

“Punished As a Court-Martial May Direct”¹: Making Meaningful Sentence Requests

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[U]nsupported arguments for a lopsided result are neither persuasive nor helpful . . . and result in counsel wasting the opportunity to meaningfully influence [an] appropriate sentence.²

I. Introduction

Do you struggle to identify a good reason for the specific sentence you want to request? Have you requested the sentencing authority adjudge a specific sentence without knowing yourself whether it was the “right” sentence? Have you given up on the idea that there is a logical connection between the crimes and a certain period of incarceration? The answers to these rhetorical questions are highlighted in the following excerpts taken from sentencing arguments of trial and defense counsel in actual courts-martial.³

Trial Counsel Arguments:

“The accused needs to go to jail for at least twenty-eight years. He is twenty-two years old right now. He will be fifty when he gets out.”

“Eighteen years in confinement will allow the victim to recover, deal with what’s been done to her, enter adulthood, and possibly have a family of her own, without the worry of the accused being free before she sees her thirtieth birthday.”

“Your Honor, you should add up the minor victims’ ages and make the accused serve confinement for that long.”

Defense Counsel Arguments:

“Return a sentence not as excessive and overreaching as the government suggests, but one that fits with what you’ve seen.”

“The accused needs to be with his family. Years in prison will only mean that he may never see them again. They need him. Any double digit number is going to be too much.”

“Give him a dishonorable discharge but only give him twenty years confinement—ten years for each victim.”

As demonstrated by these examples, court-martial practitioners struggle to formulate reasons that support the specific sentences they request. Too often, their arguments for specific sentences are illogical, meaningless, and unhelpful to the sentencing authority.⁴ If this is true for a military judge who has the experience to know the sentencing ballpark, imagine the impact of such unreasoned arguments on a court-martial panel. Major General George S. Prugh, former Judge Advocate General of the Army, addressed this: “The initial sentencers . . . are not told what the purpose of the sentence is; they are not told what should be their goal. They are . . . generally left to their own devices to fit the pieces together in one intelligible sentence.”⁵ This is not a good way to make, arguably, the most important decision in a Soldier’s life. However, practitioners can remedy this deficiency through professional development and a logical, empirical methodology to litigating sentencing theory. This article encourages the former and offers an example of the latter. First, this article will present an overview of civilian and military sentencing philosophy; then it will offer a method for litigating sentencing theory.

II. Overview of Sentencing Philosophy

To understand sentencing theory is to ask why we punish. There is no one answer, and various theories have experienced zeniths and nadirs in popularity over time. This section will first recount the various theories as they came into and out of sentencing vogue and then address sentencing theory in the military.

A. Sentencing Philosophy Generally

Modern sentencing philosophy began at the turn of the nineteenth century in the writings of Immanuel Kant and G.W.F. Hegel. They focused on retribution,⁶ but only retribution that restored the criminal to his status quo ante. Both Kant and Hegel believed in individual autonomy and that the infliction of harm on the individual via punishment

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¹ Every punitive article of the Uniform Code of Military Justice includes this language, except Articles 106 (Spies—“shall be punished by death”) and 134 (General article—“punished at the discretion of that court”). See 10 U.S.C. § 870 et seq. (2015).

² Jody Russelburg, Major, U.S. Army, *Sentence Arguments: A View from the Bench*, ARMY LAW. 50-51 (March 1986).

³ Publication of these paraphrased arguments is not meant to belittle the counsel but is offered to teach others.

⁴ The author willingly admits that he made similar arguments as a trial practitioner. As a military judge, he has listened to a few exceptional sentencing arguments that displayed much of the methodology offered in Section III.B. of this article.

⁵ George S. Prugh, Major General (U.S. Army), ARMY LAW. 1, 4 (December 1974).

⁶ See IMMANUEL KANT, *The Penal Law and the Law of Pardon*, in THE METAPHYSICAL ELEMENTS OF JUSTICE, § I (John Ladd trans., Bobbs-Merrill 1965) (1798); G.W.F. HEGEL, *Wrong [Das Unrecht]*, in ELEMENTS OF THE PHILOSOPHY OF RIGHT, § 101 (Allen W. Wood, ed., H.B. Nisbet trans., Cambridge University Press 1991) (1821).

was wrong unless it fortified individual autonomy. Kant stated that each individual who participates in the social compact wrongs himself as a beneficiary of the compact when he wrongs others.⁷ Punishment is just, therefore, because it is a physical manifestation of the wrong the individual has done to himself.⁸ Hegel saw punishment as the righting of a wrong, but only the wrong: “[A]n injury to the [will of the criminal] is the cancellation of the crime . . . and the restoration of right.”⁹ Both Kant and Hegel disclaimed any purpose of punishment that is utilitarian, i.e., punishment that serves some future purpose.¹⁰

In the 1820s, Jeremy Bentham challenged the retributivists by arguing for the principle of utility in sentencing. Bentham believed sentences should serve “the greatest happiness of all those whose interest is in question . . .”¹¹ Sentences, then, should serve the ends of “reformation” (i.e., rehabilitation) and “disablement” (i.e., incapacitation) of the wrongdoer; “pleasure or satisfaction to the party injured;” “coercion or restraint” (i.e., general deterrence); and “apprehension” (i.e., specific deterrence) in addition to “sufferance” (i.e., retribution).¹² Therefore, sentencing authorities should consider the wrongdoer’s intention and consciousness; issues of causation and material consequences; and the level of temptation inspired by the profit of the wrong and the quantum of pain required to outweigh that temptation.¹³

⁷ KANT, *supra* note 6, at § I.

⁸ *Id.*

⁹ HEGEL, *supra* note 6, at § 99.

¹⁰ Kant said, “a human being can never be manipulated merely as a means to the purposes of someone else . . .” KANT, *supra* note 6, at § I. Hegel dismissed specific deterrence stating that punishment could never claim to change a person’s disposition. HEGEL, *supra* note 6, at § 94.

¹¹ JEREMY BENTHAM, *The Utilitarian Theory of Punishment*, in AN INTRODUCTION TO PRINCIPLES OF MORALS AND LEGISLATION, Ch. I (J.H. Burns et al. eds., Athlone 1970) (1789).

¹² *Id.* at Ch. XIII, §§ 1 n.a., 4. Bentham also referred to “coercion or restraint” as “example.” *Id.*

¹³ *Id.*, at Ch. XII, paras. VI, XXIV, Ch. XIV, para. IX.

¹⁴ Retributivist theory exists almost in a vacuum because it does not consider the community or the offender’s individual characteristics in determining his blameworthiness. Utilitarian theory, on the other hand, permits unjust excesses: Excessive punishment for minor crime is permissible because the threat of punishment exceeds the temptation of gain from wrongdoing; and punishment of the innocent is permissible as long as it deters others.

¹⁵ Antony Duff, *Penance, Punishment, and the Limits of Community*, 5 PUNISHMENT & SOC’Y 295, 301 (2003). The wrongdoer must undergo “a burdensome penalty . . . to reconcile him with the community.” *Id.*

¹⁶ See, e.g., Tapio Lappi-Seppala, *Sentencing and Punishment in Finland: The Decline of the Repressive Ideal*, in SENTENCING AND SANCTIONS IN WESTERN COUNTRIES (Michael Tonry et al. eds., Oxford Univ. Press 2001).

¹⁷ See, e.g., Sheldon Glueck, *Principles of a Rational Penal Code*, in CRIME AND CORRECTION: SELECTED PAPERS, (Addison-Wesley Press

Both the retributivist and utilitarian approaches suffer, however, in that the former is under-inclusive and the latter overinclusive.¹⁴ Other philosophers attempted to refine both theories. Anthony Duff said retributive sentencing should be viewed as an opportunity for the wrongdoer to make moral reparations.¹⁵ The utilitarian Tapio Lappi-Seppala said general deterrence is only viable if the public knows the punishment for certain crimes and whether certain offender behavior could aggravate or mitigate that punishment and to what extent.¹⁶ Sheldon Glueck said that punishment should be a medicine to reform the wrongdoer.¹⁷

The rise of behavioral science pushed utilitarianism to the fore, and it maintained prominence in western sentencing until the 1970s.¹⁸ In the mid-1970s, however, the pendulum swung back toward retributivism and determinate sentencing;¹⁹ and in 1984, Congress passed the Sentencing Reform Act²⁰ to establish sentencing determinacy. While the federal courts experimented with the novel sentencing guidelines, new sentencing philosophies emerged in the 1990s. “Restorative justice” philosophers prioritized repairing harm over punishing offenders.²¹ Social theorists questioned the value of incarceration.²² The most prevalent, recent philosophy is a brand of mixed retribution-utilitarian theory,²³ which is reflected in the Federal Sentencing Guidelines. Current military sentencing philosophy is in

1952) (1927). Glueck proposed a quasi-judicial “treatment board” of doctors and psychiatrists to assess a criminal’s treatment needs and help the judge form a sentence that fulfills those needs. *Id.*

¹⁸ WHY PUNISH? HOW MUCH?, at 18 (Michael Tonry, ed., Oxford Univ. Press 2011).

¹⁹ See Glueck, *supra* note 17, at 20-21. Utilitarianism unsettled many because of its unpredictability, almost unbounded judicial discretion, the inability to appeal sentences because of a lack of sentencing rules by which to judge them, and the “moral appropriateness of attempting to coerce changes in human beings.” *Id.* at 21.

²⁰ 28 U.S.C. § 994 (2015).

²¹ John Braithwaite stated that as long as the offender takes part in the healing process, it matters not whether he “takes responsibility.” See, e.g., John Braithwaite, *In Search of Restorative Jurisprudence*, in RESTORATIVE JUSTICE AND THE LAW (Walgrave ed., Willan 2002). Lode Walgrave proposed a stakeholder mediation process where the victim, the offender, and others directly affected by the wrong would make a sentence recommendation to the judge. Lode Walgrave, *Restoration in Youth Justice*, CRIME AND JUSTICE: A REVIEW OF RESEARCH 31, pts. C, E (Michael Tonry et al. eds., Chicago Univ. Press 2004).

²² Some questioned whether poor minorities, which represent a majority of prison inmates, are truly members of the social compact (and thereby bound by its rules) in that they do not benefit from the compact. See *supra* note 18, at Ch. 25. Others questioned whether prison conditions should be made worse than poor minorities’ normal living conditions in order to maximize general deterrence. *Id.* at Ch. 26.

²³ For example, T.M. Scanlon added three “values” of punishment to retribution: affirmation of victims as respected citizens; punishing similarly situated offenders similarly; and deterrence. T.M. Scanlon, *Punishment and the Rule of Law*, in THE DIFFICULTY OF TOLERANCE: ESSAYS IN POLITICAL PHILOSOPHY (Cambridge Univ. Press 2003).

accord with this philosophy, but it took a different track to get there.

B. Sentencing Philosophy in Military Courts

While the civilian sentencing philosophy pendulum swung from retributive to utilitarian and back to center (mixed retributive-utilitarian), military sentencing philosophy progressed like building blocks.²⁴ Prior to World War I, military sentencing was still dominated by Kantian retributivism.²⁵ The sentence was based on the crimes and not on factors associated with utilitarianism.²⁶ The military did not officially incorporate utilitarianism until the publication of the 1917 Manual for Courts-Martial (MCM).²⁷ That Manual provided sentencing considerations for panel members: retribution, the interests of the service, and the individual characteristics of the accused.²⁸ Subsequent versions of the MCM added more utilitarian considerations.²⁹ In 1950, the new Uniform Code of Military Justice permitted panel members to consider more and different sentencing evidence.³⁰ Military appellate courts clearly embraced utilitarianism in a spate of 1950s-era decisions: protection of society, general deterrence, “denunciation,” and rehabilitation.³¹ Military sentencing philosophy never fully shed itself of retributivism, however. It merely added, albeit incrementally, utilitarian principles to a retributivist system.

Such a mixed system remains today, and military judges instruct court-martial panel members to consider rehabilitation, punishment, protection of society, preservation of good order and discipline in the military, and special and general deterrence.³² However, no guidance other than a one-sentence instruction—buried in a glut of instructional language—exists to help sentencing authorities craft just sentences. If trial practitioners employ a logic-based, methodical approach to litigating sentencing theory, their arguments for specific sentences will be helpful and meaningful and rein in the sentencing authority’s almost unbounded discretion.

²⁴ For a more thorough look at military sentencing history, see Denise K. Vowell, Captain (U.S. Army), *To Determine an Appropriate Sentence: Sentencing in the Military Justice System*, 114 MIL. L. REV. 87 (Fall 1986).

²⁵ *Id.* at 109.

²⁶ *Id.*; see also, W. WINTHROP, *MILITARY LAW AND PRECEDENTS* 397 (2d ed. 1920). Such other factors were viewed as collateral to the crimes and therefore collateral to the sentence; their only relevance was to clemency. *Id.* at 396.

²⁷ See Vowell, *supra* note 24, at 113.

²⁸ *Id.* at 113-14 (quoting *MANUAL FOR COURTS-MARTIAL*, 1917, para. 342).

²⁹ The 1928 MCM directed panel members to consider the accused’s prior discharges to determine his character. *Id.* at 116-17. The 1949 MCM obliquely permitted consideration of rehabilitation, special and general

III. Litigating Sentencing Theory

Forget that specific sentence you think you want to request. Instead, determine how you are going to get there. To effectively litigate your sentencing theory, you must first ensure that your merits theme and your sentencing theory are cohesive and then present your sentencing theory methodically.

A. Selecting the Theory

Rather than working backward from a specific sentence you want to request and forcing the rest of your case to fit, work forward from your merits case to determine the specific sentence you should request.³³ The starting point for any sentence determination is the wrong itself—the wrong is what requires a sentence. What do the facts from the merits case say about the accused (is he a predator?; an opportunist?; a repeat offender?; a generally good person with one lapse in judgment?), good order and discipline (did the offenses cause an increase of indiscipline in the unit?; did the offenses adversely affect unit or individual readiness?), and the offenses themselves (how serious was each offense in comparison to the least and most serious versions of that offense?). The facts during the merits case tell a story—that story is your theme.

Take the case of an officer-in-charge, who, having no resident supervisors, maltreats and sexually assaults his subordinates over a significant course of time while threatening adverse administrative action if they report his wrongs. A prosecution theme might be “abuse-of-power.” In the case of a drill sergeant who has consensual sex with a trainee on the eve of the trainee’s graduation, thereby violating Army and command policies, a defense theme might be “lapse-in-judgment.” In either case, the theme points toward certain sentencing factors. In the former, the theme points to the sentencing factors of punishment, incapacitation, and good order and discipline. In the latter case, the theme points to rehabilitation and deterrence. These sentencing factors become your theory.³⁴ Developed in this manner, the

deterrence, and the need to preserve respect for the military justice system. *Id.* at 118.

³⁰ *Id.*

³¹ *Id.* at 122 and n.181 (citations omitted).

³² See U.S. DEP’T OF ARMY, PAM 27-9, *MILITARY JUDGES’ BENCHBOOK* para. 2-6-9 (1 Jan. 2010). See also, *United States v. McDonald*, 55 M.J. 173, 175 (C.A.A.F. 2001).

³³ “Merits case” refers to the facts surrounding the offenses whether litigated or in a stipulation of fact.

³⁴ Although the law “recognizes” five principle theories of sentencing, a sentencing authority is not required to apply all of them to a given case. “One interest may be accepted by the sentencer as the dominant interest to be best satisfied by the sentence adjudged.” Russelburg, *supra* note 3, at 51.

theme and theory are cohesive; one logically leads to the other.

Once the facts determine the theme and the theme determines the theory, you must refine your theory. If multiple sentencing factors are applicable, will presentation of all of them support your sentence request or dilute it? For example, in the abuse-of-power case, does incapacitation really help the government's argument for confinement? If the fear is that the accused will harm others if left in a position of authority, the appropriate remedy is to remove his authority (dismissal from the service would accomplish this) so confinement would not be necessary. However, if the real goal is to exact retribution on the accused for the sake of society and the victims, the government should rely on the sentencing factor of punishment (which supports both confinement and dismissal); adding incapacitation will likely detract from the case (unless articulated as supporting a dismissal). On the other hand, the lapse-in-judgment case described above may dictate the defense argue both rehabilitation and deterrence—there is no need to reform a good person who makes a small mistake, the accused has already been deterred by the court-martial process and the conviction, and any general deterrence should be slight given the lack of harm. After refining the sentencing theory, the counsel must present it to the sentencing authority.

B. Presenting the Theory

The presentation of the sentencing theory should show the logical connection between merits and presentencing facts (the what), sentencing theory (the why), and the requested sentence (the how).

1. Empirically Support the Theory

The first step is determining what additional presentencing facts are necessary to support the theory. The presentencing evidence should supplement the merits case rather than establish a separate set of facts. In other words, the presentencing evidence should feed into the sentencing theory. Some presentencing facts will be important to the theory and others less so. The method of presenting each (a letter versus an affidavit versus a phone call versus in-person testimony) should reflect its relative importance to the theory.

As a military judge astutely noted nearly three decades ago, “an accused who has just been convicted of rape and murder is not likely to benefit significantly from the fact that he has always had highly polished boots and a neat haircut.”³⁵

³⁵ Russelburg, *supra* note 3, at 51.

³⁶ HYMAN GROSS, A THEORY OF CRIMINAL JUSTICE, 400-01 (Oxford Univ. Press 1979).

³⁷ Criminologist John Braithwaite noted that the core restorative justice intuition is that because crime hurts, justice should heal. See Braithwaite, *supra* note 21.

More to the point, such evidence may not reinforce the selected sentencing theory. Perhaps that evidence is best presented by a letter enclosed in the accused's “good Soldier book.”

2. Articulate the Theory

The second step is to articulate the theory to the sentencing authority. First, transition from theme to theory. Demonstrate how the merits case demands consideration of the particular sentencing theory. Second, describe the sentencing theory. Get beyond the maxim and explain the theory. Waxing eloquent about Bentham or Hegel likely will not help, but explaining to the sentencing authority what the sentencing theory aims to achieve will.

For example, retribution is not simply about vengeance; rather, it is a balancing of scales, giving the offender what he deserves so he can be made right, and preventing “the dissipation of [the laws'] power that would result if they were violated with impunity.”³⁶ Good order and discipline is not just about general deterrence; it is also about maintaining readiness, ensuring the validity of the military disciplinary system, and demonstrating that the military is responsible to the law. Rehabilitation is more than the accused's aphoristic “potential to be returned to a useful place in society”; it is about realizing a society where citizens depend on and trust each other to maximize each person's benefit to the social compact—the sentencing authority can create one more or one less taxpayer with a job that helps other people. Incorporating short but cogent quotes from philosophical writings that capture the essence of the various theories can be helpful to the sentencing authority.

Finally, after describing the selected theory, undermine your opponent's theory. Know what theory opposing counsel is likely to select, understand that theory as well as your own, and explain why it is not applicable. If your theory is rehabilitation and your opponent's theory is retribution, ask the sentencing authority whether it is more consistent with human dignity to “wreak vengeance” or to heal³⁷ and whether it is more helpful to society to punish or to build constructive societal partners. If your opponent argues that the accused need not be rehabilitated because he knows his wrong and apologized to his victims, argue that “[b]eing remorseful, by itself, is not atonement . . .” and that an insistence on “mitigation for remorse is to undercut the sincerity of the remorse itself.”³⁸ In explaining why your sentencing theory is the better fit, direct the sentencing authority's attention back to the merits and presentencing facts that support the theory (reinforcing the theme-theory cohesion). Once you

³⁸ Paul H. Robinson, *The Virtues of Restorative Processes, the Vices of 'Restorative Justice'*, 2003 UTAH L. REV. 375, 382 (2003). Robinson said that “the punishment discount for remorse will always be a pleasant surprise to the truly remorseful.” *Id.* at 383 n.20.

place the sentencing theory firmly in the sentencing authority's mind, you must draw the link between the theory and a particular sentence.

3. Identify Appropriate Types of Punishment

The third step in presenting the theory is determining which types of punishment are appropriate based on the identified theory. This depends on whether your theory is retributivist or utilitarian. For example, is it appropriate to consider confinement? Incapacitation does not always mean confinement; for purely military offenses, incapacitation could mean taking away the accused's ability to impact the military (i.e., a discharge). For specific and general deterrence, how can you measure what level of punishment will deter? Certainly confinement can deter; the better question, however, is whether a sentence can deter without confinement. If the answer is yes, confinement is not appropriate for deterrence.³⁹ Does retribution demand confinement? Taking a Kantian view of retribution, confinement will only be appropriate if the accused deprives someone of their liberty.⁴⁰ This is a difficult principle to employ: Does the accused deprive anyone of their liberty by stealing \$50,000 of Basic Allowance for Housing?; sexually assaulting a sleeping or unconscious victim?; or using controlled substances? These questions must be asked because the only purpose of retribution is to right the wrong. Utilitarian principles might approve of confinement to serve some other purpose, but retribution does not.

To illustrate this, consider the abuse-of-power and lapse-in-judgment cases, above. In the abuse-of-power case, the sentencing theory is retribution. Did the accused deprive his subordinates of their liberty by assaulting and mistreating them such that he should also suffer deprivation of liberty? Although difficult, the argument is not impossible. While assaulting them, the accused "confined" them for the period of his assaults; they were not free to go about their duties or enjoy the safety of the laws by which they were abiding; and they were subject to his orders and could not exercise their freedoms for fear that he would deprive them of their livelihoods. On the other hand, in the lapse-in-judgment case the government's sentencing theory is likely deterrence, a utilitarian principle. The argument for confinement is easier, because its purpose is to convince others who are similarly situated not to engage in the same misconduct. The difficulty for the government, however, will be explaining the need for this message and that some lesser sentence than confinement will not serve that end.

³⁹ See BENTHAM, *supra* note 11, at Ch. XIV, pt. XIII ("punishment ought [not] be more than what is necessary").

⁴⁰ See KANT, *supra* note 7, at § 1 ("underserved evil that you inflict on someone else is one that you do to yourself").

⁴¹ See, e.g., ROBERT A. FERGUSON, *INFERNO*, 14 (Harvard Univ. Press 2014) ("The basis of a sentence ... exists not in the number of years assigned, but in what that number means in relation to ... years in prison for more serious crimes"). Given that a court-martial panel is not instructed on

4. Determine the Sentence Range

The fourth step in presenting the sentencing theory is to identify the range of appropriate punishment for each offense and for all offenses taken together. It is difficult to determine where a sentence falls in the range of no punishment to the maximum punishment authorized. First, determine how serious each offense is in relation to other possible factual permutations of that same offense. Did the accused smoke one marijuana cigarette on Friday night, smoke five marijuana cigars the night before a helicopter preflight check, sniff cocaine inducing bleeding from the nose, inject heroin while pregnant, or jump off a second-story balcony in a crystal methamphetamine-induced psychotic state? In a sexual assault case, did the accused engage in digital, oral, or penile penetration? Was the victim unconscious? Did he violently subdue her? Determining gradations of seriousness within each offense can help narrow the range of appropriate punishment.⁴¹

Second, determine how the various offenses interact. Are there separate sentencing goals for each offense? Did the accused inflict disparate harms or violate separate and distinct societal norms? Do the offenses reflect essentially one transaction even though there may be multiple victims, multiple harms to one victim, or multiple offenses over a course of time (regardless of whether the military judge finds an unreasonable multiplication of charges⁴²)? The answers dictate whether the separate offenses should be treated separately—and therefore whether the range of punishment should be increased. The sentencing theory matters here as well. In retributivist philosophy, each wrong must be righted and determining the number of wrongs affects the punishment range. In utilitarian philosophy, the number of wrongs is less important. If the accused had a single criminal impulse but committed several crimes, should he suffer more pain to deter him from future misconduct than if that single impulse had resulted in only one crime? Do multiple crimes demonstrate that the accused is less susceptible to reformation than if he had committed one crime? If the answer to these questions is no, then aggregating punishment for different offenses does not serve the end of that sentencing principle.

This punishment range is only the starting point. Although Kant and Hegel would end the inquiry there, modern retributivists recognize that other factors influence the "value" or seriousness of the crime. Joel Feinberg states that in determining the "moral gravity" of the crime, the

the maximum punishment for each offense, counsel can only articulate these gradations in the abstract. Counsel should not give a court-martial panel the impression that it may do other than return a single, specific sentence.

⁴² See RULE FOR COURTS-MARTIAL 906(b)(12), MANUAL FOR COURTS-MARTIAL (2012); *United States v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001).

offender's motive is important.⁴³ Therefore, an accused's specific intent or benign motive could shift the appropriate sentence upward or downward within the punishment range. Herbert Morris implores consideration of "different degrees of fault."⁴⁴ Jeffrey Murphy might agree that an accused who has begun paying his debt has reduced that debt, and his punishment should be commensurately reduced.⁴⁵ Non-retributivist philosophers have offered other measurements for determining the value of crimes. Some argue that, because retribution is aimed primarily at the offender, the offender's background and social susceptibility to crime must be considered.⁴⁶ Therefore, those at the lower end of the socio-economic spectrum should be punished less because they have benefited less from the social compact. Others encourage sentencing authorities to consider issues of causation.⁴⁷ Whether the accused's act was the sole, or a contributing, cause of harm impacts the "materiality" of the wrong and could increase or decrease the sentence. The selected sentencing theory should determine the availability of these adjustments. Moreover, counsel should explain why the sentencing theory permits such adjustments in order to sustain the logic of the sentence request.⁴⁸

IV. Conclusion

Sentencing arguments often seem to be an afterthought, and requests for specific sentences are woefully devoid of any connection to facts or logic. When counsel request a sentence that appears to be a "randomly selected result" rather than a "carefully considered conclusion,"⁴⁹ counsel are merely dumping the considerable burden of sentence determination on the sentencing authority. In doing so, they are not helping their clients. The counsel who helps the sentencing authority understand why the facts dictate a particular result is the counsel who shapes the sentence to benefit her client. Major General Prugh noted, "[F]ar too little attention has been paid to the *reasons* underlying [argued for] sentences. We should ask ourselves the question, 'What are we trying to have the sentence achieve?'"⁵⁰ More importantly, counsel should effectively litigate sentencing theory that explains what the sentence should seek to achieve. Practitioners best accomplish this by expanding their professional development programs to include writings on sentencing philosophy and by taking a forward-looking, logical approach to requesting a specific sentence.

⁴³ Joel Feinberg, *The Expressive Function of Punishment*, THE MONIST 49(3): 397, 422 (1965).

⁴⁴ Herbert Morris, *A Paternalistic Theory of Punishment*, AMERICAN PHILOSOPHICAL QUARTERLY 18(4): 263, 266 (1981).

⁴⁵ Jeffrey Murphy, *Marxism and Retribution*, PHILOSOPHY AND PUBLIC AFFAIRS 2: 217, 228 (1973).

⁴⁶ See, e.g., Michael Tonry, *supra* note 19, at 217-18; Lappi-Seppala, *supra* note 17.

⁴⁷ BENTHAM, *supra* note 11, at Ch. XII, pt. XXIV.

⁴⁸ NB: Counsel should not give the sentencing authority the impression that it may return a sentence of a range of punishment (e.g., "to be confined for one to two years").

⁴⁹ Russelburg, *supra* note 3, at 51.

⁵⁰ Prugh, *supra* note 6, at 1.