

Archaic Sentencing Liturgy Sacrifices Public Safety: What's Wrong and How We Can Fix It



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Introduction

Our persistence in ignoring research when exercising sentencing discretion exceeds even offenders' persistence in crime. Although academia and corrections agencies have learned a great deal about how to reduce recidivism, we judges ignore their wisdom while they are content to defer to and even to enable our hubris. We adhere to a liturgy of just deserts that celebrates aggravation and mitigation. We invoke reformation only rarely, and then only by assumption — with no more attention to results than when we purport to “send a message.” Though this approach evades immediate accountability for recidivism, our sentencing decisions unavoidably have public safety outcomes. Our successes, necessarily accidental, are rare. Accordingly, we fail to prevent victimizations that should never occur, needlessly inflict cruelty, waste public resources, and diminish respect for the law. Having conducted the public ceremony of criminal justice in this fashion, the only mystery is that some of us are surprised at the public penchant for punitiveness we have enabled.

Broad support for crime reduction and modern information technology combine to offer a solution. Oregon legislation and Judicial Department policy have endorsed this change. Multnomah County has responded by building sentencing support tools that allow us to focus sentencing decisions on what works on which offenders to reduce criminal behavior. The tools allow all involved to compare crime reduction correlations by offender, charge, and sentence. These innovations hold the promise of profound improvement in criminal justice — as much by redirecting the inquiry as by informing it.

What we Know about What Works— and How We Ignore It

Although sentencing hearings, arguments, and negotiations almost never broach the subject of what works to reduce criminal behavior, academic institutions and correctional agencies have an enormous store of research about what works. Much of it is solid. But because it is so removed from actual implementation, a significant portion of this research is entirely theoretical and of no use except to those whose careers depend

upon publication. Of the latter variety, proposed models of deterrence based upon untested assumptions, and a great deal of meta analysis, provide typical examples.

The potentially useful data¹ provide repeated support for some important propositions: Smaller sanctions, shorter sentences, and minimal supervision correlate with reduced criminal behavior for low risk offenders as compared with more intense responses to low risk offenders.

Treatment programs that identify and responsibly address multiple criminogenic factors work far better than treatment programs that do something other than address criminogenic factors, and substantially better than programs that only address one or two criminogenic factors.²

Incapacitation works very well during the period of incapacitation. Measured by impact on recidivism (*after release*), though, anything longer than six months is probably counterproductive.³

Shock incarceration, shock probation, scared straight, D.A.R.E., and boot camp programs do not work and frequently do more harm than good.⁴

Sex offenders and sex offender treatment have often been the subject of research and publication. In general, we know that opportunistic intra-familial offenders are more susceptible to effective treatment than sexual offenders who seek out child victims or who commit violent rape against strangers, and that treatment competently aimed at risk factors is significantly effective at reducing recidivism.⁵

Although this vast body of data about what works on which offenders is accessible to us, and could vastly improve our choices in individual cases and on a policy level, sentencing practices and policy decisions overwhelmingly ignore it. Prosecutors stress the evil of the offender's deed and the extent of his record; defenders minimize the offender's misconduct or intent, quibble with his criminal record, or mine the offender's circumstances for sympathy. Once we settle any questions as to the legal limits that apply to the sentence as a result of guidelines or mandatory minimum sentences, and agree as to the range of any discretion⁶ — both sides accept that the issue is aggravation and mitigation, the liturgy of just deserts. I hear

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what an offender "deserves," and I am told to "send a message," apparently invoking the axiom of deterrence. And in recent years, either side is ready to mount an "equal treatment" contention whenever the offender can be painted into a category to which we usually assign a punishment acceptable to the momentary advocate of what masquerades as consistency?

Where the parties present a joint recommendation to the court and encourage or invite no analysis from the court, their underlying negotiation proceeds from the assumption that the same principles would emerge in a sentencing dispute and produce a result within the agreed range.

Some defenders of the status quo argue that our use of programs demonstrates our concern with reducing recidivism. It is true that at least for beginning offenders, we send thieves to "theft talk," sex offenders to sex offender treatment, brawlers to anger management, and drunk drivers to alcohol evaluation and treatment. That this is symmetry rather than science — that we cannot cite these practices as evidence of a responsible pursuit of crime reduction — is obvious from these circumstances: we never ask the programs whether their graduates reoffend; we make no effort to determine which offenders actually benefit and which do not. Instead, we are satisfied when programs communicate effectively with the system to document completion — which we deem "success" — or indicate failure (regardless of any lack of recidivism). Because we make no effort to track the impact of these sentences on criminal behavior, we fail to motivate the programs to compete on the basis of crime reduction; we fill many with offenders they cannot improve, fail to send many offenders to programs that would work for them, sustain some programs that work on no one, and — worst of all — fail to preserve some programs remarkably good at crime reduction.⁸ Like "reformation" in general, programs are simply part of the liturgy of the sentencing mantra, rather than a responsibly deployed strategy to serve public safety.

The recent and persistent growth of "therapeutic jurisprudence"⁹ in the form of drug courts, drunk driver courts, domestic violence courts, and mental health courts are a promising exception to the ancient trend. Listen to any presentation by judges involved in this work and it is obvious that improving the behavior of offenders is indeed the focus of these courts. Whether the approach works in general is debated, but it surely works for some offenders and is generally assumed to be far more cost-effective than traditional responses to the same offenders.¹⁰ Although I am firmly convinced that these courts generally serve public safety and offenders better than traditional courts, I have two primary concerns: first, they are typically a poor cousin of the criminal justice system, erected initially rather to reduce caseloads and avoid less "important" cases than

to assist the system as a whole to reform in the direction of better public safety performance. They may even serve to deflect arguments for improving the core of criminal justice in the direction of reformation — "I gave at the office."

Second, the therapeutic courts sweep rather broad categories of offenders within their purview without much attempt to tailor responses to the varieties of offenders within their jurisdiction based on data about which works best on which of them. In common with mainstream responses, the therapeutic courts respond to the crime without making those fine distinctions among those who commit them upon which responsible attempts at crime reduction depend.

The Consequences of Our Continuing Mistake

Because we make no responsible effort to learn what works on which offenders, our public safety performance is abysmal. The first offender is a rarity, the persistent offender the norm.¹¹ A now discontinued Portland Police monthly report tabulated which people in jail for any given month had been also been in the same jail within the last year. The last full month report — typical of those I'd followed for years — had these figures: of the 2,395 people jailed during July, 2000,¹² 1,246 had been jailed in Portland on some other occasion within the previous 12 months. Twenty-two of the 32 jailed for Burglary in July, 2000, had been jailed in Portland on some other occasion within the previous 12 months — as had 22 of the 23 jailed for Robbery, 20 of the 26 jailed for Theft in the First Degree, 304 of the 372 jailed on drug charges, and 32 of the 39 jailed for vehicle theft.

The magnitude of persistent crime is similarly apparent from other measures. Bureau of Justice Statistics suggest an average of 15 prior arrests for a typical jail inmate; recidivism rates in the United States and western countries commonly range from over 60 to over 80 percent.¹³

The failure of sentencing practices to produce much crime reduction should come as no surprise, given our complete disregard of research and data that show which sentences are most likely to work on which offenders. Our dysfunctional public safety performance would probably qualify as reckless under applicable standards of the criminal law.¹⁴ Logic and human experience, at least in light of the vast body of research that exists, compel the conclusion that we could do a far better job than we now do by accident were we responsibly to discern and apply what seems to work on which offenders.

To the extent that we could reduce recidivism with smarter sentencing, we are now irresponsibly allowing some victimizations we could avoid; squandering law enforcement, judicial and correctional resources; inflicting enormous financial burdens on the public and

crime victims; and diminishing respect for the law and the legal system. Our persistence in this dysfunction is cruel to those whose victimization we should have prevented, and to offenders whose punishment fails to serve public safety by addressing criminogenic aspects in their lives.

Why We Persist in Error

Again, our sentencing behaviors reveal our archaic adherence to the myth of deterrence, the ritual of retribution, and the façade of rehabilitation — although in some jurisdictions we have modernized the jargon by employing “accountability,” “consequences” and “responsibility.” Without disputing that these notions may have an appropriate role in sentencing,¹⁵ I submit that we lack any coherent direction as to how they are supposed to mix, and, in particular, how the issue of public safety is supposed to be involved.

In part, of course, this is a product of historical inertia. Sentencing has been a ceremony of punishment for a very long time. We wear robes and conduct what is in large part a morality play — maintaining a secular equivalent of a state church. But there is more to this than history. At one level, there is some real safety in not being held accountable for recidivism. If our task is to craft “appropriate” sentences in light of some largely subjective measure of moral equivalency, it is far easier to escape criticism or accountability than were we actually assessed by the impact of our choices on crime reduction — particularly when that impact is discernable only after careful assessment over several years. If our job is to deliver an appropriate sermon, we need only work on our delivery and steer towards severity.

At another level, legislative direction has generally codified confusion by merely listing various purposes of sentencing without much direction, leaving judges and advocates no clear charge even to pursue public safety within this mix.¹⁶ Where and when the legislature (or, in the United Kingdom approach, an appellate court) has issued sentencing guidelines, they, too, list potential factors in aggravation and mitigation while attempting to regularize the application of just deserts with no logical or responsible pursuit of public safety through crime reduction.¹⁷

Although correctional officials routinely support and disseminate research about what is and is not effective in crime reduction, they do not carry their findings to courts. For many sentencing occasions, and typically by law, once a non-probationary sentence is announced, the offender is relegated to the jurisdiction of the correctional agency without further judicial involvement absent a successful appeal, post-conviction release, habeas corpus, or prisoner rights litigation. Outside the realm of probationary sentences, correctional agencies have no occasion to interact with courts. In that realm, however, probation officers may have many occasions upon which to report a violation or recommend a

modification or revocation to the court. And, in many jurisdictions (but with unfortunately declining frequency), correctional workers assist the court by conducting pre-sentence investigations.¹⁸ But presentence and probation violation reports almost never address what is most likely to work and why; instead, they wholly obscure any underlying awareness of criminological research or literature and speak in the terms of our ancient judicial intonations. Addressing sentencing, writers dutifully report the demographic, medical, and criminal background of the offender; the circumstances and perspective of any victims; and any applicable legal principles such as guidelines. Then, they craft a recommended sentence based expressly on aggravation and mitigation or impliedly on just deserts, with no greater connection to what is likely to reduce criminal behavior than a conclusion that the sentence recommended is “appropriate.” Similarly, in probation violation reports, we may get a treatment based recommendation for adding or modifying conditions of probation based on perceptions of the offender’s needs, but we most often get recommendations for revocation based on the notion that the probationer by his misconduct has “forfeited” the “privilege” of probation and thus should be relegated to prison — presumably for punishment earned, occasionally so he can “think about making better decisions in the future,” which at least has some connection to Jeremy Bentham’s fallacy of penitence in penitentiaries.

It is most likely our fault as judges for creating the expectation that our drummer is just deserts, but we almost¹⁹ never get analysis based on what is most likely to work and why. Occasionally, we speak in terms of probation “not working” and the probationer “wasting resources” — both of which are often true — but with no attempt whatever to compare the utility or waste of the recommended alternative: imprisonment.

The third player in this tragedy of ignoring accumulated wisdom about what works is academia. While supporting research of great potential value to criminal justice, academia is not only apparently entirely comfortable with exclusion from the sentencing process — it also occasionally voices great concern that judges might actually take it upon themselves to attempt to find the available sentence most likely to reduce future criminal conduct. And, when expressly addressing sentencing behavior, even centers of higher learning devoted to the issue do everything *but* address how sentencing practices do or do not promote public safety by reducing criminal behavior.²⁰ In general, to the extent that criminological research addresses sentencing, it tends largely to celebrate the mysteries of the liturgy of aggravation and mitigation;²¹ generally to favor leniency while criticizing trends toward increasing use of incapacitation;²² and to fear that any mere practitioner might actually attempt to employ predictive analysis to determine sentences.²³

Protesting that judges should not or can not predict outcomes does not change the unavoidable fact that our choices *have* outcomes. Some of our sentences simply correlate better than others with reduced future criminal conduct. There is no real basis for debate whether our choices in fact affect public safety; to argue that we should nonetheless make no attempt to improve our choices is at best absurd and at worst irresponsible.

A Path to Progress

Two circumstances together provide a means out of this dysfunction. First, in spite of assumptions to the contrary, there is generally tremendous agreement among policy makers and the public that we ought to be doing what works to reduce crime — even before punishment for its own sake. My experience in writing and promoting what became 1997 Oregon Laws, chapter 433³⁴ with strong agency and bipartisan legislative support (and support from the organized victims' community) is entirely consistent with the findings of a recent British Home Office study known as "the Halliday Report."³⁵ Charged with assisting the Court of Appeals with promulgating sentencing guidelines based in part on how well sentences worked and how much they cost, the authors instead conducted public opinion research. Disappointing as this choice was, it did reveal that increasing punishment will *not* promote public confidence³⁶ and that "[t]he general public are very clear about what they want sentencing to achieve: a reduction in crime."³⁷ Policy makers vastly overrate the friction between public support for punitiveness and public interest in data-driven sentencing.

The other circumstance is the current availability of technology that allows us to deliver data about what works on which offenders directly into the sentencing process.

In Oregon, a 1996 citizen's ballot measure inserted "protection of society" at the top of our state constitutional list of the purposes of criminal sentences.³⁸ In 1997, we adopted legislation to make reduced criminal behavior the dominant measure of performance of criminal justice agencies (and their private partners) for juvenile and adult offenders; to require that agencies share data (including juvenile and adult data) to facilitate assessment of the impact of correctional efforts on future criminal behavior; and to require that criminal justice agencies use the data to see correlations between correctional responses and reduced criminal behavior.³⁹ In the same year, the Oregon Judicial Conference adopted a resolution that concludes "in the course of considering the public safety component of criminal sentencing, juvenile delinquency dispositions, and adult and juvenile probation decisions, judges should consider and invite advocates to address the likely impact of the choices available to the judge in reducing future criminal conduct."⁴⁰

Multnomah County's Sentencing Support Technology

In Multnomah County, Oregon, we have constructed a data warehouse³¹ and have developed the tools with which to give all involved in sentencing decisions rapid access to information about what works on which offenders. At the state level, the Oregon Judicial Department Information Technology Division has begun the work of creating similar tools for state-wide use.³²

Screen shots and a step by step explanation (as well as technical links) are available on the "smart sentencing" web site,³³ but in their simplest application the tools work like this: a user enters a case number,³⁴ then selects the charge which will be the subject of the sentencing decision.³⁵ The software then assembles sentencing elements used in the past for similar offenders when sentenced for similar charges, and displays a bar chart. For each sentencing element, a bar represents the proportion of those within the cohort sentenced to that element who did not suffer a new conviction for a similar charge within three years of that sentencing occasion. The bars are arranged from most to least frequently imposed for that cohort, left to right.³⁶

It is of tremendous significance that these tools include incarcerative as well as non-incarcerative dispositions in the comparisons. This capacity transcends the divide between advocates of reformation and those of incapacitation by allowing us to assess correlations on a level playing field. Because most recidivism data that disparages custodial sanctions measures recidivism after release, it is unpersuasive to those who assert the common sense that offenders in custody cannot offend citizens outside that custody.³⁷ These tools demand that we focus on the public safety outcomes of sentences, and they are intended to avoid any bias for or against any species of sanction (except that we have not included financial sanctions at this point). Our use of these tools so far confirms the general trend of the literature that for less severe offenders, common treatment-oriented sentences and probation with little or no jail time correlate better with crime reduction than sentences to long jail or prison terms. But this varies with the cohort, which is a good part of the point, and there are increasingly common examples of prison yielding the best outcome in terms of public safety as the cohort is defined by increasing severity of criminal record.

By selecting any of three tabs, users can modify any of many variables and recalculate outcomes, receiving a new bar chart in seconds. For example, users might want to compare only those like the offender who were sentenced for an *identical* charge instead of a merely "similar" charge. The tools permit setting the sentencing charge variable by statute, by category,³⁸ by statutory division, or by including sentencing for *any* crime. The tab that reveals the offender profile variables shows the selection that reflects the offender's criminal history in

flavor and severity,³⁹ age, gender,⁴⁰ and ethnicity.⁴¹ Users can modify any or all of these variables and recalculate — generating a new bar chart in seconds.

Finally, users can alter the flavor of recidivism that determines “success.” Our tools include the ability to adjust outcome measures because the whole purpose of this effort is to do a better job of reducing criminal behavior. When I am sentencing an offender for a theft crime, the program by default measures recidivism by a conviction for a property crime within three years of the sentencing that it is comparing. But, if I were sentencing an offender for a property crime whose greatest threat (apparent from prior convictions) is violence, I might very well want to look at violent recidivism by people so sentenced. For responsible pursuit of public safety, we need to be able to look at various recidivism measures. Flexible recidivism measures also allow us to identify opportunities we would not notice were we focused only on the crime of conviction. We may notice that of the choices available for a particular property crime offender, none vary significantly in their correlation with reduced property crime recidivism, but one or two show marked reduction in drug or driving under the influence crimes.⁴²

Similar considerations support our need to vary the length of time during which we consider recidivism, and this program allows us to choose six months, three years, five years or “all available time” as the period during which a new crime counts as a performance measure.⁴³ We can also deem an arrest instead of a conviction an incident of recidivism.⁴⁴ All of these choices have implications, and all can be debated. For example, the longer period we use, the more likely it is that circumstances other than our sentencing choice have intervened to produce the result; the shorter period we use, the less likely it is that we are capturing the long-run public safety implications of our choices.

We can also change the profile. We may learn that the offender’s age or criminal history as reflected in the available data is incorrect. By clicking or unclicking the appropriate boxes, we can recalculate and see what difference the corrections (or changed assumptions) make in the correlations between choices available and future criminal behavior by offenders meeting our adjusted profile.⁴⁵

The Status and Future of Sentencing Support

These tools are now available at computers inside the county district attorneys’ offices and the offices of the major indigent defense firm; others can access them at no charge from a computer dedicated to that use in the courthouse. Judges have access in their courtrooms.

But we have a very long way to go. Sentencing support tools are roughly where aviation was at the Wright Brothers’ first flights at Kitty Hawk. The present limitations of the technology would be astounding were

they in competition with anything like a mature, data-based activity such as we expect of medicine. For example, the bars represent individual sentencing elements, though sentences commonly come in clusters — such as a probation including some incarceration and several conditions. The correlations that are depicted are those between outcomes and sentences *imposed* regardless of whether the offender complies with or completes that sentence.⁴⁶ And although our measures of recidivism are flexible, the tools do not yet allow for distinctions in the frequency or severity of recidivism within any of the crime categories.

We presently see only data for Multnomah County; the relatively small size and youth of this data pool means that we have to widen the net defined by variables to yield any results as we move from the more common and minor crimes to the more serious and, thankfully, rare. Since the tools are new, we have yet to attract the involvement of academia, which I would expect substantially to improve the tools’ ability to focus on the most useful and reliable of variables and correlations. And, because the tools are limited to data presently captured by existing operational systems within the criminal justice community, we are unable at this time to exploit information of potentially enormous use and importance to our purpose — data such as mental health status, vocational background, substance abuse involvement, educational level, and perhaps even personality test and risk assessment scores.⁴⁷

We need to expand the automation and the quality of operational data collection at many levels of juvenile and adult criminal justice, law enforcement, and corrections. Actually *using* the data adds tremendously to quality control. We need to enhance these tools to allow us to analyze clusters of sentencing options commonly employed instead of merely individual sentencing components. We need to give users choices in including or excluding certain recorded behaviors other than arrests or convictions, such as police contacts generating “family beef” codes. We need to expand the range of included operational database sources for the data warehouse — such as motor vehicle records, alcohol and drug treatment records,⁴⁸ and juvenile records.⁴⁹ We need to add a host of attributes to offender profiles. We need to expand the measures of recidivism to recognize frequency and severity as well as time and type. We need to enhance the tools to facilitate their application to pre-trial release, probation supervision, and probation revocation decisions.

We also need to exploit the power of automated analysis. Eventually, the software should be “smart” enough to scour the variables so as to alert us to opportunities of which we should be aware. For example, as things now stand, it’s up to users to decide whether to look at sex offense recidivism when dealing with a property crime offender; a smarter system would

look without us and alert us if any notable peaks or valleys show up with respect to any of the dispositions we are considering with a property crime perspective.

Even all of this is just scratching the surface. As other related technology matures, we should have integrated computer-based resources to include such factors as the geographical location of possible treatment (or incarceration) providers to improve the sentencing (or supervision) choice—for example, it may be that the offender's chances of completing a beneficial program are improved if we select a provider near his residence, even though one across town has a higher percentage of successful graduates; we may want to consider which prison facility has both the services appropriate for an inmate and an absence of fellow gang associates. It is sobering that businesses that flood our mail with catalogues are more sophisticated than we are in exploiting this technology to improve outcomes.

The present limitations of the tools would seem crippling were they in competition with any information about outcome—but they are not. Nor are they designed to deliver a sentencing recommendation in return for the user's input of offender and offense. Even with all the enhancements envisioned for the near and distant future, these tools are intended primarily to promote and only secondarily to inform a sentencing analysis based on what is most likely to reduce crime. They presuppose the continued notion of a justice system that focuses on the individual and employs the wisdom, experience, and discretion of a public official to mix reliable information about what works on similar offenders with insight into what makes any individual unique. These tools are not intended to be relied upon without more to dictate a sentencing decision.⁵⁰ At their best, they tell us outcomes of past sentences for similar crimes and similar offenders, with the degree of similarity varying with the amount of data available for a given cohort, but always limited by the fact that no amount of variables supported by data can precisely define an individual offender—and even if they could, the cohort would be too small to yield a useful number of comparisons for precisely similar sentencing occasions. But knowing these outcomes gives us tremendously valuable information with which to conduct the art of sentencing—information which has not been a part of the sentencing process in the past. The purpose of the tools is in large part to nudge sentencing judges from the pulpit of just deserts into the modern role of administrator of a social agency that is responsible for public safety.

Notwithstanding the nascent stage of sentencing support tools, they (and the campaign to deploy them) are beginning to make an impact on the criminal justice system in Multnomah County. Bar charts are making their way in to plea negotiations and sentencing arguments. I have certainly used programs instead of jail or in combination with less jail in some cases, more

jail (or prison) in others, based on a discussion and analysis prompted by a sentencing support bar chart. I have been convinced to try things I would not have thought of—such as anger management for some thieves and parenting education for some drug offenders—as a result of a discussion and analysis prompted by a surprising result in a display. To my astonishment, I have even seen defendants accept plea bargains as a result of conferring with their counsel over our bar charts.

Beyond the direct use of the sentencing support tools, attorneys, probation officers and judges are becoming accustomed to focusing this process on what is most likely to reduce criminal behavior by offenders.⁵¹ Defense attorneys are slowly learning that stressing a violent defendant's abusive childhood may simply worsen the expectation that treatment will succeed and thereby increase the argument for incapacitation; prosecutors' resistance to the approach begins to fade when they realize that incapacitation is considered on the basis of its crime reduction impact along with treatment approaches—and that the approach allows argument that the prognosis is so poor and the risk of harm so great that prolonged incarceration best serves crime reduction. Both sides now commonly join issue on which of the available choices are most likely to serve public safety.⁵²

Consider the old and the new approach with a recidivist thief with substance abuse issues. The old approach at sentencing was that the prosecutor would argue how richly the offender deserves punishment having failed to learn from the prior messages we sent to him, and the defender would argue the power of addiction to diminish the offender's moral culpability. At a probation violation hearing, the prosecutor would typically assert that the offender has forfeited the privilege of probation, while the defender would list the stressors that diminish the offender's fault in failure. In both cases, incarceration was viewed as a door out of our realm into another whose machinations were of no interest to us whatever.

The new approach at sentencing is focused on crime reduction. The prosecution may argue that jail or prison is appropriate because it will at least stop the thefts during incarceration, and the defense will attempt to convince the court, perhaps, that inpatient treatment holds out the best hope of crime reduction over time. A prosecutor or probation officer now may argue that substance abuse and cognitive restructuring programs available *in custody* will best serve public safety. For the more common and less serious crimes, the bar charts of sentencing support may help us choose a result, whether or not they began the discussion.

With more serious crimes, the sentencing support tools are decreasingly useful because of limited data, but we can still focus on public safety. In a multi-count kidnap, assault, and robbery case, how much prison to

use, and whether to run mandatory minimum sentences consecutively, is now the subject of debate as to how much we can expect from programs available in prison, given the offender's susceptibility or not to treatment as compared to the offender's capacity for inflicting harm.³³ I now rarely hear arguments that an offender will "think about his choices and make better ones next time" if we simply send him to jail or prison. Rarer still is the plea that I "send a message" with my sentence. If just deserts surfaces at all, it is usually in the context of avoiding a sentence that is disproportionately harsh in light of the offender's crimes and their impact on victims.

Vision of Sentencing Based on Data

We have a long, long way to go, but we have taken the first steps out of centuries of darkness. Public safety will surely benefit, and we have every reason to expect that we can leave a legacy of brutally dysfunctional ignorance in the past where it surely belongs.

Appendix A

How to Argue Sentencing to Judge Marcus

Judge Michael Marcus, Circuit Court Department 34

This short piece is intended to elicit from advocates (defense and prosecution), PSI writers and probation officers the kind of information and argument that will assist me in making better sentencing decisions. Arguments that allude to aggravating and mitigating circumstances and then conclude simply that the recommended disposition is "appropriate" to the crime are for the most part unintelligible and unpersuasive to me, without analysis based on the following concerns. For more information, see my web site, <http://www.smartsentencing.com>.

1. The Law. If there is a mandatory minimum sentence (or mandatory sentencing component), it will be imposed unless state or federal constitutional considerations foreclose what the statutes direct. Where the law requires "compelling and substantial reasons for a departure," I will not depart without them. My understanding is that a stipulation is not alone sufficient for a departure.

2. The Objectives. I am extremely skeptical of the efficacy of general deterrence outside the realm of white collar crime or minor regulatory fines. Advocates who ask me to "send a message" as a matter of general deterrence should be ready to make an intelligent demonstration that this is a viable tactic to reduce criminal behavior. My highest objective is to prevent future crime and victimization by the offender. If there

is a specific victim, I want to serve the needs of that victim.

A. Reducing Criminal Behavior. I intend to follow the direction of 1997 Judicial Conference Resolution #1: "judges should consider and invite advocates to address the likely impact of the choices available to the judge in reducing future criminal conduct" [the full text is on the reverse of this page]. Incapacitation (incarceration) is generally excellent protection against harm by an offender on the outside while the offender is in the inside of an institution, but in most cases I will have to consider the likelihood of diverting offenders from criminal careers with or without custodial measures.

Anyone wanting to argue in this area should be prepared to discuss what we know about the sources of the offender's criminal conduct and what responses (programs, sanctions, etc) are in fact available in or out of custody. Yes, access to information may depend on whether the advocate represents the state, the defendant, or corrections. If we need some kind of evaluation or assessment of the offender, say so and why. Speed is *not* our most important product. If necessary, make the phone call to find out whether a given service is actually going to be available in custody or out, and whether it really addresses an offender's needs. Prison, jail, and even "in-patient treatment" are not black boxes; some of what goes on in each, and how much of it is available or appropriate to a given offender, can be discovered with some inquiry — and it changes over time.

B. Serving the needs of victims. Where there is a victim, restitution may or may not be a viable need and a viable objective. Many victims would benefit from "restorative justice" in the form of "victim-offender" programs. All victims are entitled to notice and an opportunity to appear at sentencing, and in non-domestic violence, non-sexual assault cases, I often want to know if the victim is interested in a more structured session with the offender, such as offered by Resolutions Northwest.

In the event of a victim of a sexual assault, particularly but not only when the victim is a child, I hope to know as much as I can about how the sentencing choices available to me affect the victim's interests in recovering from the effects of the crime. This may involve finding a way for the offender to pay for ongoing counseling, but I am also interested in this difficult question — which depends in large part on the circumstances of an individual victim and victimization — Will a sentence perceived as harsh or lenient exacerbate or alleviate any feelings of guilt, blame, or responsibility for the incidents involved? How does this choice affect any counseling or treatment prognosis? In intra-familial cases, is this complicated by any attitudes of other members of the family towards the case or the parties involved?

As with the impact on future criminal behavior, arguments based on ideology or philosophy are far less likely to be persuasive than those based on contact with providers (ideally, the victim's provider) or at least based on accepted social science.

Appendix B

Sentencing Policy Resolution

Adopted at the 1997 Oregon Judicial Conference

WHEREAS Oregon law vests judges with discretion to select an appropriate sentence or disposition following adjudication of criminal conduct or violation of terms of probation in adult and juvenile cases;

WHEREAS Article I, Section 15, of the Constitution of the State of Oregon provides that "Laws for the punishment of crime shall be founded on these principles: protection of society, personal responsibility, accountability for one's actions and reformation";

WHEREAS Oregon law declares that the purposes of the Criminal Code include, among others, "To insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized, the correction and rehabilitation of those convicted, and their confinement when required in the interests of public protection" (ORS 161.025(1)(a)); "To prescribe penalties which are proportionate to the seriousness of offenses and which permit recognition of differences in rehabilitation possibilities among individual offenders" (ORS 161.025(1)(f)); and "To safeguard offenders against excessive, disproportionate or arbitrary punishment" (ORS 161.025(1)(g));

WHEREAS Oregon law empowers judges to "impose any special conditions of probation that are reasonably related to the crime of conviction or the needs of the defendant for the protection of the public or reformation of the offender, or both" (ORS 137.540(2)), and requires that judges make decisions to incarcerate probation violators in prison based "upon a reasonably systematic basis that will insure that available prison space is used to house those offenders who constitute a serious threat to the public, taking into consideration the availability of both prison space and local resources" (ORS 137.592(2));

WHEREAS Oregon law provides that the juvenile justice system in delinquency cases is "founded on the principles of personal responsibility, accountability and reformation within the context of public safety and restitution to the victims and to the community" (ORS 419C.001);

WHEREAS Oregon law vests judges with discretion to select an appropriate sentence or disposition following an adjudication of criminal conduct or violation of terms of probation in adult and juvenile cases;

WHEREAS public safety would be furthered by increased attention to the probable impact of judges' choices in the exercise of such discretion on the future criminal conduct of offenders;

THEREFORE, BE IT RESOLVED BY THE OREGON JUDICIAL CONFERENCE that in the course of considering the public safety component of criminal sentencing, juvenile delinquency dispositions, and adult and juvenile probation decisions, judges should consider and invite advocates to address the likely impact of the choices available to the judge in reducing future criminal conduct.

BE IT FURTHER RESOLVED that judges are encouraged to seek and obtain training, education and information to assist them in evaluating the effectiveness of available sanctions, programs, and sentencing options in reducing future criminal conduct.

Notes

¹ See generally, Lawrence W. Sherman, Denise C. Gottfredson, Doris L. MacKenzie, John Eck, Peter Reuter, and Shawn D. Bushway, *Preventing Crime: What Works, What Doesn't, What's Promising*, Research in Brief, National Institute of Justice, July, 1998, and sources cited (<http://www.ncjrs.org/pdffiles/171676.pdf>); *Community Corrections: What Programs Work?*, Oregon Department of Corrections, and sources cited (http://www.doc.state.or.us/community_corrections/whatiscc/whatwork.shtml).

² See generally, *Treatment Works For Youth In The Juvenile Justice System*, National Mental Health Association, and sources cited (<http://www.nmha.org/children/justjuv/treatment.cfm>); Mark Gornik, *Moving from Correctional Program to Correctional Strategy: Using Proven Practices to Change Criminal Behavior*, U.S. Department of Justice, National Institute of Corrections, and sources cited (<http://www.nicic.org/pubs/2001/017624.pdf>).

³ Smith, P., Goggin, C., & Gendreau, P. (2002), *the Effects of Prison Sentences and Intermediate Sanctions on Recidivism: General Effects and Individual Differences* (User Report 2002-01) Ottawa: Solicitor General Canada, (http://www.sgc.gc.ca/publications/corrections/200201_Gendreau_e.pdf), cited in *The Effects of Punishment on Recidivism*, 7 RESEARCH SUMMARY No. 3 (May 2002), Office of the Solicitor General of Canada, (http://www.sgc.gc.ca/publications/corrections/pdf/200205_e.pdf).

⁴ See sources cited note 1, *supra*.

⁵ See generally, *Recidivism of Sex Offenders*, Center for Sex Offender Management (Office of Justice Programs, U.S. Department of Justice) (May 2001), and sources cited (<http://www.csom.org/pubs/recidsexof.html>); *The Effectiveness of Treatment for Sexual Offenders*, 7 RESEARCH SUMMARY No. 4 (July 2002), Office of the Solicitor General of Canada, and sources cited (http://www.sgc.gc.ca/publications/corrections/200207_e.asp).

⁶ Although the range of actual discretion available in a

sentencing decision varies from case to case and jurisdiction to jurisdiction, and although legislative and ballot measure responses to our public safety dysfunction has substantially limited discretion, enormous discretion remains. Where to sentence within guideline ranges, whether and when to run sentences consecutively or concurrently, whether and how far to depart when departure is legally available, and whether to revoke or modify probation all call for discretion that could be vastly improved by the means I advocate here—not to mention the vast number of crimes not subject to either guidelines or minimum sentences, such as virtually all Oregon misdemeanors.

⁷ Consistency is overrated in such endeavors. It is largely accomplished only by adamant refusal to acknowledge differences so that we can claim that we are treating like offenders alike. The charade occasionally forces absurd outcomes—for example, when the presumptive sentence under guidelines depends on the dollar value of damage caused by an arson—when that value was suppressed by the accident that the homeowner was a firefighter. And we seem ready to abandon common notions of right and wrong to pretend we've achieved equal treatment—as when we punish more severely the car thief who takes a valued toy from a stable of collector cars than the one who steals the sole means of transportation from a single mother struggling to get by. Finally, the outcome of such efforts continues to be overwhelming failure as measured by recidivism. If we generally do more harm than good, consistency in our pursuit is hardly a virtue.

⁸ In my tenure, we've lost two extraordinarily effective programs. One, "Our New Beginnings," was incredibly successful in converting addicted street prostitutes into productive citizens; another, a sex offender treatment program for prisoners, dramatically reduced recidivism of predatory sex offenders previously deemed incorrigible. A system that gave proper priority to effectiveness would not have lost these programs, but would have done its best to replicate them.

⁹ See, e.g., David Wexler, *Therapeutic Jurisprudence: An Overview*, 17 THOMAS M. COOLEY LAW REVIEW 125, (2000) (<http://www.law.arizona.edu/depts/upr-intj/intj-o.html>); see a cumulative bibliography at <http://www.law.arizona.edu/depts/upr-intj/intj-cb.html>.

¹⁰ Most of the data is highly favorable. E.g., *Drug Court Resources—Facts & Figures*, National Criminal Justice Reference Service, US Department of Justice (http://www.ncjrs.org/drug_courts/facts.html); *Looking at a Decade of Drug Courts* (Rev. 1999), Drug Court Clearinghouse and Technical Assistance Project (DCCTAP), American University, sponsored by the Drug Courts Program Office of the Office of Justice Programs, U.S. Department of Justice (<http://www.american.edu/academic.depts/spa/justice/publications/decade1.htm>). For a collection of more negative assessments, see *Drug Courts and Treatment as an Alternative to Incarceration* (http://www.reconsider.org/issues/drug_court/interesting_facts.htm), Reconsider: Forum on Drug Policy, and authorities cited. Even the latter source shows our local drug court (Multnomah County) as producing rearrest rates roughly one-third as high as those for graduates of the traditional approach. The sentencing support tools I promote show that our DUII court produces significantly greater success for most cohorts than for conventional correctional devices. See <http://www.smartsentencing.com>.

¹¹ Exceptions are the first offender drunk drivers and customers of prostitutes.

¹² Portland Police Bureau Data Processing, August 25, 2000. The Portland Bureau of Police stopped producing these statistics in mid-2000; I am still waiting for their successor. An extract of the statistics is available at <http://www.smartsentencing.com>.

¹³ "Sixty-seven percent of former inmates released from state prisons in 1994 committed at least one serious new crime within the following three years," and "272,111 offenders discharged in 1994 had accumulated 4.1 million arrest charges before their most recent imprisonment and another 744,000 charges within 3 years of release." Bureau of Justice Statistics Criminal Offenders Statistics, <http://www.ojp.usdoj.gov/bjs/abstract/rpr94.htm>; see also <http://www.ojp.usdoj.gov/bjs/crimoff.htm>. For Australian statistics, see <http://www.abs.gov.au/Ausstats/ABS@.nsf/94713ad445ff1425ca25682000192af2/a47fa7f4931f2bf3ca2569bb00164f7e!OpenDocument> For English statistics, see <http://www.crimereduction.gov.uk/drugsalcohol25.htm>. For Canada, see <http://www.crime-prevention.org/english/publications/children/profil.html#history>.

¹⁴ Oregon's definition of "reckless" behavior for purposes of the criminal law is typical of common law jurisdictions: "Recklessly," when used with respect to a result or to a circumstance described by a statute defining an offense, means that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation." ORS 161.085(9).

¹⁵ "Just deserts" certainly has an appropriate role in limiting the extent to which we have any business burdening an offender in the interests of public safety. For example, life imprisonment would prevent shoplifting recidivism, but life imprisonment would be disproportionately severe for shoplifting. Retribution or "denunciation"—punishment *per se*—may well be appropriate in the therapeutic interests of vulnerable victims, such as the victims of sex abuse who may need a demonstration that they have none of the blame. And the family of the victim of a deadly drunk driver may have a legitimate need for significant punishment far beyond what may be necessary to prevent recidivism. But in the vast majority of cases, responsibly pursuing the response that is most likely to prevent recidivism will also serve any interest in denunciation and any conceivable impact in the nature of "general deterrence"—assuming *arguendo* that the strategy of general deterrence has any viability. The bitter irony is that by pursuing deterrence, retribution, and the like under the banner of choosing the "appropriate" sentence, we have done a terrible job of reducing crime which—after all—is the primary charge the public rightly assumes is ours. More ironic still is our discomfort with public demand for increasingly punitive measures while we persist in legitimizing retribution.

¹⁶ Putting aside 1997 Oregon House Bill 2229 [1997 Or Laws ch 433], which marks a major step forward from this legislative ambivalence (see <http://ourworld.compuserve.com/homepages/SMMarcus/ch433.htm>), Oregon, like most jurisdictions, simply lists the objects of sentencing and leaves the user no guidance in assembling the parts: see ORS 161.025, ORS 419C.001, Or. Const. Art. I, §15. The Canadian approach is quite similar (See Criminal Code of Canada, Part XXIII, §718), although Canadian law quite directly 1) recognizes "denunciation" as a purpose of sentencing (§718(a)), 2) proclaims a principle of least restrictive alternatives—deeming incarceration a

choice of last resort (§718.2(d)), and 3) directs judges to consider the special "circumstances of aboriginal offenders" (§718.2(e)).

¹⁷ For example, Oregon lists non exclusive aggravating and mitigating factors for purposes of upward or downward departure sentences (OAR 213-008-0002, at http://arcweb.sos.state.or.us/rules/OARS_200/OAR_213/213_008.html), as do the federal sentencing guidelines (see United States Sentencing Commission, *Guidelines Manual* (Nov 2002), Chapters Three ("Adjustments") and Five, Part K ("Departures") (<http://www.ussc.gov/2002guid/2002guid.pdf>)). Guidelines like Oregon's may achieve some limited improvement in consistency, but the federal approach of attempting to assign each component a number of points for the façade of mathematical calculation typically leaves practitioners with no confidence whatever that they have served consistency. See, e.g. *United States v. Griffin*, 17 F3d 269, 273 (8th Cir 1994) (Bright J., dissenting); *United States v. Goebel*, 898 F2d 675, 679 (8th Cir 1990) (Bright, J., concurring); *United States v. O'Meara*, 895 F2d 1216, 1221 (8th Cir) (Bright, J., dissenting), cert. denied, 498 US. 943, 111 Sct 352, 112 LEd 2d 316 (1990) ("This case opens the window on the sometimes bizarre and topsy-turvy world of sentencing under the Guidelines.")

¹⁸ See, e.g., ORS 137.530.

¹⁹ Again, recent changes in Multnomah County provide some exceptions.

²⁰ See M. Marcus, *Thoughts on Strathclyde* (2002), an analysis of the Second Sentencing and Society Conference at Strathclyde University, Scotland, June of 2002. (http://ourworld.compuserve.com/homepages/SMMarcus/Thoughts_on_Strathclyde.htm)

²¹ See, e.g., Nigel Walker, *AGGRAVATION, MITIGATION AND MERCY IN CRIMINAL JUSTICE* (Oxford University Press 1999).

²² See, e.g., James Austin, Marino A. Bruce, Leo Carroll, Patricia L. McCall, Steven C. Richards, *The Use of Incarceration in the United States*, A Policy Paper Presented by the National Policy Committee to the American Society of Criminology (2001) (<http://www.asc41.com/policypaper1.html>).

²³ See generally Allan Manson, *SENTENCING AND PENAL POLICY IN CANADA* (Toronto: Emond Montgomery, 2000). Professor Manson expressed this view in plenary session at the Strathclyde Conference (*supra*, note 20). In this book and elsewhere, Professor Manson disparages the one proven use of incapacitation—preventing crime while the offender is in jail or prison—as "preventive detention," apparently exploiting its analogy to a very different device: *pre-trial* detention. In his Strathclyde abstract, Prof. Manson wrote: "Canada has been engaged in creating and expanding processes for preventive detention, all based on dubious conclusions about a person's future propensity. These options seek to confine and control individuals based on perceptions of dangerousness rather than traditional sentencing principles." (http://www.law.strath.ac.uk/CSR/conference2002/conference/abs_gm.htm#manson).

²⁴ 1997 HB 2229, *supra* note 18.

²⁵ John Halliday, Director, Review Team Cecilia French, Team Member Christina Goodwin, Team Member, *MAKING PUNISHMENTS WORK REPORT OF A REVIEW OF THE SENTENCING FRAMEWORK FOR ENGLAND AND WALES* (Home Office, July 2001) (<http://www.homeoffice.gov.uk/docs/halliday.html>).

²⁶ *Id.* at 8 ¶1.61.

²⁷ *Id.*, App. 5 (at 108); "When asked unprompted what the purpose of sentencing should be, the most common response is that it should aim to stop re-offending, reduce crime or create a safer community. Next most frequently

mentioned are deterrence and rehabilitation. Very few spontaneously refer to punishment or incapacitation."

²⁸ Article I, Section 15, of the Constitution of the State of Oregon, now lists "protection of society, personal responsibility, accountability for one's actions and reformation." (<http://landru.leg.state.or.us/orcons/orcons.html>). Unfortunately, this ballot measure also removed language denigrating "vindictive justice."

²⁹ 1997 HB 2229, *supra* note 18.

³⁰ 1997 Oregon Judicial Conference Resolution #1, reproduced at the end of this article.

³¹ Data warehouse technology is the current state of the art for analysis of information from multiple sources. Its critical attributes are these: 1) It "extracts" operational data from existing databases fed by criminal justice activities. It does not require separate data collection or entry. Multnomah County's data warehouse now gathers data from courts, local law enforcement, prosecutors, and jails, and will next add data from the state Department of Corrections. Eventually we will include alcohol and drug treatment and other public and private program providers among our data sources. 2) It "transforms" that data so it all speaks the same language, without requiring that we first unify and standardize the platforms and hardware with which the various criminal justice agencies meet their information services needs. 3) It "transfers" the data to a central repository ("warehouse") where it assembles the data in a structure whose "architecture" is designed for efficient responses to the queries anticipated from the target users—in our case, judges, attorneys, probation officers, pretrial release workers, probation and parole officers, and corrections counselors. 4) Finally, our project provides users with query tools that facilitate the analyses users need.

³² This effort is about three years behind Multnomah County's work, which serves as something of a pilot. Judges from around the state have concluded a "requirements" session with a Judicial Department software engineer to begin the process of building similar tools for all Oregon judges. Initially, the state tools will be limited to court data, but the plan is to exploit the data hoped to be available by way of a "Public Safety Data Warehouse" or similar project, construction by the Department of Oregon State Police. See <http://pmo.das.state.or.us/psdw/>.

³³ <http://www.smartsentencing.com>.

³⁴ A case number identifies an individual in our system, as well as a case—multiple defendants in the same case each have a distinct case number.

³⁵ The software offers the charges in the case, but also allows the user to select any charge known to state or local law in Oregon.

³⁶ Bars appear only for sentencing elements employed at least 30 times within the cohort. All data is displayed in a table below the bar chart, arranged in descending order of frequency.

³⁷ One of the judges who served on our state-wide sentencing support requirements committee sits in the county in which most of our prisons are located; she cured me of any notion that offenders don't commit crime *inside* prisons, as her courts hear most of those cases.

³⁸ For example, by default, when the charge selected at the outset is "Theft in the Second Degree," the cohort includes offenders like the offender who were sentenced for any "property crime."

³⁹ We parse criminal history into five levels of severity (none to severe) in each of six "flavors" of criminal behavior: property crime, violent crime, sex crime, drug crime, DUII and major traffic, and domestic violence. The data rules governing

these assignments have been adopted by a focus group of users including a prosecutor, a defense attorney and myself. The biggest constraint is the data available to the tools.

⁴⁰ Some argue that immutable factors such as gender cannot fairly be part of a risk assessment instrument; they would presumably have the same criticism of our tools. Users can eliminate such variables, but should not unless they must to obtain enough data to yield displays. Criticism of cognizance of factors such as gender may make sense in a world of just deserts, but it surely does not serve fairness in a system focused on public safety. Ignoring the variable is as likely to result in a sanction that is unnecessarily severe as one that is fortuitously lenient as compared with one that best serves public safety. We would unfairly ignore or underrate programs that are uniquely valuable for one gender or age group. There is nothing fair about blinding ourselves to sentences that best serve public safety and offenders. If immutable factors such as gender in fact help determine what is most likely to prevent avoidable victimizations, it is no more "fair" to ignore them than it would be to ignore psychopathy in some violent offenders. Besides, were this criticism to succeed, it would merely perpetuate uninformed sentencing practices that are inherently susceptible to the personal history, philosophy, preconceptions, and proclivities of the sentencer—*i.e.*, to unfairness, including class, gender, and racial bias—and that apparently perpetuate otherwise avoidable victimizations.

⁴¹ Although users can freely eliminate ethnicity from the operative variables, the inclusion of this variable serves at least two important purposes. First, some minorities suffer exaggerated incarceration and conviction rates, so criminal histories are not fairly (or accurately) comparable without this variable. Second, this variable allows us to assess the many programs that target minority offenders.

⁴² For example, I have found some types of property offenders for whom anger counseling has a remarkable correlation with reduced criminal behaviors; parenting education seems to correlate highly with reduced recidivism for many female drug offenders.

⁴³ In future iterations, we should recognize frequency and severity of recidivism. Diverting a violent offender into property crime may be a better result than we achieve now.

⁴⁴ Particularly with domestic violence, it may be important to recognize arrests because the inability to prosecute many of these crimes due to victim unavailability may well mask our successes and our failures. In any event, our tools allow the parties and the court to consider the arguments, make the changes, and recalculate during (and in preparation for) a hearing so we can observe and consider the correlations.

⁴⁵ We can also use the tools to explore concerns beyond actual convictions. For example, I recently sentenced a young woman who had as her first encounter with the criminal justice system a series of property crimes committed when former friends made the terrible mistake of selecting her as a house sitter, whereupon she sold their valuables, exhausted their credit cards, and very nearly ruined their lives. During sentencing, our tools showed that female

offenders of her age who were otherwise "similar" in having no prior record had a very bright prognosis. When the pre-sentence investigation came back, it became clear that something else was at work: the defendant had allowed her friends to move in and they all consumed enormous quantities of illegal drugs. The defendant had no prior drug convictions, but she had a severe drug addiction. I decided to run the calculations again with a "minimal" drug crime record assumption just to see what difference that might make, and found the prognosis tremendously worsened and diverse in correlation with the various sentencing options. I believe the experiment helped me make a better choice—better in the sense that it affords a greater likelihood for success—than I would have made without these tools, or even with these tools but without their flexibility. The victims attended the sentencing hearing, which Oregon law encourages, and they fully supported the analytical approach encouraged by the sentencing support tools.

⁴⁶ This may well turn out to be the best choice after all, but it would at least be useful to distinguish between those who do and those who do not complete the assignment inherent in the sentencing element.

⁴⁷ As a member of the Oregon Department of Corrections' "Inmate Incarceration and Transition Plan Design Team," I offered input to such assessment design precisely to improve our ability to profile offenders so as to improve our dispositions in court, in prisons, and on probation.

⁴⁸ Yes, we've considered the confidentiality issues so heavily laden with federal law and regulation. Our discussions with the Oregon Attorney General and the Director of the Oregon Department of Alcohol and Drug Abuse Programs have led to a consensus that aggregate data can be exploited for analytical purposes without legislative or regulatory change.

⁴⁹ 1997 Oregon Laws, Chapter 433, §8(4) [1997 House Bill 2229], *supra* note 18, amending ORS 420A.012, mandates sharing juvenile and adult data to help us see what happens to juveniles after we deal with them in delinquency (and dependency) hearings when they become eligible by age to show up in adult criminal justice data.

⁵⁰ Apart from the reasons discussed in the text, general crime reduction is not the only object. Substantial incarceration may be justified to allow a domestic violence victim to escape a relationship, or a sex abuse victim to succeed in therapy, or the family of a deadly drunk driver's victim to process their loss.

⁵¹ It matters not whether the campaign to promote the tools is causative or merely concomitant with trends towards a more rational criminal justice system.

⁵² Appendix A is a sentencing argument guide which I give to pre-sentence investigation writers and attorneys in anticipation of sentencing hearings.

⁵³ Multnomah County Judges have added a box to the standard order for pre-sentence investigations, asking for "analysis of what is most likely to reduce this offender's future criminal behavior and why, including the availability of any relevant programs in or out of custody." Our next step is to request that probation violation reports routinely include such information.