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# Evidence-Based Sentencing: The Application of Principles of Evidence-Based Practice to State Sentencing Practice and Policy

By ROGER K. WARREN\*

## Introduction

OUR CURRENT STATE sentencing policies have resulted in unprecedented rates of offender recidivism and the highest incarceration rates in the world.<sup>1</sup> State judges sentence over one million felony defendants annually, accounting for 94% of all United States felony convictions.<sup>2</sup> Three quarters of state felony defendants have prior arrest records, and about one third were on probation, parole, or pre-trial release at the time of their current arrest.<sup>3</sup> About three quarters of felony arrestees are charged with a nonviolent offense and over

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1. See *infra* Part I.A & B (discussing the negative impact of retributive state sentencing policies that fail to account for alternative methods of rehabilitation).

2. MATTHEW R. DUROSE & PATRICK A. LANGAN, U.S. DEP'T OF JUSTICE, STATE COURT SENTENCING OF CONVICTED FELONS, 2002, at tbl.1.1 (2005). In 2002, the last year for which the Bureau of Justice Statistics published these statistics, the federal courts convicted 63,217 persons of a violent, property, drug, or other felony. *Id.* State courts convicted an estimated 1,051,000 persons. *Id.*

3. THOMAS H. COHEN & BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2002, at 8 tbl.7 & 10 tbl.8 (2006). The report is based on data collected from the nation's 75 most populous counties in 2002. *Id.* These 75 counties account for 37% of the United States population, and about 50% of all reported serious violent crimes and 42% of all reported serious property crimes in the United States, according to the FBI's 2002 Uniform Crime Reports. *Id.*

three quarters of those sentenced to prison are convicted of a nonviolent offense.<sup>4</sup>

The sentencing policies that have resulted in today's high rates of recidivism and incarceration, especially among nonviolent offenders, were originally written in most states thirty years ago at a time when the violent crime rate had tripled in just fifteen years.<sup>5</sup> People were fed up and convinced that sentences were too lenient and rehabilitation and treatment did not work. "Nothing works" was the watchword of the day.<sup>6</sup>

But today much has changed. Our use of incarceration has increased sixfold since the mid-1970s, many more serious and dangerous felons are behind bars, and the use of prisons to incapacitate is now of limited and diminishing benefit.<sup>7</sup> More important, a large body of rigorous research conducted over the last twenty years has proven that well-implemented rehabilitation and treatment programs carefully targeted with the assistance of validated risk assessment tools at the right offenders can reduce recidivism by 10%–20%.<sup>8</sup>

The concept of "evidence-based practice" has emerged to describe these corrections practices that have been proven by the most rigorous "what works" research to significantly reduce offender recidivism. More recently, researchers and corrections practitioners have distilled several basic principles of Evidence-Based Practice ("EBP") to reduce recidivism.

This Article examines these basic recidivism reduction principles of Evidence-Based Practice and the research on which they are based.

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4. *Id.* at 2 (noting that 30% of felony defendants are charged with property offenses, 36% with drug offenses, and 10% with public-order offenses).

5. See *infra* Part I (discussing government reaction to increased crime, and the offense-based sentencing theories implemented as a result).

6. Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 PUB. INT. 22, 22 (1974); see also DOUGLAS LIPTON ET AL., *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES* (1975); Francis T. Cullen & Melissa M. Moon, *Reaffirming Rehabilitation: Public Support for Correctional Treatment*, in *WHAT WORKS—RISK REDUCTION: INTERVENTIONS FOR SPECIAL NEEDS OFFENDERS* 7, 7–25 (Harry Allen ed., 2002); Robert Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 HOFSTRA L. REV. 243, 252 (1979) [hereinafter Martinson, *New Findings*]. Martinson pointed out many years later that of the 231 studies Martinson reviewed, fewer than 80 were treatment programs that measured recidivism, and only 3 of the programs relied on behavioral-modification components, which more recent research shows to be the most effective in reducing recidivism. *Id.*

7. See discussion *infra* Part I.C (noting that following the Justice Kennedy Commission, the ABA discovered that crime reduction is not necessarily dependent on high rates of incarceration).

8. See *infra* Part II (discussing the efficacy of evidence-based practices and the use of actuarial tools to better assess an individual's specific rehabilitative needs).

It then reviews the application of EBP principles to state sentencing policy and practice, and broadly outlines some of the emerging key features of Evidence-Based Sentencing.

Although the EBP principles are applicable to other criminal justice stakeholders,<sup>9</sup> this Article focuses on felony sentencing because of the growing concern in the states today and among the public about the cost, effectiveness, and fairness of our current crime-control strategies.

Felony cases dominate the workload of most judges. Over 2.725 million felony cases were filed in the state courts in 2004.<sup>10</sup> For many judges, as well as for other criminal justice professionals, victims of crime, and the public at large, the most frustrating felony cases are not those involving the most violent or dangerous criminals who constitute about 25% of the cases.<sup>11</sup> The most frustrating felony cases are the vast majority comprised of repeat offenders.

A recent survey of state chief justices conducted by the National Center for State Courts found that two sentencing-reform objectives that state chief justices believed to be most important were: (1) to promote public safety and reduce recidivism through expanded use of evidence-based practices, programs that work, and offender risk and needs assessment tools; and (2) to promote the development, funding, and utilization of community-based alternatives to incarceration for appropriate offenders.<sup>12</sup>

The survey also found that the most frequent complaints from state trial judges hearing felony cases included the high rates of recidivism among felony offenders, the ineffectiveness of traditional probation supervision in reducing recidivism, the lack of appropriate sentencing alternatives, and restrictions on judicial sentencing discre-

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9. Prison and jail authorities can implement EBP to improve the effectiveness of the rehabilitation services that are provided to prison and jail inmates. Probation and parole authorities can incorporate EBP in supervising probationers and parolees, recommending appropriate sentences, and determining appropriate sanctions and services for violations of probation or parole. The principles of EBP are surely also applicable to the federal courts, as well as to the state courts.

10. RICHARD SCHAUFFLER ET AL., NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 2005: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT, at tbl.7 (2006). Although felony cases constitute a relatively small proportion of the total overall state court caseload, they constitute a much higher percentage of the average court's workload, determined by taking into account the average amount of time that a judge spends on each of the different types of cases that judges hear. *Id.*

11. See DUROSE & LANGAN, *supra* note 2, at tbl.1.1.

12. TRACY W. PETERS & ROGER K. WARREN, NAT'L CTR. FOR STATE COURTS, GETTING SMARTER ABOUT SENTENCING: NCSC'S SENTENCING REFORM SURVEY 2-3 (2006).

tion that limited the ability of judges to sentence more fairly and effectively.<sup>13</sup>

Thoughtful application of principles of EBP to all aspects of sentencing offers great potential not only to achieve the objectives identified by state chief justices but also to respond to some of the most frequently heard complaints among state trial judges handling felony cases.

The primary application of EBP principles to felony sentencing is likely to be in cases in which neither the applicable law nor the circumstances of the case dictate a sentence to state prison, i.e., where probation or an intermediate sanction is a likely or potential sentencing option. In most jurisdictions, these cases are likely to constitute the overwhelming majority of all felony cases. Within sentencing and violation proceedings of such cases, EBP principles have many potential applications.<sup>14</sup>

## I. Current Sentencing Policies and Consequences

For most of the twentieth century—up until the 1970s—state sentencing policies were “offender-based.”<sup>15</sup> They were based primarily on a “rehabilitative” model of sentencing that assumed that an offender’s subsequent behavior could be shaped through treatment and the threat of incarceration. The rehabilitative model was reflected in “indeterminate” sentencing systems under which judges had almost unlimited discretion to sentence within a broad range of possible outcomes, while the actual length of the prison sentence was determined by a parole board or other administrative authority in light of the offender’s response to treatment and incarceration.<sup>16</sup> During the 1960s and early 1970s, however, the national violent crime rate tripled,<sup>17</sup> people became fed up, and the public and public officials demanded

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13. *Id.* at 5.

14. The principles of EBP would also be applicable to addressing parole violations or post-release supervision in jurisdictions where trial courts supervise reentry courts, conduct parole revocation hearings, or otherwise oversee prison post-release supervision programs.

15. See KEVIN R. REITZ, MODEL PENAL CODE: SENTENCING, Report 1 (2003).

16. See *id.*; see also JUSTICE KENNEDY COMM’N, Am. Bar Ass’n, Report to the ABA House of Delegates 11–14 (2004).

17. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, REPORTED CRIME IN UNITED STATES—TOTAL, available at <http://bjsdata.ojp.usdoj.gov/dataonline/Search/Crime/State/RunCrimeStatebyState.cfm> (select “United States–Total” from the “Choose one or more States” field; select “Number of violent crimes” from the “Choose one or more variable groups” field; when both fields are populated, click “Get Table”) [hereinafter REPORTED CRIME TOTALS]. The number of violent crimes rose from 288,460 in 1960 to 1,039,710 in 1975. *Id.*

surer and stiffer sanctions against criminal offenders. Officials were cynical about whether rehabilitation could really ever succeed in reducing offenders' criminal behavior. Indeterminate offender-based sentencing systems also produced unjust sentencing disparities among similarly situated offenders. The "rehabilitative ideal" was replaced with new sentencing theories.<sup>18</sup>

Starting in the mid-1970s, federal and many state governments turned to "offense-based" theories of sentencing reflected in "retributive" and "determinate" sentencing models. The new models emphasized punishment rather than rehabilitation and favored incarceration not only for punishment but also for incapacitation and general deterrence. "Determinate" sentencing provisions limited judicial discretion in individual cases through passage of mandatory sentencing requirements and sentencing guidelines that also increased the penalties for many crimes. Other provisions eliminated or limited parole and early release discretion, requiring all offenders to serve a longer portion of judicially imposed prison sentences.<sup>19</sup> Use of rehabilitation and treatment programs, custodial and non-custodial, dried up.

Thus, the goals of retribution, incapacitation, and general deterrence came to supersede the goals of rehabilitation and specific deterrence in federal and state sentencing policy. The new sentencing policies sought to reduce crime not by changing the behaviors of criminal offenders, but by removing more offenders from the community for longer periods of time through harsher punishment and incapacitation.

### A. High Incarceration Rates and Costs

The adverse consequences of the more retributive sentencing policies have been dramatic. Between 1974 and 2005, the number of inmates in federal and state prisons increased from 216,000<sup>20</sup> to 1,525,924,<sup>21</sup> an increase of more than sixfold. America's rate of imprisonment had remained steady until the 1970s at about 110 per

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18. REITZ, *supra* note 15, at 28; JUSTICE KENNEDY COMM'N, *supra* note 16, at 14–16; *see also* FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE 76–78 (1981).

19. REITZ, *supra* note 15, at 35–41; JUSTICE KENNEDY COMM'N, *supra* note 16, at 16.

20. THOMAS P. BONCZAR, U.S. DEP'T OF JUSTICE, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001, at 2 tbl.1 (2003).

21. PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEP'T OF JUSTICE, PRISONERS IN 2005, at 1 (2006).

100,000.<sup>22</sup> Since that time the United States imprisonment rate has increased more than fourfold to 491.<sup>23</sup> The likelihood of an American going to prison sometime in his or her lifetime more than tripled between 1974 and 2001 to 6.6%.<sup>24</sup>

The number of inmates in local jails also increased dramatically. Between 1985 and 2005, the number of persons in local jails rose from 256,615<sup>25</sup> to 747,529<sup>26</sup>, an increase of almost threefold. Overall, the United States incarcerated over 2.3 million persons at year end 2005.<sup>27</sup> The United States now imprisons a higher percentage of its citizens than any other country in the world, at a rate roughly five to eight times higher than the countries of Western Europe and over thirteen times higher than Japan.<sup>28</sup> Fourteen of the American states have incarceration rates that exceed even the national rate of incarceration.<sup>29</sup>

The number of Americans under probation or parole supervision also increased dramatically over the last twenty-five years, but at a slower pace than the increase in the number incarcerated. The number of persons on probation supervision increased from 1,118,097 in 1980 to 4,151,125 in 2004,<sup>30</sup> an increase of 271%. The number of persons on parole supervision increased from 220,438 in 1980 to 765,355 in 2004, an increase of 247%.<sup>31</sup> There are now over seven million adults under some form of correctional supervision, a number exceeding the adult population of all but eight states.<sup>32</sup>

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22. MARC MAUER, *RACE TO INCARCERATE* 16 (1999).

23. *Id.*

24. JUSTICE KENNEDY COMM'N, *supra* note 16, at 18 (quoting Alan J. Beck of the Bureau of Justice Statistics in his address to the National Committee on Community Corrections on April 16, 2004).

25. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *CORRECTIONS POPULATION IN THE UNITED STATES, 1997*, at 21 tbl.2.4 (2000) [hereinafter 1997 CORRECTIONS POPULATION REPORT].

26. HARRISON & BECK, *supra* note 21, at 2.

27. *Id.*

28. MARC MAUER, *THE SENTENCING PROJECT, COMPARATIVE INTERNATIONAL RATES OF INCARCERATION: AN EXAMINATION OF CAUSES AND TRENDS 2* (2003), available at [http://www.sentencingproject.org/Admin/Documents/publications/inc\\_comparative\\_intl.pdf](http://www.sentencingproject.org/Admin/Documents/publications/inc_comparative_intl.pdf).

29. PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEP'T OF JUSTICE, *PRISON AND JAIL INMATES AT MIDYEAR 2005*, at 10 (2006).

30. TRACY L. SNELL, U.S. DEP'T OF JUSTICE, *CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1993*, at 5 tbl.1.1 (1995); LAUREN E. GLAZE & SERI PALLA, U.S. DEP'T OF JUSTICE, *PROBATION AND PAROLE IN THE UNITED STATES, 2004*, at 1 (2005).

31. SNELL, *supra* note 30, at 5 tbl.1.1; GLAZE & PALLA, *supra* note 30, at 1.

32. LAUREN E. GLAZE & THOMAS P. BONCZAR, U.S. DEP'T OF JUSTICE, *PROBATION AND PAROLE IN THE UNITED STATES, 2006*, at 2 (2007).

Our more retributive sentencing policies have had a particularly devastating impact on minority communities. In 1930, whites constituted 77% of prison admissions, and African-Americans and other minorities made up 22%.<sup>33</sup> In 2001, 45% of the prison population was African-American, almost two-thirds were persons of color, and whites comprised about a third of the prison population.<sup>34</sup> For an African-American male born in 2004, the likelihood of being incarcerated sometime during his lifetime is 32%, compared to 6% for Hispanic males and 17% for white males.<sup>35</sup> At year end 2005, 8.1% of black males age twenty-five to twenty-nine were in prison compared to 2.6% of Hispanic males and 1.1% of white males in the same age group.<sup>36</sup>

Over-reliance on incarceration has also resulted in enormous cost increases for state taxpayers. Between 1985 and 2004, state corrections expenditures increased over 200%, more than any other cost item in state budgets.<sup>37</sup> By comparison, state spending on higher education during the same period increased by 3%, spending on Medicaid by 47%, and spending on secondary and elementary education by 55%.<sup>38</sup>

## B. High Rates of Recidivism

Our over-reliance on incarceration and abandonment of efforts to change the behaviors of criminal offenders through rehabilitation and treatment also resulted in unprecedented rates of recidivism among felony offenders. Recidivism rates are particularly high among nonviolent offenders. Recidivism among felony offenders fuels the overcrowding of our prisons and jails while at the same time reducing public safety and subjecting the public to further harm at the hands of repeat offenders.

In 2002, 32% of felony defendants, and 34% of those charged with a non-violent offense, had an active criminal justice status, consisting of being on parole, probation, or pretrial release, at the time of their arrest on the current felony charge.<sup>39</sup> Sixty-four percent of defendants had a felony arrest record, continuing an upward trend from

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33. PATRICK A. LANGAN, U.S. DEP'T OF JUSTICE, RACE OF PRISONERS ADMITTED TO STATE AND FEDERAL INSTITUTIONS, 1926-1986, at 6 tbl.2 (1991).

34. HARRISON & BECK, *supra* note 21, at 1.

35. JUSTICE KENNEDY COMM'N, *supra* note 16, at 18, 48.

36. HARRISON & BECK, *supra* note 21, at 1.

37. DON STEMEN, VERA INST. OF JUSTICE, RECONSIDERING INCARCERATION: NEW DIRECTIONS FOR REDUCING CRIME 13 (2007), available at [http://www.vera.org/publication\\_pdf/379\\_727.pdf](http://www.vera.org/publication_pdf/379_727.pdf).

38. *Id.*

39. COHEN & REAVES, *supra* note 3, at 8 tbl.7 (2006).

1992 when 55% had a felony arrest record.<sup>40</sup> Forty-three percent of defendants, and 46% percent of the defendants charged with a nonviolent offense, had at least one prior conviction for a felony—an increase from 36% in 1992.<sup>41</sup> Recidivism rates among jail inmates in 2002 were even higher: 45% percent had been on probation or parole at the time of arrest.<sup>42</sup>

The largest recidivism study of state prison inmates examined the criminal histories of 272,111 inmates released from state prisons in 1994.<sup>43</sup> About 67% percent of the former inmates committed at least one serious new crime within three years of their release.<sup>44</sup> This rearrest rate was 5% higher than among prisoners released eleven years earlier in 1983.<sup>45</sup> The 272,111 inmates had accumulated more than 4.1 million arrest charges before their current imprisonment and acquired an additional 744,000 arrest charges in the three years following their discharge in 1994—an average of about eighteen criminal-arrest charges per offender during their criminal careers.<sup>46</sup> The highest recidivism rates were again among nonviolent offenders. The released prisoners with the highest rearrest rates were those sentenced for motor-vehicle theft (78.8%), possession or sale of stolen property (77.4%), larceny (74.6%), and burglary (74.0%).<sup>47</sup>

The most recent survey of state prison inmates reported by the Bureau of Justice Statistics indicated that 75% of the inmates had served previous sentences; 43% of the inmates had served three or more prior sentences; 18% had served six or more; and 6% had served eleven or more prior sentences.<sup>48</sup>

Between 1975 and 1991, the number of probation and parole violators entering state prisons increased from 18,000 to 142,000, twice the rate of growth of offenders newly committed by the courts.<sup>49</sup> Whereas 17% of state prison inmates had been on probation or parole at the time of their current arrest in 1974 when the first national inmate survey was conducted, 45% of state prison inmates were on

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40. *Id.* at iii.

41. *Id.* at iii, 13.

42. DORIS J. JAMES, U.S. DEP'T OF JUSTICE, PROFILE OF JAIL INMATES, 2002, at 1 (2004).

43. PATRICK A. LANGAN & DAVID J. LEVIN, U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1994, at 1 (2002).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. 1997 CORRECTIONS POPULATION REPORT, *supra* note 25, at 57 tbl.4.10.

49. ROBYN L. COHEN, U.S. DEP'T OF JUSTICE, PROBATION AND PAROLE VIOLATORS IN STATE PRISON, 1991, at 1 (1995).

probation or parole at the time of their current arrest in 1991.<sup>50</sup> Successful completion of probation declined from 69% in 1990 to 59% in 2005; successful completion of parole declined from 50% in 1990 to 45% in 2005.<sup>51</sup>

### C. Limited and Diminishing Benefits of Incarceration

In a historic address to the American Bar Association (“ABA”) in August 2003, United States Supreme Court Associate Justice Anthony Kennedy raised serious concerns about America’s over-reliance on incarceration as a criminal sanction, concluding “[o]ur resources are misspent, our punishments too severe, our sentences too long.”<sup>52</sup> The Kennedy Commission, appointed by the ABA to look into Justice Kennedy’s concerns, subsequently concluded that “in many instances society may conserve scarce resources, provide greater rehabilitation, decrease the probability of recidivism and increase the likelihood of restitution if it uses alternatives to incarceration. . . .”<sup>53</sup> In August 2004, the ABA adopted the commission’s recommendation that American “sentencing systems provide appropriate punishment without over-reliance on incarceration as a criminal sanction. . . .”<sup>54</sup>

The precise relationship between incarceration—whether for the purpose of punishment, retribution, incapacitation, or general deterrence—and crime is unclear. Reviewing the research, the Kennedy Commission noted that “a steady increase in incarceration rates does not necessarily produce a steady reduction in crime,” and “some jurisdictions have reduced crime rates to a greater extent and with less reliance on sentences of incarceration than other jurisdictions.”<sup>55</sup> Although crime reduction is not necessarily dependent on high rates of incarceration, there is general consensus that our high rates of incarceration over the last twenty-five years have been among the factors contributing to the declining crime rates since 1990.<sup>56</sup> The principal studies suggest that about 25% of the decline in crime can be attrib-

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50. *Id.* at 3.

51. GLAZE & BONCZAR, *supra* note 32, at 6, 9; THOMAS P. BONCZAR & LAUREN E. GLAZE, U.S. DEP’T OF JUSTICE, PROBATION AND PAROLE IN THE UNITED STATES, 1998, at 2, 7 (1999).

52. JUSTICE KENNEDY COMM’N, *supra* note 16, at 4.

53. *Id.* at 6.

54. *Id.* at 9.

55. *Id.* at 23.

56. See generally RYAN S. KING ET AL., THE SENTENCING PROJECT, INCARCERATION AND CRIME: A COMPLEX RELATIONSHIP (2005) (analyzing the relationship between incarceration and crime, and discussing whether tough sentencing really affects crime rates); see also JUSTICE KENNEDY COMM’N, *supra* note 16, at 19–22.

uted to increased incarceration.<sup>57</sup> The most rigorous studies find that a 10% increase in the incarceration rate results in a 2%–4% decrease in the crime rate.<sup>58</sup> Most of the crime-reduction effect of incapacitation strategies today, however, is not on dangerous or violent offenders, but on nonviolent offenders. It is estimated that 80% of the crime-reduction effect of increased incarceration is on nonviolent offenses,<sup>59</sup> where recidivism rates nonetheless remain especially high.

The eminent criminologist James Q. Wilson pointed out over ten years ago that the United States has reached a point of diminishing returns on its investment in incapacitation and prisons, i.e., that the crime-avoidance benefit of incarceration has declined as the number of persons incarcerated has increased.<sup>60</sup> Most other researchers agree.<sup>61</sup>

Moreover, the marginal benefit of incarceration for purposes of incapacitation is outweighed for many offenders by the ineffectiveness of incarceration in reducing recidivism by changing offender behavior. The research evidence is unequivocal that incarceration does not reduce offender recidivism. Thus, at best, incarceration merely limits the ability of prison and jail inmates to commit further crimes in the short term, during their periods of confinement. Upon their release inmates are somewhat more likely to commit further crimes than those not incarcerated, or incarcerated for shorter periods of time. Almost all inmates are ultimately released, most after actually serving relatively short periods of time. It is estimated that 97% of prison inmates are eventually released from prison to return to their communities.<sup>62</sup>

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57. REITZ, *supra* note 15, at 33.

58. See STEMEN, *supra* note 37, at 4–5.

59. MAUER, *supra* note 22, at 4.

60. James Q. Wilson, *Crime and Public Policy*, in *CRIME: PUBLIC POLICY FOR CRIME CONTROL* 489, 489–507 (James Q. Wilson & Joan Petersilia eds., 2d ed. 2002).

61. STEMEN, *supra* note 37, at 8; STEVE AOS, WASH. STATE INST. FOR PUB. POLICY, *THE CRIMINAL JUSTICE SYSTEM IN WASHINGTON STATE: INCARCERATION RATES, TAXPAYER COSTS, CRIME RATES, AND PRISON ECONOMICS 1–2* (2003), available at <http://www.wsipp.wa.gov/rptfiles/SentReport2002.pdf>. A recent study found that the diminishing returns of higher incarceration rates actually accelerate as prison populations grow. *Id.* at 7. When a state's incarceration rate reaches 325 to 492 inmates per 100,000 person population, the impact of incarceration increases on the crime rate actually reverses: after a state's incarceration rate reaches that "inflection point," the higher incarceration rate results in higher crime rates. See Raymond Liedka et al., *The Crime-Control Effect of Incarceration: Does Scale Matter?*, 5 *CRIME & PUB. POL'Y* 245, 245–76 (2006).

62. ABT ASSOCS. INC. & NAT'L INST. OF CORR., *TRANSITION FROM PRISON TO COMMUNITY INITIATIVE 2* (2002), available at <http://www.nicic.org/pubs/2002/017520.pdf>.

Research by the Washington State Institute for Public Policy has shown that use of research-based rehabilitation and prevention programs, in lieu of incarceration to reduce recidivism among targeted criminal offenders, results in significant public savings without increasing the crime rate.<sup>63</sup> The Washington Institute's most recent study for the Washington legislature, for example, employed sophisticated computer-modeling techniques in concluding that if Washington successfully implemented a moderate portfolio of evidence-based alternatives to imprisonment it could avoid a significant level of future prison construction, save Washington taxpayers about two billion dollars, and also reduce Washington's crime rate by 8%.<sup>64</sup>

In *The Diminishing Returns of Increased Incarceration: A Blueprint to Improve Public Safety and Reduce Costs*, James Austin and Tony Fabelo concluded that what states now need to do, after ensuring that dangerous and violent prisoners are incarcerated, is to reduce prison populations and costs, improve utilization of limited criminal justice resources, and enhance public safety "by diverting non-violent offenders from prison to alternative rehabilitation and sanctioning programs. . . ."<sup>65</sup>

The challenges in sentencing and corrections today are quite the opposite of those that faced our nation in the mid-1970s. The 1960s and early 1970s witnessed the most rapid increase in the national index crime rate since the U.S. crime index was created in 1930.<sup>66</sup> The violent and property crime indices, and the firearms crime rate, rose

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63. STEVE AOS ET AL., WASH. STATE INST. FOR PUB. POLICY, EVIDENCE-BASED PUBLIC POLICY OPTIONS TO REDUCE FUTURE PRISON CONSTRUCTION, CRIMINAL JUSTICE COSTS, AND CRIME RATES 16 (2006).

64. *Id.* at 1, 7–8. The Institute's analysis is compelling for a number of reasons. First, it is exhaustive and relies solely on scientifically rigorous studies. The Institute found and analyzed 571 rigorous comparison-group evaluations of adult and juvenile corrections and prevention programs. *Id.* at 8. Second, the analysis was conducted at the request of the state legislature, and the estimates were explicitly constructed "cautiously." *Id.* at 16. Recidivism effects were adjusted significantly downward from published results (typically about 50%) to account for a variety of potential sources of research bias. *Id.* at 22. Third, the described taxpayer benefits included only the benefits to taxpayers resulting from avoidance of prison and other criminal justice costs due to crime reduction, and did not include the additional benefits to taxpayers resulting from reduction of other health, welfare, and social costs. *Id.* at 36–37. Finally, the amount of taxpayer benefits was adjusted to take into consideration the additional cost to taxpayers resulting from the marginal crime increase projected to occur as a result of reduced use of incarceration. *Id.*

65. JAMES AUSTIN & TONY FABELO, JFA INST., *THE DIMINISHING RETURNS OF INCREASED INCARCERATION: A BLUEPRINT TO IMPROVE PUBLIC SAFETY AND REDUCE COSTS* 3 (2004).

66. See OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T. OF JUSTICE, *CRIME AND JUSTICE ATLAS* 2000, at 36–37 (2000).

to historic highs in 1980 and the early 1990s.<sup>67</sup> But those crime rates have been in steady decline since then and the violent and firearms crime rates are now back at the levels of the mid-1970s.<sup>68</sup> The homicide rate declined in 2002 to its lowest level in thirty-five years.<sup>69</sup> On the other hand, our prison populations are today six times higher than they were in the mid-1970s, and our rates of offender recidivism have never been higher.<sup>70</sup>

Incarceration is today of limited and diminishing benefit in reducing crime and is one of the most expensive items in most state budgets. Most important, however, unlike in the 1970s, there exists today a large body of rigorous research proving that treatment programs operated in accord with rigorous research-based evidence can significantly change offender behavior and reduce recidivism.

## II. The Principles of Evidence-Based Practice (“EBP”)

Skepticism in the early 1970s among researchers and practitioners about the effectiveness of rehabilitation programs in changing offender behavior has given way over the last twenty years as a voluminous body of robust research has emerged to prove that rehabilitation programs can indeed effectively change offender behavior and reduce offender recidivism.<sup>71</sup> This body of corrections research, conducted principally in the United States, Canada, Australia, and England, consists of rigorous evaluations of various types of corrections programs using non-treatment control groups well-matched to the treatment group, and reliance on systematic reviews, or meta-analyses, of multiple such evaluations rather than on merely a few isolated studies.

A recent meta-analysis by the Washington State Institute for Public Policy, for example, reviewed 291 rigorous evaluations of more than thirty different types of adult corrections programs to determine

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67. See REPORTED CRIME TOTALS, *supra* note 17. In 1976, the violent crime rate was 467.8 per 100,000 population; in 2007, the violent crime rate was 466.9 per 100,000 population. *Id.*; see also BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMES COMMITTED WITH FIREARMS 1973–2006, available at [http://www.ojp.usdoj.gov/bjs/glance/tables/gun\\_crimetab.htm](http://www.ojp.usdoj.gov/bjs/glance/tables/gun_crimetab.htm) (discussing the rate of firearms used in crimes).

68. REPORTED CRIME TOTALS, *supra* note 17.

69. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SERIOUS VIOLENT CRIME LEVELS DECLINED SINCE 1993, available at <http://www.ojp.usdoj.gov/bjs/glance/cv2.htm>.

70. See *supra* Part I.A & B (discussing the rate at which former inmates are rearrested).

71. Martinson, *New Findings*, *supra* note 6, at 244; see also LAWRENCE W. SHERMAN ET AL., UNIV. OF MD., PREVENTING CRIME: WHAT WORKS, WHAT DOESN'T, WHAT'S PROMISING: A REPORT TO THE UNITED STATES CONGRESS PREPARED FOR THE NATIONAL INSTITUTE OF JUSTICE 14 (1998), available at <http://www.ncjrs.gov/docfiles/wholedoc.doc>.

the extent to which each of the different types of program did or did not reduce recidivism among its adult offender participants.<sup>72</sup> Even after substantial downward adjustment of the published results of the evaluations reviewed to further account for the methodological quality of the research, the Institute confirmed a variety of out-of-custody treatment programs that achieved, on average, statistically significant reductions in the recidivism rates of program participants between 10% and 20%.<sup>73</sup>

A second development over the last ten years has been emergence of the concept of “evidence-based practice.” The concept originated in the medical profession and has subsequently been adopted and applied to other areas of professional practice, including psychology, mental health, substance abuse, and corrections. The concept of “evidence-based practice” refers to professional practices that are supported by the “best research evidence,” consisting of “scientific results related to intervention strategies . . . derived from clinically relevant research . . . based on systematic reviews, reasonable effect sizes, statistical and clinical significance, and a body of supporting evidence.”<sup>74</sup> Thus, the concept of evidence-based practice in corrections refers to corrections practices that have been proven through scientific corrections research “to work” to reduce offender recidivism. Effective corrections policies reduce recidivism by focusing resources on effective evidence-based programming and avoiding ineffective approaches.<sup>75</sup>

Most recently, researchers and corrections practitioners have distilled from the research on evidence-based practice and evidence-based programs several basic “principles of EBP” or “principles of effective intervention” to reduce the risk of offender recidivism.<sup>76</sup> The seven principles of EBP that are most relevant to the work of state judiciaries are: (1) The Risk Principle; (2) The Needs Principle; (3) Use of Risk/Needs Assessment Instruments; (4) The Treatment and Responsivity Principles; (5) Motivation, Stages of Change, and Trust;

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72. STEVE AOS ET AL., Wash. State Inst. for Pub. Policy, Evidence-Based Adult Corrections Programs: What Works and What Does Not 1 (2006).

73. *Id.* at 3. The average recidivism reduction achieved in certain programs was as high as 31%. *Id.* at 8.

74. AM. PSYCHOLOGICAL ASS'N, POLICY STATEMENT ON EVIDENCE-BASED PRACTICE IN PSYCHOLOGY 1 (2005), available at <http://www2.apa.org/practice/ebpstatement.pdf>.

75. AOS ET AL., *supra* note 72, at 3.

76. CRIME & JUSTICE INST., IMPLEMENTING EVIDENCE-BASED PRACTICE IN COMMUNITY CORRECTIONS: THE PRINCIPLES OF EFFECTIVE INTERVENTION 1-2 (2004), available at <http://www.cjjustice.org/cji/evidencebased.pdf>.

(6) Program Monitoring and Accountability; and (7) Integration of Treatment and Community-Based Sanctions.<sup>77</sup>

### A. Evidence-Based Sentencing: The Application of Principles of EBP to State Sentencing

Although much remains unknown about the most effective ways to assist offenders in changing criminal behaviors, principles of EBP are solidly based on what we *do* know. Research demonstrates that “corrections” is more science than art. Competent medical, legal, or other professional services are based not on trial and error, but on reasoned application of principles of practice founded upon a specialized body of knowledge and understanding in the respective professional field. Accordingly, competent corrections services consist of thoughtful application of principles of practice based upon what is known in the profession to be most effective in correcting the behaviors of criminal offenders.<sup>78</sup> Courts cannot randomly assign offenders to just any available programs. To the contrary, the fundamental lesson we have learned about effective treatment programs is that they must be specifically targeted to address the identified needs of a certain group of offenders in certain ways.<sup>79</sup>

The three most important principles of EBP, therefore, answer three critical questions about rehabilitation and treatment programs that have been proven effective in reducing recidivism: (1) *who* are the most appropriate offenders to assign to these programs; (2) *what* characteristics or needs of the offenders should these programs address; and (3) *how* should the programs go about addressing the needs of those offenders. In short, effective corrections programs must be carefully designed and implemented to “target” that group of offenders and those needs in certain prescribed ways.

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77. *Id.*

78. See Edward J. Latessa et al., *Beyond Correctional Quackery—Professionalism and the Possibility of Effective Treatment*, 66 FED. PROBATION 43, 47 (2002).

79. See CRIME & JUSTICE INST., *supra* note 76, at 3 (discussing interventions targeted to criminogenic needs); EDWARD J. LATESSA, OHIO DEP’T OF PUB. SAFETY, FROM THEORY TO PRACTICE: WHAT WORKS IN REDUCING RECIDIVISM?, at 170–71 (2003), available at <http://www.ocjs.state.oh.us/State%20Of%20Crime/10.%20Corrections.pdf> (discussing the principles of evidence-based practice); FAYE S. TAXMAN ET AL., NAT’L INST. OF CORR., *Tools of the Trade: A Guide to Incorporating Science Into Practice* 26 (2004), available at <http://www.nicic.org/pubs/2004/020095.pdf> (providing a guide to incorporate behavior management concepts in order to prevent a recurrence of offenses) [hereinafter TAXMAN ET AL., *TOOLS OF THE TRADE*].

## B. The Risk Principle

The first task in applying principles of EBP to a particular sentencing decision is to determine whether the defendant is a suitable candidate for a rehabilitation or treatment program. The risk principle of effective intervention refers to the risk or probability that an offender will reoffend. It identifies the risk level of those offenders who are the most appropriate targets of a recidivism- or risk-reduction strategy.<sup>80</sup> Effective recidivism-reduction programs target moderate- and high-risk offenders, i.e., those more likely to reoffend.<sup>81</sup> Unfortunately, all too often we target low-risk offenders to participate in these programs. This is a waste of correctional resources because, by definition, low-risk offenders are already unlikely to reoffend. Providing more services than necessary to low-risk offenders depletes resources that should be devoted to the more serious offenders.

Moreover, the research has shown that placing low-risk offenders in more structured and intensive programs along with higher-risk offenders actually *increases* the risk that the low-risk offenders will reoffend.<sup>82</sup> Low-risk offenders rarely influence the behaviors of higher-risk offenders. To the contrary, the higher-risk offenders influence the lower-risk offenders by challenging their pro-social thinking, introducing them to antisocial peers, and using manipulation and strong-arm tactics. Furthermore, participation by low-risk offenders disrupts the pro-social factors like employment, family ties, and positive peer relations that make the offenders low-risk in the first place. In fact, some corrections experts resist involving judges in decisions about which offenders should be placed in programs designed for higher-risk offenders because of the perceived tendency of many judges to “widen the net,” to use those corrections resources for low-risk offenders some of whom inevitably violate program requirements and become even further enmeshed in the criminal justice system.<sup>83</sup> Low-risk offenders should be diverted from prosecution altogether, fined, or

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80. Risk, as used in this context, does not refer to the risk of committing a serious crime, or the likelihood that an offender will incur technical violations, but rather, to the likelihood that the offender will commit *another* crime. An offender may be at a high risk to reoffend, but not necessarily to commit a violent or serious crime, or a low risk, but still likely to commit technical violations of probation or parole.

81. For a review of some of the prominent research, see CHRISTOPHER T. LOWENKAMP & EDWARD J. LATESSA, UNDERSTANDING THE RISK PRINCIPLE: HOW AND WHY CORRECTIONAL INTERVENTIONS CAN HARM LOW-RISK OFFENDERS 6 (2004), available at <http://www.nicic.org/pubs/2004/period266.pdf>.

82. *Id.* at 3.

83. See MARCUS NIETO, CAL. RESEARCH BUREAU, COMMUNITY CORRECTION PUNISHMENTS: AN ALTERNATIVE TO INCARCERATION FOR NONVIOLENT OFFENDERS, § I.B (1996),

placed in a low-supervision or low-intervention program, such as community service or a one-time class.

The risk principle also identifies the level of services offenders should receive. More intensive treatment and intervention programs should be reserved for higher-risk offenders, along with greater use of external controls to properly manage and monitor the offenders' behavior, such as intensive probation, day-reporting centers, drug tests, frequent probation officer contacts, home detention, and electronic monitoring.<sup>84</sup>

High-risk offenders must be distinguished from the extremely high-risk or highest-risk offenders who are deeply enmeshed in a criminal subculture. Extremely high risk offenders tend not to be responsive to traditional correctional programming. Use of limited programming funds on these extremely high risk, oftentimes recalcitrant offenders, is usually a poor investment that may deprive another more suitable offender of receiving necessary services. Extremely high risk offenders who are not violent or dangerous might still be safely dealt with in the community but only through the use of sanctions and external controls. They should receive sanctions that provide high levels of structure, accountability, surveillance, or incapacitation so that at least during the time they are under correctional supervision the risk they present is effectively managed. For these offenders, 40%–70% of the crime-prone hours of the day should be structured through supervised activities.<sup>85</sup> For this extremely high risk group of chronic offenders, time or age appears most effective in reducing recidivism. That is, high-risk chronic offenders who are not responsive to intervention often have relatively short criminal careers and may “time out” of a criminal lifestyle after five to ten years, or “age out” by the time they reach their forties.

### C. The Needs Principle

The closely related second task in applying principles of EBP to sentencing decisions is to identify the offender's “dynamic risk factors,” i.e., those offender characteristics that increase the likelihood of

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available at <http://www.library.ca.gov/crb/96/08/> (discussing why states should allow both judicial sentencing and correctional alternatives).

84. See LOWENKAMP & LATESSA, *supra* note 81, at 7–8.

85. See Paul Gendreau & Claire Goggin, *Principles of Effective Programming with Offenders*, 8 F. ON CORRECTIONS RES. 38, 38–40 (1996); see also Ted Palmer, *Programmatic and Non-programmatic Aspects of Successful Intervention: New Directions for Research*, 41 CRIME & DELINQUENCY 100, 100–31 (1995) (analyzing correctional intervention based on literature reviews and meta-analyses).

recidivism and can be reduced through effective intervention.<sup>86</sup> Our current sentencing policies tend to focus on traditional “static” risk factors, i.e., factors that may accurately predict the likelihood of recidivism (such as prior criminal history, age at first conviction, and history of child abuse/neglect), but are historic and cannot be changed. The EBP needs principle identifies those dynamic risk factors, or “criminogenic needs,” i.e., those characteristics of the individual offender that are most closely associated with the likelihood of committing crime.<sup>87</sup> These are the risk factors or “needs” that, if properly addressed, will reduce criminal behavior. Addressing non-criminogenic needs may provide some benefit to the offender, but because the needs are not related to the likelihood of criminal behavior targeting them will not reduce the likelihood of recidivism.

The eight criminogenic needs most predictive of the likelihood of criminal behavior are: (1) anti-social attitudes, values, and beliefs; (2) anti-social associates; (3) anti-social personality pattern; (4) family and marital issues; (5) substance abuse; (6) education issues; (7) employment issues; and (8) lack of pro-social activities.<sup>88</sup>

Offenders with anti-social attitudes that are supportive of crime are more likely to commit criminal acts.<sup>89</sup> These offenders retreat from the mainstream community and have few contacts with others in the community who are not involved in criminal conduct. Offenders who associate with other criminal offenders are more likely to commit further crimes. Offenders with antisocial personality patterns have weak self-control, are aggressive, and do not care how their actions affect others and, therefore, often feel no remorse for what they do. The absence of family nurturance or supervision, and of positive family role models, is the fourth of the “big four” criminogenic needs most highly associated with criminal behavior.<sup>90</sup> Although a significant number of prisoners commit their offense under the influence of drugs,<sup>91</sup> the predictive value of substance abuse, educational needs,

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86. EDWARD WALLACE SIEH, *COMMUNITY CORRECTIONS AND HUMAN DIGNITY* 149 (2005). Dynamic risk factors “are personal attributes that are subject to change[,] such as criminal history, employment record, education, marital status, antisocial associates, attitudes, and personality.” *Id.*

87. See D.A. Andrews et al., *Classification for Effective Rehabilitation: Rediscovering Psychology*, 17 *CRIM. JUST. & BEHAV.* 17, 19, 20–23 (1990).

88. TAXMAN ET AL., *TOOLS OF THE TRADE*, *supra* note 79, at 26.

89. *Id.* at 3.

90. See Andrews et al., *supra* note 87, at 19–22.

91. CHRISTOPHER J. MUMOLA & JENNIFER C. KARBERG, U.S. DEP’T OF JUSTICE, *DRUG USE AND DEPENDENCE, STATE AND FEDERAL PRISONERS, 2004*, at 1–2 (2006); *DRUG POLICY INFO. CLEARINGHOUSE, OFFICE OF NAT’L DRUG CONTROL POLICY, DRUG-RELATED CRIME 2* (2000),

unemployment, and lack of pro-social leisure activities is far less than the predictive value of the primary criminogenic needs in predicting the likelihood of recidivism.<sup>92</sup>

Prominent examples of non-criminogenic needs include low self-esteem, emotional distress, poor physical health, lack of physical conditioning, low IQ, anxiety, and major mental disorders.<sup>93</sup> Most studies have found, for example, that boot camps do not reduce recidivism because they tend to focus on non-criminogenic needs like self-esteem, physical conditioning, discipline, and offender bonding.<sup>94</sup> Other corrections programs or practices that have been found not to reduce recidivism are “scared straight programs,” challenge-type programs such as wilderness-exploration programs, and “insight-oriented” programs that include psychoanalytic features.<sup>95</sup> In the absence of a treatment component, intermediate sanctions programs, such as intensive supervision and electronic monitoring, do not reduce future recidivism.<sup>96</sup>

The more criminogenic needs of the offender that are addressed in treatment, the greater the likelihood of reducing criminal behaviors. For offenders with multiple criminogenic needs, treatment programs that address at least four criminogenic needs achieve better results.<sup>97</sup>

#### D. Risk and Needs Assessment

Determination of the degree of risk of reoffense that an offender presents, and of the offender’s criminogenic needs, requires a careful assessment of relevant information about each offender. Too often, determinations of risk are based solely on the nature of the offense committed (a very poor predictor of recidivism) and prior criminal

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available at <http://www.whitehousedrugpolicy.gov/publications/pdf/ncj181056.pdf>; see also *id.* at 1 (finding that drug users who used illicit drugs in the previous year were sixteen times more likely than nonusers to have committed larceny or theft).

92. See TAXMAN ET AL., TOOLS OF THE TRADE, *supra* note 79, at 26.

93. Although there is no direct statistical link between these characteristics and crime, some of these factors, including emotional distress, low IQ, and mental illness, for example, may constitute “responsivity factors” that may need to be addressed in particular cases in order to successfully address true “criminogenic needs.” *Id.* at 26–28.

94. Edward J. Latessa, Ctr. for Criminal Justice, Univ. of Cincinnati, What Works and What Doesn’t in Reducing Recidivism: The Principles of Effective Intervention 12, [http://www.dsgonline.com/Program\\_Logic\\_Model/San\\_Diego\\_TM/Day%201-Lunch-Latessa.ppt](http://www.dsgonline.com/Program_Logic_Model/San_Diego_TM/Day%201-Lunch-Latessa.ppt) (last visited Apr. 16, 2009).

95. *Id.* at 25; see AOS ET AL., *supra* note 72, at 5–6.

96. AOS ET AL., *supra* note 72, at 6.

97. See TAXMAN ET AL., TOOLS OF THE TRADE, *supra* note 79, at 21.

history. Although prior criminal history is a legitimate and strong risk factor, it is not a sufficient basis for an accurate assessment. Looking at offense characteristics alone does not comport with evidence-based practice in predicting recidivism. Offender characteristics are almost always more predictive of whether an individual is likely to commit a future crime than offense characteristics.<sup>98</sup>

There are generally four methods of determining risk:<sup>99</sup> (1) professional judgment based on the education and experience of a corrections or treatment professional (first generation); (2) an actuarial risk-assessment instrument that has been validated on a comparable offender population and uses objective, but “static,” risk factors that can be measured and weighted to give an overall risk score (second generation); (3) an actuarial tool that includes assessment of dynamic risk and criminogenic needs factors as well as static risk factors (third generation); and (4) a combination of a third-generation risk-assessment instrument and professional judgment.<sup>100</sup>

Actuarial tools are far better predictors of risk than professional judgment.<sup>101</sup> However, the most accurate assessment requires use of both a third-generation actuarial tool and professional judgment.<sup>102</sup> A 2006 survey of state court leaders reported some use of formal risk-assessment instruments in about half of the states, although not necessarily in the court system.<sup>103</sup> The survey also identified the Level of Service Inventory Revised (“LSI-R”), a proprietary third-generation tool, as the most commonly used risk-assessment instrument in the states.<sup>104</sup>

In addition, many jurisdictions that use a formal assessment tool also use a simpler formal or informal “screening tool” to divert low-risk offenders or determine whether use of a full assessment tool is required. There are also a large number of supplemental or “trailer” tools that provide more detailed assessment in such areas such as mental health, substance abuse, domestic violence, and sexual of-

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98. Paul Gendreau, Tracy Little & Claire Goggin, *A Meta-Analysis of the Predictors of Adult Offender Recidivism: What Works!*, 34 *CRIMINOLOGY* 575, 575–608 (1996); Carl B. Clements, *Offender Classification: Two Decades of Progress*, 23 *CRIM. JUST. & BEHAV.* 121, 121–43 (1996).

99. See D.A. Andrews et al., *The Recent Past and Near Future of Risk and/or Need Assessment*, 52 *CRIME & DELINQ.* 7, 7–8 (2006).

100. *Id.*

101. Gendreau et al., *supra* note 98, at 591.

102. *Id.* at 577–78.

103. PETERS & WARREN, *supra* note 12, at 17.

104. *Id.*

fense.<sup>105</sup> Overwhelmed by data from multiple assessment tools, interviews, and other case-related information, corrections programs in Maryland and Iowa developed software to synthesize and graphically display all of the assessment information in a manner facilitating design of individual case management plans for each offender.<sup>106</sup> The Georgia Parole Board has implemented an automated actuarial risk-assessment instrument that automatically updates risk changes daily for 21,000 Georgia parolees and whose ability to predict whether a parolee will commit a new felony is claimed to exceed the published abilities of any risk-assessment instrument on the market.<sup>107</sup>

The availability of accurate risk- and needs-assessment information is critical in making sound judicial decisions on a variety of issues that frequently arise in sentencing felony offenders. One issue, for example, is the offender's suitability for diversion. Whether an offender should be diverted from further prosecution, deferred for sentencing, placed in a low-intervention/supervision corrections program, merely fined, or placed in a community-service activity depends in large part on whether the offender is a low risk to reoffend. On the other end of the range of sentencing alternatives, there is the issue of whether the offender should be sentenced to prison. Imprisonment should be reserved for the most violent, serious, or dangerous offenders. Whether a particular defendant should be imprisoned may depend in part on the likelihood of being able to address the offenders' criminogenic needs and provide the required behavioral controls in the community. Determining whether incarceration, on the one hand, or intermediate sanctions such as work release, day reporting, residential commitment, intensive supervision, electronic monitoring, and testing, on the other hand, are appropriate also depends in part on the degree of risk, the risk factors that need to be controlled, and how best to integrate an appropriate sanction with appropriate treatment services.<sup>108</sup>

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105. For information on specialized assessments for offender populations, see NAT'L INST. OF CORR., U.S. DEP'T OF JUSTICE, TOPICS IN COMMUNITY CORRECTIONS 25 (2003), available at <http://www.nicic.org/pubs/2003/period243.pdf>.

106. Steve Street, *Quality Case Management Through Integrated Use of Assessment Data*, in TOPICS IN COMMUNITY CORRECTIONS 27, 28 (2004), available at <http://www.nicic.org/pubs/2004/period265.pdf>.

107. George Braucht et al., *Automating Offender Risk Assessment*, in TOPICS IN COMMUNITY CORRECTIONS 35, 35 (2004), available at <http://www.nicic.org/pubs/2004/period265.pdf>.

108. DEAN J. CHAMPION, MEASURING OFFENDER RISK: A CRIMINAL JUSTICE SOURCEBOOK 49-71 (1994).

It is important that courts provide the offender the appropriate type of treatment services according to the offender's criminogenic needs. Courts that place the offender in a treatment program not designed to address the offender's particular criminogenic needs wastes treatment resources and actually harms the defendant by impeding opportunities for success. Similarly, in the absence of a risk and needs assessment, the judge is unable to reasonably determine appropriate conditions of probation to manage offender risk in the community and address the offender's risk factors and criminogenic needs.<sup>109</sup>

While on parole, the court seeks to shape the offender behavior through the imposition of conditions of probation. Probation conditions describe the terms under which the offender is released to the constructive custody of the probation officer and the actions that the offender must take and the behaviors the offender must avoid as a condition of continued release from physical custody. The conditions of probation should reflect the behavioral controls that the judge finds necessary to manage the risk that the defendant's freedom from custody presents to the community and the risk factors related to that risk. Probation conditions should also address the offender's criminogenic needs and require the offender's cooperation with the probation officer and successful participation in services provided to address those needs, as directed by the probation officer.

The corrections agency is typically more qualified and in a better position than the judge to determine how best to address the offender's risk, risk factors, and criminogenic needs with the available resources in the community. Both risk and needs are dynamic; they change over time. It is the probation officer's responsibility to continuously monitor the probationer's behaviors and respond accordingly.<sup>110</sup> From the perspective of the corrections agency, the conditions of probation establish the framework for developing an appropriate case management plan for the offender.<sup>111</sup> Development, modification, and implementation of the case management plan are the responsibility of the probation officer, not the judge.

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109. Faye Taxman, *Assessment with a Flair: Offender Accountability in Supervision Plans*, 70 FED. PROBATION (2006), [http://www.uscourts.gov/fedprob/September\\_2006/accountability.html](http://www.uscourts.gov/fedprob/September_2006/accountability.html) [hereinafter Taxman, Offender Accountability].

110. CHAMPION, *supra* note 108, at 207–09. Recent research indicates that use of risk-assessment tools to reassess offender risk and need over time, especially acute risk factors, might double or even triple the predictive abilities of the tools. Andrews et al., *supra* note 99, at 16.

111. TAXMAN ET AL., TOOLS OF THE TRADE, *supra* note 79, at 53–54.

Conditions of probation should only include those conditions that the judge believes are essential to address the offender's risks and needs. Imposition of additional conditions beyond those directly related to the offender's risk level or needs only distract and impede the offender and probation officer and undermine the ability of both the court and the probation officer to hold the defendant accountable for compliance with essential conditions.

Accurate risk- and needs-assessment information is also critical in determining the nature of any sanction to be imposed upon violation of probation. Probation agencies should have a broad range of graduated sanctions available to respond to violations of probation.<sup>112</sup> They may include, in approximate order of severity, sanctions such as verbal warning, reprimand, counseling, increased contacts or reporting requirements, restructuring of financial payments, home visits, curfew, additional conditions of probation, loss of travel or other privileges, increased testing, referral to additional treatment or education services, extension of probation, community service, electronic monitoring, drug treatment, more intensive supervision, day-reporting center, home confinement, local incarceration, or imprisonment.<sup>113</sup>

Low-level responses are clearly within the authority of probation staff; high-level responses clearly require judicial involvement. Where the line is drawn depends upon the law of the particular jurisdiction, the extent to which probation agencies have the legal authority to impose administrative sanctions in lieu of revocation, and the scope of authority delegated to the probation department by the court. In many jurisdictions the probation department is authorized to negotiate modifications of the terms of probation directly with the probationer and submit such agreements to the court for approval without personal appearance.<sup>114</sup>

Probation must respond quickly, consistently, and fairly to all violations. The appropriate response to probation violations depends upon the severity of the violation, the probationer's adjusted level of risk in light of the violation, and the extent of motivation, cooperation, and success the probationer has demonstrated in complying with

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112. Peggy Burke, *Filling in the Gaps: Increasing the Available Range of Responses to Violations*, in *RESPONDING TO PAROLE AND PROBATION VIOLATIONS: A HANDBOOK TO GUIDE LOCAL POLICY DEVELOPMENT* 73–75 (2001), available at <http://www.nicic.org/pubs/2001/016858.pdf>.

113. *Id.* at 74.

114. Madeline E. Carter & Ann Ley, *Making It Work: Developing Tools to Carry Out the Policy*, in *RESPONDING TO PAROLE AND PROBATION VIOLATIONS*, *supra* note 112, at 51.

other terms and conditions of probation.<sup>115</sup> An appropriate response to a particular probation violation involves not merely a consideration of sanctions but a weighing of the relative importance of at least three discrete probation objectives: sanctions proportionate to the seriousness of the violation to hold the offender accountable for the violation; assertion of sufficient control over the offender's behavior to properly manage the risk and seriousness of risk that the probationer presents to the safety of the community; and facilitation of the offender's continued rehabilitation resulting in ongoing compliance, successful completion of probation, and future law-abiding behavior.<sup>116</sup>

Courts should, in response to petitions to revoke probation, utilize the same factors and objectives as probation agencies. Probation violations, especially technical violations not involving new criminal conduct, should not necessarily result in removal from the community.<sup>117</sup> What is required is a thoughtful weighing of the likelihood of success in continuing to manage offender risk within the community without incurring further criminal behavior in light of the seriousness of the violation. Unless the court and probation department achieve a clear, consistent, and shared understanding about how to weigh these factors and objectives in responding to common violations, time consuming revocation requests will likely inundate the courts. This may often result in lack of concurrence between the court and probation department.

Unfortunately, reliable risk- and needs-assessment information is rarely available to state court judges in felony-sentencing proceedings. The presentence investigation ("PSI") report has been the principal source of information to sentencing judges since the 1920s.<sup>118</sup> Although the policy of the American Probation and Parole Association still requires preparation of PSIs in every felony case,<sup>119</sup> the content of the PSIs has changed substantially over the past twenty-five years, and are currently available in a diminishing proportion of felony cases.

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115. MADELINE M. CARTER, NAT'L INST. OF CORR., RESPONDING TO PAROLE AND PROBATION VIOLATIONS, *supra* note 112, at 7-18, 52-61.

116. Peggy Burke, *Beyond the Continuum of Sanctions: A Menu of Outcome-Based Interventions*, in RESPONDING TO PAROLE AND PROBATION VIOLATIONS, *supra* note 112, at 77-81.

117. CARTER, *supra* note 115.

118. DANIEL MACALLAIR, CTR. ON JUVENILE & CRIMINAL JUSTICE, THE HISTORY OF THE PRE-SENTENCE INVESTIGATION REPORT 1, [http://www.cjcrj.org/files/the\\_history.pdf](http://www.cjcrj.org/files/the_history.pdf).

119. See AM. PROB. & PAROLE ASS'N, PROBATION PRE-SENTENCE INVESTIGATION (1987), available at [http://www.appa-net.org/eweb/Dynamicpage.aspx?site=APPA\\_2&webcode=IB\\_PositionStatement&wps\\_key=24e1c1d8-c753-4710-8f89-6085c6191128](http://www.appa-net.org/eweb/Dynamicpage.aspx?site=APPA_2&webcode=IB_PositionStatement&wps_key=24e1c1d8-c753-4710-8f89-6085c6191128).

Historically, the PSI typically included an offense summary; the offender's role; prior criminal justice involvement; a social history of the offender with an emphasis on family history, employment, education, physical and mental health, financial condition, and future prospects; and the probation officer's sentencing recommendation.<sup>120</sup> As sentencing systems have become more determinate, retributive, and offense-based over the past thirty years, PSIs have become more succinct, including less offender information. Now, in many jurisdictions, the primary role of the PSI is merely to determine the applicable mitigating and aggravating circumstances. In some states PSIs are no longer required at all, having been replaced by worksheets that calculate prescribed sentences under statutory or administrative guidelines.<sup>121</sup>

Furthermore, the dramatic increase in felony filings since the 1970s, and the serious funding challenges that have confronted local probation and community corrections agencies over the past decade, have led to further reductions in the use of PSI reports. In most states today, PSIs are either not required, or waived in a large proportion of cases.<sup>122</sup>

Even when PSIs are available, they rarely incorporate actuarial offender risk and needs information. Recognizing the importance to the sentencing judge of accurate offender risk and needs information, however, several jurisdictions have recently begun to make assessment information available to sentencing judges. The recent efforts vary significantly, both in the scope of information available and in their stage of development.

In Virginia, a state Sentencing Commission created a risk-assessment instrument, validated by the National Center for State Courts.<sup>123</sup> Virginia judges have, since 2003, used the instrument to successfully divert 25% of Virginia's nonviolent offenders, who would otherwise be incarcerated, to alternative sanctions programs.<sup>124</sup> However, the instrument does not purport to assess criminogenic needs.<sup>125</sup>

In Arizona, the Maricopa County Adult Probation Department developed three related risk-assessment tools now used statewide: an Offender Screening Tool ("OST"); a shorter Modified Offender

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120. MACALLAIR, *supra* note 118, at 2.

121. *Id.*

122. *See, e.g.*, VA. CODE ANN. §19.2-299 (2006); IDAHO CRIM. R. 32.

123. OSTROM ET AL., NAT'L CTR. FOR STATE COURTS, OFFENDER RISK ASSESSMENT IN VIRGINIA 15 (2002), available at [http://www.vcsc.virginia.gov/risk\\_off\\_rpt.pdf](http://www.vcsc.virginia.gov/risk_off_rpt.pdf).

124. *Id.*

125. *Id.* at 64.

Screening Tool (“MOST”); and a Field Reassessment Offender Screening Tool (“FROST”) used by probation officers in the field to reassess risk and make appropriate modifications to probation case management plans.<sup>126</sup> Risk-assessment information in the relevant criminogenic domains is sometimes referenced in the PSIs prepared for the courts and has been particularly useful in avoiding the over-programming of lower-risk offenders. Several local jurisdictions around the country also include results of formal risk assessments in their PSI reports. In Washington County, Minnesota, for example, the LSI-R numerical score is included in the PSI Report and used to determine the level of supervision. In Travis County, Texas, on the other hand, the significant criminogenic risk factors identified by the formal risk assessment instrument and related offender interview are set forth in the PSI Report and used to determine the recommended supervision strategy and conditions of probation, as well as to classify the offender’s risk level.<sup>127</sup>

A pilot project in San Diego, California, now tests the involvement of county probation officers and judges in creating treatment plans for offenders sentenced to state prison based on use of risk- and needs-assessment information at the time of sentencing.<sup>128</sup> Judge Michael Marcus in Multnomah County, Oregon, reports that although PSIs have become relatively rare in recent years, when they are available they regularly include information about offender risk and criminogenic needs.<sup>129</sup>

A study group in Maine recently recommended the state undertake a multi-county pilot project to implement a triage risk-assessment system.<sup>130</sup> The proposed triage risk-assessment system consisted first of a simple three-item pre-plea screening tool to assess offender eligibility for diversion or unsupervised probation, or whether, upon convic-

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126. MARICOPA COUNTY ADULT PROB. DEP’T, MANAGING FOR RESULTS: FIVE YEAR STRATEGIC PLAN: FISCAL YEARS 2005–2010, at 6 (2005), available at <http://www.superiorcourt.maricopa.gov/AdultProbation/docs/mfr5yp.pdf>.

127. Geraldine F. Nagy, Experience from the Field: Strategic Planning and Evidence-Based Practices in Travis County, Texas, Presentation to Kansas Community Corrections 23–29 (Oct. 22, 2008), available at <http://doc.ks.gov/community-corrections/resources/SA%20and%20EBP%20in%20Travis%20County%20TX.pdf>.

128. LITTLE HOOVER COMM’N, SOLVING CALIFORNIA’S CORRECTIONS CRISIS: TIME IS RUNNING OUT 28–29 (2007), available at <http://www.lhc.ca.gov/lhcdir/185/Report185.pdf>.

129. Michael Marcus, *Justitia’s Bandage: Blind Sentencing*, 1 INT’L J. PUNISHMENT & SENT’G 1, 25 (2005).

130. CRIME & JUSTICE INST., EVIDENCE-BASED PRACTICES: A FRAMEWORK FOR SENTENCING POLICY 33–34 (2006), available at <http://www.maine.gov/corrections/caac/SupMat/FinalReportSentencingPracticesSubcommitteeForPrinting.pdf>.

tion, an LSI-R should be administered.<sup>131</sup> The court would mandate an LSI-R in some instances and conducted at the joint request of the parties in other instances.<sup>132</sup> If the offender scores as a high risk on the LSI-R, a full PSI Report would be prepared.<sup>133</sup> Other specialized assessment tools would be pilot tested in appropriate cases. The LSI-R results would be used in setting probation conditions and to determine an appropriate response at any subsequent probation-revocation hearing.<sup>134</sup>

## E. The Treatment and Responsivity Principles

Although it is not primarily the judge's responsibility to regulate the quality or effectiveness of treatment services available in the community, sentencing judges should not blindly assume that one treatment program is as good as any other, or that the mere fact a program exists in the community constitutes an implicit assurance of its effectiveness. If the judge's objective in ordering treatment is to reduce the likelihood of further criminal behavior and resulting victimization by the offender, it is not sufficient to determine merely that the offender is an appropriate candidate for treatment and that there is a treatment resource available. Given the risks and costs at stake, due diligence requires that a conscientious judge have some credible reason to believe that the program works for such offenders. If the program does not work for such offenders, an order that the offender participate in the program is a waste of the judge's time, and of the time and resources of the probation department and community, and merely sets the offender up for failure. Even if the probation department, or some other governmental entity, has final responsibility for the quality and effectiveness of available treatment, the sentencing judge should seek credible evidence that the treatment works and that the program is evidence-based.

### 1. The Treatment Principle

The treatment principle of EBP synthesizes the overwhelming body of research finding that cognitive-behavioral programs rooted in social-learning theory are the most effective in reducing recidivism.<sup>135</sup> Social-learning theory posits that over the long term people behave in

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131. *Id.*

132. *Id.* at 33.

133. *Id.* at 43.

134. *Id.* at 33.

135. See CRIME & JUSTICE INST., *supra* note 76, at 6.

ways for which they are rewarded, and not in ways for which they are sanctioned.<sup>136</sup> There are reasons why people do what they do (behavioral “antecedents”). “Behaviors” result in “consequences.” Behavioral consequences help shape the antecedents of future behavior. Positive consequences (rewards) reinforce behaviors while negative consequences (sanctions) discourage behaviors. A clear set of consequences, both positive and negative, is critical to develop a sense of personal self-control, and responsibility for one’s own behavior. Successful treatment is offender centered, enabling offenders to assume responsibility for their own behaviors and make good behavioral decisions in light of the foreseeable consequences of those decisions.<sup>137</sup>

Cognitive-behavioral programs attack the thinking patterns that promote and support criminal conduct by training offenders in pro-social thinking and behavioral skills. They teach offenders ways to solve problems without resorting to violence, how to negotiate with authority, how to make deliberate choices before they act, and self-control.<sup>138</sup> The characteristics of effective cognitive-behavioral programs include the following:

1. They focus on the offender’s current risk and needs factors.
2. Skills are not just taught; they are role-played. The offender is required to regularly practice pro-social behavioral skills.
3. The treatment professional is interpersonally warm, socially skilled, firm, and consistent.
4. The treatment professional models appropriate behaviors.
5. The treatment professional provides feedback. Pro-social behavior is reinforced and antisocial behavior is discouraged.<sup>139</sup>

Related research on human behavior indicates that people respond better, and maintain learned behaviors longer, when approached with “carrots” rather than “sticks,” rewards rather than punishments.<sup>140</sup> Behavioral research indicates that reinforcement should be applied frequently; for optimal learning, positive feedback should outweigh negative feedback by four to one.<sup>141</sup> Because rewards

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136. TAXMAN ET AL., *TOOLS OF THE TRADE*, *supra* note 79, at 13–20; *see also* ALBERT BANDURA, *SOCIAL LEARNING THEORY* (1977).

137. *See* Daniel H. Antonowicz & Robert Ross, *Essential Components of Successful Rehabilitation Programs for Offenders*, 38 *INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY* 97, 97–104 (1994); Paul Gendreau, *Offender Rehabilitation: What We Know and What Needs to Be Done*, 23 *CRIM. JUST. & BEHAV.* 144, 144–61 (1996).

138. TAXMAN ET AL., *TOOLS OF THE TRADE*, *supra* note 79, at 69.

139. *CRIME & JUSTICE INST.*, *supra* note 76, at 6.

140. *Id.*

141. Francis T. Cullen, *Rehabilitation and Treatment Programs*, in *CRIME: PUBLIC POLICY FOR CRIME CONTROL* 253–89 (James Q. Wilson & Joan Petersilia eds., 2d ed. 2002); *see also* D.A. ANDREWS & JAMES BONTA, *THE PSYCHOLOGY OF CRIMINAL CONDUCT* (1996).

achieve behavioral change more effectively than punishments, providing incentives for behavior change through “negative reinforcement,” is more effective than threats of punishment, such as application of additional sanctions or conditions.<sup>142</sup> Unlike sanctions, courts do not have to apply consistent reinforcement throughout the duration of treatment, but can instead taper or reduce it over time. However, the increased use of reinforcements and incentives should not undermine the use of immediate, certain, and real responses to unacceptable behavior. Offenders demonstrating problems with responsible self-regulation generally respond positively to reasonable application of additional structure and boundaries. Although offenders may initially overreact to new demands for accountability, seek to evade detection or consequences, and fail to recognize personal responsibility, with continued exposure to clear rules, consistently and immediately enforced with appropriate negative consequences, offenders will tend to behave in ways that result in the most rewards and the fewest punishments.<sup>143</sup> This form of extrinsic motivation is often useful in beginning the process of offender behavior change.

The criminal behaviors that characterize most moderate- and high-risk offenders are chronic, not acute. Just as in medicine, the treatment response must provide a continuing-care approach based on a chronic-care model, not an acute-care approach.<sup>144</sup> Chronic behaviors are not resolved with some fixed amount or duration of treatment. As with substance-abuse and mental-health treatment, an interim goal is to engage and retain the offender in treatment at an appropriate level of care and monitoring until the offender can successfully manage his or her own care and behavior.

For many chronic offenders continuing care spans the period of at least six to nine months of intensive treatment followed by a period of often longer aftercare. Many studies confirm that more time in treatment leads to more positive post-treatment outcomes, including

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142. CRIME & JUSTICE INST., *supra* note 76, at 6. Unacceptable behavior, such as violation of conditions of probation, for example, must of course be met with swift, consistent, and unambiguous responses. Responses need not be harsh, however, and consequences should be graduated.

143. See Hawaii’s Opportunity Probation with Enforcement Program (“HOPE”), [http://www.courts.state.hi.us/page\\_server/SpecialProjects/HOPE/6EC40FB677DBA4BE1102D7ECD9E.html](http://www.courts.state.hi.us/page_server/SpecialProjects/HOPE/6EC40FB677DBA4BE1102D7ECD9E.html) (last visited Apr. 16, 2009) (discussing ways to innovatively implement sanctions in order to deter probation violations and revocations).

144. A. Thomas McLellan, Principles of Effective Treatment, Presentation at a Meeting of the Center of Evidence-Based Interventions for Crime and Addiction (Dec. 6, 2006) (on file with author).

on measures of criminal activity.<sup>145</sup> Judges must thus ensure that the treatment programs in their jurisdiction provide the necessary continuity of care.

To extend and sustain behavioral changes, offenders in treatment also require positive support, especially from the persons closest to them: family members, friends, religious institutions, and supportive others in their communities.<sup>146</sup> The period immediately following treatment often poses the time of greatest risk of relapse, especially for those offenders seeking to undergo a major life change while returning to the company of the same dysfunctional family, criminal peers, or network of antisocial associates who previously supported the offender's criminal behaviors. Many successful treatment interventions, therefore, actively recruit participation by pro-social supporters in the offender's immediate environment to positively reinforce the offender's desired new behaviors. This "community reinforcement approach" has been found effective for a variety of behaviors, including unemployment, alcoholism, and substance abuse.<sup>147</sup> Twelve-step programs, religious activities, and restorative-justice initiatives aimed at improving connections with pro-social members of the community have also been found successful.<sup>148</sup> As with continuity of care, judges must also insist that local treatment programs incorporate the necessary family and community reinforcement opportunities.

## 2. The Responsivity Principle

The principle of specific responsivity provides guidance on how treatment is "delivered."<sup>149</sup> The individual offender's gender, culture, IQ, learning style, level of motivation, readiness for change, and mental health all influence the offender's responsiveness to treatment. Courts must match treatment alternatives, agency staffing, and methods of communication to the offender's personal characteristics. Courts should identify common offender sub-populations including, for example, the severely mentally ill and those with co-occurring disorders for special services.<sup>150</sup>

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145. See AMANDA B. CISSNER & MICHAEL REMPEL, CTR. FOR COURT INNOVATION, THE STATE OF DRUG COURT RESEARCH 8 (2005).

146. ANDREWS & BONTA, *supra* note 141.

147. CRIME & JUSTICE INST., *supra* note 76, at 6.

148. *Id.*

149. WILLIAM MILLER & STEPHEN ROLLNICK, MOTIVATIONAL INTERVIEWING: PREPARING PEOPLE FOR CHANGE 338 (2d ed. 2002); CRIME & JUSTICE INST., *supra* note 76, at 6.

150. Jennifer L. Skeem & Jennifer Eno Loudon, *Toward Evidence-Based Practice for Probationers and Parolees Mandated to Mental Health Treatment*, 57 PSYCHIATRIC SERVICES 333,

The treatment, responsivity, and other EBP principles this Article discusses have been a strong catalyst for change in the way probation and parole agencies supervise criminal offenders in the community. As probation and parole agencies incorporate principles of EBP and the research findings on which the principles are based into their practice, community supervision has become a more proactive process for managing offender behavior to reduce recidivism.<sup>151</sup> Supervision staff seek to proactively engage the offender in behavior modification and to use supervision to assist the offender in achieving pro-social behaviors.<sup>152</sup> Proactive supervision is achieved through active case management—developing a supervision plan for changing the offender's behavior to which the offender and supervision staff mutually agree and then implementing the agreed-upon plan through a behavior contract that facilitates behavior change.<sup>153</sup> The behavior contract outlines what is expected of the offender, the services to be offered, and the consequences of meeting and not meeting expectations.<sup>154</sup> The ultimate goal is offender self-management. The behavior contract seeks to promote behavioral change, not primarily through external controls, but by assisting the offender in developing internal controls and taking responsibility for managing his or her own behavior in a pro-social manner.

The treatment and responsivity principles also have important implications for the manner in which judges identify appropriate conditions of probation and the ways in which judges communicate with offenders. It is important that the terms and conditions of probation set by the sentencing judge establish the framework for the probation agency's community-supervision plan to achieve the objective of offender self-management. Appropriate conditions of probation are those that, upon the offender's compliance, will result in the desired positive behavioral change and ability to self-manage. Once appropriate conditions of probation are established, securing the offender's subsequent compliance with the conditions of probation becomes the mutual objective of all concerned. The judge, probation agency, offender, and public all then have a common and mutual interest in offender compliance.

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333–42 (2006) (discussing the prevalence of mental illness in individuals who violate probation or parole).

151. Taxman, *Offender Accountability*, *supra* note 109, at 1–11.

152. TAXMAN ET AL., *TOOLS OF THE TRADE*, *supra* note 79, at 4.

153. *Id.* at 5.

154. *Id.* at 6.

All communications with the offender in connection with sentencing, especially by the judge, should therefore be conducted in a manner to gain the offender's voluntary compliance with the conditions of probation to achieve those mutual and common goals. The judge, like the probation officer, acts as a change agent to reinforce the importance of the offender's voluntary compliance, not merely to enforce compliance. It is critical that the offender understand and, ideally, agree at the outset that it is in his or her best interest to comply with the conditions of probation for that purpose. The offender must also understand the behaviors to avoid and that such avoidance is under his or her own control.

The manner in which appropriate conditions of probation are communicated will have a significant impact on the likelihood of offender compliance. Compliance research has shown that speaking in simple terms and obtaining public expression of commitment to comply, especially in the presence of family or friends, promote subsequent compliance.<sup>155</sup> David Wexler has noted that principles of cognitive behavioral therapy also suggest that a judge enter into a dialogue with the offender to encourage the offender to identify the causes of offending and help formulate the rehabilitation plan that is then implemented through the conditions of probation.<sup>156</sup> By allowing participants to make a choice in relation to rehabilitation, the court promotes compliance and minimizes the negative side effects of coercive orders of the court.<sup>157</sup> Bruce Winick has observed:

Individuals coerced to participate in a treatment program—for example, by court order as a condition of diversion, probation or parole; by correctional authorities; or by authorities in psychiatric settings—often just go through the motions, satisfying the formal requirements of the program without deriving any real benefits. In contrast, the voluntary choice of a course of treatment involves a degree of internalized commitment to the goal often not present when the course of treatment is imposed involuntarily.<sup>158</sup>

Judges can encourage the offender to participate in the treatment discussion and decision, understand the behavioral responsibility that he or she accepts in choosing probation in lieu of

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155. David B. Wexler, *Robes and Rehabilitation: How Judges Can Help Offenders "Make Good,"* 38 CT. R. 18, 19 (2001), available at <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1208&context=ajacourtreview>.

156. *Id.* at 19–20.

157. Michael S. King, *The Therapeutic Dimension of Judging: The Example of Sentencing*, 16 J. JUDICIAL ADMIN. 92, 93 (2006).

158. Bruce J. Winick, *Competency to Consent to Treatment: The Distinction Between Assent and Objection*, 28 HOUS. L. REV. 15, 52 (1991).

imprisonment, and view the sentence and treatment plan as a behavior contract with the court. Although the constraints of the court calendar and courtroom environment may restrict extended dialogue by the judge at the sentencing of every felony offender considered for probation supervision, the judge should consider enlisting the cooperation of defense counsel and any probation staff involved with interviewing the defendant in seeking to engage the offender in the probation and treatment decision.

## F. Motivation, Stages of Change, and Trust

### 1. Motivation

In addition to the principles of EBP previously discussed, the quality of the relationship between treatment providers, probation officers, or judges and the offender has a significant influence on the likelihood of effective treatment outcomes. High-quality relationships are characterized by respect, understanding, care, and positive expectations. The judge's communications with the offender in connection with the sentencing proceedings are critical in promoting behavior change in the offender. As one county corrections administrator emphasized: "it is the professional's ability (whether [probation] officer, therapist, lawyer, or judge) to communicate effectively with a probationer, client, or inmate that determines the effectiveness of the outcomes obtained. . . . Without this skill, a program founded on the best of principles is doomed."<sup>159</sup>

The research on drug courts, as well as the personal experience of judges in drug courts and other problem-solving courts, has shown that personal interaction between the offender and judge plays a critical role not only in encouraging the offenders' engagement and participation in the sentencing discussion and decision, but also in motivating offenders to change their behaviors, and providing offenders with positive reinforcement throughout.<sup>160</sup>

Motivation to change on the part of the offender is an important starting place for behavioral change. Behavior change will only take place if the offender chooses to do so. The offender's motivation to

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159. Gary E. Christensen, Crime & Justice Inst., *Our System of Corrections: Do Jails Play a Role in Improving Offender Outcomes?*, at 9–10 (June 9, 2006) (unpublished report), available at [http://www.urban.org/reentryroundtable/cji\\_jails\\_draft.pdf](http://www.urban.org/reentryroundtable/cji_jails_draft.pdf).

160. See Bruce J. Winick & David B. Wexler, *Judging in a Therapeutic Key* (2003); King, *supra* note 157, at 93; Carrie Petrucci, *Respect as a Component in the Judge-Defendant Interaction in a Specialized Domestic Violence Court that Utilizes Therapeutic Jurisprudence*, 38 CRIM. L. BULL. 263 (2002).

change is strongly influenced by interpersonal relationships, especially with counselors, therapists, probation officers, judges, and other authority figures.<sup>161</sup>

Research indicates that the principal obstacle to overcome in behavioral change, especially among offenders who are good candidates for risk-reduction treatment strategies, is ambivalence or lack of resolve. Offenders are typically uncertain about the behaviors in which they wish to engage. Effective treatment professionals and probation officers are therefore often trained in “motivational interviewing” (“MI”), a set of communications techniques that effectively enhance intrinsic motivation for behavioral change by helping clients explore and resolve their ambivalence in a positive way.<sup>162</sup>

The judge’s interactions with the offender during the sentencing proceedings can play a critical role in influencing the offender’s level of intrinsic motivation regarding treatment and behavior change. For many judges, MI techniques will seem unnatural because they are in some respects contrary to traditional judicial modes of communication in the courtroom, especially in dealing with criminal offenders at sentencing. The research on MI demonstrates, for example, that common communication tendencies that serve as intrinsic motivation roadblocks include ordering or directing, sympathizing, warning or threatening, arguing, lecturing or preaching, criticizing or blaming, and shaming. On the other hand, communication techniques that enhance intrinsic motivation and help offenders resolve ambivalence in a positive way include: use of open-ended questions; empathetic or reflective listening; summarizing key points of the offender’s communications; respectfully pointing out inconsistencies between the offender’s statements and the offender’s actual behaviors; reinforcement and affirmation of positive behaviors; eliciting self-motivating statements; supporting self-efficacy (knowing one can accomplish a feat because one has done it in the past); and “rolling with” resistance to change.<sup>163</sup> By utilizing MI techniques in communicating with offenders, judges can promote intrinsic motivation and compliance.<sup>164</sup>

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161. TAXMAN ET AL., TOOLS OF THE TRADE, *supra* note 79, at 4–9; MILLER & ROLLNICK, *supra* note 149, at 9.

162. William Miller & Stephen Rollnick, *What Is Motivational Interviewing?*, 23 BEHAV. & COGNITIVE PSYCHOTHERAPY 325, 325–34 (1995); CRIME & JUSTICE INST., *supra* note 76, at 4.

163. Michael D. Clark et al., *Motivational Interviewing for Probation Officers: Tipping the Balance Toward Change*, 70 FED. PROBATION 38, 38–44 (2006); TAXMAN ET AL., TOOLS OF THE TRADE, *supra* note 79, at 44–48.

164. See Miller & Rollnick, *supra* note 162, at 334–38.

## 2. Stages of Change

It is also useful to understand the change process through which offenders typically proceed. Commentators recognize the "stages of change" as a useful device to determine appropriate behavior change strategies in relation to an offender's readiness to change.<sup>165</sup> Judicial officers, like the health-care professionals for whom the model was originally developed, tend to assume an authoritative stance expecting the offender to obey directives and interpreting failure to do so as insubordination or lack of will power. That approach typically meets only with resistance, not compliance. The stages of change model helps to guide practitioners toward a more effective approach. The stages of change and related strategies are:

1. Pre-contemplation—the offender does not believe there is a problem, ignores evidence to the contrary, and does not want to change. Attempting to engage the offender in some self-diagnosis is often the best approach.
2. Contemplation—the offender has begun to seriously contemplate change but is ambivalent and has not made a commitment to do so. The change strategy at this stage is to highlight the reasons to change and risks of not doing so, strengthen the offender's confidence in her or his ability to do so (e.g., by imagining what their changed state might be), provide positive feedback, refer to the success of others, and express optimism.
3. Determination—the offender is planning to change and beginning to make that intention public. At this stage the offender is reassessing key aspects of her or his life. The best strategy at this stage is to help the offender formulate a menu of options, or a clear plan with realistic goals and rewards and identifiable risks; emphasize the offender's choices; be positive; and emphasize the success of others.
4. Action—the offender is actively taking steps to modify his or her behavior, underlying thinking and attitudes, or environment. The most appropriate treatment strategy is to reinforce the steps the offender is taking.
5. Maintenance—ensuring that change is maintained and that relapse does not occur. The desired treatment approach is to help the offender discover and apply strategies to prevent relapse.
6. Relapse—when the offender returns to old patterns of behavior, the treatment strategy is to reevaluate and help the offender reengage in the stages of contemplation, determination, and action while avoiding demoralization.<sup>166</sup>

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165. TAXMAN ET AL., *TOOLS OF THE TRADE*, *supra* note 79, at 17; James O. Prochaska & Carlo DiClemente, *Stages and Processes of Self-Change of Smoking: Toward an Integrated Model of Change*, 51 J. COUNSELING & CLINICAL PSYCHOL. 390, 390-95 (1983).

166. Prochaska & DiClemente, *supra* note 165, at 390-95.

A basic understanding of motivational interviewing and the stages of change may be particularly helpful to a judge in dealing with probation violations. In an article discussing the application of motivational interviewing to sentencing proceedings, Michael King, an Australian magistrate concludes with an observation about the significant impact that judges' actions may have on an offender—whether judges intend to or not:

By virtue of their status and the function they perform judicial officers have an effect on those who come before them in court. Whether judicial officers are of the view that the judicial function includes motivating behavioral change in accord with justice system goals or not, they have the opportunity of maximizing any positive effect and minimizing any negative effect of court processes by means of the way they interact with people coming before them.<sup>167</sup>

### 3. Trust

Research in the field of “procedural justice” identifies another way judges can, through personal interaction with an offender, positively influence an offender’s internal motivation and behavior. Procedural justice studies by Professors Tom Tyler and Yuen Huo show that when criminal defendants view well-intentioned judges and court processes as fair and respectful, they are more likely to cooperate with legal authorities and voluntarily engage in law-abiding behaviors.<sup>168</sup>

The study of procedural justice entails the study of the causes and consequences of people’s subjective reactions to the fairness of dispute-resolution processes.<sup>169</sup> In studies of the experiences of persons who come in contact with police and judges, including criminal offenders, researchers have reached three important findings:

(1) People evaluate the procedural fairness of authorities’ decision-making processes by three criteria: (a) the fairness of the decision-making process itself; (b) whether they are personally treated with respect; and (c) whether they trust the motives of the decision

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167. King, *supra* note 157, at 103–04. The opposite is certainly true as well—that the nature of the judge’s interactions with offenders has an impact on the judge, whether the offender intends it or not. Judicial processes that promote positive interaction between judges and offenders also appear to provide intangible benefits for the judge. Judges sitting in drug courts and other problem-solving courts employing such processes report higher levels of litigant respect and gratitude resulting in significantly higher levels of judicial satisfaction than judges sitting in other assignments. See Peggy Hora & Deborah Chase, *Judicial Satisfaction When Judging in a Therapeutic Key*, 7 CONTEMP. ISSUES L. 1, 1 (2004); Roger K. Warren, *Public Trust and Procedural Justice*, 37 CT. R. 12, 16 (2000).

168. See, e.g., TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 7 (2002).

169. TOM R. TYLER ET AL., SOCIAL JUSTICE IN A DIVERSE SOCIETY 5 (1997).

maker, i.e., whether they feel that the decision maker is truly concerned about them and trying to do what is right and fair. Many of Professor Tyler's studies find that the third criterion is the most important factor affecting procedural justice judgments.<sup>170</sup>

(2) People's subjective evaluations of procedural fairness are much more influential in affecting their overall satisfaction with the experience and acceptance of the decision than either the fairness or favorability of the outcome, especially when the outcome is unfavorable.<sup>171</sup>

(3) People's sense of satisfaction and acceptance of particular decisions result in attitudes of increased trust in, and acceptance of, the legitimacy of law and legal institutions generally, as well as increased cooperation with legal authorities, voluntary law-abiding behavior, and compliance with the law.<sup>172</sup>

Commenting on this body of research and the "new theory of crime prevention called 'procedural justice,'" Larry Sherman, one of America's leading criminologists, writes:

The more offenders feel that they have been treated fairly, the more likely they will be to obey the law in the future—even if they believe the actual punishment is unjust. Growing evidence in the U.S. and Australia shows that offenders are less likely to re-offend when they feel that the last time they were caught, the legal system [treated them fairly].<sup>173</sup>

Procedural justice researchers also discuss the importance of the judge's personal interactions with litigants in the courtroom:

Many police officers and judges believe that their role requires them to dominate people and places, but that attitude can lead them to neglect the feelings of the people with whom they are interacting. Training can emphasize that treating people with dignity has an important impact on their willingness to defer to authorities.<sup>174</sup>

Researchers also suggest that judges create opportunities for litigants to participate more actively in the dispute-resolution process.<sup>175</sup>

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170. *Id.* at 121–22; TYLER & HUO, *supra* note 168, at 39–42.

171. TYLER & HUO, *supra* note 168, at 88.

172. *Id.* at 7; TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 75 (2006).

173. Lawrence W. Sherman & Geoffrey C. Barnes, *Restorative Justice and Offenders' Respect for the Law* (Aust. Nat'l Univ., Canberra, RISE Working Paper No. 3, 1997), available at <http://www.aic.gov.au/rjustice/rise/working/risepap3.html>.

174. TYLER & HUO, *supra* note 168, at 163.

175. E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 219 (2003).

“Through their own actions,” Tyler and Huo write, “judges can shape people’s behavior by tapping into their intrinsic motivations.”<sup>176</sup>

Tyler and Huo contrast this procedural-justice-based model of social and legal regulation with traditional deterrence strategies that seek to achieve compliance with the law through costly and inefficient surveillance strategies and uncertain threats of apprehension and punishment often met with resistance and hostility.<sup>177</sup> Mirroring social-learning theory, they point out that the advantage of the procedural-justice-based model is that it allows authorities to obtain cooperation and compliance voluntarily, through self-regulation. Intrinsic motivation shaped by feelings of procedural fairness induces people to follow the law not out of fear of being caught and punished but because “[it] is something that they should take personal responsibility for doing because they feel it is the correct behavior in a given situation.”<sup>178</sup>

### G. Program Monitoring and Accountability

Researchers on evidence-based practice distinguish between “efficacy” and “effectiveness.”<sup>179</sup> Efficacy refers to the success of an intervention in reducing recidivism under experimental or controlled conditions. Effectiveness refers to the success of the intervention in reducing recidivism under real-world, or field, conditions. There is general consensus that the effectiveness of programs in the field varies considerably and invariably falls short of program efficacy under controlled conditions.<sup>180</sup> The variability and fall off is attributable to the difficulty of replicating programs in the field with perfect “fidelity” to the laboratory-tested design. Some of the factors that contribute to the discrepancy include the difficulty in recruiting and retaining qualified program staff; high staff turnover; inadequate staff training; large caseloads; inadequate resources; imposition of unnecessary and extraneous conditions of supervision; and lack of performance measures

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176. TYLER & HUO, *supra* note 168, at 26.

177. *Id.* at 204–05.

178. *Id.* at 27.

179. Douglas B. Marlowe et al., Drug Court Efficacy vs. Effectiveness, Presentation to the Center on Evidence-Based Interventions for Crime and Addiction 2 (Dec. 6, 2006).

180. D.A. Andrews & Craig Dowden, *The Risk-Need-Responsivity Model of Assessment and Human Service in Prevention and Corrections: Crime-Prevention Jurisprudence*, 1 CANADIAN J. CRIMINOLOGY & CRIM. JUST. 439, 439–64 (2007). The recidivism-reduction effects cited in this article are based on systematic reviews of studies of program effectiveness in the field, not studies of program efficacy under controlled conditions. *Id.*

and accountability.<sup>181</sup> It is critical that judicial systems avoid such factors to ensure that treatment programs are implemented and operated effectively and produce significant recidivism reductions.<sup>182</sup>

The Correctional Program Assessment Inventory (“CPAI”) is a preeminent evaluation tool for that purpose and commentators associate it with significant reductions in participant recidivism.<sup>183</sup> Monitoring of program performance and accountability is not a direct responsibility of judges, but judges must ensure that probation or corrections staff are properly monitoring the performance of program managers.

It is also the responsibility of treatment program managers to put in place and monitor measures of offender recidivism. Because there is a significant lag time between an offender’s entry into the treatment program and the reporting and collection of data from longitudinal measures of offender recidivism, it is also important that courts establish and monitor interim measures of offender performance. Such measures ensure accurate management of case information; feedback to offenders on their progress, both positive and negative, is documented; and that offender progress, behavior changes, and attrition are properly reported. Judges can establish procedures for the regular reporting to the court of aggregate data on offender outcomes by all community-based treatment and corrections programs. If desirable, judges can also set selected cases on court calendars for individual judicial review, or establish procedures for regularly reporting to the court on the progress, attrition, or recidivism of certain types of offenders.

## H. Integrating Treatment and Community-Based Sanctions

The research unequivocally demonstrates that in the absence of treatment, neither punishment, nor incarceration, nor any other criminal sanction reduces recidivism—beyond the period of confinement, restraint, or surveillance. In fact, punishment and sanctions increase the likelihood of recidivism slightly, even when controlling for

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181. Marlowe et al., *supra* note 179, at 3.

182. Edward J. Latessa & Alexander Holsinger, *The Importance of Evaluating Correctional Programs: Assessing Outcome and Quality*, 2 CORRECTIONS MGMT. Q. 2, 22–29 (1998).

183. CHRISTOPHER T. LOWENKAMP & EDWARD J. LATESSA, INVESTIGATING THE RELATIONSHIP BETWEEN PROGRAM INTEGRITY AND CORRECTIONAL PROGRAM EFFECTIVENESS 7, available at [http://ohiojudges.org/\\_cms/tools/act\\_Download.cfm?FileID=293&/Com%20Cor%20Program%20Integrity.pdf](http://ohiojudges.org/_cms/tools/act_Download.cfm?FileID=293&/Com%20Cor%20Program%20Integrity.pdf); see also Jennifer A. Peeler & Edward J. Latessa, *Applying the Principles of Effective Intervention to Juvenile Correctional Programs*, CORRS. TODAY, Dec. 2004, at 26–29, available at [http://www.uc.edu/CCJR/Articles/Applying\\_PEI\\_JCP.pdf](http://www.uc.edu/CCJR/Articles/Applying_PEI_JCP.pdf).

respective offender risk levels.<sup>184</sup> Persons who serve longer prison sentences are also slightly more likely to recidivate than offenders serving shorter sentences, again comparing offenders of equivalent risk level.<sup>185</sup> Nor does adding a jail sentence to a sentence of probation reduce recidivism.<sup>186</sup>

Nevertheless, punishment, incarceration, and other sanctions proportionate in severity to the gravity of the offense certainly remain legitimate sentencing tools when necessary for the purpose of achieving other sentencing objectives, such as “just deserts,” general deterrence, or incapacitation. In cases involving the most violent and serious crimes, or involving some extremely high risk offenders, the objectives of punishment, deterrence, or incapacitation may override the objective of recidivism reduction and call for imprisonment or strict external controls on the offender in the community.

Even in cases involving nonviolent or less serious crimes, punishment may still be appropriate on a just-deserts basis. Less frequently, incarceration may also control offender risk in the short term. In many such cases, however, appropriate punishment and offender control need not and should not take the form of long-term incarceration but can and should take the form of some “intermediate sanction” less severe than incarceration but more severe than standard probation. It is common that sentences to reduce the future risk of recidivism also include imposition of appropriate intermediate sanctions—sanctions not involving long-term incarceration but that appropriately punish the offender and control short-term risks. Community-corrections programs based on EBP are not an “alternative” to appropriate punishment; they can and often are combined with appropriate punishment.

If appropriate intermediate sanctions programs are unavailable in a jurisdiction, judges will have little choice in many cases but to ignore recidivism-reduction strategies and resort to imprisonment or long-term incarceration. Effective use of community-based corrections

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184. D.A. Andrews et al., *Does Correctional Treatment Work? A Clinically Relevant and Psychologically Informed Meta-Analysis*, 28 *CRIMINOLOGY* 369, 396 (1990); PAULA SMITH ET AL., CTR. FOR CRIMINAL JUSTICE STUDIES, *THE EFFECTS OF PRISON SENTENCES AND INTERMEDIATE SANCTIONS ON RECIDIVISM: GENERAL EFFECTS AND INDIVIDUAL DIFFERENCES* 10–11 (2002), available at <http://dsp-psd.pwgsc.gc.ca/Collection/JS42-103-2002E.doc>; DON M. GOTTFREDSON, NAT'L INST. OF JUSTICE, *EFFECTS OF JUDGES' SENTENCING DECISIONS ON CRIMINAL CASES* 1–2 (1999); OR. DEP'T OF CORR., *THE EFFECTIVENESS OF COMMUNITY BASED SANCTIONS IN REDUCING RECIDIVISM* 6–7 (2002).

185. SMITH ET AL., *supra* note 184, at 10.

186. GOTTFREDSON, *supra* note 184, at 7–8.

programs designed to address the criminogenic needs of felony offenders, therefore, typically requires the availability of appropriate intermediate sanctions programs or other offender control mechanisms. The design and nature of such intermediate sanctions programs and control mechanisms must correlate to the seriousness of the offenses and to the committed offender risk levels. In the absence of pressure from judges and local probation or corrections officials, local jurisdictions are not likely to create and maintain appropriate intermediate sanctions programs.

To achieve the multiple sentencing objectives applicable in such instances—recidivism reduction, punishment, and offender restraint—courts must integrate treatment programs with other sentencing requirements. This includes any period of incarceration, custody in a day-reporting or work-release facility, or electronic monitoring. The probation agency, the program provider, and corrections staff must cooperate to properly integrate treatment programs and intermediate sanctions.

### **III. Local Criminal Justice Collaboration and Policy Reforms**

#### **A. Local Criminal Justice Collaboration**

Judicial implementation of evidence-based sentencing practices that are effective in reducing the risk of recidivism will be severely constrained by the presence or absence of other conditions that may significantly impede the judiciary's efforts. Unless avoided or addressed, these constraints will constitute significant barriers to the implementation of effective recidivism-reduction strategies. Although none of these constraints is under the control of the judiciary, all of them are subject, to varying degrees, to judicial influence. Effective pursuit of risk-reduction sentencing strategies requires cooperation, coordination, and collaboration between the court and other local criminal justice agencies, especially prosecution, probation, and program providers.

The use of actuarial risk-needs assessment tools is essential and the court must have the resulting assessment information available at the time of sentencing. As previously noted, however, probation and community corrections programs do not widely use such tools. Even where such tools are used, risk-needs assessment information is rarely presented to the court at the time of sentencing and PSI reports are not frequently prepared.

Another common constraint that will probably confront the courts in many jurisdictions is the extent to which, as a practical matter, felony dispositions are effectively prescribed by prosecutorial charging, plea-bargaining, or probation revocation policies. Such policies rarely, if ever, consider the research on risk reduction, or EBP principles to reduce recidivism. Interested in expanding evidence-based sentencing practices, state courts may confront early challenges to secure prosecutorial cooperation. Typically judges are not bound by plea agreements, and in appropriate cases a judge might require counsel to explain how a proposed plea agreement conforms with EBP principles, or to explain why the court should accept the compromise if it does not.<sup>187</sup>

Many other potential constraints for the use of EBP principles exist. Probation departments are often responsible for conducting offender assessments, preparing pre-sentence investigations and reports, operating or overseeing operation of intermediate sanctions and community-corrections programs, monitoring offenders and enforcing conditions of probation, and maintaining records of program performance and offender compliance. Treatment service providers are responsible for operating treatment programs in accord with design objectives, maintaining accurate records of program and offender performance and compliance, and regularly and accurately reporting on performance and compliance. Failure of probation authorities or treatment providers to fully discharge these responsibilities will undermine the effectiveness of any court efforts to reduce recidivism. The courts should be able to look to probation departments and program providers for expertise on the principles of EBP, but the sad fact is that most community-corrections agencies and treatment providers have had neither the incentive nor the resources to reengineer their operations and programs in accord with EBP

Without proactive judicial leadership in securing the cooperation and collaboration of other local criminal justice system partners in addressing those potential constraints, effective judicial implementation of EBP cannot realistically occur. Of course, the challenge of local interagency collaboration in the criminal justice system is neither

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187. A sentencing policy resolution adopted at the 1997 Oregon Judicial Conference provides that "in the course of considering the public safety component of criminal sentencing, . . . judges should consider and invite advocates to address the likely impact of the choices available to the judge in reducing future criminal conduct." How to Argue Sentencing to Judge Marcus, <http://www.smartsentencing.info/MHMsentguideonly.pdf>, at 2 (last visited Apr. 12, 2009).

new nor unique to the field of EBP. Over the last fifteen years, state courts have often led collaborative interagency criminal-justice-policy teams in efforts to address issues of criminal justice planning, substance abuse, overcrowding of jails and juvenile detention facilities, intermediate sanctions, security and emergency preparedness, domestic violence, foster-care reform, and delinquency prevention.<sup>188</sup> The state courts will again be called upon to lead such collaborative efforts if evidence-based sentencing practices are to become a reality.

## **B. Local Policy Reforms**

In addition to securing the cooperation of other local criminal justice partners, courts can pursue, through local criminal-justice-policy teams in support of recidivism-reduction strategies, at least four local policy initiatives.

### **1. Developing Community-Based Corrections Programs That Address the Criminogenic Needs of Felony Offenders**

Courts can effectively advocate for the creation of corrections programs that address the criminogenic needs of appropriate offenders. Judges have often provided critical leadership needed to advocate for sentencing reforms through the creation and operation of drug courts, mental-health courts, domestic-violence courts, and other problem-solving courts. In 2004, the Conference of Chief Justices and Conference of State Court Administrators adopted a joint resolution requesting each state to implement a plan to expand the use of the principles and methods of problem-solving courts into their main-stream courts.<sup>189</sup>

Often, the state must first conduct a comprehensive review of existing rehabilitation and treatment programs, including the types of offenders, offender risk levels, and offender criminogenic needs for which they were designed; how the treatment programs are used; how many offenders currently participate in them; what, if any, performance measures and performance evaluations currently exist; and the

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188. PEGGY MCGARRY & BECKI NEY, U.S. DEP'T OF JUSTICE, GETTING IT RIGHT: COLLABORATIVE PROBLEM SOLVING FOR CRIMINAL JUSTICE 152 (2006), available at <http://www.nicic.org/Downloads/PDF/Library/019834.pdf>.

189. Conference of Chief Justices, Conference of State Court Administrators, Resolution 22 In Support of Problem-Solving Court Principles and Methods 2, <http://cosca.ncsc.dni.us/Resolutions/CourtAdmin/Problem-SolvingCourtPrinciplesMethods.pdf> (July 29, 2004).

feasibility of modifications that might bring them into greater compliance with EBP principles.

## **2. Developing Appropriate Community-Based Intermediate Sanctions**

Once again, courts can effectively advocate for the development and operation of appropriate intermediate sanctions programs—appropriate to the risk levels of participating offenders and the nature of the committing offenses. As with rehabilitation and treatment programs, courts must initially conduct a comprehensive review of existing intermediate sanctions to determine the feasibility of modification to better implement EBP principles.

## **3. Providing Judges and Advocates with Access to Accurate and Relevant Sentencing Data and Information**

To pursue a risk-reduction strategy, trial judges must have access to reliable data and information, not only about the offense, but also about the offender, the available treatment and intermediate sanctions programs, and potential sentencing dispositions. General program information should include information about the design capability of the program, including the types of offenders, levels of risk, and criminogenic needs for which the program was designed, and performance data addressing the program's level of success in reducing recidivism for various categories of offenders.

If full pre-sentence reports are not prepared in individual cases, sufficient data should be provided to at least allow the judge to meaningfully determine (1) whether the offender is a suitable candidate for treatment, intermediate sanctions, or both; (2) the appropriate intermediate sanctions and corrections programs to employ; (3) the form, duration, and appropriate conditions of probation to be imposed; and (4) the appropriate sanctions, programs, and probation conditions, if any, for a violation of probation.<sup>190</sup>

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190. Oregon legislation that went into effect in January of 2006 required that Oregon pre-sentence reports "provide an analysis of what disposition is most likely to reduce the offender's criminal conduct," and "provide an assessment of the availability to the offender of any relevant programs or treatment in or out of custody, whether provided by the department or another entity." OR. REV. STAT. § 144.791 (2007).

#### **4. Incorporating a Curriculum on EBP into Professional Education and Training Programs for Judges, Probation Officers, Prosecutors, and the Defense Bar**

The other policy initiatives recommended here will not successfully enhance public safety without effective judicial and other professional EBP education curricula. Unless sentencing judges, probation officers, prosecutors, and defense attorneys are knowledgeable about the EBP research and skilled at applying its principles to day-to-day sentencing decisions, they cannot properly implement risk-reduction strategies. The education curriculum should include presentation and discussion of EBP research, as well as an opportunity to apply the EBP principles in designing appropriate sentencing dispositions in hypothetical sentencing scenarios. The curriculum should also emphasize the important role of the principals, especially the judge, in the offender-behavioral-change process and in effective cooperation and collaboration among criminal justice agencies. Finally, the curriculum should encourage advocacy of the other local and state recidivism-reduction policy initiatives outlined here.

Sentencing experts, with assistance of professional educators, should develop the core curriculum nationally and allow for its use in specific jurisdictions, and incorporated into existing state and local professional education programming.

### **IV. State Sentencing and Corrections Policy**

In many states, existing state policies on sentencing, corrections, and criminal justice information may limit the courts' ability to promote public safety through sentences proven to reduce offender recidivism. Four state-level policy initiatives that courts and local criminal justice policy teams can undertake to address these constraints follow below.

#### **A. Including Risk Reduction as an Explicit Objective of State Sentencing Policy**

Because repeat offenders commit most crimes,<sup>191</sup> and due to increasing knowledge about how to reduce recidivism among repeat offenders, recidivism reduction should be a principal goal of effective sentencing policy. Most states, however, do not explicitly recognize

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191. TAXMAN ET AL., TOOLS OF THE TRADE, *supra* note 79, at 3.

recidivism reduction as a key objective of state sentencing policies.<sup>192</sup> Indeed, it is the failure of mainstream sentencing policies to address drug addiction, mental illness, domestic violence, homelessness, and low-level “quality-of-life” crime that has motivated many state judges, prosecutors, corrections officials, and others over the last fifteen years to establish specialized courts across the United States.<sup>193</sup> One of the principal objectives of the widespread efforts to institute these new “courts” has been to address this deficiency of state sentencing policy and to reduce recidivism among these categories of offenders.<sup>194</sup> Indeed, the principal criterion by which the success of these problem solving courts has usually been evaluated is reduction of offender recidivism.

Courts can encourage appropriate legislative and executive branch policy makers, and sentencing commissions, to include risk reduction as an explicit objective of state sentencing policy. In addition, when not inconsistent with state law, courts can include risk reduction as a sentencing objective in state judicial-branch policy. In Oregon, for example, a 1997 Judicial Conference Resolution requires sentencing judges to consider the likely impact of potential sentences on reducing future criminal conduct.<sup>195</sup>

## **B. Ensuring State Sentencing Policy Provides Sufficient Flexibility for Sentencing Judges to Implement Risk-Reduction Strategies**

State sentencing statutes, rules, and guidelines should provide sufficient flexibility for sentencing judges to impose sentences consistent with EBP, and not foreclose or limit such sentencing by overly strict, arbitrary, or unjustified sentencing mandates. Principal examples of existing mandates that sometimes interfere with sentencing outcomes that promote risk reduction are provisions requiring lengthy terms of imprisonment or incarceration, prohibiting the granting of probation, or setting mandatory minimum terms of im-

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192. REITZ, *supra* note 15, at 42–43 (observing that sentencing systems designed to achieve offender risk-reduction “have been tried so far only on a limited basis in one or two states”).

193. See Conference of Chief Justices, *supra* note 189; PAMELA M. CASEY & DAVID B. ROTTMAN, NAT’L CTR. FOR STATE COURTS, *Problem-Solving Courts: Models and Trends 1* (2003) (noting in the “Overview” that problem-solving courts were developed in response to frustration by both the court system and the public in the large numbers of cases “that seemed to be disposed repeatedly but not resolved”).

194. *Id.*

195. Marcus, *supra* note 129, at 24.

prisonment or incarceration where neither the seriousness of the particular offense nor the risks presented by a particular offender warrant such sentences.<sup>196</sup>

As noted above, research indicates that courts cannot accurately assess the risk of re-offense by relying exclusively on the type of offense committed or prior criminal history. When the offender is eligible for probation, state sentencing policies should encourage the use of accurate risk assessment instruments.

### C. Modification of State Corrections Policies to Provide for the Development of Evidence-Based Corrections and Intermediate Sanctions Programs

In many communities, the most formidable barrier to the application of EBP principles in sentencing is the absence of state support for the development and operation of evidence-based rehabilitation and treatment programs to reduce recidivism and appropriate intermediate sanctions. Policy makers in two western states, however, provide substantial financial and other support for the development of evidence-based practices to reduce recidivism. In 2003, Oregon adopted a statute requiring that in 2005–2007 the Oregon Department of Corrections spend at least 25% of its state “program funding” on “evidence-based programs.”<sup>197</sup> The statute requires the department to spend 50% of its program funding on evidence-based programs in 2007–2009, and 75% commencing in 2009.<sup>198</sup> The statute defines an “evidence-based program” as a program that “incorporates significant and relevant practices based on scientifically based research [that] . . . is cost effective [and] is intended to . . . reduce the propensity of a person to commit crimes. . . .”<sup>199</sup>

The Washington legislature indicated its intention to remove barriers to the use of evidence-based practices in the treatment of mental illness, chemical dependency disorders, or both.<sup>200</sup> The Institute found that evidence-based treatment of these disorders could achieve about \$3.77 million in benefits per dollar of treatment costs, and that

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196. JUSTICE KENNEDY COMM'N, *supra* note 16, at 26–27 (advocating the repeal of provisions that set mandatory minimum terms because they prevent sentencing courts from considering the unique characteristics of offenders).

197. 2003 Or. Laws 2624.

198. *Id.* at 2625.

199. *Id.* at 2624.

200. 2005 Wash. Sess. Laws 2340.

the state would generate \$1.5 billion in net benefits for the citizens of Washington if the changes went forward.<sup>201</sup>

Additionally, the Washington legislature directed the Institute to study the net short-run and long-run fiscal savings to state and local governments of implementing evidence-based treatment and corrections programs “including prevention and intervention programs, sentencing alternatives, and the use of risk factors in sentencing.”<sup>202</sup> As noted earlier, the Institute also concluded that if Washington successfully implemented a moderate-to-aggressive portfolio of those and other in-custody and juvenile evidence-based options, a significant level of future prison construction could be avoided, saving taxpayers about \$2 billion and reducing existing crime rates by 8%.<sup>203</sup>

State judges can bring these developments to the attention of their own state-level policy makers and advocate for similar financial and legislative support for evidence-based programming in their own states.

#### **D. Creating Offender-Based Data and Sentencing Support Systems That Facilitate Data-Driven Sentencing Decisions**

Formal risk-assessment instruments are the best way, but may not be the only way, to assess offender risk. Despite the fact that the state courts sentence over a million felony offenders annually, few state or local governments routinely collect and maintain data on the impact of the various sentences imposed on offender recidivism.<sup>204</sup> Such data may provide an actuarially sound assessment of the likelihood that a similar offender will re-offend under various sentencing scenarios. Offender-based sentencing support systems can be created at the state or local level to maintain and compile records on the criminal histories, offender characteristics, and program outcomes of various offenders.

Again, the state of Oregon has taken the lead. In 1997, the Oregon legislature directed that reduction of criminal behavior become a

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201. STEVE AOS ET AL., WASH. STATE INST. FOR PUB. POLICY, EVIDENCE-BASED TREATMENT OF ALCOHOL, DRUG, AND MENTAL HEALTH DISORDERS: POTENTIAL BENEFITS, COSTS, AND FISCAL IMPACTS FOR WASHINGTON STATE 1–2 (2006).

202. 2005 Wash. Sess. Laws 2194.

203. AOS ET AL., *supra* note 63, at 1–2.

204. See Marc L. Miller & Ronald F. Wright, *The Wisdom We Have Lost: Sentencing Information and Its Uses*, 58 STAN. L. REV. 361, 370–71 (2005). Such systems are often referred to as “sentencing information systems.” *Id.* at 371. There is considerable experience with the development and use of such systems in Scotland, New South Wales, Canada, and Australia. *Id.* The very limited development of such systems in the United States has been decried by several prominent sentencing experts. *Id.* at 371–72.

dominant performance measure of the criminal justice system and required criminal justice agencies to collect, maintain, and share data to facilitate the display of correlations between dispositions and future criminal conduct.<sup>205</sup> In 2001, the first recommendation of the Oregon Criminal Justice Commission's "Public Safety Plan" was for the development of an offender-based data system to track each individual through the criminal justice system and facilitate data-driven pretrial release, sentencing, and correctional supervision decisions.<sup>206</sup> In the meantime, Oregon's Multnomah County courts constructed electronic sentencing support tools that allow judges and advocates to view the recidivism outcomes of offenders sentenced for similar crimes.<sup>207</sup>

## Conclusion

Dealing with the problem of crime is primarily a state and local responsibility. Thirty years ago, most states enacted sentencing and corrections policies to control crime by locking up more offenders for longer periods of time. To some extent the policies worked. The violent crime rate finally peaked in the early 1990s and then steadily declined back to the approximate level it had been in the mid-1970s.<sup>208</sup> The most sophisticated research credits the expanded use of imprisonment and incarceration with about 25% of the crime-reduction effect over the last fifteen years.<sup>209</sup> But the relationship between incarceration and crime is complex. Some states have achieved substantial crime reductions without greater use of incarceration. The incarceration rate in California, for example, increased about 40% from 2000–2007, and California violent crime rates decreased 40–50% since 1990.<sup>210</sup> In New York, on the other hand, the incarceration rate *decreased* about 10% over the same period and crime rates decreased 60%, even more than in California.<sup>211</sup>

Moreover, as the number of incarcerated prisoners continues to grow, the benefits of incarceration as a crime-control strategy increasingly diminish—or disappear altogether. The benefits of incarcera-

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205. 1997 Or. Laws 927.

206. Marcus, *supra* note 129, at 24–25.

207. *Id.*

208. REPORTED CRIME TOTALS, *supra* note 17.

209. REITZ, *supra* note 15, at 33.

210. REPORTED CRIME TOTALS, *supra* note 17; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISON INMATES AT MIDYEAR 2008, at 3 tbl.2 (1996).

211. REPORTED CRIME TOTALS, *supra* note 17; BUREAU OF JUSTICE STATISTICS, *supra* note 210, at 3 tbl.2.

tion in reducing crime are also offset by the greater likelihood that incarcerated offenders will commit further crimes upon release. Targeted use of evidence-based imprisonment alternatives offers a more cost-effective strategy to reduce crime rates.

Our reliance on incarceration as a crime-control strategy over the past thirty years has also produced higher incarceration rates in the United States, the most prosperous nation in the world, than in any other country, and extreme racial and ethnic disparities in sentencing outcomes. Our prisons and jails are overcrowded, while state corrections budgets grow faster than any other item in state budgets and eat up resources that might otherwise be invested in prevention and rehabilitation services, education, or health services.

Our current over-reliance on incarceration resulted in the vicious cycle of historically high rates of offender recidivism that in turn fuel even higher rates of incarceration. Yet today, unlike thirty years ago, we know—based upon meticulous meta-analysis of rigorously conducted scientific research—that carefully targeted rehabilitation and treatment programs can reduce offender recidivism by conservative estimates of 10–20%.<sup>212</sup> We also know much more than we did thirty years ago about how to motivate and assist offenders to voluntarily change their criminal behavior. Today, there are more-effective ways to control crime that do not incur the costly, harmful, and unfair consequences of current policies.<sup>213</sup>

Our sentencing and corrections policies have lurched from the “rehabilitation ideal,” which predominated through the early 1970s, to the retribution-minded “just-deserts” model, which has predominated over the last thirty years. We have essentially gone from the extreme of trying to rehabilitate everyone to the extreme of trying to rehabilitate no one. What we need today are policies much more

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212. AOS ET AL., *supra* note 63. Although well-implemented treatment programs can, on average, achieve reductions in participant recidivism rates of 10–20%, researchers today suggest that even with well-implemented programs it may not be realistic to expect to achieve more than a 10% overall reduction across an entire population of offenders on probation or parole. *Id.* To some, a 10% reduction in recidivism may not seem significant, but based on their calculations, researchers at the Washington State Institute for Public Policy confirm that “it is important to note that even relatively small reductions in recidivism rates can be quite cost-beneficial.” *Id.* at 4. “For example, a 5 percent reduction in the reconviction rates of high risk offenders can generate significant benefits for taxpayers and crime victims.” *Id.*

213. Reviewing contemporary American corrections practices in light of the research findings over the past two decades, three eminent corrections researchers concluded “that what is done [today] in corrections would be grounds for malpractice in medicine.” Latessa et al., *supra* note 78, at 47.

finely crafted than those of today or yesteryear, policies that do not focus exclusively on the nature of the offense committed, but also on the risks and needs of individual offenders. In our desire to avoid disparities and achieve uniformity in sentencing, to ensure similar outcomes for offenders convicted of similar offenses, we have ended up undervaluing individual differences of circumstance, attitude, risk, and need. We over-incarcerate some offenders, and under-incarcerate many others.

Today, we need smarter and more individualized sentencing and corrections policies that allow judges, prosecutors, corrections officers, and other practitioners to target more carefully those individual offenders who should be imprisoned and those who are the most appropriate candidates for effective treatment, intermediate sanctions, or community-corrections programs. We need evidence-based policies that target dynamic risk factors and then address those risk factors in the most effective way possible. EBP Principles provide a sound scientific foundation for such policies.