Debating a Federal Sentencing Commission Circa 1978

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Norval Morris and I spent a quarter century disagreeing about the wisdom of sentencing commission structures as a reform in federal and state criminal justice process. From the period in the late 1970s when legislative formulations of a federal sentencing commission were accumulating shapes and missions until the end of his life, Norval was a friend of the institution and harbored hopes that it would contribute to decency and parsimony in punishment. I was far from certain that this new institutional structure would do more harm than good, then and now.

When one searches for the issues that divided us, for the conceptual or ideological foundation for this disagreement, it turns out that there was no clear intellectual foundation for either Norval’s enthusiasm or my suspicion. What separated us on the sentencing commission idea was more a difference in disposition than of ideology or sentencing theory. Our differences over commissions and guidelines were closer in structure to the standard jokes about optimists and pessimists than to structural approaches to the allocation of sentencing power in democratic government. Norval Morris was an optimist and a pragmatist who regarded many of the details of sentencing commission ambitions in that era as silly but thought that the long-run prospects of the institution would carry value. Here is Norval on point in 1970:

The criminal justice system may be compared to a blind man far down the side of a mountain. If he wants to reach the top, he must first move. And it matters little whether his first move is up or down because any movement with subsequent evaluation will tell him which way is up. A step by step process of experimenting, evaluating, and modifying must be undertaken. Both innovation and the subsequent evaluation of its consequences are essential to climbing up.¹

Norval never was consumed by the details in either the early or later discussion of commissions. Rather, he was a generalist who painted with a broad brush.

If that portrait of Norval on the sentencing commission as an institution is a correct one, there is an interesting contrast to the Norval Morris methodology on the substantive principles of sentencing and the texture of his approach to sentencing institutions, including not only commissions but also appellate courts, sentencing councils, and the like. The mid-1970s were the golden age of Norval’s jurisprudence of criminal sentencing, first with The Future of Imprisonment in 1974² and continuing into the bicentennial lecture in 1976.³ And all of this work was conceptual, precise, and detailed at a very high level. To engage Norval’s substantive jurisprudence of sentencing was to dance with guiding principles, limiting principles, and defining principles as they interacted in a complex choreography leading to decisions about imprisonment.

This contrast in texture between Norval’s substantive and procedural thinking is not a criticism or an expose. Norval Morris did not lead a double life, nor is there any structural inconsistency between his views on institutions and his views on the jurisprudence of sentencing. But there were also no detailed interconnections between his institutional preferences and his jurisprudential principles. This has left plenty of work for younger scholars like Richard Frase and Kevin Reitz to pursue.

There is one other aspect of Norval’s artistry when painting with a broad brush that is worth remembering. He had a real talent for Big Pictures that few of his peers displayed. When Norval and Gordon Hawkins talked in 1977 of the development of an administrative law of crime,⁴ they hit the American nail on its head. Morris combined a worldliness about the future with optimism about the capacity of institutions to live up to democratic aspirations. His was a sophisticated and qualified optimism but no less genuine because it recognized the frailty of our personal and institutional abilities. From the decidedly mixed perspective of 2009 on crime, justice, and liberty, we can only hope Norval was right.

Notes