Deference, Tolerance, and Numbers: A Response to Professor Wright's View of the Sentencing Commission

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The United States Sentencing Commission promulgates the Federal Sentencing Guidelines, which greatly constrain judicial discretion in choosing the sentence for federal crimes. One commentator has argued that the willingness of the courts and Congress to defer to a guideline should depend on whether the Commission has justified the guideline by reference to empirical evidence. This article explores the theoretical and practical difficulties of giving such effect to empirical justifications.

The Federal Sentencing Guidelines have radically changed the practice of criminal sentencing in federal courts. Like sentencers in most jurisdictions, federal judges formerly possessed considerable discretion to fix an offender's sentence within the broad range typically existing between the statutorily set maximum and minimum sentences for the offense. The Sentencing Reform Act of 1984[1] established the United States Sentencing Commission, which was charged with developing guidelines that would narrow this enormous power.[2] The resulting guidelines, which require the court to make

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1. Pub. L. No. 98-473, tit. II, ch. 2, 98 Stat. 1987 (1984).

2. U.S. SENTENCING COMM'N, GUIDELINES MANUAL 1 (1992) [hereinafter GUIDELINES MANUAL].

findings on facts that are not themselves elements of the statutory offense (for example, the scope of a defendant's criminal record or whether a firearm was used in an offense), narrow the range within which the court is expected to sentence in the ordinary case.

How should these guidelines be treated by the President, who evaluates new guidelines; by Congress, which approves any new guidelines; and by the courts, which apply the guidelines and determine whether particular guidelines are within the power of the Commission to promulgate? In a thoughtful article,[3] Professor Ronald Wright argues that two attributes of the United States Sentencing Commission inform how the guidelines should be treated. First, the Commission is well positioned to assess how judges have approached sentencing issues and how they continue to approach them. This advantage is absent to the extent that the Commission "strays too far from judicial sentencing practice."[4] (But it is present, for example, when the Commission justifies a guideline as reflecting the usual pre-guideline punishment for a crime.) Second — and this is one reason the Commission possesses the first advantage — the Commission has the ability to collect and evaluate empirical data relevant to sentencing policy.[5]

Wright is quite explicit about how these domains of special competence should affect Congress: a proposed rule for which the Commission does not provide "adequate support . . . , based in empirical evidence or the experience of sentencing courts," should result in Congress's "invalidating the proposed amendment and asking the Commission to try again."[6] Conversely, Congress should not interfere with a guideline that is justified on such grounds.[7] Wright is somewhat more coy about the role of the courts. Though he generally advocates judicial reluctance to strike a guideline, he is less clear about how severely a judge should feel bound in sentencing a defendant under a guideline that is justified by neither judicial practice nor empirical evidence. The guidelines permit a judge to "depart" from the guideline sentencing range when the judge concludes the case involves facts not adequately considered by the Commission in promulgating the guidelines. Though Wright does not explicitly so state, his argument seemingly suggests that courts should be free to depart from a sentence when a guideline is not justified by either

3. Ronald F. Wright, *Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission*, 79 CAL. L. REV. 1 (1991).

4. *Id.* at 34.

5. *See id.* at 11-16.

6. Wright puts the point this way in a summary of his article. *See* Ronald F. Wright, *The United States Sentencing Commission As an Administrative Agency*, 4 FED. SENTENCING REP. 136 (1991).

7. Wright, *supra* note 3, at 76.

judicial practice or empirical evidence. He certainly offers no argument that would support the anomolous position of asking courts to defer to rules that he would like Congress to invalidate.

Though Wright's article has much to commend it — and though I concur with many of Wright's recommendations — I have considerable difficulty with Wright's preference for empirically justified rules other than those justified by reference to past judicial practice. For simplicity's sake, I shall refer to such justifications simply as empirical justifications, excluding the empirical justification of past judicial practice except when mentioned explicitly. Wright's preference for empirically justified rules strikes me as theoretically problematic and likely to generate bad consequences.

Before we can assess Wright's approach, we should examine whether he accepts it himself. Consider Wright's treatment of the death penalty. Though Wright is quite clear in articulating the reasons for deferring to the Commission, his treatment of the death penalty is inconsistent with his own model and carries the seeds of broader deference to the Commission that Wright explicitly favors. While arguing that Congress should normally "allow the Commission to initiate and guide the development of sentencing legislation,"[8] Wright seeks to exclude capital punishment from that directive. Though Wright suggests that the "moral outrage of the public over a particular crime may be considered an acceptable basis for imposing the death penalty," he asserts that "responding to such outrage does not call on the empirical research capabilities of the Commission," and he notes that federal courts have no substantial experience in deciding how to apply the death penalty (as opposed to reviewing the constitutional limits on when a state may impose the ultimate sanction).[9]

Albeit questionable,[10] this argument is at least consistent with

8. *Id.* at 79.
9. *Id.* at 79-80.
10. If one assumes that public outrage over certain types of offenses is a justifiable basis for imposing the death penalty, then the Commission's ability to conduct empirical research does give it a privileged position from which to address the issue, for the question of what kind of crime generates such public opinion is an empirical one capable of evaluation through standard polling techniques not beyond the Commission's abilities. Elsewhere in his article, Wright himself seems to accept this point, identifying "information about the harms caused by crimes, or public perceptions of the seriousness of various crimes," *id.* at 11 n.33, as examples of the portion of sentencing policy that has a "sizeable empirical component, susceptible of improvement or verification through research." *Id.* at 10-11. I tend to agree with Wright's bottom line here, however, for I am personally skeptical about how large a role public outrage ought to play in justifying the death penalty.

Wright's articulated approach to the Commission's expertise. He goes on, however, to add another reason that the Commission is not entitled to occupy a privileged position with respect to the death penalty: the absence of any "packaging" problem with Congressional initiatives respecting the death penalty. Wright notes that when Congress increases the offense level for one offense, it creates a packaging problem because other offenses must be changed to continue "treat[ing] like offenses alike."[11] Such problems do not arise if Congress legislates about the death penalty, Wright argues, because "death is . . . different."[12] I grant that death is qualitatively different from, say, a twenty-five year sentence. But can anyone seriously doubt that death is more severe? If a statute increasing the penalty for crime *A* to twenty-five years necessitates an increase in the penalty for crime *B*, can anyone seriously argue that a statute increasing the penalty for crime *A* to death does not necessitate any increase in the penalty for crime *B*? The packaging problem seems not to have disappeared.

While I am thus unconvinced by Wright's argument regarding the death penalty, the more ominous threat to his thesis is that his death penalty argument will be taken seriously. Assume, as Wright argues, that no packaging problem exists regarding the death penalty, and that the absence of packaging problems is a real reason for Congress not to defer to the Commission on death penalty issues. If the absence of packaging problems justifies no deference regarding the death penalty, then must not the presence of packaging problems constitute yet a third basis (in addition to tracking judicial practice and reliance on empirical research) for deferring to the Commission in all other areas? Either the presence of packaging problems is a reason for deference or it is not; the factor cannot justify nondeference in the death penalty area, yet suddenly become irrelevant outside that area.[13] In other words, Wright has identified no reason (and I have thought of none) which would justify paying attention to the packaging problem in the death penalty context, but not in other settings.

The problem thus posed for Wright's *articulated* general approach to deference is substantial, because in almost any area a change in

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11. *Id.* at 80.

12. *Id.* at 80 n.362 (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion)).

13. I should emphasize that this is a problem for Wright even if he is correct in arguing that death is different. My objection to that argument assumes that Wright is correct in arguing that packaging is relevant to the question of deference, but rejects the conclusion that death is different in a way that eliminates packaging problems. My argument here is that Wright's position that packaging is relevant to the question of deference, if taken as true, should not be viewed as inherently limited to the death penalty context.

one guideline will raise substantial "packaging" problems rendering irrelevant any consideration of whether the Commission has tracked judicial performance or based its decision on empirical information. Consider the frequency with which packaging problems will occur. Suppose the Commission believes two offenses to be of equal severity. If Congress increases the offense level for one of them, then the Commission will feel the need to increase the offense level for the other offense as well. Moreover, a similar analysis also should dictate changed penalties for still other offenses, whose severity the Commission assesses as some ratio of the severity of the offense whose sentence Congress has altered.[14] And there is no reason that this process should be limited to offenses that somehow deal with "related" subject matters. Though it may not be as apparent, a change in a drug statute presents a packaging problem not only respecting other drug offenses, but regarding all other offenses. Taking packaging problems seriously would greatly expand the deference due the Commission. It may be beneficial to view the packaging argument as just a failed attempt to explain why deference to the Commission is not justified regarding the death penalty, a position that may well be justifiable on other grounds.[15]

But let us take Wright at his word. What of his model's preference for empirically justified rules? Assessing his model's coherence requires answering another question: What exactly should count as adequate empirical support for a rule? Whatever it is, it apparently is lacking from the Commission's explanation of its policy statement prohibiting departures based on age.[16] Accordingly, were the Commission to promulgate the policy statement on age as a guideline, Wright would advocate that Congress not permit the guideline to go into effect. But what would Wright say if the hypothetical guideline were justified as follows?

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14. For example, if the Commission regards crime *A* as half as serious as crime *B*, and Congress increases the penalty for crime *B*, then the Commission would still feel the need to increase the penalty for crime *A* to retain the proper distinction between the two offenses. *Cf.* Wright, *supra* note 3, at 78 ("a change in one statute creates pressure for the Commission to change its guidelines in related areas for the sake of consistency, thus creating a ripple of changes in large areas of the guidelines").

15. *See, e.g., supra* note 10 (challenging Wright's suggestion that deference to public opinion may be warranted).

16. GUIDELINES MANUAL, *supra* note 2, §§ 5H.1-6. This is among the guidelines that Wright criticizes as having been promulgated by the Commission with "no supporting explanation at all." Wright, *supra* note 3, at 66.

> Age, including youth, is not ordinarily relevant. Reducing sentences for those who are young decreases the demand on scarce prison resources. [Imagine here a discussion of how many offenders are young and how much the reduction of their sentences would reduce demands on the system.] Notwithstanding this effect, the Commission's projections show that a failure to consider youth in sentencing will not result in demands that exceed available resources. [Imagine here a discussion of the Commission's projections.]

We now have a proposed rule that is, in some sense, empirically justified. If Wright merely argued that Congress should defer to the Commission's empirical *judgments*, I would have little objection. On such an approach, my proposed rule would not be immune to Congressional review. Instead, in reviewing the rule, Congress would simply be told that it should defer to the Commission's assessment of the likely effects of the rule. Thus, while Congress could block the rule, it should not block the rule on the ground that consideration of youth is necessary to reduce demand on prison resources. Congress would be free, however, to act based on other concerns: Congress' belief that lower sentences for the young will not significantly increase crimes by the young, or its belief that those who commit crimes at a young age often are less culpable than older criminals because the young have not had sufficient opportunities to learn the right path. The reason for deference to the Commission would be clear; the Commission should be deferred to *regarding those of its judgments that it is especially well-suited to make.* Because the Commission is better suited than Congress or the courts to collect and evaluate empirical data, it should be deferred to respecting the impact of its proposed rule on prison populations. We might think of this level of deference as "narrow deference," and we would likely think it clearly justifiable on the grounds of Commission expertise.

But Wright's approach is somewhat different. He does not simply require deference to the Commission's *empirical assessments*; he requires deference to the Commission's *empirically justified rules*, and he advocates that the Commission not be allowed to promulgate rules that lack empirical, including judicial practice, justification.[17] We can call Wright's approach a "broad deference" approach. This broad deference approach requires an analytic step not necessary in the narrow deference approach. Under the broad deference approach, we must decide exactly how much empirical justification for a rule is needed before Congress permits it to take effect. Would Wright actually find the "justification" for my age guideline sufficient to deserve Congressional deference to the rule?

I suspect that many would find anomolous a requirement that Congress reject an utterly unsupported age guideline but defer to my

17. *See* Wright, *supra* note 3, at 79-80. Wright believes that capital punishment or special sanctions for corporate defendants are two areas where the Commission lacks guidance from empirical evidence.

modified age guideline. The reason is that deference to my proposed guideline so radically exceeds the level of deference that a focus on expertise would justify. We reject the completely unsupported rule because it implies several conclusions that the Commission has no special expertise in embracing (at least in the absence of empirical evidence). Among the possible conclusions are (1) that youth need not be considered to preserve scarce prison resources, (2) that lower sentences for the young will lead to increased crimes by the young, and (3) that those who commit crimes at a young age are no less culpable than older criminals. But if Congress cannot block the same rule because of a justification of the kind I have offered, then Congress is being required to defer to the Commission on judgments (2) and (3) notwithstanding the Commission's lack of special expertise respecting those judgments.[18]

Now consider how we should treat our age guideline if the Commission offered a fuller justification for it. In addition to the argument about prison resources, suppose the Commission also justified its rule by reference to studies suggesting that any significant reduction in punishment for youthful crime would likely lead to some particular increase in the crime rate among the young. We may now feel more comfortable about deferring to the Commission's rule. But should we? Evidence about the effects of sentencing on criminal behavior is only part of the relevant inquiry even for a simple consequentialist — that is, for a person who believes that punishment should occur if but only if it will be socially beneficial. A consequentialist would want to know not just (1) the effect on crime of the proposed rule, but also (2) the cost of imposing the punishment and (3) the social harm when the crime occurs. It is a staple of consequentialist punishment theory that, on certain facts, more crime will be better than less crime.[19] If Wright would require Congress to defer to this better-justified age guideline, he would require Congress

18. I should make clear that I do not necessarily agree that the Commission lacks expertise in making these judgments, or at least would continue to lack expertise in making them if permitted to do so. My argument is that, from an expertise perspective, Wright's clear advice that Congress block rules justified by neither empirical evidence nor judicial practice implies that the Commission lacks special expertise on these issues in the case of a totally unjustified rule. The Commission gains no expertise on these issues by doing empirical research on other issues.

19. For example, if we could reduce the number of robberies by one per year by increasing punishment tenfold, a consequentialist almost inevitably would conclude that the cost of increasing punishment tenfold is not justified by the avoidance of one robbery, and thus that more crime is better than less crime. I have explored consequentialist punishment theory in Kevin Cole, *Killings During Crime: Toward a Discriminating Theory*

to defer to the Commission's judgment on points (2) and (3), even though an expertise explanation of why empirical evidence is important would lead to the conclusion that, in the absence of empirical evidence, the Commission has no special expertise to decide those issues.

Of course, the Commission could go farther. It could expand its empirical inquiry to include the cost of imposing the punishment and the social harm when the crime occurs — to undertake what Wright calls "cost-benefit analysis."[20] If this is the level of empirical evidence that Wright would require before Congress should defer to the Commission, it would be tempting to conclude that Wright is advocating a system justified by an expertise rationale (and indeed, that his "broad deference" approach does not significantly depart from a "narrow deference" approach), for the Commission will have gathered and evaluated empirical evidence on each of the issues a consequentialist should consider to determine what penalty to impose for a crime.

Although this conclusion is tempting, it would be wrong, for the Commission would not have gathered and evaluated any empirical evidence relevant to the decision of whether one should in fact *be* a consequentialist, wrong indeed because empirical evidence cannot speak to that point at all. No one can devise the multiple-regression study that will prove it is morally objectionable knowingly to punish an innocent person or knowingly to punish a person in excess of the punishment the person deserves, even if that punishment would produce a net gain in social happiness. My objections to such punishments are nonconsequentialist; they are derived from moral principle, not from predictions about what effects punishment would have on society. But the fact that such objections are nonconsequentialist does not make them inconsequential. In fact, I suspect that the great majority of contemporary criminal law theorists embrace some similar nonconsequentialist view about the appropriate limits of punishment.

The inability of empirical evidence to identify which fundamental value choices to make in framing sentencing policy demonstrates that a requirement of Congressional deference, even to a rule supported by cost-benefit analysis, is ultimately unjustifiable by notions of the Commission's expertise flowing from its special ability to collect and evaluate empirical data. But my concern is not simply to demonstrate that expertise in evaluating empirical evidence cannot alone justify any version of "broad deference." In addition, differential treatment for empirically justified and nonempirically justified

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of Strict Liability, 28 AM. CRIM. L. REV. 73 (1991).

20. Wright, *supra* note 3, at 83.

rules risks skewing sentencing policy toward the punishment theories that lend themselves most readily to empirical support.

Empirical support will come much more readily for rules justified by certain punishment theories. The familiar consequentialist justifications for punishment — deterrence, incapacitation, and rehabilitation — all turn on the effects of punishment. As such, the rules they generate are all supportable by empirical evidence, though as Wright correctly notes, the empirical questions often will be difficult to answer.[21]

In contrast, nonconsequentialist punishment theories — for example, a retributive focus that opposes punishments in excess of just deserts — will not necessarily be sharpened by wide-ranging empirical inquiries. Wright asserts that the "empirical element is present regardless of the theory of sentencing purposes at work."[22] The only remotely nonconsequentialist theory he explores, however, is addressed in the following sentence: "A theory aimed at making punishment proportional to the seriousness of an offense might benefit from information about the harms caused by crimes, or public perceptions of the seriousness of various crimes."[23] I take this to be Wright's effort to show how empirical evidence is relevant to a retributivist. However, Wright is exploring but a narrow and, to my mind, morally problematic strand of retributive theory. The information he identifies would be useful to a *harm-based* retributivist, one who believes that the morally justifiable punishment for a crime turns on the harm the criminal caused. But the information would be of precious little use to an *intent-based* retributivist, one who believes the morally justifiable punishment for a crime turns not on the harm the criminal caused, but rather on the harm that the criminal *intended* to cause. A harm-based retributivist would want to know the indirect harms caused and the public unrest created by particular crimes to assess accurately the harm that a particular defendant has caused and the sentence the defendant deserves. For an intent-based retributivist, however, harms so indirect or inperceptible as to reveal themselves only through social science methodology likely will have escaped the criminal's attention as well. If they have not, evidence about the criminal himself and his situation will be the far preferable means by which to learn that the criminal in fact adverted to those harms.

21. *See id.* at 86.
22. *Id.* at 11 n.33.
23. *Id.*

I do not mean to suggest that no case can be made in favor of harm-based retributivist or consequentialist punishment theories; however, I do mean to claim that we should be leery of providing the Commission with incentives to slide toward such theories without any requirement of justification beyond the obligation to crunch some numbers. Wright's differential approach to deference, with its preference for empiricism, is thus not without risk. The risk increases the greater the empiricial evidence required to trigger broad deference. Cost-benefit analysis, for example, simply does not speak to an intent-based retributive theory. The risk is less when less empirical evidence is required to trigger broad deference. After all, even an intent-based retributivist can study what demands a proposed rule will make on prison resources. But the lower the level of empirical evidence needed to trigger broad deference, the greater the gulf becomes between the requirement of deference and the justification that the Commission has special expertise in assessing empirical evidence. And even if the objection to expertise is overlooked, a slight requirement of empirical justification still poses some risk of skewing Commission rules toward particular punishment theories. As more kinds of empirical justifications will be available for some punishment theories than for others, some will remain easier to justify than will others.

The problems I discuss here could be remedied in either of the two following ways. We could defer to Commission rules even when their justifications are not empirically based, or we could decline to defer to Commission rules when they are justified by empiricism alone. By treating empirically justified rules with the same level of deference as nonempirically justified rules, either approach eliminates the troublesome incentives in Wright's approach.

Deferring to both empirically and nonempirically justified rules would vest considerable power in the Commission. The extent of power turns in part on whether courts in the departure setting are expected to defer to the same rules to which Congress defers. If courts may not depart from a guidelines sentence when the Commission has rationally explained its rule (by reference to empiricism or otherwise), then the Commission will have been given considerable power to make the value choices inherent in any decision to prefer a consequentialist theory to a nonconsequentialist one, or vice versa. Those who disagree with the Commission's value decisions will be consigned to seek their remedy from Congress directly, which is likely a difficult task. This greater power would surely increase pressures to politicize the Commission.

On the other hand, if courts are permitted to depart even where Congress should defer — so long as, for example, the Commission's rule is not justified in terms of judicial practice — the consequences

of permitting the Commission to promulgate rules justified in other terms are less sweeping. The Commission's initial value choice could be viewed as a simple mechanism to focus judicial attention on an area of sentencing difficulty. So long as courts are clear on their power to depart, the period after the Commission's promulgation of a rule would constitute a sort of judicial referendum on the Commission's value choice. Courts that agree with the Commission's choice, and courts that disagree with the Commission's choice but agree with the Commission's sentence for different reasons on the facts of the case before them,[24] will apply the Commission's rule when the time comes. Other courts will depart. Through this process, the Commission will be able to discern not only how many judges prefer one sentencing policy over another, but also which cases are the ones in which judges believe the choice of theory should make a difference. Ultimately, the Commission will be able to justify its rule by reference to judicial acceptance, or it will have sufficient evidence to devise a new rule in accord with judicial practice. On this approach, the Commission may serve as an agenda-setter on sentencing policy[25] and even an advocate for a particular position, but the fundamental value choices that underlie sentencing policy would continue to be made by sentencing judges. Some will regard such an arrangement as putting the decision where the expertise lies. Even those who disagree that judges have expertise on these issues that commissioners lack may nevertheless feel that the greater number of sentencing judges increases the chance that their views will fairly present the alternatives available, and that the number of federal judges and the assorted other issues they confront will make the judiciary more resistant to political pressure directed toward particular sentencing outcomes.

The other way of removing Wright's preference for empiricism — deferring to Commission rules only when they are justified by judicial practice — seems to abandon too many of the potential advantages of the Commission approach. Confining the Commission to

24. It will often be true that the same sentence will be justifiable in a case on both consequentialist and deontological grounds. For example, the retributive notion that punishment in the absence of fault is unjust might also be defended in deterrent terms. Our highest deterrent yield results from spending our punishment dollars on those who cause harm through fault, for those contemplating causing harm are the persons most susceptible to influence through the threat of punishment.

25. The courts would not completely surrender their power to set the agenda, however. Even without an explicit Commission rule to spur debate, a court might act as something of an agenda-setter simply through the act of departure.

rules reflecting judicial practice would vest more sentencing power in courts than under a system of deference to all manner of justifications. First, it would deprive the Commission of the ability to set the judiciary's sentencing agenda, for a rule that could not be justified by reference to existing sentencing patterns would be nullified by Congress. Second, it would eliminate the risk that judicial inertia would permit a Commission's value choices to become law without sufficient scrutiny. But the ability of an agency devoted to the study of sentencing issues to identify issues needing attention by the courts strikes me as a strength of the Commission approach. And if courts are unwilling to accept the Commission's invitation to study vexing sentencing problems — if inertia is indeed a risk — then I suspect empowering the Commission is the only means likely to result in improvements in sentencing.

I do not take the courts' reluctance thus far to depart from the guidelines as strong evidence that the courts are unwilling to play a role in creating sentencing policy. I suspect, instead, that courts simply need to heed one of Wright's most important messages — in the war on sentencing disparity, departures are not acts of cowardice.[26]

I wish to emphasize one additional point. The option of deferring even to nonempirically justified rules does not dictate deferring to rules for which the Commission offers no justification at all. I agree with Wright that the Commission owes us something more than *ipse dixit* when it promulgates a rule that does not purport to rest on past judicial practice.[27] I find attractive Wright's conclusion that the statutory right of courts to depart in cases in which the Commission has not adequately considered a relevant factor supports requiring the Commission to offer some explanation for its guidelines, much as the Administrative Procedure Act precludes "arbitrary" and "capricious" actions by the agencies to which it applies — a requirement that courts have read as requiring agencies to provide reasons for their actions.

I simply think we should remain open to guidelines supported by nonempirical justifications. These justifications will take different forms from the justifications available to consequentialist theorists. A retributivist who cites "some good end" that derives from punishment is subject to the criticism that he is actually just a consequentialist.[28] At the very least, however, we can expect the retributivist to identify his premises (e.g., with respect to the hypothesized age guideline, that youth is really not relevant to an actor's culpability,

26. *See* Wright, *supra* note 3, at 67-69.
27. *Id.* at 69.
28. Hugo A. Bedau, *Retribution and the Theory of Punishment*, 75 J. PHIL. 601 (1978).

or that guideline penalties already have been set with the young offender in mind, simply giving a punishment break to older offenders, or [to argue the other way] that youth, in fact, is a substantial factor in assessing culpability) and to suggest why those premises are consistent with positions taken in other guidelines. Such explanations would facilitate reasoned debate of the guidelines.