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Cost as a Sentencing Factor: Missouri's Experiment

*Chad Flanders**

I. INTRODUCTION

In 2010, the Missouri Sentencing Commission recommended that, in addition to offense and offender characteristics, the pre-sentencing reports prepared for sentencing judges also should include the costs of various possible sentences.[1] Thus, for example, the pre-sentencing report for a person charged with second degree robbery would include not only the severity of the crime (in this case, "medium") and the prior conviction history of the offender, but also something resembling the following:

> Mitigating Sentence: Probation – 5 years probation [at] $1364 per year. Total cost = $6770
>
> Presumptive Sentence: Community Structured Sentence – 5 years enhanced probation [at] $1792 per year. Total Cost = $8960
>
> Aggravating Sentence: Prison – 5-years prison [term] assuming expected actual time served of 62% = 3.1 years in prison [at] $16,823 per year + remaining sentence of 1.9 years on parole [at] $1354 . . . . Total Cost = $54,724[.][2]

In other words, the report would present the judge with various types of sentences and the price tag associated with each sentence. The proposed reform

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1. *See* Mo. Sentencing Advisory Comm'n, *Sentencing Information on www.mosac.mo.gov Now Includes Costs of Recommended Sentences and Risks of Reincarceration*, SMART SENTENCING, Aug. 17, 2010, at 1, 4-5 [hereinafter *Sentencing Information*], *available at* http://www.mosac.mo.gov/file.jsp?id=45502.

2. *Id.* at 4-5.

would make – and seems intended to make – the cost of each sentence a salient factor for the judge to consider.

The reform was controversial, making local and national headlines.[3] Supporters of the inclusion of cost figures claimed that it was an important cost-cutting move, and, at worst, just another piece of information for the judge to consider.[4] Critics of the measure argued that sentencing was not about cost but about deciding what sentence was appropriate for the particular offender.[5] The allocation of social resources, they reasoned, was a job for the legislature, not something that judges should be worrying about.[6] Specifically, critics raised concerns about how to accurately and adequately calculate the social cost of putting an offender in prison and whether judges also should take into account the costs of crimes that those offenders put on probation, rather than imprisoned, might commit.[7] It might be cheaper to put someone on probation rather than imprison him, but if the person on probation goes on to commit a crime, there is certainly a cost to *that.*[8]

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3. *See, e.g.*, Monica Davey, *Missouri Tells Judges Costs of Sentences*, N.Y. TIMES, Sept. 18, 2010, at A1; Jeff Milyo, Editorial, *"Smart Sentencing" Needs More Study*, ST. LOUIS POST-DISPATCH, Mar. 31, 2011, at A18; Heather Ratcliffe, *Missouri Judges Get Penalty Costs Before Sentencing*, ST. LOUIS POST-DISPATCH, Sept. 14, 2010, at A1; Chad Flanders, Op-Ed., *The Cost of Justice*, ST. LOUIS BEACON (Sept. 17, 2010), http://www.stlbeacon.org/content/view/104956/74/ [hereinafter Flanders, *Cost of Justice*].

4. *See, e.g.*, Davey, *supra* note 3 ("'Long missing [in the criminal justice system] has been a sober realization that even if we get significant benefits from incarceration, that comes at a significant cost.'" (quoting Douglas A. Berman)); Ratcliffe, *supra* note 3 (Cathy Kelly of the Missouri Public Defender System noted that the "'state is going bankrupt'" and judges need to know about "cost-effective options besides prison.").

5. Davey, *supra* note 3 ("'Justice isn't subject to a mathematical formula . . . . Every case is an individual case, and every victim has the right to have each case viewed individually, and every defendant has that right.'" (quoting St. Louis County prosecuting attorney Robert P. McCulloch)); Ratcliffe, *supra* note 3 ("'Justice doesn't come down to dollars and cents.'" (quoting St Charles County prosecuting attorney Jack Banas)).

6. Brian Garst, *Should Judges Consider Costs?*, CONSERVATIVE COMPENDIUM (Sept. 19, 2010, 6:44 PM), http://conservative-compendium.com/wordpress/2010/09/should-judges-consider-costs/ ("I'm all for giving judges as much information as possible, but jurisdictions should be careful about not using the availability of such information as an excuse to let judges handle decisions about the allocation of social resources that might best be left to the legislature.").

7. *E.g.*, *id.*

8. *See* Davey, *supra* note 3 (noting that reports fail to include social costs of those not incarcerated committing another crime); Milyo, *supra note* 3 (describing flaws in the reports' data). Milyo also has written an important unpublished white paper detailing at length the various methodological flaws in the Sentencing Commission's figures. *See* Jeff Milyo, *An Initial Review of Recommended Sentencing in Missouri* (Feb. 15, 2011) (unpublished manuscript), available at http://christiancounty

The debate over the inclusion of cost figures in sentencing reports is part of the larger question of what factors are appropriate for a judge to consider when sentencing.[9] Should a judge include considerations of the social cost of certain forms of punishment when deciding a sentence, or does that mean the sentence is no longer tailored to the individualized facts of the crime and the criminal? The question of including sentence cost also raises an issue central to modern retributivist theory: to what extent can the criminal justice system and the various parties in it consider societal consequences in determining a sentence?[10] Should the right punishment be given to the offender, even if important social programs remain unfunded?[11]

Indeed, the decision to include cost as a salient sentencing factor rubs against the retributivist intuition that judges should decide sentences based solely on the crime committed and the conduct of the offender.[12] The intuition sometimes has a corollary: while judges are restricted in whether they can consider cost, legislatures are not.[13] Indeed, legislatures should consider the costs of various sentences when passing sentencing legislation.

This Article probes this intuition and offers a qualified defense of it. That is, the Article defends the critics of the Missouri sentencing reform. Part II spells out the intuition in more detail and attempts to give it a theoretical basis. The Missouri reform opponents' position reflects H. L. A. Hart's famous theory of punishment (and also a similar theory John Rawls present-

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prosecutor.net/wp-content/uploads/2011/02/Milyo_Report_MOSAC_R2.pdf; *see also* Davey, *supra* note 3 ("Others, like Paul Cassell, a law professor at the University of Utah, argue that Missouri's plan counts certain costs but fails to measure others – the societal price, for instance, if someone not incarcerated commits another crime.").

9. For a good overview of the topic, see Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM. L. 37, 39 (2006); *see generally* NORA V. DEMLEITNER ET AL., SENTENCING LAW & POLICY, chs. 4-5 (2d ed. 2007) (on sentencing "inputs"); and Carissa Byrne Hessick, *Why Are Only Bad Acts Good Sentencing Factors?*, 88 B.U. L. REV. 1109 (2008).

10. *See generally* Mitchell N. Berman, *Two Kinds of Retributivism*, *in* PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 433 (R.A. Duff & Stuart P. Green eds., 2011); Michael T. Cahill, *Retributive Justice in the Real World*, 85 WASH. U. L. REV. 815, 821 (2007).

11. The most (in)famous example of this brand of retributivism is, of course, Immanuel Kant. *See* IMMANUEL KANT, THE METAPHYSICS OF MORALS 140-45 (Mary J. Gregor ed. & trans., Cambridge Univ. Press 1991) (1797) (obligation to punish is a "categorical imperative").

12. For an excellent comparative look at the origins of this intuition, see James Q. Whitman, *Equality in Criminal Law: The Two Divergent Western Roads*, 1 J. LEGAL ANALYSIS 119, 124 (2009).

13. *See, e.g.*, Angelyn C. Frazer & Adam Diamond, *Legislatures Consider Deferment and Sentencing Reform*, CHAMPION, Apr. 2011, at 49, *available at* http://www.nacdl.org/champion.aspx?id=16228.

ed[14]), which proposed a division of labor between judges and the legislature.[15] Under this theory, consequences justify punishment on the institutional level, but the particular facts of a given case dictate the individual's punishment. Only the legislature, which is responsible for the institution of punishment as a whole, is empowered to consider the costs of sentences. Judges, by contrast, should consider only the punishment the offender deserves based on his particular crime. Hart's theory made punishment *as an institution* subject to consequentialist considerations, but in the individualized distribution of punishment, he was a retributivist.[16]

Part III puts this picture to the test. If it is wrong for judges to include societal cost as a sentencing factor, what makes it appropriate, even necessary, for legislatures to consider cost? Are legislatures who make aggregate decisions about sentencing based on cost considerations also guilty of making sentences unjust? Alternatively, if consequentialist theories justify punishment as a whole, why is it wrong for judges to take into account those same consequentialist considerations when sentencing an individual offender? The problem with two-level theories, such as Hart's, is that they need to show how the two levels will not bleed or collapse into each other. If consequentialism is appropriate in some circumstances, we need to know why it is appropriate only in those circumstances, so that judges are prevented from considering any consequences when they sentence. Similarly, if judges are retributivists when they punish, forsaking concern with the overall consequences of their sentences, we need to know why legislatures also should not ignore consequences when they determine sentencing levels in the aggregate. These challenges are difficult to meet and require further delineation of the two-level theory.

Part IV returns to the question of considering cost as a sentencing factor. If the distinction between the legislature and the judiciary's roles is not as clear-cut as the two-tiered theory suggests, then what remains of the intuition that judges should not consider cost as a sentencing factor? The obvious reasons might rest more on pragmatism than on principle.[17] For the usual reasons, consequences dealing with *general considerations of social policy* are better off for the legislature to decide. Indeed, the risk is that the public might blame judges for not cutting costs, when in reality the legislature should be the main force driving cost control.[18]

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14. JOHN RAWLS, *Two Concepts of Rules* (1955), *reprinted in* JOHN RAWLS: COLLECTED PAPERS 20, 23 (Samuel Freeman ed., 1999).

15. H. L. A. HART, *Prolegomenon to the Principles of Punishment*, *in* PUNISHMENT & RESPONSIBILITY 1 (2d ed. 2008).

16. *See infra* notes 32-38 and accompanying text.

17. I consider these types of concerns in more detail in a companion article to this one. *See* Chad Flanders, *Cost and Sentencing: Some Pragmatic and Institutional Doubts*, 24 FED. SENT'G REP. 164 (2012) [hereinafter Flanders, *Cost and Sentencing*].

18. *See* Davey, *supra* note 3 (positing that the reform was designed to pressure judges to impose cheaper sentences); Flanders, *Cost of Justice*, *supra* note 3; Garst,

But this Article argues that there also is the more principled consideration of consistency or uniformity that figures in the decision to disfavor factoring in consequences when it comes to judicial sentencing.[19] A decision to sentence based on cost is less likely to be uniform across judges than, say, the nature of the offense. Moreover, it is a lack of uniformity that is more likely to be morally arbitrary than other considerations. But this reasoning only shows that a sentence's cost should not have determinative weight, not that it should have no weight. There is only a strong argument against making cost an especially salient sentencing factor, which is what the Missouri Sentencing Commission reform does.

This argument is avowedly theoretical and normative. That is, this Article tries to determine what judges *ought* to do, not what they in fact do. Judges and attorneys may argue cost at sentencing hearings, and many of them do.[20] That does not mean that they *should* be debating cost or basing sentencing decisions on it. I also am not concerned about whether, pragmatically, letting judges figure cost into their decisions might be a good thing overall, because it might lead to lower sentences.[21] I put these concerns to one side, important as they may be as a practical matter.[22] Instead, the Article questions: Ideally, what should sentencing look like? My answer is simple: Cost should be, at most, a marginal consideration in sentencing and should not be something that judges are *urged* to consider as a primary sentencing factor.

II. JUSTIFYING THE INTUITIVE PICTURE

A. Whether Judges Should Consider Cost in Sentencing

The idea that judges should not consider cost in sentencing rests on the powerful, brute intuition that it is simply wrong for judges to base sentence length upon cost. Judges should sentence in spite of cost considerations, the

supra note 6 (noting worry about proper division of responsibility between judges and legislators).

19. Here I am indebted especially to unpublished work by Dan Markel. *See* Dan Markel, Luck or Law? The Constitutional Case Against Indeterminate Sentencing (Fla. State Univ. Coll. of Law, Pub. Law Research Paper No. 376, 2009) (on file with author). Markel describes and defends the value of what he calls "horizontal equality," which is very similar to what I will be calling uniformity in sentencing. *Id.*

20. If only in an informal way. For instance, an attorney may argue that "Your honor, it doesn't make sense to spend thousands of dollars to put this guy in prison, when he presents no real safety risk to the public."

21. This has been suggested to me several times in conversation, viz., that the real aim in letting judges consider cost is to bring sentences down.

22. Although I take them up in Flanders, *Cost and Sentencing*, *supra* note 17.

intuition goes; they should not sentence because of cost considerations.[23] Even if a long term prison term is very expensive, the judge should give it to an offender if the offender deserves it.

Phrasing the intuition this way puts it as pro-prosecution, and this is how the argument against judges considering cost naturally presents itself. Jail time is expensive, as the Missouri Sentencing Commission shows,[24] and if judges take into account cost, then they might lower sentences because they cost too much. It is hard to imagine that a judge will increase a sentence in order to spend more money. Rather, a judge, knowing the cost of a longer sentence, would only be impelled to impose a longer sentence in spite of the greater cost of that sentence. So the intuition that cost is an irrelevant factor naturally suggests that it would be wrong for a judge to decrease someone's sentence or to give that person a different type of punishment than was appropriate because it would cost the state too much money.[25]

But if cost is an inappropriate factor to consider in sentencing, what factors *are* appropriate for judges to weigh? Here the sense is that what matters most of all is the crime that the offender has committed.[26] Subject to the limitations the legislature places on permissible sentences, the judge should look primarily at the offender's crime and to facts about it, e.g., was it done in an especially gruesome way, was it done with a weapon, etc.? The legislature may make some of these considerations salient, and appropriately so. For example, the legislature may allow a greater sentence imposed if a robber was armed. But the focus should be on what the crime was and matching the sen-

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23. This also seems to be the consensus view of the federal courts. *See, e.g.*, United States v. Molina, 563 F.3d 676, 678 (8th Cir. 2009) ("[W]e doubt that sentencing courts have the authority to impose lesser sentences based on the cost of imprisonment."); United States v. Tapia-Romero, 523 F.3d 1125, 1126-27 (9th Cir. 2008) ("Congress has not made the cost to society of a defendant's imprisonment a factor [that] a sentencing judge should consider under [18 U.S.C.] § 3553(a) in determining the appropriate term of imprisonment under 18 U.S.C. § 3582(a)."); United States v. Collins, No. 98-3765WM, 1999 WL 1143677, at *1 (8th Cir. Dec. 2, 1999) (per curiam) ("'[T]he public interest' (the phrase that the Court used at sentencing to refer to the economic costs of incarcerating Collins) is not a factor which the Court should have considered as a basis for departure."); United States v. Wong, 127 F.3d 725, 728 (8th Cir. 1997) ("The decision whether tax dollars should be used to pay for lengthy sentences is a congressional determination, not one to be made by federal courts."). Admittedly, these courts are interpreting a statute, not just going off intuition; but here, I think the statute reflects our rough intuitions.

24. *See Sentencing Information*, *supra* note 1, at 2-5.

25. There might also be worries from the defense side. Suppose that a drug rehabilitation program is very expensive; in that case, a judge might opt for a short prison stay rather than drug rehab. However, the early responses to the reform by the defense bar seem to be mostly favorable. *See, e.g.*, Ratcliffe, *supra* note 3 (providing examples of Missouri defense attorneys who support the reform).

26. Again, see Whitman, *supra* note 12, at 120, on the pervasiveness of this intuition, at least in America.

tence in a way that it is particularized to the crime and the manner of its commission.

According to the intuitive way of looking at things, other factors are relevant, but either they are derivative of the primary factor (the nature of the crime) or they go to specific characteristics of the offender. Consider the offender's prior offenses. Why might they matter in figuring out a sentence? For one, it might be that because an offender has committed previous crimes, and especially previous crimes of a similar nature, the offender had fair notice that he or she could be punished for this crime.[27] It is as a consequence permissible to punish him more harshly for the fifth time he commits the same crime.

Or, even if the prior offense does not relate to the nature of the present crime committed, it may be appropriate to tailor a sentence to this person's character, and past crimes certainly matter here. The judge might take into account that the person previously has committed many bad, albeit unrelated, acts when deciding that his sentence should be longer. This determination is thought to be an appropriate factor for the judge to consider because it seems germane to how much time this particular offender for this particular offense should be made to serve.[28]

Later, this Article will discuss what additional factors judges may consider and when they should consider them.[29] But it is intuitive, I want to propose, that judges should rest their decisions primarily on the nature of the offense and the nature of the offender.[30] If this conclusion is correct, then our intuitions about judicial sentencing are retributivist. We want judges to focus on what an offender deserves for his particular crime and, secondarily, on facts about the particular offender.

Suppose, by contrast, our sentencing intuitions were primarily consequentialist. We might ask, then, the judge to look at what sentence would be necessary to prevent the offender from harming others, deterring others from committing the same crime, or (at the outer edge) maximizing happiness and reducing suffering overall. On this picture, we would want judges to be social planners. Everything might in principle be on the table: the cost of the sentence, the suffering imposed on the offender, the fact that the money spent

27. Youngjae Lee, *Recidivism as Omission: A Relational Account*, 87 TEX. L. REV. 571, 577 (2009) (defending consideration of an offender's prior convictions on retributivist grounds).

28. 18 U.S.C. § 3553(a)(1) (2006) (stating that judges may consider "the nature and circumstances of the offense and the history and characteristics of the defendant"); *see also* Williams v. New York, 337 U.S. 241, 247-48 (1949).

29. *See infra* Part IV.

30. In this respect, the role of the judge is not (and should not be) wholly forward-looking. He or she should start where the jury has ended: with the guilty verdict for the particular crime.

on incarceration might be used for other socially worthwhile projects.[31] But this is not what we think. We want judges to be rather narrow in their decision on sentencing, not ranging over *all* the possible costs and consequences of different sentences.

B. Whether Other Parties Should Consider Costs in Sentencing

But this belief does not mean that consequences should never factor into decisions regarding sentences. Thus, we must examine the corollary regarding the role of judges in sentencing, which is that *other* parties might be able to consider costs. Societal consequences are divorced from judicial sentencing not because they are irrelevant in the criminal justice system (as any punishment theory that is attuned to the real world will have to attend to the question of social costs[32]) but because there is a question of division of labor when it comes to sentencing. Judges should look at what an offender deserves for his or her crime, but legislatures are the proper entity to be concerned with the all-things-considered costs of various sentences.[33] This is how the division of labor works: legislators use these all-things-considered judgments to set the boundaries within which judges work.

Legislatures, unlike judges, should look at the big picture. Legislatures talk to the people, use their own judgment, and try to determine what money should go where. Of course, the finite amount of money in the state's budget puts constraints on how legislatures can fund various projects. This lack of money affects criminal justice. People may want longer sentences, bigger prisons, or more conduct criminalized, but the state may not be able to afford these projects. The legislature must make these judgments to determine what type of criminal justice the state can afford. In making this determination, the legislature will not only decide how to best spend the money within each category but also how to spend among categories. In short, the legislature has to make these sorts of all-things-considered judgments both within each category (is money spent on police better than money spent on prisons?) and between categories (health care or education?). While judges are insulated from consequences on the intuitive picture, legislatures are all about consequences.

This division of labor between judges and legislatures tracks a familiar set of theories about punishment that Hart and Rawls articulated in the mid-

31. We might, for reasons of institutional competence, restrict the role of the judges in what they can consider when sentencing: this would be to limit the judge's role for consequentialist reasons. Judges *could* consider the overall happiness of society in sentencing, but they are in a bad position to do so. Therefore, we should prevent them from doing so.

32. *See* Cahill, *supra* note 10, at 822. On the pervasiveness of efficiency issues in criminal justice see Berman & Bibas, *supra* note 9, at 44.

33. Gore v. United States, 357 U.S. 386, 393 (1958) (noting that questions of the apportionment, severity and efficacy of punishment are "peculiarly questions of legislative policy").

twentieth century.[34] They share the idea that there are at least two levels to the question of criminal punishment. On one level – the *distribution* of punishment – only certain considerations are and should be salient.[35] This level is where judges decide particular cases, and they should do so only on the basis of desert and not on any considerations of deterrence or, more generally, social cost. On the second level to the punishment question – the *justification* of punishment[36] – consequences become a relevant consideration.

Indeed, Hart and Rawls seem to insist that consequences are the main, if not the only thing, relevant at the level of justification. The reason we have punishment at all, and punishment in this particular form, is consequentialist.[37] But once we have set up the institution, we have those actors within the institution that make decisions not on consequentialist grounds but on the basis of desert.[38] The theory is consequentialist on the level of the institution of punishment as a whole, but retributivist when it comes to deciding particular sentences. There is a division of labor between legislatures and judges, and each sphere has its own rules and decision procedures.

This theory is attractive, and it likely underlies the "intuitive reaction" to the Missouri Sentencing Commission's recommendation that judges take into consideration the cost of a sentence. Many people balk at this idea because they believe that judges should not worry about how much sentences cost. But they do not balk at the idea that legislatures should consider costs when assigning sentences to classes of crime. That is exactly what legislatures do.

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34. *See generally* HART, *supra* note 15; RAWLS, *supra* note 14. My picture here is cruder than the ones Hart or Rawls defend. In fact, the nuanced theory I present in the next section may be much closer to Hart's actual theory. Rawls and Hart, however, do say some things that tend to resemble the crude view. *See, e.g.*, HART, *supra* note 15, at 9 ("Much confusing shadow-fighting between utilitarians and their opponents may be avoided if it is recognized that it is perfectly consistent to assert *both* that the General Justifying Aim of the practice of punishment is its beneficial consequences *and* that the pursuit of this General Aim should be qualified or restricted out of deference to principles of Distribution which require that punishment should be only of an offender for an offence."); RAWLS, *supra* note 14, at 23 ("One can say, then, that the judge and the legislator stand in different positions and look in different directions: one to the past, the other to the future. The justification of what the judge does, *qua* judge, sounds like the retributive view; the justification of what the (ideal) legislator does, *qua* legislator, sounds like the utilitarian view."). Still, in setting out the crude view, I adopt Hart's terminology.

35. *See* HART, *supra* note 15, at 9.

36. *Id.* at 8-9, calls this the "general justifying aim" of punishment.

37. *See* HART, *supra* note 15, at 9; RAWLS, *supra* note 14, at 22-23. Hart seemed to think, as a general matter, societal institutions as a whole should be justified consequentially. HART, *supra* note 15, at 8-10. We have the institution of property, for instance (Hart's example), because it is a good, socially useful thing to have. *Id.* at 3-4. But there is a separate question once we have the institution about how to distribute property rights, etc., and how one becomes entitled to property. *Id.*

38. *See* HART, *supra* note 15, at 12; RAWLS, *supra* note 14, at 23.

They reason in terms of consequences. But in these simple terms, the two-level theory is not quite correct, and it needs modification.

III. TESTING THE THEORY

A. Application to the Legislature

There is a general problem with theories, such as the one just presented, that attempt to use multiple grounds for decision-making within the same system. That problem is: why should decision-making in one sphere be restricted only to that sphere? If there are considerations that are cogent at one level, why does that cogency disappear when shifting to another level? This problem is evident when wanting to insist, as Hart and Rawls do, that the two levels embrace different theories of morality.[39] On one level, we have consequentialism, which says to assess the good of an institution by whether it maximizes social welfare. But on another level, we have retributivism, which says judges should look at whether the offender deserves punishment and asks judges to bracket any concern with consequences. Can two theories exist side by side in this way? Why should one theory not control *both* spheres if the arguments in each sphere are compelling? In fact, despite the great intuitive appeal of a two-level theory, it can have serious flaws. We may want a two-level theory, but it will have to be one that is more nuanced than the simple picture painted in Part II.

Let us first consider the legislative side. Is it true that the legislature should only concern itself with social costs and have nothing to do with retributivism? It seems not. At the very least, some rules of justice must constrain the legislature, even if within these rules there is room to maneuver. Although recent Supreme Court jurisprudence has eviscerated the doctrine of proportionality,[40] it nonetheless still is there, and its existence testifies to the fact that the legislature works under constraints of justice. A life sentence for a parking ticket[41] is an injustice, even if it would be the most cost effective way to deal with the problem of parking violations. So too would punishing the children of an offender be unjust, even if this would deter some crimes.[42] In other words, even though the legislature might be concerned with all-things-considered judgments of cost, this concern is not the whole story. The whole story would include moral principles, such as justice, that constrain the legislature.

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39. *See* HART, *supra* note 15, at 9; RAWLS, *supra* note 14, at 23.

40. *E.g.*, Harmelin v. Michigan, 501 U.S. 957, 965 (1991).

41. Rummel v. Estelle, 445 U.S. 263, 274 n.11 (1980) ("This is not to say that a proportionality principle would not come into play . . . if a legislature made overtime parking a felony punishable by life imprisonment.")

42. This is an example raised by Hart. *See* HART, *supra* note 15, at 12.

Thus, the possibility exists that the legislature in making sentences might set the sentence level for a crime too high *and* too low, and as a result, engage in its own injustice. Suppose that due to cost constraints, the legislature could no longer afford to sentence murderers to any jail time during a certain fiscal year.[43] The legislature had to let them out on supervised release, for example. This decision might be an injustice on the part of the legislature, because the legislature was not giving convicted murderers what they deserve. Even though they are setting the sentence for murderers as a whole, and not a particular murderer, the sentence would still be unjust: it would be too low of a sentence for the crime of murder.

Now, more must be said about what this kind of injustice is. Is it true that all crimes demand at least a certain range of punishments to obtain justice? For instance, is twenty-one years in prison too little for the murder of seventy-six people?[44] Or is there no appropriate level of punishment for each crime? The thought experiment above suggests that we think there are some constraints legislatures work under when sentencing. If this intuition is right, then the legislature might be guilty of injustice if, for morally arbitrary reasons such as cost, it selects a lower range of punishments for a crime.[45]

For now, suffice it to say that the legislature operates under some justice constraints, if not positive ones – so that it should enforce some kinds of sentences for crimes (murderers must serve prison time) – at least in a negative way – it cannot go above a line for certain punishments (parking violations cannot merit the death penalty). Even this negative constraint is a constraint

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43. For recent examples of this happening, see Charlie Savage, *Trend to Lighten Harsh Sentences Catches on in Conservative States*, N.Y. TIMES, Aug. 13, 2011, at A14; *see generally* Chad Flanders, Op-Ed., *Prison Bills Come Due*, ST. LOUIS BEACON (Nov. 16, 2011), http://www.stlbeacon.org/voices/in-the-news/114151-prison-bills-come-due.

44. *See* Valeria Criscione & Oren Dorell, *Can Norwegian Punishment Fit the Crime?*, USATODAY.COM (July 28, 2011), http://www.usatoday.com/news/world/2011-07-27-Norway-punishment-lenient-death-penalty_n.htm; Jamie Weinstein, *Police: Alleged Norwegian Mass Murderer Faces Just 21 Years in Prison*, DAILY CALLER (July 23, 2011), http://dailycaller.com/2011/07/23/police-alleged-norwegian-mass-murderer-faces-just-21-years-in-prison/.

45. Consider another possibility, namely, that there is no one right sentence for each crime, and there may not even be one right *range* of punishments for a particular crime. Instead, just criminal punishments are determined on a comparative case-by-case basis. A more severe crime should be punished more than a less severe crime (given some plausible understanding of severity), and it would be unjust if this scheme of things were reversed. But there is no objective truth about how much the more severe crime should be punished, that is, whether armed robbery should be punished by fifteen years in prison, or only three years probation. I suspect this view might be close to being correct: that justice in punishment is more comparative than objective. I will not be able to defend this view here, although I say more about it in an unpublished paper. *See* Chad Flanders, Punishment and Political Philosophy: The Case of John Rawls (Mar. 11, 2012) (unpublished manuscript) (on file with author).

of justice, and if we believe it constrains, then the two-tier position in its simple form is false.

B. Application of the Theory to the Judiciary

Not only do some principles of justice bind the legislature; judges do and should consider consequentialist factors. To track our intuitions about this matter, consider that the federal sentencing advisory guidelines permit judges to consider an offender's potential for rehabilitation when sentencing.[46] Retributivists, strictly speaking, should not allow this consideration. To be sure, it deals with some characteristics of the offender. In that sense, this consideration is centered on facts particular to the crime and the person who committed it; it does not move the judge into the territory of all-things-considered social cost analysis. But it nonetheless strays from the core retributivist concern of appropriately sentencing the offender given the offense that he has committed. When we look at whether the offender might reform himself and become reintegrated into society, we are moving, even if subtly, away from the retributivist ideal that there is an appropriate punishment for any given crime. If one person gets five years in prison, and the other person only three years based on the latter's capacity for rehabilitation, then there is some sense on the retributivist picture that this situation is unjust. They have committed the same crime, and so should face the same penalty. Consequences, even the consequences of punishing this offender, should not enter into the retributivist calculus.[47]

From the perspective of the strict retributivist, the sentencing guidelines confuse matters, including factors that are irrelevant to sentencing. For instance, the sentencing guidelines also allow judges to consider whether the sentence given to a particular offender will operate as an effective deterrent not only for the offender but also for other people.[48] If it is the former, then we have an offender-specific sentencing factor, but one that stretches into

46. *See* 18 U.S.C. § 3553(a)(2)(D) (2006) (stating that the court shall consider the need for the sentence "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner"). *But see* Tapia v. United States, 131 S. Ct. 2382, 2391-93 (2011) (stating that judges cannot lengthen an offender's prison term for the sake of further treatment).

47. Again, see KANT, *supra* note 11, at 140 ("*Punishment* . . . can never be inflicted merely as a means to promote some other good for the criminal himself or for civil society. It must always be inflicted upon him only *because he has committed a crime*.").

48. 18 U.S.C. § 3553(a)(2)(B) (2006) (stating that the court shall consider the need for the sentence "to afford adequate deterrence to criminal conduct").

consequentialist territory. If it is the latter – and it certainly seems to be[49] – then we are in consequentialist territory and not far from all-things-considered social cost balancing. The judge that decides whether a particular punishment is in the best interests of society because it will prevent further crimes is adopting a policy perspective: the judge is asking not what does this offender deserve but what is best for the overall happiness of society. This determination is what the legislature – on the two-tier picture – is tasked with doing.

But is there anything wrong with the judge taking not just rehabilitation but specific and general deterrence into consideration? The answer to this question may be in some respects similar to the one we gave in analyzing the role of justice in the legislature's determination of sentences.[50] We want judges to give a just sentence. But what does a just sentence mean? It could mean that there is one particular sentence for each crime and each offender that would be the "just" sentence. If this definition were true, then the judge who did not give this sentence would be guilty of sanctioning an injustice: he would be punishing the offender either more or less than what he deserved.

I doubt that sentences are just or unjust in this way – that is, that there is a single just punishment for each offender. This perspective would be taking a God's eye view of sentencing: God knows what is appropriate for us and what our just deserts are. Even from the God's eye view it likely is too much to say that one determinate sentence exists for each offender and for the crime he has committed.[51] A range of sentences likely would be just given the offense and the criminal's individual characteristics. Within that range other specific or general deterrence considerations also might fit in. The legislature provides judges parameters within which to work, and so long as he remains within those parameters, he can consider factors that are outside of the particular offender and his particular crime.[52]

On that point, consider the Missouri Sentencing Commission recommendation that, in addition to listing the cost of each sentence, an offender's Sentencing Assessment Report also should show the risk that the offender would commit the same crime again given each sentence.[53] If the various sentences fell within the range of a just sentence, then the judge might be correct in choosing one sentence over another based on the fact that the sentence would make it less likely for the offender to reoffend. The possibility

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49. *See, e.g.*, United States v. Medearis, 451 F.3d 918, 920-21 (8th Cir. 2006) ("General deterrence . . . is one of the key purposes of sentencing, and the district court abused its discretion when it failed to give that matter its proper weight.").

50. *See supra* notes 40-44 and accompanying text.

51. Here I tend to agree with Bernard Williams that we have "very little idea of what such a[n all-just, omniscient] judge would or could do." BERNARD WILLIAMS, MAKING SENSE OF HUMANITY 243 (1995).

52. On the importance of these parameters, see Zachary Hoskins, *Deterrent Punishment and Respect for Persons*, 8 OHIO ST. J. CRIM. L. 369, 369-70 (2011).

53. *See Sentencing Information*, *supra* note 1, at 1.

of recidivism is, strictly speaking, a factor outside of what a pure retributivist would consider permissible to use in sentencing. It goes to the future dangerousness of the offender and not the past crime. Nonetheless, we might think that so long as the judge is primarily constrained by looking for a just sentence, he or she can go on to look at the various utilities of one sentence over another. In other words, not just the legislature can look at consequences, the judge also can do so.

IV. COST AS A SENTENCING FACTOR

On the simple version of the two-tier theory, the two levels were hermetically sealed: the principle for one did not operate in the other, and vice versa. Yet Part III demonstrated that the two levels *can* adopt the principles of the other sphere, appropriately defined. The legislature is constrained by principles of justice, even retributive justice. We can say, intuitively, that some sentences will be excessive even if applied in a general manner to all who commit the crime, and (perhaps more tentatively) we also can say that some punishments would be not severe enough. Conversely, the role of the judge is not merely to dole out just deserts. If there is a range of appropriate punishments for an offense, that is, punishments that can be considered just, then the judge could use some factors outside of just deserts to tip the balance in favor of one sentence or one type of sentence over another. The result is that legislatures and judges will be involved with assessing consequences and justice.

The two-tiered theory has some value, for it contains a considerable amount of truth, even if that truth must be qualified. The modifications to the two-tier theory still provide us ample grounds to be suspicious of using cost as a salient factor in sentencing. There may be room for judges to consider consequences, but there also may be reasons to limit such discretion, especially consequences of the all-things-considered variety. The legislature may be better suited to deal with this factor more appropriately, and there are good reasons to resist making the cost of a sentence an especially salient factor, as the new Sentencing Assessment Report the Sentencing Commission prepared does.[54] The reasons for limiting judicial discretion in this way, and limiting judicial exposure to certain facts, rests in some degree on pragmatic considerations, considerations which this Article canvassed in the Introduction and in Part II. Legislatures are in a better position to assess all-things-considered consequences and are more connected to the people, who will want to weigh in on what programs the legislature will fund and what programs it will cut.

But there is also a principle that is relevant when it comes to considering cost as a sentencing factor. That principle is *uniformity* in sentencing, something which reflects a concern with fairness not merely as to the justness of a particular sentence but also to fairness *across* sentences, across time and

54. *See id.* at 1.

across offenders.[55] Uniformity in sentencing is threatened when judges possess too much discretion to base sentencing decisions on factors other than the desert of the offender. To what extent this is true with cost is an empirical question. What is "uniformity" and why is it relevant in determining who has the main role of considering all-things-considered costs in sentencing? Consider when the legislature determines the sentencing range for a particular crime, when it, for example, makes second degree theft a Class B felony rather than a misdemeanor. By legislating in this way it forces every criminal convicted under the statute to face the same range of penalties. A sentence outside of that range would be ripe for reversal. Thus, the legislature can enforce a sort of uniformity across criminals. Legislatures make general laws that apply to people who share similar features, and those characteristics can be relevant either in defining the crime (all those who forcibly steal are guilty of robbery) or in specifying the punishment (all robbers should serve no less than five years). A law that singled out a particular person would be unjust.

Sometimes the legislature will violate this value of uniformity. Suppose that the legislature, in an effort to cut down on the rise of identity theft, increases the punishment of credit card theft from a misdemeanor to a felony. Those criminals punished under the later regime are the victims of unfortunate timing. They face a different sentence by virtue of when they committed the crime. This practice is a violation of temporal uniformity. Like offenders are treated unequally. But this situation does not seem to be on its face unjust. It might be unjust only if one of the sentences, either the earlier or the later, was *substantively* unjust – that is, it was unjust in its own right. For instance, a felony conviction for the theft of a credit card might be too harsh. But this harshness is not an offense against uniformity; it is an offense against the underlying substantive injustice of the sentence.

So we can acknowledge that over time there may be a lack of uniformity across sentences and that this lack of uniformity might not be unjust in its own right. The legislature is able to adapt and change sentences in response to concerns about effective deterrence or to popular concern with crimes.[56] The fact that sentences change over time is to be expected and is not a sin against justice. However, it would be unjust to make the new sentence apply to those people already convicted. This set of circumstances would be a violation of the principle of ex post facto. The prohibition on ex post facto laws is the exception that proves the rule: When legislation is passed, the same punishment and sentencing parameters must be applied to all future crimi-

55. Here again I am indebted to the work of Markel, *supra* note 19. The classic defense of uniformity of sentencing is still MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1972).

56. Consider, for example, the move to criminalize leaving a missing child unreported after the Casey Anthony affair. *See, e.g.*, Julie Mack, *Casey Anthony Case Prompts Michigan Senate Bill that Would Criminalize Failure to Report Missing Child*, MLIVE.COM (July 7, 2011, 11:38 AM), http://www.mlive.com/news/kalamazoo/index.ssf/2011/07/casey_anthony_case_prompts_mic.html.

nals.[57] The legislature cannot go back and arbitrarily change the sentences of those people convicted of the crime.[58] They are subjects of the earlier, uniform rule. There may be intra-temporal non-uniformity but never a lack of uniformity for the same crime committed at the same time. These rules have to be uniform.

But whereas uniformity in the legislative act is guaranteed in this way, this uniformity does not exist with the mechanisms of criminal justice in the other branches,[59] which explains why there are various checks on non-uniform treatment. Constitutional rules against arbitrary enforcement by police officers are illustrative. We do not want police to use vague laws to punish selectively one group and not another group. We want to preserve the uniformity of the law even after the legislature has passed its laws and specified the penalties for breaking those laws. Police officers, unlike legislatures, are permitted to act non-uniformly. Laws, if they are poorly written, give them this power. By allowing constitutional due process challenges against vagueness, we try to limit their ability to be discriminatory in their enforcement of the laws.[60]

And so too can judges permissibly fail to apply laws uniformly.[61] If the legislature gives them too much discretion in sentencing, judges run the risk of being unfair, *not* because they are giving sentences that do not fit the crime, but because they are treating criminals convicted of the *same* crime differently. This form of unfairness is different but still is bad. It is the unfairness that occurs *between* convicted criminals. This unfairness was one of the worries that gave rise to the movement for sentencing guidelines.[62] Judges possessed too much discretion, and legislatures sought to remedy this unbridled discretion through uniformity in sentencing; whether this attempt worked and whether this decision was a good idea is a matter of controversy.[63] But at least as far as motivation, the legislature was trying to make sentencing more uniform, and in that way, more just.

But not all discretion is bad, that is to say, not all variation in sentencing is bad – so we need to make some distinctions. Once we move beyond the

57. *See* Collins v. Youngblood, 497 U.S. 37, 43 (1990).

58. *See id.*

59. On the pervasiveness of discretion in the criminal justice system, see Whitman, *supra* note 12, at 122.

60. See the discussion in Markel, *supra* note 19, at 64-87. This same principle may lead us to worry about the use of the Executive Branch's pardon power, i.e., that it will be used arbitrarily to favor some people or groups of people over others. *See* Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1436-37 (2004).

61. *See* Jeremy Waldron, *Lucky in Your Judge*, 9 THEORETICAL INQUIRIES L. 185, 211 (2008) (examining the arbitrariness that arises given that different offenders are sentenced by different judges).

62. *See* KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING 104 (1998) (giving history of the movement for uniform sentencing guidelines).

63. *See id.* at 126-28.

simple and probably false retributivist picture that only one single punishment is just for each crime[64] and admit that other factors legitimately might enter in, then we open ourselves to some non-uniformity in sentencing. Some sentences for the same crime will be different, even the *exact same crime*, because of judges' legitimate decisions. It is only when the difference in sentences between offenders convicted of the same crime become too great, or are based on the wrong reasons, that this discretion needs to be questioned and cabined. If the variation between sentences is based on race, for instance, then we have reason to be suspicious of that variation. Or if the difference between sentences for the same crime becomes too great between judges, say a matter of years or decades, we again have reason to be suspicious.

What, then, makes variations in sentences bad? Two sorts of reasons that should make us look at variation between sentences with a skeptical eye include: 1) when the decision is made on arbitrary or irrelevant factors, such as race or class[65] and 2) when the variation between judges becomes too extreme for the crime committed. Allowing cost as a sentencing factor may implicate both of these reasons.

Imagine a set of concentric circles, representing the reasons a judge might use in sentencing a convicted offender. At the center, the smallest circle represents the facts of the crime that the criminal has committed. These include such things as whether the criminal was armed, whether he committed the crime in an especially grisly way, etc. These considerations are what we can call purely retributive reasons for sentencing. They go to the nature of the bad act itself.

A little further out, though, are the facts of the offender. Was it his first crime? Did he show remorse? Was he coerced in any manner into doing the crime? Was he cooperative with the police? These categories are less favored but remain near the core of what the judge ought to consider. We might make a plausible retributive case that the proper punishment is not just for the crime, but to some extent for this offender. And to make the punishment fit this offender, we have to look at facts about him or her. Of course, when we follow this rubric, we are moving away from uniformity. From a purely retributivist point of view, this type of variation is impermissible. But

64. Although it has its defenders. *See, e.g.*, David Gray, *Punishment as Suffering*, 63 VAND. L. REV. 1619, 1621-22 (2010).

65. I would also argue (perhaps more controversially) that subjective susceptibility to suffering should not be a relevant factor in sentencing. On a purely practical level, it would be hard to reliably assess how much different individuals suffered from any given punishment. But on a more principled level, and consistent with the theme of this essay, those who commit the same crime ought to be punished the same, all else being equal. *See generally* Dan Markel & Chad Flanders, *Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice*, 98 CALIF. L. REV. 907, 911 (2010).

we should take a more relaxed stance and permit judges to consider offender characteristics and not merely offense characteristics.

Even further out, and a larger circle, are considerations of specific deterrence. What kind of punishment do we need to give this person to prevent him from offending again? This type of inquiry is consequential in nature. We are considering the social good that will come out of the punishment, albeit in a way that focuses on the characteristics of a particular offender. What amount do we need to punish him or her to ensure that he or she will no longer offend? This consideration is forward looking. That is, we are not looking at what crime was committed and what sort of person committed it; we are looking forward to what we need to do to prevent the offender from committing another crime. We also can put the offender's capacity for rehabilitation into this category.

General deterrence brings us farther from the retributivist core of sentencing and is another, farther out, circle. Here we do not look to what will deter the offender, but what will deter people *generally* from committing the same type of crime. Interestingly, this consideration may bring some uniformity back into sentencing, despite it being an empirical question. Judges might agree about how severe a punishment should be not just to deter *this* offender but to deter offenders generally.

But they also may disagree about the right amount of punishment; different judges may think that different punishments are needed to promote general deterrence. The more factors we introduce into sentencing, the more room for variation there will be.[66] General deterrence likely introduces variation because it is an additional factor and because it leaves judges guessing as to the possible social consequences of a given sentence. They are not just looking at the severity of a crime, they are engaging in small-scale social engineering. And here we might invite deep disagreement between judges.

If this observation is true of general deterrence, it is truer of using cost as a sentencing factor, which would be the outermost circle in our diagram.[67] Here the judge leaves not only the features of the crime and of the offender but also in a way the sphere of punishment altogether. He is not concerned with whether a punishment will deter, or rehabilitate or justly punish. He is just looking to punish cheaply. The judge, in this respect, is acting as a mini-legislator, thinking about the money being spent and trying to cut costs.[68]

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66. "The greater the number of decisions required and the greater their complexity, the greater the risk that different courts would apply the guidelines differently to situations that, in fact, are similar, thereby reintroducing the very disparity that the guidelines were designed to reduce." U.S. SENTENCING GUIDELINES MANUAL ch. 1. pt. A(3) (2010).

67. I am leaving out impermissible factors, such as race or the color of the offender's eyes: what I want to capture is the permissible range of sentencing factors, of which I consider cost to be one.

68. Or, as the United States put one defendant's arguments, the court is considering whether "the public has better things to spend its money on than incarcerating

What we have when we get to this part of the circle is a factor, which should be much less relevant in the judicial calculus than the other factors in the diagram. It is not only outside of the judge's traditional competence, balancing costs and benefits, but it is also far removed from what we think judges should be doing, i.e., looking at the offense and the offender. Though there should not be a rigid rule against consequences figuring in the sentencing decision, there is little difference conceptually between considering general deterrence and considering the cost of a punishment.[69] The consequences that should matter most in sentencing relate to the specific offender: what punishment would be proper to deter *him* from committing the same crime again? Further out, judges may consider general deterrence – what it will take to deter people in general from committing the same crime. Consequences at the level of all-things-considered social costs should be the least relevant. They should not be removed categorically from the judicial ken, but they should be at the very least disfavored and certainly not be made salient to the judge.

Making social cost salient to the judge risks significant variation based on a marginally relevant factor, and thus creates the possibility of an injustice against one offender relative to other offenders. An offender legitimately might balk if someone who committed the same crime is given a lesser sentence because the judge was keener on cost cutting than his judge. And this variation becomes more worrisome as the disparities in sentences increase. If the variation is great, then the reliance on a presumptively disfavored category becomes all the more troubling. Variation is not always bad – it is probably inevitable, and sometimes can be good – but it can become bad when it is large and when the cause of the variation is not the best of reasons, including societal cost considerations. Bad variation is a function of how relevant the factor is (whether it relates to the specific offender or with general social costs) and the degree of the variation. Such is the risk that using cost as a sentencing factor introduces.

But what if the variation is not that great? Is there anything wrong with some variation based on using cost as a sentencing factor? We should acknowledge that if a judge wants to make a small (months, rather than years) variation in sentence based on cost, the sin against uniformity is not that bad. However, we should be wary. The more factors the judge must consider, the greater the risk of variation. Also, judges might vary widely to the extent that they think consequences matter. Some judges might refuse to consider cost, and some judges will be avid cost-cutters. If (a) costs will vary radically for different punishments and (b) judges will tend to vary their approach to cost cutting, then we have a recipe for wide non-uniformity in criminal sentences

him." United States v. Molina, No. 08-1368, 2008 WL 1943916, at *8 (8th Cir. Apr. 23, 2008).

69. This makes general deterrence something that generally should be a disfavored factor; it, like cost, is something that is extrinsic to the characteristics of the offense and the offender.

and a reason to suspect that the sentencing system is unfair. If, however, the cost difference between punishments is not that great, so that judges will be less likely to be swayed by cost in sentencing, and if judges tend all to use cost in the same way (and in the same cases), the risk to uniformity will be less. Although this seems to me correct as an intuitive matter, only empirical study can give us clear answers to these questions.[70]

V. CONCLUSION

Cost as a sentencing factor should be presumptively disfavored. Although we probably cannot excise all consideration of cost in sentencing, we should not make it a salient factor for judges to consider. But this is precisely what the new Sentencing Assessment Report does.

This Article began with a simple picture of two tiers of sentencing: the legislative and the judicial. Each tier had its own values. This picture turned out to be too simple. Legislatures should be concerned with justice in sentencing and not just social cost. Judges, too, can figure in consequentialist factors for sentencing. But there remained some truth to the two-tier picture. When we give too much discretion, we risk losing the uniformity the legislature secures by passing general laws. If there is not uniformity in sentencing, injustice occurs: like offenders are not being treated alike.

The question is when variation is permissible and when it is not. Although cost cannot be excluded categorically as a factor, it is worrisome when it introduces wide variation in sentences. This factor, when it operates, should operate only at the margins. Judges are not trained in making all-things-considered judgments of social cost, and different judges might have different takes on when cost is appropriate and how much to weigh cost.

Thus, we might want to question the inclusion of cost in the new Sentencing Assessment Reports. While cost can be relevant sometimes, judges usually should not use it as a sentencing factor, especially when it risks creating non-uniform sentences for a reason that is properly at the margins of a judge's decision-making process.

70. I address these questions in more detail in Flanders, *Cost and Sentencing*, *supra* note 17.