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Federal Sentencing Reporter

Paul J. Hofer & Mark H. Allenbaugh, *Reconstructing the Philosophy of the Federal Sentencing Guidelines: Still Incoherent After All These Years?*
Summary

15 Fed. Sent. R. 211

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Their full article has been published under a new title, "The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines," in 40 AM. CRIM. L. REV. 19 (2003).

February, 2003

LENGTH: 1586 words

TEXT:

This summary was prepared by SOFIA YAKREN, Yale Law School '04.

Although the Sentencing Reform Act (SRA) of 1984 was intended to establish a consistent philosophy of sentencing, authors of the SRA, academic observers, past Sentencing Commissioners and judges alike have decried the resulting federal sentencing guidelines' lack of an explicit rationale. As the reasoning goes, courts are left without a fixed purpose of sentencing to inform their application of the guidelines. However, Hofer and Allenbaugh disagree with the widespread perception that the guidelines have no philosophy. They challenge judges to interpret and rationalize the purposes of the guidelines and to depart in pursuit of these purposes. Unlike commentators who have encouraged judges to choose among the various purposes of sentencing on a case-by-case basis, they argue for the self-conscious judicial evolution of a shared philosophy of federal sentencing, to be applied uniformly by all judges in all cases. This, they believe, is the best way to fend off the reemergence of the unwarranted inter-judge disparities that first inspired the SRA.

In Part I of their paper, Hofer and Allenbaugh trace the perception that the guidelines lack a consistent philosophy to the indeterminacy of the SRA and to the procedures used by the original Commission to develop the guidelines. The SRA mandates a comprehensive philosophy that accommodates just desert, deterrence, incapacitation, and rehabilitation without prioritizing the various purposes or instructing how to reconcile the tensions among them. The early Commission debated competing versions of the guidelines, built on these varying philosophies, but was unable to arrive at a consensus. As a compromise, the Commission turned to empiricism, purporting to derive sentences from data on past practices, while avoiding any explicit articulation of a comprehensive sentencing philosophy. Congress further impeded the development of a coherent theory for the guidelines by enacting mandatory minimum sentences for some types of crime, which the Commission tried to accommodate within the guideline structure.

In Part II, the authors present the problems that arise if we accept that the guidelines have no underlying philosophy. Without a guiding theory to explain why the rules treat different offenders differently, judges risk making arbitrary sentencing distinctions and generating sentencing disparity. Without an understanding of the guidelines' purposes, judges lack the basis for assessing the system's success or for criticizing a particular rule as anomalous. As a solution, Hofer and Allenbaugh propose that judges reconstruct the philosophy of the guidelines by using an accepted method of judicial interpretation. "Rational reconstruction" is widely used in other areas of law, and is especially appropriate as a method for understanding the guidelines. By examining the text of the SRA, relevant Supreme Court cases, Commission commentary and reports, and, most importantly, the content and structure of the rules themselves, judges can identify the general principles that maximize the coherence of the guidelines and minimize their anomalies.

In Part III, the authors conduct such a reconstruction, attempting to demonstrate that the content and structure of the guidelines are most consistent with a type of limiting retributivism they call "modified just desert." Modified just desert is a hybrid philosophy that gives primary weight to proportionate punishment (just desert) and secondary weight to increasing imprisonment for those offenders most likely to commit new crimes if left free (incapacitation). The guidelines account for the former with their offense level calculations and for the latter with their criminal history scores. Thus, the two axes of the guidelines' "sentencing table" represent the two dimensions of the modified just desert philosophy.

Other sentencing purposes are also accommodated within the guidelines, but are given a lower priority and cannot explain the content and structure of the particular guideline rules. Consistent with the text and the legislative history of the SRA, rehabilitation gets the lowest priority. Judges must consider defendants' rehabilitation needs when determining appropriate conditions of probation or supervised release, such as mandatory treatment or training. But the guidelines never allow rehabilitation to override the need for just punishment or for the incapacitation of higher-risk offenders. In contrast, deterrence figures prominently as a goal of the SRA and there is good reason to think that the guidelines support it. However, the guidelines accommodate deterrence generally as a side benefit of just punishment; deterrence theory did not inform the drafting of specific guideline provisions due to the absence of data on how best to deter specific types of crime. Accordingly, the rules do not reflect considerations relevant to deterrence theory, such as the probability of detection for a given type of crime.

The authors argue that the Commission's use of criminal records to predict recidivism limits the tension in the guidelines between just desert and incapacitation, because offenders with criminal records are not only at higher risk of recidivism but are also viewed as more culpable by some just desert theorists. Although this "double justification" for the use of criminal history can raise questions about the specific purposes of the rules governing the criminal history score, a close reading suggests that incapacitation/crime control, not retribution, is the best explanation of almost all of the rules in Chapter Four. This means that when judging ambiguous provisions or deciding whether to depart based on inadequacy of the criminal history score, judges should search for the reading that best furthers incapacitation.

Finally, just desert is at the top of the list of the purposes of sentencing in the SRA. The Commission's Supplementary Report (released with the original promulgation of the guidelines), as well as the content and structure of the rules themselves, demonstrate that the guidelines' top priority is to ensure that the severity of punishment is proportionate to the seriousness of the offense. Following the writings of Andrew Von Hirsch, a leading just desert theorist, offense seriousness is measured along two dimensions: harmfulness of the offense conduct and culpability of the offender. The vast majority of specific offense adjustments in Chapters Two and Three of the guidelines can be seen to measure offense harm and offender culpability. Furthermore, commentary in these chapters encourages departure whenever the guidelines underestimate offense harm or overestimate the culpability of the offender, as in cases of coercion, duress, or diminished capacity. Based on this evidence, the authors conclude that "modified just desert" provides the best account of the guidelines as a whole.

In Part IV, the authors suggest that many common complaints about the guidelines can be understood as disagreements with their philosophy, rather than as complaints about the guideline system itself. The authors divide guideline critics into two camps: those who disagree with the modified just desert philosophy and those who believe that the guidelines ought to implement it more coherently. The authors concur with critics of the second camp who argue that the guidelines under-appreciate the importance of culpability as a mitigating factor. In its concern with sentencing disparity arising from subjective assessments, the original Commission preferred objective sentencing factors and elevated more readily quantifiable harms, such as quantity of drugs or money involved in an offense, to a significance beyond their worth.

Hofer and Allenbaugh disagree with critics who believe that the drug trafficking guideline lacks a clear purpose. The authors contend that its purpose is the same as the other Chapter Two guidelines: just desert. However, they agree that the function of drug quantity in the guideline is confused, because it has been variously described as a measure of the harmfulness of the crime or of the offender's position within the drug distribution system, and thus his/her culpability. They challenge judges to recognize the genesis of these inconsistencies and to factor them into an understanding of the guideline and of the circumstances when departure would be appropriate. The authors conclude by discussing how the widely criticized jurisprudence of departures has suffered from a failure to recognize the philosophy underlying the guideline rules. The departure mechanism allows judges to help identify the guidelines' philosophy by departing whenever the guidelines' own purposes would be defeated with the imposition of a within-guideline sentence. Despite commentary encouraging departure when strict application of the guidelines would fail to achieve proportionate punishment or incapacitation of high-risk offenders, judges have been reluctant to depart for reasons including: the lack of encouragement to depart in certain types of cases; the alternatives judges already employ to achieve just sentences; and, most importantly, the incoherence of the "heartland" concept. The authors urge judges to use instrumental legal reasoning to interpret the guidelines and to depart when appropriate. Departures in pursuit of the guidelines' own purposes will reduce, not increase, true sentencing disparity.