Punishment and Sentencing

May Missouri legally execute seventeen-year-old murderer Christopher Simmons?

Simmons and Benjamin entered the home of the victim, Shirley Crook, after reaching through an open window and unlocking the back door. Simmons turned on a hallway light. Awakened, Mrs. Crook called out, "Who's there?" In response Simmons entered Mrs. Crook's bedroom, where he recognized her from a previous car accident involving them both. Simmons later admitted this confirmed his resolve to murder her.

Using duct tape to cover her eyes and mouth and bind her hands, the two perpetrators put Mrs. Crook in her minivan and drove to a state park. They reinforced the bindings, covered her head with a towel, and walked her to a railroad trestle spanning the Meramec River. There they tied her hands and feet together with electrical wire, wrapped her whole face in duct tape and threw her from the bridge, drowning her in the waters below. . . . Simmons, meanwhile, was bragging about the killing, telling friends he had killed a woman "because the bitch seen my face." . . .

Core Concepts and Summary Statements

Introduction

In the last decade the United States has experienced a shift from indeterminate to determinate sentencing.

Punishment

- A. The legal test for punishment considers various factors, including legislative intent, whether the type of penalty has historically been considered punishment, the degree of restraint on an individual's liberty, the purpose of the penalty, whether intent is required, and whether the conduct has traditionally been viewed as criminal.
- **B.** Whether a statute is considered to impose a civil disability or criminal punishment can have important consequences.

Purpose of Punishment

A. The purposes of punishment include retribution, deterrence, rehabilitation, incapacitation, and restoration.

Sentencing

A. A judge may sentence an individual convicted of a crime to imprisonment, fines, probation, intermediate sanctions, or capital punishment.

Evaluating Approaches to Sentencing

A. Several considerations may prove useful in evaluating sentencing schemes. These include proportionality, individualism, disparity, predictability, and simplicity.

Approaches to Sentencing

A. There are various approaches to sentencing, including determinate sentences, mandatory minimums, indeterminate sentences, presumptive sentences, and presumptive sentencing guidelines.

Sentencing Guidelines

- A. Determinate has replaced indeterminate sentencing as the primary approach in the United States. This reflects a shift from rehabilitation to retribution, deterrence, incapacitation, and treatment of offenders.
- B. Sentencing guidelines provide for a presumptive sentence that reflects the gravity of the offense and offender history. There may be a downward or upward departure from this presumptive sentence based on mitigating or aggravating factors.
- C. Recent Supreme Court decisions have resulted in these guidelines being considered advisory rather than binding.

Truth in Sentencing

A. "Truth in sentencing" requires that prisoners serve a significant percent of their sentence. The federal government provides funds to construct prisons to states that guarantee that prisoners serve as least eighty-five percent of their sentence.

Victims' Rights

A. The "victims' rights" movement has resulted in provisions in federal and state laws to compensate for injuries, expenses, and restitution. It also provides for the right of victims to be informed of developments in regards to the prosecution and sentencing of offenders and the right to participate in the trial through victim impact statements.

Eighth Amendment

- A. The Eighth Amendment to the U.S. Constitution prohibits cruel and unusual punishment. This clause limits the methods employed to inflict punishment, restricts the "amount of punishment" that may be imposed, and prohibits the criminal punishment of certain acts.
- B. The Eighth Amendment is not limited to punishments that were prohibited at the time of the adoption of the Eighth Amendment and draws its meaning from evolving standards of decency.
- C. The death penalty is not prohibited. Capital punishment, however, is restricted to murder in which aggravating factors outweigh mitigating factors. The administration of the death penalty is subject to various procedures intended to insure that capital punishment is imposed in a proportionate fashion.
- D. Courts generally have held that state and federal statutes providing for punishment for a "term of years," such as "Three Strikes and You're Out" laws and drug offenses are proportionate to the offender's crime.
- E. Under the Eighth Amendment, individuals are to be punished for their criminal acts rather than for their personal status.

Equal Protection

A. A judge may not base a criminal sentence on a defendant's race, gender, religion, ethnicity, or nationality. A defendant seeking to establish that a statute is "neutral on its face" is a violation of equal protection must demonstrate both a discriminatory intent and a discriminatory impact.

Introduction

One of the primary challenges confronting any society is to insure that people follow the legal rules that protect public safety and security. This is partially achieved through the influence of families, friends, teachers, the media, and religion. Perhaps the most powerful method to persuade people to obey legal rules is through the threat of criminal punishment. Following a defendant's conviction, the judge must determine the appropriate type and length of the sentence. The sentence typically reflects the purpose of the punishment. A penalty intended to exact revenge will result in a harsher punishment than a penalty designed to assist an offender to "turn his or her life around."

An American judge during the early American Republic was able to select from a wide array of punishments, most of which were intended to inflict intense pain and public shame. A Virginia statute of 1748 punished the stealing of a hog with twenty-five lashes and a fine. The second offense resulted in two hours of pillory (public ridicule) or public branding. A third theft resulted in a penalty of death. False testimony during a trial might result in mutilation of the ears or banishment from the colony. These penalties were often combined with imprisonment in a jail or workhouse and hard labor. You should keep in mind that minor acts of insubordination by African American slaves resulted in swift and harsh punishment without trial. Between 1706 and 1784, 550 African slaves were sentenced to death in Virginia alone.¹

We have slowly moved away from most of these physically painful sanctions. The majority of states followed the example of the U.S. Congress, which in 1788 prohibited federal courts from imposing whipping and standing in the pillory. Maryland retained corporal punishment until 1953, and Delaware only repealed this punishment in 1972. Delaware, in fact, subjected more than 1,600 individuals to whippings in the twentieth century.² This practice was effectively ended in 1968, when the Eighth Circuit Court of Appeals ruled that the use of the strap "offends contemporary concepts of decency and human dignity and precepts of civilization which we profess to possess." In 1994, President Bill Clinton and twenty-four U.S. Senators wrote the President of Singapore in an unsuccessful effort to persuade him to make an "enlightened decision" and to halt plans to subject an American teenager charged with vandalism to four lashings with a rattan rod.⁴

In the United States, courts have attempted to balance the need for swift and forceful punishment with the recognition that individuals are constitutionally entitled to fair procedures and are to be free from cruel and unusual punishments. You should be familiar with several central concerns when you complete the study of this chapter:

- · the definition of punishment,
- justifications for punishment,
- the types of sentences that may be imposed by judges,
- the considerations employed to evaluate the merits of sentencing schemes,
- the approaches to sentencing in federal and state courts,
- the constitutional standards that must be met by criminal sentences.

You should also come away from this chapter with an understanding that sentencing policies have evolved over time. Disillusionment with flexible sentences and rehabilitation led to the development of sentencing guidelines and determinate sentences that are intended to insure uniform and fixed sentences that "fit the crime." The federal and state governments also adopted "truth in sentencing laws" that assure the public that defendants are serving a significant portion of their prison terms. These developments have been accompanied by a growing concern for victims.

The central point that you should appreciate is that the United States is witnessing a revolution in sentencing. Keep the following points in mind:

- *Purpose of Punishment*. The emphasis is on deterrence, rehabilitation, incapacitation, education, and treatment of offenders rather than on rehabilitation.
- *Judicial Discretion*. Judicial discretion in sentencing is greatly reduced. The federal government and states have introduced sentencing guidelines and mandatory minimum sentences, illustrated by "Three Strikes and You're Out" legislation and drug laws.
- *Truth in Sentencing*. The authority of parole boards to release prisoners prior to the completion of their sentence and the ability of incarcerated individuals to accumulate "good time" is vastly reduced as a result of "truth in sentencing" legislation. As a consequence, offenders are serving a greater percentage of their sentences.
- Victims. Victims are being provided a greater role and protections in the criminal justice process.
- **Death Penalty.** The death penalty does not violate the Eighth Amendment. Capital punishment, however, is subject to a number of constitutional limitations under the Eighth Amendment intended to insure that death is proportionate penalty to the offender's crime.
- *Terms of Years*. Courts have deferred to the decision of state legislatures and the Congress in regards to sentencing decisions and generally have held that prison sentences are proportionate to the offender's crime.
- *Equal Protection*. Courts have ruled that sentencing decisions and statutes based on race or gender violate the Equal Protection Clause.

The larger point to consider as you read this chapter is whether we have struck an appropriate balance between the interests of society, defendants, and victims in the sentencing process. You should make an effort to develop your own theory of punishment.

Punishment

 ${f P}$ rofessor George P. Fletcher writes that the central characteristic of a criminal law is that a violation of the rule results in punishment before a court. Whether an act is categorized as a criminal as opposed to a civil violation is important because a criminal charge triggers various constitutional rights, such as a right against double jeopardy, the right to a lawyer, the right not to testify at trial, and the right to a trial by a jury. Would the quarantine of individuals during a flu pandemic be considered a civil disability or a criminal penalty? The U.S. Supreme Court has listed various considerations that determine whether a law is criminal.

- Does the legislature characterize the penalty as civil or criminal?
- Has the type of penalty imposed historically been viewed as criminal?
- Does the penalty involve a significant disability or restraint on personal freedom?
- Does the penalty promote a purpose traditionally associated with criminal punishment?
- Is the imposition of the penalty based on an individual's intentional wrongdoing, a requirement that is central to criminal liability?
- Has the prohibited conduct traditionally been viewed as criminal?

Whether a law is considered criminal punishment can have important consequences for a defendant. For instance, in *Smith v. Doe,* the U.S. Supreme Court was asked to decide whether Alaska's sex registration law constituted *ex post facto* criminal punishment.

In 1994, the U.S. Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act that makes certain federal criminal justice funding dependent on a state's adoption of a sex offender registration law. By 1996, every state, the District of Columbia, and the federal government had enacted some type of **Megan's Law**. These statutes were named in memory and honor of Megan Kanka, a seven-year-old New Jersey child who had been sexually assaulted and murdered in 1994 by a neighbor who, unknown to Megan's family, had prior convictions for sexual offenses against children.⁷

Alaska adopted a retroactive law that required both convicted sex offenders and child kidnappers to register and keep in contact with local law enforcement authorities. Alaska provided nonconfidential information to the public on the Internet, including an offender's crime, address, place of employment, and photograph.

Supreme Court Justice Anthony Kennedy, in his majority opinion in *Smith v. Doe,* agreed with Alaska that this statute was intended to protect the public from the danger posed by sexual offenders through the dissemination of information, and that the law was not intended to constitute and did not constitute unconstitutional *ex post facto* (retroactive) criminal punishment.⁸

Justice Ruth Ginsburg dissented from the majority judgment affirming the constitutionality of the Alaska statute. She observed that placing a registrant's face on a Web site under the label "Registered Sex Offender" was reminiscent of the shaming punishment that was employed during the colonial era when individuals were branded or placed in stocks and subjected to public ridicule.

Justice Ginsburg pointed out that John Doe I, one of the individuals bringing this case, had been sentenced to prison for sexual abuse nine years before the passage of the Alaska statute. He successfully completed a rehabilitation program and gained early release on supervised probation. John Doe subsequently remarried, established a business, and gained custody of one of his daughters based on a judicial determination that he no longer posed a threat. The Alaska version of Megan's Law now required John Doe I "to report personal information to the State four times per year," and permitted the State publicly to label him a Registered Sex Offender for the rest of his life.

Justice Ginsburg's argument that Megan's Law constitutes *ex post facto* punishment would render Alaska helpless to alert citizens to the continuing danger posed by sex offenders convicted prior to the passage of Megan's Law. Does Justice Ginsberg overlook the fact that, although registrants must inform authorities of changes in appearance, employment, and address, these individuals remain free to live their lives without restraint or restriction and can hardly claim to have been punished? On the other hand, there was evidence that registrants were scorned by the community and experienced difficulties in employment, housing, and

encountered hostility. However, this resulted from the acts of members of the public rather than the government.

The next section briefly outlines the purposes or goals that are the basis of sentencing in the criminal justice system. These purposes include retribution, deterrence, rehabilitation, incapacitation, and restoration.

Purposes of Punishment

In the United States, we have experienced various phases in our approach to criminal punishment. We continue to debate whether the primary goal of punishment should be to assist offenders to turn their life around or whether the goal of punishment should be to safeguard society by locking up offenders. Others rightly point out that we should not lose sight of the need to require offenders to compensate crime victims. In considering theories of punishment, ask yourself what goals should guide our criminal justice system.

Retribution

Retribution imposes punishment based on "just deserts." Offenders should receive the punishment that they deserve based on the seriousness of their criminal act. The retributive philosophy is based on the familiar biblical injunction of an "eye for an eye, tooth for a tooth." Retribution assumes that we all know right from wrong and are morally responsible for our conduct and should be held accountable. The question is what punishment is "deserved": a prison term, fine, or home confinement? How do we determine the appropriate length of a prison sentence and in what type of institution the sentence should be served? This is not always clear because what an individual "deserves" may depend on the circumstances of the crime, the background of the victim, and the offender's personal history.

Deterrence

The theory of **special deterrence** imposes punishment to deter or discourage a defendant from committing a crime in the future. Critics note that the recidivism rate indicates that punishment rarely deters crime. Also, we once again confront the challenge of determining the precise punishment required to achieve the desired result, in this case to deter an individual from returning to a life of crime. **General deterrence** punishes an offender as an example to deter others from violating the law. Critics contend that offenders have little concern or awareness of the punishment imposed on other individuals and that even harsh punishments have little general deterrent effect. Others reply that swift and certain punishment sends a powerful message, and that a credible threat of punishment constitutes a deterrent. There are also objections to punishing an individual as an example to others because this may result in a harsher punishment than is required to deter the defendant from committing another crime.

Rehabilitation

The original goal of punishment in the United States was to reform the offender and to transform him or her into a law-abiding and productive member of society. **Rehabilitation** appeals to the idealistic notion that people are essentially good and can transform their lives when encouraged and given support. However, studies cast doubts on whether prison educational and vocational programs are able to rehabilitate inmates. Reformers, on the other hand, point out that rehabilitation has never been seriously pursued and requires a radically new approach to imprisonment.

Incapacitation

The aim of **incapacitation** is to remove offenders from society to prevent them from continuing to menace others. This approach accepts that there are criminally inclined individuals who cannot be deterred or rehabilitated. The difficulty with this approach is that we lack the ability to accurately predict whether an individual poses a continuing danger to society. As a result, we may incapacitate an individual based on a faulty prediction of what he or she may do in the future rather than for what he or she did in the past. **Selective incapacitation** singles out

offenders who have committed designated offenses for lengthy incarceration. In many states, a conviction for a drug offense or a second or third felony under a "Three Strikes and You're Out" law results in a lengthy prison sentence or life imprisonment. There is continuing debate over the types of offenses that merit selective incapacitation.

Restoration

Restoration stresses the harm caused to victims of crime and requires offenders to engage in financial restitution and community service to compensate the victim and the community and to "make them whole once again." The restorative justice approach recognizes that the needs of victims are often overlooked in the criminal justice system. This approach is also designed to encourage offenders to develop a sense of individual responsibility and to become a responsible member of society.

This discussion of the purposes of punishment is not mere academic theorizing. Judges, when provided with the opportunity to exercise discretion, are guided by these purposes in determining the appropriate punishment. For example, in a New York case, the court described Dr. Bernard Bergman as a man of "unimpeachably high character, attainments and distinction" who is respected by people around the world for his work in religion, charity, and education. Bergman's desire for money apparently drove him to fraudulently request payment from the U.S. government for medical treatment that he had not provided to nursing home patients. He entered guilty pleas to fraud charges in both New York and in federal courts and argued that he should not be imprisoned because he did not require "specific deterrence."

Judge Marvin Frankel recognized in his judgment that there was little need for incapacitation and doubted whether imprisonment could provide useful rehabilitation. Nevertheless, he imposed a four-month prison sentence explaining that this is "a stern sentence. For people like Dr. Bergman who might be disposed to engage in similar wrongdoing, it should be sufficiently frightening to serve the . . . [purpose] of general deterrence." Judge Frankel also explained that the four-month sentence served the interest in retribution and that "[f]or all but the profoundly vengeful, [the sentence] should not depreciate the seriousness of his offenses." Do you agree with Judge Frankel's reasoning and sentence?

Sentencing

V arious types of punishments are available to judges. These punishments often are used in combination with one another:

- *Imprisonment*. Individuals sentenced to a year or less are generally sentenced to local jails. Sentences for longer periods are typically served in state or federal prisons.
- *Fines.* State statutes usually provide for fines as an alternative to incarceration or in addition to incarceration.
- **Probation**. Probation involves the suspension of a prison sentence so long as an individual continues to report to a probation officer and to adhere to certain required standards of personal conduct. For instance, this may entail psychiatric treatment or a program of counseling for alcohol or drug abuse. The conditions of probation are required to be reasonably related to the rehabilitation of the offender and the protection of the public.
- *Intermediate Sanctions*. This includes house arrest with electronic monitoring, short-term "shock" incarceration, community service, and restitution. Intermediate sanctions may be imposed as a criminal sentence or as a condition of probation or following imprisonment or in combination with a fine.
- *Death*. Thirty-six states and the federal government provide the death penalty for homicide. The other states provide life without parole.

We should also note that the federal government and most states provide for **assets forfeiture** or seizure pursuant to a court order of the "fruits" of illegal narcotics transactions (along with certain other crimes) or of the "instrumentalities" that were used in such activity. The burden rests on the government to prove by a preponderance of the evidence that

instrumentalities (vehicles), profits (money), or property are linked to an illegal transaction. In United States v. Ursery, the U.S. Supreme Court held that the seizure of money and property did not constitute double jeopardy because forfeitures do not constitute punishment.¹⁰

The U.S. Department of Justice reports in 2002 that state and federal courts convicted almost 1,114,000 adults of felonies. State courts accounted for 1,051,000 of these convictions. Sixtynine percent of individuals convicted in state courts were sentenced to prison and thirty-one percent were sentenced to probation with no jail time. The average sentence for felons sentenced to state prisons was fifty-four months; the average probation sentence was thirty-six months. Individuals sentenced to local jails, on average, received a seven-month sentence. Twenty-five percent of convicted felons were ordered to pay fines and roughly eleven percent were required to pay restitution, undergo some form of treatment, perform community service, or satisfy some other requirement.

🔙 Evaluating Sentencing Schemes

s you read about various approaches to sentencing in the remainder of the chapter, keep sev-A eral considerations in mind that might prove useful in evaluating the merits of a particular approach.

- Proportionality. A sentence should "fit the crime."
- Individualism. A sentence should reflect the offender's criminal history and the threat posed to society.
- Disparity. The sentences for a particular offense should be uniform; "like cases should be treated alike."
- *Predictability and Simplicity.* The sentence to be imposed for a particular offense should be clear and definite and should not be dependent on the personality or biases of the judge. It should be relatively easy for a judge to determine the appropriate sentence.
- Excessiveness. A sentence should not inflict unnecessary and needless pain and suffering.
- *Truthfulness.* An offender's sentence should reflect the actual time served in prison.
- *Purpose.* A sentence should be intended to achieve one or more of the purposes of punishment.

Clearly no single approach can achieve each of these goals.

Approaches to Sentencing

The approach to sentencing in states historically has shifted in response to the prevailing I criminal justice thought and philosophy. The federal and state governments generally follow four different approaches to sentencing offenders. Criminal codes may incorporate more than a single approach.

- Determinate Sentences. The state legislature provides judges with little discretion in sentencing and specifies that the offender is to receive a specific sentence. A shorter or longer sentence may be given to an offender, but this must be justified by the judge.
- Mandatory Minimum Sentences. The legislature requires judges to sentence an offender to a minimum sentence, regardless of mitigating factors. Prison sentences in some jurisdictions may be reduced by good-time credits earned by the individual while incarcerated.
- Indeterminate Sentences. The state legislature provides judges with the ability to set a minimum and maximum sentence within defined limits. In some jurisdictions, the judge only possesses the discretion to establish a maximum sentence. The decision to release an inmate prior to fully serving his or her sentence is vested in a parole board.

• *Presumptive Sentencing Guidelines.* A legislatively established commission provides a sentencing formula based on various factors, stressing the nature of the crime and offender's criminal history. Judges may be strictly limited in terms of discretion or may be provided with some flexibility within established limits. The judge must justify departures from the presumptive sentence on the basis of various aggravating and mitigating factors that are listed in the guidelines. Appeals are provided in order to maintain "reasonable sentencing practices" in those instances in which a judge departs from the presumptive sentence in the guidelines.

An individual convicted of multiple crimes may be given **consecutive sentences**, meaning that the sentences for each criminal act are served one after another. In the alternative, **concurrent sentences** are served at the same time.

Governors and the President of the United States, in the case of federal offenses, may grant an offender **clemency** resulting in a reduction of an individual's sentence or in a commutation of a death sentence to life in prison. A **pardon** exempts an individual from additional punishment. The U.S. Constitution in Article II, § 2 authorizes the president to pardon "offenses against the United States." In 2004, former Illinois Governor George Ryan concluded that the problems in the administration of the death penalty risked the execution of an innocent and responded by pardoning four individuals on death row and commuting the sentences of over one hundred individuals to life in prison.

Sentencing Guidelines

At the turn of the twentieth century, most states and the federal government employed indeterminate sentencing. The legislature established the outer limits of the penalty and parole boards were provided with the authority to release an individual prior to the completion of his or her sentences in the event the offenders demonstrated that he or she had been rehabilitated. This approach is based on the belief that an individual who is incarcerated will be inspired to demonstrate that he or she no longer poses a threat to society and deserves an early release. The disillusionment with the notion of rehabilitation and the uncertain length and extreme variation in the time served by offenders led to the introduction of determinate sentences.

In 1980, Minnesota adopted sentencing guidelines to in an effort to provide for uniform proportionate and predictable sentences. Currently over a dozen states employ guidelines. In 1984, the U.S. Congress responded by passing the Sentencing Reform Act. The law went into effect in 1987 and established the U.S. Sentencing Commission, which drafted binding guidelines to be followed by federal judges in sentencing offenders. The Sentencing Commission is comprised of seven members appointed by the president with the approval of the U.S. Senate. At least three of the members must be federal judges. The Sentencing Commission has the responsibility to monitor the impact of the guidelines on sentencing and to propose needed modifications.¹¹

The Sentencing Reform Act abandoned rehabilitation as a purpose of imprisonment. The goals are retribution, deterrence, incapacitation, and the education and treatment of offenders. All sentences are determinate, and an offender's term of imprisonment is reduced only by any good-behavior credit earned while in custody.

Sentences under the federal guidelines are based on a complicated formula that reflects the seriousness and characteristics of the offense and the "criminal history" of the offender. The judge employs a sentencing grid and is required to provide a sentence within the narrow range where the offender's criminal offense and criminal history intersect on the grid.

Judges are required to document the reasons for criminal sentences and are obligated to provide a "specific reason" for an upward or downward departure. The prosecution may appeal a sentence below the presumed range and the defense any sentence above the presumed range. This process can be incredibly complicated and require the judge to undertake as many as seven separate steps. The federal guidelines also specify that a judge must approve **plea bargains**, or negotiated agreements between defense and prosecuting attorneys, to insure that any sentence agreed upon is within the range established by the guidelines. The impact of the guidelines is difficult to measure, but studies suggest that the guidelines have increased the percentage of defendants who receive prison terms.

The federal guidelines are much more complicated than most state guidelines and provide judges with much less discretion in sentencing. Experts conclude that as a result of several recent Supreme Court cases, federal as well as state sentencing guidelines should now be considered merely advisory rather than binding on judges. These complicated and confusing legal decisions, outlined as follows, hold that it is unconstitutional to enhance a sentence based on facts found to exist by the judge by a **preponderance of the evidence** (a probability) rather than **beyond a reasonable doubt** by a jury. According to the Supreme Court, excluding the jury from the fact-finding process constitutes a violation of a defendant's Sixth Amendment right to trial by a jury of

In *Blakely v. Washington*, decided in 2004, Blakely pled guilty to kidnapping his wife. The judge followed Washington's sentencing guidelines and found that Blakely had acted with "deliberate cruelty" and imposed an "exceptional" sentence of ninety months rather than the standard sentence of fifty-three months. The U.S. Supreme Court ruled that a judge's sentence is required to be based on "the facts reflected in the jury verdict or admitted by the defendant" and that a judge may not enhance a sentence based on facts that were not determined by the jury to exist. ¹³

his or her peers. In *Apprendi v. New Jersey*, the U.S. Supreme Court explained that to "guard against . . . oppression and tyranny on the part of rulers, and as the great bulwark of [our] . . . liberties, trial by jury has been understood to require that 'the truth of every accusation . . . should . . . be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors.'" 12

More recently, in *United States v. Booker*, the U.S. Supreme Court held that the enhancement of sentences by a judge under the federal sentencing guidelines unconstitutionally deprives defendants of their right to have facts determined by a jury of their peers. Booker was convicted of possession with intent to distribute at least fifty grams of crack cocaine. His criminal history and the quantity of drugs in his possession required a sentence of between 210 and 262 months in prison. The judge, however, concluded by a preponderance of the evidence that Booker had possessed an additional 556 grams of cocaine and that he also was guilty of obstructing justice. These findings required the judge to select a sentence of between 360 months and life. The judge sentenced Booker to thirty years in prison. The Supreme Court ruled that the trial judge had acted unconstitutionally and explained that Booker had, in effect, been convicted of possessing a greater quantity of drugs than was charged in the indictment and that the determination of facts was a matter for the jury rather than for the judge. Justice Breyer concluded that the best course under the circumstances was for judges to view the guidelines as advisory rather than as requiring the selection of a particular sentence. The result is that sentencing guidelines no longer restrict or dictate a judge's sentence. As a consequence, the significance of state and federal guidelines in judicial sentencing remain in doubt. A number of federal judges had publicly criticized the guidelines as unduly complicated and as limiting their discretion to impose more lenient sentences on deserving defendants and likely silently rejoiced over the Supreme Court decisions. 14

Truth in Sentencing

Whatever the fate of federal sentencing guidelines is, keep in mind that in 1984 the U.S. government moved from indeterminate to determinate sentencing. This was part of a general trend away from rehabilitation. A federal prisoner currently serves his or her complete sentence, only reduced by good-time credits earned while incarcerated. This replaces a system in which good-time credits and parole reduced a defendant's incarceration to roughly one-third of the sentence. Crime victims complained in frustration that the criminal justice system favored offenders over victims.

As part of this more open and honest approach to sentencing, the U.S. Congress championed **truth in sentencing laws**. What does this mean? The indeterminate sentencing model resulted in the release of prisoners prior to the completion of their sentence who succeeded in persuading parole boards that they had been rehabilitated. Truth in sentencing insures that offenders serve a significant portion of the sentence. In the Violent Crime Control and Law Enforcement Act of 1994, Congress authorized the federal government to provide additional funds for prison construction and renovation to states that guarantee violent offenders serve eighty-five percent of their prison sentences. Roughly forty states have some form of truth in sentencing legislation and have qualified for funding. The result is that over seventy percent of violent offenders are serving longer sentences than they did prior to truth in sentencing.

Victims' Rights

E arly tribal codes viewed criminal attacks as offenses against the victim's family or tribe. The family had the right to revenge or compensation. By the late Middle Ages, crime came to be viewed as an offense against the "King's Peace," which is the right of the monarch to insist on social order and stability within his realm. Government officials now assumed the responsibility to apprehend, prosecute, and punish offenders. The victim's interest was no longer of major consequence. In 1964, California passed legislation to assist victims, and today every state as well as the District of Columbia provides monetary payments to various categories of crime victims. The plans typically cover compensation for physical and emotional injuries and also provide restitution for medical care, lost wages, and living and burial expenses. Most states have statutes that authorize courts to require offenders to provide this restitution as part of their criminal sentence. Forty-three states have adopted so-called **Son of Sam laws**, named after a New York law directed at serial killer David Berkowitz. These laws prohibit convicted felons from profiting from books, films, or television programs that recount their crime and make such funds available to victims. The properties of the properties of the provide and make such funds available to victims.

In 1986, the U.S. Congress passed the Victims of Crime Act (VOCA). This provides for a compensation fund and establishes the Office for Victims of Crime (OVC), which is responsible for coordinating all victim-related federal programs. President George W. Bush also signed the Crime Victims Rights Act of 2004 that proclaims various rights for crime victims, including the right to be informed of all relevant information involving the prosecution, imprisonment, and release of an offender as well as the right to compensation and return of property. California, along with nineteen other states, has adopted constitutional amendments protecting victims.

Another important development is the U.S. Supreme Court's approval of **victim impact statements** in death penalty cases. In *Payne v. Tennessee*, the defendant stabbed to death Charisse Christopher and her two-year-old daughter in front of Charisse's three-year-old son Nicholas. This was a particularly brutal crime; Charisse suffered eighty-four knife wounds and was left helplessly bleeding on the floor. The Supreme Court ruled that the trial court had acted properly in permitting Charisse's mother to testify during the sentencing phase of the trial that Nicholas continued to cry for his mother. The court explained that the jury should be reminded that "just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." The federal government and an estimated twenty states have laws that authorize direct victim involvement at sentencing for criminal offenses, and all fifty states and the District of Columbia provide for some form of written submissions. ¹⁶

In the next portion of the chapter we will see that criminal sentences must satisfy the constitutional requirements of the Cruel and Unusual Punishment Clause of the Eighth Amendment and meet the requirements of equal protection that we discussed in Chapter 2.

👆 Cruel and Unusual Punishment

The Eighth Amendment to the U.S. Constitution is the primary constitutional check on sentencing. The Eighth Amendment states that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The prohibition on cruel and unusual punishment received widespread acceptance in the new American nation. In fact, the language in the U.S. Bill of Rights is taken directly from the Virginia Declaration of Rights of 1776, which in turn was inspired by the English Bill of Rights of 1689. The English document significantly limited the powers and prerogatives of the British monarchy and recognized certain basic rights of the English people. ¹⁷

The U.S. Supreme Court has ruled that the prohibition against cruel and unusual punishment applies to the states as well as to the federal government, and virtually every state constitution contains similar language. Professor Wayne LaFave lists three approaches to interpreting the clause: (1) it limits the *methods* employed to inflict punishment, (2) it restricts the "amount of punishment" that may be imposed, and (3) it *prohibits* the criminal punishment of certain acts.¹⁸

Methods of Punishment

Patrick Henry expressed concern during Virginia's consideration of the proposed federal Constitution that the absence of a prohibition on cruel and unusual punishment would open the door to the use of torture to extract confessions. In fact, during the debate in the First Congress on the adoption of a Bill of Rights, one representative objected to the Eighth Amendment on the grounds that "villains often deserve whipping, and perhaps having their ears cut off." ¹⁹

There is agreement that the Eighth Amendment prohibits punishment that was considered cruel at the time of the amendment's ratification, including burning at the stake, crucifixion, breaking on the wheel, drawing and quartering, the rack, and the thumbscrew.²⁰ The Supreme Court observed as early as 1890 that "if the punishment prescribed for an offense against the laws of the state were manifestly cruel and unusual as burning at the stake, crucifixion, breaking on the wheel, or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition."²¹ In 1963, the Supreme Court of Delaware held that whipping was constitutionally permissible on the grounds that the practice was recognized in the state in 1776.²²

The vast majority of courts have not limited cruel and unusual punishment to acts condemned at the time of passage of the Eighth Amendment and have viewed this as an evolving concept. The U.S. Supreme Court has stressed that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." An example of the application of the prohibition on cruel and unusual punishment to a new situation is *Trop v. Dulles*. In *Trop*, the U.S. Supreme Court held that it was unconstitutional to deprive Trop and roughly seven thousand others convicted of military desertion of their American citizenship. Chief Justice Earl Warren wrote that depriving deserters of citizenship, although involving "no physical mistreatment," was more "primitive than torture" in that individuals are transformed into "stateless persons without the right to live, work or enjoy the freedoms accorded to citizens in the United States or in any other nation."²³

The death penalty historically has been viewed as a constitutionally acceptable form of punishment. ²⁴ The Supreme Court noted that 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. [Cruelty] implies there is something inhuman and barbarous—something more than the mere extinguishment of life."²⁵

The Supreme Court has rejected the contention that death by shooting²⁶ and electrocution are cruel and barbarous, noting in 1890 that the newly developed technique of electricity was a "more humane method of reaching the result."²⁷ In *Louisiana ex rel. Francis v. Resweber*, Francis was strapped in the electric chair and received a bolt of electricity before the machine malfunctioned. The U.S. Supreme Court rejected the claim that subjecting the petitioner to the electric chair a second time constituted cruel and unusual punishment. The court observed that there was no intent to inflict unnecessary pain and the fact that "an unforeseeable accident prevented the prompt consummation of the sentence cannot . . . add an element of cruelty to a subsequent execution." The next question confronting courts is whether execution by the lethal injection of toxic chemicals violates the Eighth Amendment to the Constitution.²⁸

Judges have actively intervened to prevent barbarous methods of discipline in prison. In *Hope v. Pelzer,* in 2002, the U.S. Supreme Court ruled that Alabama's use of a "hitching post" to discipline inmates constituted "wanton and unnecessary pain." During Hope's seven-hour ordeal on the "hitching post" in the hot sun, he was painfully handcuffed at shoulder level to a horizontal bar without a shirt, taunted, and provided with water only once or twice and denied bathroom breaks. There was no effort to monitor the petitioner's condition despite the risks of dehydration and sun damage. The ordeal continued despite the fact that Hope expressed a willingness to return to work. The Supreme Court determined that the use of the "hitching post" was painful and punitive retribution that served no legitimate and necessary penal purpose.²⁹

In judging whether a method of criminal punishment or prison discipline is cruel and unusual, courts consider:

Prevailing Social Values. The punishment must be acceptable to society.

Penological Purpose. The punishment must be strictly necessary to the achievement of a valid correctional goal, such as deterrence, rehabilitation, or incapacitation.

Human Dignity. Individuals subject to the punishment must be treated with human respect and dignity.

There is an argument that individuals convicted of crimes have forfeited claims to humane treatment and that courts have gone too far in "coddling criminals" and in "handcuffing" state and local criminal justice professionals. According to individuals who adhere to this position, judges are too far removed from the realities of crime to appreciate that harsh penalties are required to deter crime and to control inmates. The debate over appropriate forms of punishment will likely continue as society moves toward utilizing alternative forms of social control. A number of states already authorize the chemical castration of individuals convicted of sexual battery and some statutes also provide individuals with the option of surgically removing their testes.³⁰

The Amount of Punishment: Capital Punishment

The prohibition on cruel and unusual punishment has also been interpreted to require that punishment is proportionate to the crime. *In other words, the "punishment must not be excessive"; it must "fit the crime."* Judges have been particularly concerned with the proportionality of the death penalty. This reflects an understandable concern that a penalty that is so "unusual in its pain, in its finality and in its enormity" is imposed in an "evenhanded, nonselective, and nonarbitrary" manner against individuals who have committed crimes deserving of death.³¹

In *Furman v. Georgia,* five Supreme Court judges wrote separate opinions condemning the cruel and unusual application of the death penalty against some defendants although others convicted of equally serious homicides were sentenced to life imprisonment. Justice Byron White reviewed the cases before the Supreme Court and concluded that there was "no meaningful basis for distinguishing the few cases in which it [the death penalty] is imposed from the many cases in which it is not." Justice Potter Stewart observed in a concurring opinion that "[t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. . . . [T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."³²

Justice Douglas controversially concluded in *Furman* that the death penalty was being selectively applied against the poor, minorities, and uneducated at the same time privileged individuals convicted of comparable crimes were sentenced to life in prison. Justice Douglas argued that the United States' system of capital punishment operated in practice to exempt anyone making over \$50,000 from execution although "blacks, those who never went beyond the fifth grade in school, those who make less than \$3,000 a year or those who were unpopular or unstable [were] the only people executed."

States reacted to this criticism by adopting mandatory death penalty laws that required defendants convicted of intentional homicide receive the death penalty. The U.S. Supreme Court ruled in *Woodson v. North Carolina* that treating all homicides alike resulted in death being cruelly inflicted on undeserving defendants. The court held that a jury "fitting the punishment to the crime" must consider the "character and record of the individual offender" as well as the "circumstances of the particular offense." The uniform system adopted in North Carolina treated "all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subject to the blind infliction of the penalty of death."³³

In *Gregg v. Georgia*, in 1976, the U.S. Supreme Court approved a Georgia statute designed to insure the proportionate application of capital punishment. The Georgia law limited the discretion of jurors to impose the death penalty by requiring jurors to find that a murder had been accompanied by one of several aggravating circumstances. This evidence was to be presented at a separate sentencing hearing and was to be weighed against any and all mitigating considerations. Death sentences were to be automatically reviewed by the state supreme court, which was charged with insuring that the verdict was supported by the facts and that capital punishment was imposed in a consistent fashion. This system was intended to insure that the death penalty was reserved for the most severe homicides and was not "cruelly imposed on undeserving defendants." ³⁴

Were there offenses other than aggravated and intentional murder that merited the death penalty? What of aggravated rape? In *Coker v. Georgia*, in 1977, the U.S. Supreme Court ruled that death was a grossly disproportionate and excessive punishment for aggravated rape and constituted cruel and unusual punishment.³⁵

The Juvenile Death Penalty

The next case in the book involves the issue of whether the capital punishment of juvenile offenders constitutes cruel and unusual punishment.

In 1966, in Kent v. United States, the U.S. Supreme Court limited the broad authority exercised by state and local judges in waiving juveniles over for criminal prosecution as adults.³⁶ The U.S. Supreme Court was next asked and refused on several occasions during the 1980s to rule on the constitutionality of the juvenile death penalty. In Eddings v. Oklahoma, in 1982, the Supreme Court declined to rule on the constitutionality of the death penalty against juveniles, but held that a defendant's youth and psychological and social background must be considered in mitigation of punishment.37

In Thompson v. Oklahoma, in 1988, the Supreme Court ruled that the execution of a young person under the age of sixteen at the time of his or her offense constituted cruel and unusual punishment. Justice John Paul Stevens wrote that "inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or pressure than is an adult."38

In Stanford v. Kentucky, in 1989, the U.S. Supreme Court finally addressed the issue of the application of the death penalty against individuals under the age of eighteen and ruled that there was no national consensus against the execution of individuals sixteen or seventeen years of age and that the imposition of capital punishment could not be considered either cruel or unusual. Justice Scalia relied on the objective fact that of the thirty-seven states that provided for capital punishment, only fifteen declined to impose it on sixteen year olds and twelve did not extend the death penalty to seventeen-year-old defendants.³⁹

The petitioners in Stanford pointed to the fact that of the 2,106 sentences of death handed out between 1982 and 1988, only 15 were imposed against individuals who were under 16 at the time of their crimes and only 30 against individuals who were 17 at the time of the crime. Actual executions for crimes committed by individuals under age eighteen constituted only about two percent of the total number of executions between 1642 and 1986. Justice Scalia explained that the statistics merely indicated that prosecutors and juries shared the view that there was a select but dangerous group of juveniles deserving of death.

In Simmons v. Roper, the U.S. Supreme Court once again considered whether the execution of individuals who are sixteen or seventeen years of age constitutes cruel and unusual punishment.

Did sentencing seventeen-year-old Christopher Simmons to death for murder constitute cruel and unusual punishment?

> ROPER v. SIMMONS 543 U.S. 551 (2005) OPINION BY: KENNEDY, J.

This case requires us to address...whether it is permissible under the Eighth and Fourteenth Amendments to the Constitution of the United States to execute a juvenile offender who was older than 15 but younger than 18 when he committed a capital crime.

Facts

At the age of 17, when he was still a junior in high school, Christopher Simmons, the respondent here, committed murder. About nine months later, after he had turned 18, he was tried and sentenced to death. There is little doubt that Simmons was the instigator of the crime. Before its commission Simmons said he wanted to murder someone. In chilling, callous terms he talked about his plan, discussing it for the most part with two friends, Charles Benjamin and John Tessmer, then aged 15 and 16 respectively. Simmons proposed to commit burglary and murder by breaking and entering, tying up a victim, and throwing the victim off a bridge. Simmons assured his friends they could "get away with it" because they were minors.

The three met at about 2 a.m. on the night of the murder, but Tessmer left before the other two set out. (The State later charged Tessmer with conspiracy, but dropped the charge in exchange for his testimony against Simmons.) Simmons and Benjamin entered the home of the victim, Shirley Crook, after reaching through an open window and unlocking the back door. Simmons turned on a hallway light. Awakened, Mrs. Crook called out, "Who's there?" In response Simmons entered Mrs. Crook's bedroom, where he recognized her from a previous car accident involving them both. Simmons later admitted this confirmed his resolve to murder her.

Using duct tape to cover her eyes and mouth and bind her hands, the two perpetrators put Mrs. Crook in her minivan and drove to a state park. They reinforced the bindings, covered her head with a towel, and walked her to a railroad trestle spanning the Meramec River. There they tied her hands and feet together with electrical wire, wrapped her whole face in duct tape and threw her from the bridge, drowning her in the waters below.

By the afternoon of September 9, Steven Crook had returned home from an overnight trip, found his bedroom in disarray, and reported his wife missing. On the same afternoon fishermen recovered the victim's body from the river. Simmons, meanwhile, was bragging about the killing, telling friends he had killed a woman "because the bitch seen my face." The next day, after receiving information of Simmons' involvement, police arrested him at his high school and took him to the police station in Fenton, Missouri. They read him his Miranda rights. Simmons waived his right to an attorney and agreed to answer questions. After less than two hours of interrogation, Simmons confessed to the murder and agreed to perform a videotaped reenactment at the crime scene.

The State charged Simmons with burglary, kidnapping, stealing, and murder in the first degree. As Simmons was 17 at the time of the crime, he was outside the criminal jurisdiction of Missouri's juvenile court system. He was tried as an adult. At trial the State introduced Simmons' confession and the videotaped reenactment of the crime, along with testimony that Simmons discussed the crime in advance and bragged about it later. The defense called no witnesses in the guilt phase. The jury having returned a verdict of murder, the trial proceeded to the penalty phase.

The State sought the death penalty. As aggravating factors, the State submitted that the murder was committed for the purpose of receiving money; was committed for the purpose of avoiding, interfering with, or preventing lawful arrest of the defendant; and involved depravity of mind and was outrageously and wantonly vile, horrible, and inhuman. The State called Shirley Crook's husband, daughter, and two sisters, who presented moving evidence of the devastation her death had brought to their lives.

In mitigation Simmons' attorneys first called an officer of the Missouri juvenile justice system, who testified that Simmons had no prior convictions and that no previous charges had been filed against him. Simmons' mother, father, two younger half brothers, a neighbor, and a friend took the stand to tell the jurors of the close relationships they had formed with Simmons and to plead for mercy on his behalf. Simmons' mother, in particular, testified to the responsibility Simmons demonstrated in taking care of his two younger half brothers and of his grandmother and to his capacity to show love for them.

During closing arguments, both the prosecutor and defense counsel addressed Simmons' age, which the trial judge had instructed the jurors they could consider as a mitigating factor. Defense counsel reminded the jurors that juveniles of Simmons' age cannot drink, serve on juries, or even see certain movies, because "the legislatures have wisely decided that individuals of a certain age aren't responsible enough." Defense counsel argued that Simmons' age should make "a huge difference to [the jurors] in deciding just exactly what sort of punishment to make." In rebuttal, the prosecutor gave the following response: "Age, he says. Think about age. Seventeen years

old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary."

The jury recommended the death penalty after finding the State had proved each of the three aggravating factors submitted to it. Accepting the jury's recommendation, the trial judge imposed the death penalty.... After these proceedings in Simmons' case had run their course, the Supreme Court held that the Eighth and Fourteenth Amendments prohibit the execution of a mentally retarded person. Atkins v. Virginia, 536 U.S. 304 (2002). Simmons filed a new petition for state postconviction relief, arguing that the reasoning of *Atkins* established that the Constitution prohibits the execution of a juvenile who was under 18 when the crime was committed. The Missouri Supreme Court agreed that "a national consensus has developed against the execution of juvenile offenders . . . [o]n this reasoning it set aside Simmons' death sentence and resentenced him to "life imprisonment without eligibility for probation, parole, or release except by act of the Governor."

Issue

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The provision is applicable to the States through the Fourteenth Amendment. As the Court has explained the Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions. The right flows from the basic "'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'" By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.

The prohibition against "cruel and unusual punishments," like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework we have established the propriety and affirmed the necessity of referring to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be cruel and unusual. . . . We now reconsider the issue . . . whether the death penalty is a disproportionate punishment for juveniles.

Reasoning

The evidence of national consensus against the death penalty for juveniles is similar, and in some respects parallel, to the evidence *Atkins* held sufficient to demonstrate a national consensus against the death penalty for the mentally retarded. When *Atkins* was decided, 30 States prohibited the death penalty for the mentally retarded. This number comprised 12 that had abandoned the death penalty altogether, and 18 that maintained it but excluded the mentally retarded from its reach. By a similar calculation in this case, 30 States prohibit the

juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude iuveniles from its reach.

Atkins emphasized that even in the 20 States without formal prohibition, the practice of executing the mentally retarded was infrequent. In the present case, too, even in the 20 States without a formal prohibition on executing juveniles, the practice is infrequent. Since Stanford, six States have executed prisoners for crimes committed as juveniles. In the past 10 years, only three have done so: Oklahoma, Texas, and Virginia. In December 2003, the Governor of Kentucky decided to spare the life of Kevin Stanford, and commuted his sentence to one of life imprisonment without parole, with the declaration that "[w]e ought not be executing people who, legally, were children." . . . By this act the Governor ensured Kentucky would not add itself to the list of States that have executed juveniles within the last 10 years even by the execution of the very defendant whose death sentence the Court had upheld in Stanford v. Kentucky.

There is, to be sure, at least one difference between the evidence of consensus in Atkins and in this case. Impressive in Atkins was the rate of abolition of the death penalty for the mentally retarded. Sixteen States that permitted the execution of the mentally retarded at the time of Penry v. Lynaugh, 492 U.S. 302 (1989) (finding no national consensus against execution of mentally challenged individuals) had prohibited the practice by the time we heard Atkins. By contrast, the rate of change in reducing the incidence of the juvenile death penalty, or in taking specific steps to abolish it, has been slower. Five States that allowed the juvenile death penalty at the time of Stanford have abandoned it in the intervening 15 years—four through legislative enactments and one through judicial decision.

Though less dramatic than the change from Penry to Atkins . . . we still consider the change from Stanford to this case to be significant. As noted in Atkins, with respect to the States that had abandoned the death penalty for the mentally retarded . . . "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change." In particular we found it significant that, in the wake of Penry, that no State that had already prohibited the execution of the mentally retarded had passed legislation to reinstate the penalty. The number of States that have abandoned capital punishment for juvenile offenders since Stanford is smaller than the number of States that abandoned capital punishment for the mentally retarded after *Penry*; yet we think the same consistency of direction of change has been demonstrated. Since Stanford, no State that previously prohibited capital punishment for juveniles has reinstated it. This fact, coupled with the trend toward abolition of the juvenile death penalty, carries special force in light of the general popularity of anticrime legislation, and in light of the particular trend in recent years toward cracking down on juvenile crime in other respects. Any difference between this case and Atkins

with respect to the pace of abolition is thus counterbalanced by the consistent direction of the change.

The slower pace of abolition of the juvenile death penalty over the past 15 years, moreover, may have a simple explanation. When we heard Penry, only two death penalty States had already prohibited the execution of the mentally retarded. When we heard Stanford, by contrast, 12 death penalty States had already prohibited the execution of any juvenile under 18, and 15 had prohibited the execution of any juvenile under 17. If anything, this shows that the impropriety of executing juveniles between 16 and 18 years of age gained wide recognition earlier than the impropriety of executing the mentally retarded. In the words of the Missouri Supreme Court: "It would be the ultimate in irony if the very fact that the inappropriateness of the death penalty for juveniles was broadly recognized sooner than it was recognized for the mentally retarded were to become a reason to continue the execution of juveniles now that the execution of the mentally retarded has been barred." Congress considered the issue when enacting the Federal Death Penalty Act in 1994, and determined that the death penalty should not extend to juveniles.

As in Atkins, the objective indicia of consensus in this case—the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice—provide sufficient evidence that today our society views juveniles, in the words Atkins used respecting the mentally retarded, as "categorically less culpable than the average criminal."

A majority of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment.

... Capital punishment must be limited to those offenders who commit "a narrow category of the most serious crimes" and whose extreme culpability makes them "the most deserving of execution." This principle is implemented throughout the capital sentencing process. States must give narrow and precise definition to the aggravating factors that can result in a capital sentence. In any capital case a defendant has wide latitude to raise as a mitigating factor "any aspect of [his or her] character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." There are a number of crimes that beyond question are severe in absolute terms, yet the death penalty may not be imposed for their commission. These rules vindicate the underlying principle that the death penalty is reserved for a narrow category of crimes and offenders.

The general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows and as the scientific and sociological studies respondent cite tend to confirm, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults

and are more understandable among the young.... In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent.

The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. ("[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.") This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment. The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.

These differences render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means "their irresponsible conduct is not as morally reprehensible as that of an adult." Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed. Indeed, "[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." . . .

Once the diminished culpability of juveniles is recognized, it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults. We have held there are two distinct social purposes served by the death penalty: "'retribution and deterrence of capital crimes by prospective offenders.'" As for retribution, . . . whether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult. Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.

As for deterrence, it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles. . . . Here . . . the absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence. . . . To the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment

without the possibility of parole is itself a severe sanction, in particular for a young person.

Certainly it can be argued, although we by no means concede the point, that a rare case might arise in which a juvenile offender has sufficient psychological maturity, and at the same time demonstrates sufficient depravity, to merit a sentence of death. . . . The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability. An unacceptable likelihood exists that the brutality or coldblooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death.... Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach.

Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. Yet . . . the laws of other countries and . . . international authorities are instructive in interpreting the Eighth Amendment's prohibition of "cruel and unusual punishments." Respondent does not contest, that only seven countries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China. Since then each of these countries has either abolished capital punishment for juveniles or made public disavowal of the practice. In sum, it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty. . . .

Holding

The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed. The judgment of the Missouri Supreme Court setting aside the sentence of death imposed upon Christopher Simmons is affirmed.

Dissenting, O'Connor, J.

The Court's decision today establishes a categorical rule forbidding the execution of any offender for any crime committed before his 18th birthday, no matter how deliberate, wanton, or cruel the offense.... [T]he rule decreed by the Court rests, ultimately, on its independent moral judgment that death is a disproportionately severe punishment for any 17-year-old offender. I do not subscribe to this judgment. Adolescents as a class are



undoubtedly less mature, and therefore less culpable for their misconduct, than adults. But the Court has adduced no evidence impeaching the seemingly reasonable conclusion reached by many state legislatures: that at least some 17-year-old murderers are sufficiently mature to deserve the death penalty in an appropriate case. Nor has it been shown that capital sentencing juries are incapable of accurately assessing a youthful defendant's maturity or of giving due weight to the mitigating characteristics associated with youth....

Questions for Discussion -

- 1. Summarize the data Justice Kennedy reviews in concluding that capital punishment for juveniles is disproportionate punishment.
- 2. What are the similarities and differences in statistics relating to the execution of the mentally retarded compared to the data concerning juveniles? Is there a clear consensus against capital punishment for individuals under eighteen?
- 3. Why does Justice Kennedy conclude that juveniles are not among the "worst offenders who merit capital punishment"? What does Justice Kennedy write about the interests in retribution and deterrence in regards to juveniles?
- 4. Explain why Justice Kennedy refers to other countries. Is this relevant to a decision of the U.S. Supreme Court?
- 5. The jurors at trial concluded that Simmons deserved the death penalty. Would it be a better approach to permit each state to remain free to determine whether to impose the death penalty for juveniles under eighteen? Is life imprisonment without parole a proportionate penalty for a juvenile convicted of the intentional killing of another person?
- 6. How would you rule in Simmons?



In December 1995, Anthony Wilson was charged by a Louisiana grand 3.1. You Decide jury with the aggravated rape of a five-year-old female. Patrick Dewayne Bethley, in another case, was charged with the rape of three juvenile females, one of whom was his daughter. At the time of the rape, the young women were five, seven, and nine. The indictment alleged that Bethley knew that he was HIV positive. Wilson and Bethley challenged the constitutionality of a Louisiana statute that permits the death penalty for the rape of a woman under the age of twelve. Aggravated rape is defined as anal or sexual intercourse without the lawful consent of the victim. A victim under the age of twelve is not considered to have consented and ignorance of the victim's age is not a defense. The defendants contended that death was a disproportionate penalty for the crime of rape as established in Coker v. Georgia, 433 U.S. 584 (1977). The Louisiana Supreme Court observed that Coker addresses the rape of an adult women and that rape is significantly more detestable when the victim is a child. The harm suffered by a child "is devastating to the child as well as to the community." The judges recognized that Louisiana was the only jurisdiction that authorizes capital punishment for the rape of a child under twelve. Florida, Mississippi, and Tennessee previously provided the death penalty for this offense under statutes enacted following the Furman decision in 1971. The Florida law was invalidated based on the precedent in Coker, although the provisions in the other two statutes were overturned as part of a more general legal challenge. The Louisiana capital punishment statute requires that the jury find that at least one aggravating circumstance is present and that any aggravating factors are to be evaluated in light of any mitigating circumstances. One of the aggravating circumstances is that the victim is under twelve at the time of the rape. Does the death penalty constitute disproportionate punishment in the Louisiana case? See Louisiana v. Wilson, 685 So.2d 1063 (La. 1996).

You can find the answer at http://www.sagepub.com/lippmanstudy

The Amount of Punishment: Sentences for a Term of Years

The U.S. Supreme Court has remained sharply divided over whether the federal judicial branch is constitutionally entitled to extend its proportionality analysis beyond the death penalty to imprisonment for a "term of years." The Court appears to have accepted that the length of a

criminal sentence is the province of elected state legislators and that judicial intervention should be "extremely rare" and limited to sentences that are "grossly disproportionate" to the seriousness of the offense. Excessively severe sentences are not considered to advance any of the accepted goals of criminal punishment and constitute the purposeless and needless imposition of pain and suffering.

The implications of this approach are illustrated by Justice Sandra Day O'Connor's opinion in *Lockyer v. Andrade*, in 2003, in which the Supreme Court affirmed two consecutive twenty-five year to life sentences for a defendant who on two occasions in 1995 stole videotapes with an aggregate value of roughly \$150.00 from two stores. ⁴⁰ Each of these convictions, when combined with Andrade's arrest thirteen years earlier for three counts of residential burglary, triggered two separate mandatory sentences under California's "Three Strikes and You're Out" law. This statute provides a mandatory sentence for individuals who commit a third felony, after being previously convicted for two serious or violent felonies. Stringent penalties also are provided for a second felony. Justice O'Connor held that the "gross disproportionality principles reserves a constitutional violation for only the extraordinary case" and the sentence in *Andrade* is not "an unreasonable application of our clearly established law."

In *Ewing v. California*, decided on the same day as *Lockyer*, Justice O'Connor affirmed a twenty-five year sentence for Daniel Ewing under California's "Three Strikes and You're Out" law. Ewing was adjudged guilty of the grand theft of nearly \$1,200 of merchandise and had previously been convicted of several violent or serious felonies. Justice Sandra Day O'Connor ruled that the Supreme Court was required to respect California's determination that it possessed a public-safety interest in incapacitating and deterring recidivist felons like Ewing whose previous offenses included robbery and three residential burglaries. 42

Weems v. United States is an example of the rare case in which the Supreme Court has ruled that a punishment is grossly disproportionate to the crime and is unconstitutional. Weems was convicted under the local criminal law in the Philippines of forging a public document. He was sentenced to twelve years at hard labor as well as to manacling at the wrist and ankle. During Weems's twelve-year imprisonment, he was deprived of all legal rights and upon his release lost all political rights (such as the right to vote) and was monitored by the court. The U.S. Supreme Court ruled that Weems's sentence was "cruel in its excess of imprisonment and that which accompanies and follows imprisonment. It is unusual in its character. Its punishments come under the condemnation of the Bill of Rights, both on account of their degree and kind."⁴³

The next case, *People v. Carmony*, asks you to consider whether the defendant's sentence under California's Three Strikes legislation constitutes cruel and unusual punishment. In *Rummel v. Estelle*, Justice Louis Powell observed that a "mandatory life sentence for overtime parking might well deter vehicular lawlessness, but it would offend our felt sense of justice." Consider Justice Powell's statement in evaluating whether Carmony's sentence is grossly disproportionate.⁴⁴

Is twenty-five years in prison proportionate to the defendant's failure to register as a sex offender?

PEOPLE v. CARMONY
26 CAL. RPTR.3D 365 (CAL.APP. 2005)
OPINION: PLEASE, J.

This case raises the question whether there is an offense so minor that it cannot trigger the imposition of a recidivist penalty without violating the cruel and/or unusual punishment prohibitions of the United States and California Constitutions.

Although defendant had registered his correct address as a sex offender with the police one month before his birthday, as required by law, he failed to "update" his registration with the same information within five working days of his birthday as also required by law. Defendant's parole agent was aware defendant's registration information had not changed and in fact arrested defendant at the address where he was registered. Defendant pled guilty to the charge of failing to register within five days of his birthday and admitted he had . . . three prior serious or violent felony convictions and had served a prior prison term. The trial court sentenced him under the Three Strikes law to a prison term of 25 years to life plus a one-year consecutive term for the prior prison term. . . .

Issue

On appeal, defendant claims the application of the Three Strikes law to the offense of failing to duplicate his registration as a sex offender violates the state and federal prohibitions against cruel and/or unusual punishment. . . . It is a rare case that violates the prohibition against cruel and/or unusual punishment. However, there must be a bottom to that well. If the constitutional prohibition is to have a meaningful application it must prohibit the imposition of a recidivist penalty based on an offense that is no more than a harmless technical violation of a regulatory law.

The purpose of the sex offender registration law is to require that the offender identify his present address to law enforcement authorities so that he or she is readily available for police surveillance. In this case the defendant did so one month prior to his birthday and was in fact present at his registered address when the arrest for the present violation was made. The stated purpose of the birthday registration requirement was (and still is) to "update" the existing registration information. Here, there was no new information to update and the state was aware of that fact. Accordingly, the requirement that defendant reregister within five days of his birthday served no stated or rational purpose of the registration law and posed no danger or harm to anyone.

Facts

In 1983, defendant was convicted of oral copulation by force or fear, with a minor under the age of 14 years . . . giving rise to defendant's life-long duty to register as a sex offender. This conviction arose when defendant, who was intoxicated, became angry with his then girlfriend, and, in retaliation, picked up her nine-year-old daughter from school and sexually assaulted her. Defendant failed to comply with the registration requirement in 1990 and again in 1997, when he was sentenced to state prison for 32 months.

Upon his release from prison, defendant reregistered as a sex offender on September 16, 1999. A week later, after moving to a new residence, he registered again on September 23, 1999, to notify authorities of his new address. His birthday is October 22nd and his parole officer reminded him he was required to update his registration annually within five working days of his birthday. He received standardized forms to that effect. Nevertheless, he failed to duplicate his registration information and on November 23, 1999, his parole officer arrested him at his registered address for failing to comply with the annual registration requirement.

Defendant's probation report shows that prior to the instant offense, he was acting in a responsible manner. He had recently married, maintained a residence, participated in Alcoholics Anonymous, was seeking job training and placement, and was employed. The record indicates that just prior to the current offense, he worked as a forklift operator for Hartsell Trucking in Redding and was employed by them until November 24, 1999, the

day following his arrest for the present offense. According to the operations manager at Hartsell, who wrote a letter on defendant's behalf, defendant was a valued and conscientious worker. Clearly then, neither defendant's present offense nor his behavior just prior to the offense indicates that he posed a serious risk of harm to the public justifying a life sentence.

Defendant pled guilty to one count of failure to register as a sex offender, a felony and admitted three prior conviction allegations under the Three Strikes law and one prior prison term allegation. . . . The trial court . . . sentenced him to a term of 25 years to life under the Three Strikes law plus an additional one-year term for the prior prison term, for an aggregate term of 26 years to life.

Reasoning

Defendant contends his life sentence violates the state and federal prohibitions against cruel and/or unusual punishment because it is disproportionate to his current

We find . . . that this is a rare case in which the harshness of the recidivist penalty is grossly disproportionate to the gravity of the offense.... [T]he defendant's offense was an entirely passive, harmless, and technical violation of the registration law. . . . The willful failure to register as a sex offender is a regulatory offense that may be committed merely by forgetting to register as required. Prior to 1995, the offense was punishable as a misdemeanor; however, the offense is now a felony The penalty is the lowest... proscribed for felonies, a prison term of 16 months, or two or three

The defendant did not evade or intend to evade law enforcement officers, his offense was the most technical and harmless violation of the registration law we have

Yet defendant was sentenced to a term of 25 years to life in prison. In real terms, he must serve 25 years in prison before he is eligible for parole. He will be 65 years old before he is even eligible for parole, having spent his remaining active years in prison. It is beyond dispute that a life sentence is grossly disproportionate to the offense just described.

The Legislature may impose stiffer penalties by treating the prior convictions as factors in aggravation. Nevertheless, because the penalty is imposed for the current offense, the focus must be on the seriousness of that offense. . . . A sentence of 25 years to life in prison serves the penological purpose of protecting society from career criminals by incapacitating and isolating them with long prison terms. Imposing such a sentence on a defendant who is 40 years old at the time of the offense, will effectively incapacitate him for the rest of his active years. That sentence does not . . . serve to protect the public when the current offense bears little indication he has recidivist tendencies to commit offenses that pose a risk of harm to the public.

Defendant's only sexual offense was committed in 1983, 16 years before the current offense, while his two prior violent felony convictions were committed in 1992 and involved assaults on two girlfriends. In 1992, defendant was convicted of assault with a deadly weapon or by means of force likely to produce great bodily injury. The first conviction arose when he punched and kicked his pregnant girlfriend, causing a miscarriage. The second conviction arose when he pushed and punched another girlfriend, and then cut her hand with a knife. Although he has not lived crime free since 1992, neither has he committed other serious or violent offenses since that time. Defendant's Three Strike offenses are remote from and bear no relation to the current offense and the current offense reveals no tendency to commit additional offenses that pose a threat to public safety. It follows that the three strike offenses cannot justify a recidivist penalty with a mandatory minimum term that is over eight times as long as the term that would otherwise be imposed for violating the . . . registration requirement.

For these reasons a prison term of 25 years to life is grossly disproportionate to the gravity of the . . . registration offense and therefore crosses the proportionality threshold. Defendant's sentence is indisputably severe. For first time offenders, his penalty is exceeded only by a sentence of life without the possibility of parole or death imposed for first degree murder. . . . It is no answer that defendant's penalty is the same as the penalty imposed for all other three strike offenders. To the contrary, it is for this very reason that we find defendant's sentence suspect. A one-size-fits-all sentence does not allow for gradations in culpability between crimes and therefore may be disproportionate to the crime when, as here, the crime is minor and the penalty severe. Many of the current offenses committed by Three Strike offenders are serious

or violent offenses or felonies posing far greater threats to the public's safety and involving far greater culpability than the offense committed by defendant. . . . In addition, only five states other than California impose recidivist penalties for violation of an annual registration requirement. Of those states, the longest term imposed is 10 years, less than one-half the term compelled under California law. . . . Thus, the analysis under this criteria also supports our conclusion that the sentence is disproportionate to the gravity of the offense. . . .

Likewise, the life sentence required by the Three Strikes law fails to take into account variations in individual culpability. . . . The mandatory sentence must be imposed regardless of the gravity of the present or prior offenses, the temporal remoteness of the prior convictions, or their lack of relevance to the new offense. . . . Because his prior strike offenses are remote and irrelevant to his current offense, they are poor indicators he is likely to commit future offenses that pose a serious threat to public safety. The potential risk posed by his failure to update his registration is further undercut by the fact he has not committed any further sex offenses and had recently updated his registration.

Holding

We conclude that because a one-size-fits-all 25 years to life sentence...is disproportionate to the current offense, where as here, the offense is minor and the prior convictions are remote and irrelevant to the offense. For these reasons, we conclude that an enhanced sentence of 25 years to life for the duplicate registration offense committed by defendant shocks the conscience of this court. We therefore hold it to be cruel and unusual punishment....

♦ Questions for Discussion -

- 1. What is the purpose of the sexual offender registration law and the criminal penalty for failing to register? Why is Carmony eligible to be sentenced under California's "Three Strikes and You're Out" law? How did the application of this law increase his prison sentence?
- 2. Explain in detail the reasoning of the appellate court in concluding that Carmony's sentence is unconstitutionally disproportionate to his sentence.
- Does Three Strikes legislation violate the prohibition against double jeopardy?
- 3. Judge Nicholson, in dissent, argues that the control of "sexual predators" through registration is important in protecting society and that Carmony's sentence is proportionate to his crime. Do you agree?
- 4. As a judge, would you rule that Carmony's sentence is cruel and unusual punishment or that it is proportionate?



The defendant Jerry Hayes, age 34, was convicted in 1998 of the "serious" theft of property valued at over \$500.00 from the cash register where he worked. Following his arrest, Hayes returned 69 percent of the \$1,000 that he stole. The trial court found that Hayes was a three-time felon, habitual offender, and he was sentenced to life in prison at hard labor without the benefit of parole, probation, or the suspension of his sentence. Hayes had previously been convicted of 2 thefts under \$100, 1 over \$100, several counts of issuing worthless checks, check forgery, and simple robbery in addition to the instant offense of theft of over \$500.



The simple robbery (a violent felony) required to qualify Hayes for life imprisonment, in combination with two other felonies, took place in 1991 when Hayes pushed a juvenile and stole his bicycle. None of his crimes involved a dangerous weapon. Hayes's probation officer recommended a sentence of ten years to the prosecutor and his employer favored imprisonment as a step toward rehabilitation. The Louisiana appellate court held that despite the provision for a mandatory sentence that a court may depart from the required presumptive minimum sentence if the defendant is able to establish that there is clear and convincing evidence in the particular case that the sentence is excessive in that the "defendant is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the guilt of the offender, the gravity of the offense, and the circumstances. "The Louisiana appellate court ruled that a life sentence was disproportionate. Hayes undoubtedly is a "tenacious thief," but a sentence of between twenty and forty years would have met the "societal goals of incarceration."

The Louisiana Habitual Offender Law is intended to punish an individual for "the instant crime in light of the . . . individual's continuing disregard of the law." Was life imprisonment "disproportionate to the harm done" and a shock to "one's sense of justice"? See State v. Hayes, 739 So.2d 301 (La. App. 1999).

You can find the answer at http://www.sagepub.com/lippmanstudy

The Amount of Punishment: Drug Offenses

"Three Strikes and You're Out" legislation is an example of determinate sentencing. Determinate sentences possess the advantage of insuring predictable, definite, and uniform sentences. On the other hand, this "one size fits all" approach may prevent judges from handing out sentences that reflect the circumstances of each individual case.

A particularly controversial area of determinate sentencing is mandatory minimum drug offenses. In 1975, New York Governor Nelson Rockefeller initiated the controversial "Rockefeller drug laws" that required that an individual convicted of selling two ounces of a narcotics substance or convicted of possessing eight ounces of a narcotic substance receive a sentence of between eight and twenty years, regardless of the individual's criminal history. This approach in which a judge must sentence a defendant to a minimum sentence was followed by other states. The federal government joined this trend and introduced mandatory minimums in the Anti-Drug Abuse Act of 1986 and the 1988 amendments. The most debated aspect of federal law is the punishment of an individual based on the type and amount of drugs in his or her possession, regardless of the individual's criminal history.

The following quantities are punishable by five years in prison under federal law:

100 grams of heroin,

500 grams of powder cocaine,

5 grams of crack cocaine,

100 kilograms of marijuana.

The following quantities are punishable by ten years in prison under federal law:

1 kilogram of heroin,

5 kilograms of powder cocaine,

50 grams of crack cocaine,

1,000 kilograms of marijuana.

Congress softened the impact of the mandatory minimum drug sentences by providing that a judge may issue a lesser sentence in those instances in which prosecutors certify that a defendant has provided "substantial assistance" in convicting other drug offenders. There also is a "safety valve" that permits a reduced sentence for defendants determined by the judge to be low-level, nonviolent, first-time offenders.

Prosecutors argue that the mandatory minimum sentences are required to deter individuals from entering into the lucrative drug trade. The threat of a lengthy sentence is also necessary in order to gain the cooperation of defendants. Prosecutors also point out that individuals who are convicted and sentenced are fully aware of the consequences of their criminal actions.

These laws, nevertheless, have come under attack by both conservative and liberal politicians and by the American Bar Association, a justice of the U.S. Supreme Court, and by the Judicial Conference, which is the organization of federal judges. An estimated twenty-two states have recently modified or are considering amending their mandatory minimum narcotics laws, including Connecticut, Louisiana, Michigan, North Dakota, and Pennsylvania. New York also has modified the "Rockefeller drug laws." This trend is encouraged by studies that indicate that these laws are:

Inflexible. Fail to take in account the differences between defendants.

Disparities. Drug kingpins are able to trade information for reduced sentences and some prosecutors who object to harsh drug laws charge defendants with the possession of a lesser quantity of drugs to avoid the mandatory sentencing provisions.

Prison Population. These laws are thought to be responsible for the growth of the state and federal prison population.

Minorities and Women. A significant percentage of individuals sentenced under these laws are African Americans or Hispanics involved in street-level drug activity. The increase in the number of women who are incarcerated is attributed to the fact that women find themselves arrested for assisting their husbands or lovers who are involved in the drug trade.

Mandatory minimum state drug laws have been held to be constitutional by the U.S. Supreme Court. In *Hutto v. Davis*, the Supreme Court ruled that Hutto's 40-year prison sentence and \$20,000 fine was not disproportionate to his conviction on 2 counts of possession with intent to distribute and distribution of a total of 9 ounces of marijuana with a street value of roughly \$200.00. The court held that the determination of the proper sentence for this offense was a matter that was appropriately determined by the Virginia legislature.⁴⁵

The Tenth Circuit Court of Appeals recently upheld the fifty-five year sentence given to rap music producer Weldon Angelos. The twenty-six-year-old Angelos, who did not possess an adult criminal history, was convicted of three counts of dealing twenty-four ounces of marijuana while in possession of a firearm. The federal statute provides that a first offense carries a mandatory minimum five-year sentence and each subsequent conviction carries a mandatory minimum of twenty-five years. Twenty-nine former federal judges and U.S. attorneys protested that Angelos's punishment violated the Eighth Amendment, pointing out that his sentence was longer than he likely would have received for various forms of murder or rape. The threejudge panel disregarded this argument and held that Angelos's punishment for possession of firearms was justified on the grounds that the weapon facilitated his drug activity by providing protection from purchasers and that Angelos's possession of a firearm endangered his neighbors. The Tenth Circuit reasoned that the federal statute furthered these interests and that Angelos's sentence was not grossly disproportionate. 46 What do you think about the argument that such sentences are so disproportionate and impose such hardship that jurors should refuse to convict defendants charged with quantities of narcotics carrying mandatory minimum sentences?⁴⁷

Crime in the News

n 1986 the U.S. Congress adopted mandatory minimum sentencing laws on drugs. Crack cocaine was singled out for harsh treatment based on the view that it is particularly addictive and associated with violence. The crack cocaine law is premised on the assumption that crack is fifty times more addictive than powder cocaine. Congress doubled this ratio and required that judges sentence defendants convicted of the possession of crack cocaine one hundred times more severely than the possession of powder cocaine (the 100:1 ratio). The law provides that a defendant convicted of the possession with the intent to distribute of 5 grams of crack cocaine will receive the same 5-year sentence as a defendant convicted of the possession of 500 grams of powder cocaine. Fourteen states distinguish between crack and power cocaine, however, no state has a ratio as large as the 100:1 differential in federal law.

This difference in treatment under federal law has been condemned by civil liberties and human rights organizations as racially discriminatory.

Crack cocaine is produced by cooking cocaine powder with baking soda and water. This forms cocaine rocks. These crack rocks are available in small quantities for much less money than is required to purchase powder cocaine. Approximately sixty percent of crack users are Caucasians, twenty-seven percent are African Americans, and nine percent are Hispanics. However, in 2000, African Americans constituted eighty-four percent of individuals convicted on crack cocaine charges, Hispanics constituted nine percent, and Caucasians six percent. In contrast, roughly thirty percent of all powder cocaine prosecutions were brought against African Americans, fifty-one percent involved Hispanics, and whites were charged in roughly eighteen percent of the cases.

The average sentence for powder cocaine is roughly 77 months compared to roughly 130 months for crack cocaine. The median average is 60 months for powder cocaine and 97 months for crack cocaine.

Individuals convicted of possession of crack serve a longer mean average sentence than individuals convicted of robbery, arson, sexual abuse, and manslaughter.

Three reasons are offered for distinguishing between crack and powder cocaine.

• Addiction. Crack is smoked and yields a swift and intense reaction. Powder cocaine is typically snorted and yields a slower and more modest high. This leads to crack being much more addictive than powder cocaine. Critics claim that scientific research calls this distinction into question.

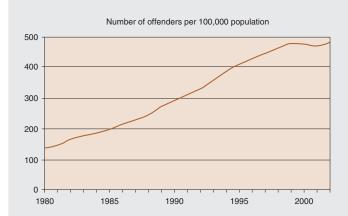
- Violence. The intense nature of crack cocaine addiction drives users into violent behavior, a violence that is encouraged by the need to feed their habit. The sale of crack in open-air drug markets is also associated with gang and turf wars. Opponents of current policy cite statistics indicating that there is no evidence that crack cocaine involves more violence than powder cocaine.
- Drug Trafficking. Crack typically is sold in small, less-expensive quantities and in open-air drug markets. Powder more often is sold in larger quantities and is not typically sold on the street. The enhanced punishment for crack is designed to combat the street-level dealing of drugs. Critics note that African Americans are disproportionately engaged in the street-level selling and purchase of drugs and find themselves targeted for arrest and prosecution under the crack cocaine law.

In United States v. Armstrong, 517 U.S. 456 (1996), the U.S. Supreme Court dismissed the defendants' claim that the crack-cocaine drug law was being enforced in a discriminatory fashion against African Americans. The fact that all twenty-four defendants were African Americans who were indicted in 1991 in central California for the possession of crack cocaine was not viewed as discriminatory because there was no demonstration that the government had failed to prosecute Caucasians or Hispanics arrested for the possession of crack cocaine.

The U.S. Sentencing Commission, created in 1986 to establish sentencing policies for federal courts, unsuccessfully recommended in 1996 that Congress equalize the penalties for crack and powder cocaine. A year later, the commission requested Congress establish a 5:1 ratio between crack and powder cocaine. Congress once again refused to lower penalties for drug laws, fearing that this would "send the wrong message, the message that drug offenses are not to be taken seriously."

The Minnesota Supreme Court, in State v. Russell, 477 N.W.3d 886 (Minn. 1996), ruled that the state's treatment of the possession of three grams of crack as equivalent to the possession of ten grams of cocaine was unconstitutional. The judgment stressed that there "comes a time when we cannot and must not close our eyes when presented with evidence that certain laws, regardless of the purpose for which they were enacted, discriminate unfairly on the basis of race." What is your view of this controversy?

Figure 3.1 Crime on the Streets: Incarceration Rates, 1980-2004



SOURCE: Bureau of Justice Statistics, Correctional Populations in the United States, 1997 and Prisoners in 2004.

- ➤ The rate of incarceration at the end of 2004 was 486 individuals per 100,000 U.S. residents. In 1995, the figure was 411 per 100,000. Roughly 1 in every 109 men and 1 in every 1,563 women were sentenced to federal or state prisons.
- ➤ The total number of prisoners under federal and state adult correctional authorities in 2004 was 1,496,629. Including jails and juvenile facilities and other institutions, the figure was 2.267.787.
- ➤ The U.S. incarceration rate of 724 per 100,000 residents is the highest in the world. Russia is next with 564. The rate for Australia is 120, Canada 116, England and Wales 145, France 88, and Japan 60.
- ➤ The states with the highest incarceration rates per 100,000 were Louisiana, Texas, Mississippi, Oklahoma, and Georgia. The states with the lowest incarceration rates per 100,000

- were North Dakota, Vermont, Wyoming, Maine, and New Hampshire.
- Prisoners sentenced for drug offenses comprised 55% of federal inmates in 2003, a decrease from 1995 (60%). In 2003, federal prisons contained 86,872 drug offenders as compared to 52,782 at the end of 1995.
- ➤ At the end of 2004, 104,848 women were incarcerated (an increase of 4%) and 1,391,781 men were in prison. Females were more likely to be imprisoned for drug offenses in state facilities than men (31.5% as compared to 20.7%) or property crimes (28.7% as compared to 20.7%). Roughly one-half of male state inmates were serving time for violent crimes as compared to one-third of female inmates.
- ➤ Between 1995 and 2004 the female inmate population grew an average of 4.8% per year; the rate of increase among men was 1.8%. The female prison population has grown almost 53% since 1995; the number of male prisoners increased almost 32%.
- 64 females were incarcerated per 100,000 and 920 males per 100,000.
- African American females were more than twice as likely as Hispanic females and 4 times as likely as Caucasian females to be in prison at the end 2004.
- African American inmates represented 41% of all inmates serving a sentence of over 1 year. Caucasians comprised 34%
- ➤ Roughly 8.4% of African American males between the ages of 25 and 29 were in prison at the end of 2004 as compared to 2.5% of Hispanic males and 1.2% of Caucasians.
- ➤ Caucasian state prisoners were more likely to be imprisoned for property offenses (26.4%) as compared to African Americans (17.6%) and Hispanics (15.7%). Hispanic offenders were more likely to be involved in narcotics offenses (27.4%) than African Americans (25.1%) or Caucasian inmates (14.8%).

Criminal Punishment and Status Offenses

In *Robinson v. California*, the U.S. Supreme Court overturned Robinson's conviction under a California law that declared it was a criminal offense "to be addicted to the use of narcotics." The Supreme Court ruled that it was cruel and unusual punishment to impose criminal penalties on Robinson based on his conviction of the **status offense** of narcotics addiction, which a majority of the judges considered an addictive illness. Justice Potter Stewart noted that "[e]ven one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold. . . . It is unlikely that any State would . . . make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with venereal disease. . . . [such a] law . . . would . . . be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth amendments."

Cruel and Unusual Punishment: A Summary

The prohibition on cruel and unusual punishment in the Eighth Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment. This prohibition has three components:

- How. Punishment may not be inflicted in a cruel or unusual fashion.
- What. Capital punishment must be imposed in a proportionate fashion and is reserved for acts of aggravated murder. Courts defer to the legislative branch and accept that

- sentences for a "term of years" are proportionate. A finding that a sentence for a term of years is disproportionate should be "extremely rare."
- *Who*. Punishment may not be extended to individuals based on a conviction for a status offense; a socially harmful act is required.

Equal Protection

Judicial decisions have consistently held that it is unconstitutional for a judge to base a sentence on a defendant's race, gender, race or ethnicity, or nationality. In other words, a sentence should be based on defendant's "act" rather than on a defendant's "identity." A federal district court judge's sentence of thirty years in prison and lifetime supervision for two first-time offenders convicted of a weapons and two narcotics offenses was rejected by federal Second Circuit Court of Appeals based on the trial court judge's observation that the South American defendants "should have stayed where they were.... Nobody tells them to come and get involved in cocaine. . . . My father came over with \$3 in his pocket." The appellate court noted that it appeared that "ethnic prejudice somehow had infected the judicial process in the instant case." The appellate court observed that one of the defendant's "plaintive request that she be sentenced 'as for my person, not for my nationality,'" was completely understandable under the circumstances. Oculate the trial court judge have constitutionally handed down the same sentence in order to deter Columbian drug gangs from operating in the United States?

Statutes also have been held to be in violation of the Equal Protection Clause that provide different sentences based on gender. In *State v. Chambers*, the New Jersey Supreme Court struck down a statute providing indeterminate sentences not to exceed five years (or the maximum provided in a statute) for women, although men convicted of the same crime received a minimum and maximum sentence, which may be reduced by good behavior and work credits.

This complicated scheme resulted in men receiving significantly shorter prison sentences than women convicted of the same crime. For instance, a female might be held on a gambling conviction "for as long as five years . . . [a] first offender male, convicted of the same crime, would likely receive a state prison sentence of not less than one or more than two years." The female offender was required to serve the complete sentence, although the male would "quite likely" receive parole in four months and twenty-eight days. The New Jersey Supreme Court dismissed the argument that the "potentially longer period of detention" for females was justified on the grounds that women were good candidates for rehabilitation who could turn their lives around in prison. The court pointed out that there "are no innate differences [between men and women] in capacity for intellectual achievement, self-perception or self-control or the ability to change attitude and behavior, adjust to social norms and accept responsibility." What was the New Jersey legislature thinking when it adopted this sentencing scheme? Can you think of a crime for which the legislature might constitutionally impose differential sentences based on gender? At least one appellate court in Illinois has upheld a statute that punished a man convicted of incest with his daughter more severely than a woman convicted of incest with her son, reasoning that this furthered the interest in preventing pregnancy. 50

What about seemingly neutral laws that possess a discriminatory impact? The general rule is that a defendant must demonstrate both a discriminatory impact and a discriminatory intent. The difficulty of this task is illustrated by the Supreme Court's consideration of the discriminatory application of the death penalty in McCleskey v. Kemp.⁵¹

Warren McCleskey, an African American, was convicted of two counts of armed robbery and one count of the murder of a Caucasian police officer. He was sentenced to death on the homicide count and to consecutive life sentences on the robbery. McCleskey claimed that the Georgia capital punishment statute violated the Equal Protection Clause in that African American defendants facing trial for the murder of Caucasians were more likely to be sentenced to death. McCleskey relied on a sophisticated statistical study of 2,000 Georgia murder cases involving 230 variables that had been conducted by Professors David C. Baldus, Charles Pulaski, and George Woodworth. This led to a number of important findings, including that defendants charged with killing Caucasian victims were over four times as likely to receive the death penalty as defendants charged with killing African Americans, and that African American defendants were one and one-tenth times as likely to received the death sentence as other defendants.

The Supreme Court ruled that McCleskey had failed to meet the burden of clearly establishing that the decision makers in his specific case acted with a discriminatory intent to disadvantage McCleskey on account of his race. What of McCleskey's statistical evidence? The Supreme Court majority observed that the statistical pattern in Georgia reflected the decisions of a number of prosecutors in cases with different fact patterns, various defense counsel, and different jurors and did not establish that the prosecutor or jury in McCleskey's specific case or in other cases were biased. McCleskey killed a police officer, a charge that clearly permitted the imposition of capital punishment under Georgia law. Where was the discrimination?

Justice William Brennan, in dissent, criticized the five-judge majority for approving a system in which "lawyers must tell their clients that race casts a large shadow on the sentencing process." Justice Brennan noted that a lawyer, when asked by McCleskey whether McCleskey was likely to receive the death sentence, would be forced to reply that six of every eleven defendants convicted of killing a Caucasian would not have received the death penalty if their victim had been African American. At the same time, among defendants with aggravating and mitigating factors comparable to McCleskey, twenty of every thirty-four would not have been sentenced to die if their victims had been African American. This pattern of racial bias was particularly significant given the history of injustice against African Americans in the Georgia criminal justice system. The Bureau of National Justice Statistics reports that in 2004, 1,851 Caucasians and 1,390 African Americans were on death row and 74 individuals were classified as "other."

International Perspective

n this section, consider the difference between American criminal law and religiously based Islamic law.

Between 750 and 1200 A.D., Muslim Spain was the most civilized and sophisticated area of Western Europe. Spain and what is now Iraq were the leading centers of astronomy, science, mathematics, medicine, architecture, and the arts. They housed the world's major libraries and research centers. Islam soon spread throughout Asia and Africa. Today 35 countries have Islamic majorities, and the world's 800 million Muslims are a significant minority in another 20 countries.

Islamic law or *Shari'a* (the path to follow) is primarily based on the holy text of the Koran. Islamic law divides criminal offenses into three categories. *Hudud* offenses are crimes against God whose punishment is set forth in the Koran and in the *Sunna* (recorded statements and acts of the Prophet Mohammad). The state serves as God's agent in initiating prosecution for *Hudud*.

Quesas are crimes of physical assault and murder, and the Koran requires that such acts shall be punished by retaliation ("the return of a life for a life"). The victim or the surviving family members may waive punishment and accept monetary compensation or pardon the offender. Quesas are "private wrongs" and the prosecution is brought by the victim or by his or her heirs.

Ta'azir crimes are acts that are condemned in the Koran and Sunna that are not specifically subject to punishment, such as the consumption of pork, charging interest on loans, provocative dress, or the refusal of a wife to obey her husband. The punishment for Ta'azir crimes is within the discretion of the qadi (judge). The victim of a Ta'azir offense may ask the ruler not to punish and to pardon the offender. The state initiates prosecution of Ta'azir as part of the ruler's responsibility to maintain public order.

In contrast to American law, which evolved through judicial decisions and legislative statutes, Islamic law is primarily based on the Holy Koran and is divinely inspired. Muslim "fundamentalists" argue that a ruler is obligated to follow religious law and that a government that does not follow the *Shari'a* betrays the dictates of God and is not deserving of respect. Some Muslim regimes attempt to avoid criticism by arguing that the *Shari'a* is a religious ideal rather than a practical program or by arguing that the Koran should be interpreted in light of modern conditions. Fundamentalists, however, insist that governments rigidly follow the *Shari'a*

Islamic law is enforced in a religious court before a *qadi*, who is typically a religious cleric or deeply religious individual. Witnesses are limited to Muslim males of high personal integrity. In some instances, two women may substitute for a male witness. The witnesses must have personally witnessed the crime. In those instances in which

the required number of witnesses fail to appear, the prosecution may only be dismissed following the defendant's swearing of a religious oath of innocence. A conviction may also result from the defendant confessing before the qadi the same number of times as the number of witnesses required to convict the defendant.

The Shari'a does not cover every conceivable crime. It is important to remember that Muslim societies do not solely depend on the criminal law to maintain social stability. The order and safety of Muslim societies primarily depends on the religious devotion and virtue of Islamic believers. In theory, the conditions that breed crime are also avoided by the obligation imposed on Muslims to provide for the poor and disadvantaged.

There is some limited use of imprisonment in Islam, but the central punishment involves the infliction of physical pain. This reflects the belief that physical punishment will deter crime. Islamic law also stresses retribution or "just deserts" in order to satisfy the demands of the victim or his or her family for "revenge." Islamic scholars further explain that punishment on earth will spare the offender an even harsher fate before Allah on the Day of Judgment.

Islamic punishment may appear harsh, but it must be remembered that crime is an offense against Allah as well as society. Muslim commentators also contend that their societies have avoided the immoral culture and rampant crime of the United States and point out that Islamic punishments are less harsh than internment in the typical American prison.

There are seven Hudud offenses. In each case two eyewitnesses are required, with the exception of prohibited sexual activity, which requires four eyewitnesses. As previously noted, guilt may also be established by a defendant confessing as many times as the number of eyewitnesses required.

Theft or the Taking of the Property of Another. The first and second acts of theft are punished by amputation of the hands. The third and fourth offenses are punished by amputation of the feet.

Prohibited Sexual Activity. This includes adultery, fornication, and sodomy between unmarried individuals. Married persons are subject to stoning to death; unmarried persons to one hundred lashes. Judges may impose a flogging before the stoning to death of married defendants and a flogging followed by exile for unmarried defendants. The punishment of these offenses requires four eyewitnesses or a confession.

Defamation. A false statement that harms an individual's reputation. The most serious accusations are false accusations of fornication and

impugning the legitimacy of a child. The penalty is eighty lashes.

Highway Robbery. The taking and carrying away of a traveler's property by force or intimidation. A bandit is subject to amputation of the right hand and left foot for the first offense, and left hand and right foot for the second offense. A bandit who murders is beheaded. A bandit who murders and plunders is punished by beheading, after which the body is displayed in a crucifixion-like form. Banding together with the intent to plunder and murder is punishable by a discretionary penalty, usually imprisonment until the individual repents. A bandit who repents may be pardoned for theft although punished for the infliction of physical harm.

Alcohol. Drinking wine or other intoxicating beverages is punishable by eight lashes.

Apostasy. The voluntary renunciation of Islam is punished by death. This offense is committed by a Muslim who converts to another faith, worships idols, or abandons a fundamental tenet of Islam. The apostate is usually provided three days to reconsider his or her position. Females are not executed and instead are imprisoned until they change their mind and return to Islam.

Rebellion. The forceful overthrow or attempted overthrow of a legitimate governmental leader is punishable by death. In the event that the rebels' accusations possess merit and the ruler has deviated from Islamic principles, the ruler is to be removed from office and punished.

In March 2002, a Shari'a court in Nigeria sentenced Admina Lawal, a thirty-one-year-old divorced mother of three, to be buried up to her neck and stoned to death for pregnancy out of wedlock. The male was not charged. As a result of protests from the United States and England, a Nigerian appellate court reversed the verdict six months later on the grounds that Amina had not been provided with an opportunity to defend herself. Twelve of the thirtysix states in Nigeria adhere to Shari'a law.

In June 2005, Iran's State Supreme Court affirmed that a twenty-eight-year-old man's eyes were to be gouged out and sprayed with acid in retribution for the defendant's blinding of another man with acid twelve years prior. He then was executed. The court had ordered that the defendant's eyes were first to be gouged out by a surgeon so that the acid would not injure the defendant's

What are some of the differences between the common law and the Shari'a? Is the United States justified in criticizing the application of Islamic criminal law and punishment in countries such as Nigeria and Iran?

You will find the following facts reprinted that were presented to a California judge at sentencing. What punishment would you impose?

Defendant Soon Ja Du was convicted of voluntary manslaughter in the killing of Latasha Harlins, a customer in defendant's store. Defendant was sentenced to 10 years in state prison. The sentence was suspended (not enforced) and defendant was placed on probation under certain terms and conditions. The District Attorney contends the court abused its discretion in granting probation and seeks a . . . legal sentence of an appropriate term in state prison.

The crime giving rise to defendant's conviction occurred on the morning of March 16, 1991, at the Empire Liquor Market, one of two liquor stores owned and operated by defendant and her family. Although Empire Liquor was normally staffed by defendant's husband and son while defendant, Ja Du, worked at the family's other store in Saugus, defendant worked at Empire on the morning of March 16 so that her son, who had been threatened by local gang members, could work at the Saugus store instead. Defendant's husband, Billy Du, was present at the Empire Liquor Market that morning, but at defendant's urging he went outside to sleep in the family van because he had worked late the night before.

Defendant was waiting on two customers at the counter when the victim, fifteen-year-old Latasha Harlins, entered the store. Latasha proceeded to the section where the juice was kept, selected a bottle of orange juice, put it in her backpack, and proceeded toward the counter.

Defendant had observed many shoplifters in the store, and it was the Defendant's experience that people who were shoplifting would take the merchandise, "place it inside the bra or anyplace where the owner would not notice," and then approach the counter, buy some small items and leave. Defendant saw Latasha enter the store, take a bottle of orange juice from the refrigerator, place it in her backpack and proceed to the counter. Although the orange juice was in the backpack, it was partially visible. Defendant testified that she was suspicious because she expected if the victim were going to pay for the orange juice, she would have had it in her hand. Defendant's son, Joseph Du, testified that there were at least forty shoplifting incidents a week at the store.

Thirteen-year-old Lakesha Combs and her brother, nine-year-old Ismail Ali, testified that Latasha approached the counter with money ("about two or three dollars") in her hand. According to these witnesses, the defendant confronted Latasha, called her a "bitch" and accused her of trying to steal the orange juice; Latasha stated she intended to pay for it. According to the defendant, she asked Latasha to pay for the orange juice and Latasha replied, "What orange juice?" Defendant concluded that Latasha was trying to steal the juice.

Defendant testified that it was Latasha's statement, "What orange juice?" which changed defendant's attitude toward the situation, since prior to that time defendant was not afraid of Latasha. Defendant also thought Latasha might be a gang member. Defendant had asked her son, Joseph Du, what gang members in America look like, and he replied "either they wear some pants and some jackets, and they wear light sneakers, and they either wear a cap or a hairband, headband. And they either have some kind of satchel, and there were some thick jackets. And he told me to be careful with those jackets sticking out." Latasha was wearing a sweater and a "Bruins" baseball cap.

Defendant began pulling on Latasha's sweater in an attempt to retrieve the orange juice from the backpack. Latasha resisted and the two struggled. Latasha hit defendant in the eye with her fist twice. With the second blow, defendant fell to the floor behind the counter, taking the backpack with her. During the scuffle, the orange juice fell out of the backpack and onto the floor in front of the counter. Defendant testified that she thought if she were hit one more time, she would die. Defendant also testified that Latasha threatened to kill her. Defendant picked up a stool from behind the counter and threw it at Latasha, but it did not hit her.

After throwing the stool, Defendant reached under the counter, pulled out a holstered .38 caliber revolver, and, with some difficulty, removed the gun from the holster. As Defendant was removing the gun from the holster, Latasha picked up the orange juice and put it back on the counter, but defendant knocked it away. As Latasha turned to leave defendant shot her in the back of the head from a distance of approximately three feet, killing her instantly. Latasha had two dollars in her hand when she died.





Defendant's husband entered the store [upon hearing defendant's calls for help] and saw Latasha lying on the floor. Defendant leaned over the counter and asked, "Where is that girl who hit me?"

Defendant then passed out behind the counter. Defendant's husband attempted to revive her and also dialed 911 and reported a holdup. Defendant, still unconscious, was transported to the hospital by ambulance, where she was treated for facial bruises and evaluated for possible neurological damage.

At defendant's trial, she testified that she had never held a gun before, did not know how it worked, did not remember firing the gun and did not intend to kill Latasha.

Defendant's husband testified that he had purchased the .38 caliber handgun from a friend in 1981 for self-protection. He had never fired the gun, however, and had never taught defendant how to use it. In 1988, the gun was stolen during a robbery of the family's store in Saugus. Defendant's husband took the gun to the Empire store after he got it back from the police in 1990.

David Butler, a Los Angeles Police Department ballistics expert, testified extensively about the gun, a Smith & Wesson .38 caliber revolver with a two-inch barrel. In summary, he testified that the gun had been altered crudely and that the trigger pull necessary to fire the gun had been drastically reduced. Also, both the locking mechanism of the hammer and the main spring tension screw of the gun had been altered so that the hammer could be released without putting much pressure on the trigger. In addition, the safety mechanism did not function properly. . . . The jury found defendant guilty of voluntary manslaughter (murder in the heat of passion). By convicting defendant of voluntary manslaughter, the jury impliedly found that defendant had the intent to kill and . . . rejected the defenses that the killing was unintentional and that defendant killed in self-defense.

After defendant's conviction, the case was evaluated by a Los Angeles County Probation officer, who prepared a presentence probation report. That report reveals the following about defendant.

At the time the report was prepared, defendant was a fifty-one-year-old Korean-born naturalized American citizen, having arrived in the United States in 1976. For the first ten years of their residence in the United States, defendant worked in a garment factory and her husband worked as a repairman. Eventually, the couple saved enough to purchase their first liquor store in San Fernando. They sold this store and purchased the one in Saugus. In 1989, they purchased the Empire Liquor Market, despite being warned by friends that it was in a "bad area."

These warnings proved prophetic, as the store was plagued with problems from the beginning. The area surrounding the store was frequented by narcotics dealers and gang members, specifically the Main Street Crips. Defendant's son, Joseph Du, described the situation as "having to conduct business in a war zone." In December 1990, defendant's son was robbed while working at the store and he incurred the wrath of local gang members when he agreed to testify against one of their number who he believed had committed the robbery. Soon thereafter, the family closed the store for two weeks while defendant's husband formulated a plan (which he later realized was "naive") to meet with gang members and achieve a form of truce. The store had only recently been reopened when the incident giving rise to this case occurred.

Joseph Du testified at trial that on December 19, 1990, approximately ten to fourteen African American persons entered the store, threatened him, and robbed him again. The store was burglarized over thirty times and shoplifting incidents occurred approximately forty times per week. If Joseph tried to stop the shoplifters, "they show me their guns." Joseph further testified that his life had been threatened over thirty times, and more than twenty times people had come into the store and threatened to burn it down. Joseph told his mother about these threats every day because he wanted to emphasize how dangerous the area was, and that he could not do business there much longer.

The probation officer concluded "it is true that this defendant would be most unlikely to repeat this or any other crime if she were allowed to remain free. She is not a person who would actively seek to harm another. . . ." However, she went on to state that although defendant expressed concern for the victim and her family, this remorse was centered largely on the effect of the incident on defendant and her own family. The respondent court found, however, that defendant's "failure to verbalize her remorse to the Probation Department [was] much more likely a result of cultural and language barriers rather than an indication of a lack of true remorse."

The probation report also reveals that Latasha had suffered many painful experiences during her life, including the violent death of her mother. Latasha lived with her extended family





(her grandmother, younger brother and sister, aunt, uncle and niece) in what the probation officer described as "a clean, attractively furnished three-bedroom apartment" in South Central Los Angeles. Latasha had been an honor student at Bret Hart Junior High School, from which she had graduated the previous spring. Although she was making only average grades in high school, she had promised that she would bring her grades up to her former standard. Latasha was involved in activities at a youth center as an assistant cheerleader, member of the drill team and a summer junior camp counselor. She was a good athlete and an active church member.

The probation officer's ultimate conclusion and recommendation was that probation be denied and defendant sentenced to state prison. The . . . court sentenced defendant to ten years in state prison (six years for the base term and four for the gun use). The sentence was suspended (not enforced) and defendant was placed on probation for a period of five years with the usual terms and conditions and on the condition that she pay \$500 to the restitution fund and reimburse Latasha's family for any out-of-pocket medical expenses and expenses related to Latasha's funeral. Defendant was also ordered to perform 400 hours of community service. The court did not impose any jail time as a condition of probation.

The trial judge possessed the option of sentencing Du to prison for three, six or eleven years and an additional four years for the use of a gun. What are the objectives of sentencing? Were these goals achieved by a sentence of probation? Under California law, probation is not to be granted for an offense involving the use of a firearm other than under certain conditions. These include whether the crime was committed under unusual circumstances, such as great provocation. Other conditions are whether the carrying out of the crime indicated criminal sophistication and whether the defendant will be a danger to others in the event he or she is not incarcerated. See *People v. Superior Court*, 7 Cal. Rptr.2d 177 (1992).

You can find the answer at http://www.sagepub.com/lippmanstudy

📥 Chapter Summary

T he distinguishing characteristic of a criminal offense is that it is subject to punishment. Categorizing a law as criminal or civil has consequences for the protections afforded to a defendant, such as the prohibition against double jeopardy. Punishment is intended to accomplish various goals, including retribution, deterrence, rehabilitation, incapacitation, and restoration. Judges seek to accomplish the purposes of punishment through penalties ranging from imprisonment, fines, probation, and intermediate sanctions to capital punishment. Assets forfeiture may be pursued in a separate proceeding.

The federal government and the states have initiated a major shift in their approach to sentencing. The historical commitment to indeterminate sentencing and to the rehabilitation of offenders has been replaced by an emphasis on deterrence, retribution, and incapacitation. This primarily involves presumptive sentencing guidelines and mandatory minimum sentences. Several recent U.S. Supreme Court cases appear to have resulted in sentencing guidelines that are advisory rather than binding on judges.

Truth in sentencing laws are an effort to insure that offenders serve a significant portion of their sentence and are intended to prevent offenders from being released by parole boards who determine that offenders have exhibited progress toward rehabilitation. We also have seen the development of a greater sensitivity to victims' rights.

Constitutional attacks on sentences are typically based on the Eighth Amendment prohibition on the imposition of cruel and unusual punishment. The U.S. Supreme Court has ruled that the prohibition against cruel and unusual punishment applies to the federal government as well as to the states, and virtually every state constitution contains similar language. Professor Wayne LaFave lists three approaches to interpreting the clause: (1) it limits the *methods* employed to inflict punishment, (2) it restricts the *amount of punishment* that may be imposed, and (3) it *prohibits* the criminal punishment of certain acts. The Equal Protection Clause provides an avenue to challenge statutes and sentencing practices that result in different penalties for individuals based on their race, religion, gender, and ethnicity.



The effort to insure uniform approaches to sentencing is exemplified by the procedural protections that surround the death penalty. Legal rulings under the Eighth Amendment have limited the application of capital punishment to a narrow range of aggravated homicides committed by adult offenders. The imposition of capital punishment on juveniles was held disproportionate in Roper v. Simmons. Constitutional challenges under the Eighth Amendment have proven unsuccessful against mandatory minimum sentences, as illustrated by the federal court's upholding of "Three Strikes and You're Out" laws and determinate penalties for drug possession. Judges have generally deferred to the decision of legislators and have ruled that penalties for terms of years are proportionate to the offenders' criminal acts. The U.S. Supreme Court has stressed that such challenges should be upheld on "extremely rare" occasions where the sentence is "grossly disproportionate" to the seriousness of the offense.

Criminal sentences may not be based on the "suspect categories" of race, gender, religion, ethnicity, and nationality. Despite the condemnation of racial practices in the criminal justice system, the due process procedures surrounding the death penalty do not appear to have eliminated racial disparities in capital punishment. An equal protection challenge to the application of capital punishment, however, proved unsuccessful in McCleskey v. Kemp.

As you read the cases in the next chapters of the textbook, pay attention to the sentences handed down to defendants by the trial court. Consider what sentence you believe that the defendant deserved.

Chapter Review Questions

- 1. Distinguish between civil disabilities and criminal punishments. Why did the Supreme Court rule that Megan's Law was not a criminal punishment?
- 2. Discuss the purposes of punishment. Which do you believe should be the primary reason for criminal punishment?
- 3. What are some types of sentences that a court may impose?
- 4. List several of the criteria that are used to evaluate approaches to sentencing. Which do you believe is most important?
- 5. Describe the various approaches to sentencing. Contrast indeterminate and determinate sentencing. What approach do you favor?
- 6. Why were sentencing guidelines introduced? How were the guidelines affected by recent Supreme Court decisions?
- 7. Describe truth in sentencing laws.
- 8. What types of protections are included within victims' rights?

- 9. List the three protections provided under the Eighth Amendment.
- 10. How do courts determine whether a method of punishment is prohibited under the Eighth Amendment?
- 11. Discuss the efforts of the Supreme Court to insure that the death penalty is applied in a proportionate fashion.
- 12. Why did the Supreme Court rule that it is cruel and unusual punishment to executive juveniles?
- 13. What is the approach of courts that are asked to decide whether a sentence for a "term of years" is proportionate to the crime? Why do judges take such a "hands off approach" in this area?
- 14. Why is it a violation of equal protection for race, gender, religion, ethnicity, or nationality to play a role in sentencing?
- 15. What is the legal test for determining whether a law that is neutral on its face is in violation of equal protection?

Legal Terminology

assets forfeiture beyond a reasonable doubt clemency concurrent sentence consecutive sentence determinative sentencing

disparity Eighth Amendment general deterrence incapacitation indeterminate sentences just deserts

mandatory minimum sentences Megan's Law pardon plea bargain preponderance of the evidence presumptive sentencing guidelines

proportionality rehabilitation restoration retribution selective incapacitation Shari'a Son of Sam Laws special deterrence status offenses "Three Strikes and You're Out" laws truth in sentencing laws victim impact statements

Criminal Law on the Web

Log on to the Web-based student study site at http://www.sagepub.com/lippmanstudy to assist you in completing the Criminal Law on the Web exercises, as well as for additional cases and resources.

- 1. The Death Penalty Information Center provides information on capital punishment. You will also
- want to read about the death penalty around the world.
- 2. You can find reports on race and gender in sentencing on the Web site of The Sentencing Project.
- 3. The Justice Policy Institute has a report on the "Three Strikes" laws that you can find on the Web site of this nonprofit research organization

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