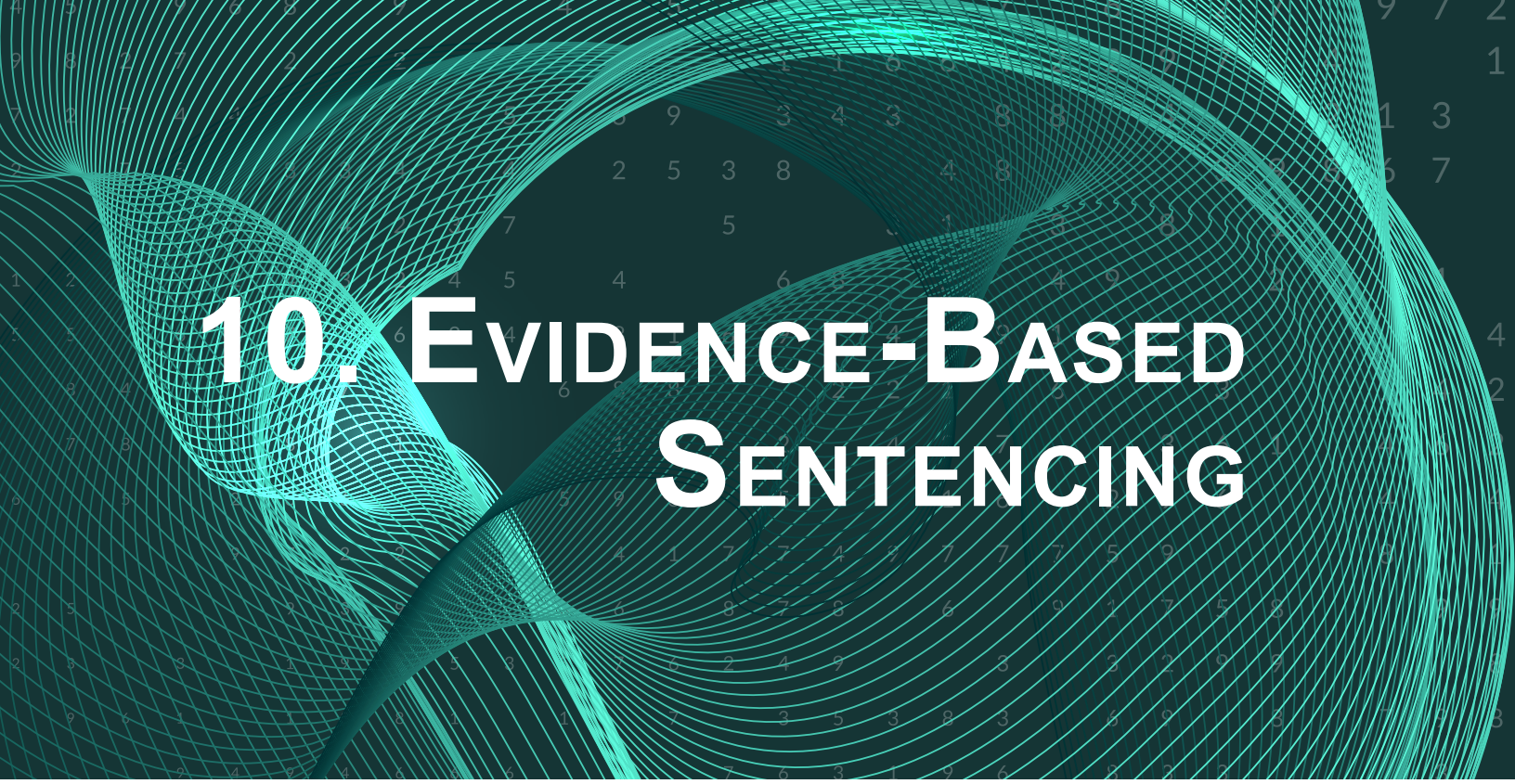

10. Evidence-Based Sentencing

Sections 10.1 - 10.4

Hon. Kevin S. Burke

10.1 Introduction

When sentencing a defendant, what sort of evidence should a judge look for? Surely it is not evidence based upon erroneous assumptions or flawed implicit bias. But sentencing *is* part judgment—driven by experience. There is a human component of compassion when imposing a sentence. Current best sentencing evidence is not perfect evidence—but the best there is. The best evidence for sentencing is not old or out-of-date evidence; but modern, up-to-date evidence.

How is evidence-based sentencing going to help judges make the right decisions? In a conscientious, explicit, and judicious way.

- **Conscientious**—being careful, and thorough, in what you do;
- **Explicit**—being "up-front," open, clear and transparent;
- **Judicious**—using good judgement and common sense.

Evidence-based sentencing is driven by actuarial tools, which can be the best current evidence to assist a judge in sentencing. The term *judicious* implies the actuarial tools are an aid to a judge's judgment, not a substitute for it. In Professor Marc Miller's article, *A Map of Sentencing and a Compass for Judges: Sentencing Information Systems, Transparency, and the Next Generation of Reform*,[1] he identifies five areas that have motivated the sentencing reform movement (1) Bringing law to the sentencing arena to replace highly discretionary systems; (2) addressing sentencing disparities for similarly situated defendants; (3) reliance upon different justifications for punishment and the collapse of the rehabilitation focus for punishment; (4) desire for greater control over resource use; and (5) the quest for the implementation of rational and proportionate rules and penalties that limit reliance on inappropriate factors.

The goal of evidence-based sentencing is to address the issues Professor Miller outlined and to more effectively:

- identify who may be safely and effectively supervised in the community; and,

- order appropriate conditions of community supervision given the defendant's recidivism risk, criminogenic needs, and responsivity factors.

There is institutional support for evidence-based sentencing. In 2007, the Conference of Chief Justices (CCJ) adopted a resolution entitled "In Support of Sentencing Practices that Promote Public Safety and Reduce Recidivism."[2] The Resolution emphasized that the judiciary "has a vital role to play in ensuring that criminal justice systems work effectively and efficiently to protect the public by reducing recidivism and holding offenders accountable."[3] The CCJ committed to "support state efforts to adopt sentencing and corrections policies and programs based on the best research evidence of practices shown to be effective in reducing recidivism."[4]

Similarly, the American Bar Association (ABA) has urged states to adopt risk assessment tools in an effort to reduce recidivism and increase public safety.[5] The ABA emphasized concerns relating to the incarceration of low-risk individuals, cautioning that the placement of low-risk defendants with medium and high-risk defendants may increase rather than decrease their risk of recidivism.[6] Such exposure can lead to negative influences from higher risk defendants and actually be detrimental to the individual's efforts at rehabilitation.[7]

10.2 What Does Evidence-Based Sentencing Involve?

10.2.1 Conducting validated risk, needs, and responsivity assessments of the defendant

Evidence-based sentencing focuses on predicting a defendant's recidivism risk based on empirical research.[8] Evidence-based sentencing is a type of risk assessment, or actuarial analysis, that relies on a large dataset to evaluate the "statistical correlations between a group trait and that group's criminal offending rate" as opposed to a clinical evaluation.[9] Recidivism, for example, can be predicted based upon a wide range of factors, including criminal history, sex,[10] age, marital status, employment, education, parental convictions, whether family members who have been crime victims, school grades, and chances of finding work above the minimum wage. The set of assessments typically includes an actuarial assessment of general recidivism risk, and other specific risks (e.g., violence or sexual offending); a structured assessment of the defendant's criminogenic needs; and additional assessments to identify factors that may pose challenges to the effective treatment of the defendant. It sounds simple, but it isn't: assessment instruments must be properly validated for use with the jurisdiction's target population of defendants.

10.2.2 Risk/Needs Assessment

Judges make "clinical judgments" when they sentence. But there are limitations on a judge's "best clinical judgment." At sentencing, how does a judge determine if the defendant is telling the judge the truth? Determining credibility is among the most difficult tasks a trial judge has. Judges are not necessarily better than others at figuring out who is telling the truth. For example, in a controlled study of 110 judges with an average of 11.5 years on the bench, judges did not do better than chance in telling who was being truthful and who was not.[11]

Judge Learned Hand once said, "The spirit of liberty is the spirit which is not too sure that it is right."[12] So if determining who is telling the truth is problematic, what about determining the sincerity of remorse? Professor Eve Hanan's research looked at the following: Whether a defendant expresses remorse at criminal sentencing

often has a direct bearing on the severity of the sentence. But how good are judges at accurately assessing genuine, meaningful remorse?[13]

Research demonstrates that many judges have flawed "clinical judgment" about remorse. Remorse can include any verbal or nonverbal expression of regret for committing a crime. It conveys acceptance of personal responsibility. A male defendant's face, for example, might show no remorse because his view of masculinity requires him to refrain from emotional displays.[14]

There are actuarial risk assessment instruments shown to be more accurate than a judge's clinical judgment in determining offender risk. But that does not mean that evidence-based sentencing is the sole basis upon which a judge should approach sentencing, and clinical judgment should never be employed. The "Tyranny of the 'or'" is a flawed approach to decision making that assumes there is only a solitary choice between one of two seemingly contradictory strategies or outcomes. Adherence to evidence-based sentencing and the analysis tools it brings does not require a judge to discard clinical judgment. Rather than the tyranny of the "or," analytic tools and sound clinical judgment by a judge produces the genius of the "and." Understanding the use of risk and needs assessment information is therefore critical in making evidence-based sentencing decisions, such as:

- Most appropriate conditions of probation to be imposed;
- Defendant's amenability to treatment;
- Most appropriate treatment or level of supervision to be imposed; and
- Kind of sanction, incentive or additional service to be ordered upon a violation of probation.

The Indiana Supreme Court in *Malenchik v. State of Indiana* observed that "the concept of evidence-based sentencing practices has considerable promise for the goal of reduced offender recidivism and improvement of sentencing outcomes."[15]

In *State of Wisconsin v. Eric L. Loomis*, the Supreme Court of Wisconsin held that the use of risk assessment tool at sentencing did not violate the defendant's due process right to be sentenced based on accurate information or his due process right

to an individualized sentence. The risk assessment tool's consideration of his gender did not violate his due process rights.[16]

Wisconsin charged Eric Loomis with five criminal counts related to a drive-by shooting. Loomis denied participating in the shooting, but he admitted that he had driven the same car involved later that evening. Loomis pleaded guilty to two of the less severe charges. In preparation for sentencing, a Wisconsin Department of Corrections officer produced a Presentence Investigation Report (PSI) that included a Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) risk assessment.[17] COMPAS is a "risk–need assessment system . . . that incorporates a range of theoretically relevant criminogenic factors and key factors emerging from meta-analytic studies of recidivism."[18]

The Wisconsin Supreme Court's decision in *Loomis* rejected Loomis's challenges and cautioned trial judges not to abandon their clinical judgments. The methodology behind COMPAS is a trade secret, and only the estimates of recidivism risk are reported to the court. Courts would do well when negotiating the purchase of an evidence-based system, to include in the contract a clause that ideally permits a court, with appropriate safeguards, to know what is behind the methodology.

10.2.3 Provide assessment results to the court

In many jurisdictions that employ evidence-based sentencing, assessment results are included in the presentence investigation report. However, in lieu of a traditional PSI, some jurisdictions elect to develop an alternate and more succinct assessment report.

The jargon of evidence-based sentencing focuses on "criminogenic needs," meaning characteristics, traits, problems, or issues of a defendant that directly relate to the defendant's likelihood to re-offend. Criminogenic needs fall into two categories: static and dynamic. The underlying theory is that offending is a product of the history of criminal justice involvement and specific criminogenic needs. By attending to dynamic criminogenic needs through proper treatment and control programming, one can affect offending behavior.

Those that cannot be changed are labeled "static." Examples include prior record or family criminality. For example, early onset of criminal behavior is a very good predictor of future behavior. Those factors that can be changed are labeled "dynamic." They may include factors like who a defendant hangs around with, defendants' attitudes and values, their lack of problem solving skills, their substance use, and their employment status. All these are correlated with recidivism, and all can be targeted for change. These dynamic factors are also called *criminogenic needs*, crime producing factors that are strongly correlated with risk.[19]

The assessment report should provide information about the defendant's overall level of risk and criminogenic and other needs. What are criminogenic needs and why are they important? Four major risk factors are associated with criminal conduct: antisocial/procriminal attitudes, values, and beliefs; procriminal associates; temperament and personality factors; and, low levels of educational, vocational, or financial achievement.

To ensure that the assessment information provided to the court is based on a validated instrument and has not been overridden by an agency without notice to the court and counsel, the report should also indicate whether the assessment result(s) had been subject to an agency override.

10.2.4 Use assessment results to inform sentencing decisions about community supervision, treatment, and other services for the offender

In deciding the appropriate sentence for the defendant, judges should consider information pertinent to several different sentencing goals. A judge may decide that sentencing goals such as punishment or restitution are most important in a case. Evidence-based sentencing typically applies only to sentencing decisions in which the judge seeks to address the goal of public safety through offender risk reduction and management.

To make evidence-based sentencing decisions, the judge will consider:

- The defendant's individual risk level, dynamic needs, and responsivity factors[20]

- The supervision and monitoring options available
- The sanctioning options available
- The treatment services designed to address criminogenic factors (needs) that are available

In some jurisdictions, the judge will make decisions about the conditions of supervision designed to ensure effective recidivism risk management if the defendant is placed in the community. In other jurisdictions probation officers make that decision.

Most evidence-based sentencing tools use information that has been central to sentencing schemes for many years such as a defendant's criminal history. An increasing amount of jurisdictions use static factors such as gender, age, marital status, education level, employment history, and other demographic information to determine risk and inform sentencing.

This practice has drawn sharp criticism from Attorney General Eric Holder. He says "using static factors from a criminal's background could perpetuate racial bias in a system that already delivers 20% longer sentences for young black men than for other offenders."[21] He has said that "utilizing such tools for determining prison sentences to be served will have a disparate and adverse impact on offenders from poor communities already struggling with social ills."[22]

10.3 Does *Daubert* (or *Frye*) Apply to Evidenced-Based Sentencing?

Sentencing hearings do not subject scientific evidence to the same rigorous testing as during trial, but the prongs of *Daubert* analysis may be helpful in assessing the analytical tools that a court wishing to employ evidence-based sentencing might apply.

> **Prong 1:** Whether evidence-based sentencing tool has been tested and validated to your jurisdiction
>
> **Prong 2:** Whether evidence-based sentencing tool has been subjected to peer review or publication
>
> **Prong 3:** What Is the known (or potential) error rate and are there standards that control evidence-based sentencing?

While the criminal justice system has experienced real progress in its ability to create and use reliable sentencing assessments, some of these instruments have shown a tendency towards disparate impacts. Thus, using the *Daubert* prongs will help ensure that an evidence-based approach to sentencing is fair and balanced.

10.4 Endnotes

1 Marc L. Miller, *A Map of Sentencing and a Compass for Judges: Sentencing Information Systems, Transparency, and the Next Generation*, 105 Colum. L. Rev. 1351 (2005).

2 Conference of Chief Justices, Conference of State Court Administrators, Nat'l Center for St. Cts, Resolution 12: In Support of Sentencing Practices that Promote Public Safety and Reduce Recidivism (August 1, 2007), http://ncsc.contentdm.oclc.org/cdm/1fref/collection/ctcomm/id/139.

3 *Id.*

4 *Id.*

5 Am. Bar Ass'n, Crim. Just. Section, *State Policy Implementation Project,* 18, http://www.americanbar.org/content/dam/aba/administrative/criminal_justice/spip_handouts.authcheckdam.pdf.

6 *Id.* at 19.

7 *Id.*

8 *See* PA. Comm'n on Sent'g, Overview of the Risk Assessment Instrument, http://pcs.la.psu.edu/publications-and-research/research-and-evaluation-re ports/risk-assessment [https://perma.cc/5FUC-GVX2].

9 Bernard Harcourt, *Against Prediction: Sentencing, Policing, and Punish-Series*, Paper No. 94, 2005); see J. Hyatt, et al., *Follow the Evidence: Integrate Risk Assessment into Sentencing*, 23 Fed. Sent'g Rep. 266, 266 (2011) [hereinafter *Follow the Evidence*] (noting that actuarial risk assessments rely on static variables whereas clinical risk assessments rely on dynamic variables).

10 Factors like sex can raise constitutional issues. See Shaina D. Massie, Note, *Orange Is the New Equal Protection Violation: How Evidence-Based Sentencing Harms Male Offenders,* 24 Wm. & Mary Bill Rts. J. 521, 522 (2015) ("Penological considerations of gender in sentencing are simply incompatible with abstract notions that criminal offenders appear before the court in their individual capacities. More important, the use of gender in evidence-based sentencing violates the concrete promises of equal protection under the law provided by the Constitution.").

11 See P. Ekman & Ma. O'Sullivan, *Who Can Catch a Liar?*, 46 Am. Psychologist 913 (1991); R. Schauffler & K. Burke, *Who Are You Going to Believe?*, 49 Ct. Rev. 124 (2013).

12 Learned Hand, The Spirit of Liberty, Address at "I Am an American Day" in New York City's Central Park (May 21, 1944), in The Spirit of Liberty: Papers and Addresses of Learned Hand 189, 189 (Irving Dilliard ed., 3d. ed. 1986).

13 Eve Hanan, *Remorse Bias*, 83 Mo. L. Rev. 301 (2017). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3079788.

14 N. Dowd et al., *Feminist Legal Theory Meets Masculinities Theory*, in Masculinities and the Law: A Multidimensional Approach 25, 31 (Frank R. Cooper & Ann C. McGinley eds., 2012).

15 Malenchick v. State, 928 N.E.2d 563, 569 (Ind. 2010).

16 For a contrary position, *see* footnote 10.

17 Tim Brennan, et al., Northpointe Inst. for Pub. Mgmt. Inc., *Evaluating the Predictive Validity of the COMPAS Risk and Needs Assessment System*, 36 Crim. Just. & Behav. 21 (2009).

18 *Id*.

19 Edward Latessa, *What are Criminogenic Needs and Why are they Important?,* For the Record, 4th Quarter 2005.

20 Responsivity principle: Maximize the offender's ability to learn from a rehabilitative intervention by providing cognitive behavioural treatment and tailoring the intervention to the learning style, motivation, abilities and strengths of the offender.

21 Daniel Luis, *The Dangers of Evidence-Based Sentencing*, GovLab blog 2014 http://thegovlab.org/the-dangers-of-evidence-based-sentencing/

22 *Id*.