



**U.S. Department of Justice**

Office of Justice Programs

Office of the General Counsel

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Washington, D.C. 20531

Via Email: [amlani@epic.org](mailto:amlani@epic.org)

**OCT 31 2017**

Ms. Natasha Amlani  
Electronic Privacy Information Center  
1718 Connecticut Avenue, N.W., Suite 200  
Washington, D.C. 20009

Re: OJP FOIA No. 17-00323

Dear Ms. Amlani:

This letter responds to your Freedom of Information Act/Privacy Act request that you sent to the Department of Justice (DOJ). On September 27, 2017, the DOJ, Office of Information Policy (OIP) forwarded your request, dated June 15, 2016, and copies of 40 pages of material, to the Office of Justice Programs (OJP), Office of the General Counsel (OGC) for processing and responding directly to you. A copy of your request is attached for your convenience.

After a review of the 40 pages located by OIP, which originated within OJP, OGC has determined that these documents are appropriate for release in full and without excisions. This completes the processing of your request by OJP.

For your information, Congress excluded three categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. 552 (c). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not exist.

You may contact Dorothy Lee, Government Information Specialist, who processed your request at (202) 616-3267, as well as, our FOIA Public Liaison, Carolyn Kennedy, Deputy General Counsel, for any further assistance and to discuss any aspect of your request at:

Office of Justice Programs  
Office of the General Counsel  
810 7<sup>th</sup> St., N.W., Room 5400  
Washington, D.C. 20531  
Telephone: (202) 307-6235  
Email: [FOIAOJP@usdoj.gov](mailto:FOIAOJP@usdoj.gov)  
Fax Number: (202) 307-1419

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Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at [ogis@nara.gov](mailto:ogis@nara.gov); telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

If you are not satisfied with my response to your request, you may administratively appeal by writing to the Director, Office of Information Policy, United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, DC 20530-0001, or you may submit an appeal through OIP's eFOIA portal at <http://www.justice.gov/oip/efoia-portal.html>. Your appeal must be postmarked or transmitted electronically within 90 days from the date of this letter. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,



Dorothy A. Lee  
Government Information Specialist

Attachments

# FOIA Request

**ELECTRONIC PRIVACY INFORMATION CENTER**

1718 CONNECTICUT AVENUE NW, SUITE 200  
WASHINGTON, D.C. 20009  
202-483-1140  
FAX 202-483-1248

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JUN 14 2016  
Office of Information Policy

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**TO: ATTORNEY GENERAL -  
DOJ**

**FROM: NATASHA AMLANI**

COMPANY:

Electronic Privacy Information Center

DATE:

6/15/16

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RECIPIENT'S FAX NUMBER:

(202) 514-1009

SENDER'S EMAIL:

amlani@epic.org

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RECIPIENT'S TELEPHONE NUMBER:

(202) 514-FOIA

SENDER'S TELEPHONE NUMBER:

(202) 483-1140

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TOTAL NO. OF PAGES INCLUDING COVER:

5

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**COMMENTS:**

EPIC FOIA Request

the individual understanding of the requester.<sup>10</sup>

**Conclusion**

Thank you for your consideration of this request. As provided in 5 U.S.C. § 552(a)(6)(E)(ii)(I), I will anticipate your determination on our request within ten business days. For questions regarding this request, John Tran can be contacted at 202-483-1140 x123 or FOIA@epic.org.

**Respectfully Submitted,**

**Natasha Amlani  
EPIC IPIOP Clerk**

**John Tran  
EPIC FOIA Counsel**

**cc:**

**Office of Justice Programs - Bureau of Justice Statistics  
Attorney General  
Office of Legal Policy  
U.S. Parole Commission**

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<sup>10</sup> 28 CFR Part 35 § 16.10(k)(2)(iii)

# epic.org | ELECTRONIC PRIVACY INFORMATION CENTER

VIA FAX  
June 15, 2016

**Attorney General  
Laurie Day  
Chief, Initial Request Staff  
Office of Information Policy  
Department of Justice  
Suite 11050  
1425 New York Avenue, N.W.  
Washington, DC 20530-0001  
Fax: (202) 514-1009**

Dear FOIA Officer:

This letter constitutes a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and is submitted on behalf of the Electronic Privacy Information Center ("EPIC") to the Federal Communications Commission ("FCC").

EPIC seeks records relating to evidence-based practices in sentencing, including policies, guidelines, source codes, and validation studies.

## Documents Requested

1. All validation studies for risk assessment tools considered for use in sentencing, including but not limited to, COMPAS, LSI-R, and PCRA.
2. All documents pertaining to inquiries for the need of validation studies or general follow up regarding the predictive success of risk assessment tools.
3. All documents, including but not limited to, policies, guidelines, and memos pertaining to the use of evidence-based sentencing.
4. Purchase/sales contracts between risk-assessment tool companies, included but not limited to, LSI-R and the federal government.
5. Source codes for risk assessment tools used by the federal government in pre-trial, parole, and sentencing, from PCRA, COMPAS, LSI-R, and any other tools used.

EPIC FOIA Request

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Evidence-based Practices

## Background

Evidence-based assessments predict future behavior by analyzing statistical data. In the criminal justice system, risk-assessment algorithms use data about defendants including their criminal history (e.g. previous offenses, failure to appear in court, violent offenses, etc.) or socio-demographic characteristics (e.g. age, sex, employment status, drug history) to then predict the person's risk of recidivism or risk of failing to appear when on bail. Such predictions are based on average recidivism rates for the group of offenders that share the defendant's characteristics. The recidivism calculation has been used by judges in pretrial release hearings as well as parole and probationary hearings, and are increasingly being used as factor considered in determining sentencing. In addition, the Justice Department's National Institute of Corrections encourages the use of the assessments at every stage of the criminal justice process.<sup>1</sup> However, many have questioned the underlying data, the reliability of the outcomes as well as defendants' lack of opportunity to challenge the results.

In 2014, then U.S. Attorney General Eric Holder called for the U.S. Sentencing Commission to study the use of algorithms in courts, concerned that the scores may be a source of bias.<sup>2</sup> In addition, Jonathan Wroblewski, Director of the Office of Policy and Legislation in the the Justice Department sent a letter to the U.S. Sentencing Commission<sup>3</sup> asking them to study how data analysis was being used in sentencing, and to issue recommendations on how such analysis should be used. The Justice Department expressed reservations about components of sentencing reform legislation pending in Congress<sup>4</sup> that would base prison sentences on factors such as "education level, employment history, family circumstances and demographic information."

There are three main risk assessment tools that are used across the country. These are: Correctional Offender Management Profiling for Alternative Sanctions (COMPAS), Public Safety Assessment (PSA) and Level of Service Inventory Revised (LSI-R). COMPAS, created by the for-profit company Northpointe, assesses variables under five main areas: criminal involvement, relationships/lifestyles, personality/attitudes, family, and social exclusion. The LSI-R, developed by Canadian company Multi-Health Systems, also pulls information from a wide set of factors, ranging from criminal history to personality patterns. Using a narrower set of

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<sup>1</sup> Julia Angwin, Jeff Larson, Surya Mattu & Lauren Kirchner, *Machine Bias*, PROPUBLICA (May 23, 2016)

<https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>;  
Evidence-Based Decision Making, NATIONAL INSTITUTE OF CORRECTIONS,  
<http://info.nicic.gov/ebdm/>

<sup>2</sup> Speech Presented at the National Association of Criminal Defense Lawyers 57th Annual Meeting, 27 FED. SENTENCING REPORTER 252 (April 2015),  
<http://fsr.ucpress.edu/content/27/4/252.full.pdf+html>.

<sup>3</sup> Letter from Jonathan Wroblewski, Director of the Office of Policy Legislation to Patti Saris, Chair of the Sentencing Commission (July 29 2014),  
<https://www.justice.gov/sites/default/files/criminal/legacy/2014/08/01/2014annual-letter-final-072814.pdf>.

<sup>4</sup> Recidivism Reduction and Public Safety Act, S.1675, 113th Cong. (2014); Public Safety Enhancement Act, H.R.2656, 113th Cong. (2013).

parameters, The Public Safety Assessment, developed by the Laura and John Arnold Foundation,<sup>5</sup> only considers variables that relate to a defendant's age and criminal history.

In addition, the Post-Conviction Risk Assessment Instrument (PCRA) is an evidence-based tool specific to the federal system. The PCRA uses information from an offender's past to identify both the risk of reoffending and the needs to be addressed to lessen that risk.<sup>6</sup> Two previously proposed pieces of legislation discussed adopting the PCRA in sentencing.

Because risk assessments are controversial yet are being increasingly relied upon, the non-public documents are needed to increase public understanding of how a defendant's risk is determined, and what steps need to be taken to ensure that the criminal justice system produces equitable outcomes. In addition, the documents are essential to give defendants the opportunity to rebut the risk assessments in their cases and provide additional information that may affect the sentence if necessary.

### Request for "News Media" Fee Status and Fee Waiver

EPIC is a "representative of the news media" for fee classification purposes.<sup>7</sup> Based on EPIC's status as a "news media" requester, EPIC is thus entitled to receive the requested records without being assessed search or review fees, and the documents are not in the commercial interest of EPIC.<sup>8</sup>

In addition, because disclosure of the validity of the evidence-based practices will "contribute significantly to public understanding of the operations or activities of the government," all duplication fees should be waived.<sup>9</sup> The subject of the request, evidence-based practices, has a direct and clear connection to identifiable operations and activities of the federal government, namely policy reform, sentencing of federal criminals, and criminal justice generally. Since the algorithms and results of validation studies, if any, have not been released to the public, the disclosure of the requested records will be meaningfully informative about government operations and activities regarding government use, recommendations, and results of evidence-based practices and thus will be "likely to contribute" to an increased public understanding of those operations and activities. Lastly, since EPIC is a news media requester, it has presumptively satisfied the requirement that the disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to

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<sup>5</sup> Press Release, More Than 20 Cities and States Adopt Risk Assessment Tools to Help Judges Decide Which Defendants to Detain Prior to Trial, LAURA AND JOHN ARNOLD FOUNDATION, June 26, 2015, <http://www.arnoldfoundation.org/more-than-20-cities-and-states-adopt-risk-assessment-tool-to-help-judges-decide-which-defendants-to-detain-prior-to-trial/>.

<sup>6</sup> OFFICE OF PROB. AND PRETRIAL SERV.S, ADMIN. OFFICE OF THE U.S. COURTS, AN OVERVIEW OF THE FEDERAL POST CONVICTION RISK ASSESSMENT (2011), <http://www.uscourts.gov/statistics-reports/publications/post-conviction-risk-assessment>.

<sup>7</sup> *EPIC v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003).

<sup>8</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II).

<sup>9</sup> § 552(a)(4)(A)(iii).

# Responsive Documents



U.S. Department of Justice

Office of Justice Programs

Office of the Assistant Attorney General

Washington, D.C. 20531

JUN 10 2014

MEMORANDUM FOR: United States Attorneys

FROM: Karol V. Mason *KVM*  
Assistant Attorney General

SUBJECT: Open Grant Program Solicitations from the Office of Justice Programs

The Office of Justice Programs (OJP) provides federal leadership in developing the Nation's capacity to prevent and control crime, administer justice, and assist victims. In this capacity, OJP administers the majority of the Department of Justice (DOJ) grant funding as appropriated by Congress. In an effort to keep United States Attorneys informed of current, available grant funding, we are providing information on the following open FY 2014 grant programs.

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**FY 2014 Grant Program Solicitations**

**Bureau of Justice Statistics (BJS)**

**Solicitation Title: BJS, 2015 Survey of Law Enforcement Personnel in Schools (SLEPS)**

**Who Can Apply?** Applicants are limited to national, regional, state, or local public and private entities, including for-profit (commercial) and non-profit organizations (including tribal for-profit and non-profit organizations), faith-based and community organizations, institutions of higher education (including tribal institutions of higher education), Federally recognized Indian tribal governments as determined by the Secretary of the Interior, and units of local government that support initiatives to improve the functioning of the criminal justice system. Consistent with OJP fiscal requirements, for-profit organizations are not permitted to make a profit as a result of this award or charge a management fee for the performance of this award.

**What's It For?** BJS will award funding to support a new data collection focused on the activities, roles, and duties of law enforcement agencies and personnel who have responsibility for interacting with and working in K-12 public schools. The tasks will require instrument design, a field test of that design, and a data collection that includes a nationally represented sample of law enforcement personnel working in schools.

**When's It Due?** Applications are due June 24, 2014.

**Solicitation Title: BJS, 2015 Criminal History Record Assessment and Research Program (CHRARP)**

**Who Can Apply?** Applicants are limited to national, regional, state, or local public and private entities, including for-profit (commercial) and non-profit organizations (including tribal for-profit and non-profit organizations), faith-based and community organizations, institutions of higher education (including tribal institutions of higher education), Federally recognized Indian tribal governments as determined by the Secretary of the Interior, and units of local government that support initiatives to improve the functioning of the criminal justice system. Consistent with OJP fiscal requirements, for-profit organizations are not permitted to make a profit as a result of this award or charge a management fee for the performance of this award.

**What's It For?** BJS will award funding to transform automated criminal history records into databases that support statistical research and studies of the criminal behaviors for various cohorts of individuals. The successful applicant will be required to implement quality control checks at each data processing stage of this project to ensure the databases conform to BJS's specifications. The research files will allow BJS to produce a wide range of statistical information on the criminal careers of various types of offenders.

**When's It Due?** Applications are due June 30, 2014.

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**National Institute of Justice (NIJ)**

**Solicitation Title: NIJ, Evaluation of the Office for Victims of Crime (OVC) Service, Support & Justice: A Strategy to Enhance Law Enforcement Response to Victims Demonstration Project**

**Who Can Apply?** Applicants are limited to states (including territories), units of local government (including Federally recognized Indian tribal governments as determined by the Secretary of the Interior), non-profit and for-profit organizations (including tribal non-profit or for-profit organizations), institutions of higher education (including tribal institutions of higher education), and certain qualified individuals. Consistent with OJP fiscal requirements, for-profit organizations are not permitted to make a profit as a result of this award or charge a management fee for the performance of this award. Foreign governments, foreign organizations, and foreign institutions of higher education are not eligible to apply.

**What's It For?** NIJ will award funding to evaluate the effectiveness of the strategy developed by the International Association of Chiefs of Police (IACP) in conjunction with OVC to help law enforcement agencies implement agency-wide changes in how law enforcement interacts with and addresses the needs of victims of crime. NIJ seeks an evaluation of the first phase of the Enhance Law Enforcement Response to Victims (ELERV) demonstration project that will include a baseline study, a process evaluation of IACP technical assistance, and the development of instruments to evaluate the implementation of the ELERV strategy.

**When's It Due?** Applications are due June 30, 2014.

**Solicitation Title: NIJ, Evaluation of the OVC Vision 21: Linking Systems of Care for Children and Youth State Demonstration Project**

**Who Can Apply?** Applicants are limited to states (including territories), units of local government (including Federally recognized Indian tribal governments as determined by the Secretary of the Interior), non-profit and for-profit organizations (including tribal non-profit or for-profit organizations), institutions of higher education (including tribal institutions of higher education), and certain qualified individuals. Consistent with OJP fiscal requirements, for-profit organizations are not permitted to make a profit as a result of this award or charge a management fee for the performance of this award. Foreign governments, foreign organizations, and foreign institutions of higher education are not eligible to apply.

**What's It For?** NIJ will award funding to evaluate the OVC Vision 21: Linking Systems of Care for Children and Youth State Demonstration Project. The project will support two state-level demonstration sites that will unite a broad network of relevant systems with professionals to establish a comprehensive and coordinated approach to serving child and youth victims and their families. This solicitation seeks proposals to conduct an evaluation of the first phase of the demonstration project, which spans 15 months.

**When's It Due?** Applications are due July 3, 2014.

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**Solicitation Title: NIJ, Information Sharing and Its Effect on Tracking Sex Offenders and Community Awareness: Examining a Key Function of the Sex Offender Registration and Notification Act (SORNA)**

**Who Can Apply?** Applicants are limited to states (including territories), units of local government (including Federally recognized Indian tribal governments as determined by the Secretary of the Interior), non-profit and for-profit organizations (including tribal non-profit or for-profit organizations), institutions of higher education (including tribal institutions of higher education), and certain qualified individuals. Consistent with OJP fiscal requirements, for-profit organizations are not permitted to make a profit as a result of this award or charge a management fee for the performance of this award. Foreign governments, foreign organizations, and foreign institutions of higher education are not eligible to apply.

**What's It For?** NIJ will award funding to support creative and innovative proposals for research that examines how information sharing, a key function of SORNA, may have evolved since the implementation of the Act. Specifically, NIJ is interested in assessing how information sharing has changed how criminal justice agents track, monitor, and prosecute offenders. NIJ is also interested in assessing what types of information are collected and shared, how the public accesses and uses information about sex offenders in their community, and the cost of inter- and intra-jurisdictional information sharing.

**When's It Due?** Applications are due July 7, 2014.

## **Office of Juvenile Justice and Delinquency Prevention (OJJDP)**

### **Solicitation Title: OJJDP, Missing and Exploited Children Training and Technical Assistance Program**

**Who Can Apply?** Applicants are limited to non-profit and for-profit organizations (including tribal non-profit and for-profit organizations) and institutions of higher education (including tribal institutions of higher education). Consistent with OJP fiscal requirements, for-profit organizations are not permitted to make a profit as a result of this award or charge a management fee for the performance of this award.

**What's It For?** OJJDP will award funding to design, develop, and implement coordinated, comprehensive, training and technical assistance on effective responses to missing and exploited children's issues. The award will support multidisciplinary teams of prosecutors, state and local law enforcement, child protection personnel, medical providers, and other child-serving professionals. The purpose of the program is to build the capacity of state and local agencies and to encourage the development and implementation of best practices related to the investigation and prosecution of cases of missing and exploited children.

**When's It Due?** Applications are due June 23, 2014.

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### **Solicitation Title: OJJDP, National Forum on Youth Violence Prevention Expansion Project**

**Who Can Apply?** Applicants are limited to units of local government, including state agencies (if targeted to a local community), and Federally recognized tribal governments (as determined by the Secretary of the Interior) that are currently implementing violence prevention strategies. Lead applicants may partner with a collaborative body that includes representation from city/county leadership, law enforcement, public health, courts, workforce development, housing and urban development, educators, and faith and community members. To be considered eligible, applicants must provide a signed letter of commitment to the goals of the National Forum from, at a minimum, the mayor, chief of police (or equivalent law enforcement executive), and superintendent of schools within the locality.

**What's It For?** OJJDP will award funding to assist successful applicants with planning and travel to the national summit on youth violence prevention. Funding will also support the delivery of training and technical assistance to Forum sites. OJJDP will competitively select as many as five new sites to join the Forum's participating localities.

**When's It Due?** Applications are due June 23, 2014.

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### **Solicitation Title: OJJDP, Initiative to Develop and Test Guidelines for Juvenile Drug Courts**

**Who Can Apply?** Applicants are limited to non-profit organizations (including faith-based, community, and tribal organizations), for-profit organizations, and institutions of higher

education (including tribal institutions of higher education) with demonstrated expertise in helping communities develop, maintain, and enhance family drug courts. Consistent with OJP fiscal requirements, for-profit organizations are not permitted to make a profit as a result of this award or charge a management fee for the performance of this award.

**What's It For?** OJJDP will award funding to support the creation of research-informed guidelines for juvenile drug courts that will promote effective practice and quality service delivery for juveniles with substance abuse disorders served by these courts. This project includes two phases: (1) develop guidelines and (2) test the guidelines. The award recipient will incorporate the findings from this research into recommended modifications to the guidelines, as appropriate, to conclude the second phase.

**When's It Due?** Applications are due June 30, 2014.

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**Solicitation Title: OJJDP, Investigator-Initiated Research on Risk Assessment**

**Who Can Apply?** Applicants are limited to states (including territories), units of local government (including Federally recognized tribal governments, as determined by the Secretary of the Interior), non-profit and for-profit organizations (including tribal non-profit and for-profit organizations), and institutions of higher education (including tribal institutions of higher education). Consistent with OJP fiscal requirements, for-profit organizations are not permitted to make a profit as a result of this award or charge a management fee for the performance of this award.

**What's It For?** OJJDP will award funding to support robust research that investigates comprehensive approaches to risk assessment (i.e., use by multiple agencies involved in juvenile justice decisions) and that is likely to inform juvenile justice reform and improvement efforts. This research should provide clear and compelling answers about the most effective risk assessment tools and their implementation, as well as how risk assessments are used for decisions to ensure: (1) optimal adjudication, disposition, and placement and (2) service provision to reduce recidivism. The research should consider a focus on assessment implementation and use across the entire continuum of agencies within a juvenile justice system and may include local, regional/county, or state systems.

**When's It Due?** Applications are due June 30, 2014.

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**Solicitation Title: OJJDP, Coordinated Assistance for States**

**Who Can Apply?** Applicants are limited to states (including territories), units of local government (including Federally recognized tribal governments, as determined by the Secretary of the Interior), non-profit and for-profit organizations (including tribal non-profit and for-profit organizations), and institutions of higher education (including tribal institutions of higher education). Consistent with OJP fiscal requirements, for-profit organizations are not permitted to

make a profit as a result of this award or charge a management fee for the performance of this award.

**What's It For?** OJJDP will award funding to provide states and communities with coordinated resources, training, and technical assistance. These provisions will assist in the planning, establishing, operating, coordinating, and assessing of delinquency prevention, intervention, and juvenile justice systems improvement projects.

**When's It Due?** Applications are due July 3, 2014.

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**Solicitation Title: OJJDP, Youth Violence Prevention Technical Assistance Program**

**Who Can Apply?** Applicants are limited to non-profit and for-profit organizations (including tribal non-profit and for-profit organizations) and institutions of higher education (including tribal institutions of higher education). Consistent with OJP fiscal requirements, for-profit organizations are not permitted to make a profit as a result of this award or charge a management fee for the performance of this award.

**What's It For?** OJJDP will award funding to make high-quality, cost-effective, training and technical assistance resources available to the jurisdictions funded through OJJDP's signature programs (Defending Childhood, National Forum on Youth Violence Prevention, and Community-Based Violence Prevention Initiatives). The aim of this work is to promote the well-being of children and youth, assist the families and communities in which they reside, and enhance public safety through the prevention and reduction of violence. The successful applicant will work closely with OJJDP to provide technical assistance consistent with the terms of this cooperative agreement.

**When's It Due?** Applications are due July 7, 2014.

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**Solicitation Title: OJJDP, National Gang Center**

**Who Can Apply?** Applicants are limited to non-profit and for-profit organizations (including tribal non-profit and for-profit organizations), and institutions of higher education (including tribal institutions of higher education). Consistent with OJP fiscal requirements, for-profit organizations are not permitted to make a profit as a result of this award or charge a management fee for the performance of this award.

**What's It For?** OJJDP will award funding to a training and technical assistance provider that will continue the activities of the National Gang Center (Center), develop anti-gang curricula, and deliver training to local law enforcement and communities around the United States. The Center provides training and technical assistance to OJP-funded programs and communities across the country, tracks current research and trends on gangs, and maintains a database of comprehensive information on the development and implementation of effective gang prevention, intervention, and suppression strategies.

**When's It Due?** Applications are due July 14, 2014.

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**Solicitation Title: OJJDP, Comprehensive Anti-Gang Strategies and Programs**

**Who Can Apply?** Applicants are limited to states (including territories), units of local government (including Federally recognized tribal governments, as determined by the Secretary of the Interior), and non-profit organizations (including tribal non-profit organizations). OJJDP welcomes applications that involve two or more entities; however, one eligible entity must be the applicant and the others must be proposed as subrecipients. The applicant must be the entity with primary responsibility for conducting and leading the program.

**What's It For?** OJJDP will award funding to enhance coordination of federal, state, and local resources in support of community partnerships implementing the following anti-gang programs: (1) primary prevention, (2) secondary prevention, (3) gang intervention, and (4) targeted gang enforcement. Awards will support coordination of community-based anti-gang initiatives that involve law enforcement as an essential partner.

**When's It Due?** Applications are due July 14, 2014.

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**Solicitation Title: OJJDP, Youth with Sexual Behavior Problems Program**

**Who Can Apply?** Applicants are limited to the following two categories. Category 1: Nontribal Project Sites – states and territories, units of local government, and non-profit and for-profit organizations are eligible. Category 2: Tribal Project Sites – Federally recognized Indian tribal governments, as determined by the Secretary of the Interior, and tribal non-profit and for-profit organizations are eligible. In both categories, OJJDP welcomes joint applications from two or more eligible entities; however, one eligible entity must be the applicant, with primary responsibility for conducting and leading the program, and the others must be proposed as subrecipients. Consistent with OJP fiscal requirements, for-profit organizations are not permitted to make a profit as a result of this award or charge a management fee for the performance of this award.

**What's It For?** OJJDP will award funding to support agencies that utilize a comprehensive, multidisciplinary approach to provide (1) intervention and supervision services for youth with sexual behavior problems and (2) treatment services for their child victims and families. Youth participating in this program must undergo a mental health evaluation to determine if they are amenable to community-based treatment and intervention. Targeted youth offenders should have no prior history of court involvement for sexual misconduct.

**When's It Due?** Applications are due July 17, 2014.

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**Solicitation Title: OJJDP, School Justice Collaboration Program: Keeping Kids in School and Out of Court**

**Who Can Apply?** Applicants are limited to the following two categories. Category 1: Local School Justice Collaboration Program – eligible applicants are local juvenile and family courts (including rural and tribal juvenile and family courts) that can verify that they have a partnership with a local education agency (LEA) that has applied to (1) the Department of Education (ED) School Climate Transformation Grants-LEA (SCTG) and (2) the Department of Health and Human Services (DHHS) Substance Abuse and Mental Health Services Administration (SAMHSA) Now Is the Time Project Advancing Wellness and Resilience in Education (AWARE)-LEA program. Additionally, applicants must partner with local law enforcement (via subgrants) as part of their collaborative effort. Category 2: School Justice Collaboration Program National Training and Technical Assistance – eligible applicants are non-profit and for-profit organizations (including tribal non-profit and for-profit organizations) and institutions of higher education (including tribal institutions of higher education). Consistent with OJP fiscal requirements, for-profit organizations are not permitted to make a profit as a result of this award or charge a management fee for the performance of this award.

**What's It For?** OJJDP will award funding to advance the goals of interagency work already in progress on supportive school discipline. This program aims to collaboratively engage the courts, law enforcement, and other stakeholders in efforts to improve school climates; respond early and appropriately to student mental health and behavioral needs; use positive, alternative responses to avoid referring students to law enforcement and juvenile justice; and facilitate a proactive and supportive school reentry process in those instances in which a youth is referred to the justice system.

**When's It Due?** Applications are due July 21, 2014.

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**Office for Victims of Crime (OVC)**

**Solicitation Title: OVC, Vision 21 Tribal Community Wellness Centers: Serving Crime Victims' Needs**

**Who Can Apply?** Applicants are limited to Federally recognized Indian tribal governments, as determined by the Secretary of the Interior. Tribal designees, Alaska Native villages and tribal consortia consisting of two or more Federally recognized Indian tribes are also eligible.

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cheers

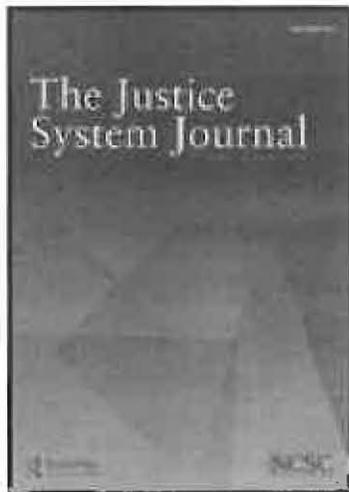
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## Justice System Journal

Publication details, including instructions for authors and subscription information:

<http://www.tandfonline.com/loi/ujsj20>

### A Decoupled System: Federal Criminal Justice and the Structural Limits of Transformation

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Published online: 13 Oct 2014.



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**To cite this article:** J. C. Oleson (2014) A Decoupled System: Federal Criminal Justice and the Structural Limits of Transformation, Justice System Journal, 35:4, 383-409, DOI: [10.1080/0098261X.2014.965856](https://doi.org/10.1080/0098261X.2014.965856)

**To link to this article:** <http://dx.doi.org/10.1080/0098261X.2014.965856>

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## A Decoupled System: Federal Criminal Justice and the Structural Limits of Transformation

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The United States federal criminal justice system is changing. Actuarial risk assessment instruments and evidence-based practices play increasingly important roles; federal reentry court programs have been implemented across the country. Yet, while promising, these developments may not be enough to stem the growth and costs of federal criminal justice. The highly politicized nature of crime and punishment may limit the potential for change. Even within the federal criminal justice system, the decoupled nature of bureaucracies, in which stakeholders make decisions for which they are not financially responsible, makes meaningful change problematic. States, however, have demonstrated that structural changes can foster efficient use of resources and improve fiscal stewardship. A number of statutory, structural, and procedural modifications could help to reorganize a continuum of fragmented bureaucracies into a cohesive federal reentry-centered system.

**KEYWORDS:** federal courts, community corrections, evidence-based practices, reentry courts, bureaucracy, reform

Federal community corrections work is undergoing a kind of sea change (e.g., Alexander and Van Benschoten 2008; Lowenkamp et al. 2012): The nature of the work of probation and pretrial services officers remains formally intact, but its substance is transforming. Increasingly, evidence-based practices drive decision making. The field is becoming more data-driven and more cost-effective in reducing recidivism and improving offender reintegration (Hughes 2008). Important recent developments include the implementation of fourth-generation risk tools (Cadigan and Lowenkamp 2011; Lowenkamp et al. 2013; Van Benschoten 2008) as well as training for probation officers in core correctional practices and cognitive restructuring (Robinson et al. 2011). Simultaneously, a large number of reentry courts have sprung up across the federal judiciary (Meierhoefer 2011; Vance 2011). Today in these problem-solving courts, judges, prosecutors, and defense attorneys work collaboratively in reentry and post-conviction supervision (Huddleston and Marlowe 2011)—formerly the exclusive domain of probation officers. The reentry court phenomenon is intersecting with the evolution of community supervision practices.

It should be a time for terrific optimism. New legislation and initiatives related to reentry have provided decision makers within the federal criminal justice system with new opportunities. This article, however, is more circumspect. What appears to be a bona fide transformation may prove to be little more than rhetoric. Despite the developments of recent years, the highly politicized

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nature of crime and punishment will make meaningful change difficult (Chambliss 1999). Even within the boundaries of the federal criminal justice system, the uncoordinated and decoupled structure of federal agencies, in which no one group of stakeholders claim responsibility for the whole, limits the potential of these innovations. In all likelihood, without restructuring and the adoption of a truly reentry-centered vision of criminal justice (Pinard 2007), the federal criminal justice system will continue to deliver what it has delivered for the past thirty years: a glut of imprisonment that is inefficient (La Vigne and Samuels, 2012), unsustainable (Pew Center on the States 2009), and, ultimately, criminogenic (Clear 2007; Vieraitis, Kovandzic, and Marvell 2007). This possibility of failure is particularly frustrating, given recent evidence from the states indicating that statutory, structural, and procedural changes indeed can build on evidence-based practice to maximize community safety in a manner that is rational, fair, just, and cost-effective. Although these challenges and solutions have obvious relevance within the United States federal justice system, they are also relevant to other jurisdictions around the world, as a growing knowledge base, improved data analysis, and austere budgets all converge to pressure policymakers to be *smart*—as well as tough—on crime (Department of Justice 2013b).

### THE FACE OF AMERICAN CRIMINAL JUSTICE

For nearly fifty years, academics and criminal justice practitioners have argued that real improvements in criminal justice are possible only if leaders conceive of criminal justice as a *system* (President's Commission 1967). Yet this holistic view has proved elusive. In 1997, Wellford observed that one hallmark of the American criminal justice system is its *disarray*. He noted that, rather than functioning as a coordinated system, American criminal justice operates as a poorly coordinated patchwork of independent fiefdoms: "police," "courts," and "corrections" (Wellford 1997). He later argued that practitioners must overcome bureaucratic, philosophical, and measurement barriers if they hope to achieve a system that is more rational, fair, and just (Wellford 2007). Other academics have observed, similarly, that criminal justice stakeholders appear to be concerned only about their own process measures rather than shared outcomes. Part of a loose confederacy, they pass data (and offenders) back and forth, but they do not share a unified vision of the system (Burrell 2012). For example, police officers focus on making a domestic violence arrest, rather than on whether there is future domestic violence (Sherman 1992). The absence of coordinated efforts and methodologies across criminal justice agencies has also been cited as limiting our ability to improve treatment outcomes for offenders moving through the federal justice process (Cadigan and Pelisser 2003). In addition, the failure to adopt a systems approach has permitted excesses that, in the opinion of some, have undermined the very legitimacy of American criminal justice (Forst 2003). Only a *non-systematic* approach, lacking coordination and fiscal responsibility, would allow for the incredible metastatic growth of American correctional populations during the last thirty years (Mauer 2002). Such unchecked growth has led to the phenomenon that the United States, with only five percent of the world's population, now houses twenty-five percent of the world's inmates (Pew Center on the States 2008).

Outside of the academic literature, there is little understanding of just how very out of step the United States is with the rest of the world in its reliance on incarceration. Many criminal justice practitioners do not understand that, compared to the rest of the world, the United States is an outlier in terms of imprisonment rates. "A far higher proportion of adults is imprisoned in the

United States than in any other country in the entire world. Our incarceration rate, which is nearly 750 individuals per 100,000 in the population, is now roughly five to ten times the rate of most other Western industrialized nations” (Berman 2009, 711). Jails and prisons in the United States house a collective 2.3 million inmates, representing an astonishing imprisonment rate of 743 per 100,000 Americans (Walmsley 2011). Worldwide, Rwanda has the second-highest incarceration rate (595 per 100,000) and Russia has the third-highest rate (568 per 100,000), yet it is reported that the U.S. rate exceeds the rate of the top 35 European countries *combined* (Hunt 2011). Also disturbing is the pronounced racial imbalance in American prisons. For white men between the ages of 18 and 64, 1 in 87 is incarcerated; for Hispanics, the rate is 1 in 16; yet for black men, the rate is 1 in 12 (Western and Pettit 2010). It is an unflattering and worrying portrait of American penal exceptionalism (Brayne 2013; Downes 2001). Yet equally troubling to this picture is the reluctance of stakeholders to acknowledge or confront it. Although three-year recidivism rates average 68 percent in state jurisdictions (Langan and Levin 2002), we continue to construct new prison facilities, ignoring the inconvenient truth that prisons do not actually appear to prevent crime (Cullen, Jonson, and Nagin 2011). Judge Richard Nygaard described the U.S. reliance of ineffective prisons in scathing terms:

American penology . . . is in shambles . . . . The law predetermines to hold responsible and punish any should they transgress the law. For most, the punishment is prison. Few question why. Society seems somehow to think collectively that we must only imprison. It is a seemingly fitting epilogue to a criminal trial. Prison [however] is systemically unsuccessful except as a temporary human warehouse, a social bandaid . . . . Is it not time we recognize the hard fact that our system is not correcting significant numbers of malefactors? Not preventing crimes? Not deterring criminals? Not assuring anyone’s safety? . . . Our penological system stumbles uncertainly in darkness, clinging to antiquated and ineffective notions. The American prison is like a cathedral to a false god. Our response—build more of them. (1995, 4–9)

The federal government, in particular, has constructed many of these cathedrals. In 1980, the federal Bureau of Prisons (BOP) housed approximately 21,000 inmates at a cost of \$333 million per year. Today, the BOP houses 218,000 inmates, and its annual budget is \$6.6 billion (Department of Justice 2013). This represents a population increase of 938 percent and a budgetary increase of 1,882 percent. Current forecasts indicate that this growth will continue and the inmate population will grow by another 11,000 during the next two years (Government Accountability Office 2012). Because too many prisoners will go back and not enough will come out (Rowland 2013), crowding will worsen. Prison crowding has been associated with a host of penological ills (Oleson 2002), including—ominously—increases in post-release recidivism (Drago, Galbiati, and Vertova 2011).

For years, academic critics have warned that America’s prison growth is unsustainable (see, e.g., Austin and Irwin 2011; Clear 2007; Drucker 2011; Gottschalk 2006; Langan 1991). Their voices have howled in the wilderness, yet American criminal justice policy has continued to follow the same punitive path (Pew Center on the States 2009). Increasingly, however, it is no longer only ivory tower academics who are sounding the alarm against a nation that is overreliant on incarceration. In his 2009 address to the American Bar Association, Attorney General Eric Holder said plainly that the country’s extraordinary incarceration rates were “unsustainable economically” (in Gottschalk 2010, 62). Later, in powerful testimony before the Senate Judiciary

Committee, Brett Tolman, former United States Attorney for the District of Utah, explained that experience had taught him about the deficiencies of the federal criminal justice system.

The current one-size-fits-all approach and warehousing of prisoner is proving not only dangerous to public safety but an unthoughtful misuse of precious taxpayer dollars. Experts across the political spectrum are finding themselves in agreement that the current growth of, and costs associated with, the federal correction system is unsustainable. (2012, 1)

Tolman went on to explain that during the last fifteen years, “the enacted BOP budget has increased from 15 percent to 24 percent of the Department of Justice budget . . . funding the expanding BOP population has become a threat to other priorities, including federal law enforcement and prosecution” (2012, 2). He continued:

[T]he federal system has neither been thoughtful nor conscientious in its punishment of those it convicts. In the drug arena, DOJ is expected to use the hammer of heavy mandatory minimum sentences to dismantle drug trafficking—but the reality is that most prosecutions, while resulting in significant prison sentences, are only netting “mules” or small time traffickers . . . . Over the last dozen years, Congress and the Department of Justice have been so focused on prosecuting and punishing crime . . . that there has been an absolute failure to recognize that without an equal focus on recidivism reduction the tough sentencing laws the federal criminal justice system may well be the downfall of a once proud and effective agency. (2012, 3)

Most criminal justice stakeholders perform their functions narrowly (Bogira 2006). Typically, they know only their individual processes and myopic objectives; few collaborate to advance wider goals. So blinkered, one government agency’s processes and procedures can unintentionally hinder the mission of other agencies. It is easy to understand how agencies could (inadvertently) work at cross purposes within such a labyrinthine structure as the federal criminal justice system. Within this system, citizens charged with federal crimes are defined first as defendants, then as inmates, and finally as offenders. They are brought by the executive branch before the judiciary, are imprisoned for years within the executive branch, and then come back out into the custody to the judiciary. It is an example of the “new penology” (Feeley and Simon 1992), “an administrative style that seeks depersonalized efficiency in processing increasingly large hordes of inmates in and out of the system” (Cullen 1995, 339–340). Of course, efforts are being made to humanize the continuum, to collaborate across the federal system, and to become more cost-effective, such as coordination between U.S. Probation and Pretrial Services and the BOP (Cadigan and Pelissier 2003). However, the challenges of a fragmented federal criminal justice system cannot be solved by simply adopting a continuum of care model (even one that extends from pretrial services to BOP through to post-conviction supervision). The problems are too great. They are political. They are philosophical. They are structural.

Jeremy Travis has identified what he calls the iron law of corrections. It is a brief and pithy law, stating simply that “they” (which is to say, inmates) *all come back* (2005, xxi). And they do. Except for the tiny fraction of federal inmates serving life sentences (3.1 percent), all federal inmates reenter neighborhoods and communities. Approximately 60,000 federal inmates release annually to the supervision of federal probation officers (Hogan 2011, tbl. 8). These individuals should be the concern of all stakeholders within the federal criminal justice system. The reduction of recidivism, victimization, and revocation proceedings should be part of the work of everyone, not just U.S. Probation. Yet this is not the case. Except within the context of reentry courts,

Assistant Federal Public Defenders typically become involved with offender reentry only once violation proceedings have been initiated; for most Assistant United States Attorneys, violation proceedings are just another duty day call. Rhine and Thompson warn:

The reentry movement in corrections will become a compelling force for change if it is tied strategically to advocacy for and the eventual adoption of sentencing reforms that incorporate the elements associated with a jurisprudence of reentry. Such a redirection must first account for current practice in the criminal justice system. As Pinard notes, though reentry services have expanded and shown greater promise for the past several years, key legal figures in positions of decision-making authority have not yet become integral players in the reentry process. In discharging their responsibilities, defense counsel, prosecutors and judges at the front-end of the criminal justice system are largely disconnected from those at the back-end in corrections who provide support and assistance relative to reentry and offender reintegration. (2011, 206)

The challenges of engaging front-end courtroom actors in the back-end work of offender reintegration are very real. Many judges perceive their role as that of a dispassionate arbiter, and they may view one-on-one engagement with reentering offenders as undermining the court's perceived neutrality. Similarly, prosecutors may see their role as one of catching bad guys, not rehabilitating them; and defense counsel may understand their function narrowly, as keeping their clients out of prison. Even when judges, prosecutors, and defense counsel *are* willing to participate in reentry work, logistical issues of organizational responsibility, workload, funding, staff motivation, and skills training can undermine the implementation of key principles (Drug Courts Program Office 1997) and limit the impact of these professionals on recidivism rates (e.g., Lipsey and Cullen 2007). Nevertheless, the concept of offender reentry has attracted a great deal of attention within the federal criminal justice system (e.g., Department of Justice 2013b; Lattimore and Visser 2009; Listwan et al. 2008; O'Hear 2007; Winterfield et al. 2006); today, new techniques and tools are helping to reshape federal community corrections.

## TWO DEVELOPMENTS IN FEDERAL CRIMINAL JUSTICE

The move to establish federal reentry courts (including drug courts, veteran courts, and mental health courts) and to adopt evidence-based practices in federal community corrections are two important changes that have shaped federal criminal justice over the last several years. Increasingly, there are synergies and confluence between them. Promising early evidence suggests that these movements may improve community safety through reduced recidivism (Robinson et al. 2011; Vance 2011), yet it remains to be seen if they actually signal a bona fide transformation of the federal criminal justice system.

### Reentry Courts

The rise of reentry courts across the federal judiciary is a phenomenon that already has been well documented (Meierhoefer 2011; Vance 2011). Reentry courts evolved from drug courts, which "transform the adversarial role of the court into a non-adversarial forum for problem solving collaboration among the judiciary, prosecution, defense bar, probation, law enforcement, and

treatment services agencies” (Vance 2011, 64). Reentry courts were first proposed as a method to assist with prisoner reintegration in the states in 1999 by then-NIJ Director Jeremy Travis (Vance 2011). Then-Attorney General Janet Reno argued:

[T]he court will use its authority for *positive reinforcement* . . . the reentry court is modeled on the same theory of carrot and stick approach [as drug courts] in using *the strength of the court and the wisdom of the court* to really push the issue . . . The reentry court would promote positive behavior by the returning offender. It would *marshal resources* to support the offender’s successful reintegration into society. The court would also use its power of punishment, using the graduated range of *swift, predictable sanctions* to make sure the individual stays on the right track. (quoted in Vance 2011, 64, emphasis added)

In 2000, the Department of Justice’s Office of Justice Programs (OJP) established a reentry court pilot, entitled the Reentry Courts Initiative (RCI), whose goal was to “establish a seamless system of offender accountability and support services throughout the reentry process” (Lindquist, Hardison, and Lattimore 2004, 96–97). This pilot project was hailed as a success, and today reentry courts have spread across the United States (Miller 2007). As of December 31, 2011, there were an estimated 31 state reentry courts and 46 federal reentry courts operating across the United States, representing a substantial fraction of the more than 2,600 estimated problem-solving courts in the country (National Institute of Justice 2012). Meta-analysis suggests that problem-solving courts reduce recidivism by approximately 10.7 percent (Aos, Miller, and Drake 2006); every dollar invested in problem-solving courts saves approximately \$1.74 in avoided justice system costs (Barnoski and Aos 2003). For high-risk offenders, the savings can be enormous: the lifetime savings associated with diverting a high-risk youth from career criminality is approximately \$1.7 to \$2.3 million per offender (Cohen 1998).

In the federal judiciary, early reentry court programs emerged in about 2005 (Vance 2011). In 2010, the Judicial Conference Committee on Criminal Law commissioned the Federal Judicial Center (FJC) to evaluate the use of reentry courts within the federal judiciary. The FJC subsequently surveyed the 93 Chief U.S. Probation Officers to determine whether their districts either operated or were planning reentry courts. Initial data indicated that 41 of the 94 districts operated judge involved supervision programs, but a detailed follow-up survey identified 36 districts hosting 39 different programs. More than three quarters of these judge-involved programs were initiated at the request of the court (Meierhoefer 2011). At the time of the survey, 1,413 offenders had participated in the programs, with a median size of ten participants and an average graduation rate of 51.4 percent (Meierhoefer 2011). Again at the request of the Committee on Criminal Law, the FJC also began two evaluations of federal reentry courts. These are still under way. The first is a six-district prospective pilot with random assignment of program participants. The second is a retrospective outcome study. There have also been three other formal evaluations of federal reentry courts to date (Oregon, Massachusetts, and Michigan Western), with mixed results (Vance 2011).

### Evidence-Based Practices

In recent years, evidence-based practices have also played a noteworthy role in federal community corrections. The Office of Probation and Pretrial Services (OPPS) at the Administrative

Office of the United States Courts has adopted evidence-based practices (Alexander and Van Benschoten 2008; Hughes 2008). Following an IBM/Price Waterhouse assessment completed in 2004, OPPS took steps to apply the best available research evidence to post-conviction operations. The Research-to-Results (R2R) program provided funding to federal districts interested in pursuing evidence-based programming. These efforts included implementation and evaluation of motivational interviewing, cognitive behavioral treatment, workforce development, and other related initiatives (Alexander and Van Benschoten 2008). The R2R districts served, in a sense, as laboratories through which OPPS was able to evaluate which, if any, initiatives might be replicated more broadly throughout federal probation. In approving districts' R2R efforts, OPPS was guided by the evidence-based principles of principles of risk, need, and responsivity (Andrews, Bonta, and Hoge 1990). Simply stated, the risk principle directs that criminal justice interventions focus on higher-risk offenders; the need principle requires supervision efforts to address those risk factors that are subject to change; and the responsivity principle states that interventions should be cognitively and behaviorally based and tailored to the individual circumstances of each offender.

Drawing from the lessons of R2R and the extant literature, OPPS developed and implemented a fourth-generation risk instrument, the Post-Conviction Risk Assessment (PCRA) (Lowenkamp and Whetzel 2009; Oleson et al. 2012). To date, the instrument has been used to assess eighty percent of the 128,000 federal offenders currently under federal supervision. Using static factors, OPPS also developed a Pretrial Risk Assessment (PTRA) tool, to be employed by officers in making pretrial release or detention recommendations (Cadigan 2009; Cadigan and Lowenkamp 2011). OPPS data indicate that 91 of 93 districts currently calculate the PTRA, although the degree to which the results are shared with judicial officers and/or prosecutors and defense attorneys varies. The remaining challenge lies in persuading other stakeholders (i.e., judges, prosecutors, defense attorneys, BOP officials, and staff of residential reentry centers) to accept—and to incorporate into practice—that actuarial risk prediction is more accurate than clinical judgment alone (Grove et al. 2000; Oleson et al. 2011).

On the heels of implementing actuarial risk prediction, OPPS developed and piloted training to improve officers' structured interventions with offenders. Entitled "Supervision Training Aimed at Reducing Recidivism" (STARR), the training teaches officers to use core correctional practices (Andrews and Kiessling 1980) as well as cognitive restructuring (Bonta et al. 2011). Essential to STARR is the officer's ability to establish a therapeutic alliance and to treat the offender in a manner that is firm but fair. STARR included initial training, the use of audiotaped interaction with offenders to measure the officers' use of the skills, booster sessions, and professional coaching. Initial evaluations of the impact of STARR were encouraging, revealing a twenty-five percent relative reduction in recidivism between offenders with STARR-trained officers and offenders whose officers were not STARR-trained (Robinson et al. 2011). Currently, OPPS is working with fourteen wave-one districts that are providing training in STARR techniques, and more than twenty districts will participate in future waves of STARR training (Hogan 2012).

OPPS's efforts supporting evidence-based practices, particularly the risk principle (cf. Department of Justice 2013b), has also been translated into interagency cooperation. For example, in support of the risk principle, in 2010, OPPS and the BOP modified their agreement so that only low-risk inmates may be referred to U.S. Probation to complete the final six months of their sentence on location monitoring (Cornish 2011). Given the financial benefit of placing an inmate on U.S. Probation supervision and location monitoring (at 15 dollars per day) versus placement

in a much more expensive (67 dollars per day) contracted Residential Reentry Center (RRC), the program has obvious fiscal value. Despite some indifference and resistance to implementation within the field, the program is estimated to have saved the BOP \$2.5 million during fiscal year 2012. OPPS staff members have also collaborated with the BOP in tracking the release of inmates through shared information technology. The “Red Flag Report” system automatically notifies federal probation offices if inmates who have been released from the BOP have not started post-conviction supervision (Third Branch 2010). Today, slipping through the cracks of reentry is nearly impossible, and the public safety benefit of the system, especially for high-risk inmates, is great. These examples indicate that the potential benefits of collaboratively applying the risk principle throughout the federal criminal justice are profound.

Federal criminal justice is rich with promise, yet serious work remains to be done. The possibility of refocusing probation officers as agents of long-term behavioral change (Smith et al. 2012) is real but difficult. Equally difficult is navigating new areas of risk and evidence-based practices within the courts, such as using actuarial risk assessment in sentencing decisions (Oleson 2011) or in support of existing or emerging reentry court programs.

### Confluence between Evidence-Based Practices and Reentry Court Programs

OPPS’s efforts to promote evidence-based practices and the FJC’s promotion of reentry courts inform one another. For example, the prospective reentry court pilot includes (as one element) probation officers who have been trained in STARR techniques. Additionally, both innovations have benefited from recent legislation and resources “designed to protect the public and promote the successful reentry of the offender into the community” (18 U.S.C. §3672). The Second Chance Act of 2007 greatly expanded the breadth of services that U.S. probation officers could provide for offenders. Subsequent policy guidance approved by the Judicial Conference allows probation officers to target virtually all of an offender’s dynamic risks and responsivity factors identified through use of the PCRA instrument (Lowenkamp et al. 2013). While probation officers were the driving force in providing Second Chance resources in some courts, reentry court judges were often more proactive in ordering services for program participants.

It may be years before the FJC completes its evaluation of the federal reentry courts and before the Judicial Conference formerly addresses the role of reentry courts within federal criminal justice. Nevertheless, in the interim, three interventions (that underlie both evidence-based practices and reentry courts) might be implemented immediately throughout the federal criminal justice system: (1) the use of a therapeutic approach (incorporating aspects of procedural justice), (2) heavy resourcing for high-risk offenders, and (3) swift and certain responses to noncompliant behavior. These very closely parallel the comments of former Attorney General Janet Reno, emphasizing positive reinforcement and the wisdom of the court, marshaling effective resources, and imposing swift and predictable sanctions.

The therapeutic rapport that judges can establish with reentry court participants is considered by many to be essential to promoting offender change (Marlowe, Festinger, and Lee 2004). To be effective, roles, procedures, and expectations must be made clear to offenders (including specific consequences of noncompliance), and procedures must be firm but fair. If these key components can be established, real change is possible. A substantial body of research has demonstrated that procedural justice in the courtroom produces beneficial offender outcomes (e.g., Lind and Tyler

1988); it has value for probation officers and other community correctional workers as well (Tyler 2010). Whether in the context of a reentry court or a probation officer's home visit, adherence to evidence-based practices and principles of procedural justice can make a difference in promoting meaningful offender change.

Janet Reno argued one benefit of reentry courts would be their ability to "marshal resources" for reentering offenders to assist them with reintegration. Indeed, one reason cited by critics for the proliferation of drug and reentry courts "is the failure of probation to address the needs of clients . . . courts can be more resource intensive, but do basically the same thing as probation departments are tasked with doing—provide case management and treatment resources [to offenders] while under criminal justice supervision" (Walsh 2011, 5). The passage of the Second Chance Act, and the allocation of funds to the courts to make use of the new authority, made unprecedented resources available to reentering federal offenders. Consistent with the risk principle, most services were reserved for moderate and high-risk offenders.

Janet Reno noted that courts could apply swift, predictable sanctions. Indeed, in a reentry court context, the judge and the court team can respond very nimbly to offender noncompliance. Actions that immediately reflect disapproval of misconduct are far more effective in reducing recidivism than actions that are disproportionate, delayed, or inconsistent. The effectiveness of a sanction depends on its certainty (Grasmick and Bryjak 1980; Paternoster 1987), celerity (Clark 1988), and proportionality (Von Hirsch 1992). Unfortunately, outside of reentry courts, response to offender noncompliance in federal courts is rarely swift or certain. Often, "probation and parole officers are more limited in their options they have to respond to either positive achievement or relapse than . . . judges" (Walsh 2011, 5). Even in the courtroom, judges' attitudes about and reactions to noncompliance vary greatly (Frankel 1973), ranging from zero-tolerance judges who revoke offenders for *any* use of illicit substances, to those who do not want to be notified of illicit drug use until three or more positive tests.

Swift and certain sanctions are a cornerstone of gun violence interventions such as Project Ceasefire (Braga et al. 2001) and Project Safe Neighborhoods (Papachristos, Meares, and Fagan 2007). They are also integral to the HOPE Project (Hawken and Kleiman 2009). In Hawaii, weekend jail was used as a response to offenders' illegal drug use identified through frequent, random drug tests. Early HOPE evaluations produced phenomenal results: HOPE probationers were 55 percent less likely to be arrested for new crimes and were 72 percent less likely to use drugs (Hawken and Kleiman 2009). Hopeful that Hawken and Kleiman's results might be replicated elsewhere, the National Institute of Justice has awarded a major grant to further evaluate HOPE's effectiveness with field demonstrations in four new sites (Office of Justice Programs 2011).

In summary, it appears that when used in combination, a therapeutic approach, heavy resourcing for high-risk offenders, and swift and certain sanctions offer a promising prescription for reducing recidivism, whether in the context of normal probation supervision or problem-solving reentry courts. The real challenge, however, lies in taking these three elements to scale across the system.

### Limited Benefit: The Challenge of Taking Change to Scale

Even in the first iteration of reentry courts under OJP's Reentry Courts Initiative, many programs operated on a very small scale (Lindquist, Hardison, and Lattimore 2004). Today, the same is

true of federal reentry courts. Currently, there are approximately 128,000 offenders under federal supervision (Hogan 2011, tbl. 8). According to the PCRA, approximately sixty percent (76,000) of them are medium or high risk and, therefore, good candidates for reentry court participation (Marlowe et al. 2006). Yet, according to the FJC, as of 2011, only 1,400 offenders (a figure representing less than 2 percent of all medium- and high-risk offenders) had participated in federal reentry courts (Meierhoefer 2011). Under existing structures, it is difficult to imagine how reentry courts might be made available to all defendants in need. One approach might be to make participation in reentry court mandatory for *all* federal offenders. This, however, would be an extraordinarily expensive and resource-intensive model of justice (NACDL 2009). The FJC found that federal reentry court programs averaged 321 annual hours of staff time to service a median ten program participants (Meierhoefer 2011). Indeed, critics of reentry courts have argued that since reentry courts are “one of the most expensive options for addressing the addiction issues of people in the justice system outside of prison, we should be putting the bulk of our resources where we get the most return” (Wright 2010, 10).

Yet while moving drug treatment outside of reentry courts may reduce costs (Barnoski and Aos 2003), it will not itself ensure that judicial resources are aligned with the dynamic risks of the population. For example, under historic decentralized funding, federal probation offices nationwide spent approximately \$50,000,000 per year on substance abuse treatment services, even though the PCRA has identified a mere 18 percent of offenders for whom substance abuse operates as a dynamic risk factor. By comparison, less than \$2.5 million has been allocated under annual Second Chance funding, which is used to address all other types of dynamic needs and responsivity factors. To realize cost-effective recidivism reduction, “heavy resourcing” for reentering federal offenders must be coordinated in a different manner.

Greater consistency is also needed in the responses to offender noncompliance. While the U.S. Sentencing Guidelines were imposed to ensure parity in federal sentencing by restricting judicial discretion (Oleson 2011; Stith and Cabranes 1998), relatively little attention has been paid to the idiosyncratic manner in which federal stakeholders respond to noncompliance while offenders are under community supervision. Revocation rates vary widely across courts and do not necessarily reflect differences in risk levels. Unless we are swift and certain in response to noncompliance, system-wide, it may be difficult to create lasting behavioral change, particularly with high-risk offenders.

Taking the lessons of evidence-based practices and reentry courts to scale throughout the federal criminal justice system would be an immense challenge. Doing so would involve retargeting (and almost certainly increasing) resources. It would require strengthening stakeholder responsiveness to reentering offenders. It would imply mandating greater structure in how districts address offenders’ failings. These would be involved and difficult changes. The challenge of applying these lessons system-wide, however, is even greater. The challenges are political. They are philosophical. They are structural.

## THE POLITICIZATION OF FEDERAL CRIMINAL JUSTICE

There are many reasons that criminological research may not translate into public policy interventions (Austin 2003; Schmitt 2013), but even when armed with relevant data, policymakers and legislators do not always make evidence-based choices (Lilienfeld et al. 2013). For example,

although there is unimpeachable evidence that needle exchange programs are effective in reducing the spread of HIV and AIDS (Abdul-Quader et al. 2013), programs of this kind are often opposed on moral and political grounds. Consequently, few such programs have been established in the United States (Lurie and Drucker 1997). On the other hand, research demonstrates that the DARE (Drug Abuse Resistance Education) programs are ineffective (Boyum et al. 2011; West and O'Neal 2004) and that scared straight programs affirmatively *increase* the risk of crime (Petrosino et al. 2000); nevertheless, these programs continue to be funded and implemented. While offenders with high measures of criminogenic risk and need derive the largest benefit from corrections interventions, and while those with low risk and needs can be made affirmatively worse by interventions (Lowenkamp et al. 2006), many new programs exclude offenders with high risk and needs (e.g., Walsh 2011) and “cherry pick” low-risk clients to ensure that the program appears to be successful (Miller et al. 2004). In the face of politics as usual, knowledge is not enough.

Drug policy is one highly politicized arena in which criminal penalties frequently do not align with actual social or public health harms. In their analyses, Nutt and his colleagues (2007) found that legal drugs (such as alcohol and tobacco) had more deleterious physical and social effects than some illegal drugs (such as MDMA [ecstasy], LSD, and cannabis/marijuana). This, however, is unsurprising; moral and political arguments often matter more than rational policy making. For example, although the chemistry of powder cocaine and cocaine base (crack) are identical, the federal penalties for the two forms of the drug are very different. Until 2010, under 21 U.S.C. §841(b)(1), the possession of five grams of crack cocaine (the weight of a U.S. nickel) triggered a mandatory minimum term of five years in federal prison, but to trigger an equivalent term for powder-form cocaine, five hundred grams (1.1 pounds) was required. The 100-to-1 crack/powder disparity was criticized for years (e.g., Blumstein 2003; U.S. Sentencing Commission 1995, 1997, 2005, 2007; Vagins and McCurdy 2006), and finally, in 2010, the Fair Sentencing Act reduced the ratio to 18:1, eliminated the mandatory sentence for simple possession, and permitted retroactive sentencing in some cases (Berman 2011). Of course, the 18:1 disparity *still* exists, and the effects of the federal government's war on drugs will reverberate for years. Federal prisons are filled with drug offenders serving lengthy prison terms. Indeed, it is ironic that at the same time twenty U.S. states and the District of Columbia have voted to legalize medical marijuana (Godfrey 2013), more than half of the offenders currently in the federal prison system are drug offenders (Bureau of Prisons 2013).

Because of a new politically driven focus on immigration offenses, however, the relative influence of drugs may wane. In fiscal year 2012, more federal offenders were sentenced for immigration offenses (32.2 percent of cases) than for drug offenses (30.2 percent of cases) (Schmitt and Dukes 2012); as of the third quarter of fiscal year 2013, more offenders were convicted of immigration offenses than of any other type of offense (U.S. Sentencing Commission 2013, tbl 3). The reason is political. In 2006, the U.S. Department of Justice introduced Operation Streamline (Lydgate 2010), which replaced the federal government's catch-and-release immigration policy to a zero-tolerance one that emphasized arrest and prosecution. Under Operation Streamline, massive numbers of immigration offenders have been processed through the federal courts (and sent to federal prisons). In some border districts, immigration proceedings are handled en masse, with as many as eighty defendants pleading guilty in a single assembly-line-style proceeding (Lydgate 2010). The impact on federal sentencing is remarkable. According to the U.S. Sentencing Commission, “[t]he number of immigration cases has increased by 97 percent in the last

decade” (Schmitt and Dukes 2012, 2). Immigration offenses now represent the third highest category of offenders in federal prison (following drugs and weapons/explosives/arson), and today, more than a quarter of federal prisoners are noncitizens (Bureau of Prisons 2013).

Sometimes the politics of criminal justice is not about any particular type of crime (e.g., drugs or immigration) but about the allocation of discretion within the criminal justice system. The judiciary itself has become a target for the politics of justice. The passage of California’s notorious three-strikes law (requiring imposition of a 25-years-to-life sentence upon conviction for a third qualifying serious or violent crime) was as much a populist rejection of judges who were perceived to be soft on crime as it was a reaction to high-profile homicides (Brayne 2013), and even politicians who did not agree with the legislation chose not to oppose it (Domanick 2005; Kieso 2005; Taibbi 2013). Politics may also help to explain the state’s response to the U.S. Supreme Court’s decision in *Brown v. Plata* (2011), requiring California to reduce its prison populations by 46,000 inmates (to 137.5 percent of design capacity). Although evidence suggests that incarceration may be criminogenic (Cullen, Jonson, and Nagin 2011), California rejected calls to comply with the Court’s order through the release of low-risk offenders. Instead, the state has attempted to ameliorate crowding through a process of “justice realignment,” incarcerating nonviolent, non-serious, and non-sex offenders in county jails and private prisons (California Department of Corrections and Rehabilitation 2012). California’s prisons remain overcrowded at 149.5 percent design capacity, but the state has moved to vacate the order to reduce overcrowding (Chemerinsky 2013).

In the federal justice system, some tough-on-crime lawmakers have indicated that federal judges cannot be trusted with discretion (Stith and Cabranes 1998) and have enacted mandatory minimum penalties to ensure that, upon a qualifying conviction, all judges—even judges who would oppose such a severe sentence in a particular case—impose consistent punishments. Of course, federal mandatory penalties produce egregious sentencing disparities (Gill 2008; Goodwin 1992; Luna and Cassell 2010; U.S. Sentencing Commission 2011) and have produced a number of high-profile miscarriages of justice (Cassell 2007; Oleson 2007). The final results of such laws may be harsh, even unconscionable, but for politicians who rely on popular support for reelection (Beale 1997), appearing tough on crime is traditionally a safe bet, while appearing weak on crime can be fatal, professionally speaking.

Thus, while reentry courts and evidence-based practices are cause for optimism, signaling a possibility of genuine transformation in the federal criminal justice system, the politicized nature of criminal justice represents a very real limit to change. Of course, most legislators and policymakers want to use justice system resources more efficiently, but the reality of politics means that criminal justice initiatives often need to demonstrate short-term gains (within a single election cycle) and that at the end of the day, voter support counts for as much as (or more than) good policy. Of course, the challenges of transforming the federal criminal justice system are not merely political; they are also structural.

## THE STRUCTURAL LIMITS OF TRANSFORMATION

It has already been noted that the United States, possessing just five percent of the world’s population but twenty-five percent of its prisoners, is an outlier in terms of incarceration rates (Berman 2009). Many state governments, however, are reversing their historic overreliance on

incarceration. In testimony before the Senate Judiciary Committee, former U.S. Attorney Brett Tolman noted:

[B]y utilizing public resources more efficiently, many states have stopped the upward trajectory of their prison population. Some have actually reversed course. In fact, 2009 was the first time in 38 years in which the combined State prison population declined. At the same time, these States have realized declining crime rates and increased public safety. (2012, 4)

Many states, as well as the federal government, are trying to be increasingly smart on crime (Department of Justice 2013b). The state of Ohio provides one excellent case study. Consistent with national trends in the 1990s, Ohio used imprisonment for many juvenile cases, including transferring juveniles to adult court. Because of overcrowding, however, Ohio needed to motivate counties not to send juveniles to state facilities. With the launch of an innovative program entitled RECLAIM (Reasoned and Equitable Community and Local Alternatives to the Incarceration of Minors), Ohio sought to reduce its use of juvenile commitments by expanding local jurisdictions' use of community-based alternatives (Listwan et al. 2008). Before RECLAIM, counties could send an unlimited number of juveniles to state institutions but received no funds for community-based alternatives. The state, not the counties, paid the costs of incarceration. Under RECLAIM, however, the state provided funds to counties to develop local noncustodial alternatives (allocations were based on the average number of felony adjudications in each county) and then allowed the counties to decide whether juvenile offenders could be handled adequately by local interventions or whether state commitment by the Department of Youth Services (DYS) was required. Under RECLAIM, counties were charged a daily fee for each juvenile in DYS custody, except for violent juveniles (i.e., those guilty of murder, aggravated assault, and rape) who could be sent to DYS at no cost (Moon et al. 1997).

To evaluate the RECLAIM pilot program, researchers matched the nine counties where the program began with nine other Ohio counties. During RECLAIM's first year, the number of juvenile commitments in pilot counties decreased by 42 percent, while the number in non-pilot counties increased by 23 percent. Once controls were put in place to account for changes in the volume of adjudications, DYS commitments from pilot districts still decreased, while commitments in non-pilot districts remained stable. When adjudications were differentiated by degree of felony (first through fourth-degree), researchers found that pilot districts continued to refer first- and second-degree felony juveniles to DYS at approximately the same rate, while a large percentage of lower-level felonies were addressed at the county level. Additionally, on average, counties were able to retain 46 percent of their state-provided funds to pay for local programming (Moon et al. 1997).

The state of Texas is sometimes maligned as excessively punitive (Teague 2001), but it provides an excellent second case study of budget-precipitated criminal justice innovation. In the mid-2000s, the Texas Legislative Budget Board recommended constructing seven to eight new state prisons. Instead, strategic bipartisan reforms were passed and signed into law (Center for Effective Justice 2013). In 2007, Texas allocated \$241 million for additional diversion and treatment capacity; these investments are estimated to have generated a short-term net savings of \$43.9 million by rendering unnecessary the need to create additional prison units. In 2008, while the average state incarceration rate increased 0.8 percent, Texas's incarceration rate *fell* 4.5 percent. In 2009, the Texas prison population dropped by another 1,563 inmates, and in the summer of 2011, Texas closed a prison for the first time in state history. They have saved two

billion dollars through their approach to incarceration, rehabilitation, and recidivism reduction. Simultaneously, the Texas crime rate has dropped by 12.8 percent, and its violent crime rate has dropped at a greater degree than that of the rest of the nation (Tolman 2012).

The kind of legislative and regulatory modifications that relieved population pressures in Ohio and Texas could produce comparable savings in the federal system, but innovations of this kind have not been implemented (Government Accountability Office 2012). Why does the federal criminal justice system continue to conduct business as usual, obtaining the same results? Why has the federal system not realized the same efficiencies as Ohio and Texas?

### A Decoupled System

There are a host of obstacles that impede the government's ability to effect meaningful change in the federal criminal justice system. The federal system is larger than corresponding state systems (Carson and Sabol 2012). At present, there are approximately 120,000 federal law enforcement officers working in 73 federal law enforcement agencies (Reaves 2012). The federal courts span 94 different judicial districts, and the Bureau of Prisons operates 119 different federal correctional institutions. Criminal justice policies in effect in one part of the country may not apply in other locations (e.g., Tillyer and Hartley 2013). The federal system is also more complex. In fact, the federal criminal system is so complex that no one actually knows how many federal crimes there are (Strazzella 1998), though estimates indicate that there are about four thousand federal crimes (Baker 2004). While much of the federal justice system lies within the purview of the executive branch (e.g., Federal Bureau of Investigation officers, U.S. Marshals, staff of the federal Bureau of Prisons, and assistant U.S. Attorneys in the Department of Justice), other crucial elements lie within the judicial branch (e.g., U.S. probation and pretrial services officers, federal defenders, and U.S. district court judges). As separate and co-equal branches of government, no single individual or body has authority over all relevant organizations. And because funds are allocated through different congressional committees, federal criminal justice agencies must compete for their budget appropriations. Funding does not come from a common pool. It is a large and complicated system.

All of these characteristics make real change to the system difficult. All of them represent difficult, perhaps intractable, problems. Yet one of the greatest obstacles to change in the federal criminal justice system is its decoupled nature. Decoupling refers to situations in which stakeholders make decisions that have financial implications for the larger system, but not for that stakeholder's own bottom line. That is, stakeholders make decisions for which they are not financially responsible. Of course, having a financial stake in critical liberty decisions could potentially cloud judgments or unduly sway the decision-maker (e.g., Miller and Selva 1994; Worrall 2001), and principled decoupling therefore has important benefits (see Hagan, Hewitt, and Alwin 1979). Nevertheless, because the federal criminal justice system includes various stakeholders and decision-makers who "own" different aspects of the process, decoupled decision-making has created enormous financial and social costs.

For example, federal prosecutors, led by a United States Attorney in each district, enjoy broad discretion about which crimes to investigate and to prosecute, which charges to file, when and whether to plea bargain, and whether to seek pretrial detention (Bloom 1999). The federal prosecutor can move to have a defendant detained in the interest of public safety (18 U.S.C.

§3142(f)). While many arguments and motions for pretrial detention are made on the basis of community safety, privately, many Assistant United States Attorneys admit that they rely on pretrial detention to coerce a defendant's cooperation and/or guilty plea (Harwin 1993). The rate of pretrial detention has increased steadily throughout the past twenty years (Cadigan 2007), and it now stands at 66.2 percent (Hogan 2011, tbl. H-14). After excluding noncitizen immigration cases, the rate is still 53.4 percent (Hogan 2011, tbl. H-14A). Thus, pretrial detention for defendants—citizens, presumed innocent under the law—is now the norm. The structural effects of this detention rate are grave (Klein 1997), and the cumulative financial consequences are vast: pretrial detention costs approximately \$72.88 per day per defendant, while pretrial supervision in the community costs only \$7.35 (Rowland 2012). These costs appear particularly egregious given that even the highest-risk pretrial defendant (category five, according to the PTR instrument), has an 80 percent chance of successfully completing pretrial release (i.e., appearing for court, not violating conditions, and incurring no new charges) (Lowenkamp and Whetzel 2009). Furthermore, the financial costs associated with pretrial detention continue to accrue as detained defendants move through the criminal justice system: after controlling for offense and criminal history, defendants who are detained before trial are more likely to be found guilty, to be sentenced to a prison term, and to serve longer sentences (Cadigan and Lowenkamp 2011).

Whenever a judge orders the pretrial detention of a defendant, the associated costs do not come from the prosecutor's budget; rather, they are borne by the U.S. Marshals Service. In 2013, the U.S. Marshals forecast a cost of \$1.6 billion for pretrial detention, much of which will be paid out to local jails on a per day per inmate basis (Department of Justice 2013). Federal detention is good business for many local jails and private facilities (Greene 2002), but it sometimes produces inefficient arrangements: for example, federal defendants from California are sometimes housed as far away as Arizona or Colorado, forcing pretrial services officers and defense counsel to fly, or drive many hours, to see their clients in remote detention facilities. Fifteen percent of federal detainees are housed more than 90 miles from the court in which they are appearing (Office of Federal Detention Trustee 2013). Long-distance transfers of this kind degrade the quality of justice and ultimately increase net justice system costs (e.g., Human Rights Watch 2011).

For the prosecutor, pretrial detention confers two tangible benefits: it creates leverage in plea negotiations, and it ensures the community's safety before trial. It also incurs costs, both in terms of financial expenses (e.g., increased pretrial detention costs and knock-on imprisonment costs) and human suffering (e.g., more detained defendants, more federal prisoners, and more collateral consequences visited upon families, friends, employers, and communities). The costs associated with the prosecutor's benefits, however, are externalized to the judiciary (Office of Federal Detention Trustee 2013). This is decoupling in action.

Similarly, when a federal judge imposes a period of incarceration, the \$30,000 per year cost of that incarceration is borne by the BOP, not the court imposing the sentence. Judges who adhere to the precautionary principle (Kemshall 1998), erring on the side of community safety by imposing terms of imprisonment where they are not needed (and by imposing longer terms than necessary when they are), avoid the two-fold risk of short-term recidivism and adverse publicity. While the decision to incarcerate a defendant for 120 months entails significant financial costs (\$300,000), these costs are borne immediately by the BOP and, ultimately, by taxpayers—not by the court. Except in the form of the 22.1 percent of federal offenders who return to court as recidivists (U.S. Sentencing Commission 2004, exhibit 1), judges do not see the consequences of the precautionary

principle and—at least under a decoupled federal justice system—need not concern themselves with the financial implications of their decisions.

Decoupling has allowed federal decision makers to operate, blind to the financial consequences of their decisions. Even after the 2008 financial crisis affected government operations around the world (Reinhart and Rogoff 2009), business has continued more or less as usual within the federal criminal justice system. Yet, as noted above, in jurisdictions such as Ohio, Texas, and California, state officials have been forced to innovate in order to ensure public safety with diminishing public resources. This moment of crisis, however, also signifies a threshold of opportunity.

After an extraordinary, quarter-century expansion of American prisons, one unmistakable policy truth has emerged: We cannot build our way to public safety. Serious, chronic and violent offenders belong behind bars, for a long time, and the expense of locking them up is justified many times over. But for hundreds of thousands of lower-level inmates, incarceration costs taxpayers far more than it saves in prevented crime. . . . [W]e are well past the point of diminishing returns, where more imprisonment will prevent less and less crime . . . . The current budget crisis presents states with an important, perhaps unprecedented opportunity to do so. Rather than trying to weather the economic storm with short-term cost saving measures, policy leaders should see this as a chance to retool their sentencing and corrections systems. (Pew Center on the States 2009, 2–3)

The same is true of the federal criminal justice system. In the federal system, 56.4 percent of offenders are ranked as minimum (17.2 percent) or low (39.2 percent) risk according to the BOP's inmate security classification tool (Bureau of Prisons 2013); Given that more than half of federal offenders are *low* risk, the system's extraordinary reliance on imprisonment—86.1 percent of those convicted in federal court receive a prison sentence (Hogan 2011, tbl. D-5)—is counterproductive. After all, research suggests that *at best*, incarceration does prisoners no harm (Cullen, Jonson, and Nagin 2011); more than likely, it makes them worse. U.S. prisons are criminogenic environments that are phenomenally effective at “break[ing] down cultural skills, social desire, . . . destroy[ing] and corrupt[ing] morals and . . . provid[ing] criminal instruction” (Nygaard 1995, 5). Indeed, given the substantial body of research suggesting that the “big four” risk factors consist of antisocial attitudes, antisocial cognitions, antisocial peers, and a history of antisocial behavior (Andrews and Dowden 2007), it is remarkable that only two-thirds (67 percent) of offenders are re-arrested within three years as recidivists (Langen and Levin 2002). But the federal criminal justice system, now operating in a permanent state of budget crisis (Osborne and Hutchinson 2009), does not need to continue doing business as usual. The federal system, building on evidence-based practices and focusing on risk and harm reduction, can create alternatives to imprisonment for the tens of thousands of low-risk offenders currently held in federal prisons.

Already, some steps are being taken in this direction. In 2010, the National Institute of Corrections (NIC) partnered with the Center for Effective Public Policy to release the report *A Framework for Evidence-based Decision Making in Local Criminal Justice Systems*. The evidence-based decision-making framework builds on NIC's underlying premise that criminal justice outcomes will be improved if decisions are informed by research. It also heralds the “belief that risk and harm reduction are fundamental goals of the justice system, and that these can be achieved without sacrificing offender accountability or other important justice system outcomes” (2010, 2). The NIC is using this framework with six local jurisdictions to equip policy makers with “the information, processes and tools that will result in measureable reductions in pretrial

misconduct and post-conviction offending” (National Institute of Corrections 2010, 6). This is a genuine *federal* effort aimed at the *local* level to apply two decades of research on criminal offending to reduce recidivism. It promotes what might be described as a “reentry-centered vision of criminal justice.”

Such an approach might be applied equally well to the federal criminal justice system. Defenders of the status quo might claim that the federal system is too large (218,000 offenders in BOP custody and another 160,000 under pretrial or post-conviction supervision in the community) (Hogan 2011; La Vigne and Samuels 2012), too decentralized (each of the 94 judicial districts enjoys significant autonomy), and too fragmented across multiple bureaucracies (e.g., U.S. Pretrial Services, U.S. Marshals Service, U.S. District Courts, U.S. Attorney, U.S. Federal Defenders, U.S. Bureau of Prisons, and U.S. Probation, not to mention an array of RRCs and treatment providers). Defenders of the status quo, however, are defending a broken system—a confederacy of federal agencies that produces recidivism rates of 22.1 percent after just two years (U.S. Sentencing Commission 2004), costs taxpayers well in excess of \$35,323,000,000 annually (Hughes 2006, tbl. 1), and that is ultimately unsustainable (Tolman 2012). Refocusing federal criminal justice away from a myopic obsession with parity (Feinberg 1993) toward an evidence-based vision of reentry (Pinard 2007) might—as in Ohio and Texas—improve public safety while reducing costs. The reality is that federal offenders bow down before Travis’s (2005) iron law of corrections, just like offenders emerging from state and local facilities: they *all* come back.

Reentry represents the most crucial component of the system of criminal justice given its intersection with the community. A reentry centered vision redirects the focus of key actors across the system of criminal justice to the “defendant’s eventual return to his or her community. It does not in any way diminish the punishment that befalls individuals convicted of crime; rather, it brings into focus the range of punishments that will actually be imposed [including the collateral sanctions and consequences of a criminal conviction] and considers the effects of the punishment on the individual, his or her family, and his or her community.” In calling for a different configuration among the system’s player, a reentry-centered vision of criminal justice seeks to embed front-end strategies and decision-making with a commitment to the individual’s community reintegration. (Rhine and Thompson 2011, 206)

### Immodest Proposals

It will not be easy to shift the paradigm of federal criminal justice from one in which parity in punishment is paramount and prison is the answer to nearly every question to one in which evidence-based practices and procedural justice are combined to ensure effective reentry and reintegration. Engrafting the logic of criminogenic risk and needs onto an extant logic of legal responsibility is difficult (Oleson 2011). Additionally, the federal criminal justice system is composed of multiple bureaucracies, and while bureaucracies often operate as effective organizational structures (Gouldner 1954), they also can stifle innovation.

Bureaucracies . . . are highly susceptible to the problems of boundaries. Bureaucracies are characterized by the strict division of labor, specialization, and myriad rules designed to cover all eventualities. These all add up to a very effective set of boundaries, which limit employees in both their internal and

external roles. Boundaries can impose undesirable or unproductive limits or restrictions on organizations and their members. If we view the boundaries of our organization as the limits of our role and responsibility, they can become blinders on our organizational vision, stifling rather than fostering networking and growth. (Burrell 2012, 40–42)

There are, however, signs that a reentry-centered vision of criminal justice (Pinard 2007) could extend to the federal system. A recent draft Senate Bill, as yet unnumbered, seeks to “increase public safety, efficiency, and accountability by transforming federal corrections into a risk and program performance-based system that bases decisions on individualized offender data, risk and needs assessment, and program performance factors indicative of risk and recidivism reduction.” This draft legislation appears to be an effort to establish a federal reentry-centered system, constructed on a foundation of research. Several findings might serve as the basis for such a reentry-centered system:

- A small number of high-risk offenders commit the majority of crime (e.g., Wolfgang, Figlio and Sellin 1972).
- Drug offenders, when incarcerated, are quickly replaced with others in their trade (Kleiman, Caulkins, and Hawken 2011).
- Criminal justice energies (e.g., investigation, prosecution, and incarceration), should focus on high-risk offenders.
- Incarceration is a necessary evil (Bentham 2008; Christie 2007); it is expensive, dehumanizing, and criminogenic (Cullen, Jonson, and Nagin 2011) and should be reserved for high-risk offenders.
- Rehabilitative efforts should focus on high-risk offenders as they prepare to reenter the community. Intervention in low-risk offenders can actually increase their chance of failure by exposing them to high-risk offenders and by attenuating their prosocial ties (Lowenkamp, Latessa, and Holsinger 2006). Interventions should be tailored to the unique circumstance of offenders and should incorporate cognitive-behavioral techniques (Landenberger and Lipsey 2005).
- Correctional interventions to reduce recidivism are more effectively delivered in community, as opposed to institutional, contexts (Petersilia 2004).

Proposed changes usually generate resistance from those with a stake in the current order of things, and this is true for criminal justice systems. But bold thinking is desperately needed in the unsustainable federal criminal justice system of today (Klein 1997; Tolman 2012). Statutory, structural, and procedural changes would all help to recast existing bureaucracies as a cohesive federal reentry-centered system that incorporates research evidence and focuses on risk and harm reduction for reentering offenders. The following bulleted modifications could help to overcome the challenges of decoupled criminal justice and enhance the implementation of evidence-based practices.

### *Statutory Changes*

- Repeal all mandatory minimum drug penalties (Gill 2008; Luna and Cassell 2010).

- Repeal of 18 U.S.C. §3142 (e)(3)(A) (establishing a rebuttable presumption of detention for all defendants accused of drug distribution).
- Extend the timeframe for inmates to be on home detention under 18 U.S.C. §3624 (c) from 6 to 12 months.

### *Structural Changes*

- Allocate to each U.S. Attorney the funds to compensate the U.S. Marshals for the pretrial detention and transportation of defendants. Funds not used for pretrial detention could be used by the U.S. Attorney for other criminal justice priorities.
- Allocate to each district court the funds to compensate the BOP for the costs of incarceration for sentenced defendants. Funds not used for BOP incarceration could be used by the court to pay to address criminogenic risks and needs and community supervision.

### *Procedural Changes*

- U.S. Attorneys should adopt the risk principle to guide their statutory mission. This would result in:
  - A focus on high-risk offenders for formal prosecution.
  - A possibility of diversion for all low-risk defendants charged with crimes with exclusive federal jurisdiction (e.g., postal fraud, Social Security fraud). Special consideration should be given to defendants with mental health issues.
  - The use of summons instead of warrants unless contraindicated by strong evidence of nonappearance risk.
  - Consideration of the Pretrial Risk Assessment (PTRA) score for all defendants at initial appearance, prior to making a motion for pretrial detention.
- U.S. Pretrial Services officers should submit written reports, incorporating PTRA risk assessments (i.e., indicating the probability of successfully completing pretrial supervision) for all defendants, excluding writ cases and illegal aliens, at the initial appearance to the court, prosecutors, and defense counsel. Courts should coordinate the scheduling of initial appearances to accommodate the pretrial investigation and PTRA calculation.
- U.S. Probation Officers should calculate the total cost of incarceration associated with the Sentencing Guidelines and include this amount in the presentence report. For example, if the calculated guideline range is 86 to 94 months, the PSR would note that this period of incarceration would cost between \$150,000 and \$165,000.
- U.S. Probation Officers should use the PCRA during the presentence phase and include its output in the PSR. This would help inform the court's assessment of relevant sentencing factors under 18 U.S.C. §3553(a)(2)(C-D). The PCRA score also should be used in fashioning special conditions.
- The BOP should establish a small number of larger RRCs in major metropolitan areas where high dosages of evidence-based programming can be delivered. A larger network of

Day Reporting Centers (DRCs), incorporating remote monitoring technologies, should be established throughout offenders' natural communities.

- The BOP should refer all low-risk offenders, as determined by the BOP's inmate security designation system, to location monitoring under U.S. Probation supervision. Absent exceptional circumstances, U.S. Probation offices would be required to accept these inmates for placement.
- Upon completion of BOP pre-release status, all offenders should be summoned before their sentencing judge to (1) clarify the court's expectations of the offender while on supervision, (2) to assess their progress in addressing dynamic risk factors and responsivity issues while in prison/RRC, and (3) to add, delete, or modify any special conditions of sentencing that are necessary to address risk factors and facilitate an effective transition back into the community.

### CONCLUSION

This is an extraordinary time in criminal justice. For the first time in decades, the U.S. prison population has declined. Financially strapped states are developing and implementing bold, innovative approaches to criminal justice. It should be an extraordinary time in the federal system as well, as much is at stake. The BOP currently houses 218,000 federal inmates (Department of Justice 2013), and the population is expected to grow; there are another 160,000 pretrial defendants and post-conviction offenders under community supervision (Hogan 2011, tbl. 8). The system costs taxpayers more than \$35,323,000,000 annually (Hughes 2006, tbl. 1), and, in the words of Attorney General Eric Holder, incarceration on this scale is simply "unsustainable economically" (in Gottschalk 2010, 62).

A change is needed, and there are strong indications that it is occurring. Federal interest in smart on crime approaches (Department of Justice 2013b), excitement about promising state and local initiatives (Hawken and Kleiman 2009; Listwan et al. 2008; National Institute of Corrections 2010), and enthusiasm for approaches related to procedural justice (Tyler 2010) and the justice reinvestment model (Clear 2011) all signal a shift in the way federal criminal justice work is done. Indeed, the move to operationalize evidence-based practices throughout the federal probation and pretrial services system is a landmark and will likely redefine community corrections for decades to come. Similarly, the reentry court phenomenon may signify a real evolution in the way that federal offenders are reintegrated into society.

Yet while there is certainly cause of optimism, Garland has wisely warned against mistaking short-term shifts in policy emphasis for long-term structural transformation (2001, 22). What might prove to be a bona fide watershed in federal criminal justice could also be squelched by budget limitations or staffing shortfalls, divergent agency goals, or an unwillingness of the rank and file to implement the vision of agency leaders. The volatile politicization of criminal justice also limits the long-term viability of evidence-driven policy. With the stroke of a pen, legislators, motivated by personal ideology or the pursuit of votes, can enact laws that fly in the face of all available research evidence. Structural decoupling, allowing criminal justice actors to externalize costs and ignore the downstream consequences of their actions, also undermines the promise of enduring change. Because of the size and complexity of the federal system, it may or may not be possible to realize a lasting reentry-centered vision of criminal justice (Pinard 2007).

At a minimum, to establish a system founded on evidence-based practices and focused on risk and harm reductions, an honest reckoning is needed among stakeholders throughout the federal criminal justice system.

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