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EVIDENCE-BASED PRACTICE TO REDUCE RECIDIVISM:

Implications for State Judiciaries

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National Center for State Courts

for the Crime and Justice Institute and
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This paper was developed as part of a set of papers focused on the role of system stakeholders in reducing offender recidivism through the use of evidence-based practices in corrections.

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CRIME & JUSTICE INSTITUTE

The Crime and Justice Institute (CJI) and the National Institute of Corrections (NIC) are proud to present a series of seven whitepapers known as the Box Set. The papers are designed to share information with criminal justice system stakeholders about how the implementation of evidence-based practices (EBP) and a focus on recidivism reduction affect their areas of expertise in pretrial services, judiciary, prosecution, defense, jail, prison, and treatment. This initiative stems from a cooperative agreement established in 2002 between CJI and NIC entitled *Implementing Effective Correctional Management of Offenders in the Community*. The goal of this project is reduced recidivism through systemic integration of EBP in adult community corrections. The project's integrated model of implementation focuses equally on EBP, organizational development, and collaboration. It was previously piloted in Maine and Illinois, and is currently being implemented in Maricopa County, Arizona and Orange County, California. More information about the project, as well as the Box Set papers, are available on the web sites of CJI (www.cjinstitute.org) and NIC (www.nicic.org).

CJI is a nonpartisan nonprofit agency that aims to make criminal justice systems more efficient and cost effective to promote accountability for achieving better outcomes. Located in Boston, Massachusetts, CJI provides consulting, research, and policy analysis services to improve public safety throughout the country. In particular, CJI is a national leader in developing results-oriented strategies and in empowering agencies and communities to implement successful systemic change.

The completion of the Box Set papers is due to the contribution of several individuals. It was the original vision of NIC Correctional Program Specialist Dot Faust and myself to create a set of papers for each of the seven criminal justice stakeholders most affected by the implementation of EBP that got the ball rolling. The hard work and dedication of each of the authors to reach this goal deserves great appreciation and recognition. In addition, a special acknowledgment is extended to the formal reviewers, all of whom contributed a great amount of time and energy to ensure the success of this product. I would also like to express my appreciation to NIC for funding this project and to George Keiser, Director of the Community Corrections Division of NIC, for his support. It is our sincere belief and hope that the Box Set will be an important tool for agencies making a transition to EBP for many years to come.

Sincerely,

Elyse Clawson
Executive Director, CJI

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FOREWORD

In 2002 the Crime and Justice Institute (CJI) entered into a cooperative agreement with the National Institute of Corrections (NIC) to implement an initiative entitled *Implementing Effective Correctional Management of Offenders in the Community: An Integrated Model*. The Initiative's implementation model is based on the premise that implementation of evidence-based practices must be integrated with the development of organizational capacity, collaboration, political engagement strategies, and evaluation research. In 2004, NIC and CJI began work to enhance the collaborative component of the model by developing a series of white papers designed to share information with criminal justice system stakeholders about how the implementation of evidence-based practices and a focus on recidivism reduction affects various criminal justice components. The complete set of papers will address the following topics: pretrial services, judiciary, prosecution, defense, jail, prison, and treatment. In the fall of 2006 CJI partnered with Judge Roger K Warren, President Emeritus of the National Center for State Courts (NCSC) to produce this white paper on evidence-based practices for state judiciaries.

Criminal sentencing is one of the most important, and time-consuming, judicial responsibilities. A NCSC survey of state chief justices conducted in early 2006 found that the top concerns of state trial judges hearing felony cases included the high rates of recidivism among felony offenders, the ineffectiveness of traditional probation supervision and other criminal sanctions in reducing recidivism, restrictions on judicial discretion that limited the ability of judges to sentence more fairly and effectively, and the absence of effective community corrections programs. The survey also found that the state chief justices believed that the most important sentencing reform objective facing the state courts was to improve public safety and reduce recidivism through expanded use of evidence-based practices and programs, including offender risk and needs assessment tools.

In this white paper the author discusses the implications of principles of evidence-based practice to reduce recidivism for state judiciaries. The paper discusses how diligent application of those principles to state sentencing practices, processes, and policies can restore much-needed balance to our current sentencing systems—sentencing systems that have swung from one extreme to the other over the last 30 years, in neither case proving very effective in addressing the problem of crime. The paper also suggests that the courts have a key leadership role to play in implementing evidence-based practices, and that evidence-based practice promises to revitalize judges' interest in sentencing just as it has rejuvenated the corrections profession.

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EXECUTIVE SUMMARY

National crime rates skyrocketed during the 1970s, and efforts to control crime through well-intentioned offender-treatment programs appeared to be patently ineffective. As a result, new state sentencing policies were enacted—policies which eschewed any effort to get offenders to accept responsibility for their own behaviors and sought to control crime by locking up many more offenders for longer periods of time. Those policies, still in effect in most states today, have resulted in overcrowded prisons, the highest incarceration rates in the world, skyrocketing corrections costs, and extreme racial and ethnic disparities. Although initially effective in locking up serious and dangerous offenders, overreliance on incarceration is today of limited and diminishing effectiveness as a crime-control strategy. Offender recidivism rates have increased. Three quarters of state prison commitments are for nonviolent offenses, resulting in overcrowded prisons and shorter prison terms for more dangerous offenders. We over-incarcerate some offenders, and under-incarcerate others.

Most important, unlike 30 years ago, there is today an enormous body of sophisticated research proving that unlike incarceration, which actually increases offender recidivism, properly designed and operated recidivism-reduction programs can significantly reduce offender recidivism. Such programs are more effective, and more cost-effective, than incarceration in reducing crime rates.

In this article we review this body of research about "what works" and the principles of Evidence-Based Practice (EBP) to reduce recidivism, which are based on that research. These principles identify the key characteristics of successful recidivism-reduction programs. The first three principles answer the questions of "who" to target for such programs, "what" to target, and "how" to target:

1. The Risk Principle (who)—moderate- to high-risk offenders
2. The Need Principle (what)—identification and treatment of the offender's "criminogenic" needs, i.e., those needs associated with the likelihood of recidivism
3. The Treatment and Responsivity Principles (how)—effective interventions, which are cognitive-behavioral; emphasize positive reinforcements and certain and immediate negative consequences; are appropriate to the offender's gender, culture, learning style, and stage-of-change readiness; are based on a chronic-care model requiring continuity, aftercare, and support; and require continuous

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monitoring and evaluation of both program operations and offender outcomes

A fourth principle of EBP recognizes the importance of using an actuarial risk/needs-assessment tool to determine the offender's level of risk and criminogenic needs. The fifth and sixth principles take up offender motivation and integration of treatment and sanctions as important conditions for success:

4. Use of Risk/Needs Assessment Instrument—professional judgment must be combined with an actuarial tool that accurately assesses dynamic risk and criminogenic need factors
5. Motivation and Trust—intrinsic motivation and trust on the part of the offender play important roles affecting the likelihood of successful behavioral change
6. Integration of Treatment and Community-Based Sanctions—treatment must be successfully coordinated with any sanctions imposed

We review the application of these six principles of EBP to state sentencing policy and practice from the perspective of the state court judges who sentence 94% of our nation's felony offenders. In light of the great public concern in the states today about the effectiveness, cost, and fairness of current sentencing policies that rely too much on imprisonment to reduce crime, we focus on the sentencing of felony offenders, i.e., those offenders subject to imprisonment for more than a year.

Among the conclusions reached by applying these principles of EBP to current state felony-sentencing practices are the following:

- Effective recidivism-reduction programs must target moderate- and high-risk offenders, i.e., those more likely to reoffend.
- Recidivism among low-risk offenders increases when they are included in programs with higher-risk offenders.
- Effective programs must also target "criminogenic needs," i.e., those values, attitudes, or behaviors of the offender that are most closely associated with the likelihood of committing crime.
- An accurate assessment of an offender's level of risk and criminogenic needs requires both sound professional judgment and an actuarial tool that includes assessment of static and dynamic risk and criminogenic need factors—dynamic factors being those that are subject to change.

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- An accurate assessment of an offender's level of risk and criminogenic needs is important in determining the offender's suitability for diversion or probation, the kind of treatment and behavioral controls to be provided, and appropriate conditions of probation to be imposed. Imposing additional conditions of probation beyond those directly related to the offender's risk level or needs only distracts and impedes the offender and probation officer and undermines the ability of both the court and the probation officer to hold the defendant accountable for compliance with essential conditions.
- An accurate assessment of the offender's level of risk and needs is also important in determining the nature of any sanction to be imposed upon violation of probation.
- Cognitive-behavioral programs rooted in social learning theory are the most effective in reducing recidivism.
- Boot camps and wilderness programs typically do not reduce recidivism, and "scared straight" and shock-type programs actually increase recidivism.
- With continued exposure to clear rules, consistently and immediately enforced with appropriate consequences, offenders will tend to behave in ways that result in the most rewards and the fewest punishments.
- Positive reinforcement is more effective than sanctions. Offenders respond better, and maintain newly learned behaviors longer, when approached with "carrots" rather than "sticks," rewards rather than punishments.
- Treatment programs must provide a continuity of care. 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.
- Treatment style and methods of communication must also be matched to the offender's personal characteristics and stage of change readiness.
- Judges must ensure that the jurisdiction's treatment programs comply with these requirements and that accurate measures of staff and program performance, and of offender outcomes, are put in place and monitored regularly.
- The sentencing process matters as much as the specifics of the sentencing decision.
- All communications with the offender in connection with sentencing, especially by the judge, should be conducted in a manner to achieve a mutual goal of the court and the offender—the offender's voluntary compliance with all conditions of probation.

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- The judge, like the probation officer, should act as a change agent to reinforce the importance of the offender's voluntary compliance, not merely to enforce compliance.
- Judges have the opportunity to maximize the positive effect and minimize any negative effect of court processes by the way they interact with people coming before them.
- Motivation to change on the part of the offender is a critical precondition for behavioral change.
- "Motivational interviewing" techniques should be adopted to enhance the offender's intrinsic motivation. Such techniques include using empathetic or reflective listening; respectfully pointing out inconsistencies between the offender's statements and the offender's actual behaviors; summarizing key points of the offender's communications; reinforcing and affirming positive behaviors; asking open-ended questions; eliciting self-motivating statements; supporting self-efficacy (knowing one can accomplish a feat because one has done it in the past); "rolling with" resistance to change; and modeling pro-social behavior.
- Such techniques seem unnatural to many judges because they are in some respects contrary to traditional judicial modes of communication in the courtroom, especially in dealing with criminal offenders at sentencing. Common judicial communication tendencies that serve as roadblocks to intrinsic motivation include ordering or directing, sympathizing, warning or threatening, arguing, lecturing or preaching, criticizing or blaming, and shaming.
- Actions are as critical as words in communicating and send offenders important signals about what is acceptable behavior in society.
- Under the stages-of-change model, the most effective behavior-change strategy depends on which of the six levels of change readiness the offender has reached.
- The more that offenders feel that they have been treated fairly, the more likely they will be to obey the law in the future.
- Community corrections programs based on EBP are not an "alternative" to appropriate punishment; they hold the offender accountable for his or her own behavior and are often perceived by the offender as punishment. They also can be combined with behavioral controls and other appropriate forms of punishment.
- To achieve multiple sentencing objectives (e.g. recidivism reduction, punishment, and offender restraint), effective treatment programs must be successfully integrated with other sentencing requirements.

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In many jurisdictions, effective application of such risk-reduction strategies is undoubtedly constrained by a number of conditions and barriers at both the local and state level that are outside the control of judges—but not outside their influence. Individual trial judges will be hard-pressed to consistently employ these and other risk reduction strategies, for example, without the cooperation of other critical criminal justice system agencies, especially prosecution, probation, and program providers. Prosecutorial-charging and plea-bargaining policies, for example, may limit the court's ability to employ evidence-based dispositions. The probation department may not properly support and monitor the offender's successful participation in the treatment program. The program provider may not operate the program with fidelity to principles of EBP, maintain relevant program performance data, diligently monitor an offender's participation, or properly report and act upon program failures and violations.

In addition to securing the cooperation of other criminal justice partners, there are at least eight local and state policy initiatives that judges may need to pursue either independently or through local or state criminal justice policy teams to gain policy support for local recidivism-reduction strategies:

1. develop local or state- community-based corrections programs that effectively address the criminogenic needs of felony offenders
2. develop community-based intermediate sanctions appropriate to the nature of committed offenses and offender risks
3. ensure judges and advocates have access to accurate and relevant sentencing information, for example, through presentence investigation reports
4. incorporate a curriculum on EBP into professional education and training programs for judges, probation officers, prosecutors, and the defense bar.
5. obtain the explicit inclusion of risk reduction as a key objective of state sentencing policy
6. ensure that state sentencing policy allows sufficient flexibility and discretion to sentencing judges to permit implementation of risk-reduction strategies
7. modify state corrections policies to provide for the development of evidence-based corrections and intermediate sanctions programs
8. create offender-based data and sentencing support systems that facilitate data-driven sentencing decisions

Policy makers and criminal justice practitioners need to get outside the box that defines punishment and rehabilitation as an either/or proposition.

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Sanctions alone will neither reduce recidivism nor result in positive behavioral change. On the other hand, treatment alone may not provide the punishment or behavioral controls that are appropriate or necessary. Every offender ought to be fairly punished and held fully accountable for his or her criminal behavior. At the same time, an effective sentence should also promote the rehabilitation of the offender to reduce the risk of future victimization and threats to public safety. State sentencing policies that expect to control crime solely by punishing the offender's past misbehavior, without any meaningful effort to positively influence the offender's future behavior, are shortsighted, ignore overwhelming evidence to the contrary, and needlessly endanger public safety. They also demand too little of most criminal offenders, often neither requiring—nor even encouraging—offenders to accept personal responsibility for their own future behaviors.

Today, we need smarter and more individualized sentencing and corrections policies that allow judges, prosecutors, corrections officers, and other practitioners to more carefully target those individual offenders who should be imprisoned and those who are the most appropriate candidates for effective treatment, intermediate sanctions, or community corrections programs.

Judges are natural advocates of the principles of EBP. More so than anyone, judges are committed to evidence-based dispute resolution. Over the last 15 years, judges have responded to the high rates of recidivism among drug-addicted offenders by assuming the leadership role in the development and oversight of effective drug courts, which have incorporated many evidence-based practices. The potential application of principles of EBP to sentencing proceedings in a much broader range of criminal cases challenges state judges to again assume their leadership role in helping to create sentencing policies, practices, and processes that improve public safety by effectively reducing recidivism among targeted offenders.

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I. INTRODUCTION

Current state sentencing policies have resulted in historically high rates of offender recidivism and the highest incarceration rates in the world. Over one million felony defendants are sentenced by state judges annually, accounting for 94% of all felony convictions in the United States.[1] Three quarters of state felony defendants have prior arrest records, and about one third were on probation, parole, or pretrial release at the time of their current arrest.[2] Over three quarters of those sentenced to prison are convicted of a nonviolent offense.[3]

The sentencing policies that have resulted in today's high rates of recidivism and incarceration, even among nonviolent offenders, were originally written in most states 30 years ago at a time when the violent crime rate had tripled in just 15 years. 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.[4]

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. More important, a large body of rigorous research conducted over the

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[1] Matthew R. Durose & Patrick A. Langan, Bureau of Justice Statistics, NCJ 208910, *State Court Sentencing of Convicted Felons, 2002*, Tbl.1.1 (2005) (In 2002, the last year for which the Bureau of Justice Statistics has published these statistics, the federal courts convicted 63,217 persons of a violent, property, drug, or other felony. State courts convicted an estimated 1,051,000).

[2] Thomas H. Cohen and Brian A. Reaves, Bureau of Justice Statistics, NCJ 210818, *Felony Defendants in Large Urban Counties*, 2002 (2006), Tbl. 7 & 8.

[3] Durose & Langan, *supra* n. 1, Tbl.1.2

[4] Robert Martinson, What Works?—Questions and Answers About Prison Reform, 35 *The Public Interest* 22 (1974). See also Douglas Lipton, Robert Martinson & Judith Wilks, *The Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies* (Praeger Publishers 1975). (In the latter volume the authors concluded: "with few and isolated exceptions, the rehabilitative efforts that have been reported so far have no appreciable effect on recidivism."); see also Francis T. Cullen & Melissa M. Moon, *Reaffirming Rehabilitation: Public Support for Correctional Treatment in What Works—Risk Reduction: Interventions for Special Needs Offenders* 7-25 (Harry Allened ed., American Correctional Association 2002). (It was pointed out many years later that of the 231 studies Martinson reviewed fewer than 80 were treatment programs where recidivism was measured and only three of the programs relied on behavioral-modification components, which more recent research shows to be the most effective in reducing recidivism.) See Robert Martinson, *New Findings, New Ways: A Note of Caution Regarding Sentencing Reform*, 7 Hofstra L. Rev. 243 (1979). (Martinson himself noted several years later that rehabilitation can work under the right circumstances.)

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last 20 years has proven that well-implemented rehabilitation and treatment programs carefully targeted with the assistance of validated risk/needs-assessment tools at the right offenders can reduce recidivism by 10% to 20%.

The research about "what works" is the product of diligent scientific investigation and analysis by researchers in the fields of criminology, psychology, mental health, substance abuse, criminal justice, and corrections. The research is particularly noteworthy because it has also proven that punishment, incarceration, and other sanctions do not reduce recidivism and, in fact, increase offender recidivism slightly. The principal significance of this body of research is threefold: first, we now know that treatment and rehabilitation can "work" to reduce recidivism; second, for appropriate offenders alternatives to imprisonment can be both less expensive and more effective in reducing crime; and, third, even where alternatives to incarceration do not decrease recidivism, they often do not increase it either, thereby providing a cost-effective alternative to imprisonment without compromising public safety.

The concept of "evidence-based practice" in corrections emerged to describe those corrections practices that have been proven by the most rigorous "what works" research to significantly reduce offender recidivism. Recently, researchers and corrections practitioners have distilled from the research on evidence-based programs and practice several basic principles of Evidence-Based Practice (EPB) to reduce recidivism. The principles identify the key components or characteristics of evidence-based programs and practice that are associated with recidivism reduction. Six principles of EBP are the most relevant to the work of state judges. The first three principles answer the questions of "who" to target, "what" to target, and "how" to target:

1. The Risk Principle (who)—moderate- to high-risk offenders
2. The Need Principle (what)—identification and treatment of the offender's "criminogenic" needs, i.e., those needs associated with the likelihood of recidivism
3. The Treatment and Responsivity Principles (how)—effective interventions, which are cognitive-behavioral; emphasize positive reinforcements and certain and immediate negative consequences; are appropriate to the offender's gender, culture, learning style, and stage of change; are based on a chronic-care model requiring continuity, aftercare, and support; and require continuous monitoring and evaluation of both program operations and offender outcomes

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A fourth principle recognizes the importance of using an actuarial assessment tool to determine the offender's level of risk and criminogenic needs. The fifth and sixth principles identify two other important conditions for success:

4. Use of Risk/Needs Assessment Instrument—professional judgment must be combined with an actuarial tool that assesses dynamic risk and criminogenic need factors
5. Motivation and Trust—intrinsic motivation and trust on the part of the offender play important roles affecting the likelihood of successful behavioral change
6. Integration of Treatment and Community-Based Sanctions—treatment must be successfully coordinated with any sanctions imposed

This article examines this body of research about "what works" and the principles of Evidence-Based Practice to reduce recidivism. In the next section we highlight the critical public importance of this research in light of the high incarceration rates, skyrocketing corrections costs, extreme racial and ethnic disparities, high recidivism rates, and limited and diminishing benefits that have resulted from our current sentencing policies, and public opinion supporting the need for reform. In section III we describe how state court judges first experimented with innovative sentencing practices to reduce recidivism among drug-addicted offenders almost twenty years ago. We begin our detailed review of the application of principles of EBP to state sentencing practices and processes in section IV, first noting some of the institutional constraints that may impede the ability of judges to sentence in accord with EBP. The research by economists on the cost-effectiveness of evidence-based programs is also discussed in section IV. In sections V and VI we summarize the policy reforms required both at the local and state levels to enable and facilitate evidence-based sentencing in the state courts. We close with some concluding observations in section VII.

We review the application of EBP principles to state sentencing policy and practice from the perspective of a state court judge, describing the implications of this science and these principles for the work of state court judges in sentencing felony offenders and handling felony probation-violation proceedings. Of course, the research has significant application not only to judges but also to many other criminal justice stakeholders. Prison and jail authorities should implement EBP to improve the effectiveness of rehabilitation services provided to prison and jail inmates. Probation and parole authorities should incorporate EBP to reduce recidivism among probationers and parolees, and in recommending or determining appropriate sanctions and treatment upon violation of probation or parole. The principles of EBP are surely applicable to the federal courts as well as to the state courts.

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But the principles of EBP are of particular interest and relevance to state court judges, who sentence 94% of felony offenders. Although the principles are applicable to other stakeholders and even other aspects of state court operations, including pretrial release, juvenile-delinquency proceedings, and misdemeanor prosecutions, we focus here on felony sentencing because of the great public concern in the states today about the cost, effectiveness, and fairness of our current crime-control strategies.

There is no responsibility that judges take more seriously than the sentencing of felony offenders. Judges alone are entrusted with the authority and responsibility to sit in judgment over those whose conduct has most seriously threatened the safety of the community. Serious crimes often result in unspeakable injury and loss to the victims and instill fear and insecurity in the entire community. The stakes for the offender and for the offender's family are also high. Judges are never more mindful of how grave a responsibility it is to act as a single judge on behalf of an entire community than when carrying out their sentencing responsibilities.

Felony cases dominate the workload of most judges. The handling of felony cases is the single most time-consuming judicial activity. Over 2.725 million felony cases were filed in the state courts in 2004.[5] 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 also taking into account the average amount of time that a judge spends on each of the different types of cases that judges hear. Data compiled by the National Center for State Courts indicate that felony cases consume about 25% of the judicial workload of a typical general-jurisdiction trial judge, far more than any other type of case.[6] About 25% of the time of those judges, or 2,850 full-time judicial positions, is exclusively dedicated to hearing felony cases.[7] Moreover, judges' felony-case workloads continue to increase. Whereas the number of felony cases filed in state general-jurisdiction courts increased by 29% over the last 10 years,[8] the number of general-jurisdiction judges increased only 1% over that time period.[9]

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[5] Richard Schauffler, Robert LaFountain, Shauna Strickland & William Raftery, National Center for State Courts, *Examining the Work of State Courts, 2005: A National Perspective from the Court Statistics Project,* Tbl.7 (2006).
[6] National Center for State Courts (2006), unpublished data on file with the author.
[7] Schauffler et al., *supra* n. 5, at 17.
[8] National Center for State Courts, *Court Statistics Project, State Court Caseload Statistics, 2005,* Tbl.7 (2006).
[9] Schauffer et al., *supra* n. 5, at 17. (In the late 1990s California unified its limited- and general-jurisdiction courts, converting about 700 limited-jurisdiction judges to general-

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For many judges, the most challenging sentencing proceedings are not those involving the most violent or dangerous criminals who clearly belong in prison and constitute less than 15% of the cases. The most exasperating and frustrating aspect of handling felony cases is dealing with the vast majority of felony cases comprised of repeat offenders. Day after day, month after month, and year after year, judges have sentenced repeat offenders, most charged with nonviolent offenses, to probation, jail, and finally prison, with little hope in changing their future criminal behavior. Many judges have questioned whether there isn't a better way.

The high percentage of recidivists who recycle daily through our criminal justice system's revolving doors as a result of our ineffective current sentencing policies and offender management practices is a principal source of frustration and discouragement, not only for judges, but also for other criminal justice professionals, victims of crime, and the public at large. This experience, repeated daily for so many, has resulted in a pervading cynicism about our current sentencing systems, the offenders who recycle through them, and the prospects for reform.

Day after day, month after month, and year after year, judges have sentenced repeat offenders, most charged with nonviolent offenses, to probation, jail, and finally prison, with little hope in changing their future criminal behavior. Many judges have questioned whether there isn't a better way.

A recent survey of state chief justices conducted by the National Center for State Courts found that the two sentencing-reform objectives that state chief justices believed to be most important were:

- 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
- to promote the development, funding, and utilization of community-based alternatives to incarceration for appropriate offenders.[10]

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 discretion that limited the ability of judges to sentence more fairly and effectively.[11] Thoughtful application of the

jurisdiction judges but not increasing the overall number of judges available to hear felony cases.)

[10] Tracy W. Peters & Roger K. Warren, National Center for State Courts, *Getting Smarter About Sentencing: NCSC's Sentencing Reform Survey* 2-3 (2006).

[11] *Id.* at 5.

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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 principal application of EBP principles to felony sentencing is likely to be in cases in which neither the applicable law nor the nature or circumstances of the case mandate a sentence to state prison, i.e., where probation or an intermediate sanction is at least a potential sentencing option. In most jurisdictions, these cases are likely to constitute the overwhelming majority, perhaps 60-75%, of felony sentences. In these cases, as we explore in some detail in section IV below, the principles of EBP have many potential applications, including in addressing violations of probation.[12]

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

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II. CURRENT SENTENCING POLICIES AND THEIR CONSEQUENCES

For most of the 20th century—up until the 1970s—state sentencing policies were "offender based."[13] They were based primarily on a "rehabilitative" model of sentencing that assumed that an individual 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 anywhere 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.[14] During the 1960s and early 1970s, however, the national violent crime rate tripled,[15] and public officials demanded surer and stiffer sanctions against criminal offenders. Officials had grown cynical about whether rehabilitation could ever be really successful in reducing offenders' criminal behavior. Indeterminate offender-based sentencing systems had also produced unjust sentencing disparities among similarly situated offenders. The "rehabilitative ideal" was replaced with new sentencing theories.[16]

Starting in the mid-1970s, the 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.[17] Use of rehabilitation and treatment programs, custodial and noncustodial, dried up.

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[13] See Kevin R. Reitz, American Law Institute, *Model Penal Code: Sentencing, Report* 18-27 (2003).
[14] See *id.*; Justice Kennedy Commission, American Bar Association, Report to the ABA House of Delegates 11-14 (2004).
[15] *Uniform Crime Reports, 1960-2005*, *available at* http://bjsdata.ojp.usdoj.gov/dataonline.
[16] Reitz, *supra* n. 13, at 28-29; Justice Kennedy Commission, *supra* n. 15, at 14-16; see also Francis A. Allen, *The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose* (New Haven 1981).
[17] See Reitz, *supra* n. 13, at 35-41; Justice Kennedy Commission, *supra* n. 14, at 16.

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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.

High Incarceration Rates and Costs

The consequences of our more retributive sentencing policies have been dramatic. Between 1974 and 2005, the number of inmates in federal and state prisons increased from 216,000[18] to 1,525,924,[19] an increase of more than sixfold. America's rate of imprisonment had remained steady until the 1970s at about 110 per 100,000.[20] Since that time the U.S. imprisonment rate has increased more than fourfold to 491.[21] The likelihood of an American going to prison sometime in his or her lifetime more than tripled between 1974 and 2001 to 6.6%.[22]

The number of state prisoners increased over 40% more during the last 25 years than the number of felony defendants in state courts. Felony filings in state courts increased about 92% from 1980 to 1990 and about 54% from 1990 to 2004.[23] However, the number of state prison inmates increased 132% from 1980 to 1990 and 76% from 1990 to 2004.[24] There is no evidence that the felony conviction rate increased between 1980 and 2004; indeed, there is some evidence to the contrary.[25] The disproportionate increase in the number of state prison inmates relative to the number of offenders prosecuted during this period, therefore, reflects the harsher sentencing practices, longer lengths

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[18] Bureau of Justice Statistics, NCJ197976, *Prevalence of Imprisonment in the U.S. Population*, *1974-2001*, Tbl.1 (2003).
[19] Bureau of Justice Statistics, NCJ215092, *Prisoners in 2005* (2006).
[20] Marc Mauer, *Race to Incarcerate* 16 (New Press 1999).
[21] *Id.*
[22] Justice Kennedy Commission, *supra* n. 14, at 18 (remarks of Alan J. Beck of the Bureau of Justice Statistics to the National Committee on Community Corrections on April 16, 2004).
[23] National Center for State Courts, NCJ87583, *State Court Caseload Statistics: Annual Report 1980,* Tbl.30 (1983); National Center for State Courts, *State Court Caseload Statistics*, 1999-2000, Tbl.15 (2000); National Center for State Courts, *supra* n. 8. (The estimates are based on reported felony filings in general jurisdiction trial courts in 25 states, the District of Columbia, and Puerto Rico, that reported such information in all three years.)
[24] Bureau of Justice Statistics, NCJ151654, *Prisoners in 1994* (1995) (contains the 1980 and 1990 data); Bureau of Justice Statistics, NCJ210677, *Prisoners in 2004* (2005).
[25] *Compare* Durose, *supra* n. 1, at 9 *with* Mauer, *supra* n. 20. (The rate of increase in felony filings between 1990 and 2004 was 3.9% per annum, whereas the Bureau of Justice Statistics reports an annual increase in felony convictions between 1994 and 2002 of 2.5% per annum.)

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of prison stays, and greater number of probationers and parolees committed to prison upon violation of their release conditions.[26]

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[27] to 747,529[28], an increase of almost threefold. Overall, the United States incarcerated over 2.3 million persons at year end 2005.[29] 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 twelve times higher than Japan.[30] Fourteen of the American states have incarceration rates that exceed even the national rate of incarceration.[31] More than 1% of the residents of Louisiana and Georgia were in prison or jail at midyear 2005.[32]

The number of Americans under probation or parole supervision also increased dramatically over the last 25 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,[33] 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%. The number of inmates in state and federal prisons increased from 305,458 in 1980 to 1,421,911 in 2004, an increase of 331%.[34] There are now over 7 million adults under some form of correctional supervision, a number exceeding the population of all but nine states.

Our more retributive sentencing policies have had a particularly devastating impact on minority communities. In 1930 whites constituted 77% of prison

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[26] See James Austin & Tony Fabelo, The JFA Institute, *The Diminishing Returns of Increased Incarceration: A Blueprint to Improve Public Safety and Reduce Costs* 5 (2004).
[27] Bureau of Justice Statistics, NCJ 177613, *Correctional Population in the U.S., 1997*, Tbl. 2.4. (2000).
[28] Bureau of Justice Statistics, *supra* n.19.
[29] *Id.*
[30] Marc Mauer, The Sentencing Project, *Comparative International Rates of Incarceration: An Examination of Causes and Trends* (2003).
[31] Paige M. Harrison & Allen J. Beck, Bureau of Justice Statistics, NCJ 213133, *Prison and Jail Inmates at Midyear 2005* (2006).
[32] *Id.*
[33] Lauren E. Glaze & Seri Palla, Bureau of Justice Statistics, NCJ 210676, *Probation and Parole in the United States, 2004* (2005).
[34] Bureau of Justice Statistics, *supra* n. 24.

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admissions, and African-Americans and other minorities made up 23%.[35] Today, 45% of the prison population is African-American, almost two-thirds are persons of color, and whites comprise about a third of the prison population.[36] For an African-American male born in 2004, the likelihood of being incarcerated sometime during his lifetime is 32 percent, compared to 17% for Hispanic males and 6% for white males.[37] At year end 2005, 8% of black males age 25 to 29 were in prison compared to 3% of Hispanic males and 1% of white males in the same age group.[38]

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. By comparison, spending on higher education in the states during the same period increased by 3%, spending on Medicaid by 47%, and spending on secondary and elementary education by 55%.[39]

High Rates of Recidivism

Our over-reliance on incarceration and abandonment of efforts to change the behaviors of criminal offenders through rehabilitation and treatment have also resulted in historically high 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.

The most recent report of the Bureau of Justice Statistics (BJS) on the processing of felony defendants in state trial courts indicates that in 2002, about a fourth of the felony defendants in the 75 largest counties were charged with a violent offense, and about three-fourths were charged with a nonviolent offense: 30% with property offenses, 36% with drug offenses, and 10% with public-order offenses.[40]

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[35] Bureau of Justice Statistics & Inter-University Consortium for Political and Social Research, Pub. L. No.916, *Race of Prisoners Admitted to State and Federal Institutions, 1926-1986*, Tbl.7 (1994).
[36] Bureau of Justice Statistics, *supra* n. 19.
[37] Justice Kennedy Commission, *supra* n. 14
[38] Bureau of Justice Statistics, *supra* n. 19.
[39] Don Stemen, Vera Institute of Justice, *Reconsidering Incarceration: New Directions for Reducing Crime* 13-14 (2007).
[40] Cohen & Reaves, *supra* n. 2, at 2. (The report is based on data collected from the nation's 75 most populous counties in 2002. The 75 counties account for 37% of the U.S. population,

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Thirty-two percent of felony defendants 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.[41] Seventy-six percent of all defendants had at least one prior arrest. Defendants charged with a nonviolent offense were more likely to have an active criminal justice status at the time of their current arrest than those charged with a violent offense (34% vs. 27%) and were more likely to have been previously arrested (77% vs. 72%).

Sixty-four percent of the defendants had a felony arrest record, continuing an upward trend from 1992 when 55% had a felony arrest record.[42] Fifty-nine percent of the felony defendants had at least one prior conviction. Nearly four-fifths of those with a conviction record, accounting for 46% of defendants overall, had more than one prior conviction. Whereas 51% of defendants charged with violent offenses had at least one prior conviction, 61% of those charged with nonviolent offenses had a prior conviction record.[43]

Nearly three in four defendants with a conviction record, 43% of defendants overall, had at least one prior conviction for a felony, an increase from 36% in 1990.[44] Whereas 35% of defendants charged with a violent felony had previously been convicted of a felony, 46% percent of the defendants charged with a nonviolent offense had been previously convicted of a felony.[45]

Recidivism rates among jail inmates in 2002 were even higher. Forty-five percent had been on probation or parole at the time of arrest, 73% had one or more prior sentences, 56% had two or more prior sentences, 39% had three or more, 17% had six or more, and 6% had eleven or more prior sentences.[46]

The largest recidivism study of state prison inmates examined the criminal histories of 272,111 inmates released from state prisons in 1994.[47] Seventy-eight percent of the inmates were in prison for a nonviolent offense. Sixty-

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and according to the FBI's 2002 Uniform Crime Reports, about 50% of all reported serious violent crimes, and 42% of all reported serious property crimes, in the United States.)

[41] *Id.,* Tbl.7.

[42] *Id*. at iii.

[43] *Id*. at 12

[44] *Id*. at iii.

[45] *Id*. at 13.

[46] Doris J. James, Bureau of Justice Statistics, NCJ 201932, *Profile of Jail Inmates, 2002* at 1 (2004).

[47] Patrick A. Langan & David J. Levin, Bureau of Justice Statistics, NCJ 193427, *Recidivism of Prisoners Released in 1994* (2002).

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seven percent of the former inmates committed at least one serious new crime within three years of their release. This rearrest rate was 5% higher than among prisoners released 11 years earlier in 1983. 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 18 criminal-arrest charges per offender during their criminal careers. 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%).[48]

The most recent survey of state prison inmates reported by BJS indicated that 50% of the inmates were currently committed for a nonviolent offense, and 38% had never been sentenced for any violent offense.[49] Forty-seven percent were on probation or parole at the time of their current offense; 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. There is significant variation among the states in the status at arrest and criminal history of state prison inmates. In California, for example, 58% of 1997 state prison inmates were on probation or parole at the time of their current arrest, and 80% had served prior sentences. Fifty-four percent had served three or more prior sentences; 29% had served six or more; and 12% had served eleven or more prior sentences.[50]

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.[51] 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, 47% of state prison inmates were on probation or parole at the time of their current arrest in 1997.[52] Successful completion of probation declined from 69% in 1990 to 59% in 2005; successful completion of parole declined from 50% in

[48] *Id*.
[49] Bureau of Justice Statistics, NCJ 177613, *Correctional Populations in the United States, 1997*, Tbl.4.10 (2000).
[50] Joan Petersilia, California Policy Research Center, *Understanding California Corrections* 58 (2006).
[51] Robyn L. Cohen, Bureau of Justice Statistics, NCJ 149076, *Probation and Parole Violators in State Prison, 1991* (1995).
[52] *Id.*

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1990 to 45% in 2005.[53] Again, there is significant variation among the states in parole-recidivism rates. Whereas nationally one-third of state prison parolees under supervision return to prison within three years, in California two-thirds of prison parolees under supervision return to prison within three years, twice the national rate.[54]

Limited and Diminishing Benefits of Incarceration

In a historic address to the American Bar Association (ABA) in August 2003, U.S. 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." 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." 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."

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."[55] 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 25 years have been among the factors contributing to the declining crime rates since 1990.[56] The principal studies suggest that about 25% of the decline in crime can be attributed to increased incarceration.[57] The most rigorous studies find that a 10% increase in the

[53] Lauren E. Glaze & Thomas P. Bonczar, Bureau of Justice Statistics, NCJ 215091, *Probation and Parole in the United States 2005* 6-9 (2006); Thomas P. Bonczar & Lauren E. Glaze, Bureau of Justice Statistics, NCJ 178234, *Probation and Parole in the United States, 1998* 4-7 (1999).
[54] Petersilia, *supra* n. 50, at 71.
[55] Justice Kennedy Commission, *supra* n. 14, at 23.
[56] See Ryan S. King, Marc Mauer & Malcolm C. Young, The Sentencing Project, *Incarceration and Crime: A Complex Relationship* (2005) & Justice Kennedy Commission, *supra* n. 15, at 19-22.
[57] Reitz, *supra* n. 13, at 33.

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incarceration rate results in a 2%-4% decrease in the crime rate.[58] Most of the crime-reduction effect of incapacitation strategies today is not on dangerous or violent offenders, however, but on nonviolent offenders. It is estimated that 80% of the crime-reduction effect of increased incarceration is on nonviolent offenses,[59] where recidivism rates nonetheless remain especially high.

… 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.

The eminent criminologist James Q. Wilson pointed out ten years ago that the U.S. 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.[60] Most other researchers agree.[61] The Washington State Institute for Public Policy has found, for example, that diminishing returns have significantly reduced the net cost-benefit advantage of increased incarceration rates for violent and property offenders in that state, and that during the 1990s the cost-benefit ratio for incarcerating drug offenders actually turned negative; i.e., it cost Washington taxpayers more to incarcerate additional drug offenders than the victimization and public costs of the crimes avoided.[62] A recent study found that the diminishing returns of higher incarceration rates actually accelerate as prison populations grow. When a state's incarceration rate reaches 325 to 492 inmates per 100,000 people, 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.[63]

At great financial and social costs, our current over-reliance on incarceration is of limited and rapidly diminishing benefit in controlling crime. 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. To the contrary, incarceration actually results in slightly increased rates of offender recidivism.[64] Thus, at best, incarceration merely limits the ability of prison

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[58] See Stemen, *supra* n. 39, at 4-5.
[59] Mauer, *supra* n. 20, at 4.
[60] James Q. Wilson, *Crime and Public Policy* (Richard Freeman, Mark H. Moore, Richard J. Herrnstein & Travis Hirschi eds., ICS Press 1983)
[61] Stemen, *supra* n. 39, at 8.
[62] Washington State Institute for Public Policy, *The Criminal Justice System in Washington State: Incarceration Rates, Taxpayer Costs, Crime Rates, and Prison Economics* 292-294 (2003).
[63] Raymond Liedka, Anne Morrison Piehl & Bert Useem, *The Crime-Control Effect of Incarceration: Does Scale Matter?*, 5 Crime and Public Policy 245, 245-276 (2006).
[64] See text, infra at footnote 204.

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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.[65] The estimated mean number of months actually served in state prison by those convicted of nonviolent offenses (after applying credits for time served in jail) range from 15 months (for vehicle theft) to 24 months (for burglary, drug trafficking, and weapons offenses).[66]

Research by the Washington State Institute for Public Policy and others has also shown that use of research-based rehabilitation and prevention programs to reduce recidivism among targeted criminal offenders is *more effective* than incarceration in reducing crime.[67] 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 portfolio of evidence-based alternatives to imprisonment it could avoid a significant level of future prison construction, saving Washington taxpayers 2 billion dollars, and reduce Washington's crime rates.[68] Similarly, several RAND studies have shown that drug treatment is much more effective than expanding mandatory penalties or use of other law-enforcement approaches in reducing drug consumption and achieving public cost savings.[69]

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."[70]

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[65] Abt Associates Inc. & National Institute of Corrections, *Transition from Prisons to Community Initiative* (2002).
[66] *Id.,* Tbl.1.5
[67] Washington State Institute for Public Policy, *supra* note 62, at 293.
[68] Steve Aos, Marna Miller & Elizabeth Drake, Washington State Institute for Public Policy, *Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates* (2006).
[69] See, King et al., *supra* n. 56, at 8.
[70] See Austin & Fabelo, *supra* n. 26.

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The challenges in sentencing and corrections today are quite the opposite of those that faced our nation in the early 1970s. The 1970s witnessed the most rapid increase in the national crime rate since the U.S. crime index was created. The violent and property crime indices, and the firearms crime rate, rose to historic highs in 1980 and the early 1990s. But those crime rates have been in steady decline since then and are now back at the levels of the mid-1970s.[71] The homicide rate declined in 2002 to its lowest level in 40 years.[72] 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. 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, today, unlike in the 1970s, there exists 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.

Public Support for Rehabilitation and Treatment

Public attitudes about sentencing have changed too. Today, rehabilitation and treatment programs enjoy broad public support. Although public safety is, of course, a top concern, the public does not see punishment and rehabilitation as an either/or proposition. At least when the public is able to consider sentencing policy issues thoughtfully, and not in the immediate wake of public outrage over a particularly sadistic crime of violence by a previously convicted offender, or during a political season in which the public's understandable fear of violence is heightened by overly charged political rhetoric, the American public would prefer to see the problem of crime addressed through greater use of prevention, rehabilitation, and treatment programs than through more—or longer—prison sentences, especially for nonviolent offenders. The public's contemporary attitudes about sentencing, and the role of judges in promoting sentencing reform, are reflected in a recent public opinion survey by the National Center for State Courts.[73] The survey of 1,502 adults conducted in the spring of 2006 by Princeton Survey Research Associates constitutes perhaps the most comprehensive single survey of public attitudes about sentencing ever conducted. The survey reflected broad public support for the use of rehabilitation and treatment programs to reduce offender recidivism, especially for nonviolent offenders.

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[71] Uniform Crime Reports, *supra* n. 15.
[72] Bureau of Justice Statistics, *Key Crime & Justice Facts at a Glance, available at* http://www.ojp.usdoj.gov/bjs/glance.htm#serious.
[73] Princeton Survey Research Associates International, *The NCSC Sentencing Attitudes Survey: A Report on the Findings* (2006).

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Asked whether "once someone turns to crime, very little can be done to turn them into productive, law-abiding citizens" or that "under the right conditions, many offenders can turn their lives around," almost 80% of respondents said people can turn their lives around. Asked to choose between having their tax dollars spent either on building more prisons or funding programs to help offenders find jobs or get treatment, 77% said funding for jobs and treatment. Fifty-eight percent preferred to deal with crime through prevention and rehabilitation programs rather than longer sentences and more police. The public was especially supportive of using alternatives to prison for nonviolent offenders: 51% said alternatives to prison should be used "often," and an additional 37% said they should be used "sometimes." Even higher percentages favor treatment in lieu of prison for the mentally ill, youthful offenders, and drug offenders. Treatment in lieu of imprisonment is especially popular with those who would like to see "major changes" in our current sentencing policies, as well as with the families and friends of both crime victims and those previously charged with crimes. Two-thirds would like to see judges play either a "leading" or "big" role in efforts to improve our sentencing system.

"People want a criminal justice system that is effective and fair in its sentencing policies and practices—tough when it needs to be to ensure public safety, but more flexible in dealing with offenders deemed less threatening to society or when rehabilitation might be better achieved through means other than incarceration.[77]

The findings of the recent NCSC survey are consistent with other state and national surveys over the last 10-15 years.[74] Polling in the early 1990s by Public Agenda incorporated extensive use of focus groups with respondents. The focus groups consistently demonstrated that the more the public knew about community-based treatment and intermediate sanctions programs the more supportive it became.[75] Like the recent NCSC survey, previous surveys show that the public's primary goal is public safety. The public tends to perceive punishment, rehabilitation, deterrence, and restitution all as legitimate objectives contributing to public safety. Overall, the public appears to consistently favor a "balanced" approach that is "tough" on the most violent and dangerous offenders while seeking to rehabilitate the less dangerous and amenable.[76] Based on its findings in the recent NCSC survey, Princeton Survey Research Associates concluded: "People want a criminal justice system that is effective and fair in its sentencing policies and practices—tough

[74] See, e.g., John Doble, *Attitudes to Punishment in U.S.—Punitive and Liberal Opinions* in Changing Attitudes to Punishment: Public Opinion, Crime, and Justice (Julian V. Roberts & Mike Hough eds., Willan Publishing, 2002); Peter D. Hart, Research Associates, Inc., Changing Public Attitudes toward the Criminal Justice System (2002); Belden Russonello & Stewart, *Optimism, Pessimism, and Jailhouse Redemption: American Attitudes on Crime, Punishment, and Over-incarceration* (2001) available at http://www.prisonpolicy.org/scans/overincarceration_survey.pdf.
[75] Doble, *supra* n. 74.
[76] *Id*.

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when it needs to be to ensure public safety, but more flexible in dealing with offenders deemed less threatening to society or when rehabilitation might be better achieved through means other than incarceration."[77]

[77] Princeton Survey Research Associates International, *supra* n. 73, at 1.

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III. DRUG COURTS: THE STATE JUDICIARY'S SUCCESSFUL EXPERIMENT WITH EBP

In Justice Kennedy's 2003 address to members of the ABA expressing his concern about America's over reliance on incarceration, he acknowledged that many lawyers might feel that "the prison system is not my problem." In Justice Kennedy's view, that feeling constituted an abdication of their responsibility: "The subject is the concern and responsibility of every member of our profession and of every citizen," he admonished the audience. "This is your justice system; these are your prisons."[78]

Although Justice Kennedy may be the most prominent American jurist to speak out about our current sentencing and corrections policies, state trial court judges first raised questions about the ineffectiveness of current policies in dealing with drug offenders almost 20 years ago. In many jurisdictions, trial judges have led innovative sentencing and corrections reforms that successfully incorporated evidence-based practices and have proven much more effective than incarceration in reducing offender recidivism.

By the late 1980s, trial judges in Miami, Florida, like many other trial judges across the country, had grown extremely frustrated with the rapidly growing number of nonviolent drug offenders entering the courts through the revolving door created by the absence of effective sentencing alternatives and treatment programs. In November 1988, Florida circuit court judge Herbert M. Klein complained that "putting more and more offenders on probation just perpetuates the problem." "The same people are picked up again and again," he wrote, "until they end up in the state penitentiary and take up space that should be used for violent offenders." The Florida Supreme Court approved Judge Klein's request for a yearlong leave of absence to lead a task force to come up with a solution to the problem.[79]

In June 1989, following the recommendations of Judge Klein's task force, the chief judge of the circuit court in Miami took the unprecedented step of issuing an administrative order creating the first drug treatment court in the United States.[80] The Miami drug court concept consisted of a court-supervised

[78] Justice Kennedy Commission, *supra* n. 14, at 1.
[79] Peter Finn & Andrea K. Newlyn, National Institute of Justice, NCJ 142412, *Miami's Drug Court: A Different Approach* 3 (1993); Herbert M. Klein, Dade City Office of the City Manager, NCJ 13119, *Strategies for Action: Combating Drug and Alcohol Abuse in Dade County* (1989).
[80] Drug Strategies, *Cutting Crime: Drug Courts in Action 6* (1997), available at http://www.drugstrategies.org/acrobat/CuttingCrime97.pdf; *see also* John R. Schwartz &

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treatment program that provided intensive judicial supervision and monitoring of offenders, used positive as well as negative reinforcements to encourage offender compliance, and held offenders closely accountable for their own actions.[81]

Under the leadership of state court judges, more than 600 drug courts became operational across the country within 10 years, along with the first community courts, domestic-violence courts, and mental-health courts based on similar principles.[82] In 2000 the leaders of the state court systems, the state chief justices and top state court administrators, adopted a joint resolution finding that the "principles and methods [of drug courts] have demonstrated great success in addressing certain complex social problems, such as recidivism, that are not effectively addressed by the traditional legal process" and agreed to "[t]ake steps, nationally and locally, to expand and better integrate the principles and methods of well-functioning drug courts into ongoing court operations."[83]

Today, over 1,600 drug courts, including over 800 adult drug courts, serve more than 70,000 clients on any given day.[84] Drug courts have also served as a model for the creation of almost 1,000 other "problem-solving" courts across the country.[85] Although it is premature to offer a definitive assessment of the other, more recently created problem-solving courts in reducing recidivism, a wide consensus has emerged regarding the effectiveness of adult drug courts. Rigorous scientific studies and meta-analyses have found that drug courts significantly reduce recidivism among drug court participants in comparison to similar but nonparticipating offenders, with effect sizes ranging

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Linda P. Schwartz, *The Drug Court: A New Strategy for Drug Use Prevention*, 25 Obstetrics & Gynecology Clinics of North America, 255 (1998):

> The concept of Drug Treatment Court is relatively new and is an innovative response by local communities to deal with the escalation of criminal activity associated with substance abuse. The frequency of repeat offenses by drug users, the overcrowding of jail space, and a diminishing sense of community well-being contributed to the impetus to look for a new approach by the criminal justice system—the creation of Drug Treatment Courts.

[81] National Institute of Justice, *Program Focus: Miami's Drug Court* 10-11 (1993).

[82] C. West Huddleston III, Karen Freeman-Wilson, Douglas B. Marlowe, & Aaron Roussell, National Drug Court Institute, *Painting the Current Picture: A National Report Card on Drug Courts and Other Problem Solving Court Programs in the United States* (2005).

[83] CCJ Res. 22, (Aug. 3, 2000) *available at*: http://ccj.ncsc.dni.us/CourtAdminResolutions/ProblemSolvingCourtPrinciplesAndMethods.pdf; COSCA Res. IV, COSCA 00-A-IV (Aug. 3, 2000) *available at*: http://cosca.ncsc.dni.us/Resolutions/CourtAdmin/resolutionproblemsolvingcts.html.

[84] Huddelston et al., *supra* note 82, at, 2-7.

[85] *Id.* at 10.

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from 10% to 70%.[86] A comprehensive review of 42 drug court studies found an average recidivism reduction of 13%.[87] The U.S. General Accounting Office reached the definitive conclusion that drug courts reduce offender recidivism.[88] Some of the most prominent researchers in the field concluded that "drug courts outperform virtually all other strategies that have been attempted for drug-involved offenders"[89]

Almost all recent reviews of the research also conclude that drug courts result in significant cost savings.[90] The amount of savings varies depending on the particular programs, the items of cost or benefit, and the length of the post-program period of evaluation. Items of cost or benefit usually include the costs of the respective programs, including court, incarceration, and treatment costs, and the future criminal justice system costs avoided as a result of reduced rates of recidivism. More recent studies have also considered the economic benefits of reduced victimization costs and reduced costs of public assistance, Medicaid, drug-exposed infants, traffic accidents, and missed child-support payments. A statewide study in Washington found average savings of $3,892 per drug court client, and a benefit/cost ratio of 1.74.[91] A

[86] See David B.Wilson, Ojmarrh Mitchell & Doris L. MacKenzie, *Systematic Review of Drug Court Effects on Recidivism*, 2 Journal of Experimental Criminology 459 (2006); Steve Aos, Polly Phipps, Robert Barnoski & Roxanne Lieb, Washington State Institute for Public Policy, *The Comparative Costs and Benefits of Programs to Reduce Crime Version 4.0* (2001); Steven Belenko, National Center on Addiction and Substance Abuse, *Research on Drug Courts: A Critical Review 2001 Update* (2001); United States Government Accountability Office, *Adult Drug Courts: Evidence Indicates Recidivism Reductions and Mixed Results for Other Outcomes* (2005); John Roman, *Drug Court Effects and the Quality of Existing Evidence* in *Juvenile Drug Courts and Teen Substance Abuse* (Jeffery Butts & John Roman eds., Urban Institute Press 2004); Denise C. Gottfredson, Brook W. Kearley, Stacy S. Najaka & Carlos M. Rocha, *The Baltimore City Drug Treatment Court: 3-Year Self-Report Outcome Study*, 29:1, Evaluation Review (2005); Michael Rempel, Dana Fox-Kralstein, Amanda Cissner, Robyn Cohen, Melissa Labriola, Donald Farole, Ann Bader & Michael Magnani, Center for Court Innovation, *The New York State Adult Drug Court Evaluation: Policies, Participants, and Impact* (2003); A. Bavon, *The Effect of the Tarrant County Drug Court Project on Recidivism*, 24 Evaluation and Program Planning 13 (2001); Jonathan E. Fielding, Grace Tye, Patrick L. Ogawa, Iraj J. Imam & Anna M. Long, *Los Angeles County Drug Court Programs: Initial Results*, 23 Journal of Substance Abuse Treatment 217, 217-224 (2002).
[87] Wilson et al., *supra* n. 86.
[88] United States Government Accountability Office, *supra* n. 86.
[89] Douglas B. Marlowe, David S. DeMatteo & David S. Festinger, *A Sober Assessment of Drug Courts*, 16 Federal Sentencing Reporter, 113, 113-128 (2003).
[90] See Amanda B. Cissner & Michael Rempel, Center for Court Innovation, *The State of Drug Court Research* (2005); Steve Belenko, Nicholas Patapis & Michael French, Treatment Research Institute, *Economic Benefits of Drug Treatment: A Critical Review of the Evidence for Policy Makers* 40-42 (2005).
[91] Aos et al., *supra* n. 86.

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California study found average savings of $2,000 per client.[92] An Oregon study over a 30-month follow-up period found net savings of $3,521 per client excluding victimization costs, and $4,789 including victimization costs.[93] A study of drug courts in Kentucky found net savings per client of $5,446, a benefit/cost ratio of 2.71.[94] A study of St. Louis drug court graduates over a period of 24 months following graduation found net savings per graduate of $ 2,615, a benefit/cost ratio of 2.8. The net savings over four years after graduation were estimated at $7,707, a benefit/cost ratio of 6.32.[95]

Not all drug court programs are successful in reducing offender recidivism. Recent drug court research has sought to identify *why* successful drug courts work, i.e., what specific drug court practices are associated with reductions in recidivism. Interestingly, it is not yet clear whether the clinical quality of the community substance-abuse treatment programs offered through drug courts actually plays a significant role in reducing recidivism.[96] It is clear, however, that certain other drug court practices are associated with recidivism reductions, including the imminent threat of incarceration associated especially with post-plea programs;[97] the focus on high-risk rather than low-risk offenders;[98] early entry by the offender into treatment;[99] continuous treatment over a period of at least a year;[100] judicial involvement and regular judicial status hearings, especially where the judge provides positive rather than negative reinforcement;[101] the use of tangible rewards, especially when administered frequently and in graduated amounts;[102] use of intermediate

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[92] Shannon M. Carey, *Evaluating the Cost of California's Drug Courts and Subsequent Policy Effects*, presented at the Annual Conference of the American Society of Criminology (2004).
[93] Shannon Carey & Michael Finigan, *A Detailed Cost Analysis in a Mature Drug Court Setting*, 20:3 Journal of Contemporary Criminal Justice, 315-338 (2004).
[94] T.K. Logan, William H. Hoyt, Kathryn E. McCollister, Michael T. French, Carl Leukefeld & Lisa Minton, *Economic Evaluation of Drug Court: Methodology, Results, and Policy Implications*, 27 Evaluation & Program Planning, 381-396 (2004).
[95] Institute for Applied Research, *A Cost-Benefit Analysis of the St. Louis City Adult Felony Drug Court* (2004).
[96] Cissner et al., *supra* n. 90, at 8-9.
[97] *Id.*
[98] Douglas B. Marlowe, David S. Festinger & Patricia A. Lee, *The Judge Is a Key Component of Drug Court,* 4 Drug Court Review 1-34 (2004); Fielding, *supra* n. 84, at 217.
[99] Michael Rempel & Christine D. DeStefano, *Predictors of Engagement in Court-Mandated Treatment: Findings at the Brooklyn Treatment Court, 1996-2000,* 33 Journal of Offender Rehabilitation 87 (2001); Rempel et al, *supra* n. 86.
[100] Cissner et al., *supra* n. 90, at 13-14.
[101] *Id*., at 11.
[102] Douglas B. Marlowe, *Cutting Edge Drug Court Research,* presentation at the Annual Meetings of the New England Association of Drug Court Treatment Professionals (2004).

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sanctions for noncompliance if administered consistently and fairly;[103] and successful completion of the program.[104]

Drug court research suggests that it is not simply the imminent threat of adverse consequences that motivates offenders to successfully complete drug court but the offender's *perception* of the seriousness of the threat that results in successful completion and reduced recidivism. The offender's perception, in turn, depends on the likelihood of actually being caught and facing adverse consequences, and whether the adverse consequences of noncompliance are clearly communicated and the offender's compliance closely monitored and reported.[105]

These drug court practices that have been proven to result in reductions in offender recidivism are specific examples of more generalized evidence-based practices that have been proven to work in other corrections programs as well. In other words, it is the extent to which drug courts have incorporated *evidence-based* practices that determines the extent to which drug courts have been successful in reducing recidivism. In the next section we begin our exploration of those practices.

The state courts' successful experience with drug courts can and should be leveraged to expand the use of evidence-based practices to other sentencing proceedings as well. As we noted earlier, state court leaders have already called for the integration of the principles and methods of successful drug courts into other, more traditional court proceedings. Focus groups of current and former drug court judges have also expressed a willingness and desire to expand the lessons learned from drug courts into other criminal proceedings. Many of the components of drug courts that the focus groups have identified as effective practices that can appropriately be applied in traditional sentencing proceedings are the same drug court practices that researchers have found to be successful in reducing recidivism: using direct judicial interaction with the defendant that enables the judge to communicate effectively with the offender, setting clear expectations and conditions of continued program participation, closely monitoring the offender's progress in treatment and

[103] Adele Harrell, Shannon Cavanagh & John Roman, *Evaluation of the D.C. Superior Court Drug Intervention Program*, National Institute of Justice, Research in Brief (2000).
[104] Cissner et al., *supra* n. 90.
[105] Douglas Young & Steve Belenko, *Program Retention and Perceived Coercion in Three Models of Mandatory Drug Treatment* 22 Journal of Drug Issues 297-328 (2002).

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compliance with established conditions, providing positive reinforcement, and responding quickly and consistently to program violations.[106]

[106] Donald J. Farole, Nora Puffett, Michael Rempel & Francine Byrne, *Applying Problem-Solving Principles In Mainstream Courts: Lessons for State Courts*, 26 The Justice System Journal 62-66 (2005).

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IV. 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 20 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.[107] 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 30 different types of adult-corrections programs to determine the extent to which each of the different types of program did or did not reduce recidivism among its adult-offender participants.[108] 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%.[109]

A second development over the last 10 years has been emergence of the concept of "evidence-based practice (EBP)." 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

[107] Compare Martinson, *supra* n. 4, with Lawrence W. Sherman, Denise Gottfredson, Doris MacKenzie, John Eck, Peter Reuter & Shawn Bushway, University of Maryland, *Preventing Crime: What Works, What Doesn't, What's Promising: A Report to the United States Congress Prepared for the National Institute of Justice* (1998).

[108] Steve Aos, Marna Miller & Elizabeth Drake, Washington State Institute for Public Policy, *Evidence-Based Adult Corrections Programs: What Works and What Does Not* (2006).

[109] *Id.*, at 3. The average recidivism reduction achieved in some types of program was as high as 31%.

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evidence."[110] 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.[111]

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.[112] The six principles of EBP that are most relevant to the work of state judiciaries are:

1. The Risk Principle;
2. The Need Principle;
3. Use of Risk/Needs Assessment Instruments;
4. The Treatment and Responsivity Principles;
5. Motivation and Trust; and
6. Integration of Treatment and Community-Based Sanctions.

Constraints and Conditions

Although we focus here on the application of EBP to the sentencing responsibilities of state trial judges, the ability of a judge to impose a sentence that is effective in reducing the risk that an offender will continue to engage in criminal behavior is severely constrained by the presence or absence of other conditions that may impede the judge's efforts. None of these constraints or conditions is under the judge's control, but all of them are subject, to varying degrees, to judicial influence. Unless avoided or addressed, these constraints and conditions will become significant barriers to effective recidivism-reduction strategies. Some of the conditions exist at the local, city, or county level, others at the state level.

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[110] American Psychological Association, *Policy Statement on Evidence-Based Practice in Psychology* (2005), available at http://www2.apa.org/practice/ebpstatement.pdf; see also David L. Sackett, Sharon E. Straus, W. Scott Richardson, William Rosenberg & R. Brian Haynes, *Evidence Based Medicine: How to Practice and Teach EBM* (Churchill Livingstone 2000).
[111] Aos, *supra* n. 108, at 3.
[112] See, e.g., Crime & Justice Institute, *Implementing Evidence-Based Practice in Community Corrections: The Principles of Effective Intervention* (2004) available at www.cjinstitute.org and www.nicic.org.

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The most common constraint confronting judges is probably the extent to which, as a practical matter, felony dispositions are effectively controlled in many jurisdictions by prosecutorial charging and plea-bargaining policies. Such policies rarely consider the research on risk reduction, or principles of EBP to reduce recidivism. Securing the cooperation of the prosecutor may often be the first challenge confronting judges interested in expanding evidence-based sentencing practice. Judges are not typically bound by plea agreements, of course, and in appropriate cases a judge might require counsel to explain how a proposed plea agreement conforms with principles of EBP, or to explain why the court should accept the compromise even if it does not.

There are many other constraints as well. For example, for a judge to effectively sentence an offender in accord with principles of EBP to successfully complete a designated local treatment program imposed as a condition of probation in lieu of incarceration, the following conditions would have to be present:

Local level

- an appropriate local treatment program that will accept the offender and that is faithfully operated by the treatment provider in accord with principles of EBP
- relevant program performance data indicating that the designated program successfully achieves recidivism-reduction outcomes
- sufficient information about the offender and designated program to permit the judge to determine that the defendant is an appropriate candidate for and good match with the program
- confidence on the part of the judge that the offender's participation in the program will be diligently monitored by the treatment provider and that program failures and violations will be duly reported and acted upon
- confidence that the probation department will support and monitor the offender's successful participation in the treatment program in accord with EBP
- an appropriate intermediate sanction or offender-control mechanism is available if punitive sanctions or greater offender controls are called for

State Level

- sufficient judicial discretion under state sentencing statutes and rules to allow the judge to impose the selected sentence

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- state corrections policies and funding that support effective adult probation services and facilitate the availability of the required treatment and intermediate sanctions programs at the local level

In the following pages, we first review application of the six principles of EBP identified above to the sentencing practices and processes of judges, including the handling of violations of probation, and then discuss economists' research on the cost-effectiveness of EBP. In sections V and VI we return to the subject of constraints and conditions and discuss the importance of judicial leadership in securing the cooperation and collaboration of local criminal justice system partners in ensuring the presence of the necessary conditions identified above, and in focusing the attention of policy makers at the state level on the need to include meaningful recidivism-reduction strategies and programs in state sentencing and corrections policies.

Application of Principles of EBP to State Sentencing

Although much remains unknown about the most effective ways to assist offenders in changing their criminal behaviors, principles of EBP are solidly based on what we *do* know. Research has demonstrated 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. So, 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.[113] Offenders cannot be assigned randomly to whatever programs might happen to be available. To the contrary, the fundamental lesson we have learned about effective treatment programs is that they must be specifically targeted to address particular needs of a certain group of offenders in certain ways.[114] The first and most important principles

[113] See, Edward J. Latessa, Francis T. Cullen, and Paul Gendreau, *Beyond Correctional Quackery—Professionalism and the Possibility of Effective Treatment,* 66 Federal Probation No. 2, 43-49.

[114] See generally, Crime & Justice Institute, *supra* n. 112; Edward J. Latessa, University of Cincinnati, *From Theory to Practice: What Works in Reducing Recidivism*?, State of Crime and Justice in Ohio 170-171 (2004); James Bonta, Public Works and Government Services of Canada, Pub. No. JS4-1/1997-1, *Offender Rehabilitation: From Research To Practice 1997-01*, (1997); Faye S. Taxman, Eric S. Shepardson, Jayme Delano, Suzanne Mitchell, James M. Bryne, Adam Gelb & Mark Gornik, National Institute of Corrections & Maryland Dept. of Public Safety and Correctional Services, *Tools of the Trade: A Guide to Incorporating Science Into Practice* (2004).

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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 participate in 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.

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 also identifies the risk level of those offenders who are the most appropriate targets of a recidivism- or risk-reduction strategy. Risk in this context does not refer to the seriousness of the crime or the likelihood that an offender will incur technical violations, but to the likelihood that the offender will commit another crime. An offender may be 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. Effective recidivism-reduction programs target moderate- and high-risk offenders, i.e., those more likely to reoffend.[115] 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.[116] 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

[115] 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*, in Topics in Community Corrections, National Institute of Corrections Annual Issue (2004).
[116] *Id.*

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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.[117] Low-risk offenders should be diverted from prosecution altogether, fined, or 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.[118]

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 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.[119] For this extremely high risk group of chronic offenders, the factor that seems to be most effective in reducing recidivism is time or age. Extremely high risk chronic offenders who are not responsive to intervention often have relatively

[117] See Marcus Nieto, California Research Bureau, *Community Correction Punishments: An Alternative To Incarceration for Nonviolent Offenders* (1996).
[118] See Lowenkamp & Latessa, *supra* n. 115.
[119] See Paul Gendreau & Claire Goggin, *Principles of Effective Programming with Offenders*, 8 Forum on Corrections Research 38-40 (1996); Ted Palmer, *Programmatic and Nonprogrammatic Aspects of Successful Intervention: New Directions for Research*, 41 Crime and Delinquency 100-131 (1995).

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short criminal careers and may "time out" of a criminal lifestyle after 5-10 years, or "age out" by the time they reach their forties.[120]

The Need Principle

The closely related second task in applying principles of EBP to sentencing decisions is to identify the characteristics, or needs, of the defendant that should be targeted for treatment. Offenders typically have many needs, only some of which are associated with the risk of criminal behavior. The need principle of EBP identifies the most appropriate needs of offenders to target. Effective programs must target "criminogenic needs," i.e., those values, attitudes, or behaviors of the offender that are most closely associated with the likelihood of committing crime.[121] These are the 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 it will not reduce the likelihood of recidivism. The criminogenic needs most predictive of the likelihood of criminal behavior are:

- Low self-control, i.e., impulsive behavior
- Anti-social personality, i.e., callousness, lack of empathy
- Anti-social values, i.e., disassociation from the law-abiding community
- Criminal peers
- Substance abuse
- Dysfunctional family[122]

Offenders are more likely to commit criminal acts when they have little ability to control their own behavior. Offenders with antisocial personality traits do not care how their actions affect others and, therefore, often feel no remorse for what they do. Antisocial values allow offenders to disassociate themselves from the community and its norms and values. 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. There is a strong relationship between substance abuse and crime. A majority of all prisoners committed their offense under the influence of

[120] Mark Carey & Roger K. Warren, *Practitioner's Guide to Evidence Based Practices*, presented at Community Corrections Collaborative Conference (2006) available at http://probation.co.la.ca.us/FVI/Related%20Documents/CCCCReferenceMaterial.pdf.
[121] See, D. A. Andrews, James Bonta & Robert D. Hoge, *Classification for Effective Rehabilitation: Rediscovering Psychology*, 17 Criminal Justice and Behavior 19-52 (1990); Gendreau & Goggin, *supra* n. 119; Bonta, *supra* n. 114.
[122] Taxman et al., *supra* n. 114.

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drugs.[123] The absence of positive family role models due to family dysfunction is also associated with criminal behavior. Although educational and vocational needs, and unemployment, are criminogenic, efforts to address these needs have been found to have less affect on recidivism than the primary criminogenic needs identified above.[124]

Prominent examples of non-criminogenic needs include low self-esteem, lack of physical conditioning, and anxiety.[125] There is no evidence that addressing these needs will reduce recidivism. Whereas addressing substance abuse and low self-control can reduce recidivism, improving self-esteem or physical conditioning is unlikely to impact future criminal behavior. 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.[126] 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.[127] In the absence of a treatment component, intermediate sanctions programs such as intensive supervision and electronic monitoring do not reduce future recidivism.[128]

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.[129]

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

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[123] Christopher J. Mumola & Jennifer C. Karberg, Bureau of Justice Statistics, NCJ 213530, *Drug Use and Dependence, State and Federal Prisoners, 2004* (2006); Office of National Drug Control Policy, *Drug Related Crime* (2000).
[124] See Taxman et al., *supra* n. 114.
[125] Gendreau & Goggin, *supra* n. 119; Edward J. Latessa, Center for Criminal Justice Research Presentation, *What Works and What Doesn't in Reducing Recidivism: The Principles of Effective Intervention*, available at http://www.dsgonline.com/Program_Logic_Model/San_Diego_TM/Day%201-Lunch-Latessa.ppt.
[126] Latessa, *supra* n. 125.
[127] Latessa, *supra* n. 113; see generally, Aos et al., *supra* n. 108.
[128] Latessa, *supra* n. 113.
[129] Paul Gendreau, Shelia A. French & Angela Taylor, University of New Brunswick, St. John, What Works (What Doesn't)—Revised 2002: The Principles of Effective Correctional Treatment, unpublished manuscript (2002).

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information about each offender. Often, determinations of risk are based solely on the nature of the offense committed and prior criminal history. Although both of these factors are legitimate risk factors, especially prior criminal history, they are not a sufficient basis for an accurate assessment. Some low-risk offenders have committed serious crimes, and some high-risk offenders have committed only minor crimes. 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.[130]

There are generally four methods of determining risk:

1. professional judgment based on the education and experience of a corrections or treatment professional (first generation);
2. an actuarial tool or risk-assessment instrument that has been validated on a comparable offender population and uses objective 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 need factors as well as static risk factors (third generation); and
4. a combination of third-generation risk-assessment instrument and professional judgment.

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.[130]

Actuarial tools are far better predictors of risk than professional judgment. The problem with second-generation instruments is that they measure only "static" risk factors, i.e., factors that cannot be changed (e.g., offense characteristics, prior criminal history, age at first conviction, history of child abuse/neglect), and therefore cannot be targeted for intervention. Third-generation instruments include assessment of "dynamic" risks and criminogenic needs (e.g. low self-control, substance abuse, antisocial attitudes) that also predict risk but can be changed and serve as targets for effective treatment.. Treatments that do not target criminogenic needs are counterproductive and ineffective and waste correctional resources. The most accurate assessment requires use of both a third-generation actuarial tool and professional judgment.[131]

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[130] Andrews et al., *supra* n. 121; D.A. Andrews & James Bonta, *The Psychology of Criminal Conduct* (Anderson Publishing 1996); Paul Gendreau, Tracy Little & Claire Goggin, *A Meta-Analysis of the Predictors or Adult Offender Recidivism: What Works*, 34 Criminology 575-608 (1996); Carl B. Clements. *Offender Classification: Two Decades of Progress*, 23 Criminal Justice and Behavior 121-143 (1996).
[131] *Id.*

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There are a number of validated third-generation risk-assessment tools on the market. In addition, some instruments in the public domain that have been developed by public agencies are available for use by other agencies. The Offender Screening Tool (OST) developed by the Maricopa County Adult Probation Department, which has now been adopted for statewide use in Arizona, is one example.[132] Many jurisdictions have done their own research and validation to determine which risk factors are most important in predicting reoffense in their jurisdictions.[133] A recent 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.[134] The survey also identified the Level of Service Inventory Revised (LSI-R), a proprietary third-generation tool, as the most widely used risk-assessment instrument in the states.

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 offense.[135] 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.[136] 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.[137]

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[132] Zachary Dal Pra, *In Search of a Risk Instrument* in Topics in Community Corrections: Assessment Issues for Managers, 9 Annual Issue 10-11 (2004).
[133] *Id.*
[134] Peters & Warren, *supra* n. 10, at 17.
[135] For information on specialized assessments for offender populations see, National Institute of Corrections, *Agencies' Use of Specialized Assessments* in Topics in Community Corrections Annual Issue (2003).
[136] George Braucht, John Prevost & Tammy Meredith, *Automating Offender Risk Assessment*, in Topics in Community Corrections, National Institute of Corrections Annual Issue (2004).
[137] *Id.*

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The availability of accurate risk- and needs-assessment information is critical to making sound judicial decisions on a variety of issues that frequently arise in sentencing felony offenders:

- On one end of the range of sentencing alternatives, the offender's suitability for diversion.[138] Whether an offender should be diverted from further prosecution, deferred for sentencing, placed in a low-intervention/supervision corrections program, 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, 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 depends in part on the likelihood of being able to address the offenders' criminogenic needs and provide the required behavioral controls in the community.
- If the offender is going to be dealt with in the community, the kind of behavioral controls that should be imposed and for what duration. 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 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.[139]
- The kind of treatment services to be provided. The appropriate kind of treatment services to be provided depends on what the offender's criminogenic needs are. Placing the offender in a treatment program that is not designed to address the offender's particular criminogenic needs is a waste of treatment resources and actually harms the defendant by impeding opportunities for success and setting him or her up for failure.
- Setting appropriate conditions of probation. In the absence of a risk and needs assessment the judge is unable to reasonably determine the conditions of probation required to manage offender risk in the community and address the offender's risk factors and criminogenic needs.[140] Imposition of conditions of probation is the means by which the court seeks to shape the behavior of the offender during probation. Probation conditions describe the terms under which the offender is released to the

[138] Carey & Warren, *supra* n. 120.
[139] Faye Taxman, *Assessment with a Flair: Offender Accountability in Supervision Plans*, 70 Federal Probation (2006), *available at* http://www.uscourts.gov/fedprob/September_2006/accountability.html.; Dean J. Champion, *Measuring Offender Risk: A Criminal Justice Sourcebook* 49-71 (Greenwood Press, 1994).
[140] Taxman, *supra* n. 139.

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The conditions of probation should reflect the behavioral controls that the judge finds are necessary to manage the risk that the defendant's freedom from custody presents to the community and the risk factors related to that risk.

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 are 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 responsibility of the probation officer to continuously monitor the probationer's behaviors and respond accordingly.[141] The judge is not typically in the position to do that. From the perspective of the corrections agency, the conditions of probation establish the framework for developing an appropriate case management plan for the offender.[142] Development, modification, and implementation of the case management plan are the responsibility of the probation officer, not the judge. 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.

- Determining the nature of any sanction to be imposed upon violation of probation. Probation agencies have or should have a broad range of graduated sanctions available to respond to violations of probation.[143]

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[141] Champion, *supra* n. 139, at 207-209. 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. D. A. Andrews, James Bonta, & J. Stephen Wormith, *The Recent Past and Near Future of Risk and /or Need Assessment*, 52 Crime and Delinquency 7-27, at 16 (2006).
[142] Taxman, *supra* n. 139.
[143] Peggy Burke*, Filling in the Gaps: Increasing the Available Range or Responses to Violations* in Madeline M. Carter, National Institute of Corrections, NCJ 196115, *Responding to Parole and Probation Violations: A Handbook to Guide Local Policy Development* (2001), 73-75.

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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. 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.[144]

It is important that probation respond quickly, consistently, and fairly to all violations. As in sentencing, appropriate response to probation violations depends upon the severity of the violation, the probationer's risk level, and the extent of motivation, cooperation, and success the probationer has demonstrated in complying with other terms and conditions of probation.[145] Again, as in sentencing, 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.[146]

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[144] Madeline E. Carter & Ann Ley, *Making It Work: Developing Tools to Carry Out the Policy* in Madeline M. Carter, National Institute of Corrections, NCJ 196115, *Responding to Parole and Probation Violations: A Handbook to Guide Local Policy Development*, 51-71, 55 (2001).

[145] Madeline M. Carter, National Institute of Corrections, NCJ 196115, *Responding to Parole and Probation Violations: A Handbook to Guide Local Policy Development*, 7-18, 52-61 (2001).

[146] Peggy Burke, *Beyond the Continuum of Sanctions: A Menu of Outcome-Based Interventions* in Madeline M. Carter, National Institute of Corrections, NCJ 196115,

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> In responding to petitions to revoke probation, courts should be guided by 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.[147] 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 these factors and objectives will be weighed by the court and department in responding to common violations, the court will likely be inundated with time-consuming revocation requests often resulting 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.[148] Although the policy of the American Probation and Parole Association still requires preparation of PSIs in every felony case,[149] the content of the PSIs has changed substantially over the past 25 years, and PSIs are currently available in only a small proportion of felony cases.

Historically, the PSI typically included a summary of the offense; 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.[150] As sentencing systems have become more determinate, retributive, and offense based over the past 30 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

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Responding to Parole and Probation Violations: A Handbook to Guide Local Policy Development 77-81 (2001).

[147] Carter, *supra* n. 145.

[148] Daniel Macallair, Center on Juvenile and Criminal Justice, *The History of the Presentence Investigation Report*, available at www.cjcj.org.

[149] See, American Probation and Parole Association, Position Statement, *Probation Pre-Sentence Investigations* (1987) available at http://www.appa-net.org/aboutprobation_presentence.htm.

[150] Macallair, *supra* n. 148.

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no longer required at all, having been replaced by worksheets that calculate prescribed sentences under statutory or administrative guidelines.

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 often not required, or are waived.[151]

Even when PSIs are available today 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.

A risk-assessment instrument created by the Virginia Sentencing Commission and validated by research conducted by the National Center for State Courts has been used by judges in Virginia since 2003 to successfully divert 25% of Virginia's nonviolent offenders, who would otherwise be incarcerated, to alternative sanctions programs. However, the instrument does not purport to assess criminogenic needs.[152] The Maricopa County Adult Probation Department has developed three related risk-assessment tools now used statewide: an Offender Screening Tool (OST); a shorter Modified Offender 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.[153] The risk-assessment results are included in the PSIs prepared for the courts and have 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. In Travis County, Texas, on the other hand, the significant criminogenic risk factors identified by the formal risk- and needs-assessment instrument are also set forth in the PSI Report and used to determine the

[151] See, e.g., Code of Virginia, Title 19.2, section 299; Idaho Criminal Rules of Court, Rule 32.
[152] Brian Ostrom, Matthew Kleiman, Fred Cheesman, Randall M. Hansen & Neal B. Kauder, National Center for State Courts, *Offender Risk Assessment in Virginia* (2002).
[153] Maricopa County Adult Probation Department, *Managing for Results: Five Year Strategic Plan: Fiscal Years 2005-2010* (2005), *available at* http://www.superiorcourt.maricopa.gov/adultPro/docs/mfr5yp.pdf.

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recommended supervision strategy and conditions of probation, as well as to classify the offender's risk level.

A pilot project in San Diego, California is testing 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.[154] 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.[155] A statewide study group in Maine has recently recommended that a multi-county pilot project be undertaken to implement a triage risk-assessment system.[156] The proposed triage risk-assessment system to be tested consists first of a simple three-item pre-plea screening tool to assess whether the offender may be eligible for diversion or unsupervised probation, or whether, upon conviction, a LSI-R should be administered. The LSI-R would be mandated in some instances and conducted at the joint request of the parties in other instances. If the offender scores as a high risk on the LSI-R, a full PSI Report would be prepared. 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.

The Treatment and Responsivity Principles

Having addressed the question of (1) *who* are the most appropriate offenders to target for participation in recidivism- or risk- reduction programs, and (2) *what* characteristics or needs of those offenders these programs should target, we turn to the third critical question of (3) *how* recidivism reduction programs should go about addressing the needs of these offenders.

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

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[154] Little Hoover Commission, State of California, *Solving California's Corrections Crisis: Time Is Running Out*, 28-29 (2007), *available at* http://www.lhc.ca.gov/lhcdir/185/Report185.pdf.

[155] Michael Marcus, *Justitia's Bandage: Blind Sentencing*, 1 International Journal of Punishment and Sentencing 25 (2005).

[156] Crime & Justice Institute, *Evidence-Based Practices: A Framework for Sentencing Policy*, report submitted to the State of Maine Corrections Alternative Advisory Committee by its Sentencing Practices Subcommittee 33-34 (2006) available at http://www.maine.gov/corrections/caac/SupMat/FinalReportSentencingPracticesSubcommitteeforPrinting.pdf.

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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 only 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 and is entitled to obtain credible evidence that the treatment works, that the program is evidence based.

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.[157] Social-learning theory posits that criminal behaviors, like all human behaviors, are learned, and learned only if and when they are rewarded.[158] There are reasons why people do what they do (behavioral "antecedents"). Furthermore, "behaviors" have resulting "consequences" ("ABCs."). Behavioral consequences help shape the antecedents of future behavior. Positive consequences (rewards) reinforce behaviors while negative consequences (punishments) discourage behaviors. A clear set of consequences, both positive and negative, is helpful to people in developing their sense of self-control, of responsibility for their own behaviors. Successful offender 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.[159]

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

[157] See generally Crime and Justice Institute, *supra* note 112; Andrews & Bonta, *supra* n. 130; Elliott Currie, *Crime and Punishment in America* (Owl Books 1998); Palmer, *supra* n. 119.
[158] Taxman et al., *supra* n. 114, at 13-20; see generally, Albert Bandura, *Social Learning Theory* (Prentice-Hall, Inc. 1977).
[159] See generally Daniel H. Antonowicz & Robert Ross, *Essential Components of Successful Rehabilitation Programs for Offenders*, 38 International Journal of Offender Therapy and Comparative Criminology 97-104 (1994); Paul Gendreau, *Offender Rehabilitation: What We Know and What Needs to be Done,* 23 Criminal Justice and Behavior 144-161 (1996).

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choices before they act, and self-control.[160] 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.[161]

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.[162] Behavioral research indicates that positive reinforcement should be applied frequently; for optimal learning, positive feedback should outweigh negative feedback by 4 to 1.[163] Unlike negative reinforcement, positive reinforcement does not have to be applied consistently throughout the duration of treatment to be effective, but instead can be tapered or reduced over time.[164] However, the increased use of positive reinforcements 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. 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, therefore, the treatment response must provide a continuing-care approach based on a chronic-care

[160] Taxman et al., *supra* n. 114, at 69.
[161] Bonta, *supra* n. 114; Crime & Justice Institute, *supra* n. 112, at 6.
[162] Crime & Justice Institute, *supra* n. 112, at 6.
[163] Francis T. Cullen, *Rehabilitation and Treatment Programs, in Crime: Public Policy for Crime Control* 253-289 (James Q. Wilson & Joan Petersilia eds., 2002.); Andrews & Bonta, supra n. 130.
[164] B.F. Skinner, *The Behavior of Organisms* (Appleton-Century-Crofts 1938).

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model, not an acute-care approach.[165] Chronic behaviors are not resolved with some fixed amount or duration of treatment. As with substance-abuse and mental-health treatment, for example, 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 on measures of criminal activity.[166] 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.[167] 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. More recently, 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.[168] As with continuity of care, judges must also insist that local treatment programs incorporate the necessary family and community reinforcement opportunities.

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[165] A. Thomas McLellan, *Principles of Effective Treatment*, presented at the meeting of the Center on Evidence-Based Interventions for Crime and Addiction, Philadelphia (December 6, 2006).
[166] Cissner et al., *supra* note 90, at 8.
[167] See Andrews & Bonta, *supra* note 130; Wayne Scott, Evidence-based Practices in Correctional Treatment, unpublished manuscript (2007).
[168] Crime & Justice Institute, *supra* n. 112, at 6.

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Program Monitoring and Accountability

The research on evidence-based practices distinguishes between "efficacy" and "effectiveness."[169] 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.[170] 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 and accountability.[171] To ensure that treatment programs are implemented and operated effectively and produce significant recidivism reductions, it is critical that such obstacles be avoided or addressed and that accurate measures of staff and program performance be put in place and monitored regularly.[172] The Correctional Program Assessment Inventory (CPAI) is a preeminent evaluation tool for that purpose and has been shown to be associated with significant reductions in participant recidivism.[173] 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

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[169] Douglas B. Marlowe, *Efficacy vs. Effectiveness,* presented at the meeting of the Center on Evidence-Based Interventions for Crime and Addiction, Philadelphia (December 6, 2006).
[170] 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.
[171] Marlowe, *supra* n. 169.
[172] Edward J. Latesssa & Alexander Holsinger, *The Importance of Evaluating Correctional Programs: Assessing Outcome and Quality,* 2 Corrections Management Quarterly, 22-29 (1998).
[173] Christopher T. Lowenkamp & Edward J. Latessa, *Investigating the Relationship Between Program Integrity and Correctional Program Effectiveness*, available at ohiojudges.org/_cms/tools/act_Download.cfm?FileID=293&/Com%20Cor%20Program%20Integrity.pdf; Jennifer A. Peeler and Edward J. Latessa, *Applying the Principles of Effective Intervention to Juvenile Correctional Programs*, Corrections Today 26-29 (2004).

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also important that interim measures of offender performance be established and monitored. Such measures ensure that accurate case information is maintained; feedback to offenders on their progress, including positive and negative reinforcements, is documented; and 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. In addition, as in drug courts, judges can set selected cases on court calendars for individual judicial review if deemed necessary or desirable, or establish procedures for regular reporting to the court on the progress, attrition, or recidivism of certain types or classes of offenders.

The "responsivity principle" provides guidance on how treatment is "delivered."[174] The offender's gender, culture, learning style, and stage of change all influence the offender's responsiveness to treatment. Treatment style and methods of communication should therefore be matched to the offender's personal characteristics and stage of change readiness. Certain common offender sub-populations including, for example, the severely mentally ill and chronic dual diagnosed should be identified and provided additional coordinated services.

The treatment, responsivity, and other principles of EBP we have discussed 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.[175] Supervision staff seek to proactively engage the offender in behavior modification and to use supervision to assist the offender in achieving pro-social behaviors.[176] 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.[177] The behavior contract outlines what is expected of the offender, the services to be offered, and the consequences of meeting and not meeting expectations.[178] The ultimate goal is offender self-management. The behavior contract seeks to promote behavioral change not

[174] William Miller & Stephen Rollnick, *Motivational Interviewing: Preparing People for Change* (Guilford Press, 2002); Crime & Justice Institute, *supra* n. 112.
[175] Taxman et al., *supra* n. 114 at 1-11.
[176] *Id.* at 4.
[177] *Id.* at 5.
[178] *Id.* at 6.

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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.[179]

The treatment and responsivity principles also have important implications for the ways in which judges identify appropriate conditions of probation and 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.

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 at the outset that the offender understand and agree 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 be avoided and that avoidance of those behaviors will be under his or her own control.

The manner in which appropriate conditions of probation are identified 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 by the client to comply, especially in the presence of family or friends, promote subsequent compliance.[180] 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 can then be included as a condition of probation.[181] By allowing

[179] See Faye S. Taxman, University of Maryland, College Park, *Proactive Supervision: Supervision as Crime Prevention* (2006) available at http://www.bgr.umd.edu/pdf/proactive_supervision.pdf.
[180] David B. Wexler, *Robes and Rehabilitation: How Judges Can Help Offenders "Make Good,"* 38 Court Review 8 (2001).
[181] *Id.* at 8.

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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.[182] 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.[183]

Judges can ensure that the offender participates in the treatment discussion and decision, understands the behavioral responsibility that he or she accepts in choosing probation in lieu of imprisonment, and views 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 being considered for probation supervision, the judge should consider enlisting the cooperation of defense counsel and any probation staff involved with interviewing the defendant in preparing a PSI in engaging the offender in the choice of probation and treatment.

EBP confirms that it is not only the sentencing outcome…The sentencing process matters as well. The judge's communications with the offender in connection with the sentencing proceedings can be critical in promoting behavior change on the part of the offender.

Motivation and Trust

Motivation

In addition to the principles of EBP previously discussed there are several other conditions that influence the likelihood of effective treatment outcomes. The research on EBP confirms that it is not only the sentencing outcome, such as assignment of an offender to a cognitive-behavioral treatment program to address specified criminogenic needs, but also the offender's acceptance of the outcome that matters in seeking to reduce offender recidivism. The sentencing process matters as well. The judge's communications with the offender in connection with the sentencing proceedings can be critical in promoting behavior change on the part of the offender. As one county

[182] Michael S. King, *The Therapeutic Dimension of Judging: The Example of Sentencing*, 16 Journal of Judicial Administration 92 (2006).
[183] Bruce J. Winick, *Competency to Consent to Treatment: The Distinction Between Assent and Objection,* 28 Houston Law Rev 15 (1991).

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corrections administrator has 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."[184]

As noted earlier, 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 does in fact play 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.[185]

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 change is strongly influenced by interpersonal relationships, especially with counselors, therapists, probation officers, judges, and other authority figures.[186] Because rewards are more effective than punishments in achieving behavioral change, providing incentives for behavior change through "negative reinforcement," such as relief from previously imposed sanctions or conditions, is more effective than threats of punishment, such as application of additional sanctions or conditions.[187]

Research on behavioral change indicates that the principal obstacle to be overcome in triggering 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

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[184] Gary E. Christensen, Our System of Corrections: Do Jails Play a Role in Improving Offender Outcomes?, 9-10 (2006), working draft available at http://www.urban.org/reentryroundtable/cji_jails_draft.pdf.

[185] See Bruce J. Winick & David B. Wexler, *Judging in a Therapeutic Key* (Carolina Academic Press 2003); King, *supra* n. 177; Rosemary Cant, Rick Downie & Darrel Henry, *Report on the Evaluation of the Geraldton Alternative Sentencing Regime*, Social Systems and Evaluation 2004; Carrie Petrucci, *Respect as a Component in the Judge-Defendant Interaction in a Specialized Domestic Violence Court that Utilizes Therapeutic Jurisprudence*, 38 Criminal Law Bulletin 263 (2002). (Writings on the application of "therapeutic jurisprudence" to judging also rely on the research demonstrating that motivational interviewing is useful in promoting behavioral change.)

[186] Taxman et al., *supra* n. 114, at 4-9; Miller & Stephen Rollnick, *supra* n. 174.

[187] Crime & Justice Institute, *supra* n. 112, at 6. (Unacceptable behavior, such as violation of conditions of probation, must be met, of course, with swift, consistent, and unambiguous responses. But responses need not be harsh and consequences should be graduated.)

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wish to engage. Effective treatment professionals and probation officers are therefore often trained in "motivational interviewing" (MI), a set of interpersonally sensitive communications techniques that effectively enhance intrinsic motivation for behavioral change by helping clients explore and resolve their ambivalence in a positive way.[188]

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 roadblocks to intrinsic motivation 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 empathetic or reflective listening; respectfully pointing out inconsistencies between the offender's statements and the offender's actual behaviors; summarizing key points of the offender's communications; reinforcement and affirmation of positive behaviors; open-ended questions; eliciting self-motivating statements; supporting self-efficacy (knowing one can accomplish a feat because one has done it in the past); "rolling with" resistance to change; and modeling pro-social behavior. Actions are as critical as words in communicating and send offenders important signals about what is acceptable behavior in society.[189]

Some of the key principles of MI are set forth in the table below.

Principles of Motivational Interviewing[190]

1. Express empathy	Ambivalence to change is normal, and acceptance helps facilitate change. Reflective listening and a problem-solving approach are important.
2. Develop discrepancy	Emphasizing the discrepancy between present behavior and the offender's goals can stimulate motivation to change. The person should be encouraged to present arguments for change. An awareness of consequences is important.

[188] William Miller & Stephen Rollnick, *What Is Motivational Interviewing*? 23 Behavioral and Cognitive Psychotherapy 325-334 (1995); Crime & Justice Institute, *supra* n. 112, at 4.
[189] Taxman et al., *supra* n. 114, at 44-48.
[190] The content of the table is drawn from Miller & Rollnick, *supra* n. 188.

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3. Avoid argument	Arguments are counterproductive, labeling is not necessary, and blaming produces defensiveness. If there is resistance, it is time to change strategies.
4. Roll with resistance	Resistance can be a sign that a topic has been forced too soon. The offender's perceptions should be shifted and the momentum used to advantage. The offender can be a valuable source for solutions to a problem. New information and perceptions can be offered but should not be imposed on the offender.
5. Support self-efficacy	The offender's belief in the possibility of change is an important motivator. It is the client who should choose from a range of alternative strategies. Self-efficacy is a predictor of treatment outcome.

By utilizing MI techniques in communicating with offenders judges can promote intrinsic motivation and compliance.

In attempting to promote compliance it is also useful to understand the change process through which offenders typically proceed. The "stages-of-change" model is recognized as a useful device for analyzing an individual's behavior change and identifying strategies to facilitate change.[191] 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 therapeutic 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.

[191] Taxman et al., *supra* n. 114, at 17; James O. Prochaska & Carlo DiClemente, *Stages and Processes of Self-change of Smoking: Toward an Integrated Model of Change*, 51 Journal of Counseling & Clinical Psychology 390-395 (1983).

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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 the 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.

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, has suggested the following approach, for example, to address a situation of noncompliance that does not include serious reoffending:

> When the issue is raised, the judicial officer could ask the person, "What happened?" The court would not try to impose its own interpretation of the person's situation but would instead listen attentively to the person and express empathy regarding personal factors raised in relation to non-compliance. Arguing with the person about the validity of the reasons offered or taking a heavy-handed approach in terms of condemning the person or a threat of imprisonment is likely to be counterproductive by promoting resistance to change.
>
> In the course of the dialogue it is important to note whether the person takes responsibility for their actions or whether blame is attributed to outside factors. While there may be legitimate reasons for non-compliance such as a medical emergency, for matters within the control of the participant, the participant needs to be called to account. An offender's failure to take responsibility for her or his actions may impede the healing process. Such a response may require a judicial officer to ask further questions such as requesting a more detailed explanation or asking "what did you do?" to facilitate the

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> taking of responsibility by the person. This approach applies equally to the participant's attitude to the offending that brought the participant before the court in the first place.
>
> Next, the court could remind the person about the goals and strategies the person set for themselves at the start, that is, the court could develop discrepancy. Then the court could ask the person what he or she intended to do about it and could support self-efficacy by providing positive feedback in relation to sound proposals suggested.
>
> If the person is unable to suggest a coherent strategy, then asking the person whether a short adjournment to enable her or him to think about it would be helpful, or the court could ask a series of questions to facilitate the person thinking about what needs to be done to address the problem. The nature of the questioning would depend upon the specific reasons the person offered as to why there was non-compliance.
>
> Upon successful completion of the pre-sentence order or adjourned sentencing period, the court can take the opportunity to review the participant's progress in open court and support and praise the participant for the progress made. The court can thereby reinforce the rehabilitation process. The court would also be able to take into account successful completion of the program in mitigation of sentence.[192]

Judge King 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.[193]

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[192] King, *supra* n. 182, at 103-104.
[193] *Id*.

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And 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 to or not. In addition to promoting the interests of public safety by reducing the risk of reoffending, 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.[194]

Trust

Another important way that personal interactions with the judge can positively influence an offender's internal motivation and behavior is identified by the social-psychology research in the field of "procedural justice." Studies in the field of procedural justice by Professors Tom Tyler and Yuen Huo show that when criminal defendants view court processes as fair and feel they have been treated with respect by caring and well-intentioned judges, they are more likely to cooperate with legal authorities and voluntarily engage in law-abiding behaviors.[195]

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.[196] 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 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.[197]

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[194] See, Peggy Hora, *Judicial Satisfaction When Judging in a Therapeutic Key*, 7 Contemporary Issues in Law (2004); Roger K. Warren, *Public Trust and Procedural Justice*, 37 Court Review 12, (2000).
[195] See, e.g., Tom R. Tyler & Yuen J. Huo, *Trust in the Law: Encouraging Public Cooperation with the Police and Courts* (Russell Sage Foundation, 2002).
[196] Tom R. Tyler , Robert Boeckmann, Heather J. Smith & Yuen J. Huo, *Social Justice in a Diverse Society* 5 (Westview Press 1997).
[197] *Id*. at 121-122; Tyler & Huo, *supra* n. 195, at 28-77.

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> (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.
>
> (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.[198]

Commenting on this body of research and "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]."[199]

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."[200] Researchers also suggest that judges create opportunities for litigants to participate more actively in the dispute-resolution process.[201] "Through their own actions," Tyler and Huo write, "judges can shape people's behavior by tapping into their intrinsic motivations."[202]

Tyler and Huo contrast this procedural-justice-based model of social and legal regulation with traditional deterrence strategies that seek to achieve

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[198]Tyler & Huo, *supra* n. 195; Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 Crime & Justice 283 (2003); Tom R. Tyler, *Why People Obey the Law* (Princeton University Press 2006).
[199] Lawrence W. Sherman & Geoffrey C. Barnes, Australian National University, Restorative Justice and Offenders' Respect for the Law, working paper (1997).
[200] Tyler & Huo, *supra* n. 195, at 163.
[201] E. Allan Lind & Tom R. Tyler, *The Social Psychology of Procedural Justice* 219 (Springer 2003).
[202] *Id*. at 26.

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compliance with the law through costly and inefficient surveillance strategies and uncertain threats of apprehension and punishment often met with resistance and hostility.[203] 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."[204]

Integrating Treatment and Community-Based Sanctions

Through application of the principles of EBP judges can effectively utilize rehabilitation and treatment programs to reduce offender recidivism and promote public safety. 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 respective offender risk levels.[205] 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.[206] Nor does adding a jail sentence to a sentence of probation reduce recidivism.[207]

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." [204]

Nevertheless, punishment, incarceration, and other sanctions proportionate in severity to the gravity of the offense certainly remain legitimate sentencing tools in appropriate cases 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

[203] *Id*. at 204-205.
[204] *Id*. at 27.
[205] D. A. Andrews, Ivan Zinger, Robert D. Hoge, James Bonta, Paul Gendreau, Francia T. Cullen, *Does Correctional Treatment Work? A Clinically Relevant and Psychologically Informed Meta-analysis.* 28 Criminology 396 (1990); Solicitor General of Canada, *The Effects of Punishment on Recidivism*, 7 Research Summary (2002); Paula Smith, Claire Goggin & Paul Gendreau, Center for Criminal Justice Studies, *The Effects of Prison Sentences and Intermediate Sanctions on Recidivism: General Effects and Individual Differences* (2002); Don M. Gottfredson, National Institute of Justice, *Effects of Judges' Sentencing Decisions on Criminal Cases* (1999); Oregon Department of Corrections, *The Effectiveness of Community Based Sanctions in Reducing Recidivism* (2002).
[206] Smith et al., *supra* n. 205, at 10.
[207] Gottfredson, *supra* n. 205, at 7-8.

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in the community. (In imprisonment cases, of course, correctional authorities can and should pursue recidivism-reduction strategies through in-custody offender-treatment programs and pre-parole and parole-release treatment programs.)

Even in cases involving nonviolent or less serious crimes, and moderate- to high-risk offenders, where recidivism reduction is a higher priority and more meaningful objective, punishment may still be appropriate on a just-deserts basis. Less frequently, incarceration may also still be in order to control offender risk in the short term. In many such cases, however, appropriate punishment 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 seeking 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 often be 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 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 be appropriate to the seriousness of the offenses for which offenders will be committed to the programs and to the risk levels of the committed offenders. 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) treatment programs must be integrated with other sentencing requirements, including, for example, any period of incarceration, custody in a day-reporting or work-release facility, or electronic monitoring. Proper integration of treatment programs and intermediate sanctions requires cooperation among the probation agency, the program provider, and corrections staff.

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The Cost-Effectiveness of EBP

There is strong evidence of the cost-effectiveness of well-implemented treatment programs. An exhaustive search of the peer-reviewed literature by researchers at the Treatment Research Institute identified 109 economic evaluations of substance-abuse treatment, including 51 articles not included in previous reviews and 17 unpublished reports.[208] The review found that "substance abuse treatment, especially when it incorporates evidence-based practice, results in clinically significant reductions in alcohol and drug use and crime." The review also found that "economic studies across settings, populations, methods, and time periods consistently find positive net economic benefits of alcohol and other drug treatment that are relatively robust. The primary economic benefits occur from reduced crime (including incarceration and victimization costs) and post-treatment reduction in health care costs."[209]

Perhaps the most comprehensive and compelling analyses of the cost-effectiveness of a wide variety of evidence-based programs are the three cost-benefit studies conducted by the Washington State Institute for Public Policy, mentioned earlier.[210]

In the most recent study, the Institute analyzed the taxpayer benefits resulting from three different assumptions: (1) that existing evidence-based programs in Washington would continue to be funded at current funding levels; (2) that existing programs would be expanded to serve 20% of the remaining eligible population; (3) that existing programs would be expanded to serve 40% of the remaining eligible population. The study found that the net benefits to taxpayers (benefits to taxpayers minus the cost to taxpayers of the evidence-based programs) resulting from the three scenarios was $1.1 billion, $1.9 billion, and $2.6 billion, respectively. The benefit-to-cost ratios of the three scenarios were $2.45, $2.55, and $2.60, respectively.[211]

The Institute's analyses are compelling for a number of reasons. First, they are exhaustive and rely solely on scientifically rigorous studies. In the most recent study, the Institute found and analyzed 571 rigorous comparison-group evaluations of adult and juvenile corrections and prevention programs.[212]

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[208] Belenko, *supra* n. 86
[209] Belenko, *supra* n. 86, at 2.

[210] Aos et al., *supra* n. 62; Aos et al., *supra* n. 68; Aos et al., *supra* n. 86.
[211] Aos, et al., *supra* n. 68, at 14
[212] *Id*. at 1, 27-34.

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Second, the analyses were conducted for the state legislature, and the estimates were explicitly constructed "cautiously."[213] In the recent study, recidivism effects were adjusted downward significantly (typically about 50%) from published results to account for a variety of potential sources of research bias.[214] Third, the benefits described in the latter study include only the benefits to taxpayers and victims resulting from crime reduction, not the benefits to taxpayers resulting from reduction of other health, welfare, and social costs.[215] Fourth, the benefits are also 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.[216]

[213] *Id*. at 16.
[214] *Id*. at 22-26.
[215] *Id*. at 8.
[216] *Id*. at 10.

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V. LOCAL SENTENCING AND CORRECTIONS POLICY REFORMS

Individual trial judges will be hard-pressed to consistently apply risk-reduction strategies without the cooperation of other critical criminal justice system agencies. Effective pursuit of risk-reduction sentencing strategies requires coordination between the court and other criminal justice agencies, especially prosecution, probation, and program providers.

Prosecutorial-charging, plea-bargaining, or probation-violation policies may obstruct court efforts to maximize the effectiveness of sentencing outcomes in reducing recidivism. In many jurisdictions, for example, the majority of sentences result from plea-bargaining processes in which the prosecution and defense reach an agreement on the sentence to be recommended to the court. Such agreements rarely, if ever, consider evidence of the likely impact of the stipulated disposition on the offender's future criminality, or the likely impact of other potential dispositions. As noted earlier, judges are not normally bound by such agreements, and in appropriate cases might require counsel to explain how a proposed plea agreement conforms with principles of EBP, or to explain why the court should accept the compromise if it does not.

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 properly 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 in accord with EBP.

The challenge of interagency collaboration in the criminal justice system is neither 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 improve sentencing effectiveness through the creation and operation of problem-solving courts and to address issues of criminal justice

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planning, substance abuse, overcrowding of jails and juvenile detention facilities, intermediate sanctions, security and emergency preparedness, domestic violence, foster-care reform, and delinquency prevention.[217]

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

1. Developing Community-Based Corrections Programs that Address the Criminogenic Needs of Felony Offenders

Courts can be effective advocates for the creation of corrections programs that address the criminogenic needs of appropriate offenders. For example, judges have often provided leadership in advocating for the development of substance-abuse, mental-health, and domestic-violence treatment programs as an important element of problem-solving courts. We have already discussed how drug courts have successfully reduced recidivism by effectively addressing the criminogenic needs of offenders. Courts can also insist that appropriate rehabilitation and treatment services be more closely coordinated with court decision-making processes. In 2004 the Conference of Chief Justices and Conference of State Court Administrators adopted a joint resolution calling upon each state to develop and implement an individual state plan to expand the use of the principles and methods of problem-solving courts into their courts.[218]

The initial task will often be 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 and for which offenders and offender needs they are currently used; how many offenders currently participate in them; what, if any, performance measures and performance evaluations currently exist; and the feasibility of

[217] Sacramento Criminal Justice Cabinet, *2000 Annual Report*, available at http://www.saccounty.net/criminal-justice-cabinet/pdf/cjc-annual-report-2000.pdf. (During the author's service as Chair of the Sacramento Criminal Justice Cabinet in the early 1990s, for example, the Cabinet addressed virtually all of these issues); see also Peggy McGarry & Becki Ney, Center for Effective Public Policy & National Institute of Corrections, NCJ 019834, *Getting it Right: Collaborative Problem Solving for Criminal Justice* (2006).
[218] CCJ & COSCA Joint Resolution 22 (July 29, 2004) available at http://cosca.ncsc.dni.us/Resolutions/CourtAdmin/Problem-SolvingCourtPrinciplesMethods.pdf.

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

2. Developing Community-Based Intermediate Sanctions Appropriate to the Nature of Committed Offenses and Offender Risks

As discussed earlier, the absence of appropriate intermediate sanctions programs at the local level will significantly hinder judicial efforts to reduce recidivism. Once again, courts can be effective advocates for the development and operation of appropriate intermediate sanctions programs. As with rehabilitation and treatment programs, the initial task may be a comprehensive review of existing intermediate sanctions to determine the feasibility of modification to better implement principles of EBP.

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

To pursue a risk-reduction strategy, trial judges must also 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. Offender data should include offender-risk and needs-assessment data, based on actuarial risk- and needs-assessment instruments. 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. Information about potential sentencing dispositions should include information about application of appropriate probation conditions to manage offender risk and facilitate the offender's treatment.

Pre-sentence investigations and reports are a traditional and natural source of appropriate offense and offender information. Oregon legislation that went into effect in January of 2006 requires that 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

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department or another entity."[219] Frequently, however, as we have noted, pre-sentence reports are not prepared in routine cases, and, even when they are, neither risk-assessment data nor program or dispositional data is normally contained in the reports. Other means of keeping sentencing judges informed about programs and available dispositions might need to be instituted. Whatever the source, there should be sufficient data to 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, to be ordered upon any violation or revocation of probation.

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 be unsuccessful in enhancing public safety without effective judicial and other professional education curricula on EBP. Unless sentencing judges, probation officers, prosecutors, and defense attorneys are knowledgeable about the research on EBP and skilled in applying principles of EBP to day-to-day sentencing decisions, they will be unable to fully and properly implement risk-reduction strategies. The education curriculum should include presentation and discussion of the research on EBP, as well as an opportunity to apply the principles of EBP 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 also encourage advocacy of the other local and state recidivism-reduction policy initiatives outlined here.

The core curriculum could be developed nationally by corrections and sentencing experts with the assistance of professional educators, adapted for use in specific jurisdictions, and incorporated into existing state and local professional education programming. Judicial education programs on EBP

[219] 2005 Or. Laws Ch. 473 § 1.

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have recently been conducted in a number of states, including Illinois and Washington.[220]

[220] Author's correspondence. (The Washington program was presented to the Washington District and Municipal Court Judges Association in June 2006. In Illinois, about 100 judges attended a two-day EBP training program in 2005. In addition, EBP principles have been incorporated into Illinois judicial seminars on an ongoing basis.)

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VI. STATE SENTENCING AND CORRECTIONS POLICY REFORMS

We earlier observed that effective sentencing to reduce recidivism is currently constrained by a number of state-level conditions and potential barriers that are outside the control of judges, but not outside their influence. In many states, existing state policies on sentencing, corrections, and criminal justice information may prohibit, restrict, or limit the ability of judges to promote public safety through sentences proven to reduce offender recidivism. Below, we describe four state-level policy initiatives that judges and local criminal-justice-policy teams can undertake to redress these constraints.

1. Including Risk Reduction as an Explicit Key Objective of State Sentencing Policy

Because most crimes are committed by repeat offenders, and we are becoming increasingly knowledgeable about how to reduce recidivism among repeat offenders, recidivism reduction should be a principal goal of effective sentencing policy. In most states, however, recidivism reduction has not been explicitly recognized as a key objective of state sentencing policies.[221] 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 15 years to establish specialized courts across the United States.[222] 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.[223] Indeed, the principal criterion by which the success of these problem solving courts has usually been evaluated is reduction of offender recidivism.

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[221] Reitz, *supra* n. 13, at 42-43. (The principal objective of state sentencing systems over the last 30 years has been the punishment and incapacitation of offenders through determinate sentencing and sentencing guidelines systems. Professor Reitz observes that sentencing systems designed to achieve offender risk-reduction "have been tried so far only on a limited basis in one or two states.")

[222] See *CCJ, supra* n. 83; Pamela M. Casey and David B. Rottman, National Center for State Courts, *Problem-Solving Courts: Models and Trends* (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.")

[223] *Id.*

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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 Judicial Conference Resolution adopted in 1997 requires sentencing judges to consider the likely impact of potential sentences on reducing future criminal conduct.[224]

2. Ensuring that State Sentencing Policy Allows Sufficient Flexibility for Sentencing Judges to Implement Risk-Reduction Strategies

In addition to formal recognition of risk reduction as an important objective of state sentencing policy, sentencing statutes, rules, and guidelines should provide sufficient flexibility that sentencing judges can impose sentences consistent with EBP without foreclosing or limiting such sentencing by strict, arbitrary, or unjustified sentencing mandates. Principal examples of existing mandates that sometimes interfere with sentencing outcomes that promote risk reduction are provisions that require lengthy terms of imprisonment or incarceration, prohibit the granting of probation, or set mandatory minimum terms of imprisonment or incarceration where neither the seriousness of all such offenses nor the risks presented by all such offenders warrant such sentences.[225]

As we observed above, the research indicates that risk of re-offense cannot be accurately assessed by relying exclusively on the type of offense committed or the offender's prior criminal history. It is important that state sentencing policy encourage the use of accurate risk-assessment instruments in such circumstances. As also noted earlier, the State of Virginia created a state sentencing commission charged with developing an offender-risk-assessment instrument designed to place 25% of its nonviolent offenders who would otherwise be incarcerated into alternative sanctions programs.[226] The National Center for State Courts subsequently conducted an independent evaluation of Virginia's risk-assessment instrument, finding that the instrument successfully predicted the likelihood of recidivism among the diverted offenders and that formal adoption of the instrument for statewide use would provide a net

[224] Marcus, *supra* n. 155.
[225] Justice Kennedy Commission, *supra* n. 14, at 26-27 (advocating the repeal of such provisions because they prevent sentencing courts from considering the unique characteristics of offenders).
[226] Brian J. Ostrom, Matthew Kleiman, Fred Cheesman, Randall M. Hansen & Neal B. Kauder, National Center for State Courts, *Offender Risk Assessment in Virginia* 9 (2002).

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annual financial benefit to the state.[227] Based on the National Center's recommendation, Virginia adopted the instrument for statewide use in 2003.[228]

3. 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 principles of EBP in sentencing is probably the absence of state financial and other 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, have recently expressed 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."[229] The statute requires the department to spend 50% of its program funding on evidence-based programs in 2007-2009, and 75% commencing in 2009.[230] The statute defines an "evidence-based program" as a "treatment or intervention program or service . . . that is intended to reduce the propensity of a person to commit crimes . . . incorporates significant and relevant practices based on scientifically based research . . . and is cost effective."[231]

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[232] and directed the Washington State Institute for Public Policy to study the net short-run and long-run fiscal savings to Washington State and local governments if evidence-based prevention and intervention options were implemented for persons with such disorders.[233] The Institute found that on average evidence-based treatments can achieve a 15-22% percent reduction in the incidence or severity of these disorders. The institute also found that evidence-based treatment of these disorders could achieve about $3.77 in benefits per dollar of treatment costs, and that the state

[227] *Id.*, at 6-7.
[228] Brian J. Ostrom & Neal B. Kauder, National Center for State Courts, *Risk Assessment: A New Approach to Sentencing Non-violent Offenders*, 10 Caseload Highlights (2004).
[229] 2003 Or. Laws Ch. 669.
[230] *Id.*
[231] *Id.*
[232] 2005 Wash. SB 5763 Ch. 504 §101 (3).
[233] 2005 Wash. SB 5763 Ch. 504 § 101.

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could generate $1.5 billion in net benefits for the citizens of Washington if the changes went forward.[234]

The Washington legislature also 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 and policies "including prevention and intervention programs, sentencing alternatives, and the use of risk factors in sentencing."[235] The Institute found that the adult, out-of-custody, evidence-based programs reduced recidivism by up to 17% and resulted in net benefits to taxpayers and victims ranging from $4,359 to $11,563 per participant. As we noted earlier, the Institute 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.[236]

State judges can bring these recent 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.

4. 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.[237] 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

[234] Steve Aos, Jim Mayfield, Marna Miller & Wei Yen, Washington State Institute for Public Policy, *Evidence-Based Treatment of Alcohol, Drug, and Mental Health Disorders: Potential Benefits, Costs, and Fiscal Impacts for Washington State* 1-2 (2006).
[235] 2005 Wash. SB 6094 Ch. 488 § 708.
[236] Aos, *supra* n. 68.
[237] See, Marc L. Miller & Ronald F. Wright, *The Wisdom We Have Lost: Sentencing Information and Its Uses*, 58 Stan. Law Rev. 361 (2005). (Such systems are often referred to as "sentencing information systems." There is considerable experience with the development and use of such systems in Scotland, New South Wales, Canada, and Australia. The very limited development of such systems in the United States has been decried by several prominent sentencing experts.)

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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 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.[238] In 2001 the first recommendation of the Oregon Criminal Justice Commission's "Public Safety Plan" was that Oregon should develop an offender-based data system to track an offender through the criminal justice system and facilitate data-driven pretrial release, sentencing, and correctional supervision decisions.[239] In the meantime, Oregon's Multnomah County courts have constructed electronic sentencing-support tools that display for judges and advocates the recidivism outcomes of various dispositions for similar offenders sentenced for similar crimes.[240]

[238] 1997 Or. Laws, Ch. 433 (HB 2229).
[239] Marcus, *supra* note 155.
[240] *Id.*

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VII. CONCLUSION

Dealing with the problem of crime is primarily a state and local responsibility. Almost 95% of felony offenders are convicted in state, not federal, courts. Thirty years ago, at a time when violent crime rates had tripled, people were fed up, and efforts to treat and rehabilitate criminal offenders did not seem to work, most states enacted sentencing and corrections policies that sought 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. The most sophisticated research credits the expanded use of imprisonment and incarceration with about 25% of the crime-reduction effect over the last 15 years. 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 12% over the last ten years, and California crime rates decreased 40-50%. In New York, on the other hand, the incarceration rate *decreased* 14% over the same period and crime rates decreased *60%,* even more than in California. California's incarceration rate is 30% higher than New York's, but New York's violent crime rate is 13% lower than California's, and its property crime rate is 37% lower.[241]

Moreover, as the number of incarcerated prisoners continues to expand, the benefits of incarceration as a crime-control strategy increasingly diminish—or disappear altogether. For some lower-level offenders the costs of imprisonment now exceed the costs saved through crime reduction. The benefits of incarceration in reducing crime are also offset by the greater likelihood that incarcerated offenders will commit further crimes upon release. Targeted use of evidence-based alternatives to imprisonment is more effective in reducing crime rates.

Our reliance on incarceration as a crime-control strategy over the past 30 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. Seventy-five percent of those imprisoned every year are convicted of nonviolent

[241] Uniform Crime Reports, *supra* n. 16; Bureau of Justice Statistics, supra, note 20; Bureau of Justice Statistics NCJ161132, Prison and Jail Inmates 1995 (1996).

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offenses, and there is evidence that the risk level of the average prison inmate has actually declined over the last 20 years.[242]

Our current over-reliance on incarceration has resulted in the vicious cycle of historically high rates of offender recidivism that in turn fuel even higher rates of incarceration. Yet today, unlike 30 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%.[243] We also know much more than we did 30 years ago about how to motivate and assist offenders in accepting responsibility for changing their antisocial and criminal behaviors. Today, there are more-effective ways to control crime that do not incur the costly, harmful, and unfair consequences of our current policies.

In 2002, three eminent researchers reviewed contemporary American corrections practices in light of corrections research findings over the past two decades and concluded "that what is done in corrections would be grounds for malpractice in medicine."[244] Over the past five years, the medical profession has launched two major national initiatives to expand the use of evidence-based practice in medical care. The first initiative, the 100,000 Lives Campaign, saved an estimated 122,000 lives over 18 months.[245] In 2006, the medical profession inaugurated the 5 Million Lives campaign to prevent five million incidents of medical harm over the next two years.[246] Likewise, the judicial and corrections professions should now move toward an evidence-based practice to avoid ineffective and harmful corrections interventions.[247]

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[242] See, e.g., Kathleen Auerhahn, *Dangerousness and Incapacitation: A Predictive Evaluation of Sentencing Policy Reform in California* (Doctorate Dissertation, University of California, Riverside), National Criminal Justice Reference Service 189734 (2000)

[243] Aos, et al., *supra* n. 108. 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. To some, a 10% reduction in recidivism may not sound like a lot, but based on their calculations researchers at the Washington State Institute for Public Policy point out that "it is important to note that even relatively small reductions in recidivism rates can be quite cost–beneficial. For example, a 5 percent reduction in the reconviction rates of high risk offenders can generate significant benefits for taxpayers and crime victims." *Id*., at 4.

[244] Latessa et al., *supra* n. 113, at 47.

[245] The initiatives are led by the Institute for Healthcare Improvement, a non-profit organization founded in 1991 to improve the quality of health care throughout the world. See, http://www.ihi.org/IHI/Programs/Campaign/Campaign.htm?TabId=1

[246] *Id.*

[247] Latessa et al., *supra* n. 113.

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It's all about targeting. 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 30 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 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 policies that target those offender risks and criminogenic needs to be addressed, and then address those risks and needs in the most effective way possible. Principles of EBP provide a sound scientific foundation for such policies.

In the 1970s we lacked any reliable means of predicting offender risk or assessing offender needs in individual cases, or of identifying those offenders most amenable to treatment. Today, we know that the nature of an offender's current offense and prior criminal history are insufficient, standing alone, as a basis to accurately assess risk or criminogenic needs. Today, a wide variety of validated and reliable actuarial risk/needs-assessment tools, both general and specialized, exist. They are indispensable to any evidence-based effort to target offenders. The risk and needs principles of EBP require use of risk-assessment tools in any rational effort to determine the most appropriate candidates for diversion, treatment, probation, or intermediate sanctions programs. Risk-assessment tools are also critical in determining the appropriate offender control mechanisms that may be required, as well as the appropriate probation conditions to be imposed. They are important in determining appropriate responses to violations of probation as well.

Unfortunately, risk-assessment data and other relevant offender information are rarely available to sentencing judges today. Offender-based sentencing information systems are also a rarity.

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The treatment and responsivity principles of EBP inform us that effective interventions: are cognitive-behavioral; emphasize positive reinforcements, and certain and immediate negative consequences; are appropriate to the offender's gender, culture, learning style, and stage of change; are based on a chronic-care model of care requiring continuity, aftercare, and support; require the active involvement of the sentencing judge in securing the offender's commitment to the treatment process and compliance with treatment conditions; and require continuous monitoring and evaluation of both program operations and offender outcomes. These principles also identify those treatment programs that *do not work*, an offender's participation in which can cause real harm both to the offender and to the community.

Policy makers and criminal justice practitioners also need to get outside the box that defines punishment and rehabilitation as an either/or proposition. The sentencing attitudes of the general public reflect a more balanced, evidence-based view of sentencing than many policy makers and practitioners appear to hold.

Intrinsic motivation and trust are important conditions of successful offender compliance and treatment. Unless the offender is internally motivated to change his or her behaviors, and trusts that sentencing and corrections authorities are fair-minded and that sentencing and corrections processes are fair, meaningful behavioral change is not likely to occur. The manner in which authorities in general, and judges in particular, communicate with the offender, and the sensitivity that they demonstrate to the stages and dynamics of the offender's behavior change process, can be critical success factors in supporting the development of intrinsic motivation and trust on an offender's part.

Finally, it is important that treatment be integrated with any sanctions imposed, e.g., by staying a period of incarceration pending successful compliance and program completion. Sanctions alone will neither reduce recidivism nor result in any positive behavioral change. On the other hand, treatment alone may not provide the punishment or behavioral controls that the judge concludes are appropriate or necessary. The sanctions imposed may interfere with the provision or effectiveness of the treatment mandated. If both sanctions and treatment are ordered, care must be taken that the several components of the sentence are integrated and do not conflict.

Policy makers and criminal justice practitioners also need to get outside the box that defines punishment and rehabilitation as an either/or proposition. The sentencing attitudes of the general public reflect a more balanced, evidence-based view of sentencing than many policy makers and practitioners appear to hold. The public seeks personal safety and security, and believes in both punishment and rehabilitation as legitimate objectives that contribute to public safety. Every offender should be punished fairly in proportion to the blameworthiness of his conduct. Every offender ought to be held accountable for his criminal behavior. At the same time, an effective sentence should also always seek to promote the rehabilitation of the offender to avoid or reduce

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the risk of any future victimization and threat to public safety. Every offender also ought to be assisted, in every practical way possible, to accept accountability for his or her own future behavior. Policies that expect to control crime only by punishing the offender's past misbehavior, without any meaningful effort to positively influence the offender's future behavior, are shortsighted, ignore overwhelming evidence to the contrary, and needlessly endanger public safety.

Diligent application of principles of EBP to state sentencing practices and processes will restore much-needed balance to state sentencing systems that have swung from one extreme to another over the past 30 years, in neither instance proving effective in addressing crime. Current sentencing policies demand too little of most criminal offenders, often merely shuttling offenders in and out of lock-up at great public cost and expense without requiring—or even encouraging—offenders to accept any responsibility for their own future behaviors. In many states, current polices demand too little of judges as well. Under many state determinate-sentencing systems, sentencing decisions are simply the result of mathematical calculations based upon mechanical application of prescribed sentencing rules, grids, or guidelines that provide judges neither incentive nor opportunity to favorably shape an offender's future behavior.

Diligent application of principles of EBP to state sentencing practices and processes will require interagency cooperation, as well as realignment of state and local sentencing and corrections policies, to conform to those principles. Without judicial support and advocacy that cooperation and realignment are unlikely to occur. Judges are natural advocates of principles of EBP. More so than anyone, judges are committed to evidence-based dispute resolution. In addition, there is no responsibility that judges take more seriously than felony sentencing. It is a grave responsibility entrusted to judges alone. Every felony trial judge has also experienced the frustration and discouragement that accompanies the seemingly endless stream of repeat offenders who file daily through our criminal justice system's revolving doors. We noted earlier that the National Center for State Court's survey of state court leaders last year found that the most frequently heard complaints from state judges hearing felony cases were about the high rates of recidivism among felony offenders, the ineffectiveness of traditional probation supervision to reduce recidivism, the lack of appropriate sentencing alternatives, and restrictions on judicial sentencing discretion that limited the ability of judges to sentence more fairly and effectively.

Similar widespread complaints among judges caused state court judges to assume a leadership role over the last 15 years in developing and overseeing

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drug courts and other problem-solving courts. Those courts have helped to identify and define the evidence-based practices that have made so many of them successful. State judges now have the opportunity to lead state criminal justice systems into a new era beyond drug courts by advocating the expanded application of principles of EBP to sentencing proceedings in all criminal cases. The potential application of EBP to sentencing in all criminal cases challenges state judges to again assume their leadership role in helping to create sentencing policies, practices, and processes that effectively reduce recidivism among targeted offenders.

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