The background of the slide is a faded, high-angle photograph of a desk. On the left, a silver pen lies on a document with the words 'MANAGED FUNDS' and 'ICE' visible. In the center, a pair of glasses sits on the desk. On the right, a portion of a white computer keyboard is visible. The overall lighting is warm and soft.

Focusing Sentencing on Public Safety

*And the Role of
Sentencing Commissions*

Michael Marcus
Oregon Circuit Judge
August 2006

[Http://www.smartsentencing.com](http://www.smartsentencing.com)

Propositions:

In contrast to the current MPC revision draft:

- ▶ *All* Sentences should exercise best evidence-based efforts at harm reduction
 - Within limits of law, proportionality, and resource
 - And absent some compelling reason to serve some other purpose
- ▶ This objective is not limited to any layer or class of crime
 - Though risk, resource, and reliability may call for different dispositions in different cases
- ▶ This metric should guide the allocation of all dispositional resources
 - Including custody, programs, alternatives, and supervision

Propositions:

- ▶ The highest calling of sentencing commissions is
 - *Not* monitoring how consistently guidelines are followed
 - *Not* studying how sentencing affects criminal justice systems
- ▶ But effectively promoting sentencing that employs best efforts at crime reduction through
 - Efficient allocation of *all* sentencing and correctional resources, measured by effectiveness in producing public safety,
 - Exploitation of best research and data about what works best on which offenders,
 - And assistance in development of evidentiary standards for evidence-driven sentencing and sentence policy-making

The current draft:

Punishment *Alone* a Sufficient Objective

- ▶ In *all* decisions: severity proportional to:
 - Gravity of the offense
 - Blameworthiness of the offender
 - Harm to victim
 - Criminal history (optional with Commissions)
- ▶ “Utilitarian” objectives: *Not unless “appropriate”*
= *not inconsistent with others, and*
“realistic prospect of success”
 - Rehabilitation
 - General Deterrence
 - Incapacitation
 - Restorative Justice

The current draft:

Utilitarian Objectives Optional

- ▶ Guideline categories and individual decisions
 - Choose *whether* to pursue utilitarian objectives
 - Choose which one (draft avoids prioritization)
 - Always sufficient to decide on aggravation/mitigation
- ▶ But:
 - All sentences have utilitarian impacts
 - All have public safety outcomes
 - Unguided sentencing causes avoidable harm

Sentencing Without Science

U.S. Bureau of Justice Statistics:

7 of 10 in jail had prior incarceration

62.5% released from prison
rearrested within 3 years

The 272,111 prisoners released in 1994:
Had 4.1 million prior arrests

and 744,000 new charges
within 3 years of their release

Sentencing Without Science

The status quo is profoundly harmful

- ▶ Guidelines not focused on crime reduction do not reduce crime:
 - Most offenders sentenced for most crimes commit new ones
 - Most serious crimes are committed by those sentenced before – *sentenced without*
 - ★ Informed, responsible attempt at preventing recidivism
- ▶ Wasted resources, and pressure –
 - To increase punishment
 - To decrease sentencing discretion
 - To reduce programs
- ▶ Avoidable victimizations, cruelty to all

Sentencing Without Science

The status quo is profoundly harmful



Sentencing Without Science

The status quo is profoundly harmful



Sentencing Without Science

The status quo is profoundly harmful



Sentencing Without Science

The status quo is profoundly harmful



Sentencing Without Science

The status quo is profoundly harmful



Guidelines without focus

Ineffective to restrain punitivism

- ▶ Some saw guidelines as protection against punitivism, and settled for reduced disparity
- ▶ But those suspicious of ordered leniency
 - ★ Brought dangerous offender, mandatory minimums, three strikes and higher ranges to guidelines
- ▶ Now both united in favor of ordered just deserts
- ▶ But guidelines have not stopped mass incarceration



Guidelines without focus

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- ▶ Now both united in favor of ordered just deserts
- ▶ But guidelines have not stopped mass incarceration

Punishment *is* Measurable

- ▶ “Punishment” has measurable purposes:
 - Reinforce social values
 - ★ Respect for rights, property, lives of others
 - Prevent vigilantism
 - Foster respect for law
- ▶ Yet the revision would exempt all from “reasonable likelihood of success”
- ▶ Why pursue *any* expensive and cruel process unless it is “reasonably likely of success”?
- ▶ Why subject only “utilitarian” objectives to empirical validation?

The Public Wants Safety

“Resonance” cannot be attained by just deserts alone

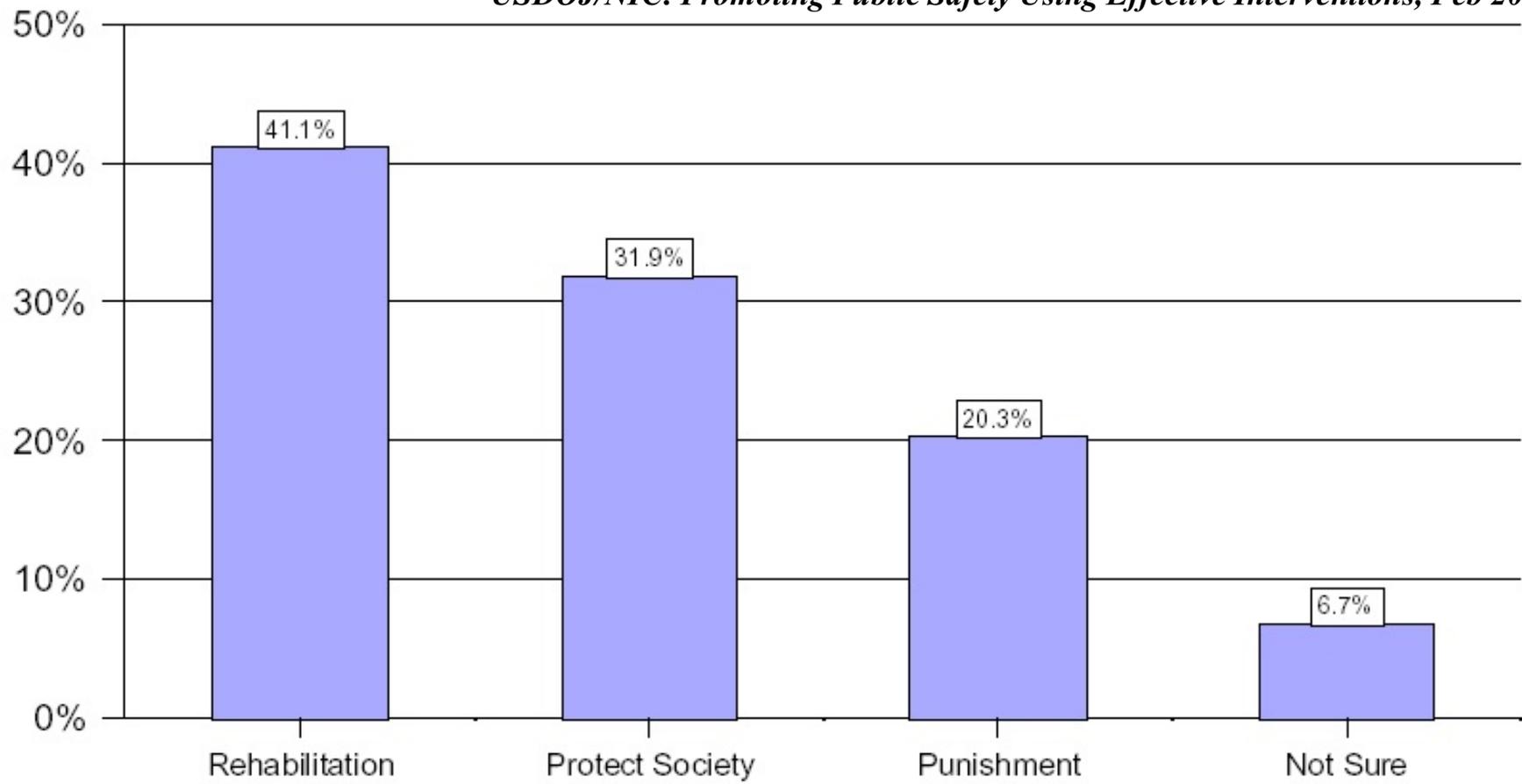
▶ Polls for sentencing commissions and others:

- rehabilitation and crime reduction are first priorities

1996 Survey of Ohio Citizens (N=551)

The main emphasis of prison should be.....

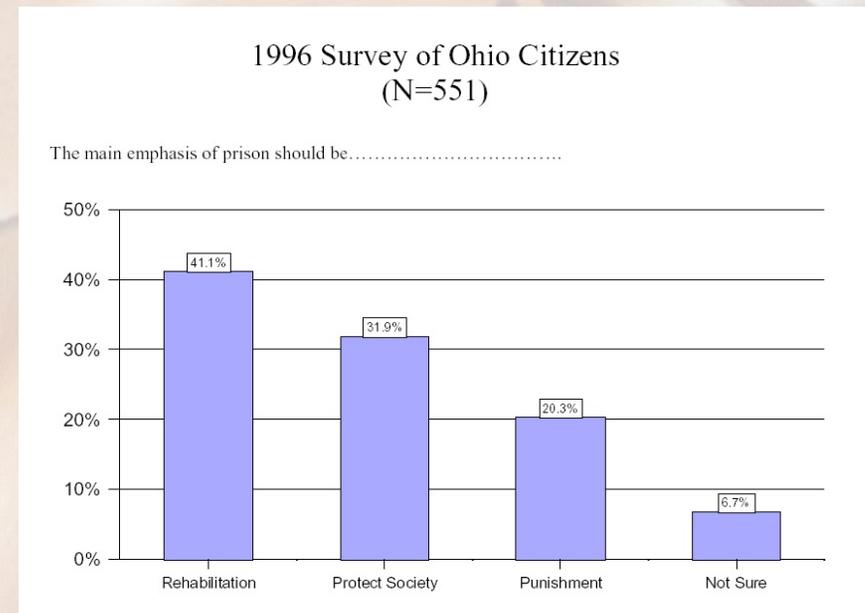
– *USDOJ/NIC: Promoting Public Safety Using Effective Interventions, Feb 2001*



The Public Wants Safety

“Resonance” cannot be attained by just deserts alone

- ▶ Polls for sentencing commissions and others:
 - rehabilitation and crime reduction are first priorities
- ▶ Policy makers consistently overestimate public punitiveness
- ▶ Policy makers consistently underestimate public support for rehabilitation
- ▶ Public continues to support rehabilitation



Incapacitation works

This issue is not “prospect of success”

- ▶ Incapacitation works while the offender is inside

What Works *includes* Jail/Prison

Some focus only on crime reduction here

Others focus only on increased recidivism here



Time in jail or prison

Probation/post prison supervision

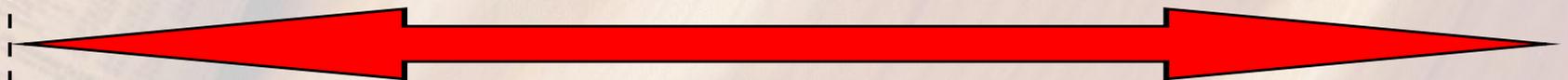


Time →



Day of Sentencing

But this is where crime reduction matters to public safety



What Works *includes* Jail/Prison

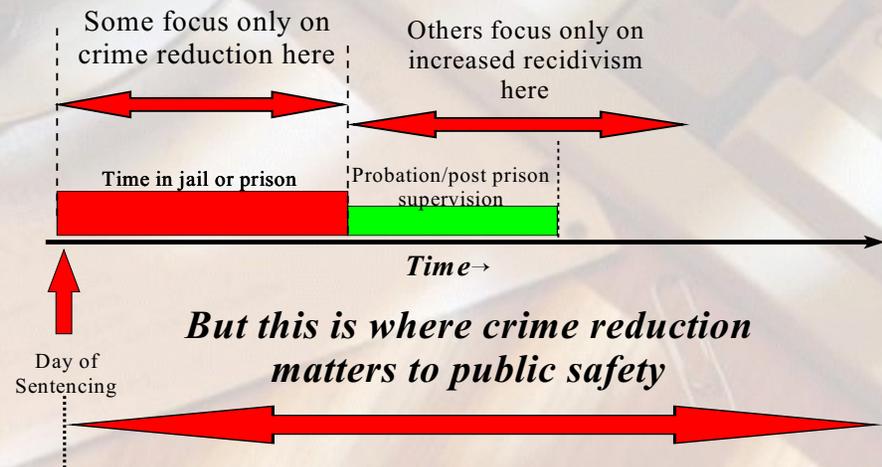
- *Of course* we need to consider:

- ▶ Recidivism after release
- ▶ What works best on which offenders
- ▶ Net impact over career

- But by justifying incapacitation by punishment alone

- ▶ The Draft loses credibility and misses the point:

- What term best serves public safety in terms of risk, total criminal behavior, and prioritized resources?



Don't blame Norval Morris

Limiting Retributivism only sets limits

- ▶ “The concept of ‘just desert’ sets the maximum and minimum of the sentence . . . it does not give any more fine-tuning to the appropriate sentence than that. The fine-tuning is to be done on utilitarian principles.”
 - ★ Madness and the Criminal Law 199 (U. Chicago Press 1982)
- ▶ “it is essential that we evaluate different correctional methods in their application to different categories of offenders.”
 - ★ Norval Morris and Gordon Hawkins, The Honest Politician's Guide to Crime Control 245 (U. Chicago Press 1970)

What we should do instead

Structure guidelines and task commissions:

- ▶ Accept responsibility for best public safety efforts
- ▶ Respond to empirical shortcomings with empirical vigor – for *all* purposes of sentencing
- ▶ Recognize crime reduction at all “layers” of crime
 - It is the *means*, not the purpose, that may vary
- ▶ Understand that all dispositions may affect crime:
 - Not just treatment or rehabilitation
 - Incapacitation is part of our arsenal
- ▶ Ask what works *on which offenders*

What we should do instead

Structure guidelines and task commissions:

- ▶ Establish crime reduction within limits of proportionality as the first purpose of sentencing
 - Allow for adjustment, within those limits, when other purposes override crime reduction alone
- ▶ Study, collect, and disseminate data on whether, when, and how deviation is supported by:
 - Any interest in general deterrence actually at stake
 - Any victim's interest actually at stake
 - Any interest in public values actually at stake

What we should do instead

Structure guidelines and task commissions:

- ▶ How sentence form and severity affect
 - Values - respect for rights, property, and persons
 - Avoidance of vigilantism
 - Respect for the rule of law
- ▶ Craft guideline presumptive ranges and grounds for departure to pursue crime reduction
- ▶ Direct that individual sentencing use best efforts at crime reduction

What we should do instead

Structure guidelines and task commissions:

▶ Commissions should:

- link to academic, corrections, and probation resources and innovations
- collect and disseminate information on best efforts for crime reduction
- Pursue the best use of jail, prison and post prison terms to reduce criminal conduct *over potential careers*
 - ➔ Custody length optimization
 - ➔ Crime avoided via incapacitation vs. criminogenic impact

What we should do instead

Structure guidelines and task commissions:

▶ Commissions should:

• Develop evidentiary standards concerning:

- Risk assessment
 - ★ Virginia, Missouri, Oregon
- Susceptibility to rehabilitation
- General deterrence impact
- Quantifying public value impact
- Quantifying actual victim interests
- Supervision effectiveness
- Incapacitation optimization

What we should do instead

Structure guidelines and task commissions:

▶ Commissions should:

- Develop strategies for promoting smart sentencing
 - Promulgate standards for injecting responsible consideration of public safety in plea bargaining
 - Promulgate standards for probation supervision, reports, and courtroom advocacy
 - Promulgate standards for presentence investigations

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR MULTNOMAH COUNTY

STATE OF OREGON

v.

Circuit Court No. _____

District Atty No. _____

Charges: _____

ORDER FOR PRESENTENCE INVESTIGATION

COURTREPORTER _____ **CASSETTE NO.** _____

CUSTODY STATUS _____ Custody, _____ Recog, _____ Close Street, _____ PRSP; Other _____

GUILTY BY _____ Plea; _____ Jury Verdict; _____ Court Trial; Guilty Finding Date _____

Defense Attorney _____ Phone No. _____ District Attorney _____

SENTENCING DATE _____ at _____ AM/PM by JUDGE _____

SGL Grid Coordinates _____ **Not SGL** _____ **Measure** _____

Pursuant to ORS 137.530, the Presentence Report shall include the circumstances of the offense, criminal record, social history and present condition and environment of the defendant. The Court further directs that the Presentence Report include the following:

- 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
- SGL Departure Information (Upward/Downward)
- Psychological evaluation by the Department of Community Corrections
- Psychiatric evaluation by the Oregon State Hospital
- Dangerous Offender evaluation
- Other _____

ATTACH COPY OF: **Plea/Stip Facts Petition; Order Entering Plea; Jury Verdict Form; Plea Agreement; Indictment; Police Reports; SGL Criminal History Form**

- Defense counsel wishes to be present at or contacted before all interviews. (Defendant is not to be interviewed without presence or consent of defense.)

What we should do instead

Structure guidelines and task commissions:

▶ Commissions should:

- Develop strategies for promoting smart sentencing
 - Promulgate standards for injecting responsible consideration of public safety in plea bargaining
 - Promulgate standards for probation supervision, reports, and courtroom advocacy
 - Promulgate standards for presentence investigations
 - Promote methods of informing judges and participants of outcomes and correlations

Welcome to DSS-Justice Sentencing Support

The first step is the identification of the offender currently being sentenced. Use the form below to search for this individual.

Select Search Method:

By ID Number

Search by ID Number:

ID number type: OJIN Court Number

ID number: 960744942

By Name

Search by Name:

First:

Middle:

Last:

DOB: (MM/DD/YYYY)

Race: -not selected-

Gender: -not selected-

submit



Case Number: 960744942 Offender Name: [SHAUN A HERMO JR](#)

Charge Selection

Please select the sentencing charge below. The primary charge for the selected offender's current court case is selected as a default.

Selected Charge

164.045-Theft II

Search/Find Next

Other Charges

Case Charges

164.045-Theft II

164.043-Theft III

Other Charges

033.010-Contempt of Court

033.015-Contempt of Court

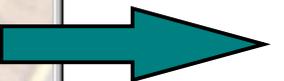
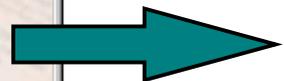
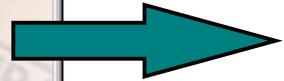
059.055-Sell Fraud/Unlic Sec

059.135-Fraud-Securities

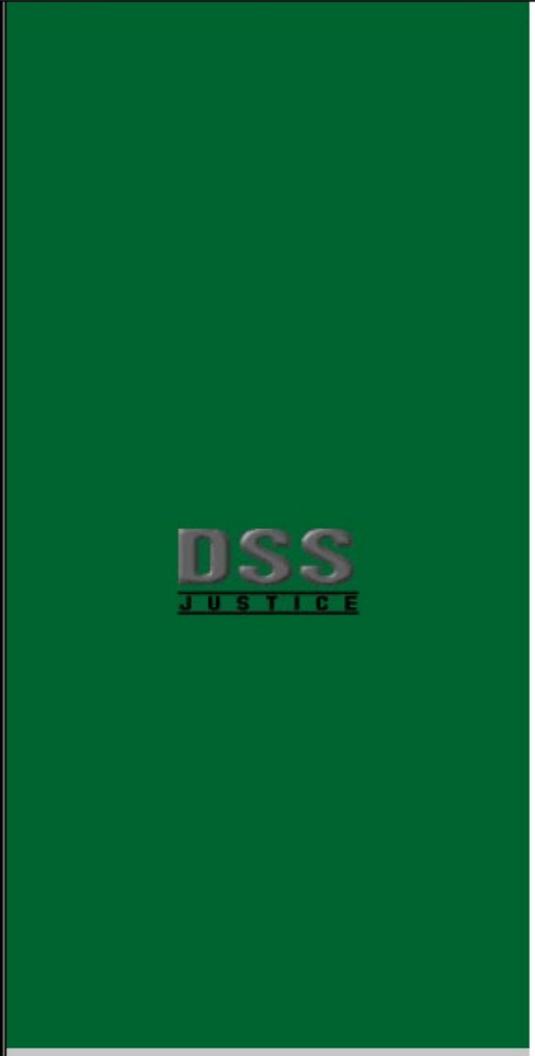
101.01.00-Unlaw Parking in Prk

101.01.50-Discharge Firearm In

101.03.20-Unlawful Entry Into



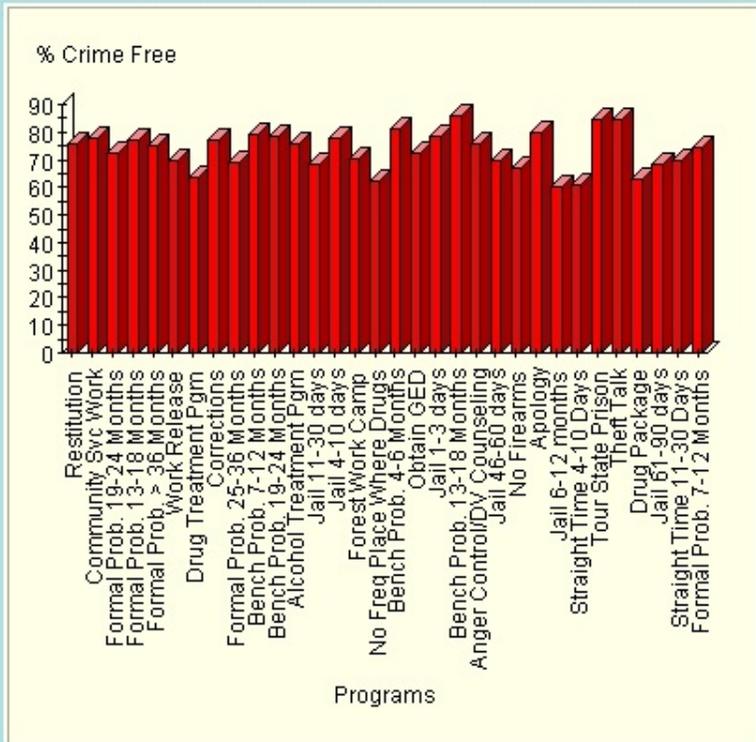
submit



[Exit](#)

The effectiveness percentages below are more stable when a larger number of sanctions (preferably greater than 30) are being evaluated.

Sentencing Support Results



Only sanctions which occurred 30 or more times in this cohort are charted here. All sanctions from this cohort are in the table below.

Sanction Type	% w/o Recidivism	# of Sentences
Restitution	75.84%	1006
Community Svc Work	77.52%	854

Current Selections:

Sentences were analyzed for the following charges:

Charge Type: Crime Theme
 Charge Theme: Property
 Charge Sub Category:
 Charge:
 Charge Class: all_values
 Charge Level: all_values
 Sanction Evaluation: All

Recidivism was measured by a conviction

for any property crime
 occurring within: 3yr

for convictions that occurred between 01/1988 and 06/2002.

Sentences will be analyzed for offenders matching the following profile.

Violent Crime Record: None
 Sex Crime Record: None
 Drug Crime Record: None
 DUI/Traffic Crime Record: None
 Property Crime Record: None
 DV Crime Record: None

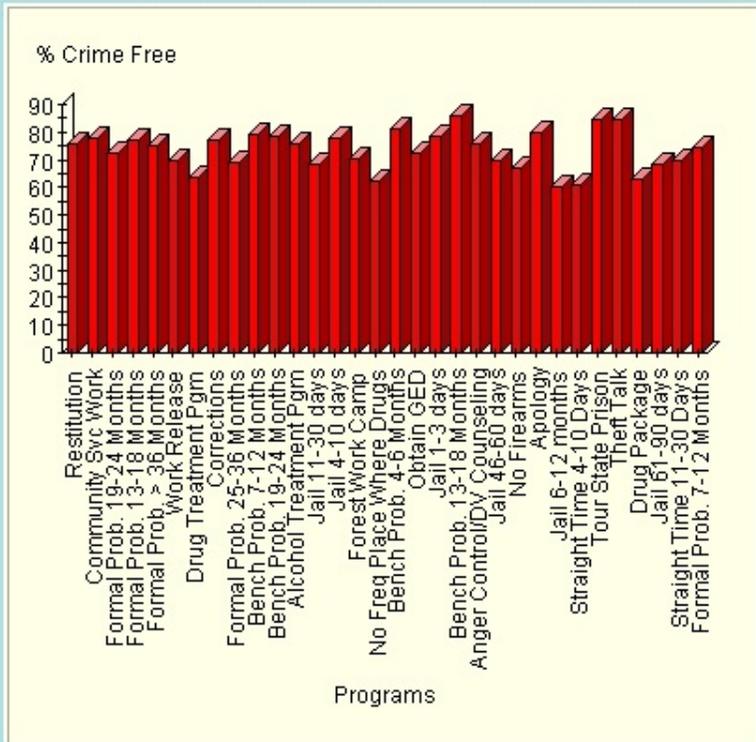
Offender Demographics:

Ethnicity: White
 Age: '18-20'
 Gender: Male

Results are now ready. You can refine these results by selecting from the menus above and clicking 'Recalculate'.

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Charge
Recidivism
Profile

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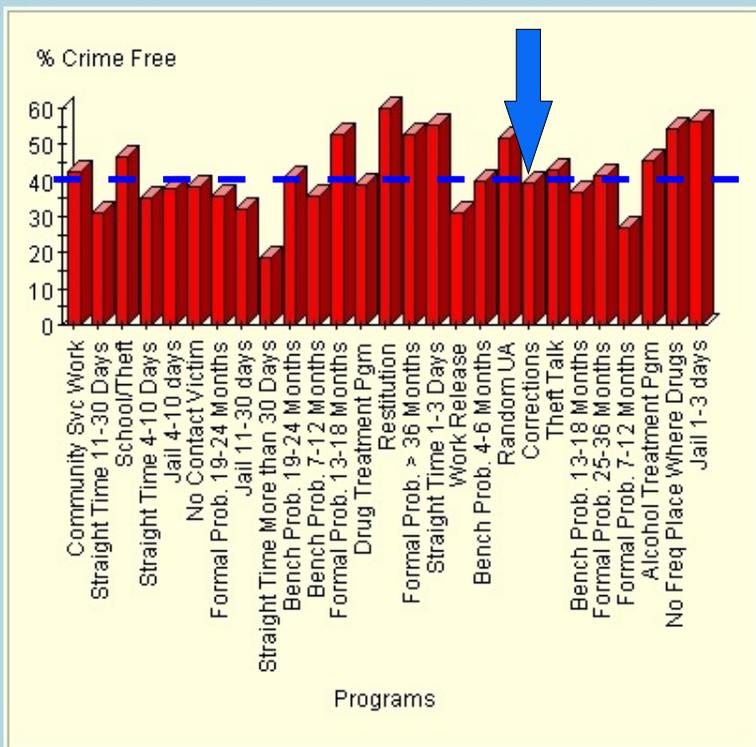
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- Property Crime Record: None
- DV Crime Record: None

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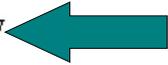
Sanction Type	% w/o Recidivism	# of Sentences
Community Svc Work	42.44%	238
Straight Time 11-30 Days	31.06%	235
School/Theft	46.51%	215
Straight Time 4-10 Days	35.43%	175
Jail 4-10 days	37.66%	154
No Contact Victim	38.16%	152
Formal Prob. 19-24 Months	35.51%	138
Jail 11-30 days	31.82%	132
Straight Time More than 30 Days	18.75%	128
Bench Prob. 19-24 Months	41.03%	117
Bench Prob. 7-12 Months	35.9%	117
Formal Prob. 13-18 Months	52.53%	99
Drug Treatment Pgm	38.95%	95

[Charge](#) | [Recidivism](#) | [Profile](#)

Current Selections:

Sentences were analyzed for the following charges:

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 Charge Theme: Property
 Charge Sub Category:
 Charge:
 Charge Class: all_values
 Charge Level: all_values
 Sanction Evaluation: All



Recidivism was measured by a conviction

for any property crime
 occurring within: 5yr



for convictions that occurred between 01/1988 and 04/2004.

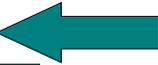
Sentences will be analyzed for offenders matching the following profile.

Violent Crime Record:
 Sex Crime Record:
 Drug Crime Record:
 DUI/Traffic Crime Record:
 Property Crime Record: Moderate, Major, Severe
 DV Crime Record:



Offender Demographics:

Ethnicity: African-American
 Age: '26-30', '31-35', '36-40', '41-45'
 Gender: Female



Results are now ready. You can refine these results by selecting from the menus above and clicking 'Recalculate'.

[Recalculate](#) | [New Search](#) | [Exit](#)

What we should do instead

Structure guidelines and task commissions:

▶ Commissions should:

• Develop strategies for promoting smart sentencing

- Promulgate standards for injecting responsible consideration of public safety in plea bargaining
- Promulgate standards for probation supervision, reports, and courtroom advocacy
- Promulgate standards for presentence investigations
- Promote methods of informing judges and participants of outcomes and correlations
- Devise sentencing tools that encourage consideration of practical issues in crafting sentences

Oregon Judges Criminal Benchbook

<http://www.ojd.state.or.us/>



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2005

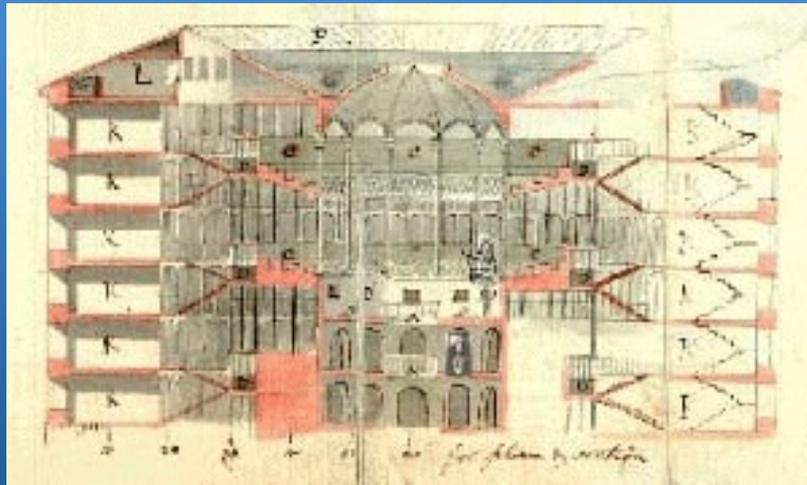
Oregon Judicial Department
Office of the State Court Administrator
Court Programs and Services Division



Conclusions

- ▶ Ordered just deserts
 - Not sufficient performance measure
 - Masks cruelly dysfunctional sentencing culture
- ▶ Sentencing rigorously pursuing harm reduction
 - Is most likely to reduce cruelty to victims
 - Most reliable protection for appropriate judicial discretion
 - Most effective response to unwarranted punitivism
 - Affords sentencing commission the most socially useful role
- ▶ *See A Harm Reduction Sentencing Code*

For further information:



[Http://www.SmartSentencing.com](http://www.SmartSentencing.com)