

# Sentencing in the Temple of Denunciation: Criminal Justice's Weakest Link

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## I. SENTENCING REALITIES

### A. A Typical Day

Consider a typical day on the trial bench, which includes—in addition to morning and afternoon sessions of an ongoing jury trial—a batch of sentencing hearings and a probation violation hearing. The first sentencing hearing, based on a guilty plea to misdemeanor shoplifting, involves a woman around thirty years old with a string of drug, petty theft, and prostitution priors, who has agreed to two years bench probation, thirty days in jail, and a collection of evaluation, treatment, and monitoring conditions. The second sentencing hearing involves a “repeat property offender” whose criminal record means his auto theft calls for a presumptive prison sentence instead of the probationary sentence otherwise encouraged by state sentencing guidelines. He agrees to a nineteen-month sentence in return for dismissal of several related charges that could be subject to a mandatory minimum seventy-month prison sentence. The third sentencing hearing involves a defendant with a long drug and property crime record who has been convicted for dealing heroin within 1000 feet of a school. The pre-sentence investigation report, after describing the defendant’s childhood deprivation and juvenile court involvement, mental and physical health, and marital/procreational and vocational history, recommends an upward departure from a presumptive twenty-five months to fifty months imprisonment. The probation hearing addresses whether the probationer, on supervision for a domestic assault, has “forfeited the privilege of probation” by repeatedly failing to report to the probation officer or to complete domestic violence intervention counseling. The probation officer recommends revocation and six months in prison.

Each offender has offended before; each is likely to offend again. In these hearings, neither the judge nor anyone else gives any apparent thought to the likely impact of the sentencing decision on the future criminal behavior of the offender. The analytical skills of all are devoted to entirely different subjects. The conscientious judge delivers the sentence along with a lecture which may involve threat, encouragement, or advice, but reflects the *judge's* socialization and experience rather than any of the relevant academic disciplines. A foreign observer might reasonably conclude that this society *has* no literature or discipline

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related to corrections or criminology, and that the ritual is not designed for public safety or that the participants trust sentencing by hubris as a matter of faith.

### B. *Alarming Statistics*

Sentencing is the goal of the bulk of law enforcement and prosecutorial resources. Yet sentencing is enormously unsuccessful at crime reduction. Bureau of Justice Statistics reflect that “[m]ore than 7 of every 10 jail inmates had prior sentences to probation or incarceration,” and that 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 three years, 46.9% were reconvicted, and 25.4% resentenced to prison for a new crime.”<sup>1</sup> In other words, two-thirds of inmates released from state prisons were arrested for at least one serious new crime within the following three years; the studied group of 272,111 offenders discharged in 1994 had accumulated 4.1 million arrest charges before their most recent imprisonment and acquired another 744,000 charges within three years of release.<sup>2</sup>

In my jurisdiction, our local statistics are similar: of the 2395 people jailed in Portland, Oregon, during July 2000, more than half had been jailed in Portland on some other occasion within the previous twelve months.<sup>3</sup> The same was true as to 22 of the 32 offenders jailed that month for burglary, 22 of the 23 jailed for robbery, 20 of the 26 jailed for theft in the first degree, 304 of the 372 jailed on drug charges, and 32 of the 39 jailed for vehicle theft.<sup>4</sup> And, according to our local sheriff’s office, “4% of our offenders accounted for 23% of [s]tandard bookings between 1995 and 1999.”<sup>5</sup>

These statistics lead to an unavoidable conclusion that our sentences more often than not fail to prevent future victimizations. As judges and as a society, we make no responsible effort to learn and apply what seems to work best on a given offender. And because we cannot possibly be achieving optimal results by

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<sup>1</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, CRIMINAL OFFENDERS STATISTICS: CHARACTERISTICS OF JAIL INMATES (2002), available at <http://www.ojp.usdoj.gov/bjs/crimoff.htm>.

<sup>2</sup> See Press Release, Bureau of Justice Statistics, U.S. Dep’t of Justice, Two-Thirds of Former State Prisoners Rearrested for Serious New Crimes (June 2, 2002), available at <http://www.ojp.usdoj.gov/bjs/pub/press/rpr94pr.htm>; see also BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1994 (June 2002), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr94.pdf>.

<sup>3</sup> See Michael H. Marcus, *Unacceptable Recidivism*, at [http://ourworld.compuserve.com/homepages/SMMarcus/the\\_problem.html](http://ourworld.compuserve.com/homepages/SMMarcus/the_problem.html) (reporting data from Portland Police Bureau Data Processing, Aug. 25, 2000). The Portland Bureau of Police stopped producing these statistics in mid-2000; I am still waiting for their successor.

<sup>4</sup> See *id.*

<sup>5</sup> *Id.* (citing findings from *The Booking Frequency Pilot Project In Multnomah County, Oregon: A Focus On Process And Frequencies* (Jan. 2002) which was produced by the Multnomah County Sheriff’s Office, in collaboration with the Multnomah County Department of Community and Family Services, Department of Community Justice, Health Department, and Corrections Health Division). Portland is the largest city in Multnomah County, Oregon.

accident, we are recklessly allowing some victimizations to occur. Legislation and ballot measures have responded to concerns about crime with draconian sentencing provisions that limit judicial discretion. But our litany elevates punishment well beyond its practical utility, allowing criminal justice to compete unfairly with social expenditures far more productive of crime prevention. We persist in this dysfunction while lamenting, ironically, that repeat offenders do not seem to learn from *their* experience.

We cannot retreat behind the abandoned notion that “nothing works.”<sup>6</sup> We now know a lot about what does and does not work.<sup>7</sup> Scared Straight, D.A.R.E., shock incarceration, shock probation, and boot camp programs do not work and frequently do more harm than good. For low-risk offenders, lighter sanctions, shorter sentences, and minimal supervision correlate with reduced criminal behavior as compared with more severe responses. Treatment programs that identify and responsibly address multiple criminogenic factors are much more effective than treatment programs that do not address criminogenic factors, and substantially more effective than programs that address only one or two criminogenic factors.<sup>8</sup> Prison terms as a means of incapacitation work very well during the period of imprisonment. Measured by its impact on recidivism *after release*, though, any sentence longer than six months is probably counterproductive.<sup>9</sup> We know that opportunistic intra-familial sex offenders are more susceptible to effective treatment than predatory sexual offenders who seek out child victims or who commit violent rape against strangers, and that treatment competently aimed at risk factors is significantly effective at reducing sex offender

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<sup>6</sup> Robert Martinson is generally charged with suggesting in 1974 that nothing works in his important and widely read review of studies of penal rehabilitation efforts entitled *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 applied to the offender population as a whole. See, e.g., James McGuire, *What Works in Reducing Criminality* (July 2000) (unpublished manuscript), at <http://www.aic.gov.au/conferences/criminality/mcguire.pdf>. Unfortunately, the persistence of the notion that almost nothing works (including both treatment and incarceration) has led those working to revise the Model Penal Code’s sentencing provisions largely to abandon public safety as a sentencing objective. See Michael H. Marcus, *Comments on the Model Penal Code: Sentencing Preliminary Draft No. 1*, 30 AM. J. CRIM. L. 135 (2003).

<sup>7</sup> See generally LAWRENCE W. SHERMAN ET AL., NATIONAL INSTITUTE OF JUSTICE, U.S. DEP’T OF JUSTICE, PREVENTING CRIME: WHAT WORKS, WHAT DOESN’T, WHAT’S PROMISING (July 1998), available at <http://www.ncjrs.org/pdffiles/171676.pdf>; OREGON DEP’T OF CORRECTIONS, COMMUNITY CORRECTIONS: WHAT PROGRAMS WORK?, at [http://www.doc.state.or.us/community\\_corrections/cc\\_in\\_or/whatwork.shtml](http://www.doc.state.or.us/community_corrections/cc_in_or/whatwork.shtml).

<sup>8</sup> See generally NATIONAL MENTAL HEALTH ASSOCIATION, TREATMENT WORKS FOR YOUTH IN THE JUVENILE JUSTICE SYSTEM (2003), at <http://www.nmha.org/children/justjuv/treatment.cfm>; MARK GORNIK, U.S. DEP’T OF JUSTICE, NATIONAL INSTITUTE OF CORRECTIONS, MOVING FROM CORRECTIONAL PROGRAM TO CORRECTIONAL STRATEGY: USING PROVEN PRACTICES TO CHANGE CRIMINAL BEHAVIOR (2001), available at <http://www.nicic.org/pubs/2001/017624.pdf>.

<sup>9</sup> PAULA SMITH ET AL., THE EFFECTS OF PRISON SENTENCES AND INTERMEDIATE SANCTIONS ON RECIDIVISM: GENERAL EFFECTS AND INDIVIDUAL DIFFERENCES (2002), available at [http://www.sgc.gc.ca/publications/corrections/200201\\_Gendreau\\_e.pdf](http://www.sgc.gc.ca/publications/corrections/200201_Gendreau_e.pdf).

recidivism.<sup>10</sup>

## II. THE SEPARATION OF SENTENCING PRACTICE AND SENTENCING DATA

Many causes contribute to the abyss that separates sentencing practice from the data and research it needs to pursue crime reduction responsibly.

*First*, sentencing stands as the present face of a ritual evolved from centuries of theological and philosophical concern with sin, authority and punishment; its roots are far deeper than those of science—particularly social science. Courts amount to secular temples, historically devolved from regal courts, themselves once united with the church. Even modern theoretical discussions of sentencing speak of deterrence and retribution with no blush of reflection on their ephemeral support in rationality, for sentencing remains a matter of sermon, not science. That denunciation is a purpose of the ritual is implicit in our laws, and codified in modern Canadian statutes.<sup>11</sup>

*Second*, crime reduction and public safety achieve only occasional mention in state and federal statutes proclaiming the purposes of sentencing, sentencing guidelines, and sentencing commissions. Even when these objectives appear, they populate an unprioritized list dominated by such just-deserts notions as that a sentence should “reflect the seriousness of the offense [and] provide just punishment for the offense.”<sup>12</sup>

*Third*, sentencing receives public, media, legislative, and prosecutorial leadership attention primarily at the level of the most heinous crimes. At this level, there is little room for comparison of incapacitation with community-based treatment. The worst cases drive sentencing expectations and policy, not those cases that are the most numerous, nor those that most impact public safety.

*Fourth*, while corrections and probation departments do their best to learn from criminological and correctional research and literature, courts have virtually no contact with correctional practice, and do nothing to encourage probation officers to bring research, wisdom, or advocacy about what works to probation violation hearings. We maintain a culture that encourages probation officers to talk of the “privilege of probation” and whether it has been “earned” or “forfeited,” and to focus concern on whether the judge will support or “undercut” the probation officer’s now failed threats to the offender. This dialogue is often wholly divorced from public safety consequences, as when a probation officer urges revocation on the theory that an offender who has failed repeatedly in drug treatment needs secure drug treatment—without any information whether drug treatment will in

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<sup>10</sup> See generally CENTER FOR SEX OFFENDER MANAGEMENT, U.S. DEP’T OF JUSTICE, RECIDIVISM OF SEX OFFENDERS (May 2001), available at <http://www.csom.org/pubs/recidsexof.html>; OFFICE OF THE SOLICITOR GENERAL OF CANADA, THE EFFECTIVENESS OF TREATMENT FOR SEXUAL OFFENDERS (Aug. 2002), available at [http://www.sgc.gc.ca/publications/corrections/200207\\_e.asp](http://www.sgc.gc.ca/publications/corrections/200207_e.asp).

<sup>11</sup> See Criminal Code of Canada, R.S.C., Part XXIII, § 718(a) (1989).

<sup>12</sup> 18 U.S.C § 3553(a)(2)(A) (2000).

fact be available during the resulting incarceration. It is not that probation officers do not care, but that they expect *us* not to care.

*Fifth*, the courts and academia ignore each other. We make no effort to involve the relevant social science disciplines in our sentencing decisions, and those disciplines are profoundly uninterested in sentencing. More importantly, to the extent that academia even addresses sentencing, it apparently has no concern with either the impact of sentencing on crime reduction or improving that impact.<sup>13</sup> Academia's approach to sentencing invokes the disparaging meaning of "academic": having no utilitarian value, but of interest solely for theoretical exercise. Worse, some academics argue that judges have no business attempting risk assessment or otherwise predicting behavior. They criticize risk-assessment instruments as productive of "false positives," disparage dangerous offender schemes as "preventative detention," and propose that we should fear sentencing based on predictions of future behavior.<sup>14</sup>

This is all sophistry. In spite of false positives, dispositions based on risk-prediction instruments are more rational and accurately predictive of public safety than dispositions without risk assessment. It is appropriate to impose a sentence on an offender convicted of a serious crime based on a *risk* of serious future victimization. Neither justice nor rationality require certainty of serious

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<sup>13</sup> I experienced academia's disinterest in sentencing data at the Second International Conference on Sentencing and Society at Strathclyde University in Glasgow, June 2002. Here's how I summarized my reaction to that event:

I am at one of the two institutions in the world devoted expressly to "sentencing research." It has occurred to almost none of those assembled that what needs to be researched is what works on which offenders to reduce recidivism. To the extent that we notice that those on whom we repeatedly impose sanctions continue to reoffend, we wonder why *they* don't change *their* behavior. We ignore rather than address our abysmal public safety performance, we label the critics "populist," we study sentencing as anthropologists would the Trobrianders or behavioral biologists savanna baboons—with this one difference: judges are viewed as anointed with divine wisdom and entitled by their office to discretion unfettered by any responsibility for the havoc we judges wreak. Indeed, those assembled receive without protest (except mine) the notion that it is not our job as judges to reduce crime with our sentences.

See Michael H. Marcus, *Thoughts on Strathclyde, Processing the Second Sentencing and Society Conference* (Aug. 20, 2002), at [http://ourworld.compuserve.com/homepages/SMMarcus/Thoughts\\_on\\_Strathclyde.htm](http://ourworld.compuserve.com/homepages/SMMarcus/Thoughts_on_Strathclyde.htm).

<sup>14</sup> See, e.g., Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventative Detention as Criminal Justice*, 114 HARV. L. REV. 1429 (2001). Professor Robinson argues that by diluting pure pursuit of just punishment with public safety objectives, sentencing *diminishes* 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 think it obvious in the real world that we do far more harm both to respect and to public safety by persistently producing recidivism while denying our responsibility for outcomes. I think it equally obvious that courts have been followers rather than leaders in reducing drunk driving and domestic violence, and that we have helped—if at all—by responding to citizen demand that we focus on the public safety impact of our sentences.

victimization as a prerequisite to the precaution of extended incarceration.<sup>15</sup> False positives are far more likely with sentencing based on just deserts; indeed academia seems to agree that “mass incarceration” imprisons offenders who do not need incapacitation. And, most importantly, every exercise of sentencing decision-making inherently has a public safety consequence whether or not we acknowledge that consequence. The offender will or will not re-offend, will or will not victimize another. It is by far most frightening that we routinely make sentencing choices without information that would help us choose that disposition most likely to avoid future victimizations. A rational response to the inadequacies of sentencing is to bring research and data to its aid, not to encourage continued reliance on hubris.

Academia has yet another impediment to involvement in the criminal justice system. Most literature disparages punishment and imprisonment. Only a small number of authors applaud incapacitation as a useful tool. The majority focuses on the impact of punishment on recidivism rates *after release from custody*, and rejoices in the lack of a correlation between increased incarceration and reduced crime rates—largely ignoring the obvious crime reduction efficacy of incarceration on a given offender *during incarceration*. Incarcerationists, for their part, exploit the mathematics of incapacitating a prolific and persistent offender—largely ignoring the impact of punishment over a lifetime of potential criminal behavior. It is not that both are wrong. Both are right. The trick is to set aside bias and assess all options based on their likely impact on the criminal behavior of a given offender over the long run (and, inevitably, their relative cost-effectiveness). But academia’s celebration of “anti-incarcerationism” brings it to the criminal justice system with impaired credibility: prosecutors, front-line probation officers, judges, and even defense counsel know well that incarceration is obviously our best available response for many offenders.

*Sixth*, criminal justice has no inherent mechanism of self-correction. Unlike businesses that would succumb to competition absent data-driven decision-making, our failures increase the demand for our services. The worse public safety results we produce, the more return customers we experience. There is simply no built-in incentive to accept our responsibility for the future behavior of those we sentence. As long as we are judged by the timbre of our sentencing pronouncements and we adhere to some acceptable range of “just punishment,” we avoid accountability for the actual results of our decisions. But our strategy (whether or not it is intentional) is not perfect; the persistence of recidivism has helped to erode public support for the courts, and has spurred campaigns to limit the discretion of judges and to politicize their selection.

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<sup>15</sup> I use “extended incarceration” to refer to prison terms that are longer than might otherwise be imposed, but still within the maximum available sentence for a given conviction. I recognize and respect the due process and related fairness concerns—including those highlighted by the Supreme Court’s decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000)—implicated by dangerous offender schemes that impose sentences beyond otherwise applicable maximum sentencing terms. I support such schemes once due process and fairness concerns are actually addressed.

## III. BRIDGING THE DIVIDE IN OREGON

A. *Our Mandate and Means*

In spite of the reasons for the abyss between research and sentencing practice, Oregon has found a strategy that is making slow but steady progress toward redirecting the culture of criminal justice towards rational crime reduction. The strategy enlists broad public and policy level consensus that crime reduction ought to be the focus of criminal justice, and exploits relatively recent technology to deliver that focus to sentencing hearings. Though academics and thoughtful policy-makers alike fear that public anger would prevent meaningful reform, research repeatedly reveals that the public's priorities are crime reduction, rehabilitation, and punishment, *in that order*.<sup>16</sup> This priority provides great fuel for improvement. Oregon, having already amended its constitution in 1996 to make "safety of society" the first objective of sentencing,<sup>17</sup> adopted legislation in 1997 broadly making crime reduction a major objective of sentencing and corrections, and requiring the collection and management of criminal justice data to facilitate analysis of what responses best reduce criminal behavior.<sup>18</sup> The Oregon Judicial Conference, as part of this effort, adopted a resolution directing "that in the course of considering the public safety component of criminal sentencing, juvenile delinquency dispositions, and adult and juvenile probation decisions, judges should consider and invite advocates to address the likely impact of the choices available to the judge in reducing future criminal conduct."<sup>19</sup>

Legislation and resolutions do not themselves change culture. Our strategy has been to employ data warehousing technology to inject information about what has best correlated with crime reduction directly into sentencing hearings. Data warehousing technology extracts copies of needed data from operational databases, translates diverse information into mutually intelligible data, and stores the result in a "warehouse" designed to facilitate anticipated queries. The Multnomah County data warehouse, "DSS-Justice," began with data from the courts, the local police and sheriff, and the local district attorney. This data warehouse technology has overcome the usual impediments to criminal justice data integration by extracting and using data from diverse platforms. And because the result has been enormously useful for research and management within criminal justice agencies, the project continues to enjoy strong and growing endorsement from criminal

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<sup>16</sup> See NATIONAL INSTITUTE OF CORRECTIONS, U.S. DEP'T OF JUSTICE, PROMOTING PUBLIC SAFETY USING EFFECTIVE INTERVENTIONS, (Feb. 2001); see also John Halliday, *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales*, App. 5, pp. 108 *et seq.* (Home Office, July 2001), available at <http://www.homeoffice.gov.uk/docs/halliday.html>.

<sup>17</sup> OR. CONST. Art. 1, § 15.

<sup>18</sup> See 1997 Or. Laws, ch. 433.

<sup>19</sup> See Sentencing Policy Resolution, 1997 Oregon Judicial Conference Resolution #1, available at <http://ourworld.compuserve.com/homepages/SMMarcus/JCRESNO1.htm>.

justice agencies.

Merely affording a better view of operations may make planning for the future easier, but it does nothing necessarily to improve performance. So we have erected sentencing support tools as the courts' major DSS-Justice application with the explicit purpose of improving the crime reduction impact of judges' sentencing decisions. The design of these tools proceeded from a simple objective. For any given sentencing occasion, we want to know how similar offenders sentenced for similar crimes have performed after receiving any of the sanctions available to the court. We learned what the presently available data could and could not tell us, and constructed our application accordingly.

A user of the DSS-Justice sentencing support tools enters a case number and selects the charge for which a sentence is being selected.<sup>20</sup> The program constructs a bar chart based on data for the offender and the charge selected. The chart displays a bar for sentencing elements imposed on such offenders for such a charge, arrayed left to right in order of their declining frequency.<sup>21</sup> 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.<sup>22</sup>

The right side of the screen displays the variables upon which the bar chart and table are based. By default, the user's choice of crime for sentencing yields a variable that chooses one of six categories of crime as a "similar crime." For example, choosing Theft in the Second Degree yields a default of "property crime," so that the program is analyzing sentences imposed on similar offenders for any property crime. By default, a "similar offender" is one who has similar demographics (age, gender, and ethnicity) and a similar criminal record. A "similar" criminal record is one that earns 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.<sup>23</sup>

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 II." If we have too little data, we may want to expand the cohort to compare offenders like the one

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<sup>20</sup> The default is the first count of the charging instrument, but the user may select any other charge in the charging instrument or any other charge available under Oregon state or local law.

<sup>21</sup> Elements used fewer than thirty times for such offenders for such crimes are not reflected in a bar, but all data are displayed in a table underneath the bar chart and are accessible by scrolling downward.

<sup>22</sup> Treatment, jail terms of various lengths, prison, alternative sanctions, and various terms and types of supervision are all typically represented by bars, depending on the crime.

<sup>23</sup> Data rules determine whether a given criminal history receives a rating of "none," "low," "moderate," "major," or "severe."



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 any of 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 instead direct that any conviction counts as recidivism regardless of similarity, or limit convictions that count to 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).<sup>24</sup>

The point of all of this is not to ask technology to select a sentence, but to focus the attention of the sentencing process on the issue of public safety. 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 what we are supposed to be focused on is 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 non-availability of local or custodial programs, or research germane to a particular sentencing analysis.

### B. *Our Discoveries*

The tools have confirmed a lot of what the literature has claimed, but they have also taught us a lot we could not otherwise have discovered. In very general terms, incarceration correlates very poorly with success for most lower level offenders with minimal or no criminal history; short jail sentences are frequently dramatically more consistent with success than longer ones for such cohorts. On the other end of the spectrum, prison correlates with success for offenders with a mix of repeat property and drug convictions. But it would be a tremendous mistake to extract a few rules of thumb from our experience with sentencing support tools—except one: what works best varies tremendously depending on the cohort and our measure of success.

We have discovered that there are some cohorts of property offenders for whom anger management counseling correlates with reduced criminal behavior at dramatically higher levels than most of the traditional theft sanctions. There are

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

some cohorts of female drug offenders for whom parenting education appears the best response. And there are some cohorts of offenders for whom prison seems by far the most productive of public safety, *except* when we focus on future *violent* recidivism; for these cohorts, avoiding future violence would apparently be better served by four days in jail than a typical prison term. The question has to remain what works best on which offenders, and the analysis must remain one that encompasses more variables than those accessible to these tools. Nevertheless, even if judged solely on a cost-benefit basis, what we learn even in light of the variety of correlations between type and intensity of supervision or incarceration and future criminal behavior holds great promise for improving the efficiency of corrections budget allocations.

Returning with the insights of data to our typical court day, we discover that, for the female persistent shoplifter, nothing looks particularly hopeful: fewer than 10% of similar offenders who received the agreed thirty-day jail sentence avoided conviction for a new crime within three years, as compared to over 27% of those who received a community service sentence. The persistent drug dealer was indeed best sent to prison, as over 43% of similar offenders who were sent to prison avoided a new conviction within three years, while only 23% of those sent to probation and drug treatment—the next “best” disposition for this cohort—avoided a similar fate. The persistent car thief, however, might as well have been put on formal probation as sent to jail—at considerable savings in corrections resources—as similar offenders on three years’ formal probation *for the crime of unauthorized use of a motor vehicle* did slightly better in avoiding a new conviction in three years than those sent to prison (47.73% as opposed to 46.31%). Work release and shorter formal probation trailed by only a few percentage points. Over the course of five years, 41.86% of those on probation were conviction free, as compared to 33.33% of those sent to prison and 40.85% who were sent to work release. Measured by an *arrest* for any crime within three years, prison correlated best with success for the domestic violence probationer—almost 75% avoided such recidivism as opposed to 55% of those sent to jail for eleven to thirty days. Measured by an arrest for any *domestic violence* crime within *five* years, however, 73.08% of those who received twenty-five to thirty-six months formal probation avoided recidivism, as compared to 72.73% of those sent to prison. Needless to say, the tools do not prescribe an outcome; they inform a critical discussion about how best to serve public safety.

#### IV. CONCLUSION

We have a long, long way to go. The tools we are using in Oregon, though unique in the world at the time of this writing, are nonetheless rudimentary—we need more data and more flexibility. It will continue to take great persistence to expand the use of these tools (and the focus on public safety) to more courtrooms and more cases. But we have definitely seen progress. Judges handling criminal cases in Multnomah County have added a box to orders for “pre-sentence

investigations” to require that the report include analysis of “what is most likely to reduce this offender’s future criminal conduct and why, including the availability of any relevant programs in or out of custody.” And we have begun discussions with our probation department management to incorporate a similar focus into routine probation reports and hearings. “What works” is increasingly addressed in sentencing discussions, and there is great hope that this effort will help free criminal justice from its archaic baggage and make it a responsible institution of public safety. We surely have a practical application for the relevant academic disciplines. If this progresses as intended, transformation of the sentencing ritual will eventually focus public debate and legislative policy on rational crime reduction.

