

Smarter Sentencing:

On the Need to Consider Crime Reduction as a Goal

Michael Marcus

In February, 2004, Oregon Governor Ted Kulongoski directed a newly created “Public Safety Review Steering Committee” to “look at our public safety system from beginning to end” and to develop “strategies to make the system stronger” wherever it does not sufficiently protect Oregonians.¹ In common with many states, Oregon long ago adopted a modification of the penal code to declare crime reduction among the purposes of sentencing. And in common with many states, Oregon has adopted a sentencing guidelines model that roughly directs sentencing to reflect crime seriousness, criminal history, and prison resources—largely or entirely ignoring crime reduction. Apparently in common with all English-speaking and European criminal justice systems, Oregon’s criminal justice system thus exhibits a profound dysfunction: The successful culmination of most combined law enforcement and prosecution activity is a conviction followed by a sentence in a criminal case. *Yet, most sentences imposed on most offenders fail to prevent future criminal behavior by the sentenced offender; most sentencing does not even expressly attempt crime reduction.*²

The participants in Public Safety Review Steering Committee represented the typical range of diverse and strongly held views as to the purposes, failures and successes of criminal justice. They held opposing positions as to mandatory minimum sentences,³ the viability of general deterrence, and the division of sentencing responsibilities between the judicial and the legislative functions (whether the latter is exercised by the people directly through ballot measures or by the legislature). My views on such matters are quite independent of the propositions asserted in this paper. The only debate we really need to

resolve before making real progress is already decided by Oregon law, and by the expectations of most citizens in all states: crime reduction is a major purpose of sentencing. Notions to the contrary are dangerously wrong, however motivated.

All rational and informed participants and observers should agree:

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

CRIME REDUCTION IS AND MUST BE A MAJOR PURPOSE OF SENTENCING

Astonishing as it should seem, there is a body of literature that argues that sentencing should *not* be about crime reduction.⁴ But Oregon law is unambiguous, and no doubt typical of most states. Oregon law has long declared public safety to be at least among the purposes of sentencing,⁵ and that policy choice was more recently enshrined in our state constitution by vote of the people in Article I, section 15: “Laws for the punishment of crime shall be founded on these principles: protec-

Footnotes

1. Press Release, *Governor Calls for Complete Review of Public Safety*, Governor Ted Kulongoski, February 26, 2004, accessible at http://governor.oregon.gov/Gov/press_022604b.shtml.
2. See generally, Michael H. Marcus, *Archaic Sentencing Liturgy Sacrifices Public Safety: What’s Wrong and How We Can Fix It*, 16 FED. SENTENCING RPTR. 76 (2003).
3. Oregon’s “Measure 11” crimes range from mid-level sexual assault crimes; second-degree robbery, assault, kidnapping, manslaughter; and upward. ORS 137.700 provides mandatory minimum sentences ranging from 70 to 300 months for these crimes, and mandates that 15, 16, and 17-year-old offenders charged with these crimes be tried as adults. Unlike the “three-strikes” provisions of many states (and Oregon’s “repeat property offender” provision, ORS 137.717), the mandatory minimum provisions apply regardless of the offender’s criminal history, though some discretion to depart is afforded for some of the least serious of these crimes. See ORS 137.712.
4. E.g., Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventative Detention as Criminal Justice*, 114 HARV. L. REV. 1429 (2001). Professor Robinson actually argues that by diluting pure pursuit of just punishment with public safety objectives, we sac-

rifice public safety. His reasoning reduces to this: citizens despair that criminals are not suitably punished, lose respect for the criminal justice system, and are therefore less influenced by that system in evolving values such as those against drunk driving and domestic violence. I submit, however, that it is obvious in the real world that we do far more harm both to respect and to public safety by persistently producing recidivism while denying our responsibility for outcomes. “Preventive Detention” is a disparaging title opponents of incarceration assign to the incapacitation purpose of sentences. Their arguments are discussed later in this paper.

5. ORS 161.025(1)(a) declares the purposes of Criminal Code, including “To insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized, the correction and rehabilitation of those convicted, and their confinement when required in the interests of public protection.” This was based on the 1962 Model Penal Code: Sentencing §102.2. Tragically, there is at present a proposal drastically to retreat from the public safety focus of this provision of the Model Penal Code. See Michael H. Marcus, *Comments on the Model Penal Code: Sentencing Preliminary Draft No. 1*, 30 AM. J. CRIM. LAW 135(2003).

tion of society, personal responsibility, accountability for one's actions and reformation."⁶

SENTENCING DOES NOT RESPONSIBLY PURSUE CRIME REDUCTION

This is where some colleagues and attorneys begin to become annoyed with me, but bear with me. The critical word is "responsibly."

First, most sentencing hearings (and probation violation disposition hearings) make no mention whatever of crime reduction.⁷ The typical dispute, once the legal range of any discretion is settled, is whether a given sentence is "sufficient" to punish the offender adequately, or somehow "excessive" given any disadvantages or ameliorating circumstances urged on behalf of the offender. Indeed, as to felonies, Oregon's sentencing guideline regulations merely mention "security of people in person and property," while stressing "appropriate punishment," inviting dispute as to "aggravation" and "mitigation,"⁸ and approaching any attempt at meaningful consideration of crime reduction only within the three (of 99) grid blocks that address "optional probation."⁹ No fair reading of the guidelines or of the regulations can render crime reduction a significant target of their attention. To this extent, the rules are in substantial tension with the statutes and the Oregon Constitution.

True, we send thieves to theft talk, drunk drivers to alcohol

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

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

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

7. Although therapeutic courts also generally avoid using crime reduction as a measure of success, they are well outside my scope of concern because they purposefully pursue an objective—usually alcohol or drug abuse reduction—that in turn strongly correlates with crime reduction. There are undoubtedly a few offenders whose freedom from addiction actually increases their efficiency in criminal activities, but the net crime reduction impact of the therapeutic courts is quite probably far superior to the traditional means of processing the offenders they divert from the regular criminal dockets. *E.g.*, *Drug Court Resources - Facts & Figures*, National Criminal Justice Reference Service, U.S. Department of Justice (http://www.ncjrs.org/drug_courts/facts.html); *Looking at a Decade of Drug Courts* (Rev. 1999), Drug Court Clearinghouse and Technical Assistance Project (DCCTAP), American University, sponsored by the Drug Courts Program Office of the Office of Justice Programs, U.S. Department of Justice (<http://www.american.edu/academic.depts/spa/justice/publications/decade1.htm>). For a collection of more negative assessments, see *Drug Courts and Treatment as an Alternative to Incarceration* (http://www.reconsider.org/issues/drug_court/interesting_facts.htm), RECONSIDER: FORUM ON DRUG POLICY, and authorities cited. Even the latter source shows our local drug court (Multnomah County) as producing rearrest rates roughly one-third as high as those for graduates of the traditional approach. The sentencing support tools discussed in this article show that our DUI court correlates with greater success for most cohorts than our conventional correctional devices.

8. See OAR 213-002-0001, particularly:

(3)(d) Subject to the discretion of the sentencing judge to deviate and impose a different sentence in recognition of aggravating and mitigating circumstances, the appropriate punishment for

a felony conviction should depend on the seriousness of the crime of conviction when compared to all other crimes and the offender's criminal history.

(3)(e) Subject to the sentencing judge's discretion to deviate in recognition of aggravating and mitigating circumstances, the corrections system should seek to respond in a consistent way to like crimes combined with like criminal histories; and in a consistent way to like violations of probation and post-prison supervision conditions.

9. See OAR 213-005-006:

(1) If an offense is classified in grid blocks 8-G, 8-H or 8-I, the sentencing judge may impose an optional probationary sentence upon making the specific findings on the record:

(a) An appropriate treatment program is likely to be more effective than the presumptive prison term in reducing the risk of offender recidivism;

(b) The recommended treatment program is available and the offender can be admitted to it within a reasonable period of time; and

(c) The probationary sentence will serve community interests by promoting offender reformation.

(2) The sentencing judge shall not impose an optional probationary sentence if:

(a) A firearm was used in the commission of the offense; or

(b) At the time of the offense, the offender was under correctional supervision status for a felony conviction or a juvenile adjudication as defined in OAR 213-003-0001(11); or

(c) The offender's conviction is for Manufacture of a Controlled Substance involving substantial quantities of methamphetamine, its salts, isomers or salts of its isomers, as defined at ORS 475.996(1)(a).

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

Part of the problem is that of the several camps around the issue of crime and punishment, a deep divide undermines our ability to be smart about such issues. One camp—I'll use the label "anti-incarcerationists"—is fairly characterized by a strong conviction that we are in the midst of an unfortunate trend towards "mass incarceration," and that non-punitive responses are both more humane and more productive of community safety than punitive sanctions. This camp cites to a great volume of literature (produced by the bulk of academia, which is similarly inclined) suggesting that at least for many offenders, and at least as measured by recidivism *after* any jail or prison term, well designed and delivered treatment programs are substantially more likely to produce crime reduction than jail or prison (or poorly designed or delivered treatment, for that matter). There is even good evidence from this camp that punitive sanctions, as well as poorly designed or delivered treatment programs, are often associated with *increased* recidivism for at least some offenders.¹⁰

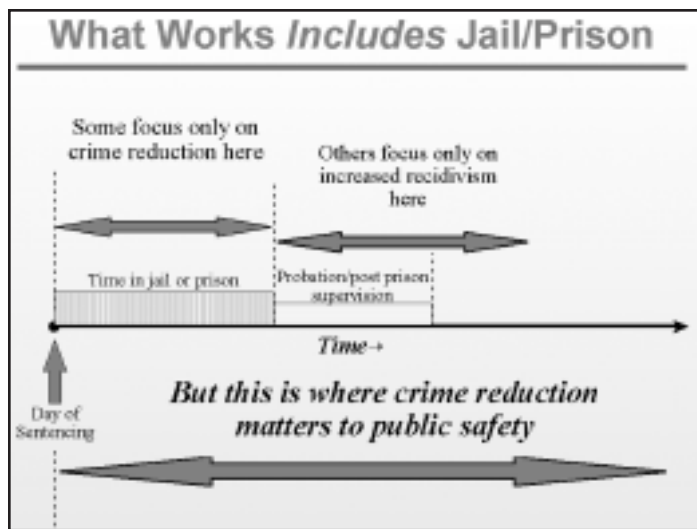
The anti-incarceration camp, however, is viewed with understandable suspicion by its opposite camp—for which I will use the label "incarcerationists"—which clings to the conviction that punishment and incapacitation offer the best road to public safety (and to just deserts) for all or virtually all offenders. The understandable part of this suspicion is that the anti-incarcerationists almost entirely avoid confronting the crime reduction touted by the pro-jail camp: people in custody simply do not commit crimes on the outside while they are inside.¹¹ This persistent avoidance of the strongest crime reduction function of "punishment" gravely undermines the credibility of most anti-incarcerationists except when they talk to each other. They are accomplished at doing that; they do a lot of good work; and they have much to teach us, but they rarely change or improve anything in criminal justice—they just publish and attend conferences to talk to teach other.

The anti-incarcerationists, for their part, are deeply suspi-

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

The following graphic illustrates the divide and how both sides¹² avoid a full picture of public safety:

To make a *responsible* effort at crime reduction, a sentencing decision in which jail or prison is available must consider *both* how much crime is likely eliminated during incarceration *and* how post-incarceration criminal behavior is likely to be



10. See generally, D.A. Andrews, *An Overview of Treatment Effectiveness: Research and Clinical Principles*, Department of Psychology Carleton University, Ottawa Canada (1994); *Treatment Works for Youth in the Juvenile Justice System*, National Mental Health Association, and sources cited (<http://www.nmha.org/children/justjuv/treatment.cfm>); Mark Gornik, *Moving from Correctional Program to Correctional Strategy: Using Proven Practices to Change Criminal Behavior*, U.S. Department of Justice, National Institute of Corrections, and sources cited (<http://www.nicic.org/pubs/2001/017624.pdf>). P. Smith, C. Goggin, & P. Gendreau, *The Effects of Prison Sentences and Intermediate Sanctions on Recidivism: General Effects and Individual Differences* (User Report 2002-01) Ottawa: Solicitor General Canada, (http://www.sgc.gc.ca/publications/corrections/200201_Gendreau_e.pdf), cited in *The Effects of Punishment on Recidivism*, 7 RESEARCH SUMMARY No. 3 (May 2002), Office of the Solicitor General of Canada, (http://www.sgc.gc.ca/publications/corrections/pdf/200205_e.pdf).

11. I'll concede exceptions for the likes of Charlie Manson and organized crime bosses.

12. There is a third camp worth mentioning here; I'll call them the "managers." Their concern is short-run efficiency—literally the speed of the plea bargaining and trial process, and the economy and budgets of courts, law enforcement, indigent defense, and

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

affected. Both camps are right, after all: longer jail sentences and prison *do* increase post-prison criminal behavior among some offenders; incarceration *does* reliably prevent criminal behavior (at least on the outside) during the period of custody—and, for some, after release. We cannot make these decisions responsibly by relying on the ideology, philosophy, or what poses as the entrenched wisdom of judges—unless of course our resulting enormous recidivism rates really are the best we can expect to achieve.

SENTENCING CURRENTLY DOES NOT ADEQUATELY ACCOMPLISH CRIME REDUCTION

It didn't take long for me to realize after taking the bench in 1990 that the first offender is a rare occurrence in our system.¹³ It became immediately obvious that most of those we sentence have been sentenced before, and that most would probably offend and be sentenced again—often having produced another victimization.¹⁴ The notion that we were actually managing criminal *careers* occurred to me early in my own career as a judge. That notion was soon followed by the suspicion and then the conviction that we could surely do a better job of diverting offenders from criminal careers if we made some substantial effort to do so—by employing data, evidence, and anything better than our various philosophies, assumptions, and untested beliefs about how people work.

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

In any event, there is no question but that recidivism rates are abysmal. There are many measures, but they surely represent the impact of sentencing that is not responsibly aimed at

crime reduction. Of the 2,395 people jailed in Portland, Oregon, during July 2000,¹⁵ 1,246 had been jailed in Portland on some other occasion within the previous 12 months. The same was true as to 22 of the 32 jailed that month for burglary, 22 of the 23 jailed for robbery, 20 of the 26 jailed for first-degree theft, 304 of the 372 jailed on drug charges, and 32 of the 39 jailed for vehicle theft. And “4% of our offenders accounted for 23% of [s]tandard bookings between 1995 and 1999.”¹⁶

Nationally, the figures are similar: the Bureau of Justice Statistics reflects that “[m]ore than 7 of every 10 jail inmates had prior sentences to probation or incarceration,” and that “[o]f the 108,580 persons released from prisons in 11 States in 1983, an estimated 62.5% were rearrested for a felony or serious misdemeanor within 3 years, 46.8% were reconvicted, and 41.4% returned to prison or jail.”¹⁷ “Sixty-seven percent of former inmates released from state prisons in 1994 committed at least one serious new crime within the following three years,” and “272,111 offenders discharged in 1994 had accumulated 4.1 million arrest charges before their most recent imprisonment and another 744,000 charges within 3 years of release.”¹⁸

Oregon's Department of Corrections publishes a recidivism rate of 30%, and a target of 28%, but these figures are profoundly misleading as they only reflect convictions for a new *felony*. This approach is typical of many state corrections departments. Almost 80% of criminal incidents involve misdemeanors, including most thefts, drunk driving, most assaults, and most crimes that affect public safety, so total recidivism after prison is quite probably at least as high in Oregon as the other statistics would suggest.¹⁹

The amount of custody available as a sentence varies as a matter of law and as a matter of prison and jail resources. As a matter of law, Oregon misdemeanors—again, almost 80% of the crimes committed in our communities—cannot result in more than one year in jail. As a matter of resource limitation, jails often release offenders well before their terms are complete simply because there are an insufficient number of beds. As a practical reality, the crime-prevention impact of custody through incapacitation may be extremely short in duration, and the possibility of any crime-increasing impact outweighing a short

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

14. We can choose to exclude drug crime as “victimless,” or recognize that users victimize themselves, family, or friends who care about or are dependent upon them, the communities that suffer from the public manifestations of abuse, or those from whom they may steal to support their addictions. Dealers may do all of this, and also victimize those whose substance abuse they support. Recognizing this extent of victimization, however, does not resolve whether deployment of the criminal justice system is the best way to combat substance abuse.

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

16. *The Booking Frequency Pilot Project in Multnomah County, Oregon:*

A Focus on Process and Frequencies, at i (The Multnomah County Sheriff's Office, Dan Noelle, Sheriff, in collaboration with the Multnomah County Department of Community and Family Services, Department of Community Justice, Health Department, and Corrections Health Division (January 2002)). Portland is the largest city in Multnomah County, Oregon. “DSS-Justice” is a data-warehouse-based criminal justice tool, which also supports the sentencing support tools discussed later in this paper. See <http://www.co.multnomah.or.us/dss/info/initiatives/DSSProjectOverview.shtml>; http://www.lpscc.org/dss_justice.htm; http://www.lpscc.org/docs/evaluation_capacity.pdf; and <http://ourworld.com-puter.com/homepages/SMMarcus/SentSuptTools.htm>.

17. Bureau of Justice Statistics Criminal Offenders Statistics, found at <http://www.ojp.usdoj.gov/bjs/crimoff.htm>.

18. Bureau of Justice Statistics Criminal Offenders Statistics, found at <http://www.ojp.usdoj.gov/bjs/abstract/rpr94.htm>.

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

period of protection is very, very real.²⁰ As to this group, any unbiased and reasonable examination of the data about the outcomes of past sentences—particularly in connection with the abundant literature—must conclude that some offenders are more likely to be diverted from future crime with one approach at supervision, programs, jail, and other sanctions, while others are more likely to be diverted from criminal behavior by another approach. Consistently with most other human experience, different things play out differently with different people.

Even with felony crimes, we are again confronted with the reality that the far more common crimes are the least serious, for which neither the law nor corrections resources afford a great deal of potential for incarceration. Under our sentencing guidelines (which apply only to felonies), the more common, lower-level felonies (predominately including drug possession, property crimes valued at less than \$5,000, except those of “repeat property offenders,”²¹ and auto theft where the vehicle is worth less than \$10,000) are subject to a presumptive *probationary* sentence with jail not to exceed 30, 60, or 90 days.²² Prison becomes a presumptive sentence only at crime seriousness level 4 out of 11 levels (predominately including property crimes valued at \$5,000 or above, auto theft involving personal use vehicles worth \$10,000 or more, and the lowest level of drug-delivery crimes), and then only for offenders with at least two prior person felonies (or “repeat property offenders”). It is only at crime seriousness level 5 (including property crimes valued at \$10,000) that prison becomes presumptive for most felony offenders, and at 8 (including the most serious drug-dealing crimes, mid-level sex crimes, burglary of an occupied dwelling) for all. And the range of presumptive prison begins at six months and doesn’t exceed three years until we reach level 8, and then only for offenders with at least two prior person felonies. Even by departure, many of the lower-level offenses are capped at 6, 12, or 18 months. So for most felony

sentencing occasions, the opportunity to do more harm than good is entirely consistent with the recidivism data.

Even at the higher levels of felony crime, we often have substantial discretion to depart upward beyond mandatory minimum sentences, or to choose between consecutive and concurrent sentences. Our choices in this regard undoubtedly have a public safety impact—as with all of our sentencing choices. We would probably do a better job of exercising that discretion if we made some responsible effort to analyze the likelihood that offender characteristics, available programs in prison, or other variables would make one offender more likely than another to need extended incapacitation, or more likely to be safe to return to society after serving concurrent time. At the very least, our decision affects the availability of beds for those that should be locked up longer to protect society.²³

MULTNOMAH COUNTY’S APPROACH—SENTENCING SUPPORT TOOLS AND A REVISED ORDER FOR PRESENTENCE INVESTIGATION

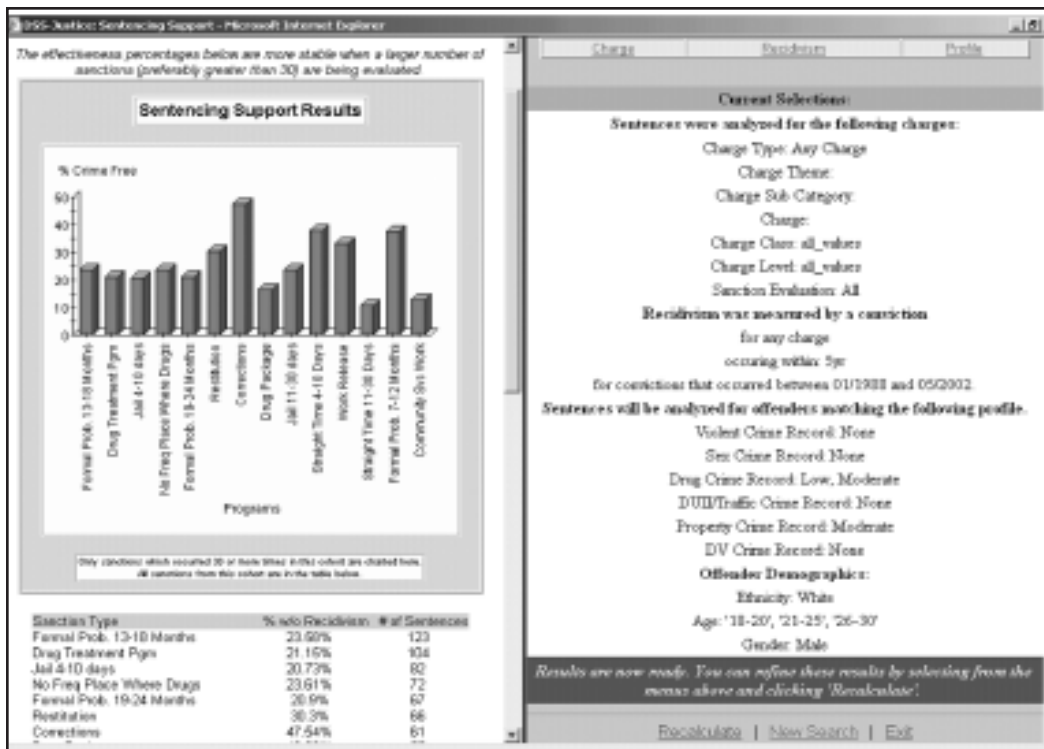
Although state law has since 1997 provided for the collection and management of criminal justice data to facilitate discovery of correlations between what we do to various offenders and their recidivism rates,²⁴ there is currently no effort at the state level to implement this function.²⁵ Multnomah County, with the assistance of a public safety technology bond issue, has constructed a data warehouse²⁶ and related criminal justice applications that provide this function to practitioners.

A user of this DSS-Justice sentencing support application (one of many criminal justice applications based on the warehouse) enters a case number and selects the charge for which a sentence is being imposed. The program constructs a bar chart based on data for the offender and the charge selected. The chart includes a bar for sentencing elements imposed on such offenders for such a charge, arrayed left to right in order of their

20. Our sentencing support data, discussed later in the text, confirms the impression of the literature that for low level offenders, short jail terms (one to five days) generally “work” better than longer ones (30 days or more) because the shorter terms are less disruptive of circumstances supportive of lawful behavior: employment, housing, and stable relationships. Higher up the range of incarceration, longer terms encourage accommodating life in custody and associating with a prison population, and are thought to enhance criminal thinking and values. See, e.g., Smith, Goggin, & Gendreau, *supra* note 10. Of course, for some offenders, good programming within prison can produce significant reduction in post-prison criminal behavior. In my view, our persistence in conducting the sentencing ritual as if crime reduction were not its purpose ultimately undermines the ability of correctional authorities to provide programs in and out of custody that would serve public safety if applied to the right offenders.
21. Oregon has adopted “repeat property offender” legislation to provide presumptive sentences of 13 or 19 months for persistent property offenders. ORS 137.717.
22. Oregon’s guidelines are accessible at <http://www.ocjc.state.or.us/SGGrid.htm> and the administrative rules are accessible at http://arcweb.sos.state.or.us/rules/OARS_200/OAR_213/213_tofc.html.
23. Even if proponents of prison can be confident in holding the line

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

24. See 1997 Or Laws Ch 433.
25. The Oregon State Police began work on a public safety data warehouse that would have eventually supported such an effort, but returned the balance of a federal grant and cancelled the project rather than come up with matching money in the early days of Oregon’s current budget crisis.
26. A data warehouse automatically collects copies of data stored in multiple systems, and stores the resulting information in a form and structure designed to facilitate analysis that would otherwise require separate access to each of those systems and manual compilation of reports. Multnomah County’s “DSS-Justice” data warehouse, constructed and maintained under the auspices of the Multnomah County Local Public Safety Coordinating Council, is refreshed nightly from the source systems, and supports a host of applications for criminal justice partners. See http://www.lpsc.org/docs/overview_dss-j.pdf.



Screen Shot of a Sentencing Support Display

declining frequency.²⁷ Each bar reflects the proportion of those receiving that sanction who were free of any new conviction for a similar crime within three years. Note that this approach displays incarcerative and non-incarcerative sanctions side by side, measured by precisely the same test.

The right side of the screen displays the variables upon which the bar chart is based. By default, the user's choice of crime for sentencing yields a variable that chooses one of six categories of crime as a "similar crime." For example, choosing first-degree theft yields a default of "property crime," so that the program is analyzing sentences imposed on similar offenders for any property crime. By default, a "similar offender" is one who has a similar criminal record and similar demographics (age, gender, and ethnicity). A "similar" criminal record is one that reflects the same rating, from "none" to "severe," in each of six crime categories: violent crime, sex crime, property crime, drug crime, major traffic crime (including impaired driving), and domestic violence.²⁸

Users can modify all of the variables and generate a new bar chart in seconds. For example, if we are dealing with a common cohort, we may be able to focus on only those offenders sentenced for the same crime as the offender before the court, so the program allows a user to change "property crime" to "Theft I." If the offender's cohort is less common, we may have

to expand it to compare offenders, like the one before the court, who have been sentenced for any crime. We may want to focus on those sentenced for felonies or only Class A felonies to distinguish among levels of drug involvement. We may also want to modify what we mean by "similar" offender. For example, the prosecutor may provide evidence of a criminal record from outside the data known to the tools. A user can access "profile" to revise the criminal history ratings in each of the crime categories. In a similar fashion, the user can correct age or even gender errors, or broaden or eliminate the "profile" categories to analyze a broader cohort.

Finally, users can modify the outcome measure. The default measure of recidivism is a new conviction for a similar crime

within three years. Users can specify instead conviction for a specific crime, for "any crime," or for a crime in any of the six crime categories. Users can also modify the period during which recidivism is tallied (six months, three years, five years, or any time since sentencing), and can choose to focus on arrests instead of convictions (particularly useful in domestic violence cases).²⁹

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

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

28. Data rules determine whether a given criminal history receives a rating of "none," "low," "moderate," "major," or "severe." In all

but domestic violence, only convictions count; arrests not followed by dismissal for want of merit (as opposed to mere loss of victim cooperation, for example) do elevate a domestic violence rating. The rules are accessible at http://www.ojd.state.or.us/mul/marcus_crimehemegrid.pdf.

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

dial programs, or with research germane to a particular sentencing analysis.

As part of the same effort, we have begun building a new partnership between the courts and probation officers, encouraging officers to discuss their assessments and expertise around the literature of criminology and corrections with courts on the occasion of probation violation allegations. We have added a box to the standard order for a presentence investigation, requesting that the report include “analysis of what is most likely to reduce this offender’s future criminal behavior and why, including the availability of any relevant programs in or out of custody.” Pre-sentence investigation writers now regularly include an analysis of what is most likely to work, citing literature and sentencing support results to the court.

PROPOSALS FOR IMPROVEMENT

I have made some additional proposals to the Adult Sentencing Subcommittee and to the Public Safety Review Steering Committee, generally intended not as changes to substantive law but as strategies for increasing the focus of advocates and decision makers on the issue of crime reduction. Specifically, I proposed that data and research concerning crime reduction be expressly³⁰ recognized as a consideration in departures under the guidelines, decisions whether to impose consecutive or concurrent sentences, whether to “remand” a juvenile to adult court,³¹ and whether to continue, modify, or revoke a juvenile or adult probation. Because of suspicion of “research” and researchers in some quarters, these proposals remain on the table so far only because references to “data and research” have been replaced with references to “reduction in criminal conduct and crime rates.”

Another proposal still on the table³² is that the legislature direct the Criminal Justice Commission to explore the feasibility of incorporating crime reduction into the contours of the sentencing guidelines—which presently are organized around just deserts, criminal history, and prison resources to the virtual exclusion of crime reduction. It has been my position since the

guidelines were first under discussion that a sentence most likely to result in crime reduction ought to be the presumptive sentence absent a substantial and compelling reason to seek some other purpose—but merely *adding* crime reduction to the mix that determines what is a “presumptive” sentence would be a profound improvement.³³

Other proposals may find their way to other subcommittees of the Public Safety Review Steering Committee: that the Department of Corrections be directed to include misdemeanors in their published recidivism rates; that the statute governing presentence investigations be amended along the lines of Multnomah County’s modification to the form for ordering such investigations; that other counties somehow be encouraged to emulate Marion County’s “Project Bond;”³⁴ that probation officers’ roles be modified along the lines encouraged in Multnomah County.

But my overall hope is that this work actually produce something of real magnitude. If all we accomplish is some minor adjustment to a system that produces the recidivism I have described, we will not begin to reach our true goals. We may make some real progress by pursuing the sort of strategies I have suggested.

OBJECTIONS TO AND CONCERNS ABOUT THIS APPROACH

Subcommittee participants and others have raised a variety of objections and concerns about injecting crime reduction analysis into sentencing, plea bargaining, probation, or other criminal justice functions.³⁵ A discussion of a few follows. Of course, Oregon law *requires* that we consider public safety in sentencing. Whether or not we do so, however, our choices have outcomes in the sense that some choices will not prevent future victimizations while others may; our present performance is abysmal when measured by public safety. Trying harder to achieve best efforts should help. Avoiding those efforts certainly will not.

30. The law surely does not forbid consideration of public safety implications when a judge exercises discretion in any of these areas, but participants rarely address those implications. The hope is that when public safety impact is an expressly articulated consideration, it will receive more frequent attention than when its role is merely permissive and implicit.

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

32. One withdrawn proposal is for resurrection of the Public Safety Data Warehouse and replication statewide of the Multnomah County sentencing support application. It was clear that this failed the “reasonably available economic resource” test in this budgetary climate.

33. There are endless possibilities, ranging from the modest to the comprehensive. In one real sense, making crime reduction impact an express consideration for departures would itself add a public safety dimension to the guidelines. The availability of a program in the community (or in custody, for that matter) that is more likely than other sanctions to reduce recidivism could be a consideration for all sentences that approach the divide between

presumptive prison and presumptive probation—or indeed, for all sentences. And it might make sense to use a risk prediction instrument to posit a presumptive period of incarceration for all crimes for which incarceration is plausible; it makes no sense to ignore psychopathy around violent crime in particular.

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

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

35. Space does not allow a full consideration of all of these, but most are considered at length on the “Frequently Asked Questions” page of my website at <http://www.smartsentencing.com>.

Concerns about the impact on the length of custodial sentences or the severity of sentences

As might be expected, one camp fears that adding any subject to sentencing analysis just provides another opportunity to find some excuse for a lighter sentence, while the other camp fears that pursuit of crime reduction will result in longer sentences. The combination is a de facto collusion in favor of the pursuit of other objectives, or a pursuit of crime reduction devoid of information. Whatever might be said of a system with unlimited jail terms and beds, for the vast majority of our sentences, law and resources make sentences long enough in their own right to achieve sustained crime reduction *simply unavailable*. Smarter sentencing for most occasions means using scarce resources more intelligently—using longer terms on those whose criminal behavior is best reduced with longer terms, and shorter terms with effective programs and treatments for those whose crime reduction is best achieved by that approach. Smarter sentencing does not inherently increase or decrease the total amount of jail and prison time served by offenders—its function is to make the allocation of that jail and prison time more efficiently productive of crime reduction through more intelligent decisions about which offenders to imprison for longer terms and which for shorter.

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

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

To those who disfavor prison, I suggest that the limitation of jail and prison time at the lower levels provides the best opportunity to establish and exploit the efficacy of responsible treatment, that demonstrating *within the criminal justice process* the crime reduction impact of these approaches can only build support for improved and expanded treatment and alternative

resources. The public cannot be expected to relax the security it believes that it has gained from mandatory imprisonment until and unless it has been convinced that public safety is reliably achieved for some through other approaches.

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

Concerns about the impact on the “other purposes” of sentencing

Although we now may speak of “protection of society, personal responsibility, accountability for one's actions and reformation,”³⁶ these overlapping objectives capture but do not displace the traditional purposes of retribution, rehabilitation, deterrence (general and specific),³⁷ and incapacitation. Oregon law already identifies most of these as tools of crime reduction.³⁸

Although retribution per se has no purported role in crime reduction (outside the scope of the death penalty), the remaining functions are clearly not “displaced” just because we consider public safety. And to whatever extent general deterrence actually works to control crime, retribution obviously overlaps that function, as does any substantial sanction. My experience is that the overwhelming majority of cases evidence no tension whatever when we consider first our best public safety result, and next the remaining concerns. That which is best for public safety usually satisfies any need for denunciation, victim satisfaction, rehabilitation, or confinement. It is also my experience that many victims who exercise their right to be heard at sentencing spontaneously articulate the objective of preventing others from suffering a loss, injury, or other victimization at the hands of the offender.

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

36. Or. Const, Art. I, § 15.

37. Specific deterrence is the effect on the offender who is punished, with the assumption that an offender will avoid behavior in the future that resulted in punishment in the past. General deterrence is the effect on potential offenders in general—the prospect of being punished makes some of these decide not to commit crimes they otherwise would commit. I suspect that the efficacy of specific deterrence is minimal to none for most offender cohorts, as poignantly demonstrated by persistently punished offenders. The literature around specific deterrence suggests that for some cohorts, punishment *increases* recidivism—at least as

measured *after* incapacitation, but it clearly appears to work on others. Literature suggests (albeit essentially on an a priori basis, hypothesized with the use of economic models) that any efficacy of general deterrence depends on the certainty and swiftness of a sanction—not its severity.

38. ORS 161.025(1)(a) provides that criminal sentences seek “[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.”

Concerns about the competence of the participants and the reliability of risk prediction

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

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

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

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

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

Concerns about the reliability of research and data

The most extreme resistance to research takes the form of rejection of virtually all research as imperfect because it fails to follow the ideal research design of random assignment control group analysis. Even assuming it were somehow feasible to subject every sentencing option available in every jurisdiction to such a study, refusing to allow any increased attention to public safety or involvement of data and research in sentencing decisions until those studies were complete is itself wholly irrational. We are not assessing sentencing as a possible activity pending due diligence as to whether it should be done at all—sentencing is under way, daily, with demonstrably dangerous results. Those who insist on ideal research before using any research or making a better attempt at crime reduction hold their own views to no such standard (citing, for example, correlations between prison bed numbers and crime rates as proof of the efficacy of jail and prison). They surely offer no research—ideal or otherwise—to argue that continuing on our present course is more productive of public safety than making our best efforts with imperfect information. Moreover, what matters is what works on which offenders, and the best of studies will always leave unanswered the question why even a sanction that works so does on some but not all members of the group that proves “success.” True, we need to be critical and to recognize the limitations of predictability, the flaws in research, and the great deal we do not know. Demanding that the adversarial process employ information and address the goal of crime reduction is surely more likely to do a better job of reducing recidivism than awaiting perfect research while making no informed or serious attempt meanwhile to achieve smarter sentencing.

Concerns about the energy and time smart sentencing would demand

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

All that being said, there is nothing about considering crime reduction that takes it outside the normal systemic factors that determine how much energy a topic actually receives from the process. At the high-volume end of the system, where cases are negotiated in minutes, we can only expect fleeting references to the notions of criminogenic factors and incapacitation. Practitioners can gradually become more fluent in what we

know about which offenders, just as they do now on topics such as the latest alternative sanctions, jail practices, suppression case law, or changes in local court procedures. As they do so, they can replace some verbal content of typical plea negotiations with growing attention to routine factors affecting best crime reduction practices in a given set of circumstances—and they can do so without losing anything of value in the discussion, without adding to the duration of the exchange, and with some increased hope of improving the likelihood that a resulting sentence will actually prevent future crime.

At the other end of the spectrum, we already have hearings with experts and what amounts to risk assessment in death penalty and dangerous offender proceedings. There is room for varying levels of intensity in the consideration of relevant sentencing data and research along the entire spectrum of criminal practice; there is no level at which its increased presence would be unlikely to improve our public safety performance. Yes, we could afford to spend a bit more time and energy seeking smart sentencing across that range. But even if reducing the human cost of victimizations is not enough to convince the managers, this should be: The biggest inefficiency of time and resource is the persistent offender; to the extent that smart sentencing offers an opportunity to divert offenders from criminal careers, even managers should at least take heed that speed is not our most important product.

CONCLUSION

Oregon's governor gave his steering committee an ambitious charge—to ask “whether the system we have in place sufficiently protects Oregonians” and, if not “to look for short and

long-term strategies to make the system stronger.” The recidivism we produce by doing things the way we have been doing them answers the first question unambiguously. The strategies proposed here would make the system stronger by encouraging practitioners to bring crime reduction into actual focus in criminal sentencing proceedings.

Others may have better or additional strategies. But merely looking for places to tweak the skirmish lines among those who favor custody, those who fear mass incarceration, and those who mostly manage can never yield the substantially better results the public needs and deserves. Our public safety problem surely includes persistent offenders and pervasive recidivism. Can smarter sentencing not be among the responses?



Michael Marcus is a judge of the circuit court in Multnomah County, Oregon, a trial court of general civil and criminal jurisdiction. He is chair of the Oregon Judicial Conference Technology in the Courts Committee and a member and past chair of the conference Criminal Law Committee. He has promoted evidence-based sentencing before the Oregon Legislature, the Oregon Judicial Conference, and the Oregon Criminal Justice Commission; in state and local working groups and national and international conferences; and through articles in journals such as the American Journal of Criminal Law, the Federal Sentencing Reporter, the Ohio State Journal of Criminal Law, and other publications. Marcus maintains a website at <http://www.smartsentencing.com>.