Four Steps to Progress: A Reality Test for Assembly Bill 900

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CALIFORNIA'S 2007 ASSEMBLY BILL 900 responds to California's prison crisis by pledging over seven billion dollars to add 53,000 prison and jail beds, proclaiming attention to treatment and prisoner reentry, and authorizing some fifty million dollars for treatment and rehabilitation services.[1] As such, AB 900 exhibits the current state of criminal justice in our world[2]: stubborn persistence in imprisonment for serious crime and underfunded, largely untested programs for minor crime. The Bill responds to swelling prison populations with more prisons, to program shortages with some program funding and incentives, and to persistent magical thinking with a minor role for science. The magical thinking is that because we punish in the name of deterrence, incapacitation, and rehabilitation, we therefore reduce crime through these mechanisms; that because we send offenders to programs nominally related to their crimes, they benefit from those programs. Because these responses reflect rather than confront the major flaws in criminal justice, they hold limited promise for success—if "success" is defined as the efficient allocation of resources measured by crime reduction.[3] Fortunately, the Bill does include a glimmer of hope by assigning at least some role for science,

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[1] Press Release, Office of the Governor of the State of California, Gov. Schwarzenegger Signs Historic Bipartisan Agreement, Takes Important Step Toward Solving California's Prison Overcrowding Crisis (May 3, 2001), *available at* http://gov.ca.gov/index.php?/press-release/6119/; Assem. 900, 2007-08 Session (Cal. 2007).

2. The analysis holds for at least all western countries. *See generally* Michael Marcus, *Justitia's Bandage: Blind Sentencing*, 1 INT'L J. OF PUNISHMENT AND SENT'G 1 (2005).

3. A more inclusive objective is harm reduction, which includes both reduced victimizations and reduction in punishments which oppress offenders without achieving any legitimate social function. *See,* Michael Marcus, *Responding to the Model Penal Code Sentencing Revisions: Tips for Early Adopters and Power Users*, 17 S. CAL. INTERDISC. L.J. 67, 86-137 (2007).

linking reintegration with public safety, and including strategies for change—conditioning new prison and jail beds upon compliance with modest programming expansion. Aimed at producing critical improvement, such approaches could implement a useful reform. However, useful reform requires that we first address fundamental flaws in criminal justice.

My perspective is that of a trial judge, having sentenced offenders since 1990 in the midst of a cruelly dysfunctional sentencing culture. Yes, there have been some commendable advances in the area of treatment courts,[4] and our probation and corrections partners have growing appreciation for the promise of evidence-based responses to crime.[5] Pretrial release hearings and dangerous offender proceedings are expected to produce a well-informed and rationally crafted result that serves the welfare of the community. Some states have made attempts to adopt strategies introducing evidence-based practices into sentencing in general.[6] Nevertheless, profound deficits stubbornly persist in mainstream sentencing: most sentences are imposed with no responsible attempt to choose a disposition that is most likely to reduce recidivism.[7]

4. *See,* NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, DRUG COURTS: THE SECOND DECADE (2006), *available at* http://www.ncjrs.gov/pdffiles1/nij/211081.pdf.

5. BRAD BOGUE, ET AL., CRIME AND JUSTICE INST., IMPLEMENTING EVIDENCE-BASED PRACTICE IN COMMUNITY CORRECTIONS: THE PRINCIPLES OF EFFECTIVE INTERVENTION (2004), *available at* http://www.nicic.org/pubs/2004/019342.pdf; Edward J. Latessa, *The Challenge of Change: Correctional Programs and Evidence-Based Practices*, 3 CRIMINOLOGY & PUB. POL'Y 547, 551, 554-57 (2004); Doris Layton MacKenzie, *Corrections and Sentencing in the 21st Century: Evidence-Based Corrections and Sentencing*, 81 PRISON J. 299, 306 (2001); Todd R. Clear, Scott H. Decker, Tony Fabelo, Darrel Stephens, David Weisburd, B. Diane Williams, Max Williams, Plenary Panel, National Instutute of Justice Conference, *Evidence-Based Policies and Practices: Making the Case That Research Can Provide What Criminal Justice Policymakers Need* (July 18, 2005), agenda available at http://www.ojp.usdoj.gov/nij/events/nij_conference/2005/agenda.pdf; Michael Marcus, *Sentencing Support Tools and Probation in Multnomah County*, Executive Exchange (Spring 2004), *available at* http://aja.ncsc.dni.us/courtrv/cr40_3and4/CR40-3Marcus.pdf; Michael Marcus, *Sentencing in the Temple of Denunciation: Criminal Justice's Weakest Link*, 1 OHIO ST. J. CRIM. L. 671, 674 (2004).

6. *E.g.,* Roger K. Warren, *Evidence-Based Practices and State Sentencing Policy: Ten Policy Initiatives to Reduce Recidivism*, 82 IND. L.J. 1307 (2007), *available at* http://www.indianalawjournal.org/articles/53/1/Evidence-Based-Practices-and-State-Sentencing-Policy-Ten-Policy-Initiatives-to-Reduce-Recidivism/Page1.html; Michael Marcus, *Smart Sentencing: Public Safety, Public Trust and Confidence Through Evidence-Based Dispositions*, in FUTURE TRENDS IN STATE COURTS, 2006, at 56, *available at* http://www.ncsconline.org/WC/Publications/KIS_CtFutu_Trends06.pdf. Devising such strategies is the mission of the National Institute of Corrections's National Advisory Committee on Evidence Based Decision Making for Local Court Systems that last met in November, 2007.

7 Beyond the notable exception of treatment courts and the more enlightened juvenile delinquency courts, sentencing thought and practice focuses on blameworthiness and

Most offenders sentenced for most crimes will offend again.[8] A great many offenders sentenced for serious crimes have prior convictions with sentences imposed with no responsible effort to prevent future crimes. As a result, our recidivism rates continue at unacceptably high levels.[9] Most offenders in jail or prison have been in jail or on probation before.[10] Violent crime rates have generally declined[11] while prison populations continue to grow[12] at rates that challenge our ability to afford other social services such as higher education, public health, and intervention programs—services that are more likely to reduce crime than criminal justice at its best.[13]

criminal history, aggravation and mitigation, and, as a last resort, largely feigned consistency. *E.g.,* Marcus, *Justitia's Bandage: Blind Sentencing*, *supra* note 2 at 1-2; Michael Marcus, *Archaic Sentencing Liturgy Sacrifices Public Safety: What's Wrong and How We Can Fix It*, 16 FED. SENT'G. REP. 76 (2003); Michael Marcus, *Comments on the Model Penal Code: Sentencing Preliminary Draft No. 1*, 30 AM. J. CRIM. L. 135, 155 n.66 (2003); Marcus, *Responding to the Model Penal Code Sentencing Revisions: Tips for Early Adopters and Power Users*, *supra* note 3.

8. "Of the 272,111 persons released from prisons in 15 States in 1994, an estimated 67.5% were rearrested for a felony or serious misdemeanor within 3 years, 46.9% were reconvicted, and 25.4% resentenced to prison for a new crime. The 272,111 offenders discharged in 1994 accounted for nearly 4,877,000 arrest charges over their recorded careers." BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, CRIMINAL OFFENDERS STATISTICS, *available at* http://www.ojp.usdoj.gov/bjs/crimoff.htm.

9 *See id.*

10. Caroline Wolf Harlow, BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, SPECIAL REPORT: PROFILE OF JAIL INMATES 1 (April, 1998), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/pji96.pdf ("More than 7 of every 10 jail inmates had prior sentences to probation or incarceration. Over 4 in 10 had served 3 or more sentences."). Figures from 2002 are similar (only 27% of jail inmates had no prior incarceration or probation). Doris J. James, BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: PROFILE OF JAIL INMATES 6 (July, 2004), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/pji02.pdf.

11. Bureau of Justice Statistics, U.S. Dept of Justice, Crime Trends, http://www.ojp.usdoj.gov/bjs/glance/cv2.htm

12. *E.g.*, THE SENTENCING PROJECT, NEW INCARCERATION FIGURES: THIRTY-THREE CONSECUTIVE YEARS OF GROWTH (2006), *available at* http://www.sentencingproject.org/Admin/Documents/publications/inc_newfigures.pdf; JENIFER WARREN, ONE IN 100: BEHIND BARS IN AMERICA 2008 at 5 (Pew Charitable Trust 2008), *available at* http://www.pewcenteronthestates.org/uploadedFiles/One%20in%20100.pdf. Proponents of prison claim credit for declining crime rates, while proponents of rehabilitation cite the same rates as reasons why we should not be building more prisons. There is wisdom and folly in both camps - the trick is to capture the wisdom and discard the folly.

13 *See, e.g.*, Greenwood, et al, *Diverting Children from a Life of Crime, Measuring Costs and Benefits* (RAND Corporation 1998), research brief available at http://www.rand.org/pubs/research_briefs/RB4010/index1.html; Sharon Mihalic, et al, *Blueprints for Violence Prevention*, JUV. JUST. BULL., Jul. 2001, at 1 *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/187079.pdf ; STEVE AOS, ET AL, EVIDENCE-BASED PUBLIC POLICY OPTIONS TO REDUCE FUTURE PRISON CONSTRUCTION, CRIMINAL JUSTICE

Worst of all, mainstream sentencing results in victimizations of citizens by repeat offenders that a smarter approach would prevent. In addition, it imposes cruelty upon offenders in the name of justice with no outcome other than oppression and dysfunction,[14] and no impact of any positive social value.

Because sentencing drives the lion's share of correctional and probation resources,[15] we need to fix what is wrong with sentencing before we can achieve substantial improvement in the rest of criminal justice. Doing more of the same—more prison, more programs—will not alter the brutality imposed by recidivist crimes and irresponsible allocation of prison resources. Just as 12-step programs teach that it is insane to persist in behaviors while expecting outcomes to change,[16] *we* need to change *our* behaviors before we can expect improved results.

COSTS, AND CRIME RATES 17 (Washington State Institute for Public Policy 2001), *available at* http://www.wsipp.wa.gov/rptfiles/06-10-1201.pdf; Ross Homel, et al, *The Pathways to Prevention project: doing developmental prevention in a disadvantaged community*, TRENDS & ISSUES IN CRIME & CRIM. JUST., Aug. 2006, at 1, *available at* http://www.griffith.edu.au/__data/assets/pdf_file/0016/13372/trends.pdf; MARGARET SHAW, INTERNATIONAL CENTER FOR THE PREVENTION OF CRIME, COMPARATIVE APPROACHES TO URBAN CRIME PREVENTION FOCUSING ON YOUTH (2007), *available at* http://www.crime-prevention-intl.org/publications/pub_188_1.pdf?PHPSESSID=bfbc4c4e5f17c426baf44b9ea8f06eb4. *See also*, *Research on Parenting Education Programs and Their Effectiveness: A Bibliography*, http://www.whitehousedrugpolicy.gov/publications/prevent/parenting/r_bib.html I. 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.

14. The reality of prisons does not diminish through our efforts to hide it from view. Weaker inmates are commonly controlled by physical brutality, subjected to sexual assault, and forced to submit to a culture whose operative values are antithetical to prosocial values free society largely relies upon for safety and order: empathy and shared values respecting the rights and persons of fellow citizens. Marcus, *supra* note 3, at 71.

15 It is sentencing, of course, that places people in prison or on probation or post-prison supervision. Even those awaiting a hearing on a probation or post-prison release charge would not be in that position without a previous sentence. Those incapacitated prior to trial are not the primary targets of probation and correctional resources, although some enlightened jurisdictions have begun to understand that they represent a worthy target of attempts to address criminogenic needs. As of mid 2007, defendants awaiting adjudication of new criminal charges represent about 400 thousand of the 2.3 million prison and jail inmates in the United States. *See*, Press Release, Bureau of Justice Statistics, Department of Justice, Slower Growth in the Nation's Prison and Jail Populations (June 6, 2008), available at http://www.ojp.usdoj.gov/bjs/pub/press/pim07jim07pr.htm.

16. This maxim has been attributed at least to Albert Einstein, Benjamin Franklin, Rudyard Kipling, and Rita Mae Brown, and probably derives from a Chinese proverb.

The vast bulk of attention to crime and sentencing ignores some core realities that we must recognize and confront — four 800 pound gorillas hiding in the midst of criminal justice: just deserts as the only requirement of sentencing ensures its continued failure; *all* sentences impact public safety; punishments that fit the crime instead of the offender cannot succeed; and nothing will change unless we redirect plea bargaining. Because it does not deal with these realities, Assembly Bill 900, like other peripheral measures such as sentencing guidelines and mandatory minimums, will only perpetuate avoidable recidivism, brutality, and waste of criminal justice resources.

I. Just Deserts is Not Enough

All seem to agree that "the punishment should fit the crime" in the sense that proportionality should set at least an upper limit to punishment, and perhaps a lower limit as well.[17] The traditional call is for "just deserts," although some now couch the demand in terms of "accountability" and "consequences."[18] The problem with the mainstream of criminal justice is that those who impose sentences and those who argue sentencing issues labor under the tremendously destructive notion that it is sufficient to produce a sentence that is lawful and does not offend proportionality by its perceived punitiveness. Even the august American Law Institute is willing to accept feigned proportionality as sufficient sentencing performance in its pending revision to the Model Penal Code—to the exclusion of public safety.[19] A small minority of judges and writers actually proclaim that reducing recidivism is not the task of the courts.[20] In contrast, most judges

17. As I argue in *Responding to the Model Penal Code Sentencing Revisions*, the extent to which just deserts sets a minimum level should be determined by the evidence that punishment is needed "to serve a legitimate need of a victim, to prevent vigilantism or private retribution, to maintain respect for legitimate authority, or to enhance respect for the persons, property, or rights of others." Marcus, *supra* note 3, at 78-80, 84-85, 90.

[18] "Just Deserts" connotes the punitive aspects of sentencing. It is what most people seem to think of when they talk of "punishment," although the latter phrase is less specific, and may even be used as a synonym for "sentence." When some call for "accountability" or "consequences," they may be invoking retribution, but may also simply be asking that we respond to the crime in a manor that makes the victim whole and improves the behavior of the offender. Further discussion usually removes any ambiguity.

19. Marcus, *Responding to the Model Penal Code Sentencing Revisions*, *supra* note 3, at 72-78.

20. *E.g.*, Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventative Detention as Criminal Justice*, 114 HARV. L. REV. 1429 (2001). At the October, 2007 Oregon Judicial Conference, a keynote speaker was Judge Kevin Burke of Hennepin County, Minnesota [co-author with Judge Steve Leben of the excellent paper *Procedural Fairness: a Key Ingredient in Public Satisfaction* (Am Judges Assn 2007), *available at* http://aja.ncsc.dni.us/htdocs/AJAWhitePaper9-26-07.pdf. Judge Burke gave a

earnestly wish to improve the future conduct of those they sentence. But the behavior of all participants—judges and advocates—follows a working consensus that lawful just deserts is enough. We wallow in what offenders deserve based on their blameworthiness and criminal history and the harm they inflicted or threatened. The vast majority of sentences flow from plea bargains that predict how judges would sentence offenders without a plea agreement.[21] In turn, the sentences that serve as real or supposed examples are those arrived at by judges who weigh aggravation and mitigation, outrage and sympathy, and perhaps, resources. There is almost never any responsible attention to public safety outcomes in the examples or in the flow of plea bargains that reflect them. [22]

Assembly Bill 900 essentially would add incapacitative and some rehabilitative resources to California's correctional arsenal, but its potential for public good is crippled by its failure to challenge the pervasively destructive reign of just deserts in sentencing.

A. Just deserts thwarts best efforts at crime reduction

The uninitiated might infer that we have institutionalized routine sentencing packages for routine cases in order to accomplish crime

motivational speech to the effect that we judges should all be pursuing perfection in our roles, that 99.5% would never be enough, and so forth. I was pleased to see some judicial jaws drop when Judge Burke announced that the first court performance measure decision in his county was *not* to measure recidivism. Some Oregon judges oppose recidivism as a court performance measure with arguments that with restrictions of law and resources we should not be responsible for outcomes. As long as we have choices, those choices have outcomes, and we are surely responsible for best efforts to promote the best outcomes. The argument that public safety is not an objective of sentencing is unavailable in Oregon as a matter of law. Or. Const. Art. I, § 15.

[21] *See, e.g.*, *In re Alvernaz*, 2 Cal. 4th 924, 933 (1992); Willam Rhodes, *Plea Bargaining: its effect on sentencing and Convictions in the District of Columbia*, 70 J. CRIM. L. & CRIMINOLOGY 360 (1973).

22. "Responsible" sentencing is rationally based on best evidence, as developed *infra*, as opposed to whim, folklore, habit, personal philosophy, mere presumption, or untested convention. *See generally*, Edward Rubin*, Just Say No to Retribution,* 7 BUFF. CRIM. L. REV. 17 (2003); James Q. Whitman*, A Plea Against Retributivism,* 7 BUFF. CRIM. L. REV. 85 (2003); Kristin L. Caballero, *Blended Sentencing: a Good Idea for Juvenile Sex Offenders?* 19 ST. JOHN'S J. LEGAL COMMENT. 379 (2005); Steven L. Chanenson, *Sentencing and Data: the Not-so-odd Couple*, 16 FED. SENT'G. RPT. 1 (2003); Nancy Gertner, *Sentencing Reform: When Everyone Behaves Badly*, 57 ME. L. REV. 569 (2005); Marc L. Miller, *A Map of Sentencing and a Compass for Judges: Sentencing Information Systems, Transparency, and the next Generation of Reform*, 105 COLUM. L. REV. 1351 (2005); Christopher Slobogin, *The Civilization of the Criminal Law*, 58 VAND. L. REV. 121 (2005); Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1 (2003); David B. Wexler, *Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal*, 17 ST. THOMAS L. REV. 743 (2005); Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293 (2006).

reduction where possible.[23] From my experience on the bench, I know that we tend to send thieves to theft talk, bullies to anger management (or domestic violence counseling), substance abusers (and drunk drivers) to substance abuse treatment, and sex offenders to behavior modification.[24] But, in my view, this is a façade; it is symmetry, not science. We make the punishment "fit the crime" rather than making any responsible effort to *reduce* crime. The proof is largely in what we do *not* do.

First, we generally make no effort to track whether any of these dispositions *work*. We do not measure the success of these dispositions based upon their performance or that of their graduates. We may track whether the offender completes the program, which is what we deem to be success.[25] As an outcome measure, attendance alone is entirely consistent with just deserts, because attendance is part of the punishment exacted for the offense. But mere attendance is wholly unsatisfactory as a public safety measure—a drunk driver who completes treatment is no success if she or he subsequently drinks, drives, and kills. A thief who steals again cannot be called a success by a rational society simply because he actually attended "theft talk" and completed probation on his previous theft conviction before committing his new crimes.

Second, we do not assign these dispositions based on offender risk and needs assessments, but rather based on the crime for which the offender is being sentenced.[26] One thief's criminality may be best addressed by cognitive restructuring, another's by addiction treatment, but we send both to "theft talk." In other words, we fit the crime instead of fitting the offender.

Throughout sentencing—within and beyond the range of the lesser crimes for which we routinely assign programs as part of the sentence—even judges who most earnestly desire to protect the public and, if possible, to reform the offender, are crippled by this prevailing sentencing culture. Neither prosecutors nor defenders come equipped to argue what sentence within the range of lawfully available dispositions is most likely to reduce the offender's future criminal conduct. If pressed to participate in such an analysis, attorneys—once they overcome their surprise—resort to deserts analysis or make something up out of the rich collection of homilies that judges sometimes articulate as a substitute for evidence-

23. As argued below, it is also a drastic mistake to assume that we have no impact on public safety outcomes by the choices that we make in more serious dispositions that commonly include substantial prison terms.

[24] *See, e.g.*, Marcus, *Justitia's Bandage: Blind Sentencing*, *supra* note 2, at 3.

[25] *Id.* at 3-4.

[26] *Id.*

based analysis: "the defendant needs some time in a cell to think about making better decisions;" "offenders will not change until they are ready for change;" "sentencing is intuitive;" "if we make this unpleasant enough, the defendant will think twice about repeating this conduct;" "let the punishment fit the crime;" "we need to send a message."[27]

This claptrap provides no assistance to a judge who wants to pursue best efforts at crime reduction, and it is no substitute for responsible sentencing. Best intentions are no substitute for best efforts. Without evidence and rational argument, judges typically rely on folklore, habit, local convention, or personal predilections and experience wholly divorced from any empirical support. Even probation officers who are well read in the fields of criminology and corrections, risk and needs assessment, and stage of change analysis[28] abandon the world of science when they enter our world—our "temples of denunciation."[29] Probation

[27] These utterings are all too familiar to criminal law practitioners. They rarely reach appellate opinions except when an appeal concerns a prosecutor's argument to the jury. Judges' comments usually remain untranscribed in what passes for an official record of proceedings at the trial level. There are exceptions. E.g., State v. Pearson, 975 So. 2d 646, 655-56 (La. 2007) (deeming judge's maximum sentence for looting to "send a message" unconstitutionally excessive); U.S. v. Butler, 252 Fed. Appx. 150 (9th Cir. 2007) (affirming 216 month sentence for possession of cocaine with intent to deliver as within judge's discretion "to ensure that the punishment fit the crime . . . ."); State v. Khuth, 2007 WL 2570453 at *6-7 (Conn. Super. Ct, 2007) (affirming assault sentence of 20 years fashioned to "send a message in this community that this sort of behavior will not be tolerated"). When I was chided by our local newspaper for a sentence it deemed insufficient to "show" that the defendant's behavior would not be "tolerated," I was given the courtesy of an op-ed reply: Michael Marcus, Op-Ed., *Sentence for Safety, not for Message*, THE OREGONIAN, Oct. 1, 2003 *available at* http://www.smartsentencing.info/safetynotshow.html. As submitted, the piece was entitled "Sentence for Safety, not for Show," but the omnipotent headline writer left his mark.

28. "Stage of Change" analysis discards the pretense of so many who evade responsibility for the public safety outcomes of sentencing by pretending that no one can change unless he or she is "ready." SCOTT T. WALTERS, MICHAEL D. CLARK, RAY GINGERICH, & MELISSA L. MELTZER, NAT'L INST. OF CORRECTIONS, U.S. DEPT. OF JUST., A GUIDE FOR PROBATION AND PAROLE: MOTIVATING OFFENDERS TO CHANGE 14 (2007), *available at* http://nicic.org/Downloads/PDF/Library/022253.pdf. Competent response to crime requires that we recognize "People can range from having no interest in making changes (precontemplation), to having some awareness or mixed feelings about change (contemplation), to preparing for change (preparation), to having recently begun to make changes (action), to maintaining changes over time (maintenance). Offenders in the earlier stages are less interested in change and may feel more coerced into acting, whereas offenders in the later stages are more interested in change for their own reasons." *Id.* Our responsibility is to identify an offender's stage of change and to respond with strategies for behavior modification in light of that stage.

29. *See generally* Marcus, *Sentencing in the Temple of Denunciation*, *supra* note 5. We have made significant progress locally; our probation officers have begun to discuss evidence-based practices, risk and needs assessment, and stage of change analysis in

reports may speak of "forfeiting the privilege of probation," and sentencing hearings are about "holding the probationer accountable" by imposing "consequences" for probation violations.[30] While probation may or may not be a privilege, we are squandering the resources involved unless we deploy them efficiently as a means of reducing criminal behavior. "Consequences" in the form of jail, prison, or alternative sanctions are often appropriate, but we are not using them wisely unless an evidence-based analysis suggests that they are reasonably likely of success.

All of this must change dramatically if we are to hope for any improvement in criminal justice. First and foremost, while just deserts properly provides limits of proportionality, it is wholly insufficient as a purpose of sentencing or as a measure of its success. Worse, its role is typically profoundly destructive because it serves as a shield against accountability for outcomes. States (and countries) with and without guidelines accept sentencing as sufficient if it "fits the crime" and is within lawful and conventional limits of severity. We will fail to make significant progress as long as a sentence that is merely lawful and proportionate in severity is therefore beyond reproach.

B. Just deserts swells prisons with virtually no attention to public safety

Sentencing guidelines typically codify the notion that public safety is not even part of the equation; mandatory or advisory guidelines commonly propose imprisonment ranges based on crime seriousness and criminal history, with no pretense of attention to outcomes.[31] Their primary value lies in reduced sentencing disparity and control over prison

probation reports and probation violation hearings.

[30] Before we joined forces with managers in our probation department to encourage more useful communications, I received hundreds of such comments in probation reports. These misguided missives, like many sentencing utterings by judges, rarely are published beyond those reports. On occasion, these notions are reflected in appellate decisions. *E.g.*, Adams v. State, 979 So. 2d 921, 925 (Fla. 2008) (holding probation a "privilege" that the court has discretion to revoke). I submit we would be better served by managing probation resources with the understanding that they should be used to accomplish crime reduction than by worrying about whether the offender deserves a "privilege."

31. Oregon's guidelines mention recidivism with respect to three out of 99 gridblocks (OR. ADMIN R. 213-005-0006(1) (2008), and otherwise distribute prisons based on crime seriousness, criminal history, aggravation, and mitigation. *See*, OR. ADMIN R. 213-002-0001(3)(d) (2008) ("Subject to the discretion of the sentencing judge to deviate and impose a different sentence in recognition of aggravating and mitigating circumstances, the appropriate punishment for a felony conviction should depend on the seriousness of the crime of conviction when compared to all other crimes and the offender's criminal history.").

resources. But, guidelines achieve consistency largely by ignoring differences that should matter.[32] They surely have not improved crime reduction. Though they have slowed prison growth, they certainly have not impeded our expanding leadership in the proportion of our population we relegate to prison.[33]

This is not merely a budget problem.[34] One of the many realities of our dysfunction is that for some offenders, *prison actually increases their overall criminal behavior.* With some exceptions,[35] recidivism rates for medium and low risk offenders commonly increase after prison,[36] while imprisonment does not seem to increase recidivism rates for high risk offenders.[37]

Ignoring even these broad consequences, we determine who to send to prison (and for how long and under what conditions) based overwhelmingly upon fundamentalist notions of just deserts—abstractions ultimately about how angry we think we should be—tempered only by budgetary restraints.[38] We eschew science and betray

32. Marcus, *Comments on the Model Penal Code*, *supra* note 7, at 155 n.66.

[33] The United States leads the world in the proportion of its population that it imprisons. WARREN, *supra* note 12.

34. Smarter sentencing is also demanded by fiscal integrity – particularly since most demand for expensive prison beds is created by recidivism. *See*, Marcus, *Justitia's Bandage: Blind Sentencing*, *supra* note 2, at 4.

35. *See The Effectiveness of Community-Based Sanctions in Reducing Recidivism* 2, 18, 25, Table 3 (Or Dept of Corrections 2002) (reporting results of Oregon study and review of national literature). Most notably, some sex offender cohorts exhibit the same rate of recidivism after incarceration as comparable sex offenders sent to alternatives or community based supervision. *Id. See generally Sex Offender Recidivism in Minnesota* (MN Dept of Corrections 2007), available at http://www.corr.state.mn.us/documents/04-07SexOffenderReport-Recidivism.pdf; Patrick Langan, et al, *Recidivism of Sex Offenders Released from Prison in 1994* (US Dept of Justice, Office of Justice Programs, Bureau of Justice Statistics 2003), available at http://www.nationalinstituteofcorrections.gov/Library/019270.

36. *See* Kovandzic et al., *When Prisoners Get Out: The Impact of Prison Releases on Homicide Rates*, 1975-1999, 15 CRIM. JUST. POL'Y REV. 212, 213-14 (2004); Todd R. Clear, *Backfire: When Incarceration Increases Crime*, 1996 J OKLA. CRIM. JUST. RES. CONSORTIUM 2 (1996); Lin Song and Roxanne Lieb, RECIDIVISM: THE EFFECT OF INCARCERATION AND LENGTH OF TIME SERVED (WA State Inst for Pub Pol'y 1993), *available at* http://www.wsipp.wa.gov/rptfiles/IncarcRecid.pdf; Paula Smith et al., THE EFFECTS OF PRISON SENTENCES AND INTERMEDIATE SANCTIONS ON RECIDIVISM: GENERAL EFFECTS AND INDIVIDUAL DIFFERENCES (Centre for Crim Just Studies, U New Brunswick 2002) 4-5, *available at* http://www.sgc.gc.ca/publications/corrections/200201_Gendreau_e.pdf; *The Effects of Punishment on Recidivism*, 7 Research Summary No. 3 (Solicitor Gen. of Canada, May 2002)(reporting meta analysis of 111 studies), *available at* http://www.sgc.gc.ca/publications/corrections/pdf/200205_e.pdf.

37. *The Effectiveness of Community-Based Sanctions in Reducing* note 35, *supra*.

[38] *See, e.g.*, Marc Mauer, *the Causes and Consequences of Prison Growth in the United States*, 3 Punishment & Society 9, 14-15 (2001).

public safety in the resulting allocation of prison resources. While AB 900 contemplates the use of risk and needs assessment after sentencing,[39] science would employ best efforts at risk and needs assessment as well at the level of sentencing, instead of reserving it only for those we send to prison whether or not they belong in prison in rational pursuit of public safety. As a result offenders we should not be locking up for significant periods (or at all) often recidivate and cause more victimizations. Most offenders return to the community well within the remaining term of their potential criminal careers,[40] and many more than make up for lost time soon after their release from prison.[41] Many return to prison with new crimes when wiser dispositions would have diverted them from prison altogether and spared their victims the crimes we should have prevented. By misusing prison in this way, we exacerbate prison overcrowding. Having squandered prison resources, we fail adequately to protect the public from others we should have locked up longer. Moreover, if we are diverting to prison budgets public safety dollars that would otherwise fund programs effective at reducing recidivism, we are also generating additional candidates for prison beds by failing to reduce

[39] *See* CAL. GOVT. CODE §§ 15819.40 -41 (Deering Supp. 2008) (2007 AB 900 §§ 2-3); CAL. PEN. CODE §§ 3020, 3105, 6270 (Deering Supp. 2008) (2007 AB §§ 11, 13, 16).

40. *Growth in State prison and parole population* (US Dept of Justice, Office of Justice Programs, Bureau of Justice Statistics, October, 2002), *available at* http://www.ojp.usdoj.gov/bjs/reentry/growth.htm ("At least 95% of all State prisoners will be released from prison at some point; nearly 80% will be released to parole supervision.").

41. *See supra* notes 8 & 9. AB 900 commendably addresses some of this problem by encouraging responsible attention to reintegration. CAL. GOVT. CODE §§ 15819.40 -41 (Deering Supp. 2008) (2007 AB 900 §§ 2-3); CAL. PEN. CODE §§ 3020, 3105, 6270 (Deering Supp. 2008) (2007 AB §§ 11, 13, 16). Assigning the right programs to the right inmates, insisting on evidence-based best practices, and rigorous performance measurement based on recidivism might actually significantly reduce the harm we do by misallocating prison beds, and might also improve the performance of those whose imprisonment is consistent with evidence-based practices. But improved reintegration alone is no substitute for insisting that sentencing produce a far more rational allocation of prison beds based on evidence-based best practices in pursuit of public safety – because there are many offenders whose criminal behavior is more effectively reduced by non prison sentences, and there are others who should be incapacitated for longer than the terms allocated without evidence-based best practices. *See The Effectiveness of Community-Based Sanctions in Reducing Recidivism supra* note 35 at 2; sources cited *supra* note 36; Marcus, *Responding to the Model Penal Code Sentencing Revisions*, *supra* note 3 at 30 (Oregon's guidelines overincarcerate about a third, underincarcerate another third, and correctly incarcerate the remaining third of Oregon prisioners based on risk of crime in the community). And funding reintegration programs (and providing inmates with incentives to participate in programs) is no guarantee of success. Surely criminal justice is a shining example of the reality that things do not work simply because they "should" work. None of this can do any good without rigorous outcome measures and evidence-based assignments of dispositions to the offenders for whom they have the highest need for and potential for success in those dispositions.

their criminal behavior—even before they qualify for those beds. Building more prisons without profound change will surely increase our production of recidivists through both mechanisms. *Prison expansion, ultimately, is a major cause of prison expansion.*

Misallocation of prison beds imposes grave performance limits on measures such as Assembly Bill 900 that concentrate on post-prison performance.[42] Ignoring public safety at the front end means that we are loading prisons with offenders whose public safety impact would be better addressed elsewhere. To this extent, we are exacerbating the very problems we later seek to mitigate through reintegration efforts while diverting resources from those who should be imprisoned longer. And to the extent that public safety demands longer terms for some offenders moderated by just deserts and resource limitations, reintegration is inherently an inadequate response.[43] Either way, reintegration efforts may mitigate, but can never solve, the problem that we use prison primarily for punishment *instead of* crime reduction.

C. Just deserts obscures any clear purpose for criminal justice

The dysfunction of criminal justice is vividly apparent in our failure to arrive at a coherent vision of its purpose. The public has consistently understood and preferred that the calling of criminal law is public safety.[44] Some courts have occasionally recognized that "the protection and safety of the people of the state" is "the most important consideration" underlying laws relating to sentencing.[45] Many states with statutes based on the 1962 Model Penal Code retain language in purposes provisions that at least includes public safety as an objective of sentencing.[46] Even with such statutes, public safety is at best one of an

[42] *See supra*, note 41.

43. A rational system would generally not incapacitate offenders whose susceptibility to reformation and risk level renders community-based dispositions the best strategy for harm reduction.

44. Marcus, *Responding to the Model Penal Code Sentencing Revisions*, *supra* note 3, at 80 n. 40.

45. *E.g.*, Tuel v. Gladden, 379 P.2d 553, 555 (1963).

46. The Model Penal Code of 1962, adopted in some form by the vast majority of states, lists the first purposes of sentencing as "(a) to prevent the commission of offenses; (b) to promote the correction and rehabilitation of offenders; (c) to safeguard offenders against excessive, disproportionate or arbitrary punishment." Model Penal Code: Sentencing (1962) §1.02(2). Oregon's version still begins with the declaration that the purpose of adopting Oregon's version of the Model Penal Code includes "[t]o insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized, the correction and rehabilitation of those convicted, and their confinement when required in the interests of public protection." ORS 161.025(1)(a). In California, the Model Penal Code purposes of sentencing are now reflected in California Rules of Court, Rule 4.410 – adopted originally as Rule 410 in 1977, after the legislature

unprioritized list of optional considerations, with no meaningful attempt to ensure its pursuit.[47] Since the spread of the 1962 Code, its faith-based optimism for rehabilitation was destroyed by early empirical analysis that gutted the medical model[48] and fueled ubiquitous surrender to just deserts to the exclusion of "utilitarian" objectives such as crime reduction. In California, this was the "significant change in . . . penal philosophy"[49] reflected in the adoption of the Uniform Determinate Sentencing Act, which flatly "declare[d]" that "the purpose of imprisonment for crime is punishment."[50] In response, the guidelines movement essentially abandoned any purpose other than regularity in pursuit of just deserts (and resource management).[51] Sadly, even the American Law Institute is now well on its way to modifying the Model Penal Code to drop public safety from the purposes to be pursued with incapacitation.[52]

In recent years, victims' groups have had to remind us that public safety is the object of criminal justice and have attempted to reintroduce the notion into our laws.[53] Organized victims' efforts have also brought

declared that "the purpose of imprisonment is punishment." CAL. PEN. CODE § 1170(a)(1) (Deering Supp. 2008). Rule 4.410 lists the purposes of sentencing as "(1) Protecting society; (2) Punishing the defendant; (3) Encouraging the defendant to lead a law-abiding life in the future and deterring him or her from future offenses; (4) Deterring others from criminal conduct by demonstrating its consequences; (5) Preventing the defendant from committing new crimes by isolating him or her for the period of incarceration; (6) Securing restitution for the victims of crime; and (7) Achieving uniformity in sentencing."

47. Kevin Reitz, Reporter, MODEL PENAL CODE: SENTENCING: PLAN FOR REVISION (Am Law Institute, 2002). Prof. Reitz's apt criticism of a "shopping list" of purposes in the 1962 Code disappeared from his subsequent attempts to adapt his revision to a host of concerns *excluding* best efforts at public safety. *See* Marcus, *Responding to the Model Penal Code Sentencing Revisions*, *supra* note 3, at 68-77.

48. The "medical model" of the early and mid-Twentieth Century posited that criminal behavior is the result of a disorder that should respond to treatment. *E.g.*, George F. Cole, and Christopher E. Smith, CRIMINAL JUSTICE IN AMERICA 254-55 (2004).

49. In re Eric J., 601 P.2d 549, 554 (1979).

50. Cal Pen Code § 1170(a)(1), Cal Stats 1976, c 1139, § 273.

51. Marcus, *Comments on the Model Penal Code:*, *supra* note 7.

52. Marcus, *Responding to the Model Penal Code Sentencing Revisions*, *supra* note 3, at 73-74.

53. In re Dannenberg, 104 P.3d 783 (2005) (discussing the various ways in which California voters have promoted considerations of public safety). Proposition 8 (1982) amended the California Constitution to recognize procedural rights for victims and substantive changes related to parole, but expressed the "the more basic expectation that persons who commit felonious acts . . . will be . . . sufficiently punished so that the public safety is protected and encouraged as a goal of highest importance." To the same end, Proposition 8 addressed repeat offenders by adding Pen Code § 667, which has been variously amended and is known as a "Three-Strikes" law. *See* Brosnahan v. Brown, 651 P.2d 274, 278 (1982). Victims have had similar impact in Oregon, requiring mandatory

us mandatory minimum, three-strikes, and similar laws that rely on extended incapacitation.[54] These were promoted in large part because they responded to real or perceived public safety deficits of the sentencing behaviors they modified.[55] However draconian and destructive of judicial discretion these devices may be in some applications, they represent a reasonable public response to our failure to accept accountability for public safety when we impose sentences. At least for many of the violent offenders targeted by such laws, lengthy incapacitation is indeed the only result that best serves crime reduction.[56] But these measures paint with too broad a brush, widening the net to include many whose criminal behavior we could more effectively reduce with other methods, and whose total criminal output will ultimately be increased by prison when they return to their communities.[57] Further, by conflating retribution with public safety, these methods perpetuate the destructive fallacy that severity and effectiveness are directly proportional.[58] As with prison

minimum and enhanced sentences for various categories of crimes (Ballot Measure 11, 1995 Or. Laws ch. 2 (codified at ORS 137.700)); amending the Oregon Constitution to list "safety of society" first among purposes of sentencing (Or. Const. Art. I, §15, as amended by 1995 Or. SJR 32 (adopted by vote of the people, Nov. 5, 1996); and adopting a "Crime Victims' Rights" initiative (1996 Or. Ballot Measure 40, Or. Const. Art. I, §42 (1997)), invalidated by *Armatta v. Kitzhaber*, 959 P.2d 49 (1998), reenacted in part by 1999 Or. HJR 87, 89, 90 and 94, adding Or. Const. Art. I, §§ 42, 43, 44 and 45). *See also, e.g.*, J. Clark, J. Austin, & D. Henry, *"Three Strikes and You're Out": A Review of State Legislation* 1 (U.S. Dept. of Justice, National Institute of Justice, Sept. 1997), *available at* http://www.ncjrs.org/pdffiles/165369.pdf; Ark. Code Ann. § 16-90-804 (Supp. 2003), Kan. Stat. Ann. § 21-4701, et seq (2003), Fla. Stat. § 9210016 (2003), N.C. Gen. Stat. § 15A-134016 (Lexis 2003), and 204 Pa. Code § 303, et seq (2004), reproduced following 42 Pa. Cons. Stat. Ann. § 9721 (Purden Supp. 2004).

54. "Mandatory minimums" require a judge to impose at least a specified minimum sentence for a given crime, typically with no reduction for "good time" or any other form of early release. Oregon's provisions are a good example. ORS 137.700. "Three strikes" sentencing laws typically mandate a lengthy sentence after the third conviction for any of a defined category of crimes – even if the third offense is objectively a relatively minor offense. California's version is CAL. PEN. CODE §667 (Deering Supp. 2008).

55. *E.g.*, In re Lance W., 694 P.2d 744, (1985); Brosnahan v. Brown, 651 P.2d 274 (1982); Cal. Const. Art. I, §28(a); *Oregon 1994 General Election Voters' Pamphlet* at 54-55 (Oregon Secretary of State 1994).

[56] Unlike most medium and low-risk offenders, high risk offenders generally show no incremental increase in recidivism in correlation with extended incarceration. Oregon Department of Corrections, *The Effectiveness of Community-Based Sanctions in Reducing Recidivism* 2 (2002), *available at* http://egov.oregon.gov/DOC/TRANS/CC/docs/pdf/effectiveness_of_sanctions_version2.pdf.

[57] *Id.*; *see* sources *supra* cited note 36.

58. Marcus, *Justitia's Bandage: Blind Sentencing*, *supra* note 2. Mandatory minimum and three strikes provisions have other negative consequences as well, such as providing enormous bargaining position to prosecutors which may, in some applications, actually deter the innocent from exercising rights to trial. *See, e.g.*,Rachel E. Barkow,

allocation by just deserts, mandatory minimum and three-strikes approaches divert to prisons financial and policy support for effective programs and alternatives—along with some or many offenders whose risk would be more responsibly managed with such programs and alternatives.

We are left with a lack of accountability lurking within notions that "the purpose of imprisonment for crime is punishment" *instead of* crime reduction, and with unprioritized "shopping lists" of purposes such as those contained in Rule 4.410.[59] The tension between the objectives of retribution and crime reduction cannot be avoided by suggesting that "punishment" in these proclamations is the equivalent of "sentencing," or that they beg the question of what is the purpose of "punishment," which may at least include public safety. For example, one California court reasoned:

> while the terms of confinement provided by determinate sentencing law are intended as punitive (Pen.Code, § 1170, subd. (a)(1)), the purposes of parole are " . . . successful reintegration of the offender into society and to positive citizenship . . . in the interest of public safety."[60]

Some courts have labored bravely to reconcile the punitive and utilitarian notions of criminal justice. Bundled within such utterances as "[t]he primary purpose of all punishment . . . is the protection of society,"[61] these courts occasionally assume that that a utilitarian objective such as incapacitation, general or specific deterrence, or reformation is served by incarceration. Still, incarceration fails the same tests[62] as our typical use of programs for lesser crimes: we generally make no effort to track whether any prison terms of any length or under any circumstances *work* once the offender is released back into the community. Surely, they prevent crimes on the outside while the offender is inside, but we do not compare the total criminal output of offenders of similar risk with and without imprisonment throughout their potential criminal careers. We ignore the overwhelming evidence that some offenders make up for lost time after imprisonment due to the criminogenic impact of prison.[63]

Separation of Powers and The Criminal Law, 58 STAN. L REV. 989 *passim* (2006).

59. California Rules of Court, Rule 4.410, *supra* note 46.

60. *Gomez v. Superior Court of Santa Barbara County*, *Appellate Departmen*t, 183 Cal. Rptr. 577, 583 -84 (1982)(unpublished).

61. *E.g.*, State v. Lawler, 927 P.2d 99, 106 (1996); Brosnahan v. Brown, 651 P.2d 274 (1982).

62. *See* Marcus, *Justitia's Bandage: Blind Sentencing*, *supra* note 2, at 3 -4 and notes 25-26, and accompanying text.

63. *Supra* notes 36 & 37.

We do not assign offenders to lengths of imprisonment based on offender risk and needs assessments, but rather based on the crime for which the offender is being sentenced. Often, we fit the crime instead of fitting the offender, as we do with programs allocated by symmetry to the exclusion of science at lower levels of crime.[64] Under Oregon guidelines, for instance, prison terms are presumptive as a matter of criminal history and crime seriousness, with possible deviation based upon "aggravation" and "mitigation."[65] This flaw is precisely the same under California's Determinate Sentencing Law, where the legislature has fixed ranges based on just deserts notions of crime seriousness and directs judges to choose a sentence within a range based essentially upon aggravation (including enhancement by criminal history) and mitigation factors[66]—all to the practical exclusion of anything approaching evidence or risk based analysis.

D. Just deserts ignores evidence-based practices

"Evidence based practices" are sweeping the ranks of the courts' criminal justice partners, as probation and corrections professionals such as Robert Martinson, have emerged from the fallacy that "nothing works."[67] As they have discovered, what Martinson and others learned was not that programs were hopeless, but that programs do not work just because we want them to, or just because we posit that they should. Serious study, competent research, and rigorous attention to learning and applying what matters have produced some modalities that have demonstrable and dramatic impact on the criminality of substantial cohorts of the criminal justice population.[68] "Evidence-based practices" are those that are likely to work for their intended purposes in view of evidence, data, and research.[69] In the face of our growing knowledge

64. Just as we tend to send lower level thieves to "theft talk" regardless of whether the major criminogenic factor is addiction or lack of empathy (*supra* text accompanying notes 24-26), we prescribe chronic thieves to prison terms when some would produce far less crime in the future were we to employ secure addiction treatment.

65. OR. ADMIN. R, 213-008-0001 & 213-008-0002.

66. *See* CAL. PEN. CODE §§ 1170; CAL. R. CT. 4.420.

67. Robert Martinson is generally charged with suggesting in 1974 that "nothing works." Robert Martinson, *What Works? Questions and Answers About Prison Reform*, 25 THE PUBLIC INTEREST 25 (1974). Martinson himself retreated from this position, and it has been thoroughly debunked—at least as descriptive of the offender population as a whole. *See, e.g.*, James McGuire, What Works in Reducing Criminality (Aug. 1, 2000) (unpublished manuscript), *available at* http://www.aic.gov.au/conferences/criminality/mcguire.pdf.

68. Marcus, *Justitia's Bandage: Blind Sentencing*, *supra* note 2, at 18-21.

69 *See, e.g,* Elyse Clawson et al., IMPLEMENTING EVIDENCE-BASED PRACTICES IN CORRECTIONS: USING AN INTEGRATED MODEL TO IMPLEMENT EVIDENCE-BASED

about what really does make a difference in corrections, the culture of sentencing has largely ignored these advances, clinging to archaic liturgy in apparent fear of the consequences of accepting accountability for the outcomes we produce.[70] The bizarre consequence is that we use science in the context of risk and needs assessment for release decisions before offenders reach the arena of sentencing, and to determine levels of supervision and programming in custody after sentencing, while sentencing itself proceeds as if left a century behind. As a practical matter, the best of what corrections has to offer is burdened with having to mitigate the lost opportunities, misguided allocations of resources, and criminogenic impacts of misguided sentencing itself.

Beyond the inertia of tradition[71] and the risks of conceding accountability for outcomes, there is a political contour to this quandary. Academia and advocates for evidence-based corrections tend to focus their attention in the direction of developing and validating effective rehabilitative programs.[72] They largely ignore the darker side of criminal justice – how best to handle offenders who pose a high risk of violence or predation, and whose apparent susceptibility to rehabilitation is either none or far too low to justify the risks associated with substituting treatment for incapacitation. There is precious little published work aiming the principles of rigorous research at maximizing the efficiency with which we use prison beds to achieve public safety, although some good work is emerging around the topic of reintegration – how best to respond to the reality that most offenders actually return to society.[73]

The politics of this is that many on the incarcerationist end of the spectrum view "evidence-based practices" with distrust.[74] Their focus is

PRACTICES IN CORRECTIONS (National Institute of Corrections 2005), *available at* http://www.nicic.org/Library/020174. Oregon legislation adds cost effectiveness to the definition: "'Evidence-based program' means a program that: (a) Incorporates significant and relevant practices based on scientifically based research; and (b) Is cost effective." OR. REV. STAT. § 182.515(3) (2007).

70. Michael Marcus, *Archaic Sentencing Liturgy Sacrifices Public Safety: What's Wrong and How We Can Fix It*, 16 FED. SENT'G REP. 76 (2003).

71. Part of the problem with courts is their historical connection to the imposition of social control through punishment in the service of ruthless autocracies and monarchies. Marcus, *Justitia's Bandage: Blind Sentencing*, *supra* note 2, at 5-7. "The more ancient the abuse, the more sacred it is." Voltaire, *Les Guébres* (1769), quoted in Nigel Rees, BREWER'S FAMOUS QUOTATIONS 5 (2006).

72 *See, e.g.*, Marcus *Justitia's Bandage: Blind Sentencing*, *supra* note 2, at 8-9.

73 The National Institute of Corrections has an extensive library of materials on prisoner re-entry at http://nicic.org/Features/Library/?Tag=385&Group=7.

74 For example, in recent written testimony to the Oregon Legislature, Crime Victims United argued that "[d]espite SB 267 (2003), that calls for programming using evidence

on the most violent or persistent of offenders.[75] Their notion is that proponents of evidence-based practices are holdovers from the discredited medical model, and liberal apologists who are "soft on crime" at the expense of victims and the public.[76] I hope that it is too early to sacrifice the concept of "evidence based practices" to this divide. In any event, my use of the concept is agnostic as to the spectrum of leniency and severity. We need to apply our best efforts to assess the relative worth of all of our correctional tools – including rehabilitation, alternatives *and* incapacitation – to the end of public safety. What is tough on *crime*, after all, is that which reduces it. What is tough on *an offender*, on the other hand, may but often does not represent what is most likely to reduce the criminal behavior of that offender. Comprehensive application of best practices would prescribe community-based responses to some offenders, lengthy incapacitation to some others, and a rich variety of intelligent responses to the wide spectrum of offenders we now treat largely as if we were indeed merely a temple of denunciation.[77]

A few states have begun the long but critical path towards evidence-based allocation of prison resources. Virginia has the most well-developed program, employing validated risk assessment as a means of increasing incarceration for some offenders while diverting to community-based corrections offenders who are lesser threats.[78] Missouri has begun more recently to incorporate risk assessment into its advisory guidelines.[79] Oregon's Criminal Justice Commission proposed a similar effort for its "mandatory" guidelines, but the Oregon Legislature has yet

based practices, we really don't know what works until we apply a proven standard; random selection." Oregon Catalyst.com, Crime Victims United -- Legislative Update (February 22, 2008), http://www.oregoncatalyst.com/index.php?/archives/1217-Crime-Victims-United-Legislative-Update.html.

[75] *See, e.g.*, CRIME VICTIMS UNITED, ALTERNATIVE INCARCERATION PROGRAM (2006), *available at* http://www.crimevictimsunited.org/issues/corrections/aip.htm.

[76] *E.g.*, Brandon C. Welsh and David P. Farrington, *Evidence-Based Crime Prevention: Conclusions and Directions for a Safer Society*, CANADIAN J. OF CRIMINOLOGY AND CRIM. JUST. 337, 339 (2005), *available at* http://www.utpjournals.com/cjccj/472_article008.pdf.

77. Marcus, *Sentencing in the Temple of Denunciation: Criminal Justice's Weakest Link*, *supra* note 5.

78. *See* BRIAN J. OSTROM ET AL., OFFENDER RISK ASSESSMENT IN VIRGINIA: A THREE-STAGE EVALUATION: PROCESS OF SENTENCING REFORM, EMPIRICAL STUDY OF DIVERSION AND RECIDIVISM, BENEFIT-COST ANALYSIS (National Center for State Courts 2002), *available at* http://www.vcsc.state.va.us/risk_off_rpt.pdf.

79. Missouri Sentencing Advisory Commission, *Recommended Sentencing Report and Implementation Update* (June 2005), *available at* http://www.mosac.mo.gov/file/final%20report21June%202005.pdf, and BIENNIAL REPORT 2007 (September 2007), *available at* http://www.mosac.mo.gov/file/MOSAC%20Commission%20Report%202007%20Final.pdf.

to provide the necessary approval.[80]

Although some have suggested that guidelines accomplish allocation of prison resources by risk because they rely on crime seriousness and criminal history in prescribing a sentence, they are wrong roughly two times out of three.[81] Guidelines were not intended to serve public safety,[82] and they do not do so well by accident.

Both sides of the persistent crime and punishment debate resist empiricism because they fear its results. Incarcerationists fear that researchers will find reasons to divert many from custody, while rehabilitationists fear that only incapacitation can withstand scrutiny from a public safety perspective.[83] The tragically absurd result is that we allocate almost all of our prison beds on the basis of just deserts to the exclusion of any effort to tie the allocation to public safety benefits. The competition between notions of punishment and notions of public safety is palpable only occasionally in our appellate opinions,[84] but the

80. The 2005 Oregon Legislature directed the Commission to study "whether it is possible to incorporate consideration of reducing criminal conduct" into Oregon's sentencing guidelines. 2005 Or. Laws Ch. 474 (SB 919). This effort produced a bill that would have broadened discretion under some of Oregon's sentencing guidelines blocks while encouraging judges to consider a risk assessment instrument in exercising that discretion. 2007 Or SB 276–4. The bill failed in the 2007 Oregon Legislature when its design promised a fiscal impact and late numbers shifted the likely impact on prison bed demand. The project may continue.

81. Marcus, *Responding to the Model Penal Code Sentencing Revisions*, *supra* note 3, at 78.

[82] *See* OR. ADMIN. R. 213-005-0006(1) and OR. ADMIN. R. 213-002-0001(3)(d), *supra* note 31.

[83] *See, e.g.*, Marcus, *Justitia's Bandage: Blind Sentencing*, *supra* note 2, at 14-15.

84. *E.g.*, In re Dannenberg, 104 P.3d 783 (Cal. 2005) (vividly illustrating that the public safety basis to avoid release of an inmate competes with punishment as the exclusive role of prison). Oregon examples are provided by cases struggling with the tension between a state constitutional provision proscribing retribution ("Laws for the punishment of crime shall be founded on the principles of reformation, and not of vindictive justice" and the dominant concern of sentencing guidelines with "punishment . . . appropriate to the offense." *See, e.g.*, State v. Spinney, 820 P.2d 854, 855-56 (Or. Ct. App. 1991) (quoting *Former* OR. CONST. art. I, § 15). Before guidelines, Oregon courts had repeatedly rejected "vindictive justice" challenges to sentences by invoking "the most important consideration of all, the protection and safety of the people of the state. Such a principle does not have to be expressed in the constitution as it is the reason for criminal law." Tuel v. Gladden, 379 P.2d 553, 555 (Or. 1963). Guidelines, adopted by Oregon in 1989, paid lip service to public safety while obviously being driven instead by ordered just deserts in tension with prison resources. *See* Marcus, *Justitia's Bandage: Blind Sentencing*, *supra* note 2, at 8-12; Marcus, *Responding to the Model Penal Code Sentencing Revisions, supra* note3, at 74-78. In 1996, Oregon voters rewrote OR. CONST. art. I, § 15, to provide "Laws for the punishment of crime shall be founded on these principles: protection of society, personal responsibility, accountability for one's actions and reformation." Or. SJR 32, 1995, adopted Nov. 5, 1996. OR. CONST. art. I, § 16, continues to provide "Cruel and unusual punishments shall not be inflicted, but all

consequences deeply impact our communities by spawning victimizations that smarter allocations would prevent and by removing from society many whose performance in the community is ultimately worsened rather than improved by their temporary removal. The first step of meaningful improvement in criminal justice, then, is overcoming this impasse.

It is simply not enough that sentencing avoids disproportionality. Minimally responsible sentencing demands best efforts within the limits of proportionality to deploy available correctional tools according to risk, effectiveness, priority, and resource limitations to the end of public safety. We must identify public safety as our primary goal,[85] responsibly pursue that goal, and accept accountability for our success or failure as measured by that goal.

To overcome the consequences of decades of retreat to retributivism in the face of the empirical paucity of merely presumed rehabilitation, we must employ a rigorous, evidence-based pursuit of effective responses to crime and learn to apply what our criminal justice partners have learned in the many decades since the premature proclamation that nothing works.[86] The error of merely assuming that we accomplished crime reduction through any means pales in comparison with the debacle of invoking ordered just deserts to abandon the most obvious purpose of criminal law.[87] What we must do is accept and meet the challenge of devising actually effective sentencing dispositions.

Incarcerationists are correct that public safety demands that some offenders need to be incapacitated for longer periods than at present. But they need to accept that public safety also demands that some offenders be diverted from prison at the outset or sent for shorter terms—both because we need the beds for those who belong there, and because many offenders are better handled in the community.[88]

Rehabilitationists are correct that properly designed and allocated programs and alternatives are far more effective at crime reduction than

penalties shall be proportioned to the offense."

85. A rational system seeks public safety with the limits of law, proportionality, priority and resource, and rationally compromises that purpose within those limits only as demonstrably necessary to pursue some other legitimate social purpose. The vast majority of sentences that responsibly seek public safety serve any other social purposes at the same time; some require adjustment to serve public purposes. *See* Marcus, *Responding to the Model Penal Code Sentencing Revisions*, *supra* note 3, at 79, 90-92, 114-15. As argued in *Responding to the Model Penal Code*, the legitimate purposes of sentencing come down to promoting public safety and promoting public values. *Id.*

86. *See* Martinson, *supra* note 67.

87. Marcus, *Responding to the Model Penal Code Sentencing Revisions*, *supra* note 3.

88. *See supra* notes 35-37, 40 and accompanying text.

jail and prison sentences for some offenders. But rehabilitationists need to accept that programs do not work just because we want them to. We need to be rigorous in vetting programs for their impact on recidivism and in developing modalities of treatment for challenging cohorts of offenders. Rehabilitationists also need to accept that public safety demands that we incapacitate some offenders within limits of law, proportionality, and resource. This is because there are offenders for whom nothing else works—offenders whose criminality will not increase after release from prison, and offenders whose risk of future harm is too high to permit them to remain in the community while we attempt to reduce their criminality.

Every sentencing disposition has consequences for the allocation of correctional resources, and every sentencing decision has public safety outcomes regardless of the extent to which we contemplate those outcomes in the course of constructing sentences. It betrays public trust and our mission to avoid responsibility for those outcomes by emphasizing the limitations of law and resource that restrict our sentencing choices.[89] We must accept accountability for our role in reducing or increasing the risk of future harm at the hands of—and even *to*—the offender. It is woefully irresponsible to blame offenders for their recidivism without also accepting responsibility for exercising best efforts to reduce the likelihood of that recidivism. Best efforts include measuring our sentencing performance[90] and the effectiveness of

89. Some communities indeed have far fewer program resources than others, and some have limitations of jail space and supervision energies. To contend that it is somehow unfair to assess the impact of our choices within those limits is tantamount to saying we should not even try to serve public safety. Every judge who handles criminal cases has substantial discretion in many cases to choose between jail and prison initially or upon finding a violation of probation; to choose between consecutive and concurrent sentences; and even to assign or recommend various conditions of probation. The issue is whether we marshal best evidence-based practices to ensure the highest likelihood of success. We cannot do so if we take the position that our choices do not matter.

90. Measuring the performance of courts in terms of their impact on recidivism is blasphemy to some judicial ears, but it is no threat to judicial "independence." *See generally* MICHAEL MARCUS, MEANINGFUL PERFORMANCE MEASURES AND JUDICIAL INDEPENDENCE (2006), *available at* http://www.smartsentencing.info/safetynotshow.html. Nor can performance measurement be justly avoided by the notion that courts do not control all of the variables that contribute to recidivism. Corrections, probation, and law enforcement have long accepted crime-related performance measures, and in common with all useful performance measures, do not depend upon controlling all of the factors – just upon recognition that the performance in question potentially contributes to the outcome. *E.g.*, NATIONAL INSTITUTE OF JUSTICE, IMPLEMENTING PERFORMANCE-BASED MEASURES IN COMMUNITY CORRECTIONS (1996), *available at* http://www.ncjrs.gov/txtfiles/perform.txt; ASSOCIATION OF STATE CORRECTIONAL ADMINISTRATORS, ASCA PERFORMANCE-BASED MEASURES RESOURCE MANUAL (2005); M.W. O'Neill, J.A. Needle, & R.T. Galvin, *Appraising the Performance of Police*

programs and other dispositions in terms of recidivism, and insisting on evidence-based practices. In turn, evidence-based practices include exploiting data, research, and risk[91] and needs assessment instruments and protocols while continuously vetting data, research, assessment instruments and protocols for validity and avenues for improvement.

An important piece of giving appropriate emphasis to public safety is that we must subject the retributive aspects of sentencing to rigorous assessment to avoid allowing it to compete irrationally and destructively with public safety. Ultimately, retribution too is charged with social purposes: to serve a legitimate need of a victim, to prevent vigilantism or private retribution, to maintain respect for legitimate authority, or to enhance respect for the persons, property, or rights of others.[92] These functions are at least as subject to validation as propositions about the general or specific deterrence value of a sentence or its likely success in accomplishing reformation.[93] In rare cases, direct pursuit of public safety should yield to other purposes,[94] but we cannot allow "just punishment"

Agencies: The PPPM (Police Program Performance Measures) System, 8 J. OF POLICE & ADMIN. 253 (1980); HARRY P. HATRY ET AL., HOW EFFECTIVE ARE YOUR COMMUNITY SERVICES?: PROCEDURES FOR MEASURING THEIR QUALITY (Urban Institute & International City/County Management Association 2d ed. 1992); Mark H. Moore & Margaret Poethig, *Police as an Agency of Municipal Government: Implications for Measuring Police Effectiveness*, *in* MEASURING WHAT MATTERS: PROCEEDINGS FROM THE POLICING RESEARCH INSTITUTE MEETINGS 151 (Robert H. Langworthy, National Institute of Justice & Office of Community Oriented Policing Services ed. 1999).

91. Opponents of risk assessment promote the fallacy that they "punish future crimes" and bemoan their imprecision. *See*, *e.g.*, Norval Morris & Marc Miller, *Predictions of Dangerousness*, *in* 6 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 1-50 (Michael Tonry & Norval Morris eds. 1985); ALLAN MANSON ET AL., SENTENCING AND PENAL POLICY IN CANADA: CASES, MATERIALS, AND COMMENTARY (2000). Of course we must be vigilant in validating and improving the instruments and their administration. But the status quo of sentencing is far more fallible, unfair, and destructive than modern risk assessment instruments. They are regularly used in pretrial and correctional settings, and are crucial to the success of many common public and entrepreneurial pursuits. It is important that we do not use them irresponsibly, but it is equally irresponsible not to make the best use of them that we can. *See* Marcus, *Responding to the Model Penal Code Sentencing Revisions: Tips for Early Adopters and Power Users*, *supra* note 3, at 108-09, and authorities cited; Marcus, *Comments on the Model Penal Code: Sentencing Preliminary Draft No. 1*, *supra* note 7, at 146-47, and authorities cited; Michael Marcus, *Post-Booker Sentencing Issues for a Post-Booker Court*, 18 FED. SENT'G RPTR. 227, 228-29 (2006).

[92] Marcus, *Responding to the Model Penal Code Sentencing Revisions*, *supra* note 3.

93. *Id.* at 78-80, 84-85, 90.

94. The social drinker who has driven impaired and killed someone but will never drink again, and the opportunistic sex offender whose child victim needs the offender's punishment for therapeutic purposes, provide examples where public values require substantial punishment even if recidivism is preventable by less punitive means. "Direct pursuit" of public safety is as distinct from the indirect ways in which pursuing public values through sentencing may also promote public safety. Marcus, *Responding to the*

to provide immunity against evidence-based practices or against accountability for sentencing that actually furthers public safety or some other legitimate public purpose.

Just deserts is essential—at least in the sense of proportionality as a limit on severity of sanctions. But as the sole measure of sentencing, it is an absolute barrier to rational pursuit of public safety and to real progress in responding to the crisis that underlies Assembly Bill 900.

II. ALL Sentences are About Public Safety

The title of Assembly Bill 900, "the Public Safety and Offender Rehabilitation Services Act of 2007,"[95] and of the "California Department of Corrections and Rehabilitation,"[96] serve as apt introductions for this part of the analysis. The culture and practice of criminal justice is woefully distorted by various and mistaken notions about the relationship among rehabilitation, incarceration, and public safety.

As discussed, the misguided present direction of the American Law Institute Model Penal Code revision and the segment of academia it represents is that while we may pursue rehabilitation when reasonable to believe it will reduce criminal behavior, we must persist in allocating prison resources on the basis of just deserts rather than public safety.[97] The courts, on the other hand, generally glean that rehabilitation *competes* with public safety, and that when public safety prevails, the result is imprisonment.[98] Assembly Bill 900 commendably identifies risk and needs assessment, programming, post-prison supervision, and reintegration as means by which to prevent recidivism and thereby serve public safety.[99] However, it largely struggles to accommodate the

Model Penal Code Sentencing Revisions, *supra* note 3, at 88-93.

95. 2007 AB 900 § 1.

96. CAL. GOV'T CODE § 12838 (Deering Supp. 2008).

97. *See supra* note 17, and accompanying text.

98. *See, e.g.*, State v. Kinkel, 56 P.3d 463, 469 (Or. Ct. App. 2002) (weight to be accorded public safety and rehabilitation vary with circumstances of an offender); In re Luisa Z., 93 Cal. Rptr. 2d 231 (Cal. Ct. App. 2000) (adult incarceration seeks to punish in pursuit of retribution, while incarceration under the California Youth Authority seeks to protect society by rehabilitation, in part by punishment *for the purpose of rehabilitation*). In the context of probation conditions, California courts commonly speak of the "dual purposes of rehabilitation and public safety." *E.g.*, People v. Pointer, 199 Cal. Rptr. 357, 365 (Cal. Ct. App. 1984). Public safety objectives cannot always be reasonably pursued by rehabilitation, but rehabilitation – in a rational system – is always a means by which to pursue public safety rather than a distinct and competing "purpose."

99. *E.g.*, CAL. PENAL CODE § 3020 (AB 900 §11) (Deering Supp. 2008) (criminogenic assessments of inmates to reduce chance of reoffending); CAL. PENAL CODE § 3073 (AB 900 § 12) (Deering Supp. 2008) (day treatment and crisis care for parolees

continuation of a prison system engulfed with punishment *regardless* of any impact on public safety. California courts have often spoken of the "dual purposes" of public safety and rehabilitation, typically in the context of terms of probation or release as distinguished from prison itself.[100] The public, for its part, persists in the fallacy that severity and effectiveness are synonymous—largely as a result of the combination of the common sense expectation that we use prison for public safety and the reality that instead we resort to ordered just deserts.

Escaping this conundrum is critical to substantial progress. The only sufficient justification within a criminal justice system for requiring

with mental health issues to reduce recidivism); CAL. PENAL CODE § 3105 (AB 900 § 13) (Deering Supp. 2008) (Inmate Treatment and Prison-to-Employment Plan to reduce chances of returning to prison); CAL. PENAL CODE § 6270 (AB 900 § 16) (Deering Supp. 2008) (continuity of services to promote successful reintegration into society), CAL. PENAL CODE § 6272 (reentry facilities to provide risk and needs assessments, case management services, and wraparound services).

Apart from the enormous flaw that these laudable provisions have no potential for improving the selection of which offenders to send to prison in the first place, they also leave important details to flounder. It is critical that assessments be exploited for evidence-based assignment to programs (or not to programs) based on their likely impact on the offender's future criminal behavior. The experience of criminal justice for generations has been that merely proclaiming our purposes in erecting procedures does nothing to ensure that we serve those purposes. Merely studying and reporting on "effectiveness" of efforts to reduce recidivism (CAL. PENAL CODE § 6141 (AB 900 § 15) (Deering Supp. 2008) or planning to address it (CAL. PENAL CODE § 2054.2 (AB 900 § 6) (Deering Supp. 2008)) is notoriously ineffective without strategies for assuring that we use what we learn. Oregon has required studies of effectiveness and plans for achieving it for years, *e.g.*, OR. REV. STAT. §§ 135.980, 137.656), but hope for any impact on the performance of corrections has arisen only since Oregon adopted incentives for the Department of Corrections to devote increasing portions of program money to "evidence based programs." OR. REV. STAT. §§ 182.515, 183.525, 2003 Or. Laws Ch. 669. Even these statutes risk accepting form instead of demanding substance, as they define "evidence based program" in part as one that "Incorporates significant and relevant practices based on scientifically based research." *Id.* Experience teaches that we risk encouraging programs to emulate studied, successful programs, and assessing them by whether they look like studied programs rather than *perform* well – which may vary with the cohort of offenders accepted into the program. AB 900 employs a similar strategy by conditioning jail and prison capital funding on program and planning steps. CAL. GOV'T CODE §§ 15819.41 , 15820.918 (AB 900 §§ 3, 5) (Deering Supp. 2008); CAL. PENAL CODE § 7021 (AB 900 § 22) (Deering Supp. 2008). This approach is as crucial to success as the requirement of assurance that any jail beds constructed will be staffed (CAL. GOV'T CODE §§ 15820.906, 15820.916 (AB 900 §§ 4 and 5)). Multnomah County, Oregon, spent close to $60 million to build a new jail facility which has remained unavailable for want of staffing for over three years as of this writing. *County: Have jail, will share*, THE PORTLAND TRIBUNE, Feb 4, 2005, *available at* http://www.thetribonline.com/news/story.php?story_id=28215. But funding programs is not the same as selecting them for quality and rigorously studying their graduates' ability to avoid criminal behavior.

100. *E.g.*, People v. Lopez, 78 Cal. Rptr. 2d 66, 71 (Cal. Ct. App. 1998. [don't you still need to close the paren????]

offenders to participate in programs at all or in lieu of or during imprisonment is that rehabilitation is the most appropriate means by which to attempt to reduce their future criminality in order to promote public safety. Alternatives such as fines or community service are much cheaper than custodial sanctions. If the only purpose is punishment, these alternatives are far easier and less costly to administer and monitor for success than programs designed to reduce criminal behavior, in part because participation is the point rather than the impact measured by reduction in recidivism.[101] Indeed, caning makes more sense than the vast majority of prison sanctions—at least at the option of the offender—if our only purpose is punishment, even assuming that we include the utilitarian functions of general and specific deterrence.[102] That we pursue rehabilitation through programs is also the legitimate answer to complaints that people should not have to commit crimes to gain access to scarce social services: we do not do it for the welfare of offenders, but for the welfare of the community.[103] Benefit to the offender is a welcome byproduct or tactical prerequisite, but the goal is public safety or we should not be spending corrections resources on rehabilitation.

At the same time, the only sufficient justification for the tremendous public investment and nonmonetary costs of maintaining an extensive system of jails and prisons is *also* public safety—primarily through the means of incapacitation, and at least theoretically[104] through the strategies of specific and general deterrence. In a rational system of justice, within the limits of proportionality, priority, and resource, we

101. It is worth noting that minimal sanctions are sufficient for substantial subsets of low risk offenders for any of several reasons: they will not reoffend regardless of the sentence; resource limitations require that we devote available resources to higher risk offenders; or we are likely to increase the risk the offender represents to the public with the available resources. For these subsets, sentencing properly responds merely to the social need for "consequences" for violating the law (and to any victim's need for restitution or a sense that justice has been done). It would help significantly, however, to embrace evidence-based practices in assessing the social needs rather than merely relying on pretense. *See* Marcus, *Responding to the Model Penal Code*, *supra* note 3, at 77-83.

102. General deterrence assumes that punishing one offender will convince others not to misbehave; specific deterrence assumes that punishing one offender will convince that offender not to misbehave again.

103. Of course, the welfare of the community is promoted by social service programs. We fund them largely to protect the quality of life, economic health, and health and safety of society as a whole. But criminal justice dollars find justification in treatment expenses more readily when the point is crime reduction, while public welfare programs suffer no contradiction when their justification is the welfare of the immediate recipient.

104. Without launching a full review of what we know about the limits of general and specific deterrence in practice – having to do with the impulsive nature of most crime and the typical delay between choice and consequence – among many other impediments to their success – the present point is merely that we should deploy them on the basis of reason and evidence, not blind faith.

rehabilitate those capable of rehabilitation with reasonable confidence in the community unless the risk they represent requires their incapacitation pending rehabilitation. On the other hand, we incapacitate high risk offenders whose risk we cannot dependably mitigate for as long as proportionality and resources permit. In prison, a rational system allocates programs to those offenders whose post prison criminality will be reduced by those programs. Our sentencing choices should *all* be for public safety; rehabilitation and incarceration may compete as the best disposition for a given offender, but not because one is pursued for public safety while the other is not.

The second critical realization, then, is that we must approach *all* sentencing choices—whether mere fines or community service, various levels of probationary supervision with treatment or alternative sanctions, or prison——on the basis that (1) their value is dependent upon their likely impact on public safety, and (2) that we should select among them on that basis within the limits of law, proportionality, risk, and resource. And, unless we act on this realization when we determine which offenders to send to prison, trying to make the best of things once they get there is at best a palliative.

III. The Issue is What Works on Which Offenders

To the substantial extent that criminology, corrections, and public debate attend to the issue of what successfully reduces crime, most attention is given to whether treatment, probation, or punishment "works" to protect society.[105] Different cohorts of participants in the debate are aligned on opposite sides of such questions as whether drug treatment, sex offender treatment, programs in general, prison, or strategies such as general or specific deterrence, treatment courts, or diversion mechanisms "work."[106] Perhaps the single most important proclamation of the "Maryland Study"—still the most comprehensive review of literature on the efficacy of programs aimed at criminal offenders—was that "[t]he important issue is not whether something works but what works for whom."[107] Sentencing culture, ignoring this

[105] *See, e.g.*, DORIS LAYTON MACKENZIE, WHAT WORKS IN CORRECTIONS : REDUCING THE CRIMINAL ACTIVITIES OF OFFENDERS AND DELINQUENTS 3 (Cambridge University Press 2006).

106. Marcus, *Justitia's Bandage: Blind Sentencing*, *supra* note 2, at 3.

107. LAWRENCE W. SHERMAN ET AL., PREVENTING CRIME: WHAT WORKS, WHAT DOESN'T, WHAT'S PROMISING, *Chapter 9: Criminal Justice and Crime Prevention, Section 4: Rehabilitation and Treatment* (National Institute of Justice & University of Maryland); *available at* http://www.ncjrs.gov/works/wholedoc.htm. A synopsis is available at http://www.ncjrs.org/pdffiles/171676.pdf.

critical step, is predominantly shaped by stalemates between opposing views in each of these debate cohorts. Thus, the choice between prison and probation, rehabilitation and punishment (in the punitive sense), and even among programs as to crimes routinely relegated to community-based dispositions, is driven by generic policy decisions. Those choices are driven by allocation of resources, just deserts, and symmetry, and are overwhelmingly blind to outcomes. Individualization in the sense of fitting the disposition to the *offender*, while jealously guarded as a judicial function, is usually driven by just deserts or folklore concerning what sentences reduce recidivism by offenders in general or convenient subcategories of offenders—rather than by serious attempts at risk or needs assessment and evidence-based analysis.

Assembly Bill 900 commendably prescribes assessments for inmates and participants in reintegration facilities,[108] presumably for purposes of assigning individuals to the programs and other responses that are most likely to reduce the criminal behavior of those individuals. We must demand that sentencing follow suit by insisting that we sentence individuals with due regard to best evidence about which dispositions are most likely to work on those individuals. In sentencing and within corrections, however, it is not enough to conduct the assessments and merely to announce their purposes. Assembly Bill 900 declares that risk and needs assessments be conducted and that programs be supplied.[109] Even aside from the circumstance that Assembly Bill 900 does not improve sentencing, it ignores critical steps: (1) using the assessments to deliver correctional resources in ways that carry the best chance of success, (2) continuing reassessment and improvement of our knowledge of what works (and what does not) on which offenders, and (3) employing meaningful performance measurements and feedback with respect to sentencing analysis and practice. A meaningful solution must add strategies to achieve these ends, and to accomplish the same improvement in the sentencing decisions that presently allocate offenders to prison and to probation.

IV. Plea Bargaining Determines Most Sentences

At a recent meeting of a National Institute of Justice workgroup (of which I am a member) on court technology and public safety, a prosecution representative proclaimed that district attorneys, not judges, do the bulk of sentencing in our system. This position is overwhelmingly accurate. Typically, well over ninety percent of criminal cases are

108. CAL. PENAL CODE §§ 3020, 6272, *supra* note 99.
109 2007 AB 900, §§ 2, 3, 6, 11, 13, 16.

resolved by plea bargains.[110] Although there are many local variations and judges in theory maintain both control and responsibility for sentences imposed as a result of plea negotiations,[111] in practice most sentences are imposed in accordance with "recommendations," "agreements," or mutual expectations arising out of a plea agreement that determines at least the charges for which the offender will be sentenced and, routinely, the sentence the offender will receive.[112] While case weaknesses, cooperation agreements, or other considerations may temper a prosecutor's preference, a plea agreement rarely reaches a court until and unless the prosecutor has accepted its terms with express or implied satisfaction with the sentence the parties expect the offender to receive.[113]

The power of prosecutorial discretion through plea bargaining has been a fertile field for academic discourse.[114] The issue in most of this discussion is whether and how the impact of prosecutorial power might be brought under judicial control.[115] Nevertheless, the issue here is not which branch of criminal justice has control but the ends to which any control is directed. For present purposes, the point is that no attempt to change the culture of sentencing holds much promise for producing any public benefit until and unless that change reaches plea bargaining.

110. *E.g.*, Patrick A. Langan & Robyn L. Cohen, State Court Sentencing of Convicted Felons (U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics 1992), *available at* http://www.ojp.usdoj.gov/bjs/pub/ascii/njrp92.txt; United States v. Booker, 543 U.S. 220, 276, 277 (2005); *see also* Blackledge v. Allison, 431 U.S. 63, 71 (1977); People v. Panizzon, 913 P.2d 1061, 1068 (Cal. 1996). When Riverside County's district attorney deviated from plea bargaining as usual, civil trials could not be had for two years and required Chief Justice Ronald George to assemble a "strike team" of 27 active and retired judges to attack the resulting "staggering" backlog of criminal cases. Nicole Brambila, *Civil Trials on Docket Once More*, THE DESERT SUN, Jan. 4, 2008..

111. *See*, *e.g.*, People v. Kaanehe, 559 P.2d 1028, 1036-37 (Cal. 1977).

112 "Although in most jurisdictions the sentence in a plea bargain is technically set by a judge, the prosecutor's deal is virtually always implemented." State v. Rummer, 432 S.E.2d 39, 70 n.16 (W. Va.,1993).

113 *See* sources cited *supra* notes 110-12.

114. A recent article collects much of the writing on the subject and offers comparisons with continental law countries – which at least serves to prove that criminal justice may vary its approach to the role of prosecutors. Yue Ma, *Prosecutorial Discretion and Plea Bargaining in the United States*, *France*, *Germany*, *and Italy: A Comparative Perspective*, 12 INT'L CRIM. JUST. REV. 22 (2002).

115. From a prosecutor's perspective, the issue may seem to be how to prevent resource limitations from allowing offenders to escape an "appropriate punishment." Prosecutors have adopted many strategies to bring plea bargaining under control of a jurisdiction's elected or appointed prosecutor, and to ensure some measure of equal treatment. But the public impact of those efforts depends not just upon their success in achieving uniformity or severity, but upon how well they generate dispositions that reduce future criminal conduct. The challenge is to harness plea bargaining controls to that purpose.

Prosecution charging, plea bargaining, and probation violation policies may obstruct court efforts to maximize the effectiveness of sentencing outcomes in reducing recidivism. In many jurisdictions, for example, the vast majority of sentences result from plea bargaining processes in which the prosecution and defense reach agreement on the sentence to be recommended to the court.[116] "Such agreements rarely, if ever, consider evidence of the likely impact of the stipulated disposition on the offender's future criminality, or the likely impact of other potential dispositions."[117]

> In the end … the best evidence that plea bargaining has held evolutionary sway over its sibling criminal-justice institutions … may be our inability to name a single important procedural innovation of the last 150 years that threatened to choke off plea bargaining and yet flourished.[118]

Surely the role of judges differs in many respects from that of prosecutors.[119] Both have a responsibility to serve public safety through sentencing and advocating for sentences within the range available in law and in fact. On rare occasion, it may be necessary to deviate from the best attempt at public safety in order to serve public values.[120] But both betray public expectation and public duty to the extent that they allow just deserts to act as a shield against accountability for best efforts to serve public safety and public values. The analysis regarding defense attorneys is more complicated, as they are charged with representing the interests and pursuing the objectives of clients within legal and ethical rules. However, that role may often correspond with pursuing the sentence that is most likely to work in terms of crime reduction.[121] When

[116] *See* sources cited *supra* notes 110-112.

117. Warren, *supra* note 6, at 1315.

118. GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 202 (Stanford University Press 2003).

119. The "Harm Reduction Code" proposed in Marcus, *Responding to the Model Penal Code Sentencing Revisions*, *supra* note 3, at 83-138, proposes sentencing functions for judges (§ 5), prosecutors (§ 7), and defense attorneys (§ 8), that are consistent with their diverse roles.

120. *See supra* notes 85, 94, and accompanying text.

121. For example, a client may prefer inpatient treatment to presumptive prison; defense counsel may serve public safety by demonstrating that the drug treatment assumed to be available during the presumptive prison sentence is in fact unavailable [because the defendant will have too short a term or is for some other reason ineligible for scarce treatment beds in the prison]. If in fact the inpatient treatment is more likely to prevent recidivism than prison without treatment, and assuming the defendant's risk level is sufficiently low to justify community-based inpatient treatment the defense advocacy might well serve public safety better than the sentence that would result without that advocacy.

it does not correspond, the advocate's competent debate with proponents of a sentence should function as it should throughout the rest of the adversarial process of the criminal law—largely to challenge and to refine evidence and analysis. But our task is to divert all of this energy and attention towards evidence based practices.

Efforts at collaboration among courts, prosecutors, and defense attorneys are surely part of any solution.[122] Even so, judges and legislatures have an opportunity to introduce rather dramatic changes in the processes and behaviors that constitute the practice of criminal justice. Judges have all seen rapid responses by criminal practitioners to significant appellate decisions such as *Crawford v. Washington*,[123] *Blakely v. Washington*,[124] and *Illinois v. Caballes*.[125] States that adopted guidelines saw sentencing practice transformed with remarkable speed, particularly when plastic covered guideline charts became as ubiquitous in courtrooms as gavels.[126] Much prattle about deserts[127] was almost immediately displaced by lawyers chatting confidently about how guidelines applied to a given defendant's case, and the sentencing discussion became about gridblocks, departures, and whichever items of "aggravation" and "mitigation" the legislature or sentencing commission happened to articulate.[128] This change did little to improve the impact of sentencing, but it demonstrates that courts can change things without

122. Warren, *supra* note 6, at 1315.

123. Crawford v. Washington, 541 U.S. 36 (2004) (invalidating a wide swath of cases approving exceptions to the constitutional right of confrontation).

124. Blakely v. Washington, 542 U.S. 296 (2004) (articulating a right to a jury trial as to any sentencing enhancement fact if the existence of that fact is prerequisite under state law to a higher level of imprisonment than would otherwise be available to the sentencing judge).

125. Illinois v. Caballes, 543 U.S. 405 (2005) (suggesting that constitutional limits on search and seizure may be substantially truncated when the object of the search is deemed "contraband"). Although this case may not have the impact of *Crawford* or *Blakely*, it represents the turbulent nature of search and seizure law in general, which dramatically impacts the behaviors of prosecution and defense attorneys in court.

126 Marcus, *Justitia's Bandage: Blind Sentencing*, *supra* note 2, at 24.

127. I am not suggesting that proportionality and desert are insignificant, or that all who address them do so frivolously. Nonetheless, much of what is said in their name in typical court proceedings has little substance.

128. Marcus, *Justitia's Bandage: Blind Sentencing*, *supra* note 2, at 24. (Oregon's rules on aggravating and mitigation factors are at OR. ADMIN. R. 213-008-002 (2008), as contemplated by OR. REV. STAT. § 37.080 (2007).). Similar dramatic changes in what goes on and is said in courtrooms accompanied the adoption of child support guidelines that are essentially mathematical. The Family Support Act of 1988, 42 U.S.C. § 667, essentially required all states to adopt such guidelines. In short order, practitioners who used to talk about need, ability, sympathy, and misbehavior while urging a higher or lower support amount started spending much of that effort filling in blanks on worksheets or on line.

awaiting a consensus; courts can and should lead on this issue, and not merely by devising dockets to speed the flow of cases towards dispositions, particularly if most are likely to do more harm than good.[129]

We are just beginning seriously to address this issue in my court. I will be advocating for a strategy that pushes the discussion of best practices back from courtrooms into plea negotiations—perhaps initially by merely requesting with each plea an explanation for how public safety is promoted and when and why it may be compromised. We might well articulate standards for preparedness of counsel on such issues as the availability of relevant resources, program waiting lists, or prison conditions.[130] Other judges have different suggestions, and we are certainly not in a position to deliver solutions to others at this stage in our work.

For present purposes, the point is simply that no change in the ills that generated Assembly Bill 900 can be successful until the very culture of sentencing changes, and no change in the culture of sentencing can occur without a corresponding paradigm shift in plea bargaining.

Conclusion

Assembly Bill 900 evidences some significant strategies and important ingredients that may contribute to solving the dysfunctions of criminal justice to which it attempts to respond. However, as with voter sentencing initiatives and sentencing guidelines, its potential is crippled because it fails to repair the predominant engine of resource allocations in criminal justice: sentencing. Prison populations are persistently swelled by the return of alumni and by a flow of new inmates that smarter sentencing would have diverted to more effective and less destructive dispositions. Both result from a sentencing culture that is gravely distorted by the use of just deserts to shield participants from accountability for our public safety impact. The process spawns avoidable victimizations, misuses both community and prison resources, and relegates fixes like Assembly Bill 900 to the role of palliative.

To achieve meaningful improvement, we must recognize that just deserts is not enough. Sentencing must rigorously employ evidence-based

129. Michael Marcus, *What Are We up to and Why - or If We're Doing More Harm than Good, Why Rush?*, a presentation to the West Central Wardens & Superintendents Association, "Round-up on the Oregon Trail," Pendleton, Oregon, June 2, 1997, *available at* http://www.smartsentencing.info/PNDLTON.htm.

130. Oregon's on-line criminal bench book devotes some forty pages to practical sentencing issues. OREGON JUDICIAL DEPARTMENT, CRIMINAL BENCHBOOK 721-63 (2005), *available at* http://www.ojd.state.or.us/reference/criminalbenchbook.htm. Judges should be able to expect counsel to be prepared on all of those issues that may be relevant in a given case.

best practices in pursuit of public safety. All sentencing choices, from mere fines, through probation, to prison and parole, are properly invoked as means to the end of public safety; we must overcome the fallacy that public safety *competes* with rehabilitation. We cannot be efficient in deploying correctional resources until we act on the reality that risk and need assessment are essential for identifying which disposition—program, alternative, or length of jail or prison—is most likely to work on which offenders. We must achieve best practices, not merely nominal symmetry between crime and punishment. Finally, although all strategies for improvement must recognize these propositions, they must also cope with the reality that there will be no change in the culture or impact of sentencing practices until that change dramatically alters plea bargaining.

When we recognize these four enormous ingredients of the problem at which Assembly Bill 900 is aimed, and responsibly address them, we may finally make some real progress. When we realize that just deserts does not begin to fulfill the social responsibility of criminal justice, that the entire range of crime and punishment affects public safety, that different things work or not on different offenders, and come up with evidence-based solutions that redirects plea bargaining accordingly, we may end the brutality that allows avoidable victimizations and punishes with no public benefit.