

Post-Drug War Sentencing

What is the purpose of punishment?

Recent developments in the social and cultural opinions on certain drugs demand a change in the way the criminal justice system handles drug charges, both past and present. One major problem faced by the criminal justice system in a time of legalization of certain drugs is what to do with the sentences handed down before the drug was de-criminalized.

The answer to this problem greatly depends on what society deems to be the purpose of criminal punishment. For example, if a person should go to jail because he broke the law, then there should be no retroactive application of change in the law. The person broke the law at the time even if doing the same activity now would not warrant the same punishment. The argument is that society decides what is and is not illegal behavior and the person chose to break society's laws. Regardless of how society now views that behavior, a wrong was still done in the willingness of that person to disregard the laws of the land. Therefore, if restitution is the basis of punishment, then the people who violated the law should remain in jail for as long as their original sentence mandated. They violated the laws of society and should suffer the consequences. However, even a restitution basis for punishment would call for the retroactive application of a change in the law in the case of unjust laws. If the law was unjust or unjustly applied, the original harm to society is not so great that the convicted person should have to serve the rest of his sentence. The law that he chose to break was not a law that society ever deemed appropriate to enforce because its very enforcement went against the values that society held even at the time the person was sentenced. Therefore, even the theory of punishment most favorable to the continued enforcement of the original sentence has room for changing the sentence as the law changes.

If the purpose of punishment is merely to incapacitate someone who has behaved in a particular way society deems to be wrong, then it makes sense that once society's view of that behavior changes, the person's sentence should also change. A deterrence model also leans in favor of a retroactive

application of new sentencing laws. The punishment no longer matches the crime. Continuing to punish someone in a way that is no longer seen as an appropriate punishment does not deter anyone. In fact, the person currently serving time in jail may feel that maintaining the original sentence is so unfair that its continuation would actually have the opposite effect.

Certainly, rehabilitation as a basis for punishment would call for the retroactive application of changes in sentencing laws. Rehabilitation seeks to show the person the error of his ways and encourage him to behave differently in the future. Once society says that his behavior is not something that needs to change, the punishment is not going to serve its intended purpose.

How do the theories of punishment apply to changing drug laws?

With the exception of restitution, the theories of punishment call for the retroactive application of changes in the law. All of the theories of punishment seek to gain something through the sentence, whether it is deterrence, rehabilitation, incapacitation, or just making society or a victim feel better. However, once a law changes and society feels that there is nothing to be gained from the punishment, that punishment should be ended. If the very reason a person was sentenced to jail is no longer a valid reason to send someone to jail then it only makes sense to free those still being punished. Additionally, it is a waste of resources to punish someone for something that is no longer illegal. The price that society has to pay when a person is sent to jail is high, both directly economically and non-economically. It costs money to keep someone housed, clothed, and fed in jail. However, it also costs society at large when families are broken apart because a provider or parental figure is in jail. Overall, it hurts society to continue to punish someone for something that society no longer feels is punishable.

Though the theories of punishment call for sentencing reforms to be applied retroactively, it does not seem that they call for restitution to be paid to those who served jail time. Society's opinions about drugs have changed, but not in such a way that it deems the laws to have been unjust. The convicted person still broke society's laws and the time they spent in jail was deemed appropriate at one point. Just as the convict should not be punished when not necessary, neither should society.

Over the course of multiple class sessions, our class attempted to tackle the challenge of sentencing reform. The exercise provided an experience of what real legislative challenges exist. Outward pressures influenced the decisions of the participants in addition to the personal beliefs. The end result was truly a proposal that almost no one actually wanted.

Many individuals prior to this exercise have expressed disgust and discontent with minimum mandatory sentences. These sentences contribute to the current overcrowding of our prisons. These sentences largely grew out of tough on drug schemes often times allowing individuals with small amounts of drugs to receive no sympathetic discretion from the judge. However, when our class was attempting to agree to a proposal we quickly conceded to a mandatory minimum sentencing scheme. While the mandatory minimum sentences we agreed to were much lower than those initially proposed, we still took away the discretion of the judge.

Why did so many people agree to a proposal they did not agree to? There were many issues factoring into this compromise. Self interests took front stage in this compromise. Everyone in the room wanted to finish as quickly as possible in order for them to leave. We valued our early dismissal over our principals and a proposal we felt would never apply to ourselves. Additionally, while each individual may have strongly held beliefs on sentencing reform they can often be opposing values. Some individuals would likely not agree to a proposal without mandatory minimum, thus it was the job of individuals opposed to mandatory minimums to ensure those low end sentences are more palatable than they were at the beginning.

Unique problem of various offenses cannot be solved by a uniform punishment system. Offenders of addiction offenses will not likely be reformed by being locked in a cell. If our goal through the punishment process is to rehabilitate wayward citizens into law abiding contributing members of society, then a more individual approach to sentencing must be applied. In order for

such a sentencing scheme to exist, judges should be provided with more discretion. However, I will readily admit that judges have broad discretion could lead to disparate sentences across racial, gender, and other lines.

This exercise further disillusioned me to the problems that will continue to plague the legislative process. If we are so willing to sacrifice our beliefs in order to improve our own self interests, then our system will not be fixed anytime soon. The only way to fix this system is to continue challenging our current system until a better one emerges.

Inappropriate Mitigating Factors

The Sentencing Reform Act (SRA) and many state sentencing guidelines prevent judges from considering certain characteristics of the offender in imposing a sentence on that offender. These characteristics include the race, gender, national origin or ethnicity, and the socioeconomic status of the offender. Sentencing reforms and guidelines generally aim to eliminate disparity and discrimination in sentencing based on these characteristics. Though not allowing a judge to consider an offender's race, gender and socioeconomic status seems like it would reduce some disparity based on these characteristics, it is nearly impossible to actually prevent a judge from considering these characteristics and influencing his or her sentencing decision. It is interesting that the SRA calls for guidelines which are neutral as to the socioeconomic status of an offender when it tasks the U.S. Sentencing Commission with deciding how an offender's education, employment record and vocational skills –three characteristics that are closely tied with socio-economic status- should affect sentencing. 28 USC §994. If a judge follows sentencing guidelines and considers an offender's limited education and vocational skills in determining that it would take longer to rehabilitate the offender into a productive member of society, is the judge not really examining the person's current and future socioeconomic status? This section of the SRA calls for guidelines and policy statements discouraging the use of characteristics such as a person's education, employment record, vocational skills, and family and community ties but still allows the Commission to decide how judges are to use these factors in determining a sentence. It seems that guidelines that follow these specifications would still lead to sentencing decisions being influenced by the forbidden characteristics and disparity based on these characteristics.

Race and gender are such offender characteristics where there is great and noticeable disparity in sentencing. For instance, women are twice as likely to avoid incarceration when convicted as men and on average, receive 63% shorter sentences than men when sentenced to imprisonment. Starr, Sonja B., "Estimating Gender Disparities in Federal Criminal Cases," (August 29, 2012). Despite sentencing guidelines and policies which are formally neutral on gender and judges knowing that gender discrimination is illegal, we still see such disparities. Gender perhaps should be considered in deciding how long it would take to rehabilitate someone or how severely they should be punished, especially since gender is linked to child rearing where

society favors and emphasizes children being with their mothers rather than fathers. Women generally have more family responsibilities that may warrant more lenient sentences. Further, the federal sentencing guidelines call for a judge to consider a convict's role in the offense when sentencing and women generally play smaller, supportive roles in committing serious crimes. Thus, considering a female offender's role in a crime may act as a proxy for considering her gender anyway.

While gender perhaps should not be a forbidden factor in sentencing decisions, the socio-economic status of an offender should definitely be considered in sentencing decisions. Forbidding consideration of the low socioeconomic status of an offender would prevent a judge from understanding the necessity of the offender committing the crime, especially if the crime resulted in financial gain (such as theft, robbery, embezzlement, etc.). If a person commits a crime in order to survive, should they not receive a lower sentence in order to get back on the path to survival? Perhaps judges should not consider anything about an offender except his or her criminal history when making sentencing decision. I think this would probably lessen the disparity based on unacceptable characteristics of a convict such as race, national origin, and gender but will do little for implicit and unconscious biases that still contribute to such disparity. Overall, this section of the SRA seems like it would result in reduced disparity and discrimination along racial, ethnic, gender and socio-economic lines, but also prevent judges from considering these characteristics as mitigating factors that would result in more lenient sentences from offenders exhibiting them.

In instructing the Sentencing Commission to consider as generally inappropriate the relevance of certain offender characteristics and circumstances, while in tandem requiring neutrality regarding categories of offenders, Congress effectively convoluted and contradicted any retributive goals it may have had in mind, as well as efforts toward uniformity of offender treatment.

Congress should amend the Sentencing Reform Act (SRA) to better realize its neutrality goals by explicitly taking into account various indicators of socioeconomic status¹ as mitigating and aggravating factors. As written, the statute requires that guidelines and policy statements be neutral with regards to socioeconomic status, yet requires these documents to reflect the “general inappropriateness” of education, vocational skills, employment record, family ties and responsibilities, and community ties of defendant” in recommending a term—or length of a term—of imprisonment.² Congress included these exceptions with the goal of reducing unwanted disparities based upon improper considerations of “mitigating” factors—such as wealth, power, and education.³

In providing explicit instructions neutering the discretion of judges to take into account certain indicators of an offender’s character and circumstances, Congress paved the way for a sentencing structure that directly—albeit somewhat informally—circumvented this goal. Rather than curb the improper use of these factors, the provision increased offender’s use of more informal means to achieve the same goals. While oversimplifying the issue, examples include situations where judges can use their discretion in sentencing offenders who have more resources to higher one or more lawyers, are well-known in the community, or have been charged with white collar crimes.

In addition, the provision discouraged judges from adjusting or departing from the guidelines for less-fortunate offenders with circumstances and characteristics that would likely serve as mitigating factors but for this provision.⁴ These exclusions serve as—now advisory—barriers for judges to adequately consider aggravating and mitigating factors recognized as fundamental to proper determinations of culpability. Rather, “relevant” considerations are limited to those such as criminal history, substantial assistance, and acceptance of responsibility, each of which often plays directly into subverting neutrality of socioeconomic status, as well as other purportedly vital neutral factors at sentencing.⁵

A step in the right direction towards lessening unwanted disparity would amend §994(e) to provide that the general presence of these circumstances or characteristics in an offender’s life—perhaps above some relative level—would serve as aggravating factors at sentencing. Conversely, notable absences in one or more areas would serve

¹ Many of these factors may also operate as proxies for race, and thus indirectly contribute to racial as well as socioeconomic neutrality.

² 28 U.S.C. § 994(d)-(e) (1985).

³ See e.g. Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics in Modern Sentencing Reforms*, 58 Stan. L. Rev. 1, 279, 283 (2005).

⁴ DEMLEITNER ET AL., *SENTENCING LAW AND POLICY* 177–78, 436 (2013)

⁵ E.g. Demleitner et al., *supra* note 4, at 183 (finding the use of legally irrelevant factors such as gender, race, ethnicity, and citizenship in “statistically significant” substantial assistance departures); see also Berman, *supra* note 3, at 287.

as mitigating factors for sentencing purposes. The level culpability—the amount of “personal responsibility”—that we attach to an offender should be heightened for those with more power, education, financial resources, and the like, and vice versa. Rather than fear the broad import of these considerations on sentencing, Congress should instead welcome some an aspect of the federal guidelines that includes some semblance of actually addressing issues with racial and socioeconomic disparities. A careful, yet inclusive approach is needed to employ a more balanced regime that justly incorporates relevant offender characteristics in accordance with culpability and utilitarian goals.⁶

⁶ Demleitner et al., *supra* note 4, at 400.

Re: Offender Characteristics

After analyzing different options that would meet the mandate set forth by Congress in 28 U.S.C. §994, or the Sentencing Reform Act, (SRA) I have concluded that only criminal history of the offender should be considered by a judge when sentencing. This means that a judge is prohibited from considering age, education, vocational skills, mental and emotional condition, physical condition, including drug dependence, previous employment record, family ties and responsibilities, community ties, or any other characteristic of the offender.

By disregarding these other offender characteristics in sentencing, the mandate of Congress will be more likely to be upheld. The SRA maintains that this Commission “shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders. This goal can only be accomplished by limiting the discretion that judges have over how they sentence offenders.

If judges were allowed to consider family ties and responsibilities, it is likely that mothers will be punished less severely for their crime than other groups of people because of the strength of their responsibilities—this would not be race neutral. If judges were allowed to consider previous employment record, vocational skills, or education, the judge would have a fair guess at the socioeconomic status of the offender and may punish offenders from a lower socioeconomic class more harshly. If judges were allowed to consider community ties, it is likely that the judge would be able to discern the creed of the offender and may judge the offender less or more harshly based on that creed.

In order to keep the process neutral as to these statuses of offenders, we need to limit the discretion of judges in sentencing. It is human nature to be sympathetic to certain situations or groups of people but in order to maintain a fair system of justice we must ensure that this aspect of human nature does not invade the courtroom. By limiting the judge's consideration to only criminal history, we are aiming to prevent injustice and sentencing based on sympathy.

It is my opinion that a judge should be sentencing based on the severity of the offender's crime as compared to the ways that crime has been committed previously. The only offender characteristic that should be considered is the offender's criminal history. The criminal history of the offender is less likely to denote the offender's race, sex, national origin, creed, or socioeconomic status. Judges, then, are more likely to remain neutral with respect to these certain characteristics and thereby upheld Congress' mandate.

1985 Sentencing Guidelines

One of the most important characteristics about the sentencing guideline problem is that the year it is supposed to take place in is 1985. While understanding equality is still far from present in today's society, it is progress from where the gaps were in 1985. The factors the sentencing commission is to assure the guidelines are neutral on, "race, sex, national origin, creed and socioeconomic status" directly contradict with several of the eight factors listed for consideration above it. Specifically, inequalities, especially in 1985, would preclude the sentencing commission from including such factors such as education, vocational skills, previous employment record, and community ties in the final guidelines.

Education as a factor to consider could implicitly lead to sentencing decisions based on race. In 1986, the African American population only made up 5.8% of the Ivy League institutions and only 4.8% of the other prestigious higher education institution.¹ To decide punishment based on education - including higher education - could potentially increase the racial disparity that is already present in sentencing before the guidelines even are enacted. Therefore, higher education should not be a category which judges should take into account during sentencing determinations.

Education also would have a cross-over impact on several other categories as well, including vocational skills, employment and socio-economic status. A lack of education could be the cause for what a judge may see as a lack of vocational skills, and not the racial bias that may already be present in the subconscious minds of the sentencing judges.

However, in these considerations also lend themselves to inequities between males and females. The male population in 1985, (and today to a slightly lesser degree) made up a much

¹ David Karen, The Politics of Class, Race, and Gender: Access to Higher Education in the United States, 1960-1986, American Journal of Education, Feb. 1991, at 214.

larger percentage of the workforce compared to the females in the workforce.² In 1985, there were more than ten million more male workers than female workers in the United States.

Structuring guidelines that include vocational skills or employment history could contribute to bias based on sex and would be impermissible.

There is significant disparity on income between men and women as well which would affect their economic status before the court. In 1985, men made around \$14,000 (in 2009 dollars) more than women did in yearly income, or about 30% more.³ Income inequality also exists along the lines of race. In 1985, white persons averaged \$43,100 and African American persons median income was \$25,691.⁴

The differences in occupations, vocational skills, employment records and similar categories should not be considered by sentencing judges. The disparity that exists among those lines among issues of race, sex, and other factors would then be doubly counted against that person by a judge in making a sentencing determination. In the interest of fairness, it is my recommendation that these personal characteristics of the defendant should not be included in the sentencing guidelines presented to Congress. In 2015's society, these biases among race and sex still exist even if to a lesser degree. Therefore, even today these factors should not be put forth to congress to be included in the guidelines. Biased judges, given the chance to use these guidelines, will continue to give even more disparate sentences that only compound the sexism and racism that is already present in society that led to these differences in the first place.

² U.S. Census Bureau, Current Population Survey, 1968 to 2009 Annual Social and Economic Supplements <http://www.census.gov/prod/2010pubs/p60-238.pdf>

³ Id.

⁴ U.S. Bureau of the Census, Income, Poverty, and Health Insurance Coverage in the United States, 2007.

How Should Offender Characteristics Matter in Sentencing?

A fundamental disagreement seems to exist between the factors that a sentencing judge should be guided to consider when determining the “nature, extent, place of service, or other incidents of an appropriate sentence” and the factors deemed “generally inappropriate” for consideration when determining whether or not to impose a prison sentence and the sentence’s length. In particular, it appears to be rather odd that one is allowed to consider education and vocational skills for the first purpose but not the second. 12 U.S.C. §994 (d) and (e). Education and vocational skills have little relevance to a judge when it comes to sentencing under this current system. If a judge may only consider these factors with respect to the nature, extent, etc. of a sentence, but not when determining whether or not to impose a prison sentence and for what length, it is hard to see how these two factors are to be used at all.

It appears that these two duties of the sentencing judge are, from a plain language perspective, fundamentally at odds with one another. It is my understanding that the place of service for an offender is based on: (1) whether or not the offender was convicted of a felony, sending him or her to jail or prison; and (2) the severity of the crime, determining the security level of the facility. In addition, the nature of that sentence would then be set by the facility’s environment and services offered. All of these factors are out of the hands of the sentencing judge once he determines whether or not to send an offender to prison and for what length. At that time he would also set the extent and other incidents of an appropriate sentence, but these are tied to the decision of prison, jail, or probation and for what length. Therefore, with regards to the nature, extent, etc. of an individual’s sentence, his or her education and vocational training is likely only to be relevant in determining his or her job within the prison walls. An inmate’s ability to succeed at that job may in turn lead to favor with the guards, thereby affecting the nature, extent, etc. of the inmate’s sentence. This is not relevant or applicable, however, at the sentencing stage. Consequently, it appears that the use for which a judge may employ his knowledge regarding a defendant’s education and vocational training in sentencing is the exact use prohibited by this statute.

Read in context to the rest of the excerpted section, it appears that Congress wanted to eliminate any unfair treatment that might be dispensed upon those individuals lacking education, but this goes against the general view of society when it comes to criminals. Perhaps times have changed since this section was drafted, or perhaps I am completely missing the purpose of this

section, but society expects those with little education and training to be the ones committing the bulk of crime. Therefore, mistreatment would not occur in these cases because a judge will expect to see a lack of education and vocational training.

On the other hand, one could argue that this section was really meant to protect the well-educated. This could be true, but is this fair? A common phrase comes to mind here: to whom much is given, much is expected. Those who have had the opportunity to attend school or have vocational training have been provided many more opportunities to live a life without crime than those without these opportunities. They have, at least theoretically, been given tools which should help them succeed to a point where a life of economic crime is not necessary. With regards to violent offenses, it is true that anger, misfortune, and temporary bad judgment overtake us all at some point. However, those who have been provided with education and vocational training have been immersed in a learning environment which tends to teach not only the particular knowledge or trade of that institution but also responsibility and societal norms. So, it could be argued that these individuals should be held to a higher standard of responsibility and moral culpability than those without these opportunities.

As a result, this section can be seen as a continuing failure on the part of society to recognize its failure to meet the educational and training needs of an underserved population. Instead, society continues to punish these individuals without then giving them the tools to improve their lives, all the while failing to hold the more fortunate fully accountable for their actions. The statute also prohibits a sentencing judge from considering the socio-economic status of an offender, but this is generally fundamentally tied to an offender's education and vocational training. Therefore, the statute appears to allow a sentencing judge to use education and vocational skills in a way that aids the more fortunate but continues to punish those who have not had the same opportunities.

Education and vocational skills should matter in sentencing, but it should matter differently for different people. Those who have not had the opportunity to obtain an education and vocational skills should be held less culpable and in turn be given those opportunities during their sentence. This will be determined by the prisons themselves though, not the sentencing judge.

Offenders and their criminal background

I think that offenders' criminal records should be used in sentencing. Every crime is different and every offender is different. I understand the argument that maybe it should not play a role because then crimes that are almost the same have the opportunity to be sentenced differently, but that is not the system we have. Mandatory sentencing would throw everything out of whack.

I work for a prosecutor's office so one of the first things that happens when we get a file is the criminal record gets requested. For starters that is a tool for prosecutors. They can see, laid out nicely for them, whether this person has ever committed this specific crime before, which would lead to the belief that if they keep doing it they will continue to do it once they are out the next time. This record also shows whether maybe the person should be sent to a program, upstairs to diversion instead of trying the case or pushing for jail time.

Furthermore, it tells an important part of the offender's crime. Sentencing happens after the trial, and the jury is not making the decision it is solely the judge. Would offender not want the judge to know if he has little to no record? Otherwise if his rap sheet is as long as I am tall then he likely knows that he is going to jail for a while and he should maybe stop committing crimes.

We have consciously decided that the same rules of evidence do not apply to sentencing as they do to trial and that has worked for this long, why change it? The criminal record offers a complete picture of who this offender is, and that enables the judge to more fairly make a decision. Otherwise I think it would only be fair to limit more what the offender could offer as evidence as to why he should be sentenced more lenient. Should the offender be allowed to say

he has a four year old daughter who needs her father in her life, and he has a job, and a drug problem and needs help not jail? If this were the road we were to go down a sentencing hearing would not even be necessary because the only facts a judge would be able to consider would be what was offered at trial. While I do not think that is the craziest thing I have ever heard, I do not like it. It is not good for the offender nor the judge, nor society. A person who was in the wrong place at the wrong time, someone who is a good person, lets say someone who was in a car accident, and someone dies, vehicular homicide or some equally heinous crime. Should that person be sentenced the exact same as someone who did it on purpose? A jury can decide given the facts that they are the same crime, but a judge can decide to be more lenient towards the accident.

All crimes are not equal and all offenders are not the same. I think that the criminal record is an important piece to the sentence that is doled out. Sure there is disparity, I am not arguing for it, and I am not naïve enough to see that minorities are treated worse, but then we should be looking at the judges we are electing. There are bigger problems at fault, and entering a criminal record at sentencing is not where we should be looking. How about *not* electing judges? I think that would be a fun idea.

I am interested in learning more about mandatory minimum sentences, consecutive versus concurrent sentencing, the bindover process, and blended sentencing. These sentencing issues subject individuals to increasingly long punishments. Specifically, I am curious about when mandatory minimum sentences began to become so popular, and possibly their effect on the current issue with prison overcrowding.

Additionally, I am very interested in the sentencing process of the juvenile court systems. Particularly, when the juvenile is subject to adult punishments for offenses committed while under the age of 18. There seems to be significant differences between the juvenile court systems, and especially bindover processes between states. Things I assumed to be uniform, such as being a juvenile meaning under the age of 18, is not consistent between the states. The bindover process seems contrary to the interests of the juvenile court system's preference for rehabilitation. Additionally, having mandatory and discretionary bindover leaves a substantial portion of juvenile offenders subject to vastly different punishment schemes than those youths retained in the juvenile court system.

I am also interested in the legality of blended sentences. The ability to apply two sentences in different court systems for the same offense to me is unconscionable. While I understand that the individual might not be forced to serve both sentences, but this notion is not realistic. The idea that an individual is capable of completing any incarceration term without violating even a small rule is incompatible with the realities of prison life. I would like to learn how they were developed and their legal challenges.

While I understand the remaining time in this course is not conducive to covering all these issues, I just wanted to express my interest in these issues. The development of these issues seems to show a trend of harder punishments that is linked to the increasing portion of

Americans incarcerated in our prison system. If we could adopt a prison system more closely related to that of ones like Norway's Halden rather than United States Penitentiary Administrative Maximum Facility (ADX), perhaps we could help our prisoners to rebuild their lives. Focusing on rehabilitation versus the cruelty of places like ADX, would allow millions of Americans to return to their families and contribute to our society. I am unapologetically optimistic that reforming our sentencing system will help all American citizens and improve our international reputation.

Given the prison overpopulation problem facing the United States, and the fact that baby steps are the only clear route to ever changing this ever growing issue, the positive aspects of the Recidivism Reduction and Public Safety Act make it one of the best bets to provide real reform with regards to sentencing law in this country.

When it comes to tackling the issues involved with prison overpopulation, education is key. The programs within the Act make helping inmates to become better members of society a priority, and will also help to serve the interests of GOP legislators who often focus on cost cutting with regards to sentencing reform. As we read in the NYT editorial about the “Roadblock to Sentencing Reform,” there are those who will always find problems with baby steps with regards to reforming the current laws. But building on the most effective practices of states that have seen a reduction in recidivism while cutting costs is the one of the most effective ways to gain bipartisan support for the Act. Huge changes without the evidence to back it up are likely to end in failure.

Several provisions of the Recidivism Reduction and Public Safety Act are estimated to save as much as \$275 million. Those kinds of cost cutting numbers are needed to gain support from Republicans. We’re not going to find passable bills with estimated savings of billions and billions of dollars, because bills with goals that ambitious are not likely to be based off of real results from states like this Act is. This Act focuses on the tangible success of states like Rhode Island, which have shown that the debate does not need to devolve into prison costs versus community protection. By giving inmates the opportunity to gain credits to reduce their sentences while participating in programs aimed at making them more productive and law abiding members of society, the Act provides the chance to at least begin to help alleviate the rising prison population in this country. It’s passage and resulting changes will continue to

provide tangible results to base bills off of in the future. Instead of having to base so much on the results of pilot programs in states such as Hawaii and Kentucky, the next ones will have more data for programs at the federal level.

The fact that the bill doesn't do anything for half of federal prisoners also shouldn't be an impediment to its passage. While that was a major concern for the author of "The Roadblock to Sentencing," I was left a little bit confused by their conclusions. After articulating their concerns that the bill didn't go far enough, the author finished their thoughts by stating, "Sentencing reform is a big and complicated issue, and may take some time to get right. It would be a mistake to pass an incomplete bill and pretend that the hard work of reform is done." Do they honestly expect a complete bill on a "big and complicated issue"? I also think the idea that the passage of a bill will result in lawmakers believing this reform is done is misguided. There are more bills than just this one with regards to reforming the prison system, and passing this now can do far more for providing evidence of how tangible results can be achieved than by waiting around for that one idea that magically fixes issues that have been around for decades.

Overall, the prison population has risen at a staggering rate in the past 30 years. Maybe this is a product of allowing senators like Grassley, whose greatest expertise lies in agriculture rather than the law to become powerful enough to act as a roadblock to prison reform. Regardless, with the 2016 election looming, I doubt that Senator Grassley and his allies will be willing to make any moves that could be viewed negatively by their constituents. I'm sure Senator Grassley is well aware of the many statistics that go into this debate, but I'm not so sure that those statistics are the ones that matter to him the most.

Applying Capital Punishment’s Sentencing Lessons to Noncapital Crimes

The most critical sentencing issues demonstrated by capital punishment are, ironically, discretionary sentencing and mandatory sentencing.¹ The United States Supreme Court has held that (1) the death penalty is constitutional;² (2) the death penalty cannot be mandatory;³ (3) the death penalty only applies to certain kinds of crimes;⁴ and (4) the death penalty only applies to certain kinds of criminals.⁵ The amalgam of the Supreme Court’s capital punishment jurisprudence demonstrates the Court’s anxieties over creating comprehensible rules for imposing death sentences while also hesitating to abolish the enterprise altogether.

In the arena of non-capital crimes, we ought to consider the merits and flaws of both discretionary and mandatory sentencing schemas in order to construct a criminal justice system that is truly effective. “Truly effective” is, of course, the operative phrase, but it does not preclude a definition.⁶ A criminal justice system is truly effective when it punishes wrongdoers in proportion to the harm they have done to society and their victims and in light of the wrongdoer’s personal history and situation. Thus, the ideal criminal justice system accounts for objective criteria, which can be prescriptively evaluated *ex ante*, and personal criteria, which eludes predetermined evaluations. In other words, a model criminal justice system incorporates both mandatory and discretionary elements in doling out punishment.

The necessity of both mandatory and discretionary elements can be seen in the slow evolution of capital punishment in the United States. Throughout the history of capital punishment in the United States, crimes that either did not cause the death of the victim or in which an actor did not himself cause the death of another person were potentially subject to the death penalty. However, the Supreme Court began to focus on proportionality in adjudicating whether or not the death penalty was appropriate.⁷ The Court noted that the general principles of justifying criminal punishment—rehabilitation, deterrence, and retribution⁸—necessitate that the punishment suit the particular crime.

The determination of whether or not a punishment is well-suited to a certain criminal act (or series of criminal acts) requires consideration of both the evolving norms of society and

¹ *Woodson v. North Carolina*, 428 U.S. 280, 301 (1976) (holding that a mandatory death penalty is unconstitutional); *McClesky v. Kemp*, 481 U.S. 279, 292–97 (1987) (describing the necessity of discretion to the functionality of the criminal justice system despite evidence that discretion may promote conscious or unconscious bias towards certain demographics).

² *Gregg v. Georgia*, 428 U.S. 153, 169 (1976); *Baze v. Rees*, 553 U.S. 35 (2008).

³ *Woodson*, 428 U.S. at 301.

⁴ *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (death penalty is unconstitutional for the crime of raping an adult); *Kennedy v. Louisiana*, 554 U.S. 407, 412 (2008) (death penalty is unconstitutional for the crime of raping a child).

⁵ *Atkins v. Virginia*, 536 U.S. 304 (2002) (death penalty for intellectually disabled persons is unconstitutional); *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (death penalty for minors is unconstitutional).

⁶ Whether or not that definition is widely accepted is another matter altogether.

⁷ See *Kennedy*, 554 U.S. at 420.

⁸ *Id.*

judicial precedent.⁹ This two-part process makes good logical sense. It does not allow society's evolving perspectives or popular thinking to have absolute control over criminal sentencing. It does not allow judges to exercise complete control either. It forces these two key stakeholders to work in tandem with each other to, hopefully, produce a system that is neither arbitrary nor unjust. Of course, in reality, neither stakeholder really, directly controls or attempts to control criminal sentencing.¹⁰ Nonetheless, both stakeholders affect criminal sentencing in indirect ways that have profound effects on the efficacy of the criminal justice system as a whole. The key is striking the right balance.

The myriad distinctions between capital crimes and non-capital crimes often cause scholars to categorize the two in such a way that the former is so far removed from the latter as to have only a *de minimis* impact on the criminal justice system as a whole.¹¹ The artificial barrier erected between the two often prevents both judges and the general public from considering the important lessons learned in one criminal context in the context of the other.

While mass incarceration may not play into capital cases, surely implicit racial bias does. While cruel and unusual methods of execution do not play into non-capital cases, cruel and unusual punishment quite clearly does.¹² The preloaded assumption that “death is different” often obfuscates the necessary parallels between criminal sentencing in both capital and non-capital contexts. This is especially pervasive in considering proportionality in non-capital cases.

Mandatory sentencing laws often doom relatively innocuous offenders to years behind bars, away from society and their families.¹³ While the drama inherent in capital cases gives society pause in bringing down the hammer, the relatively blasé nature of a five-year bit rarely gets press except when talking about mass incarceration. But, that's the real rub: in capital cases, individual justice—evaluating the nature of the person on trial as a human being—is vital; in non-capital cases, defendants are only significant in the aggregate. Instead of treating the two groups of crimes and offenders as disparate, isolated sub-units in our criminal justice system, we ought to apply the same principles in both kinds of cases. Thus, properly balancing discretion with mandates ought to be just as important in the non-capital context as it is in the capital context.

⁹ *Id.* at 421 (noting that both society's consensus and judicial precedent and understanding are required to justify a punishment for a certain crime).

¹⁰ See Douglas A. Berman, *Symposium: A Common Law for this Age of Federal Sentencing: The Opportunity and Need For Judicial Lawmaking*, 11 STAN. L. & POL'Y REV. 93, 99 (1999) (describing how federal judges have largely avoided constructing a coherent common law sentencing scheme).

¹¹ Sure, “death is different” from other sentences. *Gregg*, 428 U.S. at 188. However, punishment is not unique to death penalty cases. Further, proportionality, efficacy, retribution, rehabilitation, and deterrence are not unique factors to consider only in death penalty cases.

¹² http://www.nytimes.com/2015/02/22/nyregion/even-as-many-eyes-watch-brutality-at-rikers-island-persists.html?_r=0

¹³ <http://www.npr.org/2014/12/16/370991710/judge-regrets-harsh-human-toll-of-mandatory-minimum-sentences>

In anticipation of moving class discussion away from capital sentencing and into non-capital sentencing, this mini-paper is a reaction to the post on the main blog about Proposition 47 in California. A recent L.A. Times article describes Proposition 47 as “the landmark ballot measure that downgraded drug possession and minor thefts [from felonies] to misdemeanors.” Its goals are utilitarian in nature: reducing incarceration times for nonviolent offenders, focusing on rehabilitation, and easing jail overcrowding. The jury’s still out on whether it is working.

Although it is probably too soon to draw conclusions as to the effectiveness of Proposition 47 (it was passed back in November), the preliminary results are interesting. Drug arrests have dropped substantially. Property crimes have risen slightly. Jail overcrowding has subsided. California plans to reinvest the money it is saving on processing and incarceration on drug treatment programs, which it hopes will reduce recidivism and crime rates. My own past research suggests that it will.

As a graduate student in sociology, I took a criminology class that required us to write an empirical paper. I chose to study how offenders fare after participating in drug treatment programs in California and New York jails. I was surprised to find that relatively few studies had evaluated the efficacy of these programs in the jail setting. It is surprising because even though jails are less likely than prisons to offer drug treatment, they house a higher proportion of drug offenders. Using regression analysis, I analyzed data from a survey of five California and New York jails to determine whether and to what extent jail drug treatment reduced the likelihood of recidivism. Here’s what I found.

Consistent with national averages, about 35% of offenders in the sample recidivated within 12 months of being released, and about half of these offenders were reincarcerated on

drug-related charges. Compared to non-participants, participants in jail drug treatment programs were 28% less likely to recidivate within 12 months, and recidivism rates differed by treatment program type. The analyses revealed no statistically significant difference in the likelihood of recidivism for several predictors including gender, age, race, and marital status, but offenders with lower levels of education were more likely to recidivate.

If California reinvests the money it would have spent processing and incarcerating offenders on rehabilitating them instead, it could have a serious positive long-term effect on crime and recidivism rates. And if it works, Proposition 47 will serve as a model for other state and federal initiatives. Time will tell.

The Governor's Proper Role in Granting Executive Clemency

Reprieving, commuting, or pardoning a death sentence is one of the most powerful decisions a governor can make. Not only because of the impact it will have on the inmate receiving clemency, but because of the free reign that a governor possesses in doing so. In these instances, the executive branch is expropriating both judicial and legislative branch authority.

Pennsylvania Governor Tom Wolf recently called himself “the final check in the capital punishment process.”¹ Interestingly, under the Pennsylvania Constitution, Governor Wolf's recent reprieve grant to all of Pennsylvania's death row inmates does not require the recommendation of the State's Board of Pardons. Conversely, a commutation or a pardon would have constitutionally required the board's recommendation. Pennsylvania is not willing to completely hand over clemency power to its Democratic governor, as the state's majority-Republican legislature probably agrees. Still, the governor has been able to effectively monopolize capital punishment sentencing law.

Governor Wolf's recent grant of reprieve to inmate Terrance Williams reads more like a legislative proposal. Only five sentences of the five page document were devoted to the inmate's circumstances. It provides no details about the murder case that he was convicted of. Instead, the governor presents the conclusions of several studies and statistics on why the death penalty should not be employed. The focus of this memorandum is squarely on general policy grounds. Alternatively, I believe the memorandum should be limited to the reasons why Terrance Williams specifically should be granted a reprieve.

In cases like this, executive clemency has evolved from a case-by-case examination process to a blanket determination that the death penalty is improper. I am an opponent of the death penalty in all instances, but I believe that governors are abusing their discretion by negating all

¹ Tom Wolf, Governor's Memorandum RE: Reprieve of Terrence Williams, pg. 1

death penalty sentences. Only the most extreme injustices should be granted executive clemency. Otherwise, the legislative and judicial branches lose legitimacy and the executive branch is aggrandized. The executive becomes the only meaningful check in the capital punishment process, undermining our government's proper operation. This coming at a period in American history where faith in government is already at a nadir.

Many will argue that governors must use clemency to save the lives of those, like Terrence Williams, that are scheduled for execution before inept legislatures will be able to act. I am unwilling to place sole responsibility on governors for something that is within the legislative domain and involves contentious policy choices. Awarding blanket clemency will only further contribute to the legislature's failure to act on important issues. If the legislature does not reform sentencing laws before more inmates are executed, the blood is on their hands.

Another argument against my position is that governors should have the authority to narrow application of the death penalty, in order to match what the US Supreme Court has been doing for decades. In *Furman v. GA*, justices Stewart, Potter, and White cited racial discrimination as a reason why the death sentences at issue violated the 8th Amendment. These are some of the same contentions that Governor Wolf references in his recent clemency memorandum. The difference is that governors are not bound to law or precedent in drawing their conclusions. Simply put, their arguments should not be given as much weight because of the arbitrary context in which they have been presented. Governors do have a role to play in formulating sentencing law, but it should not be through executive clemency.

I began to mull around ideas for this week's paper – ideas that worked as lessons learned from the death penalty that could be applied to non-capital punishment. I then saw the article posted on the main blog on February 11, 2015, about the federal judge who, to the surprise of federal prosecutors, handed down a greatly reduced sentence for a man convicted of possession child pornography, by relying on a polling of the jury. The judge simply asked the jury what they thought the sentence should be. I found this odd because in my experience so far, the jury only determines the sentence of a convicted person when the death penalty is involved, through the process of bifurcated trials. But as we move into non-capital punishment, I have to wonder if juries would be well suited for determining sentences when the death penalty is not involved.

For example, if the death penalty were to be abolished, the most serious form of punishment would become life without the possibility of parole (LWOP). However, juries often don't have the power to sentence someone to prison for life if the death penalty is not an option. At least one of the benefits served by having juries determine whether to impose capital punishment is some kind of comfort and fairness, if you can even call it that. Rather than an elected judge imposing the death penalty upon an individual, it is a jury of the individual's peers – fellow members of the community – that impose the death penalty. There seems to be a greater degree of finality to the sentence because in theory, 10 to 12 “normal” people agreeing on a punishment is more fair than a single judge deciding a punishment. Perhaps this was the reasoning behind the above-mentioned federal judge's polling of the jury.

But if we are going to leave such a serious decision up to a jury, then why not extend that process to LWOP? We already give the jury the power to convict, so why not give them the power to sentence? Of course the death penalty and LWOP are starkly different in the fact that one form of punishment results in the state actively ending a person's life. However, LWOP essentially ends a person's meaningful life in society. Along with the death penalty, LWOP is the only punishment that completely and certainly extinguishes any hope of freedom that a convicted person may have (although this argument may be extended to life with the possibility of parole when the minimum time to be served is well beyond a human's age expectancy). A person sentenced to LWOP is often times ineligible for programs within the prison, as many of the programs are rehabilitative in purpose and the state has no reason to rehabilitate a person who is never leaving the

confines of the prison walls. A sentence of LWOP casts a person aside to be forgotten until their death. And while the state may not be injecting drugs into a LWOP prisoner's veins, that person is essentially dead as far as the state is concerned.

The point being, if LWOP and the death penalty are similar in many aspects, and they represent the two most serious punishments available, shouldn't a jury have sole discretion in sentencing when it comes to LWOP, especially when a state has abolished capital punishment? Since 2007, six states have abolished the death penalty and all six utilize LWOP now in place of capital punishment.¹ Of those six states, three – Illinois, New Jersey, and New Mexico – allow a unanimous jury to determine whether to sentence a person to LWOP after that person has already been convicted. The bifurcated system in these states is the same as it was before, just replacing the death penalty option with LWOP. Two states – Maryland and New York – leave the decision up to the judge. Connecticut makes LWOP an automatic sentence upon conviction of the eligible offense (this raises a different issue that I won't bring up here).

While giving the choice of LWOP to a jury might be more "fair" in some sense, there exists a huge logistical problem with this. There are a lot more people sentenced to LWOP than the death penalty. In 2012, there were 3,033 people on death row.² Comparatively, there were 159,520 people serving life sentences, of which 49,081 were LWOP.³ If we were to require a sentence of LWOP to be determined by a jury, there would be 16x more bifurcated trials, and almost 53x more if we require that *any* life sentence be determined by a jury. In a justice system that doesn't necessarily win awards for speed, giving juries this power may effectively bring the criminal justice system to a halt. So much in fact, that prosecutors may stop seeking life sentences in the interest of efficiency. Of course, this is all pure speculation based upon nothing resembling an in-depth statistical analysis, but the numbers are at least interesting and some states have already implemented the method.

¹ Death Penalty Information Center

² Id.

³ The Sentencing Project 2013 report: Life Goes On: The Historic Rise of Sentences in America

Questioning the “Fall” of Rehabilitative Theory

In class on Thursday February 19th, Professor Berman indicated that he intended to discuss “the rise and fall of rehabilitation theory.” I wish we would have reached that point in our discussion, because I am curious whether Professor Berman thinks the “fall” of rehabilitation theory, has been lasting and permanent, or whether he thinks that in at least some meaningful way, rehabilitation theory is regaining prominence.

I readily admit that in decades past the penological practice of rehabilitating prison inmates became disfavored. I think that every first-year law student gets fed this fact in their first-semester course on criminal law. However, I think that there is some evidence that in recent years, rehabilitation has reemerged as a viable objective of criminal punishment, at all levels, and across all branches of government.

For example, the United States Supreme Court, in the recent Eighth Amendment case Graham v. Florida, declared that states must provide juvenile offenders who commit non-homicide offenses with a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.”¹ Importantly, the Court found that juveniles who commit non-homicide offenses **have the capacity to change**, and that sentencing such offenders to life in prison without the possibility of parole (LWOP), constituted cruel and unusual punishment. It was partially because the Court found that an LWOP sentence “foreswears altogether the rehabilitative ideal,” that the Court held the sentence unconstitutional.

The United States Congress also endorsed rehabilitation as a goal of criminal punishment in passing the Second Chance Act of 2008.² The Second Chance Act, among other things, provides federal funding for state and local governments to assist in the development of offender reentry programs.³ Up to a million dollars in federal funding is available for state or local programs that provide substance abuse

¹ Graham v. Florida, 560 U.S. 48, 75, 130 S. Ct. 2011, 2030, 176 L. Ed. 2d 825 (2010).

² 42 U.S.C. § 3797.

³ Id.

treatment, education and vocational training, or mental and physical healthcare with the aim of facilitating the reentry of prison inmates into the community.⁴

State and Local governments across the country have also taken steps to develop rehabilitative resources for offenders. For example, in 2009, our own Franklin County Municipal Court developed specialized programs to handle offenders who had been charged with solicitation or drug offenses.⁵ A Columbus City Councilmember stated that the program would be “providing an alternative to incarceration through an intensive, court-supervised environment that addresse[d] criminal activity and help[ed] offenders become productive members of society. . .”⁶ In addition, specialized mental health courts have exploded in number across the country. While in 1997 there were only four mental health courts in the United States, there are now over three hundred, with programs in almost every state.⁷ Further, five more states have abandoned the death penalty in the past decade, either by judicial decree or by statute, possibly offering further proof of a trend toward rehabilitative programs rather than purely punitive sentencing.⁸

The increased invocation of the possibility of rehabilitation as a bar to certain types of punishment, as well as the development of rehabilitative programs is evidence that, across the branches of government, at the federal, state, and local levels, even if rehabilitation has indeed “fallen” as Professor Berman indicated, it is not dead and gone; rehabilitation remains a viable and worthy goal of criminal punishment.

Tamas Tabor

⁴ 42 U.S.C. § 3797(b).

⁵ <http://www.franklincountyohio.gov/fc/content/press/boc07-14-09.cfm>.

⁶ Id.

⁷ <http://csgjusticecenter.org/mental-health-court-project>.

⁸ Ryan, Megan J., Death and Rehabilitation, 46 U.C. Davis L. Rev. 1231, 1240 (2013).

Sentencing Paper #2: Reflections On The Franciscan University Murders and Geographic Arbitrariness in Sentencing

The Franciscan University murders of 1999 provide a case study that is ripe for exploring how geographic arbitrariness in sentencing unfolds in the context of the death penalty. Oftentimes, arbitrariness with regards to the death penalty centers on concerns of race or socioeconomic status. However, geographic arbitrariness is yet another distinct form that, depending on the laws of the states involved, results in an uneven application of the death penalty against certain parties. In this particular case, the defendant evaded a death penalty sentence because he was retried on a jurisdictional technicality in Pennsylvania. Had the case remained in Ohio, however, an Ohio jury would have decided that Yarbrough was slated to die. Though I was only eight years old when the murders occurred nearly sixteen years ago, I am familiar with this case because I am from Washington County (about thirty miles south of Pittsburgh). Unsurprisingly, it captured the attention of the media for years on end in Western Pennsylvania and across the country.¹ *Yarbrough's* case is also one of second chances for all parties involved.

In a disturbing fact pattern, defendants Yarbrough and Herring kidnapped two Franciscan University (OH) students, drove them to the side of a Pennsylvania interstate, forced them to perform oral sex on one another, and shot each of them in the back of the head with a .44-caliber handgun. Yarbrough was sentenced to 59 years in prison on charges of kidnapping, aggravated robbery, aggravated burglary, gross sexual imposition, grand theft auto, and receiving stolen property. He received a death sentence, but his record was later wiped clean by the Supreme Court of Ohio on a jurisdictional technicality: since the murders technically took place in Pennsylvania, Ohio courts did not have jurisdiction to try the murder aspects of the case. However, the state supreme court allowed the prison time for the aforementioned crimes that did occur in Ohio to stand. Notably, prosecutors in Ohio and Pennsylvania debated the jurisdictional issue prior to agreeing on conducting only one trial in Ohio for the crimes. The confusion of where to try the case stemmed from the fact that the crime began in Ohio, but continued on into Pennsylvania, where the ultimate shooting took place. The logic behind consolidating the case into one, large state trial in Ohio was for efficiency and to save the families of the victims from unnecessary grief and heartache.

¹ <http://old.post-gazette.com/regionstate/20000928steubenville2.asp>; see also <http://www.nytimes.com/2000/08/27/us/national-news-briefs-ohio-man-found-guilty-in-killings-of-2-students.html>.

In 2009, Yarbrough was retried and found guilty by a Pennsylvania jury, but received an LWOP sentence (despite prosecutors pushing for the death penalty). Here, double jeopardy was not of concern since a different entity brought the charges. Interestingly, this retrial also presented the prosecution with the ability to admit new evidence, and to mount an even stronger case against Yarbrough. Contrarily, the defense attorney now had the opportunity to present a new defense (that Yarbrough had an IQ of only 67 and was therefore incompetent to be executed).

Washington, PA and Steubenville are a mere 35 miles apart from one another. These 35 miles essentially made the difference between life and death for Yarbrough. Though I ultimately believe the Washington County jury made the right call by sentencing Yarbrough to life imprisonment, Mr. Yarbrough could have very easily been sitting on death row (nearly fifteen years later), had the Supreme Court of Ohio failed to catch the lower court's error. Thankfully, the Supreme Court of Ohio reviews all death penalty proceedings handed down in the state, and Yarbrough was not put to death prior to catching the error in jurisdiction. In this case, there was little dispute over Yarbrough's guilt, but the way the case was handled faces local criticism to this day regarding the issue of jury discretion, a topic we have covered extensively in class. "Guided" jury discretion by the judge and by the legislature's sentencing guidelines seems to (at least for now) provide the most balanced way to sentence. As discussed in class, one alternative would be the imposition of a mandatory death penalty for certain crimes. However, this seemed unsatisfactory to the majority of the class for a host of reasons, including the fact that it leaves no room for the consideration of aggravating or mitigating situational factors.

Finally, this case presents an interesting entanglement of which state will bear the cost burden of trying the defendants, imprisoning the defendants, and perhaps, ultimately, administering the death penalty to the defendants. Certainly, a closer examination of jurisdictional requirements before the Ohio leg of the murder trial took place could have salvaged a great deal of taxpayer money. However, one of the justifications for consolidating the case into an Ohio-only dispute was for the sake of efficiency. Presumably, and perhaps uniquely, the prosecutors were worried about wasting taxpayer and state resources. In this case, both states necessarily fronted the costs of each respective trial. However, one can imagine (especially during times of tight budgeting) a similar situation in the future in which this exact claim is disputed between states, as trials and the death penalty continue to be enormously expensive.

Mini-Paper #1

For my first mini-paper of the semester I chose to reflect upon our class's discussion of the Eighth Amendment. More specifically, I chose to watch the oral arguments for Ohio v. Moore. The question in the Moore case is: does Moore's sentence violate the United States Supreme Court's ruling in Graham v. Florida which held juvenile non-homicide offenders may not be sentenced to life without parole.

My first reaction after watching the oral arguments concerns a "who." As I watched both attorneys present their case to the Justices I was struck with how much I favored Moore's side based upon the legal advocacy of the attorney. Moore's counsel was clearly able to field the numerous questions from the Justices' eloquently and succinctly. This honestly led me to give her arguments more credit. Moore's counsel was able to cite specific case law and even the exact pages from Graham upon which she utilized quotations. The State's counsel, on the other hand, seemingly struggled to get into a rhythm and at times it appeared that a Justice would need to come to his rescue in order to flesh out the actual argument the attorney was trying to make. Of course, this may be because the State did indeed have the losing argument but it did detract from his arguments and made it appear as if the State were grasping for a legal leg to stand on.

The Justices seemed very interested in Moore's side but were quite worried about striking down Moore's sentencing and leaving the trial court without any guidance. This led me to look at some of the cited cases that had found similar aggregate sentences in violation of the 8th Amendment. I found the Wyoming Supreme Court's instructions to the trial court particularly interesting. They said the trial court should consider the practical result of a lengthy prison sentence and take into account mitigating factors such as youth when exercising its discretion. This may be somewhat telling as one of the Justices in the oral argument asked the State what the

practical application is if Moore isn't eligible for review until he is 92. The State was forced to answer that it is "highly unlikely" that Moore will live to see that day. Thus the State is essentially admitting that Moore has been handed a life sentence (in fact the trial court judge explicitly said he never wanted Moore to get out of prison) and their only argument for why this doesn't violate the 8th Amendment as interpreted by SCOTUS is because Moore's sentence is for multiple offenses rather than one (as in Graham).

I agree with Moore that the fact that a juvenile was sentenced for multiple offenses is not determinative of whether Graham's rationale applies. Graham is not arguing that juveniles be guaranteed release but just have the meaningful opportunity to have their sentence reviewed. I find this argument persuasive and applicable even for instances of aggregated sentences because juveniles non-homicide offenders, whether sentenced for one offense or multiple, still have the "twice diminished moral culpability" of being a juvenile and not committing homicide. Additionally, the State's only argument for why Graham does not apply to Moore is because SCOTUS was drawing a "clear line" that the reasoning only applied to single offenses. I believe that this argument incorrectly frames SCOTUS's opinion. SCOTUS is attempting to draw a line between juveniles and adults, and homicide offenses and non-homicide offenses. Reading Graham, SCOTUS emphasizes the possible rehabilitation of *all* juvenile non-homicide offenders based upon the mitigating circumstance of youth rather than how many separate counts a prosecutor can get a conviction on.

In light of the arguments presented by counsel, the persuasive authority from other courts, and the Justices questions, I believe the Court should find in favor of Moore.

In enacting these mandates into guidelines, I believe it is important to allow the sentencing judge discretion over all of these factors. The judges will be in the best position to consider all the relevant information from the prosecution, defense, and any presentence investigations. Of course, this deference entrusts judges to make the correct decisions regarding sentencing. However as a safeguard, I believe that the amount of adjustment attributed to each characteristic should have a ceiling which limits the maximum amount of increase, but there should be no floor, or minimum amount that the sentence must be increased or decreased. To avoid ridiculous increases or decreases, the reductions/enhancements should be applied in terms of percentages, rather than years. For example, the guideline could read “if the offender is the sole income-earner for his/her family, reduce sentence of imprisonment by up to 30% or convert imprisonment sentence to community control at a rate of 3:2 (2 years community control for what would have been every 3 years of imprisonment).

An interesting caveat is the Mandate’s requirement that all guidelines be neutral as to the race, sex, national origin, creed, and socioeconomic status of the offender. While I agree that lack of discrimination is a positive thing for the guidelines, I question how realistic neutrality can be with respect to these factors, considering the eight other factors which must be considered. For example, a person with low socioeconomic status will often times have a lesser degree of completed education and a much different employment record than those of a higher socioeconomic status. By considering factors such as education and employment record, I fear that the guidelines will be indirectly determining a person’s sentence based upon the socioeconomic status. The same goes for national origin - a person of a foreign national origin may often times have lesser community ties. Although the guidelines may not be directly determining a sentence based upon the neutrality factors, the guidelines are determining a sentence based upon the aspects which make up the neutrality factors. I’m not sure if there is a way around this, other than significantly decreasing the importance of education, employment record, and communities ties, relative to the other five factors of consideration.