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Criminal Law:*The Institutional Design of Punishment*¹

Aaron Rappaport

Over the past 40 years, the United States has experienced an extraordinary transformation in the institutional design of its punishment systems. Many states, along with the federal government, have shifted from indeterminate sentencing models (in which courts and parole boards wield principal authority) to determinate systems (in which legislators and sentencing commissions have principal power). This shift has been called one of the most important changes in federal judging in more than 50 years.²

Whether the institutional transformation is a good one remains the source of heated debate. But noticeably lacking from the discussion is any sustained effort to examine the institutional design of punishment from a theoretical point of view, and specifically to explore the underlying *morality* of different institutional schemes. This chapter summarizes the first sustained attempt to explore the relationship between moral theory and institutional design in the punishment field.

The effort must confront one immediate obstacle—a persistent lack of agreement over the appropriate moral theory governing punishment decisions. Two moral theories dominate the field—utilitarianism and retribution—along with hybrid versions that meld the two. The choice among these moral theories has proved endlessly controversial, and no accepted methodology exists to resolve the dispute.

The controversy over moral premises need not be an insuperable obstacle, however. Rather than trying to identify the “correct” moral principle, an alternative approach would be to assess the institutional ramifications of *each moral theory in turn*. The result would be a menu of design options, each associated with a different moral principle. This approach would confront retributivists and utilitarians, in turn, with the institutional ramifications of their favored moral outlook. This chapter summarizes the first step toward this approach by exploring the institutional ramifications of one dominant principle of punishment: utilitarianism. The hope is that the

1. Summarized and excerpted from Aaron J. Rappaport, *The Institutional Design of Punishment*, 60 ARIZ. L. REV. 913 (2018).

2. Jose A. Cabranes, *Sentencing Guidelines: A Dismal Failure*, 207 N.Y. L.J. 2 (Feb. 11, 1992).

effort will inspire others to examine the institutional implications of other moral theories in the punishment field.

So which institutional structure is best suited for promoting utilitarian goals? Such an institution must possess two essential qualities: It must be *committed* to promoting utilitarian goals, and it must be *capable* of carrying out the relevant analysis consistently and competently over time. Among sentencing institutions, which comes closest to satisfying both requirements?

I. Commitment to Utilitarian Goals

Commitment to the utilitarian enterprise is a critical requirement. An institution that fails to adopt the moral principle of utilitarianism, and thus embraces theories such as retribution, will be utility-maximizing only by accident. Thus, the institutional designer must consider whether an entity's structure might influence its choice of moral goals. This idea—that institutional structure can affect goal selection—might seem surprising. But recent research in moral psychology identifies structural features that tend to encourage the adoption of a utilitarian orientation.

A. Cognitive Science and Institutional Design

Much of the new research focuses on how human beings make moral judgments—specifically, why the very same individuals sometimes make judgments aligned with consequentialist theories (like utilitarianism) and at other times reach decisions more consistent with nonconsequentialist or “deontological” theories (like retributivism). A common research strategy has been to pose moral dilemmas (such as the famous “trolley” problem) to individuals and study how the participants react. These studies are supplemented by MRI tests applied to individuals while they make moral decisions.

Drawing from such research, Professor Joshua Greene argues that human beings have two different mental processes for reasoning about moral matters—one more closely associated with consequentialist thinking; the other aligned with nonconsequentialist approaches.³

3. See Joshua Greene et al., *Embedding Ethical Principles in Collective Decision Support Systems*, in PROCEEDINGS OF THE THIRTIETH AAAI CONFERENCE ON ARTIFICIAL INTELLIGENCE 4147 (2016); Joshua Greene, *Beyond Point-and-Shoot Morality: Why Cognitive (Neuro)Science Matters for Ethics*, 124 ETHICS 695 (2014); JOSHUA GREENE, MORAL TRIBES (2013).

These processes take place in different parts of the brain, suggesting different biological mechanisms for each.

They also operate in very different ways. For example, the nonconsequentialist process appears to require a smaller degree of effort and, perhaps as a result, operates at a faster speed. That helps explain why individuals, when given moral dilemmas under stress or time constraints, tend to favor deontological decisions. By contrast, utilitarian considerations become more prevalent when participants are given greater opportunities for reflection and deliberation.

From these and related studies, Greene concludes that the deontological mechanism operates as an intuitive, fast-operating process, one that occurs automatically without any conscious thinking. By contrast, the consequentialist process is a slower, more methodological process requiring more effort. This “dual-process theory,” as Greene calls it, rests on a wealth of supporting data; it will serve as our working hypothesis going forward concerning how individuals make moral decisions.

The empirical research suggests that various aspects of the decisionmaker’s environment might influence which of the two cognitive processes is favored. Three factors in particular appear to be significant: the emotional vibrancy of the decision; the individual’s scope of responsibility; and the decisionmaker’s opportunities for deliberation and reflection. These factors provide a set of criteria for assessing which institution is most likely to adopt a utilitarian goal.

First, the emotional vibrancy of a decision is probably the central factor influencing moral deliberation. Emotions play a major role in deontological thinking. Strongly held emotions of anger and disgust, among others, are associated with intuitive desires to punish violators or help victims, and thus they increase the likelihood that an individual will adopt nonconsequentialist ways of thinking. By contrast, consequentialist thinking tends to be more deliberative, abstract, and cognitive. Thus, where individuals are able to moderate their emotional responses and consider decisions more abstractly, utilitarian considerations are favored.

These observations have implications for institutional design. Perhaps most notably, they suggest that, to promote utilitarian thinking, an institution should be designed in a way that creates some emotional distance from specific offenders and their concrete crimes. The most feasible way to achieve that result is to ensure that an institution addresses a sentencing question in the abstract rather than in the context of a specific individual’s case. All else being equal, entities, like juries, that confront defendants more directly are more likely to react in an intuitive, retributive manner. Conversely, institutions that have some

distance from the sentencing decision, such as sentencing commissions, are more likely to adopt a utilitarian framework.

A second relevant factor concerns the scope of the decisionmaker's responsibilities. According to preliminary research, individuals who have a society-wide perspective may be more likely to take into account the broader costs and benefits of a decision, while individuals who are narrowly focused on one individual tend to react in a more intuitive, moralizing way.

These results have implications for the punishment field, as well. Certain sentencing institutions, such as the legislature, possess a system-wide perspective; their responsibility, in a sense, is for society at large. Others, like judges, are principally focused on an individual criminal case. The implication is that, for a utilitarian, sentencing authority should be given to institutional actors with the broader, system-wide perspective because they are more likely to adopt a consequentialist approach to punishment decisions.

Finally, cognitive research suggests that the decisionmaker's opportunities for reflection can affect his or her moral orientation. When required to make decisions under time constraints or with other stressors, individuals default to automatic and intuitive nonconsequentialist thinking. Conversely, some evidence indicates that efforts to promote deliberation and increase accountability may encourage a more reflective approach conducive to utilitarian thinking.

Institutions can be structured to promote a more reflective decisionmaking environment. For example, establishing a multimember decisionmaking panel or commission can increase the likelihood that the members deliberate over various policy options. Mandating a period of time for input from affected individuals, requiring actors to consider those comments, and demanding that the officials issue a statement of reasons for their decisions would also help. All of these features should be considered because they can be helpful in calming the emotions of the punishment decision, thus promoting consequentialist thinking.

The research into moral psychology provides a general blueprint for constructing an institution that will tend to encourage utilitarian values. Such an institution should be responsible for promulgating general sentencing rules rather than for imposing punishments on specific individuals; should have a system-wide perspective on punishment decisions, including a responsibility to consider the interests of the community at large; and should be subject to procedures that encourage reflection and deliberation. Of the five traditional institutions of punishment—juries, judges, legislatures, parole boards,

and sentencing commissions—only the Sentencing Commission satisfies these three requirements to any significant respect.

B. Utilitarianism and Institutional Commitments

Sentencing Commissions possess a structure that is particularly hospitable to consequentialist thinking. The legislature, of course, possesses similar structural features, including the focus on general sentencing rules and system-wide perspectives. Yet the legislature's appeal is undercut by its political sensitivity to the passions of the public, which lead to emotion-driven decisionmaking. Do sentencing commissions suffer from the same defect? Some certainly do. One of the central critiques of the U.S. Sentencing Commission has been that it is insufficiently insulated from the political branches. But not all commissions are vulnerable to such a critique. Nothing makes them inherently political or apolitical. Rather, the degree of political insulation they possess is largely dependent on each commission's specific structure.

Perhaps the most important structural feature of political influence concerns how commission members are appointed to or removed from office. The U.S. Sentencing Commission, for example, has several membership rules designed to curb political influence. These rules establish long terms in office, require Senate confirmation for all nominations, permit no more than four of the seven members to be drawn from the same political party, permit removal only for cause, and require staggered appointments to the commission (to prevent the appointment of all commission members during the same Presidential term). All of these features give the Commission some insulation from political pressures.

Another critical area of insulation concerns *who* can be appointed to a sentencing commission. Commissioners must be appointed who are not overly dependent on, or subservient to, the political branches. Appropriately crafted membership requirements can promote that goal. To give one obvious approach, a commission that is comprised of life-tenured officials would have a much greater degree of political insulation—comparable to that of the federal judiciary. Thus, one approach to ensure a high degree of independence would be to require that all sentencing commission members be life-tenured judges and appointed to the commission for life (or at least very long terms).

This approach, of course, would not entirely eliminate the role of politics in the commission's rulemaking. Even life-tenured judges have political allegiances, and they may desire higher offices within the judiciary or elsewhere. As a practical matter, moreover, the sentencing

commission is dependent on the legislature for funding and its autonomy. Thus, the commission must be wary of making decisions that could trigger a legislative backlash. Nonetheless, one might hope that, over time, a relatively independent commission will accrue sufficient political capital to withstand the inevitable pressures generated by the political branches. In doing so, it will be able to fulfill its ultimate role as a broadly independent institution within the sentencing system.

In sum, the sentencing-commission model has certain appealing features that make it relatively well-designed to promote utilitarian goals. Like the legislature, it possesses the emotional distance and system-wide perspective that are conducive of utilitarian goals. In contrast to the legislature, though, the commission can be structured to reduce the influence of political pressure. The result is an entity well-suited for promoting utilitarian goals, or at least better suited than its rivals.

II. The Competence of Sentencing Institutions

Commitment to utilitarian goals is not alone sufficient to ensure that an institution achieves utilitarian objectives. The institution must also be *capable* of carrying out the utilitarian cost-benefit analysis consistently and accurately over time. Thus, the institutional designer must also consider the kinds of institutional skills necessary to carry out that analysis effectively.

A. Key Criteria of Competence

Three qualities will be essential—technical expertise, an expansive sense of empathy, and political impartiality.

A sentencing institution must possess a degree of technical expertise. Attempts to assess the public-safety benefits of a sentencing decision will inevitably involve complex judgments about the deterrent effect of punishment, the risk of recidivism, and the rehabilitative potential of the defendant. Similarly, attempts to assess the public costs of punishment will require some understanding of government finances, including the financial costs associated with the courts, police, prison, and other entities within the criminal justice system.

A second competence might be classified as a human, rather than technical, skill. It is the ability to *empathize* with human beings who may be very different from the decisionmaker. The utilitarian calculus, after all, requires consideration of the private costs of punishment,

which means a decisionmaker must be willing and able to take into account the suffering of a defendant sentenced to prison. Empathy requires the decisionmaker, then, to see the essential human worth of every defendant, despite the offender's possibly egregious acts.

A sentencing institution must also be able to employ these skills without being unduly influenced by political pressure or public opinion. Given the turbulent political environment and passions surrounding crime and punishment today, the ability to maintain any kind of independence is inevitably difficult. The unfortunate result is a skewing of sentencing decisions. Political pressure can lead an institution to overstate public benefits or understate the private costs of a sentencing decision, resulting in excessive penalties. To ensure an impartial assessment of the interests at stake, a sentencing institution must be insulated to some degree from the political passions swirling through the criminal-justice field.

These three competences—technical expertise, empathy, and impartiality—are the essential skills of a utilitarian sentencing institution. Lacking those skills, an institution's decisions will be based on speculation or, worse, political influence or bias.

B. Assessing the Competence of Sentencing Institutions

Which of the punishment institutions have all three of these skills to a significant degree? Again, only one: a well-designed sentencing commission.

Sentencing commissions can possess significant technical skill in assessing the public-safety effects of punishment. Commissions are commonly conceived as expert agencies charged with taking into account the latest research on punishment. Further, sentencing commissions can adopt a broad, system-wide approach that encourages consideration of the full range of public-safety concerns. In some jurisdictions, commissions are staffed with highly trained experts, including statisticians and other research scientists.

The primary obstacle commissions face in assessing the public benefits of punishment has been the "shortfall in quality research on the effectiveness of criminal sanctions in reducing crime."⁴ Nonetheless, sentencing commissions are well-positioned to make the best use of the available information. And, in some jurisdictions, commissions are tasked with actively promoting and supporting new research initiatives.

4. MODEL PENAL CODE § 6A.01 (Tentative Draft #1, 2007).

Turning to the public costs of crime, sentencing commissions appear to have comparable advantages. An effective institution must account for the full range of costs incurred by the government, including the costs of prison, correctional personnel, and the court system. An institution like the commission—with its system-wide perspective and with some expertise in accounting and related disciplines—will be able to gather and analyze these various data streams. The agency is also positioned to take account of cost issues relating to prison capacity. Sentencing commissions may not yet fulfill these tasks with complete success—anecdotal evidence suggests that commissions look at the cost side only occasionally—but the institution is the candidate with the best potential to carry out the task effectively.

The sentencing commission's ability to assess the private costs of punishment is more questionable. Like legislatures, commissions operate at a distance from individual offenders, potentially leading agency members to treat offenders as abstractions, without the full appreciation for the unique self-worth of the lives at stake. This danger can be mitigated somewhat by appropriately crafted membership rules. For example, a commission comprised of a panel of trial judges would be far less vulnerable to this critique. Trial judges have extensive experience confronting offenders in their ordinary sentencing decisions. One might hope that this experience would ensure that judges understand that they are dealing not with abstractions, but with real human beings.

The final consideration in assessing the commission's competence is its ability to weigh the public and private interests in an impartial, unbiased way. How does the commission fare on this metric? Some say not particularly well. Commissions have been criticized for being overly political. Justice Scalia famously denounced the U.S. Sentencing Commission for being merely a "junior varsity Congress."⁵ Despite this critique, it is a mistake to conclude that sentencing commissions are inherently sensitive to political pressure. The degree of independence they enjoy depends on their structure and membership.

The U.S. Sentencing Commission already possesses several structural features—such as removal only for cause—that help ensure a degree of political insulation. Requiring all commission members to be life-tenured judges would dramatically strengthen that insulation. This change would not eliminate all political influence, but, over time, as the Commission gains legitimacy and political capital, it will have further leeway to act on its own judgments without interference.

5. *Mistretta v. United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting).

This analysis suggests that a properly structured sentencing commission—one that is comprised of life-tenured trial judges—would be well-equipped to weigh the costs and benefits of punishment. Unlike the legislature, such a commission would neither overstate the public interests of punishment nor give short shrift to public or private costs. Unlike the judiciary, it would not be tempted to neglect public interests in its focus on private ones. Such a sentencing commission would represent the best option among the traditional sentencing institutions. Of course, the appeal of a sentencing commission depends fundamentally on how it is structured. To gain the full benefits of a commission, appropriate institutional safeguards must protect the commission from the inevitable political pressures that will be brought to bear on it over time.

Conclusion

Some might disagree with some of the empirical assumptions made here. Questioning those assumptions is entirely appropriate, and further research is unquestionably needed to ensure that the analysis is grounded in data rather than anecdote. Others might disagree with the analysis on a more fundamental level by rejecting the moral premise of utilitarianism. For them, this analysis will hopefully spur exploration of the institutional ramifications of their preferred moral theory. The ultimate goal of this effort goes beyond specific policy prescriptions. It is to promote a more transparent debate about the moral assumptions of institutional design, and to encourage individuals to be more reflective about the bases for their own institutional preferences in the criminal-justice field.
