“OHIO’S SENTENCING ODYSSEY – a critique of the Rehabilitative, Retributive and Restorative models”

Scope of Workshop Inquiry established by RC 181.23

- focus on proportionality, effectiveness and programing in criminal sentencing
- apply the principles of sentencing to facilities, services and programs that include punishment, deterrence, fairness, rehabilitation, and treatment
- Design sentencing to enhance public safety by incorporating
    1. certainty in sentencing [predictable and consistent]
    2. deterrence [consequential punishment to discourage others]
    3. reasonable use of correctional facilities, programs and services
    4. and design a system to Achieve fair sentencing [symmetrical or at least congruent sentences imposed for similarly situated offenders and offenses]

Sentencing History

1. 100 year history of the Rehabilitative Model, indeterminate sentences
2. Retributive Sentencing: Federal Sentencing Reform Act of 1984, Ohio: SB 2, determinate sentencing
3. Restorative/Therapeutic: HB 86, sentencing yet to be determined
4. The one constant through sentencing transition in Ohio is a funding relationship between courts of common pleas and ODRC…[

Sentencing Critique

“My eyes only” documenting for me the historical development of sentencing from 1996 through the Neighborhood Safety Constitutional Amendment through my lens of vision focused on constitutionality (separation of powers, judicial independence and judicial discretion) and ethical constraints in the context of the tensions between social order and individual liberty in the fields of criminology and penology

Foundational Law

- <u>Justice</u>, an organizing principle of government supported by <u>Rule of Law,</u> that defines and enforces rights, duties, privileges and immunities of citizenship
- Rule of Law bookended by Constitution and Bill of Rights
    1. Constitution establishes social order through <u>Federalism</u> and <u>Separation of powers</u>: tripartite government: legislative, executive and judicial branches, equal, independent but coordinated, balanced and checked-government in equilibrium. Government functions by enacting and enforcing our

collective norms and values expressed in laws which conform to the Constitution.

2. Bill of Rights protects liberty: Those rights frame the administration of justice; they establish procedural due process; they play out in a fault-based, adversarial, common law, precedent bound system of justice litigated in the crucible of a jury model.
3. Administration of criminal justice eases the tensions between order and liberty. It is the fulcrum on which the judiciary balances our collective right to social order against the individual rights of liberty of convicted criminals. Within the Constitution and laws that conform to it, the judiciary bears that responsibility.
4. An extension of over zealous order is tyranny: January 6th. An extension of unfettered liberty is anarchy: post-George Floyd riots.

Separation of Powers Relevant to Criminal Sentencing

Shortly after the battle of Hastings, Paul Pfeifer wrote a majority opinion in *State ex Rel. Bray v. Russell* (2000), 89 Ohio St.3d 132

- The essential principle underlying the policy of the division of powers of government…[is that].. none of them ought to possess directly or indirectly an overruling influence over the others. (State ex rel. Bryant v. Akron Metro. Park Dist. (1929),
- Judicial power resides in the judicial branch…[and]…The determination of guilt in a criminal matter and the sentencing of a defendant convicted of a crime are solely the province of the judiciary JUDICIAL INDEPENDENCE

United States v. Mistretta, (1989), 488 U.S. 361distinguishes judicial discretion from judicial independence

- the function of determining the scope and extent of punishment -- never has been thought to be assigned by the Constitution to the exclusive jurisdiction of any one of the three Branches of Government.
- Congress, of course, has the power to fix the sentence for a federal crime
- And the scope of judicial discretion with respect to a sentence is subject to congressional control. I always equated discretion with independence, it is not, but where the bounds of discretion are determined, exercise of discretion is mostly unfettered w/i those bounds

Separation of powers is also supported by the *Ohio Code of Judicial Conduct* Canon 1:

- A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.
- The Board of Commissioners held in BCGD Op. No. 2003-9 that under Canon 4(C)(2), Canon 2(B) and Canon 2(A) of the Ohio Code of Judicial Conduct, common pleas court judges should not serve on judicial corrections boards for community-based correctional facilities and its programs.

- Rehabilitative, Indeterminate Sentencing:

- Roots in Progressive Reform, Elmira, NY, 138 years ago: Indeterminate sentencing, Ohio, 1884/5, Edward Lindsey, Historical Sketch of the Indeterminate Sentence and Parole System, Journal of Criminal Law and Criminology, Volume 16 | Issue 1:

> In 1884 the Ohio legislature passed an Act providing that "every sentence to the penitentiary of a person hereafter committed for felony, except for murder in the second degree, who has not previously been convicted of a felony and served a term in a penal institution, may be, if the court having said case thinks it right and proper, a general sentence to the penitentiary. The term of such imprisonment of any person so convicted and sentenced may be terminated by the board of managers, as authorized by this Act; but such imprisonment shall not exceed the maximum term provided by law for the crime of which the prisoner was convicted and sentenced; and no such prisoner shall be released until after he shall have served at least the minimum term provided by law for the crime for which he was convicted." By other sections of the Act provision was made for the classification and the parole of prisoners under the indeterminate sentence modeled in the main upon the Act governing the Elmira reformatory.

- In 1906, Roscoe Pound, Dean of the University of Nebraska College of Law, called upon the ABA to adopt an appointive system for the selection of state judges, to eliminate the sporting theory of justice and pursue "sociological jurisprudence."

- The Rehabilitative Sentencing Model, *Williams v. New York* (1949), 337 US 241

    - United States Supreme Court applied the rehabilitative sentencing model in reviewing a death sentence in a New York state court conviction in

Williams v. New York. After a two week jury trial, Williams was convicted of murder in the first degree and the jury recommended life imprisonment.

  - The law in New York at that time required a pre-sentence report …After considering information as to his previous criminal record without permitting him to confront or cross-examine the witnesses on that subject, the trial judge sentenced him to death.
  - US Supreme Court held that it had long been the practice to permit the sentencing judge to exercise a wide discretion as to the sources and types of information used to assist him in determining the sentence to be imposed within the limits fixed by law…I assume this is precedent to both state and federal prosecutions, but it would depend on applicable law as to whether a judge had latitude to override a recommendation of life.

- 1958: Congress created the Judicial Sentencing Institute and Council to formulate standards and criteria for sentencing;
- 1972; The US Parole Board developed a "customary" range of confinement
- 1976: Parole Commission and Reorganization Act 'to moderate disparities in the sentencing practices of individual judges.

- Culture Revolution:

- Transition from the Rehabilitative indeterminate sentencing to the Retributive determinate model was certainly driven a loss of public confidence in the way it was managed, but the transition also had much to do with the excesses that came with the Cultural Revolution that began in the 1950s, engulfed a fifty year spread of history and continues today.

    1. The Revolution had profound implications to morality and criminality.
    2. It was defined by radicalism and "the turn on, tune in and drop out" generation. [At Mt. Union that was 3.2 beer.]
    3. It introduced the carnage of drug abuse, addiction and associated crime to a nation wholly unprepared for the unforeseen consequences of social disruption and escalating violent criminal conduct. Ozzie and Harriett didn't see it coming
    4. The revolution embraced multiple factors, in part driven by changes in substantive law, some by grass roots movements, others righting wrongs, real and perceived: The Civil Rights movement, Brown v.

Board of Education, the 1964 Civil Rights Act, the 1965 Voting Rights Act, the Hart-Cellar Immigration Act, and in 1968 the Fair Housing Act, a "tangle of pathology," race riots between between 1965 and 1968; the Kerner Commission's conclusions concerning "white racism" and police practices [employment and housing in that order were chief complaints among blacks]; campus disruptions; a collision between drug abuse and traditional concepts of law and order; anti-war fervor; the women's rights and a hundred other factors that could be added.

5. While the nation's population had increased 32% between 1960 and 1984, combined violent and property crime increased 354% in some unexplained expression of the revolution, whether it was the cause or simply correlated doesn't matter, it did not go unnoticed in Washington or in Columbus. Crime and punishment are inextricably tied together.

- President Johnson signed into law the "Omnibus Crime Control and Safe Streets Act of 1968," recognizing that states bore the brunt of escalating crime, and were not adequately prepared to manage the volume of cases that were being anticipated. The act provided financial assistance to state and local government law enforcement."

- Between the *Williams* case and *Mistretta,* the Supreme Court began its own revolution when it resurrected the 14th Amendment and introduced the states to equal protection and due process by applying the federal Bill of Rights to the administration of state criminal justice.

  - Over two decades, the Warren Court dramatically altered, standardized and enforced uniform trial and appellate practice across the country.
  - The impact was most profoundly felt in the south where Jim Crow laws were overturned and fairness and predictability were introduced into trial practice.
  - Police Conduct: Through a series of cases, Supreme Court established minimum standards for police conduct in investigations and arrest.
    - The Supreme Court policed the police in their methods and practices in conducting investigations.
    - Probable cause became the enforceable lynchpin of searches, seizures and arrests.
    - Confessions were circumscribed by knowing, intelligent and voluntary standards.

- And enforcement was through exclusion of evidence that was obtained outside those constitutional standards.
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- *Terry v. Ohio*
  - Introduced a diluted probable cause standard for police officer safety where an officer had an articulable suspicion that a suspect was on a criminal mission thus allowing a "stop and frisk" for weapons and seizure of contraband found incident to the frisk.
  - The court held that a minor traffic offense committed in a police officer's presence was sufficient probable cause to stop the vehicle, order the driver and passengers to exit the vehicle and seize weapons and contraband observed in plain sight.
  - These ruling had a significant impact in high crime black neighborhoods where criminality was more open and observable: Broken Windows theory of policing
  - Stop and frisk led to claims of racial bias and discrimination leading to disparate impact on blacks in part because it required a higher police presence in certain neighborhoods resulting in more police/resident contacts, increased stops and frisks, and because of high crime in the neighborhoods, more arrests of blacks.

- [The criminal justice system is reactive, particularly the courts. What triggers everything in criminal justice is crime, or allegations of crime, or probable cause to believe that crime has been committed, or reasonable suspicion articulated]

Procedural Due Process, Post-conviction, *Morrissey v. Brewer* (1972), 408 U.S. 471

- A parolee's liberty implicates the protection of the Due Process Clause of the Fourteenth Amendment, and
- termination of that liberty requires an informal hearing to give assurance that the finding of a parole violation is based on verified facts to support the revocation.
- At the revocation hearing, which must be conducted reasonably soon after the parolee's arrest, minimum due process requirements approach *Crim. R. 11.*

Transition from the indeterminate, discretionary model of sentencing to retributive sentencing, *United States v. Mistretta*,

In describing indeterminate sentencing:

- Under the rehabilitative model, Congress delegated almost unfettered discretion to the sentencing judge to determine what the sentence should be within the customarily wide range so selected
- This broad discretion was further enhanced by the power later granted the judge to suspend the sentence and by the resulting growth of an elaborate probation system.
- Also, with the advent of parole, Congress moved toward a "three-way sharing" of sentencing responsibility by granting corrections personnel in the Executive Branch the discretion to release a prisoner before the expiration of the sentence imposed by the judge. Congress established the legal framework, the judiciary imposed sentence and the executive, through parole, determined prison release and terms thereof.
- Having just said unfettered discretion nevertheless the scope of judicial discretion in sentencing is limited to the parameters established by relevant sentencing laws. The transition from the rehabilitative model to retributive was intended to reduce discretion

Mistretta explained the failures in the rehabilitation model,

In 1984, The U.S. Senate reported that the rehabilitation model was outmoded, and efforts of the criminal justice system to rehabilitate had failed. Indeterminate sentencing system had two ‘unjustifi[ed]’ and ‘shameful’ consequences.

1. The first was the great variation among sentences imposed by different judges upon similarly situated offenders. (asymmetrical, maybe incongruent.)
2. The second was the uncertainty as to the time the offender would spend in prison.

Federal Sentencing Reform Act of 1984 through the eyes of *Mistretta, inter alia*:

3. Congress rejected strict determinate sentencing, finding that a guideline system would be successful in reducing sentence disparities while retaining the flexibility, and the Judiciary Committee rejected a proposal that would have made the sentencing guidelines only advisory.
4. Rejected imprisonment as a means of promoting rehabilitation, stated that punishment should serve retributive, educational,

deterrent, and incapacitative goal; Created the United States Sentencing Commission to consolidate the power of the judge and parole authority to decide what punishment an offender should suffer; directed Commission to devise sentencing guidelines; and prospectively abolished the Parole Commission.

5. The Sentencing Commission made all sentences basically determinate reduced only by any credit earned by good behavior while in custody…' [Truth in sentencing.]
6. It made the Sentencing Commission's guidelines binding on the courts, with limited judicial discretion to depart from the guideline applicable to a particular case; and the Act also requires the court to state its reasons for the sentence imposed, and to give 'the specific reason' for imposing a sentence different from that described in the guideline.
7. It authorized limited appellate review of the sentence.

The appeal in *Mistretta* dealt with separation of powers when non judges and judges were place on a commission within the judiciary with powers to promulgate.

Procedural due process, first recognized in post-sentence, pre-revocation hearing , in *Morrissey*, probably was fair warning that it would be applied too other aspects of sentencing]as it did in] series of cases ending with *Blakely* and *Booker*.

- In *Washington v. Blakely* (2004), 542 US, and concluded that a maximum statutory sentence is the maximum sentence a judge may impose based on a jury verdict or facts admitted to by a defendant through a guilty or no contest plea.
- The court then applied *Blakely* to the United States sentencing grid in United *States v. Booker* (2005), 543 US It recognized that judicial fact finding within a range of sentences is permitted.
- As a remedy for the *Blakely* violations, the *Booker* court held that the Federal Sentencing Guidelines must be treated as advisory only, with the maximum sentence being the top of the range set by the statute under which the defendant was convicted.

Considerations in the Rehabilitation Model

- A root cause of some of disparities in sentences for offenders who have committed similar crimes, often result more from differences in the values, beliefs, and personalities of the judges or parole board members than from differences among

offenders. Is this an explanation for the disparate sentencing between Cuyahoga and Lake Counties. Conversely, nothing inherently wrong if offenders convicted of the same crimes receive different sentences when justified by their respective risk profiles or criminogenic factors.

- Broad discretion given judges and corrections officials gives too much opportunity to invoke their conscious biases or unconscious stereotyping.

- Inadequate implementation of rehabilitative programs. Did indeterminate sentences deliver on rehabilitation? Vocational training was and is often not relevant to the job market, London Prison Farm. Prison Industries. Psychiatric, psychological, and medical services were inadequate. Funds were seldom sufficient to provide rehabilitative services tailored to offenders' needs in prison or in the community.

- Just Desserts. Critics claimed that indeterminate sentencing severed the link between seriousness of crime and severity of punishment apparently because parole eligibility did not reflect the seriousness of the offense. The "deserved punishment" position is that people should receive particular punishments and that anything less, in the words of the Model Penal Code, "depreciates the seriousness of the crime." "He got his just desserts."

- Treatment effectiveness. There was a widely adopted view "nothing works," point of view reflected in *Mistretta.* The University of Cincinnati found that probation grants funneled under SB 2 through 2005 funded by ODRC and implemented by local corrections boards were largely ineffective. UC now assures us now that there exists a direct correlation between program integrity and a reduction of recidivism.

OHIO'S SENTENCING ODYSSEY

To the extent that there was rehabilitation under Ohio's "Rehabilitative Model", [some of it] was managed through probation under general terms and conditions.

- *State ex rel. Gordon v. Zangerle* (1940), 136 Ohio St.371, created a constitutional exception to separation of powers where the extra-judicial power exercised merely augmented the exercise of judicial function.

1. establishment of a probation department by the common pleas court did not violate separation of powers by encroaching upon the executive's pardon power. Constitutionally trial judges could either suspend imposition of sentence or suspend execution of sentence, but under the statute then in force, the trial court was limited to the former. "In the final analysis the judge or magistrate in suspending imposition of a sentence or granting probation merely makes an order in a pending case."

2. SB 2 eliminated both the suspension of imposition and the suspension of execution of sentences with the creation of a continuum of community control sanctions. The trial judge directly imposes one or more community control sanctions. Such a sentence is executed: nothing is suspended, and *Zangerle* does not speak to the constitutionality of such probation practice. Indeed, it is this line, between where the court's authority to impose sentence ends and the executive's authority to execute sentence [is about to] begin] that underlies the constitutional implications of the current statutory scheme where the executive's authority trumps judicial discretion by terms of a grant]

3. The General Assembly first recognized suspension of the execution of a sentence in 1965 with the enactment of "shock probation." An early version of intervention in lieu of conviction also provided "suspension of execution of sentence."

In Ohio, institutional criticism of the rehabilitative model focused on sentencing disparities and increased crime rates. Legislative remediation sought to bring greater consistency and certainty to sentencing in the 1970s and 1980s.

- In 1974, Ohio criminal code was rewritten based upon the Model Penal Code, [just desserts] I remember that trafficking in pot was reduced from 20-40 years to 1-5. The law retained indeterminate sentencing with the judge selecting the minimum term from a range set by statute for each of four felony levels. It extended shock probation to indefinite terms of imprisonment. Mandatory sentences appeared in the mid-70s for certain drug crimes. Ohio's eight prisons held 10,707 inmates on July 1, 1974.

- In 1979, Ohio became the sixth state to pass a Community Corrections Act, designed to divert felony offenders from the prison system. The original legislation created Community-Based Correctional Facilities (CBCFs) and prison diversion subsidy programs; and in 1990 the act was amended to allow for jail

diversion as well. This began an entanglement between DRC and trial courts that pervades the judiciary today.

- In the '80s, SB 199 mandated longer terms for high level 'aggravated' felons, especially on repeat offenses, and for those having guns while committing felonies. Similar legislation added longer mandatory terms to misdemeanor law, with increased penalties for impaired drivers. It added eight new sentencing ranges. The Ohio prison population on July 1, 1983 was 18,030.

- Governor's Committee on Prison Crowding issued a 1986 report that it was unable to agree whether the state
  - should build more prisons or restructure sentencing to fix prison crowding.
  - The Committee proposed remedial legislation and enacted
    1. earned credit programs,
    2. increased use of halfway houses,
    3. encouraged the adoption of parole guidelines,
    4. expanded community-based correctional facilities and
    5. enacted provisions to govern sentencing reductions if an overcrowding emergency occurs.
  - In March 1990, the prison population reached 31,268.

- At the federal level, President Reagan signed into law the *Anti-Drug Abuse Act of 1986.* The law allocated funds to new prisons, drug education, and treatment. The act substantially increased the number of drug offenses with mandatory minimum sentences. It mandated a minimum sentence of 5 years without parole for possession of 5 grams of crack cocaine while it mandated the same for possession of 500 grams of powder cocaine. The harsh sentences on crack cocaine trafficking and abuse disproportionately affected blacks.

- As the Ohio Sentencing Commission was ramping up, the legislature raised certain misdemeanors to felonies and created mandatory sentences for sex offenders. Crack cocaine made a dramatic entrance into drug scene. Longer sentences were imposed. Mirroring the federal experience, between 1974 and 1990, Ohio prison inmates increased by 400%. Length of stay exacerbated prison overcrowding.

- Following the federal precedent, the legislature explored a sentencing commission to develop comprehensive plans to deal with crowding and a range of other sentencing goals including public safety, consistency, and proportionality, sounding much as today's mandate.

1990, the seeds for competing views were sown in Ohio. As Berra said, we came to a fork in the road at the end of the rehabilitation model, and we took it: we went down both legs of the fork: Legislative and judicial

1. The General Assembly undertook a traditional and transparent legislative agenda in regular order to consider substantive and procedural changes to the administration of justice in a retributive model based on sound penological principles, and

2. Supreme Court administration and the OSBA joined together to adopt the agenda of the National Conference of State Court's (NCSC) State Courts Futures Program that embraced radical changes to the administration of justice utilizing an opaque process called "Apollo Forecasting" to gain public acceptance of some form of sociological jurisprudence that touches upon a concept of judicial governance and redistribution theory.

In my opinion, the General Assembly was operating in its legislative lane, and the Supreme Court administration was wholly outside its juridical lane. But the common denominator between them was Chief Justice Tom Moyer: Chair of the Sentencing Commission, CJ of the Ohio Supreme Court with superintendency authority and President of the CJ'S Association and Chair of the NCSC.

<u>Ohio Criminal Sentencing Commission,</u>

- In 1990, the General Assembly created the Ohio Criminal Sentencing Commission, chaired by Tom Moyer, Chief Justice of the Ohio Supreme Court, and composed of 31 appointed governmental officials diverse by politics, gender and race. Presumably the General Assembly modeled the commission after the United States Sentencing Commission, whose constitutionality was affirmed in *Mistretta*.

The substantive difference between the two commissions:

1. Federal Commission promulgates sentencing rules
2. Ohio Commission recommends legislative action

- Relevant legislation directed the Sentencing Commission to undertake a comprehensive review of Ohio's criminal law and recommend to the General Assembly appropriate changes to

  - "enhance public safety by achieving certainty in sentencing, deterrence, * * * a reasonable use of correctional facilities, programs, and services, and * * * fairness in sentencing." The same language we deal with today

- Based on its studies and findings, the Sentencing Commission made recommendations to the General Assembly for a comprehensive revision of Ohio's Criminal Code. On August 10, 1995, the governor signed into law SB 2 which became effective July 1, 1996. It premised its changes on reduction of imprisonment while moving toward retributive modalities. It dramatically changed the definitions of crimes and Ohio's system of sentencing.

  - It must be understood that after passage of SB 2 and its effective date, the Ohio Judicial Conference conducted preparatory conferences with the trial judges to explain the impact of the criminal code and the sentencing structures that surrounded. It was to be touted as "Truth in Sentencing,' and Common Pleas judges were asked to sell the concept in their respective jurisdictions: like offenders with like offenses would be similarly sentenced, inmates would serve the time they were sentenced to subject only to nominal good time and judicial release; parole would be abolished with respect to those sentenced under the new law. It was a "Law and Order" time in which the relevant statutory language demanded that the judiciary protect the public and punish the offender within stated parameters.

- Utilizing an entire year selling "Truth in Sentencing" was a wholly transparent process while providing a rationale for change that assured the public acceptance.

- A major impact of S.B. 2 was on drug sentencing. The cocaine and crack epidemics had struck the minority communities across the nation disproportionally. On the back of the epidemic, mandatory drug sentencing under S.B. 2 modestly increased our prison population. Across the nation, the federal drug sentencing guidelines significantly increased imprisonment.

  - From the time of the passage of *Anti-Drug Abuse Act of 1986* until 2015, violent crime and property crime every year dramatically went down. Although cause is debated, there was nothing in my view to interpret in this phenomena. Incarceration deterred crime, exactly what it was touted to do; incarceration

removed violent offenders from the streets. Retributive sentencing was intended to employ punishment to reduce crime, and it did. We should not have expected less.

- Although there is a paucity of support among sociologists for the fact that increased incarceration has deterred crime, there is a direct correlation between incarceration rates and reduced crime in an inverse relationship. Call it mass incarceration if you must, but it reduced crime.

    - The Brennen Center and other progressive think tanks claim that reductions in crime resulted from abortion and the banning of lead gasoline and paint. Intuitively, when statisticians control for this and that, they often use such controls to assure a desired outcome. Apparently there has been a return of lead paint and gasoline with recent increases in violent crime, and we can expect a dramatic upturn in 15 years with *Roe v. Wade* overturned.

- If it was viewed that Ohio joined the Retributive Sentencing Club, there was a less recognized side of S.B. 2. It stated a public policy that favored local sanctions for nonviolent offenders through alternative sentencing. The vehicle to accomplish this included Community Local Correction Boards and grants that were dependent upon an agreed and stated percentage of diversions from prison and jail under terms established and enforced by ODRC. For reasons stated in *BCGD Op. No. 2003-9,* judicial participation remains canonically suspect.

Ohio's transition from rehabilitative to retributive sentencing reflected much of the same historical concerns outlined in *Mistretta* and shared at both the state and federal levels.

- In implementing SB 2, Ohio replaced the rehabilitative model of sentencing with "truth in sentencing" intended to promote certainty and proportionality in felony sentencing.
- The hybrid sentencing plan retained indeterminate sentences for certain offenses, but most penitentiary sentences fell within ranges of determinate sentences that have been eviscerated by a growing list of exit ramps leading to early prison release. In the beginning, judges, not the parole board, controlled early release decisions. Discretion of judges is trumped by statutory authority.

R.C. 2929.11, PURPOSES AND PRINCIPLES OF SENTENCING HB 86

A) A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others, to punish the offender, and to promote the effective **rehabilitation** of the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.
(B) A sentence imposed for a felony shall be reasonably calculated to achieve the three overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders. [keep in mind theat the ORAS doesn't recognize the nature of the crime or victim's impact]
(C) A court that imposes a sentence upon an offender for a felony shall not base the sentence upon the race, ethnic background, gender, or religion of the offender.

R.C. 2929.12

A) Unless otherwise required by section 2929.13 or 2929.14 of the Revised Code, a court that imposes a sentence under this chapter upon an offender for a felony has **discretion** to determine the most effective way to comply with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code. In exercising that **discretion**, the court shall consider [but not make findings]***[seriousness and recidivism factors]***"
B) Borrowing from *Blakely*, within the range of sentences statutorily established by legislation
C) Discretion is a qualitative analysis of sentencing factors to relevant facts related to the victim, seriousness of the offense and recidivism considerations in contrast to the ORAS which is a quantitative analysis based on statistical probabilities and criminogenic factors related to the defendant, to-wit: a number. [focus group of judges I think that you would find consensus among them that the greatest predictor of reoffending is a history of offending and reoffending-2/4 points on ORAS]

- Although federal law had replaced rehabilitation with retribution, Ohio retained rehabilitation as a purpose of sentencing. SB 2 created presumptive prison for specific high level offenses and drug offenses. At the same time, it created community control preference for lower level felonies, but certain findings could require incarceration.

- SB 2 restricted judicial discretion, as it was intended by imposing fact-finding obligations upon judges before they impose more than the minimum or maximum prison terms. The statute also included mandatory prison terms, special terms for repeat violent offenders and major drug offenders, specifications, consecutive terms, and post release control, as well as provisions related to specific offenses and shock incarceration.
  - It authorized a range of sanctions other than imprisonment, allowing a sentencing judge to choose a combination of punishments that will best serve the overriding purposes of felony sentencing. That is the essence of judicial discretion. If a court is authorized to grant community control in a particular case, it may consider residential sanctions, nonresidential sanctions, and financial sanctions, including mandatory fines for certain offenses.

In 2006, the Ohio Supreme Court in *Ohio v. Foster* applied the holdings of Blakely and Booker to S.B. 2: judicial fact-finding dictated where a trial court imposes maximum sentences, consecutive sentences or enhanced penalties for repeat-violent or major –drug offenders.

- It found the offending statutes unconstitutional to the extent that judicial fact-finding is required before the imposition of a sentence greater than the maximum authorized by jury verdict or by defendant's admissions in those circumstances immediately set forth above.
- Through severance, the offending provisions were removed by the court's decision and sentencing factors became "considerations."

Severance of those restraints was felt by DRC:

- "The provisions [held unconstitutional] helped to keep the prison population static between 1997 and 2006. Since Foster, prison terms have increased about 5 months, on average. DRC estimates the cumulative impact by the end of the decade at over 8,000 prison beds.
- Severance of those restraints was felt by DRC: "The provisions [held unconstitutional] helped to keep the prison population static between 1997 and 2006. Since *Foster,* prison terms increased about 5 months, on average. DRC

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- In 1995, the prison census was 45,285; in 2000 it was 46,619; in 2005, a year before Foster, the prison census was 44,976; and in 2010 it was 51,145. The largest increase in the Ohio prison census was in the four years following *Foster* driven by unfettered judicial discretion when imposing a prison term within the basic ranges, or imposing maximum sentences, consecutive sentences or enhanced penalties for repeat-violent or major –drug offenders.

HB 86 became effective September 30, 2011. The Columbus Dispatch reported June 30, 2011 that, "Sentencing-overhaul law to reduce Ohio's prison population."

- The tough-on-crime cycle that began in the 1980s came full circle yesterday when Gov. John Kasich signed criminal-sentencing reform that could reduce the prison population by several thousand inmates in the next three years.***
- Legislative backers consistently said savings would reach $78 million, based on an estimate from a study done for the state by the Council of State Governments.
- But Carlo LoParo, spokesman for the Department of Rehabilitation and Correction, said the actual savings will be almost $46.3million. He said that's because not all elements proposed by the study ended up in the final version of the legislation.
- The law will divert some nonviolent offenders, including drug offenders, to community programs; give inmates the chance to earn up to 8 percent credit off their sentences by completing treatment and training programs; and allow the release of inmates, with court approval, after they have served at least 80 percent of their sentences. The law also equalizes penalties for crack and powder-cocaine possession and raises the threshold for a felony theft charge to $1,000 from $500.

Predicted reduction in the prison census modestly increased to 52,223 in 2015 and slowly decreased to 48,697 in 2020.

It is simply an observation that "Truth in Sentencing" exists no more: prison sentences are subject to judicial release, court recommended risk reduction sentence 80%; ODRC 80% release; earned credit up to 8% for programing and 10% for participation in specific programing; transitional control for the final 180 days of sentence; earned reduction of minimum term by 5 to 15% of indefinite non-life sentence; community-based substance abuse treatment programs ; medical release for terminally ill, medically incapacitated or in imminent danger of death.

ODRC was required to design a single validated risk assessment tool, and when an assessment was ordered, the single validated risk assessment tool was to be used by courts, probation departments, CBCF's and other entities. State funding and local subsidies were tied to the use of the single validated risk assessment tool, the typical enforcement modality to subordinate the judiciary.
It established mandatory community control sanctions of at least one year's duration for non-violent, first-time felony four and felony five offenders;

A consistent drumbeat from both the General Assembly and DRC during the last decade is that common pleas judges have imprisoned low level, non-violent felons of the fourth and fifth degrees beyond legislative or executive intent and expectation. Those incarcerations have resulted in penitentiary overcrowding. As a consequence, since 2011 and passage of H.B. 86, the General Assembly has consistently reduced judicial discretion to impose prison time for felonies of the fourth and fifth degrees.

State Court Futures Movement

The Ohio Courts Future Movement is important to review because it interjected some level of restorative justice into the state sentencing calculus. While the Sentencing Commission was considering replacement of the rehabilitative model with a hybrid retributive model, the Ohio Courts Futures Commission was reviewing systemic changes to the administration of justice with a preference for restorative and therapeutic sentencing. It considered a total restructuring to the judiciary into judicial districts with appointed judges.

National Center for State Courts founded 1971as a national clearing house to serve state judiciaries and improve court management and administration. It was situated in Williamsburg, Va.

• Between 1986 and 1990, the NCSC began the "Future of State Court Projects." It advocated

- merit selection of judges,
- it implored state chief justices to establish race and gender bias task forces
- it commenced litigation to apply the Voting Rights Act to state judicial elections; and
- it conducted management reviews of court operations and technology.

At times relevant, Tom Moyer was Chief Justice of the Ohio Supreme court, chair ex officio of the NCSC board and Chair of the Ohio Courts Futures Commission In cooperation with the OSBA, they jointly adopted and implemented a template in support of the state courts futures project.

At times relevant James Dator was director of the Institute for Alternative Futures, in Alexandria, Va., and a consultant to NCSC and a direct advisor to state futures movements. Through the Institute he advocated radical changes in state judiciaries.

- Central to changes, the Constitutional principle of tripartite government and "reflective of the ancient, neutral principles upon which our nation was founded deserves a serious reconsideration."

Dator's Institute developed a methodology to promote the court futures agenda"Reinventing Courts for the 21st Century, Designing a Vision Process."

- It employed what he called "Apollo Forecasting" and "incasting": establishing a futuristic vision of what result is desired and then working back to the present to criticize the present obstacles to the desired changes while ignoring constitutional or institutional impediments.

Within the Cultural Revolution the nation is struggling with, there is a philosophical debate on whether our present constitutional form of government based on principles of Enlightenment can support a multi-cultural society. In the 1950s, postmodernism arose to challenge the basic tenets of Enlightenment.

- Enlightenment is the genesis of liberal order, theories of equality, neutral principles of constitutionalism, legal reasoning, meritocracy and rationalism.
- Postmodernists reject absolutes and certainty, and they consider reality, reason and logic to be conceptual constructs; they deny absolutes and truth; they assert that human nature is socially acquired; relativism prevails.
- Postmodernism is not simply in competition with enlightenment. It seeks to discredit and replace it through the process of deconstruction, the critical dismantling of enlightenment's traditions and traditional modes of thought.
- It is a systematic deconstruction of enlightenment's tenets intended to restructure or displace the American form of government with a system based on Marxist, postmodern and multi-cultural norms and values.

"Apollo Forecasting" is simply post-modern deconstruction that criticizes aspects of the administration of justice in states employing court futures commissions to create an atmosphere in which the public is willing to modify the existing system

and replace it with systemic change. The following two paragraphs reflect Dator's reliance on deconstruction and adherence to multiculturalism.

- In *Judicial Governance of the Long Blur,* Dator wrote in 2001 that the legislative and executive branches of government are obsolete and obstructionist, that majority rule impedes diversity and individuality-it is the blunt instrument of oppression; the judiciary has the power to subordinate the other branches of government through judicial review; the judiciary can deliver social justice through judicial activism and leadership; and social justice is a redistribution of wealth. To accomplish this, Dator argues that the structure and culture of the courts must be changed. [This represents pure post-modern deconstruction]

- Dator: "Majority rule is wholly obsolete…which accepts diversity as normal and preferable. How can we make a single, fair rule for all? We cannot. Thus I suggest we abandon the effort and wholly redirect governance way from forcing conformity to a single standard towards supporting individuals and groups in their attempt to realize their own values and helping buffer and resolve conflicts which will invariably thus occur…There is no average person. There is no normal person. There are no community standards. There are only individuals…How even more necessary for us, finally, to let go of our old notions of human rationality, discipline, and responsibility.[This is pure multi-culturalism]

What did that Apollo Forecasting and incasting look like in Ohio?

> Between 1992 and 1999 the Gender Bias Task Force, the Citizen's Committee on Judicial Elections, The Ohio Racial Fairness Commission and the Structure and Organizational Task Force found anecdotally that invidious gender and racial bias existed in the courts, in the workplace, in bar associations, law schools and in the administration of criminal justice. In the final analysis, it painted the entire legal profession with gender and racial bias. The judicial elections committee found a perceived link between financing of judicial elections and decisions, and that campaign contributions in judicial races undermined judicial independence, both in perception and in fact.

With the three reports circulated publicly, on February 12, 1997, the Chief Justice announced to the General Assembly formation of the Ohio Courts Futures Commission, "* * * to help us chart a course for our justice system as we move into the next century.

- * * * The Structure and Organization Task Force (SOTF) will look at how our courts are structured to administer this crush of cases and funding. Surely if we were to design a new court system it would not look like what is in place today. The Commission will review the number of courts and related agencies and answer difficult questions relating to cost and efficiency."

End of February 1998, received a letter from Jim Rapp, Hardin County Probate Judge, now a year and half from effective date of SB 2:

> "I need your help. I am one of approximately 52 commission members of the Ohio Courts Futures Commission.***I serve on the Organization and Structure Task Force Committee (SOTF).***On this task force there is strong support for restructuring the 'courts of general jurisdiction' (all divisions of Common Pleas) to be known as circuit courts. Each circuit would consist of one or more counties. An example showing 25 circuits is attached along with a draft of part of our committee's report.***I have serious concerns about these recommendations but would like to have input from you to me before our next meeting (March 18th) if at all possible.***"

Enclosed was the Structure and Organization Task Force report of its findings in its March 4, 1998 12 page draft summarized:

> With no fact finding, no reports and no empirical data, the SOTF found that there was a national trend toward regionalism; the view of community was away from the county structure; the present Ohio judiciary was uncivilized, dilatory and incompetent; the administration of justice was inefficient, ineffective and without standards or uniformity; there was a broad disparity in the quality of judging, case processing and court administration; Ohio's judges lacked specialized expertise; the system of justice was Balkanized; and, "In the end, courthouses, like any other structure, can be recycled for other uses if their current purposes cease to exist."

The Commission agenda included merit selection of judges in judicial districts managed through administration in Columbus; de-emphasis of the jury model in favor of alternative dispute resolution modalities; restorative modalities of criminal justice; a system of justice based on certain enumerated principles surrounding access, quality, structure, organization, education and public awareness (inculcate, indoctrinate), technology, relaxed rules and procedure, community courts, specialized dockets, self representation, etc. "Think outside the box." Of course, the

box was the Constitution that judges are required to work within and defend. And the administration of justice, contained in that box, is circumscribed by our fault-based adversarial jury system supported by procedural due process.

May 2000, A Changing Landscape:

> "From the outset of its work, the Commission took to heart your admonition that we envision the best possible judicial branch in the year 2025 by looking beyond current issues and immediate concerns facing state courts today. As a result of that long-range focus, a number of the recommendations in this report call for new approaches and expanded court functions that depart significantly from traditional practices."
>
> "***that, at their discretion, local trial courts should be authorized to create one or more 'community courts within a county that could assume many of the functions of mayors' courts and provide many additional judicial and dispute resolution services.
>
> ***Community court restorative justice programs (in which offenders agree to compensate victims and the community) have been particularly effective when community service punishment is imposed in a small town or neighborhood setting and drug and alcohol treatment are part of the correction effort. Community courts, which typically work in partnership with neighborhood associations, churches, businesses and other community groups***."

The Futures Commission deferred to the SB 2.

> "Criminal Sentencing was covered in great depth by the Ohio Criminal Sentencing Commission, which completed a multi-year review and overhaul of felony sentencing concepts in 1996 and worked closely with the General Assembly in 1997 to achieve passage of major legislation addressing issues including 'truth in sentencing' and elimination of the traditional parole process. The Commission has continued to work in a variety of areas including adult misdemeanor and juvenile sentencing and forfeiture issues…

Ironically, the Sentencing Commission had moved toward retributive justice with S.B. 2.

Post Changing Landscape, the OJC and the Ohio Judicial College promoted an agenda of programs consistent with a shift from a fault-based, adversarial justice system in a jury model to alternative dispute resolution modalities, restorative practices and a progressive, therapeutic model of problem-solving justice together with a substantial push for judges to consider specialized dockets for drug and mental health offenders.

The overarching concern that I had was the nature and scope of the proposed evolving judiciary. That role was set forth by the OJC:

- In addition to these and other statutory requirements, the evolving roles of judges and courts often call on judges to be more broadly involved in local governmental institutions in order to effectively carry out all the duties of their offices.

- This is perhaps most evident in the growth of 'problem-solving' courts—drug courts, mental health courts, environmental courts, reentry courts, and so on. In order for these kinds of courts to function effectively, judges must work closely with representatives from a wide range of treatment, social service and law enforcement agencies. A natural outgrowth of this involvement is for judges to serve on the boards and commissions that develop local management principles in these areas.

The movement encouraging "problem-solving" judges in Ohio was best exemplified by an October 2001 program on judicial leadership, held in Dayton, and conducted by Dean Lisa Kloppenberg of the University of Dayton School of Law and then Chief Judge Walter Herbert Rice of the U.S. District Court for the Southern District of Ohio. The keynote speaker…extolled to a group of Ohio judges the virtues of a state court's "adjudicator and policymaking functions" which "include active leadership roles in community-involved planning aimed at interest-and needs-based outcomes."

- The speaker added that the "independence of judges circumscribes their competence in making public policy" and that "[c]ommunity-involved judges in states such as Wisconsin, Ohio, and California report that their Supreme Court Chief Justices' public endorsement of judicial activism lends credibility to their efforts, encourages others to become active, and reduces skepticism among reticent colleagues.

- Think “outside the box” to address “progressive” forms of dispute resolution. Again, we operate in a box, the Constitution. It protects us from our best intentions.
- When holistic dispute resolution modalities embrace methods outside the common law, adversarial jury system, they raise serious and profound constitutional issues. Moreover, when judges seek interest-based and needs-based outcomes, the notions of legal and litigant impartiality are abandoned. Judicial independence itself becomes defined by a purported adjudicator policy-making function.

Within the context of the court futures movement, there were two spin-off attempts to salvage part of the NCSC agenda for Ohio:

- The Racial Fairness Implementation Commission recommended that Federal Judge Al Marbley oversee a racial/gender discrimination/bias remedy in every aspect of the practice of law and administration of justice with attorney general oversight over sentencing practice of judges. It essentially was a consent decree without a law suit or threat thereof. It was facially unconstitutional under strict scrutiny controlled by the rationales of Adarand I & II, Richmond v. Croson, Wygatt v. Jackson City Schools, and Mallory v. Oho. Three months after its introduction, it was withdrawn.
- 2007 Ohio Judicial Conference, “Judge’s Symposium.”

    - explore the emerging role of the judiciary in a holistic, therapeutic, collaborative approach to restorative justice.
    - the symposium was informational and intended to assess the general sentiment of the judiciary on the fast changing role of judges in the administration of justice.
    - Justice Evelyn Stratton had become a strong advocated of both drug and mental health courts.

Chief Justice Moyer had been supportive of systemic changes to the criminal justice system with <u>post-conviction emphasis on evidence-based supervision</u>
<u>intention to use the symposium as a launching pad to gain OJC recognition of a restorative model for sentencing with a likely legislative agenda.</u>

> I went into the symposium with a belief that it was an extension of the court futures movement intended to justify judicial ascendence in making public policy in what should be a legislative function.

I prepared a rebuttal memorandum in opposition to the judiciary's constitutional authority to adopt profound and systemic changes to criminal sentencing. The memorandum, "RESTORATIVE JUSTICE AND ITS IMPLICATION IN OHIO", was included in the materials. I wrote:

- Drug courts radically transform the traditional courtroom roles of judge, defense counsel and prosecutor. They also, by their very nature, seek to redefine what is considered "justice" in the context of drug crimes. The therapeutic justice movement, like the therapeutic community, rejects fairness inquiries as irrelevant, dispenses with the concept of guilt or fault and regards coerced treatment as a valuable tool in the fight against addiction. Because a preoccupation with being consistent or fair, establishing fault, or convincing an addict to seek treatment voluntarily all get in the way of helping that person overcome addiction, these are not important issues in a treatment regime. Nonetheless, consistency, fairness, proof of guilt and protection from governmental intrusion are foundational to the traditional justice system.

- Any change in the administration of justice must continue to meet constitutional standards of due process and comport with traditional separation of powers limitations. Also, if drug courts are to be used, they should be established by the legislature after sufficient investigation and debate.

- <u>In Ohio, and across the country, advocates of therapeutic justice have attempted to move our historic fault-based, retributive system of criminal justice to a restorative model based on the theory of crime as pathology and seeking recovery for offenders</u>. This change has been embraced by some elements of Ohio's judiciary; the response of the Supreme Court has been to allow the establishment of specialized dockets based on the therapeutic model. In operation, some courts conflate treatment and punishment.

Restorative justice a system of criminal justice which focuses on the rehabilitation of offenders through reconciliation with victims and the community at large.

> The three core elements of restorative justice are the interconnected concepts of Encounter, Repair, and Transform. Each element is discrete and

essential. Together they represent a journey toward wellbeing and wholeness that victims, offenders, and community members can experience. Encounter leads to repair, and repair leads to transformation.

If that is what restorative justice looks like, it has no relationship whatsoever to constitutional principles. It is outside the box!

The following restorative concepts are harvested from the information gathered from the Futures Commission and from the Ohio Judicial Conference communications shortly after the Futures Commission issued its report.

- local trial courts should be authorized to create one or more 'community courts within a county that could assume many of the functions of mayors' courts and provide many additional judicial and dispute resolution services.
- Community court restorative justice programs (in which offenders agree to compensate victims and the community) have been particularly effective when community service punishment is imposed in a small town or neighborhood setting and drug and alcohol treatment are part of the correction effort.
- Community courts, which typically work in partnership with neighborhood associations, churches, businesses and other community groups***.
- The virtues of a state court's "adjudicator and policymaking functions" "include active leadership roles in community-involved planning aimed at interest-and needs-based outcomes.
- The "independence of judges circumscribes their competence in making public policy" and that "[c]ommunity-involved judges endorsement of judicial activism creates "progressive" forms of dispute resolution including 'problem-solving' courts—drug courts, mental health courts, environmental courts, reentry courts, and so on.
- Judges must work closely with representatives from a wide range of treatment, social service and law enforcement agencies.The evolving roles of judges and courts often call on judges to be more broadly involved in local governmental institutions in order to effectively carry out all the duties of their offices.
- Community court restorative justice programs, in which offenders agree to compensate victims and the community, have been particularly effective when community service punishment is imposed in a small town or neighborhood setting and drug and alcohol treatment are part of the

> correction effort. Community courts, which typically work in partnership with neighborhood associations, churches, businesses and other community groups***.

This represents sociological jurisprudence called for by Roscoe Pound more than 100 years ago. The lines of separation of powers are blurred, judicial discretion untethered, procedural due process abandoned. It lends itself to multicultural concepts where community courts, like tribal courts, uphold community standards rather than the general law. Implementation of some concept of restorative justice is most certainly a step outside the box. ODRC PROBATION GRANTS, ETHICS AND SEPARATION OF POWERS

Community-based corrections programs and local corrections planning boards were first established by law in 1979. They bridge the rehabilitative and retributive modalities of sentencing into some not yet fully defined hybrid version of restorative sentencing in a context of protecting the public, punishing and rehabiltating the offender, perhaps a recognition that criminal culpability and pathology both have a place in the sentencing calculus.

SB 2 altered traditional probation.

- It established a menu of sanctions that included community control sanctions, residential sanctions and financial sanctions.
- From 1996 through 2005, the ODRC funded local probation programs through a variety of grants to local community correction boards. Such grants were conditioned on prison and jail diversions.
- In small to medium sized jurisdictions, grant funds augmented probation department budgets. In larger jurisdictions, funding supported programs and treatment. Even today, most smaller counties use ODRC grant money as a revenue stream to fund traditional probation department or programs.

The ethical implications of judges serving on governmental committees, commissions, or other positions as called for in the restorative model was first addressed by the Board of Commissioners on Grievances and Discipline in *BCGD Po. No. 2002-9*, issued August 9, 2002:

> The Board of Commissioners established a three-part test to analyze the ethical efficacy of a judge's service on a governmental committee, commission or board:

(1) Would a judge's participation cast doubt on the judge's ability to act impartially, demean the judicial office, or interfere with performance of judicial duties? [I believe that judicial duties are those which federal immunity attaches in a canonical context]

(2) Is it likely that the governmental entity will be engaged in proceedings that ordinarily would come before the judge or be engaged in adversary proceedings with frequency in the court of which the judge is a member or in any court subject to the appellate jurisdiction of the court of which the judge is a member?

(3) Is the governmental entity concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice?

Readers are reminded that the Board of Commissioners found that judicial impartiality was compromised because judges, through the judicial corrections board, had to seek funding through ODRC services.

- Moreover, judges entered financial assistance agreements with the Division of Parole and Community Services which, at the time, required 15% of eligible felons be diverted to CBCFs.
- Funding was tied to a percentage of persons committed or referred. "Because judges must make sentencing decisions, a judge's involvement in applying for funding tied to the number of persons committed or referred casts doubt on impartiality."
- Unethical is unethical. Under the present configuration that subordinates judges' discretion to ODRC funding, the unethical doubt cast upon impartiality slides into the violation of separation of powers. That, in turn, casts a broader shadow over the relationship between the state judiciary and the executive branch conducting business through ODRC.

The Board held in *BCGD Op. No. 2003-9* that under Canon 4(C)(2), Canon 2(B) and Canon 2(A) of the Ohio Code of Judicial Conduct, common pleas court judges should not serve on judicial corrections boards for community-based correctional facilities and programs.

I raised to the Board of Professional Conduct both a canonical and constitutional issue concerning ODRC grants and judges serving on local correction boards immediately after passage of HB 86.

- Canonically grants tied to diversion violated the canons: "Because judges must make sentencing decisions, judges involvement in applying for funding tied to the number of persons committed to prisons casts doubt on impartiality." *BCG&D Op. No. 2003-9*.
- Constitutionally, "... none of branches of government ought to possess directly or indirectly an overruling influence over the others." *St. ex rel Bray v. Russell.* At first the Board refused to address the ethical issue. It denied jurisdiction over a separation of powers issue.

The ethical issue became more apparent when ODRC issued its Probation Grant Summary in 2013:

- "Eighteen of the twenty-five programs performed well and received incentive payments as a result of their performance...
- The remaining seven grant recipients received notice in April 2013 that DRC and the Justice Reinvestment Committee reviewed the program's performance and determined that the grant did not qualify for any incentive funding and will not automatically qualify for funding in the Fiscal Year 2014-2015 cycle. The programs were encouraged to continue the program through the end of the funding cycle (June 2013) and were invited to apply and go through the competitive process for funding in Fiscal Years 2014/2015."

The probation improvement grants clearly demonstrated the ethical conundrum previously described. Judges are paid to reduce imprisonments; judges are paid a bounty when they exceed their "Performance Measures"; and judges are penalized through loss of grants if they fail to meet the number of diversions the grant provided for. It took another year to get the Board's attention on what appeared to be an obvious canonical violation for judges who enter such grants. On March 3rd 2015, the Board vacated its *BCG&D Op. No. 20003-9*.

As just noted, ODRC through grants, pays judges of counties not to imprison offenders who otherwise, in the exercise of discretion, would be sentenced to the penitentiary. In the execution of the grant, the judge must demonstrate that as a result of grant funding, a person who otherwise would have been imprisoned was diverted into a community control sanction. In other words, there must be a demonstrable link between the grant and the diversion from imprisonment.

There is no substantive difference between a common pleas court judge serving on a CBCF board, a multi-county jail board or serving on a Local Correction Planning Board.

- With judges in membership, the local corrections board is responsible for managing a continuum of community control sanctions including: fiscal and operational requirements, establishing programs consistent with the Administrative Code; complying with relevant law, regulations, ODRC sanctions, policies, procedures and audit standards, meeting grant agreements; and submitting an annual report. The Ohio Department of Rehabilitation and Correction subjects the local board, county, and grant contractors to fiscal audits thereby requiring a concomitant duty to maintain such records locally.
- The question is not whether sound management practices require oversight by means of fiscal and program audits, rather, it is a question of whether the resulting entanglement compromises the ability of the judiciary to perform its judicial function, whether sitting on the board, advising the board or carrying out the grants under the direction of the board and ODRC.

On April 9, 2014, the Board of Commissioners wrote:

> "The Committee concluded that Opinion 2003-9 evaluates the role of judges under a statutory scheme the General Assembly has since amended. [Judges were removed from the CBCF governing board and placed in an advisory capacity] The Committee also noted that the opinion applies the former Code of Judicial Conduct. Because the opinion is no longer current and arguably impacts constitutional issues that are not within the Board's advisory authority, the Committee determined that it must conduct a comprehensive analysis of the opinion, the present-day statutory provisions, and the Code of Judicial Conduct adopted in 2009 before making a presentation to the full Board.***"

On March 3, 2015, the Board of Professional Conduct wrote:

> Opinion 2003-9 was issued on December 5, 2003 under the former Code of Judicial Conduct, and stated that common pleas judges should not

> serve on judicial corrections boards for community based correction facilities and programs prescribed by R.C. 2301.51. On October 12, 2006, Am. Sub. H.B. No. 162 became effective and amended R.C. 2301.51. The amendments essentially removed common pleas judges from the operations of community-based corrections facilities and placed them in a advisory role. On March 1, 2009, the Code of Judicial Conduct became effective, and on November 18, 2014 was amended. Opinion 2003-9 was premised on the former Code of Judicial Conduct and on a statute that has been amended to remove the judiciary from serving on any meaningful capacity on judicial corrections boards. As a result, Advisory Opinion 2003-09 is now effectively moot and the committee will recommend at the April Board Meeting that the opinion be formally withdrawn.
>
> Nevertheless, the committee is sympathetic to your concerns regarding the statutory expansion of the judiciary in extrajudicial activities that may undermine a judge's independence, integrity, or impartiality. Ideally, the laws would not prescribe that judges serve in any capacity with community-based correction facilities and programs, but the Board lacks the jurisdiction to determine the constitutionality of state laws or to opine on issues involving the separation of powers, even though ethical rules are implicated. The remedy you seek is one specifically designated for the courts and the legislature.

If the rational of *BCG&D Op. No. 20003-9* been applied to local community corrections boards, judge participation as statutorily required would have been unethical because of the entanglement between ODRC and the judges's activities and duties under the grant. The failure of the Board ofGrievances and Discipline to simply apply the new Judicial Code to the old local community corrections board statute regarding judicial participation leaves the judiciary in limbo. In traditional judicial independence, the judge should exercise independence and serve as a buffer between the execution of community control sanctions overseen a by ODRC and the probationer serving an executed sentence.

Director Wilkinson conducted a "Community Correction Act Symposium" in 2005 to address these issues.

- Because of the enormity of the programs, the ODRC commissioned The University of Cincinnati (UC), Division of Criminal Justice to evaluate them for effectiveness and determine their successful characteristics.

- Distilled to the essence, the programs funded by ODRC were wholly ineffective. Surprisingly, the UC found that certain ODRC grant programs actually increased recidivism.
- UC concluded that "programs that adhere to the principles of effective interventions can lead to substantial decreases in recidivism.
- All that remained was to develop a risk based assessment tool predicated on the "findings" of the study, mandate that such tool be used at every level of the criminal justice system and then administer the evaluation of the very programs they helped create.

UC identified a series of criminogenic factors which it opined are necessary to identify and address in post-conviction sanctions to meaningfully reduce recidivism. Those characteristics include criminal history, substance use and abuse, family dynamic, education, employment, finances and other personal and subjective characteristics essential to assess and target individuals for successful treatment models and meaningful rehabilitation. An individual's success is dependent on being placed in programs that address the unique criminogenic factors of each offender.

For most judges, this was our first exposure to evidence-based sentencing. The use of risk/needs assessment became a key component of the evidence-based approach, and between then and now, Ohio and other jurisdictions have developed purportedly empirically-validated instruments for assessing risk, including actuarial risk assessment tools. In Ohio, the instrument is the ORAS.

However, as the OJC Policy Statement on the ORAS pointed out:

> "As the United States Department of Justice recently opined in a letter to the United States Sentencing Commission, 'basing criminal sentences, and particularly imprisonment terms on [risk assessment] data – rather than the crime committed and surrounding circumstances – is a dangerous concept that will become much more concerning over time as other far reaching sociological and personal information unrelated to the crimes at issue are incorporated into risk tools. This phenomenon ultimately raises constitutional questions because of the use of group-based characteristics and suspect classifications in the analytics.'" [A recognition of deemphasis purposes and principles of sentence and shift to the defendant.]

The OJC properly emphasized the constitutional and canonical conundrum that arises from the statutory and administrative code entanglement among the Department of Rehabilitation and Correction, local community corrections board, and participating courts of common pleas by requiring ODRC to establish and administer probation improvement and probation incentive grants for courts of common pleas that supervise felony probationers.

> "The bill tied eligibility for grants to the court's compliance with statutory probation duties and its implementation of ORAS. The tool is to be applied and integrated into the operation, supervision, and case planning of virtually every sector of the criminal justice system, including by judges, at sentencing."

The OJC embraces widely disparate views among the judges as to the appropriate role of the judiciary in separation of powers and in the exercise of discretion. Judicial orthodoxy supported by procedural due process occupies one end of the spectrum, and restorative justice, holistic procedure with therapeutic results occupy the other.

Given such diverse views among judges, it was remarkable that the OJC was able to reach a consensus on proposed guiding principles for the use of ORAS and Risk and Needs Assessment Tools. The OJC has adopted the following guiding principles relative to the use of ORAS and risk and needs assessment tools:

- Risk and need assessment information should be used as a tool to inform a sentencing judge of public safety considerations related to offender risk reduction and management should the offender be placed on community control. <u>It should not be used as an aggravating or mitigating factor in determining the severity of an offender's sanction.</u>

- Risk and needs assessment information is one factor for judges to consider in determining whether an offender can be supervised safely and effectively in the community. <u>Because risk and needs assessment information is only one factor, judicial reliance or non-reliance on risk assessment tools, such as ORAS, should not be a performance criteria or performance standard used in the determination of grant funding to courts.</u>

- Risk and needs assessment information should be used to aid the judge in crafting terms and conditions of probation supervision that enhance risk reduction and management. It also provides assistance in determining

appropriate responses if the offender does not comply with the required conditions.

These principles are wholly consistent with the position held by the National Center for State Courts (NCSC):

> "During the last two decades, substantial research has demonstrated that the use of certain practices in criminal justice decision making can have a profound effect on reducing offender recidivism. One of these practices is the use of validated risk and needs assessment (RNA) instruments to inform the decision making process.***The use of RNA information at sentencing is somewhat more complex than for other criminal justice decisions because the sentencing decision has multiple purposes - punishment, incapacitation, rehabilitation, restitution - only some of which are related to recidivism reduction." (Emphasis added.)

It should be noted the NCSC promotes evidence based sentencing to reduce recidivism, not to reduce incarceration.

- Such sentencing does not predict a particular offender's specific risk of recidivism; rather it statistically predicts whether he or she is likely to recidivate.
- It informs the sentencing judge about risk reduction and management of an offender who is placed on community control.
- It is not intended to be an aggravating or mitigation factor in determining the severity of a sanction.
- Under this view, risk-related factors are not necessarily determinative of whether an offender should be granted probation.
- Finally, in this model, evidence-based sentencing does not replace judicial discretion; it is intended to provide additional information for the judge to consider in crafting an offender's sentence.

A key element to the restructuring of sentencing under HB 86 is the integration into corrections of the single validated risk assessment tool, also referred to herein as ORAS. Ohio Revised Code §5120.114 requires ODRC to select a single validated risk assessment tool for adult offenders.

HB 86 maintains the purposes and principles of sentencing, protect the public and punish the offender, promote effective **rehabilitation** using the minimum sanctions to accomplish those purposes without imposing an unnecessary burden on state or local government resources. To achieve those purposes, the sentencing

court shall consider incapacitation, deterrence, rehabilitation and restitution with emphasis on the victim, the seriousness of the crime and recidivism factors that are of an entirely different emphasis than criminogenic factors reviewed in the ORAS. HS 86 factors are qualitative interpreted through discretion. ORAS factors are quantitative and interpretation is numerical. As I previously indicated, a focus group of judges would likely conclude that the greatest predictor of reoffending is a history of offending and reoffending-2/4 points on ORAS]

1. This ORAS shall be used by Common pleas courts, when the particular court orders an assessment of an offender for sentencing or another purpose
2. The tool is to be applied and integrated into the operation, supervision and case planning of virtually every sector of the criminal justice system.
3. In the final analysis, utilization of ORAS is now the common denominator in matters of policy, practice and procedure surrounding the administration of criminal justice in matters of pretrial release, sentencing, community control sanctions, imprisonment, post-release control and re-entry of criminal offenders. R.C. 2929.12
4. Unless otherwise required by section 2929.13 or 2929.14 of the Revised Code, a court that imposes a sentence under this chapter upon an offender for a felony has discretion to determine the most effective way to comply with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code. In exercising that discretion, the court shall consider***[seriousness and recidivism factors]***"
5. The ORAS template assesses the offenders criminal history; education, employment, and financial situation; family and social support; neighborhood problems; substance abuse; peer associations; and criminal attitudes and behavioral patterns. [
6. The numerical score establishes the likelihood for failure in supervision, and thereby placed offenders in domain levels
7. The problem is, the ORAS bears no rational relationship to the sentencing structure established by the General Assembly in R.C. 2929.11 through 2929.20. R.C. 2929.12
   D) Unless otherwise required by section 2929.13 or 2929.14 of the Revised Code, a court that imposes a sentence under this chapter upon an offender for a felony has **discretion** to determine the most effective way to comply with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code. In exercising that **discretion**, the court shall consider***[seriousness and recidivism factors]***"

8. There is recent scholarship that suggests that risk assessments should not be used by a judge to determine what sentence to impose. In a soon to be released law journal article, Professor Erin R. Collins opines that although actuarial risk assessment tools are being integrated into sentencing decisions, they were designed to assist corrections officers with a specific task of how to administer punishment in a way that advances rehabilitation. "***these tools emerged and evolved to address a very specific problem: how to administer punishment efficiently and effectively. It then demonstrates that these same tools are now being asked to serve a very different purpose, and one that their creator specifically warned against – to determine how much punishment is due.
9. Collins and in the *Bray* case Paul Pfeifer agree:
    - "These applications are sentencing-specific because only a sentencing judge is empowered to make these decisions.
    - The power to determine the severity of a sentence-to determine how much punishment is due a particular offender for a particular offense-is a core judicial function.
    - After the judge imposes a sentence, the responsibility to execute that sentence then shifts to the executive branch, specifically correctional authorities and parole boards (if the jurisdiction allows for parole).
    - Neither of these institutional actors, however, can reverse or modify the judge's sentencing decision.

The United States Department of Justice under the Obama Administration opined:

- "First, most current risk assessments - and in particular the PCRA [analogous to the ORAS], which is specifically mentioned in the pending federal legislation - <u>determine risk levels based on static, historical offender characteristics such as education level, employment history, family circumstances and demographic information. We think basing criminal sentences, and particularly imprisonment terms, primarily on such data - rather than the crime committed and surrounding circumstances - is a dangerous concept that will become much more concerning over time as other far reaching sociological and personal information unrelated to the crimes at issue are incorporated into risk tools.</u>

- "Second, experience and analysis of current risk assessment tools demonstrate that utilizing such tools for determining prison sentences to be served <u>will have a disparate and adverse impact on offenders from poor</u>

communities already struggling with many social ills. The touchstone of our justice system is equal justice, and we think sentences based excessively on risk assessment instruments will likely undermine this principle.

- "Third, use of risk assessments to determine sentences erodes certainty in sentencing, thus diminishing the deterrent value of a strong, consistent sentencing system that is seen by the community as fair and tough. Our brothers and sisters in the defense and research communities have repeatedly cited research to the Commission about the value and efficacy of certainty of apprehension and certainty of punishment in deterring crime. Swift, certain and fair sanctions are what work to deter crime, both individually and across society." CONCLUSION

We are bound by law to study and evaluate sentencing effectiveness, proportionality, and whether the use of correctional assets furthers the integrated goals of punishment, deterrence, fairness, rehabilitation, and treatment. Those five factors are imbedded in whatever sanctions are imposed in the execution of the sentence imposed.

How do you enhance public safety and fairness? Through certainty in sentencing, deterrence, and a reasonable use of correctional facilities, programs, and services.

Certainty in sentencing produces predictability, stability and continuity. It appears that certainty is undermined by unnecessarily complex sentencing gymnastics that are crafted to attempt to control judicial discretion in every aspect of sentencing.

I point out as I did a few weeks ago, in 1970 the DUI statute was 25 words and penalty section was 53. Today, the UA DUI ordinance is 8756 words. There is no discretion in a sentencing structure of the tone.

Certainty in the actual sentence imposed is eroded by the numerous off ramps now statutorily authorized that reduce the actual time served eviscerating "Truth in Sentencing," including judicial release, court recommended risk reduction sentence 80%; ODRC 80% release; earned credit up to 8% for programing and 10% for participation in specific programing; transitional control for the final 180 days of sentence; earned reduction of minimum term by 5 to 15% of indefinite non-life sentence; community-based substance abuse treatment programs ; medical release for terminally ill, medically incapacitated or in imminent danger of death. I am not

challenging the penological efficacy of any of the exits, but they undermine public confidence in "Truth in Sentencing."

- Have we gathered sufficient information and empirical data to answer the RC 181.23 duty to study and evaluate sentencing effectiveness, proportionality, and whether the use of correctional assets furthers the integrated goals of punishment, deterrence, fairness, rehabilitation, and treatment.
- If we don't, what more has to be done?
- If we do, can we demonstrate a system that enhances public safety and fairness?
- If we can, how do integrate deterrence, and a reasonable use of correctional facilities, programs, and services into sentencing certainty?

I don't have the professional competence to form and opinion on best practices, methods or modalities, but I recognize that Ohio has experimented in what I believe are the three most recognized penological models: rehabilitative, retributive, and restorative more often compelled by crime, incarceration numbers and overcrowding, than policy.

My own sense is that the rehabilitation model presents the greatest flexibility to work around into which you can integrate restorative concepts but keep a tight reign on violent crime through retributive practices. I'm not sure what that looks like. And if our present practices create a constitution and canonical conundrum, the community sanctions model has to be built around local boards that answer to ODRC and an independent judiciary that acts as a neutral applying due process to offender compliance and not act as a support actor on behalf of the offender. ODRC oversight would be directed to board, not to judicial compliance.

- I'm saying as fact and not my preference, the focus of indeterminate sentencing on the individual offender as the ORAS does, the administrative flexibility of continuum of community sanctions, and its relatively light focus on the seriousness of the offense and victim's impact and criminal history make indeterminate sentencing potentially more reconcilable with community/restorative sentencing and risk-based sentencing than is structured/ determinate sentencing, with its emphases on detailed rules, "certain" punishments, and public accountability.

Particularly since HB 86, the General Assembly and ODRC have structured statutory and and administrative regulations to keep non-violent offenders out of the penitentiary. My experience has been that the leverage that judges's possess to

incarceration is the impetus to meaningful rehabilitation. But if that is the goal is community control of non-violent offenders, then it is absolutely necessary that you separate local judges from local correction boards so that they can neutrally, and impartially enforce terms of community control with some form of consequential incapacitation at the local level.