Are Costs a Unique (and Uniquely Problematic) Kind of Sentencing Data?

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The results of sentencing decision-making by judges are often the subject of close scrutiny and extended debate. Public policy discussion and academic literature often explore whether and when sentencing outcomes are just, are fair, and achieve various punishment purposes. But it is far less common to see careful examination and systematic assessment of sentencing inputs. Perhaps due to a rough consensus that sentencing judges need to consider information about both an offender’s conduct and his character, controversies concerning the front end of the sentencing process tend to focus mostly on how much weight should be given to particular sentencing factors rather than to whether certain factors are proper for consideration at sentencing at all.

Thanks to an innovative program developed by the Missouri Sentencing Advisory Commission, however, a debate over whether sentencing judges should consider the financial costs of a sentence recently spilled onto the pages of the New York Times. In a lengthy front-page article headlined “Missouri Tells Judges Cost of Sentences,” the Times provided this brief description of the Missouri innovation and the kind of controversy it has engendered:

When judges here sentence convicted criminals, a new and unusual variable is available for them to consider: what a given punishment will cost the State of Missouri.

For someone convicted of endangering the welfare of a child, for instance, a judge might now learn that a three-year prison sentence would run more than $37,000 while probation would cost $6,770. A second-degree robber, a judge could be told, would carry a price tag of less than $9,000 for five years of intensive probation, but more than $50,000 for a comparable prison sentence and parole afterward. The bill for a murderer’s 30-year prison term: $504,690.

Legal experts say no other state systematically provides such information to judges, a practice put into effect here last month by the state’s sentencing advisory commission, an appointed board that offers guidance on criminal sentencing.

The practice has touched off a sharp debate. It has been lauded nationally by a disparate group of defense lawyers and fiscal conservatives, who consider it an overdue tool that will force judges to ponder alternatives to prison more seriously.

But critics—prosecutors especially—dismiss the idea as unseemly. They say that the cost of punishment is an irrelevant consideration when deciding a criminal’s fate and that there is a risk of overlooking the larger social costs of crime. “Justice isn’t subject to a mathematical formula,” said Robert P. McCulloch, the prosecuting attorney for St. Louis County.1

Thanks to the inspiration and organizational efforts of Professor Chad Flanders, the Federal Sentencing Reporter is able to publish in this issue a set of original articles discussing the potential pros and cons of Missouri’s innovative decision to make available to trial judges information about the economic costs of various punishment options at the time of sentencing. Excitingly, Professor Flanders was able to get former Chief Justice of the Missouri Supreme Court, Michael A. Wolff, to author the lead article in this series. His piece provides context concerning the operation of Missouri’s sentencing system and explains in detail just how and why the state began providing
information about cost to its sentencing judges. Professor Flanders, along with Professors Lynn Branham and Ryan Scott, follow with thoughtful commentary and some criticisms concerning not only what Missouri is doing, but also broader issues as to what factors ought to influence sentencing and which institutional players ought to focus on the fiscal consequences of particular sentencing policies and practices.

FSR is not only grateful to Professor Flanders for putting together a terrific mini-symposium on a cutting-edge state sentencing development, but it is also pleased to publish in this same issue a distinct set of materials concerning federal sentencing outcomes. Specifically, in this issue appears (1) part of a significant new report from the U.S. Sentencing Commission on the application mandatory minimum sentencing, along with an original commentary by Paul Hofer concerning this report, and (2) an important policy speech delivered recently by Assistant Attorney General Lanny Breuer expressing concerns about recent federal sentencing developments, along with a response to that speech from a group of federal defenders.

Tellingly, the Sentencing Commission’s report and the other materials commenting on federal sentencing practices and outcomes present distinct and diverse perspectives on what even the most basic federal sentencing data may tell us (and may not tell us) about the virtues and vices of the modern federal sentencing system. In this way, the Commission’s report, and the diverse reactions and commentary that all the Commission’s data regularly generate, highlight that all forms of sentencing data, and not just information about sentencing costs, can be interpreted and utilized by various sentencing actors in various ways.

As the title of this brief Editor’s Observation is intended to suggest, reviewing reports and debates over federal sentencing data in the wake of the commentaries concerning Missouri’s innovative program to provide cost data to judges raises broader questions about how sentencing judges and all other sentencing actors can and should be expected to filter and assess competing data that necessarily raise obvious (and sometimes-not-so-obvious) normative issues about punishment purposes and the inevitable trade-offs between valid and competing public policy issues implicated in all criminal justice debates. Whether there are systemwide concerns about economic costs of different sentencing options or unwarranted sentencing disparities, or case-specific questions about whether a particular offender is likely to be deterred or rehabilitated by a particular punishment, a wide array of legal and political actors will always encounter and need to process a wide array of information from a wide array of sources about different potential sentencing options and outcomes.

These issues concerning when and how sentencing actors receive and process sentencing information demand broader reflection in part because, in response to continuing high rates of recidivism despite high rates of incarceration, many lawmakers, sentencing commissions, and judges have started paying greater attention to new social science research concerning whether and how different forms of punishment for different types of offenses and offenders impact recidivism rates. These trends have accelerated in the last few years as budgetary concerns in many jurisdictions have prompted policymakers to seek to limit or reduce the considerable costs associated with incarceration; lawmakers and public-policy groups around the nation have been investigating and adopting sentencing and corrections reforms that can efficiently and effectively divert or release offenders from prison without resulting in an adverse impact on public safety. In some form, nearly every state in the nation has adopted, or at least been seriously considering how to incorporate, evidence-based research and alternatives to imprisonment into their sentencing policies and practices.

For understandable reasons, it is hard to be seriously opposed to, or even skeptical about, modern movement toward these “evidence-based” sentencing policies and practices. But the materials in this issue provide an important reminder that even references and appeals to “data” or “evidence” come freighted in the sentencing setting with deep philosophical concerns and intricate normative questions about potential trade-offs between those competing public policy issues implicated in all criminal justice debates. While the provision of cost information to sentencing judges in Missouri serves as the latest locus for these debates in the states, and while the application of mandatory minimums and concerns about unwarranted disparities serve as enduring subjects of debate in the federal system, these matters are just a piece of the even bigger puzzle concerning how legal and political actors can best process all the data necessarily brought into the sentencing equation.

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