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Evidence-Based Practice and Sentencing in State Courts: A Critique of the Missouri System

Claire Botnick*

INTRODUCTION

The number of adults under some form of correctional supervision in the United States has increased by 270 percent since 1980.[1] States—where the majority of felony cases are tried—are under immense pressure to reconcile the overwhelming costs of incarceration with the austerity policies of state governments in the wake of the Great Recession.[2] After reaching an all-time high in 2008, some states are beginning to see a slight decline in their prison populations as a result of reforms to the criminal justice system, declines in crime, and other policy changes.[3]

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* J.D., M.S.W. (2015), Washington University School of Law and George Warren Brown School of Social Work; B.A. (2008), Mount Holyoke College. I would like to thank Professor Karen Tokarz for her guidance and mentorship, and the entire editorial board of *Journal* for their work to bring this Volume to print. Special thanks to Editor-in-Chief, Christopher Scavone. I would also like to thank Aaron for being my most trusted sounding board and patient, diligent editor in all of life's projects.

1. James Austin, *The Proper and Improper Use of Risk Assessment in Corrections*, 16 FED. SENT'G REP. 1–2 (2004), *available at* http://www.jfa-associates.com/publications/pcras/proper%20userand%20misuse%20of%20risk.pdf (discussing the reasons for the increase as the "number of offenders [] on probation (nearly 4 million) followed by those in state and federal prison (1.4 million). Both the prison and jail populations have increased the fastest but there have also been significant increases in the probation and parole populations." In part, these increases are due to the increasing "size of the U.S. population—29%—and in the number of persons arrested each year—an even higher 125% increase.").

2. *See* Jamie Fellner, *The Human Rights Paradigm: The Foundation for a Criminal Justice System We Can Be Proud Of*, *in* TO BUILD A BETTER CRIMINAL JUSTICE SYSTEM, 16 (Marc Mauer & Kate Epstein eds., 2012), *available at* http://sentencingproject.org/doc/publications/sen_25_eassys.pdf. "In recent years, the dire straits of state budgets have begun to push public officials in the United States to consider cost saving changes in the criminal justice system . . . but I hope that in 25 years we will have accomplished more than a series of policy changes prompted by fiscal austerity." *Id.*

3. *See* Erica Goode, *U.S. Prison Populations Decline, Reflecting New Approach to Crime*, N.Y. TIMES, July 25, 2013, http://www.nytimes.com/2013/07/26/us/us-prison-populations

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The numbers of people involved in the criminal justice system in the state of Missouri is reflective of national trends. In 2013, 41,998 people were in prison and jail statewide.[4] In addition, there were 55,700 people on probation and 20,679 people on parole.[5] Administering these sentences comes at a significant cost to taxpayers and further strains already scarce funding.[6] In 2012, Missouri spent nearly $651 million on corrections, approximately 8.2 percent of its operating budget.[7] Additionally, these rates of incarceration have social, cultural, and political impacts on the state and its people because they disproportionately bear on low-income and African American Missourians.[8] The ratio of black to white in the incarcerated population in 2011 was 5.2:1.[9]

The cost of corrections, the increased size of the correctional population, and the significant racial disparities that exist in sentencing have been the subject of many empirical inquiries, which

-decline-reflecting-new-approach-to-crime.html. "The prison population in the United States dropped in 2012 for the third consecutive year . . ." *Id.* From 2011 to 2012 the prison population decreased by 1.7 percent, and "[a]bout half the 2012 decline—15,035 prisoners—occurred in California, which has decreased its prison population in response to a Supreme Court order to relieve prison overcrowding." *Id.* Further, there have been decreases of more than one thousand inmates in New York, Florida, Virginia, and North Carolina. *Id.*; *see also* THE PEW CTR. ON THE STATES, PEW CHARITABLE TRUSTS, PRISON COUNT 2010 (2010), *available at* http://www.cjpc.org/Prison_Count_2010%20Pew%20%20Center%20report.pdf.

4. *Missouri*, THE SENT'G PROJECT, http://www.sentencingproject.org/map/state data.cfm?abbrev=MO&mapdata=true (last visited Oct. 11, 2013).

5. *Id.*

6. *The Price of Prisons: Missouri*, THE VERA INST. OF JUSTICE (Jan. 2012), http://www.vera.org/files/price-of-prisons-missouri-fact-sheet.pdf [hereinafter *The Price of Prisons*]. According to the Vera Institute, the Missouri Department of Corrections spent $503.9 million on prison expenditures in 2010. *Id.* The Department, however, also incurred $176.5 million in related costs such as employee benefits, pension contributions, underfunded retiree health care contributions, capital costs, judgments and legal claims, and statewide administrative costs. *Id.*

7. OFFICE OF ADMIN., DIV. OF BUDGET AND PLANNING, FY 2012 TOTAL OPERATING BUDGET (2011), *available at* http://archive.oa.mo.gov/bp/pdffiles/2012Budcharts.pdf.

8. Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of* Booker, 123 YALE L.J. 2 (2013); *see also* Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 806 (2014) (describing that "equal treatment of all persons is a central objective of the criminal justice system, and [evidence-based practice in sentencing] as currently practiced may have serious social consequences. It can be expected to contribute to the concentration of the criminal justice system's punitive impact on who already bear its brunt, including people of color.").

9. *The Price of Prisons*, *supra* note 6.

have produced varied policy responses.[10] Further, high rates of recidivism across the country have put researchers and policy makers on notice of the importance of developing and identifying interventions capable of reducing criminal justice involvement and improving offender reentry.[11]

The first major reforms[12] occurred at the federal level and gave rise to federal mandatory sentencing regimes, which were later found to be unconstitutional.[13] The problem of disparities in sentencing, high rates of recidivism, and strains on state budgets persist, and policy makers at the state and federal levels continue to grapple with the question of how to make the system both more fair and efficient.[14]

Today, reformers hail the rise of evidence-based sentencing and the use of risk assessment[15] as the latest answers to the pressing issue of rising costs, the ballooning prison population, and the stark racial disparities in the system.[16] Evidence-based practice in sentencing first emerged to describe practices that have been tested by rigorous study and have been shown to reduce recidivism.[17] Applying the principles of evidence-based practice to sentencing refers to the use of actuarial

10. Starr & Rehavi, *supra* note 8, at 4; *see generally* MICHELLE ALEXANDER, THE NEW JIM CROWE: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

11. Susan Turner, James Hess & Jesse Jannetta, *Development of the California Static Risk Assessment (CSRA)*, UC IRVINE CNTR. FOR EVIDENCE-BASED CORRECTIONS (2009), *available at* http://ucicorrections.seweb.uci.edu/files/2009/11/CSRA-Working-Paper.pdf [hereinafter *CSRA*].

12. Crystal S. Yang, *Have Inter-Judge Sentencing Disparities Increased in an Advisory Guidelines Regime? Evidence from Booker*, 89 N.Y.U. L. REV. 1268 (2014). "In response, policymakers sought to limit the 'unfettered discretion the law confers on those judges and parole authorities [that implement] the sentence.'" *Id.* at 1270 (alteration in original) (quoting S. REP. NO. 98-225, at 38 (1983)). Congress enacted the Sentencing Reform Act of 1984, which gave rise the Federal Sentencing Guidelines. Yang, *supra* note 12, at 1270.

13. Yang, *supra* note 12, at 1272 "Following nearly two decades of mandatory Guidelines sentencing, the Guidelines were struck down in *United States v. Booker* . . ." *Id.*; *see also* United States v. Booker, 543 U.S. 220 (2005).

14. *See* ROGER K. WARREN, NATIONAL CENTER FOR STATE COURTS, EVIDENCE-BASED PRACTICE TO REDUCE RECIDIVISM: IMPLICATIONS FOR STATE JUDICIARIES 8–10 (2007), *available at* http://static.nicic.gov/Library/023358.pdf.

15. *CSRA*, *supra* note 11, at 4. "Research in evidence-based practices identifies the use of validated risk assessment instruments as valuable in classifying criminal justice clients by risk levels and identifying needs in custodial and non-custodial settings." *Id.*

16. WARREN, *supra* note 14, at xi.

17. *Id.*

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risk prediction instruments, often called risk assessments, which are used by judges to guide sentencing decisions.[18]

Missouri has been on the front lines of implementing evidence-based practices in sentencing.[19] The implementation and institutionalization of these practices, however, has raised complex issues that must be resolved by the players in Missouri's sentencing arena, such as lawyers, judges, clinicians, court administrators, and correctional personnel.[20]

In this Note, I propose that the development of evidence-based practice, and the use of risk assessments specifically, may be a transformative tool for reforming Missouri's criminal justice system. In order for evidence-based practice to make a meaningful impact on the system, however, the state must allocate adequate resources to this effort, establish a process to increase transparency in data collection, and limit the use of dynamic factors in risk assessment tools. Without such safeguards, Missouri is likely to replicate the same trends that have existed for decades and disproportionately disadvantage the state's most vulnerable citizens.

Part I of this Note will address the state of the correctional system in the United States and in Missouri. Part II will address the history of evidence-based practices, the development of risk assessments, and the use of these practices in Missouri. Part III will provide an analysis of the use of risk assessments and a critique of the implementation and institutionalization of evidence-based sentencing. Finally, Part IV will assess the inherent problems of implementing evidence-based tools in Missouri's sentencing system. In order to truly improve the state's sentencing scheme, Missouri must prioritize the rigorous evaluation of these programs enhance the training and resources allocated to data collection and analysis used in evidence-based practices in sentencing.

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18. *Id.* at xii.

19. Michael A. Wolff, *Missouri's Information-Based Discretionary Sentencing System*, 4 OHIO ST. J. CRIM. L. 95, 96 (2006) (stating by 2003, Missouri had established its third sentencing commission in fifteen years).

20. *Id.* at 98.

I. THE STATE OF SENTENCING

In 2011, state governments spent $26.4 billion on corrections.[21] According to the Bureau of Justice Statistics, state and local governments spend over a third of all of their funds on corrections.[22] In 2011, the total correctional population—including individuals under correctional supervision, such as parole or probation—was more than seven million people.[23]

Prosecuting, trying, and sentencing felonies is a labor-intensive process for state courts.[24] Further, there are significant costs to the state involved with administering felony sentences.[25] In 2010, the Missouri Department of Corrections spent $503.9 million on prison-related expenditures.[26] The total cost of Missouri's expenditures in 2010 was $680.5 million.[27] On average, the Department of Corrections in Missouri supervised a daily population of 30,447 people in custody.[28] For state judges sentencing reform is imperative so that the process of sentencing becomes more efficient and cost-effective, and also meets the state's goals for reducing recidivism.[29]

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21. Tracey Kyckelhahn, *Local Government Corrections Expenditures, FY 2005–2011*. BUREAU OF JUST. STAT., http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4804 (last visited Jan. 20, 2013).

22. *Id.*

23. *Id.*; *see also* Michael A. Wolff, *Evidence-Based Judicial Discretion: Promoting Public Safety Through State Sentencing Reform*, 83 N.Y.U. L. REV. 1389, 1392 (2008). "In 2003, Justice Kennedy, in a speech to the American Bar Association, spoke about the 'extraordinary rate of incarceration in this country—one in 143 persons—compared with the average rate of European nations—about one per 1000.' 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.'" *Id.*

24. WARREN, *supra* note 14, at 4.

25. *Id.* at xi.

26. *The Price of Prisons*, *supra* note 6. In addition, the state spent $176.5 million in prison-related expense outside of the department's budget. *Id.* Twenty-five percent were costs outside the corrections budget. *Id.* Determining the total cost of state prisons requires accounting for expenditures in all areas of government that support the prison system—not just those within the corrections budget. *Id.* "The additional costs to taxpayers can include expenses that are centralized for administrative purposes (such as employee benefits and capital costs) and services for inmates funded through other agencies. Prison costs also include the cost of underfunded contributions to corrections employees' pensions and retiree health care plans; states must pay the remainder of those contributions in the future." *Id.*

27. *Id.*

28. *Id.*

29. WARREN, *supra* note 14, at ix.

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The increase in the prison population has had a disproportionate impact on communities of color.[30] Nationally, one out of every nine black men between the ages of twenty and thirty-four is incarcerated.[31] Black men are incarcerated at nearly seven times the rate of white men.[32] While the precise explanation for the enduring prevalence of racial disparities in the criminal justice system is widely debated, some scholars attribute the disparities to policing tactics, prosecutorial discretion, and developments in criminal justice policy.[33]

In response to the persistent disparities in sentencing Congress passed the US Sentencing Guidelines in 1984, implementing mandatory guidelines for judges.[34] In response, states began to borrow from the federal guidelines and began to adopt their own guidelines for judges in the state courts. In 2004, however, the Supreme Court struck down the use of such state sentencing guidelines in *Blakely v. Washington*, where Washington State had adopted aspects of the guidelines in their own criminal sentencing policy.[35] In June 2005, the Court decided the case of *United States v. Booker*, finding that federal mandatory guidelines violated the Sixth Amendment and were therefore unconstitutional.[36] The *Booker* decision made the Guidelines advisory rather than mandatory.[37] In less than a year, the Supreme Court struck down mandatory sentencing regimes at the state and federal level in *Blakely* and

30. Starr & Rehavi, *supra* note 8.

31. *Id.* (citing to PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008 2 (2008), *available at* http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2008/one20in20100pdf.pdf). "[I]n 2003, the Bureau of Justice Statistics projected that one in every three black men could expect to be incarcerated at some point in his life." *Id*. (citing to THOMAS A. LHAMON, BUREAU OF JUSTICE STATISTICS, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001 1 (2003), *available at* http://bjs.gov/content/pub/pdf/piuspo1.pdf).

32. *Id.*

33. Starr & Rehavi, *supra* note 8, at 5–6.

34. 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.").

35. *Id.* at 647.

36. Starr & Rehavi, *supra* note 8, at 14.

37. *Id.*

Booker and with those decisions the approach to sentencing reform was undone.[38]

Changes occurring in the federal system, such as the implementation of the US Sentencing Guidelines, often overshadow state sentencing reforms,[39] but state courts are where the bulk of felony cases in America are processed.[40] In 2004, over 2.7 million felony cases were filed in state courts.[41] The National Center for State Courts reports that felony cases take up approximately 25 percent of the judicial workload of a typical trial judge, which is far more than any other type of case.[42]

In order for criminal justice reform to reduce recidivism and racial disparities in sentencing, states are uniquely situated to make a meaningful impact.[43] State judges sentence over one million felony defendants annually, which account for 94 percent of all felony convictions in the United States.[44] More than three fourths of these offenses are non-violent ones.[45]

Further, states are grappling with the public safety reality that an overwhelming number of felons convicted in state courts return to their communities.[46] In Missouri, as many as 97 percent of offenders who are released from prison or jail return home.[47] Recently, states have taken notice of the reality that the systematic overreliance on incarceration as a method of advancing public safety is

38. *Id.* at 56–57.

39. Douglas A. Berman & Steven L. Chanenson, *The Real Sentencing World: State Sentencing in the Post-Blakely Era*, 4 OHIO ST. J. CRIM. L. 27, 28 (2006).

40. WARREN, *supra* note 14, at 4 (citing to ROBERT LAFOUNTAIN ET AL., NATI'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 2005: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT (2006)).

41. *Id.*

42. *Id.*

43. WARREN, *supra* note 14, at 5 (citing TRACEY W. PETERS & ROGER K. WARREN, NAT'L CTR. FOR STATE COURTS, *GETTING SMARTER ABOUT SENTENCING: NCSC'S SENTENCING REFORM SURVEY* 203 (2006).

44. WARREN, *supra* note 14, at 1 (citing MATTHEW R. DUROSE & PATRICK A. LANGAN, BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2002 2 (2004) ("In 2002, the last year for which the Bureau of Justice Statistics has published these statistics, the federal courts convicted 63,217 persons of a violent, property, drug, or other felony. State courts convicted an estimated 1,051,000.").

45. Wolff, *supra* note 23, at 1393 & 1419 n.10.

46. *Id.*

47. *Id.*

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fundamentally flawed.[48] As a result, states are searching for strategies that allow them to use valuable state resources more efficiently by reserving incarceration for the most dangerous offenders and relying less on incarceration as punishment for those less likely to recidivate.[49]

II. STATE SENTENCING COMMISSIONS AND THE RISE OF EVIDENCE-BASED PRACTICE IN SENTENCING

The intense pressure that criminal justice systems put on state resources, paired with the Supreme Court's decisions in *Blakely* and *Booker*, put state governments under immense pressure to adapt to the rapid changes in the sentencing arena.[50] Many states formed statewide sentencing commissions to respond to the changed environment.[51] Sentencing commissions have proven to be an effective mechanism for developing reforms and new policy innovations.[52] Additionally, states were faced with the reality that the sentencing policies of the 1970s and 1980s, which had drastically increased the prison population and, in turn, recidivism, had failed to make the public safer.[53]

In his article, *A Map of Sentencing and a Compass for Judges: Sentencing Information Systems, Transparency, and the Next*

48. *Id.* at 1394–96.
49. *Id.*
50. Wolff, *supra* note 19, at 95.
51. *Id.*
52. Steven L. Chanenson & Daniel F. Wilhelm, *Evolution and Denial: State Sentencing after* Blakely *and* Booker, 18 FED. SENT'G REP. 1, 4 (2005).

> Now is the time for states to strengthen their mechanisms to deal with the impending shifts in the sentencing seas. We continue to believe that accountable yet independent-minded sentencing commissions are the best frontline policy-making tool that any jurisdiction can employ. Sentencing commissions are far from perfect, but they can be important and effective when they are adequately resourced, adept at developing and analyzing the objective data that can depoliticize and most rationally inform sentencing policy, and draw together essential criminal justice actors for debate and consensus building.

Id.
53. Wolff, *supra* note 23, at 1395.

Generation of Reform, scholar Marc Miller identifies five primary areas that have motivated the sentencing reform movement to date:[54]

> (1) Bringing law to the sentencing arena to replace highly discretionary systems; (2) addressing sentencing disparities for similarly situated individuals; (3) reliance upon different justifications for punishment and the collapse of the rehabilitation focus for punishment; (4) desire for greater control over resource use; (5) and the quest for the implementation of rational and proportionate rules and penalties that limit reliance on inappropriate factors, such as race.[55]

In response to these concerns, the concept of evidence-based practice has taken hold in the sentencing community at the state level, which includes judges, prosecutors, the defense bar, court administrators, and clinicians.[56] The National Center for State Courts recently conducted a survey of state chief judges.[57] The report found that there are two sentencing reform objectives state chief judges believe to be the most pressing:

> (1) to promote public safety and reduce recidivism through expanded use of evidence-based practices, programs that work, and offender risk and needs assessment tools; and (2) to promote the development, funding, and utilization of community-based alternatives to incarceration for appropriate offenders.[58]

The trend towards evidence-based sentencing is premised on the idea that there is a place for empirical research in sentencing and judicial decision making.[59] Sentencing reforms typically contemplate the

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54. Marc L. Miller, *A Map of Sentencing and a Compass for Judges: Sentencing Information Systems, Transparency, and the Next Generation of Reform*, 105 COLUM. L. REV. 1351, 1359 (2005).

55. *Id.* at 1360.

56. *Id.*

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

58. WARREN, *supra* note 14, at 5.

59. *Id.* There are six principles of evidence-based practice that are most relevant to the work of state judges. These are (1) The Risk Principle; (2) The Need Principle; (3) The

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central issue of how punishment will reduce or otherwise impact future crimes.[60] That concern undergirds the adoption of the evidence-based approach, which emphasizes the use of empirical research in the prediction of recidivism.[61]

States that have adopted this approach use data in an "actuarial" manner instead of relying on their own professional, or "clinical," judgment.[62] The use of evidence-based practice in sentencing has been touted by advocates in a wide range of settings including academia, the judiciary, sentencing commissions, think tanks, and advocacy organizations.[63] The principles of evidence-based practice have taken hold so widely that the National Center on State Courts has advocated expanding the usage of evidence-based practices in judicial decision making at all stages of a case.[64] Further, the Center calls for the use of evidence-based practices when training prosecutors and defense counsel to identify high and low risk offenders.[65]

Advocates of evidence-based practices believe that using data as a guiding principle will "help to address the rate of incarceration, corrections costs, and racial and ethnic disparities in the prison and jail population."[66] One instrument for achieving those ends, which has recently gained popularity in the state courts, is the use of risk

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Treatment and Responsivity Principle; (4) Use of Risk/Needs Assessment Instrument; (5) Motivation and Trust; (6) Integration of Treatment and Community-Based Sanctions. *Id.* at 2–3.

60. This may be in contrast with the traditional rationales for sentencing: deterrence, retributivism, incapacitation, and rehabilitation. *See* J.C. Oleson, *Risk in Sentencing: Constitutionally Suspect Variables and Evidence-Based Sentencing*, 64 S.M.U. L. REV. 1329, 1399 (2011); *see also* JEREMY BENTHAM, THE RATIONALE OF PUNISHMENT 18 (2009) (1830); RONALD DWORKIN, LAW'S EMPIRE (1986); *and* H. L. A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 4–5 (1968).

61. Oleson, *supra* note 60, at 1399–1402.

62. Starr, *supra* note 8, at 807.

63. *Id.* at 814.

64. *Id.* at 814–15.

65. *Id.*; *see also* CONFERENCE OF CHIEF JUSTICES AND CONFERENCE OF STATE COURT ADM'RS., RESOLUTION 12 IN SUPPORT OF SENTENCING PRACTICES THAT PROMOTE PUBLIC SAFETY AND REDUCE RECIDIVISM (2007); *see also* Mark H. Bergstrom & Richard P. Kern, *A View from the Field: Practitioner's Response to Actuarial Sentencing: An 'Unsettled' Proposition*, 25 FED. SENT'G REP. 185, 187 (2013).

66. WARREN, *supra* note 14.

assessments.[67] Risk assessments are viewed as producing "reliable, valid, and objective determinations of future risks," and are used to "enhance managerial accountability."[68] Risk assessments have been in use for nearly one hundred years; however, they have only recently been applied in the sentencing arena.[69] Risk assessments are based on averages of data collected about sentences that have been imposed by judges across the state.[70] This data is used to produce a projection for the individual offender, which assesses the risk for recidivism.[71]

In 1994, Virginia became the first state to use risk assessments in the sentencing context.[72] Virginia's Sentencing Commission worked with the Virginia Department of Corrections to develop an actuarial risk assessment tool.[73] In developing the instrument, the Virginia Sentencing Commission found "four general types of factors significant in predicting risk: offender characteristics and demographics, current offense information, prior adult criminal record, and prior juvenile contact with legal authorities."[74]

In recent years, an increasing number of states, including Missouri, have followed Virginia's lead.[75] Today, the Sentencing Advisory Commission in Missouri has developed its own risk

67. Starr, *supra* note 8, at 811.

68. KELLY HANNAH-MOFFAT, ACTUARIAL SENTENCING: AN "UNSETTLED" PROPOSITION 3 (2010), *available at* http://www.albany.edu/scj/documents/Hannah-Moffatt_RiskAssessment.pdf.

69. Starr, *supra* note 8, at 809.

70. *Id.*

71. *Id.*

72. *Id.*

73. BRIAN J. OSTROM ET AL., NAT'L INST. OF JUST. & VIRGINIA CRIM. SENT'G COMM'N, OFFENDER RISK ASSESSMENT IN VIRGINIA 1 (2002), *available at* http://www.vcsc.virginia.gov/risk_off_rpt.pdf.

74. *Id.* at 27. Today, eleven specific factors have been incorporated into Virginia's risk assessment tool. They are: gender, age, marital status, employment status, whether the offender acted alone when committing the crime, whether there were additional offenses at conviction, whether the offender had been arrested or confined within the past twelve months, offender's prior criminal record, whether the offender had prior drug felony convictions, whether the offender had been incarcerated as an adult, and whether the offender had been incarcerated as a juvenile. *Id.* Demographic variables and socioeconomic variables receive substantial weight in the risk analysis scheme. *Id.*

75. MISSOURI SENTENCING ADVISORY COMM'N, SMART SENTENCING 1 (2010), *available at* http://www.mosac.mo.gov/file.jsp?id=45502 [hereinafter MOSAC].

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assessment tool to help judges make sentencing recommendations.[76] According to scholar Douglas Berman, "[i]n some form, nearly *every* state in the nation has adopted, or at least been seriously considering how to incorporate, evidence-based research and alternatives to imprisonment into their sentencing policies and practices."[77]

The use of risk assessments, which was first used strictly in the probation and parole context, has changed over time.[78] Some scholars have categorized the evolution of risk assessments into four generations.[79] Risk assessments initially relied primarily on clinical assessments, which depended on a clinician's professional judgment.[80] As such, there was little standardization or consistency between cases.[81] Then, in the 1970s, a process called the Salient Factor Score test was introduced, which focused on interjecting more objective criteria into the evaluation process.[82]

Third generation risk assessments shifted to a focus on dynamic risk factors that account for historical life experiences beyond the

76. *Id.* In Missouri, the Department of Corrections has developed their own risk assessment tool that ranks defendants from -8 to 7. A rating of "4-7 is rated 'good;' 2-3 is 'above average;' 0-1 is considered 'average;' -1 to -2 is 'below average;' and -3 to -8 is 'poor.'" Starr, *supra* note 8, at 813. Then, the report produces three different types of projections: (1) the "presumptive" sentence, which is the sentence most frequently given for that crime by judges throughout Missouri; (2) an "aggravated" sentence, where the specific circumstances of the crime or the potential risk posed by the offender justifies a harsher sentence; and (3) a "mitigated" sentence, where the circumstances of the crime, facts about the defendant, or the risk presented by the defendant justify a less harsh sentence. MOSAC, *supra* note 75, at 2–3. Missouri does not include gender as a factor in their risk assessment instrument; however, most states with instruments in use do include gender as a factor. Starr, *supra* note 8, at 823.

77. Starr, *supra* note 8, at 811.

78. Susan Turner et al., Development of the California Static Risk Assessment (CSRA): Recidivism Risk Prediction in the California Department of Corrections and Rehabilitation 1 (Sept. 2013) (working paper) (on file with UC Irvine Ctr. for Evidence-Based Corr.) *available at* http://ucicorrections.seweb.uci.edu/files/2013/12/Development-of-the-CSRA-Recidivism-Risk-Prediction-in-the-CDCR.pdf.

79. *Id.*

80. *Id.* "Initially, offender risk assessment was a fairly subjective process in which clinicians informally gathered and analyzed data . . . ." *Id.*

81. *Id.*

82. *Id.* The focus shifted from "subjective measurement to more actuarial or mechanical measures that were designed to roughly predict the likelihood of offender recidivism." *Id*. The Salient Factor Score test (SFS) included factors such as prior convictions, age, time passed since last offense, and drug dependency. *Id.* "Research has shown that the SFS is a valid assessment tool with a mean predictive criterion validity estimate . . . of .30 for general recidivism, and the predictive validity estimates of the SFS remain fairly consistent over time." *Id.*

criminal history factors.[83] The third generation produced the Level of Service Inventory-Revised (LSI-R) instrument that was "designed to aid practitioners in determining appropriate levels of service for offenders."[84] Finally, fourth generation risk assessment tools (1) account for the process from intake or arrest through supervision, (2) are used to assess more than risk alone, and (3) are intended to extend from sentencing decisions to case management.[85] The development of these tools has led to a split between scholars who favor tools that focus on static, unchanging factors—such as the LSI-R—with those who favor measurements of dynamic factors, which help to predict the clinical needs of the offender beyond the likelihood of recidivism.[86]

The risk assessments most commonly used today consider factors such as demographics, employment status, and criminal history.[87] However, some risk assessments include explicit inclusion of gender, age, and socioeconomic factors, such as employment, education, and "financial status."[88] Additionally, some risk assessment tools include family history and neighborhood of residence, as well as mental health diagnoses.[89] Although some risk assessment instruments included race as a factor up until the 1970s, the modern risk assessments overwhelmingly do not.[90]

Over time, these actuarial models have become more sophisticated.[91] Some risk assessment instruments today are longer

83. *Id.* at 2.

84. *Id.*

85. *Id.* These instruments also assess "strengths, needs, and responsivity to link them with appropriate services and levels of supervision." *Id.*

86. *Id.*

87. *See, e.g.*, NAT'L CTR. FOR STATE COURTS, CASELOAD HIGHLIGHTS (2004), *available at* http://cdm16501.contentdm.oclc.org/cdm/ref/collection/criminal/id/90.

88. Starr, *supra* note 8, at 805, 835.

89. *Id.* at 812 (citing Malenchik v. State, 928 N.E.2d 564, 572 (Ind. 2010)).

90. Starr, *supra* note 8, at 811. "There appears to be a general consensus that using race would be unconstitutional." *Id.* at 812. Further, some courts have found that the use of gender as a factor may also be unconstitutional. *Id.* at 824.

91. CHRISTOPHER BAIRD, COUNCIL ON CRIME AND DELINQUENCY, A QUESTION OF EVIDENCE: A CRITIQUE OF RISK ASSESSMENT MODELS USED IN THE JUSTICE SYSTEM 3 n.1 (2009), *available at* http://cjjr.georgetown.edu/pdfs/ebp/baird2009_QuestionOfEvidence.pdf (noting that the different forms of the risk assessments commercially available today are the LSI-R: Level of Service Inventory–Revised; COMPAS: Correctional Offender Management

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and more detailed than those in previous generations.[92] Further, they are more likely to rely on dynamic factors, as opposed to static ones.[93] There is much debate in the literature over whether dynamic risk factors have improved the reliability and accuracy of risk assessments.[94]

Advocates of the new generation of risk assessment instruments argue for the inclusion of more advanced, "dynamic" factors, which they claim will increase the reliability of the instruments as well as assist in individual case management.[95] These more advanced instruments, however, have not been found to be more effective in predicting recidivism.[96] As such, critics have called for a return to the more simplified instruments that rely primarily on static factors because they have more inter-rater reliability and are as accurate as the more advanced, dynamic instruments.[97]

In Missouri, risk assessments are based on eleven factors.[98] Six of the factors relate directly to the offender's criminal history.[99] The other factors that are measured include substance abuse, educational level, age, and employment status.[100]

The Research and Evaluation Unit within the Missouri Department of Corrections is responsible for providing data and analysis to the Department.[101] The Unit maintains statistical data

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Profiling for Alternative Sanctions; PACT: Positive Achievement Change Tool; LS/CMI: Level of Service/Case Management Inventory; YASI: Youth Assessment and Screening Instrument).

92. *Id.*

93. *CSRA*, *supra* note 11, at 3. Static factors represent unchanging factors, such as age, criminal history (including conviction and incarceration records), and addiction history. *Id*.

94. *Id.*

95. *Id.* "Proponents of using dynamic measures in risk and needs assessment suggest that these measures are essential because they can be used to target interventions during the community reintegration process." *Id*.

96. *Id.*

97. *Id.*; *see also* BAIRD, *supra* note 91, at 7 (emphasizing that nearly all of the literature on popular risk models refers to their demonstrated validity and reliability). Inter-rater reliability is particularly critical when models include twenty-five or more items, many of which are scored using subjective judgment. When there is little or no consistency among staff members completing risk instruments, the validity of the system cannot be assumed. *Id*.

98. Wolff, *supra* note 23, at 1406. These factors are each correlated with recidivism. *Id*.

99. *Id.*

100. *Id.*

101. MO. DEP'T OF CORRECTIONS, EXEC. DEP'T, OFFICIAL MANUAL 380–81 (2013), *available at* http://s1.sos.mo.gov/cmsimages/bluebook/2013-2014/6_Corr. pdf#corrections.

required to evaluate the Department's programs.[102] The research team analyzes this data and ultimately publishes its research and evaluations to agencies inside and outside of state government.[103] Offenders' supervising probation and parole officers collect the actual data required for this process.[104] Missouri has designated significant resources and personnel to the production of risk assessments and seems poised to continue to promote and rely upon the use of these tools in the future.

III. AN ANALYSIS OF RISK ASSESSMENT IN PRACTICE

At their best, risk assessments provide a valuable means for judges to determine whether greater resources should be expended by the state for greater supervision, and alternatively, when such resources may be preserved.[105] These predictions are based on the average rate of recidivism for offenders, which are in turn based on the shared traits that the risk assessment instrument relies upon.[106]

The utility of these predictions rests on the principle "that the model is well specified and based on a sample that is representative of the population to which the results are extrapolated."[107] The tools may, however, still be limited in their ability to make useful predictions for a particular individual.[108] The use of generalized data

102. *Id.*

103. *Id.*

104. MO. DEP'T OF CORRECTIONS, STRATEGIC PLAN FY 2012-2013 113 (2012), *available at* https://doc.mo.gov/Documents/publications/FY2012_2014StrategicPlan.pdf.

105. Wolff, *supra* note 23, at 1389–90. "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." *Id.* at 1395.

106. Starr, *supra* note 8, at 806; *see also* HANNAH-MOFFATT *supra* note 68, at 10. "Categorizing individuals as risky in comparison with an aggregate group contradicts the jurisprudential value of individualism." *Id.*

107. Starr, *supra* note 8, at 842.

108. *Id.* "Social scientists sometimes refer to the broader ranges attached to individual predictions as 'prediction intervals' (or sometimes as 'forecast' uncertainty or 'confidence intervals for a forecast') to distinguish them from the 'confidence intervals' that are estimated for the group mean or for the effect of a given variable." *Id.*

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to make specific predictions about individual risk may be inherently problematic.[109]

As the use of risk assessments in sentencing gains popularity, states will be forced to reckon with these inherent problems. As Judge Michael Wolff said in 2008, risk assessment instruments are "far from perfect, which is why the severity of punishment should not be based on a risk assessment prediction."[110] Meanwhile, the enthusiasm for the use of these assessments remains at an all-time high and has influenced the current draft of the Model Penal Code, which encourages judges to use risk assessments especially for "felony offenders who present an unusually low risk to public safety."[111]

As courts and judges work to define the precise role of risk assessments in sentencing decisions, these instruments, which are intended to benefit public safety and offenders, are in use and have a serious impact on the lives of criminal justice involved people, their families, and wider community.[112] These risk assessments become attached to the offender throughout his or her sentence and may impact "correctional decisions from levels of surveillance and intervention to eventual parole release."[113]As such, risk assessments have a lasting impact on decisions throughout the lifecycle of a criminal case.

Further, the ability of these tools to do what they purport to do—predict risk—may not be so. Judge Wolff's concession that the instruments are imperfect seems to be widely accepted in the scholarly community.[114] Using aggregate statistics to inform sentencing "has been critiqued on theoretical, methodological, and

109. HANNAH-MOFFATT, *supra* note 68, at 3. "The use of risk tools in sentencing is especially problematic because when used in courts they may offend moral and legal norms as well as country-specific constitutional values." *Id.*

110. Wolff, *supra* note 23, at 1405.

111. MODEL PENAL CODE: SENTENCING § 6B.09(3) (2012); *see also* Wolff, *supra* note 19, at 1406.

112. HANNAH-MOFFAT, *supra* note 68, at 3.

113. *Id.* "Because the tools classify and promote interventions based on categories of offender risk (i.e. low, medium, high), risk technologies tend to de-individualize punishments and can shift and reorient sentencing practices in unanticipated ways." *Id.*

114. *Id.* at 10 (explaining that most scholars agree that the field's present knowledge of risk assessments "does not allow us to provide an absolute statement about an offender's likelihood of recidivism or the timing of potential recidivism . . . .").

ethical grounds."[115] There is no doubt that great resources and effort are being dedicated to improving these instruments; however, the work is ongoing.[116] In the meantime, these instruments are in use across the country and are having a direct impact on decision-making by prosecutors, judges and clinicians working in the criminal justice system.

Further, in a system where policing and prosecutions are marred by the prevalence of racial profiling and implicit bias, risk assessments should be viewed critically because they may serve as a "statistical veil" for the profiling and aggressive policing and jailing of people of color.[117] This is particularly important when considering the prominent role that criminal history plays in the risk assessment scheme.[118] As discussed by University of Chicago Professor of Law and Political Science Bernard Harcourt, "[w]hen you live in a world in which juveniles are much more likely to be stopped—or, if stopped, be arrested, or, if arrested, be adjudicated—if they are black, then all of the indicators associated with prior criminal history are going to be serving effectively as a proxy for race."[119] Professor Harcourt explains that by relying on criminal history as a key factor in the prediction of future risk of reoffending, "you just inscribe the racial discrimination you have today into the future."[120]

Even in the presence of significant doubt about the validity of these tools, questions remain regarding the avenues that offenders have to raise these important questions about how risk assessments bear on their sentencing outcomes. To date, there is only one published appellate opinion about the use of risk assessments in sentencing.[121] In *Malenchik v. State*, the Indiana Supreme Court discussed the "proper use of assessment scores and other information obtained from the use of assessment tools."[122] There, the court found

115. *Id.* at 11.
116. *Id.* at 10–11.
117. BERNARD E. HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE 188–89 (2007).
118. *Id.*
119. Nadya Labi, *Misfortune Teller*, THE ATLANTIC MONTHLY (Dec. 20, 2011), http://www.theatlantic.com/magazine/archive/2012/01/misfortune-teller/308846/.
120. *Id.*
121. Starr, *supra* note 8, at 805.
122. *See* J. Richard Couzens, Tricia A. Bigelow & Gregg L. Prickett, *§ 5:15 The Proper*

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that risk assessments are neither "intended nor recommended to substitute for the judicial function of determining the length of sentence appropriate for each offender."[123] The court recommended these assessments be used primarily for judicial consideration in determining "whether to suspend all or part of a sentence, how to design a probation program for the offender, [and] whether to assign an offender to alternative treatment facilities or programs."[124]

Further, the court found that risk assessment scores do not amount to mitigating circumstances or aggravating circumstances because the "data selection and evaluations upon which a probation officer['s] . . . assessment is made nor the resulting scores are necessarily congruent with a sentencing judge's findings and conclusion regarding relevant sentencing factors."[125]

As risk assessments are hailed as a critical tool for judges to rely on in making important decisions in sentencing, their precise role remains undefined. According to the *Malenchik* court, risk assessment tools should be "statistically valid, reliable, and effective in forecasting recidivism."[126] The scores, however, should merely supplement and "enhance a judge's evaluation," not take the place of it.[127]

Finally, the use of risk assessments in sentencing has the potential to replace the traditional theories of punishment that have historically

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Use of EBP at Sentencing, SENTENCING CALIFORNIA CRIMES (July 2015), *available at* https://a.next.westlaw.com/Document/Iae0d542c9c9711e28658babd155efe11/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.Default); *see also* Malenchik v. State, 928 N.E.2d 564 (Ind. 2010); *and* Taylor v. State of Indiana, 957 N.E.2d 215 (Ind. 2011).

> On appeal, Taylor concedes that the trial court properly considered his criminal history and the fact that he was out on bond at the time he committed the instant offenses to be aggravating factors at sentencing. Taylor argues, however, that the trial court improperly considered his history of illegal drug and alcohol use, his poor LSI-R score, his failure to accept responsibility for his actions, previous attempts at rehabilitation have failed, and the fact that his minimum sentencing was non-suspendable to be aggravating factors.

Id. at 217.

123. *Malenchik*, 928 N.E.2d at 573; *see also* Couzens, Bigelow, & Prickett, *supra* note 122.

124. *Malenchik*, 928 N.E.2d at 573.

125. *Id.*

126. *Id.*

127. *Id.* This finding is consistent with the proposal by the National Center for State Courts, which issued a recommendation for the use of risk assessments. Couzens, Bigelow, & Prickett, *supra* note 122.

shaped sentencing practices, such as retributivism, deterrence, and utilitarianism.[128] Sentencing reformers should carefully consider the ways in which the use of risk assessments shifts the purpose and theory of sentencing "from a backward-looking retributive approach with a focus on uniformity, proportionality, and reduction of unwarranted disparity to a forward-looking utilitarian approach with a focus on public safety and crime reduction."[129]

In effect, this use of risk assessments has the capacity to fundamentally shift the focus of the punishment from what an offender has done to what an offender could do in the future.[130] As risk assessments become increasingly popular and widely used, they may be silently transforming the theoretical underpinnings of our sentencing scheme. Further, the rights of offenders may be at risk if the channels for challenging the use of risk assessments in their cases are ill-defined and amorphous.

IV. PROPOSAL

The development and use of actuarial information in the criminal justice system can be traced as far back as the 1920s.[131] Never before, however, has there been such widespread enthusiasm for this tool and its application in the sentencing context.[132] As best practices evolve, Missouri—an early champion of these instruments—is uniquely situated to lead by example and significantly advance the field. But in order to do so, Missouri must charge its Sentencing Commission with continued evaluation of the risk assessment instrument and the data collection and evaluation process.

Identifying offenders with high risks of recidivism and devoting more services and resources to such cases is certainly important. However, this merely reinforces the importance of using reliable instruments to inform these life-altering sentencing decisions. As

128. HARCOURT, *supra* note 117, at 188.
129. Bergstrom & Kern, *supra* note 65, at 185.
130. *Id.* at 185–86.
131. HARCOURT, *supra* note 117, at 1–2, 39–47; *see also* Labi, *supra* note 119. "In 1927, Ernest Burgess, a sociologist at the University of Chicago, drew on the records of 3,000 parolees in Illinois to estimate an individual's likelihood of recidivism." *Id.*
132. Starr, *supra* note 8, at 804–05.

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such, the Sentencing Commission should seriously consider the appropriateness of inclusion of dynamic factors in the risk assessment tool, as they have not been validated and have no proven relationship to recidivism. As we are still in the early stages of implementation and institutionalization of risk assessments, the relationship between risk scores and outcomes must be under heightened scrutiny by the Research and Evaluation Unit of the Missouri Department of Corrections, so the instruments only include factors that are validated and have high rates of intra-rater reliability, or consistency, within the data.

Missouri should avoid rushing to advance these instruments by including dynamic factors that have not been validated. Relying on risk factors that may "reduce the relationship between risk scores and outcomes,"[133] will damage the credibility of the Missouri system, have a negative impact on the offenders that the system wishes to better serve, and in turn create a negative impact on public safety.

In Missouri, the data used in risk assessments is collected by the Department of Probation and Parole. The collection of data used in risk assessments requires rigorous training and skill in order for the information to be unbiased and have intra-rater reliability.[134] Additionally, the value of this data is predicated on the availability of skilled statisticians who are able to interpret the data to make it usable and accurate for risk assessments.

While the Missouri Department of Corrections has developed its own instruments, little is known about the way in which these instruments were developed and how they compare to other similar instruments. Efficacy of risk assessment tools relies on the fact that the data is reliable. If evidence-based practice is to become a central part of reforms to the Missouri criminal justice system, then the state must allocate sufficient resources, training, and personnel to the effort. Evidence-based practice can only be effective when there is transparency and reliability within the data and when the state supports the agencies responsible for its implementation.[135]

133. BAIRD, *supra* note 91, at 10–11.

134. *Id.* at 7.

135. HANNAH-MOFFAT, *supra* note 68, at 14 (quoting James Bonta, an advocate for risk assessments, on the issue of risk assessments in practice: "[i]t is one thing for scientists to

In order to achieve this goal, Missouri should implement a system of checks and balances for the use of risk assessments in the state to ensure that there is regular training and assessment of practices in the Department of Probation and Parole, which is responsible for the collection of this data. Further, a system of evaluation should be established by the Department of Corrections. In order for these instruments to develop and improve, Missouri's Department of Corrections must work to create an environment that emphasizes continued training and provides effective supervision so that the data may be reliably collected.[136]

Missouri's use of risk assessments may improve the sentencing system's ability to predict recidivism; however, it will not assure the availability of an appropriate correctional program, services, or treatment plan for the offender.[137] As such, state lawmakers and judges must critically engage with the question of what resources are dedicated to offenders who receive lessor sentences under the new scheme. Reducing recidivism requires not just that the state have an increased capacity to predict the risk of recidivism, but also that Missouri be able to provide offenders with the necessary clinical and social services that will keep them from recidivating. Missouri has successfully implemented some rehabilitative programs across the state. However, it has to do more, or else Missouri will, once again, fall behind.

CONCLUSION

Today, there is great enthusiasm for the promise of using evidence-based practice in Missouri's sentencing system. A unique coalition of legislators, policy makers, reformers, judges, and practitioners has emerged in support. Each party is likely to have its own rationale for wanting to incorporate risk assessments into the sentencing process; however, they should all agree that Missouri can

demonstrate that a risk instrument or a treatment program can work but it is a very different matter to make it work in correctional agencies with a diverse work force in terms of education, values and experience, conflicting criminal justice policies, and management practices that are not conducive to selecting and training of staff in effective assessment techniques.").

136. *Id.*

137. *Id.*

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improve public safety, make the criminal justice system fairer and more efficient, and make a meaningful impact on the lives of individual offenders by using data to make smarter decisions in sentencing.[138]

After decades of policies of overreliance on incarceration, which has come at significant economic, social, and political costs, Missouri is now in the unique position to serve as a national leader in reform. But, it will take a robust commitment by leaders in government, the judiciary, the Department of Corrections, and the larger community in order to ensure that the work gets done to make risk assessments one piece of a cogent public safety strategy. This strategy should use evidence-based practice to guide decision making towards a more fair and just system that reduces our collective reliance on incarceration, decreases recidivism, and makes Missouri safer.

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138. Marc L. Miller, *A Map of Sentencing and A Compass for Judges: Sentencing Information Systems, Transparency, and the Next Generation of Reform*, 105 COLUM. L. REV. 1351, 1359–61 (2005).

> Reformers, including legislators, are not generally hostile to empirical assessment. However, in the same way that legislators rarely think of their proposals as hypotheses to be tested, they rarely think in terms of how their proposals might be tested, or what kinds of questions and data they might later consider in assessing each reform.
>
> When asked, reformers, scholars, and practitioners (including judges) each pose different questions about sentencing. Most reformers and scholars ask questions about the operation and effects of the system as a whole . . . . Legislators in particular often begin by asking about the functional goals of reform—reducing sentencing disparities, limiting reliance on inappropriate factors, and controlling resource use.

Id.