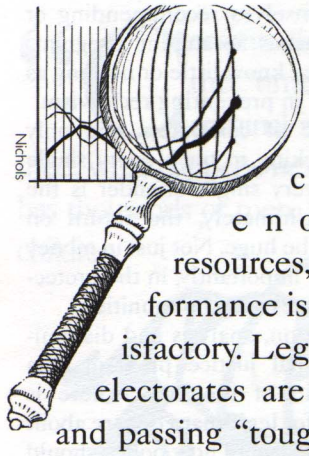
Improving our Judgment:
Knowledge-based Sentencing

by Michael Marcus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The criminal justice system consumes enormous resources, but its performance is far from satisfactory. Legislatures and electorates are considering and passing "tough on crime" measures like the "three strikes" laws of several states. An Oregon ballot measure imposes minimum sentences of 90 months on some first-time juvenile offenders. Critics argue that we are still too "soft on crime"; others contend that there is something wrong when we imprison a higher proportion of our population than almost any other nation in the world. Commentators attribute our crime problem to misled juries, bad parents, deteriorating public schools, liberal judges, plea bargaining, the loss of family values, or the Miranda decision and other "technicalities" that exclude evidence from criminal trials.

After some years of experience as a trial judge, I have become convinced that we can do much more to reduce crime. The criminal justice system can not do much to affect the social conditions which increase crime rates. It certainly can't reform all offenders or eliminate the need to lock up really dangerous criminals, but it can certainly do a better job of preventing many offenders from committing new crimes. Essentially, we must look beyond individual criminal cases and become better at diverting offenders from criminal *careers*. We must keep track of which sanctions seem to work best on which offenders, and rigorously apply what we learn through the sentences we impose. If this sounds obvious, it should be. But in practice we almost never take this approach to sentencing decisions.

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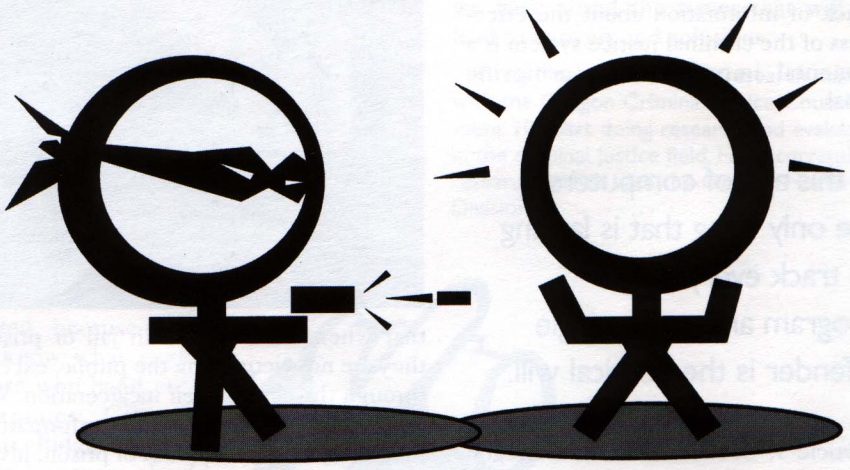
Part of our problem is that we do not seem to agree which functions criminal justice can or should perform. We often speak of "sending a message," "accountability," and "responsibility." These terms usually refer to one or more of the various theoretical functions of criminal punishment.

Deterrence assumes that punishing one offender convinces others not to commit crimes. We have little good information on whether, how, or when deterrence works. The likelihood and consequences of getting caught probably figures into a business decision whether to dump toxic waste illegally. But the vast majority of crimes that frighten and anger us are not committed by people who plan ahead, weigh their options, and make good choices. When Jeremy Bentham first proposed the creation of penitentiaries near the end of the 18th Century, pickpockets regularly worked the crowds assembled to watch another pickpocket hang. Today, we have many offenders who are not deterred by the prospect of being caught and punished for their crimes.

Incapacitation is a reliable consequence of jail or prison; it keeps people from committing crimes as long as they're locked up. With very rare exceptions (such as "organized crime"), prisoners cannot commit crimes on the outside while they're on the inside. Prisons, however, put people together who are likely to share criminal values and techniques. We do not know how many commit more and worse crimes during their criminal *careers* than they would have if we had used a sanction other than prison. We do know that crimes are commonly committed by offenders who have previously completed prison sentences.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Retribution, now often included within such concepts as "accountability" or "consequences," is punishment as a matter of moral just deserts. It is the infliction of a sanction to restore moral equivalency or to assert public

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values. This is what people usually have in mind when they discuss whether a sentence is "just" or "fits the crime."

Reformation is the function of reducing or eliminating future criminal behavior by an offender. This is the most glaringly *unsuccessful* mission of criminal justice; at the same time, it is the most critical. All of us in the criminal justice system know that, except for a few crimes, the first-time offender is rare in our system. Commonly, a serious offender's career started with a variety of petty offenses and escalated in spite of whatever sanctions the criminal justice system imposed along the way. If we fail at diverting an offender from a criminal career, that career will burden the public and victims with many crimes. On the other hand, each successful reformation prevents the crimes that career would otherwise spawn.

The adversary process is quite capable of testing the validity of academic reasoning.

Whether or when deterrence works or retribution is proper, surely reformation should be a consideration in most criminal sentencing decisions–all but those involving offenders too dangerous and crimes too heinous to contemplate anything short of life imprisonment without parole. Statutes in most states say reformation is a goal of corrections, and we continue to send offenders to alcohol, drug and gambling programs, work release centers, domestic violence and other anger counseling, "theft talk," and sex offender counseling. Whether or not they do any good, these programs exist because we are supposed to try to reduce criminal behavior by offenders once they return to their communities.

I have heard judges and at least one law school dean argue otherwise. Some insist that our job stops with imposing punishment for its own sake, and that it is not our responsibility to modify the behavior of offenders. This notion that criminal justice is merely a perpetual morality play may not be obsolete, but its adherents are vastly outnumbered by those who, when asked, agree that public safety is at least among the highest callings of the criminal justice system.

Reformation is achievable, at least for many in the offender population. Academia has produced hundreds of studies about what does and does not reduce crime. Courts, however, have done virtually nothing to implement what academia has discovered. Almost never does an advocate at a sentencing hearing argue about which sentence is most likely to reduce an offender's future criminal behavior. We make sentencing choices based on rumor, folklore, and the public relations skills of the available programs.

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Incredibly, though we now have computer technology which could show us how a given sanction's graduates perform after graduation, and compare the performance of similar offenders who have completed other sanctions, we have not provided this tool to lawyers, judges or correctional professionals to help them make more intelligent decisions about their charges. Any business in a competitive industry which spent so little effort to monitor its performance would soon perish. If our military behaved this blindly, we would have lost the war in Grenada. The cynical could argue that the criminal justice system likes "return customers" because they create demand for more police, judges and lawyers. But we can and should hold ourselves to a higher standard of performance.

Here is what I propose. First, we should tell our policy makers and judges that whatever our disagreements about criminal justice, we all agree that we must try to reduce the criminal behavior of offenders. Except for those we intend to lock up for good (or execute), it is our responsibility to do the best we can to reduce their criminal behavior after they complete their sentences.

Second, we must use our technology to keep track of which sanctions and programs, in and out of custody, seem to work best to reduce criminal behavior by which offenders. Yes, some kinds of offenders are harder to improve than others, but we certainly have the technology to compare sanctions by looking at the performance of their *comparable* graduates.

Third, we must insist that judges look at this information when making sentencing decisions. In some cases other concerns may prevail, and the magnitude of the offense may properly determine or limit what we do to a particular offender. But in most cases, judges should select from among the available choices based on which seems to work best to reduce criminal behavior by offenders like the one before the court.

Finally, we should learn from the process so we can improve our ability to profile offenders in terms of their susceptibility or not to various forms of sanctions. With this information, legislatures could adjust what range of sanctions they prescribe for various offenses and offenders, and policy makers could make more intelligent choices about which programs or sanctions to support with public safety dollars. Ultimately, we would divert many more offenders from crime before we had to put them in prison to protect ourselves from them, and we would focus prison resources more accurately on those from whom we can only be safe when they are in custody. Within prisons, programs would focus on those inmates whose post-prison behavior the programs would likely improve.

These goals are attainable, but they will not come without strong leadership and persistence. We have made a good start in Oregon. Criminal defense attorneys, judges, prosecutors, corrections officials,

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and victims' advocates supported changes the Oregon Legislature adopted in 1997 to facilitate this approach. For example, the Oregon Department of Corrections is now directed to "Provide central information and data services sufficient to ... permit analysis of correlations between sanctions, supervision, services and programs, and future criminal conduct."[1] The Oregon Judicial Department has resolved 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."[2] Further, "judges are encouraged to seek and obtain training, education and information to assist them in evaluating the effectiveness of available sanctions, programs, and sentencing options in reducing future criminal conduct."[3]

State and local committees are at work and have much to do. Information systems specialists are crucial, because we must extract data from numerous sources and make it easily accessible. In Multnomah County, we have already started building a "data warehouse" and "decision support system" to show us what does and does not work. But this effort will not be a success until and unless advocates and judges routinely use accurate information about what works to help make sentencing decisions. Once the information is available and actually used in courtrooms, lawyers will demand access to it just as they do to a new case or statute which they need to know about to make (or meet) arguments in court.

At this stage, I see two impediments to this improvement in our sentencing decisions. First, we must be vigilant against losing our focus on what works because of the pressures from the system merely to process cases "efficiently," and we must overcome treatment providers' inclination to use measures other than their graduates' criminal behavior for fear that our focus may threaten their existence or income.

Second, we must insist that judges and advocates have access to the data I have described, and that this effort does not end up simply generating research projects instead of "live" sentencing decision support. Researchers can alert us to such problems as insufficient samples and help design better queries. They can examine the validity of apparent correlations between sanctions and results and explore the reasons some things work on some offenders and not others. And this access to data can greatly benefit and facilitate traditional research. But we must never allow ourselves to be kept from the data because researchers think it is not safe for us to use it without their intervention. If advocates and judges regularly use this effectiveness data, there will be ample incentive and energy to discover and correct misinterpretations. If we revert to letting researchers simply report back to us, they rarely will–and we will rarely pay attention when they do.

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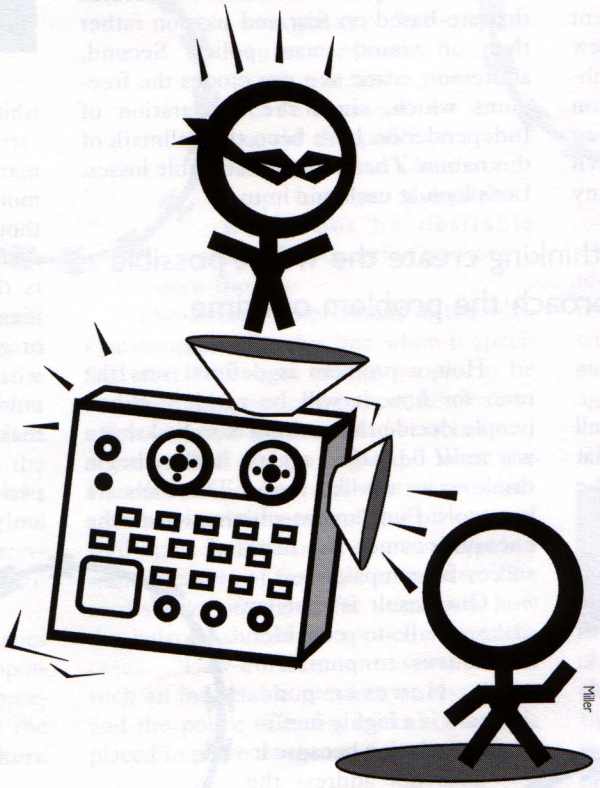

Only when what works is routinely debated in courtrooms will there be day-to-day demand for academia's input. Even without that input, we cannot possibly be better off with no information than we would be with a good flow of "raw data" about which programs' graduates are doing what. The adversarial process, after all, is very good at finding the flaws in arguments. Judges and juries are routinely called upon to decide which opinion or analysis is most convincing. Courts deal with DNA evidence, medical malpractice, product liability, and human relationships in families and businesses. The adversarial process is quite capable of testing the validity of academic reasoning. Besides, without this kind of real world contact, experts are occasionally apt to go quite astray.

Once we start making sentencing decisions based on good information about what works, we will do a far better job of being "tough on crime" by reducing criminal behavior and diverting offenders from criminal careers. We will increase public safety, reduce the frequency of victimization, and spend our crime and corrections dollars far more efficiently than we do now. When the media routinely encounter and report on debates about what works in high profile sentencing hearings, public debate will benefit from a decrease in fear and anger and an increase in reasoned consideration of how best to respond to crime. Policy makers will then be permitted and encouraged to do the same. We will all benefit from a much wiser approach to the design and execution of criminal justice strategies.

We have an enormous opportunity to bring our criminal justice system into line with modern notions of performance and public responsibility. There is no reason to wait until the 20th Century is over.

Michael Marcus has been a trial judge in Multnomah County for eight years. He hears felony and misdemeanor criminal cases as well as the entire range of civil cases. For more information on his views, visit his web page: http://ourworld.compuserve.com/homepages/SMMarcus/whatwrks.html

(1) 1997 Or Laws Ch. 433, Section 9 (ORS 423.478, as amended,1997).

(2) 1997 Oregon Judicial Conference Resolution #1.

(3) Ibid.