LEARNING OBJECTIVES

After reading this chapter, you should be able to

• Describe the five goals of contemporary criminal sentencing.
• Describe the nature of indeterminate sentencing, and explain its purpose.
• Describe the nature of structured sentencing, and describe the different types of structured sentencing models in use today.
• Identify alternative sanctions, and assess recent sentencing innovations.
• Describe the nature and importance of the presentence investigation report.
• Describe the history of victims’ rights and services, and discuss the growing role of the victim in criminal justice proceedings today.
• List the four traditional sentencing options.
• Outline the arguments for and against capital punishment.
In sentencing, we have gone through determinate, indeterminate and back and forth in the last century. But in our time, life moves much faster. It took a hundred years from the peak of indeterminate sentencing, or the full realization of indeterminate sentencing values in the late 1870s to 1900 to wash away by the mid-1970s. . . . Is it possible that, with things happening so much faster, in just twenty or twenty-five years the cycle might once again be changing back in a different direction?

—Michael Tonry, Director, Institute of Criminology, Cambridge University

Developing a sentencing system that provides appropriate types and lengths of sentences for all offenders is a challenging task.

—National Conference of State Legislatures

sentencing
The imposition of a criminal sanction by a judicial authority.

If you want a small prison population, make punishment certain. If you want a large prison population, make punishment uncertain.

—Former House Speaker Newt Gingrich

INTRODUCTION

In April 2008, Iowa Governor Chet Culver signed the nation’s first piece of legislation that requires policymakers to conduct racial-impact studies and to prepare racial-impact statements for any proposed policy changes affecting criminal sentencing, probation, or parole. The action came after research showed that Iowa leads the nation in racial disparity in its prison population. A few months later, a similar piece of legislation was signed into law by Connecticut Governor M. Jodi Rell, and the Illinois General Assembly passed a law creating the state’s Commission to Study Disproportionate Justice Impact, a body charged with investigating the extent to which the structure of criminal sentencing in Illinois affects communities of color.

Marc Mauer, head of the Washington, D.C.–based Sentencing Project says, “The premise behind racial impact statements is that policies often have unintended consequences that would be best addressed prior to adoption of new initiatives.” One example Mauer gives is that of enhanced criminal penalties associated with drug sales near school grounds—a law, he says, more likely to be violated by minorities because they tend to live in areas with greater proximity to schools. Studies of the racial impact of sentencing practices, Mauer says, force us to examine twin problems in the justice system: (1) the need for policies and practices that can work effectively to promote public safety, and (2) the need to reduce disproportionate rates of minority incarceration when feasible. “These are not competing goals,” says Mauer. “If we are successful in addressing crime in a proactive way, we will be able to reduce high imprisonment rates; conversely, by promoting racial justice we will increase confidence in the criminal justice system and thereby aid public safety efforts.”

Under an organized system of criminal justice, sentencing is the imposition of a penalty on a person convicted of a crime. Sentencing follows what is intended to be an impartial judicial proceeding during which criminal responsibility is ascertained. Most sentencing decisions are made by judges, although in some cases, especially where a death sentence is possible, juries may be involved in a special sentencing phase of courtroom proceedings. The sentencing decision is one of the most difficult made by any judge or jury. Not only does it affect the future of the defendant—and at times it is a decision about his or her life or death—but society looks to sentencing to achieve a diversity of goals, some of which are not fully compatible with others.

This chapter examines sentencing in terms of both philosophy and practice. We will describe the goals of sentencing as well as the historical development of various sentencing models in the United States. This chapter also contains a detailed overview of victimization and victims’ rights in general, especially as they relate to courtroom procedure and to sentencing practice. Federal sentencing guidelines and the significance of presentence investigations are also described. For an overview of sentencing issues, visit the Sentencing Project via Web Extra 11–1 at MyCrimeKit.com. Resources on sentencing and sentencing law are available at Web Extra 11–2.
THE PHILOSOPHY AND GOALS OF CRIMINAL SENTENCING

Traditional sentencing options have included imprisonment, fines, probation, and—for very serious offenses—death. Limits on the range of options available to sentencing authorities are generally specified by law. Historically, those limits have shifted as understandings of crime and the goals of sentencing have changed. Sentencing philosophies, or the justifications on which various sentencing strategies are based, are manifestly intertwined with issues of religion, morals, values, and emotions. Philosophies that gained ascendancy at a particular point in history usually reflected more deeply held social values. Centuries ago, for example, it was thought that crime was due to sin and that suffering was the culprit’s due. Judges were expected to be harsh. Capital punishment, torture, and painful physical penalties served this view of criminal behavior.

An emphasis on equitable punishments became prevalent around the time of the American and French Revolutions, brought about in part by Enlightenment philosophies. Offenders came to be seen as highly rational beings who intentionally and somewhat carefully chose their course of action. Sentencing philosophies of the period stressed the need for sanctions that outweighed the benefits to be derived from criminal activity. The severity of punishment became less important than quick and certain penalties.

Recent thinking has emphasized the need to limit offenders’ potential for future harm by separating them from society. We also still believe that offenders deserve to be punished, and we have not entirely abandoned hope for their rehabilitation. Modern sentencing practices are influenced by five goals, which weave their way through widely disseminated professional and legal models, continuing public calls for sentencing reform, and everyday sentencing practice. Each goal represents a quasi-independent sentencing philosophy, since each makes distinctive assumptions about human nature and holds implications for sentencing practice. These are the five goals of contemporary sentencing:

- Retribution
- Incapacitation
- Deterrence
- Rehabilitation
- Restoration

Retribution

Retribution is a call for punishment based on a perceived need for vengeance. Retribution is the earliest known rationale for punishment. Most early societies punished all offenders who were caught. Early punishments were immediate—often without the benefit of a hearing—and they were often extreme, with little thought given to whether the punishment “fit” the crime. Death and exile, for example, were commonly imposed, even for relatively minor offenses. The Old Testament dictum of “an eye for an eye, a tooth for a tooth”—often cited as an ancient justification for retribution—was actually intended to reduce the severity of punishment for relatively minor crimes.

Today, retribution corresponds to the just deserts model of sentencing, which holds that offenders are responsible for their crimes. When they are convicted and punished, they are retribution

The act of taking revenge on a criminal perpetrator.

just deserts

A model of criminal sentencing that holds that criminal offenders deserve the punishment they receive at the hands of the law and that punishments should be appropriate to the type and severity of the crime committed.
said to have gotten their “just deserts.” Retribution sees punishment as deserved, justified, and even required by the offender’s behavior. The primary sentencing tool of the just deserts model is imprisonment, but in extreme cases capital punishment (that is, death) becomes the ultimate retribution.

In both the public’s view and in political policy making, retribution is still a primary goal of criminal sentencing. During the 1990s, as the public-order perspective with its emphasis on individual responsibility became dominant, public demands for retribution-based criminal punishments grew loud and clear. In the mid-1990s, for example, the Mississippi legislature, encouraged by then-Governor Kirk Fordice, voted to ban prison air-conditioning, remove privately owned television sets from prison cells and dormitories, and prohibit weight lifting by inmates. Governor Fordice sent a “get tough” proposal to the legislature, which was quickly dubbed the “Clint Eastwood Hang ‘Em High Bill” and which required inmates to wear striped uniforms with the word CONVICT stamped on the back. State Representative Mac McInnis explained the state’s retribution-inspired fervor this way: “We want a prisoner to look like a prisoner, to smell like a prisoner.” As critics note, however, none of these measures are likely to deter crime, but that is beside the point. The goal of retribution, after all, is not deterrence, but satisfaction.

**Incapacitation**

Incapacitation, the second goal of criminal sentencing, seeks to protect innocent members of society from offenders who might harm them if not prevented from doing so. In ancient times, mutilation and amputation of the extremities were sometimes used to prevent offenders from repeating their crimes. Modern incapacitation strategies separate offenders from the community to reduce opportunities for further criminality. Incapacitation, sometimes called the “lock ‘em up approach,” forms the basis for the modern movement toward prison “warehousing.” Unlike retribution, incapacitation requires only restraint—and not punishment. Hence advocates of the incapacitation philosophy of sentencing are sometimes also active prison reformers who want to humanize correctional institutions. Innovations in confinement offer new ways to achieve the goal of incapacitation without imprisonment. Remote location monitoring (discussed in Chapter 12) and biomedical intervention (such as “chemical castration”) may offer alternatives to imprisonment.

**Deterrence**

Deterrence uses the example or threat of punishment to convince people that criminal activity is not worthwhile. Its overall goal is crime prevention. **Specific deterrence** seeks to reduce the likelihood of recidivism (repeat offenses) by convicted offenders, while **general deterrence** strives to influence the future behavior of people who have not yet been arrested and who may be tempted to turn to crime.

Deterrence is one of the more “rational” goals of sentencing because it is an easily articulated goal and because it is possible to investigate objectively the amount of punishment required to deter. It is generally agreed today that harsh punishments can virtually eliminate many minor forms of criminality. Few traffic tickets would have to be written, for example, if minor driving offenses were punishable by death. A free society like our own, of course, is not willing to impose extreme punishments on petty offenders, and even harsh punishments are not demonstrably effective in reducing the incidence of serious crimes, such as murder and drug running.

Deterrence is compatible with the goal of incapacitation, since at least specific deterrence can be achieved through incapacitating offenders. Tufts University Professor Hugo Adam Bedau, however, points to significant differences between retribution and deterrence. Retribution is oriented toward the past, says Bedau. It seeks to redress wrongs already committed. Deterrence, in contrast, is a strategy for the future. It aims to prevent new crimes. But as legal philosopher H. L. A. Hart observed, retribution can be the means through which deterrence is achieved. By serving as an example of what might happen to others, punishment may have an inhibiting effect.
Rehabilitation

Rehabilitation seeks to bring about fundamental changes in offenders and their behavior. As in the case of deterrence, the ultimate goal of rehabilitation is a reduction in the number of criminal offenses. Whereas deterrence depends on a fear of the consequences of violating the law, rehabilitation generally works through education and psychological treatment to reduce the likelihood of future criminality.

The term rehabilitation, however, is a misnomer for the kinds of changes that its supporters seek. Rehabilitation literally means to return a person to his or her previous condition, just as medical rehabilitation programs seek to restore functioning to atrophied limbs, to rejuvenate injured organs, and to mend shattered minds. In the case of criminal offenders, however, it is likely that in most cases restoring criminals to their previous state will result in nothing but a more youthful type of criminality.

In the late 1970s, the rehabilitative goal in sentencing fell victim to the “nothing-works doctrine.” The nothing-works doctrine was based on studies of recidivism rates that consistently showed that rehabilitation was more an ideal than a reality. With as many as 90% of former convicted offenders returning to lives of crime following release from prison-based treatment programs, public sentiments in favor of incapacitation grew. Although the rehabilitation ideal has clearly suffered in the public arena, emerging evidence has begun to suggest that effective treatment programs do exist and may be growing in number. See Library Extra 11–1 at MyCrimeKit.com to read more about treatment programs that work.

Restoration

Victims of crime and their families are frequently traumatized by their experiences. Some victims are killed, and others receive lasting physical or emotional injuries. For many, the world is never the same. The victimized may live in constant fear, be reduced in personal vigor, and be unable to form trusting relationships. Restoration is a sentencing goal that seeks to address this damage by making the victim and the community “whole again.”

A U.S. Department of Justice report explains restoration this way: “Crime was once defined as a ‘violation of the State.’ This remains the case today, but we now recognize that crime is far more. It is—a among other things—a violation of one person by another. While retributive justice may address the first type of violation adequately, restorative justice is required to effectively address the latter. . . . Thus [through restorative justice] we seek to attain a balance between the legitimate needs of the community, the . . . offender, and the victim.” The “healing” of all parties has many aspects, ranging from victims’ assistance initiatives to legislation supporting victims’ compensation.

Restorative justice (RJ) is also referred to as balanced and restorative justice. Conceptually, “balance” is achieved by giving equal consideration to community safety and offender accountability. Restorative justice focuses on “crime as harm, and justice as repairing the harm.” The community safety dimension of the RJ philosophy recognizes that the justice system has a responsibility to protect the public from crime and from offenders. It also recognizes that the community can participate in ensuring its own safety. The accountability element defines criminal conduct in terms of obligations incurred by the offender, both to the victim and to the community. RJ also has what some describe as a rehabilitation

The attempt to reform a criminal offender. Also, the state in which a reformed offender is said to be.

Nobody gets rehabilitated.
Well, I shouldn’t say no one;
some of them die.

—Former Los Angeles
Police Chief Daryl Gates

restorative justice (RJ)
A sentencing model that builds on restitution and community participation in an attempt to make the victim “whole again.”

restoration
A goal of criminal sentencing that attempts to make the victim “whole again.”

Inmates in a California prison learning how to repair computer equipment. Skills acquired through such prison programs might translate into productive, noncriminal careers for ex-convicts. Rehabilitation is an important, but infrequently voiced, goal of modern sentencing practices. What are some other sentencing goals identified in this chapter?

Courtesy of Robert W. Winslow
TABLE 11–1 Differences between Retributive and Restorative Justice

<table>
<thead>
<tr>
<th>Retributive Justice</th>
<th>Restorative Justice</th>
</tr>
</thead>
<tbody>
<tr>
<td>Crime is an act against the state, a violation of a law,</td>
<td>Crime is an act against another person or the community.</td>
</tr>
<tr>
<td>an abstract idea.</td>
<td></td>
</tr>
<tr>
<td>The criminal justice system controls crime.</td>
<td>Crime control lies primarily with the community.</td>
</tr>
<tr>
<td>Offender accountability is defined as taking punishment.</td>
<td>Offender accountability is defined as assuming responsibility and taking action to repair harm.</td>
</tr>
<tr>
<td>Crime is an individual act with individual responsibility.</td>
<td>Crime has both individual and social dimensions of responsibility.</td>
</tr>
<tr>
<td>Victims are peripheral to the process of resolving a crime.</td>
<td>Victims are central to the process of resolving a crime.</td>
</tr>
<tr>
<td>The offender is defined by deficits.</td>
<td>The offender is defined by the capacity to make reparation.</td>
</tr>
<tr>
<td>The emphasis is on adversarial relationships.</td>
<td>The emphasis is on dialogue and negotiation.</td>
</tr>
<tr>
<td>Pain is imposed to punish, deter, and prevent.</td>
<td>Restitution is a means of restoring both parties; the goal is reconciliation.</td>
</tr>
<tr>
<td>The community is on the sidelines, represented abstractly by the state.</td>
<td>The community is the facilitator in the restorative process.</td>
</tr>
<tr>
<td>The response is focused on the offender's past behavior.</td>
<td>The response is focused on harmful consequences of the offender's behavior; the emphasis is on the future and on reparation.</td>
</tr>
<tr>
<td>There is dependence on proxy professionals.</td>
<td>Both the offender and the victim are directly involved.</td>
</tr>
</tbody>
</table>


The root of revenge is in the weakness of the Soul; the most abject and timorous are the most addicted to it.

—Akhenaton (circa 1375 B.C.)

Competency development element, which holds that offenders who enter the justice system should leave it more capable of participating successfully in the wider society than when they entered. In essence, RJ is community-focused; its primary goal is improving the quality of life for all members of the community. See Table 11–1 for a comparison of retributive and restorative justice.

Sentencing options that seek to restore the victim have focused primarily on restitution payments that offenders are ordered to make, either to their victims or to a general fund, which may then reimburse victims for suffering, lost wages, and medical expenses. In support of these goals, the 1984 Federal Comprehensive Crime Control Act specifically requires that “[i]f sentenced to probation, the defendant must also be ordered to pay a fine, make restitution, and/or work in community service.”

Vermont began a new Sentencing Options Program in 1995 built around the concept of reparative probation. According to state officials, the Vermont reparative options program, which “requires the offender to make reparations to the victim and to the community, marks the first time in the United States that the Restorative Justice model has been embraced by a state department of corrections and implemented on a statewide scale.” Vermont’s reparative program builds on “community reparative boards” consisting of five or six citizens from the community where the crime was committed. It requires face-to-face public meetings between the offender and board representatives. Keeping in mind the program’s avowed goals of “making the victim(s) whole again” and having the offender “make amends to the community,” board members determine the specifics of the offender’s sentence. Options are restitution, community service work, victim–offender mediation, victim-empathy programs, driver improvement courses, and the like.

Some advocates of the restoration philosophy of sentencing point out that restitution payments and work programs that benefit the victim can also have the added benefit of rehabilitating the offender. The hope is that such sentences will teach offenders personal responsibility through structured financial obligations, job requirements, and regularly scheduled payments. Learn more about restorative justice by visiting Library Extras 11–2 and 11–3 and Web Extra 11–3 at MyCrimeKit.com.
INDETERMINATE SENTENCING

While the philosophy of criminal sentencing is reflected in the goals of sentencing we have just discussed, different sentencing practices have been linked to each goal. During most of the twentieth century, for example, the rehabilitation goal was influential. Since rehabilitation requires that individual offenders’ personal characteristics be closely considered in defining effective treatment strategies, judges were generally permitted wide discretion in choosing from among sentencing options. Although incapacitation is increasingly becoming the sentencing strategy of choice today, many state criminal codes still allow judges to impose fines, probation, or widely varying prison terms, all for the same offense. These sentencing practices, characterized primarily by vast judicial choice, constitute an indeterminate sentencing model.

Indeterminate sentencing has both a historical and a philosophical basis in the belief that convicted offenders are more likely to participate in their own rehabilitation if participation will reduce the amount of time they have to spend in prison. Inmates exhibiting good behavior will be released early, while recalcitrant inmates will remain in prison until the end of their terms. For that reason, parole generally plays a significant role in states that employ the indeterminate sentencing model.

Indeterminate sentencing relies heavily on judges’ discretion to choose among types of sanctions and to set upper and lower limits on the length of prison stays. Indeterminate sentences are typically imposed with wording like this: “The defendant shall serve not less than five and not more than twenty-five years in the state’s prison, under the supervision of the state department of correction.” Judicial discretion under the indeterminate model also extends to the imposition of concurrent or consecutive sentences when the offender is convicted on more than one charge. Consecutive sentences are served one after the other, while concurrent sentences expire simultaneously.

The indeterminate model was also created to take into consideration detailed differences in degrees of guilt. Under this model, judges can weigh minute differences among cases, situations, and offenders. All of the following can be considered before sentence is passed: (1) whether the offender committed the crime out of a need for money, for the thrill it afforded, out of a desire for revenge, or “just for the hell of it”; (2) how much harm the offender intended; (3) how much the victim contributed to his or her own victimization; (4) the extent of the damages inflicted; (5) the mental state of the offender; (6) the likelihood of successful rehabilitation; and (7) the degree of the offender’s cooperation with authorities.

Under the indeterminate sentencing model, the inmate’s behavior while incarcerated is the primary determinant of the amount of time served. State parole boards wield great discretion under this model, acting as the final arbiters of the actual sentence served.

A few states employ a partially indeterminate sentencing model. They allow judges to specify only the maximum amount of time to be served. Some minimum is generally implied by law but is not under the control of the sentencing authority. General practice is to set one year as a minimum for all felonies, although a few jurisdictions assume no minimum time at all, making offenders eligible for immediate parole.

Critiques of Indeterminate Sentencing

Indeterminate sentencing is still the rule in many jurisdictions, including Georgia, Hawaii, Iowa, Kentucky, Massachusetts, Michigan, Nevada, New York, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, West Virginia, and Wyoming. Since the 1970s, however, the model has come under fire for contributing to inequality in sentencing. Critics claim that the indeterminate model allows judges’ personalities and personal philosophies to produce too wide a range of sentencing practices, from very lenient to very strict. The indeterminate model is also criticized for perpetuating a system under which offenders might be sentenced, at least by some judges, more on the basis of personal and social characteristics, such as race, gender, and social class, than on culpability.

Because of the personal nature of judicial decisions under the indeterminate model, offenders often depend on the advice and ploys of their attorneys to appear before a judge who is thought to be a good sentencing risk. Requests for delays are a common defense strategy.
Do Sex-Offender Websites Spur Vigilantism?

In 2006, officials in Maine decided to temporarily shut down the state’s sex-offender website after two convicted sex offenders listed in the online registry were shot and killed. The site provides names, addresses, ages, and offender histories for more than 2,200 nonincarcerated registered sex offenders residing in Maine.

One of the offenders who died, 57-year-old Joseph Gray, was shot five times through a window after being awakened by barking dogs at three o’clock in the morning. Gray had been convicted in Massachusetts in 1992 of indecent assault and battery on a child and child rape and had been sentenced to four to six years in prison. Five hours later, William Elliott, age 24, a registered sex offender living in Corinth, Maine, was shot and killed as he answered the door to his ramshackle trailer. In 2002, Elliott had pleaded guilty to two misdemeanor counts of sexual abuse of a minor. The charges stemmed from an intimate relationship he had had with a girl two weeks shy of her 16th birthday when he was 19 years old.

On the night of the killings, Canadian Stephen Marshall, a 20-year-old dishwasher from Nova Scotia and the only suspect in the killings, died when he shot himself in the head with a .45-caliber handgun as police stopped and boarded a bus he was riding to Boston. Marshall had been visiting his father in Houlton, Maine, a town near the Canadian border, where the two had planned to go target shooting. Maine Department of Public Safety officials had quickly zeroed in on Marshall after they determined that he had logged on to the state’s sex-offender registry and obtained information on the victims and 32 other men shortly before the killings. Investigators found a small-caliber pistol and a laptop computer in his backpack.

Charles Onley, a research associate at the Center for Sex Offender Management, a U.S. Department of Justice project, told reporters following the Maine killings that critics had previously warned that online offender registries could be used to facilitate vigilante-type killings. The only other known case of vigilantism linked to a sex-offender website occurred in August 2005, when Washington State resident Michael Mullen killed two sex offenders in Bellingham, Washington, after locating them through the city’s online sex-offender registry. At the time, Don Pierce, executive director of the Washington Association of Sheriffs and Police Chiefs, said that “the value of sex-offender registries to the community far outweighs the risks.”

YOU DECIDE

1. Should society’s interest in knowing the identities and residential locations of released sex offenders supersede the concerns for personal safety that those offenders may have?
2. Do you agree with Don Pierce that the value of sex-offender registries far outweighs their risks? Why or why not?

Sentencing

CHAPTER 11

proportionality
A sentencing principle that holds that the severity of sanctions should bear a direct relationship to the seriousness of the crime committed.
equity
A sentencing principle, based on concerns with social equality, that holds that similar crimes should be punished with the same degree of severity, regardless of the social or personal characteristics of offenders.
social debt
A sentencing principle that holds that an offender’s criminal history should objectively be taken into account in sentencing decisions.

TABLE 11–2 Percentage of Sentence Likely to Be Served, by New Court Commitments to State Prison

<table>
<thead>
<tr>
<th>Offense Type</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Violent</td>
<td>51</td>
</tr>
<tr>
<td>Property</td>
<td>46</td>
</tr>
<tr>
<td>Drug</td>
<td>46</td>
</tr>
<tr>
<td>Public-order</td>
<td>49</td>
</tr>
<tr>
<td>Average for all felonies</td>
<td>49</td>
</tr>
</tbody>
</table>


STRUCTURED SENTENCING

Until the 1970s, all 50 states used some form of indeterminate (or partially indeterminate) sentencing. Eventually, however, calls for equity and proportionality in sentencing, heightened by claims of racial disparity in the sentencing practices of some judges, led many states to move toward greater control over their sentencing systems.

Critics of the indeterminate model called for the recognition of three fundamental sentencing principles: proportionality, equity, and social debt. Proportionality refers to the belief that the severity of sanctions should be punished with the same degree of severity, regardless of the social or personal characteristics of offenders. According to the principle of equity, for example, two bank robbers in different parts of the country, who use the same techniques and weapons, with the same degree of implied threat, should receive roughly the same sentence even though they are tried under separate circumstances and in different jurisdictions. The equity principle needs to be balanced, however, against the notion of social debt. In the case of the bank robbers, the offender who has a prior criminal record can be said to have a higher level of social debt than the first-time robber, where all else is equal. Greater social debt, of course, suggests a more severe punishment or a greater need for treatment.

Beginning in the 1970s, a number of states addressed these concerns by developing a different model of sentencing, known as structured sentencing. One form of structured sentencing, called determinate sentencing, requires that a convicted offender be sentenced to a fixed term that may be reduced by good time (time off for good behavior) or earned time (time off in recognition of special efforts on the part of the inmate). Determinate sentencing states eliminated the use of parole and created explicit standards to specify the amount of punishment appropriate for a given offense. Determinate sentencing practices also specify an anticipated release date for each sentenced offender.

In a 1996 report that traced the historical development of determinate sentencing, the National Council on Crime and Delinquency (NCCD) observed that “the term ‘determinate sentencing’ is generally used to refer to the sentencing reforms of the late 1970s.” At that time, the legislatures of California, Illinois, Indiana, and Maine abolished the parole release decision and replaced indeterminate penalties with fixed (or flat) sentences that could be reduced by good-time provisions. In response to the then-growing determinate sentencing movement, a few states developed voluntary/advisory sentencing guidelines during the 1980s. These guidelines consist of recommended sentencing policies that are not required by law and serve as guides to judges. Voluntary/advisory sentencing guidelines are usually based on past sentencing practices and may build on either determinate or indeterminate sentencing structures. Florida, Maryland, Massachusetts, Michigan, Rhode Island, Utah, and Wisconsin all experimented with voluntary/advisory guidelines during the 1980s. Voluntary/advisory guidelines constitute a second form of structured sentencing.

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proportionality
A sentencing principle that holds that the severity of sanctions should bear a direct relationship to the seriousness of the crime committed.
equity
A sentencing principle, based on concerns with social equality, that holds that similar crimes should be punished with the same degree of severity, regardless of the social or personal characteristics of the offenders.
social debt
A sentencing principle that holds that an offender’s criminal history should objectively be taken into account in sentencing decisions.

determinate sentencing
A model of criminal punishment in which an offender is given a fixed term of imprisonment that may be reduced by good time or gain time. Under the model, for example, all offenders convicted of the same degree of burglary would be sentenced to the same length of time behind bars.

voluntary/advisory sentencing guidelines
Recommended sentencing policies that are not required by law.
presumptive sentencing
A model of criminal punishment that meets the following conditions: (1) The appropriate sentence for an offender convicted of a specific charge is presumed to fall within a range of sentences authorized by sentencing guidelines that are adopted by a legislatively created sentencing body, usually a sentencing commission. (2) Sentencing judges are expected to sentence within the range or to provide written justification for failing to do so. (3) There is a mechanism for review, usually appellate, of any departure from the guidelines.

aggravating circumstances
Circumstances relating to the commission of a crime that make it more grave than the average instance of that crime.

mitigating circumstances
Circumstances relating to the commission of a crime that may be considered to reduce the blameworthiness of the defendant.

truth in sentencing
A close correspondence between the sentence imposed on an offender and the time actually served in prison.

A third model of structured sentencing employs what NCCD calls “commission-based presumptive sentencing guidelines.” Presumptive sentencing became common in the 1980s as states began to experiment with sentencing guidelines developed by sentencing commissions. These models differed from both determinate and voluntary/advisory guidelines in three respects. First, presumptive sentencing guidelines were not developed by the state legislature but by a sentencing commission that often represented a diverse array of criminal justice and sometimes private interests. Second, presumptive sentencing guidelines were explicit and highly structured, typically relying on a quantitative scoring instrument to classify the offense for which a person was to be sentenced. Third, the guidelines were not voluntary in that judges had to adhere to the sentencing system or provide a written rationale for departing from it.

By 2006, the federal government and 16 states had established commission-created sentencing guidelines. Ten of the 16 states used presumptive sentencing guidelines. The remaining six relied on voluntary/advisory guidelines. As a consequence, with the advent of the twenty-first century, sentencing guidelines authored by legislatively created sentencing commissions had become the most popular form of structured sentencing. Learn more about the history of sentencing reform via Library Extras 11–4 and 11–5 at MyCrimeKit.com.

Guideline jurisdictions, which specified a presumptive sentence for a given offense, generally allowed for “aggravating” or “mitigating” circumstances—indicating a greater or lesser degree of culpability—which judges could take into consideration when imposing a sentence somewhat at variance from the presumptive term. Aggravating circumstances call for a tougher sentence and may include especially heinous behavior, cruelty, injury to more than one person, and so on. Mitigating circumstances, which indicate that a lesser sentence is called for, are generally similar to legal defenses, although in this case they only reduce criminal responsibility, not eliminate it. Mitigating circumstances include such things as cooperation with the investigating authority, surrender, and good character. Common aggravating and mitigating circumstances are listed in the CJ Today Exhibit box.

Federal Sentencing Guidelines
In 1984, with the passage of the Comprehensive Crime Control Act, the federal government adopted presumptive sentencing for nearly all federal offenders. The act also addressed the issue of truth in sentencing. Under the old federal system, on average, good-time credits and parole reduced time served to about one-third of the actual sentence. At the time, the sentencing practices of most states reflected the federal model. While sentence reductions may have benefited offenders, they often outraged victims, who felt betrayed by the sentencing process. The 1984 act nearly eliminated good-time credits and began the process of phasing out federal parole and eliminating the U.S. Parole Commission (read more about the commission in Chapter 12). The emphasis on truth in sentencing created, in effect, a sentencing environment of “what you get is what you serve.” Truth in sentencing, described as “a close correspondence between the sentence imposed upon those sent to prison and the time actually served prior to prison release,” has become an important policy focus of many state legislatures and the U.S. Congress. The Violent Crime Control and Law Enforcement Act of 1994 set aside $4 billion in federal prison construction funds (called Truth in Sentencing Incentive Funds) for states that adopt truth-in-sentencing laws and are able to guarantee that certain violent offenders will serve 85% of their sentences.

Title II of the Comprehensive Crime Control Act, called the Sentencing Reform Act of 1984, established the nine-member U.S. Sentencing Commission. The commission, which continues to function today, comprises presidential appointees, including three federal judges. The Sentencing Reform Act limited the discretion of federal judges by mandating the creation of federal sentencing guidelines, which federal judges were required to follow. The sentencing commission was given the task of developing structured sentencing guidelines to reduce disparity, promote consistency and uniformity, and increase fairness and equity in sentencing.

The guidelines established by the commission took effect in November 1987 but quickly became embroiled in a series of legal disputes, some of which challenged Congress’s authority to form the Sentencing Commission. In January 1989, in the case of Mistretta v. U.S., the U.S. Supreme Court held that Congress had acted appropriately in establishing...
Aggravating and Mitigating Circumstances

Listed here are typical aggravating and mitigating circumstances that judges may consider in arriving at sentencing decisions in presumptive sentencing jurisdictions.

**AGGRAVATING CIRCUMSTANCES**
- The defendant induced others to participate in the commission of the offense.
- The offense was especially heinous, atrocious, or cruel.
- The defendant was armed with or used a deadly weapon during the crime.
- The defendant committed the offense to avoid or prevent a lawful arrest or to escape from custody.
- The offense was committed for hire.
- The offense was committed against a current or former law enforcement or corrections officer while engaged in the performance of official duties or because of the past exercise of official duties.
- The defendant took advantage of a position of trust or confidence to commit the offense.

**MITIGATING CIRCUMSTANCES**
- The defendant has no record of criminal convictions punishable by more than 60 days of imprisonment.
- The defendant has made substantial or full restitution.
- The defendant has been a person of good character or has had a good reputation in the community.
- The defendant aided in the apprehension of another felon or testified truthfully on behalf of the prosecution.
- The defendant acted under strong provocation, or the victim was a voluntary participant in the criminal activity or otherwise consented to it.
- The offense was committed under duress, coercion, threat, or compulsion that was insufficient to constitute a defense but that significantly reduced the defendant’s culpability.
- At the time of the offense, the defendant was suffering from a mental or physical condition that was insufficient to constitute a defense but that significantly reduced the defendant’s culpability.

Note: Recent U.S. Supreme Court rulings have held that facts influencing sentencing enhancements, other than prior record or admissions made by a defendant, must be determined by a jury, not by a judge.

FEDERAL GUIDELINE PROVISIONS

As originally established, federal sentencing guidelines specified a sentencing range from which judges had to choose. If a particular case had “atypical features,” judges were allowed to depart from the guidelines. Departures were generally expected only in the presence of aggravating or mitigating circumstances—a number of which are specified in the guidelines. Aggravating circumstances may include the possession of a weapon during the commission of a crime, the degree of criminal involvement (whether the defendant was a leader or a follower in the criminal activity), and extreme psychological injury to the victim. Punishments also increase when a defendant violates a position of public or private trust, uses special skills to commit or conceal offenses, or has a criminal history. Defendants who express remorse, cooperate with authorities, or willingly make restitution may have their sentences reduced under the guidelines. Any departure from the guidelines may, however, become the basis for appellate review concerning the reasonableness of the sentence imposed, and judges who deviate from the guidelines were originally required to provide written reasons for doing so.

Federal sentencing guidelines are built around a table containing 43 rows, each corresponding to one offense level. The penalties associated with each level overlap those of the levels above and below to discourage unnecessary litigation. A person convicted of a crime involving $11,000, for example, and sentenced under the guidelines, is unlikely to receive a penalty substantially greater than if the amount had been somewhat less than $10,000. A change of six levels roughly doubles the sentence imposed under the guidelines, regardless of the level at which one starts. Because of their matrix-like quality, federal sentencing provisions have the Sentencing Commission and that the guidelines developed by the commission could be applied in federal cases nationwide. The federal Sentencing Commission continues to meet at least once a year to review the effectiveness of the guidelines it created. Visit the U.S. Sentencing Commission via Web Extra 11–4 at MyCrimeKit.com.

African-American men comprise less than 6% of the U.S. population and almost one-half of its criminal prisoners.

—Bureau of Justice Statistics
been referred to as structured. The federal sentencing table is available at Web Extra 11–5 at MyCrimeKit.com.

The sentencing table also contains six rows corresponding to the criminal history category into which an offender falls. Criminal history categories are determined on a point basis. Offenders earn points for previous convictions. Each prior sentence of imprisonment for more than one year and one month counts as three points. Two points are assigned for each prior prison sentence over six months or if the defendant committed the offense while on probation, parole, or work release. The system also assigns points for other types of previous convictions and for offenses committed less than two years after release from imprisonment. Points are added to determine the criminal history category into which an offender falls. Thirteen points or more are required for the highest category. At each offense level, sentences in the highest criminal history category are generally two to three times as severe as for the lowest category.

Defendants may also move into the highest criminal history category by virtue of being designated a career offender. Under the sentencing guidelines, a defendant is a career offender if “(1) the defendant was at least 18 years old at the time of the . . . offense, (2) the . . . offense is a crime of violence or trafficking in a controlled substance, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.”

According to the U.S. Supreme Court, an offender may be adjudged a career offender in a single hearing, even when previous convictions are lacking. In Deal v. U.S. (1993), the defendant, Thomas Lee Deal, was convicted in a single proceeding of six counts of carrying and using a firearm during a series of bank robberies in the Houston, Texas, area. A federal district court sentenced him to 105 years in prison as a career offender—5 years for the first count and 20 years for each of the five other counts, with sentences to run consecutively. In the words of the Supreme Court, “We see no reason why [the defendant should not receive such a sentence], simply because he managed to evade detection, prosecution, and conviction for the first five offenses and was ultimately tried on all six in a single proceeding.”

PLEA BARGAINING UNDER THE GUIDELINES Plea bargaining plays a major role in the federal judicial system. Approximately 90% of all federal sentences are the result of guilty pleas, and the large majority of those stem from plea negotiations. In the words of former Sentencing Commission Chairman William W. Wilkins, Jr., “With respect to plea bargaining, the Commission has proceeded cautiously. . . . The Commission did not believe it wise to stand the federal criminal justice system on its head by making too drastic and too sudden a change in these practices.”

Although the commission allowed plea bargaining to continue, it required that the agreement (1) be fully disclosed in the record of the court (unless there is an overriding and demonstrable reason why it should not be) and (2) detail the actual conduct of the offense. Under these requirements, defendants are unable to hide the actual nature of their offense behind a substitute plea. Information on the decision-making process itself is available to victims, the media, and the public.

In 1996, in the case of Melendez v. U.S., the U.S. Supreme Court held that a government motion requesting that a trial judge deviate from the federal sentencing guidelines as part of a cooperative plea agreement does not permit imposition of a sentence below a statutory minimum specified by law. In other words, under Melendez, while federal judges could depart from the guidelines, they could not accept plea bargains that would have resulted in sentences lower than the minimum required by law for a particular type of offense. Visit Library Extra 11–6 at MyCrimeKit.com to read more about presumptive sentencing.

The Legal Environment of Structured Sentencing

A crucial critique of aggravating factors and their use in presumptive sentencing schemes was offered by the U.S. Supreme Court in 2000 in the case of Apprendi v. New Jersey. In Apprendi, the Court questioned the fact-finding authority of judges in making sentencing decisions, ruling that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum is, in effect, an element of the crime, which must be submitted to a jury and proved beyond a reasonable doubt. The case
involved Charles Apprendi, a New Jersey defendant who pleaded guilty to unlawfully possessing a firearm—an offense that carried a prison term of five to ten years under state law. Before sentence was imposed, however, the judge found that Apprendi had fired a number of shots into the home of an African American family living in his neighborhood and concluded that he had done so to frighten the family and convince them to move. The judge held that statements made by Apprendi allowed the offense to be classified as a hate crime, which required a longer prison term under the sentencing enhancement provision of New Jersey’s hate-crime statute than did the weapons offense to which Apprendi had confessed. The Supreme Court, in overturning the judge’s finding and sentence, took issue with the fact that after Apprendi pleaded guilty, an enhanced sentence was imposed without the benefit of a jury-based fact-finding process. The high court ruled that “under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.”

The Apprendi case essentially says that requiring sentencing judges to consider facts not proven to a jury violates the federal Constitution. It raised the question of whether judges anywhere could legitimately deviate from established sentencing guidelines or apply sentence enhancements based solely on judicial determinations of aggravating factors—especially when such determinations involve findings of fact that might otherwise be made by a jury.40

In 2004, in the important case of Blakely v. Washington,41 the U.S. Supreme Court effectively invalidated any state sentencing schema that allows judges rather than juries to determine any factor that increases a criminal sentence, except for prior convictions. The Court found that because the facts supporting Blakely’s increased sentence were neither admitted by the defendant himself nor found by a jury, the sentence violated the Sixth Amendment right to trial by jury. The Blakely decision required that the sentencing laws of eight states be rewritten. Washington state legislators responded quickly and created a model law for other legislatures to emulate. The Washington law mandates that “the facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt,” or, “if a jury is waived, proof shall be to the court beyond a reasonable doubt.” The Washington law can be read at Library Extra 11–7 at MyCrimeKit.com.

In 2007, in the case of Cunningham v. California,42 the Supreme Court applied its reasoning in Blakely to California’s determinate sentencing law, finding the law invalid because it placed sentence-elevating fact-finding within the judge’s purview. As in Blakely, the California law was found to violate a defendant’s Sixth Amendment right to trial by jury.

In 2005, in the combined cases of U.S. v. Booker43 and U.S. v. Fanfan,44 attention turned to the constitutionality of federal sentencing practices that relied on extra-verdict determinations of fact in the application of sentencing enhancements. In Booker, the U.S. Supreme Court issued what some have called an “extraordinary opinion,”445 which actually encompasses two separate decisions. The combined cases brought two issues before the Court: (1) whether fact-finding done by judges under federal sentencing guidelines violates the Sixth Amendment right to trial by jury; and (2) if so, whether the guidelines are themselves unconstitutional. As in the preceding cases discussed in this section, the Court found that, on the first question, defendant Freddie Booker’s drug-trafficking sentence had been improperly enhanced under the guidelines on the basis of facts found solely by a judge. In the view of the Court, the Sixth Amendment right to trial by jury is violated where, under a mandatory guidelines system, a sentence is increased because of an enhancement based on facts found by the judge that were not found by a jury nor admitted by the defendant.446 Consequently, Booker’s sentence was ruled unconstitutional and invalidated. On the second question, the Court reached a compromise and did not strike down the federal guidelines as many thought it would. Instead, it held that the guidelines could be considered by federal judges during sentencing but that they were no longer mandatory.

In effect, the decision in Booker and Fanfan turned the federal sentencing guidelines on their head, making them merely advisory and giving federal judges wide latitude in imposing punishments. While federal judges must still take the guidelines into consideration in reaching sentencing decisions, they do not have to follow them.
In 2007, in a continued clarification of Booker, the Supreme Court ruled that federal appeals courts that hear challenges from defendants about prison time may presume that federal criminal sentences are reasonable if they fall within U.S. Sentencing Guidelines. In that case, Rita v. U.S., the Court held that “even if the presumption increases the likelihood that the judge, not the jury, will find ‘sentencing facts,’ it does not violate the Sixth Amendment.” The justices reasoned that “a nonbinding appellate reasonableness presumption for Guidelines sentences does not require the sentencing judge to impose a Guidelines sentence.”

In 2009, in what appeared to be a loosening of prohibitions on judges’ sentencing authority, the U.S. Supreme Court found that the Constitution does not prohibit judges from imposing consecutive sentences based on facts not found by a jury. Writing for a slim 5–4 majority in Oregon v. Ice, Justice Ruth Bader Ginsburg said, “In light of historical practice and the States’ authority over administration of their criminal justice systems, the Sixth Amendment does not inhibit states from assigning to judges, rather than to juries, the finding of facts necessary to the imposition of consecutive, rather than concurrent, sentences for multiple offenses.” In a 2007 case, Gall v. United States, the Court clarified its position on appellate review of sentencing decisions by lower courts when it held that “because the Guidelines are now advisory, appellate review of sentencing decisions is limited to determining whether they are ‘reasonable.’”

A recent survey by the U.S. Sentencing Commission found that 61.2% of all federal sentences handed down in the year following Booker and Fanfan were within ranges specified under federal sentencing guidelines. In comparison, in the year prior to Blakely, 72.2% were within guideline ranges. In light of the Court’s decisions, it is now up to Congress to reconsider federal sentencing law in light of Booker—a process that is under way as this book goes to press. In the meantime, some expect the federal courts to be flooded with inmates appealing their sentences.

Mandatory Sentencing

Mandatory sentencing, another form of structured sentencing, deserves special mention. Mandatory sentencing is just what its name implies: a structured sentencing scheme that mandates clearly enumerated punishments for specific offenses or for habitual offenders convicted of a series of crimes. Mandatory sentencing, because it is truly mandatory, differs from presumptive sentencing, which allows at least a limited amount of judicial discretion within ranges established by published guidelines. Some mandatory sentencing laws require only modest mandatory prison terms (for example, three years for armed robbery), while others are much more far-reaching.

Typical of far-reaching mandatory sentencing schemes are “three-strikes” laws, discussed in the CJ Today Exhibit box on page 386. Three-strikes laws (and, in some jurisdictions, two-strikes laws) require mandatory sentences (sometimes life in prison without the possibility of parole) for offenders convicted of a third (or second) serious felony. Such mandatory sentencing enhancements are aimed at deterring known and potentially violent offenders and are intended to incapacitate convicted criminals through long-term incarceration.

Three-strikes laws impose longer prison terms than most earlier mandatory minimum sentencing laws. California’s three-strikes law, for example, requires that offenders who are convicted of a violent crime and who have had two prior convictions serve a minimum of 25 years in prison. The law doubled prison terms for offenders convicted of a second violent felony. Three-strikes laws also vary in breadth. The laws of some jurisdictions stipulate that both of the prior convictions and the current one be for violent felonies; others require only that the prior convictions be for violent felonies. Some three-strikes laws count only prior adult convictions, while others permit consideration of juvenile crimes.
By passing mandatory sentencing laws, legislators convey the message that certain crimes are deemed especially grave and that people who commit them deserve, and should expect, harsh sanctions. These laws are sometimes passed in response to public outcries following heinous or well-publicized crimes.

Research findings on the impact of mandatory sentencing laws on the criminal justice system have been summarized by British criminologist Michael Tonry. Tonry found that under mandatory sentencing, officials tend to make earlier and more selective arrest, charging, and diversion decisions. They also tend to bargain less and to bring more cases to trial. Specifically, Tonry found the following: (1) Criminal justice officials and practitioners (police, lawyers, and judges) exercise discretion to avoid the application of laws they consider unduly harsh. (2) Arrest rates for target crimes tend to decline soon after mandatory sentencing laws take effect. (3) Dismissal and diversion rates increase during the early stages of case processing after mandatory sentencing laws become effective. (4) For defendants whose cases are not dismissed, plea bargain rates decline and trial rates increase. (5) For convicted defendants, sentencing delays increase. (6) When the effects of declining arrests, indictments, and convictions are taken into account, the enactment of mandatory sentencing laws has little impact on the probability that offenders will be imprisoned. (7) Sentences become longer and more severe. Mandatory sentencing laws may also occasionally result in unduly harsh punishments for marginal offenders who nonetheless meet the minimum requirements for sentencing under such laws.

In an analysis of federal sentencing guidelines, other researchers found that blacks receive longer sentences than whites, not because they received differential treatment by judges but because they constitute the large majority of those convicted of trafficking in crack cocaine (versus powdered cocaine) —a crime Congress has singled out for especially harsh mandatory penalties. In 2006, for example, 82% of those sentenced under federal crack cocaine laws were black, and only 8.8% were white, even though more than two-thirds of people who use crack cocaine are white. This pattern can be seen as constituting a “disparity in results,” and partly for this reason, the U.S. Sentencing Commission has recommended to Congress that it eliminate the legal distinction between crack and regular cocaine for purposes of sentencing (a recommendation that Congress rejected). Recent indications, however, are that the heightened discretion available to federal judges in the wake of Booker and Fanfan is resulting in sentences that are similar for all types of cocaine trafficking and that vary more by the amount than the type of cocaine involved.

Sherelle Purnell, 18, of Salisbury, Maryland, walking along the street in front of a Tiger Mart gas station wearing a sign declaring her offense. On July 30, 2004, Purnell drove away from the station without paying for 2.78 gallons of fuel.

Innovative judges sometimes make use of creative sentences in an attempt to deter offenders from future law violations. How effective do you think Purnell’s sentence will be as a general deterrent, and whom is it most likely to deter?
Three Strikes and You’re Out: A Brief History of the “Get Tough on Crime” Movement

In the spring of 1994, California legislators passed the state’s now-famous “three strikes and you’re out” bill. Amid much fanfare, Governor Pete Wilson signed the “three-strikes” measure into law, calling it “the toughest and most sweeping crime bill in California history.”

California’s law, which is retroactive in that it counts offenses committed before the date the legislation was signed, requires a sentence of 25 years to life for three-time felons with convictions for two or more serious or violent prior offenses. Criminal offenders facing a “second strike” can receive up to double the normal sentence for their most recent offense. Parole consideration is not available until at least 80% of the sentence has been served.

Today, about half of the states have passed three-strikes legislation, and other states may be considering it. At the federal level, the Violent Crime Control and Law Enforcement Act of 1994 contains a three-strikes provision that mandates life imprisonment for federal criminals convicted of three violent felonies or drug offenses.

Questions remain, however, about the effectiveness of three-strikes legislation, and many people are concerned about its impact on the justice system. One year after it was signed into law, the California three-strikes initiative was evaluated by the RAND Corporation. RAND researchers found that in the first year, more than 5,000 defendants were convicted and sentenced under the law’s provisions. The large majority of those sentenced, however, had committed nonviolent crimes, causing critics of the law to argue that it is too broad. Eighty-four percent of two-strikes convictions and nearly 77% of three-strikes convictions resulted from nonviolent drug or property crimes. A similar 1997 study of three-strikes laws in 22 states, conducted by the Campaign for an Effective Crime Policy, concluded that such legislation results in clogged court systems and crowded correctional facilities while encouraging two-time felons to take dramatic risks to avoid capture for a third offense. A 1998 study found that only California and Georgia were making widespread use of three-strikes laws. Other states, the study found, have narrowly written laws that are applicable to repeat offenders only in rare circumstances.

A 2001 study of the original California legislation and its consequences concluded that three-strikes laws are overrated. According to the study, which was conducted by the Washington, D.C.–based Sentencing Project, “California’s three-strikes law has increased the number and severity of sentences for nonviolent offenders—and contributed to the aging of the prison population—but has had no significant effect on the state’s decline in crime.” The study found that declines in California crime rates that are often attributed to the legislation are consistent with nationwide declines in the rate of crime and would mostly have occurred without the law. “Crime had been declining for several years prior to the enactment of the three-strikes law, and what’s happening in California is very consistent with what’s been happening nationally, including in states with no three-strikes law,” said Marc Mauer, an author of the study.

Supporters of three-strikes laws argue that those convicted under them are career criminals who will be denied the opportunity to commit more violent crimes. “The real story here is the girl somewhere that did not get raped,” said Mike Reynolds, a Fresno, California, photographer whose 18-year-old daughter was killed by a paroled felon. “The real story is the robbery that did not happen,” he added.

Practically speaking, California’s three-strikes law has had a dramatic impact on the state’s criminal justice system. By 1999, more than 40,000 people had been sentenced under the law. But the law has its critics. “‘Three strikes and you’re out’ sounds great to a lot of people,” says Alan Schuman,

INNOVATIONS IN SENTENCING

In an ever-growing number of cases, innovative judges in certain jurisdictions have begun to use discretionary sentencing to impose truly unique punishments. In 2004, for example, 18-year-old Sherelle Purnell was ordered by county judge D. William Simpson to spend three hours walking along the grassy strip between a convenience store and a busy highway in Salisbury, Maryland, wearing a sign that read “I was caught stealing gas.” The theft was recorded by a video surveillance device as Purnell drove away without paying for 2.78 gallons of gas from a Tiger Mart. In Memphis, Tennessee, Judge Joe Brown escorted burglary victims to thieves’ homes, inviting them to take whatever they wanted. An Arkansas judge made shoplifters walk in front of the stores they stole from, carrying signs describing their crimes. And in California, a purse snatcher was ordered to wear noisy tap dancing shoes whenever he went out in public.

Faced with prison overcrowding, high incarceration costs, and public calls for retribution, other judges have used shaming strategies to deter wrongdoers. At least one Florida court ordered those convicted of drunk driving to put a “Convicted DUI” sticker on their license plate.

president of the American Probation and Parole Association. “But no one will cop a plea when it gets to the third time around. We will have more trials, and this whole country works on plea bargaining and pleading guilty, not jury trials,” Schuman said at a meeting of the association.7 According to RAND, full enforcement of the law could cost as much as $5.5 billion annually—or $300 per California taxpayer.

Researchers at RAND conclude that while California’s sweeping three-strikes legislation could cut serious adult crime by as much as one-third throughout the state, the high cost of enforcing the law may keep it from ever being fully implemented. In 1996, the California three-strikes controversy became even more complicated following a decision by the state supreme court (in People v. Superior Court of San Diego—Romero8) that California judges retain the discretion to reduce three-strikes sentences and to refuse to count previous convictions at sentencing “in furtherance of justice.”

In 2003, however, in two separate cases, the U.S. Supreme Court upheld the three-strikes California convictions of Gary Ewing and Leandro Andrade in California.9 Ewing, who had four prior felony convictions, had received a 25-years-to-life sentence following his conviction for felony grand theft of three golf clubs. Andrade, who also had a long record, was sentenced to 50 years in prison for two petty theft convictions.10 In writing for the Court in the Ewing case, Justice Sandra Day O’Connor noted that states should be able to decide when repeat offenders “must be isolated from society . . . to protect the public safety,” even when nonserious crimes trigger the lengthy sentence. In deciding these two cases, both of which were based on Eighth Amendment claims, the Court found that it is not cruel and unusual punishment to impose a possible life term for a nonviolent felony when the defendant has a history of serious or violent convictions.

In 2004, Californians voted down Proposition 66, a ballot initiative that would have changed the state’s three-strikes law so that only specified serious or violent crimes could be counted as third strikes. Passage of the proposition would also have meant that only previous convictions for violent or serious felonies, brought and tried separately, would have qualified for second- and third-strike sentence increases.

California’s three-strikes law remains firmly in place. In its current form, it punishes anyone who commits a third felony, regardless of its severity, with a mandatory sentence of 25 years to life if the first two felonies were violent or serious.


10Under California law, a person who commits petty theft can be charged with a felony if he or she has prior felony convictions. The charge is known as “petty theft with prior convictions.” Andrade’s actual sentence was two 25-year prison terms to be served consecutively.

plates. In 2008, more than two dozen young people who broke into the former home of Pulitzer Prize–winning poet Robert Frost to hold a beer party, were required to take classes in Frost’s poetry as part of their punishment.62 Also in 2008, a Florida judge ordered two young men who had thrown 32-ounce cups of soda and ice at a Taco Bell window-server to post a recorded apology on the video-sharing website YouTube.63 Similarly, a few years ago Boston courts began ordering men convicted of sexual solicitation to spend time sweeping streets in Chinatown, an area known for prostitution. The public was invited to watch men sentenced to the city’s “John Sweep” program clean up streets and alleyways littered with used condoms and sexual paraphernalia.

There is considerable support in criminal justice literature for shaming as a crime-reduction strategy. Australian criminologist John Braithwaite, for example, found shaming to be a particularly effective strategy because, he said, it holds the potential to enhance moral awareness among offenders, thereby building conscience and increasing inner control.64 Dan Kahan, a professor at the University of Chicago Law School, points out that “shame supplies the main motive why people obey the law, not so much because they’re afraid of formal sanctions, but because they care what people think about them.”65
alternative sentencing

The use of court-ordered community service, home detention, day reporting, drug treatment, psychological counseling, victim—offender programming, or intensive supervision in lieu of other, more traditional sanctions, such as imprisonment and fines.

Is Chemical Castration a Valid Sentencing Option?

In 2000, convicted Florida sex offender Shannon Coleman circumvented a 21-year prison term by agreeing to undergo chemical castration. Coleman, a self-described sex addict, had used the Internet to contact two Florida girls, ages 12 and 15. He admitted to visiting the 12-year-old at her house, where he fondled her and then masturbated. He had sex with the 15-year-old after she invited him to her house. Coleman and his lawyer asked the judge handling the case to exercise his discretion under Florida’s 1997 sex-offender law, which gives judges the discretion to order people convicted of sexual battery to undergo drug treatment to stop or reduce testosterone production. The first chemical castration law in the United States was enacted in California in 1996, signed into law by then-Governor Pete Wilson. The California statute requires regular hormone injections for twice-convicted child molesters (where the victim is under 13 years of age) upon their release from prison. Under the law, judges can also mandate injections for first offenders. Treatment is to continue until state authorities determine that it is no longer necessary.

Most chemical castration laws require convicted offenders to receive weekly injections of synthetic female hormones known as Depo-Provera (medroxyprogesterone acetate) and Depo-Lupron. The laboratory-manufactured chemicals reduce blood levels of the sex hormone testosterone and are believed to lower the male sex drive.

To date, California, Florida, Georgia, Texas, and Montana have chemical castration legislation in place, and some other states are considering enacting chemical castration laws. If chemical castration survives continuing court challenges, it may establish itself in the mid-twenty-first century as a widely used form of alternative sentencing. Opposition to chemical castration laws, however, is plentiful. After the California law was enacted, for example, a spokeswoman for the American Civil Liberties Union (ACLU) claimed that the legislation mandates an unproven remedy for child molestation and is therefore a violation of civil rights. “There is no evidence, absolutely no evidence, that chemical castration will alleviate the problem,” said Ann Bradley, a Los Angeles ACLU spokeswoman. “We see this as a violation of prisoners’ civil liberties,” she said.

Proponents of the legislation, on the other hand, cite studies in Canada and Europe in which repeat offender rates of more than 80% were reduced to less than 4% among criminals treated with Depo-Provera. “I would have to say to the ACLU that there is no right to molest a child,” Governor Wilson replied.


Whether public shaming will continue to grow in popularity as an alternative sentencing strategy is unclear. What is clear, however, is that the American public and an ever-growing number of judicial officials are now looking for workable alternatives to traditional sentencing options.

Questions about Alternative Sanctions

Alternative sanctions include the use of court-ordered community service, home detention, day reporting, drug treatment, psychological counseling, victim—offender programming, or intensive supervision in lieu of other, more traditional sanctions like imprisonment and fines. Many of these strategies are discussed in more detail in the next chapter. As prison populations continue to rise, alternative sentencing strategies are likely to become increasingly attractive. A number of questions must be answered, however, before most alternative sanctions can be employed with confidence. These questions were succinctly stated in a RAND Corporation study authored by Joan Petersilia.66 Unfortunately, although the questions can be listed, few definitive answers are available yet. Here are some of the questions Petersilia poses:

- Do alternative sentencing programs threaten public safety?
- How should program participants be selected?
- What are the long-term effects of community sanctions on people assigned to these programs?
- Are alternative sanctions cost-effective?
- Who should pay the bill for alternative sanctions?
- Who should manage stringent community-based sanctions?
- How should program outcomes be judged?
- What kinds of offenders benefit most from alternative sanctions?

**THE PRESENTENCE INVESTIGATION**

Before imposing sentence, a judge may request information on the background of a convicted defendant. This is especially true in indeterminate sentencing jurisdictions, where judges retain considerable discretion in selecting sanctions. Traditional wisdom has held that certain factors increase the likelihood of rehabilitation and reduce the need for lengthy prison terms. These factors include a good job record, satisfactory educational attainment, strong family ties, church attendance, no prior arrests for violent offenses, and psychological stability.

Information about a defendant’s background often comes to the judge in the form of a presentence investigation (PSI) report. The task of preparing presentence reports usually falls to a probation or parole office. Presentence reports take one of three forms: (1) a detailed written report on the defendant’s personal and criminal history, including an assessment of present conditions in the defendant’s life (often called the long form); (2) an abbreviated written report summarizing the information most likely to be useful in a sentencing decision (the short form); and (3) a verbal report to the court made by the investigating officer based on field notes but structured according to established categories. A presentence report is much like a résumé, except that it focuses on what might be regarded as negative as well as positive life experiences.

The data on which a presentence report is based come from a variety of sources. The Federal Bureau of Investigation’s National Crime Information Center (NCIC), begun in 1967, contains computerized information on people wanted for criminal offenses throughout the United States. Individual jurisdictions also maintain criminal records repositories that can provide comprehensive files on the criminal history of those who have been processed by the justice system.

Sometimes the defendant provides much of the information in the presentence report. In this case, efforts must be made to corroborate the defendant’s information. Unconfirmed data are generally marked on the report as “defendant-supplied data” or simply “unconfirmed.”

In a presentence report, almost all third-party data are subject to ethical and legal considerations. The official records of almost all agencies and organizations, though often an ideal source of information, are protected by state and federal privacy requirements. In particular, the federal Privacy Act of 1974 may limit access to these records. Investigators must first check on the legal availability of all records before requesting them and must receive in writing the defendant’s permission to access the records. Other public laws, among them the federal Freedom of Information Act, may make the presentence report available to the defendant, although courts and court officers have generally been held to be exempt from the provision of such statutes.

The final section of a presentence report is usually devoted to the investigating officer’s recommendations. A recommendation may be made in favor of probation, split sentencing, a term of imprisonment, or any other sentencing option available in the jurisdiction. Participation in community service programs or in drug- or substance-abuse programs may be recommended for probationers. Most judges are willing to accept the report writer’s recommendation because they recognize the professionalism of the presentence investigator and because they know that the investigator may be assigned to supervise the defendant if he or she is sentenced to a community alternative.

Jurisdictions vary in their use of presentence reports. Federal law mandates presentence reports in federal criminal courts and specifies 15 topical areas that each report must cover. The 1984 federal Determinate Sentencing Act directs report writers to include information on the classification of the offense and of the defendant under the offense-level and criminal history categories established by the statute. Some states require presentence reports only in felony cases, and others require them in cases where the defendant faces the possibility of incarceration for six months or more. Other states have no requirement for presentence reports beyond those ordered by a judge.
Report writing, rarely anyone's favorite task, may seriously tax the limited resources of probation agencies. In September 2004, officers from the New York City Department of Probation wrote 2,414 presentence investigation reports for adult offenders and 461 reports for juvenile offenders, averaging about 10 reports per probation officer per month. Learn more about the sentencing environment at Library Extra 11–8 at MyCrimeKit.com.

**THE VICTIM—FORGOTTEN NO LONGER**

Thanks to a grassroots resurgence of concern for the plight of victims that began in this country in the early 1970s, the sentencing process now frequently includes consideration of the needs of victims and their survivors. In times past, although victims might testify at trial, the criminal justice system frequently downplayed a victim’s experience, including the psychological trauma engendered both by having been a victim and by having to endure the criminal proceedings that bring the criminal to justice. That changed in 1982, when the President’s Task Force on Victims of Crime gave focus to a burgeoning victims’ rights movement and urged the widespread expansion of victims’ assistance programs during what was then their formative period. Victims’ assistance programs today offer services in the areas of crisis intervention and follow-up counseling and help victims secure their rights under the law. Following successful prosecution, some victims’ assistance programs also advise victims in the filing of civil suits to recoup financial losses directly from the offender. In the mid-1990s, the National Institute of Justice conducted a survey of 319 full-service victims’ assistance programs based in law enforcement agencies and prosecutors’ offices. The survey found that “the majority of individuals seeking assistance were victims of domestic assault and the most common assistance they received was information about legal rights.” Other common forms of assistance included help in applying for state victims’ compensation aid and referrals to social service agencies.

About the same time, voters in California approved Proposition 8, a resolution that called for changes in the state’s constitution to reflect concern for victims. A continuing goal of victims’ advocacy groups is an amendment to the U.S. Constitution, which such groups say is needed to provide the same kind of fairness to victims that is routinely accorded to defendants. In the past, for example, the National Victims’ Constitutional Amendment Passage (NVCAP), has sought to add a phrase to the Sixth Amendment: “likewise, the victim, in every criminal prosecution, shall have the right to be present and to be heard at all critical stages of judicial proceedings.” NVCAP now advocates the addition of a new amendment to the U.S. Constitution. Visit NVCAP via Web Extra 11–6 at MyCrimeKit.com.

In September 1996, a victims’ rights constitutional amendment—Senate Joint Resolution 65—was proposed by a bipartisan committee in the U.S. Congress, but problems of wording and terminology prevented its passage. A revised amendment was proposed in 1998, but its wording was too restrictive for it to gain endorsement from victims’ organizations. The next year, a new amendment was proposed by the Senate Judiciary Committee’s Subcommittee on the Constitution, Federalism, and Property, but it did not make it to the Senate floor. The U.S. Department of Justice, which had previously supported the measure, reversed its position due to a provision in the proposed amendment that gives crime victims the right to be notified of any state or federal grant of clemency. The U.S. attorney general apparently believed that the provision would impede the power of the president. The legislation also lacked the support of then-President Bill Clinton and was officially withdrawn by its sponsors in 2000.

Although a victims’ rights amendment to the federal Constitution may not yet be a reality, more than 30 states have passed their own victims’ rights amendments. According to
Proposition 9, which appeared on the November 4, 2008, ballot in California, passed with 53.8% of the vote. It amended the California Constitution by adding new provisions that provide victims in California with a number of specifically enforceable rights (see the CJ Today Exhibit).

At the federal level, the 1982 Victim and Witness Protection Act (VWPA) requires judges to consider victim-impact statements at federal sentencing hearings and places responsibility for their creation on federal probation officers. In 1984, the federal Victims of Crime Act (VOCA) was enacted with substantial bipartisan support. VOCA authorized federal funding to help states establish victims’ assistance and victims’ compensation programs. Under VOCA, the U.S. Department of Justice’s Office for Victims of Crime provides a significant source of both funding and information for victims’ assistance programs. The rights of victims were further strengthened under the Violent Crime Control and Law Enforcement Act of 1994, which created a federal right of allocution, or right to speak, for victims of violent and sex crimes. This gave victims the right to speak at the sentencing of their assailants. The 1994 law also requires sex offenders and child molesters convicted under federal law to pay restitution.

**Victims’ Rights in California**

In order to preserve and protect a victim’s rights to justice and due process, a victim shall be entitled to the following rights:

1. To be treated with fairness and respect for his or her privacy and dignity, and to be free from intimidation, harassment, and abuse, throughout the criminal or juvenile justice process.
2. To be reasonably protected from the defendant and persons acting on behalf of the defendant.
3. To have the safety of the victim and the victim’s family considered in fixing the amount of bail and release conditions for the defendant.
4. To prevent the disclosure of confidential information or records to the defendant, the defendant’s attorney, or any other person acting on behalf of the defendant, which could be used to locate or harass the victim or the victim’s family or which disclose confidential communications made in the course of medical or counseling treatment, or which are otherwise privileged or confidential by law.
5. To refuse an interview, deposition, or discovery request by the defendant, the defendant’s attorney, or any other person acting on behalf of the defendant, and to set reasonable conditions on the conduct of any such interview to which the victim consents.
6. To reasonable notice of and to reasonably confer with the prosecuting agency, upon request, regarding the arrest of the defendant if known by the prosecutor, the charges filed, the determination whether to extradite the defendant, and, upon request, to be notified of and informed before any pretrial disposition of the case.
7. To reasonable notice of all public proceedings, including delinquency proceedings, upon request, at which the defendant and the prosecutor are entitled to be present and of all parole or other post-conviction release proceedings, and to be present at all such proceedings.
8. To be heard, upon request, at any proceeding, including any delinquency proceeding, involving a post-arrest release decision, plea, sentencing, post-conviction release decision, or any proceeding in which a right of the victim is at issue.
9. To a speedy trial and a prompt and final conclusion of the case and any related post-judgment proceedings.
10. To provide information to a probation department official conducting a pre-sentence investigation concerning the impact of the offense on the victim and the victim’s family and any sentencing recommendations before the sentencing of the defendant.
11. To receive, upon request, the pre-sentence report when available to the defendant, except for those portions made confidential by law.
12. To be informed, upon request, of the conviction, sentence, place and time of incarceration, or other disposition of the defendant, the scheduled release date of the defendant, and the release of or the escape by the defendant from custody.
13. To restitution.
14. To the prompt return of property when no longer needed as evidence.
15. To be informed of all parole procedures, to participate in the parole process, to provide information to the parole authority to be considered before the parole of the offender, and to be notified, upon request, of the parole or other release of the offender.
16. To have the safety of the victim, the victim’s family, and the general public considered before any parole or other post-judgment release decision is made.
17. To be informed of the rights enumerated in paragraphs (1) through (16).

Reference: Section 28(e) of Article I of the California Constitution.
of all the initiatives that this Congress could undertake, few will touch the heart of Americans as dearly as the measure seeking to ensure that the judicial process is just and fair for the victims of crime.

—Senator Orrin Hatch

to their victims and prohibits the diversion of federal victims’ funds to other programs. Other provisions of the 1994 law provide civil rights remedies for victims of felonies motivated by gender bias and extend “rape shield law” protections to civil cases and to all criminal cases, prohibiting inquiries into a victim’s sexual history. A significant feature of the 1994 law can be found in a subsection titled the Violence against Women Act (VAWA). VAWA, which provides financial support for police, prosecutors, and victims’ services in cases involving sexual violence or domestic abuse, is discussed in greater detail in Chapter 2.

Much of the philosophical basis of today’s victims’ movement can be found in the restorative justice model, which was discussed briefly earlier in this chapter. Restorative justice emphasizes offender accountability and victim reparation. Restorative justice also provides the basis for victims’ compensation programs, which are another means of recognizing the needs of crime victims. Today, all 50 states have passed legislation providing for monetary payments to victims of crime. Such payments are primarily designed to compensate victims for medical expenses and lost wages. All existing programs require that applicants meet certain eligibility criteria, and most set limits on the maximum amount of compensation that can be received. Generally disallowed are claims from victims who are significantly responsible for their own victimization, such as those who are injured in fights they provoke. In 2002, California’s victims’ compensation program, the largest in the nation, provided $117 million to more than 50,000 victims for crime-related expenses. A comprehensive California proposal to improve victims’ services, with applicability to victims’ service programs throughout the nation, can be read at Library Extra 11–9 at MyCrimeKit.com.

In 2001, the USA PATRIOT Act amended the Victims of Crime Act of 1984 to make victims of terrorism and their families eligible for victims’ compensation payments. It also created an antiterrorism emergency reserve fund to help provide compensation to victims of terrorism. A year earlier, in November 2000, the federal Office for Victims of Crime (OVC) created the Terrorism and International Victims Unit (TIVU) to develop and manage programs and initiatives that help victims of domestic and international terrorism, mass violence, and crimes that have transnational dimensions.

In 2004, the U.S. Senate passed the Crime Victims’ Rights Act as part of the Justice for All Act. Some saw the legislation as at least a partial statutory alternative to a constitutional victims’ rights amendment. The Crime Victims’ Rights Act establishes statutory rights for victims of federal crimes and gives them the necessary legal authority to assert those rights in federal court. The act grants the following rights to victims of federal crimes:

1. The right to be reasonably protected from the accused
2. The right to reasonable, accurate, and timely notice of any public proceeding involving the crime or of any release or escape of the accused
3. The right to be included in any such public proceeding
4. The right to be reasonably heard at any public proceeding involving release, plea, or sentencing
5. The right to confer with the federal prosecutor handling the case
6. The right to full and timely restitution as provided by law
7. The right to proceedings free from unreasonable delay
8. The right to be treated with fairness and with respect for the victim’s dignity and privacy

In addition to establishing these rights, the legislation expressly requires federal courts to ensure that they are afforded to victims. In like manner, federal law enforcement officials are required to make their “best efforts to see that crime victims are notified of, and accorded,” these rights. To teach citizens about the rights of victims of crime, the federal government created a website that you can access via Web Extra 11–7 at MyCrimeKit.com. It includes an online directory of crime victims’ services, which can be searched locally, nationally, and internationally.

**Victim-Impact Statements**

Another consequence of the national victims’ rights movement has been a call for the use of victim-impact statements before sentencing. A victim-impact statement is generally a written document describing the losses, suffering, and trauma experienced by the crime victim...
or by the victim’s survivors. Judges are expected to consider such statements in arriving at an appropriate sanction for the offender.

The drive to mandate inclusion of victim-impact statements in sentencing decisions, already required in federal courts by the 1982 Victim and Witness Protection Act, was substantially enhanced by the “right of allocation” provision of the Violent Crime Control and Law Enforcement Act of 1994. Victim-impact statements played a prominent role in the sentencing of Timothy McVeigh, who was convicted of the 1995 bombing of the Murrah Federal Building in Oklahoma City and was executed in 2001. Some states, however, have gone further than the federal government. In 1984, the state of California, for example, passed legislation giving victims a right to attend and participate in sentencing and parole hearings. This has inspired other states to consider similar legislation. Approximately 20 states now have laws requiring citizen involvement in sentencing, and all 50 states and the District of Columbia “allow for some form of submission of a victim-impact statement either at the time of sentencing or to be contained in the presentence investigation reports” made by court officers. Where written victim-impact statements are not available, courts may invite the victim to testify directly at sentencing.

An alternative to written impact statements and to the appearance of victims at sentencing hearings is the victim-impact video. Some contemporary victim-impact videos display photo montages of the victim and are set to music and narrated. In 2008, for example, the U.S. Supreme Court rejected an appeal from a death-row inmate wanting to exclude just such a digitized narrative set to music by Enya that had been played to the jury during the sentencing phase of his trial. The full video is available via Library Extra 11–10 at MyCrimeKit.com.

One study of the efficacy of victim-impact statements found that sentencing decisions are rarely affected by them. In the words of the study, “These statements did not produce sentencing decisions that reflected more clearly the effects of crime on victims. Nor did we find much evidence that—with or without impact statements—sentencing decisions were influenced by our measures of the effects of crime on victims, once the charge and the defendant’s prior record were taken into account.” The authors concluded that victim-impact statements have little effect on courts because judges and other officials “have established ways of making decisions which do not call for explicit information about the impact of crime on victims.” Learn more about the rights of crime victims and the history of the victims’ movement at Web Extra 11–8 at MyCrimeKit.com, and read about the constitutionality of victim-impact statements at Library Extra 11–11 at MyCrimeKit.com.

### MODERN SENTENCING OPTIONS

Sentencing is fundamentally a risk-management strategy designed to protect the public while serving the ends of retribution, incapacitation, deterrence, rehabilitation, and restoration. Because the goals of sentencing are difficult to agree on, so too are sanctions. Lengthy prison terms do little for rehabilitation, while community-release programs can hardly protect the innocent from offenders bent on continuing criminality.

Assorted sentencing philosophies continue to permeate state-level judicial systems. Each state has its own sentencing laws, and frequent revisions of those statutes are not uncommon. Because of huge variation from one state to another in the laws and procedures that control the imposition of criminal sanctions, sentencing has been called “the most diversified part of the Nation’s criminal justice process.”

There is at least one common ground, however. It can be found in the four traditional sanctions that continue to dominate the thinking of most legislators and judges: fines, probation, imprisonment, and death. Fines and the death penalty are discussed in this chapter, while probation is described in Chapter 12, and imprisonment is covered in Chapters 13 and 14.

In jurisdictions that employ indeterminate sentencing, fines, probation, and imprisonment are widely available to judges. The option selected generally depends on the severity of the offense and the judge’s best guess as to the likelihood of the defendant’s future criminal involvement. Sometimes two or more options are combined, such as when an offender is fined and sentenced to prison or placed on probation and fined in support of restitution payments.

Jurisdictions that operate under presumptive sentencing guidelines generally limit the judge’s choice to only one option and often specify the extent to which that option can be
applied. Dollar amounts of fines, for example, are rigidly set, and prison terms are specified for each type of offense. The death penalty remains an option in a fair number of jurisdictions, but only for a highly select group of offenders.

A recent report by the Bureau of Justice Statistics on the sentencing practices of trial courts found that state courts convicted 1,079,000 felons in 2004. Another 66,518 felony convictions occurred in federal courts. The report also found the following for offenders convicted of felonies in state courts (Figure 11–1):

- Forty percent were sentenced to active prison terms.
- The average sentence length for those sent to state prisons has decreased since 1990 (from six years to four years and nine months).
- Felons sentenced in 2004 were likely to serve more of their sentence before release (50%) than those sentenced in 1990 (33%).
- Thirty percent received jail sentences, usually involving less than a year’s confinement.
- Those sent to jail received an average sentence of six months.
- Twenty-eight percent were sentenced to probation, with no jail or prison time to serve.
- The average probation sentence was 41 months.
- Fines were imposed on 33% of convicted felons, and restitution was ordered in 18% of cases.

Although the percentage of felons who receive active sentences may seem low, the number of criminal defendants receiving active prison time has increased dramatically. Figure 11–2 shows that the number of court-ordered prison commitments has increased nearly eightfold in the past 40 years.

### Fines

While the fine is one of the oldest forms of punishment, the use of fines as criminal sanctions suffers from built-in inequities and a widespread failure to collect them. Inequities arise when offenders with vastly different financial resources are fined similar amounts. A fine of $100, for example, can place a painful economic burden on a poor defendant but is negligible when imposed on a wealthy offender.

Nonetheless, fines are once again receiving attention as a serious sentencing alternative. One reason for the renewed interest is the stress placed on state resources by burgeoning prison populations. The extensive imposition of fines not only results in less crowded prisons but can contribute to state and local coffers and can lower the tax burden of law-abiding citizens. There are other advantages:

- Fines can deprive offenders of the proceeds of criminal activity.
- Fines can promote rehabilitation by enforcing economic responsibility.
Fines can be collected by existing criminal justice agencies and are relatively inexpensive to administer.

Fines can be made proportionate to both the severity of the offense and the ability of the offender to pay.

A National Institute of Justice (NIJ) survey found that an average of 86% of convicted defendants in courts of limited jurisdiction receive fines as sentences, some in combination with another penalty. Fines are also widely used in courts of general jurisdiction, where the NIJ study found judges imposing fines in 42% of all cases that came before them for sentencing. Some studies estimate that more than $1 billion in fines are collected nationwide each year.

Fines are often imposed for relatively minor law violations, such as driving while intoxicated, reckless driving, disturbing the peace, disorderly conduct, public drunkenness, and vandalism. Judges in many courts, however, report the use of fines for relatively serious violations of the law, including assault, auto theft, embezzlement, fraud, and the sale and possession of various controlled substances. Fines are most likely to be imposed where the offender has both a clean record and the ability to pay.

Opposition to the use of fines is based on the following arguments:

- Fines allow the release of convicted offenders into the community but do not impose stringent controls on their behavior.
- Fines are a relatively mild form of punishment and are not consistent with the “just deserts” philosophy.
- Fines discriminate against the poor and favor the wealthy. Indigent offenders are especially subject to discrimination since they lack the financial resources with which to pay fines.
- Fines are difficult to collect.

A number of these objections can be answered by procedures that make available to judges complete financial information on defendants. Studies have found, however, that courts of limited jurisdiction, which are the most likely to impose fines, are also the least likely to have adequate information on offenders’ financial status. Perhaps as a consequence, judges are sometimes reluctant to impose fines. Two of the most widely cited objections by judges to the use of fines are (1) that fines allow more affluent offenders to “buy their way out” and (2) that poor offenders cannot pay fines.

A solution to both objections can be found in the Scandinavian system of day fines. The day-fine system is based on the idea that fines should be proportionate to the severity of the offense but also need to take into account the financial resources of the offender. Day fines are computed by first assessing the seriousness of the offense, the defendant’s degree of culpability, and his or her prior record as measured in “days.” The use of days as a benchmark of seriousness is related to the fact that, without fines, the offender could be sentenced to a number of days (or months or years) in jail or prison. The number of days an offender is assessed is then multiplied by the daily wages that person earns. Hence, if two people are sentenced to a five-day fine, but one earns only $20 per day and the other $200 per day, the first would pay a $100 fine and the second $1,000.

In 2004, one of Finland’s richest men, 27-year-old Jussi Salonoja, was fined a record 170,000 euros ($217,000) for speeding through the center of Helsinki. Salonoja, heir to his family’s international sausage business, was caught driving 80 kilometers per hour (kph) in a 40-kph zone. The fine was based on Salonoja’s 2002 earnings, which were estimated at close to 7 million euros.

In the early 1990s, the NIJ reported on experimental day-fine programs conducted by the Richmond County Criminal Court in Staten Island, New York, and by the Milwaukee Municipal Court. Both studies concluded that “the day fine can play a major . . . role as an intermediate sanction” and that “the day-fine concept could be implemented in a typical American limited-jurisdiction court.” Those conclusions were supported by a 1996 RAND Corporation report that examined ongoing day-fine demonstration projects in Maricopa County, Arizona; Des Moines, Iowa; Bridgeport, Connecticut; and four counties in Oregon.
DEATH: THE ULTIMATE SANCTION

Some crimes are especially heinous and seem to cry out for extreme punishment. In 2008, for example, a 28-year-old grocery store stock clerk named Kevin Ray Underwood was sentenced to death in the atrocious murder of a ten-year-old girl in what authorities said was an elaborate plan to cannibalize the girl’s flesh. Underwood had been the girl’s neighbor in Purcell, Oklahoma, and her mutilated body was discovered in his apartment covered with deep saw marks. Investigators told reporters that Underwood had sexually assaulted the little girl and planned to eat her corpse using the meat tenderizer and barbecue skewers that they confiscated from his kitchen. “In my 24 years as a prosecutor, this ranks as one of the most heinous and atrocious cases I’ve ever been involved with,” said McClain County Prosecutor Tim Kuykendall.

Many states today have statutory provisions that provide for a sentence of capital punishment for especially repugnant crimes (known as capital offenses). Estimates are that more than 18,800 legal executions have been carried out in the United States since 1608, when records began to be kept on capital punishment. Although capital punishment was widely used throughout the eighteenth and nineteenth centuries, the mid-twentieth century offered a brief respite in the number of offenders legally executed in this country. Between 1930 and 1967, the year when the U.S. Supreme Court ordered a nationwide stay of pending executions, nearly 3,800 people were put to death. The peak years were 1935 and 1936, with nearly 200 legal killings each year. Executions declined substantially every year thereafter. Between 1967 and 1977, a de facto moratorium existed, with no executions carried out in any U.S. jurisdiction. Following the lifting of the moratorium, executions resumed (Figure 11–3). In 1983, only five offenders were put to death, while 37 were executed nationwide in 2008. A modern record for executions was set in 1999, with 98 executions—35 in Texas alone.
Today, the federal government and 35 of the 50 states\textsuperscript{102} permit execution for first-degree murder, while treason, kidnapping, aggravated rape, the murder of a police or corrections officer, and murder while under a life sentence are punishable by death in some jurisdictions.\textsuperscript{103}

The United States is not the only country to make use of capital punishment. In 2007, for example, Saudi Arabia beheaded 158 people,\textsuperscript{104} and Japan hung 10 criminals in just the first four months of 2008.\textsuperscript{109} China, the world’s most populous country, is reported to routinely execute more than 1,700 people annually, meaning that more people are executed in China than in the rest of the world combined. According to Amnesty International, 8,864 people received a sentence of capital punishment globally in 2008, and at least 2,390 people were executed in 25 countries worldwide.\textsuperscript{106}

The list of crimes punishable by death under federal jurisdiction in the United States increased dramatically with passage of the Violent Crime Control and Law Enforcement Act of 1994 and was expanded still further by the 2001 USA PATRIOT Act. The list now includes a total of about 60 offenses. State legislators have also worked to expand the types of crimes for which a death sentence can be imposed. In 1997, for example, the Louisiana Supreme Court upheld the state’s year-old child rape statute, which allows for the imposition of a capital sentence when the victim is younger than 12 years of age. The case involved an AIDS-infected father who raped his three daughters, ages five, eight, and nine. In upholding the father’s death sentence, the Louisiana court ruled that child rape is “like no other crime.”\textsuperscript{107} In 2008, however, in the case of Kennedy v. Louisiana, the U.S. Supreme Court ruled that the Eighth Amendment bars Louisiana (and other states) from imposing the death penalty for the rape of a child where the crime did not result, and was not intended to result, in the victim’s death.\textsuperscript{108}

A total of 2,955 offenders were under sentence of death throughout the United States on January 1, 2008.\textsuperscript{109} The latest statistics show that 98.3\% of those on death row are male, approximately 56\% are white, 13\% are Hispanic, 42\% are African American, and the remainder are of other races (mostly Native American and Pacific Islander).\textsuperscript{110} Statistics on race have been less meaningful recently, since classification depends on self-reports, and individuals may report being of more than one race.

Methods of imposing death vary by state. The majority of death-penalty states authorize execution through lethal injection. Electrocution is the second most common means, while hanging, the gas chamber, and firing squads have survived, at least as options available to the condemned, in a few states. For the most current statistical information on capital punishment, visit the Death Penalty Information Center via Web Extra 11–9 at MyCrimeKit.com. Learn more about the history of capital punishment at Library Extra 11–12 at MyCrimeKit.com.

**Habeas Corpus Review**

The legal process through which a capital sentence is carried to conclusion is fraught with problems. One serious difficulty centers on the fact that automatic review of all death sentences by appellate courts and constant legal maneuvering by defense counsel often lead to a dramatic delay between the time the sentence is handed down and the time it is carried out. Today, an average of twelve years and nine months passes between the imposition of a death sentence and execution.\textsuperscript{111} Such lengthy delays, compounded by uncertainty over whether an execution will ever occur, directly contravene the generally accepted notion that punishment should be swift and certain.

Even death-row inmates can undergo life-altering changes. When that happens, long-delayed executions can become highly questionable events. The case of Stanley “Tookie” Williams, who was executed at California’s San Quentin Prison in 2005 at age 51, is illustrative.\textsuperscript{112} Williams, self-described cofounder of the infamous Crips street gang in the early 1970s, was sentenced to die for the brutal shotgun murders of four people during a robbery 26 years earlier. In 1993, however, he experienced what he called a “reawakening” and began working from prison as an antigang crusader. Williams found a sympathetic publisher and wrote a series of children’s books titled *Tookie Speaks Out against Gang Violence*. The series was intended to help urban youth reject the lure of gang membership and embrace traditional values. He also wrote *Life in Prison*, an autobiography describing the isolation and despair experienced by death-row inmates. In his final years, Williams worked with his editor, Barbara
Cottman Becnel, to create the Internet Project for Street Peace, a demonstration project linking teens from the rough-and-tumble streets of Richmond, California, to peers in Switzerland in an effort to help them avoid street violence. In 2001, Williams was nominated for the Nobel Peace Prize by a member of the Swiss Parliament and for the Nobel Prize in Literature by a number of college professors. Pleas to spare his life, which came from Jesse Jackson, anti–death penalty activist Sister Helen Prejean, the National Association for the Advancement of Colored People (NAACP), and others, were rejected by Governor Arnold Schwarzenegger who said that “there is no reason to second-guess the jury’s decision of guilt or raise significant doubts or serious reservations about Williams’ convictions and death sentence.”

In a speech before the American Bar Association in 1989, then-Chief Justice William Rehnquist called for reforms of the federal habeas corpus system, which, at the time, allowed condemned prisoners virtually limitless opportunities for appeal. Writs of habeas corpus (Latin for “you have the body”), which require that a prisoner be brought into court to determine if he or she is being legally held, form the basis for many federal appeals made by prisoners on state death rows. In 1968, Chief Justice Earl Warren called the right to file habeas petitions, as guaranteed under the U.S. Constitution, the “symbol and guardian of individual liberty.” Twenty years later, however, Rehnquist claimed that writs of habeas corpus were being used indiscriminately by death-row inmates seeking to delay executions even where grounds for delay did not exist. “The capital defendant does not need to prevail on the merits in order to accomplish his purpose,” said Rehnquist. “He wins temporary victories by postponing a final adjudication.”

In a move to reduce delays in the conduct of executions, the U.S. Supreme Court, in the case of McCleskey v. Zant (1991), limited the number of appeals a condemned person may lodge with the courts. Saying that repeated filing for the sole purpose of delay promotes “disrespect for the finality of convictions” and “disparages the entire criminal justice system,” the Court established a two-pronged criterion for future appeals. According to McCleskey, in any petition beyond the first filed with the federal court, a capital defendant must (1) demonstrate good cause why the claim now being made was not included in the first filing and (2) explain how the absence of that claim may have harmed the petitioner’s ability to mount an effective defense. Two months later, the Court reinforced McCleskey when it ruled, in Coleman v. Thompson (1991), that state prisoners could not cite “procedural default,” such as a defense attorney’s failure to meet a state’s filing deadline for appeals, as the basis for an appeal to federal court.

In 1995, in the case of Schlup v. Delo, the Court continued to define standards for further appeals from death-row inmates, ruling that before appeals based on claims of new evidence could be heard, “a petitioner must show that, in light of the new evidence, it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt.” A “reasonable juror” was defined as one who “would consider fairly all of the evidence presented and would conscientiously obey the trial court’s instructions requiring proof beyond a reasonable doubt.”

Opportunities for federal appeals by death-row inmates were further limited by the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, which sets a one-year postconviction deadline for state inmates filing federal habeas corpus appeals. The deadline is six months for state death-row inmates who were provided a lawyer for habeas appeals at the state level. The act also requires federal courts to presume that the factual findings of state courts are correct, does not permit the claim of state court misinterpretations of the U.S. Constitution as a basis for habeas relief unless those misinterpretations are “unreasonable,” and requires that all petitioners must show, prior to obtaining a hearing, facts sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the petitioner guilty. The act also requires approval by a three-judge panel before an inmate can file a second federal appeal raising newly discovered evidence of innocence. In 1996, in the case of Felker v. Turpin, the U.S. Supreme Court ruled that limitations on the authority of federal courts to consider successive habeas corpus petitions imposed by AEDPA are permissible since they do not deprive the U.S. Supreme Court of its original jurisdiction over such petitions.

Some recent statements by Supreme Court justices have indicated that long delays caused by the government in carrying out executions may render the punishment unconstitutionally cruel and unusual. One example comes from the 1998 case of Elledge v. Florida, where the execution of William D. Elledge had been delayed for 23 years. Although the full
Court refused to hear the case, Justice Stephen Breyer observed that “[t]wenty-three years under sentence of death is unusual—whether one takes as a measuring rod current practice or the practice in this country and in England at the time our Constitution was written.” Moreover, wrote Breyer, execution after such a long delay could be considered cruel because Elledge “has experienced that delay because of the State’s own faulty procedures and not because of frivolous appeals on his own part.” Elledge remains on death row at the Union Correctional Institution in Florida. He has been under sentence of death for 34 years.

Opposition to Capital Punishment

Thirty years ago, David Magris, who was celebrating his twenty-first birthday with a crime spree, shot Dennis Tapp in the back during a holdup, leaving Tapp a paraplegic. Tapp had been working a late-night shift, tending his father’s quick-serve gas station. Magris went on to commit more robberies that night, killing 20-year-old Steven Tompkins in a similar crime. Although Magris was sentenced to death by a California court, the U.S. Supreme Court overturned the state’s death-penalty law in 1972, opening the door for Magris to be paroled in 1985. Long before Magris was freed from prison, however, Tapp had already forgiven him. A few minutes after the shooting happened, Tapp regained consciousness, dragged himself to a telephone, and called for help. The next thing he did was ask “God to forgive the man who did this to me.”

Today, the men—both staunch death-penalty opponents—are friends, and Magris is president of the Northern California Coalition to Abolish the Death Penalty. “Don’t get me wrong,” says Tapp, “What [David] did was wrong. ... He did something stupid and he paid for it.”

Because for many the death penalty is such an emotional issue, attempts have been made to abolish capital punishment since the founding of the United States. The first recorded effort to eliminate the death penalty occurred at the home of Benjamin Franklin in 1787. At a meeting there on March 9 of that year, Dr. Benjamin Rush, a signer of the Declaration of Independence and a leading medical pioneer, read a paper against capital punishment to a small but influential audience. Although his immediate efforts came to naught, his arguments laid the groundwork for many debates that followed. Michigan, widely regarded as the first abolitionist state, joined the Union in 1837 without a death penalty. A number of other states, including Alaska, Hawaii, Massachusetts, Minnesota, West Virginia, and Wisconsin, have since spurned death as a possible sanction for criminal acts. As noted earlier, it remains a viable sentencing option in 38 of the states and in all federal jurisdictions, so arguments continue to rage over its value.

Today, six main rationales for abolishing capital punishment are heard:

1. The death penalty can be and has been inflicted on innocent people.
2. The death penalty is not an effective deterrent.
3. The imposition of the death penalty is, by the nature of our legal system, arbitrary.
4. The death penalty discriminates against certain ethnic and racial groups.
5. The death penalty is far too expensive to justify its use.
6. Human life is sacred, and killing at the hands of the state is not a righteous act but rather one that is on the same moral level as the crimes committed by the condemned.

The first five abolitionist claims are pragmatic, that is, they can be measured and verified or disproved by looking at the facts. The last claim is primarily philosophical and therefore not amenable to scientific investigation. Hence, we shall briefly examine only the first five.

THE DEATH PENALTY AND INNOCENT PEOPLE The Death Penalty Information Center claims that 133 people in 25 states were freed from death row between 1973 and 2009 after it was determined that they were innocent of the capital crime of which they had been convicted (Figure 11–4). One study of felony convictions that used analysis of DNA to provide
crime that only the perpetrator could know. Pitchfork became the 4,583rd man to undergo DNA testing, and his DNA proved a perfect match with that of the killer.

In the last 20 years, the use of DNA testing by police departments has come a long way. Today, the FBI's Combined DNA Index System (CODIS) database makes use of computerized records to match the DNA of individuals previously convicted of certain crimes with forensic samples gathered at crime scenes across the country. A recent federal law allows the FBI and other federal law enforcement agencies to include preconviction DNA in their databases. Fifteen states also allow the collection of DNA samples from people awaiting trial.

Advocates of genetic privacy, however, question whether anyone—even those convicted of crimes—should be sampled against their wishes and have their genetic profiles added to government databases. The Truro case, in which the American Civil Liberties Union (ACLU) sent letters to the town’s police chief and Cape Cod prosecutor calling for an end to the “DNA dragnet,” highlights what many fear—especially when local police announced that they would pay close attention to those who refused to cooperate. One commentator noted that it’s “a very old trap” to say, “If you have nothing to hide, then why not cooperate?”

European courts, it would seem, agree. In 2008, the European Court of Human Rights, ruled unanimously that British officials must destroy nearly 1 million DNA samples and fingerprints taken from people without criminal records. Keeping the samples, the court said, was a violation of the right to privacy established under the European Human Rights Convention, to which the United Kingdom is a signatory.

YOU DECIDE

What degree of “genetic privacy” should an individual be entitled to? Should the government require routine genetic testing of nonoffenders for identification purposes? Should they require it of arrestees who have not been convicted? How might such information be used in the event of a terrorist attack?

point out, “Unlike witnesses who disappear or whose recollections fade over time, DNA in biological samples can be reliably extracted decades after the commission of the crime. The results of such testing have invariably been found to have a scientific certainty that easily outweighs the eyewitness identification testimony or other direct or circumstantial proof that led to the original conviction.”

“In 2006, for example, Floridian Alan Crotzer, 45, was freed from prison after spending almost 24 years behind bars for two rapes that DNA tests later showed he didn’t commit. Crotzer had been convicted in 1982 of raping a 12-year-old girl and kidnapping, raping, and robbing a Tampa woman. Five eyewitnesses identified him as the shotgun-wielding leader of a gang of robbers who invaded a Tampa, Florida, home and assaulted the people inside. Crotzer was also convicted of aggravated assault, burglary, robbery, and attempted robbery and was sentenced to 130 years in prison. Although DNA testing was not readily available at the time he was tried, DNA tests performed in 2005 on rape kit evidence stored in a Florida Department of Law Enforcement locker since the crime proved Crotzer’s innocence. The test’s findings were supported by the admission of another man, Douglas James, one of the original suspects, that he had committed the crimes along with his brother and a childhood friend. Shortly after learning of the test results, prosecutors asked Tampa Judge J. Rogers Padgett to set aside Crotzer’s conviction and set him free. “The motion is granted. You are a free man,” Padgett told Crotzer in a courtroom crowded with members of the press and Crotzer’s family. Asked whether he would seek compensation from the state for the years he spent behind bars, Crotzer told reporters, “There ain’t no compensation for what they done to me; but I’m not bitter.”

A 2000 study by Columbia Law School Professor James Liebman and colleagues examined 4,578 death-penalty cases in state and federal courts from 1973 to 1995. They found that appellate courts overturned the conviction or reduced the sentence in 68% of the cases examined. In 82% of the successful appeals, defendants were found to be deserving

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**FIGURE 11–4**

Number of DNA-based exonerations by state since 1989.

of a lesser sentence, while convictions were overturned in 7% of such appeals. According to the study’s authors, “Our 23 years worth of findings reveal a capital punishment system collapsing under the weight of its own mistakes.” You can read the Liebman report in its entirety at Library Extra 11–13 at MyCrimeKit.com.

Claims of innocence are being partially addressed today by recently passed state laws that mandate DNA testing of all death-row inmates in situations where DNA testing might help establish guilt or innocence (that is, in cases where blood or semen from the perpetrator is available for testing). In 2000, Illinois Governor George Ryan announced that he was suspending all executions in his state indefinitely. Ryan’s proclamation came after DNA testing showed that 13 Illinois death-row prisoners could not have committed the capital crimes of which they were convicted. In 2006, the New Jersey legislature voted to suspend use of the death penalty until a state task force made its report on whether capital punishment is fairly imposed. In a sad footnote to the Illinois proclamation, former Governor Ryan, who drew international praise for his stance against the death penalty and who had been nominated for the Nobel Prize, was found guilty in 2006 of racketeering and fraud in a corruption scandal that ended his political career.

In 2004, in recognition of the potential of DNA testing to exonerate the innocent, President George W. Bush signed the Innocence Protection Act into law. The Innocence Protection Act provides federal funds to eliminate the backlog of unanalyzed DNA samples in the nation’s crime laboratories and sets aside money to improve the capacity of federal, state, and local crime laboratories to conduct DNA analyses. The act also facilitates access to postconviction DNA testing for those serving time in state or federal prisons or on death row and sets forth conditions under which a federal prisoner asserting innocence may obtain postconviction DNA testing of specific evidence. Similarly, the legislation requires the preservation of biological evidence by federal law enforcement agencies for any defendant under a sentence of imprisonment or death.

Not all claims of innocence are supported by DNA tests, however. In 2006, for example, DNA test results confirmed the guilt of Roger Keith Coleman, a Virginia coal miner who had steadfastly maintained his innocence until he was executed in 1992. Coleman, executed for the 1981 rape and murder of his sister-in-law, Wanda McCoy, died declaring his innocence and proclaiming that he would one day be exonerated. His case became a cause célébre for death-penalty opponents, who convinced Virginia Governor Mark Warner to order DNA tests on surviving evidence. Coleman’s supporters claimed that the tests would provide the first scientific proof that an innocent man had been executed in the United States. Results from the tests, however, conclusively showed that blood and semen found at the crime scene had come from Coleman. After the test results were announced, James McCloskey, director of a New Jersey prison ministry and one of the leaders in the effort to clear Coleman’s name, told reporters, “We who seek the truth must live or die by the sword of DNA, [but] this particular truth feels like a kick in the stomach.” Learn more about DNA testing and how it can help determine guilt or innocence from the President’s DNA Initiative via Web Extra 11–10 at MyCrimeKit.com.

THE DEATH PENALTY AND DETERRENCE During the 1970s and 1980s, the deterrent effect of the death penalty became a favorite subject for debate in academic circles. Studies of states that had eliminated the death penalty failed to show any increase in homicide rates. Similar studies of neighboring states, in which jurisdictions retaining capital punishment were compared with those that had abandoned it, also failed to demonstrate any significant differences. Although death-penalty advocates remain numerous, few still argue for the penalty based on its deterrent effects. One study that has found support for use of the death penalty as a deterrent was reported in 2001 by Hashem Dezhbakhsh and his colleagues at Emory University. According to the researchers, “Our results suggest that capital punishment has a strong deterrent effect. . . . In particular, each execution results, on average, in 18 fewer murders.” They note that most other studies in the area have not only been methodologically flawed but have failed to consider the fact that a number of states sentence select offenders to death but do not carry out executions. They write, “If criminals know that the justice system issues many death sentences but the executions are not carried out, then they may not be deterred by an increase in probability of a death sentence.”
THE DEATH PENALTY AND ARBITRARINESS  The third abolitionist claim, that the death penalty is arbitrary, is based on the belief that access to effective representation and to the courts themselves is differentially available to people with varying financial and other resources. The notion of arbitrariness also builds on beliefs that differences in jury composition, judges’ personal dispositions and backgrounds, varying laws and procedures, and jurisdictional social characteristics may lead to varying sentences and could mean that a person who might be sentenced to die in one place might receive a lesser sentence elsewhere.

Access to the courts, which some see as more dependent on a changing legal environment than on fair standards of due process, is another area in which arbitrariness can play a role. In recent years, access to appellate courts has been restricted by a number of new state and federal laws (discussed in greater detail in Chapter 14). Such restrictions led the American Bar Association (ABA) House of Delegates in 1997 to cite what it called “an erosion of legal rights of death row inmates” and to urge an immediate halt to executions in the United States until the judicial process could be overhauled.146 ABA delegates were expressing concerns that during the past decade, Congress and the states have unfairly limited death-row appeals through restrictive legislation. The ABA resolution also called for a halt to executions of people under 18 years of age and of those who are intellectually disabled.147

THE DEATH PENALTY AND DISCRIMINATION  The claim that the death penalty is discriminatory is harder to investigate. Although past evidence suggests that blacks and other minorities in the United States have been disproportionately sentenced to death,148 more recent evidence is not as clear. At first glance, disproportionality seems apparent: 45 of the 98 prisoners executed between January 1977 and May 1988 were African American or Hispanic, and 84 of the 98 had been convicted of killing whites.149 A 1996 Kentucky study found that blacks accused of killing whites in that state between 1976 and 1991 had a higher-than-average probability of being charged with a capital crime and of being sentenced to die than did homicide offenders of other races.150 For an accurate appraisal to be made, however, any claims of disproportionality must go beyond simple comparisons with racial representation in the larger population and must somehow measure both frequency and seriousness of capital crimes between and within racial groups. Following that line of reasoning, the Supreme Court, in the 1987 case of McCleskey v. Kemp,151 held that a simple showing of racial discrepancies in the application of the death penalty does not constitute a constitutional violation. A 2001 study

Death-penalty opponent Mark Bherand sitting outside San Quentin Prison holding a sign as he awaits the execution of convicted killer Stanley “Tookie” Williams on December 13, 2005. Williams, reputed cofounder of the Crips street gang, had been convicted of four murders that occurred in 1979. He was denied clemency by California Governor Arnold Schwarzenegger. What arguments can be made in favor of and against capital punishment? Which arguments do you find most compelling?  
Justin Sullivan/Getty Images—GINS/Entertainment News & Sports

There is no evidence of racial bias in the administration of the federal death penalty.  
—Former U.S. Attorney General John Ashcroft
After decades of moral arguments reaching biblical proportions, after long, twisted journeys to the nation’s highest court and back, the death penalty may be abandoned by several states for a reason having nothing to do with right or wrong:

Money. Turns out, it is cheaper to imprison killers for life than to execute them, according to a series of recent surveys. Tens of millions of dollars cheaper, politicians are learning, during a tumbling recession when nearly every state faces job cuts and massive deficits.

So an increasing number of them are considering abolishing capital punishment in favor of life imprisonment, not on principle but out of financial necessity.

“IT’s 10 times more expensive to kill them than to keep them alive,” though most Americans believe the opposite, said Donald McCartin, a former California jurist known as “The Hanging Judge of Orange County” for sending nine men to death row.

Deep into retirement, he lost his faith in an eye for an eye and now speaks against it. What changed a mind so set on the ultimate punishment?

California’s legendarily slow appeals system, which produces an average wait of nearly 20 years from conviction to fatal injection—the longest in the nation. Of the nine convicted killers McCartin sent to death row, only one has died. Not by execution, but from a heart attack in custody. . . .

“It’s a waste of time and money,” said the 82-year-old, self-described right-wing Republican whose sonorous voice still commands attention. “The only thing it does is prolong the agony of the victims’ families.”

In 2007, time and money were the reasons New Jersey became the first state to ban executions since the U.S. Supreme Court reinstated the death penalty in 1976.

Democratic Gov. Jon Corzine commuted the executions of 10 men to life imprisonment without parole. Legal costs were too great and produced no result, lawmakers said. After spending an estimated $4.2 million for each death sentence,

A session of the California legislature. States like California are considering the cost of capital punishment, along with public sentiment and moral aspects of court-ordered executions, in weighing the future of the death penalty in their state. What role, if any, should cost play in capital punishment decisions?

Max Whittaker/Getty Images

...of racial and ethnic fairness in federal capital punishment sentences attempted to go beyond mere percentages in its analysis of the role played by race and ethnicity in capital punishment sentencing decisions. Although the study, which closely reviewed 950 capital punishment cases, found that approximately 80% of federal death-row inmates are African American, researchers found “no intentional racial or ethnic bias in how capital punishment was administered in federal cases.” Underrepresented groups were more likely to be sentenced to death, “but only because they are more likely to be arrested on facts that could support a capital charge, not because the justice system acts in a discriminatory fashion,” the report said. Read the entire report at Library Extra 11–14 at MyCrimeKit.com.

Another 2001 study, this one by New Jersey Supreme Court Special Master David Baime, found no evidence of bias against African American defendants in capital cases in New Jersey during the period studied (August 1982 through May 2000). The study concluded, “Simply stated, we discern no sound basis from the statistical evidence to conclude that the race or ethnicity of the defendant is a factor in determining which cases advance to a penalty trial and which defendants are ultimately sentenced to death. The statistical evidence abounds the other way—it strongly suggests that there are no racial or ethnic disparities in capital murder prosecution and death sentencing rates.”
Evidence of socioeconomic discrimination in the imposition of the death penalty in Nebraska between 1973 and 1999 was found in a 2001 study of more than 700 homicide cases in that state. The study, which had been mandated by the state legislature, found that while race did not appear to influence death-penalty decisions, killers of victims with high socioeconomic status received the death penalty four times as often as would otherwise be expected. According to the study, “The data document significant statewide disparities in charging and sentencing outcomes based on the socio-economic status of the victim.”

**THE DEATH PENALTY AND EXPENSE** The fifth claim, that the death penalty is too expensive, is difficult to explore. Although the “official” costs associated with capital punishment are high, many death-penalty supporters argue that no cost is too high if it achieves justice. Death-penalty opponents, on the other hand, point to the huge costs associated with judicial appeals and with the executions themselves. According to the Death Penalty Information Center (DPIC), which maintains information on state-by-state estimates of such costs, “The death penalty costs North Carolina $2.16 million per execution over the costs of a non-death penalty murder case with a sentence of imprisonment for life.” The DPIC also says that some states spend far more on executions because of jurisdiction-specific litigation over such things say it’s because crime rates have declined and execution is a strong deterrent; abolitionists say it’s because jurors and judges are reluctant to risk taking a life when future scientific tests could prove the accused not guilty.

Executions, too, are dropping. There were 98 in 1999; 37 in 2008.

Still, the costs of capital punishment weigh heavily on legislators facing Solomon-like choices in these dismal economic times. In Kansas, Republican state Sen. Caroline McGinn is pushing a bill that would repeal the death penalty effective July 1 [2009]. Kansas, which voted to suspend tax refunds, faces a budget deficit of nearly $200 million. McGinn urged fellow legislators “to think outside the box” for ways to save money. According to a state survey, capital cases were 70 percent more expensive than comparable non-death penalty cases.

In New Mexico, Gov. Bill Richardson recently said his long-time support of capital punishment was wavering—and belt-tightening was one the reasons. As the state tries to plug a $450 million budget shortfall with cuts to schools and environmental agencies, a bill to end executions has already passed the House as a cost-saving measure. The state supreme court has ruled that more money must be given for public defenders in death penalty cases, but legislators have yet to act.

In Maryland, a 2008 Urban Institute study said taxpayers forked out at least $37.2 million for each of five executions since the death penalty was re-enacted in 1978. The survey, which examined 162 capital cases, found that simply seeking the death penalty added $186 million to prosecution costs. Gov. Martin O’Malley, who disdains the death penalty on moral and financial grounds, is pushing a bill to repeal it.

Author’s Note: Since this article was written, New Mexico has abolished the death penalty.


When I walked out of that execution chamber that night, I felt like I had been given my life back. It could not bring Cary back, but it gave us our life back.

—Charlotte Stout, the mother of an eight-year-old murder victim, after witnessing the killer’s execution in 2000
as methods used. According to research cited by DPIC Director Richard C. Dieter, Florida spends $24 million for each execution that it carries out, and the death penalty costs California more than $100 million per event. At those rates, a single execution costs many times what it would cost to imprison someone in a single cell at the highest security level for 40 years. The death penalty can be expensive even in states where no executions have occurred. One 2005 New Jersey study, for example, found that the death penalty has cost state taxpayers more than $253 million in prosecution and other costs since 1992, even though no one has been executed in New Jersey since 1963. Learn more about the costs of capital punishment at Library Extra 11–15 at MyCrimeKit.com.

Justifications for Capital Punishment

On February 11, 2004, 47-year-old Edward Lewis Lagrone was executed by lethal injection in Huntsville, Texas, for the murder of three people in their home. Earlier, Lagrone had molested and impregnated one of the victims, a ten-year-old child, whom he shot in the head as she was trying to protect her 19-month-old sister. Lagrone also killed two of the child’s great-aunts who were in the house at the time of the attack. One of the women, 76-year-old Caola Lloyd, was deaf, blind, and bedridden with cancer. Prior to the killings, Lagrone had served seven years of a 20-year prison sentence for another murder and was on parole. “He’s a poster child to justify the death penalty,” said David Montague, the Tarrant County assistant district attorney who prosecuted Lagrone.

Like many others today, Montague feels that “cold-blooded murder” justifies a sentence of death. Justifications for the death penalty are collectively referred to as the retentionist position. The three retentionist arguments are (1) revenge, (2) just deserts, and (3) protection. Those who justify capital punishment as revenge attempt to appeal to the idea that survivors, victims, and the state are entitled to “closure.” Only after execution of the criminal perpetrator, they say, can the psychological and social wounds engendered by the offense begin to heal.

The just deserts argument makes the simple and straightforward claim that some people deserve to die for what they have done. Death is justly deserved; anything less cannot suffice as a sanction for the most heinous crimes. As U.S. Supreme Court Justice Potter Stewart once wrote, “The decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community’s belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.”

The third retentionist claim, that of protection, asserts that offenders, once executed, can commit no further crimes. Clearly the least emotional of the retentionist claims, the protectionist argument may also be the weakest, since societal interests in protection can also be met in other ways, such as incarceration. In addition, various studies have shown that there is little likelihood of repeat offenses among people convicted of murder and later released. One reason for such results, however, may be that murderers generally serve lengthy prison sentences prior to release and may have lost whatever youthful propensity for criminality they previously possessed. For an intriguing dialogue between two U.S. Supreme Court justices over the constitutionality of the death penalty, see Web Extra 11–11 at MyCrimeKit.com.

The Courts and the Death Penalty

The U.S. Supreme Court has for some time served as a sounding board for issues surrounding the death penalty. One of the Court’s earliest cases in this area was Wilkerson v. Utah (1878), which questioned shooting as a method of execution and raised Eighth Amendment claims that firing squads constituted a form of cruel and unusual punishment. The Court disagreed, however, contrasting the relatively civilized nature of firing squads with the various forms of torture often associated with capital punishment around the time the Bill of Rights was written.

Similarly, the Court supported electrocution as a permissible form of execution in In re Kemmler (1890). In Kemmler, the Court defined cruel and unusual methods of execution as follows: “Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there is something inhuman and barbarous, something more than the mere extinguishing
of life.”166 Almost 60 years later, the Court ruled that a second attempt at the electrocution of a convicted person, when the first did not work, did not violate the Eighth Amendment.167 The Court reasoned that the initial failure was the consequence of accident or unforeseen circumstances and not the result of an effort on the part of executioners to be intentionally cruel.

It was not until 1972, however, in the landmark case of 

*Gregg v. Georgia*,168 that the Court recognized “evolving standards of decency”169 that might necessitate a reconsideration of Eighth Amendment guarantees. In a 5–4 ruling, the 

*Furman* decision invalidated Georgia’s death penalty statute on the basis that it allowed a jury unguided discretion in the imposition of a capital sentence. The majority of justices concluded that the Georgia statute, which permitted a jury to decide issues of guilt or innocence while it weighed sentencing options, allowed for an arbitrary and capricious application of the death penalty.

Many other states with statutes similar to Georgia’s were affected by the 

*Furman* ruling but moved quickly to modify their procedures. What evolved was the two-step procedure used today in capital cases. In the first stage, guilt or innocence is decided. If the defendant is convicted of a crime for which execution is possible, or if he pleads guilty to such an offense, a second, or penalty, phase ensues. The penalty phase, a kind of minitrial, generally permits the introduction of new evidence that may have been irrelevant to the question of guilt but that may be relevant to punishment, such as drug use or childhood abuse. In most death-penalty jurisdictions, juries determine the punishment. However, in Arizona, Idaho, Montana, and Nebraska, the trial judge sets the sentence in the second phase of capital murder trials, and Alabama, Delaware, Florida, and Indiana allow juries only to recommend a sentence to the judge. One of the most widely followed penalty hearings took place in 2006, in the case of al-Qaeda conspirator Zacarias Moussaoui. After a six-week trial and seven days of deliberations, a federal jury of nine men and three women decided that Moussaoui should spend the rest of his life in prison rather than be executed for his part in the 9/11 attacks.170

The Supreme Court formally approved the two-step trial procedure in 

*Gregg v. Georgia* (1976).171 In 

*Gregg*, the Court upheld the two-stage procedural requirements of Georgia’s new capital punishment law as necessary for ensuring the separation of the highly personal information needed in a sentencing decision from the kinds of information reasonably permissible in a jury trial where issues of guilt or innocence alone are being decided. In the opinion written for the majority, the Court for the first time recognized the significance of public opinion in deciding on the legitimacy of questionable sanctions.172 Its opinion cited the strong showing of public support for the death penalty following 

*Furman* to mean that death was still a socially and culturally acceptable penalty.

Post-

*Gregg* decisions set limits on the use of death as a penalty for all but the most severe crimes. In 1977, in the case of 

*Coker v. Georgia*,173 the Court struck down a Georgia law imposing the death penalty for the rape of an adult woman. The Court concluded that capital punishment under such circumstances would be “grossly disproportionate” to the crime. A year earlier, in the 1976 case of 

*Woodson v. North Carolina*,174 a law requiring mandatory application of the death penalty for specific crimes was overturned.

In two 1990 rulings, 

*Blystone v. Pennsylvania*175 and 

*Boye v. California*,176 the Court upheld state statutes dictating that death penalties must be imposed where juries find a lack of mitigating factors that could offset obvious aggravating circumstances. In the 1990 case of R. Gene Simmons, an Arkansas mass murderer convicted of killing 16 relatives during a 1987 shooting rampage, the Court granted inmates under sentence of death the right to waive appeals.177 Prior to the 

*Simmons* case, any interested party could file a brief on behalf of the condemned—with or without their consent.

In 2005, in the case of 

*Deck v. Missouri*,178 the Court forbade the use of visible shackles during the penalty phase of capital trials, unless special circumstances justify their use. Although the Court meant to maintain the dignity and decorum of trial proceedings by not forcing a person to plead for his or her life in shackles, the justices also recognized that judges may order the use of restraints when they are necessary to protect themselves and their courtrooms and to reduce the risk of escape for offenders who are especially likely to flee.

Recently, death-row inmates and those who file cases on their behalf to test the boundaries of statutory acceptability have been busy challenging state capital punishment laws. Most such challenges focus on the procedures involved in sentencing decisions. In 1994, for
decisions, made by the Court since then, have further refined the aggravating factors justifying the death penalty. What other right to have a jury, and not just a judge, determine the existence of aggravating circumstances? At bottom, then, the Cruel and Unusual Punishments Clause prohibits the infliction of uncivilized and inhuman punishments. The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is “cruel and unusual,” therefore, if it does not comport with human dignity.

—Former U.S. Supreme Court Justice William Brennan, concurring in Furman v. Georgia

example, a challenge to the constitutionality of California’s capital sentencing law, which requires the jury to consider details such as the circumstances of the offense, prior violent crimes by the defendant, and the defendant’s age, was rejected in Tuilaepa v. California.179

Following Apprendi v. New Jersey (discussed earlier in this chapter), attorneys for an Arizona death-row inmate successfully challenged that state’s practice of allowing judges, sitting without a jury, to make factual determinations necessary for imposition of the death penalty. In Ring v. Arizona (2002),180 a jury had found Timothy Stuart Ring guilty of felony murder occurring in the course of an armed robbery for the killing of an armored car driver in 1994, but it deadlocked on the charge of premeditated murder. Under Arizona law, Ring could not be sentenced to death, the statutory maximum penalty for first-degree murder, unless a judge made further findings in a separate sentencing hearing. The death penalty could be imposed only if the judge found the existence of at least one aggravating circumstance specified by law that was not offset by mitigating circumstances. During such a hearing, the judge listened to an accomplice who said that Ring planned the robbery and shot the guard. The judge then determined that Ring was the actual killer and found that the killing was committed for financial gain (an aggravating factor). Following the hearing, Ring was sentenced to death. His attorneys appealed, claiming that, by the standards set forth in Apprendi, Arizona’s sentencing scheme violated the Sixth Amendment’s guarantee of a jury trial because it entrusted a judge with fact-finding powers that allowed Ring’s sentence to be raised above what would otherwise have been the statutory maximum. The U.S. Supreme Court agreed and overturned Ring’s sentence, finding that “Arizona’s enumerated aggravating factors operate as the functional equivalent of an element of a greater offense.” Ring established that juries, not judges, must decide the facts that lead to a death sentence. The Ring ruling called into question at least 150 judge-imposed death sentences181 in at least five states (Arizona, Colorado, Idaho, Montana, and Nebraska).182

In 2003, in the case of Summerlin v. Stewart,183 the U.S. Court of Appeals for the Ninth Circuit retroactively applied the Ring decision and vacated the death sentences of 100 prisoners in three states that fall within its jurisdiction. The court found that inmates in Arizona, Idaho, and Montana had been sent to death row by judges rather than juries in violation of Ring and ordered that their sentences be commuted to life in prison. Those sentences were reinstated, however, by the U.S. Supreme Court in the 2004 case of Schriro v. Summerlin,184 in which the retroactivity analysis of the Ninth Circuit Court was invalidated. The rule established in Apprendi and Ring, said the Court, could not be applied to sentences that had already been imposed because it was merely a new procedural rule and not a substantive change. Only substantive changes, said the Court, are watershed events retroactively applicable to sentences that have already been finalized. Soon after Ring was decided, however, the affected states began the process of amending their death-penalty laws to bring them into line with the Court’s new requirements.

Although questions may arise about sentencing practices, the majority of justices on today’s high court seem largely convinced of the fundamental constitutionality of a sentence of death. Open to debate, however, is the constitutionality of methods for execution. In a 1993 hearing, Poyner v. Murray,185 the U.S. Supreme Court hinted at the possibility of revisiting questions first raised in Kemmler. The case challenged Virginia’s use of the electric chair, calling it a form of cruel and unusual punishment. Syvasky Lafayette Poyner, who originally brought the case before the Court, lost his bid for a stay of execution and was electrocuted in March 1993. Nonetheless, in Poyner, Justices David H. Souter, Harry A. Blackmun, and John Paul Stevens wrote, “The Court has not spoken squarely on the underlying issue since In re Kemmler . . . and the holding of that case does not constitute a dispositive response to litigation of the issue in light of modern knowledge about the method of execution in question.”

At bottom, then, the Cruel and Unusual Punishments Clause prohibits the infliction of uncivilized and inhuman punishments. The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is “cruel and unusual,” therefore, if it does not comport with human dignity.

—in Furman v. Georgia

Attorney General Schriro v. Summerlin, 2004 (Ninth Circuit Court)
In a still more recent ruling, members of the Court questioned the constitutionality of hanging, suggesting that it too may be a form of cruel and unusual punishment. In that case, *Campbell v. Wood* (1994), the defendant, Charles Campbell, raped a woman, was released from prison at the completion of his sentence, and then went back and murdered her. His request for a stay of execution was denied since the law of Washington State, where the murder occurred, offered Campbell a choice of various methods of execution and therefore an alternative to hanging. Similarly, in 1996, the Court upheld California’s death-penalty statute, which provides for lethal injection as the primary method of capital punishment in that state. The constitutionality of the statute had been challenged by two death-row inmates who claimed that a provision in the law that permitted condemned prisoners the choice of lethal gas in lieu of injection brought the statute within the realm of allowing cruel and unusual punishments.

Questions about the constitutionality of electrocution as a means of execution again came to the fore in 1997, when flames shot from the head and the leather mask covering the face of Pedro Medina during his Florida execution. Similarly, in 1999, blood poured from behind the mask covering Allen Lee “Tiny” Davis’s face as he was put to death in Florida’s electric chair. State officials claimed that the 344-pound Davis suffered a nosebleed brought on by hypertension and the blood-thinning medication that he had been taking. Photographs of Davis taken during and immediately after the execution showed him grimacing while bleeding profusely onto his chest and neck. In 2001, the Georgia Supreme Court declared electrocution to be unconstitutional, ending its use in that state. The Georgia court cited testimony from lower court records showing that electrocution may not result in a quick death or in an immediate cessation of consciousness. By the time of the court’s decision, however, the Georgia legislature had already passed a law establishing lethal injection as the state’s sole method of punishment for capital crimes. Today, only one state, Nebraska, still uses electrocution as its sole method of execution.

In 2006, questions were raised about lethal injections as constituting cruel and unusual punishment. Those questions originated with eyewitness accounts, postmortem blood testing, and execution logs that seemed to show that some of those executed remained conscious but paralyzed and experienced excruciating pain before dying. Such claims focused on the composition of the chemical cocktail used in executions, which contains one drug (sodium thiopental, a short-acting barbiturate) to induce sleep, another (pancuronium bromide) to paralyze the muscles (but which does not cause unconsciousness), and a third (potassium chloride) to stop the heart. If the first chemical is improperly administered, the condemned person remains conscious, and the procedure can cause severe pain and discomfort.

Complicating matters is the fact that the ethical codes of most professional medical organizations forbid medical practitioners to take life—meaning that although the codes are not legally binding, medical professionals are largely excluded from taking part in executions, other than to verify the fact that death has occurred. To counter fears that lethal injections cause pain, some states have begun using medical monitoring devices that show brain activity and can ensure that sleep is occurring.

In 2008, the Court took up this issue in the case of *Baze v. Rees*, which had been brought by prisoners on Kentucky’s death row. The Court held that the capital punishment protocol used by Kentucky does not violate the Eighth Amendment because it does not create a substantial risk of wanton and unnecessary infliction of pain, torture, or lingering death. “Because some risk of pain is inherent in even the most humane execution method,” wrote the justices, “the Constitution does not demand the avoidance of all risk of pain.”

The U.S. Supreme Court has, however, ruled that certain personal characteristics of the perpetrator, such as mental inability and age, can be a bar to execution. In 2001, for example, in the case of *Penry v. Johnson*, the U.S. Supreme Court found that a state trial court in Texas had failed to allow a jury to properly consider a murder defendant’s low IQ and childhood abuse as mitigating factors when it found that his crime warranted the death penalty rather than life in prison. This was the second time that the Court had ordered a new sentencing hearing for Johnny Paul Penry, who was first convicted of brutally raping and murdering Pamela Carpenter on October 25, 1979, and had twice been sentenced to die. In both cases, the Court found fault with Texas jury instructions and the system for their implementation, which restricted jurors from effectively weighing Penry’s mental retardation as a mitigating circumstance in their sentencing decision. However, shortly after the Court’s
When a juvenile commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity.


decision, Texas Governor Rick Perry vetoed legislation that would have banned the execution of mentally retarded death-row inmates throughout the state.195

Following Penry, the U.S. Supreme Court ruled in the case of Atkins v. Virginia (2002)196 that executing mentally retarded people violates the Constitution’s ban on cruel and unusual punishments. The Court, following the lead of the federal government and the 18 states that had already banned such executions, noted that “a national consensus has developed against it.” According to the Court, the standards by which the practice and imposition of capital punishment are to be judged today are not those that prevailed at the time the Bill of Rights was authored. They are, rather, “the evolving standards of decency that mark the progress of a maturing society.”197 Atkins, whose IQ was measured at 59 (100 is “average”), had been convicted of murdering a man during a robbery when he was 18.

In what some thought an unusual turn of events, Johnny Paul Penry, whose case sparked national interest in the execution of mentally retarded offenders, was sentenced to death for a third time only 10 days after the Atkins ruling. The Texas jury that sentenced him rejected his claims of mental inadequacy.198 Nonetheless, Atkins called into question the standing of a substantial number of death-row inmates across the country, many of whom are expected to appeal their convictions. The case also ushered in a national debate on how mental retardation should be measured. Finally, some people questioned the Court’s wisdom in keeping mentally retarded offenders from facing the death penalty, saying that capital crimes involve moral judgments, not intellectual ones, and that even people of low intelligence should be expected to act morally.199

Although people with very low IQs may not be executed, serious mental illness is not a bar to execution unless it affects the condemned inmate’s mind such that he doesn’t know why he’s on death row or doesn’t understand the punishment he faces. In 2004, for example, Texas Governor Rick Perry rejected a recommendation by the Texas Board of Pardons and Paroles as well as a humanitarian request by the president of the European Union that he commute the sentence of mentally ill killer Kelsey Patterson to life imprisonment.200 Patterson, who apparently suffered from a particularly severe form of paranoid schizophrenia, frequently spoke of “remote control devices” and “implants” that controlled him and said that he committed acts involuntarily.201 Patterson was executed shortly after the governor denied clemency. Patterson had been on death row since 1992 for the shooting death of a secretary and her boss at an oil company office in Palestine, Texas.

Finally, in 2007, a closely divided U.S. Supreme Court stayed the execution of Texas murderer Scott Panetti who suffers from an especially severe form of schizophrenia. Panetti had killed his parents-in-law in 1992 by shooting them at close range inside their Texas home while his terrified wife and daughter watched. In preventing Panetti’s execution, the Court held that “gross delusions stemming from a severe mental disorder may put an awareness of a link between a crime and its punishment in a context so far removed from reality that the punishment can serve no proper purpose.”202 Because the Panetti ruling focused narrowly on Panetti’s particular form of mental illness, it is not expected to prevent the execution of other mentally ill death-row inmates.

Age is a bar to execution when the offender committed the crime when he was younger than 18, a standard announced in the 2005 U.S. Supreme Court case of Roper v. Simmons.203 The majority opinion in the case, based on what the Court considered to be evolving standards of decency, was rendered after the justices heard evidence that juveniles are generally impetuous, immature, and vulnerable to negative peer pressure. The ruling, which is also discussed in Chapter 15, invalidated the capital sentences of 72 death-row inmates in 12 states. Among the 962 people put to death between January 1976 and January 2004, 22 had committed their crimes as juveniles.204

Although there is as yet no upper age limit on executions, some have made the argument that a person may be too old and infirm to die at the hands of the state. Just such an argument was advanced in the case of San Quentin State Prison inmate Clarence Ray Allen before his January 17, 2006, execution by lawyers who said that the 76-year-old Allen, sentenced to die for a triple murder that he ordered from behind bars, was too old and too sick to be put to death. Executing someone like Allen—who had had two heart attacks and a stroke...
sentencing

and was legally blind, nearly deaf, diabetic, and confined to a wheelchair—“is beyond the borders of civilized behavior,” said his attorney, Michael Satris.205

The Future of the Death Penalty

Support for the death penalty varies considerably from state to state and from one region of the country to another. In 2007, New Jersey repealed its capital punishment legislation, and in 2009, New Mexico Governor Bill Richardson signed legislation ending capital punishment in that state. Short of renewed Supreme Court intervention, the future of capital punishment may depend more on popular opinion than it does on arguments pro or con. A Gallup poll conducted in 2006 found 65% of those polled generally favored use of the death penalty under certain circumstances (down from 80% in 1994). A similar poll by the same organization found that although most respondents voiced support for the death penalty, that support dropped to 48% when respondents were offered an alternative sentence of life without parole.206

Evolving standards of human decency will finally lead to the abolition of the death penalty in this country.

—Former U.S. Supreme Court Justice William Brennan

Report: California Death Penalty System Deeply Flawed

California’s 30-year-old death penalty system that costs more than $100 million annually to administer is “close to collapse,” according to a new report issued [in June 2008].

The California Commission on the Fair Administration of Justice, appointed by the state legislature to propose criminal justice reforms, issued a 117-page report detailing a deeply flawed system with the biggest backlog of cases in the nation. The commission stopped short of calling for the abolition of the state’s death penalty. It did note, however, that California would save hundreds of millions of dollars if capital punishment were eliminated. Most condemned inmates are essentially given life sentences because so few executions are carried out, the report said.

The commission blamed inadequate legal representation and a broad death penalty law that makes nearly all first-degree murder cases eligible for the death penalty among other issues that have made the California capital punishment system “dysfunctional.”

“It is the law in name only, and not in reality,” the report stated.

The commission recommended California double its annual amount of capital punishment spending to hire more defense lawyers and prosecutors.

There are 673 inmates on California’s death row. Seventy-nine of them are still waiting to be appointed attorneys to prepare their automatic appeals to the California Supreme Court.

California has executed 13 inmates since reinstating the death penalty in 1978. No one has been executed since 2005, when a federal judge ordered a de facto moratorium until state officials fixed flaws in how California prison officials deliver the lethal injection during executions.

It takes an average of about 17 years in California between the time a killer is convicted and executed on the exceedingly rare occasion when an inmate is executed. The national average is about 10 years.

“The families of murder victims are cruelly deluded into believing that justice will be delivered with finality during their lifetimes,” the report stated.

The commission also suggested limiting the number of crimes eligible for the death penalty to multiple murders, the killing of law enforcement officials or witnesses and the torture of murder victims. As it stands, the commission said 87 percent of all first-degree murder charges could be prosecuted as death penalty cases.

The commission “found no credible evidence” that an innocent person had been executed in California in the last 30 years.

“The strain placed by these cases on our justice system, in terms of the time and attention taken away from other business that the courts must conduct for our citizens, is heavy,” the commission concluded.

Ultimately, public opinion about the death penalty may turn on the issue of whether innocent people have been executed. According to a number of recent studies, Americans from all walks of life are less likely to support capital punishment if they believe that innocent people have been put to death at the hands of the justice system or if they think that the death penalty is being applied unfairly.\textsuperscript{207} A 2007 survey by the Death Penalty Information Center, for example, found that “a significant majority of 58% responding in this poll believed it was time for a moratorium on the death penalty while the process undergoes a careful review.”\textsuperscript{208} The study’s authors note that support for the death penalty among Americans varies by race, with African Americans less likely to support capital punishment than whites. They found that much of the difference, however, is explained by differing beliefs between the races about the number of executed innocents and perceived fairness in application of capital sanctions. Consequently, execution of the innocent is at the center of today’s debate concerning the legitimacy of capital punishment, and it is likely to determine the future of the death penalty in individual states as local legislatures move to mandate procedural enhancements meant to guarantee fairness.

In 2002, a special commission appointed by Governor George Ryan to examine the imposition of capital punishment in Illinois made its report, saying that the system through which capital sentences are imposed should be modified to encompass a number of procedural safeguards. Safeguards that were recommended included (1) tighter controls on how the police investigate cases, including a requirement that investigators “continue to pursue all reasonable lines of inquiry, whether these point toward or away from the suspect”; (2) controls on the potential fallibility of eyewitness testimony, including lineups where the person in charge is not aware of which person in the lineup is the suspect (to preclude him or her from unconsciously identifying the suspect); and (3) statutory reform so that the death penalty cannot be applied based solely on the testimony of any single accomplice or eyewitness without further corroboration.\textsuperscript{209} In April 2003, incoming Illinois Governor Rod R. Blagojevich said that because of his concerns over executing innocent people, he would not lift his state’s ban on executions even if the state’s legislature passed a bill aimed at improving the system.\textsuperscript{210} Blagojevich was impeached by the Illinois state senate in 2009 and removed from office. Pat Quinn, the state’s new governor, has yet to make his stance on capital punishment clear.

The goals of criminal sentencing include retribution, incapacitation, deterrence, rehabilitation, and restoration. Retribution corresponds to the just deserts model of sentencing, which holds that offenders are responsible for their crimes. Incapacitation seeks to protect innocent members of society from offenders who might harm them if not prevented from doing so. The goal of deterrence is to prevent future criminal activity through the example or threat of punishment. Rehabilitation seeks to bring about fundamental changes in offenders and their behavior to reduce the likelihood of future criminality. Restoration seeks to address the damage done by crime by making the victim and the community “whole again.”

- The indeterminate sentencing model is characterized primarily by vast judicial choice. It builds on the belief that convicted offenders are more likely to participate in their own rehabilitation if such participation will reduce the amount of time that they have to spend in prison.
- Structured sentencing is largely a child of the just deserts philosophy. It grew out of concerns with proportionality, equity, and social debt—all of which this chapter discusses. A number of different types of structured sentencing models have been created, including determinate sentencing, which requires that a convicted offender be sentenced to a fixed term that may be reduced by good time or gain time, and a voluntary/advisory sentencing model under which guidelines consist of recommended sentencing policies that are not required by law, are usually based on past sentencing practices, and are meant to serve as guides to judges. Mandatory sentencing, another form of structured sentencing, mandates clearly enumerated punishments for specific offenses or for habitual offenders convicted of a series of crimes. The applicability of structured sentencing guidelines has been called into question by recent U.S. Supreme Court decisions.  
- Alternative sanctions include the use of court-ordered community service, home detention, day reporting, drug treatment, psychological counseling, victim–offender mediation, and intensive supervision in lieu of other, more traditional, sanctions, such as imprisonment and fines. A number of questions have been raised...
about alternative sentences, including questions about their impact on public safety, the cost-effectiveness of such sanctions, and the long-term effects of community sanctions on people assigned to alternative programs.

- Probation and parole officers routinely conduct background investigations to provide information that judges may use in deciding on the appropriate kind or length of sentence for convicted offenders.

- Historically, criminal courts have often allowed victims to testify at trial but have otherwise downplayed the experience of victimization and the suffering it causes. A new interest in the experience of victims, beginning in the 1970s in this country, has led to a greater legal recognition of victims’ rights, including a right to allocation (the right to be heard during criminal proceedings). Many states have passed victims’ rights amendments to their constitutions, although a federal victims’ rights amendment has yet to be enacted. The Crime Victims’ Rights Act of 2004 established statutory rights for victims of federal crimes and gives them the necessary legal authority to assert those rights in federal court.

- The four traditional sentencing options identified in this chapter are fines, probation, imprisonment, and—in cases of especially horrific offenses—death. The appropriateness of each sentencing option for various kinds of crimes was discussed, and the pros and cons of each were examined.

- Arguments for capital punishment identified in this chapter include revenge, just deserts, and the protection of society. The revenge argument builds upon the need for personal and communal closure. The just deserts argument makes the straightforward claim that some people deserve to die for what they have done. Societal protection is couched in terms of deterrence, since those who are executed cannot commit future crimes, and execution serves as an example to other would-be criminals. Arguments against capital punishment include findings that a death sentence has been imposed on innocent people, that the death penalty has not been found to be an effective deterrent, that it is often arbitrarily imposed, that it tends to discriminate against powerless groups and individuals, and that it is very expensive because of the numerous court appeals involved. Opponents also argue that the state should recognize the sanctity of human life.

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questions for reflection

1. Of the different kinds of sentencing practices described in this chapter, which do you think makes the most sense? Why?

2. If you could set sentencing practices in your state and had to choose between a determinate and an indeterminate scheme, which would you select? Why?

3. What is truth in sentencing? Do you agree that it is an important concept? Why or why not?

4. Explain the development of federal sentencing guidelines. What have recent court decisions said about the applicability of those guidelines?

5. In your opinion, is the return to just deserts consistent with structured sentencing? Explain.
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- Flashcards: 31 flashcards to test your knowledge of the chapter’s key terms
- Web Quest: visit the U.S. Sentencing Commission (USSC) on the Web to review recent publications and reports to Congress regarding federal sentencing
- Assignments: real-world essay questions about current issues, e-homework, opinion-based essay questions, and chapter projects for research and analysis

Go to Chapter 11 of Criminal Justice Interactive to use the following resources and study tools:

- Learning Modules: Sentencing, Presentence Reports, Determinate and Indeterminate Sentencing, Capital Punishment, the Appeals Process, and Victims’ Rights History
- Simulation: Sentencing. Select sentences that reflect an appropriate sentencing philosophy, and receive feedback on your choices in the form of newspaper editorials.
- Issue 1: “Three Strikes” and Other Mandatory Sentencing Guidelines
- Issue 2: Alternative Sentencing

Endnotes for this chapter can be found online at MyCrimeKit.com