CHAPTER 10
PUNISHMENT AND SENTENCING
While most ordinary crimes rarely make news headlines, this changes when a celebrity is involved in a crime. As a result of their social status, these cases dominate the headlines regardless of the offense. In 2009, Chris Brown was arrested for felony assault against his then girlfriend Rihanna following a domestic dispute. In an effort to avoid jail time, he pled guilty and received five years of probation, one year of domestic violence counseling, and six months of community service. However, his involvement with the criminal justice system didn’t end with this incident. Over the next five years, Brown continued to have run-ins with the law, including a hit-and-run accident in California and an aggravated assault outside a Washington, D.C., hotel in 2013. As a result, Brown’s probation was revoked, and he spent 90 days in an inpatient anger management treatment program. However, he was kicked out of the program for noncompliance and, as a result, spent two and a half months in jail. In 2015, he was released from probation.

Meanwhile, Justin Bieber’s involvement in at-risk and criminal behavior has been escalating since 2013. While his official record highlights a DUI arrest in 2014, media accounts list events such as reckless driving throughout his neighborhood, bar scuffles, marijuana use, and vandalism, which have occurred both in the United States and abroad. However, the punishments for these bad acts have been limited. In 2014, the DUI case was resolved with a charitable donation and by enrolling in anger management classes. He also accepted a plea deal in the vandalism case that sentenced him to two years probation plus $80,000 in restitution. In 2015, the Canadian courts found him guilty of assault and careless driving. His punishment for this crime was a $600 fine.

Do celebrities receive preferential treatment in the criminal justice system as a result of their status? In some instances, the punishments in these cases do little to sanction the offenders, particularly when the punishment is a small fine. Some groups were highly critical of the sentence that Brown received for his domestic assault, arguing that it was not proportional to the injuries that he inflicted to his victim. Meanwhile, others express concerns about what sort of message is received by youth who might look up to these superstars and how they are treated by the criminal justice system.
In this chapter, you will learn about the types of sentencing practices that are used by the criminal justice system. The chapter begins with a discussion about the various philosophies that guide sentencing practices. The chapter then looks at the different types of sentences. The chapter concludes with two Current Controversy debates related to the criminal court system. The first, by Kimberly Dodson, asks whether habitual sentencing laws deter offenders. The second, by Scott Vollum, looks at whether there is a risk of executing an innocent individual.

**CORRECTIONAL PHILOSOPHIES**

What is the purpose of punishment? Is it to prevent someone from doing the same thing again? Or do we punish someone to send a message that certain behaviors will not be tolerated? There are five different philosophies that have helped guide our sentencing and correctional practices, and each of these philosophies has been popular at different points throughout history. In order to understand these different practices and how they are used by the criminal justice system, we must first understand the foundations of these practices.

**Deterrence**

The theory of deterrence suggests that offenders will be discouraged from committing crime if they fear the punishments that are associated with these acts. There are two different ways in which deterrence theory works. First, there is the concept of specific deterrence. **Specific deterrence** looks at how individual behaviors are curbed as a result of Becarria's pain–pleasure principle. If the individual decides that the threat of punishment (such as a prison sentence) is undesirable, then specific deterrence suggests that that particular individual will make the decision not to engage in the criminal behavior. Specific deterrence is limited to a particular individual. In contrast, the theory of **general deterrence** suggests that if people fear the punishments that others receive, they will, in turn, decide not to engage in similar acts, as they do not want to risk the potential punishment for themselves.5

In order for deterrence theory to be effective, a punishment must possess three characteristics. The first of these characteristics is **certainty**. This means that offenders need to be reasonably aware that if they engage in a criminal act, they will be apprehended and punished. Consider that parents generally teach their children not to touch a sharp object (such as a knife), or else, they will likely get hurt. This works because the punishment (getting hurt) is relatively certain. When it comes to crime and punishment, this level of certainty doesn’t exist because crimes occur every day that are not reported to the police, and offenders are not punished for these acts. Second, the punishment must be severe. If the punishment is not harsh enough, offenders may not be deterred from engaging in the criminal behavior. The **severity** of a punishment can limit the certainty of that punishment—as the severity of a punishment increases, the likelihood of that punishment being implemented decreases.6 Finally, the potential punishment must be swift. This is also referred to as the **celerity** of punishment. Celerity of punishment references the amount of time between the criminal act and the punishment for said act. If the punishment does not occur in a timely fashion, the deterrent effect is reduced. Therefore, the most effective punishments, from the perspective of deterrence theory, are those that are certain, severe, and swift. The problem with deterrence is that punishments rarely operate in this manner. For example, most people do not engage in crime with the expectation that they will be caught, which negates the certainty principle. And what is considered
SPOTLIGHT

Deterrence and the Death Penalty

Once upon a time, deterrence used to be the leading reason as to why people expressed support for the death penalty. According to a Gallup poll, 62% of those surveyed in 1985 believed that the death penalty acts as a deterrent against murder and that having the death penalty leads to lower murder rates. Today, people are most likely to support capital punishment for retributive reasons, and people no longer believe that it serves as an effective deterrence (see Figure 10.1).

Research on capital punishment as an effective deterrent has long been cited by policymakers and politicians. One of the most notable contributions on deterrence and the death penalty was published during the 1970s by Isaac Ehrlich, an economist from the University of Chicago. His work indicated that for every execution, the number of homicides decreased by eight. These findings were in sharp contrast to the previous studies in the field, and many jumped to embrace deterrence as a plausible justification for the practice of execution. Even the U.S. Supreme Court cited Ehrlich’s work in their decision to reinstate the death penalty in 1976. However, Ehrlich’s research methods have since been highly criticized, and many studies since have failed to find evidence of a deterrent effect. While there are certainly a number of factors that scholars use to investigate the effects of deterrence from the death penalty, opponents of the death penalty often begin with a review of murder rates between those states that have laws that permit executions and those states that have abolished the death penalty. Here, we can see that states that have retained the death penalty have higher murder rates compared with those states without it.

While many politicians continue to suggest that the death penalty saves lives, we simply don’t know what would-be murderers think about before they decide whether to engage in violent crime. Given that only 2% of those convicted of death-eligible crimes actually receive the death penalty, it is fair to say that there is little certainty that a would-be murderer will receive the death penalty. The issue as to whether the death penalty is the most severe form of punishment is also debated. Of those who favor the

Figure 10.1  Murder Rates in Death Penalty and Non–Death Penalty States

Murder rates in states that impose the death penalty have been consistently higher than in states that do not impose the death penalty. How does this relate to the idea that the death penalty acts as a deterrent?

Source: http://www.deathpenaltyinfo.org/deterrence-states-without-death-penalty-have-consistently-lower-murder-rates

(Continued)
death penalty, 37% say that life in prison without the possibility of parole would be a worse punishment. Finally, it is difficult to argue that the length of time between sentencing an offender to death and carrying out an execution is swift. Nationwide, the average time spent on death row is 14.8 years. In some states, such as California, 37% of offenders have spent more than 20 years waiting for their execution. Indeed, inmates are more likely to die of natural causes than to be executed by the state.

So if we look at the death penalty through the eyes of the certainty, severity, and celerity of punishment, it is questionable as to whether this practice is an effective example of deterrence. A severe punishment is a subjective concept—while some offenders might feel that six months in jail is an extreme punishment, others may feel that it’s not a big deal. Finally, in an era of crowded court systems and legal challenges, how often are punishments delayed?

Rehabilitation

Many of the rehabilitative ideals that are reflected in the modern-day criminal justice system began during the early 20th century. Prior to this, rehabilitative efforts were tied to religious reforms. It was from this focus that we saw the development of practices such as probation, parole, and the juvenile justice system. The concept of rehabilitation focuses on reforming criminal behavior so that the offender does not need or want to engage in future acts of crime. Rehabilitation was used within the prison walls not only as a way to treat prisoners and help transform their behaviors but also to assess whether offenders were prepared to return to the community.

During the 1970s, rehabilitation became less popular as a result of a belief that “nothing works.” In his 1974 article “What Works?—Questions and Answers About Prison Reform,” Martinson reviewed more than 200 programs, from counseling to education, and noted rather dismal results. However, he noted that these results may reflect the efficacy of the specific programs. Alas, the stone was cast, and Martinson’s research became part of the quest to turn against rehabilitation in favor of a tougher approach. In political circles, support for rehabilitative programming became the equivalent of being soft on crime. Consider the 1988 presidential election in which presidential candidate Michael Dukakis was heavily criticized by the Republican candidate, George H. W. Bush, for Dukakis’s support of weekend furlough releases for convicted offenders. The debate centered on the case of Willie Horton, who was a convicted murderer. Even though he had received a sentence of life without the possibility of parole (LWOP) for his crime, he was still permitted to participate in the program. Unfortunately, on one occasion, Horton never returned from his furlough. Instead, he traveled to Maryland, where he robbed a local couple, physically assaulted the male, and raped the woman. As governor, Dukakis was held politically responsible for Horton’s release (which had led to these crimes) and was declared to be “soft on crime,” a position that ultimately contributed to his loss in the election.
Today, we have evidence that programs can work when they are targeted toward the needs of the offender (compared with a general approach), are provided with the financial support to offer programs in a manageable way, and have staff that are adequately trained and supportive of the rehabilitative mission. When implemented with these ideals in mind, rehabilitative efforts that focus on changing the way individuals think about crime and criminal behavior can reduce recidivism.

**Incapacitation**

Incapacitation refers to the practice of removing offenders from society so that they will not engage in criminal behaviors for a certain period of time. Generally speaking, we think of the prison as a way to incapacitate offenders. However, technology has made it possible to utilize some of the features of incapacitation in other settings. This is particularly useful given the current issues of overcrowding in prisons. For example, few celebrity cases, such as the one you learned about at the beginning of this chapter, lead to time behind bars. The concept of incapacitation has been used for low-level offenders as well as serious offenders. Sentencing practices such as mandatory minimums and three-strikes laws are examples of how incapacitation is used to ensure public safety.

Today, most sentencing practices combine the use of incapacitation with other theories of punishment, such as deterrence and retribution, which can make it difficult to determine whether incapacitation is an effective tool in preventing crime. For low-level offenders, research indicates that the benefits of increasing public safety through the use of incapacitation are often superseded by the challenges that come with the “ex-convict” label in society, prompting some to question whether incapacitation does more harm than good in the long run for certain groups of offenders. Indeed, studies find that prison may actually increase the likelihood of future offending. Even in the case of parole violators, research demonstrates that community-based sanctions are more effective in preventing crime compared with the use of jail time as a punishment.

**Retribution**

Retribution is a punishment philosophy that reflects the idea that offenders should be punished for their bad acts purely on the basis that they violated the laws of society. Retribution does not take into consideration whether the punishment will lead to future change in the offender’s behavior (like deterrence or rehabilitation philosophies do). The theory of retribution embodies the concept of lex talionis from ancient law and is even referenced in biblical texts with the discussion of punishment as an eye for an eye. Retribution is a way for offenders to pay for the harms that they have caused. In some states, inmates have the opportunity to work with training service dogs for visually impaired persons. Such programs can have a transformative experience for the inmates, who learn about dealing with anger and developing patience, and provide opportunities for empathy and responsibility. Should these types of programs be available to inmates?
CAREER VIDEO
Drug and Alcohol Counselor

CAREERS IN CRIMINAL JUSTICE
So You Want to Be a Drug and Alcohol Counselor?

As a drug and alcohol counselor, you will work with individuals who are struggling with addiction. Careers in this field are tied to many different academic backgrounds, including criminal justice, social work, human services, and psychology. Some states require a bachelor’s degree while others allow for workers to qualify for these careers with a certificate program in substance abuse counseling. Such careers also may require you to pass an exam in order to qualify with the state department of health.

People in this field work in many different environments. For example, you might work as part of a program providing counseling to inmates who have been incarcerated as a result of their addiction or whose crimes are related to their substance abuse. You might work in a residential treatment or outpatient treatment center in the community. You might also work providing educational outreach for the purposes of prevention or intervention. Within the context of your job, you will deal with emotional environments as people navigate their sobriety. In many cases, the damage caused by addiction is not limited to just the individual but can span across their family members and friends. Like other human service fields, this work can be challenging because people have to want to change their behavior. Not all who seek treatment want or are willing to change their behaviors that create the environment for addiction. In these cases, it can be challenging for workers to identify successful outcomes with their work, and it can lead to questions about their job satisfaction and burnout.

This field is considered a growth industry, particularly as more people find themselves covered by health insurance under the Affordable Care Act. This policy requires that plans provide coverage for mental health programs and may include support for addiction services. In addition, many states are looking at reducing their prison populations and have directed more offenders to community-based services, which may include treatment for substance abuse.

perpetuated against society. Under this philosophy, there is no justice if the offender is not punished under the law.

The use of retribution draws on the concept of just deserts. The theory of just deserts argues that a punishment for a crime should be proportional or equal to the crime itself. Under this perspective, a serious crime would result in a serious punishment and a minor crime would result in a low-level punishment. While retribution often invokes a discussion about vengeance or revenge, this is not an appropriate response under retributive theory. However, the use of retribution can be a way to express the emotional or value-centered beliefs of the public on issues such as the death penalty or terrorism.19

Unlike other philosophies, retribution is not about improving public safety or other utilitarian functions. Retribution is about looking back at the act and enacting a punishment for that violation. This key feature is often confused with many of the policies developed under the tough-on-crime model that dominated the late 20th century in the United States. For example, mandatory minimum sentences were developed during the modern retributive era, which began in the 1970s and continues today. One of the most popular uses of mandatory minimum sentencing was the war on drugs, which began with the passage of the Anti–Drug Abuse Act of 1986. One of the more notable features of the law was that it mandated a sentence of five years for the possession of 500 grams of powder cocaine yet gave the same sentence for only 5 grams of crack cocaine. While this 100:1 sentencing disparity was reduced to an 18:1 ratio with the passage of the Fair Sentencing Act in 2010, the war on drugs has made a significant contribution to the rise in prison populations nationwide.

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Restoration

The theory of restoration is the only punishment philosophy that places the victim at the core of all decision-making. This feature is very different compared with other theories, which view crime as a violation against the state. The theory of restoration is best reflected in restorative justice practices, which you learned about in Chapter 5. While restoration has often been positioned in opposition to a retributive model, some scholars suggest that the two may actually have some common themes, as both strive for justice. In particular, it is important to note that a restorative philosophy does not mean that offenders are not punished for their crimes. Instead, the decision-making on how the crime should be punished involves a joint process between the victim, the offender, and the community. Justice becomes an opportunity for healing. Research demonstrates that victims who participate in restorative justice programs generally have higher rates of satisfaction with the process compared with victims whose cases are handled through traditional criminal courts. Evidence also suggests that offenders whose cases are handled in this fashion are also less likely to recidivate, making restorative justice a cost-effective model in reducing future offending.

Each of these punishment philosophies impacts the different types of sentences that are handed down by the courts. For example, under a model of deterrence or incapacitation, sentences may be more likely to feature time in a jail or a prison. In contrast, sentences handed down under a model of rehabilitation will be more likely to emphasize counseling and treatment. While these theories of punishment can influence how a judge will make a decision, these decisions are somewhat limited by the laws that are created by the legislature. In the next section, you will learn about some of the different sentencing structures that have been adopted by various states and the federal government.

DETERMINATE SENTENCING

How does a judge decide on a sentence for an offender? In some cases, the law dictates what type of punishment should be handed down for a specific crime. Many jurisdictions have passed determinate sentencing structures. Determinate sentencing is when the offender is sentenced to a specific term. While the law may allow for an offender to be released early due to good-time credits, these releases are incorporated into the law. This means that there is no opportunity for an early release based on the behavior of the offender, also known as parole. You will learn more about parole in Chapter 12.

Throughout most of history, judges have had discretion in handing out sentences to offenders. In most cases, judges were free to impose just about any type of sentence, from probation to incarceration. Essentially, the only guidance for decision-making came from the judge’s own value system and beliefs in justice. This created a process whereby there was no consistency in sentencing, and offenders received dramatically different sentences for the same offenses, whereby the outcome depended on which judge heard their case. While this practice allowed for individualized justice based on the needs of offenders and their potential for rehabilitation, it also left the door open for the potential of bias based on the age, race, ethnicity, and gender of the offender.

Sentencing Guidelines

During the 1970s, the faith in rehabilitation as an effective correctional approach began to wane and was replaced with the theory of “just deserts,” a retributive philosophy that aimed to increase the punishment of offenders for their crimes against society. In an effort to reform sentencing practices and reduce the levels of discretion
This table guides federal judges when determining the length of an offender’s sentence. They factor in the level of the offense as well as the offender’s past criminal history. Do you think these guidelines are helpful, or do they hinder the discretion of federal judges too much?

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within the judiciary, many jurisdictions developed sentencing guidelines to create systems in which offenders would receive similar sentences for similar crimes. At the heart of this campaign was an attempt to regulate sentencing practices and eliminate racial, gender, and class-based discrimination in courts. As part of the Sentencing Reform Act of 1984, the U.S. Sentencing Commission was tasked with crafting sentencing guidelines at the federal level. Several states have also adopted sentencing guidelines as part of their determinate sentencing structure. One of the key features of this act was the abolition of parole boards at the federal level.

Since their implementation in November 1987, these federal guidelines have been criticized for being too rigid and unnecessarily harsh. In many cases, these criticisms reflect a growing concern that judges are now unable to consider the unique circumstances of the crime or characteristics of the offender. Table 10.1 presents the federal sentencing guidelines.

Each federal crime is classified on the basis of its severity level and is ranked on a scale of 1 to 43. Depending on the specific circumstances of the crime and the defendant’s role in the offense, this value may be increased. Examples of these enhancements include characteristics about the victim (such as whether the victim was a government employee or a member of law enforcement), the crime (such as a hate crime or serious human rights offense), and the offender (mitigating factors and acceptance of responsibility by the offender). These categories are reflected along the left side of the table. The number of prior convictions is organized into six categories and is listed along the top of the table. To determine the sentencing range (in terms of months), you would find the intersection of the criminal history category and the offense classification plus any enhancements. For example, the crime of aggravated assault carries a base level of 14. If a firearm was discharged during the crime, the score increases by five levels. If the victim sustains bodily injury as a result of the crime, the score increases by an additional three levels. But if the offender accepts responsibility for the crime, the score decreases by two levels. As a result, the sentencing of this act is rated at a value of 20. If the offender has no prior history, the sentencing range for this offense is 33 to 41 months. If, however, the offender has five prior offenses, the sentencing range increases to 41 to 51 months.

Opposition to Sentencing Guidelines

In 2004, the U.S. Supreme Court heard the case of *Blakely v. Washington*. The Court held that while the state sentencing guidelines that were used by Washington State were intended to serve as a mandatory sentencing scheme, they violated a defendant’s 6th Amendment right to a trial by jury. *Blakely* states that only those facts that are either admitted by the defendant or proved beyond a reasonable doubt may be used to determine an appropriate sentence for the offender. The case of *United States v. Booker* applied this ruling to the federal sentencing guidelines. Even though the federal sentencing guidelines now serve as an advisory practice rather than a mandatory one, research by the U.S. Sentencing Commission indicates that the majority of sentences fall within the ranges specified by the guidelines. Others note that sentence severity has been reduced dramatically since *Booker*. However, minority offenders continue to receive slightly higher sentences than white offenders, as shown in Figure 10.2.

**INDETERMINATE SENTENCING**

In comparison with determinate sentencing structures, indeterminate sentencing practices generally set a minimum sentence length. The maximum sentence is reflected in the laws set forth by the legislature, though a judge may set a maximum
Indeterminate sentencing was first featured during the progressive era of the late 1800s. It was during this time that new innovations in corrections such as probation and parole first appeared. Indeterminate sentencing structures fit within the rehabilitative focus of this time period. The theory of indeterminate sentencing was that offenders would be released based not only on their time served but also their efforts toward reforming their criminal selves. As a result, the length of time that an offender served was determined by a parole board, which would consider factors such as the types of programming that an offender participated in and his or her institutional behavior and plan for reintegration in determining whether someone would be released. While the 1970s saw a shift toward determinate and mandatory sentencing structures, many states still retain some form of indeterminate sentencing and the use of parole boards today.

**MANDATORY SENTENCES**

While determinate sentences were designed to limit the discretion of judges, mandatory sentences have effectively eliminated judicial discretion from the criminal justice system. Under a **mandatory sentencing** scheme, the law prescribes the specific punishments. Earlier in this chapter, you learned about how the Anti–Drug Abuse Act of 1986 created mandatory minimum sentences for the possession of certain illicit drugs. Congress has also created mandatory sentencing practices for certain gun-related crimes, sexually based offenses (including pornography), and white-collar crimes. However, we have seen several other examples of mandatory sentences, some

![Figure 10.2: Race of Prisoners Serving LWOP for Nonviolent Offenses, by Jurisdiction](https://www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_0.pdf)
Criminal Sentencing in China

Unlike the United States, the criminal justice system in China is a relatively new phenomenon. As a result, it has embarked on several revisions and reforms over the past four decades. In some ways, the features of China’s criminal justice system are similar to those in the United States, and in others, there are marked differences between the two.

While several jurisdictions in the United States are shifting the way they look at some drug offenses, nonviolent drug-related crimes are ranked as severe crimes in China (along with acts of violence, such as murder and robbery). Research on drug trafficking in China demonstrates that judges are most likely to make their sentencing decisions in these cases based on the amount of drugs involved. Since many smuggling cases involve high quantities of drugs such as heroin, the sentences are quite significant as most offenders are sentenced to either more than 10 years in prison, a life sentence, or even death. However, Chinese law allows for offenders to express remorse for their crimes, which, in turn, can significantly reduce the length of the sentence that an offender will receive, even for these serious crimes. Finally, the country has also relied less on the death penalty in recent years. During the “strike hard” era of punishment, China was a consistent user of the death penalty and even carried out more than 1,000 executions in a month. While China still leads the world in the number of executions, some scholars have suggested that China may begin to shift its thinking on the issue as other Southeast Asian countries abolish the death penalty in law or in practice.

In addition to punishments by the judiciary for criminal offenses, China allows for individuals to be sent to a labor camp for up to three years. These decisions are based on administrative law and do not allow for judicial interventions. This means that an individual can be sent away for a “re-education through labor” sentence (referred to as laodong jiaoyang) without any criminal charges filed or being processed by the criminal court. This is particularly interesting in that many of the students of such camps are sent there as a result of their involvement in minor crimes, such as vandalism, drug use, and theft. The labor camp is designed to rehabilitate first-time offenders, and following the completion of their service, they do not have a criminal record.

The current sentencing practices in China have been pushed by a desire to “balance leniency and severity.” In one high-profile incident, an offender offered a victim financial restitution in exchange for a reduced sentence. While some suggest that this reflected a restorative justice model, others believed that the case was so minor that it would never have been considered for prosecution under the new reforms. Others still questioned whether preferential treatment was given to this offender because of his financial status. Indeed, white-collar offenders who have privileged status (such as a government official) are less likely to receive a sentence of incarceration than are offenders of low social status. Given that the modern judicial system in China is a relatively new one, it is likely that they will continue to experience efforts to reform and revise sentencing practices.

CRITICAL THINKING QUESTIONS

1. Given that China’s criminal justice system is relatively new, what can they learn from the experiences of the American criminal justice system?

2. What are some of the ways in which the Chinese system of justice is similar to that of the United States? In what ways does it differ?
Opposition to Mandatory Sentences

One of the major criticisms of mandatory sentencing practices is that they prevent the judge from considering the unique characteristics of the offense or the offender in handing down a sentence. In effect, the power of sentencing is shifted to the prosecutor, who determines whether a charge that carries a mandatory sentence will be filed against an offender. Mandatory sentencing has been tied to the dramatic increase in prison populations throughout the late 20th and early 21st centuries. As a result, many states have begun to repeal their mandatory sentencing laws (Figure 10.3). South Carolina and Pennsylvania have eliminated their use of mandatory sentences for school zone drug cases. Others, such as Ohio and California, have replaced mandatory prison sentences for first-time drug offenders with drug treatment programming. The U.S. Supreme Court recently held that sentencing enhancements for violent felonies under the Armed Career Criminals Act are unconstitutional on the grounds that defendants were denied their right to due process and that the law was vague in its application (Johnson v. United States). Mandatory sentencing laws have

Figure 10.3  State Sentencing and Correction Trends

Many states are undertaking reforms of their sentencing and corrections practices. What reform efforts has your state undertaken?

also been used to deal with habitual offenders. You’ll learn about these types of sentences in Current Controversy 10.1 at the conclusion of this chapter.

**CAPITAL PUNISHMENT**

The death penalty has been referred to as the ultimate punishment, reserved for the worst of the worst offenders. However, the United States is one of the last remaining developed countries to engage in executions as a form of punishment. And its implementation throughout the United States varies dramatically. Currently, there are 31 states (as well as the federal government and the military) that allow for the use of the death penalty. Figure 10.4 shows states that currently allow and prohibit the use of capital punishment.

Since the death penalty is aimed for the worst of the worst offenders, states have restricted its use to crimes of first-degree murder with special circumstances. A first-degree murder is defined as one in which the crime was premeditated, meaning that the offender planned the attack on the victim. States vary on the types of special circumstances that can make a case death penalty eligible; examples of this include a murder that was committed during a felony (such as rape, kidnapping, or burglary) or involved a particular type of victim, such as a police...
officer or government official. The federal government permits the use of the death penalty in cases of treason or espionage.

The first use of the death penalty in the United States involved the execution of Captain George Kendall in 1608 for acts of treason against the government. Since then, there have been an estimated 16,000 executions over the past four centuries. Throughout history, our system has been plagued with sentencing practices that were often disproportionate and arbitrary. As a result, the U.S. Supreme Court determined in Furman (1972) that the administration of the death penalty at that time constituted cruel and unusual punishment and violated the 8th Amendment of the Constitution. As a result, 629 death sentences in 32 states were overturned.

Legal Challenges

Following the Furman decision, several states developed new death penalty statutes to address these constitutional violations and bring the death penalty back to life. In an attempt to resolve the issue of arbitrary administration, North Carolina and Louisiana designed laws requiring mandatory death sentences for capital crimes. These states posited that such laws would eliminate the unregulated discretion of the jury decision-making process that concerned the Furman court. The justices held that mandatory death sentences would violate “the fundamental respect for humanity” and declared these laws unconstitutional. However, the Court approved the statutes presented in the cases of Gregg v. Georgia (428 U.S. 153), Jurek v. Texas (428 U.S. 262), and Proffitt v. Florida (428 U.S. 242). Known as the Gregg decision, these cases developed a new system by which offenders could be sentenced to death. The provisions in these cases created three new procedures that dramatically altered the administration of capital sentences. First, the Gregg decision separated the guilt and sentencing decisions into two trials. As a result, juries must first determine whether the defendant is guilty of capital murder and then decide in a separate trial if the convicted person should receive the death penalty. For all states that have the death penalty, the alternate option is a life without the possibility of parole. This means that regardless of the sentence, the offender will die behind prison walls. Second, an automatic appellate process was created, which mandated that the highest court of each state review all convictions and death sentences to protect against constitutional errors. Finally, states implemented guided discretion statutes to help juries weigh the effects of aggravating and mitigating factors in applying a death sentence. Aggravating factors are circumstances that increase the severity of the crime, such as torture, excessive violence, or premeditation. Mitigating factors include references to the defendant’s background that may explain the defendant’s behavior but that do not constitute a legally relevant defense. In order for a death sentence to be handed out under these guided discretion statutes, a jury must determine that the value of the aggravating factors outweighs any mitigating factors. If the value of the mitigating factors exceeds any aggravators, then life without the possibility of parole (or a similarly designated sentence of incarceration) is given. Since the reinstatement of the death penalty, there

WEB LINK
Death Penalty Information Center

VIDEO
2015 Was a Historic Year for the Death Penalty in America

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The number of executions has been declining, in part due to legal challenges related to issues such as the use of lethal injection drugs.

Figure 10.5 illustrates the executions that have been carried out over the past 40 years.

Methods of Execution Under the 8th Amendment

Recent execution history in the United States has involved five methods of execution: hanging, firing squad, electrocution, lethal gas, and lethal injection. While each had its day of popularity, most of these methods have drifted into obscurity in light of constitutional challenges. Today, the primary method of execution for all states is lethal injection, though, as you saw in Figure 10.4, several states still allow these other methods.

Firing Squad

The firing squad involves strapping the offender into a chair and placing a white cloth over the offender’s heart. Five shooters are armed with rifles, although only four of the weapons are loaded with live ammunition. The cause of death is dramatic blood loss as a result of a rupture of the heart and/or lungs. The use of the firing squad was made famous in modern times with the execution of Gary Gilmore in January 1977, the first execution following the reinstatement of the death penalty in Gregg v. Georgia (1976). With the introduction of lethal injection in Utah in 1980, the state legislature retained the choice of the firing squad “in case the man who was going to die wanted his blood to be shed, as a bid for salvation.” In 2004, the Utah legislature enacted a provision that eliminated the option of the firing squad.
However, Utah recently reauthorized the use of the firing squad if other methods were found to be unconstitutional. The firing squad is also an accepted form of execution in Oklahoma but can only be used if lethal injection is found to be unconstitutional.

Hanging

Like the firing squad, hanging remains a constitutionally valid method of execution, even as many states have eliminated its use. Historically, hangings account for the majority of all executions throughout the history of the United States. Today, hanging is utilized as an option for execution in New Hampshire and Washington. Death by hanging is designed to occur when the offender is dropped through a trap door, causing the person’s body to fall and his or her neck to break, resulting in death.

Electrocution

During the late 1800s, electrocution was developed as a more humane option than hanging. Death occurs from a high dose of electricity over a 30-second period that is administered to the body through electrodes that are attached to the skull and the leg. In some cases, multiple attempts are required to cause death. While the Court upheld the use of the electric chair in In re Kemmler (1890), many states have since outlawed its use, with Nebraska being the most recent state to declare the electric chair unconstitutional in 2008. Eight additional states (Alabama, Arkansas, Florida, Kentucky, Oklahoma, South Carolina, Tennessee, and Virginia) still permit the use of electrocution under law, though no states have carried out an execution in this manner since the adoption of lethal injection. Justice Brennan argued in 1985 that the practice of electrocution is “a cruel and barbaric method of extinguishing human life, both per se and as compared with other available means of execution.” In recent history, several cases of botched executions via electrocution have made headlines. In the state of Florida, the executions of Jesse Tafaro in 1990 and Pedro Medina in 1997 resulted in flames erupting from their heads due to the improper use of sponges designed to conduct electricity to their brains. In both cases, the men did not die quickly. The state responded to these issues, stating that the botched executions were a result of human-related error.

Lethal Gas

As the public grew concerned with the potential for pain in execution methods, several states looked toward technological advances in their search for humane execution. For many states, the move to lethal cyanide gas was the answer, and it was first introduced by the state of Nevada in 1921. While lethal gas is an option in Arizona, California, Missouri, Oklahoma, and Wyoming, the practice is rarely utilized today. In 1996, the Ninth Circuit Court of Appeals, in the case of Fiero v. Gomez, held that the use of the cyanide gas was unconstitutional. Recently, Oklahoma passed legislation allowing for a lethal dose of nitrogen gas as an alternative to lethal injection.
Lethal Injection

Currently, the primary method of execution is lethal injection. First adopted by the state of Oklahoma in 1977 (with the first execution by lethal injection carried out by the state of Texas in 1982), lethal injection represents the concept of the most humane medicalized method of execution to date. Since its acceptance as a method of execution, lethal injections have accounted for the majority of all executions carried out during the modern era of the death penalty.46

The constitutionality of the use of lethal injection has been challenged in the courts and involves not only the petitions of death row inmates but also the opinions of medical professionals. This challenge is based on the administration of the drugs used during the execution process and inquires whether (1) the chemicals cause unnecessary pain and (2) whether the lethal injection “cocktail” masks the true levels of pain experienced by the inmate during the execution. In 2008, the Court heard the case of Baze v. Rees, which challenged the lethal injection process in the state of Kentucky. The Court held that the use of sodium thiopental as a sedative, which was designed to render the inmate unconscious while drugs designed to stop the heart and lungs from functioning were administered, did not constitute cruel and unusual punishment. Since then, several manufacturers of this and similar drugs have either halted production or prohibited their use in lethal injection. As a result, states have been left to seek out alternative options for use in either a one- or three-drug protocol. One option that has been used by several states is midazolam. Several inmates challenged the use of this drug after executions in Oklahoma and Arizona were identified as botched because it was unclear whether the inmate was appropriately sedated before other drugs were administered. In Glossip v. Gross (2015), the Court held that the use of midazolam was constitutional.47

In addition to concerns over the way in which people are executed, the Court has heard several challenges over the past three decades about who can be executed (such as juveniles and the intellectually disabled) as well as procedural issues, such as juror selection, racial bias, and ineffective assistance of counsel. In addition, public opinion polls show that support for the death penalty has declined significantly over the past two decades and that individuals are leaning more toward support for life without the possibility of parole for offenders due to the high financial costs of the death penalty. Another key debate in this issue is whether there is a risk of executing an innocent offender. You’ll learn more about this debate in Current Controversy 10.2 at the conclusion of this chapter.

CONCLUSION

As you have learned in this chapter, our correctional system is tied to how and why offenders should be treated under the law. Whether it is rehabilitation or retribution that guides our practices, these foundations have a significant effect on the programs and practices that extend from our courts to our correctional system. As you read the next two Current Controversy debates, consider which correctional philosophies are best represented in these practices. Are these policies an accurate representation of what our criminal justice system should stand for? Are there alternatives that our criminal justice system should consider that would better serve our communities?

Lethal injection

A method of execution that involves the injection of drugs designed to stop the heart and lung functions, resulting in the death.
Do Habitual Sentencing Laws Deter Offenders?
—Kimberly Dodson—

INTRODUCTION

In the 1970s, there was an antirehabilitation movement adopted by policymakers and legislators across the United States. The final blow to rehabilitative efforts came in the form of a report that declared “nothing works” to reduce recidivism. Rehabilitation gave way to the “get tough” movement of the 1980s and 1990s. The more punitive approach toward offenders included the development and implementation of policies to punish offenders through incapacitation, bolster victims’ rights, and address public safety concerns. Habitual-offender laws were an outgrowth of this policy shift.

Habitual-offender statutes target individuals who repeat the same or similar types of criminal offenses. Under these laws, habitual offenders receive harsher legal penalties because of their continued involvement in criminal behavior. Most states have statutes that include provisions for sanctioning both habitual misdemeanor and felony defendants. Being classified as a habitual offender can lead to additional criminal penalties, including greater fines and the loss of certain rights and privileges (e.g., driver’s license revocation, inability to purchase or own firearms, or termination of parental rights). However, the most common type of sanction is a sentencing enhancement that allows or requires a judge to increase the term of incarceration for repeat or habitual offenders.

Three-strikes legislation is arguably the most well-known habitual-offender law in the United States. In California, if an offender has two prior felony convictions, a third felony offense (or strike) triggers a mandatory sentence of 25 years to life. California’s three-strikes law is one of the harshest in the country. The rationale for habitual-offender laws is deterrence.

As you recall from earlier in the chapter, deterrence consists of three primary components: certainty, severity, and celerity (i.e., swiftness). Certainty refers to the likelihood an offender will be punished for wrongdoing. If an offender believes the certainty of apprehension and punishment is great, he or she is more likely to be deterred. The severity of the punishment should not be excessive but rather proportionate to the crime committed to have the greatest deterrent effect. Swift punishment sends a message to would-be offenders that the consequences of criminal behavior will be immediate. Theoretically speaking, when these three components are applied properly, deterrence can be achieved. Deterrence is based on the premise that individuals are rational, calculating actors who make behavioral choices that maximize pleasure and minimize pain. If the consequences of criminal offending are sufficiently painful, individuals will likely choose not to engage in it. Following this logic, habitual-offender laws may have the potential to deter individuals because the consequences for repeat offenders are substantial.

Proponents of habitual-offender laws believe repeat offenders are unable or unwilling to adhere to the laws of society and, as a result, should receive severe sanctions. They argue that certain and severe punishment will deter the future offending of habitual criminals and send a message to would-be repeat offenders that if they choose to break the law, they will face serious consequences.

The certainty of punishment is the most important element under deterrence theory. To be deterred, individuals must calculate that the certainty of apprehension and punishment are relatively high. Therefore, policymakers and criminal justice practitioners must increase the public perception that those who choose to violate the law will be caught and sanctioned.
Policymakers and criminal justice practitioners have successfully heightened the public’s awareness regarding habitual-offender laws. In California, for example, the highly publicized cases of Kimber Reynolds and Polly Klaas led to the passage of three-strikes legislation, which was followed by an intense media blitz. In all, 25 states have established three-strikes and/or similar habitual-offender laws, and the prosecution of two- and three-strikes cases across the country has increased dramatically since the first legislation was passed in 1993. Thus, it stands to reason that the certainty of punishment for repeat offending has significantly increased, and it is difficult to imagine that the public is unaware of the potential consequences of violating habitual-offending laws. Additionally, research consistently demonstrates that the certainty of punishment is a deterrent to criminal behavior.

Opponents of habitual-offender laws are skeptical about the deterrent effect of these laws. Some policymakers believe that it is unrealistic to assume that habitual criminals are knowledgeable about these laws. If this is true, then the decision to commit future crimes is made without regard to the potential consequences of violating habitual-offender statutes because the offender lacks the knowledge to conduct a cost–benefit analysis. Research shows a significant portion of offenders suffer from mental illness, including depression, bipolar disorder, and schizophrenia. Mentally ill individuals often lack the intellectual capacity to make rational decisions, so it is unlikely habitual-offender laws will act as a deterrent for this population of offenders. Taken together, it appears that not all offenders rationally weigh and consider the possible costs and benefits of their behavior. On the contrary, there is a significant body of research that indicates they make decisions impulsively.

Although supporters contend that habitual-offender laws ensure the certainty of punishment, there is evidence to suggest otherwise. For example, research indicates that prosecutors frequently decline to pursue charges under habitual-offender laws. Prosecutors can move to dismiss or strike prior felony convictions from consideration during sentencing. There also is evidence to suggest habitual-offender laws are not uniformly applied across jurisdictions.

When the probability of punishment is uncertain, the chances individuals will commit additional offenses is much more likely.

Opponents also argue that habitual-offender laws are overly severe. The public has been led to believe that these laws are directed at deterring serious habitual offenders, especially those with violent criminal histories. However, some estimates indicate that about 70% of defendants charged under habitual-offender statutes are nonviolent. Habitual offenders also may trigger prosecution even if their third offense is a misdemeanor. For example, Robert Fassbender had two prior felony robbery convictions, and he faced life in prison for his third offense—stealing a pack of donuts valued at less than one dollar.

One unintended outcome of habitual-offender laws is a backlog of criminal cases. Because the penalties under habitual-offender laws are so severe, more and more defendants are choosing to go to trial rather than plea bargain. Jury trials significantly slow down the courts’ ability to process cases quickly. Deterrence theory states that the punishment should be swift so that the offender will associate actions with consequences. Delays in court processing hinder the deterrent effect of habitual-offender laws.

Deterrence theory states that the severity of the punishment should be proportionate to the crime committed, or the “punishment should fit the crime.” The penalties under habitual-offender statutes for repeat offenders seem to meet this criterion. Most habitual-offender laws are designed to punish serious criminal offending, especially violent crimes such as robbery, rape, and murder. It seems reasonable that harsh sanctions like life in prison for repeated acts of violence are proportionate and thus warranted. As previously mentioned, habitual-offender laws, including potential punishments, have received a great deal of media attention in the last two decades. Knowing that the sanctions for repeat offending are serious, the public has been put on notice regarding the possible consequences. Rational individuals should be able to weigh the benefits of repeat offending against the costs, resulting in deterrence.
SUMMARY

Proponents of habitual-offender laws argue that certain and severe punishment should be imposed on habitual or repeat offenders to deter criminal behavior. In addition, there are some who claim that their states experienced a significant decline in serious crime in the wake of the implementation of habitual-offender laws. Opponents maintain that habitual-offender laws have not had the deterrent effect that their supporters claim. Although supporters argue that crime rates decline after the implementation of habitual-offender laws, others claim that this was merely part of a downward trend in crime rates across the United States, even in states without habitual-offender laws. Below are some questions to consider.

DISCUSSION QUESTIONS

1. What are some of the arguments that indicate that habitual-offender laws deter crime? Give specific examples.

2. What are some of the arguments that indicate that habitual-offender laws are not a deterrent to crime? Give specific examples.

3. Do you think habitual-offender laws deter criminal behavior? Why or why not?

Current Controversy 10.2

Is the Risk of Executing Innocent People Acceptably Low?

—Scott Vollum—

INTRODUCTION

Most agree that executing innocent people is the worst thing that could happen in a criminal justice system. But there is vast disagreement about whether this is likely to happen. As former Supreme Court justice Antonin Scalia has said, if an innocent person had ever been executed (in the contemporary death penalty period), people would be “shouting from the rooftops” and calling for an end to the death penalty. The question here is whether the risk has been sufficiently minimized so as to be acceptably low or is the risk still unacceptably high, warranting serious concerns about the use of the death penalty in the United States.
The Risk of Executing an Innocent Person Is Acceptably Low

In spite of any acknowledged risk of wrongful execution, the fact remains that there has been no officially recognized (meaning by criminal justice or governmental authorities) case of an innocent person being executed in the modern era of the death penalty. Justice Scalia made this point in Kansas v. Marsh, declaring that in the modern death penalty era, there has never been “a single case—not one—in which it is clear that a person was executed for a crime he did not commit. If such an event had occurred in recent years, we would not have to hunt for it; the innocent’s name would be shouted from the rooftops.”64 However, even those who reject any notion of innocent people having been executed in the modern death penalty era acknowledge some risk—that it could possibly happen. But, they argue, this risk is present in all criminal justice endeavors, and to eliminate any risk would mean bringing all crime control efforts to a screeching halt. Given that the death penalty enjoys the most rigorous procedural safeguards to ensure only the right person is being executed, the risk is sufficiently low.

As you learned earlier in this chapter, the changes to the death penalty in the 1970s meant that states needed to use “super due process” in cases where an offender was facing the death penalty. The intent of these procedural safeguards was to ensure the proper and fair application of the death penalty and minimize any risk of executing an innocent person. One of the outcomes of this is a lengthy appeals process that often spans decades before an individual is executed. The exonerations that have occurred since the 1970s provide evidence that these safeguards are working, and by extension, it can be argued that the risk of executing an innocent person is kept sufficiently low.

Some take this argument one step further and note that the risk of executing innocent people must be weighed against the risk of not having the death penalty. In other words, the benefits that are gained by having the death penalty outweigh any small risk that exists of executing an innocent person.

The argument in terms of public safety takes the form of either general deterrence (that the death penalty stops other people from committing murder) or incapacitation (that the death penalty physically prevents the particular offender from causing any further harm). Most famously, Isaac Ehrlich conducted such an analysis in the early 1970s and concluded that for each execution, eight murders were prevented.65 If this is true, it is argued, the minimal risk of executing an innocent person is acceptable given that substantially more innocent lives are being saved than lost. Similarly, if we assume that the death penalty is eliminating people who would otherwise cause further harm (whether in prison or if/when they return to society), including possibly committing more murders, the argument can be made that the death penalty is reducing harm to and the death of innocent people at a greater rate than the minimal risk of wrongful execution would yield.

The Risk of Executing an Innocent Person Is Unacceptably High

Of course, the aforementioned arguments rely on the assumption that the risk of wrongful execution is very low and that execution of innocent people, if it happens at all, is an extremely rare event. Contrary to this assumption, there is evidence that death penalty cases are particularly susceptible to errors and carry a heightened risk of wrongful conviction and execution. This is primarily due to two things: the nature of the crimes and the nature of capital trials. First, the death penalty is intended only for the most serious and heinous murders. Capital murders are typically very brutal crimes that evoke outrage and horror. This reaction by the public and officials alike puts great pressure on police to apprehend and arrest the perpetrator and on prosecutors to secure a conviction. It is argued that this creates a situation primed for overzealous investigation and prosecution. This, in turn, spawns events and factors known to contribute to wrongful convictions, such as false confessions, faulty eyewitness testimony, and prosecutorial misconduct.66 Second, the jury selection process is unique in capital murder trials as juries are responsible for determining both the guilt of and sentence for the offender. As a result, juries must be death qualified. That is, individuals who could under no circumstances sentence someone to death (even if that’s what the law and evidence
require) must be excluded from the jury. Research has shown that the death qualification process predisposes jurors toward guilt by injecting the presumption of guilt into the voir dire (jury selection) process. Prospective jurors are asked to assume a determination of guilt in answering the question of whether they then would be able to vote for a death sentence under the appropriate circumstances. Research has shown that this creates a conviction-prone jury and increases the likelihood of convicting an innocent person and possibly sending that person to his or her death.67

Those who believe that the risk of executing an innocent person is unacceptably high often cite the large number of exonerations as evidence. As of 2015, there have been 156 individuals wrongfully sentenced to death and eventually formally exonerated since 1973.68 Given this number, we are talking about more than one exoneration for every 10 executions (as of February 2016, there have been 1,429 executions in the United States). A recent study examined all cases in which offenders were sentenced to death and concluded that there was an error rate of 4.1%, meaning that about 1 in 25 individuals sentenced to death were actually innocent.69 In addition, there have been several heavily documented cases (such as Carlos DeLuna and Cameron Willingham) in which the evidence strongly suggests that a person who was executed was indeed innocent.

In regard to the suggested benefits of the death penalty, some call into question the incapacitative value of the death penalty because capital murderers typically present no greater threat of further harm than other offenders.70 Additionally, the option of true life without parole sentences can accomplish the same level of incapacitation as the death penalty without the risk of executing an innocent person.

**SUMMARY**

Others would say that it is just one among many historical examples of the heightened and endemic risk of killing an innocent person when you use the death penalty. We are compelled to acknowledge that there is some risk that innocent people will be executed as long as the United States continues to use the death penalty. Whether this risk is too great and the consequences too grave or whether it is as minimized as possible and worth the benefits of maintaining the death penalty will continue to be debated. On both sides is a sincere desire to save innocent lives.

**DISCUSSION QUESTIONS**

1. Do you agree with Justice Scalia that if an individual had been wrongfully executed, people would be shouting from the rooftops in calling for an end to the death penalty?

2. Do you think that the United States would stop using the death penalty if there were an officially acknowledged execution of an innocent person?

3. Do you think that there is an acceptable risk of wrongful execution in terms of the benefits of the death penalty outweighing this potential cost? If so, how many wrongful executions are acceptable? If not, on what grounds do you base your answer?

**KEY TERMS**

Aggravating factors 246  
Celerity 234  
Certainty 234  
Determinate sentencing 239  
Electrocution 248  
Firing squad 247  
General deterrence 234  
Hanging 248  
Incapacitation 237  
Indeterminate sentencing 241  
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Lethal gas 248  
Lethal injection 249  
Mandatory sentencing 242  
Mitigating factors 246  
Parole 239  
Rehabilitation 236  
Restoration 239  
Retribution 237  
Severity 234  
Specific deterrence 234
DISCUSSION QUESTIONS

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1. How have sentencing philosophies evolved throughout history? What features suggest that retribution continues to dominate our sentencing practices? What signs exist that indicate that we may be moving away from retribution?

2. Compare and contrast indeterminate and determinate sentencing. What are the benefits and drawbacks of each?

3. What are some reasons for opposing mandatory sentencing?

4. What is required in order for deterrence to be an effective sentencing philosophy? In which cases is deterrence successful? In which cases does it fail?

5. What are sentencing guidelines, and why are they problematic?

6. What are the five methods of execution in the United States? Which is used most frequently now?

LEARNING ACTIVITIES

1. Review some of the criminal laws in your state. Identify which of the five sentencing philosophies best describes the types of punishments that are used for perpetrators of these crimes.

2. Research your state’s laws on capital punishment. Discuss how these practices fit within your state’s general sentencing practices.

3. Identify a case from the most recent term of the U.S. Supreme Court on sentencing practices. How will this decision alter how offenders are sentenced in your state? What challenges do you believe will arise as a result of this decision?

SUGGESTED WEBSITES

- The Sentencing Project: http://www.sentencingproject.org
- Death Penalty Information Center: http://www.deathpenaltyinfo.org

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