Testimony before the United States Sentencing Commission

Public Hearing "The Sentencing Reform Act of 1984: 25 Years Later"

Rodney L. Engen, PhD

Associate Professor

Department of Sociology and Anthropology

Box 8107

North Carolina State University

Raleigh, NC 27695

rlengen@sa.ncsu.edu

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Good morning. My name is Rodney Engen. I am an Associate Professor of Sociology at North Carolina State University, where I specialize in the study of criminology and the criminal justice process. I have been involved in research on plea bargaining, sentencing, and sentencing guidelines over the past 15 years. During that time I have also worked as a research investigator with the State of Washington Sentencing Guidelines Commission, and as a research consultant to the North Carolina Sentencing Policy and Advisory Commission. I am honored to have the opportunity to share my thoughts with you today.

I did not come here with a specific set of policy recommendations in mind, but rather, to encourage the commission to exercise its leadership in pursuing three broad objectives that, in my professional opinion, are essential for achieving the SRA's purposes, that are consistent with the commission's missions of advising Congress and advancing research on sentencing practices, and that will ultimately improve the quality of justice in the United States.

I. Reducing Imprisonment Rates.

The U.S. imprisonment rate has grown at an unprecedented rate over the last 35 years. Data released by the Bureau of Justice Statistics, in December, 2008, shows that the U.S. imprisonment rate continued to climb in 2007, reaching an all-time high of 506 persons in state and federal prisons per 100,000 U.S. residents. For white males, the imprisonment rate was 955 per 100,000, for Hispanic males, 1,259. By comparison there were 3,138 black men in state and federal prisons for every 100,000 in the population.

I am confident the Commission is well aware of these numbers, as are most members of the audience, so I won't belabor the point. Rather, it is with these statistics in mind that I wish to encourage the Commission to consider more fully the consequences of sentencing policies that support this unprecedented rate of imprisonment and of racial disproportionality, and to pursue, aggressively, policies that will decrease our reliance on imprisonment and increase the use of community-based alternatives for federal offenders.

Calls to limit or reduce the rate at which offenders, especially non-violent offenders, are sentenced to federal and state institutions are often justified on the basis of the enormous fiscal

burden they impose on the government and taxpayers. However, a growing body of research indicates that the social costs, and indirect economic costs, of imprisonment are enormous as well. The negative consequences of imprisonment are long-term and far reaching, affecting not only individual offenders, but also their families, the communities in which they live, and ultimately local, state, and federal governments.

Imprisonment obviously disrupts offenders' employment. It also significantly reduces their ability to gain employment once released, reduces the quality of jobs they are able to find, and reduces substantially their long-term earning potential (Western, 2006; Western and Pettit, 2004; Pager 2003. Imprisonment separates children from parents, dissolves marriages, and reduces the likelihood of marriage in the future (Lopoo & Western 2005). Imprisonment has significant and negative effects on offenders' physical and mental health (Liebling & Maruna 2005; Kruttschnitt & Gartner 2005), increases exposure to infectious diseases such as HIV, hepatitis, and tuberculosis (Johnson & Raphael, 2006; Massoglia 2008a; National Commission on Correctional Health Care 2002), and generally decreases long-term physical well-being (Massoglia 2008b).

Given the level of racial and ethnic disproportionality in imprisonment rates, these consequences fall disproportionately on African American and, to a lesser extent, Hispanic men; on already economically marginalized groups.

Ex-offenders are not the only ones affected by these collateral consequences. We are all affected. Stable employment and marriage are two of the best predictors of whether offenders will reoffend or refrain from crime (Sampson & Laub 1990). Policies that undermine these stabilizing forces are likely to increase recidivism.

Imprisonment also indirectly impacts the well-being of offenders' families, both by immediately removing a potential source of income during the offender's incarceration and by reducing the ex-offender's earning potential. The loss of employment opportunities post-release can have serious long-range consequences, for instance by making it even less likely they will find jobs that provide stable full-time employment, which is often key to obtaining essential benefits that most of us take for granted, such as health insurance or—dare to dream—a retirement savings

plan. The lack of such benefits not only diminishes their children's quality of life and future prospects, it inevitably will increase the long-term burden on local and state government to provide for the health and welfare of offenders and their dependants.

High rates of imprisonment also indirectly affect whole communities, particularly the economically disadvantaged, high-minority, urban communities from which a large proportion of the incarcerated population comes. The reentry of large numbers of unemployable men into these communities means that all of the problems experienced by these offenders and their families then are multiplied, which is likely to further destabilize these communities and result in even higher crime rates over time than they would have experienced otherwise (Rose & Clear, 1998).

Unfortunately, under the current guidelines, roughly 11% offenders are eligible for community-based alternatives to prison without a sentence departure.[1]

Recommendation: *With these considerations in mind, I urge the Commission to pursue, as one of its primary goals, identifying ways to decrease our reliance on imprisonment, to consider the negative social costs and consequences of imprisonment whenever contemplating changes to the guidelines, and to communicate to Congress and the American people that despite the presumed benefits of imprisonment for reducing crime, it also comes at an enormous social cost. This is also one way in which this Commission can demonstrate leadership and set an example that the states might then be more inclined to follow as well.*

[1] The USSC's (2009) *Alternative Sentencing in the Federal Criminal Justice System* reports that alternative sentencing options were available for "nearly one-fourth of federal offenders (p. 3)," based on the fact that 21.5% of all offenders were sentenced in Zones A, B, or C. However, the report also indicates that roughly half of the offenders sentenced in Zones A, B, and C were non-citizens and therefore ineligible for alternative sentences, suggesting that an eligibility rate of 11% is more realistic. Nonetheless, 13.5% of offenders received alternative sentences in 2007 (19% of U.S. citizens). Among 40,830 federal offenders who are U.S. citizens, 5,378 (13%) were sentenced within the guideline range in Zones A, B, or C, and thus were eligible for community based sanctions. This excludes offenders who were not eligible due to mandatory minimums or who received departures, and non-citizens. Among these eligible offenders, 68% received the alternative sentence.

II. Consider the role of US Attorneys and AUSAs in the sentencing process: Promote research examining the relationship between plea-bargaining, sentencing outcomes, and the goals of the SRA.

It is convenient, both for policy makers and for scholars, to act as though criminal sentencing is a simple function of three things: (1) the facts of a case (or at least the facts that can be proven in court); (2) the applicable guidelines; and (3) the thoughtful exercise of discretion by the sentencing judge. If this were the case, then all that would be required to change the nature of punishment would be to fine tune the guidelines. But it is not this simple. The plea agreement struck by the prosecutor and the defendant is the critical fourth term in the equation. The reality of American criminal justice is that sentencing—in the states and in US District courts—is determined to a large extent by what happens in plea negotiations. Ninety six percent of all federal convictions in 2007 were obtained by guilty pleas. Unless we understand what happens at that stage in the process, and why, knowing the final outcome is not especially meaningful.

Research by this Commission (USSC, 1991) found that among drug and firearm cases eligible for mandatory minimum sentences, only 59% were convicted of crimes requiring the most severe mandatory sentence applicable, and 25% were convicted of crimes that did not carry mandatory sentences. Prosecutors also granted "substantial assistance" departure motions in one-third of cases convicted under a mandatory minimum provision, negating the mandatory sentence. Other evaluations estimate that from one third (US General Accounting Office, 1993) to half (Meierhoefer, 1992) of offenders eligible for mandatory minimums in U.S. courts avoided them. Likewise, Schulhofer and Nagel (1997) estimated that federal prosecutors circumvented the guidelines in 20% to 35% of cases, most often in cases involving mandatory minimums, and report "huge discounts" in some jurisdictions. Even more striking, the USSC found that federal prosecutors filed firearm enhancements in only 20% of qualified cases in 2000, down from 45% in 1991 and 35% in 1995 (USSC, 2004).

Interviews with court actors find that plea negotiations involve an even wider range of considerations, including the seriousness of charges, stipulations to "relevant conduct", such as weather a weapon was used, the quantity of drugs involved, the dollar loss amount, the

defendant's role in the offense, or the existence of prior "strikes" in a defendant's record; and eligibility for 5K1 departures (Schulhofer and Nagel, 1997; USSC, 1998; Ulmer, 2005). Research by the commission and others also finds that US Attorneys' definitions of what constitutes "substantial" assistance vary by district, as do practices regarding acceptance of responsibility reductions and the use of Federal Rule 35 allowing resentencing (Ulmer, 2005; USSC, 1998).

Together, these studies provide strong evidence that plea-negotiations frequently determine the charges that defendants plead guilty to, the "facts" that constitute relevant conduct, whether defendants have rendered substantial assistance, and whether mandatory minimums will be applied. As Nagel and Schulhofer pointed out, when prosecutors bargain around the guidelines "the sentencing decision is not being made by the judge, as the guidelines contemplated. It is being made exclusively by the parties" (1992, p. 551). In this way, the displacement of discretion that Alschuler and others warned of more than 30 years ago is very real, and has the potential to undermine the SRA's goals of ensuring uniformity and proportionality.

However, little else is known about the role of plea-bargaining in Federal courts beyond the glimpses provided by this handful of studies. Moreover, none of these studies included data with sufficient detail on the charging and plea agreement process and with a sufficient sample of individual cases to establish how frequently these kinds of facts are negotiated, the characteristics of cases that predict the outcome of these negotiations, or the effect that plea bargaining has on average sentence severity or how closely the "facts" presented in court—and recorded in the commission's sentencing monitoring database—resemble actual offending, relevant conduct, or substantial assistance.

Undoubtedly, "circumvention" of the laws happens, but have the guidelines really shifted control over sentencing to prosecutors, and to what degree? Has plea-bargaining over the essential facts of the case undermined the goals of the SRA? The empirical evidence with which to answer these questions is quite limited.

It is certainly likely that USAs and AUSAs exercise their discretion in ways that often result in what outside observers would consider appropriate, just, and fair outcomes, possibly even adjusting for some features of the guidelines that otherwise might result in a less appropriate punishment. It is also likely that this is often not the case. Does the exercise of discretion on the part of US Attorneys usurp the authority of federal judges and circumvent or undermine the goals of the SRA? The problem, from my perspective as a researcher, is that we currently lack the empirical evidence with which to make this determination.

Recommendation: I urge the commission to strive for greater openness and transparency in the sentencing process, including the charging and plea bargaining stages, so that scholars and concerned citizens alike may make more realistic and useful assessments of whether, in fact, the guidelines goals have been achieved and what modifications might be appropriate or necessary. I urge the commission to work with the department of justice and US Attorneys to nurture a research-positive environment that facilitates greater input from all parties involved in these important decisions. Making data readily available to independent scholars that includes even basic information regarding pre-sentencing decisions, including the initial indictment, relevant facts that can affect the sentence, and plea agreements struck, as well as the final outcome, will greatly improve the quality of their resulting research and will increase the value of that research as guide in policy formation.

To the US attorneys and assistant attorneys in the audience, please do not construe my remarks as an indictment of your office (if you'll pardon the expression). I do not mean to imply that fed prosecutors are abusing their discretion or that this discretion is necessarily at odds with the goals of the SRA. There are certainly instances where applying the guidelines mechanistically may create as many dilemmas for the prosecutor as they resolve, resulting in a greater injustice than would be achieved through some more creative charging. Just as a judge may depart from the guidelines in order to achieve a more appropriate sentence, so too may a prosecuting attorney adjust the charge or relevant facts. The fact is, researchers know so little about how and why Federal prosecutors use their decision-making authority that it is premature for us to conclude anything about the decisions they make, except to point out that they do have discretion, they do

exercise it, and it does make a difference. We just don't know how much difference it really makes.

Understanding the role of charging decisions by us attorneys in the sentencing process is essential to addressing the major questions of interest to the commission: How has Booker affected the process? Do the guidelines appropriately balance uniformity and judicial discretion? Have the guidelines achieved proportionality in punishment? And how can the guidelines be improved? A complete answer to each of these questions requires detailed knowledge of the plea process. Substantial changes to the guidelines, including major decisions like Booker, do not only affect the exercise of discretion on the part of judges, they also affect the charging and plea negotiation process that is at the heart of criminal sentencing. Consequently, it is difficult to anticipate fully the effect of reforms to the sentencing guidelines, either in terms of the severity of punishments meted out, or the degree of uniformity or disparity that results.

USAs and AUSAs play an integral part in the sentencing process. Their knowledge, experience, and insights therefore are absolutely essential to the research endeavor as well if we are to ever develop a comprehensive understanding of the sentencing process, and for the Commission to develop more effective policies. One specific area in which research on the plea process and prosecutorial discretion is absolutely critical is in the use of 5K1.1 departures. Many studies point to departures, especially substantial assistance departures in drug cases, as a point at which unwarranted sentencing disparities arise. Studies indicate that black and Hispanic defendants may benefit less from these departures than do white defendants. But why is this? Does this indicate discrimination either on the part of the judge or the US Attorney who submitted or did not submit a motion for 5K1 departure? Perhaps, but it is also possible that there are real differences in the kinds of assistance provided by different offenders, or in the strength of evidence that might explain variation in the use of departures. Currently data are collected on cases that receive substantial assistance departures, and the nature of the assistance provided, but the data are not readily available to researchers. Furthermore, even if they were, an objective analysis of the use of departures requires the ability to compare sentencing outcomes among cases in which defendants did and did not provide assistance, regardless of whether a departure was ordered.

I will close with the following recommendation, and I will be brief as the point is by no means an unfamiliar one:

III. Encourage the repeal of mandatory minimums.

I urge the Commission to encourage Congress to repeal mandatory minimum sentencing statutes in favor of the guidelines provided in the SRA.

There are not currently, nor have there ever been, any truly "mandatory" sentencing provisions under U.S. laws or state laws. Mandatory minimums do not ensure that offenders who have committed certain crimes or with a requisite criminal history will receive a particular sentence. They do, however, ensure that some subset of the offenders will be subject to especially harsh punishment, while others will avoid those mandatory sentences by pleading guilty to a lesser charge. Mandatory minimums that trump the guidelines, that do not take into account important differences among offenders who ostensibly committed the same crime, and that are controlled entirely by US Attorneys whose decisions are not reviewable, run counter the very principle of presumptive sentencing guidelines. By their very nature mandatory minimums invite inconsistent application, undermine uniformity in the punishments meted out to offenders who in all likelihood committed the same crimes, and yet, simultaneously, by require excessive uniformity for those to whom the mandatories are applied, threatening proportionality of punishment in the process. They are fundamentally at odds with the principles and goals of the SRA, compromise the effectiveness of the SRA in achieving those goals, and interfere with the Commission's ability to achieve meaningful reforms to the sentencing guidelines.

As well-know sentencing scholar past President of the American Society of Criminology, Michael Tonry, concluded:

Evaluated in terms of their stated substantive objectives, mandatory penalties do not work. The record is clear from research in the 1950s, the 1970s, the 1980s, and the 1990s that mandatory penalty laws shift power from judges to prosecutors, meet with widespread circumvention, produce dislocations in case processing, and too often result in imposition of penalties that everyone involved believes to be unduly harsh (1996; p. 135).