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EVIDENCE-BASED JUDICIAL DISCRETION: PROMOTING PUBLIC SAFETY THROUGH STATE SENTENCING REFORM

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In this speech delivered for the annual Justice William J. Brennan, Jr., Lecture on State Courts and Social Justice, the Honorable Michael Wolff offers a new way of thinking about sentencing. Instead of attempting to limit judicial discretion and increase incarceration, states should aim to reduce recidivism in order to make our communities safer. Judge Wolff uses the example of Missouri's sentencing reforms to argue that states should adopt evidence-based sentencing, in which the effectiveness of different sentences and treatment programs are regularly evaluated. In pre-sentencing investigative reports, probation officers should attempt to quantify—based on historical data—the risk the offender poses to the community and the specific treatment that would be most likely to prevent reoffending. Judges, on their own, lack the resources to implement all of these recommendations; probation officers and others involved in sentencing should receive the same information—

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risk assessment data—and their recommendations should become more influential as they gain expertise.

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INTRODUCTION

We Americans put more people behind bars per capita than any other country in the western world. But this high rate of incarceration is not necessarily helping to reduce crime. In fact, when we put the wrong people in prison, we make them—and the problem of crime—worse. As we come to realize this, I believe a new way of thinking about sentencing is emerging around the country. This new way of thinking, which actually may not be so new, focuses on sentencing outcomes as a means of putting public safety at the top of our concerns. Sentencing is a complex topic that needs to be approached with humility, an open mind, and common sense. I believe we have the analytical tools to create a system that minimizes recidivism and maximizes public safety.

Let me begin with a case from Missouri that typifies the traditional way of thinking. The defendant was a thirty-seven-year-old construction worker who lived, and owned rental property, in a rural Ozark Mountain community in southern Missouri. He had sole custody of his two small children after his wife had moved to another state. The sheriff came to the defendant's apartment after one of his tenants called to complain of an altercation. While in the apartment, the sheriff noticed the remains of a marijuana cigarette and arrested the defendant. He was charged with possession with intent to distribute. Despite the fact that there was no evidence of distribution, his defense attorney persuaded him to plead guilty. He was sentenced to a term of years, with 120 days in prison and the remainder of the sentence on probation.¹

This was one of the cases that Professor Robert J. Levy and I studied in an annual workshop of Missouri judges and law students at St. Louis University School of Law in the early 1990s. The participating judges from urban areas were surprised that the sheriff made the arrest, shocked that the prosecutor issued a charge, dismayed at the role of defense counsel, and amazed by the sentence. The judges and students agreed that this defendant should not have been sent to prison.

Their consensus is supported by statistics. Recidivism rates for offenders who receive probation and community treatment generally are low, unlike recidivism rates following prison, which are often two to three times that of probation (depending on the offense).² The 120-day "shock" sentence this man received is associated with recidivism rates only slightly lower than regular prison sentences.³

Over the years, I often have wondered: Who took care of the defendant's children while he was in prison? Was the defendant employable after prison? But lately, when thinking of this case (and many similar cases), I think: Enough about this defendant; what about the community's interests—*our* interests? Specifically, did he

¹ The 120-day sentence is referred to as "shock probation." The statute, MO. REV. STAT. § 559.115 (2000), authorizes the judge to put the offender on probation after 120 days in prison, usually upon receiving a report from the prison authorities as to the offender's behavior. See MO. SENTENCING ADVISORY COMM'N, RECOMMENDED SENTENCING USER GUIDE 4, 8, 12 (2007), available at http://www.mosac.mo.gov/file/User%20Guide%202007-2008_1.pdf (describing shock probation statute).

² See *infra* Appendix A (recidivism rates by offender type and sentence); *infra* Appendix B (recidivism rates by crime and sentence).

³ See *infra* Appendix A (showing difference of only about three percent in recidivism rates between shock treatment and imprisonment). See generally Michael Marcus, *Archaic Sentencing Liturgy Sacrifices Public Safety: What's Wrong and How We Can Fix It*, 16 FED. SENT'G REP. 76, 76 (2003) (arguing shock incarceration programs do not work).

commit other offenses? What effect did the defendant's imprisonment have on the life outcomes of his children? Are we safer or less safe as a result of the punishment he received?

I

THE PROBLEM OF RECIDIVISM: OUR PUNISHMENT SCHEME IS NOT WORKING AND PEOPLE ARE READY FOR CHANGE

A. *Justice Kennedy's Challenge: Reducing Recidivism*

Nearly five years ago, in a speech to the American Bar Association, Justice Anthony Kennedy noted the extraordinary rate of incarceration in this country—one in 143 persons⁴—compared with the average rate of European nations—about one per 1000.⁵ He summed up the sad state of American sentencing in just a dozen words: “Our resources are misspent, our punishments too severe, our sentences too long.”⁶

Are we better off now—in terms of public safety—than we were five years ago when Justice Kennedy spoke? I think not. Today, there are even more offenders in prison than in 2003.⁷ In state and federal prisons and local jails, there are more than two million inmates.⁸

The overreliance on prison as punishment is making us less safe, not more. When offenders are sent to prison, they are more likely to reoffend than if they serve probation or community-based sentences.⁹

⁴ In 2008, a Pew report found that more than one of every one hundred adults in the United States is now incarcerated. PEW CENTER ON THE STATES, *One in 100: Behind Bars in America* 5 (2008), available at http://www.pewcenteronthestates.org/report_detail.aspx?id=35904; see also Adam Liptak, *More Than 1 in 100 Adults Are Now in Prison in U.S.*, N.Y. TIMES, Feb. 29, 2008, at A14 (reporting that new report estimates 2.3 million of 230 million adults in United States are incarcerated in prison or jails).

⁵ Justice Anthony M. Kennedy, Speech at the ABA Annual Meeting (Aug. 9, 2003), in 16 FED. SENT'G. REP. 126, 127 (comparing United States to “countries such as England, Italy, France, and Germany”).

⁶ *Id.*

⁷ Compare PAIGE M. HARRISON & JENNIFER C. KARBERG, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISON AND JAIL INMATES AT MIDYEAR 2003, at 1 (2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim03.pdf> (“At midyear 2003 the Nation's prisons and jails incarcerated 2,078,570 persons.”), with WILLIAM J. SABOL, TODD D. MINTON & PAIGE M. HARRISON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISON AND JAIL INMATES AT MIDYEAR 2006, at 1 (2007), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim06.pdf> (“During the 12 months ending June 30, 2006, the number of inmates in the custody of State and Federal prisons and local jails increased 2.8% to reach 2,245,189.”).

⁸ SABOL, MINTON & HARRISON, *supra* note 7, at 1.

⁹ See *infra* Appendix A (showing that in Missouri, recidivism rate for probationers is lower than for imprisoned offenders).

Most offenders we send to prison, moreover, are sentenced for nonviolent offenses.¹⁰

Legal scholars who study sentencing are tempted to focus primarily on the federal system.¹¹ This is odd, of course, because only about six percent of felony sentencing in the United States occurs in the federal courts.¹² For all the attention paid to it, federal sentencing is not a big factor in the day-to-day dispensing of justice in the United States. However, some of the attitudes that shaped the federal sentencing system have similarly influenced state legislators, other policymakers, and state courts.

In state courts, there are over a million felony sentencings per year,¹³ of which over three-fourths are for nonviolent offenses.¹⁴ In Missouri, about ninety-seven percent of those sent to prison eventually return to our communities.¹⁵ Nationally, about 700,000 offenders have been released annually from federal or state prison in recent years.¹⁶ These are daunting numbers.

¹⁰ For example, in Missouri, approximately eighty percent of the offenders newly incarcerated from 1991 to 2007 were nonviolent offenders. Memorandum from David Oldfield, Dir. of Research & Evaluation, Mo. Dep't of Corr., to author (Jan. 22, 2008) (on file with the *New York University Law Review*).

¹¹ See Douglas A. Berman & Steven L. Chanenson, *The Real (Sentencing) World: State Sentencing in the Post-Blakely Era*, 4 OHIO ST. J. CRIM. L. 27, 27–28 (2006) (“Despite the fact that *Blakely* evaluated state sentencing procedures, a great deal of the resulting buzz revolved around how this decision might affect the federal scheme.”).

¹² MATTHEW R. DUROSE & PATRICK A. LANGAN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2004, at 1 (2007), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fssc04.pdf> [hereinafter DUROSE & LANGAN, FELONY SENTENCES IN STATE COURTS] (“[Ninety-four percent] of felony convictions occurred in State courts, the remaining [six percent] in Federal courts.”); see also ROGER K. WARREN, EVIDENCE-BASED PRACTICE TO REDUCE RECIDIVISM: IMPLICATIONS FOR STATE JUDICIARIES 1 n.1 (Crime and Justice Inst. & Nat'l Inst. of Corr., Community Corr. Div. 2007), available at <http://www.nicic.org/Library/022843> (citing MATTHEW R. DUROSE & PATRICK A. LANGAN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, STATE COURT SENTENCING OF CONVICTED FELONS, 2002, tbl.1.1 (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/scscf02.pdf>) (noting that in 2002, federal courts convicted 63,217 people, while state courts convicted 1,051,000). In 2004, the last year for which the Bureau of Justice Statistics has published these statistics, federal courts convicted 66,518 persons, while state courts convicted an estimated 1,078,920, of felonies. DUROSE & LANGAN, FELONY SENTENCES IN STATE COURTS, *supra*, at 2.

¹³ DUROSE & LANGAN, FELONY SENTENCES IN STATE COURTS, *supra* note 12, at 2.

¹⁴ *Id.*

¹⁵ E-mail from David Oldfield, Dir. of Research & Evaluation, Mo. Dep't of Corr., to author (Feb. 7, 2008, 16:41 CST) (on file with the *New York University Law Review*) (reporting that, in Missouri, 99.7% of offenders sent to prison in 2007 were eligible for release and that only 3.2% of those incarcerated on December 31, 2007, were not eligible for parole).

¹⁶ WILLIAM J. SABOL & HEATHER COUTURE, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISON INMATES AT MIDYEAR 2007, at 4 tbl.4 (2008), available at <http://>

Recently, the Missouri Department of Corrections analyzed the rates of recidivism for the twenty-five most frequently sentenced crimes from 1995 to 2005.¹⁷ Most of these crimes were nonviolent offenses.¹⁸ Felony stealing is an example: Of the 13,000 offenders sentenced to probation or a community sentence for felony stealing, 19.1% committed another offense.¹⁹ Of the approximately one thousand offenders sent to prison on 120-day sentences for felony stealing, 45.1% committed a subsequent offense.²⁰ And of the 1,921 offenders who went to prison for longer periods for felony stealing, nearly half (48%) reoffended.²¹ The higher recidivism rates for prison sentences may not prove that prison causes increased recidivism (because the more dangerous offenders are probably more likely to be sentenced to prison), but they are cause for concern. If prison is criminogenic—that is, if it encourages or teaches offenders to commit further offenses²²—then we need to find effective punishments that do not make the problem worse.

The higher rate of recidivism for those in prison does not necessarily mean that imprisonment is a poor punishment. Perhaps public safety is improved by incarcerating a large number of offenders—indeed, this may be true for violent offenders. But we have not reserved the spaces in prison for the most dangerous and most likely to repeat.²³ We have, in fact, thrown the net far more widely and

www.ojp.usdoj.gov/bjs/pub/pdf/pim07.pdf (noting that 698,459 offenders were released from state or federal prison in 2005, and 713,473 were released in 2006).

¹⁷ See *infra* Appendix A. The Department of Corrections defines recidivism by two measures: (1) the first incarceration (for a technical violation or for a new sentence) following the start of the new probation or the release from prison; and (2) the first new conviction (resulting in prison or probation) following the start of the new probation or release from prison. 2007 MO. SENTENCING ADVISORY COMM'N RECOMMENDED SENT'G BIENNIAL REP. 42, available at <http://www.mosac.mo.gov/file/MOSAC%20Commission%20Report%202007%20Final.pdf> [hereinafter MO. BIENNIAL REP.]. Recidivism rates obviously can be calculated only for reported crimes. Thus, the recidivism statistics are inherently less than complete: Not all crimes are reported, and even if reported, they may not be prosecuted for various reasons, such as weak evidence or lack of cooperation by the victim. However, some of the crimes that are not reported as new convictions are included in the recidivism calculation when an offender is returned to prison after committing a technical violation.

¹⁸ See *infra* Appendix A.

¹⁹ See *infra* Appendix B.

²⁰ *Id.*

²¹ *Id.*

²² See Robert E. Pierre, *Adult System Worsens Juvenile Recidivism, Report Says*, WASH. POST, Nov. 30, 2007, at A14 (“Youths tried as adults and housed in adult prisons commit more crimes, often more violent ones, than minors who remain in the juvenile justice system, a panel of experts appointed by the Centers for Disease Control and Prevention said in a new report.”).

²³ See, e.g., Douglas A. Berman, *Tweaking Booker: Advisory Guidelines in the Federal System*, 43 HOUS. L. REV. 341, 382 (2006) (“According to a report from the Sentencing

included many more offenders who, after prison, will be more likely to commit crimes than they were before they went to prison. Nearly all of them will be back in our communities, and many will commit similar offenses or, perhaps, will have graduated to worse forms of crime based on their experiences behind bars or their diminished life prospects upon leaving. Many offenders, unfortunately, are repeat offenders.²⁴

The large increase in the prison population has not made us safer. When the era of prison expansion was beginning in the 1980s, the worst prisoners were already being incarcerated. The expansion of prisons since then has resulted in incarcerating large numbers of non-violent, “marginal” offenders who then become recidivists in greater numbers than they would have had they been punished outside of prison.²⁵ Apparently, nonviolent offenders are learning the wrong lessons in prison.

We must acknowledge that the reason for sentencing is to punish, but if we choose the wrong punishments, we make the crime problem worse, punishing ourselves as well as those who offend. If we are to think rationally about what is in our own best interest—that is, public safety—we should try to determine what reduces recidivism. We must pay particular attention to which sentences make recidivism more likely, which sentences are ineffectual at reducing recidivism, and which programs and punishment-treatment regimens have the best outcomes.

Project, over one-third of the federal prison population is comprised of first-time, non-violent offenders, and nearly three-fourths of this population are non-violent offenders with no history of violence.” (citing THE SENTENCING PROJECT, THE FEDERAL PRISON POPULATION: A STATISTICAL ANALYSIS (2004), available at <http://www.sentencingproject.org/pdfs/federalprison.pdf>)).

²⁴ Cf. Michael Marcus, *Unacceptable Recidivism* (Aug. 25, 2000), http://ourworld.compuserve.com/homepages/SMMarcus/the_problem.html (offering statistics, based on Judge Marcus’s tracking of new prisoners in Portland, Oregon, for one month, to show that over half of all persons jailed in Portland in July 2000 had also been jailed during the previous year); see also Michael Marcus, *Smarter Sentencing: On the Need to Consider Crime Reduction as a Goal*, 40 CT. REV. 16, 19 (2004), available at http://aja.ncsc.dni.us/courtrv/cr40_3and4/CR40-3Marcus.pdf (“Of the 2,395 people jailed in Portland, Oregon, during July 2000, 1,246 had been jailed in Portland on some other occasion within the previous 12 months.”).

²⁵ Don Stemen, *Reconsidering Incarceration: New Directions for Reducing Crime*, 19 FED. SENT’G REP. 221, 224 (2007) (citing FRANKLIN E. ZIMRING & GORDON HAWKINS, *CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA* (1997)).

*B. Is the Public Ready for Reform?*²⁶

When we examine issues of crime and sentencing, we should pay attention to public perceptions and attitudes, for the public is often wiser than the politicians who exploit these issues. A recent survey for the National Center for State Courts found:

[First, the public consistently favors] a much tougher approach in sentencing those convicted of violent crimes than . . . in sentencing non-violent offenders.

[Second,] Americans think rehabilitation is a more important priority than punishment and overwhelmingly believe that many offenders can, in fact, be successfully rehabilitated. But most see America's prisons as unsuccessful at rehabilitation.

. . . .

[Third, there are high] levels of public support . . . for alternatives to a prison sentence like probation, restitution, and mandatory participation in job training, counseling or treatment programs, at least for non-violent offenders. The public is particularly receptive to using such alternatives in sentencing younger offenders and the mentally ill.²⁷

In the federal legal system and in certain states, “sentencing reform” is once again on the agenda. The recent decisions of the Supreme Court in *Gall v. United States*²⁸ and *Kimbrough v. United States*²⁹—which made it plain that the federal sentencing guidelines are advisory, not mandatory—have sparked debate about federal sentencing. At the same time, the American Law Institute has continued to revise the Model Penal Code on state sentencing.³⁰ In addition, the

²⁶ I am generally skeptical of proposals labeled as reform. See Michael A. Wolff, *Missouri's Information-Based Discretionary System*, 4 OHIO ST. J. CRIM. L. 95, 120 (2006) (“Based on my previous government work I avoid the use of the word ‘reform.’ When reformers reform, they usually convey the message that the people in the system to be reformed are defective.”). Reform usually does not work, in my experience, without the involvement of those who do the day-to-day work in the system.

²⁷ PRINCETON SURVEY RESEARCH ASSOCS. INT’L FOR THE NAT’L CTR. FOR STATE COURTS, THE NCSC SENTENCING ATTITUDES SURVEY: A REPORT ON THE FINDINGS 2 (2006), available at http://www.ncsonline.org/D_Research/Documents/NCSC_Sentencing_Survey_Report_Final060720.pdf [hereinafter PRINCETON SURVEY].

²⁸ 128 S. Ct. 586, 595 (2007) (holding that “extraordinary” circumstances are not required to justify sentence outside Guidelines range).

²⁹ 128 S. Ct. 558, 573 (2007) (holding that federal district courts’ freedom to deviate from hundred-to-one crack cocaine sentencing ratio did not violate sentencing statute’s anti-disparity provision).

³⁰ See, e.g., MODEL PENAL CODE: SENTENCING (Preliminary Draft No. 5, 2007) (approved in part at ALI Annual Meeting, Aug. 12, 2007) (proposing new sentencing guidelines incorporating, for example, instruments to assess risk of recidivism). For a dissenting view as to the approach taken in the Model Penal Code drafts, see Michael Marcus, *Responding to the Model Penal Code Sentencing Revisions: Tips for Early Adopters and*

ABA Kennedy Commission has recently made a number of recommendations based on the following principles:

- (1) [L]engthy periods of incarceration should be reserved for offenders who pose the greatest danger to the community and who commit the most serious offenses.
- (2) Alternatives to incarceration should be provided when offenders pose minimal risk to the community and appear likely to benefit from rehabilitation efforts.³¹

To apply the Commission's principles and to get sentencing right, we must focus on public safety. This requires acknowledging the centrality of discretion and the need to inform decisionmakers as to the risks and needs of offenders. Also, we must measure the effectiveness of treatment programs and the outcomes of sentences.

Judicial discretion—and, for that matter, discretion on the part of law enforcement officers, prosecutors, defense attorneys, probation officers, prison supervisors, and parole boards—is inherent in the system. To make better discretionary decisions, it is important to use data to help us determine which people to incarcerate and which to supervise in the community. The more successful we are at making these discretionary judgments, the safer we will be.

When Justice Kennedy eloquently addressed this problem to the ABA, he rightly said, “The subject is the concern and responsibility of every member of our profession and of every citizen. This is your justice system; these are your prisons.”³² The admonition that we are responsible for this system is helpful but has not yet produced change. The key, I believe, is to appeal to our mutual self-interest.

II

BIG IDEAS IN SENTENCING: REFORMS THAT HAVE FAILED TO ADDRESS THE PROBLEM OF RECIDIVISM

There is no single solution to getting sentencing right. As we have seen in Part I, prison does not reduce recidivism; prison is associ-

Power Users, 17 S. CAL. INTERDISC. L.J. 67, 72 (2007). The Model Penal Code reporter, Professor Kevin Reitz of the University of Minnesota Law School, deserves credit for his thoughtful responses to critiques of the Code's limited retributivism approach and for placing a greater emphasis on public safety and outcomes in later draft revisions. Compare Marcus, *supra*, at 74–75 (“The [2004] revision has essentially . . . eschew[ed] responsibility for improvement of the public safety performance of sentencing”), with MODEL PENAL CODE: SENTENCING § 6B.09(1) (Preliminary Draft No. 5, 2007) (supporting development of instruments to determine “risk that felons pose to public safety”).

³¹ ABA JUSTICE KENNEDY COMM'N, REPORTS TO THE HOUSE OF DELEGATES 1 (2004) [hereinafter ABA KENNEDY COMM'N]; see *id.* at 9–10 (listing recommendations).

³² *Id.* at 3.

ated with recidivism. A singular approach to reducing sentencing disparities also may be misguided, because disparities can be reduced by sentencing more offenders to prison, which may lead to more recidivism. Two “big ideas”—the recent preference for incarceration and the goal of reducing disparities—are discussed below in Subparts II.A and II.B, respectively. Subpart II.C shows how these ideas became influential after the goal of rehabilitation was discredited and people began to believe that simply “nothing works.” This, I hope, will lead to more nuanced approaches—a series of “small ideas” I lay out in Part III.

A. *The Traditional Preference for Incarceration*

In the past, sentencing “reform” was characterized by “big ideas”—mandatory minimum sentences,³³ prescriptive sentencing guidelines,³⁴ “truth in sentencing”³⁵ (whatever that means), and abolition of parole.³⁶ All of these big ideas are based on a preference for incarceration and a mistrust of discretion.

³³ In response to public concern about crime and the belief that many offenders are released too soon, state and federal lawmakers passed laws severely increasing sentences for repeat offenders. John Clark, James Austin & D. Alan Henry, “*Three Strikes and You’re Out*”: A Review of State Legislation, NAT’L INST. JUST. RES. BRIEF (Dep’t of Justice), Sept. 2007, at 1, available at <http://www.ncjrs.org/pdffiles/165369.pdf>.

³⁴ In describing the federal sentencing guidelines, the Fifth Circuit Court of Appeals explained:

The sentencing guidelines do not merely change the procedures used to impose sentences, they initiate an historic shift in modern penology. The guidelines are designed to create uniform, determinate sentences based upon the crime committed, not the offender. Congress abandoned the rehabilitation model that shaped penology in the Twentieth Century. . . . By enacting the sentencing guidelines, Congress returned federal sentencing to an earlier philosophy that the punishment should fit the crime and that the main purpose of imprisonment is punishment. . . . To accomplish this goal, Congress limited the discretion of district judges through the guidelines and made the sentence imposed determinate by abolishing parole. The guidelines provide the analytic framework needed to create uniform sentences. The accompanying abolishment of parole ensures that the imposed sentences will be served.

United States v. Mejia-Orosco, 867 F.2d 216, 218–19 (5th Cir. 1989).

³⁵ Truth-in-sentencing laws require that persons convicted of violent crimes serve at least eighty-five percent of their sentence. See Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 13704 (2000) (requiring states to implement such laws in order to be eligible to receive grant awards under § 13704).

³⁶ Starting with Maine in 1975, fourteen states and the federal government, to varying degrees, abolished parole boards and their ability to release prisoners early. See John F. Pfaff, *The Continued Vitality of Structured Sentencing Following Blakely: The Effectiveness of Voluntary Guidelines*, 54 UCLA L. REV. 235, 242–43 tbl.1 (2006) (citing U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: TRUTH IN SENTENCING IN STATE PRISONS 3 tbl.2 (1999), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/tssp.pdf>) (listing years during which states abolished parole boards).

I am here to suggest instead, with hope and with some evidence, that there are some smaller ideas that we should pursue. Each small idea is something that may work for a particular category of offender. We should focus on identifying what reduces recidivism and what does not.³⁷ Each time we find an approach that seems successful, we should be prepared to defend its efficacy with data about its results.

In some respects, our search for answers will involve trying to shake the system free of some of the big ideas that did not work as intended. For example, a preference for incarceration was a central idea in the development of the federal sentencing guidelines. The Sentencing Reform Act was enacted in 1984,³⁸ and the federal sentencing guidelines took effect in 1987,³⁹ but the preference for incarceration predates the federal sentencing guidelines. The preference was a product of its time and was influential even outside the federal system.⁴⁰ As a result, the rates of incarceration in the federal and state systems began to climb several years before the federal guidelines, with these rates increasing sixfold in state and federal courts since the 1970s.⁴¹ Missing throughout, however, was any evidence that increased incarceration makes us safer.

B. *The Dilemma of Sentencing Disparity*

The preference for incarceration seems loosely linked to another popular “big idea”—that sentencing disparity is bad. The federal sen-

³⁷ See WASH. STATE INST. FOR Pub. Policy, Evidence-Based Adult Corrections Programs: What Works and What Does Not 3 (2006), available at <http://www.wsipp.wa.gov/rptfiles/06-01-1201.pdf> [hereinafter ADULT CORRECTIONS PROGRAMS] (“[T]he first basic lesson from our evidence-based review is that some adult corrections programs work and some do not. . . . [A] corrections policy that reduces recidivism will be one that focuses resources on effective evidence-based programming and avoids ineffective approaches.”).

³⁸ Congress enacted the Sentencing Reform Act of 1984 as Chapter II of the Comprehensive Crime Control Act of 1984. Pub. L. No. 98-473, §§ 211–239, 98 Stat. 1837, 1987–2040 (codified as amended in scattered sections of 18 and 28 U.S.C. (2000)).

³⁹ U.S. SENTENCING COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM, at iv, 3–7 (2004), available at http://www.ussc.gov/15_year/15_year_study_full.pdf.

⁴⁰ Cf. DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 14 (2001) (“Within the post-war penal-welfare system, the prison was viewed as a problematic institution, necessary as a last resort, but counterproductive and poorly oriented to correctionalist goals. . . . In the last twenty-five years this long-term tendency has been reversed, first and most decisively in the USA . . .”).

⁴¹ WARREN, *supra* note 12, at 1. Sentencing behavior alone does not account for all of the increase. The rates of incarceration also are affected by making offenses felonies that previously were misdemeanors, by criminalizing conduct not before recognized as criminal, by enhancing prison terms, and by enacting mandatory minimum sentences.

tencing scheme was designed to address the issue of disparity.⁴² This idea was captured in the phrase of the era: “If you do the crime, you do the time.” This emphasis on minimizing disparity, in retrospect, was an example of the simple truth that if you ask the wrong question, you are not likely to get a satisfactory answer.⁴³

The federal sentencing system that took effect in 1987 attempted to eliminate disparities by minimizing judicial discretion and making federal sentencing a rule-based system.⁴⁴ This was largely the product of one of the big ideas of the time—that the disparities created by judicial discretion made sentencing an essentially lawless activity.⁴⁵

When Missouri established its first sentencing commission in the late 1980s, its mission was simply to study sentencing to determine whether there were disparities.⁴⁶ Money was appropriated and spent. Disparities were found.⁴⁷ All of this was intended to encourage policymakers to change the system to eliminate or minimize disparities.⁴⁸ But that may have been the wrong goal.

Disparities based on irrelevant factors like race and gender are deeply troubling, and any reform effort to reduce such disparities is laudable.⁴⁹ Not only do we need to fix these kinds of specific

⁴² KATE STITH & JOSÉ A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* 2 (1998).

⁴³ One can be philosophical about this essential dilemma of sentencing: “[A] proposal for sentencing standards that are constraining enough to assure that like cases are treated alike and flexible enough to assure that different cases are treated differently is a counsel of unattainable perfection.” MICHAEL TONRY, *SENTENCING MATTERS* 185–86 (1996), *quoted in* Berman & Chanenson, *supra* note 11, at 33.

⁴⁴ William W. Berry III, *Discretion Without Guidance: The Need To Give Meaning to § 3553 After Booker and Its Progeny*, 40 *CONN. L. REV.* 631, 633 (2008) (“The Sentencing Reform Act of 1984 . . . moved the sentencing regime almost completely to the other extreme, implementing a system of mandatory guidelines that severely limited the discretion of the sentencing judge.”).

⁴⁵ *See, e.g.*, MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 6 (1973) (noting that uncertainty in sentencing broke promise “to have a government of laws, not men”); Marvin E. Frankel, *Lawlessness in Sentencing*, 41 *U. CIN. L. REV.* 1, 5 (1972) (“[T]here is no law—certainly none that anybody pretends to have enforced—telling the judge he must refrain, expressly or otherwise, from trespassing against higher claims to wreak vengeance.”).

⁴⁶ *MO. REV. STAT. § 558.019.8* (Supp. 1990).

⁴⁷ The Commission found significant disparities for various felonies: Sentences of white and female defendants were less severe than those for black and male defendants. *See* 1994 *MO. SENTENCING ADVISORY COMM’N ANN. REP.* 3–7 (on file with the *New York University Law Review*) (providing data showing lower sentences for white defendants compared to black defendants, and women compared to men, when charged with same felony).

⁴⁸ *MO. REV. STAT. § 558.019(6)(2)* (2003) (requiring Missouri Sentencing Commission to study whether sentencing disparities exist between circuit courts or based on economic or social class of defendant).

⁴⁹ The recent “crack vs. powder” cocaine debate, *see, e.g.*, *Kimbrough v. United States*, 128 S. Ct. 558 (2007), exposed a dramatic national problem in disparate sentencing. In

problems in our sentencing schemes, but we also need to develop the analytical tools that will help make sure that race, gender, and location are not factors that account for disparities.

However, some disparities in sentencing from one locale to another are inevitable. They simply reflect the differing values of the respective communities in a diverse state like Missouri, which has forty-five judicial circuits.⁵⁰ That is, for me, an uncomfortable statement, for it seems to suggest that there is not one system of justice in our state but forty-five. Indeed, recent data for all of Missouri's forty-five judicial circuits suggest that sentencing disparities remain.⁵¹ It is difficult, however, to determine whether there are relevant differences not captured by the data that could explain the disparities.

The fixation on sentencing disparity obscures an issue important to state courts: recidivism. In Missouri, for example, the vast majority of offenders are released back into our community.⁵² For the offender's sake, as well as ours, we should be attuned to the offender's needs as they relate to the chances that he or she will offend again. This is more satisfactory than worrying about whether the offender received the same sentence as another offender who violated the same statute.

A single-minded attempt to eliminate or reduce sentencing disparities could have unintended consequences. Disparities can be—and have been—eliminated by sending more offenders to prison, with the unintended result of greater recidivism. A better solution would be to tolerate some disparity in sentencing, as long as it is part of a plan to reduce recidivism. For example, disparities based on the risk of reoffending—as measured, perhaps, by the severity of the offense

Missouri, regression analysis in 2007 using data from the Missouri Department of Corrections concluded:

The Missouri incarceration rate for Blacks is over five times that of Whites Using the sentencing data for [fiscal year 2007], the comparison between the four racial or ethnic groups indicates that Blacks have the highest average prison sentence, 7.2 years compared to an average of 5.6 years for Whites. The aggregate data also indicates that Hispanics have the highest percentage of prison sentences (34.1%) and Whites have the highest percentage of probation sentences (65.6[%]).

MO. BIENNIAL REP., *supra* note 17, at 24. The analysis further concluded that there are race-based disparities in the time served by prisoners. "Blacks served significantly more time than Whites (44.4 months compared to 28.9 months) in part because Blacks on average were sentenced to longer sentences (83 months compared to 65.7 months). As a percent of sentence Blacks also served longer than Whites (53.5% compared to 44.0%)." *Id.* at 30.

⁵⁰ Circuit Courts of Missouri, <http://www.courts.mo.gov/page.asp?id=321> (last visited Aug. 24, 2008).

⁵¹ MO. BIENNIAL REP., *supra* note 17, at 13.

⁵² E-mail from David Oldfield, *supra* note 15.

and the offender's criminal history—may be acceptable and even desirable.

C. “Nothing Works”

The preference for incarceration became influential after rehabilitation fell from favor during the 1970s. Many believed that offenders could not be rehabilitated: “Nothing works” was the answer at that time.⁵³ That answer was a “big idea” that appears to be influential to this day. But it was wrong.⁵⁴ There is, in Judge Roger Warren's words, “a large body of rigorous research conducted over the last 20 years” that shows that treatments are effective in reducing offender recidivism.⁵⁵ And, importantly, the public no longer believes, if it ever did, that nothing works.⁵⁶

Although incorrect, the “nothing works” philosophy had a lasting impact; it spurred many states to establish sentencing commissions⁵⁷ and rethink their sentencing system.⁵⁸ Today, sentencing commissions remain well regarded, even though the “nothing works” philosophy has been discredited. The 2006 draft of the Model Penal Code Revision recommends granting state sentencing commissions the authority to draft “presumptive” sentencing guidelines, with appellate review of sentences, but also recognizes an option of “advisory” guidelines for states (such as Missouri) that want to preserve trial judge discretion.⁵⁹

⁵³ See, e.g., Robert Martinson, *What Works? Questions and Answers About Prison Reform*, 10 PUB. INT. 22, 25 (1974) (“With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism.” (emphasis omitted)); see also WARREN, *supra* note 12, at 5 (“During the 1960s and early 1970s, however, the national violent crime rate tripled, 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.”).

⁵⁴ See, e.g., Robert Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 HOFSTRA L. REV. 243, 244 (1979) (“[C]ontrary to my previous position, some treatment programs do have an appreciable effect on recidivism.”).

⁵⁵ WARREN, *supra* note 12, at 1.

⁵⁶ Cf. PRINCETON SURVEY, *supra* note 27, at 7 (“[A] majority [of the public] . . . think[s] it is very important to direct more non-violent offenders into treatment, job and education programs and to keep them out of prison.”).

⁵⁷ Berman & Chanenson, *supra* note 11, at 29 n.14; see also Richard S. Frase, *Sentencing Guidelines in Minnesota, Other States, and the Federal Courts: A Twenty-Year Retrospective*, 12 FED. SENT'G REP. 69, 70 (1999); ANDREW VON HIRSCH ET AL., *THE SENTENCING COMMISSION AND ITS GUIDELINES* app. at 177–88 (1987) (summarizing guidelines in Minnesota, Washington, and Pennsylvania).

⁵⁸ See sources cited *supra* note 57.

⁵⁹ MODEL PENAL CODE: SENTENCING § 6B.01 cmt. b (Discussion Draft 2006) (listing possible amendments for “[s]tates opting to employ advisory rather than presumptive sentencing guidelines”); see also *id.* § 1.02(2) cmt. p (providing background information and listing of Comments regarding choice between presumptive and advisory sentencing guidelines).

However, the differences between mandatory and advisory guidelines have diminished: Factual determinations, the United States Supreme Court held, are subject to the Sixth Amendment right to a jury trial.⁶⁰ It is now clear: Guidelines are advisory. Judges have discretion.⁶¹

The centrality of judicial discretion in sentencing decisions is one of the reasons for Missouri's historical reluctance to adopt big ideas that were popular elsewhere.⁶² We are, after all, the "Show Me" state. However, like other states, we have attempted to improve our sentencing system.

In the 1990s, when a predecessor to our current sentencing commission promulgated advisory "guidelines,"⁶³ I was privileged to get a rare kind of focus-group examination of Missouri judges' attitudes

⁶⁰ See *Cunningham v. California*, 549 U.S. 270, 281 (2007) ("[U]nder the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence."); *Gall v. United States*, 128 S. Ct. 586, 597 (2007) (observing that district court's use of sentencing guidelines as mandatory would constitute "significant procedural error"); *Kimbrough v. United States*, 128 S. Ct. 558, 564 (2007) ("[D]istrict courts [are required] to read the United States Sentencing Guidelines as 'effectively advisory'" (internal citation omitted)); *United States v. Booker*, 543 U.S. 220, 244 (2005) ("Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."); *Blakely v. Washington*, 542 U.S. 296, 301 (2004) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (internal citation omitted)). See generally Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190 (2005) (surveying state sentencing guidelines systems and analyzing options available to policymakers in light of *Blakely*). For overviews and assessments of federal and state guidelines systems before *Blakely*, see generally Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901 (1991), Richard S. Frase, *Is Guided Discretion Sufficient? Overview of State Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 425 (2000), and Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681 (1992).

⁶¹ For a summary of a study by the National Center for State Courts of the sentencing practices in three states that have different styles of sentencing commissions, see 2007 VA. CRIMINAL SENTENCING COMM'N ANN. REP. 39, available at <http://www.vcsc.virginia.gov/2007VCSCReport.pdf>. The three states are Minnesota, which has the most mandatory guidelines; Virginia, which has the most voluntary guidelines; and Michigan, which is somewhere between the other two. *Id.* at 15. The National Center study was not available in final form at time of publishing of this Lecture, but, according to the Virginia report, "the study shows that consistency in sentencing has been achieved in Virginia. . . . [And] there is no evidence of systematic discrimination in sentences imposed in Virginia in regards to race, gender, or the location of court." *Id.* at 16.

⁶² See, e.g., MO. SENTENCING ADVISORY COMM'N, RECOMMENDED SENTENCING: REPORT AND IMPLEMENTATION UPDATE 11 (2005), available at <http://www.mosac.mo.gov/file/final%20report21June%202005.pdf> ("Judicial discretion is the cornerstone of sentencing in Missouri courts.").

⁶³ MO. REV. STAT. § 558.019.8 (Supp. 1990).

through the workshop Professor Levy and I conducted at St. Louis University.⁶⁴ From these sessions, I learned that judges had incomplete and sometimes inaccurate information about programs in the community, programs in prison, and the means of addressing the needs of offenders and their families. I also discovered that judges were unaware of parole board standards. No judge knew anything about risk assessment, even though the parole board at the time was using risk assessment to guide its discretionary release decisions.

III

SMALL IDEAS FOR REFORM: CREATING INFORMED DISCRETION THROUGH RISK ASSESSMENT

In this Part, I will outline a process that we developed in Missouri to incorporate modern risk-assessment methodology into traditional sentencing practices. For many states, including Missouri, the goal of having a prescriptive guideline-based sentencing system is beyond reach. So the approach that makes sense is to refine and improve the current system of sentencing by informing the discretion of those who have power in the sentencing process, especially judges and prosecutors.

When the Missouri Sentencing Advisory Commission was reconstituted in 2004, we were faced with the prospect of doing the same thing over again—promulgating guidelines or recommendations and somehow expecting different results. But, unlike sentencing commissions in other states, we instead set out not to restrict judicial discretion but to better inform its exercise.

Our discussions, early on, centered on how little each of the various actors involved in sentencing knew about what the others were doing. The parole board offered to share its risk-assessment and release guidelines, as well as the data on its actual decisions. This methodology formed the foundation of the commission's work. Disclosing the parole board's risk-assessment methods and practices to the trial judge at the time of sentencing proved to be very popular with our judges.

The guiding principle of the current commission's work is that "[j]udicial discretion is the cornerstone of sentencing in Missouri courts."⁶⁵ Coupled with the central idea of judicial discretion, of course, is the smaller idea of enhancing such discretion with data that can shape the correct placement of offenders. To design our recommended system, we engaged in a bottom-up process that involved trial

⁶⁴ See *supra* text accompanying notes 1–2.

⁶⁵ MO. SENTENCING ADVISORY COMM'N, *supra* note 62, at 11.

judges, prosecutors, and especially probation officers. Since the system of recommended sentencing was implemented about two short years ago, the state's prison population already has dropped by nearly 700 inmates.⁶⁶ Concurrent with the statewide implementation of the new presentence information system were the Department of Corrections' improvements in community supervision centers and greater efforts at strengthening reentry programs.⁶⁷

Informed discretion can help achieve better sentencing outcomes. But perhaps it is time to rethink the label "judicial discretion," which is often misunderstood to mean that judges get to do whatever they like. I suggest we rebrand our central concept and call it evidence-based sentencing, for that is what it is: sentences by judges who have considered the evidence that informs their discretion.

A. Analyzing Risk Factors

Both risk assessment and needs assessment are used to provide the recommendations found in Missouri's presentence investigation report. Risk-assessment factors are designed to "predict[] who will or will not behave criminally in the future."⁶⁸ Risk assessment is distinguished from "needs assessment," in which "predictive methods [are used] to attempt a reduction in criminality through assignment to differential treatments."⁶⁹ Taken together, these assessments are the means by which we can try to ascertain what sanctions and what programs are appropriate for individual offenders.

Notice that I said "try to ascertain." These instruments are far from perfect, which is why the severity of a punishment should not be based on a risk-assessment prediction.⁷⁰ Nevertheless, prediction—however imprecise—is often part of a judge's rationale for imposing a sentence. Judges routinely express the belief that they are protecting the public by imprisoning an offender because of the danger the judge

⁶⁶ MO. SENTENCING ADVISORY COMM'N, PROGRESS REPORT ON THE IMPLEMENTATION OF THE RECOMMENDED SENTENCING ASSESSMENT REPORT 1 (2008) (showing reduction from 30,507 inmates in November 2005 to 29,846 inmates in December 2007).

⁶⁷ Virginia Young & Tim O'Neil, *State Leads Way in Cutting Prison Population*, ST. LOUIS POST-DISPATCH, July 29, 2007, at 1A.

⁶⁸ MODEL PENAL CODE: SENTENCING § 6B.09 Reporter's Note a (Preliminary Draft No. 5, 2007) (citation and inner quotation marks omitted).

⁶⁹ *Id.* (citation and inner quotation marks omitted).

⁷⁰ Cf. John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391, 428 (2006) ("Past criminal behavior is the only scientifically valid risk factor for violence that unambiguously implicates blameworthiness, and therefore the only one that should enter the jurisprudential calculus in criminal sentencing."). See generally Rasmus H. Wandall, *Actuarial Risk Assessment: The Loss of Recognition of the Individual Offender*, 5 LAW, PROBABILITY & RISK 175 (2006) (evaluating Virginia's "actuarial risk assessment" method).

believes the offender poses.⁷¹ Likewise, judges often give “breaks” to offenders they believe have a likelihood of staying out of trouble in the future.⁷² Prediction is inherent in sentencing decisions.

Experienced trial court judges, however, often express humility when it comes to their predictive abilities, perhaps because they still remember their mistaken predictions. This humility is justified: Actuarial predictions have been found to be consistently superior to clinical or human judgments in predicting future criminal behavior.⁷³ At the very least, the use of statistics can be a check on a judge’s own intuitions and judgments in sentencing.⁷⁴ The current draft of the Model Penal Code on state sentencing comes to the same conclusion: It encourages the use of risk-assessment instruments, especially to identify low-risk offenders who should be diverted from prison.⁷⁵

In Missouri, risk assessment is based on eleven factors that correlate with reoffending, ranked by the strength of the correlation. Six of the eleven factors relate to prior criminal history; other factors include age, employment status, education, and substance abuse.⁷⁶ Based on these eleven factors, offenders are risk-classified as “good,” “above average,” “average,” “below average,” or “poor.”⁷⁷ Being over the

⁷¹ See *supra* text accompanying notes 1–2 (discussing St. Louis University workshop for trial judges).

⁷² This was a common explanation given by trial judges in the St. Louis University workshop when asked why they imposed lenient sentences on some offenders.

⁷³ See MODEL PENAL CODE: SENTENCING § 6B.09 cmt. a (Preliminary Draft No. 5, 2007) (“Actuarial—or statistical—predictions of risk, derived from objective criteria, have been found superior to clinical predictions built on the professional training, experience, and judgment of the persons making predictions.”); Stephen D. Gottfredson & Laura J. Moriarty, *Clinical Versus Actuarial Judgments in Criminal Justice Decisions: Should One Replace the Other?*, FED. PROBATION, Sept. 2006, at 15, 15 (“In virtually all decision-making situations that have been studied, actuarially developed devices outperform human judgments.”); see also Grant T. Harris, Marnie E. Rice & Catherine A. Cormier, *Prospective Replication of the Violent Recidivism Among Forensic Patients*, 26 LAW & HUM. BEHAV. 377, 390 (2002) (“[C]omposite clinical judgment scores were significantly correlated with violent recidivism, but significantly less than the actuarial scores.”).

⁷⁴ See Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 5 (2007) (“[J]udges are predominantly intuitive decision makers, and intuitive judgments are often flawed. . . . [W]here feasible, judges should use deliberation to check their intuition.”).

⁷⁵ See MODEL PENAL CODE: SENTENCING § 6B.09(1)–(2) cmt. a (Preliminary Draft No. 5, 2007) (“[T]he Code seeks to give transparency to [predictions of future offender behavior], bring to bear relevant statistical knowledge where it exists, incorporate clinical judgments where they can be most helpful, and subject the assessment process to the procedural safeguards available in the trial and appellate courts.”).

⁷⁶ The Missouri risk-assessment scale does not use race, gender, or marital status as a factor in the analysis. See Wolff, *supra* note 26, at 112–13 (listing factors). On the correlation of education and employment to crime rates, see Stemen, *supra* note 25, at 221, 226.

⁷⁷ For a complete description of this risk-assessment system, see Wolff, *supra* note 26, at 112–14.

age of forty-five rates well. (Good news for some of us.) But being under twenty-two is a minus: It is highly correlated with reoffending.⁷⁸ However, strictly following the statistics with respect to age would result in the overly harsh treatment of some youthful offenders who are too young to have had the opportunity for educational or vocational attainments or who simply may need to catch a break.⁷⁹

Other states likewise have developed risk-assessment instruments. In 1996, Virginia developed a risk-assessment tool for the purpose of diverting low-risk offenders from prison to community sanctions.⁸⁰ This effort appears to have produced positive results. Now only about twenty percent of Virginia's inmates are in prison for nonviolent offenses—a substantial contrast to the federal system, where about seventy-five percent of inmates are in prison for nonviolent crimes and have no history of violence.⁸¹ By comparison, only about half of Missouri's inmates are in prison for nonviolent offenses.⁸²

Risk assessment may help to answer two crucial sentencing questions: First, are we using prison appropriately? Second, are we using community-based programs appropriately? If we put people in prison

⁷⁸ See MO. SENTENCING ADVISORY COMM'N, RECOMMENDED SENTENCING USER GUIDE 2007–2008, at 37–38 (2007), available at http://www.mosac.mo.gov/file/User%20Guide%202007-2008_1.pdf (assigning value of negative one (-1) to risk factor of being under age twenty-two, where negative values indicate higher risk).

⁷⁹ If risk assessment of youthful offenders followed the data strictly, helpful services to reduce the chances of reoffending would be denied to youthful offenders, even though this group greatly needs such services. See Steven L. Chanenson, *Sentencing and Data: The Not-So-Odd Couple*, 16 FED. SENT'G REP. 1, 2 (2003) (discussing Virginia approach, in which (1) offenders who receive more than nine points are ineligible for alternative punishment; and (2) high point values are assigned to young age despite benefit youths receive from services in alternative punishment).

⁸⁰ 2007 VA. CRIMINAL SENTENCING COMM'N ANN. REP. 39, available at <http://www.vcsc.virginia.gov/2007VCSCReport.pdf> (“[I]mplementation of the [nonviolent-risk-assessment] instrument began in pilot sites in 1997. . . . In July 2002, the . . . instrument was implemented statewide for all felony larceny, fraud, and drug cases.”).

⁸¹ *Id.* at 18 (noting that, as of 2007, 79.1% of Virginia's inmate population were violent offenders); THE SENTENCING PROJECT, THE FEDERAL PRISON POPULATION: A STATISTICAL ANALYSIS (2004), available at <http://www.sentencingproject.org/pdfs/federalprison.pdf> (noting, in 2004, that 72.1% of federal prison population were “non-violent offenders with no history of violence”). By contrast, the current efforts in Missouri have lowered the percentage of nonviolent offenders in prison, but it remains high—about fifty percent. This figure derives from the fact that approximately eighty percent of new admissions are for nonviolent offenses. Memorandum from David Oldfield, *supra* note 10. The difference between the two percentages reflects the fact that nonviolent offenders receive shorter sentences than violent offenders.

⁸² MO. DEP'T OF CORR., A PROFILE OF THE INSTITUTIONAL AND SUPERVISED OFFENDER POPULATION ON JUNE 30, 2007, at 13 (2008), available at <http://www.doc.missouri.gov/pdf/Offender%20Profile%20FY07.pdf> (including offenses classified as nonviolent, drug, and DWI).

who do not belong there, we risk destroying their lives (and possibly their children's prospects) beyond what their own conduct has done, and we risk making the community to which they return less safe. If we put people in the wrong kind of community program, we are wasting our money.

To reduce recidivism, the punishment should fit the offender as well as the crime. But, of course, we should not blindly follow recidivism rates as a sentencing determinant; the types of crimes one is at risk of committing in the future are also important. Persons who are likely to commit a violent felony in the future concern us more than, say, a person who is likely to commit at most a petty theft. Thus, the kind and severity of the sentence, as contained in the sentencing commission's recommendations, are based on the severity of the crime and the offender's criminal history.⁸³

Risk-assessment techniques have been extended beyond presentence reports in Missouri. Recently, probation officers adopted an actuarial instrument for assessing the risk of recidivism in sex crimes.⁸⁴ This tool is important because many sex offenders are released back into the community. Some offenders are found guilty of low-level felonies, while others plead guilty to more serious felonies but are able to negotiate nonprison sentences because of the weakness of the prosecution's evidence.⁸⁵ In either case, the sex-offender assessment often helps to determine what kind of supervision and treatment strategies are likely to succeed.

Missouri's adoption of risk-assessment measures is at an early stage. More refined and more sophisticated use of such instruments will, I hope, develop over time.

B. Sharing Information About Risk

Risk assessment is an appropriate aid for those involved in sentencing. When we organize the information necessary to assess an individual's risk factors, we can more precisely address the individual

⁸³ Severity of the crime is measured by the harshness of the punishments imposed by Missouri judges over a three-year period for each offense. Wolff, *supra* note 26, at 106.

⁸⁴ The STATIC-99, a widely used instrument for assessing risks for sex offenders, was validated on the Missouri sex offender population. MO. BIENNIAL REP., *supra* note 17, at 39–41. The STATIC-99 is described in *Murrell v. State*, 215 S.W.3d 96, 114–16 (Mo. 2007) (Wolff, C.J., dissenting). In short, “[it] is an instrument that is useful to sentencing judges in assessing the risk that a particular offender is in a category of persons who are more or less likely to re-offend.” *Id.* at 115. The STATIC-99 helps to “determin[e] what kinds of controls, short of confinement . . . might work to reduce the chance of recidivism in a particular type of offender.” *Id.*

⁸⁵ See MO. BIENNIAL REP., *supra* note 17, at 47–55 (listing tables of average sentence statistics per offense).

needs of offenders and minimize the risk to public safety in allowing them to serve their sentences in the community rather than in prison. I call risk assessment a small idea, because it is not the complete answer—indeed, no predictive system is anywhere near perfect.

Risk-assessment methodology—whatever its components—ought to be shared among all who exercise discretion or judgment during the sentencing process. This includes prosecutors, defense attorneys, probation officers, judges, prison officials, parole boards, and parole officers. Risk assessment is useful because it provides a statistically valid measure of factors that affect the outcome of particular sentences. But the use of risk assessment has a larger secondary purpose: to ensure that the actors involved in the sentencing process focus on both the community's safety and the offender's needs.

All actors involved in the system should have the same information about risks and needs because judges are not the only ones who make discretionary decisions. As noted earlier, with respect to our marijuana case from the Missouri Ozarks,⁸⁶ law enforcement officers exercise discretion in making an arrest, prosecutors exercise discretion as to the charge, and prosecutors and defense attorneys exercise judgment in negotiating plea bargains. In addition, probation officers exercise discretion regarding what to include and what not to include in their presentence reports, even though the reports—as Missouri has reframed them—are governed by the various components of the risk scale.

C. *Managing the Offender*

The probation officer's expertise is essential in assessing the offender's needs.⁸⁷ A very important section of each Sentencing Assessment Report—Missouri's redesigned presentence investigation report—is the "offender management plan." In this section, the probation officer recommends programs or treatment options that are available and appropriate for the particular offender.⁸⁸ Sentencing Assessment Reports also contain the Missouri Sentencing Advisory Commission's recommendations on the proper sentence, but the probation officer's recommendations as to management strategies often are just as important.⁸⁹

⁸⁶ See *supra* note 1 and accompanying text.

⁸⁷ To help ensure the success of Missouri's new Sentencing Assessment Report, the redesign process involved some of the 1200 probation officers who would be using the methodology daily.

⁸⁸ For a more extensive discussion of this program, see Wolff, *supra* note 26, at 116.

⁸⁹ See MO. REV. STAT. § 557.026 (2000) ("When a probation officer is available to any court, such probation officer shall, unless waived by the defendant, make a presentence

Judges do not have the resources by themselves to keep up with both the availability of programs and the alternatives to incarceration. Nor do judges tend to keep up with whether such programs and alternatives are effective. But probation officers who write Sentencing Assessment Reports and supervise offenders are likely to develop expertise regarding which kinds of supervision strategies, restraints, and programs will be most effective at reducing the offenders' likelihood of reoffending.

In my view, probation officers and judges are becoming more sophisticated at targeting what are known as criminogenic needs—the particular factors that influence whether the offender will be inclined to reoffend. Examples include employment prospects, substance abuse, and education. Prison, in my opinion, is a negative criminogenic factor because it often exposes the offender to serious criminals, diminishes the offender's employment prospects, breaks up the offender's family, and traumatizes the offender.⁹⁰ Prison also increases the criminogenic risk for other family members.⁹¹

To reduce the risk of reoffending, a particular sentencing option or treatment should target the offender's criminogenic needs.⁹² Examples of community-based programs abound, both through corrections departments and private groups. The Commission, on its website, tries to keep track of and provide information about the various programs available in each county—including community service and restorative justice.⁹³ Ideally, each such program should be

investigation in all felony cases and report to the court before any authorized disposition under section 557.011.”).

⁹⁰ See Jeffrey Fagan, Valerie West & Jan Holland, *Neighborhood, Crime, and Incarceration in New York City*, 36 COLUM. HUM. RTS. L. REV. 71, 72–73 (2004) (discussing effect of incarceration on employment and family).

⁹¹ See J. Mark Eddy & John B. Reid, *The Adolescent Children of Incarcerated Parents: A Developmental Perspective*, in PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES AND COMMUNITIES 233, 236–37 (Jeremy Travis & Michelle Waul eds., 2003) (“Incarcerated parents reported in cross-sectional surveys that 5 to 30 percent of their adolescent children were arrested at least once. In contrast, nationally representative surveys of youth found that 10 to 12 percent of U.S. youth reported being arrested at least once by age 14 to 16.” (citations omitted)).

⁹² See Frank Domurad, Evidence-Based War Stories, Evidence-Based Management (Oct. 2, 2006), http://www.evidence-basedmanagement.com/guests/domurad_oct06.html (“What is an effective public safety intervention is treating those individual and environmental factors that are ‘criminogenic’ in nature By focusing on these so-called criminogenic needs and using cognitive-behavioral and behavioral techniques, correctional agencies are achieving average reductions in recidivism of thirty percent and more.”).

⁹³ Mo. Sentencing Advisory Comm’n, Local Alternative Sentencing Resources, http://www.mosac.mo.gov/Local_ASR.htm (last visited June 2, 2008).

subject to a careful and neutral examination to determine whether it is effective, and if so, with which categories of offenders.⁹⁴

Programs that do not reduce recidivism should not be supported. Remember “boot camps”? We believed these military-style programs, which combined rigorous physical activity and disciplined living, would steer young offenders away from lives of crime. Although boot camps initially enjoyed wide public and legislative support, most of them have now closed. The reason: They simply did not work.⁹⁵ Such programs produced offenders who were more physically fit but who still had not undergone the kind of educational changes required to move them away from further criminal behavior.⁹⁶

D. Compliance with Sentencing Recommendations

Sentencing Assessment Reports written by probation officers are not used in all cases, but the Commission’s sentencing recommendations based on an offender’s prior criminal history are available on the Commission’s website.⁹⁷ Our data show that implementing the Commission’s recommendations reduces recidivism.⁹⁸ Sentences that deviate from those recommendations tend to produce greater recidivism, especially when the deviation involves imposing a prison sentence on someone for whom probation or another community sentence was recommended.⁹⁹

⁹⁴ See ADULT CORRECTIONS PROGRAMS, *supra* note 37, at 2 (“The research approach we employ in this report is called a ‘systematic’ review of the evidence. In a systematic review, the results of *all* rigorous evaluation studies are analyzed to determine if, on average, it can be stated scientifically that a program achieves an outcome.”).

⁹⁵ See Michael Marcus, *Archaic Sentencing Liturgy Sacrifices Public Safety: What’s Wrong and How We Can Fix It*, 16 FED. SENT’G REP. 76, 76 (2003) (citing LAWRENCE W. SHERMAN ET AL., NAT’L INST. OF JUSTICE, PREVENTING CRIME: WHAT WORKS, WHAT DOESN’T, WHAT’S PROMISING 9 (July 1998), available at <http://www.ncjrs.org/pdffiles/171676.pdf> (collecting studies)) (“Shock incarceration, shock probation, scared straight, D.A.R.E., and boot camp programs do not work and frequently do more harm than good.”).

⁹⁶ LAWRENCE W. SHERMAN ET AL., NAT’L INST. OF JUSTICE, PREVENTING CRIME: WHAT WORKS, WHAT DOESN’T, WHAT’S PROMISING 6–9 (July 1998), available at <http://www.ncjrs.org/pdffiles/171676.pdf>; see also WARREN, *supra* note 12, at 24 (discussing failure of boot camp programs to focus on correct needs).

⁹⁷ Mo. Sentencing Advisory Comm’n, Recommended Sentencing Application, https://web.mo.gov/doc/RWeb/message.do?r_Command=view (last visited Sept. 16, 2008).

⁹⁸ MO. BIENNIAL REP., *supra* note 17, at 46 (finding lower recidivism rates when recommendation of probation is followed than when it is not followed).

⁹⁹ The statisticians derived the recidivism data by a retrospective look at outcomes of sentences that were deemed to be within or outside the recommendations, even though the recommendations were not then in effect. They took sentences from as far back as 1995 and examined the outcome for those offenders, determining which sentences would have been within the recommended sentences if the recommendations had been in effect. This methodology made it possible to assess whether the outcomes were better or worse than if

Our most recent data, which include all felony sentencing, indicate that the sentences within the Commission's recommendations are imposed more than eighty percent of the time.¹⁰⁰ In about five percent of cases, the sentence is more lenient than recommended; in the remaining cases (about thirteen percent), the sentence is more severe.¹⁰¹

The statistics show that if recommendations based on risk assessment are followed, recidivism is minimized. This is important news—a small idea that may grow bigger. Future studies, I hope, not only will make broad conclusions about sentencing—as in this initial study—but also will examine the data for various categories of risk and offenses.

IV

REHABILITATING OFFENDERS: DRUG COURTS AND OTHER THERAPEUTIC COURTS

The development of drug courts and other “therapeutic” courts that will be described in this Part has led to direct judicial involvement in rehabilitation efforts. When new approaches to sentencing and corrections are developed, it is important to assess their effectiveness. Because these courts focus on nontraditional methods of rehabilitation, the evaluations that are done—especially those that measure recidivism—have promoted the use of statistical analysis and, hence, the goals of evidence-based sentencing.

Many states, including my own, have developed drug courts, mental-health courts, driving-while-intoxicated (DWI) courts, reentry courts, and other innovative forms of “therapeutic” or “problem-solving” courts.¹⁰² Of these, drug courts are the most prominent, and

the Commission's recommendations had been in place and been followed or ignored. *Id.* at 42–46.

¹⁰⁰ *Id.* at 7 (stating compliance with recommendations was 82.4% in 2007); MO. SENTENCING ADVISORY COMM'N, PROGRESS REPORT ON THE IMPLEMENTATION OF THE RECOMMENDED SENTENCING ASSESSMENT REPORT 8 (2008) (on file with *New York University Law Review*) (stating compliance with recommendations has been 83.5% since October 15, 2007).

¹⁰¹ MO. BIENNIAL REP., *supra* note 17, at 9.

¹⁰² See generally Judith S. Kaye, *Delivering Justice Today: A Problem-Solving Approach*, 22 YALE L. & POL'Y REV. 125, 125 (2004) (explaining how “New York's state courts adopted a problem-solving approach to delivering justice in certain categories of cases,” using “examples of community courts, drug courts, and domestic violence courts”); David Rottman & Pamela Casey, *Therapeutic Jurisprudence and the Emergence of Problem-Solving Courts*, NAT'L INST. JUST. J., July 1999, at 12, 13–16, available at <http://www.ncjrs.gov/pdffiles1/jr000240.pdf> (discussing history of problem-solving courts and underlying theory and methodology of those courts). David Wexler explains that “therapeutic jurisprudence can itself be divided into four overlapping areas of inquiry. These involve (1) the role of the law in producing psychological dysfunction, (2) therapeutic

a number of studies have found them to be effective in reducing recidivism.¹⁰³

The judge's role in drug courts is unconventional. Most drug courts require offenders to return to court on a frequent basis.¹⁰⁴ Drug treatment is available, and many drug courts encourage or require offenders to attend schooling, job training, and other programs designed to free offenders from a life of substance abuse and crime.¹⁰⁵

The methodology of drug courts is also being used in some communities for DWI offenders,¹⁰⁶ a group whose addictions present challenges similar to those of drug addictions. If the attempt to deal with these offenders in the community is successful, it will likely reduce prison populations and recidivism. Among the Missouri offender population, 6.7% are felony DWI offenders.¹⁰⁷ Those in prison under the 120-day shock program have a 23.6% recidivism rate, and those in prison for terms of years have a 31% recidivism rate, compared to a recidivism rate of 18.4% for those sentenced to probation only.¹⁰⁸

Drug courts have allayed some of the public concern that we send too many people to prison for low-level drug offenses.¹⁰⁹ We still send many offenders to prison for drug offenses, but drug courts have shifted the focus for many offenders from punishment to rehabilitation.¹¹⁰

aspects of the law, (3) therapeutic aspects of the legal system, and (4) therapeutic aspects of judicial and legal roles." David B. Wexler, *Introduction to THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT* 3, 4 (David B. Wexler ed., 1990); see also GREG BERMAN & JOHN FEINBLATT, *GOOD COURTS: THE CASE FOR PROBLEM-SOLVING JUSTICE* 49-52 (2005) (describing concept of therapeutic jurisprudence).

¹⁰³ U.S. GOV'T ACCOUNTABILITY OFFICE, REP. NO. 05-219, *ADULT DRUG COURTS: EVIDENCE INDICATES RECIDIVISM REDUCTIONS AND MIXED RESULTS FOR OTHER OUTCOMES* 5 (2005), available at <http://www.gao.gov/new.items/d05219.pdf> ("[GAO's] analysis of evaluations reporting recidivism data for 23 programs showed that lower percentages of drug court program participants than comparison group members were rearrested or reconvicted."). The Washington State Institute for Public Policy reviewed fifty-six studies of drug courts and found that adult "drug courts achieve, on average, a statistically significant 10.7 percent reduction in the recidivism rates of program participants compared with a treatment-as-usual group." *ADULT CORRECTIONS PROGRAMS*, *supra* note 37, exhibit 1, at 3. The Institute also reviewed five studies that showed, on average, a 12.4% reduction in recidivism as a result of drug treatment in the community. *Id.*

¹⁰⁴ BERMAN & FEINBLATT, *supra* note 102, at 9.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 8.

¹⁰⁷ See *infra* Appendix A.

¹⁰⁸ See *infra* Appendix A.

¹⁰⁹ Cf. BERMAN & FEINBLATT, *supra* note 102, at 11 (discussing improved public confidence in justice stemming from use of problem-solving courts).

¹¹⁰ The Missouri Department of Corrections reports that, amongst offenders who complete the drug-court program, 7.4% are incarcerated within twenty-four months and 5.5% receive a new conviction. Offenders who fail the drug-court program have a 44.9% incar-

There are two major positive effects of the drug-court movement. The first is an increased emphasis on rehabilitation and treatment. Drug-court advocates have persuaded legislatures to greatly increase funding for community drug-treatment efforts. Without the success of drug courts, there likely would have been less of a shift from punishment to treatment. The second positive effect is the greater attention being paid to sentencing outcomes and, specifically, to recidivism.

However, a fair risk assessment of offenders participating in drug-court programs is still needed. Drug courts should not unnecessarily bring people into the criminal justice system.¹¹¹ The test for individual drug courts is how they succeed with moderate- to high-risk offenders with serious addictions. If a drug court is serving only low-risk offenders, it may have little impact on crime prevention because low-risk offenders might do just as well at avoiding recidivism without the intervention of a drug court. Whenever we criminalize large groups of otherwise law-abiding persons, we must ensure that doing so results in a sufficient increase in crime prevention.

Another evidence-based approach¹¹² that is becoming more widespread is the use of mental-health courts. Some of these programs take place in municipal courts and focus on the problem of nuisance crimes committed by offenders who have noticeable mental-health issues. In Missouri, approximately two-thirds of all known offenders, and over ninety percent of those with known severe substance-abuse problems, have mental-health records in the Depart-

ceration rate after twenty-four months and a 20.2% rate of new conviction. Mo. Dep't of Corr., Drug Court Recidivism Statistics 1 (Jan. 31, 2008) (unpublished report on file with *New York University Law Review*). For the Department's definition of recidivism, see *supra* note 17.

¹¹¹ See Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479, 1553 (2004) ("Treatment programs, in an effort to demonstrate effectiveness, start cherry picking the low-risk candidates who would have been screened out of a traditional diversion system and channeling up and into the criminal justice system the high-risk candidates they were originally designed to serve.").

¹¹² Evidence-based sentencing looks at whether a particular treatment is appropriate and whether it is effective. Aos, Miller, and Drake outline four recommended criteria for evidence-based review of corrections policy: (1) Researchers must "consider all available studies"; (2) "To be included in [the review, an] evaluation's research design [must] include control or comparison groups"; (3) Evaluation studies should "use 'real world' samples from actual programs in the field," rather than samples from "so-called 'model' or 'efficacy' programs"; and (4) "If the researcher of an evaluation is also the developer of the program," it is necessary to "discount the results from the study to account for potential conflict of interests, or the inability to replicate the efforts of exceptionally motivated program originators in real world field implementation." Steve Aos, Marna Miller & Elizabeth Drake, *Evidence-Based Public Policy Options To Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates*, 19 FED. SENT'G REP. 275, 281 (2007).

ment of Mental Health.¹¹³ These data show a high incidence of both mental-health and substance-abuse problems among those in the corrections population. They are a reminder that criminal behavior is not isolated from other personal issues and that the agencies of the state that deal with them—especially mental-health and corrections departments—cannot work in isolation from one another. We have a lot of work to do in addressing the mental-health needs of offenders and their families.

The innovative methodology of drug courts also is being adapted by some states to create “reentry courts,” another model of therapeutic jurisprudence.¹¹⁴ Once offenders leave prison, they often return to the same communities, where they face the same issues that contributed to their imprisonment in the first place. This occurs for a large number of offenders: Six-hundred thousand are released from prison each year, and about one-hundred-thirty thousand of those released are not required to report to anyone.¹¹⁵ As opposed to drug courts, which focus on the offender’s behavior, reentry courts often use a “managerial” model, in which the court functions as a manager for obtaining services for the released offender that are needed to readjust to life in the community.¹¹⁶ Improvements in the reentry process—whether through reentry courts, parole supervision, or community-based service providers outside the criminal justice system—are essential to reducing recidivism.¹¹⁷

CONCLUSION: PRINCIPLES AND RECOMMENDATIONS

Let me end with a series of simple recommendations—small ideas to help address the problems that we now face.

¹¹³ Under a grant the Missouri Sentencing Advisory Commission received from the Council of State Governments, the databases of the Departments of Corrections and of Mental Health were examined to see how many offenders in the criminal justice system have previous or concurrent experience in the mental-health system. Memorandum from Jeff Moore, Special Asst. Technician, Research & Evaluation, Mo. Dep’t of Corr., to Sherri Paschel, Project Manager for Comm. on Mental Health Issues, Office of State Courts Adm’r (July 16, 2007) (on file with the *New York University Law Review*). The Commission and the Departments of Corrections and of Mental Health are supporting the effort to make crisis intervention training for law enforcement officers available statewide as a means of diverting mentally ill persons from the criminal justice system. *See id.*

¹¹⁴ *See* Eric J. Miller, *The Therapeutic Effects of Managerial Reentry Courts*, 20 FED. SENT’G REP. 127, 127 (2007) (describing reentry courts).

¹¹⁵ Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C. L. REV. 255, 257 (2004).

¹¹⁶ Miller, *supra* note 114, at 127.

¹¹⁷ Thompson, *supra* note 115, at 258–60.

Punishment should be no harsher than warranted. This is a central message of the American Law Institute's Model Penal Code Sentencing revision.¹¹⁸ Longer prison stays do not reduce recidivism.¹¹⁹

There should be no mandatory minimum sentences. Such provisions may seem politically popular, but mandatory minimums are ineffective at reducing recidivism and often have dysfunctional, unintended consequences.¹²⁰

"Evidence-based sentencing" should replace the misunderstood phrase "judicial discretion." As with many decisions in our courts and in our criminal justice system, discretion is inherent. Instead of removing discretion, we should be prepared to defend our decisions by basing them on evidence that includes an assessment of the offenders' risks and needs.

We should have a preference for community-based sanctions, rather than for incarceration. Community-based sanctions are especially important for nonviolent offenders. Prison should be reserved for those we fear, not those we are mad at.

Everyone who works with an offender should know that person's risks and needs. All who work in the system—prosecutors, defense attorneys, judges, probation officers, parole authorities, and prison officials—should use the common language of risks and needs for managing the offender.

The goal of every sentence—whether in the community or in prison—is not only to punish but also to minimize the chances of recidivism. For any sentence shorter than life imprisonment, from the day an offender enters prison, the system should be preparing for his or her release by developing a reentry plan that will put that person back in the community with enough support to reduce the chances of reoffending.

All treatment programs, both in prison and in the community, should be evaluated on an ongoing basis, particularly with respect to how well they meet the criminogenic needs of moderate- and high-risk

¹¹⁸ MODEL PENAL CODE: SENTENCING § 1.02(2)(a)(iii) (Tentative Draft No. 1, 2007). *But see* Marcus, *supra* note 30, at 72 (disagreeing with this approach).

¹¹⁹ Marc Mauer, *The Hidden Problem of Time Served in Prison*, 74 SOC. RES. 701, 703–04 (2007).

¹²⁰ See ABA KENNEDY COMM'N, *supra* note 31, at 9 ("There is no need for mandatory minimum sentences in a guided sentencing system."); *see also* THOMAS GABOR & NICOLE CRUTCHER, MANDATORY MINIMUM PENALTIES: THEIR EFFECTS ON CRIME, SENTENCING DISPARITIES, AND JUSTICE SYSTEM EXPENDITURES 31 (2002), *available at* http://www.justice.gc.ca/eng/pi/rs/rep-rap/2002/tr02_1/tr02_1.pdf ("[Mandatory minimum sentences for drug offenses] are blunt instruments that provide a poor return on taxpayers' dollars because they fail to distinguish between low and high-level, as well as hardcore versus transient dealers.").

offenders. The measurement of success is very simple: Is the particular program effective in avoiding recidivism?

We should evaluate sentencing outcomes. For the most frequently committed crimes, by each category of risk, we should track the recidivism data for prison sentences versus various forms of community sentences. The important thing is that we need to inform those involved in sentencing—especially judges and prosecutors—as to which sentences actually increase recidivism for particular categories of offenders.

Last, but not least: *We should keep the public informed of what we are doing.* The public wants to know that the sentencing done in its names—and by its authority—is promoting its safety. We should make sure that, to the extent humanly possible, sentencing is indeed promoting the public's safety.

APPENDIX A
OFFENDER RECIDIVISM RATES, BY OFFENSE AND PUNISHMENT
TYPE, FOR THE TWENTY-FIVE MOST NUMEROUS
OFFENSES, 1995–2005†

Offender Type	Nonviolent*	Violent**	Drug***	Endangering Child Welfare	Driving While Intoxicated
Total Offender Population	66.00%	4.50%	10.20%	0.60%	6.70%
Offenders Placed on Probation	81.20%	63.00%	66.50%	77.50%	54.00%
Recidivism Rate of Probationers	24.00%	25.70%	18.80%	16.30%	18.40%
Offenders Subject to Shock Treatment	6.80%	16.10%	20.20%	12.00%	32.20%
Recidivism Rate of Shock-Treatment Offenders	43.10%	35.10%	23.50%	32.30%	23.60%
Offenders Imprisoned	10.20%	20.70%	13.30%	10.60%	13.80%
Recidivism Rate of Imprisoned Offenders	46.70%	38.70%	26.20%	28.50%	31.00%

† Data based on report from David Oldfield, Dir. of Research & Evaluation, Mo. Dep't of Corr. (Jan. 16, 2008) (unpublished report, on file with the *New York University Law Review*).

* Nonviolent offenses included in this list are: Theft of \$500–\$25,000, Fraudulent Use Credit/Debit Device, Stealing, Stealing of a Motor Vehicle, Tampering First Degree with Motor Vehicle or Airplane, Unlawful Use of a Weapon, Property Damages First Degree, Criminal Nonsupport of \$5,000, Passing Bad Check of \$500 or More, Burglary First Degree, Burglary Second Degree, Forgery, Receiving Stolen Property of \$150 or More, Leaving the Scene of an Accident, Passing a Bad Check, and Distribution of Five Grams of Marijuana.

** Violent offenses included in this list are: Assault Second Degree, Domestic Assault Second Degree, and Robbery Second Degree.

*** Drug offenses included in this list are: Distribution of a Controlled Substance, Trafficking in Drugs or Attempted Trafficking, and Possession of a Controlled Substance.

APPENDIX B
TOP TWENTY-FIVE OFFENSES, BY DIFFERENCE IN RECIDIVISM, 1995-2005†

Offense	Felony Class	Offense Type	Total Offenders Sentenced	Sentence						Difference in Recidivism Between Prison and Probation
				Probation		Shock/Treatment		Prison		
				Total	Recidivism Rate (in %)	Total	Recidivism Rate (in %)	Total	Recidivism Rate (in %)	
Theft of \$500-\$25,000	C	Non-Violent	2,603	2,337	17.9	121	45.5	145	62.1	44.1
Fraudulent Use of Credit/Debit	D	Non-Violent	1,163	928	19.0	64	43.8	171	48.5	29.6
Stealing	C	Non-Violent	16,168	13,208	19.1	1,039	45.1	1,921	48.0	28.9
Stealing of Motor Vehicle	D	Non-Violent	1,403	1,116	32.2	85	49.4	202	58.4	26.2
Tampering First Degree	C	Non-Violent	4,244	3,212	37.8	388	58.0	644	63.2	25.4
Unlawful Use of Weapon	D	Non-Violent	6,540	5,327	20.0	392	33.4	821	43.7	23.7
Property Damages First Degree	D	Non-Violent	1,451	1,220	26.6	84	40.5	147	49.7	23.0
Criminal Nonsupport of \$5,000 for 6-12 Months	D	Non-Violent	9,902	9,399	15.6	111	35.1	392	37.8	22.1
Passing a Bad Check of \$500+	D	Non-Violent	1,166	1,088	15.6	27	48.1	51	43.1	21.6
Burglary First Degree	C	Non-Violent	1,595	1,129	27.4	232	46.1	234	48.3	20.9
Possession of a Controlled Substance	C	Drugs	37,485	31,653	20.3	3,010	35.4	2,822	40.3	20.0
Burglary Second Degree	C	Non-Violent	12,743	9,451	35.3	1,365	52.7	1,927	55.2	19.9
Forgery	C	Non-Violent	9,938	7,987	25.0	664	48.0	1,287	44.7	19.7
Receiving Stolen Property of \$150+	C	Non-Violent	2,736	2,187	26.9	205	44.9	344	46.5	19.6
Leaving the Scene of an Accident	D	Non-Violent	1,708	1,306	20.8	161	32.3	241	39.8	19.1
Assault Second Degree	C	Violent	5,500	3,558	19.5	804	27.5	1,138	37.7	18.2
Endangering the Welfare of a Child	D	Child Abuse	1,202	931	16.3	144	28.5	127	32.3	16.0
Trafficking in Drugs (or Attempt)	A	Drugs	1,317	1,033	11.6	185	16.2	99	25.3	13.6
DWI/Alcohol	D	DWI	12,073	6,523	18.4	3,887	23.6	1,663	31.0	12.7
Passing a Bad Check	D	Non-Violent	5,886	4,986	21.0	200	40.5	700	33.4	12.4
Domestic Assault Second Degree	C	Violent	1,094	898	25.5	102	39.2	94	37.2	11.7
Distribution of Five Grams of Marijuana	C	Non-Violent	1,142	847	21.1	154	34.4	141	30.5	9.4
Robbery Second Degree	B	Violent	1,708	784	32.1	433	38.6	491	41.3	9.2
Distribution or Manufacture of a Controlled Substance	B	Drugs	14,812	9,563	21.5	3,165	25.9	2,084	26.6	5.1
Trafficking in Drugs (or Attempt)	B	Drugs	2,409	1,739	23.3	396	28.9	274	26.6	3.3
Total Top Twenty-five Offenses			157,988	122,410	23.0	17,418	38.5	18,160	42.1	19.0
All Offenses			181,302	139,206	21.8	20,132	38.2	21,964	40.8	19.0

† Recidivism after two years of offenders' recommended probation, according to the Missouri Recommended Sentences; calculated as of June 30, 2007.