

SMART SENTENCING: PUBLIC SAFETY, PUBLIC TRUST AND CONFIDENCE THROUGH EVIDENCE-BASED DISPOSITIONS

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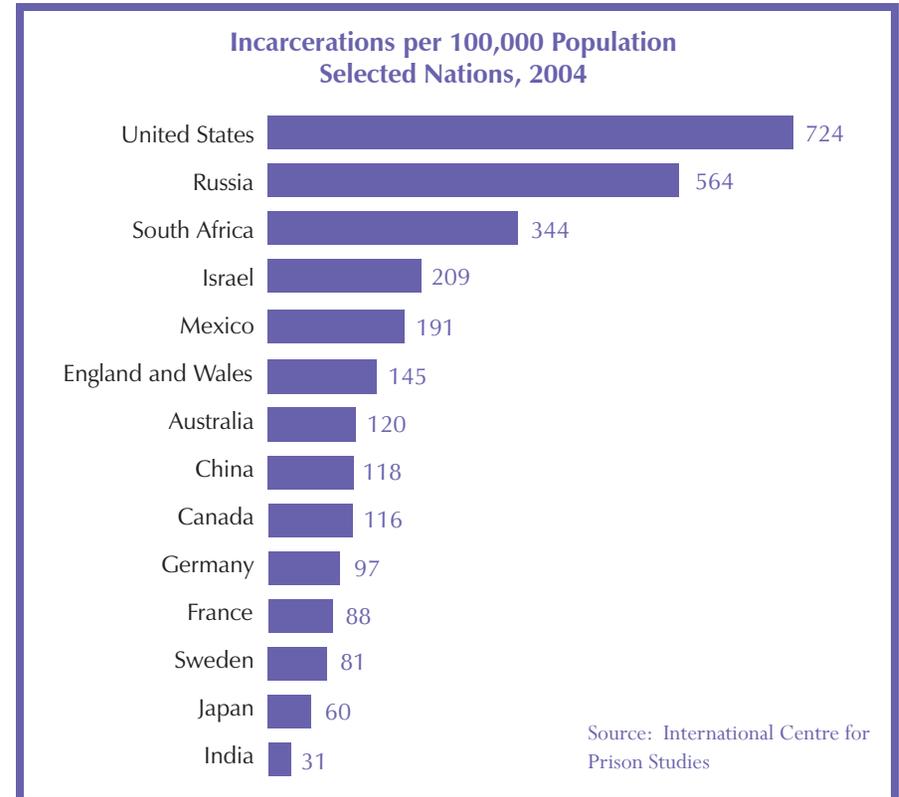
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A long-simmering, but often tacit debate questions whether sentencing discretion should reflect best efforts to reduce recidivism. Smart-sentencing trends embrace that responsibility and enlist a wide range of strategies in pursuit of evidence-based decisions that earn public trust and confidence through accountability for public safety.

Sentencing Policy at a Crossroad

When the mid-twentieth-century enthusiasm for the medical model of crime control crumbled under empirical scrutiny, it was replaced with increased reliance on jails and prisons.¹ Although incarceration surely halts criminal behavior during the period of incapacitation, it proved an insufficient strategy for the many offenders whose numbers and crime seriousness ruled out permanent imprisonment as a matter of social economics or proportionality—or both. Because jail and prison performed no better (and often even worse) than programs or treatment in preventing an offender’s next crime, at least for some offenders, the demand for incarceration grew and left most cities and states with strained correctional resources.²

The United States now persistently vies for first place in the world for the percentage of its population in custody.³ The sentencing-guideline movement appealed both to policymakers seeking a way to control prison growth for fiscal integrity and to those opposed on principle to heavy reliance on incarceration. Some of the latter, having largely abandoned reliance on programs and treatment, now treasure guidelines as promoting consistency and as restraining what they perceive as “punitivism.” Although many crime-control advocates initially condemned guidelines as codified leniency, having adjusted them with minimum and mandatory sentencing schemes, they now regard guidelines as bulwarks against judicial leniency. This diverse mix would support the current project for revising the Model Penal Code provisions on sentencing.⁴



The competing strain of sentencing policy also finds a wide spectrum of support. The demise of the medical model was not complete. Some criminologists and theorists responded to empirical disappointment by using research to identify program and treatment variables that yield success. A strong body of experience and literature now demonstrates that some approaches work very well—and significantly better than jail or prison—on some offenders. And many concerned with crime control doubt that the enormous recidivism rates we generate represent the best public safety we can produce. After all, when measured by post-incarceration recidivism, jail and prison work even worse than treatment and programs—and often far worse—on some offenders than programs and treatment designed and allocated based on sound evidence.⁵ Policymakers concerned with the public-safety impact of corrections, victims’ groups committed to preventing

avoidable victimizations, and proponents of “therapeutic jurisprudence” find common ground in evidence-based sentencing initiatives.

The resulting critical issue in sentencing policy thus runs along a very different axis than the traditional divide between punitivists and advocates of reformation. Evidence-based “smart sentencing” posits that by rigorously scrutinizing data on what works or not on which offenders, we can allocate our correctional resources far more efficiently—measured by public safety—than if we continue to settle for “just deserts” with no accountability for outcomes. Smart sentencing demands that the primary mission of sentencing discretion be the responsible pursuit of crime reduction. Within limits imposed by law, proportionality, and resources prioritized by risk levels, dispositions should be based on what is most likely to reduce criminal behavior for a given offender. Programs and alternative sanctions should be used on those offenders whose criminal behavior is most likely to be reduced by those dispositions; jail and prison beds should be reserved primarily for those offenders for whom incapacitation is the disposition most productive of public safety. Smart sentencing holds that we are likely to do a better job of crime reduction if we make a concerted effort to promote public safety with sentencing discretion than if we insist that we are only responsible for just deserts.⁶

Aligned against smart sentencing are a mix of those who reject utilitarian sentencing on principle, those who fear evidence-based sentencing will lead to accelerated severity, and those who fear that allowing judges to consider “what works” will only produce inappropriate leniency.⁷

Strategies in Pursuit of Smart Sentencing

Proponents of smart sentencing have pursued a variety of strategies to nudge sentencing toward evidence-based practices. After Oregon voters emphatically amended the state constitution to proclaim “safety of society” as a primary purpose of sentencing,⁸ the 1997 legislature directed that reduction of criminal behavior be a dominant performance measure, and required that criminal-justice agencies collect, maintain, and share data to facilitate display of correlations between dispositions and future criminal conduct.⁹ Subsequent sessions have employed “budget notes” to encourage agencies to convert case-based criminal-justice data to “offender-based” systems to facilitate tracking and analysis of most effective practices.

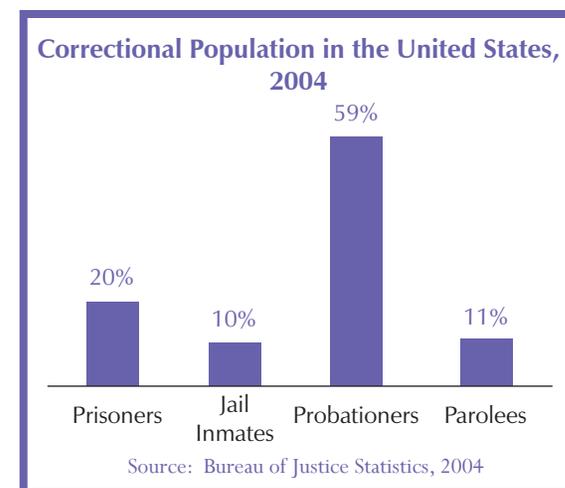
A contemporaneous initiative in Multnomah County constructed sentencing-support tools that show judges and advocates outcomes in terms of recidivism for any given cohort of offenders sentenced for any given crime. Once the user selects the crime for which an offender is being sentenced, the tools build a default display based upon what the database “knows” about that offender and similar offenders sentenced for similar crimes. Users can access and modify the variables to improve results. The results show outcomes measured by recidivism correlated with various dispositions previously used for such offenders and crimes. They do not purport to display causation; their primary purpose is to encourage advocates in sentencing hearings to address what works to reduce crime.¹⁰

The Oregon Judicial Conference also adopted in 1997 a resolution urging

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.¹¹

In 2001 the Oregon Criminal Justice Commission (Oregon’s sentencing commission) completed hearings and a study, then published its mandated “Public Safety Plan.” The plan’s first recommendation was:

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.¹²



In 2002 judges in Multnomah County modified the form by which to order presentence investigations to 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.”¹³

Presentence reports in Multnomah County now routinely include analysis based on needs assessment, state-of-change analysis, and sentencing-support-tools queries as part of a recommended disposition. Through continued collaboration with the Multnomah County Department of Community Justice, judges and probation-department managers have implemented a program to train probation officers to use the same approach in probation reports and probation-violation hearings. The goal is to transform probation officers into the court’s experts in what works, to the end that they bring their training in the literature of corrections and criminology, and experience with available resources and persistent offenders, to the service of best efforts at crime reduction in responding to probation violations.¹⁴

The 2003 legislature required that correctional agencies demonstrate that an increasing proportion of “program” spending is “evidence-based”—meaning that programs must be cost-effective and employ “significant and relevant practices based on scientifically based research.”¹⁵

Building on its “Justice 2020: A Vision for Oregon’s Courts,”¹⁶ the Oregon Judicial Department adopted “performance measures” in pursuit of “public trust and confidence” and “accountability.” Although, in common with the national performance-measure movement,¹⁷ these measures otherwise avoid general accountability for the public-safety impact of sentencing decisions, Oregon has at least made a cautious beginning in this direction by adopting one performance measure that evaluates juvenile-drug-court performance by graduates’ avoidance of recidivism. The 2005-2007 revisions to the performance measures are scheduled to consider additional performance measures based on the effectiveness of sentencing decisions in reducing future criminal conduct. The challenge is to express performance measures so as accurately to reflect the wide range of risk levels among offenders and to highlight the role of shortages of effective corrections and program resources. But public trust and confidence cannot be achieved by performance measures that ignore our impact on public safety.

Between biennial legislative sessions, Oregon governor Ted Kulongoski convened a “Public Safety Review Steering Committee” to explore how criminal justice might better serve public safety.¹⁸ Two measures recommended by the “Sentence Imposition Task Force” of that committee were among those adopted by the 2005 legislature. One measure adopted the Multnomah County approach to presentence investigations by directing that the Oregon Department of Corrections

require that a presentence report provide an analysis of what disposition is most likely to reduce the offender’s criminal conduct, explain why that disposition would have that effect and provide an assessment of the availability to the offender of any relevant programs or treatment in or out of custody, whether provided by the department or another entity.¹⁹

Even more promising, the other measure directs the Oregon Criminal Justice Commission to

conduct a study to determine whether it is possible to incorporate consideration of reducing criminal conduct and the crime rate into the commission’s sentencing guidelines and, if it is possible, the means of doing so.²⁰

The required advisory committee is chaired by Oregon’s immediate past chief justice, the Honorable Wallace P. Carson, Jr. Its work plan includes examination of Virginia’s innovative incorporation of validated risk-assessment into that state’s sentencing guidelines.²¹

Late in 2005, the Oregon Judicial Department Court Programs and Services Division completed a massive update of a Criminal Law Bench Book, available online to attorneys, judges, and the public. Some 30 pages are devoted to practical considerations in pursuit of best efforts to exercise sentencing discretion effectively to reduce future criminal conduct.²²

Conclusion

Having confronted the choice between avoiding and accepting responsibility for the public-safety outcomes of sentencing decisions, Oregon has provided examples of many strategies for reducing crime through sentencing decisions. The proponents of this approach believe that it is essential to public trust and confidence. It is also more likely to control unwarranted reliance on expanded incarceration than approaches that seek to avoid accountability for public safety.

ENDNOTES

¹ Kevin R. Reitz, Reporter, “Model Penal Code: Sentencing Report” (American Law Institute, April 11, 2003): 28-29, and authorities cited; Michael H. Marcus, “*Blakely, Booker, and the Future of Sentencing*,” *Federal Sentencing Reporter* 17 (2005): 243.

² Michael H. Marcus, “Justitia’s Bandage: Blind Sentencing,” *International Journal of Punishment and Sentencing* 1 (2005): 17-21, and authorities cited, available at http://www.sandstonepress.net/ijps/IJPS_sample.pdf (accessed on January 21, 2006).

³ See, e.g., The Sentencing Project. “New Incarceration Figures: Growth in Population Continues,” available at: <http://www.sentencingproject.org/pdfs/1044.pdf> (accessed on January 21, 2006).

⁴ Marcus, “*Blakely, Booker, and the Future of Sentencing*,” *supra* note 1.

⁵ Michael H. Marcus, “Comments on the Model Penal Code: Sentencing Preliminary Draft No. 1,” *American Journal of Criminal Law* 30 (2003): 135, available on WestLaw at 30 AMJCR 135.

⁶ Marcus, “Comments on the Model Penal Code,” *supra* note 5; Michael H. Marcus, “Archaic Sentencing Liturgy Sacrifices Public Safety: What’s Wrong and How We Can Fix It,” *Federal Sentencing Reporter* 16 (2003): 76, available on WestLaw at 2003 WL 23269275.

⁷ Marcus, “*Blakely, Booker, and the Future of Sentencing*,” *supra* note 1.

⁸ Oregon Constitution, Article I, Section 15, as amended by a 1996 ballot measure, now provides: “Laws for the punishment of crime shall be founded on these principles: protection of society, personal responsibility, accountability for one’s actions and reformation.”

⁹ 1997 Oregon Laws, chapter 433 (1997 Or HB 2229), accessible at <http://www.leg.state.or.us/97reg/measures/hb2200.dir/hb2229.en.html> (accessed January 21, 2006), or in the form of the printed and enrolled bill at <http://ourworld.compuserve.com/homepages/SMMarcus/ch433.htm> (accessed January 21, 2006).

¹⁰ See, e.g., Michael H. Marcus, “Sentencing in the Temple of Denunciation: Criminal Justice’s Weakest Link,” *Ohio State Journal of Criminal Law* 1 (2004): 671 (available on Lexis at 1 Ohio St. J. Crim. L. 671). See generally <http://www.smartsentencing.com>. Although the tools themselves require a direct connection, the user manual is available on the Multnomah County Circuit Court Web site at http://www.ojd.state.or.us/mul/marcus_defattymanual.pdf (accessed January 21, 2006).

¹¹ Available at <http://ourworld.compuserve.com/homepages/SMMarcus/JCRESNO1.htm> (accessed January 21, 2006).

¹² <http://www.ocjc.state.or.us/PSP.htm> (accessed January 21, 2006).

¹³ <http://ourworld.compuserve.com/homepages/SMMarcus/WhatsNew.htm> (see entry for January 2, 2002) (accessed January 21, 2006).

¹⁴ Michael H. Marcus, “Sentencing Support Tools and Probation in Multnomah County,” *Executive Exchange* (Spring 2004) (journal of the National Association of Probation Executives).

¹⁵ 2003 Oregon Laws, chapter 669 (2003 Or SB 267), accessible at <http://www.leg.state.or.us/03orlaws/0669.pdf> (accessed January 21, 2006).

¹⁶ <http://www.ojd.state.or.us/osca/cpsd/programplanning/futures/documents/justice2020vision.pdf> (accessed January 21, 2006). The “Partnerships” vision includes “We use preventive measures and effective sentencing to reduce criminal behavior;” the strategies include “Employ Technology to Improve Sentencing Practices and Data-Sharing Systems.”

¹⁷ See, e.g., National Center for State Courts, “*CourTools—Trial Court Performance Measures*,” accessible at http://www.ncsonline.org/D_Research/CourTools/tcmp_courttools.htm.

¹⁸ <http://www.ocjc.state.or.us/PSReview/index.php> (accessed January 21, 2006).

¹⁹ 2005 Oregon Laws, chapter 473 (2005 Or SB 914), accessible at <http://www.leg.state.or.us/05reg/measpdf/sb0900.dir/sb0914.en.pdf> (accessed January 21, 2006).

²⁰ 2005 Oregon Laws, chapter 474 (2005 Or SB 919), accessible at <http://www.leg.state.or.us/05reg/measpdf/sb0900.dir/sb0919.en.pdf> (accessed January 21, 2006).

²¹ Virginia Criminal Sentencing Commission, *Assessing Risk Among Sex Offenders in Virginia* (Richmond: Virginia State Sentencing Commission, 2001), accessible at http://www.vscs.state.va.us/sex_off_report.pdf; Brian J. Ostrom, Matthew Kleiman, Fred Cheesman II, Randall M. Hansen, and Neal B. Kauder, *Offender Risk Assessment in Virginia: A Three-Stage Evaluation* (Williamsburg, VA: National Center for State Courts, 2002), accessible at http://www.vscs.state.va.us/risk_off_rpt.pdf (accessed January 21, 2006); Virginia Criminal Sentencing Commission, *2004 Annual Report* (Richmond: Virginia State Sentencing Commission, 2004), accessible at <http://www.vscs.state.va.us/2004FULLAnnualReport.pdf> (accessed January 21, 2006).

²² The bench book is available on the Oregon Supreme Court Library Page at <http://www.ojd.state.or.us/reference/criminalbenchbook.htm> (accessed January 21, 2006).