Sentencing Support Tools: Technology as Strategy

Michael Marcus, CTC9, Sept 2005
http://www.smartsentencing.com

Introduction:

Courts adopt technology to seek efficiency and accessibility, and accept foreseen and unforeseen changes in the way we do business as a tolerable cost. We know that e-filing and electronic records will ultimately please our "business partners" in the civil bar, and that automated criminal judgments will avoid errors and delay in the business of handing off sentenced offenders to corrections. We delegate the attendant difficulties of overcoming resistance and retraining staff to change management because we accept that doing what we do more quickly cheaply is a positive objective. We are grateful for the reduced costs associated with video arraignments and web-based fine payments, and view the increased security of the former and higher payment rates of the latter as icing on the cake.

Although we are willing to attempt changes in our behaviors to accommodate technology, we do not generally employ technology as a strategy for modifying our behavior. Multnomah County's sentencing support project is precisely such a strategy. It proceeds from the conclusion that sentencing behaviors of courts cannot be improved by speed until and unless they are responsibly directed at public safety.

This paper and the related presentation will provide a critical overview of contemporary criminal sentencing, a summary of the argument that responsible sentencing must include best efforts at crime reduction, a description of sentencing support tools in Multnomah County, and a report on their combination with additional strategies to transform the archaic dysfunction of modern criminal punishment into a responsible and effective social function.

Overview of contemporary criminal sentencing:

Most state and federal statutes prescribing the purposes of sentencing date from the mid-century fallacy that merely proclaiming those purposes would accomplish their achievement. The 1962 Model Penal Code was an effective articulation of the assumption that sentences served public safety by a combination of deterrence, reformation, and incapacitation, with substantial deference to proportionality and what became known as the medical model of punishment: that most offenders would respond to diagnosis and treatment by reducing their criminal behavior.[1] Those skeptical of rehabilitation eventually gained substantial vindication in growing scientific evidence that treatment success was limited and rare — and in growing frustration with the recidivism easily attributed to parole boards laboring with blunt predictive tools under indeterminate sentencing laws.[2]

By the late 20th century, the skirmish lines shifted. "Truth in sentencing" and, soon, guideline schemes achieved an equilibrium among competing sentencing ideologies. Those who resisted long prison sentences hoped guidelines would moderate what they deemed "punitivism." They celebrated the guidelines' function of limiting sentencing disparity as a sufficient accomplishment, even when those who favor incapacitation elevated guideline ranges with ballot measures and legislation.[3] Initially suspicious

---

[1] Compare Model Penal Code §1.02(2) (1962) *with, e.g.*, ORS 161.025.

[2] Kevin R. Reitz, Reporter, MODEL PENAL CODE: SENTENCING REPORT 28-29 (American Law Institute, April 11, 2003), *and authorities cited*.

[3] Oregon adopted sentencing guidelines initially by 1989 Or Laws ch 790, §87. From the same legislative session, 1989 Or Laws ch 1, §§ 2 & 3, and ch 790, §82, 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 ch 2), codified at ORS 317.700, *et seq.*). 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.

of what they saw as the structural leniency of guidelines, the latter now generally support guidelines but struggle to raise sentencing floors and minimize judicial discretion to depart downward.[4]

The resulting *de facto* coalition supporting guidelines enables their consistent failure to improve the crime reduction impact of sentencing. While it surely has social value to determine some metric by which to spread just deserts appropriately among offenders based on their present and past crimes, we must not rest on such puny laurels. The actual range of "just punishment" is quite broad by any popular, historical, or analytical model. While crimes that rightly cause outrage or cause great harm or reflect brutality clearly call for severe punishment, the most common crimes don't evoke a consensus for any but the broadest range of appropriate punishment. Yet we construct intricate matrices that create the illusion of precision[5] but have nothing whatever to do with public safety except by accident[6] — while achieving consistency in large part by ignoring variables we should not ignore.[7]

Why responsible sentencing must include best efforts at crime reduction:

The argument that through modern sentencing we are doing the best we can is a façade jointly maintained by opponents — those who fear evidence-based practices (or any erosion of the "predictability" of guidelines) would accelerate "mass incarcerationism," and decry risk assessment for "false positives;" and those who fear that any expansion of judicial discretion would promote leniency, which they oppose for its own sake or out of essentially fundamentalist notions that severity and crime-control are synonymous. The reality is that we are doing a terrible job if the performance measure is crime reduction,[8] and that we surely could improve were we to make anything resembling a responsible effort to do so.

Recidivism is enormous. Many agencies, particularly departments of correction, understate the problem by ignoring the most common crimes — misdemeanors. But the data is ultimately unavoidable: most offenders we sentence for most crimes will offend again; most we sentence for serious crimes have been sentenced before — without any attempt to prevent future crimes. Our actual recidivism rates range well above 60 percent.[9]

Oregon is hardly alone in this experience that guidelines do not function as bulwarks against severe sentencing policy. *Compare, e.g.*, J. Clark, J. Austin, & D. Henry, "THREE STRIKES AND YOU'RE OUT": A REVIEW OF STATE LEGISLATION 1 (U.S. Dept. of Justice, National Institute of Justice, Sept.1997), http://www.ncjrs.org/pdffiles/165369.pdf (last accessed August 1, 2005) *with* Ark Code Ann §16-90-804 (Supp 2003); Kan Stat Ann §21-4701, *et seq* (2003); Fla Stat §9210016 (2003); NC Gen Stat §15A-134016 (Lexis 2003); 204 Pa Code §303, *et seq* (2004), reproduced following 42 Pa Cons Stat Ann §9721 (Purden Supp 2004).

[4] Michael Marcus, *Blakely, Booker, and the Future of Sentencing*, 17 Federal Sentencing Reporter 243 (2005).

[5] Even where we actually do treat like alike, the accomplishment hardly eclipses all other sentencing objectives: "Treating like cases alike is by no means a categorical imperative of justice; it is merely one of several interacting, guiding principles of justice to be accorded respect up to the point that it decreases community protection or increases individual suffering without sufficiently compensating social advantage."

Norval Morris, MADNESS AND THE CRIMINAL LAW 209 (U. Chicago Press 1982).

[6] The accident is that we end up incarcerating longer those who commit worse crimes with worse records. This is an irresponsibly crude and imprecise version of modern risk assessment, but the leaders of the guidelines movement eschew any intent to address crime reduction.

[7] Michael Marcus, *Comments on the Model Penal Code: Sentencing Preliminary Draft No. 1*, 30 Am J Crim Law 135, 155, n.66 (2003).

[8] For compelling evidence that we have not accepted any responsibility to pursue public safety is nowhere more poignant than the recently-released National Center for State Courts' "*NCSC CourTools - Trial Court Performance Measures*" http://www.ncsconline.org/D_Research/CourTools/tcmp_courttools.htm (last accessed July 31, 2005). Omitting public safety from court outcome measures is both profound and outrageous.

[9] 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." Bureau of Justice Statistics Criminal Offenders Statistics, http://www.ojp.usdoj.gov/bjs/crimoff.htm (last accessed July 31, 2005). "Sixty-seven percent of former inmates released from state prisons in 1994 committed at least one serious new crime within the following three years," and "272,111 offenders discharged in 1994 had accumulated 4.1 million arrest charges before their most recent imprisonment and another 744,000 charges within 3 years of release." Bureau of Justice

The legitimate criticism of untested treatment modalities initiated by Morrison's 1974 bombshell that "nothing works"[10] was badly needed, but it was no excuse for rejecting reformation as an objective of penology. Had medicine responded in kind to the plague, medicine would now be as archaic as sentencing. Indeed, criminologists and others have labored long and hard to determine what works on which offenders,[11] and we now know that properly designed and implemented programs can substantially reduce the recidivism of a significant portion of the criminal justice population.[12]

But the efficacy or not of programs merely scratches the surface of an evidence-based approach to sentencing. After all, not just programs, but everything we do (and the way we do it) works better on some than on other offenders. Our sentences have public safety outcomes whether or not we notice. "Rehabilitation" proponents must understand that incarceration works tremendously well for almost all offenders during the period of incarceration. "Incarcerationists" must understand that for some offenders, incarceration may increase their criminality to the point that their recidivism after release makes up for lost time several-fold when they return to their communities. We have a wide range of responses to crime — from treatment (outpatient, inpatient and custodial), alternative sanctions, and various forms and lengths of supervision, to jail and prison of varying duration. A responsible criminal justice system goes far beyond merely accepting a just deserts calculus for using these resources to reduce the risk of harm at the hands of offenders. A responsible criminal justice system does its best to learn which responses are most likely to reduce the total risk of harm posed by an offender over the course of a potential criminal career— and to apply that learning within the limits of proportionality and resources. A responsible criminal justice system understands that what works on one offender may not work on another — and that on some offenders, nothing but incapacitation works.

Which offenders to incarcerate, and for how long and under what conditions, is an insufficiently researched but critically important set of issues. We have indeed learned far more[13] than we consider

---

Statistics Criminal Offenders Statistics, http://www.ojp.usdoj.gov/bjs/abstract/rpr94.htm (last accessed July 31, 2005).

Our local experience is consistent: of the 2,395 people jailed in Portland, Oregon, during July, 2000, 1,246 had been jailed in Portland on some other occasion within the previous 12 months. Portland Police Bureau Data Processing, August 25, 2000, available at http://www.smartsentencing.com (site maintained by the author) . 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." 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.

[10] Robert Martinson, *What Works? — Questions and Answers About Prison Reform*, 35 THE PUBLIC INTEREST 22 (1974).

[11] "The important issue is not whether something works but what works for whom." Doris Layton MacKenzie, *Criminal Justice and Crime Prevention*, ch 9, p. 20 of PREVENTING CRIME: WHAT WORKS, WHAT DOESN'T, WHAT'S PROMISING: A REPORT TO THE UNITED STATES CONGRESS (1979), http://www.ncjrs.org/docfiles/wholedoc.doc (last accessed 7/31/05).

[12] *See generally*, *Treatment Works For Youth In The Juvenile Justice System*, National Mental Health Association, and sources cited (http://www.nmha.org/children/justjuv/treatment.cfm, last accessed July 31, 2005); Mark Gornik, *Moving from Correctional Program to Correctional Strategy: Using Proven Practices to Change Criminal Behavior*, U.S. Department of Justice, National Institute of Corrections, and sources cited (http://www.nicic.org/pubs/2001/017624.pdf, last accessed July 31, 2005). 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.

[13] 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) (last accessed August 1, 2005), cited in The

when employing discretion on such matters. Of all the guideline jurisdictions, only Virginia has taken on the challenge of refining and incorporating risk assessment to allocate prison resources to produce best efforts with prison resources.[14] Those who rail against risk assessment as unfair "preventive detention" and wrought with high "false positive" rates[15] ultimately make no argument that risk assessment would not improve our crime reduction performance. Rather, they eschew crime reduction as a performance method because they oppose incarceration. Unavoidably, rejecting risk assessment for merely ordered just deserts *increases* our "false positives" measured by incarcerations not required by public safety, increases our "false negatives" by recidivism occasioned by our failure to incarcerate, and compounds unfairness — both to victims whose crimes smarter sentencing would have avoided and to those we punish while stubbornly avoiding the responsibility to seek best outcomes.[16] As long as the resulting disposition is within the broad range of proportionality, doing our best with modern instruments (and otherwise) to apportion incapacitation as a device to manage risk and reduce harm is far from unjust. It is not inequitable to apportion prison sentences among those who have "earned" the time according to the *risk* each poses — even though we must do so imperfectly.

In light of the reality that we presently make essentially no effort to use what others have learned about the efficacy of sentencing choices, it is unavoidable that we would do a better job of public safety than we are now doing were we to make that effort responsibly. Until then, we are to a significant extent complicit in the victimizations smarter sentencing would prevent, and in the waste of resources distributed now without attention to which offenders are most appropriately dealt with by which modality. Moreover, notwithstanding the rhetoric of the vociferous or the fears of the scholarly opponents of sentencing discretion in pursuit of crime reduction, the public values crime reduction far more than it values retribution.[17] That the public wants us to pursue crime reduction is yet another reason that we must accept accountability for the public safety outcomes of our sentencing choices.

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) (last accessed August 1, 2005).

[14] The first result was far longer sentences for sex offenders who posed a greater risk of recidivism than others. Later, Virginia extended risk assessment to ensure that prison beds were available for a wide range of offenders who represented an elevated risk of harm while relegating lower risk offenders to alternative sanctions. The history and results of this effort are available on the Virginia Criminal Sentencing Commission's web site, http://www.vcsc.state.va.us/reports.htm (last accessed August 1, 2005).

[15] *See, e.g.*, Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventative Detention as Criminal Justice*, 114 Harv. L. Rev. 1429 (2001); Allan Manson, SENTENCING AND PENAL POLICY IN CANADA (Toronto: Emond Montgomery, 2000); 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 (Chicago: University of Chicago Press, 1985), pp. 1-50; Norval Morris, *On "Dangerousness" in the Judicial Process*, 39 Record of the Bar Association of the City of New York 102 (1982).

[16] Michael Marcus, *Blakely, Booker, and the Future of Sentencing*, 17 Federal Sentencing Reporter 243, 246 (2005), and authorities cited.

[17] 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); Fairbank, Maslin, Maulin & Associates, RESOURCES FOR YOUTH CALIFORNIA SURVEY (1998); Peter D. Hart Research Associates, Inc., CHANGING PUBLIC ATTITUDES TOWARD THE CRIMINAL JUSTICE SYSTEM (Feb 2002) [for The Open Society Institute], available at http://www.soros.org/initiatives/justice/articles_publications/publications/hartpoll_20020201/Hart-Poll.pdf (last accessed August 2, 2005); 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 (last accessed August 2, 2005); John Halliday, Cecilia French, Christina Goodwin, MAKING PUNISHMENTS WORK REPORT OF A REVIEW OF THE SENTENCING FRAMEWORK FOR ENGLAND AND WALES App 5, at 8 (Home Office, July 2001), http://www.homeoffice.gov.uk/docs/halliday.html (last accessed August 2, 2005).

Multnomah County's Sentencing support tools:

Multnomah County's sentencing support tools assist judges and others involved in a sentencing decision to see outcomes in terms of recidivism correlated with sentencing choices for offenders like the one before the court, sentenced for similar charges.[18] The tools run against a data warehouse automatically filled and updated with information from a variety of computerized operational information systems. The courts, the police, the sheriff (who runs our jail), the district attorney, and the department of corrections provide access to their data. Data warehouse technology extracts a copy of the needed information from each source, transforms it so it is mutually intelligible, and transfers it to the "warehouse" where criminal justice users can query it for answers that cannot be obtained from any one source alone.

A user of the sentencing support application (one of many running based on the warehouse) enters a case number and selects the criminal charge for which a sentence is being selected. The program constructs a bar chart based on data for the offender and the charge selected. The chart includes a bar for sentencing elements imposed on such offenders for such a charge, arrayed left to right in order of their declining frequency.[19] Each bar reflects the proportion of those receiving that sanction who were free of any new conviction for a similar crime within three years. This approach displays incarcerative and non-incarcerative sanctions side by side, measured by precisely the same test, which is always some flavor of recidivism. The right side of the screen displays the variables upon which the bar chart is based. The user's choice of crime for sentencing yields a variable that chooses one of six categories of Screen Shot of a Sentencing Support Display crime as a "similar crime." For example, choosing Theft in the First Degree yields a default of "property crime," so that the program is analyzing sentences imposed on similar offenders for any property crime. A "similar offender" is one who has a similar criminal record and similar demographics (age, gender, and ethnicity). A "similar" criminal record is one that reflects the same rating, from "none" to "severe," in each of six crime categories: violent crime, sex crime, property crime, drug crime, major traffic crime (including impaired driving), and domestic violence. Users can modify all of the variables and generate a new bar chart in seconds. For example, if we are dealing with a common criminal category, we may be able to focus on only those offenders sentenced for the same crime as the offender before the court, so the program allows a user to change "property crime" to "Theft I." If the offender's crime category is less common, we may have to expand it to compare offenders like the one before the court who have been sentenced for any crime. We may also want to modify what we mean by "similar" offender. Finally, users can modify the outcome measure. The default measure of recidivism is a new conviction for a similar crime within three years. Users can specify instead conviction for "any crime," or for a crime in any of the six crime categories. Users can also modify the period during which recidivism is tallied or focus on arrests (particularly useful in domestic violence cases).

The point of all of this is not to ask technology to select a sentence, but to focus the attention of the sentencing process on public safety. With that focus, advocates and probation officers can supplement the data available from sentencing support tools with information about the offender's particular

---

[18] For a more comprehensive description, screen shots, the user manual, slide shows, and additional information consult http://www.smartsentencing.com (site maintained by the author).

[19] Those familiar with "sentencing support" programs running in the UK, New South Wales, Israel, and elsewhere may mistake our tools as similar. The critical difference is that those programs encourage judges to do what judges have most frequently done to similar offenders for similar crimes. They display dispositions ranked by frequency, with frequency of imposition as the only outcome measure — wholly ignoring public safety, and – like guidelines outside Virginia – normalizing sentencing behaviors around precisely those that have generated unacceptable recidivism.. *See* Michael Marcus, *Comments on the Model Penal Code: Sentencing Preliminary Draft No. 1*, 30 Am J Crim Law 135, 160 (2003), *and authorities cited.*

circumstances or treatment history, the availability or not of local community-based or custodial programs, or with research germane to a particular sentencing analysis.[20]

Related strategies for promoting smarter sentencing:

Sentencing support tools represent a strategy for meeting the challenge of empty proclamations and untested practices with evidence-based and responsible pursuit of sentencing behaviors that reduce crime within the limits of proportionality and available resources. Strategies are critical. In Oregon, as elsewhere, the mid twentieth century promise of public safety through deterrence, rehabilitation, and incapacitation[21] was so emasculated in practice that no one appeared to notice that sentencing guideline schemes enveloped our sentencing culture with no pretense of pursuit of public safety.[22] In 1997, in the first year after a ballot measure inserting "protection of society" as the first constitutional purpose of sentencing,[23] the Oregon legislature laid the groundwork for sentencing support by restating the notion that crime reduction is a dominant performance measure for juvenile and adult sanctions, and by requiring that criminal justice agencies maintain and share data to "[p]ermit analysis of correlations between sanctions, supervision, services and programs, and future criminal conduct."[24] In the same year, the Oregon Judicial Department adopted a resolution calling for sentencing judges to "consider and invite advocates to address the likely impact of the choices available to the judge in reducing future criminal conduct."[25] In 2001, the Oregon Criminal Justice Commission adopted a "Public Safety Plan" including as its first recommendation that "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."[26] And the Oregon Judicial Department adopted "2020 Justice: A Vision for Oregon's Courts," reciting "[w]e use preventive measures and effective sentencing to reduce criminal behavior;" the strategies include "Employ Technology to Improve Sentencing Practices and Data-Sharing Systems."[27]

In early 2002, Multnomah County judges who handle criminal cases modified the form that orders a "pre-sentence investigation report" to add a wholly new requirement that the preparer include "[a]nalysis 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."[28] PSI writers now regularly include sentencing support data in their reports. The same judges then joined with probation department management to transform the role of probation officers:

---

[20] For a description of the way in which these tools can modify sentencing considerations and outcomes, see Michael Marcus, *Sentencing in the Temple of Denunciation: Criminal Justice's Weakest Link*, 1 Ohio State Journal of Criminal Law 671 (2004), available at http://moritzlaw.osu.edu/osjcl/issue2_articles/Marcus.pdf (last accessed August 1, 2005).

[21] ORS 161.025.

[22] In Oregon, for example, the presumptive sentence is determined by the "crime seriousness" associated with the offense and related circumstances, and the "criminal history" of the offender. See Oregon Administrative Rule 213-004-0001 and http://www.ocjc.state.or.us/SGGrid.htm (last accessed August 1, 2005).

[23] In 1996, Oregon voters amended the state constitution to proclaim: "Laws for the punishment of crime shall be founded on these principles: protection of society, personal responsibility, accountability for one's actions and reformation." The previous version stated ""Laws for the punishment of crime shall be founded on the principles of reformation, and not of vindictive justice." Or. Const. Art. I, § 15

[24] 1997 Or Laws, ch 433 (1997 HB 2229) (site maintained by author).

[25] 1997 Oregon Judicial Conference Resolution #1 (site maintained by author).

[26] http://www.ocjc.state.or.us/Public%20Safety%20Plan.pdf (last accessed August 1, 2005).

[27] http://www.ojd.state.or.us/osca/cpsd/programplanning/futures/documents/justice2020vision.pdf (last accessed August 1, 2005).

[28] Michael Marcus, *Smarter Sentencing: on the Need to Consider Crime Reduction as a Goal*, Court Review 16, 22 (Winter 2004) [Journal of the American Judges Association], available at http://aja.ncsc.dni.us/courtrv/cr40_3and4/CR40-3Marcus.pdf (last accessed August 1, 2005).

"Judges who handle criminal cases have asked our probation department to approach the probation violation process as our experts on what works – to write violation reports and to advocate in court for the outcome most commensurate with public safety. We recommended that probation violation report recommendations spell out how the recommendation serves public safety, short and long term."[29]

In 2003, the Oregon Legislature mandated that increasing portions of "program" budgets of the adult and juvenile corrections agencies be devoted to "evidence-based programs."[30]

In the session ending 2005, the Oregon Legislature mandated that pre-sentence reports state-wide follow Multnomah County's lead by including:

"an analysis of what disposition is most likely to reduce the offender's criminal conduct, explain why that disposition would have that effect and provide an assessment of the availability to the offender of any relevant programs or treatment in or out of custody, whether provided by the department or another entity"[31]

Finally, in what may prove to be merely another committee producing the innocuous and unremarkable, or a major step towards bringing sentencing practices into conformity with the original promise of responsible pursuit of crime reduction, the Oregon Legislature directed our Criminal Justice Commission to:

"conduct a study to determine whether it is possible to incorporate consideration of reducing criminal conduct and the crime rate into the commission's sentencing guidelines and, if it is possible, the means of doing so."[32]

Sentencing support tools were designed not just to inform sentencing discretion, but to foment the same transformation of sentencing practices that these various measures implicitly seek. There is irony in the uncertainty with which we can assess exactly what role the tools have had in encouraging these related strategies. And it is too early in the slow transformation of sentencing culture to attempt any rigorous analysis of whether the tools themselves have contributed to the crime reduction impact of sentencing choices. Attorneys and judges have been slow to embrace the tools as part of sentencing advocacy and analysis, but their use has continued to expand. PSI writers regularly refer to them, and they have surely been part of the movement towards evidence-based sentencing — if for no other reason that they represent a powerful and persistent demonstration that we can indeed access information to help tie our sentencing choices to crime reduction. Maintaining that function tangibly belies the excuses for avoiding accountability for crime reduction in sentencing.

"Improvement is within our grasp, but will require relentless search for strategies for

---

[29] Michael Marcus, *Sentencing Support Tools and Probation in Multnomah County*, Executive Exchange (Spring 2004) [national journal of probation executives], available at http://ourworld.compuserve.com/homepages/SMMarcus/ProbationSSPTools.pdf (site maintained by the author).

[30] 2003 Oregon Laws Chapter 669 (SB 267)' http://www.leg.state.or.us/03orlaws/0669.pdf (last accessed August 1, 2005).

[31] 2005 Oregon Laws Ch 473 (SB 914), http://www.leg.state.or.us/05reg/measpdf/sb0900.dir/sb0914.en.pdf (last accessed August 1, 2005).

[32] 2005 Oregon Laws Ch 474 (SB 919), http://www.leg.state.or.us/05reg/measpdf/sb0900.dir/sb0919.en.pdf, last accessed August 1, 2005).

transforming sentencing from an archaic and harmful ritual into a socially responsible exercise."[33]

Conclusion:

Sentencing support tools represent an ambitious application of technology as part of an attempt to change institutional culture to serve a function the courts have traditionally avoided. As such, they answer the least heeded but highest and most urgent calling of technology: not to increase our speed or to lower our costs, but to improve our performance as measured against our public mission. Nowhere is the challenge or the promise more profound than in criminal sentencing.

[33] Michael Marcus, *Justitia's Bandage: Blind Sentencing*, 1 Int'l Journal of Punishment and Sentencing 1 (2005), http://www.sandstonepress.net/ijps/IJPS_sample.pdf (last accessed August 2, 2005).