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New Dimensions in Sentencing Reform in the Twenty-First Century

I believe that while many factors remain that make positive sentencing reform problematic, a set of factors have come together at the beginning of this new century to make such reform more likely than it has been for a number of years. However, because these critical factors are not likely to stay in alignment

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for a long period of time, they also challenge progressive reformers to act with dispatch.

One of the dominant themes in sentencing reform is captured in the word reintegration. The first element of that theme is restorative justice—a system of criminal justice and punishment that focuses on repairing the relationship that crime breaks between victim, offender, and the community. Each of these three elements—victim, offender, and community—is critical to the restorative justice model. Its goal is to restore, to reintegrate.

A second element of the theme of reintegration concerns a shift that must occur when harsh punishments are imposed—a focus on reintegration of the released inmate into the community from which he or she came and into free society. Only rarely do we lock prisoners up and throw away the key, even though that is sometimes the imagery we use. The vast majority of prisoners are eventually released, and for increasing numbers of those who committed very serious offenses, that someday is today, tomorrow, or shortly thereafter. Even with harsh punishment, we must combine a mechanism to reintegrate the offender, for if we do not, we will see the horrors of crime and carnage repeated over and over with each new wave of releases.

The third major element concerns the unequal allocation of discretion in the current sentencing structure. The effort in sentencing reform to eliminate discretion and create equality and openness, often called transparency, has advanced, but not all that far. Discretion has not disappeared, but rather in critical situations, it has simply been moved to another location—to the prosecution in its decisions on whom to prosecute and particularly on what offenses to charge. Since discretion has not, should not, and cannot be removed from the system, it should be, in controlled and justified steps, accorded to judges and to corrections officials for inmates who take steps conducive to successful reintegration.

I

IMPORTANT FACTORS THAT HAVE NOT CHANGED

Before moving to the new dimensions in sentencing reform, it is important to list some of the factors that remain largely unchanged.

First, the concentration of racial minorities and the poor, what some call the underclass, in the most distressed areas of the larg-

est urban centers remains a fixture in society. Crime and race overlap very visibly there. Economic prosperity in the nineties was making some inroads, but the recent downturn in the economy and a likely return to more realistic levels of economic growth suggests the gains based on that surge in economic well-being may be limited. In this context, drug punishment that appears to disproportionately affect inner-city minorities, particularly African Americans, may generate its own general disrespect for the criminal law that may in turn destroy its legitimacy and undercut its deterrent effect.¹

In this regard, one very troubling demographic feature of the imprisoned population should be highlighted—its racial makeup. Nationally, on December 31, 2001, an incredible 10% of black males twenty-five to twenty-nine years old were in prison.² This compares to 2.9% of Hispanic males and 1.2% of white males in the same age group.³ In Oregon, the picture is similar. The total black or African-American population in Oregon in 2000 was only 55,662, or 1.6% of the population.⁴ Despite Oregon's extremely small black population, 10.9% of its prison population was black on January 1, 2002.⁵ That means about 2% of the state's African Americans were in prison,⁶ a figure roughly seven times higher than the percentage of the white population in prison.⁷

Second, the safe political response to crime remains harsh-

¹ William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1832 (1998) (arguing that as the criminal justice system through drug laws incarcerates more and more young black men from inner-city neighborhoods, it may undermine the normative power of not only of drug laws, but of criminal law as a whole and in the end render our vastly increased punishment ineffective).

² Paige M. Harrison & Allen J. Beck, *Prisoners in 2001*, BUREAU JUST. STAT. BULL., July 2002, at 12, <http://www.ojp.usdoj.gov/bjs/pub/pdf/p01.pdf>.

³ *Id.*

⁴ U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, PROFILE OF GENERAL DEMOGRAPHIC CHARACTERISTICS FOR OREGON: 2000 (2000), http://www.census.gov/Press-Release/www/2001/tables/dp_or_2000.pdf.

⁵ Oregon counted 1,200 black inmates among its 11,031 total inmates. OFFICE OF PUB. AFFAIRS, OR. DEP'T OF CORR., QUICK FACTS 1 (May 2002), http://www.doc.state.or.us/publicaffairs/pubs/pdf/quickfacts_502.pdf.

⁶ *Id.*; U.S. CENSUS BUREAU, *supra* note 4. Nationally in 2001, 46.3% of prisoners were black, 36.1% white, and 15.6% Hispanic. Harrison & Beck, *supra* note 2, at 11-12. Seventy-five percent of the prison population in Oregon in January 2002 was white. OFFICE OF PUB. AFFAIRS, *supra* note 5, at 1.

⁷ Oregon held 8,277 white prisoners on January 1, 2002. OFFICE OF PUB. AFFAIRS, *supra* note 5, at 1. Oregon's total white population was 2,961,623 in 2000. U.S. CENSUS BUREAU, *supra* note 4.

ness—get tough on crime. Nationally, there is no debate between the major political parties on crime. In private, liberal and conservative politicians may differ, or may argue about details, but there is no difference in the basic political rhetoric.

Third, victims have become and will remain a powerful force in the criminal justice debate and in formulating sentencing policy.

Fourth, the media and entertainment's depiction of crime is unlikely to change. That focus is on the most sensational, most brutal crime. The treatment of crime in entertainment, in the movies and on television, is no doubt very important. However, I focus mainly on the depiction of crime in the press.

The media's almost instantaneous access to events across a nation of more than 280 million people translates to the appearance that new waves of crime may be upon us at any moment. For example, carjackings, though not a real trend when they burst on the public scene in 1992 through the much publicized death of a young mother, nevertheless appeared to be an epidemic.⁸ Likewise, the rise of the "abuse excuse" as it was called in the mid-1990s in books and on magazine covers, was not and did not become a real threat to justice.⁹ More recently, news from Oregon City, Salt Lake City, Stockton, and San Diego bring the horror of child kidnappings into our homes, and it seems that they are certainly on the rise, if not an epidemic. The facts are that the numbers are declining: in the range of 200 to 300 stranger kidnappings annually in the 1980s,¹⁰ 134 in 1999, 106 in 2000, and 93 in 2001.¹¹ The numbers were not higher, despite the extensive news coverage, in 2002.¹²

Because the subject of societal perception of crime is so broad

⁸ William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 531 & n.108 (2001).

⁹ See Robert P. Mosteller, *Syndromes and Politics in Criminal Trials and Evidence Law*, 46 DUKE L.J. 461, 496-504 (1996) (describing the public concern and arguing that the problem was overblown and misdescribed).

¹⁰ Timothy W. Maier, *Child Abduction: Data Missing on Missing Children*, INSIGHT MAG., Sept. 23, 2002, at 16, 2002 WL 100906932.

¹¹ Tatsha Robertson, *Kidnappings Put Parents on Alert: Rash of Child Kidnappings Put Parents on Guard, Officials Say*, BOSTON GLOBE, Sept. 17, 2002, at A1, 2002 WL 4149170.

¹² From October 2001 through June 2002, the FBI opened sixty-two cases of child abductions by strangers. Colleen Diskin & Leslie Brody, *Child Kidnap Cases Down Despite Rash of Reports*, THE RECORD (Bergen County, N.J.), Aug. 29, 2002, at A1, 2002 WL 4670433. From January 1 until the beginning of August 2002, forty-six stranger abductions had been reported to the FBI. Editorial, *Protecting the Children*, COLUMBUS DISPATCH (Ohio), Aug. 16, 2002, at 12A, 2002 WL 25411035.

and the empirical research incomplete, I can only hope to suggest important features and possible consequences. Consider three points: first, crime and particularly violent crime, is broadly and disproportionately reported because of its entertainment value; second, the nature of crime reporting tends to bias the public in its perception of the causes of and solutions to crime; and third, the media's predominate image of crime contributes to these pernicious effects.

The first element of this picture is the fixation on crime, particularly violent crime, in America's media. Network news has treated crime as the number one story in the 1990s, and among crime stories, murder has accounted for an increasing share of crime stories. Even after excluding the O.J. Simpson case, stories about murder increased over 300% between 1990 and 1995. This increase is particularly remarkable given that murder rates declined by thirteen percent during the same period of time.¹³

Looking at local news, Professor James Hamilton has found that coverage of crime varies, not with the amount of crime in the local market, but with viewer interest in violent programming, stations' interest in satisfying that market, and stations' desire to thereby maximize the market share.¹⁴ Similar to network decisions noted above, when local news focuses on crime, it generally depicts it as violent and often treats crime as entertainment.¹⁵ Professor Hamilton suggests no evil intentions by local station managers, but rather responses to market forces, producing what economists call externalities that appear in the form of distorted public attitudes.¹⁶

Second, researchers have found important relationships between the news media's treatment of crime, perceptions of crime, and the appropriate policy to deal with it. The framing of stories

¹³ *Network News in the Nineties: The Top Topics and Trends of the Decade*, MEDIA MONITOR, May/June 1997, at 1-3, available at <http://www.cmpa.com/Mediamon/mm070897.htm>.

¹⁴ JAMES T. HAMILTON, CHANNELING VIOLENCE: THE ECONOMIC MARKET FOR VIOLENT TELEVISION PROGRAMMING 239-84 (1998).

¹⁵ *Id.* at 249-55.

¹⁶ *Id.* at 276-79. Indeed, as others have described, street crime reporting is both inherently dramatic and easy to report: "All you have to do is reconstruct the crime as vividly as possible, interview the shell-shocked victims and the police, then maybe throw in a description and a few helpful safety tips. For a quarter of a century, this journalistic strategy has worked like a charm." Matt Zoller Seitz, *Newscasts Still Covered in Blood Although Violent Crimes Are Waning*, STAR-LEDGER (Newark, N.J.), Feb. 10, 1998, at 37, 1998 WL 3390383.

by the media may affect society's perception of responsibility for the problem covered by those stories.¹⁷ Framing is considered "episodic" when it takes the form of an event-oriented report, and "thematic" when it places the public issue in a more general or abstract context. Generally, "episodic" framing elicits individualistic attributions of responsibility for the underlying problem, while "thematic" framing suggests societal responsibility.¹⁸ In one five-year period studied, the networks framed crime stories almost exclusively in episodic terms.¹⁹

Crime stories both in the press and in entertainment focus on the individual crime. That is the compelling story. That is a story about injury and moral wrong and society's and the victims' quest for justice. The path that led some individuals to crime and others away from it—the broader view of who are criminals and how through sound parenting, good schools, economic opportunity, and a myriad of other steps we can steer people toward productive crime-free lives—does not rivet attention nor does it fit easily in pithy news breaks or even in longer entertainment blocks of the typical television show or movie.

Overlapping the theory of framing is a more general theory of attitude cultivation by media presentation of crime stories. Professor George Gerbner contends that viewing stories about crime can produce a "mean world" effect in which society is viewed as relatively frightening and hostile. Such a world view has predictable results on public policy preferences for relatively harsh or punitive solutions to crime.²⁰

¹⁷ SHANTO IYENGAR, *IS ANYONE RESPONSIBLE?: HOW TELEVISION FRAMES POLITICAL ISSUES* (1991).

¹⁸ *Id.* at 15-16. In testing his theory, Professor Iyengar conducted a series of experiments, one set of which dealt with crime stories. The results were consistent with the theory described above, but the attribution effects were less substantial than he anticipated and depended on an interaction between framing and the specific subject matter of the crime story. In two topics, crimes committed by black defendants and illegal drugs, Professor Iyengar found individual responsibility already the dominant attribution before he began the experiment, and framing effects were not observed. In two other areas, "episodic" framing made subjects more individualistic in their causal attributions of responsibility as he had expected. *Id.* at 26-31, 39-45.

¹⁹ *Id.* at 27. The period was 1981 to 1986. *Id.*

²⁰ GEORGE COMSTOCK & HAEJUNG PAIK, *TELEVISION AND THE AMERICAN CHILD* 181-87 (1991) (describing the research of Professor Gerbner on the impact of television on beliefs about personal safety). See generally RICHARD SPARKS, *TELEVISION AND THE DRAMA OF CRIME: MORAL TALES AND THE PLACE OF CRIME IN PUBLIC LIFE* 86-98 (1992) (describing Professor Gerbner's work and related research and criticizing its limitations).

The third element of this picture pertains to the predominate depiction of crime and its impact on the public's view of proper crime control and punishment policy. Professor Ray Surette has observed that the media has developed a central image of crime, what he labels "predator criminals as media icons," images that have become dominant in both the entertainment and news media depictions of crime.²¹ He argues that the policy impact is very significant. By concentrating on this type of individual, the media supports a view that "crime is caused by predatory individuals who are inherently different from the rest of us—more ruthless, greedy, violent, or psychotic Criminality is an individual choice and other social, economic, or structural explanations are irrelevant and ignored."²² This type of person cannot be reformed. He or she must be eliminated or confined forever if society is to be safe.

In the 1988 presidential campaign, many Americans saw the face of the archetypal predator criminal, Willie Horton.²³ The images created in that campaign "giving a face to the public's worst fears, and perhaps tapping its worst instincts" will likely forever be a part of the politics of crime.²⁴

Other researchers have found that media exposure to crime stories is an important factor in shaping fear of crime, with the degree of media attention given to violent crime related significantly to fear of certain types of violent crime. Bahram Haghighi & Jon Sorensen, *America's Fear of Crime*, in *AMERICANS VIEW CRIME AND JUSTICE: A NATIONAL PUBLIC OPINION SURVEY* 16, 23, 29 (Timothy J. Flanagan & Dennis R. Longmire eds., 1996). Fear of crime was generated not only by news shows about crime but also through viewing television programs that deal with crime, such as *Cops*, *Real Stories of the Highway Patrol*, *Justice Files*, or *America's Most Wanted*. *Id.*

²¹ Ray Surette, *Predator Criminals as Media Icons*, in *MEDIA, PROCESS, AND THE SOCIAL CONSTRUCTION OF CRIME: STUDIES IN NEWSMAKING CRIMINOLOGY* 131, 131-58 (Gregg Barak ed., 1994).

²² RAY SURETTE, *MEDIA, CRIME, AND CRIMINAL JUSTICE: IMAGES AND REALITIES* 49 (2d ed. Wadsworth Publ'g Co. 1998).

²³ See generally DAVID C. ANDERSON, *CRIME AND THE POLITICS OF HYSTERIA: HOW THE WILLIE HORTON STORY CHANGED AMERICAN JUSTICE* (1995). Anderson sees the Horton story as helping to give shape to a new form of "expressive justice," and finds as one of its key differences from earlier manifestations of the concept the inclusion of crime victims and their demands for holding the criminal system accountable for their injury and loss. *Id.* at 20-21.

²⁴ In recent years, the contrasting faces of the innocent survivors and the predator-perpetrator have reappeared in various notorious cases, but the emphasis between the two is sometimes now reversed. My perception is that the relative order of importance between predator and victim icons changed from the time of Willie Horton to Polly and Marc Klaas. In the first case, the public saw the faces of Horton's victims, but those names remain unfamiliar to most of us. By contrast, the

The effects described above appear exacerbated because ever more frequently we experience intense media attention surrounding a particularly evocative crime that comes to dominate national attention. Perhaps the clearest example can be seen in the enactment of California's expansive version of "three strikes and you're out." Although proposed earlier, it was not part of serious political debate until its enactment was virtually assured when Polly Klaas was kidnapped and her killer, an ex-convict of "Willie Horton proportions," confessed and led authorities to the body.²⁵

II

FACTORS THAT HAVE CHANGED

A number of largely unrelated factors have changed and together provide the possibility for a major examination and rethinking of sentencing policy. First, crime rates are down substantially both locally and nationally. Second, after a period of rapid increases in prison population both in Oregon and nationally, the rate of growth has dramatically slowed on a national level. The same pattern has not been followed in Oregon where prison population has grown rapidly in the past few years and is expected to continue to rise. Third, an economic downturn that has resulted in a reduced budget in many states has highlighted the conflict between financing a growth in prison population and other highly valued government services. Fourth, consensus in sentencing practices has fractured in the United States leading to more diversity and uncertainty regarding rationale. Fifth, a new sentencing practice, restorative justice—which emphasizes restoring relationships that crime breaks between the victim, the

public also saw and heard from the man who murdered Polly, but it is his victim and her father whom we came to know.

²⁵ Franklin E. Zimring, *Populism, Democratic Government, and the Decline of Expert Authority: Some Reflections on "Three Strikes" in California*, 28 PAC. L.J. 243, 245-46 (1996). See also Ray Surette, *News from Nowhere, Policy to Follow: Media and the Social Construction of "Three Strikes and You're Out" in THREE STRIKES AND YOU'RE OUT: VENGEANCE AS PUBLIC POLICY* 177, 194 (David Shichor & Dale K. Sechrest eds., 1996) ("Sadly, the passage of three strikes was assured the day Polly Klaas was kidnaped." [sic]).

Professor Surette finds in the impact of Polly Klaas' murder on California's "three strikes" legislation a confluence of the predator-criminal imagery and extraordinary media to create public policy in a flash. In addition, he noted that the events that galvanized public reaction are amplified beyond their locality by national media attention. Finally, he suggests that a media event of this type can produce legislative action before substantial debate occurs on the issue. *Id.* at 197-99.

offender, and the community, and fosters healing rather than punishment—is gaining greater attention. Sixth, growing numbers of prisoners who were incarcerated under tough sentencing laws are now reaching the end of their sentences and are being released, provoking an unavoidable examination of long-neglected programs to aid successful reintegration of those released into society. The result may be that public safety concerns will motivate a growing interest in making such programs successful. Finally, the effort in sentencing reforms to eliminate discretion from sentencing decisions has proven only partially successful, relocating much of that discretion in the hands of prosecutors. The growing recognition of this reality may allow some of that discretion to be openly allocated to other actors in the criminal justice system, particularly for participation in programs that aid successful reintegration of prisoners into society. These factors are discussed in the sections that follow.

A. Crime Is Down Substantially Nationally and in Oregon

Crime rates are substantially down across the nation and in Oregon. The 2001 National Crime Victimization Survey, released in September 2002, showed a dramatic drop in crime.²⁶ The survey is based on interviews with victims and includes violent crime, other than murder, and property crime.²⁷ The results are considered more accurate than data on reported crime, as the survey reveals that a little less than half of all crimes committed are reported to the police.

According to the survey, the violent crime rate is at its lowest level since the survey began in 1973, and the rate is half what it was in 1993.²⁸ Since 1993, the violent crime rate has decreased from fifty to twenty-five victimizations per 1,000 persons.²⁹ Murder, which is not included in this study,³⁰ can be rather accurately measured directly. That rate also fell substantially after 1993, when there were 24,350 homicides in the nation.³¹ In 2000, the number of murders fell to 15,517, representing a decrease of

²⁶ Callie Rennison, *Criminal Victimization 2001: Changes 2000-01 with Trends 1993-2001*, BUREAU JUST. STAT. NAT'L CRIME VICTIMIZATION SURV., Sept. 2002, <http://www.ojp.usdoj.gov/bjs/pub/pdf/cv01.pdf>.

²⁷ *Id.* at 13.

²⁸ *Id.* at 1, 12.

²⁹ *Id.* at 12.

³⁰ *Id.* at 3 tbl.1.

³¹ *Id.* at 11.

36.3%.³² The murder rate rose in 2001 by 3.1% according to FBI estimates, which still leaves a 34.3% decline since 1993.³³ Also, property crimes were down 47.7% for the period.³⁴

Another way that crime is registered is through the FBI's index of reported crime as part of its Uniform Crime Reports.³⁵ The index crimes include the violent crimes of murder, forcible rape, robbery, and aggravated assault.³⁶ The property crimes include burglary, larceny-theft, motor vehicle theft, and arson.³⁷ These crimes were chosen because they were considered the most serious and the most consistently reported.³⁸

Oregon's violent crime rate is thirty-fourth in the nation.³⁹ After rising in the mid-1980s, the rate declined slightly except for a minor increase in 1994 and 1995.⁴⁰ Since 1995, it has fallen sharply, and in 2001, the violent crime rate was at its lowest level since 1973.⁴¹

Oregon's murder rate is thirty-ninth in the nation.⁴² That rate is substantially below its high in 1986, and 2000 and 2001 saw the lowest rates since 1964.⁴³ Oregon's robbery rate is thirty-seventh in the nation, which is below the national average.⁴⁴ It is substantially below its peak in 1986 and also is the lowest rate since 1968.⁴⁵ On aggravated assault, Oregon's rate is thirty-fifth in the nation.⁴⁶ It has been substantially below the national average

³² *Id.* at 11.

³³ *Id.* at 5 n.2.

³⁴ *Id.* at 11 tbl.8.

³⁵ 2 OFFICE OF ECON. ANALYSIS, DEP'T OF ADMIN. SERVS., AN ANALYSIS OF REPORTED INDEX CRIME IN OREGON: 1975-2001, at 1 (2003), http://www.oea.das.state.or.us/prison/index_crime_oregon.pdf.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* Beginning in 1930, the Federal Bureau of Investigation has published a Uniform Crime Reports series. *Id.* The Office of Economic Analysis report is based in part on that series. *Id.* at ii. Statewide data is available on the Bureau of Justice Statistics website, at <http://149.101.22.40/dataonline/index.cfm>. *Id.*

³⁹ *Id.* at 2.

⁴⁰ *Id.* at 7.

⁴¹ BUREAU OF JUSTICE STATS., U.S. DEP'T OF JUSTICE, CRIME & JUSTICE DATA ONLINE, at <http://149.101.22.40/dataonline/index.cfm> (last revised Jan. 16, 2003).

⁴² OFFICE OF ECON. ANALYSIS, *supra* note 35, at 8 fig.7.

⁴³ BUREAU OF JUSTICE STATS., *supra* note 41 (measuring murder and nonnegligent manslaughter). The rate in 2000 was slightly below that for 2001, but even the higher 2001 rate is lower than that for any year since 1964. *Id.*

⁴⁴ OFFICE OF ECON. ANALYSIS, *supra* note 35, at 10 fig.11.

⁴⁵ BUREAU OF JUSTICE STATS., *supra* note 41.

⁴⁶ OFFICE OF ECON. ANALYSIS, *supra* note 35, at 11 fig.13.

since the mid-1980s and has been falling after a peak in 1995.⁴⁷ Like the overall rate and the rate for murder and robbery, the aggravated assault rate was the lowest in 2001 since 1973.⁴⁸ Rape is the one violent crime where Oregon's rate is above the national average at twenty-first in the nation.⁴⁹ This rate has declined sharply since its high in 1991, and while far too high, it is at its lowest since 1975.⁵⁰

Oregon's property index crime rate, by contrast, is higher than the national average, and as a result, the overall crime rate is above the national average.⁵¹ However, both Oregon rates for 1999-2001 were at their lowest levels since 1971.⁵²

The exact cause of the decline in crime is much in debate. It is undeniable that the huge increase in prison population over the last twenty years is part of the explanation. However, the consistency of the decline across jurisdictions without regard to specific sentencing policies or rates of incarceration strongly suggests that other factors besides specific approaches to crime prevention or punishment are the chief causes of this decline.

Regardless of the cause, the fact is that crime rates are down, and that reduction provides a freedom to discuss alternatives that could not be so rationally considered in a more threatening time.

B. Prison Population Leveling Off Nationally While Substantially Growing in Oregon

After decades of rapid growth, increases in prison population dramatically slowed starting in 2000. The national population

⁴⁷ *Id.* at 11 fig.12.

⁴⁸ BUREAU OF JUSTICE STATS., *supra* note 41.

⁴⁹ OFFICE OF ECON. ANALYSIS, *supra* note 35, at 9 fig.9.

⁵⁰ *Id.* at 9 fig.8.

⁵¹ *Id.* at 5. In 2001, Oregon had the fifth highest property crime rate, *id.* at 14 fig.16, and the ninth highest overall index crime rate, *id.* at 5 fig.2.

The high index property crime rate and overall index crime rate almost entirely are explained by a higher than average larceny-theft rate, which is the index crime most frequently reported. *Id.* at 3, 17. Oregon is second in the nation as to this index crime. *Id.* at 17 fig.20. Its burglary and auto-theft rates are almost identical to the national averages. *Id.* at 15 fig.7, 18 fig.21.

There are even reasons to believe the relatively high property index rate for this FBI report may in fact be the result of a higher rate of reporting of property crime in Oregon rather than a higher actual crime rate. This explanation is based in part on data that showed that in Portland, in 1999, the rate for reporting residential burglaries was sixty-six percent compared to forty-nine percent nationwide. *Id.* at 14-15.

⁵² BUREAU OF JUSTICE STATS., *supra* note 41.

grew 1.3% in 2000, 1.1% in 2001, and 2.6% in 2002.⁵³ This trend is not being followed in Oregon. According to Justice Department figures, Oregon had the fourth highest one-year growth of any state in 2001.⁵⁴ From 1995 through 2001, Oregon’s prison population grew 75.2%, more than three times the national average.⁵⁵

The following time line illustrates Oregon’s prison population growth.⁵⁶

March 1982	3,000 incarcerated in Oregon prisons.
January 1987	4,000 prison population.
February 1989	5,000 prisoners incarcerated.
November 1, 1989	OREGON SENTENCING GUIDELINES TAKE EFFECT. ⁵⁷
February 1990	6,000 prisoners incarcerated.
February 1995	7,000 prisoners incarcerated.
April 1, 1995	MEASURE 11 TAKES EFFECT. ⁵⁸
April 1996	8,000 prisoners incarcerated.

⁵³ Paige M. Harrison & Allen J. Beck, *Prisoners in 2002*, BUREAU JUST. STAT. BULL., July 2003, at 1, <http://www.ojp.usdoj.gov/bjs/pub/pdf/p02.pdf>.

⁵⁴ Harrison & Beck, *supra* note 2, at 3 & tbl.3.

⁵⁵ *Id.* at 5 tbl.5.

⁵⁶ 9 DEP’T OF ADMIN. SERVS., OREGON CORRECTIONS POPULATION FORE-CAST (2003), <http://www.oea.das.state.or.us/prison/prison0403.pdf>; OR. DEP’T OF CORR., HISTORICAL PRISON AND COMMUNITY CORRECTIONS POPULATIONS, <http://www.doc.state.or.us/research/POPS4.pdf> (last visited July 23, 2003). A highlighted date indicates a change in law.

⁵⁷ The Oregon Sentencing Guidelines are discussed in Kathleen M. Bogan, *Constructing Felony Sentencing Guidelines in an Already Crowded State: Oregon Breaks New Ground*, 36 CRIME & DELINQ. 467 (1990) and Laird C. Kirkpatrick, *Mandatory Felony Sentencing Guidelines: The Oregon Model*, 25 U.C. DAVIS L. REV. 695 (1992). The guidelines were designed to accomplish a number of purposes. They created a degree of uniformity by establishing a sentencing grid that was mandatory upon sentencing judges absent “substantial and compelling reasons for departure” with the sentence established by scores on two scales, one rating crime seriousness and the other offender’s criminal history. *Id.* at 702-09. They established “truth-in-sentencing” by bringing time served relatively closely in line with the sentence imposed by the sentencing judge. *Id.* at 698. They increased sentences for some very serious offenses. Bogan, *supra* at 484. They sought to control and/or plan for prison growth by conforming prison population to capacity, termed capacity-based sentencing. Kirkpatrick, *supra* at 695.

⁵⁸ Ballot Measure 11, approved by voters in November 1994, imposed mandatory minimum sentences, with no possibility of reduction, to sixteen crimes against persons. Act effective June 30, 1995, ch. 421, sec. 1, 1995 Or. Laws 1072 (codified as amended at OR. REV. STAT. § 137.700 (2001)) (listing crimes covered by Ballot Measure 11). The Oregon legislature expanded Measure 11 crimes in 1995 with Attempted or Conspiracy to Commit Murder and Attempted or Conspiracy to Commit Aggravated Murder, and in 1997 with Arson I, Compelling Prostitution, and Use of Child to Display Sex Act. *Id.*; act effective Oct. 4, 1997, ch. 852, sec. 2,

January 1, 1997	“LOCAL CONTROL” TAKES EFFECT. ⁵⁹
April 1998	9,000 in custody (8,174 in state prisons, with an additional 954 under Local Control).
February 1999	10,000 in custody (8,805 in state prisons, with an additional 1,267 under Local Control).
March 2000	11,000 in custody (9,591 in state prisons, with an additional 1,473 under Local Control).
October 2001	12,000 in custody (10,809 in state prisons, with an additional 1,220 under Local Control).
January 2003	13,000 in custody (11,732 in state prisons, with an additional 1,171 under Local Control).
2004	14,000 prisoner level projected.
2007	15,000 prisoner level projected.
2009	16,000 prisoner level projected.
2011	17,000 prisoner level projected. ⁶⁰

The prison population in the United States has grown massively over the past twenty years. The population grew more than 400% from less than 320,000 in 1980 to nearly 1.4 million at the end of 2002.⁶¹ The total population including those in jail was almost two million, with more than 1.8 million in state facilities.⁶²

More recently, there has been a decidedly different trend. As Paige Harrison and Allen Beck stated in their report for the Bureau of Justice Statistics, “[s]ince 1995 the overall growth of the Nation’s prison population has steadily slowed.”⁶³ The one year grow rates from 1990 through 1995 were 9%, 7%, 7%, 7%, 9%,

1997 Or. Laws 2479. “Measure 11 is responsible for most prison population growth since 1996.” DEP’T OF ADMIN. SERVS., *supra* note 56, at 15-16.

⁵⁹ Oregon Revised Statute § 137.124(2)(a) places felons sentenced to incarceration of one year or less in county custody—Local Control—rather than in state prisons. DEP’T OF ADMIN. SERVS., *supra* note 56, at 6. The statute took effect January 1997, and state prisons housed 725 less inmates by October 1997. *Id.*; OR. DEP’T OF CORR., *supra* note 56, at 8. However, the statute largely only changed where the state incarcerated an inmate sub-group, as counties housed 885 state inmates by October 1997. OR. DEP’T OF CORR., *supra* note 56. Thus, from 1997 forward, total prison population is the sum of those incarcerated in state prison and under Local Control.

⁶⁰ The number under “local control” is projected to grow to 1,500 by December 2011. DEP’T OF ADMIN. SERVS., *supra* note 56, at 28.

⁶¹ Harrison & Beck, *supra* note 53, at 4 tbl.4.

⁶² Harrison & Beck, *supra* note 2, at 2 tbl.1. The number in state prisons is 1,181,128. Only 143,337, or 7.3% of the total population, were confined in the federal system. *Id.*

⁶³ *Id.* at 2.

and 7%—averaging 8%.⁶⁴ From 1996 through 1999, the growth rates slowed. The rates were 5%, 5%, 5%, and 3%—averaging 4.5%.⁶⁵ There was another drop in growth rates from 2000 through 2002, with a 1.3% increase in 2000, 1.1% in 2001, and 2.6% in 2002—an average of less than 2%.⁶⁶

Cumulatively, the increase from 1995-2001 in sentenced prisoners was 23.9% nationally.⁶⁷ However, it was 75.2% in Oregon, more than three times higher than the national figure.⁶⁸ From year-to-year, the national growth rate average was 3.6%.⁶⁹ It was 9.8% in Oregon.⁷⁰ The growth rate for Oregon since 1995 was the third highest in the country, behind only North Dakota and Idaho.⁷¹ Similarly, the one-year growth rate for Oregon in 2001 was 8.3%.⁷² That figure placed it fourth behind West Virginia, Alaska, and Idaho, all with decidedly smaller prison populations than Oregon.⁷³

Crime is down nationally and in Oregon. Thus, high crime rates do not offer a justification for Oregon's recent sharp increase in prison population or its projected prison growth. Crime rates are down nationally since 1993 on all levels. The trends in Oregon are sharply downward on both violent and property crimes. More importantly, the crime rates for violent crime, those subject to Measure 11 and driving the vast majority of the increase in imprisonment, have never been high in Oregon and have generally been declining since 1980.

C. *Economic Downturn and Budgetary Crisis*

Budgets throughout the states are in crisis and are likely to remain extremely tight in most states for years to come. Nationally, corrections was one of the fastest growing items in state budgets in the 1990s, on average consuming seven percent of

⁶⁴ Christopher J. Mumola & Allen J. Beck, *Prisoners in 1996*, BUREAU JUST. STAT. BULL., July 1997, at 2 tbl.2, <http://www.ojp.usdoj.gov/bjs/pub/pdf/p96.pdf>.

⁶⁵ Harrison & Beck, *supra* note 53, at 3 tbl.2.

⁶⁶ *Id.*

⁶⁷ Harrison & Beck, *supra* note 2, at 5 tbl.5.

⁶⁸ *Id.*

⁶⁹ *Id.* This figure is the combined federal and state rate. The growth rate was lower in the states at 3.2% and higher in the federal system at 8.5%. *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 6 tbl.6.

⁷² *Id.* at 3 tbl.3.

⁷³ Harrison & Beck, *supra* note 2, at 3 tbl.3.

state budgets at the turn of the century.⁷⁴ In fiscal year 2002, faced with severe budget problems, twenty-five states reduced their corrections budgets.⁷⁵

Much of the current prison expansion occurred in far better economic times when the tradeoffs were not so obvious. However, the competition is now quite visible for limited, often inadequate, funds between prisons and other critical programs such as schools and medical care. Choices to confine more prisoners are currently likely to be understood as having important consequences to other pressing priorities.

D. America No Longer Has Uniformity in Sentencing Theory and Practice

Uniformity in approach to sentencing has broken down. There is no longer an American system of punishment. Multiple, often conflicting, approaches are in operation within the same jurisdiction and between jurisdictions. We may not yet fully recognize it, but we have in effect admitted that we do not agree on a theory of punishment. Either we do not have the answers or perhaps there is no single answer as to how punishment should be determined and administered.

We reach this point in our history with an amazing degree of disagreement about appropriate sentencing policy. By contrast, only a few decades ago, uniformity in theory and approach characterized American sentencing. For much of the middle part of the twentieth century up until the early 1970s, a reasonably widespread sentencing regime existed in this country. For serious offenses, it was a system of indeterminate sentencing in which the judge, within very wide margins and with little guidance, established a set of maximum and minimum terms of imprisonment. Parole boards controlled ultimate release dates. The theory of sentencing was utilitarian in concern for deterrence and incapacitation, and was animated by what might be termed the rehabilitative ideal. Wide variance existed between the sentences of those convicted of the same crime.⁷⁶

⁷⁴ JUDITH GREENE & VINCENT SCHIRALDI, CUTTING CORRECTLY: NEW PRISON POLICIES FOR TIMES OF FISCAL CRISIS 2 (2002), <http://riseup.net/jpi/downloads/CuttingCorrectly.pdf>.

⁷⁵ DANIEL F. WILHELM & NICHOLAS R. TURNER, IS THE BUDGET CRISIS CHANGING THE WAY WE LOOK AT SENTENCING AND INCARCERATION?, 2 (2002), http://www.vera.org/publication_pdf/167_263.pdf.

⁷⁶ Robert P. Mosteller, *The United States Perspective on the Judicial Role in Sen-*

That sentencing structure permitted discretionary sentencing by trial court judges. Discretion was generally constrained only by the legislature's action in setting ranges for sentencing for each crime within broad ranges and crime definitions that provided only marginal restraint in many cases. Judicial discretion existed also as to whether to imprison at all or to grant probation. Because there were no established set of principles for determining the appropriate sentence, judges were largely at sea in determining what theory of punishment to apply and how to arrive at an actual sentence under the principles chosen.⁷⁷

The sentence was indeterminate. This meant that the term actually served by the defendant was not set by the sentencing court but was determined by various reductions earned by good conduct while in prison and by the discretionary action of a parole board, which determined when the defendant would in fact be released. Under this system, a defendant often would serve between one-third and two-thirds of the maximum term imposed by the judge. A "life" sentence might easily turn out to mean eight, ten, or fifteen years until release, or it might mean confinement for life.⁷⁸

In the 1970s that system came under attack from a number of philosophical and political positions.⁷⁹ One element of the attack was that the system of discretionary sentencing resulted in unjustified disparities in sentences from judge to judge and from defendant to defendant, particularly with respect to the conduct of the individual. The potential for, and reality of, discrimination on the basis of race, ethnic group, social status, and gender was widely decried.⁸⁰ A second element of the criticism was based on skepticism that prison officials and parole boards could treat inmates or ascertain which ones had been rehabilitated and which

tencing: A Story of Small Victories and a Call for Partial Solutions in a Difficult Environment, in *THE JUDICIAL ROLE IN CRIMINAL PROCEEDINGS* 247 (Sean Doran & John D. Jackson eds., 2000); Michael Tonry, *The Fragmentation of Sentencing and Corrections in America*, *SENTENCING & CORRECTIONS*, Sept. 1999, at 1, <http://www.ncjrs.org/pdffiles1/nij/175721.pdf>.

⁷⁷ Mosteller, *supra* note 76, at 248.

⁷⁸ *Id.*

⁷⁹ See, e.g., AM. FRIENDS SERV. COMM., *STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA* (1971); ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* (1976); MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1972).

⁸⁰ See, e.g., AM. FRIENDS SERV. COMM., *supra* note 79, at 140-43.

ones were likely to recidivate.⁸¹ Finally, an influential group of sentencing theorists argued that sentences *should* be based principally on a “just desserts” theory, rather than on the utilitarian goals of rehabilitation, deterrence, or incapacitation.⁸²

Empirical analysis demonstrated that prison professionals could not accurately identify those who had been rehabilitated and those who would likely recidivate, and the ability of prison officials effectively to “treat” incarcerated criminals was broadly dismissed. The theorists who argued that punishment ought to be based on the seriousness of the offense and the culpability of the perpetrator provided an alternative that did not require any empirical verification. Moreover, the loss of faith in the rehabilitation ideal meant that there was no effective counterweight to the argument that the sentencing disparities produced by the existing system were unjustified, and discretion and individualization of sentences invited invidious discrimination. The just desserts rationale promised a theoretically and apparently practically superior alternative.

The chief alternative that entered the field was a system familiar to an Oregon audience, called “structured sentencing.” A key feature of structured sentencing is that it provides for a determinant sentence and takes the parole board out of the sentencing process. One form of structured sentencing, although not the only one, is sentencing guidelines, with Minnesota, Washington, and Oregon leading the way in the states, and the federal system adopting a somewhat different version.⁸³ Another form of structured sentencing is the mandatory minimum sentence of imprisonment to be imposed upon conviction for specified crimes or combinations of crimes. Typically covering repeat offenders, but often including other specific offenses, mandatory minimum laws

⁸¹ See, e.g., *id.* at 34-47. The lack of any meaningful appellate review of sentences was another source of criticism. See, e.g., FRANKEL, *supra* note 79, at 75-85.

⁸² See, e.g., VON HIRSCH, *supra* note 79, at 45-55, 66-76.

⁸³ See, e.g., Kirkpatrick, *supra* note 57 (describing Oregon as following approaches in Minnesota and Washington, which were among the first dozen states to adopt guidelines and noting it differs in approach from the federal guidelines); Kay A. Knapp & Denis J. Hauptly, *State and Federal Sentencing Guidelines: Apples and Oranges*, 25 U.C. DAVIS L. REV. 679 (1992) (describing differences between state guideline systems and the federal sentencing guidelines); Thomas B. Marvell, *Sentencing Guidelines and Prison Population Growth*, 85 J. CRIM. L. & CRIMINOLOGY 696 (1995) (noting that Minnesota, Washington, and Oregon were among the first group of states to adopt guidelines).

were enacted by a number of jurisdictions.⁸⁴ As the experience in Oregon demonstrates, first with sentencing guidelines and later with Measure 11, more than one of these forms of structured sentencing can be used.

However, unlike the system it replaced, structured sentencing never fully occupied the field. It was the leading alternative, but it was not universally adopted. For a time, sentencing commissions and sentencing guidelines were the most common types of reforms in sentencing in America. However, in rough numbers, only nineteen states adopted sentencing commissions and only seventeen states developed sentencing guidelines.⁸⁵ Moreover, there was no consistency between jurisdictions or in the meaning of these terms.⁸⁶ As in Oregon, conflicting regimes quickly started to enter and to occupy various parts of the field.

In terms of sentencing theory, “just desserts” was presented as an intellectual alternative to utilitarian justifications for sentencing, such as rehabilitation. However, arguably one utilitarian sentencing scheme was in fact replaced by another. In the 1990s, the major contender for the dominant punishment theory was general incapacitation.⁸⁷ Because rehabilitation in prison was seen as improbable and because specific individuals could not be identified as particularly worthy of incarceration to benefit public safety, a *de facto* decision seems to have been made to imprison as the default position. A just desserts theory was given a harsh interpretation and it helped produce, or at least it did not constrain,⁸⁸ development of a broadly applied utilitarian theory of general incapacitation. The two worked hand-in-glove to pro-

⁸⁴ BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, 1996 NATIONAL SURVEY OF STATE SENTENCING STRUCTURES 3 (1998). As of 1996, forty states had mandatory sentencing provisions for repeat or habitual offenders, thirty-eight states for crimes accompanied by possession of a deadly weapon, thirty-six states for drug possession/trafficking, thirty-one states for drunk driving, and thirty states for sex offenses. *Id.* at 6-7, 8-9 exhibit 1-4. Twenty-four states enacted “two or three strikes and you’re out” legislation between 1993 and 1995. *Id.* at 17 exhibit 1-9.

⁸⁵ *Id.* at 10.

⁸⁶ Tonry, *supra* note 76, at 2.

⁸⁷ FRANKLIN E. ZIMRING & GORDON HAWKINS, INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME 3 (1995).

⁸⁸ Professors Zimring and Hawkins have argued that, although desserts can in theory constrain the expansive tendencies of a general incapacitation justification for punishment, the limits imposed by desserts theory “are difficult to define and very hard to sustain as a matter of practical politics” and “are not likely to provide the definitive stopping points that an incapacitation-driven system requires.” *Id.* at 74.

duce a vastly increased prison population, and by the end of the twentieth century it resulted in almost two million men and women being confined in federal and state prisons and jails.⁸⁹

Sentencing expert Professor Michael Tonry wrote near the end of the century, “American sentencing and corrections policies are in ferment. No longer is there anything that can be characterized as the American approach. . . . What look like monolithic tough-on-crime policies in many jurisdictions are being undermined from within by new, individualized programs and approaches.”⁹⁰ He notes that despite the advances in determinate sentences, thirty-six states and the District of Columbia continue to use indeterminate sentencing,⁹¹ which in the 1980s seemed to be on its way out of existence. We are, as Professor Tonry said, in a period of ferment. While the nation collectively has accomplished a massive increase in incarceration, we are uncertain at the theoretical level why we have done so. The data on the collective slowdown in growth of prison population strongly suggests that we may be increasingly uncertain whether continuing on this path is advisable. It is indeed an interesting time to consider sentencing policy.

*E. Restorative Justice: A New Model in Sentencing
Is Emerging*

Restorative justice, a different approach to sentencing, is gaining momentum. This theory focuses on a three-party relationship in crime: the victim, the offender, and the community. Its emphasis is away from punishment, and when punishment is meted out, it calls for punishment that restores rather than destroys. To date, restorative justice has most often been used with juveniles and relatively minor crimes. Professor John Braithwaite describes restorative justice as “a process of bringing together the individuals who have been affected by an offense and having them agree on how to repair the harm caused by the crime. The purpose is to restore victims, restore offenders, and restore communities in a way that all stakeholders can agree is just.”⁹²

⁸⁹ Harrison & Beck, *supra* note 2, at 2 tbl.1.

⁹⁰ Michael Tonry, *Reconsidering Indeterminate and Structured Sentencing*, SENTENCING & CORRECTIONS, Sept. 1999, at 1, <http://www.ncjrs.org/pdffiles1/nij/175722.pdf>. See also Tonry, *supra* note 76.

⁹¹ Tonry, *supra* note 90, at 3.

⁹² John Braithwaite, *A Future Where Punishment is Marginalized: Realistic or Utopian?*, 46 UCLA L. REV. 1727, 1743 (1999).

Restorative justice shows great promise to transform the discussion of sentencing policy and perhaps to moderate the harshness of some aspects of our sentencing practices. However, how and where restorative justice ultimately will fit in American sentencing and justice systems are yet to be determined.

Professor Mark Umbreit gave this description:

The values of restorative justice “emphasize healing and reparation rather than retribution and punishment.” Repairing the harm caused by crime is far broader and much more complex than simply establishing an agreed upon restitution amount. Restorative justice encompasses additional hopes and goals for the victim who was harmed, for the youth who offended, and for the community of which they both are members.⁹³

Professor Michael Smith gives this description:

In this new paradigm the purpose of justice is to restore the victim and the victim’s intimates (who suffer the harm), the community (whose fabric is torn by the crime), and the offender (who will remain part of that community, or will reenter it before long, and who, if unrestored, represents a continuing threat to it).⁹⁴

The restorative justice model does not envision a premature use of punishment. As Professor Braithwaite puts it:

One value of restorative justice is that we should be reluctant to resort to punishment. . . . [J]ustice has more meaning if it is about healing rather than hurting. “Crime hurts; justice heals”: This captures the essence of the paradigm shift. It involves rejection of a justice that balances the hurt of the crime with proportionately hurtful punishment.⁹⁵

Restorative justice is an ancient concept, its supporters argue, with roots in the communitarian justice systems of pre-modern peoples around the world.⁹⁶ It has modern models in the justice practices of indigenous peoples, seen in practices of the Maori tribe in New Zealand⁹⁷ and in Navajo peacemaking in the United

⁹³ MARK S. UMBREIT ET AL., JUVENILE VICTIM OFFENDER MEDIATION IN SIX OREGON COUNTIES: FINAL REPORT IV (2001) (citation omitted), <http://ssw.che.umn.edu/rjp/Resources/Documents/final%20report%20or.pdf>.

⁹⁴ Michael E. Smith, *What Future for “Public Safety” and “Restorative Justice” in Community Corrections?*, SENTENCING & CORRECTIONS, June 2001, at 3, <http://www.ncjrs.org/pdffiles1/nij/187773.pdf>.

⁹⁵ Braithwaite, *supra* note 92.

⁹⁶ GERRY JOHNSTONE, RESTORATIVE JUSTICE: IDEAS, VALUES, DEBATES 36-61 (2002).

⁹⁷ *Id.* at 43.

States.⁹⁸

The modern restorative justice movement in North America is traced to the first victim-offender mediation program in Ontario, Canada, in 1974, established by the Mennonites.⁹⁹ Religion and moral theory continue to provide strong backgrounds for the movement.¹⁰⁰

Restorative justice is practiced in a number of forms in the United States. Four are worth mentioning. The first and most common is victim offender mediation. There are approximately 300 victim offender mediation programs operating in the United States and 700 in Europe.¹⁰¹ In the United States, the majority of these programs work with juveniles, with minor crimes, and as pretrial diversion alternatives. By contrast, in Germany and Austria, the programs are much broader and cover serious offenses and adult offenders.

Secondly, family group conferencing involves a broader range of participants than does victim offender mediation, often including family, friends, teachers, and coworkers. Family members and other supporters of the offender and victim often take collective responsibility for the offender and for ensuring fulfillment of the agreement. This form of restorative justice frequently depends on officials, such as the police, probation, or social service agencies, to provide organization and facilities.¹⁰²

Sentencing circles are the third major form of restorative justice programs in the United States. They involve local residents to help empower and develop communities. The circles involve not only victims and offenders and their supporters but also key members of the community or, as occasionally practiced, any member of the community.¹⁰³ This model of restorative justice tends to be used more expansively, encompassing adult offenders, more serious crimes, and requiring community involvement.¹⁰⁴

⁹⁸ *Id.* at 44-47.

⁹⁹ Leena Kurki, *Restorative and Community Justice in the United States*, 27 *CRIME & JUST.* 235, 239-40 (2000).

¹⁰⁰ *Id.* at 240, 265.

¹⁰¹ *Id.* at 268. Lane County, Oregon, operates a successful program called the Restorative Justice Program of Community Mediation Services.

¹⁰² *Id.* at 273-80. Leena Kurki, *Incorporating Restorative and Community Justice Into American Sentencing and Corrections*, *SENTENCING & CORRECTIONS*, Sept. 1999, at 4-5, <http://www.ncjrs.org/pdffiles1/nij/175723.pdf>.

¹⁰³ Kurki, *supra* note 99, at 280-82.

¹⁰⁴ *Id.*

Finally, community reparative boards are generally comprised of a small group of trained citizens. They meet with offenders, who have typically been ordered by a court to participate in the process. They discuss with the offender the offense and its consequences and reach an agreement with him or her on how reparations for the crime will be made. The board then monitors the offender's compliance and reports to the court regarding it.¹⁰⁵

Professor Umbreit, a major researcher and theoretician in the restorative justice movement, in a recent report noted that the distinctions between the first three models may not be very clear at all: in recent years, a blurring has taken place particularly among practitioners who are attempting to apply restorative concepts and processes to real life settings.¹⁰⁶

Increasingly, practitioners describe what they are doing as conferencing. The characteristics of the case, the nature of the underlying conflict, and to a certain extent the desires of the victim and offender determine whether the conferencing process used resembles the victim offender mediation, family group conferencing, or circle model. Also, each of these approaches may be used at different stages of a single case.¹⁰⁷

No one in the United States knows what will happen with restorative justice and its relationship to the criminal justice system. Its concepts are increasingly accepted and practiced around the country. Indeed, in some states—Minnesota and Vermont—restorative justice programs and principles have state-wide application.¹⁰⁸ Based on past experience, some growth in importance and expansion is very likely.

Perhaps the chief reason to presume growth is participant satisfaction. The research on the impact of restorative justice on important outcomes, such as recidivism, is in its early stages, and the results are not clear. However, one finding appears uniformly clear: participants in the program express a high degree of satisfaction.¹⁰⁹

¹⁰⁵ Gordon Bazemore & Mark Umbreit, *A Comparison of Four Restorative Conferencing Models*, JUVENILE JUST. BULL., Feb. 2001, at 3-4, <http://www.ncjrs.org/pdffiles1/ojjdp/184738.pdf>.

¹⁰⁶ MARK S. UMBREIT ET AL., *THE IMPACT OF RESTORATIVE JUSTICE CONFERENCING: A REVIEW OF 63 EMPIRICAL STUDIES IN 5 COUNTRIES 1* (2002), <http://ssw.che.umn.edu/rjp/Resources/RJP%20CONFERENCING-mono%205-5-02.pdf>.

¹⁰⁷ *Id.*

¹⁰⁸ Daniel W. Van Ness & Pat Nolan, *Legislating for Restorative Justice*, 10 REGENT U. L. REV. 53, 91 (1998).

¹⁰⁹ Kurki, *supra* note 99, at 270-72 (reporting that early studies are inconclusive).

What are the challenges? Most knowledgeable observers note an incompatibility between the demands of our criminal justice system for speed, efficiency, uniformity, equality, and transparency, and restorative justice's informality, individuality, and care.¹¹⁰ These observers demonstrate a desire to bring restorative justice into American sentencing structures,¹¹¹ but whether full incorporation is feasible is uncertain.

Moreover, there are also questions whether the restorative justice model can withstand the pressures from other established interests and remain independent and stable. Restorative justice has a group of committed adherents who believe deeply in its concepts. However, others come to restorative justice with their own agendas. Liberals and criminal justice reformers may embrace restorative justice as a way to begin talking again about rehabilitation. Indeed, for just this reason, some in the movement fear being integrated into the criminal justice system, which they believe is inherently focused too much on the offender.¹¹²

In contrast, victims' rights advocates are drawn to the concept because they agree that crime is more than a wrong against the state. They emphasize that crime causes a distinctive harm to a specific victim. Restorative justice thus also breaks the government's monopoly in responding to crime. However, restorative justice does not fit within the victims' rights movement, which often advocates for punishment and retribution. This is counter to restorative justice's focus on "how relationships are harmed by crime and how they can be rebuilt to promote recovery and healing for people affected by crime, [a process that] . . . respects equally victims and offenders."¹¹³

Part of the question about the future of restorative justice in the United States is whether it comes to be dominated by existing institutional and political groups or whether it remains a new perspective with its own voice. Thus, it is critical that the move-

on the effects of victim offender mediation on recidivism but show strong participant satisfaction); John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 21-23 (1999) (describing high degrees of satisfaction among participants in programs in Australia, Canada, Germany, Great Britain, and the United States).

¹¹⁰ See generally Kurki, *supra* note 102; Robin L. Lubitz & Thomas W. Ross, *Sentencing Guidelines: Reflections on the Future*, SENTENCING & CORRECTIONS, June 2001, at 3-4, <http://www.ncjrs.org/pdffiles1/nij/186480.pdf>.

¹¹¹ See, e.g., Lubitz & Ross, *supra* note 110, at 4, 5 (proposing a hybrid approach).

¹¹² JOHNSTONE, *supra* note 96, at 18.

¹¹³ Kurki, *supra* note 99, at 266 (citation omitted).

ment establish its own constituency, which may potentially develop gradually as those who have participated grow in number and influence. The test for continued independence will be in the nature of the programs embraced. Restorative justice recognizes that there are three components that must be restored: the victim, the offender, and the community. If commitment to any of the three is omitted, it is not restorative justice.

How exactly does restorative justice fit into what will result from the sentencing debate in the new century? It is likely to encourage positive change. While restorative justice de-emphasizes punishment, it is a system of justice and must recognize in many situations the necessity of punishment. However, its punishment is administered with the goal of the restoration and reintegration of victim, community, and offender.

Advocating the concept of punishment that has as one of its purposes reintegrating the offender provides an important new voice in the American sentencing debate. Restorative justice may have relatively little impact on the most serious crimes where community safety is such an overriding concern. Perhaps the main impact of restorative justice will be the modest, but critical, impact of reintegrating individual young offenders across America into a positive relationship with those they have harmed and their community. However, if it is taken seriously, it may have an impact across a substantial range of cases.

F. Those Sentenced to Prison, Even Those Sentenced Under Mandatory Minimums, Do Get Released

The reality is that criminals sentenced under harsh systems, including those with mandatory minimums, are being released. Eight or ten years ago, we could say that we will “lock them up and throw away the key,” or more realistically, lock them up now and worry about how to deal with their release when the time comes—somewhere in the distant future. However, that future is now upon us. The time for release is today or tomorrow or soon.

Those serious criminals will re-enter the free population. When they do so, they will have been confined for longer, with fewer remaining links to their families and communities, and having had less treatment and training than when resources were not so scarce and when there was more emphasis on rehabilitation. That is a reality we must face. The burning question is whether those released are citizens who will be successfully rein-

tegrated into society, or are convicts, who in large numbers, will re-offend at terrible costs.

During the 1990s, when mandatory minimum sentences and two- and three-strikes punishment schemes enjoyed their greatest popularity, many saw the way to solve the crime problem generally, and the problem with individual criminals specifically, was to “lock them up and throw away the key.” However, it is clear that but for a very few individuals, those we lock up will one day be released. What happens when these people get out is critical to our safety and the well-being of our communities, the inmates’ families, and the re-entering members of society.

Measure 11 has very tough mandatory minimums for offenses. The crimes grouped according to mandatory minimums are:

25 years (300 months)	Murder
10 years (120 months)	Attempted or Conspiracy to Commit Aggravated Murder, and Manslaughter I
8.33 years (100 months)	Rape I, Sodomy I, and Sexual Penetration I
7.5 years (90 months)	Arson I, Assault I, Attempted or Conspiracy to Commit Murder, Kidnapping I, and Robbery I
6.25 years (75 months)	Manslaughter II, Rape II, Sexual Abuse I, Sexual Penetration II, and Sodomy II
5.83 years (70 months)	Assault II, Compelling Prostitution, Kidnapping II, Robbery II, and Using Child Display Sex Act ¹¹⁴

Measure 11 went into effect on April 1, 1995, about eight and one-half years ago, and only recently have substantial numbers of those inmates been released. As of June 1, 2003, the cumulative total was 525.¹¹⁵ By the end of 2003, it is expected to reach over 800.¹¹⁶ The release number will exceed 2,200 by the end of 2006; 3,250 by the end of 2008; and, over 5,000 early in 2012.¹¹⁷ Of the 4,092 Measure 11 inmates in custody on July 1, 2002, over seventy-five percent, or 3,100, are expected to be released from prison in the next ten years.¹¹⁸

Because it has only been eight and one-half years since Mea-

¹¹⁴ OR. REV. STAT. § 137.700 (2001).

¹¹⁵ OR. DEP’T OF CORR., POST PRISON POPULATION WITH MEASURE 11 CONVICTIONS AS OF JUNE 1, 2003, <http://mscfprod1.iservices.state.or.us/doc/Meaure11/m11pps.cfm> (last visited June 25, 2003).

¹¹⁶ E-mails from Suzanne M. Porter, Corrections Population Analyst, Oregon Office of Economic Analysis (Oct. 2002) (on file with author).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

sure 11 sentences were first imposed, those released to date were convicted of offenses carrying the shorter terms. As of June 1, 2003, the numbers were:¹¹⁹

Assault I	9
Assault II	105
Attempted Murder	1
Kidnapping I	3
Kidnapping II	29
Manslaughter II	17
Rape II	19
Robbery I	31
Robbery II	158
Sex Abuse I	140
Sexual Penetration II	4
Sodomy I	2
Sodomy II	7

However, the seriousness of Measure 11 offenders released will change over the years. The first Robbery I convicts are just now leaving prison. In the next ten years, almost 450 Robbery I convicts will be released, along with over 150 convicted of Rape I and over 100 convicted of Assault I. Among the crimes of Assault I, Kidnapping I, Manslaughter I, Rape I, and Robbery I, almost 850 are expected to be released in the next decade.¹²⁰

When Measure 11 was enacted, what would be done with these inmates when they were released was not the chief or immediate concern. That problem could theoretically be dealt with in the long, distant future. However, that future is now upon us.

The problem, which is easy to see, is described by the Urban Institute, in *From Prison to Home*.¹²¹ Since a larger number of prisoners have been incarcerated, more are being released. As to those being released, because they were incarcerated for a longer period of time, they are less connected to their communities and less well-prepared for life outside the prison walls. Substantial resources have been committed to prisons, nationally going from expenditures on corrections of nine billion dollars in 1982 to

¹¹⁹ OR. DEP'T OF CORR., *supra* note 115.

¹²⁰ E-mails from Porter, *supra* note 116.

¹²¹ JEREMY TRAVIS ET AL., *FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY* (2001), http://www.urban.org/Uploaded_PDF/from_prison_to_home.pdf. See also MARTA NELSON & JENNIFER TRONE, *WHY PLANNING FOR RELEASE MATTERS* (2000), http://www.vera.org/publication_planning_for_release.pdf.

forty-nine billion dollars in 1999.¹²² In many jurisdictions, the available funds are limited and highly contested, even if the cupboard is not totally bare.

Nationally, the number of convicts being released each year has grown extraordinarily. In 1977, 147,895 were released,¹²³ while in 2000, the number had almost quadrupled to 585,000.¹²⁴ The growth in release numbers makes perfect sense. Because we have increased the number of people in prisons and jails dramatically, currently reaching a total incarcerated population of almost two million, the number finishing their sentences and being released each year has increased as well.

While the trend to impose longer sentences for serious and violent offenses meant that expanding release numbers were delayed somewhat, the inevitable growth in release numbers that comes from an increase in incarceration totals is now upon us. Seventy-five-thousand prisoners convicted of crimes of violence were released in 1985.¹²⁵ By 1998, that number had almost doubled to more than 140,000.¹²⁶ Also, the proportion of those who had served five or more years in prison rose from twelve percent in 1991 to twenty-one percent in 1997.¹²⁷

These released individuals are not scattered evenly across a map. They are returned to communities to either become part of those communities or to harm them, and are disproportionately returned to a small number of communities. The impact there can be very damaging.¹²⁸

The released prisoners frequently have problems with jobs, housing, families, substance abuse, and mental health.¹²⁹ It is es-

¹²² BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, DIRECT EXPENDITURES BY CRIMINAL JUSTICE FUNCTION, 1982-99, <http://www.ojp.usdoj.gov/bjs/glance/tables/exptyptab.htm> (last revised Feb. 10, 2002). The Department of Justice lists direct expenditures by three functions: police, judicial, and corrections. In 1982, police had 53.2% of the total, judicial 21.7%, and corrections 25.2%. In 1999, the judicial share was virtually unchanged at 22.0%. The police share had gone down by 8.4% to 44.6%, and corrections had grown by 8.6% to 33.4%. *Id.*

¹²³ TRAVIS ET AL., *supra* note 121, at 4.

¹²⁴ The number for 2000 is a projection made in April 2000. ALLEN J. BECK, STATE AND FEDERAL PRISONERS RETURNING TO THE COMMUNITY: FINDINGS FROM THE BUREAU OF JUSTICE STATISTICS (2000), <http://www.ojp.usdoj.gov/bjs/pub/pdf/sfprc.pdf>.

¹²⁵ TRAVIS ET AL., *supra* note 121, at 9-10.

¹²⁶ *Id.*

¹²⁷ *Id.* at 11.

¹²⁸ *Id.* at 40-43.

¹²⁹ *Id.* at 11-12.

timated that three-fourths of the prison population have a history of some type of substance abuse, and many of those being released have not received treatment.¹³⁰

Based on past studies nationally, nearly two-thirds of released prisoners are expected to be re-arrested for felony or serious misdemeanor within three years of release, and almost fifty percent will be convicted of a new crime.¹³¹

Focused on get-tough policies, some jurisdictions let programs slip that would otherwise help reintegrate the released prisoner into the community. Participation in many pre-release programs, such as vocational training, education, or drug treatment is less likely for today's released prisoners.¹³² Also, spending on post-release programs such as parole supervision is down on a per capita basis, while caseloads per officer have risen.¹³³ In these situations, community support services have not grown, in my judgment, as needed.

Drug treatment, vocational training, and educational training all have positive impacts in prisons. Repeatedly, studies verify the benefits of carefully developed programs in these areas. Those working in the system indeed are becoming more sophisticated in determining which programs work with which types of offenders. For example, it now is recognized that some drug programs are far more effective than others and have different success rates with different populations.¹³⁴ There is a perceivable consensus among experts on re-entry that target investments in quality programs will return large dividends for returning prisoners, their immediate communities, and the larger society.

The identified problem is national in scope, and Oregon is no exception. The operative concept in reaching a solution must be

¹³⁰ *Id.* at 12; NELSON & TRONE, *supra* note 121, at 4.

¹³¹ Patrick A. Langan & David J. Levin, *Recidivism of Prisoners Released in 1994*, at 7 (Bureau of Justice Stats., U.S. Dep't of Justice, Special Report NCJ 193427, 2002), <http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr94.pdf>. Of 272,111 prisoners released in 1994 from prisons in 15 states including Oregon, 67.5% were arrested for a new felony or serious misdemeanor, and 46.9% were convicted of a new offense. *Id.* at 1, 7. The most recent Oregon figures show 32.6% of prisoners released in the second half of 1999 were convicted of a felony within 36 months of their release. Or. Dep't of Corr., *Recidivism of New Parolees and Probationers 1* (2003), <http://www.doc.state.or.us/research/Recid.pdf>.

¹³² Jeremy Travis et al., *Prisoner Reentry: Issue for Practice and Policy*, 17 CRIM. JUST. 12, 12 (Spring 2002).

¹³³ TRAVIS ET AL., *supra* note 121, at 5.

¹³⁴ *Id.* at 25-27.

reintegration, which is necessary not only to salvage individual lives, but also to ensure community safety. Efforts to provide prisoners with the needed treatment, training, and community connections to avoid future crime do not represent a policy of becoming soft on crime or criminals, or reverting to a rehabilitative ideal. Instead, adopting this approach is a matter of public safety. Men and women who committed serious offenses are scheduled to be released at regular intervals. Either they will be reintegrated into society, or they will likely victimize it.

Working to solve the problem of prisoner reintegration will have a ripple effect with sentencing policy. If nothing works, the approach of locking prisoners up for long periods of time is justified. If, however, well designed and implemented programs do have a significant impact, then giving some degree of discretion to prison officials to release prisoners who work hard and succeed in those effective programs makes good sense.

G. The Relocation of Discretion and Its Proper Distribution

Finally, discretion has not been removed from sentencing. As seen in the past, discretion as to whom will be prosecuted and how they will be punished is with the prosecution, which with statutorily heightened sentences, increases their leverage. Prosecutorial discretion in sentencing has beneficial aspects in making systems workable and moderating otherwise inappropriate results. However, such hidden discretion is the antithesis of transparency. If discretion exists, it should be open, controlled, and shared with other responsible actors—judges and corrections officials—in the system.

Key elements of the sentencing reforms in the 1980s and 1990s was that discretion should be removed from imposition and service of sentences and that the process be open and visible to all, which is understood as “transparency.” Many systems achieved some success in reaching these goals. For example, in Oregon, adopting determinant sentencing and mandatory minimum sentences made large portions of the sentencing decisions definite and the outcomes clearly visible and understandable to all.

Judicial discretion was a clear target of the reforms. It is clear that some of the discretion once held by judges has not disappeared from the system. Instead, a substantial portion of judicial discretion has been transferred to prosecutors, who determine which crimes to charge and have far greater power than before to

dictate the terms of plea bargains because of the draconian and fixed sentences that face the accused upon conviction under mandatory sentencing systems.

In an article, *The Pathological Politics of Criminal Law*,¹³⁵ Professor William Stuntz discusses a similar phenomenon, which he sees as pervasive in the modern relationship between lawmakers and the prosecution. The pathological politics to which he refers is not a blind tough-on-crime political agenda. A tough-on-crime perspective by legislatures is assumed. The pathological part is the development of a set of incentives, without controls, that works in only one direction, constantly ratcheting up the potential for harshness and according increasingly greater power and discretion to prosecutors.

The process works as follows: An event happens that causes public concern, such as a carjacking that results in the tragic death of a young mother.¹³⁶ The crime already is covered by a number of provisions of the criminal law, but the political urge is to act in response to public concern.¹³⁷ So, the legislature passes a new law, providing a symbolic response.¹³⁸ The effect in most situations, such as this, is to add an additional layer of criminality to the act. Punishments can be stacked on top of each other. Proving that some criminal act took place is made easier. The hand of the prosecution is strengthened, and incentives for plea bargaining and guilty pleas become greater.

Moreover, the hue and cry that one would expect from over-criminalization does not materialize because, as the legislature expected, the exercise of discretion by the prosecution removes the hard edge.¹³⁹ The law is not fully enforced and the problematic cases that might cause backlash are eliminated through the exercise of reasoned discretion.

In this fashion, the legislature would satisfy its need to do something, and it thereby is encouraged to follow that path again. The prosecution has seen its hand strengthened, making prosecutions cheaper and trials less frequent and easier to win when they do occur. The difficult decisions would be made not

¹³⁵ Stuntz, *supra* note 8.

¹³⁶ *Id.* at 531-32.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 528.

in courtrooms, but in the private offices of prosecutors, as they determine charging decisions and set plea bargains.

With Measure 11, Oregon has seen a migration of power and discretion to prosecutors. Upon conviction of a Measure 11 offense, an adult faces mandatory sentences without exception as to most covered crimes.¹⁴⁰ Corrections officials, once they have a prisoner, lack the ability to alter the time served based on any factor that suggests willingness and ability to re-integrate into the community. Upon charging a juvenile age 15-17 with a Measure 11 offense, he or she becomes an adult without the ability of a judge to disagree or even examine the decision, and the possibility of extended punishment grows dramatically.¹⁴¹

Discretion has clearly not been eliminated from the system, however. It resides in the decision to charge and seek conviction for Measure 11 offenses. It rests with the prosecutor who can exercise that power in a process that is not open or transparent, is not regulated, and therefore may not be applied equally.

Like the legislators described by Professor Stuntz, members of the public generally should want prosecutors to exercise their discretion and judgment, and on the whole, the public generally benefits. Occasionally some light and transparency can even be brought into the process, as has been done in examining whether minority youth are disproportionately charged as adults under Measure 11. However, such an inquiry almost always is difficult and complicated. Moreover, discretion may be unchecked as to relatively powerless members of groups not singled out for scrutiny.

Even in the federal system where sentences are purportedly based on the “real offense,” rather than on the charged offense or offense of conviction, prosecutors generally have the ability to shape the facts reported.¹⁴² In most states, like Oregon, the charging decision, particularly at the time of the guilty plea, is enormously significant.

¹⁴⁰ A court that finds a “substantial and compelling reason” under the Oregon Criminal Justice Commission rules may impose a sentence less than the Measure 11 minimum for Assault II, Kidnapping II, Manslaughter II, Rape II, Robbery II, Sex Abuse I, Sexual Penetration II, and Sodomy II. OR. REV. STAT. § 137.712 (2001).

¹⁴¹ OR. REV. STAT. § 137.707 (2001).

¹⁴² See, e.g., Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 Yale L.J. 1681, 1697-98 (1992) (“The judge . . . becomes a handcuffed decisionmaker. . . [whose] sentencing range is now tethered to the prosecutor’s choice of charges and facts, unless the probation officer’s independent inquiry brings some facts into question.”).

The public should be informed and needs to recognize that transparency and equality have not been realized and discretion has not been eliminated. Critical sentencing decisions are made on a discretionary basis, potentially unequally, and very much in private by prosecutors. The result gives prosecutors tremendous leverage and, therefore, great power. That realization in a time of high levels of incarceration, tight budgets, and low crime rates should allow the public to once again consider restoring some measure of discretion, under standards and within limits, to judges and, based on proven performance, to corrections officials.

CONCLUSION

While much remains unchanged, a series of new factors are coalescing in this new century that make it feasible to chart new directions in sentencing policy. These factors include substantially lower crime rates, tighter budgets, high levels of incarceration—particularly among minority populations—and an uncertainty about the theory of punishment and sentencing. The latter is seen in the dramatic leveling off of national imprisonment numbers after years of substantial and steady increase.

A change in spirit is seen with the rise of the restorative justice movement that seeks to restore and reintegrate. Of necessity, greater attention will be given to reintegrating into society the large numbers of released offenders convicted of serious crime. The exercise of discretion should be extended to others besides prosecutors for reasons of openness, fairness, and even public safety.

These changes will not come suddenly, but instead will be the result of difficult debate and incremental changes. However, such changes are more likely than they have been in many years as a result of these new dimensions.