Thoughts on Strathclyde

processing the Second Sentencing and Society Conference

Michael H. Marcus, August 20, 2002
http://www.smartsentencing.com

I had the good fortune to be invited to the Second International Sentencing and Society Conference[1] at the University of Strathclyde School of Law, in Glasgow, Scotland, June 27-29, 2002. I was a "chair/discussant" at two of the parallel panels, presented a paper at a third, and attended the plenary sessions and one panel at each of the remaining parallel sessions.[2] The Conference was attended by the intended audience, "academic scholars and researchers, judges and other practitioners or policy makers," representing dozens of countries. "Delegates" ranged in age from young graduate students to judges retired after long careers on the bench. Although the Conference was a most valuable experience, it exacerbated my long-standing concerns for the nature, direction, and value of prevailing notions concerning criminal sentencing. This paper allows me to process this experience; I hope others may find some value in it.

Background

I've been a trial judge for over 12 years, and have handled a wide range of civil and criminal cases. For ten years before taking judicial office, I was introduced to judging by serving from time to time as a judge *pro tempore*, and was intrigued by the complete lack of guidance concerning how to exercise the tremendous discretion available to judges in making sentencing decisions. Expecting reasonableness usually to reside somewhere between the positions of the advocates for the prosecution and the defense, I was alarmed to find any clue of rationality elusive. I soon gathered that everyone assumed sentencing to be about three things - how much punishment the defendant "deserved" (largely based on how evil was his deed and sordid his past record, but also on his "attitude" and apparent "remorse"), how much sympathy could be mustered on his behalf (based on hardships of his childhood or the circumstances surrounding his crime), and what was usually done to such folks by other judges. By the time I finally became a "real judge," I was relieved that the legislature had recently adopted sentencing guidelines that prescribed a presumptive sentence. I had found the uncertainty of wide discretion with so sloppy a compass disquieting, and welcomed the comfort of knowing that at least for felonies I could get it "right" just by calculating a gridblock and adopting a presumptive sentence unless convinced for some compelling reason to "depart."

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[1] Underlined phrases in this document are hyperlinks which when clicked will take the reader to the on-line source assigned to the link provided 1) this document is being read in its electronic form; 2) the user is using a version of WordPerfect, Word, or Adobe Reader that is recent enough to support hyperlinks; 3) the user's computer is connected to the internet and employs a compatible web browser; and 4) the link has not changed since this publication. For example, most hyperlinked names will take your browser to a biography (from the Conference site or elsewhere if the Conference site had no biography); most hyperlinked Conference paper titles will take the browser to the text of the presenter's abstract.

[2] All participants were able to attend each of the three plenary panels, but had to choose among three or four panels in each of the seven parallel sessions. As chair or presenter in three panels, there were four sessions in which I had a choice.

But as a full time judge, I soon confirmed a growing suspicion: the first offender is a rarity, apart from those who drink and drive or attempt to hire a prostitute who turns out to be an undercover police decoy. It was obvious that some of these offenders and most by far of those we sentenced for other crimes had been sentenced before. To that extent what we had done before hadn't worked. This raised the obvious question whether what we were doing *now* was likely to work – and the equally obvious realization that we weren't making any effort to make it work – being concerned, as we were, with anger at and sympathy for the defendant and not straying from the path broadly beaten by those whose sentences usually hadn't worked either.

Then I started seeing some numbers that were deeply disturbing. A now discontinued Portland Police monthly report reflected which people in jail had been there before within the last year. The last full month report – typical of those I'd followed for years – had these figures: of the 2,395 people jailed during July, 2000,[3] 1,246 had been jailed in Portland on some other occasion within the previous 12 months. Twenty-two of the 32 jailed for Burglary in July, 2000, had been jailed in Portland on some other occasion within the previous 12 months – as had 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.

It was soon apparent that Portland was not unique, but that its experience was typical of the rest of the United States and the other western countries for which I could find statistics. Bureau of Justice Statistics for jails in the United States 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."[4] A more recent report released in June, 2002, summarized its findings as follows: "Sixty-seven percent of former inmates released from state prisons in 1994 committed at least one serious new crime within the following three years;" 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.[5]

A recent English study found that of nearly 10,000 prisoners, 84% had prior convictions;[6]

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[3] 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.

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

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

[6] http://www.crimereduction.gov.uk/drugsalcohol25.htm. The report is summarized on the "Crime Reduction" website, which is described as follows: "The website was developed by the Home Office in partnership with the Association of Chief Police Officers (ACPO), the Local Government Association, Crime Concern and NACRO. It is managed on behalf of the UK crime reduction community by the Home Office Crime Reduction College." http://www.crimereduction.gov.uk/help/index.htm. The full report is at http://www.drugs.gov.uk/ReportsandPublications/Publications/arms.pdf. "The Home Office is the Government department responsible for internal affairs in England and Wales. The purpose of the Home Office is to work with individuals and communities to build a safe, just and tolerant society enhancing opportunities for all and in which rights and responsibilities go hand in hand, and the protection and security of the public are maintained and enhanced." http://www.fairer-sentencing.co.uk/.

another concluded "around three-quarters of those who have served sentences for burglary or theft are convicted of a further offence within two years of release."[7] The National Crime Prevention Centre of the Department of Justice of Canada reports "approximately 75% to 80% of incarcerated adults were persistent offenders in their youth."[8] The Australian Bureau of Statistics reports that "[m]ore than 60% of offenders in prison at the time of the 1994 Census had been imprisoned at some time previously" with a high of 78% for "break and enter" offenders.[9] The New Zealand Ministry of Justice reports that "over two-thirds (70%) of [studied prison] inmates had more than 10 convictions prior to being imprisoned" and "nearly two-thirds (65%) of inmates imprisoned for a violent offence were reconvicted within two years of their release, and over three-quarters (79%) were reconvicted within five years. These proportions are a little lower than those for all inmates released."[10]

Our sentences more often than not fail to prevent future victimizations at the hands of our subjects. We make no responsible effort to learn what seems to work best on which offenders and incorporate that learning into our choices. We cannot possibly be performing as well by accident as we could with such a responsible effort. By most standards, we are recklessly[11] *allowing at least some victimizations to occur.*

My response to this realization of our public safety dysfunction was to embark on a crusade to do what I can to turn the attention of criminal justice to serving public safety by diverting offenders from criminal careers. In the past five years, and thanks to the support and efforts of many others seeking the same goals,[12] we have written and promoted legislation and a

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[7] http://www.cabinet-office.gov.uk/seu/reduce_reoff/reoffending.htm. This is the "Social Exclusion Unit" that works as part of the "Crime Reduction Strategy" cited in note 6. "The Social Exclusion Unit (SEU) was set up in 1997 by the Prime Minister. We work mainly on specific projects, chosen following consultation with other Ministers and suggestions from interested groups." http://www.cabinet-office.gov.uk/seu/what_is_SEU.htm

[8] http://www.crime-prevention.org/english/publications/children/profil.html#history

[9] http://www.abs.gov.au/Ausstats/ABS@.nsf/94713ad445ff1425ca25682000192af2/a47fa7f4931f2bf3ca2569bb00164f7e!OpenDocument

[10] http://www.justice.govt.nz/pubs/reports/2002/reconviction-imprison-rates/chapter-3.html

[11] Oregon's definition of "reckless" behavior for purposes of the criminal law is typical of common law jurisdictions: "'Recklessly,' when used with respect to a result or to a circumstance described by a statute defining an offense, means that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation." ORS 161.085(9).

[12] The list is very long. It certainly includes Oregon Chief Justice Wallace Carson, Jr.; past Multnomah County Presiding Judge James Ellis and present Presiding Judge Dale Koch; Court of Appeals Judge Rick Haselton; Multnomah County District Attorney Michael Schrunk; Multnomah County Public Defender Jim Hennings; Multnomah County Trial Court Administrator Doug Bray; past Multnomah County Chair Beverly Stein and present County Chair Diane Linn and the rest of the Multnomah County Board of Commissioners; former Portland Police Chief Charles Moose; present Chief Mark Kroeker; Multnomah County Sheriff Dan Noelle; Portland Mayor Vera Katz and the Portland City Council; Suzanne Riles, Nancy Arnot, Gail McKeel, John Doss, Charles Hill, James Conlin, Eric Hall; Deputy District Attorney Tom Cleary; defense attorney John Connors. At the state level, the list includes Governor John Kitzhaber, MD, Senators (1997)

judicial conference resolution to this end, and helped to develop and establish a sentencing support technology that allows judges and attorneys, during and in preparation for sentencing hearings, to explore local data showing what sentences appear to work on which offenders. All of these materials are collected on a website I maintain for this purpose.[13]

It was through my obsessive efforts to promote this approach that I crossed paths with the organizers of the Strathclyde Conference.

What's wrong with this picture: "Populist Punitivism"

The Conference opened with an introduction by Elish Angiolini, Solicitor General of Scotland. She articulated the challenge that presumably brought us together: how to bridge the gap between the public that lives with crime and our theories of rehabilitation, retribution and restorative justice. This seemed to me to be precisely what we should have been up to, but the immediately following opening plenary session, "Escaping Populist Punitiveness," raised doubts that we would accept the challenge. The first plenary presenters[14] voiced themes that would recur throughout the Conference: the public is badly misinformed about crime rates, imprisonment rates, and imprisonment conditions. This is the fault of politicians who pander to the populace and a media that inflames it. The result is repeated and deplorable encroachments on judicial discretion. Although we need to be careful not irrationally to discard as "populist" even healthy criticism of our "expert systems," we ought to "name and shame" "populist tactics," publicize the truth about crime and imprisonment rates, and focus on the "public safety dividend" of sentences as opposed to their "toughness" on offenders.

It's not so much that I disagree with any of this,[15] it's just that it completely ignores the

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Neil Bryant, Jeannette Hamby, Dick Springer, Shirley Stull, Eileen Qutub, Veral Tarno, Cliff Trow; Representatives (1997) Jo Ann Bowman, John Minnis, Peter Courtney, Floyd Prozanski, Lane Shetterly, Ron Sunseri, Larry Wells; former Department of Corrections Director Dave Cook, present Acting Director Ben de Haan, Assistant Director Scott Taylor; Oregon Youth Authority Director Karen Brazeau; Oregon Department of State Police Program Manager Lt. John Tawney; Oregon Board of Parole and Post-Prison Supervision former chair Dianne Middle; Oregon Crime Victims United former chair Bob Kouns, and present Chair Steve Doell. Most recently, James Roten, of the Oregon Judicial Department's Information Technology Division, has begun work on sentencing support tool for Oregon Judges state-wide. Individual Oregon judges who have supported this effort are too numerous to list here. Being on this list does not imply endorsement of the views I express in this paper.

[13] http://www.smartsentencing.com. Although the sentencing support tools are described and explained on the site along with screen shots, the tools themselves can only be run from a networked and secure computer for reasons of bandwith and perceptions of security.

[14] Chair/Discussant: Professor Michael Hough, South Bank University UK; Professor Julian V. Roberts, Ottawa University Canada; Dr. David Indermaur, University of Western Australia; Professor Richard Sparks, Keele University, UK

[15] I certainly endorse the notion that we ought to focus on public safety, and that sensational distortions make meaningful reform more difficult than it would otherwise be. I do disagree with some other notions expressed, however. One is that recidivism rates are actually quite lower than thought by the public; the other, that offenders are generalists rather than specialists. I am convinced that claims of low recidivism rates are almost always premised upon a measure of recidivism that ignores the more common and less serious manifestations of repeated criminal conduct (typically, such measures require a felony crime conviction or prison commitment), while the more numerous and excluded crimes - thefts, drinking and driving - actually heavily contribute to the public's dissatisfaction with our public safety performance. And

role of our profound dysfunction in the public's concerns. Yes, politicians and the media emphasize the sensational and distort the public's understanding of crime and imprisonment rates. But focusing on this relatively minor flaw in the public's assessment of criminal justice to the exclusion of our tremendous problem with repeat offenders is to take us entirely off the course charted by Solicitor General Angiolini.

As I argued to the assembly in the discussion that ended the first plenary session, we have little worth defending and much to improve in our sentencing performance. We fail to take responsibility for the public safety outcomes of sentences we impose, fail to prevent victimizations by those we sentence, and forfeit credibility for our claim to independence as long as we insist on wielding our remaining discretion with obstinate insistence on our right to do so and blind indifference to the consequences of sentencing based primarily on hubris. On the other hand, should we actually accept responsibility for our public safety outcomes and invite this focus for sentencing, we have every potential for communicating beneficially with legislatures and a public which would welcome and applaud our new direction.

The speaker that broke the silence after my strident pitch, an older Irish judge I believe, proclaimed that he was "quite passionate" about the independence of the judiciary and that he would never allow public pressure to cause him to impose a more severe sentence that he concluded was appropriate. The next speaker[16] proposed that it wasn't "the job" of judges to prevent crime. Then one of the panelists[17] suggested that he would be "very uncomfortable" with judges trying to predict how their sentences would affect future criminal behavior by those they sentence.

Whether or not we notice, and whether or not we accept responsibility, our sentencing decisions correlate with quite various public safety outcomes. We really don't have the choice whether judges' decisions affect the rate of future victimizations; they unavoidably do. The only choice is whether we make some effort to learn how to do our best to divert offenders from criminal careers or continue not even to try. It is preposterous that not even trying should be less frightening than making the effort.[18] *If we insist that we should not make the effort, the*

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what I've seen in criminal histories convinces me that though few offenders commit only one type of crime during their careers, there are important flavors of criminal careers that are quite distinct, and which are significant for choosing the correctional response that is most likely to divert the offender from a criminal career.

[16] Professor [of law] Allan Manson.

[17] Professor [of criminology] Julian Roberts.

[18] I am not suggesting that judges usurp the role of probation officers and corrections counselors in supervising and directing sentenced offenders so as to reduce their criminal conduct. I expect such professionals to be better equipped by learning, experience and (I hope) direction to accomplish their task. On the other hand, it hasn't worked and cannot be expected to work just to assume that after any sentence, the operation of corrections agencies and personnel will achieve the public safety objective. First, judges' decisions must allow the best opportunity for crime reduction to apply – and this means, for example, that the judges know what is most likely to work and where it resides in the system; it is the judge who quite frequently decides between prison and local sentences, and thereby forecloses whatever crime reduction opportunities lie only on the path not chosen. Second, judges should be in the business of identifying issues to be addressed or at least considered by corrections workers in custody or supervision. Third, the extent to which the judicial

"populists" are right about us.[19]

The other panel that made the largest impression on me was a parallel panel among those that began the next day of the Conference, "The Impact of Techniques to Direct Sentencing Decision-Making."[20] These presenters described the work of governmental commissions in the UK, Belgium, and New South Wales, Australia, established, broadly speaking, to improve sentencing.

By way of background, sentences in the UK are appealable for leniency or severity (in the US, sentences in general are only appealable for legal error – a category that has certainly broadened with the arrival of legislation designed to limit discretion, but which leaves decisions within the remaining discretion unappealable). In part to stave off legislative promulgation of sentencing guidelines (viewed as a deplorable infringement upon judicial discretion), appellate courts in the UK have promulgated guidelines that are remarkably like those common in the US.[21] In Australia, the High Court cast doubt on the use of guideline judgments; "The New South Wales government reacted angrily with threats to introduce mandatory sentencing if the High Court continued to criticise guideline judgments."[22] In Britain, Parliament was apparently concerned that the guideline judgments promulgated by the Court of Appeals promoted inappropriate leniency, and responded with legislation establishing (as of July 1999) a Sentencing Advisory Panel, requiring the Court of Appeals to consider the Panel's advice before promulgating any more guideline judgments.[23] Belgium's commission is even newer, and owes its existence to a government swept into power by public outrage at a notorious series of heinous crimes committed by the same offender.

The representatives of the Sentencing Advisory Panel distributed and described the work

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process and all its ceremony and legitimacy celebrates or subverts crime reduction as an objective ultimately has a tremendous impact on the enthusiasm and the resources with which corrections can address crime reduction.

[19] This might be a good place to acknowledge that at least in the United States, populism has progressive as well as draconian aspects – or, more accurately, that there have been wonderfully democratic and inclusive as well as punitive and racist manifestations of what we loosely lump together as "populism." A good reading list is at http://iberia.vassar.edu/1896/bibliography.html#populism. Pete Seeger and Woody Guthrie, after all, were populists, yet can hardly be grouped with the likes of Pia Kjærsgaard, John Tyndall, Willis Carto, and Pim Fortuyn.

[20] Chair/Discussant: Sonja Snacken, Free University of Brussels, Belgium; Professor Andrew Ashtoreth, Oxford University and Judge Peter Jones, Circuit Judge at Sheffield Combined Court Centre and member of the Sentencing Advisory Panel, England, UK, *The Sentencing Advisory Panel At Work*; Professor Kristel Beyens, Free University of Brussels, Belgium, *How to Improve Sentencing Practice? Sentencing Research and Sentencing Reform in Belgium*; Professor Kate Warner, University of Tasmania, Australia, *The Role of Guideline Judgements in the Law and Order Debate in Australia.*

[21] Apparently, the independence that matters is with the branch of government rather than the officer who has the most access to relevant information. From this trial judge's perspective, this misses part of the point of independence, but I'll get to that later. See text accompanying notes 68-83, *infra*.

[22] Warner, K, *The Role of Guideline Judgments in the Law and Order Debate in Australia (abstract).*

[23] Crime and Disorder Act of 1998, §§ 80, 81.

reflected in the Panel's latest ANNUAL REPORT. The Panel delivered advice to the Court of Appeal on extended sentences (akin to dangerous offender provisions in US law), murder, domestic burglary, and rape. The Panel functioned by soliciting input from a variety of concerned organizations, such as police, judges, corrections associations, lawyers, prison reform and victim support groups.

In spite of express statutory invitation to address "the cost of different sentences and their relative effectiveness in preventing re-offending,"[24] *the Panel enlisted the assistance of researchers only to conduct a public opinion survey;*[25] its recommendations followed the classic pattern of recommending presumptive outcomes subject to aggravation and mitigation, reflecting an approach wholly obedient to just deserts and oblivious to public safety outcomes.[26] When I asked, the representatives confirmed that the Panel made no effort whatsoever to address which sentences might be most or least correlated with reduced criminal behavior by the offender. My proposal to do so was "an interesting idea."

The panelist from Australia explained how useful the guideline judgments and the process of generating them had been for diffusing anger at the criminal justice system; the panelist from Belgium described her commission's recently completed draft proposing sentencing reforms. Professor Beyens articulated the purposes of the reforms: "to reduce the use of [an] unconditional prison sentence . . . and to evolve to a sentencing system which is more oriented towards reparation towards the victim and social integration of the offender."[27] The commission's proposal is, unfortunately, doomed in its present form because of a political blunder: it *equates* "public safety" with "incarceration" and expressly makes "public safety" the last resort and the lowest priority of sentencing.[28] Instead of taking the reasonable route of exploiting the data showing that programs and responses that help the offender integrate into

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[24] Id., §80(3)(c). To be precise, the directive is to the Court of Appeals to consider such matters in crafting guideline judgments, and to the Panel to advise the Court of Appeals in this enterprise.

[25] My point is not that sampling public opinion is incorrect, but that the far more pressing task is to start focusing on "effectiveness in preventing re-offending." As the Panel correctly notes, public opinion is certainly relevant to "the need to promote public confidence in the criminal justice system," (ANNUAL REPORT at 67); it is also relevant to the obviously related issue of proportionality.

[26] Indeed, the Panel seems not to have advanced much beyond Jeremy Bentham in its correctional expertise: "One purpose of an extended sentence is to reduce the likelihood of reoffending by giving the offender the time and opportunity to address his offending behaviour." Sentencing Advisory Panel, ANNUAL REPORT (2002), 44. This is not a reference to existing programs within custody or their impact; it is a remnant of the notion, discredited within the corrections community, that an offender left to his own devices in solitude will achieve penitence. For a bibliography on Bentham and his Panopticon, consult http://www.ucl.ac.uk/Bentham-Project/Faqs/fpanbib.htm. *See also* http://www.monthlyreview.org/0701editr.htm; http://northstargallery.com/ESP/easternstatehistory01.htm.

[27] Beyens, K, *How to Improve Sentencing Practices? Sentencing Research and Sentencing Reform in Belgium (abstract)*

[28] The more common blunder is the assumption that crime reduction is accomplished only by programs that address such issues as "criminal thinking," addiction, anger management, and the like. A responsible system monitors the effectiveness of *all* available dispositions – programs, in and out of custody, supervision, and incarceration – and feeds back the results so that sentencers, probation and corrections officials, and policy makers can made decisions based on what is most likely to work on which offenders under what circumstances.

society are more likely than incarceration to reduce some offenders' recidivism, the draft presents its recommendations as if they were mutually exclusive. When I suggested revising the articulation, Professor Beyens responded that this was "an interesting idea."

By now I am utterly astounded. I am at one of the two institutions in the world devoted expressly to "sentencing research." It has occurred to almost[29] *none of those assembled that what needs to be researched is what works on which offenders to reduce recidivism. To the extent that we notice that those on whom we repeatedly impose sanctions continue to reoffend, we wonder why* ***they*** *don't change* ***their*** *behavior. We ignore rather than address our abysmal public safety performance, we label the critics "populist," we study sentencing as anthropologists would the Trobrianders or behavioral biologists savanna baboons – with this one difference: judges are viewed as anointed with divine wisdom and entitled by their office to discretion unfettered by any responsibility for the havoc we judges wreak – indeed, those assembled receive without protest (except mine) the notion that it is not our job as judges to reduce crime with our sentences. Even a commission invited by legislation to address "the cost of different sentences and their relative effectiveness in preventing re-offending" instead retained experts to explore the nuances of public opinion; another borne of public outrage at heinous crime proposes to make public safety the* ***last*** *consideration of sentencing. As we so often accomplish with the draconian measures we condemn, by our liturgy we encourage the worst in our performance as jurists and as scholars.*[30]

In the remainder of this exercise, I will explore some of the other papers presented at the Conference, reflect on the role of the judiciary and the nature of academia, consider at some length the 2001 HALLIDAY REPORT (of which I learned through the Conference and studied as part of this exercise), and articulate what I think are realistic hopes for correcting the dysfunctions of criminal sentencing.

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[29] One of the "populist punitivism" presenters, Dr. David Indermaur, suggested that "an attempt to shift the debate to a focus on effectiveness in producing community safety is recommended rather than defensively apologizing for the actions of offenders." Indermaur, D., *Influencing Public Attitudes to Punishment (abstract)*. With this approach, I wholeheartedly agree, even if it arises in the context of strategies for diverting popular anger. Another presenter actually addressed outcomes, but merely for the purpose of exploring the relationship between judicial sentencing styles and impact on offenders. Tait, D., *Moderate punishment and re-offending levels: an indirect experiment from NSW local courts (abstract).* Curiously, although his abstract recited that "sentencers who cluster their penalties at the middle of the sentencing range achieve lower re-offending rates, while those that make more use of penalties at either the top or the bottom of the sentencing range are less successful," his presentation reported that those whose sentences are at the *lowest* end of the range are most effective. Even these delegates who touched on outcomes stopped far short of suggesting that judges be informed that it is their job to reduce criminal behavior, or that they should be supplied with the information with which to have some hope of performing that job with competence.

[30] Ruminating over this, I constructed an elaborate parable of which I will include only a hint: robed elders convene regularly outside the wall of a city and ceremoniously hurl offending rocks over the wall with styles "appropriate" to the path that brought the rocks to the ceremony. Students of the robed hurlers revere them and scholars study their styles. Over the years, they have evolved a rich literature debating the nuances of appropriate hurling styles and purposes. When the good citizens, some bloodied, complain of deaths and injuries from the falling rocks, the hurlers, students, and scholars hold a conference, label the citizens "populist punitivists," conclude that politicians, the media, and incompetent polling are to blame. When an intruder suggests that maybe we ought to worry about where the rocks are landing, a scholar indignantly responds that it is not the job of hurlers to worry about that, their responsibility is altitude . . . and so on.

Other Papers; Other Examples

The first of the parallel panels I attended was entitled "Formal or Substantive Equality? The Justice of Penal Standardisation and Enforcement."[31] I chose this panel because of my views that "uniformity" so often functioned as an organizing goal for sentencing analysis, while achieving only the façade of uniformity and retarding any real improvement in public safety or sentencing equity.[32] The presenter from The Netherlands discussed the tension between "human rights" interests in sentencing like offenders alike as opposed to public safety interests by which "the judge has to consider the circumstances of the crime and the specific (mental) characteristics of the offender" in crafting a sentence.

The Chinese presenter articulated her analysis of the correct approach as follows: "The decision on criminal penalty needs to consider the awareness and strengthening of citizen's normative consciousness and the hazardous personality of criminals, which is the requirement of positive general precaution and specific prevention."[33]

The UK representative invoked research on the attitudes of magistrates to address issues limited to the role of fines as sanctions – how they should be adjusted for an offender's ability to pay, how they should be enforced when not paid, and for what category of offenses they were appropriate.

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[31] Chair/Discussant: Mary Campbell, Solicitor General Office, Canada; Assistant Professor Pauline Schuyt, Nijmegen University, The Netherlands, *Sentencing: Equality or Made to Measure?*; Professor Feng Rui, Chinese Academy of Social Sciences, *China Study on the Principle of Sentencing Discretion in Chinese Criminal Law*; Professor John Raine, Eileen Dunstan, Alan Mackie, University of Birmingham, *Financial Penalties as a Sentence of the Court: Lessons for Policy and Practice from Research on enforcement in the English and Welsh Magistrates' Courts*.

[32] About a week before the Conference, I had sent the following e-mail to presenters and chairs at sessions touching "consistency" in sentencing: "The great bulk of occasions on which I've seen equal treatment invoked, it serves no such legitimate purpose, for one of more of the following reasons:

"1. The equality asserted is almost always achieved only by insisting that only some factors are properly considered in deciding which crimes and which offenders are alike. We are not really treating like offenders alike at all in most cases; we're simply insisting that offenders and crimes that are not alike are alike by refusing to acknowledge their differences. Examples abound, but my favorites include insisting that the appropriate comparisons are based on the dollar value of the property damaged or stolen -- as when the extent of the fire damage depended not on anything intended or done by the arsonist, but on the skill and proximity of the property owner [I had an arsonist who qualified for a lower presumptive sentence because he had the good fortune of setting fire to the home of a fireman]; or when we punish more severely the theft of a highly valued collector's car in a stable of many, than the theft of a single mother's sole means of transportation.

"2. It precludes exploiting a disposition that holds real promise of diverting an offender from a criminal career because we don't recognize that circumstance as distinguishing such an offender from others for whom no effective disposition is available.

"3. We cling to the illusion of 'equality' by ignoring real differences that are extremely important to proper sentencing strategies – as when we ignore the presence or absence of psychopathy in dealing with assaultive behavior.

"4. We pursue what has always been done in spite of the fact that what we've done has always produced recidivism rates averaging 65-75%, and thereby use the illusion of equal treatment to continue to do more harm than good and to escape any responsibility for the public safety outcomes of our sentencing decisions."

In short, something not worth doing is not worth doing consistently; if we're doing more harm than good, why try to do so consistently?

[33] The ideological rigidity of this construct was no doubt amplified by the necessity of a translator. Nonetheless, the only reason western just deserts ideology seems less rigid is its familiarity; just deserts ideology as compared with the Chinese equivalent is equally intransigent and destructive of the proper performance of our public responsibilities.

No one in this world of "sentencing research" has actually undertaken to investigate which sanctions best serve public safety when imposed on which offenders.[34] The presenters did not disagree. To the extent that any of these papers even addressed public safety, they *assumed* that sentencing judges are equipped with the mission, the wisdom, and the information by which to select sanctions according to individual characteristics of criminal and offense.

When we arrive at consensus that preventing future crime is a primary objective of the process, and learn which characteristics of offender and offense help us choose the most effective dispositions (fine, program, supervision, incarceration or other device), we will be in a position to treat alike those who are alike in ways that matter (for public safety) and will actually be serving both public safety and sentencing equity. As long as we are adrift in the dark and mystical sea of sentencing driven by what is "appropriate" for an offender based on individual judges' (or guideline-promulgators') attitudes about the world, just deserts, and personal responsibilities, we will achieve only a fraudulent uniformity (by choosing to ignore differences inconvenient for whatever scheme we've adopted) and we will perpetuate sentencing behaviors that have long produced far more failures than successes.

The next morning, I chaired the parallel panel "Assessing the Assessors: Risk Assessment, Prediction, Prevention and the Effectiveness of Penal Decision-Makers."[35] Professor Shute summarized a report of a study of actual reoffense rates of several categories of paroled sex offenders as compared with predictions by their parole officers and with predictions based on an actuarial risk assessment instrument.[36] In essence, both sources of risk predictions tend to yield false positives at a high rate, but for some categories of offenders those who reoffend are correctly identified as high risk. As I recall, the actuarial instruments fared better than "clinical impressions" of parole officers.

Professor Manson (who voiced the opinion at the first plenary session that it is not the job of judges to reduce crime) explored what he categorized as "preventive detention," sentencing schemes that subject an offender to substantially lengthened incarceration based upon conviction for one of a specified category of crimes coupled with a prediction of future dangerousness involving input from a psychiatric or psychological examination and report. Professor Manson's views are, apparently, that these schemes are poorly thought out responses to popular pressure by the "victims' lobby," and encourage irresponsible reliance on bad science

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[34] The HALLIDAY REPORT, *infra* note 101, did indeed touch on this topic, but was largely ignored at this Conference.

[35] Chair/Discussant: Michael Marcus; Professor Stephen Shute, University of Birmingham, England UK, *Sex Offenders Emerging from Long-term Imprisonment : A Study of Their Long-term Reconviction Rates and of Parole Board Members' Judgements of Their Risk*; Professor Allan Manson, Queens University, Ontario, *Preventive Detention, Perceptions of Dangerousness and the Expansion of State Control : Legal, Empirical and Political Lessons from Canada*; David Tait, Director, National Court of the Future Project, University of Canberra, Australia, *Moderate Punishment and Re-offending Levels: An Indirect Experiment from NSW Local Courts*.

In retrospect, I regret that my obligation to chair this panel conflicted with another panel held at the same time, "Making Sentencing Reform Work: Round-Table Panel." I treat what I've been able to recover of the contents of that panel later in this paper in my discussion of the HALLIDAY REPORT, at text accompanying notes 101-131, *infra*.

[36] These results are published in 42 BRITISH JOURNAL OF CRIMINOLOGY 371-394 (2002)[subscription required for on-line access].

with arbitrary and oppressive results.

David Tait reported on a study that sought to correlate sentencing styles with outcomes. Although his abstract recited that "Sentencers who cluster their penalties at the *middle* of the sentencing range achieve lower re-offending rates, while those that make more use of penalties at either the top or the *bottom* of the sentencing range are less successful," his oral presentation submitted that sentencers who sentence at the bottom of the range had the best results.

Several themes in this panel recurred throughout the Conference. One was that the Canadians had done the world a disservice by promoting predictive instruments for use in corrections.[37] The goal of those who mentioned the risk assessment instruments seemed to be to find data that prove them imperfect. No one claimed them to be useless, just somehow "incorrect." My sense of the body was that the Canadian risk prediction instruments were welcomed because they provided easy targets for criticism (particularly in that they yield false positives: many deemed at high risk of reoffending do not do so), and that no one thought the challenge was to improve them or to find more useful ways to improve our correctional and sentencing public outcomes. Criticism without constructive suggestions for improving or replacing these instruments is merely destructive, although it may serve functions similar to the conformation ring at dog shows. Many of these instruments have been powerfully validated;[38] none are perfect. All prediction in this area is imperfect for the same reasons that epidemiology is imperfect; we cannot responsibly abandon either to await perfection. Responsibly combating crime is like promoting public health; some things work better than others; different things work differently on different people; some diseases are more challenging than others; incremental advances rather than "silver bullet" cures are the rule; lives are at stake.

After all, the real issue is how parole officer decisions with and without risk prediction instruments compare with sentencers' decisions – and the data I started with[39] suggests that they'd have to do an awful job to compete with our results as judges.

Another theme at the Conference – that growing imprisonment rates are deeply troublesome – surfaced in the discussion of "preventive detention." It is worth noting initially that this phrase, originally associated with incarceration without trial[40] (widely and correctly

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[37] I've learned recently that the Scots are often credited for developing such instruments. See, e.g., Social Work Research Findings No. 40, *The Relative Effectiveness of Risk Assessment Instruments*, Scottish Executive Central Research Unit, http://www.scotland.gov.uk/cru/resfinds/swr40-00.asp. No one was claiming this honor at the Conference.

[38] E.g., *Prediction of Recidivism, Question: Is the Statistical Information on Recidivism (SIR) scale still a valid measure of offender risk?,* Solicitor General, Canada, RESEARCH SUMMARY, Solicitor General, Canada, Research Summary, http://www.sgc.gc.ca/epub/corr/e199671/e199671.htm; http://www.state.ct.us/bop/risk.htm; S. Jones, et al, *Alameda County Placement Risk Assessment Validation, Final Report*, National Council on Crime and Delinquency, National Institute of Justice US Dept of Justice, Number 189240 http://www.ncjrs.org/rr/vol3_1/1.html.

[39] See text accompanying notes 3-10, *supra.*

[40] E.g.,*Punitive use of preventive detention legislation in Jammu and Kashmir*, Amnesty International index: ASA 20/010/2000, May 5, 2000 http://web.amnesty.org/ai.nsf/Index/ASA200102000; Norman Fernandez and Halim Ashgar Hilmi, Judicial Review of Preventive Detention in Malaysia, Public Law Active Research Project, 1994 (Tas) 39 PPL http://www.foi.law.utas.edu.au/active/abstracts/abstracts/1994Tas39PPL.html; *Dealing with Dissent: The "Black Laws" of Bangladesh*, South Asia Human Rights Documentation Centre, HRF/8/99 (Embargoed for 11 October 1999)

condemned as abusive of human rights and characteristic of despotism), has been coopted to refer to and quite probably intentionally to denigrate any scheme by which a convicted offender's incarceration or supervision is prolonged based on predictions as to the offender's dangerousness.[41] That prison is cruel and is used too often and for too long was another apparent consensus at the Conference.

Prison is indeed cruel.[42] I agree that we (particularly the United States, but also those who emulate our propensity to declare "war" on everything) have accelerated imprisonment rates, and that we are putting some people in prison who shouldn't be there, and some in prison for longer than is necessary. But equating *using incarceration to incapacitate convicted offenders* with *incarceration without trial for purposes of antidemocratic political control* is at least analytically defective. It cheapens the criticism of human rights violations (and erroneous foreign policy) while skewing any honest analysis of the proper role of incapacitation as a correctional strategy for offenders who are in fact dangerous and have been fairly convicted of violent crime. And just as there are those in prison who shouldn't be, or shouldn't be there as long as they are, there are also horrendous crimes committed by offenders who should have been in prison or in prison longer for a prior conviction instead of free to commit those new crimes. Only if public safety has no rightful role in sentencing is it fair to denigrate prolonged incapacitation as a sentencing option *per se*.

My experience with dangerous offender laws[43] makes me welcome this unusual approach: we start with someone convicted of a violent crime, and we invite competing experts to do careful analysis (albeit under imperfect legislative classifications) of whether the offender is likely to remain dangerous enough and long enough to justify an extended period of incapacitation. *Yes, this is an imperfect prediction, but it is far more careful and far more precisely aimed at the legitimate objective of public safety than the usual sentencing analysis. It*

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http://www.hri.ca/partners/sahrdc/hrfeatures/hrf8.htm; Stephen Mburu, *How detention was used to break people*, *The East African* (Published by the Nation Group), April 30, 2000 http://www.nationaudio.com/News/DailyNation/30042000/Comment/Special_Report2.html.

[41] Professor Manson clearly used the term with this meaning. *Preventive Detention, Perceptions of Dangerousness and the Expansion of State Control : Legal, Empirical and Political Lessons from Canada*. This is also apparently the convention at the Max Planck Institute for Foreign and International Criminal Law. *See, e.g.,* Jörg Kinzig, *Recidivism of Preventive Detainees and Dangerous People - A Follow-Up Study*, http://www.iuscrim.mpg.de/forsch/krim/kinzig2_en.html.

[42] I won't fulfill my need to process this experience without expressing this thought: my impression is that the concern for overincarceration had little or nothing to do with real empathy for prisoners or any but theoretical notions about prison conditions – much less with empathy for victims of crime or the impact of crime on their lives. I have the feeling that many of these folks have no real appreciation for what it's like to "do time" (I had a small taste of this in the 1960s for civil disobedience, and I believe I learned a lot about the realities of inmates and prisons) or to have a loved one mauled or murdered by an offender who should have been doing time at the time (I've been spared this experience, but have gotten to know a lot of people who have not). It's a bit like cocktail party chat about the plight of the "under privileged' among people who'd never pick up a hitchhiker and never rescued a welfare mom from a flea-bitten motel room. (As a legal aid attorney for 20 years, I met and learned respect for many of the "underprivileged," picked up many hitch hikers, and rescued more than one client from homelessness). It's not that the folks with the drinks are bad people; they just have a real risk of missing the point – like the well-intended anthropologists who introduced chicken farming to nomadic South American Indians only to find upon returning that their new sedentary ways led to their enslavement by ranchers.

[43] I had a dangerous offender hearing within two weeks of departing for Scotland, and have had several in my career.

is also virtually unique in enlisting those with relevant expertise in the exercise, and subjecting them to the same crucible we use when dealing with other expert testimony in our courts: cross examination and the opportunity to respond with conflicting expert evidence that will be put to the same challenge. It makes no sense to deride the exercise as imperfect when the default we defend is overwhelming less informed, less careful, less analytical, and routinely productive of astoundingly high recidivism rates.

Our usual approach is cruel to the victims whose victimizations we could have prevented with a responsible approach to sentencing – one that starts with recognition that our choices necessarily have public safety outcomes, and includes accessing information and both inviting and performing analysis of what is most likely to prevent future crime by those we sentence. We are also cruel to those whose punishments do not improve their performance, at least to the extent that a better choice would have prevented their next journey through the criminal justice system to a custodial sanction.[44] For those whose incarceration is indeed necessary for public safety – and there are many – focusing the juggernaut of criminal justice on public safety outcomes would permit programs and techniques that work *in custody* to gain the funding source they need, and vastly improve the ability of the corrections community to improve prison conditions because humane conditions in prison generally serve public safety to the extent they improve the thinking and habits of those released back into the community.

Again, the challenge is to compare the public safety outcomes of the psychologist and psychiatrist recommendations[45] with those of uninformed judicial discretion. That's not a contest in which I'd bet on us. I am as critical of psycho babble as the next person, but I simply don't understand how those interested in sentencing research can responsibly attempt to impede injecting research and correctional expertise into the sentencing process that now so routinely and profoundly ignores research and expertise. Could it be that academics and jurists share the same fear that responsibility for outcomes would expose our failures?

Delighting in criticism of risk assessment instruments, dangerous offender statutory schemes and the expertise mustered to administer them may serve the interests of debate and academic performance, but does nothing to further either public safety or improvement in the precision with which we use incapacitation when it is indeed required for public safety. Of course it makes sense to incarcerate longer those whose risk of harm to others is greater. Of course an offender nominated for incarceration should be afforded every accouterment of due process before convicted and sentenced – and a sentence-enhancement scheme that fails to afford those accouterments should be revised.[46] Assuming that it makes sense to incapacitate any offenders to serve public safety, however, it also makes sense to incapacitate longer those whose risk is greater or more likely to continue. The challenge is to improve our ability to make

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[44] If we blunder, we can also be cruel in designing or implementing community (probation) sentences so as to impede rather than further law abiding behavior and successful lives. We certainly may need to disrupt employment, housing and relationships to further public safety – but doing so when the net result is to *damage* pubic safety is cruel to both offenders and to the victims whose plight should have been avoided.

[45] *See, e.g.,* Hollida Wakefield and Ralph Underwager, *Assessing Violent Recidivism in Sexual Offenders*, INSTITUTE FOR PSYCHOLOGICAL THERAPIES, Volume 10 - 1998

[46] *See Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

those predictions; that such predictions can never be perfect is no excuse for abandoning public safety or the effort to hone our predictive skills. Criticism must be constructive to be productive.

A third theme evident in this panel and pervasive at the Conference was that recidivism is merely another variable by which to savor analysis. We compare sentencing styles to outcomes because it's intellectually interesting, not to help judges to understand that public safety is the goal and to learn how we might improve our ability to reduce criminal behavior by those we sentence. Again, the answer to all of this is obvious to me: our job is to establish public safety as a dominant goal and measure of sentencing performance; our worth is to be measured at least in large part by the extent to which we succeed in these efforts.[47]

The next parallel panel I attended was "Standards & Stereotypes: Sexual Offence Law and Punishment."[48] I had hoped that the enormous attention to sex offender treatment effectiveness in the literature[49] might have generated some attention to effectiveness in sentencing decisions, but these presentations yielded no evidence to that effect. Hilde Tubex discussed the tendency of most European countries to swell prison populations with sex offenders sentenced for serious sex crimes under recent trends toward greater penalization,[50] while Germany and the Netherlands use more alternative dispositions for less serious offenders, treating the more serious with sentences that are no longer than those imposed for other serious crimes. Barbara Moretti related that Italian law has recently recognized that sex crimes often

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[47] For the record, I do not suggest that there aren't other legitimate goals of sentencing, or that proportionality concepts should not limit the extent to which we sanction an individual in the interests of public safety. As a legal aid lawyer, I found myself always inclined towards the cause of the underdog. In sentencing theory and practice, public safety is far and away the obvious underdog.

[48] Chair/Discussant: Tom O'Malley, National University of Ireland Galway, Republic of Ireland; Hilde Tubex, PhD, Free University Brussels, Belgium, The Sentencing of Sexual Offences in an International Perspective; Barbara Moretti, University of Milan, Italy, Sentencing Sexual Offenders in Italy: a Critical Analysis of the Laws Governing Sex Crimes; Associate Professor Wing-Cheong Chan, National University of Singapore, Constructing Sexuality through the Offences of Rape and Sex with Underage Girls in Singapore.

[49] See, e.g., Juvenile Sex Offender Research Bibliography, Office of Juvenile Justice and Delinquency Prevention; Sex Offenders Statistics and Research; National Child Protection Clearinghouse; http://www.css.edu/users/dswenson/web/SexOffender/SexOffenderlinks.html; Compendium of Ojp-sponsored Projects Relating to Sex Offenders; Derek Perkins, Sean Hammond, Dawn Coles, Darren Bishopp, *Review of Sex Offender Treatment Programmes*, Prepared for the High Security Psychiatric Services Commissioning Board (HSPSCB) November 1998.

[50] She reported that increased penalization for serious sex offenses from detection through sentencing "results" in an increase in complaints and arrests. The United States experience has been, at least through some eyes, that increasing penalties *reduces* complaints, and least in cases of intra-familial child sex abuse – because family members want the offender to "get help," not to have the state imprison him. *E.g.* Deborah Ingraham, *Dealing with Sex Offenders-How to Repair and Rebuild* . For a similar concern about the use of capital punishment in intra-familial rape cases, see Dr. Bernadette Madrid, Heather Spader, Rachel Spiegel, Dr. Amelia Fernandez and Dr. Victoria Herrera, *Examining the Mandatory Death Penalty For Familial Child Perpetrators: An Academic Treatise for Physicians*, UP CM-PGH Child Protection Unit and The Advisory Board Foundation (Sept 2001). Similar concerns are raised in *Concept Paper on Amendments to Legal and Policy Provisions for Incest* by The Women's Aid Organisation (WAO), "an independent, non-religious, non-governmental organisation based in Malaysia, committed to confronting violence against women."

victimize individuals rather than just "public decency," but still fails to protect victims in the absence of violence or threat of violence. Wing-Cheong Chan traced the even more antiquated Singapore Penal Code to Nineteenth Century British colonialism, but was able to point to some indications of modernization.

Although the sex-offender treatment community has long labored to document its effectiveness in reducing recidivism, and although providers are well aware of disparities in the amenability of offenders to treatment correlated with the type of sex crime and offender involved,[51] the criminal justice world seems wholly disinterested. Oregon had a wonderfully effective treatment program for incarcerated sex offenders in the Oregon State Hospital. Rigorous scrutiny revealed substantial success in reducing the recidivism rates among even those offender categories deemed wholly incorrigible. Because criminal justice does not sufficiently value what works (and budget decisions usually ignore the costs of repeated criminal behavior), the program was cut. The result is a steady flow of dangerous and untreated sex offenders, with or without post-prison supervision.[52] Failing to support programs that actually help protect public safety[53] is another way in which the criminal justice community's persistence in misdirected liturgy fails the public safety mission the rest of society innocently assumes that we unquestioningly accept.[54]

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[51] In general, intra-familial, opportunistic offenders are far more amenable to treatment (measured by avoiding recidivism) than are predatory offenders who either engage in forcible rape with strangers or groom child victims. *Child Sexual Molestation: Research Issues*, Series: NIJ Research Report (1997); Minnesota Sex Offender Screening Tool Revised (MnSOST-R), Minnesota Department of Corrections. There are many varieties, and little certainty that what is generally so will be so in any specific case, but the disparities are strong enough to demand a role in any rational sentencing policy.

[52] At some point, post-prison supervision expires. The worst offenders return to prison repeatedly for violating the terms of post prison supervision, and may ultimately be released directly from prison with no supervision whatsoever.

[53] A local example was "Our New Beginnings," a program run by a former offender for drug-addicted women convicted of prostitution and related crimes. Carole Pope, the director of this program, was somehow able to turn a surprising proportion of her clients into fully productive and law-abiding citizens. After the program was cut for short-run budget reasons (budget cutters rarely calculate the long-run cost savings of such programs), I attended its last Christmas party – an event at which graduates and supporters in the community brought presents for the children and showed their support for the residents struggling with the combined burdens of parenthood, their own childhood abuse, sexual exploitation, and addiction. I chatted with a woman I took to be a "society" supporter, only to find that she was a graduate of the program who had recently completed her studies for a MSW degree. The director of the program now works part time with women in Oregon's newest prison, Coffee Creek Correctional Institution. But "Our New Beginnings" is gone.

[54] For completion, let me hasten to add that at least some sex offense victims are the best argument for retributive sentencing. Many sex crime victims tend to blame themselves and accept some guilt for either the offense, the offender's fate, or both. For many of these victims, an appropriately stern sentence may have therapeutic value – and that is ample justification for punishment that does not find adequate justification solely by reference to reducing recidivism. For this reason, the sentencing argument guide I provide to advocates and pre-sentence investigators recites: "In the event of a victim of a sexual assault, particularly but not only when the victim is a child, I hope to know as much as I can about how the sentencing choices available to me affect the victim's interests in recovering from the effects of the crime. This may involve finding a way for the offender to pay for ongoing counseling, but I am also interested in this difficult question - which depends in large part on the circumstances of an individual victim and victimization – Will a sentence perceived as harsh or lenient exacerbate or alleviate any feelings of guilt, blame, or responsibility for the incidents involved? How does this choice affect any counseling or treatment prognosis? In intra-familial cases, is this complicated by any attitudes of

The just deserts obsession of criminal justice has yet another but related self-defeating consequence. Because the obsession renders "appropriate punishment" an objective of essentially religious proportions without any responsible link to public safety outcomes, crime prevention *before* offenders enter the criminal justice system has to compete with an unfair handicap for education and social service dollars left over after enormous budgets for law enforcement, criminal justice, and corrections. Most of us know that parenting education, high school completion, and other similar efforts are far more efficient at preventing crime than anything we can do with sentencing.[55] I do not suggest that we simply divert funds from one sector to the other, but merely that we make careful decisions about deploying all of the resources involved – from home visits to new parents to supervising incarcerated and paroled felons, and all of the steps in between – based on responsible analysis of how best to prevent or to reduce criminal behavior (and otherwise to serve public interests). At present, just deserts criminal justice policy irrationally skews our decisions at all levels.

The second plenary panel, Making International Sentencing & Penal Comparisons: What Do We Know and What Do We Still Need to Know?,[56] strengthened my growing understanding that the problems I've discovered through my experiences as a trial judge in Portland are global in distribution. Professor Frase[57] spoke of the difficulties of comparing jurisdictions diverse in their categorization of criminal behavior, procedure prerequisite to conviction, sentencing options, sentencing legislation, the availability of diversionary options preclusive of conviction, and the means by which they account for pretrial detention (which I take to be a reference to what we call "sentence for time served").

Professor Hans-Jörg Albrecht summarized the findings of a wide range of "sentencing research": the "panic" over sentencing disparity of the 1980s has somewhat subsided. Judges

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other members of the family towards the case or the parties involved?"

[55] See, e.g.., Developmental Crime Prevention Consortium, Professor Ross Homel, Griffith University, *Early Intervention and Developmental Approaches to Crime Prevention*, South Australia Attorney General's Department (1999), http://www.cpu.sa.gov.au/nacs_eidacp.htm; California (USA) Youth Authority, *Delinquency Prevention Resources*, http://www.cya.ca.gov/juvenile/delinquencyprevention.html; Department of Justice, Canada, *Alberta Crime Prevention Initiatives*, http://canada.justice.gc.ca/en/news/nr/2001/doc_27924.html; National Crime Prevention Council, *Small Cities and Rural Crime Prevention*, http://www.ncpc.org/5part5dc.htm; A good source is at *Research on Parenting Education Programs and Their Effectiveness: A Bibliography*, http://www.whitehousedrugpolicy.gov/publications/prevent/parenting/r_bib.html; National Crime Prevention Centre (Canada), *Health, social and educational services - determinants of health* (2001), http://www.crime-prevention.org/english/publications/children/health/health_e.html. An Oregon Colleague, Judge Pamela Abernethy, has launched a program ("Project Bond") that wonderfully combines both sectors: parents of very young children who appear as criminal defendants are given sentencing incentives to agree to injecting services into their parenting.

[56] Chair/Discussant: Professor Arie Freiberg, Head of the Department of Criminology at Melbourne University, Australia, Making Sentencing Reform Work? Comparing English And Victorian Approaches To Sentencing Reform; Professor Richard Frase, University of Minnesota, USA, Promises and Pitfalls of Comparative Sentencing Research; Professor Hans-Jörg Albrecht, Director, Max Planck Institute for Foreign and International Criminal Law, Germany.

[57] I had met Proffesor Frase in 1998 at the University of Minnesota Law School Sentencing Seminar and Workshop conducted by Professor Robert Levy. I had brought the same message, delivered it in the same style, over the three weekend sessions of the Workshop.

continue to impose sentences within the lower third of the range of the discretion legislatures have left them, and almost never make use of the full range of their discretion. What is missing from our repeated discussions of sentencing consistency and predictability is a theory of disparities beyond mere distance from norms – one that links perceptions with crime seriousness and sanctions. Without such a theory we cannot make conclusions about sentencing disparity and cannot determine if cases are similar. Rehabilitation's decline (*which I take to be a reference to the "nothing works" phase of criminology in the 1970s*[58]) has not ended to the extent that we can expect help in structuring sentences. Apart from a small group of cases – drug, sex, and violent crimes – the judiciaries have not adopted a punitive sentencing policy. French and German judges believe "individual deterrence" the highest priority, but tend to do what they are used to doing: the French use short sentences, the Germans, fines. Actual imprisonment rates in the two countries are similar, however, because the French offset their greater use of prison sentences with greater use of parole and "amnesty."

My response to all of this is that of course it is hard to make any sense of sentencing as it is now practiced – whether simply for the purposes of comparison, as related by Professor Frase, or in pursuit of an improved analysis of consistency as suggested by Professor Albrecht. Without a clear and shared objective, sentencing systems cannot be expected to achieve rational comparability, let alone meaningful consistency. The product of judges untrained in psychology or criminology, undirected in our purpose other than to achieve an "appropriate" sentence within legal limits of their discretion, encouraged in our exaggeration of our own wisdom, and generally protected from insight into our actual outcomes, will necessarily be chaotic in its order and hazardous to any external purpose. This explains the difficulties encountered by the modelers[59] and others[60] in capturing the realities of the sentencing process. I understand Dr. David Indermaur completely to agree with me that public safety is the obvious but missing lodestar.[61] I would add that, beyond telling judges that our job includes pursuing public safety,

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[58] Robert Martinson began the phase in 1974 by suggesting that nothing worked to reduce criminal behavior by offenders. Although the conclusion was enthusiastically accepted by those for whom it was welcomed philosophically or politically, Martinson himself retreated from this position, and it has been thoroughly debunked – at least as applied to the offender population as a whole. *See, e.g.*, McGuire, James, *What Works in Reducing Criminality* (2000), and authorities cited.

[59] Charles W. Ostrom, *A Theoretical and Empirical Model of the Type of Sentence Decision (abstract)*: "Our results show little hope for the longstanding quest to discover a single dimension, like severity, along which all sanctions can be arrayed. Instead, we find evidence that judges conceptualize the sentence type decision in terms of multiple dimensions." That it may or may not be possible to construct a model that allows us to replicate chaos is fascinating on a theoretical level, but useless for public safety – particularly where the sentencers subject of the model are never directed to pursue any precise objective or provided with the information with which to do so.

[60] Cyrus Tata's presentation was aptly named "The Quest for Coherence in the Sentencing Decision Process: Noble Dream or Chimera?."

[61] Indermaur, D., *Influencing Public Attitudes to Punishment (abstract)*. See note 29, *supra*.

we must also introduce into our sentencing process[62] (and into the many criminal justice activities driven in anticipation of that process - such as plea negotiations and charging decisions) access to information with which the participants may meaningfully pursue that charge.

That Professor Albrecht found "individual deterrence" a top priority with judges has both positive and negative implications. The positive is that judges are in my experience overwhelmingly receptive to the notion that we should do what works to divert those we sentence from criminal careers. Give us that marching order, the information, and the choices, and most of us will gladly pursue that course. The negative implication is that *punishment* necessarily or at least generally has the effect of reducing future crime by offenders. This is the notion of "specific deterrence," that offenders will respond to punishment by seeking to avoid choices that lead to punishment in the future. Although there may be some viability to this notion in practice, its efficacy is exaggerated far beyond any empirical support – a proposition with which I would suspect most at the Conference would agree. "Specific deterrence" in the criminal justice system, like general deterrence[63] and rehabilitation, is an article of faith rather than a measured and responsibly sought objective. That punishment doesn't seem to work as a "specific deterrent" with any reliability is amply demonstrated by our statistics – most crime is committed in the midst of careers in which crime and punishment are repeatedly interspersed.

I started the next day of the Conference as "Chair/Discussant" of the parallel panel "Judicial Individualism and / or Judicial Independence? Personal Judicial Philosophies, Principles and Accountability."[64] The presenters and I discussed beforehand the real lack of continuity among the presenters' three abstracts, but the presentations and ensuing discussion provide fuel for further exploration of the same themes that ran through the Conference.

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[62] Experience has shown that a bookshelf full of resources will stay on the bookshelf. My suggestion is an interactive technology, designed to be part of the very process of sentencing arguments and plea negotiations. See http://www.smartsentencing.com.

[63] I will not undertake analysis of general deterrence here, other than to state my position, because I sense that those at the Conference would largely agree with me. General deterrence draws academic support (as opposed to the anecdotal support treasured by law enforcement and "tough on crime" activists) almost entirely from the existence of numerous articles that construct models of fascinating sophistication that are *premised on* rather than supportive of an actual connection between the punishment of some offenders and the criminal conduct of others. I've actually collected some leading articles in the area and enlisted a graduate student's assistance in translating the more mathematical discourses, and realized that the articles do not really purport to prove the existence of a general deterrent effect.

I suspect that general deterrence does not work at all in most realms, although there are pockets of human activity that are indeed responsive to major changes in the existence (and likely imposition) of sanctions: illegal parking and corporate crime. The former lacks the passion (or at least lack of impulse control) that drives most crime; the latter is typically subject to logical and long range planning. The bulk of criminal behavior involves drives and defects for which abstract thinking (even if present) is no match – and the prospect of getting caught is abstract. I hasten to add that the validity of my notions about the importance of doing to offenders what is most likely in fact to divert *them* from criminal careers is entirely independent of whether I'm correct about general deterrence.

[64] Chair/Discussant: Michael Marcus; Judge Ken Gee (retired), Consultant to the Judicial Commission of New South Wales, Australia, *Judicial Independence and Judicial Accountability*; Judge Moshe Talgam (retired), Former President of Tel Aviv Appeal and District Court, *Penal Disparities – The Israeli Approach – Subjective Paradigm*; Dr. Susan Edwards, Buckingham University, UK, *Lies, Damned Lies...And Perjury*.

Ken Gee, a retired judge and consultant to the Judicial Commission of New South Wales, Australia, reported on his work screening complaints against sitting judges. Judge Gee's message was that the process worked well in that no complaints had been found meritorious, most being dismissed on grounds such as a pending appeal. Judge Gee spoke also of the Commission's work in developing sentencing support technology with which I have become very familiar, as I was co-presenter with one of its architects, Ernest John Schmatt,[65] at the National Center for State Courts' Seventh National Court Technology Conference in Baltimore, 2001. As Judge Gee noted, the technology allows judges to see *what other judges have typically done* with offenders and crimes similar to those before the court. This certainly gives some comfort to new judges, and illustrates to all the path to safety from reversal in jurisdictions in which the appellate court can reverse for leniency and severity. But this approach perpetuates rather than improves our dismal public safety performance. Over the days that followed, Judge Gee repeatedly volunteered that the notion of building recidivism figures into the equation was extremely intriguing.

Judge Talgam and I had already talked. He described the Israeli version of sentencing support technology. Essentially, it works as does the New South Wales version, except that a judge can select favorite flavors of judicial style – "retributive-deterrent, incarceration, [or] rehabilitative" – and retrieve data reflecting the decisions other judges with similar styles. The system has the advantage from the user's point of view that the results will be more comfortable than if the user's style preferences are omitted, but public safety is still irrelevant to the tool, and probably damaged rather than furthered by encouraging judges to do what we've always done – unless, of course, Israel's recidivism rates are dramatically different than anyone else's.[66] Judge Talgam in his presentation acknowledged that the Israeli technology would be improved by incorporating outcome measures related to future criminal conduct.[67]

Dr. Edwards' presentation focused on the notions underlying appropriate sanctions for contempt: "In this area 'law is suffused with morality and, as a result, can't ultimately be identified or applied without the making of moral judgments.'" She pursued issues such as whether the punishment for contempt ought to turn on the severity of the consequences to those affected by the lie, and how enforcing the testimonial oath compares with other priorities in a system which is on the one hand dependent upon compelled testimony and on the other well-stocked with devices that presuppose that credibility must be tested.

During the ensuing discussion, the nature of the judicial process and its claims to legitimacy provided context for a skirmish concerning the nature of judicial independence. Professor Hans-Jörg Albrecht suggested in his remarks to Judge Gee that any agency for the acceptance of criticism of judges extrinsic either to appellate review or (in extreme cases)

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[65] The abstracts of our two projects aptly distinguish them; as of this writing, they are still available on-line on the CTC7 web site.

[66] Available evidence is to the contrary. Sixty five percent of Israel's prison population has prior imprisonment. See The Israel Prison Service - Unofficial Home Page, http://www.geocities.com/TimesSquare/5432/stat.html.

[67] Judge Talgam, who had begun referring to me as "St. Michael" in private, attributed the suggestion to include outcome measures instead to me as "the learned Chairman." I was quick to correct the designation, given the latitude accorded a "Chair/*Discussant*."

criminal prosecutions of judges was inconsistent with judicial independence. My position, apparently shared by others in the room, was that judges whose behavior is rude, condescending, insulting, or arrogant, or who conduct their office in some other manner repugnant to its purposes and responsibilities, at some point reach the level at which our failure to respond profoundly undermines the ability of the judicial system to maintain the respect that is critical to its legitimacy, that legitimacy is prerequisite to our in function in society, and that only with respect and legitimacy can we hope to retain independence. But the position articulated by Professor Albrecht is not unique, and the issue is worthy of some extended analysis.

Judicial Independence from What?

"Judicial Independence" and "judicial discretion" frequently surface as themes in sentencing discussions. Shortly after Oregon voters adopted "Ballot Measure 11" creating mandatory minimum sentences for a range of serious crimes, several progressive defense attorneys came to my office to enlist my cooperation with an effort to produce an educational video about why these provisions needed to be repealed. Their notion was that I could speak to the disaster of encroaching upon judicial independence by removing sentencing discretion in cases subject to the measure's mandatory minimums. I explained that although I agreed that there were cases in which mandatory minimum sentences were excessive or ultimately destructive of public safety or both,[68] I didn't see the loss of judicial discretion as being the

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[68] Again, I am not resisting the Conference's apparent consensus that trends toward higher and higher imprisonment rates has produced at least some sentences that are wrong-headed and cruel. But the criminal justice community loses credibility to the extent that it overlooks the impact of ineffective sentencing on future victims of crime. I believe we have to take responsibility for and meaningfully attempt to improve our public safety performance – which is cruel to both victims and offenders – before we have either the standing or potential to improve the rationality of public debate or public policy decisions around sentencing. My views on Ballot Measure 11 (Oregon's mandatory minimum sentence law, now codified at ORS 137.700, *et seq*) are that it serves public safety for the core of its target offenders – those who are truly violent and represent a persistent risk of violent recidivism if and when they are released, and for whom protracted incapacitation is the disposition most consistent with public safety. At the periphery of this core of offenders, however, are those for whom lengthy imprisonment is – at least in some cases – more likely to accelerate than to divert criminal careers, and to increase rather than decrease future victimization. The Oregon Legislature, in subsequent sessions, has ameliorated some but not all of these potential applications of mandatory minimum sentences, as have progressive prosecutors employing their discretion. There is no doubt in my mind that the measure has prevented some victimizations that would otherwise have occurred, but it has also probably distorted the balance of power in plea negotiations and resulted in sentences that represent a misuse of prison resources. In some cases, it has probably resulted in an increase rather than a decrease in crime by throwing relatively minor offenders into a prison environment from which they emerge with greater criminality than they would have under less draconian treatment. A preliminary report of a three year Rand Criminal Justice study concludes that "there is no evidence to suggest the mandatory minimum sentencing law has driven crime down since it took effect in 1995." *The Oregonian*, August 7, 2002, at D1. This may reflect the difficulty of isolating the cause of crime rate fluctuations, or it may reflect that recruitment, the criminogenic impact of prison, and returning prisoners eventually offset any general reduction accomplished by increased prison terms. See HALLIDAY REPORT, *infra* note 101, at 9 §§ 1.66,1.67. The best discussion I could find on the criminogenic impacts of prison is Todd R. Clear, PhD (Florida State University), *Backfire: When Incarceration Increases Crime*, http://www.doc.state.ok.us/DOCS/OCJRC/Ocjrc96/Ocjrc7.htm. Note, however, that not all of the criminogenic effects of imprisonment militate against prison as compared with other correctional responses. "Recruitment," for example, follows any correctional response that interrupts an offender's criminal behavior without addressing the social realities that support or tolerate such behavior at the same time and place.

point. After all, judicial discretion had produced abysmal recidivism rates, contributing to the public concerns that led to the adoption of Ballot Measure 11. Judges are not trained in sentencing. We have not in the past been provided with clear direction as to what we are supposed to accomplish with sentences.[69] And we have no meaningful access to information that would assist us to achieve improved public safety outcomes. We are essentially unrestrained in our personal philosophies, politics, life experience, and subcultures; it is therefore hardly surprising that our discretionary decisions are unpredictable except that they tend to reflect class predilections, and productive of public safety largely by accident. The defense attorneys were clearly disappointed, left, and never produced the video as far as I know.[70]

At the Conference, I encountered repeated expressions of what I take to be a consensus that "judicial independence" is a core value sufficient in itself to rebut any argument for legislative encroachment on sentencing discretion. I understand that disdain for such encroachment explains a virtually unanimous abhorrence of US style sentencing guidelines,[71] and in the UK has led to the promulgation of guideline judgments by appellate courts as a preemptive measure.

I firmly support the notion that a healthy society demands an independent judiciary. "A judge shall not be swayed by partisan interests, public clamor or fear of criticism."[72] But there are two very different strains intertwined in the notion of judicial independence. We must disentangle or at least distinguish them. Only one of these strains is defensible.

The oldest of underpinnings of "judicial independence" is the absolute power of the sovereign, whose original "court" was the royal court, and from whose assertedly divine authority modern courts ultimately evolved. "Independence" of this lineage is based on might, frequently in service of despotism. Criticism of the authority of judges as representatives of the king was potentially treasonous. Judges were free to use torture in pursuit of the sovereign's

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[69] This much has improved in Oregon. A constitutional amendment, legislation, and a judicial conference resolution unambiguously direct us to public safety. The text of all three are at http://www.smartsentencing.com. (The constitutional amendment is reflected in Article I, §15 of the Oregon Constitution, recited in 1997 Oregon Judicial Conference Resolution #1; 1997 Oregon House Bill 2229 is anther link on the site).

[70] On the other hand, it was a discussion about Ballot Measure 11 at a judges' meeting that launched my efforts to draft what became 1997 House Bill 2229.

[71] For the record, I am critical of the guidelines on other grounds: instead of making what works to reduce crime the presumptive sentence – and missing the opportunity to do so is their greatest shortcoming – they construct an illusion of rationality and a façade of consistency from a mix of ephemeral just deserts and very real correctional resource limitations. They impede rather than support focus on public safety. In practice, as Oregon's guidelines allow for departures based on substantial and compelling reasons, OAR 213-008-0001 *et seq*, it is usually possible to seek the best public safety outcomes with a public safety outcome explanation for the departure. On the other hand, since the guidelines' upper limits are below the otherwise applicable maximum sentences for many crimes, they impede public safety when public safety requires longer incapacitation than that allowed by an "upward departure." Mandatory minium sentences impede public safety when they require imprisonment that is likely to accelerate rather than to retard criminal behavior over the course of an offender's career. See note 68, *supra.*

[72] Judicial Rule (JR) 2-108, Revised Oregon Code of Judicial Conduct.

interests.[73]

The other strain evolved in resistance to the first, notably advancing with Magna Carta's movement toward shared power and the notion of a sovereign subject to law.[74] This judicial independence existed not to further the absolute power of the sovereign, but to preserve rights won for others. Modern democracies expanded notions from the Magna Carta[75] to develop an independence that is surely part of "checks and balances,"[76] but derives its legitimacy from the rights of citizens and the role of courts to preserve those rights in opposition – if necessary – to both the executive and legislative branches of government, and free of the impact of special interests[77] and inflamed public emotion.[78]

The significance of this distinction is that "judicial independence" means very different things to different observers and in different contexts. In the debate whether legislative bodies, appellate courts, or any authority ought to issue sentencing guidelines to restrict sentencing discretion, what, exactly are we defending? If we are defending the authority or the power of the judiciary for its own sake, we may have historical continuity on our side; we may reasonably invoke the notion that we've inherited what was once the king's. But surely we cannot expect to convince the other branches of government or the public with this strategy, particularly where our sentencing performance figures would doom any business in a competitive economy.

If instead we stress the derivative argument that judicial independence is worthy of support because of its role in a free society to check excesses by the other branches for the good of the public (the republic, the society, or whatever), we are on firmer ground than with arguments based on entitlement alone, and far more likely to prevail.

When I heard in the opening plenary session a judge solemnly proclaim his passion for his right to resist popular sentiment for a harsher sentence than he in his wisdom deemed "appropriate," I wasn't sure which voice I was hearing – Henry VIII or Thomas Jefferson.

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[73] See, e.g., Tamar Herzog, Torture in Early Modern Spain and Latin America; The Doge's Palace in Venice includes a room where witnesses and those accused of crime were tortured to ensure the veracity of their statements and to coerce confessions. See http://www.venicescapes.org/guided_tour_of_Venice-espionage_and_political_justice.htm. In my chambers I have a photo of myself in one of the magistrate's chairs in this room to remind myself of the darker side of our role as judges.

[74] An interesting piece, designed to correct the distortions of common law history by such groups as the "Freemen," is published by the Public Information Editorial Board of the State Bar of South Dakota, *Common Law Courts - Uncommon and Uncourtly*.

[75] See, e.g., William M. Brinton, AN ABRIDGED HISTORY OF EUROPE, *Chapter One: The European Union and the New Millennium* (1999).

[76] See, e.g., Center for Democracy, *The Annual International Judicial Conference: "Courts of Ultimate Appeal: Judicial Independence in Supreme and Constitutional Courts"*: "The establishment of an independent judiciary remains one of the greatest challenges to emerging democracies. To insure this critical separation of powers, constant care must be taken to strengthen judicial institutions and protect the rights of citizens."

[77] See, e.g., American Bar Association "Justice at Stake Campaign" press release: "Judges protect our individual rights, and an impartial, independent judiciary is essential to our democratic form of government."

[78] See, e.g., Len J King, *Public Opinion & the Judicial System: How does public opinion legitimately influence the course of justice?*, South Australia Institute of Justice Studies, Challenges and Directions in Justice Administration.

In the guilt phase of a criminal trial, it is easy to identify the relationship between judicial independence and the rights of citizens to due process of law. Judges must fiercely resist any attempt by the sovereign to compel a result, or by a public outraged at a crime to distort the precision and fairness by which we determine the guilt or innocence of one accused of that crime. Sentencing after conviction, however, calls for a substantially different analysis – as evidenced by the interest in public opinion of the Sentencing Advisory Panel[79] and the Home Office HALLIDAY REPORT[80] when recommending appropriate sentences: At least to the extent of just deserts or proportionality, the proper outcome *is* related to popular sentiment.[81] The sentiment we must ignore in sentencing in this regard is inflamed passion.

To whatever extent our need to distance ourselves from popular passions or the interests of other branches of government requires implicit force, it is clear that we are dependent entirely upon other branches for that force. It follows that we need more than force to protect our independence *from* the other branches– we need an educated and supportive public.[82]

Although tension between judicial and other branches as to which branch sets sentencing parameters surfaced at the Conference, I expect that most systems recognize that it is the proper role of the legislature to determine the maximum sentence available for various categories of crimes. Until recently, there hasn't been much debate about the propriety of legislative prescription of *minimum* sentences for some crimes. I expect that most jurisdictions will ultimately conclude, as has ours,[83] that establishing mandatory minimum sentences and sentencing guidelines are within the legislative prerogative in a government with distinct judicial, legislative, and executive functions. The value in this debate lies in analysis of the role and appropriate breadth of judicial discretion that lies within legislative limits.

Passion and sovereignty aside, the functional distinction between legislative and judicial roles in sentencing decisions lies in the difference between the general and the specific. Legislatures are policy bodies deciding such issues as what behaviors should be declared criminal (involving questions about deploying law enforcement, criminal justice, and correctional resources), how serious such behaviors are in general, and how much sanction (or

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[79] See text accompanying notes 23-26, *supra*.

[80] See note 101 and accompanying text, *infra*.

[81] Lest any rejoice in an apparent contradiction, I do not reject the role of just deserts wholesale. Surely proportionality has at least the function of limiting the upward extent of a sanction that may be imposed on an offender for a given crime and under a given set of circumstances, and punishment that exceeds in its severity that which is necessary for rehabilitation may be justified by the therapeutic needs of a victim, particularly in domestic violence and sex abuse cases. But my primary point in the text here is that judicial independence is generally not offended by the notion that public opinion is some measure of what a given crime calls for as an "appropriate sentence," while allowing public opinion to affect the determination of guilt is generally regarded as repugnant to an independent judiciary.

[82] "In a famous quip by President Andrew Jackson regarding a Supreme Court case involving the Cherokee Indian nation, Jackson retorted after the Marshall Court, named after Chief Justice John Marshall, announced the ruling by saying 'Marshall has now made his decision, now let's see him enforce it.' Instead of force what must the Court must rely on is the respect the people have for the institution." http://www.dacc.edu/~chantz/Poli150FederalJudiciary.htm; See also, the Supreme Court Historical Society at http://www.supremecourthistory.org/04_library/subs_volumes/04_c02_k.html.

[83] *See State ex rel Huddleston v. Sawyer*, 324 Or. 597, 932 P.2d 1145, *cert. den.* 522 U.S. 994, 118 S.Ct. 557, 139 L.Ed.2d 399 (1997).

correctional resource) is appropriate to devote to the purposes of "punishment" or otherwise responding to such behaviors – again, in general. The judicial role, whether we assume the traditional banner of deterrence, retribution (including denunciation), rehabilitation or the objective to do "what works," is to explore within the general parameters of offender and offense the specific circumstances of offense, offender, and current resources to craft an "appropriate" sentence. It will be such an easier case to make, though, when we actually know what we're supposed to be doing.

Although I tend to cringe at my colleagues' occasional assertion that sentencing is an "art," my concern is that without good data and clear direction, our "art" has produced terrible public safety results, and that we tend to respond to public criticism by suggesting that the public needs the equivalent of an art appreciation course before we need to listen. With direction and data, however, I agree that there is an "art" to sentencing – processing the details of the crime and the offender's criminal history, as well as his or her subtle expressions of personality that are so often completely stripped from a cold transcript. For this reason, and to this extent, I believe winning the power to issue guidelines for the appellate courts instead of the legislative branch is not much of a victory. Appellate courts should generally defer to trial courts in such matters for the same reasons that they should generally defer to a trial court's findings of fact or assessment of witness credibility. Of course, appellate courts have an important role in reviewing the lawfulness of sentences, which may include such questions as which factors are and are not properly part of the analysis – and, in rare cases, whether a sentence is so disproportionate as to be unlawfully excessive.

But I am certainly in accord with the apparent consensus of the Conference that the sentencing role requires judicial discretion for its most effective application. The trouble is that discretion alone does not *assure* effective application. The real risk to our discretion is not the theory, but the practical result; we are doing a miserable job with our discretion – at least if assessed by the recidivism statistics I discussed above.

I submit that anyone reasonably observant of history must concede that protesting that we have inalienable rights to independence or discretion for our own sake is unlikely of success. In short, even if we had a plausible theory by which to *demand* public support for our independence, the tactic is bankrupt. Whether we like it or not, we must earn and retain public support if we expect to regain or retain our independence.

As I argued to the defense lawyers who came for my support for judicial discretion in the face of mandatory minimum sentences, our "right" to independence doesn't even convince *me.* What is persuasive to the public and to legislatures, however, is that criminal sentencing ought to be aimed at positive public safety outcomes, and that those who make sentencing decisions ought to have access to good information about which disposition is most likely to achieve public safety.

The best strategy for retaining what discretion we have, and regaining sentencing discretion that has been eroded, is to accept responsibility for public safety outcomes, achieve access to information about what works best on whom and under what circumstances, and intelligently and responsibly to use our discretion to do our best to divert offenders from criminal careers. Our independence is threatened by our poor performance, best regained by improving that performance (and by welcoming a reasonably designed mechanism for enforcing appropriate judicial conduct); and not furthered by argument that we have a right to respect

regardless of our performance.

My presentation was at the second parallel session in the morning of the last day of the Conference, "Preventing Future Offending: Empirical and Ethical Issues in Using Punishment to Prevent Crime."[84] The previous evening's festivities[85] had taken their toll on our numbers. Although on this day there were three rather than four panels in each parallel session, my audience was much reduced; perhaps my message or my style had some role in this, but I was left with about ten new people to address, the remainder being participants in the panel or attendees I'd talked to before at Chicago[86] or Baltimore[87] who returned for more. I presented my slides and my pitch: recidivism statistics are abysmal, and evidence our profound dysfunction in a process upon which public safety necessarily depends. We must extract ourselves from denial about our impact and our responsibilities; exploit newly available decision support technology to show us correlations between what we've done to similar defendants sentenced for similar crimes and their future criminal conduct; and thus divert at least some offenders from criminal careers. By this route, we should regain respect and discretion that have been eroded in part by public reaction to our poor public safety performance.

Professor Cohen followed with a description of the interaction of DNA technology with the criminal justice system, the present disjunct between popular expectations and the actual utility of DNA technology (identification is the presently reliable use; it's a long way from mouse aggression genomes to humans), and the fascinating issues with which we will have to grapple if and when we actually achieve the technology to affect offenders' behavior at a genetic level.

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[84] Chair/Discussant: Jerry Cederblom, University of Nebraska, USA, who presented a paper at a panel that I could not attend, "*Retributive Sentencing: Matching Punishments to Offenses While Accounting for Intent*," in which he proposes a theory of just deserts that emphasizes the harm associated with the act *intended* by the offender. The other presenter was Neil Cohen, University of Tennessee USA, *DNA and Sentencing*. Judge Gilles Renaud, Ontario Court of Justice, Canada, did not appear as scheduled. His abstract, *Teaching Offenders A Thing or Two: Imprisonment to Permit an Offender to "Learn a Trade,"* describes an exploration of the issue "whether it is within the province of criminal courts to inflate otherwise appropriate sentences to assist offenders" by affording them the opportunity to benefit from vocational training and other opportunities in prison.

[85] An apparent tradition at the Conference is a night of Scottish folk dancing known as "Ceilidh" [pronounced "kay - lee"] which involved a good deal of drinking and heavy exercise; the Ceilidh looks much like the other folk dancing I've seen, with lots of rounds and intricacies few can master with one night's training. The clear expert was one of the Conference organizers, Neil Hutton, who made kilts look like obviously appropriate attire, and graciously ushered those brave enough to risk embarrassment through the various moves and steps. It was a delight to watch participants from all continents having a good time in the real world before returning, somewhat reduced in their number and their capacity, to the academic. Judge Talgam won "first prize" for his enthusiastic participation – a bottle of Scotch, of course.

[86] I had presented a paper, "Sentencing Technology in Pursuit of Public Safety," at the 2001 Judicial Decision Support Systems Conference at the Chicago-Kent School of law on May 26, 2001.

[87] I presented a similar paper, "Sentencing Support Technology," at the National Center for State Courts' Seventh National Court Technology Conference in Baltimore, in August, 2001; the slide presentation is available as a download; although instructions for obtaining a more recent version are available on my website, http://www.smartsentencing.com.

I suppose the counterpoint between our two presentations for me underscored the obvious propriety of exploring correlations between what we already do to offenders and their future criminal conduct. As long as we avoid excessive punishment, we can confidently address any ethical issue. The current serious ethical question is the one never raised: how can we continue to do what has always been done *without* responsibly attempting to achieve public safety – given that our usual product allows avoidable repeated victimizations.

Response to my pitch was what I've come to expect. A few seemed genuinely intrigued. One audience member came up and quietly[88] shared that he thought the Dutch were ready to move in the direction I advocated. Another announced that he was on his way to obtain a copy of my paper. A third announced that my propositions were obviously correct and exuded common sense.

The rest had politely applauded when appropriate and filed out to the waiting bag lunches.

In the last parallel session, I chose to attend "Managerialism and Rationalities in the Decision to Incarcerate."[89] Although I was a bit mystified by the meaning of "managerialism" in this context,[90] the abstracts led me to hope that this session would actually yield insights on the relationship between sentencing decisions and future criminal conduct. I was again disappointed.

An Raes, a researcher at the Department of Criminology at the Free University of Brussels, reported on a study of recent trends in sentencing theory and practice in the context of Belgium's recent focus on traffic safety and a system of enforcement which affords public prosecutors unfettered discretion to offer or not a "transaction," which allows an offender to pay a fine to avoid conviction and any lasting record of the offense.

Rasmus Wandall, a doctoral student at the University of Copenhagen, reported on his

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[88] Looking back, there was something covert to his encouragement, as with a jail trustee slipping a forbidden cigarette to a fellow inmate with fewer privileges. This tone accompanied several messages of agreement discretely delivered to me during the Conference.

[89] Chair/Discussant: Mary Campbell, Director, Corrections Policy, Solicitor General, Canada; An Raes, Researcher at the Free University of Brussels, Belgium, *The "Processing" of Traffic Offences by the Belgian Public Prosecutor: An Example of Managerialism*; Rasmus Wandall, University of Copenhagen, Denmark, *Rationalities of Incarceration in Sentencing Decision-making*; Vanja Stenius, Rutgers University USA, *Sentencing Policies and Returns From Incarceration: A Consideration ofthe Law of Diminishing Returns*.

[90] I've since learned that this may be attributable to my nationality: "Managerialist Stories are almost unrecognizable in the U.S. Most U.S. scholars and managers do not understand the term 'managerialist.' Critical work on managerialist discourse comes mostly from Australia and the U.K. and reveals, the International community is well along in its understanding of the functionalist mindset." David M. Boje, *Managerialist Storytelling* (July 1, 1999; updated April, 2002), http://cbae.nmsu.edu/~dboje/managerialist.html. Indeed, the blossoming literature defining and exploring the concept is chiefly from the UK. *E.g., New Managerialism: Theoretical Debates and Issues*, UUK/SRHE Research Seminar, June 20, 2001, http://www.srhe.ac.uk/cvcp/UUK%202001%20Reed.htm. I was able to find this US definition: "This paper presents a discussion of the influence of managerialist values on the field of public administration. The author begins by developing a definition of managerialism consisting of four components: efficiency as the primary value guiding managers' actions and decisions; faith in the tools and techniques of management; a class consciousness among managers; and a view of managers as moral agents." J. David Edwards, Department of Political Science, University of Tennessee at Chattanooga, *Managerial Influences in Public Administration*, http://www.utc.edu/~mpa/managerialism.htm.

quantitative analysis of burglary and violence cases in six city courts in Denmark, aimed at discovering the extent to which actuarial rationalities have impacted decisions to incarcerate - particularly as they may supplant the traditional ideologies (which he characterized as "individual-preventive ideas, general-preventive ideas, equality and proportionality").

Vanja Stenius, a doctoral student at the School of Criminal Justice at Rutgers University, summarized her construct of a model by which to illustrate diminishing returns for an increasing incarceration rates as correlated with "the unintended consequences of incarceration (i.e., substitution, criminogenic effects of imprisonment)."

What all of these presentations had in common was that any reference to impact on offender behavior was entirely theoretical, and included, if at all, only because of its role in the logical construct of the presenter's thesis. Vanja Stenius's model did not purport to use any real data, let alone data about crime or post-prison offense rates, but rather merely to illustrate how theories about general deterrence, incapacitation, and the criminogenic effects of incarceration *might* interact were the economic model of diminishing returns applicable. Rasmus Wandall's studies looked to the data on the distribution of decisions as potentially impacted by the changes he explored, not to the impact of those decisions on public safety. And when I asked An Raes whether anyone had examined whether the prosecutor's choices or implementation of the new approach to traffic crimes in Belgium had correlated with either individual defendants' post-process behavior, traffic death and injury statistics, or even fine revenues (I was desperate for any attempt to link to the real world), I received nervous giggles. I expect I was an embarrassment to an academic ritual, just as asking what works seems to embarrass many participants in a sentencing hearing.

Is Public Safety "Academic"?

In processing all of this, it finally occurred to me that one of my obstacles is an age-old tension in higher education between the theoretical and the practical. There has always been the view in academia that insisting on practical application cheapens scholarship, with commercialization as the worst example. Pure theory in any field – from art to zoology – in one sense celebrates the highest expression of human endeavor.[91] The "populist" perception, of course, is captured in the concept of "ivory tower," but the tendency of academia to eschew real world implications is broadly enough established that one definition of "academic" is "having no practical purpose or use."[92] On the other hand, higher education has often sought connections

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[91] With teachers and artists in my family, I fully recognize the importance of "impractical" pursuits of art, music, philosophy, theoretical science, and the like to the value of our culture – and the threat that insistence on practical application can pose to that value. Mao's assault on Chinese art, for example, cannot be justified on pragmatic terms.

[92] Definition 8, AMERICAN HERITAGE COLLEGE DICTIONARY Third Edition, (Houghton Mifflin, Boston 1997). Here's an example apropos my discussion of judicial independence: "What powers do judges have to scrutinize and overturn decisions made by other branches of the government? Can judges be independent if their positions and budgets are solely controlled by an executive branch entity? In deciding a case, how can judges be shielded from political interference? Who determines whether a legal decision is in keeping with either a written constitution or previous judgments? These questions are not academic." *Independence of the Judiciary*, ELECTRONIC JOURNALS OF THE U.S. INFORMATION AGENCY,

with other enterprises to sustain itself, particularly in the realm of public institutions and public funding.

This dichotomy crosses the divide between science and the liberal arts, with pure research and theory typically occupying the higher realms of academia even in fields in which a practical application – such as designing a bridge, curing a patient, or implementing urban planning – is acknowledged as part of the field. Yet the chasm is neither inevitable nor incurable.

In the field of public safety, my impression is that those who end up with the responsibility for actually achieving the public purpose are busy learning their trade in institutions far removed from those in which "research" is conducted, celebrated and debated. Law enforcement and corrections workers tend to be educated in junior colleges rather than in "centers for sentencing research."

The Strathclyde conference convinced me that our community of jurists and scholars has managed entirely to divorce itself from the practical, with the consequence that we're about as far off base as was Bishop Ussher when he convinced his world that it was created in 4004 B.C.[93] We have steadfastly ignored empirical examinations of outcomes in our assessments of sentencing, preferring to examine and debate – and even to model – every aspect *except* what seems to work best to reduce the criminal behavior of those we sentence. But we needn't abandon theory, scholarly perfection, or anything else of value to add empiricism to our world; academia and scholarship have profited rather than suffered from the work of James Hutton and Georges-Louis Leclerc de Buffon: all that was necessary was to combine theory with thoughtful observation of the real world.[94]

In medicine, including public health, the practical and the theoretical seem to coexist, each benefitting the other. There seems to be a trickle down from the purest of research to a public benefit in the field, and an occasional benefit to research beyond the mere subject matter offered by the real world of disease and human behavior. Perhaps AIDS advances are the most analogous examples of the need for and the value of both practical and theoretical work – because of the challenge, the complexity, and the human costs of the problem. I submit that responsibly addressing how our sentencing decisions affect criminal careers (and thereby public safety) would enrich rather than debase scholarly endeavors; that we need not abandon pure research or theory to add the real world to our contemplations; and that accepting responsibility for improving our public safety performance will earn us far more respect than any campaign for public education or insistence upon our inherent "rights" to independence. It may also spare us the ridicule that ultimately visited the last defenders of Bishop Ussher's calculations.

Volume 1, Number 18, December 1996.

[93] Sunday, October 23, 4004 B.C., to be exact.

[94] Hutton debunked the pure theory of Ussher with observation and experiment concerning the nature of the earth's strata and their implications for the age of our planet; Leclerc de Buffon, combined painstaking observation with theory to presage modern theories of evolution. See, e.g., Martin Gorst, MEASURING ETERNITY: THE SEARCH FOR THE BEGINNING OF TIME (Random House 2001).

The last plenary panel was entitled "Understanding and Responding to (In)Equality in Sentencing."[95] The presenters variously and correctly deplored the disparate impact of criminal justice on ethnic and racial minorities. Barbara Hudson had explored the related issue of poverty and punishment in a previous panel, addressing such questions as whether those deprived of the benefits of society should not be spared the punishment appropriate for offenders who have. As far as I could tell, the presenters all agreed that the solution lies in publishing the data to the public and to sentencers. I have my doubts. I was relieved that there was no advocate for "equal treatment" in the usual sense: creating categories of crime and offender, then insisting that everyone convicted of a crime who was an offender of a given category be treated precisely as every other offender of the same category convicted of the same crime.[96]

In the ensuing discussion, I made one last stab at this point: we cannot hope to improve the application of sentencing until we give sentencers some clear direction as to our objectives, and access to information with which intelligently to pursue those objectives. As long as we insist that sentencing is essentially about declaring society's values, punishing those who violate them, and denunciation, we cannot be surprised that the unpleasant sides of personal philosophies, values, and backgrounds often produce reflections of the prejudices that linger in our societies.

To be sure, there are real difficulties to be faced even if we adopt a public safety model akin to the public health system. I think it generally accepted that economic hardship and social discrimination are likely to exaggerate in their victims the conditions that generate crime, and to minimize the opportunities to succeed in rehabilitation after a conviction. This has nothing to do with the moral debate, which always features examples of people who overcame all hardships to succeed. We certainly know that stable employment, housing, and relationships tend to correlate with law abiding behavior (all other things being equal)[97]; we also know that economic hardship and discrimination correlate with unemployment or underemployment, substandard housing or homelessness, and single parent families.[98] So the poor and victims of discrimination are going to be over represented in a criminal justice system even if law enforcement were color- and class-blind, and criminal justice would in a very real sense be perpetuating the effects of

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[95] Chair: Professor Julian V. Roberts, Ottawa University Canada; Marc Mauer, Assistant Director, The Sentencing Project, Washington USA; Professor Doris Marie Provine, Arizona University USA; Barbara Hudson, *Punishment, citizenship and impoverished offenders*, University of Central Lancashire, UK.

[96] I had sent an e-mail as quoted in note 32 to Professor Doris Provine (and others) before the Conference; before the final session, she told me she was thinking of quoting the e-mail. By the time of the concluding panel, it was clear that there was no consensus at the Conference that pretending to treat all alike was a solution to anything, and there was no need to make the argument.

[97] See, e.g., *Rehabilitating Prisoners and Ex-Offenders*, Staff, Vera Institute of Justice, May 16, 2002, http://www.vera.org/project/project1_1.asp?section_id=3&project_id=14; *What We Know about the Root Causes of Crime in Toronto*, Official Web Site of the City of Toronto, http://www.city.toronto.on.ca/safety/sftyrprt3.htm.

[98] *The National Strategy on Community Safety and Crime Prevention At Work in New Brunswick*, Department of Justice, Canada (June 2002), http://canada.justice.gc.ca/en/news/nr/2002/doc_30541.html; "The prevalence of both property crime and violent crimes is related to problems of economic hardship among the young no matter what region." *Chapter 1: The experience of crime and justice*, GLOBAL REPORT ON CRIME AND JUSTICE, United Nations Office for Drug Control and Crime Prevention, (Oxford University Press 1999), http://www.uncjin.org/Special/c1.html.

economic disparity racism even if it added no additional disparity of its own. And, of course, the criminal justice system and law enforcement systems have added disparity.[99]

From my perspective, the overriding prerequisite to addressing disparate sentencing impact is aiming the process at public safety and responsibly pursuing that objective. If sentencing arguments and decisions are about selecting a disposition that is most likely to reduce future criminal behavior, and if they are fueled with data relevant to that end, sentencers are less likely to resort to inappropriate predispositions than when asked simply to "fit the crime" with an "appropriate sentence." We need to be cognizant of the impact of unfairness in generating the criminal records of minorities and disadvantaged offenders, because it may be that those records are inflated by circumstances other than propensity for criminal behavior, as compared with offenders whose records reflect no such inflation. To this extent, we may even find ways in some cases to ameliorate past discrimination – with a perfectly legitimate basis that should withstand any claim of "reverse discrimination." And in many jurisdictions, including mine, there are programs that target ethnic minorities with "culturally appropriate" content. If and when such programs work as well or better than the alternatives, we should use them. On the other hand, we may find that the same social conditions that commonly generate crime also make it harder to divert affected offenders from future crime, and we may find that we must consider limiting severity to avoid compounding racism.[100]

Proportionality does serve to set an upper limit of what we should do to a given offender to prevent future crime, and there is no reason why other equitable limitations should apply. But this is very different than directing the entire process to search for an "appropriate sentence" based on just deserts. If we are in the habit and practice of learning what works best for which offenders under which circumstances, we can rationally and responsibly face the questions of whether or when what works should be outweighed by some other valid consideration. At least we would have something of value (public safety) to weigh against the competing interest (avoiding racial disparity, or punishing an offender to further a victim's recovery from a sex crime, or dealing with the non-recidivist drunk driver who kills someone). In the present system, we have far less of value to compete with any other valid consideration – simply because we make no responsible effort to select sentences that are most likely to reduce future criminal conduct and produce abysmal public safety results.

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[99] See, e.g., Speech of Gurbux Singh, Chair of the Commission for Racial Equality, on Sept 5, 2000, to the Howard League conference, http://www.cre.gov.uk/media/nr_arch/nr000905a.html. I think the most significant reflection of the problem is the growing number of statistical reports of monitored police activity showing that minorities are stopped more often but have no higher "hit rate" (the rate at which the enforcement activity yields evidence of crime) than non minorities. Deborah Ramirez, Jack McDevitt & Amy Farrel, A RESOURCE GUIDE ON RACIAL PROFILING DATA COLLECTION SYSTEMS: PROMISING PRACTICES AND LESSONS LEARNED 3 (2000), quoted in *Racial Profiling Summary of Research to date*, The Institute on Race & Poverty, University of Minnesota Law School, Twin Cities Campus, Feb 13, 2001, http://www1.umn.edu/irp/publications/racialprofiling1213.html.

[100] The sentencing support tools we have developed allow the user to include or exclude an ethnicity variable for precisely the reasons mentioned in this paragraph. First, users can compare the offender with others of the same age and ethnicity who have been sentenced for similar crimes with similar criminal histories. This may avoid comparing minority defendants with nonminority offenders whose records, uninflated by racism, are reflective of a higher level of criminality. Second, users can see how programs aimed at minorities correlate with reduced recidivism, as compared with other programs used on such offenders. Third, users can alter the ethnicity variable to see what impact it has on the results.

The HALLIDAY REPORT

I learned of the HALLIDAY REPORT as a result of attending the Conference (in spite of the surprisingly little attention it received there). In writing this paper, I ended up studying the Report, and believe the resulting analysis important enough to include here.

The Home Office published MAKING PUNISHMENTS WORK: REPORT OF A REVIEW OF THE SENTENCING FRAMEWORK FOR ENGLAND AND WALES in July 2001, as a result of a project chaired by Lord John Halliday.[101] The report represents an exhaustive examination of most aspects of crime and punishment, and sets forth a series of recommendations for change for England and Wales. Although I believe the effort fails to accomplish the breakthrough in perception essential to meaningful progress in sentencing, it credibly gathers the necessary components. Its recommendations come remarkably close to describing the system in place in Oregon.[102] It amounts to a compendium of modern information on the important issues it addresses. As far as I can tell, however, it has been largely ignored – in common with a great deal of work that sits on academic and agency shelves.

The presenters reporting on the Sentencing Advisory Panel, and the Panel's ANNUAL REPORT, made no significant use of the HALLIDAY REPORT, though it was published just as the Panel was beginning its years's work. The HALLIDAY REPORT was discussed in at least one other Conference panel[103] and in three abstracts[104] assembled for the Strathclyde Conference.

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[101] John Halliday, Director, Review Team Cecilia French, Team Member Christina Goodwin, Team Member, MAKING PUNISHMENTS WORK REPORT OF A REVIEW OF THE SENTENCING FRAMEWORK FOR ENGLAND AND WALES (Home Office, July 2001), http://www.homeoffice.gov.uk/docs/halliday.html. [Hereafter referred to as "HALLIDAY REPORT" with page cites to the text] Note that the entire report with appendices (and annexes to appendices) is available in Adobe "portable document format" from this site.

[102] Oregon certainly follows the approach of routinely requiring or encouraging increased imprisonment for repeat offenders and offenders with convictions for multiple crimes sentenced in the same proceeding. Our sentencing guidelines are not, as the HALLIDAY REPORT suggests, focused on public safety (they attempt to reconcile just deserts with prison resources), but a later state constitutional amendment and intervening legislation (some of which I authored) direct that the process focus on public safety. Oregon's sentencing guidelines (which articulate treatment opportunities only for three of 99 gridblocks - see OAR 213-005-0006), in common with some of the thinking of the HALLIDAY REPORT (at 19, ¶ 2.35 and illustration), emphasize rehabilitation efforts primarily for a small segment of defendants to be sentenced, although the more recent amendment and legislation establishes public safety as a dominant objective for all offenders. The public safety focus exists on paper in Oregon; it will take some time to bring the criminal justice culture itself into line with the prescriptions of statutes and the judicial conference resolution.

[103] Making Sentencing Reform Work: Round-Table Panel, http://www.law.strath.ac.uk/CSR/conference2002/conference/abs_af.htm#haliday_report.

[104] *Making Sentencing Reform Work? Comparing English And Victorian Approaches To Sentencing Reform*, Arie Freiberg, Melbourne, Australia, http://www.law.strath.ac.uk/CSR/conference2002/conference/abs_af.htm#freiberg;
Criminal Sanctions Reform Proposals in Germany and England from a comparative perspective,
Christiane Rabenstein, Max Planck Institute, Germany,
http://www.law.strath.ac.uk/CSR/conference2002/conference/abs_ns.htm;
Sex Offenders Emerging from Long-term Imprisonment: A Study of Their Long-term Reconviction Rates and of Parole Board Members' Judgements of Their Risk
Professor Stephen Shute, School of Law, University of Birmingham,
http://www.law.strath.ac.uk/CSR/conference2002/conference/abs_ns.htm.

Professor Arie Freiberg, of Melbourne, Australia, prepared a similar report for the Victorian government, though more narrowly focused on "the maximum penalty for child stealing, sentencing for drug offences and drug-related offences, the range of sentencing options (with special reference to the procedures and consequences following breach of such orders), mechanisms to inform the sentencing process including guideline judgements and the desirability of introducing a sentencing indication scheme."[105]

Much of the HALLIDAY REPORT articulates (and supports) propositions for which I have long argued:[106]

- "the present sentencing framework suffers from serious deficiencies that reduce its contributions to crime reduction and public confidence"[107]
- "Persistent offenders commit a disproportionate number of crimes and account for a disproportionate number of sentencing occasions"[108]
- Criminal careers have different flavors[109]
- sentences ought to be imposed within the range that is legally available to divert offenders "away from lives of crime"[110]
- "Sentencers should be provided with accessible information about the efficacy of sentencing, as well as its costs, and should make themselves generally aware of it"[111]
- sentencers should be encouraged to consider crime reduction[112] - "what sentence would most closely serve the purposes of crime reduction and reparation in this case?"[113]
- "consistency of approach rather than artificial uniformity of outcomes [should be the goal], recognising that disparate outcomes in superficially similar cases are frequently

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[105] http://www.law.strath.ac.uk/CSR/conference2002/conference/abs_af.htm#haliday_report

[106] I of course do not suggest that the HALLIDAY REPORT got these ideas from me, but that they are demonstrably so and easily perceived once the observer steps out of the archaic liturgy of our present criminal justice culture.

[107] HALLIDAY REPORT at i.

[108] Id. at 2, ¶1.14 and App 3.

[109] Id., App. 3 (pp. 92-95)

[110] Id., at ii. ¶0.3,0.4, 0.5. We diverge, however, in that the Report would have the sentencer determine the range of "appropriate punishment" within that legally available, and only then determine what would be most likely to reduce criminal conduct. My view is that the sentencer should determine what would be most likely to reduce criminal conduct within the range legally available, and only then worry whether some consideration other than public safety required some other result within that range. The difference is not "academic."

[111] Id.. at iii, ¶0.9. To be fair, I rarely articulate concern with the relative costs of sentencing options, probably because I am focused instead on the squander of resources occasioned by failing to prevent repeaters from repeating to demand resources.

[112] Id. at 2, ¶1.9

[113] Id. at 18, ¶2.30

justifiable and necessary"[114]

- programs in and out of custody, aimed at offenders based on what is most likely to work on them, might reduce recidivism rates from five to 15 percent, and the sentencing framework ought to do more to maximize their success[115]
- There is a lack of correlation between punishment levels and crime levels to evidence the viability of general deterrence as a sentencing objective, but sentences aimed at other tangible objectives may provide general deterrence as a "bonus"[116]
- Evidence does not support the notion that changing punishment levels in itself will promote public confidence[117]
- "The general public are very clear about what they want sentencing to achieve: a reduction in crime."[118]
- The primary function of prison is crime reduction through incapacitation.[119]

Having assembled the components of a major improvement in sentencing policy, the HALLIDAY REPORT adroitly avoided such an accomplishment by plumbing the depths of archaic and empirically unsupported tradition to craft its recommendations:

> At its roots, sentencing contributes to good order in society. It does so by visibly upholding society's norms and standards; dealing appropriately with those who breach them; and enabling the public to have confidence in its outcomes. The public, as a result, can legitimately be expected to uphold and observe the law, and not to take it into their own hands.[120]

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[114] Id. at iii, ¶0.9

[115] Id. at 6-7, ¶1.45-.50, App 6

[116] *See* Id. at 8-9, ¶¶1.62-69, App 6. Note: although the text allows that general deterrence "clearly exists," it cites "Appendix 6" for support – but Appendix 6 provides none. See note 63, *supra*.

[117] Id. at 8 ¶1.61.

[118] Id.. App. 5 (at 108); "When asked unprompted what the purpose of sentencing should be, the most common response is that it should aim to stop re-offending, reduce crime or create a safer community. Next most frequently mentioned are deterrence and rehabilitation. Very few spontaneously refer to punishment or incapacitation."

[119] Id. App 7, Annex A (p. 160).

[120] Id. at 1 ¶1.3. The notion that "appropriate sentences" are necessary to prevent vigilantism is certainly within the ancient culture of criminal justice and its rationales, although it is articulated relatively rarely. For purposes of this analysis, the notion is indistinguishable in effect from the "public confidence" issue – if the available evidence doesn't link variations in public confidence with changes in sentencing levels, it does not support the notion that the changes recommended by the Report are necessary to prevent vigilantism.

The Report articulated "three other more specific purposes,"[121] "punishment," "crime reduction," and "reparation," articulated disagreement "whether punishment is a goal in its own right or is, rather, a means of achieving the other two" of these three goals, and then concluded:

> Punishment - meaning the loss of liberty, property or other rights and freedoms - is necessary in order to achieve any of the three aspects of crime reduction, as well as reparation. Perhaps above all, the goal is to achieve punishments that work as well as they can, in terms of crime reduction and the satisfaction of victims and communities. Equally important is the goal of achieving punishments that are just, and are seen to be just.[122]

The major recommendations of the Report are obviously based not on the data concerning public attitudes as to what sentencing should accomplish, or connecting sentencing with public confidence, or concerning effectiveness of incarceration and other dispositions in reducing recidivism, criminal careers, and so on, but rather on profoundly influential – apparently primordial – notions of "punishments that are just and are seen to be just," "visibly upholding society's norms and standards; dealing appropriately with those who breach them; and enabling the public to have confidence in its outcomes." In short, instead of using its data to fashion recommendations, the Report drew on notions of just deserts wholly without any support in the data it assembled.

Thus the major recommendations[123] of the report include:[124]

- The existing "just deserts" philosophy should be modified by incorporating a new presumption that severity of sentence should increase when an offender has sufficiently recent and relevant previous convictions.
- The principles governing severity of sentence should be as follows:
  - ➢ severity of punishment should reflect the seriousness of the offence (or offences as a whole) and the offender's criminal history;
  - ➢ the seriousness of the offence should reflect its degree of harmfulness, or risked harmfulness, and the offender's culpability in committing the offence;
  - ➢ in considering criminal history, the severity of sentence should increase to reflect a persistent course of criminal conduct, as shown by previous convictions and sentences.

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[121] I submit that "punishment" is neither "other than" nor "more specific" than "visibly upholding society's norms and standards; dealing appropriately with those who breach them," in any way addressed by the HALLIDAY REPORT. For purposes of my analysis, any difference is surely academic.

[122] Id., ¶¶1.4, 1.5. I submit that the recommendations belie the claim of equal importance.

[123] These are all quoted verbatim from portions of the recommendations summarized at p. 21 of the Report.

[124] The report makes many recommendations with which I entirely agree – such as urging sentencers to exercise discretion to do what most likely reduces crime, and to access information to help them do that. The problem is that the just deserts recommendations overwhelm these insightful recommendations by allowing just deserts and punitive purposes drastically to reduce the range within which a sentencer should consider public safety. The difference is not academic.

- Imprisonment should be used when no other sentence would be adequate to meet the seriousness of the offence (or offences), having taken account of the offender's criminal history.
- Courts should be free to choose from the full range of non-custodial sentences, while being required to match the punitive weight of such a sentence with the seriousness of the offence (or offences), having taken account of the offender's criminal history.
- Courts should have clear discretion to pass a non-custodial sentence of sufficient severity, even when a short prison sentence could have been justified – bearing in mind their ability to re-sentence in the event of repeated breach of conditions.
- The so-called "totality principle," which requires courts to look at all the current offences before the court as a whole, and increase sentence severity accordingly without adding the total suitable for each offence cumulatively, should remain.
- New sentencing guidelines should set out "entry points" for considering severity of sentence, alongside graded definitions of seriousness of offences, and indicate the range of effects that previous convictions should have on sentence severity.

A major part of the HALLIDAY REPORT was its "cost-benefit analysis" that purported to quantify in monetary terms the costs and the benefits of various options in implementing its recommendations for "adjustments." Since increased incarceration terms were the most expensive of the recommendations,[125] the cost benefit analysis took pains to construct a model that would include direct and indirect costs of crime and direct and indirect crime reduction effects of increased incarceration. The model is expressly,[126] obviously, and profoundly dependent upon incredibly soft "assumptions" about all the variables. This infects both the costs and the benefits, and renders any outcomes wholly undependable. Typical is the derivation of the estimate of the quantity of crime reduction accomplished by incarceration: The crime reducing benefit is in substantial part premised on the assumption that incarcerated offenders would otherwise commit 21 offenses per year, a number apparently arrived at by "assuming" the average ratio of recorded to actual offenses is 4.2, multiplying that by "the reduction in offences per reconviction," which is assumed to be five – and that number is arrived at by considering two US studies of totally disparate methodology, one which estimates nine to 13 offenses per year (based on self-reports of offenders), and another estimating the rate at from two to four per year (based on "official statistics for the early 1990's [sic] and cohort data on successive convictions"), and opting for five per year as "the pragmatic position taken in SR2000."[127]

At least at one point in the development of the model, the authors concede: "At this stage, the model was largely structural, to allow for maximum flexibility and the prompt inclusion of data

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[125] These prominent recommendations probably also explain the low profile of the HALLIDAY REPORT at the Conference, which seemed generally of the persuasion that increased prison terms were a move in the wrong direction.

[126] The assumptions, their origins, and their dramatic limitations are candidly revealed (in substantial part) in Appendix 7 to the report, p. 140 *et seq.*

[127] 159 App 7, Index A, @ 28 & n.10. "SR2000" is Sir David Omand, Permanent Secretary, THE JULY 2000 SPENDING REVIEW, http://www.homeoffice.gov.uk/pfd/dis00.pdf, November 2000.

once determined."[128] This means no more or less than this: the modelers have constructed a structure that they hope correctly represents the interaction among the many variables in the estimate, but has no claim to accuracy whatever until the assumptions about those variables are validated – and then only if the modelers have correctly identified and quantified the interactions. This approach to modeling is endemic in economics and the social sciences, and it may well produce valuable insights with which to understand the interactions of parts of a complex whole. But it is also remarkably susceptible to the "Bridge over the River Kwai"[129] syndrome – in which the architects of the structure become so enamored with its form that they completely disregard its purpose.

My purpose is not to quibble with the results of the cost-benefit analysis (by its assumptions about the costs of crimes prevented, the modeling concludes that the Report's suggestions would produce a net benefit rather than a net cost.) Certainly, crimes cost the public and crime victims enormous amounts of money (and other losses), and the criminal justice system costs the public enormous amounts of money. Depending upon the implementation of the Report's recommendations for adjustments in the criminal justice system and the actual relationship between criminal justice (including corrections) and the incidence of crime, and depending upon which costs of crime are included in the analysis, adjustments may very well produce a net savings. Apart from the reflection that the assumptions critical to the cost-benefit analysis are far too haphazard to provide any confidence in the results, I have no quarrel with the attempt.

Nor is it my purpose to argue that repeat offenders in general should not be incarcerated for longer periods than first offenders. Most should.

Rather, my reaction to all of this is that I feel like a member of an audience with whom the author of a drama (comedy or tragedy, but the latter is more analogous) shares with the audience a critical ignorance of the protagonist – If only they could *see*, none of this would have to happen.[130]

First, if our present practices result in repeated crimes by offenders, they also result in repeated costs to victims *and* to the criminal justice system, including the costs of *repeated* imprisonment. By failing to account for criminal careers and the financial implications of failing to exploit opportunities to divert a greater proportion of offenders from those careers, the cost-benefit analysis misses a profoundly important point.

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[128] 133 App 7, @ 8.

[129] Pierre Boulle, THE BRIDGE OVER THE RIVER KWAI. There are many themes in the story, taken from an actual World War II incident in which the Japanese forced British and US POWs to build an essential bridge in Burma. When the allies attempted to destroy the bridge, the British Commander who accomplished its construction as a POW died defending his masterpiece.

[130] Romeo, Stop! Juliet lives! Oedipus, Stop! He's your father; she's your mother! And so on. Another analogy: it is as if a wonderfully equipped committee went about trying to modernize horse-drawn transportation, and came up with all of the parts of a modern automobile: chassis, engine, transmission, drive train, body, seats, brakes and steering, but then assembled a tricycle out of some left over sheet metal and clock gears, and used the remaining components to construct a replica of Lady Justice – with blindfold and terrible sword prominent.

Second, freed for just a moment of the veil of ancient dogma, anyone should be able to see that what is called for is to turn the sentencing concept entirely around. Instead of determining what punitiveness is "appropriate" under the circumstances according to a calculus more suitable to the determination of degrees of Masonry than to the responsible efforts of a government function charged with serving public safety, this system ought to be doing is its very best to determine what disposition will best work to reduce crime by the offender before the court. Freed of ancient dogma, anyone should also see that legislators and the public would welcome a criminal justice system that functions as a responsible agency of dispute resolution and public safety implementation instead of a theater for a morality play.

Instead of estimating whether prison or more prison is appropriate based on enormous generalizations about broad categories of offenders and crimes, we should be doing our very best to learn with great precision which variations among offenders, their crimes, their histories, and their other personal details correlate with future dangerousness and susceptibility to the many dispositions we might employ to prevent future criminal behavior. Instead of tolerating generalizations appropriate for theoretical and moral debate, we must insist upon precise analysis of the differences among offenders and dispositions and the connections that will produce the best public safety outcome. If we expect to improve our performance at all, we must stop acting as if the issue is the proper selection of a ceremony to appease a particular social wind, and begin acting as we do when competently combating individual illness or a major public health issue. Instead of evaluating dispositions based upon enormous generalizations about their impact on offenders in general, we should be doing our very best to determine with great precision which dispositions are most likely to reduce criminal behavior when applied to which categories of offenders. Instead of allocating expensive and critical prison resources according to constructs about when prison is necessary to "meet the seriousness of the offence," we must do our very best to use prison precisely and when it is necessary because of the dangerousness of the offender and the offender's lack of (or limited) susceptibility to other correctional responses. Instead of viewing only a small range of dispositions as relevant to crime reduction, every piece of the sentencing spectrum should be deployed as if the choice to deploy it has consequences for public safety – because it necessarily does. Public safety should not be what we consider in the interstices between the minimum and maximum "appropriate penalty." It must be the touchstone of every sentencing decision.

For the record, I am not arguing for greater or lesser severity or leniency, and I have no idea whether the overall effect of implementing my suggestions would make sentencing more or less severe "in general." I do suspect that applying correctional resources and making sentencing decisions precisely and responsibly in light of good information about what works would result in longer prison sentences for some, lesser sanctions for others, and – most importantly – substantial improvement in our impact on future criminal behavior by those we sentence – a reduction in the number of victimizations at their hands. How could it not, when we presently do almost everything in our power *to avoid* considering what works when sentencing those who come before us.

It is painfully obvious to me that all of the Report's data-based conclusions support this

approach – just consult the list of conclusions recited above.[131] *Public confidence is best served by focusing on what the public wants – crime reduction. Public safety is the demand of legislative branches, and our failure to pursue it is what fundamentally drives assaults on what is worth defending about "judicial independence."*

No data suggest that resisting this course is required to prevent vigilantism, to protect judicial independence, to deter potential crimes, or to preserve our culture. We know that different things work (or not) on different people; we agree that sentencers should pursue what best works to prevent future crime by those they sentence. We seem to agree that by responsibly doing so, we should produce significantly better public safety outcomes than we now do. When we decide to revoke probation, or to put repeat offenders in prison for an extended period, it should not be because they "deserve it," but because careful consideration of the options and the data lead to the responsible conclusion that public safety is served by the decision. Probation is not a "privilege" to be "forfeited" by offender violations, it should be seen (and exploited) as a mechanism we employ to reduce criminal behavior; whether to revoke or extend or to modify the conditions of probation should not be an exercise in deserts, but in analysis of which choice best serves public safety. And so on.

To whatever extent there is a real conflict between the conclusion based on public safety and that suggested by other legitimate considerations in a sentencing analysis, the conflict should be considered after a responsible public safety analysis is on the table. In most cases by far, the result will not offend notions of what is "appropriate," but when considerations such as a victim's need for emotional recovery or reparation suggest another disposition than the one that seems best to serve public safety, sentencers can make a responsible and reasoned choice. But it is sophistry to allow just deserts to drive the system, and to pay lip service to public safety only on the periphery of the process. Worse, it is reckless public policy that exacts an enormous toll in avoidable victimizations, squandered correctional resources, and the financial burden of a law enforcement and judicial process bloated by having to deal with repeaters repeatedly.

We have no business being outraged that the public is responding to our present ineffectiveness by restricting our discretion and requiring harsher sentences. Until we focus competently and effectively on public safety, how are we in a position to argue that the public's responses are "unjust"?

Realistic Expectations

In processing this encounter between my perceptions of common sense and the ancient religion that imprisons criminal justice in a profoundly dysfunctional state, I find it important to consult reality often. I think it necessary essentially to modify the culture of criminal justice, so that what works matters and drives the great bulk of operations. There is no doubt that cultural modification is necessary, because what works is presently banished to the periphery of criminal justice by the enormous weight of a just deserts premise that has long outdistanced any real

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[131] Pages 32-33 (text accompanying notes 106-119).

popular support or social function.

On the one hand, unrealistic objectives are doomed to failure. On the other, tremendous potential support for a change exists, and we have made enough progress locally to demonstrate that dramatic change is achievable. Oregon's public safety constitutional amendment, Oregon's 1997 legislation making crime reduction expressly a dominant purpose of sentencing (and enlisting information technology in the task of reducing crime), and the Oregon Judicial Conference resolution encouraging judges to invite "what works" into the sentencing process all demonstrate a good deal of this potential.[132] And Multnomah County has built and deployed sentencing support tools, running against a data warehouse, that deliver useful data about what works on which offenders directly into that process. Although these products have yet to change the culture of criminal justice, the experience of the sentencing guidelines demonstrates the viability of that objective: once plastic-coated guideline gridblock charts were distributed to court and counsel, guideline calculations gained a place in the process virtually overnight. Gaining as prominent a seat for consideration of public safety outcomes would be a tremendously more valuable accomplishment – and it is entirely realistic to seek that result.

For purposes of this paper, I will articulate outcomes that seem entirely plausible as objectives in each of the following fields:

Criminal Justice:

- Judges accept that their sentencing decisions unavoidably have public safety outcomes, and that their sentencing obligations include responsibly accessing and applying information about which legally and practically available dispositions (including the entire range of sentencing options) best serve public safety.
- Judges routinely and responsibly analyze sentencing decisions based on information and argument concerning which disposition for the offender before the court – within those legally and practically available – is most likely to reduce criminal behavior by the offender over the course of a potential criminal career, including in the calculus, as relevant, the present risks of danger represented by the offender, the availability and efficacy of devices that would incapacitate (confine) the offender, rehabilitate the offender, modify the offender's behavior, or otherwise reduce those risks. The first question in every sentencing decision is what is most likely to prevent future criminal conduct over the offender's potential criminal career.
- Judges deviate from the disposition most likely to promote public safety only after identifying and assessing the public safety opportunity and any competing sentencing objective, and articulating a satisfactory basis for concluding both that the objectives cannot both be achieved by some available disposition and that the competing objective is entitled to prevail over public safety.
- Judges demand that advocates, probation services, and resources (including information technology resources) support the public safety objective with argument and information. They expect presentence and probation violation reports to address competently what is most likely to work and why, and to set forth the availability of any relevant programs in or out of custody.

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[132] See note 69, *supra*.

- Defense attorneys routinely prepare for both plea negotiation and sentencing hearings by understanding the available arguments about what is most likely to divert the offender from crime and, as relevant, which devices or programs are actually available to an offender in and out of custody. Within the scope of the obligation to represent the client's interests and adhere to the client's choices, defense attorneys exploit available information in arguing with prosecutors and the court for a disposition based on its public safety benefits.
- Prosecutors view their role as reducing criminal behavior and victimization, and see plea negotiations and sentencing arguments as occasions on which to achieve an outcome that will most likely reduce the offender's criminal behavior over the course of the offender's criminal career.[133] Prosecutors learn which attributes of offenders correlate with success or failure of the various sentencing options, which sentencing options are in fact available, and negotiate and argue with counsel and courts based on that information. Prosecutors also seek to serve sentencing objectives other than public safety when appropriate, attempt to reconcile those objectives with those of public safety, and responsibly chose which to prefer when public safety and other objectives conflict based on a careful analysis of competing values and interests.
- Presentence report writers routinely research the attributes in the offender's background and circumstances that correlate or not with susceptibility to interventions designed to reduce criminal behavior; remain informed about the availability (in and out of custody) and efficacy of correctional devices (including as relevant both those that incapacitate and those that attempt to modify behavior) in reducing criminal behavior of various categories of offenders, and present the court with an analysis of which dispositions are actually available to the offender and most likely to prevent or reduce the offender's criminal behavior over the offender's potential career. If the needs of victims for reparation or resolution are present, the writers include those interests in their research and analysis; if objectives of sentencing other than public safety *compete* with public safety (they are usually consistent), the writer sets out a recommendation and analysis as to which competing interest should prevail.
- Probation officers are in the business of responsibly assigning probationers to programs, activities, and other devices based on responsible and informed assessment of what will work best on which offenders to reduce their criminal conduct over the course or their potential criminal careers. To this end, probation officers use assessment instruments and remain informed about the availability (in and out of custody) and efficacy of correctional devices (including as relevant both those that incapacitate and those that attempt to modify behavior) at reducing criminal behavior of various categories of offenders. They rely on this information in assigning probationers to programs and when making recommendations to the court when alerting the court to violations of probation. They present the court with an analysis of which dispositions are actually available to the offender and are most likely to prevent or reduce the offender's criminal behavior over the offender's potential career.

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[133] One of the mechanisms that prosecutors need to deal with is the circumstance that the highest status in the endeavor is usually afforded to those who prosecute the worst crime – crimes for which the retributive and public safety analyses almost always militate for extensive (or permanent) incapacitation. But this has not and should not preclude prosecutors who head such offices from understanding that the quality of life in our communities is affected by the very broad range of criminal behavior, including in greatest number the crimes for which many choices – far short of permanent incarceration – are most likely to divert offenders from their criminal careers.

- Probation officers, who in the past have had their criminological expertise discouraged by a judicial system that seems obsessed with just deserts, find that their analyses of what works are warmly received by a system that sees public safety as its mission.
- All involved - judges, advocates, presentence investigators, probation officers, pretrial release officers – regularly employ decision support technology to access information about what seems to work best on which offenders.
- The ceremonial and symbolic functions of the court endorse the importance of rigorous and data-based pursuit of dispositions that serve public safety, and thereby enhance public support for rational deployment of law enforcement and criminal justice resources, and for the criminal justice process as a whole.

Corrections:

- Corrections agencies routinely assess inmates for crime-related deficiencies in substance abuse, physical and mental health, vocational and general education, and design curricula and assign inmates to programs in custody based on what is most likely to serve public safety and reduce criminal behavior (whether by secure incarceration, treatment, education, or otherwise);
- Corrections agencies design and conduct transition services and post prison supervision (and responses to violations of conditions of post-prison supervision) based on what is most likely to serve public safety and reduce criminal behavior during and after post prison supervision;
- Corrections agencies, which in the past have had their recommendations for programmatic support disregarded by executive and legislative branches that seem obsessed with just deserts, find that their budget recommendations are responsibly assessed by officials who accept that the measure of success is public safety, and that failing to divert offenders from criminal careers represents repeated waste of public resources and a failure of responsibility for public safety.

Executive and Legislative Branches and the Commissions and Panels that Advise them:

- Abandon the ghost of the past that has insisted that an expensive and quixotic quest for moral equivalency comes before modern governance based on competent social science;
- Address issues of where and how to deploy the criminal law, criminal justice, and correctional resources based upon what works best to achieve public safety;
- Assess *all* sentencing options by how and when they work to reduce criminal behavior as applied to potential criminal careers;
- Make expenditure recommendations and decisions based on realization that successfully diverted criminal careers avoid multiple occasions for public expense and multiple victimizations;
- Responsibly heed the public demand that crime reduction is the primary directive of criminal justice.

Institutions of higher learning in law and criminology:

- Emulate the medical model of including the practical as well as the theoretical within their realm;

- Include study of what is most likely to work on which offenders;
- Include study of how law enforcement, criminal justice, and corrections can improve their impact on public safety;
- Include practicum opportunities for students who work for defense attorneys, prosecutors, judges, probation officers, correctional agencies, and legislative and executive advisory panels and commissions to link research on what works with operational decisions and policy recommendations about the fate of cases, offenders, probationers, and inmates;
- Include practicum opportunities (including in collaboration with students of information technology) for students to develop and refine information and decision support technologies to support all of the above.

Or is this discussion academic?