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Some Thoughts on Restoration, Reintegration and Justice in the Transnational Context

Mark Andrew Sherman*

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Mark Andrew Sherman

Abstract

This Essay argues that all actors – prosecutors, judges, and defense counsel – should care about what happens to foreign offenders following a judgment of conviction or entrance of a guilty plea, and that transnational correctional processes should be constructed and used to facilitate restoration of the victim and victimized community, and rehabilitation and reintegration of the offender. This is critical because, as in the domestic context, decisions about where and how foreign offenders are to be punished have much to do with whether justice is achieved for victims, affected communities, and offenders.

SOME THOUGHTS ON RESTORATION, REINTEGRATION, AND JUSTICE IN THE TRANSNATIONAL CONTEXT

*Mark Andrew Sherman**

INTRODUCTION

There has been a lot of talk lately among members of the bench and bar regarding transnational crime. Such talk tends to focus on assistance or cooperation in transnational matters and the use of international instruments to effect assistance or cooperation. Symposia and conferences are held and articles and books are written discussing prosecutorial and defense access to, and usage of extradition, mutual legal assistance, and prisoner transfer regimes. All this talk and scholarship is helpful. I suggest, however, we broaden the discussion to cover issues of restoration of victims and communities affected by transnational crime, and reintegration of foreign offenders.¹

Many prosecutors and defense counsel—and even some members of the bench—tend to view their roles narrowly. Prosecutors, rightly, are concerned with convicting “bad guys” in order to protect the public. Defense counsel, rightly, are concerned with ensuring the protection of criminal defendants’ rights. The bench, rightly, is concerned with ensuring the fair administration of justice. The problem is that these perspectives, while correct, often fail to consider the long-term consequences of prosecutorial, defense, and judicial decisions and the larger environment in which crime occurs. This problem is troublesome in the transnational context.

Consider, for example, an extradition request involving a citizen of the requested country for a crime committed in the requesting country.² Despite the requested country’s concern

* Education Specialist, Federal Judicial Center, Washington, D.C. B.A. George Washington University; J.D., University of Miami; LL.M. Georgetown University. Member, District of Columbia Bar. The views expressed in this Essay are those of the author and do not necessarily represent the views of the Federal Judicial Center.

1. For purposes of this Essay, a “foreign offender” is an offender who is not a citizen or subject of the prosecuting state. This group includes, but is not limited to, foreign nationals subject to extradition and immigrants.

2. Extradition is merely one aspect of this problem, and extradition of nationals an

with extraditing its citizens,³ the extradition occurs, the defendant is convicted (or pleads guilty), and is sentenced to a period of incarceration in the requesting country. What happens to the offender after sentencing? If a prisoner transfer treaty exists between the requested state and the sentencing state, then the offender may request a transfer. Since the transfer decision is carried out at the discretion of the sentencing state, maybe the transfer will occur or maybe it will not.⁴ But what if either there exists no such treaty or, if one does exist, the offender does not know it? If no transfer occurs and the offender completes his or her sentence in the sentencing state, then what occurs during the period of incarceration and during and after the offender's deportation proceedings? In a situation that goes beyond extradition of foreign nationals, what if the sentencing country determines that it has too many foreign prisoners generally, commutes the sentences of those determined to be the least dangerous, and returns them to their home country?⁵ What does this mean for the victim of the offender's crime? What does it mean for the community subjected to the offense? What are the resulting risks for the community receiving the released offender and the offender herself?

Prosecutors and judges usually do not concern themselves with these questions because they are not germane to the short-term prosecutorial or judicial functions. While defense counsel often do so concern themselves, they sometimes do not. These attitudes persist even in the domestic context. In that situation,

even narrower subset. The problems described in this Essay are also applicable to extradition from third countries and to the immigration context.

3. For an extensive discussion of the principle of non-extradition of nationals, see Michal Plachta, *Non-Extradition of Nationals: A Never Ending Story?*, 13 *EMORY INT'L L. REV.* 77 (1999).

4. For an exhaustive study of the prisoner transfer process, see MICHAL PLACHTA, *TRANSFER OF PRISONERS UNDER INTERNATIONAL INSTRUMENTS AND DOMESTIC LEGISLATION: A COMPARATIVE STUDY* (1993). For a critique of Michal Plachta's analysis and discussion of prisoner transfer as applied in the United States, see Mark Andrew Sherman, Book Review, *Transfer of Prisoners Under International Instruments and Domestic Legislation: A Comparative Study*, 28 *GEO. WASH. J. INT'L L. & ECON.* 495 (1995). For a practical primer on the prisoner transfer process in the United States, see Alan Ellis, *An Introduction to Prisoner Transfers: Going Home*, CHAMPION, July 1999, at 32.

5. This situation has occurred in the United States. See *Florida Becomes First State in a Move To Deport Illegal Aliens Before Expiration of Their Prison Term*, 10 *INT'L ENFORCEMENT L. REP.* 242 (1994); *Texas Becomes Latest State To Sue U.S. Government over Prisoner and Illegal Alien Costs*, 10 *INT'L ENFORCEMENT L. REP.* 237 (1994); *California Proposes Changes in Transfer of Foreign-Born Prisoners*, 11 *INT'L ENFORCEMENT L. REP.* 290 (1995)).

however, correctional systems exist that minimize any adverse effects. This is much less the case in the transnational sphere. Therefore, this Essay argues that all of these actors should care about what happens to foreign offenders following a judgment of conviction or entrance of a guilty plea, and that transnational correctional processes should be constructed and used to facilitate restoration of the victim and victimized community, and rehabilitation and reintegration of the offender. This is critical because, as in the domestic context, decisions about where and how foreign offenders are to be punished have much to do with whether justice is achieved for victims, affected communities, and offenders.

I. THE MYRIAD PROBLEMS OF JUSTICE

The situation of foreign offenders presents several problems of justice, which will increase in magnitude as the world continues to shrink. Consider the victim of the offense. Keep in mind that a "victim" can be an individual, community, or both. When a nation refuses to extradite a national who has committed an offense in another country, this situation leaves the victim without practical recourse to justice, even if the offender is tried and convicted in his or her own country.⁶ Similarly, if the foreign offender is extradited, tried, and convicted in the requesting state, then the victim cannot be made whole if the offender is transferred or deported. In these situations, the offender is treated fairly, but the victim is not.

Consider also, the foreign offender and other collateral parties. When a foreign offender is imprisoned in the country in which the offense took place, without possibility of transfer to his or her own country, the offender may have little real opportunity for effective rehabilitation and reintegration. While this situation may not present an immediate problem for the sentencing state, since the foreign offender most likely will be deported upon completion of his or her prison term (if not before),⁷ it

6. This Essay assumes that justice for victims of crime is an important value and that traditional punishment of offenders is merely one part of the "justice" package.

7. In the United States, the general rule is that criminal aliens become deportable upon release from imprisonment. See 8 U.S.C. § 1231(a)(1)(B)(iii) (1994). Further "[p]arole, supervised release, probation, or the possibility of arrest or further imprisonment is not a reason to defer removal." *Id.* § 1231(a)(4)(A). Moreover, recent immigration legislation now makes it possible for criminal aliens to be deported prior to

presents a serious problem for the offender, the victim, the receiving community, the criminal justice systems of both the deporting and receiving states, and the larger society. In this regard, to argue that an offender can spend several years in a foreign prison and then, following deportation, immediately readapt to life at home without correctional supervision, stretches credulity. Indeed, this reasoning is why nations with modern criminal justice systems have some type of parole, probation, or community supervision system for domestic offenders. Without access to systems of meaningful restoration and reintegration, justice remains elusive for the victim and recidivism by the offender is more likely. The latter consequence translates into greater risk of harm to the public; repeated contact with the criminal justice system for the offender; heavier caseloads for police, prosecutors, defense counsel, the bench, prisons, and community correction agencies; and a greater criminal justice tax burden to be borne by the public.

II. A PROPOSAL

To change direction to a form of transnational criminal justice that considers the needs of victims, affected communities, and offenders, the community of nations must reach consensus on the goals of criminal justice, such as:

- Holding offenders accountable while protecting their due process rights;
- Providing offenders the opportunity for effective rehabilitation and reintegration;
- Providing victims and communities with opportunities for restoration and protection.

Certainly, much of the world agrees with the first goal, and there is significant agreement on the second goal as well. The international community, however, is just getting started on the third goal.⁸

completion of their sentence. *Id.* § 1231(a)(4)(B). For further discussion of issues involving the rights of criminal aliens, see Kari Converse, *Criminal Law Reforms: Defending Immigrants in Peril*, CHAMPION, Aug. 1997, at 10; William R. Maynard, *Deportation: An Immigration Primer for the Criminal Defense Lawyer*, CHAMPION, June 1999, at 12.

8. See, e.g., AUSTRALIAN INSTITUTE OF CRIMINOLOGY, RESTORATIVE JUSTICE: AN INTERNATIONAL PERSPECTIVE (visited May 5, 2000) <www.aic.gov.au/rjustice/international.html> (on file with the *Fordham International Law Journal*); Council of Europe

But assume, *arguendo*, that the community of nations achieved consensus on all three goals. What could transnational criminal justice look like? Countries who are part of this consensus group might be willing, for example, to dispense with the principle of non-extradition of nationals and similar norms that obstruct assistance and cooperation. In return, protection of the offender's human rights would be guaranteed, and he or she would be eligible for return once the victim and victimized community have been made whole. Similarly, among this group of nations, the reactive practice of "dumping" illegal immigrant offenders via deportation and transfer could cease and be replaced by a proactive system that would guarantee that, in appropriate cases, following restoration of victims and communities, offenders would be eligible for transfer to their home country and provided a realistic opportunity to re-enter society under supervision, thus reducing the risk of harm to the receiving community.

The legal tools currently exist to facilitate such a systemic transformation. Modern bilateral and multilateral extradition, prisoner transfer and transnational courtesy offender supervision (*i.e.*, probation/parole) regimes exist and can be modified accordingly, if necessary. With regard to courtesy offender supervision, for several years Member States of the Council of Europe, pursuant to a multilateral convention,⁹ have routinely supervised offenders conditionally sentenced or conditionally released in another country. This is like the courtesy offender supervision commonly engaged in by probation agencies in the United States. Certainly, membership to that convention could be expanded, or the U.N. Model Treaty on the Transfer of Supervision of Offenders Conditionally Sentenced or Conditionally Released¹⁰ could be used as an alternative. These treaties, when used in tandem with prisoner transfer treaties, could permit an

Committee of Ministers, Recommendation R(99)19 Concerning Mediation in Penal Matters (Sept. 1999); *see also* U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, OFFICE FOR VICTIMS OF CRIME, PROMISING VICTIM-RELATED PRACTICES AND STRATEGIES IN PROBATION AND PAROLE 56-71 (1999) (discussing uses of restorative justice approaches in United States).

9. *See* European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders, Nov. 30, 1964, Europ. T.S. No. 51, 978 U.N.T.S. 227.

10. Model Treaty on the Transfer of Supervision of Offenders Conditionally Sentenced or Conditionally Released, G.A. Res. 45/119, U.N. GAOR, 45th Sess., Supp. No. 49A, at 221, U.N. Doc. A/45/49 (1991). This is also available via the U.N. Criminal Justice Information Network at <<http://www.uncjin.org>>.

offender to serve part of the sentence in the sentencing state, engage in restorative action toward the victim and the affected community, and then be transferred home to complete the sentence and re-integrate under supervision.

As for restorative concepts of justice, several countries are altering their domestic systems to include such approaches. Restorative justice even has been recognized at the intergovernmental level: along with international cooperation in combating crime, restorative justice is on the agenda of the Tenth United Nations Congress on the Prevention of Crime and Treatment of Offenders.¹¹

CONCLUSION

As we enter the twenty-first century, we continue to witness the world become increasingly integrated economically, technologically, and socioculturally. Accompanying this integration, law enforcement officials tell us there is a rise in transnational crime. So too, therefore, must be the number of transnational offenders, victimized individuals, and victimized communities. Thus, it is incumbent upon the community of nations, working bilaterally and through intergovernmental organizations, to recognize the implications of such integration not just for law enforcement, but criminal justice as a whole. Municipal criminal justice systems must adapt to the increasingly borderless nature of crime. Serious problems of justice exist transnationally—on a relatively small scale now, but they will grow. The basic tools and concepts to facilitate change exist, but broad discussion and consensus do not, and that is where much of the serious work must now focus.

11. U.N. General Assembly, U.N. GAOR 53rd Sess., *Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders: Discussion Guide*, A/CONF.187.PM.1 (Sept. 22, 1998).