What Works? Who Cares?

Strategies for making what works matter

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http://www.smartsentencing.com

Introduction: In spite of concern outside the criminal justice system for effective programs and sanctions, the system itself remains deliberately oblivious to whether its sanctions accomplish anything for the offenders on whom they are deployed. This session will explore a variety of strategies through which we have attempted to make what works matter in criminal justice, and will seek to encourage a discussion of how the evaluation and research communities can attempt to ensure that the criminal justice system actually exploits evaluation to pursue best efforts in sentencing.

Why it matters if what works matters: Program evaluation as an undertaking assumes some level of interest in how programs perform by some definition of success. Programs related to criminal justice presumably do or do not result in some improvement in the lives or circumstances of offenders subjected to those programs, in their behavior, or both. But if judges, prosecutors, and defense attorneys don't care whether programs (or other dispositions) "work" by any measure, several consequences follow.

If no one cares, there is limited or no demand for evaluation or research. From the public's point of view, if no one cares, we achieve best practices only by accident, if at all. And to the extent that the relevant measure has to do with harm reduction, if no one cares we can expect (and in fact we experience):

- avoidable victimizations,
- cruelty both to victims whose victimization should have been avoided and to offenders whose punishment benefits no one
- squandered correctional and criminal justice resources
- underfunded crime prevention efforts[1]
- increased pressure for increasing punitiveness, decreasing discretion, and withdrawing program resources
- minimal demand for program evaluation

Unfortunately, it is readily apparent to any who have observed sentencing arguments that what works does *not* seem to matter to most criminal justice participants. That crime reduction is not a meaningful goal of the criminal justice system is most powerfully demonstrated by our recidivism rates. Most sentences imposed for most crimes do not prevent the offender from offending again. Twenty two of the 23 persons jailed for robbery in Portland in July, 2000, had been in the same jail within the previous year; nationally, seven out of ten inmates have been incarcerated before; well over 60% of those released from state prisons will commit new crimes; and most of those we sentence have been sentenced before.[2]

In the remainder of this paper I will address why various factions concerned with sentencing oppose efforts at achieving crime reduction; strategies we've attempted so far to focus sentencing on crime reduction; and new ideas that may be worth pursuing. I hope the live version of this presentation will conclude with discussion of additional strategies various criminal justice partners might pursue.

Why many resist ordering sentencing around crime reduction: There are many currents in the philosophical mix of those who advocate for and set criminal justice policies. It is common to approach the issue as though the divides that matter are those between utilitarianism and retributivism (or "punitivism") and between incarcerationism and rehabilitationism, but the more significant distinction is between those who avoid evidence- based practices and those who would pursue them.

Fear of Leniency: Probably the most vocal and effective forces currently are those seen as punitive – the voices that brought us Ballot Measure 11.[3]

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[1] Because criminal justice based on just deserts rather than crime reduction claims and receives its funding based on principals of morality rather than performance, effective crime prevention activities such as high school completion, parenting education, and early infant visitation programs compete for the dregs of public funding left after criminal justice takes its bite of resources.

[2] Michael H. Marcus, *Comments on the Model Penal Code: Sentencing Preliminary Draft No. 1*, 30 AMERICAN JOURNAL OF CRIMINAL LAW 135, 138-40 (2003), and authorities cited [hereinafter *"Comments"*]. Note that departments of correction are fond of publishing recidivism rates, typically around 30 percent, based on new *felony* convictions – a measure grossly understating actual recidivism because misdemeanors account for roughly three-quarters of all crimes.

[3] This 1995 ballot measure brought Oregon mandatory minimum sentences for a range of serious person felonies for offenders fifteen years of age and older, regardless of prior

Although their opponents see them as retributivists, most in fact sincerely seek primarily to achieve crime reduction – they are clearly utilitarian even if they do not shy from punitivism. Thus, although they successfully promoted another ballot measure that amended the state constitution's declaration of the purposes of sentencing to remove the former prescription of "vindictive justice," their new version places "safety of society" at the forefront of sentencing purposes.[4] And these voices joined in support of 1997 Oregon Laws chapter 433,[5] which broadly injected crime reduction in statutes touching criminal justice purposes, and established duties for the collection and exploitation of data to support evidence-based sentencing and corrections.

The resistance of these forces to ordering sentencing around crime reduction is not based on a supervening preference for punishment over crime prevention, but is based on a profound suspicion of programs, research, and academia. They forcefully reject evidence of increased recidivism after incarceration, and celebrate the prevention of crimes during the incarceration of a prolific offender. They fear that any attempt to introduce "what works" into the sentencing equation will inevitably introduce the bias they perceive in academia into the process – a bias in favor of leniency and rehabilitation and in opposition to incarceration. For the same reason, they fear that modifying sentencing guidelines to involve crime reduction would effectively broaden judicial discretion – which they in turn fear because they believe many judges also welcome the opportunity to achieve leniency.[6]

Fear of Severity: Though they are less vocal, many involved in the process quietly harbor the notion that punitive forces and mass incarcerationism are well in control of criminal justice policy-making. Characteristic of much of academia and many progressive disciplines, these voices are anxious to explore the limitations of the effectiveness of incarceration, but extremely reluctant to recognize the unavoidable efficacy of incapacitation during the period of custody. Thus, they expose the criminogenic effects of jail and prison for many offenders, but tend to ignore the crimes prevented while a prolific offender is in custody. Because they understand that incapacitation *is* effective in the short run, they fear that making sentencing pursue crime reduction will increase incarceration, particularly if judges regain discretion to increase punishment beyond that permissible under sentencing guidelines.

The Guidelines Movement: Oregon's sentencing guidelines date from 1989. They represented a major shift from the previous revision of criminal law which accounted for the 1971 Criminal Code, which was based in turn on the Model Penal Code of 1962.[7] Oregon statutes derived from the Model Penal Code continue to declare the purposes of sentencing in a manner that is directly tied to crime reduction: ORS 161.025(1)(a) states the purposes of the Criminal Code, including "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." As argued by the author of now-pending proposed revisions to the Model Penal Code sentencing provisions,[8] the 1962 code and its criminal justice context had critical flaws: The public had grown increasingly (and probably excessively) skeptical of the wisdom of parole boards, and hence of indeterminate sentences, due to heinous and highly publicized crimes committed by parolees; provisions stating the purposes of sentencing simply presented a

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criminal history. ORS 137.700.

[4] 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." The 1996 ballot measure amended the provision to declare "Laws for the punishment of crime shall be founded on these principles: protection of society, personal responsibility, accountability for one's actions and reformation."

[5] 1997 House Bill 2229. This law is discussed at page 7, *infra*, and the full text is available at http://www.smartsentencing.com under "Legislative, Judicial and Criminal Justice Materials."

[6] This fear, and supervening "repeat property offender" and mandatory minimum sentencing provisions, help explain the general acceptance among these forces of the sentencing guidelines – which they originally strongly criticized as regularizing leniency.

[7] The Model Penal Code is a product of the American Law Institute. It has no legal force of its own, but volunteers as a model for states to adopt or not with or without modifications. The 1962 Model Penal Code was enormously influential, in that over 40 states adopted it in some form.

[8] Kevin R. Reitz, Reporter, MODEL PENAL CODE: SENTENCING - PRELIMINARY DRAFT NO. 3 (May 28, 2004) [hereinafter *MPC Third Draft*.]

long and unprioritized "shopping" list of purposes;[9] utilitarian objectives including crime reduction were articulated as a matter of faith (or "decoration") with no connection to empirical reality or any attempt at achievement; sentencing produced sanctions whose wild disparity was limited only by laws establishing maximum sentences and the enormous range of judicial philosophies, ideologies, and whims; and incarceration rates have soared; and sentencing as practiced imposed racially disparate burdens. Noting that research disclosed that faith in rehabilitation and incapacitation reflected "insufficiently critical optimism,"[10] the proposed revision largely abandons public safety as a goal, ignores even the short run crime reduction efficacy of incapacitation, and celebrates sentencing guidelines and associated appellate review as a device by which to normalize sentencing practices around limited just deserts.[11] The Model Penal Code revision effort has become the academic arm of the sentencing guidelines movement, of which Oregon has been an early adherent since 1989.

Notwithstanding statutory (and more recent state constitutional[12]) proclamations that sentencing is supposed to be at least largely aimed at crime reduction, Oregon's guidelines are organized around principles that *have nothing intentionally to do with public safety or crime reduction:*

> 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)

> Subject to the sentencing judge's discretion to deviate in recognition of aggravating and mitigating circumstances, the corrections system should seek to respond in a consistent way to like crimes combined with like criminal histories; and in a consistent way to like violations of probation and post-prison supervision conditions.
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> OAR 213-002-0001(3)(e)

In short, the sentencing scheme that strongly modulates all felony sentencing in Oregon is guided

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[9] The Oregon list tracks the existing Model Penal Code. Here are the two provisions:

ORS 161.025 Purposes; principles of construction. (1) The general purposes of chapter 743, Oregon Laws 1971, 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.

Model Penal Code [1962], Section 1.02. Purposes; Principles of Construction.
* * * *
(2) The general purposes of the provisions governing the sentencing and treatment of offenders are:
(a) to prevent the commission of offenses;
(b) to promote the correction and rehabilitation of offenders;
(c) to safeguard offenders against excessive, disproportionate or arbitrary punishment;
(d) to give fair warning of the nature of the sentences that may be imposed on conviction of an offense;
(e) to differentiate among offenders with a view to a just individualization in their treatment;
(f) to define, coordinate and harmonize the powers, duties and functions of the courts and of administrative officers and agencies responsible for dealing with offenders;
(g) to advance the use of generally accepted scientific methods and knowledge in the sentencing and treatment of offenders;
(h) to integrate responsibility for the administration of the correctional system in a State Department of Correction [or other single department or agency].

[10] Kevin R. Reitz, MODEL PENAL CODE: SENTENCING, REPORT at 28 (ALI March 27, 2003).

[11] *See Comments*, *supra* note 2

[12] See note 3, *supra*.

by aggravation, mitigation, crime seriousness, criminal history – and prison bed resources. "What works" is no deliberate part of the equation.

In my experience, the guidelines movement is largely populated with well-meaning policy-makers and academics who quietly bemoan "mass incarcerationism," embrace just deserts (usually under the heading of "accountability") more enthusiastically as a tactic than as a philosophy, and fixate on uniformity as their worthy accomplishment. They then fiercely defend guidelines against all criticism, occasionally invoking moderating racial disparity in sentencing as a benefit, but quietly drawing their strength from the conviction that any approach tolerant of a role for crime reduction would undermine the efficacy of guidelines in moderating contemporary punitivism – or at least erode the normalization of sentencing whose reality and importance they have vastly exaggerated.

The guideline movement, to the extent that it resists normalization of sentencing behaviors around crime reduction, is woefully misguided. It does not significantly resist attempts to increase reliance on incapacitation, as Oregon has repeatedly overridden guidelines with higher presumptive and mandatory minimum sentences whenever the public or their representatives have chosen to do so.[13] It achieves uniformity of sentencing largely by facade.[14] It tragically fails to exploit the overwhelming public interest in crime reduction.[15] And the impact of the guidelines on the racial disparity of sentencing is nothing to brag about – after 15 years of guidelines, African Americans represent over six times the proportion of Oregon's prison population than they do of Oregon's total population.[16]

But the point of all of this is that the legal and regulatory structure that strongly guides felony sentencing in Oregon, and thereby powerfully affects the culture of the criminal justice process for misdemeanor sentencing as well, essentially excludes crime reduction efficacy from any substantial role – another significant reason that "what works" doesn't matter.

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[13] 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)). In 1996 the Oregon Legislature adopted "repeat property offender" provisions substantially increasing punishment for such offenders, and in 2001 the Legislature expanded the scope of these "RPO" provisions. 1996 HB 3488; 2001 SB 293, both reflected in ORS 137.717.

[14] "Consistency is overrated in such endeavors. It is largely accomplished only by adamant refusal to acknowledge differences so that we can claim that we are treating like offenders alike. The charade occasionally forces absurd outcomes – for example, when the presumptive sentence under guidelines depends on the dollar value of damage caused by an arson – when that value was suppressed by the accident that the homeowner was a firefighter. And we seem ready to abandon common notions of right and wrong to pretend we've achieved equal treatment – as when we punish more severely the car thief who takes a valued toy from a stable of collector cars than the one who steals the sole means of transportation from a single mother struggling to get by. Finally, the outcome of such efforts continues to be overwhelming failure as measured by recidivism. If we generally do more harm than good, consistency in our pursuit is hardly a virtue." *Comments, supra* note 2, at 155, n. 66.

[15] All who have looked, here and abroad, have found that the purportedly punitive public actually favors crime reduction over punishment *per se*. *E.g.*, 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); Fairbank, Maslin, Maulin & Associates, *Resources for Youth California Survey* (1998).

[16] US Census figures show African Americans at 1.6% of Oregon's population, Native Americans at 1.3%, Asian at 3%, and Hispanics at 8.0% (http://quickfacts.census.gov/qfd/states/41000.html); Oregon Department of Corrections figures show African Americans at 9.9% of the prison population, Native Americans at 2.3%, Asians at 1.1%, and Hispanics at 7.6% (http://www.doc.state.or.us/research/POPREP.pdf).

The Sentencing Culture of Just Deserts: Historically and persistently, the behavior, the language, and the trappings of the sentencing process have been organized around aggravation and mitigation, the minions of just deserts. This is the language of upward and downward departure for sentencing guidelines.[17] It underlies the "limiting retributivism" around which the current proposal for revision of the Model Penal Code is legitimated.[18] And even the recently completed Kennedy Commission Report wholly embraces the premise that sentencing is, has always been, and should remain overwhelmingly about punishment. There may be issues about severity, alternatives, and disparity – but the question remains how much or how little and in what form, but rarely *why* we impose sanctions and *almost never by what measure we should determine their effectiveness*.[19] Tragically, the tremendous efforts of both of these undertakings are doomed to failure because they proclaim the legitimate objective of a more humane sentencing structure while failing completely to articulate any realistic strategy for achieving a change. Any such strategy must address the public's entirely legitimate interest in crime reduction.[20]

The culture of sentencing is presided over by judges who are, in essence, spiritual figures in temples of denunciation.[21] Although I would not seriously propose the existence of an intentional effort to ensure our job security, the process is hardly structured to motivate us toward reducing recidivism. Our failures only increase demand for our services, along with those of law enforcement, prosecution and defense counsel, and community and institutional corrections workers. Every sentence that fails to prevent the next criminal act engenders repeat customers. This is in stark contrast to the business world in which an enterprise with persistently unsatisfactory performance must either embrace great change or succumb to competition. It is also quite distinct from the world of medicine in which the measure and demonstration of success or failure are understood and apparent. Judges have no incentive for abandoning a system that expects only an "appropriate sentence" measured by its severity and its timbre, and that actually accepts the notion that the mere accumulation of experience is the equivalent of "judicial wisdom."[22] We have no incentive for inviting accountability for our impact on public safety.

That is not to say, however, that no judges care about future criminal behavior or make any effort to reduce it. Indeed, many truly care and make the effort. But none of us have succeeded in making a responsible pursuit of best practices based on good information a regular part of sentencing.[23] Wanting to achieve something and assuring ourselves that we're doing our best is hardly the same thing as accepting accountability for outcomes, inviting data into the process, demanding competent assistance from advocates in the courtroom, and rigorously pursuing best practices. Our recidivism statistics are powerful evidence of the distinction.

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[17] OAR 213-002-000(3)(d).

[18] "A sentencing theory provides a sound platform for the exercise of authority only if it gives structure to the thoughts and impulses that are commonly felt by responsible officials. [Normal] Morris's theory of limiting retributivism was designed to capture these preexisting realities." *MPC Third Draft*, *supra* note 7, at 9

[19] Although the Justice Kennedy Commission began by including the "purposes" of punishment within its efforts to answer Justice Kennedy's challenge to combat escalating mass incarceration, it soon abandoned any hope of offering any "pronouncements on the criminal justice issues that have been debated by scholars, judges and lawyers for many years," and instead simply expanded on the questions that Justice Kennedy raised about how we might reduce our use of incapacitation for some common categories of crime. American Bar Association, Justice Kennedy Commission, REPORT TO THE HOUSE OF DELEGATES 7-11 (August 2004).

[20] See note 14, *supra*.

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

[22] A few of my colleagues tell me that with their years of experience, they've learned what best reduces crime – they don't need the assistance of advocates or the influx of data in sentencing or probation hearings. I suspect, of course, that this is just a measure of comfort with established sentencing behaviors, assumptions, and myths – and no substitute for rigorous and empirical pursuit of best practices. These colleagues would not knowingly rely on medical advice that so stubbornly excludes science.

[23] What comes closest to representing an exception is the therapeutic courts – drug court, intensive DUII supervision court, mental health court, and so on – which are committed to best *treatment* practices. I suspect these reduce crime far more effectively for many of their subjects than the rest of us. But they are not yet to the point where they assess their impact with long-run recidivism figures. Multnomah County's DISP [DUII Intense Supervision] Program has recently started using sentencing support tools.

Academia: I was 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.[24] Instead, the thoughts and minds of most were directed at the specter of "populist punitiveness" and the rise of mass incarcerationism. Academia has always included a theme of detached and therefore unbiased observation, a theme that rejects as impure involvement and advocacy – though there was nothing neutral about the condemnation of incapacitation as "preventive detention."[25]

Most of academia has a largely laudable distaste for incarceration, which emerges as a heavy bias in the resulting literature. Most studies focus on the failure of prison to reduce recidivism after release, or to reduce substantially the crime rate of jurisdictions that have experimented with "three-strikes" or other mandatory sentencing laws. These results can be judged on their merits and on 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. Unfortunately, the literature is divided into two camps – that which disfavors incarceration, and a much smaller camp that lauds it. Both camps have much to contribute to a rational sentencing policy, but neither seems particularly able to agree 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 busy promoting jail and prison, while disparaging "treatment," that it, too, has little credibility beyond its ranks.

Strategies for making what works matter: Oregon has seen a variety of attempts to focus sentencing on crime reduction and to improve its public safety impact. Some apparently rest on the often belied assumption that passing a law will change things even without thought and effort at implementation. Others reflect an attempt to identify feasible adjustments that may change the behaviors of those involved in the process. None has proven to be a silver bullet, but many show some promise of assisting in accomplishing what amounts to a cultural shift in our attitudes and practices in sentencing. Together, and with substantial focus on identifying and

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[24] "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."

[25] *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 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).

implementing additional strategies to make "what works" matter in sentencing, such strategies may ultimately transform sentencing into a socially responsible means by which to secure public safety.[26]

Laws: As noted above, 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.[27]

These provisions certainly establish a legal basis for insisting on crime reduction as a purpose of sentencing, but they embody no strategy for implementation. Just as the Model Penal Code declared purposes as if by faith, with no mechanism for enforcement, 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:

- articulate "reduction in future criminal conduct" as a dominant performance measure;
- 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
- permit access to juvenile data to allow analysis of the effectiveness of juvenile dispositions at diverting juveniles from criminal behavior as adults.[28]

Again, this legislation is not self-implementing. Although it lays the groundwork for analysis and use of effectiveness data, and the creation of 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 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 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

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[26] I should note that there is no need to abandon notions of proportionality. 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 right of survivors or the family of victims of a heinous crime to a just resolution. 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.

[27] The previous version prohibited "vindictive justice" but said nothing of public safety. See note 3, *supra*.

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

program," which:

> . . . means a program that:
> (a) Incorporates significant and relevant practices based on scientifically based research; and
> (b) Is cost effective.[29]

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. And critical to success in crime reduction is recognition that different things work on different people. A program that was studied and found successful based on one cohort of offenders may be wholly ineffective when applied to a different cohort. What matters is what works on which offenders.

Other Strategies: 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,[30] it didn't take 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 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.

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;
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> 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.
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> 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.[31]

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[29] 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."

[30] ORS 25.270, *et seq*; OAR 137-050-0320, *et seq*.

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

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've 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 results during a sentencing hearing.[32]

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

Although use of the sentencing support tools has not yet become routine in most courtrooms,[33] 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 spread the focus on what works. Judges handling criminal cases 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.[34]

Governor's Public Safety Review Steering Committee: This committee was established by order of Oregon's Governor, and charged with reviewing Oregon's criminal justice system to see where it might better serve public safety. I have participated primarily in the Sentence Imposition Subcommittee of the Adult Sentencing Task Force of the Steering Committee, and floated several proposals expressly as strategies for focusing sentencing on crime reduction. Two survived by the time of the September 24, 2004, meeting of the full Task Force, and will reach the Steering Committee on the afternoon of the OPEN Conference (October 8, 2004), having passed with no negative votes. These proposals are:

> (1) 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.
>
> (2) The Department of Corrections shall modify its rules governing the contents of presentence investigations to provide 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 [essentially emulating Multnomah County's approach state-

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[33] An effort to build such tools state wide 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.

[34] 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."

wide].

Four proposals were voted down by the Subcommittee: that consideration of the impact on crime reduction be expressly articulated in statutes governing judicial discretion on subjects of departures under the guidelines, consecutive versus concurrent sentencing, probation violation dispositions, and transfers of juvenile cases to adult court.[35] I believe these were defeated for the same reasons that consensus is so difficult to attain in this area – some fear that smarter sentencing will reduce severity, others that it will increase it; judges have no incentive to invite accountability, and fear that attempting best crime reduction will lengthen hearings. Others vaguely fear somehow ominous "unforeseen consequences."[36]

Potential Strategies Outside of Criminal Justice: I hope that this presentation will encourage a fruitful search for strategies within the program evaluation and research communities. For example, there may be opportunities to structure projects and studies so as to confront the perception of academic and research bias - such as by exploring prison and post prison supervision data to search for the best use of both. Are there cohorts for which a certain length of sentence and post prison supervision is more likely to result in crime reduction than other lengths, or are there cohorts for which a shorter or longer period of prison or post prison supervision is more likely to reduce criminal behavior?

Another example might be to research which sentencing behaviors seem to correlate best with crime reduction, or which program modalities are most likely to reduce criminal behaviors by which offenders.

And there may be opportunities for program evaluators to partner with courts, corrections and probation activities, perhaps in conjunction with the "therapeutic courts" – drug court or DUII intensive supervision court.

Conclusion

For many reas [;orons, sentencing pays little or no heed to the best research about what works to reduce crime by which offenders. There are many reasons for this profound gap in the social responsibility of the criminal justice system, but recent attempts to focus sentencing on crime reduction suggest that through concerted effort we might enlist creative and effective strategies to make what works the centerpiece of most sentencing decisions – to the end that we make far more extensive use of program evaluation and far more effective sentencing choices in pursuit of public safety.

Michael Marcus
October 5, 2004

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[35] The proposal would only address occasions on which transfer to adult court is discretionary with the court – which it is not in "ballot measure 11" crimes, which result in an automatic transfer offenders 15 and older to adult court.

[36] For a more complete discussion, see *Smarter Sentencing: On the Need to Consider Crime Reduction as a Goal*, *supra* note 23.