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SENTENCING LAW AND POLICY

Cases, Statutes, and Guidelines

Fifth Edition

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To my parents, Alfred and Walburga Demleitner.

NVD

To my grandfather and mother, Seymour Kleinman and Dale Berman.

DAB

To Daniel J. Freed.

MLM

To my mother, Marian Stallings Wright.

RFW

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PREFACE

What claim does sentencing have in the modern law school curriculum, which already seems filled to capacity? We believe that the law of sentencing has plenty to offer all law students, even those not inclined toward a career in criminal law. This field provides an insightful case study in the dynamics of law reform; requires synthesis of theoretical and practical issues of doctrine, procedure, and policy; and touches deep and abiding issues about the nature and structure of law in society. Sentencing, in our view, illustrates superbly what advanced law courses can offer.

Of course, for students interested in a career in criminal law, the law of sentencing creates the central legal framework defining their day-to-day practice. Sentencing outcomes are the true bottom line of criminal law practice, and thoughtful defense attorneys and candid prosecutors regularly state that sentencing rules should be a lawyer's very first consideration in a criminal case. Moreover, because sentencing issues are frequently the focal point of criminal justice policy debates, many lawyers working for the government or for public interest groups engage with sentencing controversies and concerns. Since criminal cases occupy such a large part of the courts' dockets, all judges (and their law clerks) spend a considerable portion of their working days on issues of sentencing law and policy.

A LAW REFORM EXPERIMENT

Criminal sentences involve some of the most severe actions that governments take against their own citizens and residents. Because every criminal conviction results in some kind of sentence, sentencing occurs all the time and involves a huge number of people. Teachers in the first-year criminal law course point again and again to issues that will be resolved at sentencing; they explain that finer gradations or more subtle principles are possible at sentencing than in the rough-cut efforts to define crimes. Teachers of criminal procedure often note that defendants and their lawyers, as well as prosecutors, care most about the sentence because it represents the bottom line of all their procedural transactions.

Given the elemental role of sentencing in criminal law and procedure and the large social costs and benefits of criminal sentences, one might expect the law in this area to be highly evolved. In fact, for much of our history there has been very little law of sentencing. While some sentencing principles and punishments are ancient, the body of law that regulates sentences has remained undeveloped and unexamined until recently.

Rules prescribing the punishment for wrongdoers are found in the Bible and in the Koran. The earliest recorded legal codes, such as the Babylonian Code of Hammurabi (c. 1780 B.C.E.), spell out sanctions for various harms. Yet by the late

twentieth century, 4,000 years of world civilization had resulted in sentencing systems in the United States (and in many other countries) that reflected only the most rudimentary qualities of law—for most offenses, only broad legislative specification of sentencing ranges, an absence of rules to guide judges in selecting punishments within those ranges, and actual determinations of sentences made not by judges but by executive release authorities.

Social and legal evolution can occur in the blink of an eye, and that has been the case for the law of sentencing. Since the 1970s, sentencing has undergone a political and legal revolution; it has become an area replete with law. Various kinds of "structured" or "guideline" systems now govern felony sentencing in many states and in the federal system; another intricate body of law now applies to capital sentencing, driven by an ongoing constitutional and policy dialogue between courts and legislatures. The emergence of sentencing law is one of the most dramatic and interesting law reform experiments in American legal history.

SENTENCING, LAW SCHOOL, AND THE NATURE OF LAW

The law of sentencing – still comparatively young – wrestles with profound and ancient themes of justice and the nature of law. These themes echo throughout the law: what makes rules and procedures wise, which institutions should design and implement these rules, how much discretion should be allowed in each case, and what impact the law will have on human lives. This combination of new laws and long-standing problems, of the familiar and the unfamiliar, gives students an opportunity to synthesize many aspects of the lawyer's art.

Some law students end their first year of studies and yearn for more opportunities to confront questions of justice, fairness, politics, and efficiency. Even the most cursory reading of daily newspapers will confirm that all these concepts remain openly in play when sentencing decisions happen. Indeed, media coverage of current sentencing debates enables a teacher to place current controversies within the enduring theoretical and doctrinal issues of sentencing law and policy.

Advanced courses should move beyond the mastery of doctrines and the already honed skill of reading appellate decisions. Sentencing integrates substantive criminal law with criminal procedure, and it often does so through institutions other than appellate courts. Sentencing law adds a strong dose of subjects not taught in most law schools, such as criminal justice policy and criminology. The emergence of a language and grammar for sentencing has made it possible to explore the substantive, procedural, and policy aspects of criminal justice together in one place in the law school curriculum.

THE APPROACH OF THIS BOOK

The promulgation of the federal sentencing guidelines has interested many scholars, and courses and seminars on federal sentencing have been developed at a number of universities. But the highly complex and visible federal sentencing system turns out to be only one slice of a much larger pie. The emergence of

sentencing as a specialized area of law has created legal flux and remarkable variety. In response, we do not focus on a single system or jurisdiction, but rather try to capture the central issues and elements for all systems in all places, looking to the practical, political, social, and historical roots of sentencing law and policy.

This book has no separate sections for guideline versus indeterminate sentencing, state versus federal systems, or domestic versus foreign systems. Nor are constitutional issues segregated into a separate unit. This is because lawyers do not think about all of the constitutional doctrine together. Instead, they think about stages of the process, and how various sources of law — constitutional and otherwise — have some bearing on a particular stage. Throughout the book, we draw on the most relevant examples from three distinct sentencing worlds: guideline/determinate, indeterminate, and capital. The examples from structured guideline jurisdictions — the dominant modern sentencing reform — occupy the center of attention. There is simply more "law" in a determinate system than in an indeterminate one, and more explicit discussion of what remains implicit in the older, discretionary systems. Because the federal system is so well funded and closely critiqued, the book devotes thorough attention to that system, but it features several key state systems as well.

We also examine capital punishment materials from time to time. Although detailed coverage of capital sentencing merits a full course and a full book in its own right, we focus here on the revealing comparisons between capital and noncapital sentencing practices.

ORGANIZATION AND SELECTION OF MATERIALS

An introductory unit surveys the social purposes (Chapter 1) and public institutions (Chapter 2) at work in the sentencing area, and then presents a case study — the creation of sentencing guideline regimes — showing how the legal system regulates the exercise of sentencing discretion (Chapter 3). After this introduction, the volume follows an intuitive organization that tracks the basic sequence of decisions made in criminal sentencing. The book first reviews the basic "inputs" to the sentencing decision: Chapter 4 weighs the importance of the crime and its effects, and Chapter 5 considers the personal background of the defendant. Chapter 6 reviews the distinctive procedures that shape how judges and others evaluate these sentencing inputs, both before and during the sentencing hearing. Chapter 7 explores the most expensive and visible "output" of sentencing: the prison system. The chapter explores alternatives to the current historical and international anomaly of high incarceration rates in the United States. Finally, Chapter 8 surveys the various institutions and rules that allow us to reconsider the criminal sentences imposed in the past. Sometimes legal actors revise old sentences in light of new information about the defendant's post-conviction behavior and new social views about the gravity of the past offense.

We view this printed volume as the "hub" that covers the core themes for most law school sentencing courses. This hub also supports several "spokes" that range out into related topics. Students can visit the online website for this book, www.sentencingbook.net, to explore these additional themes and to cover more ground in the field. At various points along the way in the printed text, we refer to more

in-depth coverage of topics that a reader can find on the website. In addition, the "spokes" include extended topics that readers may treat as additional chapters in this book. The website chapters include cases, statutes, and guidelines dealing with nonprison punishments (Chapter 9) and the patterns of race, gender, and class that emerge in sentencing outcomes (Chapter 10). The website also discusses punishment choices that arise in institutional settings other than the criminal trial court. Chapter 11 looks at alternatives to criminal sentences.

Our principal materials—both in the hub of the published volume and the spokes of the online topics—come from many sources, reflecting the many institutions that shape and apply sentencing law. The U.S. Supreme Court makes occasional forays into the noncapital sentencing realm, but it leaves the great majority of the legal questions for others to address. We blend decisions from the U.S. Supreme Court, state high courts, and the federal appellate courts, along with a sprinkling of cases from foreign jurisdictions and supranational tribunals.

State cases carry substantial weight in this book, since well over 95 percent of criminal defendants are sentenced in state court and many of the most interesting modern sentencing reforms have occurred in the states. The amazing variety among state systems also allows instructive class discussions about the sentencing choices available.

We do not reprint only appellate judicial opinions as principal materials. We often use statutes or guideline provisions to lay out the common choices made by those who try to change sentencing practices. Reports and data from sentencing commissions and other agencies also help set the scene. To keep track of the options and to prevent our celebration of variety from obscuring core concepts, we strive in the notes to tell readers what the most common practices are in various U.S. jurisdictions. The principal materials usually explain (and often embody) this majority position, but we also underscore it in the notes. To the extent possible in an emerging field of law such as sentencing, we estimate in the notes how often a lawyer is likely to encounter a given practice in American jurisdictions.

CENTRAL THEMES IN THIS BOOK

The book returns regularly to five major themes:

1. *Variety and change.* There is no single law of sentencing but rather many laws of sentencing, providing varied answers to a range of similar problems. This variation is apparent both across jurisdictions and within jurisdictions over time. Why are there different answers to similar questions?
2. *Multiple institutions.* One of the most striking aspects of sentencing is the variety of participants, both in lawmaking and in application. These participants include not only the top officials within each branch of government, but also various lower-level actors and institutions. Thus, we highlight distinctions between the roles of sentencing judges and appellate judges, spotlight the role of prosecutors, and consider the specialized roles of sentencing commissions, parole boards, and probation officers. We continually ask students to compare decision makers both

descriptively and normatively: when does it (and when should it) matter whether judges or legislators make a certain type of decision?

3. *Purposes and politics.* Sentencing and punishment serve many different purposes—some explicit and others implicit, some philosophical and others practical and perhaps base. We repeatedly ask students to consider the connections between specific sentencing rules and the purposes, politics, and practicalities of criminal justice.
4. *Impact and knowledge.* Modern sentencing law sometimes invokes the optimistic belief that knowledge and research can form a sound basis for creating and improving legal systems. Experience tempers the perhaps naïve hope for empirically grounded reform. Still, the materials in this book aim to identify the effects of sentencing practices on the work of judges and attorneys and on defendants of different social groups.
5. *Discretion and equality.* A major theme of sentencing across systems has been the need to individualize sentences to account for relevant variations among convicted offenders. At the same time, one of the major goals of modern sentencing reform has been to regulate the discretion of those who sentence and punish individuals, with the aim of reducing or eliminating unjust disparity. Of particular concern here are sentencing disparities based on race, class, or gender. We believe it is impossible to assess properly any aspect of criminal justice in the United States, including sentencing, without explicit and steady attention to issues of social inequality.

Each of these larger lessons attends to the nature of law. The dramatic construction of a new field over a relatively short time—although a field replete with links to ancient puzzles and problems—provides a special kind of clarity into these deeper themes.

THE FIFTH EDITION

This new edition reflects widely noted and dramatic shifts in constitutional sentencing law along with a host of significant changes in law and policy at the federal and state levels. This edition also reflects our education as teachers and editors as we have taught sentencing courses and heard from teachers around the country about which cases and materials have proved most effective in the classroom and which less so.

The pressures for change in sentencing policy and practice come from many directions. The United States Supreme Court took a dramatic turn in constitutionalizing aspects of charging, crime definition, and punishment through the *Apprendi-Blakely* line of cases. These cases had widely varying impacts in different jurisdictions and have become a pervasive part of sentencing discussions. This constitutional sentencing revolution demands explicit attention—at times in passing, at times as a focal point—throughout this volume.

The world-leading levels of imprisonment in the United States have drawn attention in states confronting the "bill due" for so much punishment. This attention has produced meaningful change in the political environment for sentencing policy

discussions. After a number of Republican governors took over states with pressing budgetary problems, a new movement labeled "Right on Crime" began to advocate for GOP elected officials to explore alternatives to incarceration for a range of less serious offenders. Now, it seems, it is no longer politically foolish to resist the "tough on crime" mantra that had been a campaign staple for decades. In some jurisdictions, some politicians can generate more positive buzz from sending fewer defendants to prison rather than more.

The policies of progressive prosecutors also contribute to a waning use of prison in some parts of the United States. The development and use of risk assessment tools at sentencing has received serious attention as a way to reduce the class disparities in pretrial detention and in sentence selection. Finally, the impacts of the COVID pandemic on sentencing and corrections have demonstrated the capacity of government actors to shrink the use of jails in responsible ways.

Most sentencing commissions have established a role as a steady voice for punishment moderation and sound policy. In particular, the commissions have reminded legislatures and executive branch agencies of the prospects for rational and cost-effective punishment. They seem to have blunted some of the more extreme policies that tend to result from public and political debate uninformed by bureaucratic expertise.

All of these pressures for change combine to produce a dramatic field of study. We have developed this fifth edition with the continuing sense of intellectual challenge, real-world demands, and drama that led us to produce the previous editions.

OUR HOPES

Sentencing has blossomed into one of the most provocative and revealing areas of the law. It has become a powerful entry point into the workings of the law itself and into the nature of our social order. We wrote this book in the belief that the study of sentencing will be valuable to all lawyers and law students, not only to those with a commitment to criminal justice practice and policy.

For sentencing law to become not only a case study in acute legal change, but also a model of legal reform and justice, the sentencing arena needs excellent lawyers, legislators, judges, and commissioners. We hope that some of those who study sentencing today will be ready right away to work for better systems and greater justice.

Nora V. Demleitner
Douglas A. Berman
Marc L. Miller
Ronald F. Wright

December 2021

Acknowledgments

Modern sentencing law, with structured sentencing at its core, has emerged over the past 40 years, and a community of sentencing scholars, judges, and practitioners has emerged along with it. We have all spent part of our scholarly careers nurturing and critiquing the work that takes place in this field; it is terrifically gratifying for us to see criminal sentencing treated as a "field" for study.

Course books reflect not only the immediate work of the editors but also the influence of colleagues and friends. Some of the most important influences on this book came from our close collaborators on other sentencing projects, most notably our fellow editors of the *Federal Sentencing Reporter* over the years: Dan Freed, Frank Bowman, Steve Chanenson, Michael O'Hear, Mark Harris, and Aaron Rappaport.

A special word is in order about Dan Freed: There is a part of Dan in everything we see or do in the area of sentencing. His farsighted and impassioned work for sentencing justice draws others, including us, to this corner of the world. We hope this book reflects Dan's joyful engagement with the ideas and realities of criminal sentencing.

Colleagues in this field around the country have been generous with their observations and encouragement during this project. Vera Bergelson, Steve Chanenson and Michael E. Smith gave us crucial feedback on this book by teaching from the manuscripts and offering us wise suggestions along the way. There are a number of scholars and teachers whose work in sentencing and related areas have influenced this volume. On this score, we thank Albert Alschuler, Rachel Barkow, Sara Sun Beale, William Berry, Stephanos Bibas, David Boerner, Dennis Curtis, Kara Dansky, George Fisher, George Fletcher, Richard Frase, Carissa Hessick, Jim Jacobs, Eric Janus, Pam Karlan, Joe Kennedy, Nancy King, Susan Klein, Dan Markel, Tracy Meares, Michael O'Hear, John Pfaff, Kevin Reitz, Alice Ristroph, Dorothy Roberts, Max Schanzenbach, Michael Simons, Sonja Starr, Don Stemen, Megan Stevenson, Kate Stith, Kimberly Thomas, Sandra Guerra Thompson, Michael Tonry, Robert Weisberg, Bert Westbrook, James Q. Whitman, and Deborah Young.

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and energy. We particularly want to thank Justice Samuel Alito Jr., Myron Bright, Guido Calabresi, Paul Cassell, Avern Cohen, Robert Conrad, Nancy Gertner, John Godbold, Frank Johnson, Gerard Lynch, John Martin, Michael Mihm, Jon O. Newman, Jim Rosenbaum, and Jack Weinstein. Prosecutors and defense attorneys, such as Stephen Bright, Judy Clarke, Roger Haines, Tom Hillier, Margy Love, Jon Sands, and Benson Weintraub, prevented us from losing sight of the realities on the ground as we observe events from our academic vantage points. In addition, probation officers, including Maggie Jensen and Matt Rowland, have provided us with useful glimpses into the difficulties of their work. Finally, our gratitude extends to scholars and researchers outside the United States. Their contributions to sentencing have informed our thinking about reforms and other changes. Among them are Hans-Jörg Albrecht, Andrew Ashworth, Albin Eser, Andrew von Hirsch, Geraldine Mackenzie, Stephan Terblanche, Dirk van Zyl Smit, Andrew Vincent, Susanne Walther, John Zeleznikow, and Emily Zimmerman.

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Sentencing Law and Policy

Chapter 1

The Purposes of Punishment and Sentencing

The simplest question about sentencing is also one of the hardest to answer: What purposes does society hope to achieve when it sentences people convicted of crimes? One long-standing and straightforward view is that society wants to punish individuals who violate social norms and that sentencing systems are the means to impose such punishment. But this initial answer raises many questions of its own. For one thing, what makes a punishment criminal if governments sometimes punish individuals outside of the criminal justice system? And is stating that the purpose of criminal sentencing is to impose punishment just tautological.

Such fundamental issues concerning the purposes of punishment confront all organized societies, but they are especially important in the United States, which is now a world leader in punishing its citizens. As of 2019, nearly 2.1 million persons were incarcerated in prisons and jails in the United States, though the global COVID pandemic reduced that number to about 1.8 million in 2020. Roughly 5 million more individuals are subject to criminal justice supervision through probation or parole. Altogether, nearly 7 million people in the United States are under the direct control of the criminal justice system. (For point of reference, this is a group larger than the resident populations of all but the 15 largest U.S. states—or roughly equal to the population of Switzerland or Honduras.) These basic numbers, however, mask enormous variation across the United States in how offenders are sentenced and punished.

Although sentencing is an important and dynamic field, decisions about sentencing often take place without any explicit reference to its underlying purposes. It is possible to study the law of sentencing without considering its fundamental purposes, but doing so would only produce expertise in technical rules and procedures without a deep understanding of the reasons (or lack of reasons) for those rules. Consequently, to make sound policy about sentencing, we must address the purposes of sentencing up front and understand the theoretical underpinning of different rules and procedures. In addition, criminal justice outcomes and sentencing patterns often exhibit disparities based on offender characteristics such as race and gender and class. Understanding theories of punishment, both stated and implicit, provides a foundation for a more sophisticated assessment of which disparities may be undermining the goals of a sentence system and how the disparities might be best addressed.

The first part of this chapter surveys the various stated or implicit purposes that society tries to achieve through the sentencing process. This analysis reveals that none of the "traditional" justifications for punishment—retribution, deterrence, incapacitation, and rehabilitation—is self-defining, and that each is contested, both conceptually and practically. This discussion also examines other more troubling social purposes that spring to mind when we observe actual punishment and sentencing systems.

The second part of this chapter illuminates three fundamental reasons why it is unrealistic and probably inappropriate to posit a single purpose for sentencing and punishment. First, several different purposes may operate together to justify or limit punishment structures or sentencing systems. Second, the purposes that may justify certain systemwide sentencing rules or procedures may differ from those that justify case-specific sentencing outcomes. Third, purposes are constantly contested in both political and legal realms, and the focal points for debate and policy change over time.

A. SOCIAL PURPOSES OF SENTENCING

Organized societies devise many ways to sanction individuals who violate social norms. Formal and substantial punishments are delivered through the criminal justice system, where governments intentionally condemn wrongdoers. All aspects of criminal law—substantive, procedural, and political—must grapple with the core question of purpose and justification: Why should governments condemn and harm their own citizens?

In answering this question, philosophers have traditionally fallen into two camps. *Consequentialist philosophers*, who judge actions based on their consequences, justify state punishment as a means of reducing the overall harms created by criminal behavior. *Deontological philosophers*, who judge actions based on notions of moral duty, justify state punishment as a means of righting the moral wrongs of criminal behavior. Consequentialist philosophers generally endorse forward-looking, utilitarian theories of punishment, believing that punishment can benefit society through *deterrence* of potential offenders from committing future crimes, through *incapacitation* to render the current offender unable to commit future crimes, or through *rehabilitation* of the offender to prevent any further wrongdoing. Deontological philosophers generally endorse backward-looking theories of punishment, described in terms of *retribution* or *just deserts* and based on the notion that punishment is just when it restores the moral balance that criminal behavior upsets.

The materials in this section raise a number of questions: What purposes should a sentencing system seek? Is it possible or helpful to state those purposes explicitly? Do any unstated purposes operate at the same time? Can a system pursue multiple purposes, and if so, can it produce reasonably coherent and consistent outcomes across cases? We also consider whether it is possible to describe and implement a decent system without any guiding purpose or purposes.

It is useful to stop at this point and articulate for yourself an initial reason or set of reasons why a government is justified in condemning and harming its own citizens through criminal punishment. You should attempt to rank the importance

of these reasons if you list more than one. Then you can compare the purposes as described in this chapter with your own initial beliefs, testing them along the way for coherence and relevance.

1. Stated Purposes

Actors in a variety of settings often make explicit claims about the purposes of a system of criminal punishments. This section surveys some of the most commonly stated purposes.

a. Purposes Statutes

When legislators consider the purposes of criminal sentences and punishment, they often articulate goals that do not fit neatly into the traditional philosophical categories. They also likely do not think about individual offenders, but rather imagine more broadly the values and interests that they hope their entire criminal justice system will pursue. An ever-present challenge in modern sentencing systems is to connect legislative statements of purpose with the traditional purposes discussed by philosophers and with actual offenders who confront judges. Consider first in the abstract the various kinds of purposes and goals identified in the following state statutes, and then try to effectuate those purposes and goals in the context of the case study presented in Problem 1-2. Ask yourself whether legislators provide useful guidance to prosecutors or sentencing judges, and why legislators may highlight purposes different in some important ways from the classic philosophical justifications.

This section begins with an effort by model law reformers (in this case the American Bar Association) to state explicitly which purposes legislatures should consider when designing a sentencing system. Is this statement of purposes complete? If not, what is missing? Is it helpful? We then compare this statement of purposes in model legislation with declarations of purposes enacted in two different legislatures.

ABA Standards for Criminal Justice, Sentencing 18-2.1

(3d ed. 1994)

Multiple Purposes; Consequential and Retributive Approaches

(a) The legislature should consider at least five different societal purposes in designing a sentencing system:

(i) To foster respect for the law and to deter criminal conduct.

(ii) To incapacitate offenders.

(iii) To punish offenders.

(iv) To provide restitution or reparation to victims of crimes.

(v) To rehabilitate offenders.

(b) Determination of the societal purposes for sentencing is a primary element of the legislative function. . . .

Commentary

Every aspect of a criminal justice system, including sentencing, derives legitimacy from the advancement of social ends.[2] Current criminal codes are generally lacking in useful articulation of the policy objectives sought in the sentencing of offenders. This Standard calls attention to the vital need for a policy foundation upon which the sentencing system can be built. Without reasonably clear identification of goals and purposes, the administration of criminal justice will be inconsistent, incoherent, and ineffectual.

The Choice of Societal Purposes

The Standards' drafters recognized that there is no national consensus regarding the operative purposes of criminal sentencing. Indeed, even among philosophers there has been unceasing disagreement over the goals of sanctions. Some current systems have been characterized as predominantly retributive in nature. Other observers have claimed that the prevailing penology of the 1980s and early 1990s has been that of incapacitation. One need not go far back in time to find periods in which theories of rehabilitation and deterrence were of high prominence. Indeed, the resurgence of interest in community-based sanctions signals that, at least for the sentencing of some offenders, rehabilitative theory is alive and flourishing.

Paragraph (a) catalogs five different societal purposes a legislature should consider when designing a sentencing system. No hierarchy of importance is intended in the ordering of the five subsections, nor is it contemplated that every jurisdiction must implement all five purposes. Rather, the Standard is drafted in recognition of the wide diversity of viewpoints that exist concerning ultimate goals, and is meant to express a conclusion that different schemas can be imagined consistent with rational and desirable public policy.

Subparagraph (a)(i) recognizes that criminal sanctions may be used in an attempt to foster respect for the law and deter criminal conduct. This goal might be understood as "general deterrence," which operates through the exemplary and educative force of criminal law.[7] If the public is made to believe that criminal behavior will be answered by painful consequences, it is hoped that some individuals will be discouraged from risking such consequences. On a more abstract plane, the imposition of punishment may disseminate a generalized message that criminal transgressions are treated seriously by society. Thus, information about criminal sentences may encourage people to respect the law as a whole and increase the numbers of law-abiding citizens.

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2. This statement is meant to encompass both consequentialist and retributive views of criminal justice policy. Consequentialists seek to promote the prospective social good of reducing future crime. Retributivists find a different social end in the punishment of past criminal acts, even where no forward-looking benefits result.

7. Some theorists have spoken in terms of "general deterrence" and "specific deterrence." The latter term refers to the tendency of painful punishments to deter the offender, who experiences them directly, from future criminal conduct. Under this Standard, such offender-specific effects are classified as "rehabilitation."

Subparagraph (a)(ii) states that a jurisdiction may legitimately consider the goal of incapacitating offenders in designing a sentencing system. There is no question that some degree of disablement occurs whenever groups of offenders are incarcerated or are subjected to the restraint and surveillance of nonprison sanctions. To this extent, all sentencing systems are incapacitative, intentionally or not. A jurisdiction may further choose to pursue incapacitation in deliberate and targeted ways, however, and such choices are matters of fair policy debate.

Subparagraph (a)(iii) acknowledges that the punishment of offenders is a reasonable objective that legislatures may incorporate into a sentencing system. While retributivism had fallen from favor in the middle of this century, at least in the academic community, the theory has enjoyed both a scholarly and political rejuvenation since the 1970s. Today, a number of states have identified punishment or the meting out of "just deserts" as the central objective of their sentencing laws.

Subparagraph (a)(iv) identifies victim restitution and reparation as an eligible goal of sentencing. This consequentialist purpose aims toward the restoration of losses suffered by crime victims, when possible. Obviously, restitution cannot adequately be achieved in all criminal cases. Some injuries defy compensation and most offenders lack the resources to make adequate payments. Where restitution can be made, however, it is hard to posit a reason not to provide for it in the criminal justice system. Accordingly, the Standards elsewhere take the position that victim restitution should be given priority over the assessment and collection of other economic sanctions.

Last, subparagraph (a)(v) states that the legislature should consider the goal of rehabilitation of offenders when designing a sentencing system. As recently as the 1960s and early 1970s, rehabilitation was the prevailing theory of sentencing and corrections, and was the principal justification for the traditional structure of indeterminate sentences and parole. In the intervening years rehabilitation has lost its position of preeminence almost everywhere, but has hardly disappeared from view. Many incarcerative and nonincarcerative programs continue to attempt to reform offenders while at the same time serving other goals, such as punishment, deterrence, and incapacitation. The Standards endorse this as a worthy aim. It should be noted, in this regard, that the Standards take the view that rehabilitation, standing alone, is never an adequate basis for criminal punishment. In effect, reform should be attempted only in connection with sentences that are independently justified on some other ground.

The preceding description of eligible purposes is only a starting point in the development of a meaningful statement of societal goals for a working sentencing system. To be useful, such a statement must identify which purpose or purposes the legislature wishes to pursue. If multiple goals are selected, a system of priorities is needed so that when two purposes conflict, decision makers have a guidepost for choosing between competing objectives. [The] legislature may even wish the hierarchy of relevant goals to change for crimes of lesser and greater severity.

18 United States Code §3553

Imposition of a Sentence

(a) Factors to be considered in imposing a sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with

the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established [in the federal sentencing guidelines]; . . .

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

Tennessee Code §40-35-102

Purpose and Intent

The foremost purpose of this chapter [on criminal sentencing] is to promote justice [and] in so doing, the following principles are hereby adopted:

(1) Every defendant shall be punished by the imposition of a sentence justly deserved in relation to the seriousness of the offense;

(2) This chapter is to assure fair and consistent treatment of all defendants by eliminating unjustified disparity in sentencing and providing a fair sense of predictability of the criminal law and its sanctions;

(3) Punishment shall be imposed to prevent crime and promote respect for the law by:

(A) Providing an effective general deterrent to those likely to violate the criminal laws of this state;

(B) Restraining defendants with a lengthy history of criminal conduct;

(C) Encouraging effective rehabilitation of those defendants, where reasonably feasible, by promoting the use of alternative sentencing and correctional programs that elicit voluntary cooperation of defendants; and

(D) Encouraging restitution to victims where appropriate;

(4) Sentencing should exclude all considerations respecting race, gender, creed, religion, national origin and social status of the individual;

(5) In recognition that state prison capacities and the funds to build and maintain them are limited, convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society, and evincing failure of past efforts at rehabilitation shall be given first priority regarding sentencing involving incarceration; and

(6) . . . A defendant who does not fall within the parameters of subdivision (5), and who is an especially mitigated or standard offender convicted of a Class C, D or E felony, should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary; however, a defendant's prior convictions shall be considered evidence to the contrary and, therefore, a defendant who is being sentenced for a third or subsequent felony conviction involving separate periods of incarceration or supervision shall not be considered a favorable candidate for alternative sentencing. . . .

NOTES

1. **Parsimony as a purpose.** The structure and language of the "purposes" statutes reprinted above vary considerably. Which theory or theories of punishment are adopted in the federal system? In Tennessee? Which theory or theories of punishment do these jurisdictions reject? Note that the opening line in the federal statute provides what has been called a "parsimony" requirement by stating that the court "shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of punishment. Why do you think Congress included this provision, and does it reflect one of the traditional theories of punishment or a different set of values? Do subdivisions (5) and (6) of Tennessee's statute pursue related interests? For a notable discussion of how a "principle of parsimony" provides an important normative lens on modern criminal justice systems, see Daryl Atkinson & Jeremy Travis, The Square One Project, The Power of Parsimony (May 2021), https://squareonejustice.org/wp-content/uploads/2021/05/CJLJ8747-Square-One-Parsimony-Report-WEB-210524.pdf (arguing that "the principle of parsimony creates a framework for a critical examination of current criminal justice policies" and "can provide a bridge to a new vision of justice").

2. **Historical trends in punishment theory.** Adoption of particular theories of sentencing and punishment has also varied across time. Retribution is perhaps the oldest theory of punishment, with clear biblical roots and a beautiful illustration in the Code of Hammurabi, a set of laws created by a ruler of Babylon in the eighteenth century B.C. (excerpts reprinted in Chapter 2). More modern history marks a turn in punishment theory in the late 1700s and early 1800s due to the influential writings of Jeremy Bentham, an English philosopher and social scientist who argued against natural law theories and urged an approach to law and punishment grounded in principles of utility. Writing around this same period, the equally influential German philosopher Immanuel Kant provided a more contemporary argument that retribution is the proper moral justification for punishment.

As a result of a variety of social forces, including the development of prison systems and modern American optimism concerning the ability of humans to improve one another, during the nineteenth and early twentieth centuries rehabilitation took center stage as the dominant (though not the only) theory justifying punishment. See Williams v. New York, 337 U.S. 241 (1949). But rehabilitation as a general justifying theory came under a sustained attack in the 1960s and 1970s, as illustrated by Professor Francis Allen's famous book *The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose* (1981). These attacks were capped by Robert Martinson's widely discussed short paper What Works?—Questions and Answers About Prison

Reform, 25 The Public Interest 25 (1974), which reviewed numerous studies evaluating efforts at penal rehabilitation. Martinson's conclusions, which were generally discouraging, quickly became oversimplified into the assertion that "nothing works."

Commentators and others have tended to overstate the prior dominance of rehabilitation, as well as the modern failings of rehabilitative efforts and the general decline of the role of rehabilitation in sentencing. Indeed, Supreme Court opinions periodically reaffirm the value of rehabilitation in some sentencing contexts. See Pepper v. United States, 562 U.S. 476 (2011) (sentencing court may consider post-sentence rehabilitation of defendant who appears for resentencing after his original sentence was set aside on appeal, despite an advisory federal sentencing guideline to the contrary); Tapia v. United States, 564 U.S. 319 (2011) (federal statute prevents judge from lengthening prison sentence of defendant solely to make her eligible for rehabilitative drug abuse program in prison). Although different theories of punishment have been expressly favored or disfavored in different eras, a thoughtful observer can probably identify the impact of each classic theory in nearly every punishment or sentencing system throughout history.

3. **Modern views of punishment theory: limiting retributivism.** As the ABA excerpt highlights, the academic debates and practical realities surrounding punishment theories remain dynamic and contested today. It is probably fair to say that most systems now recognize, either expressly or implicitly, some combination of retribution, deterrence, and incapacitation, along with a sprinkling of other rationales. One of the most interesting developments in modern thinking about punishment is the decline of the once-dominant theory of rehabilitation: Note that the ABA states expressly that "rehabilitation, standing alone, is never an adequate basis for criminal punishment [and] reform should be attempted only in connection with sentences that are independently justified on some other ground." Why do you think the ABA declared rehabilitation to be the one traditional theory that cannot alone provide an adequate justification for punishment?

The refinement of retributive theory into various subtypes has proven to be an especially fruitful area for scholarship. See Mitchell N. Berman, Two Kinds of Retributivism, in Philosophical Foundations of Criminal Law 433 (R.A. Duff & Stuart Green eds., 2011); R.A. Duff, Retrieving Retributivism, in Retributivism: Essays on Theory and Policy 3 (Mark D. White ed., 2011); Dan Markel, What Might Retributive Justice Be? An Argument for the Confrontational Concept of Retributivism, in Retributivism: Essays on Theory and Policy 49 (Mark D. White ed., 2011). Some scholars assert that a dominant modern rationale has emerged through the idea of "limiting retributivism," an idea often attributed to Professors H.L.A. Hart and Norval Morris (writing separately). This theory suggests that retribution sets the upper and lower boundaries of just punishment, within which other purposes can hold sway, including utilitarian theories of deterrence, incapacitation, and rehabilitation. See Richard Frase, Limiting Retributivism: The Consensus Model of Criminal Punishment, in Michael Tonry ed., The Future of Imprisonment (2004). This theory has been endorsed by the American Law Institute in its revised Model Penal Code sentencing provisions, although the exact meaning and the appropriateness of this decision is debated in academic circles. See Paul Robinson, The A.L.I.'s Proposed Distributive Principle of "Limiting Retributivism": Does It Mean in Practice Pure Desert?, 7 Buff. Crim. L. Rev. 3 (2004); Edward Rubin, Just Say No to Retribution, 7 Buff. Crim. L. Rev. 17 (2003).

Here is the key language appearing in the final revised Model Penal Code §1.02(2) approved by the ALI:

> The general purposes of the provisions on sentencing, applicable to all official actors in the sentencing system, are: (a) in decisions affecting the sentencing of individual offenders:
>
> (i) to render sentences in all cases within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders;
>
> (ii) when reasonably feasible, to achieve offender rehabilitation, general deterrence, incapacitation of dangerous offenders, restitution to crime victims, preservation of families, and reintegration of offenders into the law-abiding community, provided these goals are pursued within the boundaries of proportionality in subsection (a)(i);
>
> (iii) to render sentences no more severe than necessary to achieve the applicable purposes in subsections (a)(i) and (a)(ii); and
>
> (iv) to avoid the use of sanctions that increase the likelihood offenders will engage in future criminal conduct.

Model Penal Code: Sentencing §1.02(2) (Am. L. Inst., Proposed Final Draft 2017). The Reporters' Note with this provision explains that the "drafters of the original Code hoped that rehabilitative successes would predominate in American sentencing and corrections, [but] punitive and incapacitative goals gained precedence during the 1970s, 1980s, and 1990s, and American incarceration rates expanded by a factor of nearly five. Indeterminate-sentencing systems such as the one recommended in the original Code became more oriented toward long-term confinement, and less invested in offender change, than most criminal-justice professionals had anticipated in 1962."

4. **Modern views of punishment theory: risk assessment.** While many in the academic community have embraced the theory of limiting retributivism, many courtroom communities have embraced instead a practice tool with a clear consequentialist commitment. Over the past decade, as many as 20 states have started to incorporate "risk assessment" tools into the sentencing process. These tools use numerous offense- and offender-based "risk factors" to estimate the likelihood a defendant will recidivate; this (big data) tool may be used by sentencing judges at initial sentencing. In addition, the federal system and a number of state systems have incorporated risk-assessment tools into determining, at the back end of the sentencing system, which persons in prison may be released early.

In the federal system, the FIRST STEP Act, which President Trump signed into law in December 2018, required the Attorney General to develop a "risk and needs assessment" system to be used to determine which persons in federal prison could be eligible to earn credits toward early release. As required by the FIRST STEP Act, the Department of Justice (DOJ) developed a new risk assessment tool called PATTERN that considers several factors to classify persons in federal prison as high, medium, low, or minimum risk of reoffending. The PATTERN scores determine how to assign "earned time" credits, and only those classified as low- or minimum-risk are eligible for early release based on those credits. During the COVID pandemic, Congress authorized then-Attorney General William Barr to transfer more persons in federal prison into home confinement, and he instructed federal prisons to make PATTERN scores a key criterion when deciding who should be transferred.

Some persons concerned about modern mass incarceration have championed risk assessment tools favorably, based on the hope that such tools could help identify low-risk offenders that need not be sent to or kept in prison. See, e.g., John Monahan, Risk Assessment in Sentencing, in 4 Reforming Criminal Justice: Punishment, Incarceration, and Release (Erik Luna ed., 2017) (arguing that "one way to reduce mass incarceration and the fiscal and human sufferings intrinsic to it is to engage in a morally constrained form of risk assessment in sentencing offenders"); see also Model Penal Code: Sentencing §6B.09(3) (Am. L. Inst., Proposed Final Draft 2017) (calling for sentencing commissions to develop risk assessment tools in order to provide "low-risk predictions as grounds for diverting otherwise prison-bound offenders to less onerous penalties"). But as the interest in and use of risk assessment at sentencing have grown, so too have concerns about whether these tools accurately or fairly influence sentencing decision making. Back in 2014, then-Attorney General Eric Holder voiced a growing concern about risk assessment tools:

> [Legislators] have introduced the concept of "risk assessments" that seek to assign a probability to an individual's likelihood of committing future crimes and, based on those risk assessments, make sentencing determinations. Although these measures were crafted with the best of intentions, I am concerned that they may inadvertently undermine our efforts to ensure individualized and equal justice. By basing sentencing decisions on static factors and immutable characteristics — like the defendant's education level, socioeconomic background, or neighborhood — they may exacerbate unwarranted and unjust disparities that are already far too common in our criminal justice system and in our society.

Eric Holder, Attorney General Eric Holder Speaks at the National Association of Criminal Defense Lawyers 57th Annual Meeting (2014), at http://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-national-association-criminal-defense-lawyers-57th. Holder's concerns, which have been echoed by many scholars, sound in retributive norms of just punishment and fairness. But might it be possible to reconcile risk assessment tools and a limiting retributivist approach to sentencing and punishment? See, e.g., Laurel Eckhouse, Kristian Lum, Cynthia Conti-Cook & Julie Ciccolini, Layers of Bias: A Unified Approach for Understanding Problems with Risk Assessment, 46 Crim. Just. & Behav. 185 (2018).

More generally, is there reason to be concerned that particular punishment theories and practices may be especially likely to reinforce and exacerbate structural and societal disparities? As detailed throughout this volume, many sentencing systems consider a person's past convictions because criminal history is often viewed as central to assessing an offender's desert and future dangerousness. But it is widely acknowledged that disparate enforcement patterns, e.g., differences in which neighborhoods are more heavily policed, can impact which persons have extensive criminal histories even more than actual differences in behavior. How should a sentencing system respond when it becomes clear that seemingly sound and purportedly "neutral" sentencing considerations are reproducing systemic inequities?

5. **Single or multiple theories?** Some philosophers have contended that utilitarian and retributive theories of punishment are incommensurable and that an initial choice must be made between them to develop a truly principled sentencing

system. Others, however, perhaps because of the strong intuitive appeal of both approaches, have endeavored to develop hybrid theories of punishment that are compatible with both theoretical perspectives. See Michael Cahill, Punishment Pluralism, in Retributivism: Essays on Theory and Policy 25 (Mark D. White ed., 2011). The theory of limiting retributivism may be popular in large part because it seems to be one of the more satisfying hybrid theories. The ABA sentencing standards suggest that a legislature may legitimately select multiple purposes for its sentencing system, but if multiple goals are selected, "a system of priorities is needed so that when two purposes conflict, decision makers have a guidepost for choosing between competing objectives."

Punishment and sentencing choices frequently reflect a variety of purposes, as Professor Norval Morris astutely observed more than 60 years ago:

> No one theory explains the different punitive measures to be found in our criminal law. . . . *All too often the purposes of punishment are discussed as if they could be treated as a single problem. . . . Surely the truth is that we have a series of related problems rather than a single problem.* . . . Surely, at the present level of our knowledge, we aim at a whole congeries of various purposes in respect not only of various types of crime but various types of criminals. [Because] we do not seek any single purpose or set of purposes through our penal sanctions, we must not suppose we are facing an academic and impractical problem. . . . Prevention, reformation, deterrence, retribution, expiation, vindication of the law, and the Kantian argument that punishment is an end in itself all mingle in the wild dialectic confusion which constitutes most discussions of the purposes of punishment. . . .

Norval Morris, Sentencing Convicted Criminals, 27 Austl. L.J. 186, 188-189 (1953) (emphasis added).

6. **Different theories for different offenders or types of crimes.** Professor Norval Morris's description of a "wild dialectic confusion" surrounding the discussion of punishment purposes can take on an extra dimension if we consider the possibility of a jurisdiction expressly adopting a different primary punishment goal or goals for different types of crimes or different types of offenders. In one respect, there is significant tradition for treating differently one type of offender: juveniles. At common law, there was a set age below which an offender would not even be subject to the criminal system, and in modern times, juvenile justice systems are structured around the belief that younger offenders can and should be rehabilitated and reintegrated into society as soon as reasonably possible. Might there be a corresponding argument for older offenders under some circumstances? Might there be arguments that other characteristics of an offender, such as gender, socioeconomic background, or drug addiction, make applications of particular punishment theories more or less fitting in at least some settings? We consider some of these issues in Chapter 5.

Another possible approach to punishment purposes might be distinctly crime-based. Perhaps economic crimes should lead to a punishment based on one theory while sex crimes are subject to a punishment response based on another theory, and drug crimes are subject to a punishment response based on yet another theory. As a matter of doctrine, one rarely sees a jurisdiction saying in formal ways that different theories of punishment should apply to different crimes. As a matter

of practice, however, it can often seem as though policymakers, prosecutors, and judges embrace distinct punishment approaches for different types of crimes. Moreover, statistics sometimes reveal disproportionalities concerning the race of defendants brought before sentencing judges for different crimes. In the federal system, for example, the vast majority of persons who have been sentenced for crack cocaine offenses have been Black, whereas most persons sentenced for methamphetamine offenses are white or Latinx. Should these kinds of data be ignored in the consideration of sentencing theories and practices? What if sentencing data reveal over time that judges sentence more harshly or more leniently for a certain kind of crime that has tended to have distinctive offender demographics?

7. **Inherent conundrums in applying punishment theory.** Though selection of multiple purposes creates the added challenge of establishing priorities, even a jurisdiction's decision to pursue only one theory of punishment does not magically simplify the conundrums inherent in developing a sound sentencing system. For one thing, each theory of punishment has conceptual variations. Rehabilitation can be understood simply in terms of offenders no longer committing crimes or more dynamically in terms of offenders becoming productive contributors to the community. Retributive principles of just deserts can focus on the subjective culpability of an offender or the objective harms created by the offense; retributive theories also conflict over whether the aim of punishment is to inflict *suffering* in response to wrongdoing (perhaps adjusting the punishment to reflect an individual offender's capacity to endure pain), or to experience *punishment* in proportion to the offense committed. Compare Adam Kolber, The Subjective Experience of Punishment, 109 Colum. L. Rev. 182 (2009) and John Bronsteen, Christopher Buccafusco & Jonathan Masur, Happiness and Punishment, 76 U. Chi. L. Rev. 1037 (2009) with Dan Markel & Chad Flanders, Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice, 98 Cal. L. Rev. 907 (2010) and David Gray, Punishment as Suffering, 63 Vand. L. Rev. 619 (2010).

In addition, each goal raises challenging (and perhaps unanswerable) empirical and factual questions. Rarely do we have unassailable evidence about what punishments will deter (or rehabilitate) which offenders, and rarely can we establish indisputably what an offender thought (or did) to assess just deserts. One major variant of retributivism, known as "empirical desert," turns on evidence of shared community intuitions about just sentences, because criminal law's moral credibility is essential to its power to control crime. See Paul H. Robinson, Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical, 67 Cambridge L.J. 145 (2008) but cf. Christopher Slobogin, Some Hypotheses About Empirical Desert, 42 Ariz. St. L.J. 1189 (2011); Donald Braman, Dan M. Kahan & David A. Hoffman, Some Realism About Punishment Naturalism, 77 U. Chi. L. Rev. 1531 (2010).

Further, punishment goals must be reconciled with a jurisdiction's various other commitments and limitations; a commitment to the right of due process, for example, may make a particular theory of punishment more difficult to pursue, as can limitations on the resources that a jurisdiction is able to devote to these matters. Should an offender's moral desert overcome illegal police searches or the passage of time that triggers the statutes of limitation? See Douglas N. Husak, Why Punish the Deserving?, 26 Nous 447 (1992). Should broad concerns about structural inequalities, both beyond and within the operation of criminal justice systems, lead lawmakers and others to give distinct attention to race or other factors driving

historic discrimination, so that they make intentional and affirmative efforts to avoid perpetuation of systemic biases? See Nicole D. Porter, The Sentencing Project, Racial Impact Statements (Feb. 2021), at https://www.sentencingproject.org/publications/racial-impact-statements/.

PROBLEM 1-1. ***Richard Graves***

One summer evening, Betsy Baker and her boyfriend ate dinner and had several beers at a local bar. As they drove home, Betsy's boyfriend was arrested for driving while under the influence (DUI). Richard Graves, a stranger, approached Betsy and offered to drive her truck home. Betsy agreed. After Richard returned with Betsy to her trailer, he followed Betsy inside. Betsy allowed Richard to stay, but told him he could sleep either on the bed or on the couch and she would stay on the other because they were not sleeping together.

Betsy awakened when she felt someone penetrating her vagina from behind her. She dove off of the bed and yelled at Richard to leave. Richard told Betsy to "hold on" and calm down, but she kept yelling for him to get out. Before he left, Betsy asked Richard, "Did we make love?" Richard replied, "I didn't mean to hurt you," then ran out the door. Betsy's loud crying brought a neighbor to her door, and she asked the neighbor to call the police. An officer arrived, who recognized Betsy from the earlier DUI stop and arrest. After Betsy calmed down, she told the officer that a man offered to drive her home after the arrest and that she had been raped.

The officer located Richard Graves based on Betsy's description. When the officer asked what had happened that night, Richard said, "What? Nothing happened." When the officer said he knew something happened, Richard told him that Betsy offered to let him sleep in the bed, but that he declined, telling Betsy, "No, that's your bed. I'll sleep on the couch." Richard then said Betsy was with him on the bed and began touching him, but then they fell asleep and that "nothing really happened after that." After Richard became evasive answering follow-up questions, the officer advised him of his rights.

After Richard was booked, a rape examination of Betsy revealed sperm, biologically consistent with Richard. Richard was charged with the offense of sexual intercourse without consent. He was tried before a jury and testified on his own behalf. Richard claimed that, as he drove Betsy home, she flirted with him and gave him a hug and kissed him affectionately. Richard also testified that after he had fallen asleep in her trailer, he awoke to find Betsy fondling his groin area. He testified that after brief foreplay, intercourse took place.

Based on Betsy's testimony and other corroborating evidence, the jury found Richard Graves guilty of sexual intercourse without consent. Montana law provides that a person convicted of sexual intercourse without consent "shall be punished by life imprisonment or by imprisonment in the state prison for a term of not less than 2 years or more than 100 years and may be fined not more than $50,000."

At a hearing before the judge at sentencing, Richard again admitted to having sexual intercourse with Betsy, and he suggested that any mistake as to consent might have resulted from the fact that he had a lot to drink that night. Richard said he was sorry for any harm he caused, and also indicated that he had enrolled in a treatment program to deal with his alcohol problems. Richard also noted that despite a disadvantaged upbringing, which included a brief stint in a juvenile corrections facility following an assault conviction, he had only minor contacts with the criminal justice system as an adult. The Montana Codes provides the following guidance about purposes at sentencing.

MONTANA CODE ANNOTATED §46-18-101

Correctional and Sentencing Policy

(1) It is the purpose of this section to establish the correctional and sentencing policy of the state of Montana. Laws for the punishment of crime are drawn to implement the policy established by this section.

(2) The correctional and sentencing policy of the state of Montana is to:

(a) punish each offender commensurate with the nature and degree of harm caused by the offense and to hold an offender accountable;

(b) protect the public, reduce crime, and increase the public sense of safety by incarcerating violent offenders and serious repeat offenders;

(c) provide restitution, reparation, and restoration to the victim of the offense; and

(d) encourage and provide opportunities for the offender's self-improvement to provide rehabilitation and reintegration of offenders back into the community.

(3) To achieve the policy outlined in subsection (2), the state of Montana adopts the following principles:

(a) Sentencing and punishment must be certain, timely, consistent, and understandable.

(b) Sentences should be commensurate with the punishment imposed on other persons committing the same offenses.

(c) Sentencing practices must be neutral with respect to the offender's race, gender, religion, national origin, or social or economic status.

(d) Sentencing practices must permit judicial discretion to consider aggravating and mitigating circumstances.

(e) Sentencing practices must include punishing violent and serious repeat felony offenders with incarceration.

(f) Sentencing practices must provide alternatives to imprisonment for the punishment of those nonviolent felony offenders who do not have serious criminal records.

(g) Sentencing and correctional practices must emphasize that the offender is responsible for obeying the law and must hold the offender accountable for the offender's actions.

(h) Sentencing practices must emphasize restitution to the victim by the offender. . . .

(i) Sentencing practices should promote and support practices, policies, and programs that focus on restorative justice principles.

If you were the prosecutor in Richard Graves's case, what sentence would you recommend? If you were a defense attorney assigned to represent Richard Graves, what sentence would you recommend? How would the provisions of Mont. Code Ann. §46-18-101 influence your recommendation?

If you were the sentencing judge in Richard Graves's case, what sentence would you impose? How would the provisions of Mont. Code Ann. §46-18-101 influence your decision? In each of these roles, would you seek additional information before making a specific recommendation or decision? Would you emphasize a particular theory or theories of punishment in your recommendation or decision?

Cf. State v. Graves, 901 P.2d 549 (Mont. 1995).

NOTES

1. **Deterrence.** Deterrence is not only a plausible concept, but one that most people use in their everyday activities. Indeed, no one seriously disputes that creating a criminal justice system that punishes wrongdoing has some deterrent impact. But far more debatable—indeed, hotly debated—is the concept of marginal deterrence, which postulates that an additional quantum of punishment can lead to a measurable decrease in a particular crime (or all crimes). Complicating this issue is the likelihood, according to many researchers, that extralegal factors such as moral views, family or community structures, and other social dynamics have more of a deterrent impact than specific legal sanctions.

Defenders of deterrence as a justification for punishment must confront the argument that it is immoral to punish one person to deter others. Philosopher Immanuel Kant's arguments eloquently set out the terms of this debate:

> [Punishment by government for crime] can never be administered merely as a means for promoting another good either with regard to the criminal himself or to civil society, but must in all cases be imposed only because the individual on whom it is inflicted has committed a crime. For one man ought never to be dealt with merely as a means subservient to the purpose of another, nor be mixed up with the subjects of real right. . . . He must first be found guilty and punishable, before there can be any thought of drawing from his punishment any benefit for himself or his fellow-citizens. The penal law is a categorical imperative; and woe to him who creeps through the serpent-windings of utilitarianism to discover some advantage that may discharge him from the justice of punishment, or even from the due measure of it. . . .

Immanuel Kant, The Science of Right 195 (W. Hastie trans., 1790). This statement is often read solely as a justification for retribution or just deserts. But notice that Kant argues that it is immoral to punish an individual "merely" to promote another good. Kant recognizes that if a person is guilty of crime, then utilitarian reasons might come into play.

A growing body of social science research suggests that we should not expect to decrease crime rates significantly through changes in criminal law rules or through the specific distribution of criminal punishments. See Paul H. Robinson & John M. Darley, Does Criminal Law Deter? A Behavioral Science Investigation, 24 Oxford J. Legal Stud. 173 (2004). Professor Michael Tonry summarizes the state of empirical knowledge about deterrence:

> Current knowledge concerning deterrence is little different than eighteenth-century theorists such as Beccaria [1764] supposed it to be: certainty and promptness of punishment are more powerful deterrents than severity. This does not mean that punishments do not deter. No one doubts that having a system of punishment has crime-preventive effects. The important question is whether changes in punishments have marginal deterrent effects, that is, whether a new policy causes crime rates to fall from whatever level they would otherwise have been at. Modern deterrent

> strategies, through sentencing law changes, take two forms: increases in punishments for particular offenses and mandatory minimum sentence (including "three-strikes") laws.
>
> Imaginable increases in severity of punishments do not yield significant (if any) marginal deterrent effects. Three National Academy of Sciences panels, all appointed by Republican presidents, reached that conclusion, as has every major survey of the evidence. There are a number of good practical reasons why this widely reached conclusion makes sense. First, serious sexual and violent crimes are generally committed under circumstances of extreme emotion, often exacerbated by the influence of alcohol or drugs. Detached reflection on possible penalties or recent changes in penalties seldom if ever occurs in such circumstances. Second, most minor and middling and many serious crimes do not result in arrests or prosecutions; most offenders committing them, naively but realistically, do not expect to be caught. Third, those who are caught and prosecuted almost always are offered plea bargains that break the link between the crime and the prescribed punishment. Fourth, when penalties are especially severe, they are often, albeit inconsistently, circumvented by prosecutors and judges. Fifth, for many crimes including drug trafficking, prostitution, and much gang-related activity, removing individual offenders does not alter the structural circumstances conducing to the crime. Sixth, even when one ignores all those considerations, the idea that increased penalties have sizable marginal deterrent effects requires heroic and unrealistic assumptions about "threat communication," the process by which would-be offenders learn that penalty increases have been legislated or are being implemented.

Michael Tonry, Purposes and Functions of Sentencing, 34 Crime & Just. 28-29 (2006).

2. **Incapacitation.** Because of the indisputable efficacy of some punishments to incapacitate offenders, one could reasonably view incapacitation as the most tangible and certain goal for punishment. (In addition, one could, after examining the history of punishment laws and the realities of punishment practices, reasonably conclude that incapacitation has been the goal most regularly and consistently pursued.) But because of the almost limitless reach of a theory of incapacitation and the obvious costs of its blind pursuit — to achieve "perfect" incapacitation, every offender would be executed — deciding how to pursue the theory poses a very serious challenge. See Kevin Bennardo, Incarceration's Incapacitative Shortcomings, 54 Santa Clara L. Rev. 1 (2014).

In the mid-twentieth century, a somewhat refined approach to incapacitation — operating under the label "selective incapacitation" — gained adherents based on the contention that judges and parole officials could accurately determine which offenders were especially dangerous to society and thus should serve longer prison terms than typical offenders. But much research conducted over the past four decades has shown that it is exceedingly difficult to predict future serious criminal behavior. Researchers generally concluded that even with the best information, predictions of future dangerousness would be wrong more often than right,

and the challenge of obtaining all needed information for these assessments only increased the risk of "false positives." See Norval Morris & Marc Miller, Predictions of Dangerousness, 6 Crime & Just. 1 (1985).

Anthony Bottoms and Andrew Von Hirsch summarize the empirical research on selective incapacitation and general incapacitation:

> Where does this [research on selective incapacitation] leave us? A limited capacity to forecast risk has long existed: persons with extensive criminal histories, drug habits, and no jobs tend to re-offend at a higher rate than other offenders. However, the limitations in that forecasting capacity must be recognized, especially as regards the difficult issue of estimating residual criminal careers. Research shows that the potential aggregate crime-prevention impact of selective incapacitation on crime rates is well below proponents' initial estimates. [We] also need to recognize the degree to which existing criminal justice practices [such as imposition of longer sentences on those with longer criminal records] in many jurisdictions already incorporate risk-related strategies.
>
> [As for general incapacitation, two] principal research strategies have been deployed in this field. Most analyses are based on what has been described as a "bottom-up" methodology [which] involves projecting, from an analysis of individual criminal careers, an average annual rate of offenses prevented by incarcerating specific groups of offenders. [This research produces] estimates of the amount of crime prevented by a given incapacitative policy [that] often vary widely, even where researchers are using similar data sets. . . . Divergences arise especially in relation to: (i) how to calculate the average offending frequency . . . of various groups of offenders, especially given evidence of considerable heterogeneity in offending rates by age and locality; (ii) issues of co-offending and of "offender replacement" [as when new sellers replace incarcerated drug dealers]; and (iii) the likely length of criminal careers. . . .
>
> The second method of studying general incapacitation is the so-called "top-down" approach. [Studies] of this kind treat the aggregate crime rate as the dependent variable (i.e., the variable to be statistically explained), and they then construct a model which seeks to account for variations in crime rates using data on age, gender, unemployment, and so forth. Among these "independent" (explanatory) variables is the size of the prison population; thus, estimates can be made of the extent to which changes in the prison population affect the crime rate. [Once again], the projected incapacitative effects vary widely in different studies. [In the most recent and sophisticated top-down studies], the estimated percentage reduction in crime rates arising from a 10% increase in incarceration varies between 2.6% and 4.4%.

Anthony Bottoms & Andrew Von Hirsch, The Crime-Preventive Impact of Penal Sanctions, in The Oxford Handbook of Empirical Legal Research 116-119 (Peter Cane & Herbert Kritzer eds., 2010). Bottoms and Von Hirsch conclude that prison expansion usually does have some incapacitative effect. It is, however, difficult to

assess the size of this effect. Moreover, the effect might not be cost-effective: Extra prison capacity might cost more than the social cost of the crimes prevented, because after prison expansion begins, "substantially diminishing returns are likely to set in."

3. **Retribution.** Though it has intuitive appeal, the seemingly simple retributivist notion that offenders deserve to be punished proves to be a difficult concept to pin down. Retribution can function as vindication for the victims of crime. See Jean Hampton, Correcting Harms Versus Righting Wrongs: The Goal of Retribution, 39 UCLA L. Rev. 1659 (1992). Retributive theory could also emphasize the rule-of-law values that might flow from punishment. Dan Markel explains the distinction between political justifications for retribution and "moral balance" justifications:

> [Some] versions of retributive theory directed attention at the infliction of suffering in the offender—in some cases, emphasizing that such inflictions of suffering should follow *lex talionis* and thus be equal to the pain and suffering he has caused (or, under some views, threatened). Those accounts, however, have often stumbled on explaining *why* the offender deserves pain and suffering, as well as whether to address wrongful actions that do not actually cause any harm. Hand-waving references to intuition or "fittingness" were often the only support that the pain and suffering version of retribution could muster. Thus, relying on cultural leitmotifs dating back to the Bible, it somehow made cosmic sense that the wicked should suffer and that the good be made happy. . . .
>
> My sense is that this desire to cause the offender suffering is misguided. [In modern accounts of state retribution], the goal is not to vindicate an agent-neutral duty to cause the offender unvariegated suffering but to implement punishment that is conceived in a relational manner, one that allows and encourages the *polity* to communicate to the offender the wrongness of her action, using particular deprivations to signal that condemnation.

In Markel's account of retributive theory, punishment reaffirms the essential equality of citizens and communicates disapproval to an offender who implicitly claims superiority by violating the law. See Dan Markel, What Might Retributive Justice Be? An Argument for the Confrontational Conception of Retributivism, in Retributivism: Essays on Theory and Policy 49, 60-61 (Mark D. White ed., 2011). But any account of retributivism must confront the human reality that different offenders who commit the same crime may experience punishment quite differently. Is a theory of just deserts well served when a wealthy person driving a new Tesla and a poorer person driving a used Toyota both receive the same $1,000 fine for speeding in a school zone? See Adam J. Kolber, The Subjective Experience of Punishment, 109 Colum. L. Rev. 182 (2009).

Though the concept of just deserts has broad appeal in the abstract, the difficulty of deciding exactly which punishment and how much punishment is "deserved" has proven to be the greatest enduring challenge in turning retributive theory into sentencing practice. For one example of a pathway through these challenges, see Andrew Von Hirsch & Andrew Ashworth, Proportionate Sentencing: Exploring the Principles (2005).

4. **Rehabilitation.** As a theory of punishment, rehabilitation is at once inevitable and oxymoronic. Interest in rehabilitation is inevitable because, unless every offender is to be executed or locked away for life, jurisdictions will want their punishment systems to reduce the likelihood that past offenders will re-offend when returned to the community. Yet a commitment to rehabilitation is oxymoronic because efforts by the state to improve the life and behavior of criminal offenders—through counseling, treatment, education, or training—do not seem like a form of punishment at all. These practical tensions have persistently burdened the concept of rehabilitation as a theory of punishment: Jurisdictions have always recognized the importance of rehabilitating criminals, but they have rarely devoted sufficient money and energy to the programs most likely to succeed and it is often politically controversial when government benefits are devoted to persons who have committed criminal offenses.

The conclusion drawn from Robert Martinson's famous article that "nothing works" to rehabilitate criminals is now well known to be a gross overstatement. Martinson himself came to recognize this, and within several years he published partial retractions of his position, noting that many rehabilitation programs had some modest impacts on individual behavior. See Robert Martinson, New Findings, New Views: A Note of Caution Regarding Sentencing Reform, 7 Hofstra L. Rev. 243 (1979). But continued research on rehabilitative efforts has tended to support a pessimistic view of the criminal justice system's ability to effectively reform offenders, although a few programs do have a track record of success. See Gerald G. Gaes et al., Adult Correction Treatment, 26 Crime & Just. 361 (1999); see also Rick Sarre, Beyond "What Works?" A 25-Year Jubilee Retrospective of Robert Martinson's Famous Article, 34 Austl. & N.Z. J. Criminology 1 (April 2001).

Researchers from the John Jay College of Criminal Justice have summarized more modern evidence concerning rehabilitation:

> Since [Martinson's review], researchers have made considerable progress in studying correctional rehabilitation of adult offenders. Recent results from meta-analytic studies of correctional rehabilitation unambiguously show that rehabilitation works. According to Mark Lipsey, a leader in the field of treatment evaluation research: "The global question of whether rehabilitation treatment works is thus answered affirmatively by the favorable mean effects on recidivism found by every meta-analyst who has conducted a systematic synthesis of a broad sample of the available experimental and quasi-experimental research." Several such examples of robustly supported interventions with adult offenders are: Aggression Replacement Therapy (ART), Cognitive Behavioral Therapy (CBT), Milieu therapy, and educational, vocational, and work programs. Multi-Systemic Therapy (MST), which enjoys robust support with juveniles, was also recently found in preliminary research to be effective with emerging adults with serious mental health conditions and recent criminal justice involvement (MST-EA). Because MST was designed as an intervention for adolescents, this last finding is consistent with a life course development perspective suggesting that adult offenders also can change in response to multi-systemic, community-based interventions that target relevant risk factors in the lives of high risk offenders.

> Recent progress has also been made in answering the question: Which methods work best for which offenders under what conditions? By using meta-analytic techniques, researchers have begun to identify the factors associated with effective treatment programs. For example, in a meta-analysis of cognitive-behavioral interventions with juvenile and adult offenders in correctional and community settings, Landenberger and Lipsey found that CBT reduced recidivism by 25%. Further analysis revealed several factors associated with effective treatment: treatment of higher risk offenders, implementation fidelity, inclusion of an anger management component, and training in interpersonal problem solving. Interventions that included this optimal mixture of ingredients were found to reduce recidivism by 50% in comparison to the average control group. In view of the findings, Landenberger and Lipsey noted, "[t]he central issue for research on CBT with offender populations at this juncture is not to determine if it has positive effects, but to determine when and why it has the most positive effects." To this end, researchers have begun to converge on several factors. First, therapeutic programs aimed at changing behavior by improving social skills and relationships are more effective than control oriented programs that emphasize discipline, surveillance, and intensive supervision. Second, treatment interventions are more effective on high-risk offenders. This runs counter to the view that high-risk offenders cannot be rehabilitated—to the contrary, evidence suggests that they benefit most from treatment. Finally, treatment is more effective in the community than in an institutional setting. This last finding comports with social ecology's emphasis on contextual factors.

Mark R. Fondacaro et al., The Rebirth of Rehabilitation in Juvenile and Criminal Justice: New Wine in New Bottles, 41 Ohio N.U. L. Rev. 697, 722-724 (2015); see also Daniel M. Filler & Austin E. Smith, The New Rehabilitation, 91 Iowa L. Rev. 951 (2006) (focusing on rehabilitative aspects of juvenile justice).

5. **Politicians' purposes.** Politicians and political party platforms often make statements about crime policy during campaigns, statements that hint at or assume certain justifications for punishment. Should the political parties take an explicit position on the role and justifications for punishment? Should voters expect individual politicians to have a substantial answer to the question "what is the purpose of punishment?" or, more broadly, "what is the purpose of the criminal justice system?" The question may be more important than the answer. Would the answer change (for a party or an individual) if the question were "what is your policy on public safety?"

b. Community Purposes

Although debate over the traditional theories of punishment has raged for centuries and continues to be quite lively, a number of philosophers and policymakers who have found the traditional debate unsatisfying or unhelpful have explored other approaches to punishment and sentencing. Notice that the ABA sentencing standards, for example, endorse sentencing systems that "foster respect for the law" and "provide restitution or reparation to victims of crimes." Similarly,

the revised Model Penal Code statement of sentencing purposes speaks of seeking to achieve not only "restitution to crime victims," but also "preservation of families, and reintegration of offenders into the law-abiding community."

Stressing the role and importance of the criminal law in establishing norms of behavior in society, modern philosophers have often spoken of the "educative" or "expressive" value of punishment and have stressed the ways in which criminal justice systems can and should shape and reinforce societal norms. Some retributive theories stress the communicative function of a punishment, because it reflects existing public values as embodied in the condemnation aimed at the offender. See R.A. Duff, Punishment, Communication, and Community (2003). This "expressive" theory of punishment, however, isolates something distinct: the power of the criminal law to shape and reinforce public values, apart from any effect the punishment might have on the offender. See Joel Feinberg, The Expressive Function of Punishment, in Doing and Deserving 98 (1970); Dan M. Kahan, What Do Alternative Sanctions Mean?, 63 U. Chi. L. Rev. 591 (1996).

Highlighting harms suffered by both offenders and their victims in traditional sentencing and punishment schemes, many modern advocates of reform have urged the application of "restorative justice" principles throughout the criminal justice system. In its broadest terms, restorative justice is concerned with restoring social relationships; in the context of crime and punishment, restorative justice has been described as a process that enables all the parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future. The growing interest in restorative justice ideas can be seen in Montana's 2001 amendment to the statute reprinted in Problem 1-1, which added subsection (i), stating that "[s]entencing practices should promote and support practices, policies, and programs that focus on restorative justice principles." See also David Dolinko, Restorative Justice and the Justification of Punishment, 2003 Utah L. Rev. 319; but see Dan Markel, Wrong Turns on the Road to Alternative Sanctions: Reflections on the Future of Shaming Punishments and Restorative Justice, 85 Tex. L. Rev. 1385 (2007).

One of the most tangible expressions of restorative justice concepts is the use of sentencing circles in some criminal justice systems. Sentencing circles are based on sentencing practices typical of Native communities in Canada, the United States, and Australia. Their value is being increasingly emphasized by those interested in broadening the applicability and usefulness of restorative justice ideas to all members of society.

A sentencing circle is typically a community-directed process, conducted in partnership with the criminal justice system, to develop consensus on an appropriate sentencing plan that addresses the concerns of all interested parties. Sentencing circles are traditional peacemaking rituals and are structured to involve the victim, victim's supporters, the offender, offender's supporters, traditional criminal justice personnel, and other community members. Within the circle, people are asked to speak from the heart in a shared search for understanding of the event, and together try to identify the steps necessary to assist in healing all affected parties and prevent future crimes.

Modern sentencing circles have been developed most extensively in Saskatchewan, Manitoba, and the Yukon and have been used occasionally in several other communities. See Dan Satterberg & Ron Wright, Prosecutors Must Learn to Listen to

Critics and Communities, Seattle Times, Oct. 26, 2016 (describing use of peacemaking circles). As you review the following discussion of one sentencing circle experience, consider what values and goals find expression in this sort of response to criminal wrongdoing. Also consider whether sentencing circles, and the ideas of restorative justice more generally, have the potential to transform traditional perspectives on theories of punishment.

A Healing Circle in the Innu Community of Sheshashit

Justice as Healing (Native Law Centre of Canada), Summer 1997

[During the fall of 1994 Gavin Sellon, while attending a clinic for alcohol and substance abuse, disclosed to counsellors that he had committed a sexual assault the year before. On his return to Sheshashit, Labrador, Mr. Sellon went to the Royal Canadian Mounted Police detachment and gave a cautioned statement admitting to having intercourse with L. without her consent. The police then began to investigate the incident.

The accused first appeared in provincial court on June 12, 1995, where he elected to be tried in the Newfoundland Supreme Court, Trial Division, waiving the preliminary inquiry. On August 9, 1995, in the supreme court, the accused indicated that he wished to plead guilty and to make an application for a sentencing circle. The Crown opposed the motion and the matter was set over to December 18, 1995, for argument, at which time the application for a sentencing circle was withdrawn. Counsel for the accused indicated that he intended to pursue an informal healing circle outside the courtroom setting and in the community of Sheshashit, and asked Judge O'Regan to give strong consideration to viewing the sentencing of Sellon with a restorative approach rather than a punitive approach. Counsel for the Crown argued that the accused, being a non-native, should be treated using the traditional methods of sentencing. Judge O'Regan indicated to both counsel that if they wished to attend the healing circle they could do so and he would place what he deemed to be appropriate weight on the results of the healing circle.]

On Sunday January 21, 1996 a circle was held in the Alcohol Centre in Sheshashit. This circle was unique because unlike previous circles that have been held, the participants of this circle were aware in advance of the circle that a written report about the circle would be completed to share with the court. The following is a report of that circle.

Much thought and discussion went into the planning and preparation for this circle. Initially Innu Nation workers in health and justice were involved in this planning. Workers all began by referring to this circle as a "sentencing" circle. Workers discussed what needs and whose needs were to be met with this circle and how best to try and meet these varied needs. There was a great deal of concern expressed that the circle needed to be witnessed by members of the justice system so that Innu would not be open to seemingly inevitable criticism that we had something to hide or fear in the circle process. The same concern was raised should we not have witnesses from the Innu public.

Those involved in planning the circle were all able to agree that as the service provider, Innu Nation has a real need to demonstrate, both to Innu and the