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Editor's Observations

CRIMINAL HISTORY AND THE PURPOSES OF SENTENCING

Aaron J. Rappaport*

The criminal history guidelines and application notes constitute one of the most confusing and complex chapters in the Sentencing Guidelines Manual. Perhaps not surprisingly, that chapter accounts for the largest number of appeals in the federal system. Yet Chapter Four has been broadly neglected by scholars and guideline experts alike. One is hard pressed to find more than a handful of journal articles discussing this fundamental section. Skimming the literature, one might be forgiven for thinking that the guidelines were constructed along a single offense-severity axis.

Given this history of neglect, the Sentencing Commission deserves special praise for publishing its Draft Simplification Paper on Criminal History. The paper, reprinted beginning page 216 *infra*, was designed to initiate a dialogue about the role of criminal history in the sentencing process. It certainly has provoked a wide-ranging discussion among the commentators in this Issue, who debate proposals to modify the method of scoring prior convictions, expand the number of criminal history categories, and simplify the "decay" rules. But the debate that unfolds in these pages is not simply a technical discussion about the structure of this complex guideline chapter. It might also be seen as a microcosm of the broader debate over the structure and operation of the sentencing guidelines as a whole. Ultimately, the controversy over criminal history reflects a fundamental conflict over the basic goals and purposes of the sentencing system. Attempts to make Chapter Four "simpler" or more "effective" are unlikely to succeed without first addressing questions about the purpose of punishment itself.

I. The Philosophical Roots of the Criminal History Score

Criminal history is an anomaly in the guideline system. Like traditional offender characteristics, such as employment history and family background, criminal history has no direct relationship to the offender's current offense of conviction. Yet, unlike these other offender characteristics, it is thought by the Sentencing Commission to be highly relevant to the sentencing decision. Why?

One explanation is that, in the case of most offender characteristics, sentencing purposes such as

just deserts and crime control point in opposite directions. An abusive childhood might suggest that an offender poses a greater threat to society, but that same factor is also thought to make a person's criminal activities more "understandable" and, hence, less culpable. Depending on the favored purpose, then, family circumstances could serve as either a mitigator or an aggravator at sentencing. Faced with this conflict of purposes, the Sentencing Commission essentially compromised and made most offender characteristics "not ordinarily relevant" in the sentencing process.¹

Criminal history is different, or at least the original Sentencing Commission thought so. It suggested that the "collision" between sentencing purposes could be averted in the case of criminal history factors, "because to a substantial extent the factors that best distinguish high-risk from low-risk offenders also are factors that make the former group more culpable than the latter (*e.g.*, prior convictions, prior incarcerations, etc.)."² In other words, the Commission suggested that criminal history should be included in the sentencing scheme because it was *both* a strong predictor of recidivism and a good indicator of culpability.³

The idea that sentencing purposes work in tandem to justify consideration of criminal history is comforting, but it is only partly true. Certain crime control and retributive theories do support *some* role for criminal history in the sentencing process, but that partnership quickly breaks down when it comes to defining precisely *how* that role should be structured. A brief look at Chapter Four suggests that crime control, not retribution, provides the core logic of these guidelines.

A. Crime Control and Criminal History

Consider, for example, the basic structure of the criminal history axis. That axis is divided into six categories, with the last category encompassing all offenders with more than 13 criminal history points. Why, one might ask, is the axis limited to six categories? Surely an offender with 26 or 39 criminal history points is more culpable than one with 13 points, and hence deserving of a longer sentence. Judge Gerald Rosen, a member of the Judicial Conference's Subcommittee on Sentencing, advances precisely this argument in his article, "Why the Criminal History Category Promotes Disparity." Contending that criminal history category VI does not reflect the true seriousness of certain recidivists' records, Rosen argues that Chapter Four should be modified to provide for proportionate increases for offenders with more than 13 criminal history points.

From a crime control perspective, on the other hand, the limited number of categories makes more sense. From this perspective, a more extensive criminal record justifies a greater sentence only if the

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additional convictions help identify offenders who are more dangerous to society. To be sure, an offender with two or three convictions might have a higher risk of recidivism than a first-time offender and thus warrant a longer sentence. But after a certain point, additional convictions do not significantly increase predictive accuracy. One unpublished study confirms that this point of diminished returns is reached somewhere between criminal history category IV and VI.⁴ If accurate, this study helps justify, at least on crime control grounds, a limited number of criminal history categories. This is one of several basic features of Chapter Four that become comprehensible when viewed from a public safety perspective.⁵

The relevance of crime control goals to Chapter Four becomes clearer when one considers the origin of the Criminal History Score. In an important article, Peter Hoffman and James Beck, two respected researchers in the field, trace the roots of Chapter Four to the Parole Commission's pioneering work on the Salient Factor Score, a methodology designed in the early 1960s to evaluate an offender's risk of recidivism upon release.

The influence of the Salient Factor Score on Chapter Four is not disputed. The Sentencing Commission cited the Salient Factor Score as a prototype for the criminal history guidelines, and the two tests share many of the same factors and structural features. The affinities between these approaches provide further insight into the philosophical foundation of Chapter Four. Beck and Hoffman explain, for example, that the Salient Factor Score was expressly based on a crime control rationale: It was specifically designed to predict an offender's risk of recidivism. Numerous tests have verified the accuracy of the Salient Factor Score in this regard. To the extent that the Commission modelled Chapter Four on the Salient Factor Score, it could be said to have tacitly adopted the underlying crime control rationale as well.

B. Conceptual Compromise and Complexity

The Commission, of course, did not adopt the Salient Factor Score without modification, nor did it embrace the logic of crime control without qualification. Several authors in this Issue note how the Commission made significant changes to the Salient Factor Score in an attempt to inject just deserts considerations into the criminal history guidelines. However, to the extent the Commission succeeded in this attempt, it created an internal tension in the guideline structure. The effect has been to mute the logic of Chapter Four, while adding complexity to guideline rules and operation.

Daniel Bach's article, "Reconsidering Related Conduct," is particularly illuminating in making this point. Bach focuses on one exceptionally confusing

provision of Chapter Four, the "related cases" rule. This provision determines which prior offenses should be grouped together and scored as a single conviction. The Simplification Paper states ominously that, "[b]oth the definition and theory of the rule are suspect." Bach agrees and contrasts the guideline provision with the relatively simple-to-use provision included in the Salient Factor Score.

Under the latter test, prior convictions that are adjudicated together are grouped so long as they are not separated by an intervening arrest. By contrast, under the sentencing guidelines, prior convictions are scored together only if they are also related in some further way, such as having been committed on the same occasion or as part of the same scheme or plan. The additional complexity, Bach suggests, reflects the Commission's attempt to combine both crime control and just deserts rationales into one provision. The resulting rule, he concludes, is unwieldy and virtually incoherent — "at odds with a guidelines system intended to promote uniformity, predictability and fairness in sentencing. . . ."

In another intriguing example, Beck and Hoffman observe that the sentencing guidelines do not take into account the age of an offender at the time of the offense, even though age is a "powerful predictive item" and even though that factor is included in the Salient Factor Score. The reason, the authors suggest, is that "age" seems irrelevant to an offender's just deserts. At the same time, Beck and Hoffman note that the Commission *indirectly* incorporated age considerations into its "decay" rules — rules that ostensibly determine when prior offenses should no longer be counted. In this way, Beck and Hoffman conclude, Chapter Four incorporates "the predictive power of the age item . . . without having any 'non-just-punishment' items. The price is increased complexity of scoring the criminal history decay provision."

C. So What's the Purpose?

The Simplification Paper suggests that, before examining specific Chapter Four amendments, it "may be beneficial for the Commission to address several broad threshold issues," such as identifying "the purpose of criminal history in the federal sentencing guidelines." Our analysis so far helps provide an answer to that fundamental question: Crime control is the principal goal of Chapter Four, while just deserts play a secondary and, in certain ways, distorting role in the structure.⁶ But identifying the logic of Chapter Four is only half the challenge. As Barbara Vincent argues in her article, "So What's the Purpose?," it is not enough to describe what the purpose of Chapter Four currently *is*. To offer prescriptions for reform, we also need to determine "what the purpose of criminal history *should* be."

With her customary eloquence, Vincent tackles

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this issue. She challenges the contention — advanced by the Commission and others — that an offender who has a prior conviction is more blameworthy for his current crime. Rather, she argues that the only justifiable rationale for considering criminal history is to promote public safety. By expressly adopting crime control as the “purpose” of Chapter Four, Vincent contends, the Commission can bring needed clarity to the criminal history debate and provide practical guidance to courts and policy makers.

For example, she suggests that the question whether a separate criminal history category should be created for “pure” first time offenders (*i.e.* those with no previous contact with the criminal justice system) should “be answered by whether or not such offenders have a lower likelihood of recidivism than . . . those with a minor prior conviction.” Similarly, the question whether a departure is justified should depend on whether, “due to circumstances not taken into account by the guidelines, the offender presents a lower or higher risk of future crimes.” One need not agree with Vincent’s specific proposals to concur that the Commission is unlikely to bring a sense of coherence and clarity to the guidelines without first resolving deeper questions about the purposes of punishment.

II. Reconsidering the Criminal History Score

How would agreement over sentencing purposes help clarify the policy debates that now confront the Commission? To answer that question, we might turn to one of the most controversial aspects of Chapter Four — the scoring of prior convictions. As currently structured, the Criminal History Score assigns points to prior convictions based on the length of the sentence imposed for the offense. Specifically, prior sentences of more than 13 months receive 3 points, sentences of between 6 and 13 months receive 2 points, and those of less than 6 months receive 1 point.

As the Simplification Paper makes clear, this methodology has been subject to extensive criticism. From a just deserts perspective, the disenchantment with the current scheme is understandable. For one thing, the methodology does not account for the true seriousness of a defendant’s prior convictions: It treats a murderer who receives a 14 year sentence the same as a petty thief who receives 14 months. For another, sentence lengths are questionable proxies for the seriousness of prior convictions, since they often embody disparities that infect state sentencing systems.

Suppose, however, that the Commission were to adopt crime control as the dominant purpose of Chapter Four. In that case, the debate would be put in a very different light. The only question would be whether the existing sentence-based system promotes public safety. As a general matter, the Criminal

History Score appears to do a fairly good job of meeting this goal. As the Commission has observed, the ability of the Criminal History Score to predict an offender’s risk of recidivism is roughly equivalent to that of the Salient Factor Score, whose predictive accuracy has been repeatedly confirmed.⁷

This is not to say that concerns about the methodology do not exist from a crime control perspective — only that they are relatively narrow and well-defined. One remaining concern is that, like all predictive devices, the Criminal History Score produces many false positives; one can always ask whether another system might do a better job at measuring risk. A second, more fundamental, concern is that the Criminal History Score (like the Salient Factor Score) only attempts to measure risk of recidivism. Certainly, the likelihood that an offender will commit a new crime is an important factor in identifying a dangerous offender. But it is not the only determinant of an offender’s threat to society. The nature of crime that the offender might commit (*e.g.*, whether it is likely to be a violent or non-violent crime) is also significant. An effective prediction device must be able to identify those offenders likely to commit particularly dangerous and violent offenses. The question naturally arises: Can we improve the current scoring system to account more accurately for an offender’s *true* threat to society?

A. Crime Control and Offense-Based Options

The most popular alternative to the present system is an “offense-based” approach, which scores an offender’s prior crimes based on the nature of the defendant’s offense (*e.g.*, whether it is a misdemeanor or felony, a violent or non-violent crime). Most state systems use some variation of this approach. In his article, “Chapter Four: Time for an Overhaul, or a Tune-Up,” Tom Hillier offers an original offense-based proposal for reforming the Chapter Four guidelines. Hillier begins by arguing that the current scoring methodology fails to distinguish between serious offenders and those who might benefit from an intermediate sanction. His approach attempts to redress that concern, principally by dividing the criminal history axis into three broad categories. The first category calls for a prison sentence for offenders with violent records. The second permits the court to impose either a prison term or an intermediate sentence for most non-violent offenders, depending on the seriousness of the criminal record and the potential for rehabilitation. The third category mandates a non-custodial sentence for offenders with minor records. Hillier argues that this approach clarifies the link between sentencing sanctions and sentencing purposes. His article deserves a careful reading.

Whether an offense-based approach does a better

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job of promoting public safety than a sentence-based system cannot be answered without empirical testing. Nonetheless, it seems clear that an offense-based approach has its own drawbacks. Caryl Ricca, chair of the Probation Officers Advisory Group to the Sentencing Commission, observes that this approach is often highly inaccurate in measuring the seriousness of prior convictions. Attempts to identify the real conduct underlying an offense, Ricca notes, is all but impossible. Moreover, a system that assigns criminal history points based on the charge associated with the prior conviction (rather than the underlying conduct) would require a complex set of rules to account for the different charging practices in the fifty states. It would also suffer from its own set of disparities, since the charge is subject to variations in plea and charging practices in different jurisdictions. The Advisory Group recommends that the current sentence-based system be retained. Beck and Hoffman concur, adding that, "To abandon items with known predictive power in favor of new items without first conducting empirical research would seem a step backward."

B. A Middle Way

From a crime control perspective, the debate between sentence- and offense-based approaches to the Criminal History Score may appear unresolvable at present. But it may also be a false debate in some ways. Chapter Four, after all, is not a pure sentence-based system, and a conduct-based methodology is not the only alternative. Indeed, the current sentence-based system takes into account the specific nature of the offender's prior conduct in at least two ways.

The court's departure authority is one example. It allows the court to look to the nature of the offender's prior record in determining whether the Criminal History Score adequately accounts for its seriousness. A second example is the existence of offense-based guidelines or policy statements that take into account the nature of the offender's underlying conduct. For example, guideline 4A1.1(f) creates an exception to the "related cases" rule, ensuring that each "violent" crime contributes at least one point to the Criminal History Score. Other examples include the Career Offender and the Armed Career Criminal guidelines.

A reasonable and feasible way to improve the operation of the criminal history guidelines might lie simply in trying to make better use of these offense-based mechanisms. The goal would be to encourage the use of departures and to develop offense-based guidelines to offset relevant defects in the Criminal History Score, such as the fact that the system attempts to predict recidivism but not the seriousness of that potential recidivism. One might doubt that courts would use the departure authority consistently to serve this goal. Judge Rosen suggests, for example,

that departures today seem to increase sentencing disparity as much as decrease it. But much of this disparity may simply reflect the conflict over sentencing purposes. With a single sentencing purpose to govern the construction of the Criminal History Score, courts would have far clearer guidance on the role of Chapter Four departures. The Commission might even begin to draft policy statements or guidelines to help identify the class of cases that are appropriate candidates for departures. The design of these rules would be guided by empirical research into the causes of recidivism and violent crime.

This task is a difficult one. It requires agreement on the ultimate purposes of Chapter Four as well as a commitment to the kind of empirical research that has been long needed but too often neglected. But it may be the only way to achieve a well-designed and effective criminal history methodology.

Conclusion

This overview touches upon only some of the issues raised by the Simplification Paper and the articles in this Issue. A wide range of topics — concerning first offenders, juvenile crime, and the decay rules — are examined in greater detail in these pages. But the general framework offered in this overview is relevant to all these debates. No modification of Chapter Four is likely to succeed without reexamining and clarifying the ultimate purpose of criminal history in the sentencing system.

NOTES

¹ See Stephen G. Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 *HOFSTRA L. REV.* 19-20 (1988).

² United States Sentencing Commission, *SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 42* (1987) (quoting American Bar Association, *STANDARDS FOR CRIMINAL JUSTICE: SENTENCING* § 18-2.2 commentary at 68 (1979)) (hereinafter *SUPPLEMENTARY REPORT*)

³ See *id.* at 42 ("Because the elements [of the criminal history guidelines] are compatible both with a just punishment and a crime control approach, the conflict that otherwise might exist between these two purposes of sentencing is diminished."). See also ABA Sentencing Standards § 18 at 227 (1980).

⁴ In 1990, staff of the Sentencing Commission completed a study of the predictive strength of the Criminal History Score. The study remains unpublished. Conversation with Joel Garner, former Research Director, U.S. Sentencing Commission.

⁵ Another notable feature is the way that criminal history has a diminishing effect on the sentencing outcome as an offender's Criminal History Score increases. Under the present structure, an increase from criminal history category I to II is equivalent to a one level increase in the offense

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severity score, while an increase from criminal history IV to V, or V to VI, generates a smaller increase. The Sentencing Commission justified this phenomenon on crime control grounds: "Because the crime-preventive benefits of imprisonment decline with age," the Commission said, "adding any given number of years to a 5-year sentence . . . is likely to be more effective in decreasing the overall level of crime than adding the same number of years to a 20 year

sentence." SUPPLEMENTARY REPORT at 44 n.77.

⁶ The Commission staff hints at a similar conclusion, suggesting that "[s]ociety and its elected representatives have reached a level of frustration with crime so that current policies more frequently tend to reflect the selective incapacitation philosophy in sentencing practices in general and criminal history in particular."

⁷ SUPPLEMENTARY REPORT at 43.