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Accomplishing the Purposes of Sentencing—The Role of the Courts and the Commission

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Panel III: Accomplishing the Purposes of Sentencing— the Role of the Courts and the Commission

Notes from the Symposium Organizers

As Commissioner O'Neill noted in his opening remarks, the foremost question for the Sentencing Commission on its fifteenth anniversary is, "Are the Guidelines working?" Panel III reminds us that we cannot determine this until we understand the Guidelines' purposes. Unfortunately, the Guidelines' purposes are not easily discerned. Failing to reach a consensus, the first Commissioners admittedly shied away from articulating a rationale for the Guidelines. Accordingly, commentators have criticized the Guidelines as incoherent.

Because the language of the Guidelines is not self-executing, purposes may be the key to guiding sentencing, particularly when judges face ambiguous guidelines, difficult departure decisions, or the primary question addressed by Panels I and II: when is disparity warranted or unwarranted? To say that judges need not consider purposes because the Commission has already done so is an unsatisfying formulation, given the remaining interpretive space in the Guidelines. In addition, purposes have serious implications for the Commission's research mandate, which will look different if the primary purpose of sentencing is just deserts instead of deterrence, for instance.

Given that articulating purposes is important, and that there has been a failure to do so thus far, who should step into this breach? Both presenters—**Paul Hofer**, Senior Research Associate at the United States Sentencing Commission, and **Aaron Rappaport**, Associate Professor at the University of California, Hastings College of the Law—agreed that a methodology called "rational reconstruction" is most appropriate for gleaning the Guidelines' underlying purposes. However, Hofer designated judges for this task, while Rappaport urged the Sentencing Commission itself to perform the analysis. Other panelists and audience participants questioned the likelihood that either body would actually establish a coherent set of purposes given past performance. Also, some wondered why we should rely on rational reconstruction to find implicit purposes rather than starting over again with a clear rationale (which Hofer and Rappaport thought unlikely to come to pass), or, at the very least, ensuring that the

Commission states its purposes when promulgating new guideline provisions.

Whoever is charged with determining the Guidelines' purposes, what purpose or purposes, if any, might they find already underlying the Guidelines if they perform rational reconstruction? What purpose or purposes should motivate the Guidelines? The Sentencing Reform Act noted four purposes of sentencing—incapacitation, retribution, deterrence, and rehabilitation. Hofer and Rappaport elicited from the Guidelines different prioritizations of these purposes, inviting further dialogue on this topic.

In addition to Hofer and Rappaport, the panel included Emory Law School **Professor Marc Miller**, **Judge Michael Mihm** of the Central District of Illinois, and Yale Law School student **Sofia Yakren**. **Judge Nancy Gertner** moderated the panel.

I. The Function of Articulated Purposes in Sentencing

Judge Gertner began the panel with an anecdote illustrating the importance of defining the purposes of the Guidelines. She recently sentenced a defendant for transporting prostitutes in a case with a fact pattern identical to the one before another judge. A key question in each case was whether there should be an upward adjustment for "extensive organization." The other judge, failing to reach a conclusion on the basis of the Guidelines and the Commentary, determined that the defendant was part of an "extensive organization" on the basis of a dictionary definition of the term. Judge Gertner, troubled by the ambiguity of "extensive organization," sought to ascertain the rationale behind an upward adjustment on its basis. What was it about membership in an "extensive organization" that made this conduct worse? Since she did not find that the purpose of an enhancement would be served under the given circumstances, Judge Gertner determined that the defendant had not been part of an "extensive organization."

The underlying purposes of the Guidelines must be identified because, in many instances, the language is not self-executing. Who is a vulnerable victim? What circumstances are extraordinary? To answer such lingering questions, it is crucial to understand why the



Panelists

Paul Hofer, USSC
Aaron Rappaport, U. Calif., Hastings
Marc Miller, Emory
Judge Michael Mihm, CD III.
Sofia Yakren

Moderator

Judge Nancy Gertner, D of Mass.

Editors

These proceedings were edited by
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words of the Guidelines are so framed and to interpret them accordingly.

II. Methodology for Ascertaining the Philosophy of the Guidelines

Hofer and **Rappaport** agreed that the best methodology for identifying the Guidelines' implicit philosophy is "rational reconstruction," a form of logical analysis applied in other areas of law and appropriate for understanding the Guidelines. By performing rational reconstruction analyses, the presenters' aim was not to determine what purposes the Sentencing Commission actually considered in writing the Guidelines, or to suggest that the Commission consciously endorsed these purposes, but to ascertain the purposes underlying the Guidelines. As **Rappaport** explained, rational reconstruction yields the purposes that would have to be adopted today to justify the current Guidelines. Accordingly, he described rational reconstruction as a tool for starting a conversation within the Sentencing Commission about *implicit* purposes. Both **Hofer** and **Rappaport** also noted that they do not necessarily endorse their results as the ideal purposes of sentencing.

Though both **Hofer** and **Rappaport** used rational reconstruction as a general method, they looked to different sources to perform their analyses. **Hofer** examined the text of the SRA, relevant Supreme Court cases, Commission commentary and reports, and, most importantly, the content and structure of the rules themselves, in his attempt to identify the general principles that maximize the coherence of the Guidelines. In considering the Guidelines themselves, **Hofer** looked at Chapter Two, which determines base offense level, Chapter Three, which provides for adjustments to the offense severity factor, and Chapter Four, which determines the criminal history score. **Rappaport** also analyzed offense severity and criminal history, but, in contrast to **Hofer**, he considered two types of departures — substantial assistance and family ties — as well. In addition, **Rappaport** insisted upon a form of internal consistency that precludes adopting a hybrid philosophy (e.g., one that incorporates utilitarian and retributive moral purposes). These variations may help explain how **Hofer** and **Rappaport** arrived at different conclusions about the Guidelines' implicit purposes even though they agreed upon the basic methodology of rational reconstruction.

III. Two Philosophies of the Guidelines

Hofer and **Rappaport** generally derived different conclusions from their analyses. As **Hofer** noted, interpretation is not a completely objective process. The presenters considered the Guidelines' implicit philosophy with respect to the four general purposes of sentencing articulated in the Sentencing Reform Act: just deserts, incapacitation, deterrence, and rehabilitation. **Hofer** compared the content and structure of the

guideline rules against the framework one would expect had the Guidelines been designed to advance each of these purposes. His analysis suggests that the Guidelines are best understood as implementing a hybrid sentencing philosophy that the literature calls "modified just desert." Chapters Two and Three are concerned with assuring that the severity of punishment matches the seriousness of the crime (just deserts). Chapter Four is concerned with identifying the offenders at higher risk of recidivism, so that they can be incapacitated for longer periods of time (incapacitation).

Other sentencing purposes are also accommodated within the Guidelines, but are given a lower priority and cannot explain the content and structure of the particular guideline rules. Consistent with the text and the legislative history of the SRA, rehabilitation gets the lowest priority, while deterrence figures prominently as a goal of the SRA and the Guidelines accommodate it generally as a side benefit of just punishment. Though the four purposes of sentencing do not often conflict, when they do, proportional punishment and incapacitation win out.

Rappaport agreed with **Hofer** that incapacitation is the purpose driving Chapter Four's criminal history evaluation. Overall, however, he argued in contrast to **Hofer** that the underlying justification for the Guidelines is the broader moral purpose of utilitarianism (including incapacitation, deterrence, and rehabilitation), rather than retribution (or just deserts). Utilitarianism is the best rationale for criminal history, substantial assistance departures, and family circumstances departures. It is also a plausible justification — at least as plausible as just deserts — for offense seriousness. Adopting a utilitarian justification for offense seriousness would also maintain internal consistency within the Guidelines.³

Yakren expressed concern that utilitarianism might not be a tangible guide for judges given that it is comprised of purposes like incapacitation, deterrence and rehabilitation, each of which can lead to different sentencing decisions.

IV. Who Should Be Charged with Determining the Guidelines' Philosophy?

Hofer compared the effort to articulate the purposes of the Guidelines to a "hot potato": Congress passed it off to the Commission, which in turn looked to the past practices of judges. Academics like **Rappaport** throw it back to the Commission, while Commission staffers **Hofer** and **Allenbaugh** turn to judges to articulate the theory implicit to the Guidelines.

A. The Courts

Hofer argued that judges have the interpretive tools and the power to derive a philosophy already underlying the Guidelines and to depart accordingly. By identifying clear purposes, judges will be better able to recognize

disparities in sentencing and to determine whether those disparities are warranted.

Yakren questioned whether judges would fare any better than the Commission has in articulating coherent purposes. How district courts have tried to give meaning to the heartland concept — an area in which Yakren has done considerable research — reflects the incoherence of judicial approaches to sentencing thus far. Judges have used varied methods to define the heartland, employing the intent of the Guidelines, the intent of the statute, empiricism/their own caseloads (as Judge Gertner has done), the common law, and their own intuitions. Typically, however, they have not provided an explicit rationale to justify one method over another. Common law practices make understandable Hofer's and Rappaport's pleas for coherence, but they also require adjustment if judges are to achieve Hofer's mandate.

Yakren also asked whether the available materials are adequate for judges to arrive at coherent purposes. What materials should they use? What should they do about inter-circuit disputes? How might we help the Commission to come up with directives that are helpful to judges?⁴

Further, **Judge Mihm** argued that it is not the function of judges to articulate philosophy. The Sentencing Commission should bear this responsibility, though of course judges should be involved. Judges should carry out policy with appropriate interpretation, but they should not create it. It is highly doubtful that judges could ever produce a coherent, consistent outcome.

Judge Gertner summarized for Paul Hofer three different views of why charging judges with articulating the philosophy of the Guidelines is problematic. First, her own concern is that judges are too apt to treat the Sentencing Guidelines as a Bible, and to apply them mechanically. Second, Yakren had cautioned that judges apply ambiguous aspects of the Guidelines incoherently. Third, Judge Mihm had said that judges implement their personal philosophies when they sentence. Given these concerns, Judge Gertner asked Hofer whether judges are up to this task.

Hofer responded that the frustration and the temptation on the part of many judges just to apply the rules mechanically stems from the Commission's failure to provide sufficient information about the reasons behind the rules. In addition, the jurisprudence of departure, with its concept of heartland, has not been very helpful in illuminating these reasons. A potentially useful definition of heartland is that a specific guideline's heartland includes those cases to which it needs to apply in order to accomplish the guideline's purpose. Once judges understand the purpose of a guideline — as many judges already consider, though more often when they are trying to interpret ambiguous provisions and to apply the Guidelines than when they

are departing — they can ask what the rule is trying to do in order to determine whether it should apply in a particular case. Once we get this process started and realize that the philosophy of the Guidelines is not that big a mystery, that it is the same as the philosophy of every other sentencing guideline system,⁵ then maybe we can jumpstart this dialogue about purposes.

B. The Commission

Unlike Hofer, **Rappaport** directed his work at the Sentencing Commission instead of at judges. The courts should articulate a philosophy if it spurs the Commission to do so as well; however, giving the responsibility to judges alone would allow the Commission to shirk its institutional and legal obligations. The Commission's institutional obligations include reducing disparity, enacting purpose-based Guidelines, and creating the Guidelines. Legally, the Commission is obligated to bear the ultimate responsibility and authority for the Guidelines and to craft Guidelines that are binding on the courts.

The Commission could be relieved of its responsibility for articulating purposes if and only if the courts were likely to articulate purposes quickly and well. However, courts' decentralized nature would hamper their ability to accomplish this goal either quickly or uniformly. Furthermore, judges' interpretations would have to continue changing as the Guidelines change. **Rappaport** concluded that the Commission's refusal to articulate the purposes promoted by the Guidelines represents a failure by the agency to fulfill its statutory obligations.⁶

Marc Miller wondered why, rather than having the Sentencing Commission perform rational reconstruction, we wouldn't want the Commission to start with its own sound, rational set of purposes. Why argue that rational reconstruction is a good place for the Commission to start, especially given the shared recognition that the first Commission shied away from any direct assessment of purposes? Perhaps we should be encouraging the Commission to step back — as commissions have done in places like Minnesota — to think rationally and in the abstract about what kind of system and principles they might want and then to determine whether the system we have in place, which obviously is not going to be completely abandoned, nonetheless might be adjusted or fixed in accordance with those principles.

Judge Gertner noted that Justice Scalia has described the Sentencing Commission as a "junior varsity legislature." Accordingly, perhaps the Commission has failed to articulate purposes because of political forces. Why would this Commission be any different from the others? **Rappaport** responded to the general issue of whether the Commission is nothing more than a junior varsity legislature. It may be that the Commission is a junior varsity Congress and that we will see the same

kind of populist punishment by the Commission as we have seen in other areas where Congress gets involved, but there is a hope that the Commission can do more if it can create some insulation from political pressures. Articulating a philosophy of punishment might offer a modest step in this direction, by encouraging the perception that the Commission is a voice of principle, not politics, in the sentencing arena.

As for why this Commission might be different, the Commission was at its most vulnerable point when it was created fifteen years ago. To ask it to articulate purposes then may have been unreasonable. And it is a hopeful sign that on the Commission's fifteenth anniversary, purposes have been made a central part of the discussion. Moreover, the Commission's articulation of purposes can be a gradual process. There are some significant areas of the Guidelines for which the purposes are obvious; for instance, we can all agree that the justification for criminal history is utilitarian, or more specifically, incapacitation. Acknowledging that purpose alone can change the way judges depart would at least be a start.

V. The Function of an Overarching Philosophy in Sentencing

A. Pleas for an Overarching Philosophy of the Guidelines

Hofer encouraged judges to use the Guidelines' implicit philosophy to interpret the Guidelines and to make principled departures. Currently, there is considerable confusion surrounding the meaning of Guidelines' language like "heartland" and the question of when departure is justified to achieve the purposes of the Sentencing Reform Act. An overarching philosophy will encourage departures in pursuit of the Guidelines' own purposes. Furthermore, it will shield against the fluctuating judicial philosophies, derived case-by-case, which resulted in unwarranted disparities during the pre-Guidelines era.

To determine whether a departure is warranted, judges should ask: With respect to the offense level, is the harm caused more or less than for offenders for whom the guideline is intended? Is the culpability of the defendant more or less than that of offenders for whom this guideline is intended? With respect to the criminal history category, what is this defendant's risk of recidivism compared to that of others in this category? These inquiries will constrain some judges' departures, but they will liberate many other judges from the worst of the Guidelines' rules, thereby reducing undue disparity.

Rappaport argued that the Sentencing Commission should articulate purposes because they are crucial to its institutional efficacy and legitimacy. A coherent and consistent statement of principles will allow the Commission to fulfill its three mandates: to reduce

disparity by clarifying objectives; to be independent and, thereby, to proceed in a principled manner; and to focus and spur empirical research.⁷

B. Skepticism About the Value of An Overarching Philosophy

Miller noted that rational reconstruction is a common mode of thinking that underlies common law reasoning and interpretation by judges. As a result, **Hofer's** hostility to the idea of judges developing ideas of purposes on their own and through the common law method is in conflict with his celebration of the rational reconstruction mode of thinking. Furthermore, section 3553(a) of the Sentencing Reform Act specifically directs judges in every case to consider the list of purposes and to find the least severe sentence that is appropriate under the circumstances. This command is a fabulous hook – which, up to this point, only the Sixth Circuit has explicitly rejected as a basis for sentencing reasoning – to bring judges into the process. Rather than trying to sell judges on a scholar's conclusions on what the purposes are, if we sell them on the rational reconstruction method of discerning purposes we may start to see the evolution of this common law.

Echoing Commissioner Michael O'Neill's opening sentiments, **Miller** noted that the fundamental issue is whether the Guidelines are working. He suggested that rational reconstruction does not help us understand whether the purposes of the Sentencing Reform Act are being achieved by the Guidelines. When an individual is sentenced, we ask what purposes the particular sentence serves, but we fail to step back to question whether the sentence fits into an overall scheme of sentencing. Accordingly, gleaning purposes from the Guidelines may be nothing more than sandpaper: It fixes knots in the tree, but the tree may be falling.

The Sentencing Guidelines' system has been undergoing substantial change. In 1990, 83.4% of sentences nationally were within the Guidelines, but in 2001 only 64% of sentences were within the Guidelines. From 1990 to 1994, there was a sharp increase in substantial assistance departures, though there has been some drop since 1994. Judicial departures have been going up every year since 1992–93. 96.6% of sentences are now the results of guilty pleas. Given all these changes, **Miller** questioned the utility of implicit purposes if the Guidelines are not working at all.

Similarly, **Judge Mihm** suggested that a search for a coherent philosophy misses the fundamental issue, which is that judges are not following the Guidelines. As a judge who has been sentencing defendants for twenty years, **Judge Mihm** expressed great skepticism that a coherent philosophy like **Hofer's** or **Rappaport's** would have any effect on some judges. He argued that the Guidelines have never suffered from a lack of philosophy because one was adequately addressed in

Section 3553 and Title 28 of the Sentencing Reform Act. Rather, the sentencing practices of those judges who do not believe that they have to follow the Guidelines have a major impact on the number of downward departures (for reasons other than substantial assistance) and on disparity in sentencing.

Judge Mihm reflected on a program in Washington, DC where he, along with Professor Dan Freed and Judge Gertner, trained twenty-eight district court judges who had been on the bench for less than a year. They provided the judges with a fact scenario from a case in Judge Mihm's court, describing all aspects of the case but the sentence. While the Guidelines' sentencing range for the offense profile was eighteen to twenty-four months, the new judges came up with sentences ranging from probation to twenty-four months. **Judge Mihm** questioned the value of an additional philosophical justification for the Guidelines in directing judges' sentencing determinations, contending that while a philosophical foundation matters for some judges, other judges believe that their personal notion of a just sentence trumps their duty to apply the Guidelines in their present form. At the time the Guidelines went into effect, everyone shared the naïve belief that all judges would follow the law, but this has not been the case. Judges who engage in intellectual dishonesty to depart downward will not be influenced by a coherent philosophy.

Judge Mihm, who considers regionalism a code word for disparity, was surprised that Panel II viewed regional differences in sentencing as a positive development. If judges were following the Guidelines, there would not be these regional disparities. In addition, if the courts and the Commission do not address such unwarranted departures, and if Congress comes to understand the full magnitude of these departures, Congress will act to further restrain judges' discretion.

Yakren, while sympathizing with Hofer's and Rappaport's quests for coherence, wondered whether a coherent philosophy would aid judges in sentencing given their current practices. In her research, judges very rarely discuss general purposes, such as deterrence or incapacitation, when ascertaining the intent of the Guidelines to elucidate a heartland. Instead, judges tend to examine the specific purposes of specific Guidelines; for instance, determining that the purpose of a guideline is to punish the typical money launderer. While a more general purpose can likely be extrapolated from such a guideline-specific purpose, one wonders whether we want to add another layer of complexity to judges' existing struggles with interpretation.

Doug Berman,⁸ an audience participant, suggested that we focus on process rather than on the purposes of the Guidelines. He noted that there was a theory before the Sentencing Reform Act: indeterminate rehabilitation. However, many judges would not follow that

theory. The motivation for Judge Frankel and the SRA was that judges needed to be reasoned, thoughtful, deliberate, and open. Those should be our guiding standards in rational reconstruction. We hate mandatory minimums, substantial assistance, and heartland and departure conversations because of their failure to meet these standards. For instance, the most common reasons given for departure are "general mitigating factors" or "pursuant to a plea agreement." As fewer defendants are sentenced within the Guidelines, as Miller's chart showed, are we satisfying these original goals of reasoned, thoughtful, deliberate, and open sentencing policy? **Yakren** added that heartland methods are incoherent, not necessarily because they vary, but because judges are not explicitly discussing their use of various methods and how they can be rationalized. The remedy need not necessarily be one overarching philosophy that precludes all other rational methods, as long as attention is given to reasoned paradigms.

Rappaport defended the importance of identifying purposes, and not just focusing on process. Process leaves us with the question, "more reasoned with respect to what?" The identification of purposes is essential to pointing the Commission in certain directions. **Judge Gertner** also took issue with Doug Berman's comparison to indeterminate sentencing days. She predicted that if we repealed the Guidelines today, we would have created a vocabulary of sentencing, which has made a tremendous difference.

VI. Looking Forward (From the Symposium Organizers)

As a result of time constraints and structure, some of the questions that panelists and audience members raised were not fully addressed within the context of the panel. Concerns regarding what tools judges or the Commission can and should use to discern the purposes of the Guidelines remain open questions. In addition, the role of the Courts of Appeals in ascertaining and applying purposes still requires attention. How would we advise a district court judge who wants to depart according to purposes, but is in the Fourth Circuit? Additionally, what would be an appropriate mechanism for handling inter-circuit disparities? Some of these questions are addressed in Hofer's and Rappaport's papers, and should guide a continuing dialogue.

The most salient points of contention in the panel were: whether judges should be constrained to prioritize a certain philosophy of sentencing instead of being encouraged to apply a rational common law process; whether the Commission should be constrained to elicit implicit purposes instead of stepping back to assess what contemporary purposes ought to be; and whether judges could be constrained to prioritize certain purposes over others, even if this were the ideal

approach. These questions are too complex to answer over the course of one panel, but are fundamental to an ongoing discussion about the future of the Sentencing Guidelines.

All participants in the Panel III debate recognized the importance of giving sentencing some rational grounding, so that judges do not act overly mechanically on the one hand, or arbitrarily on the other. Methods such as rational reconstruction can foster conversation regarding purposes among the crucial actors to help them find the parameters of a more principled sentencing regime.

Future research might elaborate on the issues raised in Panel III by examining, in greater detail, the role of purposes in judicial decision-making. In addition, since Panel II highlighted the importance of attending to discretion outside the judicial sphere, researchers might evaluate the role of purposes in shaping the discretion of prosecutors, defense attorneys, and parole officers. Most fundamentally, the Commission might establish pilot programs on several ambiguous Guidelines issues, using its own data and communications with the courts to incorporate purpose-based models for decision-making into the Guidelines.

Notes

¹ See Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19 (2003)

(providing a more detailed and updated version of Dr. Hofer's arguments, many of which he could not make during the panel due to the inevitable time constraints of such a forum).

- ² Aaron Rappaport, *Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing Guidelines*, 52 EMORY L. REV. __ (forthcoming 2003) (providing a more detailed version of Professor Rappaport's arguments concerning the underlying purposes of the Guidelines system, arguments that he could not make during the panel due to the inevitable time constraints of such a forum); see also Aaron Rappaport, *Unprincipled Punishment: The U.S. Sentencing Commission's Troubling Silence About the Purposes of Punishment*, 6 BUFF. CRIM. L. REV. __ (forthcoming 2003) (arguing that the Commission's failure to articulate a principled sentencing philosophy has undermined its ability to fulfill the agency's statutory objectives).
- ³ These points are discussed in greater detail in Rappaport, *Rationalizing the Commission*, *supra* note 2.
- ⁴ For one possible response to this question, see Hofer & Allenbaugh, *supra* note 1, Part II.C (noting that the "content and structure of the rules as a whole" are the most important materials).
- ⁵ Hofer and Allenbaugh present evidence in their paper showing that all state guidelines systems use a philosophy of modified just desert. See, e.g., Richard Frase, *Sentencing Principles in Theory and Practice*, 22 CRIME & JUST. 363, 430 (1997).
- ⁶ These points are discussed in more detail in Rappaport, *Unprincipled Punishment*, *supra* note 2.
- ⁷ See *id.*
- ⁸ Professor of Law, Ohio State University; Managing Editor, FEDERAL SENTENCING REPORTER.