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Minnesota's Failed Experience with Sentencing Guidelines and the Future of Evidence-based Sentencing

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MINNESOTA’S FAILED EXPERIENCE WITH
SENTENCING GUIDELINES AND THE FUTURE OF
EVIDENCE-BASED SENTENCING

John Stuart† and Robert Sykora††

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I.  INTRODUCTION

The year was 1978. Jimmy Carter was president. Rudy Perpich was Minnesota’s governor. A gallon of gas cost about sixty-three cents. Disco was at its height and the Bee Gees were at the top of the popular music charts. That year, Minnesota’s legislature created the Sentencing Guidelines Commission. Two years later, the new Guidelines began to control adult sentencing decisions made by judges in Minnesota’s state courts.¹

The new Guidelines replaced a parole system which was highly discretionary: a robber, for example, might be sentenced to “0–20 years,” but actually serve three years, based on the Minnesota Corrections Board’s review of his case² and his conduct in prison.³


².  As a convenience, male personal pronouns are used to describe offenders in this Article. In fact, as of July 1, 2010, 6.5% of offenders in Minnesota prisons
Under the new Guidelines, proponents claimed things would be different—prison sentences were to be set forth in a matrix filled with precise numbers of months. The matrix was designed to improve sentences in several ways:

- Create sentences proportional to the offender’s culpability and the crime;
- Eliminate or greatly reduce disparities;
- Be “rational and consistent”; and
- Be economical: treat prison beds as a scarce resource and work within the state’s existing capacity.

Under the new Guidelines, some hard-to-measure purposes of sentencing—like rehabilitation and incapacitation—were to drop out of the picture in favor of clear, carefully measured “just deserts.” The Sentencing Guidelines Commission was supposed to produce these results by taking on a permanent role as an independent sentencing policymaker working outside the political turbulence of the state legislature.

Thirty years of experience demonstrates that the claims made by the proponents of the Guidelines have gone unrealized. All three branches of government have asserted control over felony sentencing. Disparity and disproportionality have flourished, especially in the politically charged arenas of drug and sex-crime sentencing. The role of the Sentencing Guidelines Commission has been to make minor adjustments, as the prison population increased fivefold over the last three decades due to big sentencing policy decisions made by elected officials. Racial demographics in

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3. See Rathke, supra note 1, at 272–76.
5. Audrey LeSuer, Introduction to the Minnesota Sentencing Guidelines, 5 HAMLIN L. REV. 293, 297 (1982). The “just deserts” model asserts that the sole motive for incarcerating an individual should be for punishment. Id. In this retribution-based model, “the severity of the sentence should depend on the seriousness of the defendant’s crime or crimes—on what he did, rather than on what the sentencer expects he will do if treated in a certain fashion.” Id. (quoting REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT 16 (1976)).
7. See infra Parts II–IV; see also Frase, supra note 1, at n.4 (showing the 1980
the prisons have swung wildly depending on the ethnic composition of the group using the most popular recreational drugs. The advocates of both rehabilitation and incapacitation have made their own changes, through departures—upward and downward—from the presumed sentences, and by establishing add-ons like the rehabilitative Drug Courts and the incapacitative sex offender commitment “hospitals.”

Along the way a new idea has emerged: that sentencing can be effective as an “evidence-based practice.” This line of thinking was left out of the Guidelines. The originators of the Guidelines were scornful of the belief that prison could serve any useful function other than housing those receiving carefully measured punishment. As use of the Guidelines evolved, it became apparent that their sentencing numbers were not really based on anything. What is the true “just desert” of someone who possesses half an ounce of cocaine? Should it be probation? Twelve months in prison? Eighty-six months—as it is now—in the post “War on Drugs” era? Nobody knows. Are we getting our money’s worth—at about $35,000 a year to incarcerate each inmate—or would the use of a Drug Court or Challenge Incarceration Program give better results at a lower cost? These are the questions that need answers. Suddenly it does not appear possible to spend unlimited funds locking people up based on large numbers on a grid written by politicians. Elected officials always feel pressure to pick the highest sentences in order to appear “tough on crime.”

Despite their flaws, the Guidelines could still play a useful role if the political branches of government would back off and allow an independent sentencing policy group to return to the original goal of prison population at 2000 inmates compared to the current population at just under 10,000).


9. See infra text accompanying notes 79–128.

10. See infra Part V.

11. See Pew Ctr. on the States, 1 in 31: The Long Reach of American Corrections Fact Sheets 24 (2009) [hereinafter The Long Reach Fact Sheets] (showing 2008 Minnesota prison cost to be $89.77 per inmate per day), available at http://www.pewcenteronthestates.org/uploadedFiles/wwwpewcenteronthestatesorg/Fact_Sheets/PSPP_1in31_factsheets_FINAL_WEB.pdf. The cited figure is the operational per diem, which is less than the per diem of $112.38 calculated pursuant to Minnesota Statutes, section 241.018. Minn. Stat. § 241.018 (2010).
of proportional, economical sentencing. The next time there is a redesign of Minnesota’s sentencing system, the decisions should be based on evidence of correctional strategies proven to work. Today there is evidence to be found and people who know how to find it.

II. SEX OFFENDERS UNDER THE GUIDELINES: THE ILLUSION OF “JUST DESERTS” AND THE ELUSIVENESS OF PROPORTIONALITY

A. Sex Offenders and Their Sentences—1980

The main felony sex offenses in Minnesota are classified using four degrees, defined in Minnesota Statutes, sections 609.342, .343, .344, and .345. First- and third-degree offenses are sexual penetration crimes while second- and fourth-degree offenses each require sexual contact. The statutes contemplate a spectrum of increasing culpability from fourth degree up to first degree. But the Sentencing Guidelines process has been unable to provide a satisfactory “just desert” sentence for first-degree criminal sexual conduct or appropriate gradations for sex crimes that fall along the spectrum. The Guidelines also failed to keep sex crime sentences proportional to the presumed sentences for other violent crimes.

Third-degree criminal sexual conduct is a good starting point for the illustration of these problems. This crime requires sexual penetration achieved by “force or coercion.” This is the common law crime of forcible rape, with first-degree criminal sexual conduct being aggravated forcible rape, including among its elements use of a weapon, or “personal injury to the complainant.”

In the original Sentencing Guidelines, the presumed sentences for both first- and third-degree crimes, if committed by a person with no criminal history, were executed commitments to state prison. First degree was to be punished by forty-three months of incarceration, the same as assault in the first degree (great bodily harm), kidnapping with great bodily harm, and manslaughter in the first degree. The third-degree sentence would be twenty-four months in prison, the same as the presumed sentence for

13. Id.
14. See id.
15. Id. § 609.344, subdiv. 1(c) (2008).
16. Id. § 609.342, subdiv. 1(d)–(e) (2008).
17. See Project, supra note 4, at 428–29.
aggravated robbery and arson in the first degree. 18

Consistency and rationality were central purposes of the Sentencing Guidelines. 19 Yet these goals are unattainable when uncertainty blurs the definition of a crime’s elements. Criminal sexual conduct, for example, is interpreted by case law as having overlapping definitions of its first and third degrees. 20 The “personal injury” necessary to establish the first-degree crime can be the pain that accompanies sexual penetration by force. 21 “Force” is also an element of the third-degree definition. 22 Therefore, any third-degree force case can be charged as a first-degree injury. The result is that some offenders who did exactly the same thing walk away with very different sentences. 23 The supreme court created a similar problem in the property crime area by holding that theft and receiving stolen property were the same offense. 24

Pre-Guidelines, when the Minnesota Corrections Board sorted out offenders who had received indeterminate sentences (“0–10 years” or “0–20 years,” for example), definitional distinctions of this sort were not too consequential. However, when the Sentencing Guidelines began to grade crimes by culpability, loose charges and degree definitions inevitably resulted in inconsistent and irrational outcomes.

Problems with consistency and rationality cropped up in other areas as well. Criminal sexual conduct sentences for first time offenders were quite different depending upon the degree charged: forty-three months incarceration for first degree, twenty-one or twenty-four for second degree. 25 The appellate courts ruled that slight penetration was sufficient to establish first degree, a definition that was later codified. 26 The second-degree offense is

18. See id.
19. See id. at 395.
22. See MINN. STAT. § 609.344 (2010).
defined as a crime of “contact.”\textsuperscript{27} Factually, the difference can be tiny. But the definitions were crafted to provide rough drafts of sentences that would be finalized through the parole process after corrections workers got to know the offender.\textsuperscript{28} No longer do the definitions provide a rough draft. Now, in the Guidelines era, they control precise and very different punishments for culpability levels that are very close or indistinguishable. The finding of slight penetration rather than touching—potentially a very small behavioral variation—after 1980 resulted in a Guidelines-mandated sentence almost twice as severe. The result of marry[ing the Criminal Code with the Guidelines was to take the power that had resided in the Minnesota Corrections Board and give it to eighty-seven elected county attorneys to exercise through plea bargaining.\textsuperscript{29}

**B. Sex Offenders and Their Sentences—1988 to the Present**

As time went by, public and legislative responses to some terrifying, horrible crimes led to drastic increases in the penalties for criminal sexual conduct. The increases raise questions about proportionality. In 1988, Carrie Coonrod and Mary Foley were raped and killed by sex offenders.\textsuperscript{30} These crimes led to the 1989 legislature doubling sex offenders’ prison sentences. This legislative intervention into the Guidelines development process was at least proportional, because other violent crime sentences were also doubled.\textsuperscript{31} In 2000, after the disappearance of a young

\begin{footnotesize}
\begin{enumerate}
\item v. Shamp, 422 N.W.2d 520, 526 (Minn. Ct. App. 1988). Similarly, knocking out a victim’s tooth is an assault in the first degree because it involves the loss of a “bodily member.” State v. Bridgeforth, 357 N.W.2d 393, 394 (Minn. Ct. App. 1984).
\item MINN. STAT. § 609.343 (2008).
\item See generally Rathke, supra note 1.
\item See Dan Gunderson, Critics Charge Sex Offender Screening Tool Doesn’t Work, MINN. PUB. RADIO, Apr. 19, 2004, available at http://news.minnesota.publicradio.org/features/2004/04/19_gundersond_mnsosr/. From an “avoidance of disparity” viewpoint, however, it is disconcerting to see the actual punishment for the same crime double overnight, so that a first degree offense committed on August 1 would receive eighty-six months rather than the forty-three months, which was the presumed sentence the day before.
\item See 1989 Minn. Laws 1594–95. The 1989 legislature, in the same bill,
\end{enumerate}
\end{footnotesize}
woman named Katie Poirer, the legislature reached into the first degree, first offender box on the grid and raised the presumed sentence from 86 to 144 months.\footnote{32}

Of course, the legislature has a duty to be concerned about violent sex crimes. But the history of sex crime sentencing raises important questions. First, what is the “just desert” for this offense? Is it forty-three months? Eighty-six months? One hundred forty-four months? Second, who should say what the “just deserts” are for these crimes? The independent, policy-making Sentencing Guidelines Commission (who designed the system in the first place) or elected officials? Third, how can the sentencing grid maintain the proportionality which is the intended source of its integrity and usefulness?

Originally, the sentence length ratio of first-degree criminal sexual conduct to aggravated robbery with no criminal history was 43:24 months.\footnote{33} In 1989, the relationship was maintained at 86:48 months.\footnote{34} Call it “not quite double,” for purposes of discussion. With the change to 144 months, however, the ratio is now 144:48.\footnote{35} To put it another way, “triple.” Is first-degree criminal sexual conduct almost twice as severe a crime as aggravated robbery or three times as severe? Similarly, first-degree criminal sexual conduct—at 86 months—had the same presumed sentence as manslaughter in the first degree; now there is a ratio of 144:86.\footnote{36} Though proportionality remains a goal of the Guidelines, it seems that no one is keeping watch over the relative severity of the behaviors that lead to these criminal charges.

The same kind of question can be asked about the presumed sentences for other degrees of criminal sexual conduct. Third degree is at the same level as aggravated robbery—forty-eight...
months presumed, with no criminal history. However, the courts continue to hold that a very slight injury to the victim is sufficient to elevate the offense to the higher degree. Under the Guidelines, if the victim of forcible sexual penetration receives a bruise or suffers “redness or soreness” after the offense, the perpetrator gets 144 months, three times the third-degree sentence. Behavioral variation between first and third degree can be slight, yet the sentence can be tripled.

No one has much sympathy for criminal sexual conduct offenders, yet just about anyone can recognize a disturbing randomness in the history of the development of these sentences. The best explanation seems to be that policy-makers, contrary to the designs of the originators of the Guidelines, are slowly finding their way toward a plan to incapacitate these individuals. In the thirty years since the Guidelines went into effect, there have been sex offender enhancements created in almost every session of the legislature. For example:

- Dangerous sex offenders sentencing;
- Criminal sexual predatory conduct;
- Predatory offender registration;
- Community notification;
- Expansion of the civil commitment program, and enormous growth of the sex offender secure treatment program.

37. See MINN. SENTENCING GUIDELINES COMM’N, SENTENCING GUIDELINES GRID (2010), available at http://www.msgc.state.mn.us/guidelines/grids/grid_2010.pdf (excluding several types of third-degree criminal sexual conduct, which carry only a thirty-six month sentence).
38. See State v. Mattson, 376 N.W.2d 413, 414 (Minn. 1985) (affirming a conviction of second degree criminal sexual conduct based on evidence of bruising and soreness); State v. Stufflebean, 329 N.W.2d 314, 316 (Minn. 1983) (affirming a conviction of fourth degree criminal sexual conduct due to evidence of victim’s “soreness and redness”); State v. Bowser, 307 N.W.2d 778, 779 (Minn. 1981) (affirming a conviction of first degree criminal sexual conduct because there was evidence of penetration and “either . . . pain or . . . minimal injury”).
40. See id. § 609.345 (2005).
42. See id. § 244.052 (1996).
• Engrained sex offenders;\(^4^4\)
• Egregious sex offenders;\(^4^5\)
• Separate grid for sex offenders.\(^4^6\)

A search of the Minnesota Revisor of Statutes webpage\(^4^7\) reveals that in the 2010 legislative session, twenty-four sex offender bills relating to sexual offenses were introduced in the senate;\(^4^8\) thirty-six in the senate.\(^4^9\) Although a new sex offender sentencing grid designed by Governor Tim Pawlenty’s Commission on Sex Offenders had just taken effect August 1, 2006, the governor proposed, and a bill was introduced, to further increase the presumed sentence for first-degree criminal sexual conduct from 144 months to 300 months.\(^5^0\) If enacted, the first-degree sentence would have been over six times the sentence for aggravated robbery.\(^5^1\) Even more perplexing, it would have been over six times the sentence for the very similar crime of third-degree criminal sexual conduct.\(^5^2\)

\(^4^4\) MINN. STAT. § 609.345, subdiv. 3(a) (2006).
\(^4^5\) Id. § 609.345, subdiv. 3 (2005).
\(^4^7\) The search results from the Revisor website are not official and are meant for illustrative purposes only.
\(^5^0\) H.F. 3081 § 1, 2010 Leg., 86th Sess. (Minn. 2010).
\(^5^1\) MINN. SENTENCING GUIDELINES COMM’N, SENTENCING GUIDELINES GRID (2009), available at http://www.msgc.state.mn.us/guidelines/grids/grid_2009.pdf (showing a sentence of forty-eight months for such offenders with a criminal history score of zero).
\(^5^2\) MINN. SENTENCING GUIDELINES COMM’N, SEX OFFENDER GRID (2009), available at http://www.msgc.state.mn.us/guidelines/grids/grid_2009_sex.pdf (showing a sentence of thirty-six or forty-eight months for such offenders with a criminal history score of zero).
It appears that policymakers have lost confidence in the ability of the Guidelines process to provide as much incapacitation as they feel is needed. Meanwhile, individuals are receiving very long sentences under the Guidelines without the Minnesota Corrections Board reevaluating these individuals and their cases. Some of the first-degree offenders might be just a little bit more culpable than a third-degree offender, and some of the third-degree offenders might be just as culpable as a first-degree offender, but the corrections officials who know these individuals have no power to change their sentences.

III. Drugs and Disparities: The Guidelines’ Desperate Voyage Through the Politics of Justice in Eighty-Seven Counties

The recent history of sex offender sentencing in Minnesota shows that the development of the Guidelines in the context of the state’s criminal justice politics has been a very rough process. The concept of “just deserts” underlying the Guidelines turned out to be a political construct lacking a strong enough foundation to withstand legislative intervention based on the kinds of actual tragic and violent sex crimes that are known to occur. High hopes for a sentencing system based on retribution ran into the reality of horrible crimes for which no retribution would be enough. The “economy” value present in the original Guidelines did not survive. The role of the Commission as independent policymakers, crucial to the whole enterprise, was greatly limited by a 1984 amendment to the statute requiring Guidelines changes to be approved by the legislature. Proportionality, one of the greatest virtues of the Guidelines, suffered greatly in the area of sex offenses: there are huge differences in the punishments for very similar or identical acts distinguished only by legally established “degrees.” Further disparities resulted as practitioners used varying enhancements, amply provided by legislation, to try to

53. See supra text accompanying notes 19–23.
54. For an example of such a horrible crime, see State v. Stewart, 514 N.W.2d 559 (Minn. 1994).
55. Von Hirsch, supra note 6, at 177.
56. Id. at 170 (emphasizing the Minnesota Sentencing Guideline Commission’s understanding that its role was to shape sentencing policy).
57. 1984 Minn. Laws 1236–37 (amending Minnesota Statutes, section 244.09 to require legislative approval of changes made to the sentencing guidelines).
58. See supra text accompanying notes 12–15.
incapacitate sex offenders. But at least these varying results for sex offenders served one of the main policy goals of the Guidelines—the use of prisons as a response to violent crimes.

In contrast, the development of drug sentencing in Minnesota since the inception of the Guidelines shows an indulgence in over-punishment, a disregard for proportionality, and a high tolerance for disparity—based mostly on where the offender happens to live. None of these three indulgences are grounded in the desire to incapacitate perpetrators of violent acts. Elected officials responded to public hysteria about drugs by pushing the Guidelines sentences higher and higher. Practitioners who daily handled the actual cases in court responded by more or less discarding the Guidelines—more so in the Metro area, less so in Greater Minnesota.

A. Drug Offenses and Their Sentences—1980 Through the “War on Drugs” Years

When the Guidelines first took effect in 1980, all felony drug convictions for first-time offenders carried only a presumptive probationary sentence. These individuals could expect an executed term of incarceration only where aggravating circumstances were present. After all, these were not violent crimes. In the 1980s, however, the “War on Drugs” ideology swept through America, tripling drug arrests and disproportionately incarcerating people of color.

59. See supra text accompanying note 26.
61. See infra Part III.C.
62. See supra text accompanying notes 56–58; infra notes 74–82.
63. See infra Parts III.C. & D.
In Minnesota, these trends overwhelmed previous versions of the Guidelines.66 One author traced the increase of drug sentences for a hypothetical offender guilty of possession of cocaine.67 Between 1980 and 1999, the hypothetical offender’s sentence grew from probation, with a year and a day stayed, to an executed sentence of 158 months in prison.68 This was forty-two months more than the presumed sentence for second-degree murder in the original Sentencing Guidelines.69

B. The Commission’s Attempts to Reestablish Proportionality

To their credit, the 2003 and 2006 legislatures directed the Guidelines Commission to prepare reports on drug offender sentences.70 They were concerned that felony drug offenders rose from 801 in 1981 to 3425 in 2002, and that this group had gone from 9% of the prison population to 23% in twelve years.71 The “new prison commit” drug cases were even higher, up to 30.1% by 2002.72 Moreover, the average prison sentence for a drug crime nearly doubled from 1988 to 2005.73 Disproportionality was obvious in at least two respects: possession of twenty-five grams of cocaine had been put at the same level as first-degree manslaughter (eightysix months for a first offense); and first offense presumed sentences for drug crimes had actually been set higher than the mandatory

66. Swanson, supra note 64. For the effect on communities of color, see Thomas L. Johnson & Cheryl Widder Heilman, Racial Disparity in the Criminal Justice System, BENCH & B. MINN., May–June 2001, at 29. At the time of the Johnson & Heilman article, Minnesota had developed “the largest disparity between black and white imprisonment rates of any state in the nation.” Id.; see also MINN. SUP. CT. TASK FORCE ON RACIAL BIAS IN THE JUD. SYS., FINAL REPORT 49–57 (1993) (“In Minnesota the number of arrests of African Americans for narcotics crimes rose 500% between 1981 and 1990, almost 17 times as fast as the rise in arrests of whites. By way of comparison, the African American population grew by 78% in that same period.”).

67. Swanson, supra note 64 (using as the hypothetical offender a person guilty of possessing a half ounce of cocaine with a street value of $1200; explaining that “intent to sell” was presumed).

68. Id.


71. Id. at 1.

72. Id. at 3.

73. UPDATED REPORT, supra note 8, at 3.
minimums for repeat controlled substance offenders.\textsuperscript{74} The first report in 2004 suggested that the threshold weights could be made higher—Minnesota’s “first degree” crimes are based on much lower weights than comparable states—or, in the alternative, drug crimes could be re-ranked at a less serious level.\textsuperscript{75}

Neither of these things happened. In 2007, the Commission presented an “Updated Report,” explicitly recommending that the sentences for first-degree and second-degree drug crimes be moved down one level, so that the presumed first offense sentence for first degree would be forty-eight months in prison, not eighty-six.\textsuperscript{76} The Commission could have made this change itself and it would have gone into effect unless explicitly rejected by the legislature.\textsuperscript{77} In fact, the 2007 legislature, in a rider to the Commission’s appropriation, had directed that “[t]he commission shall propose changed rankings for controlled substance offenses on the sentencing guidelines grid [taking into account] . . . proportionality[.] . . . [other states’ and federal sentences,] . . . and . . . cost . . . .”\textsuperscript{78}

The stage appeared to be set for change. However, as the year went by and the Commission continued to discuss the issue, powerful resistance appeared.\textsuperscript{79} The Chair of the Commission, Olmsted County Sheriff Steven Borchardt, indicated to the group that his constituency “would not support lowering controlled substance in the first-degree and second-degree by one severity level each. . . . [T]hat was a job for the legislature.”\textsuperscript{80} A compromise emerged that would lower the levels for the possession offenses in

\textsuperscript{74} Id. Note that “intent to sell” is no longer required to receive this sentence. Sentence levels for 2005 are set forth in Minn. Sentencing Guidelines Comm’n, Sentencing Guidelines Grid (2005), available at http://www.msgc.state.mn.us /guidelines/grids/grid_2005.doc.

\textsuperscript{75} REPORT, supra note 70, at 1–2. For specific state comparisons, see id. at 48–51. The Minnesota Supreme Court exacerbated the “drug weight threshold” problem when it ruled that liquid in a water pipe used to smoke drugs counts as part of the drug weight. See State v. Peck, 773 N.W.2d 768 (Minn. 2009).

\textsuperscript{76} UPDATED REPORT, supra note 8, at 2–3, 20.

\textsuperscript{77} Minn. Stat. § 244.09, subdiv. 11 (2008); see also Minn. Sentencing Guidelines Comm’n, Approved Meeting Minutes 3 (Feb. 15, 2007), available at http://www.msgc.state.mn.us/msgc5/meetings.htm#2007.

\textsuperscript{78} 2007 Minn. Laws 226–27.


\textsuperscript{80} Id.
the first- and second-degree statutes.\textsuperscript{81} It would not lower sentences for sales offenses and would create new aggravating factors to produce higher sentences in certain situations.\textsuperscript{82}

In the fall of 2007, there was more resistance.\textsuperscript{83} The Minnesota County Attorneys Association issued a lengthy position paper opposing the Commission’s compromise re-ranking proposal.\textsuperscript{84} Their leading claim was that drug possessors actually are violent criminals because they are “associated with… gang activity” or might commit other violent crimes to get money for drugs.\textsuperscript{85} A more substantial issue emerges toward the end of their document: by taking some drug offenders out of state prison and putting them on probation—funded locally in many parts of the state—a cost shift from state to county funding would occur.\textsuperscript{86} Rather than argue for a fund transfer, the county attorneys opposed the whole concept.\textsuperscript{87}

Then the Minnesota County Attorneys Association joined with the Minnesota Chiefs of Police Association, the Minnesota Sheriffs Association, and the Minnesota Police and Peace Officers Association to form a new group they named the “Minnesota Law Enforcement Coalition.”\textsuperscript{88} This group also asserted that drug possessors were “violent” so that re-ranking of the possession crimes would be inappropriate; plus, it might transfer a cost from the state to the counties.\textsuperscript{89}

Finally, the day before the Commission was scheduled to vote on whether to submit its compromise “possession crimes” re-ranking proposal to the legislature, the members got a letter from

\begin{footnotesize}
\begin{enumerate}
\item See MINN. SENTENCING GUIDELINES COMM’N, PROPOSED MODIFICATIONS TO THE MINNESOTA SENTENCING GUIDELINES AND COMMENTARY: RE-RANKING 1ST AND 2ND DEGREE CONTROLLED SUBSTANCE POSSESSION CRIMES 1 (2007) (on file with author John Stuart).
\item Id.
\item See, e.g., MINN. CNTY. ATT’YS ASS’N, RESPONSE TO MINNESOTA SENTENCING GUIDELINES 2007 UPDATED REPORT ON DRUG OFFENDER SENTENCING ISSUES (2007).
\item Id.
\item Id. at 3. With this approach, the Guidelines depart from a “just deserts” philosophy by failing to make the punishment closely fit the crime. Rather, they punish people not just for their actual bad acts, but for presumed ones as well. Due process of law fails when drug offenders have no day in court on the question of violence.
\item Id. at 11.
\item See id. at 12.
\item See Letter from Minn. Law Enforcement Coal. to Minn. Sentencing Guidelines Comm’n (Oct. 29, 2007) (on file with author John Stuart).
\item Id.
\end{enumerate}
\end{footnotesize}
Governor Pawlenty. His position was that “the re-ranking proposal should not be enacted,” because drug offenders “must be held accountable. Their oftentimes violent crimes endanger Minnesota residents . . . .”

The Governor’s position is irreconcilable with the “just deserts” foundation of the Guidelines in addition to being contrary to the intent of the legislature when it directed the Commission to submit a plan to re-rank these offenses. However, the Commission voted 7-3 not to submit its own compromise proposal after all. The conclusion is inescapable: the Commission gave up its independent policy-making voice in the area of drug sentencing.

The epilogue? The 2008 legislature created a “Working Group on Controlled Substance Laws,” directed to consider nine questions that might lead to changes in the weight thresholds or offense rankings. The discussions were very contentious and did not lead to the enactment of any changes in the 2009 or 2010 legislative sessions.

C. Sentencing Departures in Drug Cases: Practitioners Vote with Their Feet

Meanwhile, practitioners in the courts were creating their own sentencing systems for drug offenders. By the summer of 2010, a good argument could be made that the Guidelines were irrelevant to these cases because the presumed sentence was being administered in far fewer than half of the cases. For example, first
offenders’ mitigated dispositional departure rate—where a judge does not send an offender to prison who had a presumed sentence that did involve prison time—ranged through the ten judicial districts from a low of 30% to a high of 85%, with the four largest districts at 80%, 85%, 52%, and 71%. For offenders who actually were sentenced to prison and for whom the Guidelines required prison sentences, there were also mitigated durational departures—shorter sentences—in the four largest judicial districts as follows: 43%, 11%, 28%, and 35%. As a result, most drug offenders who were supposed to go to prison either did not go at all, or went for less time than they were intended to serve. For example, only 20% of the Hennepin County first offenders who were meant to go to prison actually went. Of the offenders who did go, 43% got less than the Guidelines sentence.

The Commission took note of this situation in its 2007 Updated Report:

The striking number of downward durational and dispositional departures substantially lessens the impact of drug crimes on Minnesota’s prisons. If the departure rates were lower, the Department of Corrections’ expenditures on drug offenders would be enormous.

The high mitigated departure rates suggest that criminal justice practitioners may believe presumptive drug sentences are too severe. The departures may also suggest that Minnesota law does not adequately identify the most serious offenders and fails to distinguish between them and less culpable individuals.

98. Stuart and Sykora: Minnesota’s Failed Experience with Sentencing Guidelines and the

99. DEPARTURES & REVOCATIONS BY RACE, at Mitigated Dispositional Departure Rates by Race and Criminal History (2010) (on file with author Robert Sykora). Only three judicial districts impose the presumed commit sentence more than half the time, and these districts are relatively small compared to the First, Second, Fourth, and Tenth districts. Id. at Type of Sentence Pronounced for Presumptive Commits by Judicial District (providing the total of dispositional and durational departures and also showing that only Districts Three, Seven, and Eight give drug offenders the presumed sentence more than half the time). Note that this 2010 report is based on 2008 data.

100. Id. at Mitigated Dispositional Departure Rates by Race and Criminal History. The four districts include Hennepin, Ramsey, Anoka, and Dakota Counties, among others.

101. Stuart and Sykora: Minnesota’s Failed Experience with Sentencing Guidelines and the

102. Stuart and Sykora: Minnesota’s Failed Experience with Sentencing Guidelines and the
In short, the lawyers, probation officers, and judges who were handling actual drug cases in court had created their own de facto reforms of the controlled substance sentencing schemes that were established in law by the Guidelines.

D. Drug Sentences and Justice-by-Geography

This widespread subversion of the presumed sentence system in controlled substance cases might mitigate some of the proportionality and disparity issues noted previously.\textsuperscript{103} That is, many first-degree drug crime first offenders were not really getting the same sentence as a person convicted of manslaughter in the first degree.\textsuperscript{104} What was lost in the proliferation of mitigated departures, however, was statewide consistency in sentencing.

Statewide consistency has been a concern from the beginning. The Commission’s Research Director, Kay Knapp, reported in 1982 that the statewide dispositional departure rate was 6.2\% of the Guidelines’ first 5500 cases.\textsuperscript{105} This was tolerable because the Commission felt that a rate of less than 10\% dispositional departures would show that uniformity was increasing over that afforded by the previous parole system.\textsuperscript{106} The range among Minnesota’s ten judicial districts varied, however, from 1.9\% in the Fifth District (Southwestern Minnesota) up to 10.2\% in the Fourth District (Hennepin County).\textsuperscript{107} Durational departure rates—the lengths of prison sentences—showed the same pattern: overall, less than 10\%, but with a big variance (3.8\%–12.9\%) among the judicial districts.\textsuperscript{108}

By 2004, it was obvious that the departure rates in drug cases were vastly higher than the 10\% contemplated by the Commission in the early 1980s. The geographical disparities also varied greatly from the study of the first sample. From 1995 to 2002, the average dispositional departure rate for drug cases in Hennepin County was 56\%.\textsuperscript{109} For the drug offenders who were sent to prison, the average mitigated durational departure rate in Hennepin County

\textsuperscript{103}. See supra Parts II and IIIA.
\textsuperscript{104}. See supra Part III.
\textsuperscript{105}. Knapp, supra note 60, at 241–42.
\textsuperscript{106}. See id. at 242.
\textsuperscript{107}. Id.
\textsuperscript{108}. Id. at 244.
\textsuperscript{109}. See REPORT, supra note 70, at 41 fig.31 (dividing the sum of the data by the eight years measured).
during those years was 50.5%. Therefore, in Hennepin County, more than half the offenders who were presumed to go to prison did not. Of the ones who did go, slightly more than half served less time than they would have been presumed to serve.

Similar 1995–2002 figures were compiled for several judicial districts aggregated as “Greater [Minnesota].” The average drug case dispositional departure rate in this sample was nearly 26%, much more than the anticipated 10%, but less than half of the Hennepin County rate. For drug case mitigated durational departure rates, the average for “Greater [Minnesota]” was nearly 23%, again more than 10% but less than half the Hennepin County rate. In sum, drug offenders were receiving the presumed sentence only in about 25–50% of the cases, and the odds of going to prison for the same crime were very different for residents of different parts of the state.

By 2010, data was available for each judicial district that showed the percent of drug offenders who received the presumed sentence. The “Greater [Minnesota]” data is disaggregated to show what happened in 2008 in each of the ten districts. Following are the “Greater [Minnesota]” districts, with a short geographical locator, and the percentage of drug offenders who actually received the presumed sentence:

- Third (southeast—includes Rochester) 61%
- Fifth (southwest—includes Mankato) 30%
- Sixth (northeast—includes Duluth) 46%
- Seventh (west central—includes St. Cloud) 57%
- Eighth (west—includes Willmar) 83%
- Ninth (northwest—includes Bemidji) 41%

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10. See id. at 41 fig.32 (dividing the sum of the data by the eight years measured).
11. Id. at 41 figs.31, 32.
12. See id. at 41 fig.31 (dividing the sum of the data by the eight years measured).
13. See supra text accompanying note 106.
14. See REPORT, supra note 70, at 41 fig.31 (dividing the sum of the data by the eight years measured).
15. Id. at fig.32 (dividing the sum of the data by the eight years measured).
16. See DRUG DEPARTURES & REVOCATIONS BY RACE, supra note 97, at Types of Sentence Pronounced for Presumptive Commits by Judicial District.
17. Id.
Hennepin County and the First District (south metro) are comparable to the Fifth District, at around 30%.

A drug offender convicted of the same offense and presumed to be bound for prison—charge bargaining may play a part here but is impossible to factor in—has an 83% chance to get the presumed sentence in Willmar, but only 30% in Mankato. Overall, drug sentences under the Guidelines show far less uniformity than the hoped-for 10% departure rate. Achieving this 10% goal would have shown more consistency than the parole board. Moreover, the departures have enshrined disparate local sentencing patterns which the statewide parole board would have ironed out in earlier decades.

IV. IN SEARCH OF STRATEGIES THAT MIGHT WORK: A 21ST CENTURY JUSTICE SYSTEM LOOKS FOR PATHS OUT OF THE GUIDELINES

We have seen that Minnesota’s official sentencing policy has been to have “just deserts”; that is, clearly defined prison sentences that are consistent, proportional, and economical. This policy of retribution was adopted instead of pursuing solutions intended to rehabilitate the most amenable and incapacitate the most dangerous. Simple as “just deserts” appears to be, it has been impossible to implement—at least in the areas of sex and drug crimes—because policymakers other than the Sentencing Guidelines Commission want something more than retributive sentences taken from a chart. Legislators, corrections officials, judges, and lawyers all want to be doing something more substantive. They want the justice system to prevent future crimes by keeping very dangerous people away from society while also giving less serious offenders a path back to community life. Moreover, practitioners are oriented toward making a difference in each case, rather than fitting hundreds of cases into a prefabricated

118. Id. It is hard not to speculate on the variances among counties within a judicial district. For example, Blue Earth County—where Mankato and a state university are located—may be the “Hennepin County” of the Fifth Judicial District.

119. See Sentencing and Correctional Policy, Program Evaluation Div. Office of the Legis. Auditor (June 1991), http://www.auditor.leg.state.mn.us/ped/1991/pe9107.htm (“[J]udges and others . . . pursue sentencing goals other than uniform and proportional punishment. Potential for rehabilitation, threat to public safety, and deterrence of repeat offenses, are all considerations that enter into the sentencing decision. The guidelines may be too narrowly constructed . . . .”).
system. As a result, they have initiated new strategies, attempting to 
wriggle out of the straitjacket that the Guidelines have become.

These strategies have an implementation track record that 
shows how costs can be reduced while lowering the crime rate. 
This section highlights these approaches, which broadly are 
characterized by four features:

- Focus on specific groups of offenders that might be taken 
  out of the Guidelines;
- Screening of individuals in the groups for suitability for an 
  alternative strategy;
- Provision of services other than pure incarceration for the 
  selected offenders; and
- Evaluation of the results and refinement of the strategy 
  based upon its outcome.

As will be seen, these efforts are precursors to a way of thinking 
about sentencing that has come to be known as “Evidence-Based 
Practices” (EBP). Strategies based on empirical evidence have 
been implemented within the corrections system and by judges as 
the criminal justice system works to become more effective with less 
funding. It is wise to pay attention to the lessons learned both by 
the corrections system and by specialty courts as the criminal justice 
system has struggled to accommodate consistently large volumes of 
offenders. Additionally, EBP use has worked to find an effective 
way of responding to sex offenders and people convicted of 
controlled substances offenses.

V. LESSONS MINNESOTA HAS ALREADY LEARNED ABOUT 
USING EVIDENCE-BASED PRACTICES TO FIGHT CRIME AND 
REDUCE COST

Those who work in the criminal justice system can point to 
instances where seasoned professionals’ experience, wisdom, and 
instinct have allowed them to predict an offender’s risk to reoffend. 
Yet the body of evidence shows that seasoned professionals’ “gut 
feelings” have a track record inferior to the actuarial risk.

120. See Roger K. Warren, Evidence-Based Sentencing: The Application of Evidence-Based 
(describing EBP as “corrections practices that have been proven by the most 
rigorous ‘what works’ research to significantly reduce offender recidivism”).

121. See infra Part V.

122. See infra Part V.B.

123. See infra Part V.C.
assessment tools that form the basis for evidence-based practices.\textsuperscript{124}

Increasingly over the past twenty years, corrections officials have used decision-making processes that rely in part on actuarially proven EBPs.\textsuperscript{125} They are used to guide decisions at all levels of the corrections delivery system, from probation officers responding to failures of offenders by imposing suspended jail or prison time, to prison officials predicting inmate misbehavior, to the Hearings and Release Unit making cost-effective reentry supervision.\textsuperscript{126} These practices have been increasingly relied upon because the evidence shows they reduce both recidivism and cost.\textsuperscript{127} Minnesota’s EBP successes mirror progress made nationally,\textsuperscript{128} and provide guidance to court officers and policy makers wishing to pursue “smarter sentencing” initiatives based on EBP.

Advances in the science of corrections can be used to enhance Minnesota sentencing practices in ways that reduce overall cost and recidivism. EBP’s demonstrated benefits in the corrections end of the business—lower cost and reduced recidivism—are also available to judges making sentencing decisions. The affected population of people convicted of crimes is identical to the one the corrections system has shown to be effectively managed using EBP. The difference between a judge’s use of EBP and corrections’ use of EBP involves the passage of time: judges make decisions earlier in an offender’s criminal justice system experience, while corrections’ decision-making comes later. This timing variance may increase or decrease the effectiveness of EBP. Perhaps a significant factor is whether an offender has yet had the “taste” of incarceration (less


\textsuperscript{125} See Warren, supra note 120, at 596 (“[A] large body of rigorous research proving that treatment programs operated in accord with rigorous research-based evidence can significantly change offender behavior and reduce recidivism.”);

\textsuperscript{126} Dr. Chris Bray, Deputy Comm’r of Corr., Minn. Dep’t of Corr., Presentation to Corrections Strategic Management and Operations Advisory Task Force, Stillwater Prison, Bayport, Minnesota (Oct. 19, 2009).


\textsuperscript{128} Dr. Chris Bray, Deputy Comm’r of Corr., Minn. Dep’t of Corr., Presentation to Corrections Strategic Management and Operations Advisory Task Force, Stillwater Prison, Bayport, Minnesota (Oct. 19, 2009).
likely at the time of sentence and more likely during correctional supervision).

Integrating EBP into the sentencing process requires some reflection about public policy driving our long-established practices. It is pretty easy to understand the "just deserts" basis underlying traditional sentencing policy; just about everyone is willing to sign onto a plan to "get the bad guy" and make him pay for his sins. So central is retribution to our common mindset that it occupies themes at the core of the world’s major religions and cultural iconography related to justice. Lady Justice after all, carries not just a set of scales, but in the other hand a sword.

Despite retribution’s popular appeal, evidence brought to light by EBP helps identify those situations in which retribution unproductively increases either cost, recidivism, or both. Alertness to the cost and flaws of "just deserts" sentencing policy helps pave the way for fiscally sound, data-driven approaches.

A. EBP Lessons from Corrections: Using Evidence to Manage Volume

The Commissioner of Corrections is responsible for an enterprise that costs nearly a half-billion dollars a year,129 employs about 4300 people,130 and—here’s the tricky bit—operates at ninety-eight percent of capacity.131 The Department faces steadily increasing demand132 at a time in which the state faces multiple unprecedented fiscal crises.

The Commissioner faces these hurdles even though Minnesota tends to put people in prison at a rate that is less than most other states. Minnesota ranks forty-ninth in its per capita rate of adult

131. MINN. DEP’T OF CORR., FACILITY DESIGN CAPACITY COMPARED TO ACTUAL DAILY POPULATION (provided to Department of Corrections Strategic Management and Operations Advisory Task Force) (on file with author Robert Sykora).
132. See HEATHER C. WEST, U.S. DEP’T OF JUSTICE, PRISON INMATES AT MIDYEAR 2009 STATISTICAL TABLES 5 (2010) (showing that the number of prisoners under the authority of Minnesota state officials increased 5.2% from December 31, 2007, to June 30, 2008, and 1.6% from December 31, 2008, to June 30, 2009).
imprisonment. But this comparison is damnation by faint praise: the United States as a whole imprisons its people at a rate higher than any other country on Earth, locking up 748 people per 100,000 of its population, a proportion greater than the Russian Federation (585 per 100,000) and more than double South Africa’s rate at the height of apartheid (368 per 100,000).

Decision-making about who goes to prison in Minnesota also warrants close attention. People of color amount to 46.8% of Minnesota’s prison population but only 9.2% of Minnesota’s population as a whole. Prison population numbers and racial disparities are only part of the story—overall correctional control rates must be part of the analysis as well. With a rate of 1 in 26 people in the population either locked up or on probation or supervised release, Minnesota has the fourth highest correctional control rate in the nation. This rate has increased significantly since 1982, when Minnesota ranked twenty-first in the nation with 1 in 114 people under correctional control. Over the past thirty years, Minnesota has experienced an ever-increasing flow of people into its criminal justice system.

Most people locked up in Minnesota “worked pretty hard to get there,” believes Kathleen Gearin, Chief Judge of the state court district located in Ramsey County. Judge Gearin notes that “there are a few who’ve gone to prison on first time convictions for murder or sexual assault, but most have stood before a judge over and over and heard the threat of prison multiple times before they

136. Id.
138. Adult Inmate Profile, supra note 2. The Long Reach, supra note 134, at 44 tbl. A5. Id.
139. The Long Reach, supra note 134, at 44 tbl. A5.
140. Id.
141. Interview with Hon. Kathleen Gearin, Chief Judge Second Judicial Dist. of Minn. (July 27, 2010).
actually got sent there." Of those incarcerated on a felony sentence, about one-fifth reoffend and return to prison within three years of release. Policy makers seem to focus on the twenty percent recidivism rate and conclude that “nothing works.” More productive conclusions may be available if we focus upon the eighty percent of offenders who do not recidivate.

The eighty percent success rate is even more remarkable considering that corrections officials do not control the flow of people into their system, the courts do. “Corrections is a lot like a bathtub. You can never let the tub overflow, yet you have no control over the water supply and only limited control of the drain,” mused one veteran corrections official.

“Limited control” of the number of people leaving prison exists as a function of Minnesota’s system of determinate sentencing. Judges commit offenders to the commissioner of corrections to be incarcerated for the number of months set forth in the Commission’s matrix. After offenders have served two-thirds of the time, the commissioner has the discretion to let the offender out of prison on “supervised release”—an option analogous to what is called parole in other states. Exercise of this discretion—and similar judgments used to determine whether a released offender should return to serve more time after a violation—is the “limited control of the drain.” It amounts to the Commissioner’s only ability to directly affect the number of people in prison.

Properly exercised, this control lowers cost (prison costs $89.77 a day and the daily cost of probation and parole is $3.73) and fights crime, as resources are focused where they are most effective—on offenders committed to the commissioner who have the greatest likelihood to reoffend.

142. Id.
145. MINN. STAT. § 244.101 (2008).
146. Id. § 244.195 (2008).
147. See Warren, supra note 120; see also supra text accompanying note 122.
148. See generally Warren, supra note 120 (showing greater prison spending does not increase public safety, whereas various innovations in community corrections, such as sorting offenders by their public safety risk level, have proven successful in reducing recidivism while saving states money). For per diem rates, see THE LONG REACH FACT SHEETS, supra note 11.
Courts and corrections already use EBPs to control recidivism and cost. \textsuperscript{149} EBP approaches have had much more support (and have shown much more success) with controlled substance offenders rather than those convicted of sex crimes. \textsuperscript{150} But the legislature has shown interest in a new approach to sex crimes as well, and Minnesota has some of the tools in place that could make it happen.

\textbf{B. EBP Lessons from Corrections: The Search for Cost-Effective Incapacitation of Sex Offenders}

At the inception of the Guidelines, the presumed sentence for criminal sexual conduct in the first degree was forty-three months, two-thirds of which would be served in prison. \textsuperscript{151} Longer sentences could be ordered through the durational departure process, but as the Minnesota Supreme Court repeatedly made clear, departures needed to be based on the facts of the offense—like “particular cruelty”—rather than on concern for what the offender might do in the future. \textsuperscript{152}

Horrendous high-profile sex offenses led to a search for means to keep dangerous sex offenders in secure settings, regardless of the release date determined by the Guidelines. \textsuperscript{153} Minnesota amended its civil commitment statutes in 1994 to provide for the civil commitment of individuals found to be “sexually dangerous persons” or “sexual psychopathic personalities.” \textsuperscript{154} In the era of

\textsuperscript{149} See text accompanying note 122.
\textsuperscript{152} State v. Partlow, 521 N.W.2d 886, 887 (Minn. 1992) (“Our system of criminal law permits the confinement of persons for acts they have committed, but does not permit present confinement for acts which may be committed in the future.”).
\textsuperscript{153} See, e.g., \textit{FINAL REPORT, GOVERNOR’S COMMISSION ON SEX OFFENDER POLICY} 7 (2005) [hereinafter \textit{FINAL REPORT}], available at http://www.doc.state.mn.us/commissionsexoffenderpolicy/commissionfinalreport.pdf (alluding to events that prompted the reevaluation of Minnesota’s sex offender laws and the new processes for civilly committing certain sex offenders).
\textsuperscript{154} 1994 Minn. Laws 5. The statutes are Minnesota Statutes, section 253B.02, subdivisions 18(b) and 18(c). Minnesota’s commitment procedure was found to be constitutional in \textit{In re Linehan}, 557 N.W.2d 171, 176 (Minn. 1996) (finding that
indeterminate parole board sentencing, these provisions were relatively rarely used. Perhaps due to the determinate nature of the Guidelines, there was a rapid increase in commitment with this population growing from 61 in 1994, to 252 in 2004, and then to 587 in 2010, due to offenders recidivating after release.\textsuperscript{156} The Minnesota Sex Offender Program population now includes committed individuals up to eighty-five years of age.\textsuperscript{156}

Besides lingering doubts about the double jeopardy aroma that arises from the practice of stacking an indefinite commitment on top of a long determinate sentence, the program is quite expensive. As of October 20, 2010, the cost is $328 per day per resident, $119,720 per year.\textsuperscript{157} As a result, the Governor’s Commission on Sex Offender Policy recommended in 2005, that Minnesota use a hybrid determinate/indeterminate sentencing strategy for sex offenders, with the Guidelines sentence to become a minimum sentence, and a “Sex Offender Release Board” to make the ultimate decision about when to release the individual.\textsuperscript{158} The 2005 legislature declined to adopt this approach, instead adding several sex offender life sentences, plus a second Guidelines grid for repeat sex offenders, while allowing the civilly committed population to continue increasing.\textsuperscript{159}

It remains to be seen if this “determinate sentence plus commitment” strategy of incapacitation will survive Minnesota’s prolonged state budget crisis. In 2010, the Chair of the House Public Safety Finance Division introduced a bill to reinstate a parole board.\textsuperscript{160} Then, in the bonding bill, the legislature provided $47,500,000 to expand the sex offender commitment facility at Moose Lake. The legislature also required a multi-agency study to

civil commitment is “not punishment”).

155. \textit{Final Report}, supra note 153, at 24; \textit{Minnesota Sex Offender Program FAQs}, MNN. DEPT OF HUMAN SERVICES, http://www.dhs.state.mn.us/main/idepg/idcService GET_DYNAMIC_CONVERSION&RevisionSelectionMethod=LatestReleased&docName=dhs16_149915# (last visited Jan. 4, 2011). Consider, for example, the initial Guidelines sentence for first degree criminal sexual conduct was forty-three months, so that the majority of those offenders would have been discharged from prison after serving about three years. Such a scenario would not have been possible under indeterminate sentencing because individuals believed to be dangerous could have been kept in prison up to the statutory maximum.

156. MNN. DEPT OF HUMAN SERVICES, supra note 155.

157. \textit{See id.}


160. H.F. 3526, 2010 Leg., 86th Sess. (Minn. 2010).
consider, among other things, “possible legislation to change determinate sentencing for sex offenders.”

An EBP is the most crucial component of a system that would enable release decisions to be based on the risks posed by an individual, rather than on the Guidelines grid. This EBP was developed in Minnesota and has been used since 1997. The EBP, known as the Minnesota Sex Offender Screening Tool-Revised (MnSOST-R) is an actuarial risk assessment tool. The MnSOST-R can be administered to an individual by a caseworker and uses sixteen empirically verifiable items—rather than clinical judgment—to predict sex offense recidivism. The MnSOST-R is the basis in Minnesota for both the classification of released offenders who are subject to community notification and decisions made by Department of Corrections officials about who should be referred for possible Sexually Dangerous Person or Sexually Psychopathic Personality civil commitment proceedings.

This screening process has critics. Some say it leads to unfair deprivations of liberty, and others say it is the basis of a system in which some very dangerous individuals can still slip through the cracks. But with no parole board to review offenders’ extensive files after years in prison, someone has to make decisions. As the creators of the MnSOST-R put it:

If the probability of dangerousness is over-predicted (false positives), many offenders are unnecessarily deprived of their liberty and placed in treatment that is both expensive and prolonged. If the probability of dangerousness is predicted too conservatively (false negatives), dangerous sex offenders are released without appropriate supervision and may commit new sexual offenses.

161. 2010 Minn. Laws 78–79.
163. Id. at 27.
164. Id. at 2–8.
165. Id. at 2.
166. Gunderson, supra note 30.
167. Epperson, supra note 162, at 4.
Harley Nelson, Deputy Commissioner of Corrections, suggests the MnSOST-R is “not perfect, ... but ... it is the best available tool for categorizing sex offenders.”

Meanwhile, there have also been major recent improvements in the supervision of sex offenders on release status. Small caseloads, frequent face-to-face contacts, familiarity with the offender’s family and community, advanced training, use of polygraphs, and the availability of a range of community-based treatment options all make it possible for supervision to be much more effective than it was in the past. These innovations, too, are evaluated on an ongoing, iterative basis.

The creators of the Sentencing Guidelines did not believe that sentencing could prevent crime. They sought to give a fair amount of punishment for each crime that had already taken place. With the new assessment tools and supervision capabilities that have evolved since 1980, however, it is not unreasonable to imagine that the 2011 legislature might follow up its question to the Department of Human Services—regarding whether to “change determinate sentencing for sex offenders”—with some real action. In the 2011 legislative session, some sex offenders could be selected for very long terms of confinement, and others might be returned to the community sooner than they would have been under the Guidelines.

171. For examples of such ongoing re-evaluations, compare the reports from Office of the Legislative Auditor, Substance Abuse Treatment, infra note 181 with Sex Offender Management Report, supra note 169, at 8–10.
172. Von Hirsch, supra note 6, at 188–89.
173. J. of the House, 86th Sess., § 17, subdiv. 6 (Minn. 2010) (requesting the commissioner of human services to conduct a study and report on possible changes to the system), available at http://156.98.78.180/cco/journals/2009-10/J0311073.htm
C. EBP Lessons from Corrections: Supervising Selected Drug Offenders In and Out of Prison

Before the advent of the Guidelines, rehabilitation was “the primary goal” of sentencing. The parole board could release an offender from prison when it decided that release would be “conducive to his rehabilitation.” The Guidelines were adopted at a time when criminologists believed that rehabilitation did not work and that offenders in prison were manipulating the system by posing as good candidates for parole.

Accordingly, the law that created the Guidelines provided that all mental health, employment, and educational programs in the prisons would be completely voluntary and would have “no effect on the length of [the] sentence.” These programs were to be limited to whatever could be provided with the funding appropriated for this purpose. This approach makes sense if one believes, as the Guidelines developers did, that the purpose of a prison sentence was limited to “just deserts.” Under the Guidelines, rehabilitation was no longer the purpose of the sentence.

Yet it is impossible to ignore the severity of the drug and alcohol problems that plague the majority of offenders sentenced to prison. A 2004 study found that sixty-four percent of these persons were “chemically dependent” and another twenty-five percent were “chemically abusive.” As this reality was better understood, and as the number of drug offenders in prison multiplied from 276 in 1990 to 2178 in 2005, the need for chemical dependency treatment in prison became undeniable even though it did not fit the “just deserts” model.

174. Rathke, supra note 1, at 272.
175. MINN. STAT. § 609.12, subdiv. 1 (1980).
176. LeSuer, supra note 5, at 294–96, 300 (discussing the move away from the goal of rehabilitation and the adoption of the “just deserts” model instead).
178. Id. at § 3.
179. See LeSuer, supra note 5, at 297–300 (explaining the “just deserts” model).
180. See id. at 296–97.
182. Id. at 83.
In 1999, the Commissioner of Corrections acquired the power to require inmates to participate in rehabilitative programs and the power to use the prison disciplinary process to extend the incarceration of those who refused.\textsuperscript{183} At this point, the offender was governed by the worst of two worlds. The Guidelines sentence was the “just deserts” for a criminal act, the liability for which could not be mitigated by the voluntary use of intoxicants, yet he or she could be required to go to chemical dependency treatment or else serve more time.\textsuperscript{184} To make matters worse, there were not nearly enough treatment beds available in the prisons, which had received minimal funding for rehabilitative programs.\textsuperscript{185}

The outcome was that the legislature decided in 2005 to allow early release from prison for certain offenders who met a long list of requirements for eligibility. Two of the requirements were that the person must be a drug offender without a violent history and must have completed chemical dependency treatment in the institution.\textsuperscript{186} In fact, the treatment had to include education and other features to build the inmate’s self-worth.\textsuperscript{187} Moreover, the legislature required the Commissioner to offer “suitable” chemical dependency treatment to all inmates who fit the profile.\textsuperscript{188} Similar opportunities were available to inmates who qualified for the Challenge Incarceration Program, including “culturally sensitive” chemical dependency programs and programs to help the inmates cope with stress.\textsuperscript{189}

\textbf{D. EBP Lessons From Corrections: Challenge Incarceration Program}

Rehabilitation had been rehabilitated with more rigor. The Challenge Incarceration Program (CIP) included a requirement for an evaluation of its effectiveness.\textsuperscript{190} Not only did the Department of Corrections evaluate the program, so did the Legislative Auditor.\textsuperscript{191} The CIP produced markedly improved results. Twenty-six percent of those who completed CIP were

\begin{itemize}
  \item \textsuperscript{183} Act of May 3, 1999, ch. 126, §§ 8–9, 1999 Minn. Laws 516, 521–22.
  \item \textsuperscript{184} MINN. SENTENCING GUIDELINES COMM’N, MINNESOTA SENTENCING GUIDELINES AND COMMENTARY § II.D.103 (2) (a) (3) (2010).
  \item \textsuperscript{185} SUBSTANCE ABUSE TREATMENT, supra note 181, at 92.
  \item \textsuperscript{186} MINN. STAT. § 244.055 (2008).
  \item \textsuperscript{187} Id., subdiv. 4.
  \item \textsuperscript{188} Id., subdiv. 3.
  \item \textsuperscript{189} Id. § 244.171, subdiv. 2 (2008).
  \item \textsuperscript{190} Id. § 244.173 (2008).
  \item \textsuperscript{191} SUBSTANCE ABUSE TREATMENT, supra note 181, at 14.
\end{itemize}
arrested again within three years, compared to 64% of those released who completed short-term programs, and 59% of all chemically dependent releasees.\textsuperscript{192}

Better still, only 4% of the people who completed CIP were actually convicted of a serious offense within three years, compared to 37% of chemically dependent releasees as a whole.\textsuperscript{193} It turned out that it was possible to select a group of offenders who had received Guidelines sentences, let them apply for a program of rehabilitative services, provide the services, and grant the offenders early release—and they would succeed. Their success could be proven, despite an approach totally contrary to the philosophy of the Sentencing Guidelines.

E. EBP Lessons from the Judiciary: Reducing Recidivism and Cost with Drug Courts

Meanwhile, in the judicial branch of government, another form of EBP was beginning to grow: drug courts. Proponents asked: Why not select drug offenders who are supposed to be incarcerated, provide them with rehabilitative services, supervision, drug testing, and regular meetings with a judge and not send them to prison at all?

The literature on the philosophy, history, and operation of drug courts is too voluminous to review here in any detail. For the purposes of this discussion, it is enough to demonstrate that in the sentencing of felony drug offenders, drug courts have been successful because they have followed a much different path than the one laid out in the Minnesota Sentencing Guidelines.\textsuperscript{194} Moreover, the drug courts can prove their success—as any sound EBP should be able to do—by documenting decreased recidivism.\textsuperscript{195}

\textsuperscript{192} Id. at 104–05.
\textsuperscript{193} Id.
\textsuperscript{195} 2 National Drug Court Institute, supra note 194, at 6 (“Four
First, the program selects drug court participants based on public, objective criteria that have been developed collaboratively by a drug court planning team. Note how different this is from any of the following more traditional sentencing methods:

a) **Determinate sentencing.** The Guidelines grid calls for forty-eight months of incarceration for a first-offense violation of the law against second-degree possession of controlled substances; or

b) **Departure-based sentencing.** The judge has a hunch, and/or the prosecutor and defense lawyer establish through plea negotiation, that the individual deserves a mitigated dispositional departure, so (as happens more than half the time) the forty-eight month sentence is stayed and a period of probation is imposed; or

c) **Indeterminate sentencing.** The offender goes to prison for zero to ten years, but after two years is released on parole because the parole board deems him “ready for rehabilitation.”

Second, the drug court provides a range of services to the individual, including supervision, drug testing, and frequent contact with the judge. This latter feature is much different from the three alternatives above, because the judge—and in fact the whole “Drug Court Team”—stays in the picture, rather than relinquishing the offender to the state or local corrections department. The court’s effort is aimed not at making the offender serve a specific amount of time consistent with other second-degree offenders; rather, the court is trying to give the person the tools to solve the problem that got him in trouble in the first place.
Finally, the governing body of the court system ensures that the efforts of the drug courts are periodically evaluated.\textsuperscript{202} In Minnesota, there are three key questions to be asked in the evaluation process: (1) Do the drug courts enhance public safety?; (2) Do the drug courts hold the offenders accountable?; and (3) Do the drug courts reduce costs to society?\textsuperscript{203} Ongoing evaluation of this sort allows for refinements over time to take advantage of the most effective approaches and to abandon those approaches found least effective.

Just like the steady evolution of EBPs guiding decisions within the Department of Corrections, the drug court model is shaped around two persistent questions: (1) are we helping to prevent crime; and (2) are our programs cost effective?\textsuperscript{204} EBP as deployed by Corrections and drug courts are precursors to a sentencing system that can be much more fully based on evidence about recidivism and cost reduction.

VI. SMARTER SENTENCING AND CRIME-PREVENTION JURISPRUDENCE: SUPPLEMENTING ART WITH SCIENCE, REPLACING HUNCH WITH EVIDENCE

Rational empiricists highly value and respect evidence. It is systematic, objective, replicable evidence that makes or breaks a theory. Without a strong respect for evidence, we are left with personal, ideological explanations of a phenomenon.\textsuperscript{205}

“‘[C]orrections’ is more science than art,” writes Judge Roger K. Warren, President Emeritus of the National Center for State Courts (NCSC).\textsuperscript{206} The science of corrections has evolved over time in the same way that other disciplines have become more sophisticated. The practice of medicine is a good model, as it has

\begin{itemize}
\item \textsuperscript{202} See Drug Court Standards, supra note 194, at 11 (“At a minimum of once every two years, drug court teams should . . . assess team functionality, review all policies and procedures, and assess the overall functionality of the court.”); Minn. Judicial Branch, Statewide Drug Court Evaluation Plan 3 (2008) [hereinafter Evaluation Plan].
\item \textsuperscript{203} See Evaluation Plan, supra note 202, at 5–7.
\item \textsuperscript{204} See id.
\item \textsuperscript{205} James Bonta, Offender Risk Assessment and Sentencing, 49 Canadian J. Criminology & Crim. Just. 519, 520 (2007).
\end{itemize}
clearly evolved over time to become an EBP. No longer do physicians bleed their clients or attach leeches to them; rather, they prescribe medication for their clients with the confidence that clinical trials support their decision. Similar evolutions have occurred in the field of corrections and are adaptable for use by sentencing judges.

Corrections professionals document a ten to thirty percent recidivism reduction when they replace intuition and hunch with EBPs.\textsuperscript{207} “Smarter sentencing” and “crime-prevention jurisprudence” are phrases used to describe application of EBP knowledge by judges when crafting a sentence.\textsuperscript{208} At the core of EBP knowledge is the risk, need, and responsivity model which addresses the questions \textit{who}, \textit{what}, and \textit{how}, as discussed below:

1. \textbf{The Risk Principle: who is and is not most likely to be successful in a recidivism reduction program?} By using validated actuarial risk assessment tools such as the Level of Service Inventory–Revised (LSI-R),\textsuperscript{210} the EBP practitioner determines who is at greatest risk to reoffend and targets resources to address those offenders.\textsuperscript{211} Over-responding to low-risk offenders can actually increase their recidivism rate, while at the same time depleting resources that could be used to respond to those at higher risk.\textsuperscript{212}


\textsuperscript{209} See Andrews & Dowden, supra note 208, at 442–47.

\textsuperscript{210} Alexander Holsinger, Assessing Criminal Thinking: Attitudes and Orientations Influence Behavior, CORRECTIONS TODAY, Feb. 1999, at 23 (explaining that the LSI-R is a fifty-four question risk and need screening tool designed to predict likelihood of recidivism by measuring the offender’s circumstances regarding criminal history, education, employment, finances, family, drug use, and the like). A sample LSI-R profile is found at http://downloads.mhs.com/lsir/lsi-r-5-profile.pdf (last visited Sept. 22, 2010).

\textsuperscript{211} Id.

2. The Need Principle: what of an offender’s characteristics can be successfully targeted for change? A health-related analogy helps illustrate the idea behind the need principle. Think of a cardiac health screening with questions about diet, exercise, and family history, and how it helps us both evaluate risk and design a treatment regimen. Cardiac patients and criminal offenders have a variety of needs, but only a subset of those needs are directly related to the outcome to be avoided (heart attack, recidivism). “Smart sentencing” requires that the judge have information available about the offender’s behaviors, attitudes, and values most closely associated with recidivism (called “criminogenic factors,” a phrase that has evolved to describe risk-related areas, which include determining the degree to which the offender has low self-control, anti-social personality, anti-social values, criminal peers, substance abuse, and a dysfunctional family).213

3. The Responsivity Principle: how to go about addressing identified problems. Judge Warren gives a good description: “it is not sufficient to determine only that the offender is an appropriate candidate for treatment and that there is a treatment resource available. Given the risks and costs at stake, due diligence requires that a conscientious judge have some credible reason to believe that the program works for such offenders.”214

Smart sentencing in action, then, looks something like this: as part of the pre-sentence investigation, the corrections worker uses an actuarial tool like the LSI-R to determine whether the offender is less likely to reoffend and therefore be amenable to have his behavior changed by interventions less costly than prison. A pre-sentence report advises the sentencing judge accordingly, including a narrative that describes the offender’s criminogenic factors such as his level of family support, the tendency of their peer group to commit crimes, and his alcohol or chemical use habits. Designing a sentence that is effectively responsive to the problems shown by the offender often involves what Minnesota Judge Kathleen Gearin describes as “sending him to work on his

214. WARREN, supra note 206, at 38.
cog skills,” that is, changing the offender’s thinking process through cognitive skills training.\(^{215}\)

Judge Gearin is a strong proponent of efforts to train judges in EBP-based smart sentencing practices, encouraging her colleagues to learn about EBPs used in sentencing.\(^{216}\) In her jurisdiction in late 2009, the Minnesota County Attorneys Association, the Justice Management Institute, and the Federal Bureau of Justice Assistance all sponsored EBP training.\(^{217}\) This smarter sentencing training is based on the core EBP principle that “risk reduction is key—preventing tomorrow’s crime is just as important as punishing yesterday’s act.”\(^{218}\) The training is designed to help court officers learn to avoid traditional sentencing practices, which, by focusing too much on punishing yesterday’s act, actually may make tomorrow’s crime more likely.\(^{219}\)

This progress is not fast enough for Chief Judge Gearin. She states: “I am very frustrated that Minnesota has not made more progress implementing evidence-based practices in the courtroom.”\(^{220}\) Slow progress towards EBP sentencing may be due to embedded judicial attitudes shaped during the years in which “nothing works” was the guiding philosophy in corrections.

### A. No Longer Can Our Sentencing Practices Be Shaped By the Belief That “Nothing Works;” In Fact, Something Clearly Does Work

Judge Roger Warren of the NCSC writes that properly implemented smarter sentencing programs can fight crime and save money by reducing recidivism significantly.\(^{221}\) EBP sentencing

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\(^{216}\) Cf. Letter from Susan Gaertner, Ramsey Cnty. Attorney, to Chief Judge Kathleen Gearin, Second Judicial Dist. of Minn. (Sept. 20, 2009) (on file with author) (inviting recipients to represent Ramsey County in two-day training course focused on promoting evidence-based sentencing practices).

\(^{217}\) Course Description, Evidence Based Smarter Sentencing: Training for Judges, Prosecutors, Defense Attorneys, and Community Corrections Professionals (Oct. 21, 2009) (on file with author).

\(^{218}\) Id. at 1.

\(^{219}\) Id.

\(^{220}\) Interview with Hon. Kathleen Gearin, Chief Judge Second Judicial Dist. of Minn. (July 27, 2010).

\(^{221}\) ROGER K. WARREN, NAT’L INST. OF CORR. AND CRIME & JUSTICE INST., EVIDENCE-BASED PRACTICE TO REDUCE RECIDIVISM: IMPLICATIONS FOR STATE JUDICIARIES
is supported by what Judge Warren described in 2007 as “a large body of rigorous research conducted over the last 20 years.” Judge Warren believes that core EBP concepts like risk and needs assessment could be an effective complement to a determinate sentencing scheme such as the type employed in Minnesota. Judge Warren cautions that incorporating risk assessments into the sentencing process runs the risk of sanctions based on risk rather than offense severity, and such an outcome “might result in people going to prison who otherwise wouldn’t be sent there.” To avoid this result, a hybrid EBP/determinate sentencing approach could be taken to guide the sentencing judge’s discretion in what Judge Warren terms “the straddle-cell cases.” That is, the judge can use her discretion to tailor sentences to address individual defendants’ risk and needs while maintaining proportionality based upon seriousness of the offense.

The principal actuarial tool used to assess an offender’s recidivism risk is called the “LSI-R.” It was co-written by Dr. James Bonta, who advises Public Safety Canada regarding sentencing policy and effective responses to criminal behavior.

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222. Id. at 11.
223. Telephone interview with Hon. Roger K. Warren, President Emeritus, NCSC (July 30, 2010).
224. Id.
225. Id.
226. For example, the risk assessment of a car thief may reveal propensity to commit greater crimes; nevertheless, a proper sentence must be proportional to the offense, not the propensity.
227. See Don Andrews & James Bonta, LSI-R—Level of Service Inventory-Revised, MULTI-HEALTH SYSTEMS, INC., About the Authors, http://www.mhs.com/product.aspx?gr=saf&prod=lsi-r&kid=resources (last visited Jan. 4, 2011) (“Dr. Bonta received his doctorate degree in Clinical Psychology from the University of Ottawa in 1979. Prior to graduating he worked with conduct-disordered children and their families, provided assessments of youth for juvenile courts, and acted as a consultant at a training school for youth. Upon graduating, Dr. Bonta became a psychologist at the Ottawa-Carleton Detention Centre, a maximum security remand center for adults and young offenders and later became Chief Psychologist at the institution. During his 14 years at the detention centre, he established the only full-time psychology department in a jail setting in Canada. Dr. Bonta is currently the director of correction research for Public Safety and Emergency Preparedness Canada. He is also a member of the Editorial Advisory Boards for the Canadian Journal of Criminology and Criminal Justice and Behavior and a fellow of the Canadian Psychological Association. He has had many publications in the areas of risk assessment and offender rehabilitation, such as The Psychology of Criminal Conduct, co-authored with D. A. Andrews and The Level of Service Inventory—Revised, an offender risk-need classification instrument
shares Judge Warren’s belief that courts using risk assessment in sentencing must avoid outcomes based only on an offender’s risk to reoffend. Rather, Bonta believes sentences “must be proportional to the offence [sic].” The LSI-R’s value is “the reliable and valid identification of criminogenic needs,” Bonta writes, and the consequent ability to craft a sentence that effectively addresses the offender’s risk of recidivism. Dr. Bonta describes a continuum of evidence-based sentencing practices in Canada involving use of recidivism risk assessments in pre-sentence reports, explaining that some provinces “write their [pre-sentence reports] around the LSI in a narrative form,” evaluating criminogenic factors, but revealing to the sentencing judge neither the LSI-R score nor the ultimate classification of low/medium/high risk to reoffend. However, practice in other provinces is one of fuller transparency, with all risk assessment information made available to the sentencing judge.

The State of Missouri takes evidence-based sentencing a step further. In 2004, when the Missouri Sentencing Advisory Commission began the process of retooling the state’s sentencing policies, it backed away from a determinate guidelines-based sentencing approach. According to Missouri Supreme Court Justice Michael Wolff, “unlike sentencing commissions in other states, we instead set out not to restrict judicial discretion but to better inform its exercise.” Judicial discretion is “enhance[ed] . . . with data that can shape the correct placement of offenders,” Justice Wolff writes, which does not mean that “judges get to do whatever they like.” Rather, the approach should be called “evidence-based sentencing, for that is what it is: sentences by judges who have considered the evidence that informs

229. Id.
230. Id.
231. Id.
233. Id.
234. Id. at 1404–05 (emphasis added).
Yet even the Missouri model of smart sentencing seems to use evidence only as an ancillary source of information for the sentencing judge, not as the driving factor. The Indiana Supreme Court explicitly created such a limitation for its courts in the first published state supreme court decision dealing with evidence-based sentencing. The court ruled in Malenchik v. Indiana that the LSI-R and other such evaluative data are acceptable when used to “inform” a trial court’s sentencing determinations in a manner “supplemental to other sentencing evidence that independently support[s] the sentence imposed.”

When forming public policy to respond to crime, there are no silver bullets. It is an ever-evolving science. Like any effort to quantify human behavior and predict the future, the process of implementing EBPs has inherent flaws. The problems may result from training inconsistencies, cultural gaps, possible gender-based norming problems, and even regional differences in test responses, as detailed below:

1. **Training variance.** Though the standardized assessment tools themselves remain static—for example, the LSI-R has fifty-four standard questions asked of everyone—training of people administering the assessment inevitably varies, and individual variations surely introduce imprecision.

2. **Culture.** Study of the LSI-R when used with Native American populations, for example, suggests that the predictive validity is low when used with those populations and that further research with this subgroup is needed.

3. **Gender.** Recent research from the University of Cincinnati suggests that predicting recidivism by women might be better accomplished with an actuarial tool normed solely with populations of women offenders.

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235. Id.
236. Malenchik v. Indiana, 928 N.E.2d 564, 566 (Ind. 2010).
237. A sample LSI-R report showing the fifty-four questions is available from its publisher at http://downloads.mhs.com/lsir/lsi-r-5-profile.pdf.
4. Region. The many studies used to validate the LSI-R have produced a variety of results. For example, an Iowa study found the tool a “valid and valuable” predictor of recidivism, while a study in Pennsylvania found only a weak correlation with certain types of offenders.

LSI-R author James Bonta argues that, despite these imprecisions, assessment tools have a track record superior to hunch and instinct. He writes: “I agree that risks/needs instruments are not perfect, but they are preferable to relying on intuition and professional judgment.” Evidence has a better track record than intuition. We owe it to the families affected by corrections and the society that pays its enormous cost to pursue the solutions that the evidence incontrovertibly shows to be effective.

VII. Conclusion

The vast majority of humankind does not need the threat of prison to motivate good behavior. Conscience and compassion work for most of us; promise of hellfire and damnation work for almost all the rest. A few need the threat of imprisonment to remain on the straight and narrow path. Even fewer—currently 9234 individuals, just under two-tenths of one percent of the Minnesota population—we choose to incarcerate at enormous cost. How best can we ensure that our State’s decreasing resources are expended in a way that reduces crime?

The best start to re-shaping felony sentencing in Minnesota is to establish recidivism reduction as an explicit goal of state sentencing policy by both the Sentencing Guidelines Commission

239. Lowenkamp & Bechtel, supra note 124.


and the Minnesota Legislature and to recommit to the values the Guidelines began with: consistency, proportionality, and economy. 245 Underlying these ideals is a valuable belief about process, that an independent, diverse, broadly experienced group of Minnesotans working together—outside electoral politics—has the ability to change criminal justice for the better.

In the 1960s, the Criminal Code was put together by such a group. In the 1970s, the same kind of collaboration created the Rules of Criminal Procedure. In 1980, the Guidelines began to operate, as we have seen, with many creators and much support. In the 1990s, a similar group from all over the geographical and professional bi-partisan map created juvenile blended sentencing, which has been a national model.

Since then, Minnesota’s ability to collaborate on criminal justice on a big-picture level has sputtered. The Non-Felony Enforcement Advisory Committee did an enormous amount of work on misdemeanor reform, which got nowhere. 244 The drug court movement took hold here five years ago (well behind many other states), but has managed to spread to less than half the counties, and remains an excellent, but small-scale option, considering the magnitude of the criminal law problem caused by drug and alcohol abuse. 245

If a multi-professional, broad-based group were to take on felony sentencing, what could it accomplish? How about:

Revise the Criminal Code and the Guidelines so that differences of degree of offense are linked to different sentencing options, and so that the old priority of using prisons for perpetrators of violent crimes predominates again.

Provide long but indeterminate sentences for sex offenses, with an independent release board equipped with evidence-based offender evaluations to make release decisions based on risk. Essentially the presumed Guidelines sentences for these offenders 245.


would be “indeterminate sentences.” Among other benefits, this approach would obviate constant tinkering with “patterned” and “predatory” and “dangerous” sentence extenders, and would save much of the cost of keeping past offenders who have served their sentences in secure hospitals because state officials are scared to let them out.  

Use evidence-based practices in setting conditions of probation for the many thousands of felons whose presumed sentence is not state prison. This way the first question would be, “what would work to prevent this person from committing more crimes?”

Sentence most drug and alcohol offenders—not the large-scale dealers, dealers with guns, dealers who sell to kids—to a presumed sentence of drug court, which operates under a plan that includes evaluating itself.

This last feature, self-evaluation, is critical. Self-evaluation is hard to do in an atmosphere where any major crime is an occasion to blame the policy-makers, blame the judges, or blame the governor who appointed them; but it is the only way criminal justice will get better, as it needs to do.

We have seen great change since 1978. Disco is dead. Gasoline is not cheap. “Just deserts” sentencing policy is costly and often ineffective. Over the history of our state we have seen criminal justice based on the death penalty evolve to criminal justice based on prison, and then change to be based on probation and parole, and then “just deserts” and the Guidelines. Fortunately, Minnesota has had people working on new solutions throughout the Guidelines era: EBP developers, drug court pioneers, and sex offender evaluators. This article is an invitation to see what we can take from their efforts to move toward the next stage of building an affordable criminal justice system that works.

246. See supra Part V.B.