

## CHAPTER 3: PUNISHMENT AND SENTENCING

The text discusses the purposes of punishment. Ohio's sentencing laws were created to fulfill same goals.

As the text explains, the Federal sentencing guidelines have experienced evolution. Ohio's guidelines have done the same. Prior to July 1, 1996 Ohio had an indeterminate sentencing scheme, giving judges discretion to select a minimum term from a range of punishments for each felony level. After the minimum term was completed, an offender was eligible for parole. In 1983, some offenses were given mandatory minimums, while other offenses were given non-mandatory determinate sentences (Wooldredge, Rauschenberg, Griffin, Pratt, 2002). The result was that Ohio's sentencing laws became convoluted and it was not clear if the sentencing scheme in place was meeting the goals of punishment.

In 1990, the Ohio Sentencing Commission was created by the Ohio General Assembly to tackle the problems associated with Ohio's sentencing laws. The legislature cited four reasons why a sentencing commission was needed. First, it was widely recognized that the sentencing laws were too confusing, leading to disparate treatment of offenders. Second, due to mandatory minimum sentences and some determinate sentences, the prison population was increasing. Third, the legislature found that racial disparity existed in Ohio's prisons, leading them to believe that the sentencing laws were to blame. Finally, judges were complaining that the mandatory minimums and determinate sentences reduced their discretion. Therefore, the Ohio Sentencing Commission was entrusted to remedy what was seen as a very problematic sentencing scheme (Wooldredge et al., 2002).

The Ohio Sentencing Commission recommended sweeping changes in Ohio's sentencing laws, focusing on the primary goals of incapacitation, deterrence, rehabilitation, and restitution. As a result of the Commission's recommendations, the Ohio General Assembly passed Senate Bill 2. This legislation established a type of determinate sentencing scheme called a presumptive system, which required minimum sentences but gave judges discretion to choose a sentence from a range of possible punishments. Also, a number of the original mandatory sentences were retained. The legislation also specified a number of other prison-related features. The first was the abolition of "good time" credits, which allow offenders to achieve early release from prison due to good behavior. Second, the legislation abolished parole for offenses committed after July 1, 1996; parole was retained for eligible individuals who committed their crimes before the effective date. Additionally, Senate Bill 2 established "bad time," which allowed prison officials to punish offenders who commit a crime while in prison. Finally, the legislation established post-release control. This is much like parole, except that offenders must complete their sentence before being released into the community under supervision by the state (Wooldredge et al., 2002; Diroll, Rauschenberg, Hawkinson, Ward, 1996). In effect, the legislation created a "truth in sentencing" system (see text) that established,

"...definite sentences; supervision after prison for those who most need to be watched or helped; a broader continuum of non-prison sanctions for less threatening felons; and "bad time" to help maintain order in prisons (Diroll et al., 1996, p. 3).

As mentioned in Chapter 1, the use of bad time was eventually ruled unconstitutional by the Ohio Supreme Court in 2000 (see *State ex rel. Bray v. Russel*, 729 N.E.2d.259, 2000).

Although its focus seemed to be on prison, Senate Bill 2 also expanded the range of non-prison sanctions so that, not only would the prison crowding problem be addressed, but punishments could be tailored to certain offenders. Unless an offender faced a mandatory prison term, a judge had the discretion to choose from a range of residential and non-residential sanctions. Residential sanctions included prison, jail,

community-based correctional facilities (CBCFs), halfway houses, and work release. Numerous non-residential sanctions were offered, including day reporting, electronically-monitored house arrest, community service, drug treatment, probation supervision (intensive and basic), drug and alcohol abuse counseling, curfew, employment, and victim-offender mediation. (Diroll et al., 1996).

Nonetheless, as explained in Chapter 1, Senate Bill 2 was dealt a powerful blow by the Ohio Supreme Court in 2006. As noted, Senate Bill 2 allowed judges discretion to choose a sanction from within a statutory range. However, a judge had to make certain factual findings before imposing more than the minimum sanction, imposing the maximum sanction, or imposing consecutive sentences. In *State v. Foster*, the Ohio Supreme Court followed the U.S. Supreme Court's lead in *Blakely* and *Booker*, and held that if a defendant's punishment was increased on the basis of a finding of fact, that finding must be made by a jury, not a judge. Otherwise, the increase violates a defendant's Sixth Amendment right to a jury trial. Accordingly, the Ohio Supreme Court held that Ohio's guidelines were merely advisory and that judges have full discretion to impose any sentence falling within a statutory range for an offense and no longer need to make findings or give reasons for imposing any sanction falling within that range. The court acknowledged that critics may conclude that by making the guidelines advisory rather than mandatory, the court took a step back from determinate sentencing. However, the court explained that a number of reforms from Senate Bill 2 remained intact, including the "truth in sentencing" reform that requires that a specific term be given at sentencing so that the defendant and interested parties know what sanction is being imposed. *State v. Foster*, 109 Ohio St.3d 1 (2006). Moreover, in a subsequent case, the Ohio Supreme Court made it clear that judicial findings are still required for downward departures. *State v. Mathis*, 109 Ohio St.3d 54 (2006). In addition, unlike the Federal Guidelines, Senate Bill 2 had always allowed Ohio judges a great deal of discretion – even if it was "guided discretion." Consequently, it is not clear yet how deeply *Foster's* impact will be felt.

## SENTENCING RANGES FOR FELONIES

As mentioned in Chapter 1, Ohio is unique in that a felony is defined as an offense that carries a punishment of six months or more incarceration. In other states, a felony constitutes a year or more incarceration. As a result, Ohio classifies felonies in five degrees:

Felony in the first degree – prison term is three to ten years in prison

Felony in the second degree – prison term is two to eight years in prison

Felony in the third degree – prison term is one to five years in prison

Felony in the fourth degree – prison term is six to eighteen months in prison

Felony in the fifth degree – prison term is six to twelve months in prison

(Ohio Revised Code, § 2929.14, 1996, available at <http://codes.ohio.gov/orc/2929.14>)

As noted above, some crimes and offenders require a mandatory term in prison. These include murder, some rape offenses, offenses involving a firearm, major drug offenders, and repeat violent offenders.

A couple of examples illustrate Ohio's new sentencing scheme. The first is felonious assault. Among a number of things, felonious assault includes knowingly: 1) causing serious physical harm to another, or to another's unborn, or 2) causing or attempting to cause physical harm to another, or to another's unborn, by means of a deadly weapon or dangerous ordnance. (see <http://codes.ohio.gov/orc/2903.11>)

Felonious assault is considered a second-degree felony, so judges have discretion to sentence a defendant from two to eight years in prison. Felonious assault becomes a first-degree felony, however, if the victim

is a peace officer.

The second example is a property crime – passing bad checks. Ohio law provides that:

No person, with purpose to defraud, shall issue or transfer or cause to be issued or transferred a check or other negotiable instrument, knowing that it will be dishonored (Ohio Revised Code, § 2913.11 (A), 1996, available at <http://codes.ohio.gov/orc/2913.11>). Depending on the amount of money stolen, the offense could either be a misdemeanor or felony. If the amount is less than \$500, it is a misdemeanor. If the amount ranges from \$500 to \$5,000, it is a fifth-degree felony. If the amount is \$5,000 to \$100,000, it is a fourth-degree felony. Finally, if the amount exceeds \$100,000, it is a third-degree felony.

In addition to the prison time that offenders must serve, post-release control may be utilized. It involves supervision of offenders up to five years after they have completed their sentence. Offenders convicted of a first-degree and second-degree felony, a felony sex offender, or a third-degree felony in which physical harm was caused or threatened are must be made subject to post-release control. Other offenders may receive post-release control if the parole board authorizes it (Ohio Revised Code, § 2967.28, 1996, available at <http://codes.ohio.gov/orc/2967>).

## **OHIO PRISON POPULATION**

It is difficult to compare Ohio's prison population with other states, as Ohio imprisons offenders who serve six months or more incarceration, while the cut-off for other states is one year. However, even when including these offenders, Ohio is ranked 26th out of 50 states when it comes to its imprisonment rate – 391 per 100,000 residents (Harrison and Beck, 2005). Ohio has roughly 44,000 offenders in its prisons. Additionally, over three-quarters of the offenders were sentenced after Senate Bill 2 was enacted. Three counties contribute approximately 40 percent of all imprisoned offenders – Cuyahoga (Cleveland), Hamilton (Cincinnati), and Franklin (Columbus) (Norton and Martin, 2006).

First-degree felonies represent the most imprisoned offenses (approximately 30%) and the percentages decrease as the felony levels decrease. Of the most imprisoned offenses, most of these are robbery, aggravated robbery, felonious assault, sex offenses, burglary/aggravated burglary, and drug offenses.

One of the issues that was addressed by the Ohio Sentencing Commission with regard to Ohio's sentencing scheme was racial disparity in Ohio's prisons. Racial disparity appears to exist in Ohio prisons. Although Blacks comprise only 11.5 percent of Ohio's general population, they comprise approximately 49 percent of its prison population (U.S. Census Bureau, 2000). Wooldredge et al (2002) analyzed the effect of Senate Bill 2 on treatment of offenders by the court system. The authors analyzed cases in the year prior to and one year after the effective date of the legislation. Generally, the authors found that race of defendant had little effect on most case processing points (e.g., charging, dismissals). However, race of defendant was significant for the imprisonment decision – unemployed, Black males were more likely to be imprisoned, even when controlling for legal factors (e.g., seriousness of the charge). This supports prior research in the area (see Spohn and Holleran, 2000).

## **CAPITAL PUNISHMENT IN OHIO**

In 1972, the U.S. Supreme Court ruled in *Furman v. Georgia* (408 U.S. 238) that the imposition of the death penalty was “arbitrary and capricious,” in that states did not have suitable guidelines for juries to follow when imposing death sentences (see text). As a result, states were ordered to change or create these guidelines in an effort to reduce discrimination in the imposition of death sentences. Ohio revamped

its death penalty statutes in 1975, but they were challenged in *Lockett v. Ohio* (438 U.S. 586, 1978).

### **Lockett v. Ohio**

Lockett was convicted of aggravated murder (Ohio Revised Code §§ 2929.03, 2929.04 (1975)). Under Ohio's death penalty statute in place at the time, the judge had to impose the death penalty unless the judge found at least one of only three mitigating circumstances:

(1) the victim had induced or facilitated the offense, (2) it was unlikely that Lockett would have committed the offense but for the fact that she "was under duress, coercion, or strong provocation," or (3) the [offense was "primarily the product of [Lockett's] psychosis or mental deficiency."

The judge determined that none of the three mitigating factors was present in Lockett's case. Therefore, she was sentenced to death. On appeal, Lockett claimed that, among other things, the judge was unable to consider other mitigating factors that could have prohibited a death sentence, such as her character, prior record, age, and her minor part in the crime (driving a get-away car from a robbery during which a pawnbroker was shot). The Court agreed, stating that,

The limited range of mitigating circumstances which may be considered by the sentencer under the Ohio statute is incompatible with the Eighth and Fourteenth Amendments. To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors.

As a result of this case, the Ohio General Assembly revamped its death penalty statute, which became effective in 1981. As was custom during this time, it was challenged in two cases, *State v. Jenkins*, 15 Ohio St. 3d 164 (1984) and *State v. Maurer*, 15 Ohio St. 3d 239 (1984), and was upheld by the Ohio Supreme Court. The U.S. Supreme Court refused certiorari in these cases.

Today, to be eligible for the death penalty in Ohio, one must be convicted of "aggravated murder," which encompasses many behaviors:

No person shall purposely, and with prior calculation and design, cause the death of another or the unlawful termination of another's pregnancy.

No person shall purposely cause the death of another or the unlawful termination of another's pregnancy while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, kidnapping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary, terrorism, or escape.

No person shall purposely cause the death of another who is under thirteen years of age at the time of the commission of the offense.

No person who is under detention as a result of having been found guilty of or having pleaded guilty to a felony or who breaks that detention shall purposely cause the death of another.

No person shall purposely cause the death of a law enforcement officer whom the offender knows or has reasonable cause to know is a law enforcement officer.

(Ohio Revised Code, § 2903.01, 2002, available at <http://codes.ohio.gov/orc/2903>).

If a defendant is found guilty of one of these during the verdict stage of a capital trial, he or she is eligible for the death penalty. This does not mean, however, that a death sentence will be imposed. In a separate sentencing trial, the jury must weigh the aggravating and mitigating circumstances. Ohio law outlines ten aggravating circumstances and six mitigating factors, plus “any other factors that are relevant to the issue of whether the offender should be sentenced to death” (Ohio Revised Code, § 2929.04, 2002). One of these factors was addressed by the Ohio Supreme Court in 2006. In *State v. Tenace*, (109 Ohio St.3d 255), the Ohio Supreme Court ruled that a defendant’s extremely disadvantaged childhood should be examined when weighing mitigating factors. In this case, the court stated that the defendant was “doomed from the start” as a result of savage treatment by his parents and a history of alcohol and drug problems among other family members. In fact, one of the justices stated,

...we struggle constantly with the issue of when a defendant’s childhood is so horrific that it militates against the death penalty. In reading this record, one cannot imagine a more terrible, depraved, and damaging childhood than that which the defendant suffered. He was victimized constantly as a child. The only skills taught him by the adults in his life were how to commit crimes and how to abuse drugs. All his siblings are now in prison, none being able to rise above their doomed childhood. If these facts don’t present a case in which mitigation finally outweighs the aggravating circumstance, then I can imagine no fact pattern that would. While it still in no way justifies the brutal murder, his terrible childhood does militate against the death penalty and in favor of a life sentence (p. 27-28).

As of July, 2009, Ohio had 169 inmates on death row (168 men, 1 woman; 87 Black, 74 White, 4 Hispanic, and 2 Arab Americans). (<http://www.drc.ohio.gov/Public/deathrow.htm>). As of July 2009, Ohio had executed a total of 374 convicts. (<http://www.drc.state.oh.us/Public/capital.htm>).

Ohio uses lethal injection as the mode of execution. As mentioned in the text, in June 2008 an Ohio common pleas court ruled that although use of lethal injection was not unconstitutional, the “three drug cocktail” used to execute death row prisoners in Ohio posed an unnecessary risk of causing them severe pain. Because Ohio law provides that the death penalty must be done by a lethal injection of a drug or drugs that quickly and painlessly causes death, the court found that the state must change the drugs it uses. [http://www.opd.ohio.gov/DP\\_Rivera/dp\\_rivera\\_dec.pdf](http://www.opd.ohio.gov/DP_Rivera/dp_rivera_dec.pdf)

In news reports, the Ohio Department of Corrections has confirmed that in 2009, it changed its protocol and will now administer a sedative to death row inmates to ensure that they are unconscious before any lethal drugs are administered. (see [http://www2.nbc4i.com/cmh/news/state\\_regional/article/painless\\_execution/15940/](http://www2.nbc4i.com/cmh/news/state_regional/article/painless_execution/15940/))

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## REVIEW QUESTIONS

1. Which of the following was NOT a reason for the creation of the Ohio Sentencing Commission?
  - a. punishments in Ohio were too lenient
  - b. increasing prison population
  - c. racial disparity in prison
  - d. judges were not given enough discretion
2. What is "bad time?"
  - a. the amount of time an offender spends on parole
  - b. a punishment for offenders who do not pay their fines
  - c. a punishment for offenders who commit crimes while in prison
  - d. a punishment for repeat offenders
3. What is "post-release control?"
  - a. another term for parole
  - b. a specific punishment for sex offenders
  - c. a form of community service
  - d. supervision of certain offenders after they have completed their prison sentence
4. Why did the U.S. Supreme Court rule Ohio's death penalty law unconstitutional in *Lockett v. Ohio*?
  - a. there was too much racial disparity in Ohio's death penalty sentencing process
  - b. there were not enough mitigating factors for judges to consider at sentencing
  - c. the law was not clear enough regarding which aggravating factors judge could consider at sentencing
  - d. consider at sentencing
  - e. the law gave juries too much discretion in determining who got a death sentence
5. Which of the following is true regarding Ohio's prison population?
  - a. Ohio has one of the highest imprisonment rates in the nation
  - b. racial disparity appears to exist in Ohio's prisons

- c. most offenders in Ohio prisons were imprisoned before Senate Bill 2 was enacted
- d. lower-level felony offenders comprise most of the offenders in Ohio prisons

### **DISCUSSION QUESTION**

As mentioned above, the Ohio Supreme Court ruled that a defendant's extremely disadvantaged childhood should be considered a mitigating factor in death penalty sentencing. In fact, that factor was one of the primary reasons the court vacated the defendant's death sentence in *State v. Tenace*. To what extent should this factor play a role in deciding if a defendant receives a death sentence? Examine the various aggravating and mitigating factors in the Ohio Revised Code and determine if there are other factors that should also be considered when making this important decision.

### **WEB RESOURCES**

- [www.legislature.state.oh.us](http://www.legislature.state.oh.us) – website of the Ohio General Assembly, for information about how laws are passed in Ohio and the status of existing legislation.
- [www.ojp.usdoj.gov/bjs](http://www.ojp.usdoj.gov/bjs) - website of the Bureau of Justice Statistics, for information about a variety of criminal justice-related data and statistics
- [www.drc.state.oh.us](http://www.drc.state.oh.us) – visit the website of the Ohio Department of Rehabilitation and Correction for information about Ohio's prison population and various prison programs
- [http://www.opd.ohio.gov/DP/DP\\_MoreInfo.htm](http://www.opd.ohio.gov/DP/DP_MoreInfo.htm) - Ohio Public Defender's website regarding death penalty issues
- <http://www.innocenceproject.org/> - Website maintained by the National Innocence Project, an advocacy and policy group dedicated to exonerating wrongfully convicted death row inmates