Imprisonment is just one of several sentencing options.

The final phase of the criminal justice process begins with sentencing. When found guilty, the defendant will be sentenced by the judge or, in a few states, by the jury. The sentence is perhaps the most critical decision in the criminal justice process. It can determine a defendant’s fate for years or, in some cases, for life.
Sentencing Options

Most criminal statutes set out a basic sentencing structure, but judges generally have considerable freedom in determining the actual type, length, and conditions of the sentence. Depending on the state, judges may choose from one or a combination of the following options:

- A **suspended sentence** is given but does not have to be served at the time it is imposed. The defendant may have to serve the sentence later if he or she is re-arrested on another charge or violates a condition of probation.

- The defendant can be released on **probation** under the supervision of a probation officer after agreeing to meet certain conditions, such as getting a job, staying drug-free, or not traveling outside the area during the probation period.

- Under **home confinement**, the defendant is sentenced to serve the term at home. Normally, the only time this defendant can leave the home is for essential purposes such as work, school, or a doctor’s appointment. The defendant is sometimes required to wear an electronic monitoring device so that his or her activities can be observed by the probation officer.

- The defendant might be required to pay the government a **fine**, or an amount of money set by the court.

- A defendant who is required to pay **restitution** must make up for whatever loss or injury was caused to the victim of the crime.

- Under **work release**, the defendant is allowed to work in the community but must return to prison at night or on weekends.

- A defendant who is **imprisoned** must serve a term in jail or prison. Some states require that a definite sentence be given, in which case the judge specifies the exact amount of time to be served, for example, two years. Some states provide for an indeterminate term, in which case the sentence is stated as a minimum and maximum term, for example, not less than three years nor more than ten years. Some judges allow defendants in misdemeanor cases to serve short jail sentences on weekends.

- If the defendant is sentenced to die for his or her crime, it is called a **death penalty**. In many states and in the federal court system, judges have the option of handing down the death penalty for the most serious offenses. This controversial issue is discussed later in this chapter.

Electronic monitoring devices are often used for home confinement. What are the advantages and disadvantages of such a sentence?
California lawmakers passed the “Three Strikes” Law in March 1994, following the high-profile kidnapping and murder of 12-year-old Polly Klaas. Her abductor was a violent offender out on parole, living in the Klaas family’s community. Outraged by this awful crime and eager for the legislature to get tougher on crime, California voters overwhelmingly approved Proposition 184. This law was designed to deter offenders from committing new crimes by requiring longer prison terms for criminals who had been convicted of felonies in the past. By the late 1990s, about 40 states had some form of recidivist statute, a law designed specifically to punish serious repeat offenders.

Under California’s Three Strikes Law, a “strike” is a conviction for a serious or violent felony. When a defendant has one strike, conviction for the second strike results in doubling the usual sentence for that crime. If a defendant is convicted of a third felony, the law requires that he or she receive a sentence of at least 25 years to life, with no possibility of parole before 25 years.

While strikes one and two must be for serious or violent felonies, any felony conviction will qualify as the third strike, whether or not the felony was serious or violent. In addition, certain offenses (called “wobblers”) can be prosecuted as either misdemeanors or felonies, at the discretion of the prosecutor or the judge. Finally, the Three Strikes Law is retroactive and is not limited to crimes committed in California. Therefore, convictions from before the law was passed (1994) or in other states can count as strikes.

In November 1995, Leandro Andrade attempted to steal five G-rated videotapes but was arrested upon leaving the store. Two weeks later, Andrade was arrested outside another store for attempting to steal more videotapes. The total value of all the tapes was approximately $150. Andrade, a longtime heroin addict, had a 15-year criminal history with five felonies and two misdemeanors on his record. None of the previous convictions were for violent offenses. Prosecutors determined that he already had two strikes under the California law when the prosecution for the most recent thefts commenced. Under California law, petty theft with a prior conviction is one of the so-called wobblers, misdemeanors that can be prosecuted as felonies. Andrade, then 37, was convicted and sentenced to 25 years to life for each of the two petty theft counts (strikes three and four).

According to the Three Strikes Law, those sentences must be served consecutively, not concurrently, so Andrade will not become eligible for parole for 50 years.

A federal appeals court found his sentence “grossly disproportionate” to the crime and a violation of the Eighth Amendment’s prohibition against cruel and unusual punishment. Prosecutors for the state of California appealed to the U.S. Supreme Court.

**Problem 15.1**

a. Why did California pass the Three Strikes Law? Why do you think these laws have become so popular in the United States?

b. What are the most convincing arguments for upholding Andrade’s sentence?

c. What are the most convincing arguments for reversing the sentence?

d. How should the Court decide the Andrade case? What arguments might the dissenting justices make?

e. As a matter of public policy, do you support or oppose laws like the Three Strikes Law? What information would you need to come to a decision on this matter?
Many considerations must be made in the sentencing process. These include the judge’s theory regarding corrections and what he or she believes is in the best interest of society and the individual. In addition, most states authorize a presentence report. This report, prepared by the probation department, contains a description of the offense and sets out the circumstances surrounding it. The report also describes the defendant’s past criminal record; provides data on the defendant’s social, medical, educational, and employment background; and includes a recommended sentence.

The presentence report may also describe the harm to the victim. In many states, victims are given the opportunity to provide the judge with a statement—orally, in writing, or in some instances via videotape—about the impact of the crime. If the victim has been killed, family members are allowed to provide victim impact statements. After receiving the presentence report, victim impact statements, and recommendations from the prosecuting and defense attorneys, the judge will impose the sentence.

Some people criticize the system of sentencing as giving too much discretion to the judge. Two people who commit the same crime may receive very different sentences, which some view as an injustice. To combat the problem of inconsistency in sentencing, the U.S. Congress passed a federal sentencing guideline law in 1988 that listed the sentences that judges were to impose for specific federal crimes. States have since passed similar laws to limit the discretion of judges in sentencing. These guidelines typically determine sentences based on the conduct and the criminal history of the defendant in question.

In reviewing these sentencing laws, the U.S. Supreme Court has said that the guidelines do not create mandatory standards but are only advisory. This means that judges must consider the guidelines in determining sentences, but they retain discretion. In general, in exercising their discretion judges are guided by the relevant punishment (sometimes range of punishments) set out in the statute. Judges also consider the potential for rehabilitation of the defendant as well as the need to protect the community from further offenses.

**Purposes of Punishment**

Over the years, the criminal sentence has served a number of different purposes, including retribution, deterrence, rehabilitation, and incapacitation. At one time, the primary reason for punishing a criminal was retribution. This is the idea behind the saying “an eye for an eye and a tooth for a tooth.” Instead of individuals seeking revenge, society, through the criminal justice system, takes on the role of punishing those who violate its laws.

Another reason for punishing criminals is deterrence. Many people believe that punishment discourages the offender from committing another crime in the future. In addition, the punishment is meant to serve as an example to deter other people from committing similar crimes.
A third goal of punishment is **rehabilitation**, or helping convicted persons change their behavior so that they can lead useful and productive lives after their release. Rehabilitation is based on the idea that criminals can overcome the social, educational, or psychological problems that caused them to commit a crime and that they can be helped to become responsible members of society. Educational, vocational, and counseling programs in prisons and jails are designed to rehabilitate inmates.

A fourth reason for punishment is **incapacitation**. This means that the criminal is physically separated from the community and the community is protected as a result of this incapacitation. While confined in prison, the offender does not pose a threat to the safety of the community.

**Parole**

In most states, the actual length of time a person serves in prison depends on whether **parole** is granted. Parole is the release of a convicted person from prison before his or her entire sentence has been served. Depending on the state, a person might become eligible for parole after serving a minimum sentence specified by the judge or law. In other states, people automatically become eligible for parole after serving a portion of the total sentence.

Eligibility for parole is not a right but, rather, a privilege. Inmates may go before a parole board that makes the decision. Some inmates are never paroled and serve their full sentences in prison. The federal prison system and some states do not make a practice of parole.
Critics of parole say this is better because it gives certainty to the sentence and improves deterrence. Others believe that inmates should be evaluated periodically and released early if there is evidence that they have been rehabilitated.

At the end of 2006, more than 7 million people were on probation, in jail or prison, or out on parole. This figure represents about 3 percent of all U.S. adult residents.

Problem 15.2

Review the information on the five defendants described in the bail hearing on page 159. Assume that each is convicted of the crime charged. Study the sentencing options on page 174 and prepare a presentence report for each of these defendants. Recommend a sentence and explain what purposes would be served by each sentence you recommend. Explain why and when each should be eligible for parole, if they should be eligible at all.

Capital Punishment

Capital punishment, also known as the death penalty, is the most controversial sentence given to defendants. It has a long history in America. The first person executed for murder among settlers in America was hanged in 1630. In colonial years, the death penalty was imposed for a number of different crimes. Gradually, capital punishment was restricted to the most serious crimes—usually murder and rape. In 1977, however, the U.S. Supreme Court held that the death penalty was an unconstitutional punishment for the crime of rape. In 2008, the Court found that a state law providing the death penalty for the rape of a child was a disproportionate punishment (it did not fit the crime) and a violation of the Eighth Amendment.

People have debated the issue of capital punishment for many years. Public protest against the death penalty gradually reduced the number of executions from a peak of 199 in 1935 to only one in 1967. For the 10 years after that, executions were halted while the courts studied the legality of capital punishment.

In the 1972 case of Furman v. Georgia, the U.S. Supreme Court held that the death penalty as then applied was unconstitutional because juries were given too much discretion in assigning this sentence. States then rewrote their capital punishment laws. In 1978, the Court ruled that the new laws were constitutional as long as aggravating and mitigating circumstances were considered. Executions soon resumed.

At the end of 2006, state and federal prisons held more than 3,200 inmates on death row. Of these inmates, 98 percent were men, 56 percent were white, 42 percent were black, and 11 percent were Hispanic. From 1977 to 2006, there were just over 1,000 executions.

As of 2008, criminals in 37 U.S. states, as well as those convicted of federal crimes, could face the death penalty. Most of the states with the death penalty use lethal injection to carry out executions.
In 2007 all executions were temporarily stopped when the Supreme Court agreed to hear a case that challenged lethal injection procedures as cruel and unusual punishment in violation of the Eighth Amendment. However, in 2008 the Court decided that the use of lethal injection did not pose a substantial risk of serious harm, and executions soon resumed.

Most capital punishment laws call for a two-part trial. In part one, the jury decides guilt or innocence. The defendant usually knows whether he or she may face the death penalty if convicted. If the defendant is found guilty, the jury decides in part two of the trial whether the defendant should receive the death penalty or a lesser punishment. Judges and juries are required to consider both aggravating and mitigating circumstances. **Aggravating circumstances** are factors that suggest the defendant deserves a more severe punishment. Examples include a gruesome murder, crimes involving children, or previous convictions of the accused. **Mitigating circumstances** are factors that suggest the defendant deserves a less severe punishment. Examples include the defendant’s age, lack of a criminal record, or a history showing that the victim had previously abused the defendant.

Opponents of capital punishment claim that no one who values life can approve of the death penalty. They claim that religious and moral objections to killing also apply to the government’s policy of executing criminals. They further argue that the death penalty does not deter murder, citing statistics showing that murder rates are the same in states with the death penalty as in those without it. Opponents also argue that the death penalty is applied in an unfair manner, that members of minority groups are more likely to receive it, and that it violates the Eighth Amendment’s ban against “cruel and unusual punishment.”

Some arguments against capital punishment point to the fact that there have at times been wrongful convictions, that is, a person who did not commit the crime was convicted and sentenced to death. Much of the proof of wrongful convictions has been based on advances in modern technology, such as the use of DNA evidence.
These findings have cast doubt on the guilt of some death row inmates who were sentenced prior to the availability of conclusive evidence. In some cases, evidence of innocence was discovered after an execution. In recent years, policy makers have considered how to deal with this problem in light of the possibility—even if remote—that someone might be waiting to be executed for a crime that he or she did not commit.

One approach to dealing with a wrongful conviction is the use of a sentence of life in prison without parole. This sentence protects communities from repeat offenders while preserving the option of freeing a person later found to have been unjustly convicted.

The death penalty existed at the time the Bill of Rights was drafted and ratified; while wanting to prohibit cruel and unusual punishment, the Framers did not intend to prohibit capital punishment. Advocates of the death penalty say that it is a just punishment for those who commit the most serious crimes. Advocates also argue that the threat of death does deter crime because people fear death more than any other punishment. In states where capital punishment is not favored by the voters, legislatures can (and have) abolished it. But, proponents argue, the Court should leave it up to the states and not undermine democratic practice by banning the death penalty nationwide.

Opinion polls in 2007 showed that a majority of American favored the use of the death penalty. However, support for capital punishment declined modestly from 1996 to 2007. Some polls showed that, when given a choice, a slight majority prefer a sentence of life without parole to death for capital offenses.

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**For Your Information...**

**The Innocence Project**

National programs such as The Innocence Project (www.innocenceproject.org) focus on exonerating inmates using DNA evidence. These programs also use recanted confessions, new witnesses, DNA analysis, and other new technology to obtain exonerations. Under the supervision of law professors, law students conduct crime scene investigations, gather evidence, interview witnesses, and write briefs and motions that are filed in court. Hundreds of innocent inmates have been released as a result of this work.

The projects have also been involved in reforming the criminal justice system so that fewer innocent people are convicted. As of 2008, there were more than 38 innocence projects in the Innocence Network, a group of organizations around the world dedicated to freeing wrongfully convicted prisoners.
The Death Penalty for Mentally Disabled Defendants and Juvenile Defendants

The following cases present situations in which the death penalty is called into question.

Case 1
Daryl Atkins and an accomplice abducted Eric Nesbitt, robbed him, and drove him to an ATM, where security cameras recorded them forcing him to withdraw more cash. They then took Nesbitt to an isolated location and shot him eight times. Atkins had a history of felony convictions. Both he and his accomplice were convicted of the killing in a Virginia state court.

During the penalty phase of the trial, Atkins’s lawyer presented evidence from a psychologist showing that Atkins was mildly mentally disabled. The jury imposed the death penalty and the Virginia Supreme Court upheld the sentence. The case was then appealed to the U.S. Supreme Court. At issue was whether it is a violation of the Eighth Amendment’s cruel and unusual punishment clause to impose the death penalty on a mentally disabled person.

Case 2
In September 1993, Christopher Simmons broke into the suburban St. Louis, Missouri, home of Shirley Crook with the intention to rob and possibly kill her. Simmons and a friend bound the victim’s hands and feet with duct tape and drove her to a nearby state park. At the park, Simmons pushed Crook off a bridge and into the Meramec River, where she drowned. Simmons was 17 years old at the time of the murder. Before the crime, he had told several friends about his plan to burglarize a home and kill the occupants, noting that they could do it and “get away with it”—or not be charged with and punished for it—because they were juveniles.

Simmons and his friend were arrested the following day, and Simmons confessed on videotape at the police station. He was found guilty, and his initial appeal to the Missouri Supreme Court resulted in his conviction being affirmed. Several years later, the state supreme court reconsidered the case, concluding that a national consensus opposed execution of juvenile offenders. As a result, the state supreme court reversed Simmons’ sentence of death. The state then appealed the case to the U.S. Supreme Court.

Problem 15.3

a. What happened in each of these cases to call the death penalty into question? Why were Daryl Atkins and Christopher Simmons given the death penalty?

b. What are the strongest arguments for upholding the state supreme court decision in each of these cases? What are the strongest arguments for reversing it?

c. Assume there has been a trend in the states not to impose the death penalty in cases involving mentally disabled defendants or juvenile defendants. Should that have any impact on the U.S. Supreme Court’s decision? Explain your answer.

d. Assume there has been a trend in other countries not to impose the death penalty in cases involving mentally disabled defendants or juvenile defendants. Should that have any impact on the U.S. Supreme Court’s decision? Explain your answer.

e. How should each of these cases be decided by the U.S. Supreme Court? Give reasons for your answer.
The Death Penalty

In 2006, 26 countries, including the United States, carried out executions. This feature describes how the death penalty is imposed in three of those countries.

Iran  The laws of Iran allow capital punishment through public hanging. Crimes punishable by the death penalty include robbery, child molestation, murder, and “acts incompatible with chastity.” The family of a murder victim has the right to pardon the killer. Iran also allows the death penalty when a person leaves the Islamic religion and joins another religion. Iran performed 177 executions in 2006. In 2004 a girl was executed for “acts incompatible with chastity,” and in 2005 two boys were publicly hanged for having homosexual relations.

China  In China, the death penalty has existed for thousands of years. Today a person convicted of such crimes as tax evasion, corruption, robbery, fraud, and murder can be executed either by firing squad or by lethal injection. However, before 1905, a method known as “Slow Slicing” or “death by a thousand cuts” was sometimes used. Currently, there are 1,000 to 8,000 people executed each year, with the government providing the low figure and human right groups the higher one.

South Africa  At one time South Africa had one of the highest rates of capital punishment in the world. Between 1910 and 1989, 4,200 people were hanged. Nearly half of them were executed between 1978 and 1988 during the last years of the apartheid system. In 1990 a moratorium on the death penalty took place due to international pressure against apartheid. A new South African Constitution was adopted in 1994 that provided for the “right to life” and prohibited “cruel and inhumane punishment” but did not specifically outlaw capital punishment. In 1995 the new Constitutional Court ruled that the death penalty violates the constitution. The Chief Justice said, “Everyone, including the most abominable of human beings, has the right to life.” The court did this despite the high rate of violent crime in South Africa and the fact that a majority of South Africans favored the death penalty. One conservative party leader who opposed the court decision said, “The rights of murderers and rapists are being held in higher regard than their victims.”

Problem 15.4

a. Compare the history of capital punishment in the three countries. How are they different? How are they similar?

b. If you lived in South Africa, would you agree with the Constitutional Court Justice or the conservative party leader quoted above?
Corrections

When a person is convicted of a crime, state and federal governments have the right to place the offender in the corrections system. Several treatment and punishment options are available, including community corrections, halfway houses, jails, and prisons.

What is the difference between jails and prisons? Jails are run by cities and counties. They are used by local law enforcement officers to detain people awaiting trial and to hold mental patients, drug addicts, alcoholics, juvenile offenders, and felons on a temporary basis as they await transfer to other facilities. Jails also hold people convicted of minor crimes for which the sentence is one year or less. Prisons are operated by federal or state governments. They are used to incarcerate people convicted of more serious crimes, usually felonies, for which the sentence is more than one year.

Life Behind Bars

A prison or jail inmate’s life is controlled by rules. Inmates are told when to get up and when to go to sleep. Mail and phone calls are screened. Access to radio, television, the Internet, and books is controlled. Visitation is limited, and inmates are subject to constant surveillance and searches. Some inmates work at prison jobs, which usually pay very little. Others spend almost all day locked in their cells.

Until the 1960s, courts had a hands-off policy toward prisons. Inmates had few, if any, rights. Prison officials could make almost any rules they wanted. As a result, harsh treatment, solitary confinement, and beatings were all fairly common.
Over the years, courts have established and enforced some prisoners’ rights, yet in recent years the U.S. Supreme Court has said that people who enter prison must give up certain rights. Still, inmates do retain limited versions of some rights after entering prison. These include the right to be free from cruel and unusual punishment, the right to freedom of religion, the right to due process, the right to medical treatment, and the right to meaningful access to the court.

While inmates still have some access to the courts, the Supreme Court has ruled that they must use all established channels of complaint within the institution before they can ask a court to resolve their issues. The courts are generally reluctant to second-guess administrators in the day-to-day operation of jails and prisons. When a prison rule or practice is challenged by an inmate, judges will usually uphold the prison practice if it is reasonably related to “legitimate penological interests.”

**Prison Policy**

During the 1990s and into the twenty-first century, the number of people incarcerated in the United States increased significantly. The rate of incarceration is six to ten times higher than that of most developed countries. This increase was caused by a get-tough-on-crime policy that resulted in more criminal defendants going to prison for longer periods. An increasing use of mandatory sentences, a lengthening of some prison terms, and decreasing use of parole and other early-release options added to prison populations.

With more prisoners entering the correctional system, the need to expand jail and prison capacity has increased. The cost of expanding existing prisons and building new ones, along with the cost of maintaining the larger number of inmates in prison—estimated to be as

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**Figure 15.1 Changes in the Criminal Justice System Population**

<table>
<thead>
<tr>
<th>Year</th>
<th>Probation</th>
<th>Jail</th>
<th>Prison</th>
<th>Parole</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1990</td>
<td>2,670,234</td>
<td>405,320</td>
<td>743,382</td>
<td>531,407</td>
<td>4,350,300</td>
</tr>
<tr>
<td>1995</td>
<td>3,077,861</td>
<td>507,044</td>
<td>1,078,542</td>
<td>679,421</td>
<td>5,342,900</td>
</tr>
<tr>
<td>2001</td>
<td>3,392,751</td>
<td>631,240</td>
<td>1,330,980</td>
<td>731,147</td>
<td>6,592,800</td>
</tr>
<tr>
<td>2005</td>
<td>4,162,536</td>
<td>747,529</td>
<td>1,446,269</td>
<td>784,408</td>
<td>7,056,000</td>
</tr>
</tbody>
</table>

* Federal and state figures are combined.

**Source:** U.S. Department of Justice, Bureau of Justice Statistics.

*The number of offenders in the criminal justice system has increased over the last 15 years.*

**Analyze the Data** By how much did the number of people in prison increase between 1990 and 2005?
much as $30,000 per inmate per year—has placed an enormous strain on state and federal budgets. To cut costs, many prison officials have reduced or eliminated inmate education, counseling, recreation, and vocational training programs.

While some voters have cheered the “lock ’em up” philosophy that has led to the increased inmate population, fewer have been as enthusiastic about paying the increased costs. Some maintain that the federal and state governments have locked up too many offenders. These critics argue that some of the money spent on prisons would be better spent on prevention and treatment programs, and that some inmates—those convicted of minor drug offenses, for example—should be returned to their communities with supervision and support. Others argue that vigorous prosecution and longer prison terms are the right approach because they have brought a significant reduction in crime, which has led to safer communities.

**Problem 15.5**

a. Should prisoners have rights? If so, what rights should they have? Make a list of these rights.

b. If you were a prison warden, what rules would you make to control the prisoners? List these rules.

c. What, if anything, should be done to reduce prison overcrowding? Should more and bigger prisons be built, or should the criminal justice system be more selective about who is locked up?

**Reentering Society**

While tougher sentencing laws have put greater numbers of people behind bars, state corrections budgets stretched by this larger prison population have had to reduce some of the programs designed to help offenders reenter society after they have served their sentences. Of special concern is the need to help offenders avoid becoming repeat offenders. More than 650,000 adult offenders leave prison every year and return to their communities. More than 100,000 juveniles leave residential facilities each year. Within three years, more than half of both groups typically become repeat offenders.

The U.S. Department of Justice, working with other federal agencies, started a program called reentry designed to reduce serious crime committed by ex-offenders. This initiative targets both adult and juvenile offenders. It has three distinct phases. Phase one programs begin in correctional institutions and focus on providing education, mental health services, substance abuse treatment, job training, and mentoring for convicts to psychologically prepare them to reenter society. Phase two programs focus on the actual transition back into the community, including decisions about where to live, how to find a job, and ways to reestablish ties with members of the community.
This phase also provides mental health and substance abuse treatment. The final phase helps link individuals who have left the supervision of the justice system with a network of social services agencies and community-based organizations. These groups can provide long-term support and mentoring relationships between convicts and counselors to help complete the transition back into society.

Planning for successful reentry begins when the defendant enters the correctional system. Reentry programs are important because the overwhelming majority of inmates will at some point return to their communities. Adequate preparation of inmates—and of the community—for reentry can reduce recidivism.

**Problem 15.6**

In almost all states, felons lose their right to vote while in prison. In some states that right is automatically restored after a sentence is completed. In other states, the ex-felon must apply for a restoration of voting rights, sometimes after a waiting period of several years after the completion of a sentence. In still other states, felons permanently lose their right to vote.

a. What are the strongest arguments for and against restoring the voting rights of felons after they complete their sentences?

b. A number of democracies around the world allow their prisoners to vote in elections on the theory that this helps with their rehabilitation. Do you support or oppose this policy? Give your reasons.