

Punishment and Sentencing

TEST YOUR KNOWLEDGE: TRUE/FALSE

1. There is little practical difference between a criminal law and a civil law.
2. One purpose of criminal punishment is retribution or punishment that individuals should receive based on the seriousness of their criminal acts.
3. An important purpose of sentencing guidelines is to ensure uniform, proportionate, and predictable sentences.
4. Truth in sentencing laws are intended to ensure that offenders serve a significant percentage of their sentences.
5. The death penalty for crimes other than homicide or treason constitutes cruel and unusual punishment in violation of the Eighth Amendment to the U.S. Constitution.
6. Courts carefully examine the criminal punishment imposed by state legislatures to ensure that the penalty is precisely proportionate to the seriousness of the crime.
7. The Equal Protection Clause of the Constitution plays no role in sentencing because there is no need to ensure that judges do not consider an offender's race, ethnicity, or gender in handing down a criminal sentence.

Check your answers on page 71.

MAY MISSOURI LEGALLY EXECUTE 17-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."

INTRODUCTION

One of the primary challenges confronting any society is to ensure 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 in colonial times and 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 25 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 repealed this punishment only in 1972. Delaware, in fact, subjected more than 1,600 individuals to whippings in the 20th 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.”³ In 1994, President Bill Clinton and 24 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, and
- 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 ensure 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, retribution, 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.
- *Plea Bargaining.* A significant number of criminal cases are plea bargained and are not brought to trial.
- *Truth in Sentencing.* The authority of parole boards to release prisoners prior to the completion of their sentences 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 more 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 ensure that death is a penalty proportionate to the offender’s crime.
- *Terms of Years.* Courts have deferred to the decisions of state legislatures and the Congress in regard 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 among the interests of society, defendants, and victims in the sentencing process. You should make an effort to develop your own theory of punishment.

PUNISHMENT

Professor 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.⁵ 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.⁶

- 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 to impose 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 7-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 website 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. What of the argument that Justice Ginsburg overlooked 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 cannot easily claim to have been punished? On the other hand, there was evidence that registrants were scorned by the community, experienced difficulties in employment and 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 lives around or whether the goal of punishment should be to safeguard society by locking up offenders. Some 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 acts. The retributive philosophy is based on the familiar biblical injunction of “an eye for an eye, a 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, a fine, or 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 **specific 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 responsible members of society.

The 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 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 “for all but the profoundly vengeful, [the sentence] should not depreciate the seriousness of his offenses.”⁹ Do you agree with Judge Frankel’s reasoning and sentence?

SENTENCING

Various 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, as a condition of probation, following imprisonment, or in combination with a fine.
- *Death.* Thirty-one states and the federal government provide the death penalty for homicide. The nineteen other states and Washington, D.C., 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

Approaches to Sentencing

The approach to sentencing in states historically has shifted in response to the prevailing 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 Sentence.** 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 Sentence.** 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 Sentence.** The state legislature provides judges with the ability to set a minimum and maximum sentence within defined limits. In some jurisdictions, the judge possesses discretion to establish only 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 the 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, in the case of federal offenses, the president of the United States 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, Section 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 person and responded by pardoning four individuals on death row and commuting the sentences of over 100 individuals to life in prison. In another example, in 2010 Florida Governor Charlie Crist pardoned the deceased lead singer of the Doors, Jim Morrison, who had been convicted in 1970 for lewd behavior during a Miami concert.

Sentencing Guidelines

At the turn of the 20th 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 sentence in the event the offender 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 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 composed 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 requires the judge to undertake as many as seven separate steps. The federal guidelines also specify that any plea bargain (a negotiated agreement between defense and prosecuting attorneys) must be approved by a judge to ensure 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 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

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 90 months rather than the standard sentence of 53 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

The decisions in *Apprendi* and in *Blakely* were relied on by the Supreme Court in *Cunningham v. California* to hold unconstitutional California's determinate sentencing law (DSL). Cunningham was tried and convicted of the

continuous sexual abuse of a child under the age of 14. Under the DSL, the offense is punishable by imprisonment for a lower term of 6 years, a middle term of 12 years, or an upper term sentence of 16 years. The judge was obligated to sentence Cunningham to the 12-year middle term unless the judge found one or more additional facts in aggravation. The trial judge found six aggravating circumstances by a preponderance of the evidence that outweighed the single mitigating factor, and Cunningham was sentenced to 16 years. The Supreme Court held that “fact finding to elevate a sentence . . . falls within the province of the jury employing a beyond-a-reasonable-doubt standard. . . . [B]ecause the DSL allocates to judges sole authority to find facts permitting the imposition of an upper term sentence, the system violates the Sixth Amendment.”¹⁴

In 2005, 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 50 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 30 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. Why? An advisory system enables judges to formulate a sentence without consulting with a jury. On the other hand, mandatory guidelines under the Supreme Court’s decisions require the jury to find each fact on which a sentence is based beyond a reasonable doubt. The Court later held that because judges may exercise broad discretion in sentencing under the guidelines, the guidelines are not subject to a challenge based on the fact that they are void for vagueness.¹⁵ 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’s pronouncement that the guidelines should be considered as advisory rather than as binding.¹⁶

In *Rita v. United States*, *Gall v. United States*, and *Kimbrough v. United States*, the U.S. Supreme Court once again addressed the federal guidelines and explicitly held that the guidelines are advisory.¹⁷ In these judgments, the Court held that an appellate court should examine whether a judge’s sentencing decision, whether inside or outside the sentencing range in the guidelines, is reasonable. In other words, a trial court judge does not have to satisfy an extraordinarily high standard on appeal to justify a sentence that departs from the guidelines.

More recently the U.S. Supreme Court in *Alleyne v. United States* held by a vote of 5–4 that a fact that triggers a *mandatory minimum sentence* (discussed below) is an “element” of the crime and must be found by a jury beyond a reasonable doubt.

The jury convicted Alleyne of carrying a firearm during the perpetration of a violent crime, carrying a mandatory minimum sentence of five years. The judge determined that Alleyne had “brandished” the weapon, increasing the mandatory minimum sentence to seven years. The Supreme Court held that whether the defendant “brandished” the weapon was an element of the crime that must be found by the jury beyond a reasonable doubt. In other words, an “ingredient of a crime” that increases a mandatory minimum sentence must be determined by the jury rather than by the judge.¹⁸

In *Peugh v. United States*, Peugh was convicted of bank fraud to finance his faltering farm-related businesses. Peugh argued that the *Ex Post Facto* Clause of the U.S. Constitution required that he be sentenced under the 1998 version of the Federal Sentencing Guidelines in effect at the time of his crime rather than the 2009 version in effect at the time of sentencing because the 2009 Guidelines call for a greater punishment than attached to bank fraud in 2000 when his crimes were committed. His sentencing range under the 1998 Guidelines was 30 to 37 months. The 2009 Guidelines in effect when Peugh was sentenced in May 2010 increased the sentencing range to 70 to 87 months. The U.S. Supreme Court held that although the Guidelines are purely advisory, they remain a starting point of analysis, and the retroactive increase in the Guidelines range applicable to a defendant creates a “sufficient risk of a higher sentence to constitute an *ex post facto* violation.” Although the Guidelines are advisory, the Court noted that “Sentencing Commission’s data indicate that when a Guidelines range moves up or down, offenders’ sentences move with it.”¹⁹

The next year, in *Molina-Martinez v. United States*, a sentencing report prepared by the Department of Probation incorrectly calculated Molina-Martinez’s guideline range as 77 to 87 months rather than the correct range from 70 to 87 months. The trial court sentenced Molina-Martinez to a prison term of 77 months. Justice Anthony Kennedy noted that the district court had offered no explanation for Molina-Martinez’s sentence, and he held that there was a “reasonable probability” that the trial court would have imposed a different sentence had the judge been aware that 70 months rather than 77 months was the lowest sentence considered appropriate under the guidelines. Justice Kennedy held that when a defendant is “sentenced under an incorrect Guidelines range [the defendant] should be able to rely on that fact to show a reasonable probability that the district court would have imposed a different sentence under the correct range. That probability is all that is needed to establish an effect on substantial rights for purposes of obtaining relief.”²⁰

In another 2016 decision, the U.S. Supreme Court determined that the Sixth Amendment right to a speedy trial does not apply to the sentencing of a defendant who has pled guilty. Brandon T. Betterman, following a guilty plea, spent 14 months in a county jail in Montana awaiting sentencing and subsequently was sentenced to seven years in prison, with four years suspended. The Court, while indicating that Betterman might seek a remedy under another constitutional provision, rejected Betterman's argument that holding him in the county jail for 14 months violated his constitutional rights.²¹

PLEA BARGAINING

The vast number of federal and state criminal cases are not brought to trial and instead are disposed of by a guilty plea as part of a **plea bargain**. In a plea bargain, the defendant agrees to plead guilty (or, in some instances, *nolo contendere*). The Federal Rules of Criminal Procedure adopted by the U.S. Congress establish the procedures for the prosecution of cases in federal courts. The Federal Rules identify three types of plea bargaining.

1. *Charges*. The prosecutor dismisses some of the charges against the defendant or charges the defendant with a less serious offense. This results in a less severe prison sentence and the defendant avoids a conviction for a more serious offense.
2. *Sentence*. The prosecutor agrees to request the judge to issue a specific sentence. This may involve the length of the sentence, a request that sentences for multiples crimes run concurrently rather than consecutively, or a request that the defendant be given probation rather than a prison sentence.
3. *Sentence recommendation*. The prosecutor agrees not to oppose the defendant's request for a specific sentence with the understanding that the judge is free to impose whatever sentence he or she views as appropriate.

The U.S. Supreme Court has upheld the constitutionality of plea bargaining and has ruled that the standard for entering a guilty plea is "whether the plea is a voluntary and intelligent choice among the alternative courses of action available to the defendant."²² The Court noted that plea bargains are essential to the administration of justice, and "[p]roperly administered, it is to be encouraged."²³

Plea bargaining allows the efficient disposal of criminal cases and enables prosecutors to focus resources on those cases in which there is a strong public interest in bringing defendants to trial. Guilty pleas also are favored because defendants accept responsibility for their actions and take an important step toward rehabilitation.

Critics assert that defendants who plead guilty invariably receive less severe sentences than defendants who are convicted at trial, which, in effect, punishes individuals for exercising their constitutional rights. Innocent defendants confronting lengthy prison sentences may plead guilty rather than risk a conviction at trial and a longer sentence. There also is a concern that plea bargaining vests too much power in prosecutors to decide a defendant's punishment.

There have been efforts to abolish or to reform plea bargaining, most recently in Alaska, and more modest efforts in Connecticut, North Carolina, Texas, and in Philadelphia, Pennsylvania. In the last several years, the U.S. Supreme Court has begun to assert control over plea bargaining by establishing constitutionally required procedures to be followed in plea bargaining. The Court has recognized that plea bargaining is a critical aspect of the criminal justice system and has stated that plea bargaining is not an "adjunct" to the criminal justice system; plea bargaining is "the criminal justice system."²⁴ The Court, for example, has held that defense attorneys have an obligation to communicate prosecutors' offers of plea bargains to defendants²⁵ and has held that federal judges should not participate in plea negotiations to avoid influencing a defendant's decision whether to accept a plea bargain.²⁶

YOU DECIDE 3.1

Paul Lewis Hayes was indicted by a Fayette County, Kentucky, grand jury for uttering a forged instrument in the amount of \$88.30, an offense punishable by a term of 2 to 10 years in prison. During plea negotiations, the prosecutor offered to recommend a sentence of five years in prison if Hayes would plead guilty. He stated that if Hayes did not plead guilty and "save the court the inconvenience and necessity of a trial," he would return to the grand jury to obtain indictment under the Kentucky Habitual Criminal Act. This would subject Hayes to a mandatory sentence of life imprisonment by reason of his two prior felony convictions. Hayes chose not to plead guilty; the prosecutor responded by obtaining a new indictment under the habitual offender statute. A jury found Hayes guilty on the principal charge of uttering a forged instrument and, in a separate proceeding, further found that he had twice before been convicted of felonies. Hayes, as required by the habitual offender statute, was sentenced to a life term in the penitentiary. Hayes at age 17 had pled guilty to "detaining a female" after initially being charged with rape and was sentenced to five years in a juvenile facility. He later was found guilty of robbery and was sentenced to five years in prison, although he was placed on probation. Did the prosecutor in *Hayes* violate due process of law in charging and convicting Hayes as a habitual offender? See *Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

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, reduced only 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 sentences who succeeded in persuading parole boards that they had been rehabilitated. Truth in sentencing ensures 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 85% of their prison sentences. Roughly 41 states have some form of truth in sentencing legislation, and the vast majority have qualified for funding. The result is that over 70% of violent offenders are serving longer sentences than they did prior to truth in sentencing.

VICTIMS' RIGHTS

Early 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 crimes; instead, these laws make such funds available to victims.²⁷

In 1986, the U.S. Congress passed the Victims of Crime Act (VOCA). This provided for a compensation fund and established 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, which 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 19 other states, has adopted constitutional amendments protecting victims.

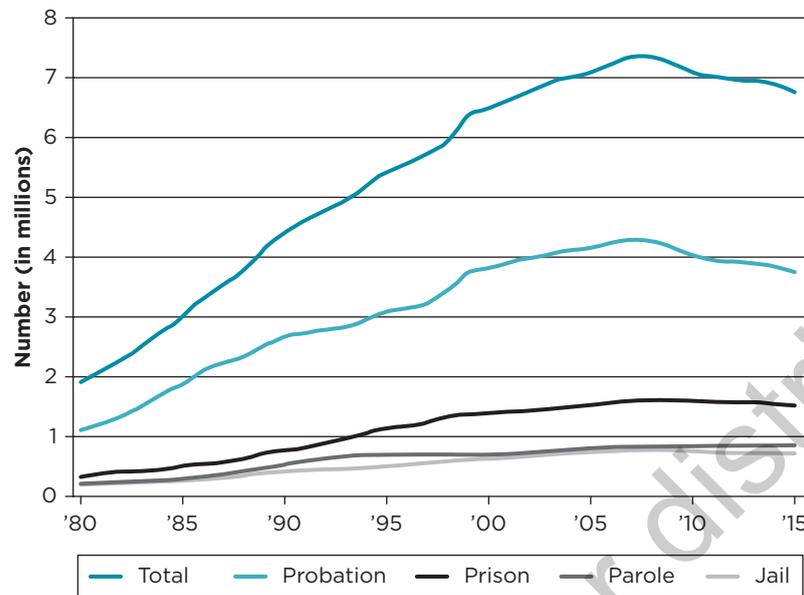
Another important development is the U.S. Supreme Court's approval of **victim impact statements** in death penalty cases. In *Payne v. Tennessee*, the defendant stabbed to death Charisse Christopher and her 2-year-old daughter in front of Charisse's 3-year-old son Nicholas. This was a particularly brutal crime; Charisse suffered 84 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 20 states have laws that authorize direct victim involvement at sentencing for criminal offenses, and all 50 states and the District of Columbia provide for some form of written submissions.²⁸ In 2016, in *Bosse v. Oklahoma*, the U.S. Supreme Court reaffirmed that victim impact statements are limited to a discussion of the victim and the consequences of his or her death for the family and that victim impact statements may not comment on the crime, the defendant, or the appropriate sentence. *Bosse v. Oklahoma*, 580 U.S. ____ (2016).

There also is concern with the threat to the public from recidivist criminal behavior. The Second Chance Act, 42 U.S.C. § 17511, was signed into law by George W. Bush in 2008 to provide funds and training for states, local governments, and nonprofit organizations to assist prisoners with making the transition from incarceration to the community (see Figure 3.1). These services include drug treatment, psychological counseling, housing, and job skills. The act, though in need of additional funding, has a significant impact in reducing recidivism.

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.

FIGURE 3.1

Crime on the Streets: Incarceration Rates. The number of adults in the correctional population has been increasing.



Estimated number of persons under correctional supervision in the United States, 1980–2015

In 2015, over 6.7 million people were under some form of correctional supervision including the following:

Probation—count-ordered period of correctional supervision in the community generally as an alternative to incarceration. In some cases, probation can be a combined sentence of incarceration followed by a period of community supervision. These data include adults under the jurisdiction of a probation agency, regardless of supervision status (i.e., active supervision, inactive supervision, financial conditions only, warrant status, absconder status, in a residential/other treatment program, or supervised out of jurisdiction).

Prison—confinement in a state or federal correctional facility to serve a sentence of more than 1 year, although in some jurisdictions the length of sentence which results in prison confinement is longer.

Jail—confinement in a local jail while pending trial, awaiting sentencing, serving a sentence that is usually less than 1 year, or awaiting transfer to other facilities after conviction.

Parole—period of conditional supervised release in the community following a prison term, including prisoners released to parole either by a parole board decision (discretionary parole) or according to provisions of a statute (mandatory parole). These data include adults under the jurisdiction of a parole agency, regardless of supervision status (i.e., active supervision, inactive supervision, financial conditions only, absconder status, or supervised out of state).

Source: Bureau of Justice Statistics, National Crime Victimization Survey, Identity Theft Supplement, 2012-2-14, <https://www.bjs.gov/index.cfm?ty=kfdetail&iid=487>

CRUEL AND UNUSUAL PUNISHMENT

The **Eighth Amendment** to the U.S. Constitution is the primary constitutional check on sentencing. The Eighth Amendment states that “[e]xcessive 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.²⁹

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 LaFare 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.³⁰

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."³¹

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.³² 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."³³ 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 1776.³⁴

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 in *Trop v. Dulles* stressed that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."³⁵ *Trop* is an example of the application of the prohibition on cruel and unusual punishment to new situations. In *Trop*, the U.S. Supreme Court held that it was unconstitutional to deprive Trop and roughly 7,000 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."

The death penalty historically has been viewed as a constitutionally acceptable form of punishment.³⁶ 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."³⁷

The Supreme Court has rejected the contention that death by shooting³⁸ or electrocution is cruel and barbarous, noting in 1890 that the newly developed technique of electricity was a "more humane method of reaching the result."³⁹ 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."⁴⁰

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.⁴¹

In 2011, in *Brown v. Plata*, Justice Anthony Kennedy affirmed a lower court judgment requiring California prisons to release roughly 46,000 inmates to relieve prison overcrowding. The California system housed twice as many prisoners as the institutions were designed to hold. Justice Kennedy concluded that the overcrowding of California prisons constituted unconstitutional cruel treatment because the prison system lacked the resources to provide adequate health and mental health care to the large prison population. Overcrowding also had led to rising tension and to violence. The Supreme Court held that "[a] prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society."⁴²

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

- *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.⁴³

The next section explores whether capital punishment constitutes cruel and unusual punishment.

You can find *Brown v. Plata* on the study site, <http://edge.sagepub.com/lippmancc15e>.

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.⁴⁴

In *Furman v. Georgia*, five Supreme Court judges wrote separate opinions condemning the cruel and unusual application of the death penalty against some defendants while 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 “these death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. . . . The 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.”⁴⁵

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 that 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.”⁴⁶

In *Gregg v. Georgia*, in 1976, the U.S. Supreme Court approved a Georgia statute designed to ensure 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 ensuring that the verdict was supported by the facts and that capital punishment was imposed in a consistent fashion. This system was intended to ensure that the death penalty was reserved for the most severe homicides and was not “cruelly imposed on undeserving defendants.”⁴⁷

Were there offenses other than aggravated and intentional murder and the crime of treason under federal law that have been held to merit 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 the aggravated rape of an adult and constituted cruel and unusual punishment.⁴⁸ Thirty-one years later, in *Kennedy v. Louisiana* (discussed in “Crime in the News”; see p. 59), the Supreme Court held that imposition of capital punishment for the rape of a child constituted cruel and unusual punishment.⁴⁹

In 2008, the U.S. Supreme Court addressed the constitutionality of the execution of individuals through the use of lethal injection. In *Baze v. Rees*, the Court upheld the constitutionality of Kentucky’s lethal injection protocol.⁵⁰ In June 2015, in *Glossip v. Gross*, Justice Samuel A. Alito Jr. writing in a 5–4 decision held that the inmates challenging Oklahoma’s use of midazolam as the first drug in a three-drug protocol were unable to establish that the challenged drug created a substantial risk of severe pain and that the inmates had failed to identify a less severe alternative.” *Glossip v. Gross*, 576 U.S. __ (2015).

You can find *Baze v. Rees* on the study site, <http://edge.sagepub.com/lippmancc15e>.

Lethal Injection

In 1977, Oklahoma passed the first lethal injection law. The law was motivated by the desire to find a less expensive and more humane method of execution. All of the 31 death penalty states along with the federal government presently provide for lethal injection as the primary method of execution. Several states provide for other methods in the event that the drugs required to execute an individual by lethal injection are unavailable (in nine, electrocution; in six, gas chamber; in three, hanging; and in three, firing squad). Between 1976 and 2017, 1,294 of the 1,459 executions in the United States were carried out by lethal injection. Three were carried out by the federal government and the remainder by the states. In recent years, lethal injection has been the sole method of execution. Until recently most state correctional agencies employed the identical three-drug sequence of sodium thiopental, pancuronium bromide, and potassium chloride used by Oklahoma.

European manufacturers of drugs like pentobarbital and sodium thiopental in the past several years decided to stop selling drugs to American states for use in executions. A shortage of these drugs led correctional authorities to experiment with new combinations of drug cocktails. Defense attorneys petitioned courts to require correctional authorities to reveal the name and source of the drugs used in executions. Lawyers argued that the use of unreliable drugs exposed inmates to the risk of painful executions in violation of the Eighth Amendment. Appellate courts, however, held that state correctional authorities are not required to reveal the chemicals in their drug protocols or the supplier of the drugs and noted that some degree of pain is inherent in the use of capital punishment.

The executions of Dennis McGuire in January 2014 in Ohio, Clayton D. Lockett in Oklahoma in April 2014, and Joseph R. Wood III in Arizona in July 2014 led to a questioning of the use of executions through lethal injection. McGuire's execution in Ohio was carried out with a new and untested combination of drugs and took about 25 minutes, although death normally should occur within 10 minutes. Witnesses reported that McGuire appeared to be gasping for air and appeared to be conscious of the pain associated with the execution. Lockett's execution in Oklahoma took 43 minutes. Lockett reportedly was moaning in pain because an improperly placed intravenous line prevented the drugs from flowing directly into his bloodstream. Wood also was executed using an experimental drug cocktail and, according to observers, gasped for air continually over the course of the nearly two hours it took for him to die.

The three inmates all had been convicted of brutal crimes, and the families of the victims pointed out that their loved ones had suffered to a much greater extent than their assailants. Lockett, for example, had been convicted of shooting a 19-year-old woman and burying her alive.

President Obama declared that the execution in Oklahoma was "deeply disturbing" and directed the Department of Justice to undertake a study of the application of the death penalty by the federal government and by state governments. The federal government, for several years, had imposed a moratorium on the application of the death penalty pending a decision on the appropriate drug cocktail to be used in executions. In 2015, the Supreme Court again approved of lethal injection. These events were followed by what appears to have been an excruciatingly painful execution of Ronald Bert Smith in Alabama in December 2016. In 2017, Florida executed Mark James Assay using the drug etomidate as a substitute for midazolam despite the manufacturer's objection to the use of the drug.

This was the first execution in Florida since the reinstatement of the death penalty in 1977 in which Florida has executed a White person for killing an African American.

The Death Penalty Information Center records 1,459 executions since 1976. More than 155 of individuals sentenced to death since 1973 were found to have been wrongfully convicted and were subsequently released from prison.⁵¹

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.⁵² 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.⁵³

In *Thompson v. Oklahoma*, in 1988, the Supreme Court ruled that the execution of a young person who was under the age of 16 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."⁵⁴

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 18 and ruled that there was no national consensus against the execution of individuals 16 or 17 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 37 states that provided for capital punishment, only 15 declined to impose it on 16-year-olds and 12 did not extend the death penalty to 17-year-old defendants.⁵⁵

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 18 constituted only about 2% 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 *Roper v. Simmons*, the U.S. Supreme Court once again considered whether the execution of individuals who are 16 or 17 years of age constitutes cruel and unusual punishment.

Did sentencing 17-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 fifteen but younger than eighteen when he committed a capital crime.

Facts

At the age of seventeen, when he was still a junior in high school, Christopher Simmons, the respondent here, committed murder. About nine months later, after he had turned eighteen, 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 fifteen and sixteen 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 ninth, 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 seventeen 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,

(Continued)

(Continued)

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." . . . On this reasoning it set aside Simmons's death sentence and resented 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.

. . . 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, thirty states prohibited the death penalty for the mentally retarded. This number comprised twelve that had abandoned the death penalty altogether, and eighteen that maintained it but excluded the mentally retarded from its reach. By a similar calculation in this case, thirty states prohibit the juvenile death penalty, comprising twelve that have rejected the death penalty altogether and eighteen that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach.

Atkins emphasized that even in the twenty states without formal prohibition, the practice of executing the mentally retarded was infrequent. In the present case, too, even in the twenty 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 ten 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 "we ought not to 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 ten 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 fifteen 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 . . . “it 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*, 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 fifteen 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, twelve death penalty states had already prohibited the execution of any juvenile under eighteen, and fifteen had prohibited the execution of any juvenile under seventeen. If anything, this shows that the impropriety of executing juveniles between sixteen and eighteen 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 eighteen, 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 eighteen 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 respondents 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 eighteen 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. (“Youth 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.

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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, “the relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuosity 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 eighteen 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 eighteen. By the same token, some under eighteen have already attained a level of maturity some adults will never reach.

Our determination that the death penalty is disproportionate punishment for offenders under eighteen 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 eighteen 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 eighteenth birthday, no matter how deliberate, wanton, or cruel the offense. ... The rule decreed by the Court rests, ultimately, on its independent moral judgment that death is a disproportionately severe punishment for any seventeen-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 seventeen-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 18?
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 regard 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 18? 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*?

Cases and Comments

1. **Juveniles and Life Without Parole.** In 2010, in *Graham v. Florida*, the U.S. Supreme Court held that sentencing a juvenile to life imprisonment without parole for a non-homicide offense violated the Eighth Amendment prohibition on cruel and unusual punishment. Terrance Jamār Graham's parents were addicted to crack cocaine, and in elementary school he was diagnosed with attention deficit/hyperactivity disorder. He began drinking alcohol and using tobacco at age 9 and smoked marijuana at age 13. At age 16, Graham was arrested and charged as an adult with armed burglary and with attempted armed robbery. He pled guilty and received a three-year term of probation, the first six months of which he served in the county jail. Roughly six months following Graham's release, he was arrested along with two accomplices for home invasion robbery following a high-speed chase. Three firearms were found in his automobile.

The trial court judge found that Graham had violated his probation by committing a home invasion robbery, possessing a firearm, and associating with individuals involved in criminal activity. The court sentenced Graham to life imprisonment without parole for the earlier armed burglary and 15 years for the armed robbery. The judge explained that "[g]iven your escalating pattern of criminal conduct, it is apparent to the court that you have decided that is the way you are going to live your life and that the only thing I

can do now is to try and protect the community from your actions."

The U.S. Supreme Court considered Graham's claim that his sentence of life without parole constituted cruel and unusual punishment. The Court determined that there was a national consensus against life imprisonment for juveniles convicted of nonhomicide offenses.

There were 129 juvenile nonhomicide offenders serving life without parole sentences. Seventy-seven of these offenders were incarcerated in Texas, and the other 52 inmates were imprisoned in 10 states and in the federal system. Twenty-six states and the District of Columbia had not imposed life imprisonment without parole despite statutory authorization. The Court concluded that considering the large number of juveniles who may be eligible for life imprisonment based on having committed aggravated assault, forcible rape, robbery, burglary, and arson, the sentence of life imprisonment without parole for nonhomicide offenses is infrequently imposed.

The Court stressed that "community consensus," although entitled to great weight, is not determinative whether life imprisonment for juveniles constitutes cruel and unusual punishment. The important step is to evaluate the degree of responsibility of juvenile offenders for their crimes. An additional consideration is whether the sentence serves legitimate penological goals.

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Offenders. *Roper v. Simmons* established that juveniles lack maturity, have an underdeveloped sense of responsibility, and are susceptible to outside pressures. As a consequence, juvenile offenders cannot be considered to be the “worst of the worst” and cannot be considered as morally responsible as an adult.

Nature of crime. The taking of the life of another person results in the loss of human life and is more serious than a nonhomicide felony.

Nature of punishment. Life without parole is the second most severe punishment authorized under law. The offender is deprived of basic liberties and is incarcerated for the remainder of his or her life. A juvenile offender will serve more years in prison than an adult offender.

Penological justification. The interest in retribution does not justify the imposition of life imprisonment on juveniles because they are not as responsible for their actions as are adults. Juveniles are impulsive and emotional and are unlikely to be deterred by the threat of punishment. The protection of society in most instances does not require the incapacitation of juvenile offenders for the remainder of their lives, and there is no justification for dismissing the possibility of rehabilitation.

The Supreme Court held that a state is required to provide defendants like Graham “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” The Eighth Amendment, however, does not “foreclose the possibility that juveniles convicted of nonhomicide crimes “will remain behind bars for life.” See *Graham v. Florida* ___ U.S. ___, 130 S. Ct. 2011 (2010).

Do you agree with the Supreme Court’s ruling? In light of *Graham*, will life imprisonment for juveniles for homicide offenses be upheld as constitutional?

2. Life Imprisonment for Juveniles for Homicide Offenses. In June 2012, in *Miller v. Alabama*, the Supreme Court in a 5–4 decision held that the Eighth Amendment prohibits mandatory sentencing schemes that require life in prison without the possibility for parole for juvenile offenders under the age of 18 convicted of homicide. Justice Elena Kagan noted that “youth matters” and mandatory sentencing schemes by making “age irrelevant” pose “too great a risk of disproportionate punishment.”

States are not precluded from sentencing juveniles to life imprisonment without parole in homicide cases, although given juveniles’ “diminished culpability” and “capacity for change,” this “harshes possible penalty [should be] uncommon.” A “sentencer” before imposing life imprisonment on a juvenile is required to consider mitigating factors, and the sentence is to be based on “individualized consideration[s],”

such as the juvenile’s age, the juvenile’s background, the juvenile’s development, the nature of the juvenile’s involvement in the crime, the juvenile’s capacity to assist his or her attorney, and the potential for rehabilitation. Would you sentence the two 14-year-old offenders in *Miller* to life imprisonment? See *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455 (2012).

In 2016, in *Montgomery v. Louisiana*, the Supreme Court held that *Miller v. Alabama* applied retroactively and that juveniles incarcerated for life with no opportunity of parole are required to have their cases reviewed for resentencing or be considered for parole. Justice Kennedy wrote that “prisoners like Montgomery must be given the opportunity to show their crime did not reflect irreparable corruption; and if it did not, their hope for some years of life outside prison walls must be restored.” See *Montgomery v. Louisiana*, 577 U.S. ___ (2016).

Roughly 28 states and the District of Columbia have changed their laws for juvenile offenders convicted of homicide and provide mandatory minimums ranging from an opportunity for parole after 15 years (as in Nevada and West Virginia) to an opportunity for parole after 40 years in prison. The other states continue to provide for life without parole for juvenile offenders convicted of homicide. In February 2018, the Louisiana parole board voted 2-to-1 to deny 71-year-old Henry Montgomery, the plaintiff in *Montgomery v. Louisiana*, release from Angola prison. He is once again eligible for parole in 2 years.

3. Mental Disability. Freddie Lee Hall and his accomplice Mark Ruffin kidnapped, beat and raped, and murdered Karol Hurst, a pregnant 21-year-old newlywed. Hall and Ruffin next planned to rob a convenience store. In the parking lot, they encountered sheriff’s deputy Lonnis Coburn, whom they shot and killed. Hall received the death penalty.

Hall’s former teachers identified him as “mentally retarded,” and various medical clinicians found that he possessed the level of understanding of a “toddler.” The abuse he suffered at the hands of his mother further impeded his development of basic skills. Hall was beaten “ten or fifteen times a week sometimes.” His mother tied him “in a ‘croaker’ sack, swung it over a fire, and beat him,” “buried him in the sand up to his neck to ‘strengthen his legs,’” and “held a gun on Hall . . . while she poked [him] with sticks.”

The U.S. Supreme Court in *Atkins v. Virginia*, 536 U.S. 304 (2002), held that the Eighth and Fourteenth Amendments to the Constitution prohibit the execution of individuals with an intellectual disability (which the Court notes is synonymous with “mental retardation”). Florida law provided that if an individual possesses an IQ of 70 or more, all further exploration of intellectual disability is foreclosed. In 2014, in *Hall v. Florida*, the U.S. Supreme Court held that the Florida law was unconstitutional because it created an unacceptable risk that

persons with intellectual disabilities will be executed. The reliance on IQ score to measure intellectual disability prevents courts from considering “evidence of intellectual disability as measured . . . by the defendant’s failure or inability to adapt to his social and cultural environment, including medical histories, behavioral records, school tests and reports, and testimony regarding past behavior and family circumstances. This is so even though the medical community accepts that all of this evidence can be probative of intellectual disability, including for individuals who have an IQ test score above 70.” The Supreme Court stressed that no legitimate penological purpose is served by executing a person with intellectual disability. “To do so contravenes the Eighth Amendment[,] for to impose the harshest of punishments on an intellectually disabled person violates his or her inherent dignity as a human being.” Do you agree? Is the question of intellectual disability too complicated for legal determination? See *Hall v. Florida*, 572 U.S. ____ (2014).

In *Moore v. Texas*, the Court affirmed that the U.S. Constitution prohibits the execution of mentally disabled

individuals. Justice Ruth Bader Ginsburg held that Texas is required to apply contemporary medical standards in determining mental ability and rejected the unscientific standard employed by a Texas appellate court to find that Bobby James Moore was eligible for the death penalty. Justice Ginsburg specifically held that Texas did not focus sufficiently on Moore’s intellectual deficits. The Texas analytical framework had not been adopted by other states in the past 12 years and created an unacceptable risk that an “intellectually disabled” individual would be executed. She noted that Moore at age 13 “lacked basic understanding of the days of the week, the months of the year, and the seasons; he could scarcely tell time or comprehend the standards of measure or the basic principle that subtraction is the reverse of addition.” A year later his father threw him out of the home because he was “stupid,” resulting in Moore spending his early years living on the streets and searching for food in garbage cans and working at menial jobs before participating at age 20 in an armed robbery in which he shot and killed a store clerk. See *Moore v. Texas*, 581 U.S. ____ (2017).

You can find *Graham v. Florida* and *Miller v. Alabama* on the study site, <http://edge.sagepub.com/lipmancc15e>.

Crime in the News

In 2008 in *Kennedy v. Louisiana*, 554 U.S. 407 (2008), the U.S. Supreme Court ruled by a vote of 5 to 4 that the imposition of the death penalty on a defendant convicted of the rape of a child constituted cruel and unusual punishment. The case almost immediately became embroiled in controversy and is one of the Court’s most controversial decisions in recent memory.

On March 2, 1998, Patrick Kennedy called 911 and reported that his stepdaughter, L.H., had been dragged from the garage and raped by two neighborhood boys who fled on their bikes. The police found L.H. in bed wrapped in a bloody blanket bleeding profusely. At the hospital, an expert in pediatric forensic medicine reported that L.H.’s injuries were the most severe that he had witnessed from a sexual assault, and L.H. was rushed into surgery. A laceration to the left wall of the vagina had separated her cervix from the back of her vagina, causing her rectum to protrude into the vaginal structure. L.H.’s entire perineum was torn from the posterior fourchette to the anus. Both L.H. and Kennedy told investigators that L.H. had been raped by two neighborhood boys, and L.H. repeated this account during a lengthy examination by a psychologist.

Eight days following the rape, Kennedy was arrested and charged with the aggravated rape of a child under 12. A number of factors led the police to question whether L.H. had been raped by two neighborhood boys. For example, Kennedy had called his employer three hours prior to the time that he allegedly discovered that L.H. had been raped and reported that he would not be at work. He then called a fellow employee to ask how to get blood out of a carpet because his daughter had “just become a lady.” An hour later, Kennedy phoned a carpet cleaning service and asked for emergency assistance in removing bloodstains from the carpet, and 30 minutes later he called 911 to report the rape.

In December 1999, 21 months following the assault, L.H. revealed that Kennedy had raped her. The jury unanimously convicted Kennedy. At the sentencing stage, a cousin of Kennedy’s former wife reported that Kennedy had abused her when she was 8, and the jury sentenced Kennedy to death. The verdict was affirmed by the Louisiana Supreme Court, which noted that other than first-degree murder, there is no crime more deserving of the death penalty.

Kennedy, an African American, was the first person to receive the death penalty for rape under Louisiana’s 1995 death penalty law. He was an eighth-grade dropout with

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an IQ of 70 whose record was marked by a prior conviction for attempting to cash five worthless checks. In 2007, Richard Davis joined Kennedy on death row when he was sentenced to death for the aggravated rape of a 5-year-old. Louisiana stands alone among the states in having sentenced a defendant to death for the rape of a child.

U.S. Supreme Court Justice Anthony Kennedy authored the majority opinion of the Supreme Court in *Kennedy* and asserted that the death penalty for the rape of a child is a disproportionate punishment as measured by the evolving standards of contemporary society. Justice Kennedy rested this conclusion on the “objective indicator” of state legislation and practice.

In 1925, 18 states, the District of Columbia, and the federal government authorized the death penalty for the rape of a child or of an adult. Between 1930 and 1964, 455 people were executed for this offense. The last person executed for the rape of a child was Ronald Wolfe in 1964 in Missouri.

The landscape of the death penalty changed in 1972 with *Furman v. Georgia*, in which the Supreme Court invalidated most state death penalty statutes. Louisiana reintroduced the death penalty for the rape of a child in 1995. Louisiana law at the time of Kennedy’s prosecution provided that anal or vaginal intercourse with a child under 12 constitutes aggravated rape and is punishable by death. Five states followed Louisiana’s example: Georgia, Montana, Oklahoma, South Carolina, and Texas. Four of these states’ statutes are narrower than Louisiana’s and limit the death penalty to offenders with a previous rape conviction. Georgia requires a finding of aggravating circumstances such as a prior conviction for a designated offense.

Justice Kennedy pointed out that 44 states did not authorize the death penalty for child rape and that in 1994 Congress expanded the number of federal crimes punishable by death and yet failed to include child rape or abuse. Justice Kennedy also noted that no defendants had been executed for child rape in recent years. The death penalty also had been infrequently imposed on juveniles (five executions) and mentally challenged defendants (five executions) despite the fact that 20 states had provided for the imposition of this penalty on these individuals. Six individuals between 1954 and 1983 had been sentenced to death for participation in a robbery.

Justice Kennedy dismissed the argument that in the last 13 years there had been a movement toward making child rape a capital offense. It was true that six states had adopted statutes providing for the death penalty for the rape of a child since 1995 and that three of these laws had been passed in the last two years. The trend of legislation, however, had been far stronger at the time of the Supreme Court decisions declaring that it was cruel and unusual punishment to execute mentally challenged individuals

and juveniles. The number of states (six) that declared child rape a capital offense was comparable to the number of states (eight) that imposed the death penalty for involvement in robbery.

Louisiana contended that any analysis of the number of states that provided for the death penalty for the rape of the child should consider the confusion that resulted from the Supreme Court’s 1976 decision in *Coker v. Georgia*, in which the U.S. Supreme Court held that the death penalty for rape was disproportionate and excessive under the Eighth Amendment. Justice Kennedy responded that the Court had stressed in *Coker* that the decision was limited to an act of rape against an “adult woman” and found no indication that state legislatures and state courts had misinterpreted *Coker* to stand for the proposition that the death penalty for child rape is unconstitutional. The fact that only five states had adopted statutes providing for capital punishment for child rape, in Justice Kennedy’s view, could not be explained by a misunderstanding of *Coker*.

Justice Kennedy recognized that rape results in a permanent psychological, emotional, and often physical impact on a child. This, however, does not mean that the imposition of death is proportionate to the offense. The Supreme Court has limited the use of capital punishment to crimes in which there has been an intentional taking of a victim’s life. Other offenses may be “devastating in their harm,” but they cannot be compared to first-degree murder in their “severity and irrevocability.” Justice Kennedy argued that the imposition of capital punishment for the rape of a child would result in a significant extension of the use of the death penalty that is contrary to “evolving standards of decency.”

In 2005, there were 5,702 incidents of vaginal, anal, or oral rape of a child under 12. This is almost twice the number of intentional murders committed during the same period. Only roughly 2.2% of these murderers are sentenced to death. The authorization of the death penalty for the rape of a child would significantly expand the application of the death penalty.

The extension of the death penalty for the rape of a child may undermine the goal of bringing offenders to justice. Children in most cases know their abusers, and their families tend to circle the wagons and in many instances do not report the abuse to the police. Relatives may prove even more reluctant to report molestation when the penalty is death. Perpetrators confronting death for the rape of a child also will have an incentive to murder their victims and to eliminate the person who is often the sole witness to the crime.

Justice Samuel Alito wrote the dissenting opinion, in which he was joined by Chief Justice Roberts and by Justices Scalia and Thomas. Justice Alito criticized the

broad and sweeping nature of the majority opinion, which prohibited the death sentence no matter the age of the child, the frequency and viciousness of the molestation, the number of children raped, or the length of the perpetrator's criminal record. Justice Alito asked, "Is it really true that every person who is convicted of capital murder and sentenced to death is more morally depraved than every child rapist?" He answered his own question by asserting that "in the eyes of ordinary Americans, the very worst child rapists . . . are the epitome of moral depravity."

Shortly after the Supreme Court decision in *Kennedy*, it was discovered that in 2006, the lawyers in their briefs submitted to the Court had failed to inform the Supreme Court that the U.S. Congress in the National Defense Authorization Act had provided that the rape of a child when committed by a member of the military was punishable by death. Critics contended that this called into question the notion that there was no national consensus for imposing the death penalty for the rape of a child. The Court responded by taking the unusual step of announcing that it would evaluate whether to reconsider the judgment in *Kennedy*. In October 2008, the majority decided that the authorization of the death penalty in the "military sphere does not indicate that the penalty is constitutional in the civilian context" and does not "affect our reasoning or conclusions." Justice Antonin Scalia thundered in response that "the indifferent response of the majority of the Court reveals that they are imposing their own political preference rather than following a national consensus." *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

The Court majority clearly was concerned that upholding the death penalty for individuals who raped a child would open the floodgates to the expansion of capital

punishment to encompass a variety of reprehensible offenses. What would be next? The death penalty for individuals who severely abused or maimed a child? There was no indication that individuals tempted to rape and molest children were not already deterred by the prospect of a lengthy prison term and by the requirement that they register as a sex offender when released from prison.

The United States already was subject to international criticism for reliance on capital punishment, and by approving of the death penalty for the rape of a child, the United States would be joining the ranks of fundamentalist Islamic regimes like Saudi Arabia. Louisiana's system of capital punishment already had come under criticism as unreliable and discriminatory. A Columbia University study found that roughly half of death penalty convictions in Louisiana had been overturned on appeal due to errors and misconduct at trial. Roughly one third of Louisiana's residents are African American, and yet, 70% of the individuals on its death row are African American, and roughly one half of the individuals who have been executed in Louisiana in the past 26 years are African Americans. Confidence in Louisiana's system of capital punishment was further shaken by the fact that nine individuals sentenced to death in recent years had been determined to have been falsely convicted and were released from prison.

Was the U.S. Supreme Court in *Kennedy* justified in holding that the rape of a child under all circumstances is cruel and unusual punishment under the Eighth Amendment? Should the Court have allowed the states to determine for themselves whether to impose the death penalty for the rape of a child, or in the alternative, should the Court have articulated various aggravating circumstances that would justify the death penalty for the rape of a child?

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 were illustrated by Justice Sandra Day O'Connor's opinion in *Lockyer v. Andrade*, in 2003, in which the Supreme Court affirmed two consecutive 25-year-to-life sentences for a defendant who, on two occasions in 1995, stole videotapes with an aggregate value of roughly \$150 from two stores.⁵⁶ These two convictions, when combined with Andrade's arrest 13 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 principle reserves a constitutional violation for only the extraordinary case" and that the sentence in *Andrade* was not "an unreasonable application of our clearly established law."⁵⁷

You can find *Kennedy v. Louisiana* on the study site, <http://edge.sagepub.com/lippmancc15e>.

In *Ewing v. California*, decided on the same day as *Lockyer*, Justice O'Connor affirmed a 25-year sentence for Daniel Ewing under California's Three Strikes and You're Out law. Ewing while on parole was adjudged guilty of the grand theft of three golf clubs worth \$399 apiece and had previously been convicted of several serious or violent felonies. As required by the Three Strikes law, the prosecutor formally alleged, and the trial court found, that Ewing had been convicted previously of four serious or violent felonies. Justice 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.⁵⁸

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 12 years at hard labor as well as to manacling at the wrist and ankle. During Weems's 12-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."⁵⁹

Another example of a punishment that was determined to be grossly disproportionate to a defendant's crime is *Humphrey v. Wilson*. In *Humphrey*, Humphrey's 15-year-old girlfriend performed oral sex on 17-year-old Genarlow Wilson. He was convicted in 2005 of aggravated child molestation and was sentenced to a mandatory minimum term of 10 years in prison and 1 year of probation and upon his release was subject to registration as a sex offender. The maximum sentence for aggravated child molestation was 30 years in prison. In 2006, the Georgia legislature modified the law to provide that (1) if a person engages in sodomy with a victim who is at least 13 but less than 16 years of age and (2) the person who engages in the conduct is 18 years of age or younger and (3) is no more than four years older than the victim, (4) the individual is guilty of the new crime of misdemeanor child abuse. At the same time, the Georgia legislature increased the penalties for adults guilty of child molestation.

Wilson claimed that the modification of Georgia law was a recognition that the criminal statute under which he had been sentenced that imposed the same punishment on juveniles as on adults constituted cruel punishment in violation of the U.S. Constitution. The Georgia Supreme Court agreed with Wilson and held that the legislature by modifying the penalties imposed on individuals 18 years of age or younger recognized that although society has an interest in protecting children from premature sexual activity, Wilson's actions did not involve the same depravity displayed by an adult who preys on children. Ten-year prison sentences in Georgia are otherwise reserved for crimes that are far more harmful to society than oral sex between teenagers. Finally, other states either did not punish individuals for the act engaged in by Wilson or treated Wilson's actions as a misdemeanor. The Georgia court as a result held that sentencing Humphrey to "extraordinarily harsh punishment" of 10 years in prison constituted cruel and unusual punishment. Keep in mind in thinking about the decision in *Humphrey v. Wilson* that the Georgia legislature had changed the law following Humphrey's conviction and thereby recognized the unfairness of the penalty imposed for sodomy between consenting young adults.⁶⁰

In summary, courts in most instances defer to the legislative branch and are reluctant to find that sentences for a term of years constitute cruel and unusual punishment under the Eighth Amendment. Courts in "rare instances" have recognized that some lengthy sentences are clearly disproportionate to the harm caused by a defendant's act.

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 ensuring 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 sentences for drug offenses. In 1975, New York governor Nelson Rockefeller initiated the controversial "Rockefeller drug laws" that required that an individual convicted of selling 2 ounces or possessing 8 ounces of a narcotic substance receive a sentence of between 8 and 20 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 Fair Sentencing Act of 2010 constituted a major reform of U.S. narcotics laws. Under the previous federal law, a conviction for possession with intent to distribute 5 grams of crack cocaine and 500 grams of powder cocaine resulted in the same 5-year sentence. Fifty grams of crack cocaine and 5 grams of powder cocaine triggered the same 10-year sentence. The thinking behind the law was that crack is sold in small, relatively inexpensive amounts on the street, ravages

You can find *Ewing v. California* and *Humphrey v. Wilson* on the study site, <http://edge.sagepub.com/lippmancc15e>.

communities, and leads to street violence between street gangs competing for control of the drug trade. The law was criticized for resulting in the disproportionate arrest and imprisonment of African Americans for lengthy prison terms while Caucasian sellers and users of powder cocaine received much less severe prison terms. The sentencing reform law reduced the 100:1 ratio between crack and powder cocaine to an 18:1 ratio.

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

- 100 grams of heroin
- 500 grams of powder cocaine
- 28 grams of crack cocaine
- 100 kilograms of marijuana

The following quantities are punishable by 10 years in prison under federal law:

- 1 kilogram of heroin
- 5 kilograms of powder cocaine
- 280 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.

In June 2012, the U.S. Supreme Court held that the new more lenient penalty provisions of the Fair Sentencing Act of 2010 apply to offenders who committed a crack cocaine offense before the law went into effect and are sentenced after the date that the law went into effect. The Court reasoned that sentencing these offenders under the old sentencing scheme would “seriously undermine . . . uniformity and proportionality in sentencing.”⁶¹

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.

Mandatory minimum 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 the Judicial Conference, which is the organization of federal judges. Virtually every state has recently modified or is considering amending its mandatory minimum narcotics laws, including California, Connecticut, Delaware, Georgia, Hawaii, Louisiana, Massachusetts, Michigan, North Dakota, Ohio, and Pennsylvania. New York also has modified its Rockefeller drug laws. This trend is encouraged by studies that indicate that these laws have several flaws:

- *Inflexibility.* They fail to take into account the differences between defendants.
- *Disparities in Enforcement.* 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.
- *Increasing Prison Population.* These laws are thought to be responsible for the growth of the state and federal prison population.

YOU DECIDE 3.2

In *United States v. Gementera*, Shawn Gementera stole letters from several mailboxes in San Francisco. He entered a plea agreement and pled guilty to mail theft. The 24-year-old Gementera already had an extensive arrest record including criminal mischief, driving with a suspended license, misdemeanor battery, possession of drug paraphernalia, and taking a vehicle without the owner’s consent. U.S. District Court Judge Vaughn Walker sentenced Gementera to two months’ imprisonment and three years’ supervised release. Several conditions were placed on the supervised release including requiring Gementera to perform one day of community service consisting of either wearing a two-sided sandwich-board-style sign or carrying a large two-sided sign stating, “I stole mail; this is my punishment.” Gementera was required to display the sign for eight hours while standing in front of a San Francisco postal facility. The prosecution and the defense attorneys jointly agreed that Gementera also would lecture at a high school and write apologies to any identifiable victims. Do “shaming punishments” promote rehabilitation? Deter criminal conduct? Unnecessarily shame and humiliate defendants? See *United States v. Gementera*, 379 F.3d 596 (9th Cir. 2004).

You can find the answer at <http://edge.sagepub.com/lippmancl15e>.

See more cases on the study site: *People v. Meyer*, <http://edge.sagepub.com/lippmancl15e>.

- *Disproportionate Effect on 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 two counts of possession with intent to distribute and on distribution of a total of 9 ounces of marijuana with a street value of roughly \$200. The Court held that the determination of the proper sentence for this offense was a matter that was appropriately determined by the Virginia legislature.⁶²

The Tenth Circuit Court of Appeals upheld the 55-year sentence given to rap music producer Weldon Angelos. The 26-year-old Angelos, who did not possess an adult criminal history, was convicted of three counts of dealing 24 ounces of marijuana while in possession of a firearm. The federal statute provides that a first offense carries a mandatory minimum 5-year sentence and each subsequent conviction carries a mandatory minimum of 25 years. Twenty-nine former federal judges and U.S. attorneys protested that Angelos's punishment violated the Eighth Amendment and that his sentence was longer than he likely would have received for various forms of murder or rape. Paul Cassell, the former federal judge, who sentenced Angelos also wrote a letter to President Barack Obama stating that the sentence he was required to hand down to Angelos was unjust and asking that Angelos be granted clemency. In May 2016, a federal district court judge in Utah ordered Angelos's release from prison, and he was set free in May 2016 after serving 13 years behind bars.⁶³

In 2012, now retired federal district court judge John Gleeson stated in *United States v. Dossie* that mandatory minimum drug sentences were intended to be used against high-level "masterminds" and "managers" and that prosecutors were abusing the law by asking judges to impose harsh mandatory minimum sentences on low-level street dealers. Dossie was convicted as a drug courier in "four hand-to-hand crack sales for which he made a total of about \$140." Judge Gleeson explained that his "hands were tied" and that he was required to impose an "unjust" prison term on Dossie. He noted that "[j]ust as baseball is a game of inches," Judge Gleeson complained, "our drug-offense mandatory minimum provisions create a serious game of grams."⁶⁴

President Obama indicated his concern for mandatory minimum sentences for drug offenses when, in December 2013, he commuted the sentences of eight federal prisoners convicted of crack cocaine offenses. All of these individuals had served at least 15 years in prison; six were sentenced to life imprisonment. The defendants had been sentenced under the 100:1 sentencing **disparity** between powder and crack cocaine, and President Obama noted that the inmates would have received significantly shorter sentences under current, reformed drug laws and already would have completed their sentences. Clarence Aaron, for example, was sentenced to three life terms for a drug crime committed when he was 22 years old. Stephanie George received a life sentence in 1997 at age 27 based on her allowing her boyfriend to store crack in a box in her home.

In April 2014, then-attorney general Eric Holder announced Clemency Project 2014, providing that nonviolent, low-level incarcerated felons who had served at least 10 years and would have received a lesser sentence under current reformed federal laws would be considered for clemency. Individuals were eligible for clemency who had no significant criminal history or history of violence, a record of good behavior in prison, and no ties to gangs. The primary beneficiaries were drug offenders sentenced before Congress's 2010 reform of the punishment for crack cocaine offenses. The Pew Research Center reports that by the time President Obama left office, he had granted clemency to 1,927 individuals, the most of any president in 64 years. This was a small percentage of the over 12,000 inmates who applied for clemency.⁶⁵

The Obama administration and states such as Texas, New York, California, Maryland, Michigan, North Dakota, and Kansas took other steps to minimize the impact of mandatory minimum sentences on low-level, nonviolent drug offenders and on other nonviolent offenders.⁶⁶ Attorney General Holder also encouraged prosecutors to place less emphasis on the sentencing guidelines in prosecuting drug offenders. Severe sentences were to be reserved for "serious, high-level, or violent drug traffickers."⁶⁷

In May 2017, Attorney General Jeff Sessions reversed Eric Holder's guidelines for federal prosecutors that were intended to avoid harsh sentences for low-level drug offenses. Attorney General Sessions instructed federal prosecutors to charge defendants with the highest possible sentence consistent with the evidence. He wrote that "[i]t is a core principle that prosecutors should charge and pursue the most serious, readily provable offense. This policy affirms our responsibility to enforce the law, is moral and just, and produces consistency." Prosecutors seeking to make an exception to this policy must "get approval" and "should carefully consider whether an exception may be justified." Attorney General Sessions explained that this policy "fully utilizes the tools" Congress has provided to federal prosecutors. He concluded by noting that this "maximalist" approach is a recognition that "the most serious offenses" were intended to "carry the most substantial guidelines sentence, including mandatory minimum sentences." Attorney General Sessions justified this return to the policy that essentially had been followed by the

Bush administration because drug trafficking is associated with crimes of violence and must be harshly punished to deter serious criminality.⁶⁸

What do you think about the argument that mandatory minimum sentences are so disproportionate and impose such hardship that jurors should refuse to convict defendants charged with quantities of narcotics carrying mandatory minimum sentences?⁶⁹ What about the impact of mandatory minimum sentences on prison overcrowding?

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 "even 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."⁷⁰

Cases and Comments

In November 2012, 55% of Colorado voters approved Amendment 64 legalizing the personal use of marijuana by individuals who are at least 21 years of age. The state legislature subsequently enacted regulations licensing the commercial production and sale of cannabis. Private possession of up to one ounce of marijuana is legal, and private cultivation of up to six marijuana plants is lawful. Individuals are free to transfer one ounce so long as no money exchanges hands. Cannabis is prohibited from being smoked in public, and there are restrictions on driving while under the influence of marijuana. The sale of marijuana is strictly regulated, and consumers may purchase up to an ounce of "pot." Individuals who grow and traffic in marijuana in violation of Colorado law are subject to federal arrest and prosecution. In the same November election, voters in Washington approved Initiative 502, whose provisions are similar to the provisions of the Colorado law.

Voters in Alaska, Oregon, and the District of Columbia in November 2014 overwhelmingly approved ballot measures legalizing marijuana for adults age 21 and over subject to restrictions that are similar to Colorado's. Two years later, California, Maine, Massachusetts, and Nevada legalized recreational marijuana. California's Prop. 64 allows adults 21 and older to possess up to one ounce of marijuana and to grow up to six plants in their homes. Twenty-nine states and the District of Columbia have medical marijuana laws.

In July 2014, the influential *New York Times* endorsed legalization of marijuana and pointed out that a majority of adults favor legalization and that there are considerable social costs associated with continuing to criminalize marijuana. For instance:

Arrests. From 2001 to 2010, there were 8.2 million marijuana arrests. Roughly 9 out of 10 were for possession. In 2010, there were 750,000 arrests

involving marijuana; and in 2011, there were more arrests for marijuana than for all violent crimes. The police made 643,122 arrests for marijuana-related offenses in 2015; 574,641 (89% of all marijuana-related arrests) were for marijuana possession rather than for the cultivation of marijuana or for trafficking. The 2015 arrest total represents a 25% decline since 2007, when the police made 872,721 arrests for violating marijuana laws.

Racial disparity. Whites and African Americans use marijuana at comparable rates, although African Americans are 3.7 times more likely to be arrested than Whites.

Economics. The estimated cost of enforcing laws on marijuana possession is \$3.6 billion.

Public safety. Arresting individuals for marijuana does not remove dangerous individuals from society. Nine out of 10 individuals convicted for possession of marijuana have no history of violence.

Disabilities. Most marijuana arrests are misdemeanors, and individuals are not imprisoned. A conviction, however, may result in the revocation of a professional license or suspension of a driver's license, and may prevent an individual from obtaining a mortgage to buy a home or obtaining a student loan.

Attorney General Jeff Sessions is a strong opponent of legalization of medical or recreational marijuana, believing that marijuana is a gateway drug to more serious forms of drug abuse, is a health risk, and will jeopardize road safety. He also has argued that legalization will provide a source of income for international drug traffickers. Should marijuana be legalized? What is your view?

YOU DECIDE 3.3

Charmaine Hines told her husband she wanted a divorce. They argued as their four children played outside. Hines told Charmaine, "If I can't have you, nobody will." He placed his hands around Charmaine's neck and choked her. Charmaine managed to escape and flee to a neighbor's house across the street and cried for help. Hines followed Charmaine to the neighbor's house, pulled a knife out of his pocket, and held it up to her neck. He grabbed her hair, pulled her off the porch and onto the ground, and cut Charmaine's neck with the knife from side to side. Two of the children witnessed the attack. Hines entered into a plea bargain and pled guilty to attempted second-degree murder and attempted second-degree intentional murder and aggravated battery in return for the prosecution dropping charges. "Prior to sentencing, a presentence investigation was conducted which determined that Hines' criminal history score resulted in an applicable sentencing range of 61-66-71 months' imprisonment for the primary offense of attempted second-degree murder. . . . For aggravated battery, . . . the applicable sentencing range was 38-41-43 months' imprisonment."

Charmaine made a statement in support of Hines's request for probation:

"I'm asking the Court to please, you know, as far as my husband, if he could get probation. I'm not saying that what he did wasn't wrong, but I feel like he really wasn't trying to harm me. And I just ask the Court to think about his children, as far as his sentencing. He's really not a—as far as what people are trying to

make him out to be. He's a loving father, a loving husband. And I'm just asking the Court, please, to give him probation, to think of his kids."

The defense counsel noted that Charmaine and Hines were currently separated and thus, this was "not a situation where . . . the victim wants to get back together with the defendant and pretend this didn't happen, these individuals are not going to be back together." Defense counsel also noted Hines did not have any prior convictions for violent offenses and that he pled guilty to the two crimes in order to take responsibility for his actions and to have the opportunity to request probation. Hines was "currently attending counseling for anger management, had the support of his family, and his domestic violence was an isolated event that was explained by the fact that Charmaine had told him she was having an affair and wanted a divorce."

After hearing statements from all the parties, the sentencing judge stated that "I can't simply ignore the fact that Mr. Hines, on this day, tried to kill Mrs. Hines. And in fact, is charged with two counts, not just the attempted second degree murder, but also the aggravated battery." The judge imposed downward departure sentences of 24 months' imprisonment for the attempted second-degree murder and aggravated battery convictions and ordered the sentences to run concurrently with one another. Do you agree with the judge's sentence? See *State v. Hines*, 29 P.3d 270 (Kan. 2013)

You can find the answer at <http://edge.sagepub.com/lippmancl15e>.

EQUAL PROTECTION

Judicial decisions have consistently held that it is unconstitutional for a judge to base a sentence on a defendant's race, gender, ethnicity, or nationality. In other words, a sentence should be based on a defendant's act rather than on a defendant's identity. A federal district court judge's sentence of 30 years in prison and lifetime supervision for two first-time offenders convicted of a weapons offense and two narcotics offenses was rejected by the 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 requests that she be sentenced 'as for my person, not for my nationality,'" was completely understandable under the circumstances.⁷¹ Could the trial court judge have constitutionally handed down the same sentence in order to deter Colombian drug gangs from operating in the United States?

Statutes that provide different sentences based on gender also have been held to be in violation of the Equal Protection Clause. 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 could be reduced by good behavior and work credits.⁷²

This complicated scheme resulted in men receiving significantly shorter prison sentences than women convicted of the same crime. For instance, while 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 28 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.

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*.⁷³

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 4 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 receive 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 was 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 6 of every 11 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’s, 20 of every 34 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 Death Penalty Information Center reports that in 2014, 775 Caucasians, 482 African Americans, and 11 Latinos were on death row. (Twenty-four additional individuals classified as “other” were also on death row.) Caucasians accounted for 1,556 victims, African Americans 311, and Latinos 137.

The following facts were presented to a California judge at sentencing. What punishment would you impose?

YOU DECIDE 3.4

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.

Defendant had observed many shoplifters in the store, and it was her 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 15-year-old Latasha Harlins 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 40 shoplifting incidents a week at the store.

Thirteen-year-old Lakesha Combs and her brother, 9-year-old Ismail Ali, testified that Latasha approached

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the counter with money (“about two or three dollars”) in her hand. According to these witnesses, 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 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?” that 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 that “either they wear some pants and some jackets, and they wear light sneakers, and they either wear a cap or a 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 \$2 in her hand when she died.

Defendant’s husband entered the store upon hearing defendant’s calls for help. . . . 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 51-year-old Korean-born naturalized American citizen, having arrived in the United States in 1976. For the first 10 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 10 to 14 African American persons entered the store, threatened him, and robbed him again. The store was burglarized over 30 times, and shoplifting incidents occurred approximately 40 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 20 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, “[I]t 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 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 10 years in state prison (6 years for the base term and 4 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 had the option of sentencing Du to prison for 3, 6, or 11 years and an additional 4 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 (Cal. Ct. App. 1992).

You can find the answer at <http://edge.sagepub.com/lippmancl5e>.

CHAPTER SUMMARY

The 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. A sentence, whether inside or outside the guidelines, is required only to be “reasonable.”

Truth in sentencing laws are an effort to ensure that offenders serve a significant portion of their sentences 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 LaFare 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 ensure 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. The reconsideration of the disparity in treatment between crack and powder cocaine is a significant step in lessening the harshness of drug laws.

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 the defendant deserved.

CHAPTER REVIEW QUESTIONS

1. Distinguish between civil disabilities and criminal punishments. Why did the Supreme Court rule that the sanction provided for in 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. Define plea bargaining. What are the benefits and costs of plea bargaining? Describe the recent approach of the U.S. Supreme Court to plea bargaining.
10. How do courts determine whether a method of punishment is prohibited under the Eighth Amendment? Does lethal injection constitute cruel and unusual punishment?
11. Discuss the efforts of the Supreme Court to ensure 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 execute 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 the Equal Protection Clause?
16. Outline the debate over whether the possession of crack cocaine should be punished more severely than the possession of powder cocaine. Are mandatory minimum sentences a good approach to deterring and to punishing drug offenses?

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TEST YOUR KNOWLEDGE ANSWERS

1. False.
2. True.
3. True.
4. True.
5. True.
6. False.
7. False.

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