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Reforming Sentencing and Corrections for Just Punishment and Public Safety

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Sentencing courts and corrections agencies are not communicating about what matters. When imposing sentence, a judge rarely states clearly the purpose of the sentence or the process by which corrections is expected to achieve it. When correctional agencies are left guessing, they revert to routine administration of the generic penal measures (prison, probation, and parole) and let offenders under supervision in the community decide who will earn revocation.

If courts and correction are to work in harmony (which our collective interest in justice and public safety requires they do), more than incremental investments in generic penal measures are needed. Major restructuring is called for—restructuring of penal and corrections law, and restructuring of correctional strategies and penal measures.¹

Imaginative sentencing judges and innovative community corrections professionals have the practical knowledge necessary to begin that restructuring. The transformation will not be easy, as it requires a fresh look at what public

safety is and how correctional agencies can contribute to it. It also requires disciplined fact finding and reasoning by sentencing courts—an application of the rule of law familiar in every area of the law but this one.²



The nature of public safety revisited

In the press and in political discourse, “public safety” usually means more arrests, more illicit drugs seized, more sentences to incarceration, and fewer reported crimes. These definitions have achieved currency because publicly accountable officials do know how to arrest and imprison offenders, have built a substantial capacity to do so, and do know how to count crime complaints.

But experience has taught us that rising numbers of arrests and prisoners are often indicators of the absence of public safety. Similarly, a falling crime rate can be cause for alarm when it means only that citizens despair of



Directors' Message

It is by now a commonplace that the number of people under criminal justice supervision in this country has reached a record high. As a result, the sentencing policies driving that number, and the field of corrections, where the consequences are felt, have acquired an unprecedented salience. It is a salience defined more by issues of magnitude, complexity, and expense than by any consensus about future directions.

Are sentencing policies, as implemented through correctional programs and practices, achieving their intended purposes? As expressed in the movement to eliminate indeterminate sentencing and limit judicial discretion, on the one hand, and to radically restructure our retributive system of justice, on the other, the purposes seem contradictory, rooted in conflicting values. The lack of consensus on where sentencing and corrections should be headed is thus no surprise.

Because sentencing and corrections policies have such major consequences—for the allocation of government resources and, more fundamentally and profoundly, for the quality of justice in this country and the safety of its citizens—the National Institute of Justice and the Corrections Program Office (CPO) of the Office of Justice Programs felt it opportune to explore them in depth. Through a series of Executive Sessions on Sentencing and Corrections, begun

Directors' Message

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in 1998 and continuing through the year 2000, practitioners and scholars foremost in their field, representing a broad cross-section of points of view, are being brought together to find out if there is a better way to think about the purposes, functions, and interdependence of sentencing and corrections policies.

We are fortunate in having secured the assistance of Michael Tonry, Sonosky Professor of Law and Public Policy at the University of Minnesota Law School, as project director.

One product of the sessions is this series of papers, commissioned by NIJ and the CPO as the basis for the discussions. Drawing on the research and experience of the session participants, the papers are intended to distill their judgments about the strengths and weaknesses of current practices and about the most promising ideas for future developments.

The sessions were modeled on the executive sessions on policing held in the 1980s and 1990s under the sponsorship of NIJ and Harvard's Kennedy School of Government. Those sessions played a role in conceptualizing community policing and spreading it. Whether the current sessions and the papers based on them will be instrumental in developing a new paradigm for sentencing and corrections, or even whether they will generate broad-based support for a particular model or strategy for change, remains to be seen. It is our hope that in the current environment of openness to new ideas, the session papers will provoke comment, promote further discussion and, taken together, will constitute a basic resource document on sentencing and corrections policy issues that will prove useful to State and local policymakers.

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reporting crimes or when fear of crime so restricts their activities that they are afraid to leave home. It makes no sense to find public safety where the crime rate in an area has fallen to zero, but where teenagers roam the parks in a vain search for robbery victims who are home behind double-locked doors. In other words, threats to public safety cannot be measured by numbers of arrests and prisoners or by aggregate crime data. They are local in nature, arising in specific places—in that park, on this street corner, in this house—and they often exist at certain times and not others.

These features make aggregate crime and justice statistics virtually useless as measures of public safety and introduce a level of complexity to which publicly accountable government officials have an understandable aversion. They can with some confidence promise more arrests, prison cells, and prison time for convicted offenders. They cannot with the same confidence claim to understand what makes a certain street corner dangerous or, more to the point, what might be done to make it safe. The agencies of government know relatively little about how to make neighborhoods, parks, bus shelters, street corners, and bedrooms safe. Nor is there a budgetary or bureaucratic reward for doing so, in part because such things are not measured. For those who administer conventional correctional agencies and for almost everyone else concerned (except those at risk of crime victimization), defining the public safety problem as “too many offenders, not enough cells” works better.

What public safety is *not*

Public safety must be more than an increase in the number of imprisoned offenders. It cannot be the same as a lower crime rate—an expression of aggregate data reflecting the volume of complaints about a host of different crimes committed in divergent communities where the facts and circumstances affecting

public safety change and move in different directions all the time.

But if public safety were defined, as it should be, by the degree to which people and property are free from the threat of harm in particular places and at particular times, publicly accountable officials would face the daunting prospect of creating the conditions of safety in the many places and at the many times in which they do not exist. We suggest that public safety is defined as it is today because those officials as well as the body politic lack confidence in government's capacity to produce the real thing.

What public safety *is*

It turns out to be too easy to say what public safety is *not*. What is needed is a rudimentary understanding of what it *is*: a condition, specific to places, in which people and property are not at risk of attack or theft and are not perceived to be at risk. Such places would likely share the following characteristics:

- A set of generally agreed-upon rules of behavior.
- A shared appreciation that rule-breaking will be punished.
- A further appreciation that playing by the rules will be rewarded.

Viewed this way, creating and maintaining public safety requires teaching the lessons of responsibility and accountability and reinforcing them in raising children, supervising adolescents, and producing law-abiding young adults. These are tasks for parents, neighbors, schools, churches, athletic teams, community service groups, the labor market, and—on what needs to be relatively rare occasions—a local police, probation, or parole officer. This is not work that can safely be left to sentencing judges and correctional agencies. It will require imposing penal measures on convicted offenders but it cannot be achieved by that means.

The community policing example

This conception of public safety has animated community policing. Instead of riding around in a patrol car waiting for the chance to arrest a bad guy, a police officer does more to create safety by finding ways to bring other adults into a neighborhood's public spaces, particularly at times when no officer is there. If a conventionally deployed police officer is the only active representative of adult authority on the street, there is *no* adult authority most of the time. Police officers help to displace citizens' fear of crime with actions that prevent it, helping them organize to restore and maintain a sense of mutual obligation in their neighborhoods and seeking their help in devising the most effective patrol deployment plans.

From this concept of government's role in generating public safety flow powerful analogies for the roles of probation and parole agents. They could be active in neighborhoods where public safety is threatened—locating, invoking, and supporting informal mechanisms of social control—to contain the risks posed by people who are under correctional supervision (and by those who are not). This seems ambitious only because we have grown accustomed to passive supervision—waiting to see which offenders will violate probation or parole—which is nicely analogous to random motor patrol by the police.

For correctional agencies to advance public safety in carrying out sentences, and for judges to take proper account of public safety when imposing them, restructuring the sentencing process is required, along with revising the deployment of corrections resources. In the first section below, we propose a restructuring of sentencing based on rule-of-law principles. We demonstrate that these principles require a judge to base a sentence on findings of fact about the specific risks an individual offender poses to public

safety, the particular places where that offender is likely to be found, and the relative plausibility of penal measures available to reduce those risks. In subsequent sections we show how, if courts are to impose sentences in accord with rule-of-law principles, the management of correctional agencies—and especially community corrections—must also change.



Sentencing under the rule of law

The plausibility of any penal measure (curfew, jail, or drug treatment, for example) as a means to advance a penal strategy (incapacitation, deterrence, or rehabilitation, for example) varies with an individual offender's characteristics and circumstances. It at first appears difficult to accommodate this fact, and the individualized sentences it seems to require, within the current normative environment, which values equality, proportionality, and accountability. Each of these values ought to inform, but inevitably complicates, a court's case-by-case assessment of the plausibility of particular penal measures.

If the value of equality requires that "like cases be treated alike," and if, as is commonly assumed, gravity of offense and prior record are the only facts relevant to the "likeness" of cases, then a proposal to tailor sentences to any other characteristics of offenders and the circumstances of the offenses would be an affront to equality. But prior record and gravity of offense, although relevant at sentencing, are hardly sufficient to define a category of offenders who are "alike" in culpability or in the threat they pose to public safety. Similarly, "like treatment" ought not mean "the same sentence." Norval Morris put it best:

The task [is] to reduce disparity in sentencing, not to achieve equality—and by disparity in sentencing I mean the

imposition of sentences randomly or deliberately outside a range agreed, expressly or implicitly, to be justly deserved and socially necessary punishments. . . . [As] desert is a limiting principle of punishment, and not a defining principle, desert will allow for the differential treatment of morally like cases.³

Adding to the complexity are tensions among plausibility of penal purpose, equality of penal burden, and accountability in complying with obligations imposed by the sentence. These tensions are most evident when a court imposes a noncustodial sentence or when the conditions of parole or other postconfinement supervision are set. They arise because:

- Different noncustodial penal measures serve different purposes.
- Noncustodial penal measures serving the public safety purpose do so by varied strategies.
- Every sentencing condition increases the risk of nonperformance by the offender.
- Nonperformance of a sentence condition damages either the offenders (if they are punished for violating the condition) or accountability (if they are not punished), and in either case poses a risk to public safety (if the condition was reasonably required for public safety).

To help guide the courts in selecting penal purpose, penal strategies, and penal measures that fit the facts as they vary from case to case, three principles can be advanced: specificity, clarity, and parsimony.⁴

Specificity. Is the purpose public safety or just deserts? Specifying the purpose of each sentence element is essential to its effective implementation. For example, a 7 p.m. curfew may be a condition of probation or parole. The enforcement of this condition and the consequences of violating it ought

to be shaped by the answer to the question, “Was the curfew imposed because the restriction on the offender’s liberty is deserved punishment or because his unsupervised liberty after 7 p.m. puts citizens or their property at risk?”

Even more important is specificity about penal strategy. An example is the sentencing of persistent petty thieves. In a court where a prison sentence of a year, for example, is routine for such cases, the year will be imposed in one case by a judge who believes it will dissuade other thieves, in a second case by a judge who hopes it will dissuade this particular thief, in a third case by a judge who is concerned only with punishing theft because theft is bad, and in a fourth case by a judge who is content to put a dent in thievery by incapacitating for a year someone known to have committed theft on a regular basis. It is unlikely that the choices of these judges are equally plausible in each petty theft case in which the 1-year sentences are imposed.

This 1-year custodial sentence probably cannot serve both penal purposes and all penal strategies in every case. But we believe no noncustodial sentence could do so. That is because of the many combinations of characteristics and circumstances thieves bring to sentencing. For example, a generic noncustodial sentence that aims to end a thief’s thievery by incapacitation, by deterrence, and by rehabilitation too would become unjustly burdensome and excessively costly in every case in which it was imposed. Ensuring the rehabilitation of homeless, addicted, persistent petty thieves would strain the purse and patience of anyone attempting it, as would ensuring their incapacitation in the community until the risk they will commit more thefts has passed. If deserved punishment is a constraint—if it is immoral to impose more punishment than an offender deserves—the accumulating penal burdens of this sentence, though noncustodial, would have to end long before its strategic objective were achieved.

Thus, it would be wise to specify deserved punishment as the purpose of sentencing petty thieves who possess these characteristics, as that purpose can be achieved within the constraint of just deserts.

Current law does not require resolving conflicts between just desert and public safety as the proper or plausible purpose of a sentence for persistent petty theft or, for that matter, for any other crime. Nor does it require that a court assess the relative plausibility of the quite different penal strategies by which theft sentences, for example, might advance the public’s interest in reducing thievery. But resolving the conflicts of purpose and selecting plausible strategies are not possible unless sentencing courts apply the principle of specificity.

Clarity. Clarity about penal purpose and strategy might seem to matter little when confinement to prison is the only penal measure about which we are concerned. But clarity about purpose permits reasoned resolution of conflicts between just desert and public safety, and lack of clarity about penal strategy aborts inquiry into the relative plausibility of each penal measure available to the court. This is because courts must select from an array or continuum of penal sanctions, each of which serves some but not all purposes. For example:

- Community service, a form of involuntary servitude, can serve retributive and deterrent purposes but is not well designed to incapacitate or rehabilitate.
- Compulsory drug treatment can have punitive weight and rehabilitative value, depending on the offender and the regimen but, depending on the regimen, might or might not have incapacitative value.

- Electronically monitored house arrest can be used for deterrence and retribution but is most plausibly connected to the public safety purpose by its partially incapacitating effects.

Absent clarity by the sentencing court about the penal purpose of a sentence and its strategic relationship to public safety, correctional agents who carry out the sentence must simply guess what to do. This makes it less likely that cases seen as “alike” by the court will

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receive like treatment—indeed, less likely that the penal strategy the court had in mind will be pursued, and less likely that either purpose (public safety, deserved punishment) will be achieved.

Parsimony. There is a major pitfall for those who construct, advocate, or carry out noncustodial sentences. By promising to accomplish more than would be required if the court’s purposes were clear and if the court specified the penal strategy by which it expects to advance public safety in a particular case, they risk accomplishing nothing. The danger of this happening is most evident when a defense attorney or sentence planner, attempting to improve the odds that a judge will impose a noncustodial sentence, recommends adding multiple conditions, justifying them by reference to every permissible sentencing purpose and strategy without regard to the plausibility of each element of the sentence or to the offender’s ability to comply.

If the court placed on record its purpose and strategies, the reasons a purpose urged by an advocate is *not* desirable or achievable, and the reasons a proposed strategy or penal measure is implausible or excessive in the

particular case, there would be benefits beyond the case. Such documentation is necessary because excess in selecting penal strategies and in imposing sentence conditions sets offenders up for failure, whether or not public safety is advanced thereby. Conversely, parsimony in selecting penal strategies and penal measures helps preserve accountability while making it more likely that the court's penal purposes will be achieved.

What does the rule of law require at sentencing?

It has been more than a quarter of a century since Judge Marvin Frankel's indictment of unfettered sentencing discretion precipitated the continuing search for ways to bring sentencing decisions within the rule of law.⁵

Almost as strong as Judge Frankel's passion for the rule of law was his doubt that judges or legislators would resolve either the "questions of justification and purpose" that surround imposition of penal measures or the questions about their efficacy that plague their execution. But the movement toward presumptive sentencing guidelines that his book inspired was not inevitable. Although he called for "a detailed chart or calculus to be used by the sentencing judge in weighing the many elements that go into the sentence," he also wrote of the need to apply to sentencing decisions the factfinding and reasoning processes on which the rule of law ordinarily relies when complexity and competing interests require the exercise of discretion.

Judges and others tend to view the numbers arrayed in guideline grids as end points of a decisionmaking process rather than as starting points. Is the rule of law observed when two facts suffice to locate an offender in a grid of prescribed sentences? We think not. The rule of law requires that a court first determine what facts are relevant in light of the purpose for which a penal sanction is being imposed and then, by inference from those facts, reason to the type and amount of penal measure.

Such application of the rule of law would specify how, at the trial court, the purpose of the sentence in a particular case is to be determined, and how the facts relevant to choosing the type and amount of sanction are to be distinguished from facts that are irrelevant. Such application would specify the process by which the relevant facts are to be found and how strong the inferences drawn from them must be for a sentence based on them to be lawful. The rule of law would set the standard of review applicable when this factfinding or reasoning is alleged not to satisfy these requirements. While promulgation and enforcement of rules—even the rules embedded in guideline grids—is "law" of a kind, the "rule of law" is something more.

What has been lost by using presumptive guidelines? Presumptive guideline grids have sometimes altered sentencing practices and the distribution of punishments, have reduced the appearance of sentencing disparity (as conventionally defined), have in some jurisdictions made prison population projections more reliable and (at least theoretically) more sensitive to resource constraints, and have in a few jurisdictions generated a body of useful appellate case law. Nevertheless, we think the decisional rules embedded in most of them fall short of rule-of-law requirements.

Using presumptive guideline grids to structure sentencing exaggerates the importance of current offense and prior record—facts made relevant, to the near exclusion of others, by their placement along the two axes of the grids. Rule-of-law sentencing would structure the factfinding by which a sentencing court determines which circumstances of the case are relevant, and the reasoning by which it selects the penal strategy (e.g., deterrence, incapacitation, rehabilitation) and the particular penal measures that most plausibly advance public safety in light of those facts. The rule of law requires that, for any sentence, the strategy linking penal purpose to the penal measures imposed be at least plausible—maybe "more plausible than the avail-

able alternatives." This requirement calls in turn for factfinding and reasonable inferences about how well the penal strategy and penal measures employed suit the facts of the particular case and offender.

Perhaps the core deficiency of presumptive guidelines is that they encourage judges to avoid this underlying complexity. In examining this complexity, we use noncustodial penal measures for illustration, because in most jurisdictions a sentence to prison is imposed in only about half of all felony cases (and is, even in those cases, almost always followed by a period of noncustodial supervision) and because any effort to bring consistency and reason to the use of noncustodial measures immediately brings the complexity to the surface.

Noncustodial penal measures are of many types, can be combined in almost infinite variation, and cannot be reduced to "duration" or another single measure of penal burden. Extending the reach of guideline grid systems to encompass such sentences has proved difficult and may have reached a dead end. This is because noncustodial penal measures cannot serve the purposes for which they are imposed unless they are tailored to the varied nonlinear characteristics and circumstances of individual offenders. The challenge is to determine how "tailoring" sanctions can be governed by the rule of law and not left to the unfettered (and perhaps biased) discretion of judges. If that challenge could be met, there would be no reason not to rely on those principles and procedures in imposing custodial sentences as well.

What is gained by reasoning from penal purpose to sentence by inference from facts and circumstances in each case? At the most general level, the rule of law by which sentences should be imposed may be stated as follows:

Decisions about the types and amount of penal measures to impose should be

reached, at a specified degree of confidence, through a publicly explained and reviewable application of a legal standard, to facts found to a specified degree of subjective certainty by fair inference from reliable evidence—with the specifications, the legal standard, and the burden of persuasion established by lawful authority other than the decisionmaker.

This statement is admittedly abstract, but it is not unknown in criminal court, where a guilty verdict is lawful only if the factfinder is confident beyond a reasonable doubt, in light of all relevant evidence, that the facts required by statutory definition of the crime have been proved.

It would be paralyzing to require a court to find beyond a reasonable doubt that the sentence imposed in a given case will advance its specified penal purpose, but the rule of law requires this level of confidence only for decisions about guilt. A burden of persuasion better suited to the sentencing decision might be that the sentence imposed is “more likely to advance the penal purpose than alternatives available to the court.” But rule-of-law principles are slighted if there is *no* burden of persuasion on this question; that is, if it were lawful for a court to impose a sentence it believes, on the basis of known evidence, is *not* likely to advance the penal purpose. This is far too often the case today, most obviously when an addicted offender is sentenced to prison for drug treatment even though the court has good reason to doubt that a treatment slot will be available.

It would indeed be possible to ground sentencing decisions in the kind of factual inquiry that criminal courts are designed to conduct. That could happen if courts’ sentencing power were exercised with case-by-case attention to the plausibility of the sentence as a means to achieve just punishment and public safety, and if care were taken to

invoke only penal measures that are actually available. This type of factual inquiry would assign prosecution and defense a function for which they are (or should be) well prepared. In addition, factfinding of this kind is especially suitable to appellate or other review. On review, the sufficiency of evidence on which a sentencing court makes its findings of fact, and the strength of the inferences drawn from them that lead it to the sentence imposed, can be tested against a prescribed legal standard.

How would rule-of-law sentencing work?

To ease the task of illustrating how the rule of law could be applied to sentencing, and why it would be worth applying, we assume a jurisdiction in which public safety and just punishment are by statute the only permissible purposes of sentences. On the basis of these assumptions, rule-of-law sentencing might be structured this way:

1. When imposing sentence—

- (a) the court shall specify the following: the primary purpose (just desert or public safety), the facts relevant to its finding of desert, the penal strategy or strategies by which it finds public safety would be advanced by its sentence, the penal measures by which it expects the sentence to serve that strategy, the facts upon which it finds the sentence more likely to advance the purposes of desert and public safety than alternatives known to it, and the facts justifying any exchange of desert for public safety;
- (b) the court shall consider public safety the primary penal purpose, although just desert should be an element of and a constraint upon every sentence;
- (c) public safety trumps desert when the court finds the magnitude of deserved punishment would interfere with the most plausible penal strategy for advancing public safety; but

- (d) just desert is the only permissible purpose when the court finds no strategy plausible for advancing public safety through imposition of any penal measures authorized for the offense.

2. The court shall impose the sentence it finds more likely to advance the specified penal purpose(s) than the alternatives.

This procedure may appear burdensome if weighed against the requirements of sentencing hearings in indeterminate sentencing systems today, or even in the most exacting presumptive guideline systems. However, the law in this country requires this sort of rigorous factfinding as a matter of course in other fields, where often much less is at stake. Moreover, although some facts will vary greatly from offender to offender, many will not, thus limiting the factfinding burden.

The procedure should be guided by a new style of sentencing commission, one that reviews evidence bearing on commonly arising questions of fact, further narrowing the original factfinding required in individual cases. Such a commission could, for example, make findings about the circumstances in which one penal strategy might generally be preferred over another for particular types of cases or for a particular purpose (for example, deterrence over incapacitation or rehabilitation over incapacitation for public safety; prison over fine or community service over prison for just punishment).

Similarly, a new style of sentencing commission could guide sentencing courts in making findings about the punishment a particular offender deserves. Just desert is notoriously difficult to “find.” It cannot properly be specified by a legislature or commission that is unfamiliar with the case-specific facts and circumstances bearing on an offender’s culpability, but we should be concerned that, without guidance, sentencing judges will “find” just desert by personal and essentially unreviewable hunch. A court’s findings about the range

of just punishment in a particular case should be tied to norms and values widely shared in the body politic, not to those of judges, legislators, or the media. The sentencing commission envisioned here would undertake systematic inquiry of the general population, to find the range of punishments widely thought to be deserved in archetypal offense/offender scenarios and to discover how the public's view is affected by knowing that particular penal measures tied to the public safety purpose are available to the sentencing court. On the basis of such inquiries, ranges of "not undeserved" punishments could be provided to the courts as starting points from which to reason to sentences.

What would rule-of-law sentencing orders look like?

The rule of law would require that sentencing orders link a limited set of conditions imposed on an offender to the lawful purpose or purposes specified. Multiple-conditioned, all-purpose sentences undermine the development of operational capacity in community correctional agencies. Correctional agents flounder when they try to deliver everything to a court that did not make clear what it wanted or how it expected the penal measures imposed to produce the intended effect. Such sentences also undermine accountability because violations of nonessential conditions often either go unpunished or are punished without good reason. They undermine cost effectiveness because staff who supervise an offender burdened with such a sentence either must waste resources on interventions and enforcement not tied to a penal purpose or not based on a plausible strategy, or they must guess which, if any, conditions of the sentence should be treated seriously.

Sentences to community service, drug or alcohol treatment, home detention, and other noncustodial penal measures serve sentencing purposes of desert or public safety (or, in some cases, both) through plausible penal strategies. But this is true only if the sentence

is imposed in cases in which the purpose and the strategy are congruent with the penal measures. For example, when community service sentences are imposed on individuals whose liberty poses immediate unacceptable threats to public safety, those sentences may indeed punish but will before long come into disrepute for their failure to incapacitate. When home confinement, curfews, and other surveillance techniques are imposed too widely on offenders whose unsupervised behavior is not viewed as particularly risky but whose offenses deserve to be punished, the conditions are not likely to be rigorously enforced. Again, the noncustodial penal measure is likely to fall into disrepute for its apparent inability to accomplish the penal purpose that would justify its imposition.

A rule-of-law sentencing order would reflect the principle of parsimony—parsimony in the number of penal strategies and measures. It would also reflect consideration of public safety risks that require management while the sentence is carried out. When a noncustodial penal measure is imposed or a prison sentence reaches its postconfinement phase, the offender's conditioned liberty may or may not put victim, family, or community at risk of harm. An essential task for sentencing courts (and for correctional staff responsible for implementing noncustodial sentences and the noncustodial phases of prison sentences) is to specify the risks the sentence is intended to contain. They should ask how serious the potential harm is, how likely the offender is to cause harm in the absence of penal intervention, and how perfectly the correctional intervention must contain the harm.

The answers can be found only by inference properly drawn from the individual characteristics and circumstances of an offender the circumstances surrounding his or her conditioned liberty, the purposes of the sentencing court, the penal strategy the court adopted, and the correctional resources available to manage the risk. When public safety is a dom-

inant purpose, it is hard to imagine findings more important for the sentencing court to make—or findings more useful to correctional agencies charged with carrying out the sentences.



What would be required of corrections under rule-of-law sentencing?

For sentencing to be governed by the rule of law in the way proposed here, judges must be offered a richer array of penal measures—noncustodial ones in particular—that are plausible for advancing public safety, and judges must be confident that corrections will execute them properly. For this to happen will require a shift in the mission of correctional agencies and new approaches to deploying and managing their resources.

Enlarging the corrections mission

Corrections has long focused on individuals—using authority and force in the routine business of punishing and treating them. Thus, we are unaccustomed to thinking about other ways public safety might be served by the considerable and increasing resources of corrections departments. But once public safety is understood as a condition of particular places at particular times, rather than as an exercise of correctional authority over some number of individuals, it is difficult to imagine an agency of the executive branch achieving it by confinement or "correction" of sentenced offenders or by "sending messages" to the not-yet convicted.

Collaboration with naturally occurring guardians. What might be more plausible ways to use the authority and resources of correctional agencies? Routine activity analysis and crime pattern theory explain crime as the result of a confluence of factors: a motivated offender, a vulnerable target, and a place and time when guardians are absent

The Need To Restructure Corrections—Evidence From a Milwaukee Neighborhood

A new framework for managing correctional resources emerged from the Wisconsin Governor's Task Force on Sentencing and Corrections, following hearings convened in 1996 in a Milwaukee neighborhood where public safety was in serious disrepair.* Community representatives were clear that crimes in their community should not go unpunished, although they were also clear that sentences were undeservedly harsh in drug possession cases, and they bemoaned the lack of attention paid, in prison and upon release, to the obvious mental health and substance abuse problems of members of their community sent there for correction. But most of all, they did not believe that routine operation of the criminal justice system would affect the public safety problems they felt most acutely.

The problem at 9th and Concordia

A police officer detailed the conditions, as he knew them, on one street corner. At 9th and Concordia, he reported, 94 drug arrests were made within a 3-month period earlier in the year. These arrests, he pointed out, were easy to prosecute to conviction. But despite the 2-year prison terms routinely handed down by the sentencing judges, the drug market continued to thrive at the intersection, posing risks to the safety of all who lived nearby or had to pass through on their way to work or school.

That the removal to prison of almost 100 felons did not increase public safety at that street corner revealed the disconnect between public safety and corrections. It surfaced the need for further inquiry into the nature of the problem at that location and into the deployment of corrections resources devoted to it. Informal inquiries after the hearing revealed that those arrested for drug offenses at the corner returned, typically after serving about 12 months of the 2-year sentences, to "supervision" of the most passive kind by parole agents to whom they were assigned randomly, who did not coordinate their supervision plans, and who were

apparently ignorant of their respective clients' connections to the same location.

Deployment for public safety

To the task force, a correctional agency aiming to advance public safety at 9th and Concordia would have to know the ecology of the threats to safety peculiar to that place and would have to deploy personnel and services in response, rather than focusing on one returning offender at a time. The task force noticed that if only one drug felon were arrested each week, and if only 80 percent were convicted and drew the 2-year prison sentence (with parole after 12 months), Wisconsin would have in effect allocated 40 prison beds and 8 correctional officers to the problem at that location. If, instead, the Department of Corrections had hired and deployed eight probation or parole officers to 9th and Concordia, it could have had one there 24 hours a day, 7 days a week and, within the same budget allocation, could have had another pair working on projects to advance public safety in the area.

In other words, the task force realized that corrections personnel could be *deployed to the place where public safety is at risk*—to enforce sentence conditions of unpaid labor (for example, with community groups who were restoring abandoned houses nearby), to ensure active rather than passive supervision of the offenders there, to block their slide back into the anonymity that fosters crime, and to help them find and keep jobs. Meanwhile, the \$3,500 per inmate that Wisconsin spends annually on the nutritional, health, and other basic needs of each offender in prison could have been spent on making habitable the afflicted neighborhood from which they came—and to which, if imprisoned, they are sure to return.

* *Wisconsin Governor's Task Force on Sentencing and Corrections*, Final Report, Madison, WI: University of Wisconsin Law School, 1996; reprinted in *Overcrowded Times* 7 (6) (1996): 5–17.

or ineffective. "Guardians" in this usage are people who have a protective relationship to a potential victim, people who are responsible for or are willing to assume responsibility for a targeted place, and people who have an intimate or supervising relationship with the potential offender. Such guardians are abundant in safe places. But they can also be found in dangerous places. The most effective police, probation, and parole officers know how to find them and enlist their help.

This is the line of thought that has led to the more complex and more intensely local engagements that characterize problem-oriented community policing. For more than a decade, police have been learning to collaborate with "naturally occurring" guardians to solve crime and disorder problems. Probation and parole officers—"official guardians"—need also to find and invoke the authority of naturally occurring guardians of the offenders under their supervision, of the people made vulnerable by proximity to them, and of places where the resulting risks arise.

The theoretical framework for restructuring corrections, set out here, emphasizes the power of naturally occurring forces in the community to create and maintain public safety and invites corrections to form relationships with them. The framework emerged from the authors' work on the 1996 Wisconsin Governor's Task Force on Sentencing and Corrections.⁶ (See "The Need To Restructure Corrections—Evidence From a Milwaukee Neighborhood.")

Of course, correctional resources are for the most part tethered to individual offenders by the sentences imposed, and correctional agencies have no license to trade their statutory, offender-centered responsibilities for place-based ones. But they can learn from the experiences of police departments that have moved beyond reactive patrol, and beyond trying to arrest more bad guys each year, toward partnership with community

to produce and maintain public safety. Correctional agencies can also learn from scattered, low-visibility attempts to adapt some of the problem-solving techniques of effective community police officers to neighborhood supervision of offenders.⁷

Principles for managing corrections for public safety. From observation of various police and corrections operations whose design reflects analysis of the public safety threats arising in particular places, we draw a half dozen principles to guide correctional agencies embracing a public safety mission:

- The nature and degree of supervision of an offender should be directly related to the risk of harm he or she poses if unsupervised. In other words, correctional measures should be tailored to the gravity of the potential harm and to the likelihood of its occurring without those measures. Thus, for example, corrections should not devote the same kind or quantity of resources to a petty thief (even though the likelihood of another theft is high) as devoted to the opportunistic burglar (whose chance of committing another offense may be lower but whose potential for harm is greater).
- The graver the potential harm and the more likely it is to occur if nothing is done to reduce the risk, the more active must be the supervision when the offender is not in prison. The nature of supervision should change as the risk to public safety the offender presents changes over time.
- Alacrity, flexibility, and parsimony should characterize responses to changes in the risks to public safety posed by offenders under supervision. For corrections staff in prisons as well as in the community, both legal authority and resources need to be configured to permit them to tailor correctional measures to changes in offenders' circumstances. Proper management of staff in exercising such discretionary power must also be active and not rely on procedural formalism.
- "Active supervision" requires that offenders who pose a risk to public safety not be allowed anonymity—not in the community and not in prison. Anonymity enables them to conceal themselves from naturally occurring agents of social control as well as from correctional agents. Active supervision is the broad engagement of correctional staff with offenders in whatever setting they are found, as well as with police; other members of offenders' communities; and offenders' families, neighbors, employers, friends, and enemies. This type of supervision necessitates reorganization and a new management style for correctional agencies, enabling them to replicate in large communities, where anonymity is more the norm, the active supervision and neighborhood orientation more often found in small communities.
- Active supervision also requires creative program development in correctional agencies. Here the aim should be for every offender who poses a risk warranting supervision in the community to have a stable housing situation; to be in the labor market; and to be bound to a supportive network of family and neighbors, when possible, or to others recruited to that role by correctional agents in the community. These requirements represent major challenges to conventional practice because most correctional agencies have not developed the capacity, for example, to create jobs and job placement services where they are lacking.
- Finally, while correctional agencies committed to the public safety purpose of sentencing need to be more active in supervising offenders and will have to seek more intensive engagement with the communities where the offenders are found, it is important that these agencies not adopt strategies and programs that conflict with the naturally occurring forces of social control that can be found in every neighborhood, even the most crime-

ridden. Active supervision requires familiarity with the operation of those forces in the lives of offenders and others who live and work where correctional agents have public safety responsibilities.

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Allocating corrections resources

More than clarity is required. The nature of public safety also demands that any correctional agency hoping to promote it will need to build new capacity, from the bottom up, and will need to construct new systems to manage that capacity and the flow of information it requires. That is because information from the local level will be required for monitoring and revising deployment plans at individual agent, regional, and State levels—and this information should be expected to change rapidly.

The experience of police agencies that are grappling with the demands of problem-oriented approaches makes it evident that victim vulnerability and public safety assets and deficits vary greatly from place to place. This necessitates planning and overseeing a State's responses to variations in its corrections investments—variations more complex, changeable, and subtle than "caseload" or "offender needs." The process ought to be grounded in information, gathered systematically and periodically, about the particular public safety threats and the naturally occurring community capacities to contain them found, neighborhood by neighborhood, throughout a State.

We know of no correctional agency that has such capacity today. But rule-of-law sentencing would call for judges to be provided information of this kind, and it is needed by

Risks to Public Safety Identified in a Milwaukee Neighborhood by Correctional Agents

Homicide	Assault	Sex Offense	Drug Offense
"Crime of passion"	Violence by intimates	Child victim	Chemical dependency
Incidental/accidental	Violence by strangers	Situational	Street-level sales
Premeditated	Armed (gun)	Adult victim	Major dealers
Burglary	Public Order Offense	Fraud	Theft
Opportunistic	Alcohol or other drug abuse	Impulsive	Theft
Lifestyle/thrill	Troublemaker	Monetary gain	Embezzlement
Armed (gun)	Mentally disabled	Predatory	Robbery

corrections to support locally oriented allocation of resources (for example, prison cells, treatment slots, transitional housing, various types of community supervision officers, job training, and drug treatment programs).

Probing for specification of public safety problems. In pursuing this issue for the Wisconsin Governor's Task Force on Sentencing and Corrections, we wanted to find out whether different communities would nominate different public safety problems as warranting attention. It was clear to us, and to the judges and other officials with whom we worked, that a corrections department ought not conduct a public opinion survey of how many prison cells are needed or what sentence should be imposed on a particular offender about to come before the court. It was just as clear, however, that without systematic inquiry, the State's policymaking apparatus was in no position to specify the nature and patterns of public safety threats in different parts of the State, and that without such inquiry policymakers would remain ignorant about what, in the view of those closest to the threats, might be done to reduce them.

In the time available to the task force, it was possible only to conduct a survey to test the proposition that perceptions of public safety threats vary from one location to another throughout the State. Variation was indeed what the pollsters found. Survey respondents'

fears were specific to the places where they lived, the places where they worked, the places they visited, and the places they avoided for safety's sake.

Categories of risks and "best practices" for managing them. To find out what might be done to manage place-specific public safety risks in Wisconsin, we first set out to categorize them in a way that would lend itself to finding best practices for dealing with them. However, no routinely gathered data were available to categorize the kinds and degrees of risk to public safety posed by the 32,000 felony offenders under probation and parole supervision in Wisconsin in 1996. Nor were such data available for the 11,000 felony offenders then in prison or the 6,000 expected to be released to parole over the following 5 years. In the absence of these data, we relied on focus group sessions conducted among experienced probation and parole staff to define behavioral categories of risk and to estimate the number of offenders in each category, in locations throughout the State. From this information, a typology of public safety risks was developed (see the exhibit).

For each of the 24 categories of risk in the typology, the focus groups sketched what would be required by "best practices" if public safety were the correctional objective. Their work permitted the task force to esti-

mate, by location, how many prison cells and how much local confinement capacity would be needed; how many community supervision agents would be needed; and what drug treatment slots, jobs, and housing would have to be made available.

The focus groups revealed differences by locality in the distribution of offenders' criminal propensities and of the circumstances in which they posed risks to public safety. They also revealed differences in community assets and correctional assets locally available to contain those risks. The result was a task force plan reflecting what best practices would require in allocating State corrections resources for public safety.

We then developed a computer application in which information of the kind provided by the focus groups was combined with data routinely gathered on related topics. This was done so that the task force and Wisconsin's Department of Corrections could see how a "bottom-up" public safety strategy might be constructed and implemented and how variations on that strategy would affect the demand for and deployment of correctional resources.

Legal authority for restructuring corrections. Flexibility in corrections' response to change in individual offenders' circumstances—necessary if public safety is the purpose—is incompatible with the core idea of determinate sentencing: that the specifics of a sentence should be determined by the court at the time sentence is imposed. Of course, more than half the States are still properly characterized as having indeterminate sentencing systems, and the flexibility public safety requires can be achieved in at least some determinate systems. In any event, sentences with public safety purposes, whether determinate or indeterminate as to duration, need to be *indeterminate as to content*.

It was with an eye to achieving the necessary flexibility that the Wisconsin Governor's Task Force asked how State law would have to be

amended to support “best practice” in corrections management of public safety risks. It recommended abolishing felony probation and creating a new form of confinement, one merging features of prisons with varying degrees of liberty and obligations of the offender in the community. This new penal measure, “Community Confinement and Control” (CCC), was designed to ensure substantially more supervision and control of behavior, and also substantially more treatment, employment, and other socialization programs than conventional probation and even “intensive” probation ever had—but for shorter periods. And because the task force recognized that parole supervision often approaches unsupervised liberty, it felt that no felony offender sentenced to prison should be granted parole without successfully completing some period in CCC status. It followed that offenders sentenced to CCC would be paroled from it, just as those sentenced to prison would be paroled from CCC after serving at least a brief time in that status on their way out.

There was remarkably little objection, from any quarter, to the proposed abolition of felony probation and to the use of CCC when purposeful supervision in the community is required. The desire to do away with felony probation stemmed from a nearly universal lack of confidence in it and from a sense that offenders convicted of felonies in Wisconsin either present, at the start of their sentence, risks too serious for conventional probation or require very little supervision at all (because all that is intended is that they fulfill a particular condition). For the latter class of cases, the task force recommended a new sentence, “conditional supervision,” which would require almost no supervisory resources unless the condition(s) were not met.

Where does this all lead?

Using the State of Wisconsin as an example, we have sketched, in some detail, how public

safety would be advanced by fundamental amendments in the mission and methods of a correctional agency. We went into detail to demonstrate that it is possible to specify the redeployment of authority and resources required for such a change. If we are correct about the public safety benefits of redeploying correctional resources this way, there is little reason not to get on with it. Rule-of-law sentencing would surely ease such a transformation but is not essential. On the other hand, rule-of-law sentencing would be a sham if a robust array of penal measures were not put at the disposal of the courts, or if sentencing judges were not provided accurate information about what penal measures are actually available and what effects they can reasonably be expected to have. In practice, however, adoption of rule-of-law sentencing by the courts would create irresistible demand for corrections to respond with place-sensitive redeployment of resources. In the same way, guideline grids would likely give way to rule-of-law sentencing if correctional practice were reformed along the lines described here.

Notes

1. For a discussion of the current debate among community corrections practitioners about their mission and methods, see Dickey, Walter J., and Michael E. Smith, *Dangerous Opportunity: Five Futures for Community Corrections*, Washington, DC: U.S. Department of Justice, Office of Justice Programs, 1999; and Joan Petersilia, ed., *Community Corrections: Probation, Parole, and Intermediate Sanctions*, New York: Oxford University Press, 1998.
2. This paper is one of four in the first “round” of publications from the Executive Sessions on Sentencing and Corrections. Together the four offer a framework for understanding the issues raised in the sessions. The other three papers are *Fragmentation of Sentencing and Corrections in America*, by Michael Tonry (NCJ 175721); *Reconsidering Indeterminate and Structured Sentencing*, by Michael Tonry (NCJ 175722); and *Incorporating Restorative and Community Justice Into American Sentencing and*

Corrections, by Leena Kurki (NCJ 175723). All: Research in Brief—Sentencing & Corrections: Issues for the 21st Century, Washington, DC: U.S. Department of Justice, National Institute of Justice/Corrections Program Office, September 1999.

3. Morris, Norval, *Madness and the Criminal Law*, Chicago: University of Chicago Press, 1982: 196.
4. Smith, Michael E., “Let Specificity, Clarity and Parsimony of Purpose Be Our Guide,” *Law and Policy* 20 (4) (October 1998).
5. Frankel, Marvin E., *Criminal Sentences: Law Without Order*, New York: Hill & Wang, 1972.
6. Walter Dickey was the chair and Michael Smith the research director of the Wisconsin Governor’s Task Force on Sentencing and Corrections.
7. Smith, Michael E., and Walter J. Dickey, “What If Corrections Were Serious About Public Safety?” *Corrections Management Quarterly* 2 (3) (Summer 1998): 12–30.

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