Author: Aaron J. Rappaport
Source: Emory Law Journal
Citation: 52 Emory L.J. 557 (2003).
Title: *Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing Guidelines*

Originally published in EMORY LAW JOURNAL. This article is reprinted with permission from EMORY LAW JOURNAL and Emory University School of Law.
EMORY LAW JOURNAL

Volume 52          SPRING          Number 2

ARTICLES

RATIONALIZING THE COMMISSION: THE PHILOSOPHICAL PREMISES OF THE U.S. SENTENCING GUIDELINES

Aaron J. Rappaport*

INTRODUCTION .......................................................................................................................... 558

I. THE METHODOLOGY OF RATIONAL RECONSTRUCTION .................................................... 563
   A. The Rationale for Rational Reconstruction ............................................................... 564
   B. The Premises of the Guideline System ................................................................. 566
   C. Constraints on the Rationalizing Effort ................................................................. 570

II. SUBSTANTIAL ASSISTANCE .............................................................................................. 571
   A. The Purpose of Substantial Assistance ............................................................... 573
   B. Character-Based Arguments ................................................................................. 575
   C. Substantial Assistance and Intermediate Assumptions ........................................ 577

III. FAMILY CIRCUMSTANCES .............................................................................................. 579
    A. Utilitarianism and Family Circumstances .......................................................... 582
    B. Retribution and Family Circumstances ............................................................... 585

IV. CRIMINAL HISTORY ......................................................................................................... 588
    A. Utilitarianism and Criminal History .................................................................... 590
    B. Just Deserts and Criminal History ...................................................................... 595
       1. Notice Arguments ............................................................................................ 596

* Associate Professor, University of California, Hastings College of the Law. Thanks to Doug Berman, Evan Lee, Marc Miller, Ana Porter, and Bill Wang for their insight and assistance.
INTRODUCTION

Debates about the ultimate purposes of punishment are, as Marc Miller has noted, “as old as the idea of punishment” itself.¹ Today, the battle lines are drawn where they have been for centuries—between those rallying around the flag of utilitarianism and those under the banner of retribution. One potentially significant change, however, has occurred during the past two decades. A new institution has been created within the federal government and charged with considering and evaluating the appropriate ends of punishment. Strange as it might seem, that institution is the United States Sentencing Commission (the “Commission”).

The Commission was established as part of the Sentencing Reform Act of 1984 (SRA or “the Act”). The Act authorizes the agency to enact binding rules—innocuously called guidelines—that set the lower and upper bounds of

permissible sentences. In this regard, the Act represents a revolutionary change in the institutional structure of sentencing at the federal level. But it also represents a dramatic philosophical change as well.

For the first time, as part of the SRA, Congress listed a set of acceptable goals—or “purposes”—of punishment. Just as important, it directed the Commission to base its guideline decisions on one or more of these purposes. This was the heart of Congress’s effort to “rationalize” the sentencing system—to ensure that the guidelines reflected an integrated and cohesive vision of the purposes of punishment.

That philosophical vision remains unfulfilled to date. Despite the clear Congressional mandate to ground guideline rules on sentencing purposes, the Commission has largely suppressed the subject of sentencing goals. That neglect, as I have argued elsewhere, constitutes a serious failing of the agency. Not only does it represent a clear violation of Congressional intent, it also undermines the Commission’s legitimacy in the sentencing field, its ability to withstand political pressures, and its capacity to reduce unwarranted sentencing disparity.

---

2 The Commission’s obligation to ground its guideline decisions on the purposes of punishment is specified in the SRA and affirmed repeatedly throughout the Act. See, e.g., 28 U.S.C. § 994(a)(2) (2000) (authorizing Commission to promulgate policy statements “regarding application of the guidelines or any other aspect of sentencing or sentence implementation that . . . would further the purposes” of punishment); 28 U.S.C. § 994(g) (requiring Commission to promulgate guidelines “to meet the purposes of sentencing”); 28 U.S.C. § 994(m) (requiring Commission to establish guidelines “consistent with the purposes of sentencing”). The Committee Report associated with the SRA confirms the centrality of purposes. See S. REP. NO. 98-225, at 181 (1983), reprinted in 1984 U.S.C.C.A.N. 3182 [hereinafter Senate Report] (“The section reflects the broad responsibility imposed upon the Commission to assure that sentencing and the administration of sentences fulfill the purposes of sentencing enumerated in section 3553(a).”); id. at 66 (stating that sentences must “achieve the general purposes of sentencing”); id. at 169 (“[T]he Commission is free to include in the guidelines any matters it considers pertinent to satisfy the purposes of sentencing.”); see generally Aaron Rappaport, Unprincipled Punishment: The U.S. Sentencing Commission’s Troubling Silence About the Purposes of Punishment, 6 BUFF. CRIM. L. REV. (forthcoming 2003) (discussing the role of purposes in the SRA). The Senate Report is widely seen as the “central document in the legislative history of the Sentencing Reform Act.” Miller, supra note 1, at 425.

3 In this respect, the modern sentencing reform movement was analogous to earlier rationalizing movements in the criminal law, which also sought to develop a criminal code that reflected a cohesive philosophical vision. For an overview of the earlier rationalizing efforts, see Sanford H. Kadish, Codifiers of the Criminal Law: Wechsler’s Predecessors, 78 COLUM. L. REV. 1098 (1978). See also Sanford H. Kadish, The Model Penal Code’s Historical Antecedents, 19 RUTGERS L.J. 521 (1988) [hereinafter Kadish, Historical Antecedents]. The most influential effort in the 20th century, of course, is the Model Penal Code. All of these rationalizing efforts were principally utilitarian in orientation. That, I believe, is no coincidence, for reasons that will become clear later in this Article.

4 See Rappaport, supra note 2.

5 For further discussion of this point, see id. at Part IV.
Over the past several years, a few positive signs have emerged that suggest the Commission is finally prepared to address its statutory obligations concerning punishment purposes. Most notably, the Commission recently announced a new policy priority "in anticipation of the fifteenth anniversary of the federal sentencing guidelines." A centerpiece of that project is an initiative to study how well the guidelines are serving the "statutory purposes of sentencing" set forth in the Act.\(^6\)

This is an extremely important initiative—the first time since the enactment of the SRA that the Commission has taken a step back to consider whether the guidelines are actually fulfilling their designated objectives. At the same time, this initiative raises unavoidable questions. Guideline rules cannot promote all of the possible purposes of punishment listed in the SRA simultaneously; the purposes often conflict in their directives.\(^7\) As a result, articulating a sentencing philosophy will require the Commission to enter the fray between utilitarians and retributionists. The agency must begin to prioritize these sentencing goals.

But how? Given the persistent debate over sentencing purposes, how can an administrative agency like the Commission decide among conflicting sentencing goals? How can the Commission possibly resolve a controversy that has remained unresolved for decades?

This Article offers specific recommendations for how the Commission can and should make headway in this seemingly intractable debate. At the heart of this effort is a methodology called "rational reconstruction." Rather than trying to identify the "correct" purpose of punishment to guide sentencing decisions, rational reconstruction calls upon the Commission to determine the

---

\(^6\) See Sentencing Guidelines for United States Courts, 66 Fed. Reg. 48306, 48307 (Sept. 19, 2001); see also Diana E. Murphy, Inside the United States Sentencing Commission: Federal Sentencing Policy in 2001 and Beyond, 87 Iowa L. Rev. 359, 394 (2002) [hereinafter Murphy, Inside the Commission]. In recent testimony before the Senate, the Chair of the Commission made this initiative a centerpiece of the agency’s ongoing research efforts:

The Commission acts as a clearinghouse and information center for information on federal sentencing practices and is statutorily responsible for monitoring how well sentences imposed under the guidelines are achieving the purposes of sentencing. ... Soon we will experience the 15-year anniversary and 500,000 defendants sentenced under the guidelines, and the Commission believes it prudent to step back and examine the operation of the guidelines over these years.


\(^7\) See Rappaport, supra note 2, at Part II.C (describing the need to resolve conflicts among punishment purposes); see also infra Parts II-V (discussing conflicts among purposes for four key guideline provisions).
purposes of punishment that already lie *implicit* in the guidelines as they exist today. By clarifying the underlying assumptions of the sentencing system, the methodology will help the Commission evaluate, in a reflective manner, the logic and appeal of the current guideline rules.

To illustrate this methodology, the Article offers a rational reconstruction of several sets of guideline rules, including rules concerning the defendant’s criminal history, family circumstances, substantial assistance, and offense seriousness. These are among the most important rules in the guideline system. The criminal history and offense seriousness guidelines are the two key determinants of the guideline sentence; together, they specify the location of the guideline range. Substantial assistance represents the most common rationale for departing *from* the guideline range. Family tie departures, while not as numerous as substantial assistance decisions, represent one of the most common reasons for departing from the guideline range due to an offender’s background and personal circumstances. If these four sets of guideline rules can be rationally reconstructed, significant headway will have been made in discovering the implicit logic of the federal sentencing system.

This analysis ultimately generates two broad conclusions, one relatively modest, the other far more ambitious. The “modest” claim is that utilitarianism is the only plausible justification for the criminal history, family tie, and substantial assistance guidelines, and one plausible justification, if not the most plausible justification, for the rules governing offense seriousness. This analysis suggests that the best rational reconstruction of the four guideline rules is either a pure utilitarian theory of punishment or, less plausibly, a hybrid theory in which just deserts governs the offense seriousness rules and utilitarianism governs the other three sets of guideline rules.

The more ambitious, and certainly more controversial, claim is that a hybrid theory of punishment can *never* serve as a coherent philosophy for a sentencing system. A hybrid theory is flawed, I suggest, because it rests on the integration of incommensurable principles of punishment. The implication of this conclusion, given the modest claim above, is that only a pure theory of

---

8 In 2001, substantial assistance constituted nearly half of all departures from that range. See infra note 44 and accompanying text.
9 See infra note 67 and accompanying text. That factor has also been the subject of an enormous body of academic and judicial commentary. See infra note 70 and accompanying text.
utilitarianism can provide a sound rational reconstruction of the guideline’s core rules.\(^\text{10}\)

Lest there be any confusion, my contention here is not that utilitarianism is an appealing theory, nor that the Commission should endorse that theory after final reflection. Rather, my claim is simply that the Commission must adopt something very much like this theory if it is to affirm that the current sentencing scheme is justified. The methodology, in other words, identifies the sentencing philosophy that the Commission must implicitly embrace when it asserts that the core features of its current guideline rules are just. The Commission might choose to reject utilitarianism as a guiding philosophy, but doing so would require it to make significant changes in the core structure of the guideline rules.

This discussion proceeds in several parts. Part I offers an overview of the methodology of rational reconstruction. As discussed further below, this methodology imposes two constraints on any punishment theory, which might be called the constraints of “vertical” and “horizontal” consistency. Vertical consistency requires the Commission to identify, for each guideline rule, a rationale that is consistent with the rule’s structure and scope. Horizontal consistency, in contrast, requires the Commission to ensure that the purposes adopted for each guideline rule are consistent with the purposes adopted for the others.

Parts II through V explore the issue of vertical consistency in detail, identifying a rationale for each of the four guideline rules under analysis. Part VI then turns to the issue of horizontal consistency, testing the compatibility of the various rationales against each other. Together, these parts generate an important insight—that only a utilitarian theory of punishment can satisfy the requirements of both vertical and horizontal consistency. That is to say, only a utilitarian philosophy offers a coherent rational reconstruction of the sentencing system.

The final Part examines several potential counter-arguments. These include concerns that the adoption of a utilitarian theory might conflict with the SRA, or that it might undermine the Commission’s political legitimacy. Neither concern, I conclude, is likely to prove significant. A utilitarian theory of punishment is likely to pass the tests of both “legality” and “legitimacy.”

\(^\text{10}\) Needless to say, the modest and ambitious claims presented in this Article are severable; one can be adopted without endorsing the other.
This analysis, ultimately, has both philosophical and practical implications. In a theoretical vein, the analysis advances an ambitious and potentially controversial philosophical claim about the nature of a rational and coherent sentencing philosophy. Specifically, the Article suggests that "hybrid" punishment theories—which attempt to integrate utilitarianism and retribution in a single philosophical system—are incoherent and internally conflicted.

In a much more practical vein, the Article offers a methodological tool for the Commission to employ in developing its own sentencing philosophy, a process that could have a significant effect on the day-to-day operation of the U.S. Sentencing Guidelines.11 In applying the methodology, the Article identifies plausible rationales for several core sentencing rules. At the very least, this analysis should help spark a conversation about the purposes served by several critical guideline provisions within the federal sentencing system and within the many state systems that have analogous provisions.

I. THE METHODOLOGY OF RATIONAL RECONSTRUCTION

How might the Commission begin to identify the purpose or purposes of punishment that should govern its guideline rulemaking? Perhaps the most obvious approach is what might be called a "top down" method. Under this methodology, the Commission identifies what, in its view, is the "correct" purpose (or set of purposes) of punishment. It then constructs specific sentencing rules in ways that promote the favored philosophy.

The top down approach is highly controversial. One might be skeptical that the seven Commissioners can agree upon a common sentencing philosophy or, if they do, whether their philosophy would be appealing. Further, one might fear that the Commission, guided by its favorite philosophy, would trigger a radical restructuring of the guideline system.

Observers have reason to be concerned. During the development of the initial guidelines, Commissioner Paul Robinson pursued a top down approach, attempting to translate his conception of "just deserts" into a specific guideline structure. This effort was widely seen as ineffectual and impractical.12 Indeed,

---

11 I discuss some of the practical effects of adopting a governing philosophy of the guidelines in Rappaport, supra note 2.

12 See U.S. SENTENCING GUIDELINES MANUAL, ch. 1, pt. A.4(a) (2001) (criticizing initial draft on grounds of complexity, noting that the draft "required the use of, for example, quadratic roots and other mathematical operations that the Commission considered too complex to be workable") [hereinafter U.S.S.G.];
the Commission ultimately abandoned efforts to "adopt a single philosophical theory and then work deductively to establish a simple and perfect set of categorizations and distinctions." Instead, the Commission decided to promulgate a sentencing system without fully articulating a coherent theory of punishment.\textsuperscript{14}

The top down approach to punishment, however, is not the only way to develop a purpose-based guideline system. A different strategy exists—a "bottom-up" approach. That strategy does not call on the Commission to identify the correct moral principles as tools for constructing an ideal guideline system. Rather, it takes, as a given, the guideline decisions already made by the Commission and then attempts to "rationally reconstruct" those policy decisions.\textsuperscript{15}

\textbf{A. The Rationale for Rational Reconstruction}

What does it mean to rationally reconstruct guideline decisions? Rational reconstruction recognizes that, in order for the Commission to endorse any set of decisions, it must believe that those guideline rules are justified. Rational reconstruction simply attempts to identify plausible arguments why the Commission's existing sentencing decisions should be embraced. Thus, rational reconstruction assumes, for the sake of argument, that a set of

\textit{see also} Marc L. Miller & Ronald F. Wright, \textit{Your Cheatin' Heart[land]: The Long Search for Administrative Sentencing Justice}, 2 BUFF. CRIM. L. REV. 723, 753 (1999) ("The Robinson draft sought to make the sentencing process an exquisite calculus, with guidelines for as many relevant sentencing factors as possible. Hard as it may be to believe, the original draft called for a system of even greater rigidity and complexity than the guidelines that appeared in 1987."); Ilene H. Nagel, \textit{Structuring Sentencing Discretion: The New Federal Sentencing Guidelines}, 80 J. CRIM. L. & CRIMINOLOGY, 883, 919 n.203 (1990) ("The complexity of the proposed system will create enormous grounds for error in application of the guidelines and appeals to challenge the sentence." (quoting Letter from Judge Jon Newman to Judge William Wikins (Sept. 3, 1986))).


\textsuperscript{14} For a discussion of the Commission's anti-theoretical methodology, see Rappaport, \textit{supra} note 2, at Part III.

decisions are justified and then attempts to “back out” or “reverse engineer” a rationale for those rules.

In this regard, the process of rational reconstruction is essentially a form of logical analysis. Arguments in support of any guideline decision are, by definition, comprised of implicit premises. Those premises together entail the conclusion that the guideline decisions are justified. Rational reconstruction attempts to identify the implicit premises of the guideline rules—what must be assumed in order to believe that the Commission’s sentencing decisions are justified.

What is the point of this logical exercise? Simply stated, by making implicit premises explicit, this methodology encourages reflection and debate on the appeal of the system’s premises—and, as a result, on the justifiability of the guidelines themselves. For example, if the Commission were unable to identify a plausible argument in support of a guideline provision, the agency would have grounds to question the appropriateness of the sentencing rule. By contrast, if the Commission were able to identify a plausible argument in support of the guidelines, the agency would be able to assess the logic of that system more directly.

In doing so, the Commission would not be obligated to endorse the implicit premises of the sentencing rules. But if it finds the underlying arguments unappealing, it would necessarily have to reconsider the appeal of the guideline decisions themselves. Ultimately, then, the premises identified by

16 Neil MacCormick, Legal Reasoning and Legal Theory 21 (1995) (“In argument . . . purports to show that one proposition, the conclusion of the argument, is implied by some other proposition or propositions, the ‘premiss(es)’ of the argument.”).

17 The aim of rational reconstruction—to clarify implicit premises of moral claims—is one of the primary objectives of philosophical analysis. See Felix S. Cohen, Ethical Systems and Legal Ideals 5 (1933) (“Ethical science involves an analysis of ethical judgments, a clarification of ethical premises.”); see generally Rappaport, supra note 15, at 445 n.18.

18 Rational reconstruction does not claim that a fully rational theory of the guidelines is a compelling or persuasive one; it simply lays bare the implicit premises of the system. As one commentator explained:

One must reconstruct the system in view in order to understand and explain it without regard to the question whether it expresses sound values or value-commitments. Good legal description is neither advocacy of the system nor critique of it. Our aim here is good description in this sense, not advocacy or critique.

Bankowski, supra note 15, at 23. In this sense, rational reconstruction is not a prescriptive methodology—it does not purport to tell individuals or institutions how they should act.

19 One can think of rational reconstruction as an important step in a common form of philosophical analysis—a step towards achieving a state of “reflective equilibrium.” See John Rawls, A Theory of Justice (1971). As John Rawls observes, individuals often make normative judgments about how to act (or
the methodology of rational reconstruction serve as a focal point for further discussion about the appeal of the guidelines. The hope is that, by making implicit premises of the system explicit, the Commission can make more intelligent and principled sentencing decisions.\textsuperscript{20}

B. The Premises of the Guideline System

What types of premises are likely to be found when reconstructing guideline rules? Since an acceptable argument must provide a basis for justifying the sentencing decisions, any plausible argument must presuppose a standard of justification. In the criminal justice field, various standards are offered for justifying punishment; they are commonly called the “purposes” of punishment. Any claim that punishment is justified must be made with respect to one or more of these justifying standards.

In establishing the Commission, Congress apparently understood this basic point, which is why it directed the Commission to assure that its decisions were justified in terms of punishment purposes. More specifically, Congress identified four objectives commonly cited as justifying standards for the sentencing rules—incapacitation, deterrence, rehabilitation, and “just punishment.”\textsuperscript{21}

As I have argued in a separate paper, these four goals of punishment are not, in fact, true justifying standards.\textsuperscript{22} For example, to say that a given

\footnotesize{\textsuperscript{20} An important assumption underlying the methodology of rational reconstruction is that efforts to explore and evaluate premises will lead to more reflective and, ultimately, better decisions. I intend to discuss the implications of this core assumption in greater detail in a subsequent paper.}


\footnotesize{\textsuperscript{22} The following discussion draws extensively from Rappaport, supra note 2, at Part II.A.}
sentence “incapacitates” an offender does not necessarily mean that the punishment is justified—even if one were to believe that incapacitation is the sole goal of punishment. To the contrary, a defendant’s crime might be so minor that incapacitation would be deemed unnecessary and wasteful. In this sense, incapacitation is not an ultimate source of justification. Rather, incapacitation is an element of a deeper theory—a moral theory—about why punishment is justified. Moral theories are, by their nature, theories about what justifies. It is the moral theory that provides the ultimate justification; specific objectives (like incapacitation) constitute considerations relevant to those moral theories.

Which moral theories underlie the traditional sentencing purposes outlined in the SRA? Those four punishment goals are typically conceived as manifestations of two mutually exclusive moral theories, which reflect the two major streams of moral thought in Western culture.

The first is consequentialism, of which utilitarianism is the most common form. Although definitions of utilitarianism vary, most hold that punishment is justified so long as, on balance, it promotes public “welfare.” In practice, punishment has both good and bad consequences; as a result, any attempt to

---

23 Kyron Huigens, Rethinking the Penalty Phase, 32 ARIZ. ST. L.J. 1195, 1196 (2000) (affirming that whether any of the traditional purposes “justify punishment . . . depends on whether a broader moral or ethical theory gives it a justifying effect”).

24 Moral principles are often conceived as justifying standards—they offer a reason or rationale why certain acts should be done. See, e.g., Kent Greenawalt, Natural Law and Political Choice: The General Justification Defense—Criteria for Political Action and the Duty to Obey the Law, 36 CATH. U. L. REV. 1, 8 (1986) (“Roughly, we can speak of moral theories as including both ultimate justifying principles and practical rules or guides to conduct.”). In this sense, they offer a rationale for imposing a certain level of punishment on an individual citizen. In a forthcoming paper, I discuss the relationship between moral principle and justification in further detail. See Aaron J. Rappaport, Rational Reconstruction in Legal Theory: An Essay on the Methodology of Analytical Jurisprudence (draft on file with author).

25 See Huigens, supra note 23, at 1196 (“[T]heories of punishment are properly distinguished and named according to their underlying ethical theories. Consequentialism stresses the justifying effects of deterrence (but not only deterrence), and deontological morality stresses the unique justification provided by retribution.”).

26 See id. at 1206 n.45 (“Under a consequentialist theory of punishment, the criminal law’s system of prohibitions is morally justified as a whole by virtue of its optimizing social welfare.”). Utilitarianism is a consequentialist theory that holds that the measure of good consequences is “utility.” See generally NICOLA LACEY, STATE PUNISHMENT 27-46 (1988) (discussing the role of utilitarianism in justifying punishment). Traditionally, utilitarians have viewed pleasure and pain as the sole determinants of human welfare; some commentators, however, have favored an approach that incorporates a more objective measure of the human good. See David Brink, Utilitarian Morality and the Personal Point of View, 8 J. PHIL. 417, 422 (1986) (contrasting versions of utilitarianism that rely on “subjective” conceptions of welfare with those that rely on “objective” conceptions); see also RICHARD NORMAN, THE MORAL PHILOSOPHERS: AN INTRODUCTION TO ETHICS 108 (1998) (contrasting hedonistic and “Platonic-Aristotelian” strands of utilitarianism).
determine the justified result requires a balancing. The bad consequences might involve the financial costs to society in carrying out the sanction or the harm caused to the defendant himself. By contrast, one of the most important benefits of punishment is its contribution to public safety.\textsuperscript{27} In this regard, three of the purposes listed in the SRA—incapacitation, general deterrence, and rehabilitation—represent ways in which the crime-fighting benefits of punishment might be pursued.\textsuperscript{28}

The second great moral tradition is sometimes called a “deontological” theory or, more commonly, a theory of “retribution.” This moral tradition rejects the idea that punishment can be justified based on its consequences for society. Rather, and speaking roughly for now, punishment is justified based on some inherent moral quality of the act or actor himself.

There are, of course, many variants of retribution, but the most common form in the sentencing literature today is “just deserts.” That theory holds that punishment is justified based on the inherent culpability of the defendant, regardless of utilitarian concerns or consequences.\textsuperscript{29} The SRA’s legislative history suggests that this is one of the principal ways that Congress interpreted the “just punishment” function of punishment.\textsuperscript{30} Among desert theorists, culpability is usually measured along two dimensions: the blameworthiness of the defendant’s mental state and the harm caused by the conduct.\textsuperscript{31}

\textsuperscript{27} The Commission sometimes speaks of crime control as a fundamental goal of punishment. See SUPPLEMENTARY REPORT, supra note 13, at 17 (discussing “philosophy of crime control”). Again, “crime control” is more accurately viewed as a principal benefit of punishment under a utilitarian theory, rather than a distinct justifying theory itself.

\textsuperscript{28} Jeffrey S. Parker & Michael K. Block, The Limits of Federal Criminal Sentencing Policy; or, Confessions of Two Reformed Reformers, 9 GEO. MASON L. REV. 1001, 1008 (2001) (“[A]t least three of the four purposes—deterrence, incapacitation, and rehabilitation—easily could be harmonized as alternative means toward the same end of harm prevention, or, in the synonym suggested by the title of the more general legislation of which the Sentencing Reform Act was part, ‘crime control.’”).

\textsuperscript{29} See, e.g., LACEY, supra note 26, at 18; Nagel, supra note 12, at 898 (noting that just desert theorists “argue that those who violate the rights of others deserve only to be punished in accordance with their individual level of blameworthiness”).

\textsuperscript{30} Senate Report, supra note 2, at 75 (“[J]ust punishment . . . is just another way of saying that the sentence should reflect the gravity of the defendant’s conduct.”). It is not, however, the only interpretation. See infra Part VII.B (discussing alternative Congressional interpretations of “just punishment”).

\textsuperscript{31} Andrew von Hirsch & Nils Jareborg, Gauging Criminal Harm: A Living-Standard Analysis, in PRINCIPLED SENTENCING 220 (Andrew von Hirsch & Andrew Ashworth eds., 1992) (“Seriousness of crime has two dimensions: harm and culpability. Harm refers to the injury done or risked by the act; culpability, to the factors of intent, motive, and circumstances that determine the extent to which the offender should be held accountable for the act.”); LACEY, supra note 26, at 18 (“Culpability is generally explained as a function of the gravity of the harm caused . . . combined with the degree of responsibility (intent, recklessness, negligence, or
To be sure, criminal theorists have identified sentencing goals that go beyond the four traditional sentencing goals. But since Congress limited the acceptable goals to those traditional objectives, and since any effort by the Commission to articulate a sentencing philosophy must be consistent with the SRA, the following analysis will focus solely on those four goals and, more generally, on the two moral theories that underlie them.

This focus is not particularly restrictive. Congress did not offer a detailed definition of the four sentencing goals (or their underlying moral theories). Thus, the Commission retains significant flexibility in defining these concepts and identifying favored purposes. Having said that, I will not attempt here to survey all of the possible moral principles that might underlie the SRA’s list of purposes. Rather, to keep the discussion manageable, the following analysis will focus only on the most common versions of utilitarian and retributive theories.

Apart from moral premises, arguments in support of individual guideline decisions often require additional, intermediate assumptions. These assumptions explain how the specific structure of a guideline rule promotes the underlying philosophy of punishment. For example, one might conclude (as I do below) that utilitarianism is the only plausible justification for the Commission’s “criminal history” guidelines. But this conclusion does not mean that the Commission’s specific guideline rule relating to criminal history is well-designed to promote that goal. That requires a separate assumption about the efficacy of the rule in promoting utilitarian objectives.

In sum, an argument justifying any given guideline decision will necessarily rest on a justifying standard—a moral theory of punishment. At the same time, these arguments often will include intermediate assumptions that explain how a given sentencing rule serves the underlying moral premise. Although the focus of the following analysis will be on articulating the moral theories implicit in the guideline structure, I will attempt where feasible to identify intermediate assumptions that play an essential part in justifying the guideline rules.33

---

32 See infra Part IV.

33 Needless to say, just as I make no effort to prove that one justifying standard is objectively compelling, I will make no effort to demonstrate that the guidelines’ intermediate assumptions are correct. Nonetheless, clarifying the intermediate assumptions is a necessary first step in developing a strategy for testing whether the sentencing rules are fulfilling their underlying purposes.
C. Constraints on the Rationalizing Effort

Efforts to rationally reconstruct a set of guideline decisions are subject to two basic constraints. First, and most obviously, the implicit premises that are identified must establish a plausible rationale for the sentencing rules. That means that the premises, if accepted, must entail the conclusion that the specific rules under consideration are justified. I call this the constraint of "vertical consistency," but it might also be called a requirement of "fit." The premises must generate arguments that "fit" the guideline decisions under analysis.

A preliminary task of any rationalizing endeavor, therefore, is to define as clearly as possible the sentencing decisions to be "reconstructed." One could attempt to reconstruct every guideline decision that the Commission has promulgated in the hope of identifying one master theory that would justify all of them. That effort, however, would surely require more patience than anyone can reasonably expect, and I confess some doubt that all of the Commission's decisions can be justified on principled grounds. As a result, the goal of the following sections is more limited. The analysis will focus on four core sentencing rules in the guideline system—the criminal history, offense seriousness, family tie, and substantial assistance guidelines. Reconstructing these rules will provide significant insight into the implicit objectives of the guidelines system.

In addition to a requirement of "fit," arguments in support of the guidelines must also satisfy a requirement of "horizontal consistency." Horizontal consistency is another way of saying that an argument in support of one guideline decision must be consistent with an argument in support of the other guideline decisions. This point is discussed in much greater detail below. But the basic point is straightforward. If one assumes that the guideline decisions under analysis are justified, then one must assume that some non-

34 In any human design, some decisions are made on arbitrary, irrational, and even biased grounds. See Bankowski, supra note 15, at 19-20 ("Since many intelligences are engaged in the tasks of decisionmaking, the probability of any perfect overall scheme being exhibited in the new material at any one time, far less over a particular period of time, is negligible. One sees tendencies towards chaos as well as tendencies towards system.").

35 In defining the specific scope of these guideline rules, I will look principally to the text of the Commission's rules and its accompanying commentary. However, where judicial interpretation has resolved significant ambiguities in the scope of the rules, I will also consider the implications of these interpretations for the reconstruction of the guideline provisions. In other words, the goal will be to rationally reconstruct the four guideline rules, defined according to Commission (and in some cases judicial) interpretations.

36 See infra Part VI (discussing horizontal consistency).
arbitrary principle exists to resolve any conflict among the purposes of punishment. In other words, one must be able to explain why the various sentencing purposes are, in the end, internally consistent.

A theory that satisfies both vertical and horizontal consistency might be called a fully "rational" or "coherent" theory of the sentencing rules. It is a theory that offers a moral argument for each guideline decision under analysis, as well as a principle for resolving any apparent conflicts among the rationales. Parts II through V, below, begin this analysis, identifying plausible arguments that "fit" the four guideline provisions (i.e. that are "vertically consistent" with those provisions). Then, in Part VI, I address whether these different arguments are horizontally consistent as well.

In starting out, one may be skeptical that this analysis will yield a determinate result. The Commission, itself, has concluded that its guideline decisions are typically supported by both retributive and utilitarian theories of punishment. If that were the case, one might safely conclude that both retribution and utilitarianism lie implicit in the guideline structure, and that either would serve as a rational reconstruction of the guideline structure. But the analysis below indicates that this view is mistaken. For at least three of the provisions under analysis—and perhaps all four—only one theory of punishment offers a plausible justifying argument.

II. SUBSTANTIAL ASSISTANCE

Historically, American courts have provided sentencing discounts to defendants who help law enforcement agencies capture and prosecute criminals. The SRA expressly authorizes this practice. It directs the Commission to "assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed . . . to take into

37 See Bankowski, supra note 15, at 19 ("By 'rational reconstruction' we mean the activity of explaining fragmentary and potentially conflicting data by reference to theoretical objects in the light of which the data are seen as relatively coherent, because presented as parts of a complex, well-ordered whole."); see also id. ("[Rational reconstruction] calls for the exercise of a disciplined and intelligent imagination in order to reconstruct the fragmentary material issued by decision makers into rational, coherent, and systematic wholes.").
38 SUPPLEMENTARY REPORT, supra note 13, at 16 ("Choosing a single or even a predominant approach was unnecessary because the issue is more symbolic than pragmatic. In practice, the differing philosophies are generally consistent with the same result.").
account a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense.\(^{40}\)

Pursuant to this statutory mandate, the Commission issued guideline section 5K1.1. The provision, as currently written, permits a court, upon motion by the prosecution, to depart downward from the sentencing range for an offender who gives substantial assistance.\(^{41}\) Needless to say, the substantial assistance motion is one of the prosecutor’s most effective weapons in persuading offenders to cooperate.\(^{42}\) It is particularly effective for offenders subject to mandatory minimum sentences, since the departure is one of the few means by which defendants can avoid the imposition of these severe sanctions.\(^{43}\)

The substantial assistance motion is widely used in the federal system. Indeed, in fiscal year 2001, federal courts departed on substantial assistance grounds in 17.1% of all cases—9,390 cases in all. This represents nearly half

\(^{40}\) See 28 U.S.C. § 994(n) (2000). The original provision, enacted as part of the SRA, directed the courts to provide a discount to informants "to the extent that such assistance is a factor in applicable guidelines or policy statements issued by the Commission pursuant to 28 U.S.C. 994(a)." The provision, however, did not require the Commission to articulate substantial assistance guidelines or policy statements. A subsequent amendment, enacted as part of the Anti-Drug Abuse Act of 1986, compelled the Commission to develop appropriate rules. See Antidrug Abuse Act of 1986, Pub. L. 99-570 § 1008(n), 100 Stat. 3207 (amending 28 U.S.C. § 994).


\(^{43}\) The SRA explicitly authorizes sentences below the mandatory minimum penalties where substantial assistance is offered. That statutory provision states:

Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994.

Limited Authority to Impose a Sentence Below a Statutory Minimum, 18 U.S.C. § 3553(e) (2000). The other major option for avoiding the application of a mandatory penalty is the "mandatory minimum safety valve," which applies only in narrow circumstances. See id. § 3553(f).
of all departures from the guidelines.\textsuperscript{44} For certain crimes, such as for drug conspiracy cases, the percentages are much higher.\textsuperscript{45} One commentator remarked that "[section] 5K1.1 probably has a greater impact on the federal criminal justice system and the guideline sentencing process than any other single guideline provision, with the probable exception of the § 3E1.1 acceptance of responsibility adjustment."\textsuperscript{46}

A. The Purpose of Substantial Assistance

The purpose of the substantial assistance provision of the guidelines seems relatively straightforward. The obvious objective is utilitarian; the benefit is crime reduction. As the vice-chair of the Commission has stated, "a substantial assistance departure is a tool for law enforcement, designed to reward cooperation and provide an incentive for a defendant to cooperate; culpability is largely irrelevant."\textsuperscript{47} This is also the traditional view among sentencing commentators, who see a clear link between substantial assistance rules and the utilitarian goals of crime reduction.\textsuperscript{48}

\textsuperscript{44} United States Sentencing Commission, 2001 Sourcebook of Federal Sentencing Statistics 53 [hereinafter Sourcebook].

\textsuperscript{45} According to Commission statistics, the highest percentage of substantial assistance departures involved antitrust cases. In 2001, more than forty percent of these cases (42.1\%) drew a substantial assistance departure. For drug trafficking offenses, the rate of substantial assistance departures was 26.3\%. See id., at 56; see also Stephen G. Breyer, Federal Sentencing Guidelines Revisited, 11 Fed. Sent. Rep. 180, 183 (1999) (noting that substantial assistance departures, along with several other guidelines, "play a particularly important role in federal drug prosecutions, which account for about 40\% of all federal sentencing").

\textsuperscript{46} For several reasons, these figures may actually underestimate the impact of the substantial assistance rules on offender conduct. First, several commentators have suggested that Commission data only take into account substantial assistance motions filed prior to the time of sentencing. But in many cases, substantial assistance motions are filed after sentencing, which is not surprising since it may take some time for prosecutors to assess whether the information is truly substantial. Stanley Marcus, Substantial Assistance Motions: What Is Really Happening?, 6 Fed. Sent. Rep. 6, 7 (1993). See also Ian Weinstein, Substantial Assistance and Sentence Severity: Is There a Correlation?, 11 Fed. Sent. Rep. 83, 85 n.5 (1998).

\textsuperscript{47} Second, the departure numbers do not reflect situations where defendants provide information in the hope of persuading prosecutors to file § 5K1.1 motions, but fail to receive such a motion. Prosecutors do not typically promise to file such a motion before assessing its significance. According to a Commission staff report, "approximately two-thirds of all defendants provide some form of assistance to the government, [but] only 38.6\% of these cooperating defendants receive a substantial assistance departure." Cynthia Lee & Brian Derdowski, Jr., The Future of Substantial Assistance: Recommendations for Reform, 11 Fed. Sent. Rep. 78, 78 (1998) (citing Linda Drazga Maxfield & John H. Kramer, Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice, 11 Fed. Sent. Rep. 6, 10 (1998)); Daniel W. Stiller, Section 5K1.1 Requires the Commission’s Substantial Assistance, 12 Fed. Sent. Rep. 107, 107 (1999).

\textsuperscript{48} Stiller, supra note 45, at 107.


\textsuperscript{47} See, e.g., Frank O. Bowman, III, Departing Is Such Sweet Sorrow: A Year of Judicial Revolt on
By contrast, the dominant version of "just deserts" seems unable to offer a satisfactory justification for providing this kind of discount. A defendant’s assistance to law enforcement seems irrelevant to assessing an offender’s blameworthiness. Indeed, it seems to have little, if anything, to do with the defendant’s mental culpability in committing the crime or the harm caused by the offense—the two key factors just deserts theorists typically consider when assessing culpability.49

Nonetheless, one might wonder if some alternative retributive argument might not provide some justification for the substantial assistance discount. The most promising approach holds that punishment should be based, not on the defendant’s culpability for the offense of conviction, but on a general assessment of the defendant’s "character."50

"Substantial Assistance" Departure Follows a Decade of Prosecutorial Indiscipline, 29 STETSON L. REV. 7, 43 (1999) ("The true justification for exchanging leniency for cooperation is a utilitarian argument from necessity—without accomplice information and testimony, many serious crimes, particularly complex crimes involving groups, could not be solved or punished; absent the prospect of leniency, most if not all, accomplices would refuse to cooperate."); Bruce M. Selya & John C. Massaro, The Illustrative Role of Substantial Assistance Departures in Combatting Ultra-uniformity, 35 B.C. L. REV. 799, 810 (1994) (arguing that § 5K1.1 is an incentive program, and, "like other incentives, [it] was conceived out of a desire to maximize the occurrence of its operative condition (i.e., cooperation with law enforcement authorities) and, as a necessary corollary, to maximize the number of times the section would be invoked"). Several courts have made similar observations. See United States v. Vargas, 925 F.2d 1260, 1265 (10th Cir. 1991) ("[T]hese provisions were designed to promote . . . cooperation."); United States v. Doe, 870 F. Supp. 702, 706-07 (E.D. Va. 1994) ("[T]he primary purpose of § 5K1.1 . . . is to increase the percentage of criminals who are successfully prosecuted . . . . [T]hose provisions are arguably satisfied whenever the government receives substantial assistance on behalf of a defendant, regardless of whether the defendant alone provides the assistance."). 49 See supra note 31 and accompanying text. Some commentators have further claimed that substantial assistance provisions actually tend to benefit the most culpable offenders, resulting in a kind of "reverse equity." See Richman, supra note 42, at 292 ("[A]ny system that rewards cooperation . . . can favor the most culpable defendants. The ‘mopes’ . . . might not have much information to trade, even if they are willing to cooperate; the kingpin or lieutenant is well placed to render ‘substantial assistance,’ often by testifying against criminal subordinates."); see also Cynthia Kwei Yung Lee, Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines, 42 UCLA L. REV. 105, 138 (1994); Stephen J. Schulhofer, Rethinking Mandatory Minimums, 28 WAKE FOREST L. REV. 199, 212-13 (1993) (discussing the "cooperation paradox"). But cf. Bowman, supra note 48, at 53 (arguing that the problem of "reverse equity" is overstated); Lee & Dersdowski, Jr., supra note 45, at 80 (1999) (same).

50 Character-based theories of punishment have been gaining influence in recent years. See, e.g., LACEY, supra note 26, at 65-72; Peter Amella, Character, Choice, and Moral Agency: The Relevance of Character to Our Moral Culpability Judgments, 7 SOCi. PHIL. & POL. 59 (1990); Michael D. Bayles, Character, Purpose and Criminal Liability, 1 LAW & PHIL. 5 (1982); R.A. Duff, Choice, Character and Criminal Liability, 12 LAW & PHIL. 345 (1993); see also Rachel A. Hill, Comment, Character, Choice and "Aberrant Behavior": Aligning Criminal Sentencing with Concepts of Moral Blame, 65 U. CHi. L. REV. 975 (1998) (applying character theory to guideline analysis).
B. Character-Based Arguments

Under a character-based theory, a defendant who provides assistance to the government would be considered to have performed a "good deed"—one that warrants commendation. That commendation should be weighed against the criminal culpability, mitigating the offender's punishment. 51

This character-based, retributive argument, however, is problematic for two related reasons. First, one might be skeptical that a defendant's actions are particularly commendable when assistance is offered in return for a section 5K1.1 departure. We ordinarily think of commendable action as involving some kind of voluntary decision. But in the case of substantial assistance motions, the defendant is effectively being coerced into giving the information; it is certainly not being performed entirely in a spirit of assistance. Under these circumstances, it is difficult to understand why providing information constitutes evidence of a positive character.

Second, and perhaps most significantly, the character-based explanation for substantial assistance does not provide a persuasive rationale for the specific structure of the Commission's substantial assistance provision. Under a character-based approach, the central issue is whether the defendant's assistance signifies his good character, which means that the offender is truly desirous of helping the government. In this regard, it should be irrelevant whether the defendant's assistance actually succeeded in helping the government. Thus, a defendant who provided substantial assistance to the government would warrant a reduction in sentence even if, unbeknownst to him, the government had already obtained the same information from another source. By contrast, under a utilitarian calculus, good intentions are not necessarily sufficient to warrant a sentencing reduction. Arguably, a utilitarian

---

Character-based theories exhibit significant variations. See Samuel Pillsbury, The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility, 67 IND. L.J. 719, 730-35 (1992) (discussing three major variations of character theory). The following discussion does not canvass the many nuances of these theories. Rather, the discussion below considers in a general way the relevance of character-based theories to substantial assistance motions.

51 Most character-based theorists focus their efforts on explaining how bad acts serve as evidence that a defendant has a blameworthy character trait, and hence warrants increased punishment. See, e.g., Bayles, supra note 50, at 7 ("[B]lame and punishment are not directly for acts but for character traits. . . . If an act does indicate an undesirable character trait, then blame is appropriate; if it does not, then blame is inappropriate . . . ."); Duff, supra note 50, at 362-63 ("The proper focus of the criminal process is . . . on some character-trait that his criminal act revealed. . . . [I]t is the character trait which the law condemns and punishes."). My focus here is on the converse situation—where good acts are treated as evidence that the defendant has a commendable character trait, and hence deserves mitigation.
might endorse a substantial assistance departure only if the substantial assistance actually helped law enforcement efforts.\footnote{Cf. Frank O. Bowman, III & Michael Heise, Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences, 86 IOWA L. REV. 1043, 1117 (2001) ("Substantial assistance departures exist based on the hardheaded utilitarian calculation that offering sentence reductions in return for testimony is sometimes necessary to detect and successfully prosecute certain crimes. . . . Implicit in the idea of substantiality is . . . proof that the assistance materially advanced the prosecutorial enterprise.").}

Which approach does the Commission follow in its substantial assistance guidelines? Are “good intentions” sufficient (as a retributive might hold), or must the substantial assistance be effective (as a utilitarian might argue)? In fact, this question has been a source of debate in the Commission. The original substantial assistance guideline spoke simply about the defendant making “a good faith effort” to provide substantial assistance.\footnote{See UNITED STATES SENTENCING COMMISSION, SENTENCING GUIDELINES AND POLICY STATEMENTS (Apr. 13, 1987) (incorporating technical, clarifying, or conforming amendments submitted to Congress May 1, 1987), reprinted in 52 FED. REG. 18,046-138 (May 13, 1987) (“Upon motion of the government stating that the defendant has made a good faith effort to provide substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.”).} This language seems to give some credence to the character-based culpability approach. However, the Commission revisited the guideline in 1989. In an amendment enacted that year, the Commission deleted the “good faith” language and replaced it with a requirement that the defendant actually provide substantial assistance.\footnote{See UNITED STATES SENTENCING COMMISSION, APPENDIX C: AMENDMENTS TO THE GUIDELINES MANUAL Amend. 290 (2002) [hereinafter APPENDIX C] ("The purpose of this amendment is to clarify the Commission’s intent that departures under this policy statement be based upon the provision of substantial assistance. The existing policy statement could be interpreted as requiring only a willingness to provide such assistance."); see also United States v. Torres, 33 F.3d 130, 131 (1st Cir. 1994) (discussing the change); United States v. Gerber, 24 F.3d 93, 95 (10th Cir. 1994) ("[T]he test under the November 1989 amendment to 5K1.1 is whether Gerber actually provided substantial assistance, not whether she engaged in a good faith effort to provide such assistance."); United States v. Broxton, 926 F.2d 1180, 1184 (D.C. Cir. 1991) ("[T]he statute makes a stark distinction between those who assist the government and those who cannot or will not."); United States v. Doc, 870 F. Supp. 702, 707 n.9 (E.D. Va. 1994) (stating that, given the amendment, "even a cooperative defendant who possesses vast amounts of information may not benefit from § 5K1.1 . . . if the government has already learned that information from another source").} The guideline thus seems to embrace the utilitarian approach.

Adding support to this view are the Commission’s application notes for section 5K1.1. Those notes state that a separate guideline provision—called “acceptance of responsibility”—is designed to reflect a defendant’s personal reformation. Thus, the Commission cautions that, “[s]ubstantial assistance is directed to the investigation and prosecution of criminal activities by persons other than the defendant, while acceptance of responsibility is directed to the
defendant’s affirmative recognition of responsibility for his own conduct.”\textsuperscript{55}

Thus, the application notes further undermine the idea that substantial assistance serves as an indicator that the defendant has “reformed” or “acknowledged responsibility” for his conduct.

To be sure, this is not a comprehensive look at all possible retributive theories, only at two of the most influential. If a different retributive argument is identified that plausibly supports the substantial assistance guidelines, that alternative would be worth considering. In the meantime, I will adopt the preliminary conclusion that utilitarianism is the most plausible justification for the substantial assistance guideline. We might go so far as to say that utilitarianism lies implicit in section 5K1.1.

C. Substantial Assistance and Intermediate Assumptions

To say that utilitarianism is the best rational reconstruction of the substantial assistance guideline is not to say that the specific structure of the guideline rule is justified on utilitarian grounds. That further claim depends on the validity of various intermediate assumptions. Specifically, one must believe that the actual use of the substantial assistance provision promotes utilitarian goals. In practice, such a conclusion requires a balancing of costs and benefits.

Many of the most significant costs and benefits relate to public safety goals. For example, reducing a helpful offender’s sentence could lead to more crime by undermining the deterrent effect of the law\textsuperscript{56} and by permitting the

\textsuperscript{55} U.S.S.G. § 5K1.1, application note 2. See also Doe, 870 F. Supp. at 707:

It is equally clear that the purpose of a reduced sentence is not to reward the defendant for his recognition of the wrongfulness of his conduct or for his newly found desire to make amends for his conduct. The commentary to § 5K1.1 makes this clear, for it explicitly distinguishes the purpose of a departure for substantial assistance from that of a reduction for acceptance of responsibility under § 3E1.1. . . . It is plain, then, that the central goal of § 5K1.1 is to encourage defendants to provide effective assistance in the government’s investigation and prosecution efforts, not to reward a defendant’s good intentions.

Needless to say, one should not take this discussion to mean that just deserts is the best reconstruction of the acceptance of responsibility guidelines. A strong utilitarian argument can be made for viewing that guideline provision as primarily serving social welfare goals—by encouraging offenders to enter guilty pleas in order to avoid costly trials. Whether this argument is the most persuasive reconstruction of the acceptance of responsibility guideline is beyond the scope of this Article.

\textsuperscript{56} Substantial assistance departures might undermine the deterrent effect of the law if offenders imagine they will be able to “make a deal” if they are caught. For a discussion of the deterrent costs, see Richman, supra note 42, at 292-93.
early-release of the offender himself.⁵⁷ Weighed against these costs are the potential public safety benefits, the magnitude of which will depend on whether information gleaned from the defendants prevents other crimes.⁵⁸ Lacking sufficient information to determine the magnitude of these various factors today, any conclusion that the substantial assistance departure successfully reduces crime is conjecture.⁵⁹

Not surprisingly, the rate of substantial assistance motions differs from jurisdiction to jurisdiction, perhaps reflecting different judgments about these positive and negative effects.⁶⁰ One of the benefits of identifying the purpose of the substantial assistance guidelines is that it might force the Commission to confront the dearth of empirical evidence about the rule's efficacy. One might hope that this, in turn, would spur the agency to undertake research on the validity of these intermediate assumptions.

---

⁵⁷ Several additional costs also can be identified. One is the cost of misinformation. If informants provide unreliable information, law enforcement might arrest innocent citizens and neglect the guilty. See Bowman, supra note 48, at 44-46 (discussing potential perjury problem); Richman, supra note 42, at 293 (similar). Another is the cost of coerced pleas. Fearful of a long sentence if convicted, an innocent offender might plead guilty to a crime in order to take advantage of a possible substantial assistance motion. See Bowman, supra note 48, at 58 (noting that a substantial assistance motion "is also a marvelous method of securing a guilty plea from the cooperator himself").

⁵⁸ There has been some concern that prosecutors are offering substantial assistance motions where the information does not warrant a sentencing reduction. See Bowman & Heise, supra note 52, at 1117 ("We suggest that the government does not need to make cooperation agreements with one-third of the drug trafficking defendants in America to successfully prosecute drug crime. Nor do one-third of all drug trafficking defendants actually provide genuinely 'substantial' assistance in the prosecution of one or more other persons.").


⁶⁰ See SOURCEBOOK, supra note 44, at 53-55 (listing departure rates by jurisdiction). Various explanations for these disparities might be offered. One factor may be the willingness of prosecutors to file motions. See Stiller, supra note 45, at 108 ("[M]y complaint here is that prosecutorial discretion in practice is being exercised very differently in different federal districts such that similarly situated defendants are not, on a nationwide basis, being sentenced similarly."). Judges also vary in their willingness to approve substantial assistance departures; even when they approve government motions they differ in the magnitude of the departures. See Michael M. O'Hear, A Review of Federal Sentencing Treatises and Periodicals, 11 FED. SENT. REP. 69, 73 (1998) ("[E]ven greater discretion [exists] as to duration and type of sentence, particularly where the government has made a substantial assistance motion."). This sort of discretion raises serious concerns, including the worry that the substantial assistance motion might be applied in a racist or unjust manner. See Maxfield & Kramer, supra note 45 (discussing concerns about the racial affect of substantial assistance motions).
III. FAMILY CIRCUMSTANCES

Under traditional indeterminate sentencing systems, sentencing courts sometimes reduce an offender’s sentence to avoid imposing significant harms on third parties, such as the defendant’s family. The SRA permits the Commission to take account of family ties or relationships, but only to a limited degree. Section 994(e) of the SRA directs the Commission to assure that the guideline system "reflects the general inappropriateness of considering the . . . family ties and responsibilities . . . of the defendant." The Commission implemented this directive using broadly similar language. Policy Statement section 5H1.6 states that "family ties and responsibilities" are "not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range." Family ties, in other words, serve as a "discouraged" ground for departure.

Despite these restrictions, family circumstances continue to play a role in the federal sentencing system. Implicit in the statement that family circumstances are not ordinarily relevant is the view that family circumstances are sometimes relevant. Courts typically say that exceptional or extraordinary

61 STANTON WHEELER ET AL., SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS 152-56 (1988) (noting that the collateral effect of punishment on dependents was one factor judges took into account when sentencing in pre-Guideline’s era); Darryl K. Brown, Third-Party Interests in Criminal Law, 80 TEX. L. REV. 1383, 1391 (2002) ("Even before the Guidelines, collateral consequences for communities, employees, and families played a role in white-collar sentencing decisions."); Eleanor Bush, Considering the Defendant’s Children at Sentencing, 2 FED. SENT. REP. 194, 195 (1990) (noting that the Model Penal Code and 10 states have expressly stated that the harmful effects of prison on third-parties is a permissible argument against incarceration).

62 18 U.S.C. § 994(e) (2000). See also Senate Report, supra note 2, at 174. According to some observers, this statutory provision reflects Congress’s "concern that allowing such departures would privilege socio-economically advantaged men who were the breadwinning heads of two-parent families." Dana L. Shoenberg, Departures for Family Ties and Responsibilities After Koon, 9 FED. SENT. REP. 292, 295 (1997). See also Bush, supra note 61, at 194. But, as commentators like Shoenberg have observed, "rather than avoid disparity, the comparative rarity of family responsibilities departures has tended to disadvantage single, mainly female, low-income parents. . . . [T]his provision seems to have disadvantaged the very groups it was trying to assist." Shoenberg, supra, at 295.

63 U.S.S.G. § 5H1.6 (2002). A court, however, has discretion to consider this factor in choosing a sentence within the guideline range.

64 See U.S.S.G. ch. 5, pt. H, introductory commentary (defining discouraged factors as "not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range, although they may be relevant to this determination in exceptional cases"); see generally United States v. Koon, 518 U.S. 81, 95 (1996) (discussing discouraged, encouraged, and forbidden factors).

family ties will justify a departure. This seemingly narrow ground for departures has received significant attention from the federal courts. Indeed, apart from substantial assistance, a defendant’s "family ties and circumstances" is one of the most common grounds for imposing a sentence outside the guideline range. Family tie departures have also become a steadily increasing percentage of all downward departures, rising from less than six percent in 1991 to approximately fifteen percent in 1999 (again, not counting substantial assistance departures).

At the same time, courts disagree markedly about which kinds of situations warrant a departure for family ties. The issue has also sparked an outpouring of academic commentary. One question is what counts as an "exceptional" manifestation of family circumstances. Although this is an important question, it is beyond the scope of this Article. The focus here will be on how courts treat family circumstances after they determine that the factor is exceptional, for it is at this point that the relevance of sentencing purposes becomes most obvious.

Consider a defendant who has been living with three mistresses at the same time. Or a defendant who has been living with a spouse thirty years his senior.

---

66 See id. (noting that courts uniformly agree that a departure is appropriate when circumstances are extraordinary, unusual, or exceptional).

67 In fiscal year 2000, 450 departures were made based on this factor. See id. at 274. These numbers do not address the influence of the factor on the choice of sentence within the relevant range. Id.


71 To determine what counts as an exceptional case, the court must make an assessment of what a "typical" case looks like—in order to determine if the present case "significantly differs from the norm." United States v. Dyce, 91 F.3d 1462, 1466 (D.C. Cir. 1996) (affirming that a departure for family ties is permissible only if the case "significantly differs from the norm"). Courts have received little guidance from the Commission in answering that difficult question.
Both cases qualify as an "exceptional" family circumstance; that is, far different from the norm. But that does not necessarily mean that these are the kinds of unusual situations that warrant a departure from the guidelines. Rather, a case will warrant a departure only if it is atypical in a significant sense—that is, in a way that is relevant to the purposes of punishment. Any attempt to assess whether a departure is warranted, therefore, requires some assumption about the underlying purpose of the family tie guideline.

One might expect that, to help courts decide when departures are appropriate, the Commission would articulate the overriding purpose of taking family circumstances into account. But the Commission and, perhaps even more surprisingly, commentators have by and large failed to address the issue in any substantive way.\(^\text{72}\) One of the few exceptions is Douglas Berman, who has criticized both the Commission and the courts for their failure to confront sentencing purposes when analyzing family circumstance departures (and departures in general). Berman has suggested that this silence on purposes has been one of the central reasons that the jurisprudence on family circumstance departures has been so confusing. He has argued forcefully that the Commission (and the courts and Congress) should begin to articulate "explicit and principled rationales for a reliance on family circumstances as a mitigating factor at sentencing."\(^\text{73}\)

So what is the rationale for relying on family circumstances as a mitigating factor in sentencing? Why might "exceptional" family ties (however they are defined) warrant a departure from the guidelines? Berman has suggested that answering this question is difficult, and the lack of commentary on the subject

\(^{72}\) See Berman, supra note 65, at 274 (lamenting "the failure of those involved with federal sentencing to grapple seriously with fundamental questions of purpose. Because there has not been serious attention given precisely to why family circumstances should lead to a reduced sentence, the departure jurisprudence . . . has been 'purposeless' and sentencing outcomes have been inconsistent"); see also Gerald Greenberg & Joanna Schwartz, Unresolved Questions About Family Circumstances, 13 PED. SENT. REP. 247, 250 (2001) ("[B]ecause many disagreements . . . center not on empirical differences, but philosophical ones, it is also critical for all these [institutional] actors to recognize and clarify the underlying points of theoretical agreement and disagreement.").

\(^{73}\) Berman, supra note 65, at 277. See also id. at 274 ("An immediate priority . . . should be to start developing explicit and principled rationales for the reliance on family circumstances as a mitigating factor at sentencing."). For a similar point, but without extensive discussion, see Farrell, supra note 69, at 273 ("Ultimately, evaluating which standards are most appropriate for judges to use when determining if family circumstances justify a departure from the Guidelines depends, to a large degree, on the function that we want sentencing to serve.").
seems to confirm that view. My contention, however, is that only one theory of punishment offers a cogent and compelling justification for taking family circumstances into account. That theory, again, is utilitarian.

A. Utilitarianism and Family Circumstances

The utilitarian justification for considering family ties is straightforward. Where a defendant has significant family ties, a downward departure might in some cases alleviate the collateral harm to these third-parties. For example, by sentencing a defendant to probation rather than prison, a court could allow a parent to continue taking care of his or her children or other dependants. The children’s welfare is a relevant factor in the utilitarian calculus of appropriate punishment levels.

To determine whether a downward departure is justified in any specific case, of course, a court must assess whether the benefits of a downward departure outweigh its costs, including the costs of releasing the defendant early from prison. Where the benefits to third parties are exceptional, one would be more confident that a downward departure is justified.

One of the appealing features of the utilitarian approach is that it aligns well with the considerations cited by many courts and commentators when discussing family ties. As Berman observes, “the ‘third-party’ harm justification for a departure based on family circumstances—has been echoed expressly or implicitly by many courts and commentators as a proper foundation for a family-based departure under the guidelines.” Similarly, Congress, courts, and commentators have suggested that sentences should be crafted in ways to mitigate the potential impact on third parties.

---

74 Berman, supra note 65, at 274 (“[U]pon deeper probing, it is difficult to provide a principled explanation for exactly why a criminal offender should merit a lesser punishment simply because he or she has a spouse or children.”)
75 Bush, supra note 61, at 195–96 (noting strong utilitarian support for considering family responsibilities at sentencing). A sentence reduction might generate other benefits as well, including cost savings in letting the defendant out of prison early.
76 See Berman, supra note 65, at 276 (citing sample of cases and articles); see also Myrna S. Raeder, Remember the Family: Seven Myths About Single Parenting Departures, 13 Fed. Sent. Rep. 251, 251 (2001) (noting how punishing single mothers “has a dramatic impact on their children that is not experienced by the children of other offenders”).
77 As the Senate Judiciary Committee observed,

[T]he Commission certainly could conclude . . . that . . . a person whose offense was not extremely serious but who should be sentenced to prison should be allowed to
The utilitarian approach also helps make sense of the specific kinds of factors that courts and commentators deem significant when considering a family ties departure. For example, in considering whether a departure is warranted, courts frequently consider the number of dependants who will be affected by the sentence, the quality of the relationship, whether the offender is the primary or sole caretaker for the dependants, and whether the dependants have special needs that the offender alone can meet. All of these factors are relevant in assessing the magnitude of the third-party harm, and thus for determining whether a downward departure is warranted. In this regard, utilitarianism offers a plausible explanation for the dominant view of the family circumstances departure today.

Despite the congruence between utilitarian considerations and judicial practice, not everyone agrees that third-party harms offer a sound justification for family tie departures today. Berman himself is one notable dissenter. In a recent article, Berman expresses concerns about relying upon a third-party harm rationale for family circumstance departures. Berman’s argument is a subtle one, but it rests primarily on statutory grounds.

Berman contends that the collateral harm rationale “suffers from one fundamental problem: the SRA does not clearly authorize judges to decrease sentences based on third-party family harms.” Berman argues that departures are justified only if they serve one of the purposes of punishment mentioned in

---

work during the day, while spending evenings and weekends in prison, in order to be able to continue to support his family.

Senate Report, supra note 2, at 174; see also Bush, supra note 61, at 197-98 (“When selecting an incarcerative sentence, choose that sanction which best allows for maintenance of the parent-child relationship . . . . When structuring non-incarcerative sentences, consider the burden the sanction imposes upon the family.”).

78 See, e.g., United States v. Haversat, 22 F.3d 790, 797 (8th Cir. 1994) (upholding departure where defendant was an “irreplaceable part” of care for mentally disabled wife); United States v. Sclamo, 997 F.2d 970, 972 (1st Cir. 1993) (upholding departure where defendant was an essential part of caring for abused child). Moreover, courts consider the degree to which a downward departure will avert third-party harm. See, e.g., United States v. Wright, 218 F.3d 812, 815 (7th Cir. 2000) (departing to allow offender to care for children); United States v. Gaskill, 991 F.2d 82, 86 (3d Cir. 1993) (justifying departure on grounds that reduced sentence will keep family intact).

79 The claim that utilitarianism is a plausible justification for family tie departures does not signify that any specific family tie departure is justified under a utilitarian analysis. That depends on intermediate assumptions about whether the given departure actually promotes utilitarian goals (which, in turn, depends on assumptions about the costs and benefits of the departure in a given case).

80 Berman, supra note 65.

81 Id. at 276.
the SRA. But, as he observes, the SRA limits the purposes of punishment to goals that "principally reference the defendant and his or her crime." 82

The traditional utilitarian purposes of punishment—deterrence, incapacitation, and rehabilitation—make no mention of third-party harm. 83 As a result, Berman concludes:

[Those commentators who urge the Commission and federal judges to rely on third-party family harms as the basis for a departure may be directing their advocacy to the wrong audience; it seems that Congress would need to amend or expand provisions of the SRA before sentencing judges should feel broad authority to directly incorporate third-party harms into sentencing calculations. 84

Berman reaches this conclusion reluctantly, for he observes that a "review of the literature makes quite compelling the social policy reasons for being concerned with third-party family harms at sentencing." 85

Nonetheless, Berman may be too quick to reject the third-party harm rationale on statutory grounds. The reason is that third-party harms may be relevant to the utilitarian purposes of punishment, even if these harms do not directly implicate the "defendant and his or her crime." To see how this is so, consider again the utilitarian purposes mentioned in the statute—deterrence, incapacitation, and rehabilitation.

On their face, these objectives deal only with the crime-fighting "benefits" of imposing punishment on the defendant. 86 They say nothing explicitly about the costs of punishment to society, such as the financial costs of imposing a prison term. Can the Commission take account of those costs when deciding, say, whether to sentence a low-level thief to prison or probation? Even though

---

82 Id. "The instructions of [the SRA] concerning the ['factors to be considered in imposing a sentence'] are focused almost exclusively on the crime and the defendant, . . . 3553(a)(2) codifies the traditional purposes of sentencing—retribution, deterrence, incapacitation, and rehabilitation—with terminology that principally references the defendant and his or her crime." Id.
83 For Berman, this signifies that Congress intended the Commission and the courts to focus on utilitarian factors related to the offense or the offender exclusively, and only to the extent that they are related to crime reduction. Berman acknowledges that family ties might be relevant to utilitarian crime-fighting goals under certain circumstances. For example, strong family ties might be relevant in assessing the defendant’s risk of recidivism. Id. at 278.
84 Id. at 277. Berman suggests that creative interpretations of other parts of the SRA—such as 18 U.S.C. § 3553(b)—might offer a statutory basis for considering third-party harms. However, as the quotation in the text suggests, he is uncertain whether these creative interpretations would survive scrutiny.
85 Id. 278 (citation omitted).
86 See supra Part I.B.
the SRA’s statement of purposes does not explicitly refer to the financial costs of punishment, it seems inconceivable that Congress intended to bar the Commission from taking such basic considerations into account. A much more reasonable conclusion would be that Congress expected the Commission to balance the benefits of a prison sentence against its social costs. These costs, one might say, lie implicit in any assessment of the best sentencing policy on utilitarian, or crime-fighting, grounds.

This conclusion is all that is needed to justify consideration of third-party harms at sentencing. If the Commission can take into account the financial costs of prison, then it can also take into account other kinds of social costs, including the collateral harms suffered by innocent third-parties. This view is fully consistent with the SRA’s legislative history, which confirms that Congress believed that third-party harms might be relevant in determining the ultimate guideline sentence.\textsuperscript{87}

This is not to deny that Berman’s interpretation of the statute might be a plausible one, only that it is neither the only plausible reading of the statute nor the most plausible reading. Even if one thought that the statute was ambiguous on this matter, the Commission would be acting well within its statutory authority to interpret the statute to authorize departures based on third-party harms.\textsuperscript{88}

In short, utilitarianism offers a natural and eminently plausible way of understanding family tie departures. The utilitarian focus on “third-party harms” is consistent with judicial practice, legislative history, and the language of the SRA itself. Utilitarian considerations are implicit in the decision to depart based on exceptional family circumstances.

\textbf{B. Retribution and Family Circumstances}

Retributive theorists, in contrast, have more trouble constructing a plausible justification for the basic features of the family ties jurisprudence. The problem is that just desert theory allocates punishment based on the defendant’s culpability for the offense of conviction. The collateral harm of punishment, however, does not seem relevant to the defendant’s

\textsuperscript{87} See supra note 77.

blameworthiness for the offense.⁸⁹ That conclusion has led at least one appellate court to reject culpability-based arguments for family tie departures. In the widely cited case of United States v. Johnson, the Second Circuit stated that, “[t]he rationale for a downward departure here is not that Johnson’s family circumstances decrease her culpability, but that we are reluctant to wreak extraordinary destruction on dependents who rely solely on the defendant for their upbringing.”⁹⁰

To be sure, commentators have identified arguments why family ties might, in some cases, be relevant in assessing the defendant’s culpability. Berman, for example, suggests that an offender’s family relationships might influence the defendant’s motivation in committing a crime, and thus affect his ultimate culpability for that offense. As an illustration, he describes a dutiful son who commits bank fraud to fund a necessary medical caretaker for his aged mother. Because this defendant’s motive to provide for his mother makes him less culpable than a defendant who commits the same fraud to finance unneeded luxuries, a court might reasonably conclude that the dutiful son’s “family circumstances” call for lesser sentence due to the SRA’s concern “to provide just punishment for the offense.”⁹¹

Though logically sound, this argument offers a sharply constrained view of the relevance of family ties. Indeed, it permits departures only when the specific motive of the defendant is mitigating (i.e. designed to help the family member). That approach is unable to explain the more expansive scope of departures in the federal system today. Moreover, it fails to explain the various factors courts consider when trying to determine how great a harm the third-party dependant will suffer—such as the number of dependants, the special needs those dependants have, and whether the defendant is indispensable to their care. Courts ask these questions typically not to determine the motive of the defendant in carrying out the crime, but to assess the degree of harm that third parties will suffer if the offender is incarcerated for lengthy periods. Berman himself acknowledges that the “motivation” approach would raise questions about numerous court cases that emphasize “third-party harms.”

---

⁸⁹ Perhaps for this reason some commentators who support the increased use of the family tie departure have been critical of just desert theory. See, e.g., Raeder, supra note 76, at 254 (lamenting that, under the just desert regime, “women’s pathways to crime, the fairness of their sentences, and the impact of their incarceration on their children are all seen as irrelevant”).


⁹¹ Berman, supra note 65, at 277. See also Bush, supra note 61, at 196.
A second retributive argument for considering family circumstances focuses, not on the defendant’s motive for the crime, but on the “additional harm” that offenders who have close family ties suffer when sent to prison. According to this line of reasoning, such offenders are “punished twice—once when they lose their freedom and again when they lose their children, whether temporarily or permanently.” Some offenders may suffer particularly severe collateral consequences as a result of their incarceration, including the loss of their parental rights. Because of the additional suffering, these offenders deserve mitigation to ensure that the total punishment they receive is comparable to other offenders.

Again, this argument is logically sound as a justification for a family ties departure of a certain sort. But as a justification for the family ties departures practiced in the federal system, it falls short. The principal difficulty again is that the argument cannot explain some of the common considerations raised by courts and commentators when talking about departures.

For example, the argument for double punishment would seem to apply whenever a defendant suffers a collateral harm that is particularly severe. As one commentator observes, “[e]ven if separation from children is arguably the most significant loss that a parent may experience . . . earning potential, professional license, reputation . . . may be just as important to many other defendants.” Yet, courts and the Commission have been notably hesitant to consider these other types of collateral harms to the offender as grounds for departure.

Even more significantly, the double harm approach fails to account for some of the key distinctions that courts make when examining harm to third-

---

92 See Segal, supra note 68, at 262 (discussing, and criticizing, this argument); see also Bush, supra note 61, at 194 (arguing that additional harm suffered by parents means that offenders experience “different effective quantities of punishment”); Tracy Tyson, Downward Departures Under the Federal Sentencing Guidelines: Are Parenthood and Pregnancy Appropriate Sentencing Considerations?, 2 S. CAL. REV. L. & WOMEN’S STUD., 577, 595-96 (1993) (urging the Commission to consider the additional costs suffered by incarcerated parents).

93 See Raeder, supra note 76, at 252 (noting that offenders face a host of collateral consequences, including the possibility of loss of parental rights and denial of food stamps). Female offenders also may suffer greater burdens because of the limited number of women’s prisons. See Segal, supra note 68, at 265 (acknowledging some force to the argument that the small number of female prisons “may impose a greater burden on women than men”).

94 See Segal, supra note 68, at 262.

95 Ilene Nagel and Barry Johnson attack this sort of justification for departure on the grounds that such comparisons “lead[s] to a free-for-all of sentencing individualization, each defendant arguing that her incarceration would be more painful than that of other defendants.” Nagel & Johnson, supra note 70, at 205.
parties. For example, courts are often particularly sensitive to third-party harms when those harms affect multiple children, when the children (or other dependants) have special needs, and when the offender is indispensable in meeting those needs. Retributionists who embrace the double harm approach have difficulty explaining why these factors are so critical.  

To conclude, this analysis does not suggest that utilitarianism is the only feasible justification for family tie departures. A retributive argument can be offered for family tie departures of a very limited sort. But only utilitarianism offers a plausible rationale for the courts’ specific practices when departing based on family ties, and only utilitarianism can explain the key factors judges actually consider to be relevant in making that assessment. The Commission, of course, is free to reject this utilitarian rationale, but this analysis makes clear that adopting a retributive approach would trigger a marked change in current family ties jurisprudence.

IV. CRIMINAL HISTORY

An offender’s prior record has long been considered a significant factor at sentencing. In traditional indeterminate sentencing systems, “most judges adjusted the sentence to take account of the offender’s previous convictions.” With the movement towards determinate sentences, many jurisdictions formalized this consideration in statutes and guidelines. Recidivist statutes, such as California’s three strikes provision, have made a defendant’s criminal record a primary factor in determining the ultimate sentence imposed.  

---

96 For example, under current case law, judges often view the availability of alternative care for dependents as an argument against departure. See, e.g., United States v. Dominguez, 296 F.3d 192, 199 n.19 (3d Cir. 2002) (citing cases). Under the “double harm” approach, this consideration seems less significant: A parent’s suffering due to separation will still be significant, even when alternative care is available. Similarly, retributionists have difficulty explaining why courts consider the ability of the departure to preserve the family relationships (by, for example, allowing the defendant to serve his time on probation rather than prison). See, e.g., Bush, supra note 61, at 195 (“The in/out stage of decisionmaking constitutes the most important point at which to consider the effects of sentencing on the children.”). Again, under the double-harm approach, the actual effect of the departure on family preservation is not necessarily a central issue. An offender would warrant a sentencing discount for the “additional harm” of losing or her children whether or not the discount would result in a sentence that would preserve the family tie.

97 ALFRED BLUMSTEIN, RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 11-12 (1983) (noting that the offender’s criminal record has long been an important factor in sentencing decisions), cited in SUPPLEMENTARY REPORT, supra note 13, at 41 n.67.


99 Most states have enacted special recidivist statutes. See Alexis M. Durham III, Justice in Sentencing:
if not all state guideline systems incorporate provisions that enhance punishment levels for past crimes to some degree.\textsuperscript{100}

The federal sentencing system is similar. The guidelines make a defendant's criminal record a central feature of the guideline sentence, more central to the sentence than family circumstances and substantial assistance. Where the latter factors serve as potential grounds for departing from the guideline range, a defendant's criminal record represents one of the two key indices for determining the sentencing range itself.\textsuperscript{101} Specifically, each offender is placed into one of six criminal history categories, which reflect the number and seriousness of prior criminal offenses. That criminal history category is cross-referenced with an "offense seriousness score"—which measures the severity of the current offense—to generate the offender's guideline range.\textsuperscript{102}

The rules for determining the defendant's criminal history category are complex.\textsuperscript{103} Briefly stated, the guidelines assign a score of between one and three points for each prior offense, depending on the length of the sentence imposed by the judge for that offense.\textsuperscript{104} The Guideline Manual also includes


\textsuperscript{101} This is fully consistent with both Congressional and Commission intentions, which envisioned criminal records playing a major role in sentencing. See 28 U.S.C. § 991(b)(1)(B) (2000) (listing criminal record and offense seriousness as two critical factors for determining when offenders are similarly situated); Nagel, supra note 12, at 924 (noting that the original Commissioners agreed that "an offender's criminal history score would dramatically affect an offender's ultimate sentence").

\textsuperscript{102} The criminal history score makes a significant contribution to the ultimate sentence. For a defendant with offense seriousness level 20, moving from criminal history category one to six more than doubles a sentence. For some state jurisdictions, criminal history plays an even more powerful role in the final sentence. See Roberts, supra note 100, at 344-47 & tbl.1.


\textsuperscript{104} One criminal history point is provided for a prior offense that involves incarceration of less than sixty days, two points are assigned for a prior offense that involves incarceration of between sixty days and thirteen months, and three points are assigned for a prior offense with incarceration of more than thirteen months. U.S.S.G. § 4A1.1 (2002). Commentators have attacked this methodology for being highly inaccurate as a measure of the seriousness of the offender's prior record. For example, the scoring system fails to make any distinctions among sentences of more than thirteen months, even though crimes in that grouping vary dramatically. Moreover, for administrative convenience, the scoring system considers only sentences imposed
several additional rules that modify the point totals. For example, the Commission rules state that, after a designated number of years, prior offenses "expire" and are not counted at all.\textsuperscript{105} Conversely, points are added for certain violent prior crimes\textsuperscript{106} or for committing a crime while under criminal justice supervision.\textsuperscript{107} The total number of points determines the category in which the defendant will be placed. Criminal history category one, at one extreme, is for offenders with zero or one criminal history points. Criminal history category six, at the other extreme, is for offenders with thirteen or more criminal history points.\textsuperscript{108}

The complexity of this structure tends to obscure the underlying purpose of the criminal history guidelines. The Commission, for its part, has suggested that the criminal history rules are supported by both utilitarian and retributive rationales.\textsuperscript{109} At first glance, this conclusion seems uncontroversial. As discussed below, both just deserts theorists and utilitarian theorists can come up with superficially plausible arguments for treating criminal records as relevant to some degree.

But the methodology of rational reconstruction does not operate in the abstract. The goal is to identify a rationale for the way the Commission has actually incorporated criminal history factors into the sentencing guidelines. When the specific structure of the criminal history rules is considered, it becomes clear that utilitarianism alone offers the most plausible justification.

A. \textit{Utilitarianism and Criminal History}

The utilitarian basis for taking an offender’s criminal record into account is, again, relatively straightforward. Numerous studies have indicated that, apart from the offense of conviction itself, an offender’s criminal record is

by the court—rather than sentences actually served. Critics argue that, since offenders serve different portions of their sentences in different jurisdictions, the "sentence imposed" figure is virtually meaningless. See United States Sentencing Commission Staff, \textit{supra} note 103, as 216 (discussing criticism).

\textsuperscript{105} U.S.S.G. § 4A1.2(e).

\textsuperscript{106} U.S.S.G. § 4A1.1(f) (requiring courts to add a point to the criminal history total “for each prior sentence resulting from a conviction of a crime of violence” that, for various reasons, did not otherwise receive points).

\textsuperscript{107} U.S.S.G. § 4A1.1(d) (requiring court to add two points to criminal history score “if the defendant committed the instant offense while under any criminal justice sentence”).

\textsuperscript{108} U.S.S.G. § 5A (sentencing table).

\textsuperscript{109} For example, in its Supplementary Report, the Commission suggested that both utilitarian and just desert theories support consideration of a defendant’s criminal record. \textit{SUPPLEMENTARY REPORT, supra} note 13, at 41.
among the most significant predictors of a defendant's recidivism risk. For a utilitarian, therefore, the defendant's prior record is highly relevant for assessing which offender is the most dangerous and hence should be kept in prison the longest. As the Commission itself observed, "[i]mposition of more restrictive sentences on those defendants who have a greater likelihood of recidivism enhances the protection of the public from further crimes by those defendants."

Utilitarianism also provides a plausible explanation for some of the unusual structural features of the criminal history score. For example, one of the most controversial features of this set of guidelines is the division of the criminal history axis into six categories. The top category encompasses all offenders with thirteen or more criminal history points. Thus, the criminal history guidelines essentially treat all criminals with thirteen or more criminal history points the same. This has proved a puzzle for some commentators who question why defendants with far more severe criminal records—say, twenty-six criminal history points—should be treated precisely the same as those with only thirteen points. Is that not a kind of disparity—sentencing two dissimilar offenders similarly?

110 Steven D. Gottfredson & Don M. Gottfredson, Accuracy of Prediction Models, in 2 CRIMINAL CAREERS AND "CAREER CRIMINALS" 212, 239-40 (Alfred Blumstein et al. eds., 1986) ("From the earliest studies to the last, indices of prior criminal conduct consistently are found to be among the most powerful predictors."); Roberts, supra note 100, at 316-17 ("Research on the prediction of criminal behavior has repeatedly demonstrated criminal record to be the single best predictor of future offending."); von Hirsch, supra note 98, at 191 ("Prediction studies tend to show that the statistical likelihood of someone's reoffending is influenced primarily by his previous criminal history.").

The ultimate predictive accuracy of recidivism measures today is the subject of some controversy. See Markus Dirk Dubber, Recidivist Statutes As A Rationa1 Punishment, 43 BUFF. L. REV. 689, 711 (1995) ("If the intense criminalological research on recidivism indicators over the past few decades has taught us anything, it is that the nature of the crime of conviction and prior criminal record are poor indicators of recidivism."). But see O'Neill, supra note 100, at 300 ("More recently, claims have been made that current predictive models represent a considerable advancement over models formerly used and are now far more reliable.").

111 SUPPLEMENTARY REPORT, supra note 13, at 42. See also id. at 41 ("From a crime control perspective, a criminal history component is especially important because it is predictive of recidivism."); Richard A. Posner, An Economic Theory of the Criminal Law, 85 COLUM. L. REV. 1193, 1216 (1985):

The repeat offender has demonstrated by his behavior a propensity for committing crimes. Therefore, by imprisoning him for a longer time we can expect to prevent more crimes during his period of imprisonment than we would do if we imprisoned a first offender, whose propensities are harder to predict, for the same period. The same prison resources "buy" a greater reduction in crime.

Interestingly, some countries make this link explicit. For example, the Indian Penal Code "justifies enhanced sentences for recidivist property crime on the grounds that offending of this nature warrants greater deterrent treatment." Roberts, supra note 100, at 309.
A utilitarian, however, has a plausible explanation for this result. The utilitarian need only assume—plausibly—that prior criminal offenses have a "diminishing value" in predicting recidivism risk. In other words, in assessing an offender's recidivism risk, one prior offense might seem quite significant. But whether the defendant has five prior offenses or six seems far less significant. And whether the offender has ten prior offenses or eleven seems even less significant. At some point, the fact that a defendant has one more prior offense adds nothing to the estimate of his risk. The Commission's criminal history rules could be seen as marking that point at thirteen criminal history points.

My claim is not that the guidelines mark the correct point at which prior offenses are irrelevant. Rather, my point is simply that a utilitarian has a plausible explanation for this structural feature of the criminal history provisions. ¹¹² Only further research will tell us whether this "intermediate" empirical assumption—that criminal history has diminishing marginal utility—is true. And, if it is true, only research will tell us whether the criminal history guidelines accurately identify the point at which the marginal utility of taking additional criminal history points into account becomes insignificant.

A second controversial feature of the criminal history guidelines concerns the rules regarding the "expiration" of old offenses. Why should old prior offenses expire? Again, the utilitarian has a ready and plausible explanation—the predictive effect of a prior record likely diminishes with age. Common sense suggests that a recent prior record is more likely to indicate future risk than a crime committed twenty years ago, followed by a long period of apparently law-abiding conduct.¹¹³ Again, the validity of this assumption—and the date at which a prior record becomes insignificant—must be tested by empirical studies.¹¹⁴

¹¹² See Aaron J. Rappaport, Criminal History and the Purposes of Sentencing, 9 FED. SENT. REP. 184, 187 n.4 (1997) (discussing unpublished research conducted by Commission staff in 1990 that allegedly supports criminal history guideline structure).

¹¹³ Two leading experts suggest another utilitarian explanation for the expiration rule—it is an indirect way to account for the significance of an offender's age in predicting recidivism rates. See Peter B. Hoffman & James L. Beck, The Origin of the Federal Criminal History Score, 9 FED. SENT. REP. 192, 193-94 (1997).

¹¹⁴ A more accurate approach would employ a sliding-scale discount, so that offenses slowly expire over time rather than expiring suddenly in year ten or fifteen. This approach would account for the diminishing significance over time of a prior record. The approach, however, would probably also entail increased administrative costs, so that a utilitarian would need to weigh the benefits and costs of a sliding-scale rule before deciding on its implementation.
The “custody status rule”—which increases the criminal history score for prior offenses committed under correctional supervision—also has a ready utilitarian justification. One might plausibly believe that a defendant who is so hardened that he or she will commit an offense under the nose of law enforcement authorities is at a particularly high risk of reoffending, and thus deserves a longer sentence.\textsuperscript{115} In citing these examples, I am not trying to suggest that utilitarianism is consistent with every aspect of the criminal history guidelines.\textsuperscript{116} Rather, my claim is simply that utilitarianism offers a plausible explanation for many of the key structural features of the criminal history rules.\textsuperscript{117}

This conclusion should not be entirely surprising, given the way in which the Commission developed the criminal history score. The original Commission approached the project in a way that virtually ensured that crime control goals would be the governing philosophical approach. When the first Commission began to consider how to structure the criminal history rules, it looked to several existing models that were designed principally to measure recidivism risk.\textsuperscript{118} Perhaps the most significant model was the Parole Commission’s guideline system used to determine offender release dates.\textsuperscript{119}

Implemented in 1970, the Parole Guidelines were also based on a two dimensional grid. Like the sentencing guidelines, one axis of the grid measured offense seriousness.\textsuperscript{120} The second axis, called the “salient factor score” (SFS), was specifically designed to determine the offender’s risk of

\textsuperscript{115} See Roberts, supra note 100, at 333-34.

\textsuperscript{116} One minor inconsistency, for example, is the Commission’s rules for “related offenses.” This set of rules appears to incorporate just desert considerations at the expense of utilitarian goals. See Daniel P. Bach, Reconsidering Related Conduct, 9 Fed. Sent. Rep. 198, 199-200 (1997) (“[T]he related cases concept represents a kind of compromise between certain specific deterrence and just desert theories.”).

\textsuperscript{117} Others agree. See, e.g., Durham, supra note 99, at 618 (“In a criminal justice system that seeks to reduce crime through forward-looking, utilitarian strategies, recidivist statutes seem well-justified.”); Roberts, supra note 100, at 349 (“Most sentencing guideline systems have a strong utilitarian orientation: the recidivist premium is justified in terms of providing additional deterrence or incapacitation.”).

\textsuperscript{118} The Commission was quite clear about this, justifying the guidelines specifically on the grounds that it was “consistent with the extant empirical research assessing correlates of recidivism and patterns of criminal behavior.” U.S.S.G. § 4A, introductory commentary (2002).


\textsuperscript{120} The Parole Guidelines were far less detailed than the federal sentencing guidelines in measuring offense seriousness. The former had only eight offense categories, rather than the guidelines’ forty-three.
reoffending. The SFS took into account several factors, although the defendant's criminal record was a major part of the assessment.

In the Supplementary Report, the Commission acknowledged its debt to the SFS provisions, noting that "[f]our of the five elements selected by the Commission for inclusion in the criminal history score are very similar to elements contained in the Salient Factor Score." The Commission also justified its reliance on the SFS by noting that the "predictive power and stability of the Salient Factor Score have been firmly established." The Commission, in short, looked to the Parole Commission's recidivism-based system as a model when constructing its own criminal history rules. One might say that the "original intent" of the Commission in developing the criminal history guidelines was to promote utilitarian, crime-control goals.

In short, the arguments for viewing the criminal history guidelines as utilitarian in orientation are powerful. Utilitarianism offers a coherent justification for taking prior criminal records into account generally. It helps to explain specific structural features of the Commission's rules. It is consistent with the considerations the Commission actually took into account when

---


122 See Hoffman, supra note 119, at 480 (noting that the SFS "gives primary weight to criminal history items").

123 Supplementary Report, supra note 13, at 43. The original criminal history guidelines had five elements. 4A1.1(a)-(e). In 1991, the Commission expanded the list to include a sixth, U.S.S.G. § 4A1.1(f), which applies only in a few cases. See Hoffman, supra note 119, at 488 n.13. This is the only significant change to the criminal history guidelines since enactment. See O'Neill, supra note 100, at 304 n.49. To be sure, the criminal history guidelines do not follow the SFS guidelines exactly. For example, the SFS employs a somewhat simpler method of measuring past records, distinguishing only between those offenders who have no priors, one prior, two or three priors, or four or more priors. In addition, the SFS includes several factors not mentioned in the federal guidelines. For example, the SFS considers age to be a relevant factor—which is not explicitly included in the guidelines' criminal history score. But cf. Hoffman & Beck, supra note 113, at 193-94 (suggesting that "age" is indirectly taken into account through the Commission's expiration rules). For further discussion of the age issue, see Roberts, supra note 100, at 355-56.

124 Supplementary Report, supra note 13, at 43. Other studies have confirmed that the SFS and the guidelines' criminal history rules are highly correlated in terms of predicting recidivism rates. See Hoffman, supra note 119, at 488 n.13. Some evidence, however, suggests that the less complex SFS actually has a slightly higher predictive power than the guidelines. See Hoffman & Beck, supra note 113, at 194 (citing two unpublished studies).

developing these guidelines. In its Supplementary Report on the original guidelines, the Commission virtually acknowledged that utilitarianism was the dominant justification for the criminal history rules. These rules, the Commission affirmed, are “included primarily for crime-control considerations.”

B. Just Deserts and Criminal History

Just desert theorists have far greater difficulty in explaining why criminal history is a relevant sentencing factor. Under a just deserts model, prior crimes are relevant to the sentencing decision only if they signify that the defendant is more culpable for his current offense. To be sure, many people have a common intuition that offenders with longer criminal records are more culpable. The Commission has, on occasion, implied the same thing.

But, on closer analysis, the connection between prior records and culpability is mysterious. After all, hasn’t the defendant already paid for his past crimes? Why should he pay for that crime again when sentenced for a new offense? Doesn’t this represent double punishment for the same crime? The problem, as Commissioner Michael O’Neill has written, is that “[p]roponents of so-called ‘just deserts’ have sought to ensure fair punishment for the present offense, not for past crimes that already may have been punished.”

---

126 SUPPLEMENTARY REPORT, supra note 13, at 17. In a more recent working paper, the Commission staff has repeated this conclusion. See United States Sentencing Commission Staff, supra note 103, at 219 (“[C]urrent policies more frequently tend to reflect the selective incapacitation philosophy in sentencing practices in general and criminal history in particular.”).

127 This view underlies recent proposals to expand the number of criminal history categories beyond six. See Spencer Freedman, In Defense of Criminal History Departures, 13 FED. SENT. REP. 311, 315 (2001) (“[A] system that rates an offender with thirteen criminal history points . . . at the same level as an offender with twice as many points or more does not accurately account for the severity of each offender’s criminal past.”); Gerald E. Rosen, Why the Criminal History Category Promotes Disparity—And Some Modest Proposals to Address the Problem, 9 FED. SENT. REP. 205, 207 (1997) (criticizing the fact that, under existing guidelines, “a defendant who has twice or three times that number of points gets the same criminal history as the person with only thirteen points, unless the court takes the initiative to depart upward”). Several state statutes affirm that recidivism is a mark of increased culpability. See Roberts, supra note 100, at 320-21.

128 As the Commission observed in its Supplementary Report, “[f]rom a just punishment perspective, a defendant with a criminal history is deemed more culpable and deserving of greater punishment than a first offender.” SUPPLEMENTARY REPORT, supra note 13, at 41.

129 Von Hirsch, supra note 98, at 191 (observing that the offender appears to have “been ‘punished already’ for his previous crime”).

130 O’Neill, supra note 100, at 297.
One academic who has attempted to justify the relevance of criminal history on just deserts grounds is Andrew von Hirsch—perhaps the foremost advocate of just desert theory today.\textsuperscript{131} Von Hirsch has offered two different arguments in support of an offender’s criminal record—a “notice” argument and a “character-based” argument. Although other retributive arguments for considering a defendant’s prior record might exist, these have been among most influential in the literature.

1. \textit{Notice Arguments}

As von Hirsch notes, mainstream just desert theory considers two factors to be critically important in assessing culpability—the mental culpability of the defendant and the actual harm caused by his or her conduct.\textsuperscript{132} Von Hirsch acknowledges that a prior criminal record is irrelevant for assessing the harm caused by the current offense.\textsuperscript{133} He asserts, however, that a criminal record could be relevant in assessing the defendant’s mental culpability for the current offense.\textsuperscript{134}

Why this might be so is a bit of a puzzle, at least at first glance. A defendant who intentionally robs a bank appears to have the same mental culpability regardless of whether it is his first offense or his second. Why should a criminal record matter? The argument that von Hirsch makes is “basically one of notice.”\textsuperscript{135}

The idea is that a defendant who is unaware that a given act is criminal, or who does not fully appreciate the consequences of his conduct, is less


\textsuperscript{132} See, e.g., von Hirsch & Jareborg, \textit{supra} note 31, at 220.

\textsuperscript{133} See von Hirsch, \textit{supra} note 98, at 192 (arguing that “[t]he harmfulness of the conduct does not seem affected” by a prior conviction).

\textsuperscript{134} To be sure, one might argue that a special harm exists—the rejection of social norms—when a recidivist commits an offense. This is the idea that “recidivism reveals an aggressive defiance that adds to the blameworthiness of the offender . . . . After being subjected to such . . . information[] . . . the offender cannot fail to understand the message. Continued criminal behavior therefore reflects a defiance of the law.” Durham, \textit{supra} note 97, at 621. Fletcher attacks this position on theoretical grounds, suggesting that public defiance should not be made criminal. \textit{See GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW} 460-66 (1978).

\textsuperscript{135} And von Hirsch agrees. \textit{See} von Hirsch, \textit{supra} note 96, at 192 (“Treating defiance in itself as an extra harm presupposes authoritarian assumptions about the state and the criminal law [that are unacceptable].”).

\textsuperscript{135} See \textit{RICHARD G. SINGER, JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT} 68 (1979) (discussing von Hirsch’s theory).
blameworthy than one who acts with full awareness. Thus, a defendant who has never committed a crime before deserves some form of mitigation. By contrast, for one who "has been formally censured for the conduct through a criminal conviction, . . . [i]t is rather like having one's nose rubbed in what one has done. . . . Thereafter, claims to possible ignorance or inattention to the prohibition become less plausible."  

Superficially, the notice argument seems to provide a sound justification for considering criminal history at sentencing. But closer analysis makes clear that the notice argument is an implausible basis for the Commission's criminal history guidelines.

First, the notice argument would seem applicable only when the prior conviction is similar to the current offense. A prior drug-trafficking conviction does not provide notice of the unlawfulness of money laundering. Yet, the criminal history rules do not typically distinguish among prior crimes based on their similarity to the current offense of conviction.

Second, the notice argument rests on the assumption that a prior conviction is needed to notify a defendant of the wrongfulness of criminal conduct. But, for many crimes, a specific warning is unnecessary. At best, the notice argument seems appropriate only for certain kinds of offenses—such as technical regulatory offenses—which are not obviously criminal. Again, the Commission has not fashioned the criminal history guidelines in such a restrictive fashion.

---

136 Von Hirsch, supra note 98, at 193. Von Hirsch's approach explains why he uses slightly different terminology than most utilitarian commentators when explaining the significance of an offender's criminal record. Utilitarians typically speak of the existence of a prior record as an aggravating factor—signifying a more dangerous offender. Von Hirsch, by contrast, says that the lack of prior record is a mitigating factor. A prior record eliminates the partial mitigation afforded to a first offender. Despite the difference in terminology and reasoning, both approaches generate the same result: All else being equal, an offender with a prior record will receive a longer sentence than a first offender.

137 This argument resonated, at least, with the House Committee considering sentencing reform bills in the early 1980s. One House report stated that "the guidelines should provide that those with previous criminal histories should be punished more severely than first offenders, because the level of culpability of a person with a prior record is higher, and such a person is on fair notice that subsequent convictions subject such a person to enhancement of punishment." H.R. Rep. No. 98-1017, at 99 (1984) (report accompanying H.R. 6012, a bill considered prior to the SRA).

138 Of course, ignorance or lack of notice is not generally an excuse for liability. But the question here is not whether ignorance is an excuse to liability, but whether it can mitigate punishment.

139 See Durham, supra note 99, at 625 (questioning the idea that people need notice of traditional crimes).
Third, von Hirsch’s argument for mitigation seems to apply only to a defendant’s first offense. After that, the defendant would appear to be on notice that the conduct is criminal. As Barbara Meierhoefer Vincent has written, the “‘he should have known better this time’ rationale for greater culpability . . . provides no standard for assessing the appropriateness of differential punishment for the third or fourth offense beyond, presumably, ‘he really, should have known better this time.’”

In short, the notice argument offers a justification for considering an offender’s criminal record in a very narrow set of circumstances. But it fails as a justification for key features of the Commission’s rules: It fails to explain why a loss of mitigation occurs for unrelated priors, why discounts should be available for first offenders of notorious crimes, and why a discount remains after the second or third offense. These significant shortcomings mean that just desert theorists must look elsewhere for a persuasive retributive argument that supports the core structure of the Commission’s criminal history rules.

2. Character-Based Arguments

In recent statements, von Hirsch has acknowledged some of these problems with the notice argument for mitigation, and he has distanced himself from his earlier writings.\textsuperscript{141} Von Hirsch, however, remains committed to the idea that a first-time offender should receive a shorter sentence than a repeat offender. In place of the notice argument, von Hirsch has advanced a new kind of explanation. Although hardly free from ambiguity,\textsuperscript{142} the argument can be described as follows.

\textsuperscript{140} Vincent, supra note 125, at 189.
\textsuperscript{141} See von Hirsch, supra note 98, at 193 (“I became aware that this argument was problematic.”). Von Hirsch recognizes, for example, that defendants may be aware of the criminality of their conduct even without a prior record:

\begin{quote}

The difficulty is, however, that the person who is convicted for the first time may have been perfectly aware of the prohibition or of the wrongfulness of the act, but simply done it anyway. Ignorance, or failure fully to understand or take notice, does not support a generally applicable discount for first offenders.
\end{quote}

\textit{Id. at 193}. He also recognizes that notice is only effectively given, if it is given at all, by prior offenses that are similar in nature to the current one. See SINGER, supra note 135, at 69 (stating that the notice argument "loses some of its force if the current offense is sufficiently dissimilar from the prior ones." (quoting VON HIRSCH, supra note 131, at 86)).

\textsuperscript{142} Sometimes von Hirsch’s argument seems to rely simply on a metaphor of “human frailty.” Thus, in one formulation, von Hirsch argues that "[t]he discount for the first offender does not rest on claims of lack of full knowledge or appreciation of the prohibition; it is rather a concession we make to the fallibility of human nature. . . . The idea is thus one of a limited tolerance for human frailty.” Von Hirsch, supra note 98, at 193.
According to von Hirsch, first offenders should receive sentencing discounts because their crimes are plausibly viewed as being “uncharacteristic” of their ordinary behavior. Repeat offenders do not deserve similar discounts because “the repeated offense can less plausibly be characterized as a lapse—an aberrational failure of moral intuition.” Von Hirsch’s argument here—if it can be called that—attempts to link culpability to some judgment about the defendant’s character, rather than to the defendant’s awareness or knowledge that his conduct is wrong. As Singer explains, von Hirsch believes that “the second offender is ‘more morally culpable’ because the criminal has demonstrated a ‘character trait’—persistent disregard of others’ rights.” This approach views a prior record as a factor used to assess the defendant’s character, presumably on the assumption that character has some relatively fixed quality that can be measured. The question, in short, is reduced to whether this defendant has an evil character, and how evil.

One of the seeming advantages of this character-based argument is that it appears to offer a justification for at least some of the core structural features of the criminal history guidelines. For example, this approach seems to explain why the criminal history guidelines do not distinguish between offenders with thirteen criminal history points and twenty-six points. Additional prior convictions, at some point, don’t add much to the conclusion that the offender has an incorrigible character.

This argument is somewhat mysterious. One obvious question presents itself: If we acknowledge that individuals are frail and often tempted to commit crimes, why shouldn’t a discount for human frailty apply to all offenders—first offenders or multiple offenders? In short, why does this discount for human frailty disappear after the first offense?

At other times, von Hirsch seems to revert back to his notice argument for mitigation. Thus, von Hirsch continues to stress that punishment has a communicative effect on the offender: “It serves to confront the agent with the censuring person’s or agency’s sense of wrongfulness of the act.” In this light, a recidivist should receive longer penalties because “[t]he person has chosen to disregard the disapproval visited on him through his punishment, and thus seems not to have made the requisite additional effort at self-restraint.” Id. at 195. In other words, longer sentences are warranted because the offender has ignored the prior notice. See also id. at 196 (arguing that the criminal’s “failure to take the previous condemnation seriously” warrants extra punishment). This argument is subject to all of the criticisms previously made against notice arguments. Given these ambiguities, my interpretation of von Hirsch’s alternative argument might be viewed as a reconstruction of his claim—an attempt to read his argument in the most charitable light possible. For discussion of the principle of charitable interpretation, see Rappaport, supra note 15, at 447 n.21.

43 See SINGER, supra note 135, at 70; see also Durham, supra note 99, at 634 (“To von Hirsch, this concept [respect for ‘human frailty’] apparently means that actors are not as culpable when they commit acts that are first-occurrence acts, that are acts out of character with their typical behavior.”).

44 See SINGER, supra note 135, at 70 (criticizing von Hirsch for attempting to assess an individual’s basic character).
Nonetheless, a character-based approach has several drawbacks as a justification for the criminal history rules. One problem is that the character-based approach generates prescriptions that, I suspect, many just desert advocates would find unappealing. For example, under a character-based approach, any factor relevant to assessing the defendant's character would be relevant to the sentencing decision. That view opens up for assessment the offender's entire background, including his or her religious beliefs, wartime contributions, and service to society. This expansive scope is troubling for many theorists.\footnote{See, e.g., id. at 70 (discussing alternative critique of this approach).} Von Hirsch himself claims that his theory of punishment does not tolerate the use of these personal features in assessing punishment levels.\footnote{See Andrew von Hirsch, Desert and Previous Convictions in Sentencing, 65 MINN. L. REV. 591, 609-12 (1985); see also ANDREW VON HIRSCH, PAST OR FUTURE CRIMES 64-66, 72, 136-38 (1987).} But he does not explain why those factors are irrelevant under a character-based approach, while a defendant's criminal history can be taken into account at sentencing.\footnote{A further problem is that the character-based approach seems to assume that defendants have some kind of "fixed character" that can be identified, and that this character is responsible for the evil actions warranting culpability. At the same time, just desert theorists like von Hirsch continue to affirm that a defendant is deserving of punishment only if his criminal conduct is the product of free will, not compulsion. Free will is central to traditional just desert theory. But von Hirsch cannot have it both ways; either criminal conduct is the product of a fixed character or free will. See Dubber, supra note 110, at 705 n.58 (suggesting that, because a repeat offender shows a fixed criminal character, he should be viewed as "less culpable than a first offender because continued criminal activity despite prior warnings may indicate that . . . factors outside of her control compromise her ability to refrain from that activity").}

A second flaw is more technical and complex, but no less significant. This might be called the problem of "double counting." Simply put, a character-based approach cannot explain why treating a prior record as an aggravating factor is not equivalent to punishing the defendant twice for the same bad character. The problem is illustrated by considering two offenders who each have committed two robberies.

Offender A faces sentencing on both robbery counts at the same time. Making certain basic assumptions, the guidelines call for a sentence of forty-one to fifty-one months for these crimes.\footnote{The base offense score for each robbery is 20; the multiple count rules increase the offense score to 22. See U.S.S.G. § 3D1.4 (2002). An offense score of 22, at criminal history category one, generates a sentencing range of 41-51 months. For purposes of this example, I assume that no other adjustments or departures are appropriate.} This is slightly longer than the guideline range for a single robbery conviction. A character-based theorist might rationalize this result by saying that an offender who commits two robberies deserves a longer sentence than a defendant who commits one.
offense, since the second robbery signifies that the defendant has a more culpable character trait.

Consider now offender B. He, by contrast, committed one of the robberies several years ago, and he has already served time for it—say, thirty-three months (the bottom of the guideline range for a first-time felon convicted of a single robbery conviction). Offender B is now being sentenced for the second robbery. How much time should he receive? We have already seen that an offender who commits two robberies deserves, for his bad character, a punishment of between forty-one and fifty-one months. But offender B has already served thirty-three months in prison for his bad character. To sentence the offender to another forty-one to fifty-one months for his second robbery would mean that offender B would receive a sentence vastly greater than offender A, even though both have committed two robberies and thus appear to have comparable “bad characters.” In effect, offender B would be punished twice for his first robbery.

To avoid double counting the first robbery, the defendant’s appropriate sentence should be forty-one to fifty-one months less the thirty-three month sentence already served. In other words, the new sentencing range should only be eight to eighteen months! This would mean that criminal history would represent a mitigating factor, and repeat offender would actually receive a lower sentence than a first-time felon. Needless to say, that result conflicts sharply with the way the criminal history rules operate.  

Given these criticisms, it may not be surprising that the character-based approach has failed to win wide acceptance as a justification for considering an offender’s criminal history. Von Hirsch himself has backtracked, denying that he meant to suggest that sentencers should try to assess the offender’s general character. Rather, von Hirsch has written, the chief task should simply be to assess whether the defendant’s current criminal conviction is “characteristic” of the offender’s conduct. But this seems to be mere wordplay. As Durham says,

149 Utilitarianism does not appear to suffer from such infirmities. Utilitarianism does not seek to calibrate sentences to reflect some general assessment of the defendant’s character. Rather, it attempts, among other things, to estimate his dangerousness and the need for general deterrence. Thus, a defendant who commits his first crime exhibits a certain risk of recidivism, which is reflected in the prison sentence. If the defendant returns to the criminal justice system again, the risk of recidivism is calculated anew—this time with additional evidence of danger.
150 See von Hirsch, supra note 146, at 607-13; see also von Hirsch, supra note 98, at 197 n.1 (“[O]nly the offender’s current criminal record should be considered, and not the broader merits or demerits of his life.”).
von Hirsch does not explain the importance of characteristic behavior. A conventional view would be that the extent to which a behavior is characteristic is important because it conveys something about the moral nature of the individual . . . . Thus, to know that criminal activity is characteristic is to know something about the offender’s moral character.  

In sum, neither the notice arguments nor the character-based arguments offer a satisfactory retributive account of the Commission’s criminal history guidelines. The implication, embraced by many criminal theorists, is that just desert theory cannot explain the major role that criminal history plays in modern sentencing schemes.

C. Intermediate Assumptions and Criminal History

The previous sections suggest that only utilitarianism can serve as a plausible basis for the criminal history guidelines. This conclusion does not imply that the actual structure of the criminal history guidelines is ideally suited for promoting utilitarian goals. Once again, that depends on intermediate assumptions about the effectiveness of the guideline rules in reducing crime and serving the public welfare. Testing these assumptions requires, among other things, empirical research regarding the ability of the criminal history guidelines to identify the offenders most likely to reoffend.

The Commission has recognized the need for additional research. In the Guideline Manual, the Commission admitted that, in developing the criminal

---

151 Durham, supra note 99, at 621.
152 See, e.g., Fletcher, supra note 133, at 466 (“The contemporary pressure to consider prior convictions . . . reflects a theory of social protection rather than a theory of deserved punishment.”); Singer, supra note 135, at 67-72 (rejecting desert-based arguments for considering criminal history); Durham, supra note 99, at 618 (“Recidivist statutes appear to fit comfortably within the forward-looking approach of policies most concerned with utilitarian strategies for crime control”); Thomas Weigend, Comparative Criminal Justice Issues in the United States, West Germany, England and France: Sentencing in West Germany, 42 Md. L. Rev. 37, 88 n.265 (1983) (“Any reliance on an offender’s prior criminal record can only rest on prediction rather than desert.”); see also Roberts, supra note 100, at 346 (“[I]t is clear that the use of criminal record is not consistent with desert theory”); Vincent, supra note 125, at 189 (“I believe that the primary purpose of criminal history in the guidelines scheme should be to determine the need for the sentence imposed to protect the public from future crimes of the defendant.”).
153 The range of questions that such research must address is broad. For example, it must examine whether the criminal history guidelines utilize the best factors to measure recidivism risk, whether the guidelines appropriately take into account the diminishing marginal effect of additional prior offenses, and whether the benefits of increased penalties are worth the cost. See Hoffman & Beck, supra note 113, at 196 (arguing that only factors that are empirically shown to correlate with prediction of recidivism should be included in the criminal history rules).
history rules, it made assumptions that have yet to be confirmed by empirical
studies.\textsuperscript{154} And in its Supplementary Report on the initial
guidelines, the Commission acknowledged the need for more research, including
research on the effectiveness of the criminal history rules in predicting recidivism risk.\textsuperscript{155}
Despite this acknowledgment, the Commission has yet to publish a study on
the predictive power of the criminal history score.\textsuperscript{156} Perhaps the lack of
empirical research might have been understandable when the Commission was
first established, given the agency’s need to promulgate the initial set of
sentencing rules under strict statutory deadline, but it seems far less excusable
now.\textsuperscript{157}

On a more optimistic note, there are signs of change on the horizon.
Commissioner O’Neill recently published an insightful article on the treatment
of “first offenders” under the guidelines’ criminal history rules.\textsuperscript{158} In that
article, he affirms the need for the Commission to undertake research on the
criminal history guidelines.\textsuperscript{159} In part due to O’Neill’s leadership, the
Commission recently initiated just such a research project. A report is
currently expected in 2004 or 2005.\textsuperscript{160} That report will be an early opportunity
for the Commission to clarify the underlying purpose of this important set of
guideline rules.

\textsuperscript{154} See U.S.S.G. § 4A, introductory commentary (2002) (stating that the Commission “has made no
definitive judgment as to the reliability of the existing data”).

\textsuperscript{155} \textit{Supplementary Report, supra} note 13, at 44:

The Commission intends to conduct research that will examine predictive power using various
measures of recidivism, and the extent of the crime-control benefits derived from increasing
sentences in relation to the criminal history score. In addition, it will consider research relating to
other possible predictors of recidivism. Such research will enable the Commission to assess the
efficacy and desirability of modification of the criminal history score.

\textsuperscript{156} See O’Neill, \textit{supra} note 100, at 341-42 (“The Commission did initially indicate a desire to conduct
research on the criminal history categories’ predictive power . . . . Unfortunately, this research has yet to be
done.”); \textit{see also} Hoffman & Beck, \textit{supra} note 113, at 194.

\textsuperscript{157} See Vincent, \textit{supra} note 125, at 190.

\textsuperscript{158} O’Neill, \textit{supra} note 100, at 347.

\textsuperscript{159} \textit{Id.} at 348 (“In light of years-long experience with criminal history categories and the development of
more sophisticated analytical devices, the Commission should undertake to fulfill Congress’s will.”).

\textsuperscript{160} See Linda Drazga Maxfield, \textit{Legal Issues and Sociolegal Consequences of the Federal Sentencing
Iowa L. Rev. 669, 680 (2002) (“The U.S. Sentencing Commission has announced that one of its fiscal year
2002-2003 priorities is an assessment of the Guidelines’ Chapter Four. Acting upon this decision, the
Commission is in the middle of a major two-year study of Guidelines recidivist behavior.”).
V. OFFENSE SERIOUSNESS

The criminal history score constitutes one of the two axes of the sentencing guideline grid. The other axis is the offense seriousness score, which measures the severity of an offender's criminal conduct. Traditional indeterminate sentencing systems leave judges with significant discretion to assess the seriousness of the criminal conduct. The federal guidelines, by contrast, formalize and standardize this analysis through rules set out primarily in Chapter Two (supplemented by rules in other chapters).

Those rules set out a procedure for grading the seriousness of the defendant's conduct. A "base offense level" is assigned to the offender's crime of conviction. Adjustments to the base offense level are then made to reflect specific features of the defendant's criminal conduct. For example, a robbery conviction receives a base offense score of twenty. Two points are added to that score if a victim suffered "bodily injury" during the commission of the offense, four points if the injury was serious.

The overriding goals of the offense seriousness rules have been discussed by a few commentators, though usually only in passing. Nearly all have affirmed that the rules are retributive in nature. This unanimity of opinion

161 United States Sentencing Commission Staff, Simplification Draft Paper: Level of Detail in Chapter 2 ("[The] base offense level . . . serves as the starting point for calculation of the offense level prong of a guideline sentence."), available at http://www.usss.gov/simple/ch2level2.htm [hereinafter United States Sentencing Comm'n Staff, Chapter Two Report].


Several state commissions have also identified just deserts as the governing principle for evaluating offense seriousness. See DALE G. PARENT, STRUCTURING CRIMINAL SENTENCES: THE EVALUATION OF MINNESOTA'S SENTENCING GUIDELINES 51 (1988) (stating that the initial Minnesota Commission relied upon just deserts as the principal determinant of the offense guidelines); John Kramer, Offense Severity: Complex
should not be accepted uncritically, however. Good reasons exist to question whether the prevailing view is correct.

One preliminary consideration is that the prevailing view ignores the many Congressional and Commission statements endorsing utilitarian goals as relevant factors in the calculation of offense rankings. Several provisions of the SRA, for example, direct the agency to consider the deterrent effect of its guideline sentences, and similar directives can be found in subsequently enacted statutes. The SRA’s legislative history also suggests that Congress expected the Commission to take account of public safety concerns in setting the offense seriousness rankings. For example, the Senate Report states that the Commission might raise offense levels to account for the increased prevalence of certain crimes “in order to deter others from committing the offense.” Congress’s public safety concerns are hardly surprising, given that a dominant impetus behind the SRA was the public’s growing fear of crime.

---


Section 994(s), for example, states that the Commission “shall give due consideration to any petition . . . requesting modification of the guidelines . . . on the basis of changed circumstances unrelated to the defendant,” such as “the deterrent effect particular sentences may have on the commission of the offense by others.” 18 U.S.C. § 994(s) (2000) (emphasis added). Similarly, § 994(c)(6) directs the Commission, when “establishing categories of offenses,” to consider the relevance, if any, of the “deterrent effect [of] a particular sentence . . . on the commission of the offense by others.” 18 U.S.C. § 994(c)(6).

For example, Congress directed the Commission to review and amend the guidelines for ecstasy traffickers to “reflect the seriousness of these offenses and the need to deter them.” See Section 3663(b)(1) of the Ecstasy Anti-Proliferation Act of 2000, Pub. L. No. 106-310 § 3663(b)(1), 114 Stat. 1101. The Commission increased penalties for ecstasy in response to this directive, establishing offense levels that “provide appropriate punishment, deterrence, and incentives for cooperation.” See UNITED STATES SENTENCING COMMISSION, APPENDIX C, supra note 54, at Amend. 621; see also Section 112(b)(2)(A) of Victim of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-388, 114 Stat. 1464 (directing the Commission to ensure that the guidelines relating to “human trafficking” are “sufficiently stringent to deter and adequately reflect the heinous nature of such offenses”); Section 805 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (directing the Commission to “review the deterrent effect of existing guideline levels with respect to federal computer crimes); Section 40112(a)(4) of Violent Crime Control and Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (“The Commission shall review and promulgate amendments to the guidelines [for sexual offenses], if appropriate, to account for the general problem of recidivism in cases of sex offenses, the severity of the offense, and its devastating effects on survivors.”).

See Senate Report, supra note 2, at 171; see also id. at 92 (“The Committee is also mindful that during a period in which the incidence of a particular kind of crime is increasing rapidly, it may be entirely appropriate for the court to give paramount emphasis to the deterrent purpose of sentencing.”).

The Commission, for its part, has affirmed that crime control considerations underpin several guideline rules. For example, in discussing the antitrust guidelines, the Commission asserted that “the most effective method to deter individuals from committing this crime is through imposing short prison sentences coupled with large fines. The controlling consideration underlying this guideline is general deterrence . . .”\[168\] Similar statements can be found regarding other Chapter Two rules.\[169\]

These statements should, at the very least, cause one to hesitate before affirming that the offense seriousness rules are predominantly retributive in nature. At the same time, the significance of these statements should not be overstated. Congress, after all, did not command the agency to pursue crime control goals exclusively, and the Commission exercised significant discretion in developing its own rules.\[170\]

Moreover, Commission statements about the goals of its offense seriousness rules are hardly uniform. Although the Commission has stated that utilitarian goals underlie several Chapter Two rules, it has also made statements that arguably suggest other rules have a retributive orientation.\[171\]

---

Ronald Reagan, keenly interested in toughening and expanding federal anticrime measures, the Senate and House Judiciary Committees considered measures that spoke directly to the public’s fear of crime.”).\[168\] U.S.S.G. § 2R1.1, commentary background (2002).

\[169\] The Commission, for example, emphasized deterrence arguments in justifying features of the tax evasion guidelines. For example, the Commission linked the offense level for these crimes to the aggregate amount of taxes avoided by the defendant because, as “the potential benefit from the offense increases, the sanction necessary to deter also increases.” See U.S.S.G. § 2T1.1, commentary background. The Commission also justified upward adjustments for defendants who use “sophisticated means” to evade taxes because “unusually sophisticated efforts to conceal the offense decrease the likelihood of detection and therefore warrant an additional sanction for deterrence purposes.” Id. Finally, the Commission increased the guideline sentence for defendants who “failed to report . . . the source of income exceeding $10,000 in any year from criminal activity,” U.S.S.G. § 2T1.1(b)(1), on the grounds that it was necessary for “for deterrence purposes.” U.S.S.G. § 2T1.1, commentary background.

\[170\] See Rapaport, supra note 2, at Part III (discussing Commission’s exercise of discretion in developing initial guidelines).

\[171\] Paul Hofer and Mark Allenbaugh, for example, cite the Chapter Three rules governing diminished capacity as evidence of the guidelines’ retributive slant. See Hofer & Allenbaugh, supra note 163, at 46. These rules encourage judges to depart below the guidelines for defendants who have a “significantly reduced mental capacity.” U.S.S.G. § 5K2.13. The departure guideline appears, at first, to reflect retributive considerations, since it represents a judgment that this sort of defendant is less responsible and less culpable for his actions. This example, however, may not be fully persuasive, because the Commission has imposed restrictions on the use of the diminished capacity departure. Under the guideline, a court

may not depart below the applicable guideline range [for diminished capacity] if . . . the facts and circumstances of the defendant’s offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; or . . . the defendant’s criminal history indicated a need to incarcerate the defendant to protect the public.
More significantly, Commission statements about the overriding objectives of its rules should not be taken as dispositive. As we saw in the case of the criminal history guidelines, the Commission's stated reasons for its rules are not always consistent with the most plausible reconstruction of those guidelines. As a result, rather than looking to what the Commission said about the objectives of individual guidelines, the following analysis looks to the actual structure of the Chapter Two rules in order to determine the most plausible rational reconstruction of these provisions.

This effort will not attempt to analyze each and every offense rule; the Chapter Two guidelines are too long and complex for such an assessment. Rather, the analysis will focus on two of the most widely used sets of Chapter Two guidelines—those for drug and economic crimes. These two categories of rules, together, serve as the primary guideline provisions for nearly two-thirds of all guideline cases. The challenge will be to assess whether retribution or utilitarianism offers the best rational reconstruction of these two critical sets of rules.

A. Just Deserts and Offense Seriousness

Though many commentators have endorsed a retributive reading of Chapter Two, few have attempted to justify that position with a close analysis of the specific structure of the Chapter Two rules. One of the few such efforts is presented in a forthcoming article by Paul Hofer, senior researcher, and Mark Allenbaugh, former staff attorney, at the Commission. In their article, Hofer and Allenbaugh forcefully argue that "just deserts" is the most plausible rational reconstruction of the offense seriousness rules. As the most elaborate analysis of Chapter Two thus far, their work deserves careful study.

Id. Under this departure rule, therefore, utilitarian considerations often trump retributive concerns, ensuring that the retributive features of the rule are likely to be limited in effect.

See supra note 109 and accompanying text.

Moreover, given the number of Chapter Two rules, it would seem unreasonable to expect that all the guideline rules would reflect a single purpose of punishment.

Drug crimes were the primary guideline in 44% of all guideline cases last year (of which § 2D1.1 was by far the largest crime grouping, representing more than 42% of all cases). See SOURCEBOOK, supra note 44, at 39-40. Crimes involving property and fraud were the primary guideline for approximately 22% of all guideline cases. Id.

Hofer & Allenbaugh, supra note 163, at 42-46.
1. Hofer & Allenbaugh’s Reconstruction of Offense Seriousness

The thrust of Hofer and Allenbaugh’s argument is that the Chapter Two rules take into account several factors that lie at the heart of just desert theory. For example, the harm caused by the offender’s conduct represents one of the central elements of retributive thinking. Hofer and Allenbaugh note that harm plays a central role in the most widely used Chapter Two rules as well.

For these rules, the key determinant of offense seriousness is the “quantity” of harm caused by the offense. To give a simple example, the offense level assigned to drug offenses turns largely on the amount of drugs sold. Similarly, the offense level for economic crimes depends principally on the monetary losses caused by the crime. This harm-based approach, Hofer and Allenbaugh conclude, supports a retributive reading of the Chapter Two rules.

An offender’s mental culpability is the second critical component of just desert theory. Hofer and Allenbaugh observe that, “the original Commission found culpability important to sentencing in a variety of ways.” One example is the adjustment for “role in the offense.” That adjustment, Hofer and Allenbaugh state, is designed to tailor punishment to the offender’s

---

176 See id. at 43-44. Other commentators have also emphasized the link between “harm” and just desert theory. See, e.g., Dora Nevaes-Muniz, The Eighth Amendment Revisited: A Model of Weighted Punishments, 75 J. CRIM. L. & CRIMINOLOGY 272, 285 (1984) (“Just deserts implies gradation of sanctions depending on the degree of social harm brought about by the crime.”). Indeed, one of the principal advocates of the belief that “every harm should count” in the guideline system is Paul Robinson, perhaps the most indefatigable defender of a retributive approach to the guidelines. See STITH & CABRANES, supra note 162, at 69 (“Implicit in the quantity-driven approach, of course, is Commissioner Robinson’s idea that no incremental harm should occur without an incremental increase in punishment.”); see also Peter B. Hoffman, Simplifying the U.S. Sentencing Commission’s Offense Scale, 44 ST. LOUIS U. L.J. 365, 365-66 (2000) (recounting that Robinson’s early proposals for the guidelines were justified on the basis of a “retributive philosophy that ‘every harm must count’ and thus a finely graded system was [thought] necessary [to ensure] that each ‘harm’ caused by the defendant would have a discrete, additive punishment.”).

177 See United States Sentencing Comm’n Staff, Chapter Two Report, supra note 161 (“[M]onitoring data illustrate the importance quantitative measures of offense seriousness, or aggregation, play in determining offense levels in Chapter Two: 79.5 percent of all cases sentenced in 1994 used a quantity-driven guideline (e.g., drugs, fraud, tax, firearms.”); STITH & CABRANES, supra note 162, at 68 (“[T]he most common specific offense characteristic found in the Sentencing Guidelines is quantity . . . .”); see also Deborah Young, Fact-Finding at Federal Sentencing: Why the Guidelines Should Meet the Rules, 79 CORNELL L. REV. 299, 324 (1994) (“For crimes involving theft of money, the primary determinant of the offense level is the quantity of money stolen.”); Murphy, Inside the Commission, supra note 6, at 386 (“Quantity is a key factor in the drug guidelines and has been used as a proxy for a drug’s dangerousness and criminal attributes such as addictiveness, harm to the body, trafficking pattern, and associated violence.”).

178 See supra note 31 and accompanying text (discussing key components of just desert theory); see also Hofer & Allenbaugh, supra note 163, at 43-44 (same).
“culpability” in committing the crime.\textsuperscript{179} The offender’s mental culpability is also taken into account more directly, by tailoring punishment to the defendant’s \textit{mens rea}. Thus,

[s]eparate offense levels are applied for first degree murder (killing with malice aforethought), second degree murder (intentional killing without premeditation), and voluntary and involuntary manslaughter (killing in the heat of passion versus merely reckless or negligent killing). . . . Other guidelines differentiate among “intentional” and “reckless” endangerment.\textsuperscript{180}

Hofer and Allenbaugh conclude that the guideline’s attention to the defendant’s \textit{mens rea} is further confirmation that the Chapter Two rules embody retributive considerations.

2. \textit{Just Deserts and the Structure of Chapter Two}

Hofer and Allenbaugh’s interpretation of the Chapter Two rules is unobjectionable, but only if the Chapter Two rules are examined at a very high level of generality. Questions begin to emerge as soon as one looks at the specific way in which the guidelines treat the key factors of harm and \textit{mens rea}. Such an assessment reveals significant tension between just deserts and the actual structure of the offense seriousness rules.

Consider the issue of “harm.” For both drug and economic offenses, offense seriousness scores are based on the degree of harm, determined according to a “loss table.” The tables assign an offense score that reflects the amount of drugs sold or money stolen in the offense. One of the most interesting features of the “drug quantity table” and the “monetary loss table” is that sentences do not increase proportionally with the amount of drugs sold or the monetary losses suffered in the offense. Rather, those tables roughly reflect what might be called a “diminishing marginal significance” of harm.

\textsuperscript{179} Hofer & Allenbaugh, \textit{supra} note 163, at 45. As Hofer and Allenbaugh note, the Commission stated that the guideline “is included primarily because of concerns about relative responsibility.” U.S.S.G. § 3B1.1, commentary background (2002). Nonetheless, the role in the offense adjustment is also amenable to utilitarian analysis: A defendant who plays a more significant role in the offense seems more dangerous and thus may warrant a more serious sanction. The Commission itself has acknowledged that the adjustment is consistent with utilitarian goals, stating “[i]t is also likely that persons who exercise a supervisory or managerial role in the commission of an offense tend to profit more from it and present a greater danger to the public and/or are more likely to recidivate.” \textit{Id}. Hofer and Allenbaugh contend that “this language is best regarded as ‘dicta,’ which does not bear on a determination of which purpose of sentencing best explain the rule.” \textit{Id}. See Hofer & Allenbaugh, \textit{supra} note 163, at 45 n.228.

\textsuperscript{180} Hofer & Allenbaugh, \textit{supra} note 163, at 46 (citing U.S.S.G. §§ 2A1.1, 2A1.4, & 2A5.2).
That is to say, sentences increase with increasing harms, but in less than proportional amounts.

Consider a defendant in criminal history category two who is convicted of larceny. The defendant must steal more than $30,000 to receive a one-year sentence, more than $120,000 for a two-year sentence, more than $400,000 for a three-year sentence, more than one million dollars for a four-year sentence, and more than two-and-a-half million dollars for a five-year sentence. In other words, as the defendant moves down the monetary loss table, larger and larger losses are needed to trigger a one-year increase in punishment. Thus, a one-year sentence may require at least $30,000 in losses, but it takes four times that amount to double the sentence (and more than thirty times that amount to quadruple it). This result is hard to explain from Hofer and Allenbaugh’s just desert perspective. In their model, an offender’s desert is directly proportional to the social harm caused. Four times the harm should result in four times the sentence.

---

181 See U.S.S.G. § 2B1.1(b)(1). These examples assume that no other adjustment applies beyond the amount of loss involved in the case. In addition, for comparison purposes, the examples refer to the sentence that would be imposed had the court sentenced the offender at the very bottom of the guideline range.

182 The diminishing effect of monetary loss on punishment levels appears to be consistent with common public views about punishment. See Peter H. Rossi & Richard A. Berk, National Sample Survey: Public Opinion on Sentencing Federal Crimes 97 (1997) (noting that for fraud, “median sentences increase more slowly than amount of money defrauded”); id. at 99 (noting that for money laundering, the “pattern repeats earlier findings; sentence length increases with the defendant’s economic gain, but at a decreasing rate”); id. at 100 (noting that for tax crimes, “once again, the median sentences increase far more slowly than the defendant’s economic gain”); id. at 103 (noting that for embezzlement, “we once again find that the median sentence increases far more slowly than the defendant’s economic gain for the crime”); see also Kenneth Pease et al., Modified Crime Indices for Eight Counties, 66 J. Crim. L. & Criminology 209, 214 (1975) (reporting survey results showing that most people do not treat offense severity as additive); Hugh Wagner & Kenneth Pease, On Adding up Scores of Offence Seriousness, 18 Brit. J. Criminology 175, 178 (1978) (discussing empirical evidence that most respondents do not believe that an offender who commits two identical crimes should be punished at twice the level of one crime and thus concluding that “offense seriousness is not additive”).

183 The drug quantity table also exhibits a diminishing marginal significance of harm, though it does so in a much more complex and irregular manner. Consider a defendant in criminal history category two who is convicted of trafficking in heroin. For this offender, the drug loss table can be broken down into several tiers. At relatively low drug levels—between 20 and 100 grams sold—an increase of 20 grams of heroin is needed to raise the sentence by a year or less. For example, a defendant who sells more than 20 grams of heroin will receive a sentence of at least 30 months, while a defendant who sells 40 grams will receive a sentence of at least 37 months. At mid-level drug amounts—between 100 grams and a one kilogram—an increase of 300 grams of heroin is needed to raise the sentence by one-and-a-half to two years. For example, a defendant who sells more than 400 grams of heroin will receive a sentence of at least 87 months, while a defendant who sells more than 700 grams will receive a sentence of at least 108 months. Finally, at high drug levels—above one kilogram—a very large increase in the amount of drugs sold is needed to raise the sentence by roughly three to four years. For example, a defendant who sells at least one kilogram of heroin will receive a sentence of at
Just desert theorists face further difficulties in explaining the Commission’s rules governing defendants charged with multiple counts of an offense.\textsuperscript{184} If these offenses are common drug or property crimes, the multiple count rules direct the court to punish the defendant based on the total amount of drugs or property at issue in the offense.\textsuperscript{185} Thus, a defendant who on two separate occasions steals $150,000 will be sentenced as if he stole $300,000. Because the loss tables reflect a diminishing significance of harm, this offender will receive a sentence that is less than twice the sanction given a defendant who steals $150,000 on one occasion.\textsuperscript{186} Again, this result seems hard to reconcile

---

\textsuperscript{184} The multiple count rules are contained in U.S.S.G. Ch. 3D. These rules “tell the sentencing judge how to arrive at a single offense level for a defendant convicted of more than one count.” Julie R. O’Sullivan, \textit{In Defense of the U.S. Sentencing Guidelines’ Modified Real-Offense System}, 91 Northwest U. L. Rev. 1342, 1358 (1997).

\textsuperscript{185} The Commission’s “multiple count” rules draw a distinction between “ aggregable” offenses and “nonaggregable” offenses:

“Aggregable” offenses are those in which the harm caused by the defendant’s conduct is based upon the amount of money or quantity of substance involved. . . . Such crimes involve most drug offenses, firearms violations, and property crimes (except armed robberies, burglary and extortion). Where multiple counts of conviction charge such aggregable crimes, the grouping rules total the fungible items and punish the offender as if there were a single count involving the total amount . . . .

O’Sullivan, supra note 184, at 1359. Thus, a defendant who is convicted of selling 10 grams to 10 different customers will be sentenced according to the drug tables as if he made one sale of 100 grams.

\textsuperscript{186} See Stephen Breyer, \textit{The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest}, 17 Hofstra L. Rev. 1, 27 (1988) (“[S]ince most drug and money crimes are determined by tables that increase punishment at a rate less than proportional to the amounts of drugs or money, collapsing the counts and using the tables produces a result that . . . the punishment increases, but at a less than proportional rate.”); \textit{see also} United States v. Wheelwright, 918 F.2d 226, 229 (1st Cir. 1990) (Breyer, C.J.) (“[A] person who sold six hundred grams of cocaine would be punished more severely than a person who sold one hundred grams, but not six times more severely.”).

A similar result occurs for crimes that cannot be aggregated by drug amount or monetary loss. Assault is an example. Under the guideline’s multiple count rules, a defendant who is convicted of six counts of assault (for assaulting six different victims) will receive a punishment that is significantly less than six times the punishment for one assault. See U.S.S.G. ch. 1, pt. A.4(e):

[When a defendant engages in conduct that causes several harms, each additional harm, even if it increases the extent to which punishment is warranted, does not necessarily warrant a proportionate increase in punishment. A defendant who assaults others during a fight, for
with just desert theory. If an offender is sufficiently culpable to warrant a two-year sentence for one $150,000 theft and a two-year sentence for another, why shouldn’t he receive a four-year sentence for both?

The guideline’s treatment of an offender’s mens rea is similarly problematic from a just deserts perspective. Hofer and Allenbaugh are correct that mens rea plays a significant role for certain Chapter Two offenses such as homicide. But homicide is a rarely used guideline provision. For the most common Chapter Two rules—economic and drug offenses—mens rea has only a limited role. 187

Consider the drug guidelines. These offense rules do not typically require any mens rea at all with respect to the quantity of drugs distributed. Thus, a defendant who believes that he or she is distributing fifty grams of narcotics but is actually selling a hundred grams will be held liable for the full amount sold. 188 This feature of the drug guidelines is troubling to just desert theorists, because the defendant’s culpability seems to differ markedly depending on his or her mens rea for the ultimate social harm.

The guidelines for economic crimes are similar. Under the Commission’s new rules for economic crimes—promulgated in May 2001—a defendant charged with theft or fraud will be held responsible for the full loss that results from the crime, so long as that loss was reasonably foreseeable. 189 In this sense, the guidelines use a “civil negligence” standard as the necessary mens rea for the amount of loss. No distinction is made between a defendant who

---

187 Hofer and Allenbaugh acknowledge this point. See Hofer & Allenbaugh, supra note 163, at 48 (noting that “culpability receives relatively little weight” for many key guidelines).

188 Id. at 49 (“[T]he defendant’s state of mind regarding the aggravating circumstance is irrelevant.”). For conspiracies, the guidelines hold a defendant liable only for “reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity.” U.S.S.G. § 1B1.3(a)(1)(B).

189 U.S.S.G. § 2B1.1. See also U.S.S.G. § 2B1.1, application note 2(A)(i) (“Actual loss’ means the reasonably foreseeable pecuniary harm that resulted from the offense.”). The economic crime guidelines depart from this rule in cases where the defendant intended to cause a greater loss. In such cases, the guidelines hold the defendant responsible for the larger, intended amount. See U.S.S.G. § 2B1.1, application note 2(A) (“loss is the greater of actual loss or intended loss”). This rule existed before the amendments were enacted. See Frank O. Bowman, III, The 2001 Federal Economic Crime Sentencing Reforms: An Analysis and Legislative History, 35 IND. L. REV. 5, 75 (2001) (“The new economic crime guideline retains the rule of the former fraud guideline that where the loss a defendant intended to inflict was larger than the loss the victim actually sustained, the larger intended loss figure should be used to calculate the sentence.”).
intended to cause the full loss and one who caused the loss negligently.\textsuperscript{190} From a just deserts approach, that structure seems questionable, since these two defendants seem very different in terms of culpability.\textsuperscript{191}

One explanation for the disappearance of \textit{mens rea} in the guidelines is that \textit{mens rea} is a difficult factor to assess accurately. Thus, efforts to account for \textit{mens rea} increase administrative costs and are prone to error. Administrative convenience, in this regard, is sometimes asserted as an explanation for the Commission's general preference for using objective factors, such as amount of harm, rather than vague ones like \textit{mens rea}.\textsuperscript{192}

Administrative convenience, however, is a classic utilitarian consideration, and one might wonder whether it should be considered at all in a just desert theory. Even if it is deemed a relevant factor, administrative convenience is a troublesome argument for suppressing \textit{mens rea} on just deserts grounds. One difficulty with the argument is that \textit{mens rea} is such a central factor—indeed, perhaps the central factor—in just desert theory. Given its centrality, one would expect \textit{mens rea} to be a part of a retributive sentencing system, regardless of the administrative costs in assessing the factor. In fact, the guidelines do take \textit{mens rea} into account for certain crimes—like homicide. The difficult question is why \textit{mens rea} is an acceptable factor for these crimes

\textsuperscript{190} The economic crime and drug trafficking guidelines are not the only guidelines with limited \textit{mens rea} requirements. \textit{See}, \textit{e.g.}, United States v. Richardson, 238 F.3d 837, 840 (7th Cir. 2001) ("Sentencing enhancements generally are imposed on the basis of strict liability rather than of the defendant's intentions or even his lack of care.").

\textsuperscript{191} Some suggest that loss is an adequate proxy for assessing a defendant's culpability. \textit{See}, \textit{e.g.}, Bowman, \textit{supra} note 189, at 39 (acknowledging that "one who desires to inflict a large harm is customarily thought to have a more reprehensible condition of mind than one who desires to inflict a small one," yet concluding that "actual loss is not a bad proxy for mental state"); \textit{see also} SYMPOSIUM ON FEDERAL SENTENCING POLICY FOR ECONOMIC CRIMES AND NEW TECHNOLOGY OFFENSES 57 (2000), available at http://www.ussc.gov/2000sympo/2000sympo.htm [hereinafter SYMPOSIUM] (statement of Judge Phil Gilbert) (stating that loss "is the best proxy or the best measurement in determining what the culpability or the sentence should be"). That view seems highly suspect, since defendants who cause similar social harms can have vastly different mental states. In any event, commentators do not explain why one would want to base culpability on a proxy rather than assess the issue of mental culpability—or \textit{mens rea}—directly.


The framers of the Guidelines were faced with the daunting task of assessing the relative seriousness of various criminal behaviors and the relative culpability and dangerousness of human beings. . . . Monetary losses and drug amounts, on the other hand, can readily be quantified. Perhaps that explains why they figure so prominently in guideline sentencing protocols.

\textit{Stith & Cabrantes, supra} note 162, at 69 ("Quantification of harm was an attractive approach for the Commission, at least initially, because it permitted the agency to distinguish among defendants on the basis of apparently objective and precisely measured criteria.").
but not for economic and drug crimes. Just desert theory does not offer any obvious rationale.

The bottom line is this: So long as one keeps attention focused at a very high level of generality, the Chapter Two guidelines appear to be broadly consistent with retribution. But once the specific structure of key guideline rules is examined in detail, serious questions emerge about the alignment between just desert theory and the Chapter Two rules.

B. Utilitarianism and Offense Seriousness

If just deserts is only partially successful in explaining the structure of Chapter Two, does utilitarianism fare any better? Most commentators seem to assume that utilitarianism is unable to offer a plausible rationale for the offense seriousness rules. Hofer and Allenbaugh suggest that only just deserts provides a rational reconstruction of those guidelines.

In this section, I argue that such a view is mistaken. With certain plausible assumptions, utilitarianism does a fairly good job of explaining the core structure of the offense seriousness guidelines for drug and economic offenses. The discussion that follows focuses primarily on deterrence considerations, both for the sake of brevity and because deterrence arguments offer the strongest justification for the Chapter Two provisions.

As an initial matter, deterrence arguments easily explain why “harm” plays such a central role in the Chapter Two guidelines. General deterrence seeks to discourage criminal conduct that is harmful to society, and society will achieve the biggest bang for its buck if, all else being equal, it focuses its prison resources on deterring those offenders who are likely to commit the most serious and costly offenses.\(^{193}\) The actual harm caused by an offense serves as a proxy for identifying these high-risk offenders.\(^{194}\) Thus, one would expect

---

\(^{193}\) In sending a message to potential offenders, a utilitarian ideally reserves the largest punishments for those individuals who pose the greatest degree of “expected” harm to society. Expected harm takes into account not only the magnitude of the harm a defendant may cause, but the probabilities that such a harm will occur. See Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 *COLUM. L. REV.* 1232, 1233 (1985) (“The probability that an act will cause harm multiplied by the magnitude of the harm will be referred to as the ‘expected’ harm.”). The total expected harm sums together all of the possible harms from a defendant’s criminal conduct, discounted by the probability that each harm will actually occur.

\(^{194}\) Although sentences should ideally be tailored to the defendant’s “expected harm” in carrying out the offense, calculating that figure is likely to prove difficult in many cases. It would require the court, among other things, to evaluate the range of possible harms and their probabilities. See supra note 193. An
offense levels to vary based on the amount of harm caused by the offense. In this regard, the central role that “harm” plays in the guidelines is readily understandable.

But what about the concrete way in which harm is incorporated into the Chapter Two guidelines? As noted above, the “loss tables” used to determine the sentencing ranges for drug and economic crimes have a specific structure. The sentences increase in roughly diminishing amounts as the quantity of harm increases. We have seen that just deserts is unable to explain this feature of the guidelines. General deterrence, however, offers a plausible explanation.

---

alternative approach holds the defendant responsible for the actual harm that occurs. Doing so encourages each defendant, ex ante, to estimate his likely punishment based on the expected result from his conduct. Sentencing based on actual losses thus serves as a proxy for sentencing based on expected harms. Cf. Shavell, supra note 193, at 1245 (noting that, given imperfect information, courts “do not directly observe the probability of harm or the different levels of harm that might have resulted” so that courts “must infer these from, among other evidence, the occurrence and magnitude of the actual harm. Thus, the sanction can reasonably rise with the actual harm.”).

In certain cases, it may make sense to modify the “actual” loss standard. For example, a sentencing system might hold a defendant responsible only for the foreseeable harms resulting from his conduct. That is because, ex ante, the defendant will only take these harms into account when deciding whether to commit a crime. As a result, imposing punishment based solely on “foreseeable” harms is likely to save punishment resources without significantly reducing the deterrent effect of punishment. Similarly, imposing punishment based on actual harm might be problematic when an offender is detained before completing the crime. In such a case, punishment based on actual harm might let the offender off easy and thus undermine the deterrent effect of the sentencing rules. One way to modify the sentencing scheme would be to increase penalties where evidence is clear that the defendant expected or intended to cause a greater degree of harm.

At a recent symposium on the economic crime guidelines, several commentators pointed to the utilitarian basis for taking harm into account. See SYMPOSIUM, supra note 191, at 58 (statement of Assistant Attorney General James Robinson) (“The amount of loss . . . is an important tool in measuring the need to promote respect for the law, to afford adequate deterrence to criminal conduct, and also to protect the public from further crimes of the defendant, which are all, of course, the goals of the Sentencing Reform Act.”); id. at 15 (statement of Eric Holder) (arguing increase in severity for economic loss tables to “deter criminal activity and protect the public.”); id. at 32 (statement of Mark Cohen) (arguing from an economic perspective that “offenders should be held accountable for all losses and costs associated with their actions”).

Incapacitation concerns also seem to mitigate towards some consideration of the harm caused by the defendants. In assessing the danger that the offender himself poses to society (and hence the need to incapacitate him), the utilitarian would consider both the likelihood that the offender will commit a new crime upon release and the magnitude of the harm expected to be committed. As discussed above, the criminal history axis is principally directed towards measuring the risk of recidivism. The defendant’s current offense may provide additional information about the risk of recidivism to the extent that different crimes have different recidivism rates. But it will also provide an indication of the kind of harms that the offender might perpetrate in the future. How well the nature of the current offense serves as a predictor of the type of offense a defendant may commit in the future is, of course, an empirical question. Some have questioned the link, at least for certain types of crimes. See, e.g., JAMES Q. WILSON, THINKING ABOUT CRIME 154 (rev. ed. 1983) (“[T]he nature of the present offense is not a good clue of future risk. The reason for this is quite simple—most street criminals do not specialize. Today’s robber can be tomorrow’s burglar and the next day’s car thief.”).
To see why, consider an economic crime like larceny. Given certain
simplifying assumptions,\textsuperscript{197} deterrence theory suggests that society should
impose more severe sanctions on larcenies involving larger losses. The reason
is straightforward: Society is better off for each $300,000 crime deterred than
for each $150,000 crime prevented. In other words, society gets a bigger bang
for its law enforcement resources by deterring crimes with greater losses.\textsuperscript{198}
But how much more should we punish the $300,000 offender than the
$150,000 criminal? Should the former sentence be twice as great—as some
just desert theories seem to suggest—reflecting the fact that it is twice as
harmful? Not necessarily.
One might plausibly believe that an increase in sanctions will have a
"diminishing marginal effect" on crime rates. In other words, as the
punishment for $300,000 larcenies increases, the marginal effect of that
increase on criminal activity may fall. At some point the marginal effect of
higher penalties may become sufficiently small that society would benefit just
as much by increasing penalties for $150,000 larcenies. In other words, at this
point, the marginal deterrent effect of increasing the sanction for $300,000
larcenies would be equivalent to the effect of increasing the sanction for
$150,000 larcenies.\textsuperscript{199}
To support the structure of the loss table, one need only believe that this
point of marginal equivalency occurs when the sentence for the $300,000
larceny is less than twice the sentence for $150,000. Given the diminishing
marginal effect of punishment on crime rates, such an assumption is at the very
least plausible. And that would mean that guideline sentences should increase
as social harm increases but in less than proportional amounts. The point is not
that these intermediate assumptions are ultimately "correct." Rather, the point
is that one can, at the very least, identify a plausible general deterrence
argument for the specific structure of the loss tables.

\textsuperscript{197} For example, I assume for present purposes that, at any given sanction level, all larcenies are equally
deterrollable. Further, I assume that the economic loss caused by a larceny is a good proxy for the total social
harm caused by the offense.
\textsuperscript{198} See Shavell, supra note 193, at 1244 (arguing that "the greater the expected harmfulness of an act, the
higher will be the optimal sanction" because, among other things, "the greater the expected harm, the more
society values increased deterrence, and therefore the more willing society should be to bear the costs of
imposing higher sanctions").
\textsuperscript{199} Under utilitarian theory, a policymaker would continue to increase sentences for each type of larceny,
until the marginal benefit of increasing the sanctions is equal to the marginal cost of additional punishment.
What about the limited use of mens rea in the economic and drug guidelines? As we saw, drug offenses come very close to being strict liability offenses, at least with respect to the amount of "harm" caused by the offenses. Economic crimes are nearly as strict, incorporating a civil negligence mens rea with respect to the amount of economic loss. These kinds of strict, or near-strict, liability offenses are troubling for the just desert theorist, but they are less of a concern for the utilitarian. Strict liability offenses are often justified on utilitarian, and particularly general deterrence, grounds.\textsuperscript{200}

Again, the reason is straightforward given plausible assumptions. In pursuing general deterrence goals, a principal objective of the sentencing system is to send a clear and appropriate message about the punishment that an offender will receive when convicted of a crime. Telling potential offenders that they will be held responsible for the "actual" harms resulting from the offense is a straightforward way to send a message that the more harm that the offender causes the greater the punishment that he will receive. The ultimate effect of that message will be an appropriate one—to encourage the offender to contemplate the expected losses due to his criminal conduct.\textsuperscript{201} Mens rea does not play a direct role in this analysis.

Deterrence theory also offers a plausible argument for why the guidelines make mens rea relevant for certain kinds of crimes—such as homicide—but not for drug and economic offenses. In the case of homicide offenses, failure to take mens rea into account can lead to the over-deterrence of lawful and socially beneficial activities. For example, a sentencing system that imposes the same severe sentences on negligent homicides that it imposes on intentional killers might lead law-abiding citizens to cut back on socially-

\textsuperscript{200} Felony murder is one example of a criminal law doctrine that has a significant strict liability element. Efforts to justify that doctrine often take a utilitarian approach. \textit{See}, e.g., Kevin Cole, \textit{Killings During Crime: Toward a Discriminating Theory of Strict Liability}, 28 AM. CRIM. L. REV. 73, 98 (1990) ("The most common defense of the felony-murder rule has rested on deterrence notions"); James J. Tomkovicz, \textit{The Endurance of the Felony-Murder Rule: A Study of the Forces that Shape Our Criminal Law}, 51 WASH. & LEE L. REV. 1429, 1448 (1994) ("The primary justification offered for the contemporary felony-murder rule is deterrence."). Utilitarian explanations have also been offered for strict liability sentencing enhancements. \textit{See United States v. Goodell}, 990 F.2d 497, 499 (9th Cir. 1993) ("The strict liability enhancement for possession of a stolen firearm is rationally related to the legitimate governmental goal of crime prevention."); \textit{See generally} Richard A. Wasserstrom, \textit{Strict Liability in the Criminal Law}, 12 STAN. L. REV. 731 (1960) (suggesting that strict liability offenses might be justified on deterrence grounds).

\textsuperscript{201} \textit{See supra} note 194.
beneficial activities, such as driving, in order to reduce the risk of punishment. 202

To avoid this problem, homicide rules explicitly take an offender’s mens rea into account. 203 Mens rea thus serves as a mechanism for distinguishing between acts that are socially undesirable in almost all cases (e.g. the intentional killing of another human beings) and acts that might under different circumstances have socially beneficial purposes (e.g. the accidental killing of another while driving an automobile). As Kevin Cole concludes, "[t]he potential of over-deterrence may often caution against employing strict liability in the criminal law." 204

By contrast, over-deterrence concerns are much less significant in the sentencing of drug and economic offenders. In these cases, the defendant has already been convicted of committing a drug or economic offense of some undetermined magnitude. The only question at sentencing is whether the defendant stole $5,000 or $10,000, or distributed five or ten grams of illegal narcotics. Failure to consider mens rea in this situation will not deter lawful activities, for all the activities under scrutiny are unlawful. 205 In this sense, over-deterrence concerns are less pressing, which might explain why mens rea is thought to be so essential for offenses like homicide, but not for the more common economic or drug crimes.

In sum, deterrence considerations provide at least a plausible rationale for key structural features of the most widely used guideline provisions. Deterrence arguments help explain why harm plays a central role in these guidelines, yet exhibits a diminishing marginal significance in determining offense levels. Over-deterrence arguments, moreover, provide a plausible rationale why mens rea resurfaces in certain less common guideline provisions,

---

202 Posner calls these costs from over-deterrence “steering clear” costs. See Posner, supra note 111, at 1225-26.
203 Id. at 1221 (“Although the cost of trying criminal cases would be reduced by not bothering to draw a sharp line between the pure coercive transfer and the accident that it externally resembles, the result would be excessive criminal punishment, leading to all sorts of serious social costs from avoidance of lawful activity ...”).
204 Cole, supra note 200, at 102.
205 See Posner, supra note 111, at 1222 (arguing that over-deterrence is less of a concern for statutory rape and felony murder cases because “we do not care about deterring activity bordering on the activity that the basic criminal prohibition is aimed at. Because we do not count the avoidance of that activity as a social cost, it pays to reduce the costs of prosecution by eliminating the issue of intent ... ”); see also Cole, supra note 200, at 102-03 (noting that over-deterrence concerns are not an issue for crimes—like felony murder—where conduct is not closely associated with lawful activities).
such as the homicide guidelines, but plays a minimal role in the drug and economic crime guidelines.

To avoid misunderstanding, let me emphasize again that this conclusion does not mean that the specific structure of the Chapter Two guidelines promotes utilitarian goals. It only means that utilitarianism is a possible rationale, whereas mainstream just desert theory appears to be an implausible explanation. Whether a utilitarian should endorse the rules depends on a range of additional considerations.

For example, the utilitarian analysis thus far has focused solely on general deterrence considerations. Other utilitarian goals—such as incapacitation—may argue for different guideline structures. If that is so, then any assessment of whether utilitarian goals are being served by the Chapter Two rules would turn on whether incapacitative or deterrent effects predominate.

Even assuming that deterrent effects predominate, one might still question whether the structure of the Chapter Two rules promotes utilitarian goals effectively. For example, the strict liability orientation of the drug guidelines might seem troublesome from a utilitarian perspective, because defendants who are aware of the full magnitude of drugs being sold might be more deterrollable than those who are ignorant of the amount. If so, deterrence goals might be promoted by imposing longer sentences on the offenders with more culpable _mens rea._

---

206 Under an incapacitation rationale, longer sentences should be reserved for the more dangerous offenders. _Mens rea_ is often viewed as a relevant factor in making an assessment of dangerousness. Thus, an actor who harms another person intentionally seems more dangerous than one who harms another negligently. Robin Charlow, _Willful Ignorance and Criminal Culpability_, 70 _Tex. L. Rev._ 1351, 1393 (1992) ("If one is to generalize, it seems that in most instances the malicious statutory rapist would be more likely to repeat his crime than the callous statutory rapist."). As a result, intentional actors would seem to warrant longer sentences than negligent actors.

A similar rationale might support incorporating _mens rea_ into the economic crime and drug trafficking guidelines. A defendant who intentionally steals $50,000 would seem to be far more dangerous than a defendant who intends to steal $1,000 but negligently takes $50,000. Whether significant crime control gains are achieved by sentencing the more dangerous drug offender to a longer prison term is debatable. Some have suggested that the incapacitative effect of punishment is limited for market-driven crimes, like drug offenses, since convicted offenders will be quickly replaced by new recruits. See, e.g., Frank O. Bowman, III, _Playing “21” with Narcotics Enforcement: A Response to Professor Carrington_, 52 _Wash. & Lee L. Rev._ 937, 982 (1995) (suggesting that the replacement effect undermines incapacitative rationale for long drug sentences).

207 Offenders who are unaware of the amount of drugs at issue may be less deterrollable because they are also unaware of the potential penalties they face. As a result, the marginal benefit of punishing these offenders may be less than punishing offenders who, all else being equal, recognize the scope of likely losses. In this situation, the unaware offender might warrant a reduced penalty. See Posner, _supra_ note 111, at 1223 (arguing that when "punishment is less efficacious, less worthwhile . . . society should buy less of it").
Finally, one might question whether the severity of the Chapter Two guidelines is well calibrated to serve utilitarian goals. Many commentators believe, for example, that the exceedingly long drug penalties cannot be justified on either general deterrence or incapacitation grounds.\textsuperscript{208} If true, that would argue for significant changes in the drug guidelines on utilitarian grounds.\textsuperscript{209} Ultimately, empirical research will be necessary to make an intelligent assessment of these issues.\textsuperscript{210}

These caveats do not detract from the ultimate conclusion of this section—that utilitarianism offers the most plausible explanation for the specific structure of these widely used Chapter Two rules. This conclusion runs counter to the nearly unanimous view among commentators today that the Chapter Two rules are retributive in nature. At the very least, just desert theorists have their work cut out for them in explaining why retribution, rather than utilitarianism, is the best rational reconstruction of the offense seriousness guidelines.

\textsuperscript{208} See, e.g., Frank O. Bowman, III, Panel Discussion: Sentencing Guidelines: Where We Are and How We Got Here, 44 St. Louis L.J. 405, 406 (2000) (“If you look at . . . the utilitarian goals of sentencing that have to do with deterrence or incapacitation, the level of many sentences that we impose for drugs under the federal guidelines simply can not be justified.”).

\textsuperscript{209} Given the existence of mandatory minimum statutes, the Commission’s ability to reduce the severity of drug sentences will likely be limited. Nonetheless, David Yellen has argued that the Commission should develop drug guidelines with “no reference to the mandatory minimum statutes.” That would mean, Yellen writes, that the Commission would establish sentencing ranges based entirely on its view of the appropriate penalty. In cases in which a mandatory minimum applies, the minimum would trump the guidelines. . . . This could be a politically explosive step: Congress might rightly see it as a slap in the face. It would, however, send the strongest possible message to Congress that the sentencing guidelines are incompatible with mandatory sentencing laws. It would also allow those defendants who now receive sentences pegged to the mandatory sentencing levels even though they are not legally subject to those provisions to be treated more equitably.


\textsuperscript{210} Needless to say, one of the principal goals of the “rational reconstruction” effort is to encourage the Commission to undertake just such a review of its guideline decisions.
VI. THE REQUIREMENT OF HORIZONTAL CONSISTENCY

The "modest" claim advanced thus far is that utilitarianism is the best and most plausible reconstruction of the four guideline rules under analysis—substantial assistance, family circumstances, criminal history, and offense seriousness. This conclusion certainly does not mean that the Commission is obligated to adopt utilitarianism as its governing rationale. The Commission might choose instead to adopt just deserts as a justification for any one of the guideline rules. The analysis simply demonstrates that doing so would require the Commission to make significant changes in the sentencing structure.

The analysis also suggests that adopting just deserts as a governing rationale would have different ramifications for different guideline provisions. For substantial assistance, family ties, and criminal history, the adoption of a retributive rationale would require dramatic changes in the rules, and perhaps their elimination entirely. Indeed, it is difficult to see how these rules can be justified on any ground other than utilitarianism.

For offense seriousness, the issue is more ambiguous. For this set of guidelines, just deserts offers a plausible justification for certain general features of the rules, such as the prominent role that "harm" plays in the guideline system. But it is unable to explain other features of Chapter Two—such as the strict, or near-strict, liability aspect of the drug and economic crime provisions. In this light, adopting just deserts for offense seriousness would require the Commission to amend Chapter Two, but it would not lead to the same kind of radical restructuring that a just deserts approach would trigger for the other guideline provisions.

Because the analysis of the offense seriousness rules is both more complex and less clear-cut, I expect that some may dissent from the conclusion that utilitarianism is the only plausible reconstruction of these rules. That is, some may conclude that, even if just deserts is not a perfect fit for the rules, the theory offers at least a plausible basis for the general structure of Chapter Two. In this Part, I want to consider for the sake of argument the possibility that this view is correct—that is, that just deserts, as well as utilitarianism, offer a plausible rationalization of the Chapter Two rules.

The implication of this assumption is that utilitarianism is not the only reconstruction of the guideline rules under analysis. An alternative is a hybrid theory, in which just deserts underlies the offense seriousness provisions and utilitarianism underlies the other three guidelines. I suspect that some will find
this alterative appealing since it retains some role for just deserts in the sentencing system. Many people have an intuition that punishment should promote a multiplicity of purposes and values—not only public safety goals but also values of “fairness” and “desert.”211 We like the idea—so eloquently articulated by Isaiah Berlin—that there is an irreducible plurality of values.212 Perhaps that is one of the reasons why hybrid theories remain so popular among criminal theorists today.213

Nonetheless, the analysis of the criminal history guidelines suggests that common intuitions about the justifications for punishment are sometimes mistaken. Indeed, I will contend in the following sections that intuitions about the appeal of hybrid theories should be similarly reconsidered. Specifically, I will argue that, even assuming that just deserts is a plausible interpretation of Chapter Two, a hybrid theory cannot offer a principled basis for sentencing decisions, and thus cannot offer a coherent reconstruction of the four key guideline rules.

This counterintuitive argument turns on an analysis of the second major requirement of rational reconstruction. This is the requirement of “horizontal consistency,” which holds that a rationale used to justify one set of guideline provisions must be consistent with the rationales used to justify others. In the following sections, I suggest that a just deserts justification for offense

211 See, e.g., Henry M. Hart, Jr., The Aims of the Criminal Law, 23 LAW & CONTEMP. PROBS, 401, 401 (1958) (“A penal code that reflected only a single basic principle would be a very bad one.”).
213 See, e.g., Don E. Scheid, Constructing a Theory of Punishment, Desert, and the Distribution of Punishments, 10 CAN. J.L. & JURIS. 441, 443 (1997) (“It has become widely accepted that neither a purely utilitarian nor a purely retributive theory will suffice and that to be adequate, a theory of punishment must be pluralistic, incorporating, at a minimum, both utilitarian and retributivist principles—or, more generally, both consequentialist principles and principles of desert or justice.”); Paul H. Robinson, Hybrid Principles for the Distribution of Criminal Sanctions, 82 NW. U. L. REV. 19 (1987); see also H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (1968); von Hirsch, supra note 146, at 38-46, 149-59 (suggesting that, though just deserts is the primary purpose, crime control considerations are relevant as well); LACEY, supra note 26, at 46; PACKER, supra note 207, at 62; C. L. TEN, CRIME, GUILT, AND PUNISHMENT 84 (1987).

Several states have embraced a hybrid approach when developing their own guidelines. See, e.g., Kramer, Offense Severity, supra note 165, at 39 (1999) (discussing Pennsylvania’s “modified just deserts” approach); Richard S. Frase, Offense Sentencing: Complex Choices, 22 CRIME & JUST. 363, 406 (1997) (suggesting that Minnesota developed a sentencing system that ultimately incorporated both retributive and utilitarian considerations). One federal court has asserted that the two axes of the federal sentencing grid embody different purposes. United States v. Mogel, 956 F.2d 1555, 1559 (11th Cir. 1992) (concluding that the SRA “correlates the penological goals of retribution and general deterrence with the offense-based, or vertical, component of a sentence, and the goals of incapacitation and rehabilitation with the offender-based, or horizontal, component”). But cf. Miller, supra note 1, at 460 n.219 (noting that the Mogel court “offers no authority for its assertion that the Commission integrated the goals of sentencing” in the guideline grid).
seriousness inevitably conflicts with the utilitarian justifications for the other guideline provisions. Even more ambitiously, I suggest that any theory of punishment that seeks to meld utilitarianism and retribution necessarily fails the test of horizontal consistency. In other words, only a sentencing philosophy that rests on a single principle of punishment—be it utilitarianism or retribution—can serve as a fully coherent justification for sentencing decisions.

Because the argument is a complex one, a brief roadmap might be useful. The argument unfolds in three steps. First, I highlight the internal inconsistency that exists in a hybrid theory that blends utilitarianism and just deserts. Second, I explain why this internal inconsistency prevents a hybrid theory from fulfilling the objectives of rational reconstruction. Third, I consider—and then reject—several influential attempts to rehabilitate hybrid theories in the face of these objections. My conclusion is that the requirement of horizontal consistency discredits any attempt to adopt just deserts as the purpose of the offense seriousness guidelines.

A. The Inconsistency of Hybrid Theories of Punishment

A hybrid theory of punishment does not, at first glance, seem to suffer from internal inconsistency. The hybrid theory in this case merely holds that just deserts underpins the rules for offense seriousness, while utilitarianism justifies the rules for the other three guideline provisions. The purposes, in other words, apply in different spheres. No conflict or inconsistency seems to exist.

But first looks are misleading: utilitarianism and retribution are not so easily quarantined. The difficulty is that moral principles are not by their nature self-limiting; they aspire to universal application. Thus, if we affirm that just deserts is a valid sentencing goal for the offense seriousness rules, the necessary next step would be to apply just deserts to all the other guideline provisions, including provisions such as criminal history, family ties, and substantial assistance. Doing so, we have seen, would require major changes in these sentencing provisions. In this regard, just deserts and the utilitarian guideline provisions are inconsistent.

Many people have the intuition that an internal inconsistency in an argument signifies a flaw in its reasoning. But why? The methodology of

---

214 This is a common view among moral and political theorists as well. See, e.g., DAVID LYONS, ETHICS AND THE RULE OF LAW 32 (1984) ("Moral positions can be discredited if they are internally inconsistent.");
rational reconstruction provides an answer. Recall that rational reconstruction seeks to identify a principled rationale for the guideline decisions under analysis. With hybrid theories, however, the Commission makes a fundamental decision that seems to lack a rationale: It has decided that utilitarianism trumps just deserts in the cases of the criminal history, substantial assistance, and family tie guidelines.

One response, of course, is that the Commission has a rationale for this decision; it is just implicit. Indeed, if the guideline structure is justified, the hybrid theorists must believe that a compelling rationale exists for favoring utilitarian goals for these three guideline rules and just deserts for offense seriousness. My contention, however, is that no principle exists to resolve this internal conflict within the hybrid theory of punishment. Nor can such a principle exist. Rather, any attempt to balance utilitarian and retributive principles must ultimately be arbitrary and, hence, unjustified. 215

B. Incommensurability and Hybrid Theories of Punishment

The problem is that utilitarianism and retribution are "incommensurable" principles—principles that cannot be integrated along a common metric or scale. 216 This is another way of saying that no reconciling principle can exist to

---

215 See Larry Alexander, Deontology at the Threshold, 37 SAN DIEGO L. REV. 893, 906 (2000) (affirming the proposition that "the difference between what is morally right and what is morally wrong cannot be arbitrary.").

216 For a roughly similar definition of incommensurability, see Matthew Adler, Law and Incommensurability: Introduction, 146 U. PA. L. REV. 1169, 1170 (1998) (stating that "[r]oughly speaking, 'incommensurability' means the absence of a scale or metric" but proceeding to discuss various nuances on this meaning); Brian Bix, Dealing with Incommensurability for Dessert and Desert: Comments on Chapman and Katz, 146 U. PA. L. REV. 1651, 1651 (1998) ("Incommensurability is the claim that different choices, or different values underlying choices, cannot be measured on a single metric."); Ruth Chang, Introduction to Incommensurability, Incomparability, and Practical Reason 1 (Ruth Chang ed., 1997) (defining incommensurability as the state of affairs in which "items cannot be precisely measured by a single 'scale' of units of value"); Richard Craswell, Incommensurability, Welfare Economics, and the Law, 146 U. PA. L. REV. 1419, 1421 (1998) (noting that "incommensurability" means "that there is no scale or metric that . . . would justify the choice of whichever option ranked higher"); Richard A. Epstein, Are Values Incommensurable or Is Utility the Ruler of the World?, 1995 UTAH L. REV. 683, 686 ("[T]he fundamental question is whether or not choices between goods and between alternate courses of action are easily reduced to a common metric."); Cass R. Sunstein, Incommensurability and Valuation in Law, 92 MICH. L. REV. 779, 780 (1994) (arguing that to say
justify limiting utilitarianism and retribution to different parts of the guideline system.\textsuperscript{217} Why? Why can’t a reconciling principle exist?

The answer is easily seen. Suppose for the sake of argument that a principle (let’s call it $P$) did, in fact, exist that could provide a principled basis for resolving the conflict between utilitarianism and retribution in any given case.\textsuperscript{218} $P$, in this sense, is the ultimate standard of justification, and retributive and utilitarian considerations are relevant only to the extent that they serve principle $P$. We have identified two mutually exclusive categories— consequentialist and deontological principles. What sort of principle is $P$?

\textsuperscript{217} For an incisive analysis of the incommensurability of consequentialism and deontology, see Alexander, supra note 215, at 908 (2000) (“A supporter of a hybrid theory must regard deontological and consequentialist norms as being capable of being weighed against each other . . . . But it is difficult to see how . . . . [this is possible] unless consequences and intrinsic wrongness were commensurable on some scale.”). \textit{See also} Anthony Ellis, Deontology, Incommensurability, and the Arbiterary, 52 PHILOS. & PHENOMENOLOGICAL RES. 855, 862-64 (1992).

\textsuperscript{218} In more technical terms, some theorists call the rationale for a decision the “covering value” or “choice value,” and they suggest that any claim of justification must be made with respect to that covering value. \textit{See} Chang, supra note 216, at 5-7; \textit{see also} Ruth Chang, Comparison and the Justification of Choice, 146 U. PA. L. REV. 1569, 1575 (1998) (“Every choice is relative to a choice value; one can only choose relative to something that matters.”). For a similar point, see Craswell, supra note 216, at 1422 & n.6.
Let us assume for the moment that $P$ is, itself, a consequential principle. In this sense, any conflict between utilitarianism and retribution in a given case should be resolved by assessing the consequences of the decision, using the consequentialist principle, $P$, as the appropriate standard for decisionmaking. This approach, however, is highly problematic. As we have discussed, just deserts is a deontological principle. That means that justification should be grounded on the inherent rightness or wrongness of criminal conduct—not on its consequences with respect to some other principle of value. In this sense, just deserts does not acknowledge that there is some higher moral principle $P$ that determines the relevance and importance of retributive claims. To value retributive guidelines based on their promotion of good consequences, in other words, is to transform this deontological principle into an element of a consequentialist doctrine. Needless to say, this result raises serious questions about the coherence of the enterprise, for it makes little sense to speak of “just deserts” as a relevant factor in promoting good consequences.

If $P$ cannot be a consequentialist standard, perhaps we can salvage the hybrid arrangement by suggesting that $P$ is a deontological principle. But this option is no more successful. As a deontological principle, $P$ cannot depend on the consequences of a given punishment for social welfare. However, as we have seen, the justification for several guideline rules turns specifically on their consequences. The substantial assistance departure, for example, mitigates an offender’s sentence in order to serve crime-fighting goals, a classic utilitarian objective. If $P$ really is a deontological principle, it should not turn on these consequentialist factors. In this sense, $P$ is incompatible with the consequentialist orientation of several guideline provisions.

The central problem with hybrid theories of punishment should be clear now. It is that utilitarianism and retribution are mutually incompatible theories, which means that they cannot be integrated in any principled manner.\footnote{Several theorists have acknowledged that retribution and utilitarianism may be incompatible theories of punishment. See, e.g., \textit{Packer, supra} note 207, at 36 (noting that the retributive and deterrent theories of punishment “are almost universally thought of as being incompatible”); \textsc{Edmund L. Pincoffs}, \textsc{The Rationale of Legal Punishment} 1-2 (1966) (noting potential conflicts between utilitarian and retributive theories). But few recognize that this conclusion also discredits hybrid theories as coherent punishment philosophies.} Either the higher principle $P$ is concerned with consequences or it is not. If it is concerned with consequences, then “retribution” is treated as an instrumental value, which is incoherent. If $P$ is a deontological principle, then
by definition the consequences of an offender’s conduct—such as his substantial assistance to law enforcement—are irrelevant.

The implication is that no principled rationale exists to resolve conflicts between utilitarian and retributive principles. \(^{220}\) The incommensurable nature of these values prevents us from identifying a “reason” for integrating the two choices in a justifiable manner. \(^{221}\) As a result, efforts to incorporate these incommensurable principles in a hybrid theory of punishment will inevitably generate arbitrary and, hence, unjustified results. This conclusion—that incommensurability precludes justified choice—is the conventional view among many philosophers. \(^{222}\) Richard Warner puts the point bluntly: “When we encounter incommensurable reasons in crucial areas of public policy, we cannot do what we should do: Choose the option supported by the [morally] best reasons.” \(^{223}\)

\(^{220}\) Why not simply say that the two principles should be resolved in a way that promotes the “common good” or the “public good”? The problem, to quote H.L.A. Hart, is that in this context, “[i]t is not clear what these phrases mean, since there seems to be no scale by which contributions of the various alternatives to the common good can be measured and the greater identified.” H.L.A. HART, THE CONCEPT OF LAW 162-63 (1961).

\(^{221}\) Bix, supra note 216, at 1651 (“The phenomenon of incommensurability can be recharacterized as the irreducible plurality of values.”). See also Scharffs, supra note 216, at 1372 (“[T]he problems of incommensurability arise when we try to compare plural, irreducible, and conflicting values.”).

\(^{222}\) See Chang, supra note 218, at 1569 (“Conventional wisdom has it that comparability of alternatives is necessary for the possibility of justified choice. After all, if two items cannot be compared, what ground could there be for choosing one rather than the other?”); see also Richarddon, supra note 216, at 120 (observing that it “seems to be taken for granted in most of the literature on decision theory and practical reasoning” that commensurability is a prerequisite of rational choice); Larry Alexander, Banishing the Bogey of Incommensurability, 146 U. PA. L. REV. 1641, 1642 (1998) (“I agree . . . that to say that a choice is justified is to imply the comparability of the thing chosen with those not chosen. The worry about incommensurability, then, is that if two courses of action are of incommensurable value, the choice between them cannot be justified.”); William Lucy, Natural Law Now, 56 MOD. L. REV. 745, 757 (1993) (“[W]e cannot rationally choose between incommensurable values.”); Donald Regan, Value, Comparability and Choice, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON, supra note 216, at 144 (“Choice between incomparables is unintelligible. . . . Choice is based on reasons. Choice between two specific goods must be based on reason to prefer one of the goods to the other. Where there is no adequate reason for preference, there can be no real choice.”).

To be sure, not everyone agrees with the conventional view. See, e.g., Gillian K. Hadfield, An Expressive Theory of Contract: From Feminist Dilemmas to a Reconceptualization of Rational Choice in Contract Law, 146 U. PA. L. REV. 1235, 1259 (1998) (“Incommensurability, however, does not imply the impossibility of choice, of comparison between alternatives and selection among them.”). Various efforts to show that justified choices can be made between two incommensurable positions are discussed below. See infra Part VI.C.

C. Can Hybrid Theories Be Saved?

This conclusion seems to undermine the use of hybrid theories as a coherent "rationalizing" theory for the sentencing guidelines. Yet perhaps that conclusion is premature. Several theorists have rejected the claim that incommensurability prevents individuals from making rational, morally justified choices. It is not my goal to survey all of the possible arguments of this sort, but rather to offer a preliminary assessment of three of the most influential.

1. Raz’s "Will Theory"

The first approach might be called the "will theory" of choice, sometimes associated with the writing of Joseph Raz. According to Raz, when two principles each represent ultimate standards of justification, an individual is justified in following whichever one he or she prefers. Either choice is morally justified.224 For this reason, Raz concludes, "[s]aying that two options are incommensurate does not preclude choice."225

Applied to the guidelines, Raz’s approach suggests that it is a matter of indifference whether the Commission adopts a utilitarian or retributive justification for individual sentencing rules.226 It does not matter, for example, whether we enact the substantial assistance guidelines (because they are justified on utilitarian grounds) or repeal the substantial assistance guidelines (because they conflict with just desert theory). Raz’s approach thus implies that an extremely broad range of sentencing structures are all equally justified.

That conclusion conflicts with the way most people think about sentencing decisions. We think it matters very much how the substantial assistance or criminal history guidelines are structured, and we certainly do not believe the justifiability of those rules turns simply on the Commission’s desires or

---

224 See Joseph Raz, Incommensurability and Agency, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON, supra note 216, at 125 ("[O]nce reason has failed to adjudicate between a range of options, we normally choose one for no further reason, simply because we want to."); see also Chang, supra note 218, at 1595 ("Raz thinks that brute desires can justify choice when alternatives are incomparable.").


226 Cf. Richardson, supra note 216, at 125 ("On this suggestion . . . the two conclusions . . . are just both reasonable, and neither overrides the other."); Chang, supra note 218, at 1594 ("[T]he only situations in which a brute desire plausibly can provide a justifying ground are ones in which it does not matter which alternative one chooses."); William A. Galston, The Legal and Political Implications of Moral Pluralism, 57 Md. L. Rev. 236, 242 (1998) ("If the moral philosophy of pluralism is roughly correct, then there is a range of indeterminacy within which various choices are rationally defensible.").
whims.\textsuperscript{227} That is why decisions about how to structure the guidelines are so controversial, and why debates over the purposes of punishment are so heated.

To the extent that we believe that certain sentencing structures are better than others, we must believe that there is a reason—a moral reason—why that is so.\textsuperscript{228} Raz’s will theory cannot explain this widely shared view. For Raz, the ultimate structure of the guideline system is determined simply by the arbitrary preferences of the Commissioners. Thus, he does not offer a principled argument for making a choice—for believing that certain guideline decisions are justified, while others are not.\textsuperscript{229}

2. “Intuitionist” Theories

A different strategy for confronting the incommensurability problem might be called an “intuitionist” approach. This approach suggests that individuals can identify the justified resolution of conflicting claims by relying upon a special faculty of judgment—“intuition” or “moral sense.”\textsuperscript{230} Intuitionism, however, does not overcome the incommensurability problem; it just fails to confront it.

On a superficial level, the intuitionist’s approach seems similar to the will-based approach. Both theories, after all, seem to rely on an individual’s judgment in identifying an appropriate course of action. But intuitionists and will theorists hold different assumptions about the role of personal judgment in the decision-making process.

\textsuperscript{227} Alexander, supra note 222, at 1642-43 (“If the values truly are incommensurable and the choices incomparable, then why the anguish? . . . One might as well blithely flip a coin.”).

\textsuperscript{228} To avoid confusion, let me emphasize that I am not taking a stand on whether Raz might be right that morality is indeterminate in precisely the way his theory suggests. Rather, I am claiming simply that such a view conflicts with the broadly shared assumption that persuasive arguments exist to believe that certain sentencing structures are more justified than others. This is analogous to Dworkin’s assumption that legal questions typically have a “right answer.” See RONALD DWORKIN, A MATTER OF PRINCIPLE 119 (1985) (“[T]he occasions when a legal question has no right answer in our own legal system may be much rarer than is generally supposed.”); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 14, 36 (1977) (arguing that a judge does not have discretion in deciding cases but must strive to identify the correct answer).

\textsuperscript{229} See Chang, supra note 218, at 1592-96 (discussing and criticizing idea that “feeling like it” can provide a justification for choice).

\textsuperscript{230} For an account of a pluralistic theory of punishment that seems to rely on “intuition” to mediate among principles of punishment, see LACEY, supra note 26, at 199 (“[M]any philosophers will feel that this conception gives too great a place to the mediation of intuition in the balancing and accommodation of the values which I have argued must be fundamental.”)
For will-theorists like Raz, judgment does not identify a determinate, morally justified reason for resolving conflicts among moral principles. To the contrary, for Raz, judgment simply expresses the individual’s arbitrary desire; there is no ultimately “correct” result. Intuitionists, by contrast, see the role of personal judgment differently. For the intuitionist, the “moral sense” is a tool for discovering a justified result. That is to say, the intuitionist believes that a moral basis really exists for resolving conflicts among incommensurable principles; intuition allows the individual to grasp that justified solution.\footnote{To put this point in more technical terms, intuitionists make both epistemological claims (claims about how one knows the good) and meta-ethical claims (claims about the nature of the good). See W.D. Hudson, ETHICAL INTUITIONISM 63 (1967) (stating that intuitionists “conceive of some ‘thing,’ or entity, the moral faculty, existing ‘within’ the minds of men; and of another kind of ‘thing,’ the moral properties of actions or states of affairs, existing ‘out there’ in objective reality”). The faculty of intuition is an epistemological tool for knowing the good. These intuitions are used to identify objective moral truths. Thus, intuitionists share the same meta-ethical position as the rational reconstructionist. Both believe that every justified decision must be supported by a distinct moral reason. See John Rawls, POLITICAL LIBERALISM 91-92 (1993) (noting that “rational intuitionism” believes both that “moral first principles and judgments, when correct, are true statements about an independent order of moral values” and that “moral knowledge is gained in part by a kind of perception and intuition”).

Ellis makes the same point. The intuitionist’s argument, he says, is “little more than bluff and rhetoric. There can be judgment only where there is something to be judged about. . . . [T]here must be considerations capable of resolving the issue (or—at the very least—bearing intelligibly upon its resolution). And the problem here is to see what considerations could do that.” Ellis, supra note 217, at 860. See Alexander, supra note 216, at 906 (stating that it is not “a satisfactory defense of non-arbitrariness . . . to appeal to the idea of judgment”); see also Hudson, supra note 231, at 52. Hudson argues that where moral duties conflict, “they must be ‘weighted’ against each other,” but the intuitionist claims only that they feel or see what to do. “This is plainly intended to mean something more than simply that one decides what to do. But can we make it mean more? . . . All it comes to is the triviality, ‘Decide by deciding!’” Id.}

Here is where the intuitionist runs into problems, for we have already shown that no moral principle is available to integrate incommensurable ends. To put the point another way, intuitionists posit a method for identifying the morally justified rationale on the assumption such a rationale exists. But they fail to explain why that assumption is plausible given the existence of incommensurable principles. Thus, intuitionism merely evades the difficult questions raised by incommensurability. Faced with those questions, intuitionists can only affirm that conflicting principles can be resolved somehow, without explaining how that can occur.\footnote{Ellis makes the same point. The intuitionist’s argument, he says, is “little more than bluff and rhetoric. There can be judgment only where there is something to be judged about. . . . [T]here must be considerations capable of resolving the issue (or—at the very least—bearing intelligibly upon its resolution). And the problem here is to see what considerations could do that.” Ellis, supra note 217, at 860. See Alexander, supra note 216, at 906 (stating that it is not “a satisfactory defense of non-arbitrariness . . . to appeal to the idea of judgment”); see also Hudson, supra note 231, at 52. Hudson argues that where moral duties conflict, “they must be ‘weighted’ against each other,” but the intuitionist claims only that they feel or see what to do. “This is plainly intended to mean something more than simply that one decides what to do. But can we make it mean more? . . . All it comes to is the triviality, ‘Decide by deciding!’” Id.}

3. Anderson’s “Expressive” Approach

Elizabeth Anderson offers a complex and dramatically different argument for transcending the problem of incommensurability. Anderson’s argument is
based on what she calls an "expressive theory" of reason. Expressive theories have gained popularity recently, and Anderson's has been one of the most influential. However, expressivism is ultimately no more persuasive than the other attempts in explaining how justified decisions can emerge from incommensurable principles.

Expressivism, Anderson says, is a moral theory that "tell[s] us that the rational (moral) thing to do is to act in ways that express our rational (or morally required) attitudes towards people." Thus, "[e]xpressive theories of action evaluate given actions according to how well they express attitudes that we ought to have toward people." In particular, in our relationships with people, we are to treat people as intrinsic goods and give them their proper due given the relationship we have with them. For example, we are to act with filial love toward family members, out of friendship for friends, with respect for human beings generally. Conversely, selling one's child would "express attitudes toward children that contradict the norms of parental love."

Anderson suggests that the expressive approach offers a solution to the incommensurability problem because it generates "alternative principles for choosing between options that do not require commensurating the goods contained in them." Rather than justifying decisions based on overriding


234 A number of legal theorists have at least tentatively endorsed Anderson's approach. See, e.g., Hadfield, supra note 222, at 1237 (drawing on Anderson's theory of expressive rationality); Sunstein, supra note 216, at 810 (1994) (concluding that "something like" Anderson's theory "is fundamentally correct").

235 Kornhauser, supra note 217, at 1623 ("Elizabeth Anderson's account of this expressive theory has been the most influential among legal scholars.").

236 See also id. at 1504 ("[E]xpressive theories tell actors—whether individuals, associations, or the State—to act in ways that express appropriate attitudes toward various substantive values."); id. at 1508 ("[An expressive theory] evaluates actions in terms of how well they express certain intentions, attitudes, or other mental states.").

237 Id. at 1513. See also id. at 1510 (noting that expressive theories ask "does performing act A for the sake of goal G express rational or morally right attitudes toward people?").

238 ANDERSON, VALUE IN ETHICS, supra note 233, at 172.

standards of justification, Anderson says that choices are justified so long as they are expressions of an appropriate kind of attitude.\textsuperscript{240}

Defined in this way, however, expressivism fails to resolve the conundrum facing the hybrid theorist in the sentencing field. Several problems emerge in applying Anderson’s theory to the guidelines. As an initial matter, Anderson’s theory seems ill-suited for addressing the challenge of integrating retribution and utilitarianism. That is because Anderson grounds her theory in Kantian philosophy: She assumes that human beings are ends in themselves and should never be used as a means towards increasing social welfare. For that reason, Anderson affirms that expressivism is incompatible with consequentialist doctrines. She consistently criticizes consequentialist efforts to justify decisions in terms of some higher conception of the public good.\textsuperscript{241}

If we take Anderson at her word on this point, expressivism does not offer a way to integrate utilitarianism and retribution; it offers a basis for rejecting utilitarianism altogether. Anderson might be right that utilitarianism is an invalid moral theory, but that is not the question posed in this Article. In this regard, Anderson’s theory offers an external critique of the guideline structure, not a reconstruction of it.

Yet, perhaps Anderson’s contention that expressivism and utilitarianism are incompatible is mistaken. After all, it seems feasible to view utilitarian sentencing goals as expressing an “appropriate” attitude toward punishment—a desire to protect innocent citizens from crime. In that sense, we might say that utilitarian goals are accompanied by an attitude that reflects a respect for the personal well-being of future crime victims. This is an attitude of benevolence, which some might say is deserving of respect.\textsuperscript{242}

\textsuperscript{240} It might seem strange to extend this analysis to governmental action. How can a government have an “attitude”? Anderson argues that “collectives can have beliefs and purposes and can act on reasons and principles of action.” Anderson & Pildes, supra note 235, at 1519. Others disagree. See, e.g., Craswell, supra note 216, at 1461 (questioning application of theory to government decisionmaking); Kornhauser, supra note 217, at 1633.

\textsuperscript{241} Anderson, \textit{Practical Reason}, supra note 233, at 97 (“[L]ittle sense can be made of adding different instances of intrinsic value . . . [s]o no sense can be made of the claim that intrinsic values of different kinds can be aggregated.”). \textit{See also} Kornhauser, supra note 217, at 1612 (“Anderson argues that consequentialism errs in grounding its theory of practical reason in the instrumental aim of action, as action is not justified by its successful realization of the agent’s goals. Rather, on her account, action is justified when it expresses the agent’s (justifiable) intentions.”).

\textsuperscript{242} Anderson & Pildes, supra note 235, at 1512 (“Thus, in the moral domain, we express our benevolence in taking the advancement of others’ interests as our goal.”). \textit{See also} ANDERSON, \textit{VALUE IN ETHICS}, supra note 233, at 272 n.26 (acknowledging in passing that “some circumstances give us no choice but to sacrifice
Even if we assume *arguendo* that utilitarianism is consistent with expressivism, Anderson’s theory fails to provide a basis for choosing between utilitarian and retributive prescriptions in situations where they conflict. In those cases, the hybrid theorist is still left with incompatible justifications—two conflicting expressive attitudes. The utilitarian wants to express an attitude of benevolence by deterring future crime; the retributivist wants to express an attitude of just desert by linking punishment to individual culpability. Where two valid attitudes conflict, what guidance can Anderson’s theory offer us about how to act? As far as I can tell, none at all. Since Anderson does not offer any transcendent moral principle to resolve conflicts among attitudes, the conflict is irresolvable (or at least Anderson does not tell us how to resolve it).

The failure of her approach is illustrated by the way she responds to a scenario posed by Ruth Chang. Chang posits: “[S]uppose the only way I can save my dying mother is by ending my friendship with Eve.”\(^{243}\) Should I do so? Chang thinks that the answer is clear: “I ought to trade the friendship in order to save my mother’s life.”\(^{244}\) Anderson’s ultimate response, however, is unsatisfying: “When we must choose between [these options], the basis of choice is not a judgment telling us which is more valuable, but a judgment telling us how best to reconcile the expressive demands of the different kinds of concern we owe to and have for them.”\(^{245}\)

The problem with this response is that it assumes that there is a “best” way to reconcile the conflicting demands of filial love and friendship. Such a view, however, presupposes some standard or principle for distinguishing between better and worse results. The difficulty, as Chang observes, is that Anderson denies the existence of such a principle. For Anderson, filial love and friendship are incommensurable, and that means that the demands of filial love and friendship cannot be resolved by reference to an overarching principle of value.\(^{246}\) Anderson’s response, in other words, is contradictory. Faced with

---

*one person or another*). Anderson does not explain why imposing punishment for deterrence reasons is not an appropriate attitude. At least for the sake of argument, I will assume that it is.

---

\(^{243}\) Anderson, *Practical Reason*, supra note 233, at 101 (quoting Ruth Chang, *Emphatic Comparability and Constitutive Incommensurability, or Buying and Selling Friends* (unpublished manuscript)).

\(^{244}\) *Id.*


\(^{246}\) Roger Craswell offers a similar criticism of Anderson and co-author Pildes’ analysis of the Ford Pinto case. Craswell, * supra* note 216, at 1461. Anderson and Pildes acknowledge that the case involves a trade-off between public safety and cost. They conclude: “[G]iven the background of social and legal understandings against which Ford executives had acted, Ford’s particular trade-off expressed contempt for human life. Other
conflicting demands, she is forced to assume the existence of a principle capable of commensurating the incommensurable.

VII. UTILITARIANISM AND THE FEDERAL SENTENCING GUIDELINES

The ramifications of this analysis are wide-ranging, for the discussion raises serious questions about the capacity of any hybrid theory of punishment to offer a rational reconstruction of the sentencing guidelines (or any set of sentencing decisions). Because utilitarianism and retribution are incommensurable theories, no principled rationale can exist to resolve conflicts among the purposes. As a result, attempts to promulgate guidelines in the face of these inevitable conflicts will necessarily represent unreasoned—that is to say, arbitrary—decisions.

This does not imply, however, that a rational reconstruction of the guideline rules under consideration is impossible; hybrid theories do not exhaust the options. As we have already observed, utilitarianism offers a plausible—indeed, the most plausible—reconstruction of each of the four guideline rules. In other words, one can avoid the problems of incommensurability altogether by adopting utilitarianism as the single overriding purpose of punishment for each of the four guideline decisions under analysis.

Doing so would mean that all the guideline provisions would be oriented towards reducing crime, and that the various rules could be integrated with that overriding goal in mind. A pure utilitarian theory would satisfy the requirements of both vertical and horizontal consistency. In fact, one of the original Commissioners—Michael Block—has argued that crime control was Congress's overriding objective when it enacted the SRA, and that utilitarianism should be treated as the governing philosophy today. But Block has been virtually alone in taking this position.\footnote{This is a preliminary conclusion. As Matthew Adler notes, "[t]he topic of law and incommensurability is, as yet, a fairly new one." Adler, supra note 216, at 1184. And criminal theorists have only just begun to assess the relevance of this topic for punishment theory.}

\footnote{Incommensurability concerns support the adoption of a "monistic" theory of punishment—a theory grounded on a single moral principle. See Richardson, supra note 216, at 121 (discussing link between incommensurability and monism).}

\footnote{See Jeffrey S. Parker & Michael K. Block, The Commission, P.M. (Post-Mistretta): Sunshine or
Once again, this conclusion does not mean that the Commission must adopt utilitarianism as its guiding rationale. It only means that the agency should do so if it wants to offer a principled rationale for the general structure of the guideline rules under analysis. Thus, the Commission certainly has the authority to adopt a hybrid theory of punishment should it decide to do so. This analysis merely shows that a hybrid theory cannot offer a fully principled basis for justifying the guideline system. That means that, should the Commission adopt a hybrid theory, it must accept the fact that its justification for the guidelines will reflect a degree of arbitrariness.

In the conclusion of this Article, I examine in further detail the problems of incorporating arbitrariness of this sort into the guideline system. For now, I will simply assume that the Commission wishes to avoid a sentencing philosophy that authorizes arbitrary punishments or that requires significant changes to the guideline structure. Since, as we have seen, only utilitarianism satisfies these criteria, I will assume for present purposes that the Commission finds that theory to be the most appealing. Before the Commission adopts utilitarianism, however, it will need to address several practical questions, including questions about the “legitimacy” and the “legality” of enshrining utilitarianism as the guidelines’ governing principle. The following sections consider these two issues, in turn.

A. Legitimacy and Utilitarianism

“Legitimacy” refers to the Commission’s need to preserve at least a degree of public and political support to carry out its work. Congress is more likely to intervene in the Commission’s affairs absent such support and, in extreme cases, might even be tempted to abolish the Commission altogether. As a result, concerns about institutional legitimacy might influence the Commission’s deliberations about its governing philosophy. Specifically, the Commission might be hesitant to adopt utilitarianism if doing so would prove unpopular with the public.

Is this a compelling argument against adopting utilitarianism as the guidelines’ guiding principle? Historical experience and common sense suggest that it is not. As a historical matter, several influential “rationalizing” efforts in the criminal justice field have embraced a largely utilitarian outlook.

Sunset?, 27 AM. CRIM. L. REV. 289, 290-91 (1989) (arguing that the Commission’s “guiding objective” is the utilitarian goal of “maximizing the overall welfare of society with respect to crime and punishment”).
Some of these efforts were largely theoretical in nature. But some were practical and triggered significant legal reform. The most famous rationalizing effort of modern times—the Model Penal Code—was inspired principally by utilitarian considerations. The Model Penal Code is widely seen as the most successful criminal reform movement in American history, despite—or perhaps because of—its philosophical grounding.

Common sense, moreover, suggests that adopting utilitarianism is unlikely to undermine the Commission’s legitimacy. Utilitarianism is another way of describing society’s crime-fighting goals, which hardly seems to be a controversial objective of law enforcement. Far more controversial, I would think, would be the attempt to pursue abstract ideals of “fairness” or “desert” at the expense of public safety considerations. The Commission itself has acknowledged, in the introduction to the Guideline Manual, that “[m]ost observers of the criminal law agree that the ultimate aim of the law itself, and of punishment in particular, is the control of crime.” Utilitarianism offers one additional benefit as a philosophy: It would not, on its first iteration, require any significant structural changes to the guideline system. Utilitarianism, we have said, supports a rational reconstruction of the existing guideline structure.

Finally, a utilitarian approach to punishment does not require the Commission to entirely ignore powerful public sentiments about just punishment, such as sentiments about the kind of sentence a given offender

---

250 Perhaps the most important of these was Bentham’s landmark study of the criminal law. See Jeremy Bentham, An Introduction to the Principles of Morals and Legislation (J.H. Burns & H.L.A. Hart eds., 1970).

251 In the nineteenth century, the most notable efforts to develop a criminal law system based on utilitarian principles were pursued by Edward Livingston and Thomas Macaulay. The former attempted (unsuccessfully) to rationalize the criminal laws of Louisiana on utilitarian grounds. The latter attempted (successfully) to reform the Indian criminal justice system along utilitarian lines. See Kadosh, Historical Antecedents, supra note 3, at 523-30.


253 See Vincent, supra note 125, at 189 (approving of the statement that alternative sanctions should be used for offenders we are mad at, so that “there would be enough prison space to adequately incapacitate those of whom we are afraid”).

"deserves." Taking account of strong retributive views may, in certain cases, be fully consistent with utilitarian theory.

As a preliminary matter, retribution may generate results that are consistent with utilitarian theory. In that case, no conflict exists between the principles. Thus, lower penalties for negligent killers relative to intentional ones is consistent with retributive rationales, because the negligent offender is less culpable for the criminal act. But, as we have noted, it may be consistent with utilitarian approaches too.

Even where public views of just punishment conflict with crime control rationales, a long-term view of utilitarian goals might justify taking public opinion into account. Among other things, sharp conflicts between the Commission's sentencing rules and the public's sentiments about just deserts could undermine respect for the law and for the Commission. That, in turn, might diminish the deterrent effect of the Commission's rules. For these and other reasons, the Commission might have good utilitarian reasons for taking into account retributive sentiments about fairness, if only in extreme cases where its legitimacy is at stake.

255 See Senate Report, supra note 2, at 178 (speaking about the need to have the guidelines reflect "current views as to just punishment").
256 See supra note 203 and accompanying text. Similarly, certain general principles of fairness might promote utilitarian ends by, for example, serving as "heuristic devices" for the indirect pursuit of good consequences. See Alexander, supra note 215, at 910. To take a simple example, punishing the innocent or imposing corporal punishment might serve crime control goals under certain circumstances, but erecting a general prohibition on such practices will plausibly promote public welfare over the long run. See, e.g., John Rawls, Two Concepts of Rules, 64 PHILOSOPHICAL REV. 9-13 (1955) (discussing utilitarian arguments against punishing the innocent).
257 Modifying guideline rules to account for public sentiments might undermine the perception that the Commission serves as a voice of principle rather than politics. For that reason, how the Commission explains its guideline decisions in these situations matters greatly. To preserve the appearance of principled decision-making, the Commission might remain silent about its underlying rationale. This is analogous to the courts' use of the passive virtues to avoid seeming unprincipled. See Alexander M. Bickel, The Least Dangerous Branch 70-71 (2d ed. 1986). Alternatively, the Commission might be open about its deliberations and explain how it is reluctantly enacting rules that validate public opinion at the expense of public safety. The Commission might even affirm a desire to modify the rules in the future should public opinion change. Which approach is preferable is left for the reader to decide.
258 A pragmatic concern for public opinion does not mean that the Commission should simply mirror public sentiments. Rather, as Franklin Zimring and colleagues point out, the public may have a sense of what sort of punishment they think is appropriate, but they are willing to accept punishments along a relatively broad range. Only when punishment levels fall below the level of "minimum" just deserts would serious objections to a punishment scheme arise. Franklin E. Zimring et al., Punishment and Democracy: Three Strikes and You're Out in California 188 (2001). For a detailed discussion of how institutional actors should balance moral principles (here, utilitarian principles) with pragmatic considerations (here, public opinion), see Rappaport, supra note 15, at 495-96.
B. The "Legality" of a Utilitarian System

Even if legitimacy concerns are no obstacle, "legality" concerns might be. Several commentators have argued that the SRA bars the Commission from adopting a single sentencing purpose as its governing philosophy. Marc Miller, for example, suggests that the original Commission (and presumably the current one) "did not have the statutory authority to select one dominant purpose for the whole system, despite recommendations that it do so, despite the fact that other guideline systems have done so, and despite the fact that it asked and then sidestepped this very question."\(^{259}\) As Miller observes, the SRA and the legislative history make clear that the Commission is required to "consider" all four purposes when developing sentencing guidelines and policy statements. "This congressional vision implicitly rejects the idea that any one purpose should guide all sentencing decisions."\(^{260}\)

But the statutory language and the legislative history are not as clear as Miller (and others) suggest. As Miller himself recognizes, the statutory language does not require the Commission to promote every purpose in every case—only to consider all of them.\(^{261}\) Indeed, we have seen that there are many situations where the purposes of punishment conflict. In those situations, the Commission has no choice but to identify a dominant purpose.

\(^{259}\) Miller, supra note 1, at 440 ("The Commission did not have the statutory power to exclude any of the statutory purposes from all cases.").

\(^{260}\) Id. Similarly, former Commissioner Nagel claims that, "a careful reading of the exact statutory language ultimately adopted, together with a review of the legislative history, makes clear that commitment to a single explicit rationale . . . would be in direct contradiction to the intent of the enabling legislation." Nagel, supra note 12, at 916. In truth, it is not at all clear that Nagel would be troubled if the Commission were to adopt utilitarianism as the primary purpose of punishment. Continuing her discussion of purposes, Nagel affirms that a commitment to a single purpose of punishment would particularly offend congressional intent if it were the just deserts rationale, as advocated by Professor von Hirsch and former Commissioner Paul Robinson. The fundamental purpose of the Comprehensive Crime Control Act was precisely that purpose included in the title—to control crime. Any attempt to minimize or eliminate the status of crime control as the central objective would contravene legislative intent.

\(^{261}\) Miller, supra note 1, at 428-29:

Neither the provisions directed to the Commission nor those directed to judges require that each purpose be achieved in every case . . . . While Congress presumably hoped that all four purposes might be achieved whenever possible, there is no suggestion that all four purposes are to be given equal weight, nor that Congress considered them equally attainable in any particular case.
The legislative history makes clear that the Commission was expected to make trade-offs when conflicts arise.\footnote{See Senate Report, supra note 2, at 77:}

The only question, in other words, is whether the Commission can lawfully adopt a single global rule determining how to act when purposes conflict—a rule that applies in all sentencing decisions. Can it, in other words, state that utilitarianism will always trump retribution when conflicts arise? Strikingly, the original Commission implicitly thought so. Soon after their appointment, the Commissioners split into two groups, each seeking to develop a sentencing system based on one purpose of punishment.\footnote{See id. at 67-68:}

Moreover, when the Commissioners finally agreed on a methodology for developing the original guideline structure, they adopted a single rule for resolving conflicts among the purposes of punishment. That rule affirmed that when crime control and retributive concerns generate inconsistent results, utilitarian goals would predominate.\footnote{Commissioner Paul Robinson embraced just deserts, while Commissioner Michael Block pursued a utilitarian approach. Various commentators also argued that the Commission should adopt a single dominant theory of punishment. See, e.g., Dale G. Parent, What Did the United States Sentencing Commission Miss?, 101 Yale L.J. 1773, 1778-83 (1992) (attacking the Commission for failing to adopt a single purpose). The Commission ultimately disclaimed any attempt to adopt a single purpose of punishment. See SUPPLEMENTARY REPORT, supra note 13, at 16 ("After much reflection . . . the Commission concluded that [choosing one dominant purpose] would not further the objectives that had been set for it."). The Commission did not reject this attempt, however, on the grounds that it was barred by the SRA, but rather because of the difficulties the Commissioners had in agreeing on a dominant objective. For further discussion on the Commission's methodology in drafting the initial guidelines, see Rappaport, supra note 2, at Part III.} Although this rule of construction was not included in the official Guideline Manual—and so is not binding on courts\footnote{See Breyer, supra note 186, at 47-48.}—it does provide evidence of the Commission’s views regarding the need to prioritize sentencing purposes, as well as its utilitarian orientation.\footnote{See 18 U.S.C. § 3553(b) (2000) ("In determining whether a circumstance was adequately taken into account in making a sentencing determination, a court may consider information relevant to the purposes of sentencing.").}
Nothing in the statute or legislative history suggests that this kind of prioritization is improper. The more accurate view is the one provided by Joel Feinberg, a Congressional staff member who was one of the principal architects of the Sentencing Reform Act. As Feinberg states, "Congress was ambivalent about prioritization of purposes and largely fudged the issue in drafting the underlying enabling legislation." Under traditional rules of administrative law, that ambiguity would permit the Commission to adopt any reasonable interpretation of the statutory language.

Finally, even if the SRA were somehow interpreted to require the Commission to give some weight to both utilitarianism and retributive concerns, the approach outlined in this Article satisfies that burden. As I have suggested, even under a utilitarian approach, the Commission can and should take into account public views about "just deserts" in certain extreme situations, such as in situations where the Commission’s legitimacy is at stake. In this regard, both moral theories potentially play a role in each sentencing decision.

Retributivists might find this final argument unconvincing on the grounds that it reinterprets "just deserts" through consequentialist lens. Retribution, after all, affirms "desert" as an ultimate value, not as an instrumental or pragmatic consideration within a utilitarian philosophy. Nonetheless, the SRA does not clearly state that "just deserts" is a non-consequentialist doctrine; in fact, the statute doesn’t even specifically use the term "just deserts" at all. It uses the phrase "just punishment" instead.

---

266 Those influences continue to be strong. In discussing the agency’s new initiative to study the guidelines’ success in serving the purposes of punishment, the Commission’s Chair placed special emphasis on crime control goals. As Chairwoman Murphy stated, the “[q]uestions that we hope to address include how well the guidelines are accomplishing the statutory purposes of sentencing, including crime control, as set forth at 18 U.S.C. § 3553(a)(2).” Oversight Testimony of Chairwoman Diana E. Murphy, supra note 6, at 104. The guidelines, she suggested, “[h]ave strengthened the ability of the criminal justice system to combat crime. We hope that our empirical research will confirm our belief.” Id.


Nothing in the SRA prevents the Commission from interpreting the statutory term “just punishment” in a consequentialist manner. In fact, the SRA’s legislative history makes clear that the term “just punishment” has a malleable meaning, and that it potentially encompasses crime control considerations. Thus, the Senate Report itself states that “just punishment” refers to sentences that are “a type and length that . . . adequately reflect, among other things, the harm done or threatened by the offense, and the public interest in preventing a recurrence of the offense.” In sum, the text and legislative history of the SRA indicate that the concept of “just punishment” is sufficiently broad and malleable to allow an administrative agency to reinterpret it in utilitarian terms. The SRA does not prevent the Commission from adopting utilitarianism as its governing theory of punishment.

CONCLUSION

The U.S. Sentencing Commission has spent fifteen years constructing a guideline system without discussing the ultimate purpose of its endeavor. This Article starts from the premise that the Commission’s silence constitutes a serious failing and that this failing must be addressed if the agency is to fulfill its statutory goal of creating a principled sentencing system.

---

270 Senate Report, supra note 2, at 76 (emphasis added). See also Senate Report, supra note 2, at 75 n.162:

[T]he Committee obviously believes that a sentence should be “just” . . . [but] it also believes that it is consistent with that purpose to examine the other purposes of sentencing set forth in section 3553(a)(2). . . . [I]ncapacitation for an extended period of an offender with a serious criminal history might be appropriate where such a long term would not be “just” if the offender’s criminal record were not considered.

Commissioner Nagel has made a similar point. She has observed that Congress avoided “theoretical orthodoxy” by deciding against using the common term “just deserts”: substituting instead . . . the words “just punishment for the offense.” No substantial leap of faith is required to interpret the congressional decision to substitute the words “punishment for the offense” for the word “deserts” as showing that the statutory intent was to carve out a goal broader in meaning than the traditional just deserts emphasis on blameworthiness.

Nagel, supra note 12, at 915. For similar arguments, see Parker & Block, supra note 28, at 1001:

[I]n the specific context of the Sentencing Reform Act, there is strong evidence that “just punishment” was intended to be consistent with the other three statutory purposes, and we believe that all four purposes can be harmonized together as a mandate for efficiency in punishment, in the fairly strict utilitarian or economic sense.
To help the Commission rectify this shortcoming, the Article describes a methodology—called “rational reconstruction”—that seeks to identify the implicit purposes of the current sentencing scheme. These are the purposes that the Commission must adopt if it is to offer a principled justification for its sentencing rules. Applying the methodology generates a notable result—that a single purpose of punishment, utilitarianism, offers the best reconstruction of the four critical guideline provisions under analysis. This result confirms the strong utilitarian orientation of the guideline system.

The methodology also highlights the “costs” that the Commission would incur by rejecting utilitarianism as its guiding philosophy. The analysis, for example, suggests that the adoption of a “just deserts” approach would require the Commission to make dramatic changes in the guideline system. Although a hybrid theory would not require the same kind of radical restructuring, it would entail other kinds of costs. Notably, because utilitarianism and retribution are incommensurable principles, a hybrid theory would prevent the Commission from offering a fully principled justification for its guideline decisions. As a result, a hybrid approach would inject a degree of arbitrariness into the punishment scheme.

Whether this kind of arbitrariness is a serious concern is worth a moment’s reflection. I suspect that, for many, the idea that punishment could be imposed in an arbitrary manner is deeply troubling; for some, it may be reason enough to reject a hybrid theory of punishment. For the Commission, the mere perception of arbitrariness may prove problematic for more practical reasons. Arbitrariness, after all, contributes to the impression that the agency’s decisions are based, not on principle, but on the whims or even prejudices of the Commissioners. To the extent it becomes widespread, this impression can undercut the Commission legitimacy in the political realm, which as I have suggested elsewhere depends on the Commission being seen as a voice of principle, and not politics, in the sentencing arena.\(^{271}\)

A utilitarian theory of punishment suffers from none of these drawbacks. Utilitarianism, after all, offers a coherent basis for justifying and integrating the existing sentencing rules. It may also offer a basis for the Commission to strengthen its institutional legitimacy in the sentencing field.

\(^{271}\) Rappaport, supra note 2, at Part IV.B (discussing relationship between sentencing purposes and Commission’s legitimacy).
Perhaps most obviously, utilitarianism is an appealing objective, one that responds to the public’s deep-seated fears about crime. But utilitarianism also helps to legitimate the Commission’s institutional role as an expert agency. The Commission’s comparative advantage over institutions such as the Judiciary or Congress lies in its superior ability to evaluate empirical research on crime and to translate that analysis into effective guideline rules. The agency’s comparative advantage is far more tenuous under a just desert theory, which allocates punishment resources based on general notions of culpability and desert. Utilitarianism, in other words, gives the Commission something to be expert about.272

In short, adopting a utilitarian theory of punishment generates both theoretical and practical benefits. As a theoretical matter, utilitarianism alone offers a fully rational theory of punishment in support of key guideline provisions. As a practical matter, adopting utilitarianism can encourage the public to see the Commission as a voice of principle, reinforcing the Commission’s legitimacy in the public realm.

This is not to deny that a utilitarian theory might entail certain costs, or that adopting such an approach might provoke controversy in the criminal justice field. Ultimately, the Commission itself must make the determination whether the benefits of adopting a utilitarian theory outweigh its disadvantages. But at the very least the Commission should do so with a full awareness of some of the significant drawbacks in adopting a retributive or hybrid model. The methodology of rational reconstruction is a tool to illustrate what a truly principled approach to sentencing would look like. In that way, it is a method for starting a conversation about the core principles of the federal sentencing system.

272 The Commission can reinforce that sense of institutional legitimacy by undertaking research efforts to explore the deterrent and incapacitative effect of punishment.