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Speaking of Purposes

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There are, it has been said, two kinds of administrative agencies – those that deliver the mail, and those in search of the holy grail. The Commission has often portrayed itself as a "deliver the mail" organization. It has pursued bureaucratic goals of consistency and uniformity. It has sought to eliminate disparity, to rationalize the operations of the sentencing system, and to reduce costs by making the guidelines easier to use.

But the sentencing commission is also – indeed is fundamentally – a holy grail agency. Its decisions implicate basic questions of political morality: What punishment is justified? What is the legitimate purpose of sentencing? These questions may be controversial, but they can not be avoided when crafting a sentencing system. If our goal is to construct a *just* system – and what else can our goal be? – then we must have some concept of what makes a particular punishment justified.

This may seem too obvious to bear repeating, except for the fact that the Commission has consistently avoided articulating its vision concerning the purposes of punishment, or how purposes are linked to specific guideline provisions. This is a failure at the very heart of the guideline movement, a failure of more than theoretical significance, for it imposes significant and concrete costs on the operation of the sentencing system.

Avoiding Purposes

In its *Supplementary Report* on the guidelines, the Commission noted two primary purposes of punishment: the utilitarian (or "crime control") goals of deterrence, incapacitation and rehabilitation, and the retributive goal of "just deserts."[1] However, the Commission refused to draw links between these purposes and its guideline decisions, or to prioritize these purposes in a rank order. It offered at least three arguments for this neglect.

One rationale was that sentencing purposes were too indeterminate to offer any useful guidance for sentencing decisions.[2] Instead of relying on purposes the Commission indicated that it would base its decisions about sentence severity on the average sentences imposed by judges in the past. These "past practice" averages were appropriate, the Commission said, because they reflected the distinctions "that the community believes, or has found over time, to be important from either a moral or a crime control perspective."[3]

But this approach makes sense only if the Commission is prepared to preserve the status quo. As soon as the Commission departs from past practice, it must again confront the difficult question: Why is the departure justified? And that question necessarily entails an assumption about the guiding purposes of punishment.

Congress did not expect the Commission to remain tied to the past. Although the Sentencing Reform Act directed the Commission to use past practice as a baseline, it also provided that "[t]he Commission shall not be bound by such average sentences, and shall independently develop a sentencing range that is consistent with the purposes of sentencing. . . ."[4] And the Commission did depart from past practice in numerous ways when it promulgated the initial guidelines (as well as in subsequent amendments).[5] In doing so, however, it said virtually nothing about why its decisions were justified. If these decisions were the product of reasoned decision making, then they must rest at least implicitly on the belief that they will serve one or more purpose of punishment. What those purposes are, or how the purposes are served by the rulings, has been left largely unexplained by the Commission.[6]

The Commission offered a second rationale for refusing to prioritize or assess the different of purposes of punishment. Doing so, the Commission suggested, was "unnecessary, because the issue is more symbolic than pragmatic." That is true because "the different philosophies are generally consistent with each other."[7]

This belief in a "harmony of purposes" is plainly mistaken, as even a cursory look at the guidelines reveals. Consider, for example, an offender's history of drug use. Under utilitarian theories, drug use is an aggravating factor, since it is correlated with increased recidivism risk. From a just deserts perspective, however, it may be viewed as a mitigator, since it suggests a lesser degree of volitional control, and hence culpability. Any decision about the relevance of drug use, then, requires a choice among the theories of punishment.

Even factors that seem justified under both retributive and utilitarian theories raise conflicts when it comes to the specific manner in which the factor is incorporated into the guidelines. The relevance of an offender's criminal record is such an example. The Commission has observed that criminal history is an aggravator under both rationales.[8] But how much of an aggravator depends on the favored sentencing theory.[9]

In short, it is impossible to justify a sentencing system without relying on the purposes of punishment – either implicitly or explicitly. But which should it be? Should assumptions remain hidden, implicit in the Commission's decision making, or should they be made explicit, open for all to see? In its *Supplementary*

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Report, the Commission offered a final argument why silence is the best strategy. Taking an open stand on sentencing purposes, the Commission suggested, "would have diminished the chance that the guidelines would find widespread acceptance."[10] In other words, the Commission assumed that, to avoid potential controversy, silence about sentencing purposes is the politically prudent course to take.

The Commission may be correct that a debate over sentencing philosophy would be controversial. But that conclusion focuses only on the cost of an open debate, and ignores the other side of the ledger, the costs of remaining silent. And those costs are significant.

One cost is increased disparity, through the inconsistent application of guidelines rules. The sentencing structure developed by Congress consists of rules promulgated by the Commission, but applied by district court judges across the country. The rules themselves are to be applied in the typical case, but can be suspended when extraordinary considerations exist. How are courts to know when an unusual set of circumstances demand a departure? Ideally, that will occur when the purposes underlying the rule are no longer served. The only way for the courts to know when this is so is for the Commission to articulate, in a clear way, the purpose of the individual guideline. Lacking such an explanation, the courts are forced to engage in sterile speculations about the Commission's intent. Inconsistencies are the inevitable result.

A second cost is the failure to provide a clear focus for the Commission's own internal operations and activities. For example, one of the Commission's statutory obligations is to "develop a means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing ... ."[11] The only way for the Commission to pursue this mission effectively is for it to take a position on the dominant purposes of punishment. Different purposes call for different research agendas.

One final cost of silence is perhaps the most significant of all. It is the harm to the political effectiveness of the Commission. Under either just deserts or utilitarian theories, the Commission will sometimes find itself opposed to transient public passions for longer (or, in rare cases, shorter) penalties. On those occasions, the Commission must take an independent stand for justice. The Commission will only be successful in this effort is if it is seen to be acting on principle, and if the sentencing guidelines are understood as an interlocking system of rules serving justice.

To convince the public that this is so, the Commission must explain the link between guideline decisions and the core purposes of punishment. The ability to link together principles and policies is the essence of political leadership, whether it is leadership by an individual statesman or by a government commission. When that vision is clearly articulated, policies become meaningful embodiments of justice. The public may not agree with each guideline decision, but they will grant the statesmen a measure of respect and, in turn, a degree of freedom to pursue her vision.[12]

Speaking About Purposes

This will be the new Commission's greatest challenge — to develop a vision of what it hopes the guidelines will be, and in doing so to clarify the goals and purposes of punishment itself. This may seem, at first, an overwhelming task, especially if the goal is characterized as the articulation of a fully-worked out sentencing philosophy. Far superior, however, would be an evolutionary approach, one that mirrors the evolutionary development of the guidelines themselves. This approach would consist of two interrelated projects designed to clarify the connection between principles and policies.

The first would examine existing guideline rules, in an attempt to make implicit assumptions about sentencing purposes explicit. This initial task will not be feasible for every guideline rule, but some rules will lend themselves to analysis more easily than others. For example, an argument can be made that the primary function of the criminal history score is to serve crime control goals.[13] Making that point explicit will help to reduce disparity by identifying the factors that a court may consider when ruling on a criminal history departure.[14]

The second task is more theoretical. The Commission should begin an independent analysis of the purposes of punishment, to determine whether the implicit assumptions adopted by the Commission are compelling. Even if the criminal history score reflects utilitarian considerations, that does not mean that this choice is the correct one. Reassessing these assumptions will help ensure that the guidelines are appropriately tailored to serve the relevant purposes of punishment.

Talking about purposes may sound daunting. But every time a guideline amendment is enacted, the Commission makes an implicit assumption that the rule serves some purpose. Its time to make those purposes clear.

Notes

[1] UNITED STATES SENTENCING COMMISSION, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 15-17 (1987) [hereinafter SUPPLEMENTARY REPORT]

[2] *See id.* at 17 ("[T]hose who adhere to a just deserts philosophy may concede that the lack of moral consensus might make it difficult to say exactly what punishment is deserved for what crime, specified in minute detail. Likewise, those who subscribe to a philosophy of crime control may acknowledge that the lack of sufficient, readily available data might make it difficult to say exactly what punishment will best prevent the crime.").

[3] *Id.*

[4] 28 U.S.C. § 994(m).

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[5] *See* KATE STITH & JOSE CABRANES, FEAR OF JUDGING 60 (1998); Marc L. Miller & Ronald F. Wright, *Your Cheatin' Heart(land): The Long Search for Administrative Sentencing Justice*, 2 BUFF. CRIM. L. REV. 723, 756-60 (1999).

[6] The Commission did state that its changes were broadly consistent with all of the theories of punishment, *see* SUPPLEMENTARY REPORT, *supra* note 1, at 17, but it provided little in the way to make this claim persuasive.

[7] SUPPLEMENTARY REPORT, *supra* note 1, at 16; *see also* U.S.S.C. GUIDELINE MANUAL 3 (1998) (Asserting that making a choice among sentencing purposes is "unnecessary because in most sentencing decisions the application of either philosophy will produce the same or similar results").

[8] *See* U.S.S.G. Ch.4A, introductory commentary.

[9] For a discussion of the differences, see Aaron J. Rappaport, *Criminal History and the Purposes of Sentencing*, 9 FED. SENT. R. 184, 184-85 (1997).

[10] SUPPLEMENTARY REPORT, *supra* note 1, at 16.

[11] 28 U.S.C. § 991(b).

[12] *See* WALTER LIPPMANN, THE ESSENTIAL LIPPMANN 457 (1963) ("When a statesman is successful in converting his constituents from a childlike pursuit of what seems interesting to a realistic view of their interests, he receives a kind of support which the ordinary glib politician can never hope for.").

[13] *See* Rappaport, *supra* note 9, at 184-85.

[14] *See* Barbara Meierhoefer Vincent, *So What's the Purpose*, 9 FED. SENT. R. 189, 190 (1997)

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