "rich and guilty than poor and innocent" (Stevenson, 2013). Many interviewees raised a version of this criticism in their reactions as well. For example, in the initial hypothetical the offender was a doctor, but what if the offender was a black teenager who also committed a similar nonviolent offense, would society have the same level of compassion viewing them as equally valuable as the doctor? Many of the interviewees were deeply uncomfortable with this idea of deciding who had "value" and deserved this type of deference. In contrast, though, some interviewees speculated that everyone has skills and talents that could be put to use. With this in mind, by normalizing the idea of doing something different for a specific offense rather than only looking at the offender specifically, there might be a space where practitioners would be more interested in the idea of exchange.

Politics

Another major concern is that of "politics." Creativity can be publicly embraced or criticized for being too hard or too easy a sentence. Many of those interviewed are elected to their positions and, as a result, are keenly aware of the political ramifications of the perceptions of their work. For the most part, though, this was also true of appointed practitioners who may be concerned about reappointment or promotion. However, we found that politics can cut both ways, being either a roadblock or an opening.

Politics as a barrier

Politics was surfaced by most respondents in their skepticism of creative sentences. Clearly, fear of political backlash can be a major reason why these unusual sentences have been uncommon. Many respondents noted that they would not think about creative sentencing specifically because of the media attention and the possible backlash. They believed that remaining within normal sentencing practices decreased the likelihood of publicity, which they interpreted as being a negative development. One interviewee summed it up well when asked about reelection "well, I do work for the people. It will always be in the back of the mind. Anyone who says otherwise is lying." Alternatively, some respondents believed the judges who handed down these sentences specifically did so to obtain positive media attention which they believed would translate to political support. While this is an example of using creative sentences, if perceived as being used for political gain, it may leave a bad taste in the mouth of other potential practitioners, thereby "tainting" the idea and preventing the acceptance of creative sentences more broadly.

Politics as an open door

Despite a great deal of discussion about how, both real and perceived, politics may be a barrier to the use of more creative or unusual sentences, it also became evident that politics may also offer an opening for doing something different. Regardless of the negative

reactions of others, one judge made a name for themselves through their use of creative sentences. Instead of viewing this as a political liability, they considered it an asset, and one that they were more than happy to embrace. Through this interview, they pointed us to other judges they knew of who had developed similar, positive, reputations for their "out of the box sentences." This presented an interesting disconnect because, as discussed above, many of our interviewees were critical of the use of shaming. Yet this judge was proud of making frequent use of it and, further, was elected and *reelected* to their position. While we should take appropriate caution before we broadly generalize from this example, it does raise the possibility that while many legal elites and practitioners view shaming as inappropriate there may be a simultaneous appetite for it among voters.

Increased receptivity to progressive policies. While none of the prosecutors we interviewed self-identified as "progressive prosecutors," we found that respondents shared some of the goals of high-profile progressive prosecutors. Some progressive policies, such as a focus on treating drug addiction as a health problem rather than only a criminal problem, were endorsed by many of those interviewed, though they eschewed the publicity associated with the "posterchild progressives." Indeed, one of the findings of this project was that the embrace of some progressive policies and the belief in how they met the goals of the criminal justice system crosscut ideologies.

Many of the prosecutors with whom we spoke were elected to their positions, and during their campaigns and tenure made it clear that they wanted to approach the criminal justice system differently. One even went as far as to say that they were pushed to think differently by their voters, suggesting that they became exposed and more open to these alternatives through the political process, flipping on its head the idea that the public pushes the criminal justice system into a more conservative direction. In this way then, we found a more complicated picture of public attitudes toward prosecutors and the criminal justice system than the media typically presents.

While Krasner in Philadelphia, Bragg in New York City, and Boudin in San Francisco have become political targets,[19] we found that some prosecutors felt encouraged, and even pressured, to think of the system through a different lens and to embrace a different approach to how we handle criminal justice. This suggests that the public may be more receptive to thinking differently about criminal justice, so long as they avoid the label of a progressive prosecutor and associated media scrutiny. While the progressive prosecutors who have captured the media's attention have used their prosecutorial discretion to not charge certain offenses, among those we interviewed, we found a different approach. For example, while our prosecutors would use their discretion to not charge, there was a pre-condition, such as seeking treatment or staying out of trouble for say, a year, before the charges would be dismissed.

Towards a more collaborative court. One place where politics has opened the door for doing something different, which may include the unusual or creative sentences we studied, was the broad bipartisan recognition that the current system of fines and incarceration that are traits of the tough on crime era are just not working. For example, a 2019 survey, found that 75% of Americans "believed that the county's criminal justice system 'needs significant improvements'" with 60% of Republicans and 84% of Democrats agreeing[20] . While each party comes to this conclusion for different reasons, this bipartisan agreement is reflected in the passage of the 2019 the FIRST STEP Act (2018), which included sentencing reforms.

The politics around crime and criminal justice may be slightly shifting, and our interviews reflected this. While many said they were afraid of backlash if they did something different, others discussed how they felt they were put there to do exactly that. This sentiment came across in a multitude of ways. For example, one interviewee who publicly touted their use of creative sentences highlighted how they were elected to their position five times and faced "limited opposition during those races." They were not blind to the potential for backlash, especially today in the era of social media, but they felt at liberty now than ever to hand down the type of creative sentences for which they became famous. This tension was echoed by another interviewee who had a similar view calling it "the best of times and the worst of times."

We did not find uniform agreement, however, on the relationship between creative or unusual sentences and being elected or appointed. While some judges felt that there was at the very least a tacit endorsement of their approach via the electoral process, others were less certain. One prosecutor felt that it should be federal judges that are seen being more creative since they are not elected and "don't give a damn about public pressure or social media." Others also felt that they were empowered by their voters to be more creative. One judge while discussing the sources of creativity in sentencing said that their county, one with several colleges, was more likely to make use of unusual sentences compared to their neighbors.

A district attorney discussed how it was the community that came to them encouraging them to do something different in terms of sentencing and criminal justice. In that instance, a community organization played a significant role educating the public about restorative justice, seeding the idea among voters that something else can, and possibly should, be done. This DA felt encouraged to approach sentencing in a more restorative or creative way. While this was a single example, the role these groups and advocates may play an important role in the application of these creative sentences more broadly. By educating the public, they can help people learn that fines and incarceration are not the only tools available to respond to crime and criminal justice. Further, in these instances where the community is pushing for something different, it very well may be that now, or in the future, instead of there being backlash for a creative sentence, those elected from these communities may instead face backlash for not using them.

Discussion: standardization of individualization

While we surfaced strange sentences initially, this study quickly evolved to engage in discussions more generally about the nature of sentencing in today's criminal justice system. Respondents quickly moved beyond the example cases to considerations about their own experiences with unusual sentences leading to reflections about the general process of creative sentencing. We found that one of the primary concerns with creative sentences could also be one of its greatest benefits: individualization. At first glance, it may seem that disparity and complexity cannot be divorced from sentences tailored to fit each defendant, a concern that was surfaced by many of our interviewees. However, there is a middle ground: the *standardization of individualization*.

Disparity seems to be a bad word in today's sentencing world, but it is not a negative concept in and of itself. We found that when asked about the themes of creative sentencing there was receptivity, sometimes quite significant, to thinking outside the box because there was a sense that what they were doing and how it was done not only fueled mass incarceration, but also failed in any demonstrable way to consistently do much else. That said, nearly all interviewees had qualms about potential unfair disparity in creative sentencing. Yet, an argument can also be made that "positive individualization" would allow more flexibility to account for mitigating and aggravating circumstances to create more effective sentences, whether effective means restorative, retributive, or rehabilitative. "Negative individualization," in contrast, unfairly doles out punishments in a way that disproportionally hurts or helps particular groups. One of the two problems that can be resolved by standardization of individualization is in selecting positive individualization while eliminating or at least curtailing negative individualization.

The second issue with individualization, hinted at by many interviewees, stems from the complexity of each defendant as a person. Which details should be considered and incorporated into the creative sentence? Are judges and prosecutors to look at the background of the defendant, their contribution to society, the background of the victim, the victim's wishes, the details of the case, or other details? As a practical matter, a single judge cannot consider infinite variables and when it comes to fairness, some variables such as race and gender should not be considered. While sentencing guidelines were, in theory, meant to resolve these questions, in practice they were an abject failure. And so creative sentencing returns, in part, to the days before guidelines mechanized sentencing. That said, in the wild west of creative sentencing, the judge is free to consider whatever variables they choose, whether there is a pre-sentencing report or not, with one notable exception: community courts.

Community courts have managed to successfully merge two opposites: individualization and standardization. With clearly delineated goals for each court and premade procedures for creative sentencing, but without the rigidity of sentencing guidelines, community courts have found a middle ground in which sentences for each defendant are tailored for them based on a specific set of rules. Though we do draw some of our conclusions from interviews with personnel in community courts, it should be stressed that the themes surfaced were neither rejected as unattractive nor impossible for more serious crimes. More than thirty years ago, Judge Jack Weinstein (1989, p. 16) noted that with respect to serious cases: "Imprisonment is not, and cannot be, the sole solution to our serious crime problem. Excessive use of long-term incarceration creates unacceptable cost for taxpayers, offenders, and society." Indeed, through the interviews, it was clear that the impressive efforts specialized courts have made to standardize individualization should serve as invitations to think in similar ways in other contexts.

Informed by the interviews, we argue that when thinking creatively about sentences, accepting a tradeoff of less consistency for greater individualization is a necessary cost, worth incurring if done appropriately. Many scholars have argued that if we are to meaningfully address mass incarceration, we need to do more than simply decriminalize drugs or not prosecute minor crimes (Gottschalk, 2015; Jacobson, 2005; Patterson, 2020; Pfaff, 2017). They argue that these strategies are simply not enough, and that we must also seriously confront the length of sentences for serious crimes. In this regard, creativity in sentencing may provide a politically palatable option given the receptivity found among respondents

that seemed to be shaped by a sense of frustration about what the current system has not accomplished.

Community courts have an approach that is akin to medical diagnosis and treatment. When diagnosing a patient, especially in the case of severe illness, multiple doctors create a unique treatment plan for that patient, usually coordinated by a lead doctor, and based on years of research, hospital standards and procedures, and the doctors' intuitive decision-making. Doctors don't just invent creative, unusual, or crazy treatments, try them once and hope for the best. The treatment plan is individualized based on standard practice. While we understand that sentencing practices are not nearly as scientific as those in the medical field, the process is similar – a doctor is to a patient what a judge is to a defendant. While our legal system has been acutely resistant to it in the past, it may be softening toward the benefits of a more scientific and research-informed approach to sentencing as opposed to sentences bound in by guidelines lacking a scientific basis.

This raises the question that if the sentencing is standardized, doesn't the creative element disappear? The answer is somewhere in the middle. While headline-worthy sentences would disappear, the creativity required to effectively treat each defendant for the combination of factors that led them to break the law could become an integral part of sentencing. What makes each case creative is not necessarily the outcome but the mechanism by which the outcome is achieved. The process for creating a sentence may be standardized while the outcome, or each sentence, is still unique to the defendant and the case at hand. In the same way that an algorithm can reach highly specific conclusions using the same digital mechanisms, so can individualized sentencing use the same legal mechanisms to reach individualized sentences, and thus achieve the standardization of individualization.

Finally, we go even further beyond our data, and consider how the use of creative or unusual sentences can factor into addressing broader harms associated with the American criminal justice system. An obvious element relates to mass incarceration, but another may be a shift in the relationship between offender and the criminal justice system. Weaver and Lerman (2010) find that contact with the criminal justice system, from an investigatory stop up to incarceration, has a negative effect on both civic participation and trust in government. Part of their argument is that contact with the criminal justice system as something negative handed out by the state to citizens, and in this regard, it is the inverse of Social Security or Medicare. These programs are positives handed out from the government to citizens that are shown to increase recipients' levels of trust and civic participation. With this in mind, we argue that the alternative courts (Drug, DUI, Veterans, Youth, etc.) could potentially break this chain. While these programs are the result of a "negative interaction with the state" they differ in two important ways.

The first is, as many interviewees pointed out, that the interaction is not necessarily an adversarial one. Instead, there is a focus on the offender as an individual. This shift in the nature of the interaction has the potential to be more significant than might first appear. Tyler (2010) argues that by changing the tone and nature of an interaction with the criminal justice system, some of the negative impacts can be mitigated or even reversed. Many of those interviewed, particularly among those who worked in the community court system, practiced versions of Tyler's procedural justice. They discussed treating the offender as an individual, and there was a noticeable difference in tone in how those individuals discussed those who came before them.

This leads to the second major difference. While these courts do hand out punishment, they also provide services and support to those that come before them, focusing on helping the individual rather than simply punishing them. For example, many we interviewed touted the rehabilitation element of their drug courts or, in a specific case, discussed how they provided training and resources for owners of dogs that have bitten someone. In this way, these community courts have the potential to break some of the negative cycle that results from contact with the criminal justice system. Further, a key element of many of the community courts that made use of creative sentencing was that incarceration would not be used if the person met other conditions. While contact with the system may have a negative impact, creative sentences have the potential to address one element of that negative relationship: specifically, incarceration. Since at a basic level some creative sentencing seeks to find something other than jail time as a punishment, these sentences may mitigate the immediate and long-term harm that results from incarceration.

Conclusion

This journey into the world of criminal sentencing, animated initially by a curiosity in a narrow set of highly visible seemingly strange sentences, led to discovering a broader interest in revisiting creativity in sentencing. Decades of disparity and the enduring embrace of various sentencing guidelines have been associated with the preeminent criminal justice nightmare, mass incarceration. In recent years, with cynicism about the efficaciousness of the criminal justice system looming large, we asked respondents to reflect about the role of creativity in sentencing. To our surprise, we found more receptivity to this idea than we had expected, albeit with nuance and caution.

As we have noted, this is an exploratory study, yet we surfaced two related concerns. One was a qualified endorsement of some of the agendas of progressive prosecutors which opens the door for creative sentencing. While few, if any, openly identified as progressive prosecutors, they nonetheless touted their own progressive agenda and their willingness to entertain the notion of creative sentencing. Second, likely prompted by recent social movements focused on racial justice, was the almost universal acknowledgment of implicit bias. Throughout the interviews concerns and sensitivity to bias, both implicit and explicit, were raised. Whether this is a sea-change in practitioners' understanding of their decision-making processes or not, making this concern a part of their policy evaluation process is a significant development for assessing future court innovations.

Jointly, and together with cynicism about the direction of criminal justice reform, these factors combined to move our inquiry from the narrow world of strange sentences to one in which individualizing sentencing, albeit with "guardrails," is reentering the sentencing reform conversation. We readily concede that what we have called the "standardization of individualization" is still in its infancy and is replete with complexities, but we think the time for a conversation re-considering the goals and policies of the criminal justice system has come.

Notes

1. Though outside the scope of our interviews, Ruhland and Scheibler (2022) reach similar conclusions regarding discretion and individualization in the context of probation.
2. See Appendix for interview questionnaire.

3. The interviews explored attitudes toward unusual sentences that departed from the usual imprisonment/fine options. Providing examples gave interviewees a baseline or starting point for what we wanted to discuss, but the point wasn't to reach a consensus on what constituted an unusual sentence. It was more to explore how receptive respondents felt toward them, even without reaching firm commitments about individual sentences.
4. Though quantifying the prevalence of these cases and the differences would be useful, it is not something we believe can realistically be found through secondary data collection or through the interviews we conducted. However, everyone interviewed had either encountered, observed, advocated for, or heard of these "unusual sentences," so we believe that this speaks to the fact that these examples are not isolated occurrences.
5. See Appendix for more detailed case descriptions as well as additional examples not used in the interviews.
6. See, United States v. Gementera, 379 F.3d 596, 599 (9th Cir. 2004), cert. den. 546 U.S. 1031 (2005).
7. See Brilliant, "The Modern-Day Scarlett Letter: A Critical Analysis of Modern Probation Conditions," 1989 Duke L. J. 1357 (1990), which also considers conditions of probation similar to the unusual sentences discussed in this paper.
8. For example, one Judge who oversaw an area with many "transient" individuals (in their case, college students and a sizable homeless population) discussed how in their situation it was hard to tell if the sentence was effective or if the individual had simply moved and was reoffending elsewhere.
9. https://casetext.com/case/people-v-turner-973.
10. Most lacked actual data to support this, although one or two interviewees did say they had some.
11. As of 2012 there were more than 3,000 "problem solving courts" nationwide (Strong et al., 2012). The prevalence of these types of courts speaks somewhat to the question of the frequency of unusual sentences raised earlier, as these courts are a location where judges have more discretion to engage in these types of sentences.
12. Several of our respondents mentioned that in felony cases there may be more of these kinds of resources available than is generally acknowledged.
13. In a systematic review, Strang et al. (2012) find that restorative justice courts result in offenders committing significantly less crime than their counterparts and that victims who take part express higher levels of satisfaction with the handling of their cases. Latimer et al. (2005) find similar results in their systematic review, but caution that findings may be tempered by self-selection bias inherent in restorative justice research.
14. Research would generally agree with this assessment (e.g., Kahan, 2006; Markel, 2001, 2007).
15. See Garvey (1998) for a discussion of shaming punishments in the context of *lex talionis*.
16. The American Psychological Association defines shame as a "highly unpleasant self-conscious emotion arising from the sense of there being something dishonorable, immodest, or indecorous in one's own conduct or circumstances" (see: https://dictionary.apa.org/shame).
17. While he doesn't specifically disentangle the relationship between shipping and shaming, see Moskos (2011) for a criticism of the brutality of the modern carceral system that suggests that flogging might be more humane.
18. Further, some felt there were troubling connections between the United States history of prison and slave labor with the idea of forcing anyone to "work for free" for the benefit of others.
19. See: https://www.nytimes.com/2022/02/04/nyregion/manhattan-da-alvin-bragg-memo-prosecution.html, https://www.phillymag.com/news/2019/06/27/larry-krasner-reforms-philadelphia/, and https://www.opensecrets.org/news/2022/07/big-donors-fueled-high-profile-recall-of-progressive-san-francisco-district-attorney-chesa-boudin/.
20. The survey was conducted by Public Opinion Strategies on behalf of The Justice Action Network (https://www.justiceactionnetwork.org/) and resulting data can be found at: https://static1.squarespace.com/static/5d128ac9071d0b00017ea5e3/t/5e3b3418cc23a7712673be52/1580938267531/National+11619.pdf.

21. See: https://www.news-herald.com/2002/02/06/man-who-cried-pig-sentenced-to-spend-quality-time-with-one/; https://www.cleveland19.com/story/654387/man-gets-creative-sentence-for-calling-officer-pig/.
22. See: https://www.cleveland.com/metro/2008/12/judge_piankas_sentence_for_lan.html; https://www.upi.com/Odd_News/2008/12/20/Landlord-forced-to-live-in-neglected-home/83461229774934/; https://www.cleveland.com/metro/2012/08/landlord_headed_back_to_housin.html.
23. See: https://www.chron.com/news/houston-texas/article/Man-who-slapped-wife-sentenced-to-yoga-1474268.php; http://edition.cnn.com/2004/LAW/01/24/cnna.standley/index.html; https://www.myplainview.com/news/article/Houston-man-sentenced-to-yoga-class-8787985.php.
24. See: https://archive.triblive.com/news/woman-avoids-jail-time-for-crash/; https://www.nbcnews.com/id/wbna3955848; http://www2.sharonherald.com/localnews/recentnews/0401/ln010804b.html; https://www.cbsnews.com/news/killer-balks-at-toting-victim-pic/.
25. See: https://www.cnn.com/2021/08/08/us/judge-ordered-man-covid-vaccine-probation/index.html; https://www.fox19.com/2021/08/31/hamilton-county-judge-lifts-order-requiring-man-get-covid-19-vaccine/.
26. See: https://www.nytimes.com/2021/08/23/nyregion/covid-vaccine-judge-order.html?smid=em-share.
27. See: https://www.nytimes.com/2021/08/23/nyregion/covid-vaccine-judge-order.html?smid=em-share.
28. See: https://www.latimes.com/archives/la-xpm-2001-oct-27-mn-62282-story.html; https://abcnews.go.com/US/CrimeBlotter/story?id=92229&page=1; https://www.deseret.com/2001/10/27/19613585/men-who-threw-bottles-ordered-to-dress-in-drag.
29. See: https://www.foxnews.com/story/career-criminal-in-iowa-sentenced-to-church-for-8-consecutive-sundays.amp; https://www.chicagotribune.com/news/ct-xpm-2008-04-04-0804040194-story.html.
30. See: https://www.nbcnews.com/id/wbna5164349; https://www.wired.com/2004/06/bread-water-and-justice/; https://www.foxnews.com/story/woman-sentenced-to-nothing-but-bread-and-water; https://www.latimes.com/archives/la-xpm-2004-jun-09-na-briefs9.7-story.html; https://www.theguardian.com/world/2004/jun/09/usa; http://www.scjc.texas.gov/media/8149/peters-04–1044-cc-public-adm-dissem.pdf.
31. See: https://www.nbcnews.com/id/wbna10181503; https://abcnews.go.com/GMA/LegalCenter/story?id=1322751.
32. See: https://abcnews.go.com/US/walk-30-miles-jail-time-judge-tells-ohio/story?id=31473002#:~:text=Victoria%20Bascom%20was%20sentenced%20to,she%20stiffed%20a%20cab%20driver.&text=Additionally%2C%20Bascom%20will%20be%20on,she%20stiffed%20a%20cab%20driver; https://www.dailymail.co.uk/news/article-3105002/Ohio-judge-orders-teenager-girl-didn-t-pay-cab-fare-walk-30-mile-length-journey-spend-30-days-jail.html.
33. See: https://www.nytimes.com/1987/08/27/us/unusual-sentence-stirs-legal-dispute.html?searchResultPosition=1.
34. See: https://www.nytimes.com/2002/03/07/nyregion/a-sentence-of-no-tv-unusual-yes-but-cruel.html?searchResultPosition=4 and https://caselaw.findlaw.com/us-2nd-circuit/1114061.html.

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Ethics statement

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Appendix

Interview Questionnaire

Part 1 - Introduction to Unusual Sentences Project

	Practitioner Comments
Introduce Project	
What do we mean by unusual sentences?	
Ask what THEY mean by "unusual sentences" or how would they define this term?	

Part 2 - Questions

Question	Judge Comments	Follow up
Have you ever used/proposed any type of unusual or creative sentence?		
Can you tell us more about the case and how/why you decided on the punishment that you did?		
What did others in court say? Input re sentence? Defendant's view; victims? Follow up if any?		
Other cases in which you've used. Why do you do this? Benefits vs costs?		
Doesn't seem like widespread, why do you think it isn't as common among other courts?		
How do others view these types of cases/sentences in your experience?		
Can it/should it be expanded? If we "put you in charge" how would you/would encourage these?		
When did you first consider an unusual sentence and why? Was the willingness to impose/propose additional sentences something you brought to your position in the court or was it something that you developed as you saw cases come through your court?		
What for you is the greater determinant as to whether you will impose/propose an alternative sentence, the offense or the offender? What are the factors you consider? Are there any cases in which you would consider an unusual sentence out of bounds (maybe a violent crime)? What is your greatest hesitancy in imposing/proposing such a sentence? Greatest incentive?		
Judges: Has either a defense counsel or prosecutor recommended or sought an unusual sentence? Have any objected when you imposed one? Attorneys: Has a judge imposed an unusual sentence for a case you have worked? Did you object?		
Some of the sentences we have seen might appear to the general public as significantly less onerous than the usual sentence (jail time or a significant fine), such as imposing an obligation to vote (one case we read, there are others). Have there been any cases in which you imposed/proposed an unusual sentence that you thought was more punitive than what the defendant might face with a usual sentence?		
What is the mechanism for determining whether the defendant carries out whatever the sanction is in an unusual sentence? If there is not one, have you monitored any of the defendants/sentences to ensure compliance? Should there be a formal monitoring mechanism?		
Something similar may already be in the questions, but do you see the imposition of unusual sentences as necessarily a rarely-used outlier to the general scheme or do you think that this will become more and more the practice in sentencing.		
Interchangeability? What do you think about exchanging time in prison or fines for something else such as some type of service that takes advantages of offender's skills or abilities?		
Other thoughts about this project AND names of others we may want to chat with?		

Part 3 - Case Examples

Crime and Sentence	Does the punishment match the crime? Fair?	Would you feel comfortable giving/proposing this kind of sentence?	Do you think this strange punishment is more effective than traditional? What is the purpose of this sentence?
pig case			
Slumlord Case			
Yoga Case			
DUI Case			
Vaccine Cases			

Full Case Descriptions

Walking a Pig (2002) – Painesville, OH: Municipal Judge Michael Cicconnetti[21]

Stephen Thompson had to go to work but found that his driveway was blocked by police vehicles. Thompson found one of the officers involved in the call and asked that they move their vehicle, they refused, and the altercation escalated until Thompson called the officer a "pig," made obscene hand gestures, and cussed at the officers. Thompson was arrested and given the option of wearing a sign reading "This is not a police officer" while standing on a street corner with a pig for two hours or 10 days in jail. He chose the former and was also ordered to apologize to the officers.

Slumlord House arrest (2008) – Cleveland, OH: Housing Court Judge Ray Pianka[22]

Nicholas Dionisopolous owned 41 rental properties and was found to have violated several building codes on multiple properties. He was fined $100,000, ordered to turn over rent payments to the Cleveland Housing Court to be used for repairs, and prohibited from purchasing properties without the explicit permission of the court. Dionisopolous was also sentenced to six months of house arrest in one of the six properties he owned, which would be considered the unusual part of this sentence.

Domestic Abuse & Yoga (2004) – Houston, TX: County Criminal Court at Law Judge Larry Standley[23]

James Lee Cross was celebrating New Year's Eve with his wife, Wendy. They began arguing about her alcohol consumption and he struck Wendy across the face. Cross has no significant criminal history. As part of a plea agreement, he was sentenced to one year of probation during which he had to complete 80 hours of community service, anger management counseling, and random urinalysis. The Judge also added weekly yoga sessions for Cross and asked that he report back on his progress. Wendy expressed satisfaction with the sentence given.

Drunk Driving & Graveyard Visitations (2002) – Butler County, PA: Butler County Common Pleas Court Judge George Hancher[24]

Jennifer Langston was drunk and, on the phone, when she got into a head-on collision with another vehicle, killing Glenn Clark, and gravely injuring his pregnant wife, Annette. Langston was sentenced to carry a photo of Glenn Clark in the casket, place flowers at the gravesite every anniversary of the death for five years, write letters of apology to the victims' families and school district, and pay $20,000 to the Victim's Compensation Fund. She was also given thirty days in jail, six months of house arrest, and five years' probation.

COVID-19 Vaccination #1 (2021) – Hamilton County, OH: Judge Christopher Wagner[25]

Brandon Rutherford was found to be in possession of fentanyl and sentenced to two years of probation. The judge ordered that Rutherford get the COVID-19 vaccine within 60 days of his court date or face jail time, as it would be a violation of probation. Rutherford refused. The judge ultimately lifted the order.

COVID-19 Vaccination #2 (2021) – Bronx, NY: Bronx Criminal Court Judge Jeffrey Zimmerman[26]

Defendant William Gregory faced several criminal charges. As part of his plea deal, the judge ordered that the defendant get the COVID-19 vaccine.

COVID-19 Vaccination #3 (2021) – Manhattan, NY: Federal Judge Jed Rakoff[27]

Defendant Elouisa Pimental was charged with conspiracy to distribute fentanyl. She was granted release on the condition that she get the COVID-19 vaccine.

Other examples of unusual sentences

Dressed in Drag - 2001 – Coshocton, Ohio: Judge David Hostetler[28]

Defendants Jason Householder and John Stockum, both under 25 years of age, were convicted of criminal damage after throwing beer bottles at a woman's car. Judge Hosteleter fined both individuals $250 and gave both the option of either spending 60 days in jail or walking around downtown Coshocton on Main Street, dressed in dresses, makeup, and wigs for one hour. It is worth noting that Coshocton has a population of 12,000. Both defendants choose to dress in "drag." Reports stated that the crowd around the two men was large enough to impede traffic. They were unable to complete their hour-long sentence because a bypasser threw a bottle at the defendants and struck one of them. The new offender was arrested, and Householder and Stockum were allowed to change out of their costumes.

Sunday Car Chase - 2015 – Iowa: Judge Christine Dalton[29]

Defendant Pachino Hill led local police in a car chase, for which he was arrested and charged. He was also in violation of his parole. Hill had multiple priors at the time of sentencing. Judge Christine Dalton sentenced him to attend Third Missionary Baptist Church for eight consecutive Sundays. The sentence was suggested by the defendant's attorney.

Horse Abuse - 2004 – Harris County, Texas: Judge Mike Peters[30]

Defendant Melissa Dawn Sweeny was convicted of animal cruelty, after neglecting two horses in her care, having left them unsheltered and unfed for four months. As a result of the neglect, the horses suffered multiple ailments. One was euthanized and the other recovered and was given to a new owner. Sweeny was sentenced to 30 days in jail. During the first three days in jail, she would be given only bread and water. No quantity was specified in the articles we found. She was also required to put pictures of her maltreated horses in her jail cell, so as to be reminded of her crime. The maximum penalty was up to two years in jail. For a number of unusual sentences issued, including the aforementioned case, Judge Peters was found in violation of the Texas Code of Judicial Conduct and issued a public admonition.

Dumping Kittens – 2005 – Coshocton County, Ohio: Judge Mike Cicconetti[31]

Michelle Murray dumped over thirty kittens in the woods and was convicted of animal abuse as a result. The kittens were recovered but suffered injuries resulting in the death of nine. The defendant claimed that the Humane Society refused to help her after the kittens were dropped off at her house and that she did not have the capacity to care for the animals. Judge Cicconetti gave her the option of either spending 90 days in jail or 14 days in jail, 15 under house arrest, $3200 fine to the Humane Society, $500 fine to the park rangers who rescued the kittens, and one night alone in the woods with no food, but water and a method of contacting emergency services if need be.

Defendant Walks – 2015 – Coshocton County, Ohio: Judge Mike Cicconetti[32]

Nineteen-year-old defendant Victoria Bascom refused to pay $100 for a 30-mile cab fare and was charged with theft. Judge Cicconetti gave her the option of spending 30 days in jail or walking 30 miles in 48 hours. Since it was not feasible for the defendant to walk 30 miles in 48 hours, the distance was shortened to 20 miles. The defendant was put on probation for four months following the march and had to pay the cab driver $100 in restitution. Judge Cicconetti has said that he only offers unusual sentences to first-time offenders, so, presumably, Bascom had no record at the time of sentencing.

Sex Offender Signage – 1987: Judge Dorothy M. Baker[33]

Defendant Richard Bateman was found guilty of child molestation after already having two similar convictions. The defendant was given a prison sentence accompanied by court-ordered counseling, no alcohol or drugs, an order to stay away from schools and playgrounds, and ordered to put a sign on his front door and car reading, "Dangerous Sex Offender No Children Allowed" in letters at least three inches high. The defendant had refused treatment on prior occasions.

No TV – 2002 – NYC, NY: Judge Alvin K. Hellerstein[34]

Defendant Edward Bello, who had multiple petty priors, pled guilty to conspiracy to use stolen credit cards. He was sentenced to 10 months of house arrest, during which he could watch no TV and only leave his home for work, grocery shopping, medical, educational, or religious activities. He was also ordered to pay 10% of his income toward restitution and five years of probation. Originally, the judge had asked that all TV sets be removed from the home, but Mr. Bello asked that his teenage daughters keep their TV sets. The judge asked that Mr. Bello state on his honor that he wouldn't watch TV, or risk jail time. The sentence was vacated by the 2nd Circuit and sent back to the district court for resentencing.