Lost in Incarceration: The Native American Advisory Group's Suggested Treatment for Sex Offenders

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Federal prosecutions for all types of sex offenses have been increasing. This is a result of shifting prosecutorial priorities, both from the Department of Justice and from Congress, as related to child pornography, “traveler” child sex cases, “sexual tourism,” “sex slavery,” prostitution, and sexual offenses that arise from areas of exclusive federal jurisdiction, such as military bases and Indian reservations. Although all of these offenses involve terrible sexual crimes, they occur under very different circumstances. Nonetheless, the sentences imposed and, for the most part, the treatment received by these offenders are the same.

It is time to recognize that the sexual offenses that arise from exclusive federal jurisdiction, such as the Indian reservations, are frequently distinct from other types of sexual offenses, and should be treated differently. This article focuses on the supervision of Indian sexual offenders upon release from custody, and bases its suggestions on the report of the Native American Advisory Group submitted to the Sentencing Commission on November 4, 2003.

I. Indian Crimes

Beginning in 1885, the federal government assumed exclusive jurisdiction over certain specified violent felonies through the Major Crimes Act, 18 U.S.C. § 1153, if the defendant is found to be an “Indian” and the offense occurred in Indian country. The determination that someone is an “Indian” within this framework has been held to be political, not racial. Thus, since 1885, on certain Indian reservations, the federal government has replaced tribal sovereignty in punishing violent offenders who belong to the tribal community and commit their offenses within the confines of Indian land.

This explains why Indian offenses, which usually account for less than five percent of the overall federal caseload, make up a significant portion of the violent crime prosecutions in federal courts. Over 80% of manslaughter and over 60% of sexual abuse cases, almost half of all murders and more than half of all assaults in federal courts arise under the Major Crimes Act. Indian offenses are a major part of federal practice in many western states, and are present in other districts, albeit to a lesser extent, as well. Thus, any changes to the guidelines, including the supervision provisions, for the listed violent offenses weigh heavily on Indian country and Indian defendants.

II. The Federal Sentencing Guidelines and Indian Crimes

The Federal Sentencing Guidelines control federal offenses arising from Indian jurisdiction which results in Indians being treated quite differently from similar state offenders. In some states, for like offenses non-Indian defendants receive much lower sentences under state law than Indian defendants under federal law. This disparity gave rise to concerns about unfairness and the perception that Indians were treated more harshly because they were Indian.

In response to these concerns, and given the exclusive federal jurisdiction over the listed crimes, the U.S. Sentencing Commission established an Ad Hoc Advisory Group to examine the effect of the Federal Sentencing Guidelines in Indian country and to make recommendations to improve their operation. The Native American Advisory Group issued its report on November 4, 2003, and presented it to the Commission in a public hearing.

The report examined those offenses most frequently prosecuted under the Major Crimes Act, and specifically addressed issues relating to the sentencing of murder/manslaughter, assaults, and sexual offenses. Under the Federal Sentencing Guidelines, sexual offenses are addressed in §§ 2A3.1, et. seq. These sections include enhancements and upward adjustments for the age of the victim, the extent of injury, and other aspects of the offense. In most sexual abuse cases these enhancements add up very quickly, resulting in appropriately lengthy sentences. Punishment for aggravated sexual abuse of a child under the age of 12, for example, could easily result in the imprisonment of even a first time offender for 15 years or longer.

III. Indian Offenses and the PROTECT Act

Congress passed the PROTECT Act in 2003. The Ad Hoc Advisory Group noted that according to the Senate Report on this bill, the purpose of it was “to restore the government’s ability to prosecute child pornography offenses successfully.” The Act, however, effectively increases the sentences for all federally prosecuted sexual
abuse offenses. In addition to across-the-board increases in custodial sentences for these offenses, the PROTECT Act also includes enhancements for prior sexual offenses, including a “two strikes you’re out” provision which when triggered, will result in a mandatory life sentence. Furthermore, the PROTECT Act restricts downward departures, limiting the discretion of the sentencing court with respect to consideration of mitigating circumstances. Significantly, it also extended the possible term of supervised release from a previous maximum of five years to “any term of years or life.” In light of the above, Congress instructed the Sentencing Commission to amend the guidelines to reflect the seriousness of these types of offenses. As a result, on May 1, 2004, the Commission sent amendments to Congress that raised the punishment even higher. Because of the jurisdictional framework explained above, these changes, including that for lengthened supervision, will disproportionately affect Native Americans prosecuted under the Major Crimes Act.

IV. Treatment and Reintegration into the Community

The large number of sexual offenses on Indian reservations have been a longstanding problem. Its origin is probably unascertainable, but its persistence and prevalence can be traced to a combination of substance abuse — primarily alcohol —, poverty, changes in culture and community, unemployment, and paucity of treatment and counseling. Arguably, the prosecution which went on for many years also has contributed to the phenomenon.

The offenders often come from isolated and insular communities. The offenses frequently involve family members. Literature examined by the Ad Hoc Advisory Group suggests that there are significant differences between incest offenders and extramarital child molesters in that recidivism rates for incest offenders are the lowest of all sexual offenders.

The nature of the offenses committed by Native Americans stands in contrast to the expressed Congressional concerns that gave rise to the enhanced sentencing provisions of the PROTECT Act. For example, in fiscal year 2002, “virtually no Native Americans” were sentenced for child pornography, Internet or similar “travel” related sex crimes. The Ad Hoc Advisory Group considered this important because the offenders most affected by the provisions of the PROTECT Act were all but absent from the group that Congress intended to target with this law. This fact demonstrates at best, a Congressional failure to understand the impact of changes to the sentencing laws for those crimes contained in the Major Crimes Act.

Given the nature of sexual abuse offenses that occur in Indian country and are prosecuted in federal court, it has become increasingly important that the offender, both before and after his release, receive the treatment necessary to aid in his reintegration into the community. This is crucial, perhaps mostly so, for the protection of the family member victims and small communities from which many of these offenders come.

At present, most offenders receive no sexual abuse treatment before release from the custodial portion of their sentence, largely because of the very limited treatment options available during incarceration. Presently, there is only one BOP program available for sexual abuse offenders, the Sexual Offender Treatment Program (SOTP), located at the Federal Correctional Institution (FCI) in Butner, North Carolina. This program consists of an intensive residential treatment program for male sex offenders. Inmates volunteer for the program, the aim of which is to reduce the risk of recidivism. The program involves intensive psychological counseling, with an emphasis on teaching sex offenders to manage their sexual behavior through cognitive behavior modification and to avoid relapse through prevention techniques. The model program, which has only a limited number of spaces, requires that an offender have between 18 and 36 months remaining in his sentence, be literate, have no history of violence or inflicting physical injury to the victims, did not undergo and fail sex offender treatment in the past, or any other disqualifying factor.

Many potential benefits flow from such a program, including reduced recidivism. Indeed the Ad Hoc Advisory Group considered the growing body of literature on the effectiveness of sex offender treatment in reducing recidivism of sex offenders. Unfortunately, because of the space limitations with this program and such disincentives as its geographic location, most sexual abuse offenders from Indian country do not receive the benefits such treatment would afford. Instead, most receive no treatment until they are released from custody and transition to the supervised release portion of their sentence.

Originally courts utilized supervised release as a means of reintegrating the offender into the community, with an eye toward education, vocational training, and for counseling. However, in recent years, it has become increasingly a means of retribution and punishment. This is reflected in the increase in the length of supervision for sex offenders to a possible lifetime, which is primarily a way of keeping a watchful eye on them.

Sexual offenders placed on supervised release are now generally required to participate in sexual abuse counseling and treatment, which can include physical arousal testing and polygraphs. Other “conditions” may include restrictions on being with minors and on the places where the offender can stay; they frequently include prohibitions on alcohol consumption, and also often require the offender to post that he is a sexual abuse offender (the so-called “scarlet letter”). Courts also have been known to impose such intrusive conditions as specifying what type of undershorts an offender must wear, and the requirement that he does indeed wear undershorts. While these conditions are imposed with the hope that they will help ensure community safety through monitoring the offender on his road to recovery, the Ad Hoc Advisory Group believed that given the nature
of cases arising under the Major Crimes Act, expanding Native American participation in a treatment program while in custody and increasing the incentives to such participation would substantially benefit the victim, the offender and the Indian communities impacted by these crimes. Earlier treatment through such a program would also allow any supervision treatment conditions to be based on a professional assessment of each offender's specific needs rather than some generically imposed template for supervision that risks being both overly burdensome and ineffective.

Earlier intervention would be helpful in a number of other respects. First, the offender would be encouraged to discard his denials earlier. Because presently most offenders do not start their treatment until they are being released from the BOP, they have no incentive to shed their denials while still in custody. However, to be accepted into the SOTP, the offender would have to meaningfully accept the consequences of his sexually offensive behavior while still facing at least one and one half years of custody. Recognition of one's guilt and need for therapy not only helps with the treatment process but can also be helpful in healing families that have been torn apart by the offender's conduct. In addition, in-custody treatment addresses some of the difficulties in getting intensive treatment for offenders who live in remote reservation areas while on supervision. Such treatment is required of all offenders, including those living on remote reservations. In the authors' experiences, these conditions often create an additional burden on offenders and an obstacle to successful reintegration into their communities because of the distances many offenders must travel to participate in treatment. Consequently, some offenders are forced to live away from their home reservations to effectuate such treatment.

For these reasons the Native American Advisory Group recommended that the SOTP be expanded and modeled on another highly successful BOP program, the Drug and Alcohol Program (DAP), an intensive drug and alcohol treatment program. Successful completion of the DAP program allows certain inmates to be eligible for up to 12 months off their sentence. 14

As with the DAP program, the Ad Hoc Advisory Group recommended that a sexual abuse offender who successfully completed the SOTP be eligible for a modest sentence reduction. The Ad Hoc Advisory Group found this incentive appropriate for a number of reasons. Primarily, it believes this reduction would help overcome some of the obstacles to participating in the SOTP program, provide an incentive to encourage sex offenders to fully accept responsibility for their crimes and successfully complete the SOTP. 15 It would also give Native Americans who may lack treatment and counseling resources on the reservations access to them while imprisoned. This would allow those who successfully complete the program to reintegrate back into their community without them having to spend an additional period of time away from the reservation to obtain intensive treatment upon release. This advantage would provide a substantial additional incentive for treatment while in custody.

V. Conclusion
Senior Judge Heaney of the Eighth Circuit has noted in a case that "little or no progress has been made by the United States Department of Interior, the Tribe, or any of the applicable federal or state agencies to reduce the incidence of sexual abuse on poverty-stricken Indian reservations." 16 It is time to make appropriate changes to the criminal justice system. It is only through such innovative programs as the SOTP that positive steps can be undertaken to treat sexual offenders rather than simply lengthening punishment or increasing restrictions without making positive counseling steps to get to the underlying causes of the crime. The Bureau of Prisons' SOTP program appears to be effective. Given the potential benefits of rehabilitation, the program should be expanded and incentives to participation provided along the same lines as in the DAP program.

Notes
1 The full report is available at http://www.uscc.gov/NAAG/NativeAmeri.pdf.
4 Public Law 280 (1953), now codified at 18 U.S.C. § 1162(a), gave a number of states criminal jurisdiction over reservations within their borders. These states include Alaska, California, much of Minnesota, Nebraska, much of Oregon and Wisconsin. Pursuant to this law Florida, Idaho, Iowa, and Nevada, as well as a handful of other states, also took over some jurisdiction over Indian country.
11 Native Americans convicted of sexual abuse were more likely to be under the influence of alcohol (or drugs) than offenders
of other racial groups — roughly 50 percent of the Native American cases involved substance abuse by the offender.


V.L. Quinsey, Treatment of Sex Offenders, in HANDBOOK OF CRIME AND PUNISHMENT 405 (M. Torny ed., 1998) ("Homosexual child molesters had the highest sexual recidivism rates, and incest offenders the lowest."); hereinafter CRIME AND PUNISHMENT. The Ad Hoc Advisory Group relied upon another study, entitled Recidivism of Sex Offenders, conducted by the Center for Sex Offender Management in May 2001, which confirmed these findings. It reported that the recidivism rate for incest offenders is 4%-10%; the rate for child molesters with female victims is 10%-29%; and the rate for child molesters with male victims is 13%-40%.


Native Americans are far more likely to be sentenced under federal laws regulating sex offenses than non-Native Americans: the 2000 Census reports that Native Americans compose roughly 1.5% of the population of the United States, but Native Americans were the offenders in over half (132 of 240) of the sexual abuse convictions in federal courts in Fiscal Year 2001.

For a full discussion of the SOTP, see Report, supra note 14, at 26–30.

BOP officials informed the Ad Hoc Advisory Group that there are currently some 10,000 federal inmates who are sex offenders. One-third are serving time for an instant sex offense, the other two-thirds have a history of sex offenses, generally revealed through state criminal convictions. The BOP provides treatment services to only one percent of those inmates.

Other disqualifying conditions include that the inmate must not have a pending charge or detainer that interferes with release to the community and that the inmate must not be psychotic or suffer from a psychiatric illness that would prevent him from participating in the program fully. No information was presented to the Ad Hoc Advisory Group on whether these disqualifying conditions result in a greater number of disqualifications of Native Americans. Even if this were the case, given that Native Americans comprise the majority of sexual abuse offenders in the federal system, the program should be geared to addressing the specific needs of this community.


The geographic obstacle arises from the fact that the majority of Native American sex offenders prosecuted in the federal courts are from the West and Southwest, notably Arizona, South Dakota, North Dakota, New Mexico, and Montana. North Carolina is distant from their families, generally preventing visitation.

BOP officials also identified two other obstacles to treatment: Native American distrust of government and the fact that Native Americans are taught to be self-reliant. Also the embarrassment and shame associated with a conviction for a sex crime may prevent an offender from seeking treatment.


While it might appear that sex offenders who admit responsibility and engage in treatment for an external purpose might not benefit from treatment, the professionals within this program advised the Ad Hoc Advisory Group that it would be very difficult for someone who did not accept responsibility and sincerely desire treatment to complete the program successfully.

United States v. White Horse, 316 F.3d 769, 777 n.2 (8th Cir. 2003) (Heaney, J., dissenting).