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For at least the last two decades the dominant public—and academic—discourse about criminal justice and sentencing has focused on imprisonment and capital punishment. Neither cost nor effectiveness of incarceration mattered much, as imprisonment appears to have fulfilled the national need for punitiveness. Congress, together with the U.S. Sentencing Commission, has been the standard bearer of imprisonment, and has continually enhanced and expanded prison sanctions, aided by federal agencies enforcing criminal justice policies.

Since the economic decline of 2001, and especially with the dramatic economic downturn of the last year, state governments that have felt strong budgetary pressures have looked for ways to decrease their prison population. They have done so through front-end diversion, as well as early release policies, while being mindful of public safety. Enlightened reformers have used evidence-based approaches to decrease the prison population without causing a substantial increase in the crime rate. Despite active discussion about, and implementation of, alternatives to imprisonment in state systems, the federal system appears to be relatively untouched by this development. Even though numerous organizations, including the American Bar Association, have called for the federal system to increase the availability of alternatives, and the Commission itself has declared it a policy priority, no dramatic change seems imminent.

As cost considerations and the precarious financial situation of states drive much of the movement to limiting or even decreasing prison admissions and prison stays, the federal system may remain untouched, as incarceration costs constitute only a small fraction of the federal budget. The lack of innovation in the federal system reflects a larger failure of federal leadership at a time when Congress would have the ability to restyle the discussion about alternatives into a precursor of systemic change.

At present, imprisonment, at least in the federal system, dominates the discourse. It remains the default option, since it rules wide areas of the guideline grid. It also rhetorically dominates, since all other sanctions are merely "alternatives." The panoply of available alternatives prevents there being one focal point, but it is precisely the variety and diversity of non-incarcerative sanctions that may allow them to respond more adequately to public concerns about deterrence, retribution, rehabilitation, and even incapacitation.

This issue presents yet another avenue to emphasize the importance of, and need for, alternatives in the federal system. It presents a broad array of approaches, some of which are already being taken, and others that require some changes in the federal system. Some of the authors bring refreshing insights from state systems, while others generate their proposals from within the federal system. In its approach, this issue will be a fruitful companion, or perhaps even a source of inspiration, for the Commission as it continues its work on alternatives.

I. Alternatives in the Federal System

During the decade before the Guidelines became effective, defense counsel, often together with sentence planners, successfully persuaded courts in many cases that alternatives to incarceration "were responsible and constructive sentences and [] met the [] sentencing goals" outlined under 18 U.S.C. §3553(a), as Herb Hoelter, the chair of the National Center on Institutions and Alternatives, writes in

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his article. In contrast, he calls the original Guidelines "prison guidelines," with prison as "the only suitable punishment to meet the goals of sentencing."

Structurally, imprisonment appears to dominate the federal system, as is visually highlighted in the Sentencing Table. All sentences are given in ranges of months that are indicative of imprisonment. The table provides only for a very small section in which non-prison sanctions may be imposed. Zone A explicitly allows for non-prison sanctions, and the ranges all begin with the number zero. Zone B permits, though does not mandate, a split sentence that can include an alternative. Zone C already requires imprisonment or some other form of detention, with Zone D, which dominates the table, presumptively mandating imprisonment. The Guidelines also discuss some sentence components that may be either alternatives or complements to a prison sentence. They include fines, restitution, community service, home confinement, and confinement in a halfway house.

Throughout its history the Commission has intermittently displayed interest in alternatives. As early as 1990, it organized a working group on the use of alternatives within the Guideline system. Despite the group's recommendation to expand non-incarcerative sentencing options, no action was taken. Some, like Judge Gertner, have argued that "[a]ll experimentation with alternatives to incarceration and innovative approaches to sentencing, like restorative justice, was necessarily squelched" by the Guidelines.[1]

Data from the Sentencing Commission indicates how little non-prison sanctions are being used, even in Zones A and B. In fiscal year 2008, only 7.4 percent of all sentenced offenders received a probation-only sentence; an additional 3.6 percent received a probation and confinement sanction. These data indicate a dramatic decrease from the 1996 fiscal year, for example, in which 11.5 percent of sentenced offenders received probation only, and another 7.2 percent received probation and confinement. Intervening years indicate a continual decline in the probation only and the probation and confinement categories.

A recent Commission study documents that the decline in probation sentences is largely due to the increasing number of non-citizens who are being sentenced within Zones A and B. As most of them are undocumented (illegal) immigrants, they will automatically be sentenced to imprisonment. For US citizen offenders, the research indicates that the percentage of those receiving a sentence of probation has been relatively steady. Further study of the changes in law enforcement and immigration law that underlie changes in these sentencing patterns will be required, as is the development of new sentencing models.

Increased sentencing flexibility in the wake of the *Booker* decision has allowed judges to take greater advantage of alternatives, including treatment programs and home confinement.[2] As early as 2005, the Probation and Pretrial Services Division of the Administrative Office of the US Courts encouraged judges to impose community service sentences at greater numbers as they are "practical, cost-effective, and fair. . . ." In 2008, the Commission itself renewed its interest in alternatives through a national conference on alternatives to incarceration. As a result, in 2009 the Commission issued a report on alternatives that acknowledged their relevance and importance. For the current Commission cycle, alternatives feature as a policy priority.

Despite the low impact alternatives have had in the federal system, at least so far, knowledge about any such possibilities remains crucial, as many of the contributors to this issue emphasize. This is especially true in the post-*Booker* world. Now, a judge may impose a non-incarcerative sanction even on defendants who fall into a presumptive imprisonment zone, where that had previously been virtually impossible. Since most judges, many prosecutors, and defense counsel did not practice before the Guidelines came into effect, they need to be educated and trained about the availability of alternatives. In his piece, Herb Hoelter sets out a number of examples of cases in which defendants received alternative sanctions, including home confinement, community service, use of tracking devices, expanded terms in halfway houses, or intermittent confinement, as a result of good lawyering skills. Assistance with sentence planning may become more important in the federal system as judges have, for example, the opportunity to defer sentencing, especially when the defense is putting in place an effective treatment plan. Research will be crucial in assisting all players in the criminal justice system in evaluating alternatives, with the goal of assuring proportionality and deterrence. Some research indicates, for example, that offenders consider alternatives, especially when they are stacked and continue for a number of years, more severe than a prison sentence. Often this perception reflects the offenders' realistic view about their likelihood of failing the requirements imposed through alternative sanctions.

Increased knowledge of the types of alternatives available and their effectiveness for select types of offenders will also be crucial for federal probation officers. Their jobs could begin to resemble their job

descriptions during the pre-Guidelines era where presentence reports included an extensive social background of the defendant and assessment of alternatives. At the time, many probation officers came from a social work background, while today, ever more of them have a law-enforcement bent, if not training. In the short run, such training and presumably an increase in staffing will be costly, but would be made up substantially through cost savings on prisons. In addition, it may allow probation offenders to begin to integrate therapeutic approaches, as advocated by Professor Wexler in this issue, or restorative justice, as Professor Eric Luna and Barton Poulson have laid out in a law review article.[3]

The articles in this issue focus on three areas in which alternatives may feature: diversion and deferred adjudication, sentences of parents and drug offenders, and a decrease in supervision time.

II. Diversion and Deferred Adjudication

Margaret Colgate Love reminds us that state judges can spare an offender a prison sentence and also prevent him from being burdened with a criminal record, a power federal courts have only in misdemeanor marijuana possession cases—a rare type of case to end up in federal court. Deferred adjudication, sometimes also called probation before judgment, would "broaden the arsenal of responses to criminal behavior available to the government and [] give federal defendants in appropriate cases a chance to start over with a clean slate," according to Margaret Love. Even though deferred adjudication is predicated upon a guilty plea, if the defendant satisfactorily concludes the probation period, which may include short-term incarceration or residential drug treatment, the court will dismiss the charges, vacate the guilty plea, and expunge or seal the record. Not being saddled with a criminal conviction may in fact be more important in federal than in state court. First, the vast majority of federal offenders do not have a prior criminal record, and it is the existence of the record that presents major barriers in light of the vast array of collateral sanctions that flow from it, in addition to substantial employment and informal barriers. Second, federal offenders will only rarely be relieved from the effects of their conviction as relief mechanisms for individual collateral sanctions are limited and presidential pardons have become almost extinct.[4]

Margaret Love provides us with the raw materials for thinking about how to put together a federal deferred adjudication program as she and her collaborators set out, in an extensive appendix, details of the deferred adjudication programs of three states, Arkansas, Texas, and Vermont. All such programs, not unlike probation-based programs, present difficult challenges for the average participant, as many offenders encounter serious difficulties in complying with the attendant conditions. Some offenders may even prefer a prison sentence to avoid the possibility of facing incarceration after all, upon struggling to comply with the conditions imposed. On the other hand, those who are willing and able to comply with those conditions and, in return, can avoid both incarceration and the collateral consequences of a conviction are unlikely to recidivate. For that reason "deferred adjudication," as Margaret Love notes, may be "an attractive part of any jurisdiction's public safety strategy."

To construct such a program effectively, a relatively wide array of offenses should make an offender eligible. Otherwise, we merely replicate the limited alternatives currently available in the federal system. In addition, neither the length of probation nor the requisite conditions should be prohibitive. Probation should be capped at three or five years, depending on the length of the supervised release that would follow otherwise mandated imprisonment. The minimum sentence should be relatively low, as even some imprisonment sanctions may be short.

As a model for deferred adjudication, Margaret Love prefers the structure of the current Federal First Offender Act, which applies only to misdemeanor marijuana possession if the offender has no prior drug convictions, as it explicitly mandates expungement for those under 21. This scheme, however, remains very limited, especially as Margaret Love suggests the Commission consider the new deferred adjudication power for federal courts only in cases "where a probationary sentence would otherwise be appropriate under the Sentencing Guidelines." While she may correctly assess political realities, such power would be so limited that it is difficult to imagine that it will impact more than a handful of cases annually. Perhaps not more cases should be advantaged in such a way; perhaps a benefit for even a very small number is preferable over no benefit at all. Nevertheless, the Commission should be encouraged to engage in a more courageous and broad scale reenvisioning of federal sentencing rather than continue to merely tinker at the margins.

David Wexler, well known as a strong proponent of therapeutic jurisprudence, would present such a systemic critique but in this issue, he sets out a detailed analysis of federal pretrial diversion in light of therapeutic jurisprudence. Specifically, he suggests its expansion, and in particular the inclusion of addicts who are currently ineligible to benefit from diversion. Most importantly, he takes

issue with the use of language and communication between the criminal justice system and the offender in light of the goals of crime prevention and offender reintegration. He criticizes the pretrial diversion forms, which are included in the U.S. Attorneys' Manual, as overly legalistic, and makes a number of suggestions for change to create greater encouragement and support for the defendant, such as the inclusion of model letters from prosecutors to offenders to serve "as an inspiration and as a positive force for [defendants'] rehabilitative law-abiding efforts," even if the offender is not selected for pretrial diversion. Ultimately, so he hopes, "form reform" would not only create "a TJ [therapeutic jurisprudence] friendly legal landscape for federal diversion" but also encourage prosecutors to take greater advantage of pretrial diversion. Currently however, it is not only the Manual but also the norms of the federal bureaucracy that strongly discourage such innovation, as they have so far prevented therapeutic jurisprudence itself from making inroads.

Even if pretrial diversion and deferred adjudication are inappropriate, special considerations at sentencing may lead to a probationary sentence or at least decreased prison time in two situations, parents and drug addicts.

III. Special Cases: Parents and Addicts

Mark Osler's article focuses on the challenges of how to consider parenting at sentencing, if it is an appropriate factor. In such cases, he suggests the court should first assess what type of a parent the defendant is. If the defendant is a good and active parent, the court should opt to impose a probationary term, with the condition of "intensive parenting," which would require a heavy investment of time and energy into the children and be subject to monitoring and supervision. On the other hand, a parent who does not present a positive influence, but should be expected to contribute financially to his children's upkeep, would also receive a probationary sentence, but with the obligation that it be served in another community, within the same federal district, in part to provide the offender with the opportunity to rehabilitate and contribute child support but also to protect the child from the parent's negative influence. To allow a judge to make such a distinction, he or she will need substantial information about the family. Like Herb Hoelter, Professor Osler also asks for a reconfiguration of the role of the probation officer, and an expansion of the corps of probation officers to allow for more in-depth investigation necessary to assist a judge in making such decisions.

Mark Osler deems probation an avenue to force offenders into relationships they usually avoid, such as employment, and in this case more intensive parenting. He suggests that men would be more likely to benefit from this new opportunity as judges "seem eager to promote active parenting by men," and hopes that judges would take substantially greater advantage of the positive rather than the negative approach to probation. He views an active parenting requirement as appropriate in light of the goals of punishment: offenders would become more aware of their function as role models, and the time and sacrifices expected of parents would amount to incapacitation and retribution, respectively. While some may reject these ideas either as too middle class–based or as demeaning to "voluntary" parents, they present an interesting approach to the perennial problem of how to accommodate children's interest when a parent is being sentenced.

Parents are not the only ones to present systemic problems at sentencing. Those convicted of drug crimes and those dependent or addicted to drugs constitute a large category of federal offenders. Ryan King, a policy analyst with the Sentencing Project, looks at the expansion of alternatives in the state systems within the last decade, many of which have focused on drug treatment and diversion. Some reforms have centered on drug treatment courts, others on the diversion to treatment for those charged with drug possession.

As in the state systems, many federal inmates are addicted to, or at least dependent on, drugs. More intensive treatment would only be likely if the federal system were able to divert lower-level offenders to out-patient treatment facilities. Not surprisingly, Ryan King argues that the Guidelines should be reconsidered to allow for the substantial number of relatively low-level drug offenders in federal prisons to be eligible for diversion programs. David Wexler also suggests that addicts become eligible for the pretrial diversion program. In addition, Ryan King asks that the sentences of the large number of nonviolent offenders currently in federal prisons be revisited.

Another possibility for expanded early release would be enhancing the federal Residential Drug Abuse Program (RDAP), which is currently the only early-release program in effect in federal prisons.[5] States have enhanced parole eligibility, largely through in-prison program participation and compliance. Despite restrictions in the federal system that currently hinder such developments, the lessons learned in the states, including those pertaining to earned discharge and release, are transferable.

Even if the federal system is unwilling to expand early-release programs, at least the Bureau of Prisons (BOP) could change its interpretation of federal good time policy, which computes good time from the time served rather than sentence length. A change in policy would grant offenders somewhat earlier release, and save the federal system millions of dollars annually. Even though all federal circuits have affirmed the BOP's approach, the Supreme Court has granted certiorari and will review the policy in spring 2010.[6] In addition to earlier release, the federal system may consider reduction of supervision time post release.

IV. Decreased Supervision Time

Melissa Aubin presents an example of a broader vision of alternatives in her description of the District of Oregon Reentry Court. It is a post-release effort that provides enhanced supervision for those released from incarceration in exchange for a one-year decrease in the post-sentence supervision period upon its successful completion. In that way, it is not an alternative to incarceration, but rather to full-term supervision, which amounts to an "earned reduction of probation." In another way, one could describe it as an alternative to future incarceration, as a means to prevent recidivism by providing services and stronger supervision at an earlier point.

The impetus for the Oregon program was the large number of methamphetamine addicts who repeatedly appeared in front of the courts. To address their needs for sobriety and other services, such as housing, employment, and social stability, the reentry team was assembled to provide the support to allow for rehabilitation. A number of other federal districts are in the process of setting up reentry courts, focused on particular matters of local needs, including mental health.[7]

Even though no long-term studies of reentry courts exist currently, their construction has been grounded in evidence-based methods. Melissa Aubin cautions that a few reentry courts cannot make any large scale impact on recidivism, and therefore advocates that every stage of the criminal system—from trial detention to sentencing, from supervision to revocation—be governed by "evidence-based interventions designed to encourage desistance." Here her advocacy aligns with the goals set out by Senator Webb in "The National Criminal Justice Commission Act of 2009." She predicts ongoing changes to sentencing practices as our knowledge increases, with such changes requiring public understanding and acceptance of the use of evidence-based insights. Despite concern over such changes, evidence-based methods might be our best avenue to reconcile the demands for public safety with the goals of reintegration and alternative sentencing.

V. Changing Attitudes

"[T]he last 40 years have seen nothing less than a tectonic shift from incarceration as an option of last resort for the most recalcitrant individuals to the predominant public policy model to address crime," according to Ryan King. At this point, alternatives in the federal system are still in their infancy, not the least because incarceration has for so long infused the discourse and ethos of our criminal justice system.

Systemic change would require a total reorientation, with greater focus on rehabilitation and public safety, with the latter centered on ultimate release rather than incapacitation. This may be particularly difficult in the federal system as budget constraints are more attenuated than in the state systems. The Bureau of Prisons has also been more willing than many state prison administrators to take all types of inmates, and seems more reluctant to release them.[8] Changing such a bureaucracy without strong outside impetus and support seems unlikely even in a world that currently tests all of our assumptions and beliefs, even those about incarceration.

Notes

1 Nancy Gertner, *Federal Sentencing Guidelines: A View From the Bench*, Hum. Rts., Spring 2002, at 7.

2 Judge Gertner, for example, expressed great hope for the expansion of alternatives after *Booker*. *See, e.g.*, Nancy Gertner, *Sentencing Reform: When Everyone Behaves Badly*, 57 Me. L. Rev. 569, 571 (2005).

3 Eric Luna & Barton Poulson, *Restorative Justice in Federal Sentencing: An Unexpected Benefit of* Booker*?*, 37 McGeorge L. Rev. 787, 810–11 (2006).

4 ABA Commission on Effective Criminal Sanctions & The Public Defender Service for the District of Columbia, *Internal Exile* 10 & nt.2 (Jan. 2009).

5 Nora V. Demleitner, Model Penal Code Symposium: *Good Conduct Time: How Much and For Whom? The Unprincipled Approach of the Model Penal Code: Sentencing*, 61 Fla. L. Rev. 777 (2008).

6 *Barber v. Thomas*, docket number 09-5201, *cert. granted* 11/30/2009.

7 *See also* Ron Sylvester, *Federal program helps ex-cons stay out of jail*, The Wichita Eagle, Jan. 2, 2010.

8 *See, e.g.*, Todd Bussert, Peter Goldberger & Mary Price, *New Time Limits on Federal Halfway Houses*, 21(1) Criminal Justice 2 (Spring 2006); FAMM, *FAQ About Compassionate Release* (June 21, 2008).