On December 9, 2008, the Oregonian published a “guest opinion” on behalf of all DAs in the state, and written by three of them. Here it is:

Accountability for our justice system

by John Foote, Michael Schrunk and Dan Norris, Guest opinion

Tuesday December 09, 2008, 5:16 PM

Editors at The Oregonian continue to insist that they're smarter than the state's citizens when it comes to property crime. They have repeatedly published one-sided stories and editorials, one after the other. The latest was the front-page story "Prisoner to Measure 57" (Dec. 1). It's time for a dose of reality.

If the votes in favor of Measures 57 and 61 in the Nov. 4 election are counted together, more than 1.9 million Oregonians cast ballots in favor of tougher sentences for property criminals. When voters overwhelmingly passed Measure 57, they were fully aware that money was going to be tight for everyone, including state and local government. But voters announced in a strong, clear voice that public safety is at the top of the list of public services for which they pay the bill.

It's ironic that The Oregonian continues to focus on the cost of Measure 57. Voters understand that low property crime rates are a vital part of economic recovery for Oregon. Property crime costs all of our citizens, including the actual economic costs to the victims of crime, the increased insurance rates for law-abiding citizens and the threat to our community's overall sense of safety and security. Measure 57 will remove career property criminals who cause the worst economic damage to our communities. There are numerous studies that show that locking up active property criminals saves money in the long run. Measure 57 is a real investment in the economic vitality of our state.

Measure 57 changes the rules for career property criminals. Prior to the measure's passage, a career property criminal in Oregon was not even eligible to go to prison until he or she had been convicted of at least five felony property crimes. Car thieves, metal thieves, identity thieves and burglars were given a slap on the wrist for their first, second, third or fourth felony convictions. The criminal justice system was completely powerless to take these criminals off the street.

Under 57, a repeat property criminal becomes eligible for prison on his or her second felony conviction. Judicial discretion will be retained for those cases in which public safety can be protected without sending a criminal to prison. And there will be treatment for those criminals who are ready to change their behavior, whether they are in prison or in the community. Measure 57 will restore common sense and real accountability for property criminals who are doing so much economic damage to our communities.

Those of us who work in public safety are ready to continue to work with our governor and the Legislature to find more ways to make our justice system more effective in protecting the public. We look forward to the upcoming legislative session as another opportunity to continue that important work on behalf of our citizens.

John Foote is Clackamas County district attorney. Michael Schrunk is Multnomah County district attorney. Dan Norris is Malheur County district attorney and president of the Oregon District Attorneys Association. All 33 of the other district attorneys in the state signed their agreement with this opinion.

On December 10. I submitted a response to the Oregonian, which it did not print [perhaps because the "1.9 million voters" was the Oregonian's mistake, not the DAs'], so I sent it directly to the DAs who wrote the "guest opinion":

The prosecutors' support for Ballot Measure 57 ["accountability for our justice system" 12/10/08] promises "a dose of reality." The pitch immediately falters with the argument that adding the yes votes for measures 57and 61 shows that "more than 1.9 million Oregonians cast ballots in favor of tougher sentences." The ballot measures were in competition, so many felt compelled to vote for one and against the other. Many thought both were a bad idea but felt compelled to vote for Measure 57 as the lesser evil. But voters were free to vote for both and obviously many did – fewer than 1.9 million Oregonians even cast ballots in the election. Most who voted were convinced that increasing sentences would serve public safety, but the "1.9 million Oregonians" pitch is simply wrong.

The next argument is that studies show that locking up active property criminals saves money, so that putting Measure 57 offenders in prison is a "real investment in the economic vitality of our state." Locking up some offenders is the best response to their criminal behavior. But a full dose of reality would recognize that while some studies suggest that prisons can avoid a bit more economic cost than they cost to build, other studies routinely show that the return on community based sentences is far greater – more like $5 to $7 for every $1 of "investment." Studies show that for some low and medium risk offenders within Measure 57's purview, imprisonment is likely to increase their criminal behavior. Studies show that what works best varies tremendously with variations in risk and needs – to which Measure 57 is blind.

The contention that "there will be treatment for those criminals" also needs a reality check. Even if the Legislature funds the treatment Measure 57 prescribes, most Measure 57 offenders will not be sufficiently "high risk" to qualify for that treatment. Most will come back without treatment.

The title "accountability for our justice system" was probably the Oregonian's addition to the piece, because prosecutors usually speak of offender accountability, not ours. If it matters, we would measure it. But we only measure the recidivism of drug court graduates. The dose of reality we need is this: an accountable "justice system" would insist that all sentencing, and the plea bargaining that drives 90-95% of sentences, be responsibly tuned to achieving crime reduction over the offender's potential career. The only exceptions should be when victims' interests, public trust and confidence, or any other legitimate interests demonstrably require an exception. Merely aiming for the broad target of "just punishment" is not enough, but outside the treatment courts, that's what we generally do in spite of our best intentions. We are not accountable until we submit to measurement of our impact on public safety and accept responsibility for best efforts to achieve it. Measure 57 doesn't do that. We have to do that.

On December 15, 2008, John Foote responded by eMail:

Dear Judge Marcus,

Thank you for taking the time to respond to our editorial. We always appreciate hearing your point of view. You make some interesting points. And sometimes we just have to "agree to disagree." We look forward to continuing to work with you and your fellow members of the judiciary, as well as the other parts of our justice system, to make things better.

Thanks again,

On December 15, 2008, I responded:

I'm sure we agree that 1.9 million voters did not vote for anything in Oregon's election.

I do wish we could make some progress in the driving engine of plea bargaining, particularly as plea bargaining drives 95% of sentences. Yes, I know judges sometimes annoy prosecutors by fiddling, but it's just fiddling -- you guys determine the sentence, but you don't focus on data for public safety.

Take a look at the attached -- let me know where we disagree.

I don't think we do or should disagree about much; the question is what are we going to do.

This was the "attached" :

Crime and Punishment in the 21st Century
What's wrong, how we're working on it, and how far we have to go

The obvious measure of success for law enforcement and the district attorney's office is a conviction for a crime. Once an offender is convicted, judges impose punishment in the form of a sentence that may include probation, jail, prison, fines or some alternative punishments like community service. Most members of the public expect that we impose sentences to protect them from crime, but most sentencing really has nothing to do with public safety. As a result, the criminal justice system is far worse than it should and could be at reducing crime. We are wasting huge amounts of public money. We are being cruel to the victims of crimes we should have prevented and to offenders punished with no benefit to them or to society. Officials often explain that we need more resources to fight crime. We do need more resources, but it is even more important to insist that we use resources far more wisely than we do now. Until we fix what is wrong, building more prisons and sending more people to jail will do more harm than good. Sending offenders to the wrong programs or to programs that don't work serves no one well. We urgently need to understand what is wrong and to fix it.

To understand what is wrong, we need first to examine why we impose punishment for crime. Traditionally, punishment is supposed to accomplish several purposes. What most writers call the

"utilitarian" purposes of punishment include deterrence, rehabilitation, and incapacitation. Punishing one offender is supposed to convince others not to commit crimes for fear of receiving a similar punishment (general deterrence). Punishment is also supposed to convince the punished offender not to offend again for fear of being punished again (specific deterrence). Requiring the offender to participate in programs, submit to jail or prison, or perform some alternative sanction is supposed to "reform" or "rehabilitate" the offender so he or she will not choose to commit new crimes in the future. Placing the offender in jail or prison at least prevents crime on the outside by "incapacitating" him while he is locked up. By these means, sentencing is supposed to accomplish the "utilitarian" purposes of punishment by reducing criminal behavior. These are the public safety purposes of punishment.

Purposes other than public safety are supposedly served when punishment is imposed because it is "deserved." Most writers refer to these purposes as "punitive," "just deserts" or "doing justice" or simply imposing "punishment that fits the crime." When a crime has victims, serving their needs is also a purpose of sentencing in addition to public safety purposes.

Since 1996, our state constitution has used newer language to refer to the same purposes of punishment: "Laws for the punishment of crime shall be founded on these principles: protection of society, personal responsibility, accountability for one's actions and reformation." The "public safety" purposes of punishment are covered by "protection of society" and "reformation," while the remaining purposes of punishment are covered by "personal responsibility" and "accountability."

In the middle of the last century, most academics and many lawmakers were convinced that all crime could be addressed with treatment and programs, although many others were doubtful that criminals could be reformed. The debates raged for years, but the 1962 Model Penal Code, which relied heavily on reformation, was adopted by most states. Oregon's 1971 code revision was based on that Code. In the 1970s, the tide turned when Robert Martinson examined treatment programs and concluded that "nothing works" to reduce offenders' criminality. Within a few years, Martinson retreated from this position, having concluded that some things do indeed work on some offenders.

But it was too late. Those who had always been skeptical and preferred punishment, jail, and prison to treatment declared victory. And most of those who supported rehabilitation switched their allegiance to the sentencing guidelines movement. In Oregon, by 1989 we had adopted sentencing guidelines that distribute prison and probation based on crime seriousness and criminal history – with virtually no attention whatever to what sentence is most likely to reduce an offender's criminal conduct in the future – including after he gets out of jail or prison. The sentencing guidelines to this day determine how we spend most of our corrections dollars. They amount to a chart that determines the "presumptive" sentence by selecting a row related to the seriousness of the crime for which the offender is to be sentenced, and a column related to the offender's criminal history. Where the two intersect is the range of months or custody units the judge must impose unless the judge finds "compelling and substantial reasons" to impose some more or less serious punishment. The guidelines expect such reasons to be based on "aggravation" or "mitigation" – concepts that focus on how mad we should be at the offender rather than on public safety. Of the 99 "gridblocks" created by the intersection of 11 rows and 9 columns, only three "optional probation" blocks invite the court's

attention to the likelihood that treatment might be more effective at preventing an offender's next crime. The remaining 88 gridblocks have nothing intentionally to do with public safety.

The skeptics of the old system had long complained that a "20-year sentence" was nothing of the sort, but often meant a much shorter period of prison followed by parole – in the discretion of a parole board. For the skeptics, the guidelines provided "truth in sentencing" by specifying a number of months in prison that more closely resemble the time that an offender will actually serve. The guidelines also were intended to impose some consistency in sentencing and to save prison resources, important goals for budget and management purposes, but also for those who had previously hoped treatment would be an adequate response to crime.

Guidelines have been disappointing. Although they have definitely reduced the tendency of some judges in some counties to impose unusually severe or lenient sentences, they are completely blind to many differences among offenses that should matter. For example, they treat a psychopath and a drunk the same if they land in the same gridblock. And the ultimate sentence varies greatly because of the local prosecutor's policies and tactics in charging crimes and in driving plea bargaining to result in a gridblock that may be quite different than the one that would apply to the offender in another county.

Guidelines have also failed to limit the severity of sentences or the need for new prisons. Ballot measure 11 imposed mandatory minimum sentences for many serious crimes that override the guidelines. The legislature has been persuaded to raise presumptive sentences for "repeat property offenders," and Ballot Measure 57, passed in 2008, requires judges to impose longer sentences on many offenders – even though crime has been steadily decreasing, and even though Oregon's imprisonment rate is already somewhere between that of Russia and Belarus, which are second and third behind the USA as world leaders in imprisonment. We – USA – are number one.

In terms of public safety, the guidelines and the current sentencing culture is a disaster. Although our department of corrections would tell you our recidivism rate – the proportion of prisoners who commit new crimes when they get out – is around 30%, that is because they don't count misdemeanor convictions as recidivism – even though misdemeanors include most versions of domestic violence, theft and driving under the influence. When all crimes are counted, our recidivism rates are closer to 65-75%. Because most sentencing doesn't seriously attempt to reduce crime, it doesn't work well to reduce crime. Because we don't make our best efforts at sentencing wisely, we continue to tolerate new victimizations that wiser sentencing would have prevented, and we continue to punish many offenders in ways that does no one any good, and may even make them worse than before we met them. There is little doubt that many of the offenders swept into prison by Ballot Measure 57 will be a greater threat when they leave prison than when they went in.

There is some good news. Oregon judges and some prosecutors have helped to establish treatment courts that carefully pursue crime reduction through addiction treatment – with increasing attention to whether the treatment actually works. While the rest of criminal justice was focused on punishment, aggravation, and mitigation, probation departments, corrections, and criminology have

learned a great deal about what works on which offenders. They have learned through "evidence-based practices" to use reliable tools to assess an offender's risk and to determine what might work to reduce that risk. So while most sentencing sends offenders to various levels of punishment with no attempt to focus on what is most likely to work, those probation and corrections agencies who receive our sentenced offenders are increasingly equipped to reduce the harm caused by our mistakes.

And Oregon has made a number of advances through a constitutional amendment and legislation to proclaim that effective sentencing must pursue public safety. We've laid the groundwork through laws that require criminal justice agencies to share information to help us see what seems to work best on which offenders – and to use that information. Oregon's "eCourt" technology modernization program stresses the need to help judges make better sentencing decisions – and juvenile and family law decisions – to serve public safety and the needs of children and families.

In 2005, the legislature directed the Criminal Justice Commission to study whether the sentencing guidelines could be adjusted to do a better job of crime reduction. The Commission in response suggested that judges be encouraged to consult risk assessment instruments when making sentencing decisions, but the 2007 legislature did not adopt that legislation. Nonetheless, the Commission will soon be offering judges a risk assessment instrument to help them achieve more effective sentences.

And a committee of Multnomah County Judges is attempting to nudge the culture of plea bargaining. Plea bargaining for all practical purposes determines roughly 95% of sentences. Yet it has little or nothing to do with public safety. Most plea bargains balance the prosecution's sense of "just punishment" against any risks that the defense might prevail on a motion to suppress evidence or at trial. Although some negotiate around treatment or community service in lieu of jail, none actually make any attempt to learn which might actually work to change an offender's behavior. Treatment programs, in general, are assigned because they purport to address a problem that has something to do with the category of crime – addiction, alcoholism, or violence – regardless of the offender's actual needs, and with no attention to whether the programs' graduates commit new crimes. We're trying to change all of that, but progress is slow.

At the heart of the problem with all of this is that we have allowed everyone involved to avoid accountability for real results by saying things like "the purpose of sentencing is punishment"; "just deserts has a place in Multnomah County"; "the prosecutor's job is not just about public safety, it's about justice." In one sense, all of these statements are true. But, as a practical matter, they are all terribly destructive. They allow us to claim success as long as a punishment is not too lenient and not too severe – without making any attempt to choose a sentence within that range that is most likely to accomplish anything at all. Not only do we fail to achieve the best outcome in terms of public safety, but we also fail to achieve those other legitimate purposes that are buried somewhere in those slogans of "punishment," "just deserts," and "justice."

We have learned over the years not to accept the claims that treatment works just because we hope it will. We've learned that we need to measure the performance of programs by how offenders behave when they graduate. We've learned that some programs work on no one, and that we need to

know quite a bit about an offender before we have a decent chance of sending him to a program that will work on him. We've learned that general deterrence makes sense in only a small category of crimes, and that whether specific deterrence makes any sense depends a lot upon offender characteristics that we can measure. We've learned all of this, though we still tend to ignore it – except in the treatment courts.

We also need to learn the same things about the other purposes of punishment. Those purposes are these: to maintain public trust and confidence; to avoid people taking the law into their own hands by vigilante justice or private retribution; to reinforce public values that condemn criminal behavior; to encourage respect for the persons, property, and rights of others; and to serve the needs of victims of crime. We don't achieve these purposes merely by stating them, any more than we achieve the purposes of treatment or programs just by stating their purposes.

In order to make any real progress, we need to break this log jam. It is not acceptable that slogans keep us from demanding that sentencing serve its social purposes. In most cases, best efforts at crime reduction also serve all the other purposes of sentencing. In some cases, those other purposes require some different sentence than the one that pursues crime reduction alone. But we need to insist that we make sure that we know what a sentence is supposed to accomplish, and that we pursue the purposes with accountability for success. We should assess the offender and the offense and determine what sentence is most likely to reduce the risk that the offender will commit a new crime. If a thief has an addiction problem, we need to do our best to figure out whether drug treatment will work as well or better than jail – or more jail – to protect the public. When there is an argument that we need more jail just to "send a message," or to serve public trust and confidence, or to enforce public values, or to meet the needs of victims, we need to be responsible in determining whether those interests actually justify a different sentence than the one that best reduces the likelihood of more crime by the offender. We should address those purposes, but not by merely pretending that we are addressing them. Most victims who appear in court for most crimes tell us that although they may want financial restitution if they have sustained some loss, they want most of all that we find some way to stop the offender's criminal behavior. In general, public trust and confidence is best served by making our best efforts at crime reduction – and not otherwise. In most cases, there is no rational basis for doing something other than our best efforts at crime reduction. In some cases, we will need to impose punishment even if it isn't necessary to prevent recidivism – examples are the shaken baby cases involving a defendant who will surely not offend again, or the social drinker who kills while driving drunk. Public values, and public trust and confidence, in these cases demand a substantial punishment regardless of the risk of new crimes by the defendant. But in most cases, public values and confidence are damaged by resorting to slogans to avoid the difficult task of doing our best to reduce crime.

The job of "doing justice" at trial from the court's perspective is to assure a fair trial and the protection of the rights of offenders and of victims of crime. From the state's perspective, doing justice at trial is achieving a conviction of someone who has committed a crime. But at sentencing, we cannot claim to be "doing justice" in most cases unless our sentence represents our best attempt to prevent the next crime by the offender, within the limits of law, proportionality, resource, and priority. Anything less is hardly delivering justice to our community.

In conclusion, if you want better public safety, demand that policy makers, judges and prosecutors be accountable for pursuing legitimate social purposes when they spend public resources by imposing punishments. Measure our success at reducing crime, and measure our success at achieving anything else with sentences. But don't give us a free pass just because we say we're "doing justice" or imposing "just punishment."

On December 15, 2008, at 1:42 pm, John Foote wrote:

Dear Judge Marcus,

Let me give you some initial thoughts to your piece. First, thank you for taking the time to write it and send it to me. I assume you wrote it at another time for another purpose. I would love to know the circumstances and time that provoked you to write it.

But let me offer some direct comments. First, you gave a short history of what you believe has been the progression in sentencing philosophy in this country. I am sure that is the history that the history books and written materials on the subject offer. However, that is not the history that I know or that my colleagues here in Oregon know. Let me give you what I have experienced in the criminal justice system in Oregon over the past 28 years.

As I am sure you know, sentencing philosophy (specifically prison sentences) has followed either the "determinate" or "indeterminate" approach. "Determinate" prison sentences are much like sentencing guidelines or mandatory minimums. The sentence is "determinate" and not subject to much change.

Oregon was following the "indeterminate sentencing" approach when I joined the legal profession in 1979 and had been doing so for many years. In that system, the judge announced the maximum sentence and the parole board actually decided when the inmate would be released from prison. And theoretically the parole board was dedicated to trying to determinate how the inmate was doing in prison and whether or not he was being successfully "rehabilitated" and, therefore, ready for release back into the community.

During my early years as a prosecutor it was apparent to everyone in the system that it was bankrupt and had absolutely no credibility. Judges, defense attorneys, police, probation officers, prosecutors, virtually everyone knew that the sentences handed down in court were a joke. For instance 20 years for residential burglary actually meant 6 months in prison, including credit for time served. A 5 year sentence for forgery, theft or commercial burglary actually meant 40 days with credit for time served. And everyone in the system became very frustrated and angry about how it worked, except, of course, for our career criminals who also thought it was a joke, but a good joke that really benefitted them. They understood nothing was really true; nothing that was said in court or in negotiations or by the police or their attorneys was real. It was the personification of "dysfunction." And a deep cynicism spread through the entire system. Most importantly victims became furious and resentful of the entire

process. As an example that I witnessed personally, one of my closest friends from law school became a very successful patent attorney in Portland. I would describe him as very liberal and open minded. He found a burglar in his home in the middle of the night and chased him away. He was caught and prosecuted successfully and sent to prison for "20 years." The defendant was a career criminal with many burglary convictions. My friend followed the entire process. Not more than 6 months later he called me on the phone and wanted to check to make sure that the sentence was actually 20 years because he had just seen his burglar standing next to him at a cross walk in downtown Portland. He was flabbergasted and disgusted. This kind of thing happened over and over again for years involving thousands of victims, witnesses, etc.

The underlying reason for the way this "determinate" system had developed in Oregon was quite simple. The Oregon legislature did not build more prisons so the parole board was changed into a population control device. Decisions were made strictly on how many inmates had to be moved out to make room for the new ones. There was no "truth in sentencing." The parole board had virtually unlimited power to change sentences later on.

All of the cynicism and frustration lead to the development of sentencing guidelines in the late 1980's as a way to restore "truth in sentencing." The concept is quite simple. What everyone hears in court is actually what is going to happen. Trust and confidence is restored because people can believe what they hear. Sentencing guidelines also contained a 20% earned time provision that allowed inmates to work off 20% of their sentence by behaving in prison and participating in all the treatment programs that had been ordered for them by the sentencing court or DOC. That possible 20% reduction from the original sentence was considered to be small enough to not impair "truth in sentencing" while still providing inmates with an incentive to change.

However, the sentencing guidelines grid was deeply flawed because it was based upon apportioning the available prison bed so that the most serious crimes received the longest sentences. But, the prison system was so small that there simply weren't enough beds. All the sentences were much shorter that the participants would have recommended. In fact, almost all property criminals were simply ineligible for prison. And most violent crimes did not have very long sentences as well. The plan was to continue to expand the prison system so the sentences could be readjusted later to fix these issues. But Governor Goldschmidt who was the architect of this effort, left office and the commitment left with him. The prison system stopped expanding and the guidelines grid was frozen.

That situation existed for 6-7 years into the early 1990's. Every session many prosecutors and other tried to help the legislature and governor to understand that the public expected more. But no one would do anything. So, Measure 11 arrived and was received by the public as a great way to force the legislature to do what they felt they should have been doing all along. It passed with overwhelming support and remains extremely popular even today. And an effort in 2000 to repeal measure 11 received approximately 25% of the vote. In other words it was absolutely slaughtered at the ballot box. And violent crime, which was not dropping before measure 11, has been dropping like a rock ever since (almost 50% in the past 13 years). The public (and I) believe measure 11 has greatly impacted the violent crime rate in Oregon and prevented thousands upon thousands of new victims.

In the past few years virtually the same scenario was being played out over property crime. In the past 2 legislative sessions prosecutors and others tried valiantly to encourage the legislature and governor to support modest increases in the sentences for repeat property criminals with absolutely no success. Then Measure 62 appeared and it had overwhelming support from the public. Measure 57 was devised by prosecutors as a better alternative to 62. Measure 57 retained judicial discretion and encouraged effective treatment for inmates who wanted to change. As you know, Measure 57 passed with more than 61% of the vote after the economic collapse in Oregon and across the nation. And Measure 62 only failed by a few thousand votes. I am convinced that 62 would have passed if it were not for 57.

So, you might ask, what are my observations and suggestions? Well, first of all I am reminded of the wonderful scene in the movie "Shawshank Redemption" in which Clifford Freeman's character, who has been in prison for decades for a murder, is asked by the Parole Board if he as been rehabilitated. He responds were a sneer and says; (I am paraphrasing here) "Rehabilitated? that is just some word someone made up. If you are asking am I the same boy who committed that murder 30 years ago? No I am not. I wish I could go back and talk to him."

I have become skeptical of the word as well. Based upon my 58 years on this earth and 28 years in the justice system watching and learning I have come to the conclusion that change is the most difficult thing human beings can try to do. I loved smoking when I was much younger and quitting was one of the most difficult things I have ever done. I think we cheapen the accomplishment when we talk about people changing their behavior like it is something we can do everyday. It is incredibly hard to change. And that includes criminals. So, when we talk about turning these criminals around (and we only lock up folks who have done the worst things or have the worst criminals records, not the younger more impressionable ones who are easier to change) I am extremely skeptical. I think they will change when they are ready and not when we think they should be ready. Many of them are committed to criminal thinking and a criminal lifestyle. They think it works for them.

I also think we must have 'truth in sentencing". Without it public trust and confidence are eroded and, eventually lost. Those of us who are lucky enough to work in the criminal justice system know we are really in the public trust and confidence business. We know we must work very hard to earn the public's trust and that when we have earned it; our ability to do our jobs is greatly enhanced. And people's sense of justice is closely connected to their sense of trust and confidence in the people who are doing that work. We look for prosecutors in our offices who will be able to exercise their judgment in a way that will earn trust and confidence.

I also believe that prosecution and sentencing are wrapped up in people's sense of justice. We need and want our citizens to believe in and trust the criminal justice system to protect them from predators and also handle the violent disputes that plague our society. If the public does not trust us to get the job done, they will resort to their own resources to make it happen. In many other places around the world, that is exactly the condition their criminal justice system is in. We never want that to happen here. Therefore, it is vitally important that our citizens have a general sense that the prosecutions and punishments are proportional to the crime. Serious crimes result in serious punishment. And predators, violent or financial, are taken off the street to protect people. That is precisely why sentences must be

of sufficient length. Without the public's general support for sentences, the system will not have public confidence and support and that can have devastating consequences for our society in the long run. That is why our law makers should listen to our citizens and try and incorporate their concerns and sense of justice into our system.

So how do we balance the public's sense of justice with the treatment of inmates? First, they always deserve to be treated with respect regardless of the crime they have committed. And the criminal justice system must remain civilized as the example of how to handle these situations. And we should try to offer inmates and criminals opportunities to change their behavior. This includes bringing resources to bear that they could not afford on their own. But this should not be done at the expense of public trust and confidence.

Finally, should the criminal justice system make it first priority to change criminal behavior? I certainly agree that is something we should all be working on. But, I do not believe it is the first responsibility of the criminal justice system. And I believe that if it is made the first priority, public confidence and trust will disappear. Our citizens know they are responsible for their own conduct everyday. And they pay the consequences when they fail in many small ways. Sometimes they pay even when they haven't done anything wrong. Life can be very unfair in that respect. But, our citizens do not believe that being a criminal should not give you more resources and opportunities to change than the average citizen. If that happens, I believe our citizens will no longer support the system.

I know I am only one person in the large system and my opinion is only one of many. I respect the opinions and suggestions of others as much as my own. And I am not in the position to make the final decisions on many if not virtually all of these issues. But, I do feel a genuine responsibility to offer my opinions when asked to do so and to base them upon what I have actually learned in my 28 years in public service.

Thank you for asking me to respond to your paper. I wish you the very best in this holiday season.

Take care.

John Foote

On December 15, 2008, at 1:44 pm John Foote wrote:

Judge Marcus,

I also felt I should explain that we did not write the 1.9 million Oregonians voted for tougher sentences. What we wrote was the 1.9 votes were cast for tougher sentences. We know that at least some citizens voted for both measures so we wrote it as accurately as possible. The editors at the Oregonian changed the language without our permission and or knowledge. That remains a frustrating part of their process that we can't change.

Take care.

John

On December15, 2008, at 8:13 PM, I wrote:

John: This is a great response. It will take me some time to respond intelligently. We agree more than you'd suspect. Just for example, my pitch is not that "rehabilitation" is job one, but that "preventing future criminal behavior" is job one. Rehabilitation is a subset of that goal, and should never be merely assumed, but vetted strictly for many reasons.

I will attempt to give your piece the response it deserves.

I expect I'll get to it soon, but other obligations intervene.

Have a great holiday - even if you hear from me first <g>!

On December17, 2008, at 9:22 PM, I wrote:

Dear John:

I greatly appreciate this conversation – thank you for taking the time involved.

Let me start by stating where I think we agree. Indeterminate sentencing was a major source of public distrust and anger; victims were rightfully furious with many common examples of disparity between sentences and time actually served. Abolishing most back-end discretion [parole] was a positive product of the 1989 guidelines for this reason. I need to do more to acknowledge this in my writings on the subject, and I thank you for reminding me. [I've already written an eMail to Kevin Reitz, with whom I have some key issues, to suggest that he emphasize this part of his argument for guidelines in the MPC sentencing rewrite].

Guidelines serve primarily to control prison growth (whether or not so originally intended – I think they were intended to do so from the outset) and were never structured to encourage sentences that best served public safety. They attempt to order just deserts within resource limits, and only contemplate effectiveness issues in the three optional probation gridblocks.

Ballot measure 11 remains invulnerable to repeal because it is popular. It is popular because it promised to do a better job of what the public wants from sentencing than prevailing sentencing as modulated by guidelines. And, although there is lots of room for argument as between cause and mere correlation, I agree that BM 11 in fact contributed to the (continued) decline in violent crime.

Public dissatisfaction with the guidelines and sentencing under the guidelines fueled BM 11, the repeat property offender provisions, and both BM 57 and 61 this cycle. BM 61 would have passed without BM 57 on the ballot.

Rehabilitation is far harder than the medical model proposed; losing weight and stopping smoking are actually good analogs for the difficulty of change that is typically necessary for reduction in criminal behavior. We have been woefully irresponsible in merely assuming that programs work. Many programs have never been validated for results, and some are probably useless. Many offenders will not change, many of those cannot. Depending on their risk level and the lawful availability of sentences based upon the crimes of which they have been convicted, many offenders should be incarcerated as long as we can afford to lock them up as the best means of pursuing public safety.

The legitimate purposes of punishment include preventing vigilantism and private retribution. Sentences perceived as disproportionate undermine public trust and confidence; maintaining public trust and confidence is a legitimate purpose of sentencing. The legitimate purposes of punishment also include reinforcing pro-social values (which includes denouncing antisocial conduct), and respect for the persons, property, and rights of others.

Policy makers (and sentencing judges) should consider the concerns of citizens.

Here's where I think you and I disagree: First, announcing that we can't change any offender who does not announce readiness for change, and forgoing the attempt, is flatly irresponsible – as are any protocols erected on that premise. Plea bargaining as it's usually conducted seems to stand on this leg among others. I see this attitude in some judges and many prosecutors – I view it as an easy but ultimately unsuccessful evasion of responsibility, and one with terrible consequences measured primarily by the victimizations we would avoid by accepting responsibility for making the best attempt to accomplish change.

While it is true that many will not change, we now know that there are effective strategies for dealing with those well short of recognizing their problem and accepting responsibility for fixing it. The literature is abundant; the labels are "stage of change" and "motivational interviewing" – though the reality they represent is part of the same continuum. Essentially, people with criminal behaviors vary widely along the spectrum of total denial ["precontemplative"] to meaningful engagement in fixing what's wrong ["active"]. It is a relatively simple matter to determine where an offender fits on this spectrum. Only by recognizing the offender's stage of change and packaging our intervention appropriately – whether it be judges' speeches at sentencing or probation violations, probation officer interaction, or institutional curriculum counseling and delivery – are we beginning to be responsible in achieving that change that is achievable. Just for example, there are offenders who can begin to move off denial to recognizing that they have a problem and might be able to address it ["contemplative"]. If we hold forth with them [or attempt to deliver effective corrections or treatment to cause a change] as if they already knew they needed the intervention, we will certainly fail; if we instead employ vetted tactics to move them off denial, we have a demonstrably better chance of succeeding with our energies and, ultimately, for achieving the target objective of change. This field of social science, by the way, was originally

developed to deal with smokers who needed to stop smoking – as I understand it [don't hold me to this part – it's just my understanding of where stage of change analysis came from].

There is also abundant literature to the effect that a properly designed and delivered program will succeed at a substantially greater rate, and for less investment by far, than prison for many [but surely not all] cohorts that we now deal with by jail, prison, or programs that are neither properly designed nor delivered. This is in spite of the difficulty of accomplishing change. Really good programs can be expected to produce a reduction in recidivism among their target offenders on the order of 30%.

The major benefit of prison is incapacitation – serving public safety by preventing those on the inside from harming those on the outside (while they are inside). Although serious commitment to evidence-based programs in custody could alter these figures somewhat, prison generally is not a reasonable device by which to reduce criminal behavior by those who "graduate." While some offenders do in fact graduate and reflect reduced recidivism after their release than do like offenders who were not incarcerated, and though it's tricky to separate aging out from any specific deterrent impact of imprisonment, it is generally true that the recidivism of high risk offenders is not increased by imprisonment, while that of low and medium risk offenders is increased in correlation with imprisonment. The bleak downside of BM 57 is that it definitely sweeps broadly into the category of offenders who seem to worsen from custody: medium and low risk offenders. What we haven't studied [as noted by the Public Safety Strategy Task Force of the legislature] is how total crime reduction is best served by prison terms – how we can tell which offenders do and which do not make up for lost time by committing enough more crimes after release so that we lose the benefit of preventing the crimes they would have committed if not incarcerated.

Oregon's failure to keep up with the long-pending trend to increase the proportion of our population we imprison is not the source of our crime problem. Building more prisons is not the answer. As you are aware, the USA is world leader in incarceration rates according to the recent Pew report. Quibble with its methodology all you want, but we are incarcerating a higher portion of our population than all or almost all countries in the world. I hope you didn't buy Kevin Mannix's pitch that this proves that we are a free country because we care about crimes with less powerful victims, but there's surely irony if he's right and Oregon ends up nestled between Russia and Belarus when we compare the state's rate of incarceration with that of nations. Oregon would come in third. Of course, imprisonment rates have a great deal to do with the drug war – which is almost as expensive and surely as ineffective as our worst military enterprises in recent decades.

Our connection to imprisonment is addictive. Sending more and more types of offenders to prison is surely the most expensive way to deal with them, increasingly the least effective (as we descend from high to lower risk offenders, serious to less serious crime), and the most reliable method by which to increase future demand for even more prisons. The latter impact is the result both of boosting recidivism of those we should have addressed with community and evidence-based interventions or alternatives and competing with resources that are far better than criminal justice at preventing crime: parenting education, high school completion, and early childhood intervention. BM 57 adds the

criminogenic impact of forcing yet more children into the foster care system – many of whom will surely compete for prison beds in the future.

Our prison use is addictive because the more we use it as an easy [though expensive] fix, the more we will want even more prison as a result. At the very least, a crime reduction policy that depends on perpetual prison expansion (as a percentage of population) is unsustainable as a matter of economics, correctional efficiency (measured by crime reduction per dollar), and morality. What we need is a far wiser use of prison, based on risk and needs assessment, so that we send the right people there for the right length of time, and ensure by not misusing it that we have adequate prison resources for those who need to be locked up as long as possible as a simple matter of responsibility for public safety. A wise use of prison requires as well that we avoid it by rigorously vetting programs and alternatives for their actual results (measured by recidivism) and by using those programs or alternatives when they are more likely to serve public safety and the risk level is not prohibitive.

Let me return to public trust and confidence. We don't deserve or earn it just by virtue of the discontinuance of false sentences in 1989. Just because we stopped "lying" about how much time an offender will serve doesn't mean we are now entitled to public trust and confidence. We are still enabling the fallacy that severity and effectiveness are the same thing. We are still allowing each other free passes on accountability for public safety outcomes by allowing each of us to invoke our clinical judgment that a sentence is appropriate in light of our take on the public's "sense of justice" regardless of the care with which that sentence was aimed at reducing future criminal behavior. It is evasion of meaningful accountability for public safety outcomes whether our notion is that the sentence adequately serves just deserts or is necessary to avoid those who would be offended by providing services to an offender that "honest citizens cannot afford." We are allowing each other to make things up and act on them when we have no support other than seat of the pants "experience." None of us would rationally trust medical advice that rested on such clinical judgment alone; we'd rightly demand data-based analysis as at least an ingredient in the judgment.

My understanding of the literature I've seen is that the public wants public safety above all else; when asked to rate public safety, punishment, and rehabilitation, "punishment" is always the least preferred of the three. The public's support for rehabilitation is far greater than that of policy makers – I believe it is even greater than the evidence warrants. [I recently had a Blakely jury find all aggravating factors it could except "unsusceptible to rehabilitation" in a psychotic child sex offender case; I imposed the absolute maximum incarceration I could because I am convinced by expert testimony and risk instruments results that this is not a guy we can fix, but one we should always fear]. The notion that we should "balance" the tools we apply to attempting to reduce an offender's criminal behavior against public resentment that those tools are provided as a result of criminal behavior is hardly frivolous. I'd bet that the real question is whether the public trusts that the tools will work to reduce criminal behavior.

From my many years of experience, and having heard from many victims at sentencing, I am firmly convinced that a victim or the average member of the public might resent the irony that treatment is

the “reward” for criminal behavior, but would still prefer that we use it if and when it is the most reliable means by which to prevent or reduce future victimization at the hands of a given offender.

Of course, that’s my clinical judgment. It is vulnerable to the same criticism as I just directed at yours. I can cite a bunch of studies (and Art I, section 15 of the Oregon Constitution) for the proposition that the public’s highest priority is reducing future criminal behavior, but I cannot claim any data on the balance you describe.

So here’s my point: Clearly, job one is reducing criminal behavior. Yes, we have other responsibilities, including public trust and confidence. But truth in sentencing is not enough for earning and retaining public trust and confidence. Yes, there surely are cases where we would erode public trust and confidence by failing to impose a sufficiently severe sentence even if that severity were not required to serve public safety [I’ve frequently listed typical examples]. But in the vast majority of cases, we can exercise best efforts at crime reduction without offending any other legitimate purpose of sentencing. Yet we don’t typically exercise best efforts. Instead we give each other a free pass under one banner or another. That free pass forfeits the right to public trust and confidence and regularly erodes it. Ballot measure 57, its competitor (BM 61) and its predecessors (BM 11, RPO legislation, and others) are all lacking trust and confidence. We will continue to deserve that rating until we accept accountability for public safety outcomes and refuse to be diverted from that accountability by untested slogans about “sense of justice,” “accountability,” or public resentment at services for offenders.

My position is that we need to be accountable, and that accountability involves relying on the best evidence available to produce what we are supposed to produce. Public safety is part of what we are supposed to produce, and we are increasingly (though imperfectly) assembling best evidence about what is likely to achieve public safety with a given offender or offender cohort. We need to use risk and need assessment to inform clinical judgment. And we need to follow the evidence without bias – whether it leads us to treatment, alternatives, or custodial dispositions [all within the limits of law, proportionality, and risk of course]. And when there is a contention that other sentencing purposes require deviation from crime reduction as our goal in crafting a sentence, again we must rely on the best available evidence. Just as saying “rehabilitation” doesn’t make treatment work, saying “public sense of justice” doesn’t mean any public need requires a particular disposition. The best evidence of reality about the need for “justice” may be quite different than recidivism measures of program effectiveness. It may be an individual victim’s expressed need for tangible justice; it may be just the best individualized and rational argument – even that is an order of magnitude better than merely reciting the slogan involved. You probably share my perception that general deterrence has been whittled down to size by rational contemplation, and we all accept that merely invoking it doesn’t make it so that a given sentencing choice actually affects the likelihood that others will commit many common crimes. But we can do better than mere argument; we have and can get more and better research on what the public wants and needs, and what the public’s choices would be if directed to the question actually at hand in a typical or atypical sentence. We can actually get research accomplished on the question, for example, how resentment against services for offenders interacts with the public’s interest in public safety, and how that interaction is affected by perceptions (and realities) about the effectiveness of those services

in reducing future victimizations. We need to do our best to do our best. Merely taking a position is not our best.

Our present course is spawning avoidable victimizations. That reality profoundly undermines whatever we may be doing well to deserve public trust and confidence.

On December 18, 2008, at 9:55 am, John Foote wrote:

Judge Marcus,

Thank you for writing back. I must confess I have just about run out of things to say and time to say it. So, I will just briefly respond to your comments.

While I think we have much in common, I also think we fundamentally disagree about what is our first job. It is not to "reduce criminal behavior." That is the responsibility of each defendant, just like it is the responsibility of every other citizen. I find it frustratingly dysfunctional to keep talking about our responsibility to change criminal behavior. That is not our responsibility. That is the responsibility of those who are behaving that way. I simply don't want to engage in that kind of inverted thinking.

It is our job to pursue justice in every case and to try and work for sentences that are proportional to the crime(s) that have been committed and to support victims as they work their way through the process. Those are really important things to keep doing as well as we can.

But, I also want to say that it is certainly worth trying to afford criminals opportunities to change and by encouraging them to change and supporting them when they do. And there are ways to do that. I think that is where we can find common ground.

Take care.

And Happy Holidays to you!!

john

On December 18, 2008, at 10:55 AM, I wrote:

I agree that we have zeroed in on a fundamental disagreement, but there's a nuance I need to identify: Our fundamental responsibility is to reduce criminal behavior, which includes using incapacitation when change is not achievable or when the risk that it is not achievable is too high to excuse forgoing incarceration.

Saying that reducing criminal behavior is not among our highest responsibilities is contrary to what I understand Art I sec 15 to say when it first lists "safety of society" as the first purpose of sentencing. Even if no "change" is achievable, we are still responsible for doing our best to reduce criminal behavior of those we sentence. Commonly in some types of cases or cohorts of offenders, the only responsible way to achieve that reduction is through incapacitation.

From my perspective, substituting "proportional sentencing" as a performance measure [as opposed to a constraint on dispositions fashioned to achieve crime reduction and any other legitimate purposes] to the exclusion of doing what we can to reduce criminal behavior -- whether by encouraging, compelling, or enforcing program participation that will predictably work or by maximizing incapacitation [meaning prison] is to betray the public trust and our respective public missions. It is causally responsible for producing victimizations a more responsible approach would have prevented. It is at least ironic to claim that in this substitution we are serving the needs of victims -- we should and must serve victims needs in the ways I identified in the last piece, but that's no excuse -- and indeed profoundly inconsistent -- with formulations that avoid our responsibility to reduce or prevent future victimizations.

As to the notion that we are not responsible for reducing criminal behavior (by change or incapacitation) because change is the responsibility of the offender, it is again my notion that this a transparently ineffective attempt to avoid what is our responsibility. Here's what I had to say about the topic in a law review article approaching publication:

Blame, like love or compassion, is not diminished by its sharing. Of course offenders are to blame for their choices, and most do not even have an argument for mitigating that blame. Childhood hardship, educational deficits, economic deprivation, and the like are not usually persuasive excuses (although they may mitigate blameworthiness so as to affect limits of proportionality). Indeed, I would argue that rational sentencing system sees such circumstances as possible indications of increased risk and challenges to preventing future harm at the hands of an offender. Reducing a sentence based on sympathy for the offender – as traditionally urged in “mitigation” – is evidence that just deserts is displacing responsible pursuit of public safety – provided, of course, the sentence would otherwise be crafted to pursue public safety. If we reduce the severity of a sentence out of sympathy for an offender’s plight as a child, for example, we may be serving public safety if it happens that the offender is one who would respond to the avoided, harsher sentence, by increasing criminal behavior after the sentence is over. But that would be accidental in a sentencing process that is not rationally designed to pursue public safety and public values.

Testing this notion that the offender is solely to blame, consider how you would feel about me as the sentencing judge if I gave the offender probation instead of jail contrary to your recommendation. Surely you would allow me to share blame with the offender should he victimize someone on probation when you think I should have had him in jail. If my sentence were not responsibly crafted to promote public safety within the lawful choices, I submit that I should share the blame with the offender – and that the offender’s blame is not thereby diminished one iota.

It may be very comfortable to shun responsibility for processing offenders by basking in their blameworthiness, but that would be no more responsible for you as the prosecutor than for me as the sentencing judge. The reality is that we deal primarily with people who have earned substantial blameworthiness. We – you and I – participate in a system in which we both have important roles in determining how we deal with these people. Through plea bargaining, after all, you affect far more sentences than I do. What we do to them unavoidably plays out to some extent as success or failure measured by recidivism. At the very least, what we do either does or does not prevent their next crime. Any concerted social effort that deals with risk – whether it be dangerous animals, infectious disease, extreme weather, transportation, or criminal justice – bears responsibility for intelligent risk management however responsible the source of the risk itself. FEMA's shortcomings in dealing with Katrina are not diminished by blaming the hurricane.

You may believe that your only function is to see that punishment is imposed as a mater of moral equivalency, regardless of the outcome in terms of public safety. It surely would be easier that way, as long as you don't have to measure what the sentences we craft actually accomplish in terms of what moral equivalency is supposed to accomplish – which, again, I submit comes down to service to victims, preventing vigilantism or private retribution, promoting respect for legitimate authority, and enhancing respect for the persons, property, and rights of others. You are typically in the service of a public official who in turn is responsible to the public. The public wants crime reduction above all.

I submit that you may remain as angry as you wish at the offender – and at me if I do something you think reprehensible – but that your anger does not diminish your public obligation to pursue public safety by employing and promoting evidence based practices in crafting sentences through plea negotiation or otherwise. This surely includes debating what is best evidence or best practices when you disagree with the contentions of the defense or the judge. But to whatever extent you fail to avoid the next victimization at the hands of an offender by failing responsibly to advocate for an effective sentence, in other words, when you could and should have achieved a sentence that would have prevented that new crime, you bear as much responsibility for that outcome as I do – neither of us can take any refuge in the locus of undiminished blameworthiness in the offender, or for that matter, by affixing the blame on each other.

Blaming the offender is understandable, and it is often a measure of loyalty or appropriate response to the victim. But relying on that blame to avoid doing our best to prevent the next crime amounts to a betrayal of public trust.

John - I like and respect you. But it continues to astonish and dismay me that people of intelligence and good will who are prosecutors think it morally permissible to embrace a job description that depends upon what seems to me to be excuses for not doing our best to reduce criminal behavior -- particularly because I am convinced that the product is avoidable victimizations (and also self-defeating and dysfunctional treatment of many offenders punished with no benefit to anyone, except, perhaps, to those that seek to support the facade that proportional punishment is sufficient performance on our part, and to those who earn their income from "treating," supervision, or confining offenders).

As you probably gathered some time ago, I can't let this stuff go unanswered.

I thank you again for your patience and willingness to communicate at this level about these subjects.