Chapter 4

The Punishment of Offenders

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ON JANUARY 14, 2014,a defendant in a tax-evasion case entered a U.S. district courthouse in Chicago. This was the day of his sentencing. Just two months prior, he had pleaded guilty to one count of tax evasion. The defendant in the case was billionaire Ty Warner. Warner made his fortune as the sole owner of Ty Inc., the company that manufactures Beanie Babies. The toy maker’s net worth has been estimated at $2.6 billion.1 Warner’s case involved concealing Swiss bank accounts from the IRS, totaling $107 million, for more than 10 years. He admitted to evading $5.6 million in past taxes by setting up secret bank accounts. According to federal prosecutors, this “was a crime committed not out of necessity but greed.” The prosecutors acknowledged that the defendant had led an “otherwise law-abiding existence.” Warner’s supporters provided at least 70 character references to the judge, all of which highlighted the defendant’s charitable contributions to society. However, the prosecution noted that “[c]harity is not a get-out-of-jail free card” and that “[g]iven his means, the defendant’s charitable works are hardly exceptional.” Prosecutors argued that failure to give Warner a prison sentence would send a message that committing tax evasion is simply “a bad investment.”2 The federal sentencing guidelines stipulate a sentence of between 46 to 57 months in federal prison for the crime Warner admitted to committing. Noting that Warner had already paid $25 million in back taxes and that the defendant had suffered public humiliation for his crime, U.S. District Judge Charles Kocoras sentenced Warner to two years of probation. Warner will also be required to pay a $53 million fine, an additional $100,000 fine, $500,000 in prosecution fees, and a court fee of $100. Finally, Warner was sentenced to perform 500 hours of community service.3 Crucial to every decision in the criminal justice process is the question “Is it just?” Should Ty Warner have been given probation, put on house arrest, or sent to federal prison? Did justice serve those harmed by Warner’s crimes? Did the sentence support society’s need for the maintenance of right conduct? What rationale governed the judge’s sentencing decision?

The Purpose of Corrections Rationales for punishment are influenced by the broad philosophical, political, and social themes of their era. Prevailing ideas about the causes of crime are closely tied to questions of responsibility and hence to the rationale for specific sanctions. As explained in Chapter 2, the ideas of the classical school of criminology, founded by Cesare Beccaria, squared nicely with the concepts of the Age of Reason, as did Jeremy Bentham’s utilitarianism. In the context of the times, “making the punishment fit the crime” was more humane because it sought to do away with the brutal punishments often inflicted for trivial offenses. With the rise of science and the development of positivist criminology toward the end of the 1800s, new beliefs emerged about criminal responsibility and the desirability of designing punishment to meet the needs of the offender. The positivists considered criminal behavior to be the result of sociological, psychological, or biological factors and therefore directed correctional work toward rehabilitating the offender through treatment. Before further examining the goals of the criminal sanction, we should consider what the term punishment actually means. Herbert Packer argues that punishment is marked by these three elements: 1. An offense. 2. The infliction of pain because of the commission of the offense. 3. A dominant purpose that is neither to compensate someone injured by the offense nor to better the offender’s condition but to prevent further offenses or to inflict what is thought to be deserved pain on the offender.4 Note that Packer emphasizes two major goals of criminal punishment: inflicting deserved suffering on offenders and preventing crime. Criminal sanctions in the United States have four goals: retribution (deserved punishment), deterrence, incapacitation, and rehabilitation. In Chapter 21 we describe the movement to make restorative and community justice a fifth goal of the criminal sanction. Here, as we discuss each of the four traditional justifications for punishment, bear in mind that although judges often state publicly that their sentencing practices accord with a particular goal, conditions in correctional institutions or the actions of probation officers may be inconsistent with that goal. Thus, sentencing and correctional policies may be carried out in such a way that no one goal dominates or, in some cases, that justice itself is not demonstrably served.

Retribution (Deserved Punishment) Retribution is punishment inflicted on a person who has violated a criminal law and so deserves to be punished. The Biblical expression “an eye for an eye, a tooth for a tooth” illustrates the philosophy underlying retribution. Retribution means that those who commit a particular crime should be punished alike, in proportion to the gravity of the offense or to the extent to which others have been made to suffer. Retribution is deserved punishment; offenders must “pay their debts.” This idea focuses on the offense alone, not the future acts of the criminal or some other purpose such as reform or deterrence. Offenders must be penalized for their wrongful acts, simply because fairness and justice require that they be punished. With the Age of Reason and the development of utilitarian approaches to punishment, the idea of retribution lost much of its influence (see Chapter 2). However, some scholars claim that the desire for retribution is a basic human emotion. They maintain that if the state does not provide retributive sanctions to reflect community revulsion at offensive acts, citizens will take the law into their own hands to punish offenders. In this view, the failure of government to satisfy
 the people’s desire for retribution could produce social unrest. Retribution helps the community emphasize the standards it expects all members to uphold. This argument may not be valid for all crimes, however. If a rapist is inadequately punished, then the victim’s friends, family, and other members of the community may be tempted to exact their own retribution. How about a young adult who smokes marijuana? If the government failed to impose retribution for this offense, would the community care? The same apathy may hold true with respect to offenders who commit other small, nonviolent crimes. But even in these seemingly trivial situations, retribution may be useful and necessary to remind the public of the general rules of law and the important values that it protects. Since the late 1970s, retribution as a justification for the criminal sanction has aroused new interest. This has occurred largely because of dissatisfaction with the philosophical basis and practical results of rehabilitation. Using the concept of “just deserts” (or deserved punishment) to define retribution, some theorists argue that one who infringes on the rights of others deserves to be punished. This approach is based on the philosophical view that punishment is a moral response to harm inflicted on society. Put differently, basic morality demands that wrongdoers be punished. Andrew von Hirsch, a well-known punishment scholar, says that “the sanctioning authority is entitled to choose a response that expresses moral disapproval: namely, punishment.”5 The deserved-punishment approach requires that sanctions be administered only to exact retribution for the wrong inflicted and not primarily to achieve other goals, such as deterrence, incapacitation, or rehabilitation.

Deterrence Many people think of criminal punishment as a way to affect the future choices and behavior of individuals. Politicians frequently talk about being “tough on crime” in order to send a message to would-be criminals. This approach goes back to the eighteenth century. Recall from Chapter 2 that Jeremy Bentham was struck by what seemed to be the pointlessness of retribution. Other reformers adopted his theory of utilitarianism, which holds that human behavior is governed by the individual’s calculation of the benefits versus the costs of one’s acts. Before stealing money or property, for example, potential offenders consider the punishment that others have received for similar acts and are thereby deterred. Modern thinking distinguishes two types of deterrence.6 General deterrence presumes that members of the general public will be deterred by observing the punishments of others and will conclude that the costs of crime outweigh the benefits. For general deterrence to be effective, the public must be constantly reminded about the likelihood and severity of punishment for various acts. They must believe they will be caught, prosecuted, and given a specific punishment if they commit a particular crime. Moreover, the punishment must be severe enough to impress them well enough to avoid committing crimes. By contrast, specific deterrence (also called special or individual deterrence) targets the decisions and behavior of offenders who have already been convicted. In this approach the amount and kind of punishment are calculated to discourage the criminal from repeating the offense. The punishment must be sufficiently severe to make the criminal conclude, “The consequences of my crime were painful. I won’t commit that crime again because I don’t want to risk being punished again.” The concept of deterrence poses obvious difficulties. Deterrence assumes that all people act rationally and think before they act. It does not account for the many people who commit crimes under the influence of drugs or alcohol, those who suffer from psychological problems or mental illness, or those who violate the law when in an extreme emotional state. In other cases the low probability of being

 caught defeats both general and specific deterrence. To be generally deterrent, punishment must be perceived as fast, certain, and severe—but it does not always happen this way. Knowledge of the effectiveness of deterrence is limited. For example, social science cannot measure the effects of general deterrence; only those who are not deterred come to the attention of researchers. A study of the deterrent effects of punishment would have to examine the impact of different forms of the criminal sanction on various potential lawbreakers. How can anyone determine how many people—or even if any people—stopped themselves from committing a crime because they were deterred by the prospect of prosecution and punishment? Therefore, while legislators often cite deterrence as a rationale for certain sanctions, no one really knows the extent to which sentencing policies based on deterrence achieve their objectives.

Incapacitation Incapacitation assumes that society can, by detention in a correctional facility or by execution, remove an offender’s capacity to commit further crimes. Many people express such sentiments by urging, “Lock ’em up and throw away the key!” In primitive societies, banishment from the community was the usual method of incapacitation. In early America, offenders often agreed to move away or to join the army as an alternative to some other form of punishment. Today, imprisonment is the usual method of incapacitation. Offenders can be confined within secure institutions and effectively prevented from committing additional harm against society for the duration of their sentence. Capital punishment is the ultimate method of incapacitation. Any sentence that physically restricts an offender can have an incapacitating effect, even when the underlying purpose of the sentence is retribution, deterrence, or rehabilitation. However, sentences based primarily on incapacitation are future oriented. Whereas retribution requires focusing on the harmful act of the offender, incapacitation looks at the offender’s potential actions. If the offender will likely commit future crimes, then the judge may impose a severe sentence—even for a relatively minor crime. Under the theory of incapacitation, for example, a woman who kills her abusive husband as an emotional reaction to his verbal insults and physical assaults could receive a light sentence. As a one-time impulse killer who felt driven to kill by unique circumstances, she is not likely to commit additional crimes. By contrast, someone who shoplifts merchandise from a store and has been convicted of the offense on 10 previous occasions may receive a severe sentence. The criminal record and type of crime indicate that he or she will commit additional crimes if released. Thus, incapacitation focuses on characteristics of the offenders instead of characteristics of the offenses. Does it offend the American sense of justice that a person could receive a harsher sentence for shoplifting than for manslaughter? Questions also arise about how to determine the length of sentences. Presumably, offenders will not be released until the state is reasonably sure that they will no longer commit crimes. But can we ever be completely sure about what someone will do in the future? And, finally, on what grounds can the state punish people for acts that the state believes they will commit in the future? In recent years, greater attention has been paid to the concept of selective incapacitation, whereby offenders who repeat certain kinds of crimes are sentenced to long prison terms. Decades of criminological research have consistently shown that a relatively small number of offenders commit a large number of violent and property crimes. Thus, these “career criminals” should be locked up for long periods.7 Although the idea of confining or closely supervising repeat offenders is appealing, it is also quite expensive to do so. In addition, selective incapacitation raises several moral and ethical questions. Because the theory looks at aggregates—the total harm caused by a certain type of crime versus the total suffering to be inflicted to reduce its incidence—policy makers may tend to focus on cost– benefit comparisons, disregarding serious issues of justice, individual freedom, and civil liberties.

Rehabilitation Rehabilitation has the goal of restoring a convicted offender to a constructive place in society through some form of vocational or educational training or therapy. Many people believe that rehabilitation is the most appealing modern justification for use of the criminal sanction. They want

 offenders to be treated and resocialized so they will lead a crime-free, productive life. Over the last century, rehabilitation advocates have argued that techniques are available to identify and treat the causes of criminal behavior. If the offender’s criminal behavior is assumed to result from some social, psychological, or biological deficiency, the treatment of the disorder becomes the primary goal of corrections. The goal of rehabilitation is oriented solely toward the offender and does not imply any consistent relationship between the severity of the punishment and the gravity of the crime. People who commit lesser offenses may receive long prison sentences if experts believe that the offenders need a long period to become rehabilitated. By contrast, a murderer may win early release by showing signs that the psychological or emotional problems that led to the killing have been corrected. According to the concept of rehabilitation, offenders are treated, not punished, and will return to society when they are reformed. Consequently, judges should not set a fixed sentence but one with a maximum and minimum term so that parole boards may release the inmate when he or she has been rehabilitated. Such sentences are known as indeterminate sentences. The indeterminate sentence is justified by the belief that if prisoners know when they are going to be released, they will not make an effort to engage in the treatment programs prescribed for their rehabilitation. If, however, they know they will be held until reformed, they will cooperate with counselors, psychologists, and other professionals seeking to treat their problems. From the 1940s until the 1970s, the goal of rehabilitation was so widely held that treatment and reform of the offender were generally regarded as the only issues worthy of serious attention. Experts assumed that crime was caused by problems affecting individuals and that modern social sciences had the tools to address those problems. Since the 1970s, however, studies of rehabilitative programs have challenged the idea that we really know how to reform criminal offenders.8 Moreover, scholars no longer take for granted that crime is caused by identifiable, solvable problems such as poverty, lack of job skills, low self-esteem, and hostility toward authority. Instead, some argue that one cannot identify the cause of criminal behavior for individual offenders. And still others believe that coerced prison treatment programs are a waste of valuable resources. Clearly, many legislatures, prosecutors, and judges have abandoned the rehabilitation goal in favor of retribution, deterrence, or incapacitation. Yet on the basis of opinion polls, researchers have found public support for rehabilitative programs.

New Approaches to Punishment During the past decade, many people have called for shifts away from punishment goals that focus either on the offender (rehabilitation, specific deterrence) or the crime (retribution, general deterrence, and incapacitation). Some have argued that the current goals of the criminal sanction leave out the needs of the crime victim and the community. Crime has traditionally been viewed as violating the state, but people now recognize that a criminal act also violates the victim and the community. In keeping with the focus of police, courts, and corrections on community justice (see Chapter 21), advocates are calling for restoration to be added to the goals of the criminal sanction. The restorative perspective views crime as more than a violation of penal law. The criminal act practically and symbolically denies community by breaking down trust among citizens. Restoration requires that the community determine how best to communicate that the offender is not above the law and that the victim is not beneath its reach. Crime victims suffer losses involving damage to property and self. The primary aim of criminal justice should be to repair these losses. Crime also challenges the essence of community, to the extent that community life depends on a shared sense of trust, fairness, and interdependence.
 Critics say that the retributive focus of today’s criminal justice system denies the victim’s need to be acknowledged and isolates community members from the conflict between offender and victim. By shifting the focus to restorative justice, sanctions can provide ways for the offender to repair harm. However, others warn that society should approach restorative justice with caution because many procedural safeguards, such as legal representation and the presumption of innocence, may be impaired.10 Restoration-oriented programs take many forms, most involving the participation of the offender, the victim, and the community. The offender must take responsibility for the offense, agree to “undo” the harm through restitution, and affirm a willingness to live according to the law. The victim must specify the harm of the offense and the resources necessary to restore the losses suffered; the victim must also lay out the conditions necessary to diminish any fear or resentment toward the offender. The community helps with the restorative process by emphasizing to the offender the norms of acceptable behavior, providing support to restore the victim, and offering opportunities for the offender to perform reparative tasks for the victim and the community. Finally, it provides ways for the offender to get the help needed to live in the community crime-free.11 Research suggests that restoration-oriented programs can be effective. For example, Lawrence Sherman and Heather Strang’s comprehensive review of the research literature showed that these programs reduce recidivism among property and violent offenders. However, such programs seem to be more effective when crimes involve a personal victim. Sherman and Strang also found evidence that such programs benefit crime victims. In particular, victims who willingly meet with offenders experience fewer posttraumatic stress symptoms.

Criminal Sanctions: A Mixed Bag? How should society justify the use of criminal sanctions? Should the purpose be deterrence or incapacitation? What about retribution and rehabilitation? Justifications for specific sanctions usually overlap. A term of imprisonment may be philosophically justified by its primary goal of retribution but also serve the secondary functions of deterrence and incapacitation. General deterrence is such a broad concept that it adapts to the other goals, except possibly rehabilitation. However, rehabilitation clearly conflicts with the other goals. For example, the deterrent power of incarceration depends primarily on being unpleasant. If incarceration consists mainly of a pleasant rehabilitative experience, it loses its deterrent power. By the same token, the more unpleasant prison life is, the less suitable an environment it is for most rehabilitation programs. Trial judges carry the heavy burden of fashioning a sentence that accommodates these values in each case. A judge may sentence a forger to a long prison term as an example to others, even though this person poses little threat to community safety and probably does not need correctional treatment. The same judge may impose a shorter sentence on a youthful offender who has committed a serious crime but may be a good candidate for rehabilitation if quickly reintegrated into society. To see how these goals might be enacted in real life, consider again the sentencing of Ty Warner. Table 4.1 shows various hypothetical sentencing statements that Judge Kocoras might have given, depending on prevailing correctional goals.

At sentencing, the judge usually gives reasons for the punishment imposed. Here are some statements Judge Charles Kocoras might have made, depending on the correctional goal he wanted to promote. Goal Judge’s Statement Retribution I am imposing this sentence because you deserve to be punished for tax evasion. Your criminal behavior in this case is the basis for your punishment. Justice requires me to impose a sanction that reflects the value the community places on right conduct. Deterrence I am imposing this sentence so that your punishment for tax evasion will serve as an example and deter others who may contemplate similar actions. In addition, I hope that the sentence will deter you from ever again committing such an act. Incapacitation I am imposing this sentence so that you will be unable to violate the law while under correctional supervision. You do not appear to be a career criminal, so selective incapacitation is not warranted. Rehabilitation The trial testimony of the psychiatrists and the information contained in the presentence report make me believe that aspects of your personality led you to violate the law. I am therefore imposing this sentence so that you can be treated in ways that will rectify your behavior so you will not break the law again.

As we next consider the ways in which these goals are applied through the various forms of punishment, keep in mind the underlying goal or mix of goals that justifies each form of sanction (see “For Critical Thinking”).

Forms of the Criminal Sanction Incarceration, intermediate sanctions, probation, and death are the ways that the criminal sanction, or punishment, is applied in the United States. Most people think of incarceration as the usual punishment. As a consequence, much of the public believes that offenders receiving alternatives to incarceration, such as probation, are “getting off.” However, community-based punishments such as probation and intermediate sanctions are imposed far more often than prison sentences. Many judges and researchers believe that the sentencing structures in the United States are both too severe and too lenient. That is, many offenders who do not warrant incarceration are sent to prison, and many who should be given more-restrictive punishments receive minimal probation supervision. Advocates for more-effective sentencing practices increasingly support a range or continuum of punishment options, with graduated levels of supervision and harshness. They argue that by using this type of sentencing scheme, authorities can reserve expensive prison cells for violent offenders. At the same time, less restrictive community-based programs can be used to punish nonviolent offenders. As Figure 4.1 shows, simple probation lies at one end of this range, and traditional incarceration lies at the other. A range of sentencing options allows judges greater latitude to fashion sentences that reflect the severity of the crime and the risk and needs of the offender. There is no standard approach to sentencing and corrections. Some states use parole release; some have abolished it. Many states have sentencing guidelines, others have determinate sentences, and some still use indeterminate sentences. Mandatory minimums, three-strikes laws, and truth-in-sentencing have affected all jurisdictions. As we examine the various forms of criminal sanctions, bear in mind that complex problems are associated with applying these legally authorized punishments. Although the penal code defines the behaviors that are illegal and specifies the procedures for determining guilt, the legal standards for sentencing—for actually applying the punishment—have not been as well developed. In other words, the United States has no common laws of sentencing. Thus, judges have discretion in determining the appropriate sentence within the parameters of the penal code.

Incarceration Imprisonment is the most visible penalty imposed by U.S. courts. At the end of 2012, there were about 1.57 million Americans in federal and state prisons.13 Many people think that imprisonment significantly deters potential offenders. However, incarceration is expensive. It also creates problems of reintegrating offenders into society upon release. In penal codes, legislatures stipulate the type of sentences and the amount of prison time that may be imposed for each crime. Three basic sentencing structures are used: (1) indeterminate sentences, (2) determinate sentences, and (3) mandatory sentences. Each type of sentence makes certain assumptions about the goals of the criminal sanction, and each provides judges with varying degrees of discretion. Indeterminate Sentences When the goal of rehabilitation dominated corrections, legislatures enacted indeterminate sentences (often termed indefinite sentences). In keeping with the goal of treatment, indeterminate sentencing gives correctional officials and parole boards significant control over the amount of time that a prisoner serves. Penal codes with indeterminate sentencing stipulate a minimum and maximum amount of time to be served in prison (for example, 1–5 years, 3–10 years, 10–20 years, 1 year to life, and so on). At the time of sentencing, the judge informs the offender about

 the range of the sentence. The offender also learns that he or she will probably be eligible for parole at some point after the minimum term has been served. The parole board decides the actual release date. Determinate Sentences In the 1970s, dissatisfaction with the rehabilitation goal and support for the concept of retribution (deserved punishment) led many legislatures to shift to determinate sentences. With a determinate sentence, an offender is imprisoned for a specific period (for example, 2 years, 5 years, 10 years) that is determined by the legislature. At the end of the term, minus credited good time (discussed later in this chapter), the prisoner is automatically freed. The time of release is tied neither to participation in treatment programs nor to a parole board’s judgment concerning the offender’s likelihood of returning to criminal activities. This sentencing policy is based on the assumption that state legislatures are able to make effective sentencing determinations, although well-known sentencing scholar Brian Johnson argues that “elected officials are unlikely to have the expertise, available time, or legal knowledge to adequately codify, monitor, and regulate systems of fixed determinate punishments.”14 Some determinate-sentencing states have adopted penal codes that stipulate a specific term for each crime category. Others allow the judge to choose the amount of time to be served from within a range. Some states emphasize a determinate presumptive sentence; the legislature or a commission specifies a term based on a time range (for example, 14–20 months) into which most cases should fall. Only in extenuating circumstances can judges depart from the recommended ranges. Whichever sentencing scheme is used, however, the offender theoretically knows at sentencing the amount of time to be served. Mandatory Sentences Politicians and the public have continued to complain that offenders are released before serving terms that are long enough, and legislatures have responded. All states and the federal government now require mandatory sentences (often

 called mandatory minimum sentences) which stipulate some minimum period of incarceration that people convicted of selected crimes must serve. The judge may not consider either the circumstances of the offense or the background of the offender, and he or she may not impose sentences that do not involve incarceration. Mandatory prison terms are most often specified for violent crimes, drug violations, habitual offenders, or crimes involving firearms. The three-strikes laws now adopted by several states and the federal government provide one example of mandatory sentencing. These laws require that judges sentence offenders who have three felony convictions (in some states two or four convictions) to long prison terms, sometimes to life without parole. Research shows that California’s three-strikes law has increased the size of the prison population. Many of these inmates received their third strike for nonviolent crimes, and these prisoners are disproportionately African American and Latino.15 This law has also resulted in a substantial aging of the prison population that will eventually result in soaring health care costs.16 Research shows that such laws have had little impact on reducing rates of serious crime (see “Myths in Corrections” for more).17 In 2003 the U.S. Supreme Court, in two 5–4 rulings, upheld California’s three-strikes law. The offenders in both cases argued that their third felonies were minor and that their long sentences were unconstitutional “cruel and unusual” punishments. Leondro Andrade’s third felony was for stealing two videotapes, for which he was sentenced to 50 years without the possibility of parole. Gary Ewing’s theft of golf clubs earned him a sentence of 25 years to life. Justices in the majority said that the California law reflected a legislative judgment and that the court should not second-guess this policy choice. The four justices in the minority argued that there was a “gross” disparity between the pettiness of the crimes and the severity of the sentences.18 In November 2012, voters in California approved Proposition 36, changing the provisions of the state’s three-strikes law in two important ways. The new law requires that third-strike offenders most recently convicted of serious or violent felonies be eligible for a sentence of 25 years to life. It also allows certain inmates serving life sentences under the old law to petition the court to request resentencing. Inmates are eligible for resentencing if the court finds that they do not pose an unreasonable risk of harm to society. Thus far, supporters of the new law argue that the results are encouraging. For example, approximately 1,000 inmates were released in the 10 months after Californians voted for Proposition 36, and the recidivism rate for these inmates is far lower than for other prisoners leaving California prisons.19 Faced with prison overcrowding and constricted budgets, officials are apparently now having second thoughts about mandatory sentences. In many states, mandatory minimum drug laws have come under attack. Well-known criminal justice policy expert Michael Tonry contends that “mandatory penalties are an idea whose time long ago passed.”

The Sentence Versus Actual Time Served Regardless of the discretion that judges have to fine-tune the sentences they give, the prison sentences that are imposed may bear little resemblance to the amount of time served. In reality, parole boards in indeterminate-sentencing states have broad discretion in release decisions once the offender has served a minimum portion of the sentence. Most states have provisions for good time, by which days are subtracted from prisoners’ minimum or maximum term for good behavior or for participating in various types of vocational, educational, or treatment programs. Correctional officials consider these policies necessary for maintaining institutional order and reducing crowding. The possibility of receiving good-time credit provides an incentive for prisoners to follow institutional rules. Prosecutors and defense attorneys also take good time into consideration during plea bargaining. In other words, they think about the actual amount of time that a particular offender is likely to serve. The amount of good time one can earn varies among the states, usually from 5 to 10 days a month. In some states, once 90 days of good time are earned, these credits are vested; that is, they cannot be taken away as a punishment for misbehavior. Prisoners who then violate the rules risk losing only days not vested. Judges in the United States often prescribe long periods of incarceration for serious crimes, but good time and parole reduce the amount of time spent in prison.

 For example, the national average for actual time served is 27 months, which is 51 percent of the average sentence length of 53 months. This type of national data often hides the impact of variations in sentencing and releasing laws in individual states. In many states, because of prison crowding and release policies, offenders serve less than 51 percent of their sentences.21 In states where three-strikes and truth-in-sentencing laws are employed, the average time served will be longer than the national average. Truth-In-Sentencing Truth-in-sentencing refers to laws that require offenders to serve a substantial proportion (usually 85 percent for violent crimes) of their prison sentence before being released on parole. These laws have three goals: (1) providing the public with more-accurate information about the actual length of sentences, (2) reducing crime by keeping offenders in prison for longer periods, and (3) achieving a rational allocation of prison space by prioritizing the incarceration of particular classes of criminals (such as violent offenders). Critics maintain that truth-in-sentencing increases prison populations at a tremendous cost.

Intermediate Sanctions Prison crowding and the low levels of probation supervision have spurred interest in the development of intermediate sanctions, punishments less severe and costly than prison but more restrictive than traditional probation. Intermediate sanctions provide a variety of restrictions on freedom, such as fines or other monetary sanctions, home confinement, intensive probation supervision, restitution to victims, community service, boot camp, and forfeiture of possessions or illegally gained assets. Advocates of intermediate punishments stipulate that these sanctions should be used in combination in order to reflect the severity of the offense, the characteristics of the offender, and the needs of the community. In addition, intermediate punishments must be supported and enforced by mechanisms that take seriously any breach of the conditions of the sentence. Too often, criminal justice agencies have devoted few resources to enforcing sentences that do not involve incarceration. If the law does not fulfill its promises, offenders may believe that they have “beaten” the system, which makes the punishment meaningless. Citizens viewing the system’s ineffectiveness may develop the attitude that nothing but stiffer sentences will work (see Chapter 9 for a full discussion of intermediate sanctions).

Probation The most frequently applied criminal sanction in the United States is probation, a sentence that an offender serves in the community under supervision. An estimated 56.8 percent of adults under correctional supervision are on probation (approximately 3.94 million adults at the end of 2012).22 Probation is designed to maintain supervision of offenders while they try to straighten out their lives. As a judicial act, granted by the grace of the state, probation is not extended as a right. Conditions are imposed specifying how an offender will behave throughout the length of the sentence. Probationers may be ordered to undergo regular drug tests, abide by curfews, enroll in educational programs or remain employed, stay away from certain parts of town or certain people, or meet regularly with probation officers. If the conditions of probation are not met, the supervising officer may recommend to the court that the probation be revoked and that the remainder of the sentence be served in prison. Probation may also be revoked for committing a new crime. (See Chapter 8 for a full discussion of probation.) Although probationers serve their sentences in the community, the sanction is often tied to incarceration. In some jurisdictions the court can modify an offender’s prison sentence, after a portion is served, by changing it to probation. This is often referred to as shock probation (or split probation). An offender is released after a period of incarceration (the “shock”) and resentenced to probation. An offender on probation may be required to spend intermittent periods, such as weekends or nights, in jail. Whatever the specific terms of the probationary sentence, it emphasizes guidance and supervision in the community.

 Probation is generally advocated as a way of rehabilitating offenders whose crimes are less serious or whose past records are clean. It is viewed as both less expensive and more effective than imprisonment, which may embitter youthful or first-time offenders and mix them with hardened criminals so that they learn more-sophisticated criminal techniques.

 Death Although other Western democracies abolished the death penalty years ago, the United States continues to use it. Capital punishment was imposed and carried out regularly before the late 1960s. Amid debates about the constitutionality of the death penalty and with public opinion polls showing increasing opposition to it, the U.S. Supreme Court suspended the use of the death penalty from 1968 to 1976. The Court eventually decided that capital punishment does not violate the Eighth Amendment’s prohibition on cruel and unusual punishments. Executions resumed in 1977 as a majority of states began, once again, to sentence murderers to death. The number of people facing the death penalty increased dramatically for over two decades, as Figure 4.2 reveals. Only during the last several years has this increase leveled off. On April 1, 2013, 3,108 people awaited execution in the United States.23 Over one-half of those on death row are in the South. The state with the largest death row population is California (731 condemned prisoners in 2013). On average, about 200 people are sent to death row each year. However, since 1976 the annual number of executions has never exceeded 98 (in 1999). Is this situation the result of the appeals process or of the lack of will on the part of political leaders and a society that is perhaps uncertain about the taking of human life? The death penalty may have more significance as a political symbol than as a deterrent to crime. In March 2011 the governor of Illinois, Pat Quinn, signed a law that put an end to the use of capital punishment in his state. Citing systemic problems in the justice system, such as wrongful conviction, Quinn noted that “it’s the right and just thing to abolish the death penalty and

 punish those who commit heinous crimes—evil people—with life in prison without parole and no chance of release.”24 More recently, Governor Dannel Malloy signed a law abolishing the death penalty in Connecticut. Malloy said that “the people of this state pay for appeal after appeal, and then watch time and again as defendants are marched in front of the cameras, giving them a platform of public attention they don’t deserve.”25 The state of Maryland followed suit in 2013. The press release from Governor Martin O’Malley said that the state had “eliminated a policy that is proven not to work. Evidence shows that the death penalty is not a deterrent, it cannot be administered without racial bias, and it costs three times as much as life in prison without parole.”26 The number of executions carried out annually in the United States has dropped steadily between 2009 and 2013 (from 52 to 39).27 Will the United States eventually join the other industrial democracies and stop executing criminals? This is an important question, which is addressed in Chapter 20.

Forms and Goals of Sanctions The criminal sanction takes many forms, and offenders are punished in various ways to serve various purposes. Table 4.2 summarizes how these sanctions operate and how they reflect the underlying philosophies of punishment. Note that incarceration, intermediate sanctions, probation, and death can each be used to achieve one or more punishment goals. As you examine the sentencing process, notice how judges use their discretion to set the punishment within the provisions of the law and the characteristics of the offender.

 In recent years, more and more attention has been directed toward “invisible punishments,” which include a variety of sanctions that are applied to convicted offenders that are not always readily apparent to members of the general public. These invisible punishments include (1) allowing termination of parental rights, (2) establishing a felony conviction as grounds for divorce, (3) restricting access to certain occupations, (4) barring felons from public welfare programs and benefits (such as public housing, student loans, and food stamps), and (5) denying felons the right to vote.28 Much of the debate regarding invisible punishments has centered on felons’ voting rights. The process of either permanently or temporarily denying convicted offenders the right to vote is referred to as felon disenfranchisement. As of December 2010, 48 states had disenfranchisement laws in place. Some of these laws restrict voting rights only while offenders are serving prison terms, but other laws apply to both inmates and parolees. Still others apply to probationers as well. In a small number of states, voting rights are restricted for inmates, parolees, probationers, and ex-felons. In some states, voting rights can be reestablished after a waiting period, the length of which varies from state to state. For example, Nebraska requires a two-year waiting period until voting rights can be restored. However, in Delaware, ex-convicts must wait five years. Those who are critical of disenfranchisement laws are quick to point out the large number of people affected by them. A recent study reported that an estimated 5.85 million Americans are no longer allowed to vote because of laws prohibiting convicted felons’ voting rights. Put differently, 1 of every 40 adults in the voting-age population is disenfranchised because of a prior felony conviction. The estimates are even more alarming when the adult African American population is considered: One of every thirteen individuals is prohibited from voting (about 7.7 percent of the African American voting-age population).29 The map provided in Figure 4.3 shows how disenfranchisement practices vary widely across the states.

 Opponents of felon disenfranchisement argue that such laws stifle reintegration efforts because they send ex-inmates who are returning to the community the message that they have not fully repaid their debt to society. Critics also allege that such laws have actually changed the outcomes of several elections across the United States. Supporters of laws restricting voting rights argue that disenfranchisement is necessary to encourage reform. Put simply, requiring ex-inmates to wait several years before having their voting rights reinstated provides them with the opportunity (and provides an incentive) to show they deserve to exercise this right.

The Sentencing Process Regardless of how and where the decision is made—misdemeanor court or felony court, plea bargain or adversarial context, bench trial or jury trial—judges are responsible for imposing sentences. The often-difficult task of sentencing involves more than applying clear-cut principles to individual cases (see “For Critical Thinking”). Legislatures establish the penal codes that set forth the sentences that judges may impose. These laws generally give judges discretion in sentencing. Judges may combine various forms of punishment in order to tailor the sanction to the offender. For example, the judge may specify that the prison terms for two charges are to run either concurrently (at the same time) or consecutively (one after the other), or that all or part of the period of imprisonment may be suspended. In other situations the offender may receive a combination of a suspended prison term, probation, and a fine. Judges may also suspend a sentence as long as the offender stays out of trouble, makes restitution, or seeks medical treatment. They may also delay imposing any sentence but retain the power to set penalties at a later date if the offender misbehaves. When a judge gazes at a defendant and pronounces sentence, what thinking has gone into his or her decision? Within the discretion allowed by the code, various elements in the sentencing process influence the decisions of judges. In “A Trial Judge at Work,” Judge Robert Satter relates some of the difficulties of sentencing. Social scientists believe several factors influence the sentencing process: (1) the administrative context of the courts, (2) the attitudes and values of judges, (3) the presentence report, and (4) sentencing guidelines.

 The Administrative Context The administrative context within which judges impose sentences greatly influences their decisions. As a result, we can find differences, for example, between the assembly-line style of justice in the misdemeanor courts and the more formal proceedings found in felony courts. Misdemeanor Court: Assembly-Line Justice Misdemeanor or lower courts have limited jurisdiction because they can normally impose prison sentences of less than one year. These courts hear about 90 percent of criminal cases. Whereas felony cases are processed in lower courts only for arraignments and preliminary hearings, misdemeanor cases are processed completely in the lower courts. Only a minority of cases adjudicated in lower courts end in jail sentences. Most cases result in fines, probation, community service, restitution, or a combination of these punishments.
 Many lower courts are overloaded and allocate minimal time to each case. Judicial decisions here are massproduced because the actors in the system share three assumptions. First, any person appearing before the court is guilty because the police and prosecution have presumably filtered out doubtful cases. Second, the vast majority of defendants will plead guilty. Third, those charged with minor offenses will be processed in volume, with dozens of cases being decided in rapid succession within a single hour. The citation will be read by the clerk, a guilty plea entered, and the sentence pronounced by the judge for one defendant after another. Defendants whose cases are processed through the lower-court assembly line may seem to receive little or no punishment. However, people who get caught in the criminal justice system experience other punishments, whether or not they are ultimately convicted. Time spent in jail awaiting trial, the cost of a bail bond, and days of work lost make an immediate and concrete impact. Some people may even lose their jobs or be evicted from their homes if they fail to work and pay their bills for just a few days. For most people, simply being arrested is devastating. Measuring the psychological and social price of being stigmatized, separated from family, and deprived of freedom is impossible.31 Felony Courts Felony cases are processed and offenders are sentenced in courts of general jurisdiction. Because of the seriousness of the crimes, the atmosphere is more formal and generally lacks the chaotic, assembly-line environment of misdemeanor courts. Caseload burdens can affect how much time is devoted to individual cases. Exchange relationships among courtroom actors can help with arranging plea bargains and shape the content of prosecutors’ sentencing recommendations. That is, sentencing decisions are ultimately shaped, in part, by the relationships, negotiations, and agreements among the prosecutor, defense attorney, and judge. Table 4.3 shows the types of felony sentences imposed for different offense classifications.

 Attitudes and Values of Judges All lawyers recognize that judges differ from one another in their sentencing decisions. The differences can be explained in part by the conflicting goals of criminal justice, by administrative pressures, and by the influence of community values. Sentencing decisions also depend on judges’ attitudes about the offender’s blameworthiness, the protection of the community, and the practical implications of the sentence.

 Blameworthiness concerns such factors as offense severity (such as violent crime or property crime), the offender’s criminal history (such as recidivist or first timer), and role in commission of the crime (such as leader or follower). For example, a judge might impose a harsh sentence on a repeat offender who organized others to commit a serious crime. Protection of the community is influenced by similar factors, such as dangerousness, recidivism, and offense severity. However, it focuses mostly on the need to incapacitate the offender or to deter would-be offenders. Finally, the practicality of a sentence can affect judges’ decisions. For example, judges may take into account the offender’s ability to “do time,” as in the case of an elderly person. They may also consider the impact on the offender’s family; a mother with children may call for a different sentence than a single woman would. Finally, costs to the corrections system may play a role in sentencing, as judges consider the size of probation caseloads or prison crowding.

The Presentence Report Even though sentencing remains the judge’s responsibility, the presentence report is an important ingredient in the judicial mix. Usually, a probation officer investigates the convicted person’s background, criminal record, job status, and mental condition to suggest a sentence that is in the interests of both the offender and society. Although the presentence report serves primarily to help the judge select the sentence, it also helps in the classification of probationers, prisoners, and parolees for treatment planning and risk assessment. In the report the probation officer makes judgments about what information to include and what conclusions to draw from that information. In some states, however, probation officers present only factual material to the judge and make no sentencing recommendation. Because the probation officer does not necessarily follow evidentiary rules, presentence reports include hearsay statements as well as firsthand information. (See Chapter 8 for an example of a presentence report.) Although presentence reports are represented as diagnostic evaluations, critics point out that they are not scientific and often reflect stereotypes. Research has shown that the nature of the offense and the prior criminal record are what largely influence probation officers’ final sentencing recommendation in presentence reports. Officers begin by reviewing the case and typing the defendant as one who should fit into a particular sentencing category. Investigations are then conducted mainly to gather further information to support the initial decision. The presentence report is one means by which judges ease the strain of decision making. The report lets judges shift partial responsibility to the probation department. Because a substantial number of sentencing alternatives are available to judges, they often rely on the report for guidance. But two questions often arise: (1) Should judges rely so much on the presentence report? and (2) Does the time spent preparing it represent the best use of probation officers’ time? “Do the Right Thing” illustrates some of the difficulties faced by a judge who must impose a sentence with little more than the presentence report to consider.

Sentencing Guidelines Since the 1980s, many states and the federal courts have adopted sentencing guidelines in hopes of reducing disparity in sentencing for similar offenses, increasing and decreasing punishments for certain types of offenders and offenses, establishing truth-in-sentencing, reducing prison crowding, and making the sentencing process more rational.32 Although statutes provide a variety of sentencing options for particular crimes, guidelines point the judge to more-specific actions that have been given previously in similar cases. The range of sentencing options provided for most offenses allows for the seriousness of the crime and the criminal history of an offender. In some states guidelines are used for intermediate sanctions. Legislatures and—in some states and the federal government—commissions construct sentencing guidelines as a grid of two scores. As shown in Table 4.4, one dimension relates to the seriousness of the offense, the other to the offender’s criminal history. The offender score is obtained by totaling the points allocated to such factors as the number of juvenile, adult

 misdemeanor, and adult felony convictions; the number of times incarcerated; the status of the accused at the time of the last offense, whether on probation or parole or escaped from confinement; and employment status or educational achievement. Judges look at the grid to see what sentence should be imposed on a particular offender who has committed a specific offense. Judges may go outside of the guidelines if aggravating or mitigating circumstances exist; however, they must provide a written explanation of their reasons for doing so. Sentencing guidelines are expected to be reviewed and modified periodically so that recent decisions will be included. Given that guidelines are constructed on the basis of past sentences, some critics argue that because the guidelines reflect only what has happened, they do not reform sentencing. One impact of guidelines is that sentencing discretion has shifted from the judge to the prosecutor.33 The ability of prosecutors to choose the charge and to plea bargain has affected the accused: They now realize that they must plead guilty and cooperate in order to avoid the harsh sentences specified for some crimes (such as operating a continuing criminal enterprise). In fact, federal drug laws give prosecutors discretion to ask judges to give sentence reductions for offenders who have provided “substantial assistance in the investigation or prosecution of another person.”34 Sentencing guidelines have led to the development of a rich body of appellate case law. Until the advent of guidelines, the right of defendants or prosecutors to appeal the terms of a sentence was limited. Challenges of judicial interpretations of the guidelines have now increased so that a common law of sentencing is developing. In most states, either party may appeal any departures from the guidelines. For example, if the guidelines call for a 36-month prison sentence and the judge imposes 60 months, the defendant can appeal.35 Whereas in 1975 virtually all appeals challenged only the conviction, today sentencing issues may be the sole or primary basis for appeal.

The Future of Sentencing Guidelines On January 12, 2005, the Supreme Court transformed criminal sentencing by returning much of the discretion that was taken from federal judges in 1984 with the institution of sentencing guidelines. The Court presented its 5–4 decision, United States v. Booker, in two parts.36 In the first part the justices said that the guidelines violated a defendant’s right to trial by jury because judges had the power to make factual findings that increased sentences beyond the maximum that would be supported by the evidence presented to the jury. Freddie J. Booker had been convicted of intending to distribute at least 50 grams of cocaine base, for which the guidelines recommend a sentence of 20 to just over 22 years. However, the judge imposed a 30-year sentence because he learned that Booker had distributed 10 times that amount of cocaine in the weeks prior to his arrest, a fact that had not been presented to the jury. The majority of the justices said that this violated the Sixth Amendment. In the second part of the Booker decision, the justices said that the guidelines should be treated as discretionary rather than mandatory. Justice Breyer, writing for the majority in this portion of the decision, said that judges should consult the guidelines and take them into account. The guidelines should be understood as being advisory and could be appealed for reasonableness. Some observers noted that judges would still rely heavily on the guidelines, while others said that such an advisory system would give federal trial judges more sentencing power than ever.37 The Booker case is the latest in a series of recent decisions that have thrown into doubt the constitutionality of the federal sentencing guidelines and those of many states. For most observers it was the logical outcome of a line of legal development that began with Apprendi v. New Jersey (2000). In that case the U.S. Supreme Court invalidated New Jersey’s hate-crime statute, which increased the sentence for an ordinary crime if the judge found that the act was motivated by bias. The court said that, other than a previous conviction, “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.”38 Until the Apprendi decision, many state and federal drug indictments did not specify a quantity of drugs in the indictment, allowing the judge to include that information in calculating the sentence. Typically, drug laws impose a series of escalating sentences, depending on drug

 quantity. Questions were immediately asked about the constitutionality of these laws. In June 2004 the U.S. Supreme Court, following the rationale established in Apprendi, struck down Washington State’s sentencing guidelines (Blakely v. Washington), which permitted judges to enhance a defendant’s sentence by using information that had not been proved beyond a reasonable doubt to a jury.39 In this case the judge added 37 months to the sentence for kidnapping; as justification, the judge cited “deliberate cruelty,” a finding not supported by admissions in Blakely’s plea bargain and not proved before the jury. Writing for the 5–4 majority, Justice Scalia said that this provision of the guidelines violates the right to trial by jury because “the judge’s authority to sentence derives wholly from the jury’s verdict.” 40 Quickly following the Court’s announcement of the Blakely decision, several federal judges declared the federal sentencing guidelines to be unconstitutional.41 Although the Booker decision might seem to end federal and state guidelines, members of the House of Representatives and the Senate indicated that there would be a renewed struggle between the congressional and judicial branches regarding sentencing policies.42 Conservatives have been highly critical of judges who have imposed sentences lighter than those called for in the guidelines, while liberals have argued that judges must have the discretion to tailor the punishment to fit the criminal and the crime (see “For Critical Thinking”). Sentencing guidelines and efforts to restrict the discretion of judges are not yet over.

. Unjust Punishment Unjust punishment can occur because of sentencing disparities and wrongful convictions. The prison population in most states contains a higher proportion of African American and Hispanic men than appears in the general population. Are these sentencing disparities caused by racial prejudices and discrimination, or are other factors at work? Wrongful conviction occurs when an innocent person is nonetheless found guilty by plea or verdict. It also includes those cases in which the conviction of a truly guilty person is overturned on appeal because of due process errors. Sentencing Disparities A central question is whether gender, racial, ethnic, or class sentencing disparity is the result of discrimination. Sentencing disparity occurs when widely divergent penalties are imposed on offenders with similar criminal histories who have committed the same offense, but no reasonable justification can be discerned for the disparity. As shown in Figure 4.4, the average prison sentence length for white offenders is 58 months, compared with 63 months for African
 Americans. The most pronounced difference concerns violent offenses, where African American offenders, on average, are sentenced to longer periods than are whites— 108 months versus 95 months. In contrast, discrimination occurs when criminal justice officials either directly or indirectly treat people differently because of their race, ethnicity, gender, or class. The fact that African Americans and Hispanics receive harsher punishments than do whites may simply mean that minorities happen to commit more serious crimes than do whites; if true, this would account for the sentencing disparity. However, if officials singled out members of these groups for harsh punishment because of their race or ethnicity, that would be discrimination. The research on racial disparities in sentencing has failed to produce consistent results. Overall, however, the weight of the evidence indicates that black and Hispanic offenders are disadvantaged when it comes to sentencing decisions in that, compared to white defendants, they are more likely to be incarcerated and less likely to benefit from downward departures from sentencing guidelines.43 A meta-analysis consisting of 71 published studies found evidence that racial disparities in sentencing are present in cases involving drug offenses and imprisonment.44 Do sentencing disparities stem from the prejudicial attitudes of judges, police officers, and prosecutors? Are African Americans and Hispanics viewed as threats when they commit crimes of violence and drug selling, which are thought to be spreading from the inner city to the suburbs? Are enforcement resources distributed so that certain groups are subject to closer scrutiny than others? Scholars have pointed out that the relationship between race and sentencing is complex and that judges consider many defendant and case characteristics. According to this view, judges assess not only the legally relevant factors of blameworthiness, dangerousness, and recidivism risk, but also race, gender, and age characteristics. The interconnectedness of these variables, not judges’ negative attitudes, is what culminates in the disproportionately severe sentences given to young African American men.45 Laws dealing with the possession and sale of crack cocaine raise interesting questions regarding sentencing disparity and racial discrimination, as discussed in “Politics and Sentencing: The Case of Crack Cocaine.”

Wrongful Convictions A serious dilemma for the criminal justice system concerns people who endure wrongful conviction. Whereas the public expresses much concern over those who “beat the system” and go free, people pay comparatively little attention to those who are innocent yet are convicted. The development of DNA (deoxyribonucleic acid) technology has increased the number of people exonerated by science. This technology compares the DNA of the suspect with the DNA in biological substances found on the victim or at the crime scene. As of February 2014, there have been 312 criminal cases in which the convicted person was exonerated because of DNA evidence. Among the exonerated, 18 served time on death row. Those exonerated spent an average of 13.6 years in prison. This translates to approximately 4,162 years behind bars for this group.46 Over the past decade the number of “innocence projects” has mushroomed nationally. These projects have played a key role in exonerating prisoners through DNA testing, pressing states

 to pass postconviction DNA statutes, implementing video-recorded interrogations in police departments, and reforming eyewitness identification procedures. Why do wrongful convictions occur? Experts usually cite such factors as eyewitness error, improper or invalidated forensic techniques, false confessions, perjured testimony, unethical conduct by police and prosecutors, inadequate counsel, and unreliable informants.47 Beyond the fact that the real criminal is presumably still free in such cases, the standards of our society are damaged when an innocent person has been wrongfully convicted. It is very difficult to determine the number of people wrongfully convicted each year in the United States. A study conducted by Robert Ramsey and James Frank asked criminal justice professionals (prosecutors, defense attorneys, judges, and police officers) to estimate how frequently wrongful convictions occur in felony cases. The results indicate that professionals believe such errors occur in 0.5 percent to 1 percent of felony cases in the legal jurisdiction in which they work, and in 1 percent to 3 percent of felony cases nationwide. These same people indicated that a wrongful conviction rate of less than 0.5 percent was acceptable.48 How should the wrongfully convicted be compensated for the time they spent in prison? What is the value of a life unjustly spent behind bars? Increasingly, legislatures have had to face these questions. More than half of the states and the federal government now have laws to provide compensation, but these laws vary widely in the assistance they provide.49 For example, Louisiana compensates exonerees at $25,000 per year of wrongful incarceration. However, the amount is capped at $250,000.50 Does any amount of money compensate for missing your child’s first day of school or not being with your parents when they die? Compensation can be much higher when in the hands of a jury. In 2012 a federal jury awarded $25 million in damages to a man who spent 16 years in prison after being wrongfully convicted because of false eyewitness testimony. The U.S. Supreme Court has weighed in on the matter of lawsuits filed by exonerated individuals. The case involved John Thompson, who was convicted of armed robbery and, in a later trial, murder. Two attorneys who were working to save Thompson from the death penalty uncovered blood evidence that was withheld by the prosecution during the murder trial. The evidence proved Thompson’s innocence. Prosecutors confessed to the misconduct, the armed robbery conviction was thrown out, and another murder trial was held that resulted in an acquittal. In all, Thompson was incarcerated for 18 years, 14 of which were spent on death row; he once came within weeks of execution. Thompson sued the district attorney’s office. The jury in the case awarded him $14 million. The Supreme Court ruled that Thompson could not demonstrate that the district attorney exercised a pattern of deliberate indifference with regard to how he instructed and trained his staff on the matter of sharing evidence with the defense.52 In support of the ruling, Justice Antonin Scalia wrote that the failure to turn over the blood evidence “was almost certainly caused not by a failure to give prosecutors specific training but by [a] miscreant prosecutor.” 53 Whether unjust punishments result from racial discrimination or from wrongful conviction, they do not serve the ideals of justice. Unjust punishments raise fundamental questions about the criminal justice system and its links to the society that it serves.

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