10-1999

A New Start Calls for a Broadened Perspective

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After a long hiatus, a new sentencing Commission is finally in place. As this Issue exemplifies, the Commission will face demands from different constituencies; suggestions and advice are multiple; unfinished business and new matters are already waiting. The new Commissioners bring with them extensive experience in the criminal justice arena, and hopefully, a fresh outlook on sentencing matters. While the Commission will have to address many issues of immediate concern and pressing importance, I suggest it broaden its perspective.

First, the Commission's sentencing research should include not only domestic data collection and evaluation but also look to other countries for novel perspectives on sentencing, especially if this Commission were to venture more into non-incarcerative sanctions. Second, the new Commission should give attention to life after imprisonment. Past Commissions have focused largely on fine-tuning the length of prison sentences, while considering very little the growing number of restrictions imposed on those on supervised release and even those who have fully served their criminal justice sentences. These developments call for the Commission to provide for sentence adjustments that may be needed to facilitate the re-integration of ex-offenders.

I. International Comparative Research

Since the inception of guideline sentencing in the United States, and especially the passage of the federal guidelines, sentencing has attracted increasing interest and research. States developing guideline systems have surveyed the impact of the federal and other state guidelines. They have learned from the positive and negative experiences of others, and adjusted their systems accordingly. The staff of the U.S. Sentencing Commission has supported some of its research proposing modifications to the federal guidelines by analyzing comparable features in guideline states.[1]

I recommend taking a small additional step. Why not look outside U.S. borders for sentencing ideas? A field of international comparative sentencing is developing rapidly. The next *FSR* Issue, for example, will provide a look at a conference that took place last year in Glasgow, Scotland. It brought together researchers and academics from the United States, Canada, Australia, England, Scotland, Ireland, and Continental Europe. In recent years, *FSR* itself has been running issues with international comparative components as well as issues on non-U.S. sentencing schemes, such as those of Canada and England. Similarly, *Overcrowded Times* always provided valuable insights into the theory and practice of sentencing and imprisonment abroad. The new journal *Punishment & Society* provides an international view of penology, albeit it is probably less likely to come across the desk of practitioners. Professors Michael Tonry and Richard Frase on the American side, Professors Andrew von Hirsch and Andrew Ashworth on the English side, and Professors Thomas Weigend and Hans-Jörg Albrecht in Germany, to mention but a few, are among those who report regularly on sentencing developments abroad and analyze their ramifications. International comparative sentencing will grow yet more rapidly with the creation of global websites and discussion groups open to practitioners and researchers in the field.

Numerous punishment issues raised in the United States are also relevant abroad; many of the burning matters discussed in other countries parallel those in the United States. The question of sex offender sentencing, for example, has been a hot-button issue not only in the United States in recent years. After highly publicized sexually motivated killings of young children in England, Belgium and Germany, European countries also turned their attention to the question of how to punish violent sex offenders and prevent them from re-offending. While the approach in the United States has remained substantially more punitive than in Europe, on both sides of the Atlantic the sentence lengths for sex offenders have increased and post-release supervisory periods have been extended.[2] With global media coverage and the perception of a crime problem in many of the Western industrialized countries, proposed solutions to sentencing problems are beginning to converge, at least in some areas. Nevertheless, enough national differentiation remains to make comparative research valuable.

The Sentencing Commission should be conscious of the fact that the federal guidelines are widely discussed in criminal law circles in other highly industrialized countries. Since many foreign observers are only vaguely aware of the existence of state sentencing regimes, most of them focus on the federal system as the paradigm of sentencing in the United States. The federal guidelines have been praised by some, and harshly criticized by others–the latter being the substantially larger group. While many aspects of U.S. criminal law and procedure have been copied abroad in the past, the guidelines have not found many friends.[3] The Commissioners might want to consider why for-

eign observers have not deemed the Commission's work worthy of emulation–at least so far.

On the other hand, even in the 21st century Americans remain reluctant to consider foreign models. If they do so, they frequently feel compelled to conceal the origin of their proposals so as to forestall automatic opposition. Nevertheless, times are changing.

In recent years, an increasing number of Supreme Court justices have participated in international conferences and exchanges. U.S. law has traditionally been considered so unique–even vis-a-vis England–that any contacts with foreign countries were deemed a one-way learning experience for the others. But that perception seems to be undergoing revision, at least as long as the exchanges are between stable, economically developed democracies. Supreme Court opinions have begun to show the impact of such cross-border conversations and the spread of human rights and democratic principles around the globe.

In a recent petition for a writ of certiorari, Justices Thomas and Breyer clashed over the relevance and value of foreign sources. The issue raised in the case was whether the Eighth Amendment's Cruel and Unusual Punishment Clause prohibits putting to death prisoners who have spent almost two decades or longer on death row. While Justice Thomas, concurring in the denial of certiorari, rejected non-U.S. sources as relevant guides for Supreme Court jurisprudence,[4] Justice Breyer in his dissent paid substantial attention to them. He referred to decisions by the Privy Council, the Supreme Court of India, the Supreme Court of Canada, the European Court of Human Rights, and the United Nations Human Rights Committee. In addition, he pointed to earlier Supreme Court decisions in the criminal law, procedure and sentencing area in which the Court surveyed foreign decisions, arguing that such consideration of foreign sources "is not surprising in a Nation that from its birth has given a 'decent respect to the opinions of mankind.'"[5] Just as increasing references to foreign sources will provide food for thought for the U.S. Supreme Court, so should the Commission and its staff look abroad for sentencing research and suggestions. The Commissioners should attend international comparative sentencing conferences, and let themselves be invigorated and inspired by the thoughtful sentencing work done in other countries.

Among the issues that might benefit most from the input of foreign experiences are non-incarcerative sentences. Since its inception the Commission's focus has been primarily on imprisonment as a sanction. Many foreign countries, however, have extensive non-incarcerative punitive regimes.[6] Their experiences, positive and negative, in terms of implementation, net-widening, impact on prison population, recidivism, would provide some immediate information based on which the Commission might better be able to consider the expansion of non-incarcerative sentencing in the United States. The Sentencing Commission would be well advised to approach the question of alternative sanctions to decrease the overcrowding in federal facilities, and contribute in bringing the U.S. incarceration rate more in accord with those in comparable countries.

II. Taking Responsibility: Life After Imprisonment

Starting in the 1980s and continuing throughout the 1990s, Congress has passed a growing array of legislation increasing restrictions on offenders released from incarceration and those who have completed their criminal justice sentences. Those so-called collateral sentencing consequences have partly punitive, partly preventive character. Recently adopted collateral consequences exclude offenders from governmental benefits programs, ranging from federal educational loans to Medicare provider reimbursement; they require the registration of sex offenders and allow for public notification of their whereabouts; they provide a growing number of criminal deportation grounds for non-U.S. citizens. States have often followed suit, covering federal offenders with additional state limitations on their liberty after they have served their sentences.

Usually collateral sentencing consequences ensue automatically upon a conviction although some must be imposed by administrative bodies or, more rarely, the sentencing court. Under the federal guidelines, the sentencing judge may, for example, deprive certain drug offenders of select welfare benefits. Most collateral consequences, however, follow without the court, the defendant, prosecution and defense attorneys being aware of their existence and additional punitive quality. Many are over inclusive. Because of their frequently automatic and mandatory nature, they do not allow for individualized assessments of the efficacy of retributive or preventive goals. Therefore, these collateral consequences impede the re-integration and re-socialization of released offenders and of those who were sentenced to probationary periods at a time when these ex-offenders have already "paid their debt" and no longer–assuming they ever did–constitute a threat to society.

Because most offenders sentenced in federal court will ultimately be released, the Commission should turn to post-conviction matters as a major agenda item. Conditions of supervised release and the growing number of collateral sentencing consequences have received only limited Commission attention in the past. Such additional legal constraints tend to make offenders' reintegration difficult, particularly since ex-offenders will also frequently face social ostracism. Many collateral consequences are highly restrictive, and their violation threatens the offender with re-incarceration, often for behavior that is not criminalized for those without a criminal record.[7] For example, Virginia has begun to prosecute convicted felons who registered to vote–a

criminal offense in Virginia since the state provides for the disenfranchisement of convicted felons. More widely publicized are the sentences imposed on convicted felons who attempt to buy a firearm, or of convicted sex offenders who try to obtain employment from which they are excluded by virtue of their criminal record. As the number of federal inmates and those convicted in federal court continues to rise, collateral sentencing consequences will affect a growing number of individuals.

Because of their increase in scope and multitude and their impact on the lives of ex-offenders, the Commission should consider the quality of collateral consequences as additional sanctions and permit courts to consider them at sentencing. For example, in addition to a criminal sentence, individuals who defraud the Medicare/Medicaid program or are convicted of felony narcotics offenses may be excluded from the federal Medicare/Medicaid reimbursement program. Since information about such a loss of privileges is made available to other insurers and to state and federal licensing agencies, for many defendants this amounts to a long-term, possibly even permanent, exclusion from work in the medical field.

Should courts be allowed or even required to consider legal consequences arising from a criminal conviction in potential in-out decisions or in the length of prison sentences? Should such decisions depend on whether the consequences are typical for a group of offenders or are unique to an individual offender? May sentence departures be based on such consequences if, for example, the court considers an offender excessively or otherwise unjustly impacted by such consequences or restrictions? Should the Commission consider lowering sentence ranges for classes of offenders who will be dramatically impacted by collateral consequences upon release from imprisonment?

These issues are novel but crucial for offenders released from imprisonment and those on probation. The Commission should assess its sentences in light of the changes that have occurred since the onset of the guidelines and re-evaluate them in light of the original congressional mandate given to the Commission. With a political scene that may become more interested in the rehabilitation of offenders,[8] the Commission should help make Congress understand how collateral sentencing consequences impede the reintegration of offenders and render them more susceptible to recidivism.

Notes

[1] *See, e.g.*, U.S. Sentencing Commission Staff, *Discussion Paper: Departures and Offender Characteristics*, *reprinted in* 9 FED. SENT. R. 149, 157-59 (1996).

[2] Nora V. Demleitner, *Searching for a Solution: How to Punish, Restrain and Treat Sex Offenders*, 10 FED. SENT. R. 59, 59-69 (1997).

[3] The only exception that has come to my attention so far is Western Australia which is considering adoption of a grid modeled on the federal guidelines.

[4] *Knight v. Florida*, 120 S. Ct. 459, 459 (1999) (mem.), *denial of petitions for cert.* (Thomas, J., concurring) ("[W]ere there any such support in our jurisprudence, it would be unnecessary for the proponents of the claim to rely on the European Court of Human Rights, the Supreme Court of Zimbabwe, the Supreme Court of India, or the Privy Council.")

[5] *Id.* at 464 (Breyer, J., dissenting).

[6] *See, e.g.*, George Mair, *Community Penalties in England and Wales*, 10 FED. SENT. R. 263 (1998); Allan Manson, *Canada's New Conditional Sentence: Will It Replace Incarceration or Probation?*, 9 FED. SENT. R. 250 (1997).

[7] For an overview of collateral sentencing consequences, *see* Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. __ (2000).

[8] Neal Peirce, *Wisconsin Governor Raising Bar on Prisons*, SAN ANTONIO EXPRESS-NEWS, Feb. 14, 2000, at 5B.