Meaningful Performance Measures and Judicial Independence

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My persistent crusade has been to establish evidence-based, "smart sentencing"[1] as the norm, in hopes of reducing victimizations, unnecessary cruelty to both victims and unwisely sentenced offenders, and the squandering of public resources in law enforcement, criminal justice, and corrections. I have come to view just deserts as an edifice that avoids real scrutiny, analysis, and improvement of the impact of sentencing discretion on public safety. It is not surprising that I am alarmed that the modern "performance measure" movement has assiduously avoided performance measures that have anything to do with the impact of our sentencing choices on recidivism.

As one colleague articulated the issues,

> I do not see how measuring recidivism can be considered anything other than a measurement of judicial performance. That is certainly the way [it] will be used.
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> I think there are many issues, including the availability and reliability of data, the conclusions that can reasonably be drawn from the data, and the very limited role judges actually have in most sentencing. This sounds really like more of a measurement of [prosecutor] performance and [department of corrections] performance to me than it does judicial performance - if it were accurately couched - but it won't be. What I am hearing you suggest is that criminal sentencing outcomes / recidivism [should] be a judicial performance [measure]. I think that many judges would have strong opinions about that, and this should be discussed at the Judicial Conference and should be considered by the Chief Justice.

Indeed, many of those who have given any thought to this area have taken the view that administrative matters, such as time to trial, can be measured, but that anything resembling measurement of "judicial performance" is off limits as a necessary corollary of "judicial independence." The usual vehemence of this sentiment suggests that measuring judicial performance is heresy. Yet it ignores the obvious: most limitations on judicial sentencing discretion are the direct product of existing judicial sentencing performance measurement by the public and those who would exploit public fear and anger about crime. The real issue is whether we should continue to yield the field to existing erroneous and destructive performance measures or compete with those measures by crafting appropriate measures ourselves.

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1 "Smart sentencing" is sentencing, whether or not innovative, that exploits information and reasoning to achieve a disposition that is most likely to accomplish the desired result – most commonly, preventing future criminal behavior by the offender who is sentenced. See http://www.smartsentencing.com, "Frequently Asked Questions."

I will explore the need for performance measures related to our impact on the likely future criminal conduct of those we sentence, unpack the supposed conflict with judicial independence, answer the other objections to performance measures directed to our public safety impact, and then discuss how we might pursue a public safety performance measures.

Why Performance Measures Must Address Crime Reduction

The NCSC website explains the five reasons for assessing court performance essentially as follows: 1) to improve the accuracy of the impressions of "court insiders" concerning what is actually going on in their courts; 2) to identify and focus on areas of greatest importance to constituents including the public; 3) to direct and encourage the creativity of staff to achieve desired outcomes; 4) to legitimatize budget requests for existing and new resources and initiatives; and 5) "to signal a court's recognition, willingness, and ability to meet its critical institutional responsibilities as part of the third branch of government."[2] Most of us interested in performance measures refer to all of the outward-looking functions of these reasons as promoting "public trust and confidence" in the courts.[3] Of course, accessibility, fairness, and promptness, captured in most iterations of performance measures, logically have to do with public trust and confidence, while the details of some measures invite the cynic's criticism that performance measures may merely provide self-serving illusions of adequacy.[4] Whether or not cynical, some urging adoption of performance measures often argue that if we don't adopt performance measures, others will impose inappropriate performance measures upon us. In the case of sentencing performance, inappropriate performance measures have long existed.[5]

But what seems most conspicuous by its absence from the performance measure energies

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National Center for State Courts, "CourTools: A court Performance Framework," at http://www.ncsconline.org/D_Research/CourTools/CourToolsWhitePages-v4.pdf

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E.g., Delaware (http://courts.delaware.gov/Courts/Family%20Court/Courts/Family%20Court/FCPS/trust.htm); National Center for State Courts (http://www.ncsconline.org/Projects_Initiatives/PTC/PublicTrust7Wtr05.htm); California (http://www.courtinfo.ca.gov/reference/documents/trust_p2.pdf); Maryland (http://www.courts.state.md.us/soj2002.html); New Jersey (http://www.judiciary.state.nj.us/strategic/subcom3.htm); Arizona (http://www.supreme.state.az.us/courtserv/crtproj/tcps.htm); Colorado (http://www.courts.state.co.us/exec/budgetrequests/budget07/c3/19-ap-supremecourt.pdf); Washington (http://www.courts.wa.gov/programs_orgs/pos_bja/?fa=pos_bja.ptc); Florida (http://www.flcourts.org/gen_public/stratplan/bin/reportfinal.pdf); North Dakota (http://www.ndcourts.com/court/committees/trust/minutesmar2001.htm); Oregon (http://www.ojd.state.or.us/osca/cpsd/programplanning/futures/documents/justice2020vision.pdf)

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Clearance rate measures, for example, may be created and maintained in ways that undermine rather than further goals of accuracy, fairness, and respect for the right to be heard – speed is not always conducive to public trust and confidence – although justice delayed can become justice denied. If our sentencing decisions presently do more harm than good, speed alone is hardly a positive goal.

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See, e.g., Sentence for Safety, not for Message, (Oregonian Op-Ed, Oct. 1, 2003), http://ourworld.compuserve.com/homepages/SMMarcus/safetynotshow.html.

visible so far is any recognition that the public has expectations concerning the ability of courts to reduce crime.[6] Of course our decisions on other hot topic issues make courts targets for one interest group or another, but at least half of our work touches people and their communities through our impact – or lack of impact – on the future criminal behavior of those we sentence for crimes. In addition to the high-profile sentencing decisions that catch headlines and occasional public ire, an undercurrent of a vague impression that courts do not do enough to protect people from crime inflates the potential success of anyone who seeks to marshal voices against the judiciary on any topic.

Although there are some dissident voices in academia, most of our constituents correctly agree that our core mission includes promoting public safety – and not just for jurors, or witnesses and victims in our buildings. Courts have an enormous responsibility at the sentencing stage of criminal cases to use whatever discretion we have under the law, and in view of the range of resources actually available for the task, to choose a sentence that is most likely to reduce the risk of future harm at the hands of the offender and others competing for limited resources. The public generally assumes that we behave accordingly, and that we at least attempt responsibly to achieve best efforts at crime reduction in exercising sentencing discretion. That is clearly what the public wants most of us – a point repeatedly missed by policy makers.[7] The public is variously aware that those we sentence usually commit new crimes, and that those who commit horrible crimes usually have been sentenced before. The notion that we are not particularly successful at harm reduction through sentencing is vaguely held but pervasive, and powerfully impedes any attempt to build public trust and confidence in the courts. The most tangible evidence of this lack of trust and confidence is the relative ease with which proponents of mandatory minimums, three-strikes laws, and other reductions in judicial sentencing discretion have rallied the necessary support to have their way with policy makers at the state and federal level. A public that trusts and has confidence in judicial sentencing discretion does not strip a judge of the power to consider the circumstances of the offender and the offense to avoid a 100 month jail sentence for a first time, mentally challenged 15 year old offender.

Worse, the public's assessment of our performance is based on an optimistic but erroneous assumption. While it is certainly true that recidivism rates are unacceptable, that resources are limited, and that most judges generally hope their choices reduce crime, the culture and practice of sentencing is not at all focused on reducing future criminal conduct. While most offenders we sentence for most crimes will commit new crimes, and most we sentence for heinous crimes have been sentenced repeatedly before, our sentencing culture does not exhibit anything like routine and responsible pursuit of best efforts at crime reduction. Even if we make

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A notable and hopeful exception is Oregon's performance measure for juvenile drug court, which focuses on recidivism. At least one Oregon judge sees this as essentially a "judicial performance measure" and therefore subversive of judicial independence.

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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).

an effort through presentence investigations or otherwise to assemble evidence about the crime, the offender, and the offender's criminal history and other background, we generally do so for purposes of aggravation and mitigation, rather than for rational analysis of what disposition is most likely to reduce the risk that the offender will cause future harm.

To compound our misdirection, our sentencing culture has enabled a related fallacy, widely held by the public, that severity and crime reduction are synonymous. It is no surprise that the public critiques us based on leniency and severity – we convey the message that severity is the only axis on which to assess a sentence – when everyone who knows anything about criminology and its related fields knows choosing the best disposition requires a much more intelligent analysis.

Unpacking Judicial Independence

Any member of the public reading my colleague's remarks would be at best be mystified by the assumption that assessing judicial performance is somehow unthinkable. Experts at public relations have urged us to drop the pitch for "independent judges" in favor of "impartial courts."[8] We often have difficulty reminding the public and other branches of government that we are an independent branch and why. But the immediate surprise that we would think it improper to measure judicial performance is absolutely correct – there is nothing about judicial independence that insulates judges from performance measures; the legitimate issues are who does the measuring and what do they measure. Part of this is easy – in a democracy, the people have the right to measure performance of all public officials.

The contours of judicial independence are not without limits. The starting point is that in our systems of checks and balances, an independent judiciary is one that can review decisions and actions of the other branches of government – statutes, administrative decisions, and the practices of public servants and officials. This sense of independence provides some limits on the ability of the other branches to measure some aspects of our performance, but even here, there is little doubt that the governor has every right to measure our productivity in light of our caseload in deciding whether to include additional judge positions in the budget, and the legislature has every right to consider the same performance issues in evaluating that budget. What neither can properly do is sanction a judge or court just because the result is an invalidated law, a civil judgment against an agency, or any decision that is inconvenient or unpopular. This flows from our role in a free society - we need this measure of independence to assure the rule of law and rights of citizens.

There's another dimension of independence that also has to do with our function. We must, when deciding law and facts, be independent of others who might seek to affect our decisions. That's why we are sensitive to the distinction between administrative and substantive authority of presiding judges and trial court administrators; that's also why we are properly skeptical of any judicial selection process that contemplates personal fundraising, promises of performance other than faithful service in office, and partisan debate of issues.

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8 *Speak to American Values: A Handbook for Winning the Debate for Fair and Impartial Courts, Justice at Stake Campaign (2006) (http://www.justiceatstake.org).*

But there's nothing wrong in a judicial selection process which assesses a judge's skill in legal reasoning and research, trial management, or the manner in which the judge conducts a trial – including assuring fairness, treating participants with dignity and compassion, and balancing the right to be heard against the need for efficiency. It makes sense for the governor to consider such things when nominating a judge for appointment to an appellate court, and for the public to assess them in deciding whether to vote for or support a particular judicial candidate. There are risks, of course, of measuring this kind of performance. They include the possibility that a powerful litigant, or a public official from another branch, might seek to manipulate outcomes under the guise of legitimate criticism. That is why the grounds for removal from office are limited, and the function of discipline lodged firmly in our branch of government through the judicial fitness commission, subject to ultimate review at the ballot box.

None of this suggests that judicial performance should be beyond measurement. Although who does the measuring and how are significant issues, we have no more right to avoid performance measure than any other public official in a free society. There is no reason the judiciary cannot measure its own performance, including judicial performance, and no reason in a free society why judicial performance is beyond public measure – as long as the process does not undermine impartiality, fairness, or other core functions of the judiciary.

The American Bar Association has repeatedly updated its "Guidelines for Evaluation of Judicial Performance," and distinguishes between issues of disagreement with outcomes and judicial philosophy, which are inappropriate because judges must be free to decide the law and facts without yielding to popular, interested, or powerful pressures, from legitimate performance measures such as legal reasoning, avoidance of impropriety, clear and logical written opinions, and treating people with respect.[9]

Surely, we must avoid undermining that component of "judicial independence" that has to do with impartiality and the uncorrupted (and incorruptible) rule of law. But there is another connotation of "judicial independence" that is not so pure – and, I'd argue, it's the connotation that does us more harm than good; its synonyms include at least one set of connotations of "unaccountability." Judicial independence in the correct sense is essential to due process, to a free society, and to the judiciary's critical role in both. Judicial independence in the worst sense is no excuse for refusing or avoiding scrutiny, for claiming a higher threshold for public criticism than other aspects of government, or for blinding ourselves to our significant role – however limited by factors beyond our control – in choosing dispositions most likely to protect the public from future criminal behavior on the part of those we sentence. Denying that role does not reduce it.

In the long run, promoting judicial independence in the worst sense is the surest way of losing what we have of judicial independence in the correct sense. After all, while we are busy

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American Bar Association, GUIDELINES FOR THE EVALUATION OF JUDICIAL PERFORMANCE WITH COMMENTARY (2005) (http://www.abanet.org/jd/lawyersconf/pdf/jpec_final_commentary.pdf). The ABA guidelines contemplate that performance measures intended to help judges improve are appropriately confidential, but that those related to selecting judges, particularly in states with election (including retention election) for judges, the democratic principle compels public access to performance measures. It can be argued that assessing sentences based on "leniency" or "severity" may be akin to measuring judicial philosophy, but judicial independence, has no legitimate component that justifies avoiding the measurement of our sentencing performance in terms of public safety outcomes.

debating whether we should adopt performance measures based on crime reduction, the press, the public, and those who would mobilize public fear and anger at crime against the judiciary *already apply their own crime-related performance measures.* We should stop yielding the field to wrong-headed measures by adopting legitimate ones to compete with them.

In the area of sentencing, by law our mission includes "protecting society"[10] and "reducing criminal conduct."[11] It surely includes other functions of sentencing as well. All functions of sentencing fit each of the five reasons for performance measures listed by the National Center for State Courts. The performance measure effort cannot adequately serve these purposes *without* performance measures that address the impact of sentencing on public safety. We certainly should care about the accuracy of our impressions about how our sentencing choices play out (reason number one): those outcomes are unavoidably among the "areas of greatest importance to constituents including the public" (reason number two); measurement could encourage creativity to achieve the desired outcomes (reason number three); measurement should assist in supporting budget requests for resources that would help us achieve better public safety outcomes (reason number four); and public safety performance measures would surely signal our recognition and willingness to meet a critical institutional responsibility (reason number five). Any effort to enhance public trust and confidence with performance measures is hopeless if we continue to ignore public safety. Moreover, our performance measures based on public safety would surely be more likely than those now operative in society to protect an appropriate judicial function.

Other Objections to Crime Reduction Performance Measures

There are really three related areas of objection that I have been able to discern. The most direct objection is that we do not control the resources that might be helpful in reducing criminal behavior (whether jail beds or treatment programs), and we don't control the variables in the offender's past, present, and future that will ultimately determine whether the offender recidivates. Second, sentences are always limited by the law and usually effectively limited by plea bargains in which the prosecution makes the major choices. The third area of objection is more elusive, but it seems to be a combination of ideology and concern that scrutiny would be damaging, perhaps unfairly so.

That we do not control the factors that brought the offender to us is certainly true. It is also true that we do not have the power to create sufficient resources with which to address the risk an offender represents, because we don't build jails or prisons and we do not fund or run treatment programs or alternative incarceration. But this argument doesn't work any better for us than it does for the probation, corrections, law enforcement, and treatment communities. It doesn't stop many of them from measuring the impact – measured by new criminal activity – that

[10] Or. Const. Art. I, §15.

[11] *E.g., 197 Or Laws ch 433; 1997 Judicial Conference Resolution No. 1.*

they have on those whose lives they touch.[12] Of course, many are quick to find performance measures they can control, but that's a different question than whether lack of control over all variables that affect an outcome relieves an agency of the responsibility for assessment of *their* impact on that outcome. And corrections and probation programs – and at least one remarkable evidence-based law enforcement initiative[13] – are increasingly attempting to measure their success in reducing recidivism. None of these criminal justice partners have any more control over the origins of offenders' criminal behavior or the relevant budgets than we have, yet at least in part they measure and are measured by their impact on criminal behavior.[14]

Even though we have little[15] or nothing to do with the circumstances or choices in an offender's life that led to crime, even though we do not control the extent and nature of dispositional resources at our disposal, and even though we cannot control all the influences in the offender's future, the sentencing choices we make will have an outcome – in light of all that or in spite of it – and we have the responsibility under our public mission to exercise best efforts to make that outcome as favorable as possible. Of course it is a challenge, but that's no excuse for not making the effort, and not making the effort ensures two things: first that our successes are accidents, and second that we will do a worse job than if we made a responsible effort to perform that job well.

The notion that legislative limits and plea bargains provide reasons for immunity from assessment is equally unpersuasive. The legal limits of our choices are not different in any relevant way from the limits facing all of the other activities that have embraced or accepted performance measures. The law provides us with tremendous discretion in spite of recent mandatory sentences and guideline limits. Under the guidelines we have explicit discretion within ranges, broad discretion over terms of probation when probation is available, a meaningful

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E.g., National Institute of Justice, Implementing Performance Measures in Community Corrections (1996) http://www.ncjrs.gov/txtfiles/perform.txt; Association of State Correctional Administrators, ASCA Performance-Based Measures Resource Manual (June 2005) http://www.asca.net/public/PBMSresourcemanual.pdf; O'Neill, M. W., J. A. Needle, and R. T. Galvin, Appraising the performance of police agencies: The PPPM (Police Program Performance Measures) System 8 Journal of Police Science and Administration 253 (1980); Hatry, H.P., Blair, L.H, Fisk, D.M., Greiner, J.M., Hall, J.R. Jr., and Schaenman, P.S., How effective are your community services? Procedures for measuring their quality (2d ed.). (Urban Institute and International City/County Management Association.1992); Moore, M.H. and Poethig, M., The police as an agency of municipal government: Implications for measuring police effectiveness, In R.H. Langworthy (ed.), Measuring What Matters: Proceedings From the Policing Research Institute Meetings, at 151 (National Institute of Justice and the Office of Community Oriented Policing Services 1999).

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Officer Jeff Myers of the Portland (Oregon) Police Bureau has maintained a focused, intelligent strategy of public involvement and focused services to reduce the impact of a core of several dozen recidivist "liveability" offenders in "Old Town," and measures his success by a remarkable 52% reduction in their arrest rate in correlation with the availability of those services. A copy of his graph of their arrest rates is attached as Appendix 1.

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Another analog is the medical field - both at the public health and individual provider level. They confront health issues that are a product of variables they did not create; they don't print or allocate money to pay for what is needed to address the health issue, and they can at best compete with other influences for their target population's future health related choices. Yet we do not and should exempt them from performance measure.

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The "little" often has to do with failing to exercise best efforts to prevent crime at a *previous* sentencing occasion.

though qualified discretion to depart from prison to probation, probation to prison, or upward or downward in the duration of either. Even with mandatory minimum sentences, we may have enormous discretion over concurrent or consecutive sentencing.

Judges vary in the comfort with which they deviate from plea bargains. The institutional pressure is to adhere to recommendations at least often enough to continue to encourage plea bargains, but the social and legal obligation for the sentence is still ours. As a matter of law, we are not bound by the sentence recommendation in a plea agreement; absent a "contract plea" the agreed sentence is only a recommendation; and even plea contracts do not relieve us of the responsibility for the sentence – which is why we always have the obligation to review and the right to reject plea contracts. Yes, prosecutors sometimes have most of the cards and can force both judge and defense attorney to agree to a result only because of a draconian the law gives only the prosecutor the power to avoid. A major purpose of performance measures is to encourage us in the direction of better outcomes. To the extent that plea bargains direct us away from best efforts at public safety, they are an argument *for* performance measures that would encourage us to assume and assert our responsibility to redirect plea bargaining towards sentences that serve public safety. Plea bargains provide no reason to resist public-safety oriented performance measures; at worst, they are part of the business-as-usual which performance measures are intended to encourage us to improve.

The other, related, area of objection has to do with the notion that crime-reduction is not our responsibility, or at least that it shouldn't be. The ideological content here certainly has its historical and – to a minor extent – authoritative supports. Politicians who pander to public anger at crime, and a small number of academics with any of a complex set of motivations, insist that the role of the courts is to mete out the punishment the legislature has decreed and that any pursuit of crime-reduction is at best mistaken and at worst some species of improper. This is an important debate with profound implications for the future of criminal law and society. But the law in Oregon is clearly in accord with the overwhelming preference of the public,[16] and it is unambiguously to the effect that our sentencing obligation includes "protection of society, personal responsibility, accountability for one's actions and reformation"[17] and "insur[ing] 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

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Peter D. Hart Research Associates, Inc., *Changing Public Attitudes Toward the Criminal Justice System* (The Open Society Institute, February 2002), 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), 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, 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).

17 Or Const Art I, §15.b

when required in the interests of public protection."[18]

The concern with adverse consequences of measuring our public safety performance may include an ideological fear of excessive punitiveness, or skepticism that anything we do will make any difference without or even with appropriate resources. It also overlaps with the simple reality that given a choice, most of us would prefer that no one would blame us for an offender's next next crime. And then there is the fact that we sentence a wide range of offenders with a wide range of susceptibility or resistance to reformation. There are as many answers as there are variations of these themes.

To those who argue that measuring our performance will simply increase pressure for more and more jail and prison beds – because surely locking people up reduces their criminal behavior – I respond first, that even if that were so, it is not a legitimate excuse, for it is not our choice but the legislature's how much to spend on hard beds as a response to crime. Second, in an extremely significant way, it is *not* so. Third, avoiding responsibility has enabled far more misplaced punitivism (and limitation of judicial discretion) than would accepting accountability for best efforts.

Yes, there are surely offenders who commit terrible crimes and whose risk to society cannot be adequately contained without lengthy prison sentences. But both economic and deontological restraints and the laws that reflect those restraints result in the bulk of offenders facing jail or prison time that is itself hardly adequate to prevent future criminal behavior because the vast majority of offenders sent to prison return to their communities early enough in their careers to make up for lost time. The literature and our own experience is powerfully to the effect that for many of these offenders, focusing on total crime output would *reduce* the amount of prison and jail resources we use on these offenders and *increase* the political pressure necessary to expand community resources that work better to reduce crime than jail. Depending on the risk level of the offender and the category of criminal behavior, jail can be *more* likely than community programs to increase recidivism.[19] Many of these offenders are competing for bed space with those we should but cannot afford to incapacitate longer than we do at present.

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ORS 161.025(1)(a). *See also* ORS 161.025(1)(f) [proportionality with "recognition of differences in rehabilitation possibilities among individual offenders"]; ORS 137.540(2) [probation conditions should seek "protection of the public or reformation of the offender, or both"]; ORS 137.592(2) [decisions deploying prison should "insure that available prison space is used to house those offenders who constitute a serious threat to the public, taking into consideration the availability of both prison space and local resources"]; ORS 419C.001 [juvenile delinquency dispositions should be "founded on the principles of personal responsibility, accountability and reformation within the context of public safety and restitution to the victims and to the community"].

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Smith, P., Goggin, C., & Gendreau, P. (2002), *The Effects of Prison Sentences and Intermediate Sanctions on Recidivism: General Effects and Individual Differences* (User Report 2002-01) Ottawa: Solicitor General Canada, http://www.sgc.gc.ca/publications/corrections/200201_Gendreau_e.pdf, cited in *The Effects of Punishment on Recidivism*, 7 RESEARCH SUMMARY No. 3 (May 2002), Office of the Solicitor General of Canada, http://www.sgc.gc.ca/publications/corrections/pdf/200205_e.pdf; *The Effectiveness of Community-Based Sanctions in Reducing Recidivism* (Oregon Department of Corrections September 5, 2002), http://egov.oregon.gov/DOC/TRANS/CC/docs/pdf/effectiveness_of_sanctions_version2.pdf.

And the answer to the wide varieties of offenders we sentence is the same as the answer to the objection that some are harder to "rehabilitate" than others: different things work on different offenders, offenders present different risk levels; effective sentences, as well as measurements of success or failure, have to be cognizant of those differences.

Most importantly, avoiding responsibility for public safety outcomes has enabled the public misconception that increasing severity is the best answer to any crime problem. By

allowing just deserts to be our measure of our performance, and by avoiding accountability for best efforts at crime reduction in response to *de facto* public measures of our performance, the example we set is that punishment is the response to expect for all crime, and that unsatisfactory recidivism calls for greater punishment – with the consequence that when anyone argues we are being too lenient, the correction is reduced discretion - from "Denny Smith,"[20] through Ballot Measure Eleven,[21] and the recent special session law[22] that assumes we cannot tell a treatable "wayward uncle" from a predator – or that the best use of public resources is to lock both up for 25 years instead of treating and monitoring one and locking up the other for even longer.

It comes to this: Avoiding responsibility has surely neither stemmed punitivism nor protected judicial discretion. Accepting responsibility is the correct and responsible thing to do – and it is also most likely to help the public understand sentencing choices and to fund resources that work better than jail or prison for some offenders, and those that work to reduce the recidivism of those who return from prison. And if we continue on our present path of resisting performance measures that matter most, the public will continue to measure performance as it has been doing, will continue to find us wanting, and to respond with increasing restrictions on discretion. Our crime reduction performance is being measured already; accepting and improving performance measures is the best hope of preserving what is left and legitimate of judicial independence, of building public support for resources that actually work to reduce crime, and of avoiding the cruelty of avoidable victimizations and punishments that serve no one but those who would insist that punishment is an end in itself.

How to Proceed

I do not suggest that we publish the name of the last sentencing judge with each report of a new crime by a recidivist offender. My sense is that a workable performance measure approach would be one that recognizes the variety of risk levels offenders represents, establishes some protocol for quantifying the availability of resources actually relevant to managing the risk [whether jail beds, alternative sanctions, programs or treatment], determines a baseline for each

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[20] ORS 137.635.

[21] ORS 137.700

[22] 2006 Or HB 3511 (Jessica's Law, one of five measures adopted at a 2006 special session) http://landru.leg.state.or.us/06ss1/measpdf/hb3511.en.pdf

of a number of offender cohorts based on their risk level, and publishes outcomes in terms of new crime together with a prominent adjustment for resource shortages. The result would be to focus the measure of success (or failure) on categories of offenders (not individual judges) while simultaneously linking the issue to resources.

Of course the process is subject to imperfection. As one colleague put it, if a county loses its mental health resources yet recidivism goes down, are we risking creating an argument for cutting every county's mental health resources? As an example this could either be a correlation that has nothing to do with causation or an outcome we don't like: that the mental health resources were doing more harm than good. I submit that the answer to this challenge cannot be avoiding the data, foreclosing the inquiry, and persistence in a sentencing protocol that encourages the public to decrease discretion, misallocate resources, and blame us for the outcome with even more justification than it would have under a more intelligently designed system of performance measure. But disliking the result is hardly a justification for evading scrutiny.

My purpose at this point is merely to urge us to make the commitment to crafting appropriate performance measures to assess the impact of our sentencing choices on recidivism. An appropriate measure would probably subsume or separate risk levels and prominently recognize resource and other factors to educate all who are interested in the relationship of those variables to public safety. I do not propose a specific solution. I attach as Appendix 1 an example of a law enforcement performance measure that illustrates one approach. The graph shows the number of arrests over time generated by 35 persistent recidivists responsible for the quality of life in Portland's Old Town, the most persistent of whom was arrested 46 times in three months. Officer Jeff Myers constructed a project involving changes in booking practices and access to and availability of services for these offenders, and charted the number of arrests they produced over time. The vertical lines indicate the addition, loss, restoration and expansion of mental health, addiction, case management and outreach services, suggesting dramatic correlations with the arrest measure of success, and suggesting a dramatic reduction of 52 percent in the number of arrests occasioned by this group of "frequent flyers"[23] in correlation with intensive services aided by targeted booking practices.

Appendix 2 is a graph originally published to suggest the impact of a loss of jail beds on property crime. I've added to a portion of the graph lines reflecting a period of declining success in the ability of a state consortium to find new employment for displaced workers.[24]

Appendix 3 is a graph showing, for each of six crime categories, the percentage of persons arrested for such crimes over time (April 2004 through January 2006) who had any

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The phrase was used to describe the 4% of offenders who accounted for almost a quarter of the bookings in our local jail over a four year period in a study directed by former Multnomah County Sheriff Dan Noelle. *The Booking Frequency Pilot Project In Multnomah County, Oregon: A Focus On Process And Frequencies* (Jan. 2002)[produced by the Multnomah County Sheriff's Office, in collaboration with the Multnomah County Department of Community and Family Services, Department of Community Justice, Health Department, and Corrections Health Division).

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The axes reflecting the numbers of jail beds and crimes were selected to make a point – that is, the only reasons the lines end up close together on the graph is because of the vertical scales selected by the originator of the display. I've done the same thing with the lines reflecting decreasing re-employment placement rates (for the local region and statewide) from PRISM. [Performance Reporting Information System – see http://www.oregon.gov/PRISM/]

conviction for any previous crime.[25] This is one way to look at how successful we have been at diverting offenders from criminal careers. The chart includes a line indicating changes in the number of jail bed availability. We should probably include as well indications of fluctuations in alcohol and drug treatment slots, Oregon Health Plan eligibility, mental health resources, and the like.[26]

Conclusion

Performance measures must embrace the impact of sentencing on recidivism. For present purposes, my hope is that we will accept this conclusion, then work on the best manner in which to define and publish this performance measure along with the others by which we hope we and others will assess the performance of Oregon courts.

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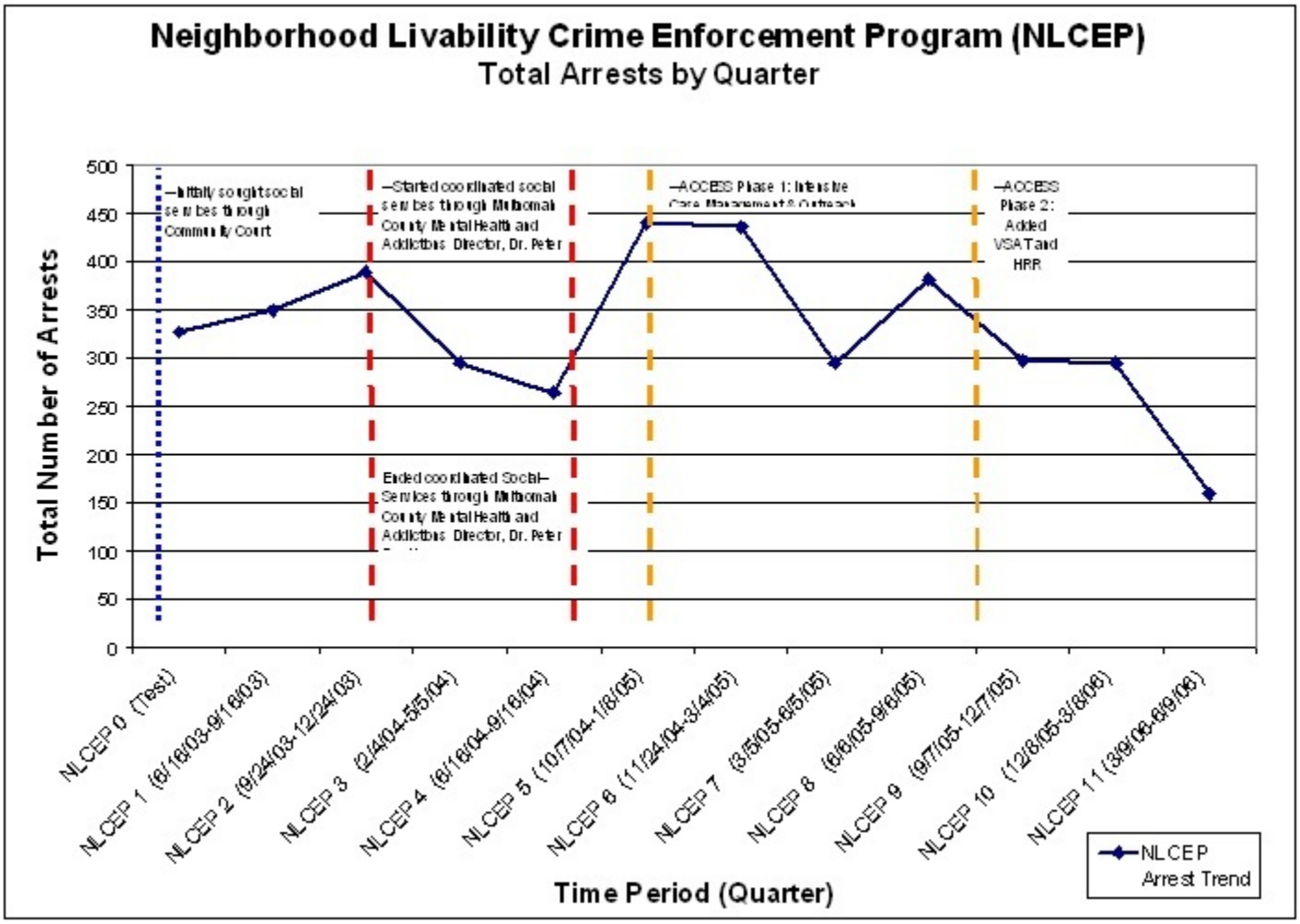
The data were provided using Multnomah County's criminal justice data warehouse, "DSS-Justice," with the priceless assistance of the project's technical lead, Gail McKeel of Multnomah County ISD, and a public safety researcher for Multnomah County, Matt Nice..

26

I have assembled charts for each of these other resource categories, but have not superimposed them on the sample chart because the time periods are different. The numbers on the chart are real. They are derived from Multnomah County's "DSS-J" criminal justice data warehouse. The jail bed availability line, closest to the top of the chart, is based on a scale from 0 to 1800 jail beds.

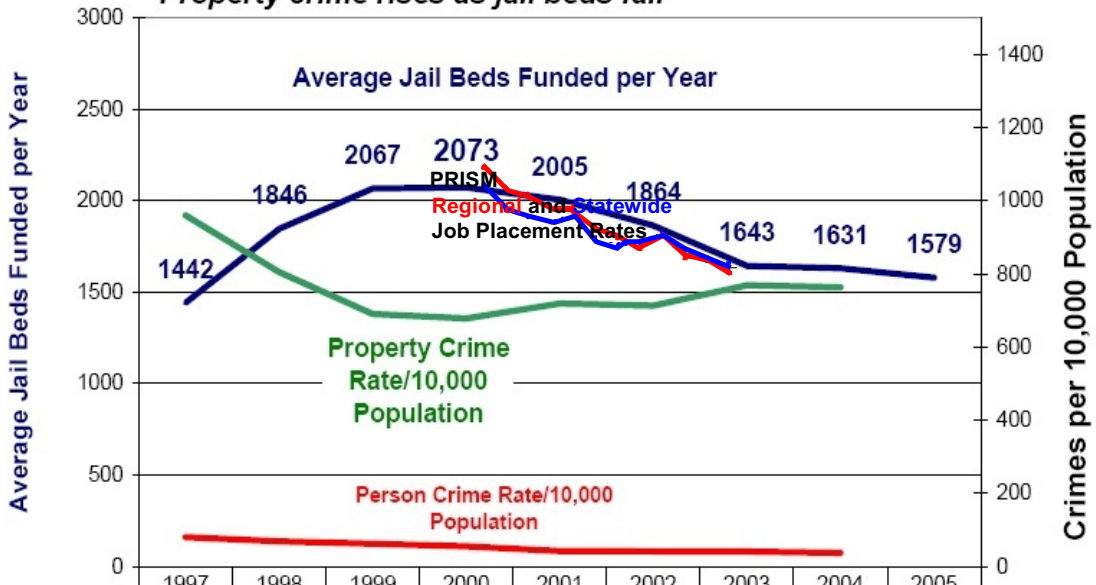

Neighborhood Livability Crime Enforcement Program (NLCEP)
Total Arrests by Quarter
Total Number of Arrests
500
450
400
350
300
250
200
150
100
50
0
—Initially sought social services through Community Court
—Started coordinated social services through Multnomah County Mental Health and Addictions Director, Dr. Peter
—ACCESS Phase 1: Intensive
—ACCESS Phase 2: Added VSA Tand HRR
Ended coordinated Social Services through Multnomah County Mental Health and Addictions Director, Dr. Peter
NLCEP 0 (Test)
NLCEP 1 (6/16/03-9/16/03)
NLCEP 2 (9/24/03-12/24/03)
NLCEP 3 (2/4/04-5/5/04)
NLCEP 4 (6/16/04-9/16/04)
NLCEP 5 (10/7/04-1/8/05)
NLCEP 6 (11/24/04-3/4/05)
NLCEP 7 (3/5/05-6/5/05)
NLCEP 8 (6/6/05-9/6/05)
NLCEP 9 (9/7/05-12/7/05)
NLCEP 10 (12/8/05-3/8/06)
NLCEP 11 (3/9/06-6/9/06)
Time Period (Quarter)
NLCEP Arrest Trend

Appendix 1

Appendix 2

Multnomah County Jail Beds Funded vs. Portland Index Crime Rates

Property crime rises as jail beds fall



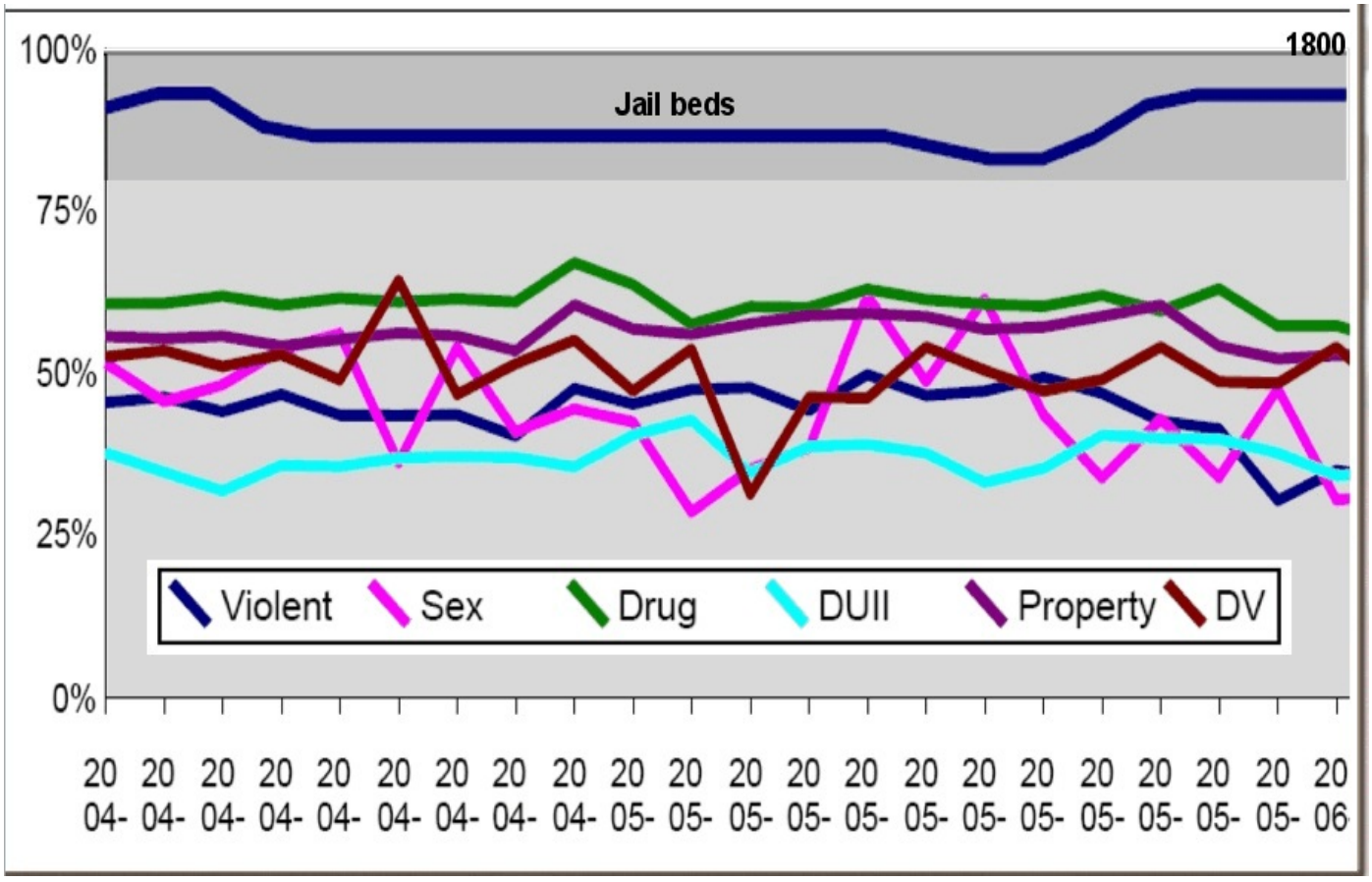
	1997	1998	1999	2000	2001	2002	2003	2004	2005
Average Beds Funded/Year	1442	1846	2067	2073	2005	1864	1643	1631	1579
Person Crime Rate/10,000 Population	160	137	124	110	85	83	81	74	
Property Crime Rate/10,000 Population	960	805	690	678	719	713	769	763	

Calendar Year

Property Crime includes burglary, larceny-theft, and motor vehicle theft. Person Crime includes murder and nonnegligent manslaughter, forcible rape, robbery and aggravated assault.

DATA SOURCE: FBI UNIFORM CRIME STATISTICS: http://www.fbi.gov/ucr/ucr.htm#cius
Multnomah County Sheriff's Office is the source of Average Jail Beds Funded per Year

Appendix 3


100%
75%
50%
25%
0%
1800
Jail beds
Violent
Sex
Drug
DUII
Property
DV
2004-
2004-
2004-
2004-
2004-
2004-
2004-
2004-
2004-
2005-
2005-
2005-
2005-
2005-
2005-
2005-
2005-
2005-
2005-
2005-
2006