

Behavioral Responsivity: Toward Evidence-Based Practice Standards For Substance-Related Crime

Douglas B. Marlowe*

ABSTRACT

This article describes sentencing-related practices proven to enhance public health and safety outcomes, improve cost-efficiency, and reduce unfair racial and ethnic disparities for persons charged with substance-related crimes. The author provides recommendations for incorporating these evidence-based practices as an enforceable standard of care for the criminal justice system and requiring officials to explain on the record why they may elect to impose conditions inconsistent with public health, public safety, and taxpayer interests. Recognizing a redressable right to evidence-based practices is the most promising strategy for achieving rational and equitable criminal justice reform.

INTRODUCTION

“Everything should be made as simple as possible, but not simpler.”

— Albert Einstein¹

More than half a century of research has identified the requisite ingredients for safe, effective, equitable, and cost-efficient interventions for drug- and alcohol-related crime, yet criminal justice professionals have little obligation to learn or adhere to the precepts. Persons involved in the criminal justice system have few enforceable rights to evidence-based practices² and officials are held minimally

* Senior scientific consultant, National Association of Drug Court Professionals; senior science and policy advisor, Alcohol Monitoring Systems. B.A., psychology, Brandeis University; J.D., Villanova University School of Law; Ph.D., clinical psychology, Hahnemann University; internship in clinical psychology and fellowship in neuropsychology, Albert Einstein College of Medicine and Montefiore Medical Center. The views in this article are those of the author and do not reflect the positions or policies of any organization with which he is affiliated.

¹ OXFORD DICTIONARY OF AM. QUOTATIONS 621 (Hugh Rawson & Margaret Miner eds., 2d ed. 2006).

² See generally *Powell v. Texas*, 392 U.S. 514 (1968) (holding penal sanctions for substance-related crime not required to achieve therapeutic effects); *Marshall v. United States*, 414 U.S. 417 (1974) (deferring to legislative discretion disallowing rehabilitative disposition for some narcotic-dependent defendants) (citing *Powell v. Texas*, 392 U.S. 514 (1968)); *Fredericks v. Huggins*, 711

accountable for failing to deliver effective services or achieve successful outcomes.³ Although constitutional and statutory provisions offer protections against arbitrary, indifferent, or demonstrably unsafe practices,⁴ a right not to be mistreated is a far cry from an affirmative right to evidence-based rehabilitation. The disheartening results are well known and include high rates of criminal recidivism,⁵ excessive probation and parole revocations,⁶ exorbitant budget expenditures,⁷ and unconscionable racial, ethnic, and other cultural inequities in the criminal justice system.⁸

F.2d 31 (4th Cir. 1983) (finding no right to methadone detoxification for pretrial detainees) (citing *Bell v. Wolfish*, 441 U.S. 520 (1979)); *Inmates of Allegheny Cnty. Jail v. Pierce*, 612 F.2d 754 (3d Cir. 1979) (holding jail policy of involuntary withdrawal from methadone not objectionable unless instituted for punitive purpose or not rationally related to penal interests) (citing *Bell v. Wolfish*, 441 U.S. 520 (1979)); *Pace v. Fauver*, 479 F. Supp. 456 (D. N.J. 1979) (finding no right to alcoholism treatment in state prison) (citing *Marshall v. United States*, 414 U.S. 417 (1974)).

³ See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (holding government officials immune from civil liability unless they violate clearly established constitutional or statutory right of which a reasonable person would have been aware); PHILLIP LYONS & TODD JERMSTAD, *CIVIL LIABILITIES AND OTHER LEGAL ISSUES FOR PROBATION/PAROLE OFFICERS AND SUPERVISORS* 117–18 (4th ed. 2013) (concluding probation and parole conditions rarely challenged successfully unless excessively broad, violate clearly established constitutional right or bear no reasonable relationship to crime deterrence or rehabilitation), <https://s3.amazonaws.com/static.nicic.gov/Library/027037.pdf>.

⁴ See, e.g., *Davis v. Carter*, 452 F.3d 686, 695–96 (7th Cir. 2006) (holding jail personnel’s failure to treat severe and prolonged opioid withdrawal symptoms may rise to deliberate indifference); *Alvarado v. Westchester Cnty.*, 22 F. Supp. 3d 208, 218 (S.D. N.Y. 2014); *Smith v. Aroostook Cnty.*, 376 F. Supp. 3d 146, 159–61 (D. Me. 2019) (granting preliminary injunction against blanket denial of addiction medication for jail inmates because it likely violates Americans with Disabilities Act), *aff’d*, 922 F.3d 41, 42 (1st Cir. 2019); *Pesce v. Coppinger*, 355 F. Supp. 3d 35, 47 (D. Mass. 2018).

⁵ See Mariel Alper et al., *2018 Update on Prison Recidivism: A 9-Year Follow-up Period (2005-2014)*, 2018 BUREAU OF JUST. STAT. 1 (finding 68% of released prisoners rearrested within 3 years, 79% within 6 years and 83% within 9 years), <https://bjs.ojp.gov/content/pub/pdf/18upr9yfp0514.pdf>.

⁶ See *Confined and Costly: How Supervision Violations are Filling Prisons and Burdening Budgets*, COUNCIL STATE GOV’TS JUST. CTR. (June 2019), <https://csgjusticecenter.org/publications/confined-costly/> [<https://perma.cc/52CH-ZXFT>] (finding 25% of state prison admissions were due to technical violations and 20% were due to new arrests on community supervision); PEW CHARITABLE TRUSTS, *PROBATION AND PAROLE SYSTEMS MARKED BY HIGH STAKES, MISSED OPPORTUNITIES* 10–11, 13 (2018) (concluding probation and parole are largest drivers of prison population by focusing on supervision and catching mistakes rather than delivering evidence-based services), https://www.pewtrusts.org/-/media/assets/2018/09/probation_and_parole_systems_marked_by_high_stakes_missed_opportunities_pew.pdf.

⁷ See generally Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POL’Y INITIATIVE (Jan. 25, 2017), <https://www.prisonpolicy.org/reports/money.html> [<https://perma.cc/XD5V-L8L8>] (finding incarceration costs U.S. government and families of justice-involved persons \$182 billion per year); *Confined and Costly*, *supra* note 6 (finding probation and parole revocations cost states \$9.3 billion annually).

⁸ See generally Ojmarh Mitchell, *Racial Disparities in Drug Sanctions: Sources and Solutions*, in *BIAS IN THE LAW* 141 (Joseph Avery & Joel Cooper eds., Lexington Books 2020) (reviewing research on racial disparities in arrest, charging, prosecution, and sentencing practices);

Exasperated (understandably) with these affairs, reform advocates are pressing initiatives designed to preclude prosecution or incarceration for many drug-related crimes⁹ and curtail the authority and resources of community corrections programs.¹⁰ Undoing our misdirected reliance on incarceration is the correct course but only half of the equation. If we fail to create a community-based system capable of delivering safe, effective, and equitable services,¹¹ lackluster or

David W. Koch et al., *Coloring the War on Drugs: Arrest Disparities in Black, Brown, and White*, 8 RACE & SOC. PROBS. 313, 319–21 (2016) (finding higher arrests for drug offenses among Black and Latinx persons controlling for other sociodemographic factors and substance use incidence); Brian D. Johnson & Stephanie M. DiPietro, *The Power of Diversion: Intermediate Sanctions and Sentencing Disparity Under Presumptive Guidelines*, 50 CRIMINOLOGY 811, 832 (2012) (finding non-White persons less likely to receive non-incarcerative rehabilitative disposition accounting for other demographic factors and criminal record).

⁹ See, e.g., OR. LEGIS. POL'Y & RSCH. OFF., MEASURE 110, BACKGROUND BRIEF (2020) (decriminalizing possession of small quantities of many nonprescribed controlled substances and reducing possession of larger quantities to misdemeanors), [https://www.oregonlegislature.gov/lpro/Publications/Background-Brief-Measure-110-\(2020\).pdf](https://www.oregonlegislature.gov/lpro/Publications/Background-Brief-Measure-110-(2020).pdf); CAL. PROPOSITION 47, THE SAFE NEIGHBORHOODS AND SCHOOLS ACT (CAL. PENAL CODE and CAL. HEALTH & SAFETY CODE) (proposed amendments 2014) (reducing drug possession and nonviolent property crimes involving less than \$950 to misdemeanors), <https://www.courts.ca.gov/prop47.htm> [<https://perma.cc/RT5P-96FW>].

¹⁰ See, e.g., Act of Sept. 30, 2020, ch. 328, sec. 1, §§ 1203a, 1203.1, 2020 Cal. Stat. 1950 (capping probation at two years for most felonies and one year for misdemeanors), https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB1950 [<https://perma.cc/E2V2-Z6AX>]; Michael P. Jacobson et al., *Less is More: How Reducing Probation Population Can Improve Outcomes*, EXEC. SESSION ON CMTY. CORR. (Harv. Kennedy Sch., Cambridge, Mass., Aug. 2017) (advocating downsizing probation and parole systems), https://www.hks.harvard.edu/sites/default/files/centers/wiener/programs/pcj/files/less_is_more_final.pdf; *Too Big to Succeed: The Impact of the Growth of Community Corrections and What Should be Done About It*, COLUM. UNIV. JUST. POL'Y LAB (2018), https://justicelab.columbia.edu/sites/default/files/content/Too_Big_to_Succeed_Report_FINAL.pdf.

¹¹ See generally KELLEY SMITH & ALEXANDER STRASHNY, CHARACTERISTICS OF CRIMINAL JUSTICE SYSTEM REFERRALS DISCHARGED FROM SUBSTANCE ABUSE TREATMENT AND FACILITIES WITH SPECIALLY DESIGNED CRIMINAL JUSTICE PROGRAMS 7 (Substance Abuse & Mental Health Servs. Admin. 2016) (finding only 26% of U.S. substance use treatment programs offer specialty services for criminal justice-involved persons), https://www.samhsa.gov/data/sites/default/files/report_2321/ShortReport-2321.pdf; Beverly D. Frazier et al., *The Impact of Prison Deinstitutionalization on Community Treatment Services*, 3 HEALTH & JUST. 9 (2015) (finding reduction in prison population led to increased inpatient psychiatric hospitalizations and substance use treatment admissions that treatment system was unprepared to manage), <https://healthandjusticejournal.biomedcentral.com/track/pdf/10.1186/s40352-015-0021-7.pdf>; Brandon L. Garrett et al., *Judicial Reliance on Risk Assessment in Sentencing Drug and Property Offenders: A Test of the Treatment Resource Hypothesis*, 46 CRIM. JUST. & BEHAV. 799, 808 (2019) (finding primary reason judges did not impose evidence-based rehabilitative sentences was “less than adequate” or “virtually non-existent” services in community); Christopher T. Lowenkamp et al., *Does Correctional Program Quality Really Matter? The Impact of Adhering to the Principles of Effective Rehabilitation*, 5 CRIMINOLOGY & PUB. POL'Y 575, 583, 587 (2006) (rating 68% of treatment programs serving criminal justice population as unsatisfactory and finding 73% were ineffective or worsened recidivism).

harmful results¹² could shake public confidence in rehabilitation and prompt a return to unduly harsh sentencing practices in the not-too-distant future.

This article reviews practices proven to enhance public health and safety outcomes, improve cost efficiency, and reduce racial and ethnic inequities for persons charged with substance-related offenses. The term *behavioral responsivity* is used to encompass three evidence-based bodies of research, including contemporary formulations of risk, need, responsivity (RNR) principles, the sequential intercept model (SIM), and behavioral science tenets of contingency management or operant conditioning. Recommendations are offered for incorporating behavioral responsivity as an enforceable standard of care for the criminal justice system and requiring officials to explain on the record why they may elect to deviate from proven practices when making fundamental decisions affecting persons' welfare and liberty interests. Recognizing a redressable right to evidence-based practices, with public standing to challenge wasteful and ineffective practices, is the most promising strategy for achieving rational and equitable criminal justice reform.

I. SUBSTANCE USE AND CRIME

Approximately 80% of persons convicted of a crime in the United States misuse illicit drugs or alcohol,¹³ and more than half meet diagnostic criteria for a moderate to severe substance use disorder.¹⁴ In a national sample of U.S. booking

¹² See, e.g., Mia Bird et al., *Impact of Defelonizing Drug Possession on Recidivism*, 19 CRIMINOLOGY & PUB. POL'Y 591, 601 (2020) (finding defelonization of drug possession associated with increased crimes against persons); Paul Cassell & Richard Fowles, *Does Bail Reform Increase Crime? An Empirical Assessment of the Public Safety Implications of Bail Reform in Cook County, Illinois*, WAKE FOREST L. REV. (forthcoming 2022) (finding reducing reliance on bail and expanding pretrial release criteria without concomitant services associated with 45% increase in crime and 33% increase in violent crime); Scott M. Mourtgos et al., *The Consequences of Restricting Police Arrest Authority: Less Deterrence and More Crime*, 41 POLICING: INT'L J. POLICE STRATEGIES & MGMT. 233, 239–40 (2018) (finding restricting arrest authority for misdemeanor drug possession associated with increased criminal activity); Aaron Gottlieb et al., *Were California's Decarceration Efforts Smart? A Quasi-Experimental Examination of Racial, Ethnic, and Gender Disparities*, 48 CRIM. JUST. & BEHAV. 116, 130 (2021) (concluding justice reform initiatives inadvertently exacerbated racial and ethnic disparities in incarceration).

¹³ See, e.g., NAT'L CTR. ADDICTION & SUBSTANCE ABUSE, BEHIND BARS II: SUBSTANCE ABUSE AND AMERICA'S PRISON POPULATION 11 tbl.2.3 (2010) (finding 78.6% of U.S. prison and jail inmates were convicted of a drug or alcohol-related offense, were intoxicated at the time of the offense, reported committing the offense to support a drug addiction, or had a history of substance use treatment), <https://files.eric.ed.gov/fulltext/ED509000.pdf>.

¹⁴ See generally Jennifer Bronson et al., *Drug Use, Dependence, and Abuse Among State Prisoners and Jail Inmates, 2007-2009*, 2017 BUREAU OF JUST. STAT. 1 (U.S. Dep't Just. Bureau Just. Stat. 2017) (finding 58% of U.S. state prisoners and 63% of jail inmates met criteria for drug dependence or abuse), <https://bjs.ojp.gov/content/pub/pdf/dudasppi0709.pdf>; Noelle E. Fearn et al., *Trends and Correlates of Substance Use Disorders Among Probationers and Parolees in the United States, 2002-2014*, 167 DRUG & ALCOHOL DEPENDENCE 128 (2016) (finding 33% of probationers and parolees met diagnostic criteria for substance dependence and 20% met criteria for substance abuse).

facilities, more than 60% of arrestees tested positive for illicit drugs at arrest.¹⁵ These figures are by no means confined to drug cases. Approximately 50% to 85% of persons arrested for violent crimes and 70% to 85% arrested for property crimes tested positive for illicit drugs or reported recent use at the time of their arrest.¹⁶ Studies consistently find that illicit drug use increases the odds several fold of engaging in violent, property, and financial crimes.¹⁷

A nexus between substance use and crime is well established for many substances, including alcohol, opioids such as heroin or oxycodone (when not taken as duly prescribed), stimulants such as methamphetamine or cocaine, sedatives such as benzodiazepines or barbiturates (when not taken as prescribed), and anabolic steroids.¹⁸ Although marijuana use is also prevalent among persons arrested for property and violent crimes,¹⁹ evidence is mixed as to whether use of

¹⁵ See OFF. OF NAT'L DRUG CONTROL POL'Y, EXEC. OFF. OF THE PRESIDENT, 2013 ANN. REP. ARRESTEE DRUG ABUSE MONITORING PROGRAM II, xi (2014) [hereinafter ADAM-II] (finding 63% to 83% of arrestees tested positive for illicit drugs at arrest in five major U.S. cities), https://obamawhitehouse.archives.gov/sites/default/files/ondcp/policy-and-research/adam_ii_2013_annual_report.pdf.

¹⁶ *Id.* at 103, 107, 111, 115, 119.

¹⁷ See Trevor Bennett et al., *The Statistical Association Between Drug Misuse and Crime: A Meta-Analysis*, 13 AGGRESSION & VIOLENT BEHAV. 107, 112 (2008) (concluding illicit drug use increased odds of criminal offending by 2.8 to 3.8 times); Matthew M. Young et al., *Attributable Fractions for Substance Use in Relation to Crime*, 116 ADDICTION 3198, 3202 (2021) (estimating 42% of violent and non-violent crimes, excluding drug crimes, would not have occurred if perpetrator was not under the influence or seeking illicit drugs or alcohol); Shaoling Zhong et al., *Drug Use Disorders and Violence: Associations with Individual Drug Categories*, 42 EPIDEMIOLOGICAL REV. 103, 112 (2020) (finding individuals with drug use disorder had four- to ten-fold greater likelihood of committing violence).

¹⁸ See, e.g., Joseph M. Boden et al., *Alcohol Misuse and Criminal Offending: Findings from a 30-Year Longitudinal Study*, 128 DRUG & ALCOHOL DEPENDENCE 30, 34 (2013) (finding causal association between alcohol misuse and assault, property damage, and intimate partner violence); McCaslin Giles & Michael Malcolm, *Prescription Opioid Misuse and Property Crime*, 102 SOC. SCI. Q. 663, 678 (2021) (finding 1% increase in opioid misuse associated with 190,000 excess property crimes); Cori Pryor et al., *Using Arrest and Prescription Data to Examine the Relationship Between Intimate Partner Violence and Opioid Prescriptions in the United States, 2006-2012*, 218 DRUG & ALCOHOL DEPENDENCE 108389, 4–5 (2021) (finding increases in opioid prescriptions associated with higher intimate partner violence); Rebecca McKetin et al., *The Contribution of Methamphetamine Use to Crime: Evidence From Australian Longitudinal Data*, 216 DRUG & ALCOHOL DEPENDENCE 108262, 3 (2020) (finding property crime and drug dealing five to six times more likely and violent crime 3.4 times more likely when persons used methamphetamine); Anders Hakansson & Virginia Jesionowska, *Associations Between Substance Use and Type of Crime in Prisoners with Substance Use Problems — A Focus on Violence and Fatal Violence*, 9 SUBSTANCE ABUSE & REHAB. 1, 5 (2018) (finding higher rates of sedative misuse and alcohol binge drinking among violent offenders); Harrison G. Pope et al., *Review Article: Anabolic-Androgenic Steroids, Violence, and Crime: Two Cases and Literature Review*, 30 AM. J. ADDICTIONS 423, 429 (2021) (finding aggressive, violent, and criminal behavior from biological effects of anabolic-androgenic steroids which are not attributable to psychological or situational factors).

¹⁹ See ADAM-II, *supra* note 15, at 103, 107, 111, 115, 119 (finding 33% to 68% of persons arrested for violent offenses and 43% to 63% arrested for property offenses tested positive for marijuana at arrest in five cities).

marijuana increases the risk for crime or violence other than drug possession.²⁰ Discrepant findings relating to marijuana may be attributable to differences in genetic vulnerability. Marijuana use appears to increase the odds of crime and violence specifically for persons who have a genetic predisposition to develop a severe substance use disorder.²¹

Among persons with substance use disorders involved in the criminal justice system, relapse to substance use is one of the most potent dynamic risk factors for criminal recidivism,²² increasing the odds of a subsequent re-offense by two to three times.²³ Longitudinal studies suggest this relationship is reciprocal or bi-

²⁰ Compare Zhong et al., *supra* note 17, at 112 (finding cannabis use associated with increased risk of violence), and Hyunjung Cheon et al., *Medical Marijuana and Crime: Substance Use and Criminal Behaviors in a Sample of Arrestees*, 48 J. DRUG ISSUES 182, 197–98 (2018) (finding arrestees using medical marijuana more likely to engage in drug dealing and driving under the influence [DUI] and nonmedical marijuana users more likely to engage in property, violent and DUI offenses), <https://doi.org/10.1177/0022042617743775> [<https://perma.cc/UM4Q-HEEA>], with MARY K. STOHR ET AL., EFFECTS OF MARIJUANA LEGALIZATION ON LAW ENFORCEMENT AND CRIME FINAL REPORT 72 (Wash. State Univ. Dep't Crim. Just. & Criminology 2020) (finding no effect of marijuana decriminalization on crime rates), <https://www.ojp.gov/pdffiles1/nij/grants/255060.pdf>, and Hakansson & Jesionowska, *supra* note 18, at 4 tbl.2 (finding no increased violence risk from cannabis).

²¹ See Jorim J. Tielbeek et al., *Genetic Correlation of Antisocial Behaviour with Alcohol, Nicotine, and Cannabis Use*, 187 DRUG & ALCOHOL DEPENDENCE 296, 298 (2018) (finding genetic correlation between cannabis use and antisocial behavior); Maureen D. Reynolds et al., *Marijuana But Not Alcohol Use During Adolescence Mediates the Association Between Transmissible Risk for Substance Use Disorder and Number of Lifetime Violent Offenses*, 39 J. CRIM. JUST. 218, 222 (2011) (finding marijuana use increased risk of violent offending for adolescents with genetic vulnerability to substance dependence); see also Kit K. Elam et al., *Genotype-Environment Correlation by Intervention Effects Underlying Middle Childhood Peer Rejection and Associations with Adolescent Marijuana Use*, 34 DEV. & PSYCHOPATHOLOGY 171, 177 (2020), <https://pubmed.ncbi.nlm.nih.gov/33349288/> [<https://perma.cc/9M2T-CMWK>] (finding genetic predisposition for aggression increased risk of marijuana use disorder and peer rejection in adolescents). These findings might be explained by a gateway effect in which persons predisposed to substance dependence are more likely to progress rapidly from marijuana use to addiction, leading to misuse of other drugs causally connected to crime and violence. See NAT'L INST. DRUG ABUSE, MARIJUANA RESEARCH REPORT: IS MARIJUANA A GATEWAY DRUG? 14 (2020), <https://www.drugabuse.gov/publications/research-reports/marijuana/marijuana-gateway-drug> [<https://perma.cc/C2BR-HRCN>].

²² Dynamic risk factors are characteristics of justice-involved persons that predict recidivism but can be ameliorated through treatment. Common examples include illicit substance use and associating with delinquent peers. See JAMES BONTA & D. A. ANDREWS, THE PSYCHOLOGY OF CRIMINAL CONDUCT 18–20 (6th ed., Routledge 2017).

²³ See Albert M. Kopak et al., *Key Risk Factors for Relapse and Rearrest Among Substance Use Treatment Patients Involved in the Criminal Justice System*, 41 J. CRIM. JUST. 14, 25–26 tbl.4 (2016) (finding relapse to substance use was greatest measured dynamic risk factor for recidivism, increasing the odds of a new arrest by 2.59 times within six months and 2.89 times within twelve months); Albert M. Kopak et al., *Clinical Indicators of Successful Substance Use Treatment Among Adults in the Criminal Justice System*, 14 INT'L J. MENTAL HEALTH & ADDICTION 831, 839 (2016); Justin C. Medina & Haley R. Zettler, *Multisubstance-Using Probationers and the Odds of Arrest While in the Community*, 64 INT'L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 818, 828 (2020)

directional, meaning that a return to illicit substance use increases the ensuing odds of committing other crimes, committing crime increases the odds of engaging in substance use, and when combined, substance use and crime contribute additively or multiplicatively to a wide range of interpersonal problems and psychosocial impairments.²⁴ Regardless of how this destructive entanglement gets started, reducing substance use is proven to weaken the chain of causation and reduce criminal activity significantly.²⁵

Providing substance use treatment can reduce crime and substance use if participants receive an adequate dosage of services.²⁶ Unfortunately, less than one quarter to one third of persons referred to treatment by the criminal justice system will enter treatment or remain long enough to receive therapeutic benefits.²⁷ In

(finding 50% greater recidivism odds for any substance use and over two times greater odds for multiple substance use).

²⁴ See Gabriel J. Merrin et al., *The Longitudinal Associations Between Substance Use, Crime, and Social Risk Among Emerging Adults: A Longitudinal Within and Between-Person Latent Variables Analysis*, 165 DRUG & ALCOHOL DEPENDENCE 71, 76 (2016) (finding reciprocal relationship between substance use and crime impacted by social risk factors such as associating with delinquent peers); Glenn D. Walters, *Recidivism and the “Worst of Both Worlds” Hypothesis: Do Substance Misuse and Crime Interact or Accumulate?*, 42 CRIM. JUST. & BEHAV. 435, 446–47 (2015); Glenn D. Walters, *Explaining the Drug-Crime Connection with Peers, Proactive Criminal Thinking, and Victimization: Systemic Cognitive Social Learning, and Person Proximity Mechanisms*, 35 PSYCH. ADDICTIVE BEHAV. 366, 369 (2021) (finding illicit drug use among adolescents predicted rises in delinquent peer interactions, criminal thinking, victimization, and recidivism).

²⁵ See Ralph C. Serin et al., *Does Intra-Individual Change Predict Offender Recidivism? Searching for the Holy Grail in Assessing Offender Change*, 18 AGGRESSION & VIOLENT BEHAV. 32, 45 (2013) (finding reduced substance use most potent measured predictor of reduced recidivism); Thomas H. Cohen et al., *Examining Changes in Offender Risk Characteristics and Recidivism Outcomes: A Research Summary*, 80 FED. PROB. 57, 63 fig.6 (2016).

²⁶ See Katy R. Holloway et al., *The Effectiveness of Drug Treatment Programs in Reducing Criminal Behavior*, 18 PSICOTHEMA 620, 623 (2006) (concluding drug treatment reduced re-offending by 29% to 36%); David J. Peters et al., *Parolee Recidivism and Successful Treatment Completion: Comparing Hazard Models Across Propensity Methods*, 31 J. QUANTITATIVE CRIMINOLOGY 149, 174 (2015) (finding completion of addiction treatment associated with 25% to 30% recidivism reduction for parolees); Michael Gossop et al., *Reductions in Criminal Convictions After Addiction Treatment: 5-Year Follow-up*, 79 DRUG & ALCOHOL DEPENDENCE 295, 298 (2005) (finding lower new conviction rates 5 years after addiction treatment); Michael L. Prendergast et al., *The Effectiveness of Drug Abuse Treatment: A Meta-analysis of Comparison Group Studies*, 67 DRUG & ALCOHOL DEPENDENCE 53, 61, 63 (2002) (finding drug treatment reduced crime by six percentage points).

²⁷ See Douglas B. Marlowe, *Effective Strategies for Intervening with Drug Abusing Offenders*, 47 VILL. L. REV. 989, 1006–10 (2002) (reviewing high attrition from substance use treatment in criminal justice system); UCLA INTEGRATED SUBSTANCE ABUSE PROGRAMS, EVALUATION OF THE SUBSTANCE ABUSE AND CRIME PREVENTION ACT: FINAL REPORT 3, 4 (2007) (finding 25% of probationers diverted to treatment in lieu of incarceration did not enter treatment and 50% of those entering treatment dropped out within 90 days), <https://www.uclaisap.org/prop36/documents/SACPAEvaluationReport.pdf>; Maria J. Casares-Lopez et al., *Predictors of Retention in a Drug-Free Unit/Substance Abuse Treatment in Prison*, 36 INT’L J. L. & PSYCHIATRY 264, 264 (2013) (finding 52.9% of inmates dropped out of treatment within six months and 67.8% dropped out within one year); Micah E. Johnson & Dieu X. Tran, *Factors Associated With Substance*

fact, the more persons need treatment and the greater their likelihood of recidivism, the less likely they will enter or complete treatment.²⁸ Such individuals, referred to as high risk and high need individuals,²⁹ often lack intrinsic motivation for change and require external pressure and accountability to succeed.³⁰ Compared with self-initiated treatment, outcomes are every bit as effective, and often more so, for persons who choose to enter and remain in treatment primarily or exclusively to avoid serious negative repercussions from their substance use, such as impending incarceration.³¹ Referred to as *leveraged* or *pressured* treatment, this arrangement differs from *compulsory* treatment in which persons have no choice but to attend treatment, as in cases of involuntary civil commitment or detainment in

Use Disorder Treatment Completion: A Cross-sectional Analysis of Justice-Involved Adolescents, 15 SUBSTANCE ABUSE TREATMENT, PREVENTION & POL'Y 92, 95 (2020) (finding only 11.5% of justice-involved adolescents completed treatment).

²⁸ See Marguerite Ternes et al., *Distinguishing the Features of Offenders Who Do and Do Not Complete Substance Use Treatment in Corrections: Extending the Reach of Psychological Services*, 17 PSYCH. SERVS. 422, 429–30 (2020) (finding justice-involved persons with highest treatment needs and risk factors for recidivism least likely to complete treatment); Mark E. Olver et al., *A Meta-Analysis of Predictors of Offender Treatment Attrition and its Relationship to Recidivism*, 79 J. CONSULTING & CLINICAL PSYCH. 6, 10, 15 (2011); Kimberly A. Houser et al., *Individual-level Predictors of Community Aftercare Completion*, 92 PRISON J. 106, 115 (2012).

²⁹ For a description of high risk and high need individuals, see text accompanying *infra* note 65.

³⁰ See Donna M. Coviello et al., *Does Mandating Offenders to Treatment Improve Completion Rates?*, 44 J. SUBSTANCE ABUSE TREATMENT 417, 422 (2013) (finding participants referred to substance use treatment by criminal justice system had lower motivation for change at entry but were ten times more likely to complete treatment); Lilach Shaul et al., *The Role of Motivation in Predicting Addiction Treatment Entry Among Offenders with Substance Use Disorders Under Probation Supervision*, 63 INT'L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 2453, 2459–60 (2019) (finding legal pressure as effective as intrinsic motivation for incentivizing treatment entry); Thomas K. Gregoire & Anna C. Burke, *The Relationship of Legal Coercion to Readiness to Change Among Adults with Alcohol and Other Drug Problems*, 26 J. SUBSTANCE ABUSE TREATMENT 35, 39 (2004) (finding legal coercion associated with increased readiness to change among substance users); Merith Cosden et al., *Effects of Motivation and Problem Severity on Court-Based Drug Treatment*, 52 CRIME & DELINQ. 599, 614 (2006) (finding intrinsic motivation for change unrelated to outcomes in court-supervised drug treatment).

³¹ See SMITH & STRASHNY, *supra* note 11, at 2 (finding persons referred to substance use treatment by criminal justice system had same or higher completion rates than self-referrals and referrals from other sources); Tawandra L. Rowell-Cunsolo & Meghan Bellerose, *Utilization of Substance Use Treatment Among Criminal Justice-Involved Individuals in the United States*, 125 J. SUBSTANCE ABUSE TREATMENT 108423, 3–4 tbl.2 (2021) (finding involvement with criminal justice system increased odds of receiving needed substance use treatment nearly eight fold); Brian E. Perron & Charlotte L. Bright, *The Influence of Legal Coercion on Dropout From Substance Abuse Treatment: Results From a National Survey*, 92 DRUG & ALCOHOL DEPENDENCE 123, 128 (2008) (finding legally referred clients retained longer in drug treatment than other clients); John F. Kelly et al., *Substance Use Disorder Patients Who Are Mandated to Treatment: Characteristics, Treatment Process, and 1- and 5-Year Outcomes*, 28 J. SUBSTANCE ABUSE TREATMENT 213, 221 (2005) (finding persons referred to substance use treatment by criminal justice system had better outcomes than other participants five years after entry).

compulsory penal treatment centers.³² Compulsory treatment offers questionable therapeutic benefits³³ and raises serious concerns about potential due process or human rights violations.³⁴ Leveraged treatment raises far fewer due process concerns because participants are given the choice (albeit a difficult choice), often with the assistance of counsel, whether to choose treatment or to proceed as usual with case adjudication.³⁵ The critical issue is to apply leveraged treatment fairly and effectively in accordance with evidence-based practices, professional ethics, and due process.

II. RISK, NEED, RESPONSIVITY

No intervention can be expected to work for everyone. Providing too much, too little, or the wrong kind of services does not improve outcomes, and in fact can make outcomes worse by allowing problems to fester for needy participants or by overburdening less impaired participants and interfering with their ability to engage in productive activities, like work or school. This is the foundation for a body of evidence-based principles referred to as risk, need, responsivity, or RNR.³⁶ RNR is derived from decades of research finding that the most effective and cost-efficient outcomes are achieved when (1) the intensity of criminal justice supervision is matched to participants' risk for recidivism (*criminogenic risk*) or likelihood of attrition from treatment (*prognostic risk*), and (2) treatment focuses principally on the specific disorders or conditions that are responsible for participants' crimes (*criminogenic needs*).³⁷ Most important, mixing participants

³² Some scholars conflate leveraged and compulsory treatment arrangements under the unduly broad rubric of *mandatory* or *coercive* treatment, leading to the flawed conclusion that leveraged treatment is ineffective. See, e.g., Karsten Lunze et al., *Mandatory Addiction Treatment for People Who Use Drugs: Global Health and Human Rights Analysis*, 353 BRITISH MED. J. i2943, 2 (2016) (defining mandatory drug treatment to include compulsory treatment without patient consent and any treatment ordered, motivated, or supervised by the criminal justice system), <https://www.bmj.com/content/bmj/353/bmj.i2943.full.pdf>.

³³ See generally D. Werb et al., *The Effectiveness of Compulsory Drug Treatment: A Systematic Review*, 28 INT'L. J. DRUG POL'Y 1 (2016) (finding three studies reporting no effects of compulsory drug treatment, two studies reporting equivocal effects, two studies reporting harmful effects, and two studies reporting positive effects).

³⁴ See UNITED NATIONS OFF. DRUGS & CRIME, FROM COERCION TO COHESION: TREATING DRUG DEPENDENCE THROUGH HEALTH CARE, NOT PUNISHMENT 8 (2010), https://www.unodc.org/docs/treatment/Coercion/From_coercion_to_cohesion.pdf (concluding forced drug treatment without right of refusal may breach United Nations Convention of Rights of Persons with Disabilities).

³⁵ See, e.g., Richard J. Bonnie, *Judicially Mandated Naltrexone Use by Criminal Offenders: A Legal Analysis*, 31 J. SUBSTANCE ABUSE TREATMENT 121, 124–25 (2006) (concluding leveraged treatment may offer hard choice but is not constitutionally or ethically objectionable because it expands rather than constricts individuals' options).

³⁶ See BONTA & ANDREWS, *supra* note 22, at 175–84 (describing RNR).

³⁷ See Paula Smith et al., *Validating the Principles of Effective Intervention: A Systematic Review of the Contributions of Meta-Analysis in the Field of Corrections*, 4 VICTIMS & OFFENDERS

with different levels of risk or need in the same treatment groups or residential programs has been shown to increase crime, substance use, and other undesirable outcomes because it exposes low-risk participants to antisocial peers and values.³⁸ Unfortunately, many criminal justice and treatment professionals misconstrue the concepts of risk and need, leading them to deliver the wrong services to the wrong persons and in the wrong order. With the best of intentions, many programs inadvertently waste scarce resources, frustrate consumers, and deliver lackluster results.

A. *The Risk Principle*

The criminal justice formulation of risk is derived from actuarial research and refers to the probability that an undesirable event will occur.³⁹ High risk indicates that an event is significantly more likely to occur than by chance or on average, but does not necessarily refer to the seriousness or harmfulness of the event.⁴⁰ Most risk tools that are employed in the criminal justice system were validated against the probability that test takers will be arrested or convicted for any new crime or

148, 160 (2009) (finding adherence to RNR associated with 28% reduction in recidivism); Elizabeth K. Drake, *The Monetary Benefits and Costs of Community Supervision*, 34 J. CONTEMP. CRIM. JUST. 47, 56 (2018) (finding adherence to RNR associated with \$7,000 net benefit per participant for crime victims and taxpayers); Michael L. Prendergast et al., *The Andrews' Principles of Risk, Need, and Responsivity as Applied in Drug Treatment Programs: Meta-analysis of Crime and Drug Use Outcomes*, 9 J. EXPERIMENTAL CRIMINOLOGY 275, 292–93 (2013) (finding drug treatment programs adhering to RNR produced greater reductions in recidivism but no differences in illicit drug use).

³⁸ See Christopher T. Lowenkamp & Edward J. Latessa, *Understanding the Risk Principle: How and Why Correctional Interventions Can Harm Low-Risk Offenders*, TOPICS COMMUNITY CORRS. 3, 7 (Jan. 2004) (describing why low risk persons are harmed in group interventions with high risk persons); Caleb D. Lloyd et al., *Rehabilitation Group Coparticipants' Risk Levels are Associated with Offenders' Treatment Performance, Treatment Change, and Recidivism*, 82 J. CONSULTING & CLINICAL PSYCH. 298, 305–07 (2014) (finding attending counseling groups with high-risk peers reduced treatment effectiveness and increased recidivism); Christopher T. Lowenkamp & Edward J. Latessa, *Increasing the Effectiveness of Correctional Programming Through the Risk Principle: Identifying Offenders for Residential Placement*, 4 CRIMINOLOGY & PUB. POL'Y 263, 283–84 (2005) [hereinafter *Residential Placement*] (finding poorer outcomes for low-risk persons in residential substance use treatment).

³⁹ See, e.g., SARAH L. DESMARAIS & JAY P. SINGH, RISK ASSESSMENT INSTRUMENTS VALIDATED AND IMPLEMENTED IN CORRECTIONAL SETTINGS IN THE UNITED STATES 5–7 (Council State Gov'ts 2013), <https://csgjusticecenter.org/wp-content/uploads/2020/02/Risk-Assessment-Instruments-Validated-and-Implemented-in-Correctional-Settings-in-the-United-States.pdf> (distinguishing actuarial risk assessment from structured decision-making aimed at managing and reducing risk).

⁴⁰ See, e.g., SARAH PICARD-FRITSCHÉ ET AL., DEMYSTIFYING RISK ASSESSMENT: KEY PRINCIPLES AND CONTROVERSIES 4 (Ctr. Ct. Innovation 2017), https://www.courtinnovation.org/sites/default/files/documents/Monograph_March2017_Demystifying%20Risk%20Assessment_1.pdf (noting risk assessment in criminal justice system typically predicts any new criminal activity regardless of charge severity or type).

detained for a technical violation.⁴¹ Therefore, if one person has a 60% chance of being arrested for drug possession and another has a 20% chance of being arrested for assault, the first person is likely to score higher on most risk tools.⁴² Unless a program employs specialized tools that were validated specifically for risk of violence or dangerousness (which are typically used in sex offender and domestic violence programs), assuming that a high score portends a threat to public safety is unwarranted.⁴³ Most importantly, no study has determined what risk scores, if any, predict better outcomes in jail or prison as opposed to community-based dispositions such as probation or drug court; therefore, risk scores should not be used to decide who should be incarcerated and who should receive a community sentence.⁴⁴ At most, information garnered from these tools should be used to set treatment and supervision conditions for persons in the criminal justice system, regardless of whether they are in custody or supervised in the community.

A useful analogy is to equate the criminal justice concept of risk with the clinical or medical concept of prognosis. Patients with a poor or guarded prognosis have known risk factors (e.g., a history of smoking or high blood pressure) that make them less likely to respond to less intensive frontline regimens; therefore, clinicians tend to treat them more aggressively. Physicians may, for example, prescribe higher doses of medication for high-risk patients, perform surgery, or recommend radiation or chemotherapy. On the other hand, physicians usually do not prescribe aggressive treatments for patients with a favorable prognosis because they are unlikely to benefit from the additional services and may experience unwarranted side effects. In line with this analogy, criminal justice professionals should reserve their most intensive and evidence-based programs for high-risk persons. They should not (as is unfortunately common) exclude high risk persons from such programs because they assume, wrongly, that they necessarily pose a threat to program personnel or other participants or are somehow less deserving of the services.⁴⁵

⁴¹ See DESMARAIS & SINGH, *supra* note 39, at 14 tbl.3, 19 (finding 70% of test validation studies in U.S. correctional settings examined risk for any recidivism and 18% examined technical violations).

⁴² Cf. PICARD-FRITSCHÉ ET AL., *supra* note 40, at 14 (noting risk for re-arrest may not align intuitively with seriousness of current case; many persons arrested for low-level misdemeanors are high risk for rearrest).

⁴³ See Sarah L. Desmarais & Samantha A. Zottola, *Violence Risk Assessment: Current Status and Contemporary Issues*, 103 MARQ. L. REV. 793, 797, 803 (2020) (finding violence risk tools significantly more accurate than general risk tools for predicting violence).

⁴⁴ Cf. Christopher D'Amato et al., *Progressing Policy Toward a Risk/Need Informed Sanctioning Model*, 20 CRIMINOLOGY & PUB. POL'Y 41, 60 (2021) (concluding risk tools should not be used to increase sentences or sanctions but rather to match defendants to needed services).

⁴⁵ For further discussion of invalid exclusion criteria for evidence-based programs, see *infra* notes 150–58 and accompanying text.

B. *The Need Principle*

Just as risk is analogous to prognosis, need is analogous to diagnosis. Need refers to the disorders, conditions, or impairments that, if present, must be addressed to reduce participants' recidivism potential and improve their psychosocial functioning.⁴⁶ More specifically, need indicates what treatment and social services are likely to be required for a participant, whereas risk indicates what levels of supervision and accountability are likely to be required to ensure the person attends those services and heeds the interventions.

Classical RNR theory bifurcates needs into two broad categories: criminogenic needs and non-criminogenic needs.⁴⁷ Criminogenic needs are dynamic or alterable risk factors for criminal recidivism that can be ameliorated through correctional programming. Common examples include substance use disorders, associating with delinquent peers, antisocial attitudes, and impulsivity.⁴⁸ Other needs that are encountered frequently in criminal justice populations, such as low self-esteem or depression, are conceptualized as non-criminogenic because they are most often a result, rather than the cause, of engaging in crime. Persons may, for example, feel depressed because their criminal lifestyle has gotten them into serious trouble or alienated them from loved ones. Addressing non-criminogenic needs (the results of crime) before treating criminogenic needs (the causes of crime) puts the cart before the horse and is associated with negative outcomes, including higher rates of criminal recidivism, substance use, and unemployment.⁴⁹ As will be discussed, this narrow taxonomy of criminogenic vs. non-criminogenic needs is insufficient for correctional programming. Finer distinctions among non-criminogenic needs are required to develop effective case plans for justice-involved persons and achieve long-term maintenance of rehabilitative goals.

C. *The Responsivity Principle*

Borrowing again from the medical analogy, the responsivity principle⁵⁰ is akin to treatment planning and clinical case management. The principal goals are to ensure that participants receive the services they need, do not receive more

⁴⁶ See BONTA & ANDREWS, *supra* note 22, at 180 (describing need principle).

⁴⁷ See BONTA & ANDREWS, *supra* note 22, at 180–81 tbl.9.3 (differentiating criminogenic from non-criminogenic needs).

⁴⁸ See BONTA & ANDREWS, *supra* note 22, at 181 tbl.9.3 (listing most common criminogenic needs in correctional populations).

⁴⁹ See, e.g., Christopher T. Lowenkamp et al., *Adhering to the Risk and Need Principles: Does it Matter for Supervision-Based Programs?*, 70 FED. PROB. 3, 6 (2006) (finding failure to address three times as many criminogenic needs as non-criminogenic needs associated with increased recidivism); Smith et al., *supra* note 37, at 160.

⁵⁰ See BONTA & ANDREWS, *supra* note 22, at 180–82 (describing responsivity principle).

services than they need, and receive services in the most effective and efficient sequence. The responsivity principle is the least developed component of classical RNR theory and requires further illumination to optimize outcomes. Evidence suggests that timing and sequencing are critical for the successful delivery of rehabilitation services. Some non-criminogenic needs, such as mental illness or homelessness, may not cause crime⁵¹ but must be addressed early in treatment before other interventions can proceed.⁵² Criminal justice professionals will have a difficult time addressing participants' antisocial attitudes or delinquent peer interactions if they are homeless, suffering from a severe mental health disorder, or experiencing acute withdrawal symptoms or cravings for drugs or alcohol.⁵³ Referred to as *responsivity needs* or *stabilization needs*, they are an important exception to the rule that criminogenic needs should be treated before non-criminogenic needs and must be addressed early in treatment to allow other interventions to take hold.⁵⁴

Other needs, such as illiteracy or deficient job skills, are unlikely to improve until after participants have been stabilized clinically, abstain from criminal activity, and reduce or eliminate their interactions with delinquent peers.⁵⁵

⁵¹ See, e.g., Eric Elbogen & Sally C. Johnson, *The Intricate Link Between Violence and Mental Disorder: Results from the National Epidemiological Survey on Alcohol and Related Conditions*, 66 ARCHIVES GEN. PSYCHIATRY 152, 154–55 (2009) (finding no link between mental illness and violence in absence of co-occurring substance use disorder); Jillian K. Peterson et al., *How Often and How Consistently do Symptoms Directly Precede Criminal Behavior Among Offenders with Mental Illness?*, 38 L. & HUM. BEHAV. 439, 444 fig.3 (2014) (finding 81.9% of crimes by mentally ill persons were unrelated to their mental health disorder).

⁵² See, e.g., Sarah McCormick et al., *The Role of Mental Health and Specific Responsivity in Juvenile Justice Rehabilitation*, 41 L. & HUM. BEHAV. 55, 63 (2017) (finding improving mental health needs increased receipt of services for criminogenic needs leading to reductions in crime); Marianne Quirouette et al., *A Precarious Place: Housing and Clients of Specialized Courts*, 56 BRITISH J. CRIMINOLOGY 370, 371, 373–75 (2016) (concluding unstable housing interferes with other service provision but is not criminogenic).

⁵³ See, e.g., Dana Jones Hubbard & Jennifer Pealer, *The Importance of Responsivity Factors in Predicting Reductions in Antisocial Attitudes and Cognitive Distortions Among Adult Male Offenders*, 89 PRISON J. 79, 95–96 (2009) (finding failure to address responsivity needs like depression undermined effects of services for criminogenic needs like criminal attitudes).

⁵⁴ See Faye S. Taxman, *The Partially Clothed Emperor: Evidence-Based Practices*, 34 J. CONTEMP. CRIM. JUST. 97, 104 (2018) (concluding responsivity factors must be addressed before treating substance use disorders, criminal cognitions, and education or employment problems); Faye S. Taxman & Michael S. Caudy, *Risk Tells Us Who, But Not What or How: Empirical Assessment of the Complexity of Criminogenic Needs to Inform Correctional Programming*, 14 CRIMINOLOGY & PUB. POL'Y 71, 94–95 (2015) (finding failure to prioritize stabilization needs like mental illness or unstable housing associated with higher recidivism).

⁵⁵ See, e.g., Robert Apel & Julie Horney, *How and Why Does Work Matter? Employment Conditions, Routine Activities, and Crime Among Adult Male Offenders*, 55 CRIMINOLOGY 307, 333–36 (2017) (finding job attainment insufficient to reduce crime or improve other outcomes before developing motivation for employment and capacity for success on job); Stephen J. Tripodi et al., *Is Employment Associated with Reduced Recidivism? The Complex Relationship Between Employment and Crime*, 54 INT'L. J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 706, 714–16 (2010).

Focusing prematurely on these issues is apt to overburden participants and interfere with their engagement in more pressing obligations, such as attending counseling sessions or probation appointments.⁵⁶ Left unaddressed over the long term, however, these needs are likely to undermine any therapeutic progress that has been achieved. Referred to as *maintenance needs*, they must be addressed in due course to ensure that participants continue to practice the skills they learned in treatment and consolidate their gains.⁵⁷

Finally, many persons in the criminal justice system are estranged from friends and family, disenfranchised from their community, and may owe restitution or atonement to victims.⁵⁸ Restorative justice interventions are designed to address these needs and aid in community reintegration.⁵⁹ Examples of restorative justice interventions include performing useful community service, participating in victim impact panels, and paying restitution, fines, or fees. Unfortunately, many sentencing orders and probation conditions require participants to meet restorative justice and maintenance obligations from the beginning of supervision, when many participants lack the resources and skills to do so effectively.⁶⁰ Restorative justice

⁵⁶ See, e.g., Alese Wooditch et al., *Which Criminogenic Need Changes are Most Important in Promoting Desistance from Crime and Substance Abuse?*, 41 CRIM. JUST. & BEHAV. 276, 289 (2014) (finding active treatment participation reduced drug use leading subsequently to increased prosocial recreation and reduced recidivism).

⁵⁷ See, e.g., Robert Bozick et al., *Does Providing Inmates with Education Improve Postrelease Outcomes? A Meta-Analysis of Correctional Education Programs in the United States*, 14 J. EXPERIMENTAL CRIMINOLOGY 389, 407 (2018) (finding remedial education reduced recidivism by 28% among released inmates); David B. Wilson et al., *A Meta-Analysis of Corrections-Based Education, Vocation, and Work Programs for Adult Offenders*, 37 J. RSCH. CRIME & DELINQ. 347, 356 (2000) (finding vocational training and remedial education associated with reduced recidivism).

⁵⁸ See, e.g., Gerald J. Stahler et al., *Predicting Recidivism for Released State Prison Offenders: Examining the Influence of Individual and Neighborhood Characteristics and Spatial Contagion on the Likelihood of Reincarceration*, 40 CRIM. J. & BEHAV. 690, 691 (2013) (reviewing studies finding parolees often have conflictual family and social relations, few resources or social capital, and are unable to obtain employment because of their criminal record); Steven Belenko, *Assessing Released Inmates for Substance-Abuse-Related Service Needs*, 52 CRIME & DELINQ. 94, 95 (2006) (noting released inmates with substance use problems are often separated from mainstream society and have difficulty reintegrating into the community or developing reliable ties with prosocial support networks).

⁵⁹ See James Bonta et al., *Restorative Justice and Recidivism: Promises Made, Promises Kept?*, in HANDBOOK OF RESTORATIVE JUSTICE 108, 114–15 (Dennis Sullivan & Larry Tifft eds., Routledge 2008) (finding restorative justice programs reduced recidivism by 7% with wide variation in effectiveness based on implementation).

⁶⁰ See, e.g., ALEXI JONES, CORRECTIONAL CONTROL 2018: INCARCERATION AND SUPERVISION BY STATE 5 (Prison Pol’y Initiative 2018), <https://www.prisonpolicy.org/reports/correctionalcontrol2018.html> [<https://perma.cc/8Y8K-XGPM>] (concluding probationers must typically comply with 18 to 20 conditions simultaneously including paying fines, fees and restitution and finding and maintaining employment or education); Ronald P. Corbett, *The Burdens of Leniency: The Changing Face of Probation*, 99 MINN. L. REV. 1697, 1709–10 (2015) (finding probation orders contained seven to 24 conditions including paying fines and fees and obtaining employment or education).

and maintenance interventions are best reserved for later phases of rehabilitation when participants have developed the means and skills required to meet their communal obligations.⁶¹

III. MATCHING DISPOSITIONS BY RISK, NEED, AND RESPONSIVITY

The following figure⁶² depicts a quadrant model of RNR that crosses two levels of risk (high or low) with two levels of need, yielding four generic profiles of persons charged with drug or alcohol-related offenses.⁶³ Services that are minimally required to rehabilitate persons in the high risk or need quadrants will often be unnecessary or counterproductive for those in the low risk or need quadrants. Studies confirm that matching participants to indicated services pursuant to the quadrant model led to significant improvements in treatment attendance, substance use, criminal recidivism and cost-effectiveness compared with programming as usual without the service-matching protocols.⁶⁴ The critical point is that justice reform initiatives cannot achieve their objectives if they fail to account for all four profiles of persons in the quadrant model.

⁶¹ See Jeff Latimer et al., *The Effectiveness of Restorative Justice Practices: A Meta-Analysis*, 85 PRISON J. 127, 139–40 (2005) (noting criminogenic risk and need factors not addressed adequately in restorative justice process leading to smaller effects than programs adhering to RNR); David Dyck, *Reaching Toward a Structurally Responsive Training and Practice of Restorative Justice*, in HANDBOOK OF RESTORATIVE JUSTICE 527, 534–35 fig.36.3 (Dennis Sullivan & Larry Tift eds., Routledge 2008) (advocating crisis management and prevention of recidivism in preparatory phases of restorative justice process).

⁶² Adapted with permission from Douglas B. Marlowe, *Evidence-Based Sentencing for Drug Offenders: An Analysis of Prognostic Risks and Criminogenic Needs*, 1 CHAP. J. CRIM. JUST. 167, 184 fig.2 (2009).

⁶³ Persons classified as moderate risk on many risk tools are classified as high risk and low need or low risk and high need in the quadrant model, thus distinguishing between two types of moderate risk persons requiring different services.

⁶⁴ See generally SHANNON CAREY, SAN JOAQUIN DUI MONITORING COURT: EVALUATION KEY FINDINGS REPORT (NPC Rsch. 2021), <https://npcresearch.com/wp-content/uploads/SJDMC-Outcome-and-Cost-Evaluation-Key-Findings-Report-2021.pdf> (finding better outcomes in countywide study from matching services for DUI probationers pursuant to quadrant model); Shannon M. Carey et al., *Using Behavioral Triage in Court-Supervised Treatment of DUI Offenders*, 33 ALCOHOLISM TREATMENT Q. 44 (2014); SHANNON M. CAREY ET AL., MISSOURI TREATMENT COURTS: IMPLEMENTING RNR IN A DRUG COURT SETTING — THE 4-TRACK MODEL IN PRACTICE OUTCOME AND COST STUDY (NPC Rsch. 2018), <https://npcresearch.com/wp-content/uploads/MO-4-Track-Outcome-and-Cost-Summary.pdf> (finding better outcomes in statewide study from matching drug court services pursuant to quadrant model); Amy Mikolajewski et al., *Employing the Risk-Need-Responsivity (RNR) Model and Predicting Successful Completion in an Alternative Drug Court Program: Preliminary Findings from the Orleans Parish Drug Court*, 131 J. SUBSTANCE ABUSE TREATMENT 108453 (2021); Karen L. Dugosh et al., *Alternative Tracks for Low-Risk and Low-Need Participants in a Misdemeanor Drug Court: Preliminary Findings*, 9 DRUG CT. REV. 43, 51 (2014) (finding better outcomes from matching low risk and low need persons to services based on quadrant model).

Figure. Risk & Need Quadrant Model

		Risk (prognosis)	
		high	low
Need (diagnosis)	high	<ul style="list-style-type: none"> • Supervision • Treatment • Habilitation 	<ul style="list-style-type: none"> • Treatment • Habilitation
	low	<ul style="list-style-type: none"> • Supervision • Habilitation 	<ul style="list-style-type: none"> • Diversion • Education

Note. Adapted with permission from Douglas B. Marlowe, *Evidence-Based Sentencing for Drug Offenders: An Analysis of Prognostic Risks and Criminogenic Needs*, 1 CHAP. J. CRIM. JUST. 167, 184 fig.2 (2009).

A. High Risk and High Need Persons

Persons in the upper left quadrant have a high need for substance use treatment and often mental health treatment and other social services, such as job training or remedial education. They also have a poor or guarded prognosis for success in standard rehabilitation programs (high prognostic risk) and may pose a substantial risk of criminal recidivism (high criminogenic risk). Three ingredients are required for successful rehabilitation of such individuals: (1) they must be supervised carefully and held accountable for their actions, including compliance with treatment; (2) they must receive substantial dosages of evidence-based substance use, mental health, and other indicated treatment services; and (3) they must receive habilitative services designed to encourage their adoption of prosocial

attitudes and help them succeed in productive maintenance activities like education or employment.⁶⁵ If any one of these ingredients is lacking or poorly implemented, the odds of success are greatly diminished.

Examples of supervision services that are required for high risk and high need persons include, but are not limited to, a minimum of biweekly (every 2 weeks) meetings with a judge or supervision officer to review their progress in treatment and administer incentives or sanctions contingent on their performance;⁶⁶ twice-weekly, random drug and alcohol testing to monitor and respond to continued substance use;⁶⁷ and home visits to ensure participants are living in safe, healthy, and drug-free conditions.⁶⁸ Because they are high need, these individuals also require approximately 200 to 300 hours of cognitive-behavioral counseling to address criminal-thinking patterns and ameliorate substance use and mental health symptoms.⁶⁹ Finally, they require habilitative services addressing acute

⁶⁵ See, e.g., Christopher T. Lowenkamp et al., *Intensive Supervision Programs: Does Program Philosophy and the Principles of Effective Intervention Matter?*, 38 J. CRIM. JUST. 368, 372–74 (2010) (finding programs combining supervision with treatment integrity and human services philosophy for high risk and need persons significantly reduced crime but those not including each of these services increased crime or had no effect); Craig Dowden & D. A. Andrews, *The Importance of Staff Practice in Delivering Effective Correctional Treatment: A Meta-Analytic Review of Core Correctional Practices*, 48 INT’L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 203, 211 (2004).

⁶⁶ See Douglas B. Marlowe et al., *Matching Judicial Supervision to Clients’ Risk Status in Drug Court*, 52 CRIME & DELINQ. 52, 70 (2006) (finding greater improvements in treatment attendance and illicit substance use for high-risk drug court participants attending biweekly court hearings but no differences for low-risk participants); Shannon M. Carey et al., *What Works? The Ten Key Components of Drug Court: Research-Based Best Practices*, 8 DRUG CT. REV. 6, 20–21 tbl.1 (2012) (finding biweekly drug court hearings associated with more than twice the crime reduction); Ojmarrh Mitchell et al., *Assessing the Effectiveness of Drug Courts on Recidivism: A Meta-Analytic Review of Traditional and Nontraditional Drug Courts*, 40 J. CRIM. JUST. 60, 68 (2012) (finding two drug court hearings per month associated with significantly greater reductions in drug-related recidivism).

⁶⁷ See Carey et al., *supra* note 66, at 21 tbl.1, 30 (finding drug courts performing drug testing at least twice per week achieved 38% greater reductions in crime and 68% greater cost savings); MARK A. R. KLEIMAN ET AL., OPPORTUNITIES AND BARRIERS IN PROBATION REFORM: A CASE STUDY IN DRUG TESTING AND SANCTIONS 32, (U.C. Berkeley Cal. Pol’y. Rsch. Ctr. 2003), <https://escholarship.org/uc/item/0238v37t> [<https://perma.cc/ZWL8-UDXH>] (finding weekly drug testing of probationers detected only 35% of drug use whereas twice-weekly testing detected over 80%).

⁶⁸ See Tammy Meredith et al., *What Happens in Home Visits? Examining a Key Parole Activity*, 47 CRIM. JUST. & BEHAV. 601, 615 (2020) (finding each home visit for high-risk parolees contributed additively to reduced risk for new felony arrest or parole revocation); ERIC MARTIN & LAURIE BRIGHT, EVALUATING THE IMPACT OF PROBATION AND PAROLE HOME VISITS 1214 (Abt Assocs. 2018), <https://www.ojp.gov/pdffiles1/nij/grants/254342.pdf> (finding field visits associated with 54% reduction in recidivism for high-risk probationers and parolees but slight increase for low-risk persons); Leanne Fiftal Alarid & Luis M. Rangel, *Completion and Recidivism Rates of High-Risk Youth on Probation: Do Home Visits Make a Difference?*, 98 PRISON J. 143, 158 (2018) (finding three times lower rearrest rates for high risk youths on probation receiving home visits).

⁶⁹ See Guy Bourgon & Barbara Armstrong, *Transferring the Principles of Effective Treatment Into a “Real World” Prison Setting*, 32 CRIM. JUST. & BEHAV. 3, 22–23 (2005) (finding minimum of

maintenance needs such as illiteracy or deficient vocational skills to enhance their long-term adaptive functioning.

Rigorously evaluated programs that include each of these elements and are proven to enhance outcomes for high risk and high need persons charged with drug-related offenses include, but are not limited to, drug courts⁷⁰ for individuals receiving community-based dispositions⁷¹ and correctional therapeutic community (TC) programs⁷² for persons who may need to be treated in a residential setting due

200 counseling hours and possibly more than 300 hours required to reduce recidivism among high-risk participants with multiple needs); Matthew Makarios et al., *Treatment Dosage and the Risk Principle: A Refinement and Extension*, 53 J. OFFENDER REHAB. 334, 345 (2014) (finding high risk cases required 200 to 250 counseling hours); Kimberly G. Sperber et al., *Examining the Interaction Between Level of Risk and Dosage of Treatment*, 40 CRIM. JUST. & BEHAV. 338, 345 (2013) (finding over 200 hours required for high-risk cases).

⁷⁰ Drug courts are special criminal court dockets for persons with substance use disorders charged with drug-related offenses. See NAT'L ASS'N DRUG CT. PROS., *DEFINING DRUG COURTS: THE KEY COMPONENTS* (1997), <https://www.ojp.gov/pdffiles1/bja/205621.pdf> [hereinafter NADCP KEY COMPONENTS]. The drug court judge leads a multidisciplinary team that commonly includes a prosecuting attorney, defense attorney, community supervision officer, treatment representatives, and law enforcement representative. Participants complete substance use treatment and other indicated services, undergo random drug and alcohol testing, and attend frequent court hearings during which the team reviews their progress and may administer incentives, sanctions, or service adjustments based on their performance. Graduates avoid incarceration, may have their charges reduced or withdrawn, and the arrest or conviction may be expunged from their legal record.

⁷¹ See MARK W. LIPSEY, *REHABILITATION PROGRAMS FOR ADULT OFFENDERS: A META-ANALYSIS IN SUPPORT OF GUIDELINES FOR EFFECTIVE PRACTICE* 9 tbl.3 (VAND. 2019), <https://www.ojp.gov/pdffiles1/nij/grants/252504.pdf> (finding drug courts significantly reduced recidivism in meta-analysis of 53 studies); Carey et al., *supra* note 66, at 17 (finding average recidivism reduction of 32% in studies of 69 drug courts); Mitchell et al., *supra* note 66, at 64 (finding recidivism reduction of 13% in meta-analysis of 92 drug court studies); SHELLI B. ROSSMAN ET AL., *THE MULTISITE ADULT DRUG COURT EVALUATION: THE IMPACT OF DRUG COURTS 3-4* (Urb. Inst. Just. Pol'y Ctr. 2011) (finding significant improvements in substance use, crime, employment, education, and income in national study of 23 drug courts), <https://www.ncjrs.gov/pdffiles1/nij/grants/237112.pdf> [<https://perma.cc/M3VT-YF5R>]; U.S. GOV'T ACCOUNTABILITY OFF., *ADULT DRUG COURTS: STUDIES SHOW COURTS REDUCE RECIDIVISM, BUT DOJ COULD ENHANCE FUTURE PERFORMANCE MEASURE REVISION EFFORTS* 19 (2011) (finding crime reduced by 6 to 26 percentage points in studies of 32 drug courts), <https://www.gao.gov/assets/gao-12-53.pdf>; Deborah Koetzle Shaffer, *Looking Inside the Black Box of Drug Courts: A Meta-Analytic Review*, 28 JUST. Q. 493, 508 (2011) (finding 9% recidivism reduction in meta-analysis of 76 drug courts). These positive effects last for at least three years and for as long as fifteen years. See Brook Kearley & Denise Gottfredson, *Long Term Effects of Drug Court Participation: Evidence From a 15-Year Follow-up of a Randomized Controlled Trial*, 16 J. EXPERIMENTAL CRIMINOLOGY 27, 41 (2020) (finding fewer new arrests, charges, and convictions for drug court participants lasting 15 years); Mitchell et al., *supra* note 66, at 68 (concluding effects of drug courts lasted at least three years); MICHAEL FINIGAN ET AL., *THE IMPACT OF A MATURE DRUG COURT OVER 10 YEARS OF OPERATION: RECIDIVISM AND COSTS* 2 (NPC Rsch. 2007) (finding effects lasted 10 to 14 years), <https://www.ncjrs.gov/pdffiles1/nij/grants/219224.pdf>.

⁷² TCs are residential programs for persons with severe substance use disorders and often co-occurring mental health and personality disorders. See generally GEORGE DELEON, *THE THERAPEUTIC COMMUNITY: THEORY, MODEL, AND METHOD* (Springer 2000). Participants are integrally involved in running the program, including co-facilitating counseling sessions, responding to rule infractions,

to the severity of their needs, the seriousness of their crime, or because they may pose an imminent threat to public safety.⁷³ These evidence-based programs are demonstrably effective when they serve high risk and high need individuals⁷⁴ but can produce poor or harmful outcomes if they imprudently serve persons with low levels of risk or need.⁷⁵ Although cost is often raised as a seemingly impenetrable barrier to developing these programs, studies indicate they generate substantial net cost-benefits, inclusive of investment costs, as compared with incarceration or community supervision as usual.⁷⁶

resolving disputes among residents, and providing support and camaraderie. Addiction is viewed as a disorder of the “whole person,” requiring participants to examine their behaviors and personality patterns over 6 to 24 months. TCs may be operated within a jail or prison, post-release halfway house, or community residential program in lieu of conviction or incarceration.

⁷³ See generally Dominique de Andrade et al., *Substance Use and Recidivism Outcomes for Prison-Based Drug and Alcohol Interventions*, 40 EPIDEMIOLOGICAL REV. 121 (2018) (concluding prison TCs significantly reduced recidivism and to a lesser extent substance use); Ojmarrh Mitchell et al., *The Effectiveness of Incarceration-Based Drug Treatment on Criminal Behavior: A Systematic Review*, 18 CAMPBELL SYSTEMATIC REVIEWS (2012), file:///C:/Users/Owner/Downloads/Mitchell_Incarceration-Based_Drug_Treatment_Update.pdf (concluding prison TCs reduced recidivism by 17%); ELIZABETH DRAKE, CHEMICAL DEPENDENCY TREATMENT FOR OFFENDERS: A REVIEW OF THE EVIDENCE AND BENEFIT-COST FINDINGS 6 tbl.1, 7 tbl.A1 (Wash. State Inst. Pub. Pol’y 2012), http://www.wsipp.wa.gov/ReportFile/1112/Wsipp_Chemical-Dependency-Treatment-for-Offenders-A-Review-of-the-Evidence-and-Benefit-Cost-Findings_Full-Report.pdf (finding TCs reduced crime significantly and were cost-beneficial).

⁷⁴ See AMANDA B. CISSNER ET AL., A STATEWIDE EVALUATION OF NEW YORK’S ADULT DRUG COURTS: IDENTIFYING WHICH POLICIES WORK BEST v (Ctr. Ct. Innovation 2013), https://www.bja.gov/Publications/CCI-UI-NYS_Adult_DC_Evaluation.pdf (finding drug courts improved outcomes for high and moderate risk participants but not low risk participants); Christopher T. Lowenkamp et al., *Are Drug Courts Effective: A Meta-Analytic Review*, 15 J. COMTY. CORR. 5, 10 (2005) (finding twice the recidivism reduction for high-risk drug court participants); Jonathan E. Fielding et al., *Los Angeles County Drug Court Programs: Initial Results*, 23 J. SUBSTANCE ABUSE TREATMENT 217, 221–22 tbl.3 (2002) (finding better outcomes for high-risk drug court participants but not low risk participants); James D. Griffith et al., *A Cost-Effectiveness Analysis of In-Prison Therapeutic Community Treatment and Risk Classification*, 79 PRISON J. 352, 362–63 (1999) (finding cost benefits from prison TCs attributable to high-risk persons). *But see* Wayne N. Welsh et al., *For Whom Does Prison-Based Drug Treatment Work? Results from a Randomized Experiment*, 10 J. EXPERIMENTAL CRIMINOLOGY 151, 170 (2014) (finding no better outcomes for high-risk TC participants who were also high on negative affect).

⁷⁵ See Warren A. Reich et al., *Treatment Modality, Failure, and Re-Arrest: A Test of the Risk Principle with Substance-Abusing Criminal Defendants*, 46 J. DRUG ISSUES 234, 242 (2016) (finding higher program failure rates and recidivism for low-risk participants in drug courts); CISSNER ET AL., *supra* note 74, at v (finding drug courts increased recidivism for low-risk participants); Harry K. Wexler et al., *Risk and Prison Substance Abuse Treatment Outcomes: A Replication and Challenge*, 84 PRISON J. 106, 115 (2004) (finding no improvements for low-risk persons in prison TC).

⁷⁶ See, e.g., Wash. State Inst. Pub. Pol’y, *Benefit-Cost Results* 4 tbl. (Dec. 2019), <https://www.wsipp.wa.gov/BenefitCost> [<https://perma.cc/4VXD-ZE3B>] (reporting average net cost benefits accounting for investment costs of more than \$9,000 per participant for drug courts and correctional TCs).

B. High Risk and Low Need Persons

Persons in the lower left quadrant do not have pressing treatment needs but they do have serious risk factors for criminal recidivism or attrition in standard rehabilitation programs. Such individuals require careful supervision and accountability for their actions as well as habilitative services to help them adopt prosocial attitudes and succeed in productive maintenance activities. Because they do not require substance use or mental health treatment (although many may misuse illicit drugs or alcohol), approximately 100 to 150 hours of cognitive-behavioral counseling will ordinarily suffice to address criminal-thinking patterns, reduce illicit substance use, and enhance adaptive functioning.⁷⁷ Moreover, because they are high risk, they require frequent meetings with a judge or supervision officer to review their progress in rehabilitation and administer incentives or sanctions contingent on their performance, frequent drug and alcohol testing to forestall a return to illicit substance use, and home visits or other community surveillance to ensure they are living in a safe and drug-free environment.

Honest Opportunity Probation with Enforcement (HOPE) is one example of a community-based program showing promise for high risk and low need individuals.⁷⁸ Participants are drug tested frequently and receive swift and certain jail sanctions (typically ranging from 2 to 15 days depending on the severity and repetitiveness of the infractions) for positive or missed drug tests or other infractions such as missed probation appointments. Participants are assigned to a dedicated court docket with a specially trained judge who orients them to the program, schedules prompt hearings in response to alleged infractions, ensures participants are treated in an encouraging and procedurally fair manner, and imposes expeditious jail sanctions for proven violations.⁷⁹ Participants also attend frequent probation sessions with supervision officers who are well trained in

⁷⁷ See Bourgon & Armstrong, *supra* note 69, at 22–23 (finding 100 counseling hours sufficient for moderate risk participants [high risk and low need persons in quadrant model]); Makarios et al., *supra* note 69, at 345 (finding 100 to 149 hours sufficient for moderate risk cases); Sperber et al., *supra* note 69, at 345 (finding 100 to 199 hours sufficient for moderate risk cases).

⁷⁸ See generally ANGELA HAWKEN & MARK KLEIMAN, MANAGING DRUG INVOLVED PROBATIONERS WITH SWIFT AND CERTAIN SANCTIONS: EVALUATING HAWAII'S HOPE (PEPP. 2009), <http://www.ncjrs.gov/pdffiles1/nij/grants/229023.pdf> (finding HOPE participants 55% less likely to be arrested for a new crime over 12 months, 72% less likely to test positive for illicit drugs, 61% less likely to miss probation appointments, and 53% less likely to have probation revoked); ANGELA HAWKEN ET AL., HOPE II: A FOLLOW-UP TO HAWAII'S HOPE EVALUATION (PEPP. 2016), <https://www.ncjrs.gov/pdffiles1/nij/grants/249912.pdf> (finding effects lasted 10 years).

⁷⁹ See generally Lorana Bartels, *HOPE-ful Bottles: Examining the Potential for Hawaii's Opportunity Probation with Enforcement (HOPE) to Help Mainstream Therapeutic Jurisprudence*, 63 INT'L J. L. & PSYCHIATRY 26 (2019) (finding HOPE court hearings involved copious praise, encouragement, and procedurally fair interactions from judge); Kelly Frailling et al., *Therapeutic Jurisprudence in Swift and Certain Probation*, 64 AM. BEHAV. SCIENTIST 1768 (2020).

effective counseling strategies addressing criminogenic and maintenance needs,⁸⁰ and they are triaged to substance use and other treatment services if they request them or are unable to refrain from illicit substance use despite the sanctioning protocol.⁸¹

Efforts to replicate the positive results from the original HOPE program have met with mixed success.⁸² Discrepant findings appear to be attributable to incomplete implementation of the model.⁸³ Although most programs bearing the HOPE moniker rigorously apply the monitoring and sanctioning components of the model, many fall short in delivering rehabilitative services addressing criminal-thinking patterns and maintenance needs.⁸⁴ Successful outcomes demand adherence to the full complement of rehabilitative services in the quadrant model to serve high risk individuals, and HOPE is not suited for high need persons with serious substance use disorders.⁸⁵

⁸⁰ See ROBERT L. DUPONT ET AL., STATE OF THE ART OF HOPE PROBATION 11 (Inst. Behav. & Health 2015), *State_of_the_Art_of_HOPE_Probation.pdf* (noting importance of probation leadership and staff training in HOPE).

⁸¹ See Steven S. Alm, *Triage: A New Model for Sentencing and Probation*, AM. PROB. & PAROLE ASS'N PERSPS. 42, 46–49 (Winter 2012) (describing triage of unsuccessful HOPE participants to drug court or other programs with \$1.2 million dedicated for treatment annually); DUPONT ET AL., *supra* note 80, at 23 (noting drug education classes, one-on-one counseling, outpatient, intensive outpatient, and residential treatment essential for HOPE).

⁸² Compare Zachary Hamilton et al., *Impact of Swift and Certain Sanctions: Evaluation of Washington State's Policy for Offenders on Community Supervision*, 15 CRIMINOLOGY & PUB. POL'Y 1009 (2016) (finding statewide implementation of HOPE associated with fewer probation violations and new convictions), with Pamela K. Lattimore et al., *Outcome Findings from the HOPE Demonstration Field Experiment: Is Swift, Certain, and Fair an Effective Supervision Strategy?*, 15 CRIMINOLOGY & PUB. POL'Y 1103 (2016) (finding no improvement in re-arrest rates and higher probation revocations and programmatic costs in four-site randomized trial of HOPE), and Daniel J. O'Connell et al., *Decide Your Time: A Randomized Trial of a Drug Testing and Graduated Sanctions Program for Probationers*, 15 CRIMINOLOGY & PUB. POL'Y 1073 (2016) (finding no improvements in randomized trial of HOPE).

⁸³ See generally Kelly Frailling et al., *Swift and Certain Probation: Assessing Fidelity to the HOPE Model*, 12 EUR. J. PROB. 265 (2021) (reviewing incomplete fidelity in HOPE replications); Steven S. Alm, *HOPE Probation: Fair Sanctions, Evidence-Based Principles, and Therapeutic Alliances*, 15 CRIMINOLOGY & PUB. POL'Y 1195, 1195 (2016) (noting “flawed and serious misunderstanding” by replication sites that HOPE requires commitment and input from probation officers and treatment providers to address participants’ rehabilitation needs).

⁸⁴ See Francis T. Cullen et al., *It's Hopeless: Beyond Zero-Tolerance Supervision*, 15 CRIMINOLOGY & PUB. POL'Y 1215, 1220–21 (2016) (describing limitations of purely deterrence-based HOPE programs).

⁸⁵ See Steven S. Alm, *HOPE Probation and the New Drug Court: A Powerful Combination*, 99 MINN. L. REV. 1665, 1683–86 (2015) (concluding persons chronically addicted to drugs or alcohol should be referred to drug court); Steven S. Alm, *A New Continuum for Court Supervision*, 91 OR. L. REV. 1181, 1188–90 (2013).

C. Low Risk and High Need Persons

Persons in the upper right quadrant have a substantial need for substance use treatment and other indicated services but do not have serious risk factors for criminal recidivism or treatment attrition. These individuals generally have a favorable prognosis if they are simply given reasonable access to an adequate dosage of evidence-based treatment and social services.

A 2000 voter initiative in California referred to as Proposition 36⁸⁶ entitles persons charged with drug possession who do not have a serious exclusionary offense in their record to plead guilty in exchange for probation with mandatory conditions for substance use treatment and other indicated services. If participants are charged subsequently with a new drug possession offense or drug-related probation violation, they are again entitled to probation with increased conditions for treatment or other indicated services.⁸⁷ Jail or prison may only be imposed if a participant is convicted of three drug possession offenses or determined by the court to be a threat to public safety or unamenable to the treatments that are reasonably available in the community.⁸⁸ Upon successful completion of treatment and probation, the guilty plea is vacated, and the participant has an opportunity for record expungement.⁸⁹

Results from Proposition 36 were largely disappointing; however, promising findings emerged for a subset of low risk and high need individuals. In the aggregate, large percentages of Proposition 36 participants did not enter treatment or left prematurely,⁹⁰ and new arrests for drug and property crimes were significantly higher than in pre-implementation years.⁹¹ Importantly, however, roughly 25% of the participants were determined to be high risk due to serious criminal histories or previous failures in treatment, and this subset of participants accounted for more than 80% of the criminal recidivism and criminal justice

⁸⁶ California Substance Abuse and Crime Prevention Act, 2000 Cal. Legis. Serv. Prop 36 (West), amending CAL. PENAL CODE §§ 1210, 3062, 3063; CAL. HEALTH & SAFETY CODE § 11999 (Deering).

⁸⁷ CAL. PENAL CODE § 1210.1(e)(3).

⁸⁸ *Id.* at §§ 1210.1(b)(5), (c)(2), (e)(3).

⁸⁹ *Id.* at § 1210.1(d).

⁹⁰ See DARREN URADA ET AL., EVALUATION OF PROPOSITION 36: THE SUBSTANCE ABUSE AND CRIME PREVENTION ACT OF 2000: 2009 REPORT 5–6 (UCLA Integrated Substance Abuse Programs 2009), file:///C:/users/owner/downloads/2009SACPARReportFinal11242009.pdf (finding 17% of Proposition 36 participants did not receive treatment, roughly one third left treatment within 30 days, and only 41% completed treatment).

⁹¹ *Id.* at 291 fig.11.3 (finding Proposition 36 participants had significantly more new arrests for drug and property crimes in all years examined compared with matched defendants in pre-implementation years).

costs.⁹² Because Proposition 36 removed nearly all leverage from criminal justice authorities, it prevented them from managing these high-risk individuals safely or effectively.⁹³

When high risk persons were excluded from the analyses, Proposition 36 showed considerable improvement for high need persons who were suffering from severe substance use disorders, including heroin and methamphetamine dependence, when they received residential treatment or medication-assisted treatment commensurate with their treatment needs.⁹⁴ These findings suggest that diverting high need persons out of the aegis of the criminal justice system and into community treatment can be effective, but only if participants do not require concomitant monitoring and behavioral management from criminal justice professionals to ensure they attend treatment, desist from crime, and comply with other probation conditions.

D. Low Risk and Low Need Persons

Finally, persons in the lower right quadrant do not have noteworthy treatment needs or risk factors for recidivism and are likely to refrain on their own from further involvement with the criminal justice system. Such individuals should ordinarily be diverted out of the criminal justice system as early as feasible in the adjudicative process; otherwise, their risk or need levels might rise if they are required to interact frequently with high risk or high need peers or if excessive conditions for treatment or supervision interfere with their ability to engage in productive activities like work, schooling, or childcare.

Low risk and low need persons can often be managed safely and effectively by having them check-in remotely with a supervision officer, such as through periodic phone or kiosk reporting.⁹⁵ At most, these individuals should be required

⁹² See DARREN URADA ET AL., EVALUATION OF PROPOSITION 36: THE SUBSTANCE ABUSE AND CRIME PREVENTION ACT OF 2000: 2008 REPORT 4 (UCLA Integrated Substance Abuse Programs 2008), <https://www.uclaisap.org/prop36/documents/2008%20Final%20Report.pdf>.

⁹³ See *id.* (recommending that high risk participants be excluded from Proposition 36 or managed differently); see also Elizabeth Evans et al., *Comparative Effectiveness of California's Proposition 36 and Drug Court Programs Before and After Propensity Score Matching*, 60 CRIME & DELINQ. 909, 928–29 (2014) (concluding Proposition 36 may be less effective than drug courts at reducing crime because of lesser availability of supervision and jail sanctions).

⁹⁴ See UCLA INTEGRATED SUBSTANCE ABUSE PROGRAMS, *supra* note 27, at 5–6 (finding residential treatment for daily methamphetamine users reduced new arrests and narcotic substitution therapy for participants with severe opioid use disorders increased treatment completion and probation compliance).

⁹⁵ See generally Geoffrey C. Barnes et al., *The Effects of Low-Intensity Supervision for Lower-Risk Probationers: Updated Results from a Randomized Controlled Trial*, 35 J. CRIME & JUST. 200 (2012) (finding lower absconding rates and technical violations and no increase in recidivism for low-risk probationers attending probation sessions every six months with one phone call in between); Geoffrey C. Barnes et al., *Low-Intensity Community Supervision for Low-Risk Offenders: A Randomized, Controlled Trial*, 6 J. EXPERIMENTAL CRIMINOLOGY 159 (2010).

to complete a brief educational curriculum with other low-risk individuals, such as drug education classes designed to forestall further use of illicit substances.⁹⁶ Often, the primary benefit of such educational curricula is to gauge whether participants attend the classes; if they do, then criminal justice professionals can be more confident that they are truly low risk and apt to remain law-abiding.

IV. SEQUENTIAL INTERCEPT MODEL

The quadrant model indicates whether and how to provide services but says little about when in the criminal justice process those services should be delivered. The sequential intercept model (SIM)⁹⁷ was developed to help jurisdictions create as many off-ramps as possible where case adjudication could be interrupted, and persons could be diverted out of the criminal justice system and into community-based treatment. In line with SIM principles, alternative treatment programs have been developed at five major intercept points in the criminal justice system: (1) pre-arrest law enforcement deflection programs, (2) pretrial diversion programs instituted after arrest or booking but prior to formal entry of charges, (3) post-plea diversion programs instituted in lieu of final conviction, (4) post-conviction rehabilitative dispositions, and (5) reentry programs designed to aid in community reintegration after release from custody.⁹⁸

Research on the SIM is in the early stages and no study has determined how participants' risk and need levels should guide the selection of intercept points.⁹⁹ Diverting high risk individuals too early in the case process may be unsuccessful if there is insufficient leverage stemming from an arrest charge, guilty plea, conviction, or sentence to keep them law abiding and engaged in treatment. Conversely, diverting low risk individuals too late in the process could worsen their outcomes by forcing them to interact with high-risk peers or interfering with productive activities. Moreover, waiting too long before initiating treatment allows problems to fester for high need persons, and it may separate them from loved ones and other social supports. Finally, the collateral consequences of a criminal record can make it difficult for high need persons to obtain assisted housing, employment, or other desperately needed public benefits.

⁹⁶ See, e.g., Dugosh et al., *supra* note 64, at 47, 50 (finding better outcomes for low-risk and low-need drug court participants attending eight psychoeducational classes).

⁹⁷ See generally Mark R. Munetz & Patricia A. Griffin, *Use of the Sequential Intercept Model as an Approach to Decriminalization of People with Serious Mental Illness*, 57 PSYCHIATRIC SERVS. 544 (2006) (introducing SIM).

⁹⁸ See generally JANEEN B. WILLISON ET AL., USING THE SEQUENTIAL INTERCEPT MODEL TO GUIDE LOCAL REFORM: AN INNOVATION FUND CASE STUDY (Urb. Inst. 2018), https://www.urban.org/sites/default/files/publication/99169/using_the_sim_to_guide_local_reform_0.pdf (describing strategies employed by several communities to implement the SIM).

⁹⁹ Cf. David S. DeMatteo et al., *Community-Based Alternatives for Justice-Involved Individuals with Severe Mental Illness: Diversion, Problem-Solving Courts, and Reentry*, 41 J. CRIM. JUST. 64, 70 (2013) (concluding studies of SIM too limited to draw scientific or policy conclusions).

The stage of adjudication is also a rate-limiting factor determining what obligations can be imposed on participants and what services are likely to be available for them. Pretrial supervision programs, for example, are typically shorter in duration and narrower in scope than probation or parole programs. Because pretrial defendants are presumed innocent until proven guilty, mandatory conditions of pretrial supervision may extend only so far as necessary to ensure the person returns to court for adjudication and does not commit an offense while on pretrial release.¹⁰⁰ In contrast, the goals of probation or parole may extend considerably further to include rehabilitation, deterrence of future crime, and incapacitation of the convicted individual. Criminal justice professionals will often find they have considerably more leverage and resources at their disposal to intervene in a case once a criminal charge or conviction has been entered.

The SIM was conceived as a decriminalization measure for low risk and high need persons whose criminal activity is fueled largely by mental health or substance use disorders, but it was not intended to replace accountability mechanisms for high risk persons engaged in willful misconduct.¹⁰¹ The progenitors assumed that high risk persons may need to be co-supervised by criminal justice professionals.¹⁰² More research is required to affirm this supposition and determine which persons can be diverted safely and effectively to treatment early in the case process, and which individuals might be better served in later stages of adjudication when criminal justice professionals have more leverage and resources to manage high-acuity cases.

V. CONTINGENCY MANAGEMENT

The quadrant model and SIM lend guidance for fashioning evidence-based dispositions and case plans, but criminal justice professionals also require careful instruction on evidence-based practices for responding to participants' conduct in the programs. Behavioral science principles of contingency management or operant conditioning govern the effective application of rewards to incentivize positive achievements and sanctions to dissuade maladaptive behaviors.¹⁰³

¹⁰⁰ See *United States v. Salerno*, 481 U.S. 739, 753–55 (1987) (holding permissible functions of bail are to safeguard court's role in adjudicating guilt or innocence and prevent threat to community safety); *McGinnis v. Royster*, 410 U.S. 263, 273 (1973) (finding rehabilitation an impermissible mandatory pretrial condition).

¹⁰¹ See *Munetz & Griffin*, *supra* note 97, at 544 (concluding persons with mental illness should not be arrested or incarcerated because of their illness or poor access to treatment but those who commit crimes with criminal intent should be held accountable like anyone else).

¹⁰² *Id.* (concluding persons may need to flow through deeper levels of criminal justice system if mental health agencies lack effective collaborative arrangements with criminal justice authorities).

¹⁰³ See generally B. F. SKINNER, *SCIENCE AND HUMAN BEHAVIOR* 62–66 (Free Press 1953) (describing scientific principles of operant conditioning); GERRY MARTIN & JOSEPH PEAR, *BEHAVIOR MODIFICATION: WHAT IT IS AND HOW TO DO IT* (Prentice-Hall 1999) (describing practical application of behavioral techniques).

A. Proximal vs. Distal Infractions

Effective contingency management requires an understanding of the critical distinction between proximal and distal behavioral goals.¹⁰⁴ Some infractions, such as failing to attend counseling sessions or delivering tampered drug test specimens, are avoidable by many participants and often reflect inattention to one's responsibilities or willful misconduct.¹⁰⁵ Such *proximal* infractions merit relatively higher-magnitude sanctions to ensure participants take their responsibilities seriously in the program and to avoid habituation in which persons become accustomed (and thus less responsive) to being sanctioned.¹⁰⁶ Providing weak or no sanctions in response to proximal infractions encourages participants to test the limits of the program's tolerance, leading to more of the same or worse behavior and reducing the likelihood that indicated sanctions will work in the future if applied correctly.

Other infractions, such as illicit substance use, are often a symptom of a participant's illness or reflect deficient problem-solving skills. Remedial services, not punishment, are required to treat relevant symptoms (e.g., depression or withdrawal symptoms from drugs or alcohol), remediate skill deficits, and help them avoid repeating such infractions in the future.¹⁰⁷ To the extent that punitive sanctions are applied for such *distal* infractions, they should involve low-magnitude instructive assignments such as journaling exercises, or increased supervision requirements such as more frequent probation sessions or drug testing. Delivering high-magnitude sanctions for distal infractions worsens outcomes by precipitating what is called learned helplessness, in which persons become despondent or resentful because they are unable to avoid punishment, leading to

¹⁰⁴ See Douglas B. Marlowe, *Applying Incentives and Sanctions*, in THE DRUG COURT JUDICIAL BENCHMARK 139, 148–50 (Douglas B. Marlowe & William Meyer eds., Nat'l Drug Ct. Inst. 2011) (defining proximal vs. distal behavioral goals and indicated responses for meeting or failing to meet these goals).

¹⁰⁵ See Jason Matejkowski et al., *Matching Consequences to Behavior: Implications of Failing to Distinguish Between Noncompliance and Nonresponsivity*, 34 INT'L. J. L. & PSYCHIATRY 269, 271–72 (2011) (distinguishing willful noncompliance with program rules which requires higher magnitude punitive consequences from failure to respond to treatment which requires treatment adjustments).

¹⁰⁶ See Marlowe, *supra* note 104, at 143–44, 149 (describing how unearned leniency for proximal infractions worsens outcomes and can lead to habituation); Douglas B. Marlowe & Kimberly C. Kirby, *Effective Use of Sanctions in Drug Courts: Lessons from Behavioral Research*, 2 NAT'L DRUG CT. INST. REV. 1, 8–10 (1999) (describing why weak sanctions can cause habituation).

¹⁰⁷ See Douglas B. Marlowe, *Strategies for Administering Rewards and Sanctions*, in DRUG COURTS: A NEW APPROACH TO TREATMENT AND REHABILITATION 317, 329–30 (James E. Lessenger & Glade F. Roper eds., Springer 2007) (describing why participants with severe substance use disorders should receive treatment adjustments rather than sanctions for continued drug use early in treatment); John H. Boman et al., *Responding to Substance-Use-Related Probation and Parole Violations: Are Enhanced Treatment Sanctions Preferable to Jail Sanctions?*, 32 CRIM. JUST. STUDS. 356, 365 (2019) (finding better outcomes from treatment adjustments than sanctions for continued substance use).

higher rates of treatment attrition, substance use, emotional distress, and crime.¹⁰⁸ It can also contribute to ceiling effects, in which criminal justice professionals exhaust their quiver of sanctions too quickly before treatment has had a chance to take effect.¹⁰⁹

Unaware of these scientific axioms, many criminal justice professionals apply sanctions based on the perceived seriousness of infractions rather than the proximal or distal nature of those infractions. Common practice, for example, is for probationers to receive higher magnitude sanctions for positive drug tests than for arriving late to counseling sessions.¹¹⁰ Drug misuse is illegal and may be seen as a potential public safety threat, whereas treatment tardiness is often viewed as a minor violation of probationary terms or conditions. In most instances, this is precisely the wrong strategy because many probationers are capable of timely attendance but may have considerable difficulty avoiding illicit substance use. Focusing consequences on reliable session attendance is a crucial first step towards achieving long-term sobriety. Criminal justice professionals must check their gut instincts at the door and pay studious attention to these science-based principles if they wish to achieve rehabilitation goals.

B. *Positive Reinforcement*

Punishment and positive reinforcement serve different functions.¹¹¹ Punitive sanctions are used to discourage maladaptive behaviors whereas desired rewards are used to increase productive behaviors. Although punishment can be effective in reducing undesired conduct over the short term, the effects last only so long as punitive consequences are forthcoming.¹¹² Once participants leave the program and are no longer subject to impending sanctions, negative behaviors tend to reemerge precipitously. Positive reinforcement is also required, therefore, to encourage

¹⁰⁸ See MARTIN E. P. SELIGMAN, *HELPLESSNESS: ON DEPRESSION, DEVELOPMENT, AND DEATH* 21–40 (W.H. Freeman 1975) (reviewing studies finding inability to avoid punishment causes severe emotional symptoms including anxiety, depression, apathy, physical distress, and aggression); Douglas B. Marlowe & Conrad J. Wong, *Contingency Management in Adult Criminal Drug Courts*, in *CONTINGENCY MANAGEMENT IN SUBSTANCE ABUSE TREATMENT* 334, 343–44 (Stephen T. Higgins et al. eds., Guilford 2008) (describing learned helplessness in drug courts).

¹⁰⁹ See, e.g., Marlowe, *supra* note 104, at 145–46 (describing ceiling effects from using high magnitude sanctions prematurely for distal behaviors).

¹¹⁰ See generally Haley R. Zettler & Kelli D. Martin, *Exploring the Impact of Technical Violations on Probation Revocations in the Context of Drug Court*, 45 *AM. J. CRIM. JUST.* 1003 (2020) (finding positive drug tests strongest predictor of probation revocations and jail sanctions); Wendy P. Guastaferrero & Leah E. Daigle, *Linking Noncompliance Behaviors and Programmatic Responses: The Use of Graduated Sanctions in a Felony-Level Drug Court*, 42 *J. DRUG ISSUES* 396, 412 (2012).

¹¹¹ See, e.g., Marlowe & Wong, *supra* note 108, at 337–38 fig. (differentiating behavior modification techniques).

¹¹² See MURRAY SIDMAN, *COERCION AND ITS FALLOUT* 62–64 (Authors Coop. 1989) (reviewing studies finding behaviors suppressed by punishment eventually return).

engagement in productive activities like hobbies or employment, which can take the place of undesirable behaviors and contribute to long-term adaptive functioning.¹¹³ Evidence suggests outcomes are significantly better when participants have more opportunities to earn positive reinforcement for their accomplishments than to receive sanctions for infractions, ideally at a 4:1 ratio of incentives to sanctions.¹¹⁴ Although some criminal justice professionals might view their role primarily as one of enforcing supervision conditions, they will quickly find that incentivizing achievements is unavoidable if they wish to protect public safety and achieve rehabilitative goals.

C. Phase Advancement

Rehabilitation works by transitioning distal goals into proximal goals. Delivering indicated services gives participants the skills and resources they need to accomplish what was previously beyond their means. For instance, although abstinence from illicit drugs or alcohol may be a daunting challenge in the early phases of treatment, symptom resolution and development of an adaptive coping repertoire make sobriety more readily attainable with time.

The term *phase advancement* is used to describe the junctures where distal goals become proximal goals and program demands should increase accordingly.¹¹⁵ Infractions that received minor sanctions or treatment adjustments in earlier phases of treatment should receive higher-magnitude consequences in ensuing phases because participants are better prepared to avoid those infractions. Evidence-based programs such as drug courts typically have well-defined phases with delineated criteria for phase progression, and they hold ritual celebrations and convey advancement certificates commemorating phase promotion.¹¹⁶ Importantly, the phases dovetail with responsivity principles. As described earlier, services are most effective when delivered in the proper sequence, addressing (if present) responsivity needs, criminogenic needs, maintenance needs, and restorative justice needs, respectively. Drug court phases are organized along these lines and have accordingly descriptive names, such as the stabilization phase (addressing

¹¹³ *Id.* at 64, 212 (concluding practitioners should take advantage of temporary suppression of undesirable behavior from punishment to positively reinforce new adaptive behaviors; the best way to stop people from doing something bad is to reward them for doing something else).

¹¹⁴ See Eric J. Wodahl et al., *Utilizing Behavioral Interventions to Improve Supervision Outcomes in Community-Based Corrections*, 38 CRIM. JUST. & BEHAV. 386, 398–99 (2011); Paul Gendreau, *The Principles of Effective Intervention with Offenders*, in CHOOSING CORRECTIONAL OPTIONS THAT WORK: DEFINING THE DEMAND AND EVALUATING THE SUPPLY 117, 123 (Alan T. Harland ed., Sage 1996).

¹¹⁵ See Marlowe, *supra* note 104, at 150 (describing phase advancement).

¹¹⁶ See NAT'L ASS'N DRUG CT. PROS., ADULT DRUG COURT BEST PRACTICE STANDARDS 5–6, 9–10 (vol. II text revision 2015), file:///C:/Users/Owner/Downloads/Adult-Drug-Court-Best-Practice-Standards-Volume-2-Text-Revision-December-2018%20(2).pdf (describing evidence-based phases and interventions for each phase).

responsivity needs) or life skills phase (maintenance needs).¹¹⁷ Participants in the stabilization phase receive treatment adjustments or minor sanctions for distal infractions like substance use, but they receive higher magnitude sanctions for failing to attend counseling sessions addressing their treatment needs. In contrast, participants in the life skills phase receive higher magnitude sanctions for substance use or failing to pursue education or employment because these goals are now reasonably within their grasp.

Unfortunately, many criminal justice programs do not have phases, and those that do often advance participants through the phases based on their time in the program rather than their mastery of previously distal goals. The first phase, for example, may simply mark the first 90 days of enrollment. Lacking delineation of proximal and distal goals for each phase, supervision officers have little basis for deciding what responses they should deliver for various behaviors and what services they should focus on, and participants have only vague notice of program expectations. Considerable thought and effort are required to design evidence-based phases for rehabilitation programs, delineate suitable phase advancement criteria, and alter the magnitude of contingent consequences in the light of participants' progression through the curriculum.

VI. BEHAVIORAL RESPONSIVITY AND JUSTICE REFORM

The principles of behavioral responsivity—incorporating the RNR quadrant model, SIM, and contingency management—comprise the evidence-based standard of care for correctional rehabilitation, yet criminal justice professionals have little obligation to learn or adhere to these practices. Dispositions are typically predicated on the severity of a defendant's current offense and criminal history, or the vagaries of plea bargaining, rather than person-specific considerations of risk or need. Access to evidence-based programs is based largely on the predilections of local justice officials and the happenstance that a program exists in a community. Services are often delivered in a one-size-fits-all manner irrespective of responsivity principles or participants' need profiles, and behavioral consequences typically focus on sanctioning misconduct with meager consideration of participants' ability to meet program expectations and inadequate attention to their achievements. Evidence-based justice reform requires adherence to behavioral responsivity practices to achieve public health and safety aims. As important, following these practices is shown to reduce unfair racial and ethnic disparities in the criminal justice system.

¹¹⁷ See NADCP KEY COMPONENTS, *supra* note 70, at 9 (describing drug court phase designations).

A. Risk and Need Assessment

Treating a patient before rendering an informed diagnosis and prognosis would be malpractice in the medical or treatment field,¹¹⁸ yet criminal justice professionals routinely make fundamental decisions affecting persons' welfare and liberty interests without the benefit of critical risk and need assessment information or a rudimentary understanding of how to act on the findings. As in the medical context, effective correctional rehabilitation requires the use of evidence-based diagnostic tests and associated service-matching protocols.¹¹⁹

Professional judgment in predicting criminogenic or prognostic risk is little better than chance, whereas standardized risk tools are typically accurate about 65% to 75% of the time.¹²⁰ Certainly, the tools are not perfect, but many justice officials take this fact as justification for overriding assessment results and trusting their gut instincts.¹²¹ In practice, assessment overrides by justice officials commonly reduce the predictive accuracy of standardized scores and rarely improve upon them.¹²² The critical issue is for carefully trained professionals to

¹¹⁸ See GERALD B. ROBERTSON & ELLEN I. PICARD, *LEGAL LIABILITY OF DOCTORS AND HOSPITALS IN CANADA* 377–83 (5th ed., Thomson Reuters 2017) (reviewing cases holding doctors have a legal and professional duty of care to diagnose their patients and exercise reasonable skill and judgment in making the diagnoses, including taking a thorough history, performing a proper examination, and administering appropriate tests).

¹¹⁹ See Lowenkamp et al., *supra* note 11, at 584–85 tbl.3 (finding pre-service client assessments associated with significantly greater reductions in new offenses, technical violations, and returns to prison in community corrections); Shaffer, *supra* note 71, at 512–13 tbl.6 (finding drug courts more effective when they administered evidence-based assessment tools).

¹²⁰ See NATHAN JAMES, *CONG. RSCH. SERV., RISK AND NEEDS ASSESSMENT IN THE CRIMINAL JUSTICE SYSTEM* 2 (2015), https://www.everycrsreport.com/files/20150724_R44087_0c47cc191ecc982888fa182c82ef0099a86eca8d.pdf (concluding best risk tools predict recidivism with 70% accuracy); Jay P. Singh & Seena Fazel, *Forensic Risk Assessment: A Metareview*, 37 *CRIM. JUST. & BEHAV.* 965, 981 (2010) (finding superior accuracy for risk tools over professional judgment); BONTA & ANDREWS, *supra* note 22, at 192–215 (concluding clinical judgment is “not very accurate” and reviewing studies finding area under the curve indices for commonly used risk tools are approximately .69 to .83 [translating loosely to 69% to 83% accuracy]).

¹²¹ See generally Lacey Schaefer & Harley Williamson, *Probation and Parole Officers' Compliance with Case Management Tools: Professional Discretion and Override*, 62 *INT'L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY* 4565 (2018) (finding 50% of probation and parole officers imposed less or more restrictive conditions than indicated by risk and need assessment); Kelly Hannah-Moffat, *Actuarial Sentencing: An “Unsettled” Proposition*, 30 *JUST. Q.* 270 (2013) (finding many justice officials adjusted assessment criteria to control risk scores without documenting overrides).

¹²² See Laura C. Orton et al., *An Examination of the Professional Override of the Level of Service Inventory-Ontario Revision*, 48 *CRIM. JUST. & BEHAV.* 421, 435–36 (2021) (finding predictive validity of risk tool for general, violent, and nonviolent recidivism decreased significantly from professional overrides); Thomas H. Cohen et al., *Risk Assessment Overrides: Shuffling the Risk Deck Without Any Improvements in Prediction*, 47 *CRIM. JUST. & BEHAV.* 1609, 1623 (2020); Jean-Pierre Guay & Genevieve Parent, *Broken Legs, Clinical Overrides, and Recidivism Risk: An Analysis of Decisions to Adjust Risk Levels with the LS/CMI*, 45 *CRIM. JUST. & BEHAV.* 82, 94 (2018).

ensure that the assessment information they obtain is accurate and complete, for example by interviewing collateral sources like family members and reviewing treatment records. As in any context, incomplete or erroneous information yields inaccurate test results. Officials should, however, tread lightly in ignoring assessment results and should, at a minimum, lend due consideration to those results when making critical decisions affecting participants' welfare and liberty interests.

Understandable concerns have been raised about whether some risk tools may over-predict risk for certain cultural groups,¹²³ contributing to unwarranted detention and unfair disparities in the justice system.¹²⁴ Care must always be taken to monitor and guard against such eventualities; however, studies indicate that the use of standardized instruments reduces detention lengths and racial disparities in detention decisions.¹²⁵ Any errors in test classification and prediction are smaller, and thus preferable, to those derived from professional judgment or business as usual in the justice system. To the extent that risk assessments contribute to unwarranted detention, this typically occurs because justice officials misinterpret the implications of high risk-scores. If officials are appropriately educated that risk usually relates to a complicated treatment prognosis and not to dangerousness, they should be more willing, and indeed expected, to refer high risk persons to evidence-based programs rather than incarceration.

¹²³ See, e.g., Julia Angwin et al., *Machine Bias: There's Software Used Across the Country to Predict Future Criminals: And It's Biased Against Blacks* (PROPUBLICA May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> [<https://perma.cc/G7CZ-PEY3>] (finding higher false positive rate from one risk tool for predicting recidivism among Black persons).

¹²⁴ See generally Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 FED. SENT'G REP. 237 (2015) (asserting risk tools are inherently biased because they assess factors confounded with race).

¹²⁵ See generally Gina M. Vincent & Jodi L. Viljoen, *Racist Algorithms or Systemic Problems? Risk Assessments and Racial Disparities*, 47 CRIM. JUST. & BEHAV. 1576, 1580 (2020) (concluding no valid evidence indicates risk instruments are biased against persons of color and their use leads to modest reductions in incarceration without threatening public safety); Jodi L. Viljoen et al., *Impact of Risk Assessment Instruments on Rates of Pretrial Detention, Postconviction Placements, and Release: A Systematic Review and Meta-Analysis*, 43 L. & HUM. BEHAV. 397, 408 (2019); Sarah L. Desmarais et al., *Predictive Validity of Pretrial Risk Assessments: A Systematic Review of the Literature*, 48 CRIM. JUST. & BEHAV. 398 (2021); Evan M. Lowder et al., *Effects of Pretrial Risk Assessments on Release Conditions and Misconduct Outcomes Relative to Practice as Usual*, 73 J. CRIM. JUST. 101754 (2021) (finding pretrial risk assessment associated with higher rates of nonfinancial release); Douglas B. Marlowe et al., *Employing Standardized Risk Assessment in Pretrial Release Decisions: Association with Criminal Justice Outcomes and Racial Equity*, 44 L. & HUM. BEHAV. 361 (2020) (finding shorter pretrial detention using risk assessments with no racial differences in classification accuracy); Evan M. Lowder et al., *Racial Bias and LSI-R Assessments in Probation Sentencing and Outcomes*, 46 CRIM. JUST. & BEHAV. 210 (2019) (finding no racial bias in probation risk assessments); Jennifer Skeem & Christopher T. Lowenkamp, *Risk, Race, and Recidivism: Predictive Bias and Disparate Impact*, 54 CRIMINOLOGY 680 (2016) (finding no racial bias in federal pretrial risk assessments).

Access to a validated risk and need assessment that is administered and interpreted by a competently trained professional should be required by statute as an enforceable right in criminal proceedings where a person's welfare or liberty interests are substantially at stake, and failure to offer reasonable access to such an assessment should be reversible error.¹²⁶ Fifth Amendment protections against self-incrimination prevent persons from being compelled to comply with such evaluations;¹²⁷ however, parties should be more willing to undergo the assessments if the results may only be used (as the tests were intended) to set conditions for treatment and supervision and not to make detention decisions. To protect participants' trial rights and encourage accurate self-reporting, use immunity should attach by law to any disclosures made during a risk or need assessment and any fruit of the poisonous tree emanating therefrom. Information derived directly or indirectly from the assessments should not be admissible in any criminal or civil proceeding to substantiate a criminal charge or technical violation against a participant, bring new charges, augment a sentence, trigger a sentencing enhancement, or bolster allegations in civil, immigration, or other legal proceedings.¹²⁸

B. *Responsive Case Management*

Considerable expertise is required to administer risk and need assessments, interpret the results, and develop effective case plans pursuant to the findings. Responsibility for these tasks typically falls to pretrial services officers or probation officers who deliver case histories and recommendations in pre-sentence investigation (PSI) reports. Lacking requisite training, these professionals are

¹²⁶ Cf. JENNIFER K. ELEK ET AL., NAT'L CTR. FOR STATE CTS., USING RISK AND NEEDS ASSESSMENT INFORMATION AT SENTENCING: OBSERVATIONS FROM TEN JURISDICTIONS 27 (2015), <https://nsc.contentdm.oclc.org/digital/collection/criminal/id/267> [<https://perma.cc/TU9R-YHSY>] (calling for risk and need assessment for all probation-eligible defendants throughout plea bargaining and sentencing process); ALISON LAWRENCE & DONNA LYONS, NAT'L CONF. STATE LEGISLATURES, PRINCIPLES OF EFFECTIVE STATE SENTENCING AND CORRECTIONS POLICY: A REPORT OF THE NCSL SENTENCING AND CORRECTIONS WORK GROUP 20 (2011), <https://www.ncsl.org/documents/cj/pew/WGprinciplesreport.pdf> (noting state legislatures increasingly require courts, supervision agencies, and parole authorities to use risk assessments). Permitting or requiring courts to consider, but not be bound by, risk information does not appear to be constitutionally objectionable. See generally *State v. Loomis*, 881 N.W.2d 749 (Sup. Ct. Wisc. 2016) (holding risk information permissible consideration in sentencing so long as it is not the sole consideration).

¹²⁷ See NAT'L LEGAL AID & DEF. ASS'N, RISK & NEEDS ASSESSMENTS: WHAT DEFENDERS AND CHIEF DEFENDERS NEED TO KNOW 4 (2015), https://www.nlada.org/sites/default/files/pictures/NLADA_Risk_and_Needs_Assessments-What_Public_Defenders_Need_to_Know.pdf (advocating defendants be advised of Fifth Amendment rights before answering questions in risk or need assessments).

¹²⁸ Cf. *id.* at 4–5 (advocating agreement among parties approved by court or carrying force of law that assessment information will not be used to initiate new prosecutions, prove criminal charges, or impose adverse civil consequences); ELEK ET AL., *supra* note 126, at 27 (advocating assurance to pretrial defendants that risk and need assessment information will not be used against them at trial).

seldom qualified to administer or interpret assessments, sequence services in the light of identified needs, or monitor participant progress for purposes of phase advancement.¹²⁹ Ensuring that this complex process is managed correctly and efficiently requires the knowledge and skills of a professionally credentialed clinical case manager,¹³⁰ such as a psychologist, social worker, or specially trained supervision officer.¹³¹ Unfortunately, few criminal justice programs have these essential personnel on staff or available through contract. Rectifying this deficiency should be the first order of business for any program seeking to apply evidence-based practices and improve outcomes.

Treatment Accountability for Safer Communities (TASC) is a specialized case management model for persons with substance use and mental health disorders in the criminal justice system.¹³² TASC case managers are trained carefully in RNR principles and service-matching protocols. Early evaluations concluded that TASC participants remained in treatment significantly longer than other persons¹³³ and had lower criminal recidivism and illicit drug use in most programs.¹³⁴ Unfortunately, the TASC model declined in influence when federal

¹²⁹ See generally James Bonta et al., *Exploring the Black Box of Community Supervision*, 47 J. OFFENDER REHAB. 248, 259, 264 (2008) (finding only 39% of criminogenic needs addressed in probation case plans and officers spent just a few minutes in sessions addressing these needs); Schaefer & Williamson, *supra* note 121 (finding 33% of probation and parole officers reported administering risk and need assessments carelessly, 25% minimized or exaggerated assessment information, 78% targeted needs not identified in assessments, and 44% disregarded identified needs); Delphine Gossner et al., *Case Planning and Recidivism of High Risk and Violent Probationers*, 1 J. COM'Y. SAFETY & WELL-BEING 32 (2016) (finding incomplete probation case plans associated with 52% higher recidivism).

¹³⁰ See, e.g., Wouter Vanderplasschen et al., *The Development and Implementation of Case Management for Substance Use Disorders in North America and Europe*, 55 PSYCHIATRIC SERVS. 913, 919 (2004) (finding better case management outcomes associated with extensive training, regular supervision, standard protocols and manuals, and treatment planning).

¹³¹ See, e.g., John Hunsley & Catherine M. Lee, *Prognosis and Psychological Treatment*, in COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY 653, 660 (David Faust ed., 6th ed., Oxford 2012) (finding better outcomes for psychologists or social workers but concluding training in evidence-based practices is most important).

¹³² See generally Pamela F. Rodriguez, *Case Management for Substance Abusing Offenders*, in HANDBOOK OF EVIDENCE-BASED SUBSTANCE ABUSE TREATMENT IN CRIMINAL JUSTICE SETTINGS 173, 177–79 (Carl G. Leukefeld et al. eds., Springer 2011) (describing TASC model); Foster Cook, *Treatment Accountability for Safer Communities: Linking the Criminal Justice and Treatment Systems*, in TREATMENT OF DRUG OFFENDERS: POLICIES AND ISSUES 105 (Carl G. Leukefeld et al. eds., Springer 2002).

¹³³ See, e.g., Robert L. Hubbard et al., *The Criminal Justice Client in Drug Abuse Treatment*, in COMPULSORY TREATMENT OF DRUG ABUSE: RESEARCH AND CLINICAL PRACTICE 57, 68–69 tbl.6, 76 (Carl G. Leukefeld & Frank M. Tims eds., Nat'l Inst. Drug Abuse 1988), <https://archives.drugabuse.gov/sites/default/files/monograph86.pdf> (finding TASC clients retained six to seven weeks longer in drug treatment than clients referred from other criminal justice and non-criminal justice sources).

¹³⁴ See generally M. Douglas Anglin et al., *Treatment Alternatives to Street Crime: An Evaluation of Five Programs*, 26 CRIM. JUST & BEHAV. 168 (1999) (finding illicit drug use lower for

funding ended, and now the programs exist sporadically in some jurisdictions with varying levels of financial, political, and managerial support. The TASC or a comparable case management model must be resurrected and rejuvenated with contemporary behavioral responsivity principles to achieve successful justice reform.¹³⁵

C. Guided Discretion

Evidence-based practices offer little benefit if they are ignored. We demand accountability from our participants and should accept no less from our public officials. Unfortunately, policy makers and reform advocates often fall prey to a false choice between unfettered discretion by justice officials or rigidly curtailed discretion to be exercised within narrowly permissible ranges. There is a middle ground alternative of guided discretion, in which officials are required to take risk and need assessment information and associated case management recommendations into consideration when making dispositions affecting persons' welfare and liberty interests¹³⁶ and explain departures from those recommendations on the record.¹³⁷ For guided discretion to work, legislation must erect a rebuttable presumption in favor of evidence-based dispositions¹³⁸ and require officials to justify substantial departures from expert recommendations.¹³⁹ For example, if a clinical case manager recommends drug court for a person who is assessed as high

TASC clients in three of five programs and criminal activity lower in two programs with largest effects for high-risk persons); Lois A. Ventura & Eric G. Lambert, *Recidivism 12 Months After TASC*, 39 J. OFFENDER REHAB. 63 (2004) (finding TASC completers less likely to be rearrested).

¹³⁵ Cf. U.S. GOV'T ACCT. OFF., DRUG CONTROL: TREATMENT ALTERNATIVES PROGRAM FOR DRUG OFFENDERS NEEDS STRONGER EMPHASIS 6 (1993), <https://www.gao.gov/assets/ggd-93-61.pdf> (calling for expansion of TASC to achieve U.S. national drug control strategy).

¹³⁶ See generally Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L. J. 377 (2005) (describing alternative paradigms between indeterminate and determinate sentencing); D'Amato et al., *supra* note 44, at 59 (advocating courts consider risk and need information in sentencing); Michael Marcus, *Archaic Sentencing Liturgy Sacrifices Public Safety: What's Wrong and How We Can Fix It*, 16 FED. SENT'G REP. 76 (2003) (advocating consideration of outcome data when making sentencing decisions).

¹³⁷ See Brandon L. Garrett & John Monahan, *Judging Risk*, 108 CALIF. L. REV. 439, 467–68 (2020) (finding 60% of surveyed judges believed being required to justify reasons for not imposing non-incarcerative rehabilitative sentences would increase use of such alternatives; however, most objected to the practice because of additional burden).

¹³⁸ See, e.g., Kentucky Public Safety and Offender Accountability Act, KY. REV. STAT. ANN. § 431.066 (West 2011) (imposing rebuttable presumption of immediate nonmonetary release for pretrial defendants scoring low or moderate risk). Without continual monitoring and public airing of their sentencing practices, judges often revert to prior habits despite such provisions. See Megan Stevenson, *Assessing Risk Assessment in Action*, 103 MINN. L. REV. 303, 355 (2018) (finding early spike in nonmonetary releases after enactment of legislative presumption followed by rapid decline to baseline).

¹³⁹ Cf. Garrett & Monahan, *supra* note 137, at 484, 491 (asserting Due Process and Equal Protection should require reasonably accurate decision-making and a rationale for the decision).

risk and high need for substance use treatment, then a sentencing court should be required to explain on the record the rationale for imposing a more restrictive, costly, and potentially harmful sentence like incarceration.¹⁴⁰ The judge might, for example, explain that incarceration is required to protect public safety or vindicate victim interests, or because no minimally adequate program exists in the community. Similarly, in deciding whether a proffered plea agreement is in the interests of justice, judges should be required to consider whether the agreement incorporates an evidence-based disposition that is likely to serve public health and public safety goals;¹⁴¹ if not, the court should be obligated to state on the record why the plea deal should nonetheless be accepted.

This process need not create a readily reviewable issue for appeal, which might clog court dockets and delay the administration of justice. The standard for review could be restrictive, such as an abuse of discretion or clearly erroneous standard.¹⁴² Despite limited avenues for appeal, requiring sentencing rationales to be articulated on the record would shape how sentencing arguments and plea negotiations are framed in court proceedings, and would provide a basis for president judges, legislators, officials making judicial appointments, bodies rating judicial qualifications, and the public to evaluate trial judge performance.¹⁴³ Information would be available, for example, on whether some judges may have a penchant for imposing more costly or less effective sentences than many of their colleagues. Information would also be available on how many defendants would have received a community-based disposition had a suitable evidence-based program been available, thus providing an impetus, or possibly a mandate, to develop such programs.

¹⁴⁰ See, e.g., Donald P. Green & Daniel Winik, *Using Random Judge Assignments to Estimate the Effects of Incarceration and Probation on Recidivism Among Drug Offenders*, 48 CRIMINOLOGY 357, 382 (2010) (finding incarceration for drug offenses produced no better outcomes than community sentences and may have increased reoffending); Cassia Spohn & David Holleran, *The Effect of Imprisonment on Recidivism Rates of Felony Offenders: A Focus on Drug Offenders*, 40 CRIMINOLOGY 329, 348–49 (2002) (finding persons incarcerated for drug or drug-related offenses were more likely than those receiving community sentences to be arrested for a new crime and they recidivated more quickly).

¹⁴¹ But see Cynthia Alkon, *Plea Bargain Negotiations: Defining Competence Beyond Lafler and Frye*, 53 AM. CRIM. L. REV. 377 (2016) (reviewing reluctance of U.S. Supreme Court to require scrutiny of attorney competence in plea negotiations).

¹⁴² Contra Steven L. Chanenson, *Booker on Crack: Sentencing's Latest Gordian Knot*, 15 CORNELL J. L. & POL'Y 551, 578–82 (2006) (advocating appellate courts review reasonableness of federal drug sentences non-perfunctorily).

¹⁴³ See Mark H. Bergstrom & Joseph Sabimo Mistick, *The Pennsylvania Experience: Public Release of Judge-Specific Sentencing Data*, 16 FED. SENT'G REP. 57, 62 (2003) (finding publishing sentencing information led to better quality research on sentencing practices and better-informed input from policy makers and the public); Paul J. Hofer & William P. Adams, *Guest Editors' Observations: Using Data for Policymaking, Litigation, and Judging*, 16 FED. SENT'G REP. 8, 11–12 (2003) (concluding publication of sentencing data led to increased research on sentencing practices and greater accountability for officials which outweighed occasional over-simplification of findings in newspaper articles).

Comparable legislation is required for revocations of community sentences. In petitioning a court for a probation or parole revocation, supervision officers should be required to establish an evidence-based foundation for the request. Assurances should be required that alleged violations involved repetitive infractions of proximal (achievable) goals, and participants received or were offered reasonable access to requisite services enabling them to meet those goals. Revocation should be presumptively inadvisable, for example, for a participant who failed to pay fines or fees (a restorative justice obligation) before first being offered services sufficient to address financial or employment deficits (maintenance needs). Similarly, revocation should be inadvisable for a participant who tested positive repeatedly for illicit substances (a criminogenic need) before being offered services sufficient to address mental health or withdrawal symptoms if present (responsivity needs). A court may elect to revoke probation or parole without such a foundation, but the judge should be obliged to articulate the rationale for doing so on the record.

Finally, treatment agencies should be held accountable for delivering services in accordance with behavioral responsivity. Few treatment programs serve high risk and low risk persons in separate counseling groups or residential milieus, thus exposing low risk persons to antisocial peers and worsening their outcomes.¹⁴⁴ Services are often delivered in a one-size-fits-all manner dictated by program philosophy,¹⁴⁵ staff are rarely familiar with treatment models designed and validated for high-risk persons with antisocial traits or complicated criminal histories,¹⁴⁶ and clinicians rarely know how to report progress information to justice officials in a manner allowing for accurate determinations of phase progression or delivery of incentives and sanctions.¹⁴⁷ As a licensure, contractual, and funding precondition for serving criminal justice populations, treatment programs should be required to demonstrate staff proficiency in RNR practices, including evidence-based procedures for matching services to participants' risk and need profiles and sequencing interventions in accordance with responsivity

¹⁴⁴ See generally Lloyd et al., *supra* note 38 (finding mixing high and low risk persons in counseling groups reduced treatment effectiveness and increased recidivism); *Residential Placement*, *supra* note 38 (finding worse outcomes for low-risk persons in residential substance use treatment); Wexler et al., *supra* note 75 (finding no improvements for low-risk persons in prison TC).

¹⁴⁵ See, e.g., Faye S. Taxman & Jeffrey A. Bouffard, *Substance Abuse Counselors' Treatment Philosophy and the Content of Treatment Services Provided to Offenders in Drug Court Programs*, 25 J. SUBSTANCE ABUSE TREATMENT 75, 82 (2003) (finding counselors treating drug court participants lacked basic understanding of evidence-based treatment models, spent little session time on clinically relevant material, gave mixed messages, and provided small tidbits of information without framing material to assist participants in reducing drug use); Faye S. Taxman & Jeffrey A. Bouffard, *Treatment as Part of Drug Court: The Impact on Graduation Rates*, 42 J. OFFENDER REHAB. 23, 45–46 (2005) (finding failure to deliver evidence-based treatment to drug court participants in government-run programs contributed to lower graduation rates).

¹⁴⁶ See SMITH & STRASHNY, *supra* note 11, at 7 (finding only 26% of substance use treatment programs in U.S. offer specialty services for criminal justice populations).

¹⁴⁷ See Lowenkamp et al., *supra* note 11, at 587 (rating 68% of treatment programs serving criminal justice population unsatisfactory in applying RNR practices).

principles.¹⁴⁸ Core staff should include clinical case managers who are well trained and certified in the delivery of TASC or a comparable case management model, and information relating to treatment progress should be translated routinely for justice officials in a manner enabling them to readily differentiate proximal from distal infractions and achievements, together with evidence-based recommendations for responding suitably.¹⁴⁹

D. Exclusion Criteria

Caution should be exercised in creating a litany of exclusionary offenses precluding access to evidence-based programs. Risk, need, and responsivity are the only known evidence-based factors governing what practices and policies should be implemented in correctional rehabilitation. Eligibility criteria based on the nature of a person's current charge or criminal history might seem important from a political or attitudinal standpoint but bear little relationship to public health or public safety outcomes.¹⁵⁰ Some crimes will not be statutorily eligible for a community disposition; however, the same principles of behavioral responsivity should be applied while persons are in custody and during community reentry. Services should be sequenced in the same manner pursuant to responsivity principles, incentives and sanctions should be delivered in the same manner pursuant to contingency management tenets, and staff discretion should be channeled within the same rational decision-making guideposts.

Many evidence-based programs exclude persons most in need of their services by drawing excessively broad or vague eligibility criteria and preventing reasonable discretion in individual cases.¹⁵¹ Many crimes classified as violent, such

¹⁴⁸ See generally Prendergast et al., *supra* note 37 (finding RNR practices improved outcomes in drug treatment); Leticia Gutierrez & Guy Bourgon, *Drug Treatment Courts: A Quantitative Review of Study and Treatment Quality*, 14 JUST. RSCH. & POL'Y 47, 66 (2012) (finding drug court effectiveness impacted by treatment provider adherence to RNR).

¹⁴⁹ See, e.g., Elizabeth Gale-Bentz et al., *Impact of Community-Based Provider Reports on Juvenile Probation Officers' Recommendations: Effects of Positive and Negative Framing on Decision Making*, 43 L. & HUM. BEHAV. 193, 199 (2019) (finding how treatment providers framed clinical information influenced probation officer recommendations for punitive consequences); Ashley B. Batastini et al., *Communicating Violence Risk During Testimony: Do Different Formats Lead to Different Perceptions Among Jurors?*, 25 PSYCH., PUB. POL'Y. & L. 92, 103 (2019) (finding information about strategies to reduce risk avoided overestimation of risk in sentencing decisions); John C. Dolores & Richard E. Redding, *The Effects of Different Forms of Risk Communication on Judicial Decision Making*, 8 INT'L J. FORENSIC MENTAL HEALTH 1 (2009) (finding judges more likely to impose non-custodial sanction when given information on managing risk).

¹⁵⁰ See *infra* notes 151–56 and accompanying text.

¹⁵¹ See, e.g., 34 U.S.C.A. § 10611(a)(1) (prohibiting federal drug court funding for persons with current violence charges or prior violence convictions); Eric L. Sevigny et al., *Can Drug Courts Help to Reduce Prison and Jail Populations?*, 647 ANNALS AM. ACAD. POL. & SOC. SCI. 190, 202 (2013) (estimating 83% to 89% of inmates at risk for drug abuse or dependence were ineligible for drug court because of unduly restrictive eligibility criteria); AVINASH SINGH BHATI ET AL., *URB. INST., TO TREAT OR NOT TO TREAT: EVIDENCE ON THE PROSPECTS OF EXPANDING TREATMENT TO DRUG-*

as simple assault, involve less severe conduct than the categorization suggests, and many persons with violence offenses in their records, including assault and domestic violence, perform as well or better than other persons in evidence-based programs like drug courts.¹⁵² Comparable effectiveness in drug courts is also reported for persons with substance use disorders charged with drug dealing offenses,¹⁵³ who are often excluded from these programs. Contrary to some assumptions, persons convicted of violent crimes do not recidivate at higher rates than those convicted of property or drug crimes,¹⁵⁴ and the notion of “crime specialization” appears to be largely a myth.¹⁵⁵ More than three quarters of persons who commit a new crime after release from prison are arrested for a different category of crime, with more than a third of those who are rearrested after incarceration for drug crimes going on to commit a violent crime.¹⁵⁶ Current and prior charges reflect a snapshot of a person’s behavior, and do not necessarily indicate what crimes that person may have committed in the past that went undetected or is likely to commit in the future.

INVOLVED OFFENDERS (2008), <https://www.ncjrs.gov/pdffiles1/nij/grants/222908.pdf> (estimating only 7.5% of arrestees at risk for drug abuse or dependence were drug court-eligible).

¹⁵² See ROSSMAN ET AL., *supra* note 71, at 4 (finding drug court participants with violence histories showed greater reductions in crime than other participants); Carey et al., *supra* note 66, at 35 (finding equivalent effects on recidivism and cost-effectiveness for drug courts serving participants with violence histories); Christine A. Saum & Matthew L. Hiller, *Should Violent Offenders Be Excluded from Drug Court Participation? An Examination of the Recidivism of Violent and Nonviolent Drug Court Participants*, 33 CRIM. JUST. REV. 291 (2008); Amanda B. Cissner et al., *Domestic Violence Courts: A Multisite Test of Whether and How They Change Offender Outcomes*, 21 VIOLENCE AGAINST WOMEN 1102, 1103 (2015) (finding domestic violence courts applying the drug court model reduced domestic violence). *But see* Mitchell et al., *supra* note 66, at 69 (finding smaller but positive effect on recidivism for drug courts serving persons with violence charges); Shaffer, *supra* note 71, at 508.

¹⁵³ See CISSNER ET AL., *supra* note 74, at 56–57 (finding drug courts had largest effect on recidivism for persons charged with drug sales); Douglas B. Marlowe et al., *An Effectiveness Trial of Contingency Management in a Felony Pre-Adjudication Drug Court*, 41 J. APPLIED BEHAV. ANALYSIS 565, 567, 574 (2008) (finding high success rate in drug court serving persons charged with delivery or possession with intent to deliver a controlled substance).

¹⁵⁴ See ALPER ET AL., *supra* note 5, at 11 (finding persons incarcerated for violent crimes less likely than those incarcerated for drug or property crimes to be rearrested after release). Persons incarcerated for violent crimes were more likely to be rearrested for a violent crime; however, the difference was negligible (11% for persons incarcerated for violent crimes vs. 9% and 7% for property and drug crimes). *See* ALPER ET AL., *supra* note 5, at 12; *see also* Timothy P. Cadigan & Christopher T. Lowenkamp, *Implementing Risk Assessment in the Federal Pretrial Services System*, 75 FED. PROB. 30 (2011) (finding pretrial defendants charged with violent crimes had fewer new arrests, failures to appear in court, and technical violations than other defendants).

¹⁵⁵ *See generally* Tamara Humphrey & Erin Gibbs Van Brunschot, *Measurement Matters: Offense Types and Specialization*, 36 J. INTERPERSONAL VIOLENCE 46 (2021) (finding substantial versatility in offense categories in criminal histories).

¹⁵⁶ *See* ALPER ET AL., *supra* note 5, at 11 tbl.7 (finding 77% of released inmates rearrested for different category of offense and 34% of drug offenders rearrested for violent offense).

Considerable evidence also suggests that police and prosecutors tend to file more serious charges against Black or Latinx persons than non-Hispanic White persons for the same alleged drug-related behavior,¹⁵⁷ thus disqualifying them from many of the most beneficial programs. Removing invalid eligibility criteria is likely, therefore, to reduce racial and ethnic inequities in the justice system. Policy makers should require inclusion and exclusion criteria for evidence-based programs to, themselves, be evidence-based,¹⁵⁸ and require justification on the record for why a person is being denied entry to such a program for empirically invalid reasons.

E. *Optional Participation*

On a final note, nothing in these proposals should be construed as requiring individuals to waive their trial rights, consent to a risk and need assessment, or participate in evidence-based programs. Conveying an enforceable right to evidence-based practices in no way obligates persons to avail themselves of the opportunity. Persons should have the option to knowingly waive their right to a risk and need assessment and proceed in the normal course of case adjudication. Evidence-based practices, when delivered correctly, should expand participants' rehabilitative options and should not invite compulsory intrusion into their lives no matter how well intentioned.¹⁵⁹

CONCLUSION

Physicians and other healthcare practitioners are guided largely in their work by practice standards and service-matching protocols, and they can be held accountable for substantial departures from those guidelines through disciplinary

¹⁵⁷ See generally Tammy Rinehart Kochel et al., *Effects of Suspect Race on Officers' Arrest Decisions*, 49 CRIMINOLOGY 473 (2011) (finding non-White persons 1.3 to 1.5 times more likely than non-Latinx White persons to be arrested for comparable conduct); Brendan Lantz & Marin R. Wenger, *The Co-Offender as Counterfactual: A Quasi-Experimental Within-Partnership Approach to the Examination of the Relationship Between Race and Arrest*, 16 J. EXPERIMENTAL CRIMINOLOGY 183 (2020) (finding Black persons more likely to be arrested than their White co-offenders); Carlos Berdejo, *Criminalizing Race: Racial Disparities in Plea Bargaining*, 59 B.C. L. REV. 1187 (2018) (finding White defendants 25% more likely to have principal misdemeanor charges dropped or reduced); Sonya B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L. J. 2, 7 (2013) (finding prosecutors twice as likely to file charges carrying mandatory minimum sentence against Black defendants accounting for offense characteristics).

¹⁵⁸ See, e.g., NAT'L. ASS'N DRUG CT. PROS., ADULT DRUG COURT BEST PRACTICE STANDARDS 5 (vol. I text revision 2018), <https://www.nadcp.org/wp-content/uploads/2018/12/Adult-Drug-Court-Best-Practice-Standards-Volume-I-Text-Revision-December-2018-1.pdf> (providing eligibility and exclusion criteria for drug courts should be predicated on empirical evidence of safety and effectiveness).

¹⁵⁹ For a discussion of the poor effects of compulsory treatment, see *supra* notes 33–34 and accompanying text.

board proceedings, malpractice actions, peer review inquiries, and reviews by third party payors.¹⁶⁰ Nothing approaching this level of accountability exists for criminal justice professionals. Adherence to evidence-based practices might be encouraged through professional education and aspired to in court rules, probation and parole department regulations, and similar resources; however, tangible consequences for deviations from evidence-based practices are rarely a sobering concern.

Safe and effective justice reform calls for the recognition of an enforceable standard of care for the criminal justice system. Unlike physicians who may be liable in their personal capacity for practice violations, criminal justice professionals are answerable to appellate courts, the legislature, and the public for limitations on their discretionary authority, for consequential review of their actions, and to justify their funding. As public servants, criminal justice professionals have no right of privacy or confidentiality in their decision-making and owe it to the community to air their practices and the effects of those practices in the light of day.

Statutory provisions are required that give persons the right to a validated risk and need assessment where the disposition is reasonably likely to affect their welfare or liberty interests, to have that information taken carefully into consideration by trained clinical case managers when imposing treatment and supervision conditions, and to receive an explanation on the record for why officials may choose to impose conditions inconsistent with proven evidence-based practices. Failure to afford these rights in individual cases should be reversible error, and systematic neglect of evidence-based practices should be a basis for injunctive relief, funding reapportionment, unfavorable employee or agency performance appraisals, and possibly judicial non-retention.

The public, too, should have standing to challenge wasteful criminal justice practices that do not serve public health or safety objectives. Class actions instituted by public interest organizations may be the only avenue available, as a practical matter, to vindicate defendants' interests and enforce adherence to empirically supported procedures. And, when officials cannot reasonably assign persons to indicated services because evidence-based programs are unavailable, publicizing these service gaps will yield actionable information for policy makers, the public, media, and other stakeholders to identify unmet rehabilitation needs and address justice impediments in their community. More than five decades of research tells us what is required for safe, effective, equitable, and cost-efficient criminal justice reform. The time is long overdue to recognize and enforce these proven practices as the normative standard of care for the criminal justice system.

¹⁶⁰ See MARK A. HALL ET AL., *MEDICAL LIABILITY AND TREATMENT RELATIONSHIPS* 377–81 (Wolters Kluwer 2013) (reviewing admissibility of learned treatises and practice guidelines as evidence of standard of care in malpractice and other legal actions).