Prosecutors and Evidence-Based Sentencing: Rewards, Risks, and Responsibilities

Steven L. Chanenson
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INTRODUCTION

Imagine the stereotypical prosecutor circa 1995. Imagine, in particular, the prosecutor who worked in a system with heavily presumptive sentencing guidelines such as the pre-Booker1 United States Sentencing Guidelines, as I did as a federal prosecutor. That prosecutor would generally focus on retribution when contemplating sentencing. She would have a gut instinct about the amount of punishment that was appropriate, but would follow the law and the guidelines. The prosecutor might wonder what happened to the defendants after she left the courtroom, won the appeal, and closed the case. However, there were strong institutional pressures encouraging her to conclude that it was not her job to focus too much on how the sentence influenced what happened to these people, or what they did in – or to – the communities to which they would ultimately return. In practice, the numbers on the Sentencing Commission’s grid drove the sentencing determinations in court.

Of course, there was more to the story. The prosecutor was a skilled professional, not an unthinking automaton. As with virtually all prosecutors, our stereotypical prosecutor made charging choices that directly affected the sentencing. In these deci-
sions, the relevant statutes as well as her own innate sense of justice again guided our prosecutor. Should the prosecutor charge the defendant at all? If so, which charge—carrying how severe a maximum (or mandatory minimum) penalty—should be filed? Yet, as a broad over-generalization, the prosecutor in this kind of system did not have to worry too much about sentencing. The heavily presumptive guidelines made many of the decisions for her, and those federal guidelines had a strong bias in favor of incarceration.

Should there have been more to this story? Maybe. Perhaps a contemporary version of that prosecutor should be thinking about concepts of evidence-based sentencing.

I. WHAT IS ALL THIS?

Evidence-based sentencing is still gaining recognition as an emerging field.\(^2\) Not surprisingly, then, the definition of evidence-based sentencing is still evolving. Insightful commentators at the Chapman Symposium and elsewhere have provided definitions that are more effective than any I could create.\(^3\) We can certainly borrow, however imperfectly, in broad strokes from other disciplines that have used evidence-based programs. Borrowing from the American Psychological Association, Judge Roger Warren has written:

The concept of “evidence-based practice” refers to professional practices that are supported by the “best research evidence,” consisting of “scientific results related to intervention strategies . . . derived from clinically relevant research . . . based on systematic reviews, reasonable effect sizes, statistical and clinical significance, and a body of supporting evidence.” Thus, the concept of evidence-based practice in corrections refers to corrections practices that have been proven through scientific corrections research “to work” to reduce offender recidivism.\(^4\)

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\(^2\) This does not necessarily mean that the concepts and practices are themselves always new. See Michael A. Wolff, Evidence-based Judicial Discretion: Promoting Public Safety Through State Sentencing Reform, 83 N.Y.U. L. REV. 1389, 1390 (2008) (“This new way of thinking, which actually may not be so new, focuses on sentencing outcomes as a means of putting public safety at the top of our concerns.”).

\(^3\) See, e.g., Douglas B. Marlowe, Evidence-Based Sentencing for Drug Offenders: An Analysis of Prognostic Risks and Criminogenic Needs, 1 CHAPMAN J. CRIM. JUST. 1, 167 (2009) (“The goal is to choose the disposition in each case that presents the least objectionable risk of recidivism, the greatest likelihood of improving the welfare of the offender, and can do so at the least cost to taxpayers.”); Stephen D. Hart, Evidence-Based Assessment for Risk of Sexual Violence, 1 CHAPMAN J. CRIM. JUST. 1, 143 (2009) (“[E]vidence-based sentencing requires evidence-based risk assessment.”).

Talking more broadly, Dr. Stephen Hart has written that, "Evidence-based means an action or decision was guided by, based on, or made after consulting a systematic review of relevant information in the form of observation, research, statistics, or well-validated theory." This is what prosecutors should do, and they should encourage judges to do the same.

Saying "evidence" to a trial lawyer means something entirely different. Evidence-based sentencing is not about testimony, hearsay, or chains of custody. The key to evidence-based sentencing for our limited purposes is the principled use of reliable social science evidence in order to achieve judicial sentencing determinations that are more likely to improve public safety. While there are many other vital sentencing concerns and considerations in the real world, such as reducing unwarranted disparities and honoring retributive limits, this piece focuses on using information derived from scientific investigations and experiments. Ideally, this information concerns a group of defendants arguably similar to the ones before the court, and most often concentrates on the impact of sentencing decisions on recidivism, however defined.

One might also break down evidence-based sentencing into "macro" and "micro" levels. "Macro" might be at the level of sentencing guidelines themselves. For example, the Virginia Criminal Sentencing Commission built risk assessment into the structure of the judicial decision-making process. "Micro" is at the level of the individual defendant, where the pre-sentence investigation report takes on a more central role in helping the judge or the prosecutor decide what to do in a particular case. For example, Dr. Doug Marlowe's effort to classify drug offenders provides

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5 Hart, supra note 3.
6 The legendary Professor Norval Morris famously advanced a theory of "limiting retributivism," and argued that desert is "an essential link between crime and punishment. Punishment in excess of what is seen by that society at that time as a deserved punishment is tyranny." Norval Morris, THE FUTURE OF IMPRISONMENT 76 (University of Chicago Press 1974); Chanenson, supra note 1, at 451 ("The limiting retributivism theory reminds us that our retributive judgments are imprecise, resulting in a range of acceptable punishments supported by our retributive beliefs."). Although beyond the scope of this piece, Professor Robinson points to the use of evidence to help us guide our retributive judgments as well. Paul H. Robinson, Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical, 67 CAMBRIDGE L. J. 145, 152-153 (2008).
7 Cf. Steven L. Chanenson, Sentencing and Data: The Not-So-Odd Couple, 16 FED. SENT’G REP. 1, 9 (2003) ("In general, data discussing recidivism can be dangerous because recidivism is a concept that means different things to different people. Does it mean rearrest, reconviction, or reincarceration? Is it gauged over a one-year, three-year or five-year time frame? Changes in any of these, or other, variables may make a big difference.").
an example of this “micro” approach.\textsuperscript{9} “Macro” and “micro” are not perfect distinctions by any means, especially because the so-called “macro” approach as described has less of an ability to consider a defendant’s needs in addition to his risk. Nevertheless, this rough approach may be helpful in understanding the landscape of this rapidly developing area.

Nothing happens in a vacuum. Missouri Supreme Court Judge Michael Wolff notes that “[t]his new way of thinking, which actually may not be so new, focuses on sentencing outcomes as a means of putting public safety at the top of our concerns. Sentencing is a complex topic that needs to be approached with humility, an open mind, and common sense.”\textsuperscript{10} While evidence-based sentencing’s focus on recidivism reduction is very important, it is not the only valid concern of the criminal justice system, let alone the legislature or the prosecutor. There are proper roles for other concepts, including the particularly vital contributions from our notions of retribution and our desires for fairness. However, an evidence-based approach to sentencing can itself be consistent with a strong concern for public safety.

We need to remember that most defendants return to their communities. We need to think not only about the relatively short period of time that most incarcerated defendants are removed from society (and thus less likely to harm society outside of the prison environment), but also about the longer term, when they return to their community after being released from incarceration.

What will happen when that person comes back to their community? Will the number of crimes committed over five years be more or less if the person was incarcerated for one year of that time, three years of that time, or none of that time?\textsuperscript{11} Social science evidence shows that some criminal justice responses generally help to reduce recidivism, while some criminal justice responses generally do not help to reduce recidivism (and may even increase recidivism).\textsuperscript{12} An evidence-based approach to sen-

\textsuperscript{9} Marlowe, supra note 3. Indeed, Dr. Marlowe and his colleagues have created an “electronic tool for local officials to rapidly assess drug-involved offenders at the point of arrest and target them into the most cost-effective community correction program.”

\textsuperscript{10} Wolff, supra note 2, at 1390.

\textsuperscript{11} Cf. id. at 1392 (“Are we safer or less safe as a result of the punishment he [the defendant] received?”).

\textsuperscript{12} See, e.g., Marlowe, supra note 3; id. at 1395 (“In the 1970s, [m]any believed that offenders could not be rehabilitated: ‘Nothing works’ was the answer at that time. . . . But it was wrong.” There is, in Judge Roger Warren’s words, “a large body of rigorous research conducted over the last 20 years” that shows that treatments are effective in reducing offender recidivism) (internal citations omitted); Compare Robert Martinson, What Works? Questions and Answers About Prison Reform, 10 PUB. INT. 22, 25 (1974) (“With few and isolated exceptions, the rehabilitative efforts that have been reported so far have
tencing can help the criminal justice system make the more promising choice.

Some people have started to conclude that public safety means being smarter about who we incarcerate and who we do not. Incorporating evidence-based ideas at sentencing is one way to get smarter about sentencing.

However, we do have other purposes of sentencing to consider. Depending on the jurisdiction, retribution can be a prominent statutory consideration that prosecutors and judges must consider. There are disagreements about how and to what extent the role of retribution and punishment should be, but retribution and punishment have a legitimate role to play in sentencing. Related concepts, like a sentence that promotes respect for the law and provides general deterrence, have also been important historically. The popular theoretical approach, noted above, of limiting retributivism – where, in part, our rough retributive notions provide both a floor and a ceiling on punishment – is crucially important. Perhaps a first-time offender who kills his young child is unlikely to commit another crime. Yet, it does not follow ineluctably that “guilt without further punishment” is the proper sentence in such a case. Notions of retribution and deterrence may demand something more severe. The law itself may demand something more severe.

Evidence-based sentencing must operate in the real world where theories of punishment sometimes conflict. Evidence-based sentencing is a tool. It is designed for humans, not computers. It works best when the controlling statutes give humans the legal space to consider all the information (“evidence” in the more legal sense), including the relevant research (“evidence” in the evidence-based sentencing sense).

had no appreciable effect on recidivism.”) (emphasis omitted), with Robert Martinson, New Findings, New Views: A Note of Caution Regarding Sentencing Reform, 7 HOFSTRA L. REV. 243, 244 (1979) (“Contrary to my previous position, some treatment programs do have an appreciable effect on recidivism.”).


14 See, e.g., Richard Frase, Punishment Purposes, 58 STAN. L. REV. 67, 78 (2005) (“Some version of limiting retributivism has also been the basis for most contemporary sentencing laws.”).

15 Cf. Norval Morris, Sentencing Convicted Criminals, 27 AUSTL. L. J. 186, 188 (1953) (“No one theory explains the different punitive measures to be found in our criminal law.”).

16 Cf. Marlowe, supra note 3 (“Evidence-based sentencing seeks to incorporate [...] empirical findings into the sentencing process. In addition to (not instead of) considering other important value-laden issues, such as victims’ sentiments, judges, defense counsel and prosecutors are encouraged to include data on effectiveness in their calculus of decision-making when advocating for or rendering sentencing dispositions.”).
Judge Wolff put it well:

We must acknowledge that the reason for sentencing is to punish, but if we choose the wrong punishments, we make the crime problem worse, punishing ourselves as well as those who offend. If we are to think rationally about what is in our own best interest – that is, public safety – we should try to determine what reduces recidivism. We must pay particular attention to which sentences make recidivism more likely, which sentences are ineffectual at reducing recidivism, and which programs and punishment-treatment regimens have the best outcomes... The goal of every sentence - whether in the community or in prison - is not only to punish but also to minimize the chances of recidivism.\textsuperscript{17}

These are insightful words from a wise man. Nevertheless, some prosecutors might think that evidence-based sentencing is a good idea, but only a good idea for judges. In other words, why should prosecutors care?

II. PROSECUTORIAL REWARDS

Unsurprisingly, there is ample room to question the sentencing decisions we make as a society. Are we incarcerating the right people? Many people believe that “[w]e have not reserved the spaces in prison for the most dangerous and most likely to repeat.”\textsuperscript{18} Others note that “Judges prescribe sentence on lesser evidence about what works and what is cost effective than doctors prescribe medicines.”\textsuperscript{19} Thus, the potential rewards for a prosecutor who starts to deploy ideas of evidence-based sentencing should be clear.

Used appropriately, prosecutors can harness evidence-based sentencing to achieve a number of desirable goals. Prosecutors can follow evidence-based sentencing principles in an effort to reduce recidivism and improve public safety. This can be especially important when the prevailing legal and theoretical principles allow for discretion, particularly between incarceration and community supervision. While the question of how to structure a

\textsuperscript{17} Wolff, supra note 2, at 1395, 1416.


sentence when all agree that incarceration is not appropriate is important and deserves much more attention than it receives, it may not be the toughest one for a prosecutor. The toughest question may be what sentence to recommend when all the legal possibilities – including incarceration – are reasonable options on the table. Why rely on gut instinct when social science evidence can help guide prosecutorial recommendations as well as judicial decisions?

This does not mean that every defendant avoids incarceration. Evidence-based sentencing is not “hug-a-thug goes high-tech.” First, as mentioned above, there are other factors to consider, including traditional notions of retribution and legal limitations. Furthermore, the research itself may show that certain programs or diversionary dispositions are poorly suited for certain types of offenses or offenders. Indeed, the research may indicate that incarceration is more appropriate under certain circumstances. Evidence-based sentencing is a methodological approach to sentencing that is not – and should not be – driven by individual or political preferences concerning incarceration. The focus, within the described limits, is on public safety.

Prosecutors can often be the key to implementing evidence-based sentencing concepts. In some jurisdictions, the legislature makes the prosecutor the case-by-case gatekeeper for sentencing alternatives. The next section will discuss one such example. In other situations, the prosecutor can be the spark for creating smarter sentencing in a jurisdiction. For example, mental health courts20 are growing in popularity.21 There are many other issues about the wisdom and propriety of these courts, such as whether they should be diversionary or adjudicatory, but those questions are beyond the scope of this piece. However, the RAND corporation recently published a study asserting that the Allegheny County, Pennsylvania Mental Health Court – which needs the agreement and cooperation of the prosecutors to function22 – has saved the government money despite the increased cost of mental

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21 One reason for the increasing popularity of mental health courts may be an expanded recognition that, in the words of prosecutor Gerald E. Nora, “the criminal justice system is a general diversion mechanism for the mental health system.” Gerald E. Nora, Proctor as “Nurse Ratched”? Misusing Criminal Justice as Alternative Medicine, 22 CRIM. JUST. 18, 18 (2007).

22 Cf. at 22 (“The prosecutor is a necessary partner, and frequently instigates a mental health court’s establishment.”).
health services for the individuals in that program.23

There are no guaranteed outcomes, but following the principles of evidence-based sentencing can help a prosecutor make decisions that are more informed and that may better protect the public while perhaps even saving funds. These are tangible rewards for both the prosecutor and the community.

III. PROSECUTORIAL RISKS

There are, of course, risks. No one likes to be snookered. This is especially true of prosecutors. At first blush, some prosecutors will be distrustful of evidence-based sentencing, fearing that it is just another attempt by defendants to avoid responsibility for their crimes. Some prosecutors are suspicious about many of the defendants who seek drug treatment instead of incarceration for narcotics-related crimes. These wary prosecutors suspect that at least some of these drug-dealing defendants only “discovered” their addiction upon arrest.24 A brief anecdote is in order. At the 2008 Annual Meeting of the National Association of Sentencing Commissions, I spoke privately with a very smart and very thoughtful senior prosecutor about evidence-based sentencing. This person’s immediate response was, “We don’t like that.” Although the prosecutor quickly retreated from that position when confronted with the prospect that public safety might be improved by following the social science evidence, the risk of being tricked—and perhaps more importantly the fear of that risk—is not a chimera.

What if the defendant is faking? What if the defendant is manipulating the system? What if the social science expert is biased in favor of the defendant?25 Public safety can be imperiled. The prosecutor’s reelection (if applicable) can be imperiled. These are real risks. How should a prosecutor respond to these real risks? Among the various options, it is possible to divide the world into two broad and rough camps: avoidance and engagement.

Avoidance describes the phenomenon of prosecutors refusing to consider the sentencing alternative. It could stem from any of a number of objections, including a philosophical disagreement with the program or an extremely risk-averse attitude.

In Pennsylvania, the General Assembly—with the strong support of the Pennsylvania District Attorneys’ Association26—
created a sentencing alternative called State Intermediate Punishment ("SIP"). The idea behind SIP is to "to create a program that punishes persons who commit crimes, but also provides treatment that offers the opportunity for those persons to address their drug or alcohol addiction or abuse and thereby reduce the incidence of recidivism and enhance public safety." Instead of receiving a normal prison sentence, which might include a mandatory minimum of three years or more followed by the prospect (but not the guarantee) of discretionary parole release, defendants sentenced to SIP receive a two-year, step-down substance abuse treatment program which starts in a prison-based therapeutic community, and progresses to a secure, community-based therapeutic community, and then to an outpatient addiction treatment program, and perhaps typical probation. The legislation excludes various types of offenders and offenses, some logically and some not, which is unsurprising politically.

Before a defendant who meets the other hurdles may be sentenced to SIP, the Department of Corrections must, by statute, assess the defendant using an externally validated instrument and "conclude[] that the defendant is in need of drug and alcohol addiction treatment, and would benefit from commitment to a DOTP [drug offender treatment program] and that placement in a DOTP would be appropriate." 

For the right offender, this is an exciting program. By design, it includes aspects of evidence-based sentencing. For example, the therapeutic community model of drug treatment has received positive reactions in the social science world. One systematic review found that while therapeutic communities "in general were clearly effective, [therapeutic communities] that combined incarceration-based treatment with mandatory post-release aftercare exhibited enhanced effectiveness in reducing


28 42 PA.C.S. § 9802(6).
29 See 42 PA.C.S. § 9903 ("Institutional therapeutic community. ‘A residential drug treatment program in a State correctional institution, accredited as a therapeutic community for treatment of drug and alcohol abuse and addiction by the American Correctional Association or other nationally recognized accreditation organization for therapeutic community drug and alcohol addiction treatment.").
30 Id. ("Community-based therapeutic community. ‘A long-term residential addiction treatment program licensed by the Department of Health to provide addiction treatment services using a therapeutic community model and determined by the Department of Corrections to be qualified to provide addiction treatment to eligible offenders.").
32 42 PA.C.S. §§ 9904(b)(1), 9903.
reoffending.”

The District Attorney must agree twice for any defendant to enter the SIP program — once at the time of referral to the Department of Corrections and once more after the Department of Corrections has agreed yet before the Judge imposes the sentence. Ultimately, it must be a three-cornered agreement between the District Attorney, the defendant, and the Judge. Thus, the District Attorneys have complete control over the SIP program.

Just as the District Attorneys as a group played a key role in establishing the SIP program, some of them have played a key role in functionally strangling the program in certain counties. The SIP program is only a few years old and therefore the numbers are still low, but early reports indicate that only about 23% of apparently eligible defendants were referred for evaluation by the Department of Corrections. In other words, we do not even know what the evidence-based principles would recommend for more than 75% of the defendants. While it is possible that some of the eligible defendants refused referrals, it seems more likely — and anecdotal reports seem to confirm — that District Attorneys in some counties are largely avoiding the SIP program. Indeed, as of February 2009, there were zero referrals to the Department of Corrections from seven of Pennsylvania’s 67 counties despite several hundred defendants being eligible under the statute in those counties.

This type of avoidance protects the District Attorney against the risk of being duped. However, it ignores the possibility of reaping the public safety rewards. In other words, this kind of avoidance ignores the purpose of Pennsylvania SIP statute, which asserts, “Many people who commit crimes will be able to become law-abiding, contributing members of society if they are able to obtain treatment for their drug or alcohol addiction or

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33 OJMARH MITCHELL ET AL., THE EFFECTIVENESS OF THE INCARCERATION-BASED DRUG TREATMENT ON CRIMINAL BEHAVIOR 18 (September 2006), available at http://db.c2admin.org/doc-pdf/Mitchell_Incarceration_DrugTx_review.pdf. But see id. (“However, the possibility of publication bias in the available body of [therapeutic community] evaluations tempers our findings. That is, there was evidence of publication bias in this area of research that apparently over-estimated the effectiveness of [therapeutic community] programs.”).
34 Cf. Editorial, STATE INTERMEDIATE PUNISHMENT PROGRAM PRISON ALTERNATIVE, Philly Inquirer (March 22, 2008) (The power to recommend defendants for SIP “is now held by district attorneys who prosecute cases, but too often they don’t use it.”).
36 Id. at 3. There are several counties with some, but very few referrals. For example, there is one county with more than 300 eligible defendants and just two referrals.
Prosecutorial engagement, in contrast, encourages the prosecutor to truly examine each case and each defendant individually while respecting the potentially competing goals of honoring retributive limits and avoiding unwarranted disparity. A vital aspect to this kind of engagement is getting enough information to exercise structured professional judgment. One way to obtain this information is through the pre-sentence investigation report. Judge Wolff has encouraged and supervised the transformation of this report in Missouri into a Sentencing Assessment Report. In an article supporting concepts of evidence-based sentencing, he notes, "probation officers who write Sentencing Assessment Reports and supervise offenders are likely to develop expertise regarding which kinds of supervision strategies, restraints, and programs will be most effective at reducing the offenders’ likelihood of reoffending."

At the University of Pennsylvania's Criminology Department, criminology master's students engage in a simulation where they use social science evidence to create a pre-sentence investigation-type report, typically on behalf of the defendant, for hypothetical cases. Based on this report, a real judge and real lawyers conduct a sentencing hearing with the student as a witness. Sometimes the student's recommendations are wildly off the mark from a courthouse culture perspective. Some of the student's recommendations are too severe to ever be presented by the defense, or too lenient to ever be adopted by a judge. Nevertheless, the lawyers and the judge get into their role. They challenge the students use of certain studies and question whether the studies can be fairly applied to the case at bar. This is a serious concern because the state of the research is severely lacking. Yet, the prosecutors are engaging with the social science on its own terms. There is no magic here. Rather, it is like anything else in court. If the advocates disagree about the implications of the evidence (here used in both meanings), they will fight it out in front of the judge. By engaging with the social science evidence, prosecutors are reducing the risk of being duped with-

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37 42 P.A.C.S. § 9902(5).
38 See Michael A. Wolff, Missouri’s Information-Based Discretionary Sentencing System, 4 OHIO ST. J. CRIM. L. 95, 115 (2006) ("The new format for these reports, called the Sentencing Assessment Report, is less extensive in describing the social and educational family history of the offender, and instead is focused on addressing specific risk factors that have been identified in the risk factor analysis.").
39 Wolff, supra note 2, at 1410.
40 I have taught this class in recent academic years.
41 This issue is beyond the scope of this piece, but it presents a problem to which prosecutors can help provide a solution, as we will see.
out abandoning the possible public safety benefits. In light of this balance of rewards and risks, what are the prosecutors' responsibilities?

IV. PROSECUTORIAL RESPONSIBILITIES

Prosecutors have vast power. With that power, as all criminal justice professionals know, comes great responsibilities. Prosecutors do not have the luxury of their defense bar colleagues to determine what just one person – the defendant – wants and argue for that zealously. Prosecutors have to do more.

In the context of evidence-based sentencing, I propose four broad prosecutorial responsibilities. These suggested responsibilities all seek to maximize the rewards while responsibly controlling the risks associated with evidence-based sentencing.

A. Prosecutors have the responsibility to become educated.

An evidence-based approach to sentencing is the wave of the future. In fact, in some courts, it is the reality of the present. Prosecutors have a responsibility to learn about the punishment options, including treatment programs that are available in their community. They must know about the available options in order to assess what the best recommendation is in light of the facts and the law. The Supreme Court of Washington recognized this in the context of judges that applies with equal vigor to prosecutors: "If judges are to consider meaningful alternatives to prison sentences, they should be knowledgeable about the programs, their effectiveness, and whether the offender is a good candidate for the program."

Prosecutors must also become educated – at least at a rudimentary level – about social science evidence. They need to be able to engage with the material on its own terms. Otherwise, they will be at an extreme disadvantage. They may miss the op-

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42 Michael Marcus, Archaic Sentencing Liturgy Sacrifices Public Safety: What's Wrong and How We Can Fix It, 16 FED. SENT’G REP. 76, 81 (2003). While the focus of this piece is on the role that prosecutors can and should play with Evidence-based Sentencing, it is also true that judges can help to alter the dynamic in the courtroom and encourage the lawyers to make evidence-based arguments concerning sentencing. Id. at 82-83. Indeed, Oregon's Judge Michael Marcus is a leader in this and many related areas.

43 There are many formulations about the prosecutor's responsibilities. See, e.g., Berger v. United States, 295 U.S. 78, 88 (1935) (“The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law...”).

44 See, e.g., Marcus, supra note 42, at 81.

portunity to improve public safety and may, in fact, get snookered. They need to be able to make an intelligent judgment about what makes sense for the offense and offender before the court. There are resources in most communities than can help prosecutors learn enough to become a critical consumer of social science evidence. As I have written elsewhere, "[t]hese trainings need not be the equivalent of 'How I Learned to Stop Worrying and Love Multiple Regression.' They would just be an effort to make the material more accessible."\(^{46}\)

B. Prosecutors have the responsibility to keep an open mind.

If prosecutors bring a closed mind to the ideas of evidence-based sentencing, they will forfeit the opportunity to reap the potential rewards of improved public safety and cost savings. In other words, prosecutors should not practice "avoidance." Instead, they should actively engage with evidence-based sentencing. Prosecutors must take an active and affirmative role in improving their communities by leveraging the knowledge of what may reduce recidivism and still be compatible with the other demands the law and society places on them. Prosecutors have discretion and must work to use that discretion in the most responsible and effective manner possible.\(^{47}\)

C. Prosecutors have the responsibility to encourage pilot programs.\(^{48}\)

Prosecutors often have the power to create new options or, alternatively, to prevent new options from being explored. They should use that power to encourage more pilot studies relating to

\(^{46}\) Chanenson, supra note 7, at 5 n.36 (citing FEDERAL JUDICIAL CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE (2d ed. 2000)).

\(^{47}\) Cf. Wolff, supra note 2, at 1397 ("Judicial discretion - and, for that matter, discretion on the part of law enforcement officers, prosecutors, defense attorneys, probation officers, prison supervisors, and parole boards - is inherent in the system. To make better discretionary decisions, it is important to use data to help us determine which people to incarcerate and which to supervise in the community. The more successful we are at making these discretionary judgments, the safer we will be.") (emphasis added).

\(^{48}\) One example can be found in the Brooklyn's Drug Treatment Alternative-to-Prison ("DTAP") program. District Attorney Charles J. Hynes believed that he had a:

...responsibility to explore new strategies to increase public safety.... Collaborating with community-based treatment providers, the judiciary, the defense bar, probation, and parole, my office launched the Drug Treatment Alternative-to-Prison (DTAP) program in the fall of 1990. DTAP is the nation's first prosecutor-run program that diverts substance-abusing, nonviolent repeat felony offenders away from prison and into drug treatment.

evidence-based sentencing.\textsuperscript{49} Pilot studies can offer windows on what sentencing choices for which kind of offenses and offenders are promising. This kind of prosecutorial support can be crucial and presents few downsides. Prosecutors have nothing to fear from greater knowledge. On the one hand, the evidence may show that the sentencing option can help or at least not hurt public safety and is worth further exploration.\textsuperscript{50} On the other hand, the evidence may show that the sentencing option is counterproductive and unworthy of consideration. In the latter situation, the number of cases was likely limited, and the results from a pilot study may even prove useful when the prosecutor opposes a subsequent defense request for the sentencing alternative. Ultimately, seeking out and evaluating ways to improve the criminal justice system – including through pilot programs concerning evidence-based sentencing – is a traditional prosecutorial role. In the words of the American Bar Association, “It is an important function of the prosecutor to seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to the prosecutor’s attention, he or she should stimulate efforts for remedial action.”\textsuperscript{51}

D. Prosecutors have the responsibility to act as Ministers of Justice.

Finally, and most obviously, prosecutors have the responsibility to act as Ministers of Justice.\textsuperscript{52} This overarching responsibility permeates everything that a prosecutor does, and chooses not to do. We all know that this means, in part, that prosecutors cannot view their jobs as solely convicting people.\textsuperscript{53} As Attorney General of the United States, Bobby Kennedy once said, “It is, after all, not the Department of Prosecution but the Department of Justice over which the Attorney General presides.”\textsuperscript{54}

This responsibility extends to sentencing as much as to conviction. As the American Bar Association has said, “The prosecutor should not make the severity of sentences the index of his or

\textsuperscript{49} Cf. Nora, supra note 21, at 22 (“The prosecutor is a necessary partner, and frequently instigates a mental health court’s establishment.”).

\textsuperscript{50} Cf. at 20 (“It is futile to sentence a defendant if the system remains willfully ignorant of the remedies that will rehabilitate the offender.”).

\textsuperscript{51} American Bar Association, Criminal Justice Standards: Prosecution Function § 3-1.2(d) (1993).

\textsuperscript{52} Id. at § 3-1.2(b)(“The prosecutor is an administrator of justice, an advocate, and an officer of the court; the prosecutor must exercise sound discretion in the performance of his or her functions.”).

\textsuperscript{53} Id. at § 3-1.2(c)(“The duty of the prosecutor is to seek justice, not merely to convict.”).

\textsuperscript{54} Robert F. Kennedy, Address opening the National Conference on Bail Reform, April 24, 1964.
her effectiveness.” In the context of evidence-based sentencing, measures of effectiveness should include some reference to recidivism and public safety. Prosecutors must remember that more prison time — or any prison time — is not necessarily the goal. It may be the goal in particular cases, but it is not always the goal. The prosecutor must think beyond petty courtroom competitions and consider how to best achieve justice for this defendant, for this victim and for the community as a whole.

CONCLUSION

In conclusion, evidence-based sentencing principles are another important tool to help prosecutors pursue justice and live up to the highest ideals of their noble calling.

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55 American Bar Association, supra note 51, at § 3-6.1(a).