

does it make sense to continue locking up more offenders every year? Incarceration comes at a price; every dollar spent on corrections means one less dollar for public schools, health care, parks, and higher education.

Although philosophical questions about the costs and benefits of punishment and incarceration have been debated for many years, a convergence of social realities is now forcing criminal justice officials and legislators to seek new approaches to punishing criminals. One factor is the significant decline in crime rates since the early 1990s. With the decreasing salience of crime as an emotional and political issue, there has been a reduction in “tough on crime” rhetoric; there have also been modest developments in alternatives to harsh sentencing policies, particularly for drug offenses. A second factor driving reforms in sentencing is the worldwide recession. Fiscal constraints imposed on state budgets have forced policymakers to confront the high cost of imprisonment and examine the cost effectiveness of sentencing policies. For example, New Mexico lawmakers repealed the death penalty in 2009 in order to save money. In other states, legislators have voted to reduce the number of probationers sent to prison for violating conditions of their release, and to reduce the amount of time prisoners must serve before being considered for parole, particularly for nonviolent offenses (Mauer, 2011). As a result, over the past few years, state prison populations have begun to stabilize overall and actually to decline in a few states.

In this chapter and against this backdrop, we address the issues of punishment and sentencing by describing their multiple goals and purposes, some of which aim to exact retribution from an offender and others that favor practical ends such as deterrence, incapacitation, and rehabilitation. We describe the factors that judges consider in their sentencing decisions, and the specific issues that arise in sentencing of juvenile and sex offenders. Finally, we examine psychological aspects of the ultimate punishment, the death penalty.

### THE PURPOSES OF PUNISHMENT

The crime control model of criminal justice has heavily influenced police, prosecutors, and many judges over the past 35 years. It interprets the primary aim of law enforcement as the apprehension and

punishment of criminals so that they will not repeat their offenses and others will be deterred from similar acts. But as resources have dwindled, policymakers are increasingly interested in punishments that serve some beneficial function, particularly to the vast majority of offenders who reenter society after spending time behind bars.

These differing viewpoints illustrate the multiple purposes of punishment. Psychologists have identified at least seven different goals (see, for example, Greenberg & Ruback, 1984):

1. *General deterrence.* The punishment of an offender—and the subsequent publicity that comes with it—are assumed to discourage other potential lawbreakers. Some advocates of the death penalty, for example, believe that fear of death may be our strongest motivation; hence, they believe that the death penalty serves as a general deterrent to murder.
2. *Individual deterrence.* Punishment of the offender is presumed to keep that person from committing other crimes in the future. Some theories assume that many criminals lack adequate internal inhibitors; hence, punitive sanctions must be used to teach them that their behavior will be controlled—if not by them, then by society.
3. *Incapacitation.* If a convicted offender is sent to prison, society can feel safe from that felon while he or she is confined. One influential position (Wilson, 1975) sees a major function of incapacitation as simply to age the criminal—an understandable goal, given that the rate of offending declines with age.
4. *Retribution.* Society believes that offenders should not benefit from their crimes; rather, they should receive their “just deserts,” or “that which is justly deserved.” The moral cornerstone of punishment is that it should be administered to people who deserve it as a consequence of their misdeeds.
5. *Moral outrage.* Punishment can give society a means of catharsis and relief from the feelings of frustration, hurt, loss, and anger that result from being victims of crime; it promotes a sense of satisfaction that offenders have paid for what they have done to others.
6. *Rehabilitation.* One goal in sentencing has always been that offenders will recognize the error of

their ways and develop new skills, values, and lifestyles so that they can return to normal life and become law abiding. This has been a primary consideration in punishing juveniles.

7. *Restitution.* Wrongdoers should compensate victims for their damages and losses. Typical statutes require that defendants pay for victims' out-of-pocket expenses, property damage, and other monetary losses. Restitution is often a condition of probation.

### Utilitarian Approaches

Most of these goals are **utilitarian**: They are intended to accomplish a useful outcome, such as compensating the victim, deterring crime, or incapacitating or rehabilitating the defendant. Utilitarian goals have a practical objective; they right the wrongs of past misconduct and reduce the likelihood of future criminal behavior.

Rehabilitation as a utilitarian goal has been in and out of favor throughout history. The basic notion is that offenders who receive treatment for the underlying causes of criminality will be less likely to reoffend. When it *was* the dominant goal, criminal sentences were expected to accomplish something other than incarceration and punishment.

Though the original purpose of prisons was to rehabilitate (many prisons are still called *correctional institutions*), high **recidivism** rates indicate that prisons have not been very effective at rehabilitating offenders. The extreme version of this view, dubbed the “nothing works” position, is attributed to Robert Martinson. He concluded, after reviewing a large number of outcome studies, that most attempts at offender rehabilitation fail (Martinson, 1974). Martinson's advocacy of another utilitarian approach—deterrence—led to a “get-tough” attitude toward offenders, and to increasingly punitive measures such as the three-strikes laws (laws stating that after a third criminal conviction, offenders go to prison for a very long time) and zero-tolerance policies enacted in the 1980s and 1990s. But after more than 30 years of this “get-tough” approach with no reduction in recidivism, the pendulum has begun to swing back slowly in the direction of rehabilitative policies. Psychologists now know that rehabilitation can be effective when it is tailored to an offender's age, race, criminal history, religion, and other personal attributes (Andrews &

Bonta, 2010). Unfortunately, many institutions continue to offer only one-size-fits-all interventions.

### Retributive Approaches

Two of the punishment goals we described are **retributive**: they involve looking back at the offense and determining what the criminal “deserves” as a consequence of committing it. These goals are retribution (sometimes called “just deserts”) and moral outrage, a close cousin of retribution (Kaplan, 1996). The notion of retribution implies that an offender deserves to be punished and that the punishment should be proportionate to the severity of the wrongdoing.

The stark contrast between utilitarian and retributive approaches raises the question of why we punish people. What are our motives for punishing others? Discovering how ordinary people think about this issue is important because those who draft sentencing laws should know what the public prefers (Carlsmith & Darley, 2008).

Psychologists have taken different approaches to answering this question. Some have simply asked people which philosophy they prefer and have assumed that respondents can report their true beliefs. But in studies that measured people's agreement with various sentencing policies, people tended to agree with all of them (Anderson & MacCoun, 1999)! Furthermore, people are sometimes unaware of the factors that influence their preferences (Wilson, 2002). An alternative research design involves considering the length of sentences that judges actually order and working backward from these sentences to identify the underlying motives (i.e., just deserts/retribution, deterrence, incapacitation). But this method can be fallible, too. Finally, other researchers have presented vignettes to respondents, varying the nature of the crime and details about the offender, and then measuring respondents' sentencing preferences.

**Public Preferences for Deterrence and Retribution.** Using a research technique called **policy capturing**, Carlsmith, Darley, and Robinson (2002) assessed the punishment motives of ordinary people. The specific motives for punishment that they contrasted were deterrence and retribution. Using vignettes that described a variety of harmful actions, the researchers attempted to understand (or “capture”) the policies underlying the punishments that people assigned.

They varied different elements of the crimes described, elements that should or should not matter to respondents depending on which motive they preferred. For example, the magnitude of the harm should matter to people who are motivated by retribution, and the likelihood of reoffending should matter to those who are concerned with future deterrence. Carlsmith and his colleagues then measured the degree to which each respondent's sentence was influenced by these variables. The data showed a high sensitivity to factors associated with retribution and relative insensitivity to factors associated with deterrence. In fact, people actively seek information relevant to retribution (e.g., the magnitude of the harm and the perpetrator's intent) when they know that a crime has been committed and are asked to assign punishments (Carlsmith, 2006). People's preferences for punishment apparently focus on their sense of what an offender deserves.

Interestingly, that's not what people *say* about their punishment beliefs. Responding to opinion polls, people are more likely to indicate support for punishment that deters criminals than punishment that exacts retribution (Carlsmith, 2008). This suggests that people do not have a good sense of their own motivations for punishing others, and may explain why citizens enact legislation one year, then soon reject it as unjust and vote to repeal it shortly thereafter (Carlsmith & Darley, 2008).

Why do people say they support deterrence but act like they favor retribution? One possibility is that people have a limited awareness of their own reasons for their punishment preferences. As social psychologists have pointed out, when it comes to introspecting about why we behave in a particular way, "we are all strangers to ourselves" (Wilson, 2002). It may also be less socially acceptable to say that we favor a penalty based on reprisal and revenge than one based on notions of future good.

These findings appear to support the idea that many people actually favor punitive sanctions, and at least some politicians are happy to respond. Joe Arpaio, the controversial sheriff of Maricopa County, Arizona (Phoenix), is a "get-tough" icon. His philosophy, which has gained him national notoriety (as well as federal investigations into his management of funds), is to make jail so unpleasant that no one would want to come back—while simultaneously saving money. He sheltered prisoners in "leaky, dilapidated military-surplus tents set on gravel fields surrounded by barbed wire" and fed them "bologna



© Scott Houston/CORBIS

The only female chain gang in America

streaked with green and blue packaging dye" (Morrison, 1995). He established the first women's and juveniles' chain gangs. His "air posse" of 30 private planes tracks illegal immigrants and drug smugglers, leading Paul Gordon, the mayor of Phoenix, to accuse him of discriminatory harassment and improper searches and seizures.

Another retributive goal—moral outrage—allows society the satisfaction of knowing that offenders have been made to pay for the harms they caused. Professor Dan Kahan (1996) argued that for a sentence to be acceptable to the public, it must reflect society's outrage. He maintained that the expressive dimension of punishment is not satisfied by "straight" probation, "mere" fines, or direct community service. According to Kahan, probation appears to be no punishment, a fine appears to be a means to "buy one's way out," and community service is something everyone ought to do. Kahan argued that imposing a **shaming penalty** would allow society to express its moral denunciation of criminal wrongdoers.

Shaming is a traditional means by which communities punished offenders. In colonial days, those who committed minor offenses were put in stocks in a public place for several hours for all to see and ridicule. Serious offenders were branded or otherwise marked so they would be "shamed" for life. In Williamsburg, Virginia, thieves were nailed to the stocks by the ear; after a period of time the sheriff would rip the offender from the stocks, thus "ear-marking" the offender for life (Book, 1999).

The modern counterpart to shaming (without mutilation) is to allow offenders to avoid all or part of a jail sentence by publicly renouncing their crimes in a humiliating way. The impetus for these alternative sentences is twofold. First, judges have become frustrated with revolving-door justice: a large number of offenders who are released from prison eventually return, suggesting that their punishments had little long-term effectiveness. Second, judges are aware of the longstanding problem of prison overcrowding and the high costs of incarceration. The American Bar Association has urged judges to provide alternatives to incarceration for offenders who might benefit from them.

Some judges have been happy to oblige, and many of the sentences they have imposed are truly ingenious. Consider the following:

1. Men caught on surveillance cameras in the process of soliciting prostitutes in Oakland, California, have their faces plastered on bus stop signs and billboards (Stryker, 2005).
2. A Kentucky judge regularly gives “Deadbeat Dads”—fathers owing more than \$10,000 in child support to more than three women—a choice: jail or a vasectomy (McAree, 2004).

Another innovative sentence is described in Box 14.1.

As you might expect, alternative sentences like these are highly controversial. Some lawyers—defense attorneys and prosecutors alike—applaud them, acknowledging that judges have discretion in sentencing and that incarceration is costly and does not always work. But others worry that the shaming

inherent in these sentences is sometimes extreme. Even Dan Kahan, the early proponent of shaming penalties, now shuns them (Kahan, 2006). He asserts that ordinary citizens prefer punishments that affirm, rather than denigrate, their core egalitarian values.

Still, shaming has intuitive appeal as a penal sanction because everyone has experienced shaming in childhood. Parents teach their children to “be good” by making them ashamed of their bad behavior. A child forced to confess to the store owner that he stole a piece of candy should associate theft with embarrassment from that time on (Book, 1999). However, the 21st century lacks the social cohesiveness of earlier societies in which shaming was effective in controlling behavior. For this reason, some perceive modern shaming as ineffective and unnecessarily cruel.

Some recent research suggests that it may also be counterproductive. When participants imagined or remembered themselves in situations where they were publicly reprimanded for wrongdoing, they expressed humiliation, even when the wrongful act was exposed to just one person. Importantly, that humiliation was associated not with feelings of shame or guilt, but rather with perceptions of unfair treatment, anger at others, and vengeful urges. Public condemnation shifts the focus from one’s wrongdoing to perceived mistreatment by others (Combs, Campbell, Jackson, & Smith, 2010).

Apparently, the line between shaming and humiliation is rather blurred. An extreme example of counterproductive shaming: A 19-year-old was ordered to publish his name, photo, and offense in

#### **Box 14.1 THE CASE OF A CROOKED COUPLE AND THEIR SHAMING PENALTY**

Over the course of her 16-year employment as an administrative assistant in the Harris County (Texas) District Attorney’s Office, Eloise Mireles discovered a serious weakness in the office’s accounting system. But rather than fix it, she and her husband Daniel opted to cheat the county out of more than \$255,000. Eloise stole money orders and cashiers’ checks intended to compensate crime victims, and Daniel deposited the checks in the couple’s account. They spent the money on trips and tickets to concerts and sporting events. After pleading guilty to theft charges, they were ordered to spend six months in jail (one month per year for six years), stand at a busy Houston intersection for five hours at a time

(he on Saturdays and she on Sundays) wearing a sign that reads “I am a thief. I stole \$255,000 from a crime victims’ fund,” and display a sign in front of their house that says “The occupants of this residence are convicted thieves.” According to Daniel Mireles’s attorney, this punishment suited his client just fine because Mireles would rather admit every day that he was wrong than go to prison (Rogers et al., 2010).

#### **Critical Thought Question**

Discuss the advantages and disadvantages of shaming as an approach to criminal sentencing in light of the goals of punishment discussed earlier in the chapter.

the local paper after his third DUI conviction. His mother saw the paper and left it on the breakfast table with a note saying she was ashamed of him. He wrote her a letter of apology and shot himself in the head (Braudway, 2004).

### Restorative Approaches

Over the years, many people have become disenchanted with retributive justice. For one thing, punishing offenders in proportion to the severity of their offenses, although cathartic, has apparently done little to curb crime or reduce suffering. For another, inflicting punishment on offenders who “deserve” to be punished provides little opportunity for victims to be involved in the process or to have their own needs met. As a result, victims are often dissatisfied with their experiences in the criminal justice system (O’Hara, 2005).

In recent decades, a new approach has emerged that attempts to repair the damage caused by criminal offenses. This approach, called **restorative justice**, uses open dialogue to gain consensus about responsibility-taking and dispute resolution. The goals of restorative justice are to repair the harm and restore the losses caused by offensive activity, reintegrate offenders into society, and empower victims and the community to move from feelings of vulnerability and loss to a sense of understanding and closure (Umbreit, Vos, Coates, & Lightfoot, 2005).

Restorative justice is based on the premise that those who are most affected by crime—victims and offenders—should have a prominent role to play in resolving the conflict and that the community also has a stake in its outcome. Thus, it expands the circle of participants beyond the offender and the state, and encourages participants to use some combination of apology, remorse, and forgiveness to move beyond the harms caused by crime.

Restorative justice policies are used throughout the world (e.g., the Truth and Reconciliation Commissions in South Africa and Rwanda were based on these principles) and are now embedded in various components of many justice systems in the United States, including the criminal, civil, and juvenile justice systems (Sullivan & Tift, 2006). We provide an example of a restorative procedure in Box 14.2.

How do people feel about achieving justice through a restorative process? Given the public’s strong desire to punish offenders, is there support for procedures that focus on other justice goals? Although restorative justice has received much less empirical scrutiny than retributive justice (Roberts & Stalans, 2004), people apparently do value its role in repairing harm done to victims and communities. In fact, for less serious crimes, people prefer to respond with restorative measures, and even for more serious offenses, people prefer responses that combine restorative procedures and punitive sanctions (i.e., prison sentences), rather than either of these options alone

#### Box 14.2 THE CASE FOR RESTORATIVE JUSTICE: HEALING A MOTHER WOUNDED BY TRAGEDY

On July 19, 2009, Sandy Eversole got the news that all parents fear and dread: her son David Mueller, a star athlete and college student, had been killed in an automobile accident. David was riding in a car driven by his friend Dylan Salazar, travelling nearly 100 mph on a Colorado Springs city street before running off the road. As expected, Sandy and her family were overwhelmed by grief in the first few months after the accident and then angered and frustrated by the claims settlement and criminal justice responses. She wanted to know what had happened that night and why, but after Salazar was sentenced to four years in a youth correctional facility, Sandy had no way to ask questions or seek solace. That changed when the District Attorney’s office gave her an opportunity to meet with Salazar in a restorative justice session led by a trained mediator. Despite initial concerns about whether she

would be capable of controlling her rage, Sandy was able to tell Salazar what her family had endured. Also appreciative, Salazar apologized and took responsibility for the accident. Reflecting on the experience, Sandy recalled, “Right away I could tell that he was full of remorse and sadness. It was hard to find out some of the details but I was glad I did. It was easy to forgive him after I saw his tears” ([www.restorativemediationproject.org](http://www.restorativemediationproject.org)).

#### Critical Thought Question

Historically, victims have had little say in how criminal offenders are punished. Why? The restorative justice approach seeks to empower victims by giving them a voice in this matter. In your opinion, should victims’ perspectives influence the punishment meted out to offenders?

(Gromet & Darley, 2006). The need to punish offenders does not preclude the desire to attend to the needs of others harmed by wrongdoing (Gromet & Darley, 2009).

Given the public's preference for both retribution and restoration, it is worthwhile examining how judges assign criminal punishments, to what extent their choices mirror public sentiment, and how psychological factors influence their decisions.

## JUDICIAL DISCRETION IN SENTENCING

Criminal sentencing lies at the heart of society's efforts to ensure public order. Hoffman and Stone-Meierhoefer (1979) go so far as to state, "Next to the determination of guilt or innocence, a determination waived by a substantial proportion of defendants who plead guilty (around 90%), the sentencing decision is probably the most important decision made about the criminal defendant in the entire process" (p. 241).

Sentencing is a judicial function, but sentencing decisions are largely controlled by the legislative branch—Congress and state legislatures. The legislative branch dictates the extent of judges' discretion, and many legislators believe that judges should have little or no discretion. They emphasize retribution and argue that the punishment should fit the crime. Mandatory sentences, sentencing guidelines, and the abolition of parole have been the primary ingredients in these "get tough" schemes.

Other legislators maintain that the sentence should also fit the offender—in essence, that judges should have discretion to make the sentence fit both the crime and the criminal. Discretion allows judges to capitalize on their perceptions of an offender's personal and external circumstances so that sentencing decisions can "serve, within limits set by law, that elusive concept of justice which the law in its wisdom refuses to define" (Gaylin, 1974, p. 67). Those who advocate individually tailored sentences note that each offender is different and deserves to be treated as an individual: "Theories [that] place primary emphasis on linking deserved punishments to the severity of crimes, in the interest of treating cases alike . . . lead to disregard of other ethically relevant differences between offenders—like their personal backgrounds and the effects of punishments on them and their families" (Tonry, 1996, p. 15).

## Sentencing Policies

Some states have **indeterminate sentencing** schemes, in which judges exercise their discretion by imposing a variable period of incarceration for a given offense (e.g., 6–20 years), and a parole board determines the actual date of release. Such policies have been both hailed and criticized: hailed because they provide incentives for good behavior and encourage offenders to take advantage of available treatment programs to enhance the chances of earlier release, and criticized because they allow parole boards wide discretion in determining when the conditions of the sentence have been satisfied. When indeterminate sentencing works as it should, offenders are neither released early nor subjected to confinement beyond that necessary to ensure public protection.

In other states, the legislative branch has imposed a **determinate sentencing** system on the judiciary, effectively reducing judges' discretion. In these systems, offenders are sentenced for a fixed length of time determined by statutes and guidelines, and there is no parole. The primary goals of these sentences are retribution and moral outrage. There is little concern for the offender's personal characteristics, apart from his or her criminal record, and less potential for arbitrary or discriminatory decisions about when an offender should be released.

In a further attempt to reduce discretion, some states impose **mandatory minimum sentences** for certain offenses, including drug crimes. These policies require judges to sentence offenders to a minimum number of years in prison regardless of any extenuating circumstances. They, too, have been criticized as unjust. For example, a Utah judge was forced to sentence a first-time offender who had sold marijuana on three occasions to 61½ years in custody with no parole. The reason: He carried a gun during the marijuana sales. The statute imposed a 5-year minimum term for the first gun count and a minimum of 25 years for each subsequent count in addition to 6½ years for the sale of the marijuana. The judge noted that on the very day he sentenced the marijuana dealer to 61½ years, using the same guidelines he sentenced a murderer to a 21-year term (*United States v. Angelos*, 2004).

Review of more than 73,000 cases from 2010 revealed that 75% of offenders subjected to a mandatory minimum penalty were convicted of a drug