JUSTITIA'S BANDAGE: BLIND SENTENCING

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Abstract: *Although the public wants sentencing to reduce crime, judges and legislators make no responsible effort to select or encourage sentences that are most likely to reduce an offender's criminal behavior. We produce cruelly avoidable victimizations and impose cruelly misdirected punishments. Most offenders sentenced for most crimes offend again. Most who commit heinous crimes have been sentenced before with no meaningful attempt to choose a sentence that is most likely to prevent future crime. Our failures in turn fuel draconian sentencing laws and repeated assaults on judicial sentencing discretion, compounding our persistent promotion of the dangerous fallacy that crime reduction is directly proportional to the severity of punishment. Just deserts has deep roots in religious and political history. It is strengthened by the unwitting coalition of those wary of empiricism for fear of leniency and those wary of crime reduction for fear of punitivism. Yet responsible pursuit of crime reduction is kinder to all and preferred by most who resort to draconian responses to our present misdirection. Improvement is within our grasp, but will require relentless search for strategies for transforming sentencing from an archaic and harmful ritual into a socially responsible exercise.*

Introduction

Norval Morris counseled over thirty years ago that we would never achieve a "rational sentencing policy" until "Justitia . . . remove[s] that anachronistic bandage from her eyes and look[s] about at the developments in society," and we learn to analyze criminals and their environment in a painstaking and objective exploitation of developing social sciences and correctional technology.[1] Instead of heeding that advice, we have celebrated rather than responded to the limitations of social and correctional science, and retreated to a just deserts model that eschews responsibility for crime reduction through sentencing.

Although the public sees crime reduction as the first objective of sentencing, judges and legislators make no responsible effort to select or encourage sentences that are most likely to reduce an offender's criminal behavior. We produce cruelly avoidable victimizations and impose cruelly misdirected punishments. Most offenders sentenced for most crimes offend again. Most offenders who commit heinous crimes have been sentenced before with no meaningful attempt to choose a sentence that is most likely to prevent future crime. Our failures in turn fuel draconian sentencing laws and repeated assaults on judicial sentencing discretion, compounding our

[1] *See* Norval Morris and Gordon Hawkins, THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL 138-44 (1970).

persistent promotion of the dangerous fallacy that crime reduction is directly proportional to the severity of punishment.

This paper will seek to demonstrate these propositions, explore their genesis, and suggest some strategies for improvement.

Sentencing and Recidivism

Sentencing is the end product of most law enforcement and prosecutorial efforts. Yet sentencing is enormously unsuccessful at crime reduction. I noticed quite early in my judicial career[2] that most offenders I sentence have been sentenced before without preventing the crime that led them to me. My impression was entirely consistent with national and local data. Although departments of corrections often publish recidivism statistics approximating 30 percent, these figures always exclude the most numerous of crimes – misdemeanors[3] – and therefore grossly underestimate actual recidivism rates, which are closer to 65 to75 percent for most[4] categories of crime. Bureau of Justice Statistics reflect that "[m]ore than 7 of every 10 jail inmates had prior sentences to probation or incarceration," and that "Of the 108,580 persons released from prisons in 11 States in 1983, an estimated 62.5% were rearrested for a felony or serious misdemeanor within 3 years, 46.8% were reconvicted, and 41.4% returned to prison or jail."[5] "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."[6]

Our local experience is consistent: of the 2,395 people jailed in Portland, Oregon, during July, 2000,[7] 1,246 had been jailed in Portland on some other occasion within the previous 12 months. The same was true as to 22 of the 32 jailed that month for Burglary, 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. And "4% of our offenders accounted for 23% of [s]tandard bookings between 1995 and 1999."[8]

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[2] My first sentencing experience began as I served as a district judge *pro tempore* from time to time throughout the 1980s; I became an elected Oregon trial judge in 1990, and have since handled a full range of criminal cases (as well as civil matters).

[3] In our county in 2003, misdemeanors accounted for approximately 79% of criminal case filings.

[4] In my experience, we are far more likely to encounter first offenders (in the sense of those with no prior *convictions*) among drunk drivers and men caught in "prostitution decoy" law enforcement missions.

[5] Bureau of Justice Statistics Criminal Offenders Statistics, http://www.ojp.usdoj.gov/bjs/crimoff.htm.

[6] Bureau of Justice Statistics Criminal Offenders Statistics, http://www.ojp.usdoj.gov/bjs/abstract/rpr94.htm.

[7] 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.

[8] *The Booking Frequency Pilot Project In Multnomah County, Oregon: A Focus On Process And Frequencies*, at i (The Multnomah County Sheriff's Office, Dan Noelle, Sheriff, In collaboration with the Multnomah County Department of Community and Family Services, Department of Community Justice, Health Department, and Corrections Health Division (January 2002)). Portland is the largest city in Multnomah County, Oregon.

I also noticed that offenders convicted in my court of major crimes often (but not always) had substantial criminal careers replete with sentences that surely did not prevent the serious crimes that brought them before me. For example, I imposed a lengthy and mandatory prison sentence on an arsonist whose crime had nearly claimed two lives and leveled most of a city block. His crime was not prevented by previous sentences for juvenile and adult assaults, thefts, and drug crimes. Another offender I sentenced for first degree robbery had not been diverted from crime by his prior sentences for property and person crimes. And an offender I sentenced for manslaughter had a long record of juvenile and adult drug, property, and driving convictions and sentences.

Of course, absent "true" life imprisonment or execution, no sentence can carry a guarantee that the offender will not offend again.[9] But what impressed me indelibly was that the sentencing rituals we conduct have no component *that even seriously pursues* crime reduction. Any observer of sentencing hearings must conclude that the participants rarely, if ever, even discuss whether any of the choices available to the judge are more or less likely to reduce criminal behavior. Instead, prosecutors tend to argue for more severe sentences based on "aggravating circumstances" such as the impact on the victim, while defenders argue for leniency based on "mitigation" in the form of abusive childhoods or more current misfortune – both tacitly accepting that sentencing should predominantly focus on punishment proportional to the offense and the propriety of mitigation due to sympathy. Proportionality is of course important, but unless our charge has nothing to do with public safety, proportionality is not a satisfactory end in itself.

The casual observer might glean some hope from the common presence of some treatment or program component in many misdemeanor and relatively minor felony sentences: we routinely require that drunk drivers complete alcohol treatment, that assaultive offenders attend "anger management," that drug offenders obtain drug treatment, and that sex offenders participate in sex offender treatment. But this appearance of concern for the offender's future behavior yields to any responsible scrutiny. We impose these sentences out of symmetry, not science; we make no effort to assess whether the graduates of any of these programs refrain from future crime.[10] All we ask is that providers inform us of failures to complete the program. We deem program completion "success" regardless of future criminal behavior. Worse, we make no attempt whatever to avoid choking programs with offenders they cannot reform or to ensure that

[9] My colleagues in counties that process crimes committed *in* prisons occasionally remind me that incarceration only prevents crimes outside prison, and history would provide the rare examples of cult leaders and other criminals who have been able to cause others to commit crimes on the outside.

[10] To be precise, there are certainly attempts by others to assess the impact of these programs on criminal behavior, and a substantial debate as to their success. *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, available at http://www.ncjrs.org/pdffiles/171676.pdf; the full report is available at http://www.ncjrs.org/works/wholedoc.htm. My point for present purposes is that none of this is visible to the sentencing process, and none has any apparent role in affecting that process.

offenders most likely to benefit from a program are linked with that program.

Most judges, of course, sincerely hope that our sentencing choices will serve the offender and public safety. Most of us take the time to deliver some words of advice, threat, encouragement, or comfort with each sentence, hoping that through our presumed wisdom and authority we will somehow impact the offender for the better. But neither our propensity for delivering sermons nor our sincere intentions substitute for responsible pursuit of best practices. Our performance as judges in our temples of denunciation[11] is governed by the widely disparate philosophies, personal experiences, ideologies, and degrees of hubris we bring to the task – rather than anything approaching evidence-based practices or even logical argument. I think it fair to say that few of us would knowingly seek medical treatment from a provider so divorced from empiricism.

In any event, recidivism statistics compel the conclusion that we are not doing a good job of diverting offenders from criminal careers. The fact that we are not really trying in turn compels the conclusion that by failing to seek best efforts, we are producing at least some victimizations that a more responsible effort would prevent. By failing to allocate correctional resources where they will do the most good, we are squandering those resources. By failing to focus on crime reduction, we tolerate the abandonment of correctional programs that are effective[12] and persist in relying on some that accomplish little or nothing for public safety. At a time when jails are overflowing with our failures,[13] our avoidance of best practices makes funding for programs in and out of custody the most vulnerable of budget items. By keeping the revolving door spinning, we multiply the social, individual, and economic consequences of our failures – tragically reducing the resources available for crime *prevention* investments that are far more efficient at crime reduction than sentencing at its best: parenting education, high school completion, and other similar efforts.[14]

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[11] Michael Marcus, *Sentencing in the Temple of Denunciation: Criminal Justice's Weakest Link*, 1 OHIO STATE JOURNAL OF CRIMINAL LAW 671 (2004).

[12] Two of the most poignant losses in Oregon were abandonment of a sex offender treatment program at the Oregon State Hospital in conjunction with the Department of Corrections that significantly reduced recidivism rates for categories of dangerous sex offenders previously thought essentially certain to reoffend after imprisonment, and termination of "Our New Beginnings," a local program run by an ex-offender for drug addicted prostitutes that turned many into productive and law-abiding citizens.

[13] Judges in my county receive daily statistics reflecting the number of sentenced and unsentenced offenders who have been released because the jails are full. There are compounding ironies: first, that we currently have about 1200 empty jail beds because we cannot afford to staff them, and second, that the sheriff uses a risk assessment instrument to determine which offenders to release that is far more rational than the process by which we select which offenders to incarcerate. *See* http://www.inmatereleases.org/.

[14] See, e.g.., Developmental Crime Prevention Consortium, Professor Ross Homel, Griffith University, *Early Intervention and Developmental Approaches to Crime Prevention*, South Australia Attorney General's Department (1999), http://www.cpu.sa.gov.au/nacs_eidacp.htm; California (USA) Youth Authority, *Delinquency Prevention Resources*, http://www.cya.ca.gov/juvenile/delinquencyprevention.html; Department of Justice, Canada, *Alberta Crime Prevention Initiatives*, http://canada.justice.gc.ca/en/news/nr/2001/doc_27924.html. A good source is at *Research on Parenting Education Programs and Their Effectiveness: A Bibliography*, http://www.whitehousedrugpolicy.gov/publications/prevent/parenting/r_bib.html; National Crime Prevention Centre (Canada), *Health, social and educational services - determinants of health* (2001),

Whenever anyone has actually asked what sentencing should be about, the public has replied that crime reduction is more important than punishment for its own sake.[15] To whatever extent we are fulfilling our social function of reinforcing values through the modern equivalent of the morality play,[16] we encourage the public misperception that punishment severity and crime reduction are directly proportional. Because we have failed to model best practices, whenever the public perceives that we are not sufficiently responding to crime – whether by legitimate analysis or exaggerated response to media exploitation of heinous crime – the routine reaction is demand for increasingly severe sentencing and decreased sentencing discretion.[17]

To all of this, we judges tend to react in dismay. But just as we are missing the obvious when we cannot fathom why offenders we sentence repeatedly do not learn from *their* mistakes, we fail to appreciate that it is our inability to learn from our own misdirection that substantially accounts for both public punitiveness and offender recidivism. Until and unless we understand that our sentencing behaviors will continue to have the same outcomes – both as to recidivism and public reaction – until we modify those behaviors, we, the public, and the offenders we share are caught in a tragic dysfunction. And, until we modify our sentencing behaviors, the public is probably doing a better job at crime reduction than we are.

The reasons for our misdirection: (i) prehistory, history, and religion

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http://www.prevention.gc.ca/en/library/publications/children/health/health.html. An Oregon Colleague, Judge Pamela Abernethy, has launched a program ("Project Bond") that wonderfully combines both sectors: parents of very young children who appear as criminal defendants are given sentencing incentives to agree to injecting services into their parenting.

[15] Peter D. Hart Research Associates, Inc., CHANGING PUBLIC ATTITUDES TOWARD THE CRIMINAL JUSTICE SYSTEM (The Open Society Institute, February 2002), available at http://www.soros.org/initiatives/justice/articles_publications/publications/hartpoll_20020201/Hart-Poll.pdf; Belden, Russonello & Stewart, OPTIMISM, PESSIMISM, AND JAILHOUSE REDEMPTION: AMERICAN ATTITUDES ON CRIME, PUNISHMENT, AND OVER-INCARCERATION (Washington, DC 2001); Judith Green and Vincent Schiraldi, CUTTING CORRECTLY - NEW PRISON POLICIES FOR TIMES OF FISCAL CRISIS 5-8, and authorities cited (Justice Policy Institute, February 7, 2002), available at http://www.justicepolicy.org/article.php?list=type&type=24; US Department of Justice, National Institute of Corrections, PROMOTING PUBIC SAFETY USING EFFECTIVE INTERVENTIONS, Section 1 (February 2001), citing, *e.g*., B.K. Applegate and F.T. Cullen, and B.S. Fisher, *Public Support for Correctional Treatment: The Continuing Appeal of the Rehabilitative Ideal*, 77 Prison Journal 237-58 (1997); MAKING PUNISHMENTS WORK: REPORT OF A REVIEW OF THE SENTENCING FRAMEWORK FOR ENGLAND AND WALES (Home Office 2001) App. 5 at 108, available at http://www.homeoffice.gov.uk/docs/halliday.html; Fairbank, Maslin, Maulin & Associates, RESOURCES FOR YOUTH CALIFORNIA SURVEY (1998).

[16] *E.g.*, Stephanos Bibas, *Harmonizing Substantive Criminal Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1361 (2003); Rollin Perkins & Ronald Boyce, CRIMINAL LAW 5-6 (1982).

[17] 1989 Or Laws ch 1, §§ 2 & 3, and ch 790, §82, enacted contemporaneously with Oregon's sentencing guidelines, required previous mandatory "gun" minimum sentences to trump guideline sentences, and required "determinate" sentences without reduction, leave, or parole for certain felonies if committed by offenders with similar prior convictions ["Denny Smith" sentences]. In 1995, Oregon voters adopted mandatory minimum sentences for a similar range of serious felonies ("Ballot Measure 11," 1995 Or Laws chs 2, 421). In 1996 (effective July, 1997), Oregon legislated 13 and 19 month presumptive sentences (to override lower presumptive sentences in the guidelines) for certain "repeat property offenders." ORS 137.717, 1996 Or Laws ch 3, §1.

In modern society, sentencing is remarkable for its immunity from scrutiny for success. Students must be tested for proficiency, performance audits have become ubiquitous for governmental agencies, a significant portion of our population studies stock and commodities markets for profit and loss trends, and businesses compete for survival around a bottom line of profit and loss. For all its faults, medicine is repeatedly scrutinized for cost and benefit, and at least in substantial part presupposes the outcome measure of health and longevity. Political parties enthusiastically exploit data and strategy in competition for votes. Indeed, among modern institutions, public and private, sentencing has few companions in the realm of *a priori* validation – religion and, arguably, foreign policy account for all or most of them. The reasons why sentencing is not held accountable for public safety are vast in tenure and tenacity.

On several levels, the commonality with religion is hardly coincidental. Criminal sentencing is usefully viewed as linked to an evolution of power and control from ancient roots in family, clan, and tribe through king, aristocracy, and the modern sovereign state.[18]

> After an appalling description of a criminal being broken on the wheel, [Joseph de Maistre] proceeds: "the executioner comes down, blood-drenched . . . . The crowd parts in horror to let him through . . . And yet on him depend all majesty, all power, all subordination. He is at once the abomination and the bond of human association. Take away from the world this incomprehensible agent, in that very moment order gives place to chaos, thrones fall into the abyss, society dissolves. God, who is the author of sovereignty, is author also of punishment." Strange and morbid though this is, it is the very heart of de Maistre's political argument. . . . this concept of punishment as not primarily deterrent or even therapeutic, but as retributive – society's vindication of its code . . . .
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> Sir Jocelyn Simon, *English Idioms from the Penal Law*, in Louis Jacques Blom-Cooper, THE LANGUAGE OF THE LAW: AN ANTHOLOGY OF LEGAL PROSE 275 (1965)

The role of punishment in civilizing society has been to co-opt retribution with a metered, official response – to end the chaotic destruction of plenary vengeance. Before the sovereign usurped retribution, whole clans or tribes might seek to annihilate others whose members were thought guilty of some affront. "Eye for an eye" was a moderating notion at its inception,[19] and the criminal law a foundation for the evolution of social forms beyond bands to communities and ultimately to cities, states, and nations. In this progression, leadership and concentrations of power depended upon allegiance; allegiance was the product of the self-interest of allies, and perhaps their respect. But power was also secured by threat, and before democratic notions, public, violent and dramatic punishment was a means of deterring disobedience and revolt. It

[18] S*ee, e.g.,* Sol Rubin, THE LAW OF CRIMINAL CORRECTION §§1-28, pp. 3-42 (1963).

[19] *Lex talionis*, or the principle of equivalency, finds expression in Exodus 21:23. Although "an eye for an eye" in modern terms is the slogan of severe punishment, in its origins it implied moderation, and was intended to condemn excessive retaliation or retribution for injuries or wrongs. A similar concept runs through the Code of Hammurabi (c. 2500 B.C.E.). See, e.g., Arthur B. Berger, *Wilson v. Seiter: An Unsatisfying Attempt at Resolving the Imbroglio of Eighth Amendment Prisoners' Rights Standards*, 1992 UTAH L. REV. 565, 567.

worked reasonably well, as all were able to observe spectacles such as public executions and the functionally related gladiatorial games of Rome[20] without the distractions common in our time. Government was at least in significant part synonymous with suppression.

Religion and government were originally also synonymous; disobedience was concurrently seditious and blasphemous. Even since they achieved some divergence, religion and secular order are often allies. Both secure obedience and allegiance by means that include threat. Both continued through most of our history to promise retribution for those whose violations were perceived as threatening. Depictions (verbal and pictorial) of souls tortured in hell, monastic piles of human skeletal remains, and gruesome public executions were but manifestations of the same tactic toward the same end: a central power moderating a population deemed potentially wayward. Notions of moral wrong continue to be deeply embedded in criminal law, and find a significant manifestation in the continued utility of the concept of *mens rea*.[21]

The criminal law was thus not just an adjunct of civilization, but also a tool of its imposition and maintenance. With these roots, it is not all that surprising that the criminal law is still content with a mission that has nothing primarily to do with reducing the future misbehavior of those sentenced, and which depends so mindlessly on archaic notions of the universal efficacy of general deterrence. And it is also plausible that we so easily tolerate recidivism, rather than recognize it as evidence of our failure to achieve crime reduction, because it provides the fodder for the repetitive morality play – and because crime reduction is not the point.[22]

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[20] *See generally*, Thomas Wiedemann, EMPERORS AND GLADIATORS (Routledge 1992).

[21] *See, e.g.*, JC Smith & Brian Hogan, CRIMINAL LAW 3-8 (1965).

[22] At this point, it is necessary to separate crime reduction through deterrence of others (general deterrence) from crime reduction through incapacitation or behavior modification of those we sentence (including specific deterrence). Sir Simon obviously assumes distinctions between retribution and deterrence. Perhaps in addition to controlling the behavior of observers by threat and example, public retribution has a ritual unifying effect around dominant social values; perhaps it "teaches" or reinforces those values by denunciation. And tangible punishment clearly has utility in obviating vigilantism. But regardless of these distinctions, the value of punishment as spectacle is lost to the extent that punishment is invisible – as it now clearly is in the vast bulk of cases, particularly to a population with so many alternate attractions through media and modern urban life even were we to return to public punishment – which, of course, we abandoned because of its debasing potential (not to mention the prevalence of pickpockets at hangings). Like reformation, deterrence deserves scrutiny and cannot rest on faith for its validation. The literature of deterrence is remarkably light on good evidence of the actual efficacy of punishment as a means of preventing crimes by others. *See, e.g.*, H. Laurence Ross and Gary D. LaFree, *Deterrence in Criminology and Social Policy*, in BEHAVIORAL AND SOCIAL SCIENCE: 50 YEARS OF DISCOVERY 129, *et seq*, and authorities cited (Committee on Basic Research in the Behavioral and Social Sciences, National Research Council 1986). A particularly popular form of discourse is the proposal of a model that *assumes* the underlying axioms and purports to compare the relative significance of swiftness ("celerity"), severity, and certainty as variables. *See, e.g.*, Daniel S. Nagin and Greg Pogarsky, *Integrating Celerity, Impulsivity, and Extralegal Sanction Threats into a Model of General Deterrence: Theory and Evidence* (Carnegie Mellon 2000), and authorities cited, available at http://www.hss.cmu.edu/departments/sds/BDRauthors/criminology.pdf. Modern thought and the great majority of criminal justice practitioners recognize that deterrence is of minimal efficacy the most crimes and criminals – because so much crime is the product of poor impulse control, poor role modeling and parenting, addiction, and a host of other criminogenic factors largely or wholly extrinsic to the rational process presupposed by deterrence theory. Deterrence may work for parking tickets, and it may work for business offenders who actually attempt to estimate risk and reward, but most in the criminal justice world agree that we are far more realistic to seek

The reasons for our misdirection: (ii) Academia, the Model Penal Code, and the guidelines movement

By disposition and background, I was predisposed to expect institutions of higher education, as citadels of rational thought and policy, to be champions of enlightened criminal justice policy and of evidence-based sentencing and correction. My search for validation of this hypothesis has been quite painful. I was particularly disheartened to learn that even that portion of the academic world most directly focused on sentencing has no apparent interest in the effectiveness of sentencing in reducing criminal behavior. At the Second International Conference on Sentencing and Society in Glasgow, Scotland, in 2002, academics and practitioners assembled from around the world to discuss everything about sentencing *except* whether it responsibly addresses crime reduction.[23] Instead, the thoughts and minds of most were directed at the specter of "populist punitiveness" and the rise of "mass incarcerationism." Although academia has often invoked the theme of detached and therefore unbiased observation – a theme that rejects involvement and advocacy as impure – there was nothing neutral about the condemnation of incapacitation as "preventive detention."[24]

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prevention, incapacitation, or behavior modification of those convicted than to rely on punishment to prevent crime by others. Michael Marcus, *Comments on the Model Penal Code: Sentencing Preliminary Draft No. 1*, 30 AM J CRIM LAW 151-52 & n.58 (2003). In any event, there is no question but that we must improve the crime reduction impact of sentences on those we sentence if we are to improve criminal justice's impact on the total crime rate.

> [I]n regard to the general deterrence question, it is better in the present state of knowledge for the penal system to concentrate on the task of making the community safer by preventing the actual offender's return to crime upon his release than to pursue the problematic preclusion of offenses by others: THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL, supra note 1, at 122.

[23] "I am at one of the two institutions in the world devoted expressly to 'sentencing research.' It has occurred to almost none of those assembled that what needs to be researched is what works on which offenders to reduce recidivism. To the extent that we notice that those on whom we repeatedly impose sanctions continue to reoffend, we wonder why they don't change their behavior. We ignore rather than address our abysmal public safety performance, we label the critics 'populist,' we study sentencing as anthropologists would the Trobrianders or behavioral biologists savanna baboons – with this one difference: judges are viewed as anointed with divine wisdom and entitled by their office to discretion unfettered by any responsibility for the havoc we judges wreak – indeed, those assembled receive without protest (except mine) the notion that it is not our job as judges to reduce crime with our sentences. Even a commission invited by legislation to address 'the cost of different sentences and their relative effectiveness in preventing re-offending' instead retained experts to explore the nuances of public opinion; another borne of public outrage at heinous crime proposes to make public safety the last consideration of sentencing. As we so often accomplish with the draconian measures we condemn, by our liturgy we encourage the worst in our performance as jurists and as scholars." Michael H. Marcus, *Thoughts on Strathclyde*, available at http://www.smartsentencing.com under "Articles on Smart Sentencing."

[24] *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. 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." *See also*, Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventative Detention as Criminal Justice*, 114 HARV. L. REV. 1429 (2001). "Professor Robinson actually argues that by diluting pure pursuit of just punishment

Much of academia has a laudable distaste for incarceration, which unfortunately emerges as a heavy bias in the resulting literature. Many studies focus on the failure of prison to reduce recidivism after release,[25] or to reduce substantially the crime rate in jurisdictions that have experimented with "three-strikes" or other mandatory sentencing laws.[26] These results can be judged on their merits and their methodology, but the resolve with which academia avoids noticing that offenders in custody rarely offend during their incarceration profoundly injures academia's credibility on criminal justice issues. A much smaller camp lauds incarceration.[27] Both camps have much to contribute to a rational sentencing policy, but neither seems open to the realization that for some offenders, the opposing camp may have the best solution. The result is that the bulk of the literature ignores crime reduction as a measure of sentencing, while the minority is so focused on the benefits of incapacitation, so unrelenting in its refusal to acknowledge the potential criminogenic impacts of prison, and so resolutely disparaging of "treatment" and alternative programs that it, too, has little credibility beyond its ranks.

To the extent that it has chosen to become involved in promoting change, academia helped support the 1962 Model Penal Code,[28] and has more recently substantially aligned itself behind the efforts of Professor Kevin Reitz to revise the sentencing provisions of that Model Penal Code to embrace sentencing guidelines.[29] The history of sentencing guidelines in the United States has been well documented.[30] I have followed our own Oregon guidelines from their inception,

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with public safety objectives, we sacrifice public safety. His reasoning reduces to this: citizens despair that criminals are not suitably punished, lose respect for the criminal justice system, and are therefore less influenced by that system in evolving values such as those against drunk driving and domestic violence. I submit, however, that it is obvious in the real world that we do far more harm both to respect and to public safety by persistently producing recidivism while denying our responsibility for outcomes." Michael H. Marcus, *Smarter Sentencing: On the Need to Consider Crime Reduction as a Goal*, 40:3&4 COURT REVIEW 16 (Winter 2004).

[25] *E.g.*, 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).

[26] *E.g.*, Lisa Stolzenberg and Stewart J. D'Alessio, *Three Strikes and You're Out: The Impact of California's New Mandatory Sentencing Law on Serious Crime Rates*, 43 CRIME AND DELINQUENCY 457 (1997).

[27] *E.g.*, Steven D. Levitt, *The Effect of Prison Population Size on Crime Rates: Evidence From Prison Overcrowding Litigation* (NBER Working Paper No. W5119, May 1995), available at http://ssrn.com/abstract=225184.

[28] The reporters, "special consultants," and advisory committee were well representative of academia, even if weighted toward law rather than criminology. *See* http://www.ali.org/ali/stu_mod_pen.htm.

[29] Kevin R. Reitz, Reporter, *Model Penal Code: Sentencing - Preliminary Draft No. 3* (American Law Institute, May 28, 2004). An earlier version of the revision (March, 2003) is available at http://www.ali.org/ali/ALIPROJ_MPC03.pdf. The advisory and consultant committees are listed at http://www.ali.org/ali/PP3.asp.

[30] *E.g.*, Richard S. Frase, *Sentencing Guidelines in Minnesota: 1978-2003*, in Michael Tonry, ed. CRIME AND JUSTICE: A REVIEW OF RESEARCH, vol. 32 (Chicago: University of Chicago Press, forthcoming); Richard S. Frase, *Sentencing Guidelines in Minnesota, Other States, and the Federal Courts: A Twenty-Year Retrospective*, 12 FED SENT RPTR 69 (1999); Kate Stith and José A. Cabranes, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS (Chicago: University of Chicago Press, 1998).

having testified before the Sentencing Guidelines Board that promulgated them in 1989 and the Oregon Criminal Justice Commission, which now serves as our sentencing commission. In classic Oregonian fashion, the related inclusive committee process included representatives of almost all attitudes toward crime and punishment. The progression in Oregon closely parallels the movement towards guidelines embodied in the current Model Penal Code revision efforts.

I share much of Prof. Reitz's critique of pre-guidelines laws based on the 1962 Model Penal Code.[31] The sentencing provisions simply provide a "shopping list" of purposes such as just punishment, general deterrence, public safety, proportionality, and reformation with no direction as to how to prioritize often competing purposes, and no means by which actually to pursue any of those purposes through a sentence.[32] Prof. Reitz calls the list therefore "mere decoration,"[33] but the list reflects a faith-based notion that sentencing serves these functions because we believe it should – just as those who finally built prisons based on Jeremy Bentham's Panopticon took it on faith that solitary incarceration would produce penitence.[34] Because these sentencing provisions provided no guidance, because their utilitarian pronouncements had no mechanism for achievement, because sentencing judges relied on their own varying notions of what they should be doing and why, and because participants neither expected nor sought to aim sentencing at crime reduction, the results were wildly disparate, effective at crime reduction only by accident, and often exacerbated the overrepresentation of minorities in prison populations. The prevalent indeterminate sentencing system, dependent on parole boards to determine actual prison term length, produced some rudimentary attempts to serve public safety, but fell into disfavor. Calls to

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[31] Oregon, in common with at least 40 other states, based a criminal code revision on the 1962 Model Penal Code. *See* 1971 Or Laws, ch 743.

[32] Oregon's iteration of the existing Model Penal Code sentencing provision is reasonable enough, but still subject to the criticism of providing no prioritization and hence little direction:

> **161.025 Purposes; principles of construction.** (1) The general purposes of chapter 743, Oregon Laws 1971, [*Oregon's criminal code*] are:
> (a) 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.
> (b) To forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests.
> (c) To give fair warning of the nature of the conduct declared to constitute an offense and of the sentences authorized upon conviction.
> (d) To define the act or omission and the accompanying mental state that constitute each offense and limit the condemnation of conduct as criminal when it is without fault.
> (e) To differentiate on reasonable grounds between serious and minor offenses.
> (f) To prescribe penalties which are proportionate to the seriousness of offenses and which permit recognition of differences in rehabilitation possibilities among individual offenders.
> (g) To safeguard offenders against excessive, disproportionate or arbitrary punishment.

[33] Kevin R. Reitz, Reporter, *Model Penal Code: Sentencing - Preliminary Draft No. 1* at 10 (American Law Institute, August 26, 2002).

[34] Hence the name "penitentiary." The first modern prisons, based on the "Panopticon" of Jeremy Bentham, were built in Pittsburgh and in Philadelphia in the early 19th Century when Quakers took up the cause that Jeremy Bentham had not yet sold in his native England. STATE PENITENTIARY FOR THE EASTERN DISTRICT OF PENNSYLVANIA RECORDS, Background Note at 2 (American Philosophical Society 2001), available at http://www.amphilsoc.org/library/mole/s/statepen.pdf.

revise the Model Penal Code to promote sentencing guidelines were a reaction to these real and perceived shortcomings.[35]

Unfortunately, instead of replacing faith-based proclamations about the purposes of sentencing with mechanisms to promote accountability for rational and empirically validated allocation of resources and sanctions to pursue crime reduction, the authors of guidelines, including Prof. Reitz, have essentially abandoned crime reduction as a purpose of sentencing and instead focused their efforts on guiding judges to impose sentences that will punish offenders within a range that generally corresponds to sentences usually imposed on offenders who commit similar crimes.[36] The success of guidelines is therefore measured by the degree to which sentences are so normalized, and by the resulting predictability of demands for prison beds. It is my sense that the proponents of this approach, like some proponents of Oregon's guidelines, tend to view the public as excessively punitive, to bemoan "mass incarcerationism," and to celebrate the normalization of sentencing around limited ranges of retribution because they are convinced they can hope for no more meaningful achievement. It is my impression that many of these embrace notions of "accountability" – a modern reformulation of limited retribution, as far as I can glean – as a matter of tactic more than as a matter of enthusiasm for punishment, and that the vehemence of their support for guidelines is in reality a reflection of their despair at having no real success at moderating what they perceive to be excessive incarceration.

I argue elsewhere at substantial length[37] that the rationales for this approach are without merit – that the guidelines' claim to equal treatment is exaggerated; that crime reduction efficacy would be a more socially responsible basis for normalization than the demonstrably unsuccessful average practices of judges neither directed nor informed towards public safety; that sentencing commissions, guidelines, and appellate review of sentences are hopeless as strategies to restrain retributivism;[38] and that we are doing tremendous harm by rejecting the challenge to pursue best practices in treatment, risk assessment, selective incarceration, alternative sanctions, and program allocation.

My point for present purposes is simply that sentencing guidelines, which reflect the dominant thinking of contemporary academics and criminal justice leaders, have nothing intentionally to do with crime reduction. The overwhelming message of the guidelines is that sentences should be based on retribution proportional to crime seriousness and criminal history, limited by available prison resources, subject to departure for reasons of aggravation or mitigation (*i.e.*, just

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[35] See, e.g., Michael Tonry, *Sentencing Guidelines and the Model Penal Code*, 19 RUTGERS L. J. 823 (1988)

[36] In Oregon, the presumptive sentence is determined by the "crime seriousness" associated with the offense and related circumstances, and the "criminal history" of the offender. *See* OAR 213-004-0001 *and* http://www.ocjc.state.or.us/SGGrid.htm. Prof. Reitz would leave up to the states whether to include criminal history in the matrix to prescribe a presumptive range of punishment or to use criminal record as an aggravating circumstance. *Model Penal Code: Sentencing - Preliminary Draft No. 3*, *supra* note 29, at 194, §6B.07.

[37] Michael Marcus, *Comments on the Model Penal Code: Sentencing Preliminary Draft No. 1*, *supra* note 22; Michael Marcus, *LR - Limiting Retributivism or Lamentable Retreat? - The Third Draft of Revisions to the Model Penal Code* (forthcoming, FED SENT RPTR); a prepublication version presented at the 2004 conference of the National Association of Sentencing Commissions is available at http://www.smartsentencing.com under "articles."

[38] Oregon's guidelines have repeatedly yielded to pressures to increase penalties. See note 17, *supra*.

deserts).[39] Any quibble about their occasional nod to treatment for a minuscule slice of offenders and sentences[40] should be silenced by this circumstance: After several months pursuing proposals for increasing the public safety performance of Oregon law, the Oregon Public Safety Review Steering Committee (appointed by Oregon's governor) on October 8, 2004, included this proposal in its recommendations:

> The Oregon Criminal Justice Commission shall examine the feasibility and means of incorporating consideration of reducing criminal conduct and the crime rate into Oregon's felony sentencing guidelines.[41]

Regardless of the fate of this proposal in the hands of the governor, the legislature, or the commission, by its existence it represents a stark demonstration that the guidelines do not now include "consideration of reducing criminal conduct." Given that guidelines set the tone for all felony sentencing and, by their example, all misdemeanor sentencing, they provide much of the answer to the question why sentencing ignores crime reduction.

The guideline movement is presently grappling with the implications of *Blakely v. Washington*,[42] a June, 2004, decision of the United States Supreme Court. *Blakely* held that when guideline provisions require fact finding to achieve a sentence exceeding that available simply based on a conviction for a crime (an "upward departure" in *Blakely*), the defendant is entitled by the Sixth Amendment to have that fact finding accomplished by a jury operating under the standard of proof beyond a reasonable doubt. *Blakely* extended *Apprendi v. New Jersey*,[43] which recognized the right to a jury trial as to facts that permit a sentence in excess of an otherwise applicable statutory maximum. Guideline proponents hoped and assumed that *Apprendi* would not affect upward departures under guidelines because the resulting sentences would not exceed generic statutory maximum sentences.[44] But *Blakely* reasoned that:

> [T]he relevant "statutory maximum" is not the maximum sentence a judge may impose

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[39] "Subject to the discretion of the sentencing judge to deviate and impose a different sentence in recognition of aggravating and mitigating circumstances, the appropriate punishment for a felony conviction should depend on the seriousness of the crime of conviction when compared to all other crimes and the offender's criminal history." OAR 213-002-0001(3)(d).

[40] Amenability to treatment is a possible factor for "optional probation" under Oregon's guidelines in three "grid blocks" out of 99. *See* OAR 213-005-0006 and http://www.ocjc.state.or.us/SGGrid.htm.

[41] The recommendations are available at http://www.ocjc.state.or.us/PSReview/viewtfrec.php?tf=AS. The principal author of Oregon's guidelines, now Oregon's Attorney General, Hardy Myers, presided over the Adult Sentencing Task Force of the Steering Committee and supported this proposal.

[42] ___ US ___, 124 SCt 2531 (2004).

[43] 530 US 466, 120 SCt 2348 (2000). *Apprendi* involved a statute that enhanced sentences otherwise available when the crime or offender in question presents aggravating circumstances, including when there were attributes of a "hate crime." NJ Stat Ann § 2C:44-3(e) (2000). New Jersey responded by repealing the hate crime subsection (NJPL 2001, ch 443), but the remaining aggravating circumstances are quite probably subject to both *Apprendi* and *Blakely*.

[44] For example, sentences for a Class A Felony under Oregon's sentencing guidelines are limited by the general provision that such felonies carry a maximum sentence of 20 years imprisonment. ORS 161.605(1). The guidelines regulate sentences up to that maximum. *Blakely* held that the "maximum sentence" for purposes of the right to a jury trial is that permissible under guidelines such as Washington's in the absence of additional fact finding.

> after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," . . . and the judge exceeds his proper authority.
>
> ___ US at ___, 124 S Ct at 2537 [citation omitted]

Prof. Reitz views *Blakely* as "perverse" because the United States Supreme Court has recently upheld several draconian sentencing schemes, yet chose the "enlightened" Washington guidelines to unravel, perhaps retarding the spread of guidelines to states that do not yet have them, encouraging advisory rather than enforceable guidelines, widely increasing the range of judicial discretion and thereby inviting a return to wide disparity in sentencing, or even to indeterminate sentencing.[45] While I share his dismay at the Court's tolerance for cruelty, there is nothing "enlightened" about sentencing guidelines that ignore public safety, and nothing pernicious about the notion that an accused should have the opportunity to have a jury decide facts upon which increased sentencing severity depends.

The states, and probably the federal system, will have to adapt to *Blakely*. In spite of Prof. Reitz's concerns, I suspect that states will accommodate *Blakely* by allowing for both the right to a jury trial and the right to waive jury on "aggravating" factors, and a bifurcated jury when fairness at the adjudicatory stage cannot otherwise be accommodated – as with the Kansas approach, which the *Blakely* Court seemed to approve.[46] Having watched juries responsibly resolve complicated disputes among experts in civil trials in medical, engineering, and product liability arenas, I would welcome their attention to rigorous disputes about how best to achieve crime reduction in sentencing. I have come to regard trials as often the most fair and accurate method by which to resolve vigorous argument about facts and science, particularly when practicality demands that we act without awaiting years of further study. Responsible pursuit of public safety demands that we use the best information available when we impose sentences. Ignoring public safety until all study is complete would be like ignoring cancer or AIDS patients (or banishing them) until we perfect cures.

But I have no confidence that the *Blakely* detour will necessarily result in our attention to crime reduction in sentencing. It is more likely that juries will only be asked to determine issues such

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[45] Prof. Reitz deemed *Blakely* a "constitutional tax" on guideline states. Remarks in a presentation at the 2004 conference of the National Association of Sentencing Commissions, August 16-17, Santa Fe, NM. *See* http://nmsc.state.nm.us/download/NASCconfPgmPlan.pdf.

[46] Kan. Stat. Ann. § 21-4718 (2003 Cum.Supp.), cited ___ US at ___, 124 S Ct at 2541. Other easy responses are to widen the range of discretion without requiring fact finding (*Blakely* had no problem with fact finding "implicit" in discretion, ___ US at ___, 124 S Ct at 2540), or to make the guideline sentences advisory rather than mandatory. My impression, at least for Oregon, is that guidelines are now widely popular – those who feared their "leniency" are now satisfied with the over-rides they achieved through ballot measures for mandatory minimum sentences and legislation establishing higher presumptive sentences than the sentencing commission prescribed; those who fear punitivism continue to celebrate normalization of sentencing *per se* as a substitute for more comprehensive improvement. For these reasons, and because the proportion of defendants who will actually want a jury to decide facts essential for enhanced prison terms is likely quite low, I predict that Oregon will prefer the occasional bifurcated sentencing trial to any significant increase in judicial sentencing discretion.

as whether an offender acted with "deliberate cruelty" as in *Blakely*,[47] suffers "from a severe personality disorder indicating a propensity toward crimes that seriously endanger the life or safety of another,"[48] or, in violating several statutes in a single criminal episode, "caused or created a risk of causing greater or qualitatively different loss, injury or harm to the victim"[49] so as to permit consecutive sentences.[50] Juries are certainly up to such tasks.

Again, regardless of the ultimate impact of *Blakely* on guidelines, the discussion itself strongly supports the notion that the impact of the guideline movement largely explains our persistent inattention to crime reduction in our sentencing rituals.

The reasons for our misdirection: (iii) ideology and suspicion

The rejection of empiricism that characterizes our sentencing culture has yet another source: the ideology of the opponents in the leniency versus severity spectrum, and their concurrence in the notion that empiricism is a threat. As noted above,[51] most academics shy away from the notion of imprisonment, while a vocal minority extols prison. The balance is quite the opposite among public policy advocates and office-holders – with prevalent attitudes favoring severity and only reluctantly conceding the restrictions of resource. Regardless of their relative numbers, these antagonists equally recoil from notions that we ought to look to data for guidance in determining what to do with which offenders to improve our chances of diverting them from further criminal behavior. Those who abhor "mass incarceration" fear that focusing on crime reduction will only increase our use of incapacitation (because they fear that incarceration in fact "works" better than treatment or alternatives, that sentencing judges will be convinced that it does, or both), while those who embrace incarceration fear that judges will too easily conclude that treatment and alternative programs "work" (because of legitimate skepticism of studies, a preference for punishment regardless of its utility, or both) and thus that allowing the inquiry will encourage leniency. The power of the resulting celebration of ignorance mirrors earlier social resistance to

[47] ___ US at ___, 124 S Ct at 2543.

[48] Oregon has applied *Blakely* and *Apprendi* to require a jury finding (absent waiver) on such issues under Oregon's dangerous offender statute, ORS 161.725. *State v. Warren*, 195 Or App 656, 98 P3d 1129 (2004).

[49] One of several findings that would permit consecutive sentencing under ORS 137.123.

[50] States are struggling with the scope of *Blakely* beyond "upward departures." Oregon's consecutive sentencing statute is particularly likely to end up within that scope because it limits consecutive sentences in crimes arising from a single course of conduct and involving one victim:

> ORS 137.123 (5) The court has discretion to impose consecutive terms of imprisonment for separate convictions arising out of a continuous and uninterrupted course of conduct only if the court finds:
>
> (a) That the criminal offense for which a consecutive sentence is contemplated was not merely an incidental violation of a separate statutory provision in the course of the commission of a more serious crime but rather was an indication of defendant's willingness to commit more than one criminal offense; or
>
> (b) The criminal offense for which a consecutive sentence is contemplated caused or created a risk of causing greater or qualitatively different loss, injury or harm to the victim or caused or created a risk of causing loss, injury or harm to a different victim than was caused or threatened by the other offense or offenses committed during a continuous and uninterrupted course of conduct.

[51] See text accompanying notes 23-27, *supra*.

sex education and recognition of the role of racism in American society – but, so far, without the sense of any groundswell favoring confronting the problems and overcoming them.

For example, the same committee process that adopted a proposal to explore Oregon's guidelines for possible adjustment to serve crime reduction[52] *rejected* several proposals to recognize expressly that potential impact on future criminal behavior might guide judges' discretion under existing law as to departure sentences, consecutive sentences, probation violation dispositions, and motions to transfer delinquency cases to adult court. The articulated reasons included fear of "unforseen consequences" and lengthened court hearings, with occasional suggestions that sentencing should not be based on predictions of future conduct.[53] The latter view also accounted for the one Steering Committee vote against reviewing guidelines to explore the possibility that they might encourage crime reduction. I have responded to these arguments at length elsewhere.[54] Suffice it to say for present purposes that expediency and attention to crime reduction are compatible by shifting equivalent energy from aggravation and mitigation to more careful assignment of sanctions, that expediency is not ultimately served by sentencing that unnecessarily produces recidivism, that public safety is worth some time and effort, and that if we are not using jails to prevent future criminal behavior through the device of incapacitation, we would all be better advised to substitute caning – at least for offenders who would choose that option.[55]

In any event, ideology is often the enemy of reason, and it certainly provides yet another reason for our persistence in sentencing that blinds itself to public safety outcomes.

The reasons for our misdirection: (iv) lack of incentive to accept accountability (plausible deniability)

A cynic might contend that we maintain the dysfunction of sentencing that is blind to outcomes out of self-interest. After all, our repeat customers maintain a high demand for our services, as well as those of law enforcement, defense and prosecution attorneys, corrections, and

[52] See text accompanying note 41, *supra*.

[53] All of this is apparent in the recorded proceedings of the Steering Committee, its Adult Sentencing Task Force, and the latter's Sentence Imposition Subcommittee, maintained in the offices of the Oregon Criminal Justice Commission, 635 Capitol Street NE Suite 350, Salem OR 97301-2524,(503) 986-6494.

[54] See authorities cited note 37, *supra*, and "Frequently Asked Questions" at http://www.smartsentencing.com.

[55] Fortunately, the notion that offenders who commit worse crimes and have worse records should be confined for longer periods than others with less serious crimes and records – reflected in the guidelines from a just deserts perspective – corresponds, however crudely, with risk assessment expertise. Expressly enlisting risk assessment and other tools for more accurate prediction would substantially reduce victimizations at the hands of recidivists. I am aware of and respond to the "false positive" critiques of risk assessment. *Comments, supra* note 22, 30 AM J CRIM LAW 135, at 146-47. In short, that we cannot predict with certainty is no excuse to avoid our best efforts to protect potential victims from a convicted dangerous offender; that an offender at high risk of reoffending may not actually reoffend is insufficient reason to reject a sentence crafted to avoid that risk - within the limits of proportionality. The critics would not increase precision, and they would not decrease the proportion of false positives and false negatives measured by public safety - they would escape measurement altogether by abandoning public safety in favor of an ephemeral standard of just deserts.

supervision officers. The suggestion would be nonsense – I certainly have not encountered anyone in these vocations who actually seems to prefer that those we process commit new crimes (though many find satisfaction when their predictions of failure are vindicated).

On the other hand, unlike businesses that must compete to survive, we have no inherent mechanism to propel us toward best practices. We surely do not want to be held responsible for harm at the hands of an offender who victimizes someone shortly after leaving our court – both because we would sincerely regret harm coming from our decisions and because we tend to eschew criticism more vehemently than public officials whose roles make them more accustomed than judges to the "tempestuous sea of liberty."[56] But no one holds us responsible for the crime committed a few years after a sentence we impose. The "shopping list" of expectations in most sentencing statutes[57] leaves us with a wide range of justification for any exercise of available discretion. Simply by adopting the appropriate timber and avoiding any notorious affront to whatever vague standards of proportionality we perceive, we can claim satisfactory performance regardless of any distant impact of our choice on a defendant's performance. We can comfortably assure ourselves that the defendant's future behavior is either the responsibility of intervening corrections or supervision or program personnel we did not hire, or the inevitable product of some mix of nature and nurture that coalesced long before we met the defendant. The public soon loses sight of the connection between our decisions and a defendant's next crime once the time between the two lengthens. Left to our own devices, then, few would expect us to seek accountability for the impact of our sentencing choices on the probability that a defendant would commit a heinous crime three, five, or ten years after our choice.

Yet our choices inevitably have some impact on that probability, whether or not we choose to recognize the connection. That we have no incentive for transcending the goal of "just punishment" is yet another reason that we do not do so.

The reasons for our misdirection: (v) selective visibility of sentencing proceedings

Long removed from the public punishments that once captured the attention of the bulk of a city's population, we now sentence in relative obscurity. The overwhelming majority of the sentences we impose are not witnessed by the community and not observed or reported by the media. In most cases, we have only the defendant's temporarily undivided attention – even the court, judicial staff, and the participating attorneys are usually concerned with a multitude of tasks and cases in a high volume process. Unless we are dealing with a heinous crime or one that has received public attention for some other reason (such as the celebrity of the offender), our sentencing behaviors are below the radar of the community and even of the bulk of public officials. Even those with some stake in the outcome – because they have responsibility for management of jail space, indigent defense funds, dockets, or prosecutors or defense attorneys –

[56] The phrase is attributed to Jefferson. THE PAPERS OF THOMAS JEFFERSON, VOLUME 29: 1 MARCH 1796 TO 31 DECEMBER 1797 86-87 (Princeton University Press 2002).
[57] See text accompanying note 32, *supra*.

are focused on the short run impact of our sentencing decisions on the operations they oversee, not the impact of our sentences on an offender's future behavior. Presiding judges are likely, in common with public transportation managers, to concentrate on speed and superficial efficiency – without attention to the ultimate social utility of the process.

The public, then, considers sentencing primarily in the relatively rare context of crime serious enough to make the evening news – murders, rapes, home invasion robberies, and the like. Understandably, public safety and imprisonment reasonably appear as synonymous in this small slice of our world – which is also the slice attended to by district attorneys with the best access to prosecutorial policy making: those with seniority and clout in their departments. All of this tends to give incarcerative and punitive notions far more sway than the proportion of cases appropriate for the most severe sanctions would justify. And all of this also substantially contributes to the difficulty of ordering sentencing behaviors around crime reduction efficacy – at least as long as we lack the resources or the will to respond to the most common crimes with extended periods of incapacitation.

Jail, prison, programs, and what works on which offenders

At this point, it is necessary to review, at least in passing, what we know about what works and what does not work on which offenders. I will return to the debates that rage in some circles about how much of this is reliable and how much is biased and irresponsible, because the short answer to such questions is that the only response consistent with public safety is increased rigor in the precision of our measurements and the resolve with which we seek to employ best practices. Since locking up all offenders forever is unavailable as a practical or as a deontological matter – and since for some offenders, anything substantially short of a life sentence may do more public safety harm than good – our only sane course is to improve our knowledge and our ability to guide our sentencing behaviors based on good evidence about what works on which offenders.

We actually "know" a great deal. While sentencing practice has almost entirely ignored science, and although science has not attempted to affect sentencing practices, criminologists and students of corrections have actually generated an enormous body of studies about the relative efficacy of various programs and custodial and noncustodial sanctions.[58] Less severe 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, while post-prison recidivism seems not to vary with the length of incarceration for high risk offenders.[59] Treatment

[58] *See generally*, *Preventing Crime: What Works, What Doesn't, What's Promising*, *supra* note 10; James Bonta, PhD, Offender Rehabilitation: *From Research to Practice - A concise overview of the effectiveness of offender rehabilitation and sanctions based on thirty years of research*., and sources cited, available at www.sgc.gc.ca/publications/corrections/pdf/199701_e.pdf.

[59] *The Effectiveness of Community-Based Sanctions in Reducing Recidivism* (Oregon Department of Corrections September 5, 2002), available at http://egov.oregon.gov/DOC/TRANS/CC/docs/pdf/effectiveness_of_sanctions_version2.pdf. Characteristically,

programs that identify and responsibly address multiple criminogenic factors typically reduce recidivism by about thirty percent; they 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.[60]

Shock incarceration, shock probation, scared straight, D.A.R.E., and boot camp programs do not work and commonly do more harm than good.[61]

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 with whom they are not acquainted, or who commit violent crimes against strangers, and that treatment competently aimed at risk factors is significantly effective at reducing recidivism, at least for some offenders.[62]

Incapacitation works very well for any offender during the period of incapacitation. Measured by impact on recidivism (after release), though, anything longer than six months is probably counterproductive for most risk categories.[63] The one area in which research is most needed is the net benefit in terms of crime reduction of varying periods of incarceration for various categories of offenders who are realistic candidates for substantial imprisonment. What we do not know – probably because of the bias that divides those who abhor and those who applaud

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researchers commonly cite the latter finding – that high risk offenders' recidivism remains constant regardless of the length of incarceration – as an argument *against* longer prison terms, when it logically suggests that with these offenders, there is no downside to lengthy sentences in terms of increased recidivism. The logical limit is that provided by prison resources available for repeat property offenders; the other limits are deontological.

[60] See generally, *Treatment Works For Youth In The Juvenile Justice System*, National Mental Health Association, and sources cited, available at 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, available at http://www.nicic.org/pubs/2001/017624.pdf. Gornik's meta-analysis of 154 studies found a 30% impact on recidivism for the 54 that assessed responsibly targeted and delivered treatment strategies. I hasten to add that I am no fan of meta-analysis to the extent that it derives numerical quantities from what is in essence a literature review, but this is a useful literature review. It is at least plausible to hope that the impact of good treatment programs on crime reduction could only improve were we to use our best efforts to send them the offenders most likely to benefit from those programs; "best efforts" hardly describes the process by which offenders are now selected for programs by sentencing courts.

[61] *What Works, What Doesn't, What's Promising*, *supra* note 10.

[62] *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, available at 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, available at http://www.sgc.gc.ca/publications/corrections/200207_e.asp.

[63] 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, available at 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, available at http://www.sgc.gc.ca/publications/corrections/pdf/200205_e.pdf.

prison[64] – is when and for whom the net public safety impact of prison is and is not outweighed by any likely increased post-prison recidivism.

Returning to the debates about validity, some argue that a good deal of research upon which some advocates rely is profoundly flawed. Indeed, a careful review an enormous body of literature, funded by the National Institute of Justice and in conjunction with the University of Maryland Department of Criminology and Criminal Justice, constructed and applied a standard by which to assess the "the scientific rigor of the studies examined." With respect to those studies of interventions aimed at offenders in the criminal justice system, it concluded that "[f]ew of the research studies are of sufficient quality to permit conclusions regarding the effectiveness of the program studied."[65] From this, some would retreat to the long-discredited notion that nothing "works."[66] But this review itself concluded

> Today, while there is still some debate about the effectiveness of rehabilitation (e.g., Lab and Whitehead 1988; Whitehead and Lab 1989) recent literature reviews and metaanalyses demonstrate that rehabilitation programs can effectively change offenders (Andrews and Bonta 1994; Andrews, Bonta, and Hoge 1990; Andrews, Zinger, Hoge, Bonta, Gendreau, and Cullen 1990; Palmer 1975; Gendreau and Ross 1979, 1987). In general, according to Andrews et al. (1990), reviews of the literature show positive evidence of treatment effectiveness. For example, in a series of literature reviews, the proportion of studies reporting positive evidence of treatment effectiveness varied from near 50 percent to 86 percent: 75 percent (Kirby 1954), 59 percent (Bailey 1966), 50 percent (Logan 1972), 48 percent (Palmer's 1975 retabulation of studies reviewed by Martinson in 1974), 86 percent (Gendreau and Ross 1979) and 47 percent (Lab and Whitehead 1988). In reviewing these studies, Andrews et al. (1990) conclude that "This pattern of results strongly supports exploration of the idea that some service programs are working with at least some offenders under some circumstances." The important issue is not whether something works but what works for whom.[67]

For present purposes, it is sufficient that the unavoidable conclusion is that although nothing works on everyone, and there are offenders on whom nothing but incapacitation can work, with

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[64] Those who abhor prison do not want to recognize the crime-reduction impact of incapacitation during imprisonment; those who applaud prison do not want to recognize the post-prison criminogenic effect of incarceration. Public safety, of course, requires that we compare both and hone our abilities to predict when prison does and does not best serve public safety over the course of a potential criminal career.

[65] W*hat Works, What Doesn't, What's Promising*, *supra* note 10; the quotes are from the full report which is unpaginated and available in html format at http://www.ncjrs.org/works/wholedoc.htm (under the heading "1.1 Examining the scientific evidence").

[66] Robert Martinson is generally charged with suggesting in 1974 that nothing works. Martinson himself retreated from this position, and it has been thoroughly debunked – at least as applied to the offender population as a whole. *See, e.g.*, McGuire, James, *What Works in Reducing Criminality* (2000), and authorities cited. Unfortunately, Prof. Reitz has relied largely on the superseded Martinson rationale, and extended it to include incarceration as well as programs, to suggest that the Model Penal Code be revised to focus on limited just deserts largely to the exclusion of crime reduction. *See* authorities cited note 37, *supra*.

[67] *What Works, What Doesn't, What's Promising*, *supra* note 10, footnote omitted. The quote is from the full report which is unpaginated and available in html format at http://www.ncjrs.org/works/wholedoc.htm (under the heading "4. Rehabilitation and Treatment").

rigor and persistence we should be able to pair some offenders with some dispositions that will carry a substantial probability of reducing those offenders' likelihood of committing new crimes. Regardless of the precision of such predictions, it is at least to me self-evident that because our present sentencing practices are devoid of rigor and persistence in pursuit of crime reduction, we should be able to improve our public safety performance by such a pursuit.

Two important reflections are useful before proceeding to a discussion of strategies for focusing sentencing on crime reduction. First, the reflection that "the important issue is not whether something works but what works for whom" is of profound importance to this analysis. Because of the ideological divide between those who favor and those who disfavor prison, the battle lines are both drawn and maintained around variations of the issue whether "programs" in general "work" to reduce crime or rehabilitate offenders. In my experience, many who are deeply suspicious of research claiming to document program efficacy are vehemently resistant to suggestions that we transcend the "what works" argument to pursue "what works on whom." My impression is that they have so much invested in the notion that nothing should compete with incarceration that they fear that exploring "on whom" would yield ground to alternatives to incarceration, and is therefore unacceptable. They agree, of course, that longer sentences are appropriate for those who have the worst records and commit the most serious crimes. By some measure, then, different lengths of imprisonment "work" for different offenders. And common human experience in medicine, sales, politics, and the social sciences is that differences among us account for variations in the ways that we process or react to experience – that different people learn differently, react to drugs differently, are persuaded by different sales pitches, or choose candidates based on different priorities. Of course different offenders will respond differently to different sentences.

A major significance of the concept of differential responses to sanctions is that recognizing the concept may well vastly improve our ability to learn what responses are most (or least) likely to work with any cohort of offenders. Most studies of the crime-reduction efficacy of programs, treatments, or punishments essentially take the first cut – with better or worse scientific rigor, they attempt to determine what percentage of subjects are affected, and to what degree, by exposure to the program in question. But almost without exception, those subjects were not directed to the studied program based on evidence-based screening as to their likely susceptibility to the modality of that program. Many studies show program impact (or a correlation suggesting impact) for some but not all offenders in the program. In many cases, this probably reflects differences among the subjects that account at least in part for their varying response to the modality in question. Exploring the characteristics that seem to identify the offenders upon whom the program "works" might permit a second cut: testing the effectiveness of the program on offenders screened by those characteristics for referral to the program. Few studies reach this second level,[68] but the potential for increasing the crime-reduction efficiency of our sentencing and correctional decision making is enormous.

[68] Examples may include studies that begin to examine efficacy for sub-cohorts deemed "low," "medium," or "high risk." *See, e.g.*, notes 58-63, *supra*, and accompanying text.

The second important reflection is that although the debate usually focuses on "treatment" versus "punishment," the question of what works on which offenders applies to the entire range of dispositions available to us. This includes treatment, of course, but extends to prison, jail, alternative sanctions, and varying forms of supervision – as well as to combinations of such dispositions. Although the Maryland study suffers from the usual academic tendency to disparage the use of incarceration as a crime-reduction strategy,[69] it is ample support for the notion, supported also by common sense, that we should be able to do a better job at preventing recidivism than we now do were we rigorously and responsibly to pursue best efforts to that end in sentencing.

Strategies for responsibly directing sentencing at crime reduction

As noted, merely listing public safety in statutes proclaiming multiple purposes of sentencing or of the criminal law demonstrably fails to ensure best practices in sentencing towards the goal of crime reduction. In Oregon, and locally, we have adopted increasingly focused strategies in an attempt to aim the culture and the practice of sentencing at reducing criminal conduct. None have proven to be a silver bullet, but many show some promise of facilitating a cultural shift in our attitudes and practices in sentencing. Together, and with substantial focus on identifying and

[69] *Compare What Works, What Doesn't, What's Promising*, *supra* note 10, "2. Incapacitation" (unpaginated html format at http://www.ncjrs.org/works/wholedoc.htm), *with* note 24, *supra*. In that section, the report summarizes the conclusions of researchers (and philosophers) to the effect that our ability to predict which offenders most need to be incarcerated for longer terms is so limited as not to justify the expense and collateral harm associated with incarceration. Prof. Michael Tonry served as one of the "scientific advisors" of the project, and has been a frequent contributor to the literature, including Norval Morris and Marc Miller, *Predictions of Dangerousness*, in Michael Tonry and Norval Morris eds., CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH, vol. 6 , pp. 1-50 (Chicago: University of Chicago Press, 1985), in which Morris and Miller make precisely these arguments against what some would call "preventive detention." But it is critical to note that the premise of all of this appropriate caution is that the use of prison – and lengths of prison terms – can responsibly be completely based on some purpose *other than* crime reduction, apparently retribution or "limiting retribution" as advocated by Prof. Reitz. As noted previously, if crime reduction is not the point, caning would be cheaper, carry less collateral harm, and would probably be preferred by offenders in comparison with prison. Expense and collateral harm are, of course, hardly avoided by continuing the use of prisons and abandoning the purpose of crime reduction. If we focus on crime reduction *alone*, the question reduces to this: whether we would use prisons more efficiently *to protect the public against crime* by attempting best efforts at crime reduction in their deployment (including the use of risk assessment) than by making no such attempt. The answer is, of course, that we would. That was clearly the conclusion of the Virginia Sentencing Commission, when after long and careful study it incorporated risk assessment into its sentencing guidelines to aim longer periods of incarceration at sex offenders whose risk assessment scores showed them at higher risk than others to reoffend. Brian J. Strom, Matthew Kleiman, Fred Cheesman, II, Randall M. Hansen, Neal B. Kauder, OFFENDER RISK ASSESSMENT IN VIRGINIA - A THREE-STAGE EVALUATION: PROCESS OF SENTENCING REFORM, EMPIRICAL STUDY OF DIVERSION AND RECIDIVISM, BENEFIT-COST ANALYSIS (The National Center for State Courts and the Virginia Criminal Sentencing Commission 2002), available at http://www.vcsc.state.va.us/risk_off_rpt.pdf; Va Code Ann § 17.1-803(5), (6) [authorizing risk assessment in guidelines for all felons]. Again (see note 24, *supra*), we do not have to achieve certainty if we responsibly identify offenders who are at greater *risk* of recidivism; the offender has no valid complaint as long as the resulting sentence is within the limits of proportionality and applicable law, and the offender has a full and fair opportunity to be heard on the facts and the science of his risk assessment.

implementing additional strategies to make sentencing responsibly pursue crime reduction, such strategies may ultimately transform sentencing into a socially responsible means by which to secure public safety.[70]

Oregon's adoption of the 1962 Model Penal Code included provisions that go directly to crime prevention, declaring purposes such as:

> 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.
>
> 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)(a), (f)

In 1996, after the intervening adoption of sentencing guidelines that have nothing deliberately to do with crime reduction, citizens adopted a ballot measure amending Article I, Section 15, of the Oregon Constitution to read:

> Laws for the punishment of crime shall be founded on these principles: protection of society, personal responsibility, accountability for one's actions and reformation.[71]

These provisions certainly establish a legal basis for insisting on crime reduction as a purpose of sentencing, but they embody no implementation strategy. Just as the revision based on the 1962 Model Penal Code proclaimed purposes as if by faith, the more recent constitutional amendment amounted to a mission statement rather than a roadmap. The next legislative session, however, enacted 1997 Oregon Laws, Chapter 433, which broadly amended a series of adult and juvenile criminal justice statutes to pursue three objectives:

- to articulate "reduction in future criminal conduct" as a dominant performance measure;
- to require the collection, maintenance, and sharing of criminal (and juvenile) justice data to facilitate "analysis of correlations between sanctions, supervision, services and programs, and future criminal conduct" and
- to permit access to juvenile data to allow analysis of the effectiveness of juvenile dispositions at

[70] I should note that there is no need to abandon notions of proportionality or other purposes of sentencing. That a more severe sentence might better serve public safety should not justify a sentence that is excessive in light of the gravity of the offense or the blameworthiness of the offender. Nor does crime reduction as a goal necessarily preclude a sentence crafted to serve other purposes when appropriate under the circumstances – such as the safety of a domestic violence victim, the recovery of a sex offense victim, or the interest of survivors or the family of victims of a heinous crime in a resolution that they deem just. But the vast majority of sentences are imposed in circumstances in which there is no conflict between such other purposes and the goal of crime reduction.

[71] Before 1996, Article I, section 15, of the Oregon Constitution provided: "Laws for the punishment of crime shall be founded on the principles of reformation, and not of vindictive justice."

> diverting juveniles from criminal behavior as adults.[72]

Again, this legislation is not self-implementing. Although it lays the groundwork for collecting and exploiting effectiveness data, and for creating a sentencing culture that welcomes program evaluation, it has as yet not produced much change in the behavior of the target institutions. For example, although the bill amended ORS 423.478 to require the Oregon Department of Corrections to "[p]rovide central information and data services sufficient . . . to permit analysis of correlations between sanctions, supervision, services and programs, and future criminal conduct," the Department has yet to provide such services in the seven ensuing years. A companion effort saw the Oregon State Police begin to build a "Public Safety Data Warehouse" that could have supported such services, but that effort collapsed when the State Police – traditionally hostile to data transparency beyond law enforcement – returned almost two million dollars of Byrne Grant money to avoid having to produce the required local matching funds.

Most recent of the legislative attempts was 2003 Oregon Senate Bill 267. This bill requires that increasing portions of "program" expenditures in corrections budgets (25, 50, and 75 percent in two year steps) meet the bill's definition of "evidence-based program," which:

> . . . means a program that:
> (a) Incorporates significant and relevant practices based on scientifically based research; and
> (b) Is cost effective.[73]

Senate Bill 267 represents a legislative strategy to make what works matter in corrections. It proceeds on the assumption that by tying evidence-based programming to budgets, corrections agencies will be sufficiently motivated to learn from and apply the literature of what works. This is a responsible effort, but experience suggests a grave risk: that administrators will seize upon whatever trappings are associated with effective programs in the literature and insist on replicating those trappings – *without* actually returning to crime reduction as the measure of success. The definition itself encourages that the measure be "practices" rather than actual *results*. A program that was studied and found successful based on one cohort of offenders may be wholly ineffective when applied to a different cohort. As mentioned, what matters is what works on which offenders.

The judicial process has seen some dramatic changes in its participants' behaviors caused by relatively modest input. When Oregon adopted child support guidelines and work sheets,[74] it was not long before attorneys who used to make the traditional evidentiary showings and arguments tailored to the perceived predilections of the assigned domestic relations judge instead brought worksheets and calculators and devoted their support energies to the narrow task of arriving at

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[72] The full text is available at http://www.leg.state.or.us/03orlaws/0669.pdf.
[73] 2003 SB 267 Section 3(3) [2003 Or Laws ch 669, Section 3(3)]. The full text of the bill is also available at http://www.smartsentencing.com under "Legislative, Judicial and Criminal Justice Materials."
[74] ORS 25.270, *et seq*; OAR 137-050-0320, *et seq*.

amounts for each blank so they might perform the calculation that produces the result. Surely, attorneys still find plenty to litigate, but the guidelines brought about a major shift in the behaviors of those involved in child support litigation.

Similarly, the sentencing guidelines changed the very nature of felony sentencing hearings. As soon as laminated guideline "matrix" sheets became available, attorneys faithfully carried them into courtrooms and plea negotiations, and built every sentencing and negotiating position on a foundation of presumptive sentence and any "factors" in aggravation or mitigation. Guidelines have become the focus of most felony sentencing – even when the plea negotiation involves getting the offender to a different grid block or dealing with a departure. The guidelines have changed the behavior of participants dramatically and in a very short time frame. Unfortunately, the guidelines do nothing to activate those behaviors in the direction of public safety, but they do demonstrate that these traditional sentencing roles can be modified within a short time and with relatively little energy. The trick is to modify them in a useful direction.

Within the Oregon Judicial Department, and particularly in Multnomah County, we have developed a series of related strategies in hopes of accomplishing a shift toward crime reduction in sentencing behaviors. After two years of work, the Oregon Judicial Conference adopted 1997 Judicial Conference Resolution No. 1, which concludes:

> 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.[75]

During the same time period, the Local Public Safety Coordinating Council in Multnomah County built a criminal justice data warehouse ("DSS-Justice"), and the courts successfully advocated for inclusion of an application that assists judges and advocates in seeing correlations between what we have done to various offenders for various crimes and their subsequent recidivism. Multnomah County's "Sentencing Support Tools" display outcomes in terms of recidivism correlated to sentencing elements for similar offenders sentenced for similar crimes. Participants can inform the process with data in an attempt to arrive at best efforts towards crime reduction. The tools are flexible enough to permit users to modify variables and display new

[75] The full text is available at http://www.smartsentencing.com under "Legislative, Judicial and Criminal Justice Materials."

results during a sentencing hearing.[76]

Although use of the sentencing support tools has not yet become routine in most courtrooms,[77] probably due to the combined impact of judicial inertia and the daunting nature of security measures that make signing on unnecessarily cumbersome for occasional users, the tools have helped to encourage the focus on crime reduction in sentencing. Judges who handle criminal cases in my county supported a change in the form for requesting presentence investigations (PSIs), so that by checking a box judges may now request:

> 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

PSI writers, as a result, now routinely use sentencing support tools and include the results, along with references to criminogenic factors, stage of change, risk assessment and community and correctional resources in their reports. This represents a profound improvement in the usefulness of presentence reports. The limitation here is that in recent years, the use of PSIs has become relatively rare. They are essentially unavailable in the great bulk of sentencing situations.

But a parallel effort promises a more wide-spread impact. The same criminal judges supported an effort to work with probation managers to transform the role of the probation officer in communicating with the courts and in probation violation hearings. Although probation officers have for years been trained on what works (or not) on which offenders, motivational interviewing, risk assessment, and criminogenic factor analysis, they have traditionally ignored all of that in communications with the court and during hearings. Entering the judicial arena, they have adopted just desert trappings and encouraged analysis on the order of whether an offender has "forfeited the privilege of probation." Through involvement in "report writing training," we have joined with community corrections managers in attempting to convince probation officers to educate us and the process – to assist us to understand enough about the offender, the circumstances, and our choices to make the best disposition. We have encouraged probation officers to see themselves as advocates for best practices in the courtroom, and as our primary conduit to the literature that we have previously avoided.[78]

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[76] Screen shots, a user manual, and related information are available at http://www.smartsentcing.com.

[77] An effort to build such tools state wide within the Oregon Judicial Department got as far as a "requirements" session, then stalled due to Judicial Department budget crises. The Oregon Criminal Justice Commission, in its mandated PUBLIC SAFETY PLAN, adopted as its first recommendation:

> Oregon should develop availability of offender-based data in order to track an offender through the criminal justice system and to facilitate data-driven pre-trial release, sentencing and correctional supervision decisions.
>
> PUBLIC SAFETY PLAN at 6 (2001) , available at http://www.smartsentencing.com under "Legislative, Judicial and Criminal Justice Materials."

Unfortunately, the recommendation is another example of wishful thinking with no implementation, but ongoing efforts to modernize the Judicial Department's technology resources and management are intended to facilitate both offender-based data and sentencing support applications.

[78] Michael H. Marcus, *Sentencing Support Tools and Probation in Multnomah County*, EXECUTIVE EXCHANGE (Spring 2004), available at http://www.smartsentencing.com under "Articles on Smart Sentencing."

The "Public Safety Review Steering Committee" was established by order of Oregon's Governor,[79] and charged essentially with articulating strategies to improve the public safety performance of criminal justices. Several such proposals survived through the October 8, 2004, meeting of the Steering Committee.[80] One calls for the Oregon Criminal Justice Commission to explore incorporation of crime reduction into Oregon's sentencing guidelines, [81] and another directs that The Department of Corrections modify its rules governing the contents of presentence investigations to extend our local approach to presentence reports state-wide by requiring all to include a crime-reduction analysis as part of any recommendation for sentencing.

Creative minds can surely supply additional strategies. In addition to proposals for tweaking legislation to remind practitioners and judges of crime-reduction objectives,[82] we should probably be looking to the therapeutic courts for opportunities to bring outcome measurement to our criminal justice work generally.[83]

There are surely many opportunities to contribute to such an effort. Those who study and publish about sentencing might fill the void of studies on the effectiveness of sentencing behaviors in reducing criminal conduct. Professors who teach criminal law might take the opportunity to inject the issue into a curriculum usually silent on crime reduction – including both theory and practice, as it is obvious to me that attorneys are not taught how to research or argue for sentencing outcomes based on public safety interests. Judges might get in the habit of asking participants in sentencing hearings – attorneys and supervision officers – to justify recommendations based on their impact on an offender's future criminal behavior, inviting references to research and even live testimony on occasion, as we do in dangerous offender proceedings. We might explore the possibility that standards of effective assistance of counsel are offended when defense counsel fails to pursue an available line of evidence and argument

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[79] The governor's press release is available at http://egov.oregon.gov/Gov/press_022604b.shtml.

[80] All recommendations approved by the Steering Committee on October 8, 2004, are available at http://www.ocjc.state.or.us/PSReview/viewtfrec.php?tf=AS. Minutes of the Adult Sentencing Task Force meeting of September 24, 2004, are available at http://www.ocjc.state.or.us/PSReview/minutes/MINUTES_AdultSentc_09-24-04.pdf.

[81] See note 41, *supra* and accompanying text.

[82] Examples are those *rejected* in the Oregon Steering Committee process, see text accompanying note 53, *supra*. *See also* Michael Marcus, *Testimony Before the [Oregon] Interim Judiciary Committee Symposium on Evidence-Based Practices - SB 267* (February 3-4, 2004), available at http://www.ocjc.state.or.us/SB267/Marcus.pdf, and Michael Marcus, *Testimony to the Governor's Public Safety Review Steering Committee* (April 25, 2004), available at http://www.smartsentencing.com under "Articles on Smart Sentencing."

[83] "Therapeutic courts," typified by drug courts, impaired driving courts, domestic violence courts, and mental health courts, are an increasing presence in criminal justice. Usually born out of the system's desperation for relief from high volume dockets, these courts essentially employ the courtroom ceremony as part of a therapeutic community seeking to augment Twelve-Step and other treatment modalities. *See generally* http://www.law.arizona.edu/depts/upr-intj/. Because these efforts are justified on the basis of their reformation impact on offenders, they frequently invite assessment. The hope expressed in the text is that this attention to efficacy may be contagious and bring such attention to the rest of the criminal justice process, as to which therapeutic courts remain on the outskirts.

that a sentence preferred by a defendant would also most likely best protect the public. I, for one, would not think petitions for post-conviction relief on such bases without potential social utility. Similarly, it is at least plausible that a prosecutor fails to exercise due diligence by overlooking a public safety analysis in proposing or arguing for a sentence. I can imagine candidates for district attorney running on a platform with a smart sentencing plank.

Conclusion

Sentencing has never responsibly produced or attempted best efforts at crime reduction. Even when notions of reformation gained nominal presence in the litany, we assumed we would accomplish reformation just as we assumed we would accomplish general deterrence by the punishments we inflicted, just as those before us assumed penitentiaries would produce penitence Instead of accepting the challenge science posed to our assumptions, we chose to disavow accountability for the outcomes of our choices. Tremendous public and private harm continues to flow from our denial. We surely have the potential to overcome our archaic liturgy,[84] and to pursue best practices as many of our fellow citizens do in the intelligent pursuit of technology, health, and profit. But transforming sentencing into a socially responsible governmental activity will surely require the conscious and relentless search for and implementation of workable strategies.

[84] Michael Marcus, *Archaic Sentencing Liturgy Sacrifices Public Safety: What's Wrong and How We Can Fix It*, 16 FED SENT RPTR 76 (2003)