Testimony to the Governor's Public Safety Review Steering Committee

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Introduction: Governor Kulongoski charged this body with the responsibility to "look at our public safety system from beginning to end" and to develop "strategies to make the system stronger" wherever it does not sufficiently protect Oregonians.[1] The successful culmination of the vast majority of law enforcement activities is a conviction followed by a sentence in a criminal case. *Most sentences imposed on most offenders fail to prevent another victimization by the sentenced offender; most sentencing does not even expressly attempt crime reduction.* This Committee cannot begin to fulfill its charge unless and until it develops strategies for improving the focus and effect of sentencing in criminal cases.

I respect the diversity of perceptions and values among the participants in this effort as to the purposes, the failures and the successes of criminal justice. My agenda is not to change anyone's views as to mandatory minimum sentences, the viability of deterrence, or the division of responsibilities as between judges and the legislative power (whether exercised by the people directly or by the legislature). I'm happy to share my views on such matters, but they are quite independent of the propositions with which I hope and expect we can all agree. The only debate we would otherwise need to resolve before making real progress is already decided by Oregon law: crime reduction *is* a major purpose of sentencing. Notions to the contrary are dangerously wrong, however motivated.

I expect that we will all agree:

- Whatever the importance of other components of sentencing, crime reduction is a major purpose
- Our actual accomplishment of crime reduction falls profoundly short of our proclamations and of our potential
- To improve our crime reduction impact, we must change the behaviors of those involved in producing sentencing decisions
- To succeed, we must pursue strategies that will actually focus participants in criminal justice on responsible, informed, and effective pursuit of crime reduction through sentencing decisions.

I suspect many of the members of the Committee already agree with parts of this, some may already agree with all of it. I will attempt to persuade all to agree, then suggest some strategies as examples. To accomplish my purpose, however, I do not have to convince members that all or even that any of the examples should be included in a final report. I will have succeeded if we can articulate strategies for crime reduction improvement with which all can agree, and that our success depends on adopting strategies that will result in judges, prosecutors, defense attorneys, probation officers, and others consciously, prominently, and competently pursuing crime reduction opportunities with sentencing decisions.

Crime reduction is and must be a major purpose of sentencing: Astonishing as it should seem, there is actually a body of literature from academia that argues that sentencing should *not* be about crime reduction.[2] But Oregon Law is unambiguous. Oregon's 1971 criminal code revision elected to declare public safety to be at least among the purposes of sentencing,[3] and that policy choice was more recently enshrined in our state Constitution by vote of the People in Article I, section 15: "Laws for the punishment of crime shall be founded on these principles: protection of society, personal responsibility, accountability for one's actions and reformation."[4] Subsequent legislation, a Judicial Conference Resolution, and the Criminal Justice Commission's Public Safety Plan all expressly contemplate that crime reduction is a major purpose of sentencing.[5]

Sentencing does not responsibly pursue crime reduction: This is where I usually begin to annoy my colleagues and some attorneys, but bear with me; the critical word is "responsibly."

First, most sentencing hearings (and probation violation disposition hearings) make no mention whatever of crime reduction. The typical dispute, once the range of any discretion is settled, is whether a given sentence is "sufficient" to punish the offender adequately, or somehow "excessive" given any disadvantages or ameliorating circumstances urged on behalf of the offender. Indeed, in felonies, although the sentencing guideline regulations mention "security of people in person and property," they stress "appropriate punishment" and invite dispute as to "aggravation" and "mitigation"[6] while approaching any attempt at meaningful discussion of crime reduction only within the three (of 99) grid blocks that address "optional probation."[7] No fair reading of the guidelines or of the rules can render crime reduction a significant target of their attention. To this extent, the rules are in substantial tension with the statutes and the Oregon Constitution.[8]

True, we sent thieves to theft talk, drunk drivers to alcohol treatment, bullies to anger counseling, addicts to drug treatment, and sex offenders to sex offender treatment. But we do this as a matter of symmetry rather than of science: we don't select offenders based on their amenability to treatment, but on the crime they've committed. We don't select providers on their impact on criminal behavior, but on their ability to provide timely paperwork. We may ask providers if offenders complete "the program" but we don't ask if they reoffend after treatment. Again, the issue is *responsible* pursuit of crime reduction – not nominal pursuit. It is probably true that many people sent to these programs benefit, and that many do not. What is absolutely unavoidable is that we've made no responsible effort to find out which programs reduce criminal behavior by which offenders – and, of course, no effort to use the results in making better use of these options.

Second, the public and some criminal justice participants seem to operate on the assumption that incarceration *is* crime reduction. There is a great deal to be said about the relationship between incarceration (incapacitation) and crime reduction; when it is said, it is obvious that while locking up some offenders is indeed the best path to crime reduction, as to others there are real issues as to which offenders to treat in the community, which to relegate to alternative sanctions, and which to lock up, for how long, and under what conditions. And it is abundantly clear that we are *not* smart about those issues because we make no responsible attempt to tackle them.

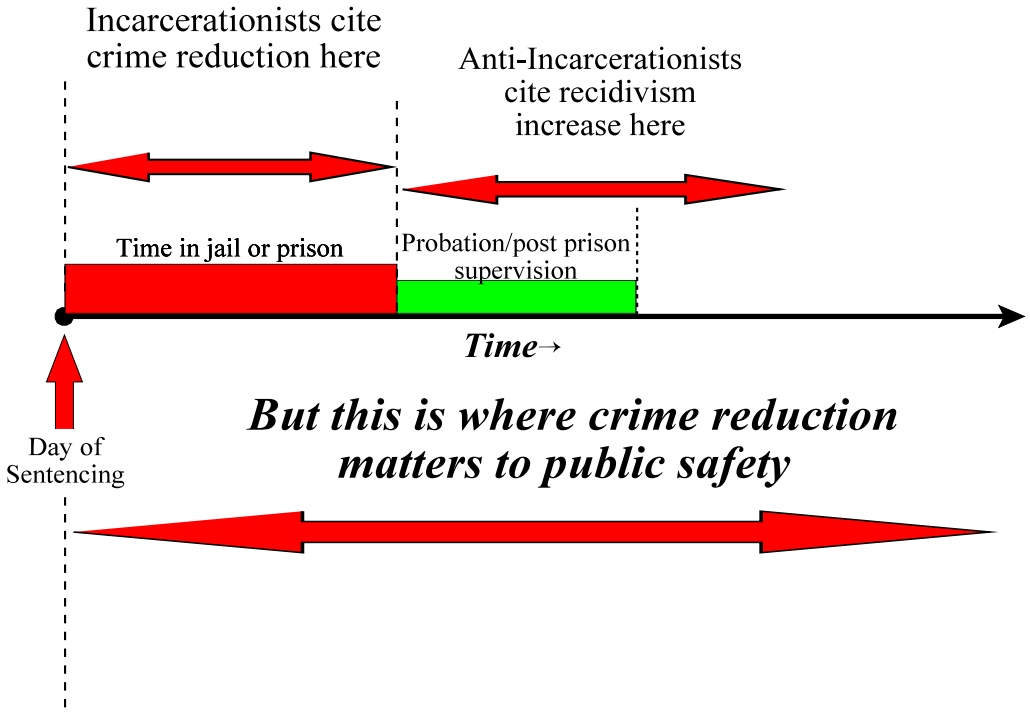
Part of the problem is that of the several camps around the issue of crime and punishment, a deep divide undermines our ability to be smart about such issues. One camp – I'll

use the label "anti-incarcerationists" – is fairly characterized by a strong conviction that we are in the midst of an unfortunate trend towards "mass incarceration," and that non punitive responses are both more humane and more productive of community safety than punitive sanctions. This camp cites to a great volume of literature (produced by the bulk of academia which is similarly inclined) suggesting that at least for many offenders, and at least as measured by recidivism ***after*** any jail or prison term, well designed and delivered treatment programs are substantially more likely to produce crime reduction than jail or prison (or poorly designed or delivered treatment, for that matter). There is even good evidence from this camp that punitive sanctions as well as poorly designed or delivered treatment programs are often associated with *increased* recidivism for at least some offenders.[9]

The anti-incarceration camp, however, is viewed with understandable suspicion by its opposite camp – for which I will use the label "incarcerationists" – which clings to the conviction that punishment and incapacitation offer the best road to public safety (and to just deserts) for all or virtually all offenders. The understandable part of this suspicion is that the anti-incarcerationists almost entirely avoid confronting the crime reduction touted by the pro-jail camp: people in custody simply don't commit crimes on the outside while they are inside. This persistent avoidance of the strongest crime reduction function of "punishment" essentially eliminates the persuasive force of most of the anti-incarcerationists except when they talk to each other. They are accomplished at doing that, they do a lot of good work, and they have much to teach us, but they rarely change or improve anything in criminal justice – they just publish and attend conferences to talk to teach other.

The anti-incarcerationists, for their part, are deeply suspicious of the incarcerationists -- whom they often deem "mass incarcerationists" or "populist punitivists," and disparage for making the United States a leader among nations in incarceration rates. The anti-incarcerationists suspect that the real agenda of their opponents is punishment for its own sake rather than crime reduction. On the other hand, some anti-incarcerationists resist careful assessment of the evidence surrounding the efficacy of incapacitation because they fear, essentially, that their opponents are correct – that the surest way to prevent crime on the outside, after all, is to lock up offenders for longer and longer periods of time.

Here's a graphic that illustrates the divide and how both sides[10] avoid a full picture of public safety:



To make a *responsible* effort at crime reduction, a sentencing decision in which jail or prison is available must consider *both* how much crime is likely eliminated during incarceration *and* how post incarceration criminal behavior is likely to be affected. Both camps are right, after all: longer jail sentences and prison *do* increase post-prison criminal behavior among some offenders; incarceration *does* reliably prevent criminal behavior (at least on the outside) during the period of custody. We can't make these decisions responsibly by relying on the ideology, philosophy, or what passes for the entrenched wisdom of judges – unless of course our resulting enormous recidivism rates really are the best we can expect to achieve.

What are our recidivism rates? It didn't take long for me to realize after taking the bench almost 15 years ago that the first offender is a rare experience in our system.[11] It became immediately obvious that most of the offenders we sentence have been sentenced before, and that most would probably offend, victimize, and be sentenced again. The notion that we were actually managing criminal *careers* occurred to me early in my own career as a judge; that notion was soon followed by the suspicion and then the conviction that we could surely do a better job of diverting offenders from criminal careers if we made some substantial effort to do so – based on data, evidence, and anything better than our various philosophies, assumptions, and untested beliefs about how people work.

Most tragic are the serious crimes. Typically, a victim has been seriously hurt, and the offender has been sentenced repeatedly before committing this latest crime, often beginning a criminal career as a juvenile. If only we had done something effective before, we might have prevented both the victimization and the years of incarceration. Though I am sure there are many crimes we could not have prevented, I am also certain we have not exercised our best efforts to prevent those that we can – and that we would have diverted many offenders from criminal careers, and prevented many crimes, had we just made a responsible effort.

In any event, there is no question but that recidivism rates are abysmal. There are many measures, but they surely represent the impact of sentencing that is not responsibly aimed at crime reduction. Of the 2,395 people jailed in Portland, Oregon, during July, 2000,[12] 1,246 had been jailed in Portland on some other occasion within the previous 12 months. The same was true as to 22 of the 32 jailed that month for Burglary, 22 of the 23 jailed for Robbery, 20 of the 26 jailed for Theft in the First Degree, 304 of the 372 jailed on drug charges, and 32 of the 39 jailed for vehicle theft. And "4% of our offenders accounted for 23% of [s]tandard bookings between 1995 and 1999."[13]

Nationally, the figures are similar: Bureau of Justice Statistics reflect that "More than 7 of every 10 jail inmates had prior sentences to probation or incarceration," and that "Of the 108,580 persons released from prisons in 11 States in 1983, an estimated 62.5% were rearrested for a felony or serious misdemeanor within 3 years, 46.8% were reconvicted, and 41.4% returned to prison or jail."[14] "Sixty-seven percent of former inmates released from state prisons in 1994 committed at least one serious new crime within the following three years," and "272,111 offenders discharged in 1994 had accumulated 4.1 million arrest charges before their most recent imprisonment and another 744,000 charges within 3 years of release."[15]

Our Oregon Department of Corrections publishes a recidivism rate of 30%, and a target of 28%, but these figures are profoundly misleading as they reflect convictions for a new *felony* only. This approach is typical of many state corrections departments. Almost 80% of crimes are misdemeanors, including most thefts, drunk driving, most assaults and most crimes that affect public safety, so total recidivism after prison is quite probably at least as high in Oregon as the

other statistics would suggest.[16]

The amount of custody available as a sentence varies as a matter of law and as a matter of prison and jail resources. As a matter of law, Oregon misdemeanors – again, almost 80% of the crimes committed in our communities – cannot result in more than one year in jail. As a matter of resource limitation, jails often release offenders well before their terms are complete simply because there are an insufficient number of beds. As a practical reality, the crime-prevention impact of custody may be extremely short in duration, and the possibility of any crime-increasing impact outweighing a short period of protection is very, very real.[17] As to this group, any unbiased and reasonable examination of the data about the outcomes of past sentences – particularly, but not necessarily, in connection with the abundant literature – must conclude that some offenders are more likely to be diverted from future crime with one approach at supervision, programs, jail, and other sanctions, while others are more likely to be diverted from criminal behavior by another approach. Consistently with most other human experience, different things play out differently with different people.

Once we pass into the world of felonies, we are again confronted with the reality that the far more common crimes are the least serious, for which neither the law nor corrections resources afford a great deal of potential for incarceration. Under our sentencing guidelines (which apply only to felonies), most of the lower level felonies are subject to a presumptive *probationary* sentence with jail not to exceed 30, 60 or 90 days. Prison becomes a presumptive sentence only at crime seriousness level four (out of 11 levels), and then only for offenders with at least two prior person felonies. It is only at crime seriousness level five that prison becomes presumptive for most felony offenders, and at eight for all. And the range of presumptive prison begins at six months and doesn't exceed three years until we reach level eight, and then only for offenders with at least two prior person felonies. Even by departure, many of the lower level offenses are capped at six, 12, or 18 months. So for most felony sentences, the opportunity to do more harm than good is entirely consistent with the recidivism data.

Even at the higher levels of felony crime, we often have substantial discretion to depart upward beyond mandatory minium sentences, or to choose between consecutive and concurrent sentences. Our choices in this regard undoubtedly have a public safety impact – as with all of our sentencing choices. We'd probably do a better job of exercising that discretion if we made some responsible effort at analyzing the likelihood that offender characteristics, available programs in prison, or other variables would make one offender more likely than another to need extended incapacitation, or more likely to be safe to return to society after serving concurrent time. At the very least, our decision affects the availability of beds for those that should be locked up longer to protect society.[18]

***Multnomah County's Approach -- Sentencing Support Tools and a revised Order for Presentence Investigation*:** Although state law has since 1997 provided for the collection and management of criminal justice data to facilitate discovery of correlations between what we do to various offenders and their recidivism rates,[19] there is currently no effort at the state level to implement this function.[20] Multnomah County, with the assistance of a public safety technology bond issue, has constructed a data warehouse[21] and related criminal justice applications that provide this function to practitioners.

A user of the DSS-Justice sentencing support application (one of many running based on the warehouse) enters a case number and selects the charge for which a sentence is being

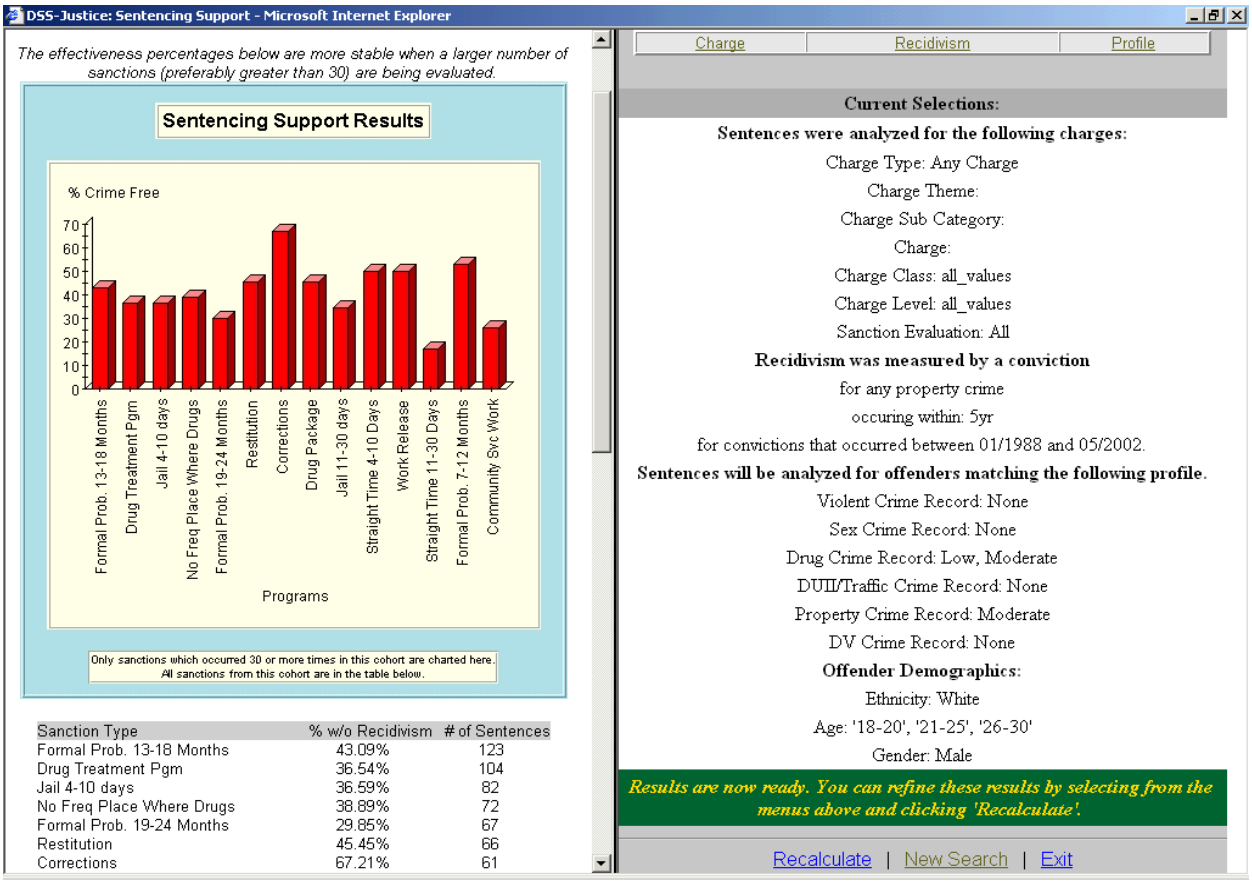
imposed. The program constructs a bar chart based on data for the offender and the charge selected. The chart includes a bar for sentencing elements imposed on such offenders for such a charge, arrayed left to right in order of their declining frequency.[22] Each bar reflects the proportion of those receiving that sanction who were free of any new conviction for a similar crime within three years. Note that this approach displays incarcerative and non-incarcerative sanctions side by side, measured by precisely the same test.

The right side of the screen displays the variables upon which the bar chart is based. By default, the user's choice of crime for sentencing yields a variable that chooses one of six categories of crime as a "similar crime." For example, choosing Theft in the First Degree yields a default of "property crime," so that the program is analyzing sentences imposed on similar offenders for any property crime. By default, a "similar offender" is one who has a similar criminal record and similar demographics (age, gender, and ethnicity). A "similar" criminal record is one that reflects the same rating, from "none" to "severe," in each of six crime categories: violent crime, sex crime, property crime, drug crime, major traffic crime (including impaired driving), and domestic violence.[23]

Users can modify all of the variables and generate a new bar chart in seconds. For example, if we are dealing with a common cohort, we may be able to focus on only those offenders sentenced for the same crime as the offender before the court, so the program allows a user to change "property crime" to "Theft I." If the offender's cohort is less common, we may have to expand it to compare offenders like the one before the court who have been sentenced for any crime. We may want to focus on those sentenced for felonies or only Class A felonies to distinguish among levels of drug involvement. We may also want to modify what we mean by "similar" offender. For example, the prosecutor may provide evidence of a criminal record from outside the data known to the tools. A user can access "profile" to revise the criminal history ratings in each of the crime categories. In a similar fashion, the user can correct age or even gender errors, or broaden or eliminate the "profile" categories to analyze a broader cohort.

Finally, users can modify the outcome measure. The default measure of recidivism is a new conviction for a similar crime within three years. Users can specify instead conviction for "any crime," or for a crime in any of the six crime categories. Users can also modify the period during which recidivism is tallied (six months, three years, five years, or any time since sentencing), and can choose to focus on arrests instead of convictions (particularly useful in domestic violence cases).[24]

The point of all of this is not to ask technology to select a sentence, but to focus the attention of the sentencing process on public safety through crime reduction. Of course, the tools cannot tell us with certainty whether the results were *caused by* the disposition, or if variables unknown to the program account for disparate results. But they give us a good look at our past results, and provide far more information than ever before available. More importantly, they focus the attention of the participants on crime reduction. Just as sentencing guideline grids, carried dutifully by practitioners into every courtroom, ensure the presence of the ephemeral calculus of guideline sentencing, sentencing support tools can encourage all to remember that we are supposed to be seeking crime reduction. With that focus, advocates and probation officers can supplement the data available from sentencing support tools with information about the offender's particular circumstances or treatment history, the availability or not of local community-based or custodial programs, or with research germane to a particular sentencing analysis.



Screen Shot of a Sentencing Support Display

As part of the same effort, we have begun building a new partnership between the courts and probation officers, encouraging officers to discuss their assessments and expertise around the literature of criminology and corrections with courts on the occasion of probation violation allegations. We have added a box to the standard order for a pre-sentence investigation, requesting that the report include "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 now regularly include an analysis of what is most likely to work, citing literature and sentencing support results to the court.

Proposals for Improvement – Most of my proposals to the Adult Sentencing Subcommittee and to the Public Safety Review Steering Committee as a whole are intended not as changes to substantive law but as strategies for increasing the focus of advocates and decision makers on the issue of crime reduction. Specifically, I proposed that data and research concerning crime reduction be expressly recognized as a consideration in departures under the guidelines, decisions whether to impose consecutive or concurrent sentences, whether to "remand" a juvenile to adult court,[25] and whether to continue, modify, or revoke a juvenile or adult probation. Because of suspicion of "research" and researchers in some quarters, these proposals remain on the table so far only because references to "data and research" have been replaced with references to "reduction in criminal conduct and crime rates."

Another proposal still on the table[26] is that the legislature direct the Criminal Justice

Commission to explore the feasibility of incorporating crime reduction into the contours of the Sentencing Guidelines – which presently are organized around just deserts, criminal history and prison resources to the virtual exclusion of crime reduction. It has been my position since the guidelines were first under discussion that a sentence most likely to result in crime reduction ought to be the presumptive sentence absent a substantial and compelling reason to seek some other purpose – but merely *adding* crime reduction to the mix that determines what is a "presumptive" sentence would be a profound improvement.[27]

Other proposals may find their way to other subcommittees of the Public Safety Review Steering Committee: That the Department of Corrections be directed to include misdemeanors in their published recidivism rates; that the statute governing presentence investigations be amended along the lines of Multnomah County's modification to the form for ordering such investigations; that other counties somehow be encouraged to emulate Marion County's "Project Bond;"[28] that probation officers' roles be modified along the lines encouraged in Multnomah County.

But my overall hope is that this work actually produce something of the magnitude envisioned by the Governor's description of our undertaking –

> "We need to look at our public safety system from beginning to end, from juveniles to adult criminals to emergency response," said the Governor. "We need to ask whether the system we have in place sufficiently protects Oregonians and strengthens Oregon's communities - and where it doesn't, we need to look for short and long-term strategies to make the system stronger."
>
> *Governor's Press Release, Feb 26, 2004*

If all we accomplish is some minor tweaks to a system that produces the recidivism I've described, we will not begin to reach that goal. We may make some real progress by pursuing the sort of strategies I've suggested.

Objections to and concerns about this approach: Subcommittee participants and others have raised a variety of objections and concerns about injecting crime reduction analysis into sentencing, plea bargaining, probation, and other criminal justice functions.[29] I will discuss a few here, but common to all are the following responses: The law *requires* that we consider public safety in sentencing; whether or not we do so, our choices have outcomes in the sense that some choices will not prevent future victimizations while others may; our present performance is abysmal when measured by public safety. Trying harder to achieve best efforts should help. Avoiding those efforts will not.

– Concerns about the impact on the length of custodial sentences or the severity of sentences: as might be expected, one camp fears that adding any subject to sentencing analysis just provides another opportunity to find some excuse for a lighter sentence, while the other camp fears that pursuit of crime reduction will result in longer sentences. The combination is a *de facto* collusion in favor of the pursuit of other objectives, or a pursuit of crime reduction devoid of information. Whatever might be said of a system with unlimited jail terms and beds, for the vast majority of our sentences, law and resources make sentences long enough in their own right to achieve crime reduction *simply unavailable.* Smarter sentencing for most occasions

means using scarce resources more intelligently – using longer terms on those whose criminal behavior is best reduced with longer terms, and shorter terms with effective programs and treatments for those whose crime reduction is best achieved by that approach. Smarter sentencing does not inherently increase or decrease the total amount of jail and prison time served by all offenders – its function is to make the allocation of that jail and prison time more efficiently productive of crime reduction through more intelligent decisions about which offenders to imprison for longer terms and which for shorter.

As to longer terms and more serious crimes, the stakes increase but the principles do not vary. Whether to run sentences consecutively or concurrently has a real public safety impact as to an offender's likelihood of reoffense. This decision also has a real impact on the distribution of prison resources – hard and soft – which in turn impact our success at crime reduction for other offenders. Making these decisions without attention to and information concerning crime reduction can only undermine their accuracy.

To those who favor prison I suggest that we have to face the reality that we can't use it forever on everyone, that we must responsibly allocate what we have to achieve the greatest public safety, and that we must use intelligence and scarce resources – including alternatives, treatment, and programs as well as incarceration – to achieve our best efforts at diverting an offender from crime *before* the next victimization. If you're right that prison is always best, carefully examining the data will generate more support for hard beds.

To those who disfavor prison, I suggest that the limitation of jail and prison time at the lower levels provides the best opportunity to establish and exploit the efficacy of responsible treatment, that demonstrating the crime reduction impact of these approaches can only build support for improved and expanded treatment and alternative resources, and that you cannot expect the public to relax the security it's gained from mandatory imprisonment until and unless you demonstrate that public safety is reliably achieved through other approaches.

Indeed, both camps are right about different offenders. The real question is which ones – and we can't expect to answer that question without information.

– Concerns about the impact on the "other purposes" of sentencing: Although we now may speak of "protection of society, personal responsibility, accountability for one's actions and reformation,"[30] these overlapping objectives capture but do not displace the traditional purposes of retribution, rehabilitation, deterrence (general and specific),[31] and incapacitation. Oregon law already identifies most of these as tools of crime reduction, when it declares a purpose of the criminal law is:

> 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.
>
> ORS 161.025(1)(a)

Although retribution *per se* has no purported role in crime reduction (outside the scope of the death penalty), the remaining functions are clearly not "displaced" just because we consider public safety. And to whatever extent general deterrence actually works to control crime,

retribution obviously overlaps that function. My experience is that the overwhelming majority of cases experience no tension whatever when we consider first our best public safety result, and next the remaining concerns. That which is best for public safety usually satisfies any need for denunciation, victim satisfaction, rehabilitation or confinement. It is also my experience that many victims who exercise their right to be heard at sentencing spontaneously articulate the objective of preventing others from suffering a loss, injury, or other victimization at the hands of the offender.

There are some significant exceptions of course. Classic are the social drinker who kills a stranger while driving and in fact swears off alcohol for life as a result, or the truly opportunistic, intra familial sex offender who will indeed benefit from treatment and avoid recidivism under supervision. Social and victim needs may well eclipse any sentence based on crime reduction alone in these and other cases. But my proposals do not urge or require that we abandon the "other purposes" of sentencing when they in fact conflict with best crime reduction practices. In the vast majority of cases there is no conflict. In those in which crime reduction conflicts with some other purpose, our task is to make the best choice – which may require displacing crime reduction as the primary objective of a sentence. That's no excuse, of course, for abandoning crime reduction as our loadstar in all other cases.

– Concerns about the competence of the participants and the reliability of risk prediction: Opponents of risk prediction by judges or with sociological instruments deem incapacitation in the interests of crime reduction "preventive detention" to disparage it, and point to literature stressing the "false positives" of incarcerating those who in fact would not reoffend if unconfined. Proponents of incapacitation for public safety insist that incarceration is the most reliable means of crime reduction while an offender is locked up, and fear that *releases* based on risk prediction will (as they have) produce "false negatives" in the form of victimizations including rape and murder. Academics fear that judges and lawyers aren't up to the task of handling this level of information.

Again, if the measure of success is crime reduction, we're doing a terrible job in light of our recidivism data. Determining the length of jail or prison terms by some measure *other than crime reduction* cannot improve its success at crime reduction. In other words, we surely have more "false positives" in terms of locking up those whose incarceration is not necessary for crime reduction if we don't even consider crime reduction in the mix – at least in the context of the nation with the highest rate of incarceration in the Western world. Those who fear "false positives" would change the definition of error, not improve our ability to avoid it. They also miss this important point: an offender who has committed a serious crime and represents a substantial risk of reoffending may and should be considered for longer incapacitation even if we cannot be certain he will reoffend.

As to false negatives, they, too, must be higher if we ignore information than if we make an attempt to use it wisely. After all, we almost always impose less than the maximum sentence, jail authorities matrix many before even the imposed sentence is served, and most offenders are released pre-trial. Indeed, jails already use risk-prediction instruments for these decisions, and are probably doing a much better job of keeping the worst in custody than we would left to our own devices. Sentencing with knowledge of the matrix release realities, and with information upon which to exercise our own best efforts is more likely to reduce false negatives than rejecting the role of risk assessment and continuing the status quo – which results in shorter than

maximum terms, matrix releases by others free of the crucible of the adversarial process in court, and pre-trial release compelled by limited jail space.

Academics worry that lawyers and judges aren't up to this kind of work. Put aside that judges often resolve battles of experts – who often cite research – in litigation involving malpractice, product liability, and intellectual property rights. The fact is that most judges already try to choose sentences that may reduce crime, and many lawyers join in with snippets of wisdom or folklore about what works or not: "Don't lock up my client so long that he'll lose his job; we all know that unemployment is criminogenic." We are making decisions *daily* with this level of discussion and thought. Surely our results would be improved with increased attention to the data and to the literature, and increased application of competent advocacy to the examination of any such proposition and its application to a given offender.

If we disqualify participants from this subject, we certainly cannot expect best efforts or best results from the process.

– Concerns about the energy and time smart sentencing would demand: Judges, prosecutors, and administrators are concerned with how long hearings take, and are concerned that any change will increase the inefficiency – on a case per unit time basis – of the process. They fear that any attention to crime reduction will necessarily result in protracted hearings with experts, additional indigent expense funds to pay for them, and clogged dockets. It seems to be in the nature of social activities that they take on a life and meaning of their own, and that as participants we find ourselves blithely accepting the needs of the system rather than focusing on its public purposes. Managers of public transportation want the trains to run on time, but pay little or no heed to what the passengers do when they get where they're going. Likewise a criminal justice system that looks from the inside as if the highest objective is to resolve as many cases as quickly as possible – with plea bargains, jury waivers, truncated evidence – whatever it takes. Presiding judges and court administrators, supervising defense and prosecution attorneys, don't regularly ask us how just a result we've facilitated, and they certainly don't ask how effectively we've reduced criminal behavior.

All that being said, there is nothing about considering crime reduction that takes it outside the normal systemic factors that determine how much energy a topic actually receives from the process. At the high volume end of the system, where cases are negotiated in minutes, we can only expect fleeting references to the notions of criminogenic factors and incapacitation. Practitioners can gradually become more fluent in what we know about which offenders, just as they do on topics such as the latest alternative sanctions, jail practices, suppression case law, or changes in local court procedures. As they do so, they can replace some verbal content of typical plea negotiations with growing attention to routine factors affecting best crime reduction practices in a given set of circumstances – they can do so without losing anything of value in the discussion, without adding to the duration of the exchange, and with some increased hope of improving the likelihood that a resulting sentence will actually prevent future crime.

At the other end of the spectrum, we already have hearings with experts and what amounts to risk assessment in death penalty and dangerous offender proceedings. There is room for varying levels of intensity in the consideration of relevant sentencing data and research along the entire spectrum of criminal practice; there is no level at which its increased presence would be unlikely to improve our public safety performance. Yes, we could afford to spend a bit more time and energy seeking smart sentencing across that range. But even if reducing the human cost

of victimizations isn't enough to convince the managers, this should be: The biggest inefficiency of time and resource is the persistent offender; to the extent that smart sentencing offers an opportunity to divert offenders from criminal careers, even managers should at least take heed that speed is not our most important product.

Conclusion

Our Governor gave this Steering Committee an ambitious charge – to ask "whether the system we have in place sufficiently protects Oregonians" and, if not "to look for short and long-term strategies to make the system stronger." The recidivism we produce by doing things the way we've been doing them answers the first question unambiguously. I have proposed some strategies to make the system stronger by encouraging practitioners to bring crime reduction into actual focus in criminal sentencing proceedings. Others may have better or additional strategies.

But merely looking for places to tweak the skirmish lines among those who favor custody, those who fear mass incarceration, and those who mostly manage can never yield the result this Committee has been asked to provide. The assignment is to come up with strategies, and the public safety problem surely includes persistent offenders and pervasive recidivism. How can smarter sentencing not be among the responses?

1. Press Release, *Governor Calls for Complete Review of Public Safety,* Governor Ted Kulongoski, February 26, 2004, accessible at http://governor.oregon.gov/Gov/press_022604b.shtml.

2. *E.g.,* Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventative Detention as Criminal Justice*, 114 Harvard Law Review 1429 (2001). Prof. 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 persuaded by that system in evolving values such as those against drunk driving and domestic violence. I think it 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. "Preventive Detention" is a disparaging title opponents of incarceration assign to the incapacitation purpose of sentences. I discuss their arguments below.

3. ORS 161.025(1)(a) declares the purposes of 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." This was based on the 1962 Model Penal Code. Tragically, there is at present a proposal drastically to retreat from the public safety commitment of sentencing. *See* Michael H. Marcus, *Comments on the Model Penal Code: Sentencing Preliminary Draft No. 1*, 30 AMERICAN JOURNAL OF CRIMINAL LAW 135(2003) [available on WestLaw at 30 AMJCRL 135].

4. Constitution of 1859; Amendment promoted by Crime Victims United, referred by S.J.R. 32, 1995, and adopted by the people Nov. 5, 1996.

5. 1997 Or Laws ch 433; 2003 Or Laws ch 669; 1997 Oregon Judicial Conference Resolution #1, and the Oregon Criminal Justice Public Safety Plan are all accessible at http://www.Smartsentencing.com (Under "Legislative, Judicial, and Criminal Justice Commission Materials").

6. *See* OAR 213-002-0001, particularly:

> "(3)(d) 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."
>
> "(3)(e) 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."

7. *See* OAR 213-005-006:

> (1) If an offense is classified in grid blocks 8-G, 8-H or 8-I, the sentencing judge may impose an optional probationary sentence upon making the specific findings on the record:
>
> (a) An appropriate treatment program is likely to be more effective than the presumptive prison term in reducing the risk of offender recidivism;
>
> (b) The recommended treatment program is available and the offender can be admitted to it within a reasonable period of time; and
>
> (c) The probationary sentence will serve community interests by promoting offender reformation.
>
> (2) The sentencing judge shall not impose an optional probationary sentence if:
>
> (a) A firearm was used in the commission of the offense; or
>
> (b) At the time of the offense, the offender was under correctional supervision status for a felony conviction or a juvenile adjudication as defined in OAR 213-003-0001(11); or
>
> (c) The offender's conviction is for Manufacture of a Controlled Substance involving substantial quantities of

methamphetamine, its salts, isomers or salts of its isomers, as defined at ORS 475.996(1)(a).

(3) A probationary sentence imposed for an offense classified in grid blocks 8-G, 8-H and 8-I when not authorized by this rule is a departure.

8. Again, ORS 161.025(1)(a) declares the purposes of 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." And Article I, § 15, unambiguously declares "Laws for the punishment of crime shall be founded on these principles: protection of society, personal responsibility, accountability for one's actions and reformation." There is obvious tension between the guidelines and these principles. Similarly, the statutory recognition that sentencing should "permit recognition of differences in rehabilitation possibilities among individual offenders" (ORS 161.025(1)(f)) is in substantial tension with the guidelines' emphasis on enforcing sentencing based on crime seriousness and criminal history with deviations based only on aggravation and mitigation (OAR 213-002-0001(3)(d), (e), set out at note 5).

9. *See generally*, D.A. Andrews, *An Overview of Treatment Effectiveness: Research and Clinical Principles,* Department of Psychology Carleton University, Ottawa Canada (1994); *Treatment Works For Youth In The Juvenile Justice System*, National Mental Health Association, and sources cited (http://www.nmha.org/children/justjuv/treatment.cfm); Mark Gornik, *Moving from Correctional Program to Correctional Strategy: Using Proven Practices to Change Criminal Behavior*, U.S. Department of Justice, National Institute of Corrections, and sources cited (http://www.nicic.org/pubs/2001/017624.pdf). 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).

10. There's a third camp worth mentioning here; I'll call them the "managers." Their concern is short run efficiency - literally the speed of the plea bargaining and trial process, and the economy and budgets of courts, law enforcement, indigent defense, and corrections. They see the whole process as one calling for the regularization of the use of whatever resources we have, and have brought us the guidelines which generally seek to regularize the use of hard beds in proportion to crime seriousness (measured along an essentially deontological scale of just deserts) and prior criminal history, with discretion to fudge based on aggravating and mitigating circumstances. They tout equal treatment and resource regulation as major accomplishments, although their success in both respects has its flaws. But they resist and avoid statutory and constitutional prescriptions to seek public safety through crime reduction because, in common with many in both other camps they assume that "public safety" is incarceration, which they try to regulate as a matter of responsible resource management, and because they are suspicious of the efficacy of "rehabilitation." For the managers, public safety is a function of how much the public will be willing to spend on hard beds and some programs, but that is someone else's problem and responsibility; theirs is to keep the system running efficiently – like public transportation officials who have no interest in what commuters do when they disembark. Of course, the managers' persistent myopia is their failure to appreciate the inefficiency of incarceration which fails to divert offenders from criminal careers and simply recycles them into the front end of the criminal justice system – after one or more new victimizations.

11. The only exceptions are impaired drivers and "johns" arrested for prostitution – having mistaken an undercover "prostitution decoy" for the real thing. There are recidivists among these offenders, of course, but they are relatively rare – a good thing, since they are also often quite dangerous.

12. Portland Police Bureau Data Processing, August 25, 2000. The Portland Bureau of Police stopped producing these statistics in mid-2000; I am still waiting for their successor. An extract of the statistics is available at http://www.smartsentencing.com.

13. *The Booking Frequency Pilot Project In Multnomah County, Oregon: A Focus On Process And Frequencies*, at i (The Multnomah County Sheriff's Office, Dan Noelle, Sheriff, in collaboration with the Multnomah County Department of Community and Family Services, Department of Community Justice, Health Department, and Corrections Health Division (January 2002)). Portland is the largest city in Multnomah County, Oregon. "DSS-Justice" is a data-warehouse based criminal justice tool which also supports the sentencing support tools discussed later in this paper. http://www.co.multnomah.or.us/dss/info/initiatives/DSSProjectOverview.shtml; http://www.lpscc.org/dss_justice.htm;

http://www.lpscc.org/docs/evaluation_capacity.pdf;
http://ourworld.compuserve.com/homepages/SMMarcus/SentSuptTools.htm.

14. Bureau of Justice Statistics Criminal Offenders Statistics, http://www.ojp.usdoj.gov/bjs/crimoff.htm.

15. Bureau of Justice Statistics Criminal Offenders Statistics, http://www.ojp.usdoj.gov/bjs/abstract/rpr94.htm.

16. One measure is Multnomah County Court data showing new felony case filings in 2003 at 6,114, and new misdemeanor case filings at 23,737.

17. Our sentencing support data, discussed later in the text, confirms the impression of the literature that for low level offenders, short jail terms (one to five days) generally "work" better than longer ones (30 days or more) because the shorter terms are less disruptive of circumstances conducive of lawful behavior: employment, housing, and stable relationships. Higher up the range of incarceration, longer terms encourage accommodating life in custody and associating with a prison population, and are thought to enhance criminal thinking and values. *See, e.g.*, 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). Of course, for some offenders, good programming within prison can produce significant reduction in post-prison criminal behavior.

18. Even if proponents of prison can be confident in holding the line against any reduction in the number of prison beds, economics can limit the growth in that number over time. Moreover, hard beds certainly compete with program expenditures for corrections dollars – and program expenditures, at least for some serious criminals, greatly affect the likelihood that they will reoffend when returned to their communities. Again, the trick is to aim the programs at the offenders who will benefit from them, and not to fill slots with those who won't.

19. See 1997 Or Laws Ch 433, accessible at http://www.Smartsentencing.com.

20. The Oregon State Police began work on a Public Safety Data Warehouse that would have eventually supported such an effort, but returned the balance of a federal grant and cancelled the project rather than come up with matching money in the early days of the current budget crisis. If and when the project is resurrected, it should be housed in an agency more suited by institutional culture to data sharing – the State Police expended considerable effort to gather an informal Attorney General opinion (which it maintains as confidential) concerning whether it was "permitted" to share CID numbers with other criminal justice agencies. CID numbers exist, of course, for the primary purpose of ensuring accurate linking of criminal records to offenders within and across criminal justice agencies.

21. A data warehouse automatically collects copies of data stored in multiple systems, and stores the resulting information in a form and structure designed to facilitate analysis that would otherwise require separate access to each of those systems and manual compilation of reports. Multnomah County's "DSS-Justice" data warehouse, constructed and maintained under the auspices of the Multnomah County Local Public Safety Coordinating Council, is refreshed nightly from the source systems, and supports a host of applications for criminal justice partners. See http://www.lpscc.org/docs/overview_dss-j.pdf.

22. Bars display only for those sentencing elements that have been imposed at least thirty times for the cohort in question, but a table below the bar chart displays all data for all elements imposed for the cohort. The thirty occasion minimum discourages predictions based on insufficient data.

23. Data rules determine whether a given criminal history receives a rating of "none," "low," "moderate," "major," or "severe." In all but domestic violence, only convictions count; arrests not followed by dismissal for want of merit (as opposed to mere loss of victim cooperation, for example) do elevate a domestic violence rating. The rules are accessible at http://www.ojd.state.or.us/mul/marcus_crimethemegrid.pdf.

24. A step-by-step description, with screen shots, and a link to a user manual, are available at http://www.smartsentencing.com.

25. The proposal would not affect the *automatic* remand of juveniles whose crimes and ages fit within mandatory minimum sentencing provisions introduced by "Ballot Measure 11," ORS 137.700.

26. One withdrawn proposal is for resurrection of the Public Safety Data Warehouse and replication state-wide of the Multnomah County sentencing support application. It was clear that this failed the "reasonably available economic resource" test in this budgetary climate.

27. There are endless possibilities, ranging from the modest to the comprehensive. In one real sense, making crime reduction impact an express consideration for departures would itself add a public safety dimension to the guidelines. The availability of a program in the community (or in custody, for that matter) that is more likely than other sanctions to reduce recidivism could be a consideration for all sentences which approach the presumptive prison vs. presumptive probation divide – or indeed, for all sentences. And it might make sense to use a risk prediction instrument to posit a presumptive period of incarceration for all crimes for which incarceration is plausible; it makes no sense to ignore psychopathy around violent crime in particular.

Ideally, risk prediction and assessment, criminogenic factor analysis, and resources would drive the assessment of a presumptive sentence for all crimes and criminal histories, with departures based on compelling and substantial reasons to forfeit crime reduction for some other purpose sentencing becoming the exception. But a journey of ten thousand miles begins with a single step.

28. "Project Bond" is an undertaking promoted by Circuit Judge Pamela Abernethy of Marion County. Based on literature documenting the crime-reduction efficacy of such intervention in the target "at risk" families, this effort involves adult offenders whose household includes very young children in parenting education and appropriate social services.

29. Space does not allow a full consideration of all of these, but most are considered at length on the "Frequently Asked Questions" page of the website at http://www.smartsentencing.com.

30. Or. Const, Art. I, § 15.

31. Specific deterrence is the effect on the offender who is punished, with the assumption that an offender will avoid behavior in the future that resulted in punishment in the past. General deterrence is the effect on potential offenders in general – the prospect of being punished makes some of these decide not to commit crimes they otherwise would commit. I suspect that the efficacy of specific deterrence is minimal to none for most offender cohorts, as poignantly demonstrated by persistently punished offenders. The literature around specific deterrence suggests that for some cohorts, punishment *increases* recidivism– at least as measured *after* incapacitation, but it clearly appears to work on others. Literature suggests (albeit on an *a priori* basis, hypothesized with the use of economic models) that any efficacy of general deterrence depends on the certainty and swiftness of a sanction – not its severity.