

## 14.1: A BRIEF HISTORY OF PUNISHMENT

### CHAPTER 14 - PUNISHMENT AND SENTENCING

#### A BRIEF HISTORY OF PUNISHMENT <sup>[135]</sup>

Feeling safe and secure in person and home is arguably one of the most discussed feelings in our nation today. The “fear of crime” influences how we think and act day to day. This has caused great fluctuation in the United States in regard to how we punish people who are convicted of violating the law. In part, punishment comes from the will of the people, which is then carried out through the legislative process, and converted into sentencing practices. People have differing views on why people should be punished, and how much punishment they should receive. These correctional ideologies, or philosophical underpinnings of punishment, have been prevalent throughout history, and are not brand new in the United States. This section details basic concepts of some of the more frequently held punishment ideologies, which include retribution, deterrence, incapacitation, and rehabilitation.



Pin It! In the News : One of the more frequently used statistics in the news about crime is homicides in the United States. Often, you will hear something about a homicide rate or the number of homicides in a state, or a city for a particular year. An interesting clarifier about this number is that it typically does not include a number of deaths in prison. Deaths in prison occur every year, yet these are not normally counted in any statistic. In 2014, there were approximately 3,927 deaths that occurred in prisons in the United States. There are a variety of reasons for these deaths, to include homicide. For more information on this, look up – Mortality in Correctional Institutions (MCI). This is also formerly known as Deaths in Custody Reporting Program (DCRP). The Bureau of Justice Statistics houses and publishes data on this phenomenon. Additionally, this is a voluntary reporting structure, which may actually not capture all deaths that occur in prison .  
<https://www.bjs.gov/index.cfm?ty=dcdetail&iid=243>



### Think About It... Philosophies of Punishment

Two stories come on during the crime section of the 6 o'clock news. In the first story, a man is described as a convicted sex offender. He is living at an address that you know is in your city. Citizens that live on the streets nearby his address are shown picketing in front of his house, voicing their displeasure that he is allowed to live there. The video shows how angry the neighborhood is, and you can visibly see their frustration and angst on the people's faces in the news clip.

The second story is of a woman who was detained (shown in the back of a squad car) for stealing food from a local grocery store, apparently to feed her children. The store manager is then on the screen describing that he is offering to donate the food to her so that she does not have to spend time in jail or get into any more trouble.

How do these two stories make you feel? Is it the same feeling for each story? Does one of these stories make you feel more afraid of crime? Angrier or upset? Which one? Who deserves to get punished more? How much punishment should they get? The answers to questions like these instantly flood our thoughts as we are watching news blurbs like this, and in general, when we hear about a crime. This is all normal. This process is what generates our own personal punishment ideology.

Now, which one of these two individuals has actually committed a crime? A second point to this story is that our perceptions of punishment can be influenced by the narrative (what is presented to us).

Although the change in our overall perception or use of the rehabilitation ideology is slow, it is necessary. As we will see in the next sections, our reliance on the "Brick and Mortar" approach to punishment comes at a great cost, and the results are less than desirable

## THEORIES OF PUNISHMENT <sup>[136]</sup>

### Learning Objective: Key Terms

- Celerity, Certainty, Cesare Beccaria, Cost Benefit Analysis, Culpable Mental State, Deterrence, Disproportionate Minority Contact, Drug Court, Fair Sentencing Act of 2010, General Deterrence, Incapacitation, Individual Racism, Institutional Racism, Multiethnic, Multiracial, NAACP, Racial Discrimination, Racism, Rational Choice Theory, Recidivism, Rehabilitation, Retribution, Severity, Specific Deterrence

When it comes to criminal sanctions, what people believe to be appropriate is largely determined by the theory of punishment to which they subscribe. That is, people tend to agree with the theory of punishment that is most likely to generate the outcome they believe is the correct one. This system of beliefs about the purposes of punishment often spills over into the political arena. Politics and correctional policy are intricately related. Many of the changes seen in corrections policy in the United States during this time were a reflection of the political climate of the day. During the more liberal times of the 1960s and 1970s, criminal sentences were largely the domain of the judicial and executive branches of government. The role of the legislatures during this period was to design sentencing laws with rehabilitation as the primary goal. During the politically conservative era of the 1980s and 1990s, lawmakers took much of that power away from the judicial and executive branches. Much of the political rhetoric of this time was about "getting tough on crime." The correctional goals of retribution, incapacitation, and deterrence became dominate, and rehabilitation was shifted to a distant position.

## DETERRENCE

It has been a popular notion throughout the ages that fear of punishment can reduce or eliminate undesirable behavior. This notion has always been popular among criminal justice thinkers. These ideas have been formalized in several different ways. The Utilitarian philosopher Jeremy Bentham is credited with articulating the three elements that must be present if deterrence is to work: The punishment must be administered with celerity, certainty, and appropriate severity. These elements are applied under a type rational choice theory . Rational choice theory is the simple idea that people think about committing a crime before they do it. If the rewards of the crime outweigh the punishment, then they do the prohibited act. If the punishment is seen as outweighing the rewards, then they do not do it. Sometimes criminologists borrow the phrase cost-benefit analysis from economists to describe this sort of decision-making process.

When evaluating whether deterrence works or not, it is important to differentiate between general deterrence and specific deterrence. General deterrence is the idea that every person punished by the law serves as an example to others contemplating the same unlawful act. Specific deterrence is the idea that the individuals punished by the law will not commit their crimes again because they “learned a lesson.”

Critics of deterrence theory point to high recidivism rates as proof that the theory does not work. Recidivism means a relapse into crime. In other words, those who are punished by the criminal justice system tend to reoffend at a very high rate. Some critics also argue that rational choice theory does not work. They argue that such things as crimes of passion and crimes committed by those under the influence of drugs and alcohol are not the product of a rational cost-benefit analysis.

As unpopular as rational choice theories may be with particular schools of modern academic criminology, they are critically important to understanding how the criminal justice system works. This is because nearly the entire criminal justice system is based on rational choice theory . The idea that people commit crimes because they decide to do so is the very foundation of criminal law in the United States. In fact, the intent element must be proven beyond a reasonable doubt in almost every felony known to American criminal law before a conviction can be secured. Without a culpable mental state , there is no crime (with very few exceptions).

## INCAPACITATION

Incapacitation is a very pragmatic goal of criminal justice. The idea is that if criminals are locked up in a secure environment, they cannot go around victimizing everyday citizens. The weakness of incapacitation is that it works only as long as the offender is locked up. There is no real question that incapacitation reduces crime by some degree. The biggest problem with incapacitation is the cost. There are high social and moral costs when the criminal justice system takes people out of their homes, away from their families, and out of the workforce and lock them up for a protracted period. In addition, there are very heavy financial costs with this model. Very long prison sentences result in very large prison populations which require a very large prison industrial complex. These expenses have placed a crippling financial burden on many states.

## REHABILITATION

Rehabilitation is a noble goal of punishment by the state that seeks to help the offender become a productive, noncriminal member of society. Throughout history, there have been several different notions as to how this help should be administered. When our modern correctional system was forming, this was the dominate model. We can see by the very name corrections that the idea was to help the offender become a non-offender. Education programs, faith-based programs, drug treatment programs, anger management programs, and many others are aimed at helping the offender “get better.”

Overall, rehabilitation efforts have had poor results when measured by looking at recidivism rates. Those that the criminal justice system tried to help tend to reoffend at about the same rate as those who serve prison time without any kind of treatment. Advocates of rehabilitation point out that past efforts failed because they were underfunded, ill-conceived, or poorly executed. Today’s drug courts are an example of how we may be moving back toward a more rehabilitative model, especially with first time and nonviolent offenders.

## RETRIBUTION

Retribution means giving offenders the punishment they deserve. Most adherents to this idea believe that the punishment should fit the offense. This idea is known as the doctrine of proportionality . Such a doctrine was advocated by early Italian criminologist Cesare Beccaria who viewed the harsh punishments of his day as being disproportionate to many of the crimes committed. The term just desert is often used to describe a deserved punishment that is proportionate to the crime committed.

In reality, the doctrine of proportionality is difficult to achieve. There is no way that the various legislatures can go about objectively measuring criminal culpability. The process is one of legislative consensus and is imprecise at best.

### A RACIST SYSTEM?

The United States today can be described as both multiracial and multiethnic. This has led to racism . Racism is the belief that members of one race are inferior to members of another race. Because white Americans of European heritage are the majority, racism in America usually takes on the character of whites against racial and ethnic minorities. Historically, these ethnic minorities have not been given equal footing on such important aspects of life as employment, housing, education, healthcare, and criminal justice. When this unequal treatment is willful, it can be referred to as racial discrimination . The law forbids racial discrimination in the criminal justice system, just as it does in the workplace.

Disproportionate minority contact refers to the disproportionate number of minorities who come into contact with the criminal justice system. Disproportionate minority contact is a problem in both the adult and juvenile systems at every level of those systems. As the gatekeepers of the criminal justice system, the police are often accused of discriminatory practices.

Courts are not immune to cries of racism from individuals and politically active groups. The American Civil Liberties Union (2014), for example, states, “African-Americans are incarcerated for drug offenses at a rate that is 10 times greater than that of whites.”

The literature on disproportionate minority sentencing distinguishes between legal and extralegal factors . Legal factors are those things that we accept as legitimately, as a matter of law, mitigating or aggravating criminal sentences. Such things as the seriousness of the offense and the defendant’s prior criminal record fall into this category. Extralegal factors include things like class, race, and gender. These are regarded as illegitimate factors in determining criminal sentences. They have nothing to do with the defendant’s criminal behavior, and everything to do with the defendant’s status as a member of a particular group.

One way to measure racial disparity is to compare the proportion of people that are members of a particular group (their proportion in the general population) with the proportion of that group at a particular stage in the criminal justice system. In 2013, the Bureau of the Census (Bureau of the Census, 2014) estimated that African Americans made up 13.2% of the population of the United States. According to the FBI, 28.4% of all arrestees were African American. From this information we can see that the proportion of African Americans arrested was just over double what one would expect.

The disparity is more pronounced when it comes to drug crime. According to the NAACP (2014), “African Americans represent 12% of the total population of drug users, but 38% of those arrested for drug offenses, and 59% of those in state prison for a drug offense.”

There are three basic explanations for these disparities in the criminal justice system. The first is individual racism . Individual racism refers to a particular person’s beliefs, assumptions, and behaviors. This type of racism manifests itself when the individual police officer, defense attorney, prosecutor, judge, parole board member, or parole officer is bigoted. Another explanation of racial disparities in the criminal justice system is institutional racism . Institutional racism manifests itself when departmental policies (both formal and informal), regulations, and laws result in unfair treatment of a particular group. A third (and controversial) explanation is differential involvement in crime. The basic idea is that African Americans and Hispanics are involved in more criminal activity. Often this is tied to social problems such as poor education, poverty, and unemployment.

While it does not seem that bigotry is present in every facet of the criminal and juvenile justice systems, it does appear that there are pockets of prejudice within both systems. It is difficult to deny the data: Discrimination does take place in such areas as use of force by police and the imposition of the death penalty. Historically, nowhere was the disparity more discussed and debated than in federal drug policy. While much has recently changed with the passage of the Fair Sentencing Act of 2010 , federal drug law was a prime example of institutional racism at work.

Under former law, crimes involving crack cocaine were punished much, much more severely than powder cocaine. The law had certain harsh penalties that were triggered by weight, and a provision that required one hundred times more powder than crack. Many deemed the law racist because the majority of arrests for crack cocaine were of African Americans, and the majority of arrests for powder cocaine were white. African American defendants have appealed their sentences based on Fourteenth Amendment equal protection claims.

### SENTENCING <sup>[137]</sup>

Learning Objective: Key Terms

- Appeal, Asset Forfeiture, Boot Camps, Community Service, Concurrent Sentence, Consecutive Sentence, Day Fine, Death Penalty, Determinate Sentencing, Electronic Monitoring, Fine, Forfeiture, Good Time, Home Confinement, House Arrest, Indeterminate Sentencing, Intensive Supervision Probation (ISP), Mandatory Sentences, Overturn, Presentence Investigation Report, Probation, Proportionality Doctrine, Remand, Scarlet-Letter Punishments, Sentencing, Sentencing Hearing, Sentencing Reform Act of 1984, Sentencing Statute, U.S. Sentencing Commission, Uphold, Victim Impact Statement

In most jurisdictions, the judge holds the responsibility of imposing criminal sentences on convicted offenders. Often, this is a difficult process that defines the application of simple sentencing principles. The latitude that a judge has in imposing sentences can vary widely from state to state. This is because state legislatures often set the minimum and maximum punishments for particular crimes in criminal statutes. The law also specifies alternatives to incarceration that a judge may use to tailor a sentence to an individual offender.

### PRESENTENCE INVESTIGATION

Many jurisdictions require that a presentence investigation take place before a sentence is handed down. Most of the time, the presentence investigation is conducted by a probation officer, and results in a presentence investigation report . This document describes the convict's education, employment record, criminal history, present offense, prospects for rehabilitation, and any personal issues, such as addiction, that may impact the court's decision. The report usually contains a recommendation as to the sentence that the court should impose. These reports are a major influence on the judge's final decision.

### VICTIM IMPACT STATEMENTS

Many states now consider the impact that a crime had on the victim when determining an appropriate sentence. A few states even allow the victims to appear in court and testify. Victim impact statements are usually read aloud in open court during the sentencing phase of a trial. Criminal defendants have challenged the constitutionality of this process on the grounds that it violates the Proportionality Doctrine requirement of the Eighth Amendment, but the Supreme Court has rejected this argument and found the admission of victim statements constitutional.

### THE SENTENCING HEARING

Many jurisdictions pass final sentences in a phase of the trial process known as a sentencing hearing . The prosecutor will recommend a sentence in the name of the people or defend the recommended sentence in the presentence investigation report, depending on the jurisdiction. Defendants retain the right to counsel during this phase of the process. Defendants also have the right to make a statement to the judge before the sentence is handed down.

### INFLUENCES ON SENTENCING DECISIONS

The severity of a sentence usually hinges on two major factors. The first is the seriousness of the offense. The other, which is much more complex, is the presence of aggravating or mitigating circumstances. In general, the more serious the crime, the harsher the punishment.

### TYPES OF SENTENCES

A sentence is the punishment ordered by the court for a convicted defendant. Statutes usually prescribe punishments at both the state and federal level. The most important limit on the severity of punishments in the United States is the Eighth Amendment.

### THE DEATH PENALTY

The death penalty is a sentencing option in thirty-eight states and the federal government. It is usually reserved for those convicted of murders with aggravating circumstances. Because of the severity and irrevocability of the death penalty, its use has heavily circumscribed by statutes and controlled by case law. Included among these safeguards is an automatic review by appellate courts.

### INCARCERATION

The most common punishment after fines in the United States is the deprivation of liberty known as incarceration . Jails are short-term facilities, most often run by counties under the auspices of the sheriff's department. Jails house those awaiting trial and unable to make bail, and convicted offenders serving short sentences or waiting on a bed in a prison. Prisons are long-term facilities operated by state and federal governments. Most prison inmates are felons serving sentences of longer than one year.

### PROBATION

Probation serves as a middle ground between no punishment and incarceration. Convicts receiving probation are supervised within the community and must abide by certain rules and restrictions. If they violate the conditions of their probation, they can have their probation revoked and can be sent to prison. Common conditions of probation include obeying all laws, paying fines and restitution as ordered by the court, reporting to a probation officer, not associating with criminals, not using drugs, submitting to searches, and submitting to drug tests.

The heavy use of probation is controversial. When the offense is nonviolent, the offender is not dangerous to the community, and the offender is willing to make restitution, then many agree that probation is a good idea. Due to prison overcrowding, judges have been forced to place more and more offenders on probation rather than sentencing them to prison.

#### INTENSIVE SUPERVISION PROBATION (ISP)

Intensive Supervision Probation (ISP) is similar to standard probation but requires much more contact with probation officers and usually has more rigorous conditions of probation. The primary focus of adult ISP is to provide protection of the public safety through close supervision of the offender. Many juvenile programs, and an increasing number of adult programs, also have a treatment component that is designed to reduce recidivism.

#### BOOT CAMPS

Convicts, often young men, sentenced to boot camps live in a military style environment complete with barracks and rigorous physical training. These camps usually last from three to six months, depending on the particular program. The core ideas of boot camp programs are to teach wayward youths discipline and accountability. While a popular idea among some reformers, the research shows little to no impact on recidivism.

#### HOUSE ARREST AND ELECTRONIC MONITORING

The Special Curfew Program was the federal courts' first use of home confinement. It was part of an experimental program-a cooperative venture of the Bureau of Prisons, the U.S. Parole Commission, and the federal probation system-as an alternative to Bureau of Prisons Community Treatment Center (CTC) residence for eligible inmates. These inmates, instead of CTC placement, received parole dates advanced a maximum of 60 days and were subject to a curfew and minimum weekly contact with a probation officer. Electronic monitoring became part of the home confinement program several years later. In 1988, a pilot program was launched in two districts to evaluate the use of electronic equipment to monitor persons in the curfew program. The program was expanded nationally in 1991 and grew to include offenders on probation and supervised release and defendants on pretrial supervision as those who may be eligible to be placed on home confinement with electronic monitoring (Courts, 2015).

Today, most jurisdictions stipulate that offenders sentenced to house arrest must spend all or most of the day in their own homes. The popularity of house arrest has increased in recent years due to monitoring technology that allows a transmitter to be placed on the convict's ankle, allowing compliance to be remotely monitored. House arrest is often coupled with other sanctions, such as fines and community service. Some jurisdictions have a work requirement, where the offender on house arrest is allowed to leave home for a specified window of time in order to work.

#### FINES

Fines are very common for violations and minor misdemeanor offenses. First time offenders found guilty of simple assaults, minor drug possession, traffic violations and so forth are sentenced to fines alone. If these fines are not paid according to the rules set by the court, the offender is jailed. Many critics argue that fines discriminate against the poor. A \$200 traffic fine means very little to a highly paid professional but can be a serious burden on a college student with only a part-time job. Some jurisdictions use a sliding scale that bases fines on income known as day fines. They are an outgrowth of traditional fining systems, which were seen as disproportionately punishing offenders with modest means while imposing no more than "slaps on the wrist" for affluent offenders.

This system has been very popular in European countries such as Sweden and Germany. Day fines take the financial circumstances of the offender into account. They are calculated using two major factors: The seriousness of the offense and the offender's daily income. The European nations that use this system have established guidelines that assign points ("fine units") to different offenses based on the seriousness of the offense. The range of fine units varies greatly by country. For example, in Sweden the range is from 1 to 120 units. In Germany, the range is from 1 to 360 units.

The most common process is for court personnel to determine the daily income of the offender. It is common for family size and certain other expenses to be taken into account.

#### RESTITUTION

When an offender is sentenced to a fine, the money goes to the state. Restitution requires the offender to pay money to the victim. The idea is to replace the economic losses suffered by the victim because of the crime. Judges may order offenders to compensate victims for medical bills, lost wages, and the value of property that was stolen or destroyed. The major problem with restitution is actually collecting the money on behalf of the victim. Some jurisdictions allow practices such as wage garnishment to ensure the integrity of the process. Restitution can also be made a condition of probation, whereby the offender is imprisoned for a probation violation if the restitution is not paid.

#### COMMUNITY SERVICE

As a matter of legal theory, crimes harm the entire community, not just the immediate victim. Advocates see community service as the violator paying the community back for the harm caused. Community service can include a wide variety of tasks such as picking up trash along roadways, cleaning up graffiti, and cleaning up parks. Programs based on community service have been popular, but little is known about the impact of these programs on recidivism rates.

#### “SCARLET-LETTER” PUNISHMENTS

While exact practices vary widely, the idea of scarlet-letter punishments is to shame the offender. Advocates view shaming as a cheap and satisfying alternative to incarceration. Critics argue that criminals are not likely to mend their behavior because of shame. There are legal challenges that have kept this sort of punishment from being widely accepted. Appeals have been made because such punishments violate the Eighth Amendment ban on cruel and unusual punishment. Others have been based on the idea that they violate the First Amendment by compelling defendants to convey a judicially scripted message in the form of forced apologies, warning signs, newspaper ads, and sandwich boards. Still other appeals have been based on the notion that shaming punishments are not specifically authorized by State sentencing guidelines and therefore constitute an abuse of judicial discretion (Litowitz, 1997).

#### ASSET FORFEITURE

Many jurisdictions have laws that allow the government to seize property and assets used in criminal enterprises. Such a seizure is known as forfeiture. Automobiles, airplanes, and boats used in illegal drug smuggling are all subject to seizure. The assets are often given over to law enforcement. According to the FBI, “Many criminals are motivated by greed and the acquisition of material goods. Therefore, the ability of the government to forfeit property connected with criminal activity can be an effective law enforcement tool by reducing the incentive for illegal conduct. Asset forfeiture takes the profit out of crime by helping to eliminate the ability of the offender to command resources necessary to continue illegal activities” (FBI, 2015).

Asset forfeiture can be both a criminal and a civil matter. Civil forfeitures are easier on law enforcement because they do not require a criminal conviction. As a civil matter, the standard of proof is much lower than it would be if the forfeiture was a criminal penalty. Commonly, the standard for such a seizure is probable cause. With criminal asset forfeitures, law enforcement cannot take control of the assets until the suspect has been convicted in criminal court.

#### APPEALS

An appeal is a claim that some procedural or legal error was made in the prior handling of the case. An appeal results in one of two outcomes. If the appellate court agrees with the lower court, then the appellate court affirms the lower court’s decision. In such cases the appeals court is said to uphold the decision of the lower court. If the appellate court agrees with the plaintiff that an error occurred, then the appellate court will overturn the conviction. This happens only when the error is determined to be substantial. Trivial or insignificant errors will result in the appellate court affirming the decision of the lower court. Winning an appeal is rarely a “get out of jail free” card for the defendant. Most often, the case is remanded to the lower court for rehearing. The decision to retry the case ultimately rests with the prosecutor. If the decision of the appellate court requires the exclusion of important evidence, the prosecutor may decide that a conviction is not possible.

#### SENTENCING STATUTES AND GUIDELINES

In the United States, most jurisdictions hold that criminal sentencing is entirely a matter of statute. That is, legislative bodies determine the punishments that are associated with particular crimes. These legislative assemblies establish such sentencing schemes by passing sentencing statutes or establishing sentencing guidelines. These sentences can be of different types that have a profound effect on both the administration of criminal justice and the life of the convicted offender.

#### INDETERMINATE SENTENCES



Indeterminate sentencing is a type of criminal sentencing where the convict is not given a sentence of a certain period in prison. Rather, the amount of time served is based on the offender's conduct while incarcerated. Most often, a broad range is specified during sentencing, and then a parole board will decide when the offender has earned release.

#### DETERMINATE SENTENCES

A determinate sentence is of a fixed length and is generally not subject to review by a parole board. Convicts must serve all of the time sentenced, minus any good time earned while incarcerated.

#### MANDATORY SENTENCES

Mandatory sentences are a type of sentence where the absolute minimum sentence is established by a legislative body. This effectively limits judicial discretion in such cases. Mandatory sentences are often included in habitual offender laws, such as repeat drug offenders. Under federal law, prosecutors have the powerful plea-bargaining tool of agreeing not to file under the prior felony statute.

#### THE SENTENCING REFORM ACT OF 1984

The Sentencing Reform Act of 1984 was passed in response to congressional concern about fairness in federal sentencing practices. The Act completely changed the way courts sentenced federal offenders. The Act created a new federal agency, the U.S. Sentencing Commission, to set sentencing guidelines for every federal offense. When federal sentencing guidelines went into effect in 1987, they significantly altered judges' sentencing discretion, probation officers' preparation of the presentence investigation report, and officers' overall role in the sentencing process. The new sentencing scheme also placed officers in a more adversarial environment in the courtroom, where attorneys might dispute facts, question guideline calculations, and object to the information in the presentence report. In addition to providing for a new sentencing process, the Act also replaced parole with "supervised release," a term of community supervision to be served by prisoners after they completed prison terms (Courts, 2015).

When the Federal Courts began using sentencing guidelines, about half of the states adopted the practice. Sentencing guidelines indicate to the sentencing judge a narrow range of expected punishments for specific offenses. The purpose of these guidelines is to limit judicial discretion in sentencing. Several sentencing guidelines use a grid system, where the severity of the offense runs down one axis, and the criminal history of the offender runs across the other. The more serious the offense, the longer the sentence the offender receives. The longer the criminal history of the offender, the longer the sentence imposed. Some systems allow judges to go outside of the guidelines when aggravating or mitigating circumstances exist.

#### INDETERMINATE-INDEFINITE SENTENCING APPROACH

For much of the twentieth century, statutes commonly allowed judges to sentence criminals to imprisonment for indeterminate periods. Under this indeterminate sentencing approach, judges sentenced the offender to prison for no specific time frame and the offenders' release was contingent upon getting paroled or released by a parole board after a finding that the person was rehabilitated. Because some criminals would quickly be reformed but other criminals would be resistant to change, indeterminate sentencing's open-ended time frame was deemed optimal for allowing treatment and reform to take its course, no matter how quickly or slowly. The decline of popular support for rehabilitation has led most jurisdictions to abandon the concept of indeterminate sentencing. Indefinite sentences give judges discretion, within defined limits, to set a minimum and maximum sentence length. The judge imposes a range of years to be served, and a parole board decides when the offender will ultimately be released.

#### DETERMINATE-DEFINITE SENTENCING APPROACH

Under determinate sentencing, judges have little discretion in sentencing. The legislature sets specific parameters on the sentence, and the judge sets a fixed term of years within that time frame. The sentencing laws allow the court to increase the term if it finds aggravating factors and reduce the term if it finds mitigating factors. With determinate sentencing, the defendant knows immediately when he or she will be released. In determinate sentencing, offenders may receive credit for time served while in pretrial detention and "good time" credits. The discretion that judges are allowed in initially setting the fixed term is what distinguishes determinate sentencing from definite sentencing.

Definite sentencing completely eliminates judicial discretion and ensures that offenders who commit the same crimes are punished equally. The definite sentence is set by the legislature with no leeway for judges or corrections officials to individualize punishment. Currently, no jurisdiction embraces this inflexible approach that prohibits any consideration of aggravating and mitigating factors in sentencing. Although mandatory minimum sentencing embraces some aspects of definite sentencing, judges may still impose longer than the minimum sentence and therefore retain some limited discretion.



## PRESUMPTIVE SENTENCING GUIDELINES

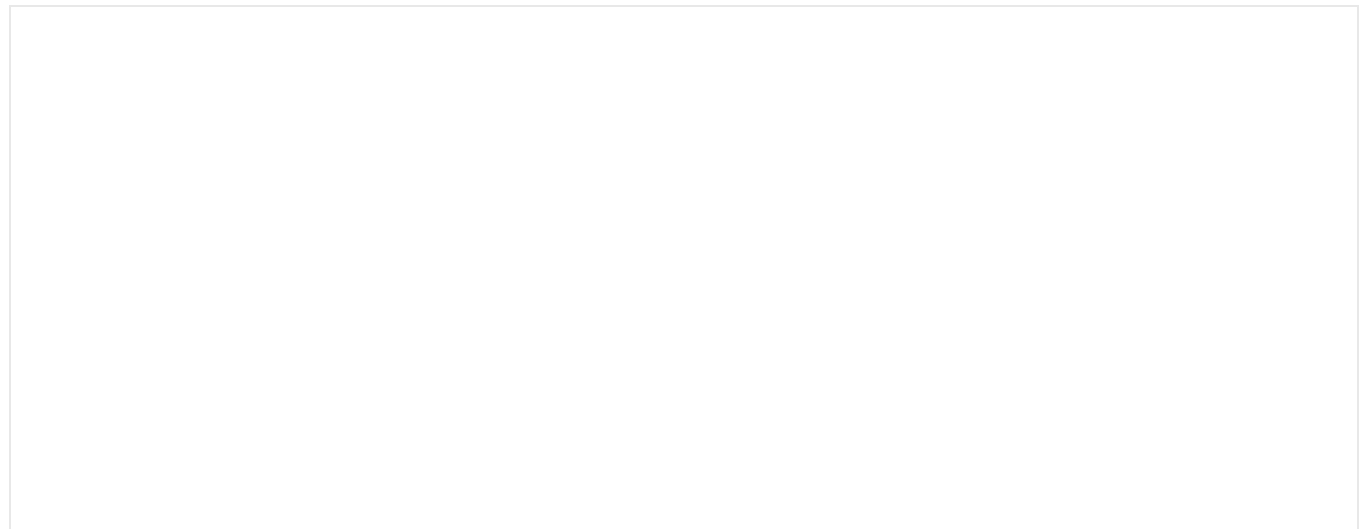
In the 1980s, state legislatures and Congress, responding to criticism that wide judicial discretion resulted in great sentence disparities, adopted sentencing guidelines drafted by legislatively established commissions. These commissions proposed sentencing formulas based on a variety of factors, but the two most important factors in any sentencing guideline scheme were the nature of the crime and the offenders' criminal history. Some states enacted advisory sentencing guidelines that gave suggestions to judges statewide of what was considered an appropriate sentence that should be followed in most cases. Some states enacted mandatory sentence guidelines that required judges to impose presumptive sentences, the length or type of sentence that was presumed appropriate unless mitigating or aggravating factors were identified on the record.

Sentencing guidelines generally differentiate between presumptive prison sentences and presumptive probation sentences. Judges who depart, or (select a different sentence, from the presumptive sentences can do a dispositional departure and impose prison when probation was the presumptive sentence or impose probation instead of prison. Judges may also do a durational departure in which they sentence the offender to a term length different than the presumptive term length, for example, giving an 18-month sentence rather than a 26-month sentence.

Guideline sentencing allows for judicial discretion, but at the same time, limits that discretion. Judges must generally make findings when sentencing the offender to a term of incarceration that is different from the presumptive sentence. The judge must indicate which aggravating factors (factors indicating the offender or offense is worse than other similar crimes) or mitigating factors (factors indicating the offender or offense is less serious than other similar crimes). The Sentencing Reform Act of 1984 (18 U.S.C.A. §§ 3551 et. seq. 28 U.S.C.A. §§991-998) first established federal sentencing guidelines. The Act applied to all crimes committed after November 1, 1987, and its purpose was "to establish sentencing policies and practices for the federal criminal justice system that will assure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes." Scheb, at 681. It created the United States Sentencing Guideline Commission and gave it the authority to create the guidelines. The Commission dramatically reduced the discretion of federal judges by establishing a narrow sentencing range and required that judges who departed from the ranges state in writing their reason for doing so. The Act also established an appellate review of federal sentences and abolished the U.S. Parole Commission.

Most states have adopted some version of sentencing guidelines, from the very simple to the very complex, and many states restrict their guidelines to felonies. Although limiting judicial discretion, state sentencing guideline schemes all allow some wiggle room if the judge finds that the case differs from the run of the mill case. In a series of cases, the Court has found that federal and state sentencing guidelines schemes that do not require the jury to make findings of aggravating factors which justify a harsher sentence imposed by the judge violate the defendant's right to a jury trial (found in the Sixth Amendment). See, *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *United States v. Booker*-*United States v. Fanfan*, 543 U.S. 220 (2005); *Blakeley v. Washington*, 542 U.S. 296 (2004). Accordingly, some of the sentencing guideline schemes have been invalidated and some modified.

"There is still considerable uncertainty about the efficacy of sentencing guidelines. There is evidence that they have reduced sentencing disparities, but they clearly have not eliminated this problem altogether. There is also concern that sentencing guidelines have promoted higher incarceration rates and have thus contributed to the problem of prison overcrowding. It is fair to say that to be successful, sentencing guidelines must be accompanied by policies designed to effectively manage prison populations." [1]





### Think About It... Controversial Issue: Mandatory Minimum Sentences

Legislative enactments, ballot measures, initiatives, and referendums have resulted in mandatory minimum sentences schemes in which offenders who commit certain crimes must be sentenced to prison terms for minimum periods. Mandatory minimum sentences take precedence over but do not completely replace, whatever other statutory or administrative sentencing guidelines may be in place. It is possible for a judge to impose a sentence that exceeds the mandatory minimum on an offender who, because of his or her extensive criminal history or particular brutality of the crime, warrants a particularly harsh guideline sentence.

Mandatory minimum sentences are a type of determinate sentence. Most mandatory minimum sentences are for violent offenses or those involving the use of firearms. Federal law also mandates minimum prison terms for serious drug crimes prosecuted in federal courts. For example, a person charged with possession with the intent to distribute more than five kilograms of cocaine is subject to a mandatory minimum sentence of ten years in prison. See, 21 U.S.C.A. §841 (b) (1)(A).

In our attempts to limit judicial discretion, we may have perhaps gone too far. Judges must impose mandatory minimum sentences regardless of any compelling mitigating facts that warrant a lesser sentence, even when victims fervently request leniency for the defendant. Sentencing discretion resting with a neutral judge has been replaced by charging discretion resting with the prosecutor. Prosecutors, in filing certain charges, can now compel negotiated pleas, and they now hold most of the cards. Also, mandatory minimum sentencing has resulted in the over-incarceration of non-violent offenders. On December 18, 2018, a bi-partisan bill for criminal justice reform called the First Step Act passed the U.S. Senate with an 87-12 vote. The bill seeks to reverse some of the effects of overly harsh sentences for non-violent drug offenders.

The following is a link to video showing the Senate Vote on the First Step Act on December 18 th, 2018 -

[https://d2hpte286tc4h.cloudfront.net/wp-raycom/\(Source\\_%20Senate%20TV/Twitter/@realDonaldTrump/KCAL/KCBS/CNN/Pool\)/2018/12/19/5c1a0dfbe4b0dcad7654b1db/t\\_cc7087e930cd408498ddba6821c2a690\\_name\\_BHDN\\_PY\\_02WE\\_SENATE\\_PASSES\\_CRIMINAL\\_JUSTICE\\_REFORM\\_BILL\\_4AME\\_CNNA\\_ST1\\_1000000004ee5b22\\_120\\_2/file\\_640x360-600-v3.mp4](https://d2hpte286tc4h.cloudfront.net/wp-raycom/(Source_%20Senate%20TV/Twitter/@realDonaldTrump/KCAL/KCBS/CNN/Pool)/2018/12/19/5c1a0dfbe4b0dcad7654b1db/t_cc7087e930cd408498ddba6821c2a690_name_BHDN_PY_02WE_SENATE_PASSES_CRIMINAL_JUSTICE_REFORM_BILL_4AME_CNNA_ST1_1000000004ee5b22_120_2/file_640x360-600-v3.mp4)

[http://HTTPS://WWW.REGISTER-HERALD.COM/CNHI\\_NETWORK/IN-BIPARTISAN-ACT-SENATE-PASSES-CRIMINAL-JUSTICE-REFORM-BILL-WITH/VIDEO\\_115833EC-71D2-5FC3-89BA-980428D75367.HTML](http://HTTPS://WWW.REGISTER-HERALD.COM/CNHI_NETWORK/IN-BIPARTISAN-ACT-SENATE-PASSES-CRIMINAL-JUSTICE-REFORM-BILL-WITH/VIDEO_115833EC-71D2-5FC3-89BA-980428D75367.HTML)

### CONCURRENT VERSUS CONSECUTIVE SENTENCES <sup>[138]</sup>

It is not uncommon for a person to be indicted on multiple offenses. This can be several different offenses, or a repetition of the same offense. In many jurisdictions, the judge has the option to order the sentences to be served concurrently or consecutively . A concurrent sentence means that the sentences are served at the same time. A consecutive sentence means that the defendant serves the sentences one after another.

### FACTORS THAT AFFECT SENTENCING <sup>[139]</sup>

#### OFFENDER'S PRIOR CRIMINAL RECORD

## EFFECT OF CRIMINAL RECORDS IN SENTENCING

A criminal record will be an aggravating factor in sentencing. The criminal record can show that the offender is a "scofflaw", is not rehabilitated or has not "learned from past mistakes".

An offender who has demonstrated an exemplary life since a prior offence and demonstrates remorse may be considered for a reduced sentence and reduce the need for specific deterrence.

It is an error in principle to determine a sentence based only on the sentence from a previous conviction. It is a "relevant consideration" but the sentence must be driven by the facts of the case.

A person who has received a discharge can still be considered a "first time offender".

## OVER-WEIGHING CRIMINAL RECORD

The record "should not be given so much weight such that it becomes more influential than the circumstances of the offence."

It is important that the prior criminal record not be over-emphasized such that it amounts "to a re-sentencing of the accused for the previous offence(s)."

## TIMING OF PRIOR RECORD

A criminal record can only be considered where the offender had one at the time of the index offence (this is known as the Coke Rule).

However, when a judge sentences for a convicted offence, the judge may take into consideration other criminal acts, and in a limited fashion, such as offences admitted in an agreed statement of facts or pending charges.

## AGE AND YOUTHFULNESS

Age is relevant to sentencing as a mitigating factor. A youthful person is seen as having a greater chance of reforming and maturing over time. The courts in certain cases recognize young adults as sometimes foolish, inexperienced, irresponsible, immature and have a "greater prospects for rehabilitation". This diminishes their level of responsibility and moral blameworthiness. [1]

Likewise, the principle of restraint is a prominent factor for young offenders. [2]

Youthfulness as a factor is of primary importance for first time offenders. [3] The factor becomes less important when the youthful offender has "considerable amount of experience in the criminal justice system, has been subject to various forms of probationary and correctional supervision, and has not only breached those conditions but has also re-offended". [4]

Where not otherwise required, a judge sentencing of a youthful offender should put more weight on rehabilitation over general deterrence. [5]

The objectives for youthful first offenders should primarily be on rehabilitation and specific deterrence. [6]

The "length of a penitentiary sentence for a youthful offender should rarely be determined solely by the objectives of denunciation and general deterrence". [7]

For an older accused, age can factor against rehabilitation and reform. [8]

At a certain age there is a recognized category of offender for which imprisonment would be considered "pointless or an unreasonable burden". [9] However, some cases have also pointed to advanced age being an inappropriate reason for sentence reduction as it should be dealt with during sentence administration. [10]

## ADVANCED AGE OFFENDERS

An offender of advanced age can "in some circumstances" be considered a mitigating feature. [11] This has been justified on the basis that prison time is tougher on older persons and that they will have less life expectancy after release.

## EMPLOYMENT

In general, a good work history is mitigating as it indicates a prior good character. [1]

The offender's "opportunity for employment" is an important factor to determine if there is a "reasonable prospect for rehabilitation".

## POLICE OFFICERS

Offences committed by persons who are "sworn to uphold the law" such as police officers have a "special duty to be faithful to the justice system" and so sentences require the objectives of denunciation has heightened significance. [1]

Police officer offenders who commit a breach of trust will be subject to "severe sentences" absent exceptional mitigating factors. [2]

A peace officer being sentenced to a period of incarceration is at risk from the general population and will inevitably serve much of the sentence in protective custody, which should warrant mitigating the punishment.

#### EFFECT ON EMPLOYMENT AND STATUS

Loss of professional or social status is not generally a mitigating factor nor is the ability to do a particular job well a mitigating factor. [1]

However, it has been said that the "ruin and humiliation" brought upon the accused and his family as well as the loss of professional status can provide denunciation and deterrence

#### Degree of Remorse and Attitude

Remorse is a mitigating factor. [1] Remorse is demonstrated by the acceptance of responsibility through word or action as well as demonstrated insight into the offender's actions. A lack of remorse, however, does not make for an aggravating factor, but simply does not allow for the mitigating effect of remorse. [2]

The courts should have "restraint...for persons who spontaneously acknowledge their culpability, have genuine remorse and seek voluntarily to make reparations." [3]

A lack of remorse or acceptance of responsibility generally cannot be taken as an aggravating factor, but rather can only be taken as an absence of mitigating factors. [4] Only in exceptional circumstances can the lack of remorse be taken as aggravating. [5]

Remorse is a "one-way street" and can only have the effect of providing reduction to sentence. [6]

An offender who "continues to maintain his innocence" cannot be found by that fact alone to lack "remorse or insight". [7]

#### Strong Case

Remorse has little importance when the case is so strong that "guilt is inevitable". [8]

#### Misconduct Negating Remorse

Where there is misconduct on the part of the accused during the course of proceedings, it will be "much more difficult to perceive the existence of remorse". [9]

#### Mistake of Law

While not strictly a defense at trial, a mistake of law can be mediating for sentence. Where the accused honestly but mistakenly believe in the lawfulness of their actions they are therefore less morally blameworthy.

#### Shame and Embarrassment

The resultant shame and scorn suffered by an offender as a result of the offence should generally not warrant a lighter sentence. [1]

When it comes to offences committed in the course of professional work, there should be little impact on sentence as the offender had "consciously chosen [to commit the offence while] they enjoyed a good reputation and a position of trust and status, which they abused to commit their crimes."

#### REPAYMENT AND RESTITUTION

Where there has been "full restitution" made in a property offence, this might be a "special circumstance" justifying a conditional sentence where a jail sentence was otherwise appropriate. [1]

It should still take "secondary role" to denunciation and deterrence in large scale frauds involving breach of trust.

#### CHARACTER

A mitigating factor that may be considered is whether the offence is "out of character".

"Stressors" that "precipitated" the offence rendering the offence "out of character" will have a mitigating effect. [1]

Letters from members of the community and family of the offender can be put into evidence at sentencing. However, the weight may be limited where there is no indication that the writers knew about the circumstances of the offence or prior record

#### RISK TO RE-OFFEND

The risk that the accused poses to re-offend is a valid factor for sentencing. [1]

A greater the risk to re-offend the more consideration there will be upon a custodial sentence. [2]

In sexual abuse against children, the fact that an accused is unlikely to re-offend is not a significant consideration. The emphasis should be on general deterrence and denunciation

#### POST OFFENCE CONDUCT

Efforts at rehabilitation and career advancement post-offence is a mitigating factor. [1]

Rehabilitation, while the accused has fled to avoid sentencing, is not a mitigating factor. [2]

Post-offence bad behavior is generally not an aggravating factor. [3] Criminal offences committed after the offence will not be aggravating. [4] However, efforts in attempting to frustrate the investigation, such as telling a victim not to report the offence or attempting to commit further offences, can be used as aggravating. [5]

#### Failure to Assist in the Investigation

Where an accused fails or refuses to assist police in an investigation it can at best neutralize mitigating factors. It cannot be an aggravating factor.

#### OFFENDER'S HISTORY OF TRAUMA

The presence of relevant abuse in the offender's history is sometimes found to be mitigating. This is particularly notable in child sexual offences where the offender had a history of abuse upon themselves.

#### ADDICTION AND SUBSTANCE ABUSE

Substance abuse, by itself, is not ordinarily a mitigating factor. [1] Nor is a history of addiction a mitigating factor to sentence. However, it can suggest a lower level of moral culpability and otherwise good character but for the addiction. It is also helpful for the court to know about to determine whether rehabilitation is a possibility when crafting an appropriate sentence.

Gambling addiction is not generally a mitigating factor. [2] However, some courts have treated it as a reduction to moral culpability as it has the effect of reducing the accused's free will and power of control due to a mental disease. [3]

An offender with issues with substance abuse may be subject to probationary terms requiring them to abstain absolutely from the possession or consumption of the substances. However, some courts will take the view that such restrictions can be counter-productive where there is no belief that they will comply with the conditions.

#### MENTAL HEALTH

Mental health can be a mitigating factor to sentence even where it is not so severe to remove criminal responsibility.

Reduction of sentences due to psychiatric grounds fall into two categories. The mental illness contributed to or caused the commission of the offence or the effect of imprisonment or penalty would be disproportionately severe because of the offender's condition.

An offender's emotional condition due to the personal circumstances of the accused should not be conflated with "mental health problems" that should accord some special treatment in sentence.

#### Causal Connection

Mental disorders, such as schizophrenia, can be a mitigating factor even when there is not a direct causal connection between the offence and the illness. This is also true where the offender was not suffering from delusions at the time. It is sufficient that the illness contributed in some way to the offence. However, the offender's mental health condition is not a factor in sentencing where there is no connection at all between the offence and the condition.

By contrast, a person who commits a crime of violence "while in a sane and sober condition, unaffected by mental impairment of any kind, has the highest level of responsibility, or moral culpability."

#### Incarceration

Treatment in the community is generally preferred over incarceration. However, this is less so for serious offences.

Mental illness is often considered a basis to order treatment and supervision over punishment.

#### Deterrence and Denunciation

General deterrence should be given "very little, if any, weight" since it is not an appropriate manner of making an example to others.

Where mental health plays "a central role in the commission of the offence ... deterrence and punishment assume less importance".

However, at times mental illness will be considered an aggravating factor that will increase sentence where it is necessary to protect the public from a dangerous person who has committed a dangerous offence. Mental illness reduces the importance of denunciation and deterrence and increases the importance of treatment. This includes situations where rehabilitation or cure is impossible.

It is suggested it should be given little if any weight since the punishing of the offender will not make an example to others by way of general deterrence.

The mental condition will attenuate the relative importance of deterrence and denunciation.

#### Degree of Responsibility

A mental illness diminishes the offender's degree of responsibility.

#### Impact of Jail

Incarceration of persons with mental health issues can create a disproportionate impact upon them, which can be a mitigating factor.

An Offenders mental illness can make a jail sentence more severe.

#### Cognitive Deficits

Diminished intellectual capacity is not a mitigating factor warranting a lesser sentence.

The cognitive deficit from Fetal Alcohol Spectrum Disorder (FASD) results in limited restraints as well as an appreciation of the immorality of their actions. This reduces the impact on deterrence and denunciation and increases the mitigation on sentence.

Systemic failures to treat the offender's mental health are mitigating factors.

#### CAPITOL PUNISHMENT <sup>[140]</sup>

##### Learning Objective: Key Points

- Crimes that can result in a death penalty are known as capital crimes or capital offences.
- Supporters of the death penalty argue that the death penalty is morally justified when applied to murder cases, especially cases with aggravating elements, such as multiple homicide, child murder, torture murder and mass killing including terrorism or genocide.
- Capital punishment is often opposed on the grounds that innocent people will inevitably be executed.
- Abolitionists believe capital punishment is the worst violation of human rights.

##### Learning Objective: Key Terms

- insubordination : The quality of being insubordinate; disobedience to lawful authority.
- capital punishment : Punishment by death.
- capital crime : A crime that is punishable by death

#### WHAT IS CAPITAL PUNISHMENT?

Capital punishment is a legal process whereby a person is put to death by the state as a punishment for a crime. Crimes that can result in a death penalty are known as "capital crimes" or "capital offenses." Capital punishment has in the past been practiced by most societies. Currently, only 58 nations actively practice it, and 97 countries have abolished it. Although many nations have abolished capital punishment, over 60% of the world's population live in countries where executions take place—the People's Republic of China, India, the United States, and Indonesia—the four most-populous countries in the world, that continue to apply the death penalty.

Execution of criminals and political opponents has been used by nearly all societies—both to punish crime and to suppress political dissent. In most places that practice capital punishment, it is reserved for murder, espionage, treason, or as part of military justice. In some countries, sexual crimes, such as rape, adultery, incest, and sodomy, carry the death penalty, as do religious crimes, such as apostasy in Islamic nations. In many countries that use the death penalty, drug trafficking is also a capital offense. In China, human trafficking and serious cases of corruption are punished by the death penalty. In militaries around the world courts, martial have imposed death sentences for offenses, such as cowardice, desertion, insubordination, and mutiny.

## ARGUMENTS FOR AND AGAINST

### IN SUPPORT OF CAPITOL PUNISHMENT

Supporters of the death penalty argue that the death penalty is morally justified when applied in murder, especially with aggravating elements, such as multiple homicide, child murder, torture murder, and mass killing including terrorism or genocide. Some even argue that not applying the death penalty in latter cases are patently unjust. Supporters of the death penalty, especially those who do not believe in the deterrent effect of the death penalty, say the threat of the death penalty could be used to urge capital defendants to plead guilty, testify against accomplices, or disclose the location of the victim's body.

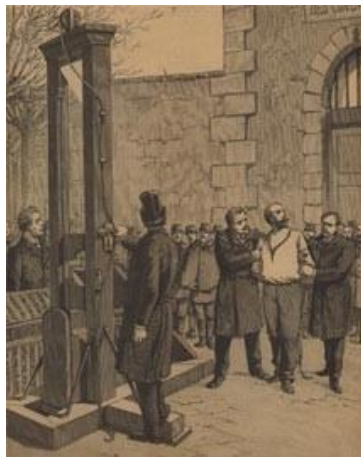


Figure 14.1 Capital Punishment: Anarchist Auguste Vaillant guillotined in France in 1894. <sup>[141]</sup>

### ARGUMENTS AGAINST CAPITOL PUNISHMENT <sup>[142]</sup>

Capital punishment is often opposed on the grounds that innocent people will inevitably be executed. Between 1973 and 2005, 123 people in 25 states were released from death row when new evidence of their innocence emerged. Abolitionists believe capital punishment is the worst violation of human rights, because the right to life is the most important, and judicial execution violates it without necessity and inflicts to the condemned to a psychological torture. In addition, opponents of the death penalty use the argument that executing a criminal costs more than life imprisonment does. Many states have found it cheaper to sentence criminals to life in prison than to go through the time-consuming and bureaucratic process of executing a convicted criminal.

Horrendous crimes are committed and will continue to be committed. Even before clear legal systems existed, people wanted to see perpetrators properly punished for the crimes they committed, and the more heinous the crime, the worse the punishment. Rape, murder, torture, and molestation will always be at the top of the list of crimes that are intolerable, as they are all gross violation of another's autonomy. I could describe a crime that would make anyone's blood boil and ignite a rage for vengeance on the criminal that had the coldness to carry out such a depraved act. I will spare the reader such a story, but you can imagine the types of crimes I am referring to. Once we catch a person that would do such a thing, the next issue we are faced with is clear: What do we do with this person? How do we punish them? Historically, execution, also known as capital punishment, has been used widely for many crimes. Today, it is reserved for the worst of the worst crimes and criminals in countries where it is used. However, many countries (notably, all of Europe except for Belarus) have either outlawed the punishment or chosen not to implement it. We thus ought to consider whether, in today's world, we should ever execute criminals.

While some crimes and criminals might deserve to be executed for their crimes, it is not a penalty that we should continue to implement, especially in the United States of America. There are four reasons for this: 1) the justice system is flawed, and with the finality of death, we should avoid punishments that cannot be properly compensated for; 2) on top of variations in prosecutors in seeking the death penalty, there are worrisome geographic and racial variations in the implementation of capital punishment that mean it is not applied fairly; 3) it is sought and carried out infrequently; and, 4) the United States is one of the few "Western"



countries to still have it, and abolishing it would put the USA in-step with its closest allies and provide an important expression of moral fortitude.

My arguments will hinge on one major claim: a life behind bars would appear to be an equally just punishment when compared to the death penalty. While one has actual life, there is no freedom to go with it. The value of living might be completely removed if one is behind bars forever, making this punishment on equal footing to death. The Spanish phrase for life imprisonment is the poetic *cadena perpetua*, which literally translates to “perpetual chain,” a reminder that the focus of such punishment isn’t on living but being imprisoned. In both prison and death freedom is removed, and never living free again is a fate that is akin to death, as any semblance of a quality life can only be a farce. On top of this, should there be good reason to do so, we can always lessen the term of the punishment and release the prisoner. Additionally, as the Dread Pirate Roberts told Westley in *The Princess Bride*, “Good night, Westley. Good work. Sleep well. I’ll most likely kill you in the morning,” there would remain the possibility of execution in the future if justice demands it (notwithstanding potential legal problems with altering a punishment); but we can’t bring someone back to life (yet) if we execute them and regret it. This doesn’t illustrate that execution is wrong but shows a technical way that life imprisonment can be advantageous. In any event, it is unclear to me that execution is the only appropriate punishment for the crimes that it is a potential punishment for.

I have not mentioned anything about costs. My reasoning is simple: it is unclear whether life in prison or the death penalty is more costly overall, as the likelihood of a shorter time spent in prison is offset by the increased costs of housing the prisoner and the longer court processes (such as multiple appeals) required for capital punishment. Of the many studies that have occurred and the analyses of the studies, there is no clear answer to the question of which one costs more, as costs per trial vary greatly based upon the details of the trial, and where it is carried out, as well as the overall costs of housing or executing an individual prisoner in a specific prison. Even if there were an answer, it is beside the point: if the death penalty is the only just punishment, then we ought to implement it since it would be appropriate to do so. It is very costly to put a car thief into prison, and a lot cheaper to implement the religious punishment of removing a hand. But it is often deemed inappropriate to do the latter, as mutilation is a permanent disfigurement that is particularly cruel. A few years of lost freedom (and maybe a monetary fine) are now deemed to be much more just.

Why should we execute people and for what crimes? There are three main reasons that hold philosophical value: justice, deterrence, and the impossibility of rehabilitation. The first, and most important, reason is that the criminal deserves to die. The act they have committed is so depraved and caused such harm, execution is the only way we can fairly punish the offender. If we kill people for awful crimes, then the threat of punishment also can function as a deterrent. If you might be killed for doing something awful, perhaps you’ll refrain from doing it. Lastly, what should we do with those people that are so depraved they are beyond rehabilitation? Some people will just continue to do bad things, and will not, by their own admission, stop. Experts can interview them and concur. They are lost, there is no hope, and they may even see death as just and preferable. Certainly, these people should be executed. On top of all of this, it gives the families of victims justice and satisfies our primal hunger for revenge.

To turn back to my primary reasons for advocating for the abolition of the death penalty in the United States, my first claim is that given the finality of the punishment and the potential of executing innocent individuals, we ought to avoid it. Let’s assume this occurs, and an innocent person was executed. Let’s also assume that execution is appropriate for certain crimes. Would executing one innocent person be worth executing all of the actually guilty individuals that would come to have the punishment of execution? After all, we allow emergency vehicles to violate all sorts of traffic laws, resulting in the occasionally fatal, and likely avoidable, accident. We believe this cost is worth it because it means that more people, on the whole, are saved. Is execution so appropriate and so important that there are no suitable alternatives or that the only alternatives are actually, all-things-considered, significantly less just?

To alleviate this concern, someone might be quick to point out that no person has been executed and later been found to be innocent since the United States restarted capital punishment in 1977. As of this writing, 161 people have been exonerated before execution (out of approximately 7,800) making the wrongful sentencing rate at least 2% (for updated information on this and all of the statistics mentioned in this work, visit <http://deathpenaltyinfo.org>). Of course, there is little reason to find out if someone was actually innocent after they have died, so those sentenced to death that die before, or as a result of, execution are unlikely to be exonerated, should they actually be innocent. All crimes carry the chance of wrongful convictions, but most of the punishments can, at least in theory, be compensated for, assuming that the value of money can be comparable to the value of time. There is no compensation for a dead person that the person will directly benefit from. As such, the risk of executing an innocent person is too great, especially when life in prison would appear to be a fitting alternative.

There is extreme variation on the implementation of the death penalty across racial and geographic lines and its application is very dependent on the prosecutor. Where the death penalty is allowed, if you are a black male that killed a white female during a robbery, the odds of receiving the death penalty over a white male that tortured a black female before death are significant, and both are much greater than a white woman that tortured then killed a black man (I don't know the exact number since no one has crunched the numbers on all of these, but consider that less than 2% of all death row inmates are women despite committing roughly 10% of eligible homicides and that black males are 97% more likely to get the death penalty when they kill a white person over a black person). The race of the perpetrator and the victim both influence whether the death penalty is sought and applied. Justice is supposed to be blind, and even if everyone who got the death penalty deserved it, the application of it is unfair. This should be concerning.

The death penalty is sought in less than 1% of eligible cases. This statistic speaks for itself: capital punishment is rarely sought as a punishment even in cases where it can be used. Capital punishment will work as a deterrent if it actually deters, but since it is rarely used, it would be reasonable for criminals to believe they would not be executed if they commit capital crimes, and thus unlikely to work as a deterrent. For the threat of capital punishment to clearly work as a deterrent, it should be implemented a lot more frequently than it is. As there is no consensus in the research on whether it is effective as a deterrent, relying upon this reason to support maintaining the death penalty is problematic.

Finally, abolishing the death penalty in the United States would send a very important symbolic and humanitarian message: we stand with the rest of the NATO countries and majority of the world (and move away from being the country with the third most executions behind China and Saudi Arabia) in deciding not to systematically execute people in the name of justice. European countries did not disavow the death penalty because it was inappropriate, but rather many did so because of all the practical concerns I have laid out. If it is unfair in how it is used, then it shows the legal system disrespects its own desire for impartiality. It undermines the integrity of the legal and justice system itself.

Yet, there is still something to be said for keeping the death penalty in light of all of my reasons for abolishing it. 26 Despite my claims that life in prison is just as bad as execution, many people disagree with this. Importantly, many criminals that face these punishments might disagree with it. The threat of execution could motivate criminals to cooperate and accept guilt more frequently, sparing us both the costs of seeking conviction and avoiding the possibility that they are found innocent (this is assuming that they really are guilty). Beyond this, people spending life in prison might not have anything other than their lives to lose, so keeping capital punishment gives them one final thing to fear and thereby prevent them from continuing to do awful things behind bars. Lastly, there might not be any value to the positive expression of our moral fortitude that abolishing the death penalty might bring with it. In fact, keeping it might be more expressive by saying that we will never tolerate extremely depraved acts.

I concede that each of these arguments provides a good reason to keep the death penalty on the table. Indeed, the fact it is rarely used is irrelevant for each of these arguments: it's on the table as a possible punishment, and that's what matters. However, the finality of the death penalty doesn't necessarily have to be the goalpost. We do not chain people to walls until they die in prison: inmates in prison for life are afforded some amount of pleasure and freedom behind walls, at the very least, in hopes of reform and an existence that contributes positively to society. We are also not heartless and can recognize the humanity in even the most hardened criminals. Thus, there can be (and are) varying degrees of freedom one may be privileged to while imprisoned, and the threat of continued loss of freedoms could be used as motivating factors in lieu of execution. To the last objection, that we do not need to show anything to our Western allies or make any statements on punishment (and that having the death penalty might even be the statement we should be making), I'd like to point out that execution is the only punishment we have that intentionally inflicts direct physical harm on a criminal. We no longer lash people, use medieval torture devices, or otherwise use methods with the intention of inflicting physical harm. While we restrain and restrict, the purpose of all other types of punishments and incarcerations are not to physically harm. If physical harm comes, it is an unintended consequence. Abolishing the death penalty, the last bastion of physical violence as a punishment, illustrates that we have moved beyond intentionally inflicting physical harm as a form of punishment.

On March 12, 2019, the governor of California, Gavin Newsom, issued a moratorium on executions during his governorship. This means that while he is governor, no one will be executed and everyone on death row will be treated as if they are in prison for life. Future governors can restart executions, however. This move was met some anger, with the loudest shouting two things: (1) voters have constantly reiterated the desire for the death penalty and the governor disregarding this is overreaching on his part, and (2) that certain people deserve to die as a result of their crimes, and the justice system has confirmed this. The former argument is one about the political structure of the state and where powers lie, and while I can be sympathetic to this viewpoint, the facts are that the governor has the power to take the actions he did, an ability he has in order to maintain a proper system of checks and balances.

Whether the system is actually balanced is a separate issue and not one I need to tackle right now. The second reason had people advocating for the killing of other human beings. It struck me as odd that the cause they are getting riled up about is one that involves such an act of violence. It feels as if we have lost our humanity if we scream and fight so that we may kill another person in the name of the law, because there is no other action that could possibly bring justice. It might be the only way to get revenge, but the law should not be used for revenge. I do believe that some crimes are worthy of such a sentence, but it is not something worth fighting for, especially when the alternative of life in prison is a sufficient proxy. I fully sympathize with the families of victims and in no way want to ignore the awfulness of the crimes these people committed, but fighting for someone else to die in the name of justice does not promote the values we ought to promote as a modern society.

To summarize, while some crimes are heinous enough that the offender can be deserving of capital punishment, implementing execution is riddled with too many problems and complications to be morally appropriate in today's world. It should thus be abolished because the alternative of life in prison is an acceptable replacement.

#### REFUTING CAPITAL PUNISHMENT IN AMERICA <sup>[143]</sup>

Ray Krone came home after finishing his mail route on New Year's Eve, 1991, planning a fun evening to ring in the new year with some of his friends. His night would go nothing as planned. Instead, a dozen police officers were waiting in his driveway. Ray was immediately apprehended and charged for the kidnapping, sexual assault, and murder of a 26-year-old woman who worked at the local bar. Ray is an African American man. The murdered woman was white. (The significance of race will be discussed later in this essay.) At trial, he was convicted of first-degree murder and kidnapping; he was later sentenced to death (Krone).

The Death Penalty Information Center showed that at the time of Ray's sentencing, around 80% of Americans supported the death penalty and saw no problem with this conviction. This position would argue that Krone committed an act of murder; therefore, he should be executed. However, Ray Krone was wrongly convicted. An innocent, honorable man was to be deprived of his life because of an act of injustice he didn't even commit. On April 8th, 2002, after serving 5 years on death row and another 5 years waiting for his innocence to be proven, Ray was exonerated (Krone). His case is one of the many that readily shows the flaws in the legal system and problems with capital punishment, such as innocence, lack of access to adequate counsel, racial disparities, and deterrence, which I will further explore to prove that the death penalty should be illegal in the United States.

Ray Krone is not the only person to be exonerated after serving time on death row. In fact, he was the 100th person, and as of 2016, there have been 156 death row exonerees (Dejong 325). Published in the scholarly journal, *Criminal Justice Ethics*, Hon-Lam Hi's research from the 1980s showed that around 3.3 to 5% of all convictions in U.S. capital rape-murder cases were erroneous. So, since erroneous convictions are inevitable because humans make mistakes, is it acceptable to execute around 4 innocent people out of every 100 executions?

Although this question seems to only have one morally acceptable answer, it can be answered in two very different ways, either using Li's principle of contractualism or the opposing principle of utilitarianism. People who hold the view of utilitarianism agree with the death penalty, as this position holds that if the benefits of an act outweigh its harm, then the act is permissible. In answering the question, the principle of utilitarianism would state that the cost of killing these 4 individuals is outweighed by the benefits the community receives for the incapacitation of the other 96 murderers and the deterrence of further crime. However, if one of those 4 people were you, a friend, or a family member, would you still hold a utilitarian perspective? It is very doubtful. The more intuitive reasoning, contractualism, holds that an act is permissible if and only if it is justifiable to everyone affected by it. This view would say that the killing of these 4 wrongfully convicted persons cannot be justified to the innocent people, their friends, or their families. Therefore, the act of killing is not permissible (Li 152). In itself, according to this view, rates of erroneous convictions, leading to possible executions of innocent people, are enough to make the death penalty unjustifiable and morally unacceptable.

Along with the way that Ray's innocence reveals moral issues regarding the death penalty, his status as an indigent defendant raises significant legal issues. Indigent defendants do not have enough money to pay for representation in court, so, per the 6th Amendment, "the accused shall enjoy the right to . . . have the assistance of counsel for his defense," meaning the state had to provide an attorney for Ray ( U.S. Constitution ). The 1984 case *Strickland v. Washington* extends the 6th Amendment because the Supreme Court ruled that defendants in capital cases have the right to effective representation that meets an "objective standard of reasonableness." However, little pay is given to defense attorneys who are hired to represent indigent defendants, and, in most cases, this attracts the least skilled and unexperienced attorneys.

A large number of attorneys assigned to represent the accused have little to no experience in criminal law, let alone litigating capital cases. They have no idea as to how they should proceed with the cases, which leads to a large number of death row

sentences. In 1999, an extensive investigation into capital punishment in Illinois was conducted by the Chicago Tribune, and it found that 33 defendants who were sentenced to death were represented by attorneys who had been, or were later, disbarred or suspended for conduct that was “incompetent, unethical, or criminal” (Dejong 329). Moreover, a 2002 study conducted by the Texas Defender Service found that Texas death row inmates face a 1 in 3 chance of being executed without having had proper case investigations or a competent attorney to argue for them (Death Penalty Info Center). Although the *Strickland v. Washington* case should eliminate the problem many indigent defendants have with inadequate representation, the ruling stated that the defendant has to prove ineffective counsel by showing that in absence of this assistance, the results would have been different. And here lies the problem many indigent defenders have; not only is this objective standard of reasonableness quite ambiguous and hard to prove, but the state hires these attorneys, so it is highly unlikely states will rule that their provided counsel is ineffective. Therefore, indigent defenders in capital cases are not fully protected by the 6th Amendment, yet another reason the death penalty is an unjust punishment.

Another major issue with imposing the death penalty is racial disparity, an aspect relevant to Ray’s case. Section one of the 14th Amendment states that “No state shall . . . deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws” (U.S. Constitution). For many years now, some people have believed problems with racial discrimination in the U.S. are nearing an end, yet evidence is readily available in our criminal justice system that these problems persist. A U.S. military study conducted from 1984 to 2005 examined all of the 105 potentially death-eligible cases during that time. Fifteen of those cases resulted in a death sentence, and from the data, evidence of three types of racial disparities was found. The most common of the race-based effects is known as “race of the victim discrimination,” which shows that capital-offense charging and sentencing decisions are applied more punitively in cases involving white victims than in similarly situated cases involving victims of color. Of the 15 cases that received the death penalty, 14 had white victims.

The second form of disparity is known as “minority-defendant/white-victim” discrimination. In these cases, there is more punitive treatment when a case involves a minority defendant and a white victim than any other race combination. Nine of the 15 executions showed this form of racial discrimination. The last identified disparity is known as “main effect” racial discrimination. In these cases, there was more punitive treatment with a minority defendant than a white defendant, and of the 15 people sentenced to death, 10 were minorities (Baldus 1229, 1265).

Although this study was conducted over a decade ago, similar trends appear in capital cases today. Since the death penalty was declared constitutional in 1976 with the Supreme Court ruling in *Gregg v Georgia*, the “race of the victim discrimination” has been very prominent. According to Baldus, only around 50% of the victims in murder cases overall are white, but this percentage is much higher for death penalty cases, around 76%. In Ray’s case, if the woman who was murdered had not been white, it would have been much less likely that the prosecution against him would have sought the death penalty as a punishment. All these stats reveal continuing signs of racial disparities in the criminal justice system, giving another reason the death penalty should be illegal. As Ray’s case sadly demonstrates, the phrase, “equal protection of the laws,” from the 14th Amendment does not rightfully and equally protect racial minorities in our country.

As mentioned earlier, at the time of Ray’s conviction, around 80% of the population agreed with capital punishment. Most advocates supported it because they believed a combination of the following three factors: it is a sufficient deterrent, it is a form of proper retribution, or it is less costly than life in prison. However, there are proven flaws with each of these factors.

First of all, capital punishment has not been statistically or scientifically proven to be a deterrent of future crime. Many criminals act on impulse and do not consider the consequences before committing a crime. As stated in Charles Manski and John Pepper’s article, published in the *Journal of Quantitative Criminology*, “the outcomes of counterfactual policies are unobservable” (Manski and Pepper 124-26). Referring to deterrence, Manski and Pepper attribute this statement to the research that has been conducted around the effectiveness of deterrence. The research has found vastly different results for this effectiveness, due to the biased assumptions researchers hold about deterrence. In turn, these individual assumptions about deterrence, as either seeing deterrence as effective or ineffective, have impacted the findings. In both cases, the results sway toward the beliefs of the particular researchers, as the researchers are cognitively biased, failing to account for factors that may stop them from reaching their desired outcome. Furthermore, Manski and Pepper argue there is too much ambiguity to properly measure the deterrent effects of capital punishment, so a conclusion cannot be drawn to determine if the death penalty increases or decreases homicide rates (Manski and Pepper 124-26).

The main reason we, as a society, seek to use the death penalty is not because of deterrence, but for retribution purposes. It is in our nature to want revenge against someone who wronged us, and the death penalty, as an ultimate punishment, seems like a proper way to make criminals suffer. Nonetheless, this is very hypocritical. We value human life and believe murder is wrong, yet we

murder criminals to supposedly uphold our beliefs against murder; but two wrongs do not make a right. Ray would also argue that the death penalty should not be used as a form of retribution because – after his experience of 10 years locked up in prison – he found that many convicts would rather die than spend the rest of their lives, slowly rotting away in their cells. To them, death is the easy way out (Krone).

Overall, the death penalty is not morally correct or as strong a form of punishment as life in prison. Life in prison, contrary to many beliefs, is less costly than seeking the death penalty. Many people look at the wrong stats when deciding which punishment costs the government less in tax dollars. They see that the drugs used for lethal injections, the most used form of execution, only cost a total of \$346.51 per execution, while life in prison costs around \$1 million per person (Banner 295). However, litigating capital cases and reaching the point of execution, takes a lot of time and resources. Capital cases may take many years, as they must go through trial and, most times, several appeals before reaching a final sentencing decision. In capital cases, most of the accused are indigent defenders so the government has to pay for the defense attorneys, along with the judges, prosecutors, other court employees, and expert witnesses. After all that, the price of obtaining a conviction and execution can range anywhere from \$2.5 to \$5 million (Banner 295). So not only is the death penalty immoral, it also costs citizens and the government a large amount of money for such an ineffective form of punishment.

Today, 31 states, Washington D.C., the U.S. Military, and the federal government have authorized the use of the death penalty within their jurisdictions. Since 1976, a total of 1,465 executions have been performed ( Death Penalty Info Center ). I am proposing we ban the death penalty as a form punishment and make it illegal throughout the Unites States, as many developed nations have done before us.

In proposing this, I am not saying we should allow criminals to get away with murder and remain in society. Rather, I believe we should sentence these criminals to life in prison without parole. This form of punishment allows for retribution and eliminates major legal and discriminatory issues that arise in capital cases. Of those 1,465 persons that have been executed, we are not sure how many of them have had their rights violated or were wrongly convicted. In the words of the late Supreme Court Justice Thurgood Marshall, “no matter how careful courts are, the possibility of perjured testimony and human error remain all too real. We have no way of judging how many innocent persons have been executed, but we can be certain that there were some” (qtd in Li 152). Ray Krone could have easily been one of these innocent persons executed. Due to all the legal issues that arise and the amount of potential error in capital cases, which suggests we cannot apply the death penalty with fairness and certainty, the death penalty should be illegal.



Think About It... For Review and Discussion

- Do you think there are certain crimes where execution is appropriate? If so, which ones and why? If not, why not?
- Assume that execution is the appropriate punishment for some crimes. Should it be used? Why or why not?
- Is execution a “cruel” or “unusual” punishment? Why or why not?

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