Evidence-Based Sentencing: Are We Up to the Task?

I. Introduction

Two-and-a-half years ago in these pages, I criticized current state sentencing policies that “expect to control crime solely by punishing the offender’s past conduct, without any meaningful effort to positively influence the offender’s future behaviors” and asserted that the “the most promising way forward” was to incorporate basic principles of evidence-based practice (EBP) into sentencing policies. Other than noting that the state chief justices had called for similar reforms in 2006 and that state judicial education programs were beginning to include information on EBP, however, there were few tangible indications of movement toward implementation of evidence-based sentencing (EBS) policies or practices to point to in June 2008.

Today, much has changed—at least in the state courts—although the changes do not appear to have much, if anything, to do with the 2008 federal election. In late 2008, “evidence-based sentencing” was described “the new frontier in sentencing policy and practice.” Since then, the concept has been favorably received in the academic community, actively pursued by state court leaders, and explicated and disseminated widely through education and training programs—resulting in significant national and state implementation activities at both the policy and practice levels.

II. Evidence-Based Sentencing

The concept of EBS dates back to adoption by the Conference of Chief Justices and the Conference of State Court Administrators in August 2007 of a formal resolution in support of “state efforts to adopt sentencing and corrections policies and programs based on the best research evidence of practices shown to be effective in reducing recidivism.” At the same time, the National Center for State Courts (NCSC), the Crime and Justice Institute, and the National Institute of Corrections published the first major paper on evidence-based sentencing, Evidence-Based Practice to Reduce Recidivism: Implications for State Jurisdictions.

By 2008, two sitting state court judges had already made significant contributions to the legal academy’s discussions of evidence-based sentencing. Judge Michael Marcus, circuit court judge in Multnomah County, Oregon, had written extensively on “smarter sentencing,” sentencing support tools, EBP, and the need to consider crime reduction as a principal goal of sentencing. In his 2008 Brennan Lecture at New York University School of Law, Justice Michael Wolff, chair of the Missouri Sentencing Advisory Commission, described Missouri trial judges’ use of risk- and needs-assessment information, Sentencing Assessment Reports, and recidivism data provided by the Commission to inform judges’ exercise of discretion in sentencing and to reduce recidivism.

The most recent and extensive academic discussions of evidence-based sentencing appear in the inaugural issue of the Chapman Journal of Criminal Justice. In August 2008, the journal hosted a national symposium titled Evidence-Based Sentencing: The New Frontier in Sentencing Policy and Practice. Panelists included judges, prosecutors, defense attorneys, criminologists, and psychologists from throughout the United States. The symposium examined use of the extensive body of empirical evidence on offender rehabilitation “to shape sentencing policies and practices at the state and federal levels, and the best methods for utilizing such evidence in making a sentencing recommendation or decision.” In 2009, the journal published papers by symposium panelists and others to present different stakeholder perspectives. In the issue’s introductory message, Chapman Law School Dean John Eastman correctly noted that “jurisdictions are now just beginning to adopt evidence-based sentencing practices that include a scientific assessment of the offender’s recidivism risk and the development of a risk management plan to reduce the likelihood of recidivism.”

A paper by San Diego District Attorney Bonnie Dumanis argued for an individualized approach to sentencing, emphasizing, “We have two choices: we can continue the revolving door of recidivism or we can create policy to mandate evidence-based sentencing.” In another paper, former federal prosecutor Steven Chunenson concluded that “evidence-based sentencing principles are another important tool to help prosecutors pursue justice and live up to the highest ideals of their noble calling.” Former criminal defense attorney Margareth Etienne reviewed several defense concerns about the use of actuarial risk-assessment information, but noted that “when properly executed, it [evidence-based sentencing] is ultimately
forward-looking, as it aims to rehabilitate the defendant as well as the practice of sentencing.”12 Next, Judge Marcus continued what he described as his “lengthy crusade to bring sentencing into the modern world.”13 Reemphasizing his view that criminal sentencing will not fully achieve its aspirations to improve public safety until the criminal justice system has more successfully constrained and “civilized” its pursuit of “just deserts” objectives.14

Professor Kirk Heilbrun examined the use of actuarial risk-assessment information in sentencing proceedings, stating that risk assessment “can provide an important contribution to decisions made at the sentencing or diversion stage of criminal adjudication.”15 Dr. Douglas Marlowe, chief of science, policy, and law at the National Association of Drug Court Professionals, investigated the use of risk- and needs-assessment information in substance abuse cases and concluded that it is difficult to argue against at least considering empirical information on effectiveness and cost effectiveness when rendering criminal dispositions. Failing to heed this information has led to an unquantifiable crisis for the criminal justice system in this country. Our correctional system is overloaded, state budgets are buckling under huge expenditures, minorities and the poor have been disproportionately injured, and yet recidivism remains at historic highs. We can and must do better.16

III. Judicial Leadership and Education

During the past two years, state court leaders have actively encouraged implementation of evidence-based sentencing in the state courts, and the NCSC and other state court-support organizations have created and delivered EBS education and training programs to many diverse audiences of policymakers and practitioners throughout the United States.

In 2008, the NCSC joined with the National Judicial College and the Crime and Justice Institute to develop a model national judicial education curriculum called Evidence-Based Sentencing to Improve Public Safety and Reduce Recidivism.17 The full-day curriculum presents the basic EBP principles to reduce recidivism and the research on which the principles are based. It contains examples from several states and exercises allowing trial judges to apply those principles in creating effective sentencing orders and responses to violations of probation. The NCSC also subsequently developed an online version of the model curriculum.18 Since 2008, the NCSC has presented the model curriculum, or adaptations of the model curriculum, at numerous judicial conferences and other educational events in fully half of the states to audiences of judges, legislators, bar leaders, probation officers, and other criminal-justice policymakers and professionals.19

In 2009, the Conference of Chief Justices and the Conference of State Court Administrators established the new nineteen-member, permanent joint Committee on Criminal Justice, cochaired by Alabama Chief Justice Sue Bell Cobb and Colorado Court Administrator Gerald Marroney. The committee comprises a Subcommittee on Evidence-Based Sentencing and a Subcommittee on Developing Effective Responses to Probation and Parole Violations, both of which are pursuing active work plans. Missouri Chief Justice William Ray Price, a member of the committee, echoed the concerns of many other committee members and state chief justices in his 2010 State of the Judiciary address when, after reviewing Missouri’s costs of incarcerating nonviolent offenders and those offenders’ high recidivism rates, he said:

There is a better way. We need to move from anger-based sentencing that ignores cost and effectiveness to evidence-based sentencing that focuses on results—sentencing that assesses each offender’s risk and then fits that offender with the cheapest and most effective rehabilitation that he or she needs. We know how to do this. States across the nation are moving in this direction because they cannot afford such a great waste of resources. Missouri must move in this direction, too.20

IV. National Policies Promoting EBS

Active state judicial leadership and robust educational programs and presentations have created a national EBS infrastructure and fueled actions at both the policy and practice levels—that is, the development of national and state-level policies promoting the use of EBS, as well as the actual use of EBS practices in state trial courts.21 National policies promoting the use of EBS practices have taken the form of policy frameworks, guidelines, proposed statues, and grant funding requirements.

In 2008, for example, the Pew Center on the States’ Public Safety Performance Project brought together a team of state policymakers, judges, practitioners, and researchers to identify state-level policy reforms that would reduce recidivism among offenders under probation or parole supervision. The resulting Policy Framework to Strengthen Community Corrections was published in December 2008. The framework identified model statues that states could enact to (a) promote the use of EBP in supervision agencies; (b) provide behavioral incentives to offenders in the form of earned compliance credits that would reduce the period of time that a compliant offender is under active supervision; (c) require the adoption of systems providing for use of swift, certain, and graduated sanctions in responding to probation violations, including use of administrative (nonjudicial) sanctioning processes; (d) establish performance incentive funding that allows supervising agencies to share in the state savings resulting from reductions in offender recidivism and revocations to prison; and (e) require supervising agencies to track and report key performance measures.22 Although not directed specifically or exclusively at the courts, successful implementation of the probation-related provisions of the framework requires courts to incorporate principles of EBP into their state sentencing practices.
The earned compliance credit and performance incentive funding portions of the framework are now embodied in 2008 Arizona legislation administered by the Arizona Administrative Office of the Courts, and in South Carolina legislation enacted in 2010. The EBP and performance incentive funding provisions of the framework served as models for legislation enacted by California in 2009.

Under the California legislation, the California Administrative Office of the Courts is required to consult with probation officials in identifying and tracking specific outcome-based performance measures regarding use of EBP, recidivism, and revocations, and the Judicial Council of California is required to consider modifications to rules of court and other judicial branch policies and programs that would support the implementation of evidence-based probation supervision practices and reduce probationer recidivism and prison revocations.

As another example, in January 2010, the National Institute of Corrections (NIC) published its “Framework for Evidence-Based Decision Making in Local Justice Systems.” Developed through a cooperative agreement with the Center for Effective Public Policy in partnership with the Pretrial Justice Institute, the Justice Management Institute, and The Careg Group, the NIC framework provides a systemwide policy framework for use by local criminal justice systems, including the courts, to reduce offender failures to appear and recidivism, as well as the resulting harm to victims and the community. Recently, seven local jurisdictions have been selected to participate in phase II of the project, funded by the NIC and the Bureau of Justice Assistance, during which these seed sites will receive extensive technical assistance from national service providers over the next twelve months in support of their local planning and implementation activities.

One of the principal applications of principles of EBP to sentencing proceedings is the use of actuarial risk- and needs-assessment information in sentencing and violation of probation proceedings. Although this development is a very recent one for most states, there is great interest throughout the nation in the potential use of risk- and needs-assessment information at sentencing. As a consequence, with financial support from the State Justice Institute and Pew Center on the States, the NCSC formed a national working group, which includes judges, court administrators, researchers, prosecutors, defenders, and probation and parole officials, to study this development and issue guiding principles for the use of risk- and needs-assessment information in state sentencing proceedings. The National Working Group on Using Risk and Needs Assessment Information at Sentencing expects to complete its work by the end of 2010.

Another key application of principles of EBP to sentencing is the use of swift, certain, and proportionate sanctions in responding to probation violations. Judge Steven Alm of the First Circuit Court in Hawaii created Hawaii’s Opportunity Probation with Enforcement (HOPE) program in 2004, using swift, certain, and short periods of court-imposed incarceration in response to violations of probation by drug and other high-risk offenders. A randomized, controlled trial evaluation of the program (funded in part by the National Institute of Justice) found that, in comparison with the control group, arrests for new crimes and probation revocations among HOPE probationers were reduced by more than 50 percent, missed probation appointments were reduced by over 60 percent, and drug use was reduced by more than 70 percent. In addition, on average, HOPE probationers served or were sentenced to almost 50 percent fewer days of incarceration than the control group.

In November 2009, with the support of the Conference of Chief Justices, a bill was introduced in Congress to authorize the Attorney General to award grants to state courts in amounts up to $25 million annually for up to five years to replicate the HOPE project. State programs modeled after the HOPE project have already been established in several states, including Alaska and Arizona.

Two other congressional bills containing similar federal grant authorization would establish a criminal justice reinvestment grant program to help states and local jurisdictions reduce spending on corrections, control growth in the prison and jail populations, and increase public safety. Section 4 (b) of the proposed Criminal Justice Reinvestment Act would authorize implementation grants for purposes that include training judicial staff on evidence-based practices for reducing recidivism, providing technical assistance in implementing use of risk- and needs-assessment tools and other evidence-based policies, establishing recidivism reduction and intermediate sanctions programs, and reducing recidivism and revocations among probationers and parolees.

A final example of national policy promoting EBS in the state courts is reflected in the Bureau of Justice Assistance Second Chance Act FY 2010 Competitive Grant Solicitation. Federally funded state reentry courts have traditionally been modeled on the drug court approach, but the most recent federal solicitations under the Second Chance Act also require use of validated risk-needs assessments in creating individualized offender reentry plans and evidence-based support services.

V. State Policies Promoting EBS

State-level policies promoting EBS have typically taken the form of either legislation or actions by judicial branch policy committees. Examples of recently enacted state legislation that incorporate principles of EBP include the following: Alabama legislation enacted in 2010 expands eligibility for community corrections supervision to include offenders convicted of certain drug offenses and limits prison sentences upon probation revocations based on technical violations of probation to ninety days for non-violent offenders who have met conditions of probation for a consecutive six-month period. New Hampshire legislation enables judges to authorize probation officers to
committees promoting EBS include the following: The recommendations sought to achieve four broad objectives: (a) acknowledge recidivism reduction as a primary purpose of probation and sentencing, (b) implement EBS practices in the sentencing of offenders placed on felony probation, (c) strengthen adult probation services, and (d) establish a statewide California system of community corrections. With strong support from the Judicial Council, SB 678 (described previously) was enacted in 2009 and achieved many of the recommended objectives. In late 2009, the California Administrative Office of the Courts created the internal Community Corrections Program and, in 2010, joined with the Chief Probation Officers of California to establish the statewide Community Corrections Coordinating Committee, composed of court, probation, and other criminal-justice stakeholder representatives, to effectively manage and coordinate its EBP and EBS implementation activities under SB 678.

VI. Evidence-Based Sentencing Practices

The principal use of EBS practices at the state trial court level is the use of actuarial risk- and needs-assessment information in state sentencing proceedings. The Indiana Supreme Court is the first (and only) state appellate court to consider the proper use of risk- and needs-assessment information in state sentencing proceedings.

In *Malenchik v. State of Indiana*, the defendant appealed his sentence on the ground that the trial court had erroneously considered the offender’s risk score on the LSI-R and SASSI risk-assessment instruments as an aggravating circumstance in enhancing his prison sentence. The Supreme Court found that the trial court had not relied on the risk scores as an independent aggravating factor, but went on to discuss “whether, and in what manner, a trial judge may consider results” from such assessment tools. The court first observed that “the concept of evidence-based sentencing practices has considerable promise” in achieving the objective that “an individualized penal consequence should be efficacious in achieving the goals of reformation and minimizing recidivism.” The court then reviewed the literature on the use of risk- and needs-assessment information at sentencing and concluded that such information does not “function as a basis for finding aggravating circumstances” and that risk scores do not constitute such a circumstance. But, the court proceeded to note, such scores “are highly useful and important for trial courts to consider as a broad statistical tool to supplement and inform the judge’s evaluation of information and sentencing formulation in individual cases.” The court noted that the LSI-R manual explicitly declares, “This instrument is not a comprehensive survey of mitigating and aggravating factors relevant to criminal sentencing and was never designed to assist in establishing the just penalty.”

The court concluded:

It is clear that neither the LSI-R nor the SASSI are intended nor recommended to substitute for the judicial function of determining the length of sentence appropriate for each offender. But such
evidence-based assessment instruments can be significant sources of valuable information for judicial consideration in deciding whether to suspend all or part of a sentence, how to design a probation program for the offender, whether to assign an offender to alternative treatment facilities or programs, and other such corollary sentencing matters. Having been determined to be statistically valid, reliable, and effective in forecasting recidivism, the assessment tool scores may, and if possible should, be considered to supplement and enhance a judge’s evaluation, weighing, and application of the other sentencing evidence in the formulation of an individualized sentencing program appropriate for each defendant.49

Some trial courts in at least ten states are now using general risk- and needs-assessment information in felony sentencing proceedings, primarily for the purpose of determining the conditions of probation supervision that the court should impose in order to most effectively manage and reduce an offender’s risk of recidivism.50 Risk- and needs-assessment information has been included in all Iowa pre-sentence reports since 2000. The Missouri Sentencing Advisory Commission began including Sentencing Assessment Reports to judges along with the commission’s individual sentencing recommendations in 2005. The reports include risk-assessment information that identifies the offender’s risk assets and risk liabilities.

In most of the ten states, however, the use of risk- and needs-assessment information at sentencing is a more recent development. Travis County (Austin), Texas, began doing so in 2006. The Wisconsin Assess, Inform, and Measure pilot projects began in late 2006 and eight pilot courts now receive risk- and needs-assessment information in at least some cases. The Idaho Department of Corrections began sharing risk-needs information with some of its courts in 2008, and the Michigan Department of Corrections provides risk- and needs-assessment information to several judges by special request. Arizona probation departments now provide risk- and needs-assessment information to all Arizona courts in virtually all felony cases.

Travis County, Texas, and all of the Arizona courts have reformatted and shortened their pre-sentence reports to focus on the most pertinent offender risk information. Based on the earlier experience of several Illinois pilot circuit courts, the Illinois Administrative Office of the Courts is also designing a shorter Illinois pre-sentence report that focuses on the offender’s salient risk factors. The Arizona courts have also reviewed all of their standard probation conditions to eliminate use of conditions that are not directly related to the individual offender’s risk factors or other specific sentencing objectives. Courts in Indiana and Arizona have recently developed or validated their own nonproprietary risk- and needs-assessment tools for statewide use.

With funding from the State Justice Institute and the NIC, the California Administrative Office of the Courts and Chief Probation Offices of California have jointly established the California Risk Assessment Pilot Project. For this project, up to six pilot counties will be selected to demonstrate the use of risk- and needs-assessment information in the sentencing and probation violation proceedings of 18-to-25-year-old offenders for the purpose of reducing recidivism and probation revocations. Teams from the initial pilot counties have participated in extensive training programs and are expected to commence pilot site operations by the end of the year 2010.

VII. Conclusion

In his acceptance speech for the Democratic Party presidential nomination in 1960, John F. Kennedy famously said:

We stand today on the edge of a New Frontier. . . . But the New Frontier of which I speak is not a set of promises—it is a set of challenges. . . . Beyond that frontier are the uncharted areas . . . , unsolved problems . . . , unanswered questions . . . . Are we up to the task—are we equal to the challenge? . . . That is the question of the New Frontier.51

In 2008, the concept of evidence-based sentencing was said to be “the most promising way forward” and “the new frontier” in sentencing policy and practice.52 Beyond this new frontier in sentencing, there undoubtedly also lurk uncharted areas, unsolved problems, and unanswered questions. It is not my task here to address these certain challenges. My task has been merely to outline developments in the field of evidence-based sentencing since the run-up to the 2008 federal elections. But, are we up to the task—are we equal to the challenge? In light of the early developments in implementation of evidence-based sentencing chronicled here, it appears that we are.

Notes

2 The U.S. Administrative Office of the Courts has recently developed new offender risk- and needs-assessment tools for federal probation officers, but it is unclear whether the federal judiciary yet has any significant interest in using risk-needs-assessment information or other evidence-based practices in federal sentencing proceedings.
at the policy level, the NCSC has conducted educational presentations on the online version of the model curriculum is also available on the Center for Sentencing Initiatives Web site, available at http://www.ncsconline.org/csi/index.html. The NCSC has conducted educational presentations on evidence-based sentencing in Alabama, Arizona, California, Colorado, Florida, Idaho, Illinois, Kansas, Kentucky, Massachusetts, Maryland, Michigan, Minnesota, Missouri, New Hampshire, Ohio, Pennsylvania, South Carolina, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin. Some states, including California for example, are incorporating materials from the NCSC model curriculum into their own state-sponsored judicial education curricula. With funding support from the Bureau of Justice Assistance, the Justice Management Institute and the Care Group also developed a training program for prosecutors, public defenders, judges, and community corrections professionals titled “Evidence-Based Smarter Sentencing.” Other prominent corrections researchers and experts have also provided education and training on evidence-based practice to judges and other criminal-justice professionals.

21 At the policy level, see Roger K. Warren, Arming the Courts with Risk: 10 Evidence-Based Sentencing Initiatives to Control Crime and Reduce Costs, Pew Center on the States (2009).
24 South Carolina Senate Bill 1154 (2010).
26 Id. at 189.
27 Center for Effective Public Policy, Pretrial Justice Institute, Justice Management Institute, and the Care Group, Framework for Evidence-Based Decision Making in Local Criminal Justice Systems, National Institute of Corrections (2010).
30 The Alaska program is called PACE (Probation Accountability with Certain Enforcement); the Arizona program is called SAFE (Swift, Accountable, and Fair Enforcement).
31 Based Sentencing by Judges
33 Alabama Senate Bill 570 (2010).
34 Alabama Senate Bill 325 (2010).
35 New Hampshire Senate Bill 500 (2010).
36 Pennsylvania House Bill 4-7 (2008); Wisconsin Assembly Bill 75 (2009).
37 South Carolina Senate Bill 1154 (2010).
38 Information referenced regarding state court EBS policies and practices is based on either the author’s personal knowledge or direct contact with state court officials with personal knowledge of the matters described. For further information about EBS activities in the state courts, consult the NCSC Center for Sentencing Initiatives Web site at http://www.ncsconline.org/csi/index.html.
41 See note 26, and accompanying text.
42 See Warren, supra note 25.
44 Id. at 568.
45 Id. at 569.
46 Id. at 572.
47 Id.
48 Id.
49 Id. at 573. In J.S. v. State of Indiana, 928 N.E.2d 576 (2010), decided the same day as Malenchik, the court held that a low LSI-R score does not function as a mitigating circumstance for the purpose of determining the length of sentence appropriate for a defendant.
50 This does not include drug courts or other specialized courts that may use risk needs assessment tools designed for specific use in substance abuse or other specific types of cases.
52 Warren, supra note 1 and CHAPMAN JOURNAL OF CRIMINAL JUSTICE, supra note 3.